

DISPUTE REVIEW BOARD RECOMMENDATION

Dec. 20, 2005

Mr. Vince Zaliauskas, P.E.
Senior Project Engineer
T.Y. Lin International Construction Services
16997 James Whitehead Road
Fort Myers, FL 33912

Mr. Tom Boyle
Project Manager
Gilbert Southern Corporation
16997 Whitehead Road
Fort Myers, Fl 33912

Ref: FIN # 200966-1-52(56)-01
Contract #T-1108
Alico Rd. Interchange/I75

Subject: Hearing #1 Dated 15 December 2005
Disputes Review Board Recommendation

Gentleman,

Gilbert Southern Corporation (GSC) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing on the above reference project. The Alico Road contract is a total interchange rebuild, including bridge and ramp replacements. It also involves considerable subsurface work, including excavating ponds, construction of box culverts, and laying water and drainage lines. Both parties furnished the board position papers for review prior to the hearing.

The Issue question submitted to the Board was:

Question #1

“Under the terms of the Alico Road Project contract, who is responsible for obtaining environmental permits such as a South Florida Water Management District Water Use or Individual Permit?”

Question #2

If the DRB concludes that GSC is required to obtain the permit, under the terms of 7-2.1 is it still the Department’s obligation to provide a fair and equitable adjustment because this work is not covered under the basis of payment clauses of the contract?”

Contractor Position – Question # 1

The contractor's position is summarized as follows:

Because the contract requires work to be performed in the dry, significant dewatering was an understood requirement of the contract from the earliest planning stages.

Accordingly, the need for a dewatering permit must have also been an understood requirement of the contract. FDOT recognizes that when such a permit is required, it is FDOT's obligation to obtain it. FDOT planning documents such as a document called Procedure for Environmental Permit Coordination require FDOT personnel to "determine and forecast permit needs", "obtain permits for all regulated construction activities in waters of the State, ...",

More importantly, that obligation is recognized in the contract which states unequivocally in 7-1.1 that ***"the Department will procure all environmental permits required by Federal, State, county and local regulatory agencies."***

In addition, it is also GSC's position that activities on the project fall under Section 7-2.2 of the standard specifications for work within navigable waters of the U.S. It clearly states, "...the Department will procure the necessary permits prior to advertising for bids."

FDOT Position – Question # 1

The Department's position is summarized as follows:

The Contractor has submitted a Notice of Claim pursuant to Section 5-12 of the Standard Specifications requesting compensation for cost and delays as a result of lost productivity, equipment and labor cost due to restricted activities for not having a Dewatering Permit. The Contractor claims that a dewatering permit is an "environmental permit" and it was/is the responsibility of the Department to procure a dewatering permit.

The Department's response to the Contractor is that the required environmental permits have been procured, including SFWMD, Army Corps of Engineers, and DEP. A dewatering permit is dependant on the means and methods chosen by the bidder awarded the Contract, therefore it is the Contractor's responsibility to obtain a dewatering permit if necessary.

A Dewatering Permit is not an Environmental Permit; it is a Water Use Permit. The Water Management Districts make this distinction in the application process. A Water Use Permit allows a user to withdraw a specified amount of water, either from the ground, a canal, a lake or a river. The water can be used for public water supply; to irrigate crops, nursery plants, golf courses, or for industrial processes. A Dewatering Permit is a special case of a Water Use Permit and is required by General and Specific Authority, Chapter 373, State Statutes, 40E-2 and 40E-20 Florida Administrative Code [E-4] and Basis of Review [E-3], Vol. III, South Florida Water Management.

Dispute Review Board Recommendation:

With respect to the first question, as to the responsibility of obtaining permits, the Board has the following recommendation:

The opinion of the Board is that the Department is responsible for obtaining the environmental permits such as a South Florida Water Management District Water Use or Individual Permit.

In as much as it is the Board's opinion that it is the Department's responsibility to obtain South Florida Water Management District Water Use or Individual permit, the Board does not give an opinion on the second question.

Rationale:

The Contract Supplemental Specification, Sub article 7-1.1 states, "The Department will procure all environmental permits required by Federal, State, county and local regulatory agencies." The Department as Permittee obtained the original Environmental Resource Permit (ERP) from the South Florida Water Management District prior to accepting bids for the project. The ERP was included as a part of the Contract Documents.

In addition, The Florida Department of Transportation, Standard Specifications for Road and Bridge Construction Sect 7-2, subsection 7-2.1 Para 2, states "The Department will also acquire any modifications or revisions to an original permit when the Contractor requires such modifications or revisions to complete the construction operations specified in the plans or Special Provisions and within the right-of-way limits."

The General Conditions, Para. 13 of the original ERP, states, "The permittee must obtain a Water Use permit prior to construction dewatering, unless the work qualifies for a general permit pursuant to Subsection 40E-20.302(3), F.A.C., also known as the "No Notice" Rule.

Thus, the provisions of the ERP, General Conditions Sect. 13, specifically specifies that the permittee, i.e., the Department, must obtain a Water Use Permit, if such a permit is required, regardless of whether or not the Water Use Permit is defined as an Environmental permit.

A Water Use Permit is required since the work does not qualify under at least two of the criteria of the "No Notice" Rule:

1. The "No Notice" Rule is intended for short term projects with duration of less than 90 days. For this project the dewatering duration will extend much beyond 90 days.
2. The "No Notice" Rule is intended for projects where dewatering will not occur within 1000 feet of wetland. The Contract Documents require the installation of the box culvert and the water pipeline to be conducted in the dry. The dewatering for the installation of a portion of the box culvert and the water pipeline will occur within 1000 feet of a wetland.

The Board sincerely appreciates the cooperation of all parties and the information presented for review in order to make this recommendation. The Disputes Review Board's recommendation should not prevent or preclude the parties from negotiating and equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

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

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

Respectfully Submitted
Disputes Review Board
Robert P. Bayless, DRB Chairman
Matthew L. Michalak, DRB Member
Denis J. Roza, DRB Member

Signed for and with the concurrence of all Members:

Robert P. Bayless
(sent by e-mail, hard copy will follow)

Robert P. Bayless
DRB Chairman