

MCM CONSTRUCTION, INC.

Contractor's Rebuttal Paper
Notice of Potential Claim

No. 10

Increase in Sales Tax
Caltrans Contract No. 04-0120L4

DRB Hearing

February 12, 2010

Notice of Potential Claim No. 10

Increase in Sales Tax

Contractor's Rebuttal Paper

1. The State Disputes The Authority Of The Disputes Review Board To Hear This Matter Yet They Refused To Agree To Waive The DRB Hearing Procedures.

MCM had requested that the State waive the DRB procedure in regard to this NOPC No. 10, knowing that the State had taken the position that the DRB did not have authority to hear this dispute. Caltrans denied MCM request. (Exhibits 5 and 6)

Later, in order to mitigate further costs, MCM requested that Caltrans agree to hear the dispute on an informal basis. This request was also refused. (Exhibits 6 and 7)

Now Caltrans is arguing that the DRB does not have authority to hear this matter.

They can't have it both ways. If this Board determines that its members are not qualified to make a recommendation that would result in the potential resolution of this dispute, then the State should be required to pay all costs related to its tactic of requiring the Contractor to expend its resources and pursue the matter before the Board.

While this Board is perfectly qualified to understand the provisions of the Contract, if there is any reservation that the Board members are not qualified to deal with the legal arguments and the constitutional arguments, then the Board recommendation should so reflect and require that the State pay the entire costs of their mandate that the dispute be formally presented to the DRB while arguing that the DRB is not authorized to hear the matter or qualified to make a recommendation.

2. The Parties to Contract 04-0120L4 are The State of California and MCM Construction, Inc.

The State appears to be arguing that the State is not a party to the Contract. It appears that out of convenience, the State is arguing that only the Engineer or the Department is the party to

the Contract. The State's position conveniently ignores the fact that the Engineer and Department are the agents of the State and every action of the State that impacts the Contractor's work, whether it changes the physical work or the burden of performing the work (ie. Costs of required materials and services) the State is responsible for imposing a greater burden on the Contractor by imposing a new cost, not contemplated by the parties.

3. Contract 04-0120L4 is not a Fixed Price Contract as defined by BusinessDictionary.com.

The definition of Fixed Price Contract set forth by Caltrans in its position paper does not exist in the Contract documents. In fact the term fixed price contract does not exist in the documents that comprise Contract 04-0120L4.

The State's assertion that a term defined in some obscure internet website, that is not referenced in the Contract or published in any manner within any Contract document or any Caltrans publication, is, at best, "grasping at straws" or most likely a deliberate attempt to obfuscate the merits of MCM's claim.

Clearly the provisions of Section 1-1.48 WORK and Section 9-1.02 SCOPE OF PAYMENT, of the Standard Specifications limit the scope of work to that which was contemplated by the parties.

4. The Contract bid amount paid to the Contractor is ONLY for the Work contemplated by the Contract.

The State conveniently chooses to ignore the natural limitation of the scope of a contract agreement to what was contemplated by the parties. The examples used by the State as not allowing for an adjustment of compensation, such as fuel prices, or taxes on gasoline, are not even applicable to this NOPC or Contract. The Contract between the State and MCM is not for supplying gasoline or fuel to the State. This Contract is for the construction of the Oakland Touchdown portion of the new San Francisco Oakland Bay Bridge and related structures and

roadwork. The State's action of increasing the burden of performing that Contract work, which is not denied, is the basis of this claim.

Similarly, an action by another, independent agency of the State in enacting new work rules, gave rise to the State's responsibility to pay the increased costs incurred in the Work Order 16 matter, this independent action by the legislature, also constitutes a compensable change to the Work.

The legislature of the State of California may enact many laws in which the State can assert sovereign immunity from liability. However, when such a legislative action results in a change to the contemplated burden in performing Work pursuant to a legally authorized Contract with the State, sovereign immunity is waived. The assertion that this increase in sales tax was beyond the control of Caltrans is of no consequence where, as in the Contract, the Contractor is directed to comply with the new, unforeseen requirement to pay more money for the materials and services incorporated into the Contract work.

The State asserts that the failure of AGC-California to negotiate an amendment to the sales tax legislation is somehow evidence that the State is not authorized to pay for increasing a Contractor's burden for performing work. Nothing in AB 3 references State contracts and nothing in AB 3 states that there is no responsibility on the part of the State pursuant to a State contract.

The State misrepresents the Calderon bill, AB 1523, by some perverse assertion that the bill was somehow related to only public works contracts. This was not the case. If the legislature intended to deny the State's authority to pay for a change to State contracts resulting from increased costs of the Work, it clearly had the opportunity to do so. There is absolutely no evidence in the legislation or the legislative record that reflects such an intent by the legislature.

The State's position that the legislature's inaction to accept amendments proposed by AGC-CA is based on the erroneous assumption that the legislature had the authority to modify a properly authorized and legal Contract. The legislature has no authority to do so. The Contractor's entitlement to an adjustment of compensation for the increased costs of performing the Contract work is based on the provisions of the Contract and the unilateral directive of a party to the Contract that results in an unforeseen increase the costs of performing the work.

5. Western Contracting Case Decision Is Totally Irrelevant.

The State improperly cites the case of Western Contracting Corporation v. State Board of Equalization (39 Cal.App.3d 341) as legal authority to support denial of the Contractor's entitlement in this claim. The decision in the Western Contracting Corp. can not be applied this NOPC 10 because the provisions of the contract in the Western Contracting matter are completely different than the terms of Contract 04-0120L4. Rather the ruling on Wage Order 16 should be the applicable basis for a decision since it is based on contract terms that are precisely the same as in Contract 04-0120L4.

The State further asserts that the Court in Western held that "Western was not entitled to any additional compensation due to the sales tax increase..." However what the court actually held was "that statute which exempted from increase in sales and use taxes 'materials' and 'fixtures' in the sale, storage, use or other consumption of the material and fixtures which were obligated pursuant to an engineering construction project contract entered into for a fixed price prior to August 1, 1967, did not provide an exemption from the increase in sales and use taxes with respect to **construction equipment and supplies utilized in performance of the contract.**" (Id. at page 229)

MCM's claim is not for tangible personal property used or consumed in the performance of the contract such as construction equipment and the spare parts, tires, fuel and accessories necessary to the operation thereof, rather it is for materials, meaning "tangible personal property 'which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure' (for example, cement)..." (Id. at page 232).

The "Changes" provisions of the contract in Western defined changes to be "changed conditions which, if they 'materially increase or decrease the costs of any portion of the work,' may be the subject of an adjustment to compensation. However, the kinds of changed conditions provided for are (1) 'Subsurface or latent physical conditions at the site of the work differing

materially from those represented in this contract,’ and (2) ‘Unknown physical conditions at the site of the work of an unusual nature differing materially from those ordinarily encountered.’ It follows that a change of the tax rate does not fall into either of these categories. (Id. at page 234)

Compared to the provisions of Section 4-1.03 in the Contract, section 4-1.03 does not narrowly construe a change to be latent physical conditions or unknown physical conditions. The Section addressing “Changes” in the Contract here is definitely more broad in scope and as interpreted in the Arbitrator decision in the Work Order 16 case, Section 4-1.03 entitles the Contractor to an adjustment of compensation for the extra costs incurred as a result of an unforeseen change in law enacted by the State. A change of the tax law is no different than a change in labor law and should fall under the Section 4-1.03 definition of a “change”; therefore the Contractor should be compensated for the increase in cost resulting from the change in law enacted by the State.

As for the third issue addressed in Western, unlike the contractor in that case MCM never contended that the imposition of the additional tax burden upon it and the denial of its claim for further compensation unconstitutionally impairs the State's obligation under the contract. Rather, MCM acknowledges that the State has a sovereign right to increase taxes for the purpose of the general welfare. However, as a party to the contract, the State modified and affected the obligations of the parties under the contract and therefore cannot require the Contractor to absorb the increased costs resulting from an act or directive of the State of California without an adjustment of compensation.

The Arbitrator’s ruling on Wage Order 16 should be the applicable basis for a decision for providing entitlement to MCM for equitable adjustment in this matter. It was an outside agency of the State that enacted the rest period law that affected contractors on projects where the State was a party; just as in this matter, it is the legislature that enacted the tax increase which was a new and unforeseen change to the character of the work on a project where the State is a party. As was held in the Wage Order 16 arbitration, the State may not shift the burden of increased costs associated with future State acts not anticipated or contemplated at bid time, from the State to the Contractor.

Article 4, Section 17 of the California Constitution Does Not Prohibit the State to Compensate a Contractor for Costs Incurred as A Result of a Change.

The argument that the California Constitution denies the Department the ability to compensate a contractor for increased costs due to a change in law is invalid. Article 4, Section 17 only applies if the Department were required to pay additional compensate for work that a Contractor was obligated under a contract to perform, it does not address this situation where the State is obligated to pay for a directed change in the contract obligation. When there is a change in the work, it is not “extra compensation or extra allowance”, therefore the State has the authority pursuant to the powers vested in it to enter into contracts to pay for the change. The “Changes” provision specifically provides the reasoning for the adjustment in compensation, and as a party to the Contract the State is authorized to make payment without violation of the California Constitution.

6. The State has Misrepresented the Arbitrator’s Decision in the Wage Order 16 matter and the State’s response to that Decision.

While the Wage Order 16 directed change impacted the Contractor’s labor cost for performing the Contract work, the State’s imposing an additional 1% of sales tax impacted the cost for providing certain material and service related to the work. The two impacts are no different. Both increased the costs of performing the work and both were caused by a direction of one of the parties to the Contract, the “party of the first part”, the State of California.

Secondly, the State indicates that not all of the claims regarding Work Order 16 have been resolved. There is no question that the Arbitrator’s Decision determined that the State is responsible for costs incurred, any remaining dispute with other Contractors regarding claims resulting from Work Order 16 must be related to quantum only since the State has no basis to deny entitlement. Further, MCM has firsthand knowledge that it’s one and only claim related to Wage Order 16 was fully paid by a Change Order issued after the Arbitrator’s Decision was sent down. (Exhibits 11 and 12) Exhibit 11 is a copy of the Contract Change Order that authorized the payment of the Wage Order 16 claim and Exhibit 12 is an excerpt from the Pay Estimate paying the claim for Wage Order 16 costs.

CONCLUSION

Here, as in the case of the Wage Order 16 change, the State has improperly denied entitlement to an adjustment in compensation for the costs of a directed change to the Work not contemplated by the parties.

It should be noted that the State's position in the Wage Order 16 situation, as stated in the February 28, 2001 Memorandum from the Construction Program Manager of Caltrans (Exhibit 13) was completely overruled by the Arbitrator's Decision in the Wage Order 16 matter. The State's position as stated in the February 28, 2001 Memorandum cites Section 7-1.01 of the Standard Specifications as the basis for denying the Wage Order 16 requests for extra compensation. Now, with respect to this change in law claim, Caltrans has again relied on Section 7-1.01 to deny this potential claim (Exhibit 14 – Memorandum dated April 2, 2009) and again the position of the State should be overruled and this Board should recommend that the State is responsible for costs added to the Work that was not contemplated by the parties and that is the result of a change in law enacted by the State.

Respectfully submitted,

MCM CONSTRUCTION, INC.

EXHIBIT 11

Contract Change Order

CEM-4900 (OLD HC-5 REV. 8/97) CT # 7541-3501-0

Change Requested by: Engineer Contractor

CCO No. 185	Suppl. No. 00	Contract No. 12-0695U4	Road 12-ORA-405,55-13.9/15.8,R8.9/R11.7	Federal Number(s) FTA-(MOS-2)N & STPLN-5312(031)N
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To **MCM Construction, Inc.** **Contractor**

You are directed to make the following changes from the plans and specifications or do the following described work not included in the plans and specifications for this contract. NOTE: This change order is not effective until approved by the Engineer.

Description of work to be done, estimate of quantities and prices to be paid. (Segregate between additional work at contract price, agreed price and force account.) Unless otherwise stated, rates for rental of equipment cover only such time as equipment is actually used and no allowance will be made for idle time. The last percentage shown is the net accumulated increase or decrease from the original quantity in the Engineer's Estimate

All work shall be performed in accordance with the Special Provisions, Standard Specifications, and Standard Plans.

ADJUSTMENT OF COMPENSATION AT AGREED LUMP SUM:

Compensate the contractor for additional costs incurred by MCM Construction, Inc. as a direct result of the "Industrial Welfare Commission, Wage Order No. 16".

For this work, the Contractor will be paid the sum of \$ 478,005.93. This sum constitutes full and complete compensation, including all markups for this change.

This Change Order fully resolves the MCM Construction, Inc. portion of Wage Order 16 claims for this project.

Total Adjustment in compensation\$ **478,005.93**

Estimated Cost: Decrease Increase \$ 478,005.93

By reason of this order the time of completion will be adjusted as follows: NO TIME ADJUSTMENT		
Submitted by		
Signature	(Print name & title) WILLIAM J. GILCHRIST - RESIDENT ENGINEER	Date
Approval Recommended by		
Signature	(Print name & title) Saeid A. Asgari, P.E., Office Chief, Construction	Date
Engineer Approval by		
Signature	(Print name & title) Saeid A. Asgari, P.E., Office Chief, Construction	Date

We the undersigned contractor, have given careful consideration to the change proposed and agree, if this proposal is approved, that we will provide all equipment, furnish the materials, except as may otherwise be noted above, and perform all services necessary for the work above specified, and will accept as full payment therefor the prices shown above. NOTE: If you, the contractor, do not sign acceptance of this order, your attention is directed to the requirements of the specification as to proceeding with the ordered work and filing a written protest within the time therein specified.

Contractor Acceptance by		
Signature <i>[Handwritten Signature]</i>	(Print name & title) MCM CONSTRUCTION, INC. Edmundo A. Puchi, Treasurer and Gen. Counsel	Date 4/20/07



EXHIBIT 12

PROGRAM CAS145 SCHEDULE OF EXTRA WORK PAGE NO. 1
 DATE 06/21/07 EST. NO.78
 TIME 12:38 PM
 R.E. NAME: WILLIAM J. GILCHRIST

12-0695U4

CCO REPORT NO. NUMBER	REPORT TYPE OF WORK (+) AMOUNT PERFORMED (-)	WORK BR CONTR DATE WK RPT.NO	COMMENTS
001 0493	666.70 E.W. @ F.A. (+)	012907 N 2875.0	
0494	888.93	013007 N 2876.0	
012 0028	3,800.00 E.W. @ F.A. (+)	010407 N 2867.1	
063 0009	-1,580.37 A.C. @ L.S. (-)	031207 N 9 0	
0010	1,886.17 A.C. @ L.S. (+)	032007 N 10 0	
0011	1,580.37 E.W. @ L.S. (+)	032007 N 11 0	
081 0001	12,000.00 A.C. @ L.S. (+)	062107 N 1 0	
102 0002	4,998.22 A.C. @ U.P. (+)	021607 N 2 0	
118 0011	1,246.08 E.W. @ F.A. (+)	051906 N 2827 0	
160 0001	-9,500.00 A.C. @ U.P. (-)	031207 N 1 0	
163 0005	15,547.56 E.W. @ L.S. (+)	032007 N 5 0	
172 0001	72.29 E.W. @ F.A. (+)	052506 N 2849 0	
0002	2,016.26	091106 N 2844 0	
0003	1,971.92	090606 N 2836 0	
0004	1,971.92	090506 N 2837 0	
0005	2,292.98	090106 N 2838 0	
0006	2,393.97	083106 N 2839 0	
0007	1,550.39	082906 N 2840 0	
0008	452.63	082806 N 2842 0	
0009	1,999.18	082406 N 2843 0	
0010	2,172.28	082506 N 2841 0	
175 0002	138,903.73 A.C. @ L.S. (+)	032107 N 2 0	
183 0001	280,780.01 A.C. @ L.S. (+)	051507 N 1 0	
185 0001	478,005.93 A.C. @ L.S. (+)	051507 N 1 0	
186 0001	207,092.05 A.C. @ L.S. (+)	051507 N 1 0	
	1,153,209.20	TOTAL THIS ESTIMATE	
	7,011,214.14	TOTAL PREVIOUS ESTIMATE	
	8,164,423.34	TOTAL TO DATE	



EXHIBIT 13

M e m o r a n d u m

To: DIVISION CHIEFS, CONSTRUCTION
AREA CONSTRUCTION MANAGERS
SENIOR CONSTRUCTION ENGINEERS
RESIDENT ENGINEERS

Date: February 28, 2001

File: CPD 01-02

From: DEPARTMENT OF TRANSPORTATION
CONSTRUCTION PROGRAM

Subject: Industrial Work Order 16 and Assembly Bill 60

Assembly Bill 60 is commonly referred to as the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999." The bill's primary objective was the reinstatement of premium pay at a rate of 1½ times base rate for each hour worked in excess of eight hours per day.

As authorized by Assembly Bill 60, the Industrial Welfare Commission (IWC) issued Wage Order 16. Among a plethora of new work rules and requirements, Wage Order 16 requires a ten-minute rest period for every four hours worked. In limited circumstances, when a rest period could result in disruption of a continuous operation and could jeopardize the product or process of the work, authorization for the rest period is not required if the employer compensates the employee for each missed ten minutes rest time at his or her own regular rate of pay within the same pay period.

Wage Order 16 generated several protests and requests for additional compensation by contractors. The basis of this request is usually a notice of potential claim of "changed condition" of the contract. The requirements of Wage Order 16 do not constitute a change in contract provisions.

Caltrans has no contractual obligation to honor the requests for additional compensation regardless of the impacts Wage Order 16 may have on project delivery or project cost. *Standard Specifications*, Section 7-1.01 "LAWS TO BE OBSERVED" requires "The contractor shall keep fully informed of all existing and future state and federal laws and county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work . . . and shall protect and indemnify the State of California, and all officers and employees thereof connected with the work, including but not limited to the director and the engineer, against any claim or liability arising from or based on the violation of any law, ordinance, regulation, order or decree."

Contractor requests for additional compensation due to the impacts of Assembly Bill 60 or Wage Order 16, should be denied.



ROBERT PIEPLOW
Program Manager
Construction



EXHIBIT 14

Memorandum

*Flex your power!
Be energy efficient!*

To: DEPUTY DISTRICT DIRECTORS, Construction
DEPUTY DIVISION CHIEF, Structure Construction
CONSTRUCTION MANAGERS
SENIOR CONSTRUCTION ENGINEERS
RESIDENT ENGINEERS

Date: April 2, 2009

File: Division of Construction
CPD 09-2

From: MARK LEJA
Chief
Division of Construction



Subject: Temporary Sales and Use Tax Increase —Assembly Bill 3 (Evans)

Assembly Bill 3 (AB 3) increased the State sales and use tax rate by 1 percent on April 1, 2009. This increase in sales and use tax costs has generated requests for additional compensation by contractors who have already entered into a contract with the Department. Although section 4-1.03, "Changes," of the Standard Specifications allows the Department to make changes to the plans and specifications and to adjust compensation to the contractor accordingly, the construction contract makes no provision to compensate the contractor for changes in tax rates.

Standard Specifications section 7-1.01, "Laws to be Observed," states that the contractor shall keep fully informed of all existing and future state and federal laws as well as county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work.

Standard Specifications sections 9-1.02, "Scope of Payment," and 7-1.03, "Payment of Taxes," state that full compensation to the contractor for all taxes is included in the contract prices. The Department has no contractual authority to provide additional compensation regardless of the impacts AB 3 may have on project costs. Increased sales and use tax costs do not constitute a change in contract provisions.

Additionally, the Department has no legal authority to pay for the increased costs resulting from the sales and use tax increase, as the California Constitution, Article 4, Section 17, states, "The legislature has no power to grant, or to authorize a city, county, or other public body to grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or to authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law."

Contractor requests for additional compensation due to the impacts of AB 3 should be denied.

If you have questions regarding this directive, please contact Michael Kissel, Division of Construction at (916) 654-2467 or Michael_Kissel@dot.ca.gov.

