**DISPUTE REVIEW BOARD REPORT AND RECOMMENDATIONS**

**Project: I-25 Managed Lanes – 120th to SH 7 Adams County, CO**

**CDOT Project No. IM 0253-234**

**DISPUTE No. 2 – Schedule Specification 108.03 Issues**

**Hearing Date:** October 30, 2018

**Hearing Location:** North Holly CDOT Office - 4670 Holly St, Denver, CO

**Party Attendees:**

**Hamon Infrastructure, Inc.** **CDOT**

 Bruce Hamon - President Stephanie Alanis - Resident Engineer Brad Davis – Project Manager Jason Lucerna – Project Engineer

 Muriel Agnelli – Vice President Andy Stratton – Program Engineer

 Brad Amy – Scheduler Andrea Hebard – Assistant Project Engineer

 Skip Smith - Sherman and Howard Richard Zamora – Region 1

 Ken Ekstrom – Schedule Expert Mike Lewis – Executive Director Casey Martinez – Project Staff

 Ed Balderrama – CDOT Observer Leo Milan, Jr. – Asst. Attorney General

 Bob Garcia – Geocal

 Jim Zufall – Atkins

 Scott Jones - Atkins

 Chris Horn - FHWA

**Background**

The North I-25 Segment 3 Express Lanes Project is the second express lanes project in the I-25 corridor, extending the managed lanes system over six miles from the current termini near 120th Avenue north to E-470. This project is similar in scope to the previous project, Segment 2 (84th Avenue to 120th Avenue). The current project includes:

* Widening to accommodate an additional lane (Express Lane) in each direction, along with standard widths of lanes and shoulders
* Supporting roadway infrastructure, including pavement, drainage and water quality systems, bridge widenings and replacements; retaining and sound walls, intelligent transportation systems (ITS), ramp metering and tolling equipment
* Reconstruction of 13 ramps and associated construction detours
* 2-inch mill and overlay of existing pavement with stone matrix asphalt (SMA), including distinct areas of crown and superelevation correction for highway drainage improvements. In all areas of cross slope correction, the construction detail includes a

“wedge” of asphalt leveling course to “fill” to the required cross slope.

* New, uniform driving surface of SMA pavement over both existing and new, widened pavement.

CDOT awarded Hamon Infrastructure, Inc. (Hamon) (Contractor) a Design-Bid-Build Contract for $56,390,000 on March 16, 2016 and issued a Notice to Proceed on July 5, 2016. Construction of the Project began in July 2016. After Baseline Schedule Revision 2 was approved on September 22, 2016, Hamon submitted monthly schedule updates which CDOT approved as noted, identifying or describing any issues or concerns. In the August 2017 update, Hamon added schedule delay due to the E-470 Right-of-Way problem. CDOT rejected the August 2017 update and continued to reject subsequent monthly updates.

After numerous meetings and significant correspondence on the schedule issues, on May 9, 2018 Hamon submitted a Request for Equitable Adjustment (REA) based on Interpretation, Enforcement and Breach of Scheduling Specification 108.08. Supplement No. 1 was submitted on May 24, 2018 and Supplement No. 2 on July 25, 2018. The Project Engineer rejected the REA on June 5, 2018 which was escalated to the Resident Engineer who rejected the REA on August 3, 2018 and stated the Project Engineer would initiate the DRB process within five days.

**Statements of the Dispute**

Since the parties could not agree on a Joint Statement of the Dispute, each party’s statement follows.

**Hamon**

Hamon submitted this REA on May 9, 2018, and submitted: Supplement No. 1, dated May 24, 2018; and Supplement No. 2, dated July 25, 2018.

Hamon contends that this is an issue of contract interpretation and that Hamon and CDOT interpret the scheduling specifications differently. Hamon believes its interpretation is correct and CDOT's actions regarding the schedule have breached the Contract. The specification at issue is §108.03, along with industry standards and practices regarding the establishment and maintenance of the project CPM schedule. Hamon contends it scheduled the project in reliance upon and in compliance with §108.03. A schedule analysis of delay events cannot be completed until the basic rules applicable to the schedule, such as whether Hamon may show a completion date different from the contract completion date, are clearly determined by the DRB.

There are additional issues that derive from the major issue summarized above but are not included. These additional issues include: whether CDOT failed to timely grant time extensions and whether Hamon is entitled to compensation and time, which issues will be resolved through either pending claims or additional requests for equitable adjustment.

This hearing is limited to whether Hamon has established merit.

**CDOT**

CDOT believes it has interpreted and administered Section 108(03) of the project specifications appropriately. Additionally, CDOT believes it has gone to extraordinary measures to provide Hamon with the opportunity to produce a schedule that can be approved. For example, and in an effort of ‘project first’, CDOT has relaxed elements of the specifications; namely the provision to withhold payment when a schedule is not approved (108.03(g)).

CDOT has the following ‘broad’ issues with schedules submitted by Hamon that have contributed to this dispute:

1. The number of logic changes requires additional explanation and review per 108.03(i).

2. Hamon made critical errors in estimating the duration of some work elements that had compounding impacts to the overall schedule.

3. Hamon regularly submitted a Schedule Update that was not predictive of upcoming work in the field. CDOT does not believe this fulfills 108.03(b) of the specification and entitles CDOT to request a Schedule Revision per 108.03(i).

4. Hamon has utilized the schedule to mis-represent common issues on construction projects. The assumed purpose of these actions is to attribute all project delay to CDOT. CDOT believes it is entitled to request the schedule be revised on this basis since time requests did not follow 108.08 nor were the sequence of events accurately representing the execution of work, as required by 108.03(b).

5. Hamon has not followed Section 108.08 regarding time extensions.

6. Hamon discards direction and/or requests by the Engineer.

The Department requests a decision on merit based solely on the contract documents and shared documents pertaining to this dispute.

**Pre-hearing Submittals**

Both parties provided the DRB with Pre-hearing Submittals per Subsection 105.23(e) which included Position Papers and documentary evidence relevant to the issues and a set of Common Reference Documents. Both parties provided the DRB with their list of attendees and Hamon disclosed one expert witness with a summary of his presentations and qualifications. There were no objections to the proposed attendees.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Schedule Specification 108.03 Issues \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Summary of Contractor Presentation on Schedule Specification 108.03 Issues**

Per the Specifications, Hamon submitted schedule updates that added activities and changed logic. CDOT told Hamon they could not add activities, change logic and show delays. After CDOT had accepted 12 schedule updates, Hamon submitted Schedule Update #13 for August 2017, which CDOT rejected, that showed a delay due to the E-470 ROW problems. Without an approved schedule, any delays cannot be evaluated and without time extensions CDOT enforces Liquidated Damages.

Hamon asks the DRB to assist the parties in interpreting Schedule Specification 108.03 and what is required for an approved schedule, including activity changes, logic changes and how delays should be shown.

Brady Amy

Brad went through the development of the Baseline Schedule and how he prepared the Schedule Updates and Project Narratives. He used industry standards and the same methodology he had used on other CDOT projects. The methodology was consistent from update to update. He met with field personnel on a continual basis to confirm progress and traveled the Project to make his own observations. Every update he submitted followed the requirements of Specification 108.03(c)(1) – Job Project Narrative Report and he emphasized sections:

 (vii) An explanation for a scheduled completion date forecasted to occur before or after the contract completion date or contract time

 (viii) Schedule Delays:

1. A description of current and anticipated delays including: Identification of the delayed activity or activities by Activity ID(s) and description(s).

4. Effect of the delay on other activities, milestones, and completion dates.

 (ix) A list of all added and deleted activities along with an explanation for the change

 (x) All logic and duration changes along with an explanation for the change

CDOT first rejected Schedule Update #13 for August 2017 and then accepted it with comments. CDOT then routinely rejected the Schedule Updates after #13 but he used the same methodology that was used for all the previous Schedule Updates that had been approved by CDOT.

Brad Davis

Brad went through how the schedule was developed based on the Phases and Project Segments. It included resources, durations (some activities were longer than 15 days) and responsibilities. During the first year there was positive float. CDOT accepted the Baseline Schedule as “comprehensive” and “thorough”. CDOT then requested modifications for Third Party activities such as ITS and E-470 operations. Each Segment had some float but Segment 6 Northbound at E-470 had the least. He showed on a chart of the Schedule Updates how there was some negative float and how time was made up. Things seemed to go ok until the August 2017 update where the E-470 delay was added.

For the October 2017 update, Update #15, Hamon ended up submitting three schedules to try to satisfy CDOT.

1. The normal Schedule Update
2. A “What if?” update
3. Revised Update #15R

CDOT rejected all three and threatened Hamon with withholding progress payments. Hamon responded to every CDOT rejection but CDOT has not responded to any of Hamon’s responses and requests for more information on exactly what caused the rejections. Finally in January 2018, at CDOT’s request, Hamon was requested to start with the July 2017 schedule and build the schedule with no additional activities. CDOT rejected this schedule too. CDOT has never explained why CDOT can require that no activities be added or deleted, the logic changed or why a late completion cannot be shown.

Kenneth Ekstrom

In the Fall of 2017, he started a “sanity check” of the schedule and in December 2017 he began attending meetings with CDOT that were contentious and non-productive. He has reviewed all the schedule updates and correspondence with emphasis on activity additions and deletions, logic changes and delay activities.

The industry has best practices when it comes to scheduling. The Owner has some activities it controls such as ROW and third parties. Contractor controlled items include “Means and Methods”. Schedules are used as an estimating tool, a planning tool and a management tool, for example to resequence some work. On this Project, Specification 108.03 covers what is required in the schedule. He went through CDOT’s Schedule Tracking Spreadsheet (Item 6.0 in CDOT’s Position Paper) and said CDOT had some comments that were wrong. In Update #2, CDOT directed certain activities to be added.

You must look at the conduct of the parties to see how things developed. In the first 12 Updates there were changes, some in the Critical Path, but the updates were approved by CDOT. Then

Update #13 came along where the E-470 delay was added and the schedules started to be rejected for activity changes, logic changes and delay being shown in the schedule. The good faith schedule scrub of the July 2017 schedule that was done in January 2018 was also rejected. He cannot find anywhere that the schedule was manipulated by the schedule changes. Also, CDOT brought in a schedule consultant that seemed to add to the reasons for rejection.

In his opinion, CDOT exceeded its authority by not allowing activity changes, logic changes and a late Contract finish. When CDOT insists on not allowing these schedule changes, CDOT is taking ownership of the schedule. The joint management of the schedule is for each party to manage its responsibilities and not for CDOT to manage the contractor. Communications were badly broken – Hamon was sticking to its positions and CDOT was very inexperienced in scheduling and the Specification. There were minor schedule problems through July 2017 and then things became very dysfunctional after the E-470 delay was added to the schedule in August 2017.

**Summary of CDOT Presentation on Schedule Specification 108.03 Issues**

Jim Zufall

He became involved to try to help settle issues. There were communication problems and strained relationships. Progress can be made if people are honest with each other. Hamon

submitted an REA in May 2018 claiming CDOT did not follow the Specification for Schedules. Hamon added delays but did not submit the delays in accordance with Specification 108.08 so that CDOT could evaluate the delays. The DRB needs to focus on the records and not the personal attacks. CDOT has a lot of experience on how jobs are built and how work is sequenced. CDOT needs a good schedule to see how the job will be built and how they need to manage their responsibilities. CDOT has three options when reviewing a schedule:

1. Approved – No exceptions taken
2. Approved-as-noted
3. Revise and resubmit

CDOT is not in breach of Specification 108.03 as the first 12 Updates were accepted with changes. Schedule Update #13 was rejected because Hamon showed a delay but did not submit the delay analysis per Specification 108.08. CDOT does not have to approve a schedule if it is inaccurate. The only work at E-470 that was delayed was the ramps and Hamon manipulated the schedule to show the delay and change in the Critical Path.

Stephanie Alanis

Changes in the schedule and delays can be shown in the schedule when approved by the Engineer. CDOT has not breached the Schedule Specification. If Hamon claims delay, they must comply with the Specifications for requesting time extensions. CDOT was consistent in its replies to Hamon’s schedule submittals. Hamon resequenced activities to change dates and mitigate the impact to Contract time. Hamon claimed delays for utilities, CDOT items and the E-470 ROW but did not comply with Specification 108.08 in documenting any delays.

Hamon refused to comply with CDOT requests as is shown in Updates #15 and #15R. Schedule Update #15R did not make any changes from Update #15. CDOT requested the ITS repairs that were Hamon’s responsibility to be shown in the schedule but Hamon did not comply. Logic changes must be approved by the Engineer and corrected if they are wrong. The contractor can’t add activities it wants like RFI’s. Mitigation activities must be shown.

CDOT needs a schedule to show how the Project will be built. There is not a schedule for the Project today that gives an accurate completion date. Per the Specification, CDOT can withhold payments for schedule problems. Time extensions and delays started with Update #3 but Hamon has not furnished the documentation required by Specification 108.08. CDOT handed out copies of Form 105 No. 755 and 761 to show how it responded to Update #13.

CDOT must look out for the traveling public and the Project stakeholders.

**Contractor Rebuttal**

Brad Amy

CDOT said the schedule updates contained inaccurate information. Hamon requested specifics but CDOT has never replied.

The Schedule Update is like a daily Report. It documents Actual Starts and Actual Finishes. It adds changes and notes responsibilities. The Project Narrative told the story of what happened in the field just as required in Specification Section 108.03(c). There was no blaming, only the facts.

CDOT said the schedule was manipulated but has never provided Hamon with examples. CDOT said there were 151 incorrect activity dates in the schedule when in actuality there were only 3.

The Specification requires that responsibilities be shown for each activity. When Hamon showed CDOT as responsible for an activity, CDOT rejected the schedule. CDOT has unsubstantiated comments. Hamon would be glad to review the comments if CDOT would provide them.

Brad Davis

CDOT said Hamon manipulated the schedule. The schedule has over 2,000 activities with many more ties. CDOT has never shown what activities and ties were manipulated.

The July 2017 email concerning the E-470 ROW shows there was a problem with the E-470 IGA. This lack of ROW affected the schedule. Although CDOT claimed it only affected the ramps, it affected all the work in the ramp areas which had to be performed in a dictated sequence – ramp detour, new ramp construction and then the mainline. In a Form 105, Hamon was told to get the permit with E-470 which was not in the original scope of work.

**CDOT Rebuttal**

Jim Zufall

Per the Schedule Specification, the contractor is to update the schedule. CDOT does not have the responsibility to accept any changes unless they are justified.

The E-470 delay was not critical for completion if the delay was properly scheduled and managed. The ROW issue with E-470 was settled in November 2017 but Phase 2A in this area was not finished until last night (October 29, 2018).

Stephanie Alanis

There was plenty of other work that could have been performed when the E-470 delay occurred. Form 105 No 890 discussed mitigation and how some time might be made up.

CDOT needs to know how the Project will be built, timelines and when the Project will be finished. The schedules CDOT has received don’t give accurate information.

**Discussions by Parties**

1. Brad Davis said the southwest part of the E-470 interchange was completed last night but the work was not critical. CDOT has deleted work on the Project that resulted in the deletion of

1,765 activities and $14 million of work. There have been 10 Plan Revisions and Phase 2C Added to the Project. Accordingly, there have to be schedule changes.

1. Brad Amy said Tab 3 in Hamon’s Pre-hearing Submittal shows the activity changes in the first 17 months of the Project. Hamon identified Hamon’s delays and showed the responsibilities for other delays. The schedules reflect the work.
2. Stephanie Alanis said the E-470 permit was obtained in November 2017 but that work did not start until February 8, 2018. Hamon said the work started on December 9, 2017.
3. Stephanie Alanis said CDOT did not always respond to the responses from Hamon since they felt it would get them nowhere.

**DRB Questions**

1. **To CDOT:** Explain the difference between a Schedule Update and a Schedule Revision and what actually happened?

CDOT said that most of the Updates were actually Revisions per Specification 108.08(i).

1. **To CDOT:** Can CDOT give exact examples that caused rejection due to added activities and logic that was wrong?

The schedules and narratives misrepresented the facts. This was discussed in the meeting in February 2018.

1. **To Both:** Can you show a document where the schedule was rejected due to a late completion being shown?

 CDOT said they could not show a document.

 Hamon said that CDOT’s rejection of Schedule Update #18 for January 2018 stated, *Your schedule revision does not comply with 108.03(i)(4) in that it shows a delayed completion date.*

1. **To CDOT:** Where does it show that the schedule did not accurately depict the work in Hamon’s revision?

 May paving was shown done in June and July and the median work was to have been done last winter.

1. **To CDOT:** Where does it say the contractor can’t assign responsibility to CDOT for an activity without CDOT approval?

CDOT said it can protect itself from responsibility until the delay can be determined as CDOT’s responsibility per Specification 108.08.

1. **To CDOT:** Where is CDOT allowed to reject the schedule for adding/deleting activities, logic changes or a late completion?

 CDOT said that if the Specification is followed, a late completion can be shown. Other changes must depict the actual or follow a delay per Specification 108.08.

1. **To Both:** Were formal schedule review meetings requested and held per Specification 108.03(b)?

 Hamon said they were held early in the process but then CDOT stopped.

 CDOT said many meetings were held.

1. **To Hamon:** How does actual construction and sequencing compare to that shown in the Baseline Schedule, forgetting the deletion of Phase 3?

Hamon said there were many Plan changes and resource shifts.

1. **To Both:** Just so the DRB is clear, what specific items does each party expect the DRB to address in its Findings and Recommendation?

Hamon:

1. Does Specification 108.03 allow the contractor to add and delete activities and change logic to accurately reflect occurrences without CDOT approval?
2. Does Specification 108.03 allow the contractor to assign responsibility to CDOT without CDOT approval?
3. Does Specification 108.03 allow the contractor to show a completion date outside the Contract completion time?

 CDOT

1. Two items in Hamon’s REA of May 9, 2018 were:
2. Number of updated activities and logic Activities and Logic Changes (CDOT prohibited the use of the CPM schedule as a tool to record progress and Plan the Work)
3. No Changes to the Approved Contract Completion Date

The updates did not reflect the actual progress. The Revised Schedules should show how the contractor plans to complete the Project in the Contract time. Form 105 No. 755 (CDOT rejection of Update #13) listed what was required in a Revised Schedule and asked how Hamon was going to get done in the Contract time.

Hamon:

Regardless of the accuracy or reasonableness of the data, if it is accurate it should stay in the schedule and Hamon’s data was accurate.

CDOT:

CDOT did not reject schedules when the data was accurate and reasonable.

**Hamon Summary**

Not accepting anything in the schedules per the Specification is a reflection on CDOT. CDOT said the schedule misrepresented information. The only error in data Hamon made was on three dates in the August 2017 Update.

There was a lack of communication. Hamon spent time doing the Updates per the Specification. CDOT has not given Hamon specifics on how the Updates were wrong. The Updates reflect how the work was done.

CDOT had an option to “Approve as noted” which would provide comments on exceptions and allow work and the schedule to continue.

**CDOT Summary**

Hamon said CDOT did not give details for the rejections. CDOT sent many Form 105’s which listed why revisions were necessary. The DRB needs to decide on the REA and not the discussions of the last half hour.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Findings**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. Baseline Schedule Rev. 1 was returned to Hamon by an email dated August 5, 2016 that stated:…*thanks again for putting together a thorough schedule. Please find attached a 105 that contains our Schedule Review comments.* Baseline Schedule Rev. 2 was returned approved with comments on August 17, 2016 stating, *Thanks for your hard work in putting together such a comprehensive schedule. We look forward to reviewing the update.*

These comments indicate that CDOT had reviewed the schedule and agreed with how Hamon originally intended to build the Project within the Contract time.

1. Hamon contended that the use of the term “rejected” is not an option for the Engineer’s review in Specification 1008.03(b). The first time that the use of the term could be found

was in the review of Schedule Update #13; however, the Engineer stated, *… a Schedule Revision #13 is required to be submitted pursuant to Revision Section 108 Project Schedule*. In reviewing correspondence after Update #13, the DRB feels CDOT made it quite clear on what **schedule action** was required by Hamon.

Specification 108.03(i) states:

 *A Schedule Revision is required in the event of any major change to the work. Examples*

 *of major changes are:*

 *(1) Significant changes in logic or methods of construction or changes to the critical path;*

 *(2) Addition, deletion, or revision of activities required by contract modification order;*

 *(3) Approval of a Contractor submitted Value Engineering Change Proposal;*

 *(4) Delays in milestones or project completion;*

 *(5) Phasing revisions, or;*

 *(6) If the Engineer determines that the schedule does not reflect the actual work.*

Accordingly, if schedule updating includes any items that impact the work as listed above, **the contractor is required to submit a Schedule Revision** following all the specification

requirements whether the Engineer requests the Revision or not. A Schedule Update is not sufficient.

1. A schedule is not a static document but rather a living document that can change for many reasons as the Project is being constructed.

Specification 108.03(b) states:

 *The schedules also serve to evaluate the effect of changes and delays to the scheduled project completion. Either party may require a formal schedule review meeting.*

 *The Project Schedule shall show* ***all activities required by all parties*** (emphasis added) *to complete the work.*

 At any meetings that were held, CDOT contended that it did not agree with the effect of the changes and delays as reported in Hamon’s updates.

Specification 108.03(c)(5) goes on to state:

 *The Contractor shall include a time-scaled logic diagram with all schedule submittals*

 *that;…* ***Clearly shows the sequence and relationships*** (emphasis added) *of all activities necessary to complete the contract work.*

Accordingly, if an issue arises that is an addition to what is already contained in the schedule, the contractor **is required** to reflect this in Schedule Updates or Revisions. This includes administrative items such as RFI’s and COR’s, as well as, logic changes that are required due to an issue. Likewise, things can change on a project that might require out-of-sequence work or the splitting of activities for numerous reasons. This could also include faulty logic shown in earlier schedules. However, these changes **must be** explained as required by Specification 108.03(c)(1) – Job Progress Narrative Report in the following sections:

 *(ix) A list of all added and deleted activities along with an explanation for the change.*

 *(x) All logic and duration changes along with an explanation for the change.*

Accordingly, as long as Hamon **complied** **with the above specification requirements**, CDOT was incorrect in stating in their reviews of Schedule Updates #13, 15 and 16 that *The contractor has been changing the logic and adding activities in the ‘Monthly Progress Schedule Updates’ without concurrence from CDOT.*

The CDOT Construction Manual, which is **NOT** a part of the Contract but is for the use of the Project Engineer, under Section 108.3.5 - When to Approve, Approve with Comment, or Reject a Schedule Submittal states, *the Engineer can approve the schedule with comments.*

***Comments need to be specific and focused on whether the schedule is reasonable*** (emphasis added)***.*** *Comments should not direct the Contractor on how to do the work.* … *Below are some examples when comments are appropriate:*

 *2. The reviewer may question logic between activities. Approval can include a comment questioning whether it is really necessary to finish Activity X before starting Activity Y.*

Section 108.3.5 goes on to state, *Table 4 – When to Reject a Schedule Submittal below lists issues that could cause rejection of the Schedule.*

|  |
| --- |
| **Table 4 – When to Reject a Schedule Submittal** |
| Schedule does not include all work items, including submittals, permits, etc. |
| Durations to accomplish work seem grossly inadequate. Additional Methods Statements can be requested to justify durations. |
| The schedule includes logic, lags, or constraints that are not allowed or have not been approved by the Engineer. |
| Update Schedule fails to show actual progress up to the data date or shows actual progress occurring after the data date. |
| Schedules that are resubmitted by the Contractor fail to address all of the Engineer’s comments in a satisfactory manner. |

The DRB finds that a discussion between the parties, when ***Either party may require a formal schedule review meeting*** per the specification, could have gone a long way to clearing up schedule issues starting with Schedule Update #13.

1. The DRB comments on Specification 108.03 as follows:

There are 3 types of schedules listed in 108.03 – Baseline, Update and Revision

Revision 2 of the Baseline Schedule was approved. The main issue today is if the schedule was correct - all activities and correct logic as far as sequence and logic ties.

Schedule Update #1 through Update #12 (July 2017) were all "Approved as Noted". Update #13 was rejected and a **Schedule Revision** was requested by CDOT.

After Update #12, Hamon continued to make their monthly submissions and CDOT considered the submissions as **Updates** and not the CDOT requested **Revisions**. The DRB can't understand why, with all the conversations and meeting that were held, that Hamon could not or would not submit what CDOT wanted. The DRB is not sure both parties agree on what is really required by the Specification.

Hamon must start with a correct Baseline Schedule and then add **required changes** and actual performance to get to the correct schedule at the time they contend there were delays. Specification108.08 clearly states what Hamon **MUST DO** for a delay.

1. Specification 108.03(g) states, *A* ***schedule update*** (emphasis added) *may show a completion date that is different than the Contract completion date, after the baseline schedule is*

*approved. Approval of this schedule shall not relieve the Contractor of its obligation to complete the work within the Contract Time. In this case, the Contractor shall provide an explanation for a late scheduled completion date in the Job Progress Narrative Report included with the schedule submittal.*

This Specification indicates that the contractor can show a late completion date as long as the contractor has included the required information in the submittal. CDOT maintains the correct and required information was not submitted.

1. Specification 108.03 cannot be read by itself if the schedule shows a delay. Specification 108.08 - Extension of Contract Time states, *For time extension requests, the Contractor shall provide a two-part submittal: part one shall consist of a written notice of the delay and part two shall consist of the Contractor's delay documentation and supporting analysis.*

Part 2 states, *This* (Contractor's delay documentation and supporting analysis) *shall be submitted within 30 days of the written notice. The Contractor shall include all documentation needed to support the time extension request. In order to request additional contract time for an unexpected delay,* ***the Contractor shall provide a contemporaneous schedule analysis in accordance with subsection 108.03*** (emphasis added)*. The schedule analysis shall show that the delayed activity or activities were on the critical path or became critical due to the delay.*

This procedure is required for **every delay** the contractor alleges. CDOT indicated in the hearing that Hamon had not followed 108.08 for all their alleged delays and that the one for E-470 was submitted well after the fact.

Accordingly, the DRB position is that timely submission of delay requests could have enabled a better analysis and review of the schedule Updates and Revisions. This is especially true if the non-compliance with Specification 108.08 prevented CDOT from being able to mitigate any costs and impacts. Although this dispute is not about delays, the DRB felt it must tie the requirements of the Contract (both specifications) into its findings.

1. Beginning with the review of Schedule Update #13, CDOT continually requested Hamon to submit a **Schedule Revision** that complies with Specification 108.03(i) but Hamon continued to submit Schedule Updates. This continued until CDOT Issues Form 105-845 on January 25, 2018 which stated:

 *CDOT has repeatedly asked for a schedule that shows how the project is intended to be built and do not feel that the December Update meets this request. We will have a formal report of our review of the December Update by Monday, 1/29. Estimate #18 was*

 *processed yesterday (Jan. 24) but this does not mean we are approving the schedule. Any further payments will be held until we have a schedule that meets the project’s needs.*

 *We have had continued written and verbal discussions on this issue, providing clear direction for what CDOT is requesting. We have agreed to review a Revised Schedule and provide comments and/or input that might help to make up project time. We want to reiterate that our request for a Revised Schedule is separate from our request for a Phase 3 traffic switch plan.*

 *Going forward, the January 25 estimate will not be paid unless/until we are able to “Approved, No Exceptions Taken” or “Approved, As Noted”: the January 25 Schedule Revision.*

On January 26, 2018, Hamon responded to CDOT stating:

Hamon will provide a Revised Schedule per 105-845. After reviewing Hamon’s schedule submittal, CDOT sent Form 105-876 which stated:

 *Per 105-845, CDOT stated that we would not pay the January Estimate if the schedule could not be approved or approved as noted. CDOT requested in this 105 that the schedule fit the project needs and be an accurate tool to track the project moving forward.*

 *In our forthcoming response to your schedule revision #18, CDOT will be asking Hamon to "Revise and Resubmit." Ultimately, CDOT does not feel the schedule submitted is a* ***REVISION*** (emphasis added) *and does not accurately reflect how Hamon intends to build the remainder of the project or closely to the intended plan our detailed response is forthcoming ASAP.*

 *If CDOT is incorrect with this assumption, Please confirm and/or that all work from January 25th - Project Completion is or is not how Hamon will complete the remainder of the work.*

This ultimately resulted in a meeting on March 1, 2018 which was documented in Hamon’s letter dated March 7, 2018 and the submittal of Schedule Update #19 on April 5, 2018.

CDOT replied to the submittal by letter dated April 19, 2018 stating, *CDOT has reviewed your Schedule revision 19 and considers it to be: REVISE AND RESUBMIT. This is not a Schedule Revision as defined in the Contract Documents Special 108.03 but should be called Schedule Update 019.*

Based on the foregoing discussion, it appears to the DRB that the parties were not clearly communicating and Project First was the furthest thing from their minds. The “battle of the

schedule” seemed to be more important than getting the remainder of the Project, including the deletion of Phase 3, scheduled and built. At some point during the Project’s construction, meeting the Contract Completion Date can become impossible. The reason for the late completion can eventually be established and the responsibility(ies) determined. Accordingly, the DRB finds that what the Contract requires is a schedule *that allows the Contractor and the Department to jointly manage the work and evaluate progress* as stated in Specification 108.03(b) rather that a Revision that *achieves completion of the work within the Contract Time* as stated in Specification 108.03(i). This finding seems to comply with Specification 108.03(i) which states, *In this case, the Contractor shall provide an explanation for a* ***late scheduled completion date*** (emphasis added) *in the Job Progress Narrative Report included with the schedule.*

1. Although Hamon indicated in various letters that it would submit a Revised Schedule, CDOT continually found that the submissions by Hamon did not meet the Schedule Revision requirements of Specification 108.03(i) and returned the schedules as “Revise and Resubmit”. After months of no progress in getting the schedule issues resolved, CDOT sent a letter dated June 15, 2018 that contained the following:

 ***Hamon 05/11/18 Memorandum:***

 ***Submission of March 2018 CPM Schedule #20 (Data Date 25MAR17)***

 *[sic…this is correctly noted as data date 25MAR18]*

 *This Update was not previously responded to previously as a result of Hamon’s escalation of the broader issues regarding project completion to the Region 1 Transportation Director and the Chief Engineer. This escalation precipitated our current Moving the Project Forward initiative. This initiative is ongoing and focused on developing a new project completion objective.*

Nothing was presented at the hearing or found in the Pre-hearing submittals that discussed the Moving the Project Forward initiative and what it might have accomplished. Ultimately, CDOT eliminated the following Project Work by issuing Form 105-954, 964 and 969.

1. Revision 29 Median Lighting
2. Original Median Barrier Reconstruction & Associated Tolling Infrastructure
3. Mainline SMA Paving (Inside the Sawcut line)
4. Median Signing
5. Median Drainage
6. Final Configuration and Striping

 Accordingly, the DRB concluded that it made little sense for it to try to follow the schedule Updates/Revisions and the parties’ positions after June 2018 since the scope of the project

 had dramatically changed. However, the DRB would like to stress that it feels that any overall Contract Project Schedule, except for a schedule to complete any remaining work, cannot be evaluated until a schedule that meets **all** Contract requirements has been developed by Hamon.

1. In reviewing Hamon’s replies to CDOT’s schedule reviews, it appears that the CDOT reviewer did not have firsthand knowledge of **all** the work being performed as demonstrated in the CDOT Schedule Update #13 review comments being marked up in red by Hamon, page after page.
2. In CDOT’s review comments it made many comments that the Work not was scheduled correctly. If this was the case, why did CDOT approve Baseline Schedule Rev. 2 since CDOT stated during the hearing that they knew how projects were built? These types of comments, without clarification, are not helpful and seem to be made to further alienate the parties.
3. Once Atkins became involved in the Project Schedule reviews, the following comment was made by Atkins.

*As part of Atkins’ review of the Update #15 and Update#14, it was requested that the ‘hand written notes’ be formally included with the Job Progress Narrative as a single submittal (the hand-written notes cannot be efficiently searched since they are not a text format). Specification 108.03 states that the items included in the notes need to be included in the Job Progress Narrative.*

During the hearing, Brad Amy made reference to his handwritten notes that were a part of each Schedule Update package. CDOT did the review of the first 13 Schedule Updates and nothing was presented at the hearing or found in the documents that indicated CDOT did not approve of the handwritten notes. If the requirements of Specification 108.03(c)(1) were met, this comment appears to be inappropriate.

 It also appears that CDOT did not relay to Atkins what it had accepted in the Baseline Schedule and Schedule Updates, as Hamon pointed out it its various schedule replies, after Atkins’ involvement began, that CDOT had previously approved various schedule practices that Atkins took exception to.

1. During the hearing, Hamon said that CDOT had not given specifics in their rejections as Hamon had requested. The DRB finds that CDOT provided numerous specifics in their reviews and that Hamon’s comment is not supported by the documents the DRB had to review.

1. Hamon’s REA claims that CDOT breached the Contract in its administration of the Specification 108.03. Based upon the above Findings, **the DRB finds that there was no breach.** However, the DRB finds that both parties failed to follow the Specification that both had agreed to when they signed the Contract and that both parties had a difference of opinion as to what was significant in the schedule and how to resolve the concern of each party.
2. The DRB is offering no findings concerning any delays, the application of Specification 108.08 or its relation to this Dispute.

**Recommendations:**

1. In order for the parties to move forward and be able to evaluate possible delays and a Contract Completion Date, it is mandatory that this dispute be settled **in accordance with the provisions of the Contract that both signed.** This will require the parties to take professional and respectful positions and put aside the hostile attitudes that have been exhibited at the hearing, as well as, at recent DRB meetings. **If progress cannot be made, the DRB strongly recommends that new personnel from each party, that are qualified in schedule application, take over the schedule reviews and negotiations and implement the further recommendations of the DRB.**
2. The DRB recommends the following procedure be implemented to achieve a schedule that can be used per the Contract requirements.
3. Scrub Baseline Revision 2 to incorporate incorrect and/or impossible  logic and add work activities that were required at bid time that were not included in Baseline Revision 2 and meet the Contract Completion Date.  Essentially this would be Baseline Rev. 3.  This would also include making revisions, after discussions by the parties, where CDOT claimed in their reviews that *Work not was scheduled correctly*.
4. Mutually go through all changes to the schedule through Update #12 based on the DRB’s Findings.  If the parties cannot agree, start Update 12A (Hamon) and 12B (CDOT) with each party justifying their positions.  Actual starts and finishes should be included. This should not be construed as CDOT “Directing the Work” but rather CDOT’s evaluation of the actual progress of the Work.
5. If Hamon claims a delay, #2 should be followed with an Update to the date of the delay supported with everything required in Specification 108.08 (delays).
6. Any subsequent delays must follow #3 up through July 2017.
7. This should give a starting point for the E-470 issues and the activities that were impacted by that issue.  If the parties cannot agree, start Update 13A (Hamon) and 13B

(CDOT) with each party justifying its positions.  Actual starts and finishes should be included.

1. Any subsequent schedule changes should be treated in the same format up to the time Phase 3 was deleted.
2. Using the schedule(s) developed through #6 above, the Phase 3 deleted work can be deleted from the schedule and any added activities due to the Phase 3 deletion can be added.

 The above procedure will require the parties to attempt to work in a collaborative manner and put aside differences on the exact meaning of Specification 108.03 and rather look at the intent of the Specification that *allows the Contractor and the Department to jointly manage the work and evaluate progress*.

1. If the parties do not understand the above Recommendations, the parties can request further involvement of the DRB to explain the Recommendations in a meeting. However, it is the DRB’s hope that the parties can get the issues resolved in the best interests of Project First.
2. If CDOT wants the Project Engineer to follow the procedures that are listed in Construction Manual Section 108.3.5 and wants them to be **included in the Contract**, Specification 108.03 should be revised accordingly.

Respectfully submitted this 27th day of November 2018

Dispute Review Board

    

L. G. Duncan Rick Yowell W. H. Hinton II