

DISPUTES REVIEW BOARD RECOMMENDATION

2 October 2017

Angel Mendoza
Senior Project Manager
Dragados USA, Inc.
8465 Merchants Way
Unit 4
Jacksonville, Fl. 32222

Greg Gaden, P.E.
President
JEA Construction
8465 Merchants Way
Suite 6
Jacksonville, Fl. 32222

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 stumps, debris, and tires.

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.

The Contractor has been severely impeded from carrying out the works by events outside his control. In particular, his progress has been delayed and disrupted by:

Lack of information in connection with actual site conditions.

The discovery of and requirement to remove from site unexpected unsuitable material at a depth specifically excluded from the Contractor's scope.

Lack of anticipated suitable material required for the embankment operations.

While performing the excavation of Ponds 12A, 15A, 15B and 18B, after all the clearing and grubbing activities were performed in accordance with the

specifications, DUSA found, at different lower levels, but at least 3-4 feet below the 12” grubbing depth requirement, tree stump, roots and debris that disrupted and delayed the excavation and embankment activities. This material was not suitable for the embankment operations that were taking place and it had to be removed, stockpiled and disposed of off-site. The discovery of this unsuitable material caused impacts on excavation and embankment activities as the Contractor was prevented from continuing as planned with the progress of the excavation/fill activities and it also caused additional costs incurred by excavating, hauling and removing that material from the pond in first instance and from the project site later on.

This issue has:

- (i) Increased the scope and extent of the Contract Works.
- (ii) Prevented DUSA from carrying out the Contract Works in accordance with the agreed Programme.
- (iii) Caused the Contractor to incur additional cost in the execution of the Contract Works that he would not otherwise have incurred,
- (iv) Disrupted the Contractor’s rate of progress such that he has incurred an extensive amount of unforeseen additional cost.

17th February 2015; DUSA served their Notice of Intent to Claim (NOIC) to the Department in relation to “*Stumps and Trees Debris underground – Ponds D12A and D15A.*”

In this NOIC, DUSA stated that “*whilst excavating Ponds D12A and D15A we have found that after excavating the first 5 to 6 feet, there is a layer of stumps and trees debris that was not anticipated (please see attached pictures for your reference).*”

DUSA also stated that they understood “*that the removal and disposal of this material is an extra cost associated with this existing condition.*”

From the 28th of May 2015 to the 2nd of July 2015 DUSA has provided details of the labor and burden costs incurred to the Department in dealing with stumps and tree/tire debris in ponds Nos. 12A, 15A, and 18B.

18th July 2017; FDOT send correspondence to DUSA with the FDOT’s resolution regarding DUSA’s claim: *The purpose of this correspondence is to document the Department's position following the June 23, 2017 escalation meeting regarding DUSA's claim pertaining to the Stumps and Debris in Ponds D12A and D15A issue. Based on the terms of the Contract and the information presented, DUSA's claim is denied.*

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)*

With regard the matter relating to the recovery of unforeseen costs incurred with the removal of tree stumps, roots and other debris during the excavation of wet detention systems at Pond sites (D12A, D15A, D15B and D18B) and the replacement fill material, the Contractor will rely on the following specific Contract provisions;

Standard Specifications for Road and Bridge Construction Division II Construction Details, in which the Department has included an obligation on the Contractor as follows;

Clearing Construction Site; Section 110 Clearing and Grubbing:

110-2.2 Depths of Removal of Roots, Stumps and Other Debris;

“In all areas where excavation is to be performed, or roadway embankments are to be constructed, remove roots and other debris to a depth of 12 inches below the ground surface. Remove roots and other debris from all excavated material to be used in the construction of roadway embankment or roadway base.”

Appendix C Division I Design-Build Specifications and Special Provisions, in which the Department has included an obligation on the Contractor as follows;

Section 4 SCOPE OF THE WORK

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.”

Article 4-3.7 [Differing Site Conditions]

“During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work. Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or

decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. [...]

The Contractor accepts that under the terms of the Contract, the cost of removing tree stumps, roots and debris is deemed to be included in the Contract Amount.

However, the Specifications are prescriptive with regard the extent to which the Contractor must bear this risk; there is an express limit as to the depth of excavation which is deemed the Contractor's risk.

The wording in Specification item 110-2 clearly defines the extent to which the Contractor is liable when it states:

“In all areas where excavation is to be performed, or roadway embankments are to be constructed, remove roots and other debris to a depth of 12 inches below the ground surface.”

Beyond this stipulated depth of 12 inches, the presence of and therefore the requirement to remove tree stumps, roots and debris becomes the Department's risk. There is a clear distinction between what the Contractor is liable for and what they are not.

The Contractor does not dispute the fact that the discovery of tree stumps, roots and debris is not unusual in nature differing materially from those ordinarily encountered and in fact the Contractor had already removed a layer of tree stumps, roots and debris before he encountered a further deeper level of tree stumps, roots and debris, after excavating through a layer of suitable material.

The Contractor however does dispute that this requirement to remove “tree stumps, roots and debris” extends way beyond the specified depth of 12 inches below the ground surface.

REBUTTAL

Department;*the Department is denying the claim indicating that the Design-Build Firm is responsible for verification of existing conditions and that Specification Section 4-3.7 does not hold the Department responsible for unknown physical conditions unless they would be considered unusual in nature differing materially from those ordinarily encountered.*”

DUSA; Article 4-3.7 also includes “*differing materially from those indicated in the Contract*”. These words are in the same sentence as the extract used by the Department and are just as important, but the Department has chosen to exclude them.

In addition, from the actual post-contract information obtained from the excavation work carried out on a total of 21 ponds and 17 dry ponds on both the North and South contracts, stumps, tree roots at that depth have

been found in only four Ponds; which by simple probability supports the contention that they are not ordinarily encountered.

Department; *It is the Department's position that the issue at hand – the existence of stumps and tree debris in Ponds D12A and D15A – is in fact not a Differing Site Condition as DUSA claims.*”

The ponds are located in what were heavily wooded areas (pre-construction

Encountering stumps and tree debris in these areas does not represent a Differing Site Condition and certainly not a condition that could be considered unusual in nature differing materially from those ordinarily encountered.

DUSA; From the actual post-contract information obtained from the excavation work carried out on a total of 21 ponds and 17 dry ponds on both the North and South contracts, stumps, tree roots at that depth have been found in only four Ponds; which by simple probability supports the contention that they are not ordinarily encountered.

The local specialist firm employed under a subcontract agreement to excavate the various Ponds informed the Contractor that in all the years he had excavated various Ponds in this local, he had not encountered the presence of stumps, tree roots etc., at the depth and conditions found on this SR23 project.

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”

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

In their July 27, 2017 email to both parties, the DRB Chairman asked if the “*Department wishes to rebut the request or its legitimacy*”. In its July 31, 2017 response the Department stated that they would not contest notice and/or preservation “*As long as DUSA's request limits the alleged impacts to the areas described*” as “*Claim No. 4 – Stumps and Debris in Ponds D12A and D15A*”. The Department went on to state that “*If DUSA expands their allegations to other areas, then the Department will contest notice and/or preservation*”.

It is the Department's position that the issue at hand - the existence of stumps and tree debris in Ponds D12A and D15A - is in fact not a Differing Site Condition as DUSA claims.

Encountering stumps and tree debris in these areas does not represent a Differing Site Condition and certainly is not a condition that could be considered "*unusual in nature differing materially from those ordinarily encountered*";

February 17, 2015 - DUSA sent an email to the CEI that stated, "**While excavating Ponds D12A and D15A we [DUSA] have found that after excavating the first 5 to 6 feet, there is a layer of stumps and trees [sic] debris that was not anticipated**".

DUSA has previously indicated that they relied on the geotechnical information provided in the "Other Documents" Section of the Design-Build Maximum Price Request for Proposal (RFP) to determine (i.e., "*anticipate*") the existing subsurface conditions they expected to encounter in the referenced ponds. DUSA is basing their claim, in part, on an assertion that this geotechnical information did not indicate the presence of the stumps and tree debris.

The Department directs the DRB's attention to the fact that the geotechnical information DUSA is relying on was provided in the "Other Documents" Section of the RFP. The RFP states, "*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.**" (Ref. Attachment No. 4)*

Section 4-1, Intent of Contract from RFP Appendix C - Division I Design-Build Specifications and Special Provisions which 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, permits, etc. of any nature or kind, unless otherwise stated in the Contract.**"

During the June 3, 2015 progress meeting, DUSA was told that some of the debris issues were for areas not included in the NOI letter (i.e. Pond 18B). The CEI inspectors were also not being told about the stumps until

after they were moved. DUSA was also told that tires/debris are to be expected in the normal clearing and grubbing activities. DUSA stated the stumps are 10 to 15 feet deep in the ponds. JEAcés stated none of the inspectors witnessed the stumps deeper than three to four feet. **DUSA was reminded that the differing site condition specification (§4-3.7) requires the Contractor to provide written notification before the Contractor disturbs the conditions and that the CEI needs to be given an opportunity to investigate that condition.**

Since the 6/3/15 progress meeting, DUSA or its subcontractors have not properly preserved the claim by not notifying the CEI prior to disturbing the affected work area.

The Design-Build Contract requires the Design-Build Team to provide the site investigation. Specification 4-3.7 (Differing Site Conditions) does not hold the Department responsible for unknown physical conditions unless they would be considered “unusual in nature differing materially from those ordinarily encountered.” Finding stumps and tree debris below the ground surface inside a previously wooded area is not unusual.

Therefore, the Department does not find this claim has any merit.

The ponds are located in what were heavily wooded areas (pre-construction);

Encountering stumps and tree debris in these areas does not represent a Differing Site Condition and certainly is not a condition that could be considered “unusual in nature differing materially from those ordinarily encountered”;

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,

Knowledge of local silviculture operations (tree farming) would lead to the same reasonable conclusion.

However, the Department contends that if this existing condition were somehow found 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

This position is supported by the Contract Provisions in Attachment No. 4 including, but not limited to, Section V.G, Verification of Existing Conditions from the RFP and Section 4-1, Intent of Contract from the RFP’s Appendix C - Division I Design-Build Specifications and Special Provisions. These Contract Provisions have been thoroughly vetted above; therefore, there is no need to revisit them in this Section.

REBUTAL

DUSA; “The Contractor has been severely impeded from carrying out the works by events outside his control. In particular, his progress has been delayed and disrupted by:

Lack of information in connection with actual site conditions.

The discovery of and requirement to remove from site unexpected unsuitable material **at a depth specifically excluded** from the Contractor’s scope.

Lack of anticipated suitable material required for the embankment operations.”

Department; Section V.G, Verification of Existing Conditions from the RFP which states, in part:

“The Design-Build Firm shall be responsible for verification of existing conditions,

“By execution of the contract, the Design-Build Firm specifically acknowledges and agrees that the Design-Build Firm is contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the Design-Build Firm and that any information is being provided merely to assist the Design-Build Firm in completing adequate site investigations.”

Section 2-4, Examination of Contract Documents and Site of Work from the RFP’s Appendix C - Division I Design-Build Specifications and Special Provisions which states, in part:

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

“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.”

If DUSA is inferring that the information that was provided contained insufficient or incorrect information, then the DRB’s attention is directed to the “Other Documents” Section of the RFP which states, in part, **“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.”

DUSA; “The Contractor avers that he is entitled to additional compensation for all the additional costs incurred because of the requirement to remove from Site additional tree stumps and roots, plus other debris, **beyond that envisaged and prescribed in the Specifications.”**

Department; The Department notes that all of the material removed from the project's stormwater ponds was done to meet the stormwater treatment volumes required by the design developed by the Design-Build Firm. In addition to the work DUSA points to that would be covered by the Clearing and Grubbing Specification, the rest of the pond volume is covered by the Regular Excavation Specification. As noted in the Department's Position Statement, Standard Specification §120-2.2.1 states that Roadway Excavation (which includes Regular Excavation) consists of "***the excavation and the utilization or disposal of all materials necessary for the construction of the roadway, ditches, channel changes, etc. ...***"

DUSA; "***110-2.2 Depths of Removal of Roots, Stumps and Other Debris; 'In all areas where excavation is to be performed, or roadway embankments are to be constructed, remove roots and other debris to a depth of 12 inches below the ground surface. Remove roots and other debris from all excavated material to be used in the construction of roadway embankment or roadway base.'***"

Department; This Contract Provision indicates that the minimum depth of root and debris removal is 12-inches in "*all areas where excavation is to be performed, or roadway embankments are to be constructed*". This covers the minimum removal in excavated areas like Ponds D12A and D15A that are the subject of this hearing. However, it also covers the minimum removal in areas of the project that are not to be excavated but on which Embankment is to be placed.

The last sentence - which DUSA did not emphasize - further instructs the Design-Build Firm to "*Remove roots and other debris from all excavated material to be used in the construction of roadway embankment or roadway base.*"

DUSA; "*The Contractor accepts that under the terms of the Contract, the cost of removing tree stumps, roots and debris is deemed to be included in the Contract Amount.*" "*However, the Specifications are prescriptive with regard [to] the extent to which the Contractor must [sic] bear this risk; there is an express limit as to the depth of excavation which is deemed the Contractor's risk.*

The wording in Specification item 110-2 clearly defines the extent to which the Contractor is liable when it states:

'In all areas where excavation is to be performed, or roadway embankments are to be constructed, remove roots and other debris to a depth of 12 inches below the ground surface.'

Beyond this stipulated depth of 12 inches, the presence of and therefore the requirement to remove tree stumps, roots and debris becomes the Department's risk. There is a clear distinction between what the Contractor is liable for and what they are not.'

Department; the Contract does not identify an "*express limit as to the depth which is deemed the Contractor's risk*". Furthermore, there is no interpretation of the Contract that would justify DUSA's allegation that "*Beyond this*

stipulated depth of 12 inches, the presence of and therefore the requirement to remove tree stumps, roots and debris becomes the Department's risk."

...the requirements in Standard Specification §110 and §120 place the responsibility on the Design-Build Firm to:

Remove and dispose of all roots and debris to a depth of 12 inches below the ground surface in all areas to be excavated or on which Embankment will be placed.

Remove roots and other debris from all excavated material to be used in the construction of roadway embankment or roadway base.

Completely remove and dispose of all stumps within the roadway right-of-way.

Remove all roots, etc., protruding through or appearing on the surface of the completed excavation within the roadway area and for structures, to a depth of at least 12 inches below the finished excavation surface.

Excavate and utilize or dispose of all materials necessary for the construction of the roadway, ditches, channel changes, etc.

Assume responsibility for determining the suitability of excavated material for use on the project in accordance with the applicable Contract Documents.

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.

The Contractor did encounter stumps, roots and other debris below the 12" of clearing and grubbing as specified in the Specifications. Specification 110-2.2 requires the contractor to remove roots and other debris to a depth of 12 inches below the ground surface.

Contractor did provide the Department with a NOI on 12 Feb. 2015.

Article 4-1 under Scope of Work it states, "*In the event that unforeseeable work is provided for in the Contract, such work shall be paid for in accordance with 4-3.2.*"

After removal of the top 12 inches of roots, stumps and debris the contractor began using the suitable material in the roadway embankment. After removing 4 to 6 feet of usable material the contractor encountered stumps, trees and other non-suitable material in various locations in ponds D12A and D15A..

The contractor had to replace the unsuitable material with other sources for the roadway embankment.

During the June 3, 2015 progress meeting, DUSA was told that some of the debris issues were for areas not included in the NOI letter. These areas not part of this hearing. The Department was provided a NOI on 12 Feb. 2015 which allowed them to monitor which ponds and material was being remove.

The Department states that information was available to the Design-Build firms at the time of bid to determine the condition (stumps and tree debris) in question existed. This information was not presented in the position papers nor at the hearing.

The Department states that local silviculture operations would lead to the same reasonable conclusions. No proof was provided that this local knowledge was required by the bidders.

Scope of work **4-3.7 Differing Site Conditions**; During the progress of the work, if subsurface or latent physical conditions are encountered at the site..., or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered... the party discovering such shall promptly notify the other party...before the Contractor disturbs the condition or performs the affected work. Upon receipt of written notification ...the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made...and the Contract will be modified in writing accordingly.

RECOMMENDATION

The Board finds that there is entitlement to the Contractor's claim that the stumps, trees and debris, found in ponds D12A and D15A, could not have been anticipated at four to six feet below the clearing and grubbing limits. Even if the Contractor had done coring's in the area of ponds D12A and D15A general specifications state that the material found at the borings is only a general indication of material likely found adjacent to the bored holes. The location of the stumps, tree and debris was scattered throughout the ponds.

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

