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MARCH 10, 1998

**TO:** BOARD OF DIRECTORS

**FROM:** CHARLES W. STARK *CWS*  
EXECUTIVE OFFICER, CONSTRUCTION

**SUBJECT:** CONTRACT CO331 DISPUTES REVIEW  
BOARD'S RECOMMENDATION OF NO MERIT  
FOR CLAIM NO. 10

**ISSUE**

The purpose of this report is to inform the MTA Board of Contract CO331 Disputes Review Board (DRB) recommendation of no merit for Claim No. 10 in the amount of \$22,992,847.

**BACKGROUND**

Contract CO331 DRB has recommended that the Contractor's Claim No. 10 be denied. Claim No. 10 as presented to the DRB alleged that Contract CO331 specifications relevant to the tunneling machines were defective and that no commercially available open-face tunneling shield could mine the entire range of ground conditions encountered during the construction of the twin tunnels between North Hollywood and Universal City.

The Contract CO331 specification was defined by the Contractor as defective because the contract documents indicated that major ground losses or subsidence, which caused suspension of work, would not have occurred using the conventional shield method. Other contract documents indicated that the tunnel could be excavated with a conventional soft ground tunnel shield equipped with an incorporated mechanical excavator.

Additionally, the Claim alleged that it was impossible to design tunneling shields with the capability to effectively excavate while maintaining the specified level of face control and meeting the contract schedule, and that no commercially available tunneling shield could cope with the entire range of ground conditions.

The MTA's position pointed out that the Contractor's failure to use proper means and methods for excavating the tunnel and the difficulties encountered in the various ground conditions, were caused by design inadequacies in the Contractor's tunneling shields. Additionally, the Contractor did not operate the equipment as stated in the approved contractual submittal. The subsidence or settlement criteria of one inch were not enforced and could not have damaged the Contractor as related to the time delay claimed.

In reaching its recommendation, the DRB conducted three days of hearings focused on testimony limited to the issue of merit of Claim No. 10. The DRB members were furnished Claims Document packages consisting of 2,030 pages of correspondence, minutes, memos, sketches, change notices and stop work notices. Position papers were also provided by both parties.

Pursuant to Contract CO331, neither the MTA nor Contractor will have the right to file suit in a court of competent jurisdiction until all claims are appealed to and receive a written recommendation from the established DRB. The recommendation of the DRB shall not be binding on either party. Within 90 days of receiving the DRB's recommendation, both the MTA and the Contractor shall respond, in writing, to the other and to the DRB signifying either acceptance or rejection of the DRB's recommendations. The failure of either party to respond within the 90 day period shall be deemed an acceptance of the DRB's recommendations. Should the dispute remain unresolved, either party may appeal the decision back to the DRB, resort to other methods of settlement, or the Contractor may seek judicial review. Failing successful resolution of the dispute, all records and written recommendations, including any minority records, will be admissible as evidence in any subsequent litigation proceeding.

Contract CO331 is a fixed-priced, federally funded procurement for the construction of the Line Section from North Hollywood to Universal City. The work includes boring and finishing existing twin tunnel line structures, cross-passages, a midline vent structure, and excavation support structures at North Hollywood Crossover.

Contract CO331 was approved for award to Obayashi Corporation by the MTA Construction Committee at its October 11, 1993, meeting and awarded by the Board on October 27, 1993. The total contract price was \$65,400,000 and has increased to the current contract value of \$91,089,763.

The C0331 Contractor submitted its original Notice of Intent to Claim for Defective Specifications on April 11, 1995, which the MTA designated as C0331 Claim No. 10. The Contractor submitted its Claim Package on August 14, 1995, wherein it alleged estimated costs of \$20,456,971. The Parties and the DRB agreed it was prudent to defer the DRB's Claim No. 10 hearing until after mining of the tunnels was completed, and later agreed that it was preferable that the DRB hear a number of less complex disputes prior to hearing Claim No. 10. On April 29, 1997, the Contractor submitted its revised estimate of costs associated with Claim No. 10 in the amount of \$22,992,847 and a contract delay of 465 days.

The DRB held its initial hearing concerning Claim No. 10 entitlement from August 12, 1997 through August 14, 1997, after having previously received Position Papers from the Contractor and the MTA. Thereafter, the DRB issued its Claim No. 10 Draft Recommendation on September 25, 1997, wherein it recommended that the Claim be denied. Subsequently, the parties responded to additional questions by the DRB concerning Claim No. 10 on November 19, 1997, prior to the DRB's Claim No. 14 hearing. After concluding its entitlement hearings on Contract C0331, Claim No. 14, the DRB issued its Final Recommendations concerning C0331 Claims No. 9 and No. 10, both of which it recommended be denied.

The DRB's recommendation has been reviewed and approved by Project Staff, MTA's Procurement Department, and Legal Counsel in compliance with MTA policy. The MTA Management Audit Service Department has not performed an audit because there is no change to Contract C0331.

Prepared by: Roger C. Mays, Sr. Contract Administrator  
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