

## DISPUTE REVIEW BOARD RECOMMENDATION

Date Recommendation Issued: October 31<sup>st</sup> 2008

**FDOT Representative:**

Kelly Cowger, P.E.  
Target Engineering Group, Inc.  
221 S Ocean Drive, Suite "A"  
Fort Pierce, FL 334949-3255

**Contractor Representative:**

Michael R Walsh, P.M.  
Dickerson Florida, Inc.  
P.O. Box 910  
Fort Pierce, FL 34954-0910

RE: SR A1A Contract ID: T4131  
FIN: 230296-1-52-01 & 417680-1-52-01  
FAP: E 043022E  
SR A1A at Little Mud Creek Bridge  
DFI Project # 3441 Letter # 0063

**Subject: Dispute Issue – Markup on First Tier Subcontractors**

Dear Sirs:

The Owner, Florida Department of Transportation (Department), and Dickerson Florida Inc. (Contractor) requested a hearing to determine entitlement on the project.

Pertinent issues, correspondence and other information relating to the Department's and the Contractor's positions were forwarded to the Board for review and discussion at the hearing that was held on October 15<sup>th</sup> 2008.

**ISSUE:**

Unforeseen conditions at Little Mud Creek were encountered during construction. Once these conditions were analyzed The FDOT thru their representative, Target Engineering, directed Dickerson Florida, Inc. as per Sub Article 4-3.2 Increase, Decrease or Altercation in the Work, to submit a cost proposal to address these changes as to time and money. Dickerson Florida, Inc. submitted the additional cost and associated time extension request as per sub article 4-3.2.1 Allowable Costs for Extra work. This submittal included work to be performed by Cone Graham, Dickerson's first tier sub-contractor. Upon analysis of the proposal FDOT determined that Cone Graham had included in their price for their portion of the work a markup on their direct cost according to sub article 4-3.2.2 Subcontracted Work. FDOT took the position that the markup for Indirect cost, Expenses and Profit taken by Dickerson per sub article 4-3.2.1 (d) 2 included any sub-contractor mark-up and profit. FDOT issued a unilateral Supplemental Agreement, #14 which excluded Cone Grahams mark-up.

This dispute was unresolved according to the established resolution matrix and a Hearing before the DRB Board was requested by Dickerson Florida, Inc. on October 10, 2008.

**CONTRACTOR'S POSITION:**

Cone & Graham requests that the Board review and rule upon the usual and customary meaning, usage and intent of the specification language detailed in section 4-3.2.1, Allowable Costs for Extra Work and section 4-3.2.2, Subcontracted Work. Specifically we request that the Board determine the markup allowed by specification for labor, equipment and materials that a subcontractor performing work for a prime contractor is entitled to when and if the prime contractor elects to exercise option 2 of subsection (d) of subarticle 4-3.2.1 of subarticle 4-3.2. Cone & Graham's position is that the specifications apply to both the prime contractor and subcontractor with regard to mark-up independently.

### **Rule**

Section 4, Scope of Work (Rev 11-14-05) (FA 12-14-05) (7-06) Subarticle 4-3.2 of the Standard Specification for Road and Bridge Construction (Pages 18-20) is deleted and replaced with Supplemental Specification Subarticle 4-3.2 (Pages 45-49).

Section 4-3.2.1 Allowable Costs for Extra Work states in clear and unambiguous language that "The Engineer may direct that extra work be done and, at the Engineer's sole discretion. The Contractor will be paid pursuant to an agreed Supplemental Agreement or in the following manner." This section provides very specific and detailed language concerning the method of compensation for labor, material, and equipment. Furthermore this paragraph clearly provides two options available for the Contractor to recover indirect costs, expenses and profit, namely, (1) Solely a mark-up of 17.5% on labor, equipment and materials with a 10% markup on the first \$50,000.00 and a 5% markup on any work over \$50,000.00 on any subcontract directly related to the additional work; or (2) Solely the formula set forth on sheet 48 of the Supplemental Specifications.

Section 4-3.2.2 Subcontracted Work, clearly identifies work performed by a subcontractor and provides the method of compensation for labor, materials, equipment and limits the compensation for all indirect costs to 17.5% on payments of labor, materials and equipment with a 10% markup on the first \$50,000.00 and a 5% markup on any work over \$50,000.00 on any subcontract directly related to the additional work.

### **Analysis**

The argument is based upon the premise that a subcontractor having a legal and binding relationship with the Prime contractor could reasonably expect to be compensated for indirect costs pursuant to an agreed Supplemental Agreement or at the established rate of 17.5% per section 4-3.2.2 of the Supplemental Specifications regardless of which option the prime contractor has selected to recover their indirect costs.

The argument is further developed and evidenced by specific language in the above referenced specifications that when the Prime Contractor elects to be compensated under section 4-3.2.1 option 2, that the above referenced sections of the contract documents provide no contradictions, provisions, or other language that would bear evidence against the subcontractor's application of the 17.5% markup, nor does it show any intent that a subcontractor is expected to perform work at cost thereby being deprived of and required to forfeit the contract established markup allowed under section 4-3.2.2. In addition no contradictions, provisions or other language in the above referenced sections of the contract documents contain any language or show any intent that the Prime contractor is required to exercise option 1 of section 4-3.2.1 providing the subcontractor elects indirect costs pursuant to section 4-3.2.2.

### **Conclusion**

Sections 4-3.2.1 and 4-3.2.2 are supplementary providing language which is both necessary and sufficient for reasonable and practical understanding of the specification without superfluous interpretations or further analysis. Furthermore there are no preconditions or restrictions implied or otherwise that would lead a prudent person to believe that only the prime contractor would be allowed to recover indirect costs, expenses and profit while mandating that a subcontractor perform work at cost.

### **DEPARTMENT'S POSITION:**

#### **Issue**

1<sup>st</sup> tier subcontractor markup as it relates to Supplemental Specification (SS) 4-3.2 - Increase, Decrease or Alteration in the Work. The prime is asking for 8% overhead formula under 4-3.2.1(d)(2) for the delay and the subcontractor an additional 17.5% for their labor, material & equipment under 4-3.2.2.

This Contract was let under the 2004 Standard Specifications with Supplemental Specification to Subarticle 4-3.2, pages 45 through 49, which are attached for your reference.

### Spec

SS 4-3.2.2 - Subcontracted Work states that for work performed by a subcontractor, compensation for the additional or unforeseen work shall be solely limited to that provided for in 4-3.2.1 (a), (b), (c) and (d)(1) only. Selection of (d)(2) is not an option for the subcontracted work.

SS 4-3.2.1 – Allowable Costs for Extra work sections (a), (b) & (c) are standard Labor & Burden, Materials & Supplies, and Equipment, respectively.

SS 4-3.2.1 (d) is Indirect Costs, Expenses and Profit where the Contractor has the option of choosing the greater of either (d)(1) or (d)(2):

- (d)(1) – Solely a mark-up of 17.5% on Labor and Burden, Materials and Supplies, and Equipment including (d)(1)(ii) – 10/5% subcontractor markup; or
- (d)(2) – Average 8% Overhead per Day Formula for the Time Extension

### Analysis

The Specifications clearly state that the prime Contractor has to choose between (d)(1) or (d)(2) in regard to Indirect Costs, Expenses and Profit under SS 4-3.2.1(d).

In the case of subcontractor work, the prime has to make a business decision on which markups to take. The prime has to elect either the prime and subcontractor mark ups provided in (d)(1) or the 8% provided in (d)(2), and whatever the prime elects is what applies to both the prime and sub. The Department's contract formula governs all payments to the prime regardless of the subcontract's payment formula.

The Contractor is requesting payment under both (d)(1) and (d)(2), stating its Subcontractor is entitled to the 17.5% on their own work despite the fact the prime opted for the 8% overhead formula for the time extension period. In regard to Indirect Costs, Expenses and Profit described by SS 4-3.2.1 (d), the Contractor has the option of choosing the greater of either (d)(1) or (d)(2), but not both.

Subcontracted Work covered under SS 4-3.2.2 states that for work performed by a subcontractor, compensation for the additional or unforeseen work shall be solely limited to that provided for in 4-3.2.1 (a), (b), (c) and (d)(1) only.

### Conclusion

SS 4-3.2.1 (d) is Indirect Costs, Expenses and Profit where the Contractor has the option of choosing the greater of either (d)(1) or (d)(2):

- (d)(1) – Solely a mark-up of 17.5% on Labor and Burden, Materials and Supplies, and Equipment and (d)(1)(ii) – 10/5% subcontractor markup; or
- (d)(2) – Average 8% Overhead per Day Formula for the Time Extension.

Our contract is with the prime. If the prime chooses (d)(2) in lieu of (d)(1), the Subcontractor does not have an option of additional markups described by (d)(1).

### **BOARD FINDINGS:**

According to the Supplemental Specifications, Sub-article 4-3.2.1, "The Engineer may direct in writing that extra work be done and, at the Engineer's sole discretion, the contractor will be paid pursuant to an agreed Supplemental Agreement or in the following manner:" Sub-article 4-3.2.1 outlines the method for computing costs for labor and burden, materials and equipment under 4-3.2.1 (a) (b) and (c). Sub-article 4-3.2.1(d), Indirect Costs, Expenses and Profit: States, "Compensation for all indirect costs, expenses, and profit of **the contractor**".

4-3.2.1 (d) continues to state that this compensation is "expressly limited to the **greater** of either (1) or (2) below". This portion **only addresses** the method of determining Dickerson's mark-up.

**Dickerson Florida, Inc.** is compensated for their mark-up by this sub-article. Dickerson's mark-up on the Cone Graham portion of the additional work was included in the formula provided in 4-3.2.1(d) 2 as this was the **greater** of the two options. Dickerson did not have a choice.

Sub-article 4-3.2.2 Subcontracted Work: "For work performed by a sub-contractor, compensation for the additional or unforeseen work shall be solely limited to as provided for in 4-3.2.1 (a), (b), (c), and (d)(1)" Cone Graham is compensated for their mark-up by this sub-article.

**BOARD RECOMMENDATION:**

The DRB Board recommends that Cone Graham be allowed mark up for indirect costs, expenses and profit as outlined in Sub-Article 4-3.2.2.

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

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

Respectfully Submitted,  
Disputes Review Board



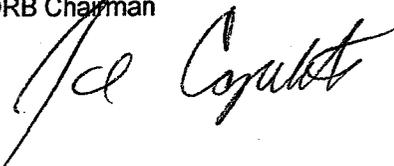
Joe Capeletti, DRB Chairman

John Nutbrown, DRB Member

Robert Cedeno, DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

DRB Chairman





# TARGET ENGINEERING GROUP, INC.

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FORT PIERCE, FLORIDA 34949-3255  
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November 14, 2008

Joe Capeletti  
Chairman DRB Board  
Aspen Capital Corp.  
1895 Merion Lane  
Coral Springs, FL 33071

Re: FIN: 417680 1 5201 and 230296-1-52-01  
CONTRACT: T4131  
FAP NO.: E042 022E  
Department Rejection of the DRB Recommendation - Subcontractor markup as it relates to Supplemental Spec 4-3.2 - Increase, Decrease or Alteration in the Work

Dear Mr. Capeletti:

The Department of Transportation is in receipt of the DRB's recommendation dated October 31, 2008 in which the Board recommended entitlement to the Contractor for the markups to the prime Contractor and subcontractor pursuant to Specification 4-3.2.1. In accordance with the DRB Operating Procedures, please consider this the Department's rejection of the Board's recommendation.

The Department will continue its efforts to obtain resolution of this matter with the Contractor in accordance with the terms of the Contract.

The Department sincerely appreciates the Board's time and consideration of this matter.

Sincerely,

Target Engineering Group, Inc.

Kelly Cowger, P.E.  
Project Engineer

Cc:

John Nutbrown, DRB Member  
Michael Walsh, Dickerson Florida  
Carolyn Gish, FDOT  
Larry Repking, FDOT  
Asem Al-Turk, Target Engineering

Robert Cedeno, DRB Member  
Chuck Cameron, Dickerson Florida  
Guillermo Vignier, FDOT  
Katie Kehres, FDOT