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**DISPUTES REVIEW RECOMMENDATION**

April 29, 2002

Ms. Ronda S. Daniell  
Assistant Resident Engineer  
Florida Department of Transportation  
1217 S.W. 10<sup>th</sup> Street  
Ocala, Florida 34474

Ms. Cynthia Snow White  
White Construction Company, Inc  
P.O. Drawer 790  
Chiefland, Florida 32644

Mr. Kent A. Selzer  
Qualex Consulting Group  
4311 W. Waters Ave., Ste. 304  
Tampa, Florida 33614

RE: SR-500 (US-27) from CR-326 to CR-326-A  
Marion County, Florida  
F.P.ID 238679-1-52-01 & 238678-1-52-01  
SPN 36070-3501 & 36070-3503  
Contract 20605

SCANNED

**SUBJECT: Claim Issue No. 20, Haul Road Delay Claim.**

MAY - 3 2002

Ocala Construction

To whom It May Concern:

The owner, Florida Department of Transportation (FDOT), requested a hearing to determine **Entitlement** of White Construction Company, Inc. (WCCI) to **additional contract time and compensation for delays encountered when the Board of County Commissioners of Levy County, Florida modified the recommendation of the Levy County Board of Adjustment for a borrow pit permit and the haul road to the borrow pit.**

Should **entitlement** for WCCI be established, the Disputes Review Board (DRB) is to determine the quantum of such entitlement.

Correspondence and other information relating to FDOT's and WCCI's position were provided the DRB prior to the hearing for review and verbal presentations at the hearing held on April 5,2002.

**CONTRACTOR'S POSITION:**

*In August 9, 2000, White Construction Company, Inc. (WCCI) received approval from the Levy County Board of Adjustments (Board) for a Special Exception Permit for a borrow pit. This permit approved the hauling of borrow material from the pit to the US-27 project (Fin No 238679-1-52-01 & 238678-1-52-01). The Board attached a list of conditions to the permit. "Pave SE 62<sup>nd</sup> Place to County Specifications.....". The intent of the Board and the interpretation of WCCI was the road was to be paved. Almost one year later, when WCCI contacted Levy County to begin coordinating the paving of the road, the Levy County Commissioners modified the conditions to require WCCI to reconstruct the roadway before*

paving could commence. This reconstruction substantially delayed the hauling operations on the project – which was a controlling item of work.

Per FDOT Specification 4-4 and 8-7.3.2.1, WCCI request a contract time extension that will account for the delay incurred.

**POSITION PAPERS – WCCI**  
**LEVY COUNTY BORROW PIT TIMETABLE**

- August 9, 2000 Levy County Board of Adjustments Meeting – petition and approval of the proposed Borrow Pit.
- August 10, 2000 Letter sent to White Construction Agent approving the Special Exception (Borrow Pit) Permit with attached conditions
- September 7, 2000 Endangered Species Act – clearance from FDOT.
- October 23, 2000 Historical Resources Approval from the Secretary of State.
- June 14, 2000 Letters to forward the Endangered Species and Historical Resources approvals to the Project Engineer.
- Mid June 2001 White Construction made contact with Levy County Road Department to coordinate the paving operations. White Construction planned to pave the county road (estimated 2 days worth of work) during the days just prior to the Forth of July Holiday.
- July 2, 2001 White Construction verbally finalized an agreement with CSX railroad and began to process the proper paperwork.
- July 3, 2001 Letter from the Levy County Road Department directing White Construction to construct the haul road to county specifications – with attached Typical Sections. Letter also request information concerning the CSX Railroad crossing.
- July 5, 2001 White Construction's anticipated date to begin hauling material from the borrow pit.
- July 24, 2001 Letter from White Construction to Levy County Road Department with attached agreement between White Construction and CSX.
- August 1, 2001 Letter from the Levy County Board of Adjustments Chairman, Mr. Dennis Andrews, clarifying the intent of the Board of Adjustments Conditions.
- August 18, 2001 Levy County Road improvements completed.
- August 20, 2001 First day of hauling from the borrow pit.

**Letter of January 4, 2002 to Mr. Dennis Lindsey, Project Engineer:**

White Construction Company, Inc (WCCI) request \$69,423.81 and 28 contract days for the delays we suffered due to an unanticipated permit alterations by the Levy County Commission. Please find attached all permits and such that are required for borrow pit – and please note that the pit and permits were secured nearly a year before our planned start date of July 5, 2001. There was a delay of 28 days after deducting Sundays and granted Weather Days.

**DEPARTMENT'S POSITION:**

**Letter of January 9, 2002 to Mr. Luther White III**

We have completed our review of your claim 20, on the above referenced project that was submitted to our Resident Engineers office and forwarded with his comments and recommendations to this office.

*White Construction Company requested 28 days and \$69,423.81, for indirect cost related to a claimed delay alleged to be the result of unanticipated permit alterations imposed by Levy County for the operation of a borrow pit to supply fill material to the project. Our review of the provided documentation and discussions with representatives of Levy County, found that the issue appears to be interpretation of the conditions imposed upon the Contractor by the County, rather than alterations by the county. The conditions imposed by the County include "Pave SE 62<sup>nd</sup> Place to County specifications...". The Contractor interpreted this condition as a requirement for them to place asphalt upon the existing dirt road. The County contends that subgrade and base were required prior to the placement of the asphalt surface on the dirt.*

*Regardless of the situation encountered by the Contractor, White Construction is solely responsible under the contract for selecting its own off site borrow sources and securing all related permits and fees in a timely fashion so as not to delay work. White is solely responsible under the contract for planning, coordination, and scheduling the work. The Department has no control over the timing of White Construction's permit applications, or the local requirements for such permits. The Department has no responsibility for, or control over, and work performed by White Construction outside the limits of construction. The Department also has no responsibility or control over the actions of Levy County.*

*Based upon the facts presented, White Construction is not entitled to any additional time or monetary compensation from the Department for this claimed issue. Therefore, your request for Claim 20 is denied.*

### **BOARD'S FINDINGS:**

- WCCI referred to paragraph 4-4 **Unforeseeable Work:** *When work is required which not covered by a price in the contract and such work does not constitute a "Significant Change" as defined in 4-3.2.1, and such work is found essential to the satisfactory completion of the contract within its intended scope, an adjustment will be made to the contract. The basis for such adjustment will be in the amount as the Engineer may determine to be fair and equitable.*
- WCCI referred to paragraph 8-7.3.2.1 (Not in 1991 Standard Specifications for Road and Bridge Construction) we will refer to paragraph 8-7.3.2 **Contract Time Extensions:** *The Department may grant an extension of contract time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid. Such extension of time may be allowed only for delays occurring during the contract time period or authorized extensions of the contract time period. When failure by the Department to fulfill an obligation under the contract results in delays in the controlling construction operations, such delays will be considered as a basis for granting credit to the contract time. Extensions of contract time will not be granted for delays due to the fault or negligence of the Contractor. (This paragraph copied in part).*
- In testimony presented during the hearing WCCI stated, of the bid quantity of 1,117,954 Cubic Yards of Borrow Material (truck measure) a source for approximately 60% of plan quantity was known at time of bid. After the contract award, WCCI attempted to obtain a site in Marion County but had two sites rejected by the Board of County Commissioners of Marion County.

- WCCI then applied for a permit in Levy County through the Board of Adjustment and on August 9, 2000 in a public hearing were granted a Special Exception for a Borrow Pit based on the Planning Commission's recommendations with attached conditions. The DRB is not clear how the approval process is structured in Levy County therefore must assume the Recommendation is presented to the Board of County Commissioners of Levy County for a vote on granting the permit. A copy of the actual permit was not included with material presented the DRB.
- In the 1991 Standard Specifications for Road and Bridge Construction **Section 7-2 Permits and Licenses. Paragraph 7-2.1 General:** *Except as provided herein below for certain permits, the contractor shall procure all permits and licenses, and he shall pay all charges and fees and give all notices necessary and incidental to the due and lawful prosecution of the work.*
- **7-11.3 Contractor's Use of Streets and Roads: Paragraph 7-11.3.1 On Systems Other than the State Highway System:** *Where the Contractor hauls materials or equipment to the project over roads and bridges on the state park road system, county road system, or city street system and such use causes damage, he shall immediately, at his expense, repair such road or bridge to as good a condition as before the hauling began.*
- The Department did not create or cause delays that impeded the Contractors progress therefore paragraph 8-7.3.2 of the Standard Specification is not applicable concerning the Department.
- During the hearing verbal reference to a Supplemental Agreement (SA) issued on State Project No. 97102 & 97102-6312 on the Veterans Expressway in Hillsborough County was made. The Board requested and received a copy of the executed S.A. April 22, 2002. WCCI feels the conditions generating S.A. No. 4 on the referenced project, dated August 6, 1993, were similar to the conditions outlined in Claim No. 20 of this project, therefore established a precedent by the Department and WCCI is entitled to the damages claimed in Claim No. 20.
- The majority of the DRB cannot establish by specification a correlation between the S.A. issued on the Veterans Expressway and Claim No. 20 on this project.
- The plans or specifications did not provide the source or location for the borrow material for this project.
- At the time of bid the Contractor, by testimony, did **not** know a source for nearly one third of the 1,117,954 C.Y. of borrow required for this project and elected to "gamble" on locating a pit if awarded the contract.
- The contract documents for this project are very clear about the Contractors responsibility for providing all materials to fulfill the requirements for constructing every phase of the contract.

**BOARD'S RECOMMENDATION:**

**Based on materials supplied to the Board prior to and following the hearing and presentations to the Board at the DRB hearing, the Majority of the Board recommends that the Contractor has NO ENTITLEMENT to claims presented in issue No. 20 "Haul Road Delay Claim".**

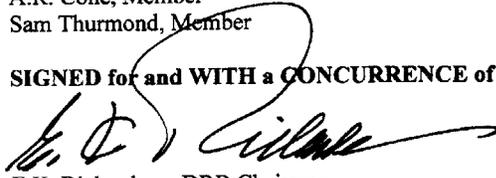
The Board sincerely appreciates the cooperation of all parties involved in preparing the presentations, prior to, during, and following the hearing in making this recommendation.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days after receipt of the document. Failure to respond constitutes acceptance of this recommendation by the non-responding party.

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

Respectfully Submitted,  
Disputes Review Board  
E.K. Richardson, Chairman  
A.R. Cone, Member  
Sam Thurmond, Member

**SIGNED for and WITH a CONCURRENCE of a MAJORITY of MEMBERS:**



E.K. Richardson, DRB Chairman

**Dissenting Opinion of DRB Recommendation**

**Re: SR 500 (US 27) from CR 326 to CR 326 A  
FPN 238679-1-52-01, etc.  
Marion County  
Levy County Borrow Pit Haul Rd.**

Gentlemen:

This dissenting opinion is offered with the full knowledge and consent of all Dispute Review Board members of the above project.

This member believes that the Contractor, White Construction (hereinafter referred to as WCCI) **is entitled to additional time and money** due to factors that were beyond its control. The majority of the Board found that:

*"The Department did not create or cause delays that impeded the Contractors progress therefore paragraph 8-7.3.2 of the Standard Specification is not applicable concerning the Department." (see 4<sup>th</sup> bullet point, page 4 of Recommendation)*

This Board Member agrees that the Department did not create or cause the delay. However, the specification does not require that the Department be culpable or responsible for the delay. It merely requires a situation wherein *"work is delayed by factors not reasonably anticipated or foreseeable at the time of bid."* The Levy County decision to require total reconstruction in lieu of re paving was a factor that WCCI could not anticipate.

In the recommendation, the majority has highlighted the word *"may"*. Apparently the majority believes that the Department can, but is not required to grant an extension of time. This member agrees with this opinion except when the Department acts arbitrarily or capriciously. If it can be proven that, in past cases, the Department has granted time and/or remuneration to other contractors for similar problems, then the Department is duty bound to grant such time and monetary compensation. This member believes that the Supplemental Agreement provided from the Veterans Expressway project satisfies the test that the Department actions on US 27 were arbitrary and capricious.

In his rebuttal, Mr. Frank O'Dea, FDOT District 5 Construction Engineer, pointed out some differences in facts between the issue at hand and the Veterans Expressway SA, citing the occurrences initiated by the "source" county and the "receiving" county. In this author's opinion these differences are moot. Further, the contractor on the Veterans Expressway had no permits in place prior to the bid either. It is extremely common for contractors to have option agreements in place with property owners prior to bidding but it is rare for the contractor to have already purchased the property and initiate the permitting process until after he has been announced as the successful bidder on a project. Economics simply will not allow a contractor to finance a project by procuring property, permitting it as a material source, and then hoping he is the successful bidder.

Other examples of the Department granting time and money where they were not at fault for delays to contracts are the numerous *"El Nino"* claims that were filed throughout the state. Many contractors were compensated for the damages and delays incurred and this was no fault of the Department as well. Why is the interference of a third party such as Levy County any different? It certainly was no fault of the contractor.

In summary, article 8-7.3.2 of the FDOT Standard Specifications for Road and Bridge Construction offers relief to the contractor for any of the following instances:

1. Delays caused by factors beyond the control of the contractor.
2. Delays caused directly by the Department.
3. Delays caused by the effects of inclement weather.
4. Delays in delivery of materials or component equipment caused by area wide shortages, industry wide strike, or natural disaster.
5. Delays in delivery of custom manufactured equipment.
6. Delays in utility construction or relocation.

Any, or all, of the above occurrences are grounds for extending contract time and WCCI has met the test with respect to item no. 1 above.