

DISPUTE REVIEW BOARD RECOMMENDATION

**FINANCIAL PROJECT ID. 231919-3-52-01 & 231920-2-52-01
INTERSTATE 95 (SR-9)
PALM BEACH COUNTY**

May 25, 2005

Mike Kanaday Project Manager
Hubbard Construction Company
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321 South Dixie Highway
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RE; I-95 (SR-9) Reconstruction from North Of SR-80 to North of Palm Beach
Lakes Boulevard
Palm Beach County

**Subject: Dispute over Use and Compensation of F.H.P. Officers for
Traffic Control During Lane Closures.**

The Dispute Review Board was convened for a hearing requested by the Contractor, Hubbard Construction Company regarding the payment for Florida Highway Patrol Officers used during lane closures and traffic restrictions on I-95 during hours of construction. The hearing was held in the offices of The Corradino Group in West Palm Beach, Florida on May 9, 2005 at 2:30 PM.

CONTRACTORS POSITION

Hubbard Construction Company commenced construction on FDOT Project T4032 – SR-9 (I-95) From a Pt. N. of Southern Blvd. To A Pt. N of Palm Beach Lakes Blvd. on January 3, 2005. During subsequent pre-paving meetings, the subject of payment for Law Enforcement Officers was breached.

It is Hubbard's position that there is a requirement and necessity for law enforcement within the project limits. Interstate 1-95 is a heavily traveled roadway, and the dangers to the motoring public and our workers are immense. The liability that Hubbard assumes for the safety of our workers and the motoring public is a major concern for us, and the presence of law enforcement reduces the likelihood

of the motoring public to drive with disregard to the speed limit or laws of this State. The Department has recognized these safety concerns and the necessity for speed and law enforcement in work zones, and has provided the FHP Hire Back program for accomplishing these goals. Included in our Contract with the Department are 10,999 man-hours for Hire Back Speed and Law Enforcement Officers (Attachment A).

The usage of the Hire Back Program is acceptable and is encouraged by Hubbard Construction Company. Our main interest is the safety and wellbeing of our workers and the motoring public.

The Hire Back contract is to provide Hire back Officer services for speed and law enforcement in work zones. In Agreement No. BD306 (Attachment B) between the Department and FHP, Exhibit "A" Scope of Services, the FDOT stresses implementing "an effective work zone traffic control system" to provide "for the safety and protection of both work zone workers and the motoring public through the work zone." Furthermore, this agreement stresses that "Law enforcement services provided are for the exclusive purpose of assisting FDOT to properly protect work zone personnel and affected motorists during necessary highway construction or maintenance activities." This contract between the FDOT and FHP includes and is the product of the FDOT and DHSMV creating "Guidelines for Use of Florida Highway Patrol in Work Zone Speed Control" dated March 2002. (Attachment C)

Included in these guidelines are numerous references to the safety of the motoring public, the workers, and the times and locations that require law enforcement officers to protect the motoring public and workers. On Page 3 of the Guidelines, it states that **"The Department has determined that construction or maintenance activities on freeways and other limited access facilities during night time hours that require lane closures which divert or restrict vehicular movement through work zones will require active enforcement to provide for the safety and protection of both workers, motorists and equipment."**

In direct conflict with the Department's requirements for Hire Back Officers and our Contract with the Department, The Corradino Group has stated that the Speed and Law Enforcement Officer(s)' are not required for nighttime work activities that impact the motoring public.

Given the Department and Hubbard's concern for the safety of the motoring public and our workers, Hubbard Construction Company's position is that in the event that the Department is unable to provide Speed and Law Enforcement Officers as

per the Contract, the Engineer has the authority and obligation to direct us to schedule Traffic Control Officers as per Plan Sheets 367 Note 31 Speed and Law Enforcement (231919-3-52-0 1) and Plan Sheet 236 Note 36 Speed and Law Enforcement (231920-2-52-01).

Plan Sheet 367 Note 31 (Attachment D) reads:

“The Contractor shall notify FDOT two weeks in advance and again 24 hours in advance of beginning construction activities requiring traffic control personnel in order that FDOT can coordinate with the FHP. **When directed by the Engineer or** required by the Standard Specifications for Road and Bridge Construction, **the Contractor shall provide Traffic Control Officer(s) to be used for Traffic Control or Speed Enforcement.** All costs for the Officer(s) shall be included in item 102-14. Speed and Law Enforcement Officers for Speed Enforcement shall be covered by Statewide Contract, cost included in item 999-102-1.”

Plan Sheet 236 Note 36 (Attachment D) reads:

“The Contractor shall notify FDOT two weeks in advance and again 24 hours in advance of beginning construction activities required traffic control personnel in order that FDOT can coordinate with Speed and Law Enforcement Officers. **When directed by the Engineer or** required by the Standard Specifications for Road and Bridge Construction, **the Contractor shall provide Traffic Control Officer(s) to be used for traffic control or speed enforcement.** During operations utilizing Lane Shifts B, D, or E the Contractor shall have off-duty officers at all affected signalized intersections for Traffic Control. All costs for the Officer(s) shall be included in Item 102-14. Speed and Law Enforcement Officers for Speed Enforcement shall be covered by Statewide Contract, cost included in item 999-102-1.”

In the time period since the initial conversation concerning off-duty law enforcement officers and payment, Hubbard has followed the Traffic Control Plan Notes (Attachment D) requested both verbally and in writing 14 days in advance for the FDOT to provide Speed and Law Enforcement Officers per the Hire Back contract. Included in these requests are the dates, times, and locations that require Speed and Law Enforcement Officers.

The FDOT is unable to provide Speed and Law Enforcement Officers through the Hire Back contract as per Hubbard’s requests. Hubbard also has verbally and in writing requested confirmation of the requested Speed and Law Enforcement

officers (Attachment E); to date, Hubbard has only received two confirmations from The Corradino Group regarding our requests (Attachment F). However, Hubbard has not been able to confirm the scheduled officers' presence in the work zone, with the exception of one occasion.

In summary, the Department's failure to comply with the Contract Documents and provide Law Enforcement Officers, and the Engineer's failure to direct Hubbard to provide Law Enforcement Officers as per the Plan Notes, dramatically increases Hubbard Construction Company's exposure and liability, as well as compromising the safety and wellbeing of the motoring public and the workforce. Therefore, Hubbard Construction Company is requesting compensation for providing Law Enforcement Officers for speed and law enforcement in the work zone.

DEPARTMENTS POSITION

Background

This contract includes a Pay Item No. 102-14 (Traffic Control Officers) with a plan quantity of 491 MH. The plan quantity was estimated to cover 200 MH in connection with anticipated northbound and southbound 1-95 closures for the construction of the Australian Avenue Bridge over 1-95, 150 MH for the same purpose for the Congress Avenue Bridge, and 141 MH for traffic control at signalized intersections along Palm Beach Lakes Boulevard at specific times.

On January 26^o, 2005, we advised the Contractor that the Department wants the Specifications followed to the letter on this subject and will not authorize payment for any off-duty FHP officers under Pay Item 102-14 for lane closures, or for any other purpose, other than as specifically required in the 2004 Standard Specifications, in Sections 102-7 and 102-11.2, and as further specified in Traffic Control Plan Note 36 on Sheet 236 of the plans.

In a letter on February 18th, 2005, the Contractor argued that on-duty FHP officers were not present during requested times, that Hubbard was therefore "forced" to provide off-duty FHP officers (Traffic Control Officers under P1 102-14), that they would continue to provide them "until such time as Speed and Law Enforcement Officers are confirmed as requested," and then demanded the Department pay for this Contractor-directed use of Traffic Control Officers through Pay Item 102-14.

In our letter dated February 21st, 2005, we confirmed arrangements for on-duty FHP for speed enforcement, reiterated our position that the contract does not require FHP officers to be present for lane closures, and repeated our direction unambiguously that we were not directing the contractor to provide Traffic Control Officers for lane closures and we would therefore not authorize payment

for Traffic Control Officers under P1 102-14.

In a letter dated March 2nd, 2005, the Contractor argued that on-duty FHP officers were not present enough or available enough to satisfy Hubbard, that Hubbard would continue to provide off-duty FHP officers, and that they expected to get paid for them under P1 102-14. They also asked for written direction on how to proceed in the event Speed and Law Enforcement Officers cannot be scheduled and/or confirmed as requested.”

We responded to that letter on March 3rd, 2005, with no change in our position, and stating: “We find nothing in the contract that creates a right for you to have FHP on site whenever you want them at the Department’s cost. The Contract does not require Traffic Control Officers or Speed Enforcement Officers to be present when you close a lane. You can a close a lane without them.” At this point we both agreed to take the issue to the Disputes Review Board.

Review of the Contract

Standard Specifications for Road and Bridge Construction (2004) Section 102-7 Traffic Control Officer (pg. 106) states:

- “Provide uniformed law enforcement officers, including marked law enforcement vehicles, to assist in controlling and directing traffic in the work zone when the following types of work is necessary on projects:
1. Traffic control in a signalized intersection when signals are not in use.
 2. When Standard Index No. 627 is used on Interstate at nighttime and required by the plans.
 3. When pacing/rolling blockade specification is used.

Standard Specifications for Road and Bridge Construction (2004) Section 102-11.2 (pg. 113) states in part:

“Payment will be made only for those traffic control officers specified in the Plans and authorized by the Engineer.”

Traffic Control Plans (231920-2-52-01), Sheet 236, in “Speed and Law Enforcement Notes,” Note No. 36 states:

“The Contractor shall notify FDOT two weeks in advance and again 24 Item 999-102-1.”hours in advance of beginning construction activities requiring traffic control personnel in order that FDOT can coordinate with speed and law enforcement officers. When directed by the Engineer or required by the Standard Specifications for Road and Bridge Construction, the Contractor shall provide traffic control officer(s) to be used for traffic control or speed enforcement. During operations utilizing Lane Shifts B, D or E, the Contractor shall have off-duty officers at all affected signalized intersections for traffic control. All costs for the officer(s) shall be included in Item 102-14. Speed and law enforcement officers for speed

enforcement shall be covered by Statewide Contract, cost included in item 999-102-1.

Traffic Control Plans (231919-3-52-01), Sheet 367, in "Speed and Law Enforcement Notes," Note No. 31 states:

"The Contractor shall notify FDOT two weeks in advance and again 24 hours in advance of beginning construction activities requiring traffic control personnel in order that FDOT can coordinate with speed and law enforcement officers. When directed by the Engineer or required by the Standard Specifications for Road and Bridge Construction, the Contractor shall provide traffic control officer(s) to be used for traffic control or speed enforcement. All costs for the officer(s) shall be included in Item 102-14. Speed and law enforcement officers for speed enforcement shall be covered by Statewide Contract, cost included in Item 999-102-1."

Department's Position

1. "The use of pay item 102-14 Traffic Control Officer is a discretionary item and the use of this item is strictly controlled by the Project Engineer. Prior direction and approval by the Project Engineer is required before this item may be used within the project and the Contractor compensated for the use." (I-95 Regional Disputes Review Board, April 7,2005)
2. Contract Documents do not require the Contractor to provide Traffic Control Officers for lane closures.
3. The Contractor has no right or contractual basis to contact FHP for services at the Departments expense without the Department's authorization and agreement.
4. The Department will not pay for off duty FHP officers contracted by HCI without authorization for lane closures or for any other purpose other than as specifically required by the contract and authorized by the Engineer.

The Department would like to make one additional point: This dispute is not a referendum on work zone safety. The Department is no less concerned than the Contractor about work zone safety. We may have a difference in opinions regarding the most effective means to reduce speed in our work zones, but that is not the issue before this Board. The issue is whether the Contractor has some contractual basis that entitles him to be paid for off-duty law enforcement officers whenever he wants them at the Department's cost. We find no such basis in the contract. The Department is trying to manage its resources in a responsible way on a state-wide basis through various efforts and initiatives for work zone safety that are beyond the scope of this presentation, but which should clearly indicate its commitment to improve safety in our work zones. We are hopeful that the Board will carefully review the contract and uphold the explicit terms of the contract on the issue before the Board.

CONTRACTORS REBUTTAL

Our contract with the Department has two methods for the Department to provide speed and law enforcement officers. The first is via Statewide Contract, Pay Item 999-102-1, and the second is through Pay Item 102-14 Traffic Control Officers.

TCG repeatedly states that FHP is not required to be on-site for lane closures; Hubbard's position is not regarding lane closures; our position is that the Department is not providing Speed and Law Enforcement Officers as per the Contract during construction activities that negatively impact the safety of the motoring public and the workforce. Additionally, the Engineer is failing to direct us to obtain Speed and Law Enforcement Officers as allowed the Traffic Control Notes.

Traffic Control Notes 31 and 36 offer additional means for the Department to provide Speed and Law Enforcement Officers, "When directed by the Engineer or.. .the Contractor shall provide traffic control officer(s) to be used for traffic control or speed enforcement" TCG on numerous occasions has denied Hubbard's requests for direction on the usage of traffic control officers for traffic control and speed enforcement. Hubbard's requests for direction follow and are only the direct cause of the Department's inability to provide Speed and Law Enforcement Officers via the Statewide Contract.

Hubbard is not asking for the right to schedule and request payment for Traffic Control Officers at any time that we desire them; we are asking for reimbursement for those Speed and Law Enforcement Officers that are required to be on site (per the FDOT's own requirements and guidelines), that the Department has been unable to furnish, and that Hubbard is incurring the costs from.

DEPARTMENTS REBUTTAL

The Department did not furnish any rebuttal for this hearing.

BOARDS FINDINGS.

The Contractor states the Department can pay for FHP Officers in the following manner State Wide Contract Pay Item 999-102-1 and the second is through Pay Item 102-14 Traffic Control Officer. Although the Contractor quotes from the Standard Specifications , 2004 Edition he fails to note that the use of these items requires the authorization of the Project Engineer or Resident Engineer. The Board can find nothing which would lead us to believe the Contractor can obligate the Department to pay for an item without first being authorized to do so.

Review of Standard Specification Section 102-7 Limits the use of a traffic safety officer to three specific applications and lane closures is not included. Authorization of this item must be directed and authorized by the Engineer.

Notes number 31 and 36 of the Contract Plans both state the FHP Traffic Officer is to be used as directed and authorized by the Engineer. Both of these notes are very clear in stating the use of officers is only as directed by the Engineer and the Standard Specifications.

BOARDS RECOMMENDATION

After a thorough examination of all documents pertaining to this matter the Board finds the Contractor is not entitled to, nor is the Department obligated to reimburse the Contractor for out of pocket expense relating to the unapproved use of uniformed FHP Officers for the installation and removal of lane closures in the I-95 corridor in Palm Beach County

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 the Hearings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.
Respectfully submitted,

Dispute Review Board

John W. Nutbrown, Chairman
Rammy Cone, Member
Jimmie Lairacey, Member

DRB Chairman