

DRB Recommendation

NOI 33

For the Contract between

Morrison-Cobalt Joint Venture (MCJV) & FDOT District Four

For Project

**CR-712 (Midway Road) Reconstruction from West of 25th Street to
East of SR-5 (US-1)**

FPID: 231440-2-52-01

Federal Aid Number: 8886-777-A

Contract No. T-4434

County: Saint Lucie (SLC)

Hearing location, Date and time:

3601 Oleander Ave. Date December 5, 2022 from 9:00 am to 4:00 p.m.
Held at the Treasure Coast Operations Center Fort Pierce, FL

Members of the Dispute Review Board

Pat McCann P.E., Member

Rick Espino P.E., Member

Ronnie Klein, Chairman

Project Information

Type: Bid Build **Contractor:** Morrison-Cobalt Joint Venture (MCJV)

Original Duration: 1,213 days **Original Contract amount:** \$28,848,291.55

Scope of work: The improvements on this project include reconstructing the existing two-lane Midway Road to a four-lane, divided highway with a raised median; installing a new signal at Sunrise Boulevard; constructing a new bridge over the North Fork St. Lucie River; constructing a 6-foot sidewalk on the north side and a 12-foot multi-purpose trail on the south side Midway Road; constructing 4-foot bike lanes on both sides of the roadway; reconstruction of S. 25th Street approximately 1000' to the south & north of Midway Road; reconstruction of Sunrise Boulevard from W. 1st Street to Charlotta Street; reconstruction of Oleander Avenue from W. 2nd Street to Merritt's Ditch; drainage improvements, including constructing 6 retention ponds at 5 locations; and signage, signalization, and lighting improvements.

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1. Issue Statement

DRB Issue Statement for NOI 33 – FPL/AT&T/COMCAST/FPUA (GAS)/FPUA (WATER) Conflict Phase 2.

Please accept this correspondence as Morrison-Cobalt JV's (MCJV) Issue Statement regarding the adverse impacts and disruption caused by the Department's failure to fulfill its obligations under Utility Work Schedule affecting the project's Phase 2 of 25th Street. This issue was originally identified under our Notice of Intent (NOI) #33. The Board is being asked to make a recommendation as to entitlement only. The Department failed to perform its obligations under the Contract Specification 7-11.5.1 and provide the necessary arrangements with utility owners for the removal or adjustment of utilities in accordance with the Utility Work Schedule and the "Utility Adjustments" shown within the Contract Plan. The Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the contract documents. The Department and the utility companies did not perform the work in accordance with Utility Work Schedule, which identified this utility work to be performed in many cases prior to construction. The necessary utility work was not performed timely and delayed the Contractor's activities in Phase 2 of 25th Street. As such, the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled, anticipated and approved. Since the utility companies failed to complete their work in accordance with Utility Work Schedules and the Contract Documents, MCJV's performance was impacted and delayed by these unforeseen conditions. Therefore, in accordance with the contract specifications, MCJV is clearly entitled and the Department is required to compensate the Contractor according to Specification 4-3.

1. Summary of the Parties Positions

1.1 Summary of the Contractors position

Morrison-Cobalt JV's (MCJV) Position Paper regarding NOI 33 identifies adverse impacts and disruption caused by the Department's failure to fulfill its obligations under Utility Work Schedule (UWS) affecting the project's Phase 2 of 25th Street.

This issue was originally identified under our Notice of Intent (NOI) #33.

The Department and MCJV have been unable to resolve significant impacts and disruptions to the project. The Board has been asked to make a recommendation as to entitlement only.

The Department failed to perform its obligations under the contract Specification Article 7-11.5, and Special Provision Article under Utility Schedules. The Department failed to timely provide the necessary Arrangements with utility owners for the removal or adjustment of utilities in accordance with the UWS and the “Utility Adjustments” shown within the Contract Plan Sheets 531-534. The Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the Contract Documents.

The Department and the utility companies did not perform the work in accordance with the UWS for the area of 25th Street between 403+00 LT and 416+40 LT. The UWS identified this utility work to be performed “prior to construction” contract work as follows:

UWS Page Project Location Scheduled Plan Sheets

Florida Power & Light Sta 403+26 (36Lt) to Sta 409+35(55Lt) Prior to Construction 531-532 Florida Power & Light 7 of 9 Sta 415+10 (60Lt) to Sta 416+40(66Lt) Prior to Construction 533.

Fort Pierce Utilities Authority (Gas)
Sta 412+20 to 413+40 Left Sta 415+40 to 416+40 Left Prior to Construction 533.

Comcast Cable
Sta 403+26(36Lt) to Sta 409+35 (55 Lt) Sta 415+10(60Lt) to Sta 416+40(66Lt)
Prior to Construction 532-533.

“Prior to Construction” is not dependent on any Contractor activities, requires no coordination with the construction phasing of the Contract, and is planned to be adjusted prior to the start date of the Contractor’s operations.

The Contractor should not need to contemplate at bid time coordinating its operations with the utility companies in this specific area. On October 10, 2019, we notified the Department of our Intent to Claim via NOI #33 for the adverse effects caused by the Department’s failure to perform the utility adjustments. As stated within the NOI, we had intended to commence operations in the affected area on October 17, 2019. As with many other ongoing issues on this project, MCJV mitigated the impacts caused by this issue by seeking and mobilizing to other areas of the project to work, albeit out of sequence and inefficiently. In fact, few areas of this project were performed within sequence and without multiple disruptions, a situation with compounding and rippling effects of decreased productivity and increased inefficiencies.

On October 29, 2019, the Department issued Revision 12 of the Contract Plans altering or eliminating the Work within the northern section of the affected area. This revision somewhat mitigated the impacts on the northern end by altering the work most affected by the utilities in conflict, thus relieving the need for and reducing the adjustments required by the utility companies. By February 3, 2020, the utility adjustments in the southern section, as originally contemplated within the UWS to be completed prior to construction, were finally completed.

Through the Department's issuance of Revision 12, large portions of the proposed drainage work was deleted from the northern section of the affected area. MCJV had provided survey of the area in preparation of drainage that would eventually be deleted. The remaining drainage work in the area was effectively modified by the design revision. MCJV had provided the surveying efforts on 25th Street that became obsolete and remains uncompensated. See the invoice from our surveyor Apogee.

MCJV would mobilize its efforts towards Oleander, another area of the project previously affected and disrupted by conflicts. The utility work was not performed timely and delayed the Contractor's activities in Phase 2 of 25th Street. As such, the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled, anticipated and approved within the Original Baseline Schedule.

Since the Department failed to perform its obligations and the utility companies failed to complete their work in accordance with UWSs, MCJV's performance was impacted and extended. In accordance with the Contract Specifications 4-3, the Department is required to compensate MCJV for unforeseen work. The Department failed in recognizing its obligations under the Contract to perform the utility adjustments in accordance with the UWS. The Department also failed to investigate the conditions and determine that these conditions differs materially from the conditions presented in the original Contract Documents. Based on these failures, the Department and its consultant did not recognize or understand MCJV's entitlement in this matter.

Yet, starting with the April 8, 2021 Dispute Review Board (DRB) Meeting and every subsequent DRB meeting, the Department and its consultant were asked by the DRB to state if they found entitlement in this issue (and others). Each time the Department and its consultant stated that entitlement was determined but that no additional costs were observed. (See DRB Meeting Minutes). Additional costs are a matter of quantum, not entitlement.

The Department's, and its consultant's, inability to recognize conditions materially different from the original conditions presented and their inability to determine how these differed conditions impact and disrupt the Contractor's operations are plainly evident.

MCJV developed its original bid and project schedule in accordance with the Contract Documents issued by the Department, who warranted that the Contract Documents were complete, accurate and buildable. However, MCJV's planned schedule and cost of performance were adversely affected by the Department's repeated failures and deficiencies. These Contract deficiencies caused disruptions in performance and inefficiencies in the MCJV's work. By failing to adhere to the UWS, the Department caused and MCJV encountered a changed condition. With MCJV unable to proceed with its planned methods of construction, MCJV's performance was adversely impacted, its crews were on the project longer than anticipated, and its cost of performance was increased as a direct result of the unforeseen conflicts.

As of the November 2019 schedule update, the number of scheduled workdays remaining for the earthwork crews and base grading crews were 238 and 154, respectively. With the disruptions and inefficiencies caused by, but not limited to, this unforeseen conflict, the actual crew days on the project after November 2019 for the earthwork and base grading crews were 377 and 366, respectively. As such, the following represents the extended crew days used on the project:

Maintenance of Traffic 325 472 147 (Planned Actual Additional)
Earthwork 238 377 139
Base Grading 154 366 212

Since the Department failed to complete its obligation in accordance with the UWS in the Contract, MCJV suffered unforeseen conflicts, extended crew days and increases in its cost of performance. Therefore, in accordance with the following Specification Article:

4-3.4 Conditions Requiring a Supplemental Agreement or Unilateral Payment: A Supplemental Agreement or Unilateral Payment will be used to clarify the Plans and Specifications of the Contract; to provide for unforeseen work, grade changes, or alterations in the Plans which could not reasonably have been contemplated or foreseen in the original Plans and Specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle documented Contract claims; to make the project functionally operational in accordance with the intent of the original Contract and subsequent amendments thereto.

MCJV was impacted by Utility Conflicts that could not have been reasonably anticipated or foreseeable at the time of bid. These conflicts were created by the Department's own failure to adhere to the UWS provided within the original and deficient Contract Documents. The effects of deficient documents, unknown failures by the Department, and unforeseen conflicts impacted MCJV's sequence, means, methods, and durations of performance on the project. Therefore, MCJV is entitled to receive a fair and equitable adjustment as compensation for increased costs caused by unforeseen conflicts. Additionally, the Department and its consultant had previously determined entitlement as mentioned previously above and within the DRB Meeting Minutes.

1.2 Summary of the Departments Position

EXECUTIVE SUMMARY

As presented in the position paper below, the Department has reviewed the Contractor's NOI, Certified Claim package, and Issue Statement related to NOI No. 033 and determined conclusively that the Contractor is not entitled to indirect costs and disruption as supported by the following contractual documents:

- **• There were no impacts to controlling work items as required by Specification 5-12.2.2**
- **• Contractor failed to meet the requirements of Specification 8-7.3.2 regarding Time Extension Requests**
- **• Conditions did not differ materially as required by Specification 4-3, nor was there any notice of differing site conditions provided**
- **• No compensation due during Holidays and Special Events per Specification 8-6.4**
- **• Contractor failed to meet the requirements of Specification 5-12.7 regarding Mandatory Claim Records**

DEPARTMENT'S POSITION

The Contractor's Certified Claim Package (Exhibit No. 34), submitted on 06.06.2022, claims for additional compensation of **indirect labor and equipment costs** and damages unforeseen at bid time caused by disruption. The backup provided includes a personnel ledger with Regular Hours for Indirect Labor and an equipment list with Operating and Standby Hours for equipment beginning on 12.09.2019 and extending through 03.31.2020. Note, all personnel and equipment noted in the certified claim supporting documents apply only to Morrison-Cobalt JV.

While the Contractor's NOI, Certified Claim, and DRB Issue Statement lack any details, locations, or contractual provisions, the Contractor's NOI should be reviewed in two distinct locations, 25th St. north of Midway Rd. and 25th St. south of Midway Rd., both southbound (SB) [left (LT) roadway], as the utility conflicts in question differed in each location.

SB 25th St., north of Midway Rd.

The Utility Adjustments in question along SB 25th St. north of Midway Rd. consisted of underground FPUA gas main relocation and overhead FPL, AT&T, and Comcast relocations. These utilities were in conflict with drainage improvements which necessitated the need for utility adjustments as shown in the Utility Work Schedules (UWS) and shown in Plan Sheet No. 533.

The Utility Adjustments in question along SB 25th St. south of Midway Rd. consisted of aboveground FPL, AT&T, and Comcast relocations. These FPL poles were in potential conflict with future curb & gutter improvements which necessitated the need for utility adjustments as shown in the Utility Work Schedules (UWS) and shown in Plan Sheet No. 54.

The Contractor's claim asserts the date the impact was fully eliminated was 04.01.2020; however, the following timeline shows resolution prior to this date. Additionally, this timeline once again shows issue resolution prior to the Start Dates of non-controlling items of work.

- 10.10.2019: NOI No. 33 Received.
- 10.11.2019: All potentially involved Utility Companies: AT&T, Comcast, FPL, & FPUA, were notified of the NOI via email.
- 10.17.2019: A meeting was held with all potentially involved Utility Companies and a separate meeting with the EOR to discuss the resolution details north of Midway Rd.
- 10.23.2019: CEI provided to Contractor copy of Draft Plan Revision No. 12 which redesigned the proposed drainage and proposed gravity wall to avoid the utilities along SB 25th St., north of Midway Rd.
- 10.24.2019: FPL provided proposed utility adjustment plans for relocation of the 3 FPL poles that were in conflict with the proposed curb & gutter and sidewalk along SB 25th St., south of Midway Rd. and confirmed the work had been scheduled to a crew with a 5-week construction time.
- 10.29.2019: S&S Plan Revision No. 12 (Exhibit No. 15) formally issued that greatly reduced the drainage
 - This revision decreased the original planned gravity wall by 73.5 LF, 24" pipe by 723 LF, handrail by 33 LF, and deleted one manhole structure. Thus, significantly reducing the amount of work in this area. With improvements to avoid the conflicts in this area. Conflict solved north of Midway Rd.
- 12.13.2019: FPL installed new poles and completed the transfer of their overhead lines south of Midway Rd.
- 01.23.2020: Relocation was completed for the remaining overhead communication cables (AT&T / Comcast) south of Midway Rd.

• 02.03.2020: FPL completed removal of the poles. Solving the conflict solved south of Midway Rd. Also, as you'll see from the daily site source records (Daily Work Reports (DWRs), the Contractor was progressing Controlling Items of Work, including stabilization, base, and paving east of Oleander Avenue, Phase 2 existing bridge structure removal and new bridge construction, including pile driving, bent construction, Retaining Wall No(s). 1 & 2 construction, etc. As an example, from the 12.16.2019 DWR that clearly identifies there were no impacts to the Controlling Items of Work, Personnel, Equipment, or Material. This was consistent throughout the NOI No. 33 time period, 10.10.2019 to 02.03.2020.

Identification of Controlling Items of Work is critical in analyzing delays to a project. This will be discussed in detail below. The following Controlling Items of Work were clearly shown in the Contractor's accepted CPM Schedule Updates and noted in their schedule narratives for the update periods noted below. The Controlling Items of Work that were identified by the Contractor in the narratives were future controlling items of work (outside of the schedule update period) that the Contractor intended on progressing to keep the project on schedule. As you can see, there were no activities on 25th St. that were determined to be controlling and therefore no delay to the overall contract due to the utility conflicts in question.

**Controlling Items of Work (CIOW) from Accepted CPM Schedule Updates during NOI No. 33
Timeframe (10.10.2019 to 02.03.2020):**

SEP 16th, 2019 - OCT 20th, 2019:

OCT 21st, 2019 - NOV 10th, 2019:

A30130: Excavation, Embankment, and Stabilization 1B East of Oleander Avenue.

A30180: Base East of Oleander Avenue.

A30220: Asphalt Pavement: Midway East of Oleander

A30300: Marking and Signing: Midway East of Oleander

A72000: Barriers and Superstructure Removal (south side)

A72025: Existing Piles removal: West

Phase 2 Bridge (South side) (from the narrative)

NOV 11th, 2019 - DEC 15th, 2019:

DEC 16th, 2019 - JAN 19th, 2020:

A30130: Excavation, Embankment, and Stabilization 1B East of Oleander Avenue.

A30180: Base East of Oleander Avenue.

A30220: Asphalt Pavement: Midway East of Oleander

A30300: Marking and Signing: Midway East of Oleander

Phase 2 Bridge (South side) (from the narrative)

Retaining Wall's 1 and 2 (from the narrative)

JAN 20th, 2020 - FEB 16th, 2020:

A30130 - Excavation, Embankment & Stabilization 1B East of Oleander

A30180 - Base East of Oleander

A30220 - Asphalt Pavement: Midway East of Oleander

A30300 - Marking and Signing: Midway East of Oleander

A70360 - Retaining Wall Construction: No. 1

Phase 2 Bridge (South side) (from the narrative)

Retaining Wall's 1 and 2 (from the narrative)

As noted above, the Contractor's claim asserts the date the impact was fully eliminated was 04.01.2020, and below are the CIOW from that extended timeframe to further explain that the no activities on 25th St. were controlling and there was no delay to the overall contract due to the utility conflicts in question even within the timeframe after the FPL poles were removed.

Controlling Items of Work (CIOW) from Accepted CPM Schedule Updates during Contractor's Extended NOI No. 33 Timeframe (through 04.01.2020):

FEB 17th, 2020 - MAR 15th, 2020:

A30130 - Excavation, Embankment & Stabilization 1B East of Oleander
A30180 - Base East of Oleander
A30220 - Asphalt Pavement: Midway East of Oleander
A30300 - Marking and Signing: Midway East of Oleander
A72240 - Bearing Pad & Beam Installation
A72260 - Deck Construction: SIP Installation
A72280 - Deck Construction: Overhang Forms Installation
Bridge Superstructure (from the narrative)
Retaining Wall's 1 and 2 (from the narrative)

MAR 16th, 2020 - APR 19th, 2020:

A30130 - Excavation, Embankment & Stabilization 1B East of Oleander
A30180 - Base East of Oleander
A30220 - Asphalt Pavement: Midway East of Oleander
A30300 - Marking and Signing: Midway East of Oleander
A72260 - Deck Construction: SIP Installation
A72280 - Deck Construction: Overhang Forms Installation
A72300 - Deck Construction: Rebar
Bridge Superstructure (from the narrative)
Retaining Wall's 1 and 2 (from the narrative)

Over the next several sections the Department will outline Specifications, note activities from the Contractor's accepted CPM Schedule Updates, and provide other information which further proves the Contractor's Controlling Items of Work were not affected by the utility relocations. Impacts to Controlling Items of Work are required to consider project delays and therefore consider compensation for indirect costs as outlined in the definition and Specifications below.

In the Issue Statement from MCJV, the Contractor states "... *the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled*". Furthermore, MCJV continues by stating, "*Since the utility companies failed to complete their work in accordance with Utility Work Schedules and the Contract Documents, MCJV's performance was impacted and delayed by these unforeseen conditions.*" The Contractor is claiming the Department delayed their work.

Per Specification 1-3 Definitions, Delay is defined as follows:

Delay.

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, material men, suppliers or other agents. This term does not include "extra work".

The definition is clear, that the event, action, force or factor must **extend the Contractor's time of performance of any controlling work item under the Contract**. Controlling Items of Work prior to and during the timeframe these utility conflicts were addressed were as shown above, derived from MCJV's accepted CPM Update submittals with Narratives and discussed in all Progress Meetings during this timeframe.

None of these Controlling Items of Work were impacted due to the utility conflicts referenced in NOI No. 33. As demonstrated in the site source documents, Daily Work Reports (DWR's), the Contractor was pursuing roadway work around Oleander Ave. and east to US-1, Phase 2 bridge removal and new construction, and Retaining Wall No(s). 1 and 2 construction. These locations were over 0.3 miles from the utility conflict locations noted in the NOI. Additionally, zero (0) non-pursuit days were observed or documented in the Contractor's Past Performance Rating (CPPR). **There were zero (0) controlling and zero (0) non-controlling activities impacted by the utility conflicts and therefore no indirect costs or impacts to the Contractor.**

The September 2019 CPM Schedule Update clearly shows that the activities mentioned above were non-controlling at the time of receiving the NOI (green bars in the Contractor's monthly CPM updates indicate non-controlling work activities for this specific project as they indicate activities that are not on the critical path).

The Contractor's accepted February 2020 CPM Schedule Update reflected the as-built schedule data after the conclusion of the potential utility conflicts for NOI No. 33. Note, there were no impacts to the schedule and the activities remained with positive float and it **showed the previously mentioned activities as still non-controlling** with 100% of the Drainage Improvements remaining in this area. Also, it should be noted that as shown in the snippet below from the accepted February 2020 CPM Schedule Update, at the time of NOI No. 33 resolution there was a large amount of positive float for the respective non-controlling items outlined above. For example, the float for A100260: Drainage Improvements: 25th St SB south changed from (-)117 from the accepted September 2019 CPM Schedule Update to (+)159 days from the accepted February 2020 CPM Schedule Update. This was due to the Department providing a global claim settlement for previous NOI's in the amount of \$3,287,359.08 and granting 209 days of time (including compensable costs), providing adequate contract time to complete these non-controlling items of work.

The Department clearly shows that controlling and non-controlling activities were not delayed or impacted. The negative float in the September 2019 CPM Update was not due to this NOI as the September 2019 CPM Update preceded the NOI submittal. Additionally, the positive float in the February 2020 CPM Update (covered time of NOI No. 033 resolution) was due to the Department executing the previously mentioned global claim settlement. As there was no delay to a controlling items of work, the contractor is not entitled to any compensation per specification 5-12.2.2. Additionally, per Specification 5-12.2.2 Claims for Delay, **there shall be no Contractor entitlement to any monetary compensation or time extensions for any delays or delay impacts, whatsoever, that are not to a controlling work item**, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2.1(1) and (3), and then only to the extent the Contractor could not reasonably mitigate such idleness. The Department did not observe any idle labor or equipment associated with the referenced NOI. Daily Work Reports (DWR's) demonstrate the Contractor's, and Subcontractor's, forces working on other project activities. There were sufficient controlling and non-controlling activities for the Contractor to efficiently progress the project by reasonably mitigating any potential impacts.

5-12.2.2 Claims for Delay: *Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the*

Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling 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. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete documentation as described in 5-12.3 and duly certified pursuant to 5-12.9.

If the Contractor fails to submit a certificate of claim as described in 5-12.9, the Department will so notify the Contractor in writing. The Contractor shall have ten calendar days from receipt of the notice to resubmit the claim documentation, without change, with a certificate of claim as described in 5-12.9, without regard to whether the resubmission is within the applicable 90 or 180 calendar day deadline for submission of full and complete claim documentation. Failure by the Contractor to comply with the ten calendar day notice shall constitute a waiver of the claim.

There shall be no Contractor entitlement to any monetary compensation or time extension for any delays or delay impacts, whatsoever, that are not to a controlling work item, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4-3.2.1(1) and (3), and then only to the extent the Contractor could not reasonably mitigate such idleness.

Pursuant to the Contract Specifications Package, Submission of a Working Schedule, Specification 8-3.2.5 Float, further defines float as the **amount of time the finish of an activity can be delayed**. It also clearly states that **negative float shall not be a basis for requesting time extensions**. Special Provision 8-3.2 continues regarding Time Extensions that an extension of time for performance shall be considered only to the extent that a delay to an activity or activities exceeds the total float along the project critical paths within the current approved schedule. The utility conflicts alleged in NOI No. 33 did not delay an activity exceeding the total float along any project critical paths.

8-3.2.5 Float: *Float is defined as the amount of time the finish of an activity can be delayed. Two kinds of float are possible: Total float is how much an activity can be delayed without affecting the finish date of the project or an intermediate deadline (constraint); it is the difference between the late finish date and the early finish date. Free float is how much an activity can be delayed without affecting its earliest successor.*

Float is not for the exclusive use or benefit of either the Department or the Contractor.

Use of float suppression techniques, such as preferential sequencing (arranging critical path through activities more susceptible to Department caused delay), special lead/lag logic restraints, zero total or free float constraints, extended activity times, or imposing constraint dates other than as required by the contract, shall be cause for rejection of the project schedule or its updates. The use of Resource Leveling (or similar software features) used for the purpose of artificially adjusting activity durations to consume float and influence the critical path is expressly prohibited.

Negative float shall not be a basis for requesting time extensions. Any extension of time shall be addressed in accordance with 8-3.2.6 Time Extensions. Scheduled completion date(s) that extend beyond the contract completion date (evidenced by negative float) may be used in computations for

assessment of payment withholdings. The use of this computation is not to be construed as a means of acceleration.

8-3.2.6 Time Extensions: *The Contractor is responsible for submitting a request for Contract Time extension in accordance with 8-7.3.2 of the standard specifications. An extension of time for performance shall be considered only to the extent that a delay to an activity or activities exceeds the total float along the project critical paths within the current approved schedule.*

As a minimum, time extension requests shall contain:

- 1. A descriptive summary of the changes*
- 2. An analysis of project impact*
- 3. A fragnet that shows the impacted activities before the change*
- 4. A fragnet that shows the impacted activities after the change*

Time extensions shall not be considered for proposals that do not include full documentation for the schedule change. Once a change has been approved by the Engineer, the specific activities and the overall schedule must be updated.

As previously described, the Department has shown there were no delays or impacts to the controlling and non-controlling activities. The negative float at the time of NOI No. 33 submittal was not due to the alleged utility conflicts along SB 25th St., but rather related to other NOIs that were closed out through the Department executing the previously mentioned global claim settlement (Exhibit No. 38). Through this settlement, the activities went from negative float to positive float and did not affect the overall schedule.

Per Specification 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. The Department will also consider the affect of utility relocation and adjustment work on job progress as the basis for granting a time extension if **all** criteria are met. These utility relocations and adjustments did not meet **Criteria 2 related to controlling work items** and **sufficient evidence of coordination efforts required in Criteria 3**, such as advanced notification to utility companies to coordinate Contractor's operations to avoid delays, **was not provided.**

8-7.3.2 Contract Time Extensions: *The Department will consider the affect of utility relocation and adjustment work on job progress as the basis for granting a time extension only if all the following criteria are met:*

- 1. Delays are the result of either utility work that was not detailed in the Plans, or utility work that was detailed in the Plans but was not accomplished in reasonably close accordance with the schedule included in the Contract Documents.*
- 2. Utility work actually affected progress toward completion of controlling work items.*
- 3. The Contractor took all reasonable measures to minimize the effect of utility work on job progress, including cooperative scheduling of the Contractor's operations with the scheduled utility work at the preconstruction conference and providing adequate advance notification to utility companies as to the dates to coordinate their operations with the Contractor's operations to avoid delays.*

Additionally, this Specification outlines the requirements for an extension of Contract Time which includes a preliminary request for an extension of Contract Time that must be made in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work. No request was made by the Contractor and no controlling items of work were delayed as previously outlined.

As a condition precedent to an extension of Contract Time the Contractor must submit to the Engineer:

A preliminary request for an extension of Contract Time must be made in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work. If the Contractor fails to submit this required preliminary request for an extension of Contract Time, the Contractor fully, completely, absolutely and irrevocably waives any entitlement to an extension of Contract Time for that delay. In the case of a continuing delay only a single preliminary request for an extension of Contract Time will be required. Each such preliminary request for an extension of Contract Time shall include as a minimum the commencement date of the delay, the cause of the delay, and the controlling item of work affected by the delay.

In his Issue Statement, the Contractor states that the *Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the contract documents.* Pursuant to Specification 4-3.1 General, the Engineer reserves the right to make, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable by the Engineer. The Specification further details that a “significant change” applies only when the Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction. **This determination by the Engineer shall be conclusive. In these instances, the Engineer determined that there were no significant changes or substantial changes to the contract documents.** The work was shown on the approved Utility Work Schedules (UWS) (Exhibit No(s). 09-12) and never delayed a controlling or non-controlling item of work. The scope of the work did not change, and the quantities were reduced due to Plan Revision No. 12. (Exhibit No. 15). The Contractor used the same manpower and equipment to complete the work as originally bid.

4-3 Alteration of Plans or of Character of Work.

4-3.1 General: *The Engineer reserves the right to make, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable by the Engineer. Such increases, decreases or alterations shall not constitute a breach of Contract, shall not invalidate the Contract, nor release the Surety from any liability arising out of this Contract or the Surety bond. The Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract.*

The term “significant change” applies only when:

- 1. The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or*
- 2. A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity. The Department will apply any price adjustment for an increase in quantity only to that portion in excess of 125% of the original Contract item quantity in accordance with 4-3.2 below. In the case of a decrease below 75% the Department will only apply a price adjustment for the additional costs that are a direct result of the reduction in quantity. In (1) above, the determination by the Engineer shall be conclusive. If the determination is challenged by the Contractor in any proceeding, the Contractor must establish by clear and convincing proof that the determination by the Engineer was without any reasonable basis.*

Per Specification 4-3.7 Differing Site Conditions, upon receipt of written notification of differing site conditions from the Contractor, **the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, and adjustment will be**

made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. As mentioned previously, the conditions were investigated and the Engineer determined that they were not materially different from the work anticipated in the contract documents and that no increase in cost or time would be required. The conditions were as shown in the plans, UWS's, and scope of the project and required coordination efforts with the Utility Companies as outlined in the Specifications and contract documents. The necessary work to complete the project required the same type of equipment and manpower as originally bid. The Contractor did not provide notification of differing site conditions until submission of their Issue Statement to the board on 10.31.2022.

4-3.7 Differing Site Conditions: *During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work.*

Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. The Engineer will notify the Contractor whether or not an adjustment of the Contract is warranted.

The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has provided the required written notice.

The Engineer will not allow a Contract adjustment under this clause for any effects caused to any other Department or non-Department projects on which the Contractor may be working.

Review of Contractor's Certified Claim

The Contractor's Certified Claim Package (Exhibit No. 34), submitted on 06.06.2022, claims for additional compensation of **indirect labor and equipment costs** and damages unforeseen at bid time caused by disruption. From a review of the certified claim the indirect costs were calculated utilizing personnel and equipment that were performing work on the project. The daily site source records Daily Work Reports (DWRs) clearly outline the Contractor's personnel and equipment in their claim were used to effectively progress controlling and non-controlling items of work on the project. The labor and equipment changed but nevertheless was effectively utilized to complete project activities including stabilization, base, and paving east of Oleander Avenue, Phase 2 existing bridge structure removal and new bridge construction, including pile driving, bent construction, Retaining Wall No(s). 1 & 2 construction, etc.

Additionally, the indirect costs, from the Certified Claim, calculated in the equipment list assumed an 8-hour day for each piece of equipment with the standby hours being 8 hours minus the operating hours shown. Even though that column in the spreadsheet is blank for most of the entries, the cost is calculated based on these assumptions. As an example, please see sample entries below.

MCJV - NOI 33 - Indirect Equipment

12.09.2019: ROLLER-VIB SMOOTH, 2 Operating Hours

8 Hours/Day – 2 Operating Hours = 6 Standby Hours

6 Standby Hours * \$5.26/Standby Rate = \$31.57 Standby Cost

From this information and for this specific example, the Contractor has Certified that the equipment was delayed by the issues identified in the NOI for 6 hours; however, it operated for 2 hours that is also compensable as indirect costs. **No additional detailed backup, justification, or explanation for these indirect costs were provided in the Certified Claim, the original NOI, project**

correspondence, or the DRB Issue Statement to support this claim. Furthermore, as will be discussed in a future DRB Hearing, but relevant to this discussion, the Contractor submitted the exact same indirect cost calculations for NOI No. 034 – exact same equipment, rates, and hours on the exact same dates. This overlapping correlation continued throughout the Certified Claim Package for **both personnel and equipment** as seen in Exhibit No. 34. The DEPARTMENTS POSITION PAPER for NOI No. 033 December 5, 2022. The backup for indirect costs in the Contractor’s Certified Claim Package even included personnel and equipment on days that were granted as weather and holiday time throughout the NOI period. As an example, T4434 CALFILE - Markup for NOI 33, the month of December 2019 can be seen with “X” marking days that personnel and equipment were noted, yet Weather and Holiday time were clearly granted. Per Specification 8-6.4 Suspension of Contractor’s Operations – Holidays and Special Events, **the Contractor is not entitled** to any additional compensation beyond any allowed Contract Time adjustment for suspension of operations during such Holiday and Special Event periods. From the calendar file, it is clear the Contractor is requesting compensation during Holiday time periods where time was granted and our Site Source Documents clearly show that no work was performed on the project, therefore no indirect costs were incurred.

8-6.4 Suspension of Contractor’s Operations - Holidays and Special Events: *Unless the Contractor submits a written request to work during one or more days of a Holiday or Special Event at least ten calendar days in advance of the beginning date of the Holiday or Special Event and receives written approval from the Engineer, the Contractor shall not work on the following days: Martin Luther King, Jr. Day; Memorial Day; the Saturday and Sunday immediately preceding Memorial Day; Independence Day; Independence Day (Observed); Labor Day; the Friday, Saturday, and Sunday immediately preceding Labor Day; Veterans Day; Veterans Day (Observed); the Wednesday immediately preceding Thanksgiving Day; Thanksgiving Day; the Friday, Saturday and Sunday immediately following Thanksgiving Day; December 24 through January 2, inclusive; and Special Events noted in the Plans. Contract Time will be charged during these Holiday and Special Event periods. Contract Time will be adjusted in accordance with 8-7.3.2. The Contractor is not entitled to any additional compensation beyond any allowed Contract Time adjustment for suspension of operations during such Holiday and Special Event periods.*

During such suspensions, remove all equipment and materials from the clear zone, except those required for the safety of the traveling public and retain sufficient personnel at the job site to properly meet the requirements of Sections 102 and 104. The Contractor is not entitled to any additional compensation for removal of equipment from clear zones or for compliance with Section 102 and Section 104 during such Holiday and Special Event periods.

Additionally, per Specification 5-12.7 Mandatory Claim Records, the Contractor **shall**, once a notice of intent to claim has been timely filed, and not less than weekly thereafter as long as appropriate, **provide the Engineer a copy of the Contractor’s daily records** and be likewise entitled to receive a copy of the Department’s daily records. **These daily records were never provided to the Department as required by Specification.**

5-12.7 Mandatory Claim Records: *After giving the Engineer notice of intent to file a claim for extra work or delay, the Contractor must keep daily records of all labor, material and equipment costs incurred for operations affected by the extra work or delay. These daily records must identify each operation affected by the extra work or delay and the specific locations where work is affected by the extra work or delay, as nearly as possible. The Engineer may also keep records of all labor, material and equipment used on the operations affected by the extra work or delay. The Contractor shall, once a notice of intent to claim has been timely filed, and not less than weekly thereafter as long as appropriate, provide the Engineer a copy of the Contractor’s daily records and be likewise entitled*

to receive a copy of the Department's daily records. The copies of daily records to be provided hereunder shall be provided at no cost to the recipient.

Per Specification 5-12.10 Non-Recoverable Items, the **Department will not have liability for any claim for other than extra work or delay.** As outlined above, this NOI does not reference any extra work, nor was there a delay impact to the Contractor; therefore, there is no entitlement.

5-12.10 Non-Recoverable Items: *The parties agree that for any claim the Department will not have liability for the following items of damages or expense:*

- 1. Loss of profit, incentives or bonuses;*
- 2. Any claim for other than extra work or delay;*
- 3. Consequential damages, including, but not limited to, loss of bonding capacity, loss of bidding opportunities, loss of credit standing, cost of financing, interest paid, loss of other work or insolvency;*
- 4. Acceleration costs and expenses, except where the Department has expressly and specifically directed the Contractor in writing "to accelerate at the Department's expense"; nor*
- 5. Attorney fees, claims preparation expenses and costs of litigation.*

SUMMARY

As clearly indicated above and supported by the Contract (Exhibit 01), the Contractor's Controlling Items of Work were not impacted by the utility conflicts as required by Specification 5.12.2.2 which is a clear precedent for considering indirect costs. Additionally, the Contractor failed to submit any Time Extension Requests for the alleged delays as required by Specification 8-7.3.2 and that the material did not differ material from that at the time of bid. We have clearly proven that the Contractor did not meet the contractual requirements that would entitle him to indirect compensation. **Therefore, the Board must conclude that the Contractor is not entitled to additional compensation for utility conflicts at 25th St.**

3. Summary of the Parties Rebuttals

2.1 Summary of the Contractors Rebuttal

Morrison-Cobalt JV (MCJV) is in receipt of the Department's position paper dated November 10, 2022 and MCJV provides the following additional information in rebuttal to the Department's position on NOI #33.

As expected, the Department has not recognized how failing to fulfill its obligations causes adverse impacts and leads to extra work not expressly provided for in the Contract. Also, as expected, the Department ignored the reality that its failure to perform its obligations within the Utility Work Schedule (UWS) differs materially from the original conditions presented in the Contract Documents. Finally, the Department wrongly believes that it can disrupt progress, cause unlimited inefficiencies, extend the durations of crews needed on the project without causing impacts and additional work and without compensation for that extra work. The Department has determined zero entitlement by wrongfully interpreting this issue as a "claim for delay" under Specification of 5-12.2.2 even though MCJV did not claim for delay of a controlling item of work on this issue nor file a time extension request related to this issue. In fact, this is a Claim for Extra Work as described in Specification 5-12.2.1. MCJV is requesting additional compensation for work not expressly provided for in the Contract. By failing to fulfill its obligations under the Utility Work Schedule (UWS), the Department caused extra work not expressly provided for in the Contract including but not limited to

additional survey work and unnecessary crew movements around the project leading to inefficiencies affecting the total number of days crews needed on the project. MCJV is not requesting additional time or a delay to any controlling work item under the Contract related to this issue. However, MCJV is requesting compensation for additional labor and equipment costs as a result of the extra work not expressly provided for in the Contract.

Per Specification 1-3 Definitions, Extra Work is defined as follows:

Extra Work.

Any “work” which is required by the Engineer to be performed and which is not otherwise covered or included in the project by the existing Contract Documents, whether it be in the nature of additional work, altered work, deleted work, work due to differing site conditions, or otherwise. This term does not include a “delay”.

Per Specification 1-3 Definitions, Delay is defined as follows:

Delay.

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, material, suppliers or other agents. This term does not include “extra work”.

Per Specification 5-12 Claims by Contractor, please note below the differences between the Specifications 5-12.2.1 and 5-12.2.2 below:

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.....

5-12.2.2 Claims For Delay: Where the Contractor deems that additional compensation or a time extensions due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work).....

The Department “determined conclusively” that the Contractor is not entitled because “there were no impacts to controlling work items as required by Specification 5-12.2.2.” In fact, MCJV did not claim this issue to have delayed a controlling work item. The stated Specification is not appropriately attributed. Also, the Department “determined conclusively” that the Contractor is not entitled because the “Contractor failed to meet the requirements of Specification 8-7.3.2 regarding Time Extension Requests.” In fact, MCJV did not submit a Time Extension Request nor claim this issue to require a time extension, another requirement under Specification 5-12.2.2 inappropriately attributed. The Department “determined conclusively” that the Contractor is not entitled because “conditions did not differ materially as required by Specification 4-3, nor was there any notice of differing site conditions provided.” In fact, MCJV did not claim a differing site conditions.

In Specification 4-3.1 General:

The Engineer reserves the right to make, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable by the Engineer.

We acknowledge the Engineer reserves the right to make such increases or decreases in quantities and such alterations in the details of construction as may be found necessary or desirable by the Engineer. Although these types of changes were made in this instance, these changes did not result in the extra work being claimed within this issue. Under this issue of NOI#33, MCJV has claimed for “Extra Work” that was not expressly provided for in the Contract in accordance with 5-12.2.1. MCJV has claimed for the Extra Work caused by the Department’s failure to fulfil its obligations and the extra work that could not have been reasonably anticipated at the time of bid. As a result of this and other repeated failures by the Department, MCJV’s sequence, means, methods, and durations of performance on the project on the project were affected causing extra work.

With the Department’s Position Paper, a snippet of our work plan is shown with choreographed crew usage as originally contemplated at bid. In reality, review of the final schedule (Tab 4) filtered for specific tasks, such as base rock, will reveal that MCJV’s crews were forced to jump from activity to activity with continuous impacts and without opportunity to complete any specific area as originally intended. Project personnel and equipment were moving back and forth between no less than 7 areas.

On this project, the Department has wrongly and unjustly determined that it can continuously and repeatedly cause extra work via directives, impacts, inefficiencies, and extended performance times without recourse unless that impact is a delay to a controlling work item. The extra work described herein is compensable under the specifications and MCJV is entitled to receive a fair and equitable adjustment as compensation for the extra work.

3.2 Summary of the Departments Rebuttal

Contractor’s DRB Position Paper for NOI 33 (FPL/AT&T/COMCAST/FPWA (GAS)/FPWA (WATER) Conflict Phase 2) copied in black text below. Department’s subsequent rebuttal response written in italic's.

Dear Sirs,

Please accept this correspondence as Morrison-Cobalt JV’s (MCJV) Position Paper regarding the adverse impacts and disruption caused by the Department’s failure to fulfill its obligations under Utility Work Schedule (UWS) affecting the project’s Phase 2 of 25th Street. This issue was originally identified under our Notice of Intent (NOI) #33 (Tab 1). The Department and MCJV have been unable to resolve significant impacts and disruptions to the project. The Board has been asked to make a recommendation as to entitlement only.

The Department failed to perform its obligations under the contract Specification Article 7-11.5 (Tab 2) and Special Provision Article under Utility Schedules (Tab 3). The Department failed to timely provide the necessary arrangements with utility owners for the removal or adjustment of utilities in accordance with the UWS and the “Utility Adjustments” shown within the Contract Plan Sheets 531-534 (Tab 4). The Department also failed to recognize its obligations under Contract Specification 4-3 to determine that these conditions differ materially from the original conditions presented in the Contract Documents.

DEPARTMENT REBUTTAL RESPONSE: *The Department did not fail to perform its obligations under the Contract as stated above by MCJV. While the utility work was not performed “Prior to Construction”, the utility relocations were completed prior to MCJV’s initiation of work on Phase 2 of 25th Street and prior to any delay to the Contractor, meeting the intent of the UWS. As outlined in the Department’s position paper, the Contractor was actively pursuing controlling items of work on the*

project around Oleander Avenue and for Phase 2 Bridge construction. The attached pictures are representative of the project activities (controlling and non-controlling) that were occurring during the timeframe from receipt of the NOI until the conflicts were resolved that clearly show the Contractor’s personnel and equipment progressing contract work. (Exhibit 01) At no time was the Contractor’s staff idle or delayed related to this NOI. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.

The Department and the utility companies did not perform the work in accordance with the UWS for the area of 25th Street between 403+00 LT and 416+40 LT. The UWS identified this utility work to be performed “prior to construction” contract work as follows:

UWS	UWS Page	Project Location	Scheduled	SPlan sheet
Florida Power & Light (Tab 5)	6 of 9	Sta 403+26 (36Lt) to Sta 409+35(55Lt)	Prior to Const.	531-532
Florida Power & Light (Tab 5)	7 of 9	Sta 415+10 (60Lt) to Sta 416+40(66Lt)	Prior to Const.	533
Fort Pierce Utilities Authority (Gas) (Tab 6)	3 of 4	Sta 412+20 to 413+40 Left Sta 415+40 to 416+40 left	Prior to Const.	533
Comcast Cable (Tab 7)	6 of 6	Sta 403+26(36Lt) to Sta 409+35 (55 Lt)	Prior to Const.	532-533
		Sta 415+10(60Lt) to Sta 416+40(66Lt)		

“Prior to Construction” is not dependent on any Contractor activities, requires no coordination with the construction phasing of the Contract, and is planned to be adjusted prior to the start date of the Contractor’s operations. The Contractor should not need to contemplate at bid time coordinating its operations with the utility companies in this specific area.

DEPARTMENT REBUTTAL RESPONSE: *As mentioned above, while the utility relocation did not occur “Prior to Construction”, the utility relocations were completed prior to MCJV’s initiation of work on Phase 2 of 25th Street and prior to any delay to the Contractor. As discussed in the Department’s position paper, the Contractor was still in Traffic Control Phase 1 working on the northbound side of 25th Street along with controlling items of work near Oleander Avenue when NOI No. 033 was received. Per Specification 5-12.2.2 from the Department’s position paper (Page 14), there were no impacts to*

controlling items of work and there were no direct idle labor impacts to non-controlling items of work. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.

On October 10, 2019, we notified the Department of our Intent to Claim via NOI #33 for the adverse effects caused by the Department's failure to perform the utility adjustments. As stated within the NOI, we had intended to commence operations in the affected area on October 17, 2019. As with many other ongoing issues on this project, MCJV mitigated the impacts caused by this issue by seeking and mobilizing to other areas of the project to work, albeit out of sequence and inefficiently. In fact, few areas of this project were performed within sequence and without multiple disruptions, a situation with compounding and rippling effects of decreased productivity and increased inefficiencies. On October 29, 2019, the Department issued Revision 12 of the Contract Plans altering or eliminating the Work within the northern section of the affected area. This revision somewhat mitigated the impacts on the northern end by altering the work most affected by the utilities in conflict, thus relieving the need for and reducing the adjustments required by the utility companies. By February 3, 2020, the utility adjustments in the southern section, as originally contemplated within the UWS to be completed prior to construction, were finally completed.

DEPARTMENT REBUTTAL RESPONSE: MCJV states "In fact, few areas of this project were performed within sequence and without multiple disruptions, a situation with compounding and rippling effects of decreased productivity and increased inefficiencies.", in their position paper above. Any reference to multiple disruptions, compounding and rippling effects of decreased productivity and increased inefficiencies are irrelevant to this dispute. The Department negotiated with MCJV a global claim settlement of \$3,287,359.08 and 209 days. (Exhibit 02) Per the certified claim by MCJV, the Contractor is pursuing indirect costs which was previously settled with the above-mentioned claim settlement. The claim settlement left open any direct costs related to NOI No. 033. As discussed in the Department's position paper and within this rebuttal paper, the Contractor was not delayed to a non-controlling item of work and there was no idle labor or equipment as the Contractor was actively pursuing controlling items of work on the project. According to the Contractor's submitted and accepted schedules, there was no impact to the activities referenced in the NOI. While the NOI and Contractor's position paper indicate that MCJV was intending to commence work in the area, this is not true as documented in the Contractor's accepted Schedule Updates (Department's position paper, Exhibits 16-21). Per Special Provision 8-3.2.7 Performance of Work, the Contractor is required to "Prosecute the work in accordance with the latest accepted Working Schedule." The accepted Schedule Updates did not indicate the Contractor progressing activities along southbound 25th Street prior to when the utility conflicts were resolved. As discussed in the Department's position paper, there was no need for the Contractor to mitigate any impacts, as they just needed to continue constructing the project per their accepted schedules. The activities they continued working on during resolution included roadwork around Oleander Avenue and Phase 2 Bridge construction, which followed the sequencing of their accepted schedules as required by Specification 8-3.2.7. The attached pictures are representative of the project activities (controlling and non-controlling) that were occurring during the timeframe from receipt of the NOI until the conflicts were resolved that clearly show the Contractor's personnel and equipment progressing contract work.(Exhibit 01) Additionally, per Specification 5-12.6.2.1, the "Contractor shall be entitled to monetary compensation for the actual idle labor and equipment, and indirect costs, expenses, and profit thereon, as provided for in 4-3.2.1(4) and solely for costs incurred beyond what reasonable mitigation thereof the Contractor could have undertaken." As there were no impacts to the Contractor or the accepted schedules, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.

Through the Department's issuance of Revision 12, large portions of the proposed drainage work was deleted from the northern section of the affected area. MCJV had provided survey of the area in preparation of drainage that would eventually be deleted. The remaining drainage work in the area was

effectively modified by the design revision. MCJV had provided the surveying efforts on 25th Street that became obsolete and remains uncompensated. See attached invoice from our surveyor Apogee. MCJV would mobilize its efforts towards Oleander, another area of the project previously affected and disrupted by conflicts.

DEPARTMENT REBUTTAL RESPONSE: *As outlined in the Department's position paper, per Specification 5-12.7 Mandatory Claim Records, the Contractor shall, once a notice of intent to claim has been timely filed, and not less than weekly thereafter as long as appropriate, provide the Engineer a copy of the Contractor's daily records and be likewise entitled to receive a copy of the Department's daily records. These daily records were never provided to the Department as required by Specification and verification of the survey layout was never requested by the Contractor. Additionally, the Contractor's accepted schedule reflected critical activities at and around Oleander Avenue throughout the period in question, therefore mobilization efforts were always planned by the Contractor. The non-controlling activities were not impacted and after the global settlement, had a significant positive total float. As previously stated, and supported by the Department's position paper, there was no impact to controlling or non-controlling activities and therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.*

The utility work was not performed timely and delayed the Contractor's activities in Phase 2 of 25th Street. As such, the Department interfered with the Contractor's work by forcing MCJV to work out of sequence and inefficiently, thereby extending the performance times of MCJV's crews and operations as originally scheduled, anticipated and approved within the Original Baseline Schedule. Since the Department failed to perform its obligations and the utility companies failed to complete their work in accordance with UWSs, MCJV's performance was impacted and extended.

DEPARTMENT REBUTTAL RESPONSE: *MCJV activities in Phase 2 were not delayed as the Contractor was actively pursuing work in Phase 1 at 25th Street at the time the NOI was received and additional controlling activities on the project, primarily at Oleander Avenue and Bridge Phase 2 during resolution of the conflicts. As documented in the Daily Work Reports, and the submitted and accepted schedules/narratives, the Contractor's crews and operations were not extended and therefore not impacted. Per Special Provision 8-3.2.2, the Contractor is required, and complied, to submit monthly schedule updates and narratives that include and describe the critical path of the project and any logic changes from the previous update. MCJV's narratives never indicated the work on southbound 25th Street as being critical, which was supported by the logic in their schedule. As outlined in the Department's position paper and reiterated above, there were no impacts to the activities along southbound 25th Street and the activities were completed well in advance of any delays or disruption to the schedule. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.*

In accordance with the Contract Specifications 4-3 (Tab 11), the Department is required to compensate MCJV for unforeseen work. The Department failed in recognizing its obligations under the Contract to perform the utility adjustments in accordance with the UWS. The Department also failed to investigate the conditions and determine that these conditions differs materially from the conditions presented in the original Contract Documents. Based on these failures, the Department and its consultant did not recognize or understand MCJV's entitlement in this matter.

DEPARTMENT REBUTTAL RESPONSE: *As outlined in the Department's position paper and as stated in the Department's rebuttal above, there were no impacts and no unforeseen work. The Contractor claims that the work differs materially but fails to acknowledge that at no time did they notify the Department of any differing site condition as required in Specification 4-3.7. Further, and more importantly, there was no differing site condition for the utility issues in dispute. While the utility relocation was not performed "Prior to Construction", the utility relocation took place prior to*

construction taking place within that Phase and prior to any impacts to the Contractor. As the Contractor failed to notify the Department of a differing site condition and as there was no differing site condition, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.

Yet, starting with the April 8, 2021 Dispute Review Board (DRB) Meeting and every subsequent DRB meeting, the Department and its consultant were asked by the DRB to state if they found entitlement in this issue (and others). Each time the Department and its consultant stated that entitlement was determined but that no additional costs were observed. Additional costs are a matter of quantum, not entitlement. The Department's, and its consultant's, inability to recognize conditions materially different from the original conditions presented and their inability to determine how these differed conditions impact and disrupt the Contractor's operations are plainly evident.

DEPARTMENT REBUTTAL RESPONSE: *The Contractor references meeting minutes over a year after the conclusion of the alleged utility impact to indicate the Department established entitlement. It is clear that the Department indicated that there was "no additional costs or impacts observed". To determine entitlement for the delay issue raised to the Board, the Contractor and Department must refer to Specification 5-12.2.2 Claims for Delay. In this Specification, as captured in the Department's position paper, the Contractor would need to prove 1 of 2 things. First, the Contractor would need to prove that there was an impact to a controlling item of work. The Contractor's own accepted schedules, clearly outlines that there were no impacts to controlling items of work. Second, the Contractor must prove that there was a direct impact to a non-controlling item of work with idle labor and equipment. As outlined in the Department's position paper, not only were there no impacts to controlling items of work, but there was also no idle labor or equipment related to a non-controlling item of work. The Contractor was pursuing controlling items of work at Oleander Avenue and Phase 2 Bridge construction. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.*

MCJV developed its original bid and project schedule in accordance with the Contract Documents issued by the Department, who warranted that the Contract Documents were complete, accurate and buildable. However, MCJV's planned schedule and cost of performance were adversely affected by the Department's repeated failures and deficiencies. These Contract deficiencies caused disruptions in performance and inefficiencies in the MCJV's work. By failing to adhere to the UWS, the Department caused and MCJV encountered a changed condition. With MCJV unable to proceed with its planned methods of construction, MCJV's performance was adversely impacted, its crews were on the project longer than anticipated, and its cost of performance was increased as a direct result of the unforeseen conflicts.

DEPARTMENT REBUTTAL RESPONSE: *As stated in the Department's position paper and stated above, any reference to disruptions, repeated failures, compounding and rippling effects of decreased productivity and increased inefficiencies are irrelevant to this dispute. The Department negotiated with MCJV a global claim settlement in the amount of \$3,287,359.08 and 209 days. (Exhibit 02) The global claim settlement resolved any indirect costs for NOI No. 033 and per the certified claim by MCJV, the Contractor is pursuing indirect costs and therefore not entitled. The claim settlement only left open any direct costs related to NOI No. 033. As was discussed in the Department's position paper and within this rebuttal paper, the Contractor was not delayed to a non-controlling item of work and there was no idle labor or equipment as the Contractor was actively pursuing controlling items of work on the project and therefore not entitled to any direct costs. According to the Contractor's submitted and accepted schedules, there was no impact to the activities referenced in the NOI. MCJV was not ready to begin the work on Phase 2 along 25th Street as they were pursuing controlling items of work at Oleander Avenue and Phase 2 Bridge construction. The Contractor mentions that the crews were on the project longer than anticipated; however, as there were no impacts to controlling items of work and no impacts to non-controlling items of work, the crews included in the certified claim were not on the project longer than*

anticipated related to this NOI. While this is only an entitlement dispute, it should be noted that MCJV has a certified claim requesting stand-by and direct labor costs from the period of 12.09.2019 to 03.31.2020. During this period, it is clear by the Daily Work Reports that the MCJV crews were not working in this area and were directly working on contract work on the project. Therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.

As of the November 2019 schedule update (Tab 13), the number of scheduled workdays remaining for the earthwork crews and base grading crews were 238 and 154, respectively. With the disruptions and inefficiencies caused by, but not limited to, this unforeseen conflict, the actual crew days on the project after November 2019 for the earthwork and base grading crews were 377 and 366, respectively. As such, the following represents the extended crew days used on the project.

Crew	Planned Crew Days As of November 2019	Actual Crew Days	Extended Crew Days
Maintenance of Traffic	325	472	147
Earthwork	238	377	139
Base Grading	154	366	212

DEPARTMENT REBUTTAL RESPONSE: *MCJV attempts to attribute any extended crew days directly to NOI No. 033 without any backup documentation or support in the certified claim or in the position paper exhibits. The Contractor attempts to calculate all of the MOT, earthwork and base grading crew days on the project directly to this issue without recognizing or acknowledging that this time was included as part of the global claim settlement. As stated, any extended crew days or impacts to the schedule are directly correlated with the global claim settlement for \$3,287,359.08 and 209 days. (Exhibit 02) Additionally, the Contractor never complied with the requirements of requesting a Time Extension per Specification 8-7.3.2 and if they had, the supporting documentation, including the submitted and accepted schedules from MCJV do not support that there was any impact to the project or extended crew days as outlined above. The period in question (while the Department disagrees with the period that MCJV has submitted), is between 12.09.2019 and 03.31.2020. There is no indication that any extended crew time was directly related to this NOI, therefore, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.*

Since the Department failed to complete its obligation in accordance with the UWS in the Contract, MCJV suffered unforeseen conflicts, extended crew days and increases in its cost of performance.

Therefore, in accordance with the following Specification Article:

4-3.4 Conditions Requiring a Supplemental Agreement or Unilateral Payment: A Supplemental Agreement or Unilateral Payment will be used to clarify the Plans and Specifications of the Contract; to provide for unforeseen work, grade changes, or alterations in the Plans which could not reasonably have been contemplated or foreseen in the original Plans and Specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle documented Contract claims; to make the project functionally operational in accordance with the intent of the original Contract and subsequent amendments thereto.

DEPARTMENT REBUTTAL RESPONSE: *The Department did not fail to complete its obligations on the Contract. The utility work was relocated prior to construction activities in the area which is the intent*

of the utility work schedule. There was no impact to the project and the crew was not impacted or delayed. There was no unforeseen work, and the relocation was contemplated in the original plans. The only change is the timeframe between the original utility work schedule and the time the work was completed. As previously stated, the work was completed prior to any work in that phase of the Contract. The Contractor was compensated for any alterations of the plans as part of Plan Revision #12, per Specification 4-3.2. As there was no unforeseen work and no alterations that impacted the Contractor's schedule or crews, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.

MCJV was impacted by Utility Conflicts that could not have been reasonably anticipated or foreseeable at the time of bid. These conflicts were created by the Department's own failure to adhere to the UWS provided within the original and deficient Contract Documents. The effects of deficient documents, unknown failures by the Department, and unforeseen conflicts impacted MCJV's sequence, means, methods, and durations of performance on the project. Therefore, MCJV is entitled to receive a fair and equitable adjustment as compensation for increased costs caused by unforeseen conflicts. Additionally, the Department and its consultant had previously determined entitlement as mentioned previously above and within the DRB Meeting Minutes.

MCJV sincerely appreciates the consideration given by the Board on the above detailed issues.

DEPARTMENT REBUTTAL RESPONSE: *The Contractor makes statements in their position paper without any contractual basis to support their statements. Their position is based upon the utility work not being completed prior to construction without acknowledging that their own submitted and accepted schedules reflect no impact to their schedule or to the completion of the Contract. Per Specification 5-12.2.2, there was no impact to a controlling item of work and no impact to a non-controlling item of work. Per Specification 8-7.3.2, the Contractor failed to provide a supported time extension request and more importantly, the accepted schedules proves that that utility relocation was completed well before any impacts to the Contract and without any delays to the MCJV crews. There was no differing site conditions or materially different conditions as the Contractor claims per Specification 4-3. Any reference to the Department indicating "entitlement" in previous DRB meetings was only that there could have been if there were impacts and it was clearly noted that no additional costs or impacts were observed. Furthermore, the executed global claim settlement resolved any indirect costs associated with NOI No. 033. Since MCJV is pursuing additional indirect costs as part of their certified claim, they are therefore not entitled. Additionally, the Department met their obligations for the utility work to be relocated prior to work in Phase 2 along southbound 25th Street and prior to any impacts to a controlling or non-controlling item of work. As outlined in the Department's position paper and in the Department's rebuttals in this paper, the Contractor is not entitled to any impacts or disruptions related to NOI No. 033.*

Sincerely,

Luis F Porro

Digitally signed by Luis F Porro

Date: 2022.11.10

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Morrison-Cobalt

4. Relevant Specifications

1. Division I Specifications §1-3 Definitions
2. Division I Specifications §4-3 Alteration of Plans or of Character of Work
3. Division I Specifications §5-12 Claims by Contractor
4. Division I Specifications §7-11.5 Utilities
5. Division I Specifications §8-6.4 Suspension of Contractor's Operations – Holiday and Special Events
6. Division I Specifications §8-7.3.2 Contract Time Extensions

5. Key findings and Analysis of facts

1. The UWS's for southbound 25th Street indicated specific utilities to be relocated prior to construction. These utilities were not relocated prior to construction.
2. On Oct 10th, 2019 Contractor submitted NOI 33 due to conflicts between Phase 2 25th Street work and the existing utilities.
3. On Oct 29th, 2019 DOT issued plan revision deleting/altering work on Southbound 25th Street (north).
4. Supplemental Agreement (SA) 87 was executed on 1/7/2020.
5. SA 87 settled all disputes of any kind as of Dec 6, 2019. Exceptions to this SA included direct costs associated with NOI 33.
6. Feb 3, 2020, utility relocations were completed on Southbound 25th St (south).
7. The contractor is requesting determination of entitlement to the cost of extra work (sequence, means and methods and durations not contemplated at time of bid).
8. The Claim for NOI 33 includes active and standby labor and equipment costs from Dec 9, 2019, through March 31, 2020.
9. **Specification 5-12.7 Mandatory Claim Records**, The Contractor once a Notice has been timely filed must keep daily claim records and provide a copy to the Engineer no less than weekly. This was not done for this NOI.
10. **Daily Work Reports (DWR's)**, The DWR's for the time frame in question do not contain documentation in support of this claim.
11. **Monthly CPM update's**, With the exception of a general comment noting Utility Conflicts, the monthly CPM updates for the time frame in question do not contain documentation in support of this claim.

The Board has relied on contract specifications and all evidence presented in the submitted documents and the Hearing conducted December 5, 2022 for NOI-33, relevant to this claim.

6. DRB Recommendation

The Contractor brought fourth this claim under Specification **4-3 Alteration of Plans or of Character of Work**. In their claim the Contractor points out the work in question took significantly longer than originally estimated in their bid. They ask for additional costs related to the extra work required during the time difference between their original estimate and the as built, as described in the Hearing.

They explained that additional work effort, both Manpower and Equipment was due to extra work required by the Department's failure to follow their original UWS. MCJV stated they were continually disrupted leading to inefficiencies and an inability to level resources and efficiently workflow the project as intended resulting in extra work.

The Board understands and acknowledges the Contractors Position associated with the progress of the UWS, however based on the lack of depth of the supporting material submitted, we are not able to conclusively attribute direct impact to this NOI.

The Board recommends **No Entitlement** to this issue.

Submitted by and for

Date of Recommendation: 12/16/2022

Ronnie Klein, Chairman

Pat McCann P.E., Member

Rick Espino P.E., Member