

DRB RECOMMENDATION

SOUTH DIXIE NORTH AND WATER MAIN PROJECTS

October 18, 2010

Mr. Arturo Perez, P.E., P.S.M. Senior Project Engineer Pinnacle Consulting Enterprises, Inc. 1700 South Red Road, Suite 201 Miami, FL 33155	Mr. Rolando J. Encinosa Project Manager Trans Florida Development Corp. 13960 S.W. 144 th Avenue Road Miami, FL 33186
--	---

Project Limits: SW 288th Street to SW 264th Street

Financial Identification Nos.: 410625-2-52-01 and 410625-2-56-01

Federal Aid Contract: 4852113P

Contract: T-6192

County: Miami-Dade

Dispute No.: 01

Hearing Date: October 4, 2010

Parties: FDOT VI and TRANS FLORIDA DEVELOPMENT CORPORATION

ISSUE

The issue is whether the Contractor's use of foreign materials (steel and iron) for the water and sewers work of the FDOT roadway project is unrestricted in the Contract where the Technical Special Provision (MDWASD Standard Specification and Details) has no restriction but the Supplemental Provision ("Buy America" provision) has a restriction of its use. The restriction on the use of foreign material was limited by the Buy America provision to the use of the greater of \$2,500 or 0.1% of the total Contract amount.

INTRODUCTION

Well written Position Papers and Rebuttals were timely submitted by both Parties on or before September 8 and September 28, respectively. A hearing was held at the FDOT District VI's Construction Office on October 4, 2010 with both Parties and their respective personnel in attendance. The FDOT presented its position first followed by the Contractor. There were successive follow ups by both Parties and their representatives during the hearing.

DEPARTMENT'S POSITION

In summary, the Department's position is that the Contractor is allowed to use foreign steel and iron but only to the extent permitted under the Contract by Supplemental Specification ("SP") 6-5.2: Source of Supply-Steel (Federal Aid Contracts Only). With merely a limitation on the use of these foreign materials, any application to the hierarchy of documents whereby the Technical Special Provisions, Section 1.03 ("TSP") takes precedent over this Supplemental Specification is inapplicable because both documents are complementary rather than contradictory. As the contract documents are to be interpreted as a whole, the Contractor should have accounted for the limitation on the use of minimal amount of quantities of foreign steel and iron to the extent of only \$11,132.35 for, including but not limited to, the water and sewer work on the Project.

CONTRACTOR'S POSITION

The Contractor's position on the other hand, is that the Contract documents relating specifically to the issue are unclear and misleading. First, the roadway plans and bridge have a "Federal Funds" designation while the independent financial project number for the water and sewer plans have no such designation. The same applies to the bid items as payment for the water and sewer work is by reimbursement to FDOT under a joint project agreement and not by federal aid participation funding. Besides it allegedly being recent to the industry, the FDOT's EOR was also unclear about the requirements of the "Buy America" provision. Specifically, shop drawings proposing the use of materials contrary to the "Buy America" provision were first approved by the EOR then later disapproved upon the advice and instruction of the Department. Albeit, to restrict the Contractor to purchase materials made of iron and steel produced in the United States according to the "Buy America" provision results in material cost increases of \$197,986.19 because domestic materials are more expensive. As a result of these

unclear and misleading provisions, the Technical Special Provision should take precedence over the Supplemental Specifications. According to the hierarchy of documents, the TSP governs over the SP under Article 5-2 of the Standard Specification ("SS"): Coordination of Contract Documents, of the Contract. As a result, the higher order TSP from MDWASD providing no restriction on the use of foreign materials, trumps the "Buy America" provision of the lower order SP. Thus, the Contractor is entitled to payment of the material cost increases flowing from the Department's imposition of the "Buy America" provision.

ANALYSIS

The Board limited its analysis to the four corners of the Contract. Both provisions in the Contract at issue were presumed to be important. Thus, an interpretation that gives effect to both provisions was preferred over an alternative interpretation that relies on the negation of the other provided that such interpretation did not distort the obvious intent of the entire Contract. Against this backdrop therefore, the Board interpreted both provisions as compatible, rather than consider one provision as unreasonable, unlawful or of no effect. Any discrepancy between the provisions however was controlled by the governing order of documents as enumerated under Article 5-2 of the Standard Specification for Road and Bridge Construction.

It was undisputed that the TSP permitted the use of both domestic and foreign materials in any proportion at the Contractor's sole option. The use of foreign materials was the most preferred option for the Contractors because of its obvious cost advantage. Likewise, the SP permitted the use of both domestic and foreign materials but strictly limited the use of foreign material on this Project to no more than \$11,132.35. Without approval of an exception by the Department, such an amount can be exhausted by the purchase of two to three fittings at the sized required for the Project. Nonetheless, both provisions permitted the use of domestic and foreign material. Both provisions were therefore, compatible. Albeit, with a restriction on the use of foreign material.

Article 5-2 Coordination of Contract Documents, on the other hand states as follows:

"These Specifications, the plans, Special Provisions, and all supplementary documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all. All parts of the Contract are complementary and describe and provide for a complete work. In addition to the work and materials specified in the Specifications as being included in any specific pay item, include in such pay items additional, incidental work, not specifically mentioned, when so

shown in the plans, or if indicated, or obvious and apparent, as being necessary for the proper completion of the work under such pay item and not stipulated as being covered under other pay items.

In cases of discrepancy, the governing order of the documents is as follows:

- 1. Special Provisions.*
- 2. Technical Special Provisions.*
- 3. Plans.*
- 4. Road Design, Structures, and Traffic Operations Standards.*
- 5. Developmental Specifications.*
- 6. Supplemental Specifications.*
- 7. Standard Specifications...." [Emphasis added].*

Under the coordination of Contract Documents therefore, both the TSP and SP are integral parts of the Contract. A requirement occurring in one is as binding as though occurring in both. Both documents are complementary. In cases of a discrepancy however, the TSP trumps the SP. At the hearing the Contractor was asked repeatedly but was unable to identify any such discrepancy between both documents. The position paper was also silent regarding any specific discrepancy between the provisions to trigger application of Article 5-2 of the SS. Instead, the Buy America provision was held to be excluded from water and sewer works, for among other things, it was not practical under the circumstances, it was not depicted clearly on the plans, and it was based on the County being the sole funding source with no federal funds attached. While the Contractor's showing that subsequent remedial measures to duplicate the "Buy America" provision specifically in the TSP to guide future bidders is a better approach to adopt in the future, regardless, there was no apparent discrepancy between the provisions relating to the use of foreign material over the use of domestic material in this Contract. Granted, an interpretation of both provisions together was required under the circumstances.

DRB RECOMMENDATION

The Board recommendation is that the Contractor's use of foreign materials (steel and iron) on the FDOT roadway project was restricted to the \$11,132.35 in the Contract by the Buy America provision. There is no entitlement therefore for additional cost for complying with this restriction.

The Board appreciates the cooperation of both Parties and the information presented for review in order to make this recommendation. Please remember that a Board's recommendation requires acceptance or rejection within 15 days. Failure to respond to the DRB and other parties within the time frame constitutes an acceptance by both parties.

The Disputes Review Board is unanimous in its presentation of these recommendations for the issue.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,

Disputes Review Board

Robert A. Cedeno – Chairman

Don Henderson – Member

Ronnie Klein - Member

Signed for all with the concurrence of all members.



Robert A. Cedeno