

DISPUTE REVIEW BOARD RECOMMENDATION**January 12, 2004**

Mr. Richard Howarth, PE
TBE Group
380 Park Place Blvd.
Suite 300
Clearwater, FL. 33759

Mr. David Rinaldo
The Middlesex Corporation
909 E. Brisson Rd.
Inverness, FL. 34450

Mr. Sasha Denmark
SMU Inc.
PO Box 3490
Bellevue, FL. 34421

Re: Financial Project No.: 257163-1-52-01
SR 44 from US 41 to CR 470, Citrus County
Dispute Review Board Recommendation - Dewatering Claim

Dear Sirs:

The Florida Department of Transportation (FDOT) and The Middlesex Corporation (TMC) requested a hearing concerning additional dewatering due to differing site conditions. TMC brought this issue before the Board on behalf of their subcontractor, South Marion Underground Inc. (SMU). Summaries of the Department's and SMU's positions were forwarded to the Disputes Review Board (DRB), and a hearing was held on January 7, 2004.

ISSUE: "Is the Contractor entitled to additional compensation for dewatering efforts performed prior to April 1, 2003?"

Contractor's Position

South Marion Underground, Inc. a subcontractor to The Middlesex Corporation for the construction of utilities on the above referenced project has been seriously impacted by conditions, which were not depicted in the original bid documents. Our firm, after careful review of the bid documents and plans, including an exhaustive examination of the on site conditions; provided the prime contractor with an honest, responsible and competitive quote. Those documents and conditions by no means illustrated the amount of subsurface water, which is currently present on this project. We attribute the increase of water to a rapid rise in the water elevations of the adjacent lakes as well as impervious layers of clay. The influx of water into our work site is not only unable to percolate into the soil but is also erupting in the form of springs due to the increased hydraulic forces from the aforementioned lakes.

In September of 2002 the Wylong Dam began operations, the attached data provide by SWFWMD, plainly shows a 3-5' rise of the Apopka Chain at this time. We have consulted numerous homeowners who have informed us that in their time residing in this area they have as yet to see the lakes at these levels. Our well point subcontractor, having well pointed on projects throughout this part of Florida, has indicated that this project has abnormal ground water conditions based on his numerous years of experience. The following documentation illustrates the numerous additional personnel, material and equipment required to complete our portion of this project under the adverse conditions

DISPUTE REVIEW BOARD RECOMMENDATION

encountered. We therefore request an equitable adjustment be provided in order to avoid filing a formal claim package.

In May of 2002 South Marion Underground received a request from the Middlesex Corporation to provide a quote for the installation of the storm drainage on the above referenced project. South Marion both eager and willing to undertake FDOT work promptly made an onsite investigation of the project as well as a thorough review of the plans provided. The plans indicated ground water in various locations which would require one of three means of dewatering. Those systems of dewatering included simple sump pump, bedding stone with simple pumping and single well pointing. Using current rental and material costs our firm estimated that the cost for this operation would be approximately \$ 133,000.00 to maintain a water free trench for the 8200 lineal feet of pipe depicted in the plans as needing some form of water maintenance.

The Middlesex Corporation was awarded the project and subsequently subcontracted our firm to begin the storm drainage. South Marion mobilized to the project in the beginning of September 2002 and began installing storm sewer as directed by the prime contractor. On November 14 of 2002 we encountered ground water for the first time at Station 352+10. The soil borings for this project indicated that groundwater was not encountered in this area. This run of pipe being adjacent to the lake we assumed that this was an isolated incident and proceeded. In the following months we experienced areas of heavy dewatering. These areas were previously recognized and bid as areas requiring water maintenance, however our concerns about the amount of money expended on dewatering were growing.

In the beginning of January 2003 we realized that the situation with respect to loss of production and rising costs for water maintenance was more than that originally anticipated. Our field supervisors met with Middlesex on numerous occasions to voice our concerns with regard to this problem. The Middlesex Corporation advised us that filing a claim was futile due to the nature of the claim. We were assured that the site condition showed signs of improvement and asked to continue as best possible. Our firm's desire to do a quality job prompted us to abide by the prime's wishes and continue on.

South Marion Underground issued notice of intent to file claim March 24, 2003 at which time we had invested almost twice the originally allotted costs for water control. A second letter of intent was forwarded on April 1, 2003 to which Tampa Bay Engineering responded stating that it was denied due to failure to provide prompt notification of changed conditions. Ongoing and numerous attempts to justify our right to additional compensation were to no avail; so on August 20, 2003 we requested that the issued be escalated to the Department. The Department's response, received 1003/03 was that of Tampa Bay Engineering again denying any entitlement to additional compensation. Therefore we consider all conventional avenues of recourse exhausted and now request that the issued be placed before the Disputes Review Board.

Our firm has provided more than sufficient data illustrating the change to the conditions experienced on this project verses those depicted in the project plans. We have documented the rapid rise of the lake adjacent to the project, a rise in the water elevation manmade by the Wvysong Dam which became operational at the same time we mobilized. The State of Florida has

DISPUTE REVIEW BOARD RECOMMENDATION

recognized Citrus County as a flood stricken area eligible for state emergency funding and the news media has shown the effects of torrential rains and evacuation of residents, yet South Marion Underground requests have been answered with "may have been impacted on four days".

We respectfully request that the Disputes Review Board review the Departments decision in hopes that this issue be resolved. We are requesting only that which we believe is rightfully due to our firm, no more.

The package submitted by SMU contained information relating to the water level elevations on the lake encountered by the Contractor. That chart is listed below:

TSALA APOPKA (HERNANDO)

	1997	1998	1999	2000	2001	2002
JANUARY	37.91	39.52	38.27	35.68	32.66	33.10
FEBRUARY	37.72	40.00	38.00	35.46	32.50	33.02
MARCH	37.49	39.89	37.74	34.66	32.36	32.96
APRIL	37.34	38.62	37.26	34.56	32.14	32.15
MAY	37.09	38.22	36.76	34.22	31.45	N/R
JUNE	36.65	37.65	36.67	34.12	31.27	31.54
JULY	36.46	38.04	36.64	34.15	31.28	34.15
AUGUST	36.69	37.98	36.66	34.54	32.01	35.13
SEPTEMBER	36.33	38.42	36.55	34.01	33.05	36.47
OCTOBER	36.21	38.28	36.43	N/R	33.56	38.30
NOVEMBER	36.65	38.30	36.30	N/R	32.27	38.10
DECEMBER	37.50	38.10	36.03	33.21	32.98	38.32
YEARLY AVG.	37.00	38.58	36.96	34.54	32.38	34.83

Department's Position

On April 1, 2003, TMC submitted SMU's written notice of "Differing Site Conditions" due to conditions that allegedly did not exist prior to bid and requested an "equitable adjustment" be made to compensate them for monetary losses. (Exhibits A1/A2). TBE responded on April 9, 2003, stating that no action would be taken on their request, as proper notification had not been given in accordance with the contract documents. (Exhibit B)

On May 9, 2003, TMC submitted SMU's claim backup documentation for the period October 24, 2002 to April 26, 2003 for "abnormal dewatering" They further claimed that the dewatering was abnormal due to infiltration of

DISPUTE REVIEW BOARD RECOMMENDATION

water from the lakes and ponds adjacent to the project. **(Exhibits C1/C2)**. TBE responded on May 21, 2003, stating that no action would be taken on their request prior to April 1, 2003 as proper notification had not been given. **(Exhibit D)**

On May 23, 2003, SMU sent a letter to TMC, with copies to FDOT and TBE, explaining their disappointment in the response to their request. SMU stated that, "the water conditions did change during the time lapse of bid to the commencement of construction" and they requested a meeting to discuss the situation. **(Exhibit E)**. A meeting was held on June 4, 2003.

On June 18, 2003, TMC submitted SMU's revised backup documentation for abnormal dewatering. SMU attributes the increase of water to a rapid rise in the water elevations of the adjacent lakes as well as impervious layers of clay, thereby preventing percolation into the soil and resulting in the production of springs. **(Exhibits F1/F2)**. TBE responded on July 16, 2003, stating that no action would be taken on their request prior to April 1, 2003 as proper notification had not been given. **(Exhibit G)**

On August 1, 2003 TMC transmitted additional documentation from SMU (dated July 31, 2003) **(Exhibits H1/H2)**. On August 21, 2003 TMC submitted SMU's request to escalate their claim to the Dispute Review Board for their review. **(Exhibits I1/I2)**. On September 3, 2003, TBE notified TMC/SMU that the issue would be escalated within the Department in accordance with the Partnering Escalation Matrix prior to going to the DRB. **(Exhibit J)**. On October 2, 2003, TBE notified TMC/SMU that the issue was escalated within the Department and the previous responses confirmed. **(Exhibit K)**. On October 3, 2003, SMU requested TMC escalate their claim to DRB. **(Exhibits L1/L2)**

On October 15, 2003, TMC requested a hearing before the DRB and submitted SMU's issue statement. **(Exhibits M1/M2)**. On October 28, 2003, TBE sent a letter to the DRB defining an agreed upon issue statement for the Board to consider. **(Exhibit N)**

The project Supplemental Specifications explains the notification procedures to be followed when differing site conditions and/or extra work are encountered. They are contained in Article 4-3.7, Differing Site Conditions, **(Exhibit O)** and Article 5-12.2.1, Claims for Extra Work, **(Exhibit P)**.

SMU, through TMC, gave notice on April 1, 2003 of Differing Site Conditions regarding their dewatering efforts. Subsequent submittals defined the time frame to be from October 24, 2002 to April 23, 2003.

Project Supplemental Specification Article 4-3.7, Differing Site Conditions, states, in part, "...the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work" **(Exhibit O)**. The Article further states, "The Engineer will not allow a Contract adjustment for a differing site condition unless the Contractor has provided the required written notice".

In addition, project Supplemental Specification Article 5-12.2.1, Claims for Extra Work

DISPUTE REVIEW BOARD RECOMMENDATION

(Exhibit P), states, in part, "...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...". The Article further states, "...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."

The issue statement being addressed is: "Is the Contractor entitled to additional compensation for dewatering efforts performed prior to April 1, 2003?" The specifications require written notification prior to performing additional work. By not giving the required notice, Specification Section 4-3.7, Differing Site Conditions, does not allow a Contract adjustment for a differing site condition and Section 5-12.2.1, Claims for Extra Work, states that the contractor waived their right to additional compensation. Therefore, there is no entitlement for this claim

Conclusion:

The contract documents clearly show that written notification is required prior to the Contractor performing the affected work. As notification was made on April 1, 2003, the Contractor is not entitled to additional compensation for dewatering work done prior to April 1, 2003.

DRB Findings

The basic argument between the parties is a simple one. The Engineer (TBE) says that the written notice was received on April 1, 2003. The subcontractor (SMU) believes that written notice was effective on October 2, 2002 by virtue of the weekly progress meeting minutes which mention water level in the lakes as a concern of the Contractor. The Board members were present at this meeting and recall this conversation. However, no specific dewatering hardships were brought up, nor was there a mention of a potential claim. Therefore, this does not constitute written notice.

The chart labeled **TSALA APOPKA (HERNANDO)** indicates that this lake has been higher in the past than what was encountered during the period in question. The average water levels of the lake were 3.75 ft. higher and 2.13 ft. higher in 1998 and 1999 respectively. The Board will concede that there was an extremely rapid rise in the elevation of the lake (6.78 ft.) between the months of June 2002 and December 2002 and this could allow the soils to become supersaturated.

SMU presented evidence of the presence of clay and clay lenses encountered where none was shown on the plans. The Engineer did not refute this

DRB Recommendation

Based on the evidence provided the Board finds no entitlement to the Contractor's position that written notice was received prior to April 1, 2003. Both Article 4-3.7 and 5-12 require that the Engineer receive written notice of a claim.

DISPUTE REVIEW BOARD RECOMMENDATION

The presence of the high water and increasing lake levels in itself does not constitute a *Differing Site Condition*. However, the presence of the clay layers combined with the increasing water level may lead to a *Differing Site Condition*.

The Board is sympathetic to the plight of SMU in this case but is governed by the four corners of the contract. Unfortunately, SMU has learned an expensive lesson that FDOT must receive written notice on claims for extra work.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in all of the meetings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board

Rammy Cone, DRB Chairman

Frank Proch, DRB Member

G.H. Stanley, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:


DRB Chairman

CC: Joy Christiano, FDOT
file