

DISPUTES REVIEW BOARD RECOMMENDATION

9 November, 2003

Jimmie Franklin
Project Engineer
Florida Department of Transportation
555 Camp Road
Cocoa, Florida 32927

Dave Park, P.E.
Vice President, Engineering
RKT Constructors, Inc.
5220 S. Washington Rd.
Titusville, Florida 32780

Ref: SR-5 (US 1) From Post Road to Pineda Causeway Contract No: 21485, Financial Project No: 237550-1-52-01. Disputes Review Board hearing regarding equitable adjustment for box culvert impact.

Dear Sirs:

The Florida Department of Transportation and RKT Constructors, Inc., requested a hearing concerning the above referenced issue. The Contractor believes he was impacted by the Department's review and approval process of shop drawings which created a delay with the box culvert construction and therefore is entitled to settlement of the above issue in a claim settlement. The Department claims the Contractor has not complied with the Claim Specification and therefore has waived his right to resolution of his claim.

CONTRACTOR'S POSITION

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

"RKT originally planned on completing two box culvert segments designated for the above mentioned project utilizing precast sections for both the culvert and wing wall applications. RKT believes that our precast solution, as contemplated at bid time and subsequently submitted, was and is the most functional / cost effective means for completing the work entailed in the contract documents in order to construct these culvert systems. RKT was ultimately, however, prohibited from utilizing precast sections for the wing walls by the department

without what we believe to be any reasonable contract justification for the system being rejected. Additionally, the project was greatly impacted by the department subjecting us to an exorbitantly long submittal process which took place prior to our being able to fabricate and install these structures. As summarized herein, it seems readily apparent that over the course of this extended time period the department essentially:

- 1.) Extensively exceeded the allowable amount of contract time given in which to review a contractor's submittal package.
- 2.) Completely changed the design criteria of material being required for provision by RKT in mid-stream of the submittal process.

Consequently, RKT is seeking equitable monetary and schedule compensation from the department in order to offset impacts and inefficiencies incurred as the result of the department's actions with respect to the issue at hand.

RKT originally submitted a precast box culvert and precast wing wall package to the department for approval on September 4, 2002. Prior to sending our initial submittal package, RKT contacted a department representative in order to ensure that the submittal would be routed correctly. RKT then distributed the submittal to the corresponding department designee and awaited a response on our submittal.

The department subsequently distributed a response to our initial shop drawing submission on September 24, 2002. The shop drawing had been reviewed at the department's level and a re-submittal was required on a few select items. RKT was required to address items involving adequate concrete coverage over the steel, soil density data, yield strength on reinforcing materials, and field verification of certain dimensions as stated on the shop drawings.

RKT subsequently received this submittal response back from the department and forwarded it to our material supplier, Rinker Materials, on October 8, 2002, in order for them to make revisions necessary and resubmit the drawings. RKT subsequently received and sent out revised shop drawings to the department on October 31, 2002 for a review of the corrections made and approval. RKT anticipated a relatively quick turn around period for approval of this secondary submittal for this controlling item of work since there was a limited number of issues which needed to be addressed.

On December 6, 2002, the engineer of record forwarded our second set of shop drawings back to the department for a final review. The engineer of record had already indicated on this set of drawings that our secondary submittal was approved from his perspective. The department then

proceeded to retain the shop drawings until December 30, 2002 when they were ultimately returned to RKT with a corresponding rejection on the type of connection to be used for the wing walls as well as the type of bedding material to be utilized in supporting the structures. ...Additionally, the submittal review process should have been completed at the department's level by no later than December 15, 2002. As previously stipulated, the process took until December 30, 2002 which is 15 days later than allowed by contract. Consequently, RKT believes the starting date for impact on this critical path item (controlling item of work) to be December 16, 2002 which represents the first day that the submittal response from the department was delinquent in our estimation on the second submittal package."

DEPARTMENT'S POSITION

We will state the Departments position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Departments position paper has the following statements and references to document their claim for no entitlement.

"It is the Department's position that the DRB should not review the merits of the claim because they believe that RKT failed to preserve their right to pursue additional time or money. Specifically, they believe that RKT did not properly submit the claim for this issue per specification 5-12.

5-12 Claims by Contractor

5-12.1 General: When the Contractor deems that extra compensation or a time extension is due beyond that agreed to by the Engineer, whether due to delay, additional work, altered work, differing site conditions, breach of Contract, or for any other cause, the Contractor shall follow the procedures set forth herein for preservation, presentation and resolution of the claim.

5-12.2.1 Claims for Extra Work, Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of

a delay. If such notification is not given and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment and time, the Contractor waives the claim for additional compensation or a time extension.

Submission of timely notice of intent to file a claim, preliminary time extension request, time extension request, and the claim, together with full and complete claim documentation, are each a condition precedent to the Contractor bringing suit against the Department for the items and for the sums or time set forth in the Contractor's written claim, and the failure to provide such notice of intent, preliminary time extension request, time extension request, claim and full and complete claim documentation within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for such claim.

5-12.2.2 Claims for Delay: Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling item work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impact to the Contractor's work by such delay. The timely providing of a written notice of intent or preliminary time extension request to the Engineer are each a condition precedent to any right on behalf of the Contractor to request additional compensation or an extension of Contract Time for that delay, and the failure of the Contractor to provide such written notice of intent or preliminary time extension request within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for that delay.

The Department did not "extensively" exceed the allowable time for review of the box culvert shop drawing submittal. Any delays incurred by RKT relative to the review and approval of this submittal are the

responsibility of RKT. Specifications pertinent to this allegation can be found in Sub-section 5-1.4 Shop Drawings (for Structures) as quoted in part below:

5-1.4.5 Submittal Path and Copies

5-1.4.5.1 (b) *When the consultant is the Engineer of Record, submit one set of prints along with the set of masters for each series of shop drawings to the consultant with a copy of the letter of transmittal sent to both the Resident Engineer and the appropriate FDOT Shop Drawing Review Office.*

5-1.4.7.1 (excerpt) — *Schedule the submission of shop drawings to allow the Department a 45-day review period. The review period commences upon the Engineer of Record's receipt of the Contractor's valid submittal or re-submittal and terminates upon the FDOT's Shop Drawing Review Office's transmittal of the submittal back to the Contractor.*

The consultant was the Engineer of Record on this project so shop drawing submittals were required to be sent to the consultant for review, not to the Department. The Department was only supposed to get copies of transmittal letters. The 45-day review period did not commence until the EOR received the shop drawings.

The submittal process was discussed at the pre-construction meeting and a flow chart for shop drawings was given to RKT. It was clearly explained to RKT that shop drawings were supposed to be submitted directly to the Engineer of Record, Reynolds Smith & Hill, not to the Department.

RKT failed to comply with the explicit notice requirements in the specifications. RKT has therefore fully, completely, absolutely and irrevocably waived its rights to any additional compensation or time extension related to the Box Culvert Issue. RKT also failed to comply with the explicit requirements in the specifications for the submittal of shop drawings."

DISPUTES REVIEW BOARD RECOMMENDATION

The Board is governed in our decision making process by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the above documents.

The Board has reviewed all the information provided by the Department and RKT. We listened to all the parties at the hearing held on 3 November, 2003. Our recommendation is based on the following facts.

The Board needs to resolve two issues before we can make a recommendation for or against entitlement. The first being did the contractor give timely notice of claim. The second issue is if proper notice was given to the Department is there entitlement for the contractor.

Specification 5-12.2 clearly states that the contractor shall notify the Department in writing of the intention to make a claim for additional compensation or additional time. According to Webster's dictionary the definitions of claim are; to demand as rightfully belonging or due to one; to call for; deserve; to state as a fact; assertion of one's right to something. With these definitions in mind and reviewing the February 3, 2003 letter from RKT it is clear to the Board that RKT did meet the timely notice of 5-12.2. On page 2 of 3 RKT states "...offer the following to clarify our position of monetary and schedule impact on this issue." This sentence gives the Department first hand notice that RKT believes that they are entitled to additional compensation. Page 2 of 3 of the same letter RKT states "...RKT should reasonably be entitled to equitable compensation for monetary and schedule impacts associated...". This sentence again shows that RKT believes that they deserve, calls for and assert their right to compensation and/or time. On page 3 of 3, same letter, RKT states "RKT will continue to track the monetary and schedule impacts associated with this issue and forward a summary over to the department upon compilation for further compensation". Again RKT has noticed the Department of their intent for and right to additional compensation.

The Board believes that RKT did comply with Specification 5-12.2 in noticing the Department of a claim issue. However this February 3, 2003 letter can only be applicable to impacts that occurred after the January 29, 2003 letter from the Department stating flowable fill to be an option and the wing walls are to be cast in place.

In reviewing the shop drawing review process the Board determined RKT submitted box culvert shop drawings on 31 October, 2002. This shop drawing was reviewed and approved by the Department on 30 December, 2002. This review of 60 days was 15 days over the time specified in the contract (section 5-1.4.7 which allows for a 45 day review).

The Board finds the Department was late in their review and approval of the second submittal by RKT. Our basis for this finding is that the Department had been accepting shop drawings from RKT on numerous occasions that did not follow Specification 5-1.4.7 nor the flowchart that

may have been given to RKT at the pre-construction meeting. Having accepted and processed shop drawings from RKT and not informing RKT that they were not following the specification the Department, by its actions, gave RKT the understanding that this process was acceptable to the Department. Once the Department accepted this process they can not make an arbitrary or capricious decision to go back to the specification without proper notification to the contractor.

The Board finds that the contractor is entitled to the 15 days that the second submittal for the box culvert shop drawing was late. However we cannot determine if there were any delays after the January 29, 2003 letter from the Department stating use cast in place wing walls.

The Board believes that the contractor had a set of approved shop drawings for the box culvert (pre-cast) and wing walls (pre-cast) on December 30, 2002. The doweled-in connections were shown as the tie-in method to be used. The only outstanding issue at this time was the flowable fill question. This issue could have certainly been resolved while the box culvert and wing walls were being cast. The Board believes that the contractor did not take a strong enough stance with their sub in casting the structure. Therefore the Board, as previously stated, cannot determine if there would have been additional delays, (in addition to the 15 days stated above), if the contractor would have started the work after receiving the approved shop drawings on December 30, 2002.

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

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Don Henderson, P.E., Chairman Peter Markham, P.E., Member Mark Puckett, P.E., Member

Signed for and with concurrence of all members



Don Henderson, PE