**DISPUTE REVIEW BOARD REPORTAND RECOMMENDATION**

 **SH 7 Cherryvale Road to 75th Street**

 **BOULDER COUNTY, CO**

 **CDOT PROJECT NO. STA 0072-010**

**DISPUTE #5 CONCERNING UTILITY INTERFERENCE**

**Hearing Date:** April 7, 2015

**Hearing Location:** CDOT Region 4 Office 1050 Lee Hill Road Boulder, CO

**Hearing Attendees:** Joe O’Dea - CEI - CEO Matt Brenkle - CEI - Project Manager

Michelle Berger – CEI - Attorney

 Keith Sheaffer - CDOT - Region 4 Program Engineer

 Dan Marcucci - CDOT - Resident Engineer Joseph Burrows - CDOT - Project Manager

 Ryan Sorensen – CDOT - DPM

 Laura Zamora - CDOT - Area Engineer

 Roselle Drahushak-Crow - CDOT - Area Engineer Leo F. Milan, Jr. - CDOT – Sr. Assistant Attorney General

 Lauren Curran - CDOT - Assistant Attorney General

**Background**

On November 10, 2011 Concrete Express, Inc. (CEI) (Contractor) was awarded a Contract by CDOT for $18,094,575.69 for the full reconstruction and widening of the roadway, major railroad structures, MSE walls, caisson walls, drainage structures, HMA pavement, and concrete curb, gutter and sidewalk on SH 7 from Cherryvale Road to 75th Street in Boulder, CO. A Notice to Proceed was issued on December 1, 2011.

Section 7 of the Contract incorporates the Plans, the Standard Specifications for Road and Bridge Construction dated 2011 and any Special Provisions for this Project and Revised Standard Specifications.

At the very start of the Project there was a delay due to problems with the Railroad Agreement. As a result, CEI proposed a phasing change so that work did not have to stop. Almost immediately CEI found unknown utilities, utilities that interfered with Contract work, utilities that had been incorrectly relocated and relocated utilities that interfered with the work. There were also some utilities that the utility companies could not identify as abandoned or live. CEI submitted 96 Contract Change Requests (CCR) to CDOT documenting its costs to relocate its crews which were either negotiated with CDOT or disapproved by CDOT. The time count for the Project stopped on December 31, 2013.

CEI submitted a Request for Additional Compensation for Utility Disruptions on June 6, 2014. CDOT requested additional information on July 15, 2014. On July 22, 2014, CEI filed a Notice of Dispute for Utility Interference which was rejected by the CDOT Resident Engineer on July 23, 2014 because CEI failed to provide additional information that CDOT had requested and CEI’s request was based on the Modified Total Cost basis which CEI had not justified. After more letters and meetings, Per Subsection 105.22(c), CEI requested the dispute be elevated to the Program Engineer on December 12, 2014. After meeting with the Program Engineer and no agreement was reached, on January 14, 2015 CEI requested the dispute be elevated to the Dispute Review Board.

**Statements of Dispute**

The parties were unable to agree upon a Joint Statement of Dispute and, therefore, each party submitted its own statement which are shown below:

**Contractor**

CEI believes the CDOT State Highway 7 Reconstruction project, STA 0072-010 experienced numerous cases of interference caused by utility lines being in conflict with the work to be performed. CEI met the project requirements to notify and coordinate the required utility relocations. Despite that coordination, there were significant interferences to CEI’s ability to complete the work in the manner indicated possible in the Contract Documents at the time of bid. Those interferences resulted in significant additional costs incurred by CEI in the form of productivity inefficiencies to earthwork, drainage and wet utility work. Due to the pervasive nature of those interferences it was impossible to determine the full extent of the damages until project completion. Once those damages were able to be quantified, CEI presented the information necessary to justify the additional costs which CEI believes are eligible for equitable adjustment. Those costs are above and beyond the previously compensated CEI CCR’s/CDOT CMO’s.

**CDOT**

CDOT believes any and all impacts were addressed during the project at the project level through CCRs submitted by CEI and negotiated in good faith. CDOT also believes this dispute amounts to a Total Cost Claim or Modified Total Cost Claim and CEI has failed to meet the criteria required.

The parties request the DRB determine both merit and quantum concerning the dispute.

**Pre-hearing Submittal**

In addition to the Plans and Specifications for the Project, both parties provided the DRB with Pre-hearing Submittals per Subsection 105.23(e) which included, but were not limited to,

documentary evidence relevant to the issues, letters, e-mails, speed memos, and handwritten notes. Both parties provided the DRB with their lists of attendees. CEI also provided an

addendum to its submittal on April 6, 2015 to add material that it received from CDOT under a CORA Request.

**CDOT Objection to Late CEI Submittal of Documents on April 6, 2015**

On April 6, 2015, the day before the scheduled hearing, CEI submitted documents that it had received from CDOT in accordance with the CORA request. On the same date, CDOT objected to the submittal since it had not been submitted 15 days prior to the hearing per the Pre-hearing Submittal requirements so the parties have time to review and prepare.

The matter was discussed at the beginning of the hearing. CDOT said the CORA request was dated January 15, 2015 and CDOT provided the documents in mid-February which was well before the Pre-hearing submittals were due. CEI said the documents were important to try to get the dispute settled now and not in litigation later on when it could make the documents part of its case. CDOT replied that if it would have known about the use of the documents, they could have prepared for the documents use at the hearing and that there is a deadline for document submittal for a reason. CEI replied that all the documents, except for the amended timeline, were CDOT documents.

The DRB asked CDOT if they would be prejudiced if the documents were used. CDOT said they would not be prejudiced. CEI replied that it was here to bring the dispute to an end and the documents should help.

The DRB said the documents would be used as appropriate in their deliberations.

**Summary of Contractor Presentation on Utility Interference**

CEI went over its revised timeline on the dispute which highlighted when the Agreements with the utility owners were signed, noting that some were signed up to 197 days after construction started on January 9, 2012.

CEI said that merit had not been contested previously by CDOT when CDOT agreed to the impacts supported by CEI’s CCR’s for the utility conflicts. The numerous conflicts show that the Project was disrupted and impacted. CDOT did not do what it was supposed to do per Subsection 105.11, failed to timely enter into agreements with some of the utilities as was required by the CDOT Utility Engineer Conditional Clearance letter of September 1, 2011(CEI Exhibit L), told FHWA they were ready for bid when they were not, and failed to enforce the CDOT Utility Code.

CEI did the Contract coordination and scheduling that was required with the utilities, even holding weekly meetings, but the utilities were slow to respond and did not meet agreed upon schedules. Although the Special Provisions listed 128 utility items, CEI found unknown utilities and utilities that had been relocated that still interfered with construction. CEI called CDOT,

sent emails and letters, provided CCR’s and discussed utility problems in the monthly Progress Narratives. CDOT representatives were there every day and saw what CEI had to do to keep the job moving. CEI described some typical interferences and delays caused by the utilities and the

utilities’ slow responses. CEI could not manage the Project as bid and the utility problems dictated the schedule and sequence of work.

The CCR’s were developed for the direct costs for the downtime and crew relocation until the crew could start work again. The CCR’s did not cover costs to return to the interference site once the problem had been corrected by the utilities, the restart costs or the costs to “piece meal”

small sections of work which was inefficient. The CCR’s had “Reservation of Rights” language for additional costs and CEI required CDOT to remove the language concerning additional claims and impacts in the CDOT CMO’s which incorporated payment for the CCR’s into the Contract because CEI knew there were more impacts.

CEI negotiated the CCR’s in good faith but CDOT did not do what the Contract required CDOT to do. CDOT should have dealt with CEI by acting in good faith and dealing fairly rather than causing interference by not timely enforcing the Utility Code and getting the utilities to pay for their delays. CDOT said they had no interest in pursuing the utilities for damages. CDOT’s Plans and Specs were incomplete and inaccurate and another example how they failed in their duties as the Owner.

CEI said that when they were negotiating with CDOT, it had a fundamental problem with CDOT on disruptions and CDOT’s actions or lack of action affected CEI. CEI said they cooperated with the utilities and worked with the utilities on the schedule. CEI needed to keep their crews moving. After all the early discussion on delays and disruption, CEI thought CDOT would enforce the Utility Code and CEI even offered to help support CDOT against the utilities but CDOT took no actions.

There were 96 instances where CEI had to reassign and resequence their work. CDOT kept charging time because CEI was working. CEI still finished on time. Many of the utility agreements that CDOT should have had in place were finally executed as much as 6 ½ months after the Project started. CEI’s CCR’s were for costs where its crews that had to move and not for the costs to come back and perform work in an inefficient manner. Bottom line is CEI had cost impacts due to CDOT’s failure to perform.

**Summary of CDOT Presentation on Utility Interference**

CDOT said the Joint Statement in the submissions was not a joint statement but rather two statements – one by CEI and one by CDOT. (This is reflected in the two Statements of Dispute shown above.) CDOT said CEI had already gone over the timeline. The underground work was completed in June 2013 and the Project was accepted in December 2013. The first submission of additional costs by CEI on utility interference was CEI’s Request for Additional Compensation dated June 6, 2014 which consisted of a two page letter and one spread sheet to back up CEI’s request for $1,189,861 (CEI Exhibit A). CDOT requested additional information from CEI. On August 6, 2014, CEI submitted a Request for Equitable Adjustment which contained a longer explanation and more spread sheets but with the same dollar value. There was confusion since

the right column total on the spreadsheet was different from the REA amount and contained some of the CCR amounts.

CDOT requested additional information but what CDOT received was not clear. Several meetings were held with CEI where CEI offered to work with CDOT in going after the utilities. CEI even offered to settle the dispute for $250,000. CDOT still had questions on CEI’s submissions because they were impossible to analyze and CDOT could not see merit based on what had been submitted and discussed.

CDOT paid the CCR’s for work that was legitimate. CDOT Exhibit 6 lists the CCR’s and the amount paid or how the CCR was resolved and CDOT worked in good faith to work things out. When there was no CDOT Project Engineer on the job, the Resident Engineer came in.

The BNSF issue delayed the Project 40 to 60 days. CEI proposed the change in phasing. The east portion of the Project (Phase 1) was rural and more open while the west portion (Phase 2) was urban. CDOT warned CEI that some utilities had not been relocated in the Phase 2 area since Phase 2was to be done after Phase 1 was complete but CEI agreed they would work around the utilities. The original Contract had 200 hours for potholing but CDOT said it was permissible to overrun the quantity and CDOT ended up paying for 1,284 hours of potholing. Where there was a CenturyLink ductbank that contained asbestos that would have caused substantial delay in Phase, CEI worked with CenturyLink to cap the ductbank which CenturyLink paid CEI to do.

CDOT responded to the interference items in the Progress Narratives as shown in CDOT’s letters of July 6, 2012 and August 14, 2012 to CEI but CDOT never received any rebuttals from CEI. CEI owns the conflicts in Phase 2 and CDOT paid for a lot more potholing to try to help out. The rephrasing started in May 2012. CEI’s letter of May 9, 2012 proposed a VECP to use squeegee to replace the flowfill around pipes and proposed cost savings of $103,000, which CDOT felt was understated. The VECP proposal stated, *The project stands to benefit significantly from this proposal by way of improved economy of operations.* Joe O’Dea and Keith Sheaffer worked out the details to use the squeegee. CDOT said CMO #2 changed the phasing and in good faith allowed CEI to work more efficiently by not requiring the flowfill which had to cure before completing the backfill and the squeegee required no compaction. The squeegee helped CEI on all the pipe and not just pipe where there were utility disruptions.

CDOT also allowed intersection closures at Cherryvale, 63rd and Westview while the Contract required the work to be done in phases with traffic moving through the intersections. CDOT worked in good faith with CEI in negotiating the CCR’s and, in order to keep the Project moving and allowed CEI to leave in place the storm drain inlets where squeegee was used by CEI but was not allowed. CDOT also allowed an inlet that was off by 6 or 7 feet to remain in place with some drainage adjustments. CMO #2 allowed the use of the squeegee as a “no cost” change.

CDOT denied the CEI change requests because information was lacking and made no sense. They paid for the CCR’s, went along with CEI’s rephrasing request and gave CEI great savings in the use of squeegee.

**Contractor Rebuttal**

CEI’s first Request for Additional Compensation to CDOT was to try to get a conversation started with CDOT on the impacts and see where both parties stood. CEI had to wait for final quantities to do its analysis of the impact. CEI disputed CDOT’s position concerning CEI’s willingness to work around the utilities in Phase 2. CEI set deadlines with the utilities that were not met.

CDOT continually wanted more information on CEI’s request and CEI tried to fill the gaps and discussed the issues at meetings. The utility disruption is a hard concept to interpret. The CCR’s paid for moving the crews but were only the starting point for the disruptions and inefficiencies that CEI encountered.

CEI offered and wanted to help CDOT in going after the utilities but CDOT is the one who has the contractual relationships with the utilities. As to the $250,000 that CDOT said CEI offered to settle the dispute for, CEI said at the meeting with CDOT it said each side would spend

$250, 000 if they went to court and CEI offered to split the amount CEI had requested. CEI said CDOT continued to argue that the CCR’s paid for the problems but CEI’s request is for its other costs to stop and start and lost productivity from what it bid. CEI was not compensated for all the CCR work because CEI agreed to drop $24,000 to try to settle.

The problem with the railroad agreement brought the Project to a halt for 69 days. CEI was faced with demobilizing and sending 50 employees home, since it had no other place to send them, or trying to find additional work areas on the Project. CEI said it would allow 3 weeks for the utilities to get out of the way so it could start work and the Program Engineer said CDOT would get the utilities out of the way. The 3 weeks turned into 6 weeks and unknown utilities were encountered. CEI contemplated the utilities would be out of the way but this was not mentioned in CMO #2. If flowfill would have been used, this would have resulted in even more disruptions. The flowfill also posed a safety issue for the traveling public since trenches could not be backfilled until the flowfill had cured which would have resulted in the pipe trenches remaining open overnight.

CEI tried every way they knew to mitigate the damages – capping the CenturyLink duct and extensive potholing. It went above and beyond what the Contract required. CDOT said CEI did not respond to the CDOT replies to the Progress Narratives. This is not correct as CEI would bring the same issues up in the next Progress Narrative. Construction at 63rd Street was phased and resulted in constructability issues due to major grade changes up to 4 feet. The impacts at the other two intersections are captured in the total costs. They also dug the trench for the Xcel gas line because there was a long delay to wait for Xcel to do it.

CEI did what they were supposed to do but was impacted by CDOT not doing their job and CDOT’s failure to enforce the Utility Code. CEI provided copies of the added documents that were provided to the DRB on April 6, 2015 and discussed at the start of the hearing. CEI continually brought up the Utility Code issue in its meetings with CDOT but CDOT continually ignored the issue. CEI is not sure why and referred to the June 29, 2012letter from the Program Engineer to the RTD (CEI Exhibit J Supplement) in which CDOT brought up going after the utilities.

CEI referenced its Exhibit L Supplement which contains the documents received from CDOT under the CORA Request. Some Utility Agreements are missing and some are not signed which is contrary to CDOT’s Conditional Utility Clearance and CDOT’s submittal to FHWA. CEI had no knowledge at bid time that CDOT had not done what it was supposed to do.

**CDOT Rebuttal**

CDOT referred to the revised timeline that CEI submitted on April 6, 2015 (CEI Exhibit A). The 197 day delay for the Xcel Agreement is not correct since there were multiple agreements with Xcel, some of which dealt with the further relocation of utilities that had been previously relocated but still caused interference. CDOT bent the rules just to get Xcel moving. CMO #2 reset the start date and allowed the Project rephrasing.

CDOT said CEI implied the CDOT letter in June 2012 to the RTD was a “smoking gun”. CDOT had many discussions on the matter. They did not pursue the utilities because they thought the utilities were doing a good job. CDOT paid for more than 1,000 additional hours of potholing to help CEI. CDOT acted in good faith. If CEI feels they were not compensated, then under Colorado Code 811 CEI can go after the utilities.

As to CEI’s comment about inaccurate Plans, the Plans and Specs showed extensive utilities and it was CEI’s duty to do the coordination during construction. Based on the 128 utilities that CDOT showed in the Plans and Specs, CEI should have expected the possibility of more unknown utilities. A Plan note says the Plans were based on “the best information possible”. Where did CEI consider in its bid utility inefficiencies since it knew there were many utilities that it would have to deal with? CDOT allowed 431 working days to complete a 2 mile project due to the amount of utilities.

CDOT will not pursue the utilities. CEI’s CCR language and its insistence to remove the CDOT standard CMO language is not a blank check for CEI to come after CDOT much later. The use of CCR’s was CEI’s method. CDOT should have used Subsection 104.03 and Force Account Form 10’s. It is not CDOT’s fault that CEI did not use the correct method. If CEI dropped $25,000 of CCR’s, why was this never submitted or brought up in the negotiations? This is the first time CEI has mentioned Differing Site Conditions. Subsection 104.02 identifies what is to be done – CEI was to call out the Differing Site Condition and notify CDOT which it did not do.

Most of the utility problems CEI called out were in Phase 2 and CEI cherry-picked CMO #2. There was never talk of acceleration for the gas line or delays due to the interferences and the work was not on the Schedule Critical Path. Xcel did bore its line in the wrong place but CEI framed it as a delay and not a disruption. CEI agreed to work with CenturyLink on the duct problem and was paid by CenturyLink which should be reflected in CEI’s costs. CEI also did other work for Boulder Valley School District but CEI has never shown how this affected this Project.

CDOT allowed the rephrasing at CEI’s request but in hind sight, it would have been better for CDOT to have stopped the Project. The potholing in Phase 2 should have started immediately when work resumed. CEI said they would work with the utilities and knew how extensive the utilities were. CDOT said constructability reviews were done and CDOT did not violate anything to do with FHWA or the Conditional Clearance.

CDOT pointed out that CEI could open much more pipe trench at one time than they could have opened if flowfill had been used. The north side of 63rd Street was shut down and the grade problems at the intersections were present at bid time. The Project Engineer at the time said he

had not seen CEI’s correspondence dated January 31, 2012 on revised excavation methods due to the Quest fiber optic line (CEI Exhibit D) by the time he left the Project in July 2012.

CDOT said that by negotiating the CCR’s and paying for them, merit is not established for this dispute.

**Discussions by Parties**

1. CEI requested a clarification on CDOT’s comment that CEI knew about the problem but did nothing about it. CDOT said it misstated “CEI” and it should have been “CDOT” (changed above) and referenced CEI’s Position Paper, Page 1, the last paragraph.

2. CEI asked who is responsible to get the clearances from the utilities. CDOT said they were but that CEI used CCR’s during construction instead of what Subsection 104 requires which is force account.

3. CEI said it does not know what utility agreements exist because what it received from CDOT under the CORA request does not cover all the utilities.

4. CEI disagreed with CDOT’s comment that it should have anticipated more utilities and pointed out CEI’s bid was in line with the other bidders.

5. CEI referred to its REA. The Utility Code is clear on utilities supplying as-builts which should have been used for the design.

6. CEI said it was not aware of Colorado Code 811 that CDOT referred to when CDOT said the contractor can go after the utility. CEI’s Contract is with CDOT and CEI does not have contracts with the utilities.

7. CEI said CDOT did not enforce the Utility Code Section 2.1.2.3 that states, *The utility company shall pay for damages caused by the company’s delay in the performance of utility relocation work or interference with the performance of transportation project work done by others.* That is why we are here today.

8. CEI said at the various meetings, CEI asked CDOT if it had any questions on the REA and CDOT said nothing. Now CDOT has said it needed more.

 CDOT responded that what CEI submitted was nothing new. The spreadsheets don’t give the details. CDOT referred to its letter of July 15, 2014 in CDOT Exhibit 2 which stated, *If the requested information is not provided, CDOT will consider the matter closed.*

9. CEI wanted to clarify CDOT’s comment on not starting the potholing immediately. CEI started work immediately with its own truck but, due to the amount of potholing necessary, it had to mobilize a sub to help with the potholing.

10. Matt Brenkle of CEI said he could not find the January 31, 2012 on the excavation problem with the Quest line but CEI and CDOT did work out the direct costs.

11. Ryan Sorensen of CDOT said he had seen CEI’s letters of June 2012 and had requested detailed information a number of times.

**DRB Questions on Utility Interference**

1. The DRB would like a copy of CMO #2. (The CMO was supplied after the meeting but made no mention on the use of squeegee. On April 8, 2015, CDOT supplied CMO #24 which added the squeegee.)

2. **To CEI:** Was notice given to CDOTon having to work the roadway in two 20 foot sections rather that one 40 foot section? What about notice on other earthwork impacts?

 CEI said they did not know and would have to check their records on both questions.

 CDOT said no notices on earthwork were received.

3. **To CEI:** The pictures show utilities hanging in some excavations. Were they existing or relocated? Why couldn’t the excavation have been shored rather that worry about the utilities?

 CEI said some utilities had been relocated and others were unknown. The excavation had to be backsloped per the retaining wall design for the backfill.

4. **To CDOT:** What did CDOT mean in negotiating CMO #2 that “it would get the utilities out of the way”?

 CDOT said they had robust discussions to get the utilities out of the way including going after the utilities. They worked constantly with the utilities. During this time, CEI changed Project Managers. CEI knew there were many utilities in Phase 2 and that is why CDOT agreed to pay for more potholing.

 CEI said that it was its understanding that CDOT would help keep the Project moving and had understood it would take 3 weeks for the utilities to get their work done and not the 6 weeks it actually took.

5. **TO CDOT:** What did CDOT think CEI’s demand to remove the language on future claims in the CMO’s meant?

CDOT said they agreed to remove the language to get the COM’s signed and CEI paid. It never suspected CEI would come back with a claim.

6. **To CEI:** The grade changes at the three intersections would have been there regardless of how the intersections were constructed. Was this different than what should have been expected at bid time?

 CEI said the intersections could not have been built per the Plans.

 CDOT said the ROW could have been used for detours and one-way traffic and the intersections could have been built per the bid.

7. **To CDOT:** What did CDOT mean when it said it “bent the rules” to get the work done by the utilities since the utility requirements and utility clearances are very clear?

 CDOT said it got permits and conditional clearances to advertise. At bid time, the work in Phase 2 was to be constructed much later. The exception was the inlets that interfered with the relocated Xcel poles. Xcel did the work before the agreement was signed which is not permitted.

8. **To CDOT:** Reference has been made to Subsection 105.11 and the Utility Special Provision. Whichcontrols and when?

 The Special Provision applies to the Contractor. Subsection 105.11 is for day-to-day issues.

9. **To Both:** Were the Escrow Documents reviewed?

 CDOT said they were reviewed for the audit on Dispute #3 but not on this dispute.

10. **To CDOT:** Does CEI have everything they asked for in the CORA Request?

 CDOT supplied everything it could find. The Utility Engineer that was involved when all this went on has retired. The new Utility Engineer provided what he had.

11. **To CEI:** When was notice given for the impact costs that it is asking for in this dispute and how?

 CEI said notice was given multiple times at meetings when the direct costs were discussed. Notice was also given per Contract as is documented in meeting minutes and the Progress Narratives. It was also discussed when CEI wanted to remove the qualifiers in the CMO’s. Joe O’Dea said he had conversations with Keith when they discussed going after the utilities and that CMO #2 does have the restrictive language.

12. **To Both:** Points were made about the use of CCR’s and Force Account. What is the difference between the methods and why wasn’t the Contract followed?

 CDOT said CEI chose to use the CCR’s. CDOT offered to use force account but CDOT needs notice so things can be tracked. CDOT received most of the CCR’s after the work was done. CDOT used the CCR info to turn the costs into a force account analysis. CDOT tried to change to force account but got resistance from Jonny Karpuk who was CEI’s Project Manager at the time. CCR’s were delivered after the fact and CEI did not follow the Contract. CDOT used Form 10’s at first.

 CEI said CDOT was notified but would not show up at the problem area for 2 to 3 hours. In the meantime, CDOT moved it crews and kept records. There was a lot for one CDOT person to track. CEI always phoned CDOT.

**Summary of Contractor Presentation on the Use of the Total Cost Method**

Quantum was not discussed with CDOT because of CDOT’s position on merit. CDOT’s position was that CEI was compensated by the CCR’s and CMO’s. The interference impact was not compensated and CEI met the four requirements of the Modified Total Cost (MTC) method. CEI dialed in on the items that were affected by the utilities which were pipe, earthwork and additional management which was exorbitant due to the coordination that was required. CEI removed any costs due to its inefficiencies and has not charged anything that CDOT is not responsible for. CEI waited to submit its costs until it had final quantities. CDOT has never discussed with CEI its position on the four requirements for MTC.

CEI met its obligations in the Contract and is not responsible for the cost overruns. The added costs are actual costs due to the utility interferences. CEI could not do the work as bid as CDOT did not do their job with the utilities. CEI is not responsible for the cost overruns.

**Summary of CDOT Presentation on the Use of the Total Cost Method**

CEI has not met the four requirements to use the MTC method.

1. The nature of the losses makes it impossible or highly impracticable to determine costs with a reasonable degree of accuracy.

 This is a CEI problem. CEI used the “700” series of costs to track work so CEI had a system with a reasonable degree of accuracy to track the costs. The spread sheets in CEI Exhibit B – Master Utility Tracking Matrix has partial information and is incomplete. Some boxes say “N/A” or are empty. CEI did not track everything they could have. CEI tracked costs for 100 CCR’s but said they could not track the impact costs.

1. The contractor’s bid or estimate was realistic.

 CDOT referenced the bid comparison in CEI’s Exhibit E. The Engineer’s Estimate is a baseline compared to the bids. The total bid of the second bidder was almost $300,000 above CEI and the third bidder was almost $600,000 above CEI. You should not look at the percent difference between bidders but the dollar amount differences. The difference is a pervasive indication that there could be a problem in how the utilities were viewed by the bidders.

 3. The contractor’s actual costs were reasonable.

 CDOT will have to have an audit to look at costs. CEI’s Position Paper on Page 16, Item 3 seems to show that CEI knows where their costs are. If CDOT’s audit can find out the costs, why can’t CEI determine actual costs.

 4. The contractor was not responsible for the cost overruns.

 The first cut of costs from CEI on CEI Exhibit E showed no inefficiencies – 6 of the 129 costs are CEI’s responsibility. CDOT does not see a genuine effort on CEI’s part to account for its inefficiencies. Examples of CEI inefficiencies that CDOT does not see were included in CEI’s presentation are listed in CDOT’s Position Paper on Page 7 and include such things as the sewer manhole that was damaged by CEI’s mishandling and delay costs on CCR’s 28, 71 and 95 that were due to CEI not timely scheduling the utility locates. CEI’s position that it is only responsible for $29,000 of costs out total impact costs of $1.1million is not reasonable.

CEI has the burden of proof to prove they meet all four MTC criteria and not CDOT. CEI has not met the criteria.

**Contractor Rebuttal**

CEI said the biggest thing is that the costs were not trackable due to the nature of the impacts with one activity affecting another activity, affecting another activity … and so on. The CCR’s only tracked the direct impacts at the time of the utility interference or disruption. Every time its crews came back to work in an area there was a “learning curve” and restart costs. CEI explained the N/A’s and blanks on Exhibit B.

The bids were close if you look at the percentage differences between bids, even the Engineer’s Estimate was close. CEI’s costs are reasonable. When the CDOT auditors looked at its books for Dispute #3, the auditors had no issues. The audit of costs is not an audit for merit. CEI uses Generally Accepted Accounting Principles and an outside auditor audits its books every year.

Exhibit E quantifies it costs and the costs were incurred due to the utilities affecting its work. $1 million is a lot of money but if you spread the total cost over 100 CCR’s its only $11,000 per CCR for the costs that were not captured in the CCR’s. If you take the 150 impacts shown in

Exhibit E and add another 50 for ones not listed, each event has costs of $5,500 which should be compared to the costs of one of its pipe crews.

CDOT brought up CEI not accounting for all its inefficiencies. It went through all its time cards to get any utility impacts and who caused them. After discussions with CDOT, some costs were removed. Also, CDOT questioned the amount of CEI deducts compared to the work. There was only about $6 million of the Contract that was affected. On the damaged manhole issue, removal was discussed but all agreed to leave it in place and make repairs.

CDOT referred to CCR’s 28, 71 and 95. On CCR 28, the utility could not identify the line which is not a CEI failure to coordinate. On CCR 95, CEI hit an unknown sewer and had to repair it.

CEI had a “locates” meeting everyday with the utilities and told the utilities when and where the locates were needed. The locate requests were also called in per the law. CEI did a lot of jumping around due to problems with utilities and sometimes went to an area where locates had not been requested since the work was not scheduled.

**CDOT Rebuttal**

Repeatedly today during its presentation and in its rebuttal, CEI has said they have information on the interferences. CDOT has asked for more information but CEI has not given CDOT anything. Accordingly, CDOT cannot evaluate CEI’s request at a reasonable level. CDOT cannot understand why CEI doesn’t provide the requested information.

**Discussions by Parties**

1. CEI is not sure of what it has not provided. CDOT has questioned what CEI has that could help in evaluating. What CEI has supplied has been the same since day one but they can’t provide detailed impact on each interference. CEI used the MTC method because they don’t have efficiency comparisons. The actual work took more effort than what was bid. CDOT has not questioned CEI’s utility coordination efforts. CEI had to come back and do skipped work in short sections but CEI did not track it.

2. CEI said there were 129 occurrences listed in Exhibit E but there were also others that were not listed. CEI used CCR’s to tell the story. There were over 500 days where CEI was impacted by utilities but it still met the Contract date.

3. CEI coordinated and notified CDOT but the utilities did not perform. CDOT needs to analyze what CEI used for costs. This is the missing link. CEI does not have each interference tracked.

4. The CDOT audit is not independent as the auditors are from CDOT. What is needed is a truly independent audit. CEI will see what comes from the audit.

**DRB Questions on the Use of the Total Cost Method**

1. **To CEI:** What costs were impacted by the disruptions other than labor and equipment costs? Why not use Column J instead of Column I on the Exhibit E spreadsheet.

CEI said none except for the unallocated company costs of $4.50 per manhour; however, CEI would like to check and confirm.

2. **To CEI:** Looking at reasonable costs, if the Project was done on time, why are PM, PE, Super and Utility Coordination added costs?

 CEI had 3 extra coordinators, 2 more superintendents and one project manager.

3. **To CEI:** Looking at reasonable costs, did anything other than the disruptions affect the dirt costs?

 CEI will have to review but it doesn’t feel many other things affected the dirt work.

4. **To CEI:** Where is the payment from CDOT for the CCR’s accounted for?

 At the bottom of the Exhibit E spread sheet.

5. **To CEI:** Where are the earthwork impacts described?

 In Exhibit B under the columns titled “Excavation and Fills”.

6. **To CEI:** Where segments of pipe had to be “piece-mealed” in, were actual costs tracked?

 No. All Contract work was tracked under the same pay item.

7. **To CEI:** Did CEI track the 20’vs. 40’ earthwork sections actual costs?

 CEI said they did not but could go into its accounting records to determine the costs.

8. **To CEI:** How often did CEI track the utility costs?

 Monthly.

9. **To CDOT:** CEI Exhibit E Bid Spreadsheet shows that earthwork is half of the impacted work. Has CDOT looked at the top 3 bids that show there is only a $7,000 spread in the bids?

 CDOT said it looks good for CEI and CDOT could look at the bid tabs.

10. **To CDOT:** Has CDOT looked atCEI Exhibit E Cost Spreadsheet that shows a decrease in cost for the waterline items?

 CDOT said they had not looked at that.

**Contractor Summary**

There is a lot of information in the Pre-hearing submittal binders. The big picture is that CEI’s operations were interfered with and CEI used CCR’s to track and show CDOT.

CDOT failed to enforce the Utility Code and perform per the Contract with CEI. CEI notified CDOT of the interferences. CDOT’s failures and the failure of the utilities to perform, hindered CEI’s operations and impacted CEI’s productivity and order of work. CEI believes CDOT was aware of the utility impacts and should have enforced the Utility Code.

CEI utilized the Modified Total Cost method and met the legal requirements of the four MTC requirements. CEI has worked with the CDOT people in the room and if some of the impacts are CEI’s or not accounted for, CEI will work them out with CDOT.

**CDOT Summary**

There is no merit to CEI’s position. CEI’s losses were paid by CDOT in the CCR’s which were negotiated on the job. The rephrasing to start in Phase 2 was CEI’s proposal and CEI knew the status of the utilities in Phase 2 and the amount of the utilities in Phase 2. With all the utilities, CEI should have expected the possibility of more utilities.

CEI’s proposal on the squeegee benefitted all of CEI’s operations and the benefits benefitted CEI alone. CEI completed the Project on time and there were no time extensions for utility delays, although some CCR’s requested time but the time was negotiated away. The lengthy list of delays are not all due to utility interferences. Most delays were not on the Critical Path so they are non-compensable.

CEI has not met the four requirements to use the Modified Total Cost method because CEI said they can quantify the costs but chose not to. CDOT still does not know what the actual costs were based on.

Bottom line is CEI was $300,000 low in their bid and offered to settle the dispute for $250,000.

**Notes:**

1.The hearing was closedon the merit of the dispute and the application of the Modified Total Cost method subject to the submission of documents requested by the DRB which were to be submitted by April 9, 2015.

2. The parties were requested to keep the hearing confidential since an audit is to be conducted by CDOT if the DRB finds merit in the dispute.

**Findings**

**Merit**

1. The Utilities Special Provision on Page 158 in the first paragraph, refers to Subsection 105.10 which is headed *Cooperation by Contractor.* The correct Subsection is 105.11 which is headed *Cooperation with Utilities.* Subsection 105.11 requires CDOT to perform various tasks related to utilities and utility companies. Some of the tasks were for the relocation of utilities by the utility companies. At the hearing and in Pre-hearing Submissions, it was pointed out by CEI that some utilities were relocated but were not where they were supposed to be or were relocated to locations that interfered with the work to be performed by CEI. Accordingly, it appears that CDOT did not perform with due diligence the oversight of the relocation of some utilities, some of which were done prior to the start of construction, or the coordination of the construction plans with the utilities.

2. At the hearing, CDOT said that with 128 known utilities noted in the Contract Documents and the location of a portion of the work in an urban area that CEI should have reasoned that there were probably more utilities than what were shown and listed. If this were true, then CDOT as the Owner who is responsible for the design, should have undertaken additional efforts to ensure that **all possible** utilities were shown in the Contract Documents.

3. At the hearing, CDOT said that CEI used the wrong Agreement documents with BNSF which was part of the initial Project delay that resulted in CEI proposing the phasing changes. This statement made it sound like the delay was due to CEI. This is not the case. At the first DRB meeting on February 8, 2012, it was pointed out that BNSF wanted to use an Agreement which was different from the one contained in the Contract Documents.

4. The Revision of Section 103 - Subsection 103.05 - Escrow of Proposal Documents (EPD) states, *If necessary, it* (EPD) *will be used for the purpose of determining the Contractor’s proposal concept, for price adjustments as provided in the Contract,* ***or to resolve any dispute or claim by the Contractor*** (emphasis added). At the hearing, both parties said that the EPD had not been reviewed for this dispute.

5. Neither party followed the provisions of Subsection 104.02(a) – Differing Site Conditions. CEI maintained that their CCR’s and Monthly Project Updates was “notice” but these documents do not comply with the Subsection statement, … *the party discovering such conditions shall* ***promptly notify*** (emphasis added) *the other party in writing of the specific*

 *differing conditions before the site is disturbed and* ***before the affected work is performed*** (emphasis added). This is especially significant for the work that was not documented by CCR’s or that was considered “piecemeal work” by CEI where they had to come back and complete small parts of the work. Likewise, CDOT did not follow the determination provisions.

 Neither party followed the provisions of Subsection 104.02(c) - Significant Changes in the Character of the Work which states, *The basis for the adjustment shall be agreed upon* ***prior to the performance of the work.***

Neither party followed the provisions of Subsection 104.03 – Extra work which states, *The Contractor shall perform unforeseen work … whenever the extra work is necessary or desirable for contract completion. This work shall be performed in accordance with the Contract and as directed, and* ***will be paid for as provided under Subsection 109.04 (Force Account)*** (emphasis added).

 CDOT failed to follow the provisions of Subsection 109.04 – Compensation for Changes and Force Account by not issuing *orders authorizing the work*. Also, CEI and CDOT did not comply with Subsection 109.04(f) which states, *The Contractor’s representative and the Engineer shall, on a daily basis,* ***agree in writing*** (emphasis added) *on the quantities of labor, equipment and materials used for the work completed on a force account basis.* Force account work could also have been documented per Subsection 109.04(h) where the Engineer keeps the daily records which are then review and approve the record.

6. CDOT was well aware of the problems that unknown, incorrectly relocated and late utility company relocations were having effects on the Project. CEI Exhibit J contains copies of CDOT correspondence on the utility issues. The correspondence of February 6, 2012, from the South Program Engineer (this Project is in this area) to the South Program Resident Engineers stated, *On All* *Region 4 South Program projects … if there is a utility company that has been notified correctly, according to the “Final Utility Accommodation Code 909 Sections, … we will be tracking all potential utility company/Contractor claims.*

 In addition, the Program Engineer’s memo dated July 02, 2012 to the Region Transportation Director (CEI Exhibit J) which covered the utility problems and cited the provisions of the CDOT Final Utility Accommodation Code dated September 17, 2009 stating, *the utility company shall pay for damages caused by the company’s delay in the performance of utility relocation work* … The Program Engineer asked for support for possible “recourse” against the utilities but never got it. Accordingly, if CDOT chose not to document the damages and pursue the utilities, CDOT should not expect CEI to absorb the damages.

 On January 15, 2015, CEI made a CORA request to CDOT for *All records pertaining to any and all correspondence and/or agreements between CDOT and utility companies …* During the hearing, CEI pointed out that some of the agreements supplied by CDOT were late in comparison to the Project schedule, some were not signed by the utility, and some agreements were not supplied by CDOT.

 Based on the foregoing, CDOT did not perform as required under Subsection 105.11 and failed to enforce the provisions of the CDOT Utility Code (2C.C.R. 601-18). Had they done so, some of the utility interference costs could have been borne by the utilities.

7. Based upon the information presented, **this DRB finds merit in the claim by CEI that it incurred additional costs as a result of reduced productivity on selected work items from the impacts and disruptions from utilities not being timely relocated and unanticipated utilities being encountered.**

8. CEI has asserted four areas where it was impacted where it asserts it should be allowed to calculate the damage using the modified total cost method. Those four areas are:

1. Storm Drainage
2. Water Line
3. Excavation and Fill
4. PM/PE Super, Utility Coordination

 The use of the modified total cost requires that four predicates be met. To use it, all four must be met and failing to meet one of the predicates disallows use of the modified total cost method. The four predicates are:

1. Any other method would be impracticable.
2. The actual costs incurred are reasonable or any that are not reasonable or appropriate have been removed.
3. The contractor’s estimate was reasonable or any amounts that are not reasonable or accurate had been accounted for.
4. Any costs that the contractor is responsible for or have been incurred as a result of contractor errors or omissions have been accounted for.

9. As to the storm drainage, Area (1) and water line, Area (2) and excavations and fill, Area (3), the DRB finds that the modified total cost method is appropriate and that the predicates for its use have been met. However, meeting the predicates is not an endorsement by this DRB that the modifications required to the costs and adjustments for estimating errors and omission have been appropriately applied. Specifically, the DRB is not accepting or endorsing the costs, budgets and amounts asserted by CEI for these three areas. The following should be addressed by the parties:

1. The claim is a disruption claim and it would appear that only labor and equipment would be disrupted. Therefore, any costs claimed should only relate to labor and equipment, not other categories of cost.
2. The escrow documents and specifically the detailed estimates for these three areas should be examined to determine that those detailed estimates properly captured the costs required for the work and any adjustments for omitted or improperly priced items are properly considered.
3. The actual costs for those three items should be examined to determine that the specific costs are reasonable and include only those costs which are allowable costs per Subsections 105.23(e)2(c) and 105.24(b)12. This includes analysis of the $4.50 per hour cost allocation. The mere fact that a cost is actually expended or recorded does not by itself make it reasonable. Further, any costs for which CEI is responsible, such as those resulting from weather, CEI errors and lack of or late coordination with utilities, within these three areas should be removed.
4. In addition to the finding above as to use of the Modified Total Cost Method, as to CEI’s claim for additional costs of excavation and fills, Area 3, the Board finds that while excavation and fill work may have been impacted, it is unclear from the information presented that all dirt work was impacted as opposed to specific areas being impacted and that to the extent the modified total cost method is used, it should only be applied to those areas and time periods where specific utility impacts to the excavation and fill work can be identified. An example is where the operation had to be separated in to two 20 foot widths instead of one 40 foot width. It should be noted that the majority of the fill (assumed to be Embankment Special) per CEI’s schedule was to be placed after the utility work was mostly complete.

10. The DRB finds that it is not appropriate to use the modified total cost method for calculating Area (4), the additional costs of additional personnel brought in to assist in the utility coordination effort as based upon the statements of CEI that it brought in specific additional people whose time on the project and specific costs can be identified it is appropriate to discretely price the added cost for this Area. As to this claim item, CEI does not meet the predicate that any other method is impractical.

**Recommendations**

**1.**  Pending the use of the Contract’s audit provision by CDOT or the audit results if an audit is performed, CEI should resubmit to CDOT its costs and Request for Equitable Adjustment as discussed in Finding 9 above for storm drainage, water line and excavations and fill. CDOT should then review the costs per the same Finding 9 and meet with CEI to discuss any disagreements.

**2.** CEI should resubmit its costs and Request for Equitable Adjustment as discussed in Finding 9 above for PM/PE Super, Utility Coordination and support the costs through the use of the Escrow Bid Documents which should be opened in accordance with the Contract provisions. CDOT should then review the costs per the same Finding 9 and meet with CEI to discuss any disagreements.

**3.** Should the parties be unable to reach agreement on the quantum issues, one or both parties may request the dispute be submitted to the DRB.

Respectfully submitted this 11th day of June 2015.





 

 W. H. Hinton II