

DISPUTE REVIEW BOARD RECOMMENDATION

January 17, 2006

via: E-Mail

Ms. Kathryn Barnes
Project Manger
DAB Constructors, Inc.
P.O. Box 1589
Inglis, FL 34449

Mr. Armando Perez
Project Administrator
Tampa Bay Engineering Group
322 W. Burleigh Blvd.
Tavares, FL 32778

RE: Dispute Review Board Hearing
F.P.ID 238314-1-52-01, 238314-1-56-04 & 238314-1-56-05
Contract T-5063
US-441 From Eustis Drive to CR-44B
Lake County

The Contractor, DAB Constructors, Inc. (DAB) requested a hearing to determine **ENTITLEMENT** for payment under Developmental Specification 311 titled "Covering Existing Pavement Markings with Sand Seal Coat", pay item 2904-311-1 Sand Seal Coating – Square Meter for all existing striping obliteration. The Owner, The Florida Department of Transportation (FDOT) through its agent, TBE Group (TBE), found no Entitlement to this request, therefore denied this claim.

Pertinent correspondence, plan sheets and specifications relating to the DAB and FDOT positions were forwarded to the Dispute Review Board (DRB) for review and discussion at the hearing held January 6, 2006 at the FDOT Operations Center in Leesburg, FL.

CONTRACTOR'S POSITION:

1. On the above referenced project, D.A.B. Constructors, Inc. provided Notice of Claim, regarding pavement markings removal, to Tampa Bay Engineering Group, and TBE has denied the same. DAB has complained that it should be paid under pay item 2904311-1. Sand Seal Coating, for covering of all existing pavement markings. TBE, however, argues that only PART of the existing pavement markings are to be covered and PART are to be removed under lump sum price for MOT, which is governed by specification 102-5.9, "Existing Pavement Markings."

2. While DAB acknowledges specification 102-5.9 typically defines marking removal on any given project, this project is not typical. On this particular project, the Department of Transportation requested to test a new methodology for obliteration of existing pavement markings. The project's contract incorporates a developmental specification, which provides for an experimental process to cover, instead of remove, pavement markings. Developmental specification 311 "Cover Existing Pavement Markings with Sand Seal Coat," employs a sand seal coat to cover markings. See attached.

3. The plan sheets indicate transition areas to receive sand seal coat. Otherwise, the plan sheets are silent towards the use of the sand seal coat. The broad use of sand seal coat is nonetheless implied. The sand seal coat contract quantity far exceeds the quantity required for the planned transition areas. Thus, the plans intend the sand seal coat to be used throughout the project, not just in the transition areas. Moreover, the specifications, itself, in no manner limits the use of this new methodology.

4. When the Department incorporates a developmental specification in a project's contract commonsense dictates that the contractor is unlikely to have a prior experience with the same. DAB had no past experience with specification 311, no basis for its interpretation. DAB was forced to develop its interpretation for the text of the specification in light of the project's plans.

5. On its face, specification 311 is broad and all-inclusive. The specification provides “cover existing pavement markings with sand seal coat”. The text of specification 311 does not limit its application to the transition areas. To the contrary, it includes all existing pavement. This text read together with the plan quantity of sand seal coat, which far exceeded the quantity of pavement markings in the transition areas, left DAB with only one reasonable interpretation: the Department intended DAB to employ the experimental process throughout the entire project.

6. DAB interpreted the specified scope of the sand seal coat to include all striping obliteration. Reading the specification together with the plans, DAB reasonably interpreted the contract, as written by the Department. DAB relied upon this interpretation when bidding this project. Now, TBE has attempted to strip DAB of its interpretation, because the Department allegedly had a different intent. As the drafter of the contract, only the Department could clearly define its intent during the bidding process. DAB cannot be punished for the Department’s inaccuracy.

7. Clear instruction, via specification 311, was provided to DAB in regards to the obliteration of existing pavement markings. DAB was to obliterate 20,831 SM of pavement striping by the sand seal coat method. No other method is included in DAB’s bid, and in turn DAB’s budget.

DEPARTMENT’S POSITION:

It is the Florida Department of Transportation (FDOT) position that the Contract Documents provide clear and detailed information as to the location and limits of the Sand Seal Coat.

The requirements of Developmental Specification Section 311 (Covering Existing Pavement Markings with Sand Seal Coat) and the detailed information provided in the Traffic Control Plans for the limits and locations of the Sand Seal Coat in no way relieves the Contractor from the requirements of Section 102 of the Standard Specifications for Maintenance of Traffic.

The Traffic Control Plans sheets 467, 468, 469, 478, 480, 481, 482, 483, 492, and 493 all provide a legend with Begin and/or End Stations for the Sand Seal Coat. The notes provided on the Traffic Control Plans are consistent with notes used throughout the plans to identify locations and limits of other items such as Gravity Walls, Hand Rails, Ditch Pavement and others.

There is no record that any of the Contractors bidding this project had questions at the time of bid or were confused by the information provided for the Sand Seal Coat location or limits.

CONTRACTOR’S REBUTTAL:

D. A. B. Constructors, Inc. hereby files a written statement regarding the decision to deny the claim for payment for pavement marking removal.

Our basis for objection to the denial is:

- 1. This project was bid with developmental specification 311 titled “COVERING EXISTING PAVEMENT MARKINGS WITH SAND SEAL COAT”. This specification states to “Cover existing pavement markings with a sand seal coat...”.*
- 2. Only after the bid was D. A. B. informed of the Department’s intention that the specification apply to **PART** of the obliteration of existing pavement marking.*
- 3. If the Department intended that a modified interpretation of the specification be used they had an obligation to make clear to the bidder and should have modified the language of the specification and to do so prior to bidding.*
- 4. D. A. B. should be allowed to reprice the obliteration of existing pavement markings as a result of the after the fact clarification of specification 311.*

Additional details and statements are attached for your information.

BOARD’S FINDINGS:

The governing specifications for this project are the 2004 edition of Standard Specifications for Road and Bridge Construction.

1. **Section 5-2 Coordination of Contract Documents.**
These Specifications, the plans, Special Provisions, and all supplementary documents are integral parts of the Contract; a requirement occurring in one is as binding as though occurring in all. All parts of the Contract are complementary and describe and provide for a complete work. In addition to the work and materials specified in the Specifications as being included in any specific pay item, include in any such pay items additional incidental work, not specifically mentioned, when so shown in the plans, or if indicated, or obvious and apparent, as being necessary for the proper completion of the work under such pay item and not stipulated as being covered under other pay items. In cases of discrepancy, the governing order of the documents is as follows:
 1. *Special Provisions.*
 2. *Technical Special Provisions.*
 3. *Plans.*
 4. *Road Design, Structures, and Traffic Operations Standards.*
 5. *Developmental Specifications.*
 6. *Supplemental Specifications.*
 7. *Standard Specifications.**Computed dimensions govern over scaled dimensions.*
2. **Section 102-1 Description. (In part):**
(Last sentence) 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.
3. **Section 102-5.9 Existing Pavement Markings:** *Where a detour changes the lane use or where normal vehicle paths are altered during construction, remove all existing pavement markings that will conflict with the adjusted vehicle paths. Do not overpaint. Remove existing pavement markings using a method that will not damage the surface texture of the pavement and which will eliminate the previous marking pattern regardless of weather and light conditions. Remove all pavement markings that will be in conflict with "next phase of operation" vehicle paths as described above, before opening to traffic. Cost for removing existing pavement markings to be included in Maintenance of Traffic, Lump Sum.*
4. **Section 102-10 Work Zone Pavement Marking.**
102-10.1 (d) Work Zone Pavement Markings will be designated in the plans or by the Engineer as removable or non-removable.
5. **Traffic Control Plan Sheets for Phases I & II, IIB and III** on sheets 467-469, 478-483 and 492-493 clearly define the limits of all areas to receive the Sand Seal Coat with Beginning and Ending Station Numbers together with a Legend Identification.
6. **Section 311 Covering Existing Pavement Markings With Sand Seal Coat.**
311-1 Description: Cover existing pavement markings with a sand seal coat composed of an application of bituminous material followed by the application of a sand cover material across the full width of the roadway.
7. During the Hearing testimony was presented that the Developmental Specification for Sand Seal Coat did not accomplish the successful obliteration of existing pavement markings and was discontinued after two attempts in limited areas. The Contractor was directed to accomplish removal of existing striping by other approved methods. The Department also stated the Contractor would be compensated for removal of existing striping in all areas designated to receive the Sand Seal Coat.
8. Section 311 is silent on the areas to receive the Sand Seal Coat and who will designate the specific areas to be treated. This Specification is interrelated with the Special Provisions, Plans and Standard Specifications for construction direction.

It sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. The Dispute Review Board is bound, like the Contractor, to the terms of the Contract Documents relating to and governing the DRB.

BOARD RECOMMENDATION:

Based on the materials supplied the Board and presentations to the Board at the DRB Hearing, the Board finds NO ENTITLEMENT to the Contractors claim requesting Payment for Existing Pavement Striping Removal/Obliteration under Pay Item No. 2904-311-1 Sand Seal Coat – Square Meter except in the areas designated on the plans.

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

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 these issues and concur with the findings and recommendations.

Respectfully Submitted

Dispute Review Board

E. K. Richardson, P.E., Chairman
R. A. Lavette, Member
Mike N. Zembillas, 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 top.

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

Cc: William Bachschmidt, Randell Prescott, John Graves, Eddie Ferris, Boone Herberman