

DISPUTES REVIEW BOARD RECOMMENDATION

26 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 at KOA.**

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.

“FDOT directed FPC to perform additional unforeseen work including but not limited to, pavement removal, milling, asphalt, friction course, type "F" curb and gutter, sidewalk and sodding at the KOA Thousand Trails RV Park. URS/ FDOT agreed that this was additional unforeseen work, prepared and engineers estimate for \$71,804.92 and 14 non compensable days. However, since FPC did not agree with non compensable days, the FDOT issued a unilateral supplemental agreement for \$36,907.65 and 8 non compensable days. In good faith, FPC proceeded with the work and submitted its actual cost for the additional unforeseen work, but URS is only paying contract unit rates.

FPC respectfully request that the DRB rule that FPC is entitled to ... compensable days and that the contract be extending to April 17, 2007 when the work was actually completed.

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 / FOOT 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 KOA Driveway, 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 refused to apply the contractual formula stipulated in 5-12.6.2.2.

FPC respectfully request that the DRB rule that FPC is entitled to ... compensable days in accordance with 5-12.6.2.2, and a time extensions to April 17, 2007 when the work was completed.”

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.

Unilateral Payments were issued to Freedom Pipeline for work associated with the reconstruction of the RV **Park** driveway. The work was added via Unilateral Payment since the Department and Freedom could not agree on the time (non-compensable time vs. compensable time) associated with this work.

Two ***Unilateral Payments*** have been issued for payment associated with this work. The total contractor payment considering both ***Unilateral Payments*** is \$73,985.46 which exceeds Freedom's original requested payment by \$2,180.54.

Per Project Specifications, Freedom is not entitled to compensable days for the RV Park Driveway 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 statement that URS prepared an "engineers estimate for \$71,804.92 and 14 non compensable days" is misleading. URS originally prepared an engineer's estimate, using contract unit rates in accordance with Specification requirements. Through several meetings, URS negotiated the pricing with Freedom and an agreement for monies was achieved. Freedom insisted that they were entitled to compensable days which they are not entitled to per the contract documents. Since an agreement on compensable time could not be met a Unilateral Payment was issued. Per Department procedure, the original engineer's estimate was used in the Unilateral. Again this price was based on contract unit rates and is allowed via Specification 4-3.1.

Freedom has indicated that this work is a controlling work item and is a critical path activity; however Freedom has provided no information to prove this point and furthermore has not completed contract work as of this date."

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. Agreement by both parties at the hearing that actual cost is not an issue. The issue is compensable time.
2. FDOT did require FPC to perform extra/unforeseen work at the RV Park (KOA).
3. FPC schedule update, dated 21 Jan 07, shows the critical activity to be the KOA work activities. The Departments UP No. 75 confirmed this as the controlling item by stating time was granted for..."delays to controlling items of work shown on approved work schedule."

4. The Department did issue Unilateral Payment (UP) No. 75 to compensate the Contactor. The Unilateral granted 8 days to FPC for the work. The 8 days were granted for ...”delays to controlling items of work shown on approved work schedule”. The Department did not treat the 8 days as compensable days when estimating the cost of the UP.
5. The UP recognizes that this extra work is the controlling (critical Path) activity.
6. 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.*
7. The critical point in this specification is found in the “*except (a) “when the performance of any portion of the additional work is a controlling work item...”* This KOA work was defined in the unilateral payment No. 75 as the controlling item. Therefore Specification 5-12.6.2.1 and 5-12.6.2.2 do apply.
8. 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 KOA work.
9. By definition a unilateral is used when agreement between the Contractor and Department cannot be reached regarding compensation. 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 specification 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 for the extra work.

10. 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.
11. No analysis was provided by either party related to the request to extend the contract time to 17 April 2007.

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 Freedom Pipeline for the 8 days of compensable time associated with the KOA extra work.

Based on the information provided, in the position papers and at the hearing, the Board could not make a determination of entitlement for the requested contract extension to 4/17/07.

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