

April 26, 1996

Faxed April 26, 1996

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MK/Centennial
6701 Muck Pond Road
Seffner, Florida 33584

Mr. Rammy Cone
The Cone Corporation
P. O. Box 310167
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Re: WPI No: 7143198
State Project No: 10190-3428/6428
F.A.P. No.: ACDPI-ACNH-0043-(6)
Contract: Interstate 4, Segment 2
Description: State Road 400 (I-4) from I-75 East to McIntosh Road
Counties: Hillsborough

Subject: Disputes Review Board
Findings of Fact Pertaining to Thrie-Beam Guardrail Repair Dispute

On April 19, 1996, at the request of MK/Centennial (MK) and The Cone Corporation (Cone), hereafter referred to as the parties, the I-4 Project Disputes Review Board (DRB) was furnished written documentation, as well as oral presentation, relating to the referenced claim on the subject project.

Issue: Cone believes that the instruction by the FDOT to maintain and repair all existing Thrie-beam guardrail at no additional cost to be both arbitrary and capricious and Cone should be paid for such repairs.

On September 28, 1995, Highway Safety Devices, Inc. quoted Cone to repair certain damaged sections of existing Thrie-beam guardrail on the subject project.

On October 13, 1995, Cone responded to MK's request for a quotation to repair certain damaged sections of existing Thrie-beam guardrail by quoting prices for the work.

On November 30, 1995, Cone inquired of MK as to the status of payment for the work performed (said repairs having been performed in the interim).

On January 15, 1996, MK responded to Cone's inquiry stating:

"It had been MK Centennial's previous understanding that the subject guardrail repairs were to be paid for under the existing FDOT Maintenance contract. Having been advised to the contrary, numerous discussions on price have followed, and a combination of Contract unit prices and FDOT Maintenance contract unit prices plus a ten percent markup is believed to be reasonable and fair."

On January 17, 1996, Cone responded by accepting MK's offer of payment.

On February 9, 1996, Highway Safety Devices, Inc. quoted Cone to repair certain additional damaged sections of existing Thrie-beam guardrail on the subject project utilizing material previously salvaged from the project.

On February 15, 1996, Cone responded to MK's request for quotation to repair certain additional damaged sections of existing Thrie beam guardrail by quoting the work.

On February 28, 1996, MK responded to Cone's quotation stating:

"As previously advised, the initial work order for guardrail repair was an exception approved by the Department since no Thrie-beam guardrail had yet been removed and

stockpiled nor was available from the Department for maintenance and repairs. As some 2400 lineal feet of Thrie-beam guardrail has previously been removed and salvaged, this condition no longer exists. Consequently, the Department has directed that all guardrail shall be repaired by the Contractor at no additional cost to the Department in accordance with Article 7-14 of the Standard Specifications.

It is further noted that the original MOT plan called for the removal of the guardrail and/or placement of temporary barrier wall throughout most of the project limits in Phase IA and IB. The revised MOT plan submitted by the Cone Corporation eliminates the use of a substantial quantity of temporary barrier wall and utilizes the existing Thrie-beam guardrail instead. It would seem reasonable under these circumstances that a certain amount of guardrail or barrier wall maintenance due to traffic incidents would be foreseeable by the Cone Corporation. As such compensation by the Department would be unwarranted.

In accordance with the Department's directive, the Cone Corporation's request for additional compensation is denied and the Cone Corporation is directed to repair the damaged guardrail sections at, but not limited to, Stations 1494, 1540, and 1600 approximately. These repairs are to be completed no later than Friday, 8 March 1996."

Florida Department of Transportation Standard Specifications for Road and Bridge Construction 1991 Edition page 56, - Section 7-14 Contractor's Responsibility for Work states:

"Until acceptance of the work by the Department it shall be under the charge and custody of the Contractor and he shall take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever, arising either from the execution or from the nonexecution of the work. The Contractor shall rebuild, repair, restore and make good, without additional compensation, all injury or damage to any portion of the work occasioned by any of the above causes before its completion and acceptance except that in case of extensive or catastrophic damage the Department may, at its discretion, reimburse the Contractor for the repair of such damage due to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, of the public enemy or of governmental authorities.

In addition to the above, the Contractor will not be held responsible for damage to any landscape items caused by an officially declared hurricane which occurs after the final acceptance of the entire work (as specified in 580-11), but during any remaining portion of the 90-day establishment period."

FDOT Standard Specifications, Section 1 Definitions and Terms, Subsection 1-51 Work, page 7, defines work as:

"All labor, materials and incidentals required for the construction of the improvement for which the contract is made, including superintendence, use of equipment and tools, and all services and responsibilities prescribed or implied, which are necessary for the complete performance by the Contractor of his obligations under the contract. Unless otherwise specified herein or in the contract, all cost of liability and of performing the work shall be at the Contractor's expense."

The Board finds that the existing guardrail meets the definition of work as defined in the Standard Specifications. Further, it was foreseeable that the existing Thrie-beam guardrail would be damaged by the traveling public during the life of the project.

However, plan sheet TC-2, note 56 states:

"EXISTING THRIE RAILING SHALL BE UTILIZED IN EARLY PHASES AS SHOWN ON THE PLANS. ALL THRIE-BEAM RAILING SHALL BE REMOVED IN THE FINAL CONDITION AS NOTED IN THE PAY ITEM NOTE FOR 563-73¹ ON SHT. 12. THE CONTRACTOR SHALL STOCKPILE 500' OF RAIL FOR REPLACEMENT IF

¹ ON THE PLANS ALL THRIE-BEAM RAILING SHALL BE REMOVED IN THE FINAL
¹ It appears that 563-73 should read 536-73.

NECESSARY AND PAID FOR UNDER THE APPROPRIATE PAY ITEMS.
(Emphasis Added)

This note introduces **ambiguity** as to the amount of foreseeable repairs that the contractor should expect to be responsible for and whether payment for repairs would be forthcoming. The Department stated at the Dispute Review Board Hearing that, it **would discuss payment for excessive damage²** to the Thrie-beam railing, and that it intended for the Contractor to furnish only **labor and equipment** for repairs to foreseeable damage to the Thrie-beam rail. Further, the Department stated that it never intended for the Contractor to provide materials and that the **Department would provide the material for all repairs** either in the form of salvaged materials from the jobsite or payment for needed materials. It was noted that the 500 feet mentioned in the above plan note was being interpreted to be a rolling stockpile, and as such was being replenished as damage was being repaired.

MK's February 28, 1996, letter to Cone states in part:

"It is further noted that the original MOT plan called for the removal of the guardrail and/or placement of temporary barrier wall throughout most of the project limits in Phase 1A and 1B. The revised MOT plan submitted by the Cone Corporation eliminates the use of a substantial quantity of temporary barrier wall and utilizes the existing Thrie-beam guardrail instead. It would seem reasonable under these circumstances that a certain amount of guardrail or barrier wall maintenance due to traffic incidents would be foreseeable by the Cone Corporation. As such compensation by the Department would be unwarranted.

FDOT Standard Specifications - Section 4-3.5 Value Engineering Incentive. Subparagraph 4-3.5.4 **Processing Procedures**, 3rd paragraph states:

Prior to approval, the Engineer may modify a VECP, with the concurrence of the Contractor, to make it acceptable. If any modification increases or decreases the net savings resulting from the VECP, the Contractor's fair share will be determined upon the basis of the VECP as modified and upon determination of final quantities. The net savings shall be computed by subtracting the revised total cost of all bid items affected by the VECP design from the total cost of the same bid items as represented in the original contract." (Emphasis Added)

Discussions at the Dispute Review Board's Hearing revealed that neither the Contractor³ nor the Engineer⁴ had taken into account the increased traffic damage to which the Thrie-beam railing would be exposed under the revised MOT plan. Had this been recognized at the time, this increased cost would have been included in the cost of the VECP prior to computing the net savings.⁵

The Board, therefore, finds that the plan note is ambiguous and the Department has constructively modified Section 7-14 of the Standard Specifications as regards responsibility for repair of the existing Thrie-beam railing. The Board finds that the Contractor is responsible for the first 500 feet of repair (taken as a unit) and the Department should compensate him for any additional repairs above the first 500 feet to said railing. This ruling applies only to the Thrie-beam railing and should not be construed to apply to any other guardrail or portion of the work.

² The Department would never quantify EXCESSIVE DAMAGE.

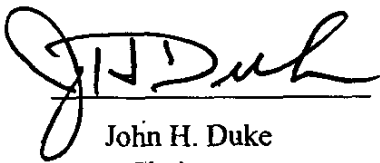
³ The Contractor stated that he did not feel that he needed to included this, since he felt that he would be reimbursed for the damage anyway.

⁴ The Department stated that it would not have considered this.


⁵ The effect would be that the project and not the Contractor would pay for the increased damage.

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.


I-4 Project Disputes Review Board



John H. Duke
Chairman



G. A. "Dolph" Hanson
Member



H. E. "Gene" Cowger
Member

CC: Sandra M. Piccirilli, P.E.