

REGIONAL DISPUTES REVIEW BOARD RECOMMENDATION

April 20, 2009

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RE: FPIDs: 41143515201, 23180215201, FAP 4888 010S, Contract T4099, Martin County SR 714 from the Florida Turnpike to West of I-95 – Milling & Resurfacing, minor widening, signalization, sidewalks, pavement marking and lighting.

Dear Sirs:

The Florida Department of Transportation (Department) and Community Asphalt Corporation (CAC) requested a hearing concerning the issues of:

1. The Contractor disagrees with negative adjustments made on this contract due to deleted work. Field conditions warranted many changes, additions, and deletion of work at several locations. These changes were tracked by the project staff. A Unilateral supplemental agreement was processed to make pay adjustments (additions and deductions). The Contractor received a payment of \$12,889.57.
2. The Contractor disagrees with the embankment quantity placed in wet area to raise elevation of sidewalk. The Department estimates approximately 1100 cubic yards (CY) of borrow material need for this area. The Contractor seeks payment of approximately 4000 CY total quantity brought into the project.

Summaries of the Departments and Contractors positions and rebuttals were forwarded to the Regional Disputes Review Board (RDRB), and a hearing was held on April 3, 2009.

ISSUE #1: “What is the amount due for payment of borrow material at the raised sidewalk area?”

Contractor’s Position – Issue #1

CAC contends that they placed approximately 4000 CY of truck measure material in the areas for the new sidewalk from Stations 220+00 to Station 232+00 and from Station 232+20 to Station 237+70. They are seeking payment for the extra unforeseen work completed per the contract.

CAC, in the process of clearing and grubbing encountered muck areas that were not indicated in the plans. CAC on June 22, 2006 gave written notice to Mr. Tim Thomas of the Department of the differing site condition and expects payment for any and all additional contract costs. August 16, 2006 CAC furnished a cost breakdown of \$16.08 per cubic yard of truck measure. Mr. Morris looked forward to receiving a Field Supplemental Agreement shortly thereafter

regarding the truck borrow placed for the work. Embankment tickets show a grand total of 3996 cubic yards. CAC pointed out at the hearing that a Unilateral Supplemental Agreement was done on October 4, 2007, but did not include work for the Embankment material for the new proposed sidewalk over the muck area. No pay adjustment was made for the additional truck borrows of 3996 CY at \$16.08 cubic yard.

Department's Position – Issue #1

The Department does not agree that it should pay for the original Lump Sum pay item PLUS payment of 3996 CY for borrow at the raised sidewalk area. Contract plans in the bid package included an estimated quantity of 9000 CY borrow material for drainage structures, swale slope rework, and sidewalk.

The dispute refers to an additional need that was identified during construction to accommodate for raising elevation of sidewalk over wet ground. This wet area began at Station 220+00 and ended at Station 237+00. The Department estimates, based on site condition and elevation verifications, fill being between 18” and 24” deep, resulting in approximate need of 1117.44 CY of compacted fill or approximately 1676 CY borrow material (truck measure).

Based on the delivery tickets collected, the Contractor used approximately 5436 CY of borrow material on the project to meet all the needs. Attachment 7, Summary of Earthwork Quantity, shows total quantity brought to the project was significantly lower than total of estimated quantity of borrow at the bidding time and additional quantity due to wet condition. This resulted in no additional payment.

The Department is in agreement with the Contractor for entitlement of this additional fill. This is evident by the Department's repeated requests for providing additional documentation, other than delivery tickets, during previous meetings with the Contractor.

The Department furnished plan sheets, Division 1 Specifications for Lump Sum contracts. This includes revised Articles ALTERATION OF PLANS OR OF CHARACTER OF WORK (REV - 8-1-00) (1-01) UNFORESEEABLE WORK (REV 9-28-98) (7-00) and MEASUREMENT AND PAYMENT (REV 5-16-05)(FA7-6-05)(1-06), Summary of Quantities sheet, Sheet 7, Spreadsheet prepared by Project Administrator, an email documenting station range, Contractor's proposal, Unilateral Payment #28, "Summary of Earthwork", Project Administrator's calculations for needed truck measures for borrow, Letter signed by John Morris, Vice President, Community Asphalt, Pictures of Embankment in wet condition, and Elevation Shots on 10/21/2008.

Contractor's Rebuttal Statement on Issue # 1

The Department's position with respect to the payment for borrow material goes against the core underlying definitions and principles of "Lump Sum" contracts and "differing site condition" and "unforeseen work" specifications.

RDRB Findings on Issue #1

The sidewalk was added after the contract was let and awarded to CAC.

The Department contends borrow shown from the Summary of Earthwork (6000 CY in place which equals 9000 CY+/- of truck measure) in the plans was in error and far less was needed to complete the original fill areas in the plans. Therefore, the quantity of 3996 cubic yards had to be in error as the Department's records only showed a total of 5436 CY of borrow material delivered for all the needs on the project including the fill of the new sidewalk. The quantity of 3996 CY's CAC is seeking has to be error. The Board asked at the hearing if original earthwork quantities were verified by the Engineer of Record (EOR) and none were.

It is evident that if the original plans required 9000 CY's of truck measurement prior to adding the new sidewalk, and the Department only documented tickets for 5436 CY's, the records kept by the Department could not be correct.

The calculation for the fill underneath the sidewalk in this wet area was presented at the hearing by the Department, showing a quantity of 1458.33 cubic yards of fill. This calculation was based on average depth and calculated end areas and stations. It showed estimated production rates and various other costs for other work.

Items to be furnished by the Department by April 10, 2009. CAC will have a chance to review and comment:

Department was to furnish any Weekly Meeting minutes that shows CAC agreed to the quantity of 1458 CY. The material was looked at and reviewed by all parties as agreed to at the hearing.

RDRB Recommendation on Issue #1

Based on the information provided, the Board finds that CAC is entitled to 3996 cubic yards of additional Borrow truck measurement for the new sidewalk area. Written notice was given to the Department on June 22, 2006 that additional payment was expected for fill material beneath the new proposed sidewalk. At that point, the Department should have kept records as per 2004 Specification pages 39 and 40 Section 5-12.2 Notice of Claim, as to the amount of truck borrow material it was going to take for the new sidewalk over the existing muck area. The quantity of 1458.33 Cubic Yards from the Department was based on estimated end areas and stations. In this calculated adjustment, nothing was included for the Clearing and Grubbing per specification 110 of the 2004 specification (extra depth), No adjustment was made for compression of the muck material, no adjustment was made for fluff and placing material in wet conditions. An end area volume would be more than the one calculated by the Department. It appears that the Department did not keep accurate records from the time of the work commencing and the written notice given by CAC on June 22, 2006. CAC provided records that showed 3996 cubic yards of fill was delivered to the project site. It was pointed out that CAC had hauled several truck loads of fill material from other projects at night and stockpiled them so there were no tickets or records accounting for the fill for the project. CAC pointed out that there was no need to provide tickets for this work as it was included in the LUMP SUM price for the project.

ISSUE #2 – Is the Department allowed to make pay item line deductions in the Lump Sum work?

Contractor’s Position – Issue #2 -

The dispute pertains to the definition of “Lump Sum” and the specifications and procedures which govern such contracts with the Florida Department of Transportation.

FDOT Plans Preparation Manual (Chapter 22, Lump Sum Project Guidelines) is to reduce cost of design and contract administration associated with quantity calculation, verification, and measurement.

The contingency pay item is recommended on a Lump Sum Project. This tool is used to pay for pay items not in the original contract scope of work.

Lump Sum contracts are not fixed price. Changed conditions, extra work and unforeseen work must be negotiated and resolved with the contractor utilizing Supplemental Agreements and/or Work Orders on Contingency Supplemental Agreements. The contract had a Contingency Supplemental Agreement in the amount of \$172,140.00.

Construction inspection personnel should not be required to document quantities, but to pay attention to the work performed. Exceptions to this are quantities for asphalt adjustments and other such items with predetermined unit prices.

CAC’s stance is that only deductions can be made per Measurement and Payment, Section 9-2.2.6 Adjustment to the Lump Sum Payment for deleted Items of work.

Department’s Position – Issue #2

During construction, field conditions required numerous changes, which were recorded in detail by project personnel. This mainly included changes in locations or elimination of drainage structure and pipes, change in scope of work of elimination of driveway enhancements, and change in cross slopes of swales along the side of the roadway.

The Department contends their decision of negative pay adjustments is based on the contract Special Provisions Sub-articles 4-3.1 and 4-3.4 under “Alteration of Plans or the Character of Work” which they say allow negative adjustments for the deleted work.

Sub-article 4-3.1 reads “4-3.1 General: The Engineer reserves the right to make, at any time prior to or during the progress of the work, alternations or changes, whether a significant 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 alternations or changes 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 or changed, the same as if it had been a part of the original Contract...

Sub-article -3.4 reads, “A Supplemental Agreement or Unilateral Payment will be used to clarify the plans and specifications of the Contract; to provide for unforeseen work, grade changes, or alterations in the plans which could not reasonably have been contemplated or foreseen in the original plans and specifications; to change the limits of construction to meet field conditions; to provide a safe and functional connection to an existing pavement; to settle documented Contract claims; to make the project functionally operational in accordance with the intent of the original contract and subsequent amendments thereto.”

CAC Rebuttal Statement- Issue # 2

CAC deleted work does not have any bearing per specification sub articles 4-3.1 and 4-3.4 which the Department claims specifically address deleted work and payment adjustment for deleted work.

CAC could not determine how these specifications covered deleted work. However, Specification in Article 4-1 Intent and scope, and Adjustment to the Lump Sum Payment for deleted work in 9-2.2.6.

CAC refers back to the position papers pages 6-8 which describes Lump Sum Project Guidelines and the role of the Project Administrator or CEI. These guidelines were clearly and blatantly mis-administered on this project and the result in prosecution contradictory and in violation of the Specifications and Contract documents.

Department’s Rebuttal Statement – Issue #2

The Department contends all deductions were made in accordance with the Specifications of the contract. They feel that the Unilateral Supplemental Agreement covered the deleted work items. These deletions were well documented in various documentation shared with the Contractor during construction such as progress meetings, emails, etc., and are also documented in the As-Built plans. The Department has not received any documentation or proposals disputing that the items were not deleted from the work.

RDRB Findings - Issue #2

The Board asked that the Department furnish a correlation between the Pay Item Summary dated 4/3/2009 given out at the Hearing (with CAC’s approval) to show what the relationship was to attachment Number 3 in the original position papers by April 10, 2009 and granted time for CAC to review and comment. They were received and reviewed per the Hearing request. CAC sent comments on the requested information and within the Hearing agreement by the RDRB.

A Unilateral Supplemental Agreement was done by the Department for \$12,889.57 to accommodate for all changes, deleted work, additional work due to change in site conditions.

When it became evident that there were several errors on the plan quantities, the Department did not consult the Engineer of Record or ask them to comment on the errors in quantities in the original plans. CAC submitted their Original Bid on these plans. If quantities changed from the original plans or were in error, new quantities and plan sheets should have been provided to the contractor.

RDRB Recommendations - Issue #2

The RDRB finds that **the contractor is entitled to payment** as addressed in the contract documents, Intent and Scope of Work, Article 4-1 Page 6 of the Special Provisions and per specification 9-2, Scope of Payments.

*9-2.2.6 Adjustment to the Lump Sum Payment for Deleted Items of Work:
When items such as pipe culverts, inlets, manholes, mitered end sections, etc. are shown in the contract documents to be constructed or installed and due to actual field conditions, it is determined by the Engineer that the item is not needed, then a negative adjustment will be made based on the invoice price for the actual cost of the item and the Contractor will retain ownership. This adjustment will not exceed \$5,000.00. Should the amount of the adjustment exceed \$5,000.00, it will be considered a significant change and an adjustment will be processed in accordance with 4-3.2.*

Also, the Plans Preparation Manual, Volume 1 – English, 22-7, Contract Administration states:

Lump Sum contracts are not fixed price. Changed conditions, extra work and unforeseen work must be negotiated and resolved with the contractor utilizing Supplemental Agreements and or work orders on Contingency Supplemental Agreements.

Construction Inspection personnel should not be required to document quantities except for asphalt and other items subject to pay adjustments (items with predetermined unit prices). Measurement and completion of “Final” quantity for summary boxes on plan sheets is not required. Focus should be on the inspection and achieving a quality final product. For example, the Project Engineer will not be concerned with how many square yards of sod it takes or the number of yards of final striping. The project engineer will be charged with ensuring that the sod, striping, embankment, pipe, etc., meets the lines and grades of the plans and specifications.

In the FDOT Preparation and Documentation Manual, in Chapter 2, Final Estimate Pre-Planning, it states:

2.3.4 If substantial errors in the plan quantity items are detected by construction personnel, the contractor shall be advised of these errors in writing (copying the DFEO) at the preconstruction conference or when the errors are detected. If a question arises during the construction of a

project involving quantities for one or more of the plan quantity items, then address and correct the quantities in the following manner:

(A) Quantity Errors of Minor nature: An example of this would be if the Designer left out 1000 LF of curb and gutter and showed 100 LF. A simple correction here would suffice.

B. Quantity Errors of Major Nature: An example of this would be if the Designer left out the southwest quadrant of an intersection. Errors of a major nature are to be resolved by the Designer of record. Construction will request in writing, that the Designer provide detailed documentation or verify the concern for the plan quantity item(s) in question.

Design must produce the backup documentation within 5 working days of the request from construction.

2.3.5 Any question on pay item interpretation, adjustment, extra work, etc., for any item shall be resolved with the District Final Estimates Manager as it occurs. Do not wait until the end of the project.

The Board appreciates the cooperation by all parties involved and the information provided to make this recommendation. The RDRB also recognized that this was a very difficult project to build and appreciates the cooperation and professional work ethics shown by both parties.

Please remember that failure to respond to the RDRB and the other party concerning your acceptance or rejection of the RDRB recommendation within 15 days will be considered acceptance of the recommendation.

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

Respectfully submitted,

Regional Disputes Review Board

Frank E. Proch, Regional Dispute Review Board Chairman
John W. Nutbrown, Regional Dispute Review Board
Joe Capeletti, Regional Dispute Review Board

RDRB Chairman

CC: