

DISPUTE REVIEW BOARD RECOMMENDATION

January 26, 2015

Ms. Yvonne Harrison
Senior Project Manager
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5219 Cone Rd.
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Mr. Terry M. Muse
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RE: SR 39 (Alexander St. N.) from SR 400 (I-4) North of Knight Griffin Road, 255585-1-52-01

Subject: Hearing Dated January 23, 2015
Disputes Review Board Recommendation

Dear Madame and Sir,

Kamminga & Roodvoets, Inc. (K&R) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of disputed issues. The hearing was held on January 23, 2015 at the FDOT Oak Park Operations Center in Tampa, FL. The parties furnished the Board position papers and rebuttal statements prior to the hearing. The Disputes Review Board was requested to consider the question of the contractor's preservation of claim and the issue of entitlement. In accordance with your request the following recommendation is offered.

Background

The project scope included new construction of a re-aligned portion of SR 39 (Alexander St. N.) from Knight Griffin Road to SR 400 (I-4) in Hillsborough County. Water retention ponds were also constructed. The first contract day was August 11, 2011.

Issue 1: Preservation of Claim with regard to a request to modify plan quantities for Embankment and Excavation

Contractor Position Issue 1: Preservation of Claim

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

1. K&R, in a timely manner, provided the Department with a notice of intent to claim for an adjustment in the earthwork Contract Plan Quantities when it first became aware of a possible error in the Department's Contract Plan Quantities. K&R, via its letter dated

May 1, 2013 provided the Department with a notice of intent to seek additional compensation for any required quantity embankment material that was in excess of the Contract Plan Quantity.

2. At the time K&R became aware that there was a possible error in the Department's earthwork quantities in the plans and proposal form, the original ground surface where embankment material was to be placed had been already disturbed by construction operations.
3. Florida courts have long held that technical defenses based on procedural specifications are not favored in the law where there was an error in the plans that resulted in additional work to be performed, the additional work was performed, and the owner knew the work was being performed.
4. Additional embankment material was furnished and placed and the Department knew the additional work was being performed. Truck tickets and vendor invoices for the imported fill material document that 87,688 CY of embankment was imported to the Project to construct the embankment in reasonably close conformity with the lines, grades, and cross-sections, dimensions, and material requirements, including tolerances, as specified in the Contract Documents.
5. K&R afforded the Department the opportunity to keep an account of the quantity of the actual additional embankment material imported by providing truck tickets and vendor invoices of the quantity of embankment material delivered to the Project, which K&R provided to the Department on a weekly basis.
6. K&R performed a GPS survey of the site after clearing. Calculations based upon the GPS survey indicated that additional embankment material would be required.
7. The "substantial error" in the earthwork Contract Plan Quantities are documented by K&R's survey data and the documents provided for the quantity of embankment material that had to be imported to the Project in order to construct the embankment to the authorized Contract plan limits/dimensions.
8. The Contract Specifications do not require the Contractor to perform work to verify the correctness of the Department's design or survey or to provide verification of the correctness of the quantities indicated by the Department's plans and proposal form prior to the Contractor contending that the plan quantity is in error and additional or less compensation is due to the Contractor as a result of the error.
9. The procedural portion of specification which states that when the Contractor contends that the plan quantity is in error and additional or less compensation is due, the Contractor is to note any differences in the original ground surfaces from that shown on the original plan cross-sections that would result in a substantial error to the plan quantity properly documented by appropriate verifiable level notes, prior to the disturbance of the

original ground surface by construction operations is, in this case, an impossible procedural specification to perform since the original ground surface had been disturbed by construction operations prior to K&R becoming aware of the plan quantity error.

10. K&R is entitled to embankment and excavation payment.

FDOT Position Issue 1: Preservation of Claim

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the FDOT's submitted written materials.

Key Points

1. The Notice of Intent to claim was submitted May 1, 2013, 21 months after initial clearing and grubbing for the project. The Contractor did not comply with FDOT Standard Specification Sub-articles 9-3.2.1, 5-12.1 and 5-12.2.1. In this regard, the contractor failed to perform a pre-construction survey, failed to provide timely notice of their intent to claim and failed to give notice of their intent to claim before beginning the work on which the claim is based.
2. K & R did not give a timely notice of intent to claim prior to commencing work and, therefore, waived its right to claim and is not entitled to additional quantities of earthwork under this contract. While all other facts germane to this issue clearly demonstrate no entitlement, due to K & R not meeting its requirement to conduct a pre-construction survey or verify suspected discrepancies, the contract clearly supports dismissal of the issue as it was not duly preserved.
3. During July and August 2011, URS performed a pre-construction survey and determined there were areas of the project which did not match the plan geometry. URS Pre-construction Survey letter, dated August 23, 2011, was submitted to K & R regarding the pre-construction survey performed by URS and the potential changes to earthwork quantities for the job. The letter recommended the contractor perform their own pre-construction survey for verification purposes prior to disturbance of original ground as required by project specification 9-3.2-1 and offered K & R the opportunity to accompany the URS survey crew for verification of the survey being completed.
4. K&R acknowledged receipt of the letter, signed it and returned it to URS on August 25, 2011. At about the same time, K & R commenced with ground disturbing activities as noted in the Daily Work Report dated August 22, 2014. K & R failed to perform a survey

prior to disturbance of the original ground surface and therefore did not adhere to Sub-article 9-3.2.1.

5. A review of the Standard Specifications Sub-article 5-12.1 indicates K & R did not duly preserve their rights to claim as they did not provide timely notice to the Department to allow the Department to track labor, materials and equipment costs associated with their claim.
6. K & R failed to preserve its rights to claim, per Sub-article 5-12.1, they failed to offer timely notice of its intent to claim, per Sub-article 5-12.2.1, they failed to notify the Department prior to beginning the work on which the claim is based and under the specific requirements of Sub-article 9.3.2.1, they neglected to perform a pre-construction survey check prior to commencement of clearing and grubbing for the project, despite the Department's best efforts to recommend they do so.

Disputes Review Board Findings Issue 1: Preservation of Claim

Key Points

1. Specifications section 5-12.2.1 provides for specific notice requirements as a condition of claim preservation.

5-12.2 Notice of Claim:

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 a request for Contract Time extension pursuant to 8-7.3.2 within thirty calendar days after the elimination of the delay. If such notification is not given and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time, the Contractor waives the claim for additional compensation or a time extension. Such notice by the Contractor, and the fact that the Engineer has kept account of the labor, materials and equipment, and time, shall not in any way be construed as establishing the validity of the claim or method for computing any compensation or time extension for such claim. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days

after final acceptance of the project in accordance with 5-11, 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 and duly certified pursuant to 5-12.9. 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 and duly certified pursuant to 5-12.9, 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. If the Contractor fails to submit a certificate of claim as described in 5-12.9, the Department will so notify the Contractor in writing. The Contractor shall have ten calendar days from receipt of the notice to resubmit the claim documentation, without change, with a certificate of claim as described in 5-12.9, without regard to whether the resubmission is within the applicable 90 or 180 calendar day deadline for submission of full and complete claim documentation. Failure by the Contractor to comply with the ten calendar day notice shall constitute a waiver of the claim.

2. K&R provided notice to the engineer of their intent to request additional compensation in their letter dated May 1, 2013.
3. K&R did not request additional time as a result of a delay.
4. K&R did submit a certificate of claim to the Engineer.
5. Following the notice given on May 1, 2013, K&R, furnished to the Engineer on a weekly basis, copies of truck tickets for additional embankment material delivered to the project.
6. As of May 1, 2013 most of the project clearing had essentially been completed.
7. As of May 1, 2013 a significant portion of the embankment work had been completed.
8. Specifications section 9-2.3 provides additional requirements for claim preservation concerning notice of an error in plan quantities.

9-3.2.1 Error in Plan Quantity: 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.

On multiple job Contracts, changes made to an individual pay item due to substantial errors will be based on the entire Contract quantity for that pay item.

Where the pay quantity for any item is designated to be the original plan quantity, the Department will revise such quantity only in the event that the Department determines it is in substantial error. In general, the Department will determine such revisions by final measurement, plan calculations, or both, as additions to or deductions from plan quantities.

In the event that either the Department or the Contractor contends that the plan quantity for any item is in error and additional or less compensation is thereby due, the claimant shall submit, at their own expense, evidence of such in the form of acceptable and verifiable measurements or calculations. The Department will not revise the plan quantity solely on the basis of a particular method of construction that the Contractor selects. For earthwork items, the claimant must note any differences in the original ground surfaces from that shown in the original plan cross-sections that would result in a substantial error to the plan quantity, and must be properly documented by appropriate verifiable level notes, acceptable to both the Contractor and the Department, prior to disturbance of the original ground surface by construction operations. The claimant shall support any claim based upon a substantial error for differences in the original ground surface by documentation as provided above.

9. K&R did not comply with the requirements in specification section 9-3.2.1 to properly document differences in original ground surface from that shown on the plan cross sections prior to disturbance of the original ground surface.

Disputes Review Board Recommendation Issue 1: Preservation of Claim

With regard to additional embankment work subsequent to the May 1, 2013 notice, K&R did meet the requirements of Specification 5-12.2.1. However, K&R's claim of an error in the original survey invokes the requirements of Specification section 9-3.2.1. K&R did not provide the required verification prior to the disturbance of the original ground surface. K&R's assertion that it was impossible to comply with Specification 9-3.2.1 is not valid. K&R chose a work method that involved performing clearing without checking existing ground elevations prior to disturbance. The contractor may choose the means and methods to perform the work, however in doing so, the Contractor assumes the associated risks.

Based upon the documentation presented and the hearing testimony, it appears that K&R was required to import additional embankment material to the project. However, the Disputes Review Board cannot ignore the clear language of the contract.

Accordingly, it is the DRB's recommendation with regard to Issue 1 that K&R has not duly preserved their claim with regard to embankment quantity.

Contractor Position Issue 2: Entitlement

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

1. K&R is not requesting a DRB recommendation as to quantum or Contract Time In accordance with the Contract Specifications, K&R relied upon the Department's design, plans, and specified earthwork embankment quantities for the Project as being correct and without error and utilized the earthwork quantities in the plans and the proposal form as the basis of its bid.
2. In accordance with the Contract Specifications, the method of measurement for payment of embankment is to be at the Contract Plan Quantity unless there is a "substantial error" in the Contract Plan Quantity.
3. There was a "substantial error" in the embankment Contract Plan Quantity. The quantity of embankment material required was greater than the quantity indicated by the Contract Plan Quantity in order to construct the embankment to the authorized Contract plan limits/dimensions
4. K&R, in a timely manner, provided the Department with a notice of intent to claim for an adjustment in the earthwork Contract Plan Quantities when it first became aware of a possible error in the Department's Contract Plan Quantities.
5. In accordance with the Contract Specifications, when there is a "substantial error" in the embankment Contract Plan Quantity, the Contract Plan Quantity is to be adjusted.
6. The original Contract Plan Quantities indicated the total quantity of earth to be excavated was 390,166 CY and the total embankment quantity was to be 388,753 CY, essentially a balance of excavation vs embankment.
7. The FDOT made several revisions to the plan earthwork quantities during the course of the project. The FDOT's final revised Contract Plan Quantities were 382,714 CY of

excavation and 391,442 CY of embankment. However, the Department's final revised Contract Plan Quantities still contained a "substantial error".

8. Additional embankment material was furnished and placed and the Department knew the additional work was being performed. Truck tickets and vendor invoices for the imported fill material document that 87,688 CY of embankment was imported to the Project to construct the embankment in reasonably close conformity with the lines, grades, and cross-sections, dimensions, and material requirements, including tolerances, as specified in the Contract Documents.
9. K&R afforded the Department the opportunity to keep an account of the quantity of the actual additional embankment material imported by providing truck tickets and vendor invoices of the quantity of embankment material delivered to the Project, which K&R provided to the Department on a weekly basis.
10. The Contract Specifications do not require the Contractor to perform work to verify the correctness of the Department's design or survey or to provide verification of the correctness of the quantities indicated by the Department's plans and proposal form prior to the Contractor contending that the plan quantity is in error and additional or less compensation is due to the Contractor as a result of the error.
11. At the time K&R became aware that there was a possible error in the Department's earthwork quantities in the plans and proposal form, the original ground surface where embankment material was to be placed had been already disturbed by construction operations.
12. The procedural portion of specification which states that when the Contractor contends that the plan quantity is in error and additional or less compensation is due, the Contractor is to note any differences in the original ground surfaces from that shown on the original plan cross-sections that would result in a substantial error to the plan quantity properly documented by appropriate verifiable level notes, prior to the disturbance of the original ground surface by construction operations is, in this case, an impossible procedural specification to perform since the original ground surface had been disturbed by construction operations prior to K&R becoming aware of the plan quantity error.
13. K&R is requesting the DRB provide a recommendation of entitlement regarding embankment and excavation payment adjustments

FDOT Position Issue 2: Entitlement

The following summary of the FDOT's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the FDOT's submitted written materials.

Key Points

1. The FDOT's position is that K&R has not complied with the requirements of Specification section 5-12.2.1 and section 9-3.2.1. Therefore, K&R has not duly preserved their claim and is not entitled to compensation. *(See FDOT points made under Issue 1: Preservation of Claim)*
2. The design survey of the existing ground elevations was performed by Ayres. A preconstruction survey of existing ground elevations was also performed by URS. The two survey results are in very close agreement, with only a very small difference in calculated embankment quantities. The results clearly indicate that the plan quantities are accurate with only minor adjustments that were made at the beginning of the project.

Disputes Review Board Findings Issue 2: Entitlement

Key Points

Note that the issue of preservation of claim has been addressed by the Disputes Review Board in the previous Issue 1 and will not be repeated here.

1. Hearing testimony and documentation submitted indicate that K&R was required to import additional embankment material to the project.
2. Two surveys of the project were performed independently by two different licensed Professional Surveyors. An analysis of the results indicates that both survey results are essentially identical.¹

	URS	Ayres
Embankment (CY)	350251	351260
Excavation (CY)	61915	64338
Subsoil (CY)	91730	87793
Total Fill (CY)	288336	286922

3. The GPS survey performed by K&R after clearing the site does not alter the credibility of the two surveys conducted by licensed Professional Surveyors prior to construction.

¹ Table 1, Exhibit K, FDOT Position Statement

Disputes Review Board Recommendation Issue 2: Entitlement

There was no information produced in the hearing that successfully challenges the credibility of the two surveys performed prior to construction by licensed Professional Surveyors. With only minor adjustments made at the beginning of the project, the plan quantity amounts must be accepted as correct. The Disputes Review Board is aware that final embankment quantities can be influenced by a number of factors such as: clearing loss, subsidence, properties of the soil materials, construction activities and subsurface site conditions. However, K&R only claimed that the FDOT's survey was in error. K&R did not affirmatively present any other reason for the required additional embankment material.

Accordingly, it is the DRB's recommendation with regard to Issue 2, that K&R is not entitled to compensation for additional costs.

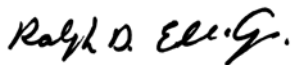
The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation.

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

Ralph D. Ellis Jr. – Chairman
Ronnie S. Klein - Member
David A. Donofrio – Member

Signed for all with the concurrence of all members.



Ralph D. Ellis, Jr.
Chairman