

## DISPUTES REVIEW BOARD RECOMMENDATION

August 18, 2011

Rusty Birchall, Project Manager  
Cone & Graham, Inc.  
P.O. Box 310167  
Tampa, FL 33680

Scott Presson, D1 Const. Services Engr.  
Florida Dept. Of Transportation  
P.O. Box 1249  
Bartow , FL 33830

RE: Financial Project No. 415569-1-52-01/413887-1-52-01/413887-2-52-01,  
Contract No. T1173, Sarasota County, SR 72

Dear Sirs:

The Florida Department of Transportation (Department) and Cone and Graham, Inc. (Cone & Graham) along with their sub-contractor Traffic Control Products of Florida, Inc. (TCP), requested a Dispute Review Board hearing on August 3, 2011.

### **ISSUE: Is the Contractor entitled to additional compensation for Temporary Concrete Barrier Wall (TCBW) ?**

#### **Contractor's Position**

TCP was contracted by Cone & Graham to furnish TCBW on the construction of SR 72. Cone & Graham also provided some TCBW of its own for the project. The original contract was 470 days. Dramatically different field conditions caused the work schedule and Maintenance of Traffic to be severely altered from the original plans to complete the work. Contract time was extended by the Department to 1,236 days by issuing 88 supplemental agreements to Cone & Graham. Various amounts of TCPs TCBW were utilized up to January 27, 2010, or an additional 656 days past the 470 original contract days. It is the position of TCP that the Department has benefitted from the use of the TCBW for additional 766 days. TCP was denied availability of this TCBW for the additional contract period and TCP could not recover the value of the TCBW for 656 days through regular pay items. Therefore, TCP is requesting to be compensated for the additional use of the TCBW.

## **Department's Position**

The original contract was 470 calendar days. During the project, an additional 766 calendar days were added due to: 41 calendar days for weather related effects, 34 calendar days for holidays, and 691 days granted through supplemental agreements. On 5/7/10, Cone & Graham submitted a request for additional compensation on behalf of TCP for TCBW for keeping the TCBW in use for 655 additional days. During this time they contended they lost income that would normally be earned with this TCBW on other projects. The Department notified Cone & Graham of its determination for no entitlement to the claim for TCBW because "all barrier wall was paid under Pay Items 102-71-11 Barrier Wall (F&I) and 102-71-21 Barrier Wall (Relocate) as placed and in accordance with contract requirements." At a meeting to discuss the claim, TCP informed the Department that the claim was not that the Department had not paid for the quantity of TCBW installed on the project, but rather that the TCBW had been kept on the project longer than anticipated at bid. The claim was denied.

## **Contractor's Rebuttal Statement:**

Cone & Graham did not provide a written rebuttal statement, however at the hearing TCP said that the Department skirted the 4-3 Specification in its entirety.

### ***4-3 Alteration of Plans or of Character 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, whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable by the Engineer. Such increases, decreases or alterations shall not constitute a breach of Contract, shall not invalidate the Contract, nor release the Surety from any liability arising out of this Contract or the Surety bond. The Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract. The term "significant change" applies only when:*

*(A) The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or*

*(B) A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity. The Department will apply any price adjustment for an increase in quantity only to that portion in excess of 125% of the original Contract item quantity, or in case of a decrease below 75% to the actual amount of work performed, such allowance to be determined in accordance with 4-3.2, below.*

*In the instance of (A) above, the determination by the Engineer shall be conclusive and shall not subject to challenge by the Contractor in any forum, except upon the Contractor establishing by clear and convincing proof that the determination by the Engineer was without any reasonable and goodfaith basis.*

## **Department's Rebuttal Statement:**

1. TCP states that contract was extended by FDOT to 1,236 days by issuing eighty-eight (88), Supplemental Agreements to Cone & Graham.

The Department states that an additional 766 calendar days were added to the contract due to the following:

41 calendar days for weather.

34 calendar days due to suspensions for Holidays.

691 calendar days granted through execution of 12 Supplemental Agreements.

2. TCP states that the barrier wall was utilized for an additional 656 days past the original contract days and that they cannot recover the value of the TCBW for that 656 day period through regular pay items.

As far as the 41 calendar days added due to effects of weather, Specification 8-7.3.2 provides the ability to grant time extensions, but specifically states that no additional compensation will be made for delays caused by the effects of inclement weather.

As far as the 34 calendars days added due to suspension of the contractor's operations for the holidays, Specification 8-6.4 provides the ability to grant time extensions, but states that the contractor is not entitled to any additional compensation beyond any allowed contract time adjustment for suspension of operations during such holiday periods.

Regarding the 691 calendar days added through 12 supplemental agreements, the supplemental agreements are full and final settlement for all costs associated with the additional time added within them.

3. TCP is formally requesting through proper channels and procedures, to be fairly compensated by the Department for additional use of the TCBW.

To rebut this contention, the Department provides a review of the proper channels and procedures to be fairly compensated:

- The contractor filed proper notice of intent to claim on 4/3/08.
- FDOT Specification 5-12.2.1 Claim for Extra Work – The contractor failed to submit full and complete claim documentation with 180 calendar days of final acceptance as required. The certified claim was not received by the Department until 6/6/11, 417 days after final acceptance.
- Specification 5-12.10 Non-Recoverable Items – the contractors claim fails to meet the requirements of the contract by requesting additional compensation for items deemed non-recoverable for this contract. TCP alleges they lost income that would normally be earned with this TCBW on other projects.

***Specification 5-12.10 Non-Recoverable Items:***

*The parties agree that for any claim the Department will not have liability for the following items of damages or expense:*

- a. Loss of profit, incentives or bonuses;*
- b. Any claim for other than extra work or delay;*
- c. Consequential damages, including, but not limited to, loss of bonding capacity, loss of*

*bidding opportunities, loss of credit standing, cost of financing, interest paid, loss of other work or insolvency;*  
*d. Acceleration costs and expenses, except where the Department has expressly and specifically directed the Contractor in writing "to accelerate at the Department's expense"; nor*  
*e. Attorney fees, claims preparation expenses and costs of litigation.*

**DRB Findings:**

Timeline of events that occurred on the project are as follows:

November 27, 2006	Contract start date
December 19, 2006	Letter from Cone & Graham pointed out drop-offs and protection for the project will be needed during construction. These areas have not been addressed by the plans for protection during the construction work.
February 13, 2007	Letter from Cone & Graham points out MOT constructability issues.
April 3, 2008	NOI Letter from Cone & Graham to the Department NOI to file claim for TCBW
April 10, 2008	Letter from Department to Cone & Graham asking for clarification of claim for TCBW
July 28, 2009	Letter from Cone & Graham to the Department states: No costs were included in the settlement of this issue to address additional maintenance of traffic costs as a result of the extension of contract time and additional work. It has been agreed that settlement of additional costs due to maintenance of traffic will be settled as a separate stand-alone issue.
May 7, 2010	Letter from Cone & Graham to the Department with breakdown costs for \$107,000+ for TCBW additional costs
June 4, 2010	Letter from the Department to Cone & Graham stating there is no merit based on the documentation submitted for the claim
April 15, 2010	Final Acceptance date
October 14, 2011	180 days after final acceptance.
June 6, 2011	Letter from Cone & Graham with TCP attachment dated June 2, 2011 asking the Department to revisit the issue
June 8, 2011	Letter from the Department to Cone & Graham denying claim for the issue of additional TCBW.

The DRB requested additional information from the Department and Cone & Graham to verify the date on their original submittal (21a) as to the June 6, 2010 date from the Cone & Graham letter. The date was verified to be June 6, 2011. This was verified by Scott Presson ( FDOT) and Rusty Birchall of Cone & Graham.

The original contract amount was	\$18,839,427.82	Original time 470 days
The present amount cost is now	\$31,813,920.78	Present time 1,236 days
Overrun cost +	\$12,974,492.96	Granted time 691days

The Board could not determine from the documentation and the hearing that any additional costs to maintain, relocate and make several adjustments were paid beyond the original contract time of 470 days. Reviewing the Supplemental Agreements presented shows that TCBW had not been addressed and no wording was included for unilateral compensation for TCBW. During several weekly meetings and the DRB meetings, it was mentioned by both parties that adjustments were to be made on MOT at a later date, as it could not be quantified at that time. Both parties (owner & Contractor) were both concerned with keeping the unilateral to items that they could reasonably and accurately quantify to keep the project moving toward a final completion.

**DRB Recommendation:**

The Board finds **entitlement** for additional compensation for TCBW provided by TCP based on Specification 4-3 for **significant change** in the contract (increased time by 691 days and \$12,974,492.96). Supplemental Agreements processed during the contact were only for specific pay items listed in each Supplemental agreement and were not for a final settlement for all work involved. Both parties stated that a payout issue is not final, as the asphalt is still an ongoing issue for the project. The Board could not find any documentation presented at the hearing that the agreement for additional costs associated with maintenance of traffic and TCBW had been paid. Both parties saved this for a later day once it could be quantified and pay could be determined.

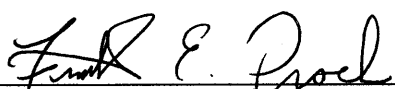
The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in the Hearings of the DRB regarding the Disputes indicated above and concur with the findings and recommendations.

Respectfully submitted,

Disputes Review Board

Frank E. Proch, Dispute Review Board Chairman  
Tom Rice, Dispute Review Board Member  
Carson Carner, Dispute Review Board Member

  
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DRB Chairman

cc:



## *Florida Department of Transportation*

RICK SCOTT  
GOVERNOR

801 North Broadway Avenue  
Tallahassee, FL 32309

ANANTH PRASAD  
SECRETARY

September 1, 2011

Mr. Frank E. Proch  
Dispute Review Board Chairman  
5140 Cyril Drive  
Ridge Manor, FL 33523

**RE: FDOT Determination on DRB Recommendation for Additional Compensation for Temporary Concrete Barrier Wall**

Fin No: 41388715201/41388725201/41556915201  
FAP No: 1401013P (Delegated FHWA)  
Contract No: T1173  
County: Sarasota  
Project Description: SR 72, East of Vanderipe Slough to East of Deer Prairie Slough

Dear Mr. Proch:

A dispute review board hearing was held on August 3, 2011 between Cone and Graham, Inc. and the Florida Department of Transportation to discuss the issue of entitlement to additional compensation for temporary concrete barrier wall.

On August 22, 2011 the Board issued its findings to the Department. Please be advised that the Department respectfully rejects the Board's determination of entitlement for additional compensation for traffic control barrier wall due to the following reasons:

- The contractor's certified claim sought payment for lost income for the temporary concrete barrier wall – an item that is identified as a non-recoverable item per specification section 5-12.10 of the contract specifications.
- The contractor's position presented at the DRB and that position certified in the claim have different basis of entitlement therefore are an attempt to amend the certified claim, which is disallowed pursuant to specification section 5-12.3 of the contract specifications.

The Department appreciates the efforts of the Board during the hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Presson", written in a cursive style.

Scott Presson, P.E.  
Construction Services Manager

cc: David Sadler, P.E., Director, Office of Construction  
Jonathan Sands, P.E., District Construction Engineer  
Terry Muse, P.E., Assistant District Construction Engineer  
Lance Grace, P.E., Sarasota Operations Engineer