

DISPUTES REVIEW BOARD RECOMMENDATION

HEARING DATE: October 26, 2012

Andy Powell

Wright Construction Group

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Parsons Brinckerhoff .

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RE: Financial Project No. 419708-2-52-01

Contract No. E1J62

Scour Countermeasures, Sarasota County

Gentlemen:

Wright Construction Group (WCG), the Contractor, and the Florida Department of Transportation (FDOT) requested that the District 1, Regional Disputes Review Board (RDRB) meet to hear both parties' position regarding a dispute which arose during the construction of the referenced project. The RDRB was asked to make a recommendation regarding entitlement. FDOT was represented by Parsons Brinkerhoff (PB).

The RDRB received Position Papers and Rebuttals from both parties and on October 26, 2012, 10:00 PM local time, the RDRB heard both sides discuss the issue. Position papers, rebuttals, and attachments are quite lengthy. Both parties summarized their positions which are paraphrased here.

**Contractor's Position:**

The Contractor's Position is that he is entitled to additional compensation for Rip Rap Rubble (Bank and Shore) material.

WCG bases this position on five points, which are as follows:

- 1) Untimely FDOT responses,
- 2) Contradictory and/or undocumented unclear information regarding Rip Rap,
- 3) Undocumented and unclear Rip Rap certification process,
- 4) An Area and Statewide Shortage of Rip Rap, and
- 5) Florida Administrative Code (14-103 FAC) not adequately incorporated.

WCG presented information about their contacts with Rip Rap suppliers and PB, information found on FDOT's website, and a telephone conversation with FDOT's State Material Office (SMO). WCG also presented RFI 005 and communication record regarding it, as well as communication from their Rip Rap Suppliers and firms which performed sampling and testing of some of the Rip Rap material. Some Daily Reports were provided, as well as excerpts from FAC and the FDOT Materials Manual. A schedule of the project was provided showing how the Rip Rap issue was involved.

**Department's Position:**

The Department's (FDOT) Position was presented by Parsons Brinkerhoff.

An Issue Chronology was provided to show how the issue developed. An Entitlement Analysis was provided to refute the Contractor's Position:

- WCG did provide notice of intent to claim.
- There was no change to the original contract.
- WCG could not obtain Rip Rap from their low bidder supplier.
- No evidence of a shortage was provided, only that the low bid supplier could not provide certified material.
- WCG delayed itself attempting to get material from its preferred sources, instead of other sources with available certified materials.
- Impacts to WCG were reasonable to be expected.
- WCG could have gotten quotes from multiple suppliers and incorporated into original bid.
- WCG did work to mitigate their supply issue.
- WCG did provide a complete, timely, claim package.

Excerpts from Special Provisions and Standard Specifications were provided. The Department does follow Florida Law in its Rip Rap processes. A table of hauling distances from various pits, those bid, proposed and two later actually used for this project were presented. The table was provided to show that no area wide shortage of Rip Rap existed. PB concludes that the Department worked to alleviate the situation, while they believed poor planning and poor estimating by WCG, along with unfamiliarity with Rip Rap to have caused the issue.

Emails and letters from PB and WCG are presented, including RFI 005, relating to use of alternatives to Rip Rap. The FDOT Rip Rap approval processes were discussed also.

**Contractor’s Rebuttal:**

WCG rebuts FDOT’s position as follows:

- 1) Material Availability – WCG could not have reasonably anticipated the supply issues relating to Rip Rap, but, FDOT was aware of the shortage, which was statewide,
- 2) WCG was diligent in planning for and soliciting Rip Rap for this contract,
- 3) WCG is not “unfamiliar with the process” rather the documents, including list of “approved” sources, is not clear and proper verification and resolution testing was not adhered to regarding this Rip Rap.

WCG concludes that although open communication may have existed, the lack of responsiveness and the Department not following their own procedures, both warrant WCG to be entitled to additional compensation.

**Department’s Rebuttal:**

FDOT rebuts the Contractor’s position as follows:

- 1) Regarding untimely responses, PB communicated multiple times verbally, but when WCG was informed in writing that there would be no additional cost and the Contractor would have to provide design, WCG chose not to pursue an alternative to Rip Rap.
- 2) FDOT approves Rip Rap sources.
- 3) FDOT has clear procedures for approving Riprap.
- 4) Rip Rap was provided by the Contractor showing there was no shortage. SMO advises confirming stockpile approval status.
- 5) The specification refers to Rule 14-103 FAC. Producer is present when sampling is done to ensure that he concurs that sampling is representative. Producers have not contested these test results.

PB additionally rebuts the following:

- 1) Rip rap materials are available locally, but SMO states on website listing Rip Rap producers: “Confirm stockpile approval status with State Materials Office.”
- 2) Split sampling is not used for Rip Rap as discussed in FM 5-538, Sampling and Testing Rip-Rap material.

### **DRB Hearing Presentations and Discussion:**

WCG made a presentation outlining the alleged causes of the Rip Rap shortage, including weather, the Rip Rap testing procedures, equipment failures, economic impacts and other unknown production issues. Other complications included delayed responses to RFI 005, SMO results, and

other communications. Major points and events were summarized and the FDOT website was introduced as it pertains to Rip Rap.

Reference was made to a phone conversation with SMO. WCG stated they were told that only one source for Rip Rap existed and that provider was Cemex in Brooksville, and that Qualified QC labs did not know how to test Rip Rap.

FDOT made a presentation emphasizing that this was a “streamlined” contract with advanced acquisition time. WCG did not request additional acquisition time. Weather days, especially for wind, were granted and the contract was completed with no liquidated damages.

PB stated that the issue was that Contractor was not able to get the Rip Rap material from the supplier he based his bid prices on. The FDOT was not aware of any shortage and the fact that the Contractor had a “successful project, finished on time,” shows no Rip Rap shortage existed.

PB states that the Rip Rap approval process is well documented and that they worked continually with the Contractor to resolve this issue.

In discussion which followed, the phone conversation with SMO office was discussed at length. At one point when no one could identify the representative of the SMO office on the other end of the line, that person was referred to as “some unknown person”. The Department pointed out that those who are qualified to do QC testing are qualified for specific types of testing, not across the board for all materials.

The contractor estimated that about 40% of the Rip Rap came from Bergeron and 60% from Cemex in Brooksville. The only parameter which the other mines failed on was Specific Gravity. The Contractor said he had the SMO failing results but they were not in either the position paper or rebuttals. PB had not seen the SMO results, although they stated that SMO had sampled and tested failing mines twice during the duration of the project.

### **Board Findings:**

- The Contractor asked for consideration of a design alternative, but never actually provided a signed and sealed alternate. Discussion was held about the RFI, but a long time passed before the Contractor was given a written response. No contractual time exists within which an RFI is to be answered.
- The Contractor did not check stockpile approval status with SMO until well into the project. A material shortage did not exist.
- The Department has a well documented, albeit complicated, process for testing and approval of Rubble Rip Rap.
- The project was completed without liquidated damages and the Contractor, the Department, and the CEI are complementary of the project and how well all parties worked together.

- Rip Rap was a controlling item of work and weather days were granted, but Standard Specification 8-7.3.2 states: “No additional compensation will be made for delays caused by effects of inclement weather” or” for delays caused by delivery of materials...” Therefore, payment of additional compensation for Rip Rap would violate Contract language.

**Board Recommendation:**

The contractor is not entitled to additional compensation for his difficulties in procuring Rip Rap for this project. This recommendation was arrived at by unanimous agreement of the Board members.

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 the recommendation by the 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,



Jim Weeks, P.E., Chairman



Allan Adderley, P.E., Member

Tom Shafer, P.E., Member

Cc: Terry Muse

Zach Wiginton