

DISPUTE REVIEW BOARD RECOMMENDATION

April 17, 2003

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RE: FIN: 256338-1-52-01
SPN: 14570-3519
Contract No.: 21198
County: Pasco
District: Seven
SR-54 from SR 55 (US-19) to East of Madison St.

Dear Sirs:

The Contractor, David Nelson Construction Co. (DNCC) and the Owner, Florida Department of Transportation (Department), requested a hearing to provide a recommendation to both parties on:

Whether or not the fiberglass structure in Pond 1A as depicted on Sheet 188 should have been included in Pay Item 2425-2-72 and whether the Contractor is entitled to additional/separate compensation for the Pond No. 1A Skimmers beyond what was provided for in the original contract documents.

Pertinent issues, 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 March 31, 2003.

CONTRACTOR'S POSITION:

Issue and Position Document- Pond 1A Fiberglass Structure

During the final project closeout process DNCC and the Department have reached an impasse on the issue of additional compensation for the stand alone fiberglass skimmer structure located in Pond 1 A. Both parties have agreed that it merits bringing it forward to the DRB for their assistance in resolving it.

ISSUE:

*Whether or not the unnumbered fiberglass structure in Pond 1A as depicted on Sheet 188 should have been included in Pay Item 2425-2-72. This structure is **not connected to Storm Structure S-300**. DNCC has requested separate compensation for this Pond 1 A structure as a separate pay item. The Department has denied this request based, as we understand, on the following note found on Sheet 8 of the Contract Plans (**Exhibit #1**):*

2425-2-72 Cost of all skimmers to be included in cost of J-7 Manholes >3M (S-300)

DNCC POSITION:

*DNCC believes and contends that the Department had an obligation to make this exception to the normal pay item clear. We further contend that it **is clear** that the pay item was **meant to include all***

¹ See original position papers of each party for exhibits.

DISPUTE REVIEW BOARD RECOMMENDATION

skimmers for Storm Structure S-300. Why else would there be such a reference as (S-300) in the above referenced note?

We must reiterate that the fiberglass structure in question was not attached to or a part of Storm Structure S-300 (Ref Exhibit #2). The Department's position now is that this structure was to be paid for as a part of Pay Item 2425-2-72. However, this was not the position of the Department in their estimates for this Project, nor was it included in the other bidders price for this item.

SUPPORTING INFORMATION:

The FDOT state-wide average bid price for Pay item 2425-2-72 J-7 Manholes > 3M is \$5,386.91 (Exhibit #3). The cost of the stand-alone fiberglass structure in Pond 1A is \$57,684.45 (see DNCC quote Exhibit #4), the value of which has not been disputed by the Department. Distributing this stand-alone structure cost over the 12 manholes in 2425-2-72 amounts to \$4,807.04 per manhole. The FDOT statewide average for 2425-2-72 is \$5,386.91. Thus, the unit price for Pay Item 2425-2-72 as the Department now interprets it should be around \$10,193.95 per manhole. However, consider the following:

DNCC bid \$4,500 each for Pay Item 2425-2-72. The other bidders ranged from a low of \$3,200.00 to a high of \$5,865.00 (Reference Exhibit #5A). The Engineers estimate for this item was \$4,100.00. Clearly, neither the Engineer's estimate, nor any of the Bidder's pricing included the added cost of \$4,807.04 per manhole for the stand-alone fiberglass structure.

Exhibit #5B indicates yet another Pay Item 2425-2-72 (4 each) for some Pasco County work. Does this mean that the Department intended for the structure in question to be divided into the 12 ea Pay Item 2425-2-72 as well as the 4 ea Pay Item 2425-2-72 ? Even spread over 16 Manholes, this latter pay item information shows that none of the bidding entities (including the Engineer) anticipated such costing in their unit price bids.

In an apparently completely separate budget, the Department again priced the pay item just like the other bidders. Exhibit #6 is a second version of the engineer's estimate. In this estimate, the Department established the value of the pay item at \$3,500 per manhole. Again, this is significantly below the statewide average of \$5,387 per manhole, and clearly does not include any consideration for the fiberglass structure in question. So, in a second unrelated estimate, the Engineer again did not include the stand-alone skimmer cost in the pay item as the Department claims it should be, and more likely intended only the S-300 skimmer to be included.

*One should also note that the Engineer's Estimate shown in Exhibit #6 is referred to as a **Three-Way Checklist/Engineer's Estimate**. We submit that if the Engineer did not or could not overcome this apparent ambiguity after checking it three different ways, then how could any Bidder, who has only limited resources and time, be expected to do any better?*

INTERPRETATION:

In hindsight, it is quite likely that the Engineer intended for only the skimmer attached to S-300 to be included in the Pay Item 2425-2-72 for J-7 Manholes > 3M. This would most logically explain the reference to (S-300) at the end of the note shown above, and would explain how the Engineer arrived at his pricing above.

Further, under the Department's current interpretation, DNCC should have been compensated \$4,807.04 for each 2425-2-72 manhole that was deleted from the work. A manhole was deleted from the work and we were not compensated.

SUMMARY:

We respectfully submit that the Department has the basic duty, responsibility, and obligation to make it clear to all bidders just what they want their contractors to price. When that is not done, an ambiguity is created, and the Department is held to a much higher degree of responsibility than is the contractor who has limited resources and time in the preparation of their competitive bid.

It is reasonable to conclude that nobody- including the Department's Engineer in a Three-Way Checklist and two separate estimates - picked up on and included this stand-alone structure in the unit prices for either version of the Pay Item 2425-2-72 Manholes. We believe and contend that this structure should have been priced separately as a per each or lump sum. Respectfully, we contend that

DISPUTE REVIEW BOARD RECOMMENDATION

this is an ambiguous, misleading situation the responsibility of which should rest with the Department. We believe we have demonstrated beyond any reasonable doubt that the fiberglass structure in question should be considered a separate pay item.

We therefore ask the Board for relief and recommend that a separate line item be added to the contract to include this one additional non-specified skimmer as a lump sum to be payable to DNCC.

DEPARTMENT'S REBUTTAL:

The following rebuttal statements are submitted in an effort to present the Department's position on the items contained in David Nelson Construction Co.'s (DNCC) submittal package. The Department's position on each subject matter will be presented in the order of DNCC's Summary of the Issue and Position Document, Pages 1-3 of their submittal package.

**2425-2-72 Cost of all skimmers to be included in cost of J-7 Manholes >3M (S-300)
(Page 1- DNCC Package).**

DNCC POSITION (Page 1 - DNCC Package):

DNCC believes and contends that the Department had an obligation to make this exception to the normal pay item clear. We further contend that it is clear that the pay item was meant to include all skimmers for Storm Structure S-300. Why else would there be such a reference as (S-300) in the above referenced note?

We must reiterate that the fiberglass structure in question was not attached to or a part of Storm Structure S-300 (Ref. Exhibit #2 - DNCC Package). The Department's position now is that this structure was to be paid for as a part of Pay Item 2425-2-72. However, this was not the position of the Department in their estimates for this Project, nor was it included in the other bidders price for this item.

- DNCC contends that the Department had an obligation to make this exception to the normal pay item clear.
- ◆ The Department agrees with this statement. That is why the Department included a Pay Item Footnote, which is a note provided in the contract plans for pay items that are exceptions to the normal pay items. These footnotes are to alert the contractor that a particular pay item contains additional costs above what is provided for in the FDOT Standard Specifications and are unique to this Contract.
- DNCC contends that it is clear that the pay item was meant to include all skimmers for Structure S-300. Why else would there be such a reference as (S-300) in the above referenced note?
- ◆ The Department contends that the Pay Item was to include all skimmers (plural) on the project (only two skimmers total), not just one of the skimmers. The reference was made to S-300, because this was one of the structures paid under Pay Item No. 2425-2-72 and this structure was located within the only pond, (Pond No. 1A), where the two skimmers are located. The Department wanted to ensure that the costs were included in the correct manhole pay item, of which S-300 was one of them, because there were several different types of manholes in the contract pay items.
- DNCC contends that the fiberglass structure (skimmer) was not attached to or a part of S-300.
- ◆ The Department contends that there were two separate skimmers, as is depicted on Sheet Nos. 184 & 188 of the Project Plans. That is why the Pay Item Footnote does not read, "All skimmers attached to S-300"; it reads "All skimmers period.
- DNCC contends that the Department's position now is that the skimmer was to be paid for as part of Pay Item No. 2425-2-72 and it was not their position in the estimates for this Project, nor was it included in the other bidders price for this item.

DISPUTE REVIEW BOARD RECOMMENDATION

- ◆ *The Department contends that their position was **clearly stated** in the original Contract Plans and has not changed since. Also, how does DNCC know what was included in the Department's estimate or what was included in the other bidders price for this pay item?*

SUPPORTING INFORMATION (Page 1- DNCC Package):

- *DNCC contends that the cost of the stand-alone fiberglass structure in Pond No. IA is \$57,684.45, the value of which has not been disputed by the Department.*
- ◆ *The Department did not **accept** or **dispute** this value, because it was to be included in the cost of Pay Item No. 2425-2-72 as **clearly stated in the Contract plans** and therefore **no separate entitlement** was considered or should be considered.*
- *DNCC contends that the unit price for Pay Item No. 2425-2-72 should be around \$10,193.95, as the Department now interprets. This is based on a Statewide Average of \$5,386.91 and their distribution of the skimmer costs over the 12 manholes.*
- ◆ *The Department contends that they do not determine cost for pay items; that is why they solicit bids for their projects. The Statewide Average is just an average based on Contractor's bids over a specific period of time. In reviewing the Statewide Average for 2001 (See attachment `A'), the range for Pay Item 2425-2-72 during this period was \$3,000 (Low) to \$35,000 (High). This wide variation does not determine the **actual value** of a Pay Item for a specific project, **nor is it relevant to this hearing**. This hearing is to determine if the cost of the skimmers were to be included in the cost of Pay Item 2425-2-72 (as clearly stated in the Pay Item Footnotes) and not what the value of the unit cost of the manholes should have been.*
- *DNCC contends that they bid \$4,500 each for Pay Item 2425-2-72, the other bidders ranged from a low of \$3,200 to a high of \$15,865 and the Engineer's estimate was \$4,100. DNCC concludes from these numbers that it is clear that neither the Engineer's estimate nor any of the Bidder's pricing included the added cost of \$4,807.04 per manhole for the stand-alone fiberglass structure (**skimmer**).*
- ◆ *The Department contends that these numbers are irrelevant. An Engineer's estimate is just an **ESTIMATE** to get an approximate value of a project for **budgeting purposes**. Engineers are **not Estimators** and do not bid projects. The variation in the bidding for this Pay Item alone is \$32,000 from the low price to the high price, which could be enough monies for the skimmers. In reviewing the bid prices for this project (See attachment `B'), there is variation in all of the prices, as one would expect. Some of the Pay Items bid with a wide variation have been highlighted and tabbed for illustration:*

(Attachment `B')

Tab 1	<i>Pay Item 2455-133-1: Temporary Sheet Piling \$80 (Low Price) to \$1,004,610 (High Price) Difference: \$1,004,530.</i>
Tab 2	<i>Pay Item 2430-11-243 AA: Concrete Pipe (150MM) \$400,800 (Low Price) to \$1,113,120 (High Price) Difference: \$712,320.</i>
Tab 1	<i>Pay Item 2110-1-1A: Clearing & Grubbing \$233,800 (Low Price) to \$700,000 (High Price) Difference: \$466,200.</i>
Tab 3	<i>Pay Item 2120-1: Regular Excavation \$179,980 (Low Price) to \$608,550 (High Price) Difference: \$428,570.</i>
Tab 4	<i>Pay Item 2162-3-101: Finish Soil Layer \$5,980 (Low Price) to \$275,020 (High Price) Difference: \$269,040.</i>

*As can be seen by this wide variation in pricing for these seemingly basic pay items, it is hard to determine what Contractors **include** or **do not include** in their pricing of pay items. Again, this*

DISPUTE REVIEW BOARD RECOMMENDATION

information is **not relevant to this hearing**. This hearing is to determine if the cost of the skimmers were to be included in the cost of Pay Item 2425-2-72 (as clearly stated in the Pay Item Footnote) and not what the value of the unit cost of the manholes should have been.

SUPPORTING INFORMATION (Page 2 - DNCC Package):

- DNCC's Exhibit #5B indicates yet another Pay Item 2425-2-72 (4 Ea.) for some Pasco County Work. DNCC asks the question "Does this mean that the Department intended for the structure (skimmers) in question to be divided into the 12 ea. Pay Item 2425-2-72 as well as the 4 ea. Pay Item 2425-2-72?"
- ◆ The Department contends that the answer to this question is **NO**. That is why the Pay Item Footnote is included under the FIN No. 256338-1-52-01 portion of the contract and not under the FIN No. 256338-1-56-02 portion of the contract (Pasco County JPA). This is another good reason why the Department **referenced drainage structure S-300** in the Pay Item Footnote, so there would be **no confusion** as to which manhole Pay Item was to include the cost of **ALL SKIMMERS** on the project.
- DNCC contends that one should also note that the Engineer's Estimate shown as their Exhibit #6 is referred to as a **Three-Way Checklist/Engineer's Estimate**. DNCC asks the question, "if the Engineer did not or could not overcome this apparent ambiguity after checking it three different ways, then how could any Bidder, who has only limited resources and time, be expected to do any better?"
- ◆ The Department contends that DNCC's Exhibit is called a **QUANTITIES Three-Way Checklist/Engineer's Estimate (See attachment `C')**. When you look at Attachment `C', it is evident that this document represents a **quantities three-way checklist** not a **three-way estimate**. That is why there are **three columns for the quantity check and only one column for the cost estimate**. This **Quantities Three-Way Checklist** is utilized by the Department to ensure that the quantities for the bid tab are correct. Again, the Engineer does not have the expertise to price a particular pay item and is only required to provide an **Estimate** for budgeting purposes. What the Engineer estimates for a particular Pay Item, as can be seen by the comparison of the **Engineer's Estimate vs. the Bidders pricing (see Attachment `B')** does not constitute the actual value of a particular Pay Item for any one Contractor nor is it **relevant to this hearing**.

INTERPRETATION (Page 2 - DNCC Package):

- DNCC contends that in hindsight, it is quite likely that the Engineer intended for only the skimmer attached to S-300 to be included in the Pay Item 2425-2-72 for J-7 Manholes > 3M. This would most logically explain the reference to (S-300) at the end of the pay item footnote, and would explain how the Engineer arrived at his pricing.

Further, under the Department's current interpretation, DNCC should have been compensated \$4,807.04 for each 2425-2-72 manhole that was deleted from the work. A manhole was deleted from the work and we were not compensated.
- ◆ The Department contends that the plans **clearly state that all skimmers (only two)** are to be included in Pay Item 2425-2-72. Also, as previously stated in this rebuttal package, the reference to drainage structure S-300 was to **clearly define** which manhole Pay Item was to include the skimmer costs, as there were several manhole pay items on this project. Further, DNCC's contention that they were not compensated for one of the manholes deleted from the work is **misleading**. The Department compensated DNCC for this manhole that was changed, not deleted, by paying for this manhole under the Pasco County JPA contract (\$6,000 EA) as part of the S.R. 54/U.S.19 jack & bore conflict settlement.

DISPUTE REVIEW BOARD RECOMMENDATION

SUMMARY (Page 2 & 3 - DNCC Package):

- DNCC contends that the Department has the basic duty, responsibility, and obligation to make it clear to all bidders just what they want their contractors to price. When that is not done, an ambiguity is created, and the Department is held to a much higher degree of responsibility than is the contractor who has limited resources and time in the preparation of their competitive bid. It is reasonable to conclude that nobody, including the Department's Engineer in a Three-Way Checklist and two separate estimates picked up on and included this stand-alone structure in the unit prices for either version of the Pay Item 2425-2-72 Manholes. We believe and contend that this structure should have been priced separately as a per each or lump sum. Respectfully, we contend that this is an ambiguous, misleading situation the responsibility of which should rest with the Department. We believe we have demonstrated beyond any reasonable doubt that the fiberglass structure in question should be considered a separate pay item.
- ◆ The Department contends that they did make it **very clear** in what they wanted the Contractors to price by including a note under the **Pay Item Footnotes**, as they are required and expected to. The Department contends that there was no ambiguity created as can be seen by the skimmer details shown on Sheet No. 184 of the Contract plans, (**very simply - two skimmers, one location**). The Contractor may have limited resources and time in the preparation of their competitive bid, but this does not mean that **they are to be compensated for items missed** at the time of bid that are **clearly** shown in the Contract documents. The Department also contends that it is not reasonable to conclude that nobody, including the Department's Engineer, included the stand-alone structure (**skimmer**) in the unit prices for either version of the Pay Item 2425-2-72 Manholes. It is not reasonable to conclude **who included what** for this particular pay item as is shown in the wide variation for many of the pay items on this contract. Again, **not relevant to this hearing**. Finally, DNCC contends that this structure (**skimmer**) should have been priced separately as a per each or lump sum. The Department has **historically included skimmers in the cost of drainage structures as was clearly stated in the Contract plans for this project**.

Rebuttal Summary/Conclusion:

DNCC's position on the Pond IA skimmers issue is that the Department had a basic duty, responsibility and obligation to make it clear to all bidders just what they wanted their Contractors to price. DNCC has tried to show and illustrate in their package what **their interpretations** were of what was to be included in Pay Item 2425-2-72 and how they arrived at this conclusion. DNCC's package includes: Pay Item Statewide averages, Contractor's bid prices, Engineer's cost estimates and DNCC's cost estimate for Pond No. 1A skimmer, all of which is **not relevant to this hearing**. The Department's package includes the **Project Plan Sheets**, which are a part of the **Contract Documents**; to illustrate the concise information provided in the plans that depicted what was to be included under Pay Item 2425-2-72 (**ALL SKIMMERS**).

DNCC's package has failed to present any information to show why they should not have included **both skimmers** under Pay Item 2425-2-72. As illustrated in this rebuttal package; Pay Item Statewide averages, Contractor's bid prices and Engineer's cost estimates for different Pay Item numbers **vary extensively**, and does not conclude that the Department did not meet their contractual obligation to make it perfectly clear in these Contract Plans on what was to be included under Pay Item 2425-2-72. The Department provided: a **Pay Item Footnote** (Plan Sheet No. 8) clearly describing what was to be included under Pay Item 2425-2-72 (**ALL SKIMMERS**), alerting the Contractor that this Pay Item contains additional costs above what is provided for in the Standard Specifications, and are unique to this Contract. The Department provided **Drainage Structure Details** (Plan Sheet No. 184), clearly showing the **two skimmers**: the Pond IA skimmer and the S-300 skimmer under the **SKIMMER DETAILS** on this sheet. Finally, the Department provided **Pond IA Layout Details** (Plan Sheet Nos. 188 & 189) clearly showing the **two skimmers** located within Pond IA. This payment issue was clearly defined in the Contract Plans with **no ambiguity, (two skimmers - one location, Pond IA)**. The issue for the Board is not a question of who included what in their cost estimates or how pay items are bid; it is a question of should the Contractor include the cost of **ALL SKIMMERS** under Pay Item 2425-2-

DISPUTE REVIEW BOARD RECOMMENDATION

72, as indicated by the Pay Item Footnote and the plan sheets. The answer to this question is yes; therefore, the Contractor has no contractual right for any additional/separate payment for one of the two skimmers beyond what was provided for in the original contract documents.

DEPARTMENT'S POSITION:

Payment for Pond 1A Skimmers

INTRODUCTION

The S.R. 54 Project (256338-1-52-01) consists of three drainage ponds throughout the entire project. The three ponds are interconnected to provide drainage for the project, with an outfall headwall located on U.S. 19. Of these three ponds within the project limits, only one pond (Pond No. 1A) contains two of the fiberglass skimmers that are the topic of this dispute. Pond No. 1B and Pond No. 2 do not contain any of the fiberglass skimmers. The Contractor is seeking compensation for one of these skimmers separately and independently of Pay Item No. 2425-2-72, which is the pay item provided for in the contract for payment of the skimmers.

DAVID NELSON CONSTRUCTION CO.'S POSITION: It is the position of David Nelson Construction that the unnumbered stand-alone fiberglass structure in Pond 1A as depicted on Sheet 188 of the contract plans should not be considered to be included in pay item 2425-2-72, and should be compensated separately. We request the DRB to review the issue and recommend whether the Structure should or should not be compensated independently of Pay Item 2425-2-72.

DEPARTMENT'S POSITION: The Contract Plans clearly state that **the cost of both fiberglass skimmers located within Pond No. 1A are to be included in the cost of the J-7 manholes >3M (S-300), Pay Item No. 2425-2-72.** Therefore, the Contractor should have included the cost for the two skimmers under this pay item at the time of bid and no additional/separate compensation should be made.

The Disputes Review Board is requested to review this dispute and provide a recommendation to both parties on whether the Contractor is entitled to additional/separate compensation for the Pond No. 1A Skimmers beyond what was provided for in the original contract documents.

SUPPORTING INFORMATION

1. Plan Sheet No. 8 – Pay Item Footnotes (See attached plan sheet)

Plan Sheet No. 8 of the project plans provides a list of Pay Item footnotes for the project. **Pay Item footnotes are provided as part of the contract documents to depict notes associated with some of the pay items.** These footnotes describe: what is included in the cost of a specific pay item, how the pay item is to be utilized, what materials are to be used for the pay item or any other special notes to assist the Contractor in calculating a price for a pay item at the time of bid. Also, these footnotes are to alert the Contractor that these particular pay items may contain additional costs above what is provided for in the FDOT Standard Specifications, and are unique to this Contract.

The footnote for Pay Item No. 2425-2-72 states:

“COST OF ALL SKIMMERS TO BE INCLUDED IN COST OF J-7 MANHOLES >3M (S-300)”

This pay item footnote refers to all skimmers (plural) associated with this project, not just one of the skimmers in Pond No. 1A. There are only two skimmers on the entire project and they are both located within Pond No. 1A right adjacent to each other. The Contractor should have been aware of this fact as stated in the footnote and should have included the cost of both skimmers under Pay Item No. 2425-2-72, as noted on Plan Sheet No. 8 and not just one of the skimmers.

2. Plan Sheet No. 184 – Skimmer Details (See attached plan sheet)

Plan Sheet No. 184 of the project plans is one of the Drainage Structure Detail sheets provided for this project and this particular sheet provides the Skimmer Details to be utilized for the construction of the two skimmers in Pond No. 1A. The detail on the left (highlighted) is titled “Pond No. 1A Skimmer Post Detail” and the detail on the right (highlighted) is titled “S-300 Skimmer Post Detail”, which shows that there are **two skimmers in Pond No. 1A.** This plan sheet clearly notes that there are two different skimmers on the project with two separate details. One detail depicting the skimmer from the ground

DISPUTE REVIEW BOARD RECOMMENDATION

line up to the top within Pond No. 1A and one detail depicting a partial skimmer for drainage structure S-300. Again, clearly there are only two skimmers on the entire project and both are located within Pond No. 1A.

3. Plan Sheet Nos. 188 & 189 – Pond No. 1A Layout Sheets (See attached plan sheets)

Plan Sheet Nos. 188 & 189 of the project plans are the Pond No. 1A layout sheets. Sheet No. 188 is the plan view of the pond, which clearly references constructing two skimmers within the pond (highlighted). *The one skimmer extends along the bottom of the pond and the second skimmer is around drainage structure S-300.* The skimmer along the bottom of the pond is further illustrated on Plan Sheet No. 189 on the Section A-A and Section C-C views of Pond No. 1A. Again, clearly there are only two skimmers on the entire project and both are located within Pond No. 1A.

SUMMARY / CONCLUSION

The Contract Documents for this project **did not misrepresent** to the Contractor the method of payment for the two skimmers on this project. The Contract Plans clearly denoted that there were only two skimmers on the project and both were within Pond No. 1A. The Contract Pay Item Footnote clearly described the Pay Item No. to be utilized by the Contractor to include the cost of the two skimmers. This is not a payment issue that required extensive research of the Contract documents for payment verification. All of the information for the two skimmers in Pond No. 1A is clearly denoted on only a couple of the plan sheets and is very easy to follow. *This issue boils down to two skimmers, one location (Pond No. 1A).* Therefore, the Contractor has no contractual right for any additional/separate payment for one of the two skimmers beyond what was provided for in the original contract documents.

CONTRACTOR'S REBUTTAL:

Department's Position: The Department contends that the Contract Plans clearly state that:

"The cost of both fiberglass skimmers located within Pond No. 1A are to be included in the cost of the J-7 manholes >3M (S-300), Pay Item No. 2425- 2-72."

Respectfully, the Department's position is not correct. *The Contract Plans state nothing whatsoever about "both fiberglass skimmers".* Nor do they say anything specifically about skimmers in Pond 1A with reference to payment. Such language, if included in the note would have been much clearer (even if it is still an unpractical way to pay for two distinctly different items). However, this is not what the note says. The note, at best, refers ambiguously to the skimmers attached to S-300. In actuality, there is only one skimmer related to (S-300), but then the Contract Documents are full of inaccuracies of this nature which normally mean nothing.

In this rebuttal we have included photographs which help illustrate the points noted herein as well as in our Position Paper.

1. Plan sheet No. 8- Pay Item Footnotes

We agree that the footnotes are intended to alert the Contractor that *particular pay items may contain additional costs.* This is not the debate. Our claim is that the note in reference to skimmers and Pay Item No. 2425-2-72 is ambiguous and unclear. If the intent is to alert the Contractor that particular pay items may contain additional costs, then in this case, the note failed. This is proven to be true by the fact that the Department's Engineer did not include the stand-alone skimmer in his estimate for Pay Item No. 2425-2-72. We have illustrated this in our Position Paper.

The footnote for Pay Item No. 2425-2-72 states:

"COST OF ALL SKIMMERS TO BE INCLUDED IN COST OF J-7 MANHOLES >3M (S-300)"

The Department then claims that this note refers to all skimmers (plural) associated with this Project, not just one of the skimmers in Pond No. 1A. If this is the case, then why do both of the Engineer's Estimates NOT reflect this position? Further, if this were the intent, why wouldn't the note simply state something to the effect:

DISPUTE REVIEW BOARD RECOMMENDATION

"BOTH SKIMMERS IN POND 1A ARE TO BE INCLUDED IN THE COST OF PAY ITEM 2425-2-72."

While this would still be a cumbersome way of accounting for these items, at least the intent would be clear. We submit that the intent of the note as written was to refer to the skimmer attached to (S-300). Why else would the note single out only one of the eleven structures that make up Pay Item 2425-2-72? Had the note really intended for all skimmers to be allocated to the fact that it refers to "skimmers" in plural is merely a vague reference that can be found anywhere in the documents.

*The contract documents, and indeed competitive bidding require us to create our bid based on what we can **reasonably interpret as the intent of the documents.** For example, as the Department points out the plurality of the "skimmers" note, please also refer to the note at the top of that same page which tells us to include the demolition of two buildings. This reference is entirely wrong- plural or not: The buildings did not exist to be demolished. In this case, as bidders we are left to our own devices to bid what we reasonably interpret to be required to complete that bid item.*

Likewise, to interpret that the monumental cost of this stand-alone structure is to be included in a storm structure pay item referencing a particular structure (which has a skimmer), is just not reasonable.

2. Plan Sheet No. 184- Skimmer Details

We acknowledge that the skimmers on Plan Sheet No. 184 exist. However, this is not the debate. The only thing in question here is what is to be included in pay Item 2425-272. Again, we maintain that we were to include the skimmer for (S-300) just as the note says.

3. Plan Sheet Nos. 188 & 189 - Pond No. 1A Layout Sheets

These sheets serve, in fact, to clarify that the stand-alone skimmer structure in question has nothing to do with Storm Structure 8-300. Again, the note refers to skimmers related to S-300.

Summary:

*If the intent of the footnote in question is as the Department contends, then the Contract Documents did, in fact, misrepresent to DNCC, the other Bidders, and the FDOT Engineer himself, the method of payment for the skimmers on the Project. The Contract **plans indicate two fiberglass structures**, one of which is a skimmer attached to Storm Structure (S-300) and referred to in the pay item footnote. The other is a stand-alone structure that does not act as a skimmer at all. Nor is it clearly referred to as to payment. Finally, it obviously is blatantly different in character from the other skimmer.*

***This issue does not boil down to two skimmers, one location. It boils down to One note, one skimmer, (S-300).** The fact that skimmers happens to be plural in the note does not and should not save the Department from the obvious unreasonableness of their catchall interpretation.*

By the reasoning established in our Position Paper and herein, we believe and contend that it is reasonable to consider the Pond 1A stand-alone structure for separate payment.

DISPUTE REVIEW BOARD RECOMMENDATION



View from the Southwest showing the distinction between Structure S-300 Skimmer (on left) and the Stand-Alone Fiberglass Structure (right). **The Stand-alone Structure is attached to structure S-8** which is a cast-in-place headwall.

PHOTO 1



Photo showing top of Structure S-300 (foreground) and the Stand-Alone Fiberglass Structure at left. Note the base of the stand-alone structure is at the finish grade of the pond. Therefore, this acts as a diverter and not a skimmer.

PHOTO 2

DISPUTE REVIEW BOARD RECOMMENDATION



View looking at the southwest corner showing the termination point of the Stand-Alone Fiberglass Structure. Note that the end is wide open which illustrates that this structure serves as a diverter of water out of structure S-8 and not as a skimmer.

PHOTO 3



Notice that the bottom of the "skimmer" is at the finish grade elevation of the Pond. Therefore, by design no "skimming" can take place. Also as shown in PHOTO 3, this Structure is obviously intended as a diverter and not a skimmer.

PHOTO 4

DISPUTE REVIEW BOARD RECOMMENDATION



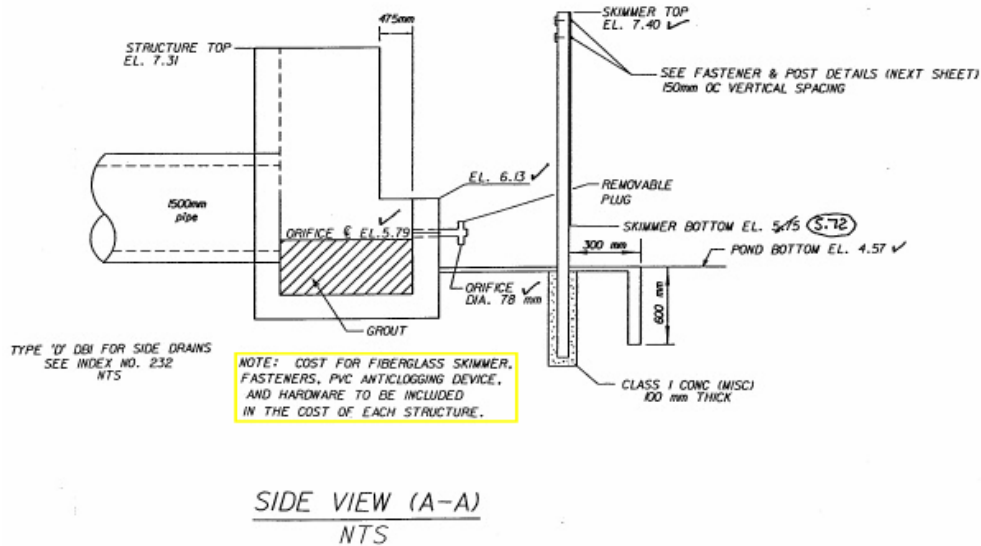
Looking east at north end of Pond IA. Note that Structure S-6A (Mitered End Section in foreground) carries stormwater runoff from SR 54/US 19 to a point behind the Stand-Alone structure effectively negating any claimed use as a skimmer.

PHOTO 5

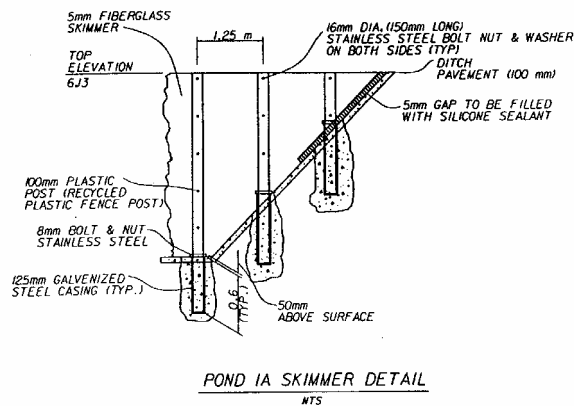
DISPUTE REVIEW BOARD RECOMMENDATION

BOARD FINDINGS:

- Sheet No. 183 of the plans – DRAINAGE STRUCTURE DETAILS – **S-300** **DETAIL** notes the “**COST FOR FIBERGLASS SKIMMER, FASTENERS, PVC ANTICLOGGING DEVICE, AND HARDWARE TO BE INCLUDED IN THE COST OF EACH STRUCTURE.**”:

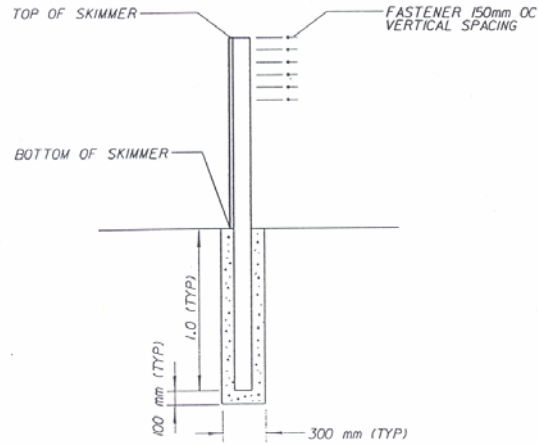


- Sheet No. 184 of the plans – DRAINAGE STRUCTURE DETAILS – **SKIMMER DETAILS** shows Pond 1A Skimmer Detail;



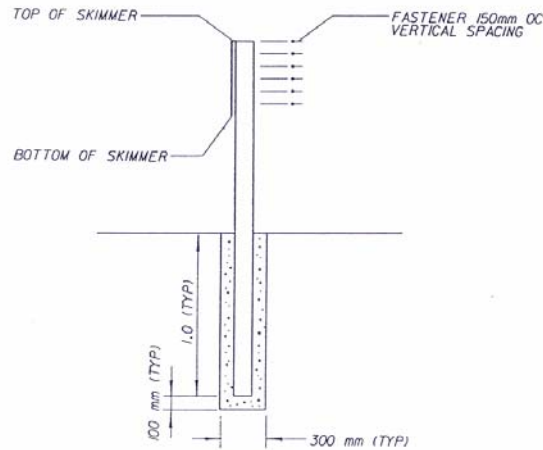
DISPUTE REVIEW BOARD RECOMMENDATION

Pond 1A Skimmer Post Detail;



POND 1A SKIMMER POST DETAIL
NTS

and S-300 Skimmer Post Detail:

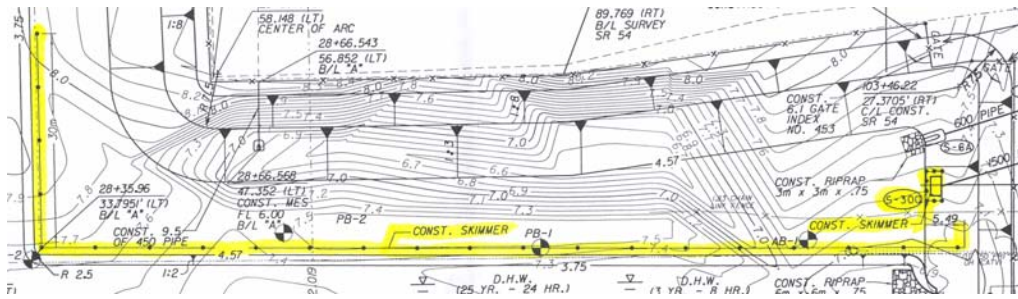


S-300 SKIMMER POST DETAIL
NTS

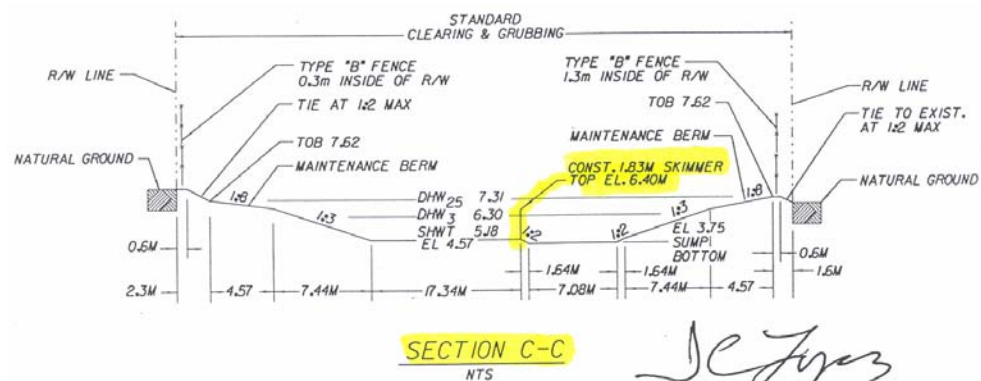
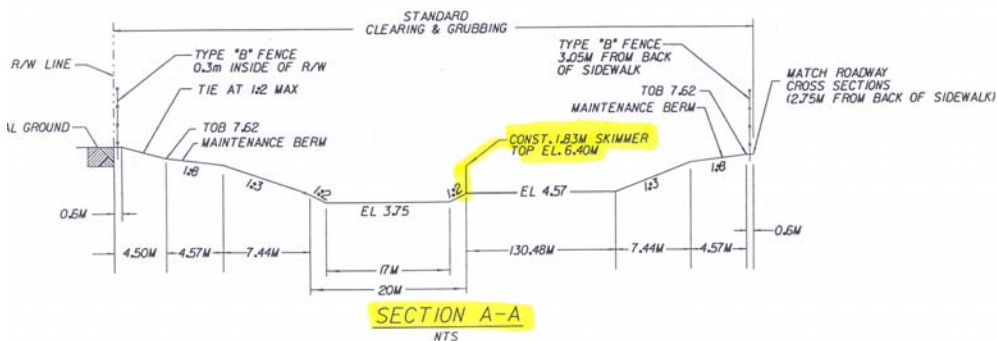
- There is **no note** on sheet 184, similar to the one on sheet 183, or **any other drainage structure detail sheet denoting how “Pond 1A skimmer” is to be paid.**
- Other than the Pay Item Note there is no note associated with payment of the skimmer in question.

DISPUTE REVIEW BOARD RECOMMENDATION

- Sheet No. 188 of the plans – POND 1A LAYOUT SHEET shows “CONST. SKIMMER”: at S-300 **and** in the pond:



- Clearly **two (2) Skimmers are shown to be constructed in Pond 1A.**
- These are **designated as skimmers** and there are no other skimmers on the project.
- **All/both** skimmers are **shown on the same plan sheets.**
- Sheet No. 189 of the plans – POND 1A shows Section A-A and Section C-C denoting “CONST. 1.82 M **SKIMMER TOP EL. 6.40 M**”: in the pond:



JC Jones

- Sheet No. 8 of the plans under Pay Item Footnotes states:

2425-2-72

COST OF ALL SKIMMERS TO BE INCLUDED IN COST OF J-7 MANHOLES >3M (S-300)

- The footnote **does not** state that only the skimmer at S-300 be included.

DISPUTE REVIEW BOARD RECOMMENDATION

- FDOT Standard Specifications for Road and Bridge Construction 2000 edition Division I – General Requirements and Covenants, Section 5 - Control of the Work states:

5-1 Plans and Working Drawings.

5-1.1 Plans and Contract Documents: The Department will furnish the Contractor copies of the plans and Special Provisions as required for the particular project. The Contractor may purchase copies of the Standard Specifications and Roadway and Traffic Design Standards from the Department. Have available on the worksite, at all times, one copy of the Contract Documents.

5-1.2 Department's Plans: The Department will furnish plans that consist of general drawings showing such details as are necessary to give a comprehensive idea of the construction contemplated. In general, roadway plans will show alignment, profile grades, typical cross-sections and general crosssections. In general, structure plans will show in detail all dimensions of the work contemplated. When the structure plans do not show the dimensions in detail, they will show general features and such details as are necessary to give a comprehensive idea of the structure.

5-2 Coordination of Contract Documents.

These Specifications, the plans, Special Provisions, and all supplementary documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all. All parts of the Contract are complementary and describe and provide for a complete work. In addition to the work and materials specified in the Specifications as being included in any specific pay item, include in such pay items additional, incidental work, not specifically mentioned, when so shown in the plans, or if indicated, or obvious and apparent, as being necessary for the proper completion of the work under such pay item and not stipulated as being covered under other pay items.

5-4 Errors or Omissions in Contract Documents.

Do not take advantage of any apparent error or omission discovered in the Contract Documents, but immediately notify the Engineer of such discovery. The Engineer will then make such corrections and interpretations as necessary to reflect the actual spirit and intent of the Contract Documents.

- Both the Contractor and the Department acknowledge:
 - there is **no standard bid item for skimmers** and that the cost for such are **normally included in the cost of the appropriate structure**,
 - normally the **note** alerting the Contractor to this fact is **shown on the structure detail**,
 - normally no **further reference** would be shown **in the Pay Item Notes**.
- At the hearing the Contractor's estimator acknowledged that just **prior to bid time** that one of his **suppliers had quoted the price for the materials** of the skimmer in question. In making the final cuts in the Contractor's bid this cost was deleted.

DISPUTE REVIEW BOARD RECOMMENDATION

BOARD RECOMMENDATION:

Based on the materials supplied to the Board, presentations to the Board at the DRB hearing and given that;

**the Contractor knew of the Skimmer prior to bid,
there is no standard bid item
and the Pay Item Note says ALL:**

the Board recommends no additional compensation for the Skimmer.

This 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 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 that 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
Tom Rice; DRB Member
Roy Adams, Jr.; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:



John H. Duke, Sr.; DRB Chairman

EC: Joy Lukcic, (Joy.Lukcic@dot.state.fl.us)
Jeff Nelson (JeffN@Nelson-Construction.com)
Terry Jennings (Terence.Jennings@dot.state.fl.us)
Jim Moulton (Jim.Moulton1@dot.state.fl.us)