

DISPUTES REVIEW BOARD RECOMMENDATION

11 September 2017

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Ref: SR 23), From N Argyle Forest Blvd. to I-10, Financial Project ID: 430565-3-52-01, ETC:, Contract No.: E2Q19: Duval County: Disputes Review Board hearing regarding entitlement to compensation for costs incurred in the removal of additional existing asphalt/concrete at Normandy Blvd.

Dear Sirs:

The Florida Department of Transportation, (FDOT), and Dragados USA, Inc., (DUSA), requested a hearing concerning the above referenced issue.

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.

In accordance with the requirements of Article **8-3.7 [Disputes Review Board]** the Contractor provides this position paper outlining the nature and scope of the claim and the basis for entitlement to the claim, for compensation for all the additional costs incurred by DUSA as a direct result of the excavation and removal from Site of differing material which could not have been foreseen.

The Contractor has requested payment in compensation for costs incurred in the removal of differing material. The Engineer has rejected the Contractor's claim on the basis that as the presence of the unsuitable material (asphalt and concrete) is shown on the as-built drawing (in the *Other Documents*) the Contractor is deemed to have included this in the Contract Amount.

However, the location and position of the existing unsuitable materials (asphalt and concrete) for which the Contractor is claiming is not the same place as that shown on the as-built drawings (in the “*Other Documents*”), but the Engineer has rejected the claim on the basis that the as-built drawings identify where the unsuitable material is located.

The claim is for costs relating to unsuitable material not shown on the as-built drawing, but the Engineer has rejected the claim because unsuitable material in a different location is shown on the as-built drawing.

Through the express terms and conditions of the Contract, the Department excluded “*Other Documents*” from forming any “*part of the RFP, contract documents or any other document that is connected or related to this Project....*” but, as can be seen from written statements made by the Engineer, extracts from the “*Other Documents*” have been used and relied upon by the Engineer to prevent the Contractor from receiving equitable compensation.

24th October 2014; NOTICE OF INTENT TO CLAIM (NOIC); DUSA notified the Engineer of the need to remove unsuitable asphalt and concrete material which was unforeseen and discovered during excavations required for the pile foundations to Normandy Blvd WB Bridge (720808) and MSE wall (#3 & #4).

DUSA stated that the proposed claim will be “*for the work required to remove the unforeseen additional asphalt and concrete slab to complete the construction of the Bridge and MSE Walls.*”

7th November 2014; the Contractor issued a further NOTICE OF INTENT TO CLAIM (NOIC); the Contractor also provided further details including details of the type of unsuitable material, its approximate dimensions and their locations, in support of the NOIC.

In addition, details of the estimated resources employed to remove the materials were also provided.

4th February 2015; with reference to the as-built drawing provided by the Engineer attached to his 30th October 2014 email, the Contractor issued a further NOTICE OF INTENT TO CLAIM.

Within this NOIC, the Contractor provided more details of the existing site conditions encountered during the excavation work.

The Contractor provided a direct comparison of the expected site conditions within the Station limits as depicted on the as-built drawing issued by the Engineer, with the actual existing conditions both within and beyond the as-built Station limits.

The Contractor concluded that the “*Dragados NOIC refers to the limits that is beyond what is included in the contract documents....*”.

With specific reference to the Contractor's NOIC dated 24th October 2014, the Engineer has mistakenly stated that: *"The Notice of Intent to Claim does not comply with the requirements of Contract Specifications 5-12, 8-7.3.2, and 100. The Notice did not include a list showing all equipment (other than small tools) for which the Contractor may request compensation, it's identification number with serial number, manufacturer, year manufactured, model and description"*.

This statement from the Engineer is an incorrect interpretation of the intended purpose of the Contractor's NOIC, as the notice to which he refers, is just that; a NOTICE OF INTENT TO CLAIM. IT IS NOT A WRITTEN CLAIM SUBMISSION.

In his email dated 30th October 2014, the Engineer directs the Contractor's attention to a document, which is specifically excluded from the contract documents, as being a source of information for existing site conditions. Here, the Engineer relies on a document expressly excluded from the Contract in his conclusion that the claim has no merit, yet denies the Contractor's claim on the grounds that the document is inadmissible.

Article 4-1 [Intent of Contract]

*"[...]The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions; and including but not limited to any or all utilities, subsoil conditions, permits, etc. of any nature or kind, unless otherwise stated in the Contract. **In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2.[...]**" (Emphasis added)*

Dragados is entitled to receive equitable compensation as the Engineer has, in his decision to reject the Contractor's claim, deemed it acceptable to rely on an as-built drawing within the "Other Documents" and in accordance with both the spirit and intent of the Contract is entitled to apply for and receive an equitable adjustment to the Contract.

Sub-article 4-3.2 [**Increase, Decrease or Alteration in the Work**] provides the Contractor with a remedy under sub-article **5-12.2** where, *the Contractor may at any time, after having otherwise timely provided a notice of intent to claim or preliminary time extension request pursuant to 5-12.2 and 8-7.3.2, submit to the Department a request for equitable adjustment of compensation or time or other dispute resolution proposal*".

Article **4-4 [Unforeseeable Work]** allows the Engineer to enable payment for the additional costs incurred;

*"When the Department requires work that is **not covered by a price in the Contract** and such work does not constitute a "Significant Change" as defined in 4-3.1, and the Department finds that such work is essential to the satisfactory completion of the Contract within its intended scope, the Department will make an adjustment to the Contract. Such adjustment will be made by Work Order*

when the Contract Documents provide for Contingency Work. When the Contract Documents do not provide for Contingency Work or the available funds for Contingency Work are insufficient, such adjustment will be made by Supplemental Agreement.”

Dragados is seeking to recover costs they have incurred as a direct result of the discovery and removal of unforeseen and unsuitable material.

The Engineer has rejected the claim for procedural and specification reasons, making reference to, and thereby relying on, an as-built drawing which was expressly excluded from the contract documents.

If the Engineer relies on a document, one that is expressly excluded from the Contract, to determine the validity of a claim, then in the same equitable way it must be deemed acceptable for the Contractor to rely on the very same document in justification for his entitlement under the Contract.

REBUTTAL

Department; *It is the Department’s position that the issue at hand – the existence of the underlying concrete slab and thickened asphalt on Normandy Boulevard – is in fact not a Differing Site Condition as DUSA claims.”*

“.....the Provisions of this Design-Build Contract clearly place the responsibility for Differing Site Conditions solely on the Design-Build Firm.such sole responsibility is sufficient reason for the DRB to determine that DUSA is not entitled to the requested compensation.”

DUSA; 4-3.7 Differing Site Conditions: This document is shown in detail in the position paper.

...if any “*work due to differing site conditions*” is not “*included in the project by the existing Contract Documents*” it is defined as **Extra Work**.

...the reason why “*the existence of the underlying concrete slab and thickened asphalt on Normandy Boulevard*” qualifies as being **Differing Site Conditions** is due to the Engineer’s reliance on an as-built drawing from the “*Other Documents*” in determining the Contractor’s entitlement under the Contract.

In his determination rejecting the Contractor’s claim, the Engineer has referred the Contractor to a document which is specifically excluded from the Contract Documents.

When this equitable reliance on “*Other Documents*” is applied, it can be seen that the as-built information to which the Engineer refers to as “*known conditions*”, excludes the location where the asphalt and concrete materials were found.

The Contractor therefore accepts he is not entitled to additional costs for the removal of unsuitable materials where they were shown on the as-built drawing (“*known conditions*”), but he is entitled to receive compensation for the removal

of unsuitable materials in locations beyond that shown on the as-built drawing, as they were unknown and could not have been revealed as it was a live carriageway at the Bid time.

Department; *Had the mainline roadway been elevated (as was shown in the Concept Plans), pile driving and MSE wall construction would have occurred outside of the footprint of the Normandy Boulevard roadbed (where the condition was encountered*

DUSA; As it can be seen in the drawings at Appendix 1, Normandy Boulevard final design has areas where the elevation has not changed, but due to design requirements new pavement package is required (see cross sections between around STAs 520 to 523 at between around STAs 546 to 548). This means that regardless which roadway was elevated, Normandy Boulevard would have to be reconstructed in some areas to comply with the design criteria. The Department's contention is therefore irrelevant.

Department; **The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions;**
..... *In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2.*

DUSA; The Department has highlighted that part of the sub-article which suits his opinion; it is selective and miss-leading to ignore the meaning and intent of the whole paragraph, as it clearly provides the Department with an obligation to reimburse the Contractor for unforeseeable work.

Unforeseeable Work is provided for under Article 4-4.

Department; *“Additionally, local knowledge of the history of the Normandy Boulevard corridor should have provided the Design-Build team with the understanding that it was one of the earliest concrete pavement roadways in the area.”*

DUSA; It was the Department's choice and decision to invite and accept a Bid proposal from a firm which was not located within the Jacksonville; a firm which they knew would not have local knowledge to the extent they are now expecting. The Department is now using this lack of local knowledge as good reason why the Contractor's claim has been rejected.

Department; *Encountering the underlying concrete slab and thickened asphalt on Normandy Boulevard occurred because of decisions made solely by the Design-Build Firm;*

Information was available to the Design-Build Firms at the time of bid to have allowed them to determine that the condition in question existed; and”

However, the Department contends that if this known, existing condition were somehow found to represent a Differing Site Condition, then the

Provisions of this Design-Build Contract clearly place the responsibility for the Differing Site Conditions solely on the Design-Build Firm.”

DUSA; The Contractor has already demonstrated that the discovery of the underlying concrete slab and thickened asphalt on Normandy Boulevard is not related to or a consequence of the Contractor’s decision to elevate the intersecting streets (103rd Street, Normandy Boulevard, and New World Avenue) rather than elevate the mainline (SR23).

The second bullet point is incomplete as this only applies to the extent shown on the as-built drawing.

The Department’s contention that “*the Provisions of this Design-Build Contract clearly place the responsibility for the Differing Site Conditions solely on the Design-Build Firm*” is incorrect as the full meaning and content of the sub-article concludes with;

“In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2”

It is here that the Department has been selective in support of its contention that the Design-Build Firm is solely responsible.

The Design-Build Firm is not solely responsible, because there is provision for payment in accordance with Article **4-1 [Intent of Contract]**.

DEPARTMENT’S POSITION

We will state the Department’s 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 Department.

The Department’s position paper has the following statements and references to document their claim for no entitlement to DUSA for Differing Site Condition.

It is the Department’s position that the issue at hand - the existence of the underlying concrete slab and thickened asphalt on Normandy Boulevard – is in fact not a Differing Site Condition as DUSA claims.

...the Department will demonstrate that if this known, existing condition were somehow to be interpreted to represent a Differing Site Condition, then the Provisions of this Design-Build Contract clearly place the responsibility for Differing Site Conditions solely on the Design-Build Firm. As such, regardless of the above arguments, such sole responsibility is sufficient reason for the DRB to determine that DUSA is not entitled to the requested compensation.

October 24, 2014 - DUSA submitted a Notice of Intent (NOI) to claim “*for the work required to remove the unforeseen additional asphalt and concrete slab to complete the construction of the Bridge and MSE Walls*” at the Normandy Boulevard/SR 23 interchange

The fact that the condition was encountered during pile driving operations for the westbound Normandy Boulevard Bridge is important. **As has been discussed numerous times during the project's Progress and DRB Meetings, several issues have developed because of the Design-Build Firm's decision to elevate the intersecting streets (103rd Street, Normandy Boulevard, and New World Avenue) rather than elevate the mainline (SR 23). The issue at hand is a direct result of this decision that was made solely by the Design-Build Firm.**

Ultimately, the Design-Build Firm's decision created this situation and it is not appropriate for the Design-Build Firm to seek relief from the Department for the resultant impacts.

Section 4-1, Intent of Contract from the RFP's Appendix C - Division I Design-Build Specifications and Special Provisions. This Section states, in part, "**The Design-Build Firm shall have all liability and responsibility for all unknowns and/or differing site conditions;** and including but not limited to any or all utilities, subsoil conditions... In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2."

By not being aware of the As-Built Typical Section Sheet until the Department provided it on October 30, 2014 the Design-Build Firm clearly indicated that they did not perform their due diligence - as required by the Contract Provisions...

...correspondence (by) DUSA seems to contend that the limits of the underlying concrete slab and thickened asphalt are restricted to the boundaries of the STA limits shown in the As-Built Typical Section Sheet. The Department notes that the referenced drawing only covered the limits of the work involved on the previous project and that nothing contained thereon could be construed to indicate that the conditions did not extend beyond the limits of the As-Built Typical Section.

Any contention by the Design-Build Firm to the contrary is unfounded and a clear demonstration that their design decision was based more on a guess than a proper factual investigation as required by the Contract.

DUSA alludes to "information provided in the contract documents" and then references the drawing... The Department strongly objects to the inference that this drawing or the information shown thereon should be construed as "*information provided in the contract documents*".

...this drawing was provided to all prospective Design-Build Firms in the collection of "Other Documents" referenced on Page iii of the RFP. The RFP includes the following language, "**OTHER DOCUMENTS** - *The following documents are being provided with this RFP. Except as specifically set forth in the body of this RFP, these documents are being provided for general information only. They are not being incorporated into and are not being made part*

of the RFP, the contract documents or any other document that is connected or related to this Project except as otherwise specifically stated herein. No information contained in these documents shall be construed as a representation of any field condition or any statement of facts upon which the Design-Build Firm can rely upon in performance of this contract. All information contained in these other documents must be verified by a proper factual investigation. The bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived.”

REBUTTAL

DUSA; “This position paper document will provide **evidence in support of the Contractor’s entitlements in terms of provisions within the Contracts** to compensate the Contractor for the unforeseen costs incurred.”

Department; The Department notes...DUSA provides limited “evidence in support” of their position that is based on “provisions within the Contract”.

DUSA; ...**The Engineer has rejected the Contractor’s claim on the basis that as the presence of the unsuitable material (asphalt and concrete) is shown on the as-built drawing (in the Other Documents) the Contractor is deemed to have included this in the Contract Amount.**”

Department; ...the claim was rejected for numerous reasons.

“There are various Contract Provisions that place the responsibility on the Design-Build team to investigate the site to determine what conditions will be encountered.”

The relevant Contract Provisions... are Section V.G, Verification of Existing Conditions from the Design-Build Maximum Price Request for Proposal (RFP) and Section 4-1, Intent of Contract from the RFP’s Appendix C - Division I Design-Build Specifications and Special Provisions.

DUSA; “...**the location and position of the existing unsuitable materials (asphalt and concrete) for which the Contractor is claiming is not the same place as that shown on the as-built drawings** (in the “Other Documents”), but the Engineer has rejected the claim on the basis that the as-built drawings identify where the unsuitable material is located.”

Department; The Department has clearly not “rejected the claim because unsuitable material in a different location is shown on the as-built drawing” and would challenge DUSA to produce documentation to support this statement.

DUSA : “**The Department’s instructed changes** and other claimable events have:

Prevented DUSA from carrying out the Contract Works in accordance with the agreed Programme.

Caused the Contractor to incur additional cost in the execution of the Contract Works that he would not otherwise have incurred,

Disrupted the Contractor's rate of progress such that he has incurred an extensive amount of unforeseen additional cost."

Department; The Department has not "instructed" DUSA in any manner regarding this issue. DUSA is solely responsible for their means and methods and is solely responsible for any resultant impacts of their actions or lack thereof.

DUSA; *"The Contractor also provided a copy of the bore hole logs showing the reports on the cores taken and the locations of each Boring Location. This information was attached to the NOIC as **confirmation that the geotechnical details, included as an attachment to FDOT's Request for Proposals, showing the existing conditions had proved to be incorrect.**"*

Department; : It is important to note that the borings DUSA attached to their October 24, 2014 NOI to support their allegation that *"the geotechnical details, included as an attachment to FDOT's Request for Proposals, showing the existing conditions had proved to be incorrect"* were taken in the existing grassed median on Normandy Boulevard.

DUSA; *"In his email dated 30th October 2014, the Engineer directs the Contractor's attention to a document, which is specifically excluded from the contract documents, as being a source of information for existing site conditions. **Here, the Engineer relies on a document expressly excluded from the Contract in his conclusion that the claim has no merit, yet denies the Contractor's claim on the grounds that the document is inadmissible.**"*

Department; The Department has only advised DUSA that the As-Built Typical Section is not a Contract Document and that it was provided for general information only.

It is the Contract which stipulates that the *"bidder agrees that by accepting copies of the documents, any and all claims for damages, time or any other impacts based on the documents are expressly waived."*

FINDINGS OF FACT

The Board's decisions are governed by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the above referenced documents, the hearing, and the following facts.

1. DUSA submitted a NOI to the engineer on the 24th of October 2014 regarding the unsuitable asphalt and concrete material that was unforeseen and discovered during excavation required for the pile foundations to Normandy Blvd.

2. Other documents included in the RFP showed as built location of thickened asphalt in the typical sections of Normandy Blvd.
3. DUSA did change the configuration of the interchange from the concept plan to having SR23 go over Normandy Blvd. The Department approved this change.
4. DUSA contends that this change would still have had an impact on the tie-ins with Normandy. No proof was provided to this Board by either party to show if this is factual or not.
5. DUSA stated that their claim is for impacts outside the limits of thickened asphalt and concrete shown on the other documents provided in the RFP.
6. The Department states that local knowledge of the Normandy corridor would lead a bidder to determine the condition of Normandy Blvd. pavement at the time. No proof was provided that local knowledge was a requirement for this project.
7. The Department stated that information was available to the Design-Build firms at the time of bid to allow bidders to determine the condition in question. No proof was provided to this Board to show that information was available. The only thing the Board saw was the as-built typical section with limits of the asphalt and concrete thickness.
8. The typical section in the other documents provided to the bidders as information only shows that the west bound pavement design was modified to incorporate the existing 9 inch thick concrete slab into the section with variable depth asphalt. Bidders should have been warned that the concrete might have extended throughout Normandy Blvd. Additional site investigation may be needed in this area.
9. DUSA nor their designer did any additional (roadway) testing in this area. It appears that DUSA relied on the as-built data shown on the typical section of the other document provided in the RFI. In the RFP in Addendum 7 the statement is made that by execution of the contract, the Design-Build Firm specially acknowledges and agrees that the D-B Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the D-B firm and that any information is being provided merely to assist the D-B Firm in completing adequate site investigations.

RECOMMENDATION

The Board finds that there is no entitlement to Dragados for the Removal of additional existing asphalt/concrete at Normandy Blvd. With the typical section showing the extra thickness of asphalt and concrete, the contractor should have determined the actual limits rather than relying on the as-built

drawing of a sheet that was information only in the other documents provided in the RFI. Addendum 7 of the RFP clearly states that the D-B Firm is being compensated for performing adequate site investigations in order to support the design being developed.

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

The Board unanimously reached the recommendation and reminds the parties that it 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 Disputes Review Board

Don Henderson, P.E.
Chairman

Ron Klein, Member
David Donofrio, P.E. Member