

# CONSTRUCTION ADVISORY

## Changes within Colorado Department of Transportation Impacting the Construction Industry



Recently, there have been several developments within the Colorado Department of Transportation (CDOT) that increase risk to companies that are doing business with CDOT.

First, CDOT has decreased its number of employees over the last five years. This has led to an increased use of consultants. Many of those consultants are former CDOT employees. Consultants are often motivated to establish their value by finding ways to save their client, CDOT, money. That may mean depriving contractors of money. In our opinion, this has led to increased disputes on CDOT projects.

Second, the mandatory CDOT dispute resolution process has increasingly failed to resolve disputes. We have found the quality of the analysis used by CDOT at the project level to evaluate contractors' requests for equitable adjustment (REAs) to be poor. This has led to more Dispute Review Boards (DRBs), which are costly and time-consuming. Moreover, CDOT has increased the frequency with which it rejects DRB findings. This has led to more certified claims by contractors, which are submitted to the CDOT Regional Transportation Director (RTD). Adverse RTD decisions may be appealed to the CDOT Chief Engineer. Unfortunately, the RTD and Chief Engineer often are inclined simply to support their CDOT people in the field, instead of conducting a thorough and neutral evaluation of a contractor's claims. This results in a disputes process that often takes a year to complete and that increasingly results in decisions adverse to contractors. Problems with the dispute resolution process substantially increase risks to contractors. They certainly increase the risk that disputes will not be resolved early in project and will have to go through the entire dispute resolution process all the way the CDOT Chief Engineer, then be followed by litigation or arbitration.



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Third, CDOT made changes to Standard Specification Section 105 on dispute resolution in order to foreclose a contractor's right to any legal, equitable, or administrative relief if the contractor did not provide written notice within 20 days of a dispute and work continuously on its resolution. This change was done without Colorado Contractors Association (CCA) input or knowledge and may block a contractor from even getting to a DRB if they fail to comply with the written notice requirement. In the past, CDOT and CCA had used a joint task force to make changes to the dispute resolution specification. Now, CDOT appears to be moving unilaterally to tip the scales clearly in its favor.

Finally, and perhaps most alarmingly, a lawsuit was recently filed that alleges CDOT improperly attempted to influence a DRB chair. This law firm filed the lawsuit on behalf of a contractor, and it is based on CDOT's own documents obtained through an Open Records Act request. Both the express terms of the dispute resolution specification and the ethical rules applicable to DRBs make it very clear that there may be no *ex parte* communications with DRB members. Notwithstanding, even though there was a standing DRB in place for this project and after CDOT had rejected two of the DRB reports and recommendations, CDOT communicated *ex parte* with the DRB chair about issues that had arisen in the prior DRBs and, among other things, threatened to remove the chair from the list of prequalified DRB members maintained by CDOT and CCA. Removal from this list, in essence, means that this person would no longer be considered for use on CDOT DRBs. This individual is one of the most experienced DRB members and one of the most experienced DRB chairs in Colorado. Notwithstanding, CDOT ultimately removed him from the prequalification list, even though he was the chair of a standing DRB for a project that had further disputes set for DRB hearings. Such actions taint the entire disputes process. If any of our readers are aware of similar improprieties by CDOT, we would greatly appreciate your bringing it to our attention.

As a result of these issues, we recommend that contractors consider these increased risks in evaluating how they should bid CDOT contracts.

## QUESTIONS

For any questions about this client advisory, please contact a member of the [Sherman & Howard Construction Group](#).