

DISPUTE REVIEW BOARD REPORT AND RECOMMENDATION

SH 7 Cherryvale Road to 75th Street

BOULDER COUNTY, CO

CDOT PROJECT NO. STA 0072-010

DISPUTE #5 CONCERNING UTILITY INTERFERENCE - QUANTUM

Hearing Date: May 18, 2016

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

Hearing Attendees: CEI: Joe O’Dea - CEO

Matt Brenkle - Project Manager

Dennis Anhorn – CFO

Dan O’Dea – Chief Estimator

Michelle Berger – CEI – Outside Attorney

CDOT: Dan Marcucci - Resident Engineer

Joseph Burrows - Project Manager

Laura Zamora - Area Engineer

Roselle Draushak-Crow - Assistant Area Engineer

Lauren Curran - Assistant Attorney General

James Ballard – Audit Manager

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.

CEI submitted a Request for Equitable Adjustment for SH 7 Utility Interferences on August 6, 2014. CEI’s request was based on the Modified Total Cost Method which CEI had not justified. Since the parties were not able to settle the dispute a DRB Hearing on merit was conducted on April 7, 2015. The DRB Report and Recommendation on the dispute was issued on June 11, 2015 and stated, *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.*

The June 11, 2015 DRB Recommendations were as follows:

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.

CEI submitted several revised REAs to CDOT and there were numerous meetings between the parties and CDOT Audit which resulted in the Audit Report dated January 15, 2016. Since the parties could not come to an agreement on quantum, on March 17, 2016 CDOT 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 their statements which are shown below:

Contractor

As established by this DRB's recommendation, CEI's Dispute #5 for the State Highway 7 project, STA 0072-010 was found to have merit. In its recommendation, the DRB provided specific prescriptions for utilizing the Modified Total Cost Method ("MTCM") and verifying the quantum. Both CDOT and CEI accepted the DRB's recommendation and participated in the CDOT Audit division's review of CEI's Request for Equitable Adjustment ("REA").

It is CEI's position that CEI's REA was revised, verified and audited in accordance with the DRB recommendation for utilizing the MTCM and verifying the quantum. The result is an undisputed admitted amount due to CEI of \$843,108.47 and a disputed amount equal to \$97,053.90. Therefore, it is CEI's position that the only review of the \$843,108.47 by the DRB which is appropriate is a review of whether the DRBs Recommendation's specific prescriptions were properly followed; CEI requests that the DRB's review of and recommendation regarding this amount be limited to these issues. For the disputed \$97,053.90 amount, CEI requests that the DRB confirm that the process for calculating quantum in the DRB Recommendation was also adhered to as prescribed for this amount, and make a recommendation that the additional \$97,053.90 is quantum owed to CEI by CDOT. It is also CEI's position that the CDOT audit

recommendation of \$843,108.47 is an undisputed admission by CDOT of an amount owed to CEI upon which interest is accruing at the rate provided for by the Green Book and the Colorado Revised Statutes; therefore, CEI requests that the DRB make a recommendation that CEI is owed this interest.

Finally, CEI wants to clarify that the initiation of the DRB for review of the Dispute #5 Quantum was not a mutual request by both parties but rather a unilateral request by CDOT in response to CEI's demand for payment of the \$843,108.47 confirmed by CDOT audit. In the interest of eliminating any future arguments by CDOT as to CEI's exhaustion of its administrative remedies, but without waiving its position that the \$843,108.47 recommended by CDOT audit is an admission of an amount owed to CEI by CDOT upon which interest is accruing, or any other rights CEI may have, CEI agrees to present the information required for the DRB to verify that the process for determining quantum as outlined in the DRB's accepted recommendation was followed in regard to both the \$843,108.47 and the \$97,053.90 amounts, and that CEI is owed a total of \$940,162.37 with interest accruing as provided for by law.

CDOT

CDOT believes Concrete Express is not due any additional quantum for Dispute #5 because Concrete Express has failed to prove any additional costs. Concrete Express has been compensated in full and in good faith for all documented interferences. CDOT also disagrees with the audit amount due to inconsistencies from Concrete Express throughout the entire process.

Pre-hearing Submittal

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 and the CDOT Audit Report. Both parties provided the DRB with their lists of attendees.

Summary of Contractor Presentation on Utility Interference - Quantum

After CEI and CDOT both accepted the DRB Recommendation, CEI submitted a revised REA for \$942,145.54 and CDOT said the quantum needed to be audited. On July 24, 2015, CEI provided CDOT Audit with the documents that Audit had requested. Meetings and correspondence between CEI and Audit continued with CEI submitting revised REAs. On January 7, 2016 the Escrowed Bid Documents were opened at the CDOT Boulder Residency. On January 13, 2016, Audit requested backup for CEI's deductions. On January 15, 2016, CDOT issued the Audit Report. On January 22, 2016, CEI responded to CDOT Audit concerning deductions that Audit made that were incorrect but CEI never received a reply. On February 16, 2016, the parties met and CEI made an offer to settle but CDOT never responded. On March 17, 2016, CEI sent a demand letter to CDOT and CDOT acted by requesting a DRB hearing.

In the Findings and Recommendations, the DRB outlined a prescriptive process for CEI and CDOT to follow in order to confirm the issue of quantum utilizing the MTCM. Based on the requirements in that process, CEI revised its Request for Equitable Adjustment (REA) and provided the necessary information to CDOT Audit on July 24, 2015 to allow CDOT to confirm CEI's costs. Over the course of approximately six months, CEI and CDOT Audit completed an exhaustive review of CEI's accounting practices and methods of calculating quantum per the DRB's findings and recommendations via the MTCM. CEI broke out various costs as requested by Audit, showed how the indirect costs were determined and included in the bid, compiled equipment rates per the Blue Book, explained the various cost categories included in the MTCM, furnished the backup for the supervision costs and detailed its method for determining the costs which were the responsibility of CEI. REAs were then revised to reflect changes that were made. CEI and CDOT Audit were very thorough and deliberate in following the DRB prescriptions provided in the Recommendations which were accepted by both parties.

A comparison of the other bidders showed CEI was close in their bid. CEI did allow for utilities in its estimate. The problems were that some of the utilities were not relocated timely, there were utilities that were not shown on the Plans and some utilities were not located correctly. The costs came from the disruptions caused by the utility problems. CDOT never questioned the way CEI prosecuted the work. The CEI Utility Tracking Matrix shows the areas that were impacted.

There were no weather impacts to costs since the Contract was a Working Day Contract and no time was charged when CEI could not work. CEI used time sheets to calculate the crew rates and then applied an interference factor to develop the costs that were CEI's responsibility. CEI reviewed the equipment records to develop equipment downtime that was CEI's responsibility.

CEI covered how the various work items were impacted and gave examples. It also showed areas where utilities had to remain in place and how they had to carefully work around them. There was also the "ripple effect" on the work as they had to move around where there was work they could do when there was a utility disruption. If you divide the REA amount of \$940,162.37 by the number of utility conflicts (149), this amounts to about \$6,300 per conflict. Using this amount, the costs CEI is responsible for is about \$44,000 and they have actually deducted \$47,000 which is fair.

CDOT Audit's letter of November 18, 2015 states, *We will then provide you with a copy of our draft report, the purpose of which is to provide you with an opportunity to comment on the report findings. Our final report will incorporate your comments and will be restricted information.* A draft report was never received or reviewed by CEI. Had Audit followed their procedures, the issues on the audit deducts could have been resolved.

CEI is owed \$940,162. Due to the length of time for the resolution of the dispute and the time for the audit, CEI is owed interest from the date of the first REA which is August 6, 2014. CDOT can object to this if they provide specifics.

Summary of CDOT Presentation on Utility Interference - Quantum

CDOT disagrees and rejects the final audit amount because CEI failed to provide Audit with complete and reliable information. Including the original REA for this dispute, CEI has sent out at least nine different REA amounts. There are also numerous notes in the audit report that give the impression that CEI was less than helpful or forthcoming in the process. CDOT recognized the DRB Recommendations on merit but the costs should be limited to the \$100,000 that CDOT has paid CEI for the Contract Change Requests for utility problems.

NOTE: CDOT handed out a package of slides it proposed to use in making its presentation. CEI objected to using the package since it was new and something they had not seen. CDOT withdrew the package and said they would cover the items in their presentation.

CDOT disagreed with the audit amount of \$843,108.47 that CEI says it is owed. CEI was continually changing the REA amounts. CEI also objects to the \$97,053.90 that audit deducted but wants the rest of the audit to be final. CEI has to either accept the audit in total or reject it in total. The time it took to do the audit was long but CDOT wanted to get the best results and Audit had some staff changes. CEI kept pushing for the final audit report. CDOT did not think it was necessary for CEI to review a draft since CEI was involved during the entire audit process.

CDOT never received accurate and complete information for CDOT Audit to use. CDOT referred to Appendix A in the Audit Report (CDOT Pre-hearing Submittal Tab 11) which shows four different REA amounts. CEI kept adjusting the different cost categories but kept the total amount about the same. CDOT questions the validity of the CEI amounts.

CDOT Audit challenged the data that CEI furnished.

- CEI was less than forthcoming in providing information.
- Audit was unable to complete audit due to lack of accounting information.
- CEI's numbers were always changing.
- There was lack of backup on equipment rental and equipment was delivered to locations other than the SH 7 Project.
- CEI's deductions were "best guesses" and subjective. The deductions seemed small and were not substantiated.
- CEI did not allow for all of its inefficiencies.

CDOT feels the lowest amount in each REA that was submitted for the various categories should be the amount used to determine the starting point before deductions are applied. The Audit lists the scope limitations. The external consultant that CDOT hired had problems in trying to audit CEI's records. CEI made its deductions after the 16% mark-up was applied but the deductions should be made before the mark-up is applied.

The CEI Timeline shows that most of the utility interferences ended in June/July 2013 but CEI did not submit its first REA until August 2014. A revised REA was submitted in July 2015 and the audit was started in July 2015.

CEI said there were no weather impacts that contributed to inefficiencies or added work. There were 42.5 weather days in 431 Contract days which is 10% of the total time. Crews were affected by weather in getting back to work just like when they had to come back to an area due to utility interferences. There were heavy snows in February and April of 2013 and there was flooding in September 2013. More credit needs to be given to CDOT for weather related inefficiencies.

Unclassified Excavation, Embankment (CIP), and Structural Excavation and Backfill should not be included in the costs. There was little impact from utility interferences on the R-50 material placement because it was done after the utility interferences. Regardless of the Phase changes, CEI had to skip areas to maintain access to the properties. There were only 1,100 CY of Muck Excavation and the Structural Backfill was only 300 CY for drainage structures.

CEI was aware of possible utility problems when it asked to start work in Phase 2 so they could keep working. The rephrasing was negotiated and accepted by CEI and CEI should have included any utility problems. CEI knew some of the utilities in Phase 2 were to be relocated later than it wanted to start but CEI took the risk in order to keep working.

Any impacts on the 72” pipe should not be included since the work was in Phase 2. CDOT’s reports do not show any delays on the 72” pipe. CEI was also allowed to use squeegee which made their backfill work easier and required less equipment since there was little compaction required for the squeegee. The structures at South Boulder Creek were not impacted and should not be included.

The equipment costs are difficult to understand. With over 30,000 hours of equipment, this works out to 65 hours per day of extra equipment hours. Since most work with utility impacts was completed in May 2013, this would result in an extra 88 hours per day of equipment on site. Additional equipment should be limited to hours before May 2013 when the utility interferences ended.

Contractor Rebuttal

CDOT’s Position Paper and presentation show there is a disconnect on what the disruption claim is about. This has been a long process and CDOT now has new positions. CDOT wants to limit the amount to the \$100,000 that has been paid plus some added items. This indicates CDOT doesn’t understand the disruptions. CDOT wants to reject the audit due to the reclassification of CEI costs which were in line the CDOT Audit requirements. CEI gave Audit what they wanted.

CDOT said CEI limited access to CEI information. CDOT did not provide CEI with the emails which are new in CDOT’s submittal. CEI handed out copies of all the emails.

NOTE: CDOT Objected to handing out the emails as CDOT had not had an opportunity to review them and Dan Marcucci was not copied on all the emails. The DRB cited Spec Section 105.23(f)9 - *The DRB shall not hear any issue or consider any information that was not contained in the Request for Equitable Adjustment and fully submitted to the*

Project Engineer and Resident Engineer during the 105.22 process. The DRB said that the emails were all a part of the audit process and therefore could be used.

After a recess, CDOT pointed out that CEI did not provide all the information that Audit had requested. CEI also objected to CDOT's handout. CDOT said that any emails that were not copied to Dan Marcucci should not be allowed. The DRB said CEI could use the emails and if CDOT had a problem with any of the emails, CDOT can bring them up in their rebuttal.

CEI said the emails show that CEI responded to Audit's requests and noted the phone calls with Audit. The CDOT team said it was not bound by the audit and that CDOT Audit was separate from CDOT. If the CDOT staff would have been involved during the audit, they would have understood the CEI submittals. CEI disagrees with the audit and objected to the Audit Report. CDOT Audit said they would review the draft with CEI but they never did. CEI is not adding \$97,000. The \$97,000 is part of CEI's \$940,000 REA.

CDOT said CEI failed to submit correct information and changed amounts over the 9 REAs that were submitted. The first REA amount of \$802,000 was a quick stab that was modified to comply with CDOT and CDOT Audit requests. The equipment rates were changed to the Blue Book rates per CDOT and Audit's requests. Items were reclassified but were part of the utility impacts. CEI just followed the Green Book. CDOT's position to use the lowest category amounts across all of the REAs that CEI submitted is arbitrary and not per the Contract and the DRB's Recommendation. CDOT has not been specific.

The Audit Notes said Audit did not review the accounting records. CEI offered the records. CEI went through an example using its time sheet files and the process. CEI never received a reply until later and then it provided all 78 pages of time sheet records. CEI explained the vendor cost sheets to Audit. Equipment suppliers don't always show the jobsite on the paperwork and might show it went to the office or that the equipment was moved from another job.

CEI developed an "Interference Factor" to come up with a best guess for the costs that were CEI's. CEI agrees that the CEI deducts should be made before the 16% mark-up is applied. This amounts to about \$8,800.

CDOT said the weather days were 10% of the Contract time. Days were not charged when CEI could not work. CEI did consider impacts for weather in its bid. Utility impacts pushed summer work to the fall and fall work to the winter. CEI had a cost code for snow removal and the costs are not in the REAs. CDOT also brought up the September 2013 floods. The floods came after the utility disruptions were over. CEI planned to jump around to maintain property access and had it in its bid. Any productivity increases due to the squeegee was accounted for in the actual costs.

As shown in Exhibit C of Tab I in CEI's Pre-hearing submittal, the actual equipment hours were 30,769. The added equipment hours of 4,376 equates to 9.35 added equipment hours per day and not the 65 or 88 that CDOT mentioned. CEI notified CDOT in a letter dated March 2, 2012 that the utilities were impacting CEI.

Due to other problems, CDOT agreed to rephrase the job in CMO 2 and said CDOT would work to get the Phase 2 utilities relocated so CEI's work would not be impacted. CDOT said the relocations would take 3 to 4 weeks but CEI gave CDOT 6 weeks and also did more potholing. CDOT still did not meet the relocation schedule.

If CDOT or CDOT Audit had questions, why were the concerns not brought up to CEI? There was a lack of engagement and good faith by CDOT. One of the reasons it took so long to develop the REAs was that it took CDOT 9 months to agree to final quantities. In order to get started, CEI used its own quantities so it could submit a REA. There was little audit information that was provided to CEI for comment.

CEI has an outside audit done every year and the auditors have never required a change after the audit. CDOT just approved CEI to bid for another year using its outside audit. CEI complied with CDOT Audit's letter of November 18, 2015. When it was working with CDOT Audit, it considered it was working with CDOT.

CDOT Rebuttal

CDOT agreed it never understood CEI's REAs starting with the numbers shown in the first REA which was an 11X17 spreadsheet totaling \$1.2 million.

The audit did take a while. CDOT Audit had some staff turnover. CDOT Audit is an independent division and this is the first time they worked with Jim Ballard. There were REA questions where CEI was not helpful or did not supply all the data. The development of the Form 580s was a large effort for both parties. CEI threw the 580s together for the Finals Engineer and emailed them on August 10, 2015. In an email from CDOT on August 17, 2015, CEI was informed that more information was needed to complete the 580s.

It wasn't until December 14, 2015 that CEI submitted a REA for the supervision costs per the DRB Recommendation.

CEI submitted ever-changing amounts and tried to keep the total at about \$1 million. With the corrections, the total amount should have gone down. CEI says the audit total should be \$940,000 and not \$843,000. The CDOT Audit costs are probable or possible but took no ownership of the numbers due to lacking information as stated in the Audit Report.

CDOT Audit said they are independent in CDOT and report to the Audit Committee. A peer review passed the Audit and CDOT contracted with an external auditor. They have to follow CDOT Policy Directives. They participated actively in the audit as shown by the many emails and requested the level of information to be provided to be in compliance with the Green Book. Audit was not able to respond on a draft review due to the pressure CEI was exerting to finalize the audit. They issued the best numbers they could assuming there would be discussions on the Audit.

CDOT said that CEI said the REAs were revised to get in line with the Green Book. Why did it take 8 or 9 REAs to get the REA in line with the bid documents?

CEI said the 42 weather days did not affect the work. If there was a learning curve for the crews to come back after a utility interference, why wouldn't the same apply when the crews had to come back after a weather delay? There were many days where the equipment set idle for half a day.

CEI said that the crew would move or go home if there was an equipment breakdown. If a utility was hit, why didn't the crew go home? CEI had many inefficiencies where CDOT did not receive a credit. The audit was required because the dispute was greater than \$250,000.

CDOT does not believe there were 4,376 added equipment hours for a total of \$468,123.78 as CEI claims and as shown in the Audit Report Table 2 – Comparison of Claim Amounts. In the CEI Monthly Narrative dated March 2, 2012 that was handed out, CDOT was willing to pay for the impact that was recorded on the time sheets.

CDOT went through CEI's Master Utility Tracking Matrix (CEI Pre-Hearing Submittal Tab C – Exhibit D) and pointed out 58 items which CDOT said did not apply out of the total of 149. Of the remaining 91 items in the Matrix, 11 (or about 10%) were in Phase 1 to the east and 80 in Phase 2, some of which CDOT might be responsible for. CDOT has paid CEI for the documented costs. CEI chose to work in Phase 2 ahead of the Contract schedule where utilities were to be relocated. There were some utility interferences that were not shown or known.

There were 154,000 CY of Unclassified Excavation on the hill and at the railroad which were not impacted by utilities as shown on the Earthwork Summary on Phan Sheet 31. The Embankment Special was done after the utility interferences and some patchwork had to be done per the Plans. Most of the Muck Excavation was for the structure at Boulder Creek which was not impacted by utilities. Two thirds of the Structure Excavation was for the walls which were not impacted by utilities except for the fiber optic cable. The Structural Backfill on the pipes was supposed to be flo-fill but CDOT paid the squeegee quantity. Some of the Structure Backfill at the railroad was not impacted.

Interest is not applicable. The Green Book states that interest applies from the date of the Notice to File a Claim and they are not yet to the claim process.

There were many changing REAs. Who has the accountability for the correct Total Costs?

Discussions by Parties

1. If CEI says the REAs are per the Green Book, why did the numbers change as shown in Appendix A of the Audit Report and why was Claim #3 included. CEI said Claim #3 was related.

2. CDOT asked about the correct application of Overhead and Profit. CEI said it should be applied after the deductions.
3. CEI asked why CDOT did not get the utilities moved for Phase 2. CDOT replied that the phasing changed because CEI could not work in Phase 1 and did not want to shut down. CDOT tried to get the utilities moved earlier.
4. CEI said that today is the first time CDOT went through the Utility Matrix and called out the items that CDOT said did not apply. This should be stricken as the Matrix was a part of the Merit hearing. If CDOT had a problem with the items in the Matrix, why didn't they bring them up in the PE and RE meetings?
5. CDOT Audit said they did not audit all time issues. CEI asked why Audit didn't ask for more time. Audit said they could have used another 3 to 6 months. Audit said it was better to provide an estimation of the costs and not give a position on quantum.
6. CDOT said the Earthwork Summary on Plan Sheet 31 shows 4,000 CY out of a total of 6,500 CY was for the walls (about 2/3), Although the BVSD line was there, it did not impact all the wall backfill.
7. CDOT said CEI chose to move to Phase 2 earlier than the Contract allowed and that was CEI's risk. There would have been no risk for CEI to shut down. CEI presented the Phase change and the utilities were discussed. CDOT paid for more potholing to help CEI. If CEI would have chosen to shut down, the costs would have been CDOT's.

DRB Questions on Utility Interference - Quantum

1. **To CDOT:** Can this dispute be settled without a total and complete audit?

CDOT said the audit is complete enough to make a decision.

2. **To CEI:** Explain Tab I – Exhibit A, Sheet 4 of 4, specifically Est # 43, 44 and 258.

CEI said over half of the labor hours are for excavations and fills. The supervision reclassification is shown in Pre-hearing Submittal Tab I – Exhibits I and J under Column I. Time was coded to supervision and should have been charged to the work items.

3. **To CEI:** Explain Tab I – Exhibit C, Sheet 27 of 29 – Structural Backfill. How can the Actual equipment hours change so much from the Estimated hours?

CEI said the Modified Total Cost is Reasonable when looking at the interferences.

4. **To BOTH:** Why were Blue Book Equipment Rates used instead of actuals?

CEI said the initial REA used actual rates. The Blue Book rates were used based on DRB Finding 9(c) which refers you to Subsections 105.23(e)2(c) and 105.24(b)12.

5. **TO BOTH:** What do they mean by compliance with the Green Book?

CEI said Subsection 109.10 lists what costs can be used.

6. **To CDOT:** Did CDOT maintain daily equipment and work reports and did the audit compare them?

CDOT said there were not reports for every day. Audit did not compare them.

7. **To BOTH: Were there any negotiations after the audit?**

CDOT said there was a meeting with Joe, Matt, Dan and Keith Sheaffer but only high and low settlement numbers were discussed.

CEI said that getting nowhere after 1½ months, CEI threatened to file an injunction to get a meeting. Dan and Keith said they had no settlement authority and would have to talk to Johnny Olson. CEI made a settlement offer in the low \$900,000 area. CDOT never got back to them. CEI then sent a demand letter to get paid the \$843,108.47.

8. **To CEI:** Why does CEI say the audit is determinative of the amount due CEI?

CEI said the auditor is a CDOT employee and made the determination based on the qualifications in the Audit Report.

CDOT Audit said the \$840,000 is not accurate based on the qualifications in the Audit. The amount is Audit's best approximation.

CEI said the Audit did not say nothing additional was due CEI. CEI sent emails to audit asking if more information was needed.

9. **To Both:** Were accounting job cost records made available to CDOT Audit?

CEI said it sent Audit a PDF of the accounting records and a spread sheet on the labor and offered to make all time cards available.

CDOT made no reply.

10. To CDOT: Were the Escrow Bid Documents reviewed?

CDOT said they only spot checked and they matched.

11. To CDOT: Who decided if CEI should have stopped work or kept working?

CDOT said the contractor can make the call and then CDOT can evaluate. They had discussions to have CEI leave and then get a new contractor. CDOT said that there were utility relocations required in Phase 2 and discussed this with CEI. CEI chose to rephrase knowing utilities were in the way. CDOT tried to mitigate the impact by adding more potholing and trying to get the utilities to move earlier. CEI wanted an area to work.

12. To CDOT: Was there a risk allocation made when the rephrasing was agreed to?

CDOT said it was discussed but was not memorialized very well. CEI never asked to stop work or brought up liquidated damages.

Findings

1. This DRB has previously ruled that there was 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 the utilities not being timely relocated and unanticipated utilities encountered.
2. CEI had asserted that in the four areas where it was impacted it should be allowed to calculate its damages using the Modified Total Cost Method. This DRB previously found that CEI had met the four predicates for use of the Modified Total Cost Method for certain of its claims. However, this DRB specifically stated in prior Finding 9 that it was not accepting or endorsing the costs, budgets and amounts asserted by CEI for the three areas of cost for which the DRB had determined CEI had met the four predicates for use of the Modified Total Cost Method (Area 1- Storm Drainage, Area 2 - Water Line, Area 3 - Excavations and Fills). The DRB specifically stated in prior Finding 9 that the following should be addressed by the parties:
 - (a) *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.*
 - (b) *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.*

(c) *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 (d)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.*

(d) *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.*

3. Additionally, in prior Finding 10 this Board specifically found the following as to CEI's claim for additional personnel to assist in the utility coordination effort.

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.

4. The intent of DRB Recommendation 1 was for CEI to submit a revised REA based on the Findings and Recommendations dated June 11, 2015 and for the CDOT Project Team to review the revised REA and meet with CEI **to discuss any disagreements**. Based on the Timeline included as Tab 2 in CEI's Pre-hearing Submittal and as discussed during the hearing, CDOT never met with CEI to discuss areas where CDOT disagreed and just turned the entire matter over to CDOT Audit.

During the hearing, CDOT went through Tab C – Exhibit D: Master Utility Tracking Matrix in CEI's Pre-hearing Submittal and pointed out items which CDOT said did not apply the utility disruptions which were not CDOT's responsibility. CEI pointed out that this was the first time during the dispute discussions, negotiations and hearings on all of Dispute #5 that CDOT had ever commented on the Matrix.

The position of the DRB is that CDOT failed to comply with the DRB Recommendation and the requirements of Spec Section 105.22(b) and (c). Also, based on the hearing, it appears the CDOT Project Team had little to do with the audit or the resolution of any questions by

CEI on the audit other than a meeting on February 16, 2016 where only a total number from CEI was discussed.

5. This matter is now before the DRB to determine the quantum or damages, if any, payable to CEI. CEI has taken the position that the CDOT audit is determinative of the damages owed. This DRB does not concur. DRB prior Finding 9 was clear in subparagraph (b) that the estimates needed to be examined to determine if the detailed estimates properly captured the costs required for the work and any adjustments that were omitted or improperly priced items are properly considered. The CDOT audit does not address this issue. Further, prior Finding 9(c) addressed the analysis required as to whether the actual costs are reasonable, which is different from the question of whether a cost is actually expended or recorded. The CDOT audit does not fully examine the issue of whether all costs are reasonable.

In addition, the DRB in an email to the parties dated April 1, 2016, cited the following from the CDOT Construction Manual SECTION 100 GENERAL PROVISIONS 105.22.2.2 Item 4:

*An audit may be performed for any dispute. The audit will evaluate the amount of the Contractor's damages **but will not make judgment on merit or quantum** (emphasis added). In certain cases there are damages that are the fault of both Parties and a determination of value to be assigned to each Party will have to be negotiated.*

6. Paragraph 9(d) addresses use of the modified total cost method in CEI's claim for additional excavations and fills. This DRB directed that the excavations and fills be examined and that only those areas and time periods where specific utility impacts to the excavation and fill work could be identified be considered. Neither CEI nor CDOT performed this analysis. CEI has asserted all of its overruns are applicable. CDOT's auditors have merely verified that the amounts claimed were actually expended. **Since CEI did not substantiate specific utility impacts to specific excavation and fill work, CEI's request for labor and equipment costs increases due to utility interferences is denied.**
7. During the audit process, CEI was requested to reprice its equipment to use Bluebook rates. The intent of prior Finding 9(c) was for CEI to use the cost categories listed in Subsection 105.24(b)12 that CEI included in its's **actual costs**. Bluebook rates are inconsistent with the rates used by CEI in its costing or estimating. Simply by using Bluebook rates CEI has substantially increased its alleged costs. This DRB has recalculated the equipment cost provided by CEI to compare the costs that would have been recorded using CEI's rates versus Bluebook rates. For all of the utility items, CEI's rates using its estimated rates would have resulted in costs of \$387,839 versus using Bluebook rates for the same hours and pieces of equipment, which would have been \$626,191.39. Attachment 1 to this Report and Recommendation details the calculations for the revised equipment costs.

For the excavation items, CEI's equipment costs using its estimated rates and the actual hours, CEI would have had \$968,061 versus using Bluebook rates where it would have costs of \$1,481,951.46. This DRB finds that the use of Bluebook rates in this matter is

inappropriate as it confers a substantial benefit on the contractor simply by the change in rates. Nothing about the utility conflicts caused CEI’s equipment rates, versus the number of hours, to change.

8. CEI’s utility work as presented in its Pre-hearing Submittal Tab I – Exhibit A Page 1 of 4 shows the following amounts for labor:

| Item | Actual Labor Cost | Adjusted Estimated Labor Cost | Overrun |
|----------------|-------------------|-------------------------------|--------------|
| Storm Drainage | \$464,830.05 | \$368,208.00 | \$96,623.41 |
| Waterline | \$102,585.00 | \$105,815.72 | (\$3,230.72) |
| Total | \$567,415.05 | | |

Using the revised equipment rates from Attachment A of this Report, Line 813, Equipment Costs of \$387,839 are, as percentage of actual direct labor, 68.4%, $387,839/567,415.05$

This DRB finds that the appropriate Equipment Costs for the impacts to the Storm Drainage and Waterlines are the difference in direct labor cost to which should be applied the same percentage of equipment costs that equipment is of total labor or 68.4% plus the markup of 16%.

9. CEI requested additional costs for Supervision of \$90,402.92 as shown in its Pre-hearing Submittal Tab I – Exhibit A page 2 of 4. Per Project Special Provisions – Utilities, the utility work and coordination that was the responsibility of the Contractor. The Special Provision contains an extensive list of know utilities and actions required of the Contractor. The costs requested by CEI for Asst. Super/FM CC Paperwork of \$11,952.27 were required by the Special Provision. **Since CEI stated the costs for the PM Staff Utility Coordinator were not included in its bid and nothing was presented during the hearing that the CDOT Audit disputed the costs, the costs for the PM Staff Utility Coordinator for \$78,450.65 and truck costs of \$1,260.00 are considered an additional cost due to the substantial amount of utility interference on the Storm Water and Waterlines.**
10. Although CDOT maintained that CEI should have given a credit for weather impacts, CDOT offered no specifics on dates or construction operations that were affected by the weather. CEI said that it was not charged for days when it could not work due to weather and had also included weather related costs in its bid. Accordingly, based on the Pre-hearing Submittals and the hearing, the DRB has no information to determine if or how much the weather caused CEI to be inefficient.

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11. Based on the above Findings, the DRB calculation of damages is:

| Area/Bid Item | Act. Cost | Labor | Final Adj. Labor Cost | Actual Cost >(<) Adj. Est Cost |
|--|---------------------|--------------|------------------------------|---|
| Total Storm Water | \$464,832.05 | | \$368,208.66 | \$ 96,623.39 |
| Total Waterline | 102,585.00 | | 105,815.72 | (3,230.72) |
| Subtotal | \$567,417.05 | | \$474,024.38 | \$93,392.67 |
| Attachment A Total Equipment Cost | \$387,839.00 | | | |
| Allocation of % Labor | 68.4% | | | \$63,880.59 |
| Added PM Staff Utility Coordinator | | | | \$78,450.65 |
| Added Truck * | | | | 1,260.00 |
| Subtotal | | | | \$79,710.65 |
| Deduct for CEI Equipment Downtime ** | | | | |
| Deduct for CEI Failure to Notify & Coordinate Utilities | | | | (\$24,960.00) |
| Subtotal | | | | \$ 212,023.91 |
| 16% Overhead and Profit | | | | 33,923.83 |
| TOTAL | | | | \$245,947.74 |

* CEI Tab I – Exhibit C Page 14 of 29: PM Staff Coordination LT Trk 180 hours at \$7.00/hr.

** Any costs associated with equipment downtime should be accounted for in the 68.4% allocation noted above.

12. As to excavation costs, CEI has not done an analysis of the specific impacted areas nor did they adequately demonstrate their costs were reasonable. For example, Area 44, Bid Item 220 Structural Backfill Class 2, CEI had estimated labor hours of 17.32 and CEI actually spent 1,980.50 hours. The equipment it estimated was relatively minor yet the actual equipment charges had substantial amounts for backhoes and large equipment items. This is a strong indication that either the costs or estimates are not reasonable. In response to questioning, CEI suggested that this might be because some of those costs related to Structural Backfill Class 1. However, they did not know and presented no credible testimony that that was the case. Generally, CEI failed in their requirement to show either that the costs recorded in the excavation and backfill codes were reasonable, or the estimates were reasonable and that they had done what the DRB prescribed - specifically analyze the costs in impacted areas and time periods. **Therefore, CEI's entire claim, including quantum, for excavation and backfill costs is denied.**

13. In CEI's Position Paper, it requested that interest be awarded CEI at the rate of 8% from the date of wrongful withholding which CEI said was August 6, 2014 when CEI submitted its first REA. Although Spec Section 105.24(b)12(9) states, *Interest shall be paid in accordance with CRS 5-12-102 beginning from the date of the Notice of Intent to File Claim*, Spec Section 105.24 - Claims for Unresolved Disputes states, *The Contractor may file a claim only if the disputes resolution process described in subsections 105.22 and 105.23 has been exhausted without resolution of the dispute*. Since this dispute is presently in the DRB Process, the Contract does not allow CEI to file a Notice of Intent to File Claim until the DRB Process has been exhausted. **Accordingly, CEI's request for interest is without merit and is denied.**

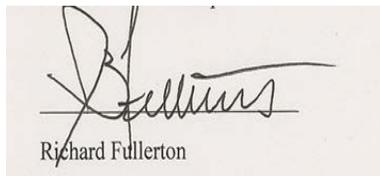
Recommendations:

1. Based on the above findings, CEI should be compensated by CDOT for the costs for utility interference/disruption in the amount of **\$245,947.74**
2. Based on Findings 6 and 12 above, since CEI did not examine the costs of the excavations and fills for only those areas and time periods where specific utility impacts to the excavation and fill work could be identified per DRB requirements, **CEI's request for equipment costs increases due to utility interferences to the excavations and fills is found to be without merit.**
3. Based on Finding 13 above, interest is not applicable until after the Notice of Intent to File Claim has been filed. Since this dispute is presently in the DRB Process, the Contract does not allow CEI to file a Notice of Intent to File Claim until the DRB Process has been exhausted. **Accordingly, CEI's request for interest is without merit and is denied.**

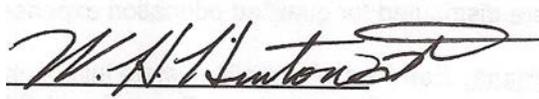
Respectfully submitted this 15th day of June 2016.



William Schwartzkopf



Richard Fullerton



W. H. Hinton II

Attachment

1. Equipment Summaries