

DISPUTE REVIEW BOARD RECOMMENDATION

February 16, 1999

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RE: State Job No. 86020-3518
WPI 4110936
State Road 5 (US-1)
From Copans Road to State Road 834 (Sample Road)
Broward County

DISPUTE

The dispute arises as the result of:

- 1) The FDOT's determination that the irrigation system proposed by the Contractor is not "equal" to the proprietary irrigation system specified in the bid documents; and
- 2) The FDOT's requirement that the Contractor supply the specified proprietary irrigation system at no additional cost to the FDOT.

CONTRACTOR'S POSITION

The Contractor claims that he is entitled to receive an equitable adjustment to the contract price because the FDOT is requiring the installation of a proprietary irrigation system referred to as the McP Irrigation System. It is the Contractor's contention that the bid documents' specification that the McP Irrigation be utilized constitutes an improper sole source specification. The Contractor contends that he bid the project using an alternative "or equal" underground irrigation system that can be provided at substantially less cost than the proprietary system specified by the FDOT. The Contractor contends that he should be allowed to utilize the alternative irrigation system, or if required to supply the proprietary system, additional compensation is due.

FDOT'S POSITION

The FDOT contends that the alternative irrigation system proposed by the Contractor does not constitute an "or equal" system because it does not satisfy the salient characteristics of the irrigation system identified by the FDOT. The FDOT also contends that it is entitled to receive the proprietary irrigation system specified in the bid documents without additional cost to the FDOT.

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RECOMMENDATION

The Dispute Review Board finds that the **FDOT is entitled to receive the proprietary irrigation system identified in the bid documents, and the Contractor is not entitled to receive additional compensation on the referenced claim.**

EXPLANATION

The Dispute Review Board finds that the FDOT's specification of the proprietary McP irrigation system does constitute a sole-source specification. The Department acknowledges that it does not know of an acceptable "or equal" alternate to the McP irrigation system and, absent submittal by the Contractor of an approvable "or equal" product, it will accept only the McP irrigation system on the subject project. The imposition of the use of a sole-source (McP) by the FDOT in this instance is defective, as **the plans and specifications fail to clearly identify the salient characteristics** that would enable bidders to propose an irrigation system that matches the important features of the McP irrigation system. The FDOT identified at the hearing those salient characteristics, however, these were not sufficiently identified for the bidder's use prior to the submittal of his bid.

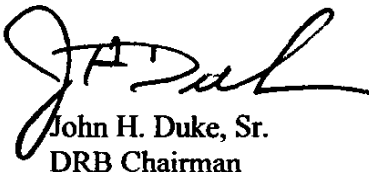
The Contractor acknowledges that his subcontractor felt that the specification constituted a sole-source specification prior to the bid letting, but failed to challenge the specification at that time. **As a result of the Contractor's/Subcontractor's failure to challenge the specification** in a timely manner, the **Contractor/Subcontractor waived his right to challenge the sole-source specification** and recover the increased cost of the sole-source product as a constructive change in the contract. Had the Contractor/Subcontractor challenged the specification in a timely manner (prior to the letting), the FDOT would have had the opportunity to justify its use of a sole-source specification and/or to correct the specification by identifying the salient characteristics necessary to enable the bidders to identify an "or equal" irrigation system.

The Contractor always has the burden of establishing the equivalency of a proposed product through the submittal of technical data and other supporting information. The Board need not determine whether the alternate irrigation system proposed by the Contractor is equivalent to the McP irrigation system as the Contractor waived his right to challenge the sole-source specification by failing to bring the challenge in a timely manner.

Respectfully Submitted,

John H. Duke, Sr.
Bobby D. Buser, P.E.
George E. Spofford, IV

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



John H. Duke, Sr.
DRB Chairman