

## DISPUTES REVIEW BOARD RECOMMENDATION

27 August, 2003

Brian Pickard P.E.  
Resident Engineer  
Florida Department of Transportation  
2822 Leslie Road  
Tampa, Florida 33619

Anthony Caruso  
J.W. Conner and Sons  
General Contractors  
P.O. Box 2522  
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Ref: SR-45 (US 41) From Gator lane to Cone Pit Road Contract No: 21764, Financial Project No: 4037181-1-52-01. Disputes Review Board hearing regarding additional compensation for (1) Subgrade Testing, (2) Non Standard Construction and (3) Sod Overrun.

Dear Sirs:

The Florida Department of Transportation and J.W. Conner and Sons, Inc., requested a hearing concerning the above referenced issue. The Contractor believes he has complied with the Department's claim specification and therefore is entitled to settlement of the above issues in a claim settlement. The Department claims the Contractor has not complied with the Specification and therefore has waived his right to resolution of his claim.

### **CONTRACTOR'S POSITION**

We will state the Contractors position by referencing and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

It is the Department's position that the DRB should not review the merits of the three outstanding claim issues on this project because they believe that J.W. Conner & Sons failed to preserve our right to pursue additional time or money. Specifically, although the Department acknowledges the existence of the outstanding issues, they believe that J.W. Connor & Sons did not properly submit claims for these issues per specification 5-12, and therefore, they have elected not to submit a formal response to the denial of our

entitlement and overtly undermine the entire DRB process.

J.W. Conner & Sons unequivocally denies this technicality, as we had for months been discussing and negotiating our contract exception issues with Tampa Construction. Furthermore, we contend that we have absolutely complied with the **intent** of the Department's Claim Specifications by sending letters of intent to file claim, and letters with the actual specifics and costs of claims prior to the July 1, 2003 certified submittal.

Additionally, J.W. Connor & Sons contends that the Department has already acknowledged our claim by formally rejecting them in writing, scheduling an on site meeting with the Regional DRB, processing a Unilateral Supplemental Agreement for certain items within our claim,...

A further review of the Department's Claim Specification is warranted at this time. The intent of the claim specification beginning with section 5-12.2.1, is to ensure the Engineer is notified of a potential claim situation and is afforded the opportunity for keeping strict account of actual labor, material, equipment and time. Specifically, it states that, "...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." J.W. Connor & Sons meet this requirement with our "Notice of Intent to claim letters" for the sod, subgrade testing, and nonstandard construction claim issues. Continuing, this section also states that "... the Contractor submit full and complete claim documentation as described in 5-12.3", Again, J.W. Conner & Sons meet this requirement with our detailed cost breakdown letters for each claim issue. Nowhere in section 5-12.2.1 or 5-12.33 does it state that the Notice of Intent or the Content of the Written Claim letter shall comply with section 5-12.9, Certificate of Claim.

### **DEPARTMENT'S POSITION**

We will state the Departments position by referencing and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Departments position paper has the following statements and references to document their claim for entitlement.

Time commenced for this project on December 2, 2002. The contractor began work on the same day. The original contract time was 65 days. The project was final accepted on February 25, 2003. The total time for the project was 68 days (actually 86) from start to finish. The original contract amount was \$908,750.00.

J.W. Conner submitted their certified claim on July 1, 2003, 126 days after final acceptance, which is 36 days past the allowable time as specified in the referenced specification. J.W. Conner contends that this is merely a formality and that it was fully known by the Department that this was a claim issue. The Department agrees that the issues contained in this claim are of no surprise; however, at no time were they submitted as formal claims, under Specification 5-12, until July 1, 2003. In fact, the Project Administrator, Fred Watkins, verbally instructed representatives of J. W. Conner and Sons, Inc. on April 2, 2003, that a certified claim would be required before we had a final meeting of the DRB. The Specifications are a contract that J. W. Conner agreed to. That contract is very clear and specific in specification 5-12.2.1 regarding the "absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim" if the time restraints are not met. In addition, Specification 5-12.9 states the any claim shall be certified under oath. Again, the only certified claim received by (**sic**) J.W. Conner is the claim dated July 1, 2003, and now brought before the DRB. This specification language has been in place since February of 2000, (over three years) and should not be a surprise for any contractor who has done business with the Department since then.

All three of these issues were previously substantively addressed by the Department and proper compensation offered.

The Department has provided J. W. Conner and Sons, Inc., just compensation for all work completed on the subject project. Although the contractor has verbalized dissatisfaction in three major areas related to the project, at no time has the Department received a valid certified claim meeting the claim requirements of the contract documents. As such, the contractor is not due any additional compensation beyond what has already been provided through regular contract payments, Supplemental Agreements and a Unilateral Supplemental Agreement. J.W. Conner has a legal responsibility to abide by the contract documents and failed to do so with regard to submitting a certified claim within 90 days of project acceptance. In such, J.W. Conner has waived any and all rights to additional compensation or time extension for such claim.

## **DISPUTES REVIEW BOARD RECOMMENDATION**

The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the above documents.

The Board has reviewed all the information provided by the Department and J.W. Conner and Sons. We listened to all the parties at the hearing held on 22 August 2003. Our recommendation is based on the following facts.

J.W. Connor and Sons delivered their certified claim packaged to the Department on 1 July, 2003. The project received final acceptance by the Department on 25 February, 2003. Based on the following specifications the contractor was allowed 90 days to submit a certified claims package. If the certified package is not submitted within 90 days the contractor waives the claim for additional compensation or a time extension. J.W. Connor and Sons claim was submitted 126 days after final acceptance of the project.

### *5-11 Final Acceptance.*

*When, upon completion of the final construction inspection of the entire project, the Engineer determines that the Contractor has satisfactorily completed the work, the Engineer will give the Contractor written notice of final acceptance.*

### *5-12 Claims by Contractor.*

*5-12.1 General: When the Contractor deems that extra compensation or a time extension is due beyond that agreed to by the Engineer, whether due to delay, additional work, altered work, differing site conditions, breach of Contract, or for any other cause, the **Contractor shall follow the procedures set forth herein for preservation,** presentation and resolution of the claim.*

### *5-12.2 Notice of Claim:*

*5-12.2.1 Claims For Extra Work; 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. Such notice by the Contractor, and the fact that the Engineer has kept account of the labor, materials and equipment, and time, shall not in any way be construed as establishing the validity of the claim or method for computing any compensation or time extension for such claim. **On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11...** However, for any claim or part of a claim that pertains solely to final estimate quantities disputes the Contractor shall submit full and complete claim documentation as described in 5-12.3, as to such final estimate claim dispute issues, within 90 or 180 calendar days, respectively, of the Contractor's receipt of the Department's final estimate.

5-12.9 *Certificate of Claim:* When submitting any claim, the Contractor shall certify under oath and in writing, in accordance with the formalities required by Florida law, that the claim is made in good faith, that the supportive data are accurate and complete to the Contractor's best knowledge and belief and that the amount of the claim accurately reflects what the Contractor in good faith believes to be the Department's liability. Such certification must be made by an officer or director of the Contractor with the authority to bind the Contractor.

This Specification is not new or special to this contract, it is part of the 2000 Standard Specifications for Road and Bridge Construction which was effective for all contracts over three years ago. It is incumbent on a Contractor to be aware of the specifications regarding filing and resolving claims.

The contractor did not follow the specifications in timely submission of his certified claim for additional compensation. In the hearing the Board was told that the Department met with J.W. Connor field personnel after the Board's field visit and reminded the Contractor of the time requirements of the claim process. The contractor did not rebut this statement. This meeting took place on the 2<sup>nd</sup> of April, 2003. This gave the Contractor ample time to submit a certified claim as required by specification.

The Board cannot find any documentation that the Department misled the Contractor into believing that the any claim or documents, as submitted, complied with the Department's claim specification.

J.W. Connor and Sons states "nowhere in section 5-12.2.1 or 5-12.3 does it state that the Notice of Intent or the Content of the Written Claim letters shall comply with section 5-12.9 Certificate of Claim". The first paragraph of 5-12.1 *...the contractor shall follow the procedures set forth herein....* Section 5-12.9 is part of this procedure.

The Board recognizes that there was confusion in the QC specs on this project, some additional sod placement required by the Department and other issues.

The Board understands that the Contractor and the Department were negotiating the above referenced claims and that all notice requirements of Specification 5-12 were met by the Contractor regarding notification. However, the Board is governed in its recommendation by the specifications which are very clear in requiring a certified claim within 90 days after final acceptance. Therefore, the Board must find that there is no entitlement for the Contractor.

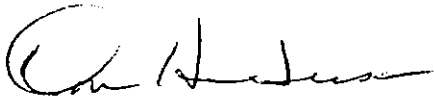
The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Don Henderson, Chairman      Jack Norton, Member      Robert Lavette,  
Member

Signed for and with concurrence of all members



Don Henderson, PE