

**RECOMMENDATION
OF
DISPUTES REVIEW BOARD**

Robert J. Robertory
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William E. Waddell, P.E.
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Thomas B. Terpening, P.E.
Member

TO: Mr. J. M. Erwin, Jr.
Tidewater Skanska/Flatiron
P. O. Box 3660
Milton, FL 32572

Mr. Eric Benson, P.E.
Florida DOT
6020 Old Bagdad Highway
Milton, Fl. 32583

Re: FDOT FIN # 417474-2-52-01
FAP No.: E043-004-E
Contract No.: E3E19
Escambia and Santa Rosa Counties
DESIGN/BUILD BRIDGE REPLACEMENT I-10
DRB hearing: August 28, 2007

DRB RECOMMENDATION ON TIDEWATER SKANSKA/FLATIRON CLAIM

GRINDING AND GROOVING OF BRIDGE DECKS

At the request of Tidewater Skanska/Flatiron Constructors (Contractor), the Disputes Review Board (the Board) met to consider the decision of the Florida Department of Transportation (FDOT) made to deny the full payment for the grinding and grooving claim on grounds that Contractor had waived it by executing Supplemental Agreement #4.

The following persons were at the hearing representing the Contractor and the FDOT:

Jay Erwin	Contractor
Ian Lindsay	Contractor
Andy Ord	Contractor
Peter Bibbs	Contractor
Wade Watson	Contractor
Peter Wade	WCS
James Enis.	PBS&J
Bryan Estock	PBCS
Don Green	PBCS
Greg Wilson	PBCS
Bill Page	WBP
Eric Benson	FDOT
Steve Hunt	FDOT

Both of the parties submitted documents to the Board prior to the hearing. Both parties gave testimony to clarify written documents.

PERTINENT CONTRACT PROVISIONS

1-3 Definitions

RFP p. 49 section q

Standard Specifications 4-3

Supplemental Specification 400-15.2.5.5

Supplemental Specification 400-15.2.5.6

Supplemental Agreement #4

Dispute:

The dispute to be heard was over the claim of grinding and grooving the bridge deck. The FDOT agreed to pay only a small portion of the claim and alleged that Contractor had waived its right to obtain more by executing Supplemental Agreement #4. The Contractor requested a Board ruling that it had not waived the claim by executing Supplemental Agreement #4.

CONTRACTOR'S POSITION

On April 17, 2006, FDOT and TSFC entered into SA # 4 compensating TSFC for “Modifications to Bridge Design to Mitigate Hurricane Delays”. The description of the work modified by SA #4 was detailed in the document under “The following contract modifications will be necessary”. Thus, by the clear and explicit terms of SA #4, FDOT did not include any changes to the contract requirements for deck planing, milling or grinding, nor any change to the contract specifications for “grooving”. FDOT has acknowledged that the contract documents are contradictory where they discuss “grinding” and “grooving”, both as to the timing of the work and the scope of the work required under the contract. Ultimately, a solution was agreed to by the FDOT project personnel and TSFC, and “Field Supplemental Agreement #13” was proposed to correct the conflicts between the RFP and Specifications. The proposed language was sent to TSFC on August 18, 2006. In this proposed document the following was contained; “The Contractor reserves the right to seek additional costs for the mobilization, demobilization and MOT due to the conflict between RFP language and the Special Provisions”. However, rather than finalize FSA #13 to resolve the admitted conflict in contract language with a contract change, FDOT, through an August 29, 2006 letter issued by PBCS, said they would “revise: the RFP requirement requiring that both the eastbound and westbound bridges be complete prior to grinding. In reliance on FDOT’s apparent intent to compensate it for this change in sequence of construction, TSFC pursued work on the revised design and construction of the eastbound bridge.

On November 17, 2006, TSFC submitted a request for additional compensation for the additional costs of complying with the Department’s August 29th request. On January 3, 2007, PBCS provided TSFC with a detailed response to their November 17, 2006 request for additional compensation. The date of this response is significant: FDOT waited until after the revised grinding and grooving work was completed before responding to TSFC’s request for compensation. Had it responded before the work was done, indicating that FDOT did not want to compensate TSFC for the additional cost incurred, TSFC may have

been able to mitigate its costs and not perform the grinding and grooving work as requested by FDOT. The sole issue to be decided by the DRB is whether, as asserted by FDOT, TSFC has by executing SA #4 waived any right to compensation for the grinding and grooving claim.

DEPARTMENT'S POSITION

After the 2005 Hurricane season, the Department and the Design/Build firm executed a Supplemental Agreement to redesign the eastbound bridge and to resolve any construction impacts prior to January 5, 2006. As part of the Contractor's schedule recovery plan submittal dated December 12, 2005, it clearly states that "The D/B will plane and groove the bridge decks on the Eastbound Structure prior to opening to 4 lanes of traffic". During the January 5, 2006, meeting to discuss the Contractor's proposal, the President of Tidewater/Skanska, Ed McLaughlin, as well as Andy Ord, state that if the Department pays the additional \$2.4 million and leaves the \$10 million bonus intact then the Contractor will assume all the risk with the change as long as the Contractor's proposal stays intact. During an August 1, 2007 meeting, the Contractor stated that the grinding and grooving proposed work activity is not shown as being part of the executed portion of the package. This is true; however, there are other activities that were part of the change that also do not show up in the executed portion of the package. In the Contractor's submittal they clearly state that certain Technical Provisions and RFP modifications must be accepted. The Supplemental Agreement was also written to resolve all issues prior to January 5, 2006, which would clearly include the RFP grinding language. By the Contractor requesting the change in December 2005, the issue falls clearly under the language to resolve all issues prior to January 5, 2006; thus the Contractor has already been compensated for grinding and grooving the eastbound bridge. It is the Department's position that the Contractor is not entitled to additional compensation for this submitted claim package.

FINDINGS

In order to mitigate delays resulting from hurricanes in 2005, the Department and the Contractor entered into Supplemental Agreement #4. This supplemental agreement was based upon the Contractor's scheduled recovery plan submittal dated December 12, 2005. In this letter the Contractor submitted a proposal for recovering schedule and open EB bridge to 4 lanes of traffic by December 19, 2006. This letter has an attachment 2 "Technical Provisions and modifications to the RFP" which included:

- (1) Spec preventing pouring of concrete to an adjacent span less than 72 hours old must be waived.
- (2) TSF "will grind and groove the bridge decks on the Eastbound structure prior to opening 4 lanes of traffic."
- (3) SIP deck forms needed at spans 44 and 48
- (4) Engineering and roadway drawings will require FDOT & FHWA approval
- (5) TSF requests 6 additional days of lane rental, which might be needed to perform paving & traffic switches
- (6) TSF requests 90 day extension to current August, 2007 completion date

TSF proposed FDOT pay \$2,484,202 and it would absorb \$3,256,924.

A meeting was held on January 5, 2006 to discuss the December 12, 2005 letter. At that time it was agreed that the specification of grinding and grooving would not be revised since this was not a highly time sensitive priority. Both parties have agreed that whatever process was used the discoloration of the bridge deck should not occur and that this issue would continue to be addressed in order to find the best possible solution. When SA #4 was issued the technical modifications requested, one and two above, were not included.

Supplemental Agreement #4 contained the following standard boilerplate language:

(3) It is further agreed that this supplemental agreement shall not alter or change in any manner the force and effect of the original Contract No E3E19, including any previous amendments thereto, except insofar as the same is altered and amended by this supplemental agreement.

(4) The FDOT and the Contractor agree that the contract time adjustment and sum agreed to in this Supplemental Agreement constitute a full and complete settlement of the matters set forth herein, including all direct and indirect costs for equipment, manpower, materials, overhead, profit and delay relating to the issues set forth in the Supplemental Agreement. This settlement is limited to and applies to any claims arising out of or on account of the matters described and set forth in the Supplemental Agreement.

SA #4 states that if something isn't covered, it isn't changed. After the SA was executed, the contract terms still required grinding & grooving after both bridges were open.

At the May 16, 2006 meeting there was much discussion as to the pros and cons about doing the grinding before and after traffic. David Bogan stated that this was one item we all agreed that we don't have a final decision, but we "gotta" get some before we go forward. This appears to show this was very much an open issue.

On August 18, 2006 FDOT sent TSF an e-mail including a proposed contract language modification, Field Supplemental Agreement 13. This proposed was a "no cost" change to clarify conflicting language in the contract documents. In this document was the following language:

The specification change is in order to mitigate conflicting language between the RFP and the Special Provisions concerning the specifications for deck grinding.....The Contractor reserves the right to seek additional costs for the mobilization, demobilization and MOT due to the conflict between RFP language and the Special Provisions. This specification change applies to both the eastbound and westbound bridges.

This proposed supplemental agreement was never executed. Rather, on August 29, 2006, FDOT "requested" TSF to grind and groove the EB bridge before opening it to traffic, and that TSF use every reasonable option to do so. TSF was requested to submit a cost proposal for any additional cost associated with this change. On November 17, 2006 the Contractor submitted a request for \$3,222,602 for additional work associated with the grinding and grooving. In their response the FDOT found entitlement of \$190,562. As the Contractor stated, this appears to acknowledge entitlement and differs only on quantum. After a January 11, 2007 meeting to discuss the equitable adjustments, FDOT evaluation of the claim was \$216,768.

From the above:

- (1) Grinding and Grooving was not mentioned in SA #4.
- (2) Grinding and Grooving continued to be a topic of discussion.
- (3) Finally in response to the Contractor's request for \$3,222,602, the Department offered to settle for first offer of \$190,562 and a final offer of \$216,768. This shows acknowledging entitlement while differing on quantum.

Therefore SA #4 did not waive a possible grinding and grooving claim.

RECOMMENDATIONS

We recommend that Tidewater Skanska/Flatiron Constructors is entitled to compensation for extra work associated with the grinding and grooving claim. Also, we encourage both parties to come to a settlement of quantum. In the event this is impossible, the DRB is available to hear the issue.

The word “recommend” is not to be construed to indicate in any way that the DRB has ruled that our decision is a recommendation or is a binding decision.

Statement:

The Board appreciates the cooperation by all parties involved and the information provided to make these recommendations. Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by the non-responding party.

We certify that we have participated in all the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully Submitted

Disputes Review Board

William E. Waddell, P.E.
DRB Chairman

Robert J. Robertory
Member

Thomas B. Terpening, P.E.
Member

Dated: September , 2007