

## 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 compensation and compensable days for Fence Repairs at Ponds 400B and 500.

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 associated with Fence Repairs at Pond 400B & 500.

On or about 1/30/07, after contract time had expired on the project, the FDOT directed FPC to perform additional unforeseen work associated with making repairs to fence that was damaged on the project.

URS / FDOT have not properly compensated FPC for the additional unforeseen work associated with Fence Repairs at Pond 400B & 500. FPC respectfully request that the DRB rule that FPC is entitled to compensation for its actual cost plus markups and at least a non-compensable day for the additional unforeseen work associated with Fence Repairs at Pond 400B & 500.

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 associated with repairs to fence, and FPC acted in good faith and performed the additional unforeseen work associated with Fence Repairs at Pond 400B & 500. The FDOT and URS have not acted in good faith or in accordance with the contract in compensating FPC for this additional unforeseen work.

URS / FDOT allege that it the contractor's responsibility to maintain the project work until final acceptance in accordance with project specification 5-11 and that the contractor is responsible for his work per Specification 7-14.

*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... 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...*

This specification is speaking to damage to the work that “**arises from the execution or non execution of the work**”. Since the damage FPC is requesting is **not** a result of the contractor’s activity or lack of activity and in fact the damage is a result of the “elements” the Department “may” reimburse the Contractor.

## **REBUTTALL**

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

FPC Response: Statements were made and agreed to by FPC / FDOT / URS & the DRB that any additional / extra work that was required by the Department after contract time had expired would be a controlling item of work. Contract time expired in December 2006 and then again in January 2007.

FPC performed the additional unforeseen work after it received a clarification / directive from URS on 2/5/07. Therefore, this work did occur after the contract time expired and as previously agreed to by the FDOT / URS, it is therefore a controlling item of work and FPC is entitled compensable time accordingly.

FPC respectfully request that the DRB rule that FPC is entitled to its actual cost plus appropriate markup, and at least a compensable day in accordance with 5-12.6.2.2 for the additional unforeseen work associated with Fence Repairs at Pond 400B & 500.

## **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 contends it is the contractor's responsibility to maintain project work until final acceptance in accordance with project Specification 5-11.

**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.*

The Department 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 damaged fencing is clearly the responsibility of Freedom Pipeline since an "inspection for acceptance" was not performed prior to the damage occurring and the Department had not "accepted" the work in accordance with Project Specification 5-10.2.

From the Department's understanding, Freedom is requesting compensation for fence repair at three locations. The three locations are Pond 400 (damaged caused by adjacent resident), Pond 400 (damaged by Hurricane Charlie) and Pond 500 (damage caused by developer). A portion of Freedom's claim includes repairs to fencing which was damaged by Hurricane Charlie. Freedom was compensated for this work effort via SA #40. Payment for damage associated with Hurricane Charlie was warranted per Specification 7-14.

Freedom has also requested contract time for this issue. Since repair of damaged fencing is the contractual responsibility of Freedom, no additional contract time is warranted. Furthermore, Freedom has not provided any evidence that this work was a controlling item of work nor have they demonstrated that performance of this work delayed overall completion of the project.

The Department contends the contractor is responsible for his work per Specification 7-14 and the contractor is responsible for repairs to any damage which may occur during the project.

**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.*

**REBUTTALL**

The Department contends the Contractor is not entitled to additional contract time for correcting fence deficiencies since correction of such deficiencies is required by contract specification and correcting fence deficiencies is not additional work. Furthermore, per Specification 4-3.2, the Contractor would only be entitled to a time extension if this effort was defined as extra work and also defined as a controlling work item. Freedom has not provided any evidence that this work was a controlling work item nor have they demonstrated that performance of this work delayed overall completion of the project.

**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. Repair to pond 400 and 500 were made after the last contract day.
2. Work was performed by a sub-contractor.
3. Damage to the fence at both ponds was not due to the action or inaction of Freedom.
4. Both parties agreed that damage was the result of others.
5. Specification 7-14 states that if there are damages... *arising either from the execution or from the nonexecution of the work.... . 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,...*
6. The Contractor stated at the Hearing that he was asking for compensation for work that was not paid for as a result of the hurricane reimbursement. This damage occurred after the Hurricane damage.

### **RECOMMENDATION**

The Board finds that the Contractor is entitled to be compensated per Specification 4-3.2 for the sub contractor work. The Contractor is entitled to time to perform the work. However, there was insufficient evidence presented at the hearing for the Board to make a determination regarding entitlement for compensable time. We did not have a CPM or as-built schedule to determine the impact of this work. The Board recognizes that this work did occur after the last contract day. The Board was present when statements were made at the March 2007 DRB meeting where URS stated to FPC and to the DRB that extra work assigned after the last contract day would be treated as a controlling item of work. If this statement is honored then Freedom is entitled to compensable time if not a concurrent delay with original contract work items.

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