



Director's Claims Board ODOT Project 293(04)

Claim 12-040293-02
Increased Rigging Costs

Decided October 23, 2008

On Tuesday, May 13, 2008 at ODOT's Central Office in room 4A, the Director's Claims Board Hearing Panel ("Board") heard oral presentations of Walsh Construction ("Walsh" or "Contractor") and ODOT District 12 relative to the subject issue. Prior to the oral presentations and in accordance with the Dispute Resolution and Administrative Claim Process set forth in the contract, the Board received written documentation from the Contractor on December 5, 2007 and then from the District on March 1, 2008.

The Board consisted of William Lindenbaum, P.E., P.S., Deputy Director, Division of Construction; Keith Swearingen, P.E., P.S., Deputy Director, Division of Highway Operations; Tim McDonald, P.E., Deputy Director, Division of Production Management.

The District 12 representatives at the hearing were Pete McHugh, Tom Hyland and Randy Over .

Walsh Construction was represented by Scott Febus, Brad Koester and Mark Hedrick. Also in attendance, representing East-West Construction was Neal Patel, George Roditis and Rob Remington.

Tom Pannett, Esq., Acting Administrator, Office of Contracts served as the Secretary of the Board.

Pam Clawson of ODOT's Division of Construction Management observed the hearing.

PROJECT DESCRIPTION:

This \$16,814,600 contract was signed on June 30, 2004 with Walsh Construction. The project is to improve the West Third Street Lift Bridge in the City of Cleveland. The project completion date was originally set for May 31, 2006 but was delayed due to a large amount of extra work. This extra work included: replacing both counterweights, replacing all sheave guards, replacing both concrete tower floors, redesigning the lift span to reduce overall weight using a fiberglass walk and various other work. The current contract stands at \$23,132,608.03 with a revised completion date of January 18, 2008.

CLAIM BACKGROUND:

As work began on the project it was found the existing deteriorated concrete tower floors would have to be removed and replaced as extra work. This floor removal altered the Contractor's planned access to the work and required it to determine alternate methods to gain access and erect their outrigger anchors for their containment system for painting operations. As-bid, the containment upper limit was to be the bottom of the tower concrete floor. When the floor was removed, the Contractor did not have that as part of their containment plan or as a work area.

By letter on August 9, 2006 the project recognized receipt of Walsh's request for additional compensation due to the floor removal. The project had previously agreed to compensate the Contractor for this change. The Contractor; however, offered a total cost submittal, which the District rejected. As a counteroffer the project agreed to pay \$4,797.22 for the additional outrigger material. After several submittals by the Contractor attempting to further substantiate their \$163,952.38 of extra costs the District responded on May 15, 2007, as their Step 1 response, that their offer still stands at \$4,797.22.

A Step 2 hearing was held and the written response sent to the Contractor on September 24, 2007 supporting the original offer of \$4,797.22. The Contractor then filed the Notice of Intent to File a Claim and requested a Step 3 hearing on October 8, 2007.

The parties agree on entitlement but disagree on cost.

SUMMARY OF CONTRACTOR'S POSITION:

The Contractor is asking a total of \$179,018.73 as a resolution of this issue.

When ODOT directed the extra work of removing the concrete decks at the top of the towers Walsh's planned method of containment was no longer available. The Contractor's original plan was to work from the concrete tower deck ~~and~~ to which the main containment supports would be connected. The concrete deck was to have been used as the paint containment upper limit.

East West Construction was subcontracted to install the containment system. The original bid for the containment system included one week per tower at a total cost of \$25,410. The actual cost was \$164,234.41 more than their original estimate and required five additional weeks. The claim was submitted as their total costs to do the work minus the cost originally estimated at the time of the bid.

The Contractor contends that as a result of the ODOT directed extra work, any additional costs incurred that either directly or indirectly affects the character of work and causes the work to be significantly different should be paid for by ODOT.

SUMMARY OF DISTRICT'S POSITION:

The Contractor did not put the project on notice until seven months after the paint containment work was started, preventing the project from any mitigation efforts or keeping accurate records.

The District acknowledges it would have been reasonable to expect to use the concrete flooring as the anchor base for the rigging. However, expecting the flooring to have served as the upper limit of the containment is overly simplistic. The Contractor would have also had to provide containment above the flooring because there was additional work above the concrete flooring that required painting and thus required containment.

East West Construction used a total cost method for reimbursement. ODOT does not accept the total cost method as an appropriate method for the measurement of damages. ODOT has asked for verification of original bid costs at Step 1 and Step 2 and has not received that.

DIRECTOR'S CLAIMS BOARD FINDINGS:

I. Facts

The Board finds a majority of facts contained in the submissions and presentations by the parties are either consistent or undisputed and can reasonably be relied upon to form the basis of this decision.

1. The Contractor was forced to change his containment plan and his work process due to ODOT's requirement to remove and replace the tower flooring.
2. The Contractor could have logically expected to use the floor to erect the containment rigging. It was also reasonable to plan to use the floor as the upper limit of containment for most of the work.
3. Some items to be prepared and painted were above the level of the floor and would have required some other containment system even in the original plan.
4. The Contractor has not submitted a detailed explanation in writing of his original containment plan and has only submitted the lump sum of \$25,410 as his estimate of the original work with no supporting backup computations or explanations.
5. The District was aware that there may be additional costs to modify the containment system when the decision was made to remove the floor but the value of these costs were not discussed until well after the work was performed.

II. Additional Information Requested

Based on their careful review of the submissions and with due consideration of the information presented at the hearing, the Board decided that ODOT was responsible for additional costs to modify the containment system but the Board could not accept the submitted costs without further backup. To that end, at the hearing, the Board requested the Contractor provide supporting information to justify their original bid amount by June 3, 2008.

As requested, the Contractor did provide an analysis to support the \$25,410 they originally had in their bid for the rigging costs on June 3, 2008.

III. Correction of Estimate and Claimed Actual Costs

As the Board worked through the Contractor's submittals it was found markups had been applied to the actual labor costs inappropriately. When calculated with ODOT's allowable markups the total of East West's actual costs become \$99,183.88 rather than the \$156,413.73 submitted. The Contractor also applied incorrect markups in his original estimate. He also omitted a lead worker and did not include an air compressor. When the original estimate is corrected it totals \$36,864 in contrast to the \$25,410 submitted by the Contractor.

IV. Conclusions

The Board agrees with the earlier finding of the parties that the removal of the concrete flooring had an impact on the Contractor's planned containment system. Since removal of the floor was a change from the original bid condition the Board further agrees that the Contractor is entitled to reimbursement of additional costs and inefficiencies resulting from changes to their rigging system. The responsibility of the Board now becomes determining fair compensation for this change.

The Contractor has submitted his request for reimbursement as a total cost claim. The Contractor has submitted its actual costs for the revised containment system, subtracted its original bid for the work and requested reimbursement/the rigging crew for the difference. ODOT does not recognize total cost claims. This approach does not link specific costs to the specific extra work which resulted from the change. The total cost method shifts all the responsibility for all added costs for the work to the owner and allocates no responsibility to the contractor. Further, the total cost method does not take into account that the original bid estimate may be flawed, the contractor's operation may have inherent inefficiencies or the cost accounting system used to prepare the actual cost could have inaccuracies.

In an attempt to overcome the inequities created by the use of the total cost method, the Board tried to identify specifically how the work of erecting the rigging was changed by the removal of the floor. The Contractor has stated it intended to utilize the floor as a working platform. They intended to use a crane to lift the tarps up to the floor at the top of the tower and place them downward from that point. Instead they lifted the tarps up with equipment called spiders, attached the tarps to the rigging from the spiders and placed the tarps downward along the tower. The Board has determined that one additional day per tower for this revised work to be reasonable. It was also agreed by the parties that the hand rail had to be reinforced to support the angled-iron rigging. The Board has also determined that the work of the rigging crew was extended one additional day per tower due the reinforcing of the handrails. Lastly, the Contractor stated they had to try several different methods to construct the rigging system due to the change. The Board has determined that one additional day was necessary for this trial and error work. In summary, the Board has determined 5 additional crew days to be a reasonable outcome of the change.

In its estimate the Contractor indicated that he planned to use 5 workers working 8 hour per day. In its actual cost submittal the Contractor indicates 7 to 16 workers constructing the containment. The Board will accept 8 workers working 8 hours per days. The Board will allow two "lead workers" at a base rate of \$37.50/hour with the remainder of the crew at a base rate of \$32.00/hour. The Board will use the required prevailing wage fringe rate for the time period of \$9.87 and apply a markup of 39.45% as itemized in the Contractor's actual cost submittal for payroll taxes and 38% profit and overhead as allowed by the contract resulting in a labor cost of \$23,310.25

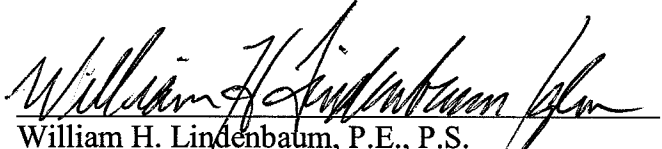
The Board has determined equipment costs with allowable markups for the 5 additional days to be \$8,582.84. Lastly, material costs with allowable markup has been determined to be \$4,797.23

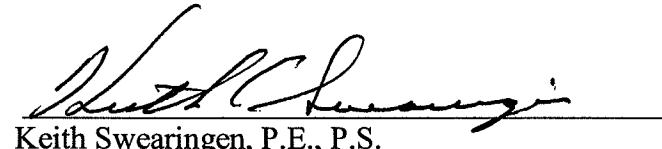
DAMAGES:


Based on the above findings, the Contractor is entitled to \$36,690.32 reimbursement for damages.

This recommendation submitted this 23rd of October, 2008.

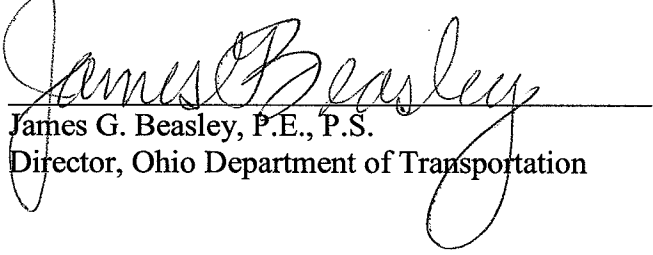
Director's Claims Board:


William H. Lindenbaum, P.E., P.S.
Deputy Director, Division of Highway Operations


Keith Swearingen, P.E., P.S.
Deputy Director, Division of Construction


Tim McDonald, P.E.
Deputy Director, Division of Production Management

Approval of this recommendation:


James G. Beasley, P.E., P.S.
Director, Ohio Department of Transportation


Date

NOTE: THE PRECEDING IS AN "OFFER TO COMPROMISE" A DISPUTE SUBMITTED ON BEHALF OF THE OHIO DEPARTMENT OF TRANSPORTATION AS THAT PHRASE IS SET FORTH IN RULE 408 OF THE OHIO RULES OF EVIDENCE; THEREFORE, ANY ADMISSION OF FACT HEREIN OR ANY STATEMENT REGARDING AN OFFER TO RESOLVE THE DISPUTE HEREIN IS DEEMED INADMISSIBLE IN AN SUBSEQUENT LEGAL PROCEEDING.