

DISPUTES REVIEW BOARD RECOMMENDATION

December 27, 2003

Mr. Ronald A. Henderson
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Ref: SR 45 (USB 41) from Palermo Place to US 41 Bus (Bypass N)
Financial Proj. ID(s) 198005-01-52-01 & 198005-1-56-01, Contract No. 20934
Discharge of GLF's Superintendent on the Project, Mr. Jack Chenneville.

Gentleman:

GLF Construction Corporation (GLF) and The Florida Department of Transportation (Department) have requested a hearing before the Disputes Review Board (Board) to determine entitlement to the following issue:

Did the Department have reasonable cause to discharge GLF's superintendent, Mr. Jack Chenneville, from the project.

A hearing was held before the Board, in the jobsite office of Post, Buckley, Schuh and Jernigan (Post Buckley), on December 13, 2003, to determine resolution of this issue.

CONTRACTOR'S POSITION

GLF contends that Mr. Chenneville was not unfaithful (Standard Specification 8-5) in his efforts to follow the project permit requirements, did not disregard the project permit requirements and did not direct forces under his control to violate the project permits, as stated in the Department's letter requiring his discharge. They also contend that the discharge letter was premature and a major over-reaction to the facts associated with the case.

With respect to the definition of "unfaithful" GLF contends that the definition contains too many references to untrustworthy to fit Mr. Chenneville's character, nor does he have a disregard for this or any other project's permit requirements. Also any direction given by Mr. Chenneville to GLF forces was to perform work that GLF felt was indicated and allowed by the Project Documents.

As an example of Mr. Chenneville's professional conduct GLF points to early in the project when it was discovered that Mangroves would have to be removed before work could commence on the coffer cell and drilled shafts. Mr. Chenneville went to the Senior Project Engineer for the CEI assigned to the project and asked what should be done, because GLF was not going to disturb the Mangroves until he was assured that no penalties would be forthcoming. A permit modification was subsequently issued for additional impact areas including removal of the Mangroves, installation of work bridges for fender construction and backfill between the coffer cell and the bank on the northeast

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quadrant of the bridge. This was obtained through the efforts of Mr. Chenneville and his counterpart, and Department contact, the Senior Project Engineer on the project.

Because of flooding in the mobile home park adjacent to the project a SWFWMD representative visited the project and discovered a drainage line from the mobile home park into the project Right of Way (ROW) that was not shown on the contract plans. Mr. Chenneville assisted the SWFWMD representative in providing drainage from this unmarked line to Hatchet Creek and then filled a claim for the extra work done to provide drainage for the mobile home park.

Shortly thereafter a Quality Assurance Review was performed by the Department's Construction Environmental Liaison and he filled a report of his review that pointed out several alleged water quality violations. The day after he made his inspection the project was shut down by the Department citing permit non-compliance. It took GLF less than one day to remove the alleged violations and on the second day the suspension order was lifted with the stipulation that GLF was not to do any more work related to the work bridges and that we perform any additional work directed by SWFWMD following their next visit. In the interest of expediting resolution, Mr. Chenneville got the SWFWMD representatives to visit the site the afternoon that the project was allowed to resume construction. Following their inspection a meeting was held where the SWFWMD representatives did not seem to be overly concerned, based upon comments made at that meeting.

GLF further suggested that the plans and permits were ambiguous and questioned whether the alleged violations had actually occurred. GLF also indicated in their response to the SWFWMD report that some of the work was extra (historical drainage) or that they had performed work according to the Contract Documents and they would not perform further work unless it was directed and supervised by PBS&J and/or SWFWMD.

GLF was not given direction by the Department and came up with a remedial plan and performed the work as outlined in the plan. Following the completion of the work another inspection was made by SWFWMD and a post inspection conference was held among all the parties. No report on this inspection has been received by GLF to this day.

Finally GLF's top management, Mr. Don Hudson, COO of GLF, requested a meeting in Bartow with the Department to request that the Department's discharge of Mr. Chenneville be rescinded. The meeting was held and the request to reinstate Mr. Chenneville was denied and the discharge allowed to stand.

DEPARTMENTS POSITION

The Department's position is outlined in Mr. Ben Doan's memorandum to the Board of December 2, 2003, as follows:

On Tuesday, September 9, 2003, Mr. Jim Young, FDOT District One Environmental Specialist, visited the subject project site for a review of the environmental conditions. During the performance of his review, Mr. Young witnessed and reported a permit violation of soil and rock

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that had been placed beyond the shoreline in the area located adjacent to the existing bridge piers that were currently being demolished. It was noted that a crane pad had been constructed with local soils and cut pile sections to support the crane during the demolition of the existing bridge. The resulting crane pad extended beyond the limits of the existing bridge footprint and along the east shoreline.

Mr. Young felt that the construction of the crane pad beyond the shoreline was a violation of the SWFWMD permit due to the constraints that the waters under the bridge are listed as wetlands. The existing SWFWMD permit was modified at the expressed request of GLF at the beginning of the project to allow the contractor to use trestles for spanning over the water during demolition and construction of the old and new bridge. In this case, trestles were not being used for construction.

On Wednesday, September 10th, 2003, following Mr. Young's report to his supervisors, the contractor (GLF) was instructed to cease all construction operations on the north project until all the material used to construct the crane pad was removed from the water and the shoreline was restored to original condition. Notification of a violation was provided to SWFWMD and an inspection was requested. The contractor complied and partial removal of the crane pad was completed by Thursday, September 11, 2003.

On Friday, September 12, 2003, the contractor was allowed to resume construction activities. Mr. Richard Watts, PWS of SWFWMD arrived on Friday afternoon and interviewed the project staff and conducted a site inspection of the shoreline.

Copies of written reports from Mr. Jim Young and Ms. Kathleen Kastner of the SWFWMD are attached (See the Department's submittal to the Board).

Sequence of Events

Based on a review of the project files, records and discussions with the project team, we have developed the following sequence of events of the environmental impacts and the basis of the decisions leading to acceptance of the conditions.

- Based on the project photos and the daily reports, demolition of the existing bridge started after the week of 11/25/02. Photos taken 11/18/02 indicate that the area under the existing bridge and the adjacent shoreline was undisturbed. Photos taken on 12/16/02 indicate that the south shoreline adjacent to the existing bridge pier had been modified with soil and cut piles.
- Discussions with project personnel revealed that PBS&J inspectors questioned the placement of the soil and pile materials beyond the shoreline and addressed the concerns with Joe Blasewitz and Paul Bedard, the Project Bridge Engineer and Senior Project Engineer, respectively.
- Mr. Bedard and Mr. Blasewitz questioned the construction procedure and referred to the project permits and specifications. The consensus of each was that the permits do not specifically address the pad placement although the modified SWFWMD permit provides the contractor permission to use trestles for over-water construction activities. A review of Florida Department of Transportation - Standard Specifications for Road and Bridge Construction 1999, Section 104-3 Control of Contractors Operations Which May Result in Water Pollution, infers that construction operations in water where necessary to accomplish the work is acceptable providing that the area is restored following the construction operations. See paragraph 2 - "Restrict construction operations in rivers, streams, lakes, tidal waters, reservoirs, canals and other water impoundments to those areas where it is necessary to perform filling or excavation to accomplish the work shown in the plans and to those areas which must be entered to construct temporary or permanent structures. As soon as conditions permit, promptly clear rivers, streams, and impoundments of all obstructions placed therein or caused by construction operations. " (Clearly, the fill operations were not necessary to the construction operation as GLF had applied and been granted a permit modification to construct a work trestle in the area.)

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- Based on the above information, the proximity of the pad to impacted areas permitted by SWFWMD and that the entire area was contained within the limits of turbidity barriers - it was the decision of Mr. Bedard, that a permit violation had not been incurred. This decision was in error.
- Discussions with the contractor indicated that GLF intends to utilize the modified permit and use a trestle for the future placement of piles.

Following the SWFWMD site visit on Friday, September 12, 2003, Mr. Watts indicated that the clean up that had been completed was acceptable and Mr. Watts provided an unofficial acceptance of the conditions under the bridge. He further indicated that no noticeable loss of wetland had occurred and the pad was within a non-vegetative wetland area. Mr. Watts indicated that the permit could be modified to allow for an as-built deviation from the plans and a temporary consent of use could be allowed. He further indicated that if all other concerns were taken care of at the time, the issue would be resolved, however document preparation would be required.

Following review of the events and with much discussion with Senior Management, it was determined that Paul Bedard, Joe Blasewitz and Jack Chenneville researched and reviewed the concerns but the decision to place and leave the soil and rock in the water was an error in judgment. Such an error in judgment could have led to a SWFWMD fine and punishment against the FDOT. GLF's request to modify the permit at the beginning of the project indicates GLF's knowledge of the permit requirements and the construction methods that must be used in permitted wetlands. The ramifications of the violation would have been much more severe if the Department had not self-reported. In fact, SWFWMD told Mr. Young that self-reporting the violation would mitigate penalties that could be assessed against the Department. Clearly this was a serious violation. This action is a violation of both State and Federal Statutes. Self-reporting of the incident is believed to have reduced SWFWMD repercussions to the project and Department.

The error in judgment by Paul, Joe and Jack has created a concern with the FDOT and PBS&J and it was determined that Jack Chenneville and Paul Bedard should be removed from the project.

In accordance with Standard Specification 8-5, a letter was written that Mr. Jack Chenneville, Construction Manager, was to be immediately discharged from the project by GLF. This was based on the Department's determination that Mr. Chenneville had been unfaithful in his efforts to follow the project permit requirements. His disregard for project permit requirements placed the project in permit violation and created the risk of monetary fines or other sanctions being imposed. Specifically, forces under Mr. Chenneville's control placed temporary fill in Wetland No. 4 in violation of the project permits.

Excerpts of Section 5-8.2 and 8-5 sanction the basis of the removal of Jack as follows:

Section 5-8.2 Contractor's Superintendent:

The Contractor shall, maintain a competent superintendent at the site at all times while the work is in progress to act as the Contractor's agent. Provide a competent superintendent capable of properly interpreting the Contract Documents and is thoroughly experienced in the type of work being performed. Provide a superintendent with the full authority to receive instructions from the Engineer and to execute the orders or directions of the Engineer, including promptly supplying any materials, tools, equipment, labor and incidentals that may be required. Furnish such superintendence regardless of the amount of sublet.

Section 8-5 Qualifications of Contractor's Personnel:

Provide competent, careful, and reliable superintendent, foreman, and workmen. Provide workman that shall make due and proper effort to execute the work in the manner prescribed in the Contract Documents, or the Engineer may take the actions as prescribed below.

Whenever, the Engineer determines that any person employed by the Contractor is incompetent, unfaithful, intemperate, disorderly, or insubordinate, the Engineer will provide written notice and the Contractor shall discharge the person from the work. If the Contractor fails to remove such person or persons, the Engineer may withhold all estimates that are or may become due or suspend the work until the Contractor complies with such orders.

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Based on the information provided and the sequence of events and decisions, Mr. Bedard was removed from the project as well.

PBS&J Senior Management will continue to provide any support that the FDOT and the DRB will require. Please do not hesitate to contact me if you have any questions of (sic) comments.

DISPUTE REVIEW BOARD FINDINGS

Specification 8-5 states in part: “Whenever, the Engineer determines that any person employed by the Contractor is incompetent, unfaithful, intemperate, disorderly, or insubordinate, the Engineer will provide written notice and the Contractor shall discharge the person from the work.”

The Department determined that, “Mr. Chenneville was unfaithful in his efforts to follow the project permit requirements”. The Dictionary definition of Unfaithful is: not faithful,

- a. not adhering to vows, allegiance, or duty
- b. not faithful to marriage vows
- c. Inaccurate, Untrustworthy

Therefore, the Department is saying that Mr. Chenneville was not adhering to his duty to follow the project permit requirements.

Mr. Chenneville demonstrated his duty to follow the project permits when he refused to work because of mangroves within the bridge area early in the project, and in fact, working with and through the Senior Project and Bridge Engineers got the permit modified so that work could be accomplished in the mangrove area. In addition Mr. Chenneville made sure that the mangroves were trimmed by a qualified contractor before work was done in the area.

The Department admits that the Senior Project Engineer made an error in judgment. Under Section 5.8.2 the contractor is to “Provide a superintendent with the full authority to **receive instructions from the Engineer and to execute the orders or directions of the Engineer** ...” Mr. Chenneville discussed filling between the pier and the mean high water line with the Senior Project Engineer and the Bridge Engineer and was told it did not present a problem. During the hearing and in the Department’s memorandum to the Board, we were told that other Project Inspectors also discussed the placing of the fill with the Senior Project Engineer and were given the same answer, “It was not a problem”.

None of the four Department Project Engineers who were, at various times, assigned to this project ever felt that it was a problem, at least no record was presented of them commenting on the fill placement within Hatchet Creek.

When SWFWMD came out to view the water drainage problem at the trailer park no mention was made of the fill placed in Hatchet Creek by these representatives of SWFWMD.

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As pointed out in the memorandum to the Board the Department's 1999 Standard Specifications, Section 104-3, paragraph 2, states: "Restrict construction operations in rivers, streams, lakes, tidal waters, reservoirs, canals and other water impoundments to those areas where it is necessary to perform filling or excavation to accomplish the work shown in the plans and to those areas which must be entered to construct temporary or permanent structures. As soon as conditions permit, promptly clear rivers, streams, and impoundments of all obstructions placed therein or caused by construction operations."

The work bridges, as permitted, were for the construction of the Fenders only, and had nothing to do with the construction of the structural steel or the bascule piers.

SWFWMD representatives made a site inspection on October 24, 2003, and during a post inspection meeting and tele-conference, which included representatives of District 1 headquarters in Bartow, the following items were discussed:

- There will not be any SWFWMD fines levied.
- The fill on both banks was called temporary.
- A permanent fix will require a modification to the permit and FDOT will have to address the fix.
- Sediment in the mangroves had been removed to the SWFWMD's satisfaction.
- No replanting was required.
- SWFWMD suggested that the slopes in the wake area be armored.
- SWFWMD suggested that the area above the armored slopes be vegetated.
- SWFWMD indicated that the remedial work could be performed during the course of the Project and that immediate action was not necessary.

The fill placed to the north of pier #9 Left and #9 Right was part of GLF's construction sequence to be able to get out to the coffer cell and do the drilled shaft work, and this plan was known to the Department. In fact, the Department advised GLF in writing on May 25, 2001, to extend the Pier 9 coffercell around the existing pier to facilitate debris removal and subsequent construction activities. Fill would have to be placed in the area between the planned coffercell and the existing pier to complete the revised construction sequence and the Department had not yet obtained the permit allowing placement of fill in this area.

Had SWFWMD brought an action against the Department the contractor's surety would have been charged with the defense of the Department and payment of any fine levied, up to and including the amount of the contract price. (Specification 3-5.4)

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The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and the contract. We have also taken into consideration the position papers, oral presentations, testimony of others and rebuttals given by all the parties. Our recommendation is based upon all of the evidence, both written and oral presented to the Board.

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The Board does understand, and agrees, that the Department has the right under specification 8-5 to have personnel removed from the project for the reasons stated in that specification. However, in this case the Board does not feel that Mr. Chenneville was unfaithful, and that together with the information presented above leads the Board to find entitlement to GLF's position that the Department did not have reasonable cause to discharge Mr. Chenneville. Mr. Chenneville acted within the contract by discussing the placing of fill with the Senior Project Engineer before placing any fill. The fill was known to be a part of GLF's plan to access the pier for the drilled shaft work within the pier and demolition of the existing bascule pier.

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

Please remember that a response to the Board and the other party of your acceptance or rejection of the 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 meetings of this DRB regarding this issue and concur with the findings and recommendation.

Signed for and in concurrence with all Board members.

John C. Norton
Member for
Don Henderson
Chairman
Ashley R. Cone
Member