

**DISPUTE REVIEW BOARD REPORT
AND RECOMMENDATION
SH 66 OVERLAY – LYONS TO SH 287
BOULDER COUNTY, CO
CDOT PROJECT NO. STA 0661-011**

DISPUTE CONCERNING PAVEMENT DISINCENTIVE

Hearing Date: July 7, 2010

Hearing Location: CDOT Region 4 Office
1050 Lee Hill Rd.
Boulder, CO

Hearing Attendees: Ken Lawson – Lawson Construction Co - President
Jim Sampson – Lawson Construction Co. – Project Manager
Jonathan Boonin – Hutchinson Black & Cook – Lawson Attorney
Neil Lacey – CDOT HQ – Area Engineer
Eric Prieve – CDOT – Materials
Mark Gosselin – CDOT Region 4 – Program Engineer
James Flohr – CDOT Region 4 – Resident Engineer
Chris Boespflug – CDOT – Project Engineer
Ella Reichley – CDOT – Assistant Project Engineer
Larry D. Tannenbaum – Senior Assistant Colorado Attorney General

Background:

Lawson Construction Co. (Contractor) was awarded a contract by CDOT for \$6,826,556.55 to construct a six inch bonded concrete overlay above a milled asphalt surface on SH 66 from Lyons to Longmont in Boulder County, approximately 7.5 miles. The width of the overlay varied from 44 to approximately 90 feet. The Notice to Proceed was issued on March 17, 2009. The Project was partially accepted on December 22, 2009 and Final Acceptance occurred on March 19, 2010.

Section 7 of the Contract incorporates the Plans, the Standard Specifications for Road and Bridge Construction dated 2005 and any Special Provisions for this Project and Revised Standard Specifications.

Due to a difference in the interpretation of the Incentive/Disincentive payment provisions of the Contract, The Contractor submitted a Request for Equitable Adjustment on January 20, 2010 which was denied by the CDOT Project Engineer on February 11, 2010. Per Spec Section 105.21, the Contractor elevated the dispute to the Resident Engineer on February 12, 2010. After four meetings with the Resident Engineer and no agreement, the decision was made to elevate the dispute to a Dispute Review Board per Spec Section 105.22.

Joint Statement of Dispute:

The through lanes were tested for longitudinal surface smoothness in accordance with the specifications and based on the results of these tests, CDOT applied a disincentive to Lawson. Lawson contends that CDOT's regulations clearly require that, for determination of incentives/disincentives, the Department's Quality Assurance testing must be done on the "final pavement surface." Lawson contends that such testing was never done on the "final pavement surface" despite repeated requests from Lawson for CDOT to do so. Lawson thus provided their final smoothness results and corresponding recalculation of incentive/disincentive values based on those results in accordance with the note on Plan Sheet No. 9. CDOT contends that the specification states that the incentive/disincentive value is calculated from the Department's Quality Assurance testing which is completed prior to any corrective work by the Contractor and that no Quality Assurance retesting or subsequent recalculation of the incentive/disincentive is to take place. It is desired that the Dispute Resolution Board (DRB) determine merit and quantum.

Pre-hearing Submittal:

In addition to the Plans and Specifications for the Project, both parties provided the DRB with Pre-hearing Submittals per Spec. Section 105.22(e) which included but were not limited to documentary evidence relevant to the issues, serial letters, e-mail, speed memos and handwritten notes. Both parties essentially submitted the same documents in organized 3 ring binders as exhibits. Both parties provided the DRB with their lists of attendees. A Timeline of Critical Events is found in Attachment 1.

Contractor Presentation on the Dispute:

The Contractor felt that the basis for any Incentive/Disincentive (I/D) was straight forward in the Plans and Specs. They do not have a disagreement on the calculations or the testing. CDOT says the Plans and Specs are clear and concise. At bid time the Contractor believed they knew what was to be used for I/D. The Contract Documents should be complimentary.

The Contractor read the General Note on Plan Sheet No. 9 – *The Contractor shall perform Smoothness Quality Control (SQC) testing. The Contractor shall also perform Smoothness Acceptance Testing (SA) which will be used for acceptance and calculation of incentive/disincentive payments.* The Contractor submitted the SA results but CDOT did not use them. They also requested clarification but CDOT did not reply.

The Contractor referenced Spec Section 105.07(c) which states ...*surface smoothness of the **final pavement surface** (emphasis added) will be tested and evaluated by the Department...* Also, the Plan Note clarified the CDOT Spec. The

items cannot be separated and the Spec is inconsistent for QA. CDOT applied the I/D provision to an incomplete surface and not to the final pavement surface. The final Contractor tests were applied to the “final surface” as that term is defined by the

Contractor. CDOT did not accept the pavement until all the repair work was complete and the final test data was received from the Contractor. In addition, CDOT refused to retest the “final surface” with its testing equipment.

The Contractor maintains that CDOT applied a penalty and did not follow the Plan Note. CDOT got a quality product, got what they asked for and then penalized the Contractor.

CDOT Presentation on the Dispute:

CDOT stated that Spec Section 105.07 is clear on who does what and when. It states *The Department will perform the QAS testing for acceptance.... Incentive/disincentive payments will be based on the Department's QAS testing.* The Contractor argues that the acceptance should be after the Contractor's final test.

CDOT handed out a copy of Spec Section 412.12 and referred to Section (c), *Final Finish*, and stated the final finish refers to the surface created when the wet concrete is dragged or otherwise treated.

The Contractor argues that the Plan Note creates an ambiguity. Spec Section 105.08 (Coordination of Plans, Specifications, Supplemental Specifications, and Special Provisions) is very clear on the order of precedence and that Standard Special Provisions take precedence over Detailed Plans. The Contractor argues that the final testing they performed is the QAS. The Specs state that the Contractor will notify CDOT to perform the QAS. The Contractor never addressed the testing issue until the I/D was applied.

Contractor Rebuttal:

The Contractor stated the handout of Spec Section was never provided to them. (The Board noted that it was part of the “Blue Book”.) The Contractor stated Spec Section 412.12 refers to **surface texture** and not **finished surface**. CDOT said the documents were *clear and unambiguous*. The Contractor could not address this at the time of the bid and the Plans and Specs should be complimentary and not separable. It is unfair for CDOT to say they are clear and unambiguous. What was the Contractor to do? CDOT now admits there is a discrepancy between the Plans and the Specs.

The Specs require the Contractor to verify the final surface. Per the CDOT Manual, CDOT is to confirm the info. The Contractor asked CDOT to do this but they refused. CDOT issued a Form 105 (Speed Memo) stating no repairs could take place until after the QAS. The Contractor brought a test van to the Project and had to start on the shoulder. CDOT stopped in the tested area.

The Contractor asked “Do we have an ambiguity or not?” CDOT put the Note in the Plans and there is a definite discrepancy. Now CDOT is applying a penalty and not a disincentive. The Contractor was required to do the bump grinding, which they did. They then provided the final measurements. Their testing equipment is certified so what does another run with the CDOT van add? Until the Contractor says they are “done”, the surface is not final. The Plan Note is specific to this Project and, therefore the Note should mean something. CDOT is not being fair.

CDOT Rebuttal:

Form 105 #24 references Standard Special Revision of Sections 105 and 601 which states *no corrective work shall begin before the QAS testing is complete and if corrective work is required the repairs are to be provided in writing.* The Special Provision also says the I/D will be based on CDOT’s QAS.

CDOT is not here to argue intent, e.g. the van. There is a typo in the Notes. Plans and Specs are not perfect but Spec Section 105.08 clears up any questions. Test results should be similar. The Contractor did not give his position prior to the repairs.

The disincentive is not a penalty. CDOT wants to reward contractors for good work. The disincentive is the opposite. CDOT doesn’t like grinds on new pavement. The incentive is given for a smooth surface at the time of concrete placement.

CDOT said any Spec Revisions go through a review by contractors and CDOT before they are issued; plans do not. The Contractor was a part of the Spec review.

Discussions after the Rebuttals:

Contractor: CDOT admits there is an ambiguity so they should not discuss intent. CDOT did not admit there was an ambiguity until after they notified CDOT of the problem. They should not suffer because of CDOT’s error. CDOT had personnel with the Contractor everyday when they did their tests.

Contractor: CDOT said they did not like grinding. The Contractor` doesn’t know where in the Contract CDOT wants uncorrected work. CDOT allows grinding of PCCP and asphalt.

CDOT: No where in the Contract does it say uncorrected work. CDOT wants the quality in the initial placement.

CDOT: Diamond grinding is acceptable in the Specs. CDOT did have inspectors when the Contractor was doing his testing but CDOT did not get any data from the Contractor prior to the repair. They only received data after the repairs were made. The Plan Note should not be applied per the precedence spec.

Contractor: The Contractor did the testing work in the QC section but CDOT was to verify the final. Form 105 # 47 acknowledged receipt of their data. (Data after repairs.)

CDOT: Once the repairs have been made, QAS cannot be performed per the Spec.

Contractor: There are two inconsistencies in what CDOT has said. Final pavement surface compared to QC/QA and final finish vs. final surface. What is the final pavement surface? Spec Section 105.07(c) does not state to wait on making repairs.

There is nothing on what or how to do things. The Contractor could have put provisions in their bid if they had known what to do. There is a revision coming out to clear up the spec due to problems.

Summation Statement by Contractor:

- CDOT says the Specs are clear. The Contractor maintains that the Specs and Plan Note are not clear.
- CDOT says to test the initial surface and not the final surface which is the surface CDOT gets and the public uses.

Summation Statement by CDOT:

- The QAS is per the Spec and the QAS is what is to be used in any I/D calculations.
- If there is an ambiguity, Spec Section 105.08 defines what applies.
- Over 100 projects have been done using this Revised Spec, ten of which have been Portland Cement Concrete Pavement (PCCP). There have been no other disputes to date and many contractors have used it including Lawson.

Findings:

1. It is undisputed by the parties, as stated in their presentations, that the General Note on Page 9 of the Plans does conflict with Standard Special Provision 105.07 dated October 25, 2007. The Contractor stated that it had not been told at time of bid that there was an ambiguity between the Plan Notes and Standard Special Provision 105.07. Nothing was presented at the Hearing that CDOT knew of the discrepancy or conflict between the Plan Notes and the Standard Special Provision at the time of bid. It should be noted that Standard Specification 102.05 (Examination of Plans, Specifications, Special Provisions, and Site of Work) in the first paragraph states *The bidder is expected to examine... the plans, specifications, supplemental specifications, special provisions...before submitting a proposal. The submission of a proposal will be considered conclusive evidence that the bidder has made this examination and is aware of the conditions to be encountered in performing the work according to the Contract.* The last paragraph of this Standard Specification states *if a bidder discovers an apparent error in the...plan or specification, the bidder shall immediately notify the Engineer to enable the Department to make any necessary revisions.* Further, the Contractor's

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Bid Form states *IN PREPARING THIS PROPOSAL, I HAVE: examined the Plans, Specifications...and I am satisfied as to the conditions to be met and the work to be accomplished.*

2. The Contractor did not comment on CDOT's statement that Standard Special Provision 105.07 had been used on 100 projects and that no other contractor had disputed the Spec. However, CDOT did not state whether the conflicting Plan Note No. 9 was also included in the other projects nor did the Contractor.
3. In a letter from the Contractor to CDOT dated September 4 2009, the Contractor notified CDOT to schedule the high speed profile testing for smoothness. This letter requested that CDOT schedule high speed profiles on September 18, 2009 and September 25, 2009. On September 22, 2009 the Contractor issued another letter to CDOT requesting CDOT to schedule October 5, 2009 as another date for the high speed profile.
4. CDOT completed the QAS profiling and provided the results pursuant to Speed Memo #29 on September 29, 2009 to Jim Sampson, re: Roadway Smoothness Results with attached CDOT QAS Results from the High Speed Profile run on September 18, 2009, noting bumps and corrective work areas with a request for Lawson to provide proposed corrective work and schedule. Subsequent QAS results were sent from CDOT to the Contractor related to HSP runs on October 7, 2009 and October 15, 2009. The Contractor completed the repair work and provided their profiling results to CDOT by their letter #25 dated December 7, 2009 as required under 105.07(a). The results also included the Contractor's I/D calculations. It also noted that this letter was following up on Pay Estimate No. 5 for I/D payment and that the Contractor was not sure if CDOT would have their van run smoothness testing again or if the Contractor's QC testing report is acceptable.
5. CDOT responded in Speed Memo #47, dated December 8, 2009 acknowledging receipt of the Contractor's QCS profiling of corrective work and that smoothness now complies with the minimum parameters set forth in the Revision of Sections 105 and 601. This Speed Memo also states that I/D payment is based on CDOT's QAS testing and that the specification does not required CDOT to rerun QAS testing.
6. There was additional correspondence between the parties related to their differing positions concerning the interpretation of Section 105.07. It should be noted that until a December 16, 2009 e-mail from James Sampson to Chris Boespflug, Subject SH 66 – Smoothness Acceptance, this issue had, from the inception of correspondence between the parties, been framed within Revised Standard 105.07; however, this e-mail requested CDOT to review the General Note on

Plan Page 9, quoting that General Note indicating that the contractor shall perform smoothness acceptance testing for calculation of incentive/disincentive payments. Based on the parties' presentations and a review of the Pre-hearing Submittals, it

appears that this was the first time the Plan Note on Plan Page 9 was mentioned.

7. Based on the forgoing findings, it is the Board's conclusion that Standard Special Provision 105.07 dated October 25, 2007 is applicable and controls the process for and calculation of incentive/disincentive payments. There is no dispute between the parties that the process outlined in Standard Special Provision 105.07 was initially followed by both the Contractor and CDOT.
8. Further, Standard Specification 105.08 states that the order of precedence of documents specifically lists Standard Special Provisions ahead of Plans and therefore, Standard Special Provision 105.07 controls over the General Plan Note page 9.
9. Standard Special Provision 105.07(c)1.A. states *The longitudinal surface smoothness of the final pavement surface will be tested and evaluated by the Department in accordance with CP 72 and using the Department's high-speed profiler (HSP)*. The question of at what period of time and condition does the term "final pavement" apply must be resolved in favor of the Department. Even though this is not a defined term within the Contract or any of the Plans and Specifications of the Contract, it can only mean that pavement surface that is initially subject to the HSP testing by the Department. The Contract does not provide for subsequent testing except at the discretion of the Engineer. (See Standard Special Provision 105.07(c)1.B, last sentence).

Recommendation:

1. Therefore, the Board finds that the Request for Equitable Adjustment by the Contractor is without merit, and further recommends that no quantum be adjusted or awarded to the Contractor.
2. CDOT should in the future perform a more careful review and check of the Plans and Specifications to insure that there are no blatant discrepancies or errors.

Respectfully submitted, this 27th day of July 2010.

Nicholas Pijoan

John L. Tracy

W. H. Hinton II

Attachments:

1. Timeline of Critical Events

ATTACHMENT 1

**STA 0661-011; 16214
SH 66 - US 36 TO SH 287**

TIMELINE OF CRITICAL EVENTS

- 6-26-09 Lawson QC profiling WB SH 66 lane as per Revision of Section 105.07(a).
- 6-30-09 Lawson submits QCS results from 6/26/09 noting that corrective action may be required and identifying actions to improve smoothness results.
- 9-4-09 Lawson requests High Speed Profiler per Revision of Section 105.07(c) for 9/18/09 and 9/25/09.
- 9-18-09 Quality Assurance Smoothness (QAS) testing with the High Speed Profiler is completed on Westbound portions of SH 66. QAS results transmitted to Lawson on 9/23/09.
- 9-22-09 Lawson requests High Speed Profiler per Revision of Section 105.07(c) for 10/5/09.
- 9-29-09 Lawson submits proposal to perform required corrective action as per Revision of Section 105.07(b). Proposal for corrective work approved.
- 10-7-09 QAS testing with the High Speed Profiler is completed on Eastbound and Westbound portions of SH 66. QAS results transmitted to Lawson on 10/8/09.
- 10-9-09 Corrective action work (bump grinding) begins in areas as noted in the QAS testing results.
- 10-15-09 QAS testing with the High Speed Pro filer is completed on the remaining portions of Eastbound SH 66. QAS results transmitted to Lawson on 10/16/09.
- 12-7-09 Lawson provides notice that quality control has verified that all corrective action (grinding) has been accomplished. Recalculation of incentive/disincentive values is requested.
- 12-11-09 Lawson submits letter noting concern regarding CDOT's interpretation of the smoothness specification and the calculation of the incentive/disincentive values.
- 12-22-09 Final corrective action work (replacement of joint sealant damaged/removed by grinding) is completed. Partial project acceptance given. Final project acceptance waiting for completion of added utility work.

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1-7-10	Notice of Dispute
1-20-10	REA submitted
2-4-10	Project level meeting to discuss merits of dispute
2-11-10	Merit of dispute denied
2-12-10	Lawson rejects PE's denial of merit in letter to the Resident Engineer (RE).
2-19-10	RE Review process begun with 1 st meeting
3-5-10	RE Review 2 nd meeting
3-12-10	RE Review 3 rd meeting
3-18-10	Addendum to REA submitted
3-19-10	RE Review process ended with 4 th meeting. Decision to take dispute to a Dispute Review Board.
3-19-10	Added utility work complete. Notice of final project acceptance given.