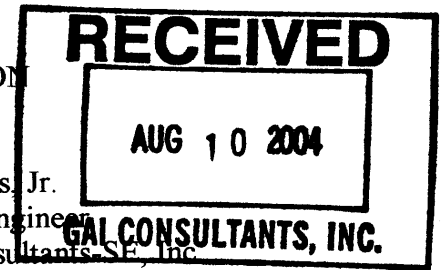


DISPUTE REVIEW BOARD RECOMMENDATION



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FIN No.: 239292-1-52-01 & FIN No.:239292-1-52-02
Contract No.:21459 WPI No.:5114628 SR 520 Orange County, Fla

Gentlemen:

By letter dated June 4, 2004, Westwind Contracting, Inc., requested that the Dispute Review Board for this project schedule a hearing to consider the issue of entitlement of their request for additional time and compensation for existing asphalt base removal and for stabilization of subgrade. Subsequently, a meeting was scheduled and conducted on July 23, 2004.

CONTRACTOR'S POSITION

Bid documents, including construction plans, were silent as to the nature of the base in place within the existing roadway.

A reasonable assumption was made that the existing roadway had a base course that could be utilized in the new roadway construction both as embankment fill and as a stabilizing agent for the subgrade.

The bid plan to use the existing base material as a stabilizing agent, rather than purchasing stabilizing material, resulted in a lower bid to FDOT.

1. Westwind incurred additional costs due to the unexpected difficulty in removing the existing sand/oil "base" from existing roadbeds.
2. Westwind incurred the added expense to haul much of this unexpected base material to waste.
3. Westwind was not allowed to incorporate this base material into the embankments for the new roadways. Westwind thereby lost 18" of material on the Project that it had planned to use. Westwind had to arrange for substitute fill material to take the place of this "lost material."
4. Westwind was not able to use the existing base material to help stabilize the new subgrades. Rather than using on-site material, Westwind had to purchase and haul stabilizer material to the Project to stabilize the subgrade.

Entitlement is created by a differing site condition as defined in Sec. 4-3.7 of the Standard Specifications as conditions encountered "of an unusual nature differing

materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract.”

The directive not to use the existing base anywhere in the new embankment was an alteration in the character of the work under Section 4-3 and/or created unforeseeable work under Section 4-4 of the Standard Specifications. The requirement to remove and waste this material and replace it with new fill constituted extra work and entitlement for compensation.

In a letter dated July 7, 2003, Westwind submitted an Intent to File Claim with GAI as a result of the problems created by this unexpected sand/oil “base” material.

DEPARTMENT'S POSITION

Removal of the existing sand asphalt hot mix asphalt is covered under Section 110-1 of the Supplemental Specifications, titled Description of Clearing and Grubbing, which states:

“Remove and dispose of all trees, stumps, roots and other such protruding objects, buildings, structures, appurtenances, existing flexible asphalt pavement and other facilities necessary to prepare the area for proposed construction, and remove and dispose of all product and debris not required to be salvaged or not required to complete the construction.”

Since the cost of the removal of the sand asphalt material is provided for in the Clearing and Grubbing Lump Sum item, Unforeseeable Work, as stated in Section 4-4, of the contract Special Provisions, and Character of Work, has not become a “Significant Change” as referred to in Section 4-3.1; do not constitute entitlement.

Section 110-8 of the Supplemental Specifications, titled Ownership of Materials, states: “The Contractor shall take ownership of all buildings, structures, appurtenances and other materials removed by him and shall dispose of them in accordance with Article 110-9, except as maybe otherwise specified in the Contract Documents.” The existing asphalt certainly qualifies as “other materials.”

Section 110-9.1 of the Supplemental Specifications, titled General Disposal of Materials, states: “Dispose of timber, stumps, brush, roots, rubbish, and other objectionable materials resulting from clearing and grubbing in areas and by methods meeting the applicable requirements of all Local, State and Federal regulations.” The existing asphalt was objectionable in the fact that it was not suitable for use in the new roadway.

Section 110-11.3 of the Supplemental Specifications, titled Removal of Existing Pavement, states: “Payment for removal of flexible asphalt is included in the Lump Sum price for clearing and grubbing.”

The FDOT and the owners representative, (GAI), contend that removing the existing flexible pavement is a part of the Clearing and Grubbing items and that contention is supported by the Contract and Specifications

In as much as neither the plans or other contract documents identified the base material in the existing roadway, there is no "differing" site condition.

The contract Special Provisions contained a web site address that contained the information describing the composition of the existing pavement.

By Section 2-4 of the Standard Specifications, contractors are advised to examine the contract documents and the site before submitting a proposal.

Sand Asphalt Hot Mix is a standard material for base construction in wet areas or in areas with a high water table.

Section 160-10.1 of the Standard Specifications states that the furnishing of stabilizing material is included in the per square meter unit price.

Section 160-10-3 of the Standard Specifications states that no separate payment will be made for any commercial stabilizing material.

The Contractor notified the Engineers in writing of his intent to file claim dated July, 7, 2003.

FDOT and their representative, GAI Consultants, conclude from the plans, Special Provisions, and the Contract that Pay Item No. 2160-4 for Stabilization Type "B" is to be paid at the Contract unit price per square meter and that price includes all efforts to reach the specification requirements.

CONTRACTOR'S REBUTTAL
Dated July 15, 2004

The sand/oil base was not an "Existing Flexible Asphalt Pavement" that had to be removed under the Clearing and Grubbing Specification.

Even if the sand/oil material was a "pavement," Westwind is entitled to be compensated for the removal of an excessive thickness of pavement.

Westwind is entitled to be compensated as a result of not being able to use the existing base course under the old roadway in the new road embankments.

The sand/oil base material was unusual and constituted a differing sight condition.

Subject FDOT web site relates only to the use of RAP in new asphalt pavement mixes.

SUMMARY

1. Differing site condition
2. Similar claims recognized by other Dispute Review Boards
3. FDOT/GAI was best able to provide the necessary information
4. Westwind is entitled to be compensated for the loss of use of anticipated base course material, and the additional costs associated with building the embankments and stabilizing the subgrade as a result of the unusual base material found on the project.

DEPARTMENT'S REBUTTAL

Dated July 15, 2004

The FDOT cannot be held responsible for assumptions made by WCI or any other contractor.

The existing base material could be used in the embankment if pulverized and cut in with local material, which was eventually done.

Flexible asphalt pavement is to be removed for its entire depth under the Clearing and Grubbing specification.

WCI should have read the Special Provisions related to the use of RAP, existing pavement and base materials information that was available to the public, and to all bidding contractors, on this FDOT website.

The asphalt base is not an unusual material and is currently in use elsewhere.

Since the SAHM base is flexible asphalt, its removal is covered under Clearing and Grubbing and is not "unforeseen work".

CONCLUSION

It is the firm position of the FDOT and GAI that there is no contractual entitlement to WCI for the issues raised in WCI's position papers.

FINDINGS of the DISPUTE REVIEW BOARD

- The construction plans and contract documents contained no description of the type of material in the existing base. Absent any other data, it would be reasonable to expect a lime rock base.
- Art. 331-2.2.4 of the contract provisions direct the bidder's attention to a website concerning "Use of Reclaimed Asphalt Pavement (RAP)." The data contained at that web site showed varying thickness of FC-2, 5, ARMI, T-1 and construction plans. This data could have been made a part of the construction plans.
- The construction plans contained soils data from a great number of core borings throughout the project, none of which were taken through the existing roadway. Section 110-1, Clearing and Grubbing, included the removal of "flexible asphalt pavement."
- Although the FDOT State Bituminous Engineer defines the material in question as Sand Asphalt Hot Mix as "part of the asphalt (or flexible) pavement structure," from sections 280-1, 300-1 and 335-1 of the Standard Specifications the material should best be described as a base course.
- SAHM is a base material included in the FDOT Standard Specifications, although not as ordinarily encountered as limestone, predominately for reasons of cost, but is currently specified in a nearby project.
- WCI was directed to dispose of the existing SAHM as it was "not suitable for use in the new roadway". Subsequently permission was granted to use the material in the embankment by machine mixing with other embankment or existing material.
- A "Notice of Intent" letter was not submitted for several months after discovery of the SAHM. However, the matter had been the subject of discussion on several occasions prior to the date of the letter.

RECOMMENDATION of the DISPUTE REVIEW BOARD

Based on the documents furnished the Board and information presented at the July 23, 2004 hearing, and as a part of the findings of the Board herein, the Board recommends that the contractor (WCI) is entitled to additional time and compensation for this issue.

The Board appreciates the cooperation of all parties and the information presented for its review. This recommendation should not prevent the parties from negotiating an equitable resolution.

Please remember that a response to the Board 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 the non-responding party.

I certify that I have participated in all of the meetings of this Board regarding this issue and concur with the findings and recommendation.

Respectfully Submitted:

Mark Moshier, P.E.
Member

John Duke
Member

Charles C. Sylvester, P.E.
Chairman



(Signed with the concurrence of the other members)

Dated August 6, 2004