

DISPUTES REVIEW BOARD RECOMMENDATION

13 August 2002

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Ref: SR-776, West of CR-771 to South of Riverwood Contract No: 20757,
State Project No: 01050-3521. Financial Project No: 193794-1-52-01.
Disputes Review Board hearing regarding pay for restrained pipe.

Dear Madam and Sir:

The Florida Department of Transportation and Misener Marine Construction, Inc. requested a hearing concerning the above referenced issue. Misener is seeking to be paid under the contract bid item for restrained pipe (406mm) at the bid price. The Department states that the scope of work changed therefore the amount of compensation should change. A hearing was held at the Ft. Myers Residency office on 29 July 2002. Both parties agreed that the board was to determine what the entitlement should be. Both parties presented their case to the Board.

CONTRACTOR'S POSITION

Misener Marine Construction is requesting the Dispute Review Board to advise and compel the FDOT to honor an agreement and pay funds that were promised to be paid upon completion of installation of restrained joint pipe across the bridge instead of unrestrained pipe, herein referred to as scope of work. This issue is not a request to receive compensation for unanticipated additional scope of work. Nor is this issue about the quantity, quality or timeliness of the scope of work. The placement of the restrained joint pipe across the bridge structure was specified by the FDOT/C.C.U., completed satisfactorily and timely. This issue is a simple contractual matter where the FDOT/C.C.U. required a change in the scope of work, specified how we would be paid for providing the scope of work and then using a controlling position, chose to pay substantially less for the scope of work long after the work is completed. This issue has a total value of \$96,390.74 with \$15,023.18 having been paid with a balance due of \$81,367.56

As prime contractor for this FDOT project, Misener Marine (MMCI) is required to furnish 433 meters of 305mm, (CI/DI) push-on unrestrained joint pipe and 433 meters of 406mm, (CI/DI) push-on unrestrained joint pipe across the top of the bridge structure from the south approach slab to the north approach slab (see Exhibit B for location). This work was part of the original scope of work and would be paid as follows:

Pay Item No. 63100110611 305mm (CI/DI) (F&I) 433.1 1M @ \$178.45 =
\$ 77,286.69

Pay Item No. 63100110613 406mm (CI/DI) (F&I) 433.1 1M @ \$131.38 =
\$56,900.67
\$134,187.36 Total

On May 22, 2001, prior to the installation of the pipe, Misener Marine received a faxed directive from Joe McGill of Sverdrup Civil that is directly quoted as follows:

" Mike Saunders of C.C.U. advised that we should use the restrained items in the contract for the bridge crossing. This will be handled as overruns to these items."

C.C.U. refers to Charlotte County Utilities. This directive simply requires MMCI to order and install 433.1 meters each of 305mm and 406mm restrained joint pipe instead of the same sizes and lengths of unrestrained pipe across the bridge structure. The directive also states that C.C.U. agrees to pay for the restrained-joint pipe using unit prices that existed in the contract. This directive modified MMCI's contract with the FDOT to reflect payment for the pipe as follows:

Pay Item No. 63100140611 305mm (CI/DI) (F&I) 433.1 1M @ \$179.28 =
\$ 77,646.16

Pay Item No. 63100140613 406mm (CI/DI) (F&I) 433.1 1M @ \$353.11 =
\$152,931.94 Total = \$230,578.10

DEPARTMENT'S POSITION

The Department feels there was a clear error made by Charlotte County Utilities in initially agreeing to pay for the restrained joint pipe going across the bridge under the restrained joint pay items. The error was found when reviewing the original claim on painting. Section 5-4 of the Standard Specifications allows the Engineer to make corrections as

necessary to reflect the actual spirit and intent of the Contract Documents. The method used for compensating the contractor for the additional cost of restraining the pipe on the bridge is reasonable and fair to all parties involved.

Charlotte County Utilities requested the contractor restrain the pipe crossing the bridge. On May 22, 2001 the Department CEI sent a Fax to Jeff St. John of Misener Marine Construction, Inc. and Mark Christenson of APAC-Florida, Inc., stating Mike Saunders of Charlotte County Utilities advised the CEI payment for the pipe crossing the bridge would be paid under the restrained joint pay item. This would compensate the contractor for restraining the pipe on the bridge.

Charlotte County Utilities realized they had made a mistake in deciding to pay for the pipe crossing the bridge as restrained as the restrained joint pay item included much more work (excavation, backfill, and compaction, dewatering, bedding material, etc.) than was going to be required to place the pipe across the bridge. After realizing this mistake Charlotte County Utilities change the payment back to the "Push-on" pay item, a deduction of \$96,368.48, and ran an Engineer's Estimate \$15,023.18, for adding the restraints (Field Lock Gaskets) to the pipe crossing the bridge. The \$15,023.18 was paid to the contractor by Unilateral Supplemental Agreement for the restraining of the pipe crossing the bridge.

DISPUTES REVIEW BOARD RECOMMENDATION

The Board has reviewed all the information provided by the Department and Misener Marine. We listened to all parties at the hearing held on the 29th of July 2002. After reviewing all the data and listening to the testimony we have determined that there is entitlement due the contractor. The contractor is entitled to be paid as the directive stated, as a overrun to the bid item. Our determination is based on the following:

The contractor was directed by the Department to construct the 406mm restrained pipe crossing the bridge. The fax stated that the construction of the 305mm and 406mm restrained pipe would be paid for as an overrun to the contract bid items. The price for constructing the 305mm and 406mm restrained pipe are listed in the bid tabs as submitted by the contractor. These prices were accepted by the Department when the department executed the contract with Misener Marine.

The contractor has the right and expectation that the department will honor the commitments made through any official communications method. A fax, from the Department or its representative, directing the contractor to perform some function is certainly a valid document from which the contractor can rely on. This fax or directive was issued to the contractor on the 22nd of May 2001. The letter from CCU (Charlotte County Utilities) changing their price was the 2nd of January 2002. This price change was after the construction of the pipe was basically done.

The Department references section 5-4 of the specification manual regarding errors. This issue does not appear to be "error" issue, but a scope issue. The contractor asked which pipe to install, restrained or unrestrained, not quantity of pipe. Misener Marine had bid both types of pipe in their original bid. The price for both types was known and accepted by the Department and CCU.

The Department and CCU stated in the hearing that the scope of work changed for the restrained pipe on the bridge. The scope for installing the 406mm pipe on the bridge was different than described in the Technical Special Provisions (Utilities Relocation) page 5 of 29, paragraph 3 titled Payment. Therefore with a reduction in the work effort by the contractor CCU requested (through the Department) a price reduction for the 406mm pipe. There was no request made to reduce the price for the 305mm with the same scope. In considering the Department only required a reduction in compensation for the 406mm and not the 305mm the issue appears to be a price issue, not scope error.

The Board believes that with the fax from the Department to the contractor stating that this item will be paid as an overrun the issue falls under the altered quantities specification.

*Florida Department of Transportation Standard Specifications for
Road and Bridge Construction*

Section 9-3 Compensation for Altered Quantities.

9-3.1 General: When alteration in plans or quantities of work not requiring a supplemental agreement as hereinbefore provided for are offered and performed, the Contractor shall accept payment in full at Contract unit bid prices for the actual quantities of work done, and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the contractor, resulting either directly from such alterations, or indirectly from unbalanced allocation among the Contract items of overhead expense on the part of the bidder and subsequent loss of expected reimbursement therefore, or from any other cause.

This specification basically states that the contractor will be paid bid price for items not requiring a supplemental agreement. The spec is party neutral in that it applies to the Department and contractor equally in the event of good or bad bid prices.

In the hearing the Department stated that they had the right to make changes to the contract when necessary or desired. This is true the Department has the right to make changes. However these changes need to be made in accordance with specifications.

Florida Department of Transportation Standard Specifications for Road and Bridge Construction

Section 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 increase or decreases in quantities, ...as may be found necessary or desirables by the Engineer.*

The key part of this spec is that the change is required to be done prior to or during the progress of the work. This change to the price for the 406mm pipe was made after the construction was basically complete. Misener states in their position paper that prior to performing the work FDOT/CCU "did not solicit any alternate pricing...to perform the work".

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation for entitlement. We hope that both parties agree to make this the basis of a mutual settlement. 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 Jack Norton, Member Rammy Cone, Member

Signed for and with concurrence of all members

Don Henderson, PE

cc Joe McGill