

**DISPUTE REVIEW BOARD REPORT
AND RECOMMENDATION
US-85 Titan to Cook Ranch
CDOT PROJECT ESI1 0852-095 (PCN 14976)**

DISPUTE 2 Liquidated Damages

Hearing Date: December 8, 2011

Hearing Location: CDOT Region Office
Arapahoe Residency
7328 S. Revere Parkway, Ste 203A.
Centennial, Colorado 80112

Hearing Attendees: Brian Erickson – Lawson Construction Co
Mike Mirowski – Environmental Logistics
Laura E. Zamora – CDOT- Area Engineer
Roman Jauregoi – CDOT - Resident Engineer
Brian Kelly – CDOT – Project Inspector
Leo L. Milan, Jr. – CDOT Legal Representative
Mark Brenner – Atkins/CDOT Project Engineer

Joint Statement of Dispute:

Colorado Department of Transportation (CDOT) and Lawson Construction Company as a pass-through for Environmental Logistics Company (ELC), are in dispute regarding seven days of Liquidated Damages (LDs) assessed for failure to complete contract work within the Contract Time. The seven days total \$23,800 of LDs assessed at a rate of \$3,400 per day as provided for in the project specifications.

Contractor believes that CDOT did not suffer damages or costs of \$23,800. The road was opened as scheduled and there were not any traffic constraints or costs incurred by CDOT after the end date. There were also procurement issues for materials and an untimely punch list that was created six days after the road opening. Actual days after road opening were two days.

CDOT and Contractor desire that the DRB review the contract documents including the specifications and rule on the merits of this dispute and on quantum.

Pre-hearing Submittal:

In addition to related Plans and Specifications for the Project, both parties provided the DRB with Pre-hearing Submittals per Specification Section 105.22(e) which included but were not limited to documentary evidence relevant to the issues, serial letters, e-mail, speed memos and handwritten notes. Both parties essentially

submitted the documents organized as exhibits. Both parties provided the DRB with their lists of attendees.

ELC Presentation by Mike Mirowski:

Mike Mirowski, presented the dispute and facts on behalf of ELC. He reviewed the four issues related to the withholding of LDs by CDOT. He estimated that CDOT had estimated 750 lineal feet of silt berm was required, however it was not enough and had been told that additional berm would be needed to complete this work activity. ELC ordered the additional silt berm material on October 7, 2010 and was told that the material was not available locally and would be shipped from Canada. It arrived on the following Tuesday, October 11th and was installed on the 12th. This required additional work and time.

ELC had seeded the stockpile on Friday, October 8, 2010 and was told by Roman on Saturday, October 9, 2010, that he could not find any evidence of seed and that the stockpile would have to be reseeded. Was told to stop work on Saturday by CDOT. ELC returned on Monday, a weather day (rain) to look over the area. It was reseeded on Tuesday, October 12, 2010.

ELC had completed all the September punch list items, however CDOT issued a new punch list on October 14, 2010 and ELC finished that work on October 15, 2010. There were only two work days after the 8th. Nobody on site on the 9th other than ELC representative and Roman (CDOT).

CDOT had a good road and was not damaged by the work by ELC after October 8, 2010 (Completion Date).

CDOT Presentation by Roman Jauregui:

CDOT's presentation was led by Roman Jauregui with an initial summary of the 5 issues outlined in his letter dated June 9, 2011. He noted there were 4 of the 5 points without merit. He reviewed the factual background of the logs at Ponds 4 and 5 and why he would grant one less day of LDs for this activity.

Roman clarified the punch list issue by stating there more than one punch list because the punch list work narrows as work progresses, thus there is more than one punch list issued over time. It was also noted stated that partial acceptance had been made by CDOT on August 26, 2010.

Speed Memos 61, 66 and 67 were reviewed. The silt berm specification on CDOT Plan Sheet No 8 of 12, with the locations of the silt berms on Plan Sheets 83 – 91, attached to Speed Memo 61, dated August 2, 2010, were reviewed. This Speed Memo had indicated the estimation of 750 lineal feet at a unit price. Roman stated that the estimate of 750 lineal feet had not been enough silt berm. ELC ordered the remaining silt berm needed on October 7, 2010, which was delivered on October 11,

2010 (Monday and installed on Tuesday the 12th. This was not a 4 day delay to the critical path and did not impact final completion.

Brian Kelly, CDOT, provided the remaining punch list items from the September 30th list to Brian Erickson with Lawson. He stated it rained on the morning of October 12th and no one was on site from ELC on the 14th. ELC arrived on the site on October 15, 2010 to complete the items on the punch list.

Roman stated that CDOT allowed work on October 9, 2010, in order to avoid additional LDs because October 8, 2010 was the Completion Date for the project. He reviewed his handwritten notes regarding the unacceptable stockpile seeding by ELC. He said it acceptable for ELC to stop the seeding work on that day in order to resolve the seeding issue on Monday morning. He clarified why the seeding by ELC was unacceptable – because it was not done according to specification, which required mulching or hand raking immediately after seeding, whereas ELC had seeded the evening before and was hand raking the next day. Further, Brian Kelly should have been informed that ELC was going to seed the stockpile on Friday, but did not. Brian stated ELC had 25 guys working on site on Friday.

Brian also stated that ELC worked on the 9th, afternoon of the 11th, 4 hours on the 13th and punch list work on the 15th.

CDOT completed their presentation.

Contractor Rebuttal

Mike Mirowski reviewed the work done on Ponds 4 and 5. On October 9, 2010, Saturday, his crews worked 2 to 3 hours. He received the punch list on October 14, 2010 and that this list had items on it that had not been on any previous list.

He stated that a small crew is not a lack of urgency – that most of the work is done using tractors. He reiterated that the 750 lineal feet is CDOT's estimate, not his. It was obvious it was not enough. He said that finding drill seed is virtually impossible – you cannot find it. Lastly, anything after the 8th is on critical path and in that time there were 2 days of actual work.

CDOT Rebuttal

Erosion logs at Sviegal access and Ponds 2 and 3 were not on original punch list, but Mike Brenner told ELC to do this work before October 1, 2010. It was 10 minutes of work. Rain was on Sunday and Monday. 14 guys on site on Monday and none on Tuesday.

Questions and Points made by the Board

DRB asked several questions for clarification.

Findings:

1. There was confusion by both CDOT and ELC over the logs for Ponds 4 and 5. CDOT granted merit for one day removed from LDs.
2. Both parties agree as to the days worked by ELC, even though there was some confusion in testimony identifying the actual dates. October 8, 2010 was the actual Completion date for the Project, as extended by Contract Modification Order #007, issued and executed on September 30, 2010. It was this CMO that estimated the 750 lineal feet of silt berm. Speed Memo 67 confirmed the 12 additional days granted and that all work must be completed by end of day on October 8, 2010.
3. An e-mail from Brian Erickson, Lawson, dated October 7, 2010, was sent to Mike Dvache, ELC, informing ELC that the completion date has been changed to Friday, October 8, 2010, and that after Friday CDOT will assess LDs.
4. ELC seeded the stockpile on Friday, October 8, 2010. As to the sequence of seeding and mulching on the same day vs. seeding one day and mulching following the next day the DRB notes that the project schedule provided in its documents, under work items 11/12, 23/24, and 28/29 all identify seeding preceding mulching by one day. The DRB does not have a copy of the actual specification regarding the sequence of these two activities. This schedule also shows all critical path activities complete by October 8, 2010.
5. ELC and CDOT met on Saturday to discuss the seeding by ELC and both agreed to delay discussing the seeding issue until Monday, October 11, 2010. No additional work was performed by ELC on Saturday on the stockpile.
6. It rained on Sunday through Monday morning, October 11, 2010. There was no reseeding work done on Monday due to wet conditions. Reseeding work done by ELC on Tuesday, October 12, 2010.
7. ELC ordered the additional silt berm material on October 7, 2010, after being informed by CDOT that additional silt berm was needed to complete the project. ELC ordered the additional silt berm that same day and was told none available locally, that it would be sent from Canada with delivery on October 11, 2010. The unavailability was due to shortage. The material arrived on the 11th and ELC picked it up and installed it on the 12th.
8. Punch list work was done by ELC on October 15, 2010. It is disputed by the parties whether this is new work or existing work that CDOT had identified earlier.

9. On October 15, 2010 the erosion control logs were removed at Ponds 2 and 3, and erosion control logs were replaced on Ponds 4 and 5. (See e-mail dated November 5, 2010 from Brian Kelly to Brian Erickson).
10. Lawson requested 7 additional days added to the project schedule and no LDs. CDOT has allowed 1 day. ELC in a letter dated March 10, 2010 (typo mistake and should be 2011) from Mike Mirowski to Brian Kelly, Lawson Construction, states that the LDs are Lawson's responsibility, that ELC's base contract responsibility was completed on October 12, 2010, however ELC will accept 3 days of LDs.

Recommendations:

1. CDOT granted one day of merit thus reducing LDs to 6 days. ELC represented to Lawson that 3 days were acceptable LDs stating that their contract responsibility was completed on October 12, 2010 thus reducing the request for additional time by ELC to 4 days.
2. The one day of merit by CDOT was for the installation of logs for Ponds 4 and 5, thus this day is eliminated from the work required by CDOT for Ponds 4 and 5 done on October 15, 2010 by ELC
3. The three days acceptable to ELC are assumed to be through October 12, 2010 allowing October 11th as a weather day (however, it is also assumed that CDOT did not allow this as a weather day). The DRB finds that October 12, 2010 is not a weather day as it was not claimed to be unusually severe weather per Specification 108(c)(1)(B). Based on this finding the DRB finds that ELC's statement that it completed its contract responsibility on October 12, 2011 translates, due to disallowance of an apparent weather day, that ELC is, at a minimum responsible for 4 days of LDs (October 9th thru 12th).
4. Specification 108.07(d) – Determination and Extension of Contract Time, provides that the Contractor shall provide CDOT a written notice within 7 days of the occurrence of the delay to the prosecution of the work with appropriate documentation. The earliest notice that I could find from the documentation submitted by either party is an e-mail from Brian Kelly, CDOT, dated November 5, 2010, to Brian Erickson, Lawson, regarding LDs. There does not appear to be an issue between CDOT and Lawson whether proper notice was given pursuant to this specification, however it is apparent that the notice provision was not complied with, thus there is a factual issue whether CDOT effectively waived compliance with the timeliness of notice from Lawson. The DRB is assuming that CDOT did not object to the notice given by Lawson therefore either there was proper written notice (though not provided to the DRB) or CDOT waived compliance with this specification.
5. The DRB was not provided by a critical path analysis by either party, therefore it has determined there is not a critical path issue before it.
6. The DRB also finds that the issue of the need for additional silt berm is without merit

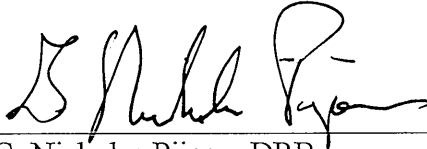
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insofar as requiring additional contract time is concerned, therefore no additional days added to October 8, 2010 for this activity. The reason for this finding is that the DRB agrees with the fact that CDOT estimated the 750 lineal feet and that ELC had stated it was obvious that additional footage was needed.

7. The seeding and reseeding issue is the most troublesome to the DRB because of the testimony and documentation. This being the case the DRB will allow one additional day for the work (Saturday, October 9, 2010).
8. The DRB finds that the issue of a new punch list without merit.
9. The DRB recommends that 5 days of Liquidated Damages are allowed CDOT and 2 days have merit to the Contractor/subcontractor. The 5 days allowed CDOT are October 10, 11, 12, 13 and 14. The two additional days of contract time for Lawson October 9 and 15. Since critical path is not an issue there is no need to account for time gap between these two dates. Therefore, it is recommended that CDOT should receive \$17,000.00.

Respectfully submitted, this 2nd day of January, 2012.



G. Nicholas Pijoan, DRB

Attachments: none