

DISPUTES REVIEW BOARD RECOMMENDATION

20 November, 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 additional compensation and compensable time for Driveway at English Chevrolet.

Dear Sirs:

The Florida Department of Transportation and Freedom Pipeline Corporation requested a hearing concerning the above referenced issue. The Board has separated the issues and will address them as such.

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") has not fully compensated FPC, and that FPC is due additional compensation and time for the additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY.

Summary of the Issue & Chronology: Soon after FPC switched traffic in late February 2005, FPC installed the storm drain from S-1201 to S-1202 and the north end of the pipe extends into the English Chevrolet Driveway. When FPC installed the pipe it became evident that the 600mm pipe was

higher than the surrounding natural ground on both the roadway and right-of-way side. FPC notified URS of a potential problem with access to English Chevrolet. URS instructed FPC to construct a temporary driveway and that URS would look into the conflict. A year and half later, on October 28, 2006 when FPC completed the final phase of work, FPC again notified URS of the problem. Joe Winfield, with URS, notified FPC to build it per the original plans because he could not get in contact with Rolando Luis. FPC proceeded with the removal of commercial material and grading for concrete. On Monday, October 30, 2006 Curb Systems was on the project to form and pour the driveway and sidewalk. Around 9:00 am, Rolando Luis arrived on site and after his discussions with the Owners of English Chevrolet, directed FPC to remove approximately 5 meters of existing driveway on English Chevrolet property so that an acceptable tie-in could be constructed. Mr. Luis acknowledged at this time that it was extra unforeseen work and said he would compensate FPC accordingly. FPC proceeded with removing previously installed forms, removal of concrete, placement of additional embankment, regrading and compaction of the revised area per Mr. Luis direction. After FPC completed the additional unforeseen work, Mr. Luis elected to pay partial compensated FPC based on existing 2002 unit rates for part of the work.

URS / FDOT have not properly compensated FPC for the additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY. FPC respectfully request that the DRB rule that FPC is entitled to compensation for its actual cost plus markups and compensable days for the additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY.

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 to the contract for the additional unforeseen work FPC acted in good faith and performed the additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY. The FDOT and URS have not acted in good faith or in accordance with the contract in compensating FPC for this additional unforeseen work.

FPC respectfully request that the DRB rule that FPC is entitled to its actual cost plus appropriate markup, and compensable days in accordance with 5-12.6.2.2 for the additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY.

- FDOT **directed** additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY including the removal of previous work as well as new work not covered under the contract pay items.
- FPC **performed** additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY.
- FPC **submitted its cost** and requested additional time and money for the additional unforeseen work at ENGLISH CHEVROLET DRIVEWAY.

REBUTTAL

URS / FDOT allege that it has adequately compensated Freedom for costs associated with this work... using existing Contract pay items for embankment, pavement removal, and 150mm sidewalk.

FPC does not agree that it has “adequately” been compensated.

The original unit rates were based on 2002 contract bid item cost, and a contract duration of 840 days with a planned completion date in May 2005. The contract has had significant amount of time added with a new completion date in late 2006 / early 2007. As a result, significant increases in material and labor cost have occurred since this project was bid in 2002 and therefore the original contract unit prices can not be utilized for this additional unforeseen work.

The scope of work required at English Chevrolet (embankment, pavement removal, and 150mm sidewalk) when compared to the original construction work is different in nature and scope. The original construction area was much larger, production rates greater because of

the volume of work, and the smaller area and confined space requires more manual labor.

URS / FDOT allege that “Freedom has not provided any evidence that this work was a controlling item of work...”

FPC Response: FPC performed the additional unforeseen work on 10/30/06. As noted on the attached Controlling Item of Work signed by URS on 10/31/06, the “Side walk at Station 187 to 188+20” is listed as a Controlling Item of 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 has adequately compensated Freedom for costs associated with this work. Freedom was paid for this work using existing Contract pay items for embankment, pavement removal, and 150mm sidewalk.

Original project plans call for construction of the concrete driveway to English Chevrolet. Original plan dimensions were increased to accommodate differences in grade and to provide an adequate transition to the newly constructed southbound US 17. Standard Specification 4-3.1, allows the Engineer the right to increase, decrease or make alterations in the contract work.

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:

(A) 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

(B) 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, or in case of a decrease below 75% to the actual amount of work performed such allowance to be determined in accordance with 4-3.2, below.

In the instance of (A) above, the determination by the Engineer shall be conclusive and shall not subject to challenge by the Contractor in any forum, except upon the Contractor establishing by clear and convincing proof that the determination by the Engineer was without any reasonable and good faith basis.

The Department contends that this work was not a significant change as defined by Specification 4-3.1.

The Department contends the Contractor is not entitled to additional contract time for this issue since Freedom has not provided any evidence that this was a controlling work item nor have they demonstrated that performance of this work delayed overall completion of the project.

Per Specification 4-3.2, the Contractor would only be entitled to a time extension if this effort were defined as a controlling work item.

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 the following facts.

1. Modifications to the driveway at English Chevrolet was required by the Department, not the Contractor. This change was not a result of actions or inactions by the Contractor.
2. Work was performed prior to last contract day.
3. This activity was listed on the controlling item list submitted by the Contractor to URS as required by contract dated 10/30/06.

4. This activity was not a significant change based on Specification 4-3.1 which states... *The term "significant change" applies only when:*

*(A) 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
(B) 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, or in case of a decrease below 75% to the actual amount of work performed such allowance to be determined in accordance with 4-3.2...*

RECOMMENDATION

The Board cannot determine if the Contractor is entitled to a compensable day for this activity. We do not have a CPM to determine which of the 6 items listed on the Work Plan Controlling Item of Work for the week of 10/31/06 is the true critical path. FPC is entitled to be compensated for the increased work, at contract unit prices, that was required by the Department at English Chevrolet.

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