



**DIRECTOR'S CLAIMS BOARD**  
**ODOT Project 80(08), PIC-23-10.38**  
**Claim 06-080080-01**  
**Bridge Painting-Scope Change due to Railroad**  
*Decided: April 6, 2011*

On Wednesday, February 23, 2011 at ODOT's Central Office in Room 4A, the Director's Claims Board ("Board") heard oral presentations of Shelly and Sands, Inc. ("Shelly & Sands" or "Contractor") and ODOT District 6 ("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 October 30, 2010 and then from the District on January 31, 2011.

The Board consisted of Megan Blackford, P.E., Esq., Deputy Director, Division of Construction; Dave Humphrey, P.E., Acting Deputy Director, Division of Highway Operations and James Young, P.E., Acting Deputy Director, Division of Production Management.

The District 6 representatives at the hearing were Lisa Zigmund, P.E.; Chuck Kiner, P.E.; Jeff Holbrook, P.E.; Bruce Birch and Don Shreve.

Tom O'Brien, P.E. represented Shelly and Sands, Inc. Christ Boukis, Esq.; Peter Boukis and Steven Boukis represented Standard Contractors ("Standard" or "Subcontractor"), Shelly and Sands' painting subcontractor for this project.

Chet Lyman, Esq., Assistant Legal Counsel, Office of Chief Counsel served as the Secretary of the Board.

Pam Clawson, P.E., Claims Coordinator of ODOT's Division of Construction Management observed the hearing.

**PROJECT DESCRIPTION:**

This project was located in Pickaway County, north of the City of Circleville. The project consisted of the rehabilitation of several bridges, including structure 10.38 left and right over the railroad tracks owned by CSXT Transportation. The scope of the project included Item 514, painting of structural steel.

Shelly and Sands, Inc. was awarded the project for \$5,115,808.03. Shelly and Sands subcontracted the painting of structural steel to Standard. The project is complete and the final value was \$4,977,282.70. The contract was signed March 3, 2008. The original project completion date was June 30, 2009. The revised completion date was August 27, 2009. The actual physical work complete date was September 30, 2009.

**CLAIM OVERVIEW:**

In accordance with the plan note on sheet 79/144, "Protection Plan", the Subcontractor submitted

a protection plan to CSXT. The plan called for the erection and maintenance of protective shields outside of the railroad clear zones. CSXT accepted this plan as submitted. In June 2009, CSXT's on-site representative informed Standard that they would have to stop work within the protective shields while rail traffic passed. Standard disagreed with this directive but proceeded to complete the work. In November 2009, the Contractor requested additional compensation claiming this directive by the railroad delayed its painting and resulted in extra costs totaling \$163,828.76.

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

The Contractor submitted its protection plan to CSXT as required. These plans were "accepted as submitted." The protective shields were constructed and work started. According to the Contractor's claim documentation "CSXT Railroad employees routinely stopped Standard Contracting on multiple times on a nearly daily basis throughout the performance of ODOT Project 080-2008." During the hearing, the Contractor indicated CSXT directed them to stop work for every train. The Subcontractor appealed to URS, CSXT's representative, and was told to follow the flagman's directions.

Standard stated in the hearing it was prepared to pull off the job because it would lose money as a result of this decision. According to its claim documentation, "Standard Contractors was not to experience any work stoppage or restrictions." The Contractor indicated during the hearing that periodic work stoppages should have been anticipated but not for every train. Standard further indicated in the hearing that it did not pull off the job because Shelly & Sands, ODOT, and its bonding company all agreed to "keep track of extras and we'll make it right." Standard stated that because of this conversation and since ODOT saw the work stop each time a train passed through the job site there was no need to provide written notice of the delay or claim.

The Contractor and its Subcontractor indicate it is normal practice to work from protective platforms over the railroad such as the one approved by URS and constructed on this project. Both stated that, in their experience, construction crews working over a railroad had never been forced to stop work every time a train passed through the work area. However, the Contractor stated that the work stoppages on this project were "excessive and unusual." Standard explained that on the same train line, during the same time period, on another project, a different contractor was permitted to continue work each time a train passed through that project.

Standard states there was nothing in ODOT's plan or specifications indicating it would have to stop work for train passages. Further, there was no indication on URS' approval of the protection plan to advise of that requirement. Standard claims that based on its past experience working over railroads it assumed it could work on the platform continuously since nothing in this plan placed restrictions on the work.

Standard asked railroad personnel after the Step 2 hearing in November 2010 why it was forced to stop work for trains and was told ODOT did not follow protocol. Standard further states it was told that ODOT could have petitioned CSXT for relief of this practice.

Standard's request for additional compensation is based on one train per hour with an assumed 15 minute delay per train. Standard then multiplies this time by the cost per hour of the work crew and all rented, idled equipment. Standard stated it does not have actual documentation or costs because CSXT will not provide train records.

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

The District stated the Contractor is responsible for complying with contract documents with regard to the paint enclosure. The Construction and Material Specifications Section 514 requires a total enclosure of the bridge to perform the work. In addition, the contract requires the Contractor to "cooperate at all times with the local officials with the railroad company."

The District agreed that there was nothing in the contract to specifically inform the contractor it would have to stop working while a train was passing but the District also pointed out the contract did not tell the contractor that it could continue working either. Likewise, URS did not indicate on its acceptance of Standard's protection plan submittal that the Contractor would be required to stop work for trains but it also did not provide permission for the Contractor to work during a train passage through the project. The District pointed out that URS' acceptance of Standard's protection plan required the Contractor to schedule a railroad flagger prior to beginning the work.

The District explained that Standard Contractors, Inc. was not Shelly & Sands' original painting subcontractor at the time of the bid. Their first bridge painting subcontractor went bankrupt before painting started. The Contractor "worked diligently pursuing the remaining bridge painting work, and there were no delays to the traveling public" so a waiver of liquidated damages was granted. Excusable, non-compensable time extensions were granted due to "weather days which precluded them from blasting/painting" but the District did not grant any time due to railroad delays.

The District cited several examples of projects on which the workers were required to stop work for trains. The District stated that contractors are aware that all work around the railroad is under the direction of the flagger. The District further indicated that this project is unique in that it has very tight tolerances for vertical clearance.

In an e-mail to Chuck Kiner on May 27, 2010 Steve VanSlayke, with URS, explained he accepted the Contractor's plan that was "near exactly the minimum temporary vertical clearance that CSXT could allow on this line in April 2009" and went on to say:

Given the lack of buffer between allowable vertical clearance to the shield, and that live load weights (employees, equipment, material [steel shot]) would be added and had potential to violate the minimum clearance if and when the contractor was working, URS concurred with CSXT's desire to take the safest route and clear the contractor activity in the work zone over the tracks.

The District stated it did not receive notice the Contractor intended to file a claim on this issue until it received an invoice for \$163,828.76 two months after completion of the work. The District pointed out that there is no actual documentation or record of the work stoppages and resulting costs incurred.

## 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 determined the following to be significant findings relevant to the issue of entitlement:

1. The Protection Plan note on page 78/144 reads in part: "The Contractor shall submit detailed plans of a protection shield or timber mats to protect the railroad tracks from falling debris during demolition of the deck."
2. The Special Clauses in the Proposal state that the Contractor must "cooperate at all times with the local officials of the railroad company."
3. The Special Clauses in the Proposal further state "The number of trains operating through the improvement is estimated to be: ... 24 Freight trains per day @ 35 miles per hour."
4. The contract is silent with regard to the Contractor's ability to continue work as trains pass through the work zone.
5. The contract requires the Contractor to provide immediate oral notification to the Engineer upon discovering a circumstance that may require a revision to the contract or may result in a dispute. If the issue is not resolved within 2 working days the Contractor is then required to provide written notice.
6. There are conflicting statements with regard to the Contractor's assumptions or expectations of work stoppages due to railroad activity at the time of bid.
7. The Contractor submitted its protection plan to CSXT in April 2009.
8. URS, on behalf of CSXT did "accept as submitted" the protection plan on April 5, 2009. The approval letter contained comments requiring a CSXT flagger when work or entry takes place onto CSXT property and that CSXT will require the Contractor's field personnel and subcontractors to participate in Job Safety Briefings daily and as necessary with the CSXT flagger.
9. There is no written documentation or record of the actual work stoppages. In addition, there are conflicting statements with regard to the frequency of these work stoppages.
10. The actual physical work complete date was September 30, 2009.
11. The Contractor's first written notice to the District was dated November 13, 2009 citing "numerous delays and additional costs". The Contractor requested additional compensation totaling \$163,828.76.

### Conclusions

The Board's decision in this claim hinges primarily on the issues of notice and the evidence presented in support of the Contractor's delay claim.

With regard to the issue of notice, the contract notice requirements are set forth in #5 above. The purpose of the notice requirements is to provide both parties the opportunity to maintain records of the time and costs and also to mitigate damages. Standard claims the District had notice and stated in the hearing that it did not pull off the job because Shelly & Sands, ODOT, and its bonding company all agreed to "keep track of extras and we'll make it right." The District does not recall this agreement and there is no supporting documentation. The fact that neither the Contractor nor the District kept records moving forward leads the Board to determine that notice was not provided until the November 13, 2009 letter requesting additional documentation.

Notwithstanding the issue of notice, the Board was not convinced the Contractor actually experienced a change in scope that was within the control of ODOT. As to the question of whether the Contractor should have anticipated being required to stop work while a train passed through the work zone the Board finds the Contractor did not provide clear and convincing evidence that it expected or should have expected to work without interruption. The contract, the Contractor's submittal and URS' acceptance letter are all silent concerning expectations for delays due to trains. Both the District and the Contractor presented opinions as to what are "reasonable" delay expectations when working around the railroad. These differed dramatically. We also have conflicting statements with regard to the Contractor's assumptions or expectations of work stoppages due to railroad activity at the time of bid. On one hand, according to the Contractor's claim documentation, "Standard Contractors was not to experience any work stoppage or restrictions." However, the Contractor indicated during the hearing that periodic work stoppages should have been anticipated but not for every train. In addition, testimony differed as to reasons the railroad required work stoppages.

The Board notes that this project is uniquely situated in that it had very tight tolerances for vertical clearance.

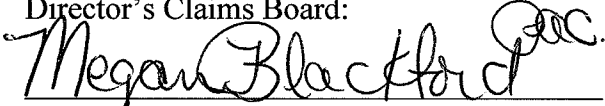
Lastly, the Contractor claims that this change in the requirements set by the railroad caused daily delays which impacted its production and cost it more to perform the work on this bridge than it bid. The Contractor requests that ODOT make it whole. The burden is on the Contractor to present evidence to this Board to support its claim, both for entitlement and damages. The Contractor failed to submit any documentation or record of the actual work stoppages. In addition, there are conflicting statements with regard to the frequency of these work stoppages.

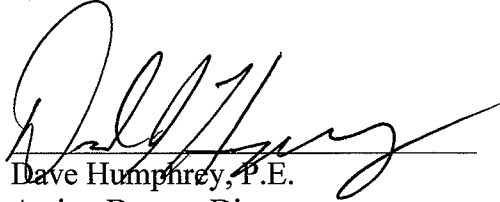
In conclusion, the Board finds that the Contractor is not entitled to additional compensation.

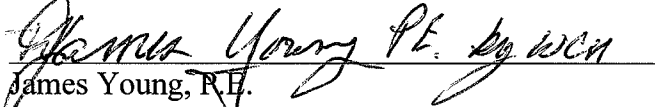
**DAMAGES:**

Based on the above findings, the Contractor is not entitled to additional compensation. This recommendation is submitted this 6<sup>th</sup> day of April, 2011.

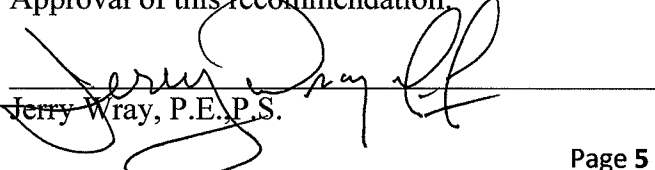
Director's Claims Board:

  
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Approval of this recommendation:

  
Jerry Wray, P.E., P.S.

4/8/11  
Date