

DISPUTE REVIEW BOARD RECOMMENDATION

July 26, 2004

E-Mailed - July 26, 2004

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RE: SR 60 (E. of Tiger Lake Rd to E. of CR 630)
FIN No.: 197395-1-52-01
County: Polk

Issue – Fuel Adjustment

Dear Sirs:

On April 8, 2004, the Contractor, Cherry Hill Construction, Inc. (CHC) requested a hearing on the subject project stating:

The dispute is based on the FDOT's refusal to include an "estimated gasoline and diesel fuel requirement" for the Contract limerock pay items within its calculation of the total Project fuel requirements. The FDOT calculated totals for gasoline and diesel fuel should be adjusted for both Group 5¹ and Group 10 Optional Base plan quantities. The addition of the optional base items will increase the amount of each monthly fuel adjustment that has occurred since the start of the Project. A total corrective adjustment in the amount of \$12,994.67 should be made to CHC for fuel adjustments through February 2004.

Pertinent correspondence and other information relating to the Owner's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on July 12, 2004. Should entitlement be established, the Parties were to negotiate the quantum of such entitlement.

CONTRACTOR'S POSITION:

*The price of fuel rose dramatically during the winter and spring of 2003. Each FDOT Pay Estimate between September 2002 and February 2003 had shown zero fuel adjustment. **When asked by CHC how the number of gallons of fuel was determined, FDOT personnel at the Bartow Construction office stated that Tallahassee used to calculate it, now its up to the Districts, but they do not know how it is done.** CHC studied the FDOT website, but could only find the monthly price indexes, nothing could be found with a reference to calculating fuel requirements, i.e. gallons.*

*CHC was eventually referred to FDOT's Mark Wright in Tallahassee. Mark Wright informed CHC that **there was a spreadsheet in each FDOT contract that showed the specific pay item conversions.** It was then that CHC found the spreadsheet (Document 1A)² within the Contract documents and learned that a total of ten (10) out of 110 Contract pay items were utilized by FDOT in determining the total Project gallons of gasoline and diesel fuel. The Contract optional base items were noticeably not among the ten items.*

*CHC **submitted an RFI to FDOT on 24 March 2003 requesting the optional base items and the turnout item be added to the fuel requirements determination** (Document 2). No written response was ever received. FDOT Personnel at Bartow Construction were noncommittal as to whether the optional base items would be added.*

On 22 April 2003 CHC forwarded a letter to FDOT's Tim Dewitz (Document 3) requesting the addition of the optional base pay item fuel conversions. No response was ever received. On the same day, CHC

¹ This is apparently a typo and was corrected during the hearing to read Group 2.

² See original position papers for referenced documents or attachments.

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faxed a copy of Document 1 to Mark Wright in order to continue a dialogue on the issue.

On 24 April 2004 CHC received a call from FDOT's David Chason. David Chason explained that **FDOT had recently limited the number of pay items with fuel conversions to just 36 pay items, in an agreed upon effort with FTBA to simplify the "system."** Group 5 and Group 10 Optional Base did not make the list, but Group 1, 6, 9, and 11 did make the list. CHC then asked David Chason how then, could CHC currently be in possession of two current FDOT bid packages for two District One projects that included more than 36 items? David Chason stated that somebody at FDOT must be pulling items from the wrong list. He said they knew they had a problem and intended to fix it on future projects

CHC then contacted FTBA (Document 4). Bob Burleson of FTBA **informed CHC that an agreement was made to simplify the system of determining project fuel requirements, but the method was left to FDOT.** FTBA did not agree to leave out certain optional base groups. Bob Burleson stated that he would discuss the matter with Ananth Prasad.

CHC later inquired with both Bob Burleson and Ananth Prasad at a District One quarterly meeting about the issue. Ananth Prasad requested that CHC submit an inquiry to him via e-mail. CHC did so, and a response was later received from FDOT's David Chason via e-mail (Document 5). David Chason stated **FDOT could not include the optional base items within CHC's total calculation because it would mean that they would have to do it for all Contractors with a similar request.** CHC shared this with FTBA and Bob Burleson stated that he would pursue it further with Ananth Prasad.

CHC reviewed the issue with FTBA again in February 2004. Bob Burleson brought it to the attention of Ananth Prasad. CHC was told by FTBA to contact David Chason again. David Chason stated that he would review it with Ananth Prasad again. David Chason reported back to CHC that FDOT would not include the optional base within the fuel requirements because they would then have to consider all such requests.

CHC has continued to bring this issue up throughout the course of the Project and is now looking for resolution.

CHC has prepared a spreadsheet to summarize the corrective action that FDOT should take to modify the Contract's fuel adjustment value to date. An immediate adjustment of \$12,994.67 should be made for the period through February 2004.

CHC makes the following statements in its behalf.

1. **Document 1A's language does not expressly limit the contract price adjustments to the items listed on Document 1A.** Rather, the adjustments are to be in accordance with the supplemental specifications (Document 1B). Document 1B states that the Department will provide an estimated quantity for fuel requirements for gasoline and diesel to cover the work specified in the Contract. Optional Base is specified within the Contract. Document 1A did not include fuel requirements for optional base which, by using FDOT's own conversion factors for the next shallower depth of base (Group 1 and 9) equals approximately 25 percent of the quantity of gallons identified in Document 1A. **Clearly, optional base is significant enough that it comprises a large share of the Contract.**
2. **CHC has been told by FDOT that it should have incorporated the information within Document 1A into its Bid.** However, nowhere do the Bid Documents, the Contract Documents, or the FDOT website describe how the fuel requirements are calculated and how they are applied to determine the monthly adjustment on the Pay Estimate. **No FDOT personnel from the District office were able to explain to CHC how the fuel requirements were determined, or how they were applied with the monthly index.** (The monthly index is the only part of this that is clearly described by FDOT. It is described within Document 1B).
3. **No fuel adjustments were made by FDOT to CHC's first six Pay estimates, presumably not because FDOT wanted to avoid them, but as further demonstration that FDOT did not know how to determine them.** Further reason to understand why a Contractor would not understand FDOT's system well enough to make an adjustment to its bid because FDOT was all of a sudden eliminating limerock base from its list of Contract pay items with associated fuel conversion factors.
4. **FTBA did not agree at any time with FDOT to make adjustments for Group 1 and 9 optional base, but not for group 2 and 10.** Rather, what more than likely happened was, despite good intention, the personnel assigned by FDOT to come up with the "36 item" list considered the many optional base items to be separate and unique, rather than classifying them as one or two items that cover the range of base depths.

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5. Premium cost per ton paid by CHC to its base rock hauler alone, has totaled over \$28,000 on this Project, due to fuel price escalation. CHC paid these premiums to keep the Project on schedule, at a loss to CHC, and FDOT has benefited from it. **CHC is not asking for calculations on numerous additional pay items, just two, Group 2 and Group 10 Optional Base.** This is a simple and clean modification.
6. FDOT has devised a method to reduce the number of pay items with fuel conversions while incorporating all depths of limerock base. The method is due to be applied to new Projects beginning in July 2004. FDOT will now have a conversion for optional base Groups 1 through 8 and one for Groups 9 through 15. **FDOT has already conceded that the oversight of the Group 2 and 10 optional base items was a mistake.**

On May 26, 2004 CHC supplemented its position paper:

Cherry Hill Construction, Inc. ("CHC") requests that the enclosed documents be included within CHC's Full Position Paper Table of Documents as Documents No. 9 and No. 10. **Paragraph 4 of the Full Position Paper refers to bid packages from the March 2003 letting that included "Estimated Fuel Requirements" lists with items not on the "Proposed Fuel Factors" list of 36 items.** Document No. 9 is the Estimated Fuel Requirements list for FDOT Project T1018 from the 26 March 2003 letting. Document No. 10 is the downloaded list of metric item fuel factors. Document No. 9 is annotated with an arrow by each item that can be found within Document No. 10. The other items in Document No. 9, including an item for Base Group 10 Optional Base, cannot be found on the downloaded list of Proposed Fuel Factors.

On June 17, 2004 CHC further supplemented its position paper:

Cherry Hill Construction, Inc. ("CHC") requests that the enclosed document be included within CHC's Full Position Paper Table of Documents as Document No. 11. Document No. 11 is the Estimated Fuel Requirements list for FDOT Project T1017 from the 26 February 2003 letting. Document No. 11 is annotated with an arrow by each item that can be found within Document No. 1 C, the FDOT English Unit Master List. **Ten of the nineteen items contained in Document No. 11 are not contained within the Master List.** The T1017 project was awarded to Cherry Hill Construction, Inc. in April of 2003 and was completed without any changes to the Estimated Fuel Requirements List. Undoubtedly there were more Projects like T1017 and T1018 that were let, awarded, and completed in 2002 and 2003 without following the FDOT's fuel requirements "Master List."

OWNER'S REBUTTAL:

Rebuttal to Contractor's Additional Reference Document of May 26, 2004

By letter dated May 26, 2004, Cherry Hill Construction, Inc., transmitted an additional reference document to the board to be included in their full position papers. At this time, the Department would like to also supplement its position paper to address this document.

The submitted document is a list of the Estimated Fuel Requirements for project T1018 which was advertised for an April 2003 letting. **It appears that the Engineer that prepared the specification package made an error in the items included in the fuel requirements sheet such that many of the items were not from the current master list.** However, the board should also be aware that this project was never awarded during this letting due to a right-of-way issue and was further tied up in a bid protest for almost a year.

When the bid protest was resolved, the project letting package (plans, contract etc.) was updated and the project was re-advertised for a March 2004 letting. The "Estimated Fuel Requirements" list for the new letting date was corrected to reflect only those items on the master list (Attachment 1). This contract, with the correct fuel items was awarded to Cherry Hill Construction, Inc. and was executed on May 20, 2004. A copy of this contract along with the first advertised contract will be available at the hearing if the board wishes to view these documents.

Therefore, **the document submitted by Cherry Hill to be included in their position papers never became part of an executed contract and is irrelevant to this dispute.**

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OWNER'S POSITION:

Contractor's Claim

By letter dated April 8, 2004, Cherry Hill Construction, Inc., the prime contractor for the referenced project, requested a Dispute Review Board hearing for additional compensation for fuel adjustments for pay items 285-702, Optional Base Group 5 and 285-710, Optional Base Group 10 (**Attachment 1**). Cherry Hill Construction contends that these optional base items were inadvertently left out of the Estimated Fuel Requirements sheet in the contract.

Narrative

The Department includes certain pay items in its construction contracts that will be subject to price adjustment based on increases or decreases in the price of gasoline or diesel from the month the project was bid. The items to be adjusted are not all inclusive, adjustments aren't made for every fluctuation in the fuel market, nor is every contract subject to adjustments.

Fuel adjustments are only applied to contracts that are longer than 100 days and then only when the price varies by more than 5%, and then only for items listed in the contract documents. Pay items to be adjusted are listed on the Estimated Fuel Requirement Sheet included with the bid documents and are based on the original plan quantity for each item listed. Pay item quantities are then converted to determine the total gallons of fuel to be adjusted for the contract. The fuel quantities are not adjusted for increases and decreases in pay item quantities. Fuel adjustments are applied on the monthly progress estimates based on the prorated percentage of the contract value earned for that month.

This particular contract included fuel quantities derived from 10 pay items which were included in the contract in the Estimated Fuel Requirements Sheet (**Attachment 2**). During the development of the contract specification package, the Department develops the list of pay items and fuel quantities by selecting from a master list, only those pay items that are used in the contract. Fuel adjustments for Base Groups 5 and 10 were not included in this contract, because they were not included in the master list.

The master list of pay items is developed by the Department in conjunction with FTBA in order to provide a standardized list of items that will be adjusted in Department contracts. Several years ago, the master list included many more items than were included in this contract. Prior to the letting of this contract, the list was reduced significantly in an effort to simplify the adjustment process. At that time, the Department was converting from a mainframe system to the Transport/SiteManger software package to better manage our projects. The reduction in the list was made by selecting 36 of the most commonly used adjustment items. This "master list" is included as Attachment 3.

Finally, the "master list" has been revised again for contracts that will be let July 2004 and thereafter (**Attachment 4**). The new master list now uses an average adjustment factor for a group of items. For example, Base Groups 01 through 08 will all use the same adjustment factor.

Department's Position

1. The Supplemental Specifications (**Attachment 4**) for this project clearly-state "The Department will, in the Contract Documents, provide an estimated quantity for fuel requirements for gasoline and diesel to cover the work specified in the contract." The list was provided with the bid documents that detailed which items would be subject to fuel adjustment. While it is unfortunate that the base options included in this contract were not among those included in the master list for adjustment, there was no changed condition from the time the project was bid. The conditions of the contract were clear and no additional compensation is warranted.
2. Fuel adjustments can be either positive or negative based on either an increase or decrease in the base fuel price. I know of no instances where a contractor requested that we add pay items to the adjusted list when fuel prices were decreasing. The intent of the adjustment is not to compensate for price fluctuations for every item that requires gasoline or diesel to construct, nor is it intended to compensate for every penny in price fluctuation. The contract is clear on the items to be adjusted and the circumstances that will result in the adjustment. Further, the contract also states "The Contractor will not be given the option of accepting or rejecting these adjustments."
3. The Contractor contends that the fact that these specific base options were not included in the master list was an oversight by the Department done without the approval of FTBA. In fact, the absence of these items was not an oversight. The Department, with the concurrence of FTBA, did not include eleven of the fifteen base options in the master list in an effort to simplify the fuel

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adjustment process. The Department specifically chose the four most commonly used base items.

4. While the Department has recently revised the master list and devised a method to include all of the base options with just two fuel conversions, this in no way should be considered as an agreement to adjust every previous contract that was developed using the "old" list. The new master list is specifically for projects let in July 2004 and thereafter.

Summary:

It may not seem "fair" that this contract did not include adjustments for the base options specified in the contract and it's unfortunate that the base options for this contract were not of the four most common options. **However, the contract terms are clear and there is no changed condition which would warrant additional compensation.** All fuel adjustments have been made and paid in accordance with the contract.

Therefore, based on all of the above, it is the Department's position that the Dispute Review Board should rule that there is no entitlement for this issue and should uphold the Department's denial to change the contract and provide additional compensation .

BOARD RECOMMENDATION:

Based on the materials supplied to the Board and presentations to the Board at the DRB hearing, **the Board recommends that the Contractor is not due additional compensation for fuel adjustments for pay items 285-702, Optional Base Group 2 and 285-710, Optional Base Group 10 on the project.**

EXPLANATION OF RECOMMENDATION:

- It is not relevant to the issue, after contract letting, whether the "master list" was developed in conjunction with the FTBA or which items are included or excluded.
- Section 9-2 Scope of Payments included in the Contract SUPPLEMENTAL SPECIFICATIONS page 78, subsection 9-2.1.1 Fuels, states in part "*The Department will, in the Contract Documents, provide an estimated quantity for fuel requirements for gasoline and diesel to cover the work specified in the Contract.*"
- The Contract documents did include said "ESTIMATED FUEL REQUIREMENTS":

CES0161		STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION ESTIMATED FUEL REQUIREMENTS				CESPJ16-1 PAGE 1			
COUNTY: 16	DISTRICT: 130	FINPROJ NO: 197395-1-52-01							
SPEC YEAR: 2000									
ITEM NO.	ALT.	IT	UN	PAY ITEM DESCRIPTION	CONVERSION FACTORS		QUANTITY	GALLONS	
					GASOLINE	DIESEL		GASOLINE	DIESEL
110-	1-	1	LS	CLEARING & GRUBBING	32.000000	45.640000	153.37	4,908	7,000
120-	1-		CY	EXCAVATION REGULAR	.002800	.201500	116,112.00	325	23,397
120-	4-		CY	EXCAVATION SUBSOIL	.004300	.278800	1,011.00	4	282
120-	6-		CY	EMBANKMENT	.034100	.517500	225,655.00	7,695	116,776
160-	4-		SY	STABILIZATION TYPE B	.030600	.119600	223,977.00	6,854	26,788
327-	70-	6	SY	MILLING EXIST ASPH PAVT (1 1/2" AVG DEPTH)	.014600	.047400	9,420.00	138	447
334-	1-	14	TN	SUPERPAVE ASPHALTIC CONC (TRAFFIC D)	.176000	4.622011	44,914.70	7,905	207,596
337-	7-	5	TN	ASPH CONC FRICTION COURSE(INC BIT/RUBBER) (FC-5) (<10')	1.317000	5.505200	276.00	1,619	42,524
425-	2-	41	EA	MANHOLES (9-7)	.000000	.150200	4.00	5	22
520-	1-	10	LF	CURB & GUTTER CONC (TYPE F)				0	73
JOB TOTAL								29,453	424,873

IN PREPARING BIDS FOR THIS PROJECT, THE DEPARTMENT OF TRANSPORTATION WILL MAKE CONTRACT PRICE ADJUSTMENTS FOR GASOLINE AND DIESEL FUELS IN ACCORDANCE WITH SUPPLEMENTAL PROVISIONS CONTAINED IN THIS CONTRACT.

Gas Diesel

- At the hearing, the parties were in agreement that the dollar percentage of Optional Base Group 10 was 9.17 % of the total as-bid contract. It is unfortunate that an item of such relative magnitude was not included in the "ESTIMATED FUEL REQUIREMENTS" list contained in the Contract documents.
- ...It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a

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compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract.** ...³

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue.

Please remember that a response to the DRB and the 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 of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully Submitted

Disputes Review Board
John H. Duke, Sr., DRB Chairman
Keith Richardson; DRB Member
Rammy Cone; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "J H Duke", with a stylized flourish at the end.

John H. Duke, Sr.
DRB Chairman

³ *DRBF Practices and Procedures Section 1 – Chapter 6*