

## DISPUTES REVIEW BOARD RECOMMENDATION

14 July, 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 arch culvert work.**

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 agreements for which Freedom Pipeline proceeded and completed the work, and that FPC is due additional compensable days for work at the Arch Culvert.

The FDOT previously issued unilateral Supplemental Agreements No. 37 and No. 56 and FPC proceeded in good faith and completed the additional unforeseen work associated with the arch culvert. FPC submitted its request for additional compensation based on FPC actual cost to the

FDOT. URS prepared a timeline for the work associated with the Arch Culvert and only granted 46 compensable days. Subsequent to FPC completing the work, the FDOT paid FPC the compensable days. After the settlement agreement was reached with the FDOT on 9/27/06, and the FDOT prepared Supplemental Agreement No. 64 the FDOT arbitrarily deducted compensable days on the unilateral agreements and from FPC estimate. FPC position is that after the FDOT issues a contractual unilateral supplemental agreement and FPC completes the work, the FDOT can not unilateral deduct previously agreed to amounts

FDOT issued two unilateral supplemental agreements for the work, and paid 100% in June 18, 2006. However, after the settlement agreement in September 2006, FDOT elected to deduct funds associated with the work at the Arch Culvert, FDOT Deducted \$38,502.90 from SA 37 & \$31,134.75 from SA 56 for a total deduction of \$69,637.65.

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:

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

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 the arch culvert, and issued a unilateral supplemental agreement to partially compensating FPC for the work and part of the time. 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.

The Department put out to bid Project 194093-1-52-01 which is located in and around the City of Wauchula in Hardee County. FDOT directed FPC to perform additional unforeseen work at the Arch Culvert. In good faith and in the spirit of partnering, FPC performed the additional unforeseen work. The FDOT prepared and paid FPC under the unilateral supplemental agreement process. After a settlement meeting between FDOT, URS and FPC, the FDOT, not in accordance with the CPAM arbitrarily deducted amounts previously paid to FPC under the unilateral supplemental agreement process.

FPC respectfully request that the DRB rule that FPC is entitled to the compensable days previously paid by the FDOT in the unilateral supplemental agreements and that FPC is also entitled to 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 the arch culvert work.

*A Unilateral Payment* was issued to Freedom Pipeline for work associated with the replacement of the existing deficient arch culvert. The work was added via Unilateral Payment since the Department and Freedom could not agree on the time and money associated with this work.

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

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.

Project Specification 5-12.6.1 states that compensation provided in 4-3.2 is full and complete payment for Extra Work.

The Unilateral Payment was used as a mechanism to pay the contractor for work performed. 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.

### *5-13 Recovery Rights, Subsequent to Final Payment*

*The Department reserves the right, if it discovers an error in the partial or final estimates, or if it discovers that the Contractor performed defective work or used defective materials, after the final payment has been made, to claim and recover from the Contractor or his surety, or both, by process of law, such sums as may be sufficient to correct the error or make good the defects in the work and materials.*

Freedom states that "FDOT has already established the fact that Freedom is entitled to compensable time extensions". This is an incorrect statement; the Department incorrectly added compensable time as a line item within the Unilateral Payments which were issued to construct the arch culvert replacement drainage system

Per project Specifications, the definition of "delay" is as follows:

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 otherwise, 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".**"

#### **DISPUTES REVIEW BOARD 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 above referenced documents and the following facts.

1. The Department did add extra work to FPC's contract for unforeseen arch culvert replacement.
2. The Department did grant 30 days compensable time to FPC using Unilateral Payment (UP) number 37. The time granted was because "The Contractor is utilizing manpower and equipment for this emergency arch culvert replacement when they could be otherwise working on Contract Critical Path items". Dated 9-23-05
3. This UP was approved by the FHWA with the compensable time as shown on UP37. Dated 9-18-05.
4. The Department issued UP 56 for an additional 16 compensable days to "complete the work". Dated 6-13-06.
5. FHWA approval was given for UP 56 on 6-2-06. This included the additional 16 compensable days.

6. In Pay Estimate 52 the Department rescinded the 46 compensable days of compensation paid to FPC.
7. This is extra work (acknowledged by FPC and FDOT) therefore Specification 4-3.5 states that it will be paid in accordance with Specification 4-3.2.
8. Specification 5-12.6.2 Compensation for Delay goes on to state *that delays maybe caused by or arise from any number of events...including, but not limited to...extra work...* Therefore the Department does state that a definition of a delay is extra work.
9. Specification 4-3.2 states in part...*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.*
10. The critical point in this specification is following the except (a) *“when the performance of any portion of the additional work is a controlling work item. “*. This arch culvert was defined in the two (37 & 56) unilateral payments as controlling items. Therefore Specifications 5-12.6.2.1 and 5-12.6.2.2 do apply.
11. In the Unilateral Payment paragraph 4 states “By acceptance of this unilateral payment the Contractor does not waive any rights the Contractor may have against the Department for payment of any additional sums the Contractor claims are due for the described work”. Therefore the Contractor does have the right to claim for additional sums for the described work.
12. By definition a unilateral is used when agreement between the Contractor and Department cannot be reached. Compensation is therefore based on Specification 4-3.2 and the formula in that spec. This specification, according to the Department, is all inclusive of all costs associated with this specified extra work. However paragraph 4 of the unilateral payment and the latter section of 4-3.2 allows for the contractor to claim for additional payment. The Department did not apply the latter section of Specification 4-3.2 to this extra work.

13. The timeline chart shown on page 35 of FPC's position paper and on page 24 of the FDOT rebuttal paper shows that there were 30 days that FPC's daily journal indicated no work on the arch culvert was done. There was no documentation provided to the Board to indicate differently.
14. 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.
15. 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.
16. The Department suggested (at the Hearing) that the Board contact other Districts as to how extra work and compensable time is handled. We did contact some senior DOT project personnel in 4 other districts. The response was compensable time was granted for extra work that impacted or became the controlling item of work. Our recommendation is not based on their response but on the contract documents.

## **RECOMMENDATION**

The Board has reviewed all the information provided by the Department and the Contractor (Freedom Pipeline Corp.). We listened to all the parties at the hearing held on 12 July, 2007. After reviewing all the data and listening to the testimony we have determined that there is entitlement to the Contractor for the 46 days of compensable time that the Department granted by Unilateral Payment Nos. 37 and 56. There was neither timeline nor schedule provided by FPC to document additional time over and above the 46 days.

This recommendation is following the specifications and past actions taken by the Department in dealing with extra work on this Project only.

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