# DISPUTES REVIEW BOARD RECOMMENDATION

12 December, 2008


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Ref: SR. 70 from MP 10.254 to MP. 13.361/W. of Header Canal. Financial Project ID: 230262-4-52-01: WPI State Job No.: 94030: Contract No.: T4080: St. Lucie County: Disputes Review Board hearing regarding entitlement for additional compensation for the additional structural asphalt work.

Dear Madam/Sir:

The Florida Department of Transportation and Ranger Construction Industries, Inc. requested a hearing concerning the above referenced issue.

**CONTRACTOR'S POSITION**

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

"On or around April 10, 2007, RCI meet with GBF in their office and informed critical project personnel of a significant plan error with regards to pay item 334 -1 -13 Superpave Asphaltic Conc (Traffic C). This unscheduled meeting was not uncommon on the project as both Contractor and CEI partnered throughout and often brought issues to one another's attention as an effective means to expedite resolution. It was determined that the plan error, specifically the published quantity for this particular pay item, would ultimately lead to substantial cost overruns for the Department.

Over the next several months, open discussions were made by project personnel as chronicled in progress meeting minutes and correspondence regarding the award of compensable time as well as an adjustment to the contract unit price due to the gross calculation error on the part of the Department. The issue was discussed in earnest upon RCI's receipt of the original draft of Supplemental Agreement #21 dated September 18, 2007.

An agreement was reached on compensation in November and on December 19, 2007 a revision to SA 21 was sent to FDOT adding 26 calendar days to the project 16 of which were compensable. For reasons not fully understood by the Contractor, this agreement was refused by the Department. On January 24th, 2007 RCI was informed verbally that the Department would unilaterally pay for the asphalt overrun by overrunning the contract unit price and would not be awarding the compensable time negotiated with the Project Engineer.

On January 28, 2007, RCI formally filed a Notice of Intent to File Claim for costs associated with asphalt quantity overruns.

RCI completed all of the structural asphalt, both original contract and extra work, by the May 2007 cut-off. The final quantity was 20,609.72 (*244% of the original contract quantity*).

Supplemental Agreement 39 was drafted by the Engineer as a negotiated settlement for damages incurred RCI for the overrun of asphalt as detailed in our request. On September 9, 2008, RCI received an email simply stating that the District Office had not granted entitlement and we would have to take the issue before the DRB.

The Department and RCI are in agreement that the additional asphalt meets the criteria for extra work as stipulated in the Specifications. Those specifications detail methods of compensation for this extra work. Engineers with direct responsibility and knowledge of the project and these specifications have stated that the contract overrun constitutes a significant change to the original contract in accordance with 4-3.1 of the Standard Specifications.

The following specifications apply to RCI's position and are listed with explanation.

1. State Statute (FL), Chapter 337.11 (2): states it is **a requirement of Florida Law that the Department *shall* ensure that all design plans are complete, accurate and up to date prior to bid.** By not using in-house verification checks, the Department

did not follow state statutes and sent a project out to bid that was clearly incomplete and inaccurate.

2. Standard Specifications Section 1, Definitions: defines **"Extra Work" as any work which is required by the Engineer to be performed and which is not included in the *original* Contract Documents whether the work be deemed additional work**, altered work or work due to differing site conditions. The additional 12,150 tons of asphalt was necessary and not part of the original contract and by definition is considered extra work that could not have been anticipated at bid time.

3. Standard Specifications Section 4, Scope of the work; **Article 4-3 Alteration of the Plans or Character of the Work: this section states that when authorized by the Engineer, Extra Work caused by a "significant change" is compensable**. The spec allows for only 1 of 2 criteria to be met. By definition in Section 1, this is not a major item of work. However, additional compensation is permitted **when the Engineer determines that the character of the work differs materially in kind or nature from that involved or included in the original proposed construction**. *The Random House Dictionary of the Law* defines material (*n.*): 1) important; of consequence; potentially dispositive; such as a reasonable person would take into account when making a decision – materially (adv). A commercial aggregate increase of over 40% from the time of bid is important and of consequence. The summation of the material cost increases further illustrates this point. A reasonable person or contractor would certainly not expect the FDOT to err so horribly in its quantity calculation and would not take this into account when making a decision on determination of the original bid unit price. If the Department were to not consider the plan error as something that differs materially, it is telling RCI that by having signed the contract we have the privilege of paying for FDOT's plan error. That is fundamentally wrong, not in the intent of the specification and flies in the face of good faith dealing.

4. Standard Specifications Section 5, Control of the work; Article 5-4, Errors and Omissions in Contract Documents: **this section expressly prohibits the Contractor from taking advantage of an apparent error or omission. This would likewise apply to the Department** and therefore, prohibit them from taking advantage of the Contractor for same error. To not compensate RCI for the additional expenses incurred by placing the additional 12,150 tons of asphalt, the Department would receive the benefit of correcting their error at the sole expense of RCI. RCI's bid unit price from

September 2005 covered the aggregate material increases up to the original 8,464 tons noted in the contract documents. By paying the original contract unit price, without adjustment for the additional tonnage placed from July 2007 to May of 2008, the Department would have RCI pay for their mistake in contrast to Section 5-4."

**CONTRACTOR'S REBUTTAL**

"Through both Position Papers and RCI's Rebuttal, it has been clearly shown that the structural asphalt overrun constitutes a significant change. Drafts to SAs 21 and 39 submitted by the Resident Engineer concur with that assessment and concurred that RCI was due additional compensation.

RCI requests that the Board rule in favor of Entitlement to the Contractor for compensation as detailed as compensable time in the Engineer's draft revision to SA21 and additional work detailed in draft for SA 39."

**DEPARTMENT'S POSITION**

We will state the Department's position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Department's position paper has the following statements and references to document their claim for no entitlement to Ranger.

"The project scope of work is the reconstruction of an approximately three mile section of SR 70 in St. Lucie County from a two lane-undivided roadway into a four- lane divided rural highway as well as the construction of a 12ft shared used path facility located north of and separated from the roadway.

This project was completed and final accepted by the Department on July 30, 2008; however, during the placement of the asphalt on the project it became apparent that plan quantity shown for the structural super pave asphalt pay item was incorrect.

As indicated on Typical Sections, Plan sheets No. 12 thru 15 the pavement composition along the mainline consists of 3 inches of Type SP 12.5 Structural course traffic level "C" (pay item 334-1-13) and 1.5 inches of Type SP 12.5 Structural course traffic level "C" (pay item 334-1-

13 along the shoulders. At the time the error was identified the contractor was following the Typical Sections stated above.

Review of the Computation Book showed the asphalt spread rate utilized by the EOR for the asphalt quantity calculation for pay item 334-1-13 Superpave Asphalt Concrete Traffic level "C" was in error. The tonnage calculation of the asphalt was done applying an incorrect spread rate utilizing a thickness of 1 inch for the mainline and the shoulder instead of using the thickness indicated on the typical sections (3 inch for the mainline and 1.5 in. for the shoulders). As a result, the asphalt quantity for the plan pay item 334-1-13 Superpave Asphalt Concrete Traffic level "C" was under calculated by 15,360.8 tons.

The issue at hand for the DRB members to discuss is the contractor's disagreement with the department's determination and interpretation of the specifications pertaining to the compensation to the contractor for the asphalt quantity overrun, and the delineation of entitlement.

***FDOT Specifications (2004):***

**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, 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. Compensation for alterations in plans or quantities of work requiring supplemental agreements shall be stipulated in such agreement, except when the Contractor proceeds with the work without change of price being agreed upon, the Contractor shall be paid for such increased or decreased quantities at the Contract unit prices bid in the Proposal for the items of work. If no Contract unit price is provided in the Contract, and the parties cannot agree as to a price for the work, the Contractor agrees to do the work in accordance with 4-3.2.

**8-7.3 Adjusting Contract Time:**

**8-7.3.1 Increased Work:** The Department may grant an extension of Contract Time when it increases the Contract amount due to overruns in original Contract items, adds new work items, or provides for unforeseen

work. The Department will base the consideration for granting an extension of Contract Time on the extent that the time normally required to complete the additional designated work delays the Contract completion schedule.

**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.

**1.3 Definition of Major Item of Work**

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

As a result of this overrun Ranger Construction filed a Notice of Intent to Claim expressing their disagreement in the substantial overrun of over 6.5% of the contract dollar amount, and requested for the Department to re-evaluate the extra work and consider it significant due to the alteration of the character of the work as stated in specification 4-3 (a).

Ranger Construction Industries indicated and demonstrated in their submittal that the price of the aggregate material utilized in the asphalt mix increased by an average of over $5.00 per ton from the time the contractor bid the project (September 2005) until the overrun was identified and the material delivered to the project (July 2007). The additional cost of the aggregate incurred as a result of the overrun of the asphalt quantity for pay item 334-1-13 Superpave Asphalt Concrete Traffic level C in the total amount of $79,278.01.

In order to resolve this matter the CEI perform an analysis on the cost submittal from Ranger Construction and recommended a negotiated settlement prior to the offer of final payment since the project was finally accepted on July 30, 2008.

The cost analysis was done by obtaining the monthly tonnage of asphalt delivered to the project starting on July 2007 (after the contractor had met the original asphalt quantity in the plans). The asphalt tonnage was obtained from the contractor's monthly certification of quantities and compared to the asphalt roadway reports. Then, the amount of aggregate in the asphalt mixture was calculated by deducting the binders, RAP and other materials. Once the aggregate amount was calculated the difference in price for the aggregate was estimated per month based on the actual invoices of the aggregate delivered at Rangers' plant for this project and for the pertaining mix. The increment on the aggregate cost was calculated comparing the price of the aggregate at the time of bid September 2005 ($12.50 per ton) versus the price of the aggregate at the time of placement from July 2007 until May 2008 (price fluctuates from $17.55 to $19.55 per ton).

Furthermore, the average overrun of the aggregate (approximately $5.00 per ton) was added to the original asphalt bid unit price and resulted in $78.25 per ton. This new unit price compared favorable to the state wide average unit price $94.94 per ton for 2007 (pay item 334-1-13) Additional costs associated with this extra work such as maintenance of traffic or overhead costs were not included in the engineers estimate.

This settlement agreement was not approved by the Department since the overrun of the pay item does not represent a major item of work and a DRB hearing date established.

The department recognizes that the design error resulted in an overrun of the asphalt pay item; however, it adheres to the literal definition of a major item of work representing 5% of the total contract dollar amount. Pay item 334-1-13 only represented 3.6% of the total dollar amount; therefore it is not a major item of work. The department acknowledges that the calculation to define a major item of work was done based on the

erroneous quantity reflected in the original contract documents; nevertheless, that original (erroneous) quantity is part of the contract documents.

In order to expedite the process and encumber the funds accordingly, the department as per changes in statutes (refer to CPAM 7.3.6.4) was able to encumber the additional funds for the asphalt overrun without a Supplemental Agreement.

As per Specification 9-3.1 the contractor would not be compensated for any monetary impacts when the alteration of the quantities does not require a supplemental agreement. The specifications also state that the Contractor "shall" accept payment in full at Contract unit bid prices for the actual quantities of the work done and no allowance will be made for any additional expense.

As per Specification 4-3.1 this asphalt overrun is not considered a 'Significant Change" since it is not a major item of work; therefore, the contractor has no option, but to agree to the pay item overrun using original contract unit price.

The department also acknowledges that this pay item is a controlling item of work as defined on the accepted CPM schedule and has granted a time extension of 26 days through a Unilateral document in order to provide the contractor with the time needed to accommodate for the additional tonnage."

**DEPARTMENT'S REBUTTAL**

"Notice of Intent to file a claim was filed on January 28, 2008; however Ranger still had not provided the Department with a clear explanation on why this overrun should be defined as "Significant Change". This explanation which consists on the change in aggregate cost was provided to the CEI on July 28, 2008, 2 days prior to final acceptance and after all the work was completed. Upon receiving this document, a recommendation was made to the Department based on how the change in cost of the aggregate would affect the cost of the asphalt overrun in order to settle this issue; however, the Department declined this request and held their position that this overrun is not a significant change as defined on the specifications.

In summary, since the issue was identified the Department's position and definition of significant change remain constant and it is stated below:

1. Pay item 334-1-13 only represented 3.6% of the total dollar

amount; therefore it is not a major item of work.

2. The department acknowledged that the calculation to define a major item of work was done based on the erroneous quantity reflected in the original contract documents; nevertheless, that original (erroneous) quantity is part of the original contract documents.
3. In order to expedite the process and encumber the funds accordingly, the department as per changes in statutes (refer to CPAM 7.3.6.4) was able to encumber the additional funds for the asphalt overrun without a Supplemental Agreement and compensate Ranger in a timely manner.
4. As per Specification 9-3.1 the contractor would not be compensated for any monetary impacts when the alteration of the quantities does not require a supplemental agreement. The specifications also state that the Contractor "shall" accept payment in full at Contract unit bid prices for the actual quantities of the work done and no allowance will be made for any additional expense.
5. As per Specification 4-3.1 this asphalt overrun is not considered a 'Significant Change" since it is not a major item of work; therefore, the contractor has no option, but to agree to the pay item overrun using original contract unit price.
6. The department also acknowledges that this pay item is a controlling item of work as defined on the accepted CPM schedule and has granted a time extension of 26 days through a Unilateral document in order to provide the contractor with the time needed to accommodate for the additional tonnage and consider these actions to be in good faith.
7. Even though, the contractor provided an explanation on how the character of work had change due to the additional aggregate cost 2 days prior to final acceptance, the Department's position remains the same, and the issue has been escalated to a DRB hearing. This overrun is not a significant change since it is not a major item of work.

CONCLUSION

The issue at hand is the interpretation of the definition of Significant Change as per the Specification 4-3.2 (A & B).

The Department does not consider this overrun to be significant based on a mathematical calculation which ***clearly*** defines that this asphalt overrun does not consists of a Major Item of Work in this contract and holds that position.

Ranger failed to ***clearly*** demonstrate to the engineer that the character of the work as altered differs materially in kind or in nature from the original contract throughout the course of the contract. Ranger submitted an explanation with proof of the increment in cost 2 days prior to Final Acceptance. Even though a settlement agreement was discussed between the District office and Treasure coast Operations it was the District's determination to present this matter to a Dispute Review Board."

**FINDINGS OF FACT**

The Board's decisions are governed by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the following referenced documents and the following facts.

1. Their was a error in the plans as provided to the bidders in the superpave asphalt quantity. The proposed bidders have the right to expect that the plans and specification are correct in order to submit a competitive bid.

2. The placement of the superpave asphalt was a controlling item of work recognized by the Department and on the CPM schedule. The Department recognized that the controlling item of work was increased by 2.7 times and would have a impact to the Contractor's schedule. This was stated in a draft supplemental agreement from the Resident Engineer to the District Construction Engineer. This draft was dated Dec. 19, 2007.

3. The Department recognized that this quantity omission was a significant change to the contract. This was stated in a draft supplemental agreement from the Resident Engineer to the District Construction Engineer. This draft was dated August 4, 2008 and was drafted by a different Resident that the December 2007 draft.

4. The Department alludes to the CPAM and a House Bill 1681 as being the rationale for not issuing a SA for this work. The CPAM is not a part of this contract and is not applicable. HB1681 was a legislative action taken in 2005. This contract is let under the Department's 2004 specifications and does not included 2005 legislative action. Neither the CPAM nor legislative bills are listed in the hierarchy of contract documents according the 2004 specifications.

   The FDOT 2004 Standard Specification for Road and Bridge Construction Section 5-4 ***Errors or Omissions in Contract***

***Documents.*** *States Do not take advantage of any apparent error or omission discovered in the Contract Documents, but immediately notify the Engineer of such discovery. The Engineer will then make such corrections and interpretations as necessary to reflect the actual spirit and intent of the Contract Documents.* It appears to the Board that the Department did take unfair advantage of the plan error. If the plan quantity had been correct the Contractor would have had the 26 days additional time in his CPM schedule and the time would have been compensable. The Department has recognized that the Contractor is entitled to the 26 days however it is not compensable. The additional cost of aggregate has been recognized by the engineer and two different FDOT Resident Engineers. The Contractor demonstrated that the aggregate costs had significantly increased from the original plan quantity to the revised quantity.

6. The FDOT 2004 Standard Specification for Road and Bridge Construction Section 4-3.4 states; ***Conditions Requiring a Supplemental Agreement or Unilateral Payment:*** *A Supplemental Agreement or Unilateral Payment will be used to clarify the plans and specifications of the Contract; to document quantity overruns that exceed 5% of the original Contract amount; to provide for unforeseen work, grade changes, or alterations in plans which could not reasonably have been contemplated or foreseen in the original plans and specifications; to settle documented Contract claims; to make the project functionally operational…* This specification is in effect for this contract. The quantity did overrun more that 5%, it was unforeseen, and it was required to make the project functionally operational.

7. The FDOT 2004 Standard Specification for Road and Bridge Construction Section 5-12.6.2.2 states: **Compensation for Indirect Impacts of Delay:** *When the cumulative total number of calendar days granted for time extension due to delay of a controlling work item caused solely by the Department is, or the cumulative total number of calendar days for which entitlement to a time extension due to delay of a controlling work item caused solely by the Department is otherwise ultimately determined in favor of the Contractor to be, greater than ten calendar days the Department will compensate the Contractor for jobsite overhead and other indirect impacts of delay, such indirect impacts including but not being limited to unabsorbed and extended home office overhead, according to the formula set forth below and solely as to such number of calendar days of entitlement that are in excess of ten calendar days.*

*All calculations under this provision shall exclude weather days, days used for performing additional work, days included in supplemental agreements, and days of suspended work.*

$$D = \frac{A \times C}{B}$$

*Where A = Original Contract Amount*
*B = Original Contract Time*
*C = 8%*
*D = Average Overhead Per Day*

This work was a controlling item of work as shown on the Contractor's CPM schedule and recognized by the Engineer.

**RECOMMENDATION**

The Board finds that there is entitlement to the Contractor for the substantial error in the plans for pay item 334 -1 -13 Superpave Asphaltic Conc (Traffic C).

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

The Board unanimously reached the recommendation and reminds the parties that it is only 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.

Submitted by the Disputes Review Board

Don Henderson, Chairman Stephanie Grindell, Member Jack Nutbrown, Member

Signed for and with concurrence of all members

Don Henderson, PE