

DISPUTE REVIEW BOARD OPINIONS

January 19, 2015

I-225 Parker to Mississippi Reconstruction

CDOT Project No. IM2254-076 (17083)

Dispute No. 2 CE Barrier Sign Transition

Dispute No. 3 Working Day Time Count Determination

Dispute No. 4 Muck Excavation

Meeting Date: January 14, 2015

Hearing Location: CDOT Field Office
1278 South Abilene Street
Aurora, CO

Parties: SEMA Construction, Inc. (SEMA)
Colorado Department of Transportation (CDOT)

BACKGROUND:

These disputes arise out of a project to widen and reconstruct I-225 between Parker and Mississippi. The project included new bridges over I-225 and a bridge constructed for the RTD light rail extension. The overall project was a working day contract but the RTD work had calendar date milestones.

Dispute No. 2:

JOINT STATEMENT OF DISPUTE AND SCOPE OF DESIRED DECISION:

Dispute #2 is a disagreement between CDOT and SEMA regarding the method of measurement and payment for 'Type 7 CE Barrier Transitions' at overhead sign structure foundations in the I-225 median.

CDOT is requesting the DRB determine Dispute #2 has "no merit" by confirming the contract documents are clear that the 'Type CE Barrier Transitions' shall be

measured and paid for as linear foot of item 606-00745 Guardrail Type 7 (Style CE) (Concrete Glare Screen).

SEMA is requesting the DRB determine Dispute #2 has “merit” by confirming the method of measurement and payment for the ‘Type CE Barrier Transitions’ is not clearly defined in the contract documents. SEMA is requesting an equitable adjustment in the amount of \$105,663.40 and a contract time extension of 30 working days.

OBSERVATIONS:

1. This dispute is entirely as to the method of payment for guardrail that is installed at sign pole locations that are within the median barrier. Both parties agree that this work was always shown as required on the drawings. And, in fact, there was a fifth sign pole shown that was removed and; hence, the barrier transition was not an issue.
2. Sheet No. 566 contains Note 9, which states, *“The pay line for barrier on both sides of an obstruction will be determined by one linear measurement along the guardrail center line.”*
3. On Sheet 288 the fourth note on the page states, *“Flared type 7 guardrail at widened sections (overhead signs, light poles, candelers) shall follow M-606-1 and paid as linear foot of guardrail.”*
4. SEMA and its subcontractor, Castle Rock Construction Company, rely on the fourth statement on Sheet 288 that states, *“All median barrier on I-225 shall be slip form”* as meaning that any barrier that could not be slip form would be not paid as barrier at the barrier unit price. They acknowledge that there is nonstandard barrier that is not slip form that is paid at the barrier rate at light pole transitions that is not an issue in this case.

5. Sheet 14 of 20 of M-606-1, Standard Plan. The Guardrail Standard Plan has a note on the right side next to a light pole concrete barrier which states, “*Guard Rail Type 7 Pay Length*” for the length of the concrete barrier section.

OPINION:

The barrier transitions at the sign structures were always required by the contract documents and are clearly shown within contract documents. There is no merit for the claim by SEMA.

Dispute #3

JOINT STATEMENT OF DISPUTE AND SCOPE OF DESIRED DECISION:

Dispute #3 is a disagreement between CDOT and SEMA regarding interpretation of the contract specifications for assessment of contract time on working day contract. SEMA and CDOT disagree on the requirements for determining chargeable working days. The specific specifications under dispute are standard specification subsections 101.93 and 108.08(a).

CDOT is requesting the DRB determine the dispute has “no merit” by confirming contract time for the project has been assessed in accordance with the requirements for a working day contract and per standard CDOT procedures.

SEMA is requesting the DRB determine the dispute has “merit” by providing a recommendation that confirms SEMA’s interpretation of the contract specifications regarding assessment of working days.

OBSERVATIONS:

1. This dispute is entirely related as to the specific interpretation of working day charges pursuant to 101.93 and 108.08(a). SEMA presented the definitions from the contract documents and examples of how they used to be applied from the CDOT Construction Manual.
2. CDOT presented substantial evidence on how the contract has been administered to date. That information may be relevant to how the working day account was actually applied but was not deemed by the DRB to be relevant to the issue of the specific meaning of the standard specification sections at issue. CDOT asserted that the working day count on this contract was consistent with its application of other contracts. While this assertion was made, there was nothing submitted to the Board to substantiate nor in the Board's view does CDOT's application of the specification on other contracts change the meaning of the contract.

OPINION:

The applicable contract provisions from the standard specification are 108.08 (a).1 and 101.93 Working Day, which defines the definition of a working day. 101.93 Working Day states as follows:

Any day, exclusive of Saturdays, Sundays and holidays, on which weather and other conditions not under the control of the Contractor will permit construction operations to proceed with the normal working force engaged in performing those items controlling the completion of the work.

By the express wording of the definition in 101.93 of Working Day is any day except Saturday, Sunday or a holiday, which permits construction operations to proceed with normal working force engaged in performing those items controlling the completion of

the work. By definition, any day in which conditions that are not under the contractor's control do not permit construction operations on the then controlling work item is not a working day. A key factor in determining a working day is the controlling work activity.

In reading 108.08 (a).1 it states in part,

One whole day of contract time will be assessed for each working day on which the work can be effectively prosecuted during 6 hours or more each day.

When reading 108.08(a).1, the term "Working Day" must be read using the definition of Working Day from 101.93, which is a day in which controlling work items can be performed with a normal workforce. For the purpose of determining the controlling item for any given day, the controlling work item(s) will be those items shown on the then current schedule as critical or controlling. If controlling work can be performed on a day, even if it is not performed, it is a working day. Even though work that is not controlling may be performed, if controlling work cannot be performed, a day is not a work day.

Dispute #4

JOINT STATEMENT OF DISPUTE AND SCOPE OF DESIRED DECISION:

Dispute #4 is a disagreement between CDOT and SEMA regarding the classification of delay and determination of additional monetary compensation and contract time related to muck excavation. The specific operation in question occurred from September 30, 2013 through October 3, 2013 on NB I-225 from approximate stations 1230+00-1239+00.

CDOT is requesting the DRB determine the dispute has "no merit" by confirming associated delays were 'Nonexcusable' for which no monetary compensation or contract time extension will be granted.

SEMA is requesting the DRB determine the dispute has “merit” by confirming the associated delays were ‘Excusable/Compensable’ for which monetary compensation and additional contract time is warranted. SEMA is requesting an equitable adjustment of approximately \$54,500 and a contract time extension of 4 working days.

OBSERVATIONS:

1. The initial contract contained a bid item for muck excavation. Muck excavation was encountered on this project and the quantity of muck excavation actually performed was four times the amount contained in the contract. The muck excavation bid item was not a major item of work as that term is defined.
2. Under Section 108.08 the following definitions are contained:
 - a. *“Excusable delay: A delay that was beyond the contractor’s control and not caused by the contractor’s fault or negligence and for which a contract time extension may be granted” and “Compensable Delay: an excusable delay caused by the department for which the contractor may be entitled to additional monetary compensation.”*
3. The finding of muck was beyond the contractor’s control but it was not caused by the department although the department is responsible for paying for that added cost and has paid for it.

OPINION:

Muck excavation is a pay item for which the contractor receives payment based on the actual quantity of work performed. There is no dispute among the parties that the quantity of muck excavation work at issue has been performed and has been paid for at the contractual price. The only dispute is as to the time duration required to perform the

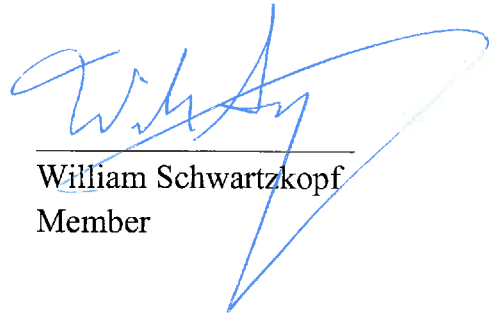
work and whether a time extension is due. Based upon the schedule that was current at the time this work was performed and the evidence presented, there was a 4-day extension to the completion date of the work as a result of the muck excavation. SEMA is entitled to a 4-day time extension which is excusable but not compensable.



Nick Pijoan
Member



Tom Pawlish
Chairman



William Schwartzkopf
Member