

Recommendation of the Disputes Review Board

Contract No. T6168

Dispute No. 1 District 6

Hearing Date: July 12, 2010

Contractor: American Engineering & Development Corporation

The Dispute: The Contractor and the Department are disputing whether the Federal Aid Project “Buy America” steel specification applies to a utility Joint Project Agreement (JPA) project contained within the Federal Aid Project contract. The Department determined that it does and required the Contractor to install domestic made water line fittings. The Contractor believes otherwise and has requested entitlement for costs based on the difference between the domestic fittings and a foreign product he intended to use.

The Contractor’s Position: The Contractor “is currently working under Contract T6168 which includes performing the reconstruction of Biscayne Blvd. from NE 15th Street to NE 38th Street. Within the scope of reconstruction Miami-Dade Water and Sewer Department (MDWASD) has incorporated the upgrade of its water services throughout the reconstruction limits. The materials for this scope of work are the topic of discussion of (the Contractor’s) paper.” The Contractor’s position is, “ that the contract documents clearly and unambiguously incorporate MDWASD’s specs and that those specs through the Technical Special Provisions and plans, govern over the specs within the Standard Specifications specifically those relating to the 6-5.2 Specification (Source of Supply-Steel).”

The Contactor states that the dispute is centered on “414624-56-01 financial number/project (56-01)”. It has been designed by a different engineer from the rest of the reconstruction project and is inspected by MDWASD. The 56-01 financial number does not have a Federal Aid number because the scope of work included with this financial number is not supplemented by federal funds. The scope is funded by MDWASD who has requested the work be performed during the reconstruction project. This scope of work includes the upgrade of the MDWASD utilities lines within the construction limits, specifically noted, the water main and services. MDWASD specs are used for all the installations and scope of work and ultimate acceptance of the installations is by MDWASD. There is a distinct separate section of the plans which describe the scope of work within the 56-01 project, specifically the water main installations to be performed. This section of the plans state that “Unless otherwise indicated, all equipment and materials used in the construction of Miami Dade Water and Sewer Department’s water and/or wastewater utilities, together with the methods and requirements for the installation of said equipment and materials, shall be in accordance with the Miami-Dade Water and Sewer Design and Construction Standard Specifications and Details, latest edition, as amended.”

“Furthermore, since this project is not part of the standard road work for FDOT and is governed by a separate entity (MDWASD), there are a set of provisions within the

contract documents for this scope of work. There is a Technical Special Provision (TSP) which describes the work and the manner in which the work is to be performed for the work associated with the 56-01 project. This TSP states that “For this TSP, Unless otherwise indicated, all equipment and materials used in the construction of Miami-Dade Water and Sewer Department’s water and/or wastewater utilities, together with the methods and requirements for the installation of said equipment and materials, shall be in accordance with the Miami-Dade Water and Sewer Design and Construction Standard Specifications and Details, latest edition, as amended”.

“Since the plans and TSP specifically state that the materials need to meet MDWASD Specifications, shop drawings for the water main materials were submitted as described in the plans, to Eithel M Sierra. These shop drawings were approved. The approved shop drawings include Sigma fittings which meet the MDWASD specs. Sigma Fittings are a standard material for MDWASD, the basis of the unit price submitted by AEDC for these items, and the items AEDC intended to be used when installing the water line.”

Upon the start of the installation of the water main, after approved shop drawings had been received for the Sigma fittings, the Department brought for an interpretation of the contract requirements which stipulated that the Standard Specification 6-5.2 regarding the requirement to use American Steel on Federally Funded projects needed to be adhered to when installing the water line. The Sigma fittings do not meet the requirement to be classified as American Steel. However, the 6-5.2 specification is part of the standard specifications. As is described in Article 5.2 of the Contract Documents, Coordination of Contract Documents, Standard Specifications are to be governed by the Technical Special Provisions and the Plans. As was stated previously in this paper, both TSP and the Plans state that “Unless otherwise indicated, all equipment and materials used in the construction of Miami-Dade Water and Sewer Department’s water and/or wastewater utilities, together with the methods and requirements for the installation of said equipment and materials, shall be in accordance with the Miami-Dade Water and Sewer Design and Construction Standard Specifications and Details, latest edition, as amended.” These requirements have clearly been met, by the Sigma fittings, since the shop drawings were approved. The contract documents clearly and unambiguously incorporate MDWASD specs and those specs, through the TSP and the plans, govern over the Standard Specification 6-5.2.

The effect of the change to use water line materials that are completely domestic made is financial. The Sigma Fittings, which were approved, are being replaced with fittings that are 100% domestic made and have prices roughly double that of the Sigma Fittings. A detailed estimate of the cost is attached as Exhibit G. To date AEDC has incurred the additional cost of these materials pursuant to the Department’s direction until a desirable solution has been reached.

The desired remedy for this impasse is that AEDC should receive entitlement for the additional cost of domestic fittings and be reimbursed in full for the additional cost of these fittings.”

The Department's position:

“It is the Department’s position that the contract documents related to construction Contract T6168 clearly defines that the Supplemental Specification 6-5.2 requirements are applicable to the Contract as a whole thereby limiting the “use of foreign steel and iron to a maximum of 0.1% of the total Contract amount”. The Department’s CEI Sr. Project Engineer, Enrique Tamayo, has communicated the Department’s position to AED.”

“Description of Disputed Issue”

“The Department has reviewed the Contract documents at various levels including the project level, Resident level, District level and State level and reached the same conclusion which is that the requirements of Supplemental Specification 6-5.2 are applicable to the Contract in its entirety, thereby each project contained within the Contract. The following documentation will present the FDOT’s position in detail. The Department requests that the Disputes Review Board (DRB) reaffirm that the requirements of Supplemental Specification 6-5.2 are applicable to the Contract and thereby American Engineering has no entitlement to additional compensation.

American Engineering & Development Corp. (AED) has submitted a claim in the amount of \$216,509.40 for what they define as additional material costs associated with the utilization of steel and iron products produced in the United States, in accordance with the Buy American provisions of 23 CRF 635.410. The matter relates to the material being used under FM 414624-1-56-01, which is the Project to install the water main and sewer main features as per the Joint Participation Agreement between the FDOT and Miami-Dade Water and Sewer (MDWASD).

The Dispute first arose when the Department’s Construction Engineering & Inspection (CEI), in an email dated November 11, 2009, reaffirmed that the utilization of “American Steel” is inflexible and applicable to the entire Contract. On December 2, 2009, AED submitted a Notice of Intent to Claim for the costs associated with the fittings and restraints required for the water main installation. The documentation supporting the additional costs was submitted by AED to the CEI on January 18, 2010.

On or about July 20, 2009, American Engineering, as required by Contract Documents, submitted shop drawings for water main components to the Engineer of Record, APCTE, and subsequently to Miami-Dade Water and Sewer for review and approval. That submittal package contained details of all materials proposed to be utilized for the water main construction. That submittal package prepared by American’s material supplier, Ferguson Enterprise, was stamped and signed “APPROVED” by American Engineering, APCTE and Miami- Dade Water and Sewer. That approved package details watermain components fabricated by Tyler/Union which provides US steel produced components.

The fact that Ferguson Enterprise and American Engineering specified Tyler/Union components in their shop drawing submittal indicates that US steel components are typical for this type of work to be performed and available for use on this Contract. It is the Department's position that the requirements of Supplemental Specification 6-5.2 Source of Supply Steel (Federal-Aid Contracts Only) is applicable to this Contract as a whole. Bid Blank Form No. 375-020-17 of Contract T6168 clearly identifies this Contract as a "Federal Aid Job". There is no language contained within the Contract Documents that provides direct contradiction to the requirements of this Specification.

The existence of Plan Notes or language within the Miami-Dade Water and Sewer Technical Special Provision does not supersede the requirements of the Supplemental Specification because the other language does not require the exclusive use of foreign steel products for the water main construction. This fact is supported by American and Ferguson when they submitted Tyler/Union US Steel products for review and approval in the shop drawings submittal process. American's Claim was formally rejected in the CEI prepared letter to American Engineering dated April 18, 2010. Plan Sheet WM-1, Note states, "this project (FM 41462415601) to be Let to Contract with Financial Project ID 41462415201 and 40557835201". These two (2) projects are Federal Aid Project No (s) 4042304C and 4852111P, respectively."

Plan Sheet WM-2, General Note 1, states "unless otherwise indicated, all equipment and materials used in the construction of Miami-Dade ... shall be in accordance with the Miami-Dade Water & Sewer Design and Construction Standard Specifications ...". This note clearly indicates that American Engineering needed to take all Contract language into consideration with respect to the materials to be utilized on this Contract. In doing so, the requirements of Supplemental Specification 6-5.2 are to be accounted for."

"PRESENTATION OF THE FACTS"

1. Sheet No. 54 of the Contract Supplemental Specifications Package for Contract T6168 contains: • "6-5.2 Source of Supply-Steel (Federal-Aid Contracts Only)" which identifies the Contract requirement regarding the use of US Steel in accordance with Buy America provisions of 23 CFR 635.410.
2. American Engineering's "Water & Sewer" Shop Drawing Submittal Package dated July 20, 2009 includes US Steel components fabricated by Tyler/Union.
3. Bid Blank Form No. 375-020-17 of Contract T6168 clearly identifies this Contract as a "Federal Aid Job" in the heading of the form and lists the two (2) Federal Aid Project No(s) 4852111P and 4042304C which define this Contract as a Federal-Aid Contract.
4. Plan Sheet WM-1 Note states "This Project (FM 41462415601) to be Let to Contract with Financial Project ID 41462415201 and 40557835201. These two FIN Project ID's are Federally Funded (4042304C & 4852111P respectively)."
5. Plan Sheet WM-2, General Note 1, indicates that the contractor needs to consider all Contract documents with respect to the materials to be used for the water main construction project."

Findings of the Disputes Review Board

FDOT Contract T6168 is stated as a “FEDERAL AID JOB” on the standard bid blank form. It contains Federal Aid Project numbers 4842111P and 4042304C, and Financial Project numbers 405578 3 52 01, 405578 3 56 01, 414624 1 52 01, 414624 1 56 01, and **414624 1 56 02** (emphasis added). Financial Project number **414624 1 56 01** represents the project involved in this dispute.

There is no relationship shown on the bid blank between the Federal Aid Project Numbers and the FDOT Financial Project Numbers. However, the letting award notice of May 20, 2009, shows that the two Federal Project Numbers are associated with only two of the five Financial Project Numbers. The other three Financial Project Numbers, including **414624 1 56 01**, are shown with a Federal Aid Number of N/A. The conclusion is that there are no Federal Aid funds going to **414624 1 56 01**.

Project **414624 1 56 01** is a utility improvement job founded on a Joint Project Agreement with the utility owner, Miami-Dade Water and Sewer Department (MDWASD) and FDOT with separate Plans and Technical Special Provisions (TSP) contained within contract T6168. Reimbursement for the work is 100% paid by MDWASD to FDOT including a percentage for administration.

*The Contractor places reliance for entitlement on two main arguments. First, that the specifications of the Plans and TSP’s for project **414624 1 56 01** conflict with the “Buy America” steel requirement of Supplemental Standard Specification 6.5.2. In such a conflict, Article 5.2 of the Standard Specifications requires that TSP’s govern over Supplemental Standard Specifications. Secondly, that the approval of his shop drawings validate the use of foreign steel fittings.*

Shop drawings were submitted timely by the Contractor to the Engineer of Record and MDWASD for project **414624 1 52 01**. He submitted two complete sets of drawings for the water main fittings from two manufacturers. Both were ultimately approved. Neither sets of shop drawings revealed the source of supply for the steel. The approvals from the Engineer of Record and MDWASD contained the identical disclaimer “Checking of shop drawing submittals is limited to general design and general arrangements only. It is not intended to be a verification of the items or total material required. Approval shall not relieve the contractor of the responsibility for details of design, correct dimensions for proper fitting, capacity, performance, construction, or *any other requirement of the contract* (emphasis added)”. **DRB Conclusion: Shop drawing approvals are a technical process. Since the Contractor did not notify either the Utility Engineer of Record or the Utility Owner of his source of supply, they could not make an informed approval on this regardless of the project requirements. Additionally, the approval disclaimers should have further informed the Contractor of his need to comply with the governing contract provisions.**

Both the Plans and the TSP's for project **414624 1 56 01** contain the requirement, "Unless otherwise indicated, all equipment and materials used in the construction of Miami-Dade Water and Sewer Department's water and/or wastewater utilities, together with the methods and requirement for the installation of said equipment and materials, shall be in accordance with the Miami-Dade Water and Sewer Design and Construction Standard Specifications and Details, latest edition, as amended". Additionally in the TSP's, this statement is preceded by, "*For this TSP* (emphasis added)".

The MDWASD TSP's are silent in regard to the source of supply for any steel or iron products. They only require that the country of origin be stamped on the castings.

The Department contends that there can be no basis for entitlement because "there is no language contained within the Contract Documents that provides direct contradiction to the requirements of this Specifications (6-5.2). Also, "The existence of Plan Notes or language within the Miami-Dade Water and Sewer Technical Special Provision does not supersede the requirements of the Supplemental Specification because the other language does not require the exclusive use of foreign steel products for the water main construction." **DRB Conclusion: It was not necessary for the MDWASD specifications to have explicit language specifying the source of steel and iron in order to contradict 6-5.2. The MDWASD specification silence in this regard is enough to notify the contractor that he could source this material outside of the country provided it met all other requirements. Both parties agreed at the hearing that MDWASD has used foreign steel in the past.**

The Department states that the Contractor submitted domestic steel fittings in his shop drawings and then changed to foreign steel after these were approved. **DRB Conclusion: During the hearing both parties agreed that both suppliers submitted by the Contractor in his shop drawings could supply either domestic or foreign steel. The original shop drawings did not reveal the source of the material, therefore, this point is moot.**

The Department states, "Plan Sheet WM-2, General Note 1 (MDWASD plans), indicates that the contractor needs to consider all Contract documents with respect to the materials to be used for the water main construction project." **DRB Conclusion: In it's Position Paper the Department did not quote the same note in the TSP's preceded by the words, "For this TSP". The TSP language leaves no doubt that any exception to the MDWASD specifications must occur within their TSP. As per Article 5-2 of the Standard Specifications, Coordination of Contract Documents, the TSP governs over Supplemental Specification 6-5.2, therefore allowing the use of foreign steel and iron.**

Recommendation of the Disputes Review Board

As a result of conflicting requirements between the Supplemental Specifications and MDWASD Technical Special Provisions contained in Project 414624 1 56 01, the Board finds that, as per Standard Specification Article 5-2, the TSP language governs the work. The Board therefore finds entitlement for American Engineering and Development Corporation for additional costs associated with the requirement by the Owner to use domestic steel in place of foreign steel fittings.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

Please remember that a response to the Board and the other party of your acceptance or rejection of the recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by the non-responding party.

I certify that I have participated in all meetings of this board regarding this issue and concur with the findings and recommendations.

Signed for, and with the concurrence of all members.
Members: C. Merritt Bird, John C. Norton, and Allan Adderley

Allan Adderley, P.E.
Chairman