

DISPUTE REVIEW BOARD RECOMMENDATION

June 13, 2000

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RE: FM 256831-1-52-01, SPN 15009-3540, WPI No. 7116917, FAP No. FA 152-0-(018)U, CONTRACT No. 20287, PINELLAS COUNTY, SR 586 (CURLEW ROAD) FROM 69TH STREET TO SR 584 (TAMPA ROAD)

DISTRICT 7 – PINELLAS COUNTY

On June 2, 2000, at the request of the Contractor, R.E. Purcell Construction Co., Inc., and the Florida Department of Transportation, the Dispute Review Board held a hearing to consider the **Contractor's Claim No. 11**.

Both the Contractor and the Department presented the Board with documentation prior to the hearing, and testimony during the hearing. GTE Telephone Network Services also provided testimony at the hearing.

DISPUTE

The Project consisted of the construction of multi-lane improvements to SR 586 (Curlew Road) for a distance of 2.328 miles in Pinellas County, Florida, including the construction of a pedestrian overpass, and the construction of a bridge over the Lake Tarpon Outfall Canal. The instant dispute involves the impact to the Project of the relocation of utilities owned by GTE Florida. The relocation of the utilities was performed by the Contractor under a joint project agreement (JPA).

It is the viewpoint of the Board that the Parties have previously acknowledged that certain conflicts or interferences existed between the location of GTE utilities and piping that was to be installed by the Contractor. Although not clearly or concisely framed by either Party, the Board understood their charter to be a determination as to entitlement of the following:

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There existed a negotiated Agreement to compensate the Contractor for certain adjustments and/or modifications to the GTE conduit and cables. The definition as to what is covered under this Agreement is the first issue before the Board. The Board views this as the primary or the threshold issue. The Contractor and the Department differ in their respective interpretations as to what the Agreement covers. The Contractor believes that the Agreement covers only the direct cost of the work associated with the adjustments and/or modifications to the GTE conduit and cables. The Department believes that the Agreement covers both the direct costs and all consequential costs and schedule impacts.

If the Board finds entitlement for the Contractor as to the threshold issue - that the Agreement does not cover all the consequential costs and schedule impacts - then the Board must determine the Contractor's entitlement to recover those costs and impacts, or the secondary issues. The Board was not asked to determine the quantum of the impact, either as to the amount of the damage suffered or the days of delay.

To evaluate the Contractor's entitlement as to impact, or the secondary issue, the Board must then be convinced that the conflicts or impacts have a direct causal relationship to: 1) the lower productivity claimed for the pipe crews, and 2) the time related damages claimed.

CONTRACTOR'S POSITION

The Contractor's position as to the threshold issue is that the Agreement covers only the direct cost associated with the necessary modifications and adjustments, not the impact of this work on other base contract work, or any impact on the project schedule. The Contractor therefore believes it is entitled to recover all consequential costs, including loss of labor efficiency and other time related damages.

The Contractor's position, was presented in a letter dated May 8, 2000, stating in part:

Even though GTE negotiated a dollar amount for the adjust and modified work, those dollars did not take into account the additional time and delay of the impact for the production of R. E. Purcell's crews and the effect it had caused on the coordinative efforts for the overall completion of the project. ...

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DEPARTMENT'S POSITION

The Department's position, as expressed through GTE, is that the Agreement between the Parties was fairly negotiated, and payments made to the Contractor (which currently total approximately \$81,895.00) represent all costs associated with the work, whether direct or indirect.

The Department's position, as put forth by GTE, is itemized in a letter dated April 28, 2000 which states:

GTE has reviewed R. E. Purcell's claim #11 alleging extra work and lost productivity associated with the adjustments and modifications to our cables and conduit on the referenced project. GTE rejects the need for any additional compensation of these items based on the following criteria:

- A. GTE and R. E. Purcell agreed upon a negotiated pricing method of payment (4/26/99) in order to mitigate any impact to R. E. Purcell. The estimated total amount was to be \$34,189.00 to date it is approximately \$81,895.00. GTE recognized the possible impacts to the schedule and thus negotiated a fair and equitable price.**
- B. GTE received R. E. Purcell's claim #11, which has no reference to the impacted critical path activities, nor an approved CPM schedule attached.**
- C. GTE Field Inspector records indicate that R. E. Purcell did not work on GTE facilities for 63 day during the period of 1/11/99 through 12/27/99. ...**

DRB FINDINGS

On January 14, 1999, R.E. Purcell Construction Co. Inc, notified the Florida Department of Transportation, that:

In order to install our pipe per the plans and specifications, GTE's existing cables and conduit will need to be adjusted and or modified.

Could you please follow up with GTE for pay items for the following.

- 1. Adjust and modify cable**
- 2. Adjust and modify conduit**

I also would appreciate it if you could follow up with GTE freight pay items for the removal of B.I.P. and G.I.P. We do not consider removal of B. I. P. and G.I. P. as conduit. ...

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On March 1, 1999, the Contractor in a letter to GTE, stated:

As per R. E. Purcell Construction Co., Inc. understanding with you, the following items will be used at a 2 to 1 ratio. As every 2' of cable or conduit B. I. P. is adjusted or modified, R. E. Purcell Construction Co., Inc. will be paid for 1' of the installation per items listed below.

Adjustable/Conduit 1832114306 conduit 6 way \$9.55 per ft.

B. I. P. 1832114303 conduit 3 way \$7.64 per ft.

Please acknowledge that this is correct & below ...

This letter was acknowledged by signature of Cecil Williams of GTE on March, 5, 1999. We refer to this as the March Agreement or the Agreement.

On April 28, 1999, the Contractor in a letter to Department, stated:

Due to the extra work associated with the adjust and modified GTE cable and conduit items, R. E. Purcell Construction Co., Inc., is placing Florida Department of Transportation on notice of our intent to file a claim. ...

Subsequent to this Notice of Intent, this issue was identified for tracking purposes as the Contractor's Claim No. 11.

On April 4, 2000, the Contractor furnished a summary sheet of the "Costs for Claim # 11" to the Department. These costs totaled \$155,710.99, and included "Lost Productivity" for the Contractor's pipe crews, "Extended Unabsorbed Administrative/Support Expenses" for the subcontractor involved in the relocation of the GTE utilities, "Extended Performance Period Well Pointing Cost", and "Home Office Overhead Cost" for the Contractor's home office.

After the Parties were unable to resolve the dispute, the matter was forwarded to the Disputes Review Board for recommendation, and a hearing was held on June 2, 2000.

The threshold issue in the dispute is whether or not the Contractor is entitled to recover costs associated with the utility relocation beyond those paid for under the adjusted pay items per the March 1, 1999 proposal agreed to by GTE on March 5, 1999.

In its presentation to the Board on June 2, 2000, the Contractor presented no additional factual evidence beyond the documentation cited, as to the Contractor's position regarding the monies paid under the adjusted pay items per the March Agreement. The Contractor's representative at the hearing was not involved in the project at the time of the utility relocation, nor was he involved in the negotiations

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that resulted in the pay item adjustment, or the Agreement. The Contractor's representative could offer the Board no insight as to the development of the costs itemized in the Agreement.

In the Department's presentation, GTE again stated their position that the Agreement covered both the direct cost of the work and all other impacts.

In a review of the documentation submitted by the Contractor, the Board found that on December 16, 1998, the Contractor's subcontractor for the GTE work, Heuer Utility Contractors, Inc., provided various prices for work not included in the bid, stating:

The following are our prices for Adjust & Modify Items not on bid:

1832 -- 900	Adjust & Modify Cable:	\$3.75 per foot/per cable
1832 -- 700	Adjust & Modify Conduit:	\$4.00 per foot/per conduit
Please add an item for removal of B.I.P. or G.I.P.:		\$3.00 per foot/per pipe. ...

The Contractor has provided no reconciliation of these proposed amounts with the March Agreement, or other information that might shed some light on the determination of the costs included in the March Agreement.

Based upon our review of the evidence presented, we can find no entitlement for the Contractor as to the threshold issue, and have determined that the Department's view of the March Agreement, as presented by GTE, is persuasive.

Even though the Contractor provided no evidence in its presentation to persuade the Board as to the threshold issue regarding the composition of the Agreement between the parties, the Board did evaluate the evidence provided as to the secondary entitlement issues.

The Contractor's presentation basically consisted of the statement that: as a result of conflicts between the GTE utilities and the pipe work, the Contractor's pipe crews had worked at reduced efficiencies and the project was delayed. The Contractor presented some detail as to how it calculated the reduced productivity in its presentation, but failed to provide a direct causal link between specific conflicts and its work.

The Contractor also failed to provide evidence to the Board that the Contractor had considered and eliminated other possible causes as to its claim of reduced efficiency. Further, the Contractor failed to provide evidence to the Board as to the nature of the conflicts that were encountered, such as: Were the GTE conduit and cables shown as being present in the contract documents? Were accurate and timely field locations provided or sought? Were the pipe crews able to perform

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additional contract work at some level of efficiency that mitigated the impact of any downtime experienced? None of the typically necessary evidence or testimony customarily used to support a lost productivity claim was presented, only the calculation of pipe crew rates of production allegedly before, and after, the nonspecifically identified conflicts.

Although the Board believes it understood the Contractor's theory as to entitlement, and that the Board recognizes that the discovery of unforeseen conditions may significantly impact a contractor's performance, the Contractor failed to address the nature and fact of the conditions encountered.

As to the time impact, the Contractor furnished a number of schedule printouts, without explanation. From the Board's review it appears that the Contractor is using the schedules to support its claim to the extended home office overhead.

The Contractor's written tabulation summary of the 41 days claimed for extended home office overhead is based on a projected completion of 16 November 2000, versus the Contract completion date of 02 November 2000. However, the Board is aware that the Contractor completed the Project on or about 19 May 2000, more than four months earlier than projected in the schedule tabulation provided. The Contractor was unable to explain its theory of entitlement to recover delay damages when it completed the project early. Further, the Contractor provided no evidence showing a causal relationship between the alleged impact of the GTE conflicts and the projected delay, other than the unexplained schedule printouts. The Board did not find this evidence persuasive.

As to the Contractor's scheduling presentation, the Department presented several responses. First, the Department stated that the affected work had adequate float and was completed prior to the expiration of that float. Second, the Department stated that they had previously granted the Contractor 4 days of time extension in the settlement of another claim related to GTE's utilities, and had made other accommodations (addition of manholes), to account for any impact to the installation of the 42" storm water piping. The Department stated that the 4 days was the only impact to the 42" work that they found in their review. Further, it was the Department's position that they are under no contractual obligation to reimburse the Contractor for costs he may incur to overcome delays, regardless of cause, that may facilitate the Contractor reaching the early completion milestone.

Based upon our review of the evidence presented, we find no entitlement for the Contractor as to the secondary issues.

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RECOMMENDATION

From written information presented in the documents provided prior to the hearing and oral statements during the hearing, the Board could not establish definitive delays to the underground pipe construction activities in the project schedule resulting from conflicts with existing GTE cables and conduit.

Therefore the Board finds that the Contractor is not entitled to extra costs, other than those negotiated previously between GTE and Purcell.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation.

Respectfully Submitted,

E.K. Richardson, P.E.
John H. Duke, Sr.
Patrick W. Brannon, P.E.

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS

E.K. Richardson ^{by PWB}

E.K. Richardson, P.E.
DRB Chairman