

DISPUTE REVIEW BOARD RECOMMENDATION

August 6, 2017

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RE: SR 5 (US 1) North of Pine St. to North of Cidco Rd.
Fin. Proj. No. 237592-2-52-01, Contract No. T-5431

Subject: Hearing Dated July 28, 2017
Disputes Review Board Recommendation

Gentlemen:

Astaldi Construction Corp. (ACC) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of two disputed issues. The hearing was held on July 28, 2017 at the FDOT Brevard Operations Center in Cocoa, FL. The parties furnished the Board position papers prior to the hearing. Both parties provided a rebuttal response for review prior to the hearing. The Disputes Review Board was requested only to consider the question of entitlement. In accordance with your request the following recommendations are offered.

Project Scope

The principal elements of the project scope include widening and related drainage improvements of US 1 in Cocoa, FL.

Issue 1: Entitlement to Additional Compensation for the Work Associated with the Construction of Pavement at Variable Width Gaps on the Northbound and Southbound Sides of SR 5 / US 1 (NOIs 15 and 18)

Contractor Position Issue 1

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

1. ACC Discovered that the Remaining Construction Was Not Tying in with the Pavement of the Previous Phases

In January 2016, ACC began working on its final phase of construction for the project. ACC began working on its remaining activities including the construction of the separator pads, e-curb and turn lanes. ACC began noticing, based on the layout of the turn lanes and separator pad, that the remaining construction was not tying in with the pavement of the previous phase

(TCP Phase IV). Further investigation revealed that there were areas next to the separator pads on the North bound side that would require specialty work due to the space constraint. It would not be feasible to place material and operate equipment in this “gap”. ACC also noticed that there were areas that aligned with no gaps remaining. This prompted ACC to further look in the phases of the Traffic Control Plans to understand why in some areas there were gaps and in other areas, no gaps. Overlapping the Phase IV and Phase V Traffic Control plans further revealed a variable, width gap throughout the northbound side of the project. The areas that had no gaps were areas where ACC went past the TCP on Phase IV thus covering the gap. However, this was not possible in all areas because it would impede oncoming traffic or interfere with the MOT wedges.

2. Discussions and Negotiations Between ACC and FDOT Continued in an Effort to Resolve the Issue

On January 20, 2016, ACC submitted RFI # 159 notifying Target that the TCP plans did not address during which phase of the project the gaps were to be constructed.

On January 25, 2016, the EOR responded that the gap was to be constructed with normal means and methods. Correctly disagreeing with the response, ACC submitted NOI # 15 on January 27, 2016. ACC first brought the issue of the gaps to the DRB on February 02, 2016. At the meeting, Target informed the DRB members that NOI # 15 was under review. NOI # 15 remained under review by Target through the course of three weeks as noted in progress meeting # 135, # 136 and # 137. At the progress meetings, Target maintained that the gaps could be constructed with normal means and methods. ACC maintained its position that the construction of the gaps was not possible due to the fact that no TCP phasing had been provided in the plans. ACC informed Target that ACC had mitigated the issue and covered a majority of the gaps as it went further than the limits of Phase IV. However, ACC was limited in what it could do and was not able to cover all the gaps due to the large MOT wedges to be maintained and the impediment of opposing traffic.

On February 5, 2016, ACC submitted to Target a Time Extension Request for an estimated 28 days to construct the northbound gaps. During its layout of the southbound turn lanes and separator pads, ACC encountered a similar issue as it noticed that there was an overlap of Phase II and Phase V, creating a gap for full reconstruction.

On February 29, 2016, ACC submitted RFI # 163 addressing the gaps on the southbound side that were not depicted in the TCPs. ACC then submitted NOI # 18 on March 02, 2016.

On March 03, 2016, ACC received the RFI response from the EOR again indicating the construction of the gap remained the contractor’s means and methods. The EOR suggested how to construct the gaps with the separator pad. However, ACC’s means and methods did not account for the construction of gaps. The separator and e curb pads were the only items to be worked along with the turn lanes of Phase V. Constructing the gaps would force ACC to utilize additional material if built together with the separator and e curb pad. Additional equipment would have to be mobilized for the construction of gaps.

On March 09, 2016, at progress meeting # 139, Target validated ACC’s claim on NOI # 15 indicating that a 15-day time extension was due to ACC for NOI # 15 northbound gaps based on their schedule analysis. ACC disagreed with Target’s assessment of time based on the areas defined as gaps by Target. NOI # 18 remained under review at that time as a separate issue.

On March 10, 2016, ACC informed Target of two options provided by ACC’s paving subcontractor, Middlesex, on how the gaps could be paved. One option would be to pave the gaps by hand, but it would take 2.5 months to pave and the slope and lifts of asphalt required by the plans and specification could not be guaranteed. This would be an additional 2.5 months on top of ACC’s grade work to prepare the base of the gaps. ACC also notified Target that the paving subcontractor did not have the availability to perform this hand work. The second option would require ACC to mill the full 7-foot width of the milling machine and repaving the full 10- foot width with the 8.5-foot paver which would subsequently eliminate the gap. Either option would have a massive cost impact on ACC.

ACC noted that the 28-days' time extension initially requested was only an estimate and did not reflect the true duration of the impact caused by the gaps 5

On March 11, 2016, having a better understanding of the scope of work required to construct the gaps, ACC submitted a longer time extension of 58 days for NOI # 18.

On March 14, 2016, Target requested that ACC resubmit the time extension request noting that both NOIs # 15 and # 18 were impacting the same activities. On March 16, 2016, during the progress meeting, ACC informed Target that the impacts should not be combined for the time impact analysis since the impacts were recorded in two separate months. Despite this request from Target, ACC was notified on March 22, 2016 that NOI # 18 was being rejected and that the 1.5-foot gap should have been overseen and anticipated by ACC. ACC later recognized the 1.5-foot gap due to the difference between the separator and e curb and reduced its gap area claimed. However, ACC remained in disagreement as to areas other than the 1.5-foot gap noted by the EOR and rightfully responded to Target's denial by maintaining that no TCPs were provided for the gap construction.

On March 29, 2016, ACC submitted a revised time extension request for NOI # 15 for 69 days. On the same day, Target replied that it did not think that ACC's time extension request made sense and stated that it believed that there were only a few gaps. Target also notified ACC that only 15 days were being recognized for NOI # 15 as reflected in Target's assessment. Following the time extension request on March 29, 2016, ACC's CEO sent an official communication to Target expressing ACC's discontent and frustration with Target's rejection of NOI # 18 even after Target had acknowledged the merit of NOIs # 15, 17 (modified P7 inlet tops) and 18 at progress meeting # 139. ACC also informed Target that ACC had been cooperative with Target's requests in attempting to resolve the issues. Furthermore, ACC provided to Target plan copies of surveyed as-built information with the traffic control plan phases overlapped clearly depicting the gaps that were the subject of NOIs # 15 and 18. ACC requested that Target reconsider ACC's position and further investigate the gaps claimed in NOI # 18. On March 30, 2016, ACC and Target agreed to meet in the field following progress meeting # 142. During the field meeting, ACC pointed out and measured the gaps claimed in NOI # 15 and 18 so that Target would have a clear understanding of the gaps ACC was claiming. Seeing ACC position, Target's Sr. Project Engineer committed to tracking the time and material associated with NOIs # 15 and 18. A mutual agreement was also made on a time extension for NOI # 17.

On April 5, 2016, Target offered support with FDOT District 5 approval to allow ACC to utilize the placement of one 3" lift versus two 1.5" lifts (required by plan) of asphalt for gaps less than 3 feet. On April 6, 2016, Target further instructed ACC to provide Quality Control and Roadway Paving Reports as per normal paving operations. ACC made note of this and requested from Middlesex to supply the QC personnel whenever paving of the gaps were performed regardless if ACC or Middlesex performed the work.

On April 06, 2016, at progress meeting # 143, Target requested that ACC resubmit all requests related to NOIs # 15 and 18. ACC was also informed that Target was further evaluating the areas classified as gaps. A meeting was scheduled for April 20, 2016 to further review the areas of NOI # 15 and 18.

On April 13, 2016, Target requested that ACC combine the three outstanding issues of NOI # 15, 17 and 18. NOI # 17 (P7 inlet tops) was a separate issue that was being settled apart from NOI # 15 and 18. A field meeting between ACC and Target was scheduled for April 18, 2016 to settle the total area of gaps. This meeting was later cancelled due Target's review of ACC time extension request in NOI # 17 with FDOT D5. The evaluation of gaps identified by Target kept changing from April 21, 2016 through the end of May 2016. ACC and Target agreed on the location and area of the gaps after several job site meetings and surveys. Target notified Middlesex on May 09, 2016 of the existence of the gaps by locations and areas that needed to be reported on the Paving Report as pay quantities. All other areas would be considered "no pay". The final shared list of gaps was part of the 1st draft Supplemental Agreement # 22 prepared by Target around end of June and that was ready for signature on July 12, 2016 and re-submitted for approval to FDOT in a 2nd draft in August 2016. Through the course of May 2016,

ACC prepared its estimated cost proposal for direct costs for NOIs # 15 and 18, totaling \$702,000 and indirect costs for NOIs # 15, 17 and 18 totaling \$733,000 (75 days for NOIs 15 and 18, plus 30 days for NOI 17). On May 25, 2016, during DRB meeting # 15, Target informed the DRB members that ACC and Target were far apart on the time and costs. Target committed that before the June 2016 pay estimate if no agreement would be reached, Target would process a unilateral payment to add time and money to the contract keeping ACC out of liquidated damages.

3. Agreement was Reached Between ACC and FDOT with Regard to Entitlement and Compensation on the Variable Width Gaps Issue (NOIs 15 and 18)

On June 23, 2016, Target and ACC came to an agreement on direct cost compensation totaling \$428,000 for NOIs 15 and 18. Target requested that ACC resubmit a cost estimate for a total of 63 compensable days at the rate of \$6,239.42 (deducting the amount of UP # 20 already paid) and \$428,000 for direct costs for a total of \$773,000. These two cost estimates did not include the direct cost of NOI # 17 as it was still being negotiated. On June 25, 2016, at DRB meeting # 16, ACC informed the DRB members that an agreement with FDOT had been reached and ACC was ready to sign an SA adding to the contract 44 compensable days and compensation for the direct cost of NOI # 15, 17 and 18 totaling \$837,000.

On July 06, 2016, Target informed ACC that Supplemental Agreement # 22 would include “line in the sand” language but was negotiable. ACC completely rejected the proposed language and, on July 08, 2016, Target informed ACC that FDOT removed the language and the SA would be processed.¹

4. The FDOT Informed ACC that the Required Funds Had Been Encumbered and Gave ACC a Notice to Proceed with the Work Included in Supplemental Agreement #22

On July 12, 2016, Target officially informed ACC that the funds for Supplemental Agreement # 22 had been encumbered and approved by FDOT and issued the Notice to Proceed² for the works associated with Supplemental Agreement #22.

5. Discussion and Negotiation Continued with Regard to Reaching Agreement on All Outstanding Project Issues

Following the NTP, ACC requested to schedule a partnering meeting to discuss the items that ACC felt had been excluded previously or not negotiated and items that ACC was not aware of until later resulting from earlier negotiations or what was bid. In the following days, Target informed ACC of FDOT’s intention to suspend the execution of SA # 22 and discuss the remaining issues in order to settle all claims for the entire project including ACC’s inefficiency claim. ACC in good faith accepted FDOT’s request and scheduled a meeting to discuss and settle all issues.

On August 03, 2016, a meeting was held between ACC (G. Castellucci – ACC CFO, G. Paparcone – ACC Director of Operations, D. Lombardo – ACC PM, R. Manzanero – ACC PE), TEG (J. Hassouneh – TEG Senior PE, S. Moffatt – TEG Project Administrator) and FDOT (J. Tyler – FDOT D5 Director, M. Hassan – FDOT D5, J. Boughanem – FDOT D5, H. Matos – FDOT PM), and the parties discussed all past and pending issues and came to an agreement to settle all pending issues with a 104-day compensable time extension and compensation for \$1.637M for ACC’s direct costs (\$837,000 for SA # 22 + \$800,000 for a final settlement). Furthermore, FDOT requested ACC to add to the settlement amount the issue of Thermoplastic Pavement Markings to be paid separately after review of a quote that ACC had to provide. FDOT committed to ACC to pay the amount of \$1.637M before the end of August 2016 given that it had taken FDOT since May 2016 to come to an agreement on NOI # 15, 17 and 18.

¹ Exhibit 1.1 – Supplemental Agreement #22

² Exhibit 1.2 – Notice to Proceed dated July 12, 2016

On August 04 and August 06, 2016 ACC provided all requested documentation for the time extension of 104 days (of settlement) and 19 days on Unilateral Payment # 20 at the rate of \$6,239.42 per day to Target Engineering. On August 11, 2016, Target Engineering notified ACC that the funds for the new SA had been encumbered.

6. The FDOT Informed ACC that its Notice to Proceed with Supplemental Agreement #22 was Withdrawn

On November 10, 2016 ACC was notified that FDOT in Tallahassee had rejected the previously agreed upon Supplemental Agreement to resolve all issues, including NOI # 15 & NOI # 18.

7. Summary – Contractor’s Position Issue 1

The work involved in constructing the roadway where the variable width gaps occurred was not indicated in the contract plans and was not foreseen by ACC. ACC provided proper notice to the FDOT with regard to this issue. ACC and the FDOT negotiated and agreed to a contract modification including cost and time compensation for this issue. Accordingly ACC is entitled to cost and time compensation for constructing the roadway where the variable width gaps occurred.

FDOT Position Issue 1

The following summary of the FDOT’s position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the FDOT’s submitted written materials.

Key Points

1. The Requirement for Constructing the Narrow Widening Sections is Included in the Plans

There is no entitlement for additional compensation on this issue. The three Typical Sections for US 1, as depicted in Plan Sheets 16, 17, and 18, indicate new construction, milling and resurfacing for various lane widths and shoulder widths from curb to curb. This includes narrow widening on the median at three locations as indicated in Plan Sheet 18. These narrow widening areas, which ACC did not undertake until near the end of the project, are also included in the original contract Typical Sections, Plan Sheets, Cross Sections and Summary Pay Items/Quantities. For example, limerock and asphalt pay items reflected the material quantities for constructing the narrow areas (See page 4).

The contractor is responsible for the means and methods of construction they intend to utilize. During roadwork construction in Phases II and IV, ACC was aware of creating the gaps; however they did not adequately plan their work or adjust their work means and methods to construct these areas effectively. As a result, ACC incurred additional costs for constructing the narrow widening in an inefficient manner. While the final project objectives were completed, the Department is not responsible for additional costs ACC may have incurred due to their own inefficiencies. Further details and supporting discussion is presented below.

2. Purpose of the Traffic Control Plans

The primary purpose of the MOT plans is to describe the Contractor’s actions to minimize traffic impacts while conveying traffic safely through the work zone. The MOT plans are not intended to be a “foot-by-foot” sequence of construction for all of the plan details and work contemplated under the contract. This is reinforced by the Department’s own design guidance. Please refer to Chapter 19, Volume II of the Plans Preparation Manual (<http://www.fdot.gov/roadway/PPMManual/2017/Volume2/V2Chap19.pdf>). Included is a list of information required to be conveyed in the plans. The list does not include details for specific dimensions of work areas and only requires identifying the general work to be accomplished during an individual phase of construction.

3. The Contractor Was Responsible

In accordance with Specification 4-1, “The intent of the Contract is to provide for the construction and completion in every detail of the work described in the Contract.” As such, not every detail needed to complete the work will be supplied by the Department and it is expected that the Contractor will determine the specific means and methods to ultimately accomplish the construction. The Contractor is expected to layout and plan their work in order to find and make adjustments, so the final product can be achieved without inefficient efforts. Simple and effective construction planning would have identified the need to make adjustments. The condition at the end, which required the Contractor to employ less efficient means and methods to complete the work that was clearly depicted, could have avoided.

Further, the Article 2.4 of the Special Provisions requires careful examination of the plans before submitting a bid proposal. Pertinent language of this article is included below.

SPECIAL PROVISION

ARTICLE 2.4 Examination of Contract Documents and Site of Work: Examine the Contract Documents and the site of proposed work carefully before submitting a proposal for the work contemplated. Investigate the conditions to be encountered, as to the character, quality and quantities of work to be performed and materials to be furnished and as to the requirements of the Contract Documents..... The bidder’s submission of a proposal is prima facie evidence that the bidder has made an examination as described in this Article. (See page 5)

By simply comparing the MOT Typical Sections of the various phases of construction, ACC should have noted the narrow widening and should have planned accordingly, as required in the Contract Documents, if they desired to have completed this work in conjunction with earlier phases on construction. Instead, they waited until the near the end of the project to address this required work. By that time, construction of the narrow widening in a more efficient manner was lost to ACC.

4. Contractor was Aware of the Issue

Included in the Attachments are RFI 159 and 163 and the responses from the Engineer of Record (EOR) on NOIs 15 and 18. The EOR reinforces the means and methods of construction are ACC’s responsibility. The EOR offered that widening widths less than a standard lane width are possible and can be accomplished by various means and methods. Also attached is Plan Sheet 565 of the Phase 5 Typical Section mentioned in RFI 159.

During construction of Phases II and IV , ACC was aware of leaving the gaps, but did not make any efforts to mitigate accordingly or to submit an RFI to the Department about this issue with the detour phasing until 8 months after Phase 4 (northbound) began and 26 months after Phase 2 began (southbound). At that point, construction had begun in the final Detour Phase 5. See Pages 6-17.

Due to the following reasons, we do not believe this was a construability issue; simply it was the contractor’s means and methods related issue:

- ACC did not present the Department with an RFI or NOI until toward the end of the project, January 2016.
- ACC did not bring forward any alternative MOT proposals or proposed plan revisions.
- During the construction of early phases, ACC was aware of leaving these gaps, but did not make any efforts to mitigate accordingly. ACC’s former Project Manager, Mr. Terry Carmichael, was aware of these gaps and these areas became a major issue after new senior management joined ACC’s Team during the last 10 months of the project and replaced Mr. Carmichael in April 2016.
- These narrow widening areas were included in the Typical Sections, Plan Sheets, Cross Sections and Summary of Pay Items/Quantities.

5. Narrow Widening is Not Unforeseen Work

Since this work is clearly depicted in the plans and addressed by the pay items, none of the following articles are applicable to this issue: Increase, Decrease or Alteration of the Work (Article 4-3.2), Extra work (Article 4-3.5), or Unforeseeable work (Article 4-4). Therefore the contractor is not also entitled to delay cost. (See Pages 18-21)

ARTICLE 4-3 Alteration of Plans or Character of Work

SUBARTICLE 4-3.2 Increase, Decrease or Alteration in the Work: The Engineer reserves the right to make alterations in the character of the work which involve a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance. Such alteration shall not constitute a breach of Contract, shall not invalidate the Contract or release of Surety.....

SUBARTICLE 4-3.5 Extra Work: Extra work authorized in writing by the Engineer will be paid in accordance with the formula in 4-3.2. Such payment will be the full extent of all monetary compensation entitlement due to the Contractor for such extra work. Any entitlement to a time extension due to extra work will be limited solely to that provided for in 4-3.2 for additional work.

ARTICLE 4-4 Unforeseeable Work: 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. The Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount.

6. Summary- FDOT Position

The Department’s position is no entitlement exists for ACC’s claim in seeking additional compensation for constructing the narrow widening areas. These areas were shown in the Contract Documents such as Typical Sections, Plan sheets and quantified and accounted for in the Summary of Pay Items. The contractor failed to effectively plan their work and utilize more efficient means and methods as required to construct the project. ACC knew these narrow widening areas were being by-passed and delayed until the end of the project. This decision resulted in ACC having to utilize inefficient means and methods to accomplish the work. These failings by ACC are not the Department’s responsibility.

Disputes Review Board Findings Issue 1

1. The requirement to construct a narrow widening section in various locations can be determined from a reasonable review of the project plans to include a comparative examination of the Typical Sections, Roadway Plan Sheets and the Traffic Control Plans. The following representative examples illustrate this point:

Example 1

- TCP Sheet No. 567, TCP Phase 4, gives the width of the North bound section to be paved in TCP Phase 4 as 40 feet.
- Plan sheet No. 61 (Station 424) gives the width of the North bound paved roadway section as 41.5 feet
- If the Phase 4 section is constructed to a 40 foot width, there will be a 1.5 foot narrow widening section remaining

Example 2

- TCP Sheet No. 563, TCP Phase 2, gives the width of the South bound section to be constructed in TCP Phase 2 as 38 ft.

- Plans Sheet No. 51 (Station 371) gives the width of the South bound paved roadway section as 39.5 feet
- If the Phase 2 section is constructed to a 38 foot width, there will be a 1.5 foot narrow widening section remaining

Example 3

- TCP Sheet No. 563, TCP Phase 2, gives the width of the South bound section to be constructed in TCP Phase 2 as 38 feet.
 - Plans Sheet No. 54 (Station 385) gives the width of the South bound paved roadway section as 39.5 feet
 - If the Phase 2 section is constructed to a 38 foot width, there will be a 1.5 foot narrow widening section remaining
2. The FDOT and the ACC negotiated a resolution of the narrow widening “gaps” issue to include both monetary and time compensation. The terms were agreed to by ACC and the FDOT at the project and district levels.
 3. On July 12, 2016, the FDOT advised ACC that the funds for the contract modification had been encumbered, and gave ACC a Notice to Proceed with the additional work defined in Supplemental Agreement No. 22.
 4. On November 10, 2016, the FDOT advised ACC that Supplemental Agreement No. 22 would not be executed by the FDOT and that the previously given NTP on the Supplemental Agreement No. 22 was withdrawn.
 5. The DRB finds that the following Standard Specification sections are most relevant to this issue:

Section 4-1 Intent of Contract

Section 4-3 Alterations of Plans or Character of Work

Disputes Review Board Recommendation Issue 1

In this hearing the Disputes Review Board is addressing only the issue of entitlement.

Item 1 in Supplemental Agreement No. 22 includes the work directly related to constructing the full depth variable width gaps.

The issuance of a written, binding Notice to Proceed with Supplemental Agreement No. 22 on July 12, 2016 was an affirmative direction to proceed with the work included in the Supplemental Agreement and as such includes an obligation to pay for the additional costs. In accordance with the contract terms, the contractor is required to proceed with the work as directed. At this point the discussion of the issue concerning the variable width widening sections was settled, and remained settled until the FDOT advised ACC on November 10, 2016 that Supplemental Agreement No. 22 would not be executed.

It is the Disputes Review Board recommendation that ACC is only entitled to justified, extra cost and justified contract time impact required to complete the “pavement gap closure” work, as described in the enclosed unsigned version of Supplemental Agreement #22. The referenced work is described in the first sentence of “Item 1” in Supplemental Agreement #22. Entitlement is recommended only for referenced work completed during the time period beginning on July 12, 2016 and ending November 10, 2016.

The existence of the narrow variable width widening sections adjacent to the median is clearly indicated in the project plans and was reasonably foreseeable. Therefore, other than the period of time when ACC was acting under a written Notice to Proceed (July 12, 2016 to November 10, 2016), the Disputes Review Board does not recommend entitlement for additional compensation related to this issue.

Issue 2: Entitlement to Additional Compensation for the Work Associated with the Modification of P7 Inlet Tops (NOI #17)

Contractor Position Issue 2

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

1. ACC Incurred Additional Costs Due to a Design Error

ACC is entitled to receive additional compensation from FDOT in the amount of \$288,282.80 in connection with NOI # 17 which involves the modification of seven P7 inlet tops due to a design error acknowledged by FDOT's CEI on the Project, Target Engineering, which resulted in significant time and cost impacts to ACC. On February 29, 2016, ACC notified Target Engineering in RFI # 162 that the median inlet tops precast per FDOT Standard Index 212 did not match the bases and risers installed in a previous phase. The orientation of the tops was perpendicular to bases and risers. Installing the precast tops as called for in the plan would have left gaps in the risers due to the disorientation. ACC faced a critical compromise to its schedule given that the precast supplier would need to modify its molds to match the bases and risers. Due to the lengthy lead time for the shipment of precast tops by the precast supplier, ACC prudently elected to proceed with casting in place the P7 tops which significantly reduced the delay associated with the precast top design error and greatly mitigated ACC's and FDOT's damages. On March 2, 2016 ACC submitted NOI # 17 for additional compensation and time, to which ACC is entitled under the following FDOT Specifications: Section 4-3.2, "Increase, Decrease or Alteration in the Work," which provides that "[t]he Engineer reserves the right to make alterations in the character of the work which involve a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance." Section 4-3.5, "Extra Work," which provides that Extra Work authorized by the Engineer will be paid in accordance with Section 4-3.2. Section 4-4, "Unforeseeable Work," which provides that "[w]hen 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 its intended scope, the Department will make an adjustment to the Contract. The Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount." Section 8-7.3.2, "Contract Time Extensions," which provides that "[t]he Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid."

2. The FDOT Has Agreed That ACC is Due Additional Compensation

There is no dispute, and Target Engineering has recognized, that there was a design error relating to the P7 inlet tops, that ACC corrected the error by casting in place the proper tops, and that, as a result, ACC suffered time and direct cost impacts for which ACC is entitled to compensation. The only issue that remains unsettled is that ACC has not been compensated in full. Target Engineering, under Unilateral Payment # 20, has only recognized 19 compensable 2 days at \$2,609.83 per day for Extended Overhead totaling \$49,586.68, with no consideration for ACC's direct costs. In fact, ACC is entitled to 39 compensable days at \$6,239.43 per day (the rate Target Engineering has recognized as the correct extended overhead rate) plus ACC's direct costs.

3. Summary – Contractor's Position

ACC requests that the DRB determine and recommend that ACC is entitled to compensation for its direct and indirect costs incurred as a result of the NOI # 17 impacts because, as per Sections 4-3.2, 4-3.5, 4-4, and 8-7.3.2 of the Specifications, there was a clear alteration of the plans and character of the work that was unforeseeable and resulted in extra work for ACC that increased the cost and time of performance to

complete its work. The quantum of the cost and time impact associated therewith (which ACC understands will be determined by the DRB at a later date if the parties are unable to negotiate a settlement) is broken down as follows and supported by the cost breakdown, time impact analysis and supporting documentation submitted with ACC's original claim:

\$244,898.18 39-day compensable time extension

\$92,971.30 ACC's direct costs

\$337,869.386 Subtotal Credit for amount paid by FDOT under Unilateral Payment # 20 \$288,282.80

Amount Owed to ACC

FDOT Position Issue 2

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the FDOT's submitted written materials.

Key Points

1. Inlet Tops Had to be Modified

There were twelve (12) Type 7 inlet tops with J-bottoms (S-309A, S-309, S-311, S-314, S-316, S-318, S-318A, S-320, S-322, S-322B, S-325 and S-334) shown on the original Plan Sheets S-1, S-2, 53, 54, 55, and 56. These twelve inlets had an issue with the Type 7 inlet tops placed over the J-bottoms with a riser. The J-bottoms placed were 5 feet wide (normal to the median concrete separator) and 3.5 feet wide (parallel to the median concrete separator). The standard Type 7 inlet top is 3 feet wide (normal to the median concrete separator) and 4 feet wide (normal to the median concrete separator). This caused the Type 7 inlet tops to be 6 inches wider than the J-bottoms.

In August 2013, ACC proposed modifications to the storm drain system in the median in order to improve ACC's production rate and time of construction by relocating the deep excavations, required for the pipe and structures, further away from the travel lanes. Five of these structures (S-309A, S-318B, S-320, S-322 and S-322B) were included in ACC's proposed modifications. After review and approval by the EOR, ACC's proposed modifications were added as a plan revision, signed and sealed by ACC's specialty engineer, to the Contract in December 2013. The modifications to these five structures included dissimilar inlet bottoms with Type 7 median inlet tops, which is similar to the issue with the seven remaining structures listed in NOI #17 (S-309, S-311, S-314, S-316, S-318, S-325 and S-334) submitted in February 2016, approximately 18 months later. During the shop drawing submittals, the supplier and ACC should have discovered that adjustments were necessary and planned accordingly for the seven structures in NOI #17.

2. ACC Has Been Appropriately Compensated in a Unilateral Payment

In the spirit of partnering and to keep the project moving forward, the Department agreed to participate in the cost associated with correcting the discrepancy. Initially, the Department and ACC worked towards negotiating a solution to this issue. Negotiations ultimately failed due to other complicating factors on the project. However, the Department still honored its commitment to participate in the cost. From schedule analysis and project records, it took 19 days to complete the work. Using its sole discretion, the Department issued Unilateral Payment #20 recognizing 19 compensable days at \$2,609.83 per day for Extended Overhead totaling \$49,586.77. The Department did not feel ACC was entitled to direct overhead costs for the 19 days, since ACC did not perform any rework, did not shutdown drainage operation and kept working on drainage items, and the seven inlet tops operations was small and isolated daily operation.

3. Summary – FDOT's Position Issue 2

The FDOT believes that the unilateral payment that has been made to be a fair and equitable compensation for what ultimately is a shared mistake. Therefore, no additional compensation is due ACC.

Disputes Review Board Findings Issue 2

- 1. Seven of the Type P7 inlet tops required a modification because the top sizes given in the plans did not match the base sizes. (Structures S-309, S-311, S-314, S-316, S-318, S-325 and S-334).
- 3. Agreement was reached at the project to cast the modified tops at the project rather than pre-casting to save time.
- 4. Negotiations between FDOT and ACC resulted in an agreement on entitlement, however, the cost quantification remained unresolved.
- 5. The FDOT issued Unilateral Payment #20 recognizing 19 compensable days at \$2,609.83 per day for Extended Overhead totaling \$49,586.77.

Disputes Review Board Recommendation Issue 2

In this hearing the Disputes Review Board is addressing only the issue of entitlement.

The FDOT and ACC have agreed that the P7 inlet tops required a modification resulting in additional cost and time requirements. Given the FDOT’s unilateral payment for this item, there is no question with regard to entitlement. The Disputes Review Board recommends that ACC is entitled to compensation for this issue to include justified costs in accordance with Specification Section 4-3.2.1.

The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,
Disputes Review Board

Ralph Ellis Jr. – Chairman
Don Henderson – Member
Murray Yates - Member

Signed for all with the concurrence of all members.

Ralph D. Ellis, Jr.

Ralph D. Ellis, Jr.
Chairman

Exhibit 1.1 Supplemental Agreement No. 22

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
SUPPLEMENTAL AGREEMENT

700-010-45
CONSTRUCTION
04/11

No. 22

Contract No.: T5431

Page 1 of 3

Road No(s). SR 5 (US 1) Federal Aid Project No(s). NA

Fin. Proj. ID 23759225201

This agreement entered into on _____, such an agreement to be effective on the last date of execution by a party hereto, by and between the State of Florida Department of Transportation, "Department", and Astaldi Construction Corporation, "Contractor", and Fidelity and Deposit Company of Maryland and Zurich American Insurance, "Surety", the same being supplementary to Contract T5431 by and between the parties aforesaid, dated January 15, 2013, for the construction or improvement of the road(s) and bridge(s) assigned the project number(s) shown above, in Brevard Count(y)(ies) Florida.

(1) See page 2 and 3 of this Supplemental Agreement.

Revised Plan Sheet Nos. 1, S-1, S-3A, S-5A, S-7A, S-9, and S-9A, dated 8/4/16, prepared by Parson are incorporated into the Contract by reference.

(2) The quantities to be paid shall be determined as provided in the Standard Specification, Edition of 2010. The quantities so determined shall be paid at the unit prices stated on the attached sheets.

(3) It is further agreed that this supplemental agreement shall not alter or change in any manner the force and effect of the original Contract No. T5431, including any previous amendments thereto, except insofar as the same is altered and amended by this supplemental agreement.

(4) The Department and the Contractor agree that the contract time adjustment and sum agreed to in the Supplemental Agreement constitute a full and complete settlement of the matters set forth herein, including all direct and indirect costs for equipment, manpower, materials, overhead, profit and delay relating to the issues set forth in the Supplemental Agreement. This settlement is limited to and applies to any claims arising out of or on account of the matters described and set forth in this Supplemental Agreement.

Granted Time this Agreement 104 Days

Net Change in Contract this Agreement: Increase \$ 1,813,354.52 Decrease \$ 0.00
No Change

Approved By:

Executed By:

put

Secretary or Designee Signature
Printed Name John E. Tyler, P.E.
Title District Construction Engineer
Date _____

Contractor Signature _____ (SEAL)
Printed Name _____
Title _____
Date _____

Executed By:

Secretary or Designee Signature
Printed Name Alan Hyman, P.E.
Title Director of Operations
Date _____

ATTEST _____
Secretary _____ Date _____
NOT REQUIRED (SEAL)
Surety _____

Attorney Signature, Department of Transportation, Legal Review
Printed Name _____
Date _____

BY _____
Florida Licensed Insurance Agent Date A4

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
SUPPLEMENTAL AGREEMENT

700-010-45
CONSTRUCTION
04/11

Page 2 of 3

No. 22 Contract No.: T5431
Road No(s). SR 5 (US 1) Federal Aid Project No(s). NA
Fin. Proj. ID 23759225201

(1) (continued):

In consideration for the \$1,813,354.52 increase in the contract price, and 104 days of additional contract time granted to the Contractor, the Department and the Contractor agree that FDOT Contract No. T5431 is amended to include the following items:

Each item below includes all labor, materials and equipment necessary to perform the work outlined below:

Item 1: Construct full depth variable width gaps (subgrade, base and paving) adjacent to the type E curb and gutter (17 locations), concrete traffic separators (33 locations) and median turn lanes (29 locations), tangent to US 1 in the northbound and southbound roadways. The amount associated with this work item is \$919,179.28. See attachment A for locations of work to be performed. Contract time granted in association with this work includes Fifty-seven (57) compensable days for the amount of \$355,647.51 as well as Thirty (30) non-compensable days, for a total of Eighty-seven (87) contract days.

Item 2: Construct cast-in-place modified Type 7 Inlet tops of drainage structures S-309, S-311, S-314, S-316, S-318, S-325 and S-334, located in the concrete traffic separator. The amount associated with this work item is \$39,959.87. Contract time granted in association with this work includes a total of Twenty-five (25) compensable days. Unilateral Payment #20 included nineteen (19) of these days which were granted along with compensation in the amount of \$2,609.83/day for a total of \$49,586.77. This Supplemental Agreement grants the additional six (6) days associated with this item in the amount of \$6,239.43/day for a total of \$37,436.58. This Agreement also compensates the Contractor for the difference of \$3,629.60/day for the nineteen (19) days previously granted in the amount of \$68,962.40. The total amount of compensation for time granted with this item is \$106,398.98.

Item 3: Construction and removal of temporary asphalt wedge transitions at five ramp intersections with northbound US 1 during the overbuild paving operations at the SR 528 interchange from Sta. 517+40 to Sta. 517+80, Sta. 520+15 to Sta. 520+90, Sta. 523+40 to Sta. 524+40, Sta. 531+40 to Sta. 532+90, Sta. 101+00 to Sta. 101+60 (Ramp C-1A), Sta. 200+90 to Sta. 201+30 (Ramp C-1B), Sta. 300+85 to Sta. 301+25 (Ramp C-2B), Sta. 400+10 to Sta. 400+60 (Ramp C-2A), Sta. 700+80 to Sta. 700+30 (Ramp D-2B) and Sta. 800+65 to Sta. 801+25 (Ramp D-1A). The amount associated with this work item that was not included in the previously executed Unilateral Payment #17 is \$147,918.76.

Item 4: Incorporate Plan Revision 16, deleting second coat of final surface painted pavement markings and replacing with thermoplastic pavement markings. The amount associated with this work item is \$257,033.52. Contract time granted in association with this work includes Eleven (11) compensable days in the amount of \$6,239.43/day for a total amount of \$68,633.73.

Item 5: Implementation of DCE MEMO 09-16 Public Records 7-14-16.

Reason 1: There were discrepancies in the dimensions of the work zones between the typical phasing details and the plan sheets of the Traffic Control Plans (TCP), resulting in variable width gaps that were not provided for in the TCP in the northbound and southbound roadways that required full depth construction.

Reason 2: Bottom sections of these structures as provided with dimensions in the plans did not conform to the standard Type 7 inlet tops also required in the plans. The inlet tops were required to be modified as approved by the EOR.

Reason 3: Construction and removal of temporary asphalt transitions and temporary pavement markings, and utilization of M.O.T crews during the significant overbuild paving operations at the US 1/SR 528 interchange were needed multiple times in order to cross traffic safely through the work zone until final structural pavement grade was constructed.

Reason 4: The Department elected to delete the second coat of final surface painted pavement markings and replace with thermoplastic pavement markings to comply with current standards and specifications.

A5

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
SUPPLEMENTAL AGREEMENT

700-010-45
 CONSTRUCTION
 04/11

Page 3 of 3

No. 22 Contract No.: T5431
 Road No(s). 5 Federal Aid Project No(s). NA
 Fin. Proj. ID 23759225201

Reason 5: See attached DCE Memo 09-16 which is made a part hereof.

Summary:

Issue #	Compensable Time	Non-Compensable Time	\$ Associated with Time	\$ Associated with Work Items
1	57	30	\$355,647.51	\$919,179.28
2	6	0	\$106,398.98	\$39,959.87
3	0	0	\$0.00	\$147,918.76
4	11	0	\$68,633.73	\$257,033.52 (\$81,417.13)
TOTALS	74	30	\$530,680.22	\$1,282,674.30

Total Contract Days = 104

Total Amount = 1,813,354.52

Direct costs for the amount of \$1,282,674.30. Indirect Costs for the Amount of \$530,680.22. Total Supplemental Agreement amount of \$1,813,354.52.

By signing this Supplemental Agreement, Contractor hereby agrees that any and all requests, claims, causes of action, issues, demands, disputes, matters or controversies of any kind or nature, including for time and compensation, known and unknown, on this Contract from January 15, 2013 through and including August 3, 2016, are hereby waived, and that this Supplemental Agreement represents a full and complete settlement of any and all issues, claims, causes of action, demands, disputes, and matters or controversies of any kind or nature by the Contractor from January 15, 2013 through and including August 3, 2016.

Exhibit 1.2 – Notice to Proceed dated July 12, 2016

Lombardo Domenico

From: Scott Moffatt <SMoffatt@targetengineering.com>
Sent: Tuesday, July 12, 2016 8:26 AM
To: Lombardo Domenico
Cc: Manzanero Robert; Jamal Hassouneh; Jim Boughanem; Clements, Richard; AnnMarie Cunningham; Rosemarie Artura
Subject: T5431 237592-2 NTP for SA #22

Domenico,

Our office has been advised that the funds for Supplemental Agreement #22 have been encumbered and approved. This Supplemental Agreement is for additional time, direct and indirect costs for delays incurred by Astaldi caused by the gaps between TCP Phases 2 and 5, and Phases 4 and 5, the modification of seven median inlet tops to conform with the bottom sections of the structures in the concrete traffic separator, and additional direct costs not included in the previously executed Unilateral Payment # 17.

This email is to notify you that the work accounted for Supplemental Agreement #22 can proceed. However, please be aware that your company will not be able to receive compensation for the work or additional time under this agreement until it is fully executed by the Department. If you have any questions in regards to this agreement, please don't hesitate to contact me.

Thanks,

R. Scott Moffatt

Project Administrator

4150 South Fiske Blvd., Rockledge, FL 32955

T (321) 634-6562 C (321) 624-8861

