

15-Aug-2008

ABF-CAL-LTR-000629

Mr. Gary Pursell  
Resident Engineer  
**California Department of Transportation**  
333 Burma Road,  
Oakland, CA 94607, USA

**PROJECT: San Francisco Oakland Bay SAS Bridge Superstructure**  
**Caltrans Contract No. 04-0120F4**  
**ABF Job No. 660110**

**SUBJECT: Potential Claim Number 008**  
**Submission of Initial Notice of Potential Claim**  
**For Protest of Weekly Statement of working & Overhead Days**  
**(WSWD) Report No. 112**

Gentlemen:

Pursuant to the Agreement, including Standard Specifications, Article 9-1.04, Notice of Potential Claim, American Bridge / Fluor, JV hereby submits the enclosed certified Form CEM 6201A, Initial Notice of Potential Claim, identified by the above number.

This Initial Notice of Potential Claim will be followed-up with a Supplemental Notice of Potential Claim.

We look forward to receiving your prompt acknowledgement of the above identified Initial Potential Claim.

If you have any questions, please contact our office.

Sincerely,

**AMERICAN BRIDGE/FLUOR ENTERPRISES, INC. A JOINT VENTURE**

  
Per Michael Flowers  
Project Director

File: 01.07.8  
02.01

STATE OF CALIFORNIA - DEPARTMENT OF TRANSPORTATION		FOR STATE USE ONLY	
<b>INITIAL NOTICE OF POTENTIAL CLAIM</b>		Received by	Date
CEM-6201A (NEW 9/2002)		(For resident engineer)	
TO Mr. Gary Pursell (resident engineer)	CONTRACT NUMBER 04-0120F4	DATE 08/15/08	IDENTIFICATION NUMBER 008

This is an Initial Notice of Potential Claim for additional compensation submitted as required under the provisions of Section 9-1.04, "Notice of Potential Claim," of the Standard Specifications. The act of the engineer, or his/her failure to act, or the event, thing, occurrence, or other cause giving rise to the potential claim occurred on:

DATE: August 15, 2008

The particular nature and circumstances of this potential claim are described as follows:

American Bridge / Fluor Enterprises, Inc. Joint Venture (ABFJV) hereby submits, pursuant to Section 9-1.04, Notice of Potential Claim, of the Standard Specifications, Notice of Potential Claim # 8, regarding the Department's failure to allow ABFJV an excusable delay and time extension of three (3) days for a power outage that halted all work related to the controlling operation of the above referenced project at ZPMC's fabrication facility on Changxing Island, China from July 02, 2008 through and including July 04, 2008.

The facts are not in dispute by the parties. A submarine power cable was struck by the anchor of a passing vessel that was not under the care, custody or control of ABFJV or its Supplier, ZPMC. As a result a power outage occurred, and all work relating to the controlling operation of the above referenced Project at ZPMC's fabrication facility on Changxing Island, China, was halted from July 02, 2008 through and including July 04, 2008.

ABFJV received Department Letter No. 05.03.01-002523 dated August 08, 2008 provided in response to ABFJV letter ABF-CAL-LTR-000597 dated July 21, 2008 and ABF-Cal-LTR-612 dated August 04, 2008. In this letter the Department rejected ABFJV's request for a three day time extension and provided two explanations for doing so. The first was "A power outage caused by human actions is not a basis for consideration of time extension under Section 8-1.07, Liquidated Damages, of the Standard Specifications as it does not constitute an Act of God." The second explanation provided in the letter was "a temporary suspension of the work was not, and would not have been ordered by the Engineer for a power outage, or unfavorable weather for that matter, as the Special Provisions define a working day as any day, with no exceptions. Non working days do not apply to the SAS Contract regardless of weather, traffic, unfavorable conditions, or temporary suspension of the work."

ABFJV disagrees with the Department's determination not to grant ABFJV a three day time extension.

Department Rational No. 1;

"A power outage caused by human actions is not a basis for consideration of time extension under Section 8-1.07, Liquidated Damages, of the Standard Specifications as it does not constitute an Act of God."

ABFJV Response:

The term "Act of God" is not defined in the Standard Specifications or the Special Provisions of the Contract and to date, the Department has failed to provide ABFJV any definition whatsoever.

California Civil Code section 1511. Section 1511 provides in pertinent part; "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein is excused by the following causes, to the extent to which they operate.

2. When it is prevented or delayed by an irresistible, superhuman cause..."

A common definition of "Act of God" is a "fortuitous event" an "irresistible force" or an "inevitable accident" which under the Civil Code relieves debtor from incurring penalty for nonperformance of principal obligation within fixed period of time, means such an interposition of human agency as is, from its nature and power, absolutely uncontrollable, and is equivalent to an Act of God, accidents which are irresistible, an act which cannot be resisted, and unforeseen occurrence, not caused by either of the parties, or such as they could prevent, or an accident which human prudence can neither foresee nor prevent.

As stated in the preceding paragraph, Pursuant to California Civil Code section 1511 the performance delay caused by the "Irresistible Force" can be construed as an "Act of God" and therefore, the resulting days lost are excused.

"Excusable delays" are defined as events caused by third parties or incidents beyond the control of both the owner and the contractor. Examples typically include acts of God, unusual weather, strikes, fires, acts of government in its sovereign capacity, etc. and the contractor is normally entitled to a time extension but no compensation for delay damages.

If the parties can not agree that "Acts of God" is defined as accidents which are irresistible, acts which cannot be resisted or unforeseen occurrences not caused by either of the parties, such as they could be prevented, or an accident which human prudence can neither foresee nor prevent, the term "Acts of God" is clearly ambiguous.

"Ambiguity" is defined as doubtfulness, doubleness of meaning, indistinctness, uncertainty of meaning of an expression used in a written instrument, want of clearness or definiteness; or difficult to comprehend or distinguish. Courts have determined; where a Government contract contains a latent ambiguity, the Court will construe the ambiguous term against the Government as drafter of the contract, provided that the contractor's interpretation was reasonable.

Section 8-1.05, Temporary Suspension of Work, of the Standard Specifications, provides in pertinent part that "...the Engineer shall have the authority to suspend the work wholly or in part, for any time period as the Engineer deems necessary, due to unsuitable weather, or to such other conditions considered unfavorable for the suitable prosecution of the work. If the Engineer orders a suspension of a portion of the work which is the current controlling operation or operations, due to unfavorable conditions, the days on which the suspension is in effect shall not be considered working days as defined in Section 8-1.06, "Time of Completion".

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Equitably, ABFJV is entitled to a time extension pursuant to Section 8-1.07, Liquidated Damages, of the Standard Specifications because the shutdown of the plant was the direct result of an outside influence, beyond the control of ZPMC or ABFJV this outside influence created a condition, unfavorable for the suitable prosecution of the work, resulting in a three day production shutdown of the fabrication plant.

For the following reasons, explained in greater detail above, ABFJV is entitled to a three (3) day time extension;

- Legally, (California Civil Code section 1511),
- Contractually, (Section 8-1.07, Liquidated Damages, of the Standard Specifications)
- Court Precedent, (see definitions “Acts of God” and “Ambiguity”)
- Common Practice, (see definition “Excusable Delay”)
- Equity, (an unforeseeable delay brought about by an outside influence, beyond the control of ZPMC or ABFJV and Section 8-1.05, Temporary Suspension of Work, Standard Specifications,)

Department Rational No. 2;

“...a temporary suspension of the work was not, and would not have been ordered by the Engineer for a power outage, or unfavorable weather for that matter, as the Special Provisions define a working day as any day, with no exceptions. Non working days do not apply to the SAS Contract regardless of weather, traffic, unfavorable conditions, or temporary suspension of the work.”

ABFJV Response:

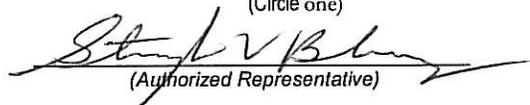
Although the Department states that “a temporary suspension of the work was not, and would not have been ordered by the Engineer for a power outage”, it is within the authority of the Engineer, pursuant to Section 8-1.05, Temporary Suspension of Work, of the Standard Specifications, to grant equitable relief when conditions exist that are considered unfavorable for the suitable prosecution of the work. The event causing the loss of electricity and the subsequent three day shut down of the fabrication facility could not have been foreseen by the parties at the time of bid and the conditions, the severed submarine electrical cable caused by the irresistible force, are definitely unfavorable for the suitable prosecution of the work.

The Department advises that "...the Special Provisions define a working day as any day, with no exceptions. Non working days do not apply to the SAS Contract regardless of weather, traffic, unfavorable conditions, or temporary suspension of the work." The Department's purpose for providing this statement is not clear. ABFJV understands that the Contract defines "working days" as calendar days, inclusive of Saturdays, Sundays and holidays. The Contract clearly allows Contract time extensions and the addition of "working days" to the Time of Completion. When a time extension is agreed by the parties, the applicable number of working days will be added to the number of total working days remaining and this revised total will be reflected in the number of working days remaining provided in the Weekly Statement of Working Days, provided each week by the Department.

For the reasons set forth above, ABFJV is entitled to an excusable delay of three (3) days, for the breakage of the submarine electrical cable and subsequent loss of power at ZPMC's fabrication facility located on Changxing Island, China that from July 2, 2008 through July 4, 2008.

(attach additional sheets as needed)

*The undersigned originator (Contractor or Subcontractor as appropriate) certifies that the above statements and attached documents are made in full cognizance of the California False Claims Act Government Code sections 12650-12655. The undersigned further understands and agrees that this potential claim to be further considered, unless resolved, must fully conform to the requirements in Section 9-1.04 of the Standard Specifications and must be restated as a claim in the Contractors written statement of claims in conformance with Section 9-1.07B of the Standard Specifications.*

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SUBCONTRACTOR or CONTRACTOR  
(Circle one)  
  
(Authorized Representative)

**For a subcontractor Potential claim**

This notice of potential claim is acknowledged, certified and forwarded by

\_\_\_\_\_  
PRIME CONTRACTOR

\_\_\_\_\_  
(Authorized Representative)

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