

DISPUTE REVIEW BOARD RECOMMENDATION

February 11, 2005

E-Mailed: February 11, 2005

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Southland Construction, Inc.
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Mr. Paul R. Wabi, P.E.
Florida Department of Transportation
133 S. Semoran Blvd.
Orlando, Florida 32807
paul.wabi@dot.state.fl.us

CC: Mr. Edward F. DeVincenzo
Orlando Paving Company
P.O. Box 547186
Orlando, Florida 32854-7186
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RE: SR-426 (Aloma Avenue) from Eastern Beltway to North of Eyrie Drive.
F.P.ID: 240174-1-52-01
SPN: 77060-3518
FAP No.: 5961 004 U
Contract No.: 21164
County: Seminole

Issue: Non-Payment of Over-thickness FC-3

Dear Sirs:

The Contractor, Southland Construction, Inc, requested a hearing on behalf of its Subcontractor, Orlando Paving Company (A Division of Hubbard Construction Company), to **determine entitlement for payment of 568.4 MT of FC-3 on the project.** Since the quantity nor quantum are an issue, the Board is to determine entitlement or no entitlement for the extra FC-3 placed.

Pertinent correspondence and other information relating to the Department's and the Contractor's positions were provided to the Board for review and discussion at the hearing held January 31, 2005 at the Engineer's office, 133 S. Semoran Blvd., Orlando, Florida.

CONTRACTOR'S POSITION:

On August 30, 2004, Southland Construction, Inc. (SCI) requested a hearing on the subject issue for its Subcontractor, Orlando Paving Company (OPC).

Hubbard is requesting this hearing as a result of the Owner and inspecting authority, the Florida Department of Transportation, withholding payment due for work completed and accepted on the above award winning construction project. Hubbard, a subcontractor to Southland Construction on the above project, request payment due on an additional 568.4 tons of friction course (FC-3, 60Kg/M2) placed and accepted by the owner. This asphalt was placed in strict accordance with the plans and specifications. This item over ran and to date the additional 568.4 tons has not been paid for by the Owner. The asphalt friction Course on this project was bid, produced placed and accepted on a per ton basis. This project was also an urban project in which the majority of the roadway was constructed with and between curb and gutter. Due to market availability was forced to use a granite aggregate material possessing a greater unit weight than limestone aggregate. The Owner agreed to and paid for this issue on 2/25/04, therefore, Hubbard's request is for the additional 568.4 tons of friction course material placed and accepted, but not compensated to date by the Owner.

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Hubbard performed its work in strict accordance with the Contract Documents. We believe issue comes down to the following points.

- *The base acceptance criteria is essentially thickness, density and cross slope. Grade is not an acceptance criterion. The DOT inspected and accepted the base according to these criteria.*
- *The base specifications allow for a tolerance of +/- 13 mm (1/2").*
- *The line and grade for the asphalt is defined by the curb and gutter.*
- *Once the curb and gutter, and base are accepted the total asphalt to be placed is defined by the lip of the gutter and base elevation. The friction course must be even with or slightly over the lip of the gutter. This criteria and cross slope assure proper drainage of the roadway.*
- *The DOT accepted the base, they agree with the total quantity of friction course placed (10,397 Mtons) and they agree that the line and grade are correct.*
- *The Department is not paying for the 568.4 tons because of the 5% cap on over runs in the friction specification. We recognize this specification requirement, however once the Department accepted the base we were required by contract and duty to the public to use whatever volume of asphalt was necessary to complete this project to line and grade. In conversations with the department they have recognized this fact and indicated that if the overrun had been in the structural course they could have paid for it all.*

The situation is not new to this project. Attached documents will show where Hubbard has been compensated for additional tons placed in a similar situation in Duval County. Please see the attached email correspondence and the Supplemental Agreement, Exhibit 1. Additionally, in an email inquiry (Exhibit 2) to Mr. Prasad from Wayne Evans about this situation, Mr. Prasad responded and stated that "we end up with some overruns beyond the 5% due to the way the road is, we have on certain occasions paid for that as a field change...". Finally, the Florida Department of Transportation has realized that this issue is a problem and has submitted a proposed Specification change as shown in Exhibit 3.

In closing, the asphalt friction course is not a per square yard item and is to be paid on a per ton basis, without restrictions on pay. The project was built within the lines, grades and tolerances provided in the Contract Documents while being inspected and accepted by the Owner. There is no dispute over notice or that the material was actually placed on the project, nor any disagreement over the number of tons placed. Hubbard placed all the tons on this project in strict accordance with the plans and specifications and should be compensated for the additional 568.4 tons of friction course placed and accepted under the per ton contract. Hubbard respectfully request that the Board recommend payment for the additional 568.4 tons of friction course.

Letter of June 10, 2004 from OPC to SCI:

We (OPC) have reviewed the most recent Offer of Final Payment from the FDOT (dated May 11) and we do not agree with the proposed quantity for the FC-3 Friction Course. This Offer of Final Payment is for 9,828.6 Mtons, whereas the FDOT records indicate the placement of 10,397 Mtons.

We recognize that the Standard Specifications include provisions to limit the maximum payment to 105% of the spread rate established by the Engineer. However, this project was an urban reconstruction and widening project that includes concrete curb the entire length. The Friction Course, as the last lift of pavement, has to be paved to match the curb and to meet the requirements of the typical sections...and on this project the Friction Course pavement ties to the curb. As a phased project being constructed under traffic there is certainly an amount of adjustment that continues to take place during the Friction Course paving. The FDOT benefits from such adjustments which allow better opportunity for the driving surface to be smooth and at the appropriate line and grade. Also a benefit to the FDOT and the public are any adjustments that may contribute to the additional asphalt thickness and, as a result, added structural value and extended life of the pavement.

The FDOT records acknowledges the placement of 10,397 Mtons and is obviously the quantity that was necessary to construct the project to completion. Consequently, we can not accept the 9,828.5 Mtons as Final Payment and request the acceptance of this current Offer of Final Payment be Qualified to reflect the outstanding payment quantity of 568.4 Mtons of FC-3 Friction Course, for a total pay quantity of 10,397 Mtons.

DEPARTMENT'S POSITION:

Southland Construction requested a board meeting to address an unresolved friction course quantity dispute on the above referred project. The Department and Southland Construction agree on the amount of friction course placed on the project. Both of our records show that 10,397 MT of FC-3 (Pay item 2337-7-3) were placed on the roadway. But based on the limiting maximum payment allowed under Standard Specification 337, payment was limited to 9488.6 MT.

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Standard Specification 337-10 states that the pay quantity will be based on the average spread rate for the project, limited to a maximum of 105% of the spread rate set by the engineer in accordance with 337-8. Standard Specification 337-8.2 sets the spread rate of FC-3 within a range 54-69KG/M2 at the pre-paving conference. Both parties agree to the interpretation of these specifications.

As part of Southland's Acceptance on Offer of Final Payment, dated October 1, 2003, a letter from Orlando Paving Company, dated August 22, 2003, was submitted to the Department. On August 22, 2003 letter, OPC sites that "in the industry there has been shortages of liquid asphalt and required aggregate". Even though discussions took place internally within the Department regarding potential asphalt shortage due to the oil industry strike in Venezuela, the contractor did not mention having any difficulties at the time paving operations occurred. There were no difficulties reported to the Department by other paving contractors in the area regarding asphalt or aggregate shortages. It was only after the Department informed this contractor that they had exceeded the maximum allowed spread rate that letters citing shortages were sent to the Department.

As explained on their August 22, 2003 letter, it is apparent that OPC made a business decision to change from a Florida limestone to granite aggregate which would allow them to save on liquid AC cost. As indicated in their letter, in April they began incorporating an increase use of granite aggregate. April 29, 2003 was the first day friction course was placed on the project and June 5, 2003 was the last day friction course was placed on the project. During all this time, it was never mentioned to the Department that changes had taken place. According to OPC, the asphalt mix was switched from a limestone to a granite aggregate based mix, but such important decision that could substantially impact the cost of the project was never even mentioned to the Department. A unilateral business decision was made. A reasonable contractor does not make changes to the contract which impacts the cost of a project without obtaining approval from the owner.

To further demonstrate how this contractor was not in full control of their operations, one needs only to simply look at the asphalt mix design used (QA 03-10814A) to realize that this contractor did not effectively plan to stay within the 5% limit set by the specifications. The lab density of their chosen mix design is 2279KG/M3 which is equivalent to 62.15Kg/M2 per 25mm. This rate is already almost 4% above the target spread rate prior to any material being placed, leaving the paving subcontractor very little room (approximately 1%) for field adjustments. The actual project spread rate ended up being 69.03Kg/M2 per 25mm. This shows that the project spread rate placed exceeded the pre-paving conference target spread rate by 15% and their mix design target spread rate by 11%. This clearly shows that this subcontractor poorly planned their ability to stay within the specification tolerances.

Also on their letter dated August 22, 2003, OPC cites that Asphalt Price Index jumped 22%. As alarming as the notion of this seems, Section 9 of the Standard Specifications addresses adjustment of bid unit prices for bituminous material. The bid unit price for bituminous material was adjusted accordingly to reflect the increase in the Asphalt Price Index. An increase in the Asphalt Price Index does not constitute an asphalt shortage.

Southland Construction also presented to the Department another letter from its paving subcontractor. OPC's letter, dated June 10, 2004, mentions that on an urban reconstruction project the friction course has to be paved to match the curb and to meet the requirements of the typical section. The Department agrees that the contractor needs to pave to match the curb and typical section. However, project records indicate that not only did the subcontractor placed friction course in excess of the planned spread rate but also placed their structural course above the target spread rate as well. Given that the Department has verified the areas paved and paid are correct, this leads to the following two possibilities: A) The paving subcontractor placed friction course above the curb line or B) The grade of the underlying base course was not precise. For item A, there are some areas where friction is placed above the curb line, but it does not appear excessive. For item B, the contractor is responsible for constructing the base course true to line and grade. Either of the above possibilities are the responsibility of the contractor and not the Department. The June 10th letter also cites added benefits to the Department in the form of smooth surface, structural value and extended service life. Even though the Department did not request any of the added benefits, the Department recognizes that granite aggregate does provide added value to the product provided. For this reason, the Department, at its own discretion, decided to participate by making an adjustment to the maximum spread rate to include the increased weight for the granite aggregate. The Department executed a Supplemental Agreement in which the spread rate upper limit established in the Standard Specification 337-8.2 was increased from 60Kg/M2 to 62,15Kg/M2 which comes from the contractor's own mix design. Essentially the Department has compensated the contractor for 105% of the contractor's chosen mix design target spread rate which effectively increasing the compensable tonnage amount from 9488.6MT to 9828.6MT.

Contractor personnel have made the argument that if the additional asphalt material would have been placed as part of the structural layers, the Contractor would have been compensated for the additional material. As explained above, it is the contractor's responsibility to build the roadway true to plan and grade. It's the Department's position that it should not be penalized for inaccuracies made by contractors during the course of the project.

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DEPARTMENT'S RESPONSE TO CONTRACTOR'S POSITION PAPER:

The Department has received a second Position Paper written by Orlando Paving Company / Hubbard Construction (undated) and submitted by Southland Construction for the Upcoming SR 426 Dispute Review Board.

The Department has not agreed to the Contractor's position regarding this issue as implied in the subject letter from the Contractor. As explained in the letter written to the Board on 11/11/04, the Department entered into a ZERO DOLLAR Supplemental Agreement (Executed 4/6/04) increasing friction course spread rate upper limit from 60Kg/M2 to 62.15Kg/M2 which in turn increased the compensable friction tonnage from 9488.6MT to 9828.6MT. Payment for this increase has been made to the contractor. In effect, the Department not only increased the upper spread rate limit (Set forth on Standard Specification 337-8.2) to the spread rate derived from the contractor's own mix design, but also paid 5% over the spread rate derived from the contractor's own mix design. Please refer to attached illustration.

The Contractor contends that the Department accepted the base prior to placement of structural and friction courses. On this project, the Engineer did not accept portions of the Work (Work as defined by Standard Specification 1-1). Standard Specification 5-10 defines the three forms of acceptance of Work by the Department: Partial, Conditional, and Final. If the Department would have issued acceptance for a portion of the Work, we would have provided written notice of acceptance in accordance with Specification 5-10.2 when the portion of the Work was completed. This did not occur. The only notice of acceptance issued by the Department was provided at Final Acceptance.

*The Contractor is asserting that the Department is responsible for their having to place additional friction course. The Contractor appears to be arguing the Department's base thickness verification constitutes acceptance that the base was constructed at the correct grade. This argument is not supported by the Contract Documents. The Department stringlines the base to verify base thickness for pay purposes only. The Department does not check grades as the Contractor is responsible for constructing the work true to line and grade. This issue is addressed in Standard Specification 5-3. Specification 5-3 is supplemented by Specification 5-7.3 which requires for the contractor to establish all horizontal and vertical control necessary to construct the work in conformity to the Contract Documents. Furthermore Standard Specification 5-7.5 states that "**The Engineer's inspection, checking, or acceptance of the Contractor's field notes or layout work does not relieve the Contractor of his responsibility to achieve the lines, grades, and dimensions shown in the Contract Documents**". In addition to the base, the Contractor is responsible for ensuring that all portions of the typical section, including the curb and gutter, are built true to line and grade as stated in Specification 5-3.*

In closing, the Department has made full payment for each portion of pavement section in accordance with the contract documents. Stabilization of the roadway was paid in accordance with Specification 160. The base was paid in accordance with Specification 337. The bottom line appears to be that factors under the direct control of the contractor created a condition for which additional material was utilized. At its own discretion, the Department already provided a very reasonable adjustment to the contract. The Department does not believe it owes further compensation for friction course placed to make up any grade or any other discrepancies created by the contractor's operations.

BOARD FINDINGS:

- **Section 5-6 of the General Specifications: "Authority and Duties of Engineer's Assistants:**

*The State Construction Engineer may appoint such assistants and representatives as he desires. These assistants and representatives are authorized to inspect all work done and all materials furnished. Such inspection may extend to all or any part of the work and to the manufacture, preparation, or fabrication of the materials to be used. Such assistants and representatives are not authorized to revoke, alter, or waive any requirement of these specifications. Rather, they are authorized to call to the attention of the Contractor any failure of the work or materials to meet the Contract Documents, and the authority to reject materials or suspend the work until any questions at issue can be referred to and decided by the Engineer. The Engineer will immediately notify the Contractor in writing of any such suspension of the work, stating in detail the reasons for the suspension. **The presence of the inspectors or other assistant in no way lessens the responsibility of the Contractor**".*

- **Section 337-3.2.2.1 Aggregates (In part):**

*In addition to the requirements of Section 901, meet the following course aggregate requirements. Use either crushed gravel, crushed granite, crushed slag, or crushed limestone from the Oolitic formation as specified for use in FC-2. **Aggregates other than those listed above may be used** if approved by the Engineer.*

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- **Section 337-8 Thickness of Friction Courses:**

The thickness of the friction courses will be based on the spread rate set by the Engineer. Plan quantities are based on the maximum spread rate within the ranges shown below. Pay quantities may be less, based on the spread rate set by the Engineer.

- **Section 337-8.2 Spread rate for FC-3:**

The Engineer will set the spread rate range within the range of 100-110 lb/yd² [54-60 kg/m²].

The FC-3 was placed on this project from 04/29/2003 to 06/05/2003. The Department by Field Supplemental Agreement No.1, dated 02/25/2004, adjusted the spread rate as follows:

“This ZERO DOLLAR Field Supplemental Agreement increases the spread rate upper range limit established in Standard Specifications for Road and Bridge Construction 2000 Section 337-8.2 from 60Kg/M² to 62.15Kg/M²”.

This Field Supplemental Agreement also contained the following paragraph:

“The Department and the Contractor agree that the contract time and sum agreed to in this document constitute a full and complete settlement of the matters set forth herein, including all direct and indirect cost for equipment, manpower, materials, overhead, profit and delay relating to the issues set forth in this document.”

- **Section 337-10 Method of Measurement:**

The quantity to be paid for will be the weight in tons [metric tons], as determined in accordance with 320-2 (including provisions for the automatic recordation system). The pay quantity will be based on the average spread rate for the project, limited to a maximum of 105% of the spread rate set by the Engineer in accordance with 337-8.

- As part of the Contractors position Papers a copy of an e-mail to Wayne Evans (OPC) from Ananth Prasad, P.E. (State Construction Engineer) on 11/7/2003 1:07 PM stated:

“A couple of thoughts come to mind.... Why didn't the Contractor during the placement of the structural layers make sure that the cross-slope and grade is correct... you know that we do not like FC is be used as a “leveling” course...FC-6 is a little different ... but after your best efforts to get the cross-slope and grade during the structural course, we end up with some overruns beyond the 5% due to way the road is, we have on certain occasions paid for that as a field change most folks in the field don't like to ...

This e-mail is in response to a e-mail sent to Ananth Prasad by Wayne Evans on 11/06/2003 12:05 PM. which states:

“We were the subcontractor on the 426 project in Orange County the entire roadway was in a curb and gutter section. All the asphalt was paid for by the ton. The FC-6 overran the quantity by 900 ton after the 5% was added to the plan quantity. The engineer is not willing to pay us for the overrun. It is my opinion that we are due payment due to the fact that we matched the curb and meet the final grade and cross slope. If we had overran the structural course this would have not been a problem. What is your opinion?”

Since the asphalt actually laid was FC-3, the reference to FC-6 is either a typo or inadvertent misstatement. No position was presented to the Board there was any difference whether FC-6 or FC-3 was used.

- Ultimately, under the contract documents, it is up to the Contractor to control the placement of the structural asphalt against the curb in order to have the specified spread rate of the friction course remain within the pay tolerances.

BOARD RECOMMENDATION:

Based on the contract and the materials supplied to the Board and presentations to the Board at the DRB hearing, the BOARD recommends the Contractor is **NOT ENTITLED** to receive payment for FC-3 above the 5% allowed by Contract Documentations adjusted by the accepted Supplemental Agreement for change in aggregate.

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

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 the non-responding party.

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

Respectfully Submitted:

Disputes Review Board
E.K. Richardson, DRB Chairman
John H. Duke, DRB Member
Peter A Markham, DRB Member

SIGNED FOR AND WITH CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "E. K. Richardson", with a large, stylized loop at the end of the signature.

E. K. Richardson, P.E.
DRB Chairman