

RECOMMENDATION No. 3

November 12, 2007

Michael D. Nash
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Astaldi Construction Corporation
1701 Lake Worth Road
Lake Worth, FL. 33460

Eduardo Perez de Morales, P.E.
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The Corradino Group
321 South Dixie Highway.
West Palm Beach, FL. 33401

Re: Financial Project ID: 231918-1-52-01 / 02
Federal Aid Project Number: 0951 568 I
Contract ID: T4039
County: Palm Beach,
Description: SR-9 (I-95) 12th Avenue South to 10th
Avenue North

Subject: Convene Dispute Review Board and Conduct a Hearing for Entitlement
Regarding Contractors Request for Additional Compensation for Deck
Grooving Quantity Change
(Pay Item 400-7)

The Dispute Review Board was convened for a hearing requested by The
Corradino Group. The Hearing was conducted on November 5, 2007 in the
Conference Room at 321 South Dixie Highway , West Palm Beach, FL.

Packages of information and position statements were presented to the Board by both
parties and excerpts are included in this recommendation.

Astaldi Construction's Position:

Subject: Deck Grooving

ISSUE:

This issue brought before the Board is entitlement for Error in Plan Quantity in accordance with
article 9-3.2 for Bridge floor Grooving. Astaldi has notified the Engineer of the substantial error
in plan quantity for pay item 0400-7 Bridge Floor Grooving on September 14, 2007 (see page3),
along with the fact that Astaldi has determined that additional compensation is required and that
Astaldi would submit the required package in the future. The Engineer on October 3, 2007
responded in an unclear manner (see page4), it appears that the Engineer is in agreement with
Astaldi, yet has chosen to bring this issue to The Board.

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Astaldi's Position:

Pay item 0400-7 Bridge Floor Grooving is a Plan Quantity pay item (see Page 6), as such is governed by Section 9 of the Supplemental Specifications entitled MEASUREMENT AND PAYMENT. Which states *“The Engineer will measure all work completed under the contract in accordance with the United States Standard Measures. The Engineer will take all measurements horizontally or vertical. Under article 9-1.3.2 Plan Quantity it states “when measuring items paid on the basis of area of finished work, where the pay quantity is designated to be plan quantity, the Engineer will determine the final pay quantity based on plan quantity subject to the provisions of 9-3.2. Generally, the Engineer will calculate the plan quantity using lengths based on station to station dimensions and widths based on neat lines shown in the plans.”* (See page 7) Article 9-3.2” Payment Base on Plan Quantity: states under 9-3.2.1 Error in Plan Quantity (See page 8) *“As used in this Article, the term “substantial error” is defined as the smaller of (a) or (b) below:*

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

(b) a change in quantity which causes a change in the amount payable of more than \$ 5,000.00

The quantity for Bridge Floor Grooving in the Contract is 62,392 SY (see page10-22) the unit Price in the contract is \$ 1.60 the actual quantity grooved is 37,627 SY which result in an error of 40% of the pay item quantity or a dollar amount of \$ 39,624.00 (see page 5). The Department issued an email that revised the plan quantity on October 18th (See page23-27). In accordance with 9-3.2.1 which states *“ the department will revise such quantities only in the even that the department determines it is in substantial error”*. (see page 8). Based on the above Astaldi is entitled to submit evidence of such form of acceptable and verifiable, measurements or calculations to justify the revised unit cost for the Bridge Floor Grooving.

Corradino Group Position Paper

Issue

The Contractor submitted a Notice of Intent to Claim for additional costs in connection with an "error in plan quantity," in connection with the Department's decision and direction to reduce the amount of bridge floor grooving under the contract. (Exhibit 1)

Background and References

Contract plan quantity for Bridge Floor Grooving pay item includes an area sufficient to groove the old portions of the viaduct, in addition to the widened portions of the viaduct. The Department decided not to groove the old bridge decks because it is not deemed necessary. The plan quantity for this pay item was therefore reduced about 42%, from an original quantity of 62,393 SY to a revised quantity of 36,082 SY, which amounts to a decrease of \$42,097 at contract unit prices.

Pay Item 400-7, Bridge Floor Grooving, is a "plan quantity" item. This is addressed explicitly in Article 400-22.3 of the Supplemental Specifications, which states:

400-22.3 Bridge Floor Grooving: *The quantity to be paid for will be plan quantity [emphasis added]* in square yards [square meters], computed, using the area bound by the gutter lines (at barrier rails, curbs and median dividers) and the beginning and end of the bridge or the end of approach slabs, whichever is applicable, constructed, in place and accepted.

We do not dispute the Contractor's contention that the original plan quantity for this pay item is an error. In fact, we consider it a "substantial error" as defined in Article 9-3.2.1 of the Supplemental Specifications, appended as Exhibit 2 and excerpted below:

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

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

(b) a change in quantity which causes a change in the amount payable of more than \$5,000. [emphasis added]

On multiple job Contracts, changes made to an individual pay item due to substantial errors will be based on the entire Contract quantity for that pay item.

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

Since the original plan quantity for the bridge floor grooving pay item meets the definition of a "substantial error" as defined in Article 9-3.2.1 above, we revised the plan quantity consistent with the same specification.

In their Notice of Intent, the Contractor referenced Article 9-3.2.1 of the Supplemental Specifications as the basis of their claim, and Article 5-12 "if we disagree." We do not dispute 9-3.2.1 is the pertinent and applicable Contract reference, and we believe it fully supports our position and actions as explained above. Article 5-12 "Claims by Contractor" does not, in and of itself, entitle the Contractor to additional compensation for a change in plan quantity; as such change is specifically contemplated and

addressed by 9-3 "Compensation for Altered Quantities" and its sub-articles. Article 9-3.1 states, in part:

9-3 Compensation for Altered Quantities.

9-3.1 General: *When alteration in plans or quantities of work not requiring a supplemental agreement as hereinbefore provided for are offered and performed, the Contractor shall accept payment in full at Contract unit bid prices for the actual quantities of work done, [emphasis added]* and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor, resulting either directly from such alterations, or indirectly from unbalanced allocation among the Contract items of overhead expense on the part of the bidder and subsequent loss of expected reimbursement therefore, or from any other cause.

We reviewed Article 4-3 "Alteration of Plans or of Character of the Work," and we find it does not apply to this change in plan quantity, because the decrease is not a "significant change" as defined by the specification. Article 4-3.1 states, in part:

4-3 Alteration of Plans or of Character of Work.

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

The term "significant change" applies only when:

(A) The Engineer determines that the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or

(B) A major item of work, as defined in 1-3, is increased in excess of 125% or decreased below 75% of the original Contract quantity. The Department will apply any price adjustment for an increase in quantity only to that portion in excess of 125% of the original Contract item quantity, or in case of a decrease below 75% to the actual amount of work performed, such allowance to be determined in accordance with 4-3.2, below.

In the instance of (A) above, the determination by the Engineer shall be conclusive and shall not subject to challenge by the Contractor in any forum, except upon the Contractor establishing by clear and convincing proof that the determination by the Engineer was without any reasonable and good-faith basis. [Emphasis added]

The change in plan quantity for Bridge Floor Grooving does not meet the definition of a "significant change" in Article 4-3.1 above. "A" does not apply because the nature of the work has not been changed, and "B" does not apply because the grooving pay item is not a "major item of work." The original Contract value of this item is 0.17% of the original Contract amount. Article 1-3 defines a "major item of work" as: "Any item of work having an original Contract value in excess of 5% of the original Contract amount."

Department's Position

To summarize the Department's position:

1. The Contractor is not entitled to additional compensation under 9-3.2.1 – The Department had the right to adjust the plan quantity for the Bridge Floor Grooving pay item to correct a "substantial error," as defined by the Contract Specifications.
2. The Contractor is not entitled to additional compensation or a price adjustment under 4-3.1 – The change in Bridge Floor Grooving quantity was not a "significant change," did not change the character of the work, and the pay item is not a "major item of work" as defined by the Contract Specifications.

Contractors Rebuttal

Subject: Deck Grooving

ISSUE: This issue brought before the Board is entitlement for Error in Plan Quantity in accordance with article 9-3.2 for Bridge floor Grooving. Astaldi has notified the Engineer of the substantial error in plan quantity for pay item 0400-7 Bridge Floor Grooving on September 14, 2007 (see page3 of Astaldi's position paper-deck grooving), along with the fact that Astaldi has determined that additional compensation is required and that Astaldi would submit the required package in the future. The Engineer on October 3, 2007 responded in an unclear manner (see page4 of Astaldi's position paper –deck grooving), it appears that the Engineer is in agreement with Astaldi, yet has chosen to bring this issue to The Board.

Department Position: Department agrees that plan quantity is in fact a substantial error as defined in article 9-3.2.

Astaldi's Position: Astaldi agrees that under article 9-3.2.1 this is a substantial error in plan quantity and as such is governed by this section of the specifications. Which clearly states "*In the event that either Department or the Contractor contends that the plan quantity for any item is in error and additional or less compensation is thereby due, the claimant shall submit at their own expense, evidence of such form acceptable and verifiable measurements or calculations*" (see page 5). Astaldi has every intention of doing so in the future.

Department Position: The Department references 9-3.1 General: which states “*When alterations in plans or quantities of work **not requiring a supplemental agreement as herein provided for are offered and performed** [Emphasis added], the contractor shall accept payment in full at the contract unit bid prices for the actual quantities of work done, and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor....*”etc (see page 4)

Astaldi’s Rebuttal: Article 9-3.2 does not define when a supplemental agreement or unilateral payment is required. Article 4-3.4 Conditions Requiring a Supplemental Agreement or Unilateral Payment is the article that determines whether a Supplemental Agreement or a Unilateral Payment is required. Article 4-3.4 states that “*Supplemental Agreement or Unilateral Payment will be used to clarify the plans and specifications of the Contract*” (see page 7-8). The Department did not offer to Astaldi this reduction in plan quantity nor did Astaldi agree to the substantial error. If the Department is going to claim that they deleted work after the fact then Article 9-4 Deleted work may come in. Which states “*The Department will have the right to cancel the portions of the contract relating to the construction of any acceptable item therein, by payment to the contractor of fair and equitable amount covering all items of cost incurred prior to the date that the Engineer cancels the work*” [Emphasis added] [see page 6].

Departments Position: The department is trying to use article 4-3.1 specifically **significant change**

Astaldi’s Rebuttal: Astaldi has never claimed that this issue is a “Significant Change” this issue is an ERROR IN PLAN QUANTITY and qualifies as a SUBSTANTIAL ERROR by the Departments own admission.

Corradino Group Rebuttal

We received a copy of the Contractor’s submittal to the Dispute Review Board (DRB) dated October 22, 2007, stating their position regarding a dispute over additional compensation for deck grooving plan quantity change.

There was nothing in the Contractor's submittal we haven't already addressed in our submittal of the same date; therefore, we see no need for a separate or additional rebuttal.

Boards Findings

The Contractor quotes Section 9-4 of the Specifications This section deals with Common Freight Carrier Rates and has nothing to do with the reduction of plan quantities.

Section 9-3 and 9-3.1 (General: When alteration in plans or quantities of work not requiring a supplemental agreement as hereinbefore provided for are offered and preformed, the Contractor shall accept payment in full at Contract unit bid prices for the actual quantities of work done, and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor, resulting either directly from such alterations, or indirectly from unbalanced allocation among the Contract items of overhead expense on the part of the bidder and subsequent loss of expected reimbursement therefore, or from any other cause.

Boards Recommendation

The Board after listening to the hearing and reviewing all documents finds the Contractor is **not entitled** to monies for this change. The Contractor has offered no evidence that this work deletion has caused " the character of the work as altered differs in kind and nature from that involved or included in the original proposed construction".

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

I certify that I participated in the Hearings of the DRB regarding the Dispute indicated above and concur with the findings and recommendations.
Respectfully submitted,

Dispute Review Board

John W. Nutbrown, Chairman
Rammy Cone, Member
Jimmie Lairscey, Member


S/ John W. Nutbrown
DRB Chairman