



Ohio Department of Transportation

1980 West Broad Street, Columbus, Ohio 43223

June 9, 2008

Greg Monsanty, P.E.
Wolf Creek Engineering and Contracting, Inc.
1288 Starlight Drive
Akron, Ohio 44306

Re: ODOT Project 441(06) Summit County – SR 21 (2.60) (4.62)
Claim: 04-060441-01 Structural Steel Price Escalation due to Sole Source

Dear Mr. Monsanty:

Enclosed is the Director's Claims Board decision on the subject claim heard on April 14, 2008.

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 within 30 calendar days of receipt.

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

Respectfully,

A handwritten signature in black ink, appearing to read "Pam Clawson", is written over a large, loopy scribble.

Pam Clawson, P.E.
Claims Coordinator

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



Director's Claims Board ODOT Project 441(06)

Claim 04-060441-01
Structural Steel Price Escalation due to Sole Source

Decided May 29, 2008

On Monday, April 14, 2008 at ODOT's Central Office in room 1C, the Director's Claims Board Hearing Panel ("Panel") heard oral presentations of the Wolf Creek Engineering and Contracting, Inc. ("Wolf Creek" or "Contractor") and ODOT District 4 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 Panel received written documentation from the Contractor on December 11, 2007 and March 28, 2008 and then from the District on February 22, 2008.

The Panel consisted of William 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.

The District 4 representatives at the hearing were Phil Crish, Tony Pamer and George Rak.

The Wolf Creek Engineering and Contracting, Inc. representative was Greg Monsanty. M. Jay Cunningham, John (Jack) Donadee and Vince Whorten of Ohio Structures, Inc. were also in attendance.

Tom Pannett, Esq., Acting 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 rehabilitated bridges on SR-21 over Greenwich Road and Reimer Road in Summit County. The original bid was \$1,973,143.08 and the current contract value is \$2,046,389.37. The contract was signed on 10/27/06, the contract completion date was 8/31/07 and the revised completion date was 11/21/07. The physical work was complete on 11/21/07.

CLAIM BACKGROUND:

At issue is the claim of a sole-sourced condition which resulted in an escalation to the cost of the structural steel for the Reimer Road structure. The plans required the replacement of existing steel beams. Wolf Creek contracted with Ohio Structures, Inc. to fabricate and furnish steel beams. Ohio Structures purchased the rolled beam section from the only domestic supplier, Nucor-Yamato Steel. Ohio Structures obtained pricing from these beam sections at the time of the bid via a purchase order (\$41.00/CWT); however, at the time of the shipment, the suppliers pricing had risen (between \$43.25 - \$46.00/CWT). Although Proposal Note 525, which allows for a steel price adjustment when the price of steel increases radically, is included in this contract, the fabricator has stated this adjustment is not

sufficient to recoup his additional costs. The additional compensation requested is \$7,572.35. Both parties agree the claim had no effect on the project schedule.

The Contractor submitted a letter requesting additional compensation for the structural steel on May 1, 2007. The project rejected the request, after asking for additional information, on August 21, 2007. The Contractor requested a Step 2 hearing on September 27, 2007. The Step 2 hearing was held on November 19, 2007 and no entitlement was found. On December 11, 2007 Wolf Creek submitted their Notice of Intent to File a Claim and requested a Step 3 hearing.

SUMMARY OF CONTRACTOR'S POSITION:

ODOT should pay for the additional steel price escalation over and above that recognized by Proposal Note 525 because ODOT required U.S.-made steel which is available through only one domestic source (see ATTACHMENT A: ORC153.011).

These costs are beyond the control of the Contractor. Nucor-Yamato would not hold the price for these products to the price listed at the time of the bid.

Ohio Structures claims that it had been paid for similar increases on other ODOT projects: 151(00), 212(95) and 634(97).

The Contractor also included a letter dated October 4, 2007 from Scottenstein, Zox and Dunn outlining the legal background for recovery of price increases on sole source steel items to demonstrate a legal precedent.

SUMMARY OF DISTRICT'S POSITION:

Proposal Note 525 (see ATTACHMENT B) is the only allowable compensation for steel price escalation. This was known by the parties at the time of the bid. The Steel Price Adjustment is intended to cushion sharp, unexpected increases in material costs, not to provide full compensation or to shift all the risk for price increases to the Department.

The Contractor did not seek relief and did not provide the District with an opportunity to mitigate the claimed circumstances under Section 106.09 of the C&MS. Section 106.09D offers relief for unusual circumstances. The Contractor never requested a review of this situation under this section.

D. Exceptions. The Director may grant specific written permission to use foreign steel or iron products in bridge construction and foreign iron products in any type of construction. The Director may grant such exceptions under either of the following conditions:

1. The cost of products to be used does not exceed 0.1 percent of the total Contract cost, or \$2,500, whichever is greater. The cost is the value of the product as delivered to the project.
2. The specified products are not produced in the United States in sufficient quantity or otherwise are not reasonably available to meet the requirements of the Contract Documents. The Director may require the Contractor to obtain letters from three different suppliers documenting the unavailability of a product from a domestic source, if the shortage is not previously established.

Most of the projects on which the Contractor claims it was compensated for similar price increases pre-date the contract provision PN525. Each project presents a unique set of circumstances, therefore,

previous action taken on projects in the past is not relevant to this situation.

The District presented a graph showing the historical price increases prior to the letting date that shows a linear upward trend that predicts a slightly higher cost than actually paid by the Contractor. Based on this information the fabricator should have anticipated an increase in cost from the bid date to the shipment date.

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. Ohio Structures did purchase the U.S.-made steel from the only domestic supplier, Nucor-Yamato Steel.
2. Nucor-Yamato Steel did offer a purchase order quote at the time of bid and did raise the price at the time of delivery.
3. Steel prices are volatile as demonstrated by data and graphs provided by the Contractor and the District.
4. PN525 is a term and condition of this contract and sets forth the requirements for compensation for escalation to the price of steel products.

II. Conclusions

In the hearing the Contractor presented data and charts to refute the District's contention that the price of steel could be predicted by a linear equation. The Contractor offered several equations that could potentially predict the cost increase better than the manner chosen by the District. The result of all of the Contractor's data analyses definitely demonstrated one thing – the cost of steel was rising at the time of bid and could be expected to continue to rise. The steel price increase was definitely foreseeable at the time of bid and a reasonably prudent contractor, knowledgeable of Nucor's quoting and billing practices would have factored that increase into its bid. ODOT offers PN525 as a remedy to cushion sharp increases but is not intended to absorb all risk a contractor may experience.

The Board does not consider the "sole source" argument relevant in this case. Regardless of where the Contractor purchased the steel, PN525 is provided as a remedy to cover sharp price increases and any other increases should have been expected as normal to the industry at the time.

The Board does not consider payment on other projects cited by the contractor to be relevant to this case. Mere mention of payments on other projects is not persuasive. The fact pattern of every payment must be considered separately. The contractor failed to identify similarities in the specific fact patterns that led to payment on the cited projects, therefore, they cannot be considered relevant.

Based on these conclusions, Wolf Creek has not sustained its burden of proving entitlement.

DAMAGES:

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

This recommendation submitted this 29th day of May, 2008.

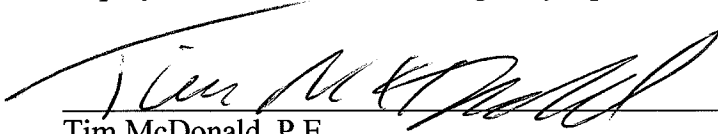
Director's Claims Board Hearing Panel:



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

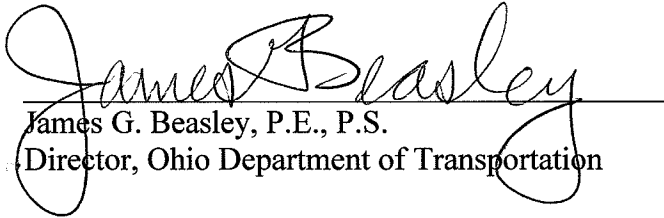


Keith Swearingen, P.E., P.S.
Deputy Director, Division of Construction



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

Approved by:



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

6/5/08
Date

ATTACHMENT A

ORC Section 153.011

153.011 Using domestic steel products in state supported projects. (Effective Date: 03-29-2001)

(A) Except as provided in division (D) of this section, whenever any building or structure, including highway improvements, in whole or in part supported by state capital funds, including moneys from the education facilities trust fund, is to be erected or constructed, or whenever additions, alterations, or structural or other improvements are to be made, if any steel products are to be purchased for or provided in the construction, repair, or improvement project, only steel products as defined in division (F) of this section shall be purchased for or provided in the project.

(B)(1) No person shall purchase or provide steel products in violation of division (A) of this section.

(2) Notwithstanding division (B) of section 153.99 of the Revised Code, no person who purchases steel products in violation of division (A) of this section shall be held liable in a civil action commenced under division (C) of this section, or pay a civil penalty under division (B) of section 153.99 of the Revised Code, if that person can demonstrate the person's compliance with division (E) of this section.

(C) Whenever the director of administrative services has reasonable cause to believe that any person has purchased or provided steel products in violation of division (A) of this section, the director shall conduct an investigation to determine whether the person has purchased or provided or is purchasing or providing steel products in violation of division (A) of this section. Upon conducting the investigation, if the director finds that the person has purchased or provided or is purchasing or providing steel products in violation of division (A) of this section, the director shall request the attorney general to commence a civil action under this section against the person for violating division (A) of this section. The remedy provided in this section is concurrent with any other remedy provided in this chapter, and the existence or exercise of one remedy does not prevent the exercise of any other. Upon collection of the civil penalty under division (B) of section 153.99 of the Revised Code, pursuant to an action authorized under this section, the attorney general shall pay the money collected to the treasurer of the board of education of the city, local, or exempted village school district and joint vocational school district, if one exists, in which the construction, repair, or improvement project for which the steel products used in violation of division (A) of this section is located. The treasurer shall deposit the civil penalty in equal amounts into the school district's general fund and the joint vocational school district's general fund. If a joint vocational school district does not exist where the violation occurred, then the entire sum of the civil penalty shall be deposited into the school district's general fund.

(D) Pursuant to section 5525.21 of the Revised Code, the director of transportation may authorize the purchase or provision or both of a minimal amount of foreign steel products for use in contracts for public bridge projects.

The director of administrative services may waive the requirements of division (A) of this section if the director determines that either division (A) or (B) of section 5525.21 of the Revised Code is true in connection with a public bridge project. The director shall issue this determination in writing.

(E) The following notice shall be included in boldface type and capital letters in all bid notifications and specifications between all parties to any contract authorized under Chapter 153. of the Revised Code or subject to this section and section 153.99 of the Revised Code: "Domestic steel use requirements as specified in section 153.011 of the Revised Code apply to this project. Copies of section 153.011 of the Revised Code can be obtained from any of the offices of the department of administrative services."

(F) As used in this section:

(1) "Steel products" means products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more of such operations, and used for load-bearing structural purposes, from steel made in the United States by the open hearth, basic oxygen, electric furnace, bessemer or other steel making process.

(2) "United States" means the United States of America and includes all territory, continental or insular, subject to the jurisdiction of the United States.

ATTACHMENT B

Proposal Note 525

Proposal Note 525 - Steel Price Adjustment – 8/2/2004

A. General: This proposal note acknowledges fluctuations in the cost of manufactured steel used in the materials defined below and placed as part of the applicable construction work in the form of a pay adjustment. This proposal note will be used in bidding documents only for as long as the price of the steel products set out below are subject to volatile spikes as determined solely by the Department. It is not the intention of the Department to make this proposal note permanent.

These price adjustment provisions apply to items in the contract including any modified standard or non-standard item where the work to be performed involves the placement or installation of one or more of the steel products specified herein.

The Department will publish a monthly adjustment index for steel using data obtained from the United States Department of Labor (USDOL), Bureau of Labor Statistics (BLS) Producer Price Index (PPI), using the average of Metals and Metal Products (WPU10), Iron and Steel (WPU101), and Steel Mill Products (WPU1017). This monthly index is listed as preliminary for four (4) months after initial publication. The Engineer will use the preliminary index data to compute progressive monthly adjustments with final adjustments occurring when the BLS data is finalized or at project closeout using the preliminary data, whichever occurs earlier. The Department will publish a monthly cost basis (CB) for steel using data obtained on the last Wednesday of the month from the American Metal Market (AMM). The cost basis shall determine the raw steel material price for Steel Plate, Cut-to-length as reported for National Mills; Steel – Rod, high carbon (1050) industrial quality as reported for the United States; and Steel – Bar, Merchant Products, Reinforcing Bar, as reported for the United States by the American Metal Market.

B. Price Adjustment Criteria and Conditions: Adjustments will be made to the contract for fluctuations in the cost of steel used in the manufacture of the primary components of only the steel products listed in Table B-1:

Product Relationship Table B-1		
Steel Product (Title)	AMM Product Designation (CB)	USDOL-BLS PPI (MI, BI)
Steel Piling and stay in-place steel casing Structural Steel Structural Steel Expansion/ Contraction Joints Steel Bearing Devices Guardrail Steel Traffic Strain Poles, Supports, and Mast Arms Steel Light Towers, Poles, and Mast Arms Sign Ground Mounted Beam Supports, Rigid Overhead Supports, and Span Wire Supports Steel Railing Corrugated Steel Pipe	Steel Plate, Cut-to-length (National Mills)	Average of, Metals and Metal Products (WPU10), Iron and Steel (WPU101), and Steel Mill Products (WPU1017)
Prestress and Post tensioning strand	Steel – Rod, high carbon (1050) industrial quality (United States)	
Reinforcing Steel	Steel – Bar, Merchant Products, Reinforcing Bar (United States)	

Nuts, bolts, rebar chairs, connecting bands and other miscellaneous hardware items shall not be included in the price adjustment. No other steel products shall be considered for a price adjustment.

Adjustments will only be made for fluctuations in the cost of the steel used in the above products as shipped from the producing mill. No adjustment will be made for changes in the cost of manufacturing, fabrication, shipping, storage, etc.

Adjustments may be positive, negative, or non-existent depending on the circumstances. Adjustments for the steel price will be calculated by the Engineer and processed by change order on the Contractor's progress estimate.

No steel price adjustments will be made for any products manufactured from steel having a mill shipping date prior to the letting date.

Furnish the following documentation for all Table B-1 steel products to be incorporated into the work. Submit all documentation to the Engineer prior to incorporation of the steel into the work. The Department will withhold progress payments if the documentation is not provided and at the discretion of the Engineer the work is allowed to proceed. Progress payments will be made upon receipt of the delinquent documentation. Submit separate documentation packages for each steel product in Table B-1 and for each quantity represented by items 2) c and d below. Label each documentation package with a unique number.

- 1) An affidavit signed by the Contractor stating that the documentation provided is true and accurate.
- 2) Identification of the steel product subject to adjustment.
 - a. Documentation package number: PN525 – (Insert the steel product “title” from Table B-1) – (Insert sequential package number beginning with “1”). Example: PN525 – Guardrail – 1, PN 525 – Reinforcing Steel – 2, etc...
 - b. The steel product quantity in pounds (kg).
 - c. Steel Certification and Mill Test Reports for the steel product.
 - d. The date the steel product, subject to adjustment, was shipped from the producing mill.

Upon the incorporation of the steel product into the work provide the Engineer the following:

- 1) An affidavit signed by the Contractor stating that the documentation provided is true and accurate.
- 2) Identification of the steel product subject to adjustment.
 - a. Documentation package number that was initially established for the steel product for which the price adjustment will be calculated.
 - b. The actual steel product quantity in pounds (kg) that was incorporated into the work.

Price Adjustment Calculations

The below formulas allow for a variation in steel prices without recognizing cost increases/decreases within the range of 95% to 105% of the Bidding Index (BI). The total steel price adjustment (SPA) will not be computed unless the percent **% Change** is 5% or more, increase or decrease:

$$\% \text{ Change} = [(MI/BI) - 1] \times 100$$

For a Price Increase:

$$SPA = [(MI/BI) - 1.05] \times CB \times Q$$

Example: If the average PPI for the month in which the project is let is 110 and the average PPI for the month in which the steel is shipped from the mill is 165 and the Cost Basis (CB) on the last Wednesday of the month preceding the letting date is \$0.32 per pound for a quantity of 50,000 pounds, then the price adjustment increase would be calculated as follows.

$$SPA = [(165/110) - 1.05] \times 0.32 \times 50,000 = \$7,200.00 \text{ (Increase)}$$

For a Price Decrease:

$$SPA = [(MI/BI) - 0.95] \times CB \times Q$$

Example: If the average PPI for the month in which the project is let is 165 and the average PPI for the month in which the steel is shipped from the mill is 120 and the CB on the last Wednesday of the month preceding the letting date is \$0.32 per pound for a quantity of 50,000 pounds, then the price adjustment decrease would be calculated as follows.

$$SPA = [(120/165) - 0.95] \times 0.32 \times 50,000 = - \$3,563.64 \text{ (Decrease)}$$

Where:

SPA = Steel Price Adjustment

MI = Mill Shipping Index. The average of the Producer Price Indices for Metals and Metal Products (WPU10), Iron and Steel (WPU101), and Steel Mill Products (WPU1017) as reported by the United States Department of Labor, Bureau of Labor Statistics for the month the steel was shipped from the producing mill.

BI = Bidding Index. The average of the Producer Price Indices for Metals and Metal Products (WPU10), Iron and Steel (WPU101), and Steel Mill Products (WPU1017) as reported by the United States Department of Labor, Bureau of Labor Statistics for the month preceding the month in which the project is bid.

CB = Cost Basis. The Consumer Buying Price Index value for either Steel – Bar, Merchant Products, Reinforcing Bar (United States); or Steel – Rod, high carbon (1050) industrial quality (United States); or Steel Plate, Cut-to-length (National Mills) as published by the American Metal Market (AMM) on the last Wednesday of the month preceding the month in which the project is bid. The CB (Cost Basis) shall be established for the product relationships listed in Table B-1 and shall establish the raw material base price. The price shall be adjusted to dollars per pound (kg).

Q = Quantity of the steel product, pounds (kg) actually incorporated into the work as documented by the Contractor and verified by the Engineer

C. Price Adjustment Limitations: The price adjustments are limited to a % Change of 50%, increase or decrease.

Example 1: If the average PPI for the month in which the project is let is 110 and the average PPI for the month in which the steel is shipped from the mill is 171 and the CB on the last Wednesday of the month preceding the letting date is \$0.32 per pound for a quantity of 50,000 pounds, then the price adjustment increase would be calculated as follows.

$$\% \text{ Change} = [(171/110)-1] \times 100 = 55.45\%$$

The limit is 50% thus the SPA is calculated as follows:

$$\text{SPA} = [(1.50) - 1.05] \times 0.32 \times 50,000 = \$7,200.00 \text{ (Increase)}$$

Example 2: If the average PPI for the month in which the project is let is 165 and the average PPI for the month in which the steel is shipped from the mill is 70 and the CB on the last Wednesday of the month preceding the letting date is \$0.32 per pound for a quantity of 50,000 pounds, then the price adjustment decrease would be calculated as follows.

$$\% \text{ Change} = [(70/165)-1] \times 100 = -57.58\%$$

The limit is -50% thus the SPA is calculated as follows:

$$\text{SPA} = [(0.50) - 0.95] \times 0.32 \times 50,000 = - \$7,200.00 \text{ (Decrease)}$$

D. Payment/Deductions: The price adjustment will be paid, or deducted from the Contractor's progress estimate, upon approval of a change order. The Engineer will use the preliminary BI and MI index data to compute progressive monthly adjustments with final adjustments occurring when the BLS data is finalized, (four months after initial publication) or at project closeout using the preliminary data, whichever occurs earlier.

If the price adjustment is based on estimated material quantities for that time, and a revision to the total material quantity is made in a subsequent or final estimate, an appropriate adjustment will be made to the price adjustment previously calculated. The adjustment will be based on the same

indices used to calculate the price adjustment which is being revised. If the shipping date(s) of the revised material quantity cannot be determined, the adjustment for the quantity in question, will be based on the indices utilized to calculate the steel price adjustment for the last initial documentation package submission, for the steel product subject to adjustment, that was incorporated into the particular item of work, for which quantities are being finalized.

Example: Reinforcing steel for a particular bridge deck was provided for in three different shipments with each having a different mill shipping date. The quantity of reinforcing steel actually incorporated into the deck was calculated and a steel price adjustment was made in a progress payment. At the conclusion of the work an error was found in the calculation of the final quantity of reinforcing steel incorporated into the deck. The quantity to be adjusted can not be directly related to any one of the three mill shipping dates. The steel price adjustment for the quantity in question would be calculated using the indices that were utilized to calculate the steel price adjustment for the quantity of reinforcing steel represented by the last initial reinforcing steel documentation package submission. The package used would be the one with the greatest sequential number.

E. Expiration of Contract Time: When steel products are shipped from the mill after expiration of contract time and liquidated damages are chargeable, steel price adjustments will be based on the MI for the month in which contract time expired.

F. Documentation Review: The Department reserves the right to inspect the records of the Contractor, its subcontractors, material fabricators and suppliers to verify the accuracy of the documentation submitted to the Department.

G. Extra Work/Force Account: When steel products , as specified herein, are added to the contract as Extra Work, in accordance with the provisions of C&MS Section 109, no steel price adjustments will be made for any products manufactured from steel having a mill shipping date 5 business days after the Department's request. Price adjustments will be made as provided herein however the BI shall be based on the month preceding the 5th business day after the Department's request. Moreover the CB shall be based on the applicable AMM Consumer Buying Price Index as published on the last Wednesday of the month preceding the 5th business day after the Department's request. For extra work performed on force account basis, reimbursement of actual material costs, along with the specified overhead and profit markup, will be considered to include full compensation for the current cost of steel and no steel price adjustments will be made.