

DISPUTE REVIEW BOARD RECOMMENDATION

November 12, 2017

Mr. Domenico Lombardo
Projects Manager
Astaldi Construction Corp.
8220 State Road 84, Suite 300
Davie, FL 33324

Mr. Jamal A. Hassouneh, P.E.
Senior Project Engineer
Target Engineering Group Inc.
725 Primera Blvd., Suite 100
Lake Mary, FL 32746

RE: SR 5 (US 1) North of Pine St. to North of Cidco Rd.
Fin. Proj. No. 237592-2-52-01, Contract No. T-5431
Issue 1.7

Subject: Hearing Dated Oct. 31, 2017
Disputes Review Board Recommendation

Gentlemen:

Astaldi Construction Corp. (ACC) and the Florida Department of Transportation (FDOT) requested a Dispute Review Board hearing of a disputed issue. The hearing was held on Oct. 31, 2017 at the FDOT Brevard Operations Center in Cocoa, FL. The parties furnished the Board position papers prior to the hearing. Both parties provided a rebuttal response for review prior to the hearing. The Disputes Review Board was requested only to consider the question of entitlement. In accordance with your request the following recommendation is offered.

Project Scope

The principal elements of the project scope include widening and related drainage improvements of US 1 in Cocoa, FL.

Issue: Entitlement to Additional Compensation for the Work Associated with Pay Item 0102 2 1 – Special Detour 1

Contractor Position Issue 1

The following summary of the Contractor's position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the Contractor's submitted written materials.

Key Points

- 1. Special Detour 1 ultimately required far greater quantities than were called out in the plans or paid for by FDOT.**

Per the Contract, FDOT agreed to pay Astaldi the original lump sum of \$176,638.42 for Pay Item 0102 2 1 – Special Detour 1. The agreed-upon amount was based on a planned area of 62,760.00 SY and a theoretical asphalt tonnage of 6,903.70 tons. During the performance of the work, additional paving, over and above that which was called out in the plans, was required to be completed. A small portion of this additional work was recognized and

paid for through Work Order No. 5 in April 2014. However, Work Order No. 5 was never intended to be full and complete payment for all additional work. Beyond the additional work, a plan bust was discovered at the end of project which resulted in Astaldi performing a takeoff on the plan area shown as Special Detour 1. The area calculated did not match the “comp book” values. Supplemental Agreement # 23 was executed to compensate for the plan bust.

However, Special Detour 1 ultimately required far greater quantities than were called out in the plans or paid for by FDOT, and to this date, Astaldi has not been fully compensated for work that FDOT is currently enjoying. The actual area paved was 98,351.98 SY, more than fifty percent (50%) greater than the 62,760 SY depicted in the plans. As a result of WO # 5 and SA #23, Astaldi has been compensated for 69,096.33 SY, leaving 29,255.65 SY unpaid by FDOT.

98,351.98 SY	Total Area Paved
(62,761.00) SY	Area paid under pay item 0102 2 1 – Special Detour 1
(2,857.13) SY	Area compensated under WO # 5
(3,478.20) SY	Area compensated under SA # 23
29,255.65 SY	Total Area Unpaid

FDOT owes payment to Astaldi, therefore, for the 29,256.65 SY of unpaid asphalt.

2. Discussion

Special Detour 1 required Astaldi to provide temporary asphalt paving and limerock base per the Traffic Control Plans of Phase 1. The areas depicted in the Traffic Control Plans for the temporary work, however, did not encompass a majority of the temporary work that was actually required to tie in side streets, intersections and drives to the main line (US 1) during construction. Beginning in late 2013, Astaldi requested information from FDOT regarding how to tie in side streets that may require overbuild not shown in the plans for temporary asphalt in Phase I and II. On November 18, 2013, TEG provided a response and direction to Astaldi as to how to approach the tie-ins that were not shown on the plans.

On January 29, 2014, Target Engineering Group, Inc. (“TEG”) directed Astaldi to submit a price per ton for the Phase 2 temporary asphalt that “were not included in the asphalt plan quantities for Special Detour #1.” Moffatt noted that if agreement could be reached, it would be possible to execute a work order, and “another work order if any more of this type of overlay is required” (emphasis added).

On April 9, 2014, TEG did, in fact, execute a work order for the extra temporary asphalt paving (Work Order No. 05). The express language of Work Order No. 5 again confirmed the failure to fully identify temporary paving in the plans, and provided in part:

The plan summary of temporary asphalt quantities included in contract pay item Special Detour 1 did not provide for temporary paving on existing sidestreets or median crossovers within Phase 2 of the Traffic Control Plans. It is necessary to overlay multiple side streets and median crossovers to maintain drainage and a smooth riding pavement surface.

Per its express terms, Work Order No. 5 only compensated Astaldi for the “addition of 300 tons of temporary asphalt pavement” to overlay 2,857.13 SY of existing pavement.

As the project neared completion, Astaldi performed a takeoff on the plans on the original lump sum quantities and discovered a calculation error (plan bust) by the Engineer of Record, which showed that Astaldi was owed for

an additional 382.6 tons of temporary asphalt for 3,478.2 SY or the original plan quantity. Accordingly, on December 14, 2016, the parties executed Supplemental Agreement 23. See Attachment A2, compensating Astaldi for the plan bust of an additional 382.6 tons of temporary asphalt for 3,478.2 SY, at an agreed adjusted price of \$165.54 per ton, resulting in a payment to Astaldi totaling \$63,336.66. However, neither WO 5 or SA 23 compensated Astaldi for the thousands of additional square yards of temporary asphalt required to properly complete the work on the Project.

In total, Astaldi (through Middlesex, its subcontractor) was required to place a total of 10,896.72 tons of asphalt covering 98,351.98 SY. Through Estimate 43, ACC has only been paid for 7,586.30 tons covering 69,096.33 SY. Accordingly, Astaldi is owed payment for an additional 3,303.42 tons covering 29,255.65 SY. for additional unpaid overlay of asphalt that was necessary for connecting walks and drives not indicated in the plans.

3. Contract Justification for Entitlement

Astaldi sustained direct cost in connection with Special Detour 1. Astaldi is entitled to full compensation for direct cost following the provisions of the Contract that support this Claim:

- Section 4-3.6 of the FDOT Standard Specifications (“Specifications”) entitled “Connecting to Existing Pavement, Drives and Walks,” provides that “if the engineer determines that it is necessary to extend the construction in order to make suitable connections to existing pavement, the Engineer will authorize such a change in writing.”
- Section 9-3.1 of the Specifications provides that “[w]hen alteration in . . . 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 . . .” Section 9.5, governing partial payments, adds that “The Department will base the amount of such [partial] payments on the total value of the work that the Contractor has performed to the date of the estimate, based on the quantities completed and the Contract prices, less payments previously made and less any retainage withheld.”
- Section 9-3.3.1 of the Specifications, entitled “Error in Lump Sum Quantity”, provides that “Where the Department designates the pay quantity for an item to be lump sum and the plans show an estimate quantity, the Department will adjust the lump sum compensation only in the event that either the Contractor submits satisfactory evidence or the Department determines and furnishes satisfactory evidence that the lump sum quantity shown is in substantial error.” (Emphasis added.)
- Section 9-3.2.1 of the Specifications, entitled “Error in Plan Quantity,” defines “substantial error” 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.”

4. Summary – Contractor’s Position

Astaldi respectfully requests that the DRB issue a recommendation that Astaldi is entitled to recover from FDOT full compensation for all of Astaldi’s direct cost it incurred in connection with Special Detour 1. Astaldi further requests that a future hearing be held on the issue of the quantum of the compensation owed to Astaldi should the parties be unable to negotiate a settlement of Special Detour 1.

FDOT Position

The following summary of the FDOT’s position is based upon written materials submitted to the Board and upon the hearing presentation. The complete position is available in the FDOT’s submitted written materials.

Key Points

1. There is no entitlement for additional compensation for this issue.

The Contractor has already been compensated for the lump sum amount in the Contract for Special Detour 1 and two authorized changes for additional costs associated with Special Detour 1.

Previously authorized additional compensation associated with Special Detour 1:

1. Work Order #5 (ICA) – April 2014: 300 tons of additional temporary asphalt pavement was authorized and paid to overlay 15 side streets on the northbound side (all south of the SR 528 interchange) in Detour Phase 1 to maintain the required cross-slope of the travel lanes and tie into the existing pavement as directed in the EOR's response to RFI 26. The additional temporary asphalt was needed because these side streets sloped away towards the east, example provided on Plan Sheets 358 and 590. Overlaying three additional existing median crossovers was also included in the Work Order.
2. Supplemental Agreement #23 – December 2016: 3,478.2 SY of temporary limerock base and 382.6 tons of additional temporary asphalt pavement was authorized and paid due to a plan error in the dimensions of Special Detour 1.

There were no other plan revisions or authorized changes to the dimensions or quantities for Special Detour 1. (See Plan Sheets 563 and 566)

2. Previously Authorized Additional Compensation NOT Associated with Special Detour 1

There was an additional 850 tons of temporary asphalt pavement that was authorized and paid for in two Work Orders (#10-ICA and #9-SA 9) for overlaying the deficient existing friction course in the travel lanes in the TCP Detour Phase 2. This additional 850 tons was NOT associated with Special Detour 1 temporary asphalt.

3. Contractor's Responsibility as Provided in Contract Documents

The Contract Plans provided locations and dimensions of temporary asphalt to construct the travel lanes in Special Detour 1 to convey traffic safely through the work zone. Note #6 on Plan Sheet 562 requires the Contractor to include all temporary asphalt in the Special Detour pay items. Articles 102-1, 102-5 and 102-6 of Supplemental Specification Section 102 "Maintenance of Traffic" make it clear it is the Contractor's responsibility to provide facilities for access to businesses and residences, etc. along the project, and to construct and maintain the detour facility for the entire period the detour is required. This allows the Contractor to modify side street connections during water main tie-ins, construct of curbing or storm drain systems, etc. All other temporary asphalt quantities noted in Astaldi's claim were not authorized for payment and were due to maintenance of the temporary asphalt throughout the duration of each detour as required in the Contract Documents. The temporary pavement in Detour Phases 1-4 required multiple occasions of repairs in multiple locations throughout the travel lanes to maintain a smooth surface and maintain positive drainage. Maintenance of the temporary repairs was the responsibility of the contractor. Pursuant to the Specification 102-6, the Contractor was responsible for selecting materials for the temporary detour that would possess sufficient durability.

SUPPLEMENTAL SPECIFICATION SECTION 102 Maintenance of Traffic

ARTICLE 102-1 Description: Maintain traffic within the limits of the project for the duration of the construction period, including temporary suspensions of the work. Construct and maintain detours. Provide facilities for access to residences, businesses, etc., along the project. Furnish, install and maintain traffic control and safety devices during construction. Furnish and install work zone pavement markings for maintenance of traffic in construction areas. Provide any other special requirements for safe and expeditious movement of traffic control specified on the plans. Maintenance of Traffic includes all facilities, devices and operations required for safety and convenience of the public within the work zone. Include the cost of any work that is necessary to meet the requirements of the Contract Documents under the MOT pay item, when there is not a pay item provided.

ARTICLE 102-5 Maintenance of Roadway Surfaces- SUBARTICLE 102-5.2: Maintain all lanes that are being used for the maintenance of traffic, including those on detours and temporary facilities, under all weather conditions. Keep the lanes reasonably free of dust, potholes and rutting. Provide the lanes with the drainage facilities necessary to maintain a smooth riding surface under all weather conditions.

SUBARTICLE 102-5.4 Crossings and Intersections: Provide and maintain adequate accommodations for intersecting and crossing traffic...

ARTICLE 102-6 Detours-SUBARTICLE 102-6.3 Construction Methods: Select and use construction methods and materials that provide a stable and safe detour facility. Construct the detour facility to have sufficient durability to remain in good condition, supplemented by maintenance, for the entire period that the detour is required.

4. Summary- FDOT Position

No entitlement for additional compensation on this issue. The lump sum pay item for Special Detour 1 was paid in full. After negotiating and coming to an agreement on the amount of additional cost, the Contractor was compensated for all authorized payment for additional temporary asphalt associated with Special Detour 1 in the above mentioned Work Orders and Supplemental Agreement. The payment for temporary pavement for access to businesses/residences and maintenance/repairs was included in the MOT lump sum pay item per the Contract Documents.

Disputes Review Board Findings

1. The Contract Included a Specific Pay Item for the Work in Question

The disputed work was specified by Pay Item 0102 2 1 – Special Detour 1. The amount of asphalt pavement to be included in Pay Item 0102 2 1 – Special Detour 1 was specified on the project plans to be 6,903.7 TN. The amount of base was specified as 62,761 SY.

2. The FDOT Provided Additional Compensation to Astaldi for Some Pavement Areas Exceeding the Specified Quantity

Work Order #5 was issued to provide compensation for additional asphalt paving required at side street intersections.

3. Compensation for Changes in Lump Sum Pay Item Quantities is Addressed in the Contract Specifications

The obligation to provide additional compensation to the Contractor when Lump Sum Quantity is in error is contained in specification section **9-3.3.1 Error in Lump Sum Quantity**.

4. The Contractor Provided Satisfactory Evidence that the Lump Sum Quantity for Pay Item 0102 2 1 – Special Detour 1 was in Error

The asphalt paving in question was temporary pavement and therefore could not be verified by a visit to the project site at the time of the hearing. However, during the hearing a careful comparison of the project plan sheets to aerial photographs taken during construction indicated that the area of installed temporary pavement exceeded the area indicated on the TCP plan sheets.¹

¹ Project Aerial Photos taken December 2013

Disputes Review Board Recommendation

In this hearing the Disputes Review Board is addressing only the issue of entitlement.

The Disputes Review Board finds that the installed area of temporary pavement specified by Pay Item 0102 2 1 – Special Detour 1 may have exceeded the specified lump sum quantity. Accordingly the Disputes Review Board recommends that the Contractor is entitled to compensation for additional asphalt tonnage for pavement areas the Contractor can identify:

- the limits of the overrun,
- the tonnage placed within the area,
- that the paved area was required for Special Detour pay item and,
- that compensation has not previously been made.

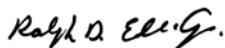
The Board appreciates the cooperation of all parties and the information presented for review in order to make this recommendation.

I certify that I have participated in all meetings and discussions regarding the issues and concur with the findings and recommendation.

Respectfully submitted,
Disputes Review Board

Ralph Ellis Jr. – Chairman
Don Henderson – Member
Murray Yates - Member

Signed for all with the concurrence of all members.



Ralph D. Ellis, Jr.
Chairman

Exhibit 1.1 Supplemental Agreement No. 22

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
SUPPLEMENTAL AGREEMENT

700-010-45
CONSTRUCTION
04/11

No. 22

Contract No.: T5431

Page 1 of 3

Road No(s). SR 5 (US 1) Federal Aid Project No(s). NA

Fin. Proj. ID 23759225201

This agreement entered into on _____, such an agreement to be effective on the last date of execution by a party hereto, by and between the State of Florida Department of Transportation, "Department", and Astaldi Construction Corporation, "Contractor", and Fidelity and Deposit Company of Maryland and Zurich American Insurance, "Surety", the same being supplementary to Contract T5431 by and between the parties aforesaid, dated January 15, 2013, for the construction or improvement of the road(s) and bridge(s) assigned the project number(s) shown above, in Brevard Count(y)(ies) Florida.

(1) See page 2 and 3 of this Supplemental Agreement.

Revised Plan Sheet Nos. 1, S-1, S-3A, S-5A, S-7A, S-9, and S-9A, dated 8/4/16, prepared by Parson are incorporated into the Contract by reference.

(2) The quantities to be paid shall be determined as provided in the Standard Specification, Edition of 2010. The quantities so determined shall be paid at the unit prices stated on the attached sheets.

(3) It is further agreed that this supplemental agreement shall not alter or change in any manner the force and effect of the original Contract No. T5431, including any previous amendments thereto, except insofar as the same is altered and amended by this supplemental agreement.

(4) The Department and the Contractor agree that the contract time adjustment and sum agreed to in the Supplemental Agreement constitute a full and complete settlement of the matters set forth herein, including all direct and indirect costs for equipment, manpower, materials, overhead, profit and delay relating to the issues set forth in the Supplemental Agreement. This settlement is limited to and applies to any claims arising out of or on account of the matters described and set forth in this Supplemental Agreement.

Granted Time this Agreement 104 Days

Net Change in Contract this Agreement: Increase \$ 1,813,354.52 Decrease \$ 0.00
No Change

Approved By:

Executed By:

John E. Tyler

Secretary or Designee Signature
Printed Name John E. Tyler, P.E.
Title District Construction Engineer
Date _____

Contractor Signature _____ (SEAL)
Printed Name _____
Title _____
Date _____

Executed By:

Secretary or Designee Signature
Printed Name Alan Hyman, P.E.
Title Director of Operations
Date _____

ATTEST _____
Secretary _____ Date _____
NOT REQUIRED (SEAL)
Surety _____

Attorney Signature, Department of Transportation, Legal Review
Printed Name _____
Date _____

BY _____
Florida Licensed Insurance Agent Date **A4**

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
SUPPLEMENTAL AGREEMENT

700-010-45
CONSTRUCTION
04/11

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No. 22 Contract No.: T5431
Road No(s). SR 5 (US 1) Federal Aid Project No(s). NA
Fin. Proj. ID 23759225201

(1) (continued):

In consideration for the \$1,813,354.52 increase in the contract price, and 104 days of additional contract time granted to the Contractor, the Department and the Contractor agree that FDOT Contract No. T5431 is amended to include the following items:

Each item below includes all labor, materials and equipment necessary to perform the work outlined below:

Item 1: Construct full depth variable width gaps (subgrade, base and paving) adjacent to the type E curb and gutter (17 locations), concrete traffic separators (33 locations) and median turn lanes (29 locations), tangent to US 1 in the northbound and southbound roadways. The amount associated with this work item is \$919,179.28. See attachment A for locations of work to be performed. Contract time granted in association with this work includes Fifty-seven (57) compensable days for the amount of \$355,647.51 as well as Thirty (30) non-compensable days, for a total of Eighty-seven (87) contract days.

Item 2: Construct cast-in-place modified Type 7 Inlet tops of drainage structures S-309, S-311, S-314, S-316, S-318, S-325 and S-334, located in the concrete traffic separator. The amount associated with this work item is \$39,959.87. Contract time granted in association with this work includes a total of Twenty-five (25) compensable days. Unilateral Payment #20 included nineteen (19) of these days which were granted along with compensation in the amount of \$2,609.83/day for a total of \$49,586.77. This Supplemental Agreement grants the additional six (6) days associated with this item in the amount of \$6,239.43/day for a total of \$37,436.58. This Agreement also compensates the Contractor for the difference of \$3,629.60/day for the nineteen (19) days previously granted in the amount of \$68,962.40. The total amount of compensation for time granted with this item is \$106,398.98.

Item 3: Construction and removal of temporary asphalt wedge transitions at five ramp intersections with northbound US 1 during the overbuild paving operations at the SR 528 interchange from Sta. 517+40 to Sta. 517+80, Sta. 520+15 to Sta. 520+90, Sta. 523+40 to Sta. 524+40, Sta. 531+40 to Sta. 532+90, Sta. 101+00 to Sta. 101+60 (Ramp C-1A), Sta. 200+90 to Sta. 201+30 (Ramp C-1B), Sta. 300+85 to Sta. 301+25 (Ramp C-2B), Sta. 400+10 to Sta. 400+60 (Ramp C-2A), Sta. 700+80 to Sta. 700+30 (Ramp D-2B) and Sta. 800+65 to Sta. 801+25 (Ramp D-1A). The amount associated with this work item that was not included in the previously executed Unilateral Payment #17 is \$147,918.76.

Item 4: Incorporate Plan Revision 16, deleting second coat of final surface painted pavement markings and replacing with thermoplastic pavement markings. The amount associated with this work item is \$257,033.52. Contract time granted in association with this work includes Eleven (11) compensable days in the amount of \$6,239.43/day for a total amount of \$68,633.73.

Item 5: Implementation of DCE MEMO 09-16 Public Records 7-14-16.

Reason 1: There were discrepancies in the dimensions of the work zones between the typical phasing details and the plan sheets of the Traffic Control Plans (TCP), resulting in variable width gaps that were not provided for in the TCP in the northbound and southbound roadways that required full depth construction.

Reason 2: Bottom sections of these structures as provided with dimensions in the plans did not conform to the standard Type 7 inlet tops also required in the plans. The inlet tops were required to be modified as approved by the EOR.

Reason 3: Construction and removal of temporary asphalt transitions and temporary pavement markings, and utilization of M.O.T crews during the significant overbuild paving operations at the US 1/SR 528 interchange were needed multiple times in order to cross traffic safely through the work zone until final structural pavement grade was constructed.

Reason 4: The Department elected to delete the second coat of final surface painted pavement markings and replace with thermoplastic pavement markings to comply with current standards and specifications.

A5

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
SUPPLEMENTAL AGREEMENT

700-010-05
 CONSTRUCTION
 04/11

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No. 22 Contract No.: T5431
 Road No(s). 5 Federal Aid Project No(s). NA
 Fin. Proj. ID 23759225201

Reason 5: See attached DCE Memo 09-16 which is made a part hereof.

Summary:

Issue #	Compensable Time	Non-Compensable Time	\$ Associated with Time	\$ Associated with Work Items
1	57	30	\$355,647.51	\$919,179.28
2	6	0	\$106,398.98	\$39,959.87
3	0	0	\$0.00	\$147,918.76
4	11	0	\$68,633.73	\$257,033.52 (\$81,417.13)
TOTALS	74	30	\$530,680.22	\$1,282,674.30

Total Contract Days = 104

Total Amount = 1,813,354.52

Direct costs for the amount of \$1,282,674.30. Indirect Costs for the Amount of \$530,680.22. Total Supplemental Agreement amount of \$1,813,354.52.

By signing this Supplemental Agreement, Contractor hereby agrees that any and all requests, claims, causes of action, issues, demands, disputes, matters or controversies of any kind or nature, including for time and compensation, known and unknown, on this Contract from January 15, 2013 through and including August 3, 2016, are hereby waived, and that this Supplemental Agreement represents a full and complete settlement of any and all issues, claims, causes of action, demands, disputes, and matters or controversies of any kind or nature by the Contractor from January 15, 2013 through and including August 3, 2016.

Exhibit 1.2 – Notice to Proceed dated July 12, 2016

Lombardo Domenico

From: Scott Moffatt <SMoffatt@targetengineering.com>
Sent: Tuesday, July 12, 2016 8:26 AM
To: Lombardo Domenico
Cc: Manzanero Robert; Jamal Hassouneh; Jim Boughanem; Clements, Richard; AnnMarie Cunningham; Rosemarie Artura
Subject: T5431 237592-2 NTP for SA #22

Domenico,

Our office has been advised that the funds for Supplemental Agreement #22 have been encumbered and approved. This Supplemental Agreement is for additional time, direct and indirect costs for delays incurred by Astaldi caused by the gaps between TCP Phases 2 and 5, and Phases 4 and 5, the modification of seven median inlet tops to conform with the bottom sections of the structures in the concrete traffic separator, and additional direct costs not included in the previously executed Unilateral Payment # 17.

This email is to notify you that the work accounted for Supplemental Agreement #22 can proceed. However, please be aware that your company will not be able to receive compensation for the work or additional time under this agreement until it is fully executed by the Department. If you have any questions in regards to this agreement, please don't hesitate to contact me.

Thanks,

R. Scott Moffatt

Project Administrator

4150 South Fiske Blvd., Rockledge, FL 32955

T (321) 634-6562 C (321) 624-8861

