

DISPUTES REVIEW BOARD RECOMMENDATION

January 29, 2004

Mr. Bryan Estock, P.E., Project Resident Engineer
Parsons Brinckerhoff Construction Services
2633-B Mahan Drive
Tallahassee, FL 32308

Mr. Behzad Ghazvini, President
SANDCO, Inc.
2811-E Industrial Park Drive
Tallahassee, FL 32301

Re: DOT Job No. 55020-3533
Financial No. 219804-1-52-01
S. R. 10 (US 90) From Capital Circle to Dempsey Mayo Road
Contract No. 20943
Leon County

Subject: Project Disputes Review Board Recommendation on Claim Package Submitted
by SANDCO, Inc. per letter of December 20, 2002 and Final Estimate
Discrepancies submitted by SANDCO per letter of August 15, 2003.

Gentlemen:

On May 8, 2001, at the request of the Contractor, Sandco, Inc., the Project Disputes Review Board (DRB) conducted a hearing to consider the subject dispute. Prior to the hearing SANDCO and Parsons Brinckerhoff, who represented the Department of Transportation in this matter, submitted documents to the DRB and during the hearing both presented testimony and documents.

The following persons were at the hearing representing SANDCO and the Department:

Steve Ghazvini	SANDCO
Robert Myrick,	SANDCO
Rod Moeller	SANDCO
Gabriella Corbin	DOT
Lori Kietzer	DOT
Archie Montgomery	DOT
Bryan Estock	Parsons Brinckerhoff Construction Services

DISPUTE:

The dispute to be heard is over claims issues submitted with SANDCO letters dated October 30, 2002 and December 20, 2002 and Final Estimates Issues submitted with the SANDCO letter dated August 15, 2003.

There are six claims and seven Final Estimates Issues, each of which is addressed separately below.

In accordance with the DRB Specification included in the contract, since the parties did not agree to the Board hearing monetary damages, the Board dealt only with matters of entitlement during this hearing.

CLAIMS

GENERAL STATEMENT

The DOT position paper makes reference to sub-article 5-12.7 of the Special Provisions which requires the Contractor to keep daily records of all labor, material and equipment costs incurred for operations affected by items covered by a notice of intent to file a claim or extra work or delay. They contend that, because of failure to provide such records to the Engineer, the Engineer was not afforded the opportunity to keep strict account of the work on which the claim is based per Sub-article 5-12.2.

The Department position paper at several locations cites Sub-article 5-12.3 of the Special Provisions which covers the minimum information required to be submitted with the Contractor's written claim. The Department contends that in view of lack of this information, the claim was not properly submitted.

In accordance with the record, SANDCO submitted a certified claim on December 20, 2002. The Department then began a review of the claim, including an audit of the claim in accordance with Sub-article 5.12.14 of the Special Provisions.

In a letter dated August 15, 2002, SANDCO contended that the Department had ignored their request for additional compensation and added to the dispute some Final Estimate Discrepancy issues. SANDCO also requested that the Disputes Review Board be assembled as soon as possible.

In a letter of August 15, 2003, the Department notified SANDCO they had completed a review of all claims submitted by SANDCO, including an audit and can find no basis for payment on any of the issues presented. They stated that they were now willing to proceed by presenting the issues to the Disputes Review Board.

The Board finds that the Department did not attempt to apply the aforementioned provisions of Article 5-12 of the Special Provisions until it presented its position paper on October 23, 2003. If the Department recognizes these as valid rebuttals to SANDCO's claim, it would appear that the Department should have brought them forward before expending the extensive effort to audit SANDCO's records and prepare a comprehensive position paper.

The Board recommends that, in view of the excess time that elapsed between the presentation of a certified claim and the Department bring forth that Article 5-12 might apply here, Article 5-12 should not be applied in resolving the disputes.

WORK RESTRICTIONS RELATED TO FOOTBALL WEEKENDS

3 DAYS HOME OFFICE O/H AND M OF T \$4,405.05 + 3 CD TIME EXTENSION

CONTRACTOR'S POSITION:

We had planned to begin work in addition to erecting signs on Friday, August 29, 2000, Contract Day No. 1. The Department would not allow us to perform work other than erecting some signs during that weekend because there was an FSU home football game that weekend.

This action apparently was based on Plan Note No. 6 in the General Notes–Traffic Control Plan which reads in part: “Lane closing shall occur only during non-peak hours or on non-event weekends. . . The ENGINEER may adjust lane closure time if conditions warrant. No work shall be performed during FSU/FAMU home football games.”

We contend that the contract does not allow the Department to suspend our operations on football weekends.

We are claiming a time extension in the amount of three calendar days and additional Maintenance of Traffic Costs and Home Office Overhead for those three days.

DEPARTMENT POSITION:

SANDCO’s interpretation of Plan Note No. 6 is not a reasonable one.

Later SANDCO was allowed to work on football game weekends as long as traffic was not impacted.

DRB FINDINGS:

The last sentence in Plan Note No. 6 is ambiguous because it is subject to difference in interpretation. It could easily be interpreted to mean that work restrictions apply only to the period during which a game is underway.

It appears that neither the Department nor SANDCO recognized this ambiguity at the beginning of work. Thus, in the Work Plan dated 10/5/00, neither party appeared to realize there was a discrepancy. Later on the Department allowed work on football weekend provided that there were no lane closures in effect.

The project records do not state that SANDCO was prohibited from working on Friday, August 29, 2000. Nevertheless only minor incidental work was done that day. On Monday, September 1, 2000 work began on clearing the East Pond, a critical work item.

DRB RECOMMENDATION:

The Board recommends that the Department consider recognizing the three calendar days in dispute here as a Department caused delay.

PROCTOR’S DRIVEWAY

53 Days Home Office O/H and M of T plus extension of the Allowable Contract time. The 53 day period is from May 3, 2002, (The date of final acceptance per DOT) and June 25, 2002, (The date on which SANDCO says they were officially released from the job)

CONTRACTOR’S POSITION:

During the first year of work on the job, SANDCO was contending that there were extensive deficiencies in the design of the driveways on the job. In August 2001, the Department finally addressed this issue.

On September 22, 2001, as ordered by the Engineer, we completed construction of a driveway

entrance to Proctor Motors to match the existing pavement at the right of way line. The plans showed a construction easement extending out from the right of way line. Thus, the driveway was constructed on a steeper slope than if built to match the existing pavement at the back of the easement. At other locations where an easement was shown, driveways were constructed to the back of easement.

When auto haulers attempted to traverse from Mahan Drive into the Proctor parking lot, they drug, forcing the haulers to be unloaded on Mahan Drive.

On March 15, 2003, the Engineer instructed us to correct the driveway.

The Engineer directed us to reconstruct the driveway in accordance with the original plans and requested that we submit costs.

On May 3, 2002, all work had been satisfactorily completed except for reconstruction of the Proctor driveway. We had not received detail plans for construction of this driveway and agreement had not been reached on the amount of compensation. Between May 3, 2002 and June 25, 2002, negotiations were underway in regard to plans and costs. During that time interval, we made a cost proposal which was not accepted by the Department.

Ultimately on June 25, 2002, the Department decided to withdraw their instruction to rebuild the driveway and back date the acceptance of the project until May 3, 2003. This action by the Department caused our risk and certain job related costs to be extended.

We are requesting that 53 Calendar Days be added to the Allowable Contract Time and that we be compensated for unforeseen additional Maintenance of Traffic costs and Home Office Overhead.

DEPARTMENT POSITION:

At the time the Engineer directed SANDCO to correct the driveway configuration, it had been constructed to meet FDOT Standards for commercial driveways, but the low clearance car carriers drug against the pavement.

SANDCO requested that they be allowed to attempt to correct the driveway profile problem at the time the Friction Course was placed on the roadway. This was not successful.

SANDCO scheduled the reconstruction work, but then submitted a proposal to do the work. The Department was not willing to accept this proposal, but on June 17, 2002 again directed SANDCO to do the work with work to be done under unilateral payment. By refusing to perform the work in accordance with the Engineer's direction, SANDCO was in violation of Section 8-9 of the Specifications.

DRB FINDINGS:

It is not certain why this driveway was constructed to terminate at the right of way line, but no evidence was submitted to indicate that this was SANDCO's decision. It is apparent that prior to May 3, 2002 there was considerable controversy over the driveway configuration among all parties involved, including the property owner. It appears that the agreement for unilateral payment mentioned in the Department letter of dated June 17, June 17, 2002 never reached SANDCO.

DISPUTES REVIEW BOARD RECOMMENDATION
CLAIM PACKAGE SUBMITTED BY SANDCO, INC.
PER LETTER OF 12/30/03

The project could have been accepted on May 3, 2002, had it not been for the Department's decision to add driveway reconstruction work. However, between May 3, 2002 and June 25, 2002 the parties could not reach agreement on the plans and payment for this work.

The Board finds that each of the parties to the contract bears responsibility for the delay in acceptance of the project.

DRB RECOMMENDATION

The Board recommends that SANDCO is due some additional compensation for this claim.

Compensation should be made for additional Maintenance of Traffic costs as claimed which should cover the actual additional Maintenance of Traffic costs and any additional administrative costs incurred by SANDCO.

No extension of the Allowable Contract time should be granted, because the days in dispute occurred after the date of acceptance (May 3, 2002).

No compensation should be made for Home Office Overhead. Sub-article 5-12.6.2.2 of the Special Provisions provides for compensation for Indirect Impact Delay only when Calendar Days are granted due to a delay of a controlling work item caused solely by the Department.

SIGNAL POWER

\$ 2,470.74 54 Meters Additional Conduit and Standby Time

When the signal subcontractor completed the signalization work he was advised that a meter could not be furnished in the location he requested because of changes in the COT electric system within the project limits. This required an extension of the signalization conduit. When the subcontractor arrived on the job to connect to the meter, it was not ready and he was on standby for several hours.

During the course of the Hearing SANDCO agreed to withdraw this claim provided that the final pay quantity for conduit is increased by 12 meters from the quantity shown in the tentative final estimate.

THERMOPLASTIC REMOVAL

\$39,990.00 PLUS \$7,613.40 (INTEREST AT 13% +/- PER 9-10 FS) 337.141

CONTRACTOR'S POSITION

SANDCO was required to remove Thermoplastic Striping from the existing pavement as each phase of the Maintenance of Traffic was implemented. It is our position that compensation for removal of all existing thermoplastic pavement markings is to be paid for under Pay Item No. 2711-7--Pavement Marking (Thermoplastic)(Removal). Sub-article 108.8.1 Basis of Payment Maintenance of Traffic (General Work) the Standard Specifications states: "When an item of Maintenance of Traffic is included in the proposal, price and payment will be full compensation

for all work and costs specified under this Section *except as may be specifically covered for payment under other items*" (EMPHASIS ADDED)

The Department has paid, under Item No. 2711-7, only for markings that were removed at the beginning and end of the job where pavement markings on the existing pavement were removed solely for the purpose of reconfiguration of the markings on the existing pavement.

DEPARTMENT POSITION

It is our position that only the existing thermoplastic markings at the beginning and end of the job where existing pavement is to remain, but reconfiguration of markings is necessary are to be paid for under the Pay Item No. 2711-7--Pavement Marking (Thermoplastic)(Removal). This pay item is not shown in the summary of quantities for the Traffic Control Plan on Plan Sheet No. 100.

SANDCO removed a large part of the thermoplastic markings using a motor grader, which is not an approved method.

The Contractor's calculation of interest was not correctly done in accordance with section 5-12.5. Only if validity is found for this issue will interest for this issue be determined and only from the date on which the claim was received by the Department and deemed valid.

DRB FINDINGS

The Board finds that, even though Pay Item No. 2711-7--Pavement Marking (Thermoplastic) (Removal) appears only on Plan Sheet No. 4 (Signing and Marking Plans) there is an ambiguity in the contract documents because Pay Item No. 2711-7--Pavement Marking (Thermoplastic) (Removal) is not included in the Basis of Payment Sub-article of Section 102--Maintenance of Traffic in the Standard Specifications or in the Special Provisions nor is there a plan note specifically setting out the work covered under that Pay Item.

The Department's statement "Only if validity is found for this issue will interest for this issue be determined and only from the date on which the claim was received by the Department and deemed valid" (**Emphasis added**) requires some interpretation. It should be remembered that a considerable period of time was consumed by the Department audit and delays in analysis of the December 20, 2002 SANDCO claim.

RECOMMENDATION

The Board recommends that the pay quantity for the Pay Item No. 2711-7--Pavement Marking (Thermoplastic)(Removal) be the area of all thermoplastic pavement removed.

The Board recommends that calculation of interest be done in accordance with Subarticle 5-12.5 of the Special Provisions. Since the Department did not make a prompt decision as to validity of the claim, the date of beginning interest calculations should be shortly after December 20, 2002.

REDUCED PRODUCTIVITY

75 Days Contract Time Extension---Home Office Overhead --- M of T.

BACKGROUND INFORMATION

This claim arises from interpretation of Sub-article 8.7.1 as contained in Special Provision No. 13

in the contract and alleged inaccurate record keeping in the Department project records as they relate to “periods of reduced productivity by the Contractor’s forces due to utility relocations/adjustments.”

Special Provision No.13 reads:

“Contract time for this project includes 90 Calendar Days for periods of reduced productivity by the Contractor’s forces due to utility relocation/adjustments. These days of reduced productivity shall be reflected in the Contractor’s work progress schedule.”

No additional compensation will be made to the Contractor for periods of reduced productivity as defined above.

Interpretation of the term “reduced productivity” arose as a dispute early in the life of the work. The Board held a hearing on May 8, 2001, to deal with the matter. The Board issued a Recommendation on May 23, 2001 setting out the situations under which a utility interference with the Contractor’s operations should be considered to be “reduced productivity” and the situations under which utility interference with the Contractor’s operations should be considered to be basis for extension of the allowable contract time per Sub-article 8-7.3.2 of the Standard Specifications (a “utility delay”).

Subsequently SANDCO and the Department negotiated based on the Board’s Recommendation and reached agreement on the dispute (Notice of Claim Item Nos.1-22). A Supplemental Agreement dated January 22, 2002, was executed. This document recognized certain utility interference to be a utility delay. Also additional contract time was granted and compensation was made for holiday periods which would have been beyond the completion date if compensable utility delays had not occurred and for “gap days” between certain of the issues.

At the Hearing, SANDCO presented a tabulation entitled “Mahan Drive Concurrency Claim Review” The Department objected to this exhibit because it had not been presented to the Department prior to the Hearing. The Board decided to not consider the information contained in that exhibit.

CONTRACTOR’S POSITION

We submitted a work progress schedule reflecting days of reduced productivity we could foresee based on information contained in the plans and utility schedules included in the contract

documents.

In administering this contract, the Department initially took the position that all days on which utility conflicts occurred were “periods of reduced productivity” until the 90 Calendar Days allowed in Special Provision No. 13 were exhausted. Thus, those utility interference days which could not have reasonably been foreseen by bidders at the time of bid preparation were being considered to be “reduced productivity” instead of “utility delays.”

On October 3, 2000, we began providing notices to the Department of utility interferences that should be considered to be “utility delays” not days of “reduced productivity.”

SANDCO requested that the DRB conduct a hearing to provide an interpretation of Special Provision No. 13. A hearing was held on May 8, 2001 and the DRB issued a recommendation on May 23, 2001. SANDCO and the Department negotiated a settlement that was documented by a Supplemental Agreement dated January 22, 2002.

SANDCO contends that, because of ambiguity in interpretation of Special Provision No. 13 and Sub-article 8-7.3.2 of the Standard Specifications the Department’s project records do not accurately document utility interferences.

SANDCO claims that 75 Calendar Days of utility delay should be added to the allowable contract time. This is in addition to the 90 Calendar Days recognized as “reduced productivity” days.

In addition we claim compensation for Home Office Overhead and Maintenance of Traffic for these 75 Calendar Days. The number of Calendar Days claimed are tabulated at Section 9.24 of our Exhibit No. 9

DEPARTMENT POSITION

We have reviewed the Contractor’s submitted documentation and found several discrepancies pertaining to reduced productivity. We prepared a table showing each of the days addressed by the Contractor and how the Department Record recorded each of the days. The Contractor’s tabulation in Section 9.24 of SANDCO Exhibit No. 9 shows 75 days reduced productivity, but only 67 days are listed.

Our table shows SANDCO requested reduced productivity for days for which they have already been compensated by Supplemental Agreement, a work order or a weather time adjustment. They also requested reduced productivity days for days of reduced productivity indicated in their Work Progress Schedule.

In reviewing the Project Records, we found that the situation on 19 days of the 67 days claimed may have constituted utility interference which had not been tabulated as such.

DRB FINDINGS

Sub-article 8-7-3.2 of the Standard Specifications (Contract Time Extensions) provides:

“The Department will consider the effect of utility relocation and adjustment work on job progress as the basis for granting a time extension only if all the following criteria are met:

DISPUTES REVIEW BOARD RECOMMENDATION
CLAIM PACKAGE SUBMITTED BY SANDCO, INC.
PER LETTER OF 12/30/03

(1) Delays are the result of either utility work that was not detailed in the plans, or utility work that was detailed in the plans but was not accomplished in reasonably close accordance with the schedule included in the Special Provisions.

(2) Utility work actually affected progress toward completion on controlling work items.

(3) The Contractor took all reasonable measures to minimize the effect of utility work on job progress . . .”

Sub-article 5-12.6 (Compensation for Extra Work or Delay) in Special Provision No. 7 of the Special Provisions provides:

5-12.6.2.1 Compensation for Direct Cost of Delay:

5-12.6.2.2 Compensation for Indirect Impacts of Delay: When the cumulative total

DISPUTES REVIEW BOARD RECOMMENDATION
CLAIM PACKAGE SUBMITTED BY SANDCO, INC.
PER LETTER OF 12/30/03

Prior to issuance of the DRB Recommendation dated May 23, 2001, interpretation of Special Provision No. 13 was in dispute. Thus, there was confusion in regard to whether to record utility interference as “reduced productivity” or “utility delay.” This is likely to have influenced the accuracy of the project record.

The Engineer’s Weekly Report dated May 24, 2001 indicates that 96 Days of Reduced Productivity had accumulated.

DRB RECOMMENDATION

The Board recommends that the parties negotiate this claim based on the Board’s Findings. The Board suggests that serious consideration be given to approval of 19 days per the Department’s analysis project records and eight days recorded as “reduced productivity” in addition to the 90 days provided for in Special Provisions No. 13.

UNFORESEEN WEATHER DELAYS

54 Days Extension of Allowable Contract Time

22 Days Home Office Overhead and M of T.*

***If it had not been for the 75 days of additional Reduced Productivity and the three days Football Weekend delay, 22 inclement weather days would not have been experienced**

CONTRACTOR’S POSITION

We compiled a tabulation (See Exhibit No. 6,--Unaccounted Weather Delays) comparing the 20 weather letters issued by the Engineer between January 1, 2001 and March 26, 2002 with the corresponding Weekly Summary Reports and found that the Engineer did not accurately record the effects of inclement weather in accordance with Sub-article 8-7 of the Standard Specifications.

We contend that the paragraph in Department Adjustment of Contract Time for the Effects of Inclement Weather letter reading:

“Your company has ten (10) days from receipt of this notice to appeal the number of days granted herein. Such appeal must be accompanied by all available facts that support your

position. Failure to make an appeal or to provide the specific facts supporting your position within (1) Ten (10) days from receipt of this notice shall constitute a waiver of any rights to appeal the Department's decision at a later date."

is invalid, because the contract does not include this as a requirement.

DEPARTMENT POSITION

The Engineer made a thorough review of the project diary which showed that, on the days the Contractor states that he was impacted, most of these days the daily report clearly shows that the weather had no impact whatsoever to the Contractor's operations. The tabulation does indicate that a controlling item of work was affected by inclement weather four (4) additional days.

Each time a time extension letter was issued by the Engineer, the Contractor was given notice that he had ten (10) days to appeal the number of days granted and that failure to request an appeal or to provide the specific facts to support his appeal shall constitute a waiver of appeal rights at a later date. This is standard Department Practice. No appeal was received by the Department and no notice of intent was ever filed pertaining to this issue.

DRB FINDINGS

Sub-article 8-7.3.2 provides:

"The Department does not include an allowance for delays caused by the effects of inclement weather in establishing Contract time for this project.

The Department will handle time extensions for delays caused by the effects of inclement weather differently from those resulting from other types of delays.

The Engineer will continually monitor the effects of weather and when justified, grant time extensions on either a bimonthly or monthly basis. The Engineer will not require the Contractor to submit a request for additional time due to the effects of weather."

The contract provides that the Engineer will determine the effects of inclement weather and grant time extensions when justified. The Contractor was offered the opportunity to contest each time extension request issued by the Engineer. The Contractor failed to take this opportunity.

DRB RECOMMENDATION

The Board recommends that no additional days be granted except for the four (4) additional days during which inclement weather affected job progress as determined by the Engineer during his review of the project records.

FINAL ESTIMATE ISSUES

DEMOLITION AND RECONSTRUCTION (ADDITIONAL PAYMENT FOR WORK AT

POWELL ROAD)

This issue involved payment for the additional work associated with removing and reconstruction a section of median curb to allow access to Powell Road.

During the Hearing, SANDCO withdrew this claim.

UNDER DRAIN INSPECTION BOXES

SANDCO was seeking compensation for two Under drain Inspection Boxes that the Department deleted from the job 15 months after work began.

The Department agreed to compensate SANDCO for:

Documented Invoice Cost of the Boxes plus delivery cost billed to SANDCO by the supplier.

Handling costs for transport to SANDCO yard and to DOT yard if applicable.
NOTE: SANDCO may no longer have possession of the Boxes.

A reasonable markup.

When accomplished, this agreement will settle the claim.

LIQUIDATED SAVINGS (Per Article 8-13 of Special Provisions)

185 Contract Days at \$2,900 per day = \$536,500.00

CONTRACTOR'S POSITION

In accordance with Sub-article 8-13.1 of Special Provision No. 15, SANDCO is due an amount of \$2,900.00 for each day the project is accepted (in accordance with 8-7) prior to the allowable contract time.

DEPARTMENT'S POSITION

This issue is solely related to the addition allowable contract time claimed in the claim package submitted by the Contractor on December 20, 2002. The number of days of Liquidated Savings due is dependent on of the number of days of additional contract time is agreed to under this claim.

DRB FINDINGS

The number of days by which the allowable contract days should be extended is the actual number of days during which utility interference with the Contractor's operations exceeded those days shown in the project records as "reduced productivity" and "utility delay.

RECOMMENDATION

The Board recommends that the parties negotiate the various items of the overall claim dealing with extensions of the allowable contract time and apply Special Provision No. 15 to that number of days.

PAYMENT FOR TEMPORARY TRAFFIC SIGNAL

During the Hearing, SANDCO withdrew this claim.

OPTIONAL GROUP 9 (BUCK LAKE ROAD INTERSECTION)

During the Hearing, SANDCO agreed to the area used by the Department in calculating the pay quantity for ABC at this location. Thus the claim was settled.

DRAINAGE STRUCTURE REVISIONS

During the Hearing, SANDCO withdrew this claim.

ADDITIONAL SUBSOIL EXCAVATION (IN THE POND)

During the Hearing, SANDCO withdrew this claim.

The Board appreciates the cooperation by all parties involved and the information provided to allow us to arrive at our recommendation.

Please remember, the Disputes Review Board Specification provides that failure to respond to the Board and the other party concerning your acceptance or rejection of the Board's recommendation within 15 days will be considered acceptance of the Board's recommendation.

The Board Members certify that they have participated in all meeting of the Board regarding this matter and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board
H. Eugene Cowger, P. E., Chairman
Jimmy Lairscey, P.E., Member
Louis Songer, P.E. Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS

H. Eugene Cowger, P. E.
DRB Chairman

c: Jimmy Lairscey, DRB Member
Louis Songer, DRB Member