November 22, 2004 E-mailed - November 22, 2004

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RE: Projects SR 5A (Nova Rd) Ormond Beach and Port Orange
FIN No.: 240758-1-52-01 & 240757-1-52-01
Contract No: 21266 & 21265
County: Volusia
District 5
Disputes Review Board

DISPUTE: Compensation for Overrun in Mowing Item.

Dear Sirs:

The Contractor, Modern Continental South, Inc. (MCS), requested a hearing to determine **entitlement** of MCS to additional compensation for overrun in the mowing item on the referenced projects. Should entitlement be established, the Disputes Review Board (DRB) was not to decide quantum of such entitlement at this time, as the parties, the Florida Department of Transportation (FDOT) and MCS would attempt to negotiate the value of the entitlement.

Pertinent issues, correspondence and other information relating to MCS's, and FDOT's positions were forwarded to the DRB for review and discussion at the hearing that was held on November 05, 2004.

CONTRACTOR'S POSITION:

There is a substantial error in method used by DOR to establish mowing quantities.

Nova 1 uses 25% of 135,249 sy sodding to arrive at 7 ac. Paid to date 23.4 ac by bid item and 11.6 ac paid under Field SA for a total over run of 500%.

Nova 2 uses 25% of 112,408 sy sodding to arrive at 5.94 ac. Paid to date 73.6 ac, 1239% overrun.

It is obvious from the comp book that this minute quantity could have been arrived at by having the Cities assume mowing as portions of project were completed. PBCS and the municipalities have declined to accept this responsibility putting MCS in a decided financial disadvantage.

This issue was addressed on September 17, 2003 and a Field SA was issued October 18, 2004 for 3 mowings 11.6 ac@ $150/ac or $5220.

However when MCS was directed by PBCS on August 6, 2004 to mow the entire N I site, PBCS refused to consider additional payment.

Standard Specification 5-4 is quite clear that neither party shall " take advantage of any apparent error" which 1) by not turning mowing over to cities or 2) compensating MCS for this extreme over run, is exactly what is occurring in this case.

Total Cost to date NI- PTD 23.4 ac @ $6 = $140.40 vs Costs to Date $9,720
N2- PTD 73.6 ac @ $25 = $1840 vs Costs to Date $8,795.95

Contractors are businessmen usually pressed for time and seeking to underbid competitors. They are not clairvoyant, nor expected to ferret out hidden errors in the bid documents and are protected if they innocently overlook an error.

MCS requests the municipalities assume responsibility for mowing as areas are completed and that the Department compensate the costs beyond the original contract quantities.

DEPARTMENT'S POSITION:

The Department respectfully submits this statement and explanation of its position regarding entitlement to MCS for claimed additional compensation relating to the Mowing Issue that is to be presented to the Board on November 5, 2004. It is the Department's understanding that the Board will consider the facts presented by both sides and render a decision on Entitlement Only that is consistent with the terms of the contract.

Mowing

We completed our analysis of MCS's September 30, 2004 Mowing claim packages for the Nova Road projects requesting additional compensation in the amount of $7,320.13 on the Port Orange projects and $7,195.95 on the Ormond Beach projects.

MCS's Claim

MCS's claim is based on the Department taking advantage of an error in the contract quantities for mowing and referenced Standard Specification 5-4, Errors and Omissions in Contract Documents.

Background Information

Attached are exhibits A thru I[1] *that detail the history of the issue.*

The Department's Position

We've reviewed Standard Specification 5-4, Errors and Omissions in Contract Documents, and determined there is no apparent error or omission in the Contract Documents. The quantity of mowing in the Port Orange and Ormond Beach contracts is typically shown as a percentage of the sod quantity. (Exhibit J) MCS established the unit price of the bid item for mowing at the time of bid and the Department, by contract, agreed to compensate MCS to perform the work at that unit price.

The quantities of mowing performed to date for the Port Orange and Ormond Beach projects were paid under the existing contract bid item, Mowing, 104-4.

Mowing is not a major item of work as defined in section 1-3 of the Standard Specifications, that is, "Any item of work having an original Contract value in excess of 5% of the original Contract amount". Therefore, there is no entitlement for any additional compensation on either the Port Orange or Ormond projects.

CONTRACTOR'S REBUTTAL:

PBCS acknowledged the error in quantities and price by issuing an equitable adjustment to contract September 17, 2003.

However the Departments position changes when further mowing is directed in August 2004.

PBCS suggests that the 25% mentioned in Basis of Estimates Handbook is irrefutable, when it is not. The handbook allows for other "basis" of payment, which should have been address by DOR not the contractor. If mowing and sodding are so closely linked why do they appear on page 4 and 17 of bid tab instead of on same page to allow comparison?

Under Environmental Best Practices Management all of the ponds should have been constructed in advance of storm drain construction, in appropriate phases.

Also roadway grassing was to also be completed in phases over two growing seasons.

Even if it was envisioned that areas would be turned over to municipalities as completed, it is difficult to imagine that at least one complete mowing would not be required.

MCS is perfectly willing to accept the unit price up to the Bid Quantity, but will not inequitably be directed to continue work at our financial duress.

[1] See original position papers for exhibits.

This is the crux of Standard Specification 5-4 Errors and Omissions in Contract Documents (Page 2), which precludes either party from taking "advantage of any apparent error".

Proof of error in the design process, as well as the actual performance is seen in more than 500% and 1200% overruns to date.

PBCS has so far refused to address Specification 5-4, continuing to cite Section 1-3, which was not the basis of claim used by MCS, and is irrelevant.

MCS requests merit for equitable adjustment to contract and for the municipalities to assume responsibility for completed areas "to reflect the actual spirit and intent of the Contract Documents.

BOARD FINDINGS:

- The Florida Department of Transportation Standard Specifications for Road and Bridge Construction, 2000 edition, contains the following provisions.

SECTION 4 SCOPE OF THE WORK states:

4-3 Alteration of Plans or of Character of Work.

4-3.1 General: *The* ***Engineer reserves the right to make****, at any time prior to or during the progress of the work, such* ***increases or decreases in quantities,*** *whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable by the Engineer. Such increases, decreases or alterations shall not constitute a breach of Contract, shall not invalidate the Contract, nor release the Surety from any liability arising out of this Contract or the Surety bond. The* ***Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract.***

*The term "****significant change" applies only when****:*

(A) The Engineer determines that the ***character of the work as altered differs materially*** *in kind or nature from that involved or included in the original proposed construction, or*

(B) A ***major item of work****, as defined in 1-3, is* ***increased in excess of 125%*** *or decreased below 75% of the* ***original Contract quantity****. The Department will apply any price adjustment for an increase in quantity only to that portion in excess of 125% of the original Contract item quantity, or in case of a decrease below 75% to the actual amount of work performed, such allowance to be determined in accordance with 4-3.2, below.*

In the instance of (A) above, the determination by the Engineer shall be conclusive and shall not subject to challenge by the Contractor in any forum, except upon the Contractor establishing by clear and convincing proof that the determination by the Engineer was without any reasonable and goodfaith basis

SECTION 1 DEFINITIONS AND TERMS defines “Major Item of Work”:

1-3 Definitions.

The following terms, when used in the Contract Documents, have the meaning described.

Major Item of Work.

Any item of work having an original Contract value in excess of 5% of the original Contract amount.

- There was a substantial overrun in the mowing item.
- The mowing item was not a major item of work.
- The character of the work was not materially different from that contained in the contract.
- There is no provision in the contract for a third party to assume responsibility for maintenance of the work before contract acceptance.
- …It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is not the DRB’s prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. …[2]

[2] *DRBF Practices and Procedures Section 1 – Chapter 6*

BOARD RECOMMENDATION:

Based on materials supplied to the Board and presentations to the BOARD at the DRB hearing, the BOARD finds that the Contractor is not entitled to additional compensation for this issue.

The BOARD sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

Please remember that a response to the DRB 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.

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

Respectfully Submitted,

Disputes Review Board
John H. Duke, Sr.; DRB Chairman
George W. Seel; DRB Member
John B. Coxwell; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

John H. Duke, Sr.
Chairman