December 9, 2017

Owner
Florida Department of Transportation
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Contractor
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RE: BOARD FINDINGS - Dispute Review Board Hearing
Project Nos.: 218605-6-52-01, 218605-7-52-01, 218605-6-56-01, 218605-7-56-01; Contract No: E3O54; FINs: 218605-6-52-01, 218605-7-52-01, 218605-6-56-01, 218605-7-56-01. Issues: PDA and others

Date of Hearing: November 28, 2017
Hearing Venue: Milton Operations Center, Milton, FL

Issue Summary

On April 12, 2017, the contractor, Roads, Inc. (Roads) submitted Notice of Intent to file a claim number four (NOI #4) for additional compensation for implementation of 100% Pile Driving Analysis (PDA) on the production piles to achieve the required bearing capacity on the production piles in Bents #5 and #6. On July 26, 2017, Roads, Inc. submitted NOI #9 to seek additional compensation for implementation of 100% Pile Driving Analysis (PDA) on the production piles to achieve the required bearing capacity on the production piles in Bents #1, #2 and #3. Roads claimed that, based on geotechnical reports provided by the owner, they did not expect to have to use the PDA, and thus did not bid the job to include the PDA; therefore, their having to employ the PDA was "unforeseeable work".

The owner, the Florida Department of Transportation (FDOT) found "NO ENTITLEMENT" because this was (is) a design-build (D-B) project and by execution of that contract, Roads specifically acknowledged and agreed that they were contracting and being compensated for performing adequate investigations of existing site conditions sufficient to support the design developed by the D-B firm (Roads) and that any information provided by FDOT was merely to assist Roads in completing those site investigations. FDOT goes on the state that the use of a PDA by a contractor in the course of driving bridge piles is common and therefore not unforeseeable.

The initial NOI's were both for additional PDA testing only, but the issues grew as time went along and the NOIs were never updated. When this was pointed out during the hearing, the Contractor stated that there had been many discussions including some at Progress Meetings where all costs for additional piling length, testing, restrikes, etc, had been part of the discussion of additional cost and at no time did the CEI ask for a revised NOI, and at no time did Roads offer one. The CEI and the Department representative agreed during the hearing that regardless of the specific language of the Contractor's reservation of rights, the Board was to consider the positions of both parties in full, not just additional PDA testing. This we have done.

Contractor's Position

Based on their Position Paper, their written Rebuttal, and statements in the hearing, Roads' position consists of the following **Arguments**:

1. Based on geotechnical reports provided by the owner, they did not expect to have to use the PDA, and thus did not bid the job to include the PDA; therefore, their having to employ the PDA was "unforeseeable work".
2. Division 1, Section 4-1 states that "In the event that unforeseeable work is provided for in the contract, such work shall be paid for in accordance with 4-3.2"
3. The terms and conditions of the contract stated in the RFP include *Volume II, Special Provisions* (SPs) *455 Structure Foundations.* Within this SP is a list of allowable methods for achieving the required Nominal Bearing Resistance (NBR) during pile driving operations. These methods are provided due to the high likelihood that the contractor will encounter unforeseeable work while performing the pile driving operations. Therefore, Roads was led to the reasonable conclusion that if it was necessary to implement the unforeseeable work outlined in the SPs, then payment for this unforeseeable work would follow the procedure outlined in Division I, Section 4, Scope of Work 4-1, *Intent of Contract.*
4. Roads accepts that it is solely responsible for all geotechnical aspects of the project. Roads met their responsibilities for identifying and performing any geotechnical investigation, analysis and design of roadways, foundations, foundation construction, foundation load and integrity testing, and inspection dictated by the project needs in accordance with department guidelines, procedures and specifications. Those responsibilities were met by Roads through the performance of an independent geotechnical investigation of the in-situ soils located within the footprint of the proposed bridge that included three soil borings.
5. Roads used the entire SP, including Section 455 *Structure Foundations* as guidelines for constructing the foundation for the bridge. FDOT created a confusing environment when it chose to include SPs as part of the RFP without

providing clarification as to which specific sections of the SPs would apply to the project, and which specific sections of the SPs would not apply to the project.

Owner's Position

The position of FDOT is based on the following **arguments**:

1. The RFP and D-B Division I Specifications clearly define the contract as a fixed time and fixed price contract and that pay adjustments shown in the contract documents shall not apply, with the exceptions as defined in Specification 9-2 *Scope of Payments*. Specification 9-2 provides only for adjustments for fuels and bituminous materials exceeding a set percentage above/below the index (fuel and bituminous), deficiencies and for material quality.
2. The D-B firm has the sole responsibility for determining the existing conditions, selecting the foundation type and all dimensions of the pile. In short, Roads is solely responsible for all geotechnical aspects of the project (RFP, Sec. V.C-1). Therefore, any confusion regarding the foundation is the responsibility of Roads.
3. The use of the PDA was Roads' choice. Section 455-5.10.6 states that when the bearing capacity of any pile is less than the required capacity, the D-B team can also splice, extract-and-drive-a-longer-pile, or drive additional piles. Roads chose the PDA option.
4. FDOT rejects the notion that use of the PDA was unforeseeable work, since it is listed as a method for determining pile capacity (Section 455-5.11).

Board Findings

Each argument will be answered in order, beginning with the arguments made by **FDOT/Stantec** (see **Owner's Position** above).

Argument No. 1. The Board agrees with FDOT's interpretation of this Specification.

Argument No. 2. The Board agrees with FDOT's interpretation of the law as applies to D-B contracting. If a D-B contract calls for the D-B team to take on those responsibilities, the responsibility is patent. The language in this contract is clear on this point.

Argument No. 3. The Board agrees with FDOT's interpretation of this Specification. This also weakens the contractor's position of claiming "unforeseen work."

Argument No. 4. The Board agrees with FDOT's interpretation of this Specification.

Next, the arguments made by **Roads** will be answered (see **Contractor's Position** above).

1. The Board rejects the Roads claim that having to use the PDA was unforeseeable work. Section 455-5.11.4 specifically speaks to the use of the PDA for the specific purpose for which it was used on this project. This position is strengthened by Roads' own **Argument No. 3** above, where they point out that "These methods are provided due to the high likelihood that the contractor will encounter unforeseeable work while performing the pile driving operations." One of the methods provided was the PDA.
2. See No. 1.
3. The Board agrees that use of the PDA was a reasonable method for Roads to use to meet the requirements of the contract documents listed by Roads.
4. The Board disagrees with the contention that "the performance of an independent geotechnical investigation of the in-situ soils located within the footprint of the proposed bridge...." constitutes Roads completely satisfying the "responsibilities for identifying and performing any geotechnical investigation, analysis and design of roadways, foundations, foundation construction, foundation load and integrity testing, and inspection dictated by the project needs in accordance with department guidelines, ... etc." The Board sees this as more of a good faith effort on the part of Roads to meet those responsibilities. The contract is clear that the D-B team is responsible to do whatever it takes to meet the requirements of the foundation design and construction.
5. The Board agrees that FDOT created a confusing environment when it chose to include SPs as part of the RFP without providing clarification as to which specific sections of the SPs would apply to the project, and which specific sections of the SPs would not apply to the project. This is the crux of the Board's ultimate decision. There is a general rule that a court will construe ambiguous contract terms against the drafter of the agreement. See Herbil Holding Co. v. Commonwealth Land Title Ins., 183 A.D.2D 219, 590 N.Y.S.2d 512 (2d Dep't 1992), which states that "[An ambiguous] contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language". This is the law, and has many precedents.

The Board believes that FDOT lost this claim/case when the Contracting section decided to insert the entire 455-D-B specification into the RFP, along with the SPs and Technical SPs. Division I, *General Requirements and Covenants* offers a governing order of documents under Section 5-2, *Coordination of Contract Documents.* The Top Three documents in order of precedence are:

1. RFP
2. SPs
3. Technical SPs

The problem in this contract is that Documents No. 2 and No. 3 are embedded into Document No.1. FDOT's Argument No. 1 above states, "The RFP and D-B Division I Specifications clearly define the contract as a fixed time and fixed price contract and that pay adjustments shown in the contract documents shall not apply, with the exceptions as defined in Specification 9-2 *Scope of Payments*. Specification 9-2 provides only for adjustments for fuels and bituminous materials exceeding a set percentage above/below the index (fuel and bituminous), deficiencies and for material quality." This is undeniable on its own; but it conflicts with Section 455 – D-B. When one checks Section 5-2 of Division I to settle the conflict between the two documents, the Order of Precedence renders no answer because, since both documents are embedded into the RFP, the two have equal standing. This supports Roads' argument on this critical point.

FDOT Contracting personnel could have avoided this conundrum in any number of ways. They could have not included Section 455 – D-B in the RFP at all; if, as they stated in the hearing, they wanted to assist Roads with the design and construction processes by including Section 455 – D-B, with its many helpful instructions and processes for foundation design and construction, it could have included the specification, but struck through the sub-sections that addressed payment. This would have prevented any reasonable assumption by Roads that they would be paid for the PDA, or the accompanying work, additional piling length, testing, restrikes, etc.

It should be noted that the Board agrees with all FDOT arguments as listed, while only agreeing with two of the five arguments as listed from Roads. However, the Board found the contract confusing, and, by law, that over-rides all the other project-specific arguments. The Board finds that the field personnel of both parties have done an excellent job in the prosecution of the work on this contract. Both sides have made wise decisions, given the contract with which they have to work.

Recommendation

The Disputes Resolution Board for the above-captioned project recommends ENTITLEMENT for the issues included in NOIs #4 and #9. This includes the list of issues as agreed to by the parties during the course of the hearing.

Respectfully Submitted,

Dispute Review Board
Dr. R. Edward Minchin Jr., P.E. - DRB Chairman
Jim Weeks, P.E. - DRB Member
Tom Shafer, P.E. - DRB Member

Signed by the Board Chairman with Agreement and Consent of all

R. Edward Minchin Jr.