Dispute Review Board Report and Recommendations
C-470 Tolled Express Lanes Segment 1
Design-Build Project
PROJECT NO.: NHPP 4701-124

Dispute 01: I-25/C-470 Interchange Design

Dispute Hearing Dates: March 15-16, 2018

Hearing Location: C-470 Project Field Office, 7852 South Elati Street Suite 100, Littleton, CO 80120

Hearing Attendees: Sign-in sheets sent with this Report

I. BACKGROUND AND DISPUTE PROCESS

A. Project Description

The C-470 Express Lanes Project ("Project") is located along 12.5 miles of C-470 between I-25 and Wadsworth Boulevard. The Project includes: adding Express Lanes; pavement reconstruction; adding auxiliary lanes at interchanges; widening and replacement of bridges; installing noise walls; and installing Intelligent Transportation Systems elements and tolling equipment. The part of the project in dispute is designated "Segment 4/5". Segment 4/5 includes the area of the I-25/C-470 Interchange to Quebec Street.

B. Dispute History

On November 8, 2017, Flatiron/AECOM LLC ("F/A") submitted to the Colorado Department of Transportation ("CDOT") a Request for Equitable Adjustment ("REA") pursuant to Section 105.22(b). F/A claimed a time extension and compensation for delays on the Segment 4/5 design that occurred between March 28, 2017 and August 30, 2017. F/A contended that the 155 day delay from this time period pushed the critical path 307 days, to a new Project Completion Notice Milestone of September 24, 2019.

On November 30, 2017, CDOT responded to the REA by determining that the dispute had merit, but also maintaining that there was not a contractual basis for modifying the Contract. CDOT offered revised Milestones to initiate Section 105.22(c) quantum negotiations based on a "Project First" partnering approach.

After negotiations on time and quantum issues, on January 16, 2018, F/A submitted REA Supplement #1, which incorporated the revised Milestones from CDOT's November 30, 2017

letter. In the cover letter F/A stated that it was willing to accept the revised Milestone dates and schedule extension, pending approval of quantum provided in Supplement #1 (emphasis supplied).

On January 25, 2018, CDOT responded to REA Supplement #1, advising that CDOT expected that the DRB process would commence while quantum was being reviewed and negotiated.

Because the Parties were not able to reach agreement on time and quantum, on February 12, 2018, CDOT initiated the DRB process this Dispute 01, culminating in a DRB hearing on March 15-16, 2018.

C. Statement of Dispute

The Parties submitted competing Statements of Dispute. The essence of the disagreement on the Dispute was that CDOT wanted the DRB to address both merit and time, and F/A wanted the DRB to address time only, because, F/A contended, CDOT had already recognized merit via its November 30, 2017 letter responding to the REA.

The DRB considered the Parties' correspondence noted above and concluded that CDOT's recognition of merit was conditioned upon reaching agreement on time and quantum, which the Parties were not able to do. Therefore, the DRB adopted CDOT's Statement of Dispute, which provided:

> *The quantity of time deserved, if any, as a result of Flatiron|AECOM's design development and ultimate disapproval from CDOT of the Alternate Direct Connect Ramp Configuration (Alternative 10) at the I25/CE470 Interchange is in dispute. In the "Project First" mentality, CDOT has offered additional time through a Directive and Order To Proceed to modify Completion Deadlines as a means of moving the Project forward but feels that the Contract and Project records were clear that F/A retained all schedule risk with and through the development of the Alternative 10 design, and therefore, by Contract, no additional time is or was contractually warranted. CDOT is requesting a contractually based recommendation from the Dispute Review Board (DRB) on the following:*
>
> - *Provide a recommendation as to whether the Dispute has merit.*
> - *If merit is recommended by the DRB, CDOT is requesting the DRB provide a recommendation on the quantity of time to which Flatiron|AECOM is contractually entitled.*
>
> *The DRB is not being asked by CDOT to address or provide a recommendation on the amount of compensation associated with the quantity of time or to confirm or agree with any previous merit determinations or Completion Deadline extensions that were previously provided by CDOT in the spirit of "Project First".*

At the hearing, the DRB further clarified with the Parties that the DRB would give a recommendation on which Party was responsible for what number of days within the 155 day period covered in F/A's REA; the DRB would not give a recommendation on the impact to the project critical path from days, if any, assigned to CDOT; and the DRB would not give a recommendation on compensation associated with days, if any, assigned to CDOT. The DRB notes that the Parties advised the DRB that they had agreed on the scheduling methodology to be applied to the critical path analysis relating to days, if any, assigned to CDOT.

II. SUMMARY OF THE PARTIES' POSITIONS

It is not the intent of the DRB to recount in detail each and every argument advanced by the Parties. The DRB summarizes below the Parties' positions as the DRB deems them material to resolution of the Dispute presented.

A. F/A Arguments

In its REA, F/A relied on the following Contract provisions from Book 1:

- Sections 13.0, 13.1.1.1, 13.3.1, 13.3.1.1, 13.3.1.2, 13.3.2, 13.5.2.2, 13.6, and 13.7 [dealing with "Changes in the Work and Encumbrance of Funds"]
- Sections 14.0, 14.1 and 14.2 [dealing with "Suspension of Work"]
- Sections 19.0, 19.2.2 and 19.2.3 [dealing with "Partnering, Claims for Adjustment and Disputes"]

In its Position Paper on Dispute 01, F/A added the following arguments:

- Promissory Estoppel [citing case law]
- Breach of Duty of Good Faith and Fair Dealing [citing case law]

At the DRB hearing, F/A agreed that, for purposes of the DRB Report, it relied on the following contractual and legal bases, which is what the DRB will address in this Report:

- Section 13.3.1.1.2 [Additional Costs due to CDOT-Caused Delays]
- Section 14.1 [Suspension for Convenience]
- Exhibit A.2 CDOT-Caused Delays (a) [Suspension issued per Section 14.1] and (g) [improper action or improper failure to act by CDOT]
- Legal doctrine of Promissory Estoppel
- Breach of the Implied Covenant of Good Faith and Fair Dealing

Based on Book 1 Section 13.3.1.1.2 [Additional Costs due to CDOT-Caused Delays], Exhibit A.2 [Definitions] CDOT-Caused Delays (a) [Section 14.1 suspension order], and 14.1 [Suspension for Convenience], F/A argued that F/A was entitled to compensable delay because CDOT suspended for convenience F/A's design work for two time periods:

Time Period 1: F/A contended that the first suspension for convenience started on March 28, 2017, when the Segment 4/5 design option designated "Alt. 12" was confirmed to be "on hold" at a Design Task Force meeting. F/A asserted that this suspension lasted until April 26, 2017.

Time Period 2: F/A contended that another suspension for convenience started via an April 26, 2017 email from CDOT canceling a May 3 stakeholder meeting on the Segment 4/5 design option designated "Alt. 10". F/A asserted that this second suspension, covering both Segment 4/5 design options—Alt. 12 and Alt. 10—lasted until August 29, 2017, when CDOT sent a letter to F/A explaining why Alt. 10 had been disapproved.

These two "suspension" periods comprised the 155 day compensable delay that F/A sought in its REA.

F/A also argued that CDOT's conduct in regard to Alt. 12 and Alt. 10 constituted improper actions and failures to act within the meaning of Exhibit A.2 CDOT-Caused Delays (g). F/A further argued that CDOT's course of conduct relating to Alt. 12 and Alt. 10 supported application of the legal doctrine of promissory estoppel and constituted a breach of the implied contractual duty of good faith and fair dealing.

B. CDOT Arguments

The DRB addresses CDOT's position only on the arguments advanced by F/A at the DRB hearing, since F/A dropped some of the arguments it made in its REA and its initial DRB hearing position paper.

CDOT argued that F/A's request for compensable time based on the delay in completion of the Segment 4/5 design must be viewed in the context of the risk that F/A undertook under its design build contract. CDOT pointed to pre-award correspondence and certifications from F/A stating that it understood that any deviation from the I-25/C-470/E-470 Interchange Direct Connect Ramps in Segment 4/5 would be at F/A's sole risk, and that F/A would have to seek and get CDOT's approval of a change order, at CDOT's sole discretion. CDOT further argued that, because design options Alt. 12 and Alt. 10 were solely F/A's risk, any problems associated with and/or delay in getting them approved were F/A's responsibility, regardless of CDOT involvement in advancing those design options as part of F/A's design development.

CDOT then argued that, in any event, CDOT did not delay F/A's efforts to get an approved design for Segment 4/5. First, CDOT contended that there was no written suspension of F/A's work, as required by Book 1 Sections 13.3.1.1.2 and 14.1. Second, CDOT argued that there was no Exhibit A.2 CDOT-Caused Delay under sub-section (g) because it did not take any improper actions, or fail to act, in regard to the progression of Alt. 12 and Alt. 10 through the design process. As to Alt. 12, CDOT contended that it told F/A that it could proceed with that design option in parallel with Alt. 10. As to Alt. 10, CDOT asserted that, although it did not "own" any responsibility for approval of the design, it cooperated with F/A in trying to advance that design

option as a "Project First" approach, until it was disapproved through the Stakeholder engagement process.

CDOT also pointed to F/A's failure to provide a Book 1 Section 13 Potential Change Notice ("PCO Notice") regarding the Segment 4/5 design delay, arguing that a proper PCO Notice was a condition precedent to F/A being entitled to a Change Order for compensable time. CDOT further contended that it was prejudiced by lack of delay notice because it could not mitigate the delay by the time it found out that F/A had not advanced the Alt. 12 design option while Alt. 10 design was stopped.

Finally, CDOT contended that F/A's reliance on promissory estoppel was misplaced because the Contract governed the rights and responsibilities of the Parties. CDOT also asserted that it did not breach the duty of good faith and fair dealing.

C. F/A Rebuttal Arguments

F/A argued that the March 28, 2017 Design Task Force meeting minutes noting the "hold" on Alt. 12 constituted a written suspension (#1), and that the April 26, 2017 email from CDOT canceling the May 3 Alt. 10 Stakeholder meeting constituted a written suspension (#2).

F/A contended that there was no need for a PCO Notice because CDOT had acknowledged to F/A that it would be due a Change Order for time related to the delays in getting the Segment 4/5 design approved. F/A also argued that CDOT's active participation in advancing Alt. 10 belied CDOT's later position that F/A owned all delay responsibility for the Segment 4/5 design. F/A pointed to CDOT's failure to acknowledge ownership of the Segment 4/5 design delay, coupled with F/A's contention that CDOT withdrew its initial REA merit determination, as improper actions under Exhibit A.2 CDOT-Caused Delay (g) and breach of the duty of good faith and fair dealing.

D. CDOT Rebuttal Arguments

CDOT responded that F/A owned <u>all risk</u> of getting CDOT Approval of a Change Order for the Segment 4/5 design changes; that CDOT did not stop F/A's advancement of the Segment 4/5 design, at least as to Alt. 12; that if F/A was confused on whether it could advance the two design options, it could have submitted a PCO Notice and sought clarification; and that CDOT did not take any improper actions or breach the implied duty of good faith and fair dealing, because CDOT did assist F/A in advancing the Segment 4/5 design options and because CDOT's REA merit determination was appropriately caveated by contractual concerns stated in its November 30, 2017 letter.

III. Factual Chronology

Based on all of the information, documents, and oral presentations from the Parties, the DRB sets forth the factual background that it found relevant to its recommendations.

1. March 14, 2016 – As part of the Proposal process, CDOT sent a letter to F/A regarding its verification and certification of its Proposal:

> *"The Technical Proposal (Volume III, Section 2, Page 21 and 23) submitted by the Flatiron I AECOM Team includes a section titled 'Continued Optimization During Final Design'."*
>
> *"In addition, the Flatiron I AECOM Team states "Although we no longer had the time to share details of our Direct Connect Ramps Concept with CDOT during the procurement schedule, our team is confident that benefits were significant enough to recognize the costs savings in our bid price."*
>
> *"CDOT's interpretation of the aforementioned 'Continued Optimization During Final Design' section is that the Flatiron I AECOM Team understands any cost savings included in the Proposers Contract Price as a result of possible modifications to previously Approved ATC's or PAE's are at the sole risk of the Proposer."*
>
> *"Furthermore, it is understood that per the Contract requirements CDOT cannot adjust the Proposers Contract Price after Award based on disapproval of possible modifications to ATC's or PAE's that were not submitted in accordance with the ITP but included in the Flatiron I AECOM Proposal at risk."*

2. March 16, 2016 – F/A sent a letter responding to CDOT's letter regarding Proposal verification and certification:

> *"In response to CDOT's interpretation of our 'Continued Optimization During Final Design' section, the Flatiron | AECOM Team understands any cost savings included in the Proposers Contract Price as a result of possible modifications to previously approved ATCs or PAEs are at the sole risk of the Proposer. Furthermore, it is understood that CDOT cannot adjust the Proposer's Contract Price after Award based on disapproval of conceptual modifications to ATCs or PAEs that were included in the Flatiron | AECOM Technical Proposal at risk."*

and

> *"Please accept this letter as written verification and certification from the Flatiron | AECOM Team of its acknowledgment and concurrence with CDOT's interpretation of our Technical Proposal (Volume III, Section 2, Page 21 and 23) 'Continued Optimization During Final Design' and related Contract requirements, and our understanding that the Proposer's Price as submitted and certified on Form J shall not be adjusted as a result of proposed modifications to previously Approved PAE Rev. 1 or ATC 07 Rev 1."*

3. February 2, 2017 **-** F/A informally presented to CDOT an alternative to the WB E470 to WB C470 movement in Segment 4/5. F/A and CDOT began over-the-shoulder discussions with CDOT to understand and refine this new alternative concept, which would eventually become Alt. 10. During the same time period, F/A was advancing to 30% the Segment 4/5 design alternative that became Alt. 12.

4. March 20, 2017 - F/A sent a letter to CDOT formally submitting to CDOT F/A's Proposed Alternate Direct Connect Ramp Configuration (Alt. 10).

> *"During design collaboration and with the feedback F/A has received from CDOT during over the shoulder reviews, F/A has developed an alternate alignment for the direct connect ramp configuration. The proposed new alignment for the direct connect ramps improves upon our current and proposal configuration, differences that are detailed below."*
>
> *"Flatiron/AECOM appreciates the input from CDOT to make this proposal possible. The end result is one that exceeds the project goals for optimizing traffic operations, improving scope of improvements, and minimizing traffic impacts during construction. We look forward to further discussions in order to implement this project plan."*

In this submittal F/A highlighted a number of benefits to F/A, CDOT, and the Project. Specific items cited included: traffic movement options/benefits; additional toll revenue; reduction of MSE wall heights; simplified construction phasing; reduced trail impacts; and a reduction in construction duration for Segment 4/5.

5. March 28, 2017 – Design Task Force meeting minutes state: "Segment 4/5 – Preliminary…On hold…awaiting Traffic Analysis on, and approval of, Alt. 10." F/A witnesses regarding the March 23 design meeting that preceded the Design Task Force meeting asserted that Alt. 12 was put on hold because CDOT did not want its resources to have to review two design alternatives (Alt. 12 and Alt. 10) simultaneously. CDOT witnesses disagreed with this, stating that F/A had the ability to seek approval for simultaneous design reviews (citing to Book 2 Section 2.1.3.4.3); that CDOT did not tell F/A to stop Alt. 12 design progress; and that the Design Task Force meeting minutes merely reflected the prioritization of design reviews based on F/A's requests at the March 23 meeting.

6. April 18, 2017 – CDOT sent a letter to F/A regarding F/A's Proposed Alternate Direct Connect Ramp Configuration (Alt. 10):

"The intent of this letter is to document the development status of the alternate I-25/C&E470 interchange design concept and provide your team with CDOT's position regarding the concept and path forward."

"During this time period, it is the understanding of CDOT that F/A continued to progress the initial design concept in parallel with the alternate concepts to mitigate potential schedule impacts if the alternative concepts were not Approved by CDOT."

"To facilitate discussions and decision making timelines regarding the proposed concept, CDOT is requesting the F/A Team provide the date when a formal "go/no-go" decision is required to maintain the current schedule milestones. CDOT understands the decision regarding whether to continue to progress the initial design concept in parallel with the alternate concepts is F|A's decision and risk."

"We look forward to continued collaboration with your team in working towards what we hope is an eventual Approval of this innovation in the most critical area of the project."

7. April 26, 2017 – CDOT sent an email from CDOT to F/A regarding cancelation of the May 3, 2017 Stakeholder meeting:

"Per legal guidance, HPTE is requesting this meeting be canceled to enable the financing process to close cleanly. I regret any inconvenience this causes and appreciate how some of you moved other meetings to help support C-470 by attending this quick fused meeting."

8. May 3, 2017 – The Stakeholder meeting on Alt. 10, scheduled for May 3, 2017, was cancelled by CDOT on April 26, 2017 per HPTE's request.

9. May 5, 2017 – CDOT sent an email to F/A regarding ceasing design activities within the Segment 4/5 Interchange Area:

"All C-470 construction (and most all design) activities must charge forward unabated to meet our aggressive schedule. However, we've received clear direction from the HPTE to cease all design activity in the vicinity of the Direct Connection (DC) ramps or westbound C-470 between I-25 and Quebec. The intent of this message is to offer clear direction that our team will not be engaging in any discussions with F/A regarding the design or any other type of evaluation of the aforementioned section of C-470 until we receive further direction from the HPTE or CDOT executive management."

"Essentially halting all design activities within the area the T&R team refers to as the 'crucible' of the entire 12.5 mile corridor until further notice comes with inherent risk."

[The email goes on to lay out a financial risk analysis, concluding that the potential financial risk of losing the TIFIA loan outweighed the *"aforementioned risks on the design-build side."*]

"Moving forward towards transparency, we will be talking openly about all relevant risks at our next Project First meeting without any intent of DC advancement seeking guidance from all available resources on our best path forward."

10. May 8, 2017 – CDOT sent a request to F/A to submit a Revised Baseline Schedule. Both Parties agreed at the DRB hearing that schedule issues were being discussed in this time period, with a particular focus on Segment 3 phasing.

11. May 12, 2017 – The Parties held a DRB/Project First meeting. The DRB meeting summary (accepted by both CDOT and F/A at the time) reflected the following:

"I-25/C&E470 Interchange Design: CDOT cannot engage in any discussions or reviews of the current proposed concept. CDOT informed F/A that they can proceed with the previously submitted design, which more closely aligns with the basic configuration and ATCs, and that the risk is F-A's if they decide to pursue anything else. F/A has not provided the previously requested date when a formal "go/no-go" decision is required to maintain the current schedule milestones."

At the DRB hearing, the Parties disagreed whether this accurately summarized the net result of both the DRB meeting and the Project First meeting. CDOT contended at the hearing that the summary it was accurate, and that this constituted approval for F/A to progress the Alt. 12 design. F/A contended at the hearing that at the Project First meeting it was not made clear on what F/A could do/could not do on Segment 4/5 design during the "quiet period". F/A contended that, notwithstanding the May 12 discussions, it relied on the May 5 email and therefore stopped <u>all</u> Segment 4/5 design, including both Alt. 12 and Alt. 10.

12. June 2, 2017 – F/A submitted a Revised Baseline Schedule for CDOT Approval, dated May 30, 2017. Among other things the F/A Narrative (Revision 0) stated at page 3: "The schedule reflects current project status for design and construction." It also stated at page 4: "Segment 4 and 5 Design and Construction – Through collaboration with CDOT, Segment 4 and 5 Design is changing from what was presented in the Original Baseline Schedule….The start and completion dates will vary depending upon the scope of the final design and when the design commences and completes."

Although at the hearing the Parties disagreed on details, both Parties were aware that the Revised Baseline Schedule showed Segment 4/5 design on the critical path of the Project starting late April/early May 2017. From the information provided to the DRB, it appears that neither Party in this time period raised any issues with progressing--or not progressing--Alt. 12 design beyond 30%.

13. July 10, 2017 – CDOT verbally notified F/A that the TIFIA financing had closed and the "quiet period" was over.

14. July 12, 2017 – CDOT sent review comments on RBS Rev. 0. Among them were the following:

> *"CDOT plans to request another [RBS] upon resolution of the plan for segments 4 and 5. Please refer to CDOT's April 18, 2017 letter requesting a formal "go-no-go" decision date and meeting minutes for the May 12, 2017 Executive Project First/DRB Meeting for further information….Please review the RBS for comments contained herein with the understanding that the timelines and plan for the incorporation of the Segment 4 and 5 will be reviewed for Approval in a future RBS. Any potential associated contract revisions will be reviewed at that time*."

15. July 17, 2017 - F/A sent a letter to CDOT, responding to CDOT's letter of April 18, 2017 regarding the Alt. 10 design option:

> *"F/A did progress this Alt 12 East design to approximately the 30% level concurrent with the design innovation. But this design could not progress any further with the design suspension because there could be no discussions, over-the-shoulder reviews, task force meetings or design reviews. Going forward, F/A does not plan to progress this design further."*

CDOT did not respond to this letter. At the DRB hearing, CDOT stated that F/A could have submitted Alt. 12 during the "quiet period" and that CDOT would have reviewed it, but as noted earlier, except for the May 12 DRB meeting summary (which was contested), the DRB was not

provided any information that either Party communicated anything further on progressing—or not progressing--Alt. 12.

16. July 28, 2017 - F/A hosted a Stakeholder meeting at which F/ A presented the Alt. 10 concept to a number of external Project Stakeholders. After this meeting, the Project Stakeholders requested a follow-up meeting with CDOT to further express concerns and issues with Alt. 10. The Parties presented different interpretations of "who coached whom" for the July 28 presentation. Despite this debate, the DRB finds that the Parties, together, presented all perceived benefits to the travelling public, to CDOT, and to F/A.

17. August 10, 2017 - CDOT hosted an internal Stakeholder meeting to review Alt. 10. Immediately following this meeting, CDOT verbally notified F/A that CDOT would not approve Alt. 10.

18. August 11, 2017 - CDOT sent a letter to F/A confirming its disapproval of Alt. 10:

> *"Final evaluation of the proposed alternate direct connect ramp configuration, including extensive discussions of the benefits and concerns identified in the July 28, 2017 meeting, was completed with the CDOT project team and project stakeholders on August 10, 2017. The result of this evaluation is that the alternate configuration is not equal to or better than the basic configuration or the previous F/A design commonly referred to as "Alt. 12". Therefore, it is the decision of CDOT that the Alternate Direct Connect Ramp Configuration commonly referred to as "Alt. 10" will not be Approved by CDOT."*

19. August 17, 2017 – F/A sent a letter to CDOT requesting further details on why CDOT did not approve Alt. 10.

20. August 29, 2017 – CDOT sent a letter to F/A explaining the reasons for Alt. 10 disapproval. At the DRB hearing, F/A contended that the reasons CDOT cited for disapproval originally were seen as "benefits" to Alt. 10, but the DRB concludes that that does not matter as F/A conceded at the hearing that CDOT had the right under the Contract to disapprove Alt. 10.

21. September 5, 2017 – At a Roadway Design Task Force Meeting F/A informed CDOT that AECOM had been given notice to proceed on Alt. 12. Ultimately, Alt. 12 was submitted to and approved by CDOT as the final design for Segment 4/5.

IV. Applicable Contract Sections

The DRB finds the following sections of the Contract and Exhibits to be relevant to the outcome of this dispute, based on the arguments advanced by F/A at the DRB hearing. The DRB includes excerpts only of the applicable sections and subsections of Book 1 and Exhibits—unquoted sections are designated as follows: "…."

13.3 Procedure for Contractor Requested Change Orders

13.3.1 Eligible Changes

The Contractor's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 13.

13.3.1.1 Contract Price Increase

The Contractor may request a Change Order to increase the Contract Price, subject to certain limitations with respect to delay and disruption damages as specified in Section 13.5.2, only for increased costs in the Work as follows: ….2. Additional costs directly attributable to CDOT-Caused Delays.

13.3.1.2 Time Extension

The Contractor may request a Change Order to extend a Completion Deadline only for the following delays in the Critical Path: 1. CDOT-Caused Delays….

13.3.2 Conditions Precedent

The requirements set forth in this Section 13.3.2 constitute conditions precedent to the Contractor's entitlement to request and receive a Change Order in all circumstances except those involving a request for a price increase under Section 11.1.3. The Contractor agrees that the filing of PCO Notices and subsequent filing of requests for Change Orders with CDOT pursuant to this Section 13.3.2 are necessary in order to begin the administrative process for Contractor-requested Change Orders. The Contractor understands that it shall be forever barred from recovering against CDOT under this Section 13 if it fails to give notice of any act, or failure to act, by CDOT or any of its representatives or the happening of any event, thing or occurrence pursuant to a proper PCO Notice, and thereafter complies with the remaining requirements of this Section 13.3.

13.3.2.1 Delivery of Potential Change Order (PCO) Notice

The Contractor shall deliver to CDOT written notice ("PCO Notice") stating that an event or situation has occurred within the scope of Section 13.3.1.1 and/or 13.3.1.2 and shall state which subsection thereof is applicable.

1.9 Standard for Approvals

In all cases where approvals, acceptances or consents are required to be provided by CDOT or the Contractor hereunder, such approvals, acceptances or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified, and shall not be unreasonably delayed if no response time is specified. In cases where sole discretion is specified, the decision shall not be subject to dispute resolution hereunder.

Book 1 Exhibit A--A.2 DEFINITIONS

CDOT-Caused Delays

Unavoidable delays, to the extent that they affect the Critical Path, arising from the following matters and no others: (a) A suspension order pursuant to Book 1, Section 14.1; …. (g) Any improper action by CDOT as representative with binding authority or improper failure to act by CDOT within a reasonable time after delivery of notice by the Contractor to CDOT requesting such action…

CDOT

The Project Director for the Project, acting directly or through a representative authorized in writing, who is responsible for administrative supervision of the Project; or the State of Colorado for the use and benefit of the Department of Transportation, whichever the context requires.

14.0 SUSPENSION OF WORK

14.1 Suspension for Convenience

CDOT may, at any time and for any reason, by written notice, order the Contractor to suspend all or any part of the Work required under the Contract Documents for the period of time that CDOT deems appropriate for the convenience of CDOT. The Contractor shall promptly comply with any such written suspension order. The Contractor shall promptly recommence the Work upon receipt of written notice from CDOT directing the Contractor to resume Work. Suspensions related to seasonal or climatic conditions, or Force Majeure events shall not be considered a CDOT-Caused Delay.

24.9 Notices and Communications

24.9.1 Delivery of Notices

Notices under the Contract Documents shall be in writing and: (i) delivered personally; (ii) sent by certified mail, return receipt requested; (iii) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (iv) sent by facsimile communication followed by a hard copy or with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person) [persons identified]….

2.1.3 Performance as Directed

At all times during the term hereof, including during the course of and notwithstanding the existence of any dispute, the Contractor shall perform as directed by CDOT in a diligent manner and without delay, shall abide by CDOT's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Section 19.

19.0 PARTNERING, CLAIMS FOR ADJUSTMENT AND DISPUTES

19.1 Partnering

CDOT intends to encourage the use of an extensive partnering program among CDOT, the Contractor, its Subcontractors and other stakeholders, where appropriate. Contractor shall follow partnering process as set forth in Book 2, Section 20. It is the intent of the parties that the dispute resolution provisions contained in this Section shall apply only in the event that the normal CDOT-Contractor issue resolution efforts through partnering are not successful. The dispute resolution provisions set forth in Section 19.2 shall apply to all Disputes arising out of the Work that are not resolved by the parties through the partnering process, except as expressly provided to the contrary in the Contract Documents.

19.2 Dispute Resolution; General Provisions

19.2.1 Mandatory Nature of Process

All Disputes between the Contractor and CDOT that have not been resolved by the parties through the partnering process shall be resolved as provided by this Section. There shall be a Standing Disputes Review Board for this Project.

19.2.2 Disputes; Disputes Governed by this Section; Priorities; Disputes Involving Utility Owners

Disputes include, but are not limited to:

1. Any disagreement resulting from a change, delay, change order, another written order, or an oral order from the Project Director or his designee, including any direction, instruction, interpretation, or determination by the Project Director or his designee concerning extra work, increased costs, delay, or any other issue including, but not limited to, an assertion by the Contractor seeking, as a legal right, the payment of money, adjustment or interpretation of Contract terms, or other relief, arising under or relating to this Contract.

2. Any unsatisfied request for additional compensation or time based on: (a) Work or materials not clearly defined in the Contract; (b) extra work not ordered by CDOT; (c) extensions of time made pursuant to subsection 13; or (d) any other cause.

V. Analysis and Conclusions

At the outset, the DRB notes that CDOT requested the DRB to follow the strict terms of the Contract in reviewing the merits of F/A's claims. Conversely, F/A argued that the DRB should apply the Contract in light of the Parties' conduct as it related to the Segment 4/5 design issues and the "Project First" approach.

As explained further below, the DRB concludes that neither Party strictly followed the terms of the Contract. In making its recommendations on responsibility for the delays at issue, the DRB has relied on the terms of the Contract as applied to the actual conduct of the Parties. By doing

so, the DRB is not finding fault with the Parties--the DRB recognizes that their efforts to take a "Project First" approach to managing the project likely contributed to both Parties not strictly following the terms of the Contract, but both Parties should acknowledge that context when reviewing the DRB's recommendations.

1. Under its design build Contract F/A assumed all design responsibility. Included in this responsibility was to seek a CDOT-approved Change Order if F/A wanted to deviate from the Approved ATCs/PAEs for Segment 4/5. This was explicitly acknowledged and certified by F/A in the pre-award correspondence between CDOT and F/A, cited above.

In proceeding with the Segment 4/5 design alternatives--eventually designated as Alt. 12 and Alt. 10--F/A at all relevant times had the responsibility to seek and obtain CDOT and other approvals of the revised designs, regardless of whether CDOT assisted F/A in advancing those design options.

F/A's acknowledged design responsibility, however, did not mean that it gave up its right to claim for CDOT-Caused Delays, as defined in the Contract.

2. In their papers and at the DRB hearing the Parties argued that Alt. 10 advantaged one Party versus the other, but the DRB concludes that both Parties recognized advantages from that design alternative. Each Party, for its own reasons, supported advancing Alt. 10 as the preferred design alternative for Segment 4/5. Although F/A continued to own ultimate design responsibility, CDOT by its statements and actions actively participated in the process of advancing Alt. 10.

3. Turning to the sequence of events cited by the Parties, the DRB disagrees with F/A's argument that the Design Task Force discussions and meeting minutes regarding the "hold" on Alt. 12 constituted a Section 14.1 Suspension for Convenience. Section 14.1 requires a written notice of suspension of work by CDOT, and Section 24.9.1 sets out the requirements for written notice. CDOT made no written notice of suspension, and the meeting minutes do not satisfy that requirement. It may have been appropriate at the time for F/A to hold up on Alt. 12 design efforts while Alt. 10 was being advanced, but that was F/A's choice and it was not directed by CDOT to do so.

4. However, the situation changed materially with CDOT's email of April 26, regarding direction from HPTE to cancel the Alt. 10 Stakeholders meeting scheduled for May 3. This direction, coupled with CDOT's May 5 email, made clear CDOT's direction that all design activities on Segment 4/5 should stop—the May 5 email stated (emphasis supplied):

> "[W]e've received clear direction from the HPTE to <u>cease all design activity in the vicinity of the Direct Connection (DC) ramps or westbound C-470 between I-25 and Quebec</u>. The intent of this message is to offer <u>clear direction</u> that our team will not be engaging in a discussions with F/A regarding design or any other type of evaluation of

the aforementioned section of C-470 until we receive further direction from the HPTE or CDOT executive management.

Essentially halting all design activities within the area the T&R team refers to as the 'crucible' of the entire 12.5 mile corridor until further notice comes with inherent risk."

The email goes on to lay out a financial risk analysis, concluding that the potential financial risk of losing the TIFIA loan outweighed the "aforementioned risks on the design-build side."

This risk assessment shows that CDOT was aware of the risks to the Project schedule from stopping the Segment 4/5 design, but affirmatively chose to stop it.

The email concluded:

"Moving forward towards transparency, we will be talking openly about all relevant risks at our next Project First meeting without any intent of DC advancement seeking guidance from all available resources on our best path forward."

5. The DRB concludes that CDOT by its April 26 and May 5 emails directed F/A to stop advancement of all Segment 4/5 design, including both Alt. 12 and Alt. 10. Although those emails were not a written notice of suspension under Section 14.1, they did constitute CDOT direction to F/A under Section 2.1.3 Performance as Directed and the Definition of CDOT under Exhibit A.2 (CDOT acting through the Project Director).

Section 2.1.3 does not specify the manner by which CDOT direction must be given. The DRB finds that that direction was given by the April 26 and May 5 emails from the CDOT Project Director, which F/A was obligated to follow.

Section 2.1.3 also provides that any dispute regarding such direction or performance shall be resolved by Section 19.

Section 19 in turn provides (emphasis supplied):

All Disputes between the Contractor and CDOT that have not been resolved by the parties through the partnering process shall be resolved as provided by this Section.

….

Disputes include, but are not limited to:

1. Any disagreement resulting from a change, delay, change order, another written order, or an oral order from the Project Director or his designee, including any direction, instruction, interpretation, or determination by the Project Director or his designee concerning extra work, increased costs, delay, or any other issue including, but not limited to, an assertion by the Contractor seeking, as a legal right, the payment of money, adjustment or interpretation of Contract terms, or other relief, arising under or relating to this Contract.

2. Any unsatisfied request for additional compensation or time based on: (a) Work or materials not clearly defined in the Contract; (b) extra work not ordered by CDOT; (c) extensions of time made pursuant to subsection 13; or (d) any other cause.

The DRB concludes that the combination of Section 2.1.3 and the specific cross-reference to Section 19, gives F/A the right to bring to the DRB the issue of whether CDOT's direction gives F/A the right to additional compensation or time.

6. The DRB believes that under the circumstances CDOT on April 26, 2017 should have issued a Section 14.1 written suspension of work. Had CDOT followed the Contract in this manner, it would have made its intent clear and F/A could have responded back in April 2017. Having elected to direct F/A as permitted under Section 2.1.3, CDOT cannot now disown its direction or contend that any confusion on CDOT's intent should be resolved against F/A when CDOT chose the method and content of communication (emails) and at the time acknowledged the risk to the Project in its cost/benefit analysis.

7. CDOT argued that the DRB meeting summary from May 12 showed that CDOT did not actually stop Alt. 12 design work. CDOT asserted at the DRB hearing that F/A could have submitted and received CDOT feedback on the Alt. 12 design during the "quiet period". At the hearing, although F/A acknowledged that its Project Manager had approved the DRB meeting summary, F/A executives told the DRB that, based on the follow-on Project First meeting, there was neither clear direction given nor a common understanding on what design could be advanced on Segment 4/5. F/A's account of the Project First meeting (which the DRB was not at) appears to be consistent with CDOT's May 5 email where it is stated: "…we will be talking openly about all relevant risks at our next Project First meeting without any intent of DC advancement seeking guidance from all available resources on our best path forward." (emphasis supplied)

The DRB here gives F/A the benefit of the doubt on the scope of CDOT's direction. CDOT issued emails with direction to F/A on Segment 4/5 design specifically, recognizing the "design-build risks" inherent in the direction given to F/A. CDOT did not at any time change or withdraw the May 5 email, so F/A reasonably relied on it in sticking with Alt. 10 as the preferred design alternative and not advancing the Alt. 12 design at that time.

8. CDOT also pointed to its request for a "go/no go" date from F/A regarding the Segment 4/5 design. As noted in the Alt. 10 emails CDOT sent to F/A and Stakeholders, and the RBS back and forth, CDOT was well aware of the critical path implications of the Segment 4/5 design process. The DRB accepts F/A's argument (as reflected in the RBS Narrative and the RBS comments from CDOT) that until the Alt. 10 Approval process had run its course, the exact impact on the schedule could not be assessed. The DRB notes in this regard that 8 days after CDOT's April 18 request for a go/no go date, CDOT cancelled the Stakeholder meeting that would have led to an Alt. 10 Approval decision that would have permitted F/A to assess the schedule impact. The

open-ended nature of the "quiet period" imposed by CDOT also made it difficult for F/A to do a schedule impact analysis.

9. The DRB concludes that CDOT's direction to stop the Segment 4/5 design process falls under the definition of CDOT-Caused Delay (g): "improper failure to act by CDOT within a reasonable time after delivery of notice by the Contractor to CDOT requesting such action". The DRB also relies on Section 1.9 Standard for Approvals, which provides, in pertinent part: "In all cases where approvals, acceptances or consents are required to be provided by CDOT…hereunder, such approvals, acceptances or consents …shall not be unreasonably delayed if no response time is specified."

F/A by its March 20, 2017 letter initiated the process for CDOT Approval of Alt. 10. At the time both F/A and CDOT recognized the urgency of getting that Approval (or not) so as to avoid impact to the Project schedule for Segment 4/5. This was reinforced by CDOT's April 18, 2017 letter noting the need for speed, the start of preparatory Stakeholder communications in April, and the scheduling of the Stakeholder meeting for May 3. This process ground to a halt with CDOT's April 26 cancellation email. The Approval process did not resume until after the "quiet period" was lifted on July 10. Since, as CDOT pointed out to F/A, Alt. 10 was conditioned upon Stakeholder approval, the process was completely dependent on getting the Stakeholder session(s) done. Therefore, the lifting of the quiet period on July 10 did not immediately advance the Alt. 10 Approval process, since the Stakeholder process had to gear up again where it had left off in late April.

10. Based on the information and documents presented to the DRB, at the time the "quiet period" ended, both Parties were assuming that Alt. 10 was the path forward. This is evidenced by the fact that right after the "quiet period" ended, F/A by its letter of July 17 resumed the communications on Alt. 10, left off after CDOT sent its April 18 letter. The Parties thereafter scheduled and jointly participated in the Stakeholder meeting that CDOT had cancelled in April. Although at the DRB hearing CDOT contended that it had "no choice" but to proceed with Alt. 10, the DRB believes that at the time CDOT agreed with F/A that Alt. 10 should be advanced as the preferred alternative. This is reinforced by CDOT's strong advocacy for Alt. 10 at the July 28 Stakeholder meeting.

The DRB believes that, had CDOT not cancelled the May 3 Stakeholder meeting, it is likely, based on what happened at the August 10 Stakeholder meeting, that Alt. 10 would have been disapproved at some point in May 2017. If that had happened, the Segment 4/5 design issue would not have drifted to August—the only reason that that happened was CDOT's direction F/A to stop Segment 4/5 design work and its cancellation of the Stakeholder engagement process then under way. Based on these facts, the DRB concludes that CDOT's actions fall within the meaning of CDOT-Caused Delay (g)—but for CDOT's direction to stop the Segment 4/5 Approval process, there would not have been the design delay the Project experienced.

11. Once the Alt. 10 Approval process had run its course to the August 11 Alt. 10 written disapproval, F/A was aware that it had to proceed with a different design.

The DRB disagrees with F/A that its seeking clarification of CDOT's Alt. 10 disapproval should extend the compensable delay period. By August 11, 2017, any confusion or doubt about CDOT's Approval (or lack thereof) on Segment 4/5 design was cleared up: Alt. 10 was disapproved, and the only extant design was Alt. 12. This is reinforced by the fact that after the August 17 and 29, 2017 correspondence exchange about Alt. 10, F/A and CDOT proceeded to advance Alt. 12 to construction drawings, starting September 5, 2017.

12. CDOT at the DRB Hearing argued that F/A did not properly send a PCO Notice per Section 13.3.2, etc., regarding the Segment 4/5 design delays. F/A argued that a PCO Notice was not needed because the Parties had agreed that a Change Order would be in order for what was then assumed to be either the Alt. 12 or Alt. 10 design for Segment 4/5 (for example, CDOT's July 12 RBS Rev 0 comments referred to a future RBS Approval and contract revisions "for the timelines and plans for the incorporation of the Segment 4 and 5").

In its REA response of November 30, 2017, at pp. 18 and 19 of 24, CDOT references the prejudice standard of Section 13.3.2.3. As the DRB noted above, both Parties were aware of the critical nature of the Segment 4/5 design and both Parties fully participated, with that knowledge, in the sequence of events, directions, and actions that led up to the August 10 disapproval of Alt. 10. The DRB concludes that, to the extent Section 13.3.2 applied under the circumstances of (a) the Parties at various junctures communicating regarding a Change Order for the Segment 4/5 design, (b) reference to approval of an updated RBS for Segment 4/5, and (c) agreement on a dispute resolution process that included submission of F/A's REA per Section 105.22(b) and Project First negotiations thereon, CDOT was not prejudiced within the terms of Sections 13.3.2.1.1 and 13.3.2.3.

13. The DRB disagrees with F/A's arguments that Restatement of Contracts (Second) Promissory Estoppel applies here. The DRB was not presented with evidence of a promise not already governed by the terms of the Contract that the Parties agreed to.

14. Likewise, the DRB disagrees with F/A's argument that CDOT breached its duty of good faith and fair dealing. Although with 20/20 hindsight, both Parties could have acted with clearer intent and stricter conformance with the terms of the Contract, the DRB concludes that CDOT did not breach the implied duty of good faith and fair dealing.

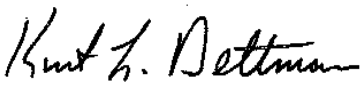
VI. Recommendations

The members of the DRB unanimously recommend that CDOT and F/A should agree on the disputed days as follows:

1. March 28, 2017 to April 25, 2017—no merit.

2. April 26, 2017 to August 10, 2017—merit.

3. August 11, 2017 to August 29, 2017—no merit.



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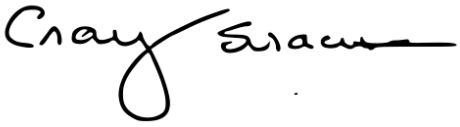

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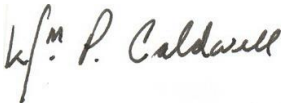

William Caldwell

Dated: April 9, 2018