

**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., P.E.
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: January 15, 2008

**DRB DECISION ON TIDEWATER SKANSKA/FLATIRON CLAIM ON THE QUANTUM
ISSUE OF THE GRINDING AND GROOVING OF BRIDGE DECKS CLAIM**

At the request of Tidewater Skanska/Flatiron Constructors (Contractor or TSFC), the Disputes Review Board (Board or DRB) met to determine the quantum issue of the Grinding and Grooving Claim

The following persons were at the hearing representing the Contractor and the Florida Department of Transportation (Department or FDOT):

Jay Erwin	Contractor
Ian Lindsay	Contractor
Wade Watson	Contractor
William Dozier	Attorney for TSFC
Peter Wade	WCS
James Enis.	PBS&J
Bryan Estock	PBCS
Don Green	PBCS
Lee Carter	PBCS
Bill Page	WBP
Eric Benson	FDOT
Steve Hunt	FDOT
Calvin Johnson	Attorney for FDOT (day 1)
Jackson Maynard	Attorney for FDOT (day 2)

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 8-13.1

Contract Provision 5-12.2

Contract Provisions 5-12.3

Contract Provision 5-12.6

Contract Provision 5-12.7

Dispute:

The dispute to be heard is the quantum issues of the Grinding and Grooving Claim.

CONTRACTOR'S POSITION

Since the issuance of Supplemental Agreement #29, FDOT has refused to offer any monetary settlement relative to TSFC's "impact costs". Likewise FDOT has refused to reevaluate any of its positions relative to the various partially-paid direct cost claims. From a dollar amount perspective, the vast majority of the dispute relative to the direct costs claims concerns TSFC's claim for additional deck cleaning costs. TSFC's basis of entitlement" is founded on a FDOT-initiated change to the contract requirements relative to when TSFC had to grind and groove the eastbound bridge decks. Under the original Contract, this work was to be done after the completion of both the eastbound and westbound bridges---*i.e.*, at the end of the entire Project. Four months before the scheduled opening of the eastbound bridge, FDOT changed the contract by directing TSFC to grind and groove the eastbound bridge decks before it was opened to traffic. To comply with this directive, TSFC incurred additional impact costs (overtime premium and labor inefficiency losses) to accelerate the completion of the decks so as to provide sufficient time in which to perform the grinding and grooving work. In addition, TSFC incurred additional direct costs to accommodate the out-of-sequence grinding and grooving.

DEPARTMENT'S POSITION

The Department has performed an evaluation of the certified claim submitted by TSFC on February 6, 2007. It has determined that TSFC has been adequately compensated for the out-of-sequence work.

The grinding and grooving requirement of the RFP called for a full grind (entire bridge deck) after completion of both the eastbound and westbound structures. According to TSFC's own technical proposal, the grinding of the eastbound structure would have to be accomplished under traffic. The costs associated with this scenario should have been anticipated and included in TSFC's original lump sum bid.

The Department feels that the Contractor benefited from not having to grind and groove the eastbound structure under traffic. Based on this fact, it appears that the Department has over-compensated TSFC.

The Department is therefore, seeking a rebate of \$460,469.76 for the less complicated operation of not having to grind and groove the eastbound structure under traffic.

FINDINGS

FDOT-Requested Rebate

FDOT was of the opinion that lane rental was in the original lump sum bid. Therefore, if rental days were not used, FDOT was due a rebate. TSFC indicated that it had not contemplated using any lane rental days in its original bid.

TSFC was able to demonstrate that by using means and methods, it was able to perform the grinding and grooving without the use of lane rental days. There was no reduced work.

Possibility of Reduction of Supplemental Change Order Agreement #29

TSFC has requested the DRB to rule on whether the dollar amount set forth in Supplemental Change Order Agreement #29 may be reduced. FDOT responded by saying it would not reduce the amount set forth in the Agreement #29.

Impact

The DRB finds that there must have been some impact to TSFC's operations as a result of the FDOT August 29, 2006, directive to grind and groove prior to opening. However, upon review of the documentation which the Parties have provided and the DRB's observations during Contract performance, the DRB also determines that the overwhelming majority of the added costs which TSFC incurred were due, not to the August 29 directive, but due to the fact that, as a result of its own prior activities, it was well behind schedule and was expending considerable effort to complete the eastbound bridge by the Incentive Bonus Date. Stated otherwise, the DRB does not accept TSFC's essentially unsupported position that it incurred 35% inefficiency, for which FDOT was responsible for half. Absent any substantiation, the DRB finds that such FDOT-caused impact was minuscule and not susceptible of quantification.

Burden -- Workmen's Compensation

FDOT alleges that burden should be applied at 55%, based upon TFSC's actual costs. TSFC alleges the burden rate should be 69.87%, and notes that there are claims outstanding. The difference revolves around workman's compensation insurance. The DRB finds that the Contract provides that a contractor may include workman's compensation costs "based on the National Council on Compensation Insurance basic rate tables adjusted by the Contractor's actual experience modification factor in effect at the time of the additional work or unforeseen work." The TFSC 69.87% includes consideration of the experience modification factor. The DRB finds that the Contract does not make any reference to limiting recovery to actual costs.

Deck Cleaning

TFSC alleges that it is due the sum of \$75,846 in additional deck cleaning costs, inclusive of overhead, profit, and bond premium. The DRB finds that it would not have incurred these costs but for the August 29 directive. Absent that directive, it could have allowed unused materials, equipment, and other detritus to remain on the decks until land access was established, and then used trucks rather than barges and cranes to remove it.

Binding Decision

The DRB finds that this claim is within the Section 8-13.1 definition of claims for which a DRB decision “will be fully binding on the Department and the Contractor . . .”

Overhead, Profit, Interest, Bond Premium

FDOT has not contested TFSC’s claim that it is entitled to overhead and profit at 17.5%, simple interest at 6.32%, and bond premium at 1.5%.

DECISION

FDOT-Requested Rebate

The DRB determines that FDOT should not receive any rebate for lane rental or reduction in work due to being directed to perform grinding and grooving before bridge opening..

Possibility of Reduction of Supplemental Change Order Agreement #29

The amount in Supplemental Agreement #29 will not be reduced.

Impact

TSFC is not entitled to any compensation for impact due to the August 29, 2006 directive.

Burden – Workmen’s Compensation

The DRB determines that the proper burden rate is 69.87%.

Deck Cleaning

The DRB determines that FDOT shall pay to TFSC the sum of \$75,846 in compensation for additional deck cleaning required to comply with the August 29 directive. This amount includes overhead, profit, and bond premium.

Binding Decision

In accordance with Section 8-13.1, this decision is deemed to be binding on the Parties.

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, P.E.
DRB Chairman

Robert J. Robertory, Esq.
Member

Thomas B. Terpening, P.E.
Member

Date