

November 29, 2008      **EXPRESS MAIL**

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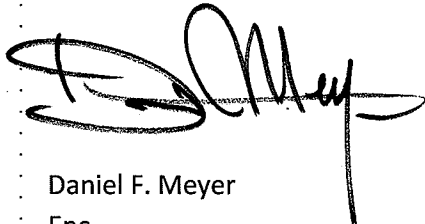
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The Velotta Company  
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Subject:            Arbitration – ODOT Project 534(03)-76-09.50  
                         Velotta Temporary Pavement Repairs  
                         Claim no. 04-030534-02

Dear Pam and Tom:

Enclosed is the ruling.

Best regards,



Daniel F. Meyer  
Enc.

# **OHIO DEPARTMENT OF TRANSPORTATION**

## **ODOT PROJECT 534(03) POR – 76-09.50 PORTAGE COUNTY I-76 PAVEMENT & STRUCTURES PROJECT**

### **THE VELOTTA COMPANY**

## **CLAIM 04-030534-02 TEMPORARY PAVEMENT REPAIRS**

## **ARBITRATION RULING**

### **I. BACKGROUND AND SUMMARY LEVEL DESCRIPTION OF DISPUTE**

The project comprised rehabilitation of four-lane I-76 highway [two lanes westbound (WB) and two lanes eastbound (EB)] with a fifty foot grass median strip. As part of the project, three sets of bridges were rebuilt along with approximately one mile of existing pavement. To facilitate the work, construction of various temporary crossovers were required for Maintenance of Traffic (MOT). After project award, as a result of a change order, one new temporary traffic lane was constructed via Change Order (CO).

The project owner is the Ohio Department of Transportation (ODOT) and the contractor is The Velotta Company (TVC). The project was sold on November 14, 2003 and the construction work has been completed.

This dispute is about compensation for certain subgrade excavation and pavement repairs related to the above referenced crossovers and temporary pavement lane.

The parties have stipulated that TVC is seeking ~\$16,947 for work associated with the temporary crossovers and ~\$23,262 for work related to the temporary pavement lane. In total, TVC is seeking ~\$40,209.

Each party submitted position and rebuttal papers. The parties elected to forgo an oral hearing and thus this case has been decided on the basis of the position and rebuttal papers.

It is not the intent of the Arbitrator to recount in detail each and every argument advanced by the parties. The Arbitrator has summarized the parties' most salient positions and believes that every position deemed to be material and significant to the resolution of this dispute has been considered.

## II. TVC POSITION

### General

In essence, TVC asserts that when installing the crossover and temporary pavement lane, it encountered differing site conditions (DSCs) in the form of unsuitable subgrade at various locations. The result of the DSC is that TVC was forced to: a) remove failed pavement, b) dig-out unstable subgrade material, c) replace the poor soil with new and d) then repave the affected areas.

Here, TVC relies upon *Section 104.2.B* of ODOT's *Construction and Material Specifications* (CMS) manual. This section provides for additional time and cost if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract documents or if unknown physical conditions of an unusual nature differing materially from that ordinarily encountered and generally recognized as inherent in the work provided by the contract documents are encountered.

TVC splits its compensation request into two parts: 1) temporary crossover work and 2) temporary pavement lane work.

### Temporary Crossover Work

As a threshold issue, TVC maintains that it was entitled to assume that the I-76 project which was originally built in 1965 was constructed according to ODOT specifications. Upon performing its cuts, fills and installing the first course of temporary pavement, TVC asserts that the pavement began pumping and had to

be fixed. As a consequence, TVC was required to; a) remove failing pavement, b) dig-out unstable subgrade material, c) replace the poor soil with new and d) then repave the affected areas. Once the above work was done, no further issues were experienced. The fact pattern, in TVC's view, supports its position that unexpected and poor subgrade caused many of the crossover failures.

TVC has acknowledged that it nevertheless experienced intervals of soft subgrade in its own fill areas but costs associated with those conditions are not included in its claim against ODOT. TVC points out that ~50% of the subgrade deficiencies were located in cut areas and, here, TVC asserts that ODOT simply should have insured proper construction in full compliance with ODOT specifications when the road was first built in 1965. If ODOT had built the road within specification requirements, there would have been no unsuitable subgrade encountered when it came time for TVC to do its work, almost 40 years later.

#### Temporary Pavement Lane Work

TVC advances the same general entitlement assertions in regard to unstable subgrade below the temporary pavement lane that it advanced for the crossovers.

With respect to the particulars of the temporary lane failures, TVC alleges that upon completion of its cuts and fills, 9" Type F concrete pavement was placed on TVC-prepared subgrade. Upon opening the lane to traffic, the new pavement failed. TVC points out that 100% of the failures were located in cut areas. TVC had to remove the pavement and poor subgrade and then repave. TVC concludes that bad subgrade was the culprit and, again, this condition would not have occurred if ODOT has seen to it that I-76 was properly constructed in 1965.

In response to ODOT's position that TVC merely took a risk and lost in regard to the efficacy of the Type F temporary pavement, TVC counters that it never assumed the risk of a poor subgrade DSC when it signed the September 2004 supplemental Maintenance of Traffic Agreement. This agreement sets forth that TVC is responsible for MOT expenses.

As additional support for its position, TVC contends that a contract plan note increased the pavement thickness by 2" due to higher expected truck counts and the import of that note coupled with the fact that signs were to be posted to keep trucks off the temporary pavement lane, caused TVC to conclude that the Type F pavement would work.

Here, TVC also asserts that ODOT failed to take the appropriate soil compaction tests in advance of pavement installation but if such tests would have been performed, TVC would have been apprised of the poor underlying soils and remedied the same. According to TVC, CMS *Section 615.03* calls for work to be done in accordance with *Section 203.02.D* and *Supplemental Specification 1015*.

These specifications, taken together, require soil compaction testing to be performed by ODOT.

### Other TVC Entitlement Arguments

TVC underpins its DSC claim by referencing some fourteen approved COs, all related to unsuitable subgrade material. TVC contends that the aggregate value of these COs is ~\$308,000 and this underscores the conclusion that during the project's design phase, ODOT was also unaware of the poor and unsuitable subgrade conditions. Thus, the poor subgrade was unexpected by all.

TVC has also asserted that it allowed ~\$100,000 for the contract's MOT pay item while other bidders allowed as little as ~\$40,000 for the same work. Accordingly, TVC asserts that it was a prudent bidder.

Finally, TVC contends that while contract plan sheet 20 delineates cut and fill quantities, the drawing does not mention poor subgrade soils which supports TVC's position that the ODOT designers were also unaware of the unsuitable soils. Thus, TVC maintains that it, as a contractor, could not have foreseen the poor actual conditions that forced it to incur additional cost.

## **III. ODOT POSITION**

### General

The instant project was a two-season job with the east bound (EB) work scheduled to take 90 days in year 2004 and the WB work taking another 90 days in year 2005. The MOT plan called for two lanes EB and one lane WB. The contract documents set forth a winter work limitation in that all traffic lanes had to be open during the period November 15 through April 1.

TVC's CPM schedule was aggressive and showed all work to be done in year 2004 but by mid-August, all parties knew that the schedule would not be met. As a result, TVC asked that an extra WB lane be built for safety purposes and a supplemental Maintenance of Traffic Agreement resulted so as to accomplish the work.

Under the agreement, if TVC completed all work by December 20, 2004, it stood to earn a bonus. Also, TVC agreed to shoulder all of the temporary lane expenses except for installation of the temporary pavement, per se.

As the project progressed, TVC missed the bonus date and had to keep the temporary lane operative through spring of 2005 and the extended use period contributed to roadway break-up.

As a general matter, ODOT disputes that 100% of the temporary pavement lane failures were confined to cut areas. Rather, such failures were distributed throughout cut and fill areas. ODOT also contends that TVC has presented no evidence that any of the encountered soil were actually unsuitable in nature. For example, ODOT contends that rain and standing water just before May 2004 crossover paving were the reason for TVC's subgrade difficulties.

### Temporary Crossover Work

ODOT asserts that the CO analysis offered by TVC is not proof that the subgrade material was unsuitable because the referenced COs were not, in fact, related to existing soil conditions. ODOT contends that COs 3, 6, 13, 17, 21 and 29 relate to improvements of shoulder pavements that were decades old. ODOT maintains that its designers obviously reckoned that such existing shoulders would be adequate to carry traffic during construction of the instant project but were simply wrong: the pavements failed within hours of being put into service. Under the above COs, the shoulder pavements were removed and replaced and no subgrade remediation was done – only new pavement was installed.

ODOT also points out that CO 4 allowed Type F pavement substitution at the crossovers and this was TVC's idea not that of ODOT.

As for COs 10 and 42, those were issued as part of partnering and merely enhanced TVC's overall paving efficiency on the I-76 project. Here, the existing subgrade was very sandy with type 310 stone mixed into the matrix: the blended material would not stand-up under construction traffic. Since a substantial amount of such traffic would be incurred in laying-down the new pavement, it was mutually agreed that, globally, 6" of existing subgrade would be removed (thus removing the troublesome material) and replaced with new 304 stone material. The replacement 304 stone was placed at the same time that the 304 stone called for in the contract was to be installed. Thus, according to ODOT, unsuitable material was not the subject of these COs.

CO 32 related to slope stability issues not to subgrade material.

In regard to the crossovers, ODOT also contends that TVC's work was out of specification. Type B conduits require 304 structural backfill but TVC instead used native material left over from its trenching operations. According to ODOT, this backfilling condition was a significant contributor to the various failures that are the subject of TVC's claim.

With respect to general embankments and subgrades, ODOT also points to certain CMS 203 and 201 shortfalls with respect to TVC's work. The specifications require clearing and grubbing and when scalping, all grass and sod has to be removed in cuts and fills. ODOT has offered photographic and other

evidence of specification violations with the result being that organic materials were incorporated into various cuts and fills.

With respect to TVC's issue that ODOT failed to perform required soil compaction testing, ODOT views this as a red herring – there is no such requirement for temporary roads which are the subject of the instant dispute. *CMS Section 615* earthwork is governed by *CMS 203* but there, *203.02.D – Compaction Testing* is merely definitional in nature – it only sets forth that when testing is required, it must be done in concert with *Supplemental Specification 1015*. Thus, the specification is silent as to when testing is required. *CMS 203.09* further states that when compaction testing is required, it shall be done in accord with *Supplemental Specification 1015* which is the relevant specification in regard to TVC's claim.

*Supplemental Specification 1015* sets forth that when testing fills, an 8" testing depth is to be used and, further, the general test area is to be prepared by first removing 6" of material and smoothing out the adjacent grade. ODOT has presented evidence that the crossover fills are only 12" deep to start with and since the specification requires a minimum of 14" to test, no testing is required.

Thus, ODOT concludes that TVC performed its work in a manner contrary to the specifications and this resulted in the failures about which TVC now complains. ODOT's contends that it did nothing wrong.

#### Temporary Pavement Lane Work

ODOT contends that *CMS Section 615.08 – Roads and Pavements for Maintaining Traffic* clearly places responsibility on TVC for all maintenance of temporary pavement and TVC has no valid claim for extra compensation. *CMS 615.07 – Maintenance* requires that temporary facilities be smooth for traffic and clearly states that no additional compensation will be made for maintenance work.

ODOT further maintains that *CMS Section 105.14 – Maintenance during Construction*, in essence, reiterates the above. *CMS Section 615.10 – Basis of Payment* also underscores the importance of the contractor maintaining pavements in proper condition as it references payment offsets if ODOT has to do the work of a contractor.

With respect to TVC's position that various COs support its claim of a DSC in regard to unexpected soil material, ODOT girds itself with the same CO analysis as set forth in regard to the crossovers.

ODOT also rebuts TVC's soil testing issue with the same analysis as set forth for the crossovers except ODOT has offered evidence that embankment depths are

less than that for the crossovers, namely, 6" on average, thus precluding compaction testing.

With respect to TVC's cite to a precedent in regard to Project 518 (05), ODOT rebuts that the referenced project entailed disaster repair pursuant to rain and flooding, which is not the same fact pattern as that in the instant claim setting.

ODOT also points out that other contractors typically do not deny their maintenance responsibilities and in the process has listed more than ½ dozen conforming contractors.

As part of its overall defense, ODOT contends that when TVC signed the September 2004 supplemental Maintenance of Traffic Agreement, TVC assumed full responsibility for all related costs except the lay-down of the temporary pavement, proper.

With respect to use of Type F pavement, ODOT notes TVC was aware that: a) a plan note had increased the project's asphalt pavement thickness by 2", b) daily traffic counts were ~26,000 and c) the truck count percentage was ~32%. Thus, according to ODOT, TVC took an inherent risk in signing up to the supplemental Maintenance of Traffic Agreement in which TVC elected to use the specification-standard 9" of unreinforced concrete pavement instead of the modified and thicker asphalt pavement used elsewhere on this project.

Finally, ODOT points out that the additional WB pavement-use duration was to be from October 21, 2004 through December 20, 2004, a total of 61 days. TVC reckoned that the temporary pavement would last for at least that long but was unable to get its work done and thus had to extend the use of the temporary pavement until May 26, 2005. More time required more maintenance and this was due to no fault of ODOT.

Thus, ODOT concludes that *CMS Section 615* clearly places responsibility for temporary pavement on the contractor, all of the State's highway contractors know that and, further, TVC signed a supplemental agreement underscoring the same. Moreover, with the high traffic and truck counts, TVC knew or should have known that its chosen form of temporary pavement would require maintenance.



## **IV. DISCUSSION OF RELATED FACTS, TESTIMONY, CONTRACT PROVISIONS, AND FINDINGS**

TVC's bedrock position is that it encountered a DSC in the form of unsuitable subgrade material which caused TVC to incur additional costs in both the crossovers and the temporary pavement lane. According to TVC, had ODOT constructed the original I-76 project in 1965 in accordance with the ODOT specification, TVC would not have encountered the unstable subgrade. TVC ties a bow around its position with the assertion that it had a right to rely upon a 1965 specification-constructed project.

Here, TVC is unreasonable on several accounts. First, it has presented no evidence as to the composition and requirements of the 1965 ODOT construction specification. Second, TVC has presented no evidence that the earthwork that it actually encountered was a result of the 1965 work being done out of specification. Third, TVC's instant contract contains no ODOT representations with respect to the type and adequacy of the subgrade material or of the 1965-era construction. In light of the above, TVC has failed to establish the basis for any reasonable DSC claim against ODOT. In short, the benchmark conditions for its claim have not been established nor have the differences as compared to benchmark been reasonably established.

As important as all of the above, TVC's instant contract at *CMS Sections 105.14 – Maintenance during Construction, 615.03 – Earthwork, 615.07 – Maintenance* clearly sets forth that TVC is responsible for general MOT and maintenance of temporary facilities and roads, all without additional compensation. Furthermore, TVC's bid included amounts for MOT. The contract language is plain and simple and cannot reasonably be ignored. The language of the supplemental Maintenance of Traffic Agreement is equally clear and straightforward in regard to TVC's shouldering all costs related to the additional pavement lane (exception noted above) including maintenance.

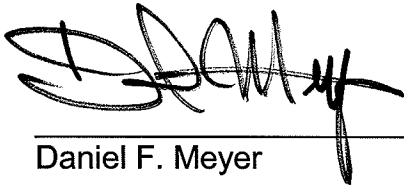
In regard to TVC's cite to the Project 518(05) as comprising a *precedent*, ODOT's different-fact-pattern rebuttal is persuasive and TVC has not challenged the same notwithstanding its opportunity to do so.

In addition to the above, while both sides have made much of the project's various COs which each party in turn references in support of its position, that dialogue is not determinative with respect to the resolution of this dispute for two reasons. First, the contract provisions are clear and governing, as set forth

above. Second, the change order documentation in the main has not been entered into the record.

## V. ARBITRATION RULING

Based on the position and rebuttal papers provided by the parties, TVC is due no additional cost related to this claim. ODOT's skirts are clean with respect to the issues herein.



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Daniel F. Meyer

November 29, 2008

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