

DISPUTE REVIEW BOARD RECOMMENDATION

July 24, 2017

PROJECT:

I-4 (SR 400) Widening from SR 44 to I-95

Volusia County, Florida

Financial Project 408464-1-52-01

FDOT Contract No. E5R16

INTRODUCTION:

Condotte / De Moya JV, LLC (Condotte / De Moya JV) was the prime contractor for the widening of I-4 (SR 400) from SR 44 to I-95 in Volusia County, Florida. The project consisted of approximately 72 lane miles of concrete pavement, the surface of which was ground to achieve smoothness. Concrete Services was a subcontractor to Condotte / De Moya JV and performed the concrete paving work.

After the concrete pavement was placed and ground, the measured smoothness (the Average Profile Index (API)), was less than 2. As a result of the measured API, Condotte / De Moya JV contends it is entitled to a pay adjustment (increase) for the quality of the smoothness in accordance with the provisions of Contract Specification Sections 4-1, 9-2.3.3 and 352-8.

The Florida Department of Transportation (Department) contends the pay adjustment (increase) provision of Specification Section 352-8 is excluded and does not apply per the terms and provisions of Specification Section 4-1. Section 4-1 excludes all pay adjustments except for certain noted items of Specification Section 9-2. The Department contends the pay adjustment of Section 352-8 is not an item that is included in the allowable pay adjustments of Section 9-2 as specified by Section 4-1. Therefore, Condotte / De Moya JV is not entitled to a pay adjustment (increase) in accordance with Specification Sections 9-2.3.3 and 352-8.

As a result of the disagreement between Condotte / De Moya JV and the Department regarding a pay adjustment (increase) related to the smoothness of the concrete pavement, Condotte / De Moya JV requested a Dispute Review Board (DRB) hearing and for the DRB to provide a recommendation on the following questions:

1. Are the pay adjustments provided in contract RFC development specifications Sections 350 for concrete pavement to be considered as “an adjustment of payment for quality,” as per 9-2.3.3?
2. Are the pay adjustments provided in contract RFC specifications Sections 352 for concrete pavement smoothness incentives to be considered as “an adjustment of payment for quality,” as per 9-2.3.3?
3. Does the pay adjustment detailed in specification Section 352-8 for the average profile index price adjustment apply to this contract?
4. If the pay adjustment detailed in specification Section 352-8 is determined to be applicable to this contract, should the unit price for concrete pavement be established as per 9-2.3.3, which requires the use of the statewide averages for six months prior to project letting, for 12” concrete pavement?

The Department requested the DRB to provide a recommendation on the following question:

1. Does the pay adjustment for incentive (API), as detailed in Section 352-8 of the specifications for the Average profile index, apply to this project?

The DRB hearing was held on July 13, 2017, at the Department’s District 5 Operations Center in Deland, Florida. Representatives of the Department and Condotte / De Moya JV in attendance, and who provided testimony at the DRB hearing, were:

For the Department

Paul Wabi – Construction Engineer
Ron Meade – Operations Engineer
Richard Hewitt – State Construction Pavement Engineer
Steve Wigle – Senior Project Engineer, WSP
Barry Johnson – Project Administrator, WSP

For Condotte / De Moya JV

Alvaro de Moya – President, de Moya Group
Grant Cool – Project Manager, de Moya Group
Rick Kontos – Vice President, Concrete Services
Roy Arias – Project Manager, Concrete Services

POSITIONS OF THE PARTIES:

CONDOTTE / DE MOYA JV POSITIONS

- The RFC contract specifications Section 9-2.3.3 allows for the pay adjustments based on quality.

Contract Section 4-1 states: *“Intent of Contract – Pay adjustments as shown in the Contract Documents, regardless of where those pay adjustments are referenced, shall not apply, except as provided in 9-2, Scope of Payments.”* (i.e. 9-2.1.1 Fuel, 9-2.1.2 Bituminous Material, 9-2.3.1 Deficiencies, 9-2.3.2 Asphalt Thickness/Spread Rate, and 9-2.3.3 Quality)

Contract Section 9-2.3.3 states: *“Quality: Where an adjustment of payment for quality is called for in the Contract Documents, the Engineer will make such adjustment for corresponding quantity of material based on the unit prices as determined using the six month State wide pay item averages. The dates will be the six months prior to the letting date for this Contract.”*

- Condotte / De Moya JV’s interpretation of 9-2.3.3 is that the quality adjustments referred to in section 9-2.3.3 are the same as any pay incentive or pay adjustment provided in the contract documents that embraces quality based standards.
- Concrete pavement pay adjustment as well as concrete pavement smoothness pay adjustments noted in Sections 350 - Cement Concrete Pavement and 352 – Grinding Concrete pavement should be considered as adjustments of pay for quality.
 - Section 350-14 Surface requirements – Produce by grinding in accordance with Section 352
 - Section 352-8: Basis of Payment (Concrete pavement grinding, pay price adjustment for incentives)
- The quality characteristics of concrete pavement pay adjustment as well as concrete pavement smoothness pay adjustments noted in Sections 350 and 352 are as equally important as asphalt quality characteristics detailed in Section 334.
- Enhanced concrete pavement smoothness is indicative of a quality concrete pavement in the same manner that achieving a maximum asphalt composite pay factor (CPF) adjustment demonstrates a quality asphalt pavement.
- Asphalt composite pay factor adjustments are being applied on this contract, on a monthly basis.

- The current DB boiler plate for specification Section 9-2.3.3, as well as Lump Sum Section 9-2.2.5, includes many quality adjustments without directly calling them “quality” adjustments in their respective specification sections.
 - 1/1/15 9-2.3.3: addresses quality adjustments and included specification Section 346, developmental specification section 330, and developmental specification Section 350. This provides further clarification that the pay adjustments noted in these sections are considered as “quality adjustments” by the Department.
 - Lump sum specification Section 9-2.2.5 includes numerous work scopes that are to receive adjustments to pay based on quality (I.E. Asphalt, Base, Structural concrete, Concrete pavement, Concrete pavement grinding, etc...)
- Condotte / De Moya JV’s interpretation is that “adjustments of pay for quality” applies to any work scope that has potential to receive positive and negative pay adjustments per their respective specifications sections, based on strict adherence within specification limits predetermined by the Department.
- Condotte / De Moya JV’s made great efforts and incurred more than \$1,000,000.00 of additional expenses to achieve the Ride smoothness adjustment. Following are the additional costs:
 - Dedicated full time survey crew used to verify asphalt base grades at 15’ intervals longitudinally per lane. \$200,000.00 of increased survey costs.
 - An additional 20+ paving days (at \$25,000.00/day) due to paving each direction in two pulls (24’ and 14’) instead of in one pull (38’). \$500,000.00 for trucking, equipment and labor.
 - Additional hourly grinding costs incurred to achieve the Smoothness incentive. \$50,000.00
 - ¼” Added concrete pavement thickness to insure sufficient additional grinding surface for the 535,000 SY of new concrete pavement. This converts to an additional 11,145 SY of equivalent concrete pavement, or an additional 3,715 CY of concrete paved. \$260,000.00 for straight ready mix produced at \$70.00/CY.

DEPARTMENT’S POSITIONS:

- Although Section 352-8 of the specifications provides a 3% incentive adjustment if the Average Profile Index (API) meets certain criteria, the incentive pay adjustment does not apply on this project because Section 4-1 of the specifications states pay adjustments on this project do not apply unless the pay adjustment is included in the exceptions listed in Section 9-2:
 - Fuel adjustments
 - Bituminous adjustments
 - Deficiency of materials that results in acceptance at reduced pay per specifications
 - Asphalt thickness deficiency more than 5% of the design spread rate
 - Where an adjustment of Quantity is called for in the contract

- The incentive pay adjustment is not available to the Contractor because the incentive is not included in the exceptions listed in section 9-2.
- Section 352-8 is an incentive contract provision and not a quality adjustment as provided for in Section 334-8 (Basis of Payment for Superpave).
- Because Section 352-8 is not included in the exceptions listed in Section 9-2 and because Section 352-8 does not expressly use the term “quality”, there is no entitlement for payment to the Contractor for achieving the incentive in Section 352-8.
- Section 334-8 (Superpave) and Section 337-12 (Friction Course), Basis of Payments are the only locations in the specifications that states based upon the quantity of the material, a pay adjustment will be applied.
- Section 352-8, basis of Payment for Grinding allows for a pay adjustment incentive which is based on the average profile index prior to any corrections. Very important to the Department’s position is the fact that Section 352-8 is not a quality adjustment.
- The Department did not apply pay adjustments for the following items as they do not state the adjustment is for quality of the material nor are they listed in section 9-2.3.2 as a thickness adjustment:
 - 200-10 – Thickness adjustment for base material
 - 350-20.1 – Thickness adjustment for concrete pavement
- Pay adjustments were made for asphalt thickness (spread rate) however, these are specifically listed in Section 9-2 (specifically 9-2.3.2) and apply per section 4-1.
- The Department did apply pay adjustments for the following items as they were allowed under Section 9-2-3.1 as a deficiency that results in the acceptance of a material at a reduced payment level.
 - 350-17 – Pay Reduction for Low Strength Concrete and Plastic Properties
- Incentive and quality are not interchangeable
 - Incentive is defined as a thing that motivates or encourages one to do something or a payment or concession to stimulate greater output or investment
 - Quality is defined as a degree of excellence, the standard of something as measured against other things of a similar kind, how good or bad something is.
- Condotte / De Moya JV’s position paper referred to an amended version of section 9-2 which is not a part of this Contract and therefore not relevant to this issue. Even if the amended version of section 9-2 did apply to this Contract, it would not support the Contractor’s position because the amended version of section 9-2 does not include Section 352-8 as an exception.

- If the interpretation that the intent of the specification, when referring to quality, means other aspects of materials or construction (specifically pavement smoothness) that are not mentioned in 9-2, then that interpretation is counter to the language in Section 4-1. Therefore, to make that interpretation, 4-1 would have to be considered completely null and void. Such interpretation is counter to the philosophy and industry standard of FDOT lump sum projects.
- The basic premise of a lump sum project is that the contractor bids a project and for that lump sum price the contractor provides what is in the contract.
- Lump sum contracts do have negative pay adjustments when the contractor does not provide what they promised to provide. Thus the concrete strength reduction. Technically we should also assess pay reductions for thickness for the same reason.
- When it comes to incentives (positive pay adjustments), they are only made in accordance with section 4-1 in that they must be listed in section 9-2.
- If the interpretation is that any material property or constructed property (in this case smoothness) is a quality property, then we must apply incentives to all lump sum projects and to do so violates the language of section 4-1 and the entire lump sum philosophy known throughout and currently followed by the road and bridge construction industry working on Department projects.
- The incentive pay adjustment for Average Profile Index in Section 352-8 does not apply to this project.
- If one were to take the interpretation that the intent of the specifications, when referring to quality, means other aspects of materials or construction (specifically pavement smoothness) that are not mentioned in 9-2, then one could argue all material properties and construction properties have quality aspects and therefore all incentives, in any section of the specifications, would apply. That interpretation is counter to the language in Section 4-1, therefore to make that interpretation one would have to consider 4-1 completely null and void.

DRB ANALYSIS:

In accordance with the terms and provisions of Contract Specifications Section 4-1, pay adjustments as shown in the Contract Documents shall not apply except for pay adjustments provided in scope of payments of Specifications Sections 9-2.1.1 Fuels, 9-2.1.2 Bituminous Material, 9-2.3.1 Deficiencies, 9-2.3.2 Asphalt Design Thickness/Spread Rate, and 9-2.3.3 Quality.

Condotte / De Moya JV contends that the pay adjustment provision of Contract Specification Section 352-8 is a pay adjustment for "Quality" under Specification Section 9-2.3.3 and thus applies to this Contract.

Condotte / De Moya JV representatives provided testimony that enhanced means and methods were utilized for pavement placement, at additional costs to Condotte / De Moya JV, to insure the provision for pay adjustment, as provided for by Specification Section 352-8, was achieved.

Specification Section 352-8 states a pay (price) adjustment for incentives is based on measured Average Profile Index (API). The Department contends the pay adjustment under Section 352-8 is for an "Incentive" and not for "Quality". The Department contends that the two words have different meanings and are not interchangeable. The Department stated "Incentive" is being a thing that motivates or encourages one to do something and "Quality" is being a degree of excellence, the standard of something as measured against other things of similar kind, or how good or bad something is.

The DRB concurs that the words "Incentive" and "Quality" are not interchangeable. "Incentive" can be a thing that motivates or encourages one to do something such as to achieve "Quality" or a degree of excellence, the standard of something as measured against other things of similar kind, or how good or bad something is. Thus, the pay adjustment incentive provision of Specification Section 352-8 can be an incentive for an adjustment of payment for quality.

Department representatives provided testimony at the hearing that pavement smoothness is a key "quality" characteristic of highway pavements, but since the word "quality" is not included in Specification Section 352-8, the pay adjustment for concrete pavement smoothness for a recorded API of equal to or less than 2 is not valid for this project by Specification Section 9-2.3.3.

Specification Section 9-2.3.3 does not specify that the word "quality" has to be expressly included in a specification section for the pay adjustment for quality to apply. Pavement smoothness has been recognized as a "quality" characteristic. The absence of the word "quality" in Specification Section 352-8 does not provide adequate notice by the Department that the pay adjustment provisions of Section 352-8, which is contained in the Contract Specifications, would not apply to quality of the pavement smoothness. It is the opinion of the DRB, Specification Section 352-8 pay adjustment, based on the API, is an adjustment for quality in accordance with Specification Section 9-2.3.3 and is not excluded from pay adjustments by Specification Section 4-1 as a result Section 352-8 not expressly including the word "quality".

Although Department representatives provided testimony at the hearing that it was the Department's intent to exclude the pay adjustment provision of Specification Section 352-8 from the Contract, such intent was not clearly stated by Specification Section 4-1 or elsewhere in the Contract Documents provided by the parties.

Given the understanding by experienced industry professionals that pavement smoothness is a key quality characteristic of highway pavement and by the wording of the Contract Specifications provided by the parties, it is reasonable to conclude that the pay adjustment provision of Specification Section 352-8 does pertain to adjustment of payment for quality in accordance with Specification Section 9-2.3.3.

In accordance with Specification Section 9-2.3.3, adjustment of payment for quality under this Contract is to be based on the unit prices as determined using the six month State wide pay item averages six months prior to the letting date for this Contract.

Condotte / De Moya JV representatives provided testimony at the hearing that Condotte / De Moya JV questions 1, 2, and 3 for a DRB recommendation all referred to the pay adjustment for smoothness of the concrete pavement (API) as provided for in Specification Section 352-8.

DRB RECOMMENDATIONS:

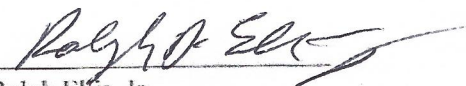
Contract Specification Section 352-8 Pay (Price) Adjustment, based on the initial measured Average Profile Index (API) prior to any corrective work, is considered an adjustment of payment for quality per Specification Sections 4-1 and 9-2.3.3 and applies to this Contract.

In accordance with provisions of Specification Section 9-2.3.3, the unit price pay adjustment for initial measured Average Profile Index (API) prior to any corrective work, as stated in Specification Section 352-8, is to be based on the six month Statewide pay item averages as stated in Specification Section 9-2.3.3.

These Recommendations, dated July 24, 2017, are based on the unanimous opinion of all the following Board members:


Matthew L. Michalak


Robert Bayless


Ralph Ellis, Jr.