

DISPUTE REVIEW BOARD RECOMMENDATION

May 18, 2004

E-Mailed May 18, 2004

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RE: SR 52 from E of US 41 to E of CR 581
FIN No.: 256387-1-52-01
County: Pasco
Disputes Review Board

Issue - # 1

Dear Sirs:

The Owner, Florida Department of Transportation (FDOT), and APAC-Southeast, Inc. - Central Florida Division (APAC) requested a hearing to determine whether APAC should be paid for Seeding and Mulching on the subject project. Should entitlement be established, the Parties were to negotiate the quantum of such entitlement.

Pertinent correspondence and other information relating to the Department's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on May 06, 2004.

CONTRACTOR'S POSITION:

*Request for Payment - for Seeding & Mulching
Line Item No. 2570-2
Per Florida Department of Transportation
Standard Specifications for Road and Bridge Construction 2000*

Project Summary:

The Department awarded APAC-FLORIDA, INC. ("APAC"), as lowest responsible bidder, the general contract, ("Contract"), for

Project No. 256387-1-52-01, SR 52, Pasco County, Florida.

*APAC and **Swart's Landscaping, Inc.** ("SLI"), entered into a **subcontract** for the Project whereby SLI agreed to lay sod, seed and mulch, and apply water along the newly constructed highway. SLI bid the job to APAC on 3/21/02, signed the subcontract agreement with APAC on 5/24/02, commenced work on 5/28/03 and completed work 7/25/03.*

Pursuant to the subcontract, SLI agreed to perform the contracted work in accordance with the contract documents.

• 2570 2	180,415	SM	Seeding and Mulching	\$0.22	\$39,691.30
• 2570 3 1	2,021	KL	Seed Grass	\$0.01	\$ 20.21
• 2570 4	162,400	MT	Mulch Material	\$0.01	\$ 1.62
• 2570 5	12	MT	Fertilizer	\$0.01	\$ 0.12
• 2570 9	7,495	KL	Water for Grassing	\$0.01	\$ 74.95
• 2575 1	87,279	SM	Sodding	\$1.50	<u>\$130,918.50</u>
			Contract Value		\$170,706.70

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Job History:

SLI started the sodding operations on May 28, 2003.

SLI finished all sod requirements per plans on July 1, 2003.

SLI completed the 5 day seeding and mulching operations on Wednesday, July 9, 2003. Per the Engineer's Daily Reports of Construction, there is no mention of a deviation from the Specifications or any indication that the seed & mulch process was not installed per Spec. (Attachment 1)

Five days later, on Monday, July 14, 2003 SLI, **at the direction of APAC**, SLI started laying sod on top of all the seed and mulch areas.

SLI completed the installation of sod on top of all the seed and mulch areas on July 25, 2003.

All major items of work were completed and the project was final accepted on July 31, 2003. Approved contract time expired on July 29, 2003. (Attachment 2)

Relative Information about Bahia Seed:

Internet research (Attachment 3) found numerous sources repeating the same information about Pensacola Bahia grass seed, of which is attached two copies. All data relative to Pensacola Bahia grass seed germination states:

"Normal (average) germination period for Pensacola is considered to be 28 days. When dormancy is broken in the seeds they germinate in approximately 28 days. During hotter summer months such as July/August when rainfall is also plentiful, Pensacola Bahia seed can germinate in as quickly as 10-14 days. Higher soil temps coupled with moist conditions will also cause more of the seed to germinate."

Facts:

- Contract time expired on July 29, 2003.
- **Per Genesis, APAC was required to establish an acceptable stand of grass before final acceptance.**
- The project was receiving significant amounts of rain daily, thus creating a continuous maintenance problem.
- Normal germination for Bahia grass seed is 28 days. The seeding operation finished on Wednesday, July 9th. If the seed would have germinated at the normal rate of 28 days, establishment would not have been until August 6th - 8 days after contract time expired.
- Five days after the seed & mulch was completed, per Genesis' letter dated July 14th, the seed and mulch efforts had failed. (Letter 13)
- On 7/8, 7/9, 7/10, 7/11, 7/12, and 7/14 paving operations were effected more than 50% by rain storms. (Attachment 4)
- Prior to the grassing operations, APAC got approval from Genesis to sod the areas that were designated for seed & mulch per plan. Genesis letter dated July 14th states "as your company was previously notified, sodding of the seed and mulch zone will be acceptable." APAC was denied any additional contract time. (Letter 13)
- The Engineer's Daily Report of Construction for 7/9, 7/14, 7/15, 7/17, and 7/18 states that APAC crews worked on the repair of embankment washouts at various locations on left and right roadway on SR52. (Attachment 5)
- On July 14th, **SLI was directed by APAC to sod on top of the seed & mulch.** SLI's crews worked behind the APAC crews that were re-dressing the shoulders from washouts. We continued laying sod until the entire 97,839.50 square meters-of seed & mulch was covered with sod.

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Conclusion:

Time was of the essences at the end of this project. The rainy season was impacting the progress of the job daily, and APAC was aware that repairing the erosion was a continuous problem that was impacting the "establishment" of the grass. APAC was denied additional contract time for the establishment of grass and also additional contract time for sodding in lieu of grassing. The decision to sod on top of the seed & mulch was APAC's in order to guarantee an acceptable stand of grass at the end of the contract time.

When SLI was directed by APAC to start sodding on top of the seed & mulch, we wrote to APAC in a letter dated July 15th, that "we expect to be paid for work that we do, including seed and mulch areas covered up by sod." (Letter 11) At this time, we did not know that APAC had been discussing with Genesis about changing seed to sod and the request for additional time. We maintain that we always expected to be paid for work completed correctly and since there is no documentation from the Engineer that the work was not correct (except that it didn't germinate in 5 days), that work should be paid.

OWNER'S POSITION:

Issue:

Is the Contractor entitled to payment for pay item number 2570-2, Seed and Mulch, on financial project number 256387 1 52 01? It is the Contractor's position that payment should be provided for the seed and mulch operation performed. It is the Department's position that the Contractor decided to replace the seed and mulch (because it was never established) with sod, under the agreement that compensation would be provided for the sod only.

Status:

After a meeting was held to resolve this matter with no success, the Contractor requested that this issue be forwarded to the Disputes Review Board.

Summary of the Department's Position:

The Department's position is that the Contractor decided to replace the seed and mulch (because it was never established) with sod, **under the agreement that compensation would be provided for the sod only.** The Contractor proceeded with the work **without providing a notice of intent to file claim or a notice of disagreement.** The basis for our position including a chronological order of events is detailed below:

1. The typical section in contract plans specified seed and mulch to be placed on the slopes on the project. (See Typical Section, p. 3-1). Prior to initiating the seed and mulch operation, the **Department provided the Contractor with the option to place sod in lieu of seed and mulch** on the project. Due to the time constraints, the **Contractor elected to seed and mulch per plan.** (See June 25, 2003 Progress Meeting Minutes, p. 4-1 thru 4-4)
2. The seed and mulch operation began on June 30, 2003. The following deficiencies were noted on the Inspector's Daily Report of Construction (See Daily Report of Construction dated June 30, 2003, p. 5-1):
 - The contract pay item for grass seed specifies **Argentine Bahia.** The **contractor began spreading Pensacola Bahia.** (See CES plan sheet, p. 3-2)
 - The second paragraph of Section 981-1.2 of the Standard Specifications Dated 2000 states: "All permanent and temporary grass seed shall have been tested within a period of six months of the date of planting.". The **Contractor spread seed that was tested in May 2002, 13 months prior to planting.** (See copy of Section 981-1.2, p. 6-1)
3. On July 1, 2003, the Contractor requested to use Pensacola Bahia in lieu of Argentine Bahia. (See APAC's letter dated July 1, 2003, p. 8-1 thru 8-2)
4. On July 3, 2003 the Engineer of Record determined that Pensacola Bahia would be an acceptable substitute for Argentine Bahia. This decision was provided with the requirement that a Contract change would be necessary in order to provide payment for the Pensacola Bahia

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seed. This letter also stated that **if the Contractor desired to pursue this change they had to advise the Department.** (See Genesis' letter dated July 3, 2003, p. 7-1)

5. On July 3, 2003, the Contractor resumed the seed and mulch operation using Pensacola Bahia seed. **No request for a contract change was made** by the Contractor. No payment was provided for the seed. (See Daily Report of Construction dated July 3, 2003, p. 5-2)
6. The seed and mulch operation continued on July 7, 2003. (See Daily Report of Construction dated July 7, 2003, p. 5-3)
7. The seed and mulch operation continued on July 8, 2003. (See Daily Report of Construction dated July 8, 2003, p. 5-4). **The mulching was not completed for the seed that was spread on this date and rain occurred this evening.** (See Daily Report of construction for night-work dated July 8, 2003, p. 5-5)
8. On July 9, 2003 the mulching was completing on the seed spread on July 8, 2003. (See Daily Report of Construction dated July 9, 2003, p. 5-6)
9. At the July 9, 2003 Progress Meeting the status of the courtesy list was reviewed and the **need to mulch bare areas was discussed.** (See July 9, 2003 Progress Meeting Minutes, p. 4-5 thru 4-11)
10. On July 14, 2003 a meeting was held between Brian Penny with Genesis and Ted Dixon with APAC. At this meeting, **Mr. Dixon asked if the option to sod the seed and mulch areas was still available. Mr. Penny responded that sod was still acceptable. However, payment would be provided for the sod only. No payment would be provided for the seed and mulch that was being replaced.** (See Genesis letter dated July 14, 2003, p. 7-2)
11. On July 16, 2003, the Contractor began sodding all seed and mulch areas. **Nothing was received verbally or in writing that the Contractor was not in agreement with the payment stipulations** as discussed and provided in writing on July 14, 2003. (See Daily Report of Construction dated July 16, 2003, p. 5-7)
12. The first and second sentences of the first paragraph of Section 5-12.2.1 of the Supplemental Specifications states:

"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. 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 second paragraph of this section states:

"Submission of a timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing any circuit court, arbitration, or other formal claims resolution proceeding against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right additional compensation or a time extension for such claim."

(See copy of Section 5-12.2.1, p. 6-2 thru 6-3)

13. At the July 22, 2003 Progress Meeting nothing was discussed in regards to the Contractor disagreeing with the payment stipulations as discussed and provided in writing on July 14, 2003. (See July 22, 2003 Progress Meeting Minutes, p. 4-12 thru 4-14)

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14. *The project was Final Accepted on July 31, 2003. (See Genesis letter dated July 31, 2003, p. 7-8)*
15. *On September 5, 2003 an "Offer of Final Payment" was made to the Contractor. (See Offer of Final Payment dated September 5, 2003, p. 9-1 thru 9-2)*
16. *On September 10, 2003 the Contractor requested copies of the calculation sheets for the grassing items on the project. (See APAC letter dated September 10, 2003, p. 8-3). Copies were provided to the Contractor, as were provided throughout the life of the Contract.*
17. *Subsequent to the Contractor's review of the quantities, a meeting was requested by the Contractor, for the purpose of discussing the non-payment of the seed and mulch. **This was the first indication to the Department that the Contractor was not in agreement with the stipulations for placing sod in lieu of seed and mulch as provided in Genesis' July 14, 2003 letter.***
18. *A meeting was held on November 7, 2003 to discuss the non-payment of the seed and mulch. The Department's position, as stated in Genesis' July 14, 2003 letter, was reiterated to the Contractor. (See meeting attendance roster, p. 4-15)*
19. *On November 17, 2003 the Contractor accepted the Department's "Offer of Final Payment" qualifying the quantity for the seed and mulch pay item. (See "Acceptance on Offer of Final Payment", p. 9-1 thru 9-2)*
20. *On December 1, 2003 the Department responded to the Contractor's qualified acceptance. This response reiterated that payment was provided for the sod only and not the seed and mulch based on the conditions established on July 14, 2003 allowing the sod to be placed. It was also stated that a **Notice of Intent to File Claim was never received in regards to this issue.** (See Genesis correspondence dated December 1, 2003, p. 7-3 thru 7-7)*
21. *On March 25, 2004 the Contractor requested to refer this issue to the Disputes Review Board. (See email from APAC dated March 25, 2004, p. 8-4)*

In summary, Section 2570-1 requires the Contractor to establish a stand of grass in all specified areas. As a result of the Contractor's concern as to whether the seed and mulch would establish, he requested to place sod in the areas previously seeded and mulched and the Department approved this request with the stipulation that payment would be provided for the sod and not the seed and mulch. The Contractor proceeded to place the sod without objection. The seed and mulch never established and provided no benefit to the Department or the Contractor. Approximately three months later the Contractor objected to the non-payment of the seed and mulch. In accordance with Section 5-12.2.1 of the Supplemental Specifications the Contractor's failure to provide notice of his intent to file claim waives his right to compensation regarding this issue. Further, It is the Department's position that the Contractor has been provided payment for the sod, which was the method of grassing the Contractor chose to incorporate into the project.

BOARD FINDINGS:

- APAC brought this issue before the Board as a pass-thru claim for its subcontractor, Swart's Landscaping, Inc. (SLI)
- On July 14, 2003, the CEI wrote APAC:

*The purpose of this letter is to document the conversation that I had this morning with Ted Dixon (APAC Superintendent) regarding using sod to stabilize the seed and mulch areas where grass has not been successfully established. As your company was previously notified, sodding of the seed and mulch zone will be acceptable. **If you choose to substitute sod rather than attempting to seed and mulch again to establish acceptable grassing, payment will be at the existing contract unit price for sod, with no payment for previous seed and mulch efforts that failed.** Also, there will be no adjustment to contract time whether you elect to utilize sod, or attempt to seed and mulch again to establish acceptable grassing.*

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- On July 15, 2003, APAC wrote SLI:

This letter is to confirm that Swart's Landscaping has made the decision not to use sod in areas where the grass has not been established on the above referenced project.

*Please be advised that all mulch work must be performed as set forth per the specifications. **Also the hay needs to be cut in and the seed needs to be disked as per specifications.** Payment will not be made until all areas of work have been accepted by the Department.*

- On July 15, 2003, SLI wrote APAC:

*Your letter, dated 7/15/03, is incorrect and not precise. Swart's Landscaping will perform any and all work requested by the Department of Transportation and Apac. Swarts stated and still is true, **we expect to be paid for work that we do including seed and mulch areas covered up by sod or seed and mulch.** Per Genesis letter, it does not appear they want to pay for the seed and mulch that has washed due to no reason of Swarts. It also seems, Genesis originally informed Apac that they could sod but chose not to do so because of the time on the contract.*

*At this time, **we would assume Genesis will be paying for the original seed and mulch operation., along with and reseeding or resodding as it does not state any differently in your letter.***

Please let us know if you want- any further seed or sod on the above referenced project. Swart's will not be responsible for LD's due to any delays.

It does not appear that this letter or any other letter that might be construed as notice of claim on this issue was sent to FDOT in a timely manner.

- On July 29, 2003 APAC wrote SLI:

We have searched our correspondence on the above referenced project and enclose a copy of the only letter we have received from you concerning the sod, seed and mulch. This correspondence does not state that Swart's intends to file a claim in this matter. However, if it is your intention to file a claim, please send us a letter stating same and APAC will promptly forward the notice to the F.D.O.T.

- Swarts stated that he should be paid pursuant to SECTION 570 GRASSING (BY SEEDING) which states in part:

570-4 Maintenance.

Maintain the planted areas as an acceptable stand of grass until final acceptance of the project at no expense to the Department. Include in such maintenance the filling, leveling, and repairing of any washed or eroded areas, as may be necessary.

An acceptable stand of grass is defined as a 1 by 1 foot [300 by 300 mm] area containing a minimum of 16 live, viable, healthy wildflower and/or grass seedlings.

The Department will pay for replanting as necessary due to factors determined to be beyond control of the Contractor.

...

- APAC never gave timely notice that it considered the cause for replanting as being beyond its control or that it expected to be paid for replanting. To the contrary, it operated in accordance with its conversation with the CEI that took place on or about 07/14/03.

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BOARD RECOMMENDATION:

Based on the materials supplied to the Board and presentations to the Board at the DRB hearing, **the Board finds that APAC is not entitled** to additional compensation for seeding and mulching on the project.

This 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 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 by the non-responding party.

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
John H. Duke, Sr., DRB Chairman
Keith Richardson; DRB Member
Kurt Stone; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "J H Duke", with a stylized flourish at the end.

John H. Duke, Sr.
DRB Chairman