

## DISPUTE REVIEW BOARD RECOMMENDATION

December 22, 2011

Mr. Vernon Walker  
Community Asphalt Corp.  
7795 Hooper Road  
West Palm Beach, FL 33411

Mr. Patrick Kennedy  
Cardno/TBE Group  
11641 Kew Gardens Ave, Suite 101  
Palm Beach Gardens, Fl 33410

RE: S.R. 9 (I-95) from S. of PGA Blvd to S. of Donald Ross Rd.  
F.P.ID 406870-1-52-01  
Palm Beach County

Subject: Payment for Repairs to Guardrail Damaged by Third Parties

Dear Sirs:

The Contractor requested a Dispute Review Board Hearing per the conditions set forth in the DRB Three Party Agreement in order to resolve an issue of entitlement for compensation.

### **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.

"Guardrail installations were damaged during the duration of the project by third party events, vehicular accidents. Community Asphalt (CA) believes the Specifications for this project provide compensation for repairs to permanent guardrail installations by Supplemental Agreement. The Department disagrees and will not provide compensation for repairs performed.

In correspondence dated October 25, 2011 Community Asphalt notified the Department of intent to claim for additional compensation associated with guardrail repairs throughout the project. The Department responded in correspondence dated October 26, 2011 acknowledging repairs were made throughout the duration of the project with no additional compensation provided.

The governing specifications for this project are the Florida Department of Transportation Standard Specifications for Road and Bridge Construction dated 2007. Related to this issue is the following subarticle from these Specifications:

"7-11.4 Traffic Signs, Signal Equipment, Highway Lighting and Guardrail: Protect all existing roadside signs, signal equipment, highway lighting and guardrail, for which permanent removal is not indicated, against damage or displacement. Whenever such signs, signal equipment, highway lighting or guardrail lie within the limits of construction, or wherever so directed by the Engineer due to urgency of construction operations, take up and properly store the existing roadside signs, signal equipment, highway lighting and guardrail and subsequently reset them at their original locations or, in the case of widened pavement or roadbed, at locations designated by the Engineer.

If the Department determines that damage to such existing or permanent installations of traffic signs, signal equipment, highway lighting or guardrail is caused by a third party(ies), and is not otherwise due to any fault or activities of the Contractor, the Department will, with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with the repairs. Repair damage caused by vandalism at no expense to the Department.

This subarticle refers to permanent installations of guardrail. Plan sheet 33 of the Contract identifies locations for permanent guardrail on this project. It is CA's position that compensation for repairs of damage to these permanent installations of guardrail caused by a third party(ies), and not otherwise due to any fault or activities of the Contractor, should be provided by Supplemental Agreement in accordance with 4-3.4.

The Specifications are clear that if damage to existing or permanent installations of traffic signs, signal equipment, highway lighting or guardrail is caused by a third party(ies), and is not otherwise due to any fault or activities of the Contractor, the Department will, with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with the repairs.

Community Asphalt is entitled to additional costs associated with repair of permanent guardrail installations caused by third party damage."

**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.

"There is no entitlement for additional compensation to the Contractor related to this issue due to the Contractor's failure to file individual notices of intent for each claim for additional compensation, and also due to the Contract's explicit language placing the protection of the work solely in the hands of the Contractor before final acceptance. Each of these two positions is explained below.

First of all, the Specifications related to this issue clearly support the Department's position. Supplemental Specification 5-12.2.1 states that *"Where the Contractor deems that additional compensation or a time extension is due for work or materials not expressly provided for in the Contract or which is by written directive expressly ordered by the Engineer pursuant to 4-3, the Contractor shall notify the Engineer in writing of the intention to make a claim for additional compensation before beginning the work on which the claim is based".* Furthermore, the same Specification goes on to say *"If such notification is not given and the Engineer is not afforded the opportunity for keeping strict account of actual labor, material, equipment, and time, the Contractor waives the claim for additional compensation or a time extension."*

On May 7, 2010, Community Asphalt sent an email to the Project Administrator asking the Department's interpretation of Standard Specification 7-11.4 related to additional compensation for guardrail repairs. The Specification was clarified on February 22, 2010, and discussed with representatives of Community Asphalt at the May 19, 2010, Weekly Progress Meeting as reported in the meeting minutes. A copy of the email clarification provided by the Department was forwarded to Community Asphalt on May 20, 2010. Prior to this discussion, and for 18 months after, Community Asphalt made guardrail repairs on the subject project and did not request additional compensation for the restoration, nor "did they notice the Department of their Intent to File Claim for additional compensation related to this issue until October 25, 2011. Clearly this did not afford the Department the opportunity to keep account of the labor, equipment, material, and time required for these repairs. Therefore, per the Contract, Community Asphalt waives any claim for additional compensation.

With respect to Standard Specification 7-11.4 it is clear that guardrail installations constructed as part of the Contract work, or to be removed, do not apply here. The Specification states *"Protect all existing roadside signs, signal equipment, highway lighting, and guardrail, for which removal is not indicated, against damage or displacement"*, The second paragraph of the Specification further discusses possible compensation for damage to these

appurtenances that are existing, permanent features to remain by stating *"If the Department determines that damage to such existing or permanent installations of traffic signs, signal equipment, highway lighting, or guardrail is caused by a third party(ies), and is not otherwise due to any fault or activities of the Contractor, the Department will, with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with the repairs"*. It is clear that the second paragraph is discussing what is defined in the first sentence of the Specification as existing guardrail for which removal is not indicated.

Furthermore, Standard Specification 7-14 states that *"Until the Department's acceptance of the work, take charge and custody of the work, and take every necessary precaution against injury or damage to the work by the action of the elements or from any other cause whatsoever"* and that the Contractor shall *"Rebuild, repair, restore, and make good, without additional expense to the Department. all injury or damage to any portion of the work occasioned by any of the above causes"*. This fact is reinforced by Standard Specification 5-10.1 which states *"Maintain all work until the Engineer has given final acceptance in accordance with 5-11 "*,

Community Asphalt made repairs to the guardrail throughout the life of this 3+ year Contract without seeking additional compensation or putting the Department on notice that they were going to claim for additional compensation related to this issue until Day 1137 of this Contract (October 25, 2011). This Contract clearly states that this failure to notify the Department and allow the opportunity to track costs/time related to this issue waives any right that Community Asphalt has related to this claim. Lastly, even if the Department had been given the proper notice and ability to track this issue, the Contract Specifications and Supplemental Specifications clearly indicate that these repairs to the work would be made by Community Asphalt without additional expense to the Department."

#### **DEPARTMENT'S REBUTTAL:**

"Community Asphalt's position on this issue is solely based on language contained in Subarticle 7-11.4 of the Specifications. Community Asphalt incorrectly concludes in their position paper that this Specification is referring to new guardrail construction and/or existing guardrail to be removed that is actually governed by Subarticles 7-14 and 5-10. In this case, the guardrail in question is required to be maintained until final acceptance per Subarticle 5-10 and rebuilt, restored, and made good without any additional expense to the Department due to damage caused "from any cause whatsoever" as indicated in Subarticle 7-14.

In order to understand the items that are covered by Subarticle 7-11.4, one needs to simply read it in its entirety. The first paragraph of the Subarticle states, "Protect all existing (emphasis added) roadside signs, signal equipment, highway lighting and guardrail, for which permanent removal is not indicated, (emphasis added) against damage or displacement. Whenever such signs, signal equipment, highway lighting or guardrail lie within the limits of construction, or wherever so directed by the Engineer due to urgency of construction operations, take up and properly store the existing (emphasis added) roadside signs, signal equipment, highway lighting and guardrail and subsequently reset them at their original locations or, in the case of widened pavement or roadbed, at locations designated by the Engineer. This first paragraph clearly defines two conditions of these appurtenances. One is existing material that is relocated and/or reset to protect them from damage during construction. The second is existing permanent installations of these existing items that will remain in their current position during construction.

The second paragraph of Subarticle 7-11.4 then states that "If the Department determines that damage to such (emphasis added) existing or permanent installations of traffic signs, signal equipment, highway lighting, or guardrail is caused by a third party(ies), and is not otherwise due to any fault or activities of the Contractor, the Department will, with the exception of any damage resulting from vandalism, compensate the Contractor for the costs associated with these repairs." The beginning of the second paragraph cited here is clearly referring back to the existing or permanent installations described in the first paragraph when it states "if the Department determines that damage to such existing or permanent. .... " The word "such" here is used as an adjective and is defined by Merriam Webster as "of the character, quality, or extent previously indicated or implied", directing the reader to the items previously described in the first paragraph. There is no language here that can point to any other type of traffic sign, signal equipment, highway lighting, or guardrail other than that described as such in the first paragraph of the Subarticle.

The Board must also consider that the Contractor's argument and rights to claim for this issue have been waived regardless, due to the fact that no notice was given to the Department as required under Subarticle 5-12 even after the Department's position on this Specification was clearly explained. Approximately eighteen months passed in between the Department's clarification of the Specification and the Contractor's Notice of Intent. It is implied that the Contractor accepted the Department's position. Therefore, as previously stated in the Department's Position Paper and as clearly indicated by the Contract, no entitlement for additional compensation for this issue is warranted."

## **FINDING OF FACTS:**

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

1. Guardrail repairs were made on this Project by the Contractor. These repairs were acknowledged by the Department, according to the Contractor's position paper, and not rebutted by the Department.
2. Specification 7-11.4 speaks to the Department compensating the Contractor for damage to permanent guardrail caused by third parties. This specification is not clearly stated nor understood in the 2007 Standard Specifications. The new future specifications have removed the word 'permanent' from this specification.
3. The Guardrail installed on this project was permanent guardrail not temporary.
4. A e-mail was sent to the Department dated May 7, 2010 regarding third party damage. It stated " This came up when we were discussing damage to the new median guardrail on the project. The 2nd paragraph of 7-11.4 Traffic Signs, Signal Equipment, Highway Lighting, and Guardrail, states "if the Department determines that damages to such existing of **permanent installations** of traffic signals, signal equipment, highway lighting, or guardrail is caused by third party(ies)...the Department will...compensate the Contractor for the costs associated with the repairs.

Other incidents we have had on the project involve damage and repair to existing guardrail during Phase 1 MOT. We were *directed to recover repair costs through the third party insurance, and if we were unsuccessful the Department would* compensated the Contractor. Since 7-11.4 does not cover guardrail to be removed, are we still able to seek compensation following the process as we original discussed?

5. At a project progress meeting (no. 72 dated 5/19/2010) the Department made clear to the Contractor the interpretation of the language in Specification 7-11.4. The e-mail from Patrick McCann dated February 22, 2010 stated "Spec. 7-11.4 addresses payment for third party damage to specific items under specific conditions. One area that might still be misunderstood is that the items that are eligible for payment are existing and to remain. We can't pay for replacement of these items if they were installed as part of the project. This may be considered a departure from past direction or practice but this is the direction from Central Office."

6. The last sentence of the McCann e-mail ("This may be considered a departure from past direction or practice but this is the direction from Central Office.") implies that the Department has compensated Contractors in the past for repairs to damage by third parties. The Contractor stated at the hearing that they have been compensated in the past for third party damages.

7. The Contractor did give a Notice of Intent to Claim to the Department dated October 25, 2011.

8. The Contractor has not provided any documentation to the Department showing that they have made any effort to collect from the third party that caused the damage.

**RECOMMENDATION:**

The Board finds that there is entitlement to the Contractor for third party damage to the permanently installed guardrail prior to the 5/19/2010 progress meeting. At this meeting the ambiguity of compensation was cleared up by a Department e-mail. This entitlement recommendation is for repairs that are documented by the Contractor that the Contractor could not get reimbursed by the third party.

There is no entitlement for third party damage to the guardrail from 5/19/2010. The ambiguity of the specification was cleared up at this time.

There is entitlement to the Contractor to the guardrail repairs after the NOI dated October 25, 2011 provided that the Contractor has pursued the third party for the costs.

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

Respectfully Submitted,

Dispute Review Board:

James V. Moulton, Chairman, Don Henderson, Member, John W. Nutbrown, Member

Signed for and with the concurrence of all members:

*James V. Moulton*  
James V. Moulton, Chairman