

DISPUTE REVIEW BOARD RECOMMENDATION

January 11, 2004

E-mailed - January 11, 2004

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RE: SR 5A (Nova Rd) from SR 5 (US 1) to Village Rd
FIN No.: 240757-1-52-01
Contract No. 21265
County: Volusia
District 5
Disputes Review Board

DISPUTE: Contract Schedule, Computation of Contract Time

Dear Sirs:

The Contractor, Modern Continental South, Inc. (MCS), requested a hearing to determine **entitlement** of MCS to a contract time extension of 129 days on the referenced project. Should entitlement be established, the Disputes Review Board (DRB) was not to decide quantum of such entitlement at this time, as the parties, the Florida Department of Transportation (FDOT) and MCS would attempt to negotiate the value of the entitlement.

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 December 18, 2003.

CONTRACTOR'S POSITION:

Position Statement

- The FDOT established **930 days** as the **Maximum Contract Time** "based on estimated production rates" and included timeframes from the Utility Relocation Schedules.
- Modern Continental South **relied on this information** related to Maximum Contract Time provided by the FDOT in the Bid Documents for Nova 1 **as being accurate and adequate for the entire scope** contained in the Contract.
- MCS is in the business of bidding on contracts and pressed for time and are **consciously seeking to underbid a number of competitors**. Like all other bidders, MCS simply reduced the Maximum Contract Time by a percentage to be competitive.
- MCS is not clairvoyant in spotting **hidden discrepancies in the bid documents**, nor have the, expertise at bid time to analyze the accuracy of the Maximum Contract Time provided by the FDOT.
- When issuing the bid documents the **FDOT; impliedly, warrants the accuracy and adequacy of those documents including, the Maximum Contract Time**. When the accuracy of the information provided by the FDOT prior to bid is in error or has an inadequacy that would cause material damage to the contractor then the contractor, MCS, is entitled to a reasonable adjustment to the contract to correct the problem.

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Port Orange Utility Relocation Schedule

- The **Nova 1** Utility Relocation Schedules show a 240 calendar-day duration for one portion of the Port Orange Blackout Schedule utility work and a 120 calendar-day duration for the other portion. A review of the information provided in this section and subsequently used by FDOT to determine the Maximum Contract Time for the Nova 1 contract reveals that **no effort was made to justify the 240 or the 120 calendar-day concurrent durations** for the entire scope of the utility work listed.
- When reviewing the same information provided for the **Nova 2** contract, one can see that **great effort was involved in determining durations for specific utilities**, when seemingly no effort was made to determine specific durations for the utilities mentioned above for the **Nova 1** project.
- In addition, the **Nova 1 specifications state that all these utilities are to be completed prior to Phase IA**, when the Maintenance of Traffic does not reflect this being the case nor, was MCS able to perform the work in this manner.

The Contract Provides for Time Extension

- The Contract: Specifications provide relief to the contractor in this circumstance, Section 8-7.3.2 Contract Time Extensions, "The Department will consider the affect of utility relocation and adjustment work on job progress as a basis for granting a time extension if the following criteria are met:
 1. **Delays are the result of ...utility work that was detailed in the plans but was not accomplished in reasonably close accordance with the schedule included in the Special Provisions.**
 2. **Utility work actually affected progress toward completion of controlling work items.**
 3. **The contractor took all reasonable measures to minimize the effect of utility work on job progress..."**
- **MCS could not perform the work in reasonably close accordance with the schedule included in the Special Provisions** due to the fact that the Utility Relocation Schedule showed this work to be performed in 240 consecutive days and completed prior to MOT Phase IA.
- The updated progress schedule is currently showing the affects from this issue(-60 work days +/-)
- MCS has worked an enormous amount of overtime, out of sequence and on any available work in order to minimize the delay due to this issue
- This defect in the contract documents is a **latent defect, not clearly evident** until most of the work was completed and when MCS discovered the defect, promptly notified the department

Conclusion

- The contractor relies on the information provided by the FDOT in the bid documents as being accurate and adequate when preparing its bid and, to be competitive on A+B bidding, the **contractor adjusts the days bid based on the original Maximum Contract Time being accurate and reduces that by a small percentage to be competitive.**
- When the original Maximum Contract Time is in error and/or determined based on erroneous information, the contractor is put at greater risk of material damage than had the Maximum Contract Time been accurate and adequate.
- This error, or defect, in the specification entitle MCS to an adjustment in contract time and price.
- The Contract Specifications provide relief to the contractor in this circumstance because **MCS could not perform the work in reasonably close accordance with the schedule included in the Special Provisions** due to the fact that the Utility Relocation Schedule was in error by, showing this work to be preformed in 240 days and **completed prior to MOT Phase IA.**

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DEPARTMENT'S POSITION:

The Department respectfully submits this statement and explanation of its position regarding an issue that will be referred to herein as the Contract Time Issue. It is the Department's understanding that the Board will consider the facts presented by both sides and render a decision regarding entitlement only that is consistent with the terms of the contract. The value or amount of any claimed additional compensation or time extension will not be discussed by the parties or considered by the Board in this hearing.

The Department has previously denied a request by MCS for a time extension for the Contract Time issue. The reasons and rationale for this denial are explained below, after a synopsis of the Department's understanding of MCS's claim.

MCS has also submitted several letters concerning comparing the pre-bid JPA schedule requirements and the maximum contract time criteria established for the Nova Road projects in Port Orange and Ormond Beach. **These comparisons are not valid due to unknown factors at the time of pre-bid. Each project must stand-alone.**

The Claim

In its letter to PBCS of November 13, 2003, **MCS claims it is due a contract time extension of 129 calendar days, based on the following allegations:**

1. "The **allowable contract time is in error or defective** and, due to this defect, MCS is entitled to an adjustment to the Contract."
2. **There was an "...error or defect in the specifications" regarding the Utility Relocation Schedule.**

Response to Allegation #1

The "allowable contract time" in this contract is **806 calendar days**. It was **provided by MCS** as an integral part of its original bid submitted on June 20, 2001 (see MCS proposal, exhibit "A").

Page 2 of the Special Provisions, Award and Execution of the Contract (exhibit "B"), revised Section 3-1 of the Supplemental Specifications, adding the requirement that for the purpose of award, the bids were to consist of two parts, A and B (A+B Bidding). Part A was the standard unit price bid on estimated quantities. Part B was the number of calendar days provided by the Contractor times the Daily Value specified (in this case \$3200). The lowest total bid was determined as being the lowest sum of Parts A and B. On the basis of its standard unit price bid and its bid of 806 calendar days, MCS was determined to be the lowest bidder and was awarded the contract. The contract time within which MCS agreed to complete all work required by this contract, i.e., the "allowable contract time", is 806 calendar days. **The Department had no input into MCS's calculation of the 806 days**, nor did the Department have any input into the means and methods MCS intended to use to complete the work within this time period.

MCS makes reference to "930 days of contract time" which it says was "in error and defective". Page 3 of the Special Provisions, Intent and Scope (exhibit "C") states the following:

"For this Contract, the Department will reject any bid in which the bidder submits proposed Contract time in excess of 930 calendar days."

The Department established 930 calendar days as the maximum bid for contract time that would be considered by the Department for award of the contract. This maximum time period was established by the Department well before the advertisement for bids and was based on estimated production rates only, with no input from MCS or any of the other bidders. Any attempt by MCS to base a claim for additional time on whether or not the Department's calculation of the 930 days was in error **has no contractual foundation**. Once the Department accepted MCS's bid of 806 calendar days for contract time, the Department's maximum time estimate of 930 days disappeared from consideration. It is not and never has been part of this contract.

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Nowhere in the bid documents or specifications did the Department define 930 calendar days as "the allowable contract time". To the contrary, Page 2 of the Special Provisions, Preparation of Proposals (exhibit "D"), expanded sub-article 2-5.1 of the Supplemental Specifications, and instructed the bidders to do the following:

*"Establish the number of calendar days necessary to complete the work in accordance with the Contract documents and show this number of calendar days for the bid item in the proposal. **For the purposes of this Contract, this number of calendar days will serve as the Original Contract Time.**" (emphasis added)*

It was the responsibility of MCS and all other bidders to carefully consider the scope of work to be completed, the conditions under which it was to be performed, and to submit their bids accordingly. These bids included both unit prices and the contract time. Based on its bids (A+B), MCS was determined to be the lowest bidder and was awarded the contract, with the "allowable contract time" being specified as 806 calendar days. If the 806 days was "in error and defective", it was MCS who made the error, not the Department.

*MCS is claiming that 129 days should be added to its bid contract time of 806 days because the Department's prebid estimate of 930 days was unreasonable and incorrect. Yet, **if these days are added, the revised contract time would be 935 days, which is essentially the same as the Department's pre-bid estimate.** The Department's pre-bid estimate cannot logically be incorrect and correct at the same time.*

Response to Allegation #2

MCS alleges that there was an error in the Utility Relocation Schedule with respect to the utility work for the City of Port Orange and the MOT plan for Phase 1A. They contend that the plans did not adequately depict the manner in which MOT was to be provided for the City's utility work during the time this work was to be performed.

*When **MCS submitted its original CPM schedule,** MCS corrected this perceived "error" by showing the City's utility work being phased into the Contract Drawing's Traffic Control Plans. This was acceptable to the Department because MCS's schedule showed project completion within the allowable contract time of 806 calendar days.*

It appeared to the Department that MCS's phasing of this utility work with the roadway construction was one of the means by which MCS intended to complete the project in 124 calendar days less than the Department's maximum estimate (i.e., 806 days in lieu of 930 days). Subsequent to the original CPM schedule, two revised CPM schedules were submitted by MCS and accepted by the Department, showing the City's utility work being phased into the Traffic Control Plans.

Page 3 of the Special Provisions, Computation of Contract Time, revised Section 8-13.1, and included the following language:

"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 sometime 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..." (emphasis added)

*If in fact there was an error in the Utility Relocation Schedule with respect to the City's utility work, MCS took this into consideration in the planning and scheduling of its work within the allowable contract time. MCS's schedule was accepted by the Department and thus became the basis for evaluating the progress of the work. MCS endeavored to perform the work in accordance with its schedule. If the work was "impossible to perform" as now alleged by MCS as a result of this alleged "error", and MCS felt it was due a time extension, **the time to notify the Department was then,** at the start of the work, not now, over two years later.*

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It does not appear to the Department that MCS is claiming the Department did anything to cause MCS any delays in the actual performance of its work. The Department agrees that it has done nothing to cause any such delay. However, if this were to be presented to the Board as a delay claim, there are certain requirements that must be met before the Department could consider such a claim. MCS's claim does not meet these requirements as explained below:

LACK OF PROPER WRITTEN NOTICE

The contractual requirements regarding notice of intent to file a claim for additional compensation and additional contract time are explicitly stated in the specifications which are quoted in whole or in part below:

5-12 Claims by Contractor

5-12.1 General: *When the Contractor deems that extra compensation or a **time extension** is due beyond that agreed to by the Engineer, whether due to delay, additional work, altered work, differing site conditions, breach of Contract, **or for any other cause**, the Contractor shall follow the procedures set forth herein for preservation, presentation and resolution of the claim. (emphasis added)*

5-12.2.1 Claims for Extra Work: *Where the Contractor deems that additional compensation or a **time extension** is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in **writing** of the intention to make a claim for additional compensation before **beginning the work** on which the claim is based, and **if seeking a time extension**, the Contractor shall also submit a **preliminary request for time extension** pursuant to 8-7.3.2 within **ten calendar days after commencement of a delay**. **If such notification is not given** and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time, the **Contractor waives the claim** for additional compensation for a time extension.*

*Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a **condition precedent** to the Contractor bringing suit against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the **failure to provide such notice** of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation **within the time required** shall constitute a **full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim**. (emphasis added)*

5-12.2.2 Claims for Delay: *Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the Contractor shall submit a **written notice of intent** to the Engineer **within ten days after commencement of a delay to a controlling item work item** (sic) expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a **preliminary request for time extension** pursuant to 8-7.3.2 **within ten calendar days after commencement of a delay** to a controlling work item, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay. The timely providing of a **written notice** of intent or **preliminary time extension** request to the Engineer **are each a condition precedent** to any right on behalf of the Contractor to request additional compensation or an extension of Contract Time for that delay, and **the failure of the Contractor to provide such written notice of intent or preliminary time extension request within the time required** shall constitute a **full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for that delay**. (emphasis added)*

8-7.3.2 Contract Time Extensions: *(last paragraph) 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 the required notice, the***

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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.

MCS started the utility work for the City of Port Orange on **December 4, 2001**. The **first written notice** received by the Department from MCS concerning the possibility of a claim on this issue was **September 15, 2003**. MCS did not notify the Department of its intent to file a claim before beginning the work in question, nor did MCS provide the Department with a preliminary time extension request within 10 days after the commencement of the alleged delay.

In light of the explicit contractual requirements, and MCS's failure to meet these requirements, MCS has fully, completely, absolutely, and irrevocably waived its rights to any additional compensation or contract time on the Contract Time Issue. The contract is clear and unambiguous in this regard. If written notice of intent to file a claim and written requests for time extensions are not submitted in accordance with the requirements of the contract, there can be no additional compensation paid contract time granted for the issues in question.

The Department's position is that the Board needs to go no further in its consideration of the Contract Time Issue than the failure of MCS to provide the required notice, and that the Board should rule in favor of the Department's position. Ruling otherwise would be directly counter to the explicit terms and intent of the contract. and written requests for time extensions are not submitted in accordance with the requirements of the contract, there can be no additional compensation paid or additional contract time granted for the issues in question.

SUMMARY

If MCS's claim is based on the Department's pre-bid time estimate of 930 days being "in error and defective", then the claim is based on something that occurred prior to bid and prior to the execution of this contract. If this were the case, the Contract Time Issue is not a matter for the Board's consideration at all.

MCS has failed to prove, nor has it alleged, that the Department was in any way responsible for any delays incurred by MCS in the actual performance of its work. **The Department accepted the contract time bid by MCS and included such time in the contract.** The scope of the work has not changed. MCS has failed to provide any causal link between the claimed 129 calendar days and any event since the start of construction that is the responsibility of the Department.

MCS has also **failed to prove that the Department in any way misled MCS and the other bidders regarding the time allowed for construction of this project.** The calculation of MCS's bid for the allowable contract time was fully the responsibility of MCS and not the Department.

MCS failed to comply with the explicit notice requirements in the specifications. MCS has therefore fully, completely, absolutely and irrevocably waived its rights to any additional compensation or time extension related to the Contract Time Issue.

The Board should uphold the explicit terms of the contract. Accordingly, the Department respectfully requests that the Board rule that there is no entitlement to MCS on the Contract Time Issue.

The Department appreciates the Board's efforts in considering this matter and looks forward to presenting its position in the upcoming hearing. Please be advised that the following attendees are to represent the Department concerning this issue:

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BOARD FINDINGS:

- It does appear that the original maximum time, as established by the Department on the project, did not take into consideration the MOT phasing required to accomplish the JPA work.
- The comparison of the Contract time on “Nova 1” (FN 240757-1-56-01, Port Orange) versus “Nova 2” (FN 240758-1-56-01, Ormond Beach) while supporting the above statement is not germane to the issue. The contracts are independent of one another.
- Had the utility work been performed by a Contractor directly employed by the Utility Owner, a delay caused by the nonperformance in accordance with the URS could have been cause for an adjustment to Contract Time. In this case, the Utility work was a part of the Contract and under the control of MCS’s means, methods and scheduling.
- The UTILITY RELOCATION SCHEDULE contained in the Contract states:

*This schedule constitutes the **contingency schedule** contemplated by the Utility Work by Highway Contractor Agreement signed for this project **to be used in the event that the utility work is not performed by the highway contractor**. THIS SCHEDULE SHALL BE A COMPLETE STAND ALONE SCHEDULE WHICH CONTAINS ALL ACTIVITIES TO BE PERFORMED ON THE PROJECT BY THE UAO EXECUTING THIS. SCHEDULE, REGARDLESS OF WHETHER THEY WERE. ORIGINALLY CONTEMPLATED TO BE PERFORMED BY THE HIGHWAY CONTRACTOR OR SEPARATELY BY THE UTILITY. THE TOTAL TIME SHOWN ON THIS SCHEDULE SHALL BE THE TOTAL TIME FOR ALL SUCH ACTIVITIES AND SHALL NOT BE LIMITED TO JUST THE TIME FOR ACTIVITIES ORIGINALLY CONTEMPLATED TO BE PERFORMED BY THE HIGHWAY CONTRACTOR.*
- The Department **established** 930 calendars days as the **maximum bid for contract time** that would be considered by the Department **for award of the contract**.
- The schedule used to establish this contract time was not furnished nor warranted to the Contractor in the bid documents.
- Using his own means, the Contractor established his bid time to the Department, submitted his proposal and executed the Contract, thereby assuming the risk and confirming that such time was reasonable for performing the work.

BOARD RECOMMENDATION:

Based on materials supplied to the Board and presentations to the Board at the DRB hearing, the Board finds that **there is no entitlement to MCS on the Contract Time 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 by the non-responding party.

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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:

A handwritten signature in black ink, appearing to read "JH Duke". The signature is written in a cursive style with a large initial "J" and a distinct "D".

John H. Duke, Sr.
Chairman