

J. B. MICHAEL
5852 SW MISTLETOE LANE
PALM CITY, FL 34990-5239
PHONE (561) 346-6115 (W/VOICE MAIL)
e-mail: MichaelJbm864@cs.com

FAX (561) 288-1914

April, 2000

FAXED April, 2000

John L. Rowell, P. E.
Metric Engineering, Inc
13940 SW 136 Street, Suite 200
Miami, FL 33186
VIA: Fax (305) 234-8810 & USPS

Armando de Moya, President
The de Moya Group Inc.
12209 So. Dixie Hwy.
Miami, FL 33156
VIA: Fax (305) 255-1935 & USPS

RE: HEFT from Quail Roost Drive to S.R. 874
Fin. Project No. 251873-1-52-01
State Project No. 97870-3300
WPI No. 6151891
County Dade

Subject: Payment for Extra Median Pavement Work

Gentlemen:

On April 3, 2000, at the request of the Contractor, The de Moya Group, Inc., the Disputes Review Board (DRB) held a hearing to consider the subject dispute. Both The de Moya Group (dMG) and the Florida Department of Transportation, Turnpike District, (FDOT) presented testimony and copies of documents and data prior to and during the hearing.

ISSUE:

Is the Contractor entitled to partial payment in the amount of \$338,909.14 for the extra median paving work ordered by the FDOT Turnpike District's Director of Operations on April 27, 1999?

CONTRACTOR'S POSITION:

"On April 27, 1999, the Department's Turnpike District Director of Operations directed/authorized the extra median paving work (copy attached¹) as defined in the Department's Revised Traffic Control Plan dated November 1998 (copy attached) including revisions dated April 27 & 29, 1999 (copy attached). The authorization included the method of payment (time and materials) and that the granting of compensable and non-compensable time would be covered under a separate Supplemental Agreement currently being formulated.

The de Moya Group began work on April 28, 1999 and the first phase of the extra work was completed on June 25, 1999.

¹ These copies are attached to the Contractor's position papers.

Metric Engineering and the de Moya Group jointly documented the manpower, materials, and equipment required to perform this extra work. The de Moya Group, Metric Engineering, and the Department have agreed on the time and material value for the portion of work submitted totaling \$338,909.14. There remains disagreement on the value of delay damages and time extensions.

The Department has refused to pay for this work because the DMG will not agree to waive its rights for delay damages and time extensions excluded from the Department's Supplemental Agreement. The de Moya Group's reservation of rights is consistent with the Department's authorization to perform the extra work.

The 1991 Standard Specifications for Road and Bridge Construction defines the authorization required to perform extra work covered under a Supplemental Agreement Sub-Article 4-3.2.3 states in part:

"...No work covered by a Supplemental Agreement shall be performed before written authorization is given by the Engineer. Such written authorization shall set forth the prices and other pertinent information and shall be reduced to written contract document form promptly..."

Conclusions:

- 1.) *The FDOT April 27, 1999 directive/authorization to proceed meets the contract authorization requirements for the Contractor to perform extra work.*
- 2.) *The Contractor performed the extra work in accordance with the Revised Plans and Specifications and the work has been approved by Metric Engineering and the Department.*
- 3.) *The Contract does not require that the Contractor waive its rights to time extension and delay damages in order to receive payment for extra work ordered by the District Director of Operations.*
- 4.) *The Department's position on this issue has vacillated from pay to no-pay several times. The de Moya Group is uncertain as to what the Department's latest position is. On February 22, 2000, we received a signed Summary of Record Negotiations Form that indicated that the Department agreed with the value of the extra work including the Special Provisions reserving the DMG's rights. The Turnpike District Secretary, Turnpike District Construction Engineer, and the FDOT Attorney signed this document. On February 23, 2000, the de Moya Group submitted the executed Supplemental Agreement including the reservation language previously agreed to by the District Secretary and others. Then, on February 24, 2000, Metric Engineering sent a letter indicating that the Department would not process the Supplemental Agreement or provide payment for this extra work.*
- 5.) *The Contract requires that the Department make payment for this extra work in a timely manner.*

DEPARTMENT'S POSITION:

"The Contractor's latest appeal to the DRB dated February 1, 2000(Exhibit A²) states as follows:

Is the Contractor entitled to partial payment in the amount of \$338,909.14 for the extra median paving work ordered by the FDOT Turnpike District's Director of Operations on April 27, 1999?

The DRB's recommendation of September 9, 1998 (Exhibit I) initiated the process for the Contractor and the Department to resolve net cost differences in the TCPs. The purpose of this SA is to address the net cost difference between the revised TCP actually used and the Contractor's proposed bid alternate.

² The reference to Exhibits in this section are those contained in the Department's position papers to the Board.

The last stumbling block on the resolution of this matter has been the wording of the SA to reach mutual agreement for a bilateral settlement. The Department is not in disagreement with the amount of the SA as outlined in the Department's December 15, 1999 letter (Exhibit F) to the contractor and copied to the DRB members. The issue of time is not addressed in this proposed supplemental agreement.

The Department's policy which was not explained in the December 15, 1999 letter (Exhibit F) is that a unilateral SA can only be implemented by the Department when there is a difference in cost and not the issue itself. Specifically, the language concerning the delay time and associated delay cost became the disputed issue for completing the SA.

The Contractor sought help from their own legal counsel, per their January 6, 2000 letter (Exhibit E), who advised the Contractor to have the April 27, 1999 (Exhibit G) authorization letter from the Department to be an exhibit in the SA which provides the reservation of rights for the Contractor. The Contractor acting on the advice of their counsel then asked the Department per their January 19, 2000 letter (Exhibit D) to include the April 27, 1999 Department letter (Exhibit G) in the SA. This letter established that the basis of payment for the work would be on a time and material basis. It also stated that the granting of compensable and non-compensable time would be covered in the closeout supplemental agreement currently being formulated.

The Department rewrote the SA per the Contractor's request and resubmitted for their signature. The Contractor did not follow advice of their own counsel and edited the proposed SA to include their most recent claim letter dated January 25, 2000 (Exhibit C) as exhibit "B", reserving their rights for \$5 million with additional cost to be determined, plus additional time. The Contractor's January 25, 2000 (Exhibit C) letter has unsupported allegations as to the events that occurred and serious allegations asserting that the Department's contract TCP plans were unsafe and defective. This letter is unacceptable as a reservation of rights and constitutes a difference for settling the SA issue.

The Department recognizes that the DRB has already addressed the entitlement aspect of this issue regarding cost as outlined in the DRB's recommendation of September 9, 1998 (Exhibit I). The Department does not believe that a ruling, which in effect would be an affirmation of its previous recommendation, is necessary. The Department's position on this matter is:

That the resolution remains with the Contractor to sign the SA which was provided as recommended by their own counsel and withdraw their latest proposed language which was to include their January 25, 2000 letter (Exhibit C), as exhibit "B" in the SA. The delays and associated cost are the subject of another appeal to the DRB.

The Department believes that by the time the DRB convenes to hear this issue that a bilateral supplemental agreement will have been implemented for payment for median paving work. If the Contractor refuses to sign it for the reasons previously noted, the Department will not issue a unilateral because it violates the policy of the Department."

FINDINGS:

Neither party furnished the Board the FDOT's policy on Unilateral Supplemental Agreements or the legal basis for such.

On January 06, 2000, dMG wrote the Department:

We are in receipt of the referenced letter whereby the Department has indicated that it will not make payment for the Extra Median Paving Work directed by the District Director of Operations on April 27, 1999.

First and foremost, the Department's assertion that The de Moya Group has rejected the DRB decision of September 9, 1999 by not signing the Department's Supplemental Agreement is baseless. The de Moya Group indicated (copy attached) that it could not sign the Supplemental Agreement because there may be conflicting language regarding the expressed terms and conditions of the extra work covered by said Supplemental Agreement. The proposed Supplemental Agreement states, in part, that "this Supplemental Agreement constitutes full and complete settlement of the matters set forth herein", while it also states

expressed terms and conditions of the extra work covered by said Supplemental Agreement. The proposed Supplemental Agreement states, in part, that "this Supplemental Agreement

that it does not include "contract time extensions and delay costs". As such, The de Moya Group requested clarification of this possible conflict to avoid any misunderstandings.

We have since conferred with counsel and have been advised that we can execute this Supplemental Agreement as prepared by the Department with the expressed inclusion of the April 27, 1999 directive. This letter would serve to clarify any possible ambiguity on this issue. (Emphasis Added)

Please provide the complete Supplemental Agreement, including the April 27, 1999 directive as an attachment, and the de Moya Group will execute same.

The Department's intended rescission of the April 27, 1999 directive ordering extra work, after completion of the extra work itself, is beyond comprehension. Surely, this is not the Department's policy on payment for extra work ordered by the District Director of Operations in accordance with Sub-Article 4-3.2.3 of the Supplemental Specifications.

By copy of this letter to Mr. Greg Xanders, State Construction Engineer, we hereby respectfully appeal the District Director of Operations' decision on this issue and request that a Supplemental Agreement/Payment be processed immediately.

On February 18, 2000, four (4) copies of "Supplemental Agreement-Median Paving Work" were hand delivered to dMG. This version of the Supplemental Agreement appears to conform to dMG's request of January 06, 2000. The Supplement Agreement was dated as "entered into this 14th day of February, 2000".

Item (4) of the Supplemental Agreement stated:

"The Department and the Contractor agree that the contract time adjustment and sum agreed to in this Supplemental Agreement constitute a full and complete settlement of the matters set forth herein, including, all direct and indirect costs for equipment, manpower, materials, overhead, profit and delay relating to the issues set forth in the Supplemental Agreement. This settlement is limited to and applies to any claims arising out of or on account of the matters described and set forth in this Supplement Agreement."

and

"Granted Time this Agreement 0 Days"

On page two (2) of the Supplemental Agreement contains the following item:

- A) The scope of this supplemental agreement is limited to the work described in the Department's directive and authorization to proceed dated April 27, 1999, attached herein as Exhibit A, and is hereby made a part of this supplemental agreement for such work through June 18, 1999. This work is further described as follows:***

...

The Department's referenced directive of April 27, 1999 to dMG reads as follows:

I am writing in response to your letter of today relative to Extra Median Paving Work. Your letter stated that you are scheduled to begin the revised median paving work Wednesday night; however, you have not yet received the required authorization from the Department to perform work covered by a Supplemental Agreement as per Subarticle 4-3.2.3 of the Standard Specifications for Road and Bridge Construction.

The purpose of this letter is to give you the authorization to proceed. While we do not necessarily agree that the additional authorization is necessary, this letter should address your concern.

The basis of payment for the work will be on a time and material basis. Granting of compensable and non-compensable time will be covered in the closeout supplemental agreement currently being formulated.

The basis of payment for the work will be on a time and material basis. Granting of

Bruce Seiler has directed me to advise you as stated above. He is currently on a field trip. The contents of this letter have been concurred to by him.

Armondo, (sic) as usual, I share your anticipation of the conclusion of this project.³

On February 23, 2000, dMG signed the Supplemental Agreement having altered its contents by adding to the first page:

“Granted Time this Agreement 0 Days” (SEE SPECIAL PROVISION ATTACHMENT PAGE 1)

and to the second page:

“SPECIAL PROVISION:

- 2) The Department’s directive and authorization to proceed, dated April 27, 1999, attached herein as Exhibit “A”, supersedes any and all contradictory language included in this Supplemental Agreement. Specifically, the de Moya Group reserves its rights to pursue additional compensation and time for all delays and increased costs as identified in The de Moya Group’s claim submittal, dated January 25, 2000, attached herein as Exhibit “B”.***

This is the same language that dMG had added to the Summary of Negotiations.

It is clear to the Board that the **Supplemental is for the extra work ordered by the Engineer for the work in the median**, and that neither the Contractor nor the FDOT dispute the amount of compensation for the work so ordered. Further, the Contractor asserts that he has been delayed by the Department, does not give up his rights for compensation for said delays including any delays for added work in the median. The Department (while not agreeing to the cause, duration or quantum) acknowledges that the Contractor has asserted that he will be seeking additional compensation/time for the impacts of those delays and does not give up these rights.

Notwithstanding the legal opinions of each party’s attorney, either party could probably sign the other’s version of the SA without making one wit of difference. This issue has clearly become a battle of wills between the two parties.

RECOMMENDATION:

It is the Board’s recommendation that, **forthwith the Department pay and the Contractor accept payment of \$338,909.14** for the documented cost incurred for work ordered by the Engineer for the following periods:

- 1.) For time and materials work performed by the Contractor during the period April 28, 1999 through June 18, 1999 totaling \$73,542.59 as shown on Daily Record of Extra Work – Site Source Records.**
- 2.) For time and materials work performed by subcontractor Weekley Asphalt during the period April 28, 1999 through May 19, 1999 totaling \$248,825.62 as shown on Daily Record of Extra Work – Site Source Records.**
- 3.) For time and materials work performed by subcontractor Turtle during the period April 28, 1999 through May 3, 1999 totaling**

³ Signed by Charles B. Wegman, P.E. for Bruce Seiler, P.E. Turnpike Director of Operations.

\$16,540.93 as shown on Daily Record of Extra Work – Site Source Records.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation.

I certify that I participated in all of the meetings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.

Respectfully Submitted,

Disputes Review Board
J. B. Michael, Jr., DRB Chairman
John H. Duke, DRB Member
Warren Craven, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

J. B. Michael, Jr.
DRB Chairman

CC: Warren Craven, DRB Member	Via: Fax & USPS
John Duke, DRB Member	Via: Fax & USPS
Walter F. Lange, P.E., FDOT	Via: USPS
Leighton Westlake, P.E., PBCS	Via: USPS