

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 in the Removal of Grass and Weeds (Sidewalk, Curbs, Fence and Guardrail)

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 compensated FPC, and that FPC is due additional compensation and time for the additional unforeseen work associated with the removal of grass and weeds in the sidewalk, curbs, fence and guardrail.

On Friday February 9, 2007 FDOT / URS prepared a punchlist and stated that FPC had to remove all weeds and vegetation growing up in the sidewalk, curbs, fence and guardrail. On February 12, 2007, FPC notified FDOT / URS that it is FPC position that this is additional unforeseen work

and put the FDOT on notice that FPC would be requesting additional compensation. FPC commenced removal of vegetation at the Ponds on 2/13/07 and the work continued until 2/24/07. The FDOT was not able to obtain the right of entry agreements for all the ponds, so URS informed FPC that it would not be required to remove the vegetation outside of the fence. Between 2/14/07 and 3/20/07 FPC removed the vegetation in the curb and sidewalk. Between 3/8/07 and 3/10/07 removed the vegetation at the Guardrail. FPC submitted its actual cost with appropriate markups and requested compensable days for the removal of grass and weeds on the project..

URS / FDOT refused to grant additional compensation or time for this additional unforeseen work and claims that it is part of the “maintenance” 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 directed FPC to remove grass and weeds in areas that did not require mowing (sidewalk, curb & gutter, fence and around guardrail). Therefore, the FDOT can not assume that additional unforeseen work in areas that did not originally require mowing can be considered incidental to that pay item.

The additional unforeseen work FDOT directed FPC to perform is not "obstructions" and the work around the guardrail is outside the contract area requiring mowing. The guard rail area is adjacent to 3:1 or greater slopes which the FDOT agreed is not part of FPC contract.

In regard to pulling weeds out of fence(s) this work is again not an "obstructions" to mowing but additional unforeseen work.

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.

FPC respectfully request that the DRB rule that FPC is entitled to its actual cost plus appropriate markup, and compensable days in

accordance with 5-12.6.2.2 for the removal of grass and weeds in the sidewalk, curbs, fence and guardrail.”

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 it is the contractor’s responsibility to maintain the project in accordance with Standard Specifications 5-10, and Plan Pay Item Note 2104-4. The Contractor is paid for this work under the mowing pay item.

Maintenance of grass in sidewalk areas and around obstructions is required by the construction contract and is specifically addressed in the pay item note for Mowing, 2104-4.

Pay Item Notes 2104-4

Shall include litter pick-up and disposal prior to mowing operations, it is the responsibility of the Contractor to mow the Contract area, hand cutting around obstructions (Signs, Headwalls, Guardrail, and like items) shall be incidental to the mowing performed each cycle.

575-3.4 – Maintenance – *Maintain the sodded areas in a satisfactory condition until final acceptance of the project....Mow the sodded areas to a height of 6 inches [150 mm] when competing vegetation height exceeds 20 inches [500 mm] in height.*

8-4.5 – Drainage – *Conduct the operations and maintain the work in such condition to provide adequate drainage at all times. Do not obstruct existing functioning storm sewers, gutters, ditches, and other run-off facilities.”*

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. The Contractor is required to maintain the project until final acceptance. Specification 5-10.1 states *Maintain all work until the Engineer has given final acceptance in accordance with 5-11.*
2. Pay item notes 2104-4 states *Shall include litter pickup and disposal prior to mowing operations, it is the responsibility of the Contractor to mow the Contract area, hand cutting around obstructions (Signs, Headwalls, Guardrails, and like items) shall be incidental to the mowing performed each cycle.*

RECOMMENDATION

The Board recommends no entitlement for grass and weed removal within the project limits. This work is incidental to the mowing operation and is paid under the mowing pay item. This work is not classified as additional work nor is it a controlling item.

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