

DEPARTMENT OF TRANSPORTATION
DEPARTMENT'S POSITION PAPER FOR
DISPUTES REVIEW BOARD

04-0120R4
Notice of Potential Claim No. 1
Steel price escalation

DRB hearing
March 14, 2005

Resident Engineer: **Lourdes David**
Contractor: **CC Meyers**

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I. Background

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

II. Description of Dispute

The price of steel materials began a steep increase in late 2003, continuing into 2004. The Contract terms do not include language to adjust contract prices for changing market conditions. One month after the contract award date, the Contractor, CC Meyers, requested that the Department provide a contract change order to allow for an adjustment in compensation for continually changing market conditions in the steel industry.

III. Description of Events in Chronological Order

12/3/03	Contract bid open.
1/28/04	Letter to extend contract award through 2/27/04 (accepted by CCM).
2/26/04	Letter to extend contract award through 3/12/04 (accepted by CCM).
3/10/04	Contract award.
4/07/04	Contractor request for contract change due to steel market conditions.
6/4/04	Department denies change request.
6/22/04	NOPC #1 filed for the Department's refusal to change the contract.
7/7/04	NOPC #1 supplemental received.
7/26/04	Department request for contractual basis for NOPC #1.
8/9/04	Contractor supplies additional arguments for position.
8/27/04	Department finds no merit to NOPC #1.

IV. The Department's Understanding of the Contractor's Position

One month after contract award, CC Meyers requested that the Department provide a contract change order to allow for an adjustment in compensation for continually changing market conditions in the steel industry.

Claimed Amount: \$1,576,000

Claimed Time Extension: 0 working days

V. The Department's Position

The Contractor is not entitled to arbitrarily change the terms of contract compensation, nor is the Department legally authorized to do so. The Contractor has failed to cite contract terms or legal precedent that would entitle this kind of a change. Further the Contractor had two opportunities to withdraw the bid or otherwise notify the Department that there was a problem with the bid prices, at a time the steel price increases were known to be occurring, but the contractor failed to do so.

CC Meyers Inc. executed a contract with the Department on 3/10/04(Attachment 01). The contract is for CC Meyers to perform the work specified in the contract documents for a specified bid price. 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, the work** described in the special provisions and the project plans described below, including any addenda thereto, and also in conformance with the Department of Transportation Standard Plans, dated July 1999, the Standard Specifications, dated July, 1999, and the Labor Surcharge and Equipment Rental Rates in effect on the date the work is accomplished, which said special provisions, project plans, Standard Plans, Standard Specifications, and Labor Surcharge and Equipment Rental Rates are hereby specially referred to and by such reference made a part hereof.”(emphasis added)

Article V contains the language that says the Contractor 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 as full compensation for furnishing all materials** and for doing all the work contemplated and embraced in this agreement; also for all loss or damage, arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the work until its acceptance by the Department of

Transportation, and for all risks of every description connected with the work; also for all expenses incurred by or in consequence of the suspension or discontinuance of work and for well and faithfully completing the work, and the whole thereof, in the manner and according to the plans and specifications, and the requirements of the Engineer under them..."(emphasis added)

The language of the Contract is repeated in Standard Specification section 9-1.02:
"The Contractor{ XE "Scope of payment" }{ XE "Payment:scope of" }{ XE "Contract:scope of payment of" } 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 contract; 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."

The above three contract excerpts expressly state that the Contractor agrees to do the work for the prices bid, to which the Contractor agreed by executing the contract. Upon execution, the Department is prohibited from changing these contract payment terms by Article 4, Section 17 of the California State Constitution. The Legislature is the body that allocates money and grants the legal authority to the Department to write contracts. This section provides the limits of the Legislature's, and therefore the Department's, legal authority to change the terms of a contract:

"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)

The Contractor had two opportunities prior to contract award and execution to notify the Department that the contract bid prices were no longer valid. After contract bid opening, the Department requested permission from the Contractor to extend the award period and bid prices (Attachment 02, 03). On both occasions, the Contractor accepted the award extension with no conditions. In accepting the extension, the Contractor had a duty to be sure that both it and its subcontractors accepted the contract bid price extension. As shown by graphs included with the Contractor's letter 215-STL.00002 dated April 7, 2004(Attachment 04), it is during this same time period that the materials prices started to climb. By waiting until after contract award and execution, the request to change the terms of the contract is untimely.

The Contractor has further failed to provide a contractual basis for changing the terms of the contract. In their letter 215-STL.00018, dated August 9, 2004(Attachment 05), the

Contractor acknowledges that the specifications do not provide a basis to substantiate their request for a change to the contract. However, the letter fails to note that the Contract does contemplate materials price increases and shortage of materials. An excusable delay may be granted if certain conditions exist by Standard Specification section 8-1.07:

“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 Contractor 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.” (emphasis added)

As such, the contract does not explicitly allow a price adjustment when market conditions change. The Contractor has not requested extra time in accordance with this specification; although the supplemental NOPC dated July 7, 2004(Attachment 06) notes that delays are being experienced.

Instead, in the same August letter, the Contractor likened steel market instability to a new and unusual situation similar to Standard Specification section 7-1.165 “Damage by Storm, Flood, Tsunami or Earthquake.” It is the Department’s position that this specification does not apply to the current dispute, and does not entitle the Contractor to a change in the contract that allows a price different from the contractor’s bid. This specification specifically applies to occurrences, including tsunamis, earthquakes, storms floods, and other natural disasters, and in those situations merely caps the liability for damages incurred. It does not apply to market instability, nor does it authorize bid price adjustments.

In the August letter, the Contractor referred to a specification such as has been provided in other contracts that allow adjustments made for asphalt oil price changes. It is the Department's position that while such a specification could have been provided in the contract, it was not, and to add it after contract bid opening not only violates the Department's legal contracting authority, but it also exposes the Department to liability for damages to the unsuccessful bidders for this contract because it relieves the low bidder of a risk that should be currently accounted for in the bid price. The unsuccessful bidders would not be afforded a similar opportunity to base their bid on the same contract terms.

The Contractor has referred to the contracting actions of other state governments. Not only are the actions of other states irrelevant to this contract, those contract terms were provided in the bid packages, not post contract award, and it is further noted that a number of states have withdrawn the use of those provisions.

Finally, in the Contractor's initial Notice of Potential Claim, dated June 6, 2004(Attachment 07), it is noted that several contractors make several additional unfounded arguments. The Notice of Potential Claim upon which this dispute is centered is not preceded by any action by the Department which could be construed as a cardinal change or breach of contract. It is possible to perform the work of procuring the steel, as evidenced by the fact that the Contractor now has much of the steel on hand. In accepting the extension, the Contractor had a duty to be sure that both it and its subcontractors accepted the contract bid price extension. By waiting until after contract award and execution, the request to change the terms of the contract is untimely.

VI. 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 a 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.

VII. Supporting Attachments

- Attachment 01 – Executed Contract
- Attachment 02 – Contract award period extension request dated January 28, 2004
- Attachment 03 – Contract award period extension request dated February 26, 2004
- Attachment 04 – Contractor letter 215-STL.00002 dated April 7, 2004
- Attachment 05 – Contractor letter 215-STL.00018, dated August 9, 2004
- Attachment 06 – Supplemental NOPC dated July 7, 2004
- Attachment 07 – Initial NOPC dated June 6, 2004
- Attachment 08 – State response letters to Contractor letters and transmittals

