

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 time for Unforeseen work performing Pavement Marking Removal.

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 performing the Pavement Marking Removal on the project.

As stated in FPC 11/8/06 email to URS, the issue is summaries as follows:

FPC agree that this item (pavement marking removal) is mentioned in the MOT section of the Standard Specifications,

however temporary stripping and RPMs are also in this section and are pay items. As stated under 12-8.1 the MOT compensation does not include items specifically covered under other items. Pavement marking removal is listed in the FDOT Master Pay Item List (0710-11, and is in ht 710 Section listed as a pay item. FPC position is that these items were inadvertently left out of the pay items by accident.

URS / FDOT has not properly compensated FPC for the additional unforeseen work performing the Pavement Marking Removal on the project.. 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 performing the Pavement Marking Removal on the project.

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

FPC respectfully request that the DRB rule that FPC is entitled to compensation for the additional unforeseen work associated with the pavement marking removal on the project.

REBUTTALL

URS / FDOT allege that this work was included in the Lump Sum MOT, and tries to lump this additional unforeseen work under 102-8.1 Maintenance of Traffic (General Work), whereas the FDOT states the following:

102-8.1 Maintenance of Traffic (General Work): When an item of Maintenance of Traffic is included in the proposal, price and payment will be full compensation for all work and costs specified URS / FDOT allege that this work was included in the Lump Sum MOT, and under this section **except** as may be specifically covered for payment under other items.

FPC Response: The FDOT is ignoring the "**EXCEPT**" identified in section 102-8.1, Section 710-9 of the standard specifications, and the special provisions.

710-9 Basis of Payment list the following item:

Item No. 2710-11 Remove Existing Markings (Paint) – Per square meter

The FDOT does specifically have payment items listed in the contract documents for pavement removal. Therefore it does not fall under the lump sum maintenance of traffic. Since no quantity was estimated or determined by the FDOT at time of bid, a unit price was not established and FPC should not be penalized for the FDOT mistake. In fact, the FDOT modified the standard specifications to include special provisions for pavement marking removal, yet is refusing to compensate FPC for actual work completed.

URS / FDOT do not address FPC request for compensable days. FPC position is that it is entitled compensable days based on the following:

FPC performed the additional unforeseen work from 2/7/05 through 3/1/06.

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. Phasing of construction was clearly outlined and detailed in the project's Traffic Control Plans. Freedom was paid for removal of pavement markings under the Contract's pay item for Maintenance of Traffic.

Project plans and project Specification 102-3.2.5 require that the contractor remove existing pavement markings which conflict with adjusted vehicle paths

102-3.2.5 Existing Pavement Markings: *Where a detour changes the lane use or where normal vehicle paths are altered during construction, remove all existing pavement markings that will conflict with the adjusted vehicle paths. Do not overpaint. Remove existing pavement markings using a method that will not damage the surface texture of the pavement and which will eliminate the previous marking pattern regardless of weather and light conditions. Remove all pavement markings that will be in conflict with "next phase of operation" vehicle paths as described above, prior to opening to traffic.*

Project Specification 102-8 addresses payment for Maintenance of Traffic and clearly states that the Maintenance of Traffic pay item includes compensation for work required by section 102.

102-8 Basis of Payment.

102-8.1 Maintenance of Traffic (General Work): *When an item of Maintenance of Traffic is included in the proposal, price and payment will be full compensation for all work and costs specified under this Section except as may be specifically covered for payment under other items.*

REBUTTALL

The Department contends that the Contractor is not entitled to additional compensation since this effort is required by the original contract and not extra work. In addition, the Contractor did not comply with Specification requirements for timely submittal of the required notice of intent. The Contractor did not submit his notice of intent to claim in accordance Specification 5-12.2.

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

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.

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 above referenced documents and the following facts.

1. The Contractor did grind and remove existing pavement between February 2005 and March 2006.
2. FPC did file notice of intent to claim on 11/8/06.
3. Notice of intent was approximately 8 months after the work was completed.
3. A price submittal was made by FPC to URS on 10/16/06.
4. No information was provided to the Board to document any discussion of pavement marking removal prior to 10.16.06.

5. Contractor did not comply with Specification 5-12.2 in submitting a notice of intent to claim regarding this work. This specification goes on to state... *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.*

RECOMMENDATION

The Board finds that there is no entitlement to the Contractor for pavement marking removal. The Contractor waived his right to claim by not adhering to the notification requirement in Specification 5-12.2 which states... *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.*

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