

DISPUTE REVIEW BOARD REPORT

US 160 4th LANE – DURANGO

NH 1602-114

HMA Overlay and Waterproofing Membrane Dispute

Hearing Date: March 20, 2009

Hearing Attendees:

Douglas J. Holen – Chair, Dispute Review Board (DRB)
Ronald Bignall – Member, Dispute Review Board (DRB)
Tom Pawlish - Member, Dispute Review Board (DRB)
Steven Cross - CDOT Engineering
Lorna Alexander- CDOT
Ed Archuleta - CDOT
Joseph Colley - CDOT
Larry Walsh - SEMA
T. Brett Ames - SEMA
Todd Schieffer - SEMA

Background: The project consists of completing the new four-lane section on US 160 through Farmington Hill and constructing portions of three (3) interchange ramps, as well as part of the US 550 Mainline, for the future US 160/US 550 interchange. The project is located in La Plata County, east of Durango on and adjacent to US 160 between Mile Marker 88.0 and Mile Marker 89.5. The project runs parallel to Wilson Gulch at the base of Farmington Hill.

Owner: State of Colorado, Department of Transportation

Contractor: SEMA Construction Inc.

Joint Statement of Dispute: “CDOT and SEMA Construction, Inc. have reached an impasse on the issue of whether or not the 3” HMA overlay and waterproofing membrane for cast-in-place post tensioned bridge structures are included in the scope of the subject contract.”

In its letter of January 29, 2009, SEMA indicated that “further discussions would be unproductive and we have reached an impasse. Based on our differing positions regarding the merit of this dispute, SEMA Construction proposes to proceed with the dispute process and refer this issue onto the Dispute Review Board (DRB) in timely manner so as to get this issue behind us.”

In its letter of March 6, 2009 CDOT Region 5 notified the Dispute Review Board (DRB) of the impasse and requested this issue be reviewed by the DRB.

In its letter of March 10, 2009 CDOT Region 5 provided the Joint Statement of Dispute and Scope of Desired Decision.

Scope of Desired Decision: “CDOT and SEMA mutually request the issue be reviewed and recommendations offered with respect to a determination of whether or not the asphalt overlays and waterproof membrane is included in the contractual work scope of the project.”

CDOT Position as stated in its Pre- Hearing Submittal: CDOT Region 5 believes that the asphalt overlays and waterproofing are in the scope of the subject contract.

In its letter to the Dispute Review Board dated March 4, 2009, CDOT Region 5 indicated that its letter of January 26, 2009 to SEMA construction “provides a thorough and concise summary of our position on this matter. I would

recommend this document a starting point for your review of our position as it outlines everything that we feel justifies our position on this issue.”

The following excerpts are taken from the letter of January 26, 2009:

“CDOT believes that the following documents and specification excerpts that were a part of the contract requirements prior to issuance of any bid clarifications support its position:

Book 2, Section 15.3.3.5 #5 Overlays

The contractor shall provide an initial bridge deck overlay with segmented systems, precast deck slab systems, and any bridge superstructure system that would require shoring for future deck replacement. Overlays shall be asphalt over a waterproofing membrane for bridges with asphalt approach pavements. When used, the asphalt overlay with a waterproofing membrane shall be used on both the bridge deck and associated approach slab. The placement of waterproofing membranes with asphalt overlays shall comply with the CDOT Bridge Design Manual.”

“SEMA chose to follow the route of the overlay and waterproofing membrane as is clearly evident in the bridge design provided by Wilson and Company.” (SEMA’s Designer for the Design-Build portion of the project.)

“Structures for Ramp A, Ramp C and US 550 Mainline all fall into this category as structures that would require shoring for future deck replacement.”

“The CDOT Bridge Design Manual is also referenced in BOOK 2 and BOOK 3 of the contract documents. The Contractor Is required to comply with this document when preparing their structure designs. Within the CDOT Bridge Design Manual there are several pertinent references:

CDOT Bridge Design Manual, 19.1.3.B Structure Layout and Type Study, paragraphs 3 and 8.”

“The CDOT Bridge Design Manual also incorporates Technical Memorandums issued by the CDOT Staff Branches.

CDOT Bridge Design Manual paragraph 19.1.6 Standards for the Design and Construction of Structures and Paragraph 19.1.6 A Standard Published by Staff Bridge.”

“The following Technical Memorandums are pertinent to this issue:

Technical Memorandum #27 – Replaceable Bridge Decks.

Memorandum dated June 15, 2000 – Bridge Deck Cover and Overlay Thickness.”

“All of these references discuss the requirements for bridge decks and overlays, again reiterating that these items should be included in the construction.”

With respect to the Pre – Bid Clarifications, the CDOT letter of January 26, 2009 states:

“First bid clarification: Clarifications and Known Changes – US 160 4th Lane – MDB Project. Pre-Bid Meeting March 4th, 2008. This was a bid clarification handed out at the mandatory pre-bid meeting. The questions and answers to #7 and #47 are below.

Question #7:

Book 2 Section 15.3.3.1 – Since the bridges are not being paved, does the contractor need to do a profilograph of the deck and approach slabs as noted?

Answer #7:

Because the 3” asphalt membrane on the bridge decks has been eliminated it is no longer necessary to perform a profilograph of the completed bridge decks or approach slabs. The contractor may use a straight edge of sufficient length to prove to CDOT that the bridge decks and approach slabs are flat and straight.

Question #47:

CDOT requires that bridge deck slabs be fully replaceable. Does that mean for CIP concrete box girder bridges, that the entire deck must be removed without the use of shoring, or is the use of shoring allowed during replacement?

Answer #47:

For CIP post tensioned box girder bridges a deck with a 3 inch HMA overlay and waterproofing is acceptable.”

“The second bid clarification was; Clarifications and Known Changes – US 160 4th Lane – MDB Project – Subsequent to Pre-Bid Meeting March 4th, 2008. The question and answer to question #25 are below:

Question #25:

CDOT requires that bridge deck slabs be fully replaceable. Does that mean for CIP concrete box girder bridges, the entire deck must be able to be removed without the use of shoring, or is the use of shoring allowed during deck replacement?

Answer # 25:

Refer to BOOK 2 Section 15.3.3.5 Paragraph 5 Overlays.”

“The third bid clarification was; List of Questions and Answers – US 160 4th Lane – MDB Project – Prebid Clarifications – March 24, 2008.

There was no clarification regarding this topic in this transmittal.”

“The fourth bid clarification was; List of Additional Questions and Answers – US 160 4th Lane – MDB Project – Prebid Clarifications – April 2, 2008.

There was no clarification regarding this topic in this transmittal.”

“The fifth and final clarification was; List of Additional Questions & Answers – US 160 4th Lane – MDB Project April 2nd, 2008 – Part #2. The question and answer to question #1 are below:

Question #1:

We need further clarification on Question 25 in the pre-bid Questions and Answers. It is our understanding that Post tensioned Structures are excluded from the replaceable deck requirement. Does this apply to all continuous post tension structures including U-Tub Structures?

Answer #1:

Yes, continuous post-tensioned U-Tub girders are exempt from the replaceable deck requirements so long as the waterproofing membrane and 3” asphalt overlay are included in the bridge deck construction per Book 2 Section 15.3.3.5.5”

“In summary, we believe there is a significant amount of information included in the contract documents which clearly state the requirement for the bridge construction to include the HMA overlay and waterproofing membrane for the CIP Post-Tensioned structures with non-replaceable decks as chosen by SEMA. Furthermore, while there was an initial clarification which inadvertently confused the issue,” (*the answer to Question #7 in the Pre-Bid Meeting dated March 4th, 2008 above*)” there were three subsequent clarifications which were issued with the specific purpose of clarifying these items and which should have eliminated any uncertainty with respect to the contract requirements. Based on these facts, it is still our position that the requirement to include the HMA overlay and waterproofing membrane is within the scope of the original contract.”

SEMA's Position as stated in its Pre – Hearing Submittal: SEMA Construction, Inc. believes that construction of the asphalt overlays and waterproofing are not in the scope of the subject contract.

SEMA provided the DRB with a document in two volumes entitled: "Prehearing Position Paper for Waterproof Membrane & 3" HMA. Volume One is an Executive Summary and Volume Two contains Reference Documents. The following excerpts are from Volume One.

"Summary of Position"

"The issue in this dispute is not whether the design should accommodate for a Waterproof Membrane and 3" HMA Overlay on the bridge deck. Sema's design provides accommodation for future installation of the waterproof membrane and 3" HMA Overlay as part of future phases of project construction in accordance with the contract specifications.

The disagreement is whether the actual construction of the Waterproof Membrane and the 3"HMA Overlay is part of the current contractual work scope on this project.

There is a distinct difference between design requirements and construction requirements. This is especially true in a Design-Build work scope for the first phase of a project requiring subsequent future contracts for the project to be functional. Several design elements of our design work scope require the design to incorporate construction elements that will be in future construction contracts for this project interchange.

SEMA Construction incorporated all of the design and construction requirements of the bidding documents, including CDOT issued clarifications into our technical approach and cost proposal.

The CDOT issued Clarifications were concise and clear. None of the Prebid questions regarding this dispute were submitted from SEMA Construction. We clearly understood the specifications and the Clarification.

SEMA Construction has consistently (word missing) in all documentation including Prebid Meeting Minutes, Escrow Documents, Structures Concept Reports, Schedule of Value Quantities, Design Development Meeting Discussions, and Design Submittals to CDOT the construction of the Waterproof Membrane and 3" HMA Overlay is in future construction contracts.

SEMA's position is supported by the following Statements of Fact:

Key Position Points

1. CDOT issued Clarifications were Addenda to the Bid Documents.
 - A. Clarifications issued by CDOT were Addendum to Bidding Documents.
 - B. CDOT Standard Specification Section 102.04 allows for certain individuals to provide clarifications to bidders.
 - C. CDOT "The Rules" Paragraph 4.04 allows for CDOT to make revisions to the plans and specifications by providing revisions to each plan holder one day prior to the bid opening.
 - D. CDOT "Rules for Procurement of Design Build Contracts" Section 12 requires Proposers to be allowed to ask questions and to receive answers or clarifications with material changes to be provided in writing.

2. CDOT deleted the Construction Requirement for the Waterproof Membrane & 3" HMA Overlay in the Clarification 03/04/08.
 - A. CDOT Clarification issued 03/04/08 Response No. 7 deleted the requirement for the inclusion of the Waterproof Membrane and the 3" HMA Overlay on Bridge Decks.
 - B. CDOT Mandatory Pre-Bid Meeting on 03/04/08 the CDOT Presentation stated Waterproof Membrane and 3" HMA Overlay was deleted.

C. CDOT never rescinded/corrected the CDOT Clarification issued 03/04/08 eliminating the inclusion for the construction of the Waterproof Membrane and 3” HMA Overlay.

3. Consistent Interpretation of Contract Documents by SEMA Construction

A. The “Structures Concept Report” (*submitted by SEMA*) required by the Contract Specifications clearly noted the Waterproof Membrane and the 3” HMA Overlay would be by others and CDOT did not take exception to the note and approved the report.

B. SEMA Construction has encouraged CDOT to view the Escrowed Bidding Documents which will show the Waterproof Membrane and 3” HMA Overlay was not included in our bid proposal.

C. Meeting minutes from the Mandatory Prebid Meeting 03/04/08 CDOT noted during the presentation the Waterproof Membrane and 3” Overlay was no longer part of this project work scope.

D. Book 4 Sheet 13 – Summary of Approximate Quantities furnished by CDOT showed a Roadway quantity of HMA Gr X 75 PG (64-28) of 4012 tons and a quantity for Ramp C Bridge of 102 tons. No quantities were shown for Ramp A or the US 550 Bridge.

The Schedule of Values submitted by SEMA Construction and approved by CDOT clearly showed the deletion of the quantity of 3” HMA Overlay for Ramp C Bridge and only showed a total project quantity of 4012 tons specific to the Roadway.

E. Book 4 Sheet 14 – Summary of Approximate Quantities furnished by CDOT did not show a contract item 515 – Waterproof Membrane for any of the bridge structures.

The Schedule of Values submitted by SEMA Construction and approved by CDOT does not show a contract pay item for the Waterproof Membrane.

4. CDOT Position Letter of 01/26/09

A. We are in agreement with CDOT; our design of the bridge deck is based on the design incorporating a Waterproof Membrane and a 3” HMA Overlay per the specification requirements for a fully replaceable bridge deck requiring shoring.

B. CDOT stated in their letters of 12/11/08 and 01/26/09 the Clarification Response No. 7 issued by CDOT on 03/04/08 was incorrectly stated and was not intended to address the elimination of the Waterproof Membrane and 3”HMA Overlay.

C. CDOT Clarification Response No. 7 was specific, clear and concise confirming the basis of the initial clarification question asked.

D. CDOT has an obligation under the CDOT Standard Specifications and the CDOT Rules and Regulations to provide Clarifications to the bid documents. The Proposers had an obligation to CDOT to incorporate CDOT Clarifications into the bid document requirements and subsequently the price proposals.

E. Prior to the submission of the bid proposal it is not unreasonable for all bidders to rely upon the exact language as stated by CDOT. It would be arbitrary and capricious for CDOT to modify a Clarification after the bid proposals are submitted.

F. CDOT Clarification on 03/04/08 for Questions and CDOT Responses No. 7 & No. 49 are two completely separate questions and responses. Question and Response No. 7 is strictly limited to construction. Question and Response No. 49 is solely a design question which was specifically addressed under Book 2, Section 15.3 – Bridge Design Requirements.

G. CDOT Clarifications on 03/18/08 for Question No. 25 and the follow-up Clarification issued on 04/02/08 Question No. 1 in the Clarifications cited specific sections of the Specification Section 15.3

entitled Bridge Design Requirements. These questions and CDOT issued Clarifications were specific to the design of replaceable bridge decks.”

Pages 11 through 17 of Volume One of the SEMA Pre-Hearing Position Paper discuss the “Key Positions” cited above in more detail. The following are three excerpts from those pages.

Page 11 -

“CDOT E-Mail 03/18/08: “

“In the e-mail from CDOT and also at the Prebid Meeting on 03/04/08 CDOT stated it was the responsibility of the General Contractors bidding the project to distribute Questions and Clarifications from CDOT as CDOT would not be issuing the traditional addenda with normal Design-Bid-Build Projects as this project was a Modified Design Build which was being administered at the region level.”

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Q&A No. 49

Pre-Bid Question: CDOT requires that the bridge deck slabs be fully replaceable. Does that mean for CIP concrete box girder bridges, that the entire deck must be able to be removed without the use of shoring, or is the use of shoring allowed during bridge deck replacement?

CDOT Response: *“No, for CIP post tensioned box girder bridges a deck with a 3 inch HMA overlay and waterproofing membrane is acceptable.”*

SEMA Commentary:

“The requirement by CDOT for a fully replaceable bridge deck in the future is a

design requirement, not a construction requirement for this project work scope. The response by CDOT clarified it was not necessary for the design of a structure to accommodate for the structure to be self-supporting without the use of shoring when the entire deck has been removed if the design incorporates a 3”HMA overlay and waterproofing membrane. Our design incorporates a 3”HMA and Waterproofing Membrane.”

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CDOT Clarification Issued 03/18/09

Q&A No. 25 – page 5 of 5

Pre-Bid Question: CDOT requires that the bridge deck slabs be fully replaceable. Does that mean for CIP concrete box girder bridges, that the entire deck must be able to be removed without the use of shoring, or is the use of shoring allowed during bridge deck replacement?

CDOT Response: *“Refer to Book 2 Section 15.3.3.5 Paragraph 5”*

SEMA Commentary: “CDOT was asked to clarify the specific intent for the design requirement for future bridge deck slab replacement relative to the use of shoring.

CDOT responded by referring the question back to Book 2 – Technical Specifications under Section 15.3 – Bridge Design Requirements Sub-Section 15.3.3.5 Paragraph 5.

Our bridge deck design incorporates and complies with the CDOT Clarification requiring the bridge deck design to include either a Waterproof Membrane with 3” HMA Overlay or a bare deck with 3” of concrete covering the reinforcing steel with a concrete sealer.”

Hearing:

SEMA Presentation: In its presentation to the DRB, SEMA provided the following Summary of its Position: *(This text is taken from the handout provided to the DRB in the Hearing.)*

1. CDOT issued Clarifications were Addenda to the Bid Documents.
2. SEMA Construction relied upon CDOT Clarifications and incorporated those clarifications into the proposal submitted to CDOT.
3. CDOT deleted the Construction Requirement for the Waterproof Membrane & 3" HMA Overlay in the Clarification Response No. 7 issued 03/04/08.

CDOT Response: *"Because the 3" asphalt membrane on the bridge decks has been eliminated it is no longer necessary to perform a profilograph of the completed bridge decks or approach slabs. The Contractor may use a straight edge of sufficient length to prove to CDOT that the bridge decks and approach are flat and straight."*

4. CDOT issued clarifications were concise and clear.
5. Proposer Question and CDOT Clarification Response No. 7 is unrelated to the subsequent Questions and Clarifications 49, 25 and 1 issued by CDOT.
6. CDOT Clarification No. 7 was construction related specific to the incorporation of the Waterproof Membrane and 3" HMA Overlay on the bridge decks in this project.
7. CDOT Subsequent Clarification to Responses No. 49, 25 and 1 were design questions and responses specifically related to the requirement for Bridge Deck Replacement Criteria.
8. Consistent Interpretation of Contract Documents by SEMA Construction:

- a. Incorporation of CDOT issued Clarifications into Bid Proposal.
- b. Prebid Meeting Minutes
- c. Escrow Documents
- d. Structure Concept Report
- e. Schedule of Values
- f. Design Development Meeting Discussions
- g. Design Submittals.

(The DRB interpreted this to mean that SEMA believed it had been consistent in showing that it had made provision for the 3”HMA overlay and Waterproofing in its design but that installation was not a part of this contract.)

9. CDOT letters of 12/18/08 and 01/26/09 regarding Clarification No. 7

“CDOT acknowledges that we did not answer this initial clarification question correctly.”

CDOT Presentation: In its presentation to the DRB, CDOT made the following points: *(This text is taken from the handout CDOT provided to the DRB in the Hearing.)*

- What transpired after the bid date is not relevant to whether or not it is in the contract. *(The DRB interpreted this to mean that CDOT believed that the fact that SEMA’s Structure Design Report and subsequent design submittals showed the 3” HMA Overlay and Waterproofing Membrane to be installed by others was not relevant.)*

- We agree that the clarifications transmitted prior to the bid date would be viewed as addendums. That is the way we would consider them if we were bidding.
- If one clarification is taken as an addendum then all have to be considered addendum, in the order the addendum were transmitted.
- We did confuse the issue with the question No. 7 of the first pre-bid clarification handed out at the Mandatory Pre-Bid. Subsequent to Question No. 7 the issue regarding HMA and waterproofing membrane was brought up three additional times in pre-bid clarifications, the second time was in the same pre-bid documentation.
- Question #7 of the first bid clarification is a patent ambiguity. A patent ambiguity is defined as: blatant, obvious and significant. Please refer to hand out; Patent Ambiguity. Patent Ambiguity Doctrine.

The doctrine of Patent Ambiguity applies to government contract and is an exception to the general rule of contra proferentium. It requires that a contractor investigate any patent ambiguities in a contract before submitting a bid. In other words, it places upon contractors a duty to inquire and provides that a breach of the duty will prevent the contractor from recovering additional compensation for performing work under an ambiguous clause. If a contract is patently ambiguous, the contractor must inquire, regardless of the reasonableness of its interpretation.

As a result; SEMA had an obligation to seek clarification as stated in the contract Section 102.05 Examination of Plans, Specifications, Special Provisions, and Site Work.

When CDOT proposed this legal theory, the DRB invited SEMA to respond. SEMA indicated that it would refer this issue to counsel and provide a response by March 27, 2009. The Chairman told the parties that the Hearing would proceed, but that the DRB would not complete its report until after it had received and reviewed the SEMA response.

The SEMA response was received on March 27, 2009 and is attached.

The CDOT presentation continued: (*again, the text is taken from the handout provided to the DRB at the Hearing.*)

The subsequent clarifications stated:

- Clarification #1 – Q49

That for CIP post tensioned box girder bridges a deck with a 3” HMA overlay and waterproofing membrane is acceptable.

- Clarification #2- Q25

The answer was referred to Book 2 Section 15.3.3.5 paragraph 5 Overlays

This question dealt specifically with what SEMA has designed and built; CIP box girder bridges. Their design does not allow for deck replacement without shoring, they chose to go with an HMA Overlay and waterproofing membrane instead of a replaceable concrete deck.

- Clarification #5 – Q1:

We need further clarification on Question #25 in the Pre-bid question and answers. It is our understanding that post tensioned structures are excluded from the replaceable deck requirement. Does this apply to all continuous post tension structures **including** U-Tub Structures?

Answer

Yes, Continuous post tensioned U-Tub girders are exempt from the replaceable deck requirement so long as the waterproofing membrane and 3” asphalt overlay are included in the bridge deck **construction** per book 15.3.3.5.5 Components.

The clarification specifically states “construction”, this was the last clarification/addenda transmitted.

SEMA chose to design and construct continuous post tensioned structures.

Section 15.3.3.5.5 Components addresses both design and construction requirements.

This addendum was received by SEMA.

- This contract is a lump sum contract; there are no unit prices.
- All quantities shown in the contract are “*for information only.*”
- Book 5: Contract Reference Drawings:

Plan sheets 13-19 of the Reference drawings shows 3” HMA and the waterproofing membrane.

The contract requires SEMA to either construct a bridge with the HMA and waterproofing membrane or with a concrete deck with 3" of cover.

- Approval of the "Structures Concept Report" did not waive the overlay requirement.

CDOT addressed the HMA and waterproofing membrane in the conceptual design review. We did not approve it without addressing the requirement. Please see attached concept review, lines #7 and #19.

(The DRB was shown a "Review Comment Resolution Form" for the Design Build Conceptual Bridge Design Submittal by Wilson & Company. The CDOT reviewer noted in line 7 that 3" HMA and waterproofing were required and in line 19 that "Waterproofing membrane shall be done by the Contractor...")

Standard Specification 105.02(b) provides that a contractor must separately notify CDOT in writing of any deviations between submittals and the plans and specifications.

Standard Specification 105.02(c) also provides that review of submittals by CDOT is not a complete check and only evaluate "general conformance with the design concept" and "general compliance with the information given in the plans and specifications."

It is settled law that shop drawing approval does not modify the parties' contract where the two differ, particularly where the contractor fails to notify the owner of those differences.

Rebuttals:

- SEMA: The Reference Drawings in Book 5 are not a part of the contract. In Book 2 it says the contractor is not required to conform to the drawings in Book 5. There are lots of differences between the reference documents and the final approved drawings.
- CDOT: Concur, the reference documents are not in the contract.
- CDOT: The Schedule of Quantities was for information only. A comparison of the Schedule of Quantities and the Schedule of Values reveals that at present, seven quantities have been decreased, twenty one have been increased and ninety two have been added.
- CDOT: Regarding the assertion by SEMA that the 3" HMA and Waterproofing will be accomplished by others in a subsequent contract, the requirement of the contract is that the design and construction be fully functioning.
- SEMA: Take exception to 15.1. These structures won't be fully functional bridges until the work in subsequent contracts is completed.

Questions from the DRB:

- DRB: Bidder asking Question No. 7 seemed to believe it knew from some prior communication that the 3" HMA Overlay and waterproofing had been eliminated. How did that happen?
- CDOT: That question came from one of the local bidders who had visited the office before the bid documents were issued.

DRB: When were the approach slabs taken out of the project?

CDOT: The approach slabs were deleted in Book 2, 15.3.3.5 Components, 2. Approach Slabs.

DRB: I thought I heard that SEMA had the asphalt quantities.

CDOT: The asphalt quantities in the Schedule of Quantities provided for reference in the bidding documents include the quantities required for the roadway and the quantity required for the 3" HMA overlays on all four bridges.

DRB: Why did you want the overlays now?

CDOT: We wanted the bridges protected because they will be used as haul roads in the future projects.

DRB Findings:

1. Book 2 Section 15.3.3.5.5 states that: “The Contractor shall provide an initial bridge deck overlay with segmental systems, precast deck slab systems, and any bridge superstructure system that would require shoring for future replacement. Overlays shall be asphalt over a waterproofing membrane for bridges with asphalt approach pavements.”
2. The CDOT response to Question 7 issued 03/04/08 –“Because the 3” asphalt membrane on the bridge decks has been eliminated...” resulted in a conflict in the contract documents.
3. Neither SEMA nor any of the other bidders questioned CDOT directly regarding the CDOT response to Question 7.
4. CDOT believes it clarified the conflict by stating in its response to questions 25, 47 and 1, that a 3”HMA Overlay and Waterproofing are required in bridge deck construction.
5. Questions 25, 47 and 1, while related to question 7, seem to be directed at clarifying how the firm posing the question (bidder) might comply with the requirements of Section 15.3.3.5 in completing its design, but did not specifically correct the response to Question 7.
6. CDOT did not issue a retraction or correction of its response to Question 7 although it had an opportunity to do so in the “Formal Revision Under Ad” issued March 13, 2008.
7. It is possible that SEMA, by utilizing the Schedule of Quantities provided for reference in the bid documents, inadvertently included an estimate for a 3” HMA overlay of each of the bridges in question in its bid.
8. The purpose of the DRB as stated in Section 105.22 of the contract is to assist in the timely and equitable resolution of disputes between CDOT and the Contractor in an effort to avoid animosity and construction delays. The

DRB is to utilize its specialized experience in technical areas and administration of construction contracts in arriving at its findings and recommendation. However, to opine on a test of the applicability of the “Patent Ambiguity” raised by CDOT in its presentation to the DRB is outside of the expertise of the DRB and hasn’t been considered by the DRB in developing its recommendation. If either of the parties believes that this issue requires a test of that principle, it should do so in a subsequent legal proceeding.

In Summary: The DRB was asked to opine on whether or not the asphalt and waterproof membrane for concrete bridges is included in the work scope of this project. The confusion in this matter seems to have been created by the CDOT response to Question 7. The DRB is concerned that SEMA did not question the CDOT response; however, the DRB feels that CDOT has the primary responsibility for this confusion because it did not clarify the answer to Question 7.

If the DRB responded literally to the parties request and SEMA did not include the membrane or asphalt in their bid because of the confusion, CDOT would get scope for which it did not pay. On the other hand, if SEMA did carry funds for some or all of this work scope in their bid, it would receive a windfall.

Therefore, the DRB offers the following Recommendation to the Parties to resolve this matter:

The DRB recommends that CDOT entertain a Request for Equitable Adjustment from SEMA Construction for a 3” HMA Overlay and Waterproofing on Ramp A, Ramp C and Highway 550 Mainline bridge provided that SEMA Construction can demonstrate and certify that funds for this work or a portion of this work are not already included in its bid.