

December 21, 2007

DISPUTE REVIEW BOARD

State of California - Department of Transportation

Contract Number 04-0120E4 – SAS Bridge-Foundations E2/T1

Mr. Pedro Sanchez
Resident Engineer
Department of Transportation
333 Burma Road
Oakland, CA 94607

Mr Dan Proctor
Project Manager
Kiewit/FCI/Manson, a JV
220 Burma Road
Oakland, CA 94607

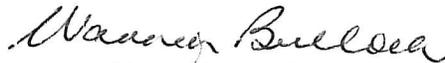
Gentlemen,

Re: Contract Number 04-0120E4
Notice of Potential Claim No. 6
Dispute Review Board Recommendation

Transmitted herewith is the Dispute Review Board Unanimous Recommendation regarding Dispute No. 1 – Notice of Potential Claim No. 6 – Trainee Welder Issue

The DRB has diligently reviewed the information provided to it, has deliberated over the issues and the DRB report is enclosed. Your attention is drawn to the requirements of Section 5-1.15 DISPUTE REVIEW BOARD of the Special Provisions, regarding requests for Clarification and/or Reconsideration, as well as DRB notification as to whether or not the dispute has been resolved. The date when the various specified time periods begin to run will commence on January 2, 2008, by which time the parties should have received the signed hard copies of the Board's Recommendation report.

Sincerely,



Warren M. Bullock
DRB Chairman

cc

Mr. R. Maasberg, DRB Member
Mr. R. Lewis, DRB Member
Mr. H. Wells, Caltrans DRB Program Manager

DISPUTE REVIEW BOARD

State of California-Department of Transportation

Contract Number 04-0120E4 – SAS Bridge - Foundations E2/T1

Dispute No. 1 – Notice of Potential Claim #6 - Welder Trainee Issue

Hearing Date: October 30, 2007

Hearing Attendees: Caltrans Representatives:

Pedro Sanchez Robert Mertz
Rick Morrow Keith Hoffman
Mark Vilchek Ryan Smith
Mark Woods
Rafael Bolon
Rob Kobal

Contractor Representatives:

Dan Proctor- KFM
George Atkinson-KFM
William Kavicky-TBS
Jay Murphy-TBS

BACKGROUND

The California Department of Transportation (hereinafter referred to as the “State “, “Department”, “Engineer” or “Caltrans”) awarded the contract for the Self-Anchored Suspension (SAS) Bridge Piers E2 and T1 Project (Contract No. 04-0120E4) to Kiewit/FCI/Manson, JV, (hereinafter referred to as “KFM”, or “Contractor”) on April 1, 2004.

The contract requires the Contractor to fabricate and install thirteen steel piles 2.5 meters in diameter 33 meters in length for tower foundation T1 and 16 steel piles 2.5 meters in diameter and 107 meters in length for pier E2 foundation. The steel piles for the T1 foundation have a wall thickness of 95mm while the steel piles for pier E2 have wall thicknesses varying from 45 to 85mm. The piles were fabricated by rolling steel plate to the required diameter to form cans 3 meters in length with a longitudinal seam weld and then connecting the cans with a circumferential (girth) weld to produce the required length of pile. The welding was generally performed using the automatic submerged arc welding (SAW) process.

KFM awarded a Materials Contract for the fabrication of the specified steel piling to Trans Bay Steel, Corp (hereinafter referred to as TBS), located in Napa, California.

DESCRIPTION OF DISPUTE

During the steel pipe pile fabrication after project re-start in November 2005, the Department's Quality Assurance representatives (METS) first began issuing Non-Conformance Reports (NCRs) on December 6, 2005, upon discovering that TBS was using welder trainees in production welding using the SAW process even though a qualified SAW welding operator was in full control of the welding operation. The Department issued the NCRs since in its opinion TBS's welder training program was in violation of the contract requirements because the individual operating the welding equipment was not a qualified welder.

TBS disagreed with the Department's issuance of NCRs for unqualified welders maintaining it had always used trainees with a qualified and approved SAW operator to perform SAW on Caltrans contracts, in conformance with its material contracts, the Special Provisions of contract and the AWS Code. The Department's objection to the use of trainee welders was a regular topic of discussion at the bi-weekly quality control/production coordination site meetings. TBS continued to use trainee welders for production welding and the Department continued to issue NCRs through May 9, 2006. Beginning in March 2006, in response to issuance of NCR's TBS removed trainees from production operations, established "training only" stations and training was performed off-line until trainees passed a welding operator qualification test.

At a meeting on May 9, 2006 between the Department and KFM, the Contractor was advised that welds performed after May 9, 2006 would not be accepted by the Department unless performed by welding operators whose qualification plates had been mechanically tested. The Department's directive was confirmed by letter dated May 10, 2006.

In an effort to keep production moving forward and to mitigate the disagreement between the parties, the Department initiated a Contract Change Order (CCO) No. 39, dated June 5, 2006. The CCO would allow TBS to use trainee welders for production welding utilizing welding teams of one trainee welding operator and an experienced qualified welding operator to perform production work under the direct supervision of the experienced welding operator, provided that TBS revised its WQCP to describe the welder training program as modified, and that additional NDT and QC inspection be performed at the Department's expense in order to satisfy the Department that the welds performed by the trainees were of comparable quality to those performed by qualified welders. The last revised version of CCO #39 was transmitted to KFM on October 24, 2006.

Negotiations between the parties over the wording of CCO #39 which had continued until November 1, 2006, when KFM returned the unsigned CCO, were never successfully concluded primarily due to a disagreement over the time frame and scope to be covered by the CCO. The KFM response of November 1, 2006 also submitted TBS's letter of October 31, 2006 which explained TBS's position on the trainee issue and provided notice of its intent to claim for the impacts of the Department's decision not to allow the use of trainees in the production welding process

TBS completed the fabrication work on the permanent steel casings and steel piling for Piers T1 and E2 on December 14, 2006 and the last product was shipped from TBS's facility on December 18, 2006.

In its letter of March 12, 2007 the State confirmed that during the Weekly Meeting of January 2, 2007, KFM had been notified that CCO No. 39 would not be issued and that per the conversation between KFM and the Department on March 8, 2007 the Department considered the discussion item pertaining to TBS that appeared in the Weekly Meeting Agenda to be closed with no further discussion warranted for work performed under the contract at TBS.

Correspondence and discussions between the parties continued in March, April, May and June, 2007. On June 20, 2007, KFM filed its Initial Notice of Potential Claim and the Department's response, dated June 27, 2007, indicated that the NOPC was not submitted within 5 days from the date the dispute first arose and that failure of the Contractor to conform to specified dispute procedures constituted a failure to pursue diligently and exhaust the administrative procedures in the contract and was deemed as the Contractor's waiver of the potential claim.

KFM objected to the Department's response to its Initial Notice of Potential Claim on July 3, 2007, maintaining that it had complied with the contract requirements.

KFM submitted the Supplemental Notice of Potential Claim on July 3, 2007 and its Full and Final NOPC filed on July 13, 2007, included Total Estimated Damages of \$1,809,981.

KFM referred the dispute to the DRB for hearing by letter dated July 5, 2007.

CONTRACTOR'S POSITION

Caltrans' objection to Trans Bay Steel's long established shop practice of training welding operators during the course of production welding impacted timely production of piling and permanent casings for E2 and T1. In response to Non Conformance Reports (NCRs) issued by Caltrans, TBS removed all trainees from production operations and altered these established shop training practices and procedures.

Caltrans initiated a Contract Change Order (CCO #39) to mitigate some of the impacts of Caltrans contract interpretation. A Notice of Potential Claim was not filed at this time, because TBS tried to negotiate in good faith with Caltrans on the issuance of this CCO. Caltrans would not, as part of CCO #39 negotiations, acknowledge the impact of their contract interpretation on TBS's fabrication effort. CCO #39 negotiations could not be concluded before completion of the work and further discussion was abandoned by Caltrans. Due to indications from Caltrans that no further discussion was warranted, TBS and KFM worked to formally continue negotiations. Following formal rejection of TBS's request for continued negotiation of CCO #39, a Notice of Potential Claim was made and subsequently referred to the DRB.

TBS's efforts to avoid additional Caltrans NCRs, removed valuable production assets and manpower from production operations to be devoted exclusively to training. Due to limited training facilities, the rate at which trainees became available to be utilized on the permanent work was reduced. As a consequence of reduced productive capacity and delayed availability of trained welding operators pile production durations were extended and pile deliveries to the project were delayed. Additional efforts were expended by TBS to mitigate delays by re-tooling portions of the plant and to perform additional testing demanded by Caltrans for acceptance of work declared by Caltrans to be in non-conformance.

TBS's damages fall into the following categories:

1. Welder Training Stand-by Time- TBS had more trainees than training stations and employees had to wait before being trained with limited available productive work. Due to employment terms mandated by USEEOC these employees could not be laid-off or terminated.
2. Clear Trainee-Related NCRs- Additional QC and Administrative time to close NCRs
3. Delay Damages and Extended Overhead- TBS realized a 119 day schedule delay.
4. Additional Overtime for UT- TBS had to work the NDT into an already full schedule. Overtime was the only way to achieve this.
5. Equipment Upgrades to Support Schedule- Once production equipment was turned into training work stations T1 delivery would have been greatly impacted. TBS modified an existing production line by heavier hydraulics and added an additional crane to handle the T1 load limits in shop floor space that was not originally planned.

TBS has proposed estimated monetary damages to Caltrans of \$1,809,981 . This amount may be revised as a result of minor errors in tabulation discovered during preliminary negotiations with Caltrans. Impacts due to delays in availability of materials to KFM at the site will be assessed by KFM when an agreed TBS schedule impact is determined.

DEPARTMENT'S POSITION

TBS's Notice of Potential Claim is extremely tardy. This NOPC was not submitted within the time frame stipulated in Section 9-1.04, "Notice of Potential Claim," of the amended Standard Specifications, and is therefore outside the scope of the Contract.

The extreme tardiness of TBS's NOPC did not give the Department the opportunity to investigate and track the amounts that TBS is alleging, or if possible, to have mitigated some of the alleged effects of these impacts.

When production work ended at TBS, the Department informed TBS that there was no longer any reason to issue CCO #39 for additional NDT that would not be performed. The Department reminded the Contractor of the requirements of Section 9-1.04, "Notice of Potential Claim," of the amended Standard Specifications, pertaining to timely notice of disputes arising under the contract.

The Department continued reminding the Contractor, both verbally during Owner's meetings and in writing, culminating in the Department's Letter No. 2955, that all production work at TBS was complete and that if TBS believed there were outstanding issues that they were required by the contract to file a NOPC in a timely manner.

As TBS did not file an NOPC within the requirements of Section 9-1.04, "Notice of Potential Claim," of the amended Standard Specifications the Department considered this matter closed and informed TBS that it considered all issues at TBS to be closed. TBS has not complied with the Contract and therefore the Department cannot consider this

latest claim by TBS an NOPC per Section 9-1.04, "Notice of Potential Claim," of the amended Standard Specifications.

Regarding the quantum of this NOPC, TBS's claim contains three (3) parts:

- (1) Welder Training
- (2) Clear Welder Trainee Related NCRs
- (3) Extended Training and Estimated Schedule Impacts

Implicit in the three portions of this NOPC are the following claims by TBS:

- (1) The Department's issuance of six NCRs related to trainees performing production welding resulted in some redundancy in TBS's labor resources resulting in trainee's standby time and required TBS to upgrade its equipment.
- (2) TBS's QC performed 176 hours of additional UT in order to clear six NCRs related to the use of trainees to perform production welding.
- (3) Any and all delays, redundancy in labor, additional equipment etc, that may or may not have occurred at TBS between the date TBS predicted it could complete the piling work in August 2006, and the actual date that TBS completed the work in December 2006, is a delay attributable to the six NCRs related to trainees performing production welding, and should be billed at a burdened rate of \$75 per hour and an extended daily overhead rate of \$9,299 per day.

DRB FINDINGS

TBS testified that during the performance of the work it was almost impossible to find and hire sufficient numbers of experienced SAW welders to perform the contract work, giving rise to the need to train suitable employees, and that this had been TBS's past history in fabricating steel piling on other Caltrans bridge contracts, namely, San Mateo, Carquinez, Richmond-San Rafael, and Benicia bridges, as well as for three months during the initial stages of this Contract work before the Contract was suspended. TBS testified that its past practice formed the basis of its bid for E2/T1. All new TBS hires were designated as trainees and placed with a qualified welding operator who was responsible for the weld. Trainees progressively assumed increasing responsibilities while under direct supervision and control of the qualified welding operator and once the welding operator deemed a trainee was ready for qualification test, the trainee was scheduled for testing.

Caltrans testified that it had not observed TBS's use of trainee welders on production welds prior to December 6, 2005, and that no welder trainee program had been presented to the Department. Caltrans further maintained that during the initial three months of pile production all trainees were trained and qualified off-line on "scrap metal" and not on production welds.

Based on the weight of evidence submitted as well as the hearing testimony, the Board finds that TBS's past practice on other Department contracts and on this contract until December 6, 2005, appears to have been to employ Welder Trainees in actual production

welding using the SAW process, although subject to the following TBS imposed provisions:

- (i) Trainee is required to work under the direction and control of a “qualified” welder
- (ii) Qualified welder has to be in attendance 100% of the time with the trainee.

TBS maintained that the welding operator training performed at its shop was not in conflict with either the AWS D1.1 2002 Code or the Special Provisions of the contract.

November 16, 2005 appears to be the first time on this contract that the Department observed “non-certified welder(s) performing work”. There was a succession of similar observations on 12/06/05, 1/31/06, 2/01/06, 2/02/06, 2/14/06, 2/17/06, 2/24/06 4/18/06, 5/09/06 leading to the issuance of NCR’s, the first being for the 12/06/05 incident.

Apparently the NCRs were being issued by METS/Caltrans as a consequence of its interpretation that the Contract specifications and AWS Code severely limited, if not totally prohibited, operation or adjustment of controls by trainees in the SAW production fabrication of the steel piling. As a consequence of the NCRs and the related “confusion and disruption” that was occurring in the shop due to the trainees’ involvement in the production process, TBS began to remove trainees from the production welding stations in March of 2006. The training procedure issue was apparently discussed on many occasions in the shop and at weekly meetings resulting in TBS letters to KFM of May 1, 2006 and May 11, 2006, which were forwarded to the Department on May 5, 2006 and May 18, 2006 respectively. The May 11, 2006 letter from TBS requested “that a Contract Change Order be written to cover this delay and the associated costs arising from it.”

The Department in its letter of May 10, 2006 (SL-001137), addressing the subject of “welding by unqualified personnel at Trans Bay Steel” confirmed that “welds performed after May 9th by welding operators whose qualification plates have not been mechanically tested will not be accepted by the Department.” The Department’s letter of May 12, 2006, (SL-001181), identified an “unqualified welding operator” performing welds on May 9, 2006 apparently confirming the Department’s position as stated in its May 10, 2006 letter. The terms “unqualified welder” and “unqualified personnel” were understood to include trainees, apprentices, helpers, etc., as well as previously qualified welders who as yet were not re-qualified by performing acceptable test plates which have been both radio-graphically and mechanically tested. These letters served to confirm the importance of implementing a welder-operator trainee program that would expedite welder qualifications along with giving clear direction that all welders must be “qualified” or their welds would be rejected by the Engineer.

The Department appeared to recognize TBS’s dilemma, since following the issuance of the NCR’s, a work stoppage in May 2006, meetings between KFM, TBS and the State, and to alleviate friction on the shop floor, it drafted CCO #39 - Welding Operator Training Plan, which would permit the utilization of two-man welding teams (one trainee welding operator and a qualified experienced welding operator) to perform SAW on the steel pipe piles. It appears a great deal of mutual effort was being made by the parties to

try to resolve the welder trainee participation matter. KFM's Email to Caltrans, dated May 10, 2006, transmitting KFM's comments on the draft CCO confirms a mutual effort being made to resolve the trainee issue and help expedite the process for welder qualification. A draft letter, dated May 18, 2006, from the Department with a draft of the CCO attached was shared with the Contractor and this was substantially the same as the draft of Contract Change Order #39 which was formally transmitted to the Contractor for review and comment, on June 5, 2006 (SL-001301).

A further letter from the Department to KFM, dated June 23, 2006 (SL-001444) indicated that its June 5, 2006 letter had requested a cost estimate (including quantities, unit prices, and hourly rates, as applicable), by June 16, 2006, but this information had not yet been received. Additionally, this letter indicated, that following discussions between the Department, KFM and TBS on June 20, 2006, the Department would consider including additional language in CCO #39 ensuring that TBS would not relinquish any rights provided for in the contract. Further, the State understood that TBS would agree to the terms of the CCO pending inclusion of such mutually agreed upon language.

On July 25, 2006, the Department transmitted unapproved CCO #39, which included reservation of rights language, to KFM, for review and signature. The transmittal also requested KFM to notify the Department if the Change Order was not acceptable, with a letter explaining its position.

The Contractor apparently did not reply to the Department's revised unapproved CCO #39 until its transmittal dated September 28, 2006 which attached the CCO with certain suggested revisions to the reservation of rights language as well requesting a time frame beginning December 1, 2005.

The Department responded by letter dated October 24, 2006 (SL 002147), agreeing to two of the Contractor's suggested changes to the "reservation of rights" language but held that the other suggested revisions, including making the effective date of commencement of the work covered in the CCO, December 1, 2005, did not add any additional meaning to the Change and did not include them in the revised CCO. CCO #39 which had been revised accordingly was attached for Contractor's review and signature. The Department advised KFM that if it chose not to sign the CCO it should be returned unsigned by November 1, 2006, along with an explanation as to why the Change was no longer agreeable. KFM was also reminded of the requirements of Section 9-1.04, "Notice of Potential Claim," of the Standard Specifications, pertaining to timely notice of disputes arising under the contract.

The Contractor responded by letter dated November 1, 2006, returning the CCO unsigned, primarily because it did not provide for the time frame TBS had requested. Along with the unsigned CCO was a letter from TBS to KFM dated October 31, 2006, which described the impacts to its operations arising from the Department's position, commencing December 6, 2005, that TBS's welder trainee practice was not in accordance with the contract Special Provisions and AWS D1.1:2002. TBS confirmed its intention to request a time extension and cost increase as a result of these impacts.

The Department's letter of December 27, 2006 (SL-002476) confirmed that the issues raised on "non-conforming work cited in State Letter Nos. 801, 803, 810, 839, 986, 994, 1085, 1181 and 1230 has not been repeated." Consequently, this letter is presumed to confirm that TBS took the necessary actions and made the appropriate changes required to clear the NCRs.

The Board finds these NCRs effectively directed TBS to abandon its traditional welder training process making it more difficult and time-consuming to qualify welder operators. In accordance with the Department's instructions, the proposed Change Order would have required the WQCP to be revised to include the modified training program and procedure. TBS testified that while some of the State's qualifications and requirements of the proposed CCO 39 were, "consistent with TBS historical practices" while others represented "new requirements proposed by Caltrans" and were not a part of its traditional training program. These new requirements had the potential for significant delays and impacts to the productivity of the SAW fabrication process, if they were included as a part of the amended WQCP. In particular, the concerns by TBS focus on Proposal Nos. 2 and 5 of the State's Proposed Revisions.

(2) "The welding teams will be qualified as described in Section 4.19.1.1 of AWS D1.1-2002, utilizing radiographic testing (RT) of the initial 15" of the first production weld performed by the team(s). Should this qualification test fail, the entire weld will be radiographed and repaired as necessary. The team will then retest on the next production weld and will follow the same procedure as stated in this section, until the team satisfactorily completes a production qualification. All RT for qualification and repair will be done as soon as practical following the completion of the weld by any combination of teams. Evaluation of this RT will be completed within three days of the completion of the weld, unless otherwise approved by the Engineer."

(5) "When welding operations are being performed by welding teams, QC Inspector(s) will be continuously present who are solely dedicated to monitoring and reporting the welding parameters of these welding teams. Each dedicated QC Inspector will inspect no more than five teams at one time."

In a letter dated March 12, 2007(SL 002955) the Department confirmed that it had notified KFM at a Weekly Meeting on January 2, 2007 that CCO #39 would not be issued and on March 8, 2007 the Department verbally advised KFM that the State considered the discussion item pertaining to TBS, appearing in the Weekly Meeting Agenda, to be closed and with no further discussion warranted for work performed under the contract at TBS. The Department further noted that fabrication work on permanent steel casings and steel piling at TBS for Piers E2 and T1 was completed on December 14, 2006 and that no contract item work was performed at the TBS facility subsequent to December 18, 2006. The Department also indicated it had not received an Initial Notice

of Potential Claim for any dispute related to contract work performed at TBS, which had been completed for 85 days and directed the Contractor to the Department's letter of October 24, 2006 in which KFM was reminded of the requirements of Section 9-1.04 "Notice of Potential Claim," of the amended Standard Specifications pertaining to timely notice of disputes arising under the contract.

The Department's letter to KFM dated March 12, 2007 was forwarded to TBS by KFM on March 14, 2007. KFM's cover letter of that date requested TBS to carefully review the Material Contract between KFM and TBS as well as the Prime Contract to ensure that all appropriate administrative measures were being taken to reserve TBS's rights should TBS desire to pursue the Trainee Welder issue further and requested a response from TBS by April 2, 2007.

In its response, on March 29, 2007, TBS transmitted a Notice of Potential Claim to KFM and an accompanying letter, dated March 30, 2007 which stated that TBS did not agree with the State that the issue of welder training was closed. It is the Board's understanding, based on hearing testimony, that neither this NOPC nor the accompanying letter were transmitted to the State at that time since it was KFM's position that negotiation of all the issues for CCO #39 were incomplete and still continuing. This was confirmed in KFM's letter to the Department dated April 19, 2007, which attached TBS's letter to KFM dated March 30, 2007 and which also requested the Department to continue negotiations on welder trainee contract interpretation. KFM further requested the Department to issue a CCO for the extra work described in previous correspondence. In its letter of March 30, 2007, TBS took exception to the State's position that the welder training issue was closed. The letter stated, "Trans Bay was under the impression after a meeting with Pete Siegenthaler that Trans Bay need to submit total costs of the dispute and a separate meeting would be held to determine the outcome, hoping to eliminate the need for an NOPC and a DRB ruling. Trans Bay made these cost estimates available, however the meeting did not take place."

KFM's letter of April 19, 2007 (KFM – LET 000258) transmitted the TBS March 30, 2007 letter and stated, "Proposed CCO – 039 addressed some aspects of this issue but did not fully reflect our understanding of negotiations. At the Department's request, KFM and TBS have explained the cause for disagreement and the impacts of the Department's contract interpretation, most recently in KFM – LET 214. The Department's response, SL 2955 fails to address the fundamental disagreement regarding welder trainee practices that was a critical element of CCO – 039 negotiations."

In a letter to the Department, dated June 1, 2007, KFM indicated that it had not received a written reply to its April 19, 2007 letter and that as a result of discussions with State representatives, requested confirmation of a meeting on June 7, 2007, to review the history of the welder trainee issue and the basis for TBS entitlement. The meeting was actually held on June 15, 2007, and it appears it was here that the parties reached impasse. Following this meeting KFM filed its Initial Notice of Potential Claim on June 20, 2007.

The State acknowledged receipt of the Contractors Initial Notice of Potential Claim in its letter to KFM dated June 27, 2007. In its letter the Department stated: "Production work at TBS was completed by December 14, 2006. During the Weekly Meeting on January 2, 2007, the Department notified KFM that CCO No. 39 would not be issued. The Department's letter No. 2147, dated October 24, 2006 transmitted the Department's final offer for CCO No. 39 and referred KFM to the requirements of Section 9-1.04, "Notice of Potential Claim," of the amended Standard Specifications. The Department's Letter No. 2955, dated March 12, 2007, informed KFM that the Department considered the Weekly Meeting Agenda's issue pertaining TBS to be closed with no further discussion, and again referred KFM to the requirements of Section 9-1.04, "Notice of Potential Claim," of the amended Standard Specifications, pertaining to timely notice of disputes arising under the contract."

Further, in the same letter, the Department stated: "In accordance with Section 9-1.04 "Notice of Potential Claim" of the amended Standard Specifications, failure of the Contractor to conform to specified dispute procedures shall constitute a failure to pursue diligently and exhaust the administrative procedures in the contract and is deemed as the Contractor's waiver of the potential claim....."

The Contractor objected to the State's response to its Initial Notice of Potential Claim by letter dated July 3, 2007. The Contractor maintained it had fully complied with the contract in its attempts to negotiate a settlement with respect to the welder trainee issue. Furthermore, the Contractor indicated that the Department had been actively involved in this issue from the outset and had not been prejudiced by the timing of the NOPC. In asserting it had complied with contract requirements and the Department's requests with respect to negotiation of CCO-039, the Contractor stated:

- In accordance with the Department's request in SL-2147, KFM LET-214 dated November 1, 2006 replied with an explanation of why proposed CCO-039 was not acceptable and was being returned un-signed. The Department letter SL-2147 did not describe the proposed CCO-039 as a "final offer." KFM did not receive a written reply to this letter until receiving SL-2955, dated March 12, 2007.
- The Department's letter SL-2955 confirms statements made at weekly coordination meetings that CCO-039 will not be issued and no further discussion with respect to work performed at TBS is warranted. In response, KFM and TBS explained in KFM LET-258 that issues raised in negotiations leading up to CCO-039 and in KFM LET-214 had not been addressed by the Department and requested negotiations to continue.
- KFM and TBS filed NOPC #6-062007 on June 2007, five days after meeting with the Department to review the status of welding operator trainee negotiations. KFM and TBS were informed at that meeting that the Department did not recognize any contract changes with respect to changes made by TBS to their training program in response to "Non-Conformance Reports" issued by the Department.

The Contractor's Supplemental Notice of Potential Claim was transmitted to the Department on July 3, 2007 and a "Full and Final" Notice of Potential Claim was transmitted on July 13, 2007.

On November 27, 2007, Board members Lewis and Bullock reviewed TBS's escrowed bid documents and its WQCP in the presence of Department and KFM/TBS representatives. The Board found no evidence to support or contradict TBS's assertion that it had based its bid on utilizing trainee welders since there was no back-up explaining the development of the hourly rate(s) TBS used to estimate its pile fabrication costs.

The Board did not review the WQCP in complete detail but found no reference to utilization of trainee welders and this finding was confirmed by representatives of the parties present on November 27, 2007.

CONCLUSIONS

It appears that TBS's past practice on previous Department contracts, has been to successfully employ Welder Trainees to assist qualified welding operators in actual production welding using the SAW process, although subject to the following TBS imposed provisions:

- (iii) Trainee is required to work under the direction and control of a "qualified" welder
- (iv) Qualified welder has to be in attendance 100% of the time with the trainee.

TBS testimony at the hearing clearly indicated that if these provisions were not adhered to during SAW operations then issuance of NCR's by the Department would be warranted.

A review of the specifications provided for various previous Caltrans projects for which TBS has fabricated steel pipe piling confirm that no significant language changes are evident with regard to the requirements to use qualified welder operators or regarding the utilization of trainees in production welding. Consequently, the Board finds it was not unreasonable for TBS to assume its traditional trainee program would be acceptable to the Department on this Contract.

AWS D 1.1 and the Contract specifications indicate that all production welding of the steel piling using the SAW process will be performed only by welders qualified and approved by the Engineer. TBS testified that the SAW process is essentially an automated machine welding process with "95% of the critical part of the SAW process in the setup of the weld" before actual welding starts.

The Board believes that the intent of the AWS Code and Contract specifications in requiring all SAW process production welds to be performed by qualified welding operators implies that the qualified welding operator will effectively control, monitor and supervise the welding process, including the weld setup, on a full-time basis.

While the AWS Code and the Contract specifications do not address or acknowledge the role of welding trainees, (or helpers), these documents do not appear to prohibit such personnel being present and assisting qualified welders performing the SAW production process, as long as the qualified welding operator remains present full time and directly supervises and controls the welding operation.

The Department's proposed addendum to TBS's Welding Quality Control Plan (WQCP) as a requirement of proposed CCO #39 confirms this premise in Item #3 as follows:

“If the trainee is at the controls of the SAW welding machine, the qualified experienced welding operator will be actively supervising the trainee 100% of the time welding operations are ongoing. Additionally, the qualified experienced welding operator will always be in a position to monitor and control the welding equipment.”

The proposed Contract Change Order #39 essentially provided for the re-implementation of the TBS training program without indicating that any change or exception to the AWS Code or the welding specifications was required.

The Board concluded that the NCRs discussed in the DRB Findings effectively provide direction by the Department in not allowing TBS trainees (i.e., apprentices, helpers, etc.) who have not been approved as qualified welder operators to be actively involved in the operation, or in any way controlling the welding machines performing SAW production fabrication of the steel piling for this Contract. NCR Nos. 041, 044, 047, 079 provide this direction while specifically acknowledging that the trainees were performing the task at the welding station under the direct supervision of a qualified welder operator. The Department's intent to enforce its interpretation of the specifications and AWS Code in this regard is confirmed in its letter of May 10, 2006 (SL-001137). The Board concluded that this constituted direction by the Engineer following which TBS responded by ultimately removing its trainees from the production welding stations to avoid further confusion and avoid any perception that the trainees were in any way involved in the setup, operation or control of the production welding process.

However, the Department apparently recognized TBS's problems and on June 5, 2006, following issuance of the NCR's, forwarded to the Contractor a draft CCO #39 - Welding Operator Training Plan, which would permit the utilization of two-man welding teams (one trainee welding operator and a qualified experienced welding operator) to perform SAW on the steel pipe piles. The underlying theme of this CCO seemed to essentially provide acceptance of TBS's welder trainee program but with additional RT and QC inspection the Department deemed necessary to verify and ensure weld quality. The Department was to compensate the Contractor for the additional RT and QC inspection of the welding teams.

Reservation of rights language, requested by the Contractor, was subsequently added to the CCO and on July 25, 2006, the Department transmitted unapproved CCO #39, to

KFM, for review and signature. The transmittal also requested KFM to notify the Department if the Change Order was not acceptable, with a letter explaining its position.

The Contractor did not reply to the Department's revised unapproved CCO #39 until its transmittal dated September 28, 2006 which attached the CCO with suggested revisions to the text. The Board concluded the Contractor was remiss in not responding to the Department in a more timely manner and no reason(s) for the untimeliness was provided by the Contractor

The Department, in its letter of October 24, 2006 (SL 2147) sent a revised and final version of proposed CCO #39. KFM responded in its November 01, 2006 letter (KFM – LET 000214) explaining the basis of its rejection of CCO #39 and forwarding the TBS letter of October 31, 2006 which also provided its position on the training issue and described the basis of its impact claim. The State did not respond in writing to this KFM claim notice until March 12, 2007 (SL 2955).

The Department's letter of March 12, 2007 (SL 2955) confirmed the State's awareness of the Contractor's intent with regard to the training issue as follows: "Fabrication at Trans Bay Steel (TBS) has been carried as an open discussion item in the Agenda for the Weekly Meeting held between Kiewit-FCI-Manson (KFM) and the Department. KFM has indicated that this item is held open with respect to additional costs associated with work performed at TBS dating to December 6, 2005."

Section 4-1.03A Procedure and Protest of the Standard Specifications states: "A contract change order approved by the Engineer may be issued to the Contractor at any time. Should the Contractor disagree with any terms or conditions set forth in an approved contract change order not executed by the Contractor, the Contractor shall submit a written protest to the Engineer within 15 days after the receipt of the approved contract change order." Section 4-1.03A also states "Proposed contract change orders may be presented to the Contractor prior to approval by the Engineer."

The "Draft" CCO # 39, as originally transmitted to KFM on June 5, 2006, and CCO #39 dated July 25, 2007, was a "proposed" but not an "approved" change order and in fact never became an approved contract change order.

The Board concluded that the filing of the Initial Notice of Potential Claim on June 20, 2007 was extremely untimely. In accordance with Section 9-1.04, "Notice of Potential Claim" of the amended Standard Specifications, the NOPC could have been filed by the Contractor soon after the NCRs regarding trainee involvement in production welding were received. Ideally, this might have served to keep the parties focused on the whole problem, served to clarify each party's expectations and motivated a more expeditious resolution of the trainee problem.

However, the Board reviewed the contemporaneous actions of, and correspondence between the parties leading up to the actual filing of the Initial NOPC on June 20, 2007. The record is replete with correspondence and meetings between the parties regarding the

welder trainee issue, between May 2006 and June 2007 and it seems clear there was constructive notice of potential claim virtually during that whole period of time. The Department testified at the Hearing that although it knew there was a problem, based on the letters and meetings, it was not aware of the “depth and breadth” of the issue. While the parties would have been better served if KFM/TBS had filed an NOPC earlier than it did, the Board concluded that the Department had received adequate constructive notice as to TBS’s intent to pursue restitution of its alleged damages regarding the welder trainee issue.

KFM/TBS and the Department apparently had different perceptions of the purpose, scope and intent of the proposed CCO #39.

KFM/TBS envisioned that, in addition to responding to the Department’s concerns, CCO #39 would ultimately provide compensation and time for the impacts of it not being able to use its traditional welder trainee process in the SAW production welding of the steel pipe piles through most of the fabrication process. Consequently, at least from May of 2006 until June of 2007, KFM and TBS viewed the proposed CCO #39 as the agreed mechanism to resolve these impacts when they could be quantified, as well as the way to reactivate a training process that could help develop qualified welders more expeditiously. The Department’s willingness to try to reach mutual agreement that would re-establish the training process through CCO #39, confirmed to KFM and TBS that they were in a process of a good faith change order negotiation that would provide the avenue for settlement of the impact damages that TBS claimed to have suffered. CCO #39 in its later drafts confirmed that when it stated, “The Engineer will consider an adjustment of compensation and/or time for these impacts. Upon determination of merit, a supplemental change order shall be issued to compensate the Contractor for these impacts.”

The Department was focused on ensuring that no compromise in the quality of the SAW welds would occur if the TBS welder training process was re-implemented. It pursued CCO #39 primarily to better define and control the welder trainee process and provide for additional RT testing and quality control inspection.

Consequently, once the TBS fabrication work was completed without an agreed CCO #39 coming to fruition, the Department considered CCO #39 to be moot.

The Department’s position with regard to the Contractor’s claim rested on the assumption that if the Engineer did not receive an NOPC on Form-6201A in accordance with 9-1.04, “Notice of Potential Claim” of the Special Provisions (amended Standard Specifications), then it presumed the Contractor would not file a claim for its alleged impacts over the trainee issue. The Contractor in turn believed it was proceeding under Section 4-1.03, “Changes” of the Standard Specifications and that the trainee impact issues were at least recognized by the Department and that therefore the Contractor was not required to file an NOPC unless and until the ultimate change order language, the dollar amount, or time adjustment in the final version of the change order were not acceptable. The Contractor believed that the requirement to file an NOPC and proceed to a DRB hearing were only

applicable when the issues involved in the negotiation of a CCO have reached an impasse.

In the Contractor's mind impasse was not reached until a meeting between the parties on June 15, 2007.

The Board concluded that the Department received constructive notice of TBS's position on the trainee issue and its intent to be compensated for its additional costs and time due to its alleged impacts arising from the State's actions regarding the welder trainee process.

The Board also concluded that under these conditions the Contractor's failure to file an NOPC earlier than June 20, 2007, does not bar it from entitlement of its impact damages under these circumstances. However, the Board believes both parties share responsibility for their failure to expeditiously reach an agreement on the terms of CCO #39 in a timely manner as this would have essentially allowed redemption of the welder trainee program and most likely would have provided a significant mitigation opportunity to reduce TBS's damages.

The State argued that as a consequence of the untimely NOPC it was prejudiced and thus unable to verify or document the Contractor's additional costs or time, if any, due to the impact of the trainee welder issue. However, the Board believes that even in the absence of a formal NOPC, when the Department received clear constructive notice of the Contractor's intent to claim its damages as a result of it not being allowed to utilize its trainee welder program, it had an obligation to do whatever it determined necessary, to track the Contractor's costs related to the alleged impact, as well as provide feedback to the Contractor of its mitigation actions that were, or should have been taken. By the same token the Contractor had a duty to mitigate its own costs in the event they became the responsibility of the State.

In response to a Board question to the Department as to whether it would have done anything differently had the NOPC been filed more timely, the Department responded that it could have issued CCO #39 earlier. The Board believes the parties responded in a reasonable time frame following issuance of the NCR's in developing the initial drafts of CCO #39 leading to the July 25, 2006 version. In hindsight this document might perhaps have been issued earlier but up until that time the parties appeared to be engaged in a collaborative effort to reach agreement. Given these circumstances the Board concluded that earlier issuance of CCO was probably not practical.

The Board further concluded that TBS has been unreasonably slow in presenting to the State the details of its claimed impact and substantiation of its damages since the steel pipe pile fabrication work was completed in December 2006, when Section 9-1.04 requires this information to be provided within thirty (30) days after the work has been completed.

The Department's reference to Section 9-1.07B, "Final Payment of Claims," is inappropriate as this section is intended to address contract completion after all the work in the general contract has been completed and accepted.

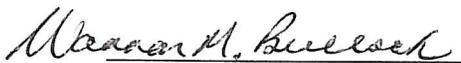
DRB RECOMMENDATION

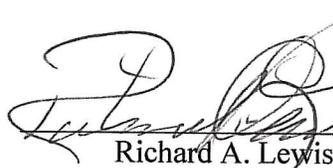
The Board unanimously recommends that the Contractor be compensated under Section 4-1.03 CHANGES, of the Standard Specifications, for its additional costs and delays (if proven) as a consequence of the impact of the Department's enforcement of its determination that welder trainees could not actively participate in the SAW production welding process even when a qualified welding operator was always present, monitoring, supervising and controlling the welding operations.

The Board believes the Department's July 25, 2006 version of CCO #39 provided a reasonable solution to enable mitigation of the impact of the trainee welder issue. Consequently the DRB recommends that the Department should not be held responsible for any additional costs and delays after an agreed-upon effective date following the Department's transmittal of July 25, 2006. The effective date, to be agreed to by the parties, should allow a reasonable period of time for the CCO to be finalized, approved and subsequently implemented, and the WQCP to be amended.

The Contractor should be responsible for any costs associated with the clearance and impacts of any NCR's that were issued by the Department as a result of TBS not adhering to its welder trainee program that required a qualified welder to directly supervise and control the welding operation and be in attendance 100% of the time with the trainee.

Respectfully submitted,


Warren M. Bullock
DRB Member


Richard A. Lewis
DRB Member


Ronald C. Maasberg
DRB Member

Dated: December 21, 2007