

DISPUTE REVIEW BOARD

June 24, 1998

FAXED June 24, 1998

Mr. Gregory Lady, P.E.
Project Manager
Florida Department of Transportation
1041 S.E. 17th Street, Suite 200
Fort Lauderdale, FL 33316
FAX (954)-525-7586

Mr. Scott Armstrong
Project Manager
Traylor Bros. Inc.
1041 S.E. 17th Street, Suite 204
Fort Lauderdale, FL 33316
FAX (954)-467-2599

REF: SRA1A, SE 17th Street Causeway
SP Nos. 86180-3522-3523-6522
FAP No. XA-HDP-9210-(3)
WPI No. 4110739
Contract No. 19871

SUBJECT: Recommendations of the Dispute Review Board (DRB) Pertaining to the Issue of a Credit for 36 KSI Steel Beams Being Furnished by the Contractor in Lieu of the Specified 50 KSI Steel Beams. The Beams to be Used as Superstructure Members for a Temporary Bridge.

Gentlemen:

On June 3, 1998, at the Department's project office, the Dispute Review Board (DRB) heard oral presentations from both parties relative to the subject issue. Prior to the oral presentations and in accordance with previously established procedures, the DRB received written documentation and rebuttal statements from both parties.

Background

The contract documents specify the use of 50 KSI steel beams for spans 7, 16, and 23 of a temporary detour bridge to be utilized during construction. Upon completion of the project, the steel beams remain the property of the Contractor. The Contractor supplied 36 KSI steel without notification to the Department of its intentions. Construction of the temporary bridge was near critical to the overall project schedule.

The Department has taken the position that a credit of \$77,500 is due. The Department's basis of determining the credit was to establish a ratio based upon the strength of the material. The Department calculated the quantity of the affected material and determined the total amount based upon applicable bid items.

The Contractor had offered a credit of \$4,091.40 based upon the difference in price of the material. However, in its addendum to the DRB the Contractor withdrew its offer.

F.D.O.T. Position and Statement of Facts

- The following contract specifications governed the procurement and fabrication process.
 - 5-3 Conformity of the Work with the Plans
 - 6-3.2 Notification of Placing Orders

DISPUTE REVIEW BOARD

- The Department's position is that the Contractor's procurement and fabrication activities were a direct contravention of the contract specifications.
- This was not an isolated incident of "substandard procurements". Three (3) previous examples of "substandard procurements" were identified by the Department's representatives as follows:
 - (1) Steel pipe piling for the temporary bridge .
 - (2) Temporary steel sheet pile.
 - (3) Temporary casing required to place HDPE water main pipe.
- The Department does not agree with the Contractor's cost differential; stating its calculations were in the range of \$6,500.
- The Department's actions were punitive due to perceived prior disregard for the contract specifications by Traylor and the lack of immediate communication with the Department relative to its correspondence of 2/20/98 and 2/23/98 wherein the Department stated its position relative to the specific issue.
- The Department's project manager stated, that had the Department been notified in a timely manner, he would have recommended accepting an actual cost differential credit.

Contractor's Position and Statement of Facts

The Contractor stated the sequence of events which occurred relative to the furnishing of 36 KSI in lieu of 50 KSI steel beams were:

- October 1997 - its steel supplier informed the Contractor 50 KSI material would not be available until a January rolling date.
- The Contractor believed that the 36 KSI material could be modified to serve its intended purpose by cover plating.
- The Contractor authorized its supplier to proceed with procurement and fabrication of the 36 KSI material.
- The Contractor failed to notify the Department of his actions through oversight.
- The Contractor did not employ its specialty engineer to design cover plates for submittal and approval.
- The Contractor explained the timely delivery of the subject material was critical to the overall project schedule. The Contractor's action avoided delay to the near critical activity of constructing the temporary bridge.
- The Contractor reviewed the fact that the structures were temporary and eventually became the property of the Contractor.
- Prior to shipment, the Department's inspection engineers, while performing their designated responsibilities, found the material was not certified as 50 KSI material. However, the material tested to greater than 36 KSI and was certified as a minimum to be 42 KSI material.
- The Contractor then employed a specialty engineer to perform an analysis of the 42 KSI material. This analysis determined the material was adequate for the intended use.

DISPUTE REVIEW BOARD

- The Contractor stated its position relative to the three early incidents of alleged “substandard procurement” practices.
- The Contractor’s Project Manager clearly stated he “unintentionally” failed to notify the Department of his intentions and actions in proceeding with 36 KSI material in lieu of 50 KSI material and of his analysis relative to cover plating the steel beams to provide an “as equal” engineering solution.

The Contractor originally offered the Department a credit of \$4,091.46 which was its stated cost differential. In its rebuttal submittal, the Contractor referred to Specifications Section 5.3, conformity of the work with the plans, and stated its present position, “The material furnished does not represent any reduction in quality and withdraws its previous offer.”

Comments of the Dispute Review Board

Several standard specifications are involved with the issue and neither party takes exception to the sections as not being appropriate.

The sequence of events and correspondence pertaining to the issue are:

- October 1997, the Contractor is notified by its supplier of the extended rolling date.
- October 1997, the Contractor believes an engineering solution can be achieved by cover plating the 36 KSI steel beams.
- October 1997, the Contractor authorizes its supplier to proceed with 36 KSI material.
- February 20, 1998, correspondence from the testing engineers informed the Department material does not meet the contract requirements. However, test reports found the material satisfied a minimal yield strength of 42 KSI. It was understood by the inspection engineer the material was to be shipped February 23, 1998. Instructions were given by the Department to hold the material in noncompliance until further instructed.
- February 20, 1998, the Department’s answer to the testing engineer's correspondence indicates a reduction in payment of 28%. This correspondence was copied to the Contractor.
- February 23, 1998, correspondence from the CEI to the Contractor confirming discussions of a 28% withhold.
- The DRB was not provided copies of the correspondence from the Contractor to the Department (stated by the Contractor to have been sent).
- The material was shipped approximately March 1, 1998.

The DRB recognizes the parties have both referred to the project being a “partnering project.” The DRB’s observation is that there appears to be a lack of assertive communication between the parties that could possibly be improved upon by implementing a continual partnering process.

DISPUTE REVIEW BOARD

The DRB's Findings and Conclusions

- The stated sections of the standard specifications are applicable to the issue.
- The material provided "technically" was adequate for the intended use.
- The delivery of the material was a near-critical item of work. The project avoided delay due to this activity.
- In all situations stated by the Department to be "substandard procurement" practices, the Contractor made modifications and/or offered credits at its added cost due to its lack of notification to the Department.
- Proper notification to the Department by the Contractor may have resulted in a VECP at a 50-50 sharing of the savings.
- The Contractor did not maliciously intend to circumvent the contract specifications.

Recommendation of the Board

The DRB has reached the following conclusions:

- The DRB finds the Department's position of requiring a credit from the Contractor to be valid.
- The DRB further recommends the monetary amount of the credit be determined pursuant to Specification 5.3, conformity of the work with plans, which states:

"In the event the Engineer finds the materials or the finished product in which the material are used not within reasonably close conformity with the plans and specifications, but that reasonably acceptable work has been produced, he shall then make a determination if the work shall be accepted and remain in place. In this event, the Engineer will document the basis of acceptance by contract modification which will provide for an appropriate adjustment in the contract price for such work or materials as he deems necessary to conform to his determination based upon engineering judgment."

- The DRB recommends that a punitive deduction not be assessed and concurs with the Engineers evaluation that the appropriate adjustment would be:

Actual invoice cost adjusted to proper material unit price including added freight (if applicable) and sales tax (approximately \$6,500).

Respectfully submitted,

Mr. Bobby D. Buser P. E., DRB, Chairman
John H. Duke, DRB Member
J. Paul Silvestri, Jr., DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



Mr. Bobby D. Buser P. E.
DRB, Chairman