

DISPUTES REVIEW BOARD RECOMMENDATION

7 January 2003

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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 additional compensation for noxious weed removal.

Dear Madam and Sir:

The Florida Department of Transportation and Misener Marine Construction, Inc. requested a hearing concerning the above referenced issue. Misener's sub-contractor, Swart Landscaping Inc. (SLI), is seeking to be paid for the cost of removing the noxious weed Tropical Soda Apple (TSA). The Contractor contends that the work was outside the scope of the work in the contract. The Department states that it was evident that the noxious weeds were introduced in the project through the contractors grassing operations and therefore it is the responsibility of the contractor to remove the noxious weeds at no cost to the Department. A hearing was held at the Bartow District Office on 12 December 2002. Both parties agreed that the board was to determine if the contractor was entitled to additional compensation. Both parties presented their case to the Board.

CONTRACTOR'S POSITION

We will state Misener Marine Construction position by referencing and paraphrasing their position and the hearing.

Misener Marine Construction is requesting the Dispute Review Board to determine if their subcontractor, Swart's Landscaping, Inc., is due entitlement regarding the invasive weed infestation issue.

The subcontractor, Swart's Landscaping, Inc. (SLI), is stating that they are in compliance with the specification relating to the providing and placement of sod. Section 7-1.3 requires the contractor to furnish the Engineer with a certification from the Florida Department of Agricultural and Consumer Services, Division of Plant Industry, stating that the sod is free of noxious weeds. SLI did submit the certifications as required.

DEPARTMENT'S POSITION

We will state the Department's position by referencing and paraphrasing their position paper and the hearing.

The Department feels there was a clear violation of Section 7-1.3 of the Standard Road and Bridge Specification in that SLI did introduce or release prohibited noxious weeds into the project. The Department believes that the Specification requires that the certification stating the sod, hay, straw, and mulch materials are free of noxious weeds, including Tropical Soda Apple, not "apparently free". The certifications provided by SLI state "apparently free".

The Department also references the following sections of the Standard Road and Bridge Specifications: Section 4-3.4 Differing Site Conditions, Section 7-14, Contractor's Responsibility for Work, and Section 6-7, Defective Materials. The Department fully believes that the Contractor was not in compliance with these referenced specs. Therefore there is no entitlement for additional compensation.

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The Board has reviewed all the information provided by the Department and Misener Marine. We listened to all parties at the hearing held on 12 December 2002. After reviewing all the data and listening to the testimony we have determined that there is entitlement due the contractor. Our determination is based on the following:

1. The contractor was in compliance with Section 7-1.3 of the specifications requiring certification of the sod being free of noxious weeds including, Tropical Soda Apple. The Certification provided by the DOA, Division of Plant Industry is the standard provided on all sod fields. The words "apparently free" are the standard for this certification. This language was verified by the Board in a telephone conversation with DOA personnel in Tallahassee. The DOA cannot certify a sod field as free of TSA

because their inspectors cannot determine if TSA seeds are present. Therefore the term “apparently free” is used because the inspection is really only a visible inspection. This certification has been and still is accepted by the Department as meeting Section 7-1.3 of the Specifications.

2. Conflicting specifications. Section 7-1.3 requires the Contractor provide certification only that the sod is free of noxious weeds. The Contractor complied with this section. Section 981-2.3 requires that the Contractor provide sod that is “free of noxious weeds and seeds”. No certification is required. The Board believes that in all likelihood the TSA came from the sod provided to the project and accepted by the Department at the project site. However with the ambiguity between the two specifications resolution of that ambiguity goes to the reader (Contractor) not the writer (Department). The Contractor complied with Section 7-1.3.
3. The Contractor did provide a cross reference to the delivery tickets, field locations and the certifications as provided by the Department of Agriculture. The data satisfied the request by the Board for additional information.
4. The Board believes that, had Section 7-1.3 of the Standard Specifications not existed, there would be no entitlement. Section 981-2.3 is more of a performance based specification requiring the Contractor to provide a product free and clear of noxious weeds and seeds. Section 7-1.3 requires the Certification by a third party (DOA) with which neither the Department nor the Contractor had a contractual relationship.
5. The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical), and the contract. Even though we feel that the TSA was probably brought to the job site through the sod our decision for entitlement is based on complying with the contract documents.

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 Swart's Landscaping Inc.