

**DISPUTE RESOLUTION BOARD**  
**US ROADS**  
**and**  
**COLORADO DEPARTMENT OF TRANSPORTATION**  
**CONCERNING CONTRACT NO. 11 HA2 22023**  
**COLORADO PROJECT NUMBER C 021A-001, 17604**  
**RECOMMENDATION**  
**OF THE DISPUTE RESOLUTION BOARD**

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This matter came on for hearing and determination pursuant to Section 105.21, as amended, of the Standard Specification of Road and Bridge Construction, for determination and resolution of issues raised by the parties, before Dispute Resolution Board ("DRB"), Raymond Dean Jones. The Colorado Department of Transportation ("C-DOT") was present at all hearings, represented principally by Joe DeHeart, Project engineer, Ajin Hu, Resident Engineer, and other staff members of C-DOT. US Roads was present at all hearings, represented by Lawrence Luecking, and Siegfried Meyer, President of US Roads, and Jerry D. King, Operations Manager of US Roads. The parties met in session on August 3, 2011, August 25, 2011, and August 26, 2011, in Colorado Springs, Colorado. The parties presented their cases in chief, respectively, then presented rebuttal information to the case in chief of the other respective party, and presented closing arguments on behalf of their respective cases. Based on the foregoing, the DRB hereby enters the following Recommendation of the DRB.

## I. FACTS AND REFERENCE TO THE STANDARD SPECIFICATIONS

On August 18, 2010, the parties entered into Contract Number 11 HS2 22023, a "Bid Item" contract, upon US Roads ("USR") being selected as the contractor for construction project No. C 021A 001, which called for USR to "furnish all materials and do all work not herein specifically excepted, necessary or incidental to the complete construction of [the Project], consisting of modifying acceleration and deceleration lanes, road side ditch work, and restriping, located on State Highway 21B in El Paso County, in the State of Colorado." All such work was described in the plans and specifications for the project. The contract and Specifications called for a Binder Mat and two additional mats of asphalt, each of the three mats to be two inches in thickness, concerning the paving aspects of the work.

The contract was to be effective upon approval of the State Controller, or on August 18, 2010, whichever was later. Payment was to be made to USR upon successful conclusion of the work, as described in the specifications in an amount not to exceed \$291,824.50. USR met all of the licensing and bonding, and other requirements of the State of Colorado to enter the contract. USR claims that the change in the date of the Pre-Construction Meeting ("Pre-Con") to September 15, 2010, had a deleterious effect on USR because it pushed the work of paving into a time of the year during which wind and decreased temperatures affect the ability of the asphalt to perform, and that it is more difficult to apply the asphalt to the roadway. There was no evidence to the contrary, however, the issues that ultimately arose and had a causal relationship to the failure of the first, or "Binder Mat," did not relate to wind, temperature, or other specific condition having directly to do with the time of the year during which that mat was being applied to the roadway. Therefore, the DRB cannot determine that the fact that the Pre-Con was held later than when first scheduled was a direct cause of the failure of the Binder Mat, and the slow-down of the work by USR.

C-DOT and USR consulted together, pursuant to Specification 401, and Table 401-1, to establish a general design mix formula for the parameters of the asphalt to be used on the project. USR was required to use a job mix formula within acceptable ranges as set forth in Table 401-1, and other specifications. Required

asphalt densities, however, were not met by the asphalt USR laid down as the Binder Mat. The specifications state that "Unacceptable work, resulting from any cause" discovered prior to final acceptance of the work, "shall be removed and replaced in an acceptable manner at the Contractor's expense." This rule is not obviated by a failure of the C-DOT inspector to call the contractor's attention to the shortcomings of the work immediately. Such work, as here, may be ordered removed and replaced in accordance with the specifications, at the Contractor's expense.

Here, C-DOT acted within its discretion to order USR to remove the defective asphalt and to replace it with asphalt meeting required densities and other specifications, at USR's own expense. This resulted in a loss to USR of approximately \$138,000.00, which C-DOT did not pay to USR under the contract, for completing the work bargained for. Additionally, USR suffered losses of hard costs, daily penalty deductions for work required after the contract completion date, and other losses totaling that much or more. The imposition of these losses pursuant to contract, while harsh, was well within the ambit of C-DOT's discretion under both the contract and the specifications governing the project.

ACCORDINGLY, it is the Recommendation that the penalties imposed herein shall remain in place.

  
Raymond Dean Jones

September 22, 2011

Disputes Resolution Board