

DISPUTES REVIEW BOARD RECOMMENDATION

14 October, 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 and cost for Additional Unforeseen Work for Mowing.

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”) had an insufficient planned quantity calculated in regard to the “mowing” on the project, and therefore the FDOT has only partially paid FPC for mowing on the project. FPC request that the DRB rule FPC is entitled compensation for mowing based on the corrected quantity, and FPC is entitled a compensable time extension.

URS / FDOT refused to correctly compensated FPC for the mowing it performed on the project. The following chronology has been prepared to substantiate FPC position:

FPC acted in good faith and performed the additional unforeseen work associated with additional mowing on the project.

The following sections have been included for information purposes and in support of FPC request.

In accordance with Supplemental Specification 004; Alteration of Plans or of Character of Work states in part the following:

4-3 Alteration of Plans or of Charter 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...

4-3.2 Increase, Decrease or Alteration in the Work: The Engineer reserves the right to make alterations in the character of the work which involve a substantial change in the nature of the design... the Contractor will be paid pursuant to an agreed Supplemental Agreement or in the following manner...

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 mowing on the project. 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. for compensable days.

The FDOT original plan quantity determined that the new sod and new seed & mulch would equate to 25.27 hectares and the FDOT original determined that only 25% of this area (6.3 hectares) would require mowing.

URS attempted to prepare a "latitude & departure" of the areas requiring mowing. Since URS quantity of all areas is less than the 25.27 hectares, it can not be correct and can not be utilized.

FPC has calculated that existing areas that the FDOT directed FPC to mow. Based on field measurements, this area equates to 6.832 hectares.

URS never came up with the correct quantity of areas requiring mowing (19.75 hectares) until 5/21/07 when URS physically went on the project and performed field measurements. FPC also field measured the project and came up with 19.375 hectares.

The FDOT did not utilize a correct plan quantity. The plan quantity of 6.3 ha was based on 25% of the "grassing area" only, and did not include existing areas on the project that the FDOT directed FPC to mow.

FPC respectfully request that the DRB rule on the following issues:

1. FPC is entitled compensation for mowing based on the corrected quantity.
2. FPC is entitled to a compensable time extension."

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 that Freedom has been adequately compensated for areas mowed on the project.

From start of construction, Freedom was compensated for actual areas mowed on the project. This methodology was used until March of 2005.

Mowing quantities, resulting payment and ways of simplifying mowing were then discussed in March 2005. The revised method of payment was specifically discussed during the progress meeting on March 10, 2005. From this point, Freedom was paid as mowing was performed in accordance with this agreement, until July of 2006

In a letter to Freedom dated May 21, 2007, URS supported the Departments position and again requested an itemized account of Freedom's perceived discrepancies on a month by month basis and has not received this information or a claim package to date.

The Department agrees that the original plan quantity for mowing was insufficient for the project duration. The Department has paid Freedom for the mowing performed to date and has exceeded the original plan quantity for mowing.

Freedom issued a notice of intent to claim on July 28, 2006. Project specification 5-12.2.1 requires that the contractor submit his notice of intent to claim before beginning work on which the claim is based. Therefore, any claim for this issue before July 28, 2006 is not valid per contract documents.

5-12.2 Notice of Claim:

5-12.2.1 Claims For Extra Work: *Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay. If such notification is not given and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time, the Contractor waives the claim for additional compensation or a time extension. Such notice by the*

Contractor, and the fact that the Engineer has kept account of the labor, materials and equipment, and time, shall not in any way be construed as establishing the validity of the claim or method for computing any compensation or time extension for such claim. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11, and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete claim documentation as described in 5-12.3. However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate. Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.

Freedom supplied their account of current mowed areas on September 4, 2006. Freedom's account of mowed areas was similar to areas calculated by URS (.111 hectare difference) and the URS calculated number was agreed to as basis for payment during the September 21, 2006 project meeting."

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 facts.

1. Contractor is required to adhere to Specification **104-7.2 Mowing** – *The Engineer may direct mowing of areas within limits of the project. Mow these designated areas within seven (7) days of receiving such order.*
2. The Department and Contractor disagree on the area mowed for compensation.

3. Notice of intent to claim was submitted 28 July, 2006.
4. Based on Specification 5-12.2.1 the Contractor is required to submit a notice of intent to claim prior to beginning work on which the claim is based.
5. This activity is not a controlling item of work.

RECOMMENDATION

The Board finds that the Contractor is not entitled to additional compensation or time prior to 28 July, 2006. He was not in compliance with Specification 5-12.2.1. The Contractor is entitled to be fully compensated for the areas mowed after 28 July, 2006. This is not a controlling item of work therefore there is no entitlement to compensable time.

The Board highly recommends that senior personnel (decisions makers) jointly measure and agree to the area that was and is mowed by FPC. The President and staff of FPC attempted to do this without any success. URSCS only provided a person not familiar with the project and not a decision maker.

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