

DISPUTES REVIEW BOARD RECOMMENDATION

HEARING DATE: April 17, 2018

James Wills

The Middlesex Corporation

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Bert Woerner

Metric Engineering

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RE: FPID No. 433830-1-52-10

Contract No. E8P06

Minneola Interchange on Florida's Turnpike

Gentlemen:

The Middlesex Corporation, the Contractor, and their Sub-Contractor, Paff Landscaping Inc., and Metric Engineering, CEI for the Florida Department of Transportation, requested that the Disputes Review Board (DRB) meet to hear both party's position regarding a dispute which arose during the construction of the referenced project. The DRB was asked to make a recommendation regarding entitlement.

The question posed to the Board was:

Is Paff entitled to reimbursement for replanting turf per the specifications?

The DRB received Position Papers and Rebuttals from both parties and on April 17, 2018, the DRB heard both sides discuss the issue. Both parties summarized their positions and rebuttals which are paraphrased here.

Contractor's Position

Minneola Interchange DRB Hearing April 17, 2018

James Wills, for the Middlesex Corporation, and Nick Paff, for Paff Landscaping, Inc., presented the Contractor's Position. The Contractor's position is that they were not negligent in their effort to establish the turf considering the severe drought which constituted an Act of God. As such the Contractor is entitled to be paid for replanting approximately 18% of the sod on the project.

The Contractor's position is that they provided as much water as they could, much more than normal and could not have avoided having to replace large areas of sod due to the drought which was beyond their control. The Contractor stated watering efforts were performed by use of two water trucks using both water cannons and hoses. During rebuttals their effort was described as "extraordinary". Also, we were told that some sod was replaced at no cost to the Department and that some replanting is expected.

The Contractor discussed another claim unrelated to this project which they introduced to demonstrate that in another instance the Department considered the drought an Act of God and provided the Governor's Executive Order #17-120 dealing with Emergency Management/Wildfires.

Additionally, the Contractor referenced Standard Specification 7-14 as allowing the Department to pay for the repair of damage beyond the control and without negligence by the Contractor and specifically mentions Acts of God.

Department's Position and Rebuttals

Minneola Interchange DRB Hearing, April 17, 2018

Bert Woerner and Ed DeCresie, Metric Engineering, CEI for this project, made the majority of the position presentation for the Florida Department of Transportation (Department). There was additional input from the Department's John Ford, Pete Nissen, and Bill Sears. The Department's position is that the Contract requires the Contractor to provide sod turf at final acceptance which meets Standard Specifications 981 for Turf Materials and 570 for Performance Turf. The Department presented documentation showing that starting about October 2016 concerns were expressed that the sod being placed did not appear to be getting established. Most of their documentation was in the form of Progress Meeting minutes and photographs showing sod which appeared distressed much planted in the Fall of 2016. Their Summary Timeline showed concerns for the turf were shared in an email to the Contractor on October 14, 2016 and became a regular discussion at Progress Meetings. On November 30, 2016, an example of Deficient Sod Areas was sent to the Contractor. On January 5, 2017, the Department requested the Contractor provide a Remedial Action Plan. Dates were shown from January, February, March, April, and May, 2017, where the Department updated the Deficient Sod Areas and requested the Remedial Action Plan. On May 4, 2017, the Contractor provided a Remediation Plan. On June 12, 2017, the Department received the Notice of Intent from the Contractor to file a claim for additional compensation for relaying sod in some areas.

The Department's position is that much of the sod placed on the project did not meet Standard Specification 981 and was not adequately watered or fertilized to provide turf meeting Standard Specification 570. Photos were shown demonstrating the poor sod condition and the CEI testified that they never saw hoses used to water the sod and many areas exceeded the reach of the water cannons.

The Department believes the Contractor was negligent in his effort to establish the turf. Additionally, the Department does not believe that the drought conditions were an Act of God and also contends that the claim on another project presented by the Contractor has no relevance to this matter.

DRB Findings

Minneola Interchange DRB Hearing

Each Party referenced the same contract specifications to support their respective positions, namely 570 Performance Turf, 7-14 Contractor's Responsibility for Work and 981 Turf Materials.

570 Performance Turf – The pertinent part of this specification which addresses additional payment for replanting is in subarticle 570-3.1 where it states:

“The Department will only pay for replanting as necessary due to factors determined by the Engineer to be beyond control of the Contractor.”

It was agreed by both parties that weather conditions, in this case a drought, are beyond the control of the Contractor. However, the Board finds what is within the control of the Contractor is his means and methods to deal with the weather conditions. The Contractor included as part of his Position Paper a document titled “Bahagrass for Florida Lawns”. Although there was reference to this document in the Contractor's Position Paper related to average time for sod to be established, it was evident, based on questions by the Board, the Contractor was unfamiliar with its content related to watering volumes for establishing turf. The Contractor included in his Position Paper a chart showing the monthly volume of water used to prove his “extraordinary” efforts to water the turf. The month of January 2017 showed the maximum volume used at 11.72 gallons per square yard. When asked how this volume compares with the guidelines in the Bahagrass for Florida Lawns he was unable to satisfactorily answer. Further, the Department's Engineer and his on-site inspector testified due to the long distance some turf was from access roads the use of water cannons was insufficient in their reach. They stated they never saw the use of water hoses or other methods by the Contractor to satisfactorily water hard-to-reach places. No evidence was provided by the Contractor to support his statements related to the use of water hoses.

7-14 Contractor's Responsibility for Work – The pertinent part of this specification addressing the Department reimbursing the Contractor states:

“The Department may, at its discretion, reimburse the Contractor for the repair of damage to the Work not caused by a third party and due to unforeseen causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to Acts of God, of the public enemy, or of governmental authorities”.

First, the Board finds the discretion for reimbursement lies with the Department. This discretion is not unlimited but confined to whether or not the damage was or was not due to the negligence of the Contractor. The Board finds that the Department expressed concerns that the sod was not living well before any drought conditions were discussed by either party. As such it was well known to the Contractor that his efforts may not be adequate. Additionally the Board finds an apparent inadequacy to the watering methods and volume employed by the Contractor based on him being unable to correlate the actual volume of water used to the recommendation of accepted standards. The Board also finds that after several months of Department concern, the Contractor was able to deliver sod of much better quality proving his ability to control the product.

Much discussion was held by both sides as to whether or not the drought condition was considered an “Act of God”. However, this is a moot point due to the phrase within the specification which states *“including but not restricted to Acts of God”* [emphasis added].

Further, as related to the Supplemental Agreement from a separate Department project which was provided to the Board in the Contractor's Position Paper; this was used by the Contractor to support their position to show the Department modified a contract due to the same drought condition. The Board finds that Supplemental Agreement has no relevance on the facts in this dispute.

981 Turf Materials - The referenced portion of this specification by the Contractor is 981-1 which states in part the sod shall meet Florida Department of Agriculture requirements and be approved by the Engineer before installation. The Contractor stated the Engineer never rejected any sod deliveries. This was confirmed by the Engineer when asked by the Board. However, the Board finds the Engineer provided numerous, well documented notification to the Contractor of his concern related to the condition of sod being delivered well before the start of the drought. This was met with a response by the Contractor that sod often looks brown when delivered and initially placed and let's wait and see. The Engineer's concerns continued over several months and culminated with both the Engineer and Contractor visiting sod fields. Further testimony revealed the Engineer relied on the experience and expertise of the Contractor so as not to reject deliveries when the Contractor continued to give reassurances that the sod will be established.

Board Recommendation
Minneola Interchange DRB Hearing

We find the Contractor was negligent in his methods for providing and establishing turf and as such the Department is within its discretion to not provide reimbursement for replanting. Therefore, the Contractor is not entitled to additional compensation.

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 the recommendation by the non-responding party.

Respectfully submitted,



Jim Weeks, P.E. Chairman

I certify that I participated in the Hearing of the DRB regarding the Dispute indicated above and concur with the findings and recommendation.

Edwin J. Mackiewicz III, P.E, Member

Paul Harkins, Member