

DISPUTE REVIEW BOARD RECOMMENDATIONS

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Financial Project No(s): 22859615201, 228595515201, 2285971520 P
Federal Aid Project No(s): 2004 041 P and 2004 040 P
Contract No: 21457
County: Indian River
Description: SR. 60 Reconstruction From MP 11.657 to MP 21998

Dear Sir and Madam,

On June 30,2006 Elmo Greer & Sons LLC requested a DRB hearing with regard to (1) Quantum of days for the removal of **Unsuitable Material** and (2) **Entitlement to time** for Area Wide Shortage of Base Material. the hearing was held on October 31 2006

PARTIES POSITION DOCUMENTS ATTACHED

DISPUTE REVIEW BOARD RECOMMENDATIONS

ROUTE 60 CORRIDOR PROJECT I

CONTRACT NUMBER 21457

INDIAN RIVER COUNTY

NOVEMBER 2006

FLORIDA DEPARTMENT of TRANSPORTATION

&

ELMO GREER & SONS LLC. CONTRACTOR

DISPUTE REVIEW BOARD RECOMMENDATIONS

ISSUE- REMOVAL of UNSUITABLE MATERIAL

FDOT issued SA No, 2 adding a new item to the contract for removal of unsuitable material. The monetary value and quantity were at the time agreeable between the parties and the document was executed and is a matter of record. The Contractor reserved his right to ask for time and has done so. The Department has reviewed the request and has granted 72 days for the extra work. The contractor disagrees with the Departments Quantity of days offered and the issue is for the DRB to determine the number of days that should be granted.

CONTRACTORS POSITION

Due to the unknown quantity of material to be removed, EGS and FDOT agreed that the amount of time due EGS would be determined after the additional subsoil excavation was complete.

EGS submitted a CPM schedule Analysis to FDOT that requested a time delay to the Project's critical path of 354 calendar days. However, as the Project had a 150 day incentive provision, EGS original baseline schedule was set up as an early completion schedule, thus 354 day delay to the critical path only extended the Project completion day by 220 days

EGS says they are entitled to a time extension of 220 days for the delays caused by the removal of \$3,000,000.of work in the removal of unsuitable material (muck) that was required to perform the Project.

FDOT POSITION

The FDOT says that EGS has not proven any impact to the schedule for critical items beyond the time they have granted.

The Department has determined that a day is earned only when it is day on the Critical Path

The Department has stated that the number of days granted are in line with the FDOT Guideline for Establishing Contract Duration a method of computing time for projects by the items description, i.e. excavation @ 2905.35 cm or 3800 cubic yards constitutes a day.

The Department says the contractor is not in compliance with the terms of the contract as outlined in their position papers, with regard to Notice and other Administrative requirements.

THE RECOMMEDATION OF THE BOARD

The Board thinks that administrative shortfalls that are outlined in FDOT position papers have been satisfied as to the fact that they have issued an extension of time.

The Board recommends that due to EGS not supplying to FDOT or the DRB at this time a schedule showing additional impacts to the critical path items of the Project, delays caused by the removal of unsuitable material, that there is no entitlement to time other than that previously granted by FDOT.

The Board recommends that parties continue to work towards an acceptable realistic schedule. Some consideration should be extended to the contractor to submit a proper schedule.

DISPUTE REVIEW BOARD RECOMMENDATION

Issue - Area Wide Shortage of Coquina Rock

Elmo Greer & Sons LLC (EGS) has requested the Dispute Review Board to determine the issue of their entitlement to contract time due to an area wide shortage of FDOT base material. (Entitlement only)

EGS cites article 8-7.3.2 "Contract Time Extensions"

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 shortage delays are beyond the control of the Contractor or supplier. Such delays may include an area-wide shortage, an industry-wide strike, or a natural disaster that affects all feasible sources of supply.

CONTRACTOR'S POSITION

- 1. They used reputable, historical sources of supply on bidding job for materials.**
- 2. The contractor used three of four local suppliers of Coquina Rock as the source of his supply and split the order three ways, which he says gave him a comfort zone in the quantity he needed.**
- 3. At the time the Coquina Rock was needed for the project only one of the three FDOT-approved suppliers had materials and only on a first come, first serve basis.**
- 4. The contractor states that Coquina Rock is unsuitable to stockpile due to degradation and deterioration which will not pass FDOT specifications at the stockpile.**

FDOT POSITION

- 1. There is no shortage of rock.**
- 2. Rock is available and the only reason the Contractor hasn't gotten it is because of price.**
- 3. They failed to stockpile rock.**
- 4. The area for supply of material as depicted by EGS is too small and cannot be considered the area.**
- 5. Failure to give purchase orders because EGS didn't have materials.**

The Dispute Review Board having heard the presentations of the parties as to their positions in this matter during the hearing held October 31, 2006.

Both parties must remember that the Dispute Review Board does not rewrite the specifications. It is sometimes argued that a DRB will provide a recommendation that ignores the contract or somewhere in between the positions taken by each party: in effect a compromise. It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract

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 4th 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.

Section 8-7.3.2 of the Florida Department of Transportation allows the state to make time considerations for this 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, according to the contractor the coquina rock base material is substantially complete on this project.

At the time of the bid and award of the contract the FDOT accepted the optional base bid as coquina rock and 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 the 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.

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 is included with the Contractors Position Papers. EGS had no direct control of the Suppliers actions.

RECOMMENDATION

The contractor is entitled to time for shortage of Coquina rock material for the project.

Minority Board Findings: EGS based their original bid on coquina base rock after receiving 3 quotes from suppliers in “close proximity” to the project and being reasonably assured that a sufficient supply of area coquina would be available 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.

One of the original supplies, Dickerson has maintained a source of supply at their Ft. Drum Mine throughout the duration of this project. On December 15, 2003 EGS was provided with a letter stating “sufficient resources to meet the quantity requirements for the project” were available. Even though this material was available at a higher cost due to the haul distance, this was 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. Coquina base rock from this mine was provided to other Contractors throughout the alleged area-wide shortage time frame.

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. Such delays may include as area-wide shortage, an industry-wide strike, or a natural disaster that affects all feasible sources of supply. In such cases, the Contractor shall furnish substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage, an industry-wide strike, etc.”

While the Contractor must rely upon the supplier to provide material which meets the specifications, this specification states that the basis for granting a time extension must be

beyond the control of the Contractor and supplier. Based on the apparent continued availability of coquina base rock from the Dickerson, Inc. Ft. Drum Mine, it appears coquina base rock could have been provided from this source and therefore, I find no entitlement for the contractor to additional contract time due to an area wide shortage of material.

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

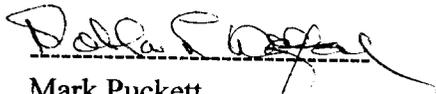
Please respond to the DRB and the other party of acceptance or rejection of this recommendation in the required 15 days. Failure to do so constitutes an acceptance of this recommendation by the non-responding party.

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

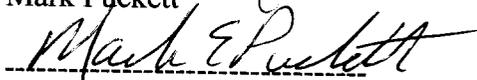
Respectfully Submitted,

Disputes Review Board,

Dallas L. Wolford Chairman



Mark Puckett



John Swengel



November 14, 2006