

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

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Ref: New Interchange at SR 710 and SR 91 (Florida Turnpike), Fin No.: 232-2-52-01,
Contract No.: E8F00

Gentleman:

Bergeron Land Development, Inc. (Bergeron) requested a Disputes Review Board (Board) hearing for their subcontractor Southwide Industries (Southwide) and the Florida Department of Transportation Turnpike Enterprise (Turnpike) agreed a hearing would be appropriate. The hearing was to determine if there was entitlement to payment for thermoplastic pavement marking removal work performed on April 25, 2005, on Jog Road under contract pay item 711-7. A hearing was held on August 29, 2005, in the site office of H.R. Eisman & Russo (Eisman) concerning this issue. Both sides presented their case to the Disputes Review Board (Board). The hearing continued until both parties had fully presented their sides of the issue and the Board fully understood the issue. The following discussion will detail both parties positions on the issue and present the Boards findings and recommendation.

CONTRACTORS POSITION

Southwide contends that they preformed removal of thermoplastic pavement marking on Jog Road to allow for the realignment of traffic so that work could proceed according to the traffic control plan. A portion of this work was preformed on the section of Jog Road that was to be completely rebuilt, and the rest on the portion of Jog Road that was to be milled and resurfaced.

The following is Southwide's position as taken from their letter to Bergeron dated November 1, 2005:

“On April 25, 2005, we mobilized to the Jog road transition site just south of Beeline (SR 710) Highway.

SWI had on sight a Pavement Marking crew and a Hydro blasting crew as required by contract.

We conducted the Hydro blasting and installed the new transition pattern as instructed by Bob of Eisman Russo.

We submitted our invoice on the monthly cut off date of May 15, 2005, as required for DOT work.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

We were advised by you that Eisman Russo was refusing to pay our contracted price. We held a meeting with Eisman Russo, Bergeron and SWI to discuss this matter. The outcome was That E&R would not pay our item 711-7 as contracted.

I discussed in great detail the issue of the none payment with the owner of SWI (John Biermann) and we decided in the "spirit of cooperation" to offer a deduction in the price of item 711-7 which would have dropped E&R's pay amount by \$13,300.00. Additionally, we agreed to lower our item price for the balance of the work left to be completed. They refused our offer.

We believe that their decision to withhold the funds that are rightfully due SWI is immoral and unethical. They as the CEI's must have been aware of the prices for the items to be performed on their job. Why then would they not bring this issue up prior to us doing the work. Why would they not notify SWI that they intended not pay this item as contracted? And why did SWI have to call after receiving the partial release that was substantially lower than what is due to find out that E&R was not going to pay for contacted work completed?

SWI has done all work as requested in a timely and professional manner.

We see no reason why E&R should have the right to withhold our money for work completed and accepted as per our contract agreement with Bergeron.

We are not a large business and the funds that E&R has withheld has seriously jeopardized SWI's relationship with its vendors and has placed a burden on this company's finances.

Our position is as follows: We did the work, we have a signed contract with established unit prices, pay SWI the work performed at the contract unit price.

If E&R wants SWI to renegotiate the price of item 711-7, then they should be willing to renegotiate all the pay items for SWI. As you are aware they refused to even discuss that option.

Unfortunately, we are left with no alternative but to pursue this matter with the DRB."

During the hearing Southwide stated that they prepared their bid based upon the bid tabs provided by the Turnpike. Southwide further stated that it was their practice to base the bid upon the bid tab items, and to use the same unit price for each division of the bid tabs as if they were detailed only under one division. Southwide's contention being that they have always been paid for identical pay items under various divisions if there was a contract unit price under only a single division. In the present case there is a pay item listed in the Signing and Marking Plans for item 711-7 PAVT MARKING REMOVE THERMOPLASTIC. Therefore, Southwide contends they are due payment for removal of the Thermoplastic Pavement Markings because there is a payment item for it in the contract.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

Southwide also points to the pay item note on sheet number 19 of the contract plans and contends that item 711-7 is quantified so they should receive payment. The note reads as follows:

102-1 The Lump Sum payment shall include all traffic control coordination, personnel, and equipment necessary for maintenance of traffic during roadway and bridge construction, except for the following items:

102.14 Traffic Control Officer

102-74-1 Barricade (Temporary) (Drum)

102-99 Variable Message Sign (Temporary)

All other items (signs, attenuators, temporary pavement, temporary concrete barrier wall, temporary reflective pavement markers, lights, striping, etc.) are quantified with payment included in 102-1.

Southwide contends that they have met all the requirements of the specifications for payment under pay item 711-7. They have removed thermoplastic pavement markings, detailed the quantities of removal and the work is excluded from payment under the payment item for Maintenance of Traffic (MOT) because there is a payment item specifically provided under another contract item.

Southwide contends that the removal of thermoplastic pavement markings is covered under other items, i.e. the Signing and Pavement Marking Plans and, therefore, they should be paid for the removal of thermoplastic pavement marking under pay item 711-7.

During the hearing Southwide stated that he did not low ball all the other striping bid items knowing he would make a profit on pay item 711-7, as stated in the Department's position statement.

DEPARTMENT POSITION

The Department contends that since there is no mention of item 711-7 in sections other than Section 0005 Signalization that the removal of thermoplastic pavement markings is included within the MOT payment and is not a separate pay item.

The Department's position is as follows:

"Scope of Work

The contract plans provide for improvements to Palm Beach County owned Jog Road. The existing north-south two lane road will be widened to four lanes, divided roadway. The widened road will continue north, cross SR 710 "Beeline Hwy" and become the Connector Road toll access to the Turnpike.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

Contract Plans

Traffic Control Plan

The Phase I - Jog Road Traffic Control Plan provides for the realignment of traffic from station 608+48 to 615+85. Traffic is basically pushed to the west to allow for construction of the new northbound roadway.

The existing southbound dedicated left turn lane for the Ironhorse Community becomes the southbound thru lane. The existing southbound thru lane becomes the temporary northbound lane. The existing northbound lane is removed and reconstructed.

Plan sheets 282 and 283 details the planned temporary striping for Jog Rd Phase 1. Striping removal is detailed for neither location nor material. The TCP plan does not quantify striping removal.

Pay Item Application

Pay Item Notes on contract plan sheet 19; 102-1 The lump sum payment shall include all traffic control coordination, personnel, and equipment necessary for maintenance of traffic during roadway and bridge construction, except for the following items:

- 102-4 Traffic Control Officer
- 102-74-1 Barricade (Temporary) (Drum)
- 102- 99 Variable message Sign (Temporary)

All other items (signs, attenuators, temporary pavement, temporary concrete barrier wall, temporary reflective pavement markers, lights, striping, etc.) **are quantified with payment included in 102-1.**

Pay Item Quantification

*Signing and Pavement Marking

Contract plan sheet S-5, Tabulation of Quantities, provides the summary of the Signing and Pavement Marking Pay Items and identifies the quantity breakdown and appropriate plan sheets on which each item can be found. The total quantity to be applied is 30 LF; (2) 24" Stop Bars each 15'. The Signing and Pavement Marking Plans, sheet S-21, shows that the intersection of the Connector Rd at Ramps B and C is STOP sign controlled. The following contract work pay items are identified:

Signing and Pavement Marking Plans sheet S-21

- Apply pavement marking for 24" Stop Bar at station 221+35 +/- Ramp B, (15')(paint).
- Apply pavement marking for 24" Stop Bar at station 650+80 +/-Connector Rd, (15')(paint).

*Signalization

Contract plan sheet T-2, Tabulation of Quantities, provides the summary of the Signalization Pay Items and identifies the quantity breakdown and appropriate plan sheets on which each item can be found. The total quantity to be removed is 30 SF; (1) 24" Stop Bar at 15'.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

Signalization Plans sheet T-7; Plan Note 3; "The signal design for this intersection is for future installation." The intersection of the Connector Rd at Ramps B and C in the future will be SIGNAL controlled. Due to sight distance criteria the STOP BAR location is moved from the STOP sign controlled to the SIGNAL controlled. The following future work pay items are identified:

- Pay Item 711-1 Pavement Marking Remove (Thermoplastic); 30 SF; located at Station 221+35 +/- Ramp B.

Timeline

4/20/05 - The CEI Project Administrator met with Bergeron Land Development and Southwide Industries regarding plan layout for MOT striping on Jog Rd for Phase I. A request was made by Southwide Industries to simplify the striping layout for ease of installation in the transition area from the tie into the existing roadway alignment and across the Ironhorse Community Entrance. The entire existing gore area is to be removed. The striping will tie back into the existing prior to the east side entrance to Palm Beach County Sheriff Department North County substation.

4/21/05 - An e-mail identifying the request for a field change was sent to the CEI Sr. Project Engineer, the Engineer of Record and the Turnpike Project Manager. Station limits and control points were identified.

4/25/05 - Southwide Industries mobilized to the project to perform the pavement markings on Jog Rd, Phase I. Thermoplastic striping removal was performed by an uncertified subordinate subcontractor "Precision Hydro Blasting, Inc." The Project Administrator notified the contractor that the certification for subordinate subcontractor had not been submitted and was assured that the sublet would be forthcoming. The existing thermoplastic was partially removed leaving approximately one third of the existing gore area. Temporary paint pavement markings and reflective pavement markers were applied by Southwide Industries, Inc.

Subletting or Assigning Contracts

The Standard Specifications for Road and Bridge Construction - 2004 Edition, Section 8, subarticle 8-1.1, pp. 71 - 72, General: "...If the contractor chooses to sublet any portion of the Contract, the Contractor must provide a written request to sublet work on the Certification of Sublet Work form developed by the Department for this use. With the Engineer's acceptance of the request the Contractor may sublet a portion of the work accordingly..." Precision Hydro Blasting, Inc. has not been submitted as required per specification.

CEI Request for Sublet Compliance

At the Weekly Project Meeting on April 27, two days after the work in question, the CEI stated concern regarding subordinate subcontractor work without Certifications to Sublet Work (i.e. JE Hill, temporary barrier wall; *Precision Hydro Blasting, Inc., pavement marking removal*; A&R, directional boring). The CEI requested submittals for the above

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

subordinate subcontractors. Certification of Sublet Work form providing written request to sublet work to Precision Hydro Blasting, Inc, has not been submitted.

Pay Item Analysis

- All FDOT pay item structures are set up into different categories, project specific (i.e. structures, roadway, lighting, signalization & pavement markings, landscaping, etc.)
- The same pay item may and will show up in different categories (i.e. pull & junction boxes, Traffic Level C asphalt, optional base, etc.).
- The same pay item can and will be bid upon differently based upon the category that it is utilized for (i.e. \$56/ton for roadway vs. \$324/ton for toll plaza of Traffic Level C asphalt).
- The contractor can not perform work under one category and expect payment for that work under another category. (i.e. paying for a signalization pull box under the lighting category pay item. It is the same item of work being performed using the same pull box, but the intention is for different uses.)

Examples of the same pay item being used under this contract but under different categories:

Pay Item	Description	Category	Price	Category	Price
160-4	Type B Stabilization	Roadway	\$5.50 / SY	Architectural	\$5.00 / SY
285-704	Opt. Base Group 04	Roadway	\$5.40 / SY	Architectural	\$10.00 / SY
334-1-13	Superpave TL C	Roadway	\$56.00 / TN	Architectural	\$324.00/TN
400-1-15	Misc. Conc. Class I	Roadway	\$1,600.00 / CY	Lighting	\$475.00 / CY
520-5-21	Traffic Sep. (Type 2)	Structures	\$64.00 / LF	Roadway	\$23.00 / LF
522-1	Sidewalk (4" Thick)	Roadway	\$23.00 / SY	Architectural	\$25.00 / SY
635-1-11	Pull & Junction Boxes	Roadway	\$345.00 / EA	Signalization	\$295.00 / EA
649-440	Mast Arm (Special)	Signing	\$16,280/ EA	Signalization	\$29,160/ EA
700-40-1	Single Post Signs	Signing	\$2 1 0.00 / AS	Signalization	\$750.00 / AS
700-46-11	Exist. Sign Removal	Signing	\$22.00 / AS	Signalization	\$22.00 / AS

Project Specific Pay Items

- The pay item in question is pay item 711-7 Pavement Marking Remove(Thermoplastic) and listed under the category of Signalization.
- The contract plans show exactly what this pay item is to be used for with a specific location of where it is to be used.
- The firm that performed this work is not an approved subcontractor or subordinate for this project. Work performed by an unapproved subcontractor or subordinate should not be accepted.
- The work performed that is in dispute was the removal of the thermoplastic on Jog Road as part of Phase I or II of the Traffic Control Plan. This work should be paid for under Lump Sum MOT.

To allow payment for an item of work performed under one category and paid under a different category is contradictory to the intent of the pay item category system. Furthermore this will set a dangerous precedent of allowing contractors to "pick and choose" between the differing pay item categories and differing unit prices. With this knowledge contractors could knowingly unbalance bids.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

The subcontractor has stated that he low balled all of his other striping bids knowing he would make a profit on this pay item in question (711-1). The following table shows what the bids were on this project based on the averages.

Pay Item	Description	Area Average	Statewide Average	Project Bid
2-102-78	Marker Pavement Reflective (Temporary)	\$2.24	\$2.85	\$3.30
2-102-911-2	Pavt. Marking Removable (White/Black) (Solid)	\$1.20	\$1.25	\$1.35
2-102-912-2	Pavt. Marking Removable (Yellow) (Solid)	\$1.22	\$1.29	\$1.35
2-705-10-11	Marker Object (Post Mount) (Type I)	\$53.66	\$84.75	\$62.00
2-705-71	Delineator Tubular (Flexible)	\$42.18	\$45.33	\$45.00
2-710-5-2	Guide Lines (Paint) (Yellow)	\$0.50	\$0.58	\$0.38
2-710-6	Directional Arrows, Painted	\$23.15	\$24.28	\$27.00
2-710-7	Pavt. Messages Painted	\$48.07	\$48.83	\$43.00
2-710-23-61	Traffic Strip Solid (White/Black) (6")	\$761.19	\$608.49	\$680.00
2-710-24-61	Traffic Strip Solid (Yellow) (6")	\$770.22	\$611.09	\$680.00
2-710-25-241	Traffic Strip Solid (White/Black) (24")	\$1.36	\$1.57	\$1.60
2-710-26-181	Traffic Strip Solid (Yellow) (18")	\$0.71	\$0.99	\$1.00
2-710-27	Traffic Strip Skip (White/Black)	\$0.22	\$0.31	\$0.35
2-710-28	Traffic Strip Skip (Yellow)	\$0.49	\$0.33	\$0.35
3-705-1	Delineator Single Unit	\$59.18	\$42.63	\$82.00
3-706-3	Retro-Reflective Pavement Marker	\$3.49	\$3.53	\$4.30
5-711-7	Pavt. Marking (Thermoplastic)	\$1.53	\$0.51	\$38.00
5-711-35-241	Traffic Stripe Solid Thermoplastic (White) (24")	\$5.92	\$2.44	\$3.00

**The Area Wide Averages were taken from the Department's website for Broward and Palm Beach Counties for the period of Jan. 2003 through Jan. 2005.

** The Statewide Averages were taken from the Department's website for the period of Jan. 2003 through Jan. 2005.

DISPUTE REVIEW BOARD FINDINGS

Southwide did partially remove the thermoplastic pavement markings from the Gore area on Jog Road to facilitate the movement of traffic through that area.

The bid tabs detail the quantity of work to be done under each specification section, and item 711-7 is detailed under Section 0005 Signalization, the specification section under which it is to be performed.

The contract plans for the area in question (Plan Sheets 282 and 283) do not indicate any removal of thermoplastic pavement markings.

The contract plans do indicate removal of thermoplastic pavement markings on plan sheet T-7.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

The various sections of the specifications are outlined below with the pertinent language in italics.

711-1 Description

Apply thermoplastic traffic stripes and markings, or refurbish existing thermoplastic traffic stripes and markings, in accordance with the Contract Documents and *remove traffic stripes and markings as required.*

711-7 Method of Measurement

The quantities to be paid for under this Section will be as follows:

- d) *The area, in square feet [square meters], of Remove Existing Markings (Thermoplastic) acceptably removed.*

The specifications describe Section 102 Maintenance of Traffic as follows:

102-1 Description

Maintain traffic within the limits of the project for the duration of the construction period, including any temporary suspensions of the work. Construct and maintain detours. Provide facilities for access to residences, businesses, etc., along the project. Furnish, install and maintain traffic control and safety devices during construction. Furnish and install work zone pavement markings for maintenance of traffic in construction areas. Provide any other special requirements for safe and expeditious movement of traffic specified in the plans. Maintenance of Traffic includes all facilities, devices and operations as required for safety and convenience of the public within the work zone.

Do not maintain traffic over those portions of the project where no work is to be accomplished or where construction operations will not affect existing roads. Do not obstruct or create a hazard to any traffic during the performance of the work, and repair any damage to existing pavement open to traffic.

Include the cost of any work necessary to meet the requirements of the Contract Documents under the MOT pay item, *where there is not a pay item provided.*

102-13 Basis of Payment

102-13.1 Maintenance of Traffic (General Work): When an item of work is included in the proposal, price and payment will be full compensation for all work and costs specified under this section *except as may be specifically covered for payment under other items.*

The pay item note on plan sheet number 19 states as follows:

102-1 The Lump Sum payment shall include all traffic control coordination, personnel, and equipment necessary for maintenance of traffic during roadway and bridge construction, except for the following items:

- 102.14 Traffic Control Officer
- 102-74-1 Barricade (Temporary) (Drum)
- 102-99 Variable Message Sign (Temporary)

All other items (signs, attenuators, temporary pavement, temporary concrete barrier wall, temporary reflective pavement markers, lights, striping, etc.) *are quantified with payment included in 102-1.*

Item 711-7 is not quantified under the Maintenance of Traffic Pay item breakdown, but is quantified under the Signalization pay items.

DISPUTE REVIEW BOARD RECOMMENDATION

September 6, 2005

DISPUTE REVIEW BOARD RECOMMENDATION

The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and the contract. The Board has carefully reviewed all the information presented at the hearing held on August 29, 2005, and the written position papers and their backup documentation presented by the Department, Bergeron and Southwide. Therefore, our recommendation is based on all of the above documents and our findings.

The Board finds no entitlement to the Contractor for removal of thermoplastic pavement markings for roadway MOT work under pay item 711-7 Pavement Marking Removal (Thermoplastic) as listed in Section 005, Signalization pay items.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making these recommendations. The Boards 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 Board and the other party of your acceptance or rejection of the recommendation is required within 15 days. Failure to respond constitutes an acceptance of the recommendation by the non-responding party.

I certify that I have participated in all the meetings of this Board regarding these issues and concur with the findings and recommendation.

Signed by the Chairman with the concurrence of all Committee members:

John C. Norton, P.E.
Chairman

Don Henderson, P.E.

Francis R. Chin