

GARTH L. WILSON
ENGINEERING AND CONSTRUCTION INSIGHTS

April 16, 2009

Chris Boespflug, Project Engineer
Colorado Department of Transportation
1050 Lee Hill Road
Boulder, CO 80302

Justin DuMond, Project Manager
Flatiron Constructors Intermountain
10090 I-25 Frontage Road
Longmont, CO 80504

Reference: CDOT Project IM-0253-160
FCI Job No. 4106

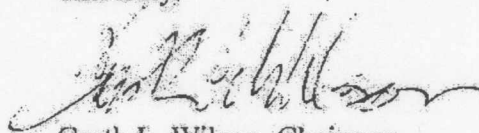
Dear Chris and Justin,

In response to your requests to the Disputes Resolution Board (DRB) to determine merit and quantum relative to Dispute #1 and #4 on the referenced Project, we enclose our recommendations herewith. In accordance with Subsection 105.22(g), one original signed copy of each recommendation is provided to each party.

We await further direction in this matter.

Inasmuch as this recommendation has been issued earlier than anticipated during our meeting of March 16, 2009, we suggest that submittal of the documents for the Disputes Package II might be made earlier than the date scheduled at that time (June 5, 2009). Please advise the DRB of your wishes.

Sincerely,



Garth L. Wilson, Chairman
For the DRB

Enclosures

cc: Bill Ashton
Dick Fullerton

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IM0253-160
Dispute Review Board Recommendation

DISPUTE #4 – Working Day Charges for Erosion Control - \$11,046.36 and 4 days

Documents Reviewed:

A. Contract and Bond:

1. Project No. IM 0253-160 Contract;
2. Special Provisions (Standard and Project);
3. Standard Specifications for Road and Bridge Construction (2005);
4. Supplemental Specifications;
5. Plans (Standard and Detailed);
6. Flatiron's Proposal;
7. Contract Modification Orders 1 through 7.

B. Correspondence:

1. CDOT Speed Memo #32 dated 12-12-06;
2. CDOT Speed Memo #45 dated 1-12-07;
3. Flatiron letter dated 1-15-07;
4. CDOT Speed Memo #58 dated 2-8-07 (with attachments);
5. CDOT Speed Memo #71 dated 3-21-07 (with attachments);
6. CDOT Speed Memo #77 dated 4-10-07 (with attachments);
7. CDOT Speed Memo #82 dated 4-13-07 (with attachments);
8. CDOT Speed Memo #98 dated 5-29-07 (with attachments);
9. CDOT Speed Memo #100 dated 5-30-07 (with attachments);
10. CDOT Speed Memo #102 dated 6-1-07 (with attachments);
11. CDOT Speed Memo #103 dated 6-4-07;
12. CDOT Speed Memo #105 dated 6-13-07 (with attachments);
13. CDOT Speed Memo #113 dated 7-12-07 (with attachments);
14. CDOT Speed Memo #136 dated 9-10-07 (with attachments);
15. CDOT Speed Memo #141 dated 9-18-07 (with attachments);
16. CDOT Speed Memo #146 dated 9-22-07 (with attachments);
17. CDOT Speed Memo #147 dated 9-25-07;
18. CDOT Speed Memo #153 dated 10-4-07;
19. CDOT Speed Memo #157 dated 10-9-07 (with attachments);
20. CDOT Speed Memo #163 dated 10-12-07 (with attachments);
21. CDOT Speed Memo #165 dated 10-16-07 (with attachments);
22. Flatiron letter dated 10-17-07;
23. CDOT Speed Memo #166 dated 10-17-07 (with attachments);
24. CDOT Speed Memo #169 dated 10-19-07 (with attachments);
25. Flatiron letter dated 5-1-08;
26. CDOT letter dated 5-2-08;
27. Flatiron letter dated 5-7-08 (with attachments);
28. CDOT letter dated 5-15-08;
29. CDOT letter dated 5-23-08;
30. Flatiron letter dated 6-9-08;
31. Flatiron Pre-Hearing Position Paper dated 4-1-09 (with attachments);
32. CDOT Pre-Hearing Position Paper dated 4-14-09 (with attachments).

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Discussion:**A. Sequence:**

As listed above, over the 10-month period from December 2006 through October 2007, Flatiron received at least twenty-two (22) notifications from CDOT that various erosion control requirements were incomplete, uninstalled, or needed maintenance. No documentation was submitted to the Dispute Review Board (DRB) by Flatiron to challenge the accuracy or veracity of those notifications.

On four occasions, Flatiron was directed to cease project work - other than for specific erosion control item placement and maintenance; April 13, 2007; June 4, 2007; September 25 to October 4, 2007; and October 19 to 22, 2007. From information provided to the DRB during the hearing the total length of time the work was suspended was 9 days.

Flatiron orally registered an objection when the stop work order dated 9-25-07 was issued and with a comment entered on the CDOT Speed Memo dated 10-19-07. On May 1, 2008, Flatiron sent its written notice of dispute concerning the issue - stating that discussions had reached an impasse as to merit and quantum. On May 7, 2008 Flatiron submitted a REA for additional compensation for time and overhead costs.

CDOT responded on May 23, 2008 to Flatiron's REA - denying the merit of the issue. After Flatiron's rejection of the CDOT position on June 9, 2008, resolution was not obtained so the matter was referred to the DRB.

B. Procedures:

Subsection 105.21 *Dispute Resolution* (as revised by CMO No. 3) provides specific steps to be taken when a dispute arises and before the issue is presented to the Dispute Review Board (DRB).

1. The DRB is proceeding on the basis that those prescribed steps have been followed.
2. A hearing was arranged as prescribed by Subsection 105.22(d) and held as prescribed by Subsection 105.22(f) on April 14, 2009.
3. The DRB was advised during the hearing that a copy of each Position Paper was provided to the other party as required by subsection 105.22(e).
4. Several typographical or entry errors in the submitted documents have made review of this issue more difficult.
5. In many respects the presentations are incomplete but some items were clarified by the parties during the hearing.

C. Positions:

1. CDOT cites Subsection 105.01 as its authority for suspending the work, claiming Flatiron failed to comply with Subsection 107.25(b) (1-2). In one instance, CDOT cited Subsection 108.09 as its authority to stop work.
2. Flatiron contends that Subsection 105.01 does not give CDOT the authority to stop the work.
3. Instead, Flatiron argues that Subsections 208.04(e) and 208.06 describe the measures the Engineer is to follow in the event of Contractor's failure to perform erosion control. Furthermore, Flatiron says applying those provisions allows the Engineer to maintain the features as necessary and to assess liquidated damages at \$500.00 per day, but the Contract does not allow a concurrent suspension of work.

D. Contract Provisions:

1. Subsection 105.01 **Authority of the Engineer** states:

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“The Engineer will decide all questions regarding the quality and acceptability of materials furnished, work performed, and the rate of progress of the work; all interpretation of the plans and specifications; and the acceptable fulfillment of the Contract.

The Engineer will, in writing, suspend the work, wholly or in part:

- (1) when the Contractor fails to correct conditions unsafe for the workmen or the general public
 - (2) for failure to carry out Contract provisions
 - (3) for failure to carry out orders
 - (4) for periods of unsuitable weather
 - (5) for conditions unsuitable for the prosecution of the work
 - (6) for any other condition or reason determined to be in the public interest”
2. Subsection 107.25(b) **Water Quality Control Construction Requirements** contains several detailed procedures to be followed to comply with the Colorado Water Quality Control Act. A copy of CDPS GENERAL PERMIT COR-030000 STORMWATER DISCHARGES ASSOCIATED WITH CONSTRUCTION is included with the documents and contains numerous specific requirements for compliance.
 3. Subsection 108.09 **Default of Contract** states in paragraph (b): “The Engineer may send a written notice of intent to find the Contractor in default to the Contractor and the Surety by certified mail for the reasons listed below. The notice will include a stop work order which will require the Contractor to cease work on the Contract Items that are unacceptable”. The subsection goes on to describe the conditions required to be met in order to resume work.
 4. Subsection 208.03(b-c) **Project Review, Schedule, and Erosion Control Supervisor** describes the requirements for certain submittals and responsibilities to comply with the erosion control provisions.
 5. Subsection 208.04(e) **Erosion Control Maintenance** states in part: “The Contractor shall continuously maintain all erosion and sediment control features so that they function properly during construction and work suspensions until the project is accepted.
 6. Subsection 208.06 **Failure to Perform Erosion Control** provides that the Contractor will be subject to liquidated damages (LD’s) for failure to perform erosion control. A list of 10 incidents is included which may subject the Contractor to the imposition of such damages. The Engineer is to give notice of failure to perform, and a period of seven days is allowed during which the Contractor is to correct the failure, after which damages will accumulate at \$500 per calendar day until the failure is corrected.

DRB Evaluation:

1. Although all documents related to this matter have not been included in the packages presented to the DRB, it is clear that CDOT notified Flatiron of failures to perform erosion control on numerous occasions – in most cases listing specific issues that required attention. From information provided during the hearing, Flatiron took corrective action to address some of those issues but, in most cases CDOT let work continue even though all items had not been corrected. However, CDOT issued a stop

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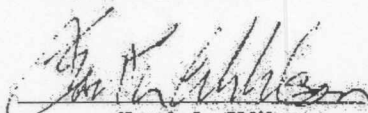
work order on 4 instances when it determined Flatiron was not being responsive to the warnings:

- i. The stop work order issued April 13, 2007 notified Flatiron that LD's would begin April 18.
 - ii. The stop work order issued June 4, 2007 notified Flatiron that LD's began June 1.
 - iii. The stop work order issued September 25, 2005 notified Flatiron that LD's would begin September 26.
 - iv. The stop work order issued October 19, 2007 notified Flatiron that LD's would begin October 26.
2. None of the stop work orders refer to the applicable Contract authority for their issuance (Subsection 105.01). This reference was made in the CDOT Pre-Hearing documents.
 3. Documentation has not been provided to quantify what liquidated damages were collected during the stop work periods. However, the parties advised during the hearing that a total of \$2,000 (\$500/day x 4 days) was assessed.
 4. Flatiron is claiming compensation related to 3 days for the period from September 25 to October 4 and 1 day for the period from October 19 to 22. During the hearing, Flatiron explained that its Project Manager in charge when the earlier stop work periods were imposed had decided not to pursue compensation.
 5. Flatiron is also requesting compensation for extended overhead costs for the cumulative time impact (11 calendar days) of the stop work orders.
 6. Flatiron's request for additional compensation includes expenses for four days of work suspended by CDOT. Its claim was based on subsection 208.06 which does not reference the suspension of work as a remedy for failure to perform erosion control work.


DRB Recommendation:

1. The DRB recommends that no payment be made and no time be awarded to Flatiron relative to this matter.
2. The DRB reasons that CDOT had sufficient reasons and the authority to suspend work under subsection 105.01 – specifically for Flatiron's failures under items (2) and (3) thereof.
3. The DRB deems that CDOT was justified in assessing LD's under subsection 208.06.
4. The DRB judges that Flatiron is incorrect in its position that LD's and stop work orders cannot be applied concurrently.
5. Furthermore, Flatiron has failed to provide adequate documentation to substantiate its monetary claim.

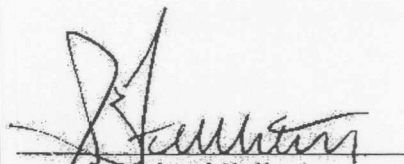
Respectfully Submitted:


 Garth L. Wilson

4/16/09
 Date


 William D Ashton

4/16/09
 Date


 Richard Fullerton

4/16/2009
 Date