



# OHIO DEPARTMENT OF TRANSPORTATION

CENTRAL OFFICE • 1980 WEST BROAD STREET • COLUMBUS, OH 43223  
JOHN R. KASICH, GOVERNOR • JERRY WRAY, DIRECTOR

April 3, 2012

Stewart Lovece, P.E., P.S.  
Cosmos Industrial Services, Inc.  
9103 Detroit Avenue  
Cleveland, Ohio 44102

Re: Project 155(11), LOR-2/MED-303  
Claim 03-110155-01, MOT for Structure LOR-2-04.59 L&R

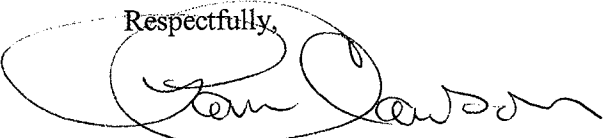
Dear Mr. Lovece:

Enclosed is the Director's Claims Board decision on the subject claim heard on January 30, 2012.

Under terms of the contract the Step 3 Director's Claims Board decision is the final step of the process and may not be appealed within the Department. You must either accept or reject this decision within 30 calendar days of receipt.

Please contact me at (614) 466-3957 with any questions.

Respectfully,



Pam Clawson  
Claims Coordinator

Copied via e-mail: O'Callaghan, Young, Zigmund, Ricciardi, Burchfield, Wilson, Mowery, Vitakis, Leonard, More, Barnes



DIRECTOR'S CLAIMS BOARD  
ODOT Project 155(11)  
Claim 03-110155-01  
Maintenance of Traffic Pay Items  
*Decided: March 28, 2012*

On Monday, January 30, 2012 at ODOT's Central Office in Room 4A, the Director's Claims Board ("Board") heard oral presentations of Cosmos Industrial Services, Inc. ("Cosmos" or "Contractor") and ODOT District 3 ("District") relative to the subject issue. Prior to the oral presentations and in accordance with the Dispute Resolution and Administrative Claim Process set forth in the contract, the Board received written documentation from the Contractor on August 31, 2011 and supplemented on January 23, 2012 and from the District on October 27, 2011.

The Board consisted of Megan O'Callaghan, P.E., Deputy Director, Division of Construction Management; James Young, P.E., Deputy Director, Division of Engineering; Lisa Zigmund, P.E., District Construction Engineer, D-6.

The District 3 representatives at the hearing were: Perry Ricciardi, P.E., District Construction Engineer; Jim Burchfield, P.E., Area Engineer; and Beth Wilson, Program Administrator.

Cosmos Industrial Services, Inc. was represented by Stan Vitakis, Steward Lovece, P.E., P.S., and Gina Mowery. Len More and Tate Barnes attended from Cleveland Barricading Systems, LLC, Cosmos' subcontractor. Al Leonard of The Great Lakes Construction Company also attended.

Pam Clawson, P.E., Claims Coordinator, Division of Construction Management served as the Secretary of the Board.

**PROJECT DESCRIPTION:**

This project included repair of structures at two locations: one in the City of Amherst in Lorain County and the other in Medina County. LOR-2-0459 L&R required minor guardrail work and repair and sealing of parapets. MED-303-0251 required beam seat repair, refurbishment of bearings, painting ends of beams, sealing the substructure, replacing expansion joints and back walls, a new concrete overlay, and minor approach work.

Cosmos Industrial Services, Inc. was awarded the contract on March 31, 2011. The contract was executed on May 13, 2011 in the amount of \$576,607.88. The original contract completion date was October 14, 2011. The completion date was subsequently revised to May 8, 2012 and the revised contract amount is \$607,001.50. The Contractor subcontracted the maintenance of traffic (MOT) work to Cleveland Barricading Systems, LLC (CBS).

**CLAIM OVERVIEW:**

Cosmos subcontracted with CBS to complete the MOT at both bridge locations. CBS, through Cosmos, is seeking additional compensation for several MOT items associated with the LOR-2 structures. The Contractor contends the itemized quantities set forth in the plans were not sufficient to cover both locations and it is entitled to additional compensation. District 3 contends it intended the basis of payment for the MOT for the two locations be different. MOT work associated with LOR-2 was to be

included the lump sum bid price for Item 614 Maintaining Traffic while the MOT work associated with MED-303 was to be separately itemized.

The Contractor requests an additional \$58,251.60 for the MOT items associated with LOR-2.

**SUMMARY OF THE CONTRACTOR'S POSITION:**

It is the Contractor's position that the quantities set forth in the plans for Portable Concrete Barrier, Work Zone Impact Attenuators, Work Zone Edge Line, Object Markers, and Barrier Reflectors were insufficient to compensate it for the MOT work associated with this projects. Specifically, the itemized quantities in the plans were only sufficient for the MOT for MED-303 and not LOR-2.

The Contractor argued that, although it is the District's contention that LOR-2 was to be paid Lump Sum MOT to provide the Contractor flexibility to design the MOT, it is not plausible for six reasons:

1. A plan note sets forth time constraints for work on the structures.
2. The work was directed to be carried out using SCD MT-95.40, which requires a lane closure using portable concrete barrier.
3. Both the left and right structures were to be worked on at the same time.
4. Work Zone Markings were to be 740.06, Type 1, Removable
5. Sealing work could only be carried out using SCD MT-95.30.
6. The project was bid as a design/bid/build and not a design/build project.

The Contractor referenced the Construction and Materials Specifications (C&MS) section 614.16 which provides, in part: "Unless separately itemized, the lump sum price bid for Maintaining Traffic shall include the cost of removal or covering of conflicting pavement markings, layout, application and removal of pavement markings when required..." The Contractor pointed out that the claimed items were separately itemized and therefore are not included in the lump sum price bid for MOT.

The Contractor continued to reference C&MS section 614.16 which also provides "The Department will pay for the following items under their associated item numbers: ...622 Portable Concrete Barrier." From this statement the Contractor further concluded PCB is not included in the lump sum price bid for MOT.

The Contractor continued to reference C&MS section 614.16 which also provides "The Department will pay for accepted quantities at the contract prices as follows: ...614 Each Object Marker, 614 Each Barrier Reflector, 614 Each Work Zone Impact Attenuator, 614 Mile (kilometer) Work Zone Edge Line." The Contractor pointed out that these items are included in the General Summary and Proposal along with unit prices. Further, these items are not designated as specific to any one structure in the Proposal.

The Contractor also pointed out that there was only one Item 614 Maintaining Traffic item included in the General Summary and Proposal and it was not designated "As Per Plan." An "As Per Plan" designation may have emphasized an unusual situation.

The Contractor argued that if the District intended the itemized quantities to be used for just one location, they should have said so clearly and succinctly. The drafter of the contract has the responsibility to ensure accurate and complete contract documents. The District's interpretation is inconsistent with standard industry practice and what bidders have come to expect with regard to the itemization of MOT items.

To reinforce its position that the District's interpretation is unreasonable, the Contractor referenced the

Department's Traffic Engineering Manual (TEM). Specifically, on page 6-118 under sub-section 641-5 Closing Right or Left Lane of a multi-lane divided Highway (MT-95.30, MT-95.40 and MT-95.50), 641-5.6 BID ITEMS:

The following items will be shown as separate quantities in the plans, when required: Item 614, Work Zone Edge Line, Class 1 (By Type), Mile, Item 622 Portable Concrete Barrier, \_\_\_ Item 614, Barrier Reflector each, Item 614, Work Zone Impact Attenuator each, Item 614, Object Marker Each.

The Contractor also referenced ODOT's Location and Design Manual (L&D). In its list of terms and definitions "Proposal Note" is defined as "a note that alters a pay item, standard drawing, C&MS or Supplemental Specification." "Standard Pay Item" is "an item whose requirements are defined by the standard construction drawings and the C&MS or the Supplemental Specifications." There were no proposal notes that altered the method of payment for these standard pay items within this contract. The Contractor recognized the TEM and L&D manuals are not Contract Documents but explained when they are used consistently the plans are uniform and contractors are able to bid consistently enabling the Department to get the best price.

To further reinforce its position, the Contractor referred the Board to another District 3 project which included multiple locations of work and itemized pay items to cover all locations. That project was consistent with the Department's standard practice and design guidelines while the subject project was not.

CBS acknowledged questioning whether there were enough quantities in the plans to cover all structures the night before submitting its quote to Cosmos. However, CBS did not view this as a plan error and the deadline for submitting a pre-bid question had passed. CBS submitted its quote assuming, based on its experience, it would be paid actual quantities.

The Contractor requests an additional \$58,251.60 for the MOT items associated with LOR-2. The Contractor explained the claimed amount increased from that set forth in their Step 3 documentation (i.e. \$35,431.20) as the work was still underway at that time.

### **SUMMARY OF THE DISTRICT'S POSITION:**

The District referenced several contract provisions beginning with C&MS 102.05 and 102.07. The District determined the Contractor failed to examine the Bid Documents and Project Site, notice the quantity discrepancies, and notify the Department of the error via a pre-bid question. All of these actions are required by these contract provisions and it is apparent the Contractor did not satisfy these requirements.

The District referenced C&MS section 614.16 which provides, in part: "Unless separately itemized, the lump sum price bid for Maintaining Traffic shall include the cost of removal or covering of conflicting pavement markings, layout, application and removal of pavement markings when required..." The District pointed out that the disputed items for LOR-2 are not separately itemized and therefore are included in the lump sum price bid for MOT.

The District explained this project involved two different sites that are in two different counties, Medina and Lorain. The Medina site is a two-lane, low-volume road with residential and agricultural access points. The work involved bridge reconstruction over the West Branch of Rocky River. The plan detailed the work zone, MOT, and estimated quantities for C&MS 622 and 614 pay items which were carried to the General Summary. The plan sheet setting forth the estimated quantities was entitled "Maintenance of Traffic Plan MED-303-0251 Over West Branch of Rocky River". The plan note title was "614-

Maintaining Traffic for Structure MED-303-0251". These titles were very specific and meant for just this location. The note states: "Payment for all labor, equipment and materials shall be included in the lump sum contract price for Item 614 Maintaining Traffic, unless separately itemized in the plan." The plan quantities exactly matched the final field quantities.

LOR 2 is a four-lane, divided interstate-look-alike with limited access right-of-way. The only plan MOT information provided for this location was a plan note entitled "614-Maintaining Traffic for Structure LOR-2-0459 L&R". This title was very specific and meant for just this location. The note states that MOT work shall be per Standard Drawing MT 95.40 and MT 95.30. The designer chose not to provide quantities for the MOT zone because of the uncertainty on how the Contractor would choose to access the work zone. The note states: "Payment for all labor, equipment and materials shall be included in the lump sum contract price for Item 614 Maintaining Traffic, unless separately itemized in the plan." Since there are no quantities itemized in the plans specifically for this location all work was to be paid for under the lump sum contract price for Item 614 Maintaining Traffic.

The District argued it should be obvious the quantities included in the plan were intended to cover the MED-303 location and not the LOR-2 location. The LOR-2 location required nearly four times the quantity of portable concrete barrier wall as the MED-303 location. The Contractor's interpretation that the quantities for the MED-303 site were to be used at the LOR-2 site is not plausible.

In response to the Contractor mentioning the lack of an "As Per Plan" designation, the District referenced Proposal Note 033 which states in part "...the absence of an "As Per Plan" designation on some item descriptions in the proposal for which there are clear and controlling plan notes does not relieve the contractors of the responsibility to read, bid and construct those particular items in accordance with the governing plan notes..."

The District pointed out the Contractor requested \$13,137.60 for damages at Step 2 and \$35,431.20 in their Step 3 submission. Then in January 2012 the Contractor increased its request to \$58,251.60 which is nearly 4.5 times the amount of their original request. The District reviewed the Contractor's submittal for accuracy and in the event the Board determines the Contractor is entitled the appropriate amount of damages would be \$54,513.60 based on actual quantities and using the bid unit costs.

## **DIRECTOR'S CLAIMS BOARD FINDINGS:**

### Facts

After careful review of the submitted documents and with due consideration of the information provided at the hearing, the Board finds the majority of the facts presented by the parties are either consistent or undisputed and can be relied upon to form the basis of this decision. The following facts are central to the issue of entitlement:

1. C&MS section 614.16 provides, in part: "The Department will pay for the following items under their associated item numbers: ...622 Portable Concrete Barrier."
2. Plan Sheet 6 entitled "General Notes" sets forth an MOT plan note for each of the two sites on this project. The following excerpt is included in both notes:  
All work and traffic control devices shall be in accordance with CMS 614 and other applicable portions of the specifications, as well as the Ohio Manual of Uniform Traffic Control Devices. Payment for all labor, equipment and materials shall be included in the lump sum contract price for 614, Maintaining Traffic, unless separately itemized in the plan.
3. Plan Sheet 7 provides the MOT details for the MED-303 site. This sheet also sets forth

estimated quantities for separately items MOT items which were carried to the General Summary. LOR-2 lane closures were required to be as per SCD MT-95.40.

4. The Proposal sets forth itemized MOT quantities. The items are included within the section entitled "0004 Maintenance of Traffic". There is no reference to specific structures. The Proposal sets forth one Item 614 "Maintaining Traffic" line item.
5. C&MS Section 105.04 Coordination of Contract Documents stipulates the Proposal is higher in the order of precedence than the plans and standard specifications.
6. Three out of four bidders appear to have interpreted the basis of payment for maintaining traffic in the same manner. In addition, the Department's estimators shared this interpretation.

Bidder	Reference 54 Maintaining Traffic	MOT Totals
Award	\$ 29,886	\$ 25,238
2	\$100,000	\$ 24,872
3	\$ 37,800	\$ 23,591
4	\$ 34,000	\$ 32,932

### Conclusions

This claim boils down to a matter of contract interpretation. The language of a contract is ambiguous if it is reasonably susceptible to two or more interpretations. When evaluating a construction claim involving contract interpretation, the contract must be viewed in its entirety and given the meaning imputed to a reasonably intelligent contractor acquainted with the involved circumstances. Ambiguities in a contract are construed against the drafter.

The Board starts its review with Item 622 Portable Concrete Barrier and C&MS 614.16 which clearly stipulates "The Department will pay for the following items under their associated item numbers: ...622 Portable Concrete Barrier." The Board concludes there is no conflicting language in any contract documents that are higher in the order of precedence that would modify this provision. Therefore, the Board concludes this work was not included in the lump sum contract price for Maintaining Traffic and the Contractor is entitled to additional compensation for this item.

The Board then refers to the plan notes on Sheet 6 that state the MOT items on MED-303 and LOR-2 will be paid under the lump sum price bid for Maintaining Traffic "unless separately itemized *in the plans [emphasis added]*". The District argues the separately itemized MOT items in the plans were only intended for MED-303 and NOT LOR-2. The Board concludes the plans and Proposal set forth separately itemized MOT items. In addition, the Proposal sets forth these quantities within the section entitled "0004 Maintenance of Traffic" with no reference to specific structures. Further, the plans and Proposal set forth a single Lump Sum Item 614 Maintaining Traffic bid item. The District's argument would require the Contractor to apply this single bid item in two different ways on the same project. Based on the Board's experience, it is unusual to have two different methods of payment for Maintaining Traffic within the same project and with only one bid item.

Next, the Board examines the bid tabs and the Department's Engineer's Estimate. Three of the four bidders on this project bid the MOT work similarly. Further, the Department's in-house estimators' interpretation was consistent with that of the three bidders.

Although not Contract Documents, the Board finds it noteworthy that this plan deviated from the Department's design standards (i.e. TEM) that set forth standard guidance for designers to produce high quality and consistent plans and is relevant for reference as an indication of standard practice.

Taking all of the above-mentioned factors into consideration together, the Board finds ambiguity in the Contract Documents which must be construed against the drafter (i.e. Department). Applying the above-mentioned standard of interpretation, it is the Board's determination that a reasonably intelligent contractor could have interpreted the method of payment for the claimed MOT items as separately itemized in the plans and in addition to the lump sum bid price. Therefore, the Contractor is entitled to additional compensation for the claimed MOT items (i.e. Work Zone Impact Attenuator, Barrier Reflector, Object Marker, Work Zone Edge Line, and Portable Concrete Barrier).

As stipulated in C&MS 102.05 and 102.07, it is the Contractor's responsibility to examine the Bid Documents and project site and to notify the Department of patent errors in Bid Documents. The Board is not convinced this situation involved a patent error. Contractors are obligated to exercise reasonable due diligence in preparing their bids. Reasonableness can be determined by many factors including project size, location, type, advertising duration, etc. This unfortunate situation emphasizes the importance of clear and unambiguous plans and design consistency statewide.


The Board would like to thank both the District and Contractor personnel for their professionalism in the hearing and for a job well done in building this project.


**DAMAGES:**

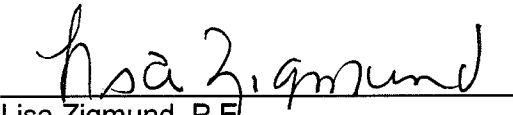
The Contractor was compensated the Lump Sum bid amount for Item 614 Maintaining Traffic. The Contractor was also compensated using itemized bid items for MOT on MED-303. The Contractor was not compensated using itemized bid items for MOT on LOR-2. Based on the above findings, and the District's review of the Contractor's claimed damages, the Board concludes the Contractor is entitled to \$54,513.60 additional compensation.

This recommendation is submitted this 28th day of March 2012.

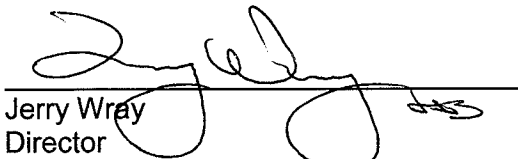
Director's Claims Board:

  
Megan O'Callaghan, P.E.  
Deputy Director  
Division of Construction Management

  
James Young, P.E.  
Deputy Director  
Division of Engineering

  
Lisa Zigmund, P.E.  
District 6 Construction Engineer

Approval of this recommendation:

  
Jerry Wray  
Director

4-2-2012  
Date