

DISPUTES REVIEW BOARD RECOMMENDATION

June 15, 2004

Mr. Rusty Birchall
Project Manager
Cone & Graham, Inc.
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Tampa, Florida 33610

Mr. Barry Wilson
Project Engineer
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14161 SR-54
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Ref: FPN: 256337 1 52 01; Contract No. 21591, SR-54 From E of Gunn Hwy to W of North Suncoast Parkway, DRB Hearing concerning Loading and Hauling of Muck Materials for Ponds 3 East and 3 West.

Gentleman:

The Florida Department of Transportation (Department) and their Construction, Engineering and Inspection (CE&I) firm, Genesis CE&I Services, LLC (Genesis) and the Contractor on this project, Cone & Graham, Inc. (Cone Graham) requested a hearing before the Disputes Review Board (Board) to determine if Cone Graham is entitled to compensation for additional work associated with the loading and hauling of muck necessary to complete the placement of the muck blanket required in Floodplain Compensation/ Wetland Mitigation Sites 3 East and 3 West beyond what was indicated as required in the plans.

Cone Graham in their position paper states: "Ponds 3 East and West require 300 mm muck blankets, with the donor muck coming from areas specifically identified in the plans. The donor muck areas did not contain sufficient muck to complete the required muck blanket, and additional muck was required to be hauled from alternative locations."

The Department states: "The matter in dispute is the Contractor's Claim of a Changed Site Condition associated with the construction of the muck blanket in Mitigation Area 3 East and 3 West. ... The Department does not believe there was a Changed Site Condition and therefore there is no entitlement for additional compensation."

A hearing was held in the Departments project office on June 4, 2004, to determine resolution of the above issue. The Board has not included any of the exhibits from either of the parties position papers or rebuttals, but has left the reference to those exhibits in the narratives.

CONTRACTORS POSITION

Statement of Issue

Cone & Graham, Inc. has requested additional compensation for additional work associated with the hauling and handling of muck necessary to complete the placement of the muck blanket required in Floodplain Compensation/ Wetland Mitigation Sites 3 East And West beyond what was indicated as required in the plans. Specifically, Ponds 3 East

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and West require 300 mm muck blankets, with the donor muck coming from areas specifically identified in the plans. The donor muck areas did not contain sufficient muck to complete the required muck blanket, and additional muck was required to be hauled from alternative locations. It is the position of Cone & Graham, Inc. that the additional cost of loading and hauling the muck from these alternative sites is additional to the contract pay item for placing the muck blanket.

Cone & Graham, Inc.'s Position

The contract plans specified that a muck blanket be constructed in Floodplain Compensation/ Wetland Mitigation Site 3 East (hereinafter referred to as Pond 3E) and 3 West (hereinafter referred to as Pond 3W). Details of the construction of the muck blanket are included on Sheet 66 of the Contract Plans (Attachment 1). This sheet contains cross sections delineating typical muck placement. It also contains a plan note that states the following:

Muck source includes SR 54 construction impacts to Wetland 15 (Approx. Sta. 200+56 to Sta. 203+20) and Wetland 19 (Approx. Sta. 205+00 to 206+00). Relocated muck source can include muck, mucky sand, and sand found within the top 450 mm of the donor wetlands. For clarification call D. O. T permit Env. Scientist (813) 975-6784.

Payment for the placement of the muck blanket in Ponds 3E and 3W is specified to be through the pay item for subsoil excavation. This requirement is noted in Pay Item Footnote 6 contained on Sheet 12 of the contract plans (Attachment 2), which states:

2120-4 - Includes cost for any and all methods required for subsoil excavation. Also includes cost of placement of muck layer as shown and described oil Floodplain Compensation/Wetland Mitigation Site 3 West and 3 East Typical Sections.

Once subsoil excavation began, it became evident that it was impossible to isolate only the top 450 mm of the muck in these donor wetlands, which is a fancy word for swamps. Due to permit restrictions, Cone & Graham, Inc.'s ability to dewater these wetlands was severely limited. Combined with higher than average winter rainfalls, Cone & Graham, Inc. excavated the muck in the wet by constructing a temporary causeway out into the wetland to work from. When you remove a bucket of muck, the surrounding muck immediately begins to fill the hole created. Therefore, it was impossible to separate 450 mm off the top of the swamp. Once subsoil excavation began, it also became evident that the amount of muck that was going to be generated from this top 450 mm of muck would not be sufficient to supply the quantity necessary to construct the muck blanket.

The Department analyzed the characteristics of the muck being removed from the donor wetlands and determined that muck below the top 450 mm was just as suitable for use in the muck blanket as that at the top. This solved the problem of "separating the muck from the muck" and generated additional muck quantity for the construction of the muck blanket. It did not, however, generate the complete quantity necessary to construct the muck blankets in Ponds 3E and 3W. In order to construct the muck blankets to specification, Cone & Graham, Inc. had to import muck from areas other than the specified donor locations.

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Instead of having a separate muck blanket pay item, or including the muck blanket in the finish soil layer pay item, FDOT chose to include the placement of the muck blanket in Pay Item 120-4, Subsoil Excavation. Therefore, in order to price the subsoil excavation, Cone & Graham, Inc. had to include the cost of hauling, spreading and finishing the muck blanket into the cubic meter price for subsoil excavation. This cost was based on hauling the muck from the donor wetlands No. 15 and No. 19. Therefore, when the specified muck source was exhausted and Cone & Graham, Inc. was directed to utilize muck from other areas of the project, the cost to place the muck blanket was increased by the additional cost to load and haul the muck from locations other than the plan designated donor wetlands. This was complicated by the fact that the majority of muck elsewhere on the project had been excavated and disposed of offsite or stockpiled for use as topsoil. Cone & Graham, Inc. had to return to the company that had agreed to accept the excess muck and request to take it back for use on the project.

Essentially, FDOT established a bid assumption by stipulating that the muck source be taken from the specified donor wetlands. Cone & Graham, Inc. based their bid on the work required to transport muck from an area limited to Sta. 200+56 to Sta. Sta. 206+00 and dump it into Pond 3W (Sta. 206 to Sta. 208) and Pond 3E (Sta. 209 to Sta. 212). When the muck from these areas fell short, additional muck was then hauled from an area where it had been stockpiled from approximately Sta. 181 to Sta. 184. This is an increased haul of 2,078 meters (6,818 feet) beyond the assumed haul at bid time. Additional costs were also incurred through the loading of the stockpiled material. It should be noted that this additional haul is a second haul that was not even contemplated at bid time when computing the bid unit price for subsoil excavation. The subsoil excavation price includes excavating, hauling and disposal of unsuitable material. Therefore, the subsoil excavation cost included hauling the material from the specified donor sites to Ponds 3E and 3W one time and the cost to haul non-donor muck off the project or to a stockpile to be utilized for topsoil on the project. Loading and hauling of the stockpiled material to utilize as topsoil is a cost that would be included in the Finish Soil Layer pay item, and would not be recovered if utilized to place the muck blanket. By hauling the stockpiled material to the ponds for a muck blanket, Cone & Graham was compensated for the additional cost of the haul, as it was not included in our original bid.

This change in condition has created additional work and additional cost. It is the position of Cone & Graham, Inc. that this additional work qualifies as a "significant change" as specified in Standard Specification 4-3, Alteration of Plans or Character of Work, which defines a significant change as when "*The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction....* "

In their letter of rejection of Cone & Graham, Inc.'s claim (attachment 3), Genesis CE&I Services, Inc. (Genesis) makes three statements to support their rejection. I have included each comment and Cone & Graham, Inc.'s position on the response below.

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Comment I - The plan note shown on Sheet No. 66 .. does not prohibit the use of other subsoil excavation sites along the length of the project as a muck source for Sites 3 East and 3 West.

If this is the case, why was the note included at all? If all areas of subsoil excavation were suitable sources for the muck blanket, why was a plan note added to specifically include two areas designated with station limits. During the subsoil excavation process, Genesis contacted FDOT to determine both if muck deeper than the specified 450 mm could be utilized and to determine if other subsoil areas of the project would be suitable for use as a muck blanket. If this was not construed as prohibited based on the plan notes, why would the question have to be asked.

Comment 2 - Pay item footnote 6 listed on Sheet No. 12 states, "2120-4 Includes cost for any and all methods required for subsoil excavation. Also includes cost of placement of muck layer as shown and described on Flood Plain Compensation Wetland Mitigation Site 3 West and 3 East typical sections.

Other than restating the pay item note, Genesis makes no comment with respect to how this note pertains to entitlement for payment. The pay item note describes the items of work which are included in the pay item. It does not indicate that muck sources other than those specified on Sheet No. 66 should be included in the cost for placing the muck blanket.

Comment 3 - It is apparent from the plans that the volume of muck required for Sites 3 East and West exceeds the subsoil excavation quantities estimated in wetland sites 15 and 19. This is not a changed condition, but one that the bidder should have considered in his bid proposal

Cone & Graham, Inc. made no assumption with regard to the amount of muck available in wetlands 15 and 19 at bid time. It was not a consideration since the plans clearly specified the source of the muck. If an assumption was made, it was that the design consultant had determined the amount of muck needed to construct the mitigation areas and had pre-selected wetland areas of adequate size and suitable muck to meet the need. The plans provide no information to lead the contractor to believe that muck from other subsoil sites would be required. If anything, by including the plan note as they did, it led us to believe that the specified sources were sufficient to cover the muck blanket requirement.

Cone Graham made the following points during their rebuttal.

1. It was not known at the time of bid that more than 450mm of material could be used out of the donor wetlands or that other wetlands could be used to supply muck.
2. Before using more than 450mm of muck material from the designated sources permission had to be obtained from the Department's environmental scientist.
3. Before using muck from sources other than those designated on the plans permission had to be obtained from the Department's environmental scientist.
4. The note on the plans concerning the source of the muck is vague, open ended and misleading.
5. If any available muck material could be used to place 12" of muck in ponds 3E and 3W why put the note in the plans designating specific areas to obtain the muck?

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6. The method Cone Graham used to construct the muck blanket was to excavate a trench to grade in ponds 3E and 3W where the muck was stored as it was excavated. After the ponds were excavated to final grade over the entire area this stored muck was then spread with bulldozers. No additional loading or hauling was required using this plan. Had it been clear that additional muck was going to be required from other areas it could have been stored in a similar manner, (trench in the ponds) and spread with bulldozers in the same manner.

In summary, Cone & Graham, Inc. has requested that the Department compensate Cone & Graham, Inc. for the additional work of loading and hauling stockpiled muck for use as a muck blanket in Ponds 3E and 3W after the specified donor muck source was exhausted. The Department specified the areas that the muck blanket was to come from, and this became the basis for Cone & Graham, Inc.'s bid for subsoil excavation. If the Department had not intended to restrict the muck source to the specified locations, then there was no reason to include the note that was included. The requirement to utilize material from other areas and stockpiles represents an alteration in the plans and character of the work, and therefore requires additional compensation.

DEPARTMENTS POSITION

Issue:

Loading and Hauling Muck Materials to Mitigation Areas 3 East and West

The dispute at hand is one of Contractual merit and/or entitlement. Is the Contractor entitled to additional compensation to load and haul muck materials from locations other than Wetlands 15 and 19 to Mitigation Areas 3 East and 3 West?

The matter in dispute is the Contractor's Claim of a Changed Site Condition associated with the construction of the muck blanket in Mitigation Area 3 East and 3 West. The contractor claims that he anticipated that all of the muck necessary to construct the muck blankets in Mitigation Areas 3 East and 3 West would come from Donor Wetlands 15 and 19. The Contractor is claiming that to complete the work in these Mitigation areas he incurred additional costs to double handle, load and haul muck from other sources within the project limits. The Department does not believe there was a Changed Site Condition and therefore there is no entitlement for additional compensation.

Status:

The escalation matrix established at the beginning of the project was followed. At the last meeting regarding this issue both parties, the Department and the Contractor, agreed to refer this matter to the Disputes Review Board.

Summary of Department's Position

It is the Department's position that the Contractor is not entitled to additional compensation to handle, load and haul muck from other sources on site to complete the

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muck blanket in Mitigation Areas 3 East and 3 West. The basis for our position is outlined below:

1. The Contractor has based his claim on one plan note shown on Sheet No. 66 which states, "Muck source includes SR 54 impacts to wetland 15 (Approx. Sta. 200+56 to Sta. 203+20) and wetland 19 (Approx. Sta. 205+00 to Sta. 206+00). Relocated muck source can include muck, mucky sand, and sand found within the top 450 mm of the donor wetlands. For clarification, call D.O.T. Permit Env. Scientist (813) 975-6784." The operative word in this plan note is includes. This plan note does not limit the muck source to only wetlands 15 and 19. Furthermore, the plan note does not prohibit the use of other subsoil excavation sites along the length of the project as a muck source for Sites 3 East and 3 West. The D.O.T. Environmental Scientist allowed the Contractor to use muck from other subsoil excavation sites along the length of the project to construct the muck blanket. *[See Plan Sheet No. 66 (Exhibit 2-4)]*

2. The contract documents do not itemize the quantity of muck blanket material needed to construct Sites 3 East and 3 West. It is the Contractor's responsibility to examine the plans and the site of the proposed work as specifically required by Article 2-4 of the Supplemental Specifications which states: "Examine the Contract Documents and the site of the proposed work carefully before submitting a proposal for the work contemplated. Investigate the conditions to be encountered, as the character, quality, and quantities of work to be performed and materials to be furnished and as to the requirements of all Contract Documents." In that the contract documents did not quantify the muck quantities for Sites 3 East and West, determination of the quantity of muck materials needed is the sole responsibility of the Contractor. This is not a changed condition, but one that the bidder should have considered in his bid proposal as required by Article 2-3 and 2-4 of the Supplemental Specifications.

It is apparent from the plans that the volume of muck required for Sites 3 East and West exceeds the subsoil excavation quantities shown in the plans for wetland sites 15 and 19. Based upon the attached calculations, using the zone acreage listed in the plans, the quantity of material required to construct the muck blanket is 17,306 cubic meters, while the quantity of subsoil indicated on the plan cross-sections for wetlands 15 and 19 is 9,897 cubic meters. The actual quantity of subsoil excavation paid for in wetland sites 15 and 19 totaled 12,912 cubic meters. This would indicate that the Contractor experienced a better situation than originally anticipated. *[See Supplemental Specifications Article 2-3 and 2-4 (Exhibit 3-1 thru 3-5, All Plan Sheets (Exhibits 2-1 thru 2-13) and Calculations of Muck Quantities (Exhibit 8-1 and 8-2)]*

3. Article 4-3.7 of the Supplemental Specifications defines Differing Site Conditions as "subsurface or latent physical conditions encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site." In this situation, there is no differing site condition because the physical conditions encountered on the project are not different from those indicated in the contract documents. *[See Supplemental Specifications Article 4-3 (Exhibit 3-6 thru 3-12)]*

4. Pay item footnote 6 listed on Sheet No. 12 states: "2120-4 Includes cost for any and all methods required for subsoil excavation. Also includes cost of placement of muck layer as shown and described on Floodplain Compensation / Wetland Mitigation Site 3 West and 3 East typical sections." This has equal importance to the note that the Contractor is relying on for the basis of his claim. This note implies that the Contractor should have considered all costs including transportation and loading to move subsoil

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excavation materials to Mitigation Sites 3 East and West. [See Plan Sheet No. 12 (Exhibit 2-11)]

5. Approximately one half of the claim cost is for loading muck materials on to dump trucks while the other half of the claim cost is for hauling the materials to Sites 3 East and West. The material was handled twice due to the means and methods of the Contractor. The muck materials that were hauled to Mitigation Sites 3 East and 3 West came exclusively from the subsoil excavation site located between Stations 182+50 and 184+50 as well as from Pond S. Work in Sites 3 East and West did not begin until early February 2003, while the subsoil excavation activities and stockpiling of muck that was later used in Sites 3 East and West was primarily completed by the end of November 2002. This would confirm that the Contractor would have had to reload the material for use on the project in other areas. This is further evidenced by the fact that the contractor's Baseline Schedule indicates that subsoil excavation of wetlands 15 and 19 would be completed by February 17, 2003 while muck blanket work and final dressing in the Mitigation Sites 3 East and 3 West would not begin until June 10, 2003. This sequencing was determined solely by the Contractor and indicates that he had planned to double handle the material. [See Daily reports of Construction (Exhibit 6-1 thru 6-19) and Original Baseline Construction Schedule (Exhibit 7-1 thru 7-7)]

The Department made the following points during their rebuttal

1. The reason for the note in the plans concerning the muck material coming from the designated areas is to use material from existing wetlands as a seed source for the muck layer in new ponds 3E and 3W.
2. The plan note says, "Muck source *includes* SR 54 construction impacts to wetland 15 ...". This means that other muck sources can be used and that Cone Graham was not restricted to the two areas mentioned in the note.
3. The Department reiterated the point that this was not a Differing Site Condition.
4. By inspection it should have been obvious to Cone Graham that there was not enough muck in wetlands 15 and 19 to cover ponds 3E and 3W with the required 12" thickness of muck and that other sources would have to be used.

CONCLUSION

In summary, the points outlined above identify that compensation Pay Item No. 2120-4 provided full compensation for installing the muck layer in Mitigation Site 3 East and 3 West. It is also clear that the plan notes clearly inform the Contractor that he may use the material from Wetlands 15 and 19, not that it was his sole source. Therefore, it is clear that this does not constitute a Changed Site Condition and therefore, the Contractor is NOT entitled to additional compensation.

DISPUTE REVIEW BOARD FINDINGS

Under the Cone Graham method of stockpiling the muck in a partially excavated pond 3E and 3W, then excavating the ponds to grade and pushing the muck into place with bulldozers, no additional loading and hauling was required.

The note on plan sheet number 66 states:

"Muck source includes SR 54 construction impacts to wetland 15 (approx. Sta. 200+56 to Sta. 203+20) and wetland 19 (approx. Sta. 205+00 to 206+00). Relocated muck source

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can include muck, mucky sand, and sand found within the top 450mm of the doner wetlands. For clarification, call D.O.T. permit Env. Scientist (813) 975-6784.”

This note is ambiguous as it seems to say, “the muck source includes, wetlands 15 and 19 only”. Or as the Department says, “the muck source, includes wetlands 15 and 19”. Another possible reading is “Muck source includes SR 54 construction impacts to wetlands 15 and 19.” A simple statement that the construction of SR 54 impacts wetlands 15 and 19. In this case all wetlands become doner wetlands.

The intent of the note on plan sheet 66 is to indicate to the contractor bidding the contract that the muck for the blanket in ponds 3E and 3W comes from the designated wetlands, 15 and 19.

By including the muck as a part of unit price pay item the Department anticipated that there was sufficient muck within wetlands 15 and 19 to construct the muck blanket. The bidding contractors needed to be able to calculate a proportion of muck to subsoil to bid the subsoil item correctly.

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The Board finds entitlement to additional compensation to Cone Graham for the added work associated with the handling and hauling of the muck necessary to complete the placement of the muck blanket required in the Floodplain Compensation/Wetland Mitigation Sites 3 East and 3 West beyond what was indicated as required in the plans. Specifically, the additional muck that came from areas other than wetlands 15 and 19 to construct the muck blanket in Mitigation Sites 3 East and 3 West.

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 the Disputes Review Board regarding this issue and concur with the findings and recommendations.

Signed with the concurrence of all Board members

John C. Norton, P.E.
Chairman
Tom Rice
Member
Mark Puckett