

**DECISION
OF
DISPUTES REVIEW BOARD**

Robert J. Roberatory, Esq.
Member

William E. Waddell, P.E.
Chairman

Thomas B. Terpening, P.E.
Member

TO: Mr. J. M. Erwin, Jr.
Tidewater Skanska/Flatiron
P. O. Box 3660
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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: December 11, 2007

**DRB DECISION ON FLORIDA DEPARTMENT OF TRANSPORTATION IN
CONNECTION WITH THE GRINDING AND GROOVING CLAIM IN REGARDS TO
CONTRACT PROVISION 5-12.3**

At the request of Department, Florida Department of Transportation, the Disputes Review Board (the Board) met to consider the Department's claim that the Contractor had submitted new information that is not allowed by contract provision 5-12.3.

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

Jay Erwin	Contractor
Ian Lindsay	Contractor
Peter Gibbs	Contractor
Wade Watson	Contractor
Peter Wade	WCS
James Enis.	PBS&J
Bryan Estock	PBCS
Don Green	PBCS
Greg Wilson	PBCS
Lee Carter	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

Contract Provision 5-12.9 (Certification of Claims)

Contract Provision 8-13.1 (Incentive/Disincentive Payment and Waiver of Contractor Claims)

Dispute:

The dispute to be heard was over whether the submission of new documentation by TSFC had offered an alternative calculation in support of their 35% inefficiency factor used in the grinding and grooving claim which is not allowed under contract provision 5-12.3, Content of Written Claim.

DEPARTMENT'S POSITION

The Contractor has offered as an alternative calculation in support of the 35% inefficiency factor used in the Grinding and Grooving Claim. The Department states that (1) the Contractor has submitted new materials for the Department's consideration, which are not certified (Only the labor costs that overlap between the Claim and this new material is certified information. Any increases in labor pool costs, new graphs, and new damage calculation is not certified.) and which cannot be certified due to the time period limitations included in contract provision 8-13.1(Incentive/Disincentive Payment and Waiver of Contractor Claims). (2) Contract provisions 5-12 prohibits "...amending either the bases of entitlement or the amount of any compensation...for any and all issues claimed in the Contractor's written claim submitted hereunder".

TSFC has submitted its claim in accordance with 5-12. This claim is not a request for equitable adjustment where the standards for submittal and additional information are not as strict. To receive the \$10 million dollar bonus the contractor chose to file a 5-12 claim in accordance to 8-13.1.

The fact that FDOT asked for supporting documentation for the 35% inefficiency factor prepared at the time of certification and reviewed new materials submitted after the certification date, does not change the contract or contractually obligate FDOT to make a payment based upon this information. FDOT requested additional information prepared after the certification date due to ongoing concerns of double counting of premium overtime, overstated worker compensation labor burden rates, inclusion of general conditions labor costs, and mathematical errors found in the Claim.

FDOT further contends that 5-12, requires, among other things, detailed factual information to support the damages in the Claim. TSFC has already certified its detailed calculations and supportive data in the Claim as accurate and complete to its best knowledge and belief.

TSFC is attempting to circumvent these requirements, based upon the fact that 8-13.1 and 5-12 places time limitations for submitting certified factual information and prohibits amendments.

CONTRACTOR'S POSITION

Section 5-12.3 was added to the State Special Provisions to establish the boundaries that a claim encompasses. It does not and cannot prevent the Contractor from performing additional calculations on

the submitted information, as indicated by the preclusion allowing the Contractor to reduce the amount of compensation for a submitted claim. There is also no exclusion on the Contractor to provide additional backup to a submitted claim, such as graphs and tables, which might better illustrate information provided in the original certified documents. TSFC states they should be allowed to use all available graphs and calculations generated to support the position of the certified claim.

FINDINGS

In order for the Contractor to receive the \$10 million dollar bonus they chose to file the grinding and grooving claim under 5-12 in accordance to 8-13.1. In doing so the Contractor certified its detailed calculations and supportive data in the Claim as accurate and complete to its best knowledge and belief. The FDOT feels that the information prepared by Peter Wade is an amendment, which is prohibited under 5-12. They also pointed out this information can not be certified since it is beyond the 60 day time limit for certification as stated in 8-13.1.

The Contractor feels that that the basis of its entitlement is the grinding and grooving issue. This they showed has not changed. They feel that their performing of additional calculations has no effect upon the basis of entitlement. Therefore, they should be allowed to present this information to the DRB.

Decision

The DRB agrees with the Florida Department of Transportation that the additional information provided by the Contractor is an amendment and is not allowable in TSFC’s position paper. Therefore, the Contractor must use his original claim in his position paper. In rebuttal, either party may submit any information that they deem necessary to rebut the other party’s position.

Statement:

The Board appreciates the cooperation by all parties involved and the information provided to make this decision.

We certify that we concur with the decision.

Respectfully Submitted

Disputes Review Board

William E. Waddell
William E. Waddell, P.E.
DRB Chairman

Robert J. Robertory
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Member

Thomas B. Terpening
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