

DISPUTES REVIEW BOARD RECOMMENDATION

10 May 2011

Mr. John Bolton, P.E.
Senior Project Engineer
Bolton Perez and Associates
1773 N.E. 205th Street
North Miami Beach, FL. 33179

Orlando Otero, President
Superior Landscaping & Lawn Service
2200 NW 23rd Avenue
Miami, FL. 33142

Ref: Project: SR-9 (I-95) from SR-5 (US-1) to NE 8th Street
Landscape Enhancements and Drainage Improvements
Fin No. 410679-9-52-01
Fed Aid No. NA
Contract ID No. E-6E88
Miami-Dade County

Dear Madam / Sir:

This hearing was requested by the Contractor relating to Contract Time Extension, Claims for Extra Work and Alleged Delay.

CONTRACTOR'S POSITION

Superior Landscaping and Lawn Service, Inc. intends to claim for Contract Time Extension, Claims for Extra Work and Claims for Delay based on the following:

On August 21, 2010, CEI Consultant HDR, presented the first "Outstanding Work List", then presented the same list in a manually revised version on September 15, 2010. HDR sent via email on September 21, 2010 another revised and condensed "outstanding Work List". HDR once again presented an "Outstanding Work Review" list dated September 29, 2010. Each "Outstanding Work List" presented by HDR to Superior, was different in content and directives. Superior Landscaping completed all contractual work within the allotted contractual time frame and as per the construction documents specs and details and Index 544 and continued to address the items on each outstanding work list provided.

F.D.O.T. representatives including, HDR, Bolton, Perez and Associates, Carnahan, Proctor, Cross and Keith and Schnars, P.A. consumed forty (40) contractual days in assessing, compiling and issuing the outstanding work lists previously mentioned. The same F.D.O.T. representatives mentioned consumed another fifteen (15) post contract days to present the document labeled as "Final Inspection Mark-Up". This document was the result of an F.D.O.T. multi-firm, day long field inspection. This document was presented undated and in handwritten bullet point fashion, superimposed on a reduced jobsite print set. The notes were vague, unspecific, not properly noted and many make reference to: **a.** warranty items, and **b.** additional work items.

Superior Landscaping performed work that it considers to be additional work items which were requested by F.D.O.T. representatives, specifically the "Harmonizing" and "Lifting" of trees. The harmonizing and lifting of trees is extra work not otherwise required by the contract and specs, and thus Superior Landscaping provided notice of its intent to seek additional time and compensation related to this work.

Superior Landscaping disagrees with F.D.O.T.'s directive because: a. the index does not address the field conditions of this project, b. F.D.O.T. has previously accepted Superior Landscaping's method of installing palms in slopes of this magnitude on prior projects, c. F.D.O.T.'s consulting firms observed, inspected and approved Superior Landscaping's work throughout the course of this entire project and failed to make one negative or contradictory comment or communication until the end of the contractual period, and d. the designated palms had been in place for approximately eight months without any problems concerning the lifespan or stability of the palms or safety to the public.

Pursuant to F.D.O.T. specification 8-7.3.2, section labeled "Contract Time Extension", we hereby requesting a commensurate extension of time of 90 calendar days due to delays by factors not reasonably anticipated or foreseeable at the time of bid and completion. Superior Landscaping is making this request in direct causation due to the F.D.O.T.'s representative's demand for corrective and remedial tasks that were unwarranted, untimely, and without a clear and precise interpretation of F.D.O.T. standard indexes and field directives. This request relates to the "harmonizing" and "lifting" work performed. Superior Landscaping and Lawn Service is hereby also making a claim for additional compensation and time for work and materials not expressly provided for in the contract which was performed or installed as induced by a written directive expressly issued by F.D.O.T. through its consulting firms. as per F.D.O.T. specification 5-12.2.1, labeled "Claims for Extra Work" and section 5-12.2.2, labeled "Claims for Delay",

Superior Landscaping and Lawn Service, Inc. notified the F.D.O.T consultants that this was additional work and thereby provided an estimate for the costs of the additional work.

In summation: Superior Landscaping and Lawn Service, Inc completed the project on time and as per the specs and details applicable to the specific site conditions of this project. The “Harmonizing” and “Lifting” requested was additional work to the contract.

DEPARTMENT’S POSITION

In accordance with section 3.5 of the Guideline for Operation of a Regional Dispute Review Board (RDRB) this Position Statement serves to address the issues as submitted by Superior Landscaping and Lawn Service, Inc. (SLL) on which the request is based.

SLL’s position that **“Superior Landscaping completed all contractual work within the allotted contract time frame and as per the construction documents, specs, and details and Index 544...”** is false. It is the Department’s position that at the time of expiration of allowable contract time, numerous trees were installed too deep (147 of the 1,848 trees installed) and not in accordance with the Roadway and Traffic Design Standards (RTDS), index no. 544 and that SLL had been given ample notice of this problem verbally and in writing two months prior to the expiration of allowable contract time. RTDS index no. 544 requires the center-top of the root ball of all plants to be installed at existing slope line (prior to excavation) as depicted on Attachments 5,6,8,and 11. Please find the enclosed pictures on Attachments 17-21 that were taken at SLL’s installed trees that illustrate that numerous trees were planted as much as 2.9’ too deep and not in accordance with index no. 544.

Regarding SLL’s position that each outstanding work list given to SLL **“was different in content and directives”**, it is our position that the content in the lists was substantially the same and that the differences were as a result of the work area conditions, SLL’s lack of maintenance after installation of the plantings, and the decline of installed planting material to below Fla. No. 1 requirements. The main deficiency on all lists pertain to SLL failure to meet the Department’s Design Standards, index no. 544.

On August 17, 2010 (two months prior to the expiration of contract time) a joint inspection was performed by CEI, LAR, and Department as a courtesy to SLL. The “outstanding work list” was emailed and mailed to SLL, Mr. Rudy Villanueva in a letter dated August 21, 2010. Among the many observations made on this list was “numerous trees and palms

throughout the project are installed too deep and do not meet standard 544". In the referenced document Mr. Villanueva was asked to "let me know if you disagree or wish to discuss any of the items." At no time did Mr. Villanueva advise CEI of any disagreement or discussion needed regarding the outstanding work list.

On September 15, 2010, almost 1 month after the above 90% inspection, CEI, LAR, and Dept. began an inspection on the project and found that most of the previously noted items had not been addressed, including the trees that had been installed too deep. In addition, many of the installed plants did not meet Fla. No. 1 standards and numerous planting beds exhibited severe weed infestation. It was noted on the list that "only certain areas were reviewed today" due to many previously noted deficiencies not addressed. On September 16, 2010, the updated and marked-up "outstanding work list" was emailed to Mr. Rudy Villanueva and Mr. Orlando Otero. Among the many remaining observations made on this list was "numerous trees and palms throughout the project are installed too deep and do not meet standard 544." Also, CEI mentioned that "I will be on site with Lisandro (SLL Superintendent) all day tomorrow (9/17/10) in the event that Superior has any questions, etc." At no time did Lisandro pose any question relative to the trees not meeting index no. 544.

It is important to note that the above inspections were not requested, scheduled, or coordinated by SLL, nor are they a requirement of the specifications. CEI scheduled these inspections as a courtesy to SLL and in the interest that the final construction product met the requirements of the contract. Please also note that SLL was reminded in both letters above that "in accordance with 5-10.2 of the specifications please advise when the outstanding work items and all contract work is completed to schedule an "inspection for acceptance. This is required by the specifications and plan notes to attain final acceptance. The outstanding work lists could have been properly utilized as a basis to correct the deficiencies or to inquire as to any disagreement with the findings and/or content. SLL failed to utilize these documents accordingly.

Regarding SLL's statement that ***"FDOT representatives...consumed forty contractual days in assessing, compiling and issuing the outstanding work lists previously mentioned. The same FDOT representatives consumed another fifteen post contract days to present the document labeled as "final inspection mark-up"***, the initial inspections were not requested, scheduled, or coordinated by SLL, nor are they a requirement of the specifications. However, SLL was provided, in a timely manner, a list of all deficiencies found, and SLL was fully aware of all major deficiencies noted as a result of SLL's Superintendent's being mostly present at the inspections but frequently

admitted that Orlando Otero (SLL President) would have to give him the go ahead to make any corrections.

Regarding SLL's statement that ***“the notes are vague, unspecific, not properly noted and many make reference to: a. warranty items, and b. additional work items.”*** we disagree in that SLL never responded to the lists with any question or disagreement or requests for clarification. Regarding item “b” the additional work items consisted of a specific few items that were addressed with SLL in a timely manner. The references to extra work consisted of the adding approx. 405 small plants and 3 cubic yards of sand cement rip-rap installed by a subcontractor. SLL had been granted more than equitable time extensions for these items to make it whole.

Regarding SLL's statement that ***“Superior Landscaping performed work that it considers additional work items which were requested by F.D.O.T representatives, specifically the “Harmonizing” and “Lifting” of trees. The harmonizing and lifting of trees is extra work not otherwise required by the contract and specs, and thus Superior Landscaping provides notice of its intent to seek additional time and compensation related to this work”***, we disagree with SLL's position that the harmonizing or lifting of trees is extra work. The harmonizing or dressing of the existing soil is necessary to meet the required profile depicted on design standard index no. 544, sheet 2 of 3 for palm and tree planting on slope details. It is important to note that RTDS index no. 544, sheet no. 1 of 3 specifically states that “the top of root ball shall be set 1” – 2’ above finish grade and set plumb to the horizon. If planting pit is too deep, remove the tree and firmly pack additional soil in the bottom of the planting pit to raise the root ball.” It is our position that the trees installed by SLL where the top of root ball was planted too deep instead of the required 1” – 2’ above finish grade as required. Also, existing field conditions are, in fact, flatter than 1:2 in many areas and thus, index no. 544 is applicable to existing conditions. It is our position that index no. 544 was not consistently followed by SLL's installation crews and for therefore corrective measures such as lifting and harmonizing was required of SLL. However, such corrective measures taken by SLL to comply with index no. 544 are non-compensatory.

There were some locations where SLL planted trees/palms approx. 7” too deep where the Department allowed SLL to correct this deficiency by harmonizing or dressing the existing slopes immediately adjacent to SLL's excavation. In no way, could this be considered extra work because the extent of the harmonization would have been substantially less if the trees/palms were initially installed by SLL at the proper height.

Below is our position with respect to SLL's statements that "**Superior Landscaping disagrees with F.D.O.T's directive because:**

- a. the index does not address field conditions of this project,**
- b. F.D.O.T. has previously accepted Superior Landscaping methods for installing palms in slopes of this magnitude on prior project,**
- c. F.D.O.T.'s consulting firms observed, inspected and approved Superior Landscaping work throughout the course of this project and failed to make one negative or contradictory comment or communication until the end of the contractual period, and**
- d. the designated palms have been in place for approximately eight months without any problems concerning the lifespan or stability of the palms or safety to the public."**

First, it is important to note that on 10/28/11, prior to SLL commencing the corrective lifting process, CEI advised SLL in response to SLL's request for direction that SLL should "proceed in whatever manner or method necessary to correct the problem". Subarticle 580-3.4 of the specifications requires that SLL must comply with the requirements of the design standards, index no. 544 and personnel performing these services are under the sole responsibility and supervision of the Contractor and must be competent, experienced, and skilled in all aspects of the required landscape installation and establishment practices.

In response to SLL's **letter a** above, index no. 544 very clearly addresses the field conditions encountered on this project. SLL has not provided any information to substantiate its assertion otherwise.

It is the Department's position that all existing slopes encountered within the project limits are a 1:2 slope (run to rise) and therefore meet the planting criteria described in index no. 544 and Attachments 16-23.

In response to SLL's **letter c**, note that SLL was given verbal instruction of the problem with the tree plantings at least 90 days prior to the expiration of contact time and written notice was provided 60 days prior. Thus, SLL has sufficient time to make any necessary corrections.

In response to SLL's **letter d**, the trees/palms that were corrected by SLL appear to be in satisfactory condition after the lifting operation by SLL. Prior to SLL's performing of the corrective measures, SLL had created unnecessary safety concerns on existing I-95 side slopes. First, SLL created a severe drop-off with 147 trees that were installed too deep by SLL. Second, SLL creates an erosion concern with the existing I-95 embankment. Please see Attachments 16-26 that illustrate these safety concerns. It is also important to note on October 15, 2010, only two days prior to the expiration of contract time, SLL indicated that it "noticed that

the trees were planted too deep, but did not say anything because no one else had brought it up.”

Regarding SLL’s statements and request for time extension it is the Department’s position that SLL, in all of its dispute issues raised above, does not have a “basis” for a time extension in accordance with subarticle 8-7.3.2 of the specifications. The corrective measures needed to correct SLL’s deficient plantings do not constitute extra work or unforeseen conditions in accordance with the contract documents, nor are the “claims for extra work” valid.

BOARDS FINDINGS

Testimony by the Departments Landscape Architect during the hearing stated that SLL was notified of the various trees being planted too deep and that they would have to be adjusted prior to being accepted. SLL was made aware of these required corrections on June 21, 2010 in person by the Landscape Architect.

The Contractor did not comply with the Standard Index 544 Sheet 2 of 3 which gives the planting criteria for placement of trees on slopes.

The Contractor did not comply with section 5-3 Conformity of Work with Contract Documents of the Standard Specifications, which in part states:

"In the event that the Engineer finds that the Contractor has used materials or produced a finished product that is not in reasonably close conformity with the contract documents, and that the Contractor has produced an inferior or unsatisfactory product, the Contractor shall remove and replace or otherwise correct the work or materials at no expense to the Department".

SLL placed heavy emphasis in their position paper on the amount of time used by the CEI firms to prepare and distribute the list of corrections in order to accept the project.

SLL mentioned only briefly the amount of time required to get these corrections completed.

The Board spent a considerable amount of time reviewing Index 544 relating to the installation of various landscape materials in steep slope conditions and found the instructions and requirements to be sufficient to give the contractor ample instruction as to how these plantings were to be accomplished. Had the Contractor required additional explanation or found problems which made the installation undoable or impractical a meeting could have been scheduled and a solution reached.

As chairman of the Regional Dispute Board I took the liberty in calling Mr. Villanueva and questioned him regarding the content of SLL's Position Paper and was told it was what was needed and no changes would be forthcoming.

RECOMMENDATION

After thorough review of all documents, Plans and Index 544 the Board finds the Contractor is not entitled to additional compensation for the alleged additional work raising and harmonizing the trees planted incorrectly.

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Regional Disputes Board

John W Nutbrown, Chairman
Don Henderson, PE, Member
Ron Klein, Member