



DIRECTOR'S CLAIMS BOARD
ODOT Project 1060(09), South Dixie, Phase 2
Claim 07-091060-01
Delay Costs/Time Extension
Decided: March 24, 2011

On Monday, February 14, 2011 at ODOT's Central Office in Room 4A, the Director's Claims Board ("Board") heard oral presentations of R.B. Jergens Contractors, Inc. ("Jergens" or "Contractor") and ODOT District 7 ("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 August 30, 2010 and then from the District on September 30, 2010.

The Board consisted of Keith Geiger, P.E., Acting Deputy Director, Division of Construction; Dave Humphrey, P.E., Acting Deputy Director, Division of Highway Operations and Lyle Flower, P.E., Administrator, Office of Consulting Services.

The District 7 representatives at the hearing were Dave Ley, P.E., Greg Collier, P.S., Scott LeBlanc, P.E. and Rod Karns.

Andrew Jergens, Roger A. Masters, Scott Pearson, Kevin Harshberger, P.E., Vic Roberts, P.E., and James Scherocman, P.E. represented R.B. Jergens Contractors, Inc.

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

Peter Narsavage, P.E., Geotechnical Specialist and Pam Clawson, P.E., Claims Coordinator both of ODOT's Division of Construction Management observed the hearing.

PROJECT DESCRIPTION:

This project consisted of full depth reconstruction of 2053 feet of flexible pavement, extension of a box culvert, installation of drainage facilities, curb and gutter and median islands. The contract was signed July 21, 2009 with an original completion date of May 31, 2010. This project included an interim completion date of October 15, 2009 at which time Phases I, II and III were to be completed with the road open to traffic and all safety features in place. To date the contract completion date has been modified to August 12, 2010 and the interim to May 31, 2010. The physical work on the project was complete September 2, 2010. The original amount of the contract was \$1,604,944.67. The current amount of the contract is \$1,616,244.15.

CLAIM OVERVIEW:

The Contractor is claiming it experienced two delays caused by ODOT. The first delay, it claims, was due to the gas company failing to move its line by the 4A note date of June 30, 2009. The Contractor alleges he was not able to start the work until September 16, 2009 (claiming 42 days). The second delay was allegedly due to ODOT requiring time to design a plan for subgrade undercutting which could be applicable to winter work. The Contractor is claiming a 40 day delay for this issue (November 4, 2009 to December 18, 2009).

The Contractor's demand for these delays is **\$92,541**. The District is also holding **\$56,600** for liquidated damages for failure to meet the interim completion date.

SUMMARY OF THE CONTRACTOR'S POSITION:

Jergens indicated this project had a 4A note notifying the bidders that the gas line would be moved by June 30, 2009. The gas company did not move its line until August 25, 2009. It was explained that Jergen's office is located on South Dixie and the Contractor's personnel closely followed the utilities' progress. The Contractor, referring to C&MS153.64.B of the Ohio Revised Code, asserted ODOT could not allow construction work to begin until the utilities had been removed from the project work area.

The Contractor stated on or about August 17, 2009 the District called to set the preconstruction meeting for September 1, 2009, immediately following the ODOT project engineer's planned vacation.

Jergens is claiming that due to both the late move by the gas company and the District's delay in scheduling the preconstruction meeting, it was forced to delay its start of work date to September 16, 2009. This represents the first 42 days of delay for which it is requesting compensation. In its letter of October 28, 2009 to Dave Ley Jergens wrote: "Because if a 42 day delay happens at the front of a project, then the whole schedule is affected." And continued "In reality, Jergens will likely finish by the original Completion Date. We intend to work during the winter accelerating completion."

The plan instructed the contractor to undercut soft subgrade and replace that poor material with Type B granular material. On November 4, 2009 Jergens put ODOT on notice of extensive soft subgrade conditions at an on-site meeting. On November 11, 2009 Jergens requested that ODOT personnel run a nuclear density compaction test to determine the moisture of the material. The inspector refused on the grounds it was "too wet to test". On November 12, 2009 Jergens hired Bowser-Morner to run the tests. Four tests were run; two at the subgrade surface and two a foot below the surface. The densities were 97%, 106% and 90%, 96% respectively. Optimum moistures ran between 8.5% and 11.9%. Bowser-Morner commented: "the density and compaction meets the specification and that the moisture was below optimum. However, the soil lift was deflecting or pumping. It appears that this area was bridged with the drier soil but the subgrade is still unstable."

Jergens claims ODOT and the City of Vandalia argued about who would pay for additional corrective measures when the undercut quantity exceeded the plan quantity. Jergens claims there was not enough subgrade undercutting quantity in the plans to address the extent of the poor material it encountered. Jergens requested and received the design consultant's original geotechnical test data for the project. From its analysis of that report Jergens calculated approximately 5000 CY of undercutting instead of the approximately 1000 CY shown in the plans. At the end of the project no subgrade excavation was performed, Jergens claims, due to lack of funds; so ODOT insisted on using alternative means of addressing the unstable subgrade.

Jergens stated on November 17, 2009 ODOT told Jergens to proceed with a revised stabilization procedure. ODOT proposed to use filter fabric, 18" of No. 2 stone and 6" of 304 material instead

of the 16" of 304 material as shown in the plans. Jergens was ready to proceed immediately; however, the ODOT inspector would not let them begin because the subgrade was too wet for the additional 6" of excavation required.

On December 8, 2009 ODOT's Construction Geotechnical Engineer visited the site. On December 16, 2009 ODOT asked for prices for a modified design. On December 18, 2009 the District ordered Jergens to proceed with the work using geotextile, geogrid, 10" of #2 stone and 6" of 304 material. Between December 28 and December 30 Jergens finished the roadway base using this winter stabilization method. Jergens is claiming from November 4, 2009 to December 18, 2009 (or 40 days) as delay days due to the soft subgrade issue.

To calculate the home office overhead payment (HOOP) for the 42 days at the start of the project Jergens looked to C&MS Section 109.05.D.2.f.i and 109.05.D.2.f.ii but adjusted the formula to take into account that approximately 90% of the work was to have been done by the interim date of October 15, 2009. Subtracting out the work to be done in 2010 the modified "original contract amount" (A) totaled \$1,508,345, the contract duration (B) would be 86 days (July 21 through October 15) and the (C) factor would be 8% using Table 109.05-5. Daily HOOP = $(A * C) / B = \$1,403/\text{day}$. The HOOP for the first 42 day delay totals **\$58,926**.

To calculate the HOOP for the subgrade redesign Jergens first calculated the Daily HOOP for the entire project duration to be $(\$1,604,945 * .08) / 313 \text{ days} = \$410.21/\text{day}$. From November 4 through November 30 Jergens assumed 14 days lost due to the delay. Using C&MS Section 109.05.D.2.f.ii: $14 \text{ days} * \$410.21 = \$5,742$. To calculate the HOOP in the unanticipated winter period (December 1 through December 18) Jergens used C&MS Section 109.05.D.2.f.iii with $D=40 \text{ days}$ and $E=88$; days $\$410.21 * 151 * (40/88) = \$27,873.77$. The total HOOP for the second delay totals **\$33,615**.

Jergens explained District 7 has been arguing it must follow the method laid out in C&MS 109.05.D.f to pay HOOP, especially arguing it cannot pay HOOP over the winter. Jergens presented Claim 10-3001(01)-1001-04 dated March 7, 2003 as indication of a project on which a Director's Claims Board agreed to pay for home office overhead.

Jergens pointed to a letter dated October 28, 2009 which states "We intend to work during the winter accelerating the completion" as proof that they intended to work during the winter. It also stated that historically it works throughout the winter when there is work to do. Therefore, Jergens argued, it should be granted HOOP during the winter.

Jergens states in its claims document:

Under the Fairness in Construction Contracting Act, (Revised Code 4113.62,) District 7 can not enforce any provision of a construction contract that waives or precludes liability for delay, when the cause of the delay is the result of the District's arguments over who will pay, and changing the design to fit their budget.

District 7 asserts that CMS 108.06 precludes and limits liability if a contractor's schedule shows no work from December 01 through April 30.

If District 7 affirmatively acts, causing a delay from November 04 through December 18, does Ohio's Fairness in Construction Act take precedence over CMS 108.06?

District 7 wrote Change Order #2 in October, which granted a 42 day time extension. Jergens signed and returned it on October 28, 2009 with the sentence "The final completion date is not effected" crossed out. ODOT would not process it with that change. ODOT finally re-processed the change order and Jergens re-signed it on June 25, 2010. Since that time, Jergens stated, it has discovered both the ODOT Manual of Procedures and an ARRA training presentation instructed the District Construction Engineer to schedule the preconstruction meeting. Jergens alleges ODOT intentionally withheld this information and manipulated it into signing Change Order #2 by falsely implying scheduling the preconstruction meeting was Jergens' responsibility to remove the blame of the utility conflicts from ODOT. Jergens stated "District 7 did not operate in good faith, nor deal fairly with Jergens..." in the matter of Change order #2 and "the 42 day time extension agreement – as drafted and negotiated (should be) – void(ed)".

SUMMARY OF THE DISTRICT'S POSITION:

The District stated that at the time Change Order #2 was written Jergens had agreed that the delay was non-compensable. The request for HOOP for those 42 days was not raised at Step 2. When Jergens submitted its Step 3 documents it included that issue along with the subgrade issue. According to the Dispute Resolution and Administrative Claim Process described in Proposal Note 109, an issue must be explored in Steps 1 and 2 before it is raised in Step 3. But for the sake of expediently resolving the delays in totality the District stated it is prepared to respond to Jergens on this delay issue, too.

The District pointed out that the 4A note was superseded by Addendum 1 which, under the heading "Vectron Energy Delivery – Gas", reads in part: "The Company (meaning Vectron) cannot start the relocation work until the clearing and grubbing has been completed along the left side of the project. The Company expects to complete the relocation work in approximately 2-3 weeks upon completion of the clearing and grubbing by the highway contractor." This addendum negated the gas company's completion date of June 30, 2009.

The District explained that while it was aware the Construction Manual instructed the District Construction Engineer to set up the preconstruction meeting, practically, it is more often scheduled as a result of a phone call from the contractor. The contractor knows when its crews and equipment are available, when the materials are at the site and when the project fits into the overall work plan of the company. If the contractor does not call, the District will, in time, call it. The District also said it is normal, especially on projects such as this one with tight completion schedules, for the contractor to call to ask that ODOT sign the contract as soon as possible. The District stated it did not get a call from RB Jergens concerned about starting the project. The District also reminded the Board and the Contractor that the Construction Manual and ARRA training are not elements of the contract.

The District presented the preconstruction notes which indicate at the time of the preconstruction meeting Jergens intended to start the project on September 21, 2009. Also at this meeting, the District stated, its personnel pointed out the interim completion date of October 15, 2009 and

they remember that the RB Jergens representative expressed surprise at that interim date. On September 2, 2009 RB Jergens sent a letter to Rod Karns of ODOT stating "At yesterday's conference, ODOT mentioned a plan note that requires completing most of the \$1.6 million project by October 15 – of this year". The last paragraph read. "We ask for your help. The October 15 date is impossible." This all seems to indicate that RB Jergens was not aware of the interim date until the preconstruction meeting on September 1, 2009. The District also noted that the Contractor asked no pre-bid questions about the utilities or the interim and final completion date.

The District reported that Vectron's work was complete on August 25, 2009. The entire left side of the project was available for work at that time; however, Jergens did not start work until September 16, 2009, a full two weeks after the preconstruction meeting. ODOT maintains this start date was entirely at the discretion of Jergens, not due to utility conflicts or a late preconstruction meeting.

Although the District now says it is skeptical that Jergens intended to begin work before September 21, 2009 it will uphold its agreement made in change order #2 to grant a 42 day excusable, non-compensable time extension in recognition that it did not reach out to Jergens earlier to get a preconstruction meeting scheduled. That change order was finally processed in July, 2010. The District stated that if RB Jergens is convinced the District wrote this change order in bad faith and wants it rescinded ODOT is willing to rescind it. That rescission would not be in the interest of RB Jergens since that change order eliminated 42 days of liquidated damages.

The District asserted that the unstable condition of the marginal soil was primarily due to high moisture content and could have been stabilized through disking and drying in good weather; however, in an effort to proceed with construction in the 2009 season, ODOT looked for an alternate remedy suitable for wet, cold weather work. The District agrees it was put on notice of the unsuitability of the subgrade on November 4, 2009 and that the Contractor could not work until it was offered a suitable redesign on November 17, 2009. The District acknowledged that the Contractor experienced an excusable, compensable delay during that time period (November 4 through 17) and will recognize Jergen's home office overhead cost for 14 days.

However, the District does not agree on the method Jergens used to calculate home office overhead. Following the method of calculating Home Office Overhead Payment detailed in the contract, C&MS 109.05.D.2.f, ODOT owes Jergens:

$$\begin{aligned}\text{Daily HOOP} &= (A * C) / B = (\$1,604,945 * .08) / 313 = \$ 410.21/\text{day} \\ \text{Total owed Jergens for subgrade HOOP} &= \$410.21/\text{day} * 14 = \$ 5,743\end{aligned}$$

On November 18, 2009 the project experienced a ½" rain event that saturated the exposed subgrade. Jergens could not undercut the required 6" of subgrade for the redesigned treatment due to the wet material. Because the Contractor wanted to continue working and ODOT wanted the project in a safe condition for the winter the project called in ODOT's State Construction Geotechnical Engineer for another solution. On December 18, 2009 the District provided Jergens an option using geotextile, geogrid, 10" of #2 stone and 6" of 304 material that did not require additional undercutting.

C&MS 108.06.A states: "The Engineer will not grant an extension of time for delays incurred from December 1 to April 30 unless the Contractor's accepted progress schedule depicts work on the critical path occurring during this period." Jergens' baseline schedule did not include winter work; therefore, no time extension will be granted nor delay costs recognized for that time frame.

In response to Jergens' claim that its letter of October 28, 2009 puts ODOT on notice it intended to work over the winter the District responded that the letter must be read as a whole and in the context of the project at the time. The letter was written to assure ODOT it could complete the project on schedule. The relevant paragraph reads: "In reality, Jergens will likely finish by the original Completion Date. We intend to work during the winter accelerating completion. (Non-compensable delay and non-compensable acceleration.) But we wish to keep the Schedule in-sync with the initial delay because that is the standard practice."

The District, Exhibit A in its documents, included a Time Impact Analysis which shows that on November 3, 2009, just prior to the subgrade delay, the project was 19 working days behind schedule. This analysis, the District claims, included all ODOT caused delays; therefore, these 19 days were the responsibility of the Contractor.

To date the District has processed the following time extensions:

Change Order #	Modified Interim Completion	Modified Final Completion	Reason	Type of Delay
2	Nov. 27, 2009	July 14, 2010	scheduling pre-con (42)	excusable, non-compensable
16	May 6, 2010	July 20, 2010	Oct. weather days (6)	excusable, non-compensable
17	May 20, 2010	August 3, 2010	TIA - Subgrade (14)	excusable, compensable
18	May 31, 2010	August 12, 2010	Nov. weather days (12)	excusable, non-compensable

In addition to the processed time-related change orders above the District has documented: two (2) weather days in May and six (6) weather days in June that are eligible for an excusable, non-compensable time extension.

The District claims Jergens incorrectly determined the delay impact. The District believes Jergens is trying to calculate the impact of the delays by applying a day for a day calculation. This project included Proposal Note 107 – Critical Path Method Progress Schedule. Sections G and H of PN107 explain the process for analyzing a time extension. The District said Jergens did not submit an acceptable baseline schedule until November 13, 2009. Then, as Jergens submitted updates the District rejected them due to logic errors. Jergens still has not submitted acceptable Feb., March, April, May, June and July Time Impact Analysis updates and the District cannot consider further time extensions without them. Once the time extensions described in the paragraph above are granted the liquidated damages can be further reduced.

RB Jergens referred to Claim10-3001(01)-1001-04 decision dated March 7, 2003 as an example of a project on which a Director's Claims Board agreed to pay for home office overhead. Upon review, the District found the original completion date of Project 3001(01) was November 15, 2001 and the extended completion date was August 9, 2002. On Project 3001(01), the Contractor did not expect to "winter over" the winter of 2001/2002. The Claims Board decision for 3001(01) stated the Contractor was ordered to stop work by ODOT, apparently for the safety of the traveling public. Home office overhead costs could be appropriate. Also, Project 3001(01) was bid under a C&MS that did not include a contractual remedy for home office overhead. That project differs from Jergens' project in that Jergens' project was scheduled to go through a winter (original completion date: May 31, 2010; extended completion date: August 12, 2010), Jergens was not delayed by ODOT and Project 1060 (09) did include a contractual remedy for home office overhead, if home office overhead was found justifiable.

In response to the Contractor's accusation that ODOT is ignoring the Fairness in Contracting Act by following the C&MS Manual the District responded that ODOT's attorneys have reviewed the language in the Manual and have determined the language as written meets the intention of the Fairness in Contracting Act.

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 original completion date for this project was May 31, 2010. The interim date was October 15, 2009.
2. The preconstruction meeting was held on September 1, 2009 and the Contractor began work September 16, 2009.
3. In its letter of September 2, 2009 to Rod Karns of ODOT RB Jergens stated "At yesterday's conference, ODOT mentioned a plan note that requires completing most of the \$1.6 million project by October 15 – of this year". The last paragraph read. "We ask for your help. The October 15 date is impossible." This all seems to indicate that RB Jergens was not aware of the interim date until the preconstruction meeting on September 1, 2009.
4. Addendum 1 superseded the 4A notes in the proposal.
5. There were no pre-bid questions concerning the completion date in relation to the 4A utility notes.
6. Vectron finished removing its gas line through the project limits on August 25, 2009.
7. The plans called for excavation of subgrade in various areas throughout the project. Wet material made this work impossible after November 4, 2009 at which time Jergens put ODOT on notice of a changed condition.
8. The District provided RB Jergens a design for subgrade stabilization on November 17, 2009.
9. The District provided RB Jergens another design for subgrade stabilization on December 18, 2009.

10. The District included a Time Impact Analysis, with all owner caused delays factored in, which shows that on November 3, 2009, just prior to the subgrade delay, the project was 19 working days behind schedule.
11. RB Jergens has not submitted a Time Impact Analysis as acceptable by Proposal Note 107 since January 2010.
12. The Contractor worked during the winter even though it did not show winter work on its baseline schedule.
13. The subgrade could have been stabilized through disking and drying during a period of good weather.
14. C&MS 108.06.A states: "The Engineer will not grant an extension of time for delays incurred from December 1 to April 30 unless the Contractor's accepted progress schedule depicts work on the critical path occurring during this period."
15. The revised completion date for this project was October 15, 2009. The revised interim completion date was May 31, 2010.

Conclusions

The Board was not presented with convincing contemporaneous evidence that the Contractor intended to begin work prior to September 16, 2009. The District presented evidence to show at the time of the preconstruction meeting RB Jergens intended to begin work on September 21, 2009. If Jergens was truly delayed by the preconstruction meeting it would have begun work on September 2, 2009.

The Contractor's interpretation that ORC§153.64.B states the project must be clear of utilities prior to the beginning of construction is in error. ORC§163.64.B actually states: "Any anticipated...relocation of underground utility facilities deemed necessary by the public authority **shall be negotiated or arranged by the public authority** with the owner of the underground utility facilities prior to the start of construction." (emphasis added). ODOT notifies its bidders of these "arrangements" with 4A notes at the time of the bid. The Contractor's argument that it was delayed by Vectron's gas line work evaporates with Addendum 1. By its signature on the contract Jergens confirmed it was aware of this change. RB Jergens could have coordinated its work with Vectron. It is possible for an ODOT contractor to work in the same project limits as a utility contractor to mitigate delays. The Board finds no entitlement to a Home Office Overhead Payment (HOOP) for the 42 days at the beginning of the project (July 21, 2009 to September 1, 2010).

ODOT's C&MS 108.06.A clearly states "The Engineer will not grant an extension of time for delays incurred from December 1 to April 30 unless the Contractor's accepted progress schedule depicts work on the critical path occurring during this period." The Contractor's schedule did not depict critical path work during the winter. Furthermore, C&MS 109.05.D.2.f.(iii) addresses Home Office Overhead Payment for an **Unanticipated** Winter Period. With a sale date of summer 2009 and a completion date of May 31, 2010 this project was obviously scheduled to winter over. There was no unanticipated winter period; therefore, no entitlement for HOOP .

The Board supports the District's decision, in the spirit of cooperation, to pay the Contractor for an excusable, compensable delay during the time period from November 4 through November 17, 2009 and its recognition of Jergen's home office overhead costs for 14 days. Although, it appears

to the Board the District would be justified in refusing to pay any costs in that time period. The Contractor is demanding recognition of a delay for a time period in which the District was attempting to find a solution helpful to the Contractor. The District could have refused to allow the Contractor to work after November 4, 2009, granted excusable, non-compensable weather days and forced it to perform the planned work in 2010 when the weather was appropriate to excavate, disc and dry the material. However, this would not have been advantageous to anyone, especially the traveling public.

The Board notes that this Contractor raised a new argument in its Step 3 documentation and presentation that it did not present in its Step 2 materials at the District level. At Step 2 the Contractor did not request HOOP for the 42 day time extension covered by Change Order #2. Since it was in the documents the District was able to address the issue in its Step 3 response so it was not harmed but such an addition in other situations could have resulted in a postponement of the hearing. The Three Step Dispute Resolution Process was set up to allow each level of decision making at ODOT to hear and respond to the same points. All parties must cooperate in order to have a successful process.

DAMAGES:

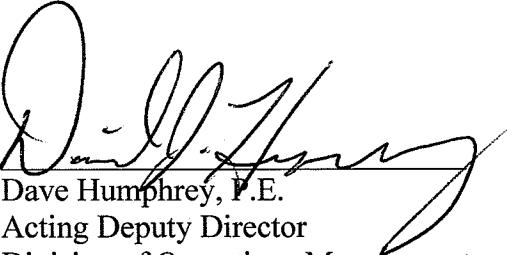
Based on the above findings, the Contractor is not entitled to additional compensation

This recommendation is submitted this 24th day of March, 2011.

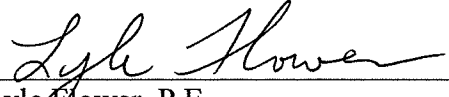
Director's Claims Board:



Keith Geiger, P.E.
Acting Deputy Director
Division of Construction Management

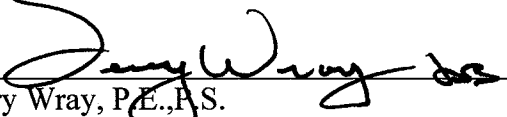


Dave Humphrey, P.E.
Acting Deputy Director
Division of Operations Management



Lyle Flower, P.E.
Administrator, Office of Consultant Services
Division of Production Management

Approval of this recommendation:



Jerry Wray, P.E., P.S.
Director, Ohio Department of Transportation

Date 4/8/2011