

Date Recommendation Issued: 5-21-2021

Owner's Representative:

Eisman & Russo Consulting Engineers  
Elie M. Assi, P.E., Sr. Project Engineer

Contractor Representative:

Southland Construction, Inc.  
Eric Norton, Project Manager

Address:

6455 Powers Ave.  
Jacksonville, Florida 32217

Address:

172 West Fourth Street  
Apopka, Florida 32703

RE: Contract No.: T5650  
Project Description: SR500 (US441) From Lake Ella Road to Avenida Central  
County: Lake (District 5)

Subject:

**Issue – Additional Temporary Asphalt/Asphalt Pad under Low Profile Barrier.**

Dear Sirs:

Southland Construction, Inc. Company requested, and the Owner agreed, to submit this issue to the DRB for a hearing to determine if there is **Entitlement for Additional Temporary Asphalt/Asphalt Pad under the Low Profile Barrier Wall for Detour #1** on the Project.

Pertinent issues, correspondence and other information relating to the Owner's and the Contractor's positions were forwarded to this Board for review, analysis, and discussions at the hearing that was held on **Friday May 14, 2021 at FDOT's Leesburg Operations Center.**

**ISSUE:**

**Whether there is entitlement to additional payment for Additional Temporary Asphalt/Asphalt Pad under Low Profile Barrier Wall**

**CONTRACTOR'S POSITION:**

**Southland Construction, Inc. Position**

Southland Construction is submitting this DRB Hearing Request to be compensated for the cost incurred for the additional temporary asphalt utilized to construct the Phase 1A/1B Special

Detour #1. The escalation process with the Department has been exhausted in an effort to resolve this open issue.

On August 11, 2020, Southland Construction submitted a request for information #2. RFI #2 concerned the low-profile barrier wall installation on a dirt shoulder, as depicted on Phase 1B Typical Section project plan sheets 653 & 654, from station 2401+58 to Station 2305+16 and Station 67+74.51 to Station 115+20. For comparison, the temporary asphalt typical sections on project plan sheets 672 & 673, clearly depicts that the low-profile barrier is to be installed on temporary asphalt, as required by Index 102-120. Southland Construction received the Engineer of Record response on August 17, 2020, stating that *“where existing pavement is not present, construct a 2” asphalt pad, using miscellaneous asphalt pavement, in accordance with Specification Section 339, with the exception that the use of pre-emergent herbicide is not required. Payment for asphalt pad will be included in the cost of the barrier”*. After further review, Southland Construction was not in agreement with the Engineer of Record response. Since the temporary asphalt required for the low-profile barrier wall installation was in most of the TCP typical sections, it is clear that it was not accounted for on sheets 653 & 654. The Metric Engineering asphalt design on project plan sheets #611 to #651, clearly delineates the location, width and length of the asphalt required for Special Detour #1. This design provided the required temporary travel lane and placement of the low-profile barrier wall since the majority of these areas are in a grassed median. The temporary asphalt pavement design, as depicted on plan sheets #611 to #651, was utilized by Southland Construction in the preparation of the bid for this project.

On November 3, 2020, Southland Construction, FDOT and Eisman & Russo met at the Department’s office in Leesburg, to discuss this Southland Construction change order request. During the meeting, the Department stated that they would *“not accept limerock base for the temporary asphalt, since Index 102-120 did not require it”*. After further discussion, the Department agreed to review a revised Southland Construction change order request that provided a 2” asphalt base for the installation of low-profile barrier wall, on compacted subgrade. On November 11, 2020, Southland Construction submitted a change order request in the amount of \$ 54,071.23 as fair and equitable compensation for this additional work. On Friday, February 12, 2021, the Department notified Southland Construction that there was no entitlement for this issue

In a detailed review of the project plans, there is no direct reference to Standard Index 102-120, Specification Section 339 or any plan note(s), that would direct any plan reviewer to make the planning assumption that the designed temporary asphalt depicted on the project plans would not include the asphalt pad, required to install the temporary barrier wall. It is the design engineer’s responsibility to clearly depict, list or note any deviation to project plans and specifications, so that the Contractor has a clear understanding of project design and scope when bidding, and during construction of the project. The Southland Construction T5650 project bid was based on the project plan and specification documents provided by the Department. It is not the Contractors responsibility to understand the design engineer’s intent or to provide design

solutions when the project is bid or after the contract is awarded. The project plans and special provisions supersede any standard specification or index. It is clear on project plan sheets 653 and 654, per this design, the installation of temporary barrier wall on a dirt shoulder is allowable. It is apparent that the same standard index and specification that the design engineer makes direct reference to, Standard Index 102-120, Specification Section 339, was not referenced by the design engineer during the design phase of the project. On a project of this size and magnitude, it is not uncommon that there are design errors or omissions uncovered during construction. It is not the Contractors responsibility, however, to make any requested or required design corrections, at that Contractors expense.

## **OWNER'S POSITION:**

### **CCEI/FDOT Position**

The Department contends that the Contract documents are clearly defined on the project plans' Cover Sheet No. 1. On this sheet at the bottom left corner the Governing Standard Plans and Governing Standard Specifications is called out. These documents along with the plans and other supplemental specifications make up the project bid package that is used to construct and bid the project On the Cover Sheet No. 1. for this project, the specified documents are: GOVERNING DESIGN STANDARDS FY 2019-20 Standard Plan and just below that is GOVERNING STANDARD SPECIFICATIONS January 2020. The Department offers a website where all these documents can be found for contractor use.

2019-2020 Standard Plans – Low Profile Barrier – Index 102-120 – Sheet 2 of 5 – Notes: clearly states *“ASPHALT PAD: Where existing pavement is not present, construct 2” Asphalt Pad using miscellaneous asphalt pavement in accordance with Specification Section 339 with the exception that the use of preemergent herbicide is not required. PAYMENT for asphalt pad will be included in the cost of the barrier”*.

GOVERNING STANDARD SPECIFICATION January 2020 as reflected on the plans' coversheet, in reference to this subject, states the following: 102-11.9 Temporary Barrier: The quantity to be paid for will be the length, in feet, of freestanding units or anchored units certified as installed/used on the project. The quantity to be paid for relocating barrier will be based on the relocated installation type. No separate payment will be made for the asphalt pad. Section 102-9.6 Temporary Barrier: *“Temporary barrier must comply with Standard Plans, Index 102-100 or 102-120. Install temporary barriers as either anchored or freestanding as shown in the Plans or the Standard Plans. It also states remove temporary asphalt pads and repair all attachment scars to permanent structures and pavements after barrier removal”*. Therefore, the plans clearly provide the referencing documents which dictates how to construct the low-profile barrier. The Standard plans also address the placement of such material, its offsets, deviation

and transition which are required for the placement of the low-profile barrier, so it is in compliance and provide guidance to Contractors on how and where to install it.

## **BOARD FINDINGS:**

### **Board Findings & Observations**

1. Standard Plans, Index 102-120, Low Profile Barrier, General Notes, Sheet 1 of 5, Note 6, states if these are specified for use on the Project “*substitution with other barrier types is not permitted.*” Sheet 2 of 5, depicts in the deflection and drop off detail use for this propriety-type barrier on Flexible or Rigid Pavement and further limits the use thereof as evident on the “LIMITATION OF USE” note, to installation on only flexible and rigid pavement with an exception where existing pavement (flexible or rigid) is not present.
2. The Contract Plans on Detour 1, Phase 1A showed the widening area of **Temporary Asphalt Pavement (Flexible Pavement)** with dimensions noted. The Contractor explained that it would be hard to quantify something different than what the plans show without actual field measurements prior to bid.
3. The Contract Plans on Detour 1, Phase 1B shows dimensions with location of edge of traffic lanes and offset required for Low Profile Barrier Wall. There is no dispute in the location of Low Profile Barrier Wall.
4. Standard Specification Section 5 Paragraph 5-2 Coordination of Contract Documents states in cases of discrepancy, the governing order of the documents is as follows:  
1- Special Provisions, 2- Technical Special Provisions, 3- Plans, 4- Design Standards/Standard Plans, 5- Developmental Specifications, 6- Supplemental Specifications, 7- Standard Specifications.
5. The Contractor discovered the need for additional asphalt when Surveying /Laying out the Detour 1, Phase 1B.
6. Phase 1B Traffic Control Plan typical sections showed Low Profile Barrier Wall on grade without any Temporary Asphalt Pavement (Flexible Pavement), or any Asphalt Pad as depicted in the Notes on Standard Plans 102.
7. The Board members discussed with the Contractor and CCEI that in some cases the Low Profile Barrier Wall was partially on the Phase 1A **Temporary Asphalt Pavement (Flexible Pavement)** as dimensioned in the Special Detour 1. Approximate missing 2 feet wide of either Flexible Pavement or 2” asphalt where existing pavement is not present to fulfill the requirements as detailed on Standard Plans, Index 102-120. The discussions centered around two random stations in Detour 1 plans where this was factually correct.
8. The Contractor full position indicated 8,186 LF of roadway/ low-profile barrier wall that had required either Flexible Pavement or additional miscellaneous asphalt if existing pavement as not present in order to fulfill the proper installation of barrier per Index

102-120. All Parties did realize the amount could have varied based on the actual site conditions.

9. The CCEI stated that the Standard Plans and Standard Specification are part of this contract and was noted on the bid document plans.
10. The Standard Plans, Index 102-120, Sheet 2 of 5, clearly states *“where **existing pavement** is not present, construct 2” asphalt pad using **miscellaneous asphalt pavement** in accordance with Specifications Section 339 ...”*
11. In Standard Plans Index 102-120 cited above, the note excludes the requirement to use pre-emergent herbicide but keeps all other provisions under the Specifications, including but not limited to, the payment by tonnage for the 2” of Asphalt Pad made of miscellaneous asphalt as a plan quantity.
12. The CCEI noted the Standard Specification January 2020 is part of the Contract. They also noted in paragraph 102-11.9, Temporary Barrier that *“no separate payment will be made for the asphalt pad.”* Standard Plans, Index 102-120, Sheet 2 of 5 states that *“Payment for asphalt pad will be included in cost of the barrier where existing pavement is not present”* reading the note as a whole.
13. In Standard Plans Index 102-120 it states **construct 2” asphalt pad using Miscellaneous Asphalt Pavement** in accordance with Specification 339. Section where the basis of payment is by the ton and on the Standard Plans it states asphalt pad will be included in the cost of the barrier. Specification 102-11.9 for the Temporary Barrier states in pertinent part that “no separate payment will be made for the asphalt pad.

## **Dispute Review Board Analysis:**

**The Owner and Contractor must read the Notes, study the Details on Standard Plans, Index 102-120, Sheet 2 of 5 to understand the Ambiguity in the design.**

- From note titled *“ASPHALT PAD*, “it is unclear the meaning of “existing pavement.” In the construction industry, “existing pavement” means pavement that exist on site prior to Bid. Ex. Existing Roadway. 2.) Likewise, **Temporary Asphalt** is flexible pavement built during construction. 3.) Also, **Miscellaneous Asphalt** is asphalt performed during construction. These all have specific industry meanings that must be assigned to them in interpreting the contract documents.
- If the **Temporary Asphalt** flexible pavement detailed in Special Detour 1 is not **Existing Pavement**, then the note, titled “ASPHALT PAD”, would then be void and of no application to this specific TCP design condition. Specifically, it states: *“ASPHALT PAD: Where existing pavement is not present, construct 2” asphalt pad using miscellaneous asphalt pavement....”* Reciprocally, the Temporary Pavement flexible pavement must

comply with the Standard Plans, particularly, the limitation of use for this propriety-type barrier wall.

- Regarding this “*LIMITATION OF USE*”: The Installation technique can only be used on flexible or rigid pavement. As such, the design plans should conform accordingly from the onset and at the bidding stages of this Project. The detail shows a zone hatched indicating Flexible or Rigid Pavement. This would indicate that the hatched area must be flexible or rigid pavement. Pavement Design manual standards outline the definition of Flexible and Rigid pavements. There is Ambiguity in the wording if the intent were to use a 2” asphalt pad where there was a shortfall in the Temporary Asphalt flexible pavement on the MOT plans.
- The **Temporary Asphalt** outlined by EOR in Special Detour 1, Phase 1A needs to be in accordance with the requirements of Flexible or Rigid Pavement.
- The EOR is the only person to know the correct limits of **Temporary Asphalt** when developing the Flexible or Rigid Pavement contract plans used for this site-specific Low-Profile Barrier Wall Installation.

### **BOARD RECOMMENDATION:**

The DRB has reviewed the Full Position and Rebuttals from both parties prior to the Hearing on May 14, 2021. During the Hearing both parties explained their position and the DRB had clarification questions which we addressed in the Board Findings & Observations.

The DRB unanimously agree that the Contract documents govern when deciding our decision for entitlement. The Contract documents in many locations call out Standard Plans Index 102-120 and the Contract Plans call out sequence of construction. The plans used during bidding caused the Contractor ambiguity. This unintentional error or deficient plan information prevented the Contractor the opportunity to correctly understand the **Temporary Asphalt/ Asphalt Pad** requirements.

### **Key Factors in Decision**

- The Low Profile Barrier partially supported on **Temporary Asphalt** pavement without any stationing references to calculate the amount of asphalt needed. This is impossible to calculate with the ambiguity created in the notes on Index 102-120.
- There is an ambiguity in the Plans depicting low-profile barrier wall being partially on the **Temporary Asphalt** pavement, where the FDOT was not aware of this at the hearing is evidence of the ambiguity.

- In the Standard Plans, Index 102-120 the detail shows Flexible or Rigid Pavement under the Low Profile Barrier Wall. The asphalt pad using 2" of **Miscellaneous Asphalt** is not a design in conformance with the limitation of placement barrier wall on Flexible or Rigid Pavement. Reference: See Flexible and Rigid Pavement Design Manuals
- In the DRB Analysis it was found that as a common notation on Contract Plans the Existing Pavement refers to **existing** travel lane roadways where **existing** flexible or rigid pavement is present. This project does not meet this condition in Special Detour 1, Phase 1A & 1B. Temporary Asphalt flexible pavement was provided on the plans to fulfill the requirement for MOT inclusive of the of Low Profile Barrier Installation appurtenance. This was an error by the EOR not abiding by the detail and notes outlined in Standard Plans, Index 102-120. The Low Profile Barrier installation plan is a requirement by the EOR for roadside safety to be established in the plans for the Project. The Contractor is responsible to install per the Contract plan.
- The **Temporary Asphalt** limits was determined by the EOR and is responsible for meeting the limitation of use for placement of the Low Profile Barrier Wall on flexible or rigid pavement to meet safety inherent in Standard Plans, Index 102-120.
- The Contractor is responsible for bidding and constructing the **Temporary Asphalt** as shown on the Contract Plans. The Contractor is not responsible to change the EOR Temporary Asphalt / flexible or rigid pavement design when bidding the project or to supplement such design with Asphalt Pad as deemed necessary in the field if there is not sufficient flexible or rigid pavement included in the Plans. This needs to be designed and approved prior to releasing plans for bid.
- The 2" asphalt pad detail is valid on projects where the design does not show the limits of temporary asphalt. The **Temporary Asphalt** on this project meets flexible or rigid pavement to be used in Special Detour 1, Phase 1A and 1B. The quantity was not correct, and the Contractor should not be penalized for this error in the plans.
- After thorough analysis we find the Contract plans were partially incomplete and many ambiguities within the Contract Plans, Standard Plans, Index 102-120 and Standard Specifications. The EOR was responsible to furnish the necessary information so the project Special Detour 1 would be built for roadside safety.
- The DRB understands additional information and facts were discovered with reviewing the notes and plans in more detail. Our ruling is on entitlement with the errors on the Contract plans.

**Based on the Board Fact Findings /Observations and DRB Analysis, the DRB Unanimously rules the Contractor is due Entitlement.**

The Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation. The Disputes Review Board's recommendation should not prevent or preclude the parties from negotiating an equitable solution (should it be appropriate) to any issue pursuant to their partnering agreement.

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

I certify that I have participated in all the meetings of this DRB regarding this Issue and concur with the findings and recommendations.

Respectfully Submitted

Disputes Review Board

Gary F. Jerabek     DRB Chairman

Don M. Cronk     DRB Member

Robert A. Cedeno   DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

DRB Chairman



