Florida Department of Transportation
Turnpike District
P.O. Box 613069
Ocoee, Florida 34761

October 27, 2005

Dispute Review Board
Lynn Gibson, P.E.; Chairman
John C. Nutbrown, P.E.; Member
Robert J. Robertory; Member

Operates the Florida Turnpike System as part of the Florida Department of Transportation

JEB BUSH
Governor

JOSÉ ABREU
Secretary of Transportation

JAMES E. ELY
Executive Director

Turnpike Headquarters
Mile Post 263, Bldg. 5315
Turkey Lake Service Plaza
Ocoee, FL 34761

Mailing Address:
P.O. Box 613069
Ocoee, FL 34761

Tel: 407 532-3999

www.floridasturnpike.com

Re: S.R. 589/Suncoast Parkway – Toll Facilities
Financial Project ID: 258886 1 52 01
Recommendation on Claims by Archer-Western Contractors, LTD and Lin R. Rogers Electrical Contractors, Inc. (Subcontractor to Archer-Western)

Dear Board Members,

This letter is to inform you of the Department's position to accept the DRB recommendation on the following claims:

Archer-Western Claims:
Section II, PCN-003
Section III, PCN-005
Section IV, PCN-074
Section V, PCN-068 B&C
Section VI, PCN -196
Section VII, PCN-226
Section VIII, PCN-231
Section IX, PCN-144
Section X, PCN-163
Section XI, PCN-195
Section XII, PCN-174
Section XIII, PCN-123
Section XIV, PCN-153
Section XV, F, J & O
Section XVI, B,C,E,F

Lin R. Rogers Claims: Claim Nos. 23, 24 and 31 (reconsideration)

The Department has determined that compensation and mitigation of claim Section XVI, D took place; therefore, we request reconsideration on this issue with any other items which were to be resubmitted as previously discussed to the DRB at a later date. The additional information found is attached showing the Department previously paid for the Contractor to provide temporary power due to the damaged feed at Section 6 Mainline. (See attached Supplemental Agreement and backup for this additional work. Item B.)

Sincerely,

Marilyn Schmuhl /jr

Rick Estripeaut, P.E.
Turnpike Enterprise Construction Engineer

CC: Sven Nylen III, Ken Webb, Tracy Keenan, Doc. Cntrl.

Rotate

No Rotation | 90° Clockwise | 90° Counter Clockwise | 180°

Enlarge Image - Opens new browser window.

Director of Transportation Operations
Florida Department of Transportation - Florida's Turnpike Enterprise
PO Box 9828
Fort Lauderdale, FL 33310
(954) 934-1247

RECOMMENDATIONS

1. The DRB makes no change to its earlier recommendations on these three claims.

2. The earlier recommendations clearly included a determination that there was some entitlement. To the extent that in the future Rogers may be able to demonstrate the extent, if any, that FDOT (and not Archer-Western) caused it to incur more expense than that for which we have previously recommended compensation, it would not be unreasonable for FDOT, to resolve these three disputes and avoid litigation, to agree on a compensation amount somewhat in excess of above those previous recommendations.

All members of the DRB concur in these Recommendations.

Date: 10/04/05

Lyle Gibson, P.E.
Chairman

John W. Nutbrown
Member

Robert J. Rogatory
Member

-4-

Rotate

Enlarge Image - Opens new browser window.

FLORIDA DEPARTMENT OF TRANSPORTATION
This site is maintained by the Office of Information Systems
Report suggestions, comments or errors to:
Enterprise Information Portal Feedback
or Service Desk

gai consultants
transforming ideas into reality

October 6, 2005

Ms. Marilynn Schmuki
Turnpike Enterprise
P. O. Box 613069
Ocoee, FL 34761

Mr. Sven T. Nylen, III, Vice President
Archer-Western Contractors LTD
929 West Adams St.
Chicago, IL 60607

Subject: Suncoast Parkway Toll Facilities
FIN 25886-1-52-01; Contract No. 20224
DRB Comments and Recommendations
Claims by Archer-Western Contractors, LTD

Reference: DRB Response to Claim Nos.:

Section II, PCN-003
Section III, PCN-005
Section IV, PCN-074
Section V, PCN-068 B&C
Section VI, PCN-196
Section VII, PCN-226
Section VIII, PCN-231
Section IX, PCN-144
Section X, PCN-163
Section XI, PCN-195
Section XII, PCN-174
Section XIII, PCN-123
Section XIV, PCN-153
Section XV, F, J & O
Section XVI, B, C, D, E, F

Attached is the DRB's Discussion and Recommendation to each of the above referenced claims.

Yours truly,

Lynn D. Gibson, P.E.
Chairman

Cc: Tracy Keenan, Greenhorne O'Mara
Robert J. Robertory
John Nutbrown

RECEIVED
OCT 7 2005
TURKEY LAKE CONSTRUCTION

618 East South Street Orlando, FL 32801 Tel 407.423.8398 Fax 407.843.1070 www.gaiconsultants.com

SUNCOAST PARKWAY TOLL FACILITIES
FIN 258886-1-52-01— CONTRACT 20224

DISPUTE REVIEW BOARD

John C. Nutbrown Member	Lynn Gibson, P.E. Chairman	Robert J. Robertory Member

TO:

Marilynn M. Schmuki, P.E.
Construction Services Management Engineer
Florida Department of Transportation

Sven Nylen, III
Vice-President
Archer-Western Contractors

ENTITLEMENT RECOMMENDATIONS ON CERTAIN CLAIMS BY ARCHER-WESTERN CONTRACTORS, LTD

Claim II – PCN 003 - Section 2B Dewatering[1]
Claim III – PCN 005 - Plan Revision No.1
Claim IV – PCN 074 - Impact to Tunnel Construction
Claim V. PCN 068 B & C—Plan Revision No.6.
Claim VI. PCN 196 — Section 6, Booth Foundation D
Claim VII – PCN 226 - Section 2B Canopy Forced Acceleration.
Claim VIII – PCN 231 - Brickwork
Claim IX – PCN 144 - Small Ramp CMU Wall Preparations
Claim X – PCN 163 - Floor Leveling and Preparations
Claim XI – PCN 195 - Section 6 Column Foundation
Claim XII – PCN 174 - Extra Work OCIP Premium
Claim XIII. PCN 123 - Pipe Truss Compound Tolerance
Claim XIV – PCN 153 - General Liability Insurance Premium Overcharge
Claim XV-F – Section 2B Yard Relocation
Claim XV-J – Canopy Capital Finish
Claim XV-O – Section 2B Attenuator Foundation Replacement
Claim XVI-B — Roofing Nailer Impact

(list continues on next page)

[1] Names and claim numbers are taken from Archer-Western's "Request for Equitable Adjustment" dated December 16, 2003.

Claim XVI-C — Weather and Holidays
Claim XVI-D — Permanent Power Interruption
Claim XVI-E — Metal Decking Theft
Claim XVI-F — Final Inspection

Archer-Western Contractors, Ltd. (Archer-Western) holds Florida Department of Transportation (FDOT or Department) Contract 20224 (Contract) for construction of toll facilities at several locations (designated as 1B, 2A, 2B, 4, 5, and 6) on the Suncoast Parkway. Greenhorne and O'Mara (G&O) was the CEI for the project. Archer-Western has submitted to the DRB a Request for Equitable Adjustment containing several claims. This consolidated Recommendation addresses separate entitlement claims for compensation presented to the DRB on August 24, 2005.

In addressing the time extension claims (XVI series), the DRB is not determining the number of days to which Archer-Western might be entitled. Only the issue of entitlement to a time extension or, in the case of Claim XVI-C how a extension is to be calculated, is before the DRB for recommendation in the XVI series.

CLAIM II – PCN 003 - SECTION 2B DEWATERING

CONTRACTOR POSITION

On October 20, 1998, Archer-Western notified the Department of a potential claim for extra work as a result of the Department's failure to include water table elevations in the information given to bidders at the time of bid. See Archer-Western Letter No. 004, Ex. 1. The Department rejected Archer-Western's claim and the matter proceeded to a hearing before the Disputes Review Board (DRB). On July 14, 1999 the DRB issued its recommendation and found that the water table information was absent from the Contract Documents and that the Contract Documents were insufficient in detail to enable Archer-Western to price the required dewatering for the mainline tunnels. See DRB Recommendation, Ex. 2. The DRB also recommended that Archer-Western submit its costs for the unanticipated dewatering. In addition, the DRB concluded that Archer-Western was entitled to a time extension to the extent that it can be demonstrated that the dewatering work was a critical path activity that impacted the progress of the Project

On April 6, 2002 Archer-Western forwarded to G&O its costs for the unanticipated dewatering in the amount of $298,109.18. See Ex. 3, Archer-Western Cost Summary. On April 25, 2002, G&O responded with its calculation in the amount of $53,869.46. See Ex. 4, G&O Fax Sheet and Attachment.

On August 27, 2002 the Department issued its unilateral Supplemental Agreement in connection with this issue in the amount of $53,869.46. See Ex. 5, Unilateral Supplemental Agreement No. 19.

In accordance with the recommendation of the DRB, Archer-Western has compiled all of the costs reasonably incurred as a result of the deficiency in the Contract Documents. These costs total $298,101.18. See Ex. 6, Archer-Western Cost Summary. Archer-Western is entitled to recover the balance due of $244,231.72

FDOT POSITION

In response to Archer-Western's request for additional compensation on February 9, 1999, Archer-Western provided their Section 2B Well Point Cost Proposal for $85,445.50 (See Attachment "A"). Archer-Western requested these unanticipated costs due to the need for a well point system created by the lack of boring and water table information provided at bid time. This amount is Archer-Western's anticipated costs based on their schedule as of February 9, 1999.

The Turnpike Enterprise disagreed with these costs and Archer-Western requested to escalate this issue to the DRB. A hearing was conducted on July 7, 1999. The DRB ruled in favor of Archer-Western as to the merit of the issue.

The DRB letter dated July 14, 1999 stated, "The DRB members unanimously agreed that the Contractor is entitled to additional compensation for dewatering of the site. We have reviewed the Contractor's cost of the dewatering operation, submitted in his letter dated February 9, 1999, and unanimously agree that this cost seems excessive in that the well point system used was far more than what was needed to dewater the site." (See Attachment B).

The DRB members recommended, "That Archer-Western re-evaluate their dewatering cost and present a cost reflecting a more practical and industry accepted dewatering system and operation to G&O. The DRB unanimously agrees that additional time for this work should be considered provided the dewatering operation was a critical path activity and impacted the progress of the work. Additional time was not discussed during the hearing and the DRB recommends that this condition be part of the settlement negotiations." (See Attachment B).

The Turnpike Enterprise disagrees with the position of the DRB, however, the Turnpike Enterprise accepted their decision and proceeded based on their findings.

Archer-Western accepted the findings of the DRB. However, Archer-Western did not proceed as recommended. Archer-Western did not provide their re-evaluation of the dewatering costs and did not present a cost reflecting a more practical and industry accepted dewatering system and operation. The additional costs were not presented to the Turnpike Enterprise until they surfaced in Archer-Western's request for additional compensation well after the project was completed.

Despite Archer-Western not providing its revised proposal, the Turnpike Enterprise continued to attempt to reach a resolution on this issue. The Turnpike Enterprise proposed and Archer-Western accepted a proposal to eliminate all time related issues within Sections 1 through 5 as of January 25, 2000, which included this issue (See Attachment C).

Entitlement has already been determined on this issue. An agreement on time has already been agreed to and the Contractor compensated for. The only issue left to be determined is quantum.

The Turnpike Enterprise attempted to resolve this issue on several occasions to no avail. The Turnpike Enterprise was forced into a situation to follow the DRB recommendations without the aid of the Contractor. The Turnpike Enterprise re-evaluated the dewatering system and made its determination of a cost that reflected a more practical and industry accepted dewatering system and operation and proceeded with a unilateral payment for $53,869.46 (See Attachment D).

In Archer-Western's request for additional compensation, Archer-Western does not provide any explanation of why the cost of a well point system that was originally determined by Archer-Western to have a value of $85,445.50, and considered to be excessive by the DRB, escalated to $298,109.00. It is unclear how the Turnpike Enterprise is responsible for this escalation of costs. In addition, Archer-Western does not attempt to provide any verifiable explanation. The only change since the original proposal was the entitlement findings of the DRB hearing.

It is the position of the Turnpike Enterprise that all time issues concerning this issue were negotiated, agreed to, executed, and compensated for in the attached Supplemental Agreement dated May 15, 2000 and the only issue to be determined by this hearing is quantum.

It is the belief of the Turnpike Enterprise that Archer-Western has not provided any documentation or verifiable explanation for why Archer-Western is due compensation over and above what was paid for in the unilateral payment and therefore no additional compensation is due

DISCUSSION

The DRB is in full agreement that Archer-Western is entitled to compensation for the furnishing, installation, and maintenance of the dewatering system used at Site 2B of the Suncoast Parkway.

The DRB heard testimony relating to the subject, but was not given enough information or any breakdown and backup of the cost package. In July 1999, when the DRB issued a recommendation of entitlement for this item, it was based on using the system for 60 days. In actuality it was on the site for 317 days. No information by either party was given at the hearing as to why the system was used for 317 calendar days instead of the estimated 60 days as previously presented. No backup as to cost was given other than a recap sheet which shows total amounts of both time and materials.

The original DRB Recommendation stated that a time extension may be appropriate if the dewatering issue affected work items on the critical path of the CPM schedule. Nothing was furnished by either party demonstrating a time extension was due relating to the dewatering causing a delay.

FDOT has stated that the time issue was addressed in the Supplemental Agreement dealing with the acceleration of the project, but this does not explain the length of time the system was on the project.

RECOMMENDATION

This DRB is in no position to make a recommendation as to quantum due to lack of verifiable information. The DRB recommends a Reconsideration Hearing on this item at which time the proper backup and time information may be furnished to the DRB so a sensible result may be furnished.

CLAIM # III – PCN 005 - PLAN REVISION NO. 1

CONTRACTOR POSITION

On November 20, 1998, before issuance of the notice to proceed, FDOT sent Plan Revision No. 1 to Archer-Western, substantially changing a portion of the work. It lowered by six feet the elevation of the canopy column foundations at sections 2B, 4 & 6. The result was an increase in the amount of formwork, the volume of excavation, and the volume of backfill. The revised work performed by Archer-Western under a Work Order, a Supplemental Agreement, and on time and material basis.

Archer-Western originally proposed to perform the work for $198,861.04. Upon completion of the work, the actual cost was determined to be $143,279.05. FDOT made a determination that the work should only have cost $74,599.98, which has been paid. Archer-Western is seeking the difference, $68,679.17.

FDOT Position

If Archer-Western can demonstrate, through additional documentation, that it has not received adequate compensation for the changed work, then it is due additional compensation. FDOT has not yet been furnished adequate documentation.

Discussion

Entitlement has been conceded by FDOT, the issue being the amount of compensation due Archer-Western. At the DRB hearing, Archer-Western stated that it would furnish additional documentation. Accordingly, the matter is not ripe for a DRB recommendation at this time. If the parties cannot reach agreement, either party may reopen this item and submit additional documentation and testimony.

Recommendation

The DRB recommends that Archer-Western provide to FDOT additional documentation and other substantiation to support the amount claimed.

CLAIM IV – PCN 074 - IMPACT TO TUNNEL CONSTRUCTION

Contractor Position

During Archer-Western's construction of the tunnels for Sections 2B, 4 and 6, the Department's on-site electrical inspector directed Archer-Western's electrical subcontractor, Lin R. Rogers Electrical Contractors (Rogers) to embed certain electrical conduits into the walls and ceilings of the tunnels. The Contract Documents clearly indicated that the conduit in question was to be mounted on the surface of the tunnel walls and ceilings. The direction by the Department's inspector was given at a time when Archer-Western had partially completed the forming and reinforcing steel for some of the walls and ceilings.

As originally planned, Archer-Western and its reinforcing steel subcontractor were to erect forms, install reinforcing steel, and pour the tunnel walls and ceilings. Rogers was to perform the surface mounted electrical work following form removal. As a result of the directed change, Rogers was forced to perform its work before and during the forming, reinforcing installation, and pouring work. The inclusion of the unanticipated electrical work in the forming, reinforcing, and pouring process had a predictably negative impact on the performance of all entities involved. Archer-Western's work was adversely affected in that its forms were exposed to the elements for an additional length of time, the forms were knocked out of alignment by the other trades, and construction of the bulkhead formwork was made considerably more difficult. In addition, the change to the electrical work caused the quality of the concrete finish work to suffer to the point that additional inspections and significant remedial work was required.

Archer-Western retained the services of Strategy, Inc., a scheduling expert, to determine the delay, if any, to critical path activities experienced by Archer-Western as a result of this constructive change directive from the Department's electrical inspector. Strategy performed a schedule analysis entitled "Strategy Delay Assessment" and determined that Archer-Western is entitled to a 43-day compensable time extension as a result of the impact of the changed electrical work. Additionally, extra-contractual inspections by the Department of Management also impacted Archer-Western's contract work.

Archer-Western has incurred additional costs of $179,652.03. The additional costs are based on the total costs incurred by Archer-Western to perform the tunnel finish work less its estimated costs. Archer-Western's extended overhead rate is $2,703.83 per day. The 43 days of compensable time at the rate of $2,703.83 per day totals $116,264.69. Archer-Western's total claim for this issue is $295,916.72.

FDOT Position

FDOT agrees that the Contractor is entitled to compensation for the markups allowed by the Contract Specifications for markups on subcontractors (10%) and applicable bonds (1.5%). This amount would be determined by the final compensation due Lin Rogers Electric.

The embedded conduits should have been installed after all forms and rebar were in place. The work at the bulkheads consisted of drilling a hole in the bulkhead and adding an expansion fitting, this was performed by Lin Rogers. There is no added work to Archer-Western. In addition, Archer-Western has not provided any verifiable back up.

Archer-Western refers to the "Strategy Delay Assessment"; this assessment does not follow the contract specification for CPM schedules. The Contractor has not provided a copy of the "Strategy Delay Assessment" using the required CPM scheduling program so that the impact can be reviewed. Based on this, the "Strategy Delay Assessment" should be discarded as invalid and not be used in determination of the alleged delays.

It is our position that Archer-Western schedule was not adversely affected by the embedment of conduits in the tunnel ceilings.

Discussion

Archer-Western has stated that it incurred additional costs of $179,652.03. It further states that its method of calculating these additional costs is "based on the total costs incurred by Archer-Western to perform the tunnel finish work less its estimated costs." This method of determining additional costs assumes that the entire difference between the estimated costs and actual costs is all attributed to the owner. This method also assumes that Archer-Western's estimated cost was accurate and without error.

The DRB agrees with Archer-Western that it was more expensive to embed electrical conduits in lieu of the contractual requirement of surface mounting. We agree that due to embedment, forms potentially could have been exposed to the elements for an additional length of time, forms could have been knocked out of alignment by other trades, and bulkhead construction was more difficult. However, Archer-Western has no records to substantiate any additional costs.

Archer-Western had the responsibility in preparation of its bid to examine carefully the plans and specifications for the project (Section 2-4 of the Standard Specifications). It should have

familiarized itself with Section 5-12 of the 1991 Standard Specifications. This specification is common to most, if not all governmental specifications. This specification places the burden on the Contractor to notify the owner, in writing and in advance of starting the work, of its intention to make claim for extra compensation. The Contractor must give the owner the opportunity to keep strict account of actual cost. If this notification is not given the Contractor waives its claim for extra compensation.

Archer-Western has also requested 43 days of compensable time at its calculated overhead rate of $2,703.83 per day for a total of $116,264.69. Archer-Western's scheduling consultant, Strategy, Inc., reviewed the schedules for the project and determined that critical path activities were affected a total of 43 days resulting from this alleged extra work.

RECOMMENDATION

The embedment of electrical conduits was an extra to the project and potentially cost Archer-Western additional money. However, Archer-Western had the responsibility to notify the owner in writing of these additional costs, but failed to do so. Records of actual costs were not maintained and Archer-Western is not entitled to additional compensation.

The DRB previously recommended that Archer-Western's electrical subcontractor, Lin Rogers Electrical Contractors, Inc. be compensated $2,204.23 for the installation of 500 feet of conduit that was added due to conduit embedment. The DRB's recommendation for payment was made because the FDOT had previously made a unilateral payment for this claim and such payment constituted a waiver of the contractual requirement and did not preclude recovery. In the case of Archer-Western, it has not produced any records, as did Lin Rogers, and, therefore, is not entitled any additional compensation or a time extension.

CLAIM V– PCN 068 B & C - PLAN REVISION NO. 6.

CONTRACTOR POSITION

In August 1999, the Department issued Plan Revision No. 6. Included within Plan Revision No. 6 were significant changes to the brick work and to the impact attenuators. Although some of the extra work covered by Plan Revision No. 6 was paid for by work order or supplemental agreement, Archer-Western has not been compensated for the additional costs of $2,783.31 for the additional brick that was substituted for the upper row of glazed brick in the parapet of the administration building and the generator building. See Ex. 13, Archer-Western Cost Summary. In addition, Archer-Western incurred additional costs of $47,341.54 to cover modifications to the impact attenuators. See Ex. 14, Archer-Western Cost Summary. Archer-Western incurred additional previously uncompensated costs of $50,124.85 as a result of Plan Revision No. 6.

FDOT POSITION

In response to Archer-Western's request for additional compensation due to Plan Revision Number 6, FDOT has reviewed this issue and believes that Archer-Western is due payment for the additional brick at the parapets. It is FDOT's position that the cost for this work is the cost Archer-Western has proposed ($2,783.31) less a credit fur the original glazed brick if applicable.

In addition, FDOT agrees that the attenuator backup blocks were modified by Plan Revision Number 6 and that compensation is due Archer-Western. However, FDOT disagrees with the quantity

of concrete and total value of Archer-Western's claim. We believe that the total quantity of concrete is 14 cubic yards with a value of approximately $4,000.00. This should be an easy issue to resolve. The quantity of concrete can easily be determined by simple calculations based on the differences between Plan Revision Number 6 and the original bid.

FDOT believes that Archer-Western should provide a credit for the glazed brick and provide a copy of their calculations for concrete quantities so that it can be reviewed for accuracy. Costs then can be negotiated so that the Contractor can be fairly compensated.

DISCUSSION

As stated at the hearing by FDOT, Archer-Western is entitled to cost of the additional brick.

Archer-Western is also entitled to the additional forming and changes in the Traffic Attenuator which changed the footings and added additional concrete and forming.

As previously stated, Archer-Western has provided no documentation relating to this additional cost in its package. Also the lack of proper notice on the part of the Contractor has prevented any sort of accurate records as to actual costs for these changes being kept.

RECOMMENDATION

The DRB finds that Archer-Western is entitled to recover costs for this additional work provided it can furnish satisfactory cost breakdowns.

CLAIM VI. PCN 196 — SECTION 6, BOOTH FOUNDATION D

CONTRACTOR POSITION

On August 18, 2000, Archer-Western was pouring the concrete foundation for the toll booth at Section 6. The pour was "stopped" by the Department's on-site representative. The stated reason for stopping the work was that forty-eight (48) minutes had elapsed between the completion of the second pour and the arrival of the third redi-mix truck. The Department's on-site representative concluded that, due to the passage of time, the previously poured concrete was no longer plastic, that the previously poured concrete had reached initial set, and that a "cold joint" condition existed. As a result of the stoppage, Archer-Western was required to uncover, remove, and replace the previously poured concrete foundation.

Following the pour, Archer-Western contacted its concrete supplier, Cemex, and requested a report on the initial set time for the concrete in question. Cemex determined that the initial set time for the concrete was in excess of five hours at 95 degrees. On October 23, 2001 Archer-Western advised the Department of Cemex's conclusion that the initial set time of the concrete was 5 hours, not 48 minutes. Archer-Western also requested a supplemental agreement in the amount of $11,231.96 to cover the direct cost of removing and restoring the work to its original condition.

On October 25, 2001, the Department denied Archer-Western's claim on the basis that the request was not timely made. Archer-Western responded and advised the Department that it objected to the Department's position in that notice was given at the time of the stoppage and the entire incident was recorded contemporaneously in the Engineer's Daily Report.

The facts clearly indicate that the stop work order issued by the Department was in error and that Archer-Western is entitled to an equitable adjustment in the Contract Sum and the Contract Time as a result. Archer-Western's claim is in the amount of $11,231.96. In addition, Archer-Western's scheduling consultant has determined that Archer-Western is entitled to a compensable extension of time of seven (7) days. Archer-Western is entitled to recover $18,926.81, which sum is 7 days at the extended overhead rate of $2,703.83 per day. The total entitlement as a result of the Department's erroneous stop work order is $30,158.77.

FDOT POSITION

In response to Archer-Western's request for additional compensation, it is important to note that this incident occurred on August 18, 2000 and Archer-Western's letter requesting additional compensation is dated October 23, 2001, over one year later.

Within the letter dated October 23, 2001, Archer-Western has made several misstatements. The first statement is that the work was stopped by FDOT's onsite representative. This decision was not made by FDOT's onsite representative, but by Archer-Western's project supervisors. The second statement is "The stated reason for stopping the work was that forty-eight minutes had elapsed between the completion of the second pour and the arrival of the third redi-mix truck." The Turnpike Enterprise's onsite representative never states this in his Daily Report of Construction. The onsite representative does state that the Contractor ordered 18 cubic yards for a 54 cubic yard pour, that the third truck was a "call back," and that the "call back" truck arrived onsite 48 minutes after the second truck left. The third statement is "The Department's onsite representative concluded that, due to the passage of time, the previously poured concrete was no longer plastic; that the previously poured concrete had reached initial set, and that a "cold joint" condition existed." Nowhere in the Daily Report of Construction does it state that the previously poured concrete was no longer plastic, that the previously poured concrete had reached initial set, or that a "cold joint" condition existed. He does state that the pit wall forms had began getting a cold joint and that the crew attempted to keep the concrete plastic. The crew would not attempt to keep the concrete plastic if the exposed concrete was not forming a crust or they feared that it would. He also states that in his opinion a cold joint had begun to set in, but not that a cold joint existed.

During FDOT's review of the concrete paperwork, it was discovered that the third concrete truck had only 23 ounces of WRDA 64 for 9 cubic yards of concrete, while on the first two trucks 72 ounces were added. The on-site representative asked the truck driver to verify this quantity, which he did. FDOT's on-site representative tested the concrete for air content, which was found to be below contract specification; this was verified by a second test. The third concrete truck was rejected.

The Daily Report of Construction states, "I began a second test to verify my results. Archer-Western's superintendent and foreman were there throughout the testing and reconfirmed the test results. Note: the superintendent is ACI certified. With all these factors the pour was stopped." This statement does not state that our inspector stopped the pour but is a statement of fact, "the pour was stopped."

It is FDOT's position that Archer-Western has failed to pursue the issue in a timely manner and that no additional compensation is due.

DISCUSSION

This incident occurred on Aug. 18, 2000. On Oct. 23, 2001, over 1 year later, Archer-Western requested a supplemental agreement be executed for payment of direct expenses for removing and restoring the work to its original state of condition. Archer-Western has requested $11,231.96 for its direct expenses to perform this remedial work.

The only written documentation of this event is on the Inspector's Daily Report of Construction. From reading the daily report the Inspector was properly exercising his authority and duties as described in Section 5-6 of the Contract's 1991 Standard Specifications. A cold joint was expected by the Inspector. Apparently, Archer-Western's concrete crew also believed that a cold joint was near for "the crew made several attempts to keep the concrete plastic" as documented on the Inspector's Daily Report. The third truck arrived 48 minutes after the second truck left. The concrete in the third truck was not accepted by the Inspector for it failed the on-site air content test and the delivery ticket showed that the air entraining agent was approximately one third of that in the two previous loads of concrete. It would have taken additional time to get another load of concrete to the pour site and with the expectation of an existing cold joint the Inspector's Daily Report states that "Archer-Western began removing the forms and washing the concrete over the side of the tunnel." The daily report supports the position that Archer-Western acted at its discretion to remove the concrete and not at the direction of the Inspector.

RECOMMENDATION

The DRB recommends that this claim be denied, including denial of the time extension request for seven (7) days.

CLAIM # VII – PCN 226 - SECTION 2B CANOPY FORCED ACCELERATION

CONTRACTOR POSITION

On April 20, 2000, Archer-Western poured concrete for the section 2B Canopy Support Structure. There was a two-hour lapse between two of the pours, but FDOT did not direct a halt to the pours. On April 21, 2000, FDOT advised Archer-Western that lapse in time between pours might have created a "plane of weakness" in three of the beams. FDOT requested an independent engineering assessment of the structural integrity of the beams. On May 3, 2000, Archer-Western provided the analysis, which concluded that no cold joint existed.

On May 24, 2001, Archer-Western requested reimbursement of the $4,394.48 cost for the engineering report cost. On February 28, 2002, Archer-Western filed a further claim, stating that it had incurred premium time costs of $28,152.28 to accelerate the work to achieve the no excuse bonus and had suffered a 20-day delay to the critical path during the engineering analysis. The 20 days included 13 days of direct delay, April 21 through May 3, plus 7 days to reschedule a crane to set double tees.

FDOT's suspicion was unfounded. Specification section 5-9.1 says FDOT may order inspection and uncovering of previously placed work, and if found to be in compliance, FDOT will pay costs associated with the work in question.

FDOT POSITION

The lapse in the pour was in non-conformance with the contract documents. The engineering report does not alter this fact. If the concrete had been poured in compliance with the specification, the engineering analysis would not have been required. However, FDOT determined that it would be fair to compensate Archer-Western for the cost of the engineering analysis and has done so. There was no agreement between the parties that FDOT would pay anything more or that there would be entitlement to a time extension.

Archer-Western never gave FDOT notice that it was accelerating and would seek compensation. In addition, the contract required a 28-day waiting period before the double-tees could be set on the concrete.

CLAUSES REFERENCED

"5-9 General Inspection Requirements.
"5-9.1 Cooperation by Contractor: . . .[F]urnish the Engineer with every reasonable facility for ascertaining whether the work performed and materials used are in accordance with the requirements and intent of the plans and specifications. If the Engineer so requests, the Contractor shall, at any time before final acceptance of the work, remove or uncover such portions of the finished work as may be directed. After examination, the Contractor shall restore the uncovered portions of the work to the standard required by the specifications. Should the work so exposed or examined prove unacceptable, the uncovering or removal, and the replacing of the covering or making good of the parts removed, shall be at the Contractor's expense. However, should the work thus exposed or examined prove acceptable, the uncovering or removing, and the replacing of the covering or making good of the parts removed, shall be paid for as Unforeseeable Work."

Special Provision 03310-3.06.B.1:
"B. Conform to ACI 304 and as specified.
"1. Deposit concrete continuously or in layers of such thickness that no concrete will be placed on concrete which has hardened sufficiently to cause the formation of seams or planes of weakness. . . ."

DISCUSSION

At the hearing, there was a difference of recollection between the parties as to whether the $4,394.48 cost of the engineering analysis had actually been paid. The parties agreed to check their records. Entitlement and quantum regarding the cost of the analysis do not appear to in dispute at this time.

The contract provides that the double tees could not be placed on the concrete for 28 days, *i.e.*, until May 18. By May 18, the engineering analysis had been received in hand for 15 days, which should have been sufficient time to schedule a crane, so that the requirement to obtain the analysis should not have delayed the job.

In addition, the need for the analysis resulted from Archer-Western's failure to have a reasonably continuous pour, as required by the contract. The testimony at the hearing, confirmed by the engineering analysis, was to the effect that there was a visible line of demarcation between layers of concrete from the two pours, which gave FDOT reasonable cause to require that an analysis be

performed to assure that there was not a plane of weakness resulting from Archer-Western's failure to comply with the contract requirements.

RECOMMENDATION

The DRB recommends (1) that if the $4,394.48 has not yet been paid to Archer-Western, that payment of that sum be made, and (2) that the remainder of the claim be denied, as there is no entitlement.

CLAIM VIII – PCN 231 - BRICKWORK

CONTRACTOR POSITION

The brickwork for the Project was subcontracted by Archer-Western to DeCristi Masonry ("DeCristi"). The amount of the subcontract with DeCristi was $237,160.00. The brick specified by the prime Contract was a Belding Brick product. DeCristi supplied the specified brick and commenced its work in the area of Section 2A, Ramp C4. Upon completion of that portion of the work DeCristi declined an obligation to perform further on the Project due to the inspection procedures being used by G&O. DeCristi claimed that its work had been constructively changed and adversely impacted by G&O's use of an improper level of inspection. DeCristi claimed that the G&O inspectors used inspection criteria beyond the requirements of the Contract Documents and beyond custom and usage in the brick industry. The Contract Documents referenced ASTM as the applicable standard for face brick inspections. As a result of the improper inspection criteria, DeCristi suffered a 12% waste factor of brick rather than the customary and usual waste factor of 3-5%.

Once DeCristi abandoned the Project, Archer-Western was left to complete the brickwork on the balance of the Project, including the administration building. Once Archer-Western commenced installing the brick on the administration building, G&O inspected the brick work using the specified CMU criteria of 10' rather than the ASTM face brick criteria of 20'. In addition, G&O's inspectors directed Archer-Western to install the brick in such a fashion that no undesirable shadows would be cast upon the mortar joints. In essence, G&O would not accept any "warped" bricks even though the extent of the warping was within the limits allowed by ASTM for this type of work. This directive was a constructive change to Archer-Western's contract since the criteria used by G&O was beyond the requirements of the Contract Documents.

As a result, Archer-Western incurred additional costs for installing brickwork in the amount of $579,859.44.

FDOT POSITION

In response to Archer-Western's request for additional compensation, Archer-Western makes many statements without providing documentation to support these statements. Archer-Western states that DeCristi's subcontract was for $237,160.00 with DeCristi supplying the "specified brick". The sublet request submitted by Archer-Western indicates that the subcontract amount was $215,600.00 with Archer-Western providing all permanent materials for the proper completion of this work Archer-Western may have added work or materials to the DeCristi subcontract which could account for the $21,560.00 difference.

Archer-Western states "Upon completion of that portion of the work DeCristi declined an obligation to perform further on the Project due to the inspection procedures being used by G&O. DeCristi claimed that its work had been constructively changed and adversely impacted by G&O's use of an improper level of inspection." If the subcontractor left due to an improper level of inspection, it would be prudent to bring this to the attention of the Turnpike Enterprise so that the level of inspection could be discussed and alleged impacts documented.

Archer-Western suggests that the Turnpike Enterprise used a Concrete Masonry Unit (CMU) specification for our inspection criteria when the contract references ASTM as the applicable standard for face brick inspection. Due to this improper inspection criteria DeCristi suffered a 12% waste factor of brick rather that the customary and usual waste factor of 3-5%. Archer-Western also states, "Once Archer-Western commenced installing the brick on the administration building, G&O inspected the brickwork using the specified CMU criteria of 10 feet rather that the ASTM face brick criteria of 20 feet."

Archer-Western is correct that the CMU specification is the improper specification to use to inspect brickwork. They are also correct that the ASTM is the correct source to be used to determine the level of inspection. However, Archer-Western has utilized the incorrect type of brick and matching inspection criteria. The classification for all facing brick, for this project, is Type "FBX" (See Attachment "B" - Page 04220-7). Therefore, the correct distance based on ASTM C216 for "FBX" is 15'.

It is very important to understand how the 15' applies to the inspection. It is not the distance the brick installation is inspected; it is the distance at which the brick face is inspected. The brick face is inspected for cracks or other imperfections detracting from the appearance at 15' for "FBX" brick.

Archer-Western asserts that G&O would not accept any "warped" bricks even though the extent of the warping was within the limits allowed by ASTM for this type of work. This issue was discussed with Archer-Western and resolved at the time of the installation. The maximum permissible distortion for "FBX" brick that is 8" and under is 1/16".

Archer-Western indicates that DeCristi suffered a 12% waste factor. Based on the Robinson Brick Company's Quality Standards, waste can be up to 10%. This is after the brick has already been culled by the Robinson Brick Company. The waste on "FBS" (a lesser standard of brick that is not culled) brick can be up to 20%. Twelve percent is not excessive based on this information.

It is FDOT's understanding that DeCristi discontinued work on this project due to Archer-Western requiring DeCristi to perform work outside of its contract, which slowed production and added additional costs. Problems started with the setting of the doorframes and then continued with the line of the CMU's, stimwall configuration being out of square, and reveals cast improperly and uneven. A "Notice of Non-Compliance" was written for these issues. NNC Number 029 was written at the end of March of 2000 and was not corrected when DeCristi arrived on site in June of 2000. FDOT's onsite inspector commented on June 7, 2000, "Mason having to work around remedial repair work to door frames which the Contractor has been aware of for several months". On June 13, 2000, he comments, "Progress slow as remedial repairs and window installation not done prior to starting brickwork.—Much needed chipping and grinding of CMU and concrete has not progressed in weeks in spite of installation of brickwork. No finishes (interior/exterior) can start until all sub-straights are brought into tolerances per contract documents".

Archer-Western was required by the Contract Documents to construct a "mock-up" wall to represent finish face brick, masonry and cast-in-place white concrete work for quality, appearance, materials and construction. This "mock-up" wall became the standard of comparison for all masonry work built and what the inspection team followed. This wall is no longer available and therefore there is no means for comparison.

It is the position of FDOT that Archer-Western has only provided allegations in support of its request for additional compensation. They have also not pursued this issue timely. It is our belief that Archer-Western is not due any additional compensation.

DISCUSSION

Archer-Western states they have incurred additional costs for performing brickwork in the amount of $579,859.44. Archer-Western has produced no records to substantiate this amount. Archer-Western failed to comply with Section 5-12 of the Contract 1991 Standard Specifications in that they did not notify the Engineer in writing of its intention to make claim for extra compensation before starting the work. The Engineer was not afforded proper opportunity for keeping strict account of the actual work.

RECOMMENDATION

The DRB recommends that this claim be denied.

CLAIM # IX. PCN 144 - SMALL RAMP CMU WALL PREPARATIONS

CONTRACTOR POSITION

There were three wall conditions encountered when placing ceramic tile in restrooms: (1) the back sides of exposed block wall; (2) drywall with blue board; (3) walls that have cast-in-place foundations above which is CMU. The third is the subject of this claim.

Archer-Western subcontracted ceramic tile work to Craig Tile, Inc. Prior to installing tile, Craig advised Archer-Western that the contract documents identified the wrong detail for installation of ceramic tile in small ramp restrooms. The contract specified Tile Council Method W-202 for thin setting 2"x2" ceramic tiles directly to walls composed of part formed and poured concrete and part concrete masonry units. Method W-202 doesn't allow for inherent variations that will occur when two products combine into a single plane. Craig's consultant opined that Method W-211 or W-201 should have been specified in order to set the tile within an acceptable slippage tolerance.

Archer-Western had to float the walls to obtain a smooth surface. On May 11, 2001, Archer-Western notified FDOT of the problem and sought an additional $21,774.65, to install the tile using a cement mortar bonded method for conditions (1) and (3). On June 8, 2001, FDOT agreed a thick set method would be more appropriate at condition (1) locations, calculating the value of the claimed changed work as $2,274.64. However, FDOT determined that the thin set method was appropriate for condition (3) walls.

In order to resolve this issue, Archer-Western offers to settle for $5,000.

FDOT POSITION

The consultant's recommendation has more to do with quality of work than with scope of work. If the quality of the joint [between poured-in-place portions and CMU portions] is reasonable, then the thin set method is fine, but if the quality of the joint is poor, then the thick set method is needed. FDOT agrees that a thick set method is more appropriate than the thin set method given the finishing requirements for the door walls in the ramp plaza restrooms and at the door walls for the employee restrooms at the mainline plazas.

Door walls in restrooms at ramp plazas and mainline plazas total 687.0 square feet. Archer-Western is due $2,274.64.

DISCUSSION

Obtaining a smooth surface when placing ceramic tile over walls composed of two different types of construction is difficult. In the DRB's opinion, the Archer-Western settlement offer is reasonable and should be accepted.

RECOMMENDATION

The DRB recommends that Archer-Western is entitled to additional compensation and the offer should be accepted.

CLAIM X – PCN 163 - FLOOR LEVELING AND PREPARATIONS

CONTRACTOR POSITION

Archer-Western retained Acousti Engineering Co. ("Acousti") to install certain floor tile required on the Project. On November 4, 2000, as Acousti began installation of work in the corridor of the Section 2B Administration Building, G&O directed Acousti to stop work until certain corrective work was performed on the concrete floors. Specifically, G&O stated that the concrete floor had to be floated out by ½ inch prior to the installation of the tile. On December 8, 2000 Archer-Western advised G&O that the direction given that the floor had to be floated out by as much as ½ inch prior to installing the tile was contrary to the requirements of the Contract Documents. In addition, as a result of the directive, Acousti demobilized from the Project from November 4, 2000 to December 8, 2000. Archer-Western also advised that at a subsequent meeting G&O agreed that the floor did not require the previously requested leveling.

On December 13, 2000 G&O responded and denied Archer-Western's request for time on the basis that it was Archer-Western's responsibility to provide level floors. On December 14, 2000 Archer-Western responded and stated that the floors in question met the specified levelness requirement of ⅛ inch in ten feet. On December 15, 2000, G&O responded and took the position that the floors in question did not meet the specified levelness criteria and any additional cost incurred by Archer-Western in connection with the floor leveling was to its own account.

On August 1, 2001 Archer-Western forwarded to G&O its additional costs and time incurred as a result of the floor leveling issue. Archer-Western sought $20,699.91 in additional costs and a 14 day time extension.

FDOT POSITION

In response to Archer-Western's request for additional compensation, FDOT attended a pre-pour meeting held at Archer-Western's office on a Saturday with Mr. Jon Sydor and Mr. John Wilder. In this meeting, FDOT emphasized the importance of a "level surface plane" and its effect on later material installations. Special Provision Section 03310 Concrete Work, Subsection 3.08 Monolithic Slab Finishes requires that the surface of the concrete slab be constructed in a "level surface plane" so that depressions between high spots do not exceed ⅛ inch under a 10-foot straightedge. If a level surface plane is not achieved it is difficult to meet the requirements for "Variations from Plumb" and "Variations from Level" as specified in the Unit Masonry Special Provision and tile flooring.

After the slab was poured, G&O initiated a joint floor level survey with Archer-Western, which indicated the need for floor leveling. Prior to door jamb and concrete masonry unit installation, a finish floor elevation was designated with the assistance of G&O to minimize the areas requiring floor leveling. Archer-Western was made aware of the need for floor leveling at Section 2B at the time the finish floor survey was completed and Archer-Western had the opportunity to correct these deficiencies prior to the work performed by Archer-Western's subcontractor Acousti Engineering Company.

The specifications are well defined in order to obtain the desired level of aesthetics expected, and paid for, by FDOT.

It is FDOT's position that Archer-Western did not meet the requirements for a "level surface plane" and any corrective measures needed to bring the floor in compliance with the specifications is the responsibility of Archer-Western. Letter numbers GO-AW134 and GO-AW136, dated December 13, 2000 and December 15, 2000 respective, are accurate and define FDOT's position well. It is our opinion that the additional leveling performed by Acousti Engineering was necessary in order to bring the concrete slab surface in compliance with Special Provision 03310. It is FDOT's belief that this issue has no merit and additional compensation is not due.

DISCUSSION

In G&O's letter dated December 15, 2000 several references are made to "level surface plane" as discussed in Section 03310, Paragraph 3.08 of the Special Provisions. G&O makes the statement that Archer-Western chose a "level surface plane" that was 3/8 in. above the lowest point on the floor to set the door jams and to prevent from grinding the slab" The reference here for "level surface plane" is a theoretical grade line. In reviewing Section 03310, Paragraph 3.08.A "level surface plane" refers to an action to assure "that depressions between high spots do not exceed ¼ in. under a 10 foot straightedge". This action is supported in Paragraph B.2 where a "level surface plane" is used to consolidate the concrete surface so that depressions between high spots do not exceed ⅛ in. under a 10 foot straightedge.

The DRB is of the opinion that Archer-Western was required to finish monolithic slabs to a theoretical grade and not to the requirement that depressions between high spots not exceed ⅛ in. under a 10 foot straightedge. These high spots are to be hand troweled with a level surface plane. The use of the terminology "level surface plane" is an action or process and not a theoretical grade line.

RECOMMENDATION

The DRB recommends that Archer-Western be compensated for the work required to finish monolithic slabs to a "level surface plane" grade line. However, the cost submitted by Archer-Western in Tab No. 33 is not sufficiently detailed for payment. Archer-Western should provide more detailed cost records from its subcontractor to substantiate payment.

CLAIM XI – PCN 195 - SECTION 6 COLUMN FOUNDATION

CONTRACTOR POSITION

On September 8, 2000, Archer-Western began pouring concrete for the Section 6 column foundation. During the course of the pour Archer-Western was directed by G&O to stop the pour because the time between placing the second and third pours was approximately one hour and twenty minutes. G&O stated that the concrete in the second pour had reached initial set, thereby causing a "cold joint" between the second and third pours. As a result, Archer-Western had to remove the existing concrete and re-pour the column.

On October 17, 2001, Archer-Western formally advised G&O that the initial set of the concrete in the second pour of the Section 6 Column Foundation did not occur until five hours had passed, not one hour and twenty minutes. Archer-Western sought a supplemental agreement, in the amount of $16,844.55, to cover the costs of removing and replacing the concrete. See Archer-Western letter No. 358.

On October 23, 2001 G&O responded and denied Archer-Western's claim on the basis that Archer-Western did not object at the time of the incident. See Ex. 35, G&O Letter No. 247. On October 25, 2001 Archer-Western responded and advised G&O that Archer-Western had objected at the time and that the entire incident was thoroughly reported in the Engineer's Daily Report for the day in question. See Ex. 36, Archer-Western Letter No. 365.

As a result of G&O's erroneous directive regarding the concrete pour, Archer-Western has incurred additional costs of $16,844.65. See Ex. 37, Archer-Western Cost Summary.

FDOT POSITION

In response to Archer-Western's request for additional compensation, it is our position that Archer-Western has not pursued this issue timely and that no additional compensation is due. Archer-Western has accepted the outcome of the field decisions made by not pursuing this issue timely.

DISCUSSION

Instead of pursuing this problem on a timely basis, Archer-Western waited 13 months before placing the Department on notice. This item should have been pursued immediately and settled.

It should also be noted the Department has no business relationship with Archer-Western's suppliers. It is up to Archer-Western to properly order materials to be on the project at the correct time and in the proper quantity. This was an extremely remote project site as to distance from concrete facilities and proper scheduling should have been done with the supplier to assure the pour sequence

was done on a timely basis. During this hearing a number of claims have arisen out of poor scheduling of concrete deliveries as well as errors as to quantity required.

RECOMMENDATION

The DRB recommends that no entitlement is due to Archer-Western's untimely pursuit of this matter.

CLAIM # XII – PCN 174 - EXTRA WORK OCIP PREMIUM

CONTRACTOR POSITION

On November 1, 1999, at the start of the project work, at FDOT's request Archer-Western provided a breakdown of the labor burden to be used on extra work proposals. The burden submitted and incorporated into the various proposals during contract performance was 54% of labor cost, but this amount was not calculated with due consideration of the contract's Owner Controlled Insurance Program (OCIP) requirements. Based on this submittal, the parties bilaterally executed several contract modifications and agreements. On August 18, 2001, Archer-Western advised FDOT that it had discovered this error and that, as a result of its error, the proposals which had led to the executed bilateral agreements had been approximately $90,241.11 deficient. Archer-Western seeks to reopen the agreements.

FDOT POSITION

The supplemental agreements and work orders were agreed to by both parties through negotiation and were accepted by both parties as being full compensation. The work detailed in those agreements was accomplished well before notice of the error was given.

DISCUSSION

There has been no evidence or even allegation that FDOT negotiators were aware of this error or that the mistake by Archer-Western was of such a nature that the FDOT negotiators should have recognized it. Absent a well-substantiated showing of such awareness or constructive awareness, there is no basis for reopening a bilateral agreement which both parties entered into in good faith.

RECOMMENDATION

The DRB recommends that this claim be denied.

CLAIM XIII. PCN 123 - PIPE TRUSS COMPOUND TOLERANCE

CONTRACTOR POSITION

During the erection of the twenty-six (26) support trusses at the three mainline canopies, it became necessary for Archer-Western to utilize A36 filler material to overcome the American Welding Society ("AWS") Section D1.1's 3/16 inch established gap tolerance for structural steel. This work became necessary because the Contract Documents failed to properly advise the Contractor that the combined tolerances allowed between the construction of the canopy and the pipe trusses would exceed

the gap tolerance established for the attachment of the six (6) support truss base plates to its respective concrete embedment plates. The following information supports Archer-Western's Position.

First, Technical Special Provisions ("TSP") Section 03310, Sub-Part 3.01A, provides that formwork construction tolerances are to conform to the American Concrete Institute (ACI) Section 347. As provided under ACI 347R-94 Sub-Section 3.4, the concrete canopy's formwork is to meet a general standard or Class C surface tolerance. This requirement mirrors the Department's surface tolerance requirement for structural concrete scheduled to receive a Class V Surface Finish. Therefore, Archer-Western was required to provide the following tolerances: Gradual... ½ inch checked with a 5-ft template.

Second, AWS Dl.I Sub-Section 3.5.1.1 provides that primary truss members are allowed a variation in straightness of ⅜ in. for members 30 to 45 feet in length.

Third, ACI 347R-94 Sub-Chapter 3.3.1 provides that the tolerances should be specified by the Engineer so that the contractor will know precisely what is required.

The conclusion is that the allowable tolerances for the fabrication of the pipe trusses compounded by the tolerance allowed for the construction of the canopy well exceeded the 3/16 inch allowable root opening. As a result, Archer-Western had to perform additional work. On September 24, 2001 Archer-Western submitted its claim for the extra work. On March 15, 2002 the Department denied Archer-Western's claim. Archer-Western contends that it is entitled to an equitable adjustment in the amount of $40,813.76.

FDOT POSITION

In response to Archer-Western's request for additional compensation, Archer-Western performed this work between November of 2000 and February 2001, however, the Department was not notified of any issue until September 24, 2001. By not notifying the Department in a timely manner, Archer-Western has not provided the Turnpike Enterprise with the opportunity to document field conditions and work effort at the time of installation.

In addition, on April 7, 2000, a fax was transmitted to Archer-Western expressing FDOT's concerns with the non-traditional way that Archer-Western was erecting its formwork for the Canopy Superstructure. The Technical Special Provisions Section 03310 state that the Contractor is responsible for form design and that the contractor provide continuous, straight, smooth, exposed surfaces. Standard Specification 4005.1 FORMS states "Forms either wood or metal, shall be as follows(a) externally secured and braced where feasible; (b) substantial and unyielding (c) of adequate strength to contain the concrete without bulging between supports and without apparent deviation from the neat lines, contours, and shapes shown in the plans." Standard Specification 400-5.5 states bracing systems, ties and anchorages used for this purpose shall be substantial and sufficient to insure against apparent deviation from shape and alignment.

Special Provision Section 03310, page 20 also states do "Set and build into work anchorage devices and other embedded items required for other work that is attached to, or supported by, cast-in-place concrete. Use setting drawings, diagrams, instruction, and directions provided by suppliers to be attached thereto". This indicated that the Contractor should have reviewed the requirements for Sign Trusses to be attached and supported by embeds, including tolerances prior to placing the embeds. In addition, ACI 347.3.2.4.2

states, "Blockouts, inserts, sleeves, anchors, and other embedded items should be properly identified, positioned, and secured."

In accordance with ACI requirements, the only applicable class of irregularities for the concrete surface is Class A. ACI 347 Section 3.4 Irregularities in Formed Surfaces provides four classes for surface tolerance. Class A is suggested for surfaces prominently exposed to public view, where appearance is of special importance. Class B is intended for coarse-textured concrete formed surfaces intended to receive plaster, stucco, or wainscoting. Class C is a general standard for permanently exposed surfaces where other finishes are not specified. Class D is a minimum quality requirement for surfaces where roughness is not objectionable, usually applied where surfaces will be permanently concealed. The beam is exposed to public view, without the application of plaster, stucco, or wainscoting and is of special importance. The other three classes do not apply and the permitted abrupt or gradual irregularities in formed surfaces as measured with a 5 ft length with a straightedge is ⅛ inch.

The relationship between the CIP beams, the subsequent connection of the pipe trusses and the application of the Class V coating is well defined. The Contractor has the responsibility and the opportunity to design, build, and erect forms in a manner that will achieve the specified result. ACI 347 recommends that the contractor prepare formwork-working drawings to review potential problems on paper to prevent problems during and after erection. Manufacturers such as Snap-tie, Burke, and Medco have published guidelines for specific application of its products in the construction of walls and beams. This information includes sizes, spacing of ties, whaler, and stiff back location, and other pertinent information. This information is standard in the industry and produces the best possible product if employed and adhered to from design to recommended concrete placement practices.

In summary, all of the necessary information was available to Archer-Western. Archer-Western is responsible for the design of the formwork and the means and methods of its installation. The lack of a thorough design and the utilization of unconventional forming system are what resulted in Archer-Western's problems in erecting the trussing. The Contract Specification addresses all the issues of Archer-Westerns concerns.

It is the FDOT's position that the Pipe Truss Tolerance issue has no merit due to the untimely notice and that no additional compensation is due.

DISCUSSION

Archer-Western had the responsibility to erect the canopy superstructure forms to the lines and grades shown in the plans. Forms were to be substantial and unyielding (Section 400-5 of the 1991 Standard Specifications). Archer-Western also had the responsibility to set and build embedments, required for other work, into cast-in-place concrete. Erection drawings, diagrams, instructions and directions provided by suppliers of the embedments were to be used to assure placement (Special Provisions Section 03310.3.04). Archer-Western had the sole responsibility to further assure that the embedments, within contractual and manufacture tolerances, matched those items they were to be attached to.

If, during the erection of the trusses to the canopy superstructure, the 3/16 in. allowable tolerance is exceeded, it is the Contractor's responsibility to use allowable and acceptable means to mount the trusses to the embedments. The acceptable procedure in this case was to use A36 filler material. The use of A36 filler material is not additional work, but the specified procedure to use when allowable tolerances are exceeded.

In addition, Archer-Western also failed to notify the FDOT of its intent to file claim per Section 5-12 of the 1991 Standard Specifications. Archer-Western notified the FDOT 7-9 months after the work was completed.

RECOMMENDATION

The DRB recommends that the claim be denied.

CLAIM # XIV – PCN 153 - GENERAL LIABILITY INSURANCE PREMIUM OVERCHARGE

CONTRACTOR POSITION

Upon review of insurance premiums withheld from the contract pursuant to the FDOT wrap-up insurance program, Archer-Western discovered that general liability and builders risk premiums assessed by FDOT are disproportionate to insurance industry standards. Furthermore, builders risk insurance premiums are not related to labor costs, but nevertheless this was the basis upon which premiums were assessed. FDOT's broker, Marsh McClellan, has been convicted with regard to certain of its practices. The insurance carrier has gained a windfall.

FDOT POSITION

This was part of Owner Controlled Insurance Program (OCIP), which was discussed in detail with prospective bidders before bidding. All contractors on the Suncoast Parkway project were assessed premiums in the same manner. OCIP Program and standard industry practice differ. Each of Archer-Western's Experience Modifiers was applied in calculating the premium.

DISCUSSION

Archer-Western acknowledges that the OCIP insurance premium assessments against it were in accordance with the contract terms, but is alleging that the manner in which the program is operating gives the insurance carrier a windfall. It is clear to the DRB that this claim involves third parties and possible overreaching by third parties, and the issues raised go far beyond this particular contract. Pursuit of this claim would require that Archer-Western have access to discovery from third parties, without which it would probably be unable to obtain sufficient details.

The purpose of a DRB is to have construction disputes reviewed by persons having experience and knowledge in construction techniques, law, and procedures. The claim by Archer-Western is not a construction dispute, but one of insurance law arising from actions outside of the parties' contract. This is an area in which the DRB panelists have neither experience nor expertise.

Under these circumstances, the DRB determines that this issue is best decided by courts or administrative tribunals having adequate jurisdiction, the ability to compel testimony and the production of documents, and pertinent expertise. Therefore determines that it would not be appropriate for the DRB to issue a recommendation.

RECOMMENDATION

The DRB makes no recommendation on this claim, for the reasons stated under "Discussion."

CLAIM XV-F – SECTION 2B YARD RELOCATION

CONTRACTOR POSITION

In an effort to coordinate with the Section 2B Roadway Contractor and to facilitate the construction of the work adjacent to the toll plaza concrete pavement, the Department directed Archer-Western to relocate all of its stored materials, which had been previously located within the designated work area. In response to the Department's direction, on November 9, 2000, Archer-Western presented the Department with its proposal for this additional work. See Archer-Western Letter No. 142, Ex. 56. Despite precedence to the contrary, the Department denied Archer-Western's request for additional compensation. See G&O Letter No. 131, Ex. 57. Archer-Western is entitled to an equitable adjustment in the amount of $13,058.09. See Archer-Western Cost Summary, Ex. 59.

FDOT POSITION

In response to Archer-Western's request for additional compensation, Construction Coordination is part of Archer-Western's contractual responsibilities as defined in Special Provision Section 01040 Construction Coordination (Toll Plaza Contract) (Sections 1B-6) (See Attachment "A"). The Contractor was required to achieve Functional Building Acceptance approximately 60 days prior to the anticipated open-to-traffic date of January 24, 2001 for Section 23 (See Attachment "B"). Functional Building Acceptance should have occurred on approximately November 25, 2000. Functional acceptance is defined in Special Provision Section 01700 Project Closeout - Toll Plaza (See Attachment "C") and is essentially the completion of the Contract requirements that will allow the uninterrupted operations for the collection of tolls.

In accordance with Special Provision Section 01040 Construction Coordination, paragraph C - Work Sequence, subparagraph 3(c) states "After substantial completion of the Toll Plaza, the Roadway Contractor shall complete the adjacent remaining Roadway Work including but not limited to the following; 1) Final Grading, 2) Base and pavement courses, 3) Barrier wall, guardrails and miscellaneous asphalt, 4) Pavement markings, 5) Signage, and 6) Remainder of sodding." Per this specification, Archer-Western was required to provide access to the necessary areas required for the Roadway Contractor to complete their work.

Archer-Western was contractually required to make this area available to the Roadway Contractor substantially earlier than the contractual date of Functional Building Acceptance.

On or about November 25, 2000 the Roadway Contractor and the Toll Plaza Contractor should have completed the work to a state where toll collection operations could take place without interruption. This includes coordination with the Roadway Contractor to complete the adjoining work. It is our belief that Archer-Western had a contractual responsibility to provide access to this area to ensure that work under this Contract would not interfere with or delay the work of the Roadway Contractor and that this should have occurred substantially before November 25, 2000. It is the Turnpike Enterprises position that compensation for the relocation of the stored materials at Section 23 was a contract requirement and that no compensation is due as stated in the G&O letter dated December 1, 2000 (See Attachment "D").

DISCUSSION

The Contractor gave the Department notice of the incurrence of extra cost to relocate the construction storage yard at the 2B site. Even though the Department uses the special provisions to refuse payment for relocating the storage yard, Greenhorne and O'Mara's letter, dated December 1, 2000, the next to last sentence of the second paragraph, states "If this continues to be an issue it can be worked out at the project level or if need be with the Disputes Review Board."

Section 01040, clause 101.C.3.c says the Roadway Contractor is to complete the roadway, after "substantial completion" of the toll plaza. It makes no reference to the area having to be cleared by any specific dates. The DRB cannot ascertain from the materials presented whether or not the 2b site had achieved "substantial completion," a contractually undefined term, as of the date of the directive to clear the area.

The fact that we are now 5 years after this happening and having been provided no breakdown or information as to the problems this has cost it is difficult at best to make a fair recommendation.

RECOMMENDATION

The DRB recommends that the Contractor is entitled to recover the costs related to this work, if it had not attained substantial completion as of the date of the directive to clear the yard area.

CLAIM XV-J – CANOPY CAPITAL FINISH

CONTRACTOR POSITION

After preparing Section 6's canopy surface for a Class V Finish, the Department directed Archer-Western to paint the inside and underside portions of the B1 & B2 canopy beams. As a result of this direction, additional surface preparation work had to be performed. Archer-Western expended $4,522.06 to comply with the Department's change directive.

FDOT POSITION

In response to Archer-Western's request for additional compensation, Archer-Western states, "the Department directed Archer-Western to paint the inside and underside portions of the BI & B2 canopy beams". We have been unable to find any correspondence on this issue and Archer-Western has not provided anything to substantiate its claim.

This only occurred at Section 6 and not at the canopy capitals in Sections 2B and 4. It would seem that if FDOT directed this change it would have occurred at all three mainline toll plazas. Archer-Western prepared the cost estimate on April 19, 2002, well after the work would have been completed.

It is our position that Archer-Western has not pursued this issue in a timely manner and therefore no compensation is due. In addition, Archer-Western did not provide any documentation that supports its allegations.

DISCUSSION

Archer-Western contends that it was directed to paint the inside and underside portions of Section 6 Canopy Beams B1and B2. The FDOT denies issuing any directive to paint these beams. If the Contractor was directed to make this change it is entitled to compensation by means of a properly executed supplemental agreement or by simply an overrun to the pay item quantity, provided there was a pay item for this specific work. The FDOT, having directed this change, would have been negligent in allowing the work to proceed without an approved supplemental agreement and the fact that the Contractor was late in submitting its price would not waive its right to be paid for this change. However, there is no evidence that this change was ever made.

Assuming the worst scenario, whereas, this change was directed by the FDOT and the Contractor submitted its cost for the work months after the work was completed. The Contractor has offered no credit to the FDOT for eliminating the Class V Finish.

RECOMMENDATION

The DRB recommends that no payment be made for painting the beams in lieu of applying the Class V Finish. The credit due to the FDOT for not applying the Class V Finish would be sufficient and there is no evidence that this change was ever directed.

CLAIM XV-O – SECTION 2B ATTENUATOR FOUNDATION REPLACEMENT

CONTRACTOR POSITION

On August 24, 2001 [sic; should be 2000], the Department directed Archer-Western to remove and replace 7 attenuator foundations on the north side of the Section 2B canopy, for failure to use concrete with a strength of 4000 psi @ 28-day concrete as required by the Contract. Shortly thereafter Archer-Western advised the Department that it took exception to the Department's direction to remove and replace the attenuator foundations on the basis that the concrete design mix in fact exceeded the 4000 psi @ 28-day strength requirement and the direction to remove was premature. Archer-Western requested that 28-day strength tests be performed on the concrete test specimens taken during that morning's pour.

On February 14, 2002, Archer-Western advised that it was seeking compensation because the concrete exceeded the contractual strength requirements. The Department rejected this claim. Archer-Western is seeking $19,424.46.

FDOT POSITION

On August 24, 2000, Archer-Western was planning to pour the attenuator back-ups at Section 2B. When the concrete trucks arrived, the CEI informed Archer-Western that the mix was not the proper mix, the Southdowne delivery tickets showing the mix to be 3400 psi instead of the designed mix of 4000 psi. Despite this warning that the mix was an incorrect mix and did not meet the requirements of the plans and specifications, Archer-Western elected to place the concrete anyway.

The CEI immediately contacted the DOR and asked if this mix would be acceptable even if the cores breaks were over 4000 psi. The response was that in the DOR's professional opinion the 3400-psi mix was not acceptable and that an improper mix incorporated into a safety feature would place undue

risk on the DOR, on the design engineer's professional license, on the Turnpike Enterprise, on the CEI, and on Archer-Western. Based on this information, Notice of Non-Compliance Number 068 was issued.

Archer-Western bases its entitlement for this issue on the 28-day breaks, which did exceed 4000 psi. These cylinders were sampled from the second truck that contained only 4 cubic yards out of the 15 cubic yards 26% of the total concrete poured in several backup attenuator blocks. The compressive strength of the remaining concrete is not known.

The contract documents require that the ACI concrete mixes be approved by the designer of record prior to placement. Archer-Western had a 4000-psi ACI mix approved and elected to proceed with the 3400-psi mix despite notification that the mix did not meet the contract documents. The designer of record has an obligation to ensure that the materials incorporated into the project meets specific guidelines, and not to do so would be negligent.

It is also important to note that this incident occurred on August 24, 2000 and Archer-Western's letter requesting additional compensation is dated February 14, 2002. It is FDOT's position that Archer-Western has not pursued this issue in a timely manner and therefore no compensation is due. In addition, the Contractor had the opportunity to provide the correct mix and chose not to do so. The DOR and the CEI have the right and obligation to reject any concrete mix that is less than that required by the contract: documents. It is FDOT's belief that Archer-Western's request for additional compensation has no merit and additional compensation should not be granted.

DISCUSSION

Drawing Sheet 202 unequivocally requires that concrete for attenuator pads and backup is to be "4000 psi @ 28 days." Providing a mix which will satisfy the 4000 psi requirement after 28 days is an obligation of Archer-Western and its concrete supplier. At the time of providing the mix ready to pour, the supplier should be able to ascertain if the mix it has prepared will, after 28 days, meet that requirement. If a supplier states upon delivery that the mix is a 3400 psi @ 28 days mix, the owner is not obligated to wait 28-days to see if perchance the concrete ultimately will meet the contract requirement.

In addition, the fact that concrete from the second load delivered, the only load that was tested, ultimately did meet the test is not indicative of whether or not the concrete from the earlier load, the majority of the concrete, would also have met the test. FDOT could not assume or hope that this safety item was constructed of adequate concrete.

FDOT was therefore within its contractual rights to direct immediate removal of the concrete.

RECOMMENDATION

The DRB recommends that Archer-Western is not entitled to any compensation for having to remove and replace this concrete.

CLAIM # XVI-B — ROOFING NAILER IMPACT

CONTRACTOR POSITION

The plans for the Section 6 toll plaza contained a error. Archer-Western was required to install an additional roof nailer on the roof of the Administration Building. Plans called for continuous 2x pressure-treated wood nailer. The specifications required a nailer that was ½" thicker because of the installation of a 1" basalt-based rigid insulation over 2" rigid polyisocyanurate base layer. The need to add an additional nailer impacted the final completion date.

FDOT POSITION

This matter was settled by bilateral execution of a "Work Order Analysis Form" on October 25, 2000, reflecting a negotiated agreement that Archer-Western was due "$2,808.93 and zero days" and reciting that "It is agreed that the [sic] no time is warranted for these revisions."

DISCUSSION

By bilaterally executing the Work Order specifically reflecting that no time extension is warranted, Archer-Western is now foreclosed from reopening this issue to seek a time extension. Archer-Western could have insisted that the Work Order contain a reservation of rights to claim a time extension, but it did not.

RECOMMENDATION

Archer-Western is not entitled to a time extension because of the need to add an additional nailer.

CLAIM # XVI-C — WEATHER AND HOLIDAYS

CONTRACTOR POSITION

Because of earlier delays. AW's weather-sensitive work was forced into months with greater incidences of inclement weather, as well as the Memorial Day, 4th of July, and Labor Day holidays. In granting time extensions, allowances should be made for the holidays and for a rainy season which would not have been encountered but for the FDOT-caused delays.

FDOT POSITION

The project was time-sensitive so tolls could be collected. This contract states that contract time will be charged for any time due to suspension of operations for employee vacations. It also states, "Allowance for delays caused by the effects of inclement weather will not be made. Delays caused by catastrophic occurrences such as a hurricane, may be considered as a basis for contract time extension." Archer-Western could have worked on any of these days; there were no catastrophes.

DISCUSSION

Specification 8.7.1 states in part:

". . .The allowable contract time is calculated with consideration given that significant work is not normally accomplished on Saturdays, Sundays, State Legal Holidays, and during seasonal inclement weather conditions with accompanying normal delays in prosecution of work on controlling items. . ."

Although in drafting this contract FDOT deleted portions of other subsections of 8-7 "Computation of Contract Time, " this provision remained. If these holidays and seasonal inclement weather conditions are taken into account in determining the time period which should be contractually established for project completion, it follows that they should also be taken into account when determining the revised period for project completion resulting from a change or other entitlement to a time extension.

RECOMMENDATION

When and if it should be determined that Archer-Western is entitled to a time extension, in determining the number of days for which the extension is granted, consideration should be given to the fact that significant work is not normally accomplished on Saturdays, Sundays, State Legal Holidays, and during seasonal inclement weather conditions with accompanying normal delays in prosecution of work on controlling items, and due allowance made for such holidays and inclement weather periods.

CLAIM # XVI-D — PERMANENT POWER INTERRUPTION

CONTRACTOR POSITION

Archer-Western was delayed for 7 days when telephone company's subcontractor, installing telephone service to the facilities constructed by Archer-Western, cut an underground electrical feeder delivering commercial power to Administration Bldg on June 12, 2001. On June 14, 2001, Rogers obtained a passing Department of Management Services inspection for the establishment of permanent power to Administration Building, but the power company could not re-establish permanent power until June 18, 2001. This delayed elevator installation & HVAC startup. When the power line was severed, Archer-Western had to notify the elevator installer, which dropped the project from its scheduling since no date could be set for the resumption of power. The portable generator mentioned by FDOT [below] would have required disconnecting already-installed lines and bringing in lines from the portable generator. Archer-Western is entitled to a 7-day time extension and $18,926.81 for extended overhead for 7 days.

FDOT POSITION

This is a third-party claim. FDOT had no control over or responsibility for power company crews, and does not understand why this claim has been filed. If Archer-Western had notified FDOT, it could have had a portable generator on site the next day.

DISCUSSION

According to the Contract, it was FDOT's responsibility to provide permanent power to an on-site distribution point. There is nothing to indicate that Archer-Western had any means of determining, when the power lines were cut, how long it could take for power to be restored. The severing of the power line and the restoration of power were matters totally outside of Archer-Western's control. It could have taken several days for FDOT to locate a portable generator, have it delivered to the site, and have it connected, and this would have entailed expenditures which would have to be borne by someone. Under the circumstances, Archer-Western acted reasonably in not immediately seeking portable power but awaiting the restoration of commercial power. The contract did not provide that Archer-Western was required to use portable power in the event of a commercial power failure.

RECOMMENDATION

If Archer-Western can demonstrate by its schedule analysis to be presented to FDOT that a critical path activity was affected, they are entitled to a compensable time extension is entitled to a time extension for a reasonable period of delay resulting from the severance of the power line and corresponding compensation for extended overhead.

CLAIM # XVI-E — METAL DECKING THEFT

CONTRACTOR POSITION

In November, 2000, the job site was burglarized and metal roof decking, in value about $800, stolen. Immediately, AW had replacement metal decking prefabricated. Archer-Western is not seeking monetary compensation, but only a time extension for the delay to the project.

FDOT POSITION

Standard Specification 6-6.3 says that the protection of stored materials is Archer-Western's responsibility and FDOT "shall not be liable for any for loss to material, by theft or otherwise, nor for damages to the stored material."

DISCUSSION

Specification 6-6.3 clearly exonerates FDOT from any monetary liability for the stolen decking. What is not clear is whether or not the term "not be liable for" is broad enough to encompass a time extension. Given the value of the material removed plus the testimony at the hearing that it was stored in a site accessible, other than by going through the project, only by a 4-wheel drive road at least a mile long, it appears to the DRB that it was reasonable for Archer-Western not to have posted a security guard and incurred the cost therefor.

What is disturbing is that because of the theft of $800 worth of material, for which amount Archer-Western is not seeking compensation from FDOT, FDOT is seeking to collect liquidated damages which total almost $50,000, if there was actually a resulting 7-day delay as Archer-Western alleges. On the other hand, the DRB also recognizes that the measure of the reasonableness of amount of liquidated damages is the approximate daily damages that would be suffered by the party entitled to receive them if performance is not completed on time. Measured by this standard, the imposition is reasonable.

However, the situation here essentially is that a third party, not having a known relationship with either contracting party, has taken an action which essentially rendered performance impossible for a brief period of time. Under such circumstances, each party should bear its own losses, namely, Archer-Western the cost of the materials and FDOT the delay in receiving tolls; liquidated damages should not be imposed to shift this bearing of burden. The means to accomplish this is a time extension of such duration as Archer-Western can prove was reasonably necessary to obtain, at the site, replacement materials.

RECOMMENDATION

Archer-Western is entitled to a non-compensable time extension of such duration as Archer-Western can prove was reasonably necessary to obtain, at the site, replacement materials and that a critical path activity was affected.

CLAIM # XVI-F — FINAL INSPECTION

CONTRACTOR POSITION

Section 6 work suffered a 21-day delay awaiting FDOT's declaration of Functional Acceptance and final punch list. On November 2, 2001, Archer-Western transmitted to FDOT the Department of Management Services successful final inspection for a final certificate of occupancy. Under the contract, subsection 1.03C, FDOT had 2 weeks to list any deficiencies not apparent during the inspection for Functional Building Acceptance. However, FDOT only sent its punch list on December 7, 2001. This delayed critical path activities. Archer-Western is seeking a 21-day time extension and an equitable adjustment of $56,780.43. [At this time, only the issue of entitlement to the time extension has been presented to the DRB.]

FDOT POSITION

The Archer-Western November 2 letter did not request a final inspection. Providing a certificate of occupancy does not constitute a request for final inspection. There were considerable work items outstanding. The contract requires that the request be submitted after work qualifies as state of readiness.

On November 15, 2001 Archer-Western sent a letter requesting a Formal Inspection , but it was determined that the work was not ready. It was agreed to perform Formal Punch List Inspection on December 5-6, despite several work items incomplete.

On January 4, 2002, Archer-Western was still not able to turn over all warranties, guarantees, workmanship bonds, & maintenance agreements necessary to fulfill requirements for conditional acceptance. Conditional Acceptance was granted on December 19, 2001 on condition these would be provided before final acceptance.

DISCUSSION

The DRB has reviewed the contract terms, and specifically section 1.03, to determine the contractual requirements and procedures. We find the contract provides as follows:

(a) As completion approaches, there will be weekly walk-throughs with development of a punch list after each. §1.03A.1.

(b) For Functional Building Acceptance, certain steps must have occurred. §1.03B.1.

(c) When the steps in (b) have occurred, Archer-Western is to request the Engineer to schedule an inspection for Functional Building Acceptance. §1.03B.2.

(d) After the Certificate of Occupancy has been received, FDOT will make a declaration of Functional Building Acceptance, will occupy the facilities, and will have two weeks to list any deficiencies not apparent during the inspection for Functional Building Acceptance. §1.03C.

(e) Functional Building Acceptance continues until Conditional Acceptance. §1.03D.

Notably, §1.03B.2 speaks of a formal inspection *before* Functional Building Acceptance, and §1.03C speaks of production of a punch list *after* Functional Building Acceptance.

The Archer-Western November 2 letter was not a request for an inspection. It was merely a transmittal of a Certificate of Occupancy. It does not mention any future inspections, nor does it mention Functional Building Acceptance. The first request for the Functional Building Acceptance inspection that has been brought to the DRB's attention is the Archer-Western letter of November 15, 2001. While it reflects an "understanding" that the inspection was to have been performed during the week of November 12, no facts have been produced which would provide a basis for any such understanding.

By letter of November 29, FDOT determined that Functional Building Acceptance had occurred on November 16. In light of §1.03B.2 and §1.03C, we must assume that either a formal inspection for Functional Building Acceptance had already occurred or had been waived by FDOT; it is doubtful that the formal inspection for Functional Building Acceptance would occur after Functional Building Acceptance had already occurred. Thus, we conclude that the December 5-6 inspection must somehow be related to the list of any deficiencies not apparent during the inspection for Functional Building Acceptance.

In any event, the November 29 letter is the declaration countenanced by §1.03C and triggers the two-week period within which FDOT is to list any further deficiencies. Under §1.03C, the declaration triggers a two-week period. If the two weeks runs from the date of the declaration, then FDOT providing the punch list on December 7 was within the two weeks allotted. If the two weeks runs from the date of Functional Building Acceptance rather than the date of declaration, then the two-week period would have ended on November 30, the day after the declaration was issued. (Obviously, the contract drafters did not contemplate a retroactive declaration.) Given that §1.03C also provides for FDOT to occupy the building and, as a result of that occupancy and the opportunity it would provide to come across other, previously unnoticed deficiencies, it would be unreasonable to hold that FDOT had one day to occupy the facility and discover deficiencies.

The DRB therefore concludes that under the contract terms, FDOT had two weeks from November 29 to provide its list of deficiencies, and met that obligation.

RECOMMENDATION

Archer-Western is not entitled to a time extension for the alleged delay in FDOT providing the deficiency list called for by §1.03C.

EXECUTION

All members of the DRB concur in each of these Recommendations.

Date: 10/6/05

Lynn Gibson, P.E.
Chairman

John W. Nutbrown
Member

Robert J. Robertory
Member

gai consultants
transforming ideas into reality

October 4, 2005

Ms. Marilynn Schmuki
Turnpike Enterprise
P. O. Box 613069
Ocoee, FL 34761

Reference: Suncoast Parkway Toll Facilities
FIN 25886-1-52-01; Contract No. 20224
DRB Comments and Recommendations
Claims by Archer-Western Contractors, LTD

Subject: Recommendation on Request for Reconsideration of Claims by Lin R. Rogers Electrical Constructors, Inc. Claim Nos. 23, 24 and 31

Dear Ms. Schmuki:

Attached is a copy of the DRB's Discussion and Recommendation on the above referenced claims.

Yours truly,

Lynn D. Gibson, P.E.
DRB Chairman

Cc: Tracy Keenan, Greenhorne O'Mara
Robert J. Robertory
John Nutbrown

618 East South Street Orlando, FL 32801 **Tel** 407.423.8398 **Fax** 407.843.1070 www.gaiconsultants.com

SUNCOAST PARKWAY TOLL FACILITIES
FIN 258886-1-52-01— CONTRACT 20224

DISPUTE REVIEW BOARD

John C. Nutbrown Member	Lynn Gibson, P.E. Chairman	Robert J. Robertory Member

TO:

Marilynn M. Schmuki, P.E.
Construction Services Management Engineer
Florida Department of Transportation

Sven Nylen, III
Vice-President
Archer Western Contractors

RECOMMENDATION ON REQUEST FOR RECONSIDERATION OF CLAIMS BY

LIN R. ROGERS ELECTRICAL CONTRACTORS, INC.

SUBCONTRACTOR TO ARCHER-WESTERN CONTRACTORS, LTD

CLAIM # 23 – CONDUITS BELOW ROADWAY SLAB

CLAIM # 24 – DELETE PULL BOXES

CLAIM # 31 – EMBEDDED CONDUIT

Lin R. Rogers Electrical Contractors, Ltd, ("Rogers") has requested that the DRB reconsider its Recommendations on the subject claims. The Appendix to the Three-Party Agreement includes the following regarding requests for reconsideration: "Either party may appeal a recommendation to the Board for reconsideration. However, reconsideration should only be allowed when there new evidence to present."

The term "new evidence" is frequently used in connection with requests for reconsideration by a court of a decision. In such event, the term normally refers to evidence which a party could not reasonably have discovered through the exercise of due diligence. *Cluett v. Department Professional Regulation*, 530 So. 2d 351 (Court of Appeal, 1988). Viewed under such a definition, Rogers has not offered a new evidence. However, this is a DRB and not a court. The DRB is not charged with ascertaining how a court might rule on a dispute, but with recommending a means toward effecting a negotiated resolution of a dispute. In addition, the use of the word "should" in the Appendix means its provisions are not mandatory. Accordingly, the DRB determines to review its earlier recommendations in the light of the material Rogers has now submitted.

The essence of our earlier Recommendations on these claims Rogers's failure, in making these claims, to distinguish between liabilities of the owner (FDOT) and liabilities of the prime contractor, and in a failure to give timely notice, which failure has prejudiced the ability of FDOT to produce documentation in support of its position.

With regard to the first of these bases, the failure to distinguish, the DRB used the following words:

> "A claimant, be it an owner or a contractor, must provide some support for the amounts claimed. Calculating the difference between the as-bid costs for labor-hours, materials, and equipment and the actually incurred costs for labor, material, and equipment, as Rogers did in these three claims, is flawed. Rogers has attributed all of the time and cost difference between as-bid and as-built to the owner. Rogers in its presentation on Claims 23, 24, and 31 has given no consideration to contractor-created delays due to inefficiencies resulting from lack of supervision of equipment and manpower, coordination of crews and subcontractors, and overall scheduling of project activities.
>
> "On several occasions the Rogers-generated documents submitted to the DRB reflect an Archer-Western failure to properly coordinate subcontractors.
>
> "The documents submitted to the DRB show that with regard to some of the elements of these claims, the multiplication of actual hours over as-bid hours is of such magnitude that Rogers should have very quickly been aware that something was not proceeding as expected and made inquiry. Its on-site supervisors, if any, should have advised management that changes were being effected."

With regard to the second of these bases, the failure to give timely notice, the DRB was "of the opinion that the FDOT's negotiation and payment of these claims constituted a waiver of the contractual requirement and does not preclude recovery." The DRB went on to state the effect of the failure to give notice and the waiver:

> "However, this does not negate all of the effects of failing to file a claim or give notice of claim. Had such a claim or notice of claim been filed in advance of or contemporaneous with the work, there would have been documentation produced which would record the efforts of Rogers to perform the changed work. Given the magnitude of some of the labor-hours claimed to have resulted from the changed work when compared to the as-bid labor-hours, the DRB must conclude that there was a total failure of supervision/subcontract administration on the part of Archer-Western and Rogers."

In sum, the DRB's recommendations were primarily grounded on two bases: First, that Rogers had failed to delineate between costs it incurred as a result of Archer-Western actions/inactions and costs it incurred as a result of FDOT. Second, Rogers failed to provide timely notice of change or intent to submit a claim to Archer-Western and Archer-Western in turn failed to provide timely notice to FDOT, to the prejudice of the Department's ability to defend. We consider these in sequence.

Dr. Hanna, in his presentation at the second hearing, correctly depicted the situation where a prime contract performs additional work for an owner. He noted that, assuming a reasonable bid (which also has not been proven here[1]), the difference between the expected effort and the actual effort is in some measure attributable to the owner, but may also be attributable to errors or mismanagement, etc., on the part of the claimant-contractor. His depiction omitted one factor present when a subcontractor is the claimant, namely, that some of the additional effort and cost may also be attributable to the prime contractor rather than to the owner.

---

[1] Given the labor-hour overruns on these three claims, see below, the reasonableness of the bid remains an open question.

Dr. Hanna further noted in his report, "Likewise, examples of causation have been cited where an action or inaction of *another party* was documented to have forced Rogers to perform its work in a more costly manner." He is correct in this assertion. However, as one DRB member pointed out to the Vice-President of Archer-Western during the last hearing, the DRB is not considering the right of Rogers to compensation from any other entity, but the right of Archer-Western to recover from FDOT. There is a difference, for, to the extent that Archer-Western, rather than FDOT, may have been the cause of Rogers expending additional time and dollars, that is a matter for resolution between those parties, involving neither FDOT nor the DRB.

The overall presentation to the DRB has convinced the DRB that a portion, perhaps a major portion, of any additional effort and expense by Rogers is attributable to Archer-Western, but not to FDOT. For example, from Rogers's own documentation:

a. Tab G of the Rogers claim includes the following: "The modified total cost amount attributed to actions caused by FDOT and Archer Western, with appropriate mark-up, is $552,259. It should be noted that this amount has not been allocated between FDOT and Archer Western."

b. The first two pages of Tab 31 states that Rogers was delayed and incurred increased costs because Archer-Western had problem in installing steel rods according to specifications, and because Archer-Western or other subcontractors damaged work performed by Rogers.

c. On page 40 of Dr. Hanna's "Narrative of Impact Report," he noted that "Rogers lost a substantial amount of money performing its work due to the inefficiencies of change orders and project acceleration necessitated by unforeseeable site conditions, poor project coordination by Archer, and delays caused by Archer and its other subcontractors."

While the DRB has recognized that Rogers, through Archer-Western, is due some compensation from FDOT, the presentations leave no basis for any recommendations as to the dollar and time amounts of such entitlement to recover from FDOT. The DRB was left with no choice but to accept the figures which FDOT was willing to concede.

With regard to the failure to give timely notice, the DRB recognizes that failure to give notice is not a defense which has found favor with courts and other tribunals. Those bodies generally require a very strict showing that the defending party has suffered some real prejudice in its ability to mount a defense. In the dispute as presented to the DRB, the presentations by Rogers and Archer-Western clearly suffered from their own lack of contemporaneous records, and it was also clear that the Department, not having received timely notices of claims, had not maintained adequate records. We cannot overlook the fact that Rogers is a large electrical contracting firm, having widespread operations.

The second page of Tab 23 of the Rogers claim indicates that it planned to expend 932 labor-hours in the particular work, but instead expended 7,956 labor-hours. The corresponding page under Tab 24 indicates expectation of expending 800 labor hours, and actually expending 5,422. Under Tab 31, the planned is said to have been 800 labor-hours, the actual 2,794. The fact that Rogers gave no notice despite such massive labor overruns, and the appearance that company headquarters may not have been aware of such massive overruns, indicates a failure of Rogers management, which in turn led to depriving the Department of the ability to investigate the problems as they occurred and to create and maintain records adequate to defend against the claims. The DRB also notes that it appears that Rogers itself was hampered in its presentations by its own failure to maintain adequate records of why there were such massive overruns.

RECOMMENDATIONS

1. The DRB makes no change to its earlier recommendations on these three claims.

2. The earlier recommendations clearly included a determination that there was some entitlement. To the extent that in the future Rogers may be able to demonstrate the extent, if any, that FDOT (and not Archer-Western) caused it to incur more expense than that for which we have previously recommended compensation, it would not be unreasonable for FDOT, to resolve these three disputes and avoid litigation, to agree on a compensation amount somewhat in excess of above those previous recommendations.

All members of the DRB concur in these Recommendations.

Date: 10/04/05

Lynn Gibson, P.E.
Chairman

John W. Nutbrown
Member

Robert J. Robertory
Member

gai consultants
transforming ideas into reality

September 23, 2005

Ms. Marilynn Schmuki
Turnpike Enterprise
P. O. Box 613069
Ocoee, FL 34761

Reference: Suncoast Parkway Toll Facilities
FIN 25886-1-52-01; Contract No. 20224
DRB Comments and Recommendations
Claims by Archer-Western Contractors, LTD
Claim No. XV

Dear Ms. Schmuki:

Attached are the DRB's comments and recommendations to Claim Nos. XV-A,B,2B,D,E,G,H,I,K,L,M and N, submitted by Archer-Western Contractors, LTD on the above referenced project.

Yours truly,

Lynn D. Gibson, P.E.
DRB Chairman

Cc: Tracy Keenan, Greenhorne O'Mara
Robert J. Robertory
John Nutbrown

RECEIVED
SEP 28 2005
TURKEY LAKE CONSTRUCTION

618 East South Street Orlando, FL 32801 **Tel** 407.423.8398 **Fax** 407.843.1070 www.gaiconsultants.com

SUNCOAST PARKWAY TOLL FACILITIES
FIN 258886-1-52-01— CONTRACT 20224

DISPUTE REVIEW BOARD

John C. Nutbrown	Lynn Gibson, P.E.	Robert J. Robertory
Member	Chairman	Member

ENTITLEMENT RECOMMENDATIONS ON CERTAIN CLAIMS BY ARCHER-WESTERN CONTRACTORS, LTD

CLAIM # XV-A – SECTION 2B PARTIAL BACKFILL AND DEWATERING SYSTEM DEACTIVATION[1]

CLAIM # XV-B – PLAN REVISION NO.5

CLAIM # XV-C – SECTION 2B WELL POINT RECONFIGURATION

CLAIM # XV-D – HURRICANE GORDON

CLAIM # XV-E – PCN-069 SIGN FRAME MOBILIZATION

CLAIM # XV-G – PREFABRICATED BOOTH CLEANING

CLAIM # XV-H. SECTION 2B SEPTIC CLEANUP

CLAIM # XV-I. SECTION 2B GATE RELOCATION

CLAIM # XV-K. REJECTED HANDRAILS

CLAIM # XV-L. ADDITIONAL MOBILIZATIONS FOR BACKFILL OPERATIONS

CLAIM # XV-M --CONCRETE JOINT SAWING

CLAIM # XV-N – RAMP A2 PAVEMENT REPAIR

Archer-Western Contractors, Ltd. (Archer-Western) holds Florida Department of Transportation (FDOT) Contract 20224 (Contract) for construction of toll facilities at several locations (designated as 1B, 2A, 2B, 4, 5, and 6) on the Suncoast Parkway. Archer-Western has submitted to the DRB a Request for Equitable Adjustment containing several claims. This Recommendation is issued to record the withdrawal of certain claims by Archer-Western during the course of the DRB hearing on August 24-26, 2005. The DRB expresses no opinion on the

---

[1] Names and claim numbers are taken from Archer-Western's "Request for Equitable Adjustment" dated December 16, 2003.

merit of any of the claims described herein. Dollar amount of claims are stated for identification only.

CLAIM # XV-A – SECTION 2B PARTIAL BACKFILL AND DEWATERING SYSTEM DEACTIVATION

This claim was for $6,821.92. The claim was withdrawn without condition.

CLAIM # XV-B – PLAN REVISION NO.5

This claim was for $4,174.88. The claim was withdrawn without condition.

Claim # XV-C – Section 2B Well point Reconfiguration

This claim was for $5,355.45. The claim was withdrawn without condition.

Claim # XV-D – Hurricane Gordon

This claim was for $12,633.94. The claim was withdrawn without condition.

Claim # XV-E – PCN-069 Sign Frame Mobilization

This claim was for $12,883.29. The claim was withdrawn without condition.

Claim # XV-G – Prefabricated Booth Cleaning

This claim was for $5,524.67. The claim for the direct costs of the booth cleaning was withdrawn, with the condition that the claim remains as a basis to allege that the change order therefor was issued during a period of liquidated damages and relieves Archer-Western from payment of liquidated damages.

Claim # XV-H. Section 2B Septic Cleanup

This claim was for $2,140.85. The claim for the direct costs of the septic system work was withdrawn, with the condition that the claim remains as a basis to allege that the change order therefor was issued during a period of liquidated damages and relieves Archer-Western from payment of liquidated damages.

Claim # XV-I. Section 2B Gate Relocation

This claim was for $1,170.09. The claim was withdrawn without condition.

Claim # XV-K. Rejected Handrails

This claim was for $11,062.40. The claim was withdrawn without condition.

Claim # XV-L. Additional Mobilizations for Backfill Operations

This claim was for $9,337.57. The claim was withdrawn without condition.

Claim # XV-M --Concrete Joint Sawing

This claim was for $5,205.82. The claim was withdrawn without condition.

CLAIM # XV-N – RAMP A2 PAVEMENT REPAIR

This claim was for $9,434.64. The claim was withdrawn without condition

EXECUTION

All members of the DRB concur.

Date: September 21, 2005

Lynn Gibson, P.E.
Chairman

John W. Nutbrown
Member

Robert J. Robertory
Member

SUNCOAST PARKWAY TOLL FACILITIES
FIN 258886-1-52-01— CONTRACT 20224

DISPUTE REVIEW BOARD

John C. Nutbrown, P.E.
Member

Lynn Gibson, P.E.
Chairman

Robert J. Robertory
Member

RECOMMENDATIONS ON CLAIMS BY
LIN R. ROGERS ELECTRICAL CONTRACTORS, INC.
SUBCONTRACTOR TO ARCHER-WESTERN CONTRACTORS, LTD

CLAIM # 23 – CONDUITS BELOW ROADWAY SLAB

CLAIM # 24 – DELETE PULL BOXES

CLAIM # 31 – EMBEDDED CONDUIT

Archer-Western Contractors, Ltd. (Archer-Western) holds Florida Department of Transportation (FDOT) Contract 20224 (Contract) for construction of toll facilities at several locations (designated as 1B, 2A, 2B, 4, 5, and 6) on the Suncoast Parkway. Archer-Western subcontracted the electrical portion of the work to Lin R. Rogers Electrical Contractors, Inc. (Rogers). The contract completion date was November 29, 2000 but the work was completed on December 19, 2001. FDOT retained Greenhorne and O'Mara to provide on-site construction engineering and inspection services on the Contract.

Archer-Western has submitted several claims, including claims by its subcontractor Rogers for extra work and for impact. On June 16, 2005, the DRB conducted a hearing on Rogers Claims 23, 24, and 31. Prior to the hearing, Rogers and FDOT attempted to negotiate a resolution, but were unable to reach agreement. FDOT then issued unilateral payments increasing the contract price in the amounts indicated below.

Except for an issue of compliance with the notice requirements of the prime Contract, the issue before the DRB is essentially to determine the amount of compensation to which Rogers may be entitled.

CONTRACTOR POSITION

CLAIM # 23 – CONDUITS BELOW ROADWAY SLAB

Rogers is claiming $198,308.93, less $24,695.53 for amounts paid under a unilateral payment as noted above, for a net claim of $173,613.40. The basis for the claim is that while the Contract Drawing Sheet #296 shows lane conduits running in roadway slabs, the FDOT

(Greenhorne and O'Mara) inspector on the Project directed Rogers to install the conduit under the slab.

Rogers's presentation alleged that it had planned to expend 932 labor hours costing $19,425.32 for this work, but the change forced it to expend 7,956 labor hours costing $165,823.15. Rogers seeks compensation for the difference, 7,024 labor-hours costing $146,397.83, or $182,997.29, with markups. In addition, Rogers alleges it incurred $7,193.90 for additional equipment costs and $8,117.74 for additional materials.

FDOT admitted that the inspector had erred. After Rogers had installed the conduit per the inspector's direction in sections 2B and 4 mainline, his order was then revoked and Rogers installed the conduits in the remaining sections per the drawings.

CLAIM # 24 – DELETE PULL BOXES

Rogers is claiming $130,251.92, less $23,987.04 previously paid under a unilateral payment as noted above, for a net claim of $106,264.88. The basis for the claim is that Rogers was directed to relocate conduits that connected to the duct banks at the small ramp toll facilities, and to remove 24" by 24" concrete pull boxes, relocating the conduits. This change caused the size of the duct banks to be enlarged to handle additional conduits.

Rogers's presentation alleged that it had planned to expend 800 labor-hours costing $15,232.13 for the affected work, but this change forced it to expend 5,422 labor-hours costing $104,507.29. Rogers seeks compensation for the difference, 4,622 labor-hours costing $89,275.16, or $111,593.95 with markups. In addition, Rogers claims $16,357.20 for additional equipment cost and $2,300.77 for additional materials.

CLAIM # 31 – EMBEDDED CONDUIT

Rogers is claiming $48,388.32, less $17,572.19 granted by unilateral payment as noted above, a net claim of $30,816.13, for having to embed conduit for tunnel lighting in the walls at mainline locations 2B, 4, and 6, rather than strapping the conduit to the wall exteriors as permitted by the plans.

Roger's presentation alleged that it had planned to expend 800 labor-hours costing $15,423.17 to install these conduits on the walls, but the change caused it to expend 2,794 labor-hours costing $54,133.83. Rogers seeks compensation for the difference, 1,994 labor-hours costing $38,710.66, or $48.388.02 with markup.

THE NATIONAL ELECTRICAL ESTIMATOR

As discussed below, FDOT used the 2000 and the 2005 editions of the *National Electrical Estimator* to determine what it deemed to be reasonable compensation. Rogers alleges that the *Estimator* is not intended to be used to price change orders.

In support of this contention, Rogers produced an e-mail from the Craftsman Book Company, publisher of the *Estimator* which stated in part:

> "All can agree that the cost of work done under a change order will be higher than the cost of work done under the original scope of work. The primary differences are in: 1. Administrative costs – processing the change. 2. Additional supervision expense – implementing the change. 3. The cost of mobilizing and demobilizing for each change. 4. The loss of economies of scale associated with task switching. . .But these costs are also beyond the scope of the 2005 National Electrical Estimator. . .It's fair to say that 2005 National Electrical Estimator should not be used to price change order work without giving special consideration to the four differences listed above. . ."

FDOT POSITION

Failure to Give Notice

With regard to all three claims, FDOT contends that Archer-Western/Rogers has failed to give the notice required by 1990 Standard Specifications section 5-12 "Claims by Contractor." [Factually, this is not contested.] That clause reads in pertinent part:

> "Where the Contractor deems that extra compensation is due him for work or materials not clearly covered in the contract or not ordered by the Engineer, the Contractor shall notify the Engineer in writing of his intention to make claim for extra compensation, before he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper opportunity for keeping strict account of actual cost, then the Contractor thereby agrees to waive the claim for such extra compensation. . ."

FDOT contends that its first notice that Rogers would be seeking additional compensation came when the project was completed or nearing completion, well after the work for which claims were made had been completed.

Claim # 23 – Conduits Below Roadway Slab

FDOT contends that "it is difficult to determine the scope of work encompassed by the quantities and hours [Rogers] states] were required to perform the work" in that not all conduits could have been placed under the pavement. In the absence of precise time and cost records, FDOT opted to estimate the cost of the work by applying the *2005 National Electrical Estimator* to estimate the hours necessary to install the work as proposed. FDOT notes that the labor materials, and equipment prices in the *2005 National Electrical Estimator* would not be applicable to the contract work, which was performed in the 1999-2001 time frame. FDOT also contends that Rogers did not have the direct supervision on the project that would have presented this issue from arising.

FDOT proceeded to work up its own estimate, using the *2005 National Electrical Estimator* for labor-hours, as follows:

a. Materials: FDOT's estimate of work accepted the Rogers price for additional materials, $8,117.74. However, it orally noted at the hearing that it had erred, by applying a

17.5% markup and raising it to $9,538.34, when Rogers had already applied an 18% markup in reaching the $8,117.74.

b. Labor: Using the *2005 National Electrical Estimator*, FDOT calculated that 622.9 hours would be a reasonable time for the additional work. Applying the labor rates in the *Estimator*, FDOT calculated an entitlement of $20,890.65. Since the 2005 labor rates exceed the actual rates paid by Rogers in 1999-2001, FDOT also calculated the entitlement using the actual labor rates, calculating an entitlement of $15,845.79. Applying markups (25%) to this, yielded an FDOT position that Rogers is entitled to $19,807.24.

c. Equipment: FDOT would allow $3,830.05 for equipment costs, based on its calculation of the time the equipment would have been required to perform the additional work.

The Engineer's Estimate concluded total compensation of $21,139.76 was due. The unilateral payment paid $24,695.53.

The FDOT estimate would allow Rogers 490.9 labor-hours to perform the additional work.

CLAIM # 24 – DELETE PULL BOXES

The additional work in issue was the result of RFI #14, dated February 18, 1999. It requested the elimination of three pull boxes and their replacement with a 90° bend, cross-referencing RFI #2 on another project not part of this contract. The RFI for the other project noted that the installation must comply with the maximum number of 90° bends permitted by the *National Electrical Code*. RFI #14 did state that "This response constitutes a change in the work and requires an adjustment to the contract by Work Order or Supplemental agreement." Rogers did not, until the work was complete or almost complete, submit a proposal. Rogers "was requested to provide daily records of crew activities" to support the claim, but did not. Although the scope of work is the same at each plaza, there is wide discrepancy among the hours claimed at each site, ranging from 361 hours at Section 4, Ramp D, to 1,349 hours at Section 5, Ramp H3.

FDOT prepared its own estimate, based upon:

a. What was bid to excavate the duct banks and what was actually excavated, a difference of 210 cubic yards. Estimating that 7 cubic yards per hour could be excavated, using one pickup truck and one backhoe, FDOT estimated the additional cost as $5,589.25.

b. What was bid to backfill the duct banks and what was actually backfilled, a difference of 170 cubic yards. Estimating that 3 cubic yards per hour could be backfilled, using one pickup truck, one backhoe, and one compactor, FDOT estimated the additional cost as $14,307.16.

c. What was bid to excavate the building area and what was actually excavated, a difference of 45 cubic yard. Estimating that 7 cubic yards per hour could be excavated, using one pickup truck and one backhoe, FDOT estimated the additional cost as $1,397.31.

These total $21,293.72. Rogers was paid $23,987.04 by unilateral payment. The Engineer's Estimate supporting the change order allowed $19,519.50 for labor, including markups, $1,646.56 for equipment, and $270.71 for materials, for a period of 12 days. The

materials included in this estimate were primarily PVC pipe and galvanized 90° bends. but did not include concrete.

CLAIM #31 – EMBEDDING CONDUITS

FDOT concedes that the work was changed at the request of FDOT. FDOT calculated that a total of 2067 linear feet of conduit was embedded in the concrete in lieu of being exposed as shown in the contract drawings.

FDOT utilized the *2000 National Electrical Estimator* to perform two sets of calculations to ascertain what it deemed to be a reasonable expenditure of time and costs for the additional work. The first set of calculations was for labor and materials costs to embed conduit in concrete under very poor conditions, which FDOT calculated to total $9,176.06. The second set was for labor and materials to attach conduit to the walls, totaling $10,937.75. In performing these calculations, FDOT considered that the labor costs in the *2000 National Electrical Estimator* were comparable to Rogers's actual rates.

Because the unilateral payment was in the amount of $17,572.19, the FDOT contends that Rogers is entitled to no further compensation.

DISCUSSION

FAILURE TO GIVE NOTICES

Archer-Western/Rogers failed to comply with the requirements of section 5-12 of the contract documents in that neither gave notice of intent to file these claims. However, notwithstanding this failure, FDOT negotiated with Rogers after receiving these claim and in fact, after the negotiations failed to produce agreement, issued unilateral payments to compensate for what it considered was reasonable compensation. The DRB is of the opinion that the FDOT's negotiation and payment of these claims constituted a waiver of the contractual requirement and does not preclude recovery.

DOCUMENTATION OF AND SUPPORT FOR CLAIMED AMOUNTS

However, this does not negate all of the effects of failing to file a claim or give notice of claim. Had such a claim or notice of claim been filed in advance of or contemporaneous with the work, there would have been documentation produced which would record the efforts of Rogers to perform the changed work. Given the magnitude of some of the labor-hours claimed to have resulted from the changed work when compared to the as-bid labor-hours, the DRB must conclude that there was a total failure of supervision/subcontract administration on the part of Archer-Western and Rogers.

A claimant, be it an owner or a contractor, must provide some support for the amounts claimed. Calculating the difference between the as-bid costs for labor-hours, materials, and equipment and the actually incurred costs for labor, material, and equipment, as Rogers did in these three claims, is flawed. Rogers has attributed all of the time and cost difference between as-bid and as-built to the owner. Rogers in its presentation on Claims 23, 24, and 31 has given no consideration to contractor-created delays due to inefficiencies resulting from lack of

supervision of equipment and manpower, coordination of crews and subcontractors, and overall scheduling of project activities.

On several occasions the Rogers-generated documents submitted to the DRB reflect an Archer-Western failure to properly coordinate subcontractors.

The documents submitted to the DRB show that with regard to some of the elements of these claims, the multiplication of actual hours over as-bid hours is of such magnitude that Rogers should have very quickly been aware that something was not proceeding as expected and made inquiry. Its on-site supervisors, if any, should have advised management that changes were being effected.

As a result, the DRB determines that the difference between as-bid and actual quantities and costs is not an appropriate way in which to ascertain the amount of the compensation to which Rogers is entitled. The DRB must endeavor to ascertain the reasonable costs which a prudent and reasonable contractor would have incurred to perform the work. The only evidence available to the DRB in this regard are the calculations performed by FDOT.

The National Electrical Estimator

FDOT erred in using the 2000 and 2005 editions of *National Electrical Estimator* in calculating labor-hours and costs for use in pricing change orders. The DRB accepts the publisher's statement that the four listed factors are not considered in its data. Unfortunately, FDOT did not utilize other publications, which are available for the purpose of pricing change orders.

The DRB has thoroughly examined and considered the method of estimating the cost of Claims #23, #24, and #31 and finds the FDOT's approach to be reasonable and fair, with the exception of compensation for home office overhead for the additional days of work. Rogers' accounting and financial inspection firm, Quantum Consulting Group LLC, has calculated Rogers' home office overhead to be $229.00 per day. This amount is consistent with the formula used by the FDOT in updated specifications. The DRB accepts the $229.00 per day for Rogers' home office overhead.

Claim # 23 – Conduits Below Roadway Slab

Inasmuch, as noted above, the FDOT Engineer's Estimate of the time and costs involved in performing the additional work is the only means presented to the DRB to ascertain the amount to which Rogers is entitled, the DRB accepts that estimate as the basis for our Recommendation. Also as noted above, there are two errors in the estimate.

The first was the Engineer's error in applying an 18% markup on materials, when a 17.5% markup had already been applied. Thus, $1,420.60 ($9538.34 - $8117.74) should be deducted from the amount of the estimate.

The second relates to home office overhead. As determined above, the DRB adds $229.00 per day as compensation for home office overhead. Assuming g this was a one-person

crew, then given the 61.4 additional days (490.9 journeyman hours ÷ 8 hours per day) that the FDOT Engineer calculated, the DRB recommends that the sum of $14,060.60 should be added to provide for home office overhead. If it should be determined that in fact the crew assigned to this task consisted of more than one person, then this calculation of days should be adjusted accordingly.

The DRB recommends that $12,640.00 be added to the amount previously given by the unilateral payment.

CLAIM # 24 – DELETE PULL BOXES

For the reasons stated above, the DRB deems the Engineer's estimate to be the only reasonable basis for calculating the additional costs. There are two adjustments to be made to the amount he determined.

The first is that no allowance was made for concrete. Given the requirement for larger duct banks, there must have been a increase in the volume of concrete required. The volume for which claim was made approximates what would have been required to construct the larger duct bank. The DRB therefore determines to add the cost Rogers alleges it incurred for additional concrete, $2,300.77.

The second was not taking into consideration home office overhead. As determined above, the DRB adds $229.00 per day for the 12 additional days that the FDOT Engineer calculated, an additional $2,748.00.

The DRB recommends that FDOT pay $5,048.77 in additional compensation for the extra work, over and above that contained in the unilateral payment.

CLAIM # 31 – EMBEDDED CONDUIT

The Rogers claim referred to additional effort it expended to repair damage caused by rod busters after it has installed the conduit. Such damage is not the responsibility of FDOT and therefore Rogers is not entitled to any compensation therefor. Rogers is only entitled to compensation from FDOT for the additional material and time that was reasonably involved in performing the changed work, not for damages caused by others, including the prime contractor and other subcontractors..

While Rogers has only claimed for additional labor, the DRB determines that it should also be compensated for installing an additional 500 feet of conduit. The DRB recommends that Rogers be paid an additional $2,204.23 for the labor and material cost to install the additional 500 feet.

Rogers is also entitled to additional compensation for home office overhead, at the rate of $229.00 per day. Reviewing the allowances by the FDOT Engineer, the DRB determines that this change to the work caused Rogers an additional 10 days of effort. The DRB recommends that the sum of is to be added to the amount previously given by the unilateral payment. The

DRB recommends that the sum of $2,290.00 should be added to provide for home office overhead.

The DRB recommends that $4,493.23 be added to the amount previously given by the unilateral payment.

RECOMMENDATIONS

1. The DRB recommends that $12,640.00 be added to the amount previously given by the unilateral payment, for the Tab 23 Claim, Conduits Below Roadway Slab.

2. The DRB recommends that $5,048.77 be added to the amount previously given by the unilateral payment, for the Tab 24 Claim, Delete Pull Boxes.

3. The DRB recommends that $4,493.23 be added to the amount previously given by the unilateral payment, for the Tab 31 Claim, Embedded Conduit.

All members of the DRB concur in these Recommendations.

Date: 7/5/05

Lynn Gibson, P.E.
Chairman

John W. Nutbrown, [redacted]
Member

Robert J. Robertory
Member