

DISPUTE REVIEW BOARD RECOMMENDATION

July 26, 2004

E-Mailed - July 26, 2004

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Mr. Kent Dube
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RE: SR 60A (Van Fleet Drive) from Agricola Road (CR 555) to SR 35 (US-98)
FIN No.: 197168-1-52-01
County: Polk

Issue – MSE Wall Sidewalk Payment

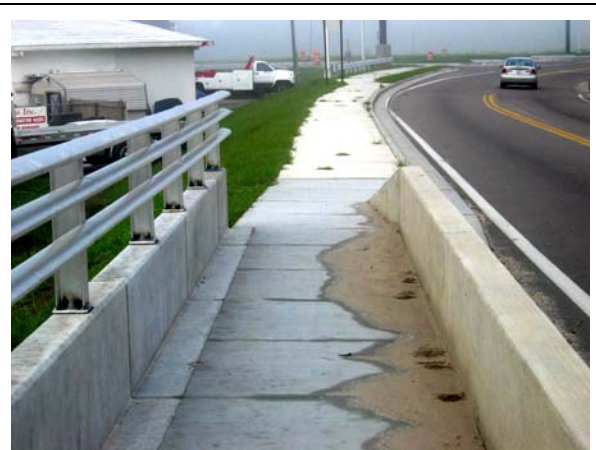
Dear Sirs:

The Owner, Florida Department of Transportation (FDOT), and the Contractor, Bulger Construction Company (BCC) requested a hearing to **determine entitlement of the Contractor to be paid for 6" concrete sidewalk adjacent to the Retained Earth Wall under Item No. 522-2, Sidewalk Concrete (6") on the project.** Should entitlement be established, the Parties were to negotiate the quantum of such entitlement.

Pertinent correspondence and other information relating to the Owner's and the Contractor's positions were forwarded to this Board for review and discussion at the hearing that was held on July 21, 2004.



West End Looking East



West End Looking West



East End of Bridge Looking West



East End of Bridge Looking East

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CONTRACTOR'S POSITION:

The Contractor provided its position to the Board on June 23rd 2004:

Position Paper for 6" Sidewalk

The first week of January 2004 we discovered a plan error in the quantity of 6" sidewalk on the referenced project. We had **previously discovered an error in the concrete barrier wall quantity while preparing the VECP plans**. This error in 6" sidewalk quantity directly relates to the concrete barrier wall quantity.

On January 9, 2004 we sent a RFI to Parsons concerning the 6" sidewalk (RFI attached). Their response was that the sidewalk was included in the cost of the wall per Index 5000, Note No. 2. We responded with BCC Letter 102-031 (attached) stating that **Note No. 2 of Index 5000 referred to C.I.P. sidewalk parapets not sidewalk**. Parsons responded with their letter 168-B100 (attached) that Note No. 2 indicates all cast in place appurtenances, including the sidewalk as an appurtenance therefore it was included in the cost of the wall.

On February 24, 2004 our subcontractor, Don Robinson Concrete, had ten (10) cubic yards of class I concrete delivered to the job to pour the 6" sidewalk. The concrete arrived on site at 8:00 AM. Parsons' inspector informed Don Robinson that the sidewalk had to be poured with class IV concrete and would not let him pour the sidewalk with class I concrete. Don Robinson lost ten (10) cubic yards of class I concrete and one day of labor and equipment. Parsons sent letter 168B098 (attached) via fax at 12:50 PM. This letter stated that according to the **plans and general notes the compressive strength for cast in place coping/sidewalk shall be class IV, 5500 psi**.

Our position is as follows:

1. All **plan sheets and shop drawings show this to be concrete sidewalk**.
2. Index 5000 Note No. 2, states that all cast in place appurtenances, i.e., coping, traffic railing barriers, **sidewalk parapets**, light pilasters, integral sign foundations, etc., shall be paid for at the contract unit price per square feet or retaining wall. **This is a separate sidewalk not a sidewalk parapet**.
3. Sheet W-1, **control drawing general notes are for a monolithic cast in place coping/sidewalk as shown on that plan sheet. The coping on this project is a pre-cast coping with the sidewalk poured separately with a construction joint between the coping and the sidewalk**. This detail is shown on sheet 14 of the shop drawings which were approved by FDOT Structures and the Engineer of Record.
4. There are **no notes either pay item or otherwise that say the sidewalk is to be included in the cost of the wall**.

We feel this was an oversight and the intention of the plans were to place 6" concrete sidewalk out of class I concrete and for it to be paid for under Item No. 522-2, Sidewalk Concrete (6").

OWNER'S POSITION:

The Owner provided its position to the Board on June 25th 2004:

Parsons Brinckerhoff Construction Services, Inc. (PBCS) serving as the Agent of the State to the Florida Department of Transportation (FDOT) has prepared this Position Paper concerning the above-mentioned subject. The Contractor performing the work of this construction project is Bulger Construction Company (BCC) under Contract No. 21541 for the FDOT - District 1.

DESCRIPTION

Plan Sheet No. W-1 details mechanically stabilized earth (MSE) walls to be built along approaches to the new bridge (SR 60A over CSX RR and Polk Street). These MSE walls are shown to be built on the southeast approach (Wall No. 1) and the northeast approach (Wall No. 3). The **details for these walls also show a cast-in-place (CIP) coping/sidewalk** and pedestrian/bicycle railing barrier wall (sidewalk parapet) atop the MSE wall. The precast coping section provided by the Contractor included reinforcing for a CIP 6-inch integral slab serving as a sidewalk as shown on Sheet No. 14 of the attached FDOT Approved Contractor Shop Drawings (Exhibit A). A concrete traffic railing barrier wall is shown adjacent to the CIP coping/sidewalk. The original Contract Plan Sheet No. W-1 and Contractor revised Plan Sheet No. W-1 are attached with this Position Paper as Exhibits B and C respectively.

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ISSUE RESOLUTION CHRONOLOGY

On January 9, 2004, BCC submitted Request-for-Information (RFI) No. 102-09 to PBCS regarding this 6-inch sidewalk detail. This RFI stated the following:

"The 6 inch sidewalk quantity does not match the plan quantity shown on sheet 2. It appears that it will overrun. Please advise. Thank you. "

On January 13, 2004, PBCS forwarded this RFI to Parsons Transportation Group (PTG), the Engineer-of-Record for this construction project.

On January 13, 2004, PTG responded to this RFI with the following:

"The 6" sidewalk quantity is correct. The 6" sidewalk adjacent to the MSE walls is included in the cost of the wall. See Index 5000, Note No. 2"

Index No. 5000, Sheet No. 1 of 1 is attached as Exhibit D with this Position Paper.

On January 13, 2004, PBCS forwarded this RFI response to BCC.

On February 20, 2004, BCC sent their Letter No. 102-031 stating the following:

"We will begin placing the 6" sidewalk between the MSE Coping and the concrete barrier wall the week of February 23. We are in receipt of a reply from Bill Bendas of Parsons (PTG) to our RFI 102-09, where he states that this sidewalk was included in the cost of the MSE wall per index number 5000, note 2. This note pertains to cast in place sidewalk parapets not sidewalk. Therefore, we expect to be paid for this work under the 6" concrete sidewalk item.

On February 24, 2004, PBCS received a phone call from BCC in which they stated they will be placing Class I concrete for the subject sidewalk.

On February 24, 2004, PBCS had a phone discussion with PTG regarding the required concrete for the subject sidewalk.

On February 24, 2004, PTG responded with the following correspondence:

"Per contract plan sheet W-1, Control Drawing General Notes, the concrete compressive strength for CIP Coping/Sidewalk Shall be Class IV, $f_c' = 5500$ psi.

On February 24, 2004, PBCS sent Letter No. 168-B098 to BCC stating the following:

"Attached you will find that the contract documents and concurrence from the Engineer of Record that Class IV concrete shall be utilized for the CIP sidewalk (6")."

On February 25, 2004, BCC sent Letter No. 102-033 to PBCS stating the following:

"We are in receipt of your letter 168-B098, dated February 24, 2004, stating that the 6" sidewalk between the MSE wall coping and the barrier wall shall be Class IV concrete.

We disagree with this and under Section 5-12 of the Standard Specifications for Road and Bridge Construction we intend to file a claim for all cost and delays associated with this work. "

BASIS OF BCC POSITION

BCC claims that the CIP Coping/Sidewalk as shown in the Contract documents was supplied as a precast coping with CIP sidewalk and; therefore, the sidewalk should be paid under Pay Item 522-2 Sidewalk Concrete (6" Thick) and should not be considered an appurtenance to the MSE Wall Pay Item No. 548-10 Retaining Wall System (Permanent).

BASIS OF FDOT/PBCS POSITION

In accordance with Supplemental Specification 5-12, BCC gave notice of intent to claim to the FDOT regarding the subject sidewalk. PBCS reviewed the Contract Plans, relevant Index Sheet, FDOT Approved Contractor Shop Drawings, and Standard Specification Section 548 (Exhibit E) and found that the sidewalk was an appurtenance to the MSE walls with payment for this sidewalk included in the plan quantity cost of the MSE wall. PBCS gained concurrence from the Engineer-of-Record regarding this finding. FDOT project personnel agreed with this finding and supported PBCS responses to BCC.

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FDOT/PBCS feels that in accordance with Index No. 5000, Note 2, the Engineer-of-Record's response should be accepted by the Dispute Resolution Board with payment for the integral 6-inch sidewalk included in the cost of the MSE walls within which it is incorporated. In such, FDOT/PBCS maintains that BCC is not entitled to additional compensation for this work as it is already being paid under Pay Item No. 548-10 Retaining Wall System (Permanent).

CONTRACTOR'S REBUTTAL:

The Contractor provided its rebuttal to the Board on July 14th 2004:

The areas in question are labeled "construct 5' concrete sidewalk" in the Contract Plans.

FDOT/PBCS Exhibit A (approved contractor shop drawing) is a detail of Type "CP24K_" Precast Coping/Parapet with sidewalk steel. The detail shows the precast coping/parapet with the sidewalk steel. A construction joint is shown with a cast in place 6" sidewalk. **This is not an appurtenance to the MSE wall, it is a separate 6" sidewalk with sidewalk steel.**

FDOT/PBCS Exhibits B & C are for a cast in place coping/sidewalk poured monolithically. As can be seen from FDOT/PBCS Exhibit A this is not what was to be constructed. **A precast coping/parapet with a 5' cast in place 6" sidewalk was to be constructed.** The notes on this page pertaining to the concrete being Class IV, 5500 psi do not pertain to this separate 6" sidewalk.

FDOT/PBCS Exhibit D (Index 5000, note 2) references cast in place appurtenances, i.e., coping, traffic railing barriers, sidewalk parapets, light pilasters, integral sign foundations, etc. **This is not a sidewalk parapet, it is a cast in place sidewalk.**

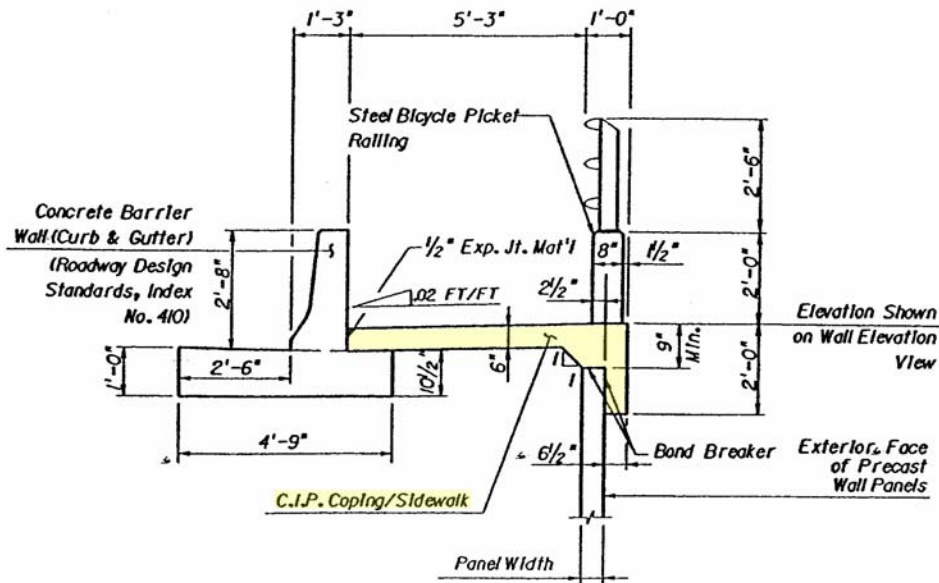
There is no place in the plans or these exhibits that could lead Bulger Construction to assume that the sidewalk was anything other than a cast in place 6" concrete sidewalk.

BOARD RECOMMENDATION:

Based on the materials supplied to the Board and presentations to the Board at the DRB hearing, **the Board recommends that there is no entitlement for the Contractor to be paid for 6" concrete sidewalk adjacent to the Retained Earth Wall under Item No. 522-2, Sidewalk Concrete (6") on the project.**

EXPLANATION OF RECOMMENDATION:

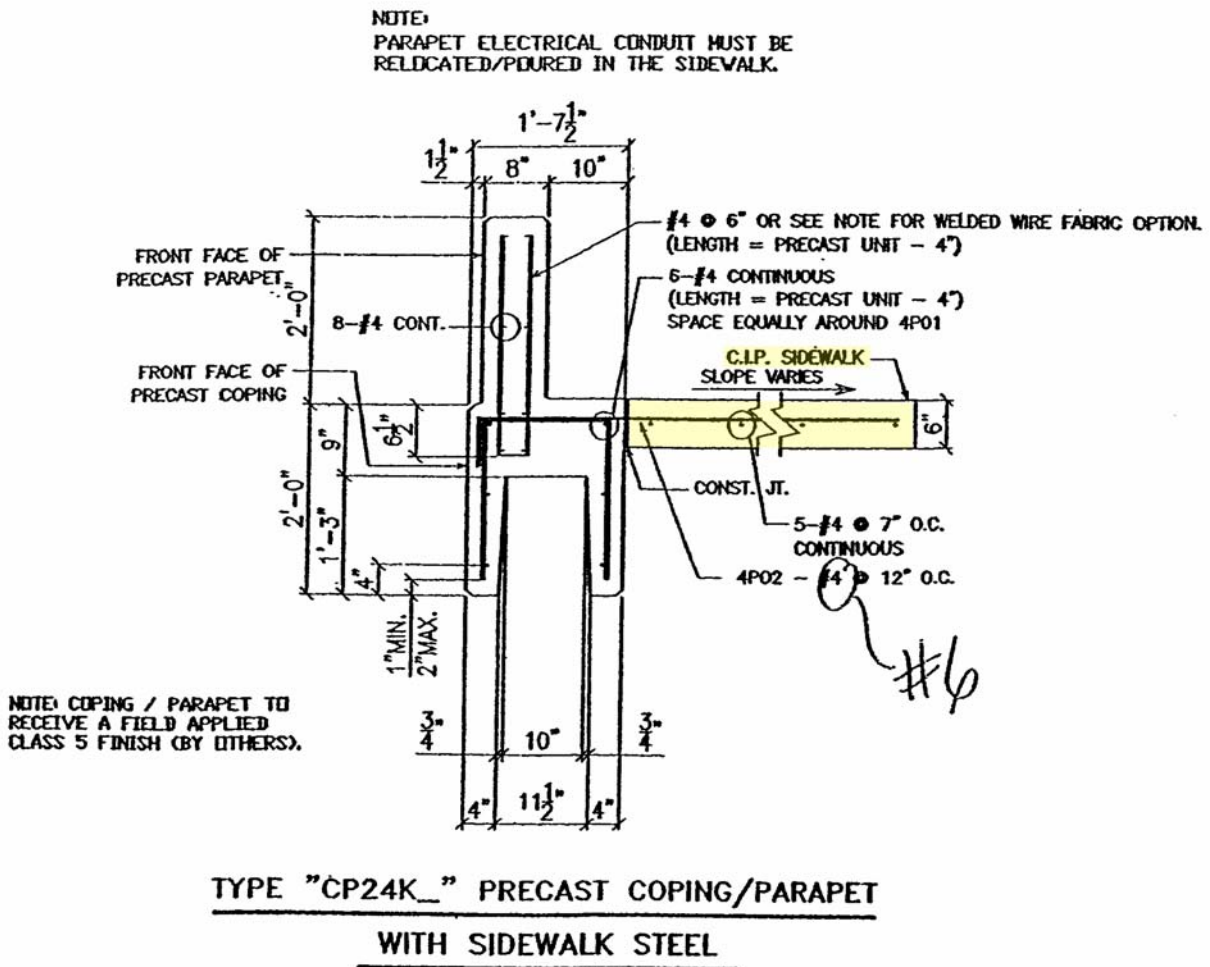
- CONTROL DRAWING GENERAL NOTES INDEX NO. S-1410 included in the contract plans has the **detail below showing the sidewalk to be an integral part of the coping.**



WALL/SIDEWALK DETAIL @ STANDARD ROADWAY SECTION
(Right Side)

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- Sheet 14 of 34 of Foster Geotechnical's approved shop drawing, RETAINED EARTH™ WALLS SECTIONS AND DETAILS, shows a detail entitled TYPE "CP24K_" PRECAST COPING/PARAPET WITH SIDEWALK STEEL which includes a **construction joint** between the sidewalk and the "coping" **with steel in the sidewalk continuing into the coping.**



- According to Webster's Revised Unabridged Dictionary, © 1996, 1998 MICRA, Inc. the definition of appurtenance is:

*That which belongs to something else; **an adjunct; an appendage; an accessory; something annexed to another thing more worthy**; in common parlance and legal acceptance, something belonging to another thing as principal, and which passes as incident to it, as a right of way, or other easement to land; a right of common to pasture, an outhouse, barn, garden, or orchard, to a house or messuage. In a strict legal sense, land can never pass as an appurtenance to land.*

- ...It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract.** ...¹
- Other quantities of sidewalk, such as the sidewalk on the bridge, are not paid under Item No. 522-2, Sidewalk Concrete (6"). While there is no note on any of the drawings

¹ DRBF Practices and Procedures Section 1 – Chapter 6

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specifically pointing to the sidewalk and stating that it is to be included in the Bid Item for Retained Earth Wall, the Board finds that the sidewalk is an appurtenance to the wall.

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent, or preclude, the parties from negotiating an equitable solution (should it be appropriate) to any issue.


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 the non-responding party.

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

Respectfully Submitted

Disputes Review Board
John H. Duke, Sr., DRB Chairman
Earl Keith Richardson; DRB Member
James T. Guyer; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "J H Duke", with a stylized flourish at the end.

John H. Duke, Sr.
DRB Chairman