AMERICAN ARBITRATION ASSOCIATION
Construction Industry Arbitration Tribunal

George & Lynch, Inc.	
and	
Cherry Creek Recycling, LLC	No. 01-14-0001-4290
and	
Delaware Department of Transportation	

Award on Phase 1

WE, THE UNDERSIGNED ARBITRATORS, Travis L. Kreiser, Esq., Rocco Cavallo, and Peter F. Marvin, Esq., Chair, having been designated in accordance with the applicable provisions of the Specifications for Road and Bridge Construction dated August, 2001 promulgated by the Delaware Department of Transportation as incorporated into Contract T200907301.01, FAP BROS-S050(19) dated February 2, 2011 between George & Lynch, Inc. and Delaware Department of Transportation and the Construction Industry Rules of the American Arbitration Association, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, with Daniel Wolcott, Jr., Esq. and James M. Kron, Esq., appearing on behalf of Claimant George & Lynch, Inc., Jesse Howard Witt, Esq., appearing on behalf of Claimant Cherry Creek Recycling, LLC, and John F. Morkan, III, Esq. and Aleine Porterfield, Esq., appearing on behalf of Respondent Delaware Department of Transportation, hereby FIND as follows:

Major prehearing submissions were made by the parties in the autumn of 2015. Hearings were held on this matter in Wilmington, DE on November 16-19, 2015 before the Panel. The initial phase of hearings on this bifurcated matter were closed as of February 5, 2016.

I. Introduction

At the core of Phase 1 of this bifurcated arbitration are three claims that George & Lynch, Inc. ("G+L"), the contractor, has advanced on behalf of Cherry Creek Recycling, LLC ("CCR"), its subcontractor, against the Delaware Department of Transportation (the "Department"), the owner.[1]

[1] This bifurcation is reflected in Scheduling Order Number Two issued by the Panel on August 5, 2015. Before the hearings, CCR advised the Panel that its claims for costs associated with a delay in pedestrian access, its removal of sand from the north access and the relocation of stockpiled material are not being asserted against the Department but may be asserted by CCR against G+L in Phase 2 of this arbitration.

After competitive bidding conducted on December 7, 2010, the Department, on February 2, 2011, awarded a contract to G+L for a project known as the Indian River Inlet Roadway and Approaches, Phase II, (the "Project") Contract T200907301.01, FAP BROS-S050(19) (the "Contract").

A portion of the scope of work required of G+L on the Project was the demolition of an existing, no longer used, highway bridge over the Indian River Inlet (the "Existing Bridge"). CCR, on March 8, 2012, signed a subcontract with G+L (the "Subcontract") under which CCR agreed to demolish the Existing Bridge.

Encountering what it has alleged were major cost over-runs on the work it was required to perform under the Subcontract, CCR has asserted a claim seeking additional compensation from G+L [redacted] cost events experienced during performance of its scope of work under the Subcontract and G+L has, in turn, asserted such claims against the Department.[2]

The Specifications for Road and Bridge Construction dated August, 2001 promulgated by the Delaware Department of Transportation (the "DelDOT Specs") established extensive requirements and guidelines controlling both the Project itself and the process for addressing claims arising from the Project including the claims asserted by CCR and G+L. Section 105.17 of the DelDOT Specs ("§105.17") provides numerous directives and limitations that bear directly on the proceedings under which these claims are to be decided.

§105.17 provides, *inter alia*:

- Any claim, properly presented pursuant to Subsection 105.15, processed through the claims procedure [submission to a Claims Committee], and finally decided by the Chief Engineer pursuant to Subsection 105.16 . . . upon the demand of either party . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect; *except as otherwise modified by these Specifications.* (emphasis added)

- The arbitration proceeding may involve presentation of facts or such portions thereof as have previously been presented at prior administrative hearings held pursuant to Subsection 105.15 herein or may be based entirely upon the record, as established therein.

- The record established at prior administrative hearings pursuant to Subsection 105.15 shall be specifically admissible at such arbitration proceedings and *such facts as have been established shall be specifically binding upon the parties; with the exclusion of opinions and conclusions thereon.* (emphasis added)

[2] G+L has presented claims against the Department on its own behalf as well as on behalf of CCR. G+L's claims are factually dependent on the [redacted] claim asserted by CCR.

- *[N]o material, information, fact, and/or claim not presented at such hearings held pursuant to said Subsection 105.15 shall be admissible at any arbitration conducted pursuant to this Section.* (emphasis added)

- The arbitrators, in their final ruling on the claim shall include a summary of the evidence, findings of fact based upon the evidence, conclusions of law, and a concise statement of the relief awarded.

The parties elected to present facts to the Panel through both written and live testimony. The record of the proceedings before the Claims Committee was before the Panel as was the decision of the Department's Chief Engineer. The Panel strove to ensure that no material, information, fact, and/or claim not presented at the Claims Committee hearings was admitted at the November hearings.

Bound by the facts that were established before the Claims Committee but not their opinions and conclusions, in accordance with §105.17, the Panel now makes the following summary of the evidence, findings of fact based upon the evidence, conclusions of law, and a concise statement of the relief awarded.

II. Summary of the Evidence[3]

On December 7, 2010, the Department opened the bids that had been submitted for the Project. With a bid of $11,625,940.29, G+L was the apparent low bidder; its bid included $1,751,200.00 as a lump sum price for the demolition of the Existing Bridge. In January, 2011, the Department conducted a Pre-Award meeting and on February 2, 2011 it awarded the contract for the Project to G+L.

An entity named PCI Bridge had provided Pre-Award pricing to G+L on the Existing Bridge demolition portion of the Project. PCI Bridge had planned to demolish the structural steel elements of the Existing Bridge ("Steel Demolition") using a water-borne crane, that is, a crane on a barge moored in the Inlet. Encountering at least informal opposition to its demolition plans, PCI Bridge withdrew from the Project.

Summit Engineering Group, Inc. ("Summit"), based in Littleton, CO, had served as the engineer for PCI Bridge on its bid to G+L. Summit also had an existing relationship with CCR, also a Colorado based entity. In January, 2012, upon hearing that PCI Bridge had withdrawn, CCR began exploring the possibility of submitting its own proposal for demolishing the Existing Bridge.

On February 7, 2012, CCR came to the Project site, visually inspected the site and met with representatives of G+L. CCR was accompanied by a representative of a potential crane supplier. On February 9, 2012, CCR submitted a proposal to G+L for the demolition of the Existing Bridge. On March 8, 2012, CCR and G+L signed the

[3] The Panel here presents only a brief summary of the evidence. A more detailed statement of the facts, supported by citation to the record, follows in the Panel's Findings of Fact.

Subcontract. The Subcontract, as ultimately agreed upon and with a small deduction, was for $1,945,500.00.

CCR's proposal was premised on its belief that the Steel Demolition could be accomplished using a large land-based crane. To that end, on March 12, 2012, CCR forwarded demolition plans labeled "not for construction" that Summit had prepared for review by the governing authorities (the "Review Plans").

The Department, on March 27, 2012, provided preliminary comments in response to the Review Plans.

A meeting was held on April 3, 2012 attended by representatives of the Department, CCR, G+L and Summit. William A. Geschrei, PE, of Whitman, Requardt & Assoc., LLP, a design professional acting on behalf of the Department, participated by telephone. During the course of the meeting, Mr. Geschrei stated that there would be or there was a possibility of a catastrophic failure of a quay wall if the land based crane was used to remove steel from the Existing Bridge.[4]

Following the April 3, 2012 meeting, CCR began to explore alternative methods for removing the steel from the Existing Bridge. CCR developed and then submitted a plan to remove the steel from the Existing Bridge using a "reverse launch" method. The first reverse launch plans were submitted to the Department in May, 2012 with submissions continuing through the summer. After the submission of all plans requested or required by the Department, including all required revisions, the plans reflecting the "reverse launch" method were approved by the Department in the autumn of 2012.

Starting in November, 2012, CCR removed the structural steel from the Existing Bridge using the reverse launch method.

CCR seeks recovery of the additional costs that it claims it incurred because it had to switch its method for Steel Demolition from the land based crane method to the reverse launch method.

With the Steel Demolition completed, it remained for CCR to demolish the piers of the Existing Bridge down to an agreed level. CCR completed that work from barges anchored in the Inlet. While that process was underway, two events occurred; these events form the bases for CCR's remaining claims: (1) Tropical Storm Andrea passed through the area; and (2) a larger tug was brought to the Project to tend to the barges. CCR seeks additional costs that it claims to have incurred because of these two events.

Beyond what it presents as a pass-through for CCR, G+L seeks: (1) reversal of liquidated damages for delay assessed against it by the Department; (2) a time extension and additional compensation for the added project time consumed by the demolition of

[4] Whether Mr. Geschrei said that there "would" or "could" be a catastrophic failure will be discussed, to the extent that it bears on our decision, in the Findings of Fact section.

the Existing Bridge; and (3) the mark-up allowed to a general contractor under the DelDot Specs if a subcontractor incurs compensable additional costs.

III. Findings of Fact Based upon the Evidence

A. *Claim for Increased Costs Due to* [redacted]

1. The Project is the Indian River Inlet Roadway and Approaches, Phase II, (the "Project") Contract T200907301.01, FAP BROS-S050(19). CLCM at 1.[5]

2. On December 7, 2010, the Department opened the bids that had been submitted for the Project. With a bid of $11,625,940.29, G+L was the apparent low bidder. CLCM at 2.

3. A portion of the scope of work required of G+L on the Project was the demolition of the Existing Bridge. G+L's bid included $1,751,200.00 as a lump sum price for the demolition of the Existing Bridge. CLCM at 2.

4. The U.S. Army Corps of Engineers and the U.S. Coast Guard became involved with the Project. CLCM at 2.

5. At a non-mandatory pre-bid meeting held in late 2010 attended by G+L, the Department made a presentation about scour holes in the inlet. Tr. 605; 643-45.

6. At a Pre-Award meeting conducted by the Department on January 18, 2011, G+L was reminded that there were potential issues with scour holes in the inlet. Ex. 146.[6]

7. G+L, at the Pre-Award meeting, asked the Department: "Is there a secret that we don't know about." The Department did not respond. Ex. 146.

8. At the Pre-Award meeting, PCI Bridge outlined for the Department the demolition method it intended to use to remove the structural steel from the Existing Bridge; PCI Bridge explained that it planned to use a 300 ton crane placed on a barge anchored in the inlet. Ex. 146.

---

[5] Citations are to:
"CLCM" – The July 10, 2014 decision of the Department's Claims Committee. Ex. 2;
"Tr." – The transcript of the hearings held before the Panel on Nov. 16-19, 2015.
"Stmnt. ____" – The witness statements submitted by the parties prior to the November Hearings;
"Ex." – Exhibits used both at the Claims Committee proceedings and the Hearings.

[6] The Claims Committee found that as of February 7, 2012, G+L knew that the inlet bottom had deep scour holes. CLCM at 2.

9. On February 2, 2011 the Department awarded the contract for the Project to G+L. CLCM at 2.

10. On April 6, 2011, the Department furnished G+L with a November, 2007 bathymetric survey. This is the first date on which G+L had the bathymetric survey showing in detail the subsurface topography as of the survey's date including the location of the major scour holes. Tr. 579-80; 936-37; Ex. 56.

11. By January 9, 2012, with the U.S. Army Corps of Engineers not having approved PCI Bridge's water-borne crane method for demolishing the structural steel, PCI Bridge had apparently withdrawn from the Project. CLCM at 2; Tr. 543, 599.

12. Between the Pre-Award meeting and the first meeting between G+L and CCR on February 7, 2012, PCI Bridge's "plan to use water-based barges with cranes on them for bridge demolition had met resistance." CLCM at 2.

13. Between the Pre-Award meeting and the February 7, 2012 meeting at the site attended by G+L and CCR, *inter alia*, it was apparent that "an alternative method [of bridge demolition] was desired." CLCM at 2.

14. In the spring of 2011, G+L submitted plans to the Department for the storage of certain heavy material on the Inlet bank. Those plans showed that G+L intended to place the material close to the quay wall. In response, on June 21, 2011 the Department sent a letter to G+L notifying G+L that the Department had concerns about the structural stability of the quay wall due to added lateral forces the proposed stock pile would generate. Ex. 115; Saborio Stmnt ¶24.3.

15. With that letter, the Department forwarded as-built drawings of the existing quay wall (the "June, 2011-supplied Drawings") to G+L. Ex. 40; Ex. 116; Saborio Stmnt ¶24.3.

16. The June, 2011-supplied Drawings differed from drawings that had been made available to G+L (and other bidders) pre-bid. The June 21, 2011-supplied Drawings appeared to show that the sheet pile jetty wall (the quay wall) did not have tie-backs. This was in direct conflict with other drawings available pre-bid that did show that the quay walls had tie-backs. CLCM at 3.

17. The Department had not previously furnished the June, 2011-supplied Drawings to G+L. Ex. 115.

18. Summit had served as the engineer for PCI Bridge on its bid to G+L. Summit also had an existing relationship with CCR, another Colorado based entity. Tr. 15-18.

19. In January, 2012, upon hearing that PCI Bridge had withdrawn, CCR began exploring submitting a proposal to G+L under which CCR would be the subcontractor to G+L demolishing the Existing Bridge. Tr. 16-17.

20. CCR was told that its bid to G+L had to be under $2,000,000.00. CLCM at 2.

21. On February 7, 2012, CCR came to the Project site, conducted a visual inspection and met with representatives of G+L. A representative of Amquip, a crane rental organization in the area, accompanied CCR on that visit to the Project site. Tr. 31, 34-35.

22. A substantial crane, although not as large as the 600 ton crane being contemplated for the steel removal, was observed working on the embankment proximate to the Existing Bridge. Tr. 24-25; 688-89.

23. On February 9, 2012, CCR submitted a proposal to G+L for the demolition of the Existing Bridge. Tr. 148-51.

24. On March 8, 2012, CCR and G+L signed the Subcontract. The Subcontract, as ultimately agreed upon and with a small deduction, was for $1,945,500.00. Ex. 106.

25. CCR's proposal, bid and Subcontract price were premised on its belief that the Steel Demolition could be accomplished using a 600 ton land-based crane. CLCM at 3.

26. On March 12, 2012, CCR forwarded, for review, a set of "not for construction" demolition plans and method statement that Summit, CCR's design engineer, had prepared. CLCM at 3; Ex. 34.

27. On March 27, 2012, G+L forwarded to CCR the preliminary comments that the Department had provided in response to CCR's March 12th submission. CLCM at 3.

28. A meeting was held on April 3, 2012. Representatives of the Department, CCR, G+L and Summit attended. William A. Geschrei, PE, of Whitman, Requardt & Assoc., LLP, a design professional acting on behalf of the Department, participated by telephone. Ex. 38; Tr. 41, 549, 918.

29. Mr. Geschrei, during the course of the meeting, stated that if a large crane were used as planned by CCR to accomplish the Steel Removal, there would be a catastrophic failure of a quay wall or that there was a possibility that there would be such a catastrophic failure. Tr. 41 (Blair); Tr. 549 (Delp)("would be") Tr. 918 (Saborio) ("was a possibility").[7]

[7] Mr. Geschrei was an employee of consulting engineers retained by the Department; he was not called by the Department at the Claims Committee hearing and, therefore, not at these hearings. On that basis, we

30. The Claims Committee found, and we accept, as we must, that at the April 3, 2012 meeting, [Geschrei] "raised a serious concern of a potential catastrophic failure of the quay wall by placing the 600-ton crane within 20 feet of the quay wall." CLCM at 3.

31. Regardless of the degree of certainty implicated in whatever Mr. Geschrei said at the April 3, 2012 meeting, his statement [redacted] changed the approach that CCR could and did take; his statement stopped any thought of using a large land-based crane to accomplish the Steel Removal. "It was a 'holy crap' moment." Tr. 42 (Blair) "That catastrophic-failure comment in [the April 3rd meeting] had opened a Pandora's box." Tr. 203 (Blair); Geschrei's comment "took the air out of the room. Everybody just sat there and looked at each other." Tr. 550 (Delp) "[W]e were caught off guard and that pretty much ended the conversation as far as what we were prepared to talk about at that time." Tr. 614 (Delp) "[The Department] was not going to allow the crane to be used on that bank." Tr. 626 (Delp).

32. ". . . it seemed obvious that [the Department] would not approve . . . a plan [using a land based crane] Delp Stmnt. ¶7.

33. Shortly after the April 3, 2012 meeting, the Department reported that the U.S. Army Corps of Engineers had stated that the Corps was not prepared to establish loading criteria for the area near the quay "without a detailed analysis." Ex. 38.

34. Given [redacted] Geschrei's statement, the likelihood that CCR, Summit and G+L could provide sufficient information to allow the Department to approve any plan CCR might submit that used a large land based crane to remove the structural steel from the Existing Bridge appeared extremely remote. Tr. 626.

35. Following the April 3, 2012 meeting, CCR began to explore alternative methods for removing the steel from the Existing Bridge. Tr. 61-66.

36. "As a result of comments from [Geschrei] about a potential catastrophic quay wall failure, [CCR] chose to redesign their demolition method switching from the land based method with a 600-ton crane to a reverse launch method." CLCM at 5.

37. CCR developed and then submitted a plan to remove the steel from the Existing Bridge using a "reverse launch" method, a complex, sophisticated approach for a demolition of the magnitude of the demolition required at the Existing Bridge. Tr. 65-66.

38. The first plans for the reverse launch method were first submitted to the Department on May 11, 2012. Additional materials for the reverse launch method were submitted throughout the spring and early summer with the last package submitted on July 26, 2012. CLCM at 3. Delp Stmnt. ¶15.

---

could draw a negative inference from his failure to testify. Given the approach we take, we need not do that, however.

39. The Department approved the reverse launch on November 14, 2012. Delp Stmnt. ¶15.

40. Starting in November, 2012, CCR accomplished the Steel Demolition using the reverse launch method. Tr. 66.

41. The requirement that CCR abandon its plan to use a land based crane and turn to the reverse launch method delayed CCR substantially. Tr. 66.

42. The requirement that CCR abandon its plan to use a land based crane and turn to the reverse launch method increased CCR's costs for removing the structural steel from the Existing Bridge substantially. *See* Findings 53-54.

[redacted]

46. The extent and depth of the scour holes precluding the use of the water based crane was not known to G+L when it submitted its bid with its lump sum price for the demolition of the Existing Bridge of $1,751,200.00. Tr. 579-80; 936-37; Ex. 56.

47. The extent and depth of the scour holes was not known to G+L until the Department delivered the bathymetric survey to G+L in April, 2011. Tr. 936-37.

[redacted]

49. The existence and fragility of the quay walls and their risk of a catastrophic collapse was not known to G+L when it submitted its bid with its lump sum price for the demolition of the Existing Bridge of $1,751,200.00. Tr. 927-29.

[redacted]

51. CCR has presented its claim for the additional costs it incurred because of the need to adopt the reverse launch method as a modified total cost claim.

52. As presented by CCR, the matrix it chooses to employ for calculating the additional costs it incurred is as follows:

Total costs incurred[8]	$3,577,284.00
Contract Price	$1,945,500.00
CCR claim on this Claim	$1,631,784.00

[redacted]

B. *Claim for Suspension of Work Due to Tropical Storm Andrea*

55. After removal of the structural steel from the Existing Bridge, CCR was required to demolish the piers of the Bridge down to an agreed upon level. This work was performed in the spring and summer of 2013.

[redacted]

56. Tropical Storm Andrea struck the Delaware region on June 7, 2013 "bringing heavy rain, storm surge flooding, and high winds." CLCM at 7.

57. "Due to the storm, activities ceased due to unsafe conditions." CLCM at 7.

58. CCR is seeking compensation for the delay associated with an Act of God from June 7, 2013 to June 22, 2013. CLCM at 8.

59. The Claims Committee found that "subsequent weather on the following days were [sic] not such that activities could not take place." CLCM at 9.

[redacted]

C. *Claim for Increased Costs Due to Additional Tug Requirements*

61. While the Claims Committee found that there was: "no documented directive from the USCG to [CCR] mandating the use of a larger vessel or tugboat in order to continue demolition," CLCM at 9, the absence of such written directive does not preclude the finding that such directive was in fact communicated to CCR. [redacted]

62. None of the parties submitted any evidence to show that the larger tugboat was required by any applicable law or Coast Guard regulation, nor was there any evidence that CCR was cited by the Coast Guard or any other governmental authority for any alleged failure to staff the Project with any equipment required by law or regulation.

[redacted]

D. *G+L's Claim*

64. G+L's claim has three components. It seeks:

a. a reversal of the assessment made against it for 43 days of delay;
b. costs it alleges it incurred due to the extended duration of the job;
c. a 5% mark-up on whatever is awarded to CCR as provided in DelDOT Specs §109.04.D.8.

[redacted]

65. We find that the Project was delayed in excess of 43 days due to the differing site conditions. *See* Finding 41.

[redacted]

IV. Conclusions of Law

A. *Claim for Increased Costs Due to Differing Site Conditions*

1. CCR seeks the additional costs that it incurred because it could not proceed using the land based crane and had to use the reverse launch method to accomplish the Steel Demolition.

2. CCR asserts that it is entitled to these costs because it encountered differing site conditions.

3. Section 101.26 of the DelDOT Specs defines differing site conditions as: "Subsurface or latent conditions encountered at the site that, 1) differ materially from those indicated in the Contract, or are 2) unknown physical conditions of an unusual nature differing materially from those conditions ordinarily encountered and generally recognized as inherent in the work provided for in the Contract."

4. Thus, to recover on a claim based on an alleged differing site condition, G+L and CCR must show either that the conditions on the Project differed materially from those indicated in the Contract or that there were unknown physical conditions of an unusual nature differing materially from those conditions ordinarily encountered and generally recognized as inherent in the work provided for in the Contract.

[redacted]