

PBS&J

SEP 18 2008

SR60
FDOT DISTRICT 1

Dispute Review Board
Dallas L. Wolford, Chairman
387 Winsford Court
Heathrow, Florida 32746

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

September 18, 2008

Aaron Watts
Division Engineer
Elmo Greer & Sons LLC
16505 State Route 60
Vero Beach, Florida 32966

RE: DRB Recommendation for Entitlement to Increase Cost of Coquina Rock
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 5to MP 21.998 and from MP 11.657 to MP 14.625

Dear Madam/Sir,

A Dispute Review Board Hearing was held on September 9, 2008. The meeting was requested by the FDOT. The request was for Entitlement for increased cost to Coquina Rock for sub base. An issue in EGS final estimates exception letter of 11/05/07.

The FDOT Position (summary) is attached items (A) through (D).

EGS did not submit a Position Paper with regard to the issue. EGS' personnel attended the Hearing but had no remarks with regard to the issue. EGS had objected to the Hearing as untimely and claimed that they had Entitlement for the issue through another DRB recommendation which was rejected by FDOT with not time granted.

The meeting was requested by FDOT to satisfy contract requirements that the DRB must hear the issue in dispute. The FDOT requested a recommendation from the DRB based

on contract and specification requirements of Sections 5 – 12.3(d), 5 – 12.6.2.1, 5 – 12.6.2, 5 – 12.6.2.2, 9 – 2.1 and 9 – 3.1.

EGS has previously asked for increased cost of Coquina work but it was never brought to the DRB prior to this FDOT request for Hearing the issue.

Despite the fact that EGS did not respond to Entitlement issue request of FDOT, the DRB must make a recommendation based on the facts of the issue presented by the FDOT on the day of the Hearing based on FDOT Specifications, Plans, and Special Provisions.

DRB RECOMMENDATIONS

Based on the issue as presented at the Hearing by the FDOT at this time there is no Entitlement to escalated costs of Coquina Rock base material.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

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 acceptance of this recommendation.

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

Signed for and with concurrence of all the Dispute Review Board Members,



Dallas L. Wolford, Chairman

Cc: Mark Puckett
John Swengel

Issue 2: Is EGS entitled escalation of base rock costs?

EGS's Position -- Yes -- because of the extended duration of the Contract

PBS&J's Position - No for the following four reasons:

(a) Since the length of time necessary to complete the work is alleged to have resulted solely from the muck removal, all costs associated with that issue were compensated in Supplemental Agreement 2, as more fully discussed in PBS&J's response to issue 1 above.

(b) A claim for costs resulting from a material price increase is merely a claim to adjust the unit prices. Standard Specification Sub article 9-3.1 (in Tab A) states that "... the Contractor shall accept payment in full at Contract unit bid prices for the actual quantities of work done, and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor, resulting either directly from such alterations, ... or from any other cause." Supplemental Specifications Sub article 9-2.1 (Tab A) requires the Contractor to accept unit prices, despite unforeseen circumstances arising during contract performance, except for adjustments for fuel and bituminous material which are based on national indexes. The project records establish that EGS has received \$2,669,162.02 in fuel and bituminous adjustments under this contract.

(c) Supplemental Specifications Sub article 5-12.6.2 (in Tab A) states that:
"... (Additional compensation set forth in 5-12.6.2.1 and 5-12.6.2.2 shall be the Contractor's sole monetary remedy for any delay other than to perform extra work caused by the Department unless the delay shall have been caused by acts constituting willful or intentional interference by the Department with Contractor's performance and then only where such acts continue after Contractor's written notice to the Department of such interference..." (No Department interference is involved.) "... The parties anticipate that delays may be caused by or arise from any number of events during the term of the Contract, including but not limited to work performed, ... supplemental agreements, disruptions, differing site conditions, ... time extensions, ... actions of suppliers, ... weather, ... or other events, factors, forces or factors experienced in construction work..."

Supplemental Specification Sub article 5-12.6.2.1 Compensation for Direct Costs of Delay states: For any delay claim, the Contractor shall only be entitled to monetary compensation for the actual idle labor, equipment and material costs incurred beyond what reasonable mitigation the Contractor could have undertaken, nor shall any indirect costs be recoverable for any delay, except as provided for in 5-12.6.2.2" (No idle costs are sought in EGS's claim.)

Supplemental Specifications Sub article 5-12.6.2.2 Compensation for Indirect Impacts of Delay, provides for recovery based on the Contractor showing a right to a time extension at a formula daily overhead rate. There are other conditions. EGS's claim asks for a time extension but does not ask for indirect impact costs and Supplemental Specification 5-12.3 prohibits EGS from now amending its claim.

(d) Supplemental Specification Sub article 5-12.3(d) (in Tab D) Contents of a Written Claim, requires "Identification of provisions of the Contract which support the claim and the statement of reasons why such provisions support the claim, or alternatively, the provisions of the Contract which allegedly have been breached and the actions constituting each breach." EGS's claim does not state any contract references which establish a right to material escalation cost.

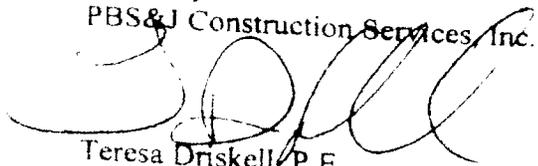
Furthermore, just like any other request that EGS makes for increased cost, the Department has a right to timely notice of the escalation costs the Contractor intends to claim so that it has an opportunity to act to mitigate impacts. This is part of the EGS's obligation to mitigate claim costs.

For reasons stated above, we respectfully request the Dispute Review Board determine that the EGS is not entitled to increased cost of aggregate material used in asphalt mixes.

Attached you will find back up correspondence and related documents.

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
Aaron Watts, EGS
Mickey Kelly, FDOT
Tim Wedeman, Project Administrator.

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

PBS&J
SEP 18 2008
SR60
DOT DISTRICT 4

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

September 18, 2008

Aaron Watts
Division Engineer
Elmo Greer & Sons LLC
16505 State Route 60
Vero Beach, Florida 32966

Re: Rebuttal Paper (Coquina Rock Area-Wide Shortage – Entitlement Only time)
Financial Project Nos.: 22859815201, 22859915201, 22860115201
Federal Aid Project Nos: 2004042P, 200443P, 2004038
Contract No: T4003
County: Indian River
Description: SR60 from 1.02km east of the Osceola/Indian River County line to 4.52km west of CR512

Dear Madam/Sir

A DRB Hearing was held on September 9, 2008 which was a continuance of a Hearing held July 23, 2008. EGS in their presentation of their position with regard to a Coquina Rock issue used a power point presentation in which the FDOT said differed from the position papers presented originally for the Hearing. FDOT asked for a continuance until they could do an analysis of the power point presentation differences. The other issues of dispute were also postponed to a new Hearing date of September 9, 2008.

The FDOT issued a rebuttal to EGS position papers on July 18, 2008.

EGS requested a hearing on March 28, 2008 requesting Entitlement to contract time due to an area-wide shortage of FDOT base material (Entitlement Only Time).

EGS cites article 8-7.3.2 (“Contract Time Extensions”).

CONTRACTORS POSITION

EGS has furnished substantial letters from a representative number of material suppliers which state there is a shortage of sub-based materials for the project.

1. They used historically reliable reputable sources of material to bid the project.
2. Some pits that were to be used by EGS were bought by other suppliers but were closed due to material not meeting the FDOT specifications. (Waivers were received from FDOT with regard to screening & chemical analysis of the material and the material was used as soon as it was approved (Ft. Drum – closed approx. 2 years due to FDOT specifications).
3. Materials from other pits approved by FDOT was taken on a first come first serve basis and demand created a shortage.
4. Contractor claims Coquina Rock is unsuitable for stock piling due to break down of fines in handling and will not then pass FDOT specs.
5. In an effort to help with supply of rock EGS tried to set up their own pit operations but permitting was difficult and time consuming. There never was enough permitted area to operate a successful pit allowed by the authorities.
6. Contractor got material (lime rock) by rail to help out that had to be trucked 67 miles from the unloading point.
7. EGS claims time was given to 2 other contractors with regard to area-wide rock shortage during this same time period.

FDOT POSITION

1. There is no shortage of rock.
2. Base construction activities were not critical at the time rock was not available from local pits and therefore did not impact the contract completion.
3. The contractor did not try to get material from other than Coquina pits. Rock was available and the only reason the Contractor hasn't gotten it is because of price.
4. The "area" in "area-wide" with regard to base material is at least Central Florida Supplemental Specification 8-7.3.2 has been implemented in the past where an area-wide shortage of material has been identified. Areas have been and continue to be defined as "entire Department Districts, Regions, i.e. Central Florida and Florida as a whole."
5. Did not consider material other than Coquina Rock for base, i.e. limestone.
6. The contractor failed to stockpile material.

DRB FINDINGS

Elmo Greer and Sons has used proper prudence in the preparation of his bid regarding the purchase of optional base materials (Coquina Base). He contacted suppliers who had historically supplied base material for other projects in the area. Due to the large quantity of material required, he planned to use three suppliers in order to receive a constant flow of material. During this time, two suppliers decided not to furnish state approved materials, some had environmental and permit problems. There was a fourth mine that had a quote to supply Coquina Rock to the project that Greer had not considered at the time of the bid due to the haul distance, but Greer used as a back up, but the mine could only produce a limited amount of material due to the size of their plant. This caused a shortage of material in the area previously utilized. However, when another producer offered material railed to Rockbridge unloading site EGS immediately took the offer.

Section 8-7.3.2 of the Florida Department of Transportation allows the state to make time considerations for this area-wide shortage with proper documentation, this section should be used to allow the contractor to procure the materials from sources outside the area or to change the base option to materials that are not economically overwhelming for the contractor. EGS has

made additional expenditures to obtain base material to the extent of attempting to permit and open a Coquina Rock mine of its own. Also with a change in the chemical content allowed by the FDOT specifications they have induced Dickerson to reopen its mine at Fort Drum, with the opening of this pit the contractor could complete the project with Coquina Rock base material.

At the time of the bid and award of the contract FDOT accepted the optional base bid as Coquina Rock and must have assumed the material was available in the area.

Under Section 2-6 of the FDOT specifications, the FDOT did not consider the bid to be an IRREGULAR PROPOSAL (unbalanced, unfair pricing, or contingency) and under Section 2-12 did not exercise their right for the bidder to furnish a statement of the origin of any material to be used in the project. Therefore, it appears they FDOT did not have a concern as to the availability of the material at the time of award of the contract. Apparently the shortage started to develop some time later both commercial and civil at an all time production demand in the area.

As to the failure of Greer to issue purchase orders for material, it is not unusual that the supplier will not sign purchase orders or acknowledge letters of intent sent by the purchaser.

The end result was the Suppliers failed to produce the required material per their quotations at the time of the bid. Documentation as to inability are included with the Contractors Position Papers. EGS had no direct control of the Suppliers actions. However, in the case of the Fort Drum pit, EGS had to sign a Waiver of Damages against one of the original suppliers to get a guarantee from supplier to give EGS first come on the material. EGS to have priority over all other customers at Ft. Drum pit. The pit reopened with a waiver on screening to a lower number on the number 4 screen, and the chemical matrix was allowed as was with a correction on the LBR to a higher LBR number.

RECOMMENDATION

The Majority Members of the DRB say:

The Contractor is entitled to time for shortage of Coquina Rock material for the project.

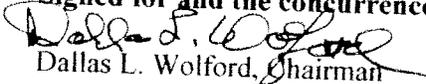
This Board appreciates the cooperation of all parties and the information supplied for its review in making a decision in this dispute. The DRB would remind you that all parties are not precluded from negotiating an equitable adjustment to any issue.

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 an 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

Signed for and the concurrence of all the Dispute Board Members


Dallas L. Wolford, Chairman

John C. Swengel

Mark Puckett

Issue – Area Wide Shortage Coquina Rock – Entitlement Only

Minority Board Findings: EGS based their original bid on coquina base rock after receiving several quotes from suppliers in “close proximity” to the project and being reasonably assured that a sufficient supply of coquina baserock would be available in the area to complete the Project.

During construction, EGS was notified by each of their planned coquina base rock suppliers that this base material was in short supply due to increased demand, permitting, and environmental issues. Each cited increased cost associated with these issues as justification for cost increases for their products. At least 2 of their original planned suppliers shut down their operations for similar reasons during the project.

One of the original supplies, Dickerson eventually purchased the Shamrock mine located in Ft. Drum, and was able to propose this source of supply to EGS. On December 15, 2003 EGS was provided with a letter stating “sufficient resources to meet the quality requirements for the project” were available at this mine. Even though this material was available at a higher cost due to the haul distance, this appears to have been an acceptable source of supply.

EGS provided an affidavit from Mr. Larry Dale of Dickerson which states “since the Ft. Drum recommended production, EGS has paid Dickerson \$8.00/ton for base rock from the Ft. Drum Mine for use on the project.” While there is additional correspondence (May 3, 2006 letter from Dickerson to EGS), which appears to suggest that shipments of base material were held up “due to Florida Department of Transportation specification changes of the minimum carbonate content,” this is strictly a supplier issue. This supplier is in business to produce material which meets FDOT requirements and as is common in the industry, must find a way to gain approval of their material, if they wish to provide the material on FDOT projects. This approval process is the responsibility of the supplier and not the FDOT.

Section 8-7.3.2 of the Supplemental Specifications states “The Department will consider the delays in delivery of materials or component equipment that affect progress on a controlling item of work as a basis for granting a time extension if such delays are beyond the control of the contractor or supplier.” There being no acknowledgement by EGS that the approval of this source of supply was expeditiously pursued by the supplier and based on the fact that coquina base rock was available and ultimately obtained from the Ft. Drum Mine following acceptance criteria changes by FDOT, I find no entitlement for the contractor to additional contract time due to an area wide shortage of material.

September 18, 2008

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

PBS&J

2008

09/18/08
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Teresa Driskell, P.E.
Senior Engineer
PBS&J Construction Services Inc.
9055 Americana Rd., Suite 24
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Aaron Watts
Division Engineer
Elmo Greer & Sons LLC
16505 State Route 60
Vero Beach, Florida 32966

RE: Dispute Review Board Recommendation (Natures Keepers Increased Cost Claims)
RE: Dispute Review Board Recommendation (Coquina Rock Shortage – EGS)
RE: DRB Recommendation (Aggregate for Asphalt – Price Escalation – Entitlement Only)
Financial Project Nos: 22859815201, 22859915201, 22860115201
Federal Aid Project Nos: 2004042P, 200449P, 2004038
Contract No: T4003
County: Indian River
Description: SR60 (Osceola Boulevard) From MP 14.624 to MP 19154, MP 10.154 to MP 21.998 and from MP 11.657 to MP 14.625

Dear Madame/Sir:

A Dispute Review Board Hearing was held on September 9, 2008. The meeting was requested by the FDOT. The request was for Entitlement on three issues in EGS final estimates exception claim letter of 11/05/07. The issues are:

Aggregate for Asphalt
Natures Keepers claim/(subcontractor)
Coquina Rock/

EGS objected to the Hearing as untimely and claimed that they had Entitlement for the three issues through the other DRB recommendations granting time. Some of the DRB recommendations were rejected by FDOT with no time granted. Further, the issues present questions of Quantum and not Entitlement and should not be brought to the Board.

The meeting was requested by FDOT because the FDOT would not waive the contract requirements that all issues must go through the DRB as part of the contract administrative requirements.

FDOT requested a recommendation from the DRB based on contract and specification requirements of Section 8-7.3.2 and 5 – 12.

The FDOT is asking for a recommendation of Contractor Entitlement only for the above stated three issues.

EGS has not asked for anything with regard to the three issues but did give notice in their letter of 11/05/07 that these were outstanding for a final settlement. EGS states it is not ready to present a formal claim until such time a higher authority rules on the time allowed by previous DRB recommendations.

EGS personnel attended the Hearing but did not speak with regard to the three issues presented by the FDOT.

Despite the fact that EGS did not respond to the Entitlement issue request of FDOT, the DRB must make a recommendation based on the facts of the three issues on the day of the Hearing based on the FDOT Specifications, Contract, Plans, and Special Provisions.

DRB RECOMMENDATION

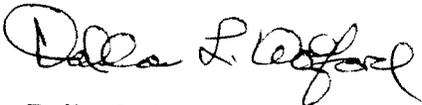
For the issues as presented on September 9, 2008 there is no Entitlement at this time.

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

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 acceptance of this recommendations.

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

Signed for and with the concurrence of all the Dispute Review Board Members,



Dallas L. Wolford, Chairman

Cc: Mark Puckett
John Swengel



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

September 23, 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: T4003
County: Indian River

Response to DRB Recommendation on Natures Keeper, Asphalt Aggregate Increase, and Coquina Base Rock Increase Claims

Dear Mr. Wolford:

Elmo Greer & Sons is in receipt of the DRB's recommendation dated September 18, 2008 in which the Board made a recommendation for no entitlement at this time for the three issues brought before the DRB by the Department and PBS&J. As the issues presented questions of quantum – not entitlement – EGS objected to the hearing going forward as framed by the Department and PBS&J. EGS must therefore reject the DRB's recommendation at this juncture.

EGS sincerely appreciates time and consideration of the Board.

Sincerely,
Elmo Greer & Sons, LLC


Aaron Watts
Project Manager

File: 496C
XC: Board Members, Teresa Driskell (PBS&J), 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
J. TODD GREER, C.O.O., ASPHALT DIVISION
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MICHAEL P. HAMM, FLORIDA DIVISION ENGINEER
GARY L. TAYLOR, P.E. L.S., C.O.O., GRADE DIVISION

September 23, 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

Response to DRB Recommendation on Coquina Base Rock Increase

Dear Mr. Wolford:

Elmo Greer & Sons is in receipt of the DRB's recommendation dated September 18, 2008 in which the Board made a recommendation for no entitlement at this time for Coquina Base Rock Increased Costs brought before the DRB by the Department and PBS&J. As the issue presented questions of quantum – not entitlement – EGS objected to the hearing going forward as framed by the Department and PBS&J. EGS must therefore reject the DRB's recommendation at this juncture.

EGS sincerely appreciates time and consideration of the Board.

Sincerely,
Elmo Greer & Sons, LLC

Aaron Watts
Project Manager

File: 496C
XC: Board Members, Teresa Driskell (PBS&J), Todd Greer (EGS), Brad Copenhaver (VLP)