



**Director's Claims Board
ODOT Project 597(08)**

Claim 12-080597-02

Excavation of Subgrade

Decision Issued: June 21, 2010

NOTE: THE FOLLOWING IS AN "OFFER TO COMPROMISE" THIS DISPUTE BETWEEN THE OHIO DEPARTMENT OF TRANSPORTATION and ANTHONY ALLEGA CEMENT COMPANY/THE GREAT LAKES CONSTRUCTION COMPANY, A JOINT VENTURE 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 A SUBSEQUENT LEGAL PROCEEDING.

On Wednesday, April 28, 2010 at ODOT's Central Office in Room 4A, the Director's Claims Board ("Board") heard oral presentations of Anthony Allega Cement Company/Great Lakes Joint Venture ("Allega" or "Contractor") and ODOT District 12 ("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 January 29, 2010 and then from the District on March 12, 2010.

The Board consisted of William Lindenbaum, P.E., P.S., Deputy Director, Division of Construction; Halle Jones Capers, P.E., Deputy Director, Division of Highway Operations and Tim McDonald, P.E., Deputy Director, Division of Production Management.

The District 12 representatives at the hearing were Mark Gabele, P.E., Ron Valdman, P.E. and Randy Over, P.E.

Joe Allega, John Allega and Gary Thomas represented Allega.

Tom Pannett, P.E., Esq., Administrator, Office of Contracts served as the Secretary of the Board.

Peter Narsavage, P.E. and Pam Clawson, P.E. of ODOT's Division of Construction Management observed the hearing.

PROJECT DESCRIPTION:

This project reconstructs and widens SR-2 in Lake County by adding a lane in each direction through the cities of Eastlake, Willoughby and Mentor. The contract was signed March 20, 2009 with an original contract completion date of October 15, 2011. The project bid at \$85,819,416.31. The current amount of the contract is \$87,349,667.50. Approximately 50% of the work is complete.

CLAIM OVERVIEW:

Due to conditions in the field the work required for item, Excavation of Subgrade, was modified from that shown in the plans. The Contractor alleges these changes resulted in \$85,091.56 in additional costs to perform this work.

CONTRACTOR'S POSITION:

Plan sheet 264 provides station locations and quantities for all of the Excavation of Subgrade (Reference 22) to be performed. The work will be performed at various locations along SR-2 between stations 274+00 and 512+50. Cross sections included in the plans provide further details of the required identifying areas to be "undercut" with cross hatching with associated quantities for cut and fill denoted within brackets "[]". Allega bid the work according the information shown in the plans.

Allega encountered extremely wet and unsuitable conditions at station 367+00 to 368+00. ODOT suspended the work and investigated the conditions. ODOT instructed Allega to fill portions of the area with concrete rubble and was also instructed to non-perform in total other areas of work shown in the plans. A recommendation was made to "modify the depth of the undercut of the existing slope to avoid encountering the wet loose silt.", "undercut the loose silt from the existing ditch, the depth, and width to be determined in field as field conditions dictates." Allega argues that this is a change in scope and character of the work from what was bid.

As bid Allega could perform undercut operations to the lines shown on the cross sections in a continuous manner. This requirement to adjust the grading limits as directed to meet field conditions interrupted the continuity of the work. The unsuitable soils were not shown on the plans. Also, there were "numerous occasions" where ODOT personnel directed Allega's crews to remobilize back to locations that had already been excavated.

In its presentation Allega stated that this item was not designated in the plans to be performed "as directed by the engineer" but was required to be constructed in an "as directed" manner. Allega claims its scope changed since it could not pursue the work in a continuous manner. This change in scope caused the following operational changes and resulting impacts:

- changing locations and dimensions of areas being excavated hindered access and reduced productivity
- excavating to depths more shallow than shown on the plans over the same area reduced volume and productivity
- being required to choke in granular material in shallow undercuts decreased productivity
- being required to fill the undercuts with soil first then top off with granular decreased productivity and required two operations
- hauling saturated material required change of truck types and a special dozer causing changes in equipment
- undercutting areas a second time caused remobilization to the site

Allega stated 22 days were required to perform the entire Excavation of Subgrade item. On nine days work was performed as planned while on 13 days planned work was impacted as described. Allega used a "measured mile" approach, comparing the productivity of unimpacted work (74 CY/crew hour) to the productivity of impacted work (54 CY/crew hour) to arrive at their damage calculation of \$85,091.56.

District's Position:

The plans identified areas for undercuts along the toe of the slope in the proximity of the original ditch line. Once the area had been cleared the project questioned the need for the undercuts and consulted

Peter Narsavage, PE, ODOT Construction Geotechnical Engineer. In his trip report Mr. Narsavage recommended modifying the limits of the plan undercuts and also recommended backfilling these undercuts with granular material. The plans did not include a bid item for granular material. Change order number 1 added 14,000 CY of granular materials at \$38.15 per cubic yard for a total amount of \$534,000.00.

The undercut work continued without discussion until the bid quantity for Reference 22 Subgrade Excavation was exhausted. At this point (June 23, 2009) the Contractor put the Department on notice that the work previously performed was significantly different than the plan item of work. Early Notice was not provided in a timely basis. Until this time project personnel believed all outstanding issues relative to the undercuts were addressed by Change Order 1. An increase in the quantity for a contract item of work that exceeds Contract Limits must occur before an adjustment to its unit price is warranted. An agreement on the unit price must be reached with ODOT before the Contractor begins work on items considered significantly changed. The additional work is not different in character from the original bid work. Therefore only the quantity of Reference 22 that exceeds the Contract Limits is subject to renegotiation.

The District argues that the character of this work did not change in “kind or nature from that shown in the plans”. The work performed was to excavate soft material for the purpose of stabilizing the toe of the slope as was intended by the plans. The work was performed with the same means and methods as the Contractor bid to do the work. The Contractor undercut the areas, loaded trucks and hauled away the material. Allega did perform undercut work in areas other than those shown in the plans, however, the method of performing the undercut did not change, and therefore the Contractor was not impacted. The District pointed out that by its nature Excavation of Subgrade is an as directed item therefore plan notes indicating the work would be directed by the Engineer is unnecessary and should be assumed by the bidder.

The District disputes Allega’s claim that its production was impacted 13 days due to a change in undercutting. It argues that Allega did not give notice of impact until June 23, 2009 therefore no damages should be considered until that time. The days of potential impact would be reduced accordingly to five. Also, The District states the method used by the Contractor for computing damages is a total cost claim approach which ODOT does not recognize as a legitimate method for calculating damages.

DIRECTOR’S CLAIMS BOARD DECISION:

I. Facts

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

1. Plan sheet 264 and the corresponding cross sections provide full details for the work for item Excavation of Subgrade (Reference 22).
2. Reference 22 Excavation of Subgrade is not designated on the plans as being “as directed by the Engineer”.
3. The Contractor was instructed to change the locations and the dimension and the limits for item Excavation of Subgrade (Reference 22) to meet field conditions.

4. The work for item Excavation of Subgrade (Reference 22) was performed on 22 days.
5. C&MS Section 104.02.D Significant Changes in Character of the Work states “If alterations or changes in quantities significantly change the character of the Work under the contract ...an adjustment, excluding anticipated profit, will be made to the Contract.” This Section defines “significant change” as:
 1. when the character of the Work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or
 2. when the product of the quantity in excess of the estimated quantity of a contract and unit price exceeds the limits set forth in Table 104.02-1.
6. C&MS Section 109.07 reads: “The Department will compensate the Contractor for inefficiency or loss of productivity resulting from 104.02 Revisions to the Contract Documents. Use the Measured Mile analysis comparing the productivity of similar work performed under un-impacted conditions to prove and quantify the inefficiency.”

II. Conclusions

A Contractor has the right to rely upon the representations made in the plan describing the requirements for the work and to determine its operations and price accordingly. In the case at hand it is reasonable that the Contractor bid to perform grading operations for Reference Number 22, Excavation of Subgrade to the lines shown in the plans without interruption. There was no indication in the plan that the Contractor would need to assess site conditions before proceeding or continuing with work. Changing a portion of the Work from that shown on the plans may have an impact on the Contractor’s means and methods and costs. C&MS Section 104 provides a method for determining and evaluating changes in the Scope of the Work .

The Board first turns to C&MS Section 104.02.D to determine if a Significant Change in the Character of the Work did in fact occur. The Board is persuaded by the facts and the information at hand that the Work performed by Allega differed materially in kind or nature from that depicted in the project plans. The District confirmed it provided direction to the Contractor as to when, where and how deep to perform the undercuts rather than grading to the lines shown on the plans. The Board is most persuaded by the nature of the modifications and their impacts on the Contractor’s planned method of operation.

Next the Board evaluates the impact. The Board is persuaded by and accepts as fact that Allega achieved a productivity of 74 CY per Crew Hour for work performed as planned and achieved a productivity of 54 CY per Crew Hour for impacted work.

Based on the above the Board determines that the Allega has proven entitlement for its claim.

C&MS Section 109.07 advises that a “Measured Mile analysis comparing the productivity of work impacted by a change to the productivity of similar work performed under unimpacted conditions to prove and quantify the inefficiency.”

The Board will not accept the calculations provided by Allega as representative of their damages due to the loss of production on this Work.

DAMAGES

This is a loss of productivity or inefficiency claim. C&MS 109.07 requires damages to be calculated using a Measured Mile analysis. Allega improperly performed its analysis. The Board computes damages as follows:

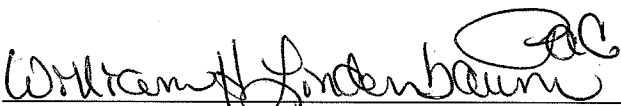
$$\begin{aligned} \text{Additional Cost per Unit Impacted} &= ((\text{Planned Productivity}/\text{Actual Productivity}) \times \text{Unit Price Bid}) - \text{Unit Price Bid} \\ &= ((74\text{cy per hr}/54\text{cy per hr}) \times \$11\text{per cy}) - \$11\text{per cy} \\ &= \$5.07 \text{ per cy} \end{aligned}$$

$$\begin{aligned} \text{Total Additional Cost} &= \text{Impacted Quantity} \times \text{Additional Cost per Unit Impacted} \\ &= 9394.5 \text{ cy} \times \$5.07 \text{ per cy} \\ &= \$38,235.62 \end{aligned}$$

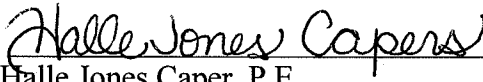
Based on the above findings, the Contractor is entitled to \$38,235.62 as reimbursement for damages.

This recommendation submitted this 21st day of June, 2010.

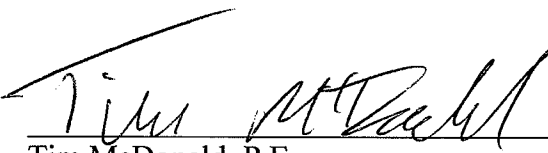
Director's Claims Board:



William H. Lindenbaum, P.E., P.S.
Deputy Director, Division of Highway Operations

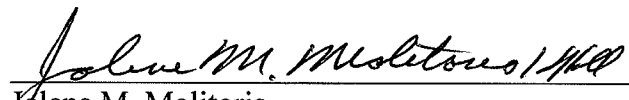


Halle Jones Capers, P.E.
Deputy Director, Division of Construction



Tim McDonald, P.E.
Deputy Director, Division of Production Management

Approval of this recommendation:



Jolene M. Molitoris
Director, Ohio Department of Transportation

6/22/10
Date