

DISPUTE REVIEW BOARD RECOMMENDATION
REI Issue Traffic Control Officer
Dispute No. 1

January 21, 2010

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Ref: Project Description - SR 8 (I-10) from Lane Avenue to
 Stockton Street Pavement Rehabilitation
 Fin No. 213113-2-52-01
 FAP No. 01051361
 Contract No. T2280
 Duval County

Dear Sirs:

Russell Engineering Inc. requested a hearing on the above referenced issue involving the payment for a Traffic Law Enforcement Officer for maintenance of traffic.

Contractors Position

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

It is our position that the Department has failed to supply since project commencement and continuing today a traffic law enforcement officer for maintenance of traffic as advised to bidders they would and therefore required by contract documents. This failure has forced us to supply and pay for the officers that should have been supplied by the Department at their expense.

We have attached the following as supporting documents:

<u>ID</u>	<u>Document Description</u>	<u>Document</u>
•	Page 1 of the Contract Plans/Cover Sheet	REI-001
•	Page 2 of the Contract Plans/Summary of Pay Items	REI-002

- Page 310 of the Contract Plans/Traffic Control Notes REI-003
- Pre-Bid Question and Answers, Information page REI-004
- Pre-Bid Questions and Answers, pages 1 - 4 REI-004-A
REI-004-B
REI-004-C
REI-004-D
- Special Provisions pages 7 and 8 section 2.4 REI-005/
REI-005A
- Supplemental Specifications pages 50 and 51, section 5-2 REI-006/
REI-006A

Our position is based upon the following facts and contract documents. During our pre-bid review we noticed there was two separate pay items indicated in the Summary of Pay Items on plan sheet number 2 (see REI-002) for law enforcement and traffic control. These pay items are 0999-102-2 (3,500 MH) and 102-14 (700 MH).

In an effort to evaluate what we could expect as far as officers we made the following calculations:

Contract Calendar Days:	965
Estimated Work Days:	689
3500 MH / 689 =	5.08 hrs per day
700 MH / 689 =	1.02 hrs per day
	=====
Estimated officer availability	6.10 hrs per day

The 689 WD used above is inclusive of holidays and anticipated weather days. If we were to appropriately consider these as non-work days the hours per day availability increases. These man-hours are based upon information supplied to all bidders, calculated and anticipated for by the designer.

Since this did not totally clarify what a bidder was to expect, during the pre-questions and answers the clarification was issued "Item 999-102 was included for all other maintenance of traffic law enforcement officer needs" (see REI-004-C). Then again a clarification was issued on pay item 999-102 the item was "State Furnished" (see REI-004-D). It is now crystal clear the Department will supply law enforcement for **all other** MOT.

The Pre Bid Questions and Answers become contract documents pursuant to **Special Provision** pages 7 and 8 in section 2.4 Examination of Contract Documents and Site of Work (see REI-005). In part this specification requires bidders to "take responsibility to review and be familiar with all questions and responses posted to this website up through 2 business days prior to the bid opening and to make any

necessary adjustments in the proposal accordingly". We followed this bid document requirement figuring the Department was supplying all other MOT law enforcement.

In accordance with Supplemental Specification pages 50 and 51 in section 5-2 Coordination of Contract Documents (see REI-006) the governing specification on this issue is the **Special Provision** Pre Bid Questions and Answers indicated above.

Accordingly we ask the Board to rule in favor of entitlement for the cost associated with past law enforcement officers supplied and paid for by us and future entitlement should the Department continue to fail to supply them for all other MOT.

FDOT Rebuttal

This office is submitting the following statement in rebuttal of Russell Engineering, Inc's (REI) position statement on the given subject. This statement is submitted in accordance with the Operating Guidelines for the Disputes Review Board such that all DRB members and the other party receive this rebuttal at least 5 calendar days prior to the hearing.

Russell Engineering, Inc opened their position paper dated December 4, 2009 by stating that *"It is our position that the Department has failed to supply since project commencement and continuing today a traffic law enforcement officer for maintenance of traffic as advised to bidders they would and therefore required by contract documents"*. REI continues in their opening stating *"this failure has forced us to supply and pay for the officers..."* This position is changed from their concise issue statement submitted on October 26, 2009. REI's position at that time was that *"a Traffic Control Officer was needed during the setup and removal of the nightly lane closures for this project"* and that *"The Department has declined to pay for the Traffic Control Officer for this need."* REI is inconsistent in their position.

Before construction began, REI requested an increase in quantity for pay item 102-14 Traffic Control Officer (TCO) in order to pay REI for TCOs they planned to use each night to set up and take down lane closures. The Department made clear at the time that the contract does not require the use of TCOs for this operation and therefore would not pay for them. REI elected to utilize off-duty officers for this operation. REI would like the Board to believe that the use of TCOs for lane closures is *"required by contract."* It is not. REI would also like the Board to believe that FDOT *"forced"* them to

use TCOs for lane closures. The Department neither required nor denied the use of off-duty officers for lane closure set up and take down. REI chose to use off-duty officers for this operation on their own volition.

The Department maintains that the contract has been and is continuing to be administered correctly. Payments have been provided for Item 102-14 Traffic Control Officer (TCO) in accordance with contractual allowance. Also the Department entered into a separate contract with the FHP to provide for Speed and Law Enforcement Officers to enhance safety in the work zone.

In their position statement, REI co-mingled the quantity of two separate items 102-14 Traffic Control Officer and 999-102-2 Speed and Law Enforcement Officer, State Furnished, District Contract, Non Bid Item. REI performed a calculation that used the combined total of man hours (MH) for each of these items and provided an estimated officer availability of 6.10 hrs per day. This methodology incorrectly paired a contract pay item with a non-bid item. One item is available for the contractor to use, but the other is not.

Claiming their interpretation of two responses to the pre-bid questions and answers regarding the use of pay item 999-102-2, Speed and Law Enforcement Officer, State Furnished, District Contract, Non Bid Item provided clarification of the Department's responsibility for payment, REI followed with a statement that *"It is now crystal clear the Department will supply law enforcement for all other MOT."* The Department is providing law enforcement (for speed control) in a separate contract. The Department is also paying for TCOs, but only as allowed by the contract. The pre-bid questions and answers do not state that the Department was altering the contract documents to allow payment for TCOs during setup and take down of lane closures. There is no specification that supports their statement.

The Department's position paper also included the Guidelines for Use of Law Enforcement Officers in Work Zone for Speed Control. This guideline explains the purpose, background, determination of need, and recommendations for speed control enforcement services - It is a contractual agreement solely between the Department and FHP and independent of the Department's contract with REI. FHP agreed to provide the Department 3500MH of patrolling the work zone strictly for enforcing speed limits (not to assist with contractor operations of set up and take down of lane closures). The guide also includes

a section for the Contractor Elected Use of Officers which specifically notes for contractor required-services "the Contractor will hire and pay these Officers". REI utilized this 3500MH in their co-mingled formula to determine estimated officer availability. While these guidelines are not an official contract document, they are readily available for contractors to research during their estimating process, which REI should have performed as directed by Special Provision 2-4 where it states, "Investigate the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents".

REI has not indicated within their position papers the estimated off-duty officer man hours for contractor required services that may have been included in the lump sum item (102-1 Maintenance of Traffic - LS \$741,143).

REI stated "the pre-bid questions and answers became contract documents pursuant to Special Provision pages 7 and 8 in section 2.4 Examination of Contract Documents and Site Work." In the following paragraph REI stated "In accordance with Supplemental Specification section 5-2 Coordination of Contract Documents, the governing specification on this issue is the Special Provision Pre Bid Questions and Answers". The pre-bid questions and answers transmitted to prospective bidders did not "become" a contract document, but were already included in the term "Contract Documents" as described in Article 1-3 Definitions of the 2007 Standard Specifications. This makes pre-bid questions and answers transmitted to prospective bidders a contract document inclusive with the Standard Specifications, not the Special Provisions. A total of 21 Special Provisions are provided in this contract. No Special Provision titled "Pre Bid Questions and Answers" is among them. Special Provision Section 2-4 does not make pre-bid questions and answers a special provision unto itself, but it does state that "When, in the sole judgment of the Department, responses to questions require plans revisions, specifications revisions and/or addenda, the Contracts Office will issue them as necessary." No revisions or addenda regarding this issue were issued on this contract.

REI's closing statement requested that the Board "rule in favor of entitlement for the cost associated with past law enforcement officers supplied and paid for by us and future entitlement should

ISSUE IN DISPUTE:

Russell Engineering, Inc. is requesting the Department compensate for the use of Traffic Control Officers during the set up and removal of nightly lane closures for this project.

CONTRACT REQUIREMENTS:

- ▶ **Supplemental Specification 5-2 Coordination of Contract Documents**, states the following:
"... In addition to the work and materials specified in the Specifications as being included in any specific pay item, include in such pay items additional, incidental work, not specifically mentioned, when so shown in the plans, or if indicated, or obvious and apparent, as being necessary for the proper completion of the work under such pay item and not stipulated as being covered under other pay items."

- ▶ **Supplemental Specification 102-7 Traffic Control Officer**, states the following:
Provide uniformed law enforcement officers, including marked law enforcement vehicles, to assist in controlling and directing traffic in the work zone when the following types of work is necessary on projects:
 1. *Traffic control in a signalized intersection when signals are not in use.*
 2. *When Standard Index No. 619 is used on Interstate at nighttime and required by the plans.*
 3. *When pacing/rolling blockade specification is used.*

- ▶ **Plan Sheet No. 310 - Traffic Control Plans General Notes - Note 15**, states the following:
When construction activities necessitate the closing of ramps, these closures will be accomplished between 8:00 P.M. and 5:00 A.M. The Contractor will provide the Department 7 days notice prior to these activities. The Contractor will provide an off-duty law enforcement officer the entire duration of the ramp closure.

- ▶ **Standard Specification subarticle 9-2.1 Items Included in Payment**, states the following in Paragraph 2:

For any item of work contained in the proposal, except as might be specifically provided otherwise in the basis of payment clause for the item, include in the Contract unit price (or lump sum price) for the pay item or items the cost of all labor, equipment, materials, tools and incidentals required for the complete item of work, including all requirements of the Section specifying such item of work, except as specifically excluded from such payments.

BACKGROUND:

In an effort to improve the quality and interpretation of the contract plans, the Florida Department of Transportation developed a process to provide all Prime Contractors and Subcontractors the opportunity to ask questions or clarifications prior to submitting bids. The FDOT posts all pre-bid questions and answers to the website up to 5:00 P.M. on the seventh calendar day prior to the bid opening.

REI has stated in their Concise Written Issue Statement that "Our position is that the Department provided a clear answer, that pay item 0102-14 covers the payment for the Traffic Control Officer during the ramp closures. Item 0999-102-2, State Furnished non bid item, was included for all other maintenance of traffic law enforcement officer needs. It is our position that for safety concerns, a Traffic Control Officer is needed during the setup and removal of the nightly lane closure for the project."

FDOT POSITION STATEMENT:

The Supplemental Specifications provides for payment of Traffic Control Officers in three circumstances: Signalized intersections not in use, moving operations in accordance with Standard Index 619, and during operations that involve pacing or a rolling blockade. The plans provide for payment of Traffic Control Officers during ramp closures. Standard Specification subarticles 5-2 and 9-2.1 provide instructions to include for payment any incidentals required to complete the work in the appropriate pay item or lump sum price that might not have been specifically provided otherwise.

The contract does not instruct REI to use Traffic Control Officers during the setup and removal of nightly lane closures. As a result of the above contract obligations, this office can find no justification for REI's request for separate payment of Traffic Control Officers during the periods of set up and removal of nightly

lane closures. The requirements for payment for the use of Traffic Control Officers are clearly defined in the Plans and Supplemental Specifications. Additionally, the pre-bid questions and answers clarified that payment for Traffic Control Officers was for the ramp closures. The costs for any other services performed by the Traffic Control Officers such as the set up and removal of the nightly lane closures should have been included in the Contract unit price it was associated with.

CONCLUSION:

The Department respectfully requests the Board to rule that no additional payment is due REI for their choice to utilize Traffic Control Officers during the setup and removal of nightly lane closures.

APPLICABLE CONTRACT PROVISIONS

- Supplemental Specification 5-2
- Supplemental Specification 102-7
- Plan Sheet 310 - Traffic Control Plans General Notes - Note 15
- FDOT Standard Specification 9-2.1
- Roadway Design Standard Index 619

Contractors Rebuttal

We have carefully read and reread the Departments position papers and offer the following comments and remarks:

First let us say that if the Contract Requirements were as stated in the FDOT Position Papers, we would not be here. The reason we are here is that we believe the Department has incorrectly interpreted the Contract Documents and therefore we are bringing the issue to the Board for a determination of the Contract Requirements.

In the first paragraph of the Departments Position Statement, the only pertinent specification they cite is 5-2. All other specifications and standards cited are irrelevant in determining entitlement of the issue at hand. In addition, the Department is incorrect in their interpretation of 5-2 as it applies to this issue perhaps due to the fact they have only read or at least only cited it in part. When you read 5-2 in its entirety it is clear that the actual governing Contract Document pertinent to this issue is found in section 2-4 of the Special Provisions or specifically the Pre Bid Questions and Answers which is not cited, at all, and could not be found anywhere in their submission.

Interestingly in the Departments Background statement they do point out the reason for the Pre Bid Question and Answer session yet give it little attention as the governing Contract Document which in this case actually determines the Contract Requirements. During this Project's Question and Answer period the Department issued its "clarification prior to submitting bids" which for "Item 999-102 was included for all other maintenance of traffic law enforcement officer needs". Then again a clarification was issued on pay item 999-102 that the item was "State Furnished".

It is most important to note that during the Departments clarification in response to bidders questions not only once but twice they could have answered like they are now in their Position Papers. First where they cite under "Contract Requirements" about 5-2's in part gotcha clause it's in there, or better yet under their "Position Statement section "The costs for any other services performed by the Traffic Control Officers such as the set up and removal of the nightly lane closures should..." be..."included in the Contract unit price it was associated with".

Finally, everything the Department listed under "Other Applicable Documents" with the exception of "Responses to Bid Questions" is irrelevant as they are not part of the contract documents and or withheld from bidders.

It appears that the Department is hung up on the words "Traffic Control Officer" which is the only law enforcement we could supply to perform this maintenance of traffic need when the State failed to furnish the law enforcement officer as told to bidders they would.

Findings of Fact

The Board's decisions are governed by the Plans, Specifications and the Contract. Therefore our recommendation is based on the above referenced documents, the hearing, and the following facts.

* 102-11.2 Traffic Control Officer

"Payment will be made only for those Traffic Control Officers specified in the Plans and authorized by the Engineer".

* Pay item 102-14 Traffic Control Officer

Allows 700MH requiring the use of a Traffic Control Officer for ramp closures.

* Traffic Control Notes Sheet No 310, Note # 15

When construction activities necessitate closing of ramps these closures will be accomplished between 8:00 PM and 5:00 AM. The contractor will provide the Department 7 days notice prior to these

activities. The contractor will provide an off-duty law enforcement officer the entire duration of the ramp closure.

DRE Note The Department and Contractor have followed the contract provisions for Traffic Control Officer for the ramp closures to date.

Q&A concerning Traffic Control Officer

1-3 Definitions (2007 Standard Specifications)

The following terms, when used in the Contract Documents, have the meaning described

Contract Documents "or other information mailed or otherwise transmitted to the prospective bidders prior to the receipt of bids"

<u>Contractors Question</u>	<u>Department Response</u>
The bid item quantity for 0102-14 Traffic Control Officer is 700 MH, Traffic Control note #15 (sh#310) directs that, in regard to when construction necessitates the closing of ramps. "The contractor will provide an Off-Duty Law Enforcement Officer the entire duration of the ramp closure". Is bid item 0102-14 intended to be used to pay for officer costs at these ramp closures? Or is it intended that the contractor include these ramp officer costs in pay item 102-2?	Item 0102-14 was included for all ramp closures. Item 99-102 was included for all other maintenance of traffic law enforcement officer needs.

<u>Contractors Question</u>	<u>Department Response</u>
Regarding answer to use of Traf Control Officer. There is no pay item 0999-102. Please clarify use of this pay item.	Item 9990102 is State Furnished and is a non bid item.

Points raised in the hearing

* It was stated in the hearing that the contractor could have found the contract provisions for the contract between the Department and the FHP covering "Item 999-102-2" on the internet and been able to evaluate the Departments contract for themselves as to whether "Item 999-102-2" would cover their mainline off duty law enforcement needs.

* It was stated in the hearing that had the contractor asked the right question they would have received the right answer concerning mainline off duty law enforcement use.

* The Contractor stated they did not include additional costs associated with Traffic Control Officer for their mainline work in Lump Sum Maintenance of Traffic 102-2, based on the Q&A responses made by the Department.

DRB conclusions

Specific questions were asked by bidders concerning the application of the two pay items: 102-14 Traffic Control Officer and 999-102-2 Speed and Law Enforcement Officer State Furnished.

If the Department intended to use "999-102-2 Speed and Law Enforcement Officer State Furnished" for a single specific predetermined purpose, i.e. to pay the FHP for increased patrols of the work zone, the Department had an obligation to clarify the use of these pay items. The answer that the Department provided during the Q&A is inaccurate and misleading: "Item 0102-14 was included for all ramp closures. Item 999-102 was included for all other maintenance of traffic law enforcement needs".

A reasonable interpretation of the answer is that the Department will use 999-102-2 for other MOT traffic enforcement needs as the answer states. Absent contrary contract language, the setup and take down of a lane closure is a reasonable MOT traffic law enforcement need.

It is unreasonable to expect the contractor to know the provisions of an undisclosed contract between the Department and the FHP, especially after the Department has stated their intended use of this item
"for all other maintenance of traffic law enforcement needs".

DRB Recommendation

Given the contract language and the facts, it is the Board's opinion that the Contractor is entitled to additional compensation for the use of a Traffic Control Officer for their past efforts with regard to the setup and takedown of temporary lane closures. With regard to future lane closure situations, the Department appears to have two options: 1. Provide the officers; or 2. Compensate the Contractor for providing the officers.

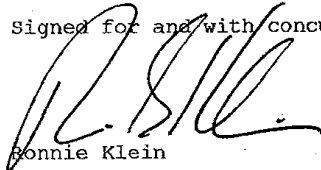
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in the making of this recommendation.

The Board is unanimous in this recommendation and reminds the parties that this is only a recommendation. 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 Dispute Review Board

Ronnie Klein	Chairman
Rammy Cone	Member
Ralph Ellis	Member

Signed for and with concurrence of all members



Ronnie Klein

Chairman