William B. Baker
511 Kortum Canyon Road
Calistoga, California 94515

April 1, 2005

DRB Coordinator
Division of Construction
MS 44
P.O. Box 942874
Sacramento, CA 94274

Re: Contract No. 04-0120-R4
SFOBB – Temporary Bypass Structure

Pursuant to Section II D of the Disputes Review Board Agreement for the above referenced project, I am transmitting a copy of the DRB Recommendation dated April 1, 2005.

Sincerely,

William B. Baker
DRB Chair

Cc Lourdes David, Caltrans
Robert Coupe, CCM
Matthew B. McGowan, DRB
Frederick Graebe, DRB

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DISPUTE REVIEW BOARD
SFOBB
TEMPORARY BYPASS STRUCTURE

April 1, 2005

Mr. Robert Coupe
Project Manager
C.C. Myers, Inc.
3286 Fitzgerald Rd.
Rancho Cordova, CA 95742

Mr. Lourdes David
Resident Engineer
Caltrans
333 Burma Road
Oakland, CA 94607

Re: Temporary Bypass Structure
Contract No. 040120R4

Gentlemen:

On March 14, 2005 at the request of C.C. Meyers, Inc. (CCM) the Dispute Review Board (DRB) held a hearing to consider the merits of the following dispute:

NOPC No. 1 "Raw Steel Market Fluctuations"

A list of attendees is included as Attachment A.

PROJECT OVERVIEW

This design-build contract provides for a temporary detour structure on the eastern side of Yerba Buena Island that will allow for reconstruction of the new East span of the San Francisco-Oakland Bay Bridge.

NOPC No. 1:
"Raw Steel Fabrication Market Fluctuation"

INTRODUCTION

CCM claims additional compensation for the increased cost of steel products due to the unprecedented escalation of steel prices.

CONTRACTOR'S POSITION

The following is quoted from the position paper dated February 24, 2005 as submitted by CCM to the DRB. The entire paper, including exhibits, is incorporated herein by reference.

"...**Justification for Equitable Adjustment:**

Bid Preparation:
C.C. Myers, Inc. prepared and submitted its bid for the project in good faith based on steel market conditions that had for the most part remained stable and predictable. Shortly after bid, unprecedented price escalations began, and continue to occur. The fact that the prosecution of the work was being delayed compounded the situation..."

"...Scope of Payment:
Section 9-1.02 SCOPE OF PAYMENT of the Standard Specifications discusses the scope of payment for the work performed under the contract. Specifically, this section emphasizes that payment is for furnishing all labor, materials, tools, equipment and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contract. The unpredictable and unprecedented events occurring in the steel market were certainly not contemplated or embraced under the contract. Therefore, this section does not preclude an equitable adjustment in compensation due to these conditions..."

"...Cardinal Change:
The Cardinal Change doctrine, founded in government contract law, has evolved in response to this type of situation. The rule permits the contractor to disregard the provisions of the contract where there has been a change or series of changes so profound to change the very nature of the contract..."

"...Commercial Impracticability
Contracts for the sale of goods in excess of $500 are covered by the Uniform Commercial Code (the "Code"). Provisions under the Code provide that a contract has become "commercially impracticable". Commercial impracticability is addressed by the UCC § 2-615; MCL § 440.2615, which provides in relevant part as follows:
'Delay in delivery or nondelivery in whole or in part by a seller...is not breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.' As is certainly the case herein, the preparation and submission of the bid and subsequent awarding of the contract were all done with the basic assumption that profound changes in the steel market would not occur. We therefore contend that it has become impracticable to perform under the contract because the inputs, namely raw steel materials have become too expensive..."

"...Force Majeure:
Section 7-1.165 DAMAGE BY STORM, FLOOD, TSUNAMI OR EARTHQUAKE of the Standard Specifications provides relief from the financial burden that occurs as a result of acts that are out of the control of either party to the contract. This in essence constitutes a force majeure clause in the contract..."

"...**Closing**
We believe that an equitable adjustment in compensation is due as a result of the unpredictable and unprecedented volatility in the pricing of raw steel materials. We have provided several reasons outlined above why this is justified and within the State's contracting ability to provide such an adjustment..."

CALTRANS' POSITION

The following is quoted from the undated position paper submitted by Caltrans to the DRB. The entire position paper including exhibits is incorporated herein by reference.

"...Article I of the executed Contract documents contains contract language that states that the Contractor agrees to do the work:

> "That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said party of the first part...the said party of the second part agrees with the said party of the first part, **at his own proper cost and expense, to do all the work and furnish all the materials...necessary to construct and complete in a good, workmanlike and substantial manner and to the satisfaction of the Department of Transportation...**"

"...Article V contains the language that says the Contactor agrees to do the work for the prices bid, and is immediately followed by the bid prices (see attachment 1):

> "And the **said Contractor agrees to receive and accept the following prices at full compensation for furnishing all materials** and for doing all the work contemplated and embraced in this agreement..."

"...The language of the Contract is repeated in Standard Specification section 9-1.02:

> "The contactor shall accept the compensation provided in the contract as full payment for furnishing all labor, materials, tools, equipment, and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contact; also ...from any unforeseen difficulties which may be encountered during the prosecution of the work until the acceptance by the Director and for all risks of every description connected with the prosecution of the work, also...for completing the work according to the plans and specifications...

"No compensation will be made in any case for loss of anticipated profits."..."

"...Upon execution, the Department is prohibited from changing these contract payment terms by Article 4, Section 17 of the California State Constitution..."

"...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." (emphasis added)..."

"...**Conclusion**

CC Meyers Inc. executed a contract with the Department on 3/10/04. CC Meyers must perform the work it promised to do for the price it promised, and is not therefore entitled to renegotiate the terms of its compensation. The Contractor, has failed to cite contract terms or legal precedent that would entitle this kind of change. Adding a contract term for compensation for market price instability is not permitted by this contract and state law, and would unfairly relieve the Contractor of risk assigned by the contract.

Further the Contractor had two opportunities to withdraw the bid, at a time the steel price increases were known to be occurring, and did not.

It is for these reasons that the Department asks the Disputes Review Board to find no merit to this Notice of Potential Claim..."

DRB FINDINGS AND CONCLUSIONS

At the DRB hearing on March 14, 2005, presentations were made by CCM and Caltrans declaring the respective positions of the parties concerning NOPC No. 1, "Raw Steel Market Fluctuation".

From the presentations and information provided by CCM and Caltrans, taken together with the Contract Documents, the DRB is of the unanimous opinion on the following:

1. Article I of the Contract states in part:

   "...at his own proper cost and expense, to do all the work and furnish all the materials...necessary to construct and complete in a good, workmanlike and substantial manner and to the satisfaction of the Department of Transportation..."

2. Article V of the Contract states in part:

   "...said Contractor agrees to receive and accept the following prices as full compensation for furnishing all materials..."

3. Standard Specification Section 9-1.02 states in part:

   "The Contractor shall accept the compensation provided in the contract as full payment for furnishing all labor, materials, tools, equipment, and incidentals necessary to the completed work and for performing all work contemplated and embraced under the contact; also...from any unforeseen difficulties which may be encountered during the prosecution of the work until the acceptance by the Director and for all risks of every description connected with the prosecution of the work, also...for completing the work according to the plans and specifications..."

The DRB finds that CCM agreed under the terms of the Contract to accept as full payment for materials furnished and work performed its prices as bid.

The DRB finds that, after bid opening on December 3, 2003, CCM twice accepted Caltrans' requests for extensions of the time to award

the contract, first to February 27, 2004 and then to March 12, 2004. At the time CCM accepted the requests for award extensions, the steel prices had increased significantly. CCM was aware of such increases, as evidenced by the Initial Notice of Potential Claim proposed by AVAR Construction System, Inc. dated June 21, 2004, prior to acceptance of the award extension and by its submittal of steel price escalation indices to Caltrans in support of its claim.

The DRB finds that the theories advanced by CCM to avoid provisions of the contract pertinent to the escalation of costs of materials are inapplicable in this instance:

- The Cardinal Change Doctrine would apply to changes ordered by Caltrans. The steel price escalation was not ordered by Caltrans.
- Commercial Impracticability is not indicated, as the contractor has not made a showing of delay of steel delivery (affecting contract performance) or non-delivery of steel due to steel price escalation.
- The doctrine of Force Majeure is usually applied in instances where insurance coverage is affected by superior and irresistible forces. No such forces apply here.

The DRB finds no contractual basis under which Caltrans can make additional compensation as requested.

DRB RECOMMENDATION

The DRB recommends that the CCM claim for additional compensation due to "Raw Steel Market Fluctuation" be denied on merit.

However, the DRB further recommends that the parties explore the extent to which past or future suspensions of work ordered by Caltrans can be demonstrated to have impacted steel prices, in which case CCM may be entitled to additional compensation.

Respectfully submitted:

Date: 4/1/05

Frederick Graebe
DRB Member

Date: 4/1/05

Matthew B. McGowan
DRB Member

Date: 4/1/05

William B. Baker
DRB Chair

ATTACHMENT A

DISPUTES REVIEW BOARD (DRB)
SIGN-UP SHEET

Project: **04-0120R4**
04-SF-80-12.6/13.2
Temporary Bypass Structure

Date: **Monday, March 14, 2005**
Time: **10:00 AM**

Location of Meeting: **Caltrans SFOBB Field Office**
333 Burma Road, Oakland, CA 94607

NAME	COMPANY / TITLE	PHONE NUMBER
Peter Siegenthaler	Caltrans - Principal Transp Engr	510 622-5112
Rob Kobal	CT - Construction	510 376-8219
Lourdes David	CT - Const. R E	510 622-5660
Fred Graebe	DRB	916-443-7219
William R. Baker	DRB	707.942.5886
Matthew B. McGowan	DRB	415-453-8013
Gary Lai	Caltrans Struc. Rep.	510 286-0511
Bob Coupe	CC Myers Inc	415-399-0175
Andrew Yan	CT - Const. OE	5102860540