

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 Pond 800 Driveway.

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”) has not fully compensated FPC, and that FPC is due additional compensation and time for the additional unforeseen work at Pond 800 Driveway

FPC installed the turnout construction at Pond 800 with commercial material in accordance with the contract plans and specifications. On or about February 2, 2007, FDOT / URS directed FPC to install a concrete turnout and driveway at Pond 800. FDOT / URS position is that the concrete driveway was included in the original FDOT computation books

and therefore FPC has to perform this work. On 2/2/07 FPC notified URS that it had reviewed plan sheet no. 21 dated 5/15/02 "Summary of Turnouts" and "Pay Item 2286-1" and revised driveway plans of 7/7/03 for the added driveways on the Northbound section of the project, they did not depict a concrete turnout was required in FPC contract. Between 2/6/07 and 3/27/07 FPC performed the additional work. On 4/19/07 FPC submitted its actual cost with appropriate markups and requested 2 compensable days.

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.

- FPC installed the turnout construction and Pond 800 in accordance with the contract plans and specifications.
- FDOT / URS directed FPC to install a concrete turnout and driveway at Pond 800. FDOT / URS position is that the concrete driveway was included in the original FDOT computation books and therefore FPC has to perform this work.
- On 2/2/07 FPC notified URS that it had reviewed plan sheet no. 21 Summary of Turnouts and pay item 2286-1 and it does not appear that a concrete turnout was included in FPC contract.
- Between 2/6/07 and 3/27/07 FPC performed the additional work.
- On 4/19/07 FPC submitted its actual cost with appropriate markups and requested 2 compensable days.
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The computation book that URS provided FPC does not show concrete sidewalk at station 225+17.679, and according to URS position paper it is apparent that Pond 800 (station 225+17.6790) was not part of the original plan quantities.

Four (4) years after the work was completed and paid for by the FDOT, and after contract time had expired, URS directed FPC to place a concrete driveway at Pond 800.

As stated in FPC position paper, the FDOT directed the additional unforeseen work on or about 2/2/07, after contract time had expired. FPC performed the additional unforeseen work from 2/6/07 through 3/27/07 .

FPC, URS & the FDOT agreed that after contract time expired, all work was controlling and critical. Therefore, all of this additional unforeseen work is a controlling item of work which impacted project completion and 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 affirms its position that the contractor was required to construct the driveway using concrete and that the contractor was compensated for construction of the Pond 800 driveway using existing contract unit rates.

The driveway leading to Pond 800 is clearly identified within the plan set on Plan Sheet 120 (Page 1). Freedom was also provided computation book sheets several times during the project which clearly indicate this driveway is to be constructed of concrete (Pages 4-6). Plan quantities tabulations for 150 mm concrete include the Pond 800 driveway (Pages 7-10). As such, plan quantities and computation book measurements for Pond 800 are the same and correspond with the contractor’s original bid.

Freedom Pipeline is also requesting compensable contract time for this issue. Since this work effort was included in the original work scope, no additional time is warranted for this issue. Furthermore, Freedom has not provided any evidence that this work was a controlling item of work for the full duration of its construction, nor have they demonstrated that performance of this work delayed overall completion of the project.

The Pond 800 driveway was part of the original contract. This driveway was not identified as a Turnout as Freedom has indicated in their DRB position papers. The Pond 800 driveway was included within the 150mm sidewalk pay item at the time of original bid. A similar pond driveway included in the original plan set is Pond 200 which was constructed on 12/13/2006. The original plan quantity was included in summary of pay items and computation book sheet.”

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. Driveway for pond 800 is shown on Plan Sheet 120 of the contract plans
2. There is no description provided as to the type of construction for this driveway.
3. Plan Sheets 66, 91, 95, 97, 100, 105, 106, 112, and 129 all show driveways to be constructed and provide a detail of the material to be used in constructing the driveway. All other driveways are open to choosing or guessing what type of material is to be used in their construction.
4. Pay item 2286-1 (turnout construction) of the plans shows a quantity of 3907 square meters. This is the quantity that all bidders had for bidding purposes.
5. The Computation Book provided to the Contractor after award of the contract is not part of this contract.
6. It is not clear to the Board if the Pond 800 driveway was paid for or not paid for. At the hearing the Department said it was and FPC said it was not. No evidence was presented at the hearing or in the positions papers to substantiate payment or lack of payment.

RECOMMENDATION

The Board recommends that Contractor is entitled to be fully compensated for the placement of 150mm concrete in the pond 800 driveway. FPC is not entitled to compensable time for this work. It was not a controlling item of work established by either party.

If URSCS/FDOT can factually demonstrate that FPC was compensated for this 150mm concrete driveway as part of the original bid quantity then no additional compensation is due.

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