

# DRB Recommendation

**Ranger Construction Industries, Inc. & FDOT District Four  
For Project  
SR-80 from SR-15 (US 441) to County Road 880**

FPID: 428720-1-52-01/ 429246-2-52-01

Federal Aid Project Number: 1002-059-P

Contract No. T-4387

County: Palm Beach

**DRB Issue:            NOI #2 Issue Statement:**

**Is Ranger Construction Ind. Inc. (Ranger) entitled to additional compensation for Weed Mitigation?**

Hearing Information: Dates January 30 & 31, 2017 from 9:00 am to 4:00 p.m. Held at PALM BEACH OPERATIONS, 7900 Forest Hill Boulevard, West Palm Beach, FL 33413-3342

## **Project Information**

**Type:** Bid Build            **Contractor:** Ranger Construction Ind. (Ranger)

**Original Duration:** 460 days    **Original Contract amount:** \$20,572,639.74

**Scope of work:** The improvements under this contract consist of safety and resurfacing, restoration and rehabilitation (RRR) improvements on SR 80.

## **Members of the Dispute Review Board:**

Dan Garner, P.E., Member

Don Henderson, P.E., Member

Ronnie Klein, Chairman

## **1. Summary of the Parties Positions**

### **1.1 Summary of the Contractors Position**

The issue in dispute is recovery of costs resulting from mitigation of pre-existing weeds and the Department's retraction of previously acknowledged entitlement of the extra costs. Extensive weeds were present within the project limits prior to construction. During construction the Department required removal of extensive weeds causing significant extra cost to Ranger. Ranger filed a Notice of Claim and after completing the weed mitigation submitted the costs for the claimed work in the amount of \$44,675.56. After reviewing the issue and the costs submitted by Ranger, the Department notified Ranger that based on the Department's position Ranger was entitled to \$26,057.68. (Although this is not a hearing for quantum, it is important to show the cost derived by the Department to prove the Department made a contemporaneous agreement to entitlement). After Ranger and the Department discussed the cost difference, Ranger agreed with the Department's Engineer's Analysis with the exception of the Department's interpretation of the Idle Equipment specification related to a water truck. That difference in interpretation was the subject of the submitted claim. Subsequent to the submission of the claim the Department reneged on their previous agreement to entitlement. No extra cost have been paid to Ranger.

### **1.2 Summary of the Departments Position**

The Department has reviewed the certified claim package submitted for this issue and finds no entitlement for the contractor. The Department finds no entitlement on this issue as the excessive weeds were at the fault of the contractor due to excessive clearing and grubbing throughout the project, which exposed the area and made it susceptible to excessive weed growth in the corridor per Specification 7-1.3, and in turn eliminated the ability for mechanical means of control, such as mowing. Additionally, the Department was not immediately notified, per Specification 7-1.3, of the introduction of noxious weeds. The Department reviewed the Maintenance Rating Program report for the corridor before the project began and the report noted that less than 25% of the corridor had weeds which indicates that weeds were not prevalent prior to construction, as alleged in the Contractor's certified claim. Per Specification 570-4, the contractor is required to monitor turf areas, remove all competing vegetation, pest plants, and noxious weeds. Specification 570-4 also includes the removal of the vegetation to be regular by manual, mechanical or chemical means, as necessary. The requirements of established turf include no pests or noxious weeds. The Department is not obligated to compensate the

contractor for equipment, whether it was idle or active, for work incurred by their actions and which was not part of the initial contract work and additionally the discussion on idle versus active equipment is irrelevant as the Department finds no entitlement for this issue. The Department had offered to the contractor the amount of \$26,057.68 in an effort to work towards settling all of the project issues on the contract, but does not agree to any entitlement to this amount as the Contractor states in their certified claim to the additional \$10,618.10 that is in the certified claim package for this issue.

### **1.3 Summary of the Contractors Rebuttal**

There is clear and contemporaneous documentation from the Department that they believe Ranger is entitled to additional compensation in the amount of \$26,057. When Ranger submitted the certified claim to recover an additional \$10,618 for equipment cost which the Department disputed only then did the Department withdraw their acknowledgement of entitlement.

On page 33 of 63 the Department now states their recognition of entitlement of the \$26,057 was only in an effort of "settling all of the project issues on the contract". However, there is no documentation at the time the Department granted entitlement for \$26,057 that it was conditioned only on "settling all project issues". In fact the Department's CEI made independent analysis of this issue and determined entitlement was valid. Only now is the Department withdrawing entitlement.

The Department now states the presence of the weeds was of Ranger's own doing due to "excessive clearing and grubbing". However, they provide no evidence to support this statement. There is no documentation or correspondence from the Department when Ranger was performing clearing and grubbing operations that they were concerned with "excessive clearing and grubbing". Ranger has been prejudiced by the Department granting entitlement to this issue and now reneging resulting in a loss of additional documentation under the belief entitlement was not at issue.

### **1.4 Summary of the Departments Rebuttal**

The Department does not find any entitlement for this issue. The Department in an effort to partner with the Contractor, offered a cost of \$26,057.68, to settle all of the issues on the project and to this date have not given entitlement to the Contractor for this NOI. The excessive weed mitigation being claimed by the Contractor was at the fault of the Contractor for excessive clearing and grubbing throughout

the project which exposed the area and made it susceptible to excessive weed growth per Specification 7-1.3. The Contractor did not immediately notify the Engineer as required per Specification 7-1.3 of the introduction of the noxious weeds. If the Contractor knew of the condition of the weeds prior to the project beginning, the notification to the Engineer would have been completed in compliance with Specification 7-1.3. The Contractor provided photos in their position showing some locations of excessive weed growth throughout the corridor, yet these photos can't be assumed as the condition throughout the 18-mile project corridor. Based on the Maintenance Rating Program reviews prior to construction starting, the report indicate that weeds were reported in less than 25% of the corridor. The Department understands that these reviews are not contractual documents, however it is important to note as the reviews would indicate that weeds were not prevalent as indicated by the Contractor. The Contractor had a contractual requirement to remove all competing vegetation, pest plants, and noxious weeds per Specification 570-4. As the Department finds no entitlement for this issue, the difference in the costs that the Contractor has claimed and that of what the Department had previously offered to settle all project issues (not to give entitlement) is not up for discussion. This is not a hearing on quantum, so the topic of the recorded time for water truck is not an argument.

## **2. Relevant Specifications**

4-3 Alteration of Plans or of Character of Work

4-3.1 General

4-4 Unforeseeable Work

7-1.3 Introduction or Release of Prohibited Aquatic Plants, Plant Pests, or Noxious Weeds

570-3 Construction Methods

570-3.1 General

570-4 Turf Establishment

## **3. Key findings and Analysis of facts**

Rangers issue in dispute is recovery of costs resulting from mitigation of pre-existing weeds and the Department's retraction of previously acknowledged entitlement of the extra costs. The Department required removal of extensive weeds causing significant extra cost to Ranger. Ranger filed a Notice of Claim and after completing the weed

mitigation submitted the costs for the claimed work in the amount of \$44,675.56. This claim is based on specification 4-4.

The first chargeable day on this project was July 27, 2014 and approximately nine (9) months into the project Ranger submitted NOI-2 on April 23, 2015. Ranger stated this claim was in response to a Deficiency Warning Letter related to the presence of weeds. Ranger began mitigation efforts.

The Department has acknowledged Rangers T/M costs in the amount of \$26,057.68 which includes total indirect cost, expenses and profit specifically attributed to Weed Mitigation during the period from April 28 to October 5, 2015, excluding idle equipment costs.

Ranger cites specification 4-4, Unforeseeable work, stating that the mitigation of pre-existing weeds requires work to be performed was work not covered by a price in the Contract.

The Department reviewed and acknowledged the contractors T/M costs as part of their due diligence during negotiations for a global settlement of four outstanding claims.

The Department contends specification 4-4 does not apply since this was not unforeseeable work. Under specification 7-1.3 and 570-4 the Contractor is required to remove competing vegetation. The need for the additional weed mitigation was due to excessive clearing and grubbing combined with the time taken to establish turf resulting in weeds being introduced.

The Board has relied on contract specifications and all evidence presented in the Hearing conducted January 31, 2017 for NOI-2, relevant to this claim.

**4. DRB Recommendation**

Ranger controlled their construction means and methods during the approximately nine months of contract work prior to filing NOI-2.

Specification 4-4, Unforeseeable Work has not been proven to the Board.

The evidence provided does not show The Department agreed to entitlement by reviewing and acknowledging Rangers T/M costs during negotiation efforts. It appears an individual offer was never made or accepted concerning this NOI.

Ranger had an obligation under Specification 7-1.3 to not introduce or release noxious weeds into the project limits as a result of clearing, grubbing, and earthwork, 570-3 To incorporate turf installation into the project at the earliest practical time, and 570-4 to Monitor turf areas and remove all competing vegetation, pest plants, and noxious weeds.

The Board recommends no entitlement on this issue.

This Recommendation is the unanimous decision of the members of the Dispute Review Board.

**Submitted by and for**

Date of Recommendation: February 17, 2017

A handwritten signature in blue ink, appearing to read "R. Klein", is written on a light blue background.

**Ronnie Klein, Chairman**

Don Henderson, P.E., Member

Dan Garner, P.E., Member