



Director's Claims Board
ODOT Project 497(05)
Claim 08-050497-01
Unclassified Excavation

December 4, 2008

On Monday, September 8, 2008 at ODOT's Central Office in room 4A, the Director's Claims Board Hearing Panel ("Panel") heard oral presentations of the Double Z Construction Company ("Double Z" or "Contractor") and ODOT District 8 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 May 27, 2008 and then from the District on June 30, 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; William Ujvari, P.E., Project Administrator, Division of Production Management.

The District 8 representatives at the hearing were Joe Bassil, Kelly Wessels and Josh Mrvelj

The Double Z Construction Company representatives were Brad Sundheimer, Dave Guzzo and Larry Lyons.

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 consists of improvements of 0.4 miles of US 52 in Clermont County by the replacement of an existing three span box beam bridge (Boat Run), the replacement of a single span pre-stressed concrete box beam bridge (Maple Creek) and the replacement of an existing concrete culvert. This project was originally bid at \$2,660,142.06 with the final cost at \$2,789,140.22 pending resolution of this claim. The contract was originally signed on February 1, 2006 with a contract completion date of October 31, 2006. The contract completion date was extended to July 31, 2007. All physical work was complete on July 26, 2007.

CLAIM BACKGROUND

The new structures to be constructed by this project differed in length from the existing structures they were replacing. This claim is centered on the removal of earthen material between the existing abutments and the proposed new abutments at the Boat Run and Maple Creek structures. The Contractor argues that this earthen material should be added to the plan estimated quantities for Item 503 Unclassified Excavation, references number 65 and 95 respectively. The Contractor is requesting payment for an additional 391 CY at \$50.00/CY for \$19,550.00 at the Boat Run Bridge and an additional 1390 CY at \$75.00/CY for \$104,250.00 at the Maple Creek Bridge for a total of \$123,800. It is the District's position that the removal of this material is incidental to other contract work and they have denied the Contractor's request for payment.

SUMMARY OF THE CONTRACTOR'S POSITION

The Contractor asserts that payment for the earthen material in question is addressed by the contract. Specifically they state that Construction & Material Specifications (C&MS) Section 503.09.C defines the areas to be included for payment under Item 503 Unclassified Excavation as "*...the material removed above the bench (if any), in front of the vertical plane described in 503.09C.1, and by the finished slope of the cut or embankment.*" It is the Contractor's contention that this specification clearly defines the area to be measured and paid.

With respect to the District's contention that removal of the earthen material between the existing abutments and the proposed new abutments is incidental to the work and included in the item for structure removal the Contractor argues that incidental, by definition, is the act of occurring merely by chance or without intention or calculation, and therefore should only entail a minor expense.

Lastly, the Contractor contends that excavation required for the structure removal item ceases at a location one (1) foot below the proposed slope excluding this material. Further, computations for the earthwork quantities stop at the back of each abutment also excluding this material.

In its submittal, the Contractor included a series of sketches depicting their position.

SUMMARY OF THE DISTRICT'S POSITION

On July 25, 2006 the Contractor notified the project engineer of an error in payment for Item 503 Unclassified Excavation at the Maple Creek structure. The project determined the Contractor used the wrong specification in the calculation of the quantity and advised the Contractor accordingly. The project considered the issue resolved. Then on June 20, 2007, while the project was being finalized payment for Unclassified Excavation again became an issue. The District contends that the claim should be denied based on failure to comply with proper notice requirements.

With regard to the specific issues of the Contractor's request for payment the District points to C&MS Section 503.09 Method of Measurement which states:

"After the requirements of Items 201,202 and 203 have been met, the Department will measure excavation by the number of cubic yards (cubic meters) as follows:" ...

"C. Bounded on the sides.

1. For Unclassified Excavation, 1 foot (.3 m) outside the outer edge of the footing, crossbeam, or wall.

... For abutment excavation quantities, the Department will include material removed above the bench (if any), in front of the vertical plane described in 503.09.C.1, and by the finished slope of the cut or embankment."

The District contends 503 Unclassified Excavation includes the material one (1) foot outside the outer edge of the new abutment footing and up to the surface of the remaining ground. The District further contends that the earthen material between the existing abutments and the proposed new abutments is

outside of the physical limits set forth in C&MS 503.09 and is not eligible for payment as Item 503 Unclassified Excavation. The earthen material in question is incidental to Item 202 Structure Removed

The District also contends that at the time of the bid it was clear the material between the existing and new abutments must be removed. If the quantity was to be paid for as Item 503 Unclassified Excavation it should have been obvious to the Contractor that the estimated quantities were incorrect and the Contractor should have asked a pre-bid question. There were no pre-bid questions submitted regarding this issue.

DIRECTOR'S CLAIMS BOARD FINDINGS

I. Facts

The Board finds some of the facts contained in the submissions and presentations by the parties are either consistent or undisputed and can be relied on to form the basis of this decision. The following facts are central to the decision:

1. Construction & Material Specification Section 503.09 set forth the method of measuring structure excavation.
2. The plans included Item 503 Excavation for Structures. Although there was a miscalculation of the estimated quantity for the Maple Creek Bridge, the quantity provided was as interpreted, measured and calculated by ODOT on the other structures on the project.
3. The plans indicate removal of earthen material between the existing and proposed new abutments.
4. The Contractor did remove the earthen material between the existing and the proposed new abutments.
5. The plans do not contain a quantity for payment removal of the material between the existing and the proposed abutments.

II. 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:

1. The Board finds that removal of the earthen material between the existing and the proposed new abutments is not included in the contract for payment. This material was in fact removed by the Contractor and it should be compensated for performing this work.

2. The Board finds that the earthen material in question lies beyond the limit of "the finished slope of the cut or embankment" cited in Section 503.09.C.1 and does not qualify for payment as Item 203 Unclassified Excavation.
3. The Board finds Item 203 Excavation is a more appropriate method for compensation for removal of the earthen material in question.

DAMAGES

The Contractor is due compensation computed as follows:

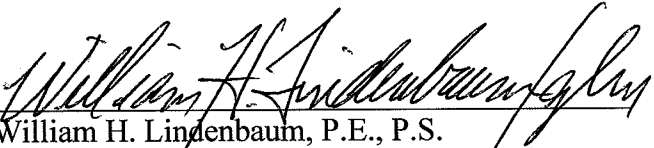

The unit bid price for excavation for this project was \$18.00 per cubic yard. This price is judged to be fair and reasonable.


$$1781 \text{ CY @ } \$18.00/\text{CY} = \$ 32,058$$

Based on the above findings, the Contractor is entitled to \$32,058.

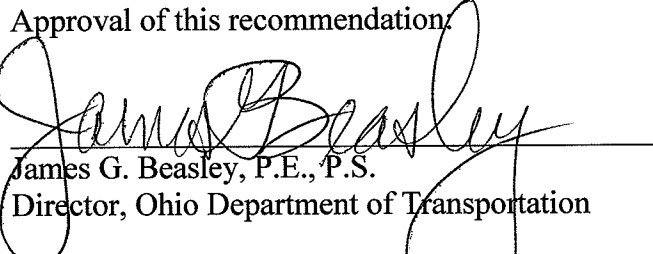
This recommendation submitted 4th day of December, 2008.

Director's Claims Board:

 William H. Lindenbaum, P.E., P.S. Deputy Director, Division of Highway Operations	 Keith Swearingen, P.E., P.S. Deputy Director, Division of Construction
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William Ujvari, P.E.
Project Administrator, Division of Production Management

Approval of this recommendation:

 James G. Beasley, P.E., P.S. Director, Ohio Department of Transportation	<u>12/16/08</u> Date
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NOTE: THE PRECEDING IS AN "OFFER TO COMPROMISE" A DISPUTE SUBMITTED ON BEHALF OF THE OHIO DEPARTMENT OF TRANSPORTATION AS THAT PHRASE IS SET FORTH IN RULE 408 OF THE OHIO RULES OF EVIDENCE; THEREFORE, ANY ADMISSION OF FACT HEREIN OR ANY STATEMENT REGARDING AN OFFER TO RESOLVE THE DISPUTE HEREIN IS DEEMED INADMISSIBLE IN AN SUBSEQUENT LEGAL PROCEEDING.