

COLORADO PROJECT NO. SHE 0702-267
I-70 W of Vail Wildlife Fence
Dispute Review Board Recommendation

A. Dispute Review Board Authority and Hearing – An on-demand Dispute Review Board (DRB) was authorized for Colorado Project No SHE 0702-267 by a Three-Party Agreement dated June 2, 2009. The members consisted of chairman Richard Fullerton, William Schwartzkopf, and Craig Siracusa who conducted a hearing at 200 Broadway, Eagle CO beginning at 9:30 a.m. on Wednesday, July 1, 2009. Attending the hearing on behalf of the parties were:

Colorado Department of Transportation (CDOT)

Martha Miller
Joe Elsen
Dennis Largent
Damian Leyba
Dan Markham
Trent Josten

ElectroBraid, Inc. (EBF)

David Bryson
Richard Lampman
Susan Lampman

B. Submittals Reviewed by the DRB:

Pre-hearing submittals from CDOT

Contract and Bond – Colorado Project No SHE 0702-276, Construction Subaccount: 15903R
CDOT Special Provisions – I-70 W of Vail Wildlife Fence
CDOT Highway Construction Bid Plans

- 1.0 Joint Statement of Dispute and Scope of Desired Decision
- 2.0 Background
- 3.0 Cost Analysis
- 4.0 List of Attendees
- 5.0 List of Intended Experts

Exhibits

1. Original Bid Documents
2. EBF April 2008 Method Statement
3. EBF Dec 1, 2008 Correspondence w-March 28, 2008 Production Rates
4. Calculation of 2007 Cost vs 2008
5. CDOT Monthly Pay Estimates
6. EBF Claimed Installed Posts on a Monthly Basis
7. Cost Analysis
8. Labor Hours
9. Equipment Exhibit
10. Calculation of Additional Labor Costs
11. Adjustments to April 9, 2008 Audit Report
12. Report on Contractors Dispute Items from EBF, Inc.
13. EBF Nov 10, 2008 Request of Equitable Adjustment letter
14. Photos
15. CDOT Standard Plans – Deer Fence and Gates

COLORADO PROJECT NO. SHE 0702-267
I-70 W of Vail Wildlife Fence
Dispute Review Board Recommendation

Pre-hearing submittals from EBF

1. D. Markham to EBF April 9 2009
2. CDOT AUDIT Final Report April 9 2009
3. ElectroBraid Exhibit A Original Bid Documents
4. ElectroBraid Exhibit B Incurred Cost Schedule
5. EBF Prelim Contract Schedule at August 23 2007
6. EBF Method Statement March 5 2008
7. EBF Project Schedule March 12 2008
8. EBF Memo to CDOT re Ram-Set Posts
9. EBF Notice of Intent to File Claim July 12 2008
10. EBF Pre-Hearing Position Paper Draft November 10 2008
11. CDOT Acceptance of Merit Nov 17 2008
12. EBF Payroll Summary - Employee Avg. Hours per Week
13. EBF INC - Financial Statement Auditors Report
14. EBF INC - Audited Statement of Deficit

EBF DRB Letter June 18 2009
DRB – EBF Submission – June 18

Documents submitted during the hearing

EBF response to CDOT management position paper dated June 19, 2009
CDOT CMO #005 – Value Engineering Change Proposal (CMO # 5 Game Ramps)

B. Project Overview

Colorado Department of Transportation project SHE 0702-267, consisted of the removal of a ROW fence, replacing it with a deer fence, game ramps, and construction traffic management. This project is located on Interstate 70 beginning approximately at mile post 147 and extending approximately 26 miles easterly to mile post 173 in Eagle County in the State of Colorado. This project is referred to as the "I-70 W. of Vail Wildlife Fence" project.

ElectroBraid Fence, Inc. submitted a low bid of \$1,795,394.00 on August 2, 2007. The notice to proceed was given to ElectroBraid on September 18, 2007. The contract had a fixed completion date of November 16, 2008. The completion date was later modified to December 17, 2008

C. Progress and Dispute

During the course of the Project, ElectroBraid encountered subsurface rock that it believed constituted a differing site condition. The total amount of deer fence that was originally to be installed was 108,780 lf. However, CDOT and ElectroBraid agreed to stop performance on the contract on December 17, 2008 after only 57,361 lf. of deer fence had been installed.

The parties are in dispute as to the impact of the differing site conditions on fence installation and the resulting amount of additional compensation to which ElectroBraid is entitled. CDOT has paid ElectroBraid \$172,600 (CMO #6) for this condition, and ElectroBraid is seeking approximately \$400,000 in additional compensation. CDOT does not believe that all of the additional costs claimed by ElectroBraid were caused by the differing site condition.

COLORADO PROJECT NO. SHE 0702-267
I-70 W of Vail Wildlife Fence
Dispute Review Board Recommendation

D. Positions:

EBF Position – The Contractor submitted a Request for Equitable Adjustment (REA) on November 10, 2008 for \$393,043 that was later increased to \$413, 826. They presented in the REA and at the hearing that they were required to work an additional four months in 2009 based on differing site conditions of subsurface rock that were not referenced in the bid information prepared by CDOT prior to bidding in August 2007.

CDOT Position – CDOT has granted merit to the Contractor's position that hand digging in lieu of mechanical drilling of more than 10% (EBF bid position) of the total number of post holes as a result of subsurface physical conditions not identified in the Contract constituted a differing site condition. CDOT did not re-argue this position as part of the hearing. This hearing was solely for the determination of the total compensation amount. It is the position of CDOT's project management that the Contractor is due a total of \$234,952.50 as compensation for this differing site condition. To date the Contractor has received \$172,620.00 of this compensation via Contract Modification Order #6. CDOT asserts that an additional \$62,332.50 should be paid to ElectroBraid as the resolution of this issue.

E. Contract Provisions addressed by the parties:

1. Subsection 104.02 Differing Site Conditions, Suspensions of Work, and Significant Changes in the Character of the Work states in part:

"(a) *Differing Site Conditions*. During the progress of work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed.

2. Section 105.23 Claims for Unresolved Disputes states in part:

(b) 12. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:

A. These categories represent the only costs that are recoverable by the Contractor. All other costs or categories of costs are not recoverable:

1. Actual wages and benefits, including FICA, paid for additional labor
2. Costs for additional bond, insurance and tax
3. Increased costs for materials
4. Equipment costs calculated in accordance with subsection 109.04 for Contractor owned equipment and based on certified invoice costs for rented equipment
5. Costs of extended jobsite overhead
6. Salaried employees assigned to the project
7. Claims from subcontractors and suppliers at any level
8. An additional 16 percent will be added to the totals of items (1) through (7) as compensation for items for which no specific allowance is provided, including profit and home office overhead

COLORADO PROJECT NO. SHE 0702-267
I-70 W of Vail Wildlife Fence
Dispute Review Board Recommendation

9. Interest shall be paid in accordance with CRS 5-12-102 beginning from the date of the Notice of Intent to File Claim

3. **Section 108.07 Determination and Extension of Contract Time** states in part:

(c) 1. *Excusable Delay.* A delay that was beyond the Contractor's control and not caused by the Contractor's fault or negligence, and for which a contract time extension may be granted.

A. *Compensable Delay.* An excusable delay caused by the Department for which the Contractor may be entitled to additional monetary compensation. Monetary compensation for such delays will be made in accordance with subsection 109.10.

4. **Section 109.04 Compensation for Changes and Force Account Work** says in part:

Differing site conditions, changes, and extra work performed under Section 104 will be paid as stipulated in the order authorizing the work. Compensation will be at unit prices or lump sum, or the Department may require the Contractor to do the work on a force account basis.

F. Discussion:

At the beginning of the hearing, Ms. Miller distributed to the DRB members copies of the DRB Three-Party Agreement signed by each member and by CDOT Chief Engineer Pamela Hutton. There was a brief discussion and acceptance of reimbursement to the DRB members for time to review documents and discuss the case outside of the hearing.

The parties confirmed that they had followed all dispute resolution procedures required in Section 105.21 of the Standard Specifications prior to presenting their dispute to the Dispute Review Board. They also confirmed that they had shared with each other all documents provided to the Dispute Review Board as background for this hearing. The parties agreed to discuss the claim incrementally in accordance with Section 105.23 (b) 12.

Ms. Miller stated that the EBF claim was not a delay claim but a matter of differing conditions based on the Request for Equitable Adjustment (REA) submitted 11/10/2008 with an Acceptance of Merit on 11/17/2008.

In recognizing additional work because of differing conditions, CDOT authorized CMO #6 and paid ElectroBraid an additional \$172,620 for unanticipated expenses in digging fence posts in rock. CDOT has offered to pay an additional \$62,332.50 to resolve the dispute.

CDOT had ElectroBraid's claim and project costs audited. CDOT's audit determined that total project costs, not including the ownership cost of contractor-owned equipment incurred by ElectroBraid were \$1,049,229.01. This amount was accepted by ElectroBraid. ElectroBraid only challenged the allocation of certain costs, not the total amount of costs.

The claiming party, ElectroBraid, Inc. presented its claim. Mr. Bryson addressed the intent to file a claim that he sent to CDOT on July 12, 2008 that included notification of differing site conditions based on subsurface rock. After recounting the history of dispute negotiations between the parties, he recognized the preference of EBF and CDOT for the DRB to determine the quantum of this issue.

COLORADO PROJECT NO. SHE 0702-267
I-70 W of Vail Wildlife Fence
Dispute Review Board Recommendation

Various issues were discussed between the parties, including

- an additional four months of time required by EBF to reach an acceptable level of completion, referencing Section 108.07,
- reimbursement for contractor-owned equipment,
- the payment of vacation pay, travel and weather allowances to employees, and the additional cost of digging post holes in rock, referencing Section 109.04
- CDOT proposed that EBF may have had a significant error in its original bid because it was never able to achieve production rates as low as the unit price included
- Mr. Schwartzkopf clarified that the CMO #6 was authorized on the basis of differing site conditions and that it is not within the authority of the DRB to entertain arguments based on a delay claim. Any claim would have to be in the format prescribed in Section 105.23.
- Both parties acknowledge that the original estimated profit would have been increased by \$110,598 because of CMO #5 for value engineering.

G. Evaluation and Recommendation:

This recommendation may be taken under consideration with the understanding that:

1. The DRB Recommendation was a proceeding based on presentations by the parties.
2. No fact or expert witnesses presented sworn testimony or were subject to cross-examination.
3. The parties to the DRB were not provided with the right to any discovery, such as production of documents or depositions.
4. There is no record of the DRB hearing other than the Recommendation.

DRB Recommendation:

As the problem of differing site conditions became apparent, CDOT and EBF agreed to stop the contract performance, reduce the scope of the contract, and bid out the remaining work under separate agreement. CDOT has previously agreed to the merit of ElectroBraid's claim, and both parties have asked that the Dispute Review Board calculate the quantum based on differing conditions. The DRB recommends that:

ElectroBraid be awarded the additional sum of \$98,961. Additionally, ElectroBraid is entitled to interest in accordance with CRS 5-12-102 from the date of Notice of Intent to File Claim, which the DRB recognizes as July 12, 2008.

The DRB has used the following calculations in determining its recommendation:

-The original contract awarded to ElectroBraid totaled \$1,795,394. ElectroBraid has billed a total of \$1,190,214 against the contract total. These numbers represent a cost of work to CDOT of 66% of the original contract. The DRB believes, therefore, that ElectroBraid is entitled to 66% of the anticipated overhead and profit for their effort.

-In calculating the anticipated overhead and profit, the DRB used estimates from pre-hearing submittals and testimony from the parties. These numbers are inexact in that ElectroBraid did not note a specific line item in their estimate for overhead or profit. They did state, however, that \$150,000 was included for corporate office overhead and \$110,000 for contract profit.

COLORADO PROJECT NO. SHE 0702-267
I-70 W of Vail Wildlife Fence
Dispute Review Board Recommendation

-Granting 66% of the original contract overhead and profit, the allowed overhead and profit due ElectroBraid is \$171,600 (66% of \$260,000).

-ElectroBraid further allowed that mobilization and startup costs during the 2007 construction season on this project exceeded their budgeted amount by \$80,000. They have conceded a loss of this amount against anticipated profit.

-Both parties agreed that ElectroBraid should benefit from value engineering authorized in CMO #5 in the amount of \$110,598.

-Therefore, the calculation of anticipated overhead and profit for the modified contract is:

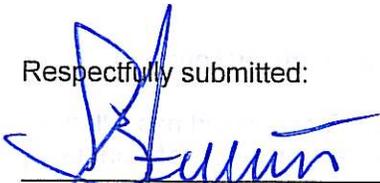
Allowed overhead and profit	\$171,600
Mobilization loss	(\$ 80,000)
Value engineering increase	<u>\$110,598</u>
Total anticipated profit	\$202,198

-To calculate the contract total, the amount of overhead and profit should be added to the cost of the work. The amount expended by ElectroBraid has been shown as \$1,049,229 (EBF Exhibit B Incurred Cost Schedule). An additional cost of work item heretofore unresolved and unbilled is the cost of contractor-owned equipment. CDOT and ElectroBraid had previously agreed that the sum of \$18,874 be allowed for two months of construction but now should be granted for four months, bringing the total of billable contractor equipment to \$37,748. This would increase the total cost of work to \$1,086,977.

-Adding the allowed overhead and profit of \$202,198 to the total cost of work, the final contract total should be \$1,289,175. Therefore, the additional compensation recommended is the final contract total minus the total billed (\$1,289,175 - \$1,190,214), or \$98,961 (plus interest).

Because it is impossible to determine the exact cost of additional work based on differing conditions, and because CDOT and ElectroBraid have been more than cooperative in trying to resolve this dispute equitably, the DRB recommends the above as a responsible and fair resolution of all claims.

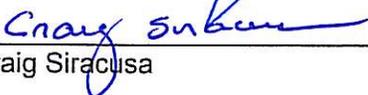
Respectfully submitted:


Richard Fullerton

7/7/09
Date


William Schwartzkopf

7/7/09
Date


Craig Siracusa

7/7/09
Date