

April 29, 2010

Colorado Department of Transportation  
1205 West Avenue, Box C  
Alamosa, Colorado 81101

Asphalt Constructors, Inc.  
7040 W. Highway 160  
Alamosa, Colorado 81101

Attention: Keith Magowan, Colorado Department of Transportation  
Todd A. Stockebrand, Asphalt Constructors, Inc.

Subject: DRB Recommendation for the Dispute between Colorado Department of  
Transportation (CDOT) and Asphalt Constructor, Inc. (ACI)

A Dispute Review Board (DRB) hearing was conducted in the Colorado Department of Transportation's (CDOT) Alamosa, Colorado office on Thursday April 1, 2010 for the CDOT project STA 017A-010, SH 17, Alamosa North.

Present at the DRB hearing were:

- Dale Martinez – CDOT Resident Engineer
- Keith Magowan – CDOT Project Engineer
- Rob Beck – CDOT Project Engineer
- Todd Stockebrand – Asphalt Constructors, Inc. (ACI)
- Chuck Reavis – A & S Construction Company (A&S)
- Raymond Henn – DRB

### **Overview of the Dispute**

At the completion of the project there was a disagreement, which evolved into a dispute, over the final payment amount to ACI for the hot mix asphalt (HMA) placed on the project. The disputed payment amount does not involve the physical quantity of HMA placed but rather the quality of the HMA placed. CDOT specifies the use of a CDOT provided computer software program which is used to generate payment amounts based on input of field quality control test results. ACI claims and CDOT confirmed that ACI's final payment for HMA was reduced based on the results of the "asphalt content", Test #28, which was performed on May 12, 2009.

### **DRB Recommendations Request by Both Parties**

At the hearing, both parties agreed that they only wanted a merit recommendation from the DRB. Based on the DRB's merit recommendation, the parties would calculate the quantum (monies) that may or may not be due to ACI.

### **DRB Recommendation**

The DRB's recommendation is that ACI position on this dispute has merit and the results from Test #28 should be excluded from the computer generated payment amount due to ACI.

### **Reasoning for the DRB's Recommendation**

- A. The asphalt represented by the results of Test #28 was for an approach (driveway) and not for the main roadway paving.
- B. The quantity of asphalt represented by Test #28 was for approximately 119 tons which represent approximately 0.53% of the total asphalt placed for the project, 22,116 tons, as of May 12, 2009 the date of Test #28.
- C. Per paragraph 105.05, page 35, of the CDOT Standard Specifications for Road and Bridge construction, "The Engineer may separate a process in order to accommodate small quantities or unusual variations".
- D. Per CDOT's letter dated December 8, 2009 to ACI, "The Colorado Department of Transportation *has elected* not to separate as an unusual variation", emphasis added.
- E. Per page 1 of CDOT's "105.22(e)(2) Position paper of the Colorado Department of Transportation", Item II states "CDOT presents the following in support of its position that CDOT has the *discretion*, not obligation, to separate any test of unusual variations", emphasis added.

Based on the above five points (A thru E), the DRB concluded that:

1. The asphalt quality in dispute, based on Test #28, is for a driveway and not the main highway paving.
2. The quantity of asphalt in dispute is very small compared to the overall project quantity of asphalt paved.
3. CDOT's engineering staff has the authority and could have exercised reasonable engineering judgment to allow Test #28 results to be excluded for payment purposes.

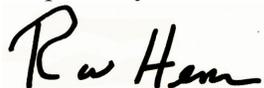
In closing, the parties are asked to review CDOT's specification section 105 Disputes and Claims for Contract Judgment, subsection 105.21 Disputes Resolution (i) which reads:

- “(i) *Acceptance or Rejection of Recommendation.* CDOT and the Contractor shall submit their written acceptance or rejection of the Recommendation, in whole or in part, concurrently to the other party and to the DRB within 14 days after receipt of the Recommendation or following receipt of responses to requests for clarification or reconsideration.

If the parties accept the Recommendation or a discreet part thereof, it will be implemented in accordance with subsections 108.07, 109.04, 109.05, or 109.10 and the dispute is resolved.

If either party rejects the Recommendation in whole or in part, it shall give written explanation to the other party within 14 days after receiving the Recommendation. When the Recommendation is rejected in whole or in part by either party, the other party may either abandon the dispute or pursue a formal claim in accordance with subsection 105.23.”

Respectfully submitted by:

A handwritten signature in black ink that reads "Raymond W. Henn". The signature is written in a cursive style with a large initial "R" and "H".

Raymond W. Henn  
Dispute Review Board