



**Director's Claims Board  
ODOT Project 477(08)**

Claim 03-080477-01

Chip Seal Warranty

*Decided: July 22, 2010*

NOTE: THE FOLLOWING IS AN "OFFER TO COMPROMISE" A DISPUTE SUBMITTED ON BEHALF OF THE OHIO DEPARTMENT OF TRANSPORTATION AS THAT PHRASE IS SET FORTH IN RULE 408 OF THE OHIO RULES OF EVIDENCE; THEREFORE, ANY ADMISSION OF FACT HEREIN OR ANY STATEMENT REGARDING AN OFFER TO RESOLVE THE DISPUTE HEREIN IS DEEMED INADMISSIBLE IN AN SUBSEQUENT LEGAL PROCEEDING.

On Tuesday June 8, 2010 at ODOT's Central Office in Room 1C, the Director's Claims Board ("Board") heard oral presentations of Specialized Construction, Inc. ("SCI" 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 March 12, 2010 and then from the District on April 15, 2010.

The Board consisted of William Lindenbaum, P.E., P.S., Deputy Director, Division of Construction; Halle Jones Capers, P.E., Deputy Director, Division of Highway Operations and Tim McDonald, P.E., Deputy Director, Division of Production Management.

The District 3 representatives at the hearing were: Perry Ricciardi, Mike Currier, Beth Wilson and Jeff Labaki and John Adamski. Dave Powers represented ODOT's Office of Materials Management.

John Alberty and John Galik represented Specialized Construction, Inc.

Tom Pannett, P.E., Esq., Administrator, Office of Contracts served as the Secretary of the Board.

Pam Clawson of ODOT's Division of Construction Management observed the hearing.

**PROJECT DESCRIPTION:**

This project consisted of chip sealing five routes in District 3 and included a two-year warranty on the work. The contract was signed on August 7, 2008. The original contract completion date was July 31, 2009 with an interim completion date of September 1, 2008 for the completion of chip seal and all other work on two of the routes, WAY 302 and RIC 96.

The original contract amount was \$1,517,678.60. The current amount is \$1,514,541.24.

**CLAIM OVERVIEW:**

Addendum Number 1 revised the interim completion date to September 15, 2008 and modified SS 882.04.2.c, by revising the prohibited period for placement of chip seal from September 1 to May 1, to September 15 to May 1.

The Contractor began work on August 19, 2008. The chip seal application on SR 302 in Wayne County began September 11, 2008 and was completed on September 17, 2008. In May 2009 the District became aware of loss of aggregate and streaking of the chip seal placed on WAY 302. In late summer of 2009 skid tests were performed on the WAY 302 section that indicated low skid resistance. The District directed the Contractor to correct the deficient work under the provisions of the warranty. By the time the Parties had worked through the Annual Review Process, the Remedial Actions discussions and the Appeals Process set forth in Supplemental Specification 882.05 through 882.07 it was too late in the year to perform chip seal work. As a result micro-milling was performed as a temporary correction for the skid resistance in the fall of 2009 at a cost of **\$24,759.30**. SCI is claiming its costs to perform the remedial micro-milling plus an additional **\$5,171.40** for claim preparation and consulting fees. SCI further claims it should be compensated for any permanent corrective work it performs, which it estimates to cost from \$130,000 to \$175,000.

**CONTRACTOR'S POSITION:**

The Contractor claims that ODOT's decision to alter the Construction & Materials Specification (C&MS) by Addendum to allow the chip seal work to proceed into mid-September caused that work to be performed too late in the season, resulting in inadequate temperature and sunlight and other adverse conditions. As a result, the emulsion was unable to properly cure causing the loss of stone. SCI further alleges the emulsion did cure out the following Spring with this improper curing process resulting in bleeding.

SCI alleges that ODOT delayed performance of the work following the bid opening on July 23, 2008. SCI argues that ODOT waited until July 31, 2008 to issue the Notice of Award and also delayed executing the contract. The Contractor claims it was not given authorization to proceed until August 18, 2008. SCI promptly began work on August 19, 2008 once it received notice. SCI claims these actions by ODOT caused the work to be performed too late in the season.

SCI also alleges that on September 3, 2008 ODOT improperly rejected cover aggregate material causing it to perform additional testing and further delays. SCI claims ODOT rejected cover material due to a rounding error of data on a test report. As a result SCI was forced to haul aggregate directly from the quarry to the spreader box rather than hauling to stockpiles near the work location as it had originally planned. SCI argues that all cover aggregate was within acceptable tolerances of the specifications. In addition, during the finalization of the project, SCI was notified that the emulsion material was not approved; however, no test results for this material were provided to the Contractor.

SCI maintains the material provided and its means and methods were all within the specifications and the cause of failure was the time of the year it was required to perform the chip sealing operation.

SCI also claims that the District made several procedural errors in its administration of SS 832 warranty provisions impacting its ability to timely pursue appeals and to perform remedial work. SS 882.05 required ODOT to conduct its first informal warranty review in late winter or early spring

2009. If a problem is noted the District is to conduct a formal review through its District Review Team (DRT). The Contractor is to be notified of this review so that it might attend and observe the Review. If a problem is noted the Contractor is to provide a Remedial Action Plan, which must be approved by ODOT before it is implemented. Any remedial action is to be performed between May 1 and September 1. SS 882.07 allows the Contractor the right to appeal the findings of the DRT to the DCE within 15 days of receiving the DRT's written results. The DCE is then to review the DRT's findings and the Contractor's appeal and render a written decision within 45 days of the appeal.

In contrast to the procedure described in SS 882 ODOT's first notice was sent to the Contractor on June 15, 2009. In this letter the District stated that a section of WAY-302 required immediate repairs and requested a plan for these repairs. SCI had not been notified of a review and had not been provided any written findings of a review. Also, on August 21, 2009 SCI was notified of a DRT review to be held on August 24, 2009. This review was held only 6 days before the September 1 chip seal cut-off date and allowed no time for appeal or remedial work.

ODOT issued a Partial C-85 on July 7, 2009 stating the work on WAY-302 was "acceptable". This Partial C-85 was modified on August 26, 2009 revising only the "Work Started" and "Physical Work Completed" dates. In addition a Final Inspection C-85 was issued on August 26, 2009 finding the work on the project to be "acceptable". No deficiencies in the work were noted on any of these documents. Lastly, SCI pointed out it received perfect scores on its C95 Contractor Evaluations at the end of the 2008 construction season and at the end of the project in July 2009.

SCI performed the micro-milling on October 15 and 16, 2009 to alleviate ODOT's immediate concern of low skid resistance. Force account records for this work were maintained indicating a cost of \$24,759.30. SCI is requesting reimbursement for the micro-milling plus an additional also claiming \$5,171.40 in claim preparation and consulting fees. SCI is asking ODOT to release SCI's bond and terminate its warranty.

### **DISTRICT'S POSITION:**

The District pointed out the interim completion date of September 15 was known at the time of the bid. Prior to this dispute the Contractor never suggested the chip seal work should not be performed after September 1 or that the warranty should be waived and did not provide early notice of a circumstance that may require a revision to the contract.

The District disputed SCI's assertion that ODOT unduly delayed the onset of the work. The total elapsed time from the bid opening to the first day of work was 27 days. This is well within the timeframe a reasonable and experienced contractor would expect for the execution of a contract. The progress schedule as submitted by the Contractor indicated an August 19<sup>th</sup> start date, which was the day SCI actually started work.

The District stated it did not order the Contractor to perform work beyond the September 15 cut-off date. The Contractor asked if it could continue with work and the District responded it could proceed if the weather conditions outlined in SS 882 were met. The District's concurrence with the Contractor's request was conditional. SCI determined conditions were adequate. Also, SCI signed Change Order Number 2 which modified the interim completion date to September 17 due to delays caused by weather with no objections or reservations of rights.

Further, SCI did not object to completing the WAY-302 chip seal work in September of 2008 while it was being performed. It was not until 2009, after SCI was asked to perform remedial work, that SCI raised objections to performing the work in September alleging that late season work was the cause for the failure. SCI did not provide Written Early Notice of a circumstance that could give rise to a dispute as required by the Department's Dispute Resolution Process.

The District disputes SCI's allegations that ODOT delayed the material approval process. The cover aggregate sample taken by SCI's consultant Hall Testing from the Wooster stockpile did not meet the specifications for both the 3/8" and #200 sieves. Test results were computed using appropriate protocols. The District stated SCI's testing firm repeatedly submitted samples taken incorrectly. Once the cover aggregate was properly sampled only four work days were required for approval to be granted. Central Office's testing of the chip seal emulsion was for the purpose of recertification of the supplier. The emulsion was not specifically sampled for this project and the issues regarding the testing of the emulsion have no bearing on this claim.

The District argues that the Contractor had adequate notice of the deficiencies of the WAY-302 chip seal in order to perform permanent repairs during 2009. There are at least 9 documented communications between May 20, 2009 and July 22, 2009. The District believed the Contractor intended to perform the remedial work under C&MS 105.11 rather than the provisions of 882 and proceeded on that assumption in good faith. It was not until SCI's letter of August 6, 2009 that ODOT realized SCI did not intend to perform any remedial work until a formal review had been performed by the District.

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

#### I. Facts

The Board finds that the majority of facts contained in the submissions and presentations 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 decision:

1. Addendum 1 revised the interim completion date to September 15, 2010 for chip seal and all other work on WAY 302 and RIC 96.
2. Addendum 1 also extended the date of placement period to September 15<sup>th</sup>.
3. The Department did not seek information or perform an analysis on the affects of performing chip seal work past September 1<sup>st</sup>.
4. Supplemental Specification 882 and Addendum 1 set forth the requirements for Chip Seal with Warranty.
5. The Director signed the contract for this project on August 7, 2008.
6. The Contractor performed the chip seal work on WAY-302 on September 11, 16 and 17, 2008.
7. Change Order Number 2 postponed the interim completion date to September 20, 2008 due to delays caused by weather. SCI signed this change order without objection.
8. An inspection for Partial Acceptance was performed on WAY-302 on October 8, 2008 and noted the work was found to be acceptable. The C-85 Partial documenting the findings of this inspection was not submitted to the Contractor until August 26, 2009.
9. On June 15, 2009 the District advised SCI in writing of conditions on WAY-302 and requested repairs.
10. The District performed a Final Inspection of the project on July, 9, 2009. The C-85

documenting the findings of the Final Inspection of the entirety of the project was dated August 26, 2009 and submitted to the Contractor on or about that date. The findings include deficiencies in the work performed on WAY-302.

11. SCI performed micro-milling of WAY-302 under protest.
12. The District did not follow the warranty review procedure set forth in SS 882.

## II. Conclusions

The Board is not persuaded that the Department's actions or inactions delayed SCI's commencement of the Work. The Board finds the 27 days which transpired between the opening of bids and the beginning of Work to be normal and reasonable.

The Board is not persuaded that the District improperly rejected cover aggregate materials. The Board finds that the District administered material approval requirements for this project appropriately and did not unduly delay the Contractor.

There was a lack of fact based evidence concerning the effect of late season placement on the performance of chip seal. Neither party adequately convinced the Board that the time of year the material was placed was or was not the cause of the failure of the chip seal. It is accepted that weather and atmospheric conditions during placement and cure are key elements to successful chip seal work. Since ODOT was responsible for the extension of the placement period beyond the standard specifications, the designer had a burden to determine if this action could potentially affect the performance of the chip seal prior to the issuance of an addendum. No such analysis was performed.

The District did not issue to the Contractor the C-85 for Partial Acceptance of WAY 302 until August 26, 2009 while the inspection had been performed on October 10, 2008 and it does not appear that a C-85 for Partial Acceptance was issued for RIC 96 at all. Issuance of the C-85 triggers the beginning of the warranty period. The Board finds that the warranty on WAY 302 and RIC 96 was not initiated in a timely manner and is therefore void.

The micro-milling work performed on WAY-302 was necessary to ensure the safety of the traveling public. Based on the above conclusions the Board determines that SCI should be reimbursed for its costs to perform the micro-milling. The Board further determines that SCI must credit the Department the value of the premium for the portion of the warranty bond for the WAY-302 and RIC-96 portions of the project since the requirements for bond protection have been waived.

The Board has determined that SCI is not entitled to reimbursement for claim preparation and consulting fees. C&MS 109.08.D disallows recovery of these expenses.

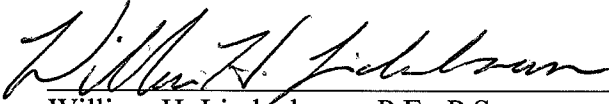
Lastly, The Board finds that the provisions of SS 882 will continue to apply to the remaining portions of the project.

### **DAMAGES:**

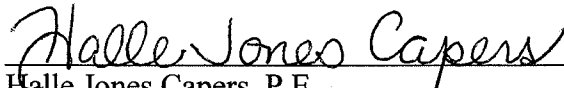
Based on the above findings SCI will be reimbursed \$24,759.30 less SCI's cost for the 2 year maintenance bond for the WAY 302 and RIC 96 portions of the project. This recommendation is submitted on this 22nd day of July, 2010.

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Director's Claims Board:



William H. Lindenbaum, P.E., P.S.  
Deputy Director,  
Division of Construction Management




Halle Jones Capers, P.E.  
Deputy Director,  
Division of Highway Operations



Tim McDonald, P.E.  
Deputy Director,  
Division of Production Management

Approval of this recommendation:

  
Jolene M. Molitoris  
Director, Ohio Department of Transportation

7/29/10  
Date