

DISPUTE REVIEW BOARD RECOMMENDATION

January 18, 2007

Mr. Bill Kyzer
Project Administrator
LBHF, Inc.
2222 Colonial Road, Suite 201
Fort Pierce, FL 34950

Mr. Jon Sydor
Project Manager
Hubbard Construction Company
8583 South Federal Highway
Port St. Lucie, FL 34952

RE: SR5, Rio Mar to CR 712, Fin. Proj. ID 23028825201

Subject: Hearing Dated Jan. 3, 2007
Disputes Review Board Recommendation
Issue 1: Noise Ordinance Related Suspension of Work
Issue 2: Differing Site Condition at Pond 23 West

Dear Sirs,

Hubbard Construction Company (HCC) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of two disputes. The hearing was held on January 3, 2007 at the FDOT Operations Center offices in Ft. Pierce, FL. The parties furnished the Board position papers for review prior to the hearing. The Disputes Review Board was requested only to consider the question of entitlement on both issues. In accordance with your request the following recommendations are offered.

Issue 1: Noise Ordinance Related Suspension of Work

Background

The project scope involved reconstruction, and rehabilitation of State Roads 5, US 1. Also included were drainage improvements with retention ponds. The issue occurred during the early stages of the project at which time the contractor was pursuing drainage improvements on US1. Lane closures were required and much of the work was being performed at night in accordance with the MOT plan. Pond 23 East had been cleared and was being used as a staging area for excavated unsuitable materials, backfill material, cold patch paving materials and drainage system materials. The pond area was an active work area during the night operations. Some time after night work at the Pond area had commenced, St. Lucie County officials contacted the project CEI advising that they had received noise complaints from residents adjacent to the pond work area and requested FDOT cooperation in complying with the local noise ordinance. In response, the project CEI issued a directive to the Contractor suspending night work at Pond 23 East. The issue before the DRB concerns the contractor's entitlement to compensation for what the contractor believes to be a delay to their work.

Contractor Position

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation.

Key Points

1. Night work was required
Traffic Control plans for Pre-Phase I (Drainage Stage A) contains numerous references to Note 1 – “Construct pipe in this phase using temporary detours during night time only. Repairs to open cut night work closed, compacted and covered with temporary asphalt one hour prior to peak hour for the effected roadway.”
2. Work was suspended without verification of noise ordinance violation
The department overacted and wrongfully suspended work operations with no data to verify that the county noise ordinance had been violated. No noise level measurements were made by St. Lucie County or by the FDOT prior to issuing the stop work directive.
3. HCC was denied the opportunity to implement noise abatement
During the suspended work time, the contractor was not given the opportunity to modify their work operations and implement appropriate noise abatement measures.

Summary

The FDOT wrongfully interfered with construction operations without obtaining any factual evidence to support their directive to suspend work. The suspension of work constitutes a change to the contract, and therefore HCC is entitled to an equitable adjustment.

FDOT Position

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation.

Key Points

1. Compliance with applicable laws , ordinances and regulations is required by contract
Specification section 7-1.1 requires that the contractor “become familiar with and comply with all Federal, State, County and city laws, by-laws, ordinances, and regulations that control the action or operation of those engaged or employed in the work or that affect materials used”.¹
2. Compliance with noise regulations is required by contract
Specification Subarticle 8-4.1 requires that the contractor “comply with all applicable regulations governing noise abatement”.²

¹ See FDOT Standard Specification for Road and Bridge Construction 2004, Section 7-1.1

² See FDOT Standard Specification for Road and Bridge Construction 2004, Section 8-4.1

3. Contractor's Lighting Plan states that "noise ordinances will be adhered to"
4. St. Lucie County contacted the FDOT CEI by telephone advising of resident noise complaints and requesting compliance with the county's noise ordinance
5. Suspension of Work Directive was issued by CEI to HCC
As a result of the notice from St. Lucie County, the CEI directed HCC to suspend operations at the Pond 23 East after sundown until 7:00am. This directive was communicated by Email on May 25, 2006 at 5:39pm.
6. HCC suspended its drainage installation operations and demobilized those crews without prior notice to the FDOT
HCC's drainage subcontractor was demobilized on May 26, 2006 without prior notice to the FDOT. The FDOT was not given an opportunity to resolve the issue prior to the demobilization.
7. The FDOT requested that HCC resume work at Pond 23 East on June 1, 2006.
HCC did not remobilize its subcontractor until June 18, 2006.

Summary

HCC has always had a clear contractual obligation to comply with St. Lucie County's noise ordinance regulations. HCC could have implemented minor noise abatement measures or relocated the staging area which would have allowed work to proceed. Instead they over reacted by demobilizing their drainage subcontractor.

Disputes Review Board Findings

1. HCC began night time drainage work activity on May 14, 2006 using Pond 23 East as a staging area to support the work activity. Working at night was consistent with the project MOT plan.
2. Some time after the night work began St. Lucie County apparently received noise complaints from residents adjacent to the Pond 23 East work area. There is no indication that County code enforcement personnel visited the site. However, there was testimony in the hearing that a sheriff deputy did visit the pond work area during the day shift on May 24, 2006 and advised a loader operator that noise complaints had been received. No written warnings or citations were ever issued by any St. Lucie County code enforcement personnel.
3. St. Lucie County contacted the project CEI by telephone and advised that they had received noise complaints and asked for cooperation with project compliance with the St. Lucie County noise ordinance.

4. In the interest of insuring compliance with the local noise ordinance and being a “good neighbor” the CEI issued a suspension of work directive on May 25, 2006 to HCC for nighttime activity at Pond 23 East. The text of the Email message reads as follows:³

“as per our telephone conversation this pm, you are not to work in or transport materials in the Pond 23 E area after sundown to 7:00am, due to a St. Lucie Co. noise ordinance. You can however work on the US1 pipe crossings. A ruling will be made on working at night on US1 by St. Lucie County early next week. You are reminded, as stated in your lighting plan for night work for this project that local noise ordinances will be adhered to unless a variance is issued by the governing authority.

If you have any questions please contact me. Thanks.”

5. HCC provided timely notice of their intent to request reimbursement for the delay resulting from the directed suspension of work at Pond 23 East.⁴
6. Following the suspension of work at Pond 23 East, HCC attempted unsuccessfully to obtain a noise ordinance variance from St. Lucie County. The CEI also attempted to assist in that effort.
7. After a few days and several discussions between the county and the CEI, St. Lucie County agreed that the Contractor could resume work at Pond 23 East if noise abatement measures were implemented. On May 31, 2006 the CEI verbally notified HCC that night work in the Pond 23 East area could resume with noise abatement measures. On the following day, June 1, 2006, the CEI provided formal written notice to HCC concerning the resumption of work.
8. Compliance with local noise control ordinance is clear a contractual requirement for the Contractor and is not disputed by HCC or the FDOT.
9. The St. Lucie County noise ordinance provides for maximum noise levels at the property boundary for day and night times, and different locations. The ordinance also contains specific enforcement provisions with penalties for non-compliance. Additionally, the ordinance contains procedures for requesting a variance to the noise limitations.⁵
10. HHC employed a specialty engineer to record and report on noise levels at Pond 23 East. Their consultant monitored noise levels on June 23, 2006 (after HCC has resumed work) and reported that noise levels were in compliance with the St. Lucie County ordinance. HCC represents that the work operations during the noise monitoring were representative of what occurred prior to the suspension on May 25 (backup alarms and tailgate slams). However, there is no known record of noise levels prior to the May 25 suspension. There appears to be no way to determine if HCC was in violation of the noise ordinance prior to the May 25 work suspension.⁶

³ See Email from Kyzer to Sydor dated May 25, 2006

⁴ See HCC letter No. 94 dated May 25, 2006

⁵ See St. Lucie County Ordinance No. 88-20, Part B, Chapter 1-13.8 Noise Control

⁶ See Letter from PSI to HCC dated Sep. 5, 2006

11. The Engineer is given authority to temporarily suspend the Contractor's work by specification section 8.6.1 which reads as follows:⁷

“8-6.1 Authority to Suspend Contractor's Operations: The Engineer has the authority to suspend the Contractor's operations, wholly or in part. The Engineer will order such suspension in writing, giving in detail the reasons for the suspension. Contract Time will be charged during all suspensions of Contractor's operations. The Department may grant an extension of Contract time in accordance with 8-7.3.2 when determined appropriate in the Department's sole judgment. No additional compensation nor a time extension will be paid or granted to the Contractor when the operations are suspended for the following reasons:

- a. The Contractor fails to comply with the Contract Documents.
- b. The Contractor fails to carry out orders given by the Engineer.
- c. The Contractor causes conditions considered unfavorable for continuing the Work.

Immediately comply with any suspension order. Do not resume operations until authorized to do so by the Engineer in writing. Any operations performed by the Contractor, and otherwise constructed in conformance with the provisions of the Contract, after the issuance of the suspension order and prior to the Engineer's authorization to resume operations will be at no cost to the Department. Further, failure to immediately comply with any suspension order will also constitute an act of default by the Contractor and is deemed sufficient basis in and of itself for the Department to declare the Contractor in default, in accordance with 8-9, with the exception that the Contractor will not have ten calendar days to correct the conditions for which the suspension was ordered.”

Disputes Review Board Recommendation

The Disputes Review Board recognizes the Engineer's authority to suspend work as provided in specification section 8-6.1. Furthermore, specification section 8-6.1 specifically denies delay compensation to the Contractor for three specific reasons:

- a. The Contractor fails to comply with the Contract Documents.
- b. The Contractor fails to carry out orders given by the Engineer.
- c. The Contractor causes conditions considered unfavorable for continuing the Work.

However, in this case, there is insufficient evidence to conclude that the Contractor was in violation of any of the above reasons for denial of compensation.

The Disputes Review Board finds that the Contractor is entitled to pursue an equitable adjustment in accordance with the provisions of 5-12.2.2. The DRB has not been asked to address quantification and does not offer an opinion concerning the affect, if any, of the work suspension on the Contractor's work.

⁷ See FDOT Standard Specification for Road and Bridge Construction 2004, Section 8-6.1

Issue 2: Differing Site Condition at Pond 23 West

Background

The project scope involved reconstruction, and rehabilitation of State Roads 5, US 1. Also included were drainage improvements with retention ponds. The contract documents did not provide information concerning the nature of the subsurface material to be excavated from Pond 23 West. This issue concerns whether or not the material encountered in Pond 23 West qualifies as a differing site condition as provided for in the contract documents.

Contractor Position

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation.

Key Points

1. The original contract documents provided no soil survey/boring information on the subsurface material to be excavated at Pond 23 West.
2. According to the Plans Preparation Manual, Section 17.3 Other Soil Surveys, designers are to include soil surveys/boring for retention ponds in the contract documents.⁸
3. Revision 3, issued after work had commenced, provides soil survey/boring information for stations 4+07.65 and station 16+88.11, which illustrates that the soil information was available for the original documents.
4. On July 31, 2006 Hubbard Construction Company (HCC) advised the CEI that they encountered a "dark clay" at the lower depths of the pond excavation.
5. The soil in the pond was subsequently sampled and tested. The test reports indicated the soil to be classified as A-2-4.
6. Most of the excavated material from Pond 23 West is not required for embankment in the project. Accordingly, HCC planned to sell the material and included the expected value of the material in their bid calculation.
7. HCC has been unsuccessful in finding a buyer for the A-2-4 material.

Summary

The FDOT had a duty to furnish soils information for Pond 23 West in the original contract documents. HCC planned on selling the excavated material from Pond 23 West. Much of the material has been found to be A-2-4 class material and as such, HCC has been unable to sell the material. HCC believes that this is a differing site condition and request entitlement to compensation.

⁸ See FDOT Plans Preparation Manual Vol. II, section 17.3

FDOT Position

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation.

Key Points

1. The Plans Preparation Manual is a design guide and is not a part of the contract between the FDOT and HCC.
2. Soil Survey/Boring information was not included in the original contract plans because the excavated materials were not required for embankment fill in the project.
3. Soil Survey/Boring information was added to the Revision 3 plan sheets because the pond configuration had been revised and the designer anticipated the requirement for a permit revision.
4. Soil Survey/Boring information was provided for the roadway work areas and included in the original plan sheets. A-2-4 class soil material or worse was indicated in many of the roadway soil borings.
5. Index No. 505, FDOT Design Standards, states that A-2-4 soil material may be used for embankment and/or subgrade.⁹
6. Standard Specification 120-2.2.1 states that "Roadway excavation consist of the excavation and the utilization or disposal of all materials necessary for the construction ...".¹⁰

Summary

The material is classified as an A-2-4 material that can be used for embankment, but is not even needed on the project. Standard Specification 120-2.2.1 states that "Roadway excavation consist of the excavation and the utilization or disposal of all materials necessary for the construction ...". Based on these facts, there is no basis for entitlement for additional compensation for this issue.

Disputes Review Board Findings

1. The original contract documents were silent with regard to the classification of subsurface soil material in Pond 23 West. No soil survey or boring information was provided for the subsurface material in Pond 23 West.
2. After excavation had begun, testing of samples take from the pond indicated the existence of A-2-4 soil material.
3. HCC made a pre-bid site visit but did not make any effort to verify the classification of the subsurface soil material at Pond 23 West.

⁹ See FDOT Design Standards , Index 505

¹⁰ See FDOT Standard Specification for Road and Bridge Construction 2004, Section 120-2.2.1

4. HCC represents that they assumed in their bid that the materials in Pond 23 West would be superior to A-2-4 material.
5. Soil classification information was provided for the roadway areas in the original plan sheets. A-2-4 material was indicated on many of the soil boring reports.
6. Specification Section 4-3.7 specifies the two types of conditions that qualify as a Differing Site Condition.¹¹

Type 1

“... subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract,

Type 2

“...unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract...”

Disputes Review Board Recommendation

The FDOT did not provide an indication of the materials to be found in Pond 23 West in the contract documents. Therefore, the first type of differing site condition is not applicable. Soil boring information given in the plan sheets for areas other than Pond 23 West frequently indicated the presence of A-2-4 materials. The Disputes Review Board does not find the presence of A-2-4 material at Pond 23 West to be of an unusual nature. Therefore, the second type of differing site condition is also not applicable.

The Disputes Review Board does not recommend entitlement to compensation on the basis of a Differing Site Condition.

¹¹ See FDOT Standard Specification for Road and Bridge Construction 2004, Section 4-3.7

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.

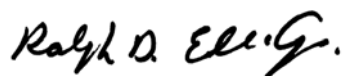
The Disputes Review Board is unanimous in its presentation of these recommendations for both issues 1 and 2.

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
Robert A. Cedeno – Member
Dallas L. Wolford - Member

Signed for all with the concurrence of all members.



Ralph D. Ellis, Jr.
Chairman