

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 MES, Weir S-6 & Rubble Slope at Townsend.

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 entitled to its actual cost plus appropriate markups and compensable time for the additional unforeseen work at Wier S-6 & Rubble Slope at Townsend.

FDOT directed FPC to perform additional unforeseen work at the Weir S-6 and the Rubble Slope at Townsend. On or about 12/5/06 to 12/21/06 FPC proceed in good faith and completed the additional unforeseen work.

URS / FDOT agreed that this was additional unforeseen work which impacted the controlling items of work on the project, but the FDOT did not fully compensate FPC for its actual cost plus mark up or the compensable days FPC is entitled.

- FDOT directed FPC to perform additional unforeseen work at Weir S-6 & Rubble Slope at Townsend.
- FPC completed this work at Weir S-6 & Rubble Slope at Townsend between 12/5/06 and 12/21/06.
- After 12/21/06 FPC submitted its actual cost and requested 3 compensable days.
- 4/5/07 FDOT issues Unilateral Payment (SA No. 72) for \$4,692.63 and 3 non 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.

In regard to the “compensable days” “controlling item of work” and “delayed overall completion of the project” the FDOT has already agreed that all of these items occurred. As noted on Unilateral Payment SA No. 72 the FDOT document states in part the following:

The Department has determined that you, as Contractor, are **entitled** to payment for the work described in the Unilateral Payment document...

Granted Time (Due to **delays** to **controlling items** of work shown on approved work schedule): 3 days.

Reason(s) for Granted Time: Extra time is being added to the project which is **critical for project completion**.

Reason for Granted Extra time is being added to the project which is **critical for project completion and acceptance**.

FPC respectfully request that the DRB rule that FPC is entitled to its actual cost plus appropriate markup, and three (3) compensable days in accordance with 5-12.6.2.2.”

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 the Contractor has been adequately compensated for this work and no additional compensation is warranted. The Department also contends that the Contractor is not entitled to compensable time for this work.

Unilateral Payment 72 was issued to Freedom Pipeline for work associated with the Weir, Slope pavement and rubble work. 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.

In May 2003, Freedom was provided Revision 3 which added a weir modification to the end wall adjacent to S-1404. In November 16, 2006, Freedom was also directed to construct slope pavement and rubble ditch lining for the MES discharge from S-1406. URS did not receive the requested cost estimates from Freedom until November 9, 2006.

Freedom Pipeline is requesting compensable contract time for this issue. Freedom has not provided any evidence that this work was a controlling item of work for the duration of its construction, nor have they demonstrated that performance of this work **delayed** overall completion of the project.

Per Project Specifications, Freedom is not entitled to compensable days for this construction effort since Freedom was compensated for Labor, Materials, and Equipment with allowable contract mark ups per Project Specification 4-3.2. As previously stated, Specification 4-3.2 allows the Engineer the right to increase, decrease or make alterations in the contract work.

4-3.5 Extra Work: *Extra work authorized in writing by the Engineer will be paid in accordance with the formula in 4-3.2. Such payment will be the full extent of all monetary compensation entitlement due to the Contractor*

for such extra work. Any entitlement to a time extension due to extra work will be limited solely to that provided for in 4-3.2 for additional work.

Project Specification 5-12.6.1 states that compensation provided in 4-3.2 is full and complete payment for Extra Work.

5-12.6.1 Compensation for Extra Work: *Notwithstanding anything to the contrary contained in the Contract Documents, the Contractor shall not be entitled to any compensation beyond that provided for in 4-3.2.”*

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. FPC did perform additional work as directed by the Department.
2. FPC was compensated by a unilateral payment since the parties could not agree on a price for the work.
3. The Department gave FPC 3 non-compensable days for this work.
4. The unilateral payment (72) stated that the 3 days were given because of delays to controlling items of work.
5. The FHWA agreed to the extra time granted as being critical for project completion.
6. Specification 4-3.2 is the critical specification in this issue. This specification is in effect and has to be complied with. The contentious part of this specification is the last sentence...*The Contractors shall have no right to any monetary compensation or damages whatsoever for any direct or indirect delay to a controlling work item arising out of or in way related to the circumstance leading up to or resulting from additional, **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 work actually delays completion of the project due to no fault of the Contractor...*
7. The Department unilaterally determined that this additional work was a controlling item of work. When the Department designated this work as a controlling item of work they extended the Contractor’s scheduled completion date and therefore extended his overhead and delayed completion of the project.

RECOMMENDATION

The Board recommends entitlement to FPC for the cost and compensable time for performing this extra. The additional work required by the Department was a controlling item as determined by the Department in Unilateral Payment No. 72. This work did extend the contract completion date through no fault of 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