

DISPUTE REVIEW BOARD RECOMMENDATION

November 22, 2004

E-mailed - November 22, 2004

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RE: Projects SR 5A (Nova Rd) Ormond Beach and Port Orange
FIN No.: 240758-1-52-01 & 240757-1-52-01
Contract No: 21266 & 21265
County: Volusia
District 5
Disputes Review Board

DISPUTE: Additional Contract Time due to Area Wide Cement Shortage.

Dear Sirs:

The Contractor, Modern Continental South, Inc. (MCS), requested a hearing to determine **entitlement** of MCS to additional contract time due to an alleged Cement Shortage Issue for two distinct time periods and further requested that the Board will render a decision as follows: Period 1 (April 29, 2004 to July 18, 2004), Quantum Only, and Period 2 (July 19, 2004 to September 1, 2004), Entitlement and Quantum.

Pertinent issues, correspondence and other information relating to MCS's, and FDOT's positions were forwarded to the DRB for review and discussion at the hearing that was held on November 05, 2004.

CONTRACTOR'S POSITION:

Executive Summary

MCS incurred a significant excusable delay on both the Port Orange ("Nova 1") and Ormond Beach ("Nova 2") contracts resulting from the state-wide and area-wide concrete shortage that began in late April 2004 and continued through July 18, 2004, the cutoff date for Part 1 of this assessment. This delay prevented MCS from performing concrete work that was the controlling item of work on the critical path shown in the Updated Progress Schedules for both projects during the period. In addition, the concrete shortage limited MCS's, and the subcontractors', ability to plan the remaining work on both contracts and made the work that was performed very inefficient.

For purposes of this assessment, Port Orange ("Nova 1") and Ormond Beach ("Nova 2") contracts are being combined in one position statement document since both contracts suffered from similar impacts from the concrete shortage and to avoid redundancy with documents relevant to both contracts. At the request of FDOT and the DRB, MCS has divided the assessment into two parts; Part 1 is related to the time period from April 28 to July 18, 2004 and, Part 2, related to the concrete shortage delays from July 19 to September 1, 2004. This assessment pertains to the Part 1 time frame from April 28 to July 18, 2004 only.

*The day after the delay began, MCS submitted proper notification April 29, 2004 for both Nova 1 and Nova 2 contracts, including a preliminary time extension request as required by the Contract (Attachment A-1 & A-2¹). During the concrete shortage, MCS attempted to mitigate the delay by performing any work available on both contracts even though the work was limited and had no beneficial effect on the critical path due to the fact that **concrete activities were the controlling items of work.** Accordingly, MCS is entitled to an Equitable Adjustment in Contract Time to compensate us for this*

¹ See original papers for attachments and exhibits.

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delay. The foregoing assessment of the facts and **schedule analysis** regarding this issue **demonstrates** that Modem Continental South is entitled to a Contract Time Extension of **74 calendar days on Nova 1**, Port Orange, and **35 calendar days on Nova 2**, Ormond Beach for the time period from April 28, 2004 to July 18, 2004.

History

On April 28, 2004, MCS placed an order for 20 CY of concrete for the Nova 1 project and 20 CY of concrete for the Nova 2 project from its supplier, Rinker Materials. However, **MCS was informed** that no concrete would be available that day and they were **unsure when the orders could be filled due to a statewide shortage of cement**. MCS requested documentation from Rinker substantiating the cement shortage and received a fax from Rinker on April 29, 2004 (Attachment A-3 & A-4) that stated:

"Cement supplies are not presently sufficient to meet demand throughout most of the Southeastern United States, including Florida where approximately 40% of the cement used is supplied from offshore sources. Rinker Materials is among the many entities affected by this shortfall.

This shortfall results from a number of factors:

- *Increased demand for cement in Florida*
- *Manufacturing disruptions have occurred at a number of cement manufacturing facilities.*
- *Worldwide cement demand has increased at the same time as a shortage of ocean shipping capacity resulting in disruptions in supply and difficulties in obtaining additional supplies from offshore sources to cover the manufacturing disruptions. Rinker Materials will keep you apprised of developments as we work to address the supply shortfall."*

In addition, the Boca Raton News published an article related to the cement shortage on April 29, 2004 (Attachment A-5) stating,

"The state of Florida is suffering a cement and local construction companies are coming up empty — especially in their pockets... Hardy Johnson, president of the Florida Business Unit of Titan America, "there is an unprecedented shortage of cement. Florida is the No. 3 cement-consuming state... "

*After receiving this fax from Rinker on April 29, 2004, MCS promptly notified the owners' representative, Parsons Brinckerhoff (PB), in writing, including a preliminary time extension request as required by the contract. PB responded on May 6, 2004 (Attachment A-6) stating, "**cement shortage has not been substantiated because we have only received one letter from one supplier concerning this issue.**" In the meantime, MCS had received no concrete since April 28, 2004 despite placing orders on a daily basis with Rinker.*

In response to the PB letter, MCS responded on May 7, 2004 (Attachment A-7) stating that Bob Burlison of FTBA indicated the statewide cement shortage is being dealt with in Tallahassee. Obviously, PB and FDOT were well aware of the shortage, however, were denying knowledge of this well publicized statewide shortage of cement. MCS also forwarded via fax an email from Hendrik Van Oss, U.S. Government Cement Specialist, explaining the possible causes of the cement shortage (Attachment A-8 to A-12). In addition, a memo was posted on the FTBA website by Ananth Prasad, Director Office of Construction explaining the crisis and how it may be dealt with (Attachment A-13). MCS has also included for review, an assessment of the cement shortage from the Portland Cement Association (Attachment A-14 to A-24).

*On May 20, 2004, **MCS forwarded letters to PB from subcontractors**, MasTec and Atlantic Asphalt and Concrete Services, concerning their inability to obtain concrete and requesting additional time extension to complete their contract work (Attachment A-25 to A-27). Meanwhile, MCS continued to request concrete from Rinker on a daily basis, and also sent correspondence on May 5, May 18, and June 9, 2004 to Rinker and **requested additional revised mix designs** that FDOT had indicated they would be receptive (Attachment A-28 to A-33). However, Rinker provided no response to these requests nor provided a revised mix design for submittal despite repeated requests by MCS.*

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During the delay period, MCS continued to update PB and FDOT of the estimated number of workdays lost due to the cement shortage. MCS sent correspondence reflecting the lost workdays on May 19, July 2 and July 26, 2004 (Attachment A-34 to A-50).

Even the Governors office was aware of the cement shortage. A letter from Transportation Secretary, Jose Abreu refers to both Nova 1 and Nova 2 projects in a letter to State Senator Evelyn Lynn that states, "Both projects are currently being impacted by a nationwide cement shortage, over which this contractor legitimately has no control. Consequently, the completion dates may be extended even further. " (Attachment A-51 & A-52)

*On July 27, MCS received a letter from PB stating that, "Please be advised that any further requests for a contract time extension on the cement shortage issue after the date of July 18, 2004 will not be considered **without the appropriate back up material from your suppliers.**" (Attachment A-53 & A54). Thus, FDOT implies that no additional information will be required to justify a contract time extension for the concrete shortage delays incurred prior to July 18, 2004. MCS responded promptly on July 30, 2004 reiterating the correspondence sent to Rinker had been forwarded to PB and that, "MCS will continue to place as much concrete as Rinker is able to ship. " (Attachment A-55)*

*Then without prior discussion or negotiations, on August 3, 2004, FDOT unilaterally issued a time extension of 40 calendar days to the Nova 1 contract and 31 calendar days time extension to the Nova 2 contract for the concrete shortage delays through July 18, 2004 (Attachment A-56 to A-58). **No time extension days have been granted to MCS since that time for the concrete shortage beyond the July 18, 2004.***

*MCS responded on August 9 & 11, 2004 taking exception to the **FDOT calculation of days, which excluded weekends** and made other changes to the calculations provided by MCS without consultation. Also, MCS requested an additional time extension for the days FDOT excluded. (Attachment A-59 to A-68).*

*On August 18, 2004, FDOT notified MCS that it would be invoking liquated (sic) damages for the Nova 1 contract even though legitimate time related issues remained unresolved and the project continued to be impacted due to the concrete shortage and Hurricane Charley (Attachment A-69). In addition, MCS was informed that **extensive back up is now required to substantiate the full amount of days requested** which was contradictory to the PB letter of July 27, 2004 where PB indicated that additional information was required only for those days requested after July 18, 2004. MCS responded to this letter on August 18, 2004 reiterating the request for additional time extension and stating that the concrete shortage delays were continuing (Attachment A-70 & A-71).*

*To fulfill the FDOT request for additional information, MCS requested additional substantiation from Rinker Materials on numerous occasions over the past few months. Subsequent to the last request, MCS received an email on October 19, 2004 from Rocky Jenkins, Area Manager of Rinker Materials, stating, "I've attached documentation below that has sufficed every FDOT project we have going in the state." (Attachment A-72). The documentation attached to the October 19, 2004 email from Rinker (Attachment A-73) is the same as the documentation provided by Rinker on April 29, 2004 (Attachment A-4). However, Jenkins statement that the information provided has sufficed every FDOT project leaves the impression that **MCS is being held to a higher standard than other contractors in the state to substantiate the concrete shortage delay.** If the documentation from Rinker is sufficient on other FDOT projects then this documentation should be sufficient on the Nova 1 and Nova 2, MCS projects. It is not fair for PB or the FDOT to hold MCS to a higher standard on these projects than other contractors performing work on FDOT projects.*

*MCS also contacted other suppliers in the area in an endeavor to procure FDOT concrete for the Nova 1 and Nova 2 projects. However, these efforts were not successful due to the fact that the **other suppliers were affected by the same cement shortage as Rinker and were not taking on new customers or were not able to supply FDOT mix due to the shortage.** The attached **email from Mari Coyle, MCS Office Manager, illustrates the efforts made by MCS staff to procure FDOT concrete from other suppliers** (Attachment A-74).*

In order to provide more substantiating data, MCS has compiled the labor force data for the months before and during the concrete shortage delay in graphic form to better demonstrate the lost labor hours suffered by MCS and the subcontractors on the project due to the concrete shortage. The labor utilization curves for the MCS labor force on Nova 1 and Nova 2 show a significant decrease in labor

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hours after April 28, 2004 when the delay began and this drop in labor force, more than 50%, continued throughout the delay period into October 2004 (Attachment F-1). It should be noted that the labor force utilization impacts shown in September and early October were mainly due to the recent succession of hurricanes. In addition, the labor utilization curves for our concrete subcontractors, Atlantic Asphalt, K & B and WBI, demonstrated an even greater loss due to the concrete shortage (Attachment F-2 to F-4). As demonstrated in the graphics MCS and the concrete subcontractors were severely impacted due to the concrete shortage delays and those impacts and delays continue until September.

All correspondence, including news articles, emails and faxes, related to the history of the concrete shortage have been compiled chronologically and included in this document as "Attachment A-1 to A-74".

Schedule Analysis

In accordance with the contract documents, MCS has prepared a schedule analysis to demonstrate the impacts the concrete shortage had on the accepted progress schedule. The analysis utilizes the progress schedule update just prior to the start of the concrete delays as the target schedule. MCS then created a calendar to be utilized as the work calendar for the concrete activities affected by the concrete shortage. The days in which concrete was not available or the amount delivered was substantially less than ordered was considered a non-work day and assigned as such to the calendar.

The calculation of a non-workday in the schedule is in accordance with industry standards and similar to that utilized by CalTrans and Kansas DOT where loss of .60 day or more constitutes a non-work day (Attachment B-1). MCS reviewed the data from the concrete delivered during the period and when 61% or more of the concrete requested for that day was delivered that day was considered a work day in the schedule calendar. Likewise, when 60% or less of the concrete that was requested for that day was delivered then that day was considered a non-work day in the schedule calendar. The FDOT standard specification section 8-7.3.2 states that a lost day is when, "The Contractor being unable to work at least 50% of the normal work day..." MCS has been more than reasonable by using 60% instead of the 50% stated in the FDOT specifications.

For the Nova 1 project, the April 18, 2004 progress schedule update "104B" was utilized as the basis for the analysis. The "104B" schedule was copied and named "TIC1" and the "104B" schedule was assigned as the target. Calendar 4 was then added to the "TIC 1" schedule to represent the concrete supply calendar and this calendar was assigned to all remaining concrete activities. The days in which concrete was not available or the amount delivered was substantially less than ordered, as shown in the MCS spreadsheet, was considered a non-work day and assigned as such to the schedule calendar, (Attachment B-2 to 13-6). The schedule was then recalculated to measure the affect the delays had on the remaining work and completion milestone in the progress schedule.

The analysis demonstrates that the schedule was impacted a total of 76 calendar days; however, the **completion milestone was impacted 74 calendar days** to an impacted completion date of September 10, 2004, (Attachment C-1 to C-3).

For the Nova 2 project, the April 25, 2004 progress schedule update "204H" was utilized as the basis for the analysis. However, schedule update "204H" was adjusted to include time extensions granted by FDOT related to the asbestos pipe, additional driveways and the Cheeseboro turn lane and an adjusted project completion date of August 12, 2004. The "204H" schedule was copied and named "TIC2" and the "204H" schedule was assigned as the target. Calendar 3 was then added to the "TIC2" schedule to represent the concrete supply calendar and this calendar was assigned to all remaining concrete activities. The days in which concrete was not available or the amount delivered was substantially less than ordered, as shown in the MCS spreadsheet, was considered a non-work day and assigned as such to the schedule calendar, (Attachment D-1 to D-4). The schedule was then recalculated to measure the affect the delays had on the remaining work and completion milestone in the progress schedule.

The analysis demonstrates that the schedule was impacted a total of 38 calendar days; however, the **completion milestone was impacted 35 calendar days** to an impacted completion date of September 16, 2004, (Attachment E-1 to E-5).

Conclusions

The delay incurred due to the concrete shortage is an excusable delay that entitles MCS to an Equitable Adjustment in Contract Time. MCS submitted timely notice including a preliminary time extension

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request for both the Nova 1 and Nova 2 projects as required by contract. This delay and MCS actions meet all of the criteria set forth in the contract and stipulated in the July 27, 2004 letter that allows the FDOT to grant a time extension for the concrete shortage.

1. "The Department will consider the delays in the delivery of material 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."
2. "Furnish substantiating letter from a representative number of suppliers clearly confirming that the delays in delivery were the result of an area-wide cement shortage "

With regard to the above criteria, the concrete shortage delay is clearly beyond the control of the contractor and supplier. Also, concerning the information confirming the concrete shortage, MCS has forwarded the April 29, 2004 fax from Rinker, the FDOT memo of May 25, 2004 and numerous news media publications, cumulatively meeting the criteria for confirming the concrete shortage was indeed "area-wide". In addition, of the other local concrete suppliers, MCS was informed verbally from two suppliers that they do not have an approved FDOT mix design and the other two suppliers were not taking on new business due to the shortage. Substantiating letters from these suppliers are not available and, even if available, would do nothing more to substantiate the well-known and highly publicized area-wide concrete shortage. **Such a well-known issue should not require exhaustive documentation.**

Nonetheless, MCS has made every reasonable effort to obtain additional documentation from Rinker regarding the concrete shortage. On October 19, 2004, MCS received a fax from Rinker Area Manager Rocky Jenkins stating that the information he provided has sufficed on every FDOT project they are involved with. However, it appears that FDOT is holding MCS to a higher standard than the other FDOT contractors and this practice is unfair to MCS.

Contract Specification Section 8-7.3.2 provides the contractor entitlement to a time extension after these types of delays occur. The specification states:

"8-7.3.2 Contract Time Extensions: The 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. The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of the Contract Time period. When failure by the Department to fulfill an obligation under the Contract results in delays to the controlling construction operations, the Department will consider such delays as a basis for granting a time extension to the Contract. Whenever the Engineer suspends the Contractor's operations, as provided in 8-6, for reasons other than the fault of the Contractor, the Engineer will grant a time extension for any delay to a controlling item of work due to such suspension. The Department will not grant time extensions to the Contract for delays due to the, fault or negligence of the Contractor. "

This concrete shortage delay impacted a controlling item of work, concrete, resulted in a significant delay and disruption and was not caused by the fault or negligence of the contractor, therefore, MCS is entitled to a full and equitable time extension for each calendar day the schedule was impacted.

FDOT has made allegations that MCS should have worked Saturdays and Sundays and tried to get Rinker to deliver concrete on weekends. This would have resulted in increased costs for MCS due to the fact that MCS would have had to pay Rinker to open the plant on the weekends and even then, the concrete availability was limited or non-existent just as it was on the weekdays. Furthermore, MCS is not obligated by contract to mitigate an excusable delay when that mitigation would result in increased costs to MCS without an agreement for compensation from FDOT for those mitigation efforts.

In addition, MCS has incurred significant increased costs, both direct and indirect, due to the concrete shortage delays. The contract allows for a time extension for the delays incurred due to material shortages; however, these delays are not compensable. MCS has been burdened with significant increased costs related to underutilized and extended overhead as well as lost momentum and lost productivity that are not recoverable. The contractor should not incur additional costs due to the FDOT assessing liquidated damages for an excusable delay. This would only punish the contractor for issues that are clearly beyond his control.

MCS incurred a significant excusable delay resulting from the state-wide and area-wide cement shortage. MCS followed all the notice requirements of the specifications including implementing all

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reasonable efforts to mitigate the delay fully funded by MCS. Unfortunately, these mitigation efforts were overcome by the continuing concrete shortage delay and, thus, MCS is entitled to an Equitable Adjustment in Contract Time as compensation for this delay.

FDOT granted a unilateral contract time extension of 40-calendar days for the concrete delays on the Nova 1 project and a 31-calendar day extension on the Nova 2 project. However, this time extension was not equitable for the delays incurred. FDOT failed to consider calendars days, weekends and holidays in their calculations. It appears they were granting time extensions only for the specific workdays in which no concrete was delivered to the projects without considering the number of calendar days of the overall delay. This unilateral approach to granting time to MCS is unfair and punishes the contractor with the threat of liquidated damages for a delay that is excusable and clearly beyond the contractor's control. MCS has demonstrated that it made every reasonable effort to mitigate the delay, requesting numerous times for a revised mix design from the supplier, Rinker Materials. MCS made sure that FDOT was fully informed of the concrete shortage and forwarded all communications between MCS and the supplier regarding the issue. These and other efforts to obtain concrete were unsuccessful; therefore, the contractor should not be punished for delays that are beyond his control. PB and FDOT made no effort to confirm any of these issues with Rinker Materials, even when requested by MCS to do so.

Therefore, the FDOT unilateral time extensions were not equitable for the delay incurred on these projects. MCS prepared a schedule analysis, in accordance with the contract, that demonstrates an equitable time extension for the concrete shortage delays. According to the analysis, MCS is entitled to a 74-calendar day time extension through July 18, 2004 on the Nova 1 project and 35-calendar day time extension through the same, July 18, 2004 date, on the Nova 2 project.

Based on the information provided, we hereby request the equitable time extension demonstrated in the schedule analysis as stated above be granted to MCS on the Nova 1 and Nova 2 contracts. Anything less would be unfair and punish the contractor with liquidated damages for excusable delays for which the contractor has no control and has already been burdened with the direct and indirect costs that are not recoverable.

DEPARTMENT'S POSITION:

The Department respectfully submits this statement and explanation of its position regarding entitlement and quantum to MCS for claimed additional time relating to the Cement Shortage Issue that is to be presented to the Board on November 5, 2004.

It is the Department's understanding that the Board will consider the facts presented by both sides and render a decision that is consistent with the terms of the contract. The Cement Shortage Issue is two distinct time periods and it is the Department's understanding that the Board will render a decision as follows: Period 1 (April 29, 2004 to July 18, 2004), Quantum Only, and Period 2 (July 19, 2004 to September 1, 2004), Entitlement and Quantum.

Cement Shortage

We completed our analysis of MCS's September 22, 2004 Cement Shortage claim package, from the period April 29, 2004 through September 1, 2004, requesting additional contract time of 107 calendar days for the Nova Road (Port Orange) projects and 63 calendar days for Nova Road (Ormond Beach) projects. No additional compensation is requested.

MCS's Claim

MCS submitted a claim package dated September 22, 2004 requesting an additional 107 calendar days on the Port Orange project, and an additional 63 calendar days on the Ormond Beach project "thru mid-October 2004". However, there is a **conflict in MCS's claim package in this regard**. The "Cement Shortage Delay Summary thru Sept 1, 2004" included in the claim package indicates a 94 calendar day delay for Port Orange and an 85 calendar day delay for Ormond Beach.

According to an e-mail dated October 1, 2004 from MCS subsequent to the September 22, 2004 claim, these requests for additional time cover the period from the commencement of the alleged delay (April 29, 2004), through September 1, 2004. Joe Peck, former MCS employee, acknowledged in this e-mail that delays after September 1, 2004 could be attributed to the hurricanes rather than to a cement shortage. No formal letter from MCS was received concerning this matter.

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Applicable Specification re: Area-wide Shortage

8-7.3.2 Contract Time Extensions – see next to last paragraph on page 79 of Standard Specifications, cited in part as follows (see exhibit A):

"The Department will consider 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. Such delays may include an area-wide shortage, an industry-wide strike, or a natural disaster that affects all feasible sources of supply. In such cases, the Contractor shall furnish substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage, an industry-wide strike, etc." (emphasis added)

Background Information

On April 29, 2004, MCS gave the Department written notice that a "statewide cement shortage is having a detrimental time effect" on the Port Orange and Ormond Beach projects (see exhibit B). Also on April 29, 2004, Rinker Materials, MCS's concrete supplier, sent a fax to MCS with an unsigned and undated statement concerning the cement shortage attached (see exhibit C). The cover letter of Rinker Materials fax stated the following, which suggested a way to help mitigate the effects of the shortage:

"I realize that this is a DOT project and Type II is a necessity. However, if you could get a variance to do sidewalks with Type I/II cement in a non-DOT mix, it might help our ability to supply your project."

On May 5, 2004, MCS wrote to Rinker Materials acknowledging receipt of Rinker Materials "undated and unsigned letter regarding an alleged cement shortage in Florida." (see exhibit D) MCS complained of delivery problems and further stated:

"Due to the apparent severity of the problem, we request that Rinker Materials and other FDOT approved concrete sources address this issue directly with the Director, FDOT Office of Construction to affect a uniform state-side resolution. Until resolved, MCS expects Rinker Materials to perform in accordance with the purchase order to the extent possible...We require that Rinker Materials pursue Type I mix designs for New Smyrna and Ormond plants, as FDOT will be receptive to approval in Class I non-structural."

On May 6, 2004, PBCS replied to MCS's April 29 notice, advising MCS of the following (see exhibit E):

"Please be advised that an area-wide shortage has not been substantiated because we have only received one letter from one supplier concerning this issue. Standard Specification 8-7.3.2 requires the contractor to furnish substantiating letters from a representative number of suppliers clearly confirming that the delays in delivery were the result of an area-wide cement shortage. Please confirm that other suppliers in the area are not able to supply you with concrete.... it is the contractor's responsibility to exhaust all avenues prior to claiming that there is a state-wide cement shortage."

In a memo dated May 10, 2004, the State Director of Construction, Ananth Prasad, acknowledged that there was a cement supply/delivery problem that could affect FDOT projects (see exhibit F). Mr. Prasad generously offered to work with affected contractors to lessen the potential for delays by allowing modifications to specified design mixes. Mr. Prasad stated the following:

"The specifications do allow some leeway in design mixes. The State Materials Office is committed to same day turn around on requests for changes with complete information."

On May 18, 2004, MCS wrote to Rinker Materials again concerning supply/delivery problems (see exhibit G):

"We wrote to you on May 5, 2004 regarding the cement shortage and have not received a reply... It is vitally important that you reply in a definitive manner such that we can get an extension of time from FDOT... Have any Type I mix designs for New Smyrna and Ormond plants been submitted? This is important to show a good faith effort during the shortage since FDOT indicates they are receptive."

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On May 25, 2004, Ananth Prasad, State Director of Construction, wrote a memo to the District Construction Engineers concerning "cement supply issues" (see exhibit H). Mr. Prasad again reiterated the Department's commitment to consider alternative design mixes and to consider non-compensable time extensions:

"The Department is committed to turning around mix design changes expeditiously to allow some leeway in design mixes to optimize the use of cement... **On active projects, the Department will consider noncompensable time extensions on a case-by-case basis if the Contractor has made an effort and taken all appropriate steps, such as revising the mix designs, etc., to mitigate this problem.** Before any time extension is granted, the District Construction Engineer needs to coordinate such requests with the Director, Office of Construction prior to approving any such extensions... No additional compensation will be made to the Contractor due to the impacts of the supply problem." (emphasis added)

On June 9, 2004, MCS again wrote to Rinker Materials concerning supply/delivery problems and attached a copy of Mr. Prasad's May 25 memo cited above (see exhibit I):

"We wrote to you on May 5 and 18, 2004 regarding the cement shortage and have not received a reply...It is vitally important that you reply in a definitive manner such that we can get an extension of time from FDOT... What if anything has been done in submitting Type I mix designs for New Smyrna and Ormond plants? This is important to show a good faith effort during the shortage since FDOT indicates they are receptive."

On July 27, 2004, PBCS advised MCS of the following, regarding both projects (see exhibit J):

"The Department is currently evaluating the cement shortage contract time extension on the above-referenced projects from April 28, 2004 to July 18, 2004 to determine the impact the cement shortage has had on your construction operations... However, **it is the Department's position that beyond July 18, 2004, delays related to cement supply are no longer an issue without written confirmation from a representative number of concrete suppliers.** Based on reports from suppliers and contractors in the central Florida region, **the cement shortage is no longer in industry wide problem...** Please be advised that any request for a contract time extension on the cement shortage after July 18, 2004, will be based on Standard Specification 8-7.3.2... Please be advised that any further requests for a contract time extension on the cement shortage after the date of July 18, 2004 will not be considered without the appropriate backup material from your suppliers."

On July 30, 2004, MCS responded to the July 27 PBCS letter (see exhibit K). In this letter, MCS again complained about Rinker Material's lack of response. Up to this date, MCS had not submitted to the Department any documentation supporting its claim of an "area-wide shortage":

"We have copied the Department on four letters MCS has sent to Rinker Materials requesting information on the cement shortage and have had no response to date. MCS has no leverage to force Rinker Materials or any other concrete supplier to furnish any records if they choose not to."

MCS provided no evidence to the Department that it was actively pursuing other suppliers or alternative mix designs to mitigate the impacts of the shortage during this period.

On August 3, 2004, after carefully evaluating the time extension request submitted by MCS, along with the projects records kept by PBCS, the Department issued MCS a certified letter granting MCS time extensions of 40 calendar days on the Port Orange project, and 31 calendar days on the Ormond Beach project. (see exhibit L)

On August 11, 2004, MCS wrote to PBCS requesting an additional 20 days on Port Orange and 22 days on Ormond Beach (see exhibit M).

On September 13, 2004, PBCS wrote to MCS acknowledging receipt of letters concerning certain claims issues, including the Cement Shortage Issue (see exhibit N). PBCS advised MCS that any claim that MCS intended to submit to the DRB must be prepared and submitted to the Department in accordance with Standard Specification 5-12. Note the following section of this specification:

"5-12.3 Content of Written Claim – As a condition precedent to the Contractor being entitled to additional compensation or a time extension under the Contract, for any claim,

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the Contractor shall submit a written claim to the Department which will include for each individual claim, at a minimum, the following information..." (emphasis added) This specification goes on to describe in detail what needs to be submitted by the Contractor for the Department's review.

On September 22, 2004, MCS submitted its claim package. It is important to note that this claim does not meet the requirements of Section 5-12. The claim has not been certified under oath, as required by Section 5-12.9. It therefore does not meet the requirements of a "certified claim".

On September 30, 2004, PBCS wrote to MCS requesting additional information that would assist in the evaluation of MCS's claim (see exhibit 0).

On October 1, 2004, MCS forwarded an e-mail to PBCS, attempting to address the questions raised by PBCS in its September 30, 2004 letter. The questions asked by PBCS were not fully answered because MCS failed to indicate if this claim package was a full and final claim submittal. (See exhibit P)

The Department's Position

For the purposes of the November 5, 2004 DRB Hearing, it is necessary to consider the Cement Shortage Issue as two separate and distinct periods.

- *Period 1 – The period from April 29, 2004 to July 18, 2004. This is the period from MCS's first notice to the Department of delays due to the cement shortage up to the pay estimate cut-off date in July 2004, for which the Department has already granted a non-compensable time extension of 40 calendar days for Port Orange and 31 calendar days for Ormond Beach.*
- *Period 2 – The period from July 19, 2004 to September 1, 2004. This is the period from the end of Part 1 to the date selected by MCS in its claim package.*

Period 1 – April 29, 2004 to July 18, 2004

MCS was granted time extensions on both projects during this period, commensurate with the delays actually experienced and based on field documentation by both MCS and the Department.

Despite the explicit terms of the contract (Section 8-7.3.2) concerning information to be provided by the contractor to support time extensions for area-wide shortages, MCS never submitted "substantiating letters from a representative number of manufacturers... confirming that the delays in delivery were the result of an area-wide shortage..."

Neither MCS, nor any suppliers for the benefit of MCS, ever submitted alternative mix designs as a means of mitigating the impacts of the shortage. This was in spite of the Department's several offers to consider alternative mixes.

*MCS submitted its request for additional time. The Department evaluated information submitted by MCS along with its own records. **The result of this evaluation was the granting of 40 calendar days on Port Orange and 31 days on Ormond Beach, via letter from Frank O'Dea on August 3, 2004, cited above. The Department considered at the time, and still considers, these granted time extensions to be fair and equitable for the entire alleged concrete shortage period.***

*It is important to note that **no other FDOT contractor working within the area of the Daytona Residency requested time extensions related to the alleged "cement shortage".***

The only issue in dispute for Period 1 is the amount of time granted (the "quantum"). Time was granted based on records provided by MCS for dates work was performed and concrete suppliers were apparently available. A good faith effort was provided by the Department in granting these days even though MCS failed to provide sufficient back-up documentation.

Period 2 – July 19, 2004 to September 1, 2004

The July 27, 2004 letter, cited and quoted above, from PBCS to MCS clearly advised MCS that for the Department to consider any time extension requests after July 18 related to the supply of cement MCS would have to comply with specification 8-7.3.2. This specification requires that "...the Contractor shall furnish substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage, an industry-wide strike, etc."

DISPUTE REVIEW BOARD RECOMMENDATION

MCS has not submitted to the Department any such "substantiating letters from a representative number of manufacturers" and has therefore failed to provide documentary support of any "area-wide shortage" of cement for Period 2. MCS has clearly not met the requirements of the contract for consideration of a time extension in this respect.

Neither MCS nor any suppliers on behalf of MCS have submitted any alternative mix designs to help mitigate the impacts of any alleged cement shortage even though the Department has offered to consider alternative mixes for this purpose.

Because of MCS's failure to submit conclusive documentation to the Department in accordance with Section 8-7.3.2 in support of its time extension claim, and **in light of the ability of other FDOT contractors in the immediate area to get concrete as needed, it is the Department's position that there is no entitlement to MCS for a time extension related to the alleged cement shortage during the period of July 19, 2004 to September 1, 2004.** Therefore, there is no quantum.

Summary

For the period of April 29, 2004 to July 18, 2004, the Department granted an additional 40 calendar days on Port Orange and 31 calendar days on Ormond Beach after a detailed evaluation of MCS's time extension request and its own project records. As a good faith effort and the known industry wide shortage, the Department processed time extensions for the period based on MCS's documentation. MCS failed to provide additional documentation that they tried using alternative mix designs and/or suppliers. No additional time is warranted and MCS's request for additional contract time is hereby denied.

For the period of July 19 to September 1, 2004, MCS has not met the requirements of the contract in support of its time extension request for an area-wide shortage. There is no entitlement to MCS for a time extension on either the Port Orange or Ormond Beach projects during this period, therefore, there is no quantum.

CONTRACTOR'S REBUTTAL:

In the position paper submitted by PBCS, it states in Part I that MCS was granted 40 calendar days on Nova I and 31 calendar days on Nova II for the "alleged concrete shortage." It was also noted in their position that it was a "known industry wide short-age." By PBCS granting MCS time it would have not been considered an "alleged" delay but a legitimate delay. It is unclear to MCS how the days were calculated by PBCS. The Excel spreadsheet submitted via email to PBCS had been altered following our submittal to exclude weekends, holidays, and the conversion rate for calendar days from workdays. There was no discussion made by either party about the number of days that would be granted. It was **not mentioned that PBCS had concluded on this claim that a workday and a calendar day are considered to be one in the same.** PBCS felt that MCS should have attempted to obtain concrete on weekends and holidays. How could PBCS expect MCS to obtain concrete on the weekends and holidays, which would incur additional costs, when it was already difficult to obtain concrete during the normal workweek?

PBCS mentions that MCS did not submit alternative mix designs. MCS requested Rinker to submit alternative mix designs, which is the supplier's responsibility. The attached email, dated October 19, 2004, from Rocky Jenkins of Rinker (page 3) states that their original memo (page 4), included in every MCS request, has been sufficient for time extensions on all FDOT projects in the state.

PBCS also mentions that no other FDOT contractors working in the Daytona Area requested time extensions. First, this is irrelevant. Second, there are very few ongoing FDOT contracts in the Daytona area. Other contractors in the area might have not been impacted by the shortage because they were not pouring significant amounts of concrete during the shortage. The jobs on I-95, the other major contracts in the area, were laying pipe and performing other activities that would not have been impacted by the shortage. We printed the list of active contracts in the Daytona area from the FDOT website, (pages 5-6) and we think that only our jobs would have been significantly affected.

On page 4 third paragraph of PBCS' position paper, PBCS states the claim was not certified under oath and therefore does not meet the requirements of a certified claim. The claim was certified under oath (page 7) exactly per Standard Specification 5-12.9 (page 8). The certification of claim was not notarized since notary is not required by the specifications. An officer within the company, who has the authority to bind the contractor, certified the claim.

DISPUTE REVIEW BOARD RECOMMENDATION

On Part 2 of PBCS' position, they continue to refute what they have already acknowledged by requesting MCS to furnish substantiating letters from other vendors. This spec is to be used, for example, when we are the only contractor in the area using a specific type of material. Then we would have to prove that a shortage exists. When you have such a widely publicized shortage, we should not be required to provide documents. In addition, suppliers that are not in business with Modern would not submit any documents to us. MCS requested PBCS contact Rinker directly on many occasions, to con-firm the unavailability of concrete due to the shortage, but PBCS declined to do so.

MCS requests equitable contract time extension as documented.

MAJORITY BOARD FINDINGS:

- The Florida Department of Transportation Standard Specifications for Road and Bridge Construction, 2000 edition, contains the following provisions.

SECTION 8 PROSECUTION AND PROGRESS

8-6.4 Suspension of Contractor's Operations - Holidays: *Unless the Contractor submits a written request to work on a holiday at least ten days in advance of the requested date and receives written approval from the Engineer, the Contractor shall not work on the following days: Martin Luther King, Jr. Day; Memorial Day; the Saturday and Sunday immediately preceding Memorial Day; Independence Day; Labor Day; the Friday, Saturday, and Sunday immediately preceding Labor Day; Veterans Day; Thanksgiving Day; the Friday, Saturday and Sunday immediately following Thanksgiving Day; and December 24 through January 2, inclusive. Contract Time will be charged during these holiday periods regardless of whether or not the Contractor's operations have been suspended. The Contractor is not entitled to any additional compensation for suspension of operations during such holiday periods.*

8-7 Computation of Contract Time.

8-7.3 Adjusting Contract Time:

8-7.3.2 Contract Time Extensions: *The 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. The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of the Contract Time period. ... The Department will not grant time extensions to the Contract for delays due to the fault or negligence of the Contractor.*

...

The Department does not include an allowance for delays caused by the effects of inclement weather in establishing Contract Time.

The Department will handle time extensions for delays caused by the effects of inclement weather differently from those resulting from other types of delays. The Department will consider these time extensions only when rains or other inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work resulting in:

- (1) The Contractor being unable to work at least 50% of the normal work day on pre-determined controlling work items due to adverse weather conditions; or*
- (2) The Contractor must make major repairs to work damaged by weather, provided that the damage is not attributable to the Contractor's failure to perform or neglect; and provided that the Contractor was unable to work at least 50% of the normal workday on pre-determined controlling work items.*

No additional compensation will be made for delays caused by the effects of inclement weather.

The Engineer will continually monitor the effects of weather and, when found justified, grant time extensions on either a bimonthly or monthly basis. The Engineer will not require the Contractor to submit a request for additional time due to the effects of weather. The Department will consider 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. Such delays may include an area-wide shortage, an industry-wide strike, or a natural disaster that affects all feasible sources of supply. In such cases, the Contractor shall furnish substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage, an industry-wide strike, etc.

DISPUTE REVIEW BOARD RECOMMENDATION

...

*Make a preliminary request for an extension of Contract Time in writing to the Engineer within ten calendar days after commencement of a delay to a controlling item of work. If the Contractor fails to provide this required notice, the Contractor waives any rights to an extension of the Contract Time for that delay. In the case of a continuing delay, the Engineer will require only one request. Include with each request for an extension of time a description of the dates and cause of the delay, a complete description of the magnitude of the delay, and a list of the controlling items of work affected by the delay. **Within 30 days after the elimination of the delay or the receipt of a written request from the Engineer, submit all documentation of the delay and a request for the exact number of days justified to be added to the Contract Time.** If claiming additional compensation in addition to a time extension, include with the documentation a detailed cost analysis of the claimed extra compensation. **The Contractor's failure to deliver the required notice or documentation within the required period constitutes an irrevocable waiver of an extension to the Contract Time for that delay.** The Contractor's failure to provide sufficient documentation, justification, records, etc., to support a request for additional Contract Time is a **valid basis for the Department to deny the request either in part or entirely.***

- Contractors within the State of Florida did experience, with varying degrees of impact, delays to controlling items of work due to area-wide shortages of cement.
- The Contractor only furnished substantiating letters from Rinker and MCS subcontractors and not from a representative number of manufacturers of such materials in the Daytona area.
- MCS did request that Rinker pursue alternate mix designs.
- The Contractor did not furnish “**substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage**” as required by the contract.
- Out of apparent frustration in obtaining the contractually required substantiation and in an apparent extraordinary leap of partnering, the Department issued a unilateral time extension.
- This time extension did not account for all contract days lost. The days granted were work week days. Time extensions for excusable delays should be based on their impact to controlling (critical) items of work and their impact to the critical path of the project.

DISPUTE REVIEW BOARD RECOMMENDATION

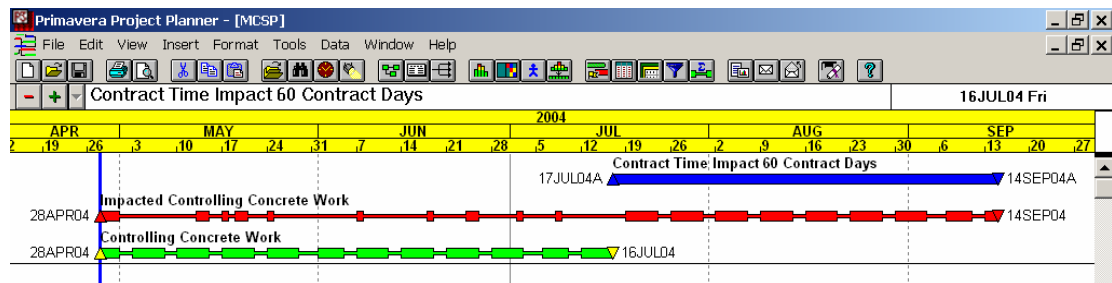
- Part 1, related to the time period from April 28 to July 18, 2004.
 - Port Orange ("Nova 1")

Out of apparent frustration in obtaining the contractually required substantiation and in an apparent extraordinary leap of partnering, the Department made the following analysis and issued a unilateral time extension. The Department in its analysis concluded that there were 41 “Lost Work Days” during this period. After deducting time extension due to Weather (1 day), it concluded that a 40 calendar day time extension was appropriate.

Nova Road (Port Orange)

Month	Lost Work Days	Concurrent Time Extension (Added Work/Weather)	Contract Time Extension
May '04	15	(1) (Weather)	14
June '04	17	0	17
July '04	9	0	9
Total	41	(1)	40

It is undisputed that the concrete work was on the critical path. The Contractor’s schedule showed the weekends to be nonworking days. In also is logical that if one could not get concrete on a weekday one could not get it on the weekend. Additionally there were three (3) holidays - Memorial Day (May 31st), July 4th (celebrated on July 5th) and Labor Day (September 6th). This leaves 56 working days that concrete was on the critical path. During this period there were 41 working days impacted by the inability to receive sufficient concrete. When these days are inserted into a schedule representing Concrete as the controlling item with holidays and weekends as non working (on concrete items), the schedule is “pushed” 60 contract days.



Assuming, as the Department did, that the weather day (1) is concurrent with the cement impact, the resulting impact to the schedule would be 59 contract days (60-1).²

² The “necked” portions of the bars represent impacted and nonworking (holidays and weekends) days.

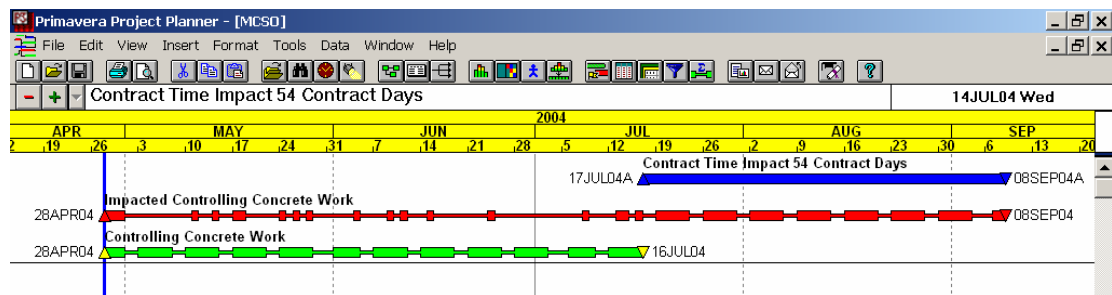
DISPUTE REVIEW BOARD RECOMMENDATION

- Ormond Beach ("Nova 2")
 Out of apparent frustration in obtaining the contractually required substantiation and in an apparent extraordinary leap of partnering, the Department made the following analysis and issued a unilateral time extension. The Department in its analysis concluded that there were 37 “Lost Work Days” during this period. After deducting time extensions due to Weather (2 days) and “Cheesbro Turn Lane (4 days), it concluded that a 31 calendar day time extension was appropriate.

Nova Road (Ormond Beach)

Month	Lost Work Days	Concurrent Time Extension (Added Work/Weather)	Contract Time Extension
May '04	14	(2) (Weather)	12
June '04	16	(4) (Cheesbro Turn Lane)	12
July '04	7	0	7
Total	37	(6)	31

It is undisputed that the concrete work was on the critical path. The Contractor’s schedule showed the weekends to be nonworking days. In also is logical that if one could not get concrete on a weekday one could not get it on the weekend. Additionally there were three (3) holidays - Memorial Day (May 31st), July 4th (celebrated on July 5th) and Labor Day (September 6th). This leaves 56 working days that concrete was on the critical path. During this period there were 37 working days impacted by the inability to receive sufficient concrete. When these days are inserted into a schedule representing Concrete as the controlling item with holidays and weekends as non working (on concrete items), the schedule is “pushed” 54 contract days.



Assuming, as the Department did, that the weather days (2) and extra work days (4) are concurrent with the cement impact, the resulting impact to the schedule would be 48 contract days (54-6).³

- Part 2, related to the concrete shortage delays from July 19 to September 1, 2004
 The Contractor has not met the burden of proof spelled out in the contract to receive a noncompensable time extension.
- ...It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is

³ The “necked” portions of the bars represent impacted and nonworking (holidays and weekends) days.

DISPUTE REVIEW BOARD RECOMMENDATION

not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...⁴

MINORITY BOARD FINDINGS:

The contractor, Modern Continental South (MCS) is requesting a time extension of 74 calendar days on Port Orange (Nova 1), and 35 calendar days on Ormond Beach (Nova 2) for concrete shortages for the period of April 28, 2004 to July 18, 2004. This covers a period (4/28 – 7/18) of some **82 calendar days, in total**. The graphic charts provided by MCS reflected the following information:

On the Ormond Beach Project, concrete was received on 30 days of the 57 days shown on which concrete was ordered, leaving 27 days with no concrete delivery. The claim is for a 35-calendar day extension.

On the Port Orange Project, concrete was received on 26 days of the 57 days shown on which concrete was ordered, leaving 31 days with no concrete delivery. The claim is for a 74-calendar day extension.

In an effort to settle the concrete shortage issue, the CEI met with the contractor's personnel for a review of the issue covering the same time frame (4/28 – 7/18). The information provided as a result of this meeting reportedly accepted by both parties.

A new chart was introduced which showed the following information:

On the Ormond Beach Project, concrete was received on 23 days of the 53 days shown on which concrete was ordered, leaving **30 days with no concrete delivery**. In a letter dated August 3, 2004 the **FDOT granted a 31-calendar day extension to the contract** for this time period.

On the Port Orange Project, concrete was received on 27 days of the 53 days shown on which concrete was ordered, leaving **26 days with no concrete delivery**. In a letter dated August 3, 2004, the **FDOT granted a 40-calendar day extension to the contract** for this time period.

In a letter dated August 11, 2004, MCS took exception to the 31-calendar day extension

On the Ormond Beach Project, stating that weekends were excluded and other changes had been made unilaterally. MCS requested an additional 22-calendar days for a total of 56-calendar days.

In a letter dated August 11, 2004, MCS took exception to the 40-calendar day extension on the Port Orange Project, stating that weekends were excluded and other changes had been made unilaterally. MCS requested an additional 20-calendar days for a total of 60-calendar days.

In summary, MCS is requesting a total of 56-calendar days on Ormond Beach, and a total of 60-calendar days on Port Orange for the 82-calendar day time period.

The following issues are very relevant to the DRB recommendation:

During the time period in question, no work was planned or anticipated by MCS on the weekends, as verified by the Project Schedule for both projects, and discussed at the hearing. Accordingly, no concrete was ordered, and there was no impact to the schedule.

⁴ DRBF Practices and Procedures Section 1 – Chapter 6

DISPUTE REVIEW BOARD RECOMMENDATION

MCS did not provide letters as required from other concrete suppliers in the area to verify the area-wide shortage, despite the fact that the CEI stated that no other contractors working in the Daytona Residency has requested time extensions relating to the cement shortage.

MCS did not provide alternate design mixes for approval by the FDOT as an acceptable alternative to mitigate the problem.

Based on the above, I find **NO ENTITLEMENT** to the contractor beyond that which has been granted.

BOARD RECOMMENDATION:

Although there is a dissenting opinion expressed above, based on materials supplied to the Board and presentations to the BOARD at the DRB hearing, the BOARD recommends that the Contractor is **entitled to an additional noncompensable time extension due to impacts during the period April 28 to July 18, 2004 of;**

19 contract days (59-40) on Nova 1 - Port Orange
17 contract days (48-31) on Nova 2 - Ormond Beach.

As to the **period July 18, 2004 - September 1, 2004**, the BOARD finds that the Contractor has not met the burden of proof spelled out in the contract and **absent such is not entitled to additional contract time for this issue.**

The BOARD sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

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.

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

Respectfully Submitted,

Disputes Review Board
John H. Duke, Sr.; DRB Chairman
George W. Seel; DRB Member
John B. Coxwell; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



John H. Duke, Sr.
Chairman