

DISPUTES REVIEW BOARD RECOMMENDATION

December 26, 2007

Curtis Rowden, Project Manager
Cherry Hill Construction
3585 US Highway 17 N
Bartow, FL 33833

David Vogel, Project Engineer
Volkert/HNTB Corp.
5912 Breckenridge Parkway, Suite E
Tampa, FL 33610

RE: Financial Project No. 197679-1-52-01, Contract No. T1064, Polk County
SR 25 (US 27) from SR 544 to Blue Heron Bay Blvd.

Dear Sirs:

The Florida Department of Transportation (Department) and Cherry Hill Construction, Inc. (Cherry Hill) along with their sub-contractor The LANE Construction Corporation (Lane) requested a Dispute Review Board hearing concerning the issue of an asphalt price adjustment on the above referenced project.

Summaries of the Department's and Cherry Hill/Lane's positions were forwarded to the Disputes Review Board and a hearing was held on December 7, 2007.

ISSUE: Cherry Hill requests entitlement to Asphalt Price Adjustment.

Contractor's Position

Lane is the asphalt sub-contractor for Cherry Hill on this project. They are seeking extra costs incurred due to changes in scope of work that were imposed upon this contract by the Department. Lane is seeking compensation for all increases in pricing such as trucking and aggregates as they pertain to the changes in scope of work in L1, L2, R1, and R2 from Sta. 572+50 to station 596+87.666. Cherry Hill is seeking entitlement to payment of \$153,478.57 for the economic impact to the cost of asphalt aggregates, haul of aggregates to the plant and haul of produced asphalt to the project which resulted in this increase.

Lane's position is that they, along with their sub-contractor, Pave-Rite, mobilized to the project in November 2004 to complete the above referenced work. It was determined by the Department that the original design was not feasible and therefore a new design was developed changing the typical section and scope of work. Asphalt originally scheduled to be placed in November of 2004 was delayed until December of 2005 and April of 2006.

Department's Position

During construction it was discovered that the information shown in the plans did not match existing cross slopes. The plans were revised to eliminate the milling, asphalt rubber membrane interlay (ARMI) and overbuild section. The revised plans called for the removal of the existing pavement, reworking the limerock base to the correct cross slope and elevation, and placing new pavement. The pavement design was the same as what was used throughout the widening and new construction sections. The estimated additional structural asphalt needed for the revision was 3700 metric tons or 8.6% of the contract amount.

Supplemental Agreement No. 5 dated April 17, 2006 was issued to pay the contractor \$1,075,281.84 and grant 168 days for the additional work and time impacts. This SA added pay items for reworking limerock base, special detours, mobilization and maintenance of traffic. Structural asphalt was excluded from this Supplemental Agreement at the request of the contractor.

The Department contends the contractor's request is not supported by Article 4-3.1 in that the change is not a change in scope. In fact the work was made easier and less costly by deleting the variable thickness and replacing it with asphalt placed at a uniform 242kg/M2 spread rate. Furthermore, this change is not significant as defined in Article 4-3.1(B) since it does not exceed 25% of the original plan quantity. Finally, the contract provisions in place to address such price escalations, Articles 9-2.1.1 and 9-2.1, are the contractor's sole remedy. These adjustments have been made on this contract and the contractor is due no further compensation.

Contractor's Rebuttal Statement:

Cherry Hill/Lane contends that the Department failed to recognize Article 4-3.2. A substantial change to the planned design occurred five months after the project start date. Lane has not requested compensation for fuel or bituminous adjustments as allowed for in the contract documents. A substantial change in production occurred due to the revised cross sections. They contend that the average production rate to mill and resurface with ARMI was 755 tons per shift. Lane had a single production day of 712.92 MT on 4/7/06. The job average was well below 755 tons per shift. They are not requesting compensation for loss of production. They want to recoup direct costs as they relate to the delay.

Department's Rebuttal Statement:

The Department contends that Cherry Hill/Lane has narrowed the focus of the hearing to one determination of fact: Does the contract revision meet the criteria of Article 4-3.1(A) pursuant to impacts on Pay Item 2334-1-14 Superpave Asphaltic Concrete? Furthermore, the Specifications state that the Engineer is the sole authority to make such determination.

The intention of the Department was to use existing contract pay items when possible for the plan revision. New pay items were added for new work only. They were not added to increase compensation to the contractor due to escalated costs of existing pay items or for time. It was the Department's intent to compensate the contractor for the additional asphalt needed by overrunning the existing pay item.

Cherry Hill/Lane's position paper basically presents a scenario that they have endured increased material costs due to the paving occurring later in the contract. However, a change to the time period that a certain construction activity is performed is not a change in the character of work. It is not uncommon to have fluctuations in construction material costs. The contract contains provisions to address the most common impacts. These provisions included in Articles 9-2.1.1 and 9-2.1.2 are the contractor's sole remedy. Both provisions have been applied to the contract and there is no additional compensation warranted.

DRB Findings:

Timeline of events that occurred on the project are as follows:

March 31, 2004	Original bid date
November 1, 2004	Original overlay/overbuild per CPM schedule
March 4, 2005	Plan Revision #1 (new typical section)
December 1, 2005	Work began on the revised section
December 2005	Contractor's extra cost data sheet shows a cost increase just over 21% for trucking and aggregates from original Bid.
March 3, 2006	Negotiation agreement reached with exception of asphalt price and Lane's intent to file a claim for additional amount.
April 17, 2006	Supplemental Agreement #5 Issued for additional costs & days
April 28, 2006	Written notification of Intent to File Claim by Cherry Hill
March 22, 2007	Request for equitable adjustment of asphalt by Cherry Hill
April 5, 2007	Department requests adequate backup documentation to substantiate the cost increases cited.
April 23, 2007	Revised claim letter from Lane to Cherry Hill
April 24, 2007	Cherry Hill supplies revised price with backup documentation.
July 9, 2007	Department denies request for additional compensation.

The DRB requested additional information at the hearing from the Department or the contractor as to when asphalt placement began on the revised section of roadway and when the official notice of intent to file a claim was filed.

The information was provided from the Department's Site Manager program and showed the asphalt work did begin on December 1, 2005. Also a copy of the written letter of notice of intent to file claim was provided which was dated April 28, 2006.

A change was made by the Owner, but the Engineer (under 4-3.1A) has determined that the character of the work was not altered "materially in kind or nature". It also appears that the Engineer, who by contract is the sole determining party, acted in good faith and the Contractor did not attempt to prove otherwise. Under 4-3.1B, the change did not constitute a significant change because the major item of work in question was not increased over 125% or decreased below 75%.

Section 4-3.2 Increase, Decrease or Alteration in the Work: "The Engineer reserves the right to make alterations in the character of the work which involves a substantial change in the nature of the design or in the type of construction or which materially increases or decreases the cost or time of performance. Such alternation shall not constitute a breach of Contract, shall not invalidate the Contract or release the Surety. The Engineer may direct in writing that the work be done and, at the Engineer's sole discretion, the Contractor will be paid pursuant to an agreed Supplemental Agreement ..."

The Contractor showed in his position papers (section L) that aggregates and truck haul costs had increased by 21% plus in December 2005. This would have been the opportune time for the Contractor to present his "Notice of Intent to file a claim" for his cost escalation of aggregates and trucking. The notice of Intent was not filed until April 28, 2006.

The Contractor agreed to do the work by a Supplemental Agreement dated April 17, 2006 and had performed asphalt work in this area beginning December 1, 2005. There is no mention in the document that the owner would entertain a future cost increase of asphalt materials and hauling of the materials related to the project. The Contractor did not provide the required notice of "intention to make a claim" (NOI) under Section 5-12 before beginning the work. Under Section 5-12, he waives the claim for the work already performed since "the Engineer (was) not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time." The Contractor did, however, perform some work after his notice of claim. In his position paper cost summary under tab "L", the Contractor lists work occurring during the time period of 4/06 through 7/06 and from 7/06 through 11/06. In both these time periods he notes the increase per ton as \$10.41 and uses this figure in his revised claim letter of 4/23/07. Since the maximum increase had already accrued prior to his NOI of 4/28/2006 and did not increase thereafter, the Contractor also cannot claim further entitlement for work performed after his NOI.

DRB Recommendation:

The Board finds **no entitlement** for additional compensation to the Contractor for an increase in additional trucking and aggregates costs prior to the Supplemental Agreement number 5, dated April 17, 2006, per Specification 5-12, Claims by Contractor.

Section 5-12.2 Notice of 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.”

This date was April 28, 2006. No provisions were found in the contract to provide for escalated cost of materials and trucking increases prior to the asphalt work beginning in December 1, 2005.

The Board is sympathetic to the plight of The Lane Construction Corporation in this case, but is governed by the Contract and Specifications for the project.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. Please remember that failure to respond to the DRB and the other party concerning your acceptance or rejection of the DRB recommendation within 15 days will be considered acceptance of the recommendation.

I certify that I participated in the Hearings of the DRB regarding the Disputes indicated above and concur with the findings and recommendations.

Respectfully submitted,

Disputes Review Board

Frank E. Proch, Dispute Review Board Chairman
Allan Adderley, Dispute Review Board Member
Gerald Stanley, Dispute Review Board Member



DRB Chairman

cc: George McClintock (FDOT)
Alan Autry (FDOT)
Ray Curtis (The Lane Construction Corporation)