<Shewit.Semere@CH2M.com>

06/05/2009 08:30 AM

To <Faleteine.Bell@dot.ca.gov>

cc

bcc

Subject FW: SAS DRB Report and Recommendation for Dispute No. 1

Fal

Please file the attached DRB Recommendation and the email below in File Cat 62.02.08.

Thanks

sheena.baker@akerman.com

05/13/2009 09:45 AM

To gary_pursell@dot.ca.gov, mflowers@americanbridge.net

cc normananderson@msn.com, WMLM@aol.com, robert.smith@akerman.com

Subject SAS DRB Report and Recommendation for Dispute No. 1

Dear Mr. Pursell and Mr. Flowers,

Attached please find DRB's Report and Recommendation for Dispute No. 1.

Regards,

Sheena M. Baker
Legal Administrative Assistant to Robert J. Smith & Hugh N. Anderson Akerman Senterfitt
222 West Washington Avenue, Suite 380
Madison, WI. 53703
T. 608.268.5049
F. 608.257.2029

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www.akerman.com

REC'D '09 JUN-24 #010094

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SAS DRB MAY 13 2009.pdf

DISPUTE REVIEW BOARD

for the

SAN FRANCISCO-OAKLAND BAY BRIDGE
SELF ANCHORED SUSPENSION SPAN
CalTrans Contract No. 04-0120F4

Robert J. Smith
222 West Washington Avenue, Suite 380
Madison, WI 53703 USA
Phone: 608-257-5352
Fax: 608-257-2029
Email: robert.smith@akerman.com

Norman C. Anderson
114 21st Avenue SW
Olympia, WA 98501
Phone: 360-754-3819
Fax: 360-705-2871
Email: normananderson@msn.com

Warren M. Bullock
1122 Ferguson Road
Sebastopol, CA 95472
Phone: 707-824-1874
Fax: 707-824-1874
Email: wmlm@aol.com

May 13, 2009

Via E-Mail
Mr. Gary Pursell
Resident Engineer
State of California
Department of Transportation
333 Burma Road
Oakland, CA 94607

Via E-Mail
Mr. Michael Flowers
Project Director
American Bridge/Fluor Enterprises, Inc., a
Joint Venture
375 Burma Road
Oakland, CA 94607

Re: SFOBB Self-Anchored Suspension (SAS) Structure – CalTrans Contract No. 04-0120-F4
Report and Recommendation of Dispute Review Board for Dispute No. 1
NOPC8: Time Extension for Power Outage at ZPMC

Gentlemen:

Accompanying this letter is a partially executed copy of the DRB's Report and Recommendation for the NOPC8 Dispute. This is the unanimous recommendation of the DRB. You will be receiving a fully executed original via mail in the near future.

We wish to remind you of the following rights and obligations which are set out in their entirety in the DRB Agreement and S.P. 5-1.12:

1. Within 10 days of receipt of Report and Recommendation

   A party may request clarification of the Report and Recommendation by submitting it to the DRB and the other party. Only one such request per party is permitted.

2. Within 10 days of receipt of a request for clarification

   The DRB will issue a clarification to the parties.

3. Within 30 days of receipt of the Report and Recommendation

   Either party may submit one request for reconsideration based on submission of new evidence. The State and the Contractor will respond to the DRB in writing stating whether the dispute is resolved or unresolved.

Please let me know if you have any questions.

Sincerely,

Robert J. Smith
DRB Chairman

Enc:
cc: Norman C. Anderson
Warren M. Bullock

San Francisco-Oakland Bay Bridge—Self Anchored Suspension Span
CalTrans Contract No. 04-0120F4

DISPUTE NO. 1: NOPC 8--Time Extension for Power Outage at ZPMC

REPORT AND RECOMMENDATION OF DISPUTE REVIEW BOARD

I. *Introduction*

A. *Parties*

1. State of California Department of Transportation ("CalTrans" or "Owner")
2. American Bridge/Fluor, A Joint Venture ("ABF JV" or "Contractor")

B. *Definitions*

1. Contract: CalTrans Contract No. 04-0120F4
2. Event: The severing of the power cable serving Changxing Island, Shanghai, China, on July 2, 2008.
3. S.P.: *Special Provisions for Contract 04-0120F4*, May 25, 2006
4. S.S.: *Standard Specifications,* State of California Department of Transportation, July 1999
5. ZPMC: Shanghai Zhenhua Port Machinery Co., Ltd

II. *Description of Dispute*

A high voltage electrical power cable serving Changxing Island was severed on July 2, 2008. The shops of ZPMC, Contractor's fabricator for the T-1 Tower and the Orthotropic Box Girders ("OBG"), are located on Changxing Island. Fabrication operations were essentially shut down until the power was restored on July 3, 2008. The Contractor seeks a non-compensable adjustment of the completion dates for three contract milestones.

III. *Procedural Background*

A. *October 9, 2008:* Pursuant to S.P. 5-1.12, Contractor referred Notice of Potential Claim ("NOPC") 8 to the Dispute Review Board.

B. *November 14, 2008; December 15, 2008*: In response to an inquiry from the DRB, the Parties advised the DRB that further contractually specified action for the DRB e.g., hold a meeting (hearing) on the dispute between 30 and 60 days of receipt of the referral (DRB Agreement ¶ Article II.D. first paragraph) should be held in abeyance pending further discussions between the Parties.

C. *March 31, 2009*: In response to a draft agenda sent to the parties by the DRB Chairman, ABF JV stated: "I believe that CalTrans and ABF JV are preparing to present NOPC No. 008 and No. 009 to the DRB during the meeting on May 5, 2009. These NOPC Hearings are not reflected in your proposed agenda."

D. *April 3, 2009*: The Parties advised the DRB that they had agreed to submit and exchange their position statements on this dispute (NOPC 8) on April 14, 2009.

E. *April 14, 2009*: CalTrans transmitted its position paper to the DRB and Contractor; Contractor submitted its description of position to CalTrans.

F. *April 16, 2009*: DRB received CalTrans' Statement of Position.

G. *April 17, 2009*: DRB received Contractor's Statement of Position

H. *May 5, 2009*: The DRB conducted a hearing at which both Parties made their presentations and rebuttals and the DRB members posed questions to the Parties.

I. *May 13, 2009*: The DRB issued its Report and Recommendation pursuant to S.P. 5-1.12.

IV. *Summary of Positions of the Parties*[1]

A. *Contractor*

1. A power outage on Changxing Island shut down ZPMC's entire steel fabrication operation for 3 days.
2. This shutdown caused a delay that was beyond the control and without the fault or negligence of Contractor or ZPMC.
3. Special Provisions control over Standard Specifications. Accordingly, S.P. 10-1.13 controls over S.S.8-1.07.
4. Under S.P. 10-1.13 Contractor is entitled to non-compensable time extensions of 6, 7, and 6 days to the target handover dates for Phases 1, 2 and 3 respectively. The durations are based on Contractor's Time Impact Analysis No. 4 of October 3, 2008.

B. *CalTrans*

1. The Contractor's reliance on solely S.P. 10-1.13 is an incorrect interpretation of the Contract.
2. S.P. 10-1.13 must be read and applied in conjunction with S.S. 8-1.07.

[1] Contractor's Position as presented to the DRB at the hearing was substantially narrower than its April 14, 2009 Statement of Position. Accordingly, there is no need for the DRB to address the Contractor's earlier contentions regarding S.S. 8-1.05 (Temporary Suspension of Work), working days vs. non-working days and force majeure.

3. A power outage caused by human action or inaction does not constitute an "Act of God".

4. A power outage is not among the enumerated events in S.S. 8-1.07 which may entitle Contractor to a time extension.

5. Contractor is not entitled to an extension of time for the time lost at ZPMC as a result of the power outage.

V. *Issue*

Is Contractor entitled to a non-compensable adjustment to Milestones 1, 2 and 3 due to delays in fabrication at ZPMC that arose from an unforeseeable event that was beyond its control and was not its fault?

VI. *Applicable Contract Provisions*[2]

A. S.S. 8-1.07 (Liquidated Damages) provides:

> *"It is agreed by the parties to the contract that in case all the work called for under the contract in all parts and requirements is not finished or completed within the number of working days as set forth in the special provisions, damage will be sustained by the State of California, and that it is and will be impracticable and extremely difficult to ascertain and determine the actual damage which the State will sustain in the event of and by reason of the delay; and it is therefore agreed that the Contractor will pay to the State of California, the sum set forth in the special provisions per day for each and every calendar day's delay in finishing the work in excess of the number of working days prescribed; and the Contractor agrees to pay the liquidated damages herein provided for, and further agrees that the Department may deduct the amount thereof from any moneys due or that may become due the Contractor under the contract.*
>
> *It is further agreed that in case the work called for under the contract is not finished and completed in all parts and requirements within the number of working days specified, the Director shall have the right to increase the number of working days or not, as the Director may deem best to serve the interest of the State, and if the Director decides to increase the number of working days, the Director shall further have the right to charge to the Contractor, or the Contractor's heirs, assigns or sureties and to deduct from the final payment for the work all or any part, as the Director may deem proper, of the actual cost of engineering, inspection, superintendence, and other overhead expenses which are directly chargeable to the contract, and which accrue during the period of*

[2] See Also Section VII.B.2 below.

the extension, except that cost of final surveys and preparation of final estimate shall not be included in the charges.

The Contractor will be granted an extension of time and will not be assessed with liquidated damages or the cost of engineering and inspection for any portion of the delay in completion of the work beyond the time named in the special provisions for the completion of the work caused by acts of God or of the public enemy, fire, floods, tsunamis, earthquakes, epidemics, quarantine restrictions, strikes, labor disputes, shortage of materials and freight embargoes, provided that the Contractor shall notify the Engineer in writing of the causes of delay within 15 days from the beginning of that delay. The Engineer shall ascertain the facts and the extent of the delay, and the Engineer's findings thereon shall be final and conclusive.

No extension of time will be granted for a delay caused by a shortage of materials unless the Contactor furnishes to the Engineer documentary proof that the Contractor has made every effort to obtain the materials from all known sources within reasonable reach of the work in a diligent and timely manner, and further proof in the form of supplementary progress schedules, as required in Section 8-1.04, "Progress Schedule," that the inability to obtain the materials when originally planned, did in fact cause a delay in final completion of the entire work which could not be compensated for by revising the sequence of the Contractor's operations. The term "shortage of materials," as used in this section, shall apply only to materials, articles, parts or equipment which are standard items and are to be incorporated in the work. The term "shortage of materials," shall not apply to materials, parts, articles or equipment which are processed, made, constructed, fabricated or manufactured to meet the specific requirements of the contract. Only the physical shortage of material will be considered under these provisions as a cause for extension of time. Delays in obtaining materials due to priority in filling orders will not constitute a shortage of materials.

If the Contractor is delayed in completion of the work by reason of the changes made under Section 4-1.03, "Changes," or by failure of the Department to acquire or clear right of way, or by moving the Contractor's plant pursuant to Section 6-2.03, "Mandatory Local Material Sources," or by any act of the Engineer or of the Department, not contemplated by the contract, an extension of time commensurate with the delay in completion of the work thus caused will be granted, and the Contractor shall be relieved from any claim for liquidated damages, or engineering and inspection charges or other penalties for the period covered by that extension of time; provided that the Contractor shall notify the Engineer in writing of the causes of delay within 15 days from the beginning of the delay. The Engineer shall ascertain the facts and the

extent of the delay, and the Engineer's findings thereon shall be final and conclusive.

Except for the additional compensation provided for in Section 8-1.09, "Right of Way Delays," and except as provided in Public Contract Code Section 7102, the Contractor shall have no claim for damage or compensation for any delay or hindrance.

B. S.P. 10-1.13 (Progress Schedule (Critical Path Method)) provides in pertinent part:

"TIME IMPACT ANALYSIS:

When the Contractor requests a time adjustment due to contract change orders or delayed activities or if the Contractor or the Engineer considers that an approved or anticipated change will impact the critical path or contract progress, the Contractor shall submit to the Engineer a written Time Impact Analysis illustrating the impact of each change or delay to the current contract completion date or milestone completion date, utilizing the current accepted schedule. Each Time Impact Analysis shall include a schedule update (an accepted schedule with a data date within the previous month of the event) reflecting the "before conditions" and schedule revision reflecting the "after condition", both with the same data dates, demonstrating how the contractor proposes to incorporate the change order or delay into the current schedule. The schedule revision shall include the sequence of activities and any revisions to the existing activities to demonstrate the impact of the delay, or change into the schedule. The Time Impact Analysis shall also include proposed mitigation measures or work arounds including but not limited to alternate work calendars, re-sequencing of other activities, or performing work activities out-of-sequence to minimize the impact of the change order or the delayed activities.

Each Time Impact Analysis shall demonstrate the estimated or actual time impact based on the events of delay, the estimated or actual date of the contract change order work performance, the status of construction at that point in time, and the event time computation of all activities affected by the change or delay. The event times used in the analysis shall be those included in the latest update of the current schedule in effect at the time the change or delay was encountered.

Time extensions will be granted only to the extent that equitable time adjustments for the activity or activities affected exceed the total or remaining float along the critical path of activities from the time of actual delay, or from the time the contract change order work is performed. Mitigation measures shall be included in the analysis. The time Impact Analysis shall also consider the use of State owned float as a mitigation

measure. Time extensions will not be granted nor will delay damages be paid unless:

A. The delay is beyond the control and without the fault or negligence of the Contractor and its subcontractors or suppliers, at any tier; and

B. The delay extends the actual performance of the work beyond the currently approved contract completion date.

C. The delay impacts a fabrication or construction activity – delays to the Contractor's submittal or shop drawing process must impact a successor fabrication or construction activity. The Time Impact Analysis shall be based on the impact to fabrication or construction activities.

Time Impact Analyses shall be submitted within 15 days after the delay occurs or after initiation of the contract change order. The schedule files will be submitted on electronic medium along with the Time Impact Analysis, which shall include a narrative description of the delay, its impact on contract completion or milestone dates and proposed mitigation measures. Mitigation measures utilized to minimize the impact of the change order or delay shall include but are not limited to work arounds, re-sequencing of work, alternate work calendars, increased resources, expedited procurement and use of State owned float.

A response to each Time Impact Analysis by the Engineer will be made within 15 days after receipt of the Time Impact Analysis. The Engineer's review shall utilize actual data unless it is appropriate to use estimated data. Resolution of each Time Impact Analysis by the Engineer shall be completed after all effects of the disruption are documented, which may include mitigation measures. A copy of the Time Impact Analysis accepted by the Engineer shall be returned to the Contractor and the accepted schedule revisions illustrating the impact of the contract change orders or delays shall be incorporated into the project schedule during the first update after acceptance. Until such time that the Contractor provides the analysis, the Engineer may, at his option, construct and utilize the project as-built schedule or other method to determine adjustments in contract time.

VII. *Analysis*

A. *Analytical Framework*

This dispute is one of contract interpretation. The respective positions of the parties are clear. The analysis consists of applying statutory and contractual rules of contract interpretation to the two positions.

B. *Rules of Contract Interpretation*

1. California Civil Code § 1641 provides:

> *"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, helping to interpret the other."*

2. Contract Documents: S.S. 5-1.04 provides, in pertinent part:

> ¶1: *"These Standard Specifications, the Standard Plans, project plans, special provisions, contract change orders and all supplementary documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary, and to describe and provide for a complete work.*
>
> ¶2: *Project plans shall govern over Standard Plans; Standard Plans and project plans shall govern over these Standard Specifications; and the special provisions shall govern over both these Standard Specifications and the plans."*

C. *Applicable Common Law Principles*

The following principles and "court-made" rules of interpretation are universally accepted unless they are contrary to statutes such as the California Civil Code or to provisions of the Contract.

1. A reasonable and logical interpretation is favored over an unreasonable, illogical, strained or circuitous interpretation. When there is not a single reasonable interpretation, or when there are two or more reasonable interpretations, other rules are applied to reach a reasonable and logical interpretation:

2. Preference is given to an interpretation that gives meaning to all terms in a contract – stated differently, a contract should, to the maximum extent possible, be read as a "harmonious whole." This principle has been codified in California Civil Code §1641. It is based on the assumption that every term in a contract was included for a purpose. Ignoring some terms is therefore disfavored as it would not reflect the intentions of the Parties.

3. Specific terms have precedence over more general terms. This is the common law equivalent of S.S. 5-1-04 quoted above. This is applicable only in the event of conflict between the specific term and the general term.

D. *Discussion of Contractor's Position*

Contractor bases its entitlement claim on its showing that it has established the three elements required for a time extension under S.P. 10-1.13, viz.

1. The delay is beyond the control and without the fault or negligence of the Contractor and its subcontractors or suppliers, at any tier.

2. The delay extends the actual performance of the work beyond the currently approved contract completion date.

3. The delay impacts a fabrication or construction activity – delays to the Contractor's submittal or shop drawing process must impact a successor fabrication or construction activity. The Time Impact Analysis shall be based on the impact to fabrication or construction activities.

The Board believes that Contractor has established the three elements with respect to the Event.

E. *Discussion of Owner's Position*

Owner asserts that: (1) establishing the three elements required by S.P. 10-1.13 does not by itself establish merit for a time extension for the Event; and, (2) S.P. 10-1.13 must be considered in conjunction with S.S. 8-1.07 which specifies events and circumstances that may be the basis for a time extension request.

F. *DRB Analysis and Findings*

1. Application of Applicable Rules of Contract Interpretation

   a. The crux of this dispute is whether or not S.S. 8-1.07 is applicable. Contractor contends that it is not, noting that Special Provisions control over Standard Specifications. It is true that this rule is stated in S.S. 5-1.04. However, the Board concludes that this order of precedence should not be automatically applied because an order of precedence clause is applicable only when there is conflict between two contract provisions or contract documents. The Board did not find any conflict between SS 8-1.07 and SP 10-1.13

   b. Contractor's interpretation is at odds with California Civil Code §1641, as it would result in no effect being given to S.S. 8-1.07. Further, S.S. 8-1-07 helps interpret S.P. 10-1.13 and the two provisions should be "taken together."

   c. Contractor's interpretation would also be at odds with that part of S.S. 5-1.04 which states in part that the Standard Specifications and the Special Provisions (and other Contract Documents) are intended to be complementary. That is precisely the situation here. S.S. 8-1.07 enumerates the grounds for excusable delays and S.P. 10-1.13 sets forth the procedures and standards for calculating the length of a possible time extension. Nowhere does S.P. 10-1.13 define or list what specific events are excusable, other than to require that an event be beyond the control of and without the fault or negligence of the Contractor. In

essence each clause needs the other as application of both of them is required to determine whether there is merit to a request for a time extension. If S.P. 10-1.13 alone was the path to a time extension, CalTrans would be inundated with extension requests for a list of "unforeseeable delays not caused by the Contractor" that could be as long as the shear leg crane barge. Thus, S.P. 10-1.13 and S.S. 8-1.07 can and should be read together as a "harmonious whole" pursuant to California Civil Code § 1641.

d. The overall theme and intent of S.P. 10-1.13 is to specify the procedures, standards and reports required for implementation and use of CPM Schedules for the Contract. The section headed "TIME IMPACT ANALYSIS" is but one of 12 main subheadings in S.P. 10-1.13. This section specifies the procedures to be followed "...when the Contractor requests a time extension due to...delayed activities" (first sentence, emphasis added). The Contractor's "request" in this instance was made in each of the following documents on the stated date and was based on S.S. 8-1.07.

- ABF-CAL-LTR-597 of July 21, 2008
- ABF-CAL-LTR-612 of August 4, 2008
- ABF-CAL-LTR-629 of August 15, 2008 (transmittal of Initial Notice of Potential Claim)
- ABF-CAL-LTR-648 of August 29, 2008 (transmittal of Supplemental Notice of Potential Claim)

Thus, the Board finds that S.S. 8-1.07 is applicable along with S.P. 10-1.13.

2. Delays under S.S. 8-1.07

Since S.S. 8-1.07 is applicable, a review of its terms is required to determine if the Event is the basis for a possible time extension. S.S. 8-1.07 sets out three categories of events that may be the basis for time extension delays:

a. ¶ 3 "Acts of God" and 11 other enumerated events or circumstances:

(1) The public enemy
(2) Fire
(3) Floods
(4) Tsunamis
(5) Earthquakes
(6) Epidemics
(7) Quarantine restrictions

(8) Strikes
(9) Labor disputes
(10) Shortage of materials
(11) Freight embargos

b. ¶ 5 lists Changes under S.S. 4-1.03, Department's failure to acquire or clear right-of-way, Moving Contractor's Plant under S.S. 6-2.03, and Acts by Engineer or Department Not Contemplated in the Contract as possible grounds for delay.

c. ¶ 6 Right of Way Delays under S.S. 8-1.09 and as provided in Public Contract Code 7102.

Accordingly, we will review whether the Event is covered by 8-1.07.

- Act of God? An Act of God is readily distinguished from other delay-causing events by a sole factor – the absence of a human cause. The Parties agreed at the hearing that the Event was caused by third party action. Therefore, the Event was not an Act of God.

- Enumerated Cause of Delay? Since the 11-item list does not include words such as "including but not limited to" or "without exclusion by way of non-enumeration" or "and other similar causes" the principle "*expressio unius est exclusio alterium*" (the express mention of one thing excludes all others) applies and there is no basis for extrapolation to, e.g., "third-party delays," such as the Event.

- The Event was not a Change under S.S. 4-1.03, did not involve moving Contractor's Plant, was not related to any right of way issue and did not occur as a result of any Act of the Department or Engineer not contemplated in the Contract.

VIII. *Recommendation*

The Board unanimously concluded that there is no merit for Contractor's Claim. The Board recommends that it be denied by the Department.

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IX. *Certification*

I certify that I participated in the hearing of this Dispute and the preparation of this Report and Recommendation.

Robert J. Smith Chairman	Warren M. Bullock Member	Norman C. Anderson Member
Date: May 13, 2009	Date:_____	Date:_____