



DIRECTOR'S CLAIMS BOARD
ODOT Project 233(12)
Claim 08-120233-01
Method of Measurement, Center Line
Decided: August 22, 2013

On Thursday June 27, 2013 at ODOT's Central Office in Room 3C, the Director's Claims Board ("Board") heard oral presentations of A&A Safety ("A&A" or "Contractor") and ODOT District 8 ("District" or "ODOT") relative to the subject claim on Project 233(12) D-8 PM/RPM FY2012 ("Project"). 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 April 12, 2013 and from the District on May 16, 2013.

The Board consisted of: Megan O'Callaghan, P.E., Deputy Director, Division of Construction Management; James Young, P.E., Deputy Director, Division of Engineering; and Dan Beasley, P.E., District Construction Administrator, District 9.

The District representatives at the hearing were: George Hall, P.E., Dennis Stemler, P.E., Chris Bateman; and Tammy Campbell, P.E.

A&A was represented by: Bill Luttmner and Norm Obert of A&A and Chris Engle, P.E. of the Ohio Contractor's Association.

Pam Clawson, P.E., Dispute Resolution Coordinator, Division of Construction Management served as the Secretary of the Board.

PROJECT DESCRIPTION:

This project upgraded pavement markings and raised pavement markers throughout District 8.

A&A Safety was awarded the contract which was executed on April 19, 2012. The original bid price was \$2,379,779.71. The original contract completion date was March 30, 2013. The project was substantially complete on March 8, 2013. To date, there have been no change orders issued on this project.

CLAIM OVERVIEW:

This claim involves the method of measurement for Reference #7, Item 642, Center Line. The Proposal included 981.00 Miles of Center Line. The Contractor claims the pay quantity "should be based on "Solid Line Equivalent", since this is the method ODOT used to arrive at the Plan Quantity" set forth in the General Summary. "Then ODOT carried this quantity to the Proposal for the basis of payment." Conversely, the District determined the Method of Payment should be "the length of completed marking, including the gaps, intersections, and other sections of pavement not normally marked..." as set forth in ODOT's Construction & Material Specifications (C&MS) Section 641.12. The Contractor's demand is \$134,021.58.

SUMMARY OF THE CONTRACTOR'S POSITION:

A&A claims it bid to place 981 Miles of Center Line as measured by the "Solid Line Equivalent, since this is the method ODOT used to arrive at the Plan Quantity. Then ODOT carried this quantity to the Proposal for the basis of payment." The Contractor supports its position by pointing out "ODOT's Estimator obviously agreed that this Project was essentially worth the

same amount as A&A Safety bid (\$2,379,779.71 vs. \$2,405,000.00)." A&A supports its claim by stating it would have "substantially raised" its unit bid price if it had bid the Project as Straight Line Miles, as ODOT suggests. "Based on the Plan Quantities and the Proposal Quantities, A&A Safety felt the Plan intent was very clear."

The Contractor contends the District made a "Unit of Measurement error" as opposed to a quantity error. Therefore, C&MS Section 104.02 does not apply as it is only applicable when ODOT non-performs a substantial quantity of bid work. In this instance, A&A performed all work set forth in the plans, with the exception of minor non-performances directed by ODOT. Further, the Contractor points out the District agreed the Solid Line Equivalent was carried to the Proposal inadvertently.

In conclusion, A&A Safety "believes the Plan intent is very clear. Even though ODOT has not measured the Center Line by Solid Line Equivalent in the past, ODOT put the Solid Line Equivalent in the Plan Quantity in the General Summary and the Proposal."

A&A Safety acknowledged it did not provide notice of this issue until the latter part of the project. It was not until then that it realized the District had a different interpretation.

The total "Equivalent Solid Line" Miles performed was 883.45. To date, ODOT has paid for 593.36 Miles. A&A claims it is entitled to payment for an additional 290.09 miles at the bid price of \$462.00 for a total of \$134,021.58.

SUMMARY OF THE DISTRICT'S POSITION:

Over the years, the District has provided measurements of "Equivalent Solid Line" alongside the measurements for "Straight Line Miles" as additional information and as a courtesy to assist contractors in the bidding process. The contract plans also provide a plan note alerting the contractor of the "Center Line Equivalent Solid Line" measurement and informs the contractor this information is provided to assist the contractor and should not be used for pay quantities or as a basis of payment for delivered materials.

The District contends it has always measured Center Line according to C&MS Sections 642.05 and 641.12. Further, this Contractor was the successful contractor of the 2011 contract and was paid according to Section 641.12. The plans contained the identical plan note "Center Line Equivalent Solid Line". Therefore, A&A should have known the method of measurement.

C&MS Section 641.12 reads "The Department will measure pavement markings complete in place in the units designated. The Department will measure line quantities as the length of completed marking, including the gaps, intersections, and other sections of the pavement not normally marked..."

It is the position of the District the measurement of "Equivalent Solid Line" which was carried forward to the General Summary and Proposal was an error. The District maintains that the contract documents are not clear, a patent ambiguity exists, and the Contractor was required to notify ODOT of errors in the bid documents. A&A did not ask a pre-bid question on this issue.

The District contends C&MS Section 104.02.D is the appropriate remedy and the Contractor is entitled to an adjustment due to the reduction of the quantity of work. There was a 39.52% reduction in the amount of Item 642 Center Line performed. In accordance with C&MS Table 104.02-2, the Contractor is entitled to \$16,449.97.

DIRECTOR'S CLAIMS BOARD FINDINGS:**Facts**

In light of all the evidence presented, the Board concludes this claim is a question of contract interpretation regarding the basis of payment and method of measurement for the subject item of work. The facts contained in the submissions and presentations of the parties are consistent and can reasonably be relied on to form the basis of this decision. The Board further concludes any inconsistencies in the facts presented by both parties are not central to the decision. The facts the Board deems pertinent to the issue of entitlement are discussed below.

1. There were no Prebid Questions regarding the Center Line method of measurement or basis of payment.
2. Plan sheets 29 through 35 provide location information for Center Line markings and include sub-columns for "Total Miles" and "Equivalent Solid Line" under the "Center Line Quantities" column. On sheet 35 the "Equivalent Solid Line" sub-column is totaled as 931. This quantity is in a row labeled "Total Carried to the General Summary." No corresponding total is shown in the "Total Miles" column.
3. Plan sheet 4 of 39 contains the General Summary which includes: 50 Miles of Center Line carried from sheet 2 and 931 Miles of Center Line carried from sheet 35.
4. The Center Line item is shown in the Proposal as:

Line	Item Code	Item Description	WT	Unit	Quantity
0007	642E00290	CENTER LINE	45	MILE	981.000
5. There are three locations in the Contract Documents that specifically address the method of measurement and basis of payment for Center Line as follows:
 - a. C&MS Section 642.05 Basis of Payment states: "The Department will pay for accepted quantities at the contract prices, or prices adjusted according to 641.11, measured according to 641.12..."
 - b. C&MS Section 641.12 Method of Measurement states: "The Department will measure line quantities as the length of completed marking, including the gaps, intersections, and other sections of pavement not normally marked."
 - c. A plan note on sheet 2 of 39 specific to "Center Line Equivalent Solid Line" reads:
6. The final measurement of the Center Line using the Straight Line Mileage is 593.36 Miles.
7. The final measurement of the Center Line using the Equivalent Solid Line method is 883.45 Miles.
8. C&MS Section 104.02.D.2 states: "If the decrease in quantity of any unit price Contract Item exceeds 25% of the estimated quantity, and the total of all such adjustments for all Contract Items is more than \$400, then after the determination of final quantities according to 109.12.C, the Engineer will adjust the unit prices for the affected Contract Item by multiplying the bid unit price by the factor obtained from Table 104.02-2."

Conclusions

This claim is a matter of contract interpretation. When evaluating a construction claim involving contract interpretation, the contract must be viewed in its entirety and given the meaning imputed to a reasonably intelligent contractor acquainted with the involved circumstances. The language of the contract is ambiguous if it is reasonably susceptible to two or more interpretations. Ambiguities in a contract are construed against the drafter.

In the case at hand, the Contractor claims it bid Item 642 Center Line as measured by the "Solid Line Equivalent" as this was the method utilized by the District to determine the plan quantity that was carried to the Proposal.

But for the specific plan note on sheet 2, the Board would conclude the Contractor's reasoning and interpretation are reasonable and would be persuaded by the Contractor's claim. However, the plan note on sheet 2 of 39 is specific and clear and therefore must not be ignored.

CENTER LINE EQUIVALENT SOLID LINE
THE EQUIVALENT SOLID LINE QUANTITIES TAKEN FROM THE DISTRICT NO. PASSING ZONE LOGS ARE PROVIDED FOR THE CONVENIENCE OF THE CONTRACTOR TO ESTIMATE THE APPROXIMATE QUANTITY OF CENTER LINE PAVEMENT MARKING MATERIAL NEEDED. THESE EQUIVALENT SOLID LINE QUANTITIES ARE NOT TO BE UTILIZED FOR PAY QUANTITIES OR AS A BASIS OF PAYMENT FOR DELIVERED MATERIALS.

The above plan note clearly instructs bidders NOT to do precisely what A&A claims it did (ie. utilize the solid line quantities for pay quantities and as a basis of payment). Viewing the contract in its entirety, the Board concludes the content of this plan note renders A&A's interpretation of the contract unreasonable. If the Contractor had a question prior to submitting its bid, it should have sought clarification by submitting a Prebid Question. Further, if the Contractor was aware of an error or omission, per C&MS Section 102.07, it had a duty to notify the Department of such error or omission. "Failure to provide the required notification prior to the opening of bids shall constitute a waiver by the Contractor and does not obligate the Department for any costs based upon any apparent or patent ambiguity arising from insufficient data or obvious errors in the Bid Documents."

Pursuant to C&MS Section 105.04 Coordination of the Contract Documents "The Contract Documents are those defined in 101.03. A requirement appearing in one of these documents is as binding as though it occurs in all." This section proceeds to set forth an order of precedence that is to be utilized in the event of a discrepancy within the documents. Inclusion of a quantity that reflected the "Solid Line Equivalent" found in the plans in the Proposal alone, without more, does not mean the Proposal set forth a different method of measurement which overrode the specific plan note.

Both the Contractor and District referenced past practices and other projects as precedent to support their positions. The Board finds the prior course of dealings to be persuasive in this matter and worth discussing. In its presentation at the hearing A&A Safety acknowledged "even though ODOT has not measured the Center Line by Solid Line Equivalent in the past, ODOT put the Solid Line Equivalent in the Plan Quantity in the General Summary and the Proposal." A&A has bid and performed work on similar district wide pavement marking contracts for which the method of measurement was as set forth in the C&MS. It is typical for the Districts to provide the Center Line Equivalent Solid Line quantities as a courtesy to the bidders. The note specific to these quantities is also typically included in the plans. Further, the Board reviewed bid history information for Item 642 Center Line striping and found A&A's unit price bid to be in line with previous bid prices that utilized the method of measurement set forth in the C&MS. The Board was unable to identify support for the Contractor's claim that "to bid the Project as Straight Line Miles, as ODOT suggests, would have substantially raised the unit bid price, which would have substantially raised the bid cost of the Project."

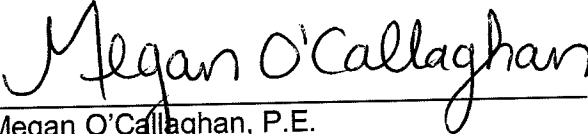
Therefore, the Board concludes the appropriate method of measurement is per C&MS Section 641.12 Method of Measurement which states "the Department will measure line quantities as the length of completed marking, including the gaps, intersections, and other sections of pavement not normally marked." As noted above, there was a decrease in quantity of Center Line in excess of 25% of the estimated quantity provided in the Proposal. Therefore, the Board concludes there was a significant change in the character of the work as defined by C&MS 104.02.D and the Contractor is entitled to an adjustment to the bid unit price.

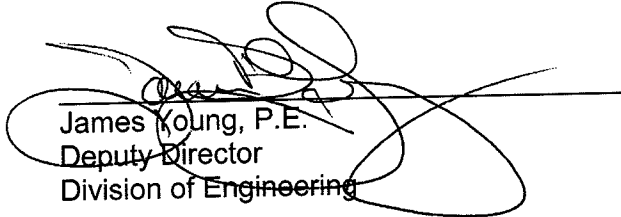
DAMAGES:


Based on the above findings and conclusions, the Board finds A&A is entitled to additional compensation in accordance with C&MS 104.02.D. Utilizing the method of measurement set forth in C&MS 641.12, the Contractor performed 593.36 Miles of Center Line striping. This quantity is a 39.52% from the quantity set forth in the Proposal. Utilizing C&MS Table 104.02-2, the unit bid price is to be adjusted by multiplying the bid unit price by 1.06 (ie. \$462.00 x 1.06 = \$489.72). Applying this adjusted unit price to the final quantity of Center Line striping performed yields \$290,580.26; an additional \$16,446.09 over the amount the District has paid to date. Therefore, the Contractor is entitled to additional compensation in the amount of \$16,446.09.

This recommendation is submitted this 22nd day of August, 2013.

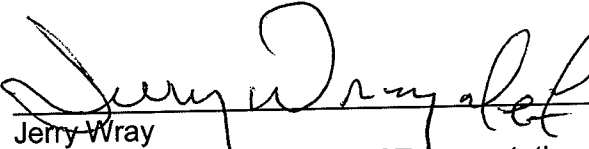
Director's Claims Board:


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District 9, Construction Administrator

Approval of this recommendation:


Jerry Wray
Director, Ohio Department of Transportation

8/23/13
Date

