

**FDOT DISTRICT 5**  
**REGIONAL DISPUTES REVIEW BOARD**  
**RECOMMENDATION, APRIL 12, 2004**

Mr. Tom Bowles  
Bridge Division Manager  
Russell Engineering, Inc.  
10704 Portal Crossing  
Bradenton, FL 34211

Mr. Edwin J. Mackiewicz, II, PE  
Senior Project Engineer  
Keith & Schnars, PA  
1384 Heritage Acres Boulevard  
Suite B  
Rockledge, FL 32955

RE: **SR 520 Low Level Bridge Replacement**  
FN No.: 237506-1-52-01  
State Project No.: 70100-3567  
WPI No.: 5110433  
FAP No.: 2761038P  
Contract No.: 21239  
Brevard County

Dear Sirs:

The Contractor, Russell Engineering, Inc., on the above-referenced project has requested a meeting of the FDOT 5<sup>th</sup> District Regional Disputes Review Board to determine entitlement on the issue of Escalated Workers Compensation Rates on the project.

**CONTRACTOR'S CLAIM:**

The contractor, Russell Engineering, Inc., (REI), is entitled to compensation pursuant to the terms of Specifications Section 4-4, Unforeseeable Work; Section 4-3.4, Conditions Requiring a Supplemental Agreement or Unilateral Payment; and Section 4-3.2, Increase, Decrease or Alteration in the Work, where "Work" is as defined in Section 1-3 of the Standard Specifications.

REI contends that the work of providing USL&H Workers Compensation coverage was unforeseeable for the following reasons:

1. The Contract Documents require Workers Compensation Insurance in "amounts sufficient to secure the benefits of the Florida Workers Compensation Law for all employees." (Spec 7-13.1). This is the State Act, not USL&H.
2. Pursuant to Specification Section 2-4, REI examined the Plans, Specifications, Special Provisions, and the Site of Work prior to submitting the successful Bid. This exhaustive examination revealed nothing that would indicate that the work was on, over, or adjacent to Navigable Waters and therefore under Coast Guard Jurisdiction and subject to USL&H Comp. Rates. Therefore, the Contract Documents failed "to

provide for the construction and completion in every detail of the work described in the contract”, as defined by Section 4-1, Intent of Contract.

Accepting that the work of providing USL&H Insurance constitutes Unforeseeable Work leads to Sections 4-3.4 and 4-3.2, mentioned above, as mechanisms for determining compensation due the Contractor.

**DEPARTMENT’S POSITION:**

In response to the contractor’s claim, Keith and Schnars, PA offers the following:

1. Section 7-2.2 of the Specifications states that when there is work in navigable waters of the US, one or more governmental agencies will exercise regulatory authority over the work. This section also indicates that for such structures, if any particular permits are required, the Department will procure these permits prior to advertising for bids. For the work required under this contract, no such permits were required or procured. This was reiterated in the Coast Guard’s response to the Contractor’s Insurance provider in their letter dated February 27, 2002. Hence, the Department did not omit or fail to procure any permit or document from the Contract.
2. The Department also argues that the requirement to obtain proper insurance to perform the work is an obligation of the Contractor under the contract as stipulated in Specification Section 7-13.
3. The Department made no inference as to the disposition of the channel being navigable and maintains that same position.
4. Any disagreement the Contractor may have had with their insurance carrier is between those two parties.
5. The fact that the Department did not intervene between the contractor and their insurance carrier does not constitute a changed condition.

Therefore, there is no entitlement for this issue.

**CONTRACTOR’S REBUTTAL:**

On February 24, 2004, the Contractor, REI, offered the following line item rebuttal to the Department’s Position stated above:

1. The Department’s statement that it “did not omit or fail to procure any permit or document from the contract” is not completely accurate. Section 7, Sub-paragraph 7-2.2 binds the contractor to any and all requirements of any number of regulatory agencies to the same extent that the Department is bound. The document referred to as the Coast Guard response dated February 27, 2002 states; “The Commandant has given advance approval to the location and plans of bridges constructed across reaches of waterways navigable in law, but not actually navigated other than by rowboats, canoes, and small motorboats.” The respondent goes on to say that “Coast Guard approval does not relieve the applicant of the responsibility to ensure compliance with any applicable federal, state, and local laws and regulations for the

proposed project.” REI contends that advance approval constitutes a permit of sorts. While this advance approval may not be project specific, the fact that it exists and applies is critical information, which is essential to define the scope of the work in every detail. The “applicant” (Contractor) can not be expected to provide for compliance with regulations unless all regulatory agencies with jurisdictional authority are called out in the contract documents. Paragraph 7-8, Structures over Navigable Waters requires that the Coast Guard be notified immediately in the event of “navigational channel” blockage and upon removal of the blockage. Obviously, in order for the contractor to comply with this Specification Requirement, the Contract Documents must include whether or not the waterway is under Coast Guard Jurisdiction and include the emergency contact information. The subject contract does not.

2. Specification Sub-Paragraph 7-13.1 refers to Florida Law, not Federal Law.
3. The fact that the Department did not address the navigability of the channel and thereby the jurisdictional agencies is in fact the critical omission which caused this problem.
4. REI’s Insurer acted with due caution in order to protect itself in the event of serious job-site injury.
5. REI does not imply that the Department’s failure to intervene with its Insurer has any bearing. REI was disappointed with the Department’s refusal to confront the Coast Guard in regard to its jurisdictional position.

#### **DEPARTMENT’S REBUTTAL TO THE ABOVE:**

On March 9, 2004, the Department responded with the following:

The Department has adhered to all Specification Requirements as it relates to this matter. The Department inquired as to the need of a U.S.C.G. permit as required in Section 7-2.2 for this project prior to advertising for construction and none was required. That disposition has not changed throughout the duration of the project.

The contractor is required to investigate the site in accordance with Section 2-4 and provide sufficient Workers Compensation Insurance in accordance with Section 7-13.

The premium for Workman’s Compensation insurance is an expenditure much like the cost of asphalt, concrete, lime rock, and reinforcing steel. It is necessary for the contractor to investigate their costs for such material when preparing their bid. As such it is also a necessity for a contractor to investigate the cost of labor and insurance prior to bid.

There was no changed condition, the plans and specification clearly described the work and the Department disclosed all information as required by the Contract. Therefore, the Department maintains the position that there is no entitlement for this issue.

## **ADDITIONAL REBUTTAL BY THE CONTRACTOR:**

On April 6, 2004, the Contractor, (REI) offered the additional rebuttal on this issue:

The Department's claim to have adhered to all specification requirements is not true. Specification Section 4-1, Intent of Contract, requires that the contract provide for the construction and completion in every detail of the work described in the contract. The contract documents fail to address jurisdictional authority of the USCG or that the waterway is considered navigable waters. As such, the insurance requirements of Section 7-13.1 are indicated. REI provided for this in its Bid Proposal. The work of providing USL&H insurance is pursuant to Federal Law, not Florida Law. As such, this requirement must be included in Bid Documents to satisfy the Specification requirement that the Contract define the work in every detail.

REI did indeed investigate the site in accordance with Section 2-4. This investigation yielded no indication that the waterway was navigable. In fact, just the opposite conclusion is indicated. Therefore, it is even more critical that this information be included in the bid documents.

REI agrees with the Department's position that the premium for Worker's Compensation is an expenditure much like asphalt, concrete, lime rock, and reinforcing steel. In other words, it is part of the work. However, in this instance the normal requirements for this work are not accurately defined by the Standard Specification since only Florida Law is addressed. Further, the job Special Provisions does not address this portion of the work, as it is unique to the specific project. This constitutes a critical omission in the Bid Documents, which could not have been anticipated by the contractor in the Bid Proposal. It should also be noted that items such as asphalt and reinforcing steel are subject to adjustment via predetermined indexes.

REI maintains that the contract documents clearly require insurance amounts to satisfy Florida Law with respect to Worker's Compensation when in fact Federal Law prevails. One may or may not consider this a changed condition. It is however, without question an error with quantifiable negative impacts borne to date by REI. We strongly believe that remuneration is justified.

## **FINDINGS:**

Based on the written information supplied and the presentations made at the hearing, the RDRB findings are as follows:

1. Section 7 of the Standard Specifications, Legal Requirements and Responsibilities to the Public, states in Section 7-1.1, that the contractor shall "become familiar with and comply with all Federal, State, county, and city laws, by-laws, ordinances, and regulations that control the action or operation of those engaged or employed in the

work or that affects materials used.” Compliance with the U.S. Longshore and Harbor Workers Act (USL&H) is a requirement under Section 7.

2. In offering his definition of “navigable waters”, as it pertains to the USL&H, the contractor stated that the definition is somewhat vague and sometimes subject to interpretation, but acknowledged that it included areas affected by tidal action, and waters that may be tributaries to navigable waters. In his pre-bid site investigation, the contractor acknowledged the tidal effect in the work area. The bridge in question is over the Banana River that reaches into both the Port Canaveral Barge Canal and the Intercoastal Waterway.
3. The Department followed established standard procedures in procuring the necessary agency permits for the construction of the project. These are listed in Sub-Article 7-2.1 in the Contract Documents. The issuance (or non-issuance) of a US Coast Guard Permit for a construction project does not, in itself, mandate the use of USL&H Workers Compensation Rates on the project. There is no omission or changed condition in this instance.
4. The contractor should have studied the site and the contract documents and, given the facts listed in 1, 2, and 3 above, assessed his need for USL&H coverage prior to bidding. The contractor also had the option of discussing the need for this coverage with his insurance carrier.

**RECOMMENDATION:**

Based on its findings, and the information presented at the hearing, the Board recommends that there is **no entitlement** in this issue.

The Board sincerely appreciates the cooperation of both parties for the information presented for its review in making this recommendation.

Please remember that a response to the RDRB and the other party of your acceptance or rejection of this recommendation is required within fifteen (15) days. Failure to respond constitutes an acceptance of the recommendation.

Respectfully submitted,  
FDOT District 5 Regional Disputes Review Board

George W. Seel, Chairman  
Michael C. Bone, Member  
Jimmy B. Lairscey, Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL BOARD MEMBERS

George W. Seel, Chairman  
April 19, 2004