

LTR-CH0032001-0604

Muskrat Falls Corporation

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07-Oct-2016

ANDRITZ HYDRO CANADA INC.
6100 Trans-Canada Hwy.
Pointe-Claire, Quebec
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Attention: Mr. William Mavromatis

Subject: Agreement CH0032-001 – Supply and Install Powerhouse and Spillway Hydro-Mechanical Equipment, Request for Extension of Time – Change Order No. 6

References: Company's Change Order No. CHO-CH0032001-006, March 18, 2015
Company's letter LTR-CH0032001-0036, July 10, 2015
Contractor's letter LTR-CH0032001-0113 (AH-Letter-PM-022), June 18, 2016
Contractor's letter LTR-CH0032001-0555 (AH-Letter-PM-278), September 1, 2016
Contractor's Letter LTR-CH0032001-0554 (AH-Letter-PM-277), September 1, 2016
Company Letter LTR-CH0032001-0559, September 7, 2016
Contractor's Letter LTR-CH0032001-0574, (AH-Letter-PM-287) September 16, 2016

Dear Mr. Mavromatis:

Company has conducted an assessment of Contractor's request for a 100 day extension of time ("EOT") set forth in letter AH-Letter-PM-277. Based on Company's evaluation Contractor's request for an EOT is denied. Contrary to Contractor's allegations, Company findings were not hastily determined and are based on the requirements set forth in the Agreement and recognized forensic schedule delay practices and procedures. Company is not denying Contractor the right to submit a request for an EOT, however whenever Contractor makes such an application, Contractor bears the burden of proof and must demonstrate entitlement, cause and effect, and calculate damages, cost and/or time, linked to the effect. Company's denial is founded on Contractor's waiver and failure to prove that the delay in the start of hydro-mechanical work on the upstream portion of the spillway impacted Contractor's plan to perform the work.

Waiver

In June 2015, Company requested Contractor to evaluate opportunities to accelerate Contractor's work to achieve river diversion by June 15, 2016. This became necessary due to the delayed access to the upstream portion of the spillway. Joint discussions continued through July and in response to Company's request, Contractor on August 19, 2015, provided a preliminary Spillway acceleration proposal. On October 28, 2015, Contractor supplemented the August proposal with an updated Control Schedule with start of the upstream work commencing on November 1, 2015. Contractor then made further revisions to the Control Schedule in November and December 2015 but still committing to a June 15, 2016 completion.

Article 26.8 of the Articles to the Agreement sets forth a process and timeline if Contractor considers that an occurrence has taken place which constitutes a Change, and if:

"Contractor fails to comply with the conditions of this Article 26.8, it will relinquish its right to request a Change Order and waives any claim it may have for additional compensation and for an extension of time to complete a Milestone arising from the occurrence."

Therefore, due to the late submittal of its EOT claim, Contractor has waived its rights to any extension of time to complete Milestone M4.

Failure to Prove its Claim

Contractor has ignored the express requirements of Exhibit 3, specifically Sections 8.3 and 8.5, in submitting a request for consideration of an extension of time. Contractor has not supported its EOT claim with any form of forensic schedule delay analysis. Contractor does not even refer to its own contemporaneous schedules in an effort to support its EOT claim. Section 7 of Exhibit 3 to the Agreement sets forth the minimum requirements for Contractor's planning, scheduling, measurement and reporting of physical progress, and schedule control activities for the Work. Contractor is required to prepare and maintain a Control Schedule, which forms the basis of this process.

"The Control Schedule is to be a schedule network, which is calculated using the critical path method."

For reference, Company's response follows the captioned delineations in Contractor's letter starting with the "Preamble".

Preamble

Contract CH0032001 does not stipulate that Company is to provide exclusive and unfettered access to any work areas. Contractor has made this groundless claim previously and has been corrected by Company in each instance. Article 3.8 of the Articles to the Agreement addresses access:

"3.8 Contractor shall cooperate with Company's Other Contractors and Company Personnel working at the Worksites with a view to reducing interference with Company's Other Contractors and Company Personnel or with the operations of Company."

Contractor has always been fully aware of the express obligation to work on site in close proximity to other contractors.

In a series of letters in October and November 2015 Contractor alleged multiple petty incidents which Contractor, and its subcontractor, unreasonably sought to amplify. Company cited references to the minutes of the daily coordination meetings that unequivocally refuted the basis of each allegation.

Contractor claims that Company's July 10, 2015 letter (Aconex LTR-CH0032001-0036) regarding the November 1, 2015 date for Interface Date "I1A" entitles Contractor to a 258-day delay to the start of the upstream hydro-mechanical work in the spillway. Company rejects this claim.

On this project, where critical path method ("CPM") schedules are prescribed, any claim for an extension of time must be proven using an analysis of impacts to the critical path. Such an analysis must include all delays to activities whether caused by Company, Contractor or third parties. Contractor may only recover for the actual delays to the critical path solely attributable to Company. Compensable delay is also limited to the time, craft labour hours and costs actually incurred in the excusable delay period. Contractor must also supply specific proof based on a critical path analysis that demonstrates Company's actions, or failures to act, solely affected Contractor's performance.

Regarding delays to Interface I1A, Contractor has repeatedly acknowledged, as recently as September 8, 2016, that Contractor's own delays were concurrent with potential Company delays. Under such circumstances Contractor would be entitled to excusable, but non-compensable time in this regard. Furthermore Contractor has confirmed Contractor delays were concurrent with delayed access until November 1, 2015. These delays include, but are not limited to, the following:

- Delays in the hoist tower anchors and the load calculations required to complete the structural design of the spillway piers, and the north and south walls;
- Delays in the fabrication of the roller gates and stop logs; and,
- Delays in the fabrication of the shelter panels.

Contractor has failed to discharge the burden of proof with regard any weather impact or other factors may have had on Contractor's productivity. In fact Contractor's summary of weather factors affecting labour productivity demonstrates a clear lack of knowledge and understanding of prevalent weather on the site as follows:

- Snow removal and deicing add extra work, and these tasks, as with contract work, may be impacted due to the weather;
- The shelters are required to perform the work regardless of the weather conditions. Some of the shelter installation work would have been performed under winter conditions, while other work would have been in warm, wet conditions. Temperature control was required at any time of the year, and heating in the shelters would have always been required for any work between October 2015 and May 2016.

- Loss of productivity and time due to Contractor's slow start and early finish of the work shifts is not a function of weather, but a function of Contractor's poor supervision and lack of control of Contractor's labour;
- Loss of time at coffee and lunch breaks are also a function of Contractor's poor supervision and control of Contractor's labour, and not the weather;
- Daylight hours have no affect on work performed in the shelters; and,
- Performance of the work in the shelters was in a controlled environment and thus the impact of winter clothing on such work was minimal at best, if at all.

Summary of Analysis

Contractor alleges five different conditions that supposedly impacted output gains, output losses, or no change in output for work the movement of work activities, however Company is not aware that Contractor has conducted an analysis based on these activities and the actual direct craft labour hours planned for each activity. Furthermore any such Contractor's analysis in this regard must be limited only to critical path activities and based on the actual periods in which these activities were performed, and not simply a baseline model. Also any Contractor's analysis must consider its own delays.

Contractor's EOT further fails as follows:

- Contractor has not provided support for how it has determined the hours to be expended in each of the periods, A1, A2, A or B, used in Charts 1 and 2
- Conflicts with its August 19, 2015 acceleration proposal and its revised proposal, revision 2, dated December 18, 2015. Contractor's August 19, 2015 proposal identified 7,096 hours, which would be lost due to labour productivity. Contractor's revision 2 proposal reduced the productivity loss due to winter working conditions to 4,940 hours;
- Represents that the claim is based on an average planned daily productivity rate of 185 man-hours/day, without any basis for this calculation;
- Alleges a loss of output due to the number of activities occurring during the holiday shutdown period. Company never required Contractor to stop work during the Christmas and New Year holiday period. That decision was solely Contractor's. Contractor's claim fails to address the subcontractors' rotation schedules when crews left site on rotation with little or no backup causing the work to be suspended; and,
- Company also draws Contractor's attention to calculation errors in Tables 1 and 2.

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Contractor's EOT claim is predicated solely on the effects of winter working conditions:

"Contractor's position is well supported by precedent in the construction industry regarding impact of winter conditions on productivity."

However, CANMEC's forecast labour hours due to winter working conditions are only 3.1% of the total hours. The loss of productivity due to learning curve is 4.7%. The greatest loss of

productivity is attributed to over crowding at 64.3%. Contractor's own invoices refute Contractor's EOT based solely on winter working conditions.

Contractor has not provided a detailed schedule analysis, but an analysis based solely on a comparison of the original plan to the amended plan. Total mechanical hours were moved from block to block with no apparent consideration for the work, the duration or the conditions under which the work was to be performed, and was performed. Contractor has not analyzed the work on an activity basis, plan versus actual. Nor has Contractor addressed the impact of winter work conditions on the tasks worked in the shelter, which would have had a limited loss of productivity due to weather. The analysis does not address the periods in which the work was actually performed. Contractor's own delays moved the work into April, May and June thus reducing the hours that were exposed to winter working conditions.

Contractor compounds its erroneous analysis by arguing that:

"Company is commercially obliged to give due consideration to the cumulative effects on the schedule of all Change Order(s) and Directives, including Change Order 6, but also all other disruptions resulting from Company's actions."

Contractor bears the burden of proof to identify all impacts on its work. This includes its own delays and disruptions, that of its subcontractors and vendors, Company, and third parties over which it had no control. Contractor must then demonstrate the effect of each, apportion responsibility, assess concurrency, and then calculate the damages for the days of compensable delay. Contractor's analysis does none of these.

Contractor concludes stating the EOT "...to address the impact of the weather condition resulting from the directed acceleration..." is legitimate. This directly contradicts the basis of its acceleration proposal that listed weather, learning curve, overstaffing, and overcrowding as the factors that would impact productivity. Contractor's invoices are framed by these same factors with the addition of stacking. Contractor's latest letter implies that this is a cumulative impact claim and all change orders and directives need to be considered, and yet Contractor has made no effort to indicate which ones these are and how they impacted the work.

Conclusion

Between August 25, 2015 and July 24, 2016 Contractor incurred a 55-day delay to Milestone M4, as measured against Activity ID A0050. This delay is Contractor's sole responsibility due but not limited to:

- Contractor's lack of resources;
- Lack of materials (shelter panels, roller gates and stop logs);
- Erection equipment problems including cranes and hydro-mobiles (breakdowns and lack of platforms and spare parts);
- Work stoppages;
- Safety issues (including safety absolutes resulting in the discharge of 11 individuals);
- Quality issues (NCRs);

- Rework; and,
- Out of sequence work.

In conclusion, Contractor's EOT claim fails on the basis of waiver for filing to provide timely notice, and failure to prove the alleged delay. Contractor's EOT claim, as currently presented, is hereby denied.

Likewise, Contractor's shortcomings in completing all the work required for river diversion are the primary cause of further delays to the completion of the post diversion work, and Milestone M4. Faced with the reality that Contractor cannot or will not complete all the work required pursuant to Milestone M4, Company is assessing what work must be completed before winter sets in. Unfortunately, this is likely to mean that some work must be deferred until 2017 which is unacceptable. Company takes Contractor's repeated failures very seriously; as a result Company is evaluating all available recourses for recovery. These include Contractor's loss of the Incentive Bonus pursuant to Section 11.2 of Exhibit 2 to the Agreement, and liquidated damages until Milestone M4 is achieved. The liquidated damages for Milestone M4 are in addition to other currently assessed liquidated damages. Such consideration by Company is the direct result of Contractor's failures to perform.

Yours truly,



Scott O'Brien

Project Manager – Muskrat Falls Generation
Project Delivery Team
Lower Churchill Project