

## **Disputes Review Board Recommendation**

### **I-70 WB MEXL**

#### **Dispute Hearing #2 – Three Disputes Presented**

- 1. CDOT's Work Area Restrictions**
- 2. CDOT's Mandated Phasing**
- 3. Median Barrier Differing Site Conditions**

**Hearing Date: June 15, 2021**

#### **Parties and Attendees**

**Contractor: Graham Contracting, Ltd**

Matt Barnes, District Manager

Ned Meyers, Project Manager

Anna Ritigliano, Outside Counsel - Martin Hild

**Delta Consulting Group**

Cory Milburn, Managing Director (CPM Scheduler)

**Agency: Colorado Department of Transportation**

Jeff Hampton, Project Engineer

Ray Strandberg, Asst Project Engineer (RS&H)

Kevin Brown, Resident Engineer

Mike Keleman, Program Engineer

Mark Straub, Area Engineer

Paul Jesaitis, Region 1 Transportation Director

Jessica Myklebust, Region 1 Deputy Director – Program Delivery

Kathy Young, First Assistant Attorney General

Tim Burns, Project Scheduler (Keville)

Tony Meneghetti, HPTE

Fred Holderness, Consultant Principal (RS&H)

Shaun Cutting, FHWA

**DRB Panel Members:**

John Finn

Bill Ott

Henry Nave

**Hearing and Documents:**

CDOT Position Paper  
CDOT Power Point Presentation  
Graham Contracting Ltd Position Paper  
Graham Contracting Ltd Rebuttal Paper  
Graham Contracting Powerpoint Presentation  
Common Documents 1.0 through 12.0

**Oral Presentations and Rebuttal Contents: Update once the recommendation is complete**

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## **PROJECT DESCRIPTION**

This contract provides for the improvement of I-70 by widening the Westbound lanes and providing a 12 mile tolled westbound shoulder lane between the Veterans Memorial Tunnels at Mile Point 243 and the US Highway 40/I-70 Interchange (Exit 232). The construction work for the Project includes shoulder widening (unclassified excavation, Class 6 base course, and Hot Mix Asphalt (HMA) patching), drainage improvements, construction of Mechanically Stabilized Earth walls (MSE walls), replacement of median barrier, relocation of segments of the existing fiber optic network, utility work in Idaho Springs, signage, and electronic tolling system.

### **Dispute Hearing No. 2**

Three (3) separate dispute issues were presented to the DRB at the June 15, 2021 Dispute Hearing #2. Graham maintains that the three issues presented as well as others are not stand-alone issues and that the issues intersect with at least one other issue to compound the delays, disruptions and reduce productivity of the individual impact events.

The DRB recognizes that it is difficult if not impossible to assess or value intermingled issues and as a result Graham has broken the intermingled issues into 3 separate issues for the DRB to provide a Recommendation.

The three separate issues are as follows:

1. WORK AREA RESTRICTIONS in the Idaho Springs Parking Lot (ISPL). All work in the ISPL suspended through the summer months.
2. MANDATED PHASING in the Exit 240 area. CDOT required that the Graham treat the EB PPSL (eastbound peak period shoulder lane) as a lane and reopened on Friday afternoon through Sunday evening weekly instead of allowing continuous closure.
3. MEDIAN BARRIER DIFFERING SITE CONDITION. The Project documents indicate that the existing type 4 median barrier is to be removed. Graham discovered that the Type 4 barrier was actually cast-in-place barrier with a monolithic footing of up to 12 inches deep requiring additional work.

The DRB will address each of the issues separately and provide a Recommendation for each issue. All references in parenthesis are to the common documents provided by the parties unless otherwise noted.

**ISSUE 1 - WORK AREA RESTRICTIONS**  
**Idaho Springs Parking Lot (ISPL)**

**CONTRACTOR POSITION**

The Contract did not provide for any restrictions to work times or seasons within the Idaho Springs Parking Lot (ISPL). Nonetheless, CDOT unilaterally implemented work area restrictions during the course of the Project from May 25, 2020, through September 7, 2020, which precluded Graham from performing its work during favorable weather and temperature periods. Graham was also forced to stop ongoing sewer casing activities and perform an out of sequence relocation of an 8-inch waterline before the CDOT imposed restrictions took effect.

These restrictions disrupted Graham's planned sequence of work, fragmented the planned progress of activities, reduced productivity, and delayed the completion of activities. Additionally, the work was pushed into fall and winter seasons, which caused additional critical path delays, disruptions, and inefficiencies.

On February 22, 2021, Graham provided a notice letter initiating the Dispute Resolution Process for unresolved issues per the Project Special Provision 105.22 (b) on 6 issues. Items 1, 2 and 3 of that notice letter were the subject of the hearing conducted by the DRB. Graham is asserting that work area restrictions that restricted work times or seasons within the Idaho Springs Parking Lot (ISPL) precluded Graham from performing its work during favorable weather conditions and caused out of sequence work on the sewer casing activities and relocation of the 8-inch water line.

CDOT Informed Graham on March 4, 2021, for the first time, that it had obtained a 1041 Permit on February 11, 2019, for CDOT to undertake development activities in the ISPL. Important to Graham's work was Section 2 - Item 6 of the Permit, which detailed the constraint that sewer line replacement work in the ISPL would only occur during off-peak seasons in the spring and fall. Contract Documents do not reference a permit for the ISPL, nor specify any restrictions for the work to be performed in that area.

CDOT prohibited Graham from performing the work within the temporary easement at the ISPL from May 25, 2020, through September 7, 2020

Graham asserts that CDOT is responsible for the delays caused by the extracontractual restrictions and in addition to denying Graham an excusable delay and/or compensable time extension, CDOT is unlawfully withholding Contract funds owed to Graham by assessing liquidated damages or \$9,900 per calendar day.

### **CDOT POSITION**

With respect to the work area restrictions for the ISPL, CDOT asserts that Graham was in control of the scheduling of work in the ISPL and that a prudent contractor would have completed this work following the CDOT standard specification 603.06 Placing Conduit starting at the downstream end of the conduit line and followed with the waterline relocation prior to the additional work required in the Exit 240 area. This would have allowed Graham to meet the request by the City of Idaho Springs at meetings in January and on February 11, 2020 to minimize the impacts to the two parking areas between 15<sup>th</sup> avenue and 17<sup>th</sup> avenue which provide the majority of the parking to Idaho Spring's businesses during its busy season between Memorial Day and Labor Day. CDOT asserts that Graham had planned on doing this work before Memorial Day but failed to do so due to poor planning, inadequate staffing, and inept pipe crews.

### **DRB DISCUSSION:**

On June 24, 2020 Graham provided a letter (8.13) to CDOT claiming a significant change to the character of the work under Section 104.02 (c) of the Standard Specifications. A significant change is defined in that section as an event which causes the character of the work as altered to differ materially in kind or nature from that involved or included in the original proposal. The events which led up to the Graham claim letter began in January of 2020 with a meeting involving CDOT, Graham and the City of Idaho Springs at which time the city requested that CDOT and Graham minimize the impact to the ISPL during their busy period between Memorial Day and Labor Day. The parties followed up that meeting with another meeting on February 11, 2020 which was attended by Ned Meyers of Graham. At this meeting, Graham agreed to provide a proposed schedule for the work in the ISPL. Graham provided that schedule in early March (6.25) which showed the sewer work being completed in May, the waterline work being completed in June and the final work in the ISPL completed by July 24.

Work actually began on the sewer work in early May and then the crew was moved to do the waterline work in the ISPL. On May 27 and May 28, CDOT then directed that the

ISPL should not be impacted during the summer months. This direction was followed by Graham's letter of June 5, 2020 (8.12) and CDOT response on June 18, 2020 (8.12.1) and ultimately the claim letter referenced above on June 24, 2020.

The widening of the WB I-70 requires that the permanent off-Ramp to SH103 at Exit 240 be moved to the north, encroaching into the ISPL. The access to the ramp work and supporting wall is predominately from the ISPL. Graham planned to perform this ramp relocation work (Phase 1A) immediately after the sewer and waterline work in the ISPL.

To continue with Phase 1B, 1C, 1D, 2, and 3 Graham needed to create construction zones for the EB and WB I-70 lanes, and adopted CDOT's suggested Phasing on Plan Sheet 498.

The Contractor planned (and bid) to perform the work in the Idaho Springs vicinity utilizing the Phasing shown on Plan Sheet 498 and scheduled the ISPL Improvements to precede the Phasing for widening of I-70 in the vicinity of Exit 240. Plan Sheet 498 Phasing is as follows: as follows:

#### Phase 1A:

- Maintain traffic in existing lanes
- Close WB Off-Ramp
- Widen WB and Construct Outside Barrier

#### Phase 1B

- Open WB Off-Ramp to traffic
- Shift two lanes of WB as far North as possible
- Pin Temp. Center Barrier
- Close EB to one lane on outside
- Demo Existing Median Barrier and Construct Median Crossover Points

#### Phase 1C

- Shift two lanes of WB and EB as far North as possible
- Pin temp. barrier on South side of EB Traffic to protect work zone
- Close EB on-ramp
- Construct EB outside improvements

#### Phase 1D

- EB on-ramp to remain closed
- WB Traffic to remain same as Phase 1B & 1C
- Close EB to one lane and construct crossover points

#### Phase 2

- EB on-ramp to remain closed
- WB Traffic to remain same as Phase 1B, 1C & 1D
- Shift EB south and construct center median and remainder of EB lanes

#### Phase 3

- Overlay final 3" across all lanes
- Restripe to final configuration

Graham maintains that the Contract Documents do not restrict access to or use of the ISPL within the temporary easement at any time throughout the Project.

On February 11, 2019, the City of Idaho Springs approved a 1041 Permit submitted by CDOT. The 1041 Permit, Terms & Condition #6, reads "Sewer line replacement work in the City parking lot north of Water Street between 15<sup>th</sup> and 17<sup>th</sup> Avenues shall occur during the off-peak seasons in the spring and fall, unless otherwise approved by the City Council."

It appears that CDOT attempted to administer the Contract knowing that the 1041 Permit (12.04) existed by restricting the contractor from utilizing the ISPL Temporary Easement. On March 4, 2021, during a meeting with the City of Idaho Springs, the City of Idaho Springs asked that no work be performed in the ISPL between Memorial Day and Labor Day. Several discussions followed with no clear direction from CDOT. Graham then generated a schedule for this area that had the work in the ISPL concluding on July 24. Graham's letter dated June 5, 2020 (8.12) states that work in the ISPL has started and is being impacted by the changed requirements and requested CDOT direction to help mitigate delays and cost impacts. CDOT letter dated June 18, 2020 (8.12) provided directions and Graham's letter dated June 24, 2020 (8.13) provides further notice that Graham considers the CDOT direction to be a Significant Change in the Character of the Work per 104.02(c).

During the CDOT Baseline Schedule review it should have been apparent that there is a likely chance that the ISPL Temporary Easement would or could be used by the

Contractor during the summer season. The Baseline schedule dated January 22, 2020 (6.7) provided for the sewer work to begin in January of 2020, the waterline to be completed in February and all work in the ISPL to be completed in May of 2020 which would have allowed for the start of Phase 1A of the Phasing Plans to begin in mid-May. The Phasing Plans do not address the work in the ISPL.

To use the Phasing shown above (Sheet 498) it would be reasonable to expect that the Contractor would utilize the ISPL Temporary Easement for the duration of the phased work in the vicinity of Exit 240 for the physical work as well as for staging for other project work. Using this logic, Baseline Schedule (Rev 4) shows that the contractor would reasonably utilize the ISPL Temp. Easement from September 30, 2019 to October 15, 2020 with a late finish of November 10, 2020.

#### CDOT Standard Specification

Section 108.08(b) Determination and Extension of Contract Time.

(b) Completion Date Contract:

“When the Contract specifies a completion date, all work under the Contract shall be completed on or before that date. No extension of the completion date will be allowed for inclement weather, foreseeable causes, or conditions under the control of the Contractor.”

(c) 1A Compensable Delay: “

“A delay that the Department, not the Contractor, is responsible for entitling the *Contractor* to a time extension and monetary compensation. Monetary compensation for compensable delays will be made in accordance with Subsection 109.10.”

#### **MAJORITY DRB FINDINGS:**

1. The Phasing shown on Plan Sheet 498 is a work sequence that works when the ISPL improvements are scheduled in advance of the Phasing.
2. The Contract Documents do not specify any work restriction for the use of the Temporary Easement and that the late addition of those restrictions is a drastic change to the work sequence and work efficiency.
3. The Contractor lost the opportunity to mitigate the impacts by scheduling the work at an earlier date. The result was that the work was performed piecemeal and out of sequence.

4. CDOT Standard Specification 603.06 Placing Conduit states: “The conduit laying shall begin at the downstream end of the conduit line.” The testimony was that the pipe was laid from the downstream end of the pipe run/manhole to the upstream end Manhole but given the restricted work in the ISPL the multiple runs of pipe could not be placed from the furthest downstream pipe structure to the furthest upstream pipe structure.
5. The delay and impacts to the ISPL work and subsequent Phasing work in the vicinity of Exit 240 qualifies as an Excusable and Compensable Delay per Standard Specification 108.08(b) and 108.08(c)1A.
6. The DRB acknowledges that Graham provided notice of delay within seven days of the Delay occurrence but failed to provide Part 2 of the notice documentation.

**Majority DRB Recommendation:**

- A. **The DRB recommends entitlement for the added work restriction in the ISPL.**

**Respectfully Submitted:**

*s/Henry Nave*

*8/2/2021*

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Henry Nave

\_\_\_\_\_  
Date

*s/William P. Ott*

*8/2/2021*

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William P. Ott

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Date

## MINORITY DRB FINDINGS

1. The Phasing shown on Plan Sheet 498 is a work sequence that works when the ISPL improvements are scheduled in advance of the Phasing. A reasonably prudent contractor would schedule utility work prior to road improvements and installation of permanent barriers.
2. Graham initially scheduled its work in the ISPL to begin with sewer work in January, waterline work in February and the work in the ISPL to be completed in May. This would have allowed Phase 1A to begin in mid-May and proceed consistent with the Phasing Plans.
3. The Phasing Plans are not mandatory requirements and the Contractor has the right to modify its planning on the project consistent with its responsibilities to manage the means and methods for the project consistent with the contract terms.
4. Graham modified its phasing of the work in the ISPL with its proposed schedule (6.25) provided in early March showing sewer line work in May, waterline work in June and completion of the ISPL in July. This schedule would not have allowed Graham to begin Phase 1A until sometime in July.
5. Graham modified its phasing again in its April 3, 2020 schedule (6.11) which showed sewer and waterline work completed in April with rough grading of the ISPL and completion of the work in the Fall.
6. CDOT imposed a restriction on use of the ISPL between Memorial Day and Labor Day. CDOT claims this restriction was an accommodation to Idaho Springs while Graham claims it was due to the 1041 Permit approved by the Idaho Springs City Council although Graham acknowledged during the hearing that Idaho Springs did not threaten a violation of the 1041 Permit. Regardless of the motivation for the restriction, CDOT imposed a work restriction that was not part of the contract and which limited the opportunity for Graham to recover for its delays in getting the sewer and waterline work completed.
7. Graham timely provided notice on June 24, 2020 of impact for time and costs but failed to provide any analysis of the delay within 30 days and did not do so until March of 2021.

**Minority DRB Recommendation**

Graham’s claim for entitlement on the Work Area Restriction has merit but only to the extent Graham can establish that the phasing was delayed beyond Graham’s own delay until mid-July of 2020 and that the delay was a delay to the critical path as it was shown on the schedule which was in place on June 24, 2020, the day of its notice of delay.

**Respectfully Submitted:**

*s/ John Finn*

*8/2/2021*

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John Finn

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Date

## **ISSUE 2 - MANDATED PHASING in the Exit 240 area.**

### **CONTRACTOR POSITION**

Graham is also asserting that the mandated phasing of the work in the area of Exit 240 could not proceed according to the phasing plan due restrictions imposed by CDOT that limited the use of the EB PPSL lane during weekends that restricted Graham to 4.5 day lane closures and caused additional work to tear down and set up barriers on Friday afternoons and Monday mornings.

### **CDOT POSITION**

With respect to the EB PPSL lane usage, CDOT asserts that the Plans and Specifications always anticipated that the EB PPSL would be available for tolling and eastbound traffic during high traffic volume times. The project special provisions included a \$1,200 per hour disincentive for any impacts to toll revenue collection. The phasing plans limited work to 1000 lf segments for median work which was a reasonable time for work to be completed in a workweek timeframe and the expectation was that the EB PPSL would be cleared of construction and traffic control devices for opening by noon on Fridays. CDOT points to the Form 1389 (8.26) issued during bidding for the project and explained at a mandatory pre-bid meeting that was attended by Graham that the EB PPSL lanes could be used for construction during the weekdays as approved by the Project Engineer. CDOT stated that it also permitted full closure of the EB PPSL lane from March 23, 2020 until May 21, 2020 after the onset of the pandemic and again in the Fall for 4 weeks, but Graham did not take advantage of the closures and was unable to execute its own work plan after requesting the Fall closure.

### **Majority DRB Findings and DISCUSSION:**

In addition to the work area restrictions described above, the second major issue raised by Graham relates to the use of the EB PPSL lane. On May 26, 2020 Graham provided a notice of delay time and costs (8.11.1) per Section 108.08 (c) 1. A and 108.08 (d) of the Standard Specifications. Subsection (c) 1. A provides for a compensable delay which is a delay caused by CDOT beyond the contractor's control and not caused by the contractor's fault of negligence. Subparagraph (d) provides a two-step process for asserting a compensable delay claim. The first step is to provide written notice within 7 days of the delay occurrence. The letter on May 26, 2020 was within 7 days of the May 21, 2020 letter from CDOT advising Graham that the previously allowed 24/7 closure of

the EB PPSL would expire. The second step is to provide a follow up within 30 days which would include a contemporaneous schedule analysis of the delay. The only delay analysis submitted was part of the REA in March 2021.

In considering the claim associated with the EB PPSL closure, there are numerous contractual and noncontractual references that apply to the use of the EB PPSL lane. In support of its position, Graham references the project phasing plan sheets 487-501. Plan sheet 488 shows temporary concrete barrier erected on either side of the median barrier replacement. Plan sheet 498 shows closing the EB lane to one lane and two lanes at various times.

In support of its position, CDOT references:

1. The same phasing plan sheets which note, "limit median barrier work zones to 1000 feet sections". CDOT has indicated that this limit was in anticipation of being able to complete the work in the 1000 feet sections during a work week.

**Majority DRB Comment:** This may be CDOT's intent, but the documents do not state that the lane is to be opened back up to traffic at the end of a work week.

2. In addition, CDOT cites Project Special 104.04 (f) which speaks to minimizing the traffic delay to I-70 traffic, local businesses and the general public to the greatest extent possible. The following mitigation measures shall be implemented to minimize such impacts without impeding completion of the work. Bullet (4) reads: Construction activities on weekends that would increase volumes on alternate routes (SH9 and US285) shall be minimized as much as possible."

**Majority DRB Comment:** General statement states a goal but is very subjective and the documents need to be more specific. This does not prohibit lane closures or work on weekends.

3. There are other paragraphs in 104.04 (f)(2) that require work requiring closure of lanes be conducted during lower traffic periods

**Majority DRB Comment:** Again, subjective and nothing specific to guide the contractor or expectations.

4. Spec. 104.04(f)(4) states "The following mitigation measures shall be implemented to minimize such impacts without impeding completion of the work. (4) Construction activities on weekends that would increase volumes on alternate routes (SH9 and US285) shall be minimized as much as possible."

5. **Majority DRB Comment:** Contractor is required to minimize the increased volumes of traffic on the alternate routes as much as possible.

6. Subparagraph (n) states that delays or impacts to the contractor due to complying with the requirements of this provision shall not be the basis for either an extension of time or additional compensation and that any denial or revocation of prior approval for traffic handling requests shall not be the basis for any claim for either additional time or compensation.

**Majority DRB Comment:** The DRB agrees with this Special Provision as it applies to the work described in the Plans and Specifications. In this case we have not found any provision that limits lane closures and closed lanes to 4.5 days a week (Monday thru Friday noon) as CDOT has administered the contract.

7. Project Special 108(c) provides all closures to the EB PPSL lanes need to be coordinated with the Engineer and any impacts to toll revenue collection due to the closure of the EB PPSL during operating hours shall result in the contractor being assessed a disincentive of \$1,200.00 per hour.

**Majority DRB Comment:**

- a. First the Contract does not state any operating hours for the toll collection. Nor does the Phasing Plan sheet 498 include any reference to a restricted closure.
- b. Phasing Plan Sheet 498 shows EB reduced to one lane by using concrete barrier and that one lane being utilized during Phase 1B, 1C , 1D, and phase 2 which was originally scheduled for 3.5 months.
- c. The contractor could reasonably expect that the EB traffic would remain in one lane during Phases 1B, 1C, 1D, and 2 for the EB improvements at Exit 240.
- d. Once the EB is in a one lane configuration, the Tolling would not be operating, so the assessed \$1200/hr would not be applicable.
- e. On June 5, 2020 CDOT deleted plan sheets 487-501 which included the phasing plans for a North to South lane construction plan. CDOT then forced Graham into a South to North construction plan which greatly enhanced construction on the EB lanes which enabled tolling to continue at time when the original phasing plans had the EB lanes reduced to a single lane configuration which prohibited any toll collection. Graham was effectively forced into a design build scenario which eventually benefitted CDOT's ability to perform significant tolling operations.
- f. On March 4, 2021, CDOT revealed a 1041 permit issued by the City of Idaho Springs (dated February 11, 2019), which had been written in coordination with CDOT which forbid disruption to the ISPL during the summer and winter season time periods. The permit was not referenced in

the contract nor in any preconstruction or Project First meetings although CDOT was directing Graham in concert with the intention of the permit. The failure of CDOT to make this knowledge available to all contractors prior to bidding on the contract could have made a significant difference in a contractor's plan of operations and reduced the confusion related to the 2020-21 construction seasons.

8. The Traffic Control Plan at page 468 of the Project Special Provisions provides the times and days of the week when single lane closures are permitted. At page 469, the Traffic Control Plan provides that there should be no lane closures during non-working hours.

**Majority DRB COMMENT:** Lane closures are generally for short periods of time within a day such as hours of the day as described in the referenced table on Special Provision page 468 and the lane is temporarily closed using barrels, coned and impact attenuators and would be removed whenever work was not going to be performed. Whereas, closed lanes are for longer durations, such as weeks or months, and use concrete temporary barrier such as the plan sheets indicate.

Lane closures were required during utility operations to install the crossings under I-70 which were not detailed in the phasing plans . CDOT dismissed this omission by stating that any knowledgeable contractor would have known that they should have started this work from the downstream end. This would have been contrary to the original phased construction plans but was possible with Lane closures. When CDOT deleted the phasing drawings in June of 2020 it required a major resequencing of Grahams plans that could have been done more productively during the 2019 winter slowdown.

9. Graham seemed to acknowledge its understanding of the EB PPSL restrictions in the schedule narrative it provided to CDOT dated October 31, 2019 at page 4 in the section titled "Weather EB Toll Closure 4x10". Graham states in its narrative that the EB PPSL lane must be open by the end of the day on Friday and throughout the remainder of the weekend.

**Majority DRB Comment:** The DRB's opinion is that this narrative is an attempt to give CDOT what they were demanding so the Schedule can be approved, and Progress payments would start. This is not consistent with the Contract Documents.

10. The final noncontractual reference by CDOT is to the Form 1389 pre-bid questions and answers provided to all bidders. That form informed all bidders that the EB PPSL may be used only during the weekday and as approved by the Project Engineer. Graham attended the mandatory pre-bid meeting and received the Form 1389.

**Majority DRB COMMENT:** This form was not incorporated by reference into the contract and contains a disclaimer clause that the bidders are responsible for all conclusions, deductions and inference drawn from such information and the information is used at the contractor's risk.

11. In addition to the contract references, CDOT argues that it allowed a 24/7 closure of the EB PPSL from March 23 to May 21 after the onset of the pandemic and the limited traffic as a result of the shutdown of activities in Colorado. Again, in the Fall, CDOT allowed the 24/7 closure of the EB PPSL for 4 weeks to assist Graham in completing the median barrier work. Graham did not use the Spring closure to do any work in the Idaho Springs corridor and neither party indicated how much of the barrier work was performed during the Fall closure.

**Majority DRB COMMENT:** It is not clear nor implied that the 24/7 closures were meant for the Exit 240 improvements or contractor to change his schedule and perform the work out of his scheduled sequence. To reschedule or resequencing the work at Exit 240 would have had other cost implications.

12. Finally, CDOT asserts that it allowed median work in the EB PPSL using traffic control vehicles and cones which limited the need to erect and move temporary barriers in the EB PPSL lane.

**Majority DRB COMMENT:** There has been no indication that setting and removing daily traffic control devices for a lane closure is a benefit to the contractor.

**Majority DRB Recommendation:**

**A. The DRB recommends entitlement to the Contractor for the Mandated Phasing issue.**

**Respectfully Submitted**

*s/ Henry Nave*

*8/2/2021*

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**Henry Nave**

\_\_\_\_\_  
**Date**

*s/ William P. Ott*

*8/2/2021*

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**William P. Ott**

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**Date**

**Minority DRB Findings**

1. The use of the EB PPSL was a unique feature of this project from the bidding stage and allowed the contractor to complete the MSE walls for a major portion of the work from the EB PPSL. Graham began this work in January of 2020 and fully complied with the requirement to reopen this lane to tolling on Friday afternoon through Sunday evening.
2. In March of 2020 when CDOT allowed 24/7 access to the EB PPSL, this gave Graham an unanticipated benefit. Technically, when CDOT allowed 24/7 access this was the time frame that Graham should have provided notice of delay since the permission to use the EB PPSL 24/7 was limited to the period before Memorial Day.
3. The letter of May 26, 2020 (8.11.1) was within 7 days of CDOT letter that once again limited use of the EB PPSL and was sufficient notice under 108.08 (d).
4. Graham provided no follow up schedule analysis within 30 days of its notice letter.
5. At page 5 of the narrative prepared by Graham to its schedule (6.5) in October 2019, Graham acknowledged in writing what its project personnel were told at the mandatory pre-bid meeting, that is, that the EB PPSL could be used during the week as long as it was cleared on Friday afternoon until Sunday evening.
6. Although the Form 1389 was not incorporated into the contract and contains disclaimer language, it is inconceivable that any of the contractors attending the pre-bid meeting would have planned this project with unlimited access to the EB PPSL lane.

7. It was the responsibility of all bidders on this project to familiarize themselves with the conditions at the project locale. CDOT has been regularly tolling the EB PPSL on weekends for the years since the EB project was complete. Anyone remotely familiar with this area knows the traffic jams that were common with ski traffic returning to Denver and summer mountain traffic returning on Saturday and Sunday afternoons. That was the entire motivation for installing the EB PPSL in the first place.
8. There are 9 separate contract clauses directly applicable to traffic control, claims associated with lane restrictions and a rather significant disincentive for closing off the tolling lane. They all would have to be disregarded for Graham's position to have merit. It should have been clear to all bidders that eliminating lanes of travel on weekends and the resulting traffic backups would not be acceptable.
9. There is nothing in the Phasing Plans which addresses weekend use of the EB PPSL as all of the methods show temporary barriers which ultimately were not used for the EB PPSL.

**Minority DRB Recommendation**

Graham claim for additional time and costs due to mandated phasing has no merit.

**Respectfully Submitted:**

*s/ John Finn*

*8/2/2021*

\_\_\_\_\_  
John Finn

\_\_\_\_\_  
Date

**ISSUE 3 - MEDIAN BARRIER DIFFERING SITE CONDITION.**

## **CONTRACTOR POSITION**

Graham is also asserting that a differing site condition existed with respect to the Type 4 Barrier removal in that there were undisclosed and unanticipated footings to the barriers of up to 12 inches that required removal and backfill of the resultant void with structural backfill.

## **CDOT POSITION**

For the DSC asserted by Graham, CDOT's position is that section 202 of the standard specifications describes the construction requirements and the basis for payment for removals. The M & S Standards, specifically M-606-15 shows a 10-inch deep footer at transitions for each of the existing or proposed types of barrier and provides information for the structural fill for any voids created by removal of existing barrier. CDOT further asserted that during early removal efforts, there was not a consistent 12 inch footing as claimed by Graham but rather footings of 2-3 inches which were to be expected.

After an exchange of letters and a meeting during which CDOT requested additional information, CDOT issued a letter on April 23, 2021 (8.24) in which CDOT denied merit for the REA on the above issues.

## **DRB DISCUSSION:**

On July 30, 2020, Graham provided a notice letter (8.14) claiming a DSC associated with the removal of the Type 4 barrier per Section 104.02 (a) of the Standard Specifications. This letter followed numerous RFIs and speed memos between the parties with respect to the removal of the barrier. Graham indicates that through site investigation, the majority of the barrier was constructed with a footing that appears to be up to 1 ft. thick (deep). Graham indicates that it disagrees with CDOT's position that backfill of the void that is created after the removal of the exiting Type 3/4/7 barrier is included in the work required under items no. 202-01130-, 202-01140 and 202-01170. Graham concludes this notice letter with the indication that it will proceed with the removal and backfill work and will track the Extra Work per Sections 104.03 and 109.04 of the Standard Specifications.

CDOT responded to Graham's notice letter by letter dated August 20, 2020 (8.14.1). In its response CDOT refers to Section 202.02 of the Standard Specifications which provides that cavities left by structure removal shall be filled to the level of the surrounding ground and compacted in accordance with subsection 203.06. Section 202.12 further indicates that the pay item shall be full compensation for sawing, removing, disposal, excavation and subsequent backfill. CDOT also references M & S Standard M-606-15 Sheet 1 of 11, Note 6 which call out the new barrier foundation to be pavement, or compacted aggregate base, or compacted embankment material.

CDOT also contested the statement in the notice letter that the majority of the barrier has a 1 ft. footing stating that the first several feet of the removal is only 2-3 inches below the existing pavement grade which would be indicative of Type 4 or Type 7 barrier that was placed on asphalt and has had subsequent Surface Treatment project completed in the area. CDOT asserts that the footing that appears to be 1 ft. thick was an isolated section in areas of concrete paving which are to be expected per RFI-108 (not provided). In its position paper, CDOT also points out that the M & S M-606-15 standards for the new Type 9 barrier provide for up to a 10 inch deep footer at transitions for each of the existing or proposed types of barriers.

Neither CDOT nor Graham provided the DRB with any information as to what the M & S Standards were for Type 4 barrier in the years when this type of barrier was a standard for road construction in Colorado. Even though Graham had indicated in its July 30, 2020 letter that it was maintaining records of the additional costs it was incurring as a result of the claimed DSC, no additional information was provided to the DRB and no inspection reports were provided as to what the actual conditions were with the removal of the barrier. The DRB notes that the contract provided for an estimate of 13,642 lf of Type 4 Guardrail removal for which Graham bid \$15.00/lf for a contract price of \$204,630.00 and 1,104 lf of Type 7 Guardrail for which Graham bid \$17.00/lf for a contract price of \$18,768.00. The majority of the Type 4 barrier was located in the Idaho Springs area. The Graham schedules do not show the removal work as a separate item for the majority of this work until the Revised Baseline Schedule (April 2020 Update) submitted on May 19, 2020 (6.14) which on page 26 of 31 shows the estimated time for removal of the existing barrier with footing to have a total duration for this work of approximately 40 days. The DRB has no information as to actual durations experienced during removal. The DRB would note that since there had been a notice provided on July 30 and a denial on August 20, it was the responsibility of both parties to maintain good records of actual conditions encountered at the site and costs incurred for the asserted extra effort and extra materials.

### **DRB Conclusion/Opinion**

The information presented to the DRB shows that the existing barrier is a cast-in-place barrier that was placed by slip forming and the “footing or deepened base” is monolithic with the barrier. Unless the barrier changed throughout its length it would be expected that the depth of the monolithic base would be the same depth throughout the project because a slip forming mold is rarely adjustable for height and when it is the variable height is in the height above the deepened base.

It is also noted that by a visual site inspection that asphalt overlays had been placed against the existing barrier and that contractor could have reasonably expected that the

removal of that barrier would have resulted in a 1-3” deep void in some or all areas of removal.

### **DRB FINDINGS**

The DRB finds that with respect to the Median Barrier DSC that a differing site condition existed for any of the Type 4 barrier/guardrail that had a footing of greater than 3 inches. In making this analysis, the DRB finds that the applicable portion of Specification Section 104.02 (a) which applies to differing site conditions is that foundations over 3 inches were an “unknown condition of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract”.

The cross section of a Type 4 Barrier is similar to that of Type 7 (Std Plan No.M-606-13 sheet 1 of 4) which has a vertical leg of 3” at the bottom for the barrier base. The drawings show that the base of the median barrier sits on a finished surface and that the removal would not create a hole/cavity to be filled. The drawings further show that at locations of anchorage there would be a 10” deep foundation and at transitions these foundations would run for up to 10 feet. Instead, Graham claims it found the existing barrier has a monolithic concrete base of up to 12 “deeper in cross section plus the shoulder has an asphalt overlay, burying the barrier base up to 3 inches deeper. This removal would require significant removal efforts including saw cutting of the asphalt shoulder to remove the barrier and then placing a structural fill to fill the hole/cavity.

In its letter of August 20, 2020 (8.14.1), CDOT indicates in the last paragraph that “the first several feet that Graham has removed is only 2-3 inches below the existing pavement grade which would be indicative of Type 4 or 7 barrier that was placed on asphalt and has had a subsequent Surface Treatment project completed in the area”. Based on this the DRB finds that footings greater than 3 inches would be unusual and differ materially from those ordinarily encountered.

The findings of the DRB with respect to merit are necessarily limited by the lack of information from either party as to a number of factors:

1. How many lf. of the barrier that was removed had a foundation of more than 3 inches.
2. How many additional hours/days of work were required to address areas where the foundation exceeded 3 inches.?
3. What were the additional costs incurred that were tracked by Graham per Specification Section 109.04 as indicated in Graham’s letter of July 30, 2020 (8.14)?

**DRB RECOMMENDATION:**

With respect to Median Barrier DSC, it is the DRB unanimous recommendation DRB that the Contractor has entitlement for a Differing Site Condition.

**Respectfully Submitted:**

*s/ John Finn*

*8/2/2021*

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John Finn

\_\_\_\_\_  
Date

*s/ Henry Nave*

*8/2/2021*

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Henry Nave

\_\_\_\_\_  
Date

*s/ William P. Ott*

*8/2/2021*

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William P. Ott

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Date