

FDOT DISTRICT 5
REGIONAL DISPUTES REVIEW BOARD
RECOMMENDATION November 13, 2003

Mr. Majid Fouladi
President
APEC, Inc.
4436 Old Winter Garden Road
Orlando, FL 32811

Mr. Calvin Landers, PE
FDOT Resident Engineer
Orlando Construction Office
133 S. Semoran Blvd.
Orlando, FL 32807

RE: SR 15/600 (US 17/92)
SIDEWALK REPLACEMENT PROJECT
FN: 405176-1-52-01
Contract No. 21533
Seminole County

DISPUTE: The Contractor, APEC, Inc. requested a RDRB hearing on the following issues:

1. FDOT should not have assessed liquidated damages on the project for the following reasons:
 - A. No consideration was given by FDOT for adverse soil conditions or work damaged by weather.
 - B. FDOT did not allow or grant sufficient rain days.
 - C. The shop drawing approval delay for the handrail. (The duration of the approval process took 72 days on the FDOT side).
 - D. Drainage shop drawing delay. (It took FDOT from August 22, 2002 until October 22, 2002 to approve the shop drawings, which is a period of 61 days)
2. Claim outstanding for the removal and replacement of 650 LF of sidewalk between Sta. 828+13 and Sta. 833+60.
3. Revision of Contractor's Performance Rating.

Dear Sirs:

The contractor, APEC, Inc. requested a hearing of the Fifth District Regional Disputes Review Board to determine entitlement on the above issues. The sequence of events in requesting this hearing has been as follows:

June 20, 2003	Original Claim submitted to RDRB by OPEC, Inc.
July 21, 2003	FDOT Position Paper Received
August 8, 2003	APEC Rebuttal No. 1 Received
August 20, 2003	FDOT Response No. 1 Received
September 8, 2003	APEC Rebuttal No. 2 Received
September 19, 2003	FDOT Response No. 2 Received
September 29, 2003	APEC Rebuttal No. 3 Received

It is not possible to detail all of the comments and arguments raised in the above transmittals in this recommendation statement. The documents listed above are on file at the FDOT Orlando Construction Office. The Board has met to review the information received in each of the above transmittals, and has based its recommendations on all of the information received as well as the presentations at the hearing.

CONTRACTOR’S POSITION:

1. FDOT should not have assessed liquidated damages on the project for the following reasons:
 - A. No consideration was given by DOT for adverse soil conditions or work damaged by weather. The contractor includes (Exhibit A) a list of the days claimed for adverse soil conditions, and supports this with his letter (33) to FDOT dated March 21, 2003, appealing the Department’s decision in this matter. **The contractor’ request is for 28 days due to adverse soil conditions on the job.**
 - B. FDOT did not allow or grant sufficient rain days on the project. The contractor includes a list of the rain days requested (Exhibit B) in this claim, including the rainfall amounts. An article from the Orlando Sentinel was also enclosed which described December 2002, as having excessive rainfall in the Central Florida area. The contractor has also referred to his letter to FDOT regarding anticipated freezes in January 2003, which would prevent concrete work. **The contractor is requesting 35 days due to rain days.**
 - C. FDOT delayed the shop drawing approval process for the handrail on the project. The approval process took 72 days. The contractor submitted the shop drawings on August 28, 2002 and was later advised in a letter from FDOT dated November 8, 2002, that the shop drawings were approved. **The time requested by the contractor was unspecified.**
 - D. FDOT delayed the approval of the drainage shop drawings on the project. The contractor submitted the shop drawings on August 22, 2002, and FDOT approval of the submittal package was not received until October 22, 2002, a period of 61 days. **The contractor is requesting 28 days for this delay in shop drawing approval.**

2. Claim outstanding for the removal and replacement of 650 LF of sidewalk between Sta. 828+13 and Sta. 833+60. The contractor questioned the design of this portion of the sidewalk, primarily due to the lack of a gravity wall from Sta. 829+00 to Sta. 835+00, the section adjacent to Lake Minnie. The contractor maintains that the sidewalk was built correctly and approved by the FDOT on December 10, 2002. However, the sidewalk in this area did wash out due to heavy rains in late December due to the lack of a gravity wall by the lake, and inadequate drainage design. FDOT directed the contractor to remove and replace the washed out sidewalk, indicating that potential reimbursement for the sidewalk replacement would be pursued. The contractor completed the work, and was advised that reimbursement for this work was not warranted under the conditions. **The contractor removed and replaced the sidewalk and filed a claim in the amount of \$25,925.00, and requested an additional 35 days for drainage.**
The contractor subsequently received a call from FDOT on February 27, 2003 to repair wash-outs under the same area of the sidewalk from Sta. 828+13 to Sta. 833+60. In response the contractor indicated that the repairs would be made only upon receipt of a written work order from the FDOT, necessitating the FDOT maintenance crews to make the repairs.
3. Revision of Contractor's Performance Rating. The contractor feels that items 1, 4, 8, and 9 in the report should be changed since they are based on time and related to total amount of days and the liquidated damages.

DEPARTMENT'S POSITION:

1. FDOT assessment of liquidated damages:
 - A. **Adverse Soil Conditions:** The contractor has requested 28 days for adverse soil conditions. Of the days listed in Exhibit A, supplied by the contractor, only 24 days actually occurred during the allowable contract time, and 4 of the days occurred after the contract time had expired. Of the 24 days claimed during the contract time, 5 of these days have already been granted as weather days. On the remaining 19 days, reports indicate the contractor worked on controlling items of work, and typically worked a full 8-hour day. No mention of slowed progress was documented, nor did the contractor voice any concern at the time. During the life of the project three letters (11/26/02, 11/26/02, and 12/12/02) were sent to the contractor advising of the time granted for weather. Each letter gives the contractor 10 days in which to appeal the time granted. No appeals were received from the contractor at that time. On 3/21/03 the contractor appealed the determination of weather days in writing, and after review, the FDOT responded on 4/9/03 reaffirming its previous position.

- B. Rain Days Granted:** The contractor has submitted an Exhibit B showing amounts of rainfall on given days with no source of the data noted. FDOT was not aware of any rain gauge being present on the construction site during the contract, so the source of the data is in question. The contractor has listed 31 days as rain days that occurred prior to the contract time expiration. Of these 31 days, 10 days have already been granted as weather days under the contract. 12 days have also been requested as “adverse soil” days, and 5 of these have also been granted. One (1) day was a Saturday for which the contractor had not indicated any work was planned. Of the remaining 12 days, the contractor’s crews made progress on controlling items of work, and typically worked an 8-hour day. No mention of slowed progress was documented, nor did the contractor voice concern of such at that time. Per **SS 8-7.3.2**, none of these days meet the requirements for granting weather days.
- C. Handrail Shop drawing approval:** The contractor is claiming that the duration of the approval process was 72 days. The contractor further requests a non-specific number of days extension to the contract, and that liquidated damages be dropped. The contractor submitted the shop drawings to FDOT on 8/28/02 and received a “verbal” approval from the FDOT project manager somewhere between the dates of 10/2/02 and 10/8/02 (41 days). The FDOT issued written approval of the handrail shop drawings on 11/8/02.
- D. Drainage Shop Drawing Approval:** The contractor is claiming that it took the FDOT from 8/22/02 until 10/22/02 to approve the drainage shop drawings, a period of 61 days. The contractor actually submitted the drainage shop drawings to the FDOT on 8/28/02, and received them back for correction and re-submittal on 9/10/02, 13 days later. The contractor then re-submitted the corrected shop drawings on 10/2/02, and received approval of the shop drawings on 10/22/02, 20 days later. The contract documents (**5-1.4.7.1**) provide for a 45-day review period for the FDOT to review shop drawings, and the FDOT was well within this time frame on both counts. The contractor’s request for a 28 day time extension is totally without merit.

2. Removal and Replacement of Sidewalk (Sta. 828+13 to Sta. 833+60): The contractor has requested \$25,925.00 for the removal/replacement of 650 LF of sidewalk at the above noted location. The top right edge design elevations of the 5-foot wide sidewalk and the cross-slope grade (2%) are critical to the drainage in this area. The designed drainage is for water to sheet flow over the sidewalk and down the embankment. The contractor was advised that the forms were too high (higher than the miscellaneous asphalt pavement under the guardrail), and that the cross-slope (6%+-) exceeded the design criteria. The contractor elected to pour the sidewalk without corrections to the forms. This allowed water to be impounded between the roadway and sidewalk, and washouts were discovered on 12/26/02. The sidewalk in question had not been accepted by the FDOT, as it had not been constructed according to the plans. On 12/27/02 the contractor was advised to remove and replace the sidewalk, and this work was completed on 1/10/03. In summary, the sidewalk in question was not constructed per plans. Per **SS 8-7.3.2**, the Department will not grant time

extensions to the contract for delays due to the fault or negligence of the contractor. The damage to the non-compliant sidewalk occurred on 12/26/02, 3 days after expiration of the contract time. Per **SS 8-7.3.2**, the Department does not grant time extensions (including weather, recovery, adverse soil conditions, etc.) for events occurring after the expiration of the allowable contract time.

FINDINGS:

Items 1A and 1B (Adverse Soil Conditions and Rain Days Granted) were presented and discussed as one issue since they were closely related.

- FDOT tracked rain days and adverse soil conditions on the project site in accordance with established procedures and granted time accordingly.
- FDOT provided the Contractor monthly with a written summary of the weather related days granted under the contract provisions, and advised the contractor of the 10-day response time to protest. The Contractor submitted no timely responses to this correspondence.
- The Contractor was under the misunderstanding that under the contract, weather days would be “banked” during the course of the project and only considered when the project was complete.
- In the project schedule originally submitted by the contractor, and during the regular progress meetings, the controlling items of work were not identified.
- Many of the major rainfall days requested by the contractor occurred after the contract time had expired.
- The Contractor’s claim for rain days at the job site was based on rainfall recorded at the Orlando Sanford Airport, some 2.5 miles away, which is not necessarily indicative of job site conditions.
- The rain data reported by the contractor was “after the fact”, and is contrary to the contract documents.

Item 1C – Handrail Shop Drawing Approval Delay:

- The handrail shop drawings were submitted by the contractor to the FDOT on August 28, 2002.
- The contractor received a letter from the FDOT approving the handrail shop drawings on November 8, 2002, some 72 days following submittal.
- The contract documents, **Section 5-1.4.7.1**, state in part that the contractor shall, “schedule the submission of shop drawings to allow the Department a 45-day review period.” The approval process by the FDOT exceeded the stated 45-day period by 27 days.

Item 1D – Drainage Shop Drawing Approval Delay:

- This item was voluntarily withdrawn by the contractor prior to discussion.

Item 2. Removal and Replacement of Sidewalk:

- The sidewalk grade and side slope were critical to the surface drainage system as designed.
- 650 LF of the sidewalk was poured too high and with incorrect cross slope to allow for the designed drainage.
- The sidewalk as constructed impeded the flow of water and the resulting undermining caused failure of the sidewalk and considerable washout of the embankment material.
- The Department directed the contractor to remove and replace the sidewalk at his expense.

Item 3. Revision of the Contractor's Performance Rating:

- The Department assured the Board that all of the internal standard guidelines and procedures were properly applied in determining the Contractor's Performance Rating.
- The Department further stated that the rating included contract completion time.

RECOMMENDATIONS:

ITEMS 1A AND 1B (Adverse Soil Conditions and Rain Days Granted)

The Board finds that the Department followed the Contract Documents in these areas and recommends that there is **no entitlement** by the contractor in these issues. The Supplemental Specifications issued for this project, **Section 8-7.3.2, Contract Time Extensions**, fully outlines all of the requirements for contract time extensions. The Department followed these documents.

ITEM 1C (Handrail Shop Drawing Approval Delay):

In this matter the Board recommends that there is **entitlement** by the contractor for the excess days utilized by the Department in the shop drawing approval process. The contractor should rely on the 45-day maximum turn-around period for approval of shop drawings as stated in the contract documents, **Section 5-1.4.7.1**. The Board recommends that the Department negotiate with the Contractor to resolve this issue, recognizing that a time extension for the contract completion may incorporate additional weather days not otherwise granted.

ITEM 2 (Removal and Replacement of Sidewalk):

The Board recommends that there is **no entitlement** by the contractor in this issue.

The Contract Documents state in **Section 5-10.1, Maintenance until Acceptance**, that the contractor is to "Maintain all Work until the Engineer has given final acceptance in accordance

with 5-11.” This is reinforced in **Section 120-10, Maintenance and Protection of Work**, which addresses the maintenance and protection of all earthwork throughout the life of the project. Further, **Section 5-1.4.10, Corrections for Construction Errors**, states that the Contractor is to “carry out all approved corrective construction methods at no expense to the Department. **Section 5-3, Conformity of Work with Contract Documents** further re-states that non-conforming work is to be “removed and replaced at no cost to the Department.” **Section 5-9.2, Failure of Engineer to Reject Work During Construction** states in part that initial failure to reject work in no way prevents the later rejection, once discovery is made by the Engineer. Additionally, **Section 5-7.3, Layout of Work**, states that the Contractor is responsible to establish all layout work necessary to construct the work in conformity with the Contract Documents.

ITEM 3 (Revision of Contractor’s Performance Rating):

The Board finds that there is no entitlement to this internal departmental issue as presented by the contractor. However, the Department stated that the rating procedures are sensitive to contract time of completion. It is recommended that once the impacts of the delays in item 1C, above, are determined, it would then be appropriate for the Department to revisit this item to determine if any changes would be proper based on an adjusted time of completion.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making these recommendations.

Please remember that a response to the RDRB and the other party of your acceptance or rejection of this recommendation is required within fifteen (15) days. Failure to respond constitutes an acceptance of the recommendation.

Respectfully submitted,

FDOT District 5 Regional Disputes Review Board

George W. Seel, Chairman
Michael C. Bone, Member
Jimmy B. Lairscey, Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL BOARD MEMBERS:

George W. Seel
Chairman

