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June 16, 2000

Mr. Frank Cassino
Metric Engineering, Inc.
4227 W. Pensacola St.
Tallahassee, FL. 32304

Mr. Jerry Burris
Mitchell Brothers, Inc.
1300 Aeon Church Rd.
Tallahassee, FL. 32304

Re: FN 219782-1-52-01, SR 366 (Pensacola St. Realignment)
Dispute Review Board Recommendation
High Voltage Transmission Pole Conflict
Third District
Issue # 2, Claim No. 3

Dear Sirs:

The Florida Department of Transportation (Department) and Mitchell Brothers, Inc. (MBI) requested a hearing concerning untimely inspection and testing. Summaries of the Department's and MBI's positions were forwarded to the Disputes Review Board (DRB), and a hearing was held on June 1, 2000.

ISSUE: Is MBI entitled to additional compensation for delays associated with the Department's Inspector's failure to perform density tests in a timely fashion?

Contractor's Position

MBI states in their letter dated December 18, 1998:

"Evidenced by the actions of F.D.O.T. Inspector Mr. Reginald Thomas. Common sense, sufficient skill, and experience has escaped him... He refused to take a density test for pipe backfill because a three (3') foot section of ditch had caved in on previous lift and stated, 'it was not an even lift'.

"On Wednesday afternoon, December 16, 1998, Mitchell Brothers requested that densities be taken on pipe backfill. It was not until 12:30 p.m. the following day, December 17, 1998, that two (2) densities had finally been accomplished. This resulted in a five (5) hour delay. In addition, it took from 12:30 p.m. to 2:40 p.m. to accomplish two (2) more densities for the roadway embankment which created another two (2) hour delay.

"... Mr. Thomas is argumentative, intemperate, and has done nothing to contribute in a positive manner to this project."

MBI further cited situations wherein the Department's Inspector chose to inspect other, more mundane, aspects of the project rather than concentrate on some of the more critical work categories of the work. Specific examples were the Inspector's "more than

adequate" search for Tropical Soda Apple within the hay bales utilized on the project; and physical measurement of the heights and spacing of MOT devices through out the job.

Department's Position

The Contractor notified the Department on December 18, 1998 that the lack of densities was affecting their controlling item of work. The Department denied the Contractor's claim based on four reasons:

1. Department records do not reflect that the MBI was delayed. According to the project diary the Contractor laid 6 sections of 1350 mm pipe on December 15, 1998; 14 sections of 1350 mm pipe on December 16, 1998; and placed 4 sections of 1350 pipe (along with S-140) on December 17, 1998. On the first two days (12/15 and 12/16) MBI did not place any backfill, therefore no density tests would have been required. The Department records indicate that 3 lifts were placed over the pipe on 12/17.
2. MBI's schedule indicates that drainage work (a controlling item of work) would begin on Day 40 of the Contract. The alleged delay occurred on Contract Day 26 (i.e. the contractor started the work earlier than scheduled).
3. Department records indicate the equipment was not idle.
4. Lack of proper notice per Section 5-12 of the Florida Department of Transportation Standard Specifications

DRB Findings

- During the hearing the Board questioned the Contractor whether he had any daily reports, logs, etc. to document that the alleged delay occurred.
- MBI's schedule indicated that the drainage work would not commence until Contract day 40. This evidence, by itself, **does not** preclude the Contractor from collecting idle equipment damages if these damages occur.
- The Contractor did not act in accordance with Article 5-12 of the Florida Department of Transportation Standard Specifications which states in part:

"Where the Contractor deems that extra compensation is due him for work or materials not clearly covered in the contract or not ordered by the Engineer, the Contractor shall notify the Engineer in writing of his intention to make claim for extra compensation, before he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper opportunity for keeping strict account of actual cost, then the Contractor thereby agrees to waive the claim for such extra compensation..."

Notwithstanding the above, the courts of Florida have determined in many cases that there are numerous instances where this specification does not pass muster. The Contractor did give notice the day following the alleged event. In their letter dated November 3, 1999, MBI cites:

"After further review of Claim #3, and it's [sic] supporting documents, it is apparent that

added) of the alleged actions of the I-10 Inspector, Mr. Reginald Thomas, which caused the interruption of controlling items of work flow, on the dates of their occurrence."

However, MBI did not submit any supporting documentation that confirms that Mr. Pate "had actual and constructive notice."

- The Department's records indicate that there was no impact to MBI.

DRB Recommendation

Absent any records supporting the Contractor's position (i.e. daily reports, logs, memos, etc.) the Board must rely on the supporting documentation furnished by the Department. The Board finds **no entitlement** to the Contractor's position.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in all of the meetings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board

Rammy Cone, DRB Chairman

John Coxwell, DRB Member

Jim Vest, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



DRB Chairman

CC: Tom Shafer, FDOT Resident Engineer

Jerry Burris, Mitchell Brothers