

DISPUTES REVIEW BOARD RECOMMENDATION

25 July, 2011

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Ref: SR-580 (Bush Blvd.) From W. of Florida Ave. to East of 56th St..
Contract No: T7189, Financial Project No: 413407-1-52-01, et. al.
Disputes Review Board hearing regarding the entitlement to
compensation on several pay items

Dear Sirs:

The Florida Department of Transportation and Pepper Contracting Services, Inc. (PCSI) requested a hearing concerning the above referenced issue.

CONTRACTOR'S POSITION

We will state the Contractors position by referencing and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

The Busch Blvd project was designed by the Department as a Resurfacing, Restoration, and Rehabilitation (3R) project. It was a 245 calendar day project, with 120 days of flex time.

The Department received bids at the April 30, 2008 letting. Pepper Contracting was low bidder at \$9,496,444. R. E. Purcell was 2nd bidder at \$9,823,066. AJAX Paving was 3rd bidder at \$9,934,120

The contract execution date was June 30, 2008 and contract time started on September 22, 2008.

During the course of the project, the Department materially changed the project quantities and pay items thru the issuance of thirteen (13) Plan Revisions and twenty six (26) work orders. In addition, the Department directed significant plan quantity changes in the field.

The Final Acceptance date was October 2, 2009. This represents a total contract time of 376 days, compared to the original 245 days. The Department issued a first Offer of Final Payment, on December 8, 2009 (67 days later). This initial Offer of Final Payment was grossly inaccurate, and the Department issued a Notification of Findings (2nd Offer of Final Payment) on January 28, 2010 (118 days after Final Acceptance). This 2nd Offer of Final Payment was still grossly inaccurate.

Further, Pepper's QA letter stated that in accordance with the contract, a Certified Claim would be submitted by June 6, 2010, which was 180 days from the Department's initial Offer of Final Payment.

As noted above, the June 3, 2010 Certified Claim submitted by Pepper itemized \$892,620.59 in quantity adjustments and missing pay items that were not included in the Department's Offer of Final Payment. Supplemental Agreements NO.5 and 6 paid Pepper a total of \$307,980.72 of the quantities and pay items that we itemized in our QA letter and Certified Claim. Pepper is seeking payment for the remaining \$584,639.87 of the \$892, 620.59 that was itemized in our QA letter and Certified Claim.

The Department sent a December 15, 2010 letter to Pepper (subsequent to processing the 8/26/10 and 11/2/10 Supplemental Agreements) in which the Department takes the position that Pepper should have submitted a Certified Claim package by a deadline of March 30, 2010, instead of the June 6, 2010 deadline. The Department is arguing that 180 days from the October 2, 2009 Final Acceptance date, or March 30, 2010, is the deadline that Pepper should be held to. The Department's letter states that the remaining quantity adjustments and pay items were being rejected on that basis.

Pay Item 705-11-3 Delineator, Flexible High Visibility Med

During the project, Roadway Specialty Devices submitted for approval to use the delineator product that it based its bid on, and that was on the Department's approved QPL list. The Department rejected that product and insisted that Roadway Specialty Devices use the product that was called out on the plans, even though it was not on the approved QPL list at bid time. This project was bid on April 30, 2008; yet, the product that the Department insisted on was not approved for use by the Department and placed on the QPL list until September 23, 2008, some 5 months later. This product, which is called a Tuff Post High Visibility Median Separator, is a sole source product. It is

significantly more expensive than other delineator products on the QPL list.

Roadway Specialty Devices timely submitted a claim for the increased delineator costs in May 2009, during the project completion. In turn, Pepper Contracting timely submitted this claim to the Department in May 2009. The Department failed to address this claim during the project. Pepper itemized this claim in our QA letter, and re-submitted it with our Certified Claim package. Since then the Department has continued to not respond to this claim.

Pay Item 101-1: Mobilization and Pay Item 102-1: Maintenance of Traffic

As noted above, during the project, the Department issued thirteen (13) Plan Revisions and twenty six (26) Work Orders, as well as directing significant plan quantity changes in the field. These extensive changes to the project had a direct impact to the scope of Pay Items 101-1 and 102-1.

A review of the Computation Book for the other Maintenance of Traffic pay items reflects that they were all based on a calculation of quantities that tied to the 245 contract days. In addition, the quantities are tied to the specific requirements of the project. Plan Sheets 57 and 58 describe the Lane Closure requirements for the project. On the Busch Blvd project, the majority of the work activities required Lane Closures, in order to create a "work zone" that would allow the work to be accomplished by using a closed lane or multiple closed lanes as the work zone. This was a major contract requirement on the Busch Blvd project, as very little work could be accomplished on this project, without a Certified MOT crew on hand, and all the signs, traffic devices and equipment to set up and take down a lane closure, as well as maintain it during each work shift.

The plans for this project and DOT specifications direct the Contractor to include in the lump sum Pay Item 102-1, the costs to perform these lane closures and related MOT activities on the project. Therefore, in preparing our bid for this project, Pepper took into account the number of lane closures that would be needed to complete the scope of the project. Pepper estimated 226 work shifts that required lane closures. We based our lump sum MOT bid on this quantity of lane closures and related MOT costs.

By comparison, the as-built quantity for Pay Item 102-76 was 1,158 ED. Therefore, the actual number of lane closures jumped to 1,158 versus the original 245. This represents a 473% increase!

Additionally, Pepper included in our Certified Claim a Work Shift analysis. This analysis reflects that 793 work shifts were required, compared to the 226 that were planned. This increase of 567 work shifts

required Pepper to significantly increase our resources on this project. The project was built by extensive use of both Day and Night Shifts. Naturally, the same crews and supervisory personnel cannot work both shifts, so Pepper had to put additional crews and supervisory personnel on the project.

On the Busch Blvd project, the Department significantly changed the scope of the project with thirteen (13) Plan Revisions and (26) Work Orders, along with significant changes to plan quantities in the field. Pepper completed all of this additional and modified work, in a timely and responsive manner. This is reflected by a CPPR score of 100 on this project.

In summary, Pepper is requesting an adjustment to the "quantity" on Pay Items 101-1 and 102-1 that is commensurate with the increase in scope for each item. Comparable to the way that Pay Item 110-1-1 Clearing and Grubbing was adjusted by the Department to reflect an increase in scope; Pay Items 101-1 and 102-1 also need to be adjusted.

Pay Item 120-1 Regular Excavation and Pay Item 120-6 Embankment

The Busch Blvd project was designed by the Department as a 3R project. This is significant to the earthwork activities, as the project plans were not prepared with cross sections.

Further, by Addendum No.2 the Department deleted approximately one mile of sidewalk at the west end of the project. However, oddly, the Department still retained the majority of the same quantity of sidewalk in the sidewalk pay item. Conversely, the Department deleted the earthwork quantities that corresponded to the sidewalk installation.

The Department communicated to the Bidders that the embankment associated with a mile of sidewalk, would be added to the contract by overrunning the 120-6 embankment pay item that it added to the contract by Addendum. Further, the Department's answers to the above questions, indicates a likely hood that the sidewalk would be added back to the contract.

The project drawings for the 6,000 LF of sidewalk showed the location of the sidewalk to be elevated, and that embankment would be required to perform the earthwork. Based on this information, as well as the original quantities provided by the Department, Bidders were able to anticipate the earthwork quantities for the project, if the sidewalk was added back in.

During the project, the Department did in fact, add the 6,000 LF of sidewalk back into the contract. However, the Department changed the location of the sidewalk, such that it was located in a "cut" or

excavation footprint, instead of an embankment footprint. In addition, the Department increased the quantity of excavation in the median areas. The combination of these changes caused the earthwork quantities to change significantly, from what Pepper anticipated.

The result was that excavation went up significantly, and embankment went down significantly as compared to the original design quantities for the project and the sidewalk area.

At the same time, Pepper's unit cost to perform the excavation work went up significantly. The increased excavation was all slow production, high cost work. The work had to be performed while working under Lane Closure restrictions, the majority of it at night.

Pepper's request for a quantity adjustment of our MOT and MOB pay items, which we documented were directly tied to the increase in the project scope, is justified, based on these very significant changes to the project scope. Further, the precedent has already been established on this project for adjustment of a Lump Sum "quantity" based on Plan Revision(s).

Similarly, the Department's incorrect quantities and incorrect approach to the Earthwork pay items needs to be equitably addressed. The Department should have addressed this when the Plan Revisions were issued, as well as during the Final Estimates process. Pepper timely addressed this issue with our QA letter and our Certified Claim package.

Finally, our subcontractor, Roadway Specially Devices, deserves to be compensated for the increased costs of the Delineator product that the Department insisted on, even though it was not on the QPL list at bid time.

CONTRACTOR'S RUBUTTAL

This contract became a fluid series of changes and the Department established the protocol of directing Pepper to proceed with the work, with the understanding and agreement that the Department would equitably adjust the contract by Supplemental Agreement and/or Final Quantity reconciliation after the fact.

Pepper acknowledges that SA # 1, 3 and 4 ... and the 26 Work Orders were executed by Pepper containing language that they are full and complete settlement of their specific work activities. We are fine with that. However, Pepper maintains our right to receive compensation for the Plan Revisions and field directed changes to Plan Quantities that we itemized in our Qualified Acceptance Letter and Certified Claim.

In summary, the history of this project establishes a clear pattern of the Department directing Pepper to proceed with quantity changes, as well as other significant changes to the project scope, with the understanding that Supplemental Agreements and Final Quantity reconciliation would follow behind.

The Department's Position Paper tries to minimize the magnitude of the changes in quantities and scope to Plan Quantities on this project. Additionally, the Department incorrectly references Specification 4-3 as the applicable specification regarding quantity changes.

Pepper refers the Regional DRB to **Specification 9-3.2.1: Error in Plan Quantity**, which states:

As used in this Article, the term "substantial error" is defined as the smaller of (a) or (b) below:

- (a) a difference between the original plan quantity and final quantity of more than 5%,*
- (b) a change in quantity which causes a change in the amount payable of more than \$5,000.*

Further, under **Specification 9-3.3.1: Error in Lump Sum Quantity**, it states:

Where the Department designates the pay quantity for an item to be a lump sum and the plans show an estimated quantity, the Department will adjust the lump sum compensation only in the event that either the Contractor submits satisfactory evidence or the Department determines and furnishes satisfactory evidence that the lump sum quantity shown is in substantial error as defined in 9-3.2.1.

Based on the definition of substantial error in 9-3.2.1, there were numerous Plan Quantity pay items on this project that were in substantial error. Further, the lump sum MOT and MOB pay items were in substantial error as they were based on the original 245 contract days, and they were based on the Plan Quantities that were in the original Plans and Bid Documents.

As Pepper described in our Position Paper, the magnitude of the added work on the Busch Blvd project is striking. Pepper setup 1,158 lane closures, compared to the bid quantity of 245; which represents a 473% increase. Our detailed work shift analysis reflects 793 actual work

shifts compared to 226 planned work shifts, a 250% increase in manpower and equipment.

Likewise, the magnitude of the earthwork changes is striking. The Plan Quantities for the Excavation and Embankment pay items are clearly in “substantial error” based on the above definition. The Department’s Position Paper summarizes that Excavation increased by 58%, and Embankment increased by 17%. However, in reality the quantities changed by 57% and 233% respectively, when compared to the original plans with the 6,000 LF of sidewalk in its original location. Either way, both pay items exceed the 5% substantial error definition.

Pepper submits that **Specification 9-3 Compensation for Altered Quantities** is the most applicable specification to what occurred on the Busch Blvd project.

For the lump sum Pay Items 101-1 Mobilization and 102-1 Maintenance of Traffic, entitlement is clearly defined under **Specification 9-3.3.2 Authorized Changes in Work**, which states:

Where the Department designates the pay quantity for an item to be a lump sum and the plans show an estimated quantity, the Department will adjust compensation for that item proportionately when an authorized plan change is made which results in an increase or decrease in the quantity of that item. When the plans do not show an estimated plan quantity or the applicable specifications do not provide adjustments for contingencies, the Department will compensate for any authorized plan changes resulting in an increase or decrease in the cost of acceptably completing the item by establishing a new unit price through a supplemental agreement as provided in 4-3.2.

Based on this specification, the quantity and therefore the compensation for both lump sum pay items should be adjusted proportionately to the increase in quantities on the project. The significant error in plan quantities is documented in the Department’s Final Estimate process.

In addition, Pepper believes that contract entitlement is provided in Section 4-3 Alteration of Plans or of Character of Work. This specification authorizes the Engineer...or on this project, the Department, to increase quantities and make changes to the scope of the project. It states that the Contractor is obligated to perform the added work, the same as if it had been part of the original contract.

The Department also states that it is relying on the notice provisions of Section 5-12 and the 180 calendar days from Final Acceptance to submit

a Certified Claims as their basis for denial of additional payment to Pepper.

Pepper's rebuttal comments regarding the Section 5-12 requirements are:

First, we do not find in the specifications that the Section 5-12 notice provisions apply to Section 9-3 Compensation for Altered Quantities. Simply, there is no notice provisions called out in Section 9-3.

Second, the history of this project is extremely important. The Department requested Pepper's cooperation with a fluid series of quantity changes. Pepper gave this cooperation to a very high level. We significantly increased our manpower and equipment on the project, as well as our supervision and related general condition requirements. It is significant that Pepper did not go after compensatory days, nor did we go after productivity impacts.

In turn, we trusted that the Department would do the same. The Department did to a point; but, did an abrupt departure after the project was completed.

It is noteworthy, that when the Department raised a concern about the 180 days from Final Acceptance, for the first time, it was in a March 30, 2010 letter. What is important for the DRB members to be aware of is that the 180 days from Final Acceptance expired the very next day, March 31, 2010. So, Pepper had no opportunity to comply at that point. We responded in writing that consistent with our statements in our Qualified Acceptance Letter, we would submit a Certified Claim package by June 6, 2010, which still met the 180 days from the Department's Offer of Final Payment.

It is also noteworthy, that the Department went on to process SA # 5 and 6 on August 26, 2010 and November 2, 2010 respectively. The Department processed these SA's, totaling over \$307k, notwithstanding that all of the items included in these SA's did not meet the formal requirements for "notice" and did not meet the formal requirements for "certified claims" that the Department is now raising.

DEPARTMENT'S POSITION

We will state the Departments position by referencing and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Departments position paper has the following statements and references to document their claim for entitlement.

Issue No. 1 – Request to Reimburse the Contractor for Increased Work Shifts and Extended Maintenance of Traffic.

This dispute is regarding additional payment for Increased Work Shifts and extended Maintenance of Traffic. The Contractor claims additional compensation related to the Plan Revisions and Department directed changes in quantities and work effort. The Department has fully reimbursed the Contractor for all revisions and quantity changes in accordance with the Contract Documents. Some facts related to the Claim are as follows:

- Notice of Claim Not Provided by Contractor in Accordance with Specification Section 5-12.
- Certified Claim Not Provided by Contractor in Accordance with Specifications 5-12, timeliness and content.
- Contractor Assertion of Increased Work Shifts and MOT is unsubstantiated and unreasonably quantified by the contractor.
- As the project progressed, the Contractor was justly compensated for all extra work in accordance with contract documents in the way of Work Orders and Supplemental Agreements. **All negotiated costs for the Work Orders and SA's are increased by an additional labor burden percentage to cover everything in this claim.** (Note; There were two Unilateral SAs issued after Final Acceptance.)
- Contractor has not substantiated any damage from the added work or quantity changes.

The Contractor failed to notify the Department of a claim for additional compensation in accordance with requirements in Section 5-12 Claims by Contractor.

5-12 Claims by Contractor. (Supplemental Specifications)

SUBARTICLE 5-12.1 (Page 45) is deleted and the following substituted:

5-12.1 General: When the Contractor deems that extra compensation or a time extension is due beyond that agreed to by the Engineer, whether due to delay, additional work, altered work, differing site conditions, breach of Contract, or for any other cause, the Contractor shall follow the procedures set forth herein for preservation, presentation and resolution of the claim... The failure to provide such notice of intent, preliminary time extension request, time extension request, certified written claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.

Supplemental Specifications

5-12.2.1 Claims For Extra Work: Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based.

At no time during this project did the Contractor provide a written Notice Of Intent To Claim for monetary compensation resulting from increased work shifts or extended Maintenance of Traffic.

The Contractor (Pepper) has not submitted a certified claim in accordance with Supplemental Specification Section 5-12.2.1 Claims for Extra Work; Section 5-12.3 Content of Written Claim nor Standard Specification 2007 Section 5-12.7. The Contractor's failure to provide proper claim notice and documentation constitutes a waiver by the Contractor to additional compensation.

Supplemental Specification

5-12.2.1 Claims For Extra Work: Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay. ...and on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the

Contractor shall submit full and complete claim documentation as described in 5-12.3. However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate. Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.

The Contractor, to date, has not submitted the above required project claim justification/documentation as required and has thereby waived any right to additional compensation.

The certified claim (see Certified Claim, page 2) was submitted after the March 31, 2010 deadline eliminating any rights to the issues.

The allowance to delay a claim submittal until 180 days after the Offer of Final Pay is to be utilized only:

“for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate.”

Since none of this part of the claim is related solely to final estimate quantities, then that part of the specification does not apply to the claim.

Lastly, at no time during this project did the Contractor provide the Department with the documentation required in Specification 5-12.7 such as daily records of all labor, material and equipment costs incurred for operations affected by the extra work or delay.

MOBILIZATION:

PCSI is claiming that their lump sum Mobilization cost should be increased due to the project's effects on Supervision, Per Diem, Plant Opening Fees, Surveyors, Staging Yard and CQC Material Testing. They then increase these costs by 17.5 % overhead percentage). All of these items are costs which should be embedded in the individual pay items. In fact, the specification for Mobilization is as follows:

**SECTION 101
MOBILIZATION**

101-1 Description.

Perform preparatory work and operations in mobilizing for beginning work on the project, including, but not limited to, those operations necessary for the movement of personnel, equipment, supplies, and incidentals to the project site and for the establishment of temporary offices, buildings, safety equipment and first aid supplies, and sanitary and other facilities.

Include the costs of bonds and any required insurance and any other preconstruction expense necessary for the start of the work, excluding the cost of construction materials.

101-2 Basis of Payment.

101-2.1 When a Separate Item is Included in the Proposal: When the proposal includes a separate item of payment for this work, the work and incidental costs specified as being covered under this Section will be paid for at the Contract lump sum price for the item of Mobilization.

Payment will be made under:

Item No. 101- 1- Mobilization -lump sum.

None of the items that PCSI is requesting is listed in the description for Mobilization.

MAINTENANCE OF TRAFFIC:

Since the Contractor did not provide any job site records supporting their assertion that additional Maintenance of Traffic should be paid, it is impossible to verify their request, or, determine entitlement. All added work and quantity changes were completed and reimbursed in accordance with the contract documents.

Contractor was justly compensated for all extra work in accordance with contract documents in the way of Work orders and Supplemental / Unilateral Supplemental Agreements. All negotiated costs for the Work Orders and SA's are increased by an additional labor burden percentage to cover everything in this claim.

All of the plan revisions and changes in quantities were fully compensated by "Full and Final" Work Orders (WO's) and Supplemental Agreements (SA's), signed and agreed to by both the Contractor and the Department. In all cases overhead was applied to extra work in accordance with the contract documents. It would be inappropriate to reimburse the Contractor these same costs again through this claim.

Towards the very end of the project, the Department and Pepper negotiated extra work for irrigation and other miscellaneous changes to be added to the contract through SA 05 and SA 06. In all cases overhead was applied to extra work in accordance with the

contract documents. After this negotiation, Pepper advised the Department that they would not execute these documents. Subsequently, Unilateral SAs 05 and 06 were issued by the Department.

Issue No. 2 – Request to Reimburse the Contractor for Increased Earthwork Quantity Changes due to Plan Revisions.

This dispute is regarding additional payment for changes to the earthwork quantities for embankment and excavation. The Contractor claims additional compensation is due because the Department made significant changes in the earthwork quantities, especially after bidding which didn't allow them to properly bid the pay items for excavation and embankment. It is especially important to note that neither pay item is a major item of work and that Pepper was fully reimbursed for all earthwork and embankment completed on the project in accordance with the bid item unit prices they themselves established. Some facts related to this portion of the Claim are as follows:

- Notice of Claim Not Provided by Contractor in Accordance with Specification Section 5-12.
- Certified Claim Not Provided by Contractor in Accordance with Specifications 5-12, timeliness and content.
- Neither pay item is a major item of work and is therefore, not subject to a negotiated price change.
- Contractor was justly compensated for all extra work in accordance with contract documents
- Contractor has not substantiated any damage from the added work or quantity changes.

The Contractor failed to notify the Department of a claim for additional compensation in accordance with requirements in Section 5-12 Claims by Contractor.

At no time during this project did the Contractor provide a written Notice Of Intent To Claim for monetary compensation due to changes in earthwork quantities

Certified Claim Not Provided by Contractor In Accordance with Specifications 5-12 .

The Contractor (Pepper) has not submitted a certified claim in accordance with Supplemental Specification Section 5-12.2.1 Claims for Extra Work; Section 5-12.3 Content of Written Claim nor Standard Specification 2007 Section 5-12.7. The Contractor's failure to provide proper claim notice and documentation constitutes a waiver by the Contractor to additional compensation.

The Contractor, to date, has not submitted the above required project claim justification/documentation as required and has thereby waived any right to additional compensation.

The certified claim was submitted after the March 31, 2010 deadline eliminating any rights to the issues.

Since none of this part of the claim is related solely to final estimate quantities, then that part of the specification does not apply to the claim.

Lastly, at no time during this project did the Contractor provide the Department with the documentation required in Specification 5-12.7 such as daily records of all labor, material and equipment costs incurred for operations affected by any changes in earthwork quantities. ...

None of the earthwork pay items are a major item of work and are therefore, not subject to a negotiated price change.

Issue No. 3 – Request to Reimburse the Contractor for Flexible High Visibility Delineators

This dispute is regarding additional payment to the Contractor for having to install a Flexible High Visibility Delineator that they claim was not on the QPL at the time of Letting, so, they couldn't accurately bid the item. It is especially important to note that this pay item is not a major item of work and that Pepper was fully reimbursed for all delineators installed on the project in accordance with the bid item unit prices they themselves established. Some facts related to this portion of the Claim are as follows:

- Certified Claim Not Provided by Contractor in Accordance with Specifications 5-12, timeliness and content.
- Pay item is not a major item of work and is therefore, not subject to a negotiated price change.
- Contractor was justly compensated for all delineators installed in accordance with contract documents
- Contractor has not substantiated any damage from the added work or Quantity changes.

Certified Claim Not Provided by Contractor In Accordance with Specifications 5-12 .

The Contractor (Pepper) has not submitted a certified claim in accordance with Supplemental Specification Section 5-12.2.1 Claims for Extra Work; Section 5-12.3 Content of Written Claim nor Standard Specification 2007 Section 5-12.7. The Contractor's failure to provide proper claim notice and documentation constitutes a waiver by the Contractor to additional compensation.

The Contractor, to date, has not submitted the ... required project claim justification/documentation as required and has thereby waived any right to additional compensation.

The certified claim was submitted after the March 31, 2010 deadline eliminating any rights to the issues.

The allowance to delay a claim submittal until 180 days after the Offer of Final Pay is to be utilized only:

“for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate.”

Since none of this part of the claim is related solely to final estimate quantities, then that part of the specification does not apply to the claim.

In fact, RSD provided their claim to Pepper through a letter dated May 19, 2009, well before Final Acceptance, but, it was not certified and submitted to the Department in accordance with the contract documents.

Lastly, the claim package does not include an invoice showing the cost that RSD paid for the item installed. Additionally, there aren't any job site records that support the labor and equipment costs in the claim.

Pay Item 0705 11 3 Delineator, Flexible, High Visibility, is not a major item of work and is therefore, not subject to a price change.

The Contractor's Certified Claim is requesting \$10,706.15 for the cost of providing and installing Flexible High Visibility Delineators that are on the Qualified Products List (QPL). Pepper was fully reimbursed for all delineators installed on the project in accordance with the bid prices shown in the contract).

The Contractor's claim package shows a unit price at Letting that does not correspond with the Contract unit price. There isn't enough information in the claim to determine the reason behind this discrepancy. Also, there isn't any information that supports the bid in the contract. The claim includes an estimate from a supplier that doesn't have any project numbers or correspondence to support it is related to the bid that Pepper submitted. Finally, the claim indicates that since there wasn't an item on the QPL at the time of bidding, they couldn't bid it properly. However, there was a similar item on the QPL at the time of bidding which could have been used for pricing purposes. That would have been a better guide to their costs than a regular Delineator.

The contract specifications require the following:

993-4 Product Acceptance on the Project.

Acceptance will be made in accordance with the requirements of Section 705. Manufacturers seeking evaluation of their product must submit an application in accordance with Section 6.

6-1.3.1.1 The Department will limit the Contractor's use of products and materials that require pre-approval to items listed on the Qualified Products List effective at the time of placement.

It is clear that all products incorporated on a state project shall be on the QPL , certified, or approved.

In summary, the Department's position is that contractor PCSI is not entitled to additional compensation based on the following reasons:

- The specifications require Notice of Claim so that the Department can obtain proper records regarding the claim and determine means/alternatives to avoid additional project costs. PCSI did not provide proper notification of claim.
- The Contractor has not provided a certified claim for either additional compensation nor a final estimates quantity dispute in accordance with the contract specifications.
- Payment for all items are clearly described in the construction plans and gives a reasonable basis for both bid preparation and contract payment.
- For changes to the contract, the Contractor was fairly compensated by negotiated and agreed upon prices. These agreements were formalized by execution of Work Orders and Supplemental Agreements throughout the life for the project. At no time during these negotiations or execution of these documents did Pepper advise the Department of reserve their rights to costs over and above those included in the WOs and SAs.

- The Contractor has not substantiated damage from the contract specifications or field conditions, has been fully reimbursed in accordance with the Contract documents, and therefore, is not entitled to payment beyond what has been paid in accordance with the contract documents.

PCSI is not entitled to further compensation.

DEPARTMENT'S REBUTTAL

Pepper's claim and Position Paper are very clearly requesting revised unit prices for several pay items. This is obviously not a claim based solely on a Final Estimate quantity dispute. Pepper has not preserved their rights for this claim since it was not timely submitted in accordance with 5-12.

If this were a claim based on altered quantities requiring a Supplemental Agreement, Standard Specification 9-3.1 states: "Compensation for alterations in plans or quantities of work requiring supplemental agreements shall be stipulated in such agreement, except when the Contractor proceeds with the work without change of price being agreed upon, the Contractor shall be paid for such increased or decreased quantities at the Contract unit prices bid in the Proposal for the items of work."

Pepper's position paper places emphasis on the late execution of the Unilateral Supplemental Agreements #5 and #6 paid to Pepper November 5, 2010. These Unilateral Supplemental Agreements were delayed since negotiations completed at the project level were not upheld by Pepper management.

According to Pepper, Mobilization and Maintenance of Traffic lump sum items should be adjusted in the same manner as to Clearing and Grubbing lump sum items. This is misleading since the Plans Addendum #1 (provided prior to Letting) contained an estimated quantity for the Clearing and Grubbing work. Several months after Letting, Addendum #9 adjusted the limits of Clearing and Grubbing, therefore, Clearing and Grubbing final pay amount was adjusted in accordance with 9-3.3.2. This adjustment would not apply for the Maintenance of Traffic and the Mobilization items.

Pepper's position paper and claim package have failed to show how they were not already fairly compensated for the changes by way of pay item overruns, time extensions and full and final Supplemental Agreements and Work Orders.

FINDINGS OF FACT

1. Specification 5-11 of then 2007 Standard Specifications for Road and Bridge Construction states:

"When, upon completion of the final construction inspection of the entire project, the Engineer determines that the Contractor has satisfactorily completed the work, the Engineer will give the Contractor written notice of final acceptance."

2. Specification 5-12.2.1 states in part:

"...on projects with an original Contract amount greater than \$3,000,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete claim documentation as described in 5-12.3."

The Board cannot find that PCSI complied with this specification. There was no documentation in the position papers, nor presented in the hearing, proving that PCSI submitted a full and complete claim documentation as required.

3. Specification 5-12.2.1 states in part:

"...for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate. Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim."

The Board finds that PCSI did comply with this section of the specification, however the Board believes this claim is not a quantities issue.

4. Specification 6-1.3.1.1 Qualified Products List states in part:

"...The list provides assurance to Contractors, consultants, designers, and Department personnel that specific products and materials are approved for use on Department facilities. The Department will limit the Contractor's use of products and materials that require pre-approval to items listed on the Qualified Products List effective at the time of placement."

The Department bid this project with a requirement for Delineator, Flexible High Visibility Median pay item 0300-0705-11-3. This item was not on the Department's QPL. The bidders did not have assurance that this particular item would ever be on the QPL at time of bid. Therefore each bidder had to use their best judgment as what to bid.

5. PCSI's sub-contractor, Roadway Specialty Devices, Inc., gave notice to PCSI that the new (QPL) approved delineator was more expensive. The Department had knowledge that this notice by RSD was made.

6. Standard Specification 5-12.10 Non-Recoverable Items states:

"The parties agree that for any claim the Department will not have liability for the following items of damages or expense:

a. Loss of profit, incentives or bonuses;"

PCSI is claiming a loss of profit due the location of the added sidewalk. The new location of the sidewalk was located in a cut section rather than a fill section which was different from where the Contactor had anticipated it to be. This is not a final quantity issue since the Department paid for all the earthwork quantities at the contract price.

DISPUTES REVIEW BOARD RECOMMENDATION

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...¹**

The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and other contract documents. Therefore our recommendations are based on the above documents.

1. Pay Item 705-11-3: Delineator, Flexible High Visibility Med – ENTITLED
 - a. This is the Item listed to be bid by Pepper.

¹ DRBF Practices and Procedures Section 1 – Chapter 6

- b. The Contract Documents required the delineators to be on the QPL.
 - c. The delineator specified was not on the QPL.
 - d. Pepper's bid unit price was based on a delineator on the QPL.
 - e. Some months after construction began the specified delineator was added to the QPL.
 - f. The acceptable delineator was manufactured by only one company at a unit price higher than the price used by Pepper for bid.
 - g. Pepper's subcontractor, Roadway Specialty Devices, Inc., was required to use the contract required delineator.
 - h. The Department acknowledged notice by Roadway Specialty Devices, Inc. through Pepper.
2. Pay Item 101-1: Mobilization – NOT ENTITLED
- a. Pepper did not provide Notice as required in the Contract Documents.
 - b. This is a Lump Sum pay item. It was paid as specified in the Contract Documents.
 - c. By definition in the Specifications, Mobilization is to, "Perform preparatory work and operations in mobilizing for beginning work on the project...."
3. Pay Item 102-1: Maintenance of Traffic – NOT ENTITLED
- a. Pepper did not provide Notice as required in the Contract Documents.
 - b. This is a Lump Sum pay item. It was paid as specified in the Contract Documents.
 - c. The Department paid Pepper for all individual Maintenance of Traffic pay items used during construction.
4. Pay Item 120-1: Regular Excavation – NOT ENTITLED
- a. Pepper did not provide Notice as required by the Contract Documents.
 - b. This item was not a major item of work as defined by the Contract Documents.
 - c. The quantity of excavation was agreed to by both the Department and Pepper.
 - d. The Department paid Pepper for the work at the Contract Unit price bid by Pepper.
5. Pay Item 120-6: Embankment – NOT ENTITLED

- a. Pepper did not provide Notice as required by the Contract Documents.
- b. This item was not a major item of work as defined by the Contract Documents.
- c. The quantity of embankment was agreed to by both the Department and Pepper.
- d. The Department paid Pepper for the work at the Contract Unit price bid by Pepper.

No recommendation has been made concerning quantum, which is left to the parties to negotiate after both sides agree to the recommendation on entitlement. Remember that if the quantum (monetary damages) cannot be negotiated within 30 days (Dispute Review Board Operating Procedures, Section 5.3) the monetary damages should be submitted to the Board for determination.

The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

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 Disputes Review Board

Don Henderson, Chairman, David Jameson, Member, William
Waddell, Member

Signed for and with concurrence of all members

A handwritten signature in blue ink, appearing to read "Don Henderson", with a long horizontal flourish extending to the right.

Don Henderson, PE

Flowers, Carolyn

From: Pickard, Brian
Sent: Wednesday, August 10, 2011 3:52 PM
To: Flowers, Carolyn
Cc: Haberle, Dan; Harris, Alene
Subject: 41340715201 PCSI Response to DRB Recommendation - Busch Blvd
Attachments: PCSI Response to DRB Recom..pdf

Carolyn, please put this and the attachment in Hummingbird

From: Mike Hill [<mailto:MikeH@peppercontracting.com>]
Sent: Monday, August 08, 2011 4:22 PM
To: dhenderson@bellsouth.com
Cc: bwaddell539@yahoo.com; jamesonconsult@tampabay.rr.com; McKishnie, Brian M; Pickard, Brian; Doug Ebbers; Terry Cradick
Subject: PCSI Response to DRB Recommendation - Busch Blvd

Mr. Henderson,

Please see the attached letter from Pepper Contracting responding to the DRB recommendation dated 7/25/11 regarding Busch Blvd.

The original is being overnighted to your address. If you have any questions please feel free to contact me.

Mike Hill
Sr. Vice President Estimating / Business Development Manager
Pepper Contracting Services, Inc.
(o) 813.891.0550
(m) 813.347.8687



August 8, 2011

Mr. Don Henderson
271 Deer Run Road
Palm Bay, Fl. 32909

RE: SR 580 (Busch Blvd) from Florida Ave to East of 56th St
Contract No.: T7189; FPN: 413407-1-52-01
DRB Recommendation

Dear Don:

Pepper Contracting Services, Inc. (PCSI) has reviewed the Disputes Review Board Recommendation dated July 25, 2011, regarding referenced project. In accordance with project specification Section 8-3.7.4.h. this letter serves as our formal response to the Board's recommendations.

Item 1. Pay Item 705-11-3: Delineator, Flexible High Visibility Median

DRB Board Recommendation: ENTITLED
PCSI Response: ACCEPTED

Item 2. Pay Item 101-1: Mobilization

DRB Board Recommendation: NOT ENTITLED
PCSI Response: REJECTED

Item 3. Pay Item 102-1: Maintenance of Traffic

DRB Board Recommendation: NOT ENTITLED
PCSI Response: REJECTED

Item 4: Pay Item 120-1: Regular Excavation

DRB Board Recommendation: NOT ENTITLED
PCSI Response: REJECTED

Item 5. Pay Item 120-6: Embankment

DRB Board Recommendation: NOT ENTITLED
PCSI Response: REJECTED

Mr. Don Henderson
August 8, 2011
Page 2

We appreciate the Board's time and effort in trying to assist in resolving these issues.

Sincerely
Pepper Contracting Services, Inc.

A handwritten signature in black ink, appearing to read "Terry Cradick", written in a cursive style.

Terry Cradick
President

Cc: David Jameson, DRB Member
William Waddell, DRB Member
Brian McKishnie, FDOT
Brian Pickard, FDOT
Doug Ebbers, PSCI