

**City of Corpus Christi
Capital Programs
Change Order**



CHANGE ORDER NO.: 16
PROJECT: Runway 17-35 Runway Extension / Displacement and Connection Taxi Way
CONTRACTOR: Berry Contracting, LP dba Bay, Ltd.
ENGINEER: KSA Engineers

CHANGE ORDER DATE: 8/10/2015
PROJECT NUMBER: E11046
CONTRACT TIME: 365 CD

Make the following additions, modifications or deletions to the work described in the Contract Documents:

The amount of \$270,000 for this change order is for a settlement between the City of Corpus Christi and Bay LTD., the Contractor, for equitable compensation for two claims submitted by Bay Ltd namely the Claim for Extended Overhead and the Claim for Excessive Milling of asphalt surfaces. The Contractor's initial claim letter is dated August 30, 2013 and is included herewith as *Attachment A*. The Contractor's second claim letter revising the claim amounts is dated January 19, 2015 and is included herewith as *Attachment B*. Also included as *Attachment C* is the Resume of Negotiations with a Findings of Fact attached thereto. The Contractor hereby agrees that the amount of \$270,000 and a time extension of 197 calendar days is fair and equitable compensation for the costs incurred resulting from the aforementioned claims and further agrees that Bay Ltd has no further claim for damages of any kind whatsoever under this contract. The City hereby agrees that no Liquidated Damages will be assessed.

Why was this Change necessary: Claim Settlement

How can similar changes be avoided in the future? Improve Geotech Investigations during design.

The compensation agreed upon in this Change Order is full, complete and final payment for all costs the Contractor may incur as a result of or relating to this change whether said costs are known, unknown, foreseen or unforeseen at this time, including without limitation, any cost for delay, extended overhead, ripple or impact cost, or any other effect on changed or unchanged work as a result of this Change Order.

Original Contract Amount	\$	12,841,419.07.06
Previously Approved Change Order Amount	\$	2,519,602.30 ✓
Proposed Change Order Amount	\$	270,000.00 ✓
Revised Contract Amount	\$	15,631,021.37.36
Percent of Total Change Orders (including this CO)		21.72% 8/19/15
Previous Change Order Contract Time		19 CD
Additional Time on This Change Order		197 CD
Revised Contract Time		581 CD

Recommended by
[CONSULTING FIRM]

By Felipe H. Ocasio J. P.E.
ECMS, LLC 8/15/15 Date

Approved by
[CONTRACTOR]

By [Signature] 8-14-15 Date
Estimating Mgr.

CITY OF CORPUS CHRISTI

Recommended by: [Signature] 8/20/15 Date
Philip L. Boehk, P.E.
Acting Construction Engineer

Recommended by: _____ Date
Jefferey Edmonds, P.E.
Director of Capital Programs

Approved by: _____ Date
Valerie H. Gray, P.E.
Executive Director of Public Works

Recommended by: _____ Date
Eddie Houlihan
Budget and Finance

Approved by: _____ Date
Gustavo Gonzalez, P.E.
Assistant City Manager

Recommended by: _____ Date
Janet Kellogg
City Attorney

Approved by: _____ Date
Ronald L. Olson
City Manager

DEPARTMENT APPROVALS: _____ Operating Department (CCIA)
Fred Segundo
Director CCIA





BERRY Company

P.O. Box 9908
1414 Valero Way (78409)
Corpus Christi, Texas
78469-9908

Bus: (361) 693-2100

August 30, 2013

Robert Jutton P.E., RPLS
KSA Engineers Inc.
Corpus Christi International Airport
1000 International Drive
Corpus Christi, TX 78406

Re: Project Nos. E11046, E11122, E11123
Owner: City of Corpus Christi, TX
Location: Corpus Christi International Airport Runway 17-35 Extension
Subject: Milling Change order

Dear Robert,

This letter is in referenced to the extra milling that was performed on the referenced project. We've had many discussions and meetings to address the excessive overrun of millings that took place where the bid SY calculated 4357 tons at 2" of removal and actual was 33,373 tons milled & hauled a huge difference. We have minimized our cost where possible going from \$738,346.40 to \$408,616.85 less payment received to date for \$ 103,006 with a remaining balance totaling \$ 305,610.85 for this proposal, please submit this to FFA for payment request.

Listed below are some milestones that lead up to this point:

1. Bid documents on the bores information provided indicated 2" thickness (Bore Attached)
2. On July 12, 2012 an email was sent asking for clarification on the milling depth. (Email Attached)
3. A response was sent on July 23, 2012 mentioning the thickness varies, and old drawing would be provided to the contractor.
4. Bid date was July 25, 2012 – still no drawings so we bid the plan information.
5. Milling began mid –November 2012 and A/E was notified of the additional depths
6. November 21, 2012 an RFI was submitted requesting additional compensation.
7. A/E responded to RFI milling stating depth of existing pavement "varies"
8. March 28th 2012, Bay submitted a request for payment \$ 637,774 for the extra milling work performed.

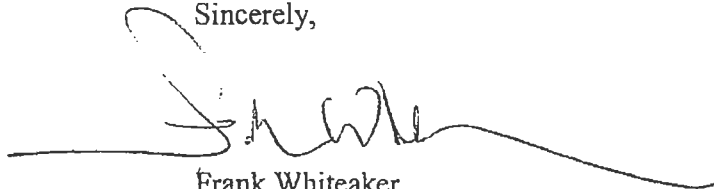
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ATTACHMENT A

9. FFA general provision 20-06 didn't have all the bore data needed to illustrate the proper pavement thicknesses, (Attached is the bore log for this referenced project and the bore log for the same vicinity received on a project that was bid on August 21, 2013, had this information be provided on July 2012 we could have bid appropriately to cover all associated cost.
10. Milling sub quoted 2"-4" - (Quote attached).
11. Bid items : Base bid- 2" of milling / Actual = 4.16"
12. Alternate Bid - 2" of milling / Actual = 21.29"
13. A/E was asked a specific question regarding the existing pavement section thickness during the pre-bid period. This question would have been answered had the old drawing been provided as agreed by the A/E. They were not provided therefore the Contractor was left to bid the milling item with the only available information that was provided showing 2" of pavement thickness.
14. Bore log attached for both projects showing a huge difference for accurate information on existing pavement thicknesses.
15. Attached with this proposal is documentation showing responses, bore logs ,RFI's, Bid estimates , trucking cost, and actual quantities performed. The two different boring logs illustrating existing hot mix thicknesses throughout the project was sufficiently different which impacted our budget cost for the project.
16. Revised payment request attached for \$305,610.85

Thank you and please feel free to call if you have any questions.

Sincerely,



Frank Whiteaker
Highway Division Manager

FW/bl

Encl



P.O. Box 9908 (78469)
1414 Valero Way
Corpus Christi, Texas 78409

(361) 693-2100
www.bayltd.com

January 19, 2015

Felix H. Ocanas, Jr., P.E.
ECMS
Engineering & Construction Management Services
5001 Oakmont Drive
Corpus Christi, TX 78413

Dear Felix,

This letter is in response to the Executive Summary that you had given me several weeks ago. Let me address some of the issues you raised in your Executive Summary report, I will address the extended overhead claim and milling separately.

EXTENDED OVERHEAD CLAIM

Attached is a excel timeline of the project (Exhibit 1) which illustrates the critical problems that arose and affected the completion date of the project. In (Exhibit 5) Project timeline will illustrate the timeline of our Baseline schedule showing 8 months in yellow for construction and ended up with 20 months in blue for substantial completion due to the additional change orders 6-14 and in (Exhibit 8) will show the RFI's and revised drawings that took place after CO5 was approved.

We understand that SP B-8.4 requires that overhead be included in CO's submitted to City. That is exactly what was done for CO 5 (Exhibit 2). In CO 5, a separate line item was specifically created for Overhead to account for the additional Overhead cost and time through October 15, 2013. The change order was accepted by FAA and paid by the City.

Our overhead calculations for CO 5 were based upon a project completion date of 10-15-13 and the City's commitment to provide approved submittals/RFI's within two business days (Exhibit 3). It is safe to say that the City and Bay considered October 15, 2013 being the new project completion date. However, as you know, almost immediately additional changes began arising which created additional CO's. Not only was the performance of CO 5 extended beyond Oct 15, 2013 but the new changes necessitated further extended completion time of the project. Based solely on CO 5 we believe we're entitled to additional overhead past Oct 15th, as a result of constant changes by FAA and failure of the City to timely provide us the information needed to complete the project by October 15th 2013. However, the new changes that were implemented after CO 5 pushed the schedule further into 2013 and into 2014 (i.e., CO 11 (T3) extended the project to April 24, 2014). Bay did not attempt to quantify the additional time necessary, and thus the additional overhead, because of the uncertainty of the additional CO's which were being proposed.

The additional overhead costs were addressed on several occasions and noted in an email dated Feb 27, 2014 addressed to Victor Gonzales, Bob Jutton, Dan Biles, Albert Pardo and Fred Segundo, a copy which is attached (Exhibit 4). The City asked us to push the CO's through in order to complete the project and it was agreed that the extended overhead and additional days would be addressed in CO 12 or in the final CO. Based upon this agreement we did not calculate overhead in any CO beyond CO 5.

The City has requested that Bay provide information proving delays to the project. The attached Project timeline schedule (Exhibit 5) shows that changes were made to the plans as late as July 11, 2014. These changes required submittals and the ordering and delivery of new materials. In reality, this project turned into a design build project. However, Bay is not

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ATTACHMENT B

seeking additional overhead beyond the mutually accepted substantial completion date of June 9, 2014. Bay is requesting 192 days of extended overhead at the same per diem rate of \$3,945 as requested and paid in CO 5.

MILLING CLAIM

Bay bid \$2.60 per square yard for the Cold Milling item (A1-1.03). The bidders were provided geotechnical data showing only two borings depicting two and four inches of existing asphalt. Bay requested additional information on the milling thickness and Bob Jutton replied that the thickness varies but that Engineering would provide old drawings depicting existing pavement sections. Those drawings were not provided. Bay disagrees with the statement that we were offered the opportunity to conduct boring at the site prior to bidding. Regardless, had such opportunity been presented, it is unreasonable to have expected Bay to perform boring on an active runway.

Attached is our subcontractor's summary establishing the actual depth milled (*Exhibit 7*). At some locations the milling depth reached 30" (in some areas, multiple passes were necessary to achieve the necessary depth). The average milled depth was 14.5" over the surface area.

15,686 CY / 39,086 SY = 14.5 IN (See calculation below)

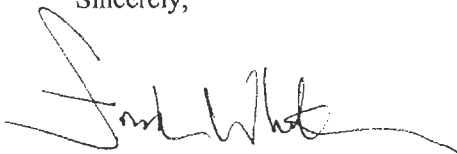
Converting Cubic Yards to Cubic Feet:	15,686 CY x 27 = 423,522 CF
Converting Square Yards to Square Feet:	39,086 SY x 9 = 351,774 SF
Dividing SF into CF to get the Depth in Feet:	423,522 CF / 351,774 SF = 1.21 Feet (Depth)
Converting Feet to Inches:	1.21 FT x 12 Inches = 14.5 Inches (Depth)

An actual thickness of 14.5" compared to the 2-4" depicted in contract documents is not a reasonable expectation of varying depths. Bay expended an additional \$295,616.30 to remove the additional depth. See attached summary of actual costs incurred above and beyond the \$2.60 per square yard as bid.

Bay is seeking to be appropriately compensated for completion of the milling items to depths far beyond what could reasonably be expected by any contractor. The request for compensation on the \$295,616.30 + 103,006 received to date totals to the amount of \$398,622.30 which comes to \$10.06 / SY for the milling. As a comparison, see attached TxDOT Statewide Average prices for similar milling depth cost. Bay's actual cost is below Txdot averages in (*Exhibit 6*).

Bay values its relationship with the City and seeks an amicable resolution to these claims. As we have in the past, Bay has attempted to complete the project in a timely manner before change orders were approved to keep the project moving forward. We look forward to discussing and meeting if necessary with you and the City to resolve this matter.

Sincerely,



Frank Whiteaker
Highway Division Manager

	Milled Area		Average Depth				Volume	
Apron	10,408.00	SY	0.83	FT	10.00	IN	2,891.11	CY
A-1	5,214.00	SY	1.00	FT	12.00	IN	1,738.00	CY
A-1	3,074.00	SY	0.50	FT	6.00	IN	512.33	CY
A-2	6,863.00	SY	1.00	FT	12.00	IN	2,287.67	CY
A-2	4,278.00	SY	0.42	FT	5.00	IN	594.17	CY
A-2	177.00	SY	1.08	FT	13.00	IN	63.92	CY
A-3	6,909.00	SY	1.00	FT	12.00	IN	2,303.00	CY
A-3	5,474.00	SY	0.50	FT	6.00	IN	912.33	CY
A-3	194.00	SY	0.75	FT	9.00	IN	48.50	CY
A	4,800.00	SY	1.00	FT	12.00	IN	1,600.00	CY
A	2,956.00	SY	0.50	FT	6.00	IN	492.67	CY
A-2 Short	4,849.00	SY	1.00	FT	12.00	IN	1,616.33	CY
A-2 Short	4,849.00	SY	1.00	FT	12.00	IN	1,616.33	CY
A-1 Tie In	881.00	SY	1.00	FT	12.00	IN	293.67	CY
A-1 Tie In	82.00	SY	0.42	FT	5.00	IN	11.39	CY
A-2 Tie In	922.00	SY	1.00	FT	12.00	IN	307.33	CY
A-2 Tie In	82.00	SY	0.42	FT	5.00	IN	11.39	CY
A-2 Tie In	255.00	SY	1.08	FT	13.00	IN	92.08	CY
A-3 Tie In	877.00	SY	1.00	FT	12.00	IN	292.33	CY
A-3 Tie In	41.00	SY	0.42	FT	5.00	IN	5.69	CY
A-3 Tie In	759.00	SY	0.25	FT	3.00	IN	63.25	CY
A-4 Tie In	911.00	SY	1.00	FT	12.00	IN	303.67	CY
A-4 Tie In	77.00	SY	0.42	FT	5.00	IN	10.69	CY
L Tie In	190.00	SY	1.00	FT	12.00	IN	63.33	CY
L Tie In	488.00	SY	0.42	FT	5.00	IN	67.78	CY
Run Up Pad Tie In	178.50	SY	1.00	FT	12.00	IN	59.50	CY
Run Up Pad Tie In	76.50	SY	0.42	FT	5.00	IN	10.63	CY
TWY Q Tie In	87.00	SY	1.00	FT	12.00	IN	29.00	CY
TWY Q Tie In	37.00	SY	0.42	FT	5.00	IN	5.14	CY
Blast Pad Tie In	75.00	SY	1.00	FT	12.00	IN	25.00	CY
Blast Pad Tie In	32.00	SY	0.42	FT	5.00	IN	4.44	CY
Blast Pad	4,400.00	SY	0.17	FT	2.00	IN	244.44	CY
	49,494.00	SY					18,577.13	CY
	Only the 'footprint' surface area							
	is calculated in the above total.							
	(Taxiway Footprint, etc.)							

Project:

Ceopus Christi Airport

AS DONE by JAMES BUTCHER, PERFORMANCE EQUIPMENT SERVICE, BETWEEN 11/13/12 - 1-1-13

Notes:

NORTH GA APRON - 10,408 sq - 10"

Taxiway A-1 - 5214 sq - 12"

- 3074 sq - 6"

Taxiway A-2 - 6863 sq - 12"

4278 sq - 5"

177 sq - 13"

Taxiway A-3 6908 sq - 12"

5474 sq - 6"

194 sq - 9"

Taxiway A(4) 4800 sq - 12"

2956 sq - 6"

Taxiway A-2 short 4849 sq - 12"

4849 sq - 12"

A-1 TIE IN 881 sq - 12"

82 sq - 5"

A-2 TIE IN 922 sq - 12"

82 sq - 5"

255 sq - 13"

A-3 TIE IN 827 sq - 12"

41 sq - 5"

759 sq - 3"

A-4 TIE IN 911 sq - 12"

77 sq - 5"

"L" TIE IN 190 sq - 12"

488 sq - 5"

RUN UP PAD TIE IN 178.5 sq - 12"

76.5 sq - 5"

Taxiway "Q" TIE IN 87 sq - 12"

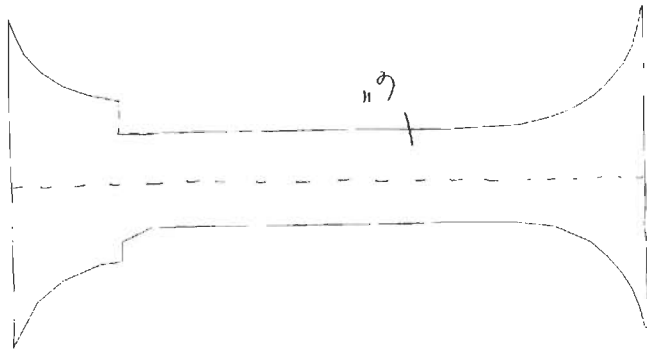
37 sq - 5"

Blast PAD TIE IN 75 sq - 12"

32 sq - 5"

BLAST PAD 4400 sq - 2"

To Do:



6" - 3074 sy

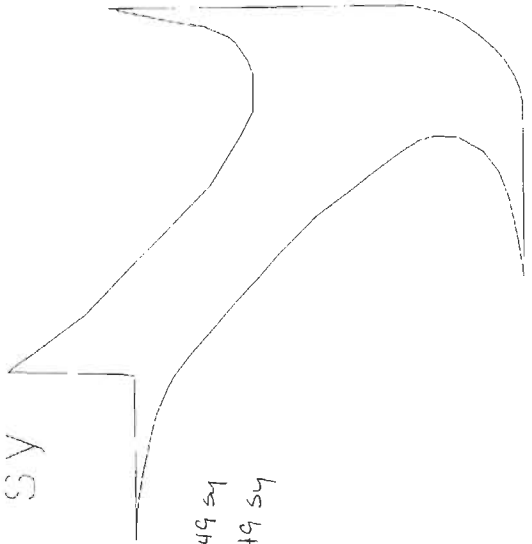
12" - 5214 sy

Taxiway A1 (Existing)
5214 sy

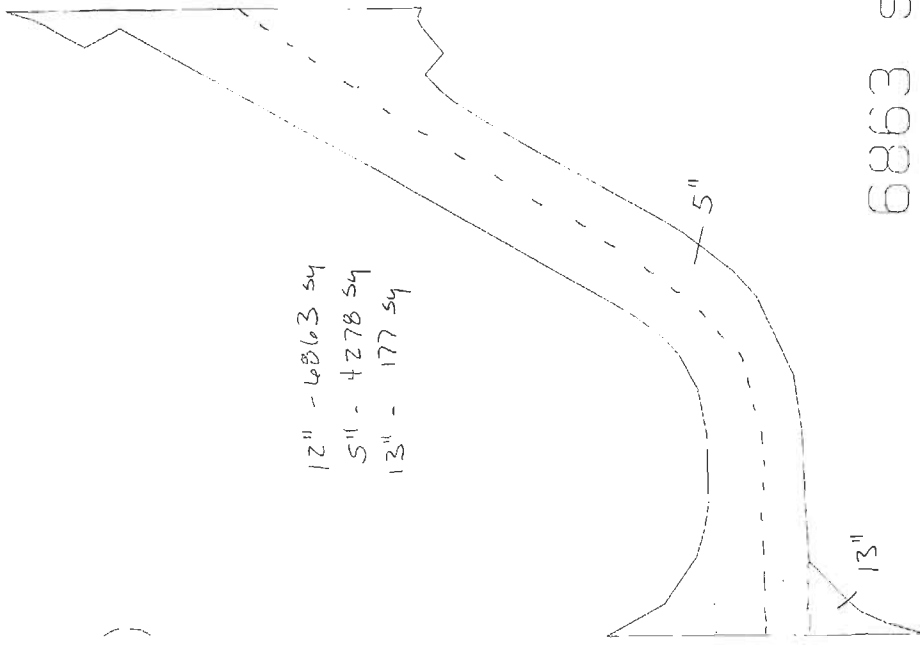
Taxiway A2 (Existing)

4849 SY

12" - 4849 SY
12" - 4849 SY



12" - 6863 SY
5" - 4278 SY
13" - 177 SY

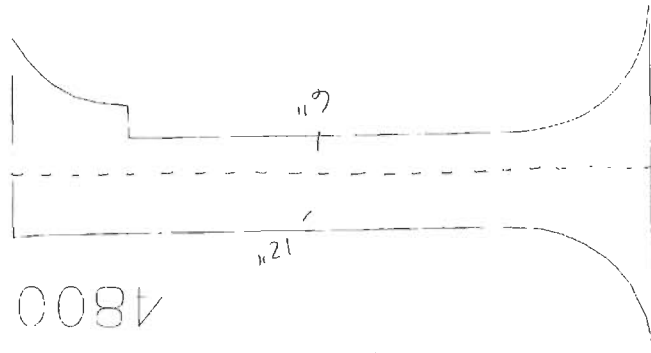


6863 SY

Taxiway A2 (Existing)

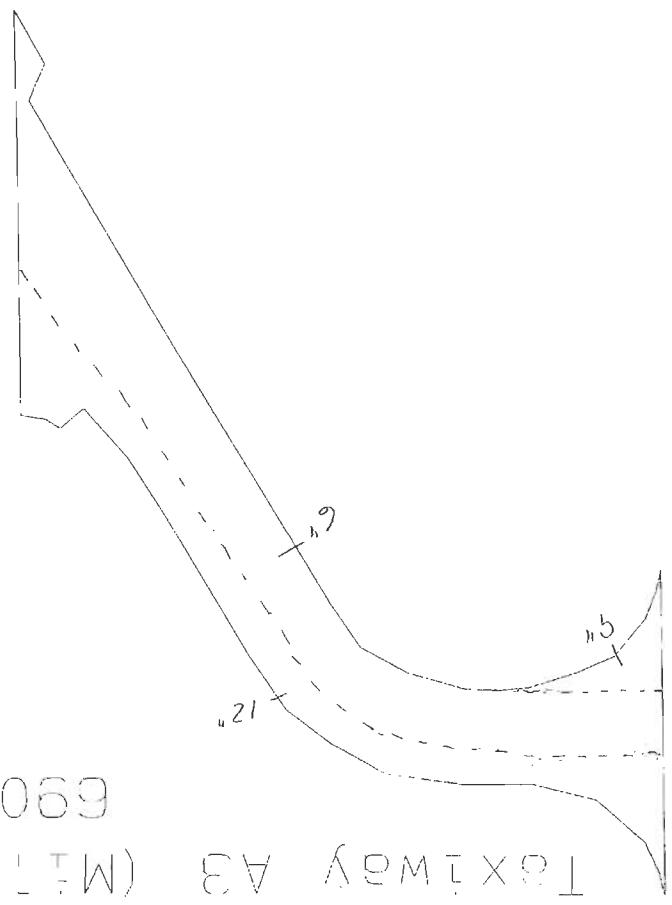
4800 SY 12" - 4800 SY
6" 2956 SY

TAXIWAY A (MILLING)
4800 SY



hs 1945 - "5
hs 5474 - "7
hs 8069 - "21

Taxway A3 (Milling)
6908 SY



RESUME OF NEGOTIATIONS

CONTRACTOR: Bay Ltd

PROJECT NO: E11046, E11122 AND E11123

PROJECT NAME: Corpus Christi International Airport
Runway 17-35 Extension/Displacement
and Connecting Taxiway

REFERENCE: Findings Of Fact by ECMS, LLC, attached hereto.

Preliminary discussions and negotiations were conducted between Mr. Frank Whiteaker, Highway Division Manager for Bay Ltd, and Felix H. Ocanas, Jr., P.E. President/CEO of ECMS LLC, Advisory Consultant for the City of Corpus Christi on construction contract issues and claims. These discussions occurred between the period of September 2014 and March 2015 at eight separate meetings with no agreements reached but both sides clarified their positions. See Findings of Fact attached hereto.

Final negotiations were conducted between Mr. Edward Martin, President/CEO of Berry Contracting, Inc. and Mr. Jerry Shoemaker P.E., consultant for the City as Assistant Director of Capital Programs and Ms. Valerie Gray, P.E., Executive Director of Public works.

The initial offer by the City was \$200,000 as recommended in the Reference above. After a short of period consideration, Mr. Martin countered with an offer of \$500,000. After a short period of consideration, the City proposed an offer of \$250,000. After about 3 week Mr. Martin made a final offer of \$270,000.

This final offer was accepted by the City after coordination with CCIA staff who coordinated with FAA officials.

Prepared by:

Felix H. Ocanas, Jr., P.E.
Pres/CEO-ECMS, LLC
Advisory Consultant

ATTACHMENT- C

FINDINGS OF FACT
CCIA, BAY LTD CLAIMS FOR
EXTENDED OVERHEAD AND MILLING
CONTRACT NO. E11046 RUNWAY 17-35
EXTENSION/DISPLACEMENT

EXECUTIVE SUMMARY

EXTENDED OVERHEAD CLAIM:

The original request for extended overhead was \$1,258,455 (319 days at \$3,945 per day), and later corrected to \$757,440 to reflect 192 days at \$3,945 per day. This is the period from the end of the 365-day contract period to the day when the contract was declared essentially complete on June 9, 2014. It was explained to Frank, Highway Division Manager for the Contractor, that if Bay's overhead is based on extended time due to change order work, each change order amount or unit price indicates total cost, including overhead, SP B-8. When the quantity is increased by more than 25% or decreased by more than 75%, either party upon demand shall be entitled to revised consideration for the quantity above 125% or below 75%. Bottom line, the overheads are included in the price for each change order.

It was explained to Bay that to show delay damages during change order work performed after the original contract period, the estimated time for each change order must be established, and then show how the City delayed Bay past that particular time frame for each change order. That period of delay days would be the period of consideration for extended overhead for each change order. That was never presented. Also, if the claim includes delays in finishing the basic contract work, that has to be proven. This was not done.

Bay claims that during the negotiations for each change order, when Bay requested additional time, KSA and Airport staff told Bay that the City Construction Engineer would negotiate any justifiable time at a later date. Basically, Bay has not shown that it was delayed beyond the original completion date of 365 days nor shown that Bay was delayed on the change orders issued by the City beyond a reasonable expected time frame for completion of each change order.

At the last meeting on March 4, 2015, Bay stated, for the first time, that KSA and the City's airport staff instructed Bay not to include any overhead on any future changes after Change Order number 5. It was recognized at that time, that the 15% markup that Bay was including on all change orders was considered by Bay to be profit only.

It was concluded that perhaps this claim could be settled if the City were to offer an additional percent of overhead to all the new changes made, i.e., those not part of the original schedule. It was decided to attempt to negotiate a 5% increase to the new items amount. The offer would be \$96,650.

MILLING CLAIM:

Bay's basis for this claim is Boring B-5 of the Rock Engineering Geotechnical Report showing asphalt depth of 2 inches. The Rock report states that this information is not for bidding purposes but for design and was not intended to reflect the depths of asphalt for milling estimating for all milling areas.

Bay asked at the pre-bid meeting, according to information provided by Bay, what the depth of milling was, and the answer was that it "Varies", which it does, from 2 inches to 12 inches with some small areas at 14 and 21 inches as shown by Bay's subcontractor measurements and confirmed with photos and interview with the KSA inspector. Bay's alleged assumption is not a reasonable one especially since Bay has done much of the previous work at the airport. SP-54, Physical Data, states the subsurface geotechnical reports are not part of the contract documents and that the City disclaims responsibility for the interpretation of that data by bidders. The Contractor's final claim submittal shows an average depth of 14.5 inches. It was decided that while it is not reasonable for the contractor to assume 2 inches it is also not reasonable to expect a bidder to prepare a good bid without more information than was provided on the drawings. It was further decided to offer the Contractor to split the difference; the Contractor accepts the bid price for seven inches and the City pays for an additional 7 inches at the contract bid price. The figure for this offer would be \$107,041.

The total recommended offer for settlement would be \$203,691, which would be rounded off to an offer of \$200,000.

The contractor's first counter offer was \$500,000 and his final counter offer was \$270,000 for both the Extended Overhead and the Milling Claims.

STATEMENT OF CLAIM

EXTENDED OVERHEAD CLAIM: Original Claim was \$1,258,455, later corrected to \$757,440 (192 DAYS @\$3,945 per day) by letter dated January 19, 2015, see **Attachment B**. The Contractor claims that because the project was declared essentially complete on June 9, 2014, 192 days after the 365-day contract period, Bay is owed \$3,945 per day extended overhead.

MILLING CLAIM: Original claim was \$738,346.40, revised to \$305,610.85 in letter dated August 30, 2013, and later revised to \$295,616.30 in letter dated January 19, 2015, see **Attachment A**. The Contractor claims that because he assumed the milling depth of existing asphalt pavement to be 2 inches as shown on Core Boring #5 on the contract drawings, and the average depth for the various areas of milling turned out to be 14.5 inches, he is owed damages for milling far more depth than he had estimated.

DISCUSSIONS WITH CONTRACTOR

We met with Bay representatives eight (8) times. The dates of the meetings are as follows with a brief statement of what was discussed. The Contractor's representative is Frank Whiteaker, Highway Division Manager who is the author of the claim and the negotiator. The lead City's representative was Felix H. Ocanas Jr., P.E., advisory consultant to the City. Other representatives were Albert Pardo, City's Construction Engineer, Kent Powers, P.E., construction management consultant to the City, and Jerry Shoemaker, P.E., consultant to the City as Acting Director of Capital Programs at the time.

1. Oct 3, 2014, met with Frank at his request. I listened to his case and pointed out that the application of extended overhead is for cases of delays or suspension of work. No agreements reached at this meeting. Regarding the milling claim, I agreed to research the records to determine if there was merit to this claim. Frank requested that he be given time to provide additional information on the extended overhead claim.

2. Oct 8, 2014, met with Frank, at his request, (Albert Pardo present). We listened to his arguments on delays, and also discussed the milling claim. No proof of delays were presented. Listened to arguments for the milling claim, but stated that assuming a 2" thickness of asphalt to be milled was unreasonable and that the claim for milling, as presented, cannot be accepted as having merit. No agreements. Frank again requested additional time to prepare additional arguments and proof as we requested.

3. Oct 23, 2014, met with Frank and his staff at his request (Albert Pardo present). They presented charts showing dates of RFI's submitted and dates of responses which allegedly created delays but did not connect the dots with any critical path schedule nor presented evidence of their dates on the charts. No agreements. They agreed to provide copies of RFI's and copies of responses. About 2 weeks later they provided three binders containing about 3,000 pages of correspondence without identifying any particular document as being applicable to the claim. I informed Frank that I would not go thru 3,000 pages of correspondence to make his claim. Frank again asked for more time to get the proof and justification we kept requesting.

4. Nov 5, 2014, met with Frank at his request. Same discussion on milling depths and extended overhead. Nothing new was presented. No agreements. Again, he asked that we give him more time.

5. Nov 24, 2014, met with Frank at his request, and Jesse Wong. Again, same discussions on additional charts provided which did not connect the dots. No agreements. Again, they asked for more time to present new information.

6. Dec 22, 2014, met with Frank and Kevin stone, another Bay executive, at Frank's request. They wanted to know the status of our decision on the two claims. I informed them that we could not find merit on either claim as they were submitted. I mentioned the possibility of an offer of \$200k for settlement for both claims. They said they would not accept such an offer if made. No agreements. Frank again asked for more time to prepare additional information.

7. Feb 18, 2015, met with Frank at his request, and his staff where they presented more charts. Still no proof of delay. Did not discuss the milling claim at this meeting. No agreements. Again, Frank asked for additional time to present a final argument.

8. March 4, 2015, Kent Powers and I met with Frank and his staff at his request. Bay went over more charts. At this last meeting Bay again tried to explain delays with Gant charts. When we realized that they were not trying to prove delays but to provide more charts with dates without providing documents to prove those dates and without attempting to show how the critical path was impacted we asked that they stop barking up the same old tree. Again, we discussed what overhead is: There is the standard overhead rate normally used in change orders and then there is extended overhead rate only applicable when delayed. Frank stated, for the first time, that he was told by KSA and the airport staff to not include any overhead on the changes after change order number 5. We asked how Bay could show that it did not include any overhead at all on the change orders. For ease of discussion we wrote on the board as an example:

labor....materials....equipment....overhead...profit

Bay's estimator wrote on the board

Labor....materials....equipment....markup 15%

We pointed out that what they call markup is what we call overhead and profit. And they said the 15% was for profit only. What they are actually saying is that Bay did include overhead and profit of 15%, but did not include extended overhead.

We requested that they give us copies of their detailed estimates used on the change order proposals so we could review and confirm that there were no other overheads included. They agreed to provide their files on the estimates, and on March 10, 2015, we received an email with a sampling of documents showing the typical markups of 15% to all change order proposals.

Seeing that change order proposals estimates included a 15% markup, I asked via email, what does markup include? The answer was "it is our proposed profit".

I responded that the industry standard for profit is 6% to 12%; 6% with no risk involved, which is the case here, and overhead is somewhere in the 15 to 20% range, recognizing that not all firms are the same in their overhead.

CONCLUSION

1. The Contractor's extended overhead claim is based on the fact that the time to complete the work went 192 days past the contract completion date due to change orders and RFI's.
2. The City has the right to issue changes, negotiate a price with the Contractor, and grant time extensions as justified. Only 19 days were granted for change orders 1 & 2. The City told Bay, after CO-5, that all additional time needed would be negotiated towards the end of the project.
3. Extended overhead is applicable when owner delays the Contractor past the completion date. The Contractor has not proven delays nor has he shown how alleged delays would have affected the critical path schedule.
4. Each change order price carries overhead and profit. Contractor claims that the **15%** mark-up on every proposal is for profit only and does not include overhead.

RECOMMENDATION FOR SETTLEMENT OF THE EXTENDED OVERHEAD CLAIM:

Use the following approach; the change orders included 15% markup and we call that overhead and profit. But we are willing to increase that to 20% overhead and profit. We can take the total of all of the "new-items" from all change orders issued (\$1,932,990) and apply an additional 5% for overhead and profit for a total of 20% for overhead and profit. This gives Bay the benefit of doubt concerning delays that Bay has not been able to prove. The City's offer for settlement is \$96,649.50, (5% of \$1,932,990).

RECOMMENDATION FOR SETTLEMENT OF THE MILLING CLAIM

Present the offer to the Contractor; that if we agree that the "depth varies" is not reasonable to assume as sufficient information for a contractor to prepare a good bid and if he agrees that 2 inches is not a reasonable depth to use in a claim for damages, the offer could be to split the difference 7" and 7", approximately. Let's agree that Bay should have assumed at least 7 inches for bidding purposes. Bay claims the average depth encountered was 14.5 inches. Bay has been paid \$107,041 as follows based on square yards of milling, regardless of depth:

15,214 SY @\$2.60/SY=\$39,556
 26,986 SY @\$2.50/SY=\$67,485
 Total..... \$107,041

Our best and final offer can be an additional \$107,041 over what Bay has been paid.

Total settlement offer for both claims would be \$203,690.50; \$96,649.50 for additional overhead & profit and \$107,041 for milling over-depth, rounded off to \$200,000, and a time extension of 173 days (192 minus 19 days granted with change orders 1 and 2).

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