

City of Scottsbluff, Nebraska

Monday, July 7, 2014

Regular Meeting

Item Reports2

Council to receive a project update on the Avenue I construction Project No. URB-5703(2) and give direction to staff.

Staff Contact: Rick Kuckkahn, City Manager



SIMON CONTRACTORS

1914 W. Overland, PO Box 147, Scottsbluff, NE 69361, Phone 308-632-4111, Fax 308-632-4111

June 30, 2014

Jack Baker, P.E.
Baker & Associates, Inc.
120 East 16th Street
Scottsbluff, NE 69361

Re: URB-5703(2), Ave. I, Beltline - 27th Street, Scottsbluff
Potential Assessment of Liquidated Damages

Dear Jack:

Good afternoon. This letter is in response to your letter to me dated June 18, 2014. For the reasons set forth below, we respectfully request that liquidated damages not be assessed on this project. While I agree that the project has not progressed at the rate it should, this has occurred solely because of the failure of our Disadvantaged Business Enterprise ("DBE") subcontractor, Perkins & Perkins Construction ("Perkins"). Since Perkins has caused this delay, NDOR has given us permission to withhold liquidated damages from Perkins. The problem is that we have been paying Perkins even earlier than required to help them overcome their delay and complete their work. We therefore have less than \$10,000.00 that we can withhold from them. And, given Perkins' failure to perform the work as required, it appears almost certain that we will not be able to get anything further from Perkins if we file suit against them for any additional amount: they don't have the money. So, if liquidated damages are assessed, the only one who will therefore ultimately suffer is Simon Contractors, notwithstanding that the delay has occurred for reasons "beyond the Contractor's control and not caused by the Contractor's fault or negligence." Simon Contractors will end up getting penalized for using Perkins, which we were *contractually required to do* per the DBE program.¹

Reluctantly, and notwithstanding our ongoing efforts to help Perkins complete its work, we terminated Perkins in response to your letter. We have since tried to find a replacement DBE (which we are contractually required to do), but without success. As a consequence, we are now soliciting non-DBE subcontractors. Once the concrete crew is replaced there should be no further delay to project completion beyond that already caused by Perkins.

¹ As long as we *could* attain DBE participation of 4% on this project, we were **required** to do so. While we could have used someone other than Perkins, the other DBE quotes were significantly higher. As a consequence, if we had used DBE contractors other than Perkins, our bid would have been significantly higher. We used Perkins because they submitted the low DBE bid, which resulted in us submitting a significantly lower overall bid to the City.

Set forth below is the factual background of why we were required to use Perkins and what we did to try and help them overcome their failure to properly prosecute their work on a timely basis. Assuming you agree with these facts, we ask that you treat this as an "Excusable Delay" under Section 108.08(c)(1)(B), and grant a time extension.

1. NDOR's DBE Program

As you know, NDOR has a DBE program. (And, since others may not be as familiar with this program, I want to go through it.) The program "was drafted in 1999 to comply with the U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise Program Final Rule, 49 CFR part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*, effective March 4, 1999." (p. 2 of NDOR DBE program).

The NDOR DBE Program is intended to remedy past discrimination against disadvantaged business enterprises, ensure a "level playing field" and foster equal opportunity in DOT- assisted contracts, improve the flexibility and efficiency of the DBE Program and reduce burdens on small businesses. (p. 2)

Firms that qualify as a "Disadvantaged Business Enterprise" are "small" businesses who show they have suffered both "social and economic disadvantage." (p. 15) This program allows NDOR to encourage "minority and/or female participation on all contracts." (p. 9).

To accomplish the goals that include remedying "past discrimination" and to "reduce burdens on small businesses," the federal government "**requires** that NDOR set an overall goal for DBE participation in DOT-assisted contracts." (p. 8) NDOR acts to meet this "overall" goal by establishing "project/contract" goals for DBE participation. (p. 9) "Contract/project goals will be established so that over the period to which the overall goal applies, they will cumulatively result in meeting the overall goal." (p. 10) Once a project goal is established, the "**obligation** of the bidder/offer is to meet DBE goal, and clearly demonstrate that it has done so, either by meeting the goals or documenting their good faith efforts." (p. 8)

For this project, NDOR established a DBE goal of 4%. That meant that we should award 4% of the project work to disadvantaged woman or minority-owned firms. In dollars, this required DBE's be awarded \$50,045.09 of the project work. We entered into a subcontract with Perkins that exceeded the goal.

2. Failure of Perkins to Properly Prosecute its Work on a Timely Basis: Why it was Beyond Simon's Control and Not Caused by Simon's Fault or Negligence

As you know, Perkins had problems properly performing its work early on. In a letter to NDOR dated April 24, 2014, we discussed Perkins' problems with "poor workmanship and production." This included five days lost "removing and replacing curb and gutter that was originally placed at an incorrect grade." We discussed the problems with Perkins, and worked with them to overcome these. Unfortunately, there was nothing then we could do to resolve this with NDOR's help. As NDOR noted in its June 27 letter to us, on which the City was copied, on or about May 27, NDOR's DBE Office then got involved: It then "received the first of many complaints that

Perkins was not performing the work subcontracted to them in a satisfactory manner, and likely would not be able to complete the work in a timely manner." In a May 28 email to Perkins, on which you were copied, NDOR stated that it "is extremely important that Perkins & Perkins Construction does something to try to resolve the problems on this project as soon as possible." In response to our communications, Perkins emailed us, you and NDOR on May 28 that it "will be onsite tomorrow morning to continue forward with completing our work."

Unfortunately, Perkins failed to improve its rate of production. On June 4, we reluctantly sent a notice of termination to Perkins. In this letter, we stated that we would allow them to continue if they immediately re-started work and accelerated their production to minimize further delay. To help them accomplish this, we offered to pay them on a 'weekly' basis rather than 'monthly' as required by our contract with NDOR. I immediately followed up this letter with an email to Perkins of the same date, in which I stated that "I would hope that you would have crews on site tomorrow." We copied you on this email.

Unfortunately, notwithstanding our efforts and those of NDOR, Perkins failed to properly prosecute its work: Perkins sporadically showed up for work, and when it did, never accelerated its rate of production as requested. NDOR outlined some of our combined efforts to work with Perkins to overcome its problems in a letter to us dated June 27, 2014, on which you were copied.

From May 27 through June 17, 2014, the DBE Office had numerous contacts via telephone and email with personnel from Simon, the City of Scottsbluff, NDOR, and Perkins to discuss and try to resolve the problems.

As you can see, we were all working together to "try to resolve the problems": we did everything we could. Notwithstanding this, the problems continued and on June 18, you sent me a letter stating that the City "fully intends to enforce the contract terms," including the assessment of liquidated damages. On the same day, we then sent a letter to NDOR requesting approval to withhold liquidated damages from Perkins. We did not request this earlier so Perkins had the financial ability to finish its work. We requested that approval on the basis of Perkins' "lack of production, rework, and for the days they pulled off the project." In a letter to us dated June 25, NDOR approved our request to withhold any liquidated damages assessed. In NDOR's June 27 letter, NDOR stated that when Mike Perkins was informed that NDOR would allow our request to withhold any liquidated damages assessed, Perkins responded that he might "leave the job because if he continued working he would not make enough money to even cover the amount of liquidated damages."

On June 25, Perkins pulled off the project. On June 25, we sent a notice of termination to Perkins. That is where we currently sit.

3. Why Perkins' Delay Should be Treated as an "Excusable Delay"

I cannot dispute, nor do I, that we have failed to prosecute the work on a timely basis. I further understand that you, City officials and local businesses have suffered as a consequence. For all of that, I apologize: you are entitled to much better, and that is normally what we provide. And

we have not provided our normal service here due solely to the failure of our subcontractor Perkins. What we have done is everything in our power to prevent the delay, short of not using Perkins, which was not an option: we were contractually required to attain a specified level of DBE participation if we could, which meant using Perkins.

I think it is important to note why Simon Contractors, Baker and Associates and the City of Scottsbluff must follow the procedures of the DBE program even though it does sometimes take additional time and resources. This is a federally mandated program and the federal funds for this project are tied to the contractor's and owner's compliance with the program. Simon Contractors has done its part to support Perkins and the DBE program. We undertook the required "good faith efforts": we met and exceeded the project DBE goal by soliciting a bid from and subcontracting with Perkins. Had we not done so, our bid would have necessarily been rejected, and it would have cost the City more for the project. Once work began, Simon Contractors also supplied Perkins the maximum amount of mentoring and assistance allowed by the DBE program. This included providing Perkins payment on a weekly versus monthly basis, although not required by contract.

In summary, I respectfully ask the City not to assess liquidated damages. You know our commitment to timely performance based on past projects. The only reason we have not fulfilled on that commitment here is because of the mandated use of a DBE subcontractor to satisfy the contract-mandated DBE participation requirement. Given this requirement, and what we have done assisting Perkins throughout the project, there is absolutely nothing more that we could have done to prevent the delay. Assuming you agree with that, then the delay was "beyond the Contractor's control and not caused by the Contractor's fault or negligence."² On that basis, we respectfully ask that this be treated as an "excusable delay" under Section 108.08(c)(1)(B), and provide us with a time extension for the delay.

Please discuss this with the City and let me know if the City still intends to assess liquidated damages. Regardless of what the City decides, since we are now in control of the remaining work, we will ensure that it is properly completed without further delay. We will look forward to hearing back from you. Thank you.

Sincerely,



Darren Gebhart
Simon Contractors

cc: Joe Kisicki, NDOR

² As you can see, I have copied Joe Kisicki of NDOR on this letter. You can confirm with him that everything we have stated in this letter is accurate.