

DISPUTE REVIEW BOARD RECOMMENDATION

February 25 , 2009

E-Mailed February 25, 2009

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RE: SR80 from West of Haverhill to West of Congress
FIN No.: 229797-1-52-01
County: Palm Beach
Disputes Review Board

Issue No. 1: Compensation for addition of work under new pay item 2700-44-096

Gentlepersons:

The Owner, Florida Department of Transportation (Department) and Contractor, Archer Western Contractors, Ltd. (AW) requested a hearing to determine **entitlement** of AW's subcontractor Atlas Traffic Management Systems (Atlas) to additional **compensation** for **new pay item 2700-44-096 (SP-24)** on the above project over and above that provided in the unilateral issued by the Department. Should entitlement be established, the Dispute Review Board (Board) was not to decide the quantum of such entitlement at this time, as the parties would attempt to negotiate the value of entitlement.

Pertinent issues, correspondence and other information relating to the Department's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on February 13th 2009.

CONTRACTOR'S POSITION:

On FDOT project 229797-1-52-01, Revision 4 changed three sign structure pay items based upon changes in the revision. The following three items pertained to Atlas' scope:

Pay Item 2700-44-095 changed to 2700-44-096
Pay Item 2700-45-23 changed to 2700-45-24
Pay Item 2700-45-44 changed to 2700-45-34

Per Atlas records, Atlas submitted the original signing shop drawings on 1/27/2004 and resubmitted these drawings on 2/19/2004 based upon the revision. During this period, **no price was ever negotiated between Atlas and the owner for the changes.**

The issue became obvious sometime in mid-2007 when the new pay items scope had begun construction and stockpile requests were made. Atlas acted upon this with the submittal of its original price quote (attachment #2)¹ for a net increase of \$181,231.00. The basis for this amount was according to Florida Statewide Averages for the new pay-items, a practice which is an acceptable method of determining price changes per CPAM guidance document 7-3-A (attachment #3). Atlas had not received word on this price submittal and hence in an email dated January 16, 2008 inquired about payment of the work performed on these specific pay items (attachment #4). It was at this time in which Atlas was notified by our customer that the proposed quote would

¹ See original position papers for exhibits.

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not be accepted. At this point, due to the monies being held by the owner for materials and services rendered on these items, Atlas requested a meeting with the engineer, owner, and customer to begin negotiations on pricing. It was at this meeting in which Atlas became aware that the maximum price offered by the owner would not be acceptable to execute due to the increased costs Atlas was incurring due to the revision (attachment #5). Atlas assessed its position and acted in occurrence with CPAM documents 7.3.7 A&B (attachment #6) in which Atlas could use time and material basis for calculation of the price increase outlined in 7.3.7 (Bb).

After completion of Pay Item 2700-44-096 which happened to be the final of the three, Atlas compiled a time and material work order for the three pay items (attachment #7) per section 4-3.2 of FDOT Standard Specifications. This pricing was submitted on May 27, 2008. During the following period, Atlas continually attempted to work with the owner/engineer on partial payments (attachment #8 & #9) and the customer patiently waited until October 2008 for notification that the time/material quote was not accepted and a unilateral payment would be made (attachment #10). Pay items 2700-45-24 and 2700-45-34 were identical to Atlas time/material quote however pay item 2700-45-096 was significantly less than the price established by our second quote (attachment #7).

Upon notification of the unilateral payment, it was clear that the time/material means and methods were accepted due to the two pay items which were paid by this method. Atlas disagreed that the third item, 270-44-096, should not be paid in the same matter. At this time, Atlas submitted a DRB request letter to its customer, Archer Western (attachment #11).

DEPARTMENT'S POSITION:

DRB HEARING POSITION PAPER

PROJECT:

SR80 from West of Haverhill to West of Congress
FIN: 229797-1-52-01

DISPUTE:

The Contractor requested \$170,155.04 compensation for changes in sign structure SP-24 due to plan revision # 4. The Department agreed to entitlement for recovery of costs commensurate with the difference or increase in scope of work. After a fair cost could not be negotiated, the Contractor was paid \$97,311.72 by a unilateral SA, which is a total contract increase of \$1,311.72 for the additional panel area. The contractor has submitted a claim for the difference between these amounts.

DESCRIPTION:

This project, FIN 229797-1-52-01, was let to construction in January 2003 under the 2000 edition of the Standard Specifications. The first contract day was June 23, 2003.

In August 2003 the Contractor was issued plan revision # 4 which included changes to the size of several sign panels. This revision was issued prior to any shop drawing submittal or material acquisition. Specifically, the revision was to insert a SR-809 logo for Military Trail in several of the sign panels, thus increasing the sign panel size in some cantilever and overhead sign structures. The contract pay items for the subject signs are dictated by the size of the sign panel, therefore this change resulted in the **creation new pay items and deletion of existing pay items as follows:**

Pay Item	Item Description	Unit	New Quantity	Old Quantity
2700-44-096	Sign SP-24 Ovhd Truss	AS	1	0
2700-45-24	Sign SP-18 Ovhd Ctlvr	AS	1	0
2700-45-34	Sign SP-01 Ovhd Ctlvr	AS	1	0
2700-44-95	Sign SP-24 Ovhd Truss	AS	0	1
2700-45-23	Sign SP-18 Ovhd Ctlvr	AS	0	1
2700-45-44	Sign SP-01 Ovhd Ctlvr	AS	1	2

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In 2004, after receiving the revision, the Contractor submitted shop drawings containing these changes. The contractor did not, at this time, provide notice to the Department that additional costs would be requested. The Shop drawings were subsequently approved and the Contractor proceeded with fabrication, obtaining the material without any request for additional compensation.

The changes from pay item 2700-45-23 to 2700-45-24 and from 2700-45-44 to 2700-45-34 included increase in sign panel sizes and some minor structural changes. In 2008, the Contractor submitted a price proposal for this revision issued in 2003. In order to provide fair payment for the work, the contractor's request for payment was paid in full due to the scope of the changes to the structure as well as the signs.

The change from pay item 2700-44-95 to 2700-44-96 (SP-24) did not involve any structural changes. As a matter of fact, the only change to this pay item was that the sign panel size was increased horizontally by 1.13 meters (3.07 SM total area increase in the panel) in order to accommodate the SR-809 logo for Military Trail. The contract price for the sign 2700-44-95 was \$96,000.QO. In 2008, the Contractor requested \$170,155.04 for the new pay item 2700-44-96 added in plan revision #4 issued in 2003.

DEPARTMENT'S POSITION

The Department supports entitlement for compensation associated with the extra cost to provide a sign panel 3.07 square meters larger. However, the contractor's request of an increase of \$74,155.04, when the only change within the scope of the pay item was for 3.07 SM of extra sign panel, was determined to be exorbitant and unfairly high.

Facts:

- In August 2003 the Contractor was issued plan revision # 4 which included change to the size of SP-24 sign panel
- In 2003 the contractor ordered the sign panel SP-24 to the fabricator as per revision # 4.
- In 2004 contractor submitted shop drawings for the overhead structure (pay item 2700-44-95) containing SP-24 as per revision # 4 and they were approved.
- In 2004 the sign panel SP-24 was inspected in the stockpiled signs at Atlas yard in West Palm Beach and sign panel was as per revision # 4.
- In October 2005 the contractor requested stockpiled material payment of \$67,835.70 for overhead structure containing SP-24 and it was paid in that month estimate under pay item 2700-44-95 as requested by contractor.
- In December 2007 contractor requested payment for pay item 2700-44-96 for the amount of \$217,717.50 based in the state wide average prices for 2006. In the same month the Contractor was told not to use the 2006 state wide average price and submit the invoices for the increased size panel.
- In February 2008 contractor started working in the installation of the structure containing SP-24 sign
- In June 2008 contractor requested payment for pay item 2700-44-96 for the amount of \$170,155.04 based in some invoices. Their invoices did not include the sign panel, the one item that was increased in revision #4 for which a change was requested and entitlement agreed. Even though the contractor did not submit an invoice, they showed the cost for the sign as \$6,229.00 plus taxes and mark-ups
- In October 2008 the contractor was paid under a unilateral SA the amount of \$97,311.72 for pay item 2700-44-96.

The contractor did not comply with the Specification provisions of 5-12.2 which require advance notice of intent to pursue additional costs. However, in order to provide fair payment for the work performed, the contractor was compensated for the increase in panel size by unilateral payment. The amount of the unilateral payment was based in the 2006 statewide average price difference between the original and revised pay items,

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2700-44-95 and 2700-44-96 respectively, resulting in an additional payment of \$1,311.72 to the contractor. In addition, this change did not impact the CPM schedule at all.

CONCLUSION:

The contractor did not provide any notice of intent to seek additional compensation before performing the work as required in Specification 5-12.2.1, Claims for Extra Work: *"Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based"*.

The contractor was not willing to accept and settle this dispute based on a fair offer commensurate with the change in scope of work for the increase in the sign panel. Instead, the contractor has requested to be compensated at their 2008 cost of the entire structure for which no change in scope was made.

The plan revision was issued in accordance with Specification Sections 4-3 noting the following:

4-3.1 Alteration of Plans or of Character of Work: *"The Engineer reserves the right to make, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such alterations in the details of construction ... as may be found necessary or desirable by the Engineer." And, "The Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract."*

4-3.2 Increase, Decrease or Alteration in the Work: *"The engineer reserves the right to make 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 increase or decrease the cost or time of performance"*. This revision did not change the foundation and/or type of equipment to install the structure. The scope of the work involved in the change was exclusively limited to the size of the sign panel. It is the Department's position that the Contractor is only allowed to be compensated for the change in scope of the added work and that they have been fairly compensated for this work. Therefore, there is no entitlement to recover additional compensation.

CONTRACTOR'S'S REBUTTAL:

There was no rebuttal submitted to the Board prior to the hearing.

DEPARTMENT'S REBUTTAL:

There was no rebuttal submitted to the Board prior to the hearing.

BOARD FINDINGS/EXPLANATION:

- During the course of the project the Board observed exceptional efforts by both the FDOT and the Contractor in resolving challenging issues. This issue is essentially a Subcontractor pass-thru claim.
- The project was bid under the FDOT 2000 Standard Specifications as amended by the Supplemental Specifications.
- The Parties agree that the work was unforeseen. Unamended Section 4-4 speaks to Unforeseeable work:

4-4 Unforeseeable Work.

*When the Department requires **work that is not covered by a price in the Contract** and such work does not constitute a "Significant Change" as defined in 4-3.1, and the Department finds that such work is essential to the satisfactory completion of the Contract within its intended scope, the Department will make an adjustment to the Contract. The **Engineer will determine the basis of payment for such an adjustment in a fair and equitable amount.***

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- The parties agree that the change does not constitute a “Significant Change”. They further agree that the work for **pay item 2700-44-95 was deleted** and a **new item for work was added under pay item 2700-44-96** which was not in the contract.
- The Engineer determined that the only change between the deleted work of pay item 2700-44-95 and added work item 2700-44-96 (SP-24), was the sign panel size and attempted to negotiate a fair and equitable price for the new item. The Parties did not reach agreement to a price for the new item.
- When the Parties cannot agree that the price for added work as determined by the Engineer to be a *fair and equitable amount* a Unilateral Payment is made.
- **Amended Section 4-3 Alteration of Plans or of Character of Work subsection 4-3.4 states:**

4-3.4 Conditions Requiring a Supplemental Agreement or Unilateral Payment: A Supplemental Agreement or Unilateral Payment will be used to clarify the plans and specifications of the Contract; to document quantity overruns that exceed 5% of the original Contract amount; to provide for unforeseen work, grade changes, or alterations in plans which could not reasonably have been contemplated or foreseen in the original plans and specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle documented Contract claims; to make the project functionally operational in accordance with the intent of the original Contract and subsequent amendments thereto.

- The Parties agree that the Department issued Unilateral Payment for new item 2700-44-96.
- Change Order Report page 1 of 1 states:

Supplemental Description1 To provide a New Pay Item for Lighted Overhead Truss Span

Bid Qty 0

Current CO Qty 1

New Revised \$97,311.72

Bid Contract \$0.00

Net Change \$97,311.72

- Paragraph (4) of the Unilateral Payment states:

(4) By acceptance of this unilateral payment the Contractor does not waive any rights the Contractor may have against the Department for payment of any additional sums the Contractor claims are due for the described work.
- While there is some uncertainty as to whether the Department received the Subcontractor’s February 22nd 2008 letter to Archer Western contesting the payment offered, the Department acknowledges that they were aware of the substance therein contained. Further, it is acknowledged that equitable payments over and above that offered by the Department for changes to two other signs on the project were established based on actual cost records furnished by the Subcontractor.
- When there is disagreement for payment of an item made under Unilateral Payment, the Contractor must notice the Department that he does not agree with the payment as established by the Engineer. He then must supply proper verifiable records pertaining to the added item to the Department. When such verified costs exceed the price established in the Unilateral the Contractor is entitled to the difference.
- It is worthy of note that if the work under 2700-44-095 not been deleted and work under new item 2700-44-096 not been added to the contract the Board’s recommendation might be different.

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It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...²**

BOARD RECOMMENDATION:

Therefore, based on the materials supplied to the Board and presentations to the Board at the DRB hearing, the Board finds entitlement of AW/Atlas to additional compensation over and above that already recognized by the Department on the above referenced project.

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond 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 this issue and concur with the findings and recommendations.

Respectfully Submitted
Disputes Review Board

John H. Duke Sr.; DRB Chairman
Lester Furney; DRB Member
Nelson Perez; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "JH Duke", written over a horizontal line.

John H. Duke, Sr.
DRB Chairman

² DRBF Practices and Procedures Section 1 – Chapter 6