

Dispute Review Board
Dallas L. Wolford Chairman
387 Winsford Ct.
Heathrow, Florida 32746

PBS&J

SEP 18 2008

SR60
FDOT DISTRICT 4

Teresa Driskell, P.E.
Senior Engineer
PBS&J Construction Services Inc
9055 Americana Rd. Suite 24
Vero Beach, Florida 32966

September 18, 2008

Aaron Watts
Division Engineer
Elmo Greer & Sons LLC
16505 State Route 60
Vero Beach, Florida 32966

Re: Rebuttal Paper (Coquina Rock Area-Wide Shortage – Entitlement Only time)
Financial Project Nos.: 22859815201, 22859915201, 22860115201
Federal Aid Project Nos: 2004042P, 200443P, 2004038
Contract No: T4003
County: Indian River
Description: SR60 from 1.02km east of the Osceola/Indian River County line to 4.52km west of CR512

Dear Madam/Sir

A DRB Hearing was held on September 9, 2008 which was a continuance of a Hearing held July 23, 2008. EGS in their presentation of their position with regard to a Coquina Rock issue used a power point presentation in which the FDOT said differed from the position papers presented originally for the Hearing. FDOT asked for a continuance until they could do an analysis of the power point presentation differences. The other issues of dispute were also postponed to a new Hearing date of September 9, 2008.

The FDOT issued a rebuttal to EGS position papers on July 18, 2008.

EGS requested a hearing on March 28, 2008 requesting Entitlement to contract time due to an area-wide shortage of FDOT base material (Entitlement Only Time).

EGS cites article 8-7.3.2 ("Contract Time Extensions").

CONTRACTORS POSITION

EGS has furnished substantial letters from a representative number of material suppliers which state there is a shortage of sub-based materials for the project.

90.9
ac

1013

1. They used historically reliable reputable sources of material to bid the project.
2. Some pits that were to be used by EGS were bought by other suppliers but were closed due to material not meeting the FDOT specifications. (Waivers were received from FDOT with regard to screening & chemical analysis of the material and the material was used as soon as it was approved (Ft. Drum – closed approx. 2 years due to FDOT specifications).
3. Materials from other pits approved by FDOT was taken on a first come first serve basis and demand created a shortage.
4. Contractor claims Coquina Rock is unsuitable for stock piling due to break down of fines in handling and will not then pass FDOT specs.
5. In an effort to help with supply of rock EGS tried to set up their own pit operations but permitting was difficult and time consuming. There never was enough permitted area to operate a successful pit allowed by the authorities.
6. Contractor got material (lime rock) by rail to help out that had to be trucked 67 miles from the unloading point.
7. EGS claims time was given to 2 other contractors with regard to area-wide rock shortage during this same time period.

FDOT POSITION

1. There is no shortage of rock.
2. Base construction activities were not critical at the time rock was not available from local pits and therefore did not impact the contract completion.
3. The contractor did not try to get material from other than Coquina pits. Rock was available and the only reason the Contractor hasn't gotten it is because of price.
4. The "area" in "area-wide" with regard to base material is at least Central Florida Supplemental Specification 8-7.3.2 has been implemented in the past where an area-wide shortage of material has been identified. Areas have been and continue to be defined as "entire Department Districts, Regions, i.e. Central Florida and Florida as a whole."
5. Did not consider material other than Coquina Rock for base, i.e. limestone.
6. The contractor failed to stockpile material.

DRB FINDINGS

Elmo Greer and Sons has used proper prudence in the preparation of his bid regarding the purchase of optional base materials (Coquina Base). He contacted suppliers who had historically supplied base material for other projects in the area. Due to the large quantity of material required, he planned to use three suppliers in order to receive a constant flow of material. During this time, two suppliers decided not to furnish state approved materials, some had environmental and permit problems. There was a fourth mine that had a quote to supply Coquina Rock to the project that Greer had not considered at the time of the bid due to the haul distance, but Greer used as a back up, but the mine could only produce a limited amount of material due to the size of their plant. This caused a shortage of material in the area previously utilized. However, when another producer offered material railed to Rockbridge unloading site EGS immediately took the offer.

Section 8-7.3.2 of the Florida Department of Transportation allows the state to make time considerations for this area-wide shortage with proper documentation, this section should be used to allow the contractor to procure the materials from sources outside the area or to change the base option to materials that are not economically overwhelming for the contractor. EGS has

made additional expenditures to obtain base material to the extent of attempting to permit and open a Coquina Rock mine of its own. Also with a change in the chemical content allowed by the FDOT specifications they have induced Dickerson to reopen its mine at Fort Drum, with the opening of this pit the contractor could complete the project with Coquina Rock base material.

At the time of the bid and award of the contract FDOT accepted the optional base bid as Coquina Rock and must have assumed the material was available in the area.

Under Section 2-6 of the FDOT specifications, the FDOT did not consider the bid to be an IRREGULAR PROPOSAL (unbalanced, unfair pricing, or contingency) and under Section 2-12 did not exercise their right for the bidder to furnish a statement of the origin of any material to be used in the project. Therefore, it appears they FDOT did not have a concern as to the availability of the material at the time of award of the contract. Apparently the shortage started to develop some time later both commercial and civil at an all time production demand in the area.

As to the failure of Greer to issue purchase orders for material, it is not unusual that the supplier will not sign purchase orders or acknowledge letters of intent sent by the purchaser.

The end result was the Suppliers failed to produce the required material per their quotations at the time of the bid. Documentation as to inability are included with the Contractors Position Papers. EGS had no direct control of the Suppliers actions. However, in the case of the Fort Drum pit, EGS had to sign a Waiver of Damages against one of the original suppliers to get a guarantee from supplier to give EGS first come on the material. EGS to have priority over all other customers at Ft. Drum pit. The pit reopened with a waiver on screening to a lower number on the number 4 screen, and the chemical matrix was allowed as was with a correction on the LBR to a higher LBR number.

RECOMMENDATION

The Majority Members of the DRB say:

The Contractor is entitled to time for shortage of Coquina Rock material for the project.

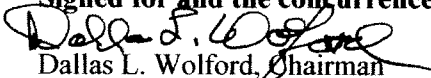
This Board appreciates the cooperation of all parties and the information supplied for its review in making a decision in this dispute. The DRB would remind you that all parties are not precluded from negotiating an equitable adjustment to any issue.

Please respond to the DRB and the other party of acceptance or rejection of this recommendation in the required 15 days. Failure to do so constitutes an acceptance of this recommendation by the non-responding party.

I certify that I have participated in all of the meetings of this DRB regarding these issues, and concur with the findings and recommendations.

Respectfully Submitted,
Disputes Review Board

Signed for and the concurrence of all the Dispute Board Members


Dallas L. Wolford, Chairman
John C. Swengel
Mark Puckett

Issue – Area Wide Shortage Coquina Rock – Entitlement Only

Minority Board Findings: EGS based their original bid on coquina base rock after receiving several quotes from suppliers in “close proximity” to the project and being reasonably assured that a sufficient supply of coquina baserock would be available in the area to complete the Project.

During construction, EGS was notified by each of their planned coquina base rock suppliers that this base material was in short supply due to increased demand, permitting, and environmental issues. Each cited increased cost associated with these issues as justification for cost increases for their products. At least 2 of their original planned suppliers shut down their operations for similar reasons during the project.

One of the original supplies, Dickerson eventually purchased the Shamrock mine located in Ft. Drum, and was able to propose this source of supply to EGS. On December 15, 2003 EGS was provided with a letter stating “sufficient resources to meet the quality requirements for the project” were available at this mine. Even though this material was available at a higher cost due to the haul distance, this appears to have been an acceptable source of supply.

EGS provided an affidavit from Mr. Larry Dale of Dickerson which states “since the Ft. Drum recommended production, EGS has paid Dickerson \$8.00/ton for base rock from the Ft. Drum Mine for use on the project.” While there is additional correspondence (May 3, 2006 letter from Dickerson to EGS), which appears to suggest that shipments of base material were held up “due to Florida Department of Transportation specification changes of the minimum carbonate content,” this is strictly a supplier issue. This supplier is in business to produce material which meets FDOT requirements and as is common in the industry, must find a way to gain approval of their material, if they wish to provide the material on FDOT projects. This approval process is the responsibility of the supplier and not the FDOT.

Section 8-7.3.2 of the Supplemental Specifications states “The Department will consider the delays in delivery of materials or component equipment that affect progress on a controlling item of work as a basis for granting a time extension if such delays are beyond the control of the contractor or supplier.” There being no acknowledgement by EGS that the approval of this source of supply was expeditiously pursued by the supplier and based on the fact that coquina base rock was available and ultimately obtained from the Ft. Drum Mine following acceptance criteria changes by FDOT, I find no entitlement for the contractor to additional contract time due to an area wide shortage of material.