

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 #4 Issue Statement

Is Ranger Construction Ind. Inc. (Ranger) entitled to additional compensation for reworking and replanting slope areas?

Hearing Information: Dates January 30 & 31, 2017 from 9:00am 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. Inc. (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 the recovery of costs associated with repairing, re-grading, reworking and replanting Performance Turf on various slopes within the subject projects. Due to factors beyond Ranger's control, slopes continually eroded washing away previously placed seed and resulted in extensive and reoccurring re-grading and replanting. After replanting several areas, Ranger requested the Department allow Performance Turf Sod - an available pay item in the contract - in lieu of seed to eliminate the risk of further erosion, repairs and replanting. The Department allowed the use of sod in only limited areas requiring Ranger to continue the Performance Turf seeding in other areas. A review of the plans and evaluation of where the Department authorized the placement of sod shows slopes that had a higher risk to erode were not designated to be sodded, but slopes with less risk to erode were. This flaw in rationale, in both the design and authorized changes, resulted in slopes continuing to erode causing extra cost for repairs and replanting.

The basis of this claim is that both the Department's original design and subsequent changes to the design were deficient and lacked consideration of important factors that contribute to slope erosion; factors that should have been considered in the design. According to Department design manuals both slope length and gradient directly influence erosion risk on given slopes. A review of the original design and subsequent changes revealed an apparent failure to properly consider the combined effect of both these factors which resulted in higher erosion susceptible slopes with no sod and lesser erosion susceptible slopes with sod. Had the design and subsequent authorized changes designated sod be used in higher risk areas, Ranger's additional and significant cost to re-grade and replant would not have occurred.

Ranger followed all contract specifications for performing the work, identified a potential design defect when continual erosion was occurring and suggested mitigation efforts which would have drastically reduced the overall cost. Specification 570 Performance Turf allows the contractor to be compensated when factors outside their control result in the need for replanting. This is exactly the situation here.

In an analysis of the original design, and the authorized changes made by the Department to that design shows how neither of these properly considered the actual erodibility of the slopes.

1.2 Summary of the Departments Position

Reworking of seeded areas is covered under the performance specification due to weather. Specification 570-4 states that the Contractor is to provide filling, leveling, and repairing as may be necessary.

Protection of work is covered under Specification 7-14. The contractor simply failed to take precautions to protect his work resulting in rework.

The contractor was granted weather days for recovery when reworking material. No additional compensation is allowed per the terms of the Contract.

Specification 9-2 states the pay item includes the cost of damage from action of the elements.

Specification 104-1 states that the Contractor is required to protect the work from damage. The contractor failed to do so.

The Department is only obligated to pay for re-seeding due to factors determined by the engineer to be beyond the control of the contractor. The contractor could have scheduled his work not to be impacted by weather as with the rest of the project, or at a minimum to mitigate the potential impacts. These factors were within the control of the contractor, but the contractor neglected to address them appropriately as required by the required specifications.

1.3 Summary of the Contractors Rebuttal

The Department states they are "only obligated" to pay for re-seeding due to factors determined by the Engineer to be beyond the control of the contractor. Ranger takes exception to this statement. The Department has numerous obligations under the contract, all of which Ranger has the right to rely upon. First and foremost the Department, and their designers, has an obligation to perform a proper design, following all mandated FDOT manuals, handbooks and directives especially when they are expressly listed in the designer's contract with the Department. These manuals, handbooks and directives are in place and are to be followed when designing a project for a reason. When the Department and their designer fail to follow these design mandates they have failed in their obligation to Ranger as the contractor.

The Department states the erosion was a result of Ranger not selecting the proper type of turf material. However, the specification lists the acceptable turf material, and as such it is reasonable to believe that any of those listed would perform properly. After all, this is not a Design Build project. Had the Department and their designer

properly considered all design elements such a gradient and length of slope they should have limited the turf to sod - just as they did for other slopes.

The Department further makes an attempt to say it was Ranger's selection of embankment material which caused the washouts. Again, Ranger selected an embankment material which met all contract requirements. It is the Department and their designer that are obligated to limit embankment to only certain types if they believe the embankment allowed by the standard specifications is not suitable.

The Department takes the twisted-logic position that because other projects have been performed without this issue, then Ranger's request for entitlement should be denied. Such a broad, vague and illogical statement has no merit to deny entitlement. Every project is different and in all likelihood the design of those "other projects" likely conformed to the proper FDOT design manuals.

The Department states that since there was no pre-bid question by Ranger again, they believe, there should be no entitlement. In essence the Department is attempting to say that since Ranger did not ask the question, "was all required design manuals, handbooks and directives followed by the EOR?" then Ranger is not entitled to recovery compensation for the design failures. Again, this is an unconscionable position by the Department.

The Department attempts to make the conclusion that because there were some areas on this project that Ranger was able to establish grass this proves there is no entitlement for other areas. Again this is twisted logic. The Department is attempting to make the connection that certain factors are consistent from one area to another on a nearly 15 mile long roadway over the course of nearly two years. This is not considered sound engineering analysis but rather flawed thinking. Whereas, not following mandated, prescribed design criteria, especially when such failure is a direct cause of erosion, is most definitely a sound basis to find entitlement.

The Department continues by listing a myriad of specifications they believe support their position in what appears to be an attempt to convolute the issue. None of the specifications listed in the Department's position paper supersede the fact the design did not consider proper criteria - criteria which is directly and expressly mandated to be followed - which, if it had, would not have resulted in Ranger's additional cost in this issue. Clearly, failure in this manner by the Department is outside Ranger's control and Ranger is entitled to be compensated.

1.4 Summary of the Departments Rebuttal

Ranger was in complete control of their means and methods. Slopes eroded because Ranger failed to protect them in accordance with 104-1. Ranger's method of grassing was to broadcast seed & mulch. Precision seeding, hydro seeding or bonded fiber mix may have been more effective but never attempted. This is a performance specification that does not specify a particular grassing method to be used and any method such as Hydro-seed, Bonded Fiber Mix or even sod was available to Ranger to use for their method. Ranger was required by contract to choose the method of grassing that best fit their means and methods of construction to establish a health stand of turf in accordance with specification 570-1.

The Department designated at the time of bid specific areas for performance turf sod and all other areas performance turf specification section 570. Under performance turf, the contractor has the option to use any grassing method and include the cost in his bid. It is not reasonable for the contractor to expect the Department to incur additional cost for the contractor's means and methods. The scope of work did not change as defined in specification 4-3.7 and there was no unforeseen condition as defined by specification 4-4. The contractor was required to stabilize earthwork within 7 days and failed to do so as indicated by contract records.

It is unreasonable for the contractor to expect tax payers to incur additional cost for contractor convenience. The contractor had the option to choose any method or material that was effective as described and allowed in specification 570. The contractor could have devoted resources or scheduled grassing when conditions were more favorable. The contractor expects compensation to be provided for poor business decisions. No unforeseen condition or change of scope means no entitlement. It is not common design or construction practice to sod slopes flatter than 3:1 slopes. The Department simply partnered to mitigate potential guardrail erosion for steep slopes.

3. Relevant Specifications

- 5-10 Final Inspection
- 5-10.1 Maintenance until Acceptance
- 8-4 Limitations of Operations
- 8-4.2 Sequence of Operations
- 9-2 Scope of Payment
- 570 Performance Turf
- 570-3 Construction Methods

4. Key findings and Analysis of Facts

1. The Contractor and the Department agreed at the hearing that clearing and grubbing was done for several thousand feet on the shoulders and left for periods of time greater than 30 days. This cleared and grubbed area was not covered or protected therefore subject to erosion from the elements.
2. The cover material used by the contractor was placed on the shoulders and left uncovered for periods of time greater than 30 days. Therefore subject to runoff.
3. No new cover material was used for the seed and mulch operation.
4. There were no abnormal rain events recorded in the area of this project.
5. The contractor cleared and grubbed extended areas of the slopes and left them unprotected for long periods of time.
6. The Department allowed and compensated the contractor for sodding the 3:1 slopes. This was a change to the contract.
7. The Contractor bid the job using seed and mulch for the slopes. There were a number of options the bidders could have chosen. Ranger chose seed and mulch.
8. The Department did not follow specifications in that they allowed the contractor to clear and grub extremely large areas and not protect those cleared areas from the elements. However this oversight did not relieve the contractor of their responsibility to maintain and protect the cleared area.
9. Specification 5-10 requires the contractor to maintain the areas until final acceptance.

The Board has relied on contract specifications and all evidence presented in the Hearing conducted January 31, 2017 for NOI-4, relevant to the claim.

5. DRB Recommendation

Ranger states they followed all applicable specifications and met all testing requirements in the performance of their work. They feel their additional rework and planting was a result of a Defective Design that didn't properly address slope length thus allowing additional run off resulting in significant slope erosion.

The Board does not agree with Rangers Position, and feels that Rangers means and methods were the final cause of any additional rework and planting.

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 centered on a light blue background.

Ronnie Klein, Chairman

Don Henderson, P.E., Member

Dan Garner, P.E., Member