

# What Would You Do? Plus What Do You Think...

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Presented By:



and



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# The Project

- ▶ The Project consisted of 3.44 mi of hot mix asphalt reconstruction and concrete paving, among other things, on M-1 from 7 Mile Road to 10 Mile Road.
- ▶ The Project was divided into two (2) segments, Segment 1 and Segment 2, with each segment consisting of four (4) stages, Stage 1, Stage 2, Stage 3, and Stage 4.
- ▶ As scheduled, Segment 1 was to be performed and completed during the 2021 construction season and Segment 2 was to be performed and completed during the 2022 construction season.
- ▶ Stage 1 and Stage 2 of Segment 2 required 4G Aggregate for the construction of the road grade.

# The Contract Documents

- ▶ The contract documents contained typical General and Special Conditions.
- ▶ The contract documents incorporated the 2012 MDOT Standard Specifications for Construction.



# The Bid

- ▶ Good Guys Construction Company (“Good Guys”) bid the Project, intending to acquire 4G Aggregate from Bigs Crushing LLC (“Bigs”) and Smalls Aggregates LLC (“Smalls”), with Bigs being its primary source for 4G and Smalls being its secondary source for 4G.
- ▶ Good Guys intended to acquire 4G from Bigs’ location in Sterling Heights, MI and Smalls’ location in Madison Heights, MI. Both suppliers were within the East Region and were able to meet the Project Schedule and site restrictions associated with MDOT’s part-width construction design.
- ▶ The part-width construction created access limitations; Good Guys accounted for it by planning to use semi-trucks for hauling material from the two above-mentioned locations.

# The Project

- ▶ Good Guys was awarded the Project on February 10, 2021.
- ▶ Good Guys performed and completed Segment 1 within the Project Schedule and without any significant issues, in particular, material supply related issues.

# The Project

- ▶ Shortly after the 2022 construction season began, Good Guys encountered issues with acquiring the 4G needed for Stage 1. The issues were exacerbated in Stage 2 and Stage 3 because of an “industry-wide shortage” of 4G in the East Region.
- ▶ On March 10, Bigs informed Good Guys that it had lost its lease in Sterling Heights and would be relocating its operation to Southland. While setting up its crusher and working to achieve MDOT approval in Southland, Bigs could not commit to a start date for the production of 4G.

# What Would You Do?

- ▶ Any Request?
  - Request for Substitution of Material
  
- ▶ Any Notice?
  - Notify Owner and Engineer of Situation and Issue
  
- ▶ Any Other Action?

# What Good Guys Did...

- ▶ Good Guys could not reasonably wait for Bigs, considering the Project Schedule and potential for liquidated damages. Therefore, on March 14, 2022, Good Guys submitted RFI No. 1, which requested a substitution of 21AA for 4G.
  - MDOT agreed with Good Guys and approved the request on March 21, 2022.
- ▶ In the interim, Good Guys contacted the two largest producers of 4G in the East Region - Mario Construction (“Mario”) and Luigi Aggregates (“Luigi”).
  - All ten (10) of their individual locations were either sold out or could not commit to the quantities of 4G required to build the Project in accordance with the Project Schedule.



# What Good Guys Did...

- ▶ Good Guys also contacted local 21AA producers Bonnie Crushing, Clyde Crushed Concrete, Burt Crushing, and Ernie Crushed Concrete about switching over to producing 4G.
  - None agreed.
- ▶ Furthermore, Good Guys reached out to the new lessor of the Sterling Heights location previously occupied by Bigs. Discussions continued from March 10 through the middle of August until it was determined that this location would not be a viable option for 4G.

# What if...

- You're a subcontractor (or a supplier)?
  - Submit notice to contractor and request contract submit notice to owner and engineer.

# The Project

- ▶ On April 30, Good Guys directed Smalls to begin producing 4G even though Smalls, a MDOT prequalified supplier, was not state certified to produce 4G, which would result in testing limitations for the production and placement of 4G.
- ▶ On June 3, Smalls' plant broke down; Smalls informed Good Guys that it would be “weeks” before it could produce 4G again.
- ▶ Good Guys immediately contacted Bigs, which had finally received MDOT approval of its Southland location, to acquire 4G.
- ▶ On June 6 and 7, Good Guys and Bigs discussed testing the 4G in Southland; Bigs informed Good Guys that the material failed on June 9.
- ▶ On June 14, Bigs said it would be “a while” before a new pile was ready for testing.

# What Would You Do?

- ▶ Any Notice?
  - Continue to Update and Notify Owner and Engineer of Situations and Issues
- ▶ Any Other Action?

# What Good Guys Did...

- ▶ Those events compelled Good Guys to contact other suppliers. Mario and Luigi replied with the same response that they had in March; both were either sold out of or could not commit to supplying the 4G required to build the Project in accordance with the Project Schedule. Good Guys contacted Bonnie Crushing again who indicated that it would still only produce 21AA.
- ▶ On June 9, Good Guys contacted Savior Stone Company (“Savior”), who notified Good Guys, on the following day (June 10), that it could provide 4G, but only from its pit in Oldport, located in the South Region.

# What Would You Do?

- ▶ Begin Hauling Material?
- ▶ Any Notice?
  - To Who?
  - About What?
  - For What?

# What Good Guys Did...

- ▶ On June 11, Good Guys started hauling from Savior.
- ▶ Since Savior's pit was located a significant distance from the Project and outside the East Region, Good Guys hauled the 4G in gravel trains, not semi-trucks as planned. The gravel trains maximized the tons per load and was more cost efficient than semi-trucks.
- ▶ Recall that the MDOT designed part-width construction presented access limitations and required the use of semi-trucks for hauling material safely to the site; therefore, Good Guys had to double handle all the 4G from Savior in gravel trains.
- ▶ Good Guys stockpiled 4G at multiple locations including the I-44 ramps, their storage yard on Madison Avenue, and onsite in areas not under construction. The material would then be loaded into semi-trucks and hauled onsite as needed.

# What Good Guys Did...

- ▶ On June 11, Good Guys notified MDOT of the “industry-wide shortage” of 4G in the East Region and submitted a notice of intent to file claim (the “Notice of Intent”). The Notice of Intent stated:

Mr. Magoo:

As discussed this afternoon, Good Guys has been informed of several supply issues for the specified Open Grade Drainage Course, 4G Aggregate, required for building the road grade on the Project. The East Region of MDOT has an industry-wide shortage that would cause delays to the project and cause additional costs to Good Guys. Good Guys believes the 4G shortage within the East Region, despite having several potential sources, is an unforeseen delay beyond Good Guys’ control. Due to the shortage, and in attempt to maintain the project schedule, Good Guys needs to acquire material from out of the East Region. Good Guys believes the requirement to go out of the East Region to acquire material is above and beyond the reasonable expectation to complete this project and deems any delays and costs associated with going out of the East Region to acquire material as compensable (i.e., entitled to additional time and money for the same). Good Guys submits this notice of intent pursuant to MDOT 2012 Standard Specification [108.08.C.7](#), [103.02.B](#), and [103.02.E](#).

- \* Before beginning the work or upon encountering the circumstance that is the basis of the claim or within 3 calendar days after the beginning of a delay



# Standard Specifications

- ▶ Std. Spec. 108.08.C.7 provides:

108.08. Extension Of Time On Calendar Day Or Calendar Date Contracts. If the contract time is specified in calendar days or by a calendar date, the Engineer will grant time extensions for the following excusable delays without liquidated damages for opening to traffic and completing within the contract time on each of the following bases:

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C. If there are delays due to unforeseen causes beyond the control and without the fault or negligence of the Contractor, including but not limited to the following, the time extension will be the duration of the delay to the controlling operation:

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7. Delayed delivery of the materials specified and approved for the project when the Contractor identifies and the Department verifies that the delay is an industry-wide shortage of materials.

# What Do You Think?

- ▶ Is it an industry-wide shortage?
  - Industry-Wide **OR** Region-Wide
    - Language of Letter
- ▶ Would you only submit notice under Standard Specification 108.08?
  - No because only time
    - What about money?

# What Do You Think?

**TIME AND MONEY**

**ALWAYS GO TOGETHER**



# What Do You Think...

- Is this a delay?
  - Why?
  - Why Not?
  
- Is this a compensable delay?
  - Why?
  - Why Not?
    - Not attributable to any party
    - Only to controlling operation (Std. Spec. 108.09)

# Standard Specifications

- ▶ Std. Spec. 103.02 provides:

## 103.02. Revisions to the Contract.

A. **General.** The Department reserves the right to revise the contract at any time. Revisions to the contract neither invalidate the contract nor release the surety, and the Contractor agrees to perform the work as revised. The Contractor must not proceed with the revised work until directed to do so by the Engineer, but must continue with all work unaffected by the revision. The Engineer will provide a work order for the revised work when requested by the Contractor.

The Department will pay the Contractor for revisions to the contract in accordance with subsection 109.05, and grant time extensions for revisions to the contract in accordance with section 108.

If the Contractor believes that one of the following subsections applies, the Contractor must notify the Engineer in accordance with subsection **103.03.B**. If the Engineer and the Contractor do not agree as to whether one of the following subsections applies, the Contractor is directed to follow the provisions of subsection **104.10**.

# Standard Specifications

- ▶ Std. Spec. 103.02 provides:

**B. Significant Changes in the Character of Work.** If alterations or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character of the work, or by affecting other work, cause such other work to become significantly different in character, an adjustment, excluding anticipated profit, will be made to the contract. The basis for the adjustment must be agreed upon prior to the performance of the work in accordance with subsection **109.05**.

A significant change applies only to the following circumstances:

1. When the character of the work...differs materially in kind or nature from that involved or included in the original proposed construction.
2. When a major pay item, as defined in subsection 101.03, is increased in excess of 125% or decreased below 75% of the original contract quantity.
3. When the Engineer increases the quantity of a minor pay item such that the revised quantity meets the criteria for a major pay item.

# What Do You Think...

- Who thinks this qualifies as a significant change?
  - Why?
  - Why Not?

# Standard Specifications

- ▶ Std. Spec. 103.02 provides:

E. Extra Work. The Engineer may, at any time during the progress of the contract, order extra work. The Engineer will provide the Contractor with a work order stating the location, kind, and estimated quantity of the extra work the Contractor is to perform.



# What Do You Think...

- Who thinks this qualifies as extra work?
  - Why?
  - Why Not?

# Standard Specifications

## ▶ Std. Spec. 103.03. Contractor–Engineer Communication.

A. **General.** The specified time limits may only be extended through a written, jointly signed agreement between the Contractor and the Engineer.

B. **Written Notice, by Contractor.** The written notice required by subsection 103.02 should include the following:

1. A description of the situation;
2. The time and date the situation was first identified by the Contractor;
3. The location of the situation, if appropriate;
4. A clear explanation of why the situation requires a revision to the contract...
5. A statement of the revisions deemed necessary...
6. An estimate of the time by which the Engineer must respond to minimize cost or delay...
7. Anything else that will help achieve timely resolution.

C. **Written Response, by Engineer.** Within 7 calendar days of receiving the Contractor's written notice, or sooner if possible, the Engineer will provide a written response that includes one of the following:

1. Confirmation of the need for a revision to the contract...
2. Denial of the request for a revision to the contract...
3. A request for additional information...

D. **Contractor's Recourse.** If the Contractor disagrees with the Engineer's final written response or the Engineer's response is untimely, the Contractor may pursue a claim in accordance with subsection 104.10.

# Standard Specifications

## ▶ Std. Spec. 109.05. Payment for Contract Revisions.

A. General. The Department will pay for contract revisions, excluding those resulting from increased or decreased quantities of pay items covered by subsection 109.03, using the sequence specified in subsection 109.05.B through subsection 109.05.F. This payment covers all costs for performing the revised work, delay costs, and all other associated costs the Engineer deems reasonable and not expressly precluded in subsection 109.05.G. The Department may direct the Contractor, at anytime, to perform the revised work under force account.

if a contract revision includes an extension of time for compensable delays under subsections 108.09.B.1 through 108.09.B.4 the Department will pay for delay costs in accordance with subsection 109.05.E.

If a contract revision includes direction to the Contractor to accelerate the work in accordance with subsection 104.01.C, the Department will pay for the directed acceleration in accordance with subsection 109.05.F.

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### D. Force Account.

1. General. If the parties are unable to reach agreement using contract unit prices or negotiated prices, the Engineer may direct the Contractor to perform the revised work, including any required offsite work, under force account...At the end of each workday, the Contractor's representative and the Engineer will compare records of the work done under force account.

5. Materials. For materials used and accepted by the Engineer, the Contractor will receive the cost of materials delivered, including tax and transportation charges, plus 15 percent...

# The Response

- ▶ On June 13, MDOT responded to the Notice of Intent, stating:

MDOT has not recognized a material shortage as of the date of this correspondence. The Contractor must obtain and provide sufficient materials to complete the project per Subsection 104.07 of the 2012 Standard Specifications for Construction.

Per Subsection 104.10 of the 2012 MDOT Standard Specification for Construction, please retain accurate records of the work or delay and allow MDOT the opportunity to gather records so that we can bring them into agreement in the event a claim is filed. The notice of intent to file a claim or record keeping does not establish the validity of a claim. The special Provision for Critical Path Method Schedule will govern a determination on any subsequent extension of time requests resulting from this occurrence.

# Standard Specifications

- ▶ Std. Spec. 104.07 provides:

Contractor Obligations. The Contractor must obtain and provide sufficient materials, equipment, tools, labor, and incidentals to complete the project as required by the contract. The Contractor, its suppliers, and its subcontractors must allow the Department access to, relevant records, accounts, other project-related documentation, and to their facilities as necessary for the Department to determine compliance with the contract requirements. Except for safety issues or as required by the contract, the Contractor must not suspend work unless approved by the Engineer in writing. The Contractor must notify the Engineer within 24 hours of suspending the work.

# What Would You Do?

- ▶ How would you respond?
  - "We interpret your letter as directing us to...If our interpretation is incorrect or contrary to your intention or direction, please let us know in writing by..."
    - You've confirmed or identified your interpretation
    - It shifts it to MDOT to correct or direct

# And The Beat Goes On...

- ▶ Good Guys received no response from MDOT
- ▶ Good Guys proceeded with work and acquiring material from Savior's pit in Oldport
- ▶ Good Guys maintained records of time and cost for labor, material, equipment, etc.
- ▶ Eventually, Good Guys submitted claim in accordance with Std. Spec. 104.10

# Standard Specifications

- ▶ Std Spec 104.10 provides:

D. Timing for Filing of Claim. The Contractor must file a claim with the Engineer within the following timeframes, whichever occurs first:

1. No later than 60 calendar days after the work involved in the claim is completed, or the delay, loss of efficiency, loss of productivity, or similar event is terminated; or
2. No later than 60 calendar days after the final acceptance of all contract work. The Department may grant extensions of the above time requirements in accordance with the Department's current claim procedure.

E. Claim Content and Certification. The Contractor's claim must include a completed Form 1953 Claim Content and Certification that contains the following information, as applicable:

1. A detailed factual statement of the claim...
2. The date or dates on which actions resulting in the claim occurred or conditions resulting in the claim became evident.
3. Identification of documents substantiating the Contractor's claim.
4. Identification of the provisions of the contract that support the claim and a statement of the reasons these provisions support the claim.
5. A detailed compilation and a breakdown of the amount of additional compensation sought...
6. A detailed compilation of the specific dates and the exact number of calendar day sought...



# RECAP...

## What would you do?

- ▶ Analyze impacts on schedule and costs
- ▶ Keep necessary parties (e.g., owner, contractor, subcontractors, suppliers, etc.) apprised of impacts
- ▶ Prepare necessary updates to schedule
  - Especially if ongoing or continuing delay or situation
- ▶ Submit necessary updates to schedule
  - Especially if ongoing or continuing delay or situation

# RECAP (cont.)...

## What would you do?

- ▶ Maintain necessary records (e.g., force accounts)
- ▶ Create separate cost related folder(s) in project file(s) (i.e., labor, material, equipment, etc.)
- ▶ Prepare timeline of events
- ▶ Issue letters supplementing prior letters (i.e., fill in gaps)
  - Especially if ongoing or continuing delay or situation

# RECAP (cont.)...

## What would you do?

- ▶ Continue to seek direction and clarification
- ▶ Offer to meet to discuss situation, reconcile records, negotiate resolution, etc.
- ▶ Engage consultant(s)
- ▶ Engage attorney(s)

# Final Tips on Claims:

- ▶ The first step in solving a problem is recognizing there is one.
- ▶ Know what to look for and what your response, rights, and remedies are or may be.
- ▶ Proactive contractors think about “if this happens, what will we do?” before situations or problems arise.
- ▶ A resolved claim beat a litigated claims 100 out of 100 times.



# Questions?

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