

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 Debris Removal at Pond 400B.

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.

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 the debris removal in Pond 400B.

The damaged was not caused by the actions or inactions of FPC, and therefore it is considered additional unforeseen work.

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

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

- FDOT **directed** additional unforeseen work associated with Removing Debris at Pond 400B after the contract time had expired.
- FPC **performed** additional unforeseen work associated with Removing Debris at Pond 400B.
- FPC **submitted its actual cost** for the additional unforeseen work associated with Removing Debris at Pond 400B.

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

REBUTTAL

URS / FDOT allege that “no intent to claim notice was provided...”

FPC position paper states the following:

2/5/07

As per our discussion with Jesse today the debris in Pond 400 does not belong to FPC but is on the Deficiency List, please track time as FPC will claim for extra work.

FPC in fact notified URS / FDOT to track both time and that it would claim for extra 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.

FPC Response:

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.

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

Statements were made and agreed to by FPC / FDOT / URS 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 from 2/7/07.

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.

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 5-10 and 5-11, and that no intent to claim notice was provided, per Standard Specification 5-12.2.1.

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.*

*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's position is that the contractor is required to maintain all work associated with the project until final acceptance per Specification 5-10.1. Removal of debris from Pond 400 is clearly the responsibility of Freedom Pipeline since the Department had not "accepted" the work in accordance with Project Specification 5-10.2.

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 Contractors' 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.

In addition, Freedom did not provided and Intent to Claim or a time extension request for this work as required by the Contract Documents. Therefore, the contractor has waived his right to additional time and compensation.

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.*

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 following referenced documents and the following facts.

1. Letter dated 2/5/07 sent to URS regarding notice of extra work.
2. URS does not have a record of the 2/5/07 letter of intent from the Contractor regarding this work.
3. Debris was removed from Pond 400B as required by URS.
4. Debris was not a result of the Contractors execution or non execution of the work.
5. 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 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.***
6. URS stated at the Hearing that contract work was being performed as well as punch list items during this time frame. The Contractor did not rebut this statement.

RECOMMENDATION

The Board finds that the Contractor is entitled to compensation for the debris removal in Pond 400B. The Contractor is entitled to time for the period required to remove the debris. However, the Contractor is not entitled to compensable time since this was a concurrent delay. The extra work time (caused by the Department) was in the same time frame of late contract work (caused by the Contractor).

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