

## **Recommendation of the Regional Dispute Review Board**

Hearing Date: Sep 18, 2013, Contractor: Highway Safety Devices

**PROJECT:** FIN No. 4193330-1-52-01  
FAP No. N/A  
Contract No. E8M16  
Project Description: Lake County Canal Protection Program

**DISPUTES:** 1. Should the Import (Offsite) Material brought to this project and used as fill to obtain the lines and grades required by the Contract Documents be paid under existing contract pay item for Borrow?

2. Should the Subcontractor be paid his Contract Unit Price for Borrow (Truck Measure)?

3. Is the Contractor due additional compensation for borrow brought to the project to construct the Finish Soil Layer (hereinafter called Prepared Soil Layer)?

### **THE PROJECT:**

The prime contractor for this project is Highway Safety Devices, Inc. (Highway Safety). The improvements under this Contract consist of installing barrier devices such as w-beam guardrail and high tension cable barrier designed to prevent errant vehicles from entering canals, ponds and any other type of roadside water hazards adjacent to Florida's Turnpike in Lake County from MP 274.0 to MP 297.7. The nature of the work consisted of widening the shoulders by the addition of miscellaneous asphalt and placing new guardrail, completion of a Prepared Soil Layer on slopes constructed to 1:4, and installing new sections of high tension cable barrier. The work also consisted of the use of a small amount of borrow in specific areas of the project designated in the plans. The Contract was let on June 12, 2012 and Notice to Proceed was issued September 4, 2012 for this 280 day contract. The contract was final accepted on July 2, 2013.

### **NATURE OF THE ISSUE:**

The claim presented to the Regional Disputes Review Board (RDRB) is a pass-thru claim by AJAX Paving Industries of Florida (AJAX), subcontractor to Highway Safety. The scope of Ajax's work includes the construction of a Prepared Soil Layer and the use of borrow in two small and separate areas of the project specifically designated in the plans.

The RDRB is to make recommendations on entitlement only.

### **CONTRACTOR'S POSITION:**

The project included two pay items that are pertinent to this dispute:

- |   |            |
|---|------------|
| (1) Item 120-2-2 Borrow Excavation (Truck Measure)            | 3 CY       |
| (2) Item 162-1-12 Prepared Soil Layer 12"                     | 41, 225 SY |
| (incorrectly identified as CY in Contractor's Position Paper) |            |

Ajax expected the work to include re-grading the turf and topsoil on the existing slopes in the areas of the new barrier system, adding borrow as required to meet the specified new lines and grades and mixing the top 12" of the graded areas to provide a uniform prepared soil layer true to line and grade.

The presence of the pay item for Borrow Excavation (Truck Measure) and the absence of sufficient plan detail/cross sections/elevation information would lead a reasonable bidder to assume that payment for required import to meet plan grades would be under the pay item for Borrow.

The bottom line: Ajax incorporated many cubic yards of imported material into the Prepared Soil Layer pay item and now expects to be paid for that material as Borrow.

### **DEPARTMENT'S POSITION:**

The Prepared Soil Layer work is clearly detailed in the 13 typical sections in the contract plans. The typical sections require a 12" Prepared Soil Layer in accordance with Index 105 Treatment II, Option 2. The typical sections in combination with Index 105 and Standard Specification Section 162 provide information on how to construct the Prepared Soil Layer and how it will be paid for.

### **CONDUCT OF THE DRB MEETING:**

The Board reminded the attendees that the documents the members received prior to the hearing were:

- (1) The Highway Safety Devices Position Paper,
- (2) The Departments Position Paper, and,
- (3) The Highway Safety Devices Rebuttal Paper.

The full contract, the full plans and specifications were not sent to, nor reviewed by, the Board members prior to the hearing.

**The contractor made its presentation**, handed out a copy of its power point presentation, but no new information beyond the position paper and the rebuttal paper was offered.



Upon query by the Board, what the contractor thought when he noted that Borrow (Truck Measure) was only 3 CY, the presenter stated that it was assumed that the excavated turf and topsoil would be sufficient in quantity to meet the line and grade of the Prepared Soil Layer. The Board also asked whether the contractor excavated for benching in areas other than those two identified in the plans; the answer was no.

**The Department made its presentation.** Again, nothing new was offered beyond the position paper. The Board made several inquiries with regard to the plan sheets. DOT explained that there was sheet 9 in the plans that gave a breakdown of the project by station as to which typical sections were applicable at specific locations. Also, plan sheets 23 and 31 showed the two specific locations on the project where benching excavation was required to repair erosion; these are also the two areas where the 3 CY of Borrow material was to be used. Those three plan sheets were examined and verified by the members during the hearing.

#### **DRB FINDINGS:**

Members of the Board examined all submitted materials, carefully listened to the presentations by the parties and the discussions after the briefings. What is described below is the collective result of the members' analyses.

None of the typical sections in the plans show any excavation other than the benching for the erosion areas. So it is hard to understand how the contractor could assume that there was sufficient turf and topsoil on site to meet the grade of the Finished Soil Layer. And had the contractor correlated the matrix on page 9 of the plans with the typical section, an estimate of the additional material needed to attain grade could have been made.

The plan sheets 23 and 31 clearly show where the Slope Erosion Treatment shown on plan sheet 59 is to be applied. Benching was only required in those two areas and the detail called it "EMBANKMENT (BORROW EXCAVATION)." That is where the 3 CY of pay item 120-2-2 is to be applied.

Sheet 6 of the Plans and Index 105 refer to the material above the existing ground as "Borrow/Salvage Turf and Topsoil" and "Borrow" respectively. This may introduce some confusion to new bidders. However, the contractor and subcontractor represented themselves as experience FDOT bidders and thus knew, or should have known that this "borrow" was part of the Prepared Soil Layer and was not paid separately under item 120-2-2.

The most critical aspect of this dispute is the Basis of Payment for the Prepared Soil Layer. It is clearly stated what is paid for under this pay item.

Article 162-7 of the Standard Specifications Finished Soil Layer Basis of Payment states: *Prices and payments will be full compensation for completing all work specified in this Section, including furnishing, hauling, and placing material to the lines and grades shown in the plans. Payment will be made under; Item No. 162-1- Prepared Soil Layer – per square yard.*

Furnished material, even if it is called Borrow, is included in the price per SY.

**DRB RECOMMENDATION:**

The RDRB, with all members concurring, recommends that:

1. The Import (Offsite) Material brought to this project and used as fill to obtain the lines and grades for the Prepared Soil Layer **SHOULD NOT** be paid under existing contract pay item for Borrow?
2. The Subcontractor **SHOULD BE** paid his Contract Unit Price for Borrow (Truck Measure), but only for **SUCH MATERIAL THAT WAS INCORPORATED INTO EMBANKMENT AS CALLED FOR IN THE PLANS?**
3. The Contractor **IS NOT ENTITLED** additional compensation for **ANY MATERIAL HAULED TO AND INCORPORATED INTO THE PREPARED SOIL LAYER.**

On behalf of the members of this RDRB, I certify that we have participated in all the meetings of this Board regarding this issue and that we concur with the findings and recommendation.

Signed for the Board, Harold Massa, Gary Geddes, Lynn Gibson,

*Harold A. Massa*

HAROLD A MASSA, PE (ret)

Chairman

1 Attachment, List of Board Meeting Attendees



SIGNING SHEET  
DRB MEETING  
EBM16

09-18-2013

|                  |               |                                  |
|------------------|---------------|----------------------------------|
| Tom Woods        | HNTB          | TWoods@hntb.co                   |
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