

DISPUTE REVIEW BOARD RECOMMENDATION

November 7, 2002

Mr. Steve W. Smith
President
Smith & Company, Inc.
2400 SE Federal Highway, Suite 220
Stuart, Florida 34994

Mr. Mark DeLorenzo, PE
Aim Engineering & Surveying, Inc.
18989 Cortez Boulevard
Brooksville, Florida 34601

RE: SR-50 from CR 485/SR-50A to SR 700 (US-98) and SR-45 (US-41) from VFW Road to Benton Avenue. F.P.ID 254805-1-52-01, 254805-1-56-01, 254816-1-56-01, 254816-1-56-02, & 254816-1-52-01.
SPN: 08002-3501 & 08010-3526.
Contract No: 20358
District 7

DISPUTE: Request for Change in Contract Price due to Significant Change in Character of Work Regarding "JPA Fittings, Water & Force Main Work."

Dear Sirs:

The Contractor, Smith & Company, Inc.(SCI), requested a hearing to determine **entitlement** of SCI to additional compensation for significant overruns in the fittings items 1511120, 1611140, & 1611140 on the referenced project. Should entitlement be established, the Disputes Review Board (DRB) was not to decide quantum of such entitlement at this time, as the parties, the Florida Department of Transportation (FDOT), the City of Brooksville (COB), and SCI would attempt to negotiate the value of the entitlement.

Pertinent issues, correspondence and other information relating to SCI's, FDOT,s and COB,s positions were forwarded to the DRB for review and discussion at the hearing that was held October 21, 2002 at 1:30 PM at the field office of AIM Engineering & Surveying, Inc. in Brooksville, Florida.

ISSUE:

The Contractor, SCI, claims that the over run of Ductile Iron Fittings has significantly changed the nature and character of work and has caused the use of additional labor and the contractor wishes to be compensated for their claimed losses.(From FDOT submittal).

CONTRACTOR'S POSITION:

Smith & Company, Inc. ("SCI") entered into a unit price Contract with the Florida Department of Transportation ("FDOT") to construct SR 50 and SR 45 (US 41); from CR 485/SR 50A to SR 700 (US 98) and from VFM Road to Benton Avenue ("Project") in accordance with the plans and specifications issued and warranted by the FDOT to be accurate and constructible as issued to SCI. (Table omitted)

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The purpose of this submittal is to request an equitable adjustment to the contract price as a result of the significant change associated with the JPA fittings on the project and the direct effect that this change had on the nature of work SCI was required to perform which was not original (sic) anticipated in the contract documents.

The following table quantifies the significant change SCI encountered:

| ROAD | PAY ITEM | DESCRIPTION | UNIT | PLAN | ACTUAL | % |
|-------|----------|-------------|------|------|--------|----------|
| SR 50 | 1511120 | Fitting | Ton | .7 | 4.393 | 627.57 % |
| SR 50 | 1611140 | Fitting | Ton | 2.2 | 18.321 | 832.77 % |
| SR 41 | 1611140 | Fitting | Ton | 4.8 | 12.316 | 256.58 % |
| | | | | 7.7 | 35.030 | |

SCI is entitled and the FDOT is required to compensate SCI for this significant change as required under the contract documents. Specifically the Unforeseen and Significant Change in the Character of the Work.

In accordance with Special Provisions 10. Conditions Requiring Supplement Agreement, which states in part the following:

Additional or unforeseen work of the type already provided by the contract for which there is a contract price will be paid for at such contract price in accordance with 4-3.2.1.

Since the fittings and pipe activities already had an existing pay item, 4-3.2.1 states in part the following:

4-3.2.1 Significant Changes in the Character of Work: The Engineer reserves the right to make...changes in the quantities and such alterations in the work as necessary to satisfactorily complete the project.....

*If the **alterations or changes in quantities significantly change the character of the work** under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to 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....of the original contract quantity...*

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As a direct result of the increase in fitting quantities, the “nature” of the work significantly changed. SCI original planned method and manner was significantly changed both in installation of the fittings as well the actual installation of the watermain and forcemain. Therefore, the FDOT is required and SCI is entitled to an equitable adjustment to its contract as a direct result of this significant change in the character of work.

In order to quantify the total number of days SCI crews actually were on the project, the FDOT Daily Construction Reports for JPA work were reviewed and are summarized below:

Actual Crew Days Watermain, Forcemain & Fittings

| | |
|-------------------------|------------|
| <i>Calendar Days</i> | <i>339</i> |
| <i>Actual Crew Days</i> | <i>540</i> |

Based on SCI approved baseline schedule which estimated 299 crew days, and the actual crew days established in the FDOT Daily Construction Reports of 540 crew days, SCI crews were on the project an additional 241 days. The FDOT granted SCI an additional 4 calendar days on Supplemental Agreement No. 5, therefore, the **requested crew days impacted by the significant change is 237 crew days.**

DEPARTMENT’S POSITION:

BACK GROUND OF ISSUE:

The water main and force main required restraints at each joint as indicated in the plan General Utility notes 7 and 8 on sheet B4 (section 2-e-1). Early on in the project it was discovered that the **ductile iron fittings were going to overrun considerably due to an error in calculation of the plan quantity by the designer.** Smith & Company, Inc. did not have an issue with this until after completion of the water and sewer. All of the installation of the water main and force main was substantially complete on 11-29-01. **The initial verbal notification of the claim was at the DRB meeting #27 on April 18, 2002.** The written claim submittal is dated May 29, 2002.

STATEMENT OF POSITION:

The Department will clearly show that there exists no validity to Smith & Company’s request for a change in the contract price for an overrun in fittings for the installation of water and sewer on the SR-50 and US-41 projects. SCI’s basis of claim is that the overrun in fittings caused a significant change in quantity to a major item of work and thus caused a change in the nature of the work and slowed production. The information presented to the Board will show that the fittings are not a major item of work and the **plan drawings show the quantity of fittings and the nature of work has not changed.** Also the information presented will show that the production rates per day exceeded the daily production rates indicated on the original baseline.

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The standard specification section 4-3-2.1 Significant Changes in the Character of Work: describes a significant change as

- (A) When the character of 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 or work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of the original contract item quantity or in case of a decrease below 75 percent, to the actual amount of work performed.*

The character and nature of the work has not changed. *The plan sheets show the installation of the water line and the General Utility notes 7 and 8 on sheet B4 (section 2-e-1). Indicate the use of ductile iron mechanical joint fittings. The City of Brooksville (utility owner) did not request the use of additional fittings above what is indicated in the plan set and contract documents nor request a change in the type of fittings from what was originally in the contract. The Standard Specifications section 1-24 defines a Major Item of work as any item of work having an original contract value in excess of five percent of the original contract amount. The water and sewer ductile iron fittings combined are 0.2% of the original contract amount.*

The original baseline schedule indicates production rates for the installation of water and sewer pipe requiring the use of fittings to be 117 feet per day. This is summarized in section 6-b-1 and 6-b-2. The production rates per day were tabulated (section 6-a-1 to 6-a-4) using the quantities from the daily reports of construction for a one-year period with 140 days of production. The results indicate a production rate of 156 feet per day. This clearly shows that there was not a loss of production. The City of Brooksville made several design changes beneficial to Smith & Company, Inc. to make the installation of the water and sewer more efficient. One item of note is the movement of the water main from the west side of US41 to the east side so that SCI could eliminate the need for concurrent work with the sanitary sewer and storm sewer on the west side. This plan change along with others allowed SCI to increase their scheduled production rate.

*Over the life of the project many issues arose concerning the installation of the sanitary sewer and water main along SR50 and US41. The City of Brooksville and the Department worked with SCI to eliminate delays and resolve issues in a timely manner. SCI submitted a claim package indicating the impacts due to the plan changes. An independent schedule expert was used to develop an as-built schedule to determine the impacts on Smith & Company's original baseline schedule due to the changes in the water and sewer system. The major changes occurred in the sewer system for US41. Their findings resulted in a settlement of \$857,750.00 and 207 additional contract days of which 187 days are compensable to include home office and field office overhead. The **settlement agreement** (section 3) **resolved all outstanding issues and claims, known or unknown, which originated prior to April 13, 2001 for Joint Project Agreement and Roadway project.** The **only exclusions** to what was covered in that agreement were specifically stated and consist*

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*of the settlement for **Superpave Asphalt issue, Bellsouth issues, additional eradication of nuisance species in Pond 5, and potential subsoil overrun.***

The settlement offer described above clearly shows that Smith & Company agreed to resolve all issues known or unknown, prior to April 13, 2001. The need for an independent party to develop a resolution was caused by SCI not following specification 5-12 (section 2-c-1) for the submission of a contract claim. The fitting issue in question is under the same situation and standard claim documentation could not be developed due to improper notification of claim. The Department seeks the expertise of the Disputes Review Board to obtain a resolution to the issues concerning Smith & Company's request for change in contract price for the installation of Ductile Iron fittings.

Conclusion:

The documents presented show that SCI is not entitled to additional compensation for their claimed significant change due to the overrun in water and sewer fittings.

CONTRACTOR'S REBUTTAL:

The Contractor offered no written rebuttal to the Department's Position prior to the hearing.

DEPARTMENT'S REBUTTAL:

*We have completed our review of the submittal package from Smith & Company, Inc. and have discovered several discrepancies. The first item refers to the SCI Approved Plan on page three (3). The origin of this schedule could not be determined. It is not the original baseline schedule **accepted** by the Department or any accepted updates.¹ This schedule or "approved plan", as referenced by SCI, was not accepted and does not provide any useful information and therefore cannot be used to provide an accurate analysis.*

The second item of note is Smith & Company's comparison of calendar day to crew days. The resource loading of the baseline schedule is not a contract requirement. The comparison of contract days to crew days cannot be used for analysis purposes.

The comment section on page 30 of SCI's submittal package identifies two examples of extra fittings used due to construction methods and SCI errors. These occurred on December 10th and 20th of 2000. Also included on page 16 of section one on SCI's analysis is work that was previously paid by Supplement agreement such as on April 27, 2000. Additional documentation for the above items is contained under section 7 of the Department's submittal package.

¹ The Contractor stated at the hearing that this schedule was obtained from the Department.

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BOARD FINDING'S:

- 1) The total fittings, ductile iron, weight actually installed was 35.03 tons. (SCI submittal package)
- 2) The pay estimate for **March 18, 2001** included 33.074 tons of Fittings, Ductile Iron.
- 3) The pay estimate for **April 15, 2001** included 33.189 tons of Fittings, Ductile Iron.
- 4) The **Settlement Offer dated and accepted April 13, 2001**, stated in part:

*This letter will memorialize the agreement between the Florida Department of Transportation (Department) and Smith & Company (SCI) that we reached this morning regarding multiple issues on the above referenced project. We have agreed to pay for 187 compensable days at \$4,500 per day for a total of \$841,500.00. The \$4,500.00 per day for compensable time is binding for this agreement only and in no way binds either part to This amount on other issues that may involve compensable time. In addition we have agreed to compensate you a total of \$6,250.00 for ten (10) drop manhole modifications. We have also agreed to compensate you \$10,125.00 for the replacement of asphalt associated with restoration of side streets during placement of utilities for the City of Brooksville. We will also grant you a 20 day non compensable time extension. This settlement will **resolve all outstanding issues and claims, known or unknown which originated prior to April 13, 2001**. The exceptions to this agreement are the Superpave Asphalt issue, the issue associated with BellSouth, additional eradication of nuisance species at Pond 5, and the potential subsoil overrun.*

Payment schedule by supplement agreement omitted.

*In addition, these supplemental agreements include the **release and waiver of any and all claims, issues, and disputes** against all parties involved in this project (including but not limited to the Florida Department of Transportation and the City of Brooksville) in effect as of April 13, 2001 except for the issues, claims, and disputes associated with the Superpave Asphalt issue, the issue associated with BellSouth, additional eradication of nuisance species at Pond 5, and the potential subsoil overrun. The release and waiver of any and all claims, issues, and disputes in effect as of April 13, 2001 includes but not limited to:*

- ...
- *The impact of the design Change on City of Brooksville facilities*
- ...

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This will settle all claims to date, known or unknown, of any nature with the exception of the Superpeve Asphalt issue, the issue associated with BellSouth, additional eradication of nuisance species at Pond 5, and the potential subsoil overrun.

...

The **Contractor's authorized representative signed this settlement offer.**

- 5) The Supplemental Agreements contain paragraph 4 which says in part:

The Department and the Contractor agree that the contract time adjustment and sum agreed to in this Supplemental Agreement constitute a full and complete settlement of the matters set forth herein, including all direct and indirect cost for equipment, manpower, materials, overhead, profit and delay relating to the Supplement Agreement. This settlement is limited to and applies to any claims arising out of the matters described and set forth in this Supplemental Agreement.

- 6) DRB meeting minutes of May 21, 2001 states in part

*Issues with the City of Brooksville: **SCI has none with the City of Brooksville.***

SCI has settled issues on inefficiencies, design impacts, and contract time with the agreement of lump sum settlement on \$802,000 and 207 days time extension...

- 7) The majority (95%) of watermain and forcemain work was completed prior to accepting the letter of agreement dated April 13, 2001.
- 8) Some items included in SCI's submittal, section 1, determining work description for crew and work days did not relate to the issues in this claim.
- 9) The increase in ductile iron fittings tonnage was a quantity tabulation error and not omissions from the plans. Other than minor increases in fittings during construction, the potable water and waste water systems could have been built by the original plans.
- 10) Relief under Section 4-3.2.1 of the general specifications is not applicable to this issue because the **character of work did not change, only the quantity.**

BOARD RECOMMENDATION:

Based on materials supplied to the Board and presentations to the Board at the DRB hearing the Board finds that the Contractor, Smith & Company, Inc., has been duly compensated for the work accomplished. Therefore, the Board finds NO ENTITLEMENT to an additional equitable adjustment to the contract amount.

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

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

Disputes Review Board

E.K. Richardson, Chairman
John H. Duke, Sr., Member
Lester C. Furney, Jr., Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "E.K. Richardson", with a large, stylized loop at the end of the signature.

E.K. Richardson
Chairman