

Florida Department of Transportation  
Eric Benson, Resident Engineer  
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Panhandle Grading & Paving, Inc.  
Attn: Mike Long  
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August 28, 2010

**RE: BOARD FINDINGS - Regional Dispute Review Board Hearing  
FPID: 220412-6-52-01; Contract: T3311  
SR 281 (Avalon Blvd.) from N of CSX R/R to S. of Commerce Rd.**

**Date of Hearing:** August 26, 2010  
**Hearing Venue:** Milton Operations Center, Milton, FL

#### **Issue Summary**

The issue before the Board involved a dispute as to whether the Contractor is entitled to compensation and compensable days related to the abnormal weather event which occurred on the project site on December 2, 2009. The weather event included an unusual volume of rain that overwhelmed the project's erosion control and drainage systems washing over 1000CY of placed and compacted embankment out of its intended location, down a hill, and over two active railroad tracks owned by CSX Transportation, Inc.

The parties were unable to resolve the issue and requested the Regional Dispute Review Board to schedule a hearing, which was held August 26, 2010 at the Milton Operations Center. The Parties submitted position papers and rebuttals to the Board prior to the hearing. Both parties made oral presentations to the Board.

#### **Owner's Position**

Risk management is defined as the identification, assessment, and prioritization of risks followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events. Insurance is a form of risk management primarily used to hedge against the risk of a contingent, uncertain loss. Specifically, Liability Insurance is to protect the insured from risks and liabilities imposed by lawsuits and similar claims. These risks may include property damage caused by direct or indirect actions of the insured.

Section 7-13.2, *Contractors' Public Liability and Property Damages Liability Insurance*, of the Florida Department of Transportation Standard Specifications for Road and Bridge Construction states that the Contractor will furnish evidence to the Department that, with respect to operations performed, regular Contractors' Property Damage Liability Insurance providing a limit of not less than \$50,000 for all damages arising out of injury to, or destruction of, property in any one occurrence and, subject to that limit per occurrence, a total (or aggregate) limit of \$100,000 for all damages arising out of injury to, or destruction of, property during the policy period is carried. This section also states that the Department is an additional insured party on the Contractor's Public Liability and Property Damages Liability Insurance policies that insure the Contractor for the described work that it performs under the Contract.

Panhandle Grading and Paving (the Contractor, PGP), Hatch Mott MacDonald, the CEI consulting firm, HMM), and the Department all recognized the potential erosion issues related to existing storm water runoff and the construction of the proposed embankment. As such, HMM and the Department worked directly with PGP for innovative ideas to deal with storm water runoff. The Department expended in excess of \$10,000.00 in erosion control and temporary drainage features to enact measures proposed by PGP. The Department did entertain the Contractor's proposal for whole scale installation of silt savers on all inlet tops, but due to budgetary considerations elected to proceed with

the erosion control devices as provided for in the original Contract (i.e. staked synthetic hay bales and silt fence). It is unclear as to whether or not the use of silt savers would have prevented the catastrophic failure of the embankment, as silt savers have also been known to restrict flow into the structures when clogged with debris. However, the decision to not compensate PGP for use of silt savers did not preclude the Contractor from utilizing this type of device at their option.

The excessive event combined with the displaced synthetic hay bale which clogged the drainage structure created an event beyond the control of the Department.

The Department finds no merit for entitlement or quantum related to the claims presented to date related to the reclamation of the embankment and restoration of the CSX property.

### **Contractor's Position**

Although the Contractor recognizes that a storm of this magnitude constitutes an "act of God," they do not feel that they should bear the total brunt of associated costs of the event of December 2, 2009. It is also their stated opinion that the Department had the responsibility to address the conditions that led up to the loss of sediment, which ended up down the embankment and across the CSX right-of-way, and should have taken the necessary steps to prevent it.

Further, being that they (the Contractor) were under the direct supervision of the Department, and were being directly instructed on what additional actions to undertake, they contend that the Department was responsible for the conditions that contributed to the issue at hand. Their position is that they could only do as much as the Department would pay for.

The Contractor provided 15 Reference Documents and approximately three pages of explanatory text to support their position.

### **Board Findings**

The second paragraph of Subsection 120-11, "Maintenance and Protection of Work," found in the Special Provisions for this project instructs the prime Contractor to "Maintain all earthwork construction throughout the life of the Contract, and take all reasonable precautions to prevent loss of material from the roadway due to the action of wind and water" and to "Repair, at no expense to the Department, except as otherwise provided herein, any slides, washouts, . . . , or other mishap which may occur prior to final acceptance of the work," and finally to "Perform maintenance and protection of earthwork construction in accordance with Section 104."

As for Section 104, the first paragraph of Subsection 104-6.2, "Incorporation of Erosion Control Features," beginning with the second sentence instructs the prime Contractor to "Use approved temporary erosion control features to correct conditions that develop during construction which were not foreseen at the time of design, to control erosion prior to the time it is practical to construct permanent control features, . . . ."

Section 7-14, "Contractors Responsibility for Work," in the *Standard Specifications for Road and Bridge Construction (2007)* instructs the prime Contractor, "Until the Department's acceptance of the work, take charge and custody of the work, and take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever, arising either from the execution or from the nonexecution of the work. Rebuild, repair, restore, and make good, without additional expense to the Department, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance, except that in case of extensive or catastrophic damage, the Department may, at its discretion, reimburse the Contractor for the repair of such damage due to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, of the public enemy, or of governmental authorities."

Both parties agreed that the rain event was an "act of God," and the Board detected no negligence on the part of either party. However, under questioning from the board, as well as in their pre-hearing submittals, both parties agreed that the possibility of this eventuality (the failure of the erosion and drainage system, and even the material ending up down the embankment and on the railroad tracks) was not unforeseen by either party, and that the two parties had discussed the possibility of such an occurrence on more than one occasion..

Under further questioning by the Board, the Contractor seemed to be only willing to make significant adjustments to the erosion control and drainage systems that they could convince the Department to pay for, though they did make minor changes. They then admitted that they did not give any appreciable thought to how the generic Erosion Control Plan provided by the Department could be improved, or adjusted to better fit the methods and chronological processes that are unique to how they, as prime Contractor, would approach and execute this project. Also, the text of Section 7-14 is clear that the Contractor is compelled to "rebuild, restore," etc., but that the Department is not compelled to reimburse the Contractor for the work in that the use of the word "may" insinuates the alternative "may not."

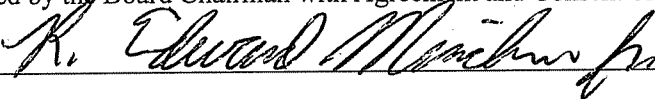
Based on the information presented, the Board finds no entitlement to additional compensation for the Contractor.

Respectfully Submitted,

Regional Dispute Review Board, District Three

R. Edward Minchin Jr., RDRB Chairman  
Glenn N. Ivey, RDRB Member  
Louis W. Songer, RDRB Member

Signed by the Board Chairman with Agreement and Consent of all

  
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