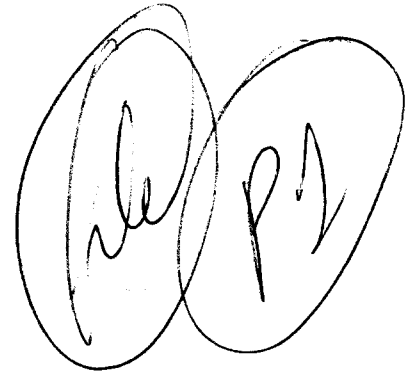


DISPUTE REVIEW BOARD
RECOMMENDATION

Two handwritten signatures are enclosed in two overlapping ovals. The signature on the left is more stylized and cursive, while the one on the right is more legible and appears to be 'P.J.'.

November 15, 2003

Mike Kanady, Project Manager
Hubbard Construction Company
2268 Indian Road, Building No. 3
West Palm Beach, FL. 33409

Eduardo Perez de Morales
The Corradino Group
321 South Dixie Highway
West Palm Beach, FL. 33401

Re: Widening and Upgrades to SR-9 / I-95 from North of Gateway Boulevard to South of 6th Avenue South
State Financial Project I.D. 231937-1-52-01
State Project No. 93220-3505
Palm Beach County

Gentlemen:

Hubbard Construction Company (HCC) and the Florida Department of Transportation (FDOT) requested this hearing be held to establish entitlement as to the payment for damages to Temporary Traffic Attenuators caused by a third party

CONTRACTORS POSITION

Widening and reconstruction of SR 9 (I-95) from South of Gateway Boulevard to South of 6th Avenue began on December 2, 2002. Since that time, Hubbard Construction has been directed by the Engineer to repair and/or replace six temporary quadguard attenuators that have been damaged by the traveling public.

Upon completion of the unforeseen work, Hubbard Construction submitted a detailed cost breakdown and requested compensation for repairs made to the damaged quadguards. Our request for additional compensation was submitted in accordance with section 544 — 4 and section 4—3.2 of the F.D.O.T. Standard Specifications.

With reference to section 544 — 4, the specification states that “Restoration of the attenuator will be paid for at the Invoice price plus 20 % for the new parts authorized by the Engineer. **Payment for restoration will be full compensation for all necessary work and materials**”. Please be advised that the restoration of the damaged attenuators was performed by Bob’s Barricades, a subcontractor to Hubbard Construction Company. Upon completion of the work, Bob’s

Barricades submitted an invoice to Hubbard Construction for the actual cost of the material plus 20 % markup as compensation for the “necessary work and materials.”

Following receipt of this invoice from our subcontractor, Hubbard Construction Company submitted our request for additional compensation in accordance with section 4-3.2 of the standard specifications. Paragraph (d) of this specification states that “The Contractor will be allowed a mark-up of 10 % on the first \$50,000 and a mark-up of 5 % on any amount over \$50,000 on any subcontract directly related to the additional or unforeseen work. A subcontractor mark-up will be allowed only by the prime contractor and a first tier subcontractor”. Paragraph (e) of this specification states that “The Contractor will receive a mark-up of 1.5 % on the overall total cost of the additional or unforeseen work for insurance and bond”.

Hubbard is entitled, per the Specifications, to mark up these costs. The Specifications are both Standard Specifications **and** one would not take precedence over the other; rather in this case, they would have to be read as one. By reading them as complementary there is no discrepancy, but would allow Hubbard its markup on the subcontractor’s work. Even if it is determined that there is a conflict in the Specifications, 5-2 Coordination of Contract Documents does not give one a governing order over the other, since they are both Standard Specifications, and in this case any ambiguity would have to be read against the marking up this item beyond it is allowed by 544-4, and Hubbard is adding its markup as allowed in 4-3. but the 20% is to cover the subs cost for labor to install the parts. They also deny the bond cost. Hubbard submits that bond cost is a premium assessed by the Surety on the additional cost of the work. It is unrealistic to believe that 20% is to cover the Subcontractor’s labor and markup, along with the Contractor’s markup and bond as well. This is completely contradictory to the markup allowances in 4-3, and is further proof that the Contractor’s markup is not included. The Owner’s interpretation on the Specification is not in keeping with what is written in the book.

While the Owner wants to submit proof that their interpretation is correct, Hubbard submits that the Owner has had the same interpretation as Hubbard and has paid the markups on other projects. This is further proof that Hubbard is correct in interpreting that the two Specifications are complementary as pointed out in section 5-2.

In summary, Hubbard Construction and our subcontractor has fully complied with the above referenced specifications while requesting compensation for attenuator restoration on the 1-95 Gateway to 6th Avenue Project.

DEPARTMENTS POSITION

The Contractor advised the Board of a dispute related to payment for the restoration of temporary Vehicular Impact Attenuators. The following is our analysis of the issue and includes all the appropriate information for the Board to make its recommendations.

Background: This contract consists of the widening of 1-95 from six (6) to ten (10) lanes between Gateway Boulevard and S. of 6th Avenue S. The work includes the widening of the 6th Avenue S. Bridge, sound barrier walls, retaining walls, drainage, roadway widening, etc. This

contract is governed by the 2000 Standard Specifications for Road and Bridge Construction. However, some of the Specifications have been modified by Special Provisions and Supplemental Specifications.

The Traffic Control Plans identified several locations where the use of Vehicular Impact Attenuators is necessary. Some of the attenuators have been damaged by third parties and the Contractor is requesting payment for the associated repairs. Section 544 of the Standard Specifications addresses payment for the restoration of damaged attenuators. (*Attachment 1*)

Contractor's request: Hubbard Construction Company is requesting payment based on Section 544 of the Standard Specification, and further requests additional mark-ups identified in Section 4.3 of the Supplemental Specifications, as follows: (*Attachment 2*)

- 1) Invoices from the subs which include parts plus 20%
- 2) Sub-contractor mark-ups and Bond per Section 4-3 of the Supplemental Specifications.
- 3) Reimbursement for MOT set-up including mark-ups per Section 4-3.2.

Specifications Review:

Section 544-4.3: This section of the specifications indicates the repair of damaged attenuators is within the Contractor's scope of work, stating: "Restore the attenuator damaged by the traveling public after the installation is completed, accepted and serving its intended purpose on an open section of bridge or roadway within 24 hours."

Section 544-4.4: This is the only specification in the contract that describes and authorizes payment to the Contractor to restore damaged attenuators. "Restoration of the attenuator will be paid for at the invoice price plus 20%, for the new parts authorized by the Engineer. Payment for restoration will be full compensation for all necessary work and materials."

Section 4-3.1: This section of the Supplemental Specifications defines "significant changes" to provide a basis for the following section (4-3.2), and states this applies only when: "(A) The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or (B) A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity...." Neither category in this section of the specifications applies to this situation, since the scope of work to repair damaged impact attenuators is defined in the contract under Section 544-3, and that scope or "character of the work" has not been changed.

Section 4-3.2 of the Supplemental Specifications: Addresses payment when "alterations in the character of the work which involve a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance.." This section does not apply, since the character of the work has not changed from that already specified in the contract under Section 544-4.3, and the method of compensation is addressed in Section 544-4.4 of the Standard Specifications.

Sections 4-3.5 of the Supplemental Specifications: States "Extra work authorized in writing by the Engineer will be paid in accordance with the formula in Section 4-3.2." This section does not apply to the repair of damaged attenuators, based on the definition of "extra work" in 1-3.

Sections 1-3 of the Standard Specifications: Defines "extra work" as: "Any 'work' which is

required by the Engineer to be performed and which is not otherwise covered or included in the project by the existing Contract Documents, whether it be in the nature of additional work, altered work, deleted work, work due to differing site conditions, or otherwise.” Also defines the Standard. Specifications as being included in the “Contract Documents.” Repairing damaged attenuators does not classify as “extra work,” since the work is specifically included in the contract by Section 544-3, and payment for the work is specifically addressed by 5-4.4 of the Standard Specifications.

The Corradino Group (TCG) Review/Interpretation: Our initial review of the specification indicated that Section 544-4 of the specifications covered “all” costs associated with the repairs, and we interpreted this to include any associated MOT costs. However, in order to ensure consistency, and based on the Contractor’s request and statements that they have been paid separately for MOT and mark-ups on other 1-95 projects, TCG requested clarification from the District. (*Attachment 3*)

FOOT Determination: The Specification requirement for compensation of attenuator restoration sets the amount which the Department will pay for the work associated with the restoration (specifically, invoice price for parts plus 20%). Any MOT necessary to restore the attenuator is to be paid separately, using existing pay items or per Section 4-3, absent pay items. (*Attachment 4*) (*Attachment 5*)

Conclusion and Recommendation:

- > Section 544-4.4 is the applicable specification and provides for the payment of repairs to damaged attenuators.
- > Section 4-3 and subsequent sub-sections do not apply and should not be used to address payment for the repairs. In order to receive payment under this section, the Contractor must meet the following criteria:
 - V Character of work as altered differs materially in kind or nature from that involved or included in the original proposed construction. (**Section 544 covers the work and payment therefore, Hubbard failed to meet this requirement**)
 - V A major increase/decrease in the contract quantities on major item of work as defined in section 4-3.1. (*This criteria is not met. since this work is not a major item of work*)
 - V Under section 4-3.5, the Contractor is entitled to be paid in accordance of the formula in Section 4-3.2 for “extra work” authorized in writing by the Engineer. . (**Section 544 covers the work and payment therefore this is not “extra work” and the criteria to apply 4-3.2 is not met**)

Based on the above, we respectfully request the Board rule that the Contractor is not entitled to the mark-ups requested, and that payment for repairing any damaged attenuators be made per Section 544-4 of the Standard Specification (invoice plus 20% for the new parts), plus any approved MOT costs associated with the repairs per Section 4-3.2 of the Supplemental Specifications or existing pay items.

CONTRACTORS REBUTTAL

Hubbard Construction Company
Rebuttal to the Departments position regarding Payment of Impact Attenuator
(Temporary)
DRB Hearing Date 12 Nov 03

The Departments position regarding payment for repair of damaged Impact Attenuators (Temporary) states that Section 544-4.3 is the governing specification for this additional and unforeseen work. However, the contract Pay Item for Impact Attenuator (Quadguard) (Temporary) is 102-89-4, which is governed by Section 102 of the specifications.

Hubbard Construction Company initially addressed this issue in 1997, on a District IV contract. We submitted to the Department for payment the cost associated with the repair of an Impact Attenuator (Temporary) damaged by a third party. The cost where presented in accordance with Specification 4-3.2, (Labor plus mark-up of 25%, Materials and Supplies plus mark-up of 17.5%, Equipment plus mark-up of 7.5%, Subcontract plus mark-up of 10%, and 1.5% mark-up on all cost for General Liability Insurance and Bond).

The Department countered stating that payment should be in accordance with section 544-4 (invoice plus 20% for the new parts). Our Subcontractor agreed to accept this as compensation acknowledging that the overall price calculated by either specification yielded similar results, further Hubbard conceded to the Department with the understanding that we receive the appropriate mark-up (10%) on our Subcontractors cost plus bond cost (1.5%) per Section 4-3.2.

It is Hubbard position that Section 544 does not govern a Pay Item designated under Section 102, further, Section 102 remains silent with regard to reimbursement for replacement of damaged Imp act Attenuators (Temporary) and therefore the cost should be compensated as additional or unforeseen work as defined in Section 4.

BOARDS FINDINGS

The Board found the Department has set precedence in District IV for the payment of repairs to Temporary Attenuators (Quadguard) when damaged by third party in a number of cases. In the previous instances the Work Order was written as Unforeseen Work and compensated the Contractor according to Section 4-3.2 of the Standard Specifications

The Department in this case states that Section 544-4.3 and Section 544-4.4 are the specifications which apply, However the Temporary Attenuator (Quadguard) is paid as item 102-89.4. Section 102 is mute as to repairs of damaged temporary attenuators. Section 544 relates to a permanent installation of an attenuator which this is not. Each section of the Standard specifications stands on its own and to apply the section relating to a permanent attenuator for repairs to a temporary attenuator is wrong.

It should also be noted the 20% markup allowed under Section 544 of the Specifications is not a profit mark-up for the Contractor but covers the labor for installing the parts by the Sub-Contractor as authorized and directed by the Department

RECOMMENDATION

The Board finds the Contractor is **entitled** to the formulas as stated in Section 4-3.2 of the Standard Specifications. The subcontractor has stated the 20% of the authorized parts is sufficient to cover the cost of installation and he would be willing to take this amount as payment in full for his work.

The Board feels that Section 544 does not apply in this case and the repair should be treated as unforeseen work as per Section 4-3 and the Contractor be compensated accordingly. The Contractor stated in the hearing that any recovery from the third party at a later date would be returned to the Department. The amount paid for this repair will be added to the total contract amount and the Contractor will be required to pay for the Bond and required Insurance for the total contract price. Therefore, the Contractor is entitled to the 1.5% bond mark-up.

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within fifteen (15) days of receiving this recommendation, the recommendation will be considered accepted by both parties.

SUBMITTED BY THE DISPUTE REVIEW BOARD

John W. Nutbrown, Chairman

Rammy Cone, Member

Jimmy Lairscey, Member

Signed for and with the concurrence of all members.

A handwritten signature in black ink, appearing to read "John W. Nutbrown", written in a cursive style. The signature is positioned above the printed name of the same individual.

John W. Nutbrown, Chairman