

Disputes Review Board Recommendation

January 28, 2018

Mr. Patrick Flynn
Ranger Construction
101 Sansbury's Way
West Palm Beach, FL 33411

Mr. Greg Dutton
Volkert
207 NW 2nd Street
Okeechobee, FL 34972

Re: FN 196904-2-52-01
SR-70 Widening from E of NE 31st Ave to E of NE 80th Ave.
Disputes Review Board Recommendation

Gentleman:

Ranger Construction Industries (RCI) requested a hearing before the Disputes Review Board concerning an overrun to Optional Base Group 1. A hearing was held on January 22, 2018

ISSUE:

Is Ranger Construction Industries, Inc. entitled to an adjustment, increase, to the Contract Unit Price for Optional Base Group 1, Pay Item 285 701 on the above referenced project?

CONTRACTOR'S POSITION

This document is Ranger Construction Industries, Inc. position on the Notice of Intent (NOI) "Optional Base Group 1 Substantial Error" submitted on June 15, 2016 to FDOT's CEI firm, Volkert, and referenced in our November 17, 2017 letter requesting a Dispute Review Board (DRB) hearing to determine entitlement to an adjustment, increase, to the Contract unit price for Optional Base Group 1, Pay Item 285 701. As documented in the NOI, Ranger identified a "substantial error" in this pay item during construction while quantifying material in place versus plan quantity (10,573 SY) and remaining work. Ranger listed a verifiable measurement of 29,844 SY as the total plan quantity, which was confirmed September 8, 2016 in an email from Volkert that identified the error as "substantial" based on the quantity increase (19,271 SY) being greater than 5% and cost difference (\$ 109,844) more than \$ 5,000.

Volkert's email stated the plan quantity (10,573 SY) for pay item 285 701 (Optional Base Group 1) would be increased by 19,271 SY for a revised plan quantity of 29,844 SY, and that the plan quantity (25,250 SY) for pay item 285 702 (Optional Base Group 2) would be decreased by 19,271 for a total of 5,979 SY. Volkert verified with the Engineer of Record that 19,271 SY included in the Optional Base Group 2 plan quantity should have been included in Optional Base Group 1, so the contract bid tabulation and pay item summary sheets were revised accordingly. Per Volkert email, FDOT's position was that the pay item plan quantities would be revised in accordance with Specification 9-3.2 (Payment Based on Plan Quantity). However, the contract unit price of \$ 5.70/SY for pay item 285 701 was not entitled to a revision (increase) per Specification 1-3 (Major Item of Work) because the original plan quantity cost of \$ 60,266.10 was less than 5% of the Original Contract Amount and per Specification 4-3 (Alteration of Plans or of Character of Work)

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the Engineer determined that the character of the work as altered did not differ materially in kind or nature from that involved or included in the original proposed construction.

Per the FDOT Design Index 514 (1/2), Reclaimed Asphalt Pavement (RAP) is an option for pay item 285- 701 and Ranger selected this material pre-bid as evidenced in the NOI based on the plan quantity and availability of RAP from Phase II of the project. Ranger submitted additional information in the NOI that outlined pre-bid estimate data that explained the rationale for a bid unit price of \$ 5.70/SY for Optional Base Group 1, which was below the FDOT Statewide Average unit price of \$ 7.72/SY (12 months – 2014). The low bid unit price for Optional Base Group 1, along with the bid price of \$ 7.70/SY for Optional Base Group 2 versus the FDOT Statewide Average (12 months – 2014) of \$ 14.17/SY is an indicator that Ranger was not aware of the plan error in 285 701 or 285 702 quantities prior to bid.

This information was provided as evidence to support Ranger’s position that Standard Specification Sections 1-3 and 4-3 are not the only sections of the Contract applicable to the NOI request for increase in unit price. It is our position that Specification 2-3.2 (Interpretation of Estimated Quantities – Contracts Other Than Lump Sum) “For those items constructed within authorized plan limits or dimensions, use the quantities shown in the plans and in the proposal form as the basis of the bid. The Department will also use these quantities for final payment as limited by the provisions for the individual items...”, and Specification 5-4 (Errors or Omissions in Contract Documents) “Do not take advantage of any apparent error or omission discovered in the Contract Documents, but immediately notify the Engineer of such discovery. The Engineer will then make such corrections and interpretations as necessary to reflect the actual spirit and intent of the Contract Documents.”

It is our position that we complied with all of the contract specifications in preparing the bid unit prices for Optional Base Group 1 and 2, including Specification Section 2-4 (Examination of the Plans, Specifications, Special Provisions and Site of Work. We did not discover the error in plan quantities for either 285 701 or 285 702 until after the bid, and Ranger notified the Engineer when it was suspected that the Optional Base Group 1 plan quantity would overrun substantially. Ranger is not aware of any firm that identified this plan quantity error prior to bid, including Contractors, FDOT, Engineer or Record or Volkert. Based on the amount of time available to firms during the bid process, contract amount and project complexity, Ranger’s efforts to identify errors and/or omissions prior to bid were consistent with industry standards. Therefore, we consider the overrun in Optional Base Group 1 plan quantity to be a “latent” plan error that was not easily discoverable by Ranger as evidenced by the bid unit price.

In addition to Rangers position above, Ranger offers the following:

Section 4-3 (Standard Specifications) Alteration of Plans or of Character of Work

Specification 4-3 allows the Engineer the right to make increases in quantities weather a significant change or not, or weather a substantial change or not.

The term “significant change” applies, in part, when the Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction.

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As noted in our request for equitable adjustment, NOI, the Department received a material credit for the original proposed construction of pay item 285 701 Optional Base Group 1. The substantial increase in quantity due to a "latent" plan error, required Ranger provide a significant/substantial amount of additional material at no cost to the Department. The character of work as altered had a significant impact on our bid in terms of value, degree, amount and extent. And differed materially in kind and nature from that involved or included in the original construction. In accordance with 4-3, the work as altered is a significant change. To think otherwise would be without reason.

Section 283 (Standard Specifications) Reclaimed Asphalt Pavement Base Article 327-1 (Special Provisions) Milling of Existing Asphalt Pavement.

Specification 283-2 Materials reads: "obtained RAP material by either milling or crushing an existing asphalt pavement. As previously noted, 285-701 Optional Base Group 1 was bid for reclaimed asphalt pavement as permitted by the contract documents. As a responsible bidder in a low bid environment, Ranger bid pay item 285 701 Optional Base Group 1 to utilize RAP material from their Ft. Pierce yard which would be replenished by the material obtained from the proposed milling operations.

Article 327-1 specifies, "for this contract, the Department will retain ownership of 500 Tons of the milled material. Haul and stockpile the material to remain the property of the Department at the location shown in the plans. The Contractor will take ownership of any milled material not to be retained by the Department ".

Ranger could not have expected a "latent" plan error to significantly disportion the material required for pay item 285 701 Optional Base Group 1. Ranger was contracted to take ownership off the remaining RAP material above 500 Tons. As a responsible bidder in a low bid environment, a portion of the material retained by Ranger was applied to the project in accordance with 4-5 Rights in and Use of Material Found on the Site of Work.

4-5 Right in and Use of Material Found on the Site of Work

4-5.1 requires the Contractor take ownership and dispose of all materials that are not designated as the property of other parties, in the roadway, found on the right-of-way. Such materials do not include earth or other excavated material required for the construction of the project.

Ranger bid the project utilizing reclaimed asphalt pavement for pay item 285 701 Optional Base Group 1. As such, the material was required for the construction of the project. Ranger applied the material cost, reclaimed asphalt pavement, to the plan quantity of referenced pay item as is the intent of Specification 4-5.

Summary

Ranger position is we are entitled equitable adjustment to pay item 285 701 Optional Base Group 1 due to a "latent" plan error not easily discoverable at time of bid.

The work as altered is a significant change to the proposed construction. Material in the roadway was applied per specification.

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The Department received the benefit of a material credit and a significantly lower than statewide average unit price as bid.

The Contractor complied with all the contract specifications in preparing the bid unit prices for Optional Base Group 1.

FDOT'S POSITION

ISSUE:

Unresolved issue regarding a plan quantity error for Item 0285-701, Optional Base Group 01. The plan quantity was correct in the Computation Book, but was not correct in the plan quantity matrix.

RCI chose to use RAP material as their option and has requested the unit price be revised from \$5.70/SY to \$9.42/SY due to alleged costs related to trucking and material costs. The request for a revised unit price has been declined based on application of the specifications. The applicable specifications are 9-3.2.1 and 4-3.1. The plan quantity will be revised per Article 9-3.2.1, Error in Plan Quantity, and the contractor will receive compensation for the quantity overrun.

BACKGROUND:

- *Pay Item: 0285-701, Optional Base Group 01*
- *Applicable Location: 196904-2*
- *Combined 196904-2 & 196904-4 Original Plan Quantity & Cost (Bid): 10,573 SY @ \$5.70/SY = \$60,266.10*
- *Required Plan Quantity & Cost (Computation Book): 29,844 SY @ \$5.70/SY = \$170,110.80*
- *SY Difference:*
29,844 SY - 10,573 SY = 19,271 SY (Increase of 182% > 5%)
- *Cost Difference:*
\$170,110.80 - \$60,266.10 = \$109,844.70 (Increase > \$5000)
- *Item meets the criteria as a "substantial error" in the plan quantity*
- *Contractor chose RAP as their preferred optional base*
- *There will also be a deduction of item 0285-702, Optional Base Group 02:*
-19,271 SY @ \$7.70/SY = -\$148,386.70

NARRATIVE

January 22, 2018 has been established as the date for the hearing. In keeping with the operating guidelines for the Disputes Review Board, this office is submitting a full position paper required 15 calendar days prior to the hearing. The narrative includes the Contractor's Position, Department's Position, Applicable Specifications, Timeline for Dispute Resolution and Conclusion below. It should provide the necessary information to support the Department's position that RCI is entitled to a plan quantity change for item 285-701, Optional Base Group 01, due to a "substantial error" in the plan quantity per Article 9-3.2.1, but not entitled to a revised unit price due to their claim that the quantity error is a "significant change" to the contract per Article 4-3.1. The contractor has not demonstrated that the quantity change "differs materially in kind or nature from that involved or included in the original proposed construction", nor does the item meet the contractual

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requirement of a Major Item of Work to be considered for a revised unit price. The plan quantity has already been changed to reflect the correct actual quantity.

Following are the Contractor's Position and Department's Position as understood at this time:

CONTRACTOR'S POSITION (as understood by CEI):

- Contractor's **original bid cost breakdown** based on 10,573 SY of RAP (2,796 tons): $\$5.70/\text{SY} \times 10,573 \text{ SY} = \$60,266$

Trucking of 2,796 tons RAP @ $\$6.25/\text{ton}$: $\$1.65/\text{SY} \times 10,573 \text{ SY} = \$17,445$ Spread, finish & prime: $\$2.74/\text{SY} \times 10,573 \text{ SY} = \$28,970$

Optional Base (Asphalt Only): $511 \text{ SY} > 112.42 \text{ tons}$: $\$1.31/\text{SY} \times 10,573 \text{ SY} = \$13,851$ Total: $\$60,266$

- Contractor chose to use Asphalt only for 511 SY. The resulting SY difference of OBG-1 (RAP) is $19,271 \text{ SY} - 511 \text{ SY} = 18,760 \text{ SY}$.
- Contractor states that an additional 5,159 tons of RAP material is now needed over the additional 18,760 SY and was not budgeted as part of their original unit price.
- Contractor claims that RAP material has a plant value of $\$15.25/\text{ton}$.
- Contractor claims **additional cost** as follows:

Trucking of RAP @ $\$6.25/\text{ton}$: $\$6.25/\text{ton} \times 5,129 \text{ tons} = \$32,243.75$ RAP Material: $\$15.25/\text{ton} \times 5,129 \text{ tons} = \$78,674.75$

Total: $\$110,918.50$

- Contractor's request for a revised unit price: Original Plan Quantity Cost: $\$170,110.80$
- Contractor's Claimed Extra Cost: $\$110,918.50$
- Total: $\$281,029.30$
- Requested Revised Unit Price: $\$281,029.30 / 29,844 \text{ SY} = \$9.42/\text{SY}$

DEPARTMENT'S POSITION (as understood by the CEI):

- There is no dispute that the item has experienced a "substantial error" in the plan quantity.
- The error occurred with the plan quantity on the (-2) project only:
-2 Project Comp Book = 19,875 SY (Bid 604 SY)
-4 Project Comp Book = 9,969 SY (Bid 9,969 SY)
Total = 29,844 SY
- Contractor is entitled to a change in the plan quantity due to the substantial error and will receive payment for the additional quantity.
- Contractor is not entitled to a change in the unit price based on the application of the specifications using the information below.
- Per Article 4-3.1, a "significant change" does not exist because:
 - 1) Per part "a", the Engineer must determine that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction. The Optional Base remained an optional base. The choice was with the contractor to select which base to use. A different base material may have had significantly less of an impact to RCI's alleged costs. The contractor has not established by clear and convincing proof that the determination by the Engineer that this issue does not constitute a significant change was without any reasonable basis. RCI is seeking consideration from Department leadership to have the

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situation deemed a significant change and therefore apply a unit price change for their claimed additional costs.

- 2) Per part "b", the pay item is not a Major Item of Work which is defined as any item of work having an original Contract value in excess of 5% of the original Contract amount.
- Original Plan Quantity Cost: \$60,266.10
 - Original Contract Amount: \$28,940,681.11
 - $\$60,266.10 / \$28,940,681.11 = 0.2\% >$ This is not a Major Item of Work and cannot be considered as a significant change to the contract.
- No direction was given to the contractor at any time regarding means or methods or choice of base material.

APPLICABLE SPECIFICATIONS:

9-3.2 Payment Based on Plan Quantity:

9-3.2.1 Error in Plan Quantity: As used in this Article, the term "substantial error" is defined as the smaller of (a) or (b) below:

(a) a difference between the original plan quantity and final quantity of more than 5%,

(b) a change in quantity which causes a change in the amount payable of more than \$5,000. On multiple job Contracts, changes made to an individual pay item due to substantial errors will be based on the entire Contract quantity for that pay item.

Where the pay quantity for any item is designated to be the original plan quantity, the Department will revise such quantity only in the event that the Department determines it is in substantial error. In general, the Department will determine such revisions by final measurement, plan calculations, or both, as additions to or deductions from plan quantities.

In the event that either the Department or the Contractor contends that the plan quantity for any item is in error and additional or less compensation is thereby due, the claimant shall submit, at their own expense, evidence of such in the form of acceptable and verifiable measurements or calculations. The Department will not revise the plan quantity solely on the basis of a particular method of construction that the Contractor selects. For earthwork items, the claimant must note any differences in the original ground surfaces from that shown in the original plan cross-sections that would result in a substantial error to the plan quantity, and must be properly documented by appropriate verifiable level notes, acceptable to both the Contractor and the Department, prior to disturbance of the original ground surface by construction operations. The claimant shall support any claim based upon a substantial error for differences in the original ground surface by documentation as provided above.

1-3 Major Item of Work.

Any item of work having an original Contract value in excess of 5% of the original Contract amount.

4-3 Alteration of Plans or of Character of Work

4-3.1 General: The Engineer reserves the right to make, at any time prior to or during the progress of the work, such increases or decreases in quantities, whether a significant change or not, and such alterations in the details of construction, whether a substantial change or not, including but not limited to alterations in the grade or alignment of the road or structure or both, as may be found necessary or desirable by the Engineer. Such increases, decreases or alterations shall not constitute a breach of Contract, shall not invalidate the Contract, nor release the Surety from any liability arising out of this Contract or the Surety bond. The Contractor agrees to perform the work, as altered, the same as if it had been a part of the original Contract.

The term "significant change" applies only when:

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- (a) *The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or*
- (b) *A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity. The Department will apply any price adjustment for an increase in quantity only to that portion in excess of 125% of the original Contract item quantity in accordance with 4-3.2 below. In the case of a decrease below 75% the Department will only apply a price adjustment for the additional costs that are a direct result of the reduction in quantity.*

In (a) above, the determination by the Engineer shall be conclusive. If the determination is challenged by the Contractor in any proceeding, the Contractor must establish by clear and convincing proof that the determination by the Engineer was without any reasonable basis.

TIMELINE for DISPUTE RESOLUTION (see attachments)

6/06/16 E-Mail/Letter was submitted from Ranger Construction Industries, Inc. (RCI) concerning an increase in the quantity of Contract Pay Item 285-701, Optional Base Group 01.

See Attachment C

6/15/16 E-Mail/Letter was submitted from RCI issuing a Notice of Intent (NOI) to protect their rights to claim for additional compensation.

See Attachment D

6/29/16 E-Mail sent to RCI acknowledging that a substantial error in the plan quantity exists, that an adjustment was made to the plan quantity, and explaining why the request for a unit price change does not meet the specifications.

See Attachment F

8/31/16 E-Mail Chain – Escalation starting on 7/15/16 & response from the Department Operations Center.

See Attachment G

8/31/16 E-Mail sent to RCI stating that their request for a unit price change had been denied by FDOT Heartland Operations and that the option to continue escalation was available.

See Attachment H

11/15/17 E-Mail from Rammy Cone, DRB Chair, to RCI acknowledging RCI's verbal request for a DRB Hearing on the subject and presenting the ground rules.

See Attachment I

11/15/17 E-Mail from Volkert to FDOT D1 Construction advising of the DRB Hearing request and re- summarizing the issue.

See Attachment J

11/17/17 E-Mail from RCI to the DRB – Issue Statement.

See Attachment K 1/8/18 Full Position Papers due 1/17/18 Rebuttals due

1/22/18 Hearing scheduled at 10:00 am

Engineer's CONCLUSION

The contract provisions were reviewed in detail to determine if any entitlement exists. The issue was escalated in accordance with the planned project escalation matrix – The request for a revised price and/or entitlement for additional compensation was denied for a lack of contractual basis for the claim.

There are three major points to be made:

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- 1) *The first is that per 4-3.1 General (a), the determination by the Engineer shall be conclusive. If the determination is challenged by the Contractor in any proceeding, the Contractor must establish by clear and convincing proof that the determination by the Engineer was without any reasonable basis. The Contractor has not established this through the escalation process.*
- 2) *The second is that per 4-3.1 General (b), the pay item is not a Major Item of Work as the specifications define it.*
- 3) *The contractor chose to use RAP as an option for the "Optional Base". Their stated increase in cost is related mostly to the use of RAP in the base. They could have chosen to use a different base material that may have had less of an impact on their costs.*

The Department requests the Board to determine that the contractor is not entitled to a price adjustment and/or additional compensation (beyond the plan quantity change) from the Department for the plan quantity error in Optional Base Group 01.

Contractors Rebuttal

ISSUE: *Department notes the issue as an error for Item 0285-701, Optional Base Group 01 (OBG 1), in that the plan quantity was correct in the Computation Book, but was not correct in the plan quantity matrix.*

Pursuant to Specification 2-3.2 Contracts other than Lump Sum: "For those items constructed within the authorized plan limits or dimensions, use the quantities shown in the Plans and in the proposal form as the basis of the bid. The Department will also use these quantities for final payments as limited by the provisions for the individual items". As noted in the specifications, Ranger Construction Industries, Inc. (RCI) used the quantities shown in the plans and in the proposal form. The Computation Book has no relevance to the contract documents. Ranger agrees the plan quantity matrix was incorrect.

BACKGROUND: *Issues will be addressed throughout this rebuttal paper.*

NARRATIVE / CONTRACTORS POSITION: *The Contractors position is as outlined in our position paper submitted on January 8, 2018 and this rebuttal paper. Any previous discussions and submittals were done in good faith as an attempt to negotiate this "latent" plan error.*

I will clarify, the Contractor did not choose to use Asphalt only for 511 SY as noted by the Department. Plan Sheet 17 of the Contract Plans specifies the use of Type B 12.5 Asphalt Base from Station 26+82.38 to 32+16.83.

DEPARTMENTS POSITION:

Department states the Contractor is not entitled to a change in the unit price. Per Article 4-3.1. "significant change" doesn't exist and notes the following:

- 1) *The Optional Base remained an optional base.*
- 2) *The Choice was with the Contractor on which base to select.*
- 3) *A different base material may have had a significantly less impact to RCI's alleged cost.*
- 4) *The Contractor has not established by clear and convincing proof that the determination by the Engineer was without any reasonable base.*

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Department states per Article 4-3.1 the pay item is not a Major Item of Work.

RCI argues a significant change does exist and the determination by the Engineer is without any reasonable base.

- 1) *"The Optional Base remained an optional base." Section 285-3 Selection of Optional Base Option notes the following: "Select one base option as allowed for each typical cross-section shown in the Plans. Only one base option is permitted for each typical cross-section". For any Contractor to bid an optional base item, the Contractor must first choose an optional material approved for its intended use. As approved by Design Standard 514, Sheet 1 of 2, and by Standard Specification 283, this project was bid to utilize reclaimed asphalt pavement as the optional material.*

The substantial error in the original plan quantity was not noted until the original plan quantity was near complete. In accordance with Section 285-3, only one base option is permitted for each typical cross section. And this project only contains one typical cross section for the quantities in error. As such, the Engineer is incorrect in stating the optional base remained an optional base. The Contractor was bound by specification to utilize reclaimed asphalt pavement for the 182% increase in quantity.

- 2) "The Choice was with the Contractor on which base to select". Agreed, however, the choice was made prior to bid and based on the information provided in the Plans, bid form and specifications. Once the plan error was noted, the Contractor no longer had a choice on which base to select. Had the Contractor known the plan error existed, an alternate material would have been utilized and the unit price significantly increased.
- 3) "A different base material may have had a significantly less impact to RCI's alleged cost." Pursuant to Section 285-3 a different base material was not an option as explained below.

"The Contractor has not established by clear and convincing proof that the determination by the Engineer was without any reasonable base." It is clear the Engineer's determination above is without reason. Please see below.

The work as altered differs materially in kind and nature from that involved or included in the original proposed construction (significant change) in that:

- 1) Original proposed construction afforded the Contractor the opportunity to choose what material option would be used on the project. As the plan error was not realized until the Contractor was at or near plan quantity, and there is only one typical section associated with the quantity increase, the material option for the increased quantity was dictated by Specification 285-3, "Select one base option as allowed for each typical cross-section shown in the Plans. Only one base option is permitted for each typical cross-section". As such, the increased quantity for Optional Base Group 1 affectively became Optional Base Group 1 (RAP Only). The character of the work as altered clearly differed materially in kind and nature from that included in the original proposed construction. Had the Contractor know the plan error existed, an alternate material would have been utilized and the unit price significantly increased.

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- 2) Original proposed construction specified, Special Provision Article 327-1, the Department would retain 500 tons of the milled material. And the Contractor will take ownership of any milled material not retained by the Department. Proposed construction for this project included a significant amount of milling 1" and 2" depth. Which would produce a significant amount of reclaimed asphalt pavement. Reclaim asphalt pavement is a component of the asphalt mixture required by the Department. As such, has significant value to the Contractor. The character of the work as altered materially required the Contractor forfeit a significant amount of reclaimed asphalt pavement specified as the Contractors.

The Engineer has determined a significant change does not exist because the optional base remained an optional base, the choice was with the Contractor on which base to select, and that a different base material may have had a significantly less impact to RCI's alleged cost. The fact is the optional base for the increased quantity, per specification, became a RAP material only base. This required the Contractor forfeit material specified as the Contractors. The Contractor was not provided a choice on which option to select for the increased quantity pursuant to Specification 285-3. And the impacts could not have been significantly less as the plan error existed prior to, and at time of bid.

Specification 4-3.1, with regards to significant change, notes the determination of the Engineer shall be conclusive. If the determination is challenged by the Contractor in any proceeding, the Contractor must establish by clear and convincing proof that the determination by the Engineer was without any reasonable basis. The Contractor offers the following as proof the determination of the Engineer was without any reasonable basis:

The Engineer made three points in determining a significant change doesn't exist.

- 1) *The Engineer determined the Optional Base remained an optional base.*
- 2) *The Engineer determined the choice was with the Contractor on which base to select.*

The Engineer determined a different material may have had a significantly less impact to RCI's alleged cost.

Yes, the optional base remained optional base but only to that quantity included in the originally proposed construction. As altered, the optional base became optional base (reclaimed asphalt pavement only). Yes, the choice was with the Contractor on which base to select but only to that quantity included in the originally proposed construction. As altered, the Contractors choice was dictated. The cost impacts were determined by the altered work and not by the originally proposed construction.

The Engineers determination above was made without consideration to the work as altered. But instead as included in the originally proposed construction. The Engineer simply notes optional base is optional base and the Contractor chose which optional material to use. Consideration was not given to specification requirements the Contractor is held to. Or Special Provisions considered at the time of bid. Nor the value of the available material on site. As such, the character of the work as altered differed materially in kind and nature from that included in the originally proposed construction as it:

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- 1) Dictated a material option for optional base. The construction within the typical cross section was in progress when the plan error was noted. Specification 285-3.
- 2) Substantially decreased the available material on site the Contractor was entitled to as included in the originally proposed construction. Special Provision 327-1.
- 3) Value of the material available on site forfeited by the contractor as the result of the altered work.

The Engineers determination was without reason as it did not take account of how the altered work differed materially in nature and kind as it compared with the original proposed construction. As such, the Contractor request the DRB Members find the engineers determination to be without reason.

The Contractor agrees, the item is not a Major Item of Work as defined by specification.

Attached: Typical Cross Section.

Special Provision Article 327-1.

Standard Specification 285-3 Asphalt Base Requirement

Department's Rebuttal

No rebuttal was submitted.

Discussion and Board Finding

The Board's recommendation is based primarily on four contract requirements:

1. Section 285-3; the bidder is required to select one base option per typical cross-section. Based on the quantity shown in the plans RCI selected the RAP option. Therefore, RCI was required to utilize RAP on all shoulders. In effect, they are tied to this option per the contract.

The CEI stated: *"They could have chosen to use a different base material that may have had less of an impact on their costs."* It is unclear if the CEI was referring to a pre-bid or post bid option selection. If it was pre-bid, the Engineer's determination is unreasonable because the Contractor's selection was based on a substantial error. If it was post bid, it was unreasonable because it would be in direct violation of Section 285-3.

2. Section 4-3.1; the Engineer has the right to alter or change quantities without invalidating the contract. The Board agrees that OBG-1 was not a major item of work, so sub paragraph (b) is moot. The question before the Board now becomes whether subparagraph (a) applies. Did this change *"differ materially in kind or nature from that involved or included in the original proposed construction?"*

Certainly, the means and methods of the Contractor did not change with respect to the act of hauling, placing, compacting, and finishing the base.

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3. Section 9-3.2.1; both parties agree that the change was a “*substantial error.*” The Engineer believes that, by adjusting the quantity, he has complied with the contractual requirements of this article. Apparently, the Engineer interprets the wording “*In the event that either the Department or the Contractor contends that the plan quantity for any item is in error and additional or less compensation is thereby due, the claimant shall submit, at their own expense, evidence of such in the form of acceptable and verifiable measurements or calculations*” to be limited to the adjustment of the quantity.

The Board does not agree. A change in quantity can have an impact on the cost of the work. In this case, the overrun of OBG-1 decreased the amount of salvageable asphalt millings that RCI had every right to rely on at the time of bid. RCI was deprived of the use of 5,159 tons of RAP material which could have been used in lieu of virgin asphalt on this or any other project (the Board assumes that the quantity of 5,159 tons mentioned in the Engineer’s position is correct). This material has a value, and Section 9-3.2.1 allows for additional or less compensation. This is a perfect example where an adjustment is warranted under this specification. If as the CEI states in their Position Paper they expected the Contractor to consider a different base group to mitigate costs they should have addressed this at the time the overrun was identified as it would have required a specification change for RCI to make a change from their bid selection.

4. Section 4-5.1; allows the contractor to take “*ownership and dispose of all materials that are not designated as the property of other parties, in both roadway and structures, found on the right-of-way*”.

The increase in quantity deprived RCI of the value of the RAP.

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Based on the testimony and evidence provided the Board recommends entitlement to RCI for the value of the RAP material only. During oral testimony Mr. Flynn stated that it was RCI’s intent to haul all RAP intended for OBG-1 from the asphalt plant. The Board was not tasked with determining the value of the RAP; therefore, we recommend the parties enter into negotiations to establish said value.

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

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by both parties.

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

Respectfully Submitted,

Disputes Review Board

Disputes Review Board Recommendation

Rammy Cone; DRB Chairman
Ron Klein, DRB Member
Pat McCann; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

Rammy Cone
DRB Chairman