

DISPUTES REVIEW BOARD RECOMMENDATION

14 October, 2007

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Ref: US 17 from North of Peace River to Tropicana Rd. Financial Project ID: 194093-1-52-01: WPI State Job No.: 1111277: Contract No.: T1009: Hardee County: Disputes Review Board hearing regarding entitlement to compensable days for Additional work at Stenstrom Road and Tuskegee.

Dear Sirs:

The Florida Department of Transportation and Freedom Pipeline Corporation requested a hearing concerning the above referenced issue.

CONTRACTORS POSITION

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

“This letter serves to state Freedom Pipeline Corp’s (“FPC”) position for merit requesting the Dispute Review Board (“DRB”) make a determination that the Florida Department of Transportation (“FDOT”) does not have the authority to deduct compensable days previously issued and executed under a unilateral supplemental agreement for which Freedom Pipeline proceeded and completed the work, that FPC is due its actual cost plus appropriate mark up for the additional work at Stenstrom and Tuskegee, and FPC is entitled compensable days for work associated with Stenstrom and Tuskegee.

The FDOT issued plan revisions 13 and 14 which added additional unforeseen work at Stenstrom and Tuskegee. FDOT agreed during the

settlement meeting on 9/27/06 that it would compensate FPC for its actual cost plus appropriate markups, compensable days for the actual time required to perform the work, and a time extension for the total time. FPC proceeded in good faith and completed the additional unforeseen work associated with both Stenstrom and Tuskegee. FPC submitted its request for additional compensation based on FPC actual cost and appropriate markups to the FDOT. Subsequent to FPC completing the work, the FDOT prepared Unilateral Payment (SA 53) for \$26,742.07 and 6 compensable days, and Unilateral Payment (SA 74) for 17,078.58 and 5 non compensable days. After the settlement agreement was reached with the FDOT on 9/27/06, and the FDOT prepared Supplemental Agreement No. 64 granting compensable days, the FDOT arbitrarily deducted the 6 compensable days on unilateral agreements (SA 53). FPC position is that after the FDOT issues a contractual unilateral payment (SA 53) and FPC completes the work, the FDOT can not unilaterally deduct previously agreed to amounts.

Furthermore, FPC position is that the FDOT is refusing to grant compensable days in accordance with Section 5-12.6.2.2 for the additional unforeseen work that the FDOT added to the Contract. The FDOT position is that the mark up for Labor, Material, Equipment and Subcontractors includes the calculated amount in Section 5-12.6.2.2. FPC position is that when the cumulative total number of calendar days exceeded ten (10) days, the Department will compensate FPC in accordance with the formula stipulated in Section 5-12.6.2.2. Since the 10 days have already been applied in the 9/27/06 settlement agreement, FPC should receive a compensable time extension for the time required to complete the additional unforeseen work associated with both Stenstrom and Tuskegee.

FPC respectfully request that the DRB rule that FPC is entitled to the compensable days previously paid by the FDOT in the unilateral payment (SA 53), FPC is entitled to its actual cost plus appropriate markups, and that FPC is also entitled to additional compensable days for the total time required to perform this additional unforeseen work

Based on the fact that the FDOT has already issued two (2) unilateral payments SA 53 & SA 74, the FDOT has already established the fact that FPC is entitled to a compensable time extensions. The following sections have been included for information purposes.

The Standard Specifications for Road and Bridge Construction 2000, page 9 "Unilateral Payment" states:

A payment of money made to the Contractor by the Department pursuant to Section 337.11(11), Florida Statutes (19978), for sums the Department determines to be due to the Contractor for work performed on the project, and

whereby the Contractor by acceptance of such payment does not waive any rights the Contractor may otherwise have against the Department for payment of any additional sums the Contractor claims are due for the work.

The actual unilateral document states in part the following:

(1) On or about ..., the Florida Department of Transportation “Department” determined that Freedom Pipeline Corporation “Contractor” is due additional sums of money for work performed under the Contract..., and the Department has elected to make payment to the Contractor pursuant to Section 337.11(11), Florida Statutes...

(5) All sums paid by the Department hereunder shall be credited against the sums that may be due the Contractor for the itemized work described above in the amounts set forth above. The Contractor shall apply the payments made hereunder to the items described above and in the amount shown above.

Standard Specifications for Road and Bridge Construction 2000, page 9 “Unilateral Payment” states in part the:

In accordance with Supplemental Specification 008; Section 8-7.3.1 Increased Work and Section 8-7.3.2 Contract Time Extensions states in part the following:

8-7.3.1 Increased Work: The Department may grant an extension of Contract Time when it increases the Contract amount due to overruns in original Contract items, adds new work items, or provides for unforeseen work. The Department will base the consideration for granting an extension of Contract Time on the extent that the normally required to complete the additional designated work delays the Contract completion schedule.

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.

Controlling Work Items are defined in the Special Provisions as follows:

The activity or work item on the critical path having the least amount of total float. The controlling item of work will also be referred to as a Critical Activity.

In regard to compensable days,

Supplemental Specifications 004 Alterations of Plans; 4-3.2 Increase, Decrease or Alteration in the Work states in part the following:

- (a) Labor: ... direct labor and burden...plus a mark-up of 25%
- (b) Materials...actual cost ...plus 17.5%
- (c) Equipment...100% of the "Rental Rate Blue Book" for actual time ... and ... 50% ... standby...the Department will allow a 7.5% mark-up thereon.
- (d) The Contractor will be allowed a markup of 10% on the first \$50,000 and a markup of 5% on any amount over \$50,000...
- (e) General Liability Insurance and Bond: a mark-up of 1.5%

Next, FDOT & URS is interpreting the last two paragraphs on page 87 "as full and final" which states in part the following:

The markups in (a) (b) (c) and (e) above include all indirect cost and expenses of the Contractor, including but not limited to overhead of any kind, and reasonable profit.

The monetary compensation provided for above constitutes full and complete payment for such additional work and the Contractor shall have no right to any additional compensation for any direct or indirect costs or profit for any such additional work...

URS / FDOT is stopping there and not continuing to the last sentence which states in part the following:

.... **Except** (a) as is provided above when the performance of any portion of the additional work is a controlling work item and the performance of such controlling work item actually delays completion of the project due to no fault of the Contractor or (b) only as provided for under 5-12.6.2.1 and 5-12.6.2.2

5-12.6.2.2 Compensation for Indirect Impacts of Delay which states in part the following:

...the Department will compensate the Contractor for jobsite overhead and other indirect impacts of delay, ... according to the formula set forth below:

$$D = \frac{A \times C}{B}$$

Where A= Original Contract Amount

B= Original Contract Time

C= 8%

D= Average Overhead Per Day

The fact is that the FDOT added new work items to the contract for the additional unforeseen work associated with plan revision 13 & 14 which added work at Tuskegee and Stenstrom. The FDOT also issued two (2) unilateral supplemental agreements to partially compensating FPC for the work and part of the compensable days. The FDOT has not properly compensated FPC for the additional time or money required to perform the additional unforeseen work, and has improperly deducted amounts from previous unilateral supplemental agreements. In addition, FDOT directed FPC to reallocate its work force and proceed with the work based on the agreement that the FDOT would grant compensable days for days actually worked and a time extensions for the total calendar days associated with the work.

...the FDOT agreed and directed FPC to perform this additional unforeseen work, and the FDOT gave its word to FPC that it would receive compensable time for the actual days it took to perform the work and a time extension for the entire time required to complete all of this work. This was agreed to by the parties when FPC stated it would perform the additional unforeseen work, but it would be the last thing completed on the project. The FDOT did not want this critical work to wait until the end of the project and subsequently the parties reached an agreement as stated above. As a result, FPC redirected its resources from other critical work (similar to the Arch Culvert) to complete this critical additional unforeseen work.

In regard to the “compensable days” “controlling item of work” and “delayed overall completion of the project” the FDOT has already agreed that all of these items occurred. As noted on Unilateral Payment SA No. 53 and Unilateral Payment SA No. 74 the FDOT document states in part the following:

The Department has determined that you, as Contractor, are **entitled** to payment for the work described in the Unilateral Payment document...

Granted Time (Due to **delays** to **controlling items** of work shown on approved work schedule): 6 days and 5 days. (total 11 days, not 12 as stated in URS position paper)

Reason(s) for Granted Time: The Contractor is utilizing manpower and equipment for this Revision that was initiated by the city of Wauchula and the Department. Time is being granted in order to complete this work which was added by Revision #14 – Tuskegee, Supplemental Specs 4-3.2

Reason for Granted The Contractor is utilizing manpower and equipment for this Revision that was initiated by the city of Wauchula and the Department. Time is being granted in order to complete this work which was added by Revision #14 – Tuskegee, Supplemental Specs 4-3.2

As stated in FPC position paper, the FDOT directed the additional unforeseen work on or about 3/30/06 after original contract time had expired. FPC performed the additional unforeseen work from 8/15/06 through 1/30/07.

FPC, URS & the FDOT agreed that after contract time expired, all work was controlling and critical. Therefore, all of this additional unforeseen work is a controlling item of work which impacted project completion and FPC is entitled to a compensable time extension.

FPC respectfully request that the DRB rule that FPC is entitled to the compensable days previously paid by the FDOT in the unilateral payment (SA 53), that FPC is also entitled to its actual cost plus appropriate mark ups, and additional compensable days for the total time required to perform this additional unforeseen work.”

DEPARTMENT’S POSITION

We will state the Department’s position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Department’s position paper has the following statements and references to document their claim for no entitlement to FPC for compensable days.

“The Department affirms that the Contractor has been compensated for all work associated with the Stenstrom Road and Tuskegee drainage modifications. The Department also contends that the contractor is not entitled to compensable days.

Unilateral Payment 53 and 74 were issued to Freedom Pipeline for work associated with the drainage modifications at Stenstrom and Tuskegee.

The work was added via Unilateral Payment since the Department and Freedom could not agree on submitted costs associated with this extra work and compensable time.

The cost estimates provided by Freedom to perform this work contained many errors which included incorrect personnel salary, incorrect taxes and inflated markups which did not follow Specification 4-3.2. URS prepared an Engineer's Estimate which corrected Freedom's errors and used that estimate to prepare both Unilateral Payment 53 and 74.

Freedom Pipeline is also requesting 25 days of compensable contract time for this issue. Freedom has not provided any evidence that this work was a controlling item of work for the full duration of its construction, nor have they demonstrated that performance of this work **delayed** overall completion of the project.

Freedom was granted 12 non-compensable contract days and 7 weather days during this work effort.

Per Project Specifications, Freedom is not entitled to compensable days for this construction effort since Freedom was compensated for Labor, Materials, and Equipment with allowable contract mark ups per Project Specification 4-3.2. As previously stated, Specification 4-3.2 allows the Engineer the right to increase, decrease or make alterations in the contract work.

4-3.2 Increase, Decrease or Alteration in the Work: *The Engineer reserves the right to make alterations in the character of the work which involve a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance. Such alteration shall not constitute a breach of Contract, shall not invalidate the Contract or release the Surety. The Engineer may direct in writing that the work be done and, at the Engineer's sole discretion, the Contractor will be paid pursuant to an agreed Supplemental Agreement or in the following manner:*

(a) Labor: The Contractor will receive payment for direct labor and burden on the actual costs of the additional or unforeseen work, plus a mark-up of 25%.

(b) Materials and Supplies: For materials accepted by the Engineer and used on the project, the Contractor will receive the actual cost of such materials incorporated into the work, including Contractor paid transportation charges (exclusive of equipment as hereinafter set forth), plus 17.5%. For supplies reasonably needed for performing the work, the Contractor will receive the actual cost of such supplies, plus 17.5%. (c) Equipment: For any machinery or special equipment (other than small tools), including fuel and lubricant, the Contractor will receive 100% of the

“Rental Rate Blue Book” for the actual time that such equipment is in operation on the work, and 50% of the “Rental Rate Blue Book” for the time the equipment is directed to standby and remain on the project site, to be calculated as indicated below. The equipment rates will be based on the latest edition (as of the date the work to be performed begins) of the “Rental Rate Blue Book for Construction Equipment” or the “Rental Rate Blue Book for Older Construction Equipment,” whichever is applicable, as published by Machinery Information Division of PRIMEDIA Information, Inc. (version current at the time of bid), using all instructions and adjustments contained therein and as modified below. On all projects, the Engineer will adjust the rates using regional adjustments and Rate Adjustment Tables according to the instructions in the Blue Book.

Allowable Equipment Rates will be established as set out below:

(1) Allowable Hourly Equipment Rate = Monthly Rate/176 x Adjustment Factors x 100%.

(2) Allowable Hourly Operating Cost = Hourly Operating Cost x 100%.

(3) Allowable Rate Per Hour = Allowable Hourly Equipment Rate + Allowable Hourly Operating Cost.

(4) Standby Rate = Allowable Hourly Equipment Rate x 50%.

The Monthly Rate is The Basic Machine Rate Plus Any Attachments. Standby rates will apply when equipment is not in operation and is directed by the Engineer to standby at the project site when needed again to complete work and the cost of moving the equipment will exceed the accumulated standby cost. Standby rates will not apply on any day the equipment operates for eight or more hours. Standby payment will be limited to only that number of hours which, when added to the operating time for that day equals eight hours. Standby payment will not be made on days that are not normally considered work days on the project.

The Department will allow for the cost of transporting the equipment to and from the location at which it will be used. If the equipment requires assembly or disassembly for transport, the Department will pay for the time to perform this work at the rate for standby equipment.

In addition to the compensation provided in this (c), as described above, the Department will allow a 7.5% mark-up thereon.

(d) The Contractor will be allowed a markup of 10% on the first \$50,000 and a markup of 5% on any amount over \$50,000 on any subcontract directly related to the additional or unforeseen work. A subcontractor mark-up will be allowed only by the prime Contractor and a first tier subcontractor.

(e) General Liability Insurance and Bond: The Contractor will receive a mark-up of 1.5% on the overall total cost of the additional or unforeseen work for insurance and bond. In addition, in the instance of subcontractor performed work only, the subcontractor may receive a mark-up of up to and including not more than 1.5% on the overall total cost of the subcontracted additional or unforeseen work for insurance and bond; provided, however, that such subcontractor mark-up for subcontractor

insurance and bond will only be paid upon presentment to the Department of clear and convincing proof that the subcontractor has actually provided and paid for separate liability and bond premiums for such additional or unforeseen work in such amount.

The markups in (a), (b), (c) and (e) above include all indirect costs and expenses of the Contractor, including but not limited to overhead of any kind, and reasonable profit.

The monetary compensation provided for above constitutes full and complete payment for such additional work and the Contractor shall have no right to any additional monetary compensation for any direct or indirect costs or profit for any such additional work beyond that expressly provided above. The Contractor shall be entitled to a time extension only to the extent that the performance of any portion of the additional work is a controlling work item and the performance of such controlling work item actually delays completion of the project due to no fault of the Contractor. All time related costs for actual performance of such additional work are included in the compensation already provided above and any time extension entitlement hereunder will be without additional monetary compensation. The Contractor shall have no right to any monetary compensation or damages whatsoever for any direct or indirect delay to a controlling work item arising out of or in any way related to the circumstances leading up to or resulting from additional work, except (a) as is provided above when the performance of any portion of the additional work is a controlling work item and the performance of such controlling work item actually delays completion of the project due to no fault of the Contractor or (b) only as provided for under 5-12.6.2.1 and 5-12.6.2.2.

Project Specification 4-3.5 further states that extra work will be paid in accordance with formulas in Specification 4-3.2 and such payment will be the full extent of monetary compensation associated with the work.

4-3.5 Extra Work: *Extra work authorized in writing by the Engineer will be paid in accordance with the formula in 4-3.2. Such payment will be the full extent of all monetary compensation entitlement due to the Contractor for such extra work. Any entitlement to a time extension due to extra work will be limited solely to that provided for in 4-3.2 for additional work.*

Definition of 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 other wise, which are beyond the control of and not caused by the Contractor, or the Contractor's subcontractors,

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

Definition of 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”.***

The Department deducted compensable days from Unilateral Payment 53 since they were erroneously included in the Engineer’s Estimate.

In regard to deducting monies from the Unilateral Payment, it is possible that items of work can be deducted from Supplemental Agreements and Unilateral Payments if items of work are not required to be performed after issuance of the document.

The Unilateral Payment was used as a mechanism to pay the contractor for work performed. Since payment was made via Unilateral Payment, there was no formal agreement between Freedom and the Department. Furthermore, Specification 5-13 states the Department reserves the right to recover errors in payment from the contractor.

Freedom makes reference to the settlement agreement between FDOT and Freedom. The settlement agreement issued via Supplemental Agreement 64 has no relevance to this issue. In addition to Unilateral #53 and Unilateral #74 which are included in URS’ Position Papers, and after numerous requests for validation documentation for claims, Unilaterals #77 and #93 were added.

Freedom was granted a total of 17 non-compensable days and 7 weather days (August, 2006) for this work effort. The time granted was based on Freedom’s actual manpower for work performed. Note time requested for Tuskegee work, was granted as rain days during that time period.

Freedom’s submitted cost estimate included payment for idle equipment. Freedom, at their own discretion, did not pursue work at Stenstrom continuously during its construction and reallocated their work forces to other areas of the project. Compensation for idle equipment is not warranted per Specification 4-3.2.”

FINDINGS OF FACT

The Board's decisions are governed by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the following referenced documents and facts.

1. Plan revisions 13 and 14 added additional unforeseen work at Stenstrom and Tuskegee.
2. Revision 13 was transmitted to FPC from 12/20/2005 to 1/17/2006.
3. Direction to proceed on revision 13 given to FPC on 8/10/2006.
4. Unilateral Payment No. 53 dated 16 March, 2006 gave 6 days of time for a controlling item of work.
5. Unilateral Payment No. 74 dated 29 March, 2007 gave 5 days of time for a controlling item of work.
6. Unilateral Payment No. 93 dated 29 August, 2007 gave 6 days of time for a controlling item of work.
7. Unilateral 53, 74, and 93 all stated the additional work was a controlling item. The Department unilaterally made that determination. This controlling item of work did impact the schedule and did extent the contract completion date. Specification 4-3.2 states... *The Contractor shall have no right to any monetary compensation or damages whatsoever for any direct or indirect delay to a controlling work item arising out of or in any way related to the circumstances leading up to or resulting from additional work, except (a) as is provided above when the performance of any portion of the additional work is a controlling work item and the performance of such controlling work item actually delays completion of the project due to no fault of the Contractor...*
8. Specification 4-3.2 states that additional work can cause a delay to the completion of the project. The Specification states... *any portion of the **additional work** is a controlling work item and the performance of such controlling work item actually **delays** completion of the project...* This counters the definitions provided by the Department regarding extra work and delays.

9. Specification 4-3.2 is silent on compensable days
10. The Department did pay FPC compensable time for extra work under supplemental agreement No.64 dated 6 Nov. 2006. The additional work was for Construction of additional driveways along the NB corridor, driveway work at BP station, additional work for 1400 series pipe, additional work at S-1, additional work at S-1A, and additional work for extra depth asphalt.
11. The Department did establish a precedent for this project that compensable days would be paid for the extra and additional work as required by the Department.

RECOMMENDATION

The Board finds that the Contractor is entitled to compensable time as both Unilateral Payments stated that the required work was a controlling item of work. This work did extend/delay the completion of the project through no fault of the Contractor.

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

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Don Henderson, Chairman Stephanie Grindell, Member Ed Hamm,
Member

Signed for and with concurrence of all members

Don Henderson, PE