

DISPUTE REVIEW BOARD RECOMMENDATION

March 18, 2018

Mr. Neil Parekh
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Mr. Mike Irwin, P.E.
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RE: SR 50 (Colonial Drive) Dean Road to Avon Park Blvd.
FIN: 239203-4-52-01/239203-4-56-01

Subject: Hearing Dated March 2, 2018
Disputes Review Board Recommendation

Gentlemen:

Prince Contracting LLC (Prince) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of a disputed issue. The hearing was held on March 2, 2018 at the FDOT Urban Office in Orlando, 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 recommendation is offered.

Project Scope

The principal elements of the project scope include widening and related drainage improvements of East SR 50 in Orlando, FL.

Issue: Is the Contractor Entitlement to Additional Compensation as a Result of a Delay in the Utility Work by AT&T?

Contractor's Position

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. AT&T did not perform their work in accordance with the project Utility Work Schedule (UWS)**

In accordance with the UWS, AT&T was to start the installation of its new fiber optic cable lines in the new duct system along the length of the project on January 21, 2014. As of the April 20, 2014 CPM schedule update AT&T had performed no work of any kind in regard in to the installation of its fiber optic cable lines on the project. As a result the project had been delayed by 77 calendar days per the April 20, 2014 CPM Update. AT&T's failure to promptly and timely start its work delayed the installation of storm drainage, mast arms, and road construction throughout the project.

The UWS required AT&T to place copper and fiber facilities as soon as the manholes and conduit were constructed and accessible. The conduit was constructed and the manholes were accessible when the Project started on January 21, 2014. Despite that, AT&T did not start its utility work until approximately May 12, 2014 – 113 calendar days after the January 21, 2014 Project start date. AT&T's delays were a result of AT&T's own design issues – discussed in each weekly coordination meeting

2. Prince was delayed in the performance of its contact work as a result of AT&T's failure to perform its work in accordance with the UWS.

AT&T's UWS shows 412 consecutive calendar days of work in Phase 1. Per the UWS, 412 calendar days from January 21, 2014 equals March 9, 2015; March 9, 2015 was the planned date for the Phase 1 work to cease. The actual end date for Phase 1 was November 12, 2015, which is substantially beyond the time allowed by the UWS.

When the delay ceased on November 12, 2015, Prince performed a fragnet analysis which yielded a 166 calendar day delay to the completion of the Project and contract time. Prince submitted this Analysis with its Time Extension Request for NOI No. 4 on December 10, 2015.

AT&T adversely impacted the Project, and FDOT has recognized AT&T's impacts. *See* Ex. D (Supplemental Agreement Nos. 29 and No. 31 in Prince's position). FDOT executed and paid \$1,020,388.38 on Supplemental Agreement Nos. 29 and 31, which covered 25 issues and related to over 23 NOIs.

The total number of days spent working on these issues was 332 calendar days. Prince's fragnet analysis from the approved baseline schedule performed after the impacts ceased shows that Project completion was extended by 166 calendar days.

Although FDOT has acknowledged these individual impacts and compensated Prince for the labor, equipment, and materials involved with the extra work, FDOT has refused to compensate Prince for the costs related to the extension of project completion and contract time.

3. The FDOT is not using the correct CPM schedule when analyzing the AT&T delay.

In the subsequent April 2014 to July 2014 CPM updates, negative float starts to build as it becomes apparent that AT&T is not progressing its work. *See* Exhibit E in Prince's position (CPM letters from Prince to CEI). This immediate impact caused by AT&T's poor performance was not surprising as the CEI told the utilities at the preconstruction meeting that it was "all about you guys at the beginning" of the Project. *See* Audio Recording of Preconstruction Meeting. At this point in the Project, the impact of AT&T's poor performance was all encompassing. Prince could not add additional resources or work extra hours as AT&T was in direct conflict with Prince's contracted work.

In the July and August 2014 CPM Updates, the float was reduced from -106 to -26 days only because the CEI directed Prince to not reflect AT&T delaying Prince in that schedule based on a new AT&T work schedule that showed AT&T completing by December. The CPM was altered, over Prince's

objection, per the direction of the CEI. See Exhibit F in Princes position (emails reflecting this direction).

The time recovered in the August 2014 CPM was a scheduling fiction as AT&T did not perform in accordance with that schedule and did, in fact, continue to delay the completion of the Project. This reality is demonstrated in the March 2015 CPM update where Prince was allowed to show the delay, and the float goes from -38 to -148. The float before and after the directed schedule manipulation demonstrates a similar impact by AT&T to the controlling work items and the completion of the Project.

Starting in March 2015, Prince is finally able to start attacking the work in the wake of AT&T's impacts. By July 2015 the negative float had been eliminated because of Prince's mitigation/acceleration efforts. Prince worked a 6 day work week (instead of the 5 days originally scheduled) and reduced durations through working extra hours. These efforts were undertaken by Prince at great expense in the absence of a time extension by the FDOT as required by the Contract.

4. The construction contract provides for additional compensation to Prince as a result of the utility delays.

Section 8-7.3.2 provides in pertinent part that FDOT "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." (Emphasis added.) And, Section 4-3.2.1 refers to "extension of the duration of the project or delay to a controlling work item." Neither operative section requires an extension to "Original Contract Time", "Contract Time" or the like. Rather, all that is required for a compensable time extension under this Contract is (1) a delay to a controlling item of work, (2) the delay not be reasonably anticipated or foreseeable at the time of bid, and (3) the delay extends the completion of the project. In this instance all three requirements have been met and PRINCE is entitled to receive compensation for the associated time impact caused by AT&T.

5. Summary – Contractor's Position

FDOT's failure to enforce AT&T's UWS adversely affected the Project and Prince. Prince mitigated the impacts to the extent possible, but still suffered damages resulting from a 166 calendar day delay. FDOT must compensate Prince pursuant to the contract; Prince is entitled to be compensated for Project supervisory personnel and under the 8 percent formula for the 166 calendar day extension of contract time and Project completion. Prince respectfully requests the DRB issue a recommendation of the same.

FDOT's Position

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. Agreement was reached between Prince and the FDOT in Supplemental Agreement No. 29

In Supplemental Agreement No. 29, which is a Contract Document, the Contractor agreed to limit its claim to the right to seek additional contract time and compensation related to that additional contract time. The specific language of the settlement is as follows:

In consideration for the \$858,359.65 increase in the contract price and Zero (0) days additional contract time granted to the Contractor, the Department and the Contractor agree that FDOT Contract T5469 is amended to include the following described additional work, labor, equipment, and materials which is full and final settlement for all additional work, labor, equipment and materials identified in issues 1 through and including 24 described herein below with the exception that **the Contractor reserves the right to seek additional contract time and compensation related to that additional contract time.**

2. Prince completed the project within the allowable time

Because the Contractor completed the project within the allowable contract time, it is not entitled to nor does it need an extension of Contract Time. As the Contractor is not entitled to an extension of contract time there is no basis for additional compensation related to that contract time.

3. Prince did not inform the FDOT of its intention to complete the project prior to the specified contract completion date

Because the Contractor did not timely inform the Department of an intent to complete early, and provided no schedule or schedule update reflecting an early completion date, the Contractor may not pursue a claim for either additional contract time or additional compensation.

4. There is no entitlement to compensation for constructive acceleration

Pursuant to the terms of the Contract, the Department has no liability for any constructive acceleration of the work. Furthermore, constructive acceleration cannot be an element of any claim (Sub-article 5-12.8).

5. Prince is unilaterally attempting to change the contract time requirement

The Contractor established the Contract Time in the A+B Bid. Therefore, asserting a claim for being denied the attempt to finish early is a unilateral attempt by the Contractor to amend the Contract's Contract Time, and thereby create a potential benefit for itself without any liability for failure to complete by the early completion date.

The Contractor requested a DRB Hearing, and the question to be heard, as established by the Board, is as follows:

Is the contractor due additional compensation as a result of a delay in the utility work by AT&T?

6. SA #29 Essentially Settled all Claims related to AT&T Impacts

Since AT&T did not compensate the Contractor for impacts to the project caused by AT&T, the Department, consistent with CPAM Procedures, paid additional compensation to the Contractor in the amount of \$858,359.65. This was accomplished in Supplemental Agreement No. 29. Supplemental Agreement No. 29, however, did not grant any additional Contract Time to the Contractor. Instead, the parties agreed to the following wording in the Supplemental Agreement:

In consideration for the \$858,359.65 increase in the contract price and Zero (0) days additional contract time granted to the Contractor, the Department and the Contractor agree that FDOT Contract T5469 is amended to include the following described additional work, labor, equipment, and materials which is full and final settlement for all additional work, labor, equipment

and materials identified in issues 1 through and including 24 described herein below with the exception that the Contractor reserves the right to seek additional contract time and compensation related to that additional contract time (Claim for Additional Contract Time) in accordance with the terms of the Contract due to the impacts caused by AT&T at the project.

Supplemental Agreement No. 29 also notes that the \$858,359.65 increase in the contract price includes the 17.5% mark-up for indirect costs as described in Standard Specification 4-3.2.1(d)(1) which is now designated as 4-3.2.1(4)(a) in the newer volumes.

Also, the additional compensation sought by the Contractor consists exclusively of Supervisory Expenses and the 8% Indirect Calculation in 4-3.2.1(d) (2) (Attachment C), both of which are only allowed in when there is an extension of contract time. For example, 4-3.2 states:

The Contractor shall be entitled to a time extension only to the extent that the performance of any portion of the additional work is a controlling work item and the performance of such controlling work item actually extends completion of the project due to no fault of the Contractor.

The Supervisory allowance is discussed in Sub-article 4-3.2.1(a) Labor and Burden where the above quoted wording is repeated as follows: **“controlling work item and the performance of such controlling work item actually extends completion of the project.”**

The 8% formula for indirect costs, which is an alternative to the 17.5% formula in 4-3.2.1(d)(1), is driven by the number of days of additional contract time granted to the Contractor as discussed in Sub-article 4-3.2.1(d)(2) and reads in part: **“defined as the combined total number of calendar days granted as time extensions due to either extra work, excluding overruns to existing contract items, that extend the duration of the project or delay of a controlling work item caused solely by the Department, or the combined total number of calendar days for which a claim of entitlement to a time extension due to delay of a controlling work item**

....

All calculations under this provision shall exclude weather days, Holidays, and Special Events.”

The Contractor completed the Project within allowable contract time and was never in a position or need to request additional contract time. Because no time extension was ever needed or required to complete the project, Supplemental Agreement No. 29 represents a full and complete settlement of the impacts to the project caused by AT&T. Since there is no additional contract time, no compensation related to additional contract time is available through the 8% formula.

7. Pursuant to the terms of the Contract, the Contractor does not qualify for a compensable contract time extension

The impacts attributable AT&T’s performance did not affect the completion date of the project. March 9, 2015 marks the completion date for Phase I work as described in the Contract Documents. At that time, the Contractor was at 148 days of negative project float. The schedule was then revised by the Contractor in July 2015 to show 13 days positive project float. Finally, when all of AT&T’s relocations were completed in December 2015 the Contractor shows the project in 61 days positive project float. Between this date and the end of the project on March 2017, the Contractor completed the project with 1 day of positive project float with no time issued for project completion.

Therefore, pursuant to the Contract, the Contractor does not qualify for a compensable contract time extension. This conclusion is supported by the following contract specifications:

8-3.2.5, paragraph 4 – Negative float shall not be a basis for requesting time extensions. Any extension of time shall be addressed in accordance with 8-3.2.6 Time Extensions.

8-3.2.6, paragraph 1 – An extension of time for performance shall be considered only to the extent that a delay to an activity or activities exceeds the total float along the project critical paths within the current approved schedule.

5-12.2.2, paragraph 3 - There shall be no Contractor entitlement to any monetary compensation or time extension for any delays or delay impacts, whatsoever, that are not to a controlling work item. . .

Furthermore, evaluation of the Contractor’s monthly schedule updates in the attachment graph shows during the period claimed by the Contractor, April 2014 through December 2015, the Contractor constructively accelerated completion of the project to reach a total 61 days of positive float after all alleged impacts were resolved. As provided for in Sub-article 5-12.8, constructive acceleration cannot be the basis for a claim.

5-12.8 - The Department shall have no liability for any constructive acceleration of the work, nor shall the Contractor have any right to make any claim for constructive acceleration nor include the same as an element of any claim the Contractor may otherwise submit under this Contract. . . .

Therefore, since a request for contract time extension is not permitted under the terms of the Contract, there is no basis for either recovery of additional time or the additional indirect costs requested by the Contractor. As noted above, the 17.5% mark-up was granted in the negotiated payment provided in Supplemental Agreement No. 29, and Specification 4-3.2.1 allows compensation for only one of the mark-ups, 17.5% or 8%.

As additional support, the Department relies upon the following specifications to support its position:

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

- a. Loss of profit, incentives or bonuses;
- b. Any claim for other than extra work or delay;
- c. Consequential damages, including, but not limited to, loss of bonding capacity. . . .
- d. Acceleration costs and expenses, except where the Department has expressly and specifically directed the Contractor in writing “to accelerate at the Department’s expense”;

. . . .

8-13.1, paragraph 3 – 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 Original Contract Time 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 Original Contract Time, regardless of whether the Contractor successfully does so or not, shall be the sole responsibility of the Contractor in every instance.

8. The facts do not support a claim based upon an intent or expectation to finish early

The Contractor did not notify the Department at preconstruction of an intent to complete early and the Contractor’s initial schedule showed completion on the last approved contract day, contract day 950. Also, through summer 2015 when the Contractor was able to escalate completion as also shown in their schedules, there was no notification of a scheduled early completion date. As previously noted, Sub-article 5-12.8 provides that the “Department shall have no liability for any constructive acceleration of the work.”

The significance of a contractor’s need to provide clear and timely written notice to the Department has heightened importance when the contractor intends to complete the project earlier than the end of Contract Time. Not only is written notice required to preserve the claim under Standard Specifications 5-12 and 4-3.2, but the legal standard of proof necessary to prevail on a claim for early completion generally includes the requirement that the contractor provide evidence that from the outset of the contract it intended to complete the contract early. For example, see Attachment F.

As a practical matter, if a Contractor intends to complete early, it needs its subcontractors to proceed with the same objective. A schedule submitted to the Department showing the Contractor using the entire Contract Time certainly would not convince subcontractors that they need to perform their work at an expedited pace not reflected in the schedule.

9. Neither party can unilaterally amend the Contract

An early completion claim by a contractor where the contractor did not inform the Department of an intent to complete early either its bid or schedule, is essentially a unilateral amendment to the Contract’s Contract Time for which the Contractor wishes to create a potential benefit for itself without any liability for failure to complete by the early completion date. Such a unilateral effort by a contractor establishes a potential financial obligation on the Department without the agreement of the Department to accept the risk and without the opportunity of the Department to make appropriate modifications to the terms of the Contract. Amendments to the Contract must be in writing and mutually agreed to. Therefore, the early completion assertion should not be recognized as a basis for entitlement of additional compensation.

10. Summary of the FDOT’s Position

Based on the above discussion, it is the Department’s position that the Contractor is not due any additional contract time or additional compensation for that additional contract time.

- a. Because, the Contractor finished within Contract Time, there is no basis for an extension of Contract Time.

- b. Without additional contract time, there is no basis to calculate additional indirect costs using the 8% formula.
- c. Supplemental Agreement No. 29 granted the Contractor indirect costs using the 17.5% formula. The 8% formula is an alternative to the 17.5% formula, and not a basis for receiving additional compensation.
- d. A contractor has the right to constructively accelerate its work, however, such efforts, by Contract, are not compensable, and more importantly cannot be an element of any claim the contractor may otherwise assert – whether denominated “acceleration” or not.
- e. The facts do not support a claim based upon an intended early completion of the project because the Contractor never informed the Department of such an intent in its bid, schedule, or schedule updates. Such an undisclosed intention is a unilateral attempt to amend the Contract by placing potential additional liability on the Department to which the Department never agreed.

Disputes Review Board Findings

1. The project UWS provided 412 days for AT&T to complete their relocation work in MOT Phase 1.
2. The existing AT&T utilities conflicted with much of the Contractor’s work operations throughout the Phase 1 corridor, preventing the Contractor from completing the construction work until utility relocation was accomplished.
3. AT&T did not start their relocation work on time. AT&T was clear to start work on January 21, 2014. AT&T did not begin their work until approximately May 12, 2014.
4. AT&T did not complete their Phase 1 relocation work within the time allowed by the project UWS. The allowable time of 412 calendar days to complete the Phase 1 utility work ended on approximately March 9, 2015. AT&T completed the Phase 1 utility work on approximately Nov. 12, 2015.
5. The original base line schedule in place at the time of the AT&T Phase 1 delay indicated that the AT&T delay was negatively affecting controlling items of work and the project’s completion date.
6. The FDOT directed Prince to modify the project CPM schedule by removing logical connections between the AT&T work and Prince’s construction work until the end of the 412 day period. This modification to the schedule changed, from a schedule perspective, the impact of the AT&T delay on Prince’s work and the project completion date. Prince objected and made the schedule modification under protest.¹
7. The language in Supplemental Agreement No. 29 clearly reserves Prince’s right to seek compensation for delays due to AT&T impacts.

¹ See Email from Ireland to Scales dated 6Oct14 and Email from Scales to Ireland dated 6Oct14

“the Contractor reserves the right to seek additional contract time and compensation related to that additional contract time (Claim for Additional Contract Time) in accordance with the terms of the Contract due to the impacts caused by AT&T at the project.”

8. The DRB finds that the following Standard Specification sections are relevant to this issue:

5-12.6.2 Compensation for Direct Costs, Indirect Costs, Expenses, and Profit thereon, of or from Delay:

4-3.2.1 Allowable Costs for Extra Work:

Disputes Review Board’s Recommendation

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

The DRB noted the delays caused by AT&T during DRB project visits. The subject of AT&T delays was frequently discussed during Project Progress Meetings and DRB Meetings, and was recorded in the meeting minutes.² There is no doubt that Prince’s construction work and more specifically their controlling items of work were delayed by AT&T.

AT&T was allocated 412 calendar days by the Utility Work Schedule to complete their utility work within MOT Phase 1. That arrangement gave AT&T 412 days to complete the last of their work activities. However, given the fact that Prince also had to accomplish work during the 412 day Phase 1 period, AT&T did not have the option of not completing each one of their work tasks until day 412 . When a construction contractor and a utility are to perform work in a road construction project, the FDOT requires utility coordination. Concurrent work activities must be identified, planned and coordinated. Furthermore, Prince was required by the contract specifications to address utility coordination issues in the project CPM schedule.³ Therefore, the FDOT’s unilateral direction to Prince to remove all logical connections in the project CPM schedule between the AT&T work activities and Prince’s construction work activities during MOT Phase 1 was unjustified.

Any experienced contractor, including Prince, would have had a reasonable expectation that appropriate utility coordination would be in place during AT&T’s work. Prince rightly expected AT&T to start their work on time, pursue their work and complete their work on time.

The contract provisions noted in Item 8 above (Disputes Review Board Findings) support reimbursement to the contractor.

It is therefore the DRB’s recommendation that Prince is due additional compensation because of delays in the utility work by AT&T.

² For example, see: DRB Meeting Minutes dated May 21, 2015, June 18, and 2015, July 16, 2015,

³ See Specification Section 8-3.2

The Board appreciates the cooperation of all parties and the information presented for review 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
Lynn Gibson – Member
Dallas L. Wolford - Member

Signed for all with the concurrence of all members.

Ralph D. Ellis, Jr.

Ralph D. Ellis, Jr.
Chairman