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9 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
10 OF THE STATE OF CALIFORNIA

11 BAY CITIES PAVING & GRADING,)	CASE NO. A-0017-2018
12 INC./C.C.MYERS JV)	
13 vs.)	ORDER RE: MOTION FOR
14 STATE of CALIFORNIA, DEPARTMENT OF)	INTEREST, FEES AND COSTS.
15 TRANSPORTATION,)	
16 Respondent.)	
17 CEMEX CONSTRUCTION MATERIALS)	
18 PACIFIC, LLC)	
19 Interested Party)	
20 _____)	

21 On February 12, 2021, the Petitioner, Bay Cities Paving & Grading, Inc./C.C. Myers
22 JV and Interested Party Cemex (the JV), filed its Motion for Interest, Attorneys' Fees and
23 Costs (the Motion), with declarations and exhibits.

24 On March 5, 2021, the Respondent (Caltrans) filed its Opposition to the Motion, with
25 declaration and exhibits and on March 12, 2021, the JV filed its Reply

26 On March 16, 2021, the parties participated in a videoconference hearing of the
27 Motion. Present on the videoconference were Steven Copeland, Esq., Marlo Manqueros, Esq.
28 and Mary Salamone. Esq. on behalf of the JV and Brandon Reeves, Esq. on behalf of
Caltrans. Present also was a Certified Shorthand Reporter, who transcribed the hearing.

1 Thereafter, the arbitrator took the matter under submission. All of the documents
2 submitted for this motion are admitted into evidence. All of the briefs and arguments of
3 counsel have been read and considered.

4 The Motion follows the Decision on the Merits, issued on January 4, 2021, in which
5 the JV was awarded the total sum of \$6,865,265.

6
7 Pre-Judgment Interest

8 The JV seeks an award of interest at the rate of 10% from the date when the damages
9 were certain or were capable of being made certain.

10 Civil Code §3287(a) states as follows:

11 “A person who is entitled to recover damages certain, or capable of being made certain
12 by calculation, and the right to recover which is vested in the person upon a particular
13 day, is entitled also to recover interest thereon from that day, except when the debtor is
14 prevented by law, or by the act of the creditor from paying the debt. This section is
applicable to recovery of damages and interest from any debtor, including the state or
any county, city, city and county, municipal corporation, public district, public agency,
or any political subdivision of the state.”

15 Clearly, the JV is entitled to recover pre-judgment interest from Caltrans if the amount
16 awarded was certain or was capable of being made certain by calculation on a particular day.

17 Caltrans argues that the damages were always speculative and that the amount of
18 damages was always in dispute. Thus no pre-award interest is owed. Caltrans argues that it
19 did not know and could not ever ascertain the amount of damages, except by this very
20 arbitration process, as there was conflicting evidence. In short, it required a judicial
21 determination to determine liability and the amount of damages.

22 To this end, Caltrans presented an extensive recounting of the evidence it presented at
23 the arbitration in support of its position that it was not liable at all, because there were a
24 myriad of disputed issues. In addition, Caltrans also offers as evidence a Final Award in
25 another case that addressed allegedly similar facts as was presented in this Case, as proof that
26 a different arbitrator could have ruled differently in this case. Accordingly, Caltrans argues

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28

1 that its position in this case was reasonable and that all of the disputed liability issues
2 demonstrate that it could not have made any accurate calculation of damages prior to the
3 hearing.

4 But the question is not whether liability was disputed. It was. The question is
5 whether the damages were disputed. They were not. In fact, the expert called by Caltrans
6 found that his calculation of damages was very similar to that claimed by the JV. He remarked
7 how rare this was that the two experts would agree on the amount of damages, almost to the
8 penny. In this case, once liability was determined, the amount of damages required no new
9 calculation or determination. Damages calculated by the expert for Caltrans would have been
10 just as sufficient as those determined by the expert for the JV.

11 Caltrans also argues that because the Full and Final PCR1, dated July 13, 2017, only
12 mentions 89 days of delay, Caltrans could not possibly have computed the amount of damages
13 for the total delay claim of 225 days, as was claimed by the JV at the arbitration hearing.

14 While it is true that the Full and Final PCR1 at Exh. 484, page 4, only mentions 89
15 days of delay on its face, certain exhibits were attached, including a Cost Breakdown at Tab
16 12, which referenced an additional 126 days. This issue was already determined in Findings
17 of Fact No. 12 in the Decision on the Merits. The damages claimed in the Full and Final
18 PCR1 were \$6,582,790. Therefore, the information given to Caltrans in the Full and Final
19 PCR1 was sufficient to calculate the amount of damages.

20 For these reasons, the arbitrator finds that the JV is not precluded from obtaining pre-
21 award interest because liability was disputed in this case or because of an alleged lack of data
22 given in the Full and Final PCR1.

23
24 The Date of Damage Calculation for PCR1

25 The next question concerns the particular day when the damages were capable of
26 being made certain, prior to the hearing. The JV argues that the date was when the
27 Dispute Review Board (DRB) ruled against Caltrans, i.e., December 5, 2014.

1 The DRB had not been presented with damage calculations and the DRB made no
2 damage award recommendations. Instead, they simply recommended that the JV is entitled to
3 “additional compensation and contract time based on merit.”

4 The JV argues that documents were presented to Caltrans shortly after the DRB
5 Report was issued, as Mr. Dees testified at the hearing. The documents were given in
6 settlement discussions and they contained specific cost calculations. In fact, Exh. 543 states
7 damages in the amount of \$5,533,495 and Exh. 550 states damages in the amount of
8 \$5,416,282. Also, Exh. 561 states damages in the amount of \$5,498,844 and states “Met
9 w/Caltrans to discuss Settlement on December 11, 2014.”

10 Therefore, as of December 11, 2014, Caltrans had a general idea of the scope of
11 damages claimed in this arbitration. However, these documents and amounts do not provide
12 damages that are certain as of that date or that could be made certain by calculation. The
13 amount awarded in the Decision on the Merits was \$6,768,848. The amounts presented to
14 Caltrans in December of 2014 were more than one million dollars less than the amount
15 awarded. The arbitrator does not find that the damages which were awarded in this arbitration
16 were certain or capable of being made certain in December, 2014.

17 The JV next argues that the damages were certain as of the date the Full and Final
18 PCR1 was submitted to Caltrans. The Full and Final PCR1 was submitted to Caltrans on July
19 13, 2017. (Exh. 484)

20 In the Full and Final PCR1, the amount claimed was \$6,582,790. The amount awarded
21 in the Decision on the Merits was \$6,768,848. The amount claimed by the JV was about two
22 hundred thousand dollars less than the amount awarded.

23 The arbitrator finds that the amount claimed in the Full and Final PCR1 is very close
24 to the amount awarded and provided a sufficient basis for Caltrans to calculate the amount of
25 damages in this dispute.

26 As noted above and in the Decision on the Merits, the two damage expert witnesses
27 called by the respective parties came essentially to the same conclusion on the amount of
28 damages. This alone is proof that the damages were capable of being made certain by

1 calculation and by using exiting documents and might even suggest an earlier date when the
2 documents were first available. Nonetheless, the arbitrator finds that the date of the Full and
3 Final PCR1 is the proper date to use for this calculation. Hence, pre-award interest is awarded
4 as of July 13, 2017.

5
6 The Date of Damage Calculation for PCR9

7 The analysis for PCR9 is similar, as the amount claimed in the Full and Final
8 PCR 9 on June 8, 2017 was \$96,417 and that was the amount awarded. Accordingly, pre-
9 award interest for PCR9 is awarded to the JV as of that date.

10
11 Rate of Interest

12 The next question is the proper rate of interest for pre-award interest. Section 9 of the
13 Special Provisions Section 9-1.02, page 475 (Exh. 1000) states that:

14 “The Department pays 6 percent annual interest for unpaid and undisputed claims.”

15 That section also states:

16 “The Department pays 6 percent annual interest for awards in arbitration
17 Civ Code §3289).”

18 Civil Code §3289(a) states

19 “Any legal rate of interest stipulated by a contract remains chargeable after a
20 breach thereof, as before, until the contract is superseded by a verdict or other
21 new obligation.”

22 The JV argues that because it was a disputed claim, the provisions of the Special
23 Provisions do not apply and the proper rate of interest is 10%, as stated in Civil Code
24 §3289(b). That code section states:

25 “If a contract entered into after January 1, 1986, does not stipulate a legal
26 rate of interest, the obligation shall bear interest at a rate of 10 percent per
27 annum after a breach.”

28 Without a doubt, this was a disputed claim. However, the contract between the parties
does stipulate the rate of interest for awards in arbitration and this language is not limited to
post-award interest. Further, there was a breach of contract and that breach occurred well

1 before the arbitration hearing. Hence, the contract rate applies after a breach and until a new
2 obligation (i.e., and arbitration award) is created.

3 For these reasons, the arbitrator awards pre-award interest for PCR1 in the amount of
4 \$1,468,751, calculated as follows; $\$6,768,848 \times .06$, divided by 365 = \$1,112.69 (daily rate)
5 $\times 1,320$ days (July 13, 2017 to March 26, 2021).

6 Also, the arbitrator awards pre-award interest for PCR9 in the amount of \$21,381,
7 calculated as follows. $\$96,417 \times .06$, divided by 365 = \$15.85 (daily rate) $\times 1,349$ days (June
8 8, 2017 to March 26, 2021).

9 Altogether, the JV is awarded the total sum of \$1,490,132 in pre-award interest.

10
11 Attorneys' Fees Because of an Offer of Settlement

12 In the Motion, the JV argues that since it was awarded damages in the Decision on the
13 Merits in excess of several settlement offers made during the course of the project, it
14 should be awarded its attorneys' fees and costs.

15 At the outset, Caltrans argues that confidential mediation communications cannot be
16 used to support any cost-shifting. There is no clear authority as to whether an offer made in
17 mediation can be used as an offer of settlement for this purpose. In general the mediation
18 confidentiality statutes are to be strictly construed. Therefore, the arbitrator finds that the
19 mediation confidentiality statutes do apply in this case.

20 The only reference to mediation is that on page 14 of the JV's Brief concerning the
21 offer of \$2 million which was made by Caltrans at the mediation. That evidence will not be
22 considered by the arbitrator. There was no other evidence offered that referenced mediation.

23 Next, Caltrans argues that offers to compromise are barred by Evidence Code Section
24 1152. The amounts discussed by the JV in the Motion were offers to compromise. During the
25 hearing, the arbitrator ruled that any discussion of a settlement in the amount of \$4.1 million
26 was not admissible at the hearing, as it was an offer of compromise in violation of this statute
27 and it was being offered to prove liability.

1 However, Evidence Code Section 1152 disallows an offer of compromise only if
2 offered “to prove his or her liability for the loss or damage or any part of it.” In other words,
3 evidence of an offer of compromise may be admissible when offered for some other purpose.
4 Here, it is not offered to establish the liability of Caltrans. That has been decided. Here, it is
5 offered to establish that an offer of settlement was made by the JV, which is an essential
6 requirement of Public Contract Code §10240.13.

7 Accordingly, offers of settlement made after the DRB Report (December, 2014) or in
8 later settlement discussions (2017) are properly considered for the sole purpose of
9 determining a date when an offer of settlement was made, thereby triggering the cost-shifting
10 provision of the Public Contract Code.

11
12 The Existence of an Offer of Settlement by the JV

13 The next question is whether the JV made an offer of settlement pursuant to the Public
14 Contract Code, such that it is entitled to attorneys’ fees and costs. The Public Contract Code
15 requires proof that the JV made an offer of settlement.

16 Public Contract Code §10240.13 states in its last two paragraphs:

17 “If a party has made an offer of settlement and the award is less favorable than the
18 offer, then the party who has received the offer shall not recover any interest accruing
from and after the date on which the offer was made, nor costs of suit.

19 Reasonable attorney fees may be recovered according to any of the following:

- 20 (a) By a party who has made an offer under the circumstances set forth in the
preceding sentence but only as to those fees incurred from and after the time of
making the offer.
21 (b) Against a party when substantial evidence establishes that the party has acted
frivolously or in bad faith in its demand for, or participation in, the arbitration.”
22

23 Reading these two code sections together, a party in an arbitration under the Public
24 Contract Code must make an offer of settlement and then must obtain an award that is better
25 than the offer of settlement. If those conditions are met, the party making the offer may
26 recover attorneys’ fees from the date of the offer of settlement.

27 Unlike CCP §998, which requires a written offer of settlement, PCC §10240.13 makes
28 no such requirement. Hence, an oral offer of settlement is acceptable.

1 Here, there is evidence that the JV made an offer of settlement for \$4.1 million on or
2 about December 18, 2014, as there was a “tentative agreement” on this amount and on or
3 about this date, subject to approval from Caltrans and to other conditions. “Settlement in the
4 amount of \$4.1M reached December 18, 2014.” (Exh. 561) The conditions were not met.
5 (Exh. 118) An agreement requires an offer and an acceptance.

6 This “tentative agreement” was made directly between the parties and without
7 counsel. There is no requirement that an offer of settlement under PCC §10240.13 must be
8 made by attorneys. That code section only refers to “parties.” For these reasons, the JV did
9 make an offer of settlement on or about December 18, 2014.

10 The arbitration award of \$6,865,265 was more favorable than the offer of settlement of
11 \$4.1 million. Hence, the JV is entitled to attorneys’ fees incurred from and after December,
12 2014

13
14 Reasonableness and Amount of Attorneys’ Fees

15 The last issue on attorneys’ fees is the reasonableness and amount. The arbitrator has
16 reviewed the three declarations presented by attorneys Steven Copeland, Mary Salamone and
17 Marlo Manqueros. All of the fees requested were incurred after December, 2014.

18 Mr. Copeland charged \$350 per hour and his paralegal was charged at \$85 per hour,
19 Altogether he and his firm have incurred fees of \$313,973.50, since February 1, 2019..

20 Ms. Salamone has incurred fees in the amount of \$271,240, since June, 2015.

21 Mr. Manqueros charged \$350 per hour and has incurred fees of \$217,910 since
22 January 14, 2016. Fees charged by in-house counsel are properly included in the award of
23 attorneys’ fees under this statute.

24 Fees in the amount of \$20,015.99 were incurred by Alan Wilhelmy of Rogers, Joseph
25 and O’Donnell since January 12, 2017, in defending a stop notice action filed by Cemex. The
26 arbitrator finds the defense of the stop notice action to be a necessary and related expense that
27 is properly included in an award of attorneys’ fees under this statute. Therefore, the sum of
28 \$20,015.99 is allowed for the fees of Rogers, Joseph and O’Donnell.

1 The fees charged and the rates charged by the attorneys representing the JV are
2 reasonable for this kind of litigation. This was protracted construction litigation that took
3 place over several years and involved attorneys with special skills, learning, age and
4 experience. The attorneys all met these qualifications. Therefore, the JV is awarded the total
5 sum of \$823,139 for attorneys' fees since December, 2014.

6
7 Costs and Expert Witness Fees

8 The JV seeks costs of \$108,169.76 and expert witness fees of \$282,150.36, on the
9 basis that it was the prevailing party and did better than the offer of compromise made in
10 December, 2014.

11 Public Contract Code §10240.13 states that:

12 "The filing fee, witness fees, costs of discovery, or any other cost
13 necessarily incurred by one party shall not be shared by any other
14 party, except that the arbitrator may allow the prevailing party to
15 recover its costs and necessary disbursements, other than attorney's
16 fees, on the same basis as is allowed in civil actions."

17 Code of Civil Procedure §1032 provides for the award of certain costs to the
18 prevailing party. The JV is the prevailing party and it is entitled to recover its allowable costs.

19 The arbitrator finds that the costs incurred by the JV are necessary disbursements,
20 except that certain costs are not allowed, pursuant to CCP §1033.5

21 Expert witness fees are expressly not allowed by CCP §1033.5(b)(1). Therefore, the
22 sum of \$282,150 for expert witnesses is disallowed. Also, the expert witness fees of
23 \$2,463.36 paid to the experts for Caltrans are disallowed for the same reason. Postage and
24 courier expenses in the amount of \$1,203.04 are also expressly not allowed by statute

25 Conversely, photocopying charges for exhibits used in depositions are allowed
26 because these same exhibits were used in the arbitration. Such exhibits are expressly allowed.
27 Travel expenses for depositions are expressly authorized by statute. Travel expenses for the
28 arbitration hearing are allowed as they are reasonably necessary for the conduct of this
litigation and are reasonable in amount. The arbitration hearing took place in Sacramento and
it was reasonable for counsel to stay in Sacramento for the duration of the hearing.

1 The cost of flying Dr. Stein to and from Sacramento for his first day of testimony in the
2 amount of \$5,610.76 is allowed as it was a necessary travel expense because of health
3 concerns of Dr. Stein during the corona virus pandemic.

4 For all of these reasons, the JV is awarded the sum of \$104,405 in costs.
5

6 Attorneys' Fees Because of Bad Faith by Caltrans

7 Pursuant to PCC §10240.13, fees may be awarded “against a party who has acted
8 frivolously or in bad faith in its demand for, or participation in, the arbitration.”

9 This argument by the JV primarily focuses on one sentence in a document dated
10 October 3, 2014, in which Caltrans personnel stated that “Whatever the result is, the claim
11 will go to arbitration.” (Exh. 29) The implication, according to the JV, is that Caltrans never
12 intended to resolve the matter, and always planned on litigation, regardless of the facts.

13 Hence, the JV argues that Caltrans acted in bad faith.

14 Other evidence was offered of the alleged bad faith on the part of Caltrans, including
15 the rejection of the unanimous DRB recommendations of the liability of Caltrans and various
16 statements made in certain documents with regard to the strength of Caltrans' position in this
17 arbitration such as the Risk Register, wherein Caltrans assessed its own liability of this claim
18 at 100% (Exh. 125, pg. 3).

19 Reviewing the entirety of the evidence, the arbitrator does not find this evidence to be
20 dispositive of bad faith or that Caltrans acted frivolously. It might be evidence that would
21 strongly suggest a settlement prior to the arbitration hearing. But a decision not to settle a case
22 is not proof of bad faith.

23 Caltrans was appropriate in its defense of this dispute throughout the course of this
24 litigation. Caltrans and its attorneys vigorously defended their positions, as is their right. But a
25 vigorous defense is not equivalent to the findings suggested by the JV, as a separate basis for
26 an award of attorneys' fees. This argument is denied.
27
28

1 Attorneys' Fees Because of Failure to Admit Requests for Admission

2 The JV argues that the provisions of Civil Code Section 2033.420 require an award of
3 attorneys' fees for the failure to admit certain Request for Admission that were ultimately
4 found to be true. That code section makes an exception for a failure to admit when the party
5 has a reasonable ground to believe that it would prevail on that matter.

6 The arbitrator finds that Caltrans did have a reasonable ground for its positions in this
7 case and that it was not required to admit matters in dispute. The mere fact that some matters
8 were eventually found to be true which were denied by Caltrans is simply a facet of the
9 litigation process. This argument by the JV is also denied.

10
11 Summary

12 In sum, the JV is awarded \$1,490,132 in pre-award interest (as of March 26, 2021),
13 \$823,139 in attorneys' fees and \$104,405 in costs, for a total of \$2,417,676 on this Motion...

14
15 IT IS SO ORDERED.

16 DATED: March 26, 2021

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19 _____
20 KEN MALOVOS
21 Arbitrator
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