

October 4, 1999

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Mr. Enrique I. Espino, P.E.
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Re: State Project No.: 97870-3313 District: Turnpike
Contract No.: 19,727
Description: Bird Road Toll Plaza Replacement Florida's Turnpike
County: Dade

SUBJECT: Recommendation of Disputes Review Board
Compensation for Replacement/Repair of Items Along S.W. 118th Ave that were
Damaged by Vandalism or Stolen

The Contractor is seeking compensation for additional costs they incurred in repairing or replacing items of work along S. W. 118th Avenue that was made necessary due to extensive and unexpected damage by vandals or to theft by third parties. This included graffiti on soundwall panels, temporary barricades, signs faces, sign posts, light fixtures and light posts and theft of 104 Areca Palm trees. In addition, they have requested compensation for removal of trash that was illegally dumped along S. W. 118th Avenue while work was underway there.

The parties exchanged position papers on the issues in dispute here in advance of this hearing and at that time furnished the Disputes Review Board copies.

The DRB held a hearing on September 28, 1999 to consider the positions of the parties to the contract. Verbal testimony was received. It was agreed that the DRB would consider both matters of entitlement and quantum during this hearing.

ISSUE:

DOT required the Contractor to repair the damage, replace the stolen palm trees and remove illegally dumped trash. The Contractor requested compensation for the costs they incurred in doing this work which they consider to be unforeseeable and due to the occurrence of extensive and unexpected third party damage.

DOT refused to make additional compensation citing the provisions of Article 7-14 of the Standard Specifications which makes the Contractor responsible for making good without additional compensation damage to any portion of the work occasioned by any cause whatsoever.

CONTRACTOR'S POSITION

In January, 1999, we advised the CEI Resident Engineer that 40 Areca Palms planted along S. W. 118th Ave. by our Landscaping Subcontractor had been stolen and in May 1999 gave notice that 64 additional Areca Palms had been stolen in that area of the project. When the first instance occurred, we suggested postponing landscaping work along S. W. 118th Ave. until a time closer to the turnover date of that area. When the second instance occurred, we requested that DOT consider reimbursing us for extensive losses incurred along S. W. 118th Ave.

DOT consider reimbursing us for extensive losses incurred along S. W. 118th Ave.

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Points made by the Contractor during the hearing included:

- a) S. W. 188th Ave is isolated from Turnpike traffic by the soundwall.
- b) We are familiar with Dade County and did not anticipate this to happen in a residential area with expensive homes.
- c) Theft of such a large number of trees from a project is not common in Miami.
- d) We made every reasonable effort to protect this work. What occurred was beyond our control because surveillance over such a long section is impractical.
- e) In order to facilitate work along S. W. 118th Ave., we moved illegally dumped trash to piles in the Turnpike right of way and later had it hauled it off.
- f) The cost to replace 104 palm trees is a large part of the work done by our Landscaping Subcontractor.

We maintain that the level of third party damage and theft encountered on this project exceeds that which the Department or the Contractor anticipated when the bid was prepared, that it violates the laws of the State of Florida, clearly is beyond our control or fault and constitutes an act of the public enemy. As such, it is bad faith for DOT to fail to exercise the discretion allowed them in Article 7-14 of the Standard Specifications to reimburse us for these costs.

We have analyzed Article 7-14 and are of the opinion that we took every reasonable precaution to protect the work against injury or damage, the damage that occurred was beyond our control and not our fault and the damage was caused by the public enemy.

DOT POSITION

We do not dispute the facts in regard to the damage and theft that occurred along S. W. 118th Ave. The dispute here is over interpretation of Article 7-14 of the Standard Specifications.

Points made by DOT:

- a) Graffiti being applied to walls, signs, etc. is a common problem in Dade County.
- b) In our opinion, the Contractor did not make a reasonable effort to protect the work involved in this dispute, especially the Areca Palm trees.
- c) Since not police reports covering the theft of palm trees have been presented, we assume that the Police Department was not notified.
- d) Since Dade County has one of the highest crime rates in the Country, theft of landscaping from an area predominated by landscaping businesses can hardly be deemed an unforeseen condition.

Our position is ~~that~~, in considering everything that occurred, the Contractor is not eligible to receive additional compensation under the discretion allowed DOT in Article 7-14, because the Contractor did not take every necessary precaution against injury or damage to the work, what occurred was not beyond the control of the Contractor and this is not an act of the public enemy.

Recommendation of Disputes Review Board

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DRB FINDINGS

It appears that damage to signs, barricades, soundwall panels and lighting on construction jobs in Dade County is a rather common occurrence and should have been anticipated by the Contractor.

It is true that illegal dumping occurred along S. W. 118th Ave. while work was underway at that location, but in our opinion this was something that was not unexpected under the circumstances.

There is some question as to whether the Contractor took every reasonable effort between January 1999 and June 1999 to prevent theft of the Areca Palm trees.

We recognize that the cost of replacing Areca Palm trees was significant to the Landscaping Subcontractor, but this cost was a not extensive or catastrophic when viewed as part of the overall work on this project.

DRB RECOMMENDATIONS

The DRB found good points on either side of this dispute, but is of the opinion that the evidence is not convincing enough to justify invoking discretionary compensation under Article 7-14 of the Standard Specifications.

DOT should make separate acceptance of the portion of the work along S.W. 118th Avenue upon satisfactory completion all work except for the twelve month landscape establishment period as they indicated at the hearing they would do.

I certify that all members of the DRB participated in all meetings of the DRB regarding this dispute and that all DRB Members concur with the findings and recommendations contained herein.

10/4/99
Date



H. Eugene Cowger, P. E.
Chairman