

D2 # 1491656
EDMS:

DISPUTE REVIEW BOARD RECOMMENDATION

March 19, 2012

Mr. Foster Bachschmidt
DAB Constructors, Inc.
PO Box 1589
Inglis, FL 34449

Ms. Lori Williams, P.E.
Resident Engineer
FDOT Gainesville Construction
Gainesville, FL

RE: Contract T2350, Fin. Project Number 212949-8-52-01
I-75 (SR 93) Operational Improvements at SR 26

Subject: Hearing Dated March 9, 2012
Disputes Review Board Recommendation

Dear Madame and Sir,

DAB Constructors, Inc. (DAB) and the Florida Department of Transportation (FDOT) requested a Regional Dispute Review Board hearing of a disputed issue. The hearing was held on March 9, 2012 at the FDOT Gainesville Operations Center in Gainesville, FL. The parties furnished the Board position papers prior to the hearing. DAB provided a rebuttal response for review prior to the hearing. The FDOT did not furnish a rebuttal response. The Disputes Review Board was requested only to consider the question of entitlement. In accordance with your request the following recommendation is offered.

Issue: Entitlement to Additional Compensation Resulting from Differing Site Condition with Regard to the Existing Soil Conditions at Pond B-4

Background

The project scope includes milling and resurfacing, base work, drainage improvements, curb and gutters, traffic signals, lighting, highway signing, guardrail, MSE walls, sidewalks and other incidental construction on the SR 93 (I-75) ramps at SR 26 (Newberry Rd.) in Alachua County. The project also includes the construction of two (2) Dry Retention Ponds within the limits of the project. The disputed work is associated with the construction of pond B-4.

Contractor Position

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

1. The project plans indicate the presence of select material (A-3) in the soil material to be excavated for pond B-4.

Plan Sheet 47 shows a plan view of Pond B-4, on which three clearly labeled borings are indicated: B-1, B-2, and B-3, see Figure 1.

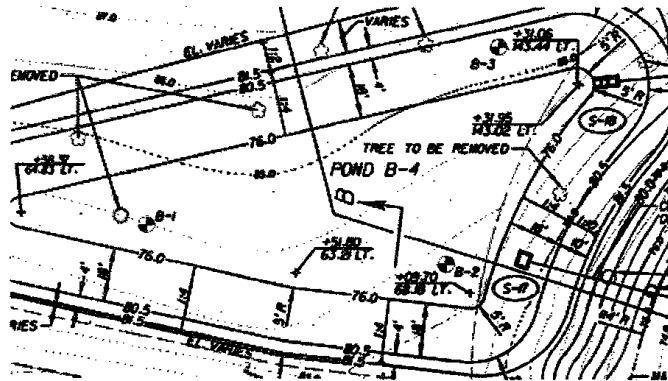


Figure 1 Excerpt from plan sheet 47

These borings correlate with borings B-1, B-2, and B-3 in the Roadway Soils Survey on Plan Sheet 50. These borings indicate that the material in Pond B-4 is select in nature being primarily A-3 sand with a thin layer of non-plastic A-2-4 below. This soils data is shown in Figure 2.

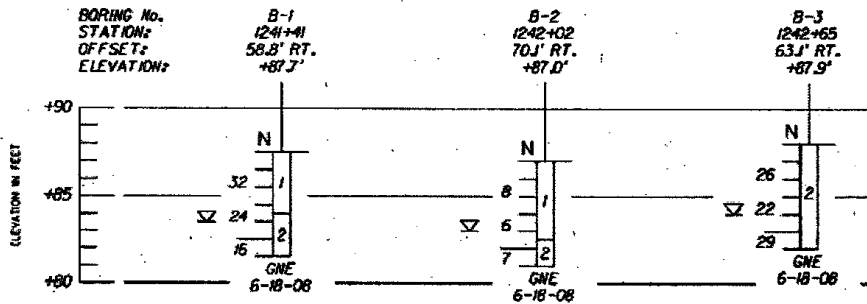


Figure 2 Excerpt from plan sheet 50

- DAB intended to use the indicated select material from pond B-4 as select fill and embankment on Ramp C

DAB notified the Department on April 4, 2011 that DAB intended to use the materials in Pond B-4 as select fill and embankment on Ramp C. The Department agreed to have the District Materials Office sample and test the pond area for suitability as select fill, which was intended for use as backfill for the MSE Wall on Ramp C.

3. The soil material to be excavated at pond B-4 was found to be highly plastic. No select material was found

Sampling of the soil material occurred on April 11, 2011. DAB also conducted verification sampling and testing of the Ponds at the same time. Upon receipt of test results, DAB was made aware of the fact that the material present in Pond B-4 did not correlate with the materials shown in the Pond Boring Data, included in the plan set. Based upon this boring data, DAB encountered site conditions which differed materially from those indicated in the plans. Whereas the borings indicate select fill would be available throughout the excavation envelope of Pond B-4; DAB only encountered highly plastic material throughout the pond. This material was neither usable on the project nor of commercial value as would it have been should the borings have been correct.

4. DAB was unaware of the undisclosed District 2 policy of not providing boring information from ponds on project plans

D.A.B. was unaware of this policy or any of its details, and despite several requests for its publication information, the Department has, heretofore failed to provide any information regarding this policy other than rudimentary confirmation of its existence. Furthermore, D.A.B. has been unsuccessful in obtaining any information regarding this policy through independent research or public information requests. State Statutes require that the bidder be provided all applicable information pertaining to the subsequent contract and the scope of work it entails. The Department's failure to include the soil borings, in spite of clear direction in the PPM, is one representation of a violation of this statute, however the Department's failure to provide any notice to the bidder(s) of a policy that will subsequently govern their contract is in acute violation of this statute.

Because D.A.B. had no knowledge of the fact that Department personnel had willfully adopted policy in violation of both State Statutes and the Standard Specifications that govern the project, D.A.B. fully anticipated the contract documents to contain boring information for Pond B-4, as both the statutes and specifications clearly state that all available information is to be provided to prospective bidders. If D.A.B. had been aware of this policy, we might have caught the Department's plan error, whereby they clearly and of their own admission mislabeled the borings in Pond B-4 such that they directly correlated with borings B-1, B-2, and B-3 in the Roadway Soils Survey (RSS).

Furthermore, the RSS clearly states that the borings pertain to the "Roadway Areas only," however the Pond Detail Sheets are contained within the Roadway Plans, as noted on the Index of Roadway Plans on Sheet 1 of the project plans. It is not accurate to state that the soil boring data does not pertain to the ponds on this basis, as the Pond Details and Pond Cross Sections are contained within the Roadway Area (their inclusion within the Roadway Plans is prima facie evidence of this).

Since D.A.B. was not aware of this policy, it is impossible for D.A.B. to have known that the Labels were incorrect. Because the boring data is graphically depicted in the Roadway Cross Sections, it is not necessary for D.A.B. to plot soil boring data throughout the plans, as this has already been done by the Designer. In the case of Contract T2350, it was also not necessary for D.A.B. to utilize the station and offset data for borings B-1, B-2, and B-3 as the Designer had already plotted them in the Pond B-4, or so it seemed. In the Department's Position Paper they opine that D.A.B. should have utilized the Station and Offset data to plot the borings, and if we had we would have discovered their Plan Error. Because it was apparent to D.A.B. that all necessary borings had been plotted in the plan set, it was simply not necessary for D.A.B. to re-plot these borings. It must be made clear that it is D.A.B.'s duty to evaluate and make known any errors that are happened upon when reviewing a project for bid. It is NOT the bidder's responsibility to actively seek out errors. If D.A.B. had known in advance that District 2 did not include boring data in ponds, then it stands to reason that this plan error might have been caught.

Summary

DAB believes that existing soil conditions at pond B-4 are different from the conditions indicated in the plans and therefore constitute a Differing Site Condition. DAB is requesting compensation for the removal and disposal of the unsuitable in situ material in Pond B-4 that was not included in their Bid for Regular Excavation which was based upon the soil boring data given in the plans. Additionally, D.A.B. is requesting compensation for Borrow Material, that would have otherwise been available in Pond B-4 had the soil boring data been correct. DAB is acceptable to using the Subsoil Excavation pay item as compensation for removal and disposal, and the previously negotiated Borrow price, as documented in Supplemental Agreement Number 16, for replacement of unsuitable material. Furthermore DAB agrees with the plan quantity for excavation in Pond B-4 as basis for payment of removal, disposal, and borrow. It is upon this basis that DAB presumes no argument over quantum exists, should entitlement be established.

FDOT Position

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

1. The contract plans are not in error with regard to the indicated soil boring information

- All work required for the construction of this pond is clearly shown on the plans and included in the original scope of the work. Pond Details and Cross Section Sheets are included in the plans, by the Engineer of Record, to provide the information necessary for the pond construction. (Plan Sheets 47-48 and 74-81)
- The plans and specifications make no guarantee as to the quality or quantity of the soils for the project and therefore excavated soil, from pond B4, should only have been considered after an adequate site evaluation and doing otherwise, is at the contractor's risk.
- Boring sheets 49 - 53, of the contract plans are titled "Roadway Soils Survey" followed by sheets 1 thru 5 in parentheses.
- Plan Sheet 47 shows Pond B-4 located left of the roadway alignment with offsets shown from the Baseline of Ramp A. Borings B1, B2, and B3 are shown at the corners of the triangular shaped pond. DAB has stated that they mistakenly utilized the boring data shown on Sheet 50, Roadway Soil Survey (2) as their means of classifying the existing soils in Pond B4, as evidenced by DAB's e-mail dated March 4, 2011 (Exhibit B).
- Borings B-1, B-2 and B-3 shown on Sheet 50, Roadway Soils Survey (2), are identified by station and linear offset distance from the Baseline of Ramp C. The three roadway borings are located right of the Baseline of Ramp C, between Station 1241+41 and 1242+65. This puts the borings far from pond B4. Additionally, the ground level elevations represented on Sheet 50 varies by approximately 4.0 ft from the existing ground elevation shown for pond B4, Sheet 47, Pond Detail (1).

- None of the prospective bidders asked questions pertaining to the borings, during the bid process.
- Pond B-4 Detail, Plan Sheet No. 48, and Pond Cross Section Sheets 74 – 81, clearly define the limits of over-excavation and fill required to construct this pond. This is a clear indication that select materials may not exist within this the area. (Exhibit C)
- Plan Sheets 49 through 53 are labeled “Roadway Soils Survey” and do NOT include boring information for Pond B-4. The soil analysis shown includes data from roadway areas only, as so noted in the plan note, and is specifically tied down by station numbers with a definitive beginning and ending station. Sheet 49, Plan Note 4, states, “SOILS ANALYSIS INCLUDES DATA FROM ROADWAY AREAS ONLY.” Also, the boring elevations documented on this analysis do not correlate with the elevations shown on the Pond Detail or Pond Cross Sections. (Exhibit D)
- Contract Specification Section 2-4, Examination of Plans, Specifications, Special Provisions and Site of Work, clearly defines the responsibilities of the Contractor. (See excerpt below)

2-4 Examination of Plans, Specifications, Special Provisions and Site of Work.

Examine the Contract Documents and the site of the proposed work carefully before submitting a proposal for the work contemplated. 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.

The Department does not guarantee the details pertaining to borings, as shown on the plans, to be more than a general indication of the materials likely to be found adjacent to holes bored at the site of the work, approximately at the locations indicated. The Contractor shall examine boring data, where available, and make his own interpretation of the subsoil investigations and other preliminary data, and shall base his bid on his own opinion of the conditions likely to be encountered.

The bidder's submission of a proposal is prima facie evidence that the bidder has made an examination as described in this Article.

Summary

Although there is not a disagreement over the quantity of embankment which has been utilized on the project to date, there is no support for the DAB's position that they are entitled to additional compensation for an alleged Differing Site Condition. The contract made no specific representations as to the type of soils to be encountered during the pond excavation. DAB has stated that it mistakenly assumed that the borings shown on the Roadway Soils Survey (Sheet 50) were the same boring represented on the Pond Detail (1) (Sheet 47) of the contract. The borings shown on Sheet 50 were clearly identified by station and offset, and therefore provided no information pertaining to the types of soils to be encountered in the pond.

Therefore, for the reasons stated above, the Department respectfully request the Board find that the contractor did not encounter a Differing Site Condition and, therefore, there is no entitlement for additional compensation.

Disputes Review Board Findings

1. Plan Sheet 47 includes boring location symbols labeled as B-1, B-2 and B-3. The boring locations are generally at the corners of pond B-4. There is no information on Sheet 47 indicating that the boring data has not been provided in the construction plans.
2. The Roadway Soil Survey includes boring data for borings B-1, B-2 and B-3. Stratum 1 material (A-3 soil) is indicated to be present at boring locations B-1 and B-2.
3. The Plan Sheet 49 contains the following note pertaining to the Roadway Soil Survey: "4. SOIL ANALYSIS INCLUDES DATA FROM ROADWAY AREAS ONLY"
4. The soil boring data contained in the Roadway Soil Survey for borings B-1, B-2 and B-3 includes the roadway station and offset data for each boring. The location information does not correspond to the pond B-4 location.
5. Other borings designated by symbol have been included in the Roadway Soil Survey. For example, borings B-30, B-32, B-34, and B-35 on plan sheet 107 are included in the Roadway Soil Survey.
6. The FDOT District 2 had a policy of not providing soil boring information for ponds. This policy was applied to the preparation of the plans for this project. This policy which was apparently unpublished and undisclosed to DAB, contradicts the guidance provided in the FDOT Plans Preparation Manual. The FDOT had the soil boring data for pond B-4 (borings B-1, B-2 and B-3) however they chose not to provide that data to the project bidders including DAB.¹
7. At a project meeting on April 4, 2010, DAB advised the FDOT on their intent to use the select material from pond B-4 as select fill and embankment. The FDOT advised that they would perform tests of the material to determine its acceptability. Subsequent testing by the FDOT and DAB indicated that the material was not acceptable.

Disputes Review Board Recommendation

The DRB recognizes the fact that an examination of the boring locations given in the Roadway Soil Survey data would call into question the correlation of pond B-4 borings B-1, B-2 and B-3 with the soil data provided. However, within the context of preparing a cost estimate for bid, the DRB believes that a reasonable contractor, unaware of the policy to not provide pond soil data, would accept the soil data by boring number without plotting the location information. The FDOT did not utilize several of the options available to them to improve the clarity of the project plans including removing the boring symbols from sheet 47 or including a plan note clarifying that the boring data was not provided. Perhaps the best option would have been to include the actual boring data from the pond B-4 borings which the FDOT possessed.

Accordingly, it is the DRB's recommendation that DAB is entitled to compensation for a differing site condition. More specifically entitlement is limited to the boring data's indication of the existence of select material at the boring locations, where no select material was found. However, variations in soil conditions between borings is possible, consequently the determination of indicated quantity remains an issue to be determined by the parties. Additionally, the DRB notes that the pond B-4 cross sections clearly indicate over excavation. The original work would have required the excavation of the upper materials regardless of their classification.

¹ The DRB understands that this policy is no longer in effect based upon communication from the FDOT central office to DAB

The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,
Disputes Review Board

Ralph Ellis Jr. – Chairman
Jimmy Lairscey – Member
Robert Robertory - Member

Signed for all with the concurrence of all members.

Ralph D. Ellis, Jr.

Ralph D. Ellis, Jr.
Chairman