

DISPUTE REBOARD RECOMMENDATION

December 2, 2003

Mr. Stephen W. Smith, President
Smith & Company, Inc.
2400 SE Federal Highway, Suite 210
Stuart, Florida 34994

Mr. Mark DeLorenzo, P.E.
AIM Engineering & Surveying, Inc.
5802 Breckenridge Pkwy., Suite 100
Tampa, Florida 33610

RE: SR-50 from CR-485/SR-50A to US-98 (SR-700), SR-45 (US-41) from VFW Road to Benton Avenue. F.P.ID 254805-1-52-01, etc., Contract No. 20358, Hernando County.

SUBJECT: Request from Smith & Company(SCI), Inc. for Time Extension and Equitable Adjustment for Concrete Work / Driveways Over-runs.

Should entitlement be established in favor of SCI, the Dispute Review Board(DRB) was **NOT** to consider the **Quantum**. The DRB feels quantum should be negotiated between the Florida Department of Transportation (FDOT) and SCI.

Pertinent information and rebuttals relating to the parties positions were provided the DRB prior to the hearing held on November 21, 2003 at the Resident Engineers office on Lemon Street in Tampa, Florida. Both parties provided testimony during the hearing.

CONTRACTOR'S POSITION

Please find attached Driveway & Concrete work that was directed to be changed in the field. These changes were compensated at over-runs at existing unit prices, however, Smith and Company request additional time and adjustment to Unit Prices for work performed outside of the scope of the original contract quantities.

As you can see from the attached backup, the quantity and nature of the work changed in scope. Extending the driveways beyond ROW limits affected other aspects of work that were not compensated for in Unit Price Line Items. Some of those are:

- *Excavation/Embankment/Earthwork*
- *Clearing & Grubbing/Pavement Removal/Concrete Removal/Disposal*
- *Night work due to limited driveway closure times..*
- *Per Diems for extended crew days.*
- *Additional concrete cost of material specification change due to limited time of driveway closures to businesses.*

This request for Equitable Adjustment totals 66 workdays equaling 90 calendar/contract days and \$143,055.76.

DEPARTMENT'S POSITION:

The information presented by the Department will clearly show that the increase in the contract pay quantity for driveway concrete did not change the scope of the work and the pay item is not a major item of work. The Standard Specifications for Road and Bridge Construction section 4-3.2.1 "Significant Changes in the Character of Work" states – If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract. The term "significant change" shall be construed to apply only to the following circumstances:

- (A) *When the character of the work as altered differs materially in kind or nature from that involved or included*

in the original proposed construction or
(B) *When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or Decreased below 75 percent of the original contract quantity.*

A major item of work (1-24) is defined as – Any item of work having an original contract value in excess of five percent of the original contract amount shall be considered as a major item of work.

The material and nature of the work has not been changed. The original work included excavation and forming for placement of six inch concrete for driveways as per the standard index. The turnout construction pay item includes the excavation and placement of four (4) inches of limerock base which will have two inches of type 'S' asphalt placed on top. The excavation and disposal material includes six (6) inches for the concrete placement and six (6) inches for the limerock and asphalt. This did not change the character of the work.

The six inch concrete for driveways pay item is not a major item of work. The original plan contract quantity is 2805 SY at \$19.00/sy which is a bid price of \$53,295.00. The original contract amount is \$20,478,514.71. Based on this information, the six inch concrete for driveways pay item is 0.26% of the original contract amount and thus not a major item of work.

The letter dated October 25, 2001 (see Section 2, page 9) from AIM to Smith & Company, Inc. indicates the methods that will be used to pay for driveway construction. This letter indicates that if the driveway is a standard driveway that can be constructed using the standard indices then this will be covered under the original contract pay items. In addition, the letter indicates that if there is a driveway that requires additional information for layout outside of the indices and not indicated in the plans then this will be considered extra work and will be paid by a work order. This is illustrated by the work orders and a letter shown in Section 2, pages 1-3.

The two letters of correspondence between Smith & Company, Inc. and Grubbs Construction Company, Inc. dated August 30, 2002 (see Section 2, pages 3-6) indicate issues between prime and subcontractor. The scheduling and payment problems have hindered the project from almost inception. Additional notices of non-payment to Grubbs are included in Section 2, pages 7 & 8. Because of the scheduling and payment issues, SCI requested to construct all parts of the driveways with 6" concrete pavement.

Conclusion:

The documents presented show that Smith & Company, Inc. is not entitled to additional compensation for extra concrete for driveways above what was paid for under the contractor unit price. SCI and Grubbs have proven over the life of the project that money and scheduling issues have been a problem. The next result is that the reliability to schedule asphalt for driveways was low and thus to the keep the project moving in a positive direction, SCI constructed the driveways entirely in concrete. The documents will also show that no additional contract time is warranted due to the overrun in the contract pay item for concrete driveways. The time analysis used by Smith & Company, Inc. does not indicate how the critical path on the accepted schedule was affected and thus per contract a time extension cannot be justified.

BOARDS FINDINGS:

- Evidence nor testimony presented established the quantity of 4" limerock base with 2" asphaltic concrete surface that was replaced with 6" concrete sidewalk.
- The FDOT did pay SCI for the 6" Concrete Sidewalk used in lieu of the limerock and asphalt specified in the contract documents for driveway connections at the Contractors request under pay item 522-2- Concrete Sidewalk, 6" thick – per square yard.
- The Standard Specifications (1991) **Turnout Construction** in paragraph 286-6 **Basis of Payment** states: "The quantity determined as provided above, shall be paid for at the contract unit price for Turnout Construction. Such price and payment shall be full compensation for all work specified in this Section including excavation; compaction of excavated area; finishing material, placing, compacting and finishing of base: and incidental work. The cost of any bituminous material used in hot bituminous mix, or for prime coat or tack coat, shall not be paid for separately." Payment shall be made under: Item No. 286-1 – Turnout Construction – per square yard. Item No. 286-2 – Turnout Construction (Asphalt) – per ton.

- The Standard Specifications (1991) **Concrete Sidewalk** in paragraph *522-10 Basis of payment* states: " *The quantity, determined as provided above, shall be paid for at the contract unit price per square yard for Concrete Sidewalk, which price and payment shall be full compensation for all work specified in this Section. Excavation shall be paid for under the items for the grading work on the project.*"
- In Letter No. 1223 dated October 28, 2002 the FDOT's resident CEI, AIM Engineering & Surveying, Inc., stated that SCI had not provided proper notice of intent to file a claim in accordance with Section 5-12 of the Standard Specifications. Section 5-12 states (in part): "*Where the Contractor deems that extra compensation is due him for work or materials not clearly covered in the contract or ordered by the Engineer, the Contractor shall notify the Engineer in writing of his intension to make claim for extra compensation, before he begins work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper opportunity for keeping strict account of actual cost, then the Contractor thereby agrees to waive the claim for such extra compensation. Etc.*"
- The Contractor, SCI, did not challenge letter 1223, therefore Section 5-12 governs this claim as stated by AIM Engineering.

BOARD RECOMMENDATION:

Based on materials submitted to the Board and Presentations to the Board at the DRB Hearing, the Board finds NO ENTITLEMENT to the Contractors "Request for Time Extension & Equitable Adjustment (for) Concrete Work/Driveways."

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

Please remember that a response to the Board and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes acceptance of this recommendation.

I certify that I have participated in all of the meetings of this DRB regarding this issue and concur with the findings and recommendations.

Respectfully Submitted,

Dispute Review Board:
E.K. Richardson, Chairman
John H. Duke, Member
Lester C. Furney, Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL BOARD MEMBERS:

E.K. Richardson

E.K. Richardson, DRB Chairman

cc: Joy Christiano, Jim Hubbard, Cliff Cooper, Frank E. Proch, Kent Selzer, John Duke,
Lester Furney.