

DISPUTE REVIEW BOARD RECOMMENDATION

October 13, 2004

Mr. S. Ponch Frank
Project Manager
Ranger Construction Industries, Inc.
1951 W. Granada Blvd.
Ormand Beach, FL 32174

Mr. Mark A. Cook
Senior Project Engineer
Jacobs Civil, Inc.
4811 Beach Blvd.
Jacksonville, FL 32207-4876

Ref: I-95 from Flagler County Line to S. of SR 207, St Johns County
FM No.: 213502-1-52-01/213503-1-52-01, Contract No.: E-2F20

Gentlemen:

Ranger Construction Industries, Inc. (Ranger) requested a hearing before the Disputes Review Board (Board) to determine if there was entitlement to their subcontractor, Maner Fence & Specialties (Maner), to receive payment for the steel index pricing for fence furnished and installed on this project. A hearing was held on October 4, 2004 in the Palatka Construction Office attended by the three Board members, two individuals from Ranger, one individual from Manner fencing, three Department representatives, two Jacob's Civil employees and one from Earth Tech Consulting Engineers.

Ranger's position is that their subcontractor is entitled to payment for the steel price index for material purchased in accordance with Memorandum No. 06-04, dated April 20, 2004, from the Director, Office of Construction, Mr. Ananth Prasad, to all District Construction Engineers.

The Department's position is that the Specification 6-4.8 indicates that the fence should be erected as a first order of business pursuant to the request of the Engineer. The original project completion was for October 2003, and Maner should have purchased the fencing materials in anticipation of this date and erected the fence as specified.

In the following discussion the references to various Exhibits have been left in so that the reader can return to the original submittal and find the referenced exhibit if desired.

CONTRACTOR'S POSITION

Ranger Construction currently has a dispute with the Department over the steel index pricing for fence. Our subcontractor has notified that he needs to be compensated for the increased price of steel for the remaining fence. Since this issue was brought to light, the Department has denied all requests, claiming that fence does not meet the criteria. The attached correspondence and backup from our subcontractor (Maner) shows that fence does meet the criteria. Ranger is seeking on behalf of Maner \$25,296.39 for increase in steel prices for the fence supplies. This constitutes the amount to date. We will have a revised figure when the work is complete.

DISPUTE REVIEW BOARD RECOMMENDATION

Our stance is that a memo came out to address the steel issue that was plaguing our industry. This memo made reference to jobs let prior to a certain date. Our project had been let prior to this date. Our subcontractor, who does work for other contractors in this state, started his due diligence and finding out prices. When brought to the Department, it was denied. Through some perseverance on Ranger and Maner's parts, we feel that according to the memo that Maner is due some money for the steel increase, and that they have done what they needed to do to demonstrate that. If we are missing any paperwork I do apologize. Since this has not been accepted by the DOT for the CEI, they have not been very helpful in helping us on the paperwork side. However, Mr. Warren does believe he has documented everything through the end of August, and will have the additional backup at the Oct. 1 meeting.

In addition, the original quantity provided greatly overran, and the Department will state Ranger/Maner should have purchased the material before hand and got paid stockpiled materials. But since the quantity overran so much, one would not have known how much was going to be needed.

Also, there has been talk about stolen materials from their yard on the project. Maner is not seeking reimbursement for this material. They have worked through local law enforcement and their insurance company for these materials. However, due to the high probability that more would get stolen, they were apprehensive about purchasing material ahead of time, not knowing how much, or what would get stolen. In addition, since the bid quantity had been paid for, the Department would have had no means to pay for stockpiled materials.

Ranger is seeking to obtain the all monies owed to Maner Fence and Specialties regarding the steel issue. A total amount will be available at the hearing. The \$25,296.39 is through the end of August only.

Range has attached all correspondence on this issue including the memo from the State Construction Engineer as a part of their submission to the Board.

DEPARTMENT'S POSITION

Fencing was required on the entire 1-95 corridor including the ponds per the permits and RFP (ref 2 and 3). Specifications 6-4.8 (ref. 1) indicate to "erect fence as a first order of business" pursuant to the request of the Engineer. Fencing was requested to be erected early by FDOT PM Jeff Williams as noted in the progress meeting minutes (ref. 4). The meeting minutes 2, 5, 8-14 indicate that getting fencing up was desired by FDOT and Ranger. Ranger letter of 1 August 2002 (ref. 5) indicated their intent to erect fence as the first order of business and FDOT's email attachment reply states their desire to get fence erected timely. Fencing was not installed timely but it had started including the raised deer fence in November 2002. FDOT considers that Maner should have purchased all the fence needed for the project in 2002 and erected it as requested, pursuant to specification 6-4.8.

DISPUTE REVIEW BOARD RECOMMENDATION

The original project completion was scheduled for October 2003 and FDOT believes that Maner should have purchased fence in anticipation of this date especially since FDOT had asked that Maner erect the fence early in the project. The record shows that Maner erected about 70% of the fence along the ROW and ponds then pulled off the project in early 2003. Jacobs CEI letter in January 2004 (ref. 6) asked the Ranger have Maner Fencing return to the project while we were experiencing drought conditions and dry weather. Maner did not start back to work on the fence until the summer of 2004. Ranger informed Jacobs CEI (ref. 7) of Maner's desire to be paid for steel price increase for fence materials for \$72,179.93. Jacobs CEI responded no entitlement was due (ref. 8). As of today fencing is still being installed. Almost no fence work was done from early 2003 to summer of 2004. Maner fence letter (ref. 9) indicated they had all their remaining fence in storage on the project but it was "pilfered" and it is implied they had to buy more fence at a higher price. Jacobs CEI interpreted the Maner letter to indicate that Maner did not suffer any steel price increase due to the 1-95 project. Jacobs CEI inspectors have indicated their belief that Maner's own crews were taking fence stocked on this project and using it to complete work on the north 1-95 (Superior Construction) Project. Ranger again stated their intent to claim for fence steel price increase (ref. 10). In the attachments to this letter Maner accuses Ranger of not letting them come back to work in the spring of 2004 and their material was "pilfered" in the meantime. Jacobs letter (ref. 11) to Ranger asked that Maner provide police reports and insurance claims for lost or stolen fence. Maner has not produced any documentation to support this claim the fence was stolen. FDOT letter of 6 May 2004 (ref. 12) to Ranger indicated their concerns about project progress and noted that there was a lot of fence remaining to be erected and for Ranger and their subcontractors to vigorously pursue contract completion.

The steel prices began to rise in late 2003 and were noticed in the winter and spring of 2004. FDOT contends that Maner should have had all the fence they needed to build the fence on this project and that they did not experience any price increase due to the fault of FDOT. FDOT wanted all the fence to be installed early in the project in 2002 thus Ranger and Maner should have taken the steps necessary to achieve this. If fence was stolen this was not FDOT's problem to pay for. Ranger has forwarded Maner's claim for steel price increase for fence they said they had to buy in 2004 to finish the project. Ranger has stated they have paid Maner for all the fence they have installed.

It was clear that 13 miles of ROW had to be fenced. The RFP asked for this. A simple takeoff of the RFP provided permits would give a rough estimate of $13 \times 5280 \times 2 = 137,280$ LF. Ponds 1-12, a simple take off indicates 35,323 LF to be fenced. My 10 minute rough estimated Total is 173,000 LF. Anyone that builds fence for a living or puts in a bid on fence could see the approximate quantity that was needed. The RFP and Permits were clear that ponds had to be fenced as well as the ROW. FDOT does not have an obligation to make Maner whole because they failed to accurately estimate quantities on a D/B project or thoroughly read the specifications. Due diligence by Maner and Ranger would be to check the quantity on 30% plans for a D/B bid.

It is our position that Maner and Ranger did not get the fence work done timely, due to no fault of FDOT, and that Maner may have had to buy more fence materials two years after

DISPUTE REVIEW BOARD RECOMMENDATION

bid at no fault of FDOT and have tried to pass the cost increase on to the FDOT. FDOT feels this is not an increase in costs they should have to pay for. FDOT recommends that the DRB rule against entitlement for the steel price index increase to Ranger and Maner Fence.

DISPUTE REVIEW BOARD FINDINGS

The Board has reviewed all the information provided by the Department and Ranger. We listened to all the parties at the hearing held on October 4, 2004.

The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore, our recommendation is based on the above documents.

The Department alleges that Maner should have purchased all the fencing required early enough to have missed the steel price increase. There are no specifications requiring a contractor to purchase all the required material early in a project. The exception being procurement time for specialized equipment. The contractor has the right to determine the time of purchase. In addition the final determination of the fencing quantity could not have been arrived at until the ponds were far enough along to make final measurements.

Erecting fence as a first order of business is specification 6-4.8 that states:

6-4.8 Fencing: Erect permanent fence as a first order of business on all projects that include fencing where the Engineer determines that the fencing is necessary to maintain the security of livestock on adjacent property, or for protection of pedestrians who are likely to gain access to the project from adjacent property. (Emphasis added).

By October 2002, Ranger had been paid 100% of the schedule of values for the fencing item. This amounted to approximately 70% (92,000+ LF) of the actual final fencing quantity and should have been enough to maintain the security of livestock on adjacent property, thus meeting the criteria for erecting permanent fence as a first order of business.

The Director, Office of Construction, promulgated a memorandum to all District Construction Engineers that states:

Due to recent dramatic increases in the price of steel beyond what the Contractor could have anticipated at the time of bid, the Department, at the request made by the Contractor will process a \$0.00 specification change for Contracts let prior to February 1, 2004 to provide for an adjustment of the price of indexed items, as defined in the attached specification. (Emphasis added).

The memorandum is clear that it applies to all contracts let prior to February 1, 2004.

There was a quantity error in the amount of fence required by the design build team. The quantity error itself is a matter to be settled within the Design/Build team.

DISPUTE REVIEW BOARD RECOMMENDATION

While this is a Lump Sum design build contract the prices included in that lump sum contract are those foreseeable at the time the contract was put out for bids, and the sharp rise in steel prices experienced in late 2003 and into 2004 could not have been anticipated at that time. This is especially true since this project was let nearly two years before the aforementioned sharp increase in steel prices.

If, as the Board was told at the hearing, 100% of the schedule of values was paid for the fencing item by October 2002, then Maner did purchase a large quantity of the fence early in the project. It must have been obvious at that time that additional fencing would be needed to complete the project and probably the approximate amount. However, once the criteria for early erection of the fencing had been satisfied the remaining fence would not need to have been purchased until it was required, and this apparently fell in the time frame the steel price adjustment is applicable.

DISPUTE REVIEW BOARD RECOMMENDATION

Ranger is entitled to payment of the steel price index adjustment for all fencing purchased after September 1, 2003, as outlined in the Director, office of Construction's memorandum number 06-04 to all District Construction Engineers.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

Please remember that a response to the Board and the other party of your acceptance or rejection of the recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by the non-responding party.

I certify that I have participated in all the meetings of this Board regarding this issue and concur with the findings and recommendation.

Signed by the Chairman, with the concurrence of all Board members:

John C. Norton, P.E.
Chairman

John W. Nutbrown
Member

Don Henderson
Member