

HEARING DATE: MAY 10, 2016

Mr. Jim Wood
Oviedo Maintenance Engineer
2400 Camp Rd.
Oviedo, Florida 32765

Mr. Dan Adams
Foundation Services
4265 N.W. 44th. Ave.
Ocala, Florida 34482

RE: Contract No.: E5P67, WPI No.: 422042-1-72-02, Performance Aesthetics Contract with Foundation Services of Central Florida, Inc.: Regional Dispute Review Board Hearing regarding certification of claim and entitlement related to payments reduced by the Department.

Hearing/Issue Summary

On February 2, 2016 the District 5 Regional Dispute Review Board was contacted by the Florida Department of Transportation District 5 Maintenance Engineer requesting that a hearing be held for contract E5P67 to address a contractor dispute. The original request was for the Board to review one issue, "if the Dispute Review Board agrees with the contract deductions".

The Board realized that most of the maintenance personnel directly involved were not familiar with the RDRB process and, therefore, a pre hearing teleconference call was held between the RDRB, key department, and contractor personnel. The purpose of this teleconference was to make all personnel aware of the RDRB Hearing process. At that conference, a hearing date was set for March 18, 2016. Unfortunately, Foundation Services was not prepared for this date and requested a continuance which was granted. Foundation Services was afforded significant latitude throughout due to their lack of resources and knowledge of the process. The hearing was rescheduled for, and held on the above referenced date.

Upon receipt of position papers it became evident that the Department was disputing two issues (see A. and B. in the Department's position paper) that had to be heard and ruled on independently. The Board agreed to hear both issues but reserved the right to rule on the issue of entitlement pending the ruling on issue A. (certification of claim). Foundation Services position disputed the reduction in payments (FDOT issue B.) and alleged in their dispute that they were held to a higher standard of performance than other contractors.

Department's position – Note: Many exhibits accompanied this position but are included only by reference in the findings of fact and/or recommendation. They can be found in the original submission or provided upon request.

Foundation Services of Central Florida, Inc. (“Foundation” or “Contractor”) entered into a Performance-Based Contract with the Florida Department of Transportation District 5 (“Department”) on May 10, 2011.

Performance-Based (PB) Contracting is a contracting method whereby the Department contracts with private or public entities for the total management and performance of the operation and maintenance of transportation facility components of specific roadway corridors or entire geographical areas. PB contracts generally have longer terms (at least 3 years) than Work Directed Contracts and are usually dynamic. The term dynamic means that the contract requires compliance with the most current specifications, procedures, manuals, and guidelines throughout the term of the contract.

PB contracts are intended to require very little administration or inspection work from the Department. The primary indicator of PB contract success is the quality of maintenance of the roadways under contract at any given point in time and the responsiveness of the Contractor to the needs of the Department and the traveling public. Therefore, the Department should generally be able to spend minimal effort concerning materials, methods, and volume of work. The Department's goal is to minimize its oversight and inspection while ensuring the Contractor performs in accordance with the contract.

The Department will not perform work-needs surveys or provide deficiency lists for the Contractor; it is the Contractor's job to determine work needs. The Department will not direct the Contractor to perform any job or task, unless otherwise specified in the PB contract (e.g. Traffic Ops and Structures Work Orders); it is the Contractor's job to determine what activities need to be performed now and which of those can be postponed. In general, the Department is not concerned with why, how, where, or how much; the Department is concerned with the condition of the roadways at a point in time.

The Contractor is expected to meet performance requirements consistently throughout the contract period. The Department will evaluate Contractor performance by comparing the condition of the roadways (work performance) to the performance measures and procedural requirements established within the Scope of Services / Performance Specifications and other contract documents. Poor performance of work or failure to meet performance measures will result in financial deductions from Contractor payments. Continued failure to perform may result in declaring the Contractor non-responsible and may further result in Contractor default.

This contract consisted of roadside maintenance work activities including turf management, litter removal, mowing, edging, road and bridge sweeping, tree trimming, tree removal, and maintaining delineators and object markers. The work areas included in this contract are the Department's rights-of-way within Seminole and portions of Orange Counties (the maintenance area of Oviedo Operations), which include fenced stormwater and mitigation facilities, ditches, and drainage easements. The original contract amount was \$1,745,215.00 and the original contract time was 1,096 days

II. Questions Before the Disputes Review Board

The Department submits the following questions to the Disputes Review Board:

- A. Did Foundation certify its disputes for additional contract funds in accordance with contract Specification 4-3.2? If not, the Department has no obligation to release any of the contract funds withheld from the monthly payments in question.**

- B. Did the Department assess pay reductions, for poor performance on the contract, in accordance with Contract Specifications 572-16, 572-17, and 57218, as well as its general authority under Specifications 9-5.1 and 9-5.3.1?**

Rebuttal by Foundation Services

The news video link shown on page 8 of the FDOT Position Paper provides no proof as to the contractor's lack of performance or actual condition of the roadways maintained within the contract as being out of specification.

Customer Complaints

FDOT's unilateral and unwavering testimony regarding "Resolution for Customer Complaints" was that any work demanded by a citizen needed to be done immediately regardless of whether or not that work was scheduled for a later date or whether or not the work was contractually required.

Performance Scores

FDOT's contract Section 572-17 called for FDOT to invite and allow the contractor to be invited to participate in all interim inspection meetings to review performance criteria. The contractor has no record of written invitations listing date, time, meeting place and additionally no

issued list of random sites due at the beginning of such inspections. FDOT has insisted that it did not have a contractual responsibility to do this and could create a score without input.

Per Section 572-15, FDOT did not notify the contractor of MRP inspections seven (7) days prior to MRP inspections: **“No work shall be performed within seven (7) days prior to or during the MRP inspections unless the work has already been identified on the contractors biweekly work schedule submitted for the period during which the MRP inspection shall take place, unless the work is part of customer service resolution, a safety issue, or the work is being performed as a correction of the items previously found to be non-compliant.”** FDOT did not provide these opportunities.

As a result, FDOT created unilateral and unsupportable “performance scores” without input which did not reflect accurately what was being required by FDOT and performed by Foundation Services.

Contract Claim

The Circuit Court of the Second Judicial Circuit has already ruled twice that the wrongful retention of earned money is not a claim for “extra compensation”.

FDOT has referred this matter to the DRB for resolution.

FDOT Response to Foundation Services Rebuttal

In their response to Foundation Services rebuttal above, as well as in their rebuttal to Foundation Services position, FDOT referenced specification 572-15 “Performance Criteria”. They assert that this specification clearly outlines how deductions are to be assessed. The Department emphasized that reductions were based on MRP scores per this specification, only.

In the hearing, the Department provided documentation of emails and phone conversations that, according to FDOT, supported that they did provide notification to Foundation Services of M.R.P. Inspections.

Contractor Position Note: Many exhibits accompanied this position but are included only by reference in the findings of fact and/or recommendation. They can be found in the original submission or provided upon request.

Foundation Services is disputing the reduction of any and all payment amounts by FDOT for Contract E5P67 and is seeking full compensation of monies withheld plus interest. The position of Foundation Services is that the work was performed (**Exhibit 1**) and the Department reduced the payments. It is also the belief that Foundation Services was held to a higher standard of performance by the Department. This can be seen in a Channel 2 Orlando news report regarding E5P67 (**Exhibit 2**) (to be emailed) and photos (**Exhibit 3**) (to be emailed) of recent conditions of maintenance by current contractor. **Exhibit 4** and **Exhibit 5** are two examples of emails that also support that position.

572-19 Method of Measurement and Basis of Payment

“Price and payment will be full compensation for all work and materials specified in this Provision, including roadside mowing, litter removal, edging, sweeping, cleaning inlet throats, grates and drainage structures, tree trimming, and maintaining delineators and object markers.”

Total contract amount: \$1,745,215.00
Total payment amounts received: \$1,507,408.86
Total Reduction of Payments: \$237,806.14
Total amount in dispute: \$237,806.14 plus interest
Exhibit 6 (to be mailed overnight)

572-19 Method of Measurement and Basis of Payment

“Breakdown the monthly invoice by maintenance area for all work units completed for each Maintenance Management System (MMS) activity number.”

MMS (Maintenance Management System) quantities of work units performed were submitted as required with invoicing and accepted by Department/Administrator as work performed for each monthly estimate. **Exhibit 7** (to be mailed overnight). Note that Exhibit 7 contains 28 of the 36 MMS Quantity submittals that we have on record. **Exhibit 8** represents the MMS Quantities entered into site manager by the contract administrator as accepted for payment process. Our attorney had requested exactly those entries and was provided **Exhibit 9** by the Department. Exhibit 9 is incomplete)

Rebuttal by the Department

The Florida Department of Transportation (FDOT) presented the following two questions for the Regional Dispute Resolutions Board’s resolution: A. Did Foundation certify its disputes for additional contract funds in accordance with

contract specification 4-3.2? If not, the Department has no obligation to release any of the contract funds withheld from the monthly payments in question. B. Did the Department assess pay reductions for poor performance on the contract in accordance with contract specifications 572-16, 572-17 and 472-18, as well as its general authority under specification 9-5.1 & 9-5.3.1? Foundation Service's (Foundation) responded to these questions by referencing specification 572-19-Method of Measure and Basis of Payment and several Exhibits. The Department reasserts that appropriate payments were made to Foundation according to this contract. Attached is Exhibit 1R, which defines the contracts Performance Criteria. Specification 572-15 defines the performance rating pursuant to the FDOT's Maintenance Rating Program (MRP) Handbook and lists 11 characteristics in which the Performance Score is based upon. The MRP provides that the Contractor shall for each performance period achieve a minimum score of 70 on each characteristic included and achieve a minimum overall Performance Score of 80. Foundation's response also refers to the FDOT's Maintenance Management System (MMS) with Exhibits. The Department gives notice that our Maintenance Management System is a historical database used primarily for the long range budgeting and planning of maintenance needs and costs from a statewide basis. The use of this information by Foundation Services is not appropriate to the performance based subject matter of this contract.

Foundation Services Response to the Department's rebuttal

Foundation Services had much to say in response and asserted that the quantities in the MMS were proof that they performed work. They noted that their final overall performance grade for the contract was a 91 indicating that such a score does not support that deductions to the contract payments should have been made. Foundation Services circulated many photos (also included in their position as exhibits) they feel support their allegation that they were held to a higher standard.

FDOT's Rebuttal of Foundation Services response

The department reemphasized in their rebuttal that contract deductions are determined by Maintenance Rating Program scores and not the final performance score. Further discussion on the topic revealed that Foundation Services performance improved each year which helps support the final grade.

On the topic of photos presented by Foundation Services, the Department noted that they were taken of an area that was currently under construction and maintenance crews were prohibited to maintain the area. Additionally, it was noted that the photos were not taken within the contract period.

Board Findings

FDOT Issue A: Did Foundation Services certify its disputes for additional contract funds in accordance with contract Specification 4-3.2?

At various times during the term of the contract with Foundation Services, the Department reduced Foundation Services pay requests due to poor performance in accordance with Contract Specifications 572-16, 572-17, and 572-18, as well as its general authority under Specifications 9-5.1 and 9-5.3.1. Most of the deductions occurred within the first two years of the contract term. Foundation Services wrote a letter dated September 30, 2011 as its official notice of dispute to the pay reductions for the pay period 8-16-2011 to 9-15-2011. The Department contends in its position papers that Foundation Services failed to certify its disputes for additional contract funds in accordance with contract Specification 4-3.2 when it failed to respond to the Department's letter of October 6, 2011 which requested additional information on why Foundation Services objected to or protested deductions from its pay requests.

Foundation Services contends in its position statement that its dispute is not a "claim for extra compensation" but is a request for the return of monies wrongfully withheld by the Department and therefore does not require certification.

The Dispute Review Board has reviewed the position statements and rebuttals and has heard oral argument from the parties and finds that Foundation Services is not required to provide certification of its disputes since its request is not a request for compensation for extra work contemplated by contract Specification 4-3.2 and 5-12.2. Rather, Foundation Services is requesting the return of monies it believes were wrongfully withheld from it. Contract Specification 4-3.2 provides the Contractor will not have a formal right to extra compensation until the Contractor complies with the procedures set forth in 5-12.2 which requires notice by the Contractor of its intention to make a claim "for additional compensation before

beginning the work on which the claim is based...” The purpose for the notice is so the Engineer is afforded the “opportunity for keeping strict account of actual labor, material, equipment...” Once the Contractor satisfies this notice requirement, then the Contractor may request an equitable adjustment of compensation which must be certified under oath. In the circumstance of Foundation Services, there is no extra or additional work involved that would require notice to and tracking by the Engineer but, instead, deductions were made from pay requests by the Department for Foundation Services poor performance in the amounts indicated and those amounts are not disputed by Foundation Services. Instead what is in dispute, was the Department’s determination of poor performance and notice of dispute to the reductions was provided in Foundation Services letter of September 30, 2011. Since the amounts are not in dispute, there is nothing to certify.

FDOT Issue B: Did the Department assess pay reductions, for poor performance on the contract, in accordance with Contract Specifications?

As was stated in response to A. above, the Department reduced payments to Foundation Services at various times during the term of the contract for what it believed to be due to poor performance of the work in accordance with the cited Specification sections.

Foundation Services contends that it performed the work and that it was held to a higher standard of performance by the Department and that the Department wrongfully withheld monies from its pay requests.

The Dispute Review Board has reviewed the position statements and rebuttals and has heard oral argument from the parties and finds that the Department properly assessed reductions to the payments to Foundation Services due to poor performance of the work in accordance with the contract Specifications 572-16, 572-17, and 572-18, as well as its general authority under Specifications 9-5.1 and 9-5.3.1. The Department provided sufficient evidence of violations of the cited Specifications and how the reductions were calculated based upon permitted periodic inspections of the work and customer complaints, all of which appear to be proper. Foundation Services on the other hand, did not supply any relevant evidence that, at the times the inspections were performed and complaints received, it was not in violation of the Specifications. Rather, Foundations Services

provided evidence that it eventually performed the work and corrected any violations, however, such performance and corrective work was performed after the inspections that determined its poor performance. In addition, it provided evidence of conditions it contended were from similar work areas within its contract scope but outside of its contract period and performed by the successor contractor whose work it contends to be out of compliance with the Specifications. It contended that the successor contractor did not have its pay requests reduced for these apparent violations and, thus, Foundation Services was being held to a higher standard by the Department. The Board determined that such evidence is irrelevant in determining whether or not Foundation Services' work complied with the contract Specifications and that the Department properly reduced its pay requests. The Board determines that only evidence of work performed by Foundation Services and assessments made by the Department that such work violated the contract Specifications could be submitted in these proceedings.

In regard to Foundation Services contention that the Department failed to invite it to witness interim inspections and failed to provide seven days' notice of the MRP inspections, the Board was provided evidence by the Department in the form of emails and phone calls that it did, in fact, invite Foundation Services to interim inspections and informed it of upcoming MRP inspections in a timely manner.

Board Recommendation

Issue A: Did Foundation Services certify its disputes for additional contract funds in accordance with contract Specifications?

Based upon position statements, rebuttals, oral argument from the parties, and our findings above, the board has determined that Foundation Services is not required to provide certification of its dispute.

Issue B: Did the Department assess pay reductions, for poor performance on the contract, in accordance with Contract Specifications?

Based upon position statements, rebuttals, oral argument from the parties, and our findings above, the board has determined that the Department assessed reductions of payments in accordance with the contract specifications. Therefore, there is no entitlement for recovery of funds associated with contract E5P67.

Foundation Services Issue: In its position papers, Foundation Services alleged that they were held to a higher standard of performance than other contractors. The majority of exhibits and verbal testimony by Foundation Services attempting to support their allegation could not be taken into consideration by this board which can only consider issues, exhibits, statements, etc. directly related to the governing specifications for contract E5P67. Accordingly, this Board only considered relevant information related to FDOT issue B and hereby finds no entitlement on this issue.

The Board sincerely appreciates the cooperation and efforts of all parties providing information that allowed us to formulate these recommendations.

The Board is unanimous in our recommendations and reminds the parties that they are only recommendations. A written response to the RDRB and opposing party of your acceptance, or rejection of these recommendations is required within 15 days. As addressed in the Three Party Agreement, failure to respond within 15 days constitutes acceptance.

Respectfully submitted
District 5 Regional Dispute Review Board
Don Cronk, Chairman
Jim Ware, RDRB Member
Roger Peters, RDRB Member

Signed for and with concurrence of all members

Don Cronk

Don Cronk, RDRB Chairman