**DISPUTE REVIEW BOARD REPORTAND RECOMMENDATION**

 **US 50 - McCulloch Blvd. to Wills Blvd.**

 **Pueblo, CO**

 **CDOT PROJECT NO. FSA 0503-081**

**DISPUTE #3 CONCERNING Night Work - Quantum**

**Hearing:** Per agreement with the parties, the dispute was presented to the DRB via document submittals.

**Background**

On December 17, 2014 Tony J. Beltramo and Sons Inc. (Contractor) was awarded a Contract by CDOT for $9,838,465.70 for the widening of the eastbound roadway, widening of a bridge structure, drainage work and HMA pavement on US 50 from McCulloch Blvd. to Wills Blvd. in Pueblo, CO. A Notice to Proceed was issued on January 15, 2015.

On July 17, 2016, the Contractor sent a letter to CDOT stating it was instructed by CDOT that no lane closures could occur during the day between 6a.m. to 6p.m. along HWY 50 and that this directive was and continues to be a change to the Contract scope.

The Contractor submitted a Request for Equitable Adjustment (REA) for night work on September 26, 2016. On October 19, 2016 the Project Engineer (PE) denied the request for additional night work; however, the PE stated that the Department would honor the previous verbal agreement to provide compensation for extra work and phase changes, added after Award of the original Contract, which required night work. On October 20, 2016, the Contractor gave notice to the Resident Engineer (RE) that it disagreed with the PE’s denial of its REA. Since the parties were not able to settle the dispute, both parties requested a DRB Hearing on merit on November 15, 2016.

A hearing on the merit of the dispute was held on January 5, 2017 and the DRB Report and Recommendation was issued on January 26, 2017. The two main Recommendations were:

1. Due to the conflicts/ambiguities in the Contract Specifications and Contractor problems in easily accessing the Region 2 Lane Closure Strategy, the direction by CDOT to perform some work at night is a Significant Change in the Character of the Work. If the parties agree with the DRB Recommendations, they should discuss an adjustment to the Contract in accordance with Specification Sections 104.02(c) or 104.03. If the parties cannot agree on the method of adjustment or the cost adjustment (quantum), the parties can request a DRB hearing to resolve the dispute.
2. If some work needed to be performed at night solely due to the problems with the bridge subcontractor and not due to CDOT’s direction to work at night, any related costs should not be included in the adjustment to the Contract as discussed in Recommendation 1.

Since the parties were not able to come to an agreement on the Quantum Issue, on April 11, 2017 the parties requested Quantum be heard by the DRB.

**Statements of the Dispute**

**Beltramo:**

This dispute is a contractual dispute relating to additional required working hours.

It is Tony J. Beltramo & Sons, Inc. stance that based on the contract documents, CDOT should pay the recoverable costs that are set forth in Subsection 105.24(b)12 for the additional work that was required due to working nights.

Purpose of this dispute hearing is to resolve the cost adjustment for the additional night work.

**CDOT:**

In accordance with the DRB decision of January 26, 2017, the Department will pay for documented additional costs incurred that are directly attributable to additional night work.

Throughout this process, the Department has reviewed multiple requests from the Contractor, which were rejected because (1) they lacked substantiated documentation, and (2) the costs could not be directly attributable solely to the night work. The Department has even attempted to determine – based on the minimal documentation submitted by the Contractor – a fair and equitable proposal for these costs. This proposal was subsequently rejected by the Contractor.

The Contractor has continually attempted to substantiate costs beyond what the Department has determined are fair and equitable actual extra costs incurred for night work.

**Submittals to the DRB**

On May 25, 2017, Beltramo submitted its Position Paper and a Dropbox file to support its REA. Beltramo’s latest REA letter dated April 4, 2017 was based on a response to CDOT questions/comments dated March 27, 2017 with a total amount of $146,539.79.

On May 25, 2017, CDOT submitted its Position Paper and copies of its offers to Beltramo. The last offer from CDOT was dated April 6, 2017 with a total amount of $30,050.90.

The DRB sent the following to the parties on June 9, 2017:

 The DRB has reviewed the information that the parties submitted on the Quantum Dispute. Based on that information, there is no way for the DRB to make a recommendation on Quantum. The weekly time cards are for the most part unreadable and what is provided is not well organized and is difficult to understand. Accordingly, the DRB requests that Beltramo provide the following:

1. For each labor item (project manager, supervisor, mechanic, light plant operator, scale operator) tie the hours requested for each night worked to the Time Cards and Certified Payrolls by Work Classification. In any cases where an employee does not appear on the Certified Payroll, an explanation must be provided. In the case of salaried employees, additional payment beyond their normal salary must be documented as actual paid costs to this project.

2. All equipment hours must be justified by tying the hours to labor or by record of actual use. Costs shall follow 105.24(b)12(A)(4).

3. Any additional payments to subs must be justified and actual paid costs documented.

 For Beltramo's information, extended jobsite overhead 105.24(b)12 does not apply since the project time was not extended due to night work.

On July 1, 2017, Beltramo submitted a Dropbox file to support its revised REA. It should be noted that Beltramo deleted and changed some previous REA amounts and also added a new item in its revised REA. The total amount of the revised REA was $128,427.53.

**Summary of Contractor Presentation on Night Work Quantum**

Beltramo’s July 1, 2017 contained the following REA with various documents to support its position.

|  |
| --- |
| Spec. 109.04(a) Labor |
| **Labor** | **Wage** | **Spec. 67%** | **Total** | **Benefits** | **Total** | **Hours** | **Total** |
| Mechanic | $27.00 | 1.67 | $45.09 | $0.00 | $45.09 | 27 | $1,217.43 |
| Mechanic (2nd shift) | $28.50 | 1.67 | $47.60 | $1.00 | $48.60 | 29.25 | $1,421.40 |
| Mechanic (2nd shift) | $44.10 | 1.67 | $73.65 | $0.00 | $73.65 | 3 | $220.94 |
| Labor (Office) | $20.25 | 1.67 | $33.82 | $0.00 | $33.82 | 4 | $135.27 |
| Project Manager | $57.69 | 1.67 | $96.34 | $1.00 | $97.34 | 430 | $41,857.19 |
| Supervisor/Safety Officer | $32.50 | 1.67 | $54.28 | $0.00 | $54.28 | 300 | $16,282.50 |
| Supervisor Pay off of CertifiedPayroll | Varies | 1.67 |  |  |  |  | $5,779.87 |
| Mechanic | Varies | 1.67 |  |  |  |  | $570.16 |
| Labor (Light plant) | Varies | 1.67 |  |  |  |  | $4,589.19 |
| Labor (office) | $24.00 | 1.67 |  |  |  |  | $2,209.41 |
| Bonuses - Project Managers tor2015 working Nights/double shifts |  |  |  |  |  |  | $10,000.00 |
| Bonuses - Alan & Jasen - COOT Approved |  |  |  |  |  | $10,000.00 |
|  | **Total** | $94,283.36 |

|  |
| --- |
| Spec. 109.04 (b) Materials |
| **Materials** | **Cost** | **Spec. 15%** | **Total** | **Quantity** | **Total** |
| Night Gear -CDOT Approved | $947.01 | 1.15 | $1,089.06 | 1 | 1,089.06 |
| Flashlights, paver lights, etc. | $500.00 | 1.15 | $575.00 | 1 | 575.00 |
| Rental Equipment | $1,019.84 | 1.15 | $1,172.82 | 1 | 1,172.82 |
| **Total** I $2,836.88 |
| Spec. 109.04 (c) Owned or Leased Equipment (RR) |
| **Equipment** | **Cost** | **Blue Book** | **Quantity** | **Total** | **Hours** | **Total** |
| Mechanic Truck- COOT Approved | $33.73 |  | 1 | $33.73 | 56.25 | $1,897.31 |
| light plant truck - COOT Approved | **$18.44** |  | 1 | $18.44 | 430 | $7,929.20 |
| Port able Light Tower - COOT Approved | $6.85 |  | 1 | **$6.85** | 430 | $2,945.50 |
| Light Plants@ yard - COOT Approved | $6.85 |  | 1 | $6.85 | 60 | **$411.00** |
| Light Plants @ yard (3 Total 1 @ feed Bio, 1@ scale house, & 1 near Silo) | $6.85 |  | 2 | $6.85 | 60 | $822.00 |
| Mechanic Truck | $33 .73 |  |  | $33.73 | 23.25 | **$784.22** |
| 2014 Light Duty Truck Project Manager | $18.57 |  |  | $18.57 | 430 | $7,985.10 |
| 2010 Light Duty Truck Supervisor | $18.44 |  |  | **$18.44** | 430 | $7,929.20 |
|  |  | $30,703.54 |
| Spec. 10 9.04 (d) Subcontractor/Rental Cost |
| **Subcontractor** | **Cost** | **Markup** | **Total** |  | **Total** |
| Work Zone (night shift OT) | $337.50 | $ 33.75 |  |  | $ 371.25 |
| Safety Inspector | $525.00 | $ 78.75 |  |  | $ 603.75 |
| **Total:** | $128,427.53 |  |

**Summary of CDOT Presentation on Night Work Quantum**

CDOT said it had not seen the items that were included in Beltramo's July 1, 2017 Dropbox submittal prior to them being sent to the DRB. CDOT also said it did not have any comments on the Dropbox submittal since it had already reviewed three separate requests prior to Beltramo’s latest REA. CDOT said it would defer to the DRB for review and comment. The following was CDOT’s latest response to Beltramo’s REA which also contained CDOT comments on the various items.

|  |
| --- |
| Specification 105.24 Manpower |
| **Labor** | **Wage** | **Spec.1** | **Total** | **Benefits** | **Total** | **Hours** | **Total** |
| Project Manager | $57.69 | 1 | $57.69 | *$0.00* | $57.59 | 0 | $0.00 |
| Supervisor /Safety Officer | S32.50 | l | $32.50 | $0.00 | $32.50 | 0 | $0.00 |
| Mechanic | $27.00 | 1 | $27.00 | $0.00 | $27.00 | 27 | $729.00 |
| Mechanic | $28.50 | 1 | $28.50 | $0.00 | $28.50 | 29.25 | $833.63 |
| Mechanic | $44.10 | 1 | $44.10 | $0.00 | $44.10 | 3 | $132.30 |
| Labor (L1ght plant) | $2054 | 1 | $20.54 | $0.00 | 520.54 | 0 | $0.00 |
| labor (office) | $20.25 | 1 | $20.25 | $0.00 | $20.25 | **4** | $81.00 |
| Safety Training |  | 1 |  |  |  | 0 | $0.00 |
| Bonuses | $5,000.00 | 1 | $5,000.00 |  | $5,000.00 | 2 | $10,000.00 |
|  | Total | $11,775.93 |
|  |  |  |
| Specification 105.24 |
| **Materials** | **Cost** | **Spec.1** | **Total** | **Quantity** | **Total** |
| Night Gear | $947.01 | 1 | $947.01 | 1 | $947.01 |
| Flash lights, paver lights, etc. | $0.00 |  | $0.00 |  | $0.00 |
| **Total** I $947.01 |
|  |
| **Specification 109 .04 Owned or leased Equipment ( R R}** |
| **Equipment** | **Cost** | **Blue Book** | **Quantity** | **Total** | **Hours** | **Total** |
| Mechanic Truck | $33.73 | **X** | 1 | $33 .73 | 56.25 | $1,897.31 |
| 2014 - Light Duty Truck | $18.57 |  | 1 | $18.57 | 0 | $0.00 |
| Light plant truck | **$18.44** | **X** | 1 | S18.44 | 430 | $7,929.20 |
| 2010 • Light Duty Truck | $18 .44 |  | 1 | **$18.44** | 0 | $0.00 |
| Portable Light Tower | **$6.85** | **X** | 1 | $6.85 | 430 | $2,945.50 |
| Light Plants @ yard | $6.85 | **X** | 1 | $6.85 | 60 | $411.00 |
|  |  |  |  |  |  |  |
|  |  | $13,183.01 |
|  |  |  |
| Specification 105 .24 Administrative Compensation |
| Total | Cost | I **Markup** | Total |  | Total |
| $25,905 .95 |  | 0.16 | $4,144.95 |  | $30,050.90 |
|  |  |  |  |  | $0.00 |
|  |  |  |  |  | $30,050.90 |
|  |
| Total: | $30,050.90 |  |

**Findings**

1. CDOT Specification Section 105.23(e)2(2) states, *When the scope of the hearing includes quantum, the requesting party's position paper shall include full cost details, calculated in accordance with methods set forth in subsection 105.24(b)12.*
2. CDOT Specification Section 105.24(b)12(A) states, *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.*

 Accordingly, the 67% labor markup used in the Beltramo REA is not allowable. The **actual costs** for any benefits and payroll taxes and insurance are the only costs that can be added to the actual wage costs.

1. Beltramo claims a total of 59.25 hours of mechanic night work. The CDOT analysis also shows 59.25 hours at the same hourly rates that were used by Beltramo. The difference between the parties’ costs is the in the labor mark-up. Accordingly, the parties should follow Finding 2 above for the labor mark-up.
2. Beltramo and CDOT agree on 4 hours for Labor (office) and the hourly rate. Accordingly, the parties should follow Finding 2 above for the labor mark-up.
3. In reviewing the payroll costs and check payments, there is no indication that Tim Beltramo and Robert Beltramo were paid anything but their normal bi-weekly/monthly salaries except for the bonuses.

Beltramo REA – Labor (Project Manager) states, *Tim & Robert Beltramo as owners, are requesting compensation for the additional supervision that occurred in which they were never compensated for.* This also indicates that neither of the Beltramo’s “Night Costs” was ever charged to the Project.

1. Beltramo’s letter Dated April 4, 2017 made comments on CDOT’s previous responses to its REA. The letter stated, *Per the DRB's guidance on quantum; ‘shall include full cost details, calculated in accordance with methods set forth in subsection 105.24(b)12’. In subsection 105.24(b) 12 A (6) it states that* ***'salaried employees assigned to the project' are recoverable*** *by the Contractor'. It also states in subsection 105.24 (b) 12 A (5) 'that costs of extended job site overhead are recoverable by the Contractor".*

 In response to questions from Beltramo, the DRB provided the following in an email dated February 7, 2017:

 Subsection 105.24(b)12 details allowable costs. Please refer to this in your quantum negotiations.

 Since the work had to be done either during the day or night, allowable costs would be only those that were added due to the work being performed at night. If night work was performed on the same day as other work was done during the day, and additional supervision was required, this could be an added cost.

 The escrow bid documents should show what was included in the bid. For some items the Certified Payrolls could help demonstrate added costs.

 In an email dated February 15, 2017, the DRB provided the following:

 The Board's email of February 7, 2017 addressed the question on supervision costs. The costs MUST have been due to the work being done at night, do not duplicate costs that would have been charged for work during the day and can be shown as a cost charged to the Project.

 Specification Section 105.10 states, *The Contractor shall have on the project, at all times that work is being performed, a competent superintendent capable of reading and understanding the contract documents and experienced in the type of work being performed. The superintendent will receive instructions from the Engineer and shall be authorized to act for the Contractor on the project and to execute orders or directions of the Engineer without delay.* This Specification Section does not state that the superintendent cannot perform any other functions like operating equipment.

 As was previously suggested to the parties, the Escrowed Bid Documents should indicate what Beltramo included in its bid for supervision. Since the supporting documents provided by Beltramo do not include employee time cards indicating when **only supervision** was being performed and the employee was not operating equipment or performing other project work, it is not possible for the DRB to determine if supervision hours were required due to the night work. Accordingly, unless Beltramo can provide the documentation on added supervision that was required due to the night work, the DRB does not see that there were any added supervision costs.

1. It is not clear where the Beltramo Mechanic Item with a cost of $570.16 comes from. Beltramo’s letter dated April 4, 2017 states, *See attached additional support documentation (besides certified payrolls) - Check Register & 0-0 Enterprises Invoice for Daytime Mechanic.* In the support documents, the only invoice from O & O Enterprises is for $752.10 and appears to be for maintenance and repair work and not work required due to night work.
2. “But for” the night work there would not have been a requirement for light plants except for the traffic signal work which Beltramo said was originally planned to be done at night. It is not unreasonable to expect that one hour would be required to set up and fuel the light plants and one hour to remove the light plants. It is also reasonable to assume that the work would have been performed before and after the other employees’ night shift so as to require overtime. Beltramo’s REA dated June 27, 2017 for Labor (Light plant) lists its requested hours and hourly rates. The parties should follow Finding 2 above for the labor mark-up.
3. Beltramo REA Item Labor (Office) was for a certified scale weigher for night work since it had a certified scale weigher for other company operations during the day. The employee time cards indicate that Trudy Jensen and Jamie Thorsen both worked every day with Jensen working when night asphalt paving was done at night. Employee time cards were not included for every week where night work occurred. Beltramo has not shown that the night paving work resulted in added scale weigher costs in its REA. Beltramo should be allowed costs where nights paving resulted in the weigher exceeding the 50 hour work week. It should be noted that the $24.00 per hour that Beltramo requested for the weighers is not supported by the payroll check register. The parties should follow Finding 2 above for the actual labor costs and labor mark-up.
4. The REA dated June 27, 2017 added the item “Bonuses - Project Managers tor 2015 working Nights/double shifts”. This is a new item that added to the initial REA. Specification Section 105.23(f)9 states, *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.* Accordingly, the DRB will not comment on the Project Manager Bonuses.
5. Since CDOT has agreed to pay the bonuses for Alan & Jasen, the DRB makes no comment.
6. Since CDOT has agreed to pay $947.01 for the night gear and this is the same amount in Beltramo’s June 27, 2017 REA, the DRB makes no comment.
7. The additional invoices provided for the item Flashlights, etc. total $1,630.89. Beltramo’s June 27, 2017 REA requested $500. Although this amount is arbitrary. It seems justified based on the number of nights worded.
8. The REA dated June 27, 2017 added the item “Rental Equipment”. This is a new item added to the initial REA. Specification Section 105.23(f)9 states, *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.* Accordingly, the DRB will not comment on the item Rental Equipment.
9. CDOT has agreed to pay for one light plant at the yard but Beltramo’s REA requests payment for three. In order for the additional light plants to be allowed, Beltramo must be able to show that they owned the light plants that were used in the yard or that they were rented. Costs should be calculated in accordance with Specification Section 105.24(b)12(A)4.
10. The equipment hours for item “Mechanic Truck should be adjusted to 59.25 hours in accordance with Finding 3 above.
11. Since CDOT has agreed to pay $7,929.20 for the Light Plant Truck and $2,945.50 for the Portable Light Tower and these are the same amounts in Beltramo’s June 27, 2017 REA, the DRB makes no comment.
12. If Beltramo can show added supervision time as discussed in Finding 6 above, then those hours should be accompanied by a Supervisor Truck provided Beltramo can show the Project was charged for the additional truck use due to the night work.
13. Finding 5 above discusses the Project Manager costs. In order for Beltramo to claim hours for the PM trucks, Beltramo must show the Project was charged for the additional truck use due to the night work which would be over and above any costs for the day shift and other company business.
14. Beltramo’s REA dated June 27, 2017 requested 4.5 hours of TCS overtime on August 1, 2016 as invoiced by Work Zone Traffic Control. This is over and above the normal 12 hour shift and is consistent with most traffic control companies’ billing procedures. Asphalt paving work was done on August 1, 2016. Accordingly, Beltramo’s request for 4.5 hours at $75.00 per hour appears to be a justifiable cost due to the night work.
15. Bob Andrew’s Activity Summary for the Highway 50 Project dated April 4, 2017 states, *On 4/23/16 the night operation was observed and all employees were wearing their proper PPE*. Bob Andrew’s invoice to Beltramo and Sons dated 8/18/16 invoiced for “Hourly work performed from **April 4, 2016 through August 18, 2016**” and was for “For services rendered, safety inspection and observation of Beltramo and Sons asphalt plant location and various jobs located within Pueblo County and showed a Total of 21 Hours at $25.00 and a Total Amount of $525.00. Beltramo’s REA dated June 27, 2017 showed the total amount of $525.00. The only allowable amount would be for any hours that were attributed to the April 23, 2016 observation.
16. Specification Section 105.24(b)12(A)8 allows a markup on costs of 16%. Accordingly, once the parties agree on the total cost amount as determined by the above Findings, an additional 16% should be added to the costs as compensation for items for which no specific allowance is provided, including profit and home office overhead.

**Recommendations**

1. As discussed in Finding 6, the parties should open the Escrowed Bid Documents and review what Beltramo included in its bid for supervision. If Beltramo can provide the documentation on added supervision that was required due to the night work, the parties should establish the hours and hourly rates for the supervisors and add the labor mark-up as discussed in Finding 2.
2. As discussed in Findings 5 and 7, the DRB recommends that these costs not be allowed unless Beltramo has clear documentation showing that these were costs charged to the project due to night work.
3. The parties should follow Findings 3, 4, 8, 9, 13, 16 and 20 to determine allowable costs.
4. If Beltramo can provide the documentation discussed in Findings 15, 18, 19 and 21, the parties should establish the hours and hourly rates for the costs.
5. As discussed in Findings 10 and 14, these items were not a part of the earlier REA and cannot be considered by the DRB.
6. As discussed in Findings 11, 12 and 17, the DRB has no comment on these items.
7. Once all of the allowable costs have been determined, markup should be added in accordance with Finding 22.

Respectfully submitted this1st day of August 2017.

 ![C:\Users\Bill\Documents\My Documents\DRB's\CDOT DRB's\US 50 Pueblo\Night Work Dispute\Signatures\Cam Signature%20001[1].jpg]() 

Champney A. McNair, Jr. William D. Ashton

****

W. H. Hinton II