

# 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 additional compensation and compensable time for Unforeseen work at Truncated Domes.

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 at Truncated Domes.

In late 2005 / early 2006 the FDOT notified FPC that it was going to require that all handicap ramps would be changed to meet the new ADA standards and the use of raised truncated domes would be required. Prior to this change, FPC had already installed all of the handicap ramps on the North

bound and utilized the accepted “stamped concrete” per the prevailing specifications for the project.

On or about July 13, 2006 URS directed FPC to use the truncated domes and requested a price for grinding all previously stamped ramps and than placing truncated domes on all ramps on the project.

On or about October 4, 2006 FPC submitted a price of \$17.65 per m2, \$307.09 for the work to URS on per m2 for installing the truncated domes, and 3 compensable days. These were based on estimated quantities and final quantities were to be based on final measurement stated in FPC transmittal.

On or about October 11, 2006 URS sent an email to FPC accepting the unit prices but not the days. FPC agreed to not purse the days as “compensable” but rather just a time extension and than FPC proceeded with the work.

On or about October 26, 2006 during the weekly meeting under the Truncated Domes Section, URS stated *“we agree on the money there is no agreement on time. FPC stated that they want time and a unilateral needs to be processed.”*

On or about January 25, 2007 URS issued Unilateral Payment SA No. 70 for \$20,814.41 and 0 days, knowing that it was based on an estimated quantity and would have to issue another SA once final quantities were determined.

On or about June 7, 2007 (need cover letter from FDOT) URS issued Unilateral Payment SA No. 83 for \$4,800.48 and 0 days. As stated in the Unilateral SA *“The First Unilateral Payment (SA #70) was an estimate of the anticipated Truncated Domes. There were an additional 12 truncated domes that are being paid for under this Unilateral Agreement.”* However, URS did not pay this unilateral in accordance with the previous agreed to unit price.

On or about July 12, 2007 after FPC received a copy of Unilateral Payment SA #83, and realized that URS was not paying the truncated domes at the previously agreed to amount, FPC notified URS of its intent to file a claim for the unpaid amount.

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 FPC acted in good faith and performed the additional unforeseen work installing Truncated Domes. The FDOT and URS have not acted in good faith or in accordance with the contract in compensating FPC for this additional unforeseen work.

- FDOT changed the contract from “stamped domes” to “truncated domes” on the project.
- FPC performed additional unforeseen work removing previously stamped concrete by “grinding” domes that had been stamped per the original contract.
- FDOT directed FPC to install Truncated Domes on the project, and FPC performed the additional unforeseen work.
- FPC submitted its actual cost and requested additional time and money for the additional unforeseen work associated with the grinding of previously installed domes and the installation of new Truncated Domes.

## **REBUTTALL**

URS/FDOT allege that it has compensated FPC for the work via Unilateral Payment SA #70, #83 and #97.

As stated in SA #83 *“The First Unilateral Payment (SA #70) was an estimate of the anticipated Truncated Domes. There were an additional 12 truncated domes that are being paid for under this Unilateral Agreement.”*

URS did not pay this unilateral in accordance with the previous agreed to unit price.

FPC has not received Unilateral Payment SA #97 so it is not possible to comment at this time.

URS / FDOT allege that “Freedom has not provided any evidence that this work was a controlling item of work...”

FPC Response: Statements were made and agreed to by FPC / FDOT / URS & the DRB 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 12/2/06 through 1/13/07 .

### **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 that the Contractor has been compensated for all work associated with installation of truncated domes on the project. The Department also contends that the contractor is not entitled to any additional time or compensable days.

Unilateral Payment #70, and Unilateral Payment #83 were issued to Freedom Pipeline for work associated with the addition of truncated domes at sidewalk ramp locations. The work was added via Unilateral Payment since the Department and Freedom could not agree on submitted costs associated with this extra work and compensable time. Unilateral Payment #97 is currently being processed. This Unilateral compensates the contractor for remaining monies associated with this issue.

As the Contractor has been compensated for performance of all work associated with this issue, The Department contends this is a compensable time issue only.

Freedom Pipeline is requesting 3 days of compensable contract time for this issue. 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.

### **8-7.3 Adjusting Contract Time:**

**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 time 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. The Department may allow such extension of time only for delays occurring during the Contract Time period or authorized extensions of the Contract Time period. When failure by the Department to fulfill an obligation under the Contract results in delays to the controlling construction operations, the Department will consider such delays as a basis for granting a time extension to the Contract. Whenever the Engineer suspends the Contractor's operations, as provided in 8-6, for reasons other than the fault of the Contractor, the Engineer will grant a time extension for any delay to a controlling item of work due to such suspension. The Department will not grant time extensions to the Contract for delays due to the fault or negligence of the Contractor.*

### **REBUTTALL**

Per project Specifications, Freedom is not entitled to additional contract time or compensable days for these construction efforts.

First, the Contractor would be entitled to a time extension for Extra Work if and only if the Contractor's effort were defined as Extra Work and also defined as a Controlling Item of Work. If these conditions were met and a Contractor is given additional contract time for actual performance of the Extra Work, all time related costs for actual performance of such work are included in the compensation and markups provided within 4-3.2. Time granted for actual performance of Extra Work is not considered a delay.

## **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. The Contractor was required to revise stamped concrete handicap ramps to new standards.
2. Contractor was compensated to perform the extra work with Unilateral Payment Nos. 70 and 83.
3. URS stated at the Hearing they are processing Unilateral Payment No. 97 for remaining payment for this extra work. URS did not state the amount of the UP or if time was included.
4. Majority of extra work was performed by sub contractor.
5. Work was completed prior to last contract day. Completion was the week of 22 December, 2006. The last contract day was 19 January, 2007.
6. There was no documentation provided to the Board to justify this activity as a controlling item of work. The only reference to extra work being a controlling item of work was made at the March 2007 DRB meeting. This was well after the truncated dome work was completed.

## **RECOMMENDATION**

The Board finds that the Contractor is entitled to be compensated per Specification 4-3.2. This means appropriate markups for sub contractor invoices and bond. FPC is also entitled to compensation for work performed by their forces. FPC is not entitled to time, compensable or noncompensable, since this extra work was not a controlling item of work nor was the work completed after the last contract day.

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