

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 additional compensation and time for unforeseen work to repair driveways and sidewalks.**

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 FPC is entitled additional compensation and time for the additional unforeseen work required to repair driveways and sidewalks damaged by others.

FDOT directed FPC to perform additional unforeseen work in removing and replacing broken curb and driveways after FPC completed the original contract, the work was accepted, open to the public, than it was damaged by others. URS / FDOT agreed that the damage was beyond our control and agreed that compensation was due FPC. FPC

proceeded with the work and submitted its actual cost for the additional unforeseen work, but URS is only paying contract unit rates.

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

The fact is that the FDOT added new work to the contract for the additional unforeseen work associated with the repairs to damaged sidewalk and driveways, and has only partially compensating FPC for the work by utilizing existing pay items. The FDOT has not properly compensated FPC for the additional time or money required to perform the additional unforeseen work, and has refused to apply the contractual formula stipulated in 5-12.6.2.2.

FPC acted in good faith and performed the additional unforeseen work in repairing driveways and sidewalks which were damaged by others and by no fault of FPC. The FDOT and URS have not acted in good faith or in accordance with the contract.

URS requested that FPC submit a price to perform this additional unforeseen work, however, the FDOT and URS acted in bad faith and is only offering to pay original contract unit prices. The additional unforeseen work that the FDOT required FPC to perform is of a different nature than the original driveway and sidewalks. Even after the work was complete and FPC submitted its actual cost, the FDOT has refused to properly compensate FPC.

FPC respectfully request that the DRB rule that FPC is entitled to its actual cost plus appropriate markup, a time extension and compensable days in accordance with 512.6.2.2. for the additional unforeseen work associated with driveway and sidewalk repairs.”

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 repair of driveways and sidewalks.

"Freedom Pipeline has requested payment for repair of damaged sidewalk and curbing which were identified on deficiency lists early in the project. Items included on deficiency lists include, but are not limited to damaged driveways, curbs, drainage structures, signs, signals, washouts, fencing, etc.

The Department's position is that the contractor is required to maintain all work associated with the project until final acceptance per Specification 5-10.1. The work associated with repair of concrete sidewalk and curbing is the responsibility of Freedom Pipeline as stated in Project Specifications.

Specification 5-10 states the following:

5-10 Final Inspection.

5-10.1 Maintenance until Acceptance: Maintain all Work until the Engineer has given final acceptance in accordance with 5-11.

5-10.2 Inspection for Acceptance: Upon notification that all Contract Work, or all Contract Work on the portion of the Contract scheduled for acceptance, has been completed, the Engineer will make an inspection for acceptance. The inspection will be made within seven days of the notification. If the Engineer finds that all work has been satisfactorily completed, the Department will consider such inspection as the final inspection. If any or all of the Work is found to be unsatisfactory, the Engineer will detail the remedial work required to achieve acceptance. Immediately perform such remedial work. Subsequent inspections will be made on the remedial work until the Engineer accepts all Work.

Upon satisfactory completion of the Work, the Department will provide written notice of acceptance, either partial, conditional or final, to the Contractor.

Until final acceptance in accordance with 5-11, replace or repair any damage to the accepted Work. The cost of such Work will be negotiated.

7-14 Contractor's Responsibility for Work

Until the Department's acceptance of the work, take charge and custody of the work, and take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever, arising either from the execution or from the nonexecution of the work. Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance, except that in case of extensive or catastrophic damage. The Department may, at its discretion, reimburse the Contractor for the repair of such damage due to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, of the public enemy, or of governmental authorities.

Specification 5-10.2 states that "Until final acceptance in accordance with 5-1.1, repair or replace any damage to the accepted Work. The cost of such work will be negotiated."

This statement is applicable once the final walk through inspection has occurred. Freedom requested several walk through inspections from January 2007 through April 2007. However, these requests were not warranted due to the number of outstanding deficiency items not yet addressed by Freedom. A final walk through inspection was performed on May 9, 2007 and a final deficiency list was prepared. Since the final walk through was not performed until May 9, 2007 this section is not applicable to Freedom's request because no repairs were made subsequent to this date.

The Department has no contractual obligation to pay Freedom for repairs to damaged sidewalk and curbing. But in an effort of fairness the Department has elected to pay the contractor unit rates for performing this work.

Freedom states that replacing damaged sidewalk is of a different nature than the original sidewalk construction. This is not a correct statement. The driveway and sidewalk repairs were of the same character as the original work and there is nothing substantially different about the repairs."

DISPUTES REVIEW BOARD FINDINGS OF FACTS

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. FPC was notified several times about deficient sidewalk and driveway areas.
2. The driveways were constructed according to plans and specifications.
3. The design of the Driveways did meet the design standards at the time of design.
4. Department compensated FPC at contract unit rates for repair to driveways and sidewalk areas.
5. Unit rates were based on 2002 contract bid item cost.
6. Original contract completion date was 21 May 2005 with contract duration of 840 days.
7. Contract has had significant time added (588 days). The new completion date is some time in mid 2007.
8. Significant increases in material and labor cost have occurred since this project was bid in 2002.
9. The scope of work required in repairing sidewalks and driveways compared to the original construction work is different in the view of the Board. In the original construction the area was much larger, production rates greater because of the volume of concrete required, the placement of reinforcement, larger area for compaction equipment if needed, full loads of concrete rather than more expensive partial loads. Larger areas allows for the use of equipment for site preparation. Smaller areas require more manual labor. This is true for both the installation and the removal of the damaged sidewalk or driveway. One must also consider that the repairs may require MOT that was not needed when the original sidewalk/driveway was constructed since the road is open to traffic.
10. Letter dated May 26, 2006 to URS Corp. from FPC stated that the repair of the Driveways would require compensation from the

Department. In the opinion of the Board this is a notice to claim for these repair costs.

11. Specification 4-3 States in part; *The Engineer reserves the right to make, at any time prior to or during the progress of the work, such increase or decrease in quantities, whether a significant change or not...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,...*
In the instance of (A)... the determination by the Engineer shall be conclusive and shall not subject to challenge by the contractor in any forum, except upon contractor establishing by clear and convincing proof that the determination by the Engineer was without any reasonable and good faith basis. The Board sees this repair/replacement work as being significantly different than the original bid work.
12. The Department uses Specification 7-14 to say that there is no contractual obligation to pay for repairs. Specification 7-14 states *Until the Department's acceptance of the work, take charge and custody of the work, and take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever, arising either from the execution or from the non execution of the work. Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance...* This specification is speaking to damage to the work that "arises from the execution or non execution of the work". If damage to the work is a result of the contractor's activity or lack of activity then the Contractor is totally responsible for the repair/replacement of that damaged work at their expense. If damage is a result of the "elements" the Department "may" reimburse the Contractor.

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 FPC for the actual costs of the repair/replacement of the driveway and sidewalk work. Specification 4-3.2 is the applicable specification for this work.

The Board did not have a schedule or timeline provided by either party to make a determination that this activity was a controlling item of work. Therefore we could not determine if this work fell within the Specifications 5-12.6.2.1 and 5-12.6.2.2 for establishing compensable time.

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