

DISPUTES REVIEW BOARD RECOMMENDATION

2 December, 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 at Bill' Muffler Shop.

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 Bill's Muffler.

Summary of the Issue & Chronology: During the construction of the north bound lanes, the property owner at Bill's Muffler Shop complained about the tie in at the right-of-way ("ROW") with his property. FPC showed Mr. Bursler that the ROW was in the middle of the swale and that FPC can not

perform work outside of the ROW, and directed Mr. Bursler to contact the FDOT. Mr. Bursler met with Mr. Carl Harmon with the FDOT. They met with Mr. Bursler in March of 2007 and the FDOT agreed to fill the ruts in the back slope of the ditch caused by off-site water to make a 2:1 slope even though the work was off of the ROW. FPC proceeded with the work pursuant to Mr. Harmon direction on April 5, 2007 and completed on April 12, 2007.

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 at Bill's Muffler. 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 directed additional unforeseen work at Bill's Muffler to repair the slope that washout and change the slope.
- FPC performed additional unforeseen work at Bill's Muffler.
- FPC submitted its actual cost and requested additional time and money for the additional unforeseen work at Bill's Muffler.

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 additional unforeseen work at Bill's Muffler.

URS / FDOT allege that it has compensated FPC for its costs using existing unit rates for excavation, embankment, and sodding.

FPC Response: URS has not provided any documentation or proof as to the amount or quantity that it alleges it compensated FPC.

By URS statement that it "**paid for this work**" is proof that URS and the FDOT acknowledge that this is extra work.

FPC position is that this additional work, which required the FDOT to obtain a right of entry, and perform work off the right of way, can **not** be compensated at the original contract unit prices and in fact FPC is entitled to its actual cost plus appropriate mark-ups. The original unit rates were based on 2002 contract bid item cost, and a contract duration of 840 days with a planned completion date in May 2005. The contract has had significant amount of time added with a new completion date in late 2006 / early 2007. As a result, significant increases in material and labor cost have occurred since this project was bid in 2002 and therefore the original contract unit prices can not be utilized for this additional unforeseen work.

The scope of work required at Bill's Muffler compared to the original construction work ("excavation, embankment and sodding") is different in nature and scope. The original construction area was much larger, production rates greater because of the volume of earthwork and sodding. The smaller area and confined space requires more manual labor. In addition, this was added after contract time expired and the road was open to traffic.

REBUTTAL

URS / FDOT allege (even though the previous statement acknowledges they "paid for this work") that it is FPC responsibility under 120-11 or 7-11.

FPC response. URS / FDOT already acknowledged that this is additional work, so it is unclear why they are trying to now change its position and claim it is FPC responsibility.

URS / FDOT make reference to maintenance and protection of work, yet fails to mention that this additional work requires a right of entry. As stated on URS position paper page 5, "As we discussed on 2/21/07, the Contractor will likely need right of entry to your property to accomplish this work... As permission was obtained in writing on 9/1/2005

(different issue), I do not believe additional written permission is necessary for the work to be accomplished.” URS is ignoring this fact and trying to shift responsibility to FPC.

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 & 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 4/5/07 through 4/12/07 (see below):

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.

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 additional unforeseen work at Bill's Muffler.

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. Freedom was paid for this work using existing contract unit rates for excavation, embankment, and sodding. Freedom was also required to maintain work performed under the construction contract in accordance with Specification 120-11.

120-11 Maintenance and Protection of Work.

While construction is in progress, maintain adequate drainage for the roadbed at all times.

Maintain a shoulder at least 3 feet [1 m] wide adjacent to all pavement or base construction in order to provide support for the edges.

Maintain all earthwork construction throughout the life of the Contract, and take all reasonable precautions to prevent loss of material from the roadway due to the action of wind or water. Repair, at no expense to the Department, except as otherwise provided herein, any slides, washouts, settlement, subsidence, or other mishap which may occur prior to final acceptance of the work. Perform maintenance and protection of earthwork construction in accordance with Section 104.

Maintain all channels excavated as a part of the Contract work against natural shoaling or other encroachments to the lines, grades, and cross-sections shown in the plans, until final acceptance of the project.

In addition, any damage caused by the contractor while traversing, utilizing or working from the Bill's Muffler property is the responsibility of Freedom Pipeline. Also, any damage to Bill's property which occurred as a result of Freedom not stabilizing project areas is the responsibility of the contractor.

7-11 Preservation of Property.

7-11.1 General: *Preserve from damage all property which is in the vicinity of or is in any way affected by the work, the removal or destruction of which is not specified in the plans. This applies to public and private property, public and private utilities (except as modified by the provisions of 7-11.6), trees, shrubs, crops, signs, monuments, fences, guardrail, pipe and underground structures, and public highways (except natural wear and tear of highway resulting from legitimate use thereof by the Contractor), etc., Whenever the Contractor's activities damage or injure such property, immediately restore it to a condition similar or equal to that existing before such damage occurred, at no expense to the Department.*

The Department contends the Contractor is not entitled to additional contract time for this issue. Per Specification 4-3.2, the Contractor would only be entitled to a time extension if this effort was defined as extra work and also defined as a controlling work item. Freedom has not provided any evidence that this work was a controlling work item nor have they demonstrated that performance of this work delayed overall completion of the project.

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 ditch and slopes were constructed according to plans and specification.
2. Wash-outs did occur from Bill's Muffler shop to FDOT ditch.
3. Repairs were made to the area by FPC.
4. URS directed FPC to make repairs.
5. Repairs were made after the last contract day of the project.
6. No documentation was provided to the Board to prove that FPC did or did not maintain this area.
7. The slopes in this area were mowed by other forces.
8. Statement made at the March 2007 DRB meeting that stated any extra work after last contract day would be a controlling item of work. This issue was addressed at the hearing and neither objected to it as not being factual.

RECOMMENDATION

The Board finds that the Contractor is entitled to compensation for this work. There was no documentation provided to the Board that showed that FPC did or did not maintain this area. The slope in the questioned area was mowed by other forces.

No CPM schedule was provided to the Board that showed this to be a controlling item of work even though this was after contract time had expired. This work may have been done during the time frame of other controlling items of work as designated by the Department.

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