



Ohio Department of Transportation

1980 West Broad Street, Columbus, Ohio 43223-1102

June 6, 2008

Mr. Thomas F. Velotta
Velotta Company
P.O. Box 157
Sharon Center, OH 44274

Re: ODOT Project 543 (03) Decision

Claims: 04-030543-02 Temporary Pavement Repairs
04-030543-03 Form Safety Stop Removal
04-030543-04 "Over Inspection" of Bridge Painting

Dear Mr. Velotta:

Enclosed is the Director's Claims Board decision on the subject claims.

Under the 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 in writing within 30 calendar days of receipt.

Please contact me at (614) 466-3598 with any questions.

Respectfully,

A handwritten signature in black ink, appearing to read "William H. Lindenbaum".

William H. Lindenbaum, P.E., P.S.
Chairman, Director's Claims Board Hearing Panel

Copies sent via e-mail and post mail:

Director's Claims Board: Director Beasley
Director's Claims Board Hearing Panel: Bill Lindenbaum, Tim McDonald, Keith Swearingen
District 4: Phil Crish, Eric Czetli
Director's Claim Board Secretary: Tom Pannett
Claim File

**Director's Claims Board
ODOT Project 543-03**

**Claims: 04-030543-02 Temporary Pavement Repairs
04-030543-03 Form Safety Stop Removal
04-030543-04 "Over Inspection" of Bridge Painting**

Decided May 28, 2008

On February 4, 2008 at Central Office, the Director's Claims Board Hearing Panel (hereafter called the "Panel") heard oral presentations of the Velotta Company (hereafter "Velotta or Contractor") and ODOT District 4 (hereafter "District") relative to the above-referenced claims.

The Panel consisted of William Lindenbaum, P.E., P.S., Deputy Director, Division of Construction Management; Tim McDonald, P.E., Deputy Director, Division of Production Management and Keith Swearingen, P.E., P.S., Deputy Director, Division of Highway Operations.

The District representatives at the hearing were Phil Crish, Tony Pamer and George Rak. Also attending for the district were Mike Rahach and Eric Czetli.

The Velotta Company representatives at the hearing were Tom Velotta and Dave Eby. Subcontractor American Native Construction & Supply were represented by Nick Hazinakis and Lynn Hazinakis.

Tom Pannett, P.E., Esq. of the Office of Chief Legal Counsel served as the Secretary of the Board.

PROJECT DESCRIPTION:

This project was let on November 14, 2003 and awarded to the Velotta Company on November 17, 2003 for \$9,493,384.57. The project consisted of pavement resurfacing and replacement and bridge repair and replacement on IR 76 in Portage County. The project was 4.02 miles in length and included ten structures.

Claim 04-030543-02 Temporary Pavement Repairs

CLAIM BACKGROUND:

Claim 04-030543-02 is for compensation for repairs to temporary pavement.

SUMMARY OF CONTRACTOR'S POSITION:

The Contractor claims entitlement to compensation in the amount of \$61,863.52 for repairs it made to temporary pavement used to maintain traffic during the performance of this project. Specifically, temporary pavement was used in two work-zone crossovers constructed at each end of the project's pavement removal section to facilitate the re-routing of traffic as well as for an additional temporary west bound lane which the contractor proposed and the district accepted.

The contractor contends that the subgrade soils were unsuitable for supporting heavy interstate traffic. The contractor points to multiple change orders for subgrade remediation and for shoulder repairs in support of its position. The contractor also contends that it constructed all temporary pavements in accordance with Construction & Materials Specifications (hereafter C&MS) Item 615. C&MS 615.03 requires earthwork for temporary pavement to be performed in accordance with Item 203 which requires the Engineer to perform compaction testing. The contractor argues that since the ODOT Engineer did not perform compaction testing it was never informed that temporary pavement embankments or subgrade were unsuitable thereby prevented him from making any necessary corrections.

The contractor also claims that the design for the temporary pavement was inadequate to carry the heavy interstate at the project site.

The contractor asserts that the forgoing circumstances were beyond its control and caused the need for repairs to the temporary pavement for which it requests compensation in the amount of \$61,863.82.

SUMMARY OF DISTRICT'S POSITION:

The District contends that the contractor failed to perform earthwork and drainage installation required for construction of the temporary pavement in accordance with the contract requirements and industry practice and contrary to the instructions of the engineer. Specifically, the contractor used topsoil and sod as embankment materials neither of which is permitted by the specifications. The District also alleges that the contractor used soil excavated from temporary drainage conduit trenches for backfill of the conduit rather than granular material as required by the specifications.

The District also contends that the change orders referenced by the contractor as evidence of poor subgrade conditions and inadequate temporary pavement design were for extra work unrelated to the performance of the temporary pavement. Further, the change modifying the composition of the temporary pavement was initiated by the contractor.

The District also contends that the specifications assign the responsibility for maintenance of the temporary pavement to the contractor. Therefore, all costs for repairs are borne by the contractor.

DIRECTOR'S CLAIMS BOARD FINDINGS:

Facts

In light of all the evidence presented, the Board concludes that the following facts are a true and accurate representation of the relevant events leading up to this dispute.

1. Numerous failures of the temporary pavement and subgrade did occur and the contractor did perform the requisite repairs.
2. The contractor did initiate the change to modify the composition of the temporary pavement.
3. The contractor did construct portions of the earthwork required for the temporary pavement contrary to the requirements of the specifications.
4. The contractor did backfill the temporary drainage conduits required for the temporary pavement in a manner contrary to the requirements of the specifications.
5. The engineer did not perform compaction testing on the temporary pavement earthwork.

Conclusions

After careful review of the submitted documents and with due consideration of the information provided at the hearing, the Board determined the following to be significant findings relevant to the issue of entitlement:

First, the Board finds that the contractor did not perform portions of the work necessary to install the temporary pavement in accordance with the contract requirements. Corrections that flow from any defect resulting from noncompliant work are the responsibility of the contractor.

The Board will now address the contractor's allegation that the design of the temporary pavement was inadequate for the traffic and other conditions at the site. Since the contractor initiated a change order modifying the composition of the temporary pavement they effectively redesigned the temporary pavement. The contractor is responsible for

any and all circumstances that flow from their requested change and are responsible for the performance of their redesigned temporary pavement.

The foregoing notwithstanding, the element that the Board finds most persuasive is the contract itself. C&MS 615.07 clearly and unambiguously instructs the contractor to maintain the temporary pavement for as long as it is needed for maintenance of traffic. A reasonably prudent contractor would have included any costs for maintenance of traffic in its bid for the construction of the temporary pavement. Therefore, the contractor is not entitled to additional payment for work which is already included in the contract.

Based on the findings above, the Contractor is not entitled to reimbursement for any damages.

Claim 04-030543-03 Form Safety Stop Removal

CLAIM BACKGROUND:

Claim 04-030543-03 is for compensation for removal of safety stops from stay-in-place forms.

SUMMARY OF CONTRACTOR'S POSITION:

The Contractor claims entitlement to compensation in the amount of \$7,803.88 for removal for stay-in-place form safety stops which the district required to be removed prior to painting of structural steel. The contractor further claims that the removal of the safety stops is not required by the plan notes that govern the furnishing and installation of the stay-in-place forms and is therefore, extra work.

SUMMARY OF DISTRICT'S POSITION:

The District contends that C&MS 514.15.A instructs the contractor to "Paint all structural steel,...". The District argues that since the safety stop is placed over the bottom side of the top flange of the existing beam the surface covered by the safety stop cannot be painted until the safety stop has been removed. In order for the contractor to comply with the requirement C&MS 514.15 the safety stop must be removed.

DIRECTOR'S CLAIMS BOARD FINDINGS:

Facts

In light of all the evidence presented, the Board concludes that the following facts are a true and accurate representation of the relevant events leading up to this dispute.

1. The requirements for the furnishing and installation of stay-in-place forms are found in notes contained on page number 104 of the contract plans.
2. The plan notes instruct the contractor to furnish and install galvanized steel stay-in-place (SIP) forms.
3. Paragraph G of the plan note instructs the contractor to "Provide safety stops to eliminate hazards from sudden uplift and lateral movement.
4. Force Account records were kept to document the removal of the safety stops. The Contractor and the District agree that the cost of the safety stop removal is \$7,803.88.

Conclusions

After careful review of the submitted documents and with due consideration of the information provided at the hearing, the Board determined the following to be significant findings relevant to the issue of entitlement:

The Board finds that the plain meaning of the plan notes on page 104 is for the contractor to furnish and install galvanized steel forms that stay in place in their entirety without any removal. Since these requirements are found in the plans, and according to the order of precedence set forth in C&MS 105.04, they supersede any requirements that may conflict with the standard Construction & Materials Specifications. Although the District's instructions to remove the safety stops resulted in a better product, the Board finds these instructions to be contrary to the requirements of the contract.

Based on the findings above, the Contractor is entitled to reimbursement for all costs for the removal of safety stops from stay-in-place forms. The contractor is due reimbursement in the amount of \$7,803.88.

Claim 04-030543-04 “Over Inspection” of Bridge Painting

CLAIM BACKGROUND:

Claim 04-030543-04 is for compensation for additional costs resulting from “Over Inspection” of structural steel painting operations performed during the 2005 construction season.

SUMMARY OF CONTRACTOR’S POSITION:

The Contractor claims entitlement to compensation in the amount of \$170,400.00 for additional costs to perform structural steel painting during the 2005 construction season. The Contractor states that personnel performing inspection of structural steel painting operations were different than those who performed inspections during the 2004 construction season. The contractor claims that its costs for the painting work performed in 2005 increased by approximately \$6.00 per square foot over its costs to perform painting work in 2004. The contractor alleges that this increase in cost was the direct result of the department’s change in inspection staff and is evidence of their “over inspection”. The contractor alleges that the 2005 inspection staff held them to a higher standard than required by the contract. Specifically, the contractor claims that they were held to the 2005 specification standard rather than the 2002 specification which was contained in the contract.

The Contractor also claims that they provided their original quality control reports to the District and that the reports have not been returned. The contractor further claims that since they do not have quality control reports they are unable to submit an accurate claim.

SUMMARY OF DISTRICT’S POSITION:

The District contends that it inspected the structural steel painting operations performed in 2005 in accordance with the requirements of the contract. The District states it conducted a pre-paint meeting with the contractor on April 19, 2005 the purpose of which was to discuss the painting work to be performed that year. The District contends that the meeting concluded with all parties understanding and agreeing upon work requirements and quality control and inspection procedures to be used for the structural steel painting work which was scheduled to begin within a few weeks. The District contends that the stated work requirements and inspection procedures were in compliance with the contract requirements namely Item 514 of the 2002 Construction & Materials Specifications. Minutes of this meeting, prepared by the District, were submitted to the Board as a part of their claim rebuttal submission.

The District offered several theories as to why production may have been slower and costs may have been higher for painting work performed in 2005 in contrast to painting work performed in 2004. Bridges painted during 2005 were comprised of plate girders with a large number of web stiffeners while bridges painted in 2004 were constructed with rolled beams. Also, work in 2005 included a bridge constructed with galvanized

steel stay-in-place which had to be protected from damage during abrasive blasting and painting operations. The contractor bid all bridges, regardless of steel configuration, at the same unit prices for the structural steel painting items.

Lastly, the District contends that its inspector did not receive any quality control records from the contractor.

DIRECTOR'S CLAIMS BOARD FINDINGS:

Facts

In light of all the evidence presented, the Board concludes that the following facts are a true and accurate representation of the relevant events leading up to this dispute.

1. The 2002 Construction & Materials Specification Item 514 as modified by a proposal note requiring training and certification of the Quality Control Specialist set forth the contract requirements for structural steel painting for this project.
2. The Contractor did not present any evidence of work beyond the contract requirements that it was required to perform such as descriptions, dates and durations or specific instructions or actions by the District.

Conclusions

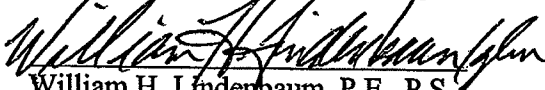
After careful review of the submitted documents and with due consideration of the information provided at the hearing, the Board determined the following to be significant findings relevant to the issue of entitlement:


The Board finds that the Contractor's claim lacks specificity. The contractor did not present any evidence to substantiate that it was required to perform the work to any standard more stringent than the contractual standard of reasonably close conformity to the stated contract requirements. Cost comparisons alone are not persuasive. The Contractor must also identify the work it performed beyond the contract requirements that contributed to the costs. Further, mere mention of a requirement is not sufficient to prove entitlement; rather, the requirement must be implemented such that it impacts the contractor's operations.

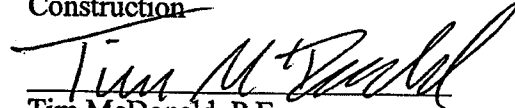
Based on the findings above, the Contractor is not entitled to reimbursement for any damages.

This recommendation submitted this 28th day of May, 2008.

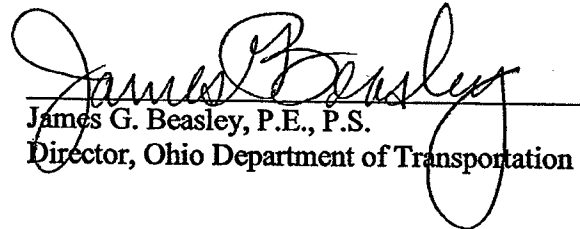
Director's Claims Board Hearing Panel:


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


Keith Swearingen, P.E., P.S.
Deputy Director, Division of
Highway Operations


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

Approved by:


James G. Beasley, P.E., P.S.
Director, Ohio Department of Transportation


Date