Dispute Review Board (DRB) Recommendation

For

IBT Construction vs. FDOT District I

SR 64 Roundabout at Rye Road

FIN 196022-5-52-01; 196022-5-56-01; 196022-5-56-02

Contract E1R07

FAP N/A

Manatee County

Marlon Orellana, Project Manager
IBT Construction
1200 Brickell Avenue
Miami, Florida 33131

John Hayes, Sr. Project Engineer
Kissinger Campo Construction Services
11041 Gateway Drive
Lakewood Ranch, Florida 34211

Date, Location and Time of (DRB) Hearing: August 21, 2020
FDOT Manatee Operation Center
14000 SR 64 East
Bradenton, FL 34212

Issue: **Is the Contractor entitled to a contract time extension and additional compensation for extra work due to unforeseen condition?**

DRB Members:

- Edwin J. Mackiewicz III, Chairman
- Allan Adderley, Member
- Ernest Wolf, Member

OVERVIEW OF DISPUTE

Subsequent to constructing a section of shell rock base and asphalt as part of Phase 2-A, but prior to shifting traffic, the newly built roadway section began to fail. IBT Construction ("IBT") filed a Notice of Intent to Claim for Differing Site Conditions resulting from this occurrence. After removing the asphalt IBT investigated the possible cause by stripping the shell base and obtaining a split sample for comparative proctor testing. After obtaining the results of the split sample testing, IBT re-constructed the base using the newly obtained proctor, proceeded to place asphalt and switch traffic. IBT believes they are entitled to recover time and compensation as a result of this event, whereas the Department believes no time or compensation is due.

DRB RESPONSIBILITY

The role of the Dispute Review Board is to provide specialized expertise in technical areas and in administration of construction contracts to assist the Department and the Contractor in resolving disputes in a timely and equitable manner. In this effort, the Board makes a recommendation based on the Contract, information presented to the DRB in the Position Papers submitted by the Parties, the Parties' Rebuttal Statements and the oral presentations and responses to the Board's questions posed to the Parties at the hearing.

CONTRACTOR'S POSITION (From Contractor's Position Paper)

This case is very simple. Put in baking terms, IBT Construction bought a Betty Crocker cake mix. IBT Construction followed the instructions per the back of the box to the tee, but the cake instead of being moist and fluffy, turned out to be gooey and not eatable. What happened? Naturally, the

batch of Betty Crocker cake mix was bad. This batch of cake mix required only 1 cup of milk, instead of 2 cups of milk, like the box directions required.

Applying those facts to the instant case, on April 29, 2020, 2020 IBT Construction elected to use the Department-approved Pit Proctor for the shell rock placed on the work areas delimited by Phase 2A, as allowed by FDOT Standard Specification 200-7.2.3. See Exhibit A- Specification FDOT Standard Specification 200-7.2.3. The pit proctor calls for the density of 129 pounds per cubic foot and an optimum moisture content of 9.5%. See Exhibit B- Pit Proctor Quarterly Report.

On April 29, 2020, IBT Construction compacted the shell rock to achieve a compaction of 98% of 129 pounds per cubic foot modified Proctor maximum density, per FDOT Standard Specifications 200-7.2.1. The rock at this point seemed to be firm and stable, although the rock was at a 5% moisture content (when the pit proctor called for optimum moisture content of 9.5%). Terracon, IBT Construction's Quality Control consultant on site that day, notified the CEI Mr. Roosevelt, that the rock was firm and stable, and ready for pavement. Mr. Roosevelt, however, told Terracon and IBT's superintendents on the field that day that "the rock was outside the tolerance of the optimum moisture [even though the FDOT Specifications do not require the Contractor to meet the optimum moisture content], and it could not be accepted by the Department." As a result, Mr. Roosevelt refused to perform the Verification Testing (VT) on the rock until water was added, thus preventing IBT from moving forward with the asphalt pavement operation. See Exhibit C- Affidavits from IBT's Superintendents on the field that night.

Accordingly, IBT proceeded to add water to the shell rock to bring it within 2% of the optimum moisture content per verbal directive. However, once the SP-12.5 structural asphalt was placed, certain portions of the base yielded, resulting in cracking and yielding of the asphalt. This in turn impeded IBT Construction to shift traffic to Phase 2B. Since the shift to Phase 2B could not be realized on the scheduled day, this also impacted the overall Critical Path of the job, specifically, construction of the Gravity Wall on Rye Road Rt. See Exhibit D- CPM Schedule Activity ID GW-211.

On May 7, 2020, a split sample was taken by IBT Construction's Quality Control consultant (Terracon) from the rock that failed. The CEI also took a sample for verification testing (VT). The Proctor of this split sample confirmed the moisture content at 7.5%. See Exhibit E- Sample Certificate of Analysis.

On May 18, 2020, IBT submitted a Certified Claim for the delay caused by the base rock failure. See Exhibit F- Certified Claim NOI 9 – Base Rock Conditions. FDOT denied entitlement to both time and money. Exhibit G- FDOT Escalation Meeting Determination – NOI 009. IBT escalated the FDOT's decision per the escalation matrix specified in the Special Provisions 8-3.8. At the escalation meeting, the FDOT denied entitlement based on two reasons: (1) the CEI denies giving the verbal directive, and (2) the FDOT contends that the additional water did not

contribute to the rock failure, but instead it was IBT's further manipulation/compaction of the base rock.

First, the CEI denies giving the verbal directive. This creates a "he-said", "she-said" situation. On the FDOT's side, you have the CEI Mr. Roosevelt denying giving the verbal directive, and on IBT's side, you have the affidavits from both of IBT's superintendents on site that night confirming the verbal directive given by Mr. Roosevelt. Furthermore, at the escalation meeting, IBT had Terracon's Manager confirm that the Terracon employee on site that night confirmed to him receiving the verbal directive from Mr. Roosevelt. The FDOT dismissed this testimony as hearsay, but unfortunately, the Terracon employee who received the verbal directive no longer works at Terracon, hence his direct Manager was on the call. IBT should be given the benefit of the doubt since it would not on its own accord choose to add more water to the mixture.

Additionally, regardless of whether the CEI gave the directive to add more water, the FDOT ignores the undisputed fact that it accepted the mixture (with the added water) and gave IBT the green light to proceed with asphalt. As a result, the FDOT cannot now disclaim any liability for time and money impacts caused to IBT by the base rock failure.

Second, regarding the FDOT's contention that the base rock failure was caused by IBT's further manipulation of the material holds no merit, as the results of the split sample taken on May 7, 2020 show that the material's granulometry and maximum density criteria were within the verification test results. See Exhibit E- Sample Certificate of Analysis.

In conclusion, IBT Construction has valid grounds for a Claim against the Department since: (1) the rock mixture obtained from an approved pit presented mechanical characteristics that did not comply with the pit proctor moisture requirements, (2) the directive by the CEI to add more water caused the material to fail, and (3) the FDOT accepted the base rock mixture before authorizing IBT to proceed with asphalt paving.

DEPARTMENT'S POSITION (From Department's Position Paper)

On April 30, 2020, IBT Construction submitted a Notice of Intent to File a Claim (NOI 009), pursuant to Standard Specification 4-3.7 "Differing Site Conditions" (Exhibit F – Page 3) from unforeseen conditions on the asphalt on Rye Road and the Roundabout areas as part of the Phase 2-A work (Exhibit D – Page 2).

On May 1, 2020, (Exhibit A - Page 76) IBT Construction began removing the failed asphalt and top 5 inches of shell base to investigate the underlying condition. Finding no underlying cause, IBT removed the entire earthwork section represented by the passing QC tests taken on April 28, 2020. No attempt was made by IBT to delineate or isolate failing areas inside the earthwork section prior to removal.

On May 18, 2020, IBT Construction submitted a Certified Claim (Exhibit D – Pages 10-60) which stated "Upon further investigation, no underlying cause was found to be causing this issue. However, based on field observations it was suspected that the rock had excessive water content, even though the tests showed the moisture content to be within 2% of the optimum level. The rock seemed to be firm and stable at around 5% moisture content. However, since this was outside the tolerance of the optimum moisture, it could not be accepted by the Department." This statement is inaccurate, per Standard Specification 105-1.2.2 Quality Control (QC) Inspection: (Exhibit F – Page 6) "Provide all necessary inspection to assure effective QC of the operations related to materials acceptance." Therefore, QC accepts the material and the Department/CEI verifies QC's acceptance of the material. In addition, the contractor was responsible for selecting the type of base rock material, and per Standard Specification 200-7.2 Base Rock Acceptance Criteria (Exhibit F – Pages 8-9) choose to use the Pit Proctor option. (Exhibit D – Page 72)

As a result of the base failure, IBT Construction choose to take a split sample of the shell base material used for the re-work area. KCCS received their portion of the split sample from QC and also took a separate Independent Verification sample for comparison to the Pit Proctor. The QC split sample results showed a proctor of 131.5 with a moisture content at 7.6% (Exhibit B – Pages 103-105), and VT sample results showed a proctor of 131.0 at 8.0% (Exhibit B – Pages 106-108). The VT sample compared to the QC sample as well as the pit proctor of 129.0 at 9.5% at the time of sampling. Per Standard Specification 200-7.4.2: Pit Proctor (Exhibit F – Page 10) "The Engineer will compare the IV results with the Pit Proctor. If the IV result is lower than or equal to the Pit Proctor plus 4.5 pcf, keep the option to use the Pit Proctor." If the IV result is more than 4.5 pcf higher than the Pit Proctor the Engineer will test the Resolution sample and compare the Resolution result with the Pit Proctor.

Based on the split sample results, "IBT Construction is of the opinion that it has valid grounds for a Claim against the Department since some of the rock obtained from an approved pit presented mechanical characteristics such that the use of the Department-approved Proctor pushed the material to failure". However, the split sample results represent the new material used for the re-work area, not the material from the failed area. No samples from the failing area were taken prior to the material being removed. Also, after a review of the Earthwork Record System (ERS) (Exhibit B – Pages 2-53), QC has had no issues obtaining passing acceptance tests. As of July 29, 2020, QC has recorded no failing acceptance tests on the base rock and all base rock lots have passing VT test results. There has been no previous indication of an issue with the moisture content and an inability to achieve compaction. In fact, there are multiple QC acceptance tests and VT verification tests with moisture more than 2% below optimum moisture of 9.5%.

KCCS evaluated IBT's Certified Claim Package and determined no entitlement was due for this issue (Exhibit D – Page 61). IBT Construction chose to use the Pit Proctor Method and all samples compared to the Pit Proctor results per Standard Specification 200-7.4.2 Pit Proctor

(Exhibit F – Page 10). The moisture content (optimum moisture) of the base material is not a comparison criteria for the Pit Proctor. Also, the split sample taken by the Contractor's QC compared to the Pit Proctor.

Standard Specification 5-12.3 Content of Written Claim (Exhibit F – Pages 4-5) expressly prohibits the Contractor from amending either the bases of the entitlement or the amount of any compensation or time stated for an and all issues claimed in the Contractor's written claim submitted. Since the claim was amended from the mechanical characteristics of the material to field direction to add water, no entitlement was warranted. Also, these amendments have denied the Department their opportunity to track, investigate, or address the issue in a timely manner, as required by Specification. These amended issues have not been duly preserved under the terms of the Contract and are ineligible for entitlement under this specification.

This Base Failure Claim issue has been escalated through both Manatee Operations and the District Construction Office, (Exhibit D – Pages 62 & 63) where the claim issue has morphed from the mechanical characteristics of the material into the CEI inspector directed IBT to add additional water thus causing the base failure.

On June 9, 2020, IBT Construction brought up in the response to the Director of Construction on the Letter of Concern Number 3 that IBT was directed in the field to bring the moisture content of the shell base to +2% of optimum moisture. (Exhibit D – Pages 64-71). This was the first reference of field staff directing the Contractor to add additional water and was received twenty-two (22) days after the date of the certified claim.

To further state the case, there has been no direction give to IBT to raise the moisture content from either the field or office. The Earthwork Record System (ERS) shown in the chart below provides the data of both QC acceptance tests and VT verification tests. The QC acceptance of tests over optimum moisture are only critical if it is primed prior to the reduction of the moisture at or below optimum. The test shown in the chart highlighted in yellow, shows such a case. IBT Construction was working the base in preparation for the paving of the area prior to the anticipated traffic shift the next day. QC accepted the base and the area was primed with a moisture content over optimum. This is a violation of Standard Specification 300-7.1 General Application of Prime Coat: (Exhibit F – Page 11) "Clean the surface to be primed and ensure the moisture content of the base does not exceed the optimum moisture. "

Priming of the base with a moisture content higher than optimum trapped water below the prime and lead to the instability of the asphalt pavement.

CQC testing				VT Testing	
Page	Location	Optimum Moisture	Test Moisture	Test Moisture	
57	EB, Sta. 1533+68 - 1535+40, Base lift 2	9.5	6.0		
58	EB, Sta. 1535+40 - 1538+00, Base lift 2	9.5	7.5		
59	EB , Sta. 1538+00 - 1540+50, Base lift 2	9.5	8.9		
60	EB , Sta. 1540+50 - 1542+40, Base lift 2	9.5	8.4	6.5	
61	EB , Sta. 1542+40 - 1545+00, Base lift 2	9.1	11.9	6.4	
62	EB, Sta. 1545+00 - 1545+75, Base lift 2	9.1	11.9		
67	Rye Rd, 5535+95-5538+75, LRI	9.5	10.7	8.2	
67	Rye Rd, 5535+95-5538+75, Base lift 1	9.5	8.2	6.2	
67	Rye Rd, 5535+95-5538+75, Base lift 2	9.5	7.6		
67	Rye Rd, 5535+95-5538+75, Base lift 1 rework	7.6	6.0		
67	Rye Rd, 5535+95-5538+75, Base lift 2 rework	7.6	7.8		
68	Rye Rd, 5538+75-5542+00, LRI	9.5	10.7	8.4	
68	Rye Rd, 5538+75-5542+00, Base lift 1	9.5	7.5		
68*	Rye Rd, 5538+75-5542+00, Base lift 2	9.5	10.3	8.6	*
68	Rye Rd, 5538+75-5542+00, Base lift 1 rework	7.6	7.8		
68	Rye Rd, 5538+75-5542+00, Base lift 2 rework	7.6	7.6	6.8	
69	White Eagle, Sta. 110+00-112+00, Base lift 2				
71	White Eagle, Sta. 4357+55-4360+10, Base lift 2	9.5	7.1	6.0	
72	White Eagle, Sta. 4360+10-4361+95, Base lift 2	9.5	6.8		
	Work Performed by Blade (Subcontractor)				
	Base Failure Area*				

I would also like to address the Notarized Affidavits submitted by IBT Construction for Mr. Stubbs (Exhibit E – Pages 6-10) and Mr. Tackett (Exhibit E – Pages 2-5), which were exhibits included in their initial position statement to the DRB. The information contained in both Affidavits are nearly identical and contain statements that are not accurate. Both state the compaction of the base rock occurred on the night of April 29, 2020 and both statements claim that Mr. Roosevelt instructed them to add water or he would not perform the verification testing. Project Daily Work Reports show the compaction of the base rock occurring an April 28, 2020 during the day (Exhibit A – Page 70). QC acceptance tests and VT verification tests were taken and recorded on April 28, 2020 (Exhibit B – Pages 44 & 86) with paving of the roadway occurring on the morning of April 29, 2020 (Exhibit A – Page 73). Mr. Roosevelt Moore worked the day shift on April 28, 2020 and April 29, 2020, while Mr. Mike O'Brien was the Senior Inspector for the night shift on April 29, 2020. In addition, Mr. Tackett's statement includes "All of the previous times we were able to get a 98% or greater up to a 101%. All within the 5.5% to 7% moisture range." As shown above in the summary on page 7 of 8, only 3 of 18 QC test moistures were within 5.5% to 7%. The inaccuracies of the statements shown in the affidavits, draws their validity into question.

Summary

The issue that occurred was a failure of the Contractor's Quality Control system. This claim is an attempt by the Contractor to transfer responsibility to the Department and the CEI team.

From IBT Construction's initial NOI for the Base Failure to IBT Construction's DRB Position Statement, the basis for this issue has morphed. The NOI was submitted as a Differing Site Condition, then the Certified Claim stated that no underlying cause was found for the base failure but the mechanical characteristics are such that the use of the Department-approved Proctor pushed the material to failure. IBT chose the material and the method for determining the proctor of the material, therefore the mechanical characteristic issues stated in the claim are not valid. The basis of the claim has once again changed, to field personnel direction to add additional water as being the cause of the base failure. Amending the bases of the Certified Claim is prohibited by Standard Specification 5-12.3 (Exhibit F Pages 4-5). Also, the Earthwork Record System (ERS) has multiple QC acceptance tests and VT verification tests with moisture more than 2% below optimum moisture, even though the field personnel allegedly directed the contractor to be within +2% of optimum moisture.

CONTRACTOR'S REBUTTAL (From Contractor's Rebuttal Paper)

Rebuttal to FDOT's Argument that IBT Changed the Basis of Entitlement

The FDOT notes that Standard Specification 5-12.3 prohibits the Contractor from amending the basis of its claim entitlement. It is the FDOT's position that "since the claim was amended from the mechanical characteristics of the material to field direction to add water, no entitlement was warranted."

The FDOT is incorrect in this position. The claim is for extra costs related to remediation work involved failed base. That claim was never changed.

Second, IBT is not changing its basis of claim entitlement because IBT's certified claim states that "The rock seemed to be firm and stable at around 5% moisture content. However, since this was outside the tolerance of the optimum moisture, it could not be accepted by the Department." Thus, IBT states in its Certified Claim that the Department would not accept the mixture because it was outside the tolerance of the optimum moisture, even though in IBT's judgment the rock seemed "firm and stable" at a 5% moisture content. The lack of Department acceptance required water (additional moisture) be added.

IBT is not "changing the basis of claim entitlement" because the basis of the claim is still entitlement for the extra work cost and time impacts due to failure of the base, and the directive from the FDOT representative is merely the result of that representative's not accepting the base for priming.

Additionally, IBT would like to point out that in its Certified Claim claiming time and money for the unforeseen conditions, was only one reason amongst other reasons listed for entitlement. IBT Construction's Certified Claim states that "IBT Construction is submitting a Certified Claim for

Contract Time Extension and resulting additional compensation in accordance to FDOT Standard Specification Section 4-3.2 (Increase, Decrease or Alteration in the Work); 4-3.5 (Extra Work); 4-4 (Unforeseeable Work), and the claim procedures established by 5-12.2.1(Claims for Extra Work), 5-12.2.2 (Claims for All other causes), and 8-7.3.2 (Contract Time Extensions)." Thus, IBT Construction is not limiting its Certified Claim only on the basis on Unforeseen Conditions, as the FDOT improperly argues.

Lastly, regarding the FDOT's argument that "[t]hese amendments have denied the Department their opportunity to track, investigate, or address the issue in a timely manner", there is no substantive difference in the claim entitlement between the defective material claim and a claim caused by a directive from FDOT's agent. In both scenarios the base rock failed. Thus, the time and costs suffered by IBT are the same regardless of which "basis of entitlement" and FDOT tracked and investigated the situation closely, as proven by the FDOT's Issue Statement and its supporting documentation. There is and was no prejudice to the FDOT that should allow a valid claim to be considered waived.

Rebuttal to FDOT's Argument that the Split Sample Results Represented New Material for the Re-Work Area

The FDOT states on page 6 of its Issue Statement that "the split sample results represent the new material used for the re-work area, not the material from the failed area. No samples from the failing area were taken prior to the material being removed." This statement is incorrect, as IBT's Issue Statement states that "On May 7, 2020, a split sample was taken by IBT Construction's Quality Control consultant (Terracon) from the rock that failed." FDOT offers no evidence to back up the statement.

Rebuttal to FDOT's Argument that the QC Has Recorded No Failing Acceptance Tests on the Base Rock and All Base Rock Lots Have Passing VT Test Results

The FDOT states on page 6 of its Issue Statement that "the QC has recorded no failing acceptance tests on the base rock and all base rock lots have passing VT test results." This statement further adds to IBT's argument of unforeseen site conditions in that "The road base was tested and achieved optimum water content and attained the maximum density…If the base was compacted to optimum levels, the failure indicates a potential unforeseen condition" as all the other times prior there was no issue with the moisture content and an inability to achieve compaction.

Rebuttal to FDOT's Argument that All Samples Compared to the Pit Proctor Results

The FDOT states on page 6 of its Issue Statement that "IBT Construction chose to use the Pit Proctor Method and all samples compared to the Pit Proctor results per Standard Specification 200-7.4.2 Pit Proctor." This statement further adds to IBT's argument that at 5% moisture content IBT had achieved the level of compaction required compared to the Pit Proctor per

Standard Specification 200-7.4.2, yet the Department would not accept the mixture because it was outside the tolerance of the optimum moisture, even though in IBT's judgment the rock seemed "firm and stable" at a 5% moisture content.

The CEI was wrong to direct IBT to achieve optimum moisture because it was not required by the Specifications. IBT, however, complied with the CEI's directive because in theory by adding water to the mixture to achieve optimum moisture would not have caused the base to fail, because at optimum moisture is when the rock performs best. Yet, the base did fail, the rock mixture obtained from an FDOT approved pit presented mechanical characteristics that did not comply with the Pit Proctor moisture requirements (thus creating an unforeseen condition). In short, IBT detrimentally relied on the Pit Proctor criteria, resulting in both time and money impacts.

Lastly, as the FDOT points out in its Issue Statement page 7, "The QC acceptance of tests over optimum moisture are only critical if it is primed." IBT was compacting the shell base to prime prior to the placement of the structural asphalt scheduled for the next morning (April 29, 2020). Thus, to state that "The moisture content (optimum moisture) of the base material is not a comparison criterion for the Pit Proctor" is misleading, as it is a comparison criterion for priming. Thus, the split sample taken by the Contractor's QC did not compare to the Pit Proctor.

Rebuttal to FDOT's Argument that the First Reference of the Directive was 22 days After the Date of the Certified Claim

As mentioned previously, in its certified claim IBT states that "The rock seemed to be firm and stable at around 5% moisture content. However, since this was outside the tolerance of the optimum moisture, it could not be accepted by the Department." Thus, IBT does state in its Certified Claim that the CEI would not accept the mixture if it was outside the tolerance of the optimum moisture, even though in IBT's judgment the rock seemed "firm and stable" at a 5% moisture content. The directive of the CEI to add water to the mixture is and was the basis of the certified clam's statement the base "could not be accepted by the Department," causing IBT to add water in order for the CEI to accept the mixture.

Rebuttal to FDOT's Argument that QC Acceptance Tests Over Optimum Moisture Are Only Critical If Rock is Primed

The FDOT states on page 7 of its Issue Statement that "The QC acceptance of tests over optimum moisture are only critical if it is primed prior to the reduction of the moisture at or below optimum." FDOT states that the "QC accepted the base and the area was primed with a moisture content over optimum." The Optimum Moisture content of the Pit Proctor is 9.5 and, while the QC Test showed a moisture content of 10.3, the VT Test showed a moisture content of 8.6, below the Pit Proctor optimum moisture content. As a result, IBT was not in violation of Standard Specification 300-7.1 General Application of Prime Coat and received the green light from the CEI to proceed with priming and then paving.

Rebuttal to FDOT's Argument Regarding the Inaccuracies of the Affidavits

The FDOT points to the inaccurate date April 29, 2020 in the notarized affidavits from Mr. Stubbs and Mr. Tackett. The date was a typo in the affidavits that was not caught by either of the affiants. The fact that the affidavits contain the inaccurate date, does not negate the fact that the compaction of the base rock occurred the day prior on April 28, 2020 and that "Mr. Roosevelt Moore worked the day shift on April 28, 2020" per the FDOT's admission. It also does not negate the fact that Mr. Tackett and Mr. Stubbs worked the day shift on April 28, 2020 and were present during the compaction of the base rock, and had a face-to-face conversation with Mr. Roosevelt Moore. That eyewitness testimony can be relied upon by the Panel.

Conclusion

In conclusion, IBT Construction has demonstrated valid grounds for its Claim for monetary compensation and contract time because IBT did not change its basis of entitlement. The rock mixture obtained from an approved pit presented mechanical characteristics that did not comply with the Pit Proctor moisture requirements, thus creating an unforeseen condition. Second, by following the refusal of the CEI to take the VT test unless it was at optimum moisture further substantiates IBT's position because by following the CEIs implicit directive to add more water to reach optimum moisture should not have made the rock fail, but it did. Lastly, the FDOT's VT test showed that the moisture content was below optimum moisture, and as a result, the Department gave IBT the green light to prime and proceed to pave.

DEPARTMENT'S REBUTTAL (From Department's Rebuttal Paper)

Standard Specification 5-12.3 Content of Written Claim (KCCS Position Statement Exhibit F – Pages 4-5) expressly prohibits the Contractor from amending either the bases of the entitlement or the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted.

- *IBT's basis of the certified claim, submitted May 18, 2020, stated "IBT Construction is of the opinion that it has valid grounds for a Claim against the Department since some of the rock obtained from an approved pit presented mechanical characteristics such that the use of the Department-approved Proctor pushed the material to failure".*

- *IBT's response to Letter of Concern No. 3, dated June 9, 2020, stated "IBT Construction was directed on the field to bring the moisture content of the rock base to ±2% of the optimum moisture level shown on the Pit Proctor, even after achieving the required density."*

- *IBT's position paper dated August 5, 2020, IBT states, "Thus, the CEI refused to perform the Verification Testing (VT) on the rock until water was added, thus preventing IBT from moving forward with the asphalt pavement operation. In this is implicit the directive of the CEI to add water to the mixture, in order for the CEI to accept the mixture."*

In short, the claim went from an NOI of Differing Site Conditions, to mechanical characteristics of the material, to directed to add water, to an implicit direction (implied though not plainly expressed). Since the claim was amended from the mechanical characteristics of the material to field direction to add water, to implied direction to add water, no entitlement is warranted.

IBT's Position Paper states "On May 18, 2020, IBT submitted a Certified Claim for the delay caused by the base rock failure. See Exhibit F- Certified Claim NOI 9 – Base Rock Conditions. FDOT denied entitlement to both time and money. Exhibit G- FDOT Escalation Meeting Determination – NOI 009. IBT escalated the FDOT's decision per the escalation matrix specified in the Special Provisions 8-3.8. At the escalation meeting, the FDOT denied entitlement based on two reasons: (1) the CEI denies giving the verbal directive, and (2) the FDOT contends that the additional water did not contribute to the rock failure, but instead it was IBT's further manipulation/compaction of the base rock." (Exhibit I – Page 3)

The denied entitlement stated above is not completely accurate. Below are the denial paragraphs from each escalation meeting:

The response from the Manatee Operation meeting stated, "There were no underlying conditions identified to cause the base failures associated with NOI 009. It is the contractor's responsibility to provide a finished product that meets all plans and specification requirements. Project Quality Control performs all acceptance testing and the Project CEI staff performs verification testing. The same material with the same Pit Proctor which failed on April 29, 2020 was used successfully in other areas of the project without failure. The differences in the optimum moistures did not prevent the acceptance and completion of other base areas within the project. Therefore, it has been determined that no entitlement associated with NOI 009 Base Failure is warranted." (KCCS Position Statement - Exhibit D – Page 62)

The response from the District Construction meeting stated, "The Contractor's Quality Control performs all Acceptance Testing and the Department's CEI staff performs all Verification Testing. The Project Earthwork Record System indicates the base in question was accepted by Contractor's Quality Control above optimum moisture, and the area was primed and paved, which is not in compliance with Specification 200-8.1. The information and data presented indicate the base failure was a direct result of the Contractor's actions and non-conformance with the Contract documents. The information/data presented does not support the claim for base material failures associated with NOI 009." (KCCS Position Statement Exhibit D – Page 63)

Standard Specification 200-8.1 Priming: "Apply the prime coat only when the base meets the specified density requirements and when the moisture content in the top half of the base does not exceed the optimum moisture of the base material. At the time of priming, ensure that the base is firm, unyielding and in such condition that no undue distortion will occur. Ensure the prime coat adheres to the base course." (Exhibit H – Page 2)

IBT states in their position paper, "Additionally, regardless of whether the CEI gave the directive to add more water, the FDOT ignores the undisputed fact that it accepted the mixture (with the added water) and gave IBT the green light to proceed with asphalt. As a result, the FDOT cannot now disclaim any liability for time and money impacts caused to IBT by the base rock failure. Second, regarding the FDOT's contention that the base rock failure was caused by IBT's further manipulation of the material holds no merit, as the results of the split sample taken on May 7, 2020 show that the material's granulometry and maximum density criteria were within the verification test results." (Exhibit I – Page 3)

IBT's statement of the Departments' acceptance of their material is inaccurate and completely disregards their responsibility per Standard Specification 105: CONTRACTOR QUALITY CONTROL GENERAL REQUIREMENTS address the contractor's responsibilities associated with materials, testing and acceptance. 105-1.2.2 Quality Control (QC) Inspection: "Provide all necessary inspection to assure effective QC of the operations related to materials acceptance. This includes but is not limited to sampling and testing, production, storage, delivery, construction and placement. Ensure that the equipment used in the production and testing of the materials provides accurate and precise measurements in accordance with the applicable Specifications. Maintain a record of all inspections, including but not limited to, date of inspection, results of inspection, and any subsequent corrective actions taken. Make available to the Department the inspection records, when requested." 105-8.2 Quality Control (QC) Manager: "Designate a QC Manager who has full authority to act as the Contractor's agent to institute any and all actions necessary to administer, implement, monitor, and as necessary, adjust quality control processes to ensure compliance with the Contract Documents." Therefore, acceptance of material is the contractor's responsibility. The FDOT, through the CEI, does verification of the Quality Control acceptance of materials on a random basis and at a reduced frequency. (KCCS Position Statement Exhibit F – Pages 6-7)

With regard to the split sample, this split sample represents the new material used in the rework of the failed base area. No sample from the material in the failed area was taken and no additional data is available for that material which was removed and disposed. However, an additional Independent Verification Sample was taken of the material brought in for the rework. This material compared to the Departments Pit Proctor results. (KCCS Position Statement Exhibit B – Pages 95-102)

There has not been a time on this project where the CEI has refused to perform verification testing for passing QC tests recorded in the Earthwork Record System for the appropriate

random number verification lot. Also, the alleged or implied direction to add water to bring the moisture content within 2% of optimum moisture was never given by the CEI inspector. There are multiple tests performed by QC and VT greater than 2% below the optimum moisture of 9.5%. Why would direction be given for this one instance and not throughout the duration of the project? The only obvious conclusion is that this alleged direction never occurred.

Conclusion:

IBT is solely responsible for the acceptance of materials for use on this project. The CEI has not directed the contractor on how to handle their materials, as that is a QC function. The Quality Control Inspector accepted the shell base prior to paving with a moisture content of 10.3% which is over optimum moisture. The area was string lined, cored and the densities verified. The passing verification test for that lot passed with a moisture of 8.5%. QC testing and VT testing are always performed in the same lot but not necessarily in the same location based on random sampling and testing. The shell rock, which was accepted by QC Personnel was primed and paved and subsequently failed. Failure of the roadway is the contractor's responsibility, therefore, no entitlement for this issue is warranted.

UNDISPUTED vs. DISPUTED FACTS

The Board's analysis of this claim starts with categorizing the facts as "undisputed" or "disputed".

The following facts are undisputed by both parties:

1. On 4-28-20 QC and VT density tests on the subject road section passed
2. The surface of the base was firm and unyielding
3. On 4-29-20, after placing asphalt but prior to the traffic switch the asphalt was failing
4. On 4-30-20 an NOI was filed for a differing site condition
5. On 5-1-20 IBT began an investigation which included obtaining a "split sample" on which a proctor test was performed
6. The base was reconstructed and - using the proctor results from the split sample - passed density
7. The area was paved and ultimately traffic was shifted
8. Moisture content is not an independent criteria used to determine a passing or failing density test but rather identifies a range by which the degree of density effort can be gauged

The following are disputed by both parties:

1. Whether or not an unrecorded QC density test was taken prior to 4-28-20 showing a passing density at 5% moisture content and whether or not IBT was directed by VT inspector, as a result of the unrecorded previous QC test, to add water to the base prior to obtaining the recorded passing density tests of 4-28-20
2. Whether or not IBT's investigation took the split sample from the original base rock or a new delivery of rock
3. The effects of the split sample proctor versus the pit proctor
4. Whether or not the base (pre-failure) was primed while having a moisture content above optimum
5. Whether or not IBT changed its basis to its claim

CONTRACT SPECIFICATIONS

The Board finds the following specifications pertinent to this matter. Relevant excerpts are as follows:

> *4-3.7 Differing Site Conditions: During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract, or if unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the Contractor disturbs the conditions or performs the affected work.*
>
> *Upon receipt of written notification of differing site conditions from the Contractor, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the Contract, an adjustment will be made, excluding loss of anticipated profits, and the Contract will be modified in writing accordingly. The Engineer will notify the Contractor whether or not an adjustment of the Contract is warranted.*

5-12.3 Content of Written Claim

Further, the Contractor shall be prohibited from amending either the bases of entitlement or the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted hereunder

200-6.2 Moisture Content: When the material does not have the proper moisture content to ensure the required density, wet or dry it as required. When adding water, uniformly mix it into the full depth of the course that is being compacted. During wetting or drying operations, manipulate, as a unit, the entire width and depth of the course that is being compacted.

*200-7.2.3 Pit Proctor**:** In lieu of Modified Proctor Maximum Density testing at the roadway, notify the Engineer in writing that the Contractor option to use the Pit Proctor supplied by the Department will be used. The Modified Proctor maximum density frequency requirements of 200-7.2.2 shall not apply. The Department will determine the Pit Proctor from statistical analysis of the base rock Modified Proctor maximum density at Department approved mines. For posting of Mines and Pit Proctors for each calendar quarter refer to the State Materials Office internet website at http://www.fdot.gov/materials/. Use the current posted Pit Proctor value in lieu of the Modified Proctor maximum density required by 200-7.2.1. Use the current posted Pit Proctor value for density acceptance during the quarter corresponding to the posting. Notify the Engineer in writing if returning to the provisions of 200-7.2 and 200-7.2.2 but do not re-elect to use the Pit Proctor until the start of the next calendar quarter.*

200-7.4 Verification Comparison Criteria and Resolution Procedures:

200-7.4.2 Pit Proctor: When using the Pit Proctor option, the Engineer will select a random location to sample and test at the minimum frequency in the table below, to obtain an Independent Verification (IV) maximum density as determined by FM 1-T180, Method D. The Engineer will collect enough material to split and hold a sample for Resolution testing.

The Engineer will compare the IV results with the Pit Proctor. If the IV result is lower than or equal to the Pit Proctor plus 4.5 pcf, keep the option to use the Pit Proctor.

200-8 Priming and Maintaining.

200-8.1 Priming: Apply the prime coat only when the base meets the specified density requirements and when the moisture content in the top half of the base does not exceed the optimum moisture of the base material. At the time of priming, ensure that the base is firm, unyielding and in such condition that no undue distortion will occur. Ensure the prime coat adheres to the base course.

BOARD FINDINGS

The Board's findings center on the disputed areas as detailed above. Each is discussed below.

1. IBT asserts it obtained an initial passing QC density test which showed moisture content of 5%. IBT states it was told by the VT inspector since the moisture content was too far below the optimum moisture as shown in the pit proctor (9.5%), IBT would need to increase the moisture before the VT inspector would perform his test. IBT never recorded this initial test. IBT asserts, as a result of the VT inspector's direction, it reworked the base and increased the moisture content.

   The Department asserts its VT inspector never gave such a directive and that IBT is in control of QC testing and if a passing test was obtained, IBT had an obligation to record it and then proceed according to the specifications. The Department further asserts any effect of IBT's action to rework the base is not the Department's liability, but rather solely IBT's.

   IBT provided notarized affidavits from individuals who attested as to the direction given by the VT inspector that the moisture needed to be increased. IBT also provided testimony at the hearing from its superintendent at the time, Mr. Timothy Tackett who stated the VT inspector required the moisture to be increased prior to a verification test being performed. The Department did not produce the VT inspector at the hearing as such the Board could not ask direct questions of him.

   The Board found Mr. Tackett's statements as to the alleged direction of the VT inspector to be very compelling and credible. However, the Board also questions why the original test showing 5% moisture was not recorded in some fashion by the QC inspector, and such direction to increase moisture, even though a passing QC test was achieved, was not better documented by IBT. IBT's responses to these questions were not nearly as compelling as Mr. Tackett's testimony. To these points, the Board believes IBT would

not have taken it upon themselves to add water after achieving a passing QC test, however, we also believe IBT had an obligation to properly document such an event.

Nevertheless, the Board finds this issue loses significance since passing QC and VT tests were ultimately obtained on 4-28-20 and recorded in the Density Log Book prior to paving. It was these passing tests that were part and parcel with other specification requirements that allowed IBT to move forward with paving.

2. Another disputed assertion is whether or not IBT took the split sample from the existing base or a new delivery of base. Specification 4-7.3 Differing Site Condition is clear that upon notice of a Differing Site Condition ("DSC") the Engineer will investigate. IBT and not the Engineer performed the investigation. This is an undisputed fact as confirmed in the Department's position paper as well as during the hearing. Additionally when the Engineer was asked if he directed IBT's investigation he said he did not. As a result of the Engineer not performing this obligation, IBT performed it. IBT removed the asphalt and base, sampled and tested the base material. IBT stated it obtained the split sample from the same rock in the failed area. The Department contends the split sample was taken from a new delivery of base rock. The Department's support for this position is a Daily Work Report ("DWR") from 5-6-20 which states -

   > *5 man crew worked on grading LT RDWY 1530+00 to 1536+00. They added material to the top lift of base to bring it up to the correct elevation.*

   The Department stated the operative word in this document was "added". IBT's superintendent stated the split sample was not new material but from the same base as in the existing failed area.

   As to this disputed contention the Board concludes that when the Engineer did not act on its obligation to perform an investigation, IBT was left with no choice but to move forward with its own investigation. IBT indicated after they removed the asphalt, they peeled the existing base to the side and in piles. Testimony by IBT's superintendent indicated as the existing base was being reworked, a split sample was taken from one of the piles, but this was not a new delivery but rather the existing material that was removed. The Department was asked if there was any other support for its conclusion e.g. delivery tickets etc, beyond the DWR. The Department said no.

   It is reasonable that such an investigation would be done in the manner in which IBT states. Testimony at the hearing makes the Board conclude the split sample was taken from the existing base rock and not a new delivery. The phrase in the CEI's DWR which states IBT "added" base is ambiguous to the extent of determining whether this was the addition of "new" base or simply adding existing material onto the previous layer of base. Moreover, since the Engineer did not perform the investigation as required per the

specification, nor did he direct the investigation which was within his right and obligation to do, the Board concludes resolving this question of fact goes to the party who performed the investigation, IBT.

3. The next item of dispute is what effect the split sample proctor test versus the pit proctor test has on the purported differing site condition. IBT obtained the split sample from which they and the Department performed independent proctor testing. The split sample proctors were compared to the pit proctor. The results are as follows:

	Density (PCF)	Optimum Moisture (%)
Pit Proctor	129.0	9.5
QC S.S.	131.5	7.6
VT S.S.	131.0	8.0

According to specification 200-7.4.2 Verification Comparison Criteria and Resolution Procedures for Pit Proctors, since the VT split sample is within 4.5 pcf of the pit proctor a valid comparison is achieved and the pit proctor is maintained. However, within this specification there is no comparison for changes in optimum moisture. This is likely due to the fact, as agreed to in the hearing, optimum moisture is used to provide information as to the range for obtaining the required density. According to specification 200-6.2 Moisture Content, when the material does not have the proper moisture content to ensure the required density, the contractor is to wet or dry it as required. This is indication that moisture content is a *physical condition* of the material that can be altered such that the required density is achieved. By extension, the optimum moisture content is also a physical condition of the material.

Although optimum moisture is not considered in whether or not a pit proctor "compares" for purposes of specification 200-7.2; for purposes of determining a potential differing site condition, optimum moisture is an integral part in the physical characteristics of the material. Thus if the new pit proctor from the split sample showed the material actually should have been constructed using a lower optimum moisture, and when it was constructed using the lower optimum moisture it did not fail, it can reasonably be concluded a latent physical condition was encountered that differed materially from that shown in the contract.

4. The next issue under dispute is whether or not the base was primed while the moisture content was above optimum. The Department stated IBT violated specification 200-8.1 Priming as related to the optimum moisture when it primed the base rock. Specification 200-8.1 states only prime the base when the moisture in the top half does not exceed the optimum moisture. This specification does not indicate how that is to be determined. Although the QC density test recorded a moisture of 10.3% the VT density test, which occurs later in time than the QC test, recorded a moisture of 8.6% which is lower than optimum moisture of the pit proctor of 9.5%. Therefore, the Board finds no basis for determining IBT failed to adhere to this requirement since the last recorded moisture does not exceed optimum moisture.

5. Lastly, as to the dispute of whether or not IBT changed the basis of its claim, IBT's NOI references a Differing Site Condition resulting from unforeseen conditions in the failed road area. It was made quite clear by both parties that at the time there was no glaring reason for what or why the road failed. IBT and not the Engineer performed the investigation. IBT offered the explanation up that the characteristics of the material were different than expected based on the pit proctor. The Board finds IBT's investigation, process and offered explanation of the roadway failure to be consistent with the basis of its claim. As such the Board does not find IBT modified the basis of claim.

BOARD'S CONCLUSION

Neither party provided clear evidence which conclusively proved what caused the road to fail. As such, the Board must make inferences from the information presented by the parties and then apply these to the specifications. It is the Boards belief from the inference of the undisputed facts as well as our reconciliation of the disputed facts a change in the physical material characteristics of the base occurred by the reduction of the optimum moisture as determined by the split samples. The base rock is certified by the Department and is accompanied with a pit proctor provided by the Department. With that comes a reasonable expectation that IBT can rely on this for the fitness of that material for its intended purpose and performance. IBT has demonstrated its ability to successfully install this base in compliance with the specification in other areas and even in this area since it obtained a passing density test prior to the failure of the road. If the base passes QC and VT testing and is firm and unyielding, but yet ultimately fails the question is why?

IBT and not the Department performed the investigation. The Department had the obligation and right to perform the investigation once they received the NOI for a DSC. They did not. Rather IBT performed the investigation and the Board finds IBT's investigation was reasonable under the circumstances. The Board concludes a change occurred in the physical property of a

material supplied by and certified by the Department to have certain characteristics. It is the Board's further conclusion that, although not 100% conclusive, it is this change in physical characteristic that more likely than not caused the base failure.

It is also clear that both parties bear some responsibility based on their actions and misunderstanding of the QC and VT process leading up to the road failure. The Contractor failed to record initial passing densities which may have resulting in a different outcome. From the Contractor's affidavits and first-person testimony, the Board believes the Department's field personnel made inaccurate representations of the contract specification VT requirements which influenced the Contractors actions. The Board must conclude that this and/or the above referenced evidence concerning the uncertain properties of the base material contributed to this dispute.

BOARD'S RECOMMENDATION

The Board unanimously finds entitlement for the Contractor to receive additional compensation and time as a result of this claim; the quantum of such is outside the scope of this recommendation.

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

The Board reminds the parties that this is 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.

Signed for and with concurrence of all members

Edwin J. Mackiewicz III, Chairman

Alan Adderley, Member

Ernie Wolf, Member

Via: email

KCCS | CONSTRUCTION SERVICES

September 18, 2020

Mr. Edwin J. Mackiewicz III, P.E.
EJM Consulting Services, LLC
1900 S. Harbor City Blvd., Suite 305
Melbourne, FL 32901

Mr. Allan Adderley
AEM Consulting, Inc.
7963 E. Rooks Rd.
Floral City, FL 34436

Mr. Ernest J. Wolf
475 Island House Path
The Villages, FL 32163

RE: DRB Recommendation August 21, 2020 Hearing Request for Reconsideration/Clarification

Fin No:	196022-5-52-01; 196022-5-56-01; 196022-5-56-02
FAP No:	N/A
Contract No:	E1R07
County:	Manatee
Project Description:	SR 64 @ Rye Road - Roundabout

Dear DRB Board Members:

The Department is requesting the Board reconsider and/or provide clarification on their finding of entitlement based on the following Contractual information and questions:

Specification 105-3:

Certain operations require personnel with specific qualifications. Certain materials require production under an approved Quality Control (QC) Plan to ensure that these materials meet the requirements of the Contract Documents. Applicable materials include hot mix asphalt, portland cement concrete (Structural), earthwork, cementitious materials, timber, steel and miscellaneous metals, galvanized metal products, prestressed and/or precast concrete products, drainage products, and fiber reinforced polymer products.

Considering the first three materials on the above specification list:

Hot mix asphalt producers are Department approved suppliers, with their own Department approved Quality Control program and their design mixes are Department approved for use on FDOT projects.

Portland Cement Concrete producers are Department approved suppliers, with their own Department approved Quality Control program and their design mixes are Department approved for use on FDOT projects.

Earthwork material suppliers are Department approved suppliers, with their own Department approved Quality Control program. Earthwork suppliers test their base rock for properties (including Optimum Moisture) and this information is provided to the Department, who in turn provides this data on their website as referenced throughout this Dispute Review Board Recommendation.

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Material failures of Asphalt (density, gradation, etc.) are issues or disputes between the Contractor and Supplier (Producer) to resolve.

Material failures of Concrete (strength, air content, etc.) are issues or disputes between the Contractor and Supplier (Producer) to resolve.

The Board concluded on pages 20 & 21 **"a change occurred in the physical property of a material supplied by and certified by the Department to have certain characteristics…although not 100% conclusive, it is this change in physical characteristic that more likely than not caused the base failure."**

Question:

1. What are the specific contract documents and references the Board used to conclude the material in question is supplied by the Department?

Clarification:

2. Please provide the contractual basis for concluding the Department is responsible for material characteristics of base rock that is: purchased; transported; stored; and installed/constructed by the Contractor?

Sincerely,

John W. Hayes, P.E.
Senior Project Engineer

cc: Jon Sands, P.E., District Construction Engineer
Brian Blair, PE, Assistant District Construction Engineer
Brian Penny, District Construction Services Manager
Trisha Hartzell, P.E, Manatee Operations Engineer
Alex Adames, P.E., Construction Engineer
Jim Nichols, Construction Manager
Carl Harman – Project Manager
Daniel Toledano, IBT
Keyvan Sangelaji, IBT
Marlon Orellana, IBT
Mike Edge – Project Administrator
OG file 103; NOI 009

Response to Department's Question/Clarification In Connection With Dispute Review Board (DRB) Recommendation

For

IBT Construction vs. FDOT District I

SR 64 Roundabout at Rye Road

FIN 196022-5-52-01; 196022-5-56-01; 196022-5-56-02

Contract E1R07

FAP N/A

Manatee County

Marlon Orellana, Project Manager
IBT Construction
1200 Brickell Avenue
Miami, Florida 33131

John Hayes, Sr. Project Engineer
Kissinger Campo Construction Services
11041 Gateway Drive
Lakewood Ranch, Florida 34211

Date, Location and Time of (DRB) Hearing: August 21, 2020
FDOT Manatee Operation Center
14000 SR 64 East
Bradenton, FL 34212

September 25, 2020

In regard to the Department's question/clarification (KCCS letter dated Sept. 18, 2020) the Board offers the combined response as following:

The Department "supplies" base material by way of approving the mines. Unlike the Department's approval of asphalt or concrete producers which take several raw materials and incorporate into a new end-line product, the Department's approval of the base rock mines are already a raw material. It is approved by the Department for use by the Contractor. Although the Contractor may purchase, transport and install the material, the physical characteristics of the raw material are not changed by the Contractor. Unlike asphalt or concrete where the improper mixture of different raw materials in the "production" process may cause the end result to fall out of specifications, base rock is not "produced" in as much as it is used in its original form. Thus the Department's approval of this material constitutes "supplying" in every way but transportation to the job.

Furthermore regarding, Specification 200-7.2.3, Pit Proctor, states if so chosen by the Contractor, they can opt to use a Pit Proctor supplied by the Department. It states, "The Department will determine the Pit Proctor from statistical analysis of the base rock Modified Proctor maximum density at Department approved mines". It also states, "Use the current posted Pit Proctor value in lieu of the Modified Proctor maximum density required by 200-7.2.1." From this the Department is certifying the material as acceptable for use and provides the testing criteria to use it. Since the Department approves the mines (and therefore the material) as well as providing a required test criteria it follows that the Contractor must place reliance on this information to build the job. Pit material is natural material in place. It cannot be compared to asphalt or concrete which are manufactured based on a multitude of material and very different specifications.

In IBT's claim they state although they used the approved material and it passed density both in QA and VT testing according to criteria supplied by the Department, it still failed under traffic. All of the evidence points to a problem with the Department's pit proctor.

Signed for and with concurrence of all members

Edwin J. Mackiewicz III, Chairman

Edwin J Mackiewicz III

Digitally signed by Edwin J Mackiewicz III
DN: c=US, o=EJM Consulting Services LLC, ou=A01410D0000016BE60E661B00004403, cn=Edwin J Mackiewicz III
Date: 2020.09.25 15:48:17 -04'00'

Alan Adderley, Member

Ernie Wolf, Member

Via: email