

DISPUTE REVIEW BOARD RECOMMENDATION

June 17, 2005

Mr. Stephen W. Potter, P.E.
Resident Construction Engineer
FDOT Panama City Construction
3633 Hwy 390
Panama City, Florida 32405

Mr. J. C. Miseroy
Area Manager
Granite Construction Company
PO Box 290757
Tampa, FL 33687

RE: Hathaway Bridge Design Build Project
Fin No: 40621415201

Subject: Hearing Dated June 14, 2005
Disputes Review Board Recommendation

Dear Sirs,

Granite Construction Company and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of a dispute involving the awarding of additional contract time as excusable but non-compensable delays. A Dispute Review Board was not in place during the performance of the project. However, at the request of the parties a Dispute Review Board was formed. A pre-hearing meeting was held on May 8, 2005 at the FDOT Panama City Construction office. Subsequently, the hearing was held June 14, 2005 at the Florida Transportation Builders Association office in Tallahassee. The parties furnished the board position papers for review prior to the hearing.

Issue: Contract Provisions for the Award of Excusable Delays

In August 2000 Granite Construction Company was the successful bidder on a Design-Build project, which consisted of the replacement of the existing Hathaway Bridge. Timely completion of the project was a priority for the FDOT. The procurement involved an A + B method in which the bidders submitted both a price and a performance time. The contract included incentive and disincentive provisions, as well as provisions for liquidated damages. The technical time bid by Granite Construction Company was 1065 days.

During the performance of the project the FDOT modified the contract time requirements by adding time extensions for circumstances that the FDOT judged as qualifying for a time extension. Granite Construction Company has requested contract time extensions for other circumstances that Granite Construction Company represents as qualifying for a time extension in accordance with the contract provisions. The FDOT has denied those requests for a time extension on the basis that the contract as interpreted by the FDOT does not contain section 8-7.3 of the Standard Specifications (1999), which is the contract provision addressing time extensions for excusable delays.

Granite Construction Company has requested that the Disputes Review Board provide a recommendation concerning whether the contract provisions provide for adjustments to the Allowable

Contract Time pursuant to section 8-7.3 of the Standard Specification (1999) with regard to imposition of Liquidated Damages (Special Provisions 41) and Disincentive Payments (Special Provisions 42).

Contractor Position

The Contractor's interpretation of the contract is that Subarticle 8-7.3 has been deleted only with respect to Incentive payments. The Contractor's position is that the Allowable Contract Time applicable to the determination of Liquidated Damages and Disincentive Payments is subject to adjustment in accordance with Subarticle 8-7.3. The Contractor's position is based in part on references to section 8-7.3 in the contract Special Provisions. The Contractor offers a number of citations of the contract in support of their position that Subarticle 8-7.3 remains applicable to adjustments in Allowable Contract Time with regard to determination of Liquidated damages and Disincentive payments. The key references are as follows:

SP 41. CONDITIONS UNDER WHICH LIQUIDATED DAMAGES ARE IMPOSED.

SUBARTICLE 8-10.4 (Page 68) is expanded by the following:

Liquidated damages will be based on the Allowable Contract Time. The term "Allowable Contract Time" as used in this Subarticle shall mean the Original Contract Time plus adjustments pursuant to 8-7.3 or for authorized suspensions of Contract Time. The Liquidated Damages Table in Subarticle 8-10.2 shall apply, based on the firm lump sum amount of the contract.

SP 42. PROSECUTION AND PROGRESS

SECTION 8 (Pages 57-59) is expanded by the following new Article:

ARTICLE 8-13 Alternative Bidding. The following new Subarticles are added:

8-13.1 Incentive – Disincentive.

Second paragraph Page 30.

For the purposes of calculation and determination of entitlement to the incentive payment stated above, the Original Contract Time will not be adjusted for any reason, cause or circumstance whatsoever, regardless of fault, save and except in the instance of a catastrophic event.

Second paragraph Page 32.

Should the Contractor fail to complete the Contract on or before expiration of the Allowable Contract Time, as adjusted in accordance with the provisions of 8-7.3 or for authorized suspensions of Contract Time, the Department shall deduct (\$10,000) for each Calendar Day completion exceeds the Allowable Contract Time, from monies otherwise due the Contractor. The term "Allowable Contract Time" as used in this Article shall mean the Original Contract Time plus adjustments pursuant to 8-7.3 or for authorized suspensions of the Contract Time.

The Contractor's interpretation of the contract is summarized as follows:

- The Contractor's time bid of 1065 days submitted with their technical proposal is the Original Contract Time and is subject to adjustment in instance of catastrophic event.
- Determination of Incentive payment is based upon the Original Contract Time.
- Determination of Liquidated Damages and Disincentive payment is based upon Allowable Contract Time.

- Allowable Contract Time is the Original Contract Time plus adjustments pursuant to Subarticle 8-7.3 or for authorized suspensions of work.

FDOT Position

The FDOT's interpretation of the contract is that Subarticle 8-7.3 was not included in the contract and is therefore not available as a contract provision. The FDOT offers the following contract citation in support of their interpretation:

SP 39. COMPUTATION OF CONTRACT TIME

SUBARTICLE 8-7.1 (Pages 63-65) is deleted and the following substituted:

8-7.1 General: Perform all work in accordance with the Contract Documents, within the number of Calendar Days submitted in the proposal or as may be extended in accordance with the provisions herein below.

SUBARTICLE 8-7.3 (Pages 63-65) is deleted.

The FDOT also makes the point in their position statement that the project completion time from conception was an overriding concern. The FDOT states that because of commitments to complete the project by the end of 2003, an allowable contract time in excess of 1245 days would be unacceptable to the FDOT. The FDOT offers the following citations from the Design and Construction Criteria and the proposal submitted by Granite Construction Company in support of their position:

SECTION I. PROJECT OBJECTIVE

Second paragraph.

The DESIGN BUILD FIRM will be responsible for completion of the project on or before the date indicated in their Proposal. The DESIGN BUILD FIRM will coordinate all utility relocations. The cost of utility relocations will be the responsibility of the utility owners.

SECTION II. PROJECT REQUIREMENTS AND PROVISIONS FOR WORK

A. Governing Regulations

9. Contract Duration

Maximum Allowable Contract Time (MCT) will not exceed 1245 days. The DESIGN BUILD FIRM will establish the contract duration for the subject project. Contract time will be continuous from the NTP to the end of the contract period to include complete utility relocation. There will be no weather time extensions, no vacation or holiday suspensions or contingencies in the schedule. The schedule supporting the proposed contract duration will be submitted with the Technical Proposal. The contract duration will include 90 days for permit processing by the DEPARTMENT.

SECTION V. BID PROPOSAL REQUIREMENTS

4. Final Selection Formula

The Selection Committee shall publicly open the sealed bid proposals and calculate an adjusted score using the following formula:

$$\text{Adjusted Score} = \frac{\text{Price Proposal} - (\text{MCT} - \text{PCT}) * \text{UDC}}{\text{TS}}$$

MCT = Maximum Allowable Contract Time (1245 days)

PCT = Proposed Contract Time

UDC = User Delay Cost per Day (\$10,000 per day)

TS = Technical Score

The firm selected will be that firm whose adjusted score is lowest.

The DEPARTMENT reserves the right to consider any proposal as non-responsive if any part of the Technical Proposal does not meet established codes and criteria. Also, if PCT is greater than MCT (1245) the proposal will be considered non-responsive.

GRANITE CONSTRUCTION COMPANY TECHNICAL PROPOSAL

Schedule

- Open WB bridge to two lanes each direction BY SEPTEMBER 1, 2003
- Open both bridges to three lanes BY MARCH 1, 2003
- Complete project BY AUGUST 1, 2003

The FDOT states that the August 1, 2003 completion date is shown in the Schedule included with the TECHNICAL PROPOSAL.

GRANITE CONSTRUCTION COMPANY TECHNICAL PROPOSAL

9E. Budget and Schedule Control

.... Attached to this proposal is a schedule that shows the time we feel it will take to build this project. We have allowed for weather impacts and other contingencies in this schedule. Close coordination between all Team members and regular schedule reviews will ensure that we meet this goal. With the overlapping experience and resources of our Team, we will mobilize additional crews and equipment if we feel that our schedule is slipping. The schedule review will be a major topic of review for the Quality Review Board.

The FDOT states that the definition of a work day was changed in the project SUPPLEMENTAL SPECIFICATIONS.

001 DEFINITIONS.

ARTICLE 1-3 (Pages 2-8) The definitions of Contract Time and Working Day are deleted and the following substituted:

Contract Time.

The number of calendar days allowed for completion of the Contract work, including authorized time extensions.

Working Day.

Any calendar day on which the Contractor works or is expected to work in accordance with the approved work progress schedule.

The FDOT's position is summarized as follows:

- Timely completion of the project was a priority for the FDOT.
- It was the FDOT's intention not to provide the Contractor with entitlement to time extensions as addressed in Subarticle 8-7.3.
- Accordingly, Subarticle 8-7.3 was deleted from the contract by SP 39.
- The provisions of the DESIGN AND CONSTRUCTION CRITERIA provide that the time schedule proposed by the Contractor will be the Maximum Allowable Contract Time and that there will be no weather time extension, holidays, vacations suspensions or other contingencies in the schedule.
- The proposal submitted by the Contractor confirms the Contractor's understanding of this requirement.

Disputes Review Board Findings

The contract language clearly provides for adjustments to the Allowable Contract Time pursuant to Subarticle 8-7.3. The specific contract language is as follows:

SP 41. CONDITIONS UNDER WHICH LIQUIDATED DAMAGES ARE IMPOSED.

SUBARTICLE 8-10.4 (Page 68) is expanded by the following:

Liquidated damages will be based on the Allowable Contract Time. The term "Allowable Contract Time" as used in this Subarticle shall mean the Original Contract Time plus adjustments pursuant to 8-7.3 or for authorized suspensions of Contract Time.

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The FDOT's position that Subarticle 8-7.3 is deleted by SP 39 and not applicable to adjustments in Allowable Contract Time disregards the above contract language. The FDOT drafted the contract

including the Special Provisions that modify the Standard Specifications (1999). Special Provision 39, 41 and 42 were all contained at the same location in the document. It is reasonable to believe that had the FDOT intended no adjustments to the Allowable Contract Time in determining Liquidated Damages and Disincentive payments, they would not have included the reference to Subarticle 8-7.3 in SP 41 and SP 42.

The Contractor's position that SP 39 only deleted Subarticle 8-7.3 with regard to adjustments to the Original Contract Time is inclusive of the contract in its entirety.

The FDOT made adjustments to the Allowable Contract Time for issues that arose during construction that the FDOT determined to have met the criteria of unforeseen conditions and for additional work added to the contract (Supplemental Agreement No. 4 and No. 10). These actions by the FDOT are consistent with the provisions of Subarticle 8-7.3.

There is no language in the DESIGN AND CONSTRUCTION CRITERIA disallowing adjustments to the Allowable Contract Time.

Disputes Review Board Recommendation

The Disputes Review Board recommends that adjustments pursuant to Subarticle 8-7.3 be considered in the determination of Allowable Contract Time with regard to Liquidated Damages and with regard to Disincentive payments. The Disputes Review Board further recommends that when addressing adjustments, both parties consider the Contractor's representation that an allowance for normal inclement weather was included in the Original Contract Time proposed by the Contractor. This recommendation does not in any way address the specific merits of any of the Contractor's unresolved request for time extensions.

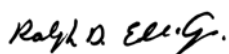
The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation. Please remember that a Boards recommendation requires acceptance or rejection within 15 days. Failure to respond to the DRB and other parties within the time frame constitutes an acceptance by both parties.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,
Disputes Review Board

Ralph Ellis Jr.– Chairman
John C. Norton – Member
Ricky Langley - Member

Signed for all with the concurrence of all members.



Ralph D. Ellis, Jr.
Chairman