

DRB Hearing

J. B. Coxwell Contracting, Inc. vs. FDOT District Two

I-10 Interchange at US-90 and SR-23 Project

FDOT Financial Project No. 209659-3-52-01

Contract No. T-2563

County: Duval

“Unsuitable Material Found in Pond 37”

August 14, 2017

10:00 AM

Members of the Disputes Review Board:

Kenneth E. Fusch, PE, Chairman.

A. Ramsdell Cone

Dr. Ralph D. Ellis, Jr., PE

Project Information:

Type: Design, Bid, Build Designer: Reynolds, Smith, & Hills CEI: JEAces

Date of Award: 5/19/2015 Contract Amount: \$45,821,967.34 Duration: 850 days

Responsibility of the DRB: As requested by the Contractor and agreed to by the Department, the Disputes Review Board convened a hearing in order to make a recommendation regarding “entitlement” on the issue in dispute. The Board did not consider the question of quantum.

If the Board is unable to reach a unanimous agreement on the Recommendation, the minority member may submit a separate recommendation outlining the reasons for the dissenting opinion.

The Board’s recommendation is based on its reading of the Position Papers and Rebuttal Statements submitted by the parties, and the information learned from the participants during discussions at the hearing. The hearing was not recorded. A list of attendees was prepared for the Board’s files, and is available upon request.

I.

ISSUE IN DISPUTE

The issue in dispute, as submitted to the Disputes Review Board on June 7, 2017, is whether or not the Contractor (J. B. Coxwell Contracting, Inc., or JBCCI) is entitled to additional compensation as reimbursement for the cost of importing 3,759 CY of suitable embankment material for use in construction of Ramp D on the project site.

II.

FINDINGS OF FACT

Facts Agreed Upon by the Parties: During the Hearing it became apparent that the parties were in agreement on many matters that have a bearing on the Issue in Dispute. These facts are as follows:

- 1) In the spring of 2016, the Contractor discovered a variety of man-made buried debris in Pond 37 while excavation was in progress to construct the modified and enlarged shape of this pond. This man-made debris had to be removed and disposed of by the Contractor.
- 2) The Contractor notified the Department in writing of this discovery within the time constraints in the contract. The Engineer then provided direction to the Contractor to proceed with the removal and disposal of this man-made debris.
- 3) This event was considered to be a “differing site condition” by both parties. The specification in the contract that addresses such an event is Section 4-3.7
- 4) The Contractor submitted a written cost proposal to carry out this extra work.
- 5) The Contractor was compensated by a Unilateral Supplement Agreement for the extra work required for this excavation and disposal. The additional compensation was \$116,345 and a four (4) day time extension. This payment was supported by Special Provision 4-4, *Unforeseeable Work*.
- 6) The Department paid the Contractor the unit price of \$3.76/CY for the full quantity of Regular Excavation (Pay Item No. 120-1) in Pond 37. This totaled \$56,344 based on a total pond volume of 14,985 CY.
- 7) The Department paid the Contractor the unit price of \$9.47/CY for the plan quantity of Embankment (Pay Item No. 120-6) used to construct Ramp D. This totaled \$685,448 based on the plan quantity of 72,381 CY for Ramp D shown on Plan Sheet SQ-27.

III.

THE MAJORITY OPINION

Issue: Entitlement to Additional Compensation for the Work Associated with Buried Man-made Debris in Pond WDA 37

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. **DURING THE EXCAVATION OF POND WDA 37 MAN-MADE MATERIALS WERE FOUND REQUIRING OFF-SITE DISPOSAL**
During March and April 2016 JBCCI encountered various man-made materials within the excavated volume of Pond WDA 37 to include EZ base, reinforcing steel, silt fencing, and PVC. The FDOT representative CEI was aware of the situation and monitored the activity. The debris materials were separated from the usable materials.
2. **THE FDOT ISSUED A UNILATERAL PAYMENT TO JBCCI FOR THE COST OF REMOVAL AND DISPOSAL OF THE DEBRIS MATERIALS**
At the request of the FDOT JBCCI provided a written cost proposal dated March 31, 2016. Subsequently a unilateral payment was initiated to amend the contract to cover cost of removing and disposing of the debris materials.
3. **SOIL BORING INFORMATION WAS PROVIDED IN THE PLANS FOR 3 BORINGS WITHIN POND WDA 37**
No man-made debris were indicated in any of the borings. Boring classification information indicated that all of the excavated material could be used in the project on the adjacent Ramp D. This was confirmed during construction as all of the excavated materials were used in the project except the amount contaminated by the man-made debris.
4. **OFF-SITE BORROW WAS REQUIRED TO REPLACE THE POND MATERIAL THAT WAS CONTAMINATED BY THE MAN-MADE DEBRIS**
As a result of the loss of the material contaminated by man-made debris approximately 3,758.75 CY of additional material had to be purchased and imported to the project.
5. **SUMMARY – CONTRACTOR'S POSITION**
Both the FDOT and JBCCI have recognized the discovery of previously unforeseen man-made debris in Pond WDA 37 as a Differing Site Condition. JBCCI has been paid for removing and disposing of the man-made debris, which is only a portion of the total cost incurred. In accordance with specification section 4-3.7 **Differing Site Conditions**, JBCCI is requesting payment for the cost of additional borrow material, which had to be purchased and imported to offset the excavated material that was lost due to contamination by man-made debris.

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 FDOT's submitted written materials.

Key Points

1. THE EMBANKMENT PAY ITEM HAS NOT BEEN AFFECTED BY THE MAN-MADE DEBRIS FOUND IN POND WDA 7

It is the FDOT's position that the discovery of man-made debris in Pond WDA 7 did not affect the embankment pay item No. 120-6 and that the Contractor has been fully paid for all embankment work.

2. THE FOLLOWING CONTRACT SPECIFICATIONS ARE RELEVANT TO THIS ISSUE:

- Standard Specification 1-3
defines extra work
- Special Provision 2.4 Examination of Plans, Specifications, Special Provisions, and Site of Work
"b. The Department does not guarantee the details pertaining to borings, as shown in 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."
- Standard Specification 4-3.1 Alterations of Plans or Character of Work
- Standard Specification 4-3.2 Increases, Decreases or Alterations in the Work
- Standard Specification 4-3.2.1 Allowable Cost for Extra Work
Note that Specification Section 4-3.2.1 details the allowable cost for performing Extra Work and how these costs are calculated. As referenced in 4-3.5 these items (a, b, c, d) represent the full extent due for such Extra Work. This section does not include allowance for alleged impact to other pay items.
- Standard Specification 4-3.5 Extra Work
- Standard Specification 4-3.7 Differing Site Conditions
- Standard Specification 9-3.1 Compensation for Altered Quantities
- Standard Specification 9-3.2.2 Authorized Changes in the Limits of Work
- Standard Specification 4-3.7 Differing Site Conditions
- Standard Specification 9-3.2.2 Authorized Changes in the Limits of Work
- Special Provision 120
Contains three earthwork pay items:
 - 120-1 Regular Excavation
 - 120-4 Subsoil Excavation
 - 120-6 Embankment
- Special Provision 120-3 Preliminary Soils Investigation
"When the Plans contain the results of a soil survey, do not assume such data is a guarantee of the depth, extent, or character of the material present."

- Special Provision 120-7.1 Use of Materials Excavated from the Roadway and Appurtenances
“Assume responsibility for determining the suitability of excavated material for use on the project in accordance with applicable Contract Documents.”
- Special Provision 120-13.7 Method of Measurement
- Special Provision 120-14.3 Basis for Payment for Embankment General
- Pond Soil Survey on Plan Sheet No. 212
“Soil survey on the plan sheet includes the following statement “SOIL BOUNDARIES ARE APPROXIMATE AND REPRESENT SOIL STRATA AT EACH BORING LOCATION ONLY””
- Special Provision 120-13.7
“The measurement will include only material actually placed above the original ground”
There is no contract provision providing adjustment to the Embankment pay item for debris material found in pond excavation.
- Special Provision 120-14.3
Price and payment will be full compensation for all work specified in this Section, including all material for constructing the embankment
This contract provision demonstrates that the bid unit price for the Embankment pay item is to include all material necessary to construct the embankment.

3. SUMMARY- FDOT POSITION

JBCCI has been paid for:

- Excavation of the material as required to provide the storage volume of Pond WDA 37
- Additional handling and disposal of the debris that was encountered in Pond WDA 37 via the Unilateral Supplemental Agreement
- Construction of the project’s Embankment volume via the Embankment pay item (120-6)

Therefore, the JBCCI is not entitled to any additional compensation.

Disputes Review Board Majority Findings

1. JBCCI encountered man-made debris during the excavation of Pond WD37 and the FDOT was notified. Subsequently, JBCCI provide a written cost proposal for the removal and disposal of the man-made debris.
2. The FDOT issued a unilateral payment dated March 14, 2016 in the amount of \$116, 344.96 to compensate JBCCI for removing and disposal of the man-made debris.
3. Excepting the material which had to be disposed of, the remaining excavated material from Pond WD 37 agreed with the provided soil boring information and was used in the embankment construction on project.

4. Specification Section 4-3.7

“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 Engineer will notify the Contractor whether or not an adjustment of the Contract is warranted.”

5. The FDOT and JBCCI both agree that the discovery of man-made debris in the material to be excavated from Pond WDA 37 was a **Differing Site Condition**.¹

“During the excavation of Pond WDA 37, JBCCI encountered buried debris. The CEI team agreed that this represented a Differing Site Condition and JBCCI was compensated via Unilateral Supplemental Agreement for cost associated with additional handling and off-site disposal of the debris.”

Disputes Review Board Majority Discussion

In this hearing the Disputes Review Board is addressing only the issue of entitlement.

This is not an issue about how well given soil boring information represented the actual borrow materials excavation from a pond. Rather it deals with the consequences of an unknown and unforeseeable condition affecting the construction cost.

The discovery of man-made debris in a pond excavation area meets the criteria for a “Differing Site Condition”.

- A physical condition encountered in the performance of the work that was not visible and not known
- And
- Is materially different from the conditions believed to exist at the time of bid

The FDOT agrees that the condition is a Differing Site Condition and has made that statement in their Position Paper. The physical facts as well as the FDOT unilateral payment for removal of the debris supports this determination. There was no indication in the plans that Pond WD 37 contained man-made debris. In fact the soil borings indicated no debris present. Clearly both JBCCI and the FDOT were unaware of the debris until they were discovered during pond excavation work.

¹ FDOT Position Paper, DISCUSSION, paragraph 1, page 6

The removal of the debris material resulted in the requirement for JBCCI to perform the extra work of obtaining off-site borrow to replace the debris material. JBCCT has not been compensated for the cost of this extra work.

IV.

THE MINORITY OPINION

FDOT's Position: District Two presented its position on this issue by addressing various contract specifications which nullify the obligation of the Department to reimburse the Contractor for the cost of 3,759 CY of imported suitable embankment material. The specifications included sections from the 2015 FDOT Standard Specifications for Road and Bridge Construction, as well as sections from the contract Special Provisions as follows:

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

Special Provision 120-3, *Preliminary Soils Investigations*

Special Provision 120-7.1, *Use of Materials Excavated from Roadway and Appurtenances*

Special Provision 120-14.3.1, *Embankment, General*

Review by the Minority Member: The following items were considered by the Minority Member to be **important factors** in the FDOT position. Items are paraphrased for clarity, with comments following each item.

1) The plans included soil surveys for over a dozen soil borings throughout the project site, many of which were in the ponds. The contract documents cautioned bidders that the borings were only a general indication as to the character and type of soils that could be found in the ponds. (Standard Spec Section 2-4)

Comments: The Minority Member concurs that this precautionary note applies to all boring, including those in the ponds.

2) There were no guarantees made by the Department in the contract as to the amount, quality, or character of any unused on-site soils on the project site which could be used as roadway embankment. (Standard Spec Section 2-4, Special Provision 120-3)

Comments: The Minority Member concurs that this specification nullifies any obligations that the Department may have had related to the suitability of on-site soils.

3) The Contractor is responsible for making his own investigations and determination of possible soils which might be available for use on the project and which meet the standards for use as roadway embankment. (Special Provision 120-7.1)

Comments: Noted by the Minority Member.

4) The Department paid the Contractor the unit price for all Embankment (Pay Item No. 120-6) placed to construct Ramp D. This payment included obtaining all material required for constructing the embankment regardless of its source. (Special Provision 120-14.3.1)

Comments: The Minority Member concurs with this statement.

5) The FDOT stated that the Contractor is not entitled to any additional compensation because such compensation is limited to only one pay item.

Comments: The Minority Member does not concur with this limitation.

6) The FDOT stated that the Contractor is not entitled to any additional compensation because such compensation would involve a loss of anticipated profits which is excluded.

Comments: The Minority Member does not concur with this interpretation of the specifications, or with the Department's definition of anticipated profits.

Conclusions based on Assessment of FDOT Position: The FDOT presented numerous statements found in the contract documents which nullified any obligation that the Department had for reimbursing the Contractor. These included the elimination of all guarantees pertaining to the type, character, and quality of the materials found in any pond, the limitations associated with all soil borings, and the responsibilities placed on the bidders for determining the suitability of the materials excavated and planned for reuse as embankment.

The unit price paid for embankment includes the cost of all embankment material regardless of the source, whether it be from an on-site pond, or from a commercial borrow pit.

Summary of the Minority Member's Review: Both parties have valid arguments in this dispute, and the arguments are supported by various sections in the specifications and special provisions. Since both parties agree, and the Board concurs, that we have a *differing site condition* caused by the discovery of buried man-made debris in Pond 37, and that *unforeseen extra work* was necessary, the specifications clearly require that a contract adjustment be made to provide additional compensation to the Contractor.

The specifications place no restrictions on the type of extra work required, and therefore place no limits on the additional compensation, other than it must be caused by the circumstances of the differing site condition, and not be connected to any other Department or non-Department projects on which the Contractor may be working.

The compensation already made to the Contractor in the amount of \$116,345 by a Unilateral Supplemental Agreement included all work effort necessary to deal with the differing site condition in Pond 37. Not included in this amount was the cost to offset the loss of an equivalent volume of material which could be used to construct Ramp D, thus requiring the Contractor to purchase suitable material from a nearby borrow pit and truck it to the site.

However, the Department's arguments against entitlement for payment of an extra amount of compensation as reimbursement to offset this loss are supported by various specifications that nullify any obligation by the Department for this extra compensation, and place responsibilities on contractors regarding soil investigations and the determination of the suitability of soils available on the project site for use as embankment.

Another important argument made by the Department against this extra compensation is the description of what is included in Pay Item No. 120-6 for Embankment. Regardless of the source of the embankment, whether it be from an available on-site source such as a pond, or purchased from a commercial borrow pit, the unit price for Embankment includes the cost of *obtaining all material* required for constructing the roadway embankment.

In addition, the contract clearly places significant limits on the reliability and usefulness of any soil borings found in the plans.

The Board's review of all pertinent information made available through the Hearing process, as well as discussions among the three members, led to a split decision by the Board. A majority of the DRB members voted in favor of the Contractor, while one dissenting minority member voted in favor of the Department.

V.

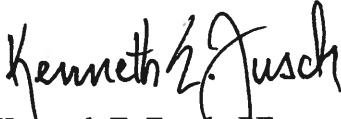
RECOMMENDATIONS

The Majority Recommendation: It is the recommendation of the majority members that in accordance with Specification Section 4-3.7 that JBCCI is entitled to an adjustment in contract for all justified additional costs resulting from the man-made debris discovered in Pond WDA 37, including the cost of obtaining off-site borrow to replace the debris material that was disposed of.

The Minority Recommendation: It is the recommendation of the minority member that JBCCI is not entitled to receive additional compensation as reimbursement for the cost of obtaining off-site borrow to replace the debris material discovered in Pond 37. The basis for this dissenting opinion is found in Special Provisions 120-3, 120-7.1, 120-14.1 and in Specification Section 2-4. The Contractor was compensated for all extra work attributable to the *differing site conditions*.

Submitted on behalf of the Board:

Date of Recommendation:



Kenneth E. Fusch, PE
Chairman, Disputes Review Board

8/31/2017

Distribution:

J. B. Coxwell Contracting, Inc.
FDOT District Two