

REGIONAL DISPUTES REVIEW BOARD RECOMMENDATION

November 14, 2010

Maria Hardy, P.E., Project Manager
APAC-Southeast
1451 Myrtle Street
Sarasota, FL 34234

Richard K. Ward, P.E., Sr. Project Engineer
Wilson-Miller/Stantec
6900 Professional Parkway East
Sarasota, FL 34240

RE: Financial Project Number 422403-1-52-01, Contract No. T1341; SR 70 from Myakka Wauchula Road to East of Sugarbowl Road, Resurfacing; Manatee County

Dear Madam and Sir:

The Florida Department of Transportation (Department) and APAC-Southeast (APAC) requested a hearing concerning the following issue:

Issue: Is the contractor entitled to a time extension due to shortage of thermoplastic material alleged by their subcontractor, Road Runner Highway Signs, Inc.

Contractor's Position:

The Contractor's position was based from his rebuttal papers dated November 2, 2010. They did not originally submit proper position papers and based their position on emails and letters submitted. At the hearing, APACs subcontractor, Mike Upton of Road Runner Highway Signs, read the rebuttal statement as their position for this issue:

Road Runner Highway Signs, Inc., requests the DRB to rule on entitlement to a time extension recovery and to release the currently held damages for the entire sixty (60) days assessed to APAC Southeast, Inc./Road Runner Highway Signs in a fair and equitable manner. Road Runner believes it has demonstrated by all intent and purpose that it could not reasonably obtain the necessary materials to finalize the thermoplastic on the governing project by producing purchase orders sent to Ennis in a timely manner and certifying under oath that due diligence was demonstrated by attempting to get materials from "Crown". That the Department ultimately directed the thermoplastic to be removed from the project as it was "at the time" convinced that we could not obtain the necessary materials from either of the two sources, Ennis-Crown, therefore, suggesting that Road Runner fulfilled its burden of proof and all other options had been extinguished. That the Department had the ability to suspend contract time for this delay under specification 8-6.1 – wholly or in part – thus mitigating specification 8-7.3.2 the Department could have granted an extension of contract time for the controlling items of work that were delayed and not reasonably anticipated or foreseeable at the time of bid when determined appropriate and said extension would have been prudent in order to obtain a reasonable solution to the material shortage stipulated in the documentation. In fact, "The owner who suffers damages is required to do whatever is reasonable and foreseeable to mitigate or reduce those damages. And to the extent the owner had opportunities to mitigate damages and clearly made a decision not to do so, the damages may be reduced by the amount that could have been saved." That the Department allowed sixty (60)

days to extinguish prior to making the decision that ultimately removed the thermoplastic from the project therefore delaying the possible mitigation of extended delays. Road Runner has demonstrated that the time of delivery prior to the commencement of this project that the average delivery from time of order was eight (8) days. That Road Runner ordered the required material well in advance and as required to complete the project in a timely manner. That the Department pursuant to specification 8-7.3.2, paragraph fourteen (page 89 – second to last paragraph) should have determined that there was an increase in time in the performance of the scheduled controlling activities that were beyond the control of the Contractor and the necessary adjustment of contract time should have been made and the contract modified. The thermoplastic was ultimately removed from the project. The Department did not demonstrate appropriate action to mitigate the delay and the costs of delay. That the Department for all intent and purpose had full use of the roadway as it was intended throughout the duration of the delayed decision to remove the thermoplastic from the project. That pursuant to the verbiage in Section 8-10.4, the assessment of damages is to be assessed “not as a penalty” but as liquidated damages.

Department’s Position:

The Department does not believe the contractor has met the requirement for a time extension in accordance with Section 8-7.3.2 regarding an area-wide shortage of material affecting all feasible sources of supply. This is because they have not submitted information that they attempted to order materials or hire another subcontractor with available materials to complete the project as bid. There were two material suppliers, Ennis and Crown, approved on the QPL to provide audible white thermoplastic. All documentation received to-date shows that material orders were only made to Ennis. The following points should be considered:

- The Prime Contractor shows no documentation that an attempt was made to contract with another subcontractor or supplier (Crown) to provide audible white thermoplastic product.
- To date, the Department in District One has only received time extension requests from Road Runner Highway Signs, Inc.
- District One had four projects during the time period in question where audible white thermoplastic was applied.
- The Contractor has been unable to provide a letter from the supplier specifically stating that they are unable to provide the necessary product to this specific project.
- An email dated June 23, 2010 from Road Runner to FTBA states that they are having difficulty getting project specific letters from other manufacturers because they are aware that Road Runner strictly buys pavement marking materials from Ennis.
- Contractor did not request any other option to mitigate the delay. The Department allowed permanent paint to be placed in lieu of thermoplastic as a remedy to complete the project and mitigate further delay.

The Department went through a timeline with key dates to show the flow of events until final acceptance of the project, which was July 31, 2010.

Contractor’s Rebuttal Statement:

The following points of rebuttal should be considered. “The Prime Contractor has shown no documentation that an attempt was made to contract with another subcontractor or supplier (Crown) to provide white audible thermoplastic product.”

Section 8-7.3.2 – The contractor is responsible for furnishing substantiating letters from a representative number of manufacturers of such materials clearly confirming that the delays in delivery were the result of an area wide shortage. There are only two suppliers for the white audible material on the QPL list – Ennis and Crown. Road Runner utilizes Ennis as its standard supplier and has for many years. Road Runner had contacted Crown – however – was unable to receive verification in writing until a later date after several attempts. That 50% should clearly be representative. That Ennis previously delivered materials within 8 calendar days as demonstrated. That two separate publicized documents stipulating the shortage were given to the FDOT that were represented by several of the Manufacturer’s listed in the QPL listing inclusive to Crown Industries. That Road Runner released the material for the project in a timely manner and the impact was clearly not foreseeable and was beyond control of the contractor. That Road Runner had every reason to believe the material would be delivered as expected in time for completion of the project as has been historically demonstrated.

Department’s Rebuttal Statement:

APAC did not submit a full position paper, but rather a compilation of emails and letters regarding the issue.

In their thermoplastic delay claim letter dated August 16, 2010, they state that letters from manufacturers other than Ennis Traffic Safety Solutions (Ennis), namely, Crown Technology, LLC (Crown) and Swarco America, Inc. (Swarco) denotes the same circumstance of a delay in receiving materials such that switching to another manufacturer was not a faster solution.

The controlling material issue was with obtaining audible white thermoplastic material. There are two FDOT approved suppliers of this material, Ennis and Crown. Swarco does not supply audible white thermoplastic materials. The letter dated April 26, 2010 from Crown indicates that prices have increased and that they ask for a 10 to 14 day lead time on new orders. No documents have been submitted to the department showing that APAC or Road Runner attempted to order materials from Crown within the time period in question. Also, no documents have been submitted to the Department that APAC attempted to contact another subcontractor to perform the work required by the contract when their subcontractor, Road Runner, could not get the required material.

The Department has had no requests for time extensions from any other contractors for audible white thermoplastic shortage issues for their subcontractors other than Road Runner. Since no new information is given in APACs position paper, the Department’s position is unchanged.

RDRB Findings:

June 1, 2010 end of allowable contract time.
June 2, 2010 Liquidated Damages (LD'S) begin.
June 4, 2010 all work complete except final Thermoplastic.
June 2010, APAC and sub contractor gave several dates to the Department to expect delivery of Thermoplastic in July (2010). The thermoplastic never was delivered.
July 20, 2010 the Department offered to do a second layer of paint in lieu of Thermoplastic to final accept the project.
July 23, 2010 the Department approved the permanent paint placement.
July 27, 2010 APAC's Sub-contractor begins to place permanent paint.
July 31, 2010 Final Acceptance of project by the Department.
During this time the Department pointed out that several other projects (4) were completed with thermoplastic without delays for the delivery of materials in District I.
The Contractor never offered the following:
Do a final permanent paint layer.
Get material from another source (supplier)
APAC never tried to terminate the subs Contract (Road Runner) and obtain another contractor to complete the work within the Contract Requirements.
APAC never made an offer or requested a time suspension to compete the project with Thermoplastic once the material could be delivered to the job site.
It was stated by the Contractor that the Department was considering offering a 29 or 31 day time extension, but was never finalized as it is was realized that the material needed to complete the project was audible white Thermoplastic only.

The Contractor's schedule showed a five (5)day time frame for placement of Thermoplastic. The earliest that any thermoplastic could have been placed was thirty (30) days from May 3, 2010. This was the last day of friction course placement. June 2, 2010, would have been the first day they could have placed the thermoplastic which was the first day of LD'S. Thus, the Contractor should have known that the project completion date was going to be late by at least five (5) days.

On November 3, 2010 Mr. Tom McSwain of Ennis Traffic Safety Solutions sent a letter to Mr. Joe DeLaGarza of Road Runner stating that "This letter serves as notice of a delay in our ability to deliver thermoplastic pursuant to our Standard Quotation and related Terms and conditions of Sale for the following job:

Contract#T1341-Manatee County
Orders placed May 2010"

RDRB Recommendation:

The Board finds that that APAC is not entitled to any additional contract days for the delay of thermoplastic materials not being delivered to the project within the original contract days prior to final acceptance. It is the obligation of the Prime Contractor to see that all items are completed within the original signed contract allowable time and within the time frame of his original CPM schedule. Per 2007 specification book, Section 8-7.3.2, Contract Time Extensions: page 87, the Contractor did not by his position papers, rebuttals, and the hearing prove by clear and convincing evidence to the Disputes

Review Board that that the Department's determination was without any reasonable factual bases. The Contractor had several opportunities during the life of the contract to make several adjustments to deliver the project on time to the Department in a satisfactory conclusion to all concerned.

Please remember that a response to the RDRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by non-responding party.

I certify that I participated in the Hearings of the RDRB regarding the Dispute indicated above and concur with the findings and recommendation.

Respectfully submitted,
Regional Disputes Review Board

Frank E. Proch, Interim Regional Disputes Review Board Chairman
Pete Markham, Regional Disputes Review Board Member
Jim Weeks, Regional Disputes Review Board Member

CC:

Lance Grace, FDOT (email)
Phil Chiarini, FDOT (email)
Paul Harkins, FDOT (email)
Scott Presson, FDOT (email)
C.J. Potts, APAC (email)
Joe DeLaGarza, RRHSI (email)
Mike Upton, RRHSI (email)