**COLORADO DEPARTMENT OF TRANSPORTATION**
**STANDARD SPECIFICATION SECTION 105 DISPUTE REVIEW BOARD**

**Brannan Sand and Gravel Co. v. Colorado Department of Transportation**

---

# DRB FINAL RESOLUTION

---

## BACKGROUND

Colorado Project No. STA 0404-044 15821R, "Removing Asphalt Mat on West Colfax Avenue and Replacing with a new Hot Mix Asphalt Overlay", was awarded to Brannan Sand and Gravel Company on August 11, 2008, for $1,089,047.93. The contract incorporated all Colorado Department of Transportation (CDOT) Standard Specifications and Project Special Conditions, including, Standard Specification 109.06:

> **Standard Specification 109.06 Partial Payments.** CDOT will make partial payments to the Contractor once each month as the work progresses, when the Contractor is performing satisfactorily under the Contract. Payments will be based upon progress estimates prepared by the Engineer, of the value of work performed, materials placed in accordance with the Contract, and the value of the materials on hand in accordance with the Contract.

**Revision of Section 109.** In September 2006, CDOT, CCA (Colorado Contractors Associations), and CAPA (Colorado Asphalt Pavement Association) formed a joint Task Force at the request of CAPA to evaluate the need for an asphalt cement cost adjustment specification that would be similar to the Fuel Cost Adjustment that was currently being used by CDOT. The result of the Task Force effort was the revision of Standard Specification 109.06 to include the Asphalt Cement Cost Adjustments Subsection.

**Subsection 109.06, Revision of Section 109, "Asphalt Cement Cost Adjustment When Asphalt Cement is Included in the Bid Price for HMA"**, states:

(i) ***Asphalt Cement Cost Adjustments***. Contract price adjustments will be made to reflect increases or decreases in the price of asphalt cement from that in effect during the month in which bids were received for the Contract. When bidding, the Contractor shall specify on the attached form whether the asphalt cement adjustment will apply to the Contract.

After bids are submitted, the Contractor will not be given any other opportunity to accept or reject this adjustment. If the Contractor fails to indicate a choice or fails to submit the form prior to bid opening the price adjustment will not apply to the Contract. If the asphalt cement cost adjustment is accepted by the Contractor, the adjustment will be made in accordance with the following criteria:

1. Price adjustments will be based on the asphalt cement price index established by the Department on the first working day of each month. The index will be the spot price per barrel of Western Canadian Select (WCA) as published on http://www.encana.com/doing_business/crudeoil pricing/index.html for the first working day of the month.

**The Revision of Section 109,** also includes an Adjustment Formula to calculate the amount of the asphalt cement (AC) cost/price adjustment resulting from prices of crude oil each month.

One of the variables in the AC Cost Adjustment Formula is the EP; the AC price index for the month in which the partial pay period ends:

1. Price adjustments will be paid on a monthly basis with the following conditions:

Payments will be based on the pay quantities on the monthly partial pay estimate for the following items when asphalt cement in the pay items:
403 Hot Mix Asphalt
403 Stone Matrix Asphalt

A. Price adjustments may be either positive or negative dollar amounts.

C. Adjustment formula:
**EP** greater than BP: ……
**EP** less than BP: ……
Where
BP = Asphalt Cement price index for the month in which bids are opened
**EP = Asphalt Cement price index for the month in which the partial estimate pay period ends**

F. Asphalt Cement cost adjustments resulting in an increased payment to the Contractor will be paid for under the planned force account item; Asphalt

Cement Cost Adjustment. Asphalt Cement cost adjustments resulting in a decreased payment to the Contractor will be deducted from monies owed the Contractor.

If the asphalt cement price index for the month in which a partial pay period ends (EP) increases by 50 percent or more over the asphalt cement price for the month in which bids are opened (BP), the Department will determine the feasibility of continuing construction of the project and will notify the Contractor in writing if the Contract is terminated in accordance with subsection 108.10.

## BASIS OF BRANNAN REQUEST FOR EQUITQBLE ADJUSTMENT (REA)

Brannan's REA alleges (1) that the Asphalt Cement Price Adjustment formula is ambiguous, as applied; (2) that the formula does not meet the original intent of the provision; and (3) that the AC and AF Cost Adjustment formula should be based on the asphalt price in existence during the month that the material is placed by the Contractor, and not the index at the time the partial payment estimate is developed.

## DRP METHODOLOGY TO REACH A RESOLUTION

In order to reach a resolution to Brannan's REA, the DRB member sought answers to the following questions:

1. Is the Adjustment Formula in the Revision of Section 109 ambiguous?
2. Does the revised provision meet the intent of original Task Force? And,
3. Should the Adjustment Formula be applied as Brannan requests?

However, before discussing the answers to the questions cited above, a discussion of the contracting process is required to establish the existence of a valid contract between Brannan and CDOT, including the provisions at issue.

## INCLUSION OF THE AC and FC COST ADJUSTMENTS IN THE CONTRACT

Bidders on CDOT asphalt paving contracts have the option to accept the asphalt cement and fuel cost adjustments in accordance with **Subsection Revision of Section 109.** In order for a bidder to accept the costs adjustment provision and make it a part of the Contract, the bidder must sign their bid submittal declaring their acceptance or rejection of the provision. If a bidder fails to make an election in their bid submittal, CDOT will assume the bidder rejects the cost adjustments for the project. After bids are submitted, bidders will not be given any other opportunity to accept or reject the cost adjustment. The acceptance-or-rejection form must be submitted with the bid. If the Contractor is submitting the bid electronically the hard copy of the form must be received by CDOT at the address listed in the specification prior to bid

For Contract No. STA 0404-044 15821R, Brannan voluntarily chose to accept the asphalt cement cost adjustments for the project; presumably, as written and understood by all parties. *"Terms of contract must be enforced as written."* ***Fox v. I-10 Ltd.****, 9557 P.2d. 1018, 1021-22 (Colo. 1998).*

## 1. IS THE PROVISION AMBIGUOUS?

Brannan alleges that the index used to calculate the asphalt cement cost adjustment is ambiguous, specifically regarding the time frame in which the adjustment is applied. Brannan states that their interpretation of the specification is that the index **should be** applied to the time frame in which the work was performed, rather than at the time the pay estimate is calculated by the CDOT engineer.

*"…a mere disagreement between the parties as to the interpretation of a term …. does not create an ambiguity".* ***Fibreglas Fabricators, Inc. v. Kylberg*** *, 799 P.2d 371 (Colo. 1990).*

Although the DRB might be in agreement with Brannan that applying the cost adjustment index at the time the asphalt is placed would likely result in a cost adjustment that is more closely aligned to the actual costs paid for the materials, the clear language of the

specification is that index at the time the pay estimate is prepared is to be used in the cost adjustment formulas.

In addition, based on the prior course of dealings between CDOT and paving contractors this REA is the first that questions how the AC and FC cost adjustment formulas are calculated.

## 2. DOES THE SPECIFICATION MEET THE INTENT OF ORIGINAL TASK FORCE?

Brannan bases its claim of ambiguity on its opinion that the intent of the specification was for the contractors and CDOT to share the risk of fluctuating asphalt prices. Brannan then concludes that, again in their opinion, the intent could be met by applying the price adjustment in the month in which the asphalt is placed.

The original CDOT, CCA, CAPA joint Task Force collectively authored the revision of Standard Specification 109.06 specifically to protect both parties, Contractors and CDOT, from fluctuations in the price of oil. And because of fluctuating prices, the favorable and unfavorable application of the price adjustment can affect either party, depending on how the market price varies in any time frame.

*"In reviewing a contract, [the] primary obligation is to effectuate the intent of the contracting parties according to the plain language and meaning of the contract."* ***Albright v. McDermond****, 14 P.3d 318, 322 (Colo. 2000).*

The original Cost Adjustment Task Force members intended for the price adjustment to have CDOT and Contractors share the risks of fluctuating oil prices. When the market price declines, the Contractors benefit, and conversely, when the price rises, CDOT benefits. In the present situation, the price adjustment proved to be unfavorable to the Contractor, Brannan, whereas, in other situations, the reverse has been the case. In the end however, the AC Cost Adjustment formula works exactly as the Task Force intended; share the risks between CDOT and Contractors.

> ***USI Props. East v. Simpson**, 938 P.2d 168, 173 (Colo. 1997). A court's primary goal is to implement the intent of the parties as expressed in the language of the decree. Id. To ascertain this intent, the courts turn to the plain and ordinary meaning of its terms. Id. If the terms are clear, a court will neither look outside the four corners of the instrument, nor admit extrinsic evidence to aid in interpretation. Id. Disagreement between the parties involved does not necessarily indicate that the documents are ambiguous. Id. Instead, the court must adopt the plain and generally accepted meaning of the words employed.*

**3. SHOULD THE FORMULA BE APPLIED AS BRANNAN REQUESTS?**

Brannan's final allegation is that the formula **should be** based on the asphalt price in existence during the month that the material is placed by the Contractor, and not be based the index in effect at the time of the partial payment estimate.

The DRB may be in agreement with Brannan that the Cost Adjustments should / could be more closely tied to the actual price of oil when the Contractor actually pays for the Adjustment-related purchases, and additionally that the precise time frame during which the adjustments are to be applied should be more definitively defined in the specifications.

The opinions of the DRB, however, are irrelevant to the final resolution of this matter.

*"……a court has no right to add a new term to a contract." See **Fountain v. Mojo**, 687 P.2d 496, 499 (Colo. App. 1984)*

The original Task Force, composed of asphalt industry organizations, developed the current languages of the Cost Adjustment Specifications. As the legislative advocate for highway paving contactors, it is the responsibility of the Task Force members to rewrite any provisions of the Cost Adjustment specifications to address ambiguities and inequalities of the existing specification; not the DRB.

The DRB concludes that that the Asphalt Cost Adjustment Formula in **Subsection 109.06, Revision of Section 109** clearly designates the index in effect during the month

in which the partial estimate pay period ends as the date on which the formula is to be applied. The DRB does not have the authority to rewrite contract terms, and for the DRB to change the day on which the index is applied, would be to rewrite the specification. Furthermore, if CDOT were to change the date or day on which the price index is applied in this instance, all previous asphalt paving contracts would have to be readjusted; a major endeavor.

*"Courts should not rewrite clear and unambiguous contract provisions." Chacon v. Am. Family Mut. Ins. Co., supra, 788 P.2d 748, 750 (Colo. 1990).*

**DRB FINAL RESOLUTION: PRIOR COURSE OF DEALING**

The DRB concludes that the specification in question is not ambiguous; the specification meets the intent of the original Task Force and a change in the index time of the specification can not be made by the DRB. Finally, the DRB finds that the 'prior course of dealings' between CDOT and asphalt Contractors clearly support the DRB's Final Resolution.

Course of dealing refers to the systematic and uniform conduct in which parties engage after they enter into a contract. The intent of the parties in regard to the meaning of the agreement is reliably ascertainable through the application of course of performance only when a contract requires a repetitive series of performances. There must be more than one performance, but no particular number is required. The fewer the performances, the more probable it is that such performances cannot constitute a course of performance.

> *Evidence of course of dealing and course of performance is admissible if it does not directly contradict the terms of a written agreement, but merely explains or supplements it.* ***Great W. Sugar Co. v. Northern Natural Gas Co.****, 661 P.2d 684 (Colo. App. 1982),* ***KN Energy, Inc. v. Great Western Sugar Co.****, 698 P.2d 769 (Colo. 1985), cert. denied, 472 U.S. 1022, 105 S. Ct. 3489, 87 L. Ed.2d 623 (1985).*

If a party accepts a course of performance without objection, his or her acquiescence is relevant to determining the meaning of the contract. The recipient of the performance

need not expressly assent to the performance; the lack of an objection is sufficient. Unless there has been acceptance without objection, a party who performs cannot benefit from the application of course of performance.

> *"Evidence of course of dealing, usage of trade and course of performance is admissible to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean."* ***Colo. Rev.Sta****t. 4-1-205, Official Comment 1*

At the Hearing on the Merits of the Brannan REA, CDOT presented information on the application of the Fuel Cost Adjustment Amounts Paid and Withheld by CDOT, listed by project. The data revealed:

1. CDOT Revised Specification Section 109.06 has been included in contracts since 1996, with no disputes filed by any other contractor questioning when the price adjustment is applied, or that the provision is ambiguous. **[Brannan has performed on other CDOT contracts containing the AC and/or AF Cost Adjustments]**

2. Brannan has worked on twelve (12) other CDOT asphalt paving contracts containing the Fuel Cost Adjustment provision. On two of the previous contacts, Brannan has had payments withheld by CDOT; on the other ten instances, Brannan fared favorably under the price adjustment calculations and received payments from CDOT. **[The Fuel Cost Adjustment and Asphalt Cement Adjustment are both calculated using the estimate cutoff date (EP) in the formulas]**

3. In the present situation, the price adjustment proved to be unfavorable to the Contractor, Brannan, whereas, in other situations, the reverse has been the case.

However, in the majority of the instances in which the price index has been applied, it has resulted in favorable results for Contractors. **[The incidences of FC Cost Adjustments Paid by CDOT exceed the incidences of FC Cost Adjustments Withheld by CDOT by a 3:1 ratio]**

**DRB FINAL RESOLUTION**

Pursuant to the January 17, 2008 Revision of Section 105 of the Standard Specifications, the DRB finds no merit in Brannan's REA and therefore, no quantum shall be awarded.

**Stanley B. Williams**
**CDOT Dispute Review Board**
**Tuesday, May 19, 2009**