

REGIONAL DISPUTES REVIEW BOARD RECOMMENDATION

HEARING DATE: FEBRUARY 22, 2012

Marc Mitchell, President

J.W. Hunter, P.E.

Capital Asphalt Inc.

Parsons Brinkerhoff

600 Blountstown Highway

2633 Mahan Drive

Tallahassee, Fl. 32304

Tallahassee, Fl. 32308

RE: Financial Project Nos. 421635-1-52-(01, 02, 03, 04, 05)

Contract No. T3294

FAP No. ARRA7188

SR61 (US27) Monroe St. from Perkins St. to SR61 (Thomasville Road)

Gentlemen:

Capital Asphalt Inc (CAI) and the Florida Department of Transportation (FDOT) requested that the District 3 Regional Disputes Review Board (RDRB) meet to hear both parties' position regarding payment for extra work CAI performed by the Contractor placing asphalt in the gutter on Monroe Street (SR61) in Tallahassee. FDOT previously acknowledged Entitlement, so the RDRB hearing was only to determine a quantum recommendation.

The RDRB received Position Papers and Rebuttal within the time frames spelled out in the DRB Operating Procedures and on Feb 22, 2012, at 10:00AM local time we heard

from both parties at the FDOT Midway Operation Center. Both parties were encouraged to express their positions fully and both parties addressed numerous questions from the Board. We appreciate the courteous and articulate manner which all parties upheld.

Contractor's Position:

The asphalt work done on the nights of August 29, 30, & 31, 2011 placing asphalt in the gutter on Monroe St should be paid for at the rate of \$12.00 per LF as Asphaltic Concrete Curb.

The Contractor provided a time table of events which led to the asphalt being placed in the gutter on the nights in question. CAI stressed that they always did as directed by the Department and their representatives. CAI gave several examples of how they tried to handle the issue proactively when CAI initially asked for the work to be paid as Miscellaneous Asphalt when the friction coarse was being laid. Since an agreement was never reached on that, and since they foresaw drainage issues if they proceeded without clear direction, the asphalt had to be placed at a later date in an operation which CAI describes as similar in quantity and effort to Asphaltic Curb. CAI asked for \$12.00 per foot which was an historical unit price for a project geographically nearby and a similar quantity of asphalt used.

The Contractor also stressed that he does not want to file a claim and provide a certified claim package, but, that he has preserved the right to do so.

The Contractor's Position Paper and Rebuttal are attached.

FDOT's Position

FDOT believes the extra work performed by Capital Asphalt, Inc. on the nights in question should be paid for as Miscellaneous Asphalt at a rate of \$230.00 per ton.

The Department agreed to allow the Contractor 15 days from the date of the Board recommendation to comply with 4-3.2 and provide certified cost records to substantiate justification for additional compensation, if necessary.(See Postscript)

The Department's representative also provided FDOT's version of the events which lead to the placing of asphalt in the curb on August 29, 30, and 31, 2011. The Department representative stated that this issue was anticipated and discussed early in the project. The Contractor was verbally instructed to "strike off" the friction course into the gutter to prevent the drop-off being created by placement of the Friction Course and its height above gutter. There were efforts made to work with the Contractor to help get this work accomplished to alleviate safety concerns. The Department stressed that if the contractor is not satisfied with the payment offered for the work, a certified claim package is required per the Contract.

The Department's Position Paper is attached, without attachments which are a part of the Project file.

Board Findings:

There was recognition and discussion early in the project that the issue of drop off at the gutter was not adequately addressed by the Contract Documents. There was discussion and some correspondence which addressed the drop off issue but clear direction or direct actions were not made until the issue was raised to its proper concern level as a safety hazard. By that time, the only solution to “fix” the situation was with the asphalt wedge as directed by PB and as placed by the Contractor. The exchange of letters at this point demonstrate that both parties had “dug in their heels” on what they believed the extra work to be worth.

The work performed by the Contractor on August 29, 30, 31, 2011 of placing asphalt in the gutter to alleviate a safety concern was Extra Work, not clearly Miscellaneous Asphalt, not clearly Asphalt Curb. The Contractor should be paid for this Extra Work at a fair price. We were not provided much cost data from either party, but both parties desired a quantum recommendation. Based on the limited data provided and the experience of the Board, we have extrapolated a dollar value for the work.

RDRB Recommendation:

The extra work performed on August 29, 30, and 31, 2011 should be compensated to CAI at \$22,000 or the Certified Claim amount. This was calculated as best we could determine from information supplied to us from both parties. CAI has been paid \$6475 so far for this work. We believe additional compensation of \$15,525 is warranted and fair based on the way the work had to be performed.

This recommendation was arrived at by unanimous agreement of the Board members.

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

I certify that I participated in the Hearings of the RDRB regarding the Dispute indicated above and concur with the findings and recommendation.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'J. Weeks', with the date '2-29-2012' written below it.

District 3 RDRB

Jim Weeks, P.E., Chairman

Cloyce Darnell, P.E. Member

Tom Shafer, P.E. Member

CC: Gabriella Molina-Corbin, P.E.

Glenn Roberts

Lori Kietzer

Dewayne Ray

Zac Wiginton

Post Script to Monroe Street DRB Recommendation

On Wednesday, February 22, 2012, the D-3 RDRB met in the morning to hear this issue from both parties and the same day in the afternoon in private to develop our recommendation.

On Friday, February 24, 2012, as we were finalizing the draft recommendation, we were copied with the attached email which contradicted information which our recommendation is based upon.

We are bound by our RDRB contract to make our recommendation based on information provided at the hearing and up to 5 days before the hearing. We are, therefore, providing our recommendation based on that information.

The DRB Operating Procedures allow for “reconsideration” of DRB recommendations, but only as an exception. This certainly seems to be an exceptional situation. If the Department and CAI wish to hold another meeting to rehear this issue in light of the February 24, 2012 email, we will do so.



1330 CAPITAL CIRCLE N.E.
TALLAHASSEE, FLORIDA 32308
PHONE 850-574-3742
FAX 850-656-6435

February 7, 2012

Weeks Planning & Engineering, Inc.
James G. Weeks P.E.
Crestview, FL

RE: DRB (Capital Asphalt, Inc. vs Florida Department of Transportation)
(Fin# 421635-1-52-(01,02,03,04,05) (Monroe Street)

ATTN: Mr. James G. Weeks, P.E.

Capital Asphalt's Opening Statement

Capital Asphalt, Inc. (CAI) informed the Department representatives early on in the life of the project there were problems with the areas and depths that were required to be milled if the existing cross-slope was to be maintained. CAI looked for direction from Department representatives in the preconstruction meeting and pre-paving meetings. CAI was continually told to maintain the existing cross-slope and restricted to milling only at certain depths. This resulted in areas that would be higher than the curb line once the friction course was to be placed. CAI made a written request to address the additional cost of the work prior to the friction course being placed. However, no negotiation was conducted. The friction course was placed which subsequently left areas of the pavement higher than the lip of the curb and gutter.

Capital Asphalt, Inc.'s Position

- Capital Asphalt, Inc. requested a Supplemental Agreement as early as May 12th, 2011 concerning the additional asphalt to be placed in the curb & gutter. This would have mitigated the cost to the Department and the Contractor if the parties could have negotiated a price prior to the work being performed. No written response was ever provided to CAI concerning the request for a SA nor was any written direction provided delineating the areas where the work was to be performed prior to the performance of the work.

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.

- No written direction was given to CAI until **after** the paving was completed.
- Asphalt paving was a major controlling item of work. As CAI was directed to perform the work after the completion of all paving operations and due to the difficult and tedious nature of the work to be performed and the fact that asphalt was the major controlling item of work, CAI requested a price of \$12.00 per LF which is consistent with :

525- 1- ASPHALTIC CONCRETE CURB

Unit LF; M1 Accuracy Linear Foot; 1/10 Meter Plan Quantity? Yes

Not intended for temporary or MOT applications. Use in accordance with Index 300.

Required Recommended

Standards Index No. 300

Specifications Section 525

Struct. 525- 1- ASPHALTIC CONCRETE CURB LF

Notes....

In addition, Capital Asphalt's price of \$12.00 per LF was a fair price when we considered the following:

PESPO03 01/05/2012-09.27.22

Page: 58

Florida Department of Transportation
Listing of Master Pay items

Spec Year: 10

DISPLAYING ONLY VALID ITEMS

From: 010 1 to: 999999999

| <u>Item Number</u> | <u>Item Description</u> | Unit Meas | Item Class | Spec Tech | Comp Flag | Obs Flag | Valid Date | Obs Date | LRE Reference Price |
|--------------------|--------------------------|-----------|------------|-----------|-----------|----------|------------|----------|---------------------|
| 0525 1 | CURB ASPHALT CONC | LF | 07 | | Y | N | 2010/01/01 | | \$16.01 |

- Asphalt was a major controlling item of work on the project and the cost of the SA would have only been a 9.4% increase in the cost of major controlling item of work.
- This caused CAI to remobilize paving crews and equipment.
- Because this operation was performed after the friction course was placed, this operation could not be performed as a normal paving operation.
- The outside lanes had to be closed off.
- The area had to be tacked by hand.
- The asphalt had to be dumped into a loader and then placed at various intervals along the curb and gutter and subsequently worked by hand.
- Because of the nature of the work, compaction could only be achieved by using hand tamps.
- The asphalt plant had to be open at night time for a very limited amount of asphalt.

On January 20th, 2012 the Department offered to increase the price for the asphalt to that consistent with Miscellaneous Asphalt Paving. However, this is a payment for work done after the friction was completed and according to the FDOT'S Basis of Estimates Manual:

339-1- MISCELLANEOUS ASPHALT PAVEMENT

**Notes
Details**

“Consists of construction of asphalt pavement in areas which will **not be subjected to vehicular traffic**, such as pavement under guardrail, bicycle paths, medians pavement, sidewalks, etc...”

Sincerely,


Donald G. Roberts for
Marc Mitchell
President, Capital Asphalt, Inc.

FDOT/Parsons Brinckerhoff Position Paper for Asphalt Wedge Issue

7 Feb 2012

FPN 42163515201 – SR 61 (US 27) Monroe Street from Perkins St to Thomasville Road

Leon County FL

Contractor: Capital Asphalt, Inc. (CAI) – Marc Mitchell - President

CEI Sr Project Engineer: J.W. Hunter, P.E. - Parsons Brinckerhoff (PB)

FDOT Construction PM: Lori Keitzer

Background

The project consists of the milling and re-surfacing of SR 61 Monroe Street from a point south of downtown Tallahassee, through downtown and north to the apex of N Monroe St and Thomasville Road. The existing roadway exhibited some wear and rutting of the asphalt and previous projects had left the edge of the asphalt sticking above the edge of the curb line. The Design Plans included milling a depth of 3 inches and replacement with 2 inches of structural asphalt and 1 inch of friction course. Additional coring done in the rutted areas post design and prior to the start of construction, indicated that the existing asphalt layer was thinner than the design indicated. Consequently, in those areas, the milling depth was reduced from 3 inches to 2.5 inches. The replacement thicknesses remained the same.

During the investigation phase it was recognized that, given the areas in which the existing asphalt was already above the curb and the ½ inch increase in paving thickness versus milling depth, the edge of the new asphalt would continue to be higher than the edge of the curb in many locations. Discussions were held with the Contractor and the Department regarding placing asphalt in the gutter line and “feathering” it to create a taper and avoid creating a drop off condition. Attachment 1 is a copy of the concurrence from the FDOT District 3 Bituminous Engineer, Frank Kreis, P.E. for this action. The need to taper the edge of the asphalt and not create a drop off condition was discussed several times with the Contractor including during the Friction Course Pre Paving Meeting held May 12th, 2011. During this meeting, the Contractor stated that they felt the tapering would result in additional hand work and consequently additional cost. It was explained to the Contractor that the intention was to extend the

side gate of the paver a couple of inches over the edge of the curb and allow the asphalt to fall naturally into the gutter line. The edge could then be struck off by the lute man at a taper and no specific compaction would be required. Following the Friction Course Pre Paving Meeting, CAI sent a letter (Attachment 2) restating their position and requesting compensation for the work as Miscellaneous Asphalt.

Implementation

During the initial placement of the friction course, Parsons Brinckerhoff (PB) personnel again tried to get CAI to extend the side gate over the curb and strike off the edge to avoid creating a drop-off condition. This request was not implemented. However, during the placement of the friction course in the area of downtown Tallahassee, CAI did strike off the edge for a period of time, however, the operation was suspended after several hours by Eddie Mitchell who stated that it was too slow and that they were not getting production. It should be noted that on the above occasion, CAI only had one lute man working and he was being pushed to keep up with the operation.

Following completion of the friction course, PB took measurements of the areas where the asphalt was greater than 1 ½ inches above the lip of the curb and/or met the definition of a “drop off” as included in Standard Index No 600 Sheet 10 of 13. PB initially identified 8931 lineal feet of curb that met the above conditions. Attachment 3 includes a detailed summary of those measurements as well as a directive for CAI to address the issue. PB also states that the payment for the work would be at the Contract Unit rate for the tonnage placed. This equals the amount that CAI would have been paid if they had performed the operation in the manner originally instructed during the full paving operation.

Attachments 4 and 5 are letters from CAI stating their position and requesting a payment of \$12 per lineal foot for the work. Attachment 6 is PB’s response to the letters and includes a summary of the Department’s position.

Prior to beginning the work, CAI requested to use a non-polymer asphalt for the wedge stating that they would have to buy a full truckload of the material in order to produce the small amount of asphalt (Less than 100 tons) anticipated for installing the wedge in the gutter line. This request was granted by the Department as shown in Attachment 7. In addition, on the day that the work was to be performed, CAI requested the ability to use RS-1 tack instead of the NTSS-1 tack used on the remainder of the project for the same reason. This request was granted verbally by PB. Both of these actions allowed CAI to perform the work at a lower cost than the remainder of the asphalt placement on the project.

CAI performed the work in three nights (Aug 29, 30 and 31, 2011). After placing tack in the gutter line, CAI filled the bucket of a rubber tire backhoe and then dumped small quantities into the gutter line. The asphalt was spread by hand and leveled with a lute and then compacted with a small plate tamp. Records were kept by PB of the actual manpower and equipment utilized for each night. Measurements were made of the actual length where asphalt was installed (6,236 lineal feet), the tonnage placed (64.75 tons) and the gallons of tack used (139 gals). Attachment 8 summarizes these quantities. The lineal footage was reduced based on field conditions and to avoid conflict with drainage structures and provide for the optimum flow of storm water off the roadway.

Payment

As shown above, 64.75 tons of asphalt were placed in the gutter line for a total length of 6236 lineal feet to correct the drop off condition. As stated previously, payment was made at the Contract Unit Rate of \$100 per ton for a total of \$6,475.00. CAI has requested payment at \$12 per lineal foot for the original 8931 lineal feet for a total of \$107,172.00 (\$1,655.17 per ton). Multiplying the requested \$12 per lineal foot by the 6236 lineal feet actually installed, the total payment would be \$74,832.00 or \$1,155.71 per ton.

After reviewing the situation, the Department decided to make an offer of payment for the work as if it was installed as Hand Laid Miscellaneous Asphalt. As mentioned above, payment in this manner had been requested by CAI (Attachment 2). FDOT researched the State Wide Averages for similar work and located a project recently performed in the Midway Operations Center which included a similar tonnage of Miscellaneous Asphalt (FPN 41694515201 SR 65 – 67.2 tons at \$226.14/ ton – Anderson Columbia/CW Roberts Contracting). Consequently, as shown in Attachment 9, the Department extended an offer to pay \$230 per ton for the work which would result in an additional payment of \$8,417.50 or a total of \$14,892.50.

This additional payment is supported by an analysis performed by PB of the potential total cost to CAI for the work. PB reviewed the actual payroll records for the days involved, the equipment utilized for the work and the Supervisory personnel onsite. Using the actual payroll costs, the equipment costs per Blue Book Equipment Rental Rates, assumed costs for supervisory personnel, overhead and profit and a cost of \$50 per ton for production and delivery of the asphalt, PB estimates that the cost to CAI is between \$11,500.00 and \$12,500.00 not including MOT costs.

The Department has not received a Certified Claim package from the Contractor as required by Specification Section 4-3.2 or Section 5-12.2 and cannot verify the actual cost to CAI.

Summary

Even though the Contractor did not follow the Department's initial "easier method" directive of simply opening the screed gate and spilling asphalt into the gutter during mainline travel-lane operations, with minimum racking work, the Department is willing to proceed directly to quantum determination. **The Department is willing to comply with the Contractor's request to be paid at a miscellaneous asphalt price (Attachment 2).** The Department has researched actual recent local area miscellaneous asphalt prices, and determined that our offer of \$230/ton to settle is above current local market prices. If the Contractor does not agree with this settlement price, the Contract requires CAI to submit a Certified Claim package in accordance with Specification Section 4-3.2 and 5-12.2, to verify his costs and fair profit margins.



1330 CAPITAL CIRCLE N.E.
TALLAHASSEE, FLORIDA 32308
PHONE 850-574-3742
FAX 850-656-6435

Capital Asphalt, Inc's Rebuttal

It is clear from the attachments supplied by the parties that proper notification of the scope and delineation of the extra work was not given to Capital Asphalt, Inc. (CAI) in accordance with any specification. Parsons Brinkerhoff (PB) asserts that there were numerous oral communications stating that they wanted the asphalt "feathered", "rolled" etc. into the curb and gutter. It is clear that a blanket application of filling in the curb and gutter from one end of the project to the other would not have been acceptable due to the multiple variations in the profile grade at the lip of the curb and gutter.

In PB's first attachment it states that they anticipated the asphalt being ½ "higher than the lip of the curb and gutter. This was communicated to Frank Kreis of the FDOT. ½" does not exceed any drop off criteria. The ½" assessment proved to be a gross underassessment of the problem.

CAI tried in earnest to communicate that the problem would be much worse than what was contemplated by PB and the Department which is evident by the numerous written communications from CAI to PB. CAI initially suggested the idea of the Misc. Asphalt price due to the excessive nature of the extra work. This offer was suggested before the work was done in conjunction with the normal paving operation. This offer was ignored by PB. CAI tried, without success to have a DRB on this issue in the spirit in which the DRB was intended but was denied by JW Hunter and PB.

DRB

"1.1 These procedures are for the purpose of providing guidelines for operation of the Disputes Review Board (DRB) and are intended to be flexible to meet circumstances that may arise during the life of the project."

1.2 The role of this DRB is to provide specialized expertise in technical areas and in administration of construction contracts to assist the Department of Transportation (Department) and the Contractor in resolving disputes in a timely and equitable manner. Within the context of partnering the Board serves to assist the parties in getting over the rough spots.

This suggestion was also denied by PB. Had the Department operated with the partnership spirit, time and cost could have been mitigated for the CAI and the Department.

Implementation

Response: PB alleges that they tried several times to get CAI to extend the gate of the paver over the curb and gutter. They also state that for some unknown reason CAI was striking off the edge to avoid creating a drop-off condition and then discontinued to do so at the direction of Eddie Mitchell. This is simply not the case. PB personnel were supposed to be ahead of the paving operation to delineate the areas that they wanted filled in but they did not fulfill this obligation as they had promised... As the operation approached approximate Station 224+20 RT it was noticed by PB's PA Keith Duke that the intended operation was filling in the gutter completely and correctly directed CAI to cease the action of filling in the curb. The paving operation continued until completion.

IF PB felt that somehow CAI was disregarding the alleged verbal communications they could have stopped the operation at any time, according to:

8-6 Temporary Suspension of Contractor's Operations.

Payment

Response: Initially, CAI's suggestion of \$12.00 per LF was verbally agreeable to PB's JW Hunter. Neither PB nor the Department ever disagreed or refuted the \$12.00 per LF unit price until a written directive was sent to CAI out of the blue.

CAI agrees with PB with respect to payment of actual lineal placed. For purposes in response to position papers, the original correspondence was submitted. However, the conflicting station measurements from the first correspondence to that which became the final measurement is a further illustration of the confusion and lack of direction from the Department and PB to CAI.

The Department and PB now want to go back and offer CAI the Misc. Asphalt payment that CAI proposed before the friction was placed. That proposal was offered as a solution before the work began on the friction course. Remobilizing after the friction was completed completely changes the nature of the work. The area where the work was performed is subject to traffic and therefore cannot be considered a Miscellaneous Asphalt operation.

While PB did not submit the documentation on the projects they referenced, CAI contends that PB is mixing apples and oranges with respect to the calculation of payment and tries to compare average prices for Miscellaneous Asphalt based on other contracts in the area that were price negotiated and scope defined prior to the work being performed and demobilization. Once again CAI tried to do this but was ignored by PB and the Department.

CAI contends that the Department directed operation was no longer a Miscellaneous Asphalt operation, but rather an Asphalt Curb scenario that has an estimated reference price of \$16.01 per liner foot. CAI requested a price of \$12.00 LF. CAI believes that this is a new operation well within the estimated statewide average. Simply stated the Department would not be able to bring a contractor in and perform that operation, under those conditions, for the price they have suggested.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Mitchell", with a stylized flourish at the end.

Marc Mitchell
President
Capital Asphalt, Inc.

Subject: FIN#: 42163515201; SR 61 (US 27) – Monroe Street from Perkins St to Thomasville Road
From: Corbin, Gabriella (Gabriella.Corbin@dot.myflorida.com)
To: marc@capitalasphalt.net;
Cc: jgwpe@yahoo.com; Steve.Potter@dot.myflorida.com; Walter.Ray@dot.myflorida.com; jwhunter99@comcast.net; Lori.Kietzer@dot.myflorida.com;
Date: Friday, February 24, 2012 3:21 PM

Mr. Mitchell,

This email is to inform you that as per specification 5-12.2.1 "Claims for Extra Work" you have ninety (90) days from the date of Final Acceptance of the project to submit a claim if you deemed you are owed additional compensation for work performed on the project. This project was final accepted on 12/02/11 so in order to reserve your rights to claim, the Department needs to receive your claim package no later than 03/01/12. Your claim package needs to be submitted in compliance with specification 5-12.3 "Content of Written Claim". On the DRB hearing held for this project on 02/22/12 I stated you could have 15 days from the date we receive the Board's ruling to submit your claim package. I was mistaken when I made this statement as it does not comply with the intent of the contract and specifications. Please accept my apologies for giving you and the Board the incorrect information. Please feel free to call if you would like to discuss this matter further.

Muchas Gracias

Gabriella Molina-Corbin, P.E.
Florida Department of Transportation
Midway Operations Engineer
Gabriella.Corbin@dot.state.fl.uset
Office: (850)9221944t
Cell: (850)5193027et