

RECOMMENDATION No. 1

November 12, 2007

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Re: Financial Project ID: 231918-1-52-01 / 02
Federal Aid Project Number: 0951 568 I
Contract ID: T4039
County: Palm Beach,
Description: SR-9 (I-95) 12th Avenue South to 10th
Avenue North

Subject: Convene Dispute Review Board and Conduct a Hearing for Entitlement
Regarding The Contractor's Notice of intent to Claim
For Weather Days after Expiration of the Authorized Contract Time.

The Dispute Review Board was convened for a hearing requested by The Corradino Group. The Hearing was conducted on November 5, 2007 in the Conference Room at 321 South Dixie Highway , West Palm Beach, FL.

Packages of information and position statements were presented to the Board by both parties and excerpts are included in this recommendation.

Astaldi Construction's Position:

Subject: Weather/ delay days

ISSUE:

This issue brought before the Board is entitlement for weather/ delay days after the contract time has expired. **Should the Department grant weather/delay days to the Contractor after the Contract time has expired?**

The Department's Position:

The Departments Representative, The Corradino Group has issued letters stating "*that no more contract extensions due to weather will be granted I refer you to the Supplemental*

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Specifications, article 8-7.3 for time extension related to weather and Supplemental One article 8-13.2 extensions on disincentives.” (See page 4)

Article 8-7.3.2 of the Supplemental Specification states “*The Department may allow such time extensions only for delays occurring during the Contract Time period or authorized extensions of the Contract Time Period*”.(see Page 5)” By definition Contract Time is “*The number of calendar days allowed for completion of the Contract work, including authorized time extensions.*”(See page 6)

Article 8-7.3.2 of the Supplemental Specifications for this Contract States “*The Department does not include an allowance for delays caused by the effects of inclement weather in establishing Contract Time. The Department will grant time extensions, on a day for day basis, for delays caused only by the effects of rains or inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work...* ” (See page 5)

The Contract is based on the Standard Specification for Road and Bridge Construction 2000. With the Supplemental Specifications which altered Article 8-7.3. The original 2000 specification read “*The Department does not include an allowance for delays caused by the effects of inclement weather in establishing Contract Time. The Department will handle time extensions for delays caused by the effects of inclement differently from those resulting from other types of delays.*”(See page 7)

In accordance with CPAM 7.2.4.4 the CEI can only grant weather days during contract time, but it does not state that delays can not be granted under 5-12 of the specification. (see page 8)

The Supplemental specifications changed the wording to read “*The Department does not include an allowance for delays caused by the effects of inclement weather in establishing Contract Time. The Department will grant time extensions, on a day for day basis, for delays caused only by the effects of rains or inclement weather conditions or related adverse soil conditions prevent the Contractor from productively performing controlling items of work resulting in:*”(see page 5)

This change can be construed to mean on a day for day basis, during Contract Time and after Contract Time. As day for day is not clear as to whether it is, Contract Day, Calendar Day, or Work Day etc...

Based on previous DRB issues specifically October 15 Olympus Paint the department official position is that the term "day for day" is a calendar a day for each day of delay (see page 9-11). By definition a calendar day is "*Every day shown on the calendar, ending and beginning at midnight*" (See page 12). Consequently the department's position that day for day means calendar day does not preclude weather/ delay days after the contract time.

By definition Delay is "Any unanticipated event, action, force or factor which extends the Contractor's time of performance of any controlling work item under the Contract. The term "delay" is intended to cover all such events, actions, forces or factors, whether styled " delay", "disruption", "interference", "impedance", "hindrance", or otherwise, which are beyond the control of and not caused by the Contractor, or the Contractor's subcontractors, materialmen, suppliers or other agents."(See page 6)

Obviously weather days that prevent performance of controlling work items under the Contract are beyond Astaldi's control and not caused by our subcontractors, material men, suppliers or other agents. Consequently a weather day qualifies as a delay. In accordance with article 5-12 Claims by Contractor. 5-12.1 General: "When the Contractor deems extra compensation or time extension is due beyond that agreed to by

the Engineer, whether due to delay, additional work, altered work, differing site conditions, breach of Contract, or for any other cause, the Contractor shall follow the

procedures set forth herein for preservation, presentation and resolution of claim".(see article 5-12.2.2 Claims for Delay page 13).Astaldi has submitted the required notification under article 5-12 and consequently preserved their rights.(See pages 14-22)

Article 8-10 Liquidated Damages states under article 8-10.4 Conditions under which Liquidated Damages are Imposed: “ *If the Contractor or, in case of his default, the surety fails to complete the work within the time stipulated in the Contract, or within such extra time that the Department may have granted then the Contractor or, in case of his default, the surety shall pay to the Department, **not as a penalty**, but as liquidated damages, the amount so due as determined by the Code requirements, as provided in 8-10.2*” (see page 23)

Summary: Astaldi believes that whether the specification 8-7.3.2 is interpreted a “**day for day basis**” to mean during and or after contract time that article 5-12 allows for the extension of time due to delays. In addition, in accordance with article 8-10.4 that *liquidated damages are not as a penalty*, not granting weather days for days that the controlling work items can not be performed, and by the Department continuing to charge liquidated damages is punitive and is not within the spirit of the contract. Astaldi believes that the intent of the specification is to allow for time extensions due to delays regardless of whether it is granted under article 8-7.3.2 or article 5-12. Weather delays are a natural hazard beyond Astaldi’s control.

The Corradino Group Position Paper:

Background

The Contractor has submitted written Notice of Intent to claim for additional time and cost associated with weather impacts affecting the limerock base grading and paving operations on September 22nd, 24th, 25th, 26th, and 30th, and October 1st, 2nd, 3rd, 4th and 5th of 2007.

Review of the Contract

The Contractor is attempting to use Article 5-12 of the Supplemental Specifications (***Exhibit 1***) to request time and monies for weather impact. The specifications are clear that, whether the Contractor submits a claim under Sub-Article 5-12.2.1 “Claims for Extra Work” or submits a claim under Sub-Article 5-12.2.2 “claims for Delay,” the Contractor must follow the requirements of Sub-Article 8-7.3.2 for any time extension requests.

Please note that both Sub-Articles 5-12.2.1 and 5-12.2.2 state: “and If seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant 8-7.3.2.

Sub-Article 8-7.3.2 of the Supplemental Specifications (***Exhibit 2***) states: “The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid. ***The Department may allow such extension of time only for delays occurring during Contract Time period or authorized extensions of the Contract Time period.*** [Emphasis added]

The last approved contract day on this project was July 23rd, 2007. All requests for weather impacts referenced by the contractor in this instance occurred after the contract time expired. In relation to any claim for additional compensation associated with weather impacts, Sub-Article 8-7.3.2 expressly states that “No additional compensation will be made for delays caused by the effects of inclement weather.” The

last paragraph of this sub-article also states: “...***the Department’s determination as to entitlement as to either time or compensability will be final unless the Contractor can provide clear and convincing evidence to a Disputes Review Board that the Department’s determination was without any reasonable factual basis.***”

Recommendation

Based on Sub-Article 8-7.3.2 it is clear that the Contractor is not entitled to time or any other compensation for delays caused by the effects of inclement weather after the approved Contract time, as adjusted by time extensions, has expired.

Contractors Rebuttal

ISSUE: This issue brought before the Board is entitlement for weather/delay days after contract time has expired. **Should the Department grant weather/ delay days to the Contractor after Contract-Time have expired?**

Departments position: The Department states “*the contractor must follow the requirements of sub-Article 8-7.3.2 for any time extension requests*”. Please note that both Sub-Article 5-12.2.1 and Sub-Article 5-12.2.2 state “*and if seeking a time extension, the contractor shall also submit a preliminary request for time extension pursuant 8-7.3.2...*”

Astaldi’s Rebuttal: Astaldi submitted notification of intent to claim in accordance with article 5-12.2.2 and as **weather days are granted on a day by day basis**, Astaldi indicated on the notification of intent to claim the specific date that was being claimed, thus fulfilling the requirement of preliminary request for time extension in accordance with article 8-7.3.2. In addition Sub-Article 8-7.3.2 states “*The engineer will continually monitor the effects of weather and when found justified, grant time extension on either a bimonthly or on monthly basis. The Engineer will not require the contractor to submit a request for additional time due to the effects of weather*” (see page3). Continually by definition is *very often, at regular or frequent intervals; habitually; without cessation or intermission; unceasingly; always* (see Page 4). If the Engineer was and is continually monitor the effects of weather he is already aware of the days impacted and as a reminder Astaldi has submitted the notice of intent and the day that was impacted by the effects of inclement weather.

Department’s position: Sub-Article 8-7.3.2 states “**The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of Contract Time period.**”[Emphasis added]

Astaldi's Rebuttal: As stated in Astaldi's position paper the Article granting the right to receive time extensions for the effects of inclement weather can either be 8-7.3.2 or 5-12.2.2 and as Astaldi has complied with the requirements of 5-12.2.2 has the right to seek the time extension relating to the effects of inclement weather.

SUMMARY: Astaldi has complied with the requirements of the contract and has the right to seek time extensions due to the effects of inclement weather after the Contract Time has expired under Article 5-12.2.2. If the Engineer is prosecuting his duties in accordance with the contract he has continually monitored the effects of inclement weather and has accurate records reflecting said impacts. As the contract clearly states "*The Department will grant time extensions, on a day for day basis, for the effects of inclement weather, and delays under article 5-12.2.2.*" By The Departments definition the effects of inclement weather clearly qualifies as a delay and as such the Contractor is entitled to an extension of time under the specification.

The Corradino Group Rebuttal

Astaldi's Position: "Day for Day"

Astaldi claims that the revision of the Supplemental Specification that changed the wording in Article 8-7.3.2 to "*...The Department will grant time extensions, on a day for day basis, for delays caused only by the effects of rains or inclement weather conditions...*" [emphasis added] can be construed to mean a day per day basis during construction time and after contract time, for any day on the calendar, if it affects the Contractor's prosecution of the work as further specified in the article.

Astaldi presented a DRB Ruling from October 15th, 2004 "Olympus Paint", presenting Department's position that the term "day for day" is a calendar day for each day of delay. Astaldi then concluded that based on the Department's position, which does not "box" or limit the calendar, it does not preclude them entitlement for weather impacts after the Contract time has expired.

Astaldi further defines delay as "Any unanticipated event, action, force, or factor which extends Contractor's time of performance of any controlling work item under the Contract. The term 'delay' is intended to cover all such events, actions, forces, or factors, whether styled 'delay', 'disruption', 'interference', 'impedance', 'hindrance', or otherwise, which are beyond the control of and not caused by the Contractor, or the Contractor's subcontractors, materialmen, suppliers, or other agents." [Emphasis added.]

FDOT Rebuttal

We are in agreement that any reference to "days" in Article 8-7.3.2 means calendar days. However, the definition of "day for day" to be a calendar day, does not entitle the Contractor to a time extension for weather impacts after the contract time has expired.

The Contractor's definition of delay quotes the general definition of delay from Article 1-3 of the Specifications. This general definition of delay does not, in and of itself, entitle the Contractor to a time extension for all delays. Other specifications address time extensions with greater specificity, and the specific cannot be ignored for the general. The specific language of 8-7.3.2 controls over the general language of 1-3.

Sub-article 8-7.3.2 addresses contract time extensions specifically, and is explicit in limiting time extensions only for delays occurring *during* the authorized Contract Time. The same article is very specific regarding how time extensions will be granted for the effects of inclement weather. There is no conflict or

ambiguity in the article; time extensions are limited to the authorized Contract Time. This specific limitation on time extensions is also not in conflict with the definition of delay in 1-3 or with the delay claim requirements contained in 5-12; in fact, 5-12 incorporates 8-7.3.2 by reference, which makes 8-7.3.2 controlling under 5-12 as well.

As already presented in our Position Paper, Sub-Article 8-7.3.2 states "The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid. ***The Department may allow such extension of time only for delays occurring during Contract Time period or authorized extensions of the Contract Time Period.***" [Emphasis added]

The Contract Time period, including all authorized time extensions, expired on July 23, 2007.

The Department does not dispute that weather has delayed the Contractor after the Contract Time expired. While neither the Contractor nor the Department create the weather, the Department believes that any impact related to weather *after* the authorized contract time expired *is* the Contractor's responsibility. We request the Board to consider that if the Contractor had completed the project within the allowable Contract Time, the weather would have not been an impact, as the project would have been completed. Therefore, ***any weather impacts now are a direct result of the Contractor's failure to complete the project on time***, which is and was totally under the Contractor's control.

Astaldi's Position: Liquidated Damages

It is Astaldi's contention that the Department charging Liquidated Damages on days impacted by weather, after the Contract Time has expired and without extending time for those days, is punitive and violates the spirit of the Contract.

FDOT Rebuttal

We agree Liquidated Damages are not and should not be a penalty. Article 8-10 "Liquidated Damages for Failure to Complete the Work," requires the Contractor to pay Liquidated Damages to the Department for the Contractor's failure to complete the work within the Contract Time, because the Department and the public are harmed by the Contractor's failure to deliver the Contract on time. The project remains incomplete today and this is a fact. It is also a fact that the Department is incurring daily expense, whether it rains or not, as a result of the Contractor's failure, and this harm to the Department is not cured but for LD's. Likewise the public remains restricted to six lanes where ten and more should have been delivered months ago. This harms the public every day, rain or shine, and if LD's were not now charged, every day after the authorized Contract Time,

this would be punitive on the Department and the public, who are not responsible for the Contractor's failure to deliver the project in time.

Summary:

It is the Department's position that the arguments presented by Astaldi are without basis in the contract or facts. Astaldi has not presented any Specifications that define his entitlement to weather impact days after the Contract time has expired. Their attempt to use Section 5-12 to request weather impacts when Sub-article 8-7.3.2 clearly and specifically addresses how to deal with those impacts is nothing but smoke.

These facts remain:

- The Contract Time, including all authorized time extensions, expired July 23, 2007.
- Astaldi did not complete the project within the Allowable Contract Time.
- If Astaldi would have fulfilled its end of the Contract and completed the project within the Allowable Contract Time, weather would not be an impact to the project now or anytime after the Contract Time.
- The Contract Specifications in Section 8-7.3.2 clearly identify the requirements for time extensions for weather impacts, and clearly disallow time extensions after the Contract Time has expired.

The Boards Findings

The Board heard testimony from both parties during the hearing. Both parties should realize the Dispute Review Board is required to use Project Specifications, Plans and other **CONTRACT** documents to draft the recommendation.

Exhibit 2 of the Corradino Groups Position Paper shows Section 8-7.3.2 and clearly states " **The Department may allow such extensions of time only for delays occurring during the Contract Time Time period or authorized extensions of the Contract**

Time period. As stated at the hearing the original Contract Time expired in July of this year.

Board Recommendation

The Board finds the Contractor is **not entitled** to additional time caused by inclement weather.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in the Hearings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.
Respectfully submitted,

Dispute Review Board

John W. Nutbrown, Chairman
Rammy Cone, Member
Jimmie Lairscey, Member



DRB Chairman