

DISPUTE REVIEW BOARD

May 28, 2008

Teresa Driskell, P.E.
Senior Engineer
PBS&J Construction Services Inc.
9055 Americana Road
Suite 24
Vero Beach, Florida 32966

Michael P. Hamm
Division Engineer
Elmo Greer & Sons, LLC
16505 State Route 60
Vero Beach, Florida 32966

Financial Project No(s): 22859615201, 22859515201, 22859715201
Federal Aid Project No(s): 2004041P, 2004040P
Contract No: 21457
County: Indian River
Description: SR60 (Osceola Boulevard) from MP 14.624 to MP 19.154, MP 10.154 to MP 21.998 and MP 11.657 to MP 14.625.

Dear Madam/Sir,

On March 18, 2008 Elmo Greer & Sons, LLC requested a Dispute Review Hearing on the Following issues:

1. Additional Contract Time for Caracara Bird Suspension
2. Directed Extra Work-Asphalt Rutting Repair
3. Directed Extra Mitered End Sections

The hearing was held May 15, 2008.

Please find attached the Position Papers and the Dispute Review Board Recommendations.

Board Recommendations

Issue 1. Additional Contract Time for Caracara Bird Suspension.

Based on the position papers and presentations to the Board at the DRB hearing, the Board finds EGS **has entitlement for this issue.**

The stop work order issued by the Engineer on 02/27/03 disrupted and delayed the Contractor's efforts to procure the necessary material for the prosecution of the work. The Board feels the Contractor had no control over the cause of the stop work order as EGS was acting in good faith attempting to prosecute the contracted work to the best of their abilities. FDOT's issuance of a stop work order at the pit to allow time for their preparation of a management plan for review and approval by the USFWS was not caused by the Contractor, but by the unanticipated presence of the endangered species (Crested Caracara).

Issue 2. Directed Extra Work - Asphalt Rutting Repair.

Based on the position papers and presentation to the Board at the DRB hearing, it has not been proven by either party the cause of the Asphalt Rutting; however, the DRB offers the recommendation with comments:

- A. The Specifications and other pertinent documents had been followed and accepted through all items of construction, i.e. embankment, stabilization and sub base at the time of placing the structural asphalt. There were no known defects of rejected materials that either party acknowledged prior to placing the structural asphalt per the contract documents.
- B. The Asphalt was in place and open to traffic approximately 22 months (structural course only).
- C. Asphalt Rutting repair occurred in the wheel paths of the traveled lanes and resulted in an out of tolerance condition prior to placement of the friction course. FDOT ordered the asphalt be repaired. The Contractor offered to repair the rutted areas at his cost but his method of repair was rejected by the Engineer.

The Board believes there is a dual responsibility by the parties, the Contractor must bring the ruts to plan and specification requirements, but the Board believes the Contractor is not responsible for milling and replacement of structural asphalt as required by the Engineer's order to remove and replace a 12 foot width where most of the asphalt was in tolerance. The Board's Recommendation is EGS **has entitlement for milling and replacement for the part of the 12 foot width that was in tolerance and compliance at the time of the repair that was ordered removed by the Engineer.**

Issue 3. Directed Extra Work Mitered End Sections.

The Board Recommends **no entitlement** on this issue. The Contractor must produce a completed MES Section that is acceptable to the Engineer and built according to plans and Specifications.

This Board appreciates the cooperation of all parties and the information supplied for its review in making a decision in these disputes. The DRB would remind you that the parties are not precluded from negotiating an equitable adjustment to any issue.

Please respond to the DRB and the other party of acceptance or rejection of this recommendation in the required 15 days. Failure to do so constitutes acceptance of this recommendation by the non-responding party.

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

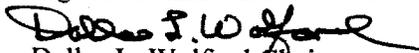
Respectfully submitted,
Disputes Review Board

Dallas L. Wolford DRB Chairman

Mark Puckett DRB Member

John Swengel DRB Member

Signed for and with the concurrence of all members.


Dallas L. Wolford Chairman



REX GREER, PRESIDENT
JERRY GREER, VICE PRESIDENT
ELMO LEE GREER, VICE PRESIDENT
GREG GREER, C.O.O., CONCRETE DIVISION
J. TODD GREER, C.O.O., ASPHALT DIVISION
LEE A. ANDERSON, P.E., CHIEF ENGINEER
TOM L. CAUDEL, P.E., ENVIRONMENTAL ENGINEER
MICHAEL P. HAMM, FLORIDA DIVISION ENGINEER
GARY L. TAYLOR, P.E. L.S., C.O.O., GRADE DIVISION

April 30, 2008

Dispute Review Board Members
Dallas Wolford, Chairman
387 Winslow Court
Heathrow, FL 32746

RE: Financial Project No(s): 22859815201, 22859915201, 228601
Federal Aid Project No(s): 2004 041 P, 2004 040 P, 2004 042 P
Contract No: ~~74003~~ 21457
County: Indian River

Contractor Position on Delay for Caracara Suspension, Asphalt Rutting, and Mitered End Section Replacement

Dear Mr. Wolford:

EGS is requesting that the Board consider the following information and render a recommendation for three disputes, which have arisen on the above referenced Project. At this time, EGS is asking the Board to limit their consideration to entitlement only.

I. Additional Contract Time for Caracara Bird Suspension

Upon award of the contract, EGS began the permitting process for material sources for the required embankment material for the Project. Some of the required permits included a Tree Removal and Land Clearing Permit in addition to the Mining Permit for the Gulfkist borrow pit. It had been requested that PBSJ perform the required Wildlife Analysis, as required by their contract, at the time the permit was submitted to avoid any potential conflict and also avoid a delay to the Project.

EGS obtained the Tree Removal and Land Clearing Permits in February 2003 and began work immediately thereafter. This commencement of EGS' work at the Gulfkist borrow pit coincided with the onset of EGS's efforts to remove the substantial volume of muck found in the surcharge areas of the Project. As the material excavated from the Gulfkist borrow pit would be serve as replacement fill, embankment and surcharge, the Gulfkist borrow pit work was a controlling item of work for the Project.

Unfortunately, EGS's work in this area was suspended via letter from Ernie Dobbs on 2/27/03. PBS&J issued its order as a result of the discovery of a Caracara Bird in the vicinity of the Gulfkist borrow pit. The suspension for the Caracara bird remained in place for 55 days (2/27/03 through 4/22/03) and two weather days were granted during this period, which results in a 53-day delay to the completion of the Project.

Section 8-7.3.2 of the special provisions is mandatory in its direction that the Engineer must provide the Contractor with a time extension when the Engineer suspends the Contractor's operations due to no fault of the Contractor. Section 8-7.3.2 provides, in pertinent part, as follows:

Whenever the Engineer suspends the Contractor's operations, as provided in 8-6, for reasons other than the fault of the Contractor, the Engineer **will** grant a time extension for any delay to a controlling item of work due to such suspension.

FDOT cannot deny that it ordered a suspension, that the suspension was for reasons other than the fault of EGS, or that the work was a controlling item of work. Having satisfied these three conditions, the Engineer is left with no discretion but to grant EGS a time extension for the entire period of the suspension. EGS has established its entitlement to a time extension as a result of this issue.

Despite the above, FDOT has granted no time as a result of this ordered suspension. In an attempt to justify its stubborn refusal to acknowledge the plain, mandatory contract language, FDOT has attempted to create a requirement for a suspension-related time extension that simply does not exist in section 8-7. In its March 17, 2008 letter denying EGS's Certified Claim in its entirety, FDOT stated, in part, as follows with respect to the ordered suspension:

During the suspension period between 2/27/03 to 4/22/03 the Contractor submitted CPM schedules had positive float, therefore, there was no delay to the contract completion date as is required by Standard Specification (SS) 8-7 in order to grant time.

However, nowhere in section 8-7 does the contract make a delay to the Project completion date an additional requirement for the granting of a time extension for an ordered suspension. Clearly no such requirement is attached to the mandatory language that is specific to the issue discussed above, nor does such a requirement appear anywhere in section 8-7 of the 2000 Edition of the Standard Specification for any time extension (a copy of which is attached to this letter). A delay to a controlling item of work is required by section 8-7 for a delay and a suspension – an actual extension of the project completion date is not.

FDOT ordered a suspension due to no fault of EGS, that suspension delayed the controlling items of work. EGS is entitled to an extension of time and FDOT has no discretion on the issue.

II. DIRECTED EXTRA WORK – ASPHALT RUTTING REPAIR

In early 2007, the Project, already significantly into liquidated damages, was nearing completion as friction course placement was underway in the westbound traffic lanes. As of January 9, EGS and PBS&J were forecasting completion of the entire project by March 2.

In mid-January, however, FDOT directed EGS to repair certain asphalt in the eastbound travel lanes due to allegedly out-of-tolerance conditions. More specifically, FDOT directed that any rutting in excess of 1/4 inch would have to be removed and replaced prior to the placement of friction course, and final acceptance.

EGS disputed the necessity and extent of the directed repairs and denied any responsibility. Nevertheless, EGS offered to perform in accordance with FDOT's direction if FDOT would agree to make additional payment to EGS for the extra work and associated delay. On February 23, FDOT rejected this offer and directed EGS to proceed with the repair as previously ordered. EGS believed that the scope of repair was unnecessary and excessive and that it constituted economic waste to remove and replace the asphalt in question. To that end, EGS engaged FDOT representatives at the District level, and higher, in an attempt to (1) convince FDOT that the directed repairs were unnecessary, as the rutting could be sufficiently addressed during the placement of friction course or (2) reduce the scope of the repair. EGS contacted Ken Murphy of Asphalt Technologies, to view the Project and he was of the opinion that the rutting could be remedied during the placement of the FC5.

Traffic was switched to the westbound roadway on March 15, and the controversy surrounding the rutting repairs began to directly delay Project completion. On April 3, EGS requested permission to place friction course on the eastbound roadway in the subject area; FDOT rejected that request on April 9. Ultimately, FDOT did agree to reduce the scope of the required replacement, which mitigated the ultimate cost of the operation, but not the delay.

III. DIRECTED EXTRA WORK FOR MITERED END SECTIONS

EGS's scope of work included installing mitered end sections ("MES") on the Project. Steel bolts, or "embedded items," designed in the concrete serve as anchors for bars covering the MES opening. The bars keep larger animals out of the MES and prevent damage to the MES.

EGS subcontracted all MES work on the Project to Sheltra & Son Construction Co., Inc. ("Sheltra"). As the Project progressed through mid-2005, FDOT oversaw, inspected, approved and paid for Sheltra's MES work, including forming and pouring related concrete. FDOT verbally notified EGS that Sheltra had not poured the concrete around the embedded items on some of the MES's and demanded that EGS correct this "defective" work.

Under the Standard Specifications, EGS was required to "[p]erform all work . . . in reasonably close conformity with the lines, grades, cross-sections, dimensions, and material requirements, including tolerances, as specified in the Contract Documents." See Std. Specs. § 5-3. This requirement notwithstanding, however, FDOT may not require a contractor to engage in economic waste, even if the contractor's work is **not** as specified in the Contract Documents:

In the event that the Engineer finds that the Contractor has used material or produced a finished product that is not in reasonably close conformity with the Contract Documents, **but that the Contractor has produced reasonably acceptable work**, the Engineer will determine if the Department will accept the work in place. In this event, the Engineer will document the basis of acceptance by Contract modification, which provides for an appropriate reduction in the Contract price for such work or materials included in the accepted work as deemed necessary to conform to the determination **based on engineering judgment**.

Std. Specs. § 5-3 (emphasis added).

On June 10, 2005, EGS proposed an alternative to destroying Sheltra's MES work. At no cost to FDOT, EGS proposed to drill 1-inch holes into the concrete, insert the 5/8-inch galvanized steel embedded items and secure the embedded items with a durable, industrial-grade epoxy (Sikadur 32, Hi-Mod). EGS's proposal was consistent with the FDOT Standard Specifications. See Std. Specs. § 926-1.

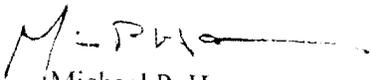
While FDOT deliberated, EGS took the proactive step of engaging, at EGS's sole expense, a bridge design engineer to evaluate EGS's proposal. On October 28, 2005, EGS transmitted the engineer's findings that EGS's proposed solution was appropriate to meet Project requirements. Therefore, under Section 5-3, EGS could produce a "reasonably acceptable" result without the economic waste associated with removing and replacing Sheltra's MES work.

On November 7, 2005, PBS&J implied that FDOT would accept EGS's cost-neutral (to FDOT) solution. See T. Wedeman Letter to EGS, November 7, 2005. EGS again took the initiative while FDOT's decision was pending and submitted shop drawings for MES repair on November 16, 2005. FDOT allowed the issue to languish for almost a year before ultimately rejecting EGS's proposal. On August 31, 2006, FDOT directed EGS to remove and replace 38 MES's for missing embedded items.

Conclusion

EGS sincerely appreciates the consideration of the Board and respectfully requests that the Board render its opinion on the listed items.

Sincerely,
Elmo Greer and Sons, LLC


/Michael P. Hamm
Division Engineer

File:496C

Xc: Board Members, Lee Anderson (EGS), Todd Greer (EGS), Brad Copenhaver (VLP)



REX GREER, PRESIDENT
JERRY GREER, VICE PRESIDENT
ELMO LEE GREER, VICE PRESIDENT
GREG GREER, C.O.O., CONCRETE DIVISION
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MICHAEL P. HAMM, FLORIDA DIVISION ENGINEER
GARY L. TAYLOR, P.E. L.S., C.O.O., GRADE DIVISION

May 9, 2008

Dispute Review Board Members
Dallas Wolford, Chairman
387 Winslow Court
Heathrow, FL 32746

RE: Financial Project No(s): 22859615201, 22859515201, 22859715201
Federal Aid Project No(s): 2004 041 P, 2004 040 P, 2004 042 P
Contract No: 21457
County: Indian River

**Contractor Rebuttal on Delay for Caracara Suspension, Asphalt Rutting,
and Mitered End Section Replacement**

Dear Mr. Wolford:

EGS is in receipt of the CEI Position paper (and rebuttal) on the above referenced items and limits this rebuttal paper to a discussion of a relevant document to the Caracara Suspension that was not previously provided to the Board by the CEI. The fact that EGS has not undertaken a point-by-point written rebuttal of the CEI Position paper should not be misconstrued to mean that EGS agrees with the many and varied statements of the CEI therein.

Conspicuously missing from the CEI's Position paper related to the Caracara Suspension are the minutes of the March 5, 2003 site meeting between the CEI, EGS, FDOT, USF&WS and SJWMD (Attachment 1). Unlike the CEI's Position paper that attempts to revise history to justify an end, these minutes accurately reflect the actual course of events as recorded at the time that they occurred and bring to light several salient points:

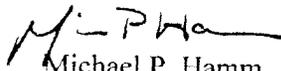
- EGS began work on the borrow pit on February 17 – after the Caracara bird was first discovered on February 12.
- After the Caracara bird relocated its nest closer to EGS's on-going construction operations, PBS&J suspended all of EGS's work within the entire borrow pit area.
- EGS was scheduled to have its SJWMD mining permit for the borrow pit reviewed by the SJWMD Board on March 11, but given the timing of the Caracara bird nest relocation (and the resulting need for a modification to the Caracara management plan), the permit application could not be reviewed at that meeting.

The need for revised management plan affected not only the SJWMD permit but also the approval of the IRC Mining Permit as EGS had to resubmit information in support of both mining permits. The presence of the Caracara bird not only resulted in the ordered suspension of EGS's construction operations by FDOT, it also resulted in a delay in the issuance of the mining permits until May. Stated differently, but for the Caracara issues, EGS would have secured all requisite permits in sufficient time so as not to delay construction. However, EGS only seeks a time extension for the actual period of the ordered suspension.

EGS sincerely appreciates the consideration of the Board and respectfully requests that the Board render its opinion on the listed items.

In addition to myself, EGS plans to have the following in attendance for the May 15th Hearing: Todd Greer, Lee Anderson, and Brad Copenhaver.

Sincerely,
Elmo Greer and Sons, LLC


Michael P. Hamm
Division Engineer

File:496C

Xc: Board Members, Lee Anderson (EGS), Todd Greer (EGS), Brad Copenhaver (VLP)

**SR 60 CORRIDOR
CRESTED CARACARA NESTING
LAND PROPOSED FOR ELMO GREER & SON PROPOSED BORROW PIT
CORRIGAN PROPERTY 1 MILE WEST OF INTERSECTION CR 512 AND SR 60**

March 5, 2003

10:30 AM @ PBS&J Field Office

Revision No. 2 (Italicized)

Financial Project No(s): 22859615201, 22859515201, 22859715201

State Project No.: 88060-3503

Federal Aid Project No(s): 2004 041 P and 2004 040 P

W.P.I. 4115446

Contract No.: 21457

County: Indian River

Limits: SR 60 (Osceola Boulevard)

Description: Roadway reconstruction, signing, pavement markings, signalization, bridge construction, landscaping and other incidental items on SR 60 from 5.5 km (3.44 miles) West of CR 512 to SR 9 (I-95)

Attendees:

Bill Vignier (Florida Department of Transportation)
William Kyzer (Florida Department of Transportation)
Paul Lampley (Florida Department of Transportation)
John Nelson (Florida Department of Transportation)
Laura Sowers (Florida Department of Transportation)
Ernie Dobbs (PBS&J)
Butch Neal (PBS&J)
David Patterson (PBS&J)
Lisa Munsch (PBS&J)
Patrick Bates (PBS&J)
John Wrublik (US Fish and Wildlife Service)
Jeff Weller (US Fish and Wildlife Service)
Elmo Greer (Elmo Greer & Sons)
Lee Anderson (Elmo Greer & Sons)
Mike Hamm (Elmo Greer & Sons)
Blake Studdard (Elmo Greer & Sons)
Marc Von Canal (St. John's River Water Management District)
Tad Corrigan (Property Owner)

Ernest C. Dobbs, PBS&J Senior Project Engineer for SR 60 Corridor, called a meeting to address the Caracara nesting on the Corrigan Property to be used by Elmo Greer & Sons for a borrow pit.

Mr. Dobbs reviewed the sequence of events which has led to this meeting.

- 1) After PBS&J received mapping for the proposed borrow pit from Elmo Greer & Sons on February 6, 2003, Mr. Patrick Bates (PBS&J Wildlife Biologist) was instructed to inspect the Borrow Pit area for presence of Endangered Species as required by the *Technical Special Provision 7-1.4.7 for Federal Endangered Species Everglade Snail*

Kite and Audubon's Crested Caracara State Road 60 Indian River County Financial Project ID(s): 228596-1-52-01, 228595-1-52-01 and 228597-1-52-01.

- 2) Mr. Bates started his inspection of the borrow pit on February 10, 2003, but the Caracaras were not observed until February 11, 2003.
 - 3) After the Caracaras were noted, Mr. Bates contacted Mr. Jeff Weller (USFWS) to schedule a meeting to observe the Caracaras. The meeting was scheduled for February 13, 2003.
 - 4) The field meeting was attended by Dave Patterson (PBS&J), Patrick Bates (PBS&J), Mike Hamm (EGS) and Mr. Weller (USFWS). During the field inspection at the site, Caracaras were observed entering and exiting what appeared to be the (*Cabbage Palm*) nest tree. At that meeting, Mr. Weller discussed several possibilities that were available to EGS with little or no impact to the current borrow pit location.
 - 1) Establish a Primary zone (300M) around the nest
 - 2) Relocate the proposed Asphalt Plant
 - 3) Relocate the 100 acre/Ft. pit area approved by SJRWMD outside the primary zone.
- Mr. Weller made it clear that any activity proposed within either the primary or secondary zones would need a Service-approved monitoring plan. Since a plan was not provided to the Service for review, comment, and acceptance, any and all activities performed within the secondary zone were undertaken at risk by the permit holder. Mr. Hamm was to provide Mr. Weller with an updated aerial view and a map indicating the proposed relocation of both the borrow pit and asphalt plant. The location of the nest with the 300M primary zone was also to be shown.*
- 5) Based upon the field meeting EGS began work on the borrow pit area outside the primary zone on February 17, 2003.
 - 6) On *February 27, 2003* the Caracara originally sited moved their nest to a tree approximately *600 feet* northwest of original nest and have been using this tree as their nest tree ever since. It was noted that the Caracaras moved closer to the existing construction activity taking place at the relocated borrow pit area.
 - 7) On February 26, 2003 a letter was sent to Mr. Weller (USFWS) regarding the meeting of February 13, 2003.

- 8) After Ms. Ann Broadwell (FDOT) received a copy of this letter, *she attempted to contact Jeff Weller to verify his conversation (with PBS&J and Elmo Greer) that occurred at the borrow pit site on February 26, 2003. Upon speaking with Jeff in regards to the activities that could occur in the secondary zone, he stated that he had asked that a management plan be submitted for this work. After discussing this issue with Patrick McCann and Laura Sowers of the Department, Ann called Mr. Dobbs on February 27, 2002-2003 and asked that work stop at the borrow pit site until coordination with USFWS is completed.* ~~called Mr. Dobbs on February 27, 2003, to discuss the Caracara situation. After discussing the issue, the Department decided that the work in the borrow pit site should stop until coordination with USFWS is completed.~~
- 9) At 4:00 PM on February 28, 2003, PBS&J issued a stop work order within the borrow pit to EGS.

All parties attending this meeting were in concurrence with the chain of events as described by Mr. Dobbs.

Mr. Weller proceeded to explain USFWS position on this issue. He made very clear that USFWS was not involved in any way regarding the stoppage of work within the borrow pit area. Mr. Weller noted that the current Management Plan for Caracaras as shown in the contract plans refer only to the nest noted at Twenty Mile Bend within the 228599 Project. A new Management Plan would have to be developed to this Caracara nest.

Mr. Tad Corrigan, the owner of the property, stated that he observed the Caracaras nesting at the second location and appeared not to be disturbed by the adjacent construction activity approximately 1000 feet away.

Mr. Weller stated that Caracara's are intelligent birds and they will notice any new activity within their territory. They can sometimes adjust to certain activities provided they are not threatened.

Mr. Weller continued to address the need for a management plan. This plan must include a site plan, an aerial with the borrow pit location. The site plan should include tree rows that will

remain as a buffer, haul routes that will not encroach the primary zone and the location of both the primary and secondary zones. *The Plan should include the data that is requested on pages 4 and 5 of the USFWS's Habitat Management Guidelines for Audubon's Crested Caracara in Central and Southern Florida, South Florida Ecological Services Office, June 2002.*

According to Mr. Weller, USFWS needs this Management Plan to determine what type of Construction Activities will be allowed within the secondary zone.

Mr. Marc Von Canal (SJRWD) stated that based upon discussion at this meeting, issuance of a permit for mining based on the information that EGS has submitted, will probably not be considered at their March 12, 2003 meeting. Since the borrow pit location on the Corrigan Property will change due to the location of the Caracara nest. *Mr. Von Canal stated that given the few number of days left prior to the March 11 meeting, and the fact that the required information to modify the project in accordance with a yet to be developed and approved Caracara management plan still has to be submitted to technical staff for review, in his experience he felt it was unlikely that the finalized information could be provided to the Board members in time to act upon the application at the March 11, 2003 meeting. Board Members normally receive the technical staff reports for review a few weeks prior to the Regulatory Meeting.*

Mr. Dobbs instructed his environmental staff (Mr. Butch Neal, Ms. Lisa Munsch & Mr. Patrick Bates) to work directly with Mr. Hamm (EGS) to prepare the Management Plan. Mr. Hamm was to supply PBS&J with any required mapping detailing the necessary information required for this Management Plan.

Ms. Laura Sowers and Mr. Paul Lampley (FDOT District Environmental) stated that when the Management Plan was completed by PBS&J/EGS the plan would be reviewed by FDOT and submitted to FHWA for their approval. After FDOT/FHWA approval, the Plan would be submitted to USFWS to allow them to prepare a report outlining the construction activities in the secondary zone during nesting and non-nesting activities.

Mr. Weller was questioned which secondary zone distance (500M or 2000M) would the USFWS be considering in their final report. Mr. Weller stated that he would have to check with other personnel at the USFWS and will call Mr. Dobbs with an answer this afternoon. Mr. Dobbs would email Mr. Weller regarding their conversation and copy FDOT, EGS and PBS&J attendees.

The meeting adjourned at 11:35 AM.



April 29, 2008
An employee-owned company

Mr. Dallas L. Wolford
Chairman, Dispute Review Board
387 Winslow Ct.
Heathrow, Florida 32746

Re: Full Position Paper: Item 1, Mitered End Sections, Item 2, Caracara Suspension, and Issue 3, Rutting repair (Entitlement only for all issues)

Financial Project Nos: 22859615201, 22859515201, 22859715201

Federal Aid Project Nos: 2004041P, 200440P

Contract No: 21457

County : Indian River

Description: SR60 (Osceola Boulevard) From MP 14.624 to MP 19.154, MP 10.154 to MP 21.998 and from MP 11.657 to MP 14.625

Dear Mr. Wolford:

Item 1 - Alleged Directed Extra Work for Mitered End Sections- Entitlement but not Quantum

We have received your email dated March 26, 2008 regarding the claimed Mitered End Section Positions/Issue. We are addressing matters raised in Contractor's 11/5/07 Final Estimates Exception Claim letter pages 25 to 27.

As background, Project 228595-1-52-01 Sheet 46, Project 228596-1-52-01 Sheet 47 and Project 228597-1-52-01 Sheet 42 all show a "Typical Side Drain" "Plan View with identical notes "Refer to W/MES per Index 273. Standard Index (2000) 273 pages 4 and 5 of 6, require two pairs of L angles below WWF 159x150-MW9xMW9 mesh on either side of two rows of 15mm Galvanized Hex Head Bolts whose bolt heads are tack-welded to each of the adjacent bars. The bars and bolts are to anchor pipe grates to the mitered end section concrete apron. (The index and cited plans are attached as exhibits.)

Daily Reports dated 5/3/04 and 5/10/04 show subcontractor Sheltra pouring concrete on Side Drain MES in Project 22859615201 between stations 691+07 and 711+90. Inspector Jason Jones checked the MES forms and explained to Sheltra's Ron Larue that the pipe grate and bolts were required. Mr. Larue's reply was that EGS did not provide them, so Sheltra would place concrete without them, since Sheltra was only to place and finish concrete. CEI letter EGS 207 4/27/05 stated that the grates needed to be installed before placing traffic. CEI Performance Deficiency Warning Letter EGS217 dated 5/20/05 (in exhibit tab B) stated that grates were not in and "our office is still waiting for your installation procedure since anchor bolts are being added after the fact rather than being placed as the MES is cast..." The CEI requested this procedure in numerous progress meetings in an effort to get an acceptable repair, between 8/23/05 and 12/5/05 (see exhibits). A procedure dealing only with epoxy was received from EGS on 11/8/05 and forwarded to the DOR on 11/8/05. In the 5/4/06 progress meeting Mr. Wedeman said that

Tallahassee would have to approve revisions to a Standard Index. In the same progress meeting Mr. Hamm said he was looking at different options.

In the progress meetings of 6/5/06 Mr. Wedeman stated that the MES in question were to be replaced. In CEI letter dated 8/31/06 Ms. Driskell directed that 39 MES not meeting Contract requirements would have to be replaced. Fourteen (14) needed to be replaced because they were broken. Most had been cast by Sheltra in Project 22859515201 in May 2004. Daily Reports show MES aprons recast between 6/8 and 9/8/06 in Project 229595-15201.

(Letters are in Exhibit B, progress meeting minutes are in Exhibit E and Daily Reports are in Exhibit F.)

The Contractor is attempting to recover extra cost due to a direction by the CEI merely to meet the Contract requirements. From the 11/5/07 Final Estimates Exception Claim the CEI discussed and refutes 9 issues raised, as follows

1. The design purpose of the MES:

Contractor's position: The 11/5/07 Final Estimates Exception Claim letter states, "The bars keep larger animals out of the MES and prevent damage to the MES." (11/5/07 page 25). EGS Engineer, Rheault, states in its 10/17/05 letter and that we are dealing with "animal grates".

The CEI's position:

- (1) The fact that the bolts heads in the index were to be placed below and welded to two (2) pieces of reinforcing steel show that they were to do more than keep animals out and protect the mitered end section. *The Roadside Design Guide (January 1996 edition (an AASHTO publication) on page 3-19 states, "Parallel drainage culverts ... are typically used under driveways, entrances, intersecting side roads and median crossovers...can present a significant roadside obstacle because they can be hit head-on by impacting vehicles. ...Parallel drainage structures should match the selected sideslopes and be safety treated if possible....the addition of pipes and bars perpendicular to traffic can reduce wheel snagging in the culvert opening."* CEI took this position in its 4/27/05 letter to EGS.
- (2) Where the drawings are clear as to what is require, it is immaterial what the designer's motives or aims were in developing the design. FDOT is entitled to have the Contractor provide what is required by the Contract Documents, and in particular Standard Index 273. On 5/4/06 Mr. Hamm dropped his pursuit of an alternate design to look at its options.

2. Did FDOT approve Sheltra's MES as cast in May 2004?

Contractor's position: "As the Project progressed though mid-2005, FDOT ... approved ...Sheltra's MES work including forming and pouring of concrete..." 11/5/07 Final Estimates Exception Claim page 26

CEI's position:

- (1) Inspector Jason Jones checked the MES forms and explained to Sheltra's Ron Larue that the pipe grate and bolts were required. Mr. Larue's reply was that EGS did not provide them, so Sheltra would place concrete without them, since Sheltra was only to place and finish concrete. The CEI followed up its objection in letters of 4/27/05 and 5/20/05 referenced in the background paragraph of this paper and included in exhibit B.
- (2) The CEI timely observed the missing bolts and timely communicated the deficiency to the contractor, but even if FDOT/CEI had not discovered the non-compliance after final payment is made, it would still be able to enforce FDOT's right to have the Contractor comply with contract requirements under Standard Specifications 5-13 "Recovery Rights Subsequent to Final Payment". The CEI noted the noncompliance prior to concrete pour, but even the Engineer's "initial failure to reject in no way prevents the later rejection when such defect is discovered, or obligates the Department to grant final acceptance. Standard Specification 4.9.2 "Failure of the Engineer to Reject Work during Construction".

3. Did FDOT pay for Sheltra's MES slabs as cast May 2004?

Contractor's Position: "As the Project progressed though mid-2005, FDOT ... paid for...Sheltra's MES work including forming and pouring of concrete..."
11/5/07 Final Estimates Exception Claim page 26.

CEI's position: Payments were made for MES concrete aprons in good faith as they were cast, with the understanding that the Contractor would pursue approval of an alternate method of attachment of the grate pipes. However due to EGS's lack of pursuit of alternate methods, Estimate No. 33 (cutoff 5/19/05) held back \$1,042.00 from Project 22859515201 MES bid items 2430984403 and 2430984404 on account of missing grates. In Estimate No.33 on Project 22859615201 MES item 2430984404 was reduced \$321 for lack of grates. No further reduction was necessary because on 5/4/06 the Contractor was proposing an engineering change to the Standard Index.

4. Should the MES slabs not meeting Standard Index 273 have been found acceptable by the Engineer according to the provisions of Standard Specification 5-3.?

Contractor's Position: It was economic waste to remove and replace MES slabs; Standard Specification 5-3 provides a means to the Engineer and Department to avoid economic waste when the contractor has produced a "reasonable acceptable work."

CEI's Position: Up until 5/4/06 when Mike Hamm abandoned it, the Contractor was pursuing an alternate design for the attachments of the grate bars to the slabs. As constructed by Sheltra, the side-drain slabs in question had no bolts at all to attach the pipe grates, and were therefore clearly not acceptable. On May 20, 2005, there were still no bolts to attach the grate bars to slab and no engineering attempts to

provide bolts one year after the CEI put the contractor on notice of the missing bolts. On 11/8/05 the CEI received the 10/28/05 engineer's proposal for epoxy with an erroneous reference to trash and animals and the review process began. The Contractor abandoned pursuit of its engineering proposal 5/5/06, leaving the slabs still without bolts for attachment of the pipe grates. The slabs clearly were not "reasonably acceptable work... based on engineering judgment" *from a public safety point of view.*

5. **Was Contractor's June 10, 2005 proposal letter (received by CEI 7/25/05 without attachments) a sufficient remedial design?** (11/5/07 Final Estimate Exception Claim page 26)

Contractor's Position: It was sufficient.

CEI's position: The 7/25/05 submittal was not sufficient. The 8/23/05, 9/13/05 and 10/11/05 progress meetings clearly reflect that, "Mr. Wedeman needed a shop drawing of the ways the bar grate members were going to be attached to the mitered end sections." In the 10/11/05 progress meeting "Mr. Watts said that the matter was in the hands of EGS's Engineer". Not only the shop drawings, but the submitted repair procedure appears to be based on the Contractor's specialty engineer's misunderstandings of the locations of mitered end structures. (See discussion of issue 1.)

6. **Was Contractor's October 28, 2005 proposal letter (received by CEI 11/3/05) appropriate to meet the Contract requirements?** (11/5/07 Final Estimate Exception Claim page 26)

Contractor's position: The proposal was appropriate to meet the contract requirements.

CEI's position:

- (1) None of the Contractor's proposals addressed the Design Standards and the proposals were never complete. In any event there is no way to determine if Contractor's 10/28/05 proposal would be appropriate to meet contract requirements since Contractor abandoned pursuit of its proposal at the 5/4/06 Progress Meeting "to look at other options". After CEI's attempt to process engineering review at the district level, it was advised that, since the proposal was to alter a Standard Index, The State Design Office in Tallahassee would have to review and approve it. The Contractor was so advised at the 5/4/06 progress meeting, and said that it would look into its options.
- (2) CEI acted appropriately in seeking FDOT designer review on what is a design issue, i.e. a substitute attachment method for grates. The Contractor never followed this matter to conclusion at its own option. Without bolts and grates, the MES slabs were not "reasonably acceptable work" under Standard Specification 5-3. Because EGS did not pursue an alternative method of attachment, for safety reasons the CEI had no alternative but to require the MES slabs be recast meeting Standard Index 273.

- (3) The Contractor admitted that the 10/28/05 proposal was not complete when the Contractor's October 28, 2005 proposal letter was supplemented by EGS's 11/16/05 letter pictorially representing the bolt, core and epoxy described in Contractor's 10/28/05 letter. Taken together the letter and the diagram still do not address the design requirements mentioned in CEI item 1.

7. Did CEI's 11/7/05 letter imply to Contractor that "FDOT would accept EGS's cost neutral solution"? 11/5/07 Final Estimates Exception Claim page 26.

Contractor's Position: That the letter implied "FDOT would accept EGS's cost neutral solution."

CEI's Position: CEI's 11/7/05 letter is merely a letter forwarding EGS's engineer's recommendation to FDOT for further transmittal for review and approval/disapproval as appropriate. The CEI does not understand what the Contractor is trying to get at in taking this position.

8. Did FDOT allow the MES repair issue to "languish for a year before ultimately rejecting the proposal"? 11/5/07 Final Estimates Exception Claim page 26.

Contractor's Position: FDOT allowed the issue to "languish for a year before ultimately rejecting the proposal.

CEI Position: The CEI/FDOT did not allow the repair issue to "languish for a year" as EGS states. The 10/28/05 EGS proposal received by the CEI 11/8/05, was transmitted the same day to Earl Wills the Designer of Record. The supplemental drawing sent by EGS letter dated 11/16/05 was forwarded to Earl Wills by letter 042EW on 12/14/05. In the 1/10/06 progress meeting Mr. Wedeman would check on review progress. In the 2/21/06 Progress Meeting Mr. Wedeman noted that he had received an incomplete response, and would call the DOR. In the 3/7/06 Progress Meeting Mr. Wedeman said he had discussed his concerns with the DOR. In the 3/21/06 Progress Meeting Mr. Wedeman said he was awaiting further response from the DOR and would check with DOR.

At the 3/21/06 Progress Meeting Mr. Wedeman passed on Mr. Wills's statement that since the proposed changes were to a Standard Index, the State Design Office in Tallahassee would be involved, because G&O could not approve of a change. Mr. Wills would get a contact name. In the 4/4/06 and 4/18/06 Progress Meetings Mr. Wedeman said he was calling Tallahassee but had no results. In the 5/4/06 Progress Meeting Mr. Wedeman asked for a written request from the Contractor to Tallahassee to initiate the review. Mr. Hamm said that since Sheltra may not now be doing the work he would look into his options. At the 6/6/06 meeting, Mr. Wedeman told Mr. Kelly that the end sections would be redone.

Subsequently, the Contractor dropped the issue and stated it would replace the mitered end section aprons. At the 7/7/06 Progress Meeting Mr. Hamm said that EGS would make the repairs in two weeks. In the 7/17/06 progress meeting Mr. Hamm said he did not know when the Contractor would begin the MES work. By its 8/31/06

letter, EGS 346, CEI listed 39+/- mitered end sections and stated, "Any MES that does not meet Contract requirements (is) to be removed and replaced". 35% of these aprons had cracks and other deficiencies which independently required the aprons to be replaced, regardless of the grate issue. Daily Reports show Project 22859515201 MES apron concrete on 9/6 and 9/8/06.

The time interval between the receipt of the supplement to the engineering proposal submittal 11/14/05 and the time EGS stopped pursuing the proposed change on 5/4/06, is less than 5 months and includes a Thanksgiving, Christmas and New Year's holiday periods. During that time there was activity by FDOT and the CEI to help the Contractor to process its proposed change. The time taken was partly a result of the incomplete nature of the submittals as received from EGS - neither addressing the remedial procedure or the Standard Index design changes or establishing that EGS was providing an equal or better alternative. Also, the correction of these mitered end sections was at no time on the critical path and not holding up critical path work.

We respectfully request the Dispute Review Board determine that the Contractor is not entitled to costs for replacement of 39+/- side drain mitered end section aprons. Attached you will find back up correspondence and related documents

Item 2 - Caracara Bird Suspension Positions/Issue (Entitlement only not quantum)

We have received your email dated March 26, 2008 regarding the claimed Caracara Bird Suspension Positions/Issue. We are addressing matters raised in Contractor's 11/5/07 Final Estimates Exception Claim letter pages 7 and 8. Quantum, (i.e. the number of days), is not an issue before the DRB, and there is no claim for entitlement to costs in the 11/5/07 Final Estimates Exception Claim, so that costs and entitlement to recover costs are not before the DRB.

To provide background, on 2/8/03 U.S. Fish and Wildlife Service's Jeffrey D. Weller met at the site with Contractor and CEI to observe "a breeding pair of Caracaras entering then exiting a nest tree." Mr. Weller's observations are included in CEI's letter JW001 dated 2/26/03. In the Progress Meeting Minutes of 2/13/03 Caracara were noted in the area. "There will be a buffer zone and the Contractor will move the excavation and hauling operation to stay 1000 feet from the nest. In CEI's 2/25/03 letter EGS047, Project Engineer David Patterson noted that on 2/24 and 2/25/03, CEI personnel observed Contractor operations within the 1000 foot prohibited zone. By email dated 2/28/03, Ann Broadwell of FDOT emailed the CEI that "...it has been determined that work should stop at the (borrow pit and asphalt plant) until coordination with USFWS is complete. The coordination will involve the modification of the Management Plan for endangered species found within the project limits." Since the borrow location was provided by EGS, it was EGS's responsibility to propose and pursue all permits resulting from its selection of borrow locations. The modification of the Management Plan was taken on by the FDOT/CEI in an effort to expedite the contractors permit responsibility and selected borrow location approval. (See Supplemental Specification 120-6 "When furnishing the ...borrow area, supply the Department with evidence that necessary permits, rights or

waiver of those areas has been secured..." By 2/27/03 letter number EGS052, CEI's Senior Project Engineer's Ernest Dobbs "Directed (Contractor's) Gulfkist Borrow Pit operations to cease work at this time." By its letter of 3/3/03, EGS submitted idle equipment rates and stated that, "We are also requesting maximum incentive be adjusted so as not to be affected by this delay as well as any other compensation provided by the specifications." By the CEI's 4/15/03 letter EGS054, Mr. Dobbs acknowledged receipt of the Contractor's letters of 3/3/03 and 4/4/04. "We recognize your intent to claim additional compensation during the shut down and we are preparing a response..." Contractor's letter of 4/16/03 claimed for idle asphalt plant costs, and provided equipment rates. By 4/23/03 letter EGS0058, the CEI told the Contractor of a management plan which would allow the Contractor to resume operations on 4/22/03 under listed conditions, except in a "primary zone". Daily Reports show that the PBSJ biologist discussed the management plan with the Contractor's superintendent 4/22/03. On 4/23/03 the primary zone was fenced off and equipment mobilized. On 4/24/03 Daily reports show material being hauled to Treasure Coast borrow pit stockpile areas. These daily reports show work had resumed.

On 4/23/08 Mr. Dobbs was advised by Peter Radke, Senior Planner/ Indian River County that IRC had not issued a pit permit, and could not until EGS or its engineer Moseby completed the requirements set by the Commissioners dated 11/15/02. Mr. Radke also told Mr. Dobbs that "...no work with regard to this borrow permit can begin until a mining permit is issued by the County. This includes the installation of any haul road or installation of the asphalt plant." In the 5/1/03 Progress Meeting, FDOT Project Manager John Nelson " said that the Contractor could not bring material on site from the Treasure Coast pit until they have a mining license (from Indian River County) and has given FDOT and PBS&J copies of the license..." As required in the contract documents see Supplemental Specification 120-6.

By CEI letter EGS067 dated 5/8/03 Subject Claim No. 1 – Shutdown Crested Caracara Management Plan, Senior Project Engineer Dobbs recited the events above and concluded, "Since no work has been permitted for this borrow pit, the approval of the Management Plan had no effect on the Contractor's operations." .."(w)e have hereby denied your claim for additional monies and extension of time." Indian River County issued a mining permit on 5/19/03. By CEI letter EGS075 dated 5/19/03 Subject: Use of the Corrigan Treasure Coast Land Mine, the CEI "approved the use of the Corrigan Treasure Coast Land Mine for an off-site borrow pit. "

No appeal or other response was sent by the Contractor regarding the Caracara suspension direction until the 11/5/07 Final Estimates Exceptions Claim letter, and even that letter does not refer to the CEI's 5/8/03 claim denial letter or otherwise answer the arguments contained in the 5/8/03 claim denial letter.

The 11/5/07 Final Estimates exceptions claim letter raises the following three issues:

Issue 1: Did CEI's 2/27/03 letter EGS052 directing the Contractor to cease work at the Gulfcoast Pit, delay a controlling work item?

Contractor's Position: The shutdown delayed a controlling item.

CEI's Position: (1) Special Provisions Article 1-3 Definitions, states "Controlling Work Items: The activity or work item on the critical path having the least amount of total float." The controlling work item will also be referred to as a Critical Activity". The last update submitted before the suspension letter, 496J.PRX (data date 2/12/03), after correcting for work not complete has as critical Activity 501030 "Borrow Pit Submittal and Review." (See footnote 1).

Supplemental Specifications 120-6.2 Furnishing of Borrow Areas states "... When furnishing the ... borrow areas, supply the Department with evidence that the necessary permits, rights or waivers to use such areas have been secured." The Progress Meeting Minutes prior to the February 27, 2003 stop-work letter show that on 2/6/03 Mr. Hamm said that the contractor had neither a temporary or permanent pit permit, and did not expect the permanent permit from SJRWMD until at least 3/15/03 when it was on SJRWMD's agenda, and did not even address Indian River County's borrow pit permit. The minutes of the 2/13/03 letter Progress Meeting state, "Contractor has a temporary permit to dig 100 acre-feet. The full permit should be approved at the March 15, 2003 SJRWMD meeting". It does not address the Indian River County borrow pit permit. By CEI letter EGS075 dated 5/19/03 "Subject: Use of the Corrigan Treasure Coast Land Mines", the CEI "approved the use of the Corrigan Treasure Coast Land Mine for an off-site borrow pit." The Caracara suspension was ended 4/23/03, a month earlier.

Issue 2. Is the Contractor entitled to a time extension for a suspension under a Supplemental Specification 8.6.1, regardless of whether or not the suspension impacts a critical path activity?

Contractor's Position: Time extensions are granted for suspensions under Supplemental Specifications 8.6.1 regardless of the suspensions impact on a critical activity.

CEI's Position: Time extensions are granted for suspensions only where they impact a critical path activity, as shown by the following three specifications. Supplemental Specification 8-6.1 states "The Department may grant an extension of time in accordance with 8-7.3.2 when determined appropriate in the Department's sole judgment." Supplemental Specification 8-7.3.2 Contract Time Extension states, "The Department may grant an extension of Contract Time when a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of the bid.... Whenever the Engineer suspends the Contractor's operations, as provided in 8-6, for reasons other than the fault of the Contractor, the Engineer will grant a time extension for any delay to a controlling item of work due to such suspension..." Special Provisions Article 1-3 Definitions, "Controlling Work Items: The activity or work item on the critical path having the least amount of total float. The controlling work item will also be referred to as a Critical Activity." Since the suspension does not impact a critical path activity, as explained in CEI's position to Issue 1, above, the Contractor is not entitled to a time extension.

Issue 3. Is the Contractor entitled to a time extension, when the Contract Completion date will be met because there is positive float?

Contractor's position: It is entitled to a time extension for a critical path suspension whether or not there is float at the time of the suspension.

CEI's Position: Special Provisions 8-3.2 tenth paragraph states "... Time extensions for damages or delays will only be granted to the extent that the time adjustments to the affected activities exceed the total float time along the affected critical paths of the schedule current at the time of the delay." The float was at all times positive, as explained in footnote 2.

Issue 4. Is the Contractor entitled to a time extension for the Caracara suspension even if not critical, because it is a concurrent delay?

Contractor's position: Contractor entitled to a time extension for the Caracara suspension even if not critical, because it is a concurrent delay, under Supplemental Specifications 5-12.6.2.2.

CEI's Position: Supplemental Specification 8-7.3.2 states that being on the critical path is a requirement for a time extension, as discussed before in CEI's position on issue 2. There is nothing in the contract specifications providing time extensions for delays which are not on the critical path. Contrary to Contractor's position, Supplemental Provision 5-12.6.2.2 does not deal with a separate non-critical activity, but to a critical activity which is impacted by two or more causes, one or more being the Department's fault and one or more being the Contractor's fault. Here, as explained in CEI's position to issue 1, the critical path activity during the 2/28/03 to 4/22/03 was Activity 510030 "Borrow Pit Submittal and review" which was critical on 2/28/03 until the Contractor could work under the issued permit on 5/19/03. See CEI position on issue 1 and footnote 1.

Issue 5. Did the contractor fail to mitigate the impact of the delay?

CEI's Position: The baseline critical path and the Traffic Control Drawings on which the baseline schedule is based, show as critical the placing of embankment for the C52 temporary Acrow bridge abutments and detour transitions from the Acrow Bridge to existing SR60. At the beginning of the Caracara suspension on 2/28/03, embankment material was being mined from 98th Avenue (Texaco Pit) and used in non-critical Project 22859515201 roadway areas. The material continued to be mined and used for non-critical Projects 22859515201 and 22959615201 throughout the suspension period ending 4/23/03, but not on the critical embankment areas at the C52 canal. Hauling material from the 98th Avenue pit to the CR52 abutment/detour transitions would have allowed critical path work to continue.

We respectfully request the Dispute Review Board determine that the Contractor is not entitled to a time extension on account of the Caracara suspension.

Attached you will find backup correspondence, meeting minutes, daily reports, cited specifications and related documents.

Item 3 - Asphalt Rutting Repairs Positions/Issue

We have received your email dated March 26, 2008 regarding the claimed Asphalt Rutting Repairs Positions/Issue. We are addressing matters raised in Contractor's 11/5/07 Final Estimates Exception Claim letter pages 23 and 24. Quantum (i.e. the number of days and amount of compensation) is not an issue before the DRB.

To provide background, this claim involves the correction of rutting in all three projects between stations 562+24 and 707+08 on the right roadway. The CEI and Contractor were aware that the right roadway was rutted, not in conformance with the roadway template in the plans for the three projects. On 1/3/07 the Contractor, FDOT and CEI met and mutually agreed to conduct a Laser Profilegraph to provide an unbiased determination of the areas most out of conformance. On 1/5/07 CEI Senior Project Engineer Teresa Driskell requested a Laser Profiler test for the eastbound lanes of three projects for 1/5/07, noting "... The Contractor is out of time and there is serious rutting on large sections of the project that need to be removed and replaced..." The test was conducted 1/9/07 from kilometer post 21.043 (station 562+24RT) to kilometer post 35.533 (station 707+08RT). Test results were faxed to Contractor's Quality Control Manager Dale Gifford on 1/11/07.

On 1/13/07, Mr. Gifford sent his and Asphalt Technology Inc. President K.H. Murphy's review and recommendation that the ruts be leveled using a minimum .75 inches (19mm) of friction course. Around 1/23/07 FDOT paving people advised that any rutting in excess of ¼" be milled to a depth of 1.5" and replaced prior to placing friction course. In Progress Meetings of 2/6/07, 2/13/07 and 2/20/07 it was reported that EGS was working on a response "to be submitted shortly." By letter of 2/21/07, EGS claimed that the Laser Profiler test was beyond contract requirements and that work would be performed on a cost plus basis. It further claimed that the roadway elements had been constructed and accepted according to specifications.

In 2/23/07 letter EGS399 Project Administrator Wedeman responded to the Contractor's 2/21/07 letter, denying "... your request for payment to correct the unacceptable condition...", describing how roadway elements had deficiencies in placement and/or protection from saturation. By letter of 3/21/07 EGS argued that the Profiler referenced in Special Provision 330-13.5.2 was not applicable to the last structural course, but only a rolling straight edge for the last course before friction under Supplemental Specification 330-13.3.3, that EGS was willing to repair rolling straightedge deficiencies and asked for direction. On 3/21/07 by CEI letter EGS401, Mr. Wedeman reminded the Contractor that they had agreed on 1/3/07 to use the Profilegraph to locate rutting, and that the surface condition of the eastbound lanes made it impossible to proceed with friction course without prior remedial work at locations of unacceptable rutting. CEI directed EGS to start asphalt corrections no later than 3/26/07.

Todd Greer emailed CEI on 3/27/07 that "... (W)e are still exploring alternative options to your direction..." Although duplicative of the Profilegraph testing on 1/9/07, the CEI began to use a straightedge at cross-slopes to locate stations where the depth of rutting

exceeded the amount where extra depth of friction course could be used. By 4/6/07 CEI letter EGS403 Mr. Wedeman told the Contractor that stations of cross-slopes where rutting exceeded 6mm had been located, and that the Contractor should locate the limits of 6mm ruts and correct deficient areas prior to placing friction course. According to his 4/9/07 email, Todd Greer would mill and replace areas identified according to CEI's 4/6/07 letter, using a new mix design, but would do it at extra cost. The CEI 4/12/07 letter EGS405 reiterated that remedial work was not compensable, but concurred in the remedial method and asphalt mix proposed in EGS's 4/9/07 email provided work would begin no later than 4/16/07. Milling took place between 4/16/07 and 4/23/07. By CEI 4/16/07 letter EBS406, Ms. Driskell acknowledged receipt of Notice of Intent to Claim for remedial asphalt work, and stated, "EGS's request for additional compensation for this item is again denied."

The 11/5/07 Final Estimates exceptions claim letter raises the following four issues:

Issue 1: Is the Contractor responsible for the rutting on the eastbound lanes of SR 60 from station 562+24 to 707+08?

Contractor's Position: The Contractor is not responsible because (1) all areas have been previously accepted for construction of embankment, stabilized subgrade, base material and asphalt placement. (2) no material in place has failing test results, including subgrade material and density, base material and density, asphalt material, thickness spread-rate cross-slope and density, (3) prior to opening the roadway to traffic a rolling straight edge test was conducted and irregularities found out of tolerance of 3/16" were corrected, (4) the surcharge method had an adverse effect, including rebound, (5) eastbound pavement subject to "an unavoidable high volume of heavy traffic during construction.

CEI's Position:

(1) As to alleged "previous acceptance" of underlying material and construction (a) The material was not "accepted" by FDOT or by the CEI inspector's. The CEI carries on tests of materials used and density tests, but these are samples and at well spaced locations, and the tests do not necessarily reflect conditions of materials and construction which are not tested. Standard Specification 5-9.2 Failure of the Engineer to Reject Work During Construction: "If, during or prior to construction operations, the Engineer fails to reject defective work or materials, whether from lack of discovery of such defect or any other reason, such initial failure to reject in no way prevents the later rejection when such defect is discovered, or obligates the Department to final acceptance. The Department is not responsible for losses suffered due to necessary removals and repairs of such defects."

(b) There are numerous references in the daily reports (Exhibit G) and correspondence (Exhibit D1 and D4) where material or construction was rejected, or found wanting but acceptable to be left in place under specifications. (See Exhibit D4). Deficiencies noted include plastic material in roadway embankment, use of untested material, density failures, base segregation, placing roadway asphalt and base over wet and yielding layers, asphalt density and permeability failures.

Where material was rejected, it was removed at locations where tests were taken. Because samples and tests were not taken at every location, and because inspectors covered several operations and may not have detected deficient materials and workmanship, the fact that known defects were removed does not prove that unseen or untested deficiencies existed.

(c) Asphalt was placed under QC2000 so that the QC inspectors were not CEI, but instead EGS personnel, so that any test or inspection failures relating to asphalt cannot possibly relate to the CEI or FDOT. There are daily reports noting work going on without EGS's QC inspectors being on hand. The daily's and correspondence note that the Contractor was advised of asphalt QC inadequacies.

(2) It is not correct to say that there are no failing test results. Daily Records referring to where inspectors rejected material or construction are collected in Exhibit G. Failing tests and construction were noted to the Contractor and remedial action taken by the Contractor.

(3) On 5/11/05 and 5/12/05 the CEI did straight-edge the structural course of the eastbound lanes from station 567+50 to 706 prior to opening the section to traffic that was east of station on 5/20/05, and west of station 618 on 7/13/05. (reports are attached). Straight-edging for an intermediate layer to be placed under traffic is a right but not a requirement of the Engineer under QC2000 Supplementary Specification 330-12.1. The straight-edge was longitudinal and would not pick up crossways deficiencies like rutting. At any rate, the rutting manifested itself after the eastbound roadway was open and under traffic loads. If the Contractor is implying CEI's inspector's did something wrong here, note that the QC function under the QC2000 specs was on the Contractor, therefore EGS is responsible for any shortcomings that may have occurred.

(4) It is not correct to say that the surcharge method had anything to do with any rutting from station 598+80 where the surcharge ended, eastward. The non-surcharged area included 79% of the milled lane length. Twenty-one percent (21%) was milled within the surcharge area. The profile graph shows the worst rutting east of kilometer post 28.500 = station 636+75. Surcharge had no effect on rutting. The Contractor mentions rebound. One would expect rebound to be spread over an area and not show itself only on each sides of ruts. Surcharge had no effect on rutting.

(5) It is not correct to say that the eastbound pavement was subject to heavy traffic. SR60 west of I95 is in a rural area with a 1997 AADT of 15,200 compared to Vero Beach Downtown's 2001 AADT of 31,100, with no cities of any size nearby. SR 60 was widened to provide a hurricane evacuation route. The Baseline schedule shows project 228595 EB pavement under traffic between 13 and 24 months, where the pavement was actually under traffic from 5/20/05 to 4/16/07 or 23 months.

(6) The Contractor is being asked to repair discovered deficiencies at his own cost. For the Contractor to take the position that it is not responsible, the Contractor has to establish another cause. By saying that his construction complied with the design, he is inferring that there is an error in the design to avoid the tolerance requirements. The only specific error that he explicitly raises is the surcharge method, but as discussed in CEI's position (4) on Issue one, this is not established.

(7) The CEI does not have to carry the burden of demonstrating a cause for the rutting. It is the Contractor which is implying that the design is the cause. Even though

FDOT/CEI does not have to establish a cause of the rutting, the LIMS and Daily Reports show failing tests for material and construction as discussed in CEI's position (1) and (2) of issue one (1) and supported by copies of Daily Records and correspondence in Exhibits B and F. Daily report excerpts in exhibits show instances of removal of high plasticity embankment material. In CEI's 2/23/07 letter EGS 399 Project administrator Wedeman also suggested that the rutting was a result of the traffic working over saturated base. An attached analysis addresses failure to establish and maintain drainage as a cause for rutting. Letters showing Contractor's failure to maintain drainage are collected in Exhibit D2 and D3. Water was building up and overflowing at side and median swales. Side swales were rough graded after roadway construction, and in some cases after the eastbound roadway was opened to traffic before some time before adjacent ditches were graded. When swales were complete, they were not maintained. No drainage crossed from the south ditches to Retention Pond WRA4A until 9/26/05, 4 months after eastbound SR60 was open to traffic. The swale between existing SR60 and new eastbound SR60 was not drained, because all of the eastbound lane cross drains had their ends blocked, and there was no drainage across existing SR60.

Issue 2. Was placing thicker friction course adequate instead of milling.

Contractor's Position: A 19mm friction course layer without milling as proposed by Dale Gifford and KH Murphy on 1/12/07 should have been accepted by FDOT.

CEI's Position: The plans require friction course of 44kg/m², approximately 3/8". The proposed remedial action would be between .75 and 1.1" thick. This was not approved by the Department because it leaves uncompacted areas where ruts are filled, with the potential for water storage.

Issue 3. Was the CEI/FDOT obliged to give a time extension for the time taken to reach an agreement of remedial action and the time to mill and repave under the final plan agreed to 4/12/07?

Contractor's Position: The Contractor is entitled to time because (1) it is not responsible for the rutting condition and (2) The FDOT/CEI were demanding remedial action that was not ultimately required.

CEI's Position: The Contractor is not entitled to a time extension, (1) because rutting exceeded tolerances and the contractor has not shown that the FDOT is responsible for the condition, for reasons explained in CEI Position to Issue 1.

(2) The time taken for the Contractor to present a reasonable remedial recommendation and the time for the FDOT to review recommendations arise from the Contractor building a roadway not within cross slope tolerances. Faced with the non-compliant situation, the actions of FDOT/CEI were reasonable and timely. The use of the Profile-graph was made with Contractor's concurrence. The proposal to use a thicker layer of friction course was correctly rejected, as explained in CEI's position on Issue 2. The rejection on 1/23/07 was made within a few days of Mr. Gifford and Murphy's presentation on some time after 1/12/07. The Contractor delayed itself in offering any further proposal. The CEI in order to get things moving it offered to straight edge cross slope and did measure them in a timely matter. The Contractor's delay in accepting CEI's revised proposal was its fault.

(3) The Contractor has not submitted a preliminary notice of claim as required by Supplemental Specification 8-7.3.2 within 10 days of the commencement of the delay.

The cited specification states "If the Contractor fails to submit his preliminary request for an extension of Contract Time, the Contractor fully, completely, absolutely and irrevocably waives any entitlement to an extension of Contract Time for that delay."

(4) The Contractor has not submitted a request for a Time Extension as required by Supplemental Specifications 8-7.3.2 within 30 days after elimination of the delay. "If the Contractor fails to submit this required request for Contract time extension, with or without a detailed cost analysis, depriving the Engineer of the timely opportunity to verify the delay and the costs of delay, the Contractor waives entitlement to an extension of Contract Time or additional Compensation for delay.

Issue 4 Is the Contractor entitled to Indirect Delay Cost?

Contractor's Position: He is entitled to delay costs under Supplemental Specifications 5-12.6.2.2

CEI's Position Contractor is not entitled to indirect delay costs because (1) The Contractor has not granted a 40 day time extension as required by Supplemental Specifications 5-12.6.2.2. (2) The Contractor is not entitled to a time extension for reasons stated in CEI's Position to Issue 3, (3) The delay is not caused "solely by the Contractor" as required by Supplemental Specifications 5-12.6.2.2.

For reasons stated above, the DRB is requested to issue a recommendation denying entitlement to time or money on account of rutting.

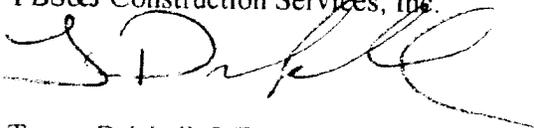
Attached you will find back up correspondence, meeting minutes, daily reports, cited specifications and related documents.

Attendees which may be present:

Pete Nissen, Pat McCann, Carolyn Gish, Tim Wedeman, William Skeen, Michael Kelly, Bill Vignier, Bruce Jones, Barry Ritchey, Teresa Driskell and Calvin Johnson.

If you have any questions, feel free to call me at (772) 778-3035.

Sincerely,
PBS&J Construction Services, Inc.



Teresa Driskell, P.E.
Senior Project Engineer

CC Mark Puckett, DRB Member
John Swengel, DRB member
Mike Hamm, EGS
Mickey Kelly, FDOT
Tim Wedeman, Project Administrator.

Footnotes:

'1. The last update submitted before the suspension letter, 496J.PRX (data date 2/12/03), reported as critical Activity 171000 "C&G/Erosion Control 561+31 to 565+60" followed by Activity 171100 "Gradework 561+31 through 565+60". A predecessor to activity 171000 is 501030 "Borrow Pit Submittal and Review", which was erroneously reported in Contractors submitted schedule as finished 5/12/03 (a future date). Because it was erroneously entered as finished, no float was reported, and the successor activities to the borrow (171000 and 171100) were then reported as then critical. Once the "actual finish" status is corrected, the report would show activity 501030 as then critical.

The March 12, 2003 data date schedule update 496K.PRX erroneously eliminated the logic successor tie between Activity 501030 "Borrow Pit submittals" and the follow on earthwork activities. Instead of being shown as critical, as it should, Activity 301030 was shown as having 600 work days of float. As submitted by the Contractor, update schedule 496K.PRX instead erroneously reported as critical a new activity 501040 "Caracara shutdown" with critical successor 171100 "Gradework 561+31 to 565+60". Activity 501040 was given a 20 work day (28 calendar day) duration, but, although the shutdown was 2/27/08, the schedule showed 20 work days (28 day calendar days) remaining duration on the 3/12/08 data date.

The April 14, 2003 data date schedule update 496L.PRX continues to erroneously report Activity 501030 "Borrow Pit submittals" without follow-on earthwork successor and with 577 work days of float. The Contractors submitted update schedule continues to erroneously report Activity 501040 "Caracara Shutdown" as critical, but now with 30 work days remaining instead of 20 and a projected finish of 5/23/03. In fact the suspension ended 4/22/03 a month earlier. The borrow pit permit was not issued by Indian River County until 5/19/03. It is clear that throughout the Caracara suspension period from 2/28/03 through 4/22/03 Activity 501039 "Borrow Permit submittals" was critical and not Activity 501040 "Caracara shutdown".

'2. The last update submitted before the suspension letter, 496J.PRX (data date 2/12/03) reported 66 work days (92 calendar days) of positive float. The suspension started 2/28/03. The March 12, 2003 data date schedule update 496K.PRX showed 21 work days (29 calendar days) of positive float, even after reducing 20 work days (28 calendar days) for its new Activity 501040 "Caracara shutdown". The April 14, 2003 data date schedule update 496L.PRX erroneously reported -17 workdays (-24 calendar days) of float, as the result of unrealistically projecting 30 work days (42 calendar days) of remaining duration and a projected 5/23/03 end of the shutdown for Activity 501040 "Caracara shutdown" when in fact the suspension ended 4/27/03 - 13 calendar days (9 work days) after the 4/14/03 data date. When the 20 work day (28 calendar day) remaining duration overstatement in the Caracara shutdown is eliminated from the negative float, 3 work days of positive float remain, not -17 work days.



An employee-owned company

May 5, 2008

Mr. Dallas L. Wolford
Chairman, Dispute Review Board
387 Winslow Ct
Heathrow, Florida 32746

Re: Rebutal to Contractor's April 30, 2008 Position Paper
Financial Project Nos: 22859615201, 22859515201, 22859715201
Federal Aid Project Nos: 2004 041P, 2004 40P
Contract No. 21457
County, Indian River
Description: SR60 (Osceola Boulevard) from MP 14.624 to MP 19.154, MP
10.154 to MP 21.998 and from MP 11.657 to MP 14.625

Dear Mr. Wolford:

We have received Contractor's April 30, 2008 position paper. We note that the Contractor's position paper caption refers to the wrong projects

In rebutal to the **Caracara** matters:

1. On page 2 of the Contractor's Position Paper the Contractor argues that Supplemental Specification 8.7 allows for a time extension for suspensions whether or not there is positive float at time of the delay. CEI's rebutal is that on page 9 of CEI's 4/30/08 position paper, in Paragraph 3 we cited Special Provision 8-3.2

"Time extensions for ... delays will be granted only to the extent that time adjustments to the affected activities exceed the total float time along the affected paths of the schedule current at the time of delay".

The Contractor cannot say that the suspension is not a delay. Standard Specification 1-3 Definitions states:

"Delay: Any unanticipated event, action, force or factor which extends the Contractor's time of performance of any controlling work under the Contract, whether styled "delay", "disruption", "interference", "impedance", "inundance" or otherwise ..."

Standard Specification 5-2 states:

"These Specifications, the plans, Special Provisions, and all supplemental documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all"

Special Provision 8-3.2 applies to delays of any kind.

2. On page 1 of the Contractor's Position Paper, Contractor states that PBS&J was requested to perform a Wildlife Analysis at the time the permit was submitted. CEI's rebuttal is that it is the Contractor's responsibility to procure the pit permits (See Supplemental Specifications 120-6). This pit is off the site, at a location of Contractor's choosing, with restrictions imposed by permitting agencies, not FDOT. If SJWMD required a "wildlife analysis", it was not FDOT's or PBS&J's obligation to provide it and from the records we have there is no indication CEI did provide a wildlife analysis of any kind related to the pit, unless the Contractor is referring to the bio-clearing CEI's biologist starting bio-clearing the pit on 2/10/03, at which time caracara nesting was observed. This was after the Contractor said he had obtained from SJWMD a temporary permit to remove 100 acre-feet of material.

3. On page 1 the Contractor's Position Paper refers to obtaining a tree removal and land clearing permit in February 2003. Our records show only that the Contractor reported to have obtained a temporary permit to remove 100 acre-feet of material sometime between 2/7 and 2/13/03. The Contractor did not get a permit from Indian River County until 5/19/03.

4. On page 1 and 2 of the Contractor's Position Paper it states that Gulfkist borrow pit work was the critical path. CEI in rebuttal refers to its Position Paper, issue 2, demonstrating that obtaining pit permits was the critical path, and the pit permit from Indian River County was not obtained until 5/19/03.

In rebuttal to the **rutting** matter:

1. On page 2 of the Contractor's position paper, the Contractor states that on 1/9/07 EGS was forecasting completion of the project on 3/2/07. CEI's rebuttal is that in Progress Meeting and DRB meeting minutes show that the CEI's scheduler projected 3/15/07, and that Mr. Hamm and Mr. Wedeman said that a 3/2/07 date was achievable. At any rate the quantum of days is not at issue before the DRB.

2. On page 3 of the Contractor's position paper it states that on 2/23/07 FDOT directed the Contractor to repair. The CEI's response is that the 2/23/07 CEI letter did not direct anything, but instead responded to the points made by the Contractor's 2/21/07 letter. At any rate, it is the Contractor's obligation to remedy deficient work.

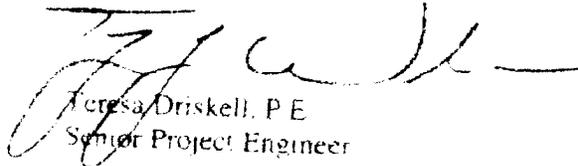
3. On page 3 of the Contractor's position paper, the Contractor refers to a 4/3/07 request to place friction course and a 4/9/07 turndown response. CEI's rebuttal is that stationing in the letter shows that neither of these letters deal with stations 562 to 708 where rutting was remedied in this dispute.

The CEI reaffirms the positions taken in its position paper dated April 30, 2008 on the three matters before the Board on May 15, 2008. All specifications, letters and meeting minutes not previously submitted 4/30/08, are attached.

PBS&J

If you have any questions, feel free to call me at (772) 778-3035.

Sincerely,
PBS&J Construction Services, Inc



Teresa Driskell, P.E.
Senior Project Engineer

Attachments

cc and attachments:

Mark Puckett, DRB Member
John Swengel, DRB member
Mike Hamm, EGS
Mickey Kelly, FDOT
Tim Wedeman, Project Administrator

PBS&J