

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

March 12, 2013

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Doug Ebbers, Exec. V.P.
Pepper Contracting Services, Inc.
6920 Asphalt Ave.
Tampa, FL 33614

Brian Pickard, P.E.
FDOT-D7 Tampa Construction
2822 Leslie Road
Tampa, FL 33619

Re: Upper Tampa Bay Trail Underpass at Sheldon Road
FPN: 418811-1-52-01
District 7

Design/Build Project
Contract No.: E7G26
Hillsborough County

Regional Disputes Review Board Recommendation

Issue: Entitlement to payment for costs incurred to construct a Critical Temporary Wall.

Gentlemen:

Pepper Contracting Services, Inc. (PCSI), the contractor, requested a Regional Disputes Review Board (RDRB) hearing on the above issue in accordance with the RDRB Specification. The hearing was held on February 26, 2013. The Florida Department of Transportation (FDOT), the owner, has rejected PCSI's claim to recover the added costs required to design and construct a Critical Temporary Wall to protect existing embankment beneath the two Sheldon Road Bridges.

Based on the materials supplied to the Board and presentations to the Board at the RDRB hearing, the Board recommends *no entitlement* to PCSI for the costs incurred by Pepper/Cardno-TBE to design and construct the critical temporary wall at issue.

The Board finds PCSI failed to provide timely notice in accordance with the specifications. And by the failure to provide timely notice, PCSI waived its claim for additional compensation. The Board's findings are based on a careful review of the materials supplied to the Board including the presentation of Position and Rebuttal Papers, Oral Testimony and Exhibits presented by both parties during the hearing, and a thorough review of the Florida Department of Transportation Plans, Specifications, and other contract documents. For information not included in the recommendation, the reader may refer to the Parties' submittals not included in this document.

Following are copies of Position Papers and Rebuttals PCSI and FDOT submitted to the RDRB for consideration. The report will conclude with an in depth RDRB analysis and assessment of the information submitted.

PEPPER-CARDNO/TBE POSITION PAPER

FDOT District 7: Regional Dispute Board

Position Paper of

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

Pepper-Cardno/TBE Design Build Team
February 8, 2013

Contract No. E7G26
Upper Tampa Bay Trail (Underpass) at Sheldon Rd.
Design/Build Project
FM: 418811-1-52-01/FAP 888-7822A

General Description of Issue and Contract Entitlement:

The Pepper/Cardno-TBE Design-Build Team (PCTBE) has requested a Regional Dispute Review Board (RDRB) hearing to address Entitlement to recover the cost and time impacts to design and build a **Critical Temporary Wall** on this project.

PCTBE refers the Regional Dispute Review Board (RDRB) to Sections 4-3, 5-12 and 9-3 which require the FDOT (Department) to make equitable compensation and adjust contract time when a “substantial change” occurs to the scope and/or character of the work. The cost of the **Critical Temporary Wall** and collateral impacts to the project were in excess of \$170,000.00. The lump sum contract amount for the project was \$864,500.00. Therefore, the financial impact of the **Critical Temporary Wall** was a substantial change to the project scope, at almost 20% of the contract amount.

Further, this claim is based on the fact that the Department did not process the Design-Build submittals in a timely manner on this project. The Department was required by the contract to respond to the Design-Build submittals within fifteen (15) working days. However, the Department routinely took longer. The 30% Plans were 12 days late. The 90% Plans were 11 days late. The 100% Plans were 12 days late, and the Critical Temporary Wall design submittal was 16 days late.

The Department advised the PCTBE Team that additional contract time and compensation would be granted upon resolution of this **Critical Temporary Wall** claim.

General Project Background

In May 2010, the Department issued a Low Bid Design-Build Request for Proposal to solicit competitive bids and proposals from Proposers for the design and construction of a new pedestrian underpass crossing under Sheldon Road at Channel A, Hillsborough County, Florida.

The description of work from the RFP states “*Design/Build services are required in connection with a 15’ wide pedestrian underpass crossing for Upper Tampa Bay Trail under Sheldon Road on the north side of Channel “A” just north of Waters Avenue in Hillsborough County.*”

PCTBE was the low responsive Bidder (out of six D-B Teams) and was awarded the contract in the amount of \$864,500.00. The Notice to Proceed was issued on September 6, 2010, and Final Acceptance was issued on November 9, 2011.

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Key Project Dates

February 18, 2011	90% Plans Submitted by D-B Team
March 29, 2011	90% Plans Approved by the Department
April 1, 2011	100% Plans Submitted by D-B Team
April 18, 2011	Department directive to incorporate a Critical Temporary Wall
May 12, 2011	D-B Team submitted Technical Special Provisions and Design for a Critical Temporary Wall
May 17, 2011	D-B Team submits CPM Update No. 7, which identified the delay and impact to the project. This served as initial Notice of Intent (NOI).
June 18, 2011	D-B Team submits a formal NOI. The NOI states that the cost of the Critical Temporary Wall was still uncertain at that point in time, but the D-B Team will be looking to the Department for the cost impacts.
June 18, 2011	D-B Team submits a formal Time Extension Request. This submittal outlined the Department's multiple delays in responding to the design submittals on the project, as well as the Design time impact for the Critical Temporary Wall at the 100% Final Component Plan stage.
June 22, 2011	The Department approved the design of the Critical Temporary Wall and released the project for construction.
July 11, 2011 to August 11, 2011	Time frame to construct the Critical Temporary Wall

Project Scope

The scope of this project was outlined in a Project Concept Report prepared by HDR Engineering (see pages 228-323). This report was dated January 2010, and was provided to the Design-Build Proposers as an attachment to the RFP. The RFP was dated May 2010, and states: *"The attachments listed in the table of contents are by this reference hereby incorporated into and made a part of this RFP as though fully set therein."*

The Jan. 2010 Project Concept Report included the following documents:

- Appendix A: Project Photos
- Appendix B: Existing Bridge Plans (partial)
- Appendix C: Existing Trail Plans (partial)
- Appendix D: Geotechnical Report

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Appendix E: Hydraulic Data for Channel A
Appendix F: Bridge Survey Data
Appendix G: Bridge Inspection Report

Figure 1 Project Location Map
Figure 2 Upper Tampa Bay Trail – Construction Phasing
Figure 3 Upper Tampa Bay Trail – Existing County Project
Figure 4 Proposed Underpass Concept (Plan View)
Figure 5 Proposed Underpass Concept (Typical Sections)

Table 1 Upper Tampa Bay Trail Construction Phases
Table 2 Hydraulic Data for Channel A
Table 3 Design Standards

This Jan. 2010 Project Concept Report and its attachments provided a thorough description of the existing conditions, previous trail and underpass construction and the scope of this project.

PCTBE directs the RDRB to pages 3 and 4 of the report which list the specific Design Standards and Design Requirements for the Design-Build Firm. It is significant that there is no mention in this report or any of its attachments that the project would require a Critical Temporary Wall.

Likewise, the May 2010 RFP (pages 180-227) was also very thorough in describing the project scope and the design requirements. PCTBE directs the RDRB to the following specific descriptions of the project scope in the RFP:

Page 1 Detailed description of the Project Scope and D-B Responsibilities
Pages 15-17 Detailed list of the Component Plans to be provided
Pages 40-43 Detailed list of the Technical Proposal requirements

Similar to the Project Concept Report, the May 2010 RFP does not contain any mention of a Critical Temporary Wall as a required design and construction feature of the project.

Nonetheless, at the 100% Component Plans Submittal stage, the Department directed PCTBE to design and construct a Critical Temporary Wall. PCTBE timely provided notice to Department of the cost and time impacts. This notice was in advance of the performance of the work. The Department had the opportunity to reconsider its directive or alternatively, an obligation to make equitable payment to PCTBE as required by Sections 4-3; 5-12 and 9-3.

Additional Documentation for Entitlement to the D-B Firm

1. The Project Concept Report references a 2003 FDOT Upper Tampa Bay Trail project, in which an almost identical pedestrian trail underpass was constructed. The 2003 project was in very close proximity to this one, and the design and construction approach for were comparable. The signed and sealed drawings for construction of that trail underpass, were based on not using a Critical Temporary Wall. The project drawings included a signed and sealed drawing of the Construction Sequence calling out temporary

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excavation of the Channel “A” slopes to 1:1 slopes, with no temporary shoring and without a Critical Temporary Wall.

Cone and Graham was the Contractor on that project, and they have communicated to the Department and PCTBE that they were allowed to use their “means and methods” to utilize temporary shoring on an “as needed” basis.

2. Project photos (pages 125-136) clearly demonstrate that the soils at the project were stable at even greater than a 1:1 slope (the Department’s design temporary excavation slope on the 2003 Cone & Graham project). The photos reflect that the soil was stable at almost a vertical face during the installation of the Critical Temporary Wall.
3. Scale Cross-Sections of the Underpass confirm that a Critical Temporary Wall was not required (Pages 372-373).
4. OSHA only requires a protective shoring system to be designed by a registered professional engineer, when a trench is 20 feet deep or greater (page 360-371).

In addition, OSHA standards allow a “Competent Person” to make the judgment call on soils and protective systems in the field, for trenches less than 20 feet deep.

“A competent person is an individual who is capable of identifying existing and predictable hazards or working conditions that are hazardous, unsanitary, or dangerous to workers, soil types, and protective systems required, and who is authorized to take prompt corrective measures to eliminate these hazards and conditions.”

PCTBE had a certified competent person at the job site as required by OSHA.

5. The PPM, Volume I, Paragraph 30.3 has the following definition of a Critical Temporary Wall.

“A critical temporary wall is one that is necessary to maintain the safety of the traveling public, or structural integrity of nearby structures and utilities for the duration of the construction project. Traffic lanes located either above or below a grade separation and within the limits shown in Figure 30.1 will require the design of a critical temporary wall.” (see pages 357-358).

Based on this definition and Figure 30.1, a Critical Temporary Wall was not required for this project.

6. Attached is a letter from Transportation Safety, Inc. (page 378) the next lowest Design-Build Proposer on this project. TSI states that it also concluded from the RFP that a Critical Temporary Wall was not required, and the project could be safely built without one. Further, TSI states that if it was the Design-Builder, it would consider a Department

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directive to incorporate a Critical Temporary Wall, as a substantial change warranting additional compensation.

Department Position

The Department has taken the following positions:

- A. That this is a Lump Sum contract and the D-B Team is responsible for whatever it takes to design and build the project.
- B. The Department refers to page 36 of the RFP as evidence or proof that a Critical Temporary Wall was required for this project (see page 219).

PCTBE Response

PCTBE points out to the RDRB that the Department's reliance on page 36 of the RFP as a mandatory requirement for a Critical Temporary Wall is taken out of context, in two (2) important ways:

First, PCTBE refers the RDRB to the Table of Contents of the RFP (pages 181-183).

Sections V and VI are boiler plate sections that are included in all D-B projects. Within these two sections, there are a number of specifications and design requirements that are not applicable for this specific project. As an example, Section VI includes a sub-section G. Structure Plans, and within this sub-section, it describes Bridge Design Analysis, which clearly does not apply to this project (see page 35 of the RFP).

Likewise, within this same sub-section, under the heading "Criteria" is the reference to Critical Temporary Wall that the Department wants to rely on. PCTBE respectfully points out to the RDRB that there are four sub-sections under "Criteria"; all of which are generic and were not specifically written for this project.

For example; the second sub-section refers to bridge widening. There was no bridge widening on this project. Similarly, the fourth sub-section refers to bridges over navigable waterways. However, Channel "A" is not a navigable waterway.

Therefore, the section of the RFP that FDOT points to is a generic specification section for Structure Plans.

Second, the Department takes the position that a Critical Temporary Wall was a mandatory requirement, because the Department suggests it believes that there was a potential risk to the traveling public.

However, the language on page 36 does not say that this is a determination for the Department to make. The language on page 36 of the RFP, communicates to the D-B Team a responsibility to evaluate if a Critical Temporary Wall may be required.

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As noted above, the definition of a Critical Temporary Wall in the (PPM) is:

A critical temporary wall is one that is necessary to maintain the safety of the traveling public, or structural integrity of nearby structures and utilities for the duration of the construction contract. Traffic lanes located either above or below a grade separation and within the limits shown in Figure 30.1, will require the design of a critical temporary wall.

This definition makes it clear that a Critical Temporary Wall is only required when the safety of the traveling public, or the structural integrity of a nearby structure or utility is at risk. The key wording in this definition is: "...necessary to maintain the safety...". This requires a determination of when it is "necessary".

PCTBE respectfully submits to the RDRB that the Design-Build Firm, under the RFP and the Design Build Guidelines, is the responsible party to make this determination.

Further, this definition refers to Figure 30.1 for guidance on the criteria on when a Critical Temporary is required. Based on Figure 30.1 and the PPM definition, a Critical Temporary Wall was not required on this project.

Summary

In summary, the Project Concept Report and the RFP both contain very specific lists of the project design requirements. However, there is no reference to a Critical Temporary Wall as a specific project requirement.

The only reference to a Critical Temporary Wall is in a boiler plate section of the RFP. This RFP description of a Critical Temporary Wall, and the PPM definition, both, require a determination to be made if a Critical Temporary Wall is necessary.

PCTBE made this evaluation, and concluded that a Critical Temporary Wall was not required.

This conclusion is supported by the following:

1. The PPM definition and Figure 30.1.
2. The nearly identical 2003 FDOT Trail Underpass project with 1:1 temporary slopes
3. The OSHA standards that allow 1:1 temporary slopes and a 4' bench
4. The OSHA standards that allow a Competent Person to make the determination when working less than 20' depth
5. Scale Cross-Sections that confirm compliance with OSHA standards
6. The project photos and field verification that confirm the stability of the soil
7. The letter from Transportation Safety, the 2nd low Proposer that confirms that it also concluded that a Critical Temporary Wall was not required by the RFP, or necessary to build this project safely.

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In closing, there is no question that in hindsight, a Critical Temporary Wall was not necessary on this project. The Department overruled the D-B Team and OSHA standards, when it insisted on a Critical Temporary Wall on this project.

PCTBE respects that the Department has a contract right to direct changes to the project scope. Equally, the Department has a contract obligation to equitably adjust the contract time and price, when the change is significant. The time and cost impacts that are summarized above, and contained in our Certified Claim, clearly document that this was a significant change to the project.

We respectfully ask the RDRB to rule for Entitlement to the PCTBE Design-Build Team.

FDOT POSITION PAPER

**Request Additional Costs and Time for Pepper Contracting Services, Inc. Certified Claim
Dated 2/6/2012
Temporary Critical Wall Design and Construction
Design/Build Project
ENTITLEMENT ONLY
Department's Position**

**Design/Build Upper Tampa Bay Trail extension under the existing Sheldon Road Bridge
over Channel A, Hillsborough County
FM 418811-1-52-01, Contract No: E7G26
Let: 5/10/2010, Time Began: 9/6/2010, Final Acceptance: 11/9/2011
Low Bid Design Build with a final Contract Amount of \$872,062.93**

Project Overview:

The Request for Proposal (RFP) for this Low Bid Design Build project consists of the design and construction of a pedestrian trail with lighting under the end span of the existing Sheldon Road Bridge over Channel A. The trail is to be 15 feet wide and tie into an existing at grade pedestrian trail. Construction consists of base and surface to match Hillsborough County's pavement design, except 6 inch concrete sidewalk shall be used where the trail starts downhill to go under the bridge. The Design Build Firm shall Design and Construct all required elements such as walls, foundation, decking and railing system for the trail structure.

The terms and conditions of this project's contract are fixed price and fixed time. The Design Build Firm's submitted bid (time and cost) is a lump sum bid for completing the scope of work detailed in the RFP.

FDOT Standard Specifications 2010 and Design Standards dated January 1, 2011 are applicable, as amended by the contract documents, to this project.

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Issue:

The Regional Disputes Review Board (RDRB) is being asked to provide a recommendation on entitlement only for the certified claim dated February 6, 2012. The claim concerns the need for a critical temporary wall during construction under the Sheldon Road Bridge for the safety and protection of the traveling public over the construction area, the construction crew and Florida Department of Transportation (FDOT) employees excavating and working under the existing Sheldon Road Bridge.

The Design Build Firm, Pepper Contracting Services, Inc. (PCSI) and their designer, Cardno-TBE (CTBE) have submitted a certified claim dated February 6, 2012 requesting \$171,924.18 and 51 contract days. This claim presents the position that a Critical Temporary Wall was not necessary for construction under the Sheldon Road Bridge and they should receive additional compensation for the design and construction costs above the agreed upon Lump Sum Contract price. PCSI is also requesting compensation for FDOT plan review delays.

We are seeking the Board's recommendation on Entitlement only for this issue.

Analysis of Entitlement:

Timeline

September 9, 2010 – Notice to Proceed and Time Begins

March 18, 2011 – Scott Arnold (FDOT) asked for clarification regarding the need for a temporary retaining wall

April 14, 2011 – FDOT requests details for the temporary retaining wall and associated calculations

April 18, 2011 – Design/Build Firm's EOR states the contractor will install a wall with an anchoring system

April 19, 2011 – FDOT requests drawings and calculations for anchoring system

April 19, 2011 – Design/Build Firm EOR provides drawing for anchoring system and states calculations will be sent soon

May 19, 2011 – Project plans are released for construction

June 18, 2011 – PCSI submits a Notice of Intent to Claim for contract **time** related to FDOT plan review

July 12, 2011 - Temporary wall construction begins

July 25, 2011 - Temporary wall construction complete

September 8, 2011 – PCSI submits a Notice of Intent to Claim for time and **money** with cost backup

November 9, 2011 – Final Acceptance of project

November 29, 2011 – PCSI executes Work Order #4 resolving all issues on project except for **costs** related to the temporary wall

February 26, 2012 – PCSI submits certified claim

PCSI's contention, based upon a Notice of Intent to Claim (NOI) for delay and/or extra work dated June 18, 2011 (see Page 6), is that during the Design Phase of the project the Department inappropriately requested the Designer to provide calculations that would support their

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construction method. This ultimately resulted in a change of the construction method and PCSI contends they should be compensated for this change. The Department disagrees with PCSI's contention for the following reasons:

- The Request for Proposal (RFP) for this Design Build, Low Bid, Lump Sum Contract states that both the Prime Construction Contractor and the Prime Consultant in Professional Services must be pre-qualified for Work Type Minor Bridge and 4.1.2 Minor Bridge Design, respectively. The RFP, (See Page 7) also states *“The team shall be responsible for all work necessary and incidental for the completion of the design and construction of this project unless otherwise noted herein.”*
- The RFP, Section F. Design Documentation, Computations and Quantities page 34, states *“The Design/Build Firm shall submit to the Department design notes and computations to document the design conclusions reached during the development of the construction plans.”* (See Page 8)
- On March 18, 2011, during the 60% design phase of this Design/Build Contract, Scott Arnold (FDOT) requested the Design/Build Firm *“Address if any temporary retaining wall is necessary for constructing this wall”* (the permanent wall). The Design/Build Firm replied *“The need for any temporary wall will be addressed.”* (See Page 9) No further information or results were provided or communicated to the Department by the Design/Build Firm until the final plan submittal.
- On April 14, 2011, during the final plan review, the Department noted and requested the following: *“Note #1 states that a temporary wall will be required. This temporary wall may be a critical temporary wall. Please show the details for the temporary wall and provide design.”* (See Page 10)
- On April 18, 2011, The Design/Build Firm replied *“This will be a temporary non-critical wall. In accordance with PPM section 30.3.4, there will be no traveling public under the bridge while constructing the wall and trail slab. The structural integrity of the existing bridge elements will not be reduced or compromised in any way while construction is going on. The contractor will install an anchoring system in phases as the existing embankment is excavated.”* (See Page 10)
- On April 19, 2011, after a conversation between the Designer and the FDOT reviewers, the FDOT stated *“As we discussed, this is a critical temporary wall. Please provide the related drawings and calculations as required by the FDOT Plan Preparation Manual (PPM).”* (See Page 10)
- On April 19, 2011, the Designer provided a drawing for the anchoring system. *“Dongzhou, Please find the information provided by Pepper Construction regarding the temporary wall system that will be used for the construction of the C.I.P. retaining wall. This is a system that has been utilized by the contractor in other jobs; and we are in the process of gathering specifics about the system: spacing and capacity of the anchors, capacity of the plywood, etc. As I mentioned to you, the reason we had not designed this system ourselves was because it was thought of as means and methods of the contractor for a non-critical temporary wall. Regardless, calculations for this temporary wall will*

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be included in the design book I will send you later today or first thing tomorrow morning.” (See Pages 11, 12 and 13) This screw anchor wall very similar to what was ultimately used with the only exception being a plywood wall rather than the metal wall that was ultimately constructed. This change was a result of the design calculations not supporting a plywood wall. The system that was ultimately approved and built is what was in the “approved for construction” signed and sealed plans.

- On April 22, 2011, the Designer replied “*Drawings and calculations for the critical temporary wall will be provided as requested.*” (See Page 14)
- The RFP, Section G-2, Structures Criteria, page 36 states “*The Design/Build Firm shall incorporate the following into the design of this facility: C - Critical Temporary Retaining Walls: Whenever the construction for a structural component (such as a wall, footing, or other such component) requires excavation that **may endanger the public** or an existing structure that is in use the Design/Build Firm must protect the existing facility and the public. If a critical temporary wall is, therefore, required during the construction stage only, it may be removed and reused after the completion of work. Such systems as steel sheet piles, soldier beams and lagging or other similar systems are commonly used. In such cases, **the Design/Build Firm is responsible for designing and detailing the wall in the set of plans.** These plans must be signed and sealed by the Structural Engineer in responsible charge of the wall design.*” (See Page 15)

This is a design issue. The Design/Build Firm did not adhere to or follow the Escalation process during design as Section V – Design Issue Escalation, of the RFP states “*The Department has established the issue escalation process for design questions and conflict resolution that the Design/Build Firm shall follow unless revised by the Partnering agreement. All issues are to be directed to the Department Project manager. If the issue cannot be resolved at this level the Department Project manager shall forward the issue to the next level in the process. The escalation process begins with the District Design Engineer, followed by the Director of Transportation Operations, and finally to the District Secretary. Each level shall have a minimum of three working days to answer, resolve or address the issue. This three day window is a response time and does not infer resolution. Questions may be expressed verbally and followed up in writing. The Department Project manager will respond in a timely manner but not to exceed three working days. The Design/Build Firm shall provide any available supporting documentation.*” (See Pages 16 and 17) In fact, they did not advise the Department of their concern on this design issue until 1.5 months after wall construction was complete.

The details provided in the claim package showing what they intended to do to hold back the earth during construction of the permanent wall is missing design calculations supporting that it would have been sufficient. In an email from PCSI, dated November 14, 2011, (See Page 18) is the following quote: “*It is not customary to provide signed and sealed drawing and support calculations for these systems.*” Given that the system is not a standard system, OSHA does require that the system be designed with these calculations available. More importantly, given the very close proximity of the excavation to the bridge end bent and the very serious concern of

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road failure due to loss of supporting material under the approach slab, the Department had a contractual right to request whatever design and calculations that showed the system would perform such that the existing bridge would not be compromised. That has never been provided for the system that is claimed to have been in the original bid.

The PCSI claim package presents a confusing picture of how they originally intended on providing protection against the loss of material under the approach slab. To this date, they still have not presented a clear picture of the method they included in their bid and planned to use. Many of the methods suggested were close in cost compared to the design that was ultimately constructed.

The Design/Build Firm is also requesting additional contract time for temporary wall design.

- It is important to note that the Department did not receive any requested supporting calculations for the protection allegedly included in their bid price until after a different temporary wall was constructed by the Design/Build Firm.
- Work Order #4 (signed by the Department and the Design/Build Firm), granted 46 contract days and compensability of \$6,821.28 as full and final compensation for all issues, time or compensation. The Work Order states *“This resolves all issues on the project except any monetary requests regarding the temporary wall under the overpass.”* – the Department has denied additional contract time.
- Additionally, the project was completed within authorized contract time, so any request for additional time would be inappropriate and is denied.

Conclusion:

The FDOT has the contractual right to request clarification on design intent and for calculations to support the design.

- FDOT did exactly this during the plan review process in an effort to ensure the public is not in danger during construction
- PCSI has a contractual obligation to adequately address FDOT’s design concerns and escalate any design issue disagreements.
- This is a design issue and no PCSI effort was made to escalate it until after another wall was constructed.

PCSI is not entitled to alleged additional costs since they did not escalate this issue and provide calculations to support their preferred protection method.

The certified claim was submitted seven (7) months after the wall construction was completed. This claim and the documents submitted thereafter continue to provide new information and different assertions as to what protection method was included in PCSI’s bid.

- This implies that PCSI did not have or was unwilling to communicate a clear plan as to how to provide protection.

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- This further supports FDOT's request for calculations.
- Ultimately, PCSI built a screw anchor wall very similar to what they stated was their plan in response to FDOT questions during plan review.

PCSI is not entitled to additional cost since they failed to provide supporting information/calculations before the design was finalized.

PCSI's claim is also requesting additional time and time related costs.

- This project was completed within allowable contract time.
- Work Order #4 was signed by FDOT and PCSI and agreed that it "resolves all issues on this project except any monetary requests regarding the temporary wall under overpass."

PCSI is not entitled to any contract time or time related costs on this project.

PEPPER-CARDNO/TBE REBUTTAL to FDOT POSITION

FDOT District 7: Regional Dispute Board

Rebuttal Paper

of

Pepper-Cardno/TBE Design Build Team

February 20, 2013

Contract No. E7G26

Upper Tampa Bay Trail (Underpass) at Sheldon Rd.

Design/Build Project

FM: 418811-1-52-01/FAP 888-7822A

The Pepper/Cardno TBE D-B Team (PCTBE) respectfully submits Rebuttal documentation to the RDRB in response to the Department's Position Paper.

Our Rebuttal is based on the following:

1. Design-Build Guidelines
2. Notice
3. Escalation
4. Position Statement of Ron Garraffa
5. Slope Stability Analysis

We look forward to the hearing next week.

Design-Build Guidelines

Attached are the FDOT Design-Build Guidelines. They provide specific guidance for the Department and Design-Build Teams. To borrow the Department's "CPR" mandate; these

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guidelines provide the basis for Design-Build projects to be Consistent, Predictable, and Repeatable from one project to the next, and from one district to the next.

PCTBE has identified the Design-Build guidelines that are relevant to this Critical Temporary Wall claim. They are listed on the attached “Excerpts” outline.

PCTBE believes that each of the guidelines on the attached “Excerpts” are important for the RDRB to consider, but, we specifically direct you to the following:

Excerpt 3.9.1(7)

Excerpt 4.12

Excerpt 5.1

Excerpt 5.4

Excerpt 10.2.1

Excerpt 10.2.2

Excerpt 10.3

Excerpt 11.1

Excerpt 13.4.2.2

Excerpt 13.4.2.5.3

At the February 26, 2013 hearing, we will discuss these FDOT Design-Build Guidelines further.

Excerpts from FDOT Design-Build Guidelines

2.28 The RFP must clearly define all functions and responsibilities required by the D-B Firm

2.28.2 The design and construction requirements clearly define the specifications essential to ensure that the project is designed and constructed, and if applicable, right of way services are provided to meet the needs determined by the Department.

3.9(6)(1) Design-Build lends itself to allowing preliminary work to be done on a project prior to advertisement. Such work may include survey, geotechnical data, permitting and/or other items of work, which could be performed by in-house staff independent of the design and construction.

3.9(6)(4) The idea behind Design-Build is to eliminate unnecessary items

3.9(6)(5) Department review times are set in the RFP. These items are absolute. If comments are not provided to the Design-Build Firm by the cut off date, the Design-Build Firm may continue their work as if approved. It is suggested that the Project Manager (PM) discuss this with the reviewing units to insure their understanding. Explain that the review times are significantly shorter (about 15 days) than in our current process. The reviews are however for ‘meeting design criteria’ only. There is not the concern for appearance of submitted items as there is with our current procedure.

3.9.1 GUIDELINES FOR REQUEST FOR PROPOSAL (RFP)

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(3) Technical Proposal The Department must provide detailed instructions regarding content and format.

(7) Scope of Services Design Services/Requirements (i.e. Design Criteria Package)

- Any particular construction processes/techniques necessary
- Design Plans, shop drawings, engineering calculations (including, but not limited to) required for submittal by the Design-Build Firm to the Department for verification of compliance (not approval).

4.10 Technical Proposals

A Technical Proposal should include a detailed project schedule using CPM (or other techniques as appropriate), preliminary design plans, preliminary specifications, technical reports, calculations, permit requirements, total Contract time and other data requested in response to the RFP.

4.12 Proposal Evaluators Review Responsiveness of Proposals

The Proposal Evaluators shall review the design concepts and preliminary designs of the lowest bidder proposed in order to assess the responsiveness of the lowest bidder's Technical Proposal compared to the Design and Construction Criteria Package.

A Bid Proposal is considered non-responsive if it does not contain all the required information and level of detail, or is non-compliant with the design and construction criteria defined in the RFP.

Chapter Five DEVELOPMENT OF THE DESIGN AND CONSTRUCTION CRITERIA PACKAGE FOR THE RFP

5.1 DESIGN SERVICES REQUIREMENT

The design requirements (criteria) and Specifications are essential to ensure that the project is constructed to meet the needs as determined by the Department.

5.4 DESIGN PLANS AND ENGINEERING CALCULATIONS REVIEW

The design criteria shall clearly define any documentation (included by not limited to design plans, shop drawings, or engineering calculations) that is to be received by the Department.

Chapter Ten SOIL AND FOUNDATION GUIDELINES

10.2 RESPONSIBILITIES

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

The responsibilities between the Department's Geotechnical Engineer and the Design-Build firm can be broken down as follows:

10.2.1 Planning and Development Phase

a. Department's Geotechnical Engineer – Gathers data on the conditions at the site sufficient for the Design-Build firm to make a realistic proposal. Helps prepare the scope including any geotechnical limitations/requirements (such as steel piles not allowed due to corrossions, etc.) for the project and construction requirements (such as requiring verification testing, no Mechanically Stabilized Earth walls are allowed, etc.) Remember if it is not written down in one of the required documents (scope, Structures, Design Guidelines, etc) it is not a requirement to the Design-Build Firm.

10.2.2 Technical Proposals & Bidding Phase

b. Design-Build Firm – Performs analyses of the geotechnical data and makes a determination of the appropriate design and construction method based on his approach/equipment. Submits Technical Proposal and Bid Price Proposal.

10.3 Presentation of Geotechnical Data

The geotechnical investigations for Design-Build projects must be handled differently from the normal design-bid-build project. The geotechnical investigation that is done prior to bidding is for information purposes only. The amount of geotechnical data gathered should be equal to or exceed what would normally be done for a typical project. The analysis of the data, however, is left to the Design-Build Firms.

10.7 Design-Build Scope

The following are some examples of what should be looked at for inclusion into the Design-Build scope.

1. Any restrictions placed on the Design-Build firm (no MSE walls are allowed, displacement piles may not be used, etc.).
2. Any special requirements that must be met such as additional geotechnical work, any required testing over and above what is normally required (i.e. requiring verification testing, etc.).

11.1 STRUCTURES GUIDELINES FOR DESIGN-BUILD

Decisions and issues, which are normally addressed during the design phase of a project, which the Department does not wish to leave up to the Design-Build firm, will need to be addressed prior to the RFP and mandated in the RFP. This includes items such as the minimum amount of foundation testing and soils tests to be performed, content and frequency of public meetings, construction phasing,

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load ratings of existing bridges and associated decisions, etc. Any desired feature must be described in enough detail to adequately transfer the requirements to the Design-Build firm so a responsive proposal can be developed.

13.4.2.2 Work Items Requiring Shop Drawings

(h) Temporary Works affecting public safety

13.4.2.5.3 Temporary Works

For Construction Affecting Public Safety, submit to the Engineer of Record shop drawings and the applicable calculations for the design of special erection equipment, falsework, scaffolding, etc.

Notice

The Department's position paper contains the following statements regarding Notice:

Page 3:

May 19, 2011: Project plans release for construction
*June 18, 2011: PCSI submits a Notice of Intent to Claim for contract **time** related to FDOT plan review*
*September 8, 2011 PCSI submits a Notice of Intent to Claim for time and **money** with cost backup*

Page 4:

In fact, they (PCSI) did not advise the Department of their concern on this design issue until 1.5 months after wall construction was complete.

PCTBE Rebuttal:

PCTBE provided three (3) written notices to the Department:

1. On May 18, 2011, PCTBE submitted our initial Notice to the Department. This written notice was included in our CPM Narrative Update 007, and states:

Impacts & Issues

An issue has been identified and its impact cannot be quantified in the update 007. A design review comment by the Owner in regard to PPM 30.3 Critical Temporary Wall was issued on Thursday 4/14/11 and was responded to by the EOR on Monday 4/18/11, the Owner responded that a Critical Temporary Wall shall be provided. This comment was at a point in which the design cannot be modified to address the comment without

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delaying the project schedule. The EOR provided a Critical Temporary Wall Design that has met the satisfaction of the Owner and submitted Final Signed & Sealed plans on Monday 5/16/11. The time and cost impact to the schedule and budget cannot be quantified in this update 007 but will be addressed in update 008 accordingly. The Changes in Durations identified below are an attempt to recover the schedule based on the delays in the design review by the Owner in regard to the above issue. (RDRB page 509).

This May 18, 2011 CPM Update 007 went on to provide the Department with “Changes in Durations” and “Changes in Logic” based on the Department’s directive to incorporate a Critical Temporary Wall (CTW) into the project (RDRB page 510).

This written notice to the Department provided the following key information:

- April 19, 2011 was documented to be the date that Department directed the D-B Team to provide a CTW.
- At that point in time, the project design had already advanced to a point that an impact to the project schedule could not be avoided (100% design plans were submitted to the Department on April 1, 2011).
- The D-B Team provided the Department with a CTW submittal on May 16, 2011.
- As of May 18, 2011, the D-B Team was not able to quantify the time and cost impact of the CTW to the project.

It is important to note that the Department did not provide a written acceptance of the CTW design submittal until June 22, 2011 (RDRB page 146).

2. On June 18, 2011 PCTBE submitted two (2) letters providing further notice to the Department that there would time and cost impacts as a result of the Critical Temporary Wall (RDRB pages 146-148).

One of the letters addresses contract time and the other letter addresses the financial impact. The letters state that the time and cost impacts could not be quantified yet, but, that they were to be considered Notice in accordance with Section 5-12.2.

Further, both letters refer the Department to the May 17, 2011 CPM Update that provided the initial Notice.

Based on the Department’s Position Paper, it appears that they want to characterize the May 17, 2011 and June 18, 2011 Notices as only addressing contract time. This is patently untrue.

Both Notices refer to cost impacts, and were in advance of the work being performed.

Escalation

The Department’s Position Paper incorrectly states that the D-B Firm did not adhere to or follow the Escalation process during design.

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

The Department quotes Section V – Design Issue Escalation of the RFP which states:

The Department has established the issue escalation process for design questions and conflict resolution that the Design-Build Firm shall follow unless revised by the Partnering Agreement. All issues are to be directed to the Department Project manager. If the issue cannot be resolved at this level the Department Project Manager shall forward the issue to the next level in the process. The escalation process begins with the District Design Manager, followed by the Director of Transportation Operations, and finally to the District Secretary. Each level shall have a minimum of three working days to answer, resolve or address the issue. This three day window is a response time and does not infer resolution. Questions may be expressed verbally and followed up in writing. The Department Project Manager will respond in a timely manner but not to exceed three working days. The Design/Build Firm shall provide any available supporting documentation. (emphasis added)

RDRB pages 149-160 are emails between PCTBE and the Department. The RDRB will see that the Department's project manager did not escalate the Critical Temporary Wall issue as required. Also, the fact that the Department directed the D-B Team to implement a Critical Temporary Wall at the 100% Design stage needs to be taken into consideration. The Department released the project for construction on May 19, 2011, notwithstanding that the Department did not approve the Critical Temporary Wall design until June 22, 2011.

PCTBE timely provided notice to the Department on May 17, 2011, in advance of the Department releasing the project for construction on May 19, 2011; however, the Department did not escalate this issue as a design escalation issue.

It was not until June 22, 2011 that the Department approved the Critical Temporary Wall design submittal, and notwithstanding the two additional Notices submitted by PCTBE on June 18, 2011, the Department still did not escalate this issue.

We respectfully submit to the RDRB that it was the Department that did not follow the escalation requirements. The Department could and should have escalated this as a "design issue" in advance of releasing the Critical Temporary Wall to construction on June 22, 2011 (RDRB page 379).

Additional emails addressing the Department's failure to escalate the Critical Temporary Wall as a Design Issue are attached.

Following is a copy of PCSI's Notice of Intent dated June 18, 2011:

June 18, 2011

TO: Florida Department of Transportation
Construction Office
2822 Leslie Road
Tampa, Florida 33619

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

RE: Upper Tampa Bay Trail Underpass at Sheldon Road Design Build
Project No. 418811-1-52-01
FAP No. 8887 822A
Contract E7G26

Subject: FDOT Standard Specification 5-12.2 Notice of Claim

Dear Mr. Curley:

Please accept the following as Pepper Contracting Services, Inc.'s (PCSI) Notice of Intent to Claim for Delay in accordance with FDOT Standard Specification 5-12.2.2. The Contractor has deemed that additional compensation and/or a time extension is due on account of delay to a controlling item of work by factors not reasonably anticipated or foreseeable at the time of bid. The May 17, 2011 CPM Update No. 007 identified the delay and as such is considered notice. The delay is for the 34 Working Day lapse in review of the Final Component Plans to schedule activity ID *TBE016 Submit Final Plans to FDOT/FHWA for Review*. At this time, the Contractor cannot ascertain the entire scope of financial impact from the said delay but reserves its right to seek additional compensation through submission of this Notice of Intent.

Respectfully submitted,
Pepper Contracting Services, Inc.
Ron Garraffa
Project Manager

DEPARTMENT'S REBUTTAL PAPER

**Request Additional Costs and Time for Pepper Contracting Services, Inc. Certified Claim
Dated 2/6/2012
Temporary Critical Wall Design and Construction
Design/Build Project
ENTITLEMENT ONLY**

**Design/Build Upper Tampa Bay Trail extension under the existing Sheldon Road Bridge
over Channel A, Hillsborough County
FM 418811-1-52-01, Contract No: E7G26
Let: 5/10/2010, Time Began: 9/6/2010, Final Acceptance: 11/9/2011
Low Bid Design Build with a final Contract Amount of \$872,062.93**

The Florida Department of Transportation (FDOT) has reviewed Pepper Contracting Services, Inc.'s (PCSI) RDRB Position Paper and we have the following comments:

1. The FDOT is concerned for the safety of the traveling public on Sheldon Road, above the trail construction. While we did not direct the type or means of protection, we did

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

request calculations from PCSI and their Designer, Cardno-TBE (CTBE) to support that the safety of the public was being maintained.

2. Specification 5-12.2 Notice of Claim states “the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based.” No Notice of Intent to Claim (NOI) for **construction costs** was submitted to the FDOT until after construction of the screw anchor wall had begun. PCSI’s NOI submitted June 18, 2011 was for delays and delay impacts only. (See Page 3)
3. This is a Design issue. If PCSI disputed the reviewer’s comment requesting wall calculations, they “did not escalate this Design issue in accordance with the Request for Proposal (RFP), prior to starting construction of the screw anchor wall.
4. The RFP clearly states that a critical temporary wall will be required when excavation may endanger the public. The **RFP is well written** as it relates to the **potential** need for a critical temporary wall. It would have limited a Design/Build Team’s flexibility had the RFP required a critical temporary wall.
5. PCSI states “Project photos clearly demonstrates that the soils at the project were stable at even greater than a 1:1 slope... The photos reflect that the soil was stable at almost a vertical face during the installation of the Critical Temporary Wall.” The vertical face referenced by PCSI sloughed and deteriorated within 48 hours of the pictures they refer being taken, when rain fell 2 days later. Please see Pages 4 - 11 for photos after the rain.
6. The comparisons to the previous trail project constructed by Cone and Graham (C&G) referenced by PCSI are misleading. The project constructed by C&G is located on a different roadway, with different geometric dimensions and was constructed 8 years before PCSI’s project.
7. PCSI is also requesting additional contract time for the temporary wall design. Work Order #4 (signed by the Department and PCSI), granted 46 contract days and compensability of \$6,821.28 as full and final compensation for all issues, time or compensation. The Work Order states “*This resolves all issues on the project except any monetary requests regarding the temporary wall under the overpass.*”

In Summary, the RFP was well written and FDOT did not direct a specific method of protection. If PCSI disagreed with FDOT during design they had an obligation to escalate that before construction began. This did not happen. Finally, Work Order #4 resolved all issues on the project except for costs related to the wall.

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RDRB RECOMMENDATION on PEPPER HEARING

Based on the materials supplied to the Board and presentations to the Board at the RDRB hearing, the Board recommends *no entitlement* to Pepper Contracting Services, Inc. (PCSI) for the costs incurred by Pepper/Cardno-TBE (D-B Team) to design and construct the critical temporary wall at issue.

The Board finds PCSI failed to provide timely notice in accordance with the specifications. And by the failure to provide timely notice, PCSI waives its claim for additional compensation. The Board's findings are based on a careful review of the materials supplied to the Board including the presentation of Position and Rebuttal Papers, Oral Testimony and Exhibits presented by both parties during the hearing, and a thorough review of the Florida Department of Transportation Plans, Specifications, and other contract documents.

The contract was for a Design-Build project constructed within the requirements of the 2010 Standard Specifications and the Design-Build Specifications (REV 10-19-09), and the other Contract Documents. The team of PCSI and Cardno-TBE was responsible for the design and the construction of the project. Therefore, the term "work" included in the contract includes both the design and the construction.

ASSERTIONS by the Parties:

D-B Team:

1. The FDOT directed the D-B Team to design and build a Critical Temporary Wall. This perceived (by PCSI and Cardno-TBE) directive was included in documents submitted to the RDRB and during hearing testimony.
2. In its Position Papers with attachments, and during the hearing, PCSI stated PCSI considered the schedule narrative submitted with CPM Schedule Update 7 on May 17, 2011 served as "Notice of Intent" to the FDOT. In a notarized statement dated Feb 19, 2013, Mr. Ron Garraffa, PCSI's project manager, said he was told by FDOT's project administrator that he considered this to comply with the Section 5-12 Notice requirements of the contract.
3. In its Position Papers with attachments, and during the hearing, PCSI stated their "Notice of Intent" submitted to the FDOT on June 18, 2011 was for additional design and construction costs as well as costs associated with project delays.

FDOT:

1. The FDOT did not direct a Critical Temporary Wall. The FDOT asked the D-B Team to describe PCSI's means and methods to protect the embankment under the Sheldon Road Bridges.

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

2. In its Position Papers with attachments, and during the hearing, the FDOT stated they did not consider the CPM Update 7 narrative comment to be "Notice." And the FDOT project administrator denied he considered the Update 7 narrative as Notice of Intent.
3. In its Position Papers with attachments, and during the hearing, the FDOT stated they considered the Notice submitted by PCSI on June 18, 2011 to be for time delays and costs associated with those delays.

Following are excerpts from the Specifications included in the project Contract Documents:

5-12 Claims by Contractor.

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

Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the certified written claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's certified written claim. The failure to provide such notice of intent, preliminary time extension request, time extension request, certified written claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.

5-12.2 Notice of Claim:

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

5-12.2.2 Claims For Delay: "Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay, and a request for Contract Time extension pursuant to 8-7.3.2 within thirty calendar days after the elimination of the delay. ...”

FACTS:

1. The Request for Proposal (RFP) for this Design/Build project did not include a requirement to construct a Critical Temporary Wall during construction. See the RFP.
2. The D-B Team did not believe a temporary wall was necessary. The D-B Team believed soil treatment and embankment protection was within the purview of PCSI's construction means and methods as temporary work. This information was included in documents submitted to the Board, and was reiterated during hearing testimony by the D-B Team representatives.
3. The FDOT first mentioned a temporary wall when the FDOT reviewed the 90% construction plans submittal. This information was included in documents submitted to the Board, and was reiterated during hearing testimony by PCSI, Cardno/TBE, and FDOT representatives.
4. The FDOT believed slope protection was necessary during construction to protect the overhead Sheldon Road Bridges approach slabs from collapse, and to provide safety for the public using the bridges. This information was included in documents submitted to the Board, and was reiterated during hearing testimony by FDOT representatives.
5. The Board deems Mr. Huang's comments included in Cardno/TBE's internal E-mail from Anne Marie Summit to Tom Fulton on April 22, 2011 constitute a directive to construct a critical temporary wall. The April 22, 2011 internal E-mail referred to a "...rejected response on ERC this morning." The E-mail documents communication between the FDOT reviewer and the TBE project manager (PM). On April 14, 2011, the reviewer stated in part, "...a temporary wall will be required. This temporary wall may be a critical temporary wall..." On April 18, 2011, the PM stated, "This will be a temporary non-critical wall..." On April 19, 2011, the reviewer stated, "As we discussed, this is a critical temporary wall..." The ERC documented discussions appear to corroborate PCSI's contention the critical temporary wall was directed by the FDOT.
6. PCSI's submitted documents included two engineering reports to show the embankment soils under the bridges were stable and did not need a critical temporary wall. The HP

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Engineering report was dated September 11, 2012, and the internal PCSI report was dated February 20, 2013. Both reports were dated well after the wall construction completion date of August 11, 2011.

A significant portion of the Board's analysis was devoted to the dates presented in the PCSI and Florida Department of Transportation (FDOT) documents. A list of those dates and actions follows:

1. February 18, 2011 90% Plans Submitted by D-B Team.
2. March 29, 2011 90% Plans Approved by the Department.
3. April 1, 2011 100% Plans Submitted by D-B Team.
4. April 19, 2011 Department directive to incorporate a Critical Temporary Wall. (note: PCSI lists this action as occurring on April 18, 2011. However, submitted documents show the FDOT reviewer confirmation was on April 19, 2011).
5. May 12, 2011 D-B Team submitted Technical Special Provisions and Design for a Critical Temporary Wall.
6. May 17, 2011 D-B Team submits CPM Update No. 7, which identified the delay and impact to the project. PCSI contends that this served as initial Notice of Intent (NOI).
7. June 18, 2011 D-B Team submits a formal NOI. The NOI states that the cost of the Critical Temporary Wall was still uncertain at that point in time, but the D-B Team will be looking to the Department for the cost impacts.
8. June 18, 2011 D-B Team submits a formal Time Extension Request. This submittal outlined the Department's multiple delays in responding to the design submittals on the project, as well as the Design time impact for the Critical Temporary Wall at the 100% Final Component Plan stage.
9. June 22, 2011 The Department approved the design of the Critical Temporary Wall and released the project for construction.
10. July 11, 2011 to August 11, 2011 Time frame to construct the Critical Temporary Wall.

Based on the timeline above, Cardno-TBE began design work on the critical wall at issue on or after April 18, 2011. The D-B Team submitted their proposed Technical Special Provisions and Design for a Critical Temporary Wall on May 12, 2011. On May 17, 2011, PCSI submitted CPM

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Update No. 7, which identified the delay and impact to the project. PCSI considered Update No. 7 served as initial Notice of Intent (NOI). PCSI, during their oral presentation at the hearing, restated their position as to notice. On June 18, 2011, PCSI submitted a formal NOI relating to the critical temporary wall construction.

Following are exact copies of the language included in the May 12th and June 18th documents:

As part of the May 12th CPM Update 7 Narrative under the paragraph titled Impacts & Issues, PCSI, in reference to the critical temporary wall at issue, wrote, *“The time and cost impact to the schedule and budget cannot be quantified in this update 007 but will be addressed in update 008 accordingly.”* A Board comment follows: There is no mention of a Notice of Intent to File Claim in the update. The narrative is required to be submitted with the CPM schedule update.

On June 18, 2011, PCSI submitted a NOI to the FDOT concerning the wall at issue. The body of the PCSI letter, in its entirety, follows: *“Please accept the following as Pepper Contracting Services, Inc.'s (PCSI) Notice of Intent to Claim for Delay in accordance with FDOT Standard Specification 5-12.2.2. The Contractor has deemed that additional compensation and/or a time extension is due on account of delay to a controlling item of work by factors not reasonably anticipated or foreseeable at the time of bid. The May 17, 2011 CPM Update No. 007 identified the delay and as such is considered notice. The delay is for the 34 Working Day lapse in review of the Final Component Plans to schedule activity ID TBE016 Submit Final Plans to FDOT/FHWA for Review. At this time, the Contractor cannot ascertain the entire scope of financial impact from the said delay but reserves its right to seek additional compensation through submission of this Notice of Intent.”* Note: some wording above was highlighted by the Board for reference in portions of the following paragraphs of this document. The words were not emphasized to take anything out of context.

SUMMARY of BOARD ANALYSIS:

1. Cardno-TBE designed and PCSI built a Critical Temporary Wall to be used to protect the embankment beneath the Sheldon Road Bridges during construction under the bridges.
2. The D-B Team stated in writing, and PCSI and Cardno-TBE stated during the hearing presentation their analysis showed a Critical Temporary Wall was not necessary during construction.
3. The issue of how PCSI intended to provide slope protection during construction was raised by the FDOT design review team after the 90% plans were submitted for review on February 18, 2011.
4. Telephone discussions and E-mail communications between FDOT and the D-B Team led the team to agree to design temporary slope protection to be used during construction under the bridges.

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

5. During communications between FDOT and the D-B Team after the 100% plans submittal, the D-B Team produced a Critical Temporary Wall design approved for construction by the FDOT on June 22, 2011.
6. There was no official letter presented to the Board to show FDOT directed the D-B Team to design and build a Critical Temporary Wall. The April 22, 2011 internal Cardno-TBE E-mail referred to in RDRB FACTS 5 above was the only documentation presented to the RDRB show the FDOT directed the critical temporary wall. There was no evidence the FDOT did not direct the wall.
7. The FDOT Position Paper states the D-B Team did not comply with the RFP issue Escalation procedures (see page 11 of 29). PCSI's Rebuttal Paper states PCSI followed the procedures by addressing the issue of the wall with the FDOT project administrator (see page 18 of 29). It appears the project administrator did not escalate the issue further. And it appears PCSI did not take action to push the issue to higher levels in the escalation hierarchy.
8. All project time issues were resolved with Work Order No. 4.
9. There were no printed and signed documents, letters or other information presented to the Board to corroborate the PCSI contention the FDOT Project Administrator considered the CPM Update 7 narrative to be Notice. The FDOT Project Administrator denied he made such a statement. And the PCSI employee to whom the statement was supposedly made was not present at the hearing.
10. PCSI submitted a formal Notice of Intent to File Claim "...for Delay...in accordance with...Standard Specification 5-12.2.2..." Specification subsection 5-12.2.2 is titled **Claims for Delay**.
11. The HP and PCSI internal soil reports referred to in FACTS 6 above were submitted well after the wall was constructed, and obviated the opportunity for the FDOT to use the data during the FDOT review process prior to wall construction.

SUMMARY OF BOARD ASSESSMENT

1. The Board could not determine from documentation or hearing presentations, and follow on questions by the Board, whether FDOT directed a Critical Temporary Wall, or if the wall was the D-B Team's response to FDOT concerns. However, it appears the FDOT plans reviewer may have directed the critical temporary wall. See 2 following.
2. The April 22, 2011 internal Cardno-TBE E-mail referred to in RDRB FACTS 5 above documented the date of April 19, 2011 as the date of the FDOT directive to design and construct a critical temporary wall. Therefore April 19 triggered the start of the period established by Standard Specification Section 5-12 for the time requirement to provide Notice of Intent to File Claim.

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

3. The CPM Update 7 Narrative did not meet the Specification requirements for Notice. See Standard Specification sub section 5-12.2 Notice of Claim. Further, the May 17, 2011 submittal date of the Update was approximately one month *after* Cardno/TBE began *work* to design the wall as addressed by FDOT during their 90% plans review. Paragraph 5-12.2.1 requires Notice be submitted in writing of the intention to make a claim for additional compensation *before* beginning the *work* on which the claim is based, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay...” The CPM Update was submitted well after the times required by sub section 5-12.2.
4. PCSI’s formal Notice of Intent submitted on June 18, 2011 did not meet the Specification requirements of Specification paragraph 5-12.2.2 Claims for Delay as it was submitted more than two months *after* the *work* began. PCSI filed the Notice of Intent to Claim for Delay in accordance with FDOT Standard Specification 5-12.2.2. The Contractor has deemed that additional compensation and/or a time extension is due on account of delay. The issue of delay is considered moot as the FDOT and PCSI resolved the time issue with Work Order 4.
5. Although PCSI stated in their position papers and during the hearing testimony the Notice dated June 18, 2011 was intended to be for the costs added to the project by the construction of the Critical Temporary Wall, and was submitted before the actual wall construction began, the Notice as written was for delay. The Notice was under Specification sub paragraph 5-12.2.2 Claims for Delay. The Board cannot assess PCSI’s intent 1½ years after the fact, and must read the Notice as it was submitted.

The Board finds:

1. PCSI failed to provide timely notice in accordance with the specifications.
2. By the failure to provide timely notice, PCSI waives the claim for additional compensation.

It is sometimes argued that a DRB will provide a recommendation that ignores the contract, or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB’s prerogative to substitute its own ideas of fairness and equity for the provisions of the contract.** . . . *DRBF Practices and Procedures Section 1 – Chapter 6.*

The Board sincerely appreciates the cooperation of all parties and the information presented for the Board’s review in making this recommendation.

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

REGIONAL DISPUTE REVIEW BOARD RECOMMENDATION

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

Respectfully Submitted
Regional Disputes Review Board

David M. Jameson; DRB Chairman
Robert J. Robertory; DRB Member
William E. Waddell; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, reading "David M. Jameson" with a decorative flourish at the end.

David M. Jameson
RDRB Chairman