

Act #2023-316

Roadbuilder Civil Liability

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Alabama Road Builders Association



ALABAMA ROAD BUILDERS ASSOCIATION

Overview

- Background
- 2012 Code – Loopholes
- 2023 Code – Changes
- Passage
- Benefits
- Impacts

Background



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Background

- Industry tried to change law last few years
- Loopholes in 2012 code
- Resulted in many lawsuits
- Goal was to codify Completed and Accepted Work Doctrine
- State Supreme Court recognized in H. O. Weaver & Sons vs Balch in 2013

Background

- Accepted Work Doctrine
 - Removes civil liability from contractor
 - After awarding authority accepts for maintenance
 - Provided work in substantial compliance with specifications
- Liability pre-August 2023
 - Up to 7 years from substantial completion
 - Civil action must commence within 2 years of cause

Background

- The Problem? To accept, awarding authority has...
 - Conducted all item inspections
 - Performed final inspection
 - Agreed Punch List is complete
 - Agreed all work is in accordance with plans and specifications
 - Once accepted, contractor has to demobilize and has no responsibility
 - All maintenance is awarding authority's responsibility

Background

- Despite this,
 - Private businesses have been liable for years
 - For crashes due to project designs and lack of maintenance
 - Including after acceptance
 - Because of state's sovereign immunity and local gov. caps



Background

- To best summarize, this has hurt roadbuilding industry
 - Financially
 - Availability of insurance companies
 - Locations to bid
- In turn, has hurt awarding authorities with higher bids

2012 Code - Loopholes



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Existing Law – the Loopholes

- Potentially Dangerous Condition Notification
 - By the contractor
 - To ALDOT Chief Engineer
 - If plans and specs **COULD RESULT...**
- Notification
 - Supposed to take responsibility off the contractor
 - That awarding authority did not scope or design properly
 - Changes needed

Existing Law – the Loopholes

- Contractor's Responsibility
 - Key phrase: *"...should have appeared to a reasonably prudent contractor..."*
- Courts/juries have put more credence in contractor's experience
 - Than AA and PE who scoped and designed the plans
- Cases where juries told contractor he should have done the work anyway despite what the contract required or what the engineer directed
- Dozens and dozens of lawsuits/settlements - \$100 million

2023 Code Changes



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2023 Code Changes

Definitions

- Awarding Authority includes:
 - ALDOT
 - County
 - Municipality
 - Other government entities (boards, commissions, departments, higher education institutions)
- Contracts for road construction, repair, or maintenance

2023 Code Changes

Definitions

- Project:
 - Construction, repair, or maintenance by a contractor
 - Section of highway, road, bridge, or street
 - With all appurtenances
 - Specified in a contract with the Awarding Authority

2023 Code Changes

Definitions

- Specifications include:
 - Specifications, plans, drawings, bid documents, but now also
 - Traffic control and communication requirements
 - Communication was major issue for ACCA
 - Wanted proper notice using Subarticle 104.02(b)
 - ***“As directed by the engineer”*** – need to document

2023 Code Changes

Definitions

- Contractor:
 - Technical change using ALDOT spec language
- Latent Defect:
 - Defect or omission resulting from the work conducted or materials provided by the contractor under the contract that was not discoverable, visible or apparent.
- Disclaimer about ALDOT history



2023 Code Changes

Definitions

- Conclusion of the Project, earlier of:
 1. Awarding Authority notifies in writing assuming maintenance
 2. 45 days after contractor provides notice of presumptive conclusion by certified mail return receipt with no response
 3. 90 days after advertising per Title 39 is completed and Awarding Authority has made final payment
- *Note: will be #1 or 2.*

2023 Code Changes

When a contractor may be held liable:

- Dangerous Condition (DC) resulting in physical injury, property damage, or death
- When plaintiff can show by preponderance of the evidence
 - Contractor failed to follow plans and specs resulting in DC
 - Latent Defect creates DC
- Basically, there are 2 exceptions

2023 Code Changes

When a contractor may be held liable:

- HUGE change!
- Many contractors sued for crashes during construction
 - Even if work conforms to plans, specs, and traffic control
- Plus,
 - No more dangerous conditions letters
 - No more “...*should have known*...”

2023 Code Changes

Impaired Driving change

- Distracted
- Impaired
- Driving over 25 mph the posted speed limit
- Applies to both *Contractor and Awarding Authority*

2023 Code Changes

Impaired Driving change

- Presumed no liability for Contractor or Awarding Authority
- When evidence supporting violation
- Presumption that prohibited conduct was the cause
- Rebuttable if plaintiff can show that prohibited conduct was not the proximate cause

2023 Code Changes

Pleading Requirements

- For claims against *Awarding Authority or its contractors*
- Heightened requirement to plead with specificity
- From Medical Malpractice law



2023 Code Changes

Pleading Requirements

- Complaint shall include:
 - Detailed specification and factual description of each act and omission alleged
 - When feasible and ascertainable, the date, time, and place of the act(s)
 - Without it, complaint is subject to dismissal for failure to state a claim upon which relief may be granted

2023 Code Changes

Impaired Driving and Pleading Requirements

- COLOSSAL CHANGES!
- Now all protected – ALDOT, ACCA, ALM, and contractors

Other changes:

- Some minor wording substitutes
- Changes only apply to causes of action after August 1, 2023



Passage



Benefits



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Benefits

- Should protect industry and local governments
- Should bring back insurance carriers
- Less risk and increased competition for insurance
- Should mean cheaper premiums and better bids
- WIN-WIN for AA and contractors

Impacts



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Impacts

- Act #2013-401 Civil Liability for Construction Monitoring Services
 - i.e. Construction Engineering & Inspection (CE&I)
- Passed in May 2013
- Codified existing common law relating to public or private infrastructure
- Professional firms and employees not civilly liable
- Property damage, personal injury, or death
- Resulting from construction monitoring services

Impacts

- Lawsuits
 - Not completely eliminated
 - More difficult for plaintiff due to impaired driving & pleading
 - Easier for contractor to estimate risk
- Specific examples
 - Drunk/impaired driver speeding and goes through curve
 - Shoulder drop-off 4 years after acceptance

Shoulder Examples



Impacts

- Potential concerns
 - Accidents on the project
 - Traffic control devices / MOT does not conform to TCP
 - Cross-slope or “e” not within tolerance
 - Guardrail at wrong height or missing bolts
 - Guardrail with field modifications that do not conform to standard drawings
 - Latent defect

Guardrail Examples



Impacts

- Change Orders and Revised Plans
 - Back of the napkin at lunch / legal pad on hood of the truck
 - Those days are OVER!!!
 - Precedent begin in Construction Bureau between 2017-2020
 - Not always consistent – judgement decision based on work

Impacts

- Change Orders and Revised Plans
 - Examples:
 - No – tack coat for paving; temporary E&SC items
 - Yes:
 - Revised Sequence of Construction
 - TCP Changes
 - Work contrary to the plans and standard drawings
 - Structural design changes

Impacts

Change Orders and Revised Plans

REVISIONS NOVEMBER 21, 2023

TEMPORARY TRAFFIC CONTROL PLAN

SEQUENCE OF CONSTRUCTION

PHASE I

- * INSTALL ALL APPLICABLE ADVANCE CONSTRUCTION WARNING SIGNS AND OTHER TRAFFIC CONTROL DEVICES REQUIRED

PHASE II

- * CLOSE SR-5/SR-195 AT THE BRIDGE, CLOSE US-78A/SR-69 WHEN NECESSARY FOR BRIDGE REMOVAL AND SETTING OF GIRDERS AND ROUTE TRAFFIC ONTO THE RAMPS
- * REMOVE EXISTING BRIDGE, INCLUDING MEDIAN BARRIER RAIL AND ATTENUATORS
- * CONSTRUCT REQUIRED BRIDGE
- * INSTALL DRILL SHAFTS BEFORE CONSTRUCTION OF BOTH MSE WALLS AND MEDIAN BARRIER RAIL, INSTALL GUARDRAIL ALONG US-78A/SR-69, AND GRADE DITCHES ALONG US-78A/SR-69
- * ADD LEVELING TO RAMPS AND 9TH AVENUE FROM STA 53+00 TO STA 55+30 AND SR-5/SR-195 FROM STA 55+30 TO STA 55+73 AND FROM STA 57+03 TO STA 60+00
- * INSTALL TRAFFIC SIGNALS AT RAMPS
- * OPEN ALL LANES ON US-78/SR-69

PHASE III

- * CONSTRUCT INTERSECTION ON SR-5 FROM STA 214+00 TO STA 217+45.33 AND OAK HILL RD FROM STA 217+45.33 TO STA 218+32.00 THROUGH UPPER BINDER LAYER

- * INSTALL TRAFFIC SIGNALS AT SR-5/SR-195 INTERSECTION

VOID

TEMPORARY

SEQUENCE OF CONSTRUCTION

PHASE I

- * INSTALL ALL APPLICABLE ADVANCE CONSTRUCTION WARNING SIGNS AND OTHER TRAFFIC CONTROL DEVICES REQUIRED



☛ PHASE II-A

- * CLOSE SR-5/SR-195 AT THE BRIDGE, CLOSE US-78A/SR-69 WHEN NECESSARY FOR BRIDGE REMOVAL AND SETTING OF GIRDERS AND ROUTE TRAFFIC ONTO THE RAMPS



☛ PHASE II-B

- * REMOVE EXISTING BRIDGE, INCLUDING MEDIAN BARRIER RAIL AND ATTENUATORS

- * CONSTRUCT REQUIRED BRIDGE

- * INSTALL DRILL SHAFTS BEFORE CONSTRUCTION OF BOTH MSE WALLS AND MEDIAN BARRIER RAIL, INSTALL GUARDRAIL ALONG US-78A/SR-69, AND GRADE DITCHES ALONG US-78A/SR-69



-SPLIT PHASE II
KCM, 11-21-2023

TCP NOTES

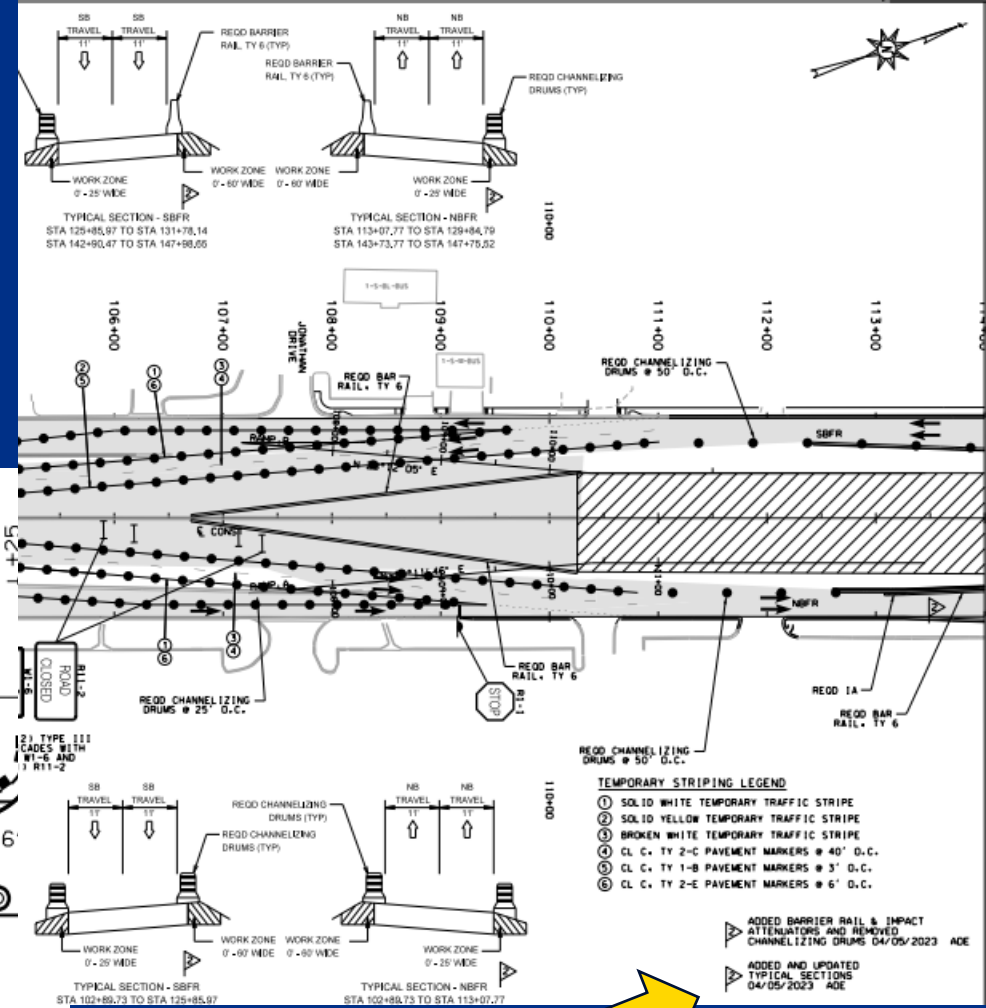
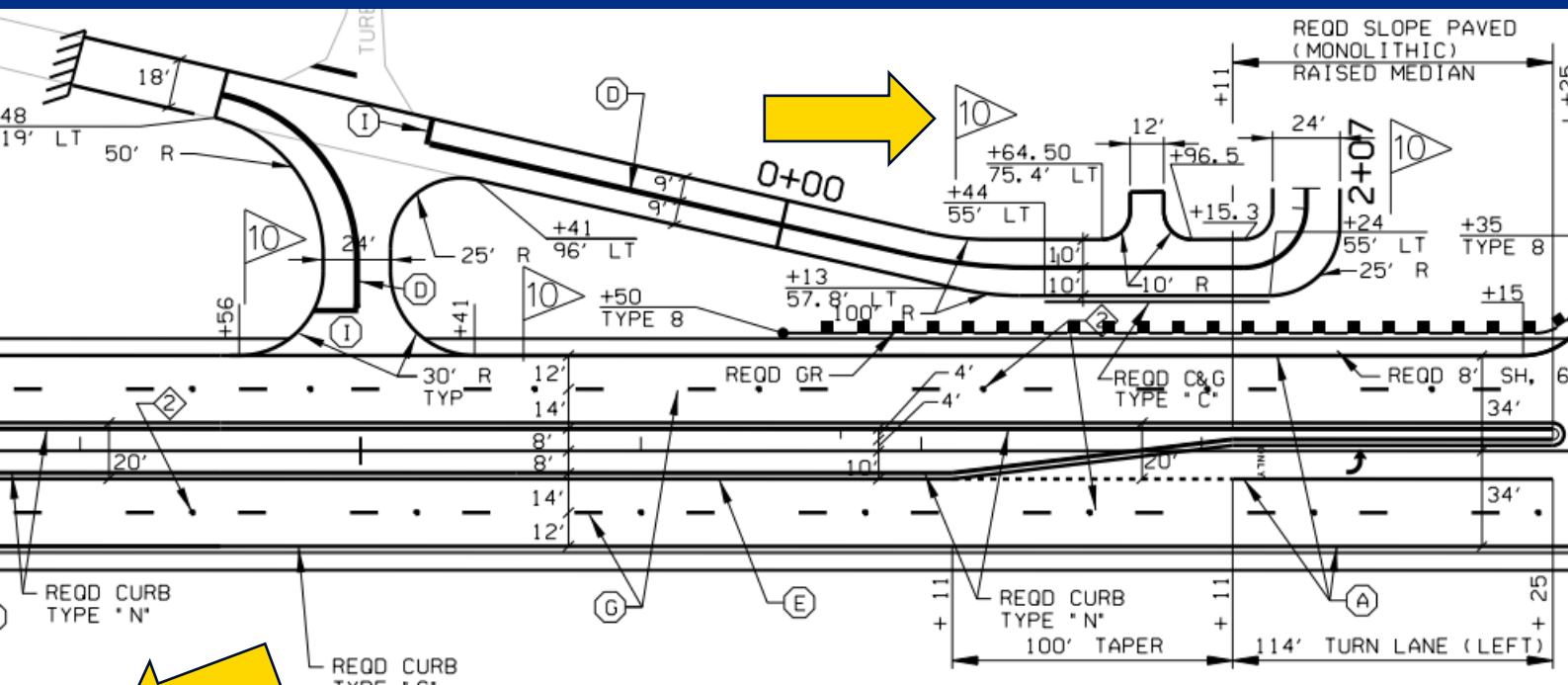
| | | | |
|-----|-----|-----|-----|
| 700 | 712 | 728 | 746 |
| 701 | 713 | 729 | 747 |
| 702 | 715 | 732 | 748 |
| 703 | 716 | 733 | 749 |
| 704 | 718 | 734 | 750 |
| 705 | 719 | 735 | 751 |
| 707 | 720 | 736 | 753 |
| 708 | 723 | 737 | 754 |
| 709 | 725 | 741 | 755 |
| 710 | 726 | 742 | 756 |
| 711 | 727 | 744 | 758 |



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Impacts

Change Orders and Revised Plans



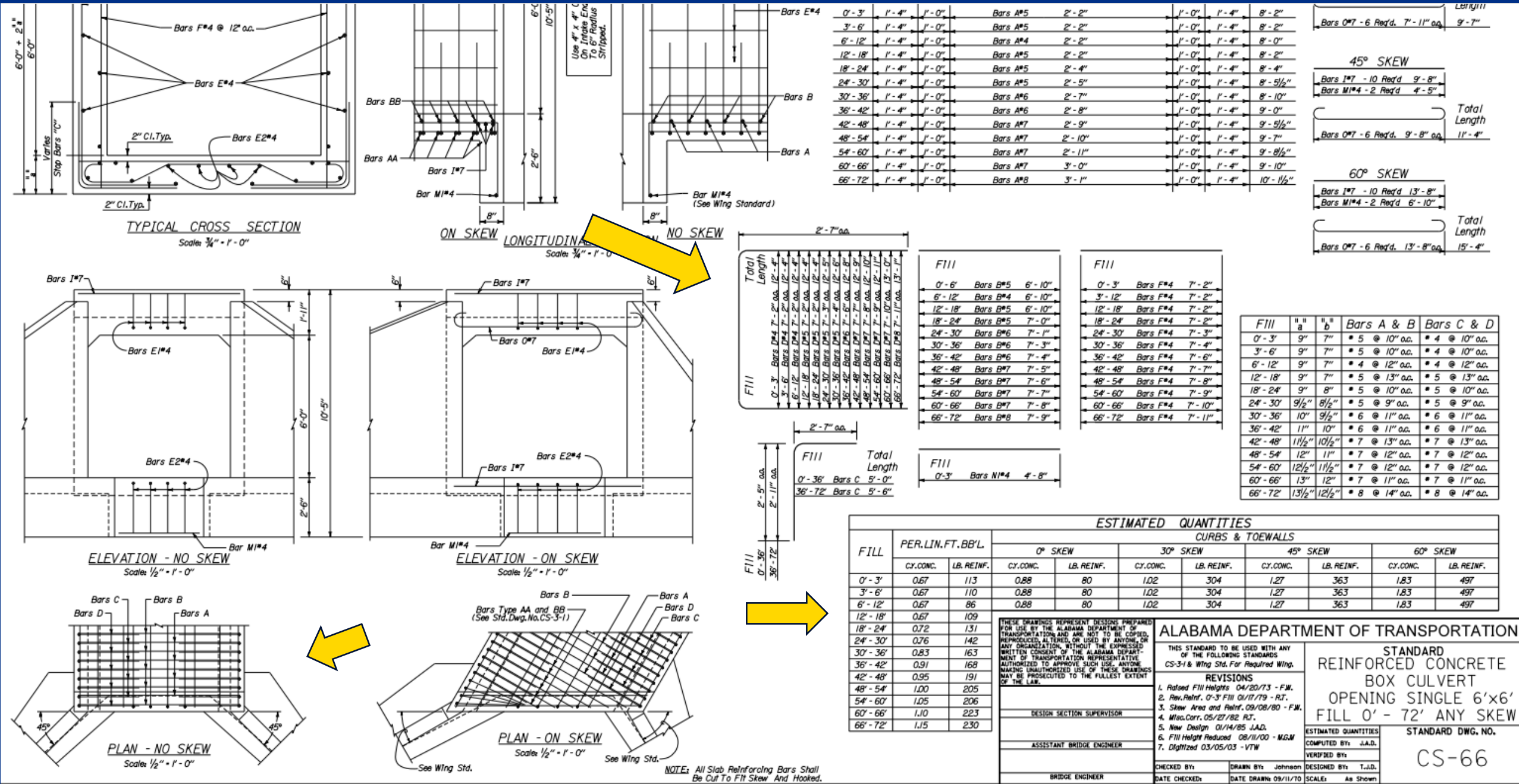
10
 08/17/2020:
 REVISED MEDIAN, DRIVEWAYS
 MODIFIED LEFT TURN LANES AND
 ADDED TRAFFIC CONTROL MARKINGS
 REMOVED RETAINING WALL #4
 ADDED GUARDRAIL AND TY 8 E-A
 REPLACED CUL-DE-SAC WITH
 DRIVEWAY (OLD MOBILE ROAD)
 ADDED C&G TY "C", LT, STA.182+44 TO 183+24



Impacts

- Change Orders and Revised Plans – why are they needed?
 1. Contractor needs to know what is required
 2. Is TCP affected
 3. Inspector needs to know the changed work, what to inspect, and what to measure
 4. Awarding authority needs records for final quantities check, as-built plans, and asset management
 5. Liability – without them, trial lawyers may have loophole

Example of Inspector's Needs



Impacts

- Change Orders and Revised Plans – why are they needed?
 - Example – culvert repair / extension in Black Belt county





Impacts

- Change Orders and Revised Plans – why are they needed?
 - Moving forward, contractors need to require revised plan sheets if there is any question
 - Start with a napkin / legal pad
 - Designers will have to adjust and provide flagged changes
 - Without, contractors will decline or else price excessively

Impacts

- In summary, while this was not planned:
 - Standard practice for revised plan sheets
 - Better documentation of as-built plans
 - Benefits contractors and awarding authorities

Questions

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