**DISPUTE REVIEW BOARD REPORT AND RECOMMENDATIONS**

**Project: I-25 Ilex Design Build - Pueblo, CO**

**CDOT PROJECT NO. FBR 025A-019**

**DISPUTE No. 1 – Entitlement for Disruption, Resequencing and Acceleration Cost Impacts Related to the CDOT Caused Delay Involving the Iron Phoenix Bridge**

**Hearing Date:** August 28, 2019

**Hearing Location:** CDOT Region 2 Headquarters - 5615 Wills Blvd., Pueblo, CO

**Party Attendees: Flatiron Constructors, Inc.** Eric Taylor - Senior Vice President

Luke Peterson - Project Manager

 Chris Mari - Project Manager

 Chad Danielson - Construction Manager

 Kyle Bogdan - In-house counsel

 Jerry Brodsky - Attorney

 James Melvin – Consultant C2G International

 **CDOT**

 Joe DeHeart - Resident Engineer Jennifer Billings - Project Engineer/Project Manager

 Ajin Hu - Program Engineer

 Scott Dalton - Project Engineer/Ops Manager

 Steve Spera - Project Manager

 Leo F. Milan, Jr. - Senior Assistant Attorney General

 Patrick Holinda – Colorado Bridge Enterprise

 Bryan Payne - Consultant ARCADIS

**Background**

On February 6, 2015, Flatiron Constructors, Inc. (Flatiron) (Contractor) and the Colorado Department of Transportation (CDOT) signed a Contract for $ 68,041,400.00 for the design and construction of approximately one mile of I-25 between City Center Drive and Santa Fe Drive in Pueblo, CO. Major scopes of work for the Project included the replacement of two existing viaduct sections with four new bridges, traditional and mechanically stabilized embankments (“MSE”) to widen travel lanes and shoulders and provide new auxiliary acceleration and deceleration lanes for D-Street and 1st Street ramp merge movements, upgraded concrete and steel traffic barriers, improved signage and pavement markings, new traffic signals, lighting, and intelligent traffic system devices, noise walls, and improved corridor aesthetics including landscaping and painted concrete. In addition, work on several bridge locations south of the Project’s main alignment improvements was included to address CDOT’s critical safety and other maintenance concerns. These bridge locations were at Northern Avenue, Mesa Avenue, Indiana Avenue and Santa Fe Avenue (US 50) over the Arkansas River.

Design began shortly after Flatiron received Notice to Proceed (“NTP”) 1 from CDOT on February 10, 2015. Flatiron began construction of the Project on May 22, 2015 after receiving NTP 2 from CDOT. The Contract identified two completion milestones: Project Completion on or before August 31, 2017 and Project Final Acceptance on or before December 1, 2017.

Flatiron’s Alternative Technical Concept (“ATC”) 8 Rev.1 for the Phelps Creek Trail Structure on the Project, approved by CDOT during the BAFO process, consisted of a 30' wide precast Conspan BEBO E-series structure to span I-25 over the Phelps Creek Trail. By approving ATC 8 Rev. 1, CDOT became contractually obligated to procure the required ROW from UPRR for the Conspan, retaining walls, and associated embankments. Pursuant to the accepted Original Initial Schedule, CDOT was provided one calendar year from NTP 1, i.e. by February 10, 2016, to acquire the ROW from UPRR. During design development, on or about December 15, 2015, the Project team learned that UPRR would not relinquish its existing ROW to CDOT. As a result of the unavailability of the ROW from the UPRR, the planned Conspan was replaced, at the direction of CDOT, by a far more complex and expensive two-span bridge.

**Joint Statement of the Dispute** **and Scope of Desired Decision**

The following was presented to the Dispute Review Board (DRB) in November 2018 when the project team began the process to seek a DRB advisory opinion related to this matter:

CDOT's attempts to acquire Right-Of-Way from the Union Pacific Railroad (UPRR), which Flatiron's proposal relied on, were unsuccessful and caused the planned culvert structure to be redesigned to a bridge that spanned the railroad's right-of-way and the Thomas Phelps Creek trail. The bridge redesign and construction impacts have been acknowledged by CDOT and to date, four individual contract change orders (CMOs) have been negotiated and fully executed:

* CMO 005 - Concept to 30% bridge over UPRR/lron Phoenix
* CMO 007 - 30% to RFC Design Bridge over UPRR/Phelps Creek Trail
* CMO 017 - Construction of 1-25 Bridge over UPRR/Phelps Creek Trail
* CMO 020 - Owner Caused Time Delay Related to the 1-25 Bridge over UPRR

CMO's 005, 007, and 017 are specific to changes in cost and character of the work from Flatiron's BAFO proposal. CMO 020 addresses the one year delay impact to the project schedule and extended project overhead costs during this period. In addition, a new Contract Milestone Date was added and Completion Dates were adjusted. Flatiron contends that these more aggressive dates require acceleration and resequencing of the Work for which additional compensation is warranted. CDOT contends that the four, fully executed CMOs listed above have wholly addressed the time and construction impacts of the Owner-caused delay.

The DRB advisory opinion was not pursued and despite our efforts to resolve the issue, we reached an impasse. Therefore, we submit the follow Joint Dispute Statement and Scope of

Desired Decision:

DISPUTE:

The dispute is over the following:

1. Entitlement of disruption, resequencing, and acceleration cost impacts as presented in Flatiron's Request for Equitable Adjustment related to the CDOT-caused delay involving the Phelps Creek Trail Structure (Iron Phoenix Bridge).

SCOPE OF DESIRED RECOMMENDATIONS:

The parties have reached an impasse on negotiations regarding Flatiron's entitlement to disruption, resequencing, and acceleration cost impacts incurred as a result of the CDOT-caused delay. Parties are requesting a recommendation from the DRB on the following:

1. Is Flatiron entitled to an additional change order for disruption, resequencing, and/or acceleration cost impacts incurred as a result of the CDOT-caused delay?

**Pre-hearing Submittals**

Both parties provided the DRB with joint Pre-hearing Submittals per Subsection 105.23(e) which included Position Papers and documentary evidence relevant to the issues. A set of Common Reference Documents was submitted by the parties. Both parties provided the DRB with their lists of attendees. The submittals also contained copies of both PowerPoint presentations that were used at the hearing.

**Summary of Contractor Presentation on Entitlement**

The CDOT-caused delay involving the Phelps Creek Trail Structure (Iron Phoenix Bridge) was significant which resulted in the As-bid Project being very different from the As-constructed Project. CDOT directed Flatiron to design and construct a new structure that met the railroad’s requirements. CMO 005 and CMO 007 resolved additional design costs, CMO 017 resolved additional construction direct costs, and CMO 020 resolved extended overhead and schedule impact costs.

The CDOT-caused delay and the CDOT-directed change resulted in Flatiron incurring additional costs for design disruption and resequencing and construction disruption and resequencing. Also, in order to meet the dates that CDOT required, Flatiron incurred acceleration costs. Flatiron gave timely notice of the impacts, and these costs are what the dispute is about and are recoverable per the Contract.

Key dates to be considered are:

 2/10/2015: NTP 1 issued by CDOT and design commenced

 5/22/2015: CDOT accepted Flatiron’s Revised Original Baseline Schedule that allowed one year for CDOT to acquire the railroad right-of-way (ROW)

 12/2015: CDOT learns the railroad will not provide the ROW – The Conspan structure could not be built and a midstream redesign was required

Flatiron explained the Project was very linear, and their initial plan was to start at Santa Fe on the south and work to the north on I-25 and do the bridge rehab work. Since the Iron Phoenix Bridge was right in the middle of the Project, the CDOT-directed change caused Flatiron to change their planned flow of work seven months after they had started construction.

CDOT issued RCP-006 on March 11, 2016 that requested the costs for the CDOT-directed change be broken into four proposals that were resolved in four CMOs.

* CMO 005 - Conceptual or 30% Design Costs
* CMO 007 - 30% Design to RFC Design Costs
* CMO 017 - Direct Construction Costs & Credits for Phelps Creek Trail Structure/Iron Phoenix Bridge
* CMO 020 - Project Indirect Costs for Design Impact Period

At a meeting on May 3, 2017, CDOT directed acceleration by stating the Project must be complete by the end of 2018. Flatiron could not meet the completion date demanded by CDOT without accelerating the construction. There were several brainstorming sessions with CDOT on how to complete the Project and the last of the CMOs, CMO 020 that resolved extended overhead and schedule impact costs, was signed on December 15, 2017. In February 2018, CDOT accepted Flatiron’s revised schedule. Flatiron’s planned work sequence was impacted from late 2015 through early 2017. Flatiron worked very hard to meet the revised schedule. Disruptions and resequencing continued after CMO 020 was executed through mid-2019. Resequencing and acceleration were required to achieve CDOT’s directed completion date. In a letter sent in June 2018, Flatiron gave notice to CDOT of added impact costs.

Flatiron is entitled to cost recovery for disruption, resequencing and acceleration due to CDOT-caused delay and CDOT-directed changes.

* Contract Section 13.5.2.1 says that Owner-caused acceleration costs and delay and disruption damages are compensable.
* The Flatiron response to RCP-006 dated February 22, 2017 showed 421 days of delay with a Final Project Completion of December 19, 2018 which relied on assumptions for the CMOs and the railroad Conditional Right of Entry.
* Flatiron met the Five Requirements for Acceleration listed in Contract Section 13.5.2.2.
* At the executive meeting on May 3, 2017, a scheduled completion of June 2019 was discussed. CDOT’s Executive Director said the 2019 Proposed Contract Completion was not acceptable and that the Project had to be in final configuration by the end of 2018.
* The boilerplate language in the CMOs, *The Contractor’s signature below indicates acceptance of full settlement for* ***the work described*** (emphasis added)*, both direct and indirect costs. Any claims for additional impact costs associated with this change order will not be considered.* **The work described** is the work listed in the CMO only. There is

no mention of disruption and resequencing damages in **the work described**. Although CMO 020 was signed in December 2017**,** until the revised schedule was approved by CDOT in February 2018, there was no way that Flatiron could have quantified the impacts.

* Flatiron’s letter of December 6, 2017 was Flatiron’s proposal that resulted in CMO 020. Nowhere in the letter is there a reference to disruption, resequencing or acceleration costs. Dates were listed but not how Flatiron was going to get there.
* Disruption and resequencing impacts were communicated to CDOT by Flatiron in RCO- 021.
* CDOT’s reliance on Contract Section 13.3.2.1.1 is misplaced because Flatiron’s impacts are directly attributable to CDOT-caused and directed change. PCOs and RCOs are not relevant because they are not a part of Contract Section 13.2 – CDOT initiated changes.
* CDOT cannot claim prejudice because CDOT:
* Modified Contract provisions and requirements
* Approved and observed implementation of the strategies and innovations to achieve the Revised Completion Milestones.
* To constitute an implied waiver, Colorado law requires that the alleged conduct be free from ambiguity and clearly manifest the intent not to assert the benefit. There was no such conduct by Flatiron and it was up to CDOT to make crystal clear what was in CMO 020.
* CDOT has not and cannot clearly and unambiguously demonstrate that CMO 020 (or any other) included Flatiron’s disruption, resequencing, and acceleration costs.
* Flatiron knew its rights and would never waive these rights.
* In a Tab 3 RCO letter, Flatiron referred to its May 2018 – Invoice 37 Final (Flatiron Submittal Book 4 of 5, Tab 37). The schedule showed revised milestones of January 17, 2019 for the Proposed Project Completion date with a Final Acceptance date of April 16, 2019.

There were some temperature sensitive work items that had to be done in time windows per the specs. To meet its acceleration strategy, Flatiron added labor and equipment, extended work hours, worked nights and changed MOTs. CDOT worked with Flatiron to review their plans and inform the public. The waiver language was on all the CMOs and now CDOT wants to bar entitlement. If what CDOT says is true, Flatiron would never have signed the CMOs. The waivers were for the work on the CMOs only.

In conclusion, Flatiron’s position is that:

* ROW from UPRR was not provided and an Owner‐Caused Delay occurred. This is not

disputed by the parties.

* The CDOT‐Caused Delay and CDOT‐Directed Change severely impacted the Project.
* Flatiron has incurred significant costs to mitigate CDOT’s delay and deliver the Project to

provide early beneficial use.

* CDOT is contractually responsible to address impacts relating to a CDOT‐caused delay and CDOT‐directed change in accordance with Section 13.5.2.1.
* Neither disruption nor acceleration costs have been addressed or waived in CMO 020 or any other.
* CDOT has failed to clearly and unequivocally showthat disruption, resequencing, and

acceleration costs were included in previously executed CMOs resulting from a CDOT‐caused delay.

* Flatiron is entitledto recover disruption, resequencing, and acceleration costs in accordance with Section 13.5.2.1.

**Summary of CDOT Presentation on Entitlement**

The four (4) CMO path to settle the issues caused by the railroad not relinquishing the ROW was agreed to by CDOT and Flatiron. Contract deadlines were collaboratively negotiated. The PCO from Flatiron was not timely and caused CDOT to be materially prejudiced. PCO 001 was submitted one year after the revised schedule was negotiated and six months after CMO 020 was signed. Flatiron decided the path they would take to get the Project completed and not CDOT. The CDOT delay was 13 months but FI’s March 2017 invoice schedule showed a 22 month delay. The accepted Revised Baseline Schedule allowed for a 17 month delay. This is not CDOT directed acceleration.

CDOT followed Section 13.2 in the Contract. The four CMO path was needed to get work going as soon as costs or time could be justified. Flatiron had schedule problems and schedule errors. They also had problems in getting the work done. The first three CMOs referred to future costs and time that would be covered by another CMO. CMO 020 made no mention of the need for another CMO. The CMO language is very clear: *The Contractors signature below Indicates acceptance of full settlement for the work described, both direct and indirect costs. Any claims for additional impact costs associated with this change order will not be considered.*

CMO 020 states, *Work on the project did not stop during the IPX bridge delay timeframe. Flatiron continued work on the interstate reconstruction area as well as many of the bridge rehabilitation locations. Also during the delay time there were other design and construction issues that required Flatiron to extend the duration of construction activities on portions of the interstate reconstruction area.* Flatiron has never addressed these other issues and their December 15, 2017 letter made no mention of the added costs they are now requesting. Contract Section 2.2 – General Obligations of Contractor, Item 12 states, *The Contractor shall: Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including*

*by resequencing, reallocating or redeploying the Contractor’s forces to other elements of the Project or to other work, as appropriate.*

CDOT did not demand Completion Deadlines and Flatiron has never produced any documentation that validates their claim that CDOT directed acceleration. Flatiron claims that the CDOT Executive director at the May 2017 meeting said the Project had to be done by the end of 2018. Per Contract Section 24.1, the only person who can direct the Contractor is the Project Engineer.

Also, Flatiron never wrote a letter saying the Executive Director directed them to accelerate. Flatiron’s schedule submitted on May 17, 2017 which extended the schedule 22 months:

* Included excessively longer work durations than were included in the original schedule.
* Attempted to make up for missed work that was not included in the original schedule.
* Included additional time needed for issues that required redesign and reconstruction.

In the interests of Project First, CDOT and Flatiron worked together in several brainstorming sessions to come up with ideas to allow Flatiron to complete the work in a justifiable timeframe. CDOT allowed several traffic control and phasing changes to aid Flatiron. CDOT was able to justify an additional four months of time for the design and construction of a two-span bridge which resulted in a 17 month time extension which was covered in CMO 020. From June 2017 to December 2017, CDOT and Flatiron negotiated costs and completion dates for the schedule extension. At no time during the negotiations did Flatiron ever bring up disruption, resequencing and acceleration cost impacts. It was CDOT’s understanding that all schedule related costs were included in the Flatiron proposal. A total settlement of the delay was the understanding at the June 22, 2017 DRB Meeting where the minutes stated, *The parties have negotiated the costs for the Iron Phoenix delay. This results in a revised schedule which has a final configuration milestone in late 2018 and a completion in April 2019.*

CMO 020 was signed on December 15, 2017 but Flatiron did not submit PCO 001 until June 2018, six months after CMO 020 was signed. Contract Section 13.3.2 addresses the conditions precedent for the Contractor to request a change order. The section also states, *The Contractor understands that it shall be forever barred from recovering against CDOT under this Section 13 if it fails to give notice… pursuant to proper PCO Notice.*

Contract Section13.3.2.1.1 states, *Each PCO Notice shall be delivered as promptly as possible after the occurrence of such event or situation. If any PCO Notice is delivered later than ten days after the Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence which is described therein, the Contractor shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the PCO Notice.* After the series of Executive Management Team meetings ended on June 19, 2017 where the parties agreed to a collaborative schedule, it took Flatiron over a year to submit their PCO. It

took Flatiron six months to submit their PCO after they signed CMO 020. This is not even close to the timeframe called out in Contract Section13.3.2.1.

Contract Section13.3.2.3 covers the timely delivery of notice to CDOT due to the limited availability of funds for the Project. The Section states, *The following matters (among others) shall be considered in determining whether CDOT has been prejudiced by the Contractor’s failure to provide timely notice:*

 *1. The effect of the delay on alternatives available to CDOT (that is, a comparison of*

 *alternatives which are available at the time notice was actually given and alternatives*

 *which would have been available had notice been given within ten days after occurrence*

 *of the event or when such occurrence should have been discovered in the exercise of*

 *reasonable prudence).*

 *2. The impact of the delay on CDOT’s ability to obtain and review objective information*

 *contemporaneously with the event.*

During the entire process of the negotiations, CDOT was upfront and honest with Flatiron. The way Flatiron delayed in giving notice to CDOT or even mentioning it during the negotiations did not allow CDOT the ability to analyze other possible solutions or means to meet the railroad’s requirements after the ROW was not granted.

Contract Section13.13 – Waiver states, *THE CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION … FOR WHICH THE CONTRACTOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY CHANGE REQUEST FOR CHANGE ORDER.* Lack of timely notice prejudiced CDOT.

* CDOT was never provided the opportunity to review alternatives.
* CDOT was not allowed to evaluate the situation or determine a conscious Project path.
* CDOT did not have the opportunity to determine cost implications.
* CDOT did not have the opportunity to participate in schedule related decisions.

The method for the change was determined by Flatiron and the schedule was determined by Flatiron. Flatiron knew what would be required to complete the Project when CMO 017 and CMO 020 were signed. CDOT approved variances from the Contract to help Flatiron.

In conclusion:

* Flatiron failed to provide prompt notice – CDOT has been prejudiced.
* The appropriate time to discuss any impacts was during CMO negotiations and at the time the revised schedule was being developed.
* The Contract is clear on the importance of timely notification.
* Flatiron has waived all rights to additional compensation due to lack of timely delivery of the notice which resulted in CDOT being prejudiced.
* Flatiron has been fairly compensated for the delay with four negotiated and fully executed CMOs and an extension of Contract Deadlines.
* Flatiron is not contractually entitled to another CMO.

**Summary of Contractor Rebuttal**

The CDOT Executive Director, who must be an authorized agent for CDOT, at the May 3, 2017 meeting, spelled out CDOT’s completion requirements and Flatiron developed a schedule to achieve those dates. Flatiron never agreed to absorb or take on the additional costs to meet the CDOT schedule and made no mention of the added costs in its CMO proposals.

The Conspan was ready to construct when the CDOT-caused delay started. The two span bridge was much more complicated to construct. The delay moved work that was temperature sensitive. The original 13 month delay that CDOT agreed to did not consider the added time needed for the two-span bridge construction.

CDOT brought up that some of the problems were self-inflicted by Flatiron. Flatiron did have some issues but the longest path was through the Iron Phoenix Bridge. The other Flatiron work should not be considered in this request for entitlement.

At the June 10, 2017 meeting, delay concurrency was discussed. The CDOT-caused delay was in the middle of the Project which did not allow Flatiron to construct the Project as they planned. Flatiron tried to mitigate impact and costs and be as efficient as possible.

Flatiron is not in agreement with the four prong approach described by CDOT. The CMOs just followed a logical sequence. The CMOs discussed follow-on costs and what the CMO work was but Colorado Law requires the language to be absolutely clear and it was not.

Flatiron partnered with CDOT in revising MOTs and temporary work. Therefore CDOT has skin in the game. The impact costs were difficult to quantify ahead of time. After the revised schedule was accepted by CDOT in February 2018, then Flatiron could start looking at impacts.

The CMO waiver language was for the work described and not the other impacts. There is nothing in CMO 020 that excludes another CMO.

CDOT referred to “Contract Titles”. CDOT wrote the Contract. CDOT referenced Contract Section 13.3 in their presentation. Contract Section 13.3 covers the “Procedures for Contractor Requested Change Orders”. CDOT should have followed Contract Section 13.2 as Flatiron did. Contract Section 13.2 covers the “Procedures for CDOT Initiated Change Orders” and the CDOT-caused delay and CDOT-directed changes due to the railroad ROW problems should follow Section 13.2. CDOT’s reference to Contract Section 13.3.2 is inappropriate.

**Summary of CDOT Rebuttal**

Flatiron’s Schedule Impact graph shows a 22 month delay. Flatiron never justified the 22 month delay. CDOT could not justify the 22 month delay and Flatiron had many problems in the construction of other areas on the Project that had nothing to do with the Iron Phoenix delay and change. Flatiron should have known all their expected costs when they signed CMO 020 and never brought up the impact costs. When CMO 020 was signed, Flatiron knew how work had to be resequenced. The revised schedule did not have all the necessary activities and contained many errors. The schedule had to be resource and cost loaded but there are no impact costs included. Flatiron thinks CDOT has an “open checkbook”. CDOT cannot understand how the Iron Phoenix impact costs were as much as the costs of the changed work.

The 17 month schedule was finalized before CMOs 017 and 020 were signed but Flatiron never brought up any impact costs and there was never anything in writing until RCO 001. Work is still not done on the Project. FHWA reviews all change orders so CDOT needs to justify all costs and time extensions. CDOT did not direct Flatiron to accelerate the work. Flatiron agreed to the 17 month time extension which should have included the remaining work and any seasonal or temperature work. Contract Section 13.5.2.2 lists five requirements for acceleration. Flatiron did not meet all five requirements. The CDOT Executive Director and the RE have no Contract authority – only the PE and there is nothing in writing from the PE directing acceleration.

CDOT cannot hold Flatiron’s hand to make sure they get everything together in their proposals. During the CMO negotiations, Flatiron never brought up the impact costs and Flatiron knew what was required to complete the Project when CMO 020 was signed.

Both Flatiron and CDOT must comply with the Contract. Flatiron made reference to Colorado Law. The DRB must make its decision based on the four corners of the Contract. Flatiron knew the requirements to complete the Project when they signed CMO 020 for the 17 month time extension. CMO 020 was a lump sum change for time and work – impact is in the work. Flatiron never questioned the waiver language and never gave timely notice. After CMOs 017 and 020, Flatiron has never shown where and when impact occurred or planned vs. actual work. Flatiron was responsible for the means and methods to complete the Project.

**Discussions by Parties**

1. CDOT pointed out that the waiver language on the CMOs comes from Contract Section 13.4.4 which states, *Each Change Order (other than Change Orders issued unilaterally by CDOT) shall contain a sworn certification in form acceptable to CDOT by the Contractor that the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change and that the Contractor has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.* Note that it states “direct and indirect” impacts.

1. Flatiron said the CMO waiver language is specific to that CMO and that the document is specific to that description only. CDOT pointed out that all 38 CMOs have contained the same language and that CMOs 005, 007 and 017 mentioned a future CMO for certain work. Flatiron said they signed the CMOs for only the work on the CMO. Contract Section 13.5 clearly spells out damages and the change was initiated by CDOT. CDOT said CMOs 017 and 020 were specific.
2. CDOT asked why Flatiron never confirmed their impacts prior to RCO 021. Flatiron said that what was important about the Executive Management Team (EMT) meeting was that Eric Taylor of Flatiron attended the meeting where the CDOT Executive Director directed Flatiron to meet the December 2018 milestones. CDOT replied that the 22 month Flatiron schedule was not justifiable and that Flatiron agreed to the 17 month schedule which CDOT could justify. CDOT did not demand acceleration. Flatiron said that the parties worked together on the schedule and did a lot of brainstorming. At that time, Flatiron did not know what the embankment settlement would be.
3. CDOT asked why Flatiron never brought up impact costs during the CMO negotiations or in settling CMO 020. Flatiron said CDOT had the lump sum backup and there were no impact costs. CDOT thought they had a lump sum price to complete the Project and told the DRB at the DRB meeting that the costs were settled. Flatiron accepted the revised dates in CMO 020 and provided a cost loaded schedule on how they would get there. Flatiron asked why CDOT never questioned more costs with all the notices and discussions that went on. CDOT said they provided many concessions to Flatiron for them to complete the work faster.
4. CDOT asked why costs were not brought up when PCO 021 was first submitted. Flatiron said there were months of notice and the PCO was the result of a CDOT-directed change. CDOT said that Flatiron has never justified how the Owner-controlled delay affected the work on the Project. CDOT said Flatiron was six months late in getting the information to the railroad on the work at the CML bridge. CDOT pointed out that the walls HDR had designed were higher than planned and this was never reflected in the schedule. Flatiron said that the updated schedules gave notice to CDOT.
5. Flatiron asked how CDOT was prejudiced. CDOT responded that Flatiron never came to CDOT and said that the revised schedule was going to cost $X per day. Flatiron said this hearing was about entitlement and not quantum and CDOT knew what was going on. CDOT said Flatiron decided on how to build the Project and never told CDOT that there would be cost impacts. Since CDOT did not know of cost impacts, they could not make any decisions. Flatiron again asked how CDOT was prejudiced and said CDOT knew what was going on in order to make decisions.

 CDOT gave the example of the railroad demolition sub and their problems. Flatiron said the REA was specific and that the DRB should look at impact. Flatiron said there were weekly meetings and CDOT knew what was happening. Flatiron did not know impacts until June 2018.

1. CDOT referenced Contract Section 13.4.4 – Contractor Representation and what is supposed to be in a Change Order. Notice was not given as required and costs were never included.
2. Flatiron said the whole Iron Phoenix issue was discussed in a collaborative way. No one knew what the railroad would do or how long it would take the railroad to make decisions.

**DRB Questions**

1. **To Both:** The DRB Meeting Minutes for May 9, 2016 state, *Right now the idea is to slow down so that when the railroad issues are settled they can go faster.* The DRB Meeting Minutes for March 16, 2017 state, *Rather than work on available work, the decision was made to ramp up later.* What was the basis for these decisions?

Flatiron said they did not slow down. After the winter of 2015, they worked full time.

CDOT said that Flatiron would slow down and then ramp up without explanation.

1. **To Both:** Were the concurrent delays shown in the schedule updates?

 Flatiron said the critical path was shown and it was through the Iron Phoenix Bridge. It would be very difficult to analyze on the schedules that were submitted. The only way to analyze the various paths is through float.

 CDOT said they made comments on the schedule reviews. Some schedules showed more crews.

1. **To Flatiron:** In Flatiron hearing submittal “3 RCOs & Responses” Second Tab, there is a letter dated July 13, 2017 with the subject – Iron Phoenix CMA Acceleration Notice Request for Change Order (RCO-021) which refers to CMOs 017 and 020 which both occurred after the letter date. Please explain the letter date?

 Flatiron said the letter was digitally signed by Stephen Cordts on June 13, 2018 and the date on the letter is wrong.

1. **To Both:** How was the four step CMO process agreed to?

 FI said the strategy makes sense but there was no agreement to the four CMO approach.

 CDOT said there is no documentation of the process but that RCO-006, Appendix B called out one design CMO plus three more CMOs. They met with Flatiron to discuss and Matt Barnes, who was the Flatiron Project Manager at the time, knew what CDOT was proposing. The idea was to use the quickest way possible to get costs and keep the

 process moving, get railroad approval and then get construction underway. This was common sense.

1. **To Both:** The DRB Meeting Minutes for June 22, 2017 state, *The parties have negotiated the costs for the Iron Phoenix delay. This results in a revised schedule which has a final configuration milestone in late 2018 and a completion in April 2019.* It was the impression of the DRB that the Iron Phoenix matter had been settled. Was this impression wrong?

 CDOT said they thought the same. Flatiron was at the meeting and never brought up that the minutes were incorrect.

 Flatiron said they could understand the impression. We are here today to determine entitlement for disruption.

 CDOT said that the question is if notice was timely.

**Contractor Summary**

The railroad caused the delay and therefore it is a CDOT-caused delay. Flatiron incurred expenses to mitigate the delay by CDOT and meet the December 2018 date.

CDOT is responsible for all the impacts per Contract Section 13.5.2.1 – Acceleration Costs; Delay and Disruption Damages.

CDOT has presented nothing to show Flatiron is not entitled to costs for impacts caused by shortening the schedule extension from 22 months to 17 months.

It is not clear per Colorado Law that the impact and acceleration costs were included in CMO 020.

Flatiron gave timely notice. The updates and schedules showed what was happening.

Contract Section 13.3 – Procedure for Contractor Requested Change Orders does not apply and Contract Section 13.2 – Procedure for CDOT Initiated Change Orders should be followed.

**CDOT Summary**

Is Flatiron entitled to additional compensation? The answer is “No”. No timely notice was ever given as is required by multiple Contract Sections.

Flatiron could have discussed the impacts prior to CMOs 017 and 020 but never did so. This would have allowed CDOT to try to mitigate the impacts that Flatiron claims.

CDOT never gave the direction to accelerate. There is nothing in writing directing Flatiron to accelerate and Flatiron was to give notice per the Contract if they were directed to accelerate.

The 17 month schedule was flawed. The 22 month schedule was flawed and was never corrected. There was other concurrent work that Flatiron was doing that had problems. Flatiron agreed to the

17 month schedule, 13 months railroad delay plus four months for added scope. The revised schedule was cost loaded to reflect CMOs 017 and 020.

Flatiron changed the approved revised schedule by changing and resequencing activities.

Flatiron has never provided the additional indirect costs they claim

Flatiron has never provided an analysis of the work as planned vs. the actual work.

The DRB must decide based on the four corners of the Contract. The DRB should find no “partial merit”, only “no merit"

**Findings**

1. Contract Section 13.6.1 states, … *the parties may mutually agree to use a multiple-step process involving issuance of a Change Order which includes an estimated design cost and which provides for another Change Order modifying the first Change Order to be issued after a certain design level has been reached, thus allowing a refinement and definition of the estimated construction cost.* RCP-006 addressed the multi-step process which stated, *A Change Order has been written (CO No.5) for Design Concept to 30% Submittal as a response to RCO 009.* ***It is anticipated that additional change orders will be written to address original cost for the original structure, 30% to RFC Design, Construction, and Schedule impacts*** (emphasis added)***.***

CDOT’s response to Flatiron dated March 31, 2017 on Flatiron’s proposal dated February 22, 2017 contained the following comments:

* *CDOT requests breaking this RCP response into 2 Change Orders. One for construction items and costs and the other for revised Project Completion date* ***and value of Time Related Direct and Indirect Costs*** (emphasis added)***.***
* *The impacted delay analysis per Book 1 Section 13.4.2.3 states that the proposed new schedule be compared to the Original Initial Schedule, Current Initial Schedule or Revised Initial Schedule. … CDOT cannot adequately determine nor justify the number of impacted days without this resubmitted schedule.*
* *The time between when the Iron Phoenix area construction was originally scheduled to start to the time the C&M Agreement was signed is considered by CDOT as excusable*

*but non-compensable delay since Flatiron is not ready for the Phase 1A-1C Traffic Shift.*

* *CDOT knows there have been decisions by Flatiron to slow Phase 1A-1C Work and also that there have been numerous design and construction issues that have delayed construction.*
* *Another aspect of this change are the time related direct and indirect costs for Flatiron and Sub consultants which is independent of our final negotiated number of*

*compensable delay days. CDOT disagrees with some of the items listed in the submittal and the costs associated with those items including but not limited to:*

* *Design during construction was included in the previous change order for design of the Iron Phoenix structure.*
* *RR flagging is not required.*
* *Erosion Control should be included in the Environmental Management pay item.*

 *CDOT requests discussing these items as well at the meeting on April 5th if possible.*

 Flatiron’s proposal for RCP-006 dated May 18, 2018 (Note: 2018 date should be 2017 based on the time frame and the document number “Sub555R1\_**170518** (FCI Response RCP006.) stated, *Please note this change order pricing reflects only the direct costs of the work plus the negotiated markup and does not include any costs for schedule related indirects. Flatiron and CDOT will continue meeting on a weekly basis to establish a new mutually agreed upon completion date and* ***discuss the indirects, overhead, and schedule related costs which will be negotiated in a future Change Order*** (emphasis added).

 The above discussion indicates that both parties knew how the Iron Phoenix change would be implemented through a series of change orders (CMOs) and what would be included in each change order.

1. Contract Section 2.2 – General Obligations of Contractor under item 12 states, *Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible, including by resequencing, reallocating or redeploying the Contractor’s forces to other elements of the Project or to other work, as appropriate.*

Contract Section 6.1.1.3 goes on to state, *If CDOT at any time determines it will be unable to provide access to a particular parcel in accordance with the ROW schedule, CDOT shall notify the Contractor regarding the revised projected date for delivery of access. The Contractor shall take appropriate action to minimize any cost and time impact and shall work around such parcel until access can be provided, including rescheduling and re-sequencing Work so as to avoid any delay to the Project.*

These statements show that Flatiron had the duty to do what was necessary to lessen the impact of the Iron Phoenix delay.

1. Contract Section 13.1.1.1 defines the term “Change Order”. RCO-006 was issued in accordance with Contract Sections 13.2 – Procedure for CDOT Initiated Change Orders and

13.8 – Necessary Design Changes. Contract Section 13.2.1.3 states, *CDOT may at any time, in its sole discretion, require the Contractor to provide two alternative Change Order forms, one of which shall provide for a time extension if applicable and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder.*

 CDOT’s response to Flatiron letter dated March 31, 2017 on Flatiron’s proposal dated February 22, 2017 contained the following comments:

* *CDOT requests breaking this RCP response into 2 Change Orders. One for construction items and costs and the other for revised Project Completion date and value of Time Related Direct and Indirect Costs.*
* *Another aspect of this change are the time related direct and indirect costs for Flatiron and Sub consultants which is independent of our final negotiated number of compensable delay days.*

 Contract Section 13.2.1.4 states, *If requested by CDOT, the Contractor shall …prepare and submit to CDOT for Approval a Change Order form for the requested change, complying with all applicable requirements of Section 13.4, and incorporating all requests made by CDOT.*

 Contract Section 13.4.2.2 – Cost Estimate states, *The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment, overhead (which includes all indirect costs) and profit, unless CDOT agrees otherwise. The estimate shall include costs allowable under Section 13.5.2, if any.*

Contract Section 13.5.2 – Limitation on Acceleration Costs: Delay and Disruption Damages under 13.5.2.1 states, *Costs of rearranging the Contractor’s work plan not associated with an extension of a Completion Deadline shall not be compensable hereunder.*

 Based on the foregoing discussions, CDOT indicated how it desired the Iron Phoenix change to be addressed and the Contract gave Flatiron the opportunity to present their cost impacts. After reviewing what was presented at the hearing and Flatiron’s submissions for RCO-006, Flatiron never once mentioned **Disruption, Resequencing and Acceleration Cost Impacts**. CDOT also stated at the hearing that Flatiron never brought up these costs during any of the negotiation or brainstorming that resulted in CMOs 017 and 020.

1. In Flatiron’s Position Paper and during the hearing, Flatiron indicated that the Iron Phoenix change caused design disruption. Flatiron submitted proposals for the two design phases. There was nothing in the Flatiron proposals or the proposals from their design sub that made any mention of design delays to the other design areas or design disruption.

 A review of the design schedule per the Revised Initial Original Schedule (Flatiron Book 2, Tab A) which was approved on May 13, 2015 shows the design period going from February

 10, 2015 to December 18, 2015. Since CMO 005 for the Iron Phoenix 30% Design was not signed until April 14, 2016, it appears that the Iron Phoenix change should not have impacted the Original Design Schedule. There was nothing in the Pre-hearing Submittals or that was presented at the hearing to explain why the design work that was not related to the Iron Phoenix change took until January 5, 2018 to complete which is more than two years after the Original Design Schedule as shown in Flatiron Book 2, Tab A.

 **Accordingly, the DRB finds that Flatiron failed to justify any design disruption based on the Revised Initial Original Schedule which showed that all design should have been completed by December 18, 2015 which was about the same time that the parties learned the railroad would not provide the ROW.**

1. Contract Section 13.3.1.1 – Contract Price Increase states, *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:* *1. Additional costs directly attributable to additional Work resulting from CDOT- Directed Changes.*

*2. Additional costs directly attributable to CDOT-Caused Delays.*

*3. Additional costs directly attributable to Necessary Design Changes, to the extent*

 *permitted in Section 13.8.*

 Contract Section 13.3.1.2 – Time Extensions states, *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.*

*2. Delays directly attributable to Necessary Design Changes, to the extent permitted by*

 *Section 13.8.*

 Flatiron maintained during the hearing that CDOT was in error by calling out performance under Section 13.3 and should have followed Section 13.2. Contract Sections 13.3.1.1 and 13.3.1.2 clearly show that Contract Sections 13.2 and 13.3 go hand-in-hand.

1. Contract Section 13.3.2 – Conditions Precedent (Procedure for Contractor Requested Change Orders) states:

 *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* (Section13.2) *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***(emphasis added) *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.*

Contract Section 13.3.2.1.1 – Importance of Prompt Delivery discusses the notice issue at length and states:

 *The Contractor’s failure to provide a PCO Notice within 30 days after the Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given event or situation shall preclude the Contractor from any relief,*

 *unless the Contractor can show, based on a preponderance of the evidence that: (i) CDOT was not materially prejudiced by the lack of notice; or (ii) CDOT’s designated*

 *representative specified in accordance with Section 24.10 had actual knowledge (including all, items (i) through (v) of Section 13.3.2.1.2), prior to the expiration of the 30-Day period, of the event or situation and that the Contractor believed it was entitled to a Change Order with respect thereto.*

 At the hearing, CDOT’s designated representative, the Project Engineer, said that during the negotiations and brainstorming sessions impact costs were never brought up.

 Contract Section 13.3.2.3 – Importance of Timely Delivery states:

 *CDOT is relying on the Contractor to evaluate, promptly upon the occurrence of any event or situation, whether the event or situation will affect* ***schedule or costs*** (emphasis added) *and, if so, whether the Contractor believes a time extension and/or price increase is required hereunder. If an event or situation occurs which may affect the Contract Price or a Completion Deadline, CDOT will evaluate the situation and determine whether it wishes to make any changes to the definition of the Project so as to bring it within CDOT’s funding and time restraints.*

 *The following matters (among others) shall be considered in determining whether CDOT has been prejudiced by the Contractor’s failure to provide timely notice:*

1. *The effect of the delay on alternatives available to CDOT (that is, a comparison of alternatives which are available at the time notice was actually given and alternatives which would have been available had notice been given within ten days after occurrence of the event or when such occurrence should have been discovered in the exercise of reasonable prudence).*
2. *The impact of the delay on CDOT’s ability to obtain and review objective information contemporaneously with the event*.

 The foregoing Contract Sections make quite clear the notice requirements of the Contract. During the hearing, CDOT pointed out that they depended on Flatiron to provide any notice requirements concerning the settlement of the Iron Phoenix change, especially where costs and schedule impacts were anticipated by Flatiron. CDOT pointed out that in the numerous negotiation and brainstorming sessions that Flatiron never made reference to additional impact costs. A review of the many Flatiron submissions concerning RCO-006 shows Flatiron never

 mentioned the additional impact costs. Based on Flatiron’s presentations at the hearing and a review of the Pre-hearing Submittals shows the first time Flatiron mentioned additional costs was in their letter dated July 13, 2017 with the subject “Iron Phoenix CMO Acceleration Notice Request for Change Order (RCO-021). This letter requests compensation for

 *…acceleration and disruption costs resulting from the Delay and CDOT’s subsequent direction to accelerate the Project Completion Deadline…* At the hearing during the DRB questions, Flatiron said the letter was not digitally signed until June 13, 2018. The reason the letter was delayed for almost a year was not explained. It should be pointed out that the letter makes reference to CMO 020 which was not signed until December 15, 2017. This letter contained no cost information. Based on Flatiron’s Pre-hearing Submittal, it appears the first cost data related to the additional impacts was not submitted to CDOT until March 14, 2019 per the letter in Flatiron’s Book 1, Reference Documents, Tab 1.

 During the hearing, CDOT pointed out that it was prejudiced due to the lack of notice, or even the mention of additional impact costs in Flatiron’s submissions and the many meetings to settle RCO-006. CDOT said the additional impact costs were almost as much as the costs of the added work for the two-span bridge.

 Based on the foregoing discussion, Flatiron should have been aware of the notice requirements, had many opportunities to bring up the subject of additional costs but failed to provide any notice until the letter signed June 13, 2018 which is more than a year after the Executive Management Team meeting in May 2017, approximately a year after Flatiron signed CMO 017 on the construction costs on June 29, 2017, and six months after CMO 020 was signed on December 15, 2017.

 **Accordingly, the DRB finds that Flatiron did not give proper notice as required in the Contract and that CDOT was prejudiced by not having the opportunity to at least discuss additional impacts while CDOT thought the four CMO process would settle all matters related to RCO-006.**

1. Contract Section 13.4.4 – Contractor Representations states, *Each Change Order … shall contain a sworn certification in form acceptable to CDOT by the Contractor that the amount of time and/or compensation requested includes* ***all known and anticipated impacts or amounts, direct, indirect and consequential****,* (emphasis added) *which may be incurred as a result of the event or matter giving rise to such proposed change and that the Contractor has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.*

A review of Flatiron’s submittals for RCO-006 shows that this statement was not contained in any of the submittals made by Flatiron. Even though CDOT did not insist on the statement being a part of the Change Orders, Contract Section 24.2.2 states, *No act, delay, or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust, or impair any right, remedy, or power of such party under any Contract Document, or* ***to relieve the other party from the full performance of its obligations under the Contract Documents*** (emphasis added)*.*

Flatiron’s letter dated May 18, 2017 provided the construction costs for the new Iron Phoenix Bridge (CMO 017) and stated, *Flatiron and CDOT will continue meeting on a weekly basis to*

*establish a new mutually agreed upon completion date and discuss the indirects, overhead, and* ***schedule related costs which will be negotiated in a future Change Order***(emphasis added)*.* Flatiron’s statement seems to indicate that there would be “**a”** (one) change order to settle the costs. From the onset of RCO-006, CDOT laid out their settlement procedure early in the process that there would be four CMOs to settle all the issues.

**Accordingly, the DRB finds that Flatiron by Contract had the duty to include “all known and anticipated impacts or amounts, direct, indirect and consequential”, in their submittals to settle RCO-006 which was to be accomplished through four CMOs and Flatiron failed to do so.**

1. Flatiron maintained during the hearing that the statement of the CDOT Executive Director at the May 3, 2017 Executive Meeting that the Project had to be in final configuration by the end of 2018 was a directive to accelerate the Project since the schedule that had been provided by

Flatiron showed a completion milestone of June 13, 2019. CDOT maintained that the Executive Director did not have the authority to direct the contractor and there was no written directive from CDOT to accelerate the Project.

Contract Section 13.1.2 – Directive Letter as a Condition Precedent to Claim that CDOT-Directed Change Occurred states, *In addition to provision of a PCO Notice* (by Flatiron) *and subsequent Change Order* *request* (by Flatiron) *pursuant to Section 13.3,* ***receipt of a Directive Letter from CDOT is a condition precedent to the Contractor’s right to claim that a CDOT-Directed Change has occurred*** (emphasis added).

Nothing was contained in the Pre-hearing submittals or presented at the hearing that demonstrates Flatiron ever gave notice of acceleration. In addition, CDOT said that during the negotiations for CMO 020 that Flatiron never brought up acceleration. Furthermore, as discussed in previous Findings, Flatiron was aware that CDOT planned to settle all issues attributed to RCO-006 through four CMOs. CDOT also pointed out that Flatiron was responsible for some of the work being done later than scheduled. After negotiations with CDOT, Flatiron agreed to the “New Completion Deadlines” that were included in CMO 020.

Contract Section 13.5.2.2 states, *In addition, before the Contractor may obtain any increase in the Contract Price to compensate for any delay and disruption damages or Acceleration Costs, the Contractor shall have* ***demonstrated to CDOT’s satisfaction*** (emphasis added) *that:*

 *1. Its schedule, which defines the affected Critical Path in fact sets forth a reasonable*

 *method for completion of the Work.*

 *2. The change in the Work or other event or situation, which is the subject of the requested*

 *Change Order, has caused or will result in an identifiable and measurable disruption of*

 *the Work, which impacted the Critical Path Activity.*

 *3. The delay or disruption damage was not due to any breach of contract or fault or negligence, or act or failure to act of any Contractor-Related Entity, and could not*

 *reasonably have been avoided by the Contractor, including by resequencing,*

 *reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment).*

 *4. The delay for which compensation is sought is not concurrent with any other delay*

 *excluding CDOT-Caused Delays.*

 *5. The Contractor has suffered or will suffer actual costs due to such delay, each of which*

 *costs shall be documented in a manner satisfactory to CDOT.*

CDOT’ position is that Flatiron did not meet all five requirements. The Findings enumerated herein support CDOT’s position.

**Accordingly, the DRB finds that CDOT did not direct acceleration and that Flatiron had more than adequate opportunity to address any acceleration during the negotiations of CMO 020.**

1. Flatiron’s position was they had to resequence the work due to the Iron Phoenix change. As discussed in Finding 4 above, the Revised Initial Original Schedule (Flatiron Book 2, Tab A) shows the design period going from February 10, 2015 to December 18, 2015; however, most

of the design work was not completed until mid-2017 as shown in Flatiron Book 2, Tab A Actual Finish dates. The late designs then delayed construction work. Some examples are shown in the following table.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Work Element | Planned Design Finish | Actual Design Finish | Planned Start Work | Actual Work Start |
| Northern Bridge and Roadway Structures | 12/18/2015 | 2/1/2017 | 12/21/2015 | 4/1//2017 |
| Guma Bridge West Half | 11/20/2015 | 3/13/2017 | 4/14/2017 | 8/6/2018 |
| Alan Hamal Bridge West Half | 11/20/2015 | 10/27/2015 | 10/5/2016 | 8/6/2018 |

Although the hearing for this dispute was to establish if there was entitlement regarding resequencing, the above table depicts delays that are not related to the Iron Phoenix change but show how Flatiron delayed the completion of some construction. Also, during the hearing CDOT said they never received a schedule from Flatiron that showed Flatiron caused impacts on the schedule.

CMO 020 states, *also during the delay time there were other design and construction issues that required Flatiron to extend the duration of construction activities on portions of the Interstate reconstruction area. These other work activities are considered by* ***Flatiron and CDOT*** (emphasis added) *to have been occurring concurrent with the owner caused time delay for the IXP design and C&M agreement.* By signing CMO 020, Flatiron agreed that it had caused some of the Project delay.

1. Flatiron’s position is that the statement on CMO 020, *The Contractor’s signature below indicates acceptance of full settlement for the Work described both direct and indirect costs.* ***Any claims for additional impact costs associated with this change order will not be***

***considered.*** (emphasis added), was only for the Work described and had nothing to do with impact costs.

Contract Section 13.3.2.3 states, *The Contractor acknowledges and agrees that, due to the limited availability of funds for the Project, timely delivery of notification of such events and situations and requests for Change Orders and updates thereto are of vital importance to CDOT.* ***CDOT is relying on the Contractor*** (emphasis added) *to evaluate, promptly upon the occurrence of any event or situation, whether the event or situation will affect schedule or costs and, if so, whether the Contractor believes a time extension and/or price increase is required hereunder.* Since Flatiron failed to bring impact costs to CDOT’s attention during the CMO negotiations, CDOT had every right to believe that all of Flatiron’s costs had been included in Flatiron’s change order proposals.

Contract Section 13.13 – Waiver states:

 *THE CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION … FOR WHICH THE CONTRACTOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY CHANGE*

 *REQUEST FOR CHANGE ORDER, AND AGREES THAT THE CONTRACTOR SHALL BE ENTITLED TO NO COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT THE CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES. IF A DEADLINE IS MISSED THAT DOES NOT PREJUDICE EITHER PARTY, FURTHER RELIEF SHALL BE ALLOWED.*

As discussed in previous Findings, Flatiron had many opportunities to address the impact costs and by Contract had the duty to include “all known and anticipated impacts or amounts, direct, indirect and consequential”, in their submittals to settle RCO-006 which was to be accomplished through four CMOs and Flatiron failed to do so. From the beginning of RCO-006 process, CDOT had made known that it planned to use four change orders to settle the costs and delays for the Iron Phoenix change. The minutes for the June 22, 2017 DRB meeting stated, *The parties have negotiated the costs for the Iron Phoenix delay* and Flatiron did not object to the statement during the meeting or to the minutes when they were given the opportunity when the minutes were emailed to them on June 26, 2017 with the statement, *Please find attached DRAFT minutes for the June 22, 2017 DRB meeting. Let me know if you have any corrections or additions.*

Based on the foregoing discussions, Flatiron had many opportunities and the contractual duty to bring up any impact costs and failed to do so. CDOT thought, and rightfully so, that Flatiron had presented all their costs and signed CMO 020. Contract Section 13.6 – Pricing Change Orders states, *CDOT and the Contractor (on its own behalf and on behalf of its Subcontractors) shall endeavor* ***to negotiate, in good faith*** (emphasis added)*, a reasonable cost for each Change Order.*

 **Accordingly, if the impact costs were not included in Flatiron’s proposals, the failure was Flatiron’s and CDOT was correct in considering all costs associated with RCO- 006 to be settled with the executions of the four CMOs.**

**Recommendations:**

Based on the Findings above, the DRB recommends as follows:

1. Flatiron’s request for entitlement due to impacts from design disruption and resequencing caused by the railroad right-of-way problem and the Iron Phoenix Bridge change is **without merit**.
2. Flatiron’s request for entitlement due to impacts from construction disruption and resequencing caused by the railroad right-of-way problem and the Iron Phoenix Bridge change is **without merit**.
3. Flatiron’s request for entitlement due to alleged CDOT-directed acceleration is **without merit**.

Respectfully submitted this 26th day of September 2019.





William P. Caldwell



W. H. Hinton II