

## DISPUTES REVIEW BOARD RECOMMENDATION

August 30, 2005

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Ref: SR-436 (Semoran Blvd.) From S. Bound Ramp of SR 528 to SR 552 (Curry Ford Rd.) Contract No: T5015, Financial Project No: 239454-2-52-01,52-02, 56-01, 56-02, 56-04, 56-09. Disputes Review Board hearing regarding "Additional compensation for Pipe Backfill Material"

Dear Sirs:

The Florida Department of Transportation and Hubbard Construction Company requested a hearing concerning the above referenced issue. The contractor has stated, in their position paper, that the issue listed above has had a monetary impact to the project. The Department has stated, in their position paper, that the issue did not warrant any additional compensation.

### **CONTRACTOR'S POSITION**

We will state the Contractors position by referencing, copying 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.

On October 9, 2003 Hubbard notified the Department by letter stating that the native soil encountered in their pipe laying operation was unsuitable for pipe backfill. After dewatering, the excavated soil still retained excessive moisture. In spite of aggressive dewatering activities that lowered the water table the soil still retained excessive moisture and was unsuitable for pipe backfill.

Hubbard, in accordance with FDOT Specification 125-8.3.4, then requested that the Department authorize the use of the approved A-3 select import material in areas that the native soils were determined to be unsuitable as pipe backfill.

All potential on-site borrow areas were inaccessible at that time, and/or did not yield the select material required to complete the backfilling operations as outlined in the FDOT

Specifications. It was agreed with all parties that the import A-3 material would be utilized on a “case by case” basis and that Hubbard would be compensated for this additional cost.

Hubbard requested payment for this additional work on May 13, 2005. The Department would not negotiate even though they agreed that the pipe laying operation was adversely affected.

The storm drainage impacts resulted from the loss of production due to handling/rehandling of this native soil, numerous compaction attempts and for the removal/replacement of this native soil with the imported A-3 material. Hubbard requests payment in the amount of \$99,080.30.

### **DEPARTMENT'S POSITION**

We will state the Departments position by referencing, copying 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 no entitlement.

In order for additional compensation to be entitled for any claim, there must be a provision in the contract which supports the claim or a provision in the contract that has been breached or a condition that was unforeseen at the time of bidding which the contractor would not have had reasonable opportunity to account for in his original bid. None of these conditions exist regarding the claim for additional compensation to import A-3 material.

The contract documents clearly show the types of soil conditions to be expected on the project. The Roadway Soil Survey shows the AASHTO classification of soil stratum No. 1 to be A-3 and A-2-4. The classification of stratum No. 2 is shown to be A-2-4. Furthermore note 7 on this sheet states “Stratum No. 1 may be difficult to penetrate, excavate and dewater and may require special equipment to penetrate, excavate and dewater”, note 9 states “ Stratums No. 1 and 2 may retain excess moisture and may be difficult to dry and compact”. There was no change between the soils shown on the plans and those encountered in the field. In fact Hubbard’s reason for importing A-3 soil is that the native soil is “retaining an excessive amount of moisture” and cannot be compacted.

In Hubbard’s letter dated October 3, 2003, in which they requested the Department to authorize the use imported A-3 material and stated they will request compensation for this unforeseen work as outlined in FDOT Specification 125-8.3.4. Hubbard incorrectly references this specification. Specification 125-8.3.4 is provided to allow the Department to authorize a specific procedure that may be used when backfilling under wet conditions. At no time did the Department authorize this procedure, either verbally or in writing, and at no time did Hubbard follow the procedure as outlined. The quoted specification does

state that “the Department will pay for any select material which *is not available from the grading* as Unforeseeable Work”, however the intent is to pay for A-3 material that is specifically used as outlined in the procedure. There was sufficient A-3 material available from normal grading operations from Pond A and Pond B that could have been used instead of importing material from off-site.

Both Pond A and Pond B had A-3 material available as indicated in the plans. This was verified by soil samples from both ponds. Hubbard indicated that the A-3 material was not available when needed for pipe backfilling operations. The sequencing of operations is wholly Hubbard’s responsibility and the Department should not be responsible A-3 material not being available when needed.

The time that elapsed between Hubbard raising the issue of the native soil having excess moisture and not readily giving it up is a significant issue. In October 2003 Hubbard informed the Department that the native soil was unsuitable for pipe backfill and they intended to import A-3 material. The Department replied that they disagreed with Hubbard and did not consider the import of A-3 material as unforeseen work. Since no further communication reference this issue the issue was considered closed. Almost 18 months later Hubbard informed the Department that they wanted payment for the imported A-3 material.

A meeting was held between the Department and Hubbard in accordance with their Partnering Escalation agreement. At this meeting the Orlando Resident Engineer stated that he saw no changed conditions to the original contract and recommended that Hubbard review the information further and provide the information. No new information was provided and the Department informed Hubbard that if they intended to pursue the issue further they should submit a written claim in accordance with FDOT Specification 5-12.3. Hubbard has not submitted a written claim.

## **DISPUTES REVIEW BOARD FINDINGS**

The following is a compilation of facts that the Board obtained from the position papers and the hearing.

- The Plans for the project did state that Stratum 1 and 2 contained AASHTO soil classifications A-3 and A-2-4 and that these layers may be difficult to penetrate, excavate and dewater.
- There is also a note on the drawings stating that Stratum Nos. 1 and 2 may retain excess moisture and may be difficult to dry and compact.
- There was A-3 material available within the project limits. When this material was available was under the control of the contractor.
- Over a year elapsed between the pipe backfill problems and the request for payment for the “unforeseen conditions”.

- The contractor was informed by the Department that the Department could find no changed contract conditions that would justify payment and the contractor should review the information and provide any conditions that were in conflict with the contract. The Contractor has not done so.

### **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 Hubbard Construction Company. We listened to all the parties at the hearing held on August 26, 2005. Our recommendation is that there is no entitlement of payment due the Contractor for additional compensation due to unforeseen conditions.

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

Peter Markham, P.E., Chairman    Don Henderson, P.E., Member    George Seel, P.E., Member

Signed for and with concurrence of all members

Peter A. Markham, PE  
Chairman