



MARCH 10, 1998

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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. 9**

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. 9 in the amount of \$21,199,526.

BACKGROUND

Contract CO331 DRB has recommended that the Contractor's Claim No. 9 be denied. Claim No. 9 as presented to the DRB, alleged that the Contractor encountered a Differing Site Condition (DSC) during the mining of the twin tunnels between North Hollywood and Universal City.

The DSC was defined by the Contractor as an unexpected volume and frequency of hard ground and the unexpected doubling of the quantity of cohesive running material which caused a virtual shutdown of the excavation, review of the mining machine's shield, and downtime. Additionally, when the capability of the tunneling system was insufficient to push through the zones of hard ground, cobbles and boulders, the hard material had to be removed. When the hard materials were removed, the cohesive material became destabilized, making it impossible or extremely impractical to hold the face with the approved and modified shield. These conditions occurred frequently, and the Contractor asked the MTA to direct and to pay for chemical grouting.

The MTA's position pointed out that the Contractor failed to reasonably interpret the indications of the subsurface conditions to be encountered and did not reasonably rely on those indications. Additionally, subsurface conditions encountered did not materially differ from those indicated in the contract documents.

In reaching its recommendation, the DRB conducted two days of hearing focused on testimony limited to the issue of merit of Claim No. 9. 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 CO331 Contractor submitted its original Notice of Intent to Claim for Differing Site Conditions (DSC) on March 2, 1995, which the MTA designated as CO331 Claim No. 9. The DSC's alleged at that time included the quantity formation of hard ground, cobbles and boulders, encountered during mining operations. The Contractor submitted its Claim No. 9, Claim Package on July 3, 1995, wherein it alleged estimated costs of \$14,229,977. Subsequently, the Contractor alleged that the quantities of hard ground and cohesive running ground encountered also constituted DSCs. The parties and the DRB agreed it was prudent to defer the DRB's Claim No. 9 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. 9. On April 29, 1997, the Contractor submitted its revised estimate of costs associated with Claim No. 9 in the amount of \$21,199,526 and a Contract delay of 375 days.

The DRB held its initial hearing concerning Claim No. 9 entitlement on May 15, 1997 and May 16, 1997, after having previously received Position Papers from the Contractor and the

MTA. Thereafter, the DRB issued its Claim No. 9 Draft Recommendation on June 6, 1997, wherein it recommended that the Claim be denied. Additional testimony concerning Claim No. 9 was subsequently presented by the Contractor at the DRB's Claim No. 10 hearing in August, 1997, with the result that the DRB requested additional information from the parties concerning the cohesive running ground issue. The parties submitted the requested supplemental position, and a DRB hearing concerning this limited issue was held on November 18, 1997, prior to the DRB's Claim No. 14 hearing. After concluding its entitlement hearings on C0331 Claim No. 14, the DRB issued its Final Recommendation concerning Contract C0331, Claim No. 9 and No. 10, both of which it recommended be denied.

The DRB's recommendation has been reviewed and approved by the 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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