

COLORADO DEPARTMENT OF TRANSPORTATION
STANDARD SPECIFICATION SECTION 105 DISPUTE REVIEW BOARD

American West Construction, LLC v. Colorado Department of Transportation

DRB FINAL DECISION

BACKGROUND

This Dispute Review Board (DRB) engagement is created for Project No. BR 0361-117, 20610, US 36 MP 11.95 – 12.33 between the parties, Colorado Department of Transportation (CDOT) and American West Construction, LLC (AWC).

There are two issues that CDOT and AWC want addressed by this dispute resolution process. The parties do not believe that the merits of the two claims are in dispute; rather, the DRB issues in both instances are specification interpretation, and quantum.

The first dispute centers on the issue of whether or not the 16% markup on recoverable delay costs as specified in Standard Specification Section 109.10 (a) is applied once for the entire pay request or whether the prime Contractor and each subcontractor are individually entitled to separate 16% markups. AWC would like a decision on how to apply section 109.10 to this claim. More specifically, are AWC and its subcontractor each allowed to mark up on their respective costs?

The second dispute centers on the issue of whether or not materials purchased for the project and delivered to CDOT are allowed mark-up because of the existence of a differing site condition. CDOT changed a pipe crossing from 54" Reinforced Concrete Pipe (RCP) to 60" Welded Steel Pipe. AWC had already purchased the 54" RCP and was not able to return the pipe for credit as it was a special-order item. AWC requested a 15% mark up on the purchase of the 54" RCP. The parties would like the DRB to decide whether a 15% mark-up is allowed on the purchase of the 54" RCP.

ISSUE # 1: 16% MARKUP FOR SUBCONTRACTORS

The parties mutually agree that there was merit for compensable delay claim for the standby when AWC encountered bedrock while attempting to jack the 54" reinforced concrete pipe (RCP) into place. All work was halted while CDOT and the Parties weighed the options. During this standby delay, CDOT Program Engineer offered AWC the option of choosing which specification AWC wanted to apply to determine AWC's delay claim quantum for the failed attempt to jack the 54" RCP; Section 109.04 – Force Account Work¹, or 109.10 – Compensable Delay². AWC was unsure of what CDOT was offering and requested guidance in making the decision; and what the decision would entail.

AWC requests a 16% markup for their drilling subcontractor, in addition to the 16% for AWC, raising the question, whether or not the 16% markup on recoverable costs is applied once, to the prime Contractor, or whether the 16% markup is applied to the prime Contractor and each lower-tiered subcontractor.

When AWC's drilling subcontractor, UIT, prepared their pricing for the delay, AWC instructed UIT to follow Section 109.10 when preparing UIT's pricing. In their pricing, UIT applied a 16% markup to their aggregate cost, and AWC took UIT's marked-up cost and applied another (AWC's) 16% markup. AWC informed CDOT of the methodology used in preparing their pricing proposal to CDOT. The issue, as presented in AWC's REA is whether the prime contractor and each lower-tiered subcontractor are entitled to separate 16% markups.

CDOT's Position RE 16% Markup for Subcontractors:

CDOT's response to AWC's request for a markup for AWC's subcontractor, was, "Administrative Compensation³ under 109.10 is a one-time markup of 16% by the Prime Contractor".

CDOT interprets subsection 109.10 (a) (8) to mean that only the Contractor, not a subcontractor, is entitled to a 16 percent mark-up on the recoverable costs identified in items (1) through (7) of this subsection⁴.

AWC's Position RE 16% Markup for Subcontractors:

AWC disagrees with CDOT's interpretation of the Specifications, and goes into a detailed dissection of Section 109.10, contending that the reason for Section 109.10 is to prevent a contractor or subcontractors from taking advantage of CDOT by requesting excessive markups.

AWC also maintains that the statement by CDOT's Mr. Sheaffer, "Administrative Compensation under 109.10 is a one-time markup of 16% by the Prime Contractor" is not in the Specifications.

DRB's Position RE 16% Markup for Subcontractors:

DRB agrees with CDOT in concluding that all Specification references to "Contractor" are to the prime Contractor. In the 2011 CDOT Specifications Section 101 – Definitions and Terms, the definitions of Contract⁵, Intent to Contract, Contractor⁶, and Subcontractor⁷ support CDOT's conclusion that all Specifications references to "Contractor" are to the prime Contractor that has signed the Contract to perform the intended contracted services. Subcontractors are referred to as such; Subcontractors, not Contractor.

The DRB also bases its opinion on the Doctrine of Privity of Contract⁸, which governs the issue of markup by subcontractors.

Throughout the CDOT 2011 Specifications, every instance of defining the rights and liabilities of the parties to the subject contract refers to the Owner as CDOT and the Contractor as the prime contractor in contract privity with CDOT. In no instance does any provision of the Specifications identify any contract rights or liabilities between CDOT and a Subcontractor.

This fact is further reinforced by the definitions of the owner, the contractor, the contract, and subcontractor above.

In a compensable delay scenario, CDOT has an obligation to make the Contractor whole. Part of making the Contractor whole may include reimbursing the Contractor for costs incurred by a subcontractor, however, because CDOT does not have a contract with a subcontractor, it is the Contractor's responsibility to make the subcontractor whole. It is CDOT's opinion that the additional 16 percent that is added to items (1) through (7) provides the Contractor the means to achieve this obligation.

DRB's QUANTUM Ruling RE 16% Stand-by Markup

The DRB hereby rules that CDOT is correct in not paying a delay markup for UIT, AWC's drilling subcontractor. Such payment would be counter to the Privity of Contract Doctrine.

ISSUE # 2: MARKUP ON 54" RCP PIPE

During pipe jacking operations to replace the 48" Corrugated Metal Pipe (CMP) at MP 12.29 with 54" Reinforced Concrete Pipe (RCP), the subcontractor performing the work (UIT) encountered a bedrock obstruction, causing the culvert replacement work to come to a halt. Over the next four weeks, CDOT and the Contractor evaluated the situation to determine how best to proceed with the work. It was decided that the best way to proceed would be to hammer Welded Steel Pipe (WSP) through the embankment rather than jack RCP. Subsequently, a 101.19 Contract Modification Order (CMO)⁹ was written to change the method of replacing the existing culvert and compensate the Contractor accordingly.

As a result of this change to the Contract, the 54" RCP that the Contractor purchased and delivered to the project site was no longer needed. And whereas, the 54" RCP was a special-order item, the supplier/maker would not accept it back for restocking so CDOT agreed to purchase this material from the Contractor in accordance with subsection 109.03, Compensation for Altered Quantities

The original US 36 Culverts Contract was a traditional Design-Bid-Build project delivery method, whereby, CDOT was responsible for the design of the culverts and the means / methods of installing the culvert pipe.

The Parties' Respective Positions on the Markup on 54" RCP Pipe

CDOT is of the opinion that Specification **109.03 Compensation for Altered Quantities**¹⁰ is how the Contractor shall be reimbursed for unused material purchased from the Contractor by CDOT. The specification states "Any such materials may, at the option of the Department, be purchased at the actual cost to the Contractor, as evidenced by certified invoices." This specification, however, does not allow for a mark-up on materials purchased from the Contractor; therefore, CDOT paid the Contractor invoice cost plus the cost to deliver the material to the project site as well as the cost to deliver the material to a CDOT maintenance yard.

AWC, however, contends that Specification **109.04 (b) Compensation for Changes and Force Account Work**¹¹ applies to markup on materials, but has problems explaining how the materials were incorporated into the work.

CDOT's interpretation of "incorporated in the work" means that the material was used on the project for the purpose it was intended, and that delivery of unused material to a CDOT maintenance yard is not incorporating the material into the work.

DRB's Analysis of Markup on 54" RCP Pipe

The DRB has reviewed the Specification sections cited by AWC and CDOT and have concluded that there is no clear-cut language in 109.04, 109.03 or 109.10 that definitively addresses the unique issue of whether a markup can be added to special-order materials that were specifically purchased for, but not incorporated into the contract work. The 2011 CDOT Specifications does not address this scenario. After coming to this conclusion, DRB considered other contract administration principles that may apply to this situation. For example; was there a Cardinal Change made to the means, methodology and culvert materials of the original Contract?

During the initial reading of AWC's REA, the DRB thought that the Cardinal Change Doctrine* might apply to this situation because the differing site condition of the bedrock could be found to mean that the change from 54" reinforced concrete Jack Pipe to 60" welded steel pipe could possibly be considered outside the scope of the original contract, and thus subject to a claim of a Cardinal Change.

Contract Change in General

When the original plan to install the 54" RCP via Jacking failed after only 8% of the culvert was installed, it was apparent that the means and methodology was ill-fated, and that a change had to be made.

A well-drafted contract will contain provisions providing a methodology for changes to the work, compensation for such changes and how changes can be requested or even compelled.

From an owner's perspective, inclusion of provisions for change in the work protects its ability to add or subtract from the scope of work. Owners will want language to state that any change orders shall constitute final settlement of all matters related to such changed work. In other words, no prior or subsequent course of conduct or oral communication should result in further price differences not set forth in the change order.

Changes to scope of work impact contractors' time and money. As a result, contractors (and subcontractors) should insist that change orders be processed within a certain period of time, and provide that work shall not proceed until the change order is in final form and fully executed. Contractors may also wish to negotiate language reserving the right to seek additional time to complete work under a change order if the full effect of the change cannot be determined within the time frame for submission and approval of change order documentation. This did not happen when the 54" RCP means and methodology failed.

What Is a Cardinal Change?

A cardinal change is a change that substantially alters the type of work described by the original contract. To succeed on this claim, contractor must prove that: (1) the change(s) were substantially different from the work described in the original contract; (2) the change(s) were not anticipated under the contract; and (3) the parties acted as if the original contract no longer applied. See *Highland v UPRR*¹²

Courts have developed the “cardinal change doctrine”, which prohibits the owner from ordering changes outside the general scope of the contract. Where the work ordered is outside the scope of the contract, it is not legally a change but is extra work. Faced with a cardinal change, a contractor has two options. It may perform the change and seek breach of contract damages after completing the work, or it may refuse to perform and face a claim for breach of contract. If the contractor performs the changed work, it can suffer severe financial hardship until it proves and recovers breach of contract damages. A change which is outside the general scope of the construction contract is called a cardinal change¹³.

In *C.W. Bignold v. King County*¹⁴, the contractor was hired to construct a county road. The contract called for an embankment to be built with excavated material, but the material contemplated in the parties’ contract proved to be unsuitable, forcing Bignold to procure other material at greater expense.

What constitutes a cardinal change depends on the unique circumstances of each case and the contract governing the work. A cardinal change can be either an addition or a deletion to the work of the project. Whether changes are cardinal changes, or within the general scope of work, is determined by examining a variety of factors, including the following:

1. The totality of changes including their number, magnitude, cost and complexity;
2. The adequacy and completeness of the original design documents;
3. The practical nature of the disruption caused by the change;
4. The overall impact to cost and time;
5. The degree of difficulty caused by the change;
6. The individual and cumulative impact of the change;
7. The extent and the effect of the owner-caused delays;
8. The extent to which the change order or other contract procedures were followed during the course of the project in the administration of the changes;
9. The amount of time spent on redesign or completion of the design during the course of the project;
10. Whether the conditions under which the contractor expected to perform the work were substantially altered or were changed by the owner;
11. Whether the completed project is substantially the same as the project contemplated by the parties; and
12. The extent to which the additional costs can be quantified and tracked to specific changes, the quality of the contractors’ records relating to the changes, and whether the condition of the records was affected by the owner.

Was there a Cardinal Change to the US 36 Culverts on this Project?

Considering the factors listed above, DRB believes that there are more than enough qualifying factors in the 54" RCP situation to support a claim for a Cardinal Change. The DRB's thought process in determining whether the change in means and methodology merited a claim for Cardinal Change, would be analyzed using the following line of reasoning:

1. The Contract was a traditional Design-Bid-Build contract; whereby;
2. CDOT, the owner, was responsible for conducting geological studies of underground rock formations on the site, designing and preparing the bid documents for the installation of the 54" RCP culvert, and selecting the Prime Contractor to install the culvert per the plans and specifications;
3. AWC was the successful bidder for the Contract, and selected Underground Infrastructure Technologies, Inc. (UIT) as its culvert-drilling subcontractor;
4. UIT encountered bedrock after the initial few feet of RCP Jack Pipe had been installed, which was allegedly 8% of the total RCP Pipe that AWC purchased for the project;
5. After work was stopped by the bedrock, the parties came up with a different plan to install the culvert;
6. The 54" Reinforced Concrete Pipe (RCP) was replaced with 60" Welded Steel Pipe (WSP); a significant change in the size and material composition of the culvert;
7. The 54" Reinforced Concrete Pipe (RCP) was attempted to be installed by 'jacking', while the 60" Welded Steel Pipe (WSP) was installed via hammer bore; a significant change, and;
8. The 60" WSP culvert was eventually totally installed, while only 8% of the 54" was originally installed; prompting a change in the methodology of the installation.

If the changes in the installation means, methodology and materials used for the culvert were found to be a cardinal change that was caused by the owner (CDOT), the Jacking of the CRP pipe could be declared an **"impossible task"**¹⁵, thereby terminating the original contract. Any new methodology that accomplishes the goals of the original Contract means and methodologies could be considered a Cardinal Change.

In conclusion, if the existing contract had been terminated due to owner-caused Cardinal Change, AWC could seek recovery of the lost markup and profits on the cost of the 54" RCP pipe as a part of the Termination Settlement Agreement.

Does the Cardinal Change Doctrine Apply to The US 36 Culverts?

The Cardinal Change Doctrine in private construction contracts is recognized in at least 22 states, including Colorado. Eighteen states, also including Colorado, have held that contractors can recover damages for cardinal changes to private construction contracts, but have not decided to allow claims for Cardinal Changes on public construction projects.

In Colorado, however, CDOT essentially prevents the application of the Cardinal Change Doctrine on CDOT projects by the inclusion of the "Contract Modification Order" provision in the 2011 Specifications

(Section 101.19), which is designated as the only method authorized for changing a CDOT Contract. Specification 101.19 states that only the CDOT Engineer is authorized to change / modify the terms of the Contract.

CDOT's Contract Modification¹⁶ Defined

The agency can use a bilateral modification to execute any number of contract changes or otherwise modify the terms of the agreement.

“The test to be applied is whether the supplemental work [or change] ordered so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract that it constitutes a new undertaking.”¹⁷

In particular, contractors must be mindful of waiver language. That is, specific language (routinely included by the government in bilateral modifications) that releases the agency from future claims for damages.

Bilateral contract modification is a supplemental agreement to a contract that both the contracting officer and the contractor sign. In general, modifications change the terms and the conditions of a contract, including but not limited to the performance period, the statement of work, the price, or the quantity.

Contractors must be aware of the implications of bilateral modifications when submitting a request for a claim or an equitable adjustment. Sometimes, a contracting officer will attempt to execute a change through a bilateral modification that you feel is outside the original contract scope. This is sometimes called a cardinal change.

In this case, you can either perform the work, thus accepting the change, or you can risk a default termination by refusing performance and risking negative reviews. This makes continued performance the only viable option for most contractors.

Contract Modification vs Cardinal Change

A bilateral modification is a supplement to the Contract that is signed by both the contractor and the government (CDOT). CDOT can use a bilateral modification to execute any number of contract changes or otherwise modify the terms of the agreement. Sometimes, however, a contracting officer may use a bilateral modification to execute a change that the contractor believes is outside the scope of the original contract (aka, a Cardinal Change). In those cases, the contractor has two options: accept the change and perform the work – or refuse to perform and risk a default termination.

Specifically, when faced with a bilateral modification including disputed terms (such as scope of work, increased costs, or increased time to perform), contractors must reserve the right to pursue damages at a later date.

There are limitations on the power of the owner to order changes. The person or persons ordering the change must have the requisite authority to issue the change order and the changes clause, which usually limits such orders to those “within the general scope of the contract,” must encompass the proposed change.

How the Parties Stand After the Contract Change / Modification

AWC fulfilled its obligations under the original Contract by seeking out and purchasing the 54” RCP Jack Pipe, and having it available on site to be incorporated into the Project; before hitting bedrock and the shutdown. However, **AWC** is denied its markup on the 54” RCP because the owner-specified means and methodology of installation was impossible to achieve because the bedrock at the site. The inability to install the 54” was not the fault of **AWC**, but arguably at least partially caused by **CDOT**’s design of the culverts, specifying the 54” RCP and directing the Jacking method to install the 54” RCP culvert.

Now that the new methodology successfully installed the 60” WSP, **CDOT** has more than 90% of the unused 54” RCP pipe stored in their inventory that can be used on future projects; after being paid for at today’s prices. **AWC**, however, has been deprived of the benefit of its bargain due to the inability to perform the work and recover its profits thereon.

There is no way of knowing the impact of the lost markup on the special-order 54” RCP Jack Pipe on **AWC**’s overall planned profit for the entire job. What is known, is that the change has deprived **AWC** of its expected mark-up on the RCP pipe and profit on the installation of 92% of the 54” RCP.

Whatever the impact, however, it does not seem fair and equitable for the innocent party to totally shoulder the consequences of the acts of the opposing party that is at least partially responsible for the situation.

DRB’s Preferred Specification to Resolve the Significant Change Issue

Considering the fact of **CDOT**’s and the State of Colorado’s failure to recognize Cardinal Changes in public contracts, **DRB** sought other Sections of the **CDOT** 2011 Specifications that could be applied to reach a fair and equitable resolution.

During the course of searching for a **CDOT** Specification provision that addresses cardinal change-type situations, **The DRB** concluded that 104.02 (c) is as close to a cardinal change provision that can be found in the US 36 Culverts Contract or **CDOT** Standard Specifications.

104.02 (c)Significant Changes in the Character of Work

(c) *Significant Changes in the Character of Work.* The Engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the Contract nor release the surety, and the Contractor agrees to perform the work as altered.

If the alterations or changes in quantities significantly change the character of the work under the Contract, whether such alterations or changes are in themselves significant changes to the character of the work, or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding loss of anticipated profit, will be made to the Contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable.

If the alterations or changes in quantities do not significantly change the character of the work to be performed under the Contract, the altered work will be paid for as provided elsewhere in the Contract. The term "significant change" shall be construed to apply only to the following circumstances:

- (1) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction,
or
- (2) When a major item of work is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed. A major item is defined to be any item having an original contract value in excess of 10 percent of the original contract amount.

DRB maintains that the change from 54" RCP to 60" WSP should be viewed as a "Significant Change" because (1) the high number of factors would likely justify a finding of a "Cardinal Change", and (2) the actual decrease in quantities (8%) is significantly below the 75% of original contract threshold.

Additional Reasons why Specification Section 104.02 (c) Specifically Applies to this ISSUE:

In addition to meeting the Cardinal Change Factors and decrease in quantities above, DRB maintains that 104.02 (c) specifically applies because:

1. A subsurface Differing Site Condition situation, as agreed to by the parties, gave rise to AWC's REA, and therefore,
2. The Written Notice requirements of 104.02 (c) are satisfied.
3. The performance of the original work was suspended until alterations in the work was agreed-to by the parties and implemented to satisfactorily complete the US 36 Culverts project.
4. Whereas, the quantity of 54" RCP that AWC planned to install (100%) and the amount actually installed (8%) was a decrease well below the 75% "Significant Changes" in quantities threshold.

5. Based on the inability of the parties to agree on the basis of adjustment to apply, the CDOT Engineer is urged to make an adjustment of 15% markup to the cost of the 54" RCP as fair and equitable.
6. 104.02 (c) can be referenced as justification for payment of the 15% markup on the 54" RCP because:
 - a. But for CDOT's design to install the 54" Reinforced Concrete Pipe, and
 - b. But for CDOT's plan to install the 54" RCP by "Jacking", and
 - c. But for the lack of more accurate underground bedrock locations,
7. Any other planned culvert system could have been installed, as was the 60" WSP.

Conclusion of DRB's Analysis of ISSUE # 2

DRB submits the following conclusions drawn from the analysis of ISSUE # 2:

- The DRB initially thought that the 54" RCP Issue could be characterized as a Cardinal Change to the original US 36 Culverts Contract; however,
- Colorado and CDOT do not specifically allow a Cardinal Change claim on Colorado construction projects.
- The only section in the 2011 CDOT Specifications that is reasonably close to a Cardinal Change provision is **104.02 (c)Significant Changes in the Character of Work.**
- Virtually all of the factors that give rise to a claim of Cardinal Change are also prevalent in the 54" RCP ISSUE fact situation; meaning, that if it were allowed, a Cardinal Change charge could be claimed if pursued in a jurisdiction that recognizes a Cardinal Change claim.
- In jurisdictions that recognizes Cardinal Change, the decision of whether a Cardinal Change has in fact occurred is made by the judge or jury; while, in Colorado, the CDOT Engineer has sole authority to decide.
- The Decision of whether there was a "**significant change**" to the original contract, and whether the "**significant change**" results in economic hardship, **an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable**; the same Engineer that is solely authorized to issue a Contract Modification on behalf of CDOT.
- And whereas, **the CDOT Engineer** is the only CDOT employee authorized to (1) enter into a Contract Modification Order **101.19** and (2) make the determination whether an equitable adjustment is "**fair and equitable**" **105.14**, the Engineer is is therefore the only CDOT employee authorized to make an **adjustment, either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable**; including markups and profit.
- Therefore, the DRB concludes that the Engineer (via the DRB) is the only CDOT employee that can rule that it is fair and equitable that AWC be awarded the requested 15% markup on the 54" RCP that was purchased, but not installed.

DRB's Ruling on the 54" pipe claim

The DRB hereby rules that the CDOT Engineer shall exercise his/her authority and pay AWC the requested 15% markup on the 54" RCP.

DRB FINAL QUANTUM DECISIONS: ISSUES #1 and #2

The DRB finds **no Quantum** in RE **ISSUE # 1: 16% Markup for Subcontractors**.

In RE **ISSUE # 2: Markup on 54" RCP Pipe, Quantum is due and payable to American West Construction**; and the Engineer is hereby directed to pay AWC a 15% markup on the cost of the entire lot of the 54" RCP pipe procured for and delivered to CDOT.

Stanley B. Williams

Stanley B. Williams
CDOT Dispute Review Board
Monday, October 15, 2018

¹ CDOT Std. Specs. Section 109.04 Compensation for Changes and Force Account Work

² CDOT Std. Specs. Section 109.10 Compensation for Compensable Delays

³ CDOT Std. Specs. Section 109.10 Compensation for Compensable Delays

⁴ CDOT Std. Specs. Section 109.10 Compensation for Compensable Delays

⁵ **101.17 Contract.** The written agreement between the State of Colorado through the Department of Transportation and the Contractor setting forth the obligations of the parties for the performance of the work and the basis of payment.

⁶ **101.23 Contractor.** The individual, firm, or corporation contracting with the State of Colorado through the Department of Transportation for performance of prescribed work.

⁷ **101.81 Subcontractor.** An individual, firm, corporation, or other legal entity to whom the Contractor sublets part of the Contract.

⁸ **The Doctrine of Privity of Contract** is a common law principle which provides that a **contract** cannot confer rights or impose obligations upon any person who is not a party to the **contract**. The premise is that only parties to **contracts** should be able to sue to enforce their rights or claim damages as such.

⁹ **101.19 Contract Modification Order.** A written order issued to the Contractor by the Department covering contingencies, extra work, increases or decreases in contract quantities, and additions or alterations to the plans or specifications, within the scope of the Contract, and establishing the basis of payment and time adjustments for the work affected by the changes. **The Contract Modification Order is the only method authorized for changing the Contract.** Contract Modification Orders must be approved as established in subsection **105.14**.

105.14 Authority and Duties of the Project Engineer. The Project Engineer has immediate charge of the administration and engineering details of each construction project. The Project Engineer has the authority to exercise all duties and responsibilities of the Engineer contained in the Contract, except those specifically retained by the Chief Engineer. **The CDOT Project Engineer and the CDOT Resident Engineer are the only representatives of the Chief Engineer authorized to sign Contract Modification Orders.** The Project Engineer is responsible for initial decisions relating to Contractor claims for additional compensation or extension of contract time filed pursuant to subsection 105.22.

¹⁰ CDOT Std. Specs. Section 109.03 Compensation for Altered Quantities.

¹¹ CDOT Std. Specs. Section 109.04 (b) *Materials*.

¹² Highland Constr. Co. v. Union Pac. R.R. Co., 683 P.2d 1042 (Utah 1984)

¹³ Rumsfeld v. Freedom N.Y., Inc., 329 F.3d 1320

¹⁴ C.W. Bignold v. King County, 14,465 Wn.2d 817, 399 P.2d 611 (1965).

¹⁵ **Impossibility:** The contract can be ended if the duties become impossible to perform. Contract termination can sometimes be necessary for both parties. Unlike breach of contract, contract termination doesn't necessarily have to involve the wrongdoing of one party. It can sometimes be based on the surrounding circumstances, as is commonly the case with contract impossibility. Attorney at Law, Managing Editor, Legal Match Law Library

¹⁶ **101.19 Contract Modification Order.** A written order issued to the Contractor by the Department covering contingencies, extra work, increases or decreases in contract quantities, and additions or alterations to the plans or specifications, within the scope of the Contract, and establishing the basis of payment and time adjustments for the work affected by the changes. **The Contract Modification Order is the only method authorized for changing the Contract.** Contract Modification Orders must be approved as established in subsection **105.14**.

¹⁷ *Albert Elia Bldg. Co., v. Container Corp. of America*