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RE: RDRB RECOMMENDATION
IMPACTS DUE TO DELAY OF WATER USE PERMIT
HEARING DATE: NOVEMBER 17, 2006
SR 400(I-4) INTERCHANGE AT THE JOHN YOUNG PARKWAY
FNID: 242493-1-52-01

Dear Sirs:

At the request of the contractor, Granite Construction Company, a hearing was held at the FDOT Orlando Construction Office regarding the entitlement of the contractor to time and costs due to the obtaining of a Water Use Permit for the project.

CONTRACTOR'S POSITION:

Dewatering on the project began approximately May 4, 2004. On May 26, 2004, a meeting with the contractor, CEI, and South Florida Water Management District (SFWMD) was held on the jobsite to discuss pumping operations on the project. At the meeting, the contractor was advised that the Department was in violation of the original Environmental Resource Permit for failure to obtain a Water Use Permit (WUP) prior to performing pumping activities. Following this meeting, the contractor, CEI, and the Department discussed continuing the contractor's pumping operations in order to minimize impacts to the project while the permit was being obtained. The decision to continue was agreed to by all parties involved.

On May 27, 2004, the CEI directed the contractor to obtain the required Water Use Permit from the SFWMD. On June 10, 2004, the contractor authorized Advantage Engineering to provide the engineering services necessary in order to obtain the WUP.

On July 20, 2004, the Department was issued a "Notice of Violation/Notice to Cease and Desist" from the SFWMD for continued pumping after the initial field meeting on May 26, 2004. At this time, all pumping operations on the project were stopped. In areas that required pumping the contractor continued to progress the project by using alternate means that ultimately reduced productivity and increased costs.

Pumping operations on the portion of the work associated with Ramp A substructure were allowed to resume on August 5, 2004, after a meeting with the SFWMD and a successful field inspection by the SFWMD.

Following the completion of the WUP application by the contractor, the Department received a WUP on September 1, 2004, and pumping operations were allowed to resume on the entire project after another successful site inspection by the SFWMD.

On June 7, 2005, the CEI directed the contractor to pay the civil penalties that had been levied against the Department by the SFWMD for continuing pumping operations following the initial notification of violation on May 26, 2004.

The failure by the Department to obtain all of the necessary environmental permits has adversely affected the completion date of the project and has added substantial costs to the contractor in the form of inefficiencies, rework, extra work, permit acquisition costs, penalties, material price escalations, and mobilization.

Section 7-1.1 of the Standard Specifications for Road and Bridge Construction, 2000 Edition, states that: “The Department will procure all environmental permits required by Federal, State, county, and local regulatory agencies.” Section 7-2.2 further states that: “...the Federal, State, county, and local regulatory agencies may require the Department to obtain a permit...the Department will procure the necessary permits prior to advertising for bids.” It is the contractor’s position that the Department did not obtain all necessary environmental permits from the SFWMD for this project.

In addition, the original Environmental Resource Permit approval was based on a statement on the application that dewatering was not required for this project. When this statement proved to be in error early on, the Department should have pursued the necessary modifications to the original permit. This would include any other requirements of the SFWMD in accordance with Specification Section 7-2.2, which states: “The Department will also acquire any modifications or revisions to an original permit when the contractor requires such modifications or revisions to complete the construction operations specified in the plans or Special Provisions.....”

It is the contractor’s position that on this project, per Sections 7-1.1 and 7-2.2 of the Standard Specifications, the responsibility to obtain the required environmental permits belongs to the Department. It is also our position that the Department is responsible for all monetary damages and time impacts associated with the failure to procure the necessary permits, including the subsequent Cease and Desist Notice, along with the additional costs to procure the permits as well as the fine assessed by the SFWMD.

In its rebuttal to the Department’s Position Paper on this issue, the contractor emphasized:

1. The Department states that all permits procured by the Department are posted on the Department’s website.
 - The referenced Environmental Resource Permit, General Condition 13 clearly requires the “permittee” to obtain a Water Use Permit. The FDOT is clearly defined as the “permittee”.

- Section 7-2.1 of the Standard Specifications states: “Except as noted for certain permits, procure all permits....: Section 7-2.2 follows to say that the Department will procure all permits required by local regulatory agencies. It is apparent that Section 7-2.2 refers to the certain permits referenced in 7-2.1.
- Further, the ERP states that a Water Use Permit was not needed if the project qualified under the “No Notice” Rule. The contractor assumed this work qualified under this rule since a Water Use Permit was not provided on the website.
- As permittee, the Department had the responsibility to procure this permit, or at least, assure the permit had been obtained prior to starting the activity.

2. The Department asserts that they could not know beforehand whether the contractor’s means and methods planned would exceed the pumping threshold for the “No Notice” Rule.

- The proximity to the adjacent wetlands (1,000 ft.) was the criteria that governed the requirement for a WUP under the “No Notice” Rule, not the contractor’s means and methods.

3. The Department states that the contractor began dewatering activities prior to notifying the Department of the need for a Water Use Permit.

- The Department was notified about the contractor’s dewatering plans during the weekly progress meetings, particularly in the two-week look ahead.
- The Department’s field personnel had initially informed the contractor that a permit was required prior to pumping. Ultimately, however, the field personnel determined that all necessary environmental permits had been obtained, and pumping was allowed to commence.
- The issue was not discussed at the Pre-Con meeting.
- The contractor could not obtain the permit without the Department’s involvement as the permittee.

4. The Department asserts that the Environmental Resource Permit (ERP) Application was provided to the contractor.

- The ERP Application was not provided to the contractor, only the resulting Permit.
- Had the ERP Application been provided on the website, the statement that dewatering is not required for this project may have resulted in a pre-bid question that could have clarified the Department’s intent.

5. The Department states that they could not have known the contractor’s means and methods.

- A note on the plans by the EOR that a Water Use Permit was required for the project because of its proximity to existing wetlands would have advised the bidder ahead of time.
- The process to obtain a Water Use Permit would not have required that much more work for the EOR above and beyond what was required to obtain the ERP.

6. The Department states that the contractor continued to de-water after being told that the project was not in compliance.

- It was mutually agreed by the contractor, CEI, and the FDOT to continue our de-watering activities while the permit was being pursued in order to minimize impacts to the project.

7. Section 8-7.3.2 of the Supplemental Specifications for the project states that: “When failure by the Department to fulfill an obligation under the contract results in delays to the controlling construction operations, the Department will consider such delays as a basis for granting a time extension to the contract. Whenever the Engineer suspends the contractor’s operations, as provided in 8-6, for reasons other than the fault of the contractor, the Engineer will grant a time extension for any delay to a controlling item of work due to such suspension.

- According to Section 7-1 and 7-2, the Department failed to fulfill their contract obligations.
- On July 26, 2004, the Department suspended the contractor’s operations.
- The contractor is due a contract time extension per Section 8-7.3.2 on both accounts.

DEPARTMENT’S POSITION:

The Department’s recommendation is to deny the contractor’s request for additional compensation and time extension for failure to provide a SFWMD Water Use Permit (WUP) for the project. Contract Special Provisions Sub-article 7-2.1 notifies the contractor that all permits procured by the Department are posted on the Department’s website for this contract. This included Permit No. 48-01320-P, Application No. 0208133, known as the Environmental Resource Permit (ERP). Sub-article 7-2.1 also requires the contractor to comply with all the provisions contained within this permit. The provisions of the ERP requires a WUP to be obtained prior to construction dewatering, unless the work qualifies for a general permit pursuant to Subsection 40E-20.302(4) F.A.C., known as the “No Notice Rule”. The contractor did not comply with the general conditions of the ERP as required by their contract. The contractor began dewatering operations prior to notifying the Department of the need for the WUP and/or applying for the permit of their own accord. This in itself violates the terms of the contractor’s contract with the Department. Accordingly, we believe that the DRB should uphold the provisions of Contract Special Provisions 7-2.1 and 8-7.3.2 and deny any entitlement for an extension of contract time.

The Department finds that the contractor's request for additional compensation as well as their notice of delay should be denied. In the Contract Special Provisions Sub-article 7-2.1 is expanded by the following: "All permits procured by the Department are posted on the Department's website." This Sub-article directs the contractor to take responsibility to obtain this information and comply with all requirements posted on the website as well as within all permits contained on the website. The contractor is further directed to comply with the provisions contained within these permits within the Contract Specifications. The contractor did not comply with the General Conditions of the ERP in that they began dewatering operations prior to applying for or notifying the Department of the need for the additional WUP.

The SFWMD ERP issued to the Florida Department of Transportation (dated April 18, 2003) and provided on this website lists under General Condition 13 on page 6 of 7, "The Permittee must obtain a WUP prior to construction dewatering, unless the work qualifies for a general permit pursuant to subsection 40E-20.302, F.A.C., also known as the "No Notice Rule".

In the Department's ERP Application that was also provided to the contractor, page 7 of 14 under a section titled, "relative concerns", the Department's Application indicates that dewatering is not required for construction. This water permit use status is common based on the following facts: The Department is unable to predetermine the means and methods that the successful bidder will employ to perform underground work associated with the project. More specifically, when the Department applies for the individual ERP, they could not possibly determine the size of the pump or pumps to be utilized by the successful bidder, nor could the Department determine if the successful bidder would contain all water from the underground operations on the construction site. In addition, the Department could not possibly know when preparing their permit application if the successful bidder's means and methods would include pumping water in excess of the threshold that would exceed the "No Notice Rule" for a general permit pursuant to Subsection 40E-20.302 F.A.C...

It is the Department's position that once the project was awarded, and the contractor determined their means and methods for the underground construction, it was incumbent on them to determine if dewatering would, in fact, be necessary. Once they determined the means they chose to construct the project would require dewatering they then had to determine if the quantity of water they planned to pump exceeded the threshold for the "No Notice Rule". If the quantity exceeded the threshold for the "No Notice Rule" then the contractor must comply with the ERP obtained by the Department and made available to the bidders on the Department's website at the time of bid. On page 6 of 7 of this permit, item 13 requires that a WUP be obtained prior to construction dewatering. As previously stated, the contractor did not comply with the General Conditions of the ERP in that they began dewatering operations prior to applying for or notifying the Department of the need for the additional WUP. Had the contractor complied with this permit and put the Department on notice prior to performing dewatering operations, the contractor and/or the Department could have procured the WUP eliminating any potential

delay caused by the Cease and Desist Order issued by the SFWMD and provided to the contractor by the Department following its receipt by the Department on July 26, 2004.

In an effort to clarify these events, we offer the following timetable:

March 15, 2004	Contractor begins construction.
May 4, 2004	Contractor begins dewatering operations.
May 26, 2004	Contractor, CEI, and SFWMD meet in field. SFWMD verbally notified the contractor of violation for dewatering without WUP. Contractor continues dewatering.
May 27, 2004	CEI directs contractor to obtain WUP.
July 20, 2004	SFWMD issues Cease and Desist Order.
July 26, 2004	Department receives C&D Order, provides to contractor.
August 6, 2004	SFWMD allows selective dewatering.
August 19, 2004	Contractor provides Notice of Delay
September 1, 2004	WUP issued by SFWMD.

It is apparent from the above timeline that the contractor did not comply with the requirements of the ERP that clearly required a WUP be obtained prior to construction dewatering. Regardless of their non-compliance, they continued dewatering until a C&D Order was issued, dated July 20, 2004, received by the Department and provided to the contractor on July 26, 2004. Between July 26 and August 6, dewatering ceased for a total of 12 days. On August 6, following a field review by SFWMD, the contractor was allowed to recommence selective dewatering to allow construction activities to continue. On September 1, 2004, the contractor recommenced full-scale dewatering operations. Any delays incurred associated with the C&D Order were the result of the contractor's failure to notify the Department of the need for dewatering and their disregard for providing the WUP application following notice by the SFWMD and the Department.

Section 8-7.3.2 of the Supplemental Specifications defines when a contract time extension may be granted. The Department may grant an extension of contract time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of the bid. The Department will not grant an extension of contract time due to the fault or negligence of the contractor. All permits procured by the Department were provided on the Department's website prior to the project's bid. The ERP was one of these permits. The bidders were required to comply with this permit. The ERP required a separate WUP be obtained prior to construction dewatering if the contractor's means and methods exceeded the No Notice Rule. The contractor began

dewatering operations prior to notifying the Department of the need for the WUP and/or applying for the permit on their own accord. By not complying with the terms of the ERP issued by the SFWMD, the contractor violated the terms of their contract with the FDOT. Based on the contractor's violation of the requirements of the contract and Section 8-7.3.2 of the Supplemental Specifications, a contract time extension is not justified and should be denied.

In its rebuttal to the contractor's position, the Department further states:

The contractor relies on Section 7-1.1 of the Standard Specifications which state in part that the Department will obtain the necessary permits prior to advertising for bids. It is the Department's position that the Department procured all permits prior to advertising for bids.

The contractor states in their position paper that the Department did not obtain all necessary permits from the SFWMD.

The Department takes exception to this statement. Permits procured by the Department are addressed within the Special Provisions, Sub-article 7-2.1, expanded by the following: "All permits procured by the Department are posted on the Department's website (website address stated)". This Sub-article goes on to state, "Take responsibility to obtain this information and comply with all requirements. Comply with the provisions contained within the permits".

The Department acknowledges responsibility for procuring all necessary permits prior to advertising for bids, however, the WUP is required only if the contractor's dewatering is in excess of the threshold for a general permit pursuant to subsection 40E-20.302(4) F.A.C., also known as the "No Notice" Rule. If a contractor's means and methods exceed the threshold of the "No Notice" Rule, then an additional WUP would have to be obtained. However, it is not possible for the Department to know these methods and to procure a WUP prior to bid. The information required to procure this permit must include the locations, sizes, flow rates, as well as total flow for all pumps planned for utilization. This information must be provided by the contractor. The contractor is aware that this is a requirement based upon the scope of services from Advantage Engineering to obtain the WUP which requires the contractor to provide any information related to the dewatering activities to the Engineer for the permit submittal and any requested additional information the SFWMD.

The contractor stated that "In addition the original ERP approval was based on a statement that jobsite dewatering was not required on this project". When this was proven to be in error the Department should have pursued the necessary modifications to the original permit".

The Department disagrees with the contractor's position on this matter as well. It is clear from the contractor's position paper that the contractor was aware that the Department did not anticipate dewatering at the time the Department applied for the ERP. We feel it

necessary to point out to the Board that the individual ERP Application that the contractor mentions in his position paper is contained within the Department's Position paper, namely, "The applicant has indicated that dewatering is not required for construction of this project". The contractor fails to provide the Board the next sentence that states, "Prior to commencing any construction dewatering, a construction dewatering permit will be obtained". This application requirement is consistent with and made part of the actual ERP obtained by the Department and made available to the contractor at the time of bid. It is the Department's contention that since the contractor began dewatering approximately two months prior to notifying the Department of the need for a WUP and/or applying for the permit on their own accord they were in violation of the terms of the ERP. By not complying with the terms of the ERP obtained by the Department and issued by the SFWMD, the Department requests that the Board find the contractor violated the terms of the contract with the Department and find that any delay was self-imposed and additional time and costs associated with said delay and requested by the contractor should be denied in accordance with Supplemental Specification 8-7.3 which states, "The Department will not grant time extensions to the contractor for delays due to the fault or negligence of the contractor".

BOARD FINDINGS:

Responsibility for Water Use Permit for Dewatering:

The Board finds that it is appropriate to include the subject permit under those permits described by 7-2.2. By taking responsibility for procuring the necessary permits for work affecting "Waters of the State"; the Department becomes the party responsible for knowing the conditions under which permits are required. The Board finds it reasonable for a contractor, operating under 7-2.2, to assume the "No Notice" rule applies when there is no water use permit included with the Department's permit package on the FDOT's website. While the permit application anticipates no dewatering will be required, this particular document was not posted on the site.

FDOT argues that they cannot know at bid time the means and methods a contractor will use to dewater. Therefore, the Department maintains they are unable to apply for a water use permit. Given the obligation of FDOT to obtain permits under 7-2.2, the Board does not find this argument compelling without a separate notice alerting bidders that they are responsible for obtaining any dewatering permits.

Responsibility for Fine levied by SFWMD:

Granite continued to pump after being notified on May 26, 2004 that they were in violation of the SFWMD requirements. A Notice of Violation/Cease and Desist was then issued on July 20, 2004. The Board finds that the contractor, by not stopping dewatering on May 26th, took on the responsibility for the penalties imposed by SFWMD in the letter of May 31, 2005.

BOARD RECOMMENDATION:

The Board recommends **entitlement** to Granite for the cost of obtaining the water use permit plus any costs and additional time associated with delays to controlling items of work due to the cessation of pumping on May 26, 2004. However, the Board recommends **no entitlement** to Granite for recovery of the fines levied by the SFWMD.

The Board sincerely appreciates the cooperation of both parties in this matter, and in particular, the clarity in which information was presented for review. Please remember that a response to the RDRB and the other party of your acceptance or rejection of the Board's recommendation is required within fifteen (15) days. Failure to respond constitutes your acceptance of the recommendation.

Respectfully submitted
FDOT District Five Regional Disputes Review Board

George W. Seel, Chairman
Jimmy Lairscey
Mike Bone

Signed for and with the concurrence of all Board Members