

September 12, 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

Determination Regarding Issue Preservation Astaldi Issue 2.1 Additional Delay Damages

The Florida Department of Transportation (FDOT) has objected to Disputes Review Board (DRB) hearing requests made by Astaldi Construction Corp. (ACC) on the basis that ACC has not properly preserved their entitlement to a DRB hearing.

The DRB must follow the procedures given in the Three Party Agreement and in the DRB Operating Procedures.

DRB Operating Procedures
Section 5.4

"... Only disputes or claims that have been duly preserved under the terms of the Contract will be eligible to be heard by the DRB.

Three Party Agreement
II Scope of Work

B. Procedure and Schedules for Dispute Resolution:

"...Only disputes or claims that have been duly preserved under the terms of the Contract as determined by the BOARD will be eligible to be heard by the BOARD..."

The DRB can only develop a Recommendation as a result of the DRB hearing process. Therefore, the DRB does not offer an opinion concerning the merit of either party's positions on these issues.

The DRB has reviewed written statements from both parties concerning preservation and has made the following determinations only with regard to the question of preservation.

Issue 2.1 Additional Delay Damages

Supplemental Agreement #11 granted ACC a time adjustment of 65 additional contract days for utility conflicts and drainage redesign. The subject of ACC's request for a DRB hearing is additional compensation for indirect time related cost associated with the 65 days of delay.

Supplemental Agreement #11 contains specific wording limiting the Contractor's ability to obtain compensation for additional issues.

“The Department and the Contractor agree that the contract time adjustment and the sum agreed to in the Supplemental Agreement constitute a full and complete settlement of the matter set forth herein, including all direct and indirect cost 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 claim arising out of or on account of the matters described and set forth in this Supplemental Agreement. “

ACC contends that the FDOT made additional representations to ACC during negotiation concerning Supplemental Agreement #11 providing that ACC would have access to request compensation for indirect time related cost if ACC was unable to obtain the early completion bonus. ACC was not able to achieve the early completion bonus.

The DRB was not privy to any of the negotiations between ACC and the FDOT regarding Supplemental Agreement #11. The DRB does not have the ability to determine what representations, if any, were made by the FDOT during the negotiations on Supplemental Agreement #11.

Both ACC and the FDOT provided Appellate Court references supporting their positions on the question of preservation of claim rights. However, the DRB is not able to determine the legal relevance and correct application of case law to the question of ACC's preservation of claim rights on Issue 2.1.

The DRB is limited and required to keep it's considerations within the terms of the Contract. When Supplemental Agreement #11 was executed, the wording included in Supplemental Agreement #11 became part of the Contract. Therefore, the DRB is unable to hear the issue of additional indirect cost relating to 65 days of additional time granted in Supplemental Agreement #11.

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