

I 4/US 98 Interchange

State No.: 16320-1409

FIN 201213-1-52-01

Recommendation of Dispute Review Board

Dispute No. 2 District 1

Hearing Date: December 3, 2003 Contractor Hubbard Construction Company

DISPUTE: Is the Contractor entitled to Payment for “Glare Screen” in addition to the pay item for “Temporary Barrier”?

CONTRACTOR'S POSITION . The plans for the project require 1,925 meters of Temporary Glare Screen during various Maintenance of Traffic Phases. The pay item for barrier wall does not compensate Hubbard for the glare screen, nor is there a pay item for glare screen. In correspondence dated June 3, 2003 from Hubbard Construction Company (Hubbard) to Metric Engineering, Inc. (Metric), Hubbard identified the need to establish a Pay Item for the Temporary Glare Screen required on the project and proposed a Unit Price Of \$29.29 per meter for that item.

Metric responded in correspondence to Hubbard dated June 4, 2003 denying entitlement to compensation for this item citing Special Provision Specification 102-8.9 Concrete Barrier Wall (Temporary)(With or Without Glare Screen). Metric stated their belief that the title of the specification indicates that the payment for the Temporary Glare Screen is included in the payment for the Temporary Barrier Wall.

Hubbard responded in correspondence to Metric dated June 5, 2003, disagreeing with Metric's belief, as Special Provision 102-8.9 states “ The Contract unit price for Concrete Barrier Wall (Temporary) will be full compensation for furnishing, installing, maintaining, and removing the concrete barrier”. Payment for the Temporary Glare Screen is not addressed in the Specification. The specification directs the contractor to furnish a temporary concrete barrier as detailed on Roadway and Traffic Design Standards, Index 415. There is no detail in that Index for the Temporary Glare Screen, nor is there a reference to that requirement. The specification does not address payment for the Temporary Glare Screen. Also, payment for the Temporary Glare Screen is not addressed by plan notes.

The specification states that “When called for, temporary glare screens shall be in accordance with 102-3.4”. The referenced specification is not included in the specification package for the project, providing further evidence that the Temporary Glare Screen requirements were overlooked during development of the pay items and specifications for the project.

The specification goes on to state that Payment will be made under Item No. 2102-70-Concrete Barrier Wall (Temporary) – per meter. The extension after the hyphen following 70 is blank. The Department's Basis of Estimates addresses payment for the Temporary Glare Screen. The final two digit code following the 70- defines the Barrier as (Standard) if ending in 1 or (With Glare Screen) if ending in 2. The pay item included in this contract is 2102-70-11 (Temp)(Stand)(Conc). While the basis of estimates handbook is not part of the contract, it is a published resource provided by The Department defining the Pay Items, which are a part of the contract. The Pay Item No. is the primary designator of Temporary Glare Screen requirements, and on this project the Pay Item No. designates that the Temporary Glare Screen is not included in the Temporary Barrier Wall.

DEPARTMENT'S POSITION :

The Department does not agree with HCC's currently presented position on entitlement. The information used to support their position contains erroneous representations regarding the Contract's lack of a method of payment for the temporary glare screen. Their position, in the context of the Contractual agreement between HCC and the Department, also has a fatal flaw in that the foundation of their analysis relies on use of Department procedural guidelines (Basis of Estimates) to support their position. Department guidelines are irrelevant in the context of Contractual obligations/requirements for either party to the Contract as they are not contract documents, as defined in the Contract, thus carry no enforceable weight.

The lack of appropriate application of the contract documents is compounded further by anecdotal references to experiences on other Department projects (again non-contract related information). This approach being convenient for their purposes but most certainly inappropriate in the context of the Contract and the rights and obligations of each party to the Contract.

The contract documents (specifically the Plans and Special Provisions) clearly establish the Contract requirements for Temporary Glare Screen. This clarity comes from a thorough review of the contract documents in their entirety. In seeking resolution of any questions regarding requirements, attentions should be directed towards and within such documents for answers.

Essential to resolution of questions regarding the Contract, and integral in the Department's position, is the fact the contract documents must be viewed and considered as whole as is required under Article 5-2 of the Standard Specifications. Clearly this is a necessary condition of the Contract. Clearly this is a condition not met by HCC in the analysis presented as support of their claim.

As indicated above, the Department's position is founded in relevant applicable Contract authorities and developed as prescribed in Article 5-2. This position has been clearly presented in MEI's June 4, 2003 (Exhibit B) response letter. Summarizing from the June 4th letter:

- C Reference is made to the contract documents, specifically Special Provision 102-8.9 titled: Concrete Barrier Wall (Temporary) (With or Without Glare Screen), which clearly indicates requirements, and the inter-linking of requirements, relative to Concrete Barrier Wall and Glare Screen
- C Referring to the contract documents, specifically Traffic Control Plan Sheets 194 thru 202 you will find several detail notes referencing "BEGIN GLARE SCREEN" and "END GLARE SCREEN". These notes directed to particular stationing for location of Temporary Concrete Barrier Wall.

Other notable information being offered at this time and specific to requirements found in Special Provision 102-8.9:

C From 102-8.9, second paragraph: **“Furnish the barrier wall and glare screen and take ownership upon completion of the project.”**

C From 102-8.9, last paragraph: **“Payment will be made under:**

Item No. 102-70- Concrete Barrier Wall(Temporary) – per foot

Item No. 2102-70- Concrete Barrier Wall(Temporary) – per meter”

The Department’s position is clearly founded in the contract documents. HCC’s issue of payment for the glare screen is addressed in these documents. When viewed in their entirety, the contract documents define the scope of work to include providing glare screen in conjunction with the temporary barrier wall and also define how payment will be made for the work.

The Department believes HCC’s analysis and interpretation of the contract documents and application of non-contractual information has led them to erroneous and unreasonable conclusions. HCC’s position being based on their erroneous conclusions regarding Department intent.

RECOMMENDATION : The Dispute Review Board unanimously agrees that the Contractor, Hubbard Construction Company, is entitled to compensation for the cost of furnishing and installing the “Temporary Glare Screen” in addition to their bid price for “Temporary Barrier”, Pay Item 2102-70-11.

RATIONALE: While the Contract Plans called for Glare Screen to be a part of this contract at some locations, the Department failed to properly provide the specification or plans for the Glare Screen and provide a pay item for this work. The Department furnished details for the Concrete Barrier Wall, but failed to provide any detail of the Temporary Glare Screen. The specification 102-3.4, referring to Temporary Glare Screen, was not a part of the bid documents.

While the “Department’s Basis of Estimates” is not an integral part of the Bid Documents, it is a standard document published by the Department and is intended to assist contractors in preparing their bid. Standard practices of bid documents may be changed from project to project, however if there is a change, it is the Department’s responsibility to clearly indicate that this is an exception for this specific project.

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Dispute Review Board’s recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue present to their partnering agreement. Please remember that a response to the DRB and 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 the non-responding party.

I certify that I have participated in all the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully submitted

Dispute Review Board

- Robert P. Bayless, DRB Chairman
- Charles W. Goodman
- Dallas L. Wolford

Signed for and with Concurrence of all Members

Robert P. Bayless, DRB Chairman