

PRIVATE ARBITRATION

Re: 01538.00002

In the Matter of the Arbitration between:

Tully Construction Company, Inc./ A.J. Pegno Construction Corp., J.V. ("Claimant")
and
Canam Steel Corporation ("Respondent")

FINAL ENLARGED, REASONED AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement (**Parties-1**) entered into between the parties and dated April 23, 2012, and having duly heard the proofs and allegations of the Parties, do hereby, FIND, as follows:

This dispute arises out of agreements between the parties, Tully Construction Company, Inc./ A.J. Pegno Construction Corp., J.V. (hereinafter "Claimant") and Canam Steel Corporation (hereinafter "Respondent") made subsequent to the July 16, 2007 Asset Purchase Agreement (**R-29, Tab D**) and the dispute is in connection with the construction of certain portions of the Whitestone Expressway, Queens County, New York.

This FINAL ENLARGED, REASONED AWARD OF ARBITRATOR is in connection with a protracted dispute concerning a contract to supply steel components for the renovation of certain portions of the Whitestone Expressway, Queens, New York. In 2002, the State of New York hired Claimant as contractor. Claimant engaged Eastern Bridge LLC ("Eastern Bridge"), a steel fabricator, to produce and deliver several million dollars of structural steel for the contract, pursuant to a Purchase Order (**C-001**).

Disputes arose concerning Eastern Bridge's compliance with the Purchase Order. Claimant and Eastern Bridge then entered into a May 15, 2007 Completion Agreement (**C-003**). Under the terms of the Completion Agreement, Eastern Bridge promised to deliver the remaining steel components in accordance with a revised delivery schedule. The Completion Agreement (**C-003**) also included an arbitration agreement.

In addition to agreeing to modify the delivery schedule for the remaining steel components, Claimant and Eastern Bridge agreed to release and waive all claims against each other that pre-dated the Completion Agreement.

As of the July 16, 2007 date of the Asset Purchase Agreement (**R-29, Tab D**), Eastern Bridge, had not defaulted on any of its delivery obligations under the Completion Agreement.

However, disputes soon arose between Claimant and Respondent, in connection with Respondent's compliance with the Completion Agreement. In April 2008 Claimant served Respondent with a Demand for Arbitration under the Rules of the American Arbitration Association.

Both Claimant and Respondent opted to forego American Arbitration Association arbitration at that time and instead entered into an October 2008 Delivery Agreement (**C-005**).

Under the terms of the Delivery Agreement, all remaining steel components were to be delivered to Claimant by June 1, 2009. Respondent did not make its final delivery until September 17, 2009.

On December 30, 2009, Claimant filed a Demand for Arbitration with the American Arbitration Association. The claims for breach of contract, intentional misrepresentation, and negligent misrepresentation totaled more than \$20 million. Respondent answered, denying liability, and counterclaimed for additional costs purportedly due to delays by Claimant, for nearly \$5.25 million.

On April 23, 2012, both parties agreed to dispense with the American Arbitration Association administered arbitration and instead entered into a private Arbitration Agreement (**Parties-1**).

The arbitrations hearings duly commenced on November 6, 2012, and concluded on January 30, 2013. During seventeen days of hearings, more than 800 exhibits were admitted into evidence.

This FINAL ENLARGED, REASONED AWARD OF ARBITRATOR is limited pursuant to the terms of the Arbitration Agreement (**Parties-1**) to those claims of Claimant, Tully Construction Company, Inc./ A.J. Pegno Construction Corp., J.V. solely against Respondent, Canam Steel Corporation; and Respondent's counterclaims.

CLAIMANT

Consistent with its staging plan, Claimant's As-Planned Baseline Schedule, 61B3 with schedule data date of January 24, 2003, showed Stage IV completion on September 19, 2005. *See, R-20, Exhibit 8.* The longest, and therefore, critical path in 61B3 ran through completion of Stage II (October 14, 2004), and the longest path to completion of Stage II ran through, among other activities, installation of structural steel for span 129. *See, C-481; C-483; C-486; C-488; C-489; C-491; R-20, Exhibit 8; Carlson Tr. 905-907, 957-961.* The timely fabrication and delivery of the new steel spans and piers, in particular the Stage II Spans 129-131 and Piers 129 and 130, were critical. For various reasons, the fabrication and delivery of the Stage II Spans 129-131 and Piers 129 and 130 was untimely, delaying the completion of Stage II. *See, Parties-1; C-3; C-17; C-109; C-110; C-111; C-120; C-133; C-140; C-159; C-160; C-175; C-206; C-211; C-227; C-233; C-235; C-272; C-300; C-301; C-450; R-20, Exhibit 9; Carlson Tr. 705-707, 711, 712; Hand Tr. 1761-1762; McPartland Tr. 143, 160.* Yet, each time Respondent issued a schedule to Claimant, Respondent believed the dates were achievable. *Bernier Tr. 1977-1978.*

Claimant notified Respondent of defects in the 129-131 material finally delivered. *See, C-461, C-462, C-463; C-464; McPartland Tr. 179-194.* Respondent stopped fabrication and delivery of any further steel. *See, C-429, C-439; Bradley Tr. 2443-2446.*

During March 2008, Claimant continued alerting Respondent of the fabrication defects to the 129-131 material delivered, including both splice and gusset plates, *see, McPartland Tr. 200-201,* necessary to complete the erection of Spans 129-131. *See, C-431, C-433, C-438, C-440, C-464, C-471, C-472, C-473, C-474.* Delivery of all Spans 129-131 necessary components, including structural steel, steel shapes, nuts, bolts, washers, scupper support pieces, and painting calculations were not completed until April 2008. *See, C-439, C-466, R-20, Exhibit 8, C-601; R-33, Tab E; Schatz Tr. 1186-1188.*

Spans 129-131 and Piers 129 and 130 dominated the schedule's critical path.

The necessary determination is whether the Claimant's alleged damages are a result of non-concurrency, were not foreseeable, were not anticipated, are excusable, and are compensable.

On its claims, Claimant is granted, for

Contract Overpayment

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Contract Overpayment" claim against Respondent of \$4,194,471.00. *See, C-478 (formerly C-459), Rows 2 – 11, (also C-447, page 16, Ex. 8f); McPartland Tr. 207-208.*

Respondent opposed the \$4,194,471.00 "Contract Overpayment" claim asserting, in essence, that Claimant's calculations were based on unsupported assumptions. *See, R-19K at CAN 16606, 16627, and 19947; C-139; C-195; Mazza Tr. 438.*

Contract Overpayment Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$4,194,471.00 "Contract Overpayment" claim from Respondent, it is denied and Claimant awarded:

\$ 0.00

Projected Liquidated Damages and Engineering Charges

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant reserved a "Projected Liquidated Damages and Engineering Charges" claim against Respondent. However, Claimant asserted no monetary amount. *See, C-478 (formerly C-459), Row 51.*

Projected Liquidated Damages and Engineering Charges Conclusion

Not having established any injury, monetary or otherwise, by a credible preponderance of testimonial or of documentary evidence the "Projected Liquidated Damages and Engineering Charges" claim is denied and Claimant awarded:

0.00

Cornell Liquidated Claim

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Cornell Liquidated" claim against Respondent of \$2,831,703.00. *See, C-478 (formerly C-459), Row 53, Exhibits C-445, C-446, C-460, C-529, C-530, and C-537; R-22, Tab C at CAN 19304 through 19309; Carlson Tr. 747-748.* Claimant's erection subcontractor, Cornell, alleged that it was required to effectively abandon the As-Bid Work Plan and erect the structural steel in a manner wholly different from that originally anticipated. *Schatz Tr. 1169-1244.*

While Respondent opposed the \$2,831,703.00 "Cornell Liquidated" claim asserting that Claimant's calculations were based on unsupported assumptions, *see, R-2P, Sheet 34; Schatz Tr. 1304; Tully Tr. 1504-1507*; both credible testimonial evidence and a credible preponderance of documentary evidence suggest otherwise.

Cornell Liquidated Claim Conclusion

Claimant persuasively justified its entitlement to the \$2,831,703.00 "Cornell Liquidated" claim by both the credibility of its testimonial evidence and by a credible preponderance of documentary evidence. The \$2,831,703.00 "Cornell Liquidated" claim, it is granted in its entirety and Claimant awarded:

2,831,703.00

Labor Escalation

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Labor Escalation" claim against Respondent of \$1,702,416.00. Absent the Respondent induced delay, Claimant would have completed without incurring labor cost increases. *See, C-478 (formerly C-459), Rows 12-19; C-602; Bolyard Tr. 2614-2617; McPartland Tr. 205-220, 330-366; Torres Tr. 2733-2767.*

Respondent opposed the \$1,702,416.00 "Labor Escalation" claim positing a less than 100%, preferably zero, entitlement, alleging imponderables and discretionary decisions in the audit trail. *See, Carlson Tr. 737-804, 957-964, 967-981; McPartland Tr. 64, 342, 346-347; Torres Tr. 2745, 2752, 2753.*

Labor Escalation Conclusion

Claimant having persuasively justified its entitlement to and persuasively established by a credible preponderance of testimonial or of documentary evidence its entitlement to 69% of its \$1,702,416.00 "Labor Escalation" claim, the claim is granted in part and Claimant awarded:

1,174,667.00

Concrete Escalation

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Concrete Escalation" claim against Respondent of \$140,861.00, using the quantity of concrete billed versus the balance to bill. *See, C-478 (formerly C-459), Rows 20 – 23; (also C-447, Ex. 8C).*

Respondent opposed the \$140,861.00 "Concrete Escalation" claim.

Concrete Escalation Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement from Respondent of the \$140,861.00 "Concrete Escalation", it is denied and Claimant awarded:

0.00

Winter Provisions

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Winter Provisions" claim against Respondent of \$155,523.00. Claimant had purchased a tent structure in late 2007 in anticipation of continued concrete operations during the 2007-2008 winter. Respondent failed to deliver the material which would allow Claimant to use the structure in mitigation of delay damages, despite representations by Respondent that delivery was imminent. *See, C-294, C-478 (formerly C-459), Row 24; (also C-447, Ex. 8D); McPartland Tr. 136, 137, 335-337.*

Respondent opposed the \$155,523.00 "Winter Provisions" claim. *See, Carlson Tr. 974, 975.*

Winter Provisions Conclusion

Claimant having persuasively justified its entitlement to and persuasively established by a credible preponderance of testimonial and of documentary evidence its entitlement to the \$155,523.00 "Winter Provisions" claim, it is granted in its entirety and Claimant awarded:

155,523.00

Home Office Overhead

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Home Office Overhead" claim against Respondent of \$1,061,108.00. *See, C-478 (formerly C-459), Row 25; Carlson Tr. 905, 906, 907, 957-961.*

Respondent opposed the \$1,061,108.00 "Home Office Overhead" claim. *See, Carlson Tr. 798; McPartland Tr. 337; also C-447.*

Home Office Overhead Conclusion

A review of the applicable Critical Path Method schedules, Critical Path Method analyses, the relevant testimony, and appropriate evidentiary documentation demonstrates that Claimant has persuasively justified its entitlement to and persuasively established by a credible preponderance of testimonial and of documentary evidence its entitlement to the last 8.5 months of the \$1,061,108.00 "Home Office Overhead" claim from Respondent, which is granted in part and Claimant awarded:

563,714.00

Field Overhead and Field Staff

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted a "Field Overhead and Field Staff" claim against Respondent of \$4,062,736.00. Claimant staffed and maintained field general conditions; i.e., trailer, utility, vehicle, communication, and maintenance/security categories; for an additional period due to the late material delivery by Respondent. *See, C-478 (formerly C-459), Rows 26 – 47; C-602.*

Respondent opposed the \$4,062,736.00 "Field Overhead and Field Staff" claim, alleging, in essence, discretionary decisions in the audit trail. *See, McPartland Tr. 364, 365.*

Field Overhead and Field Staff Conclusion

A review of the applicable Critical Path Method schedules, Critical Path Method analyses, the relevant testimony, and appropriate evidentiary documentation demonstrates that Claimant has persuasively justified its entitlement to and persuasively established by a credible preponderance of testimonial and of documentary evidence its entitlement to the last 8.5 months of the \$4,062,736.00 "Field Overhead and Field Staff" claim from Respondent, which is granted in part and Claimant awarded:

2,158,329.00

Miscellaneous Backcharges

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Claimant.

Claimant asserted against Respondent a "Miscellaneous Backcharges" claim to remedy Respondent's defective work for as much as \$33,600.00. *See, C-478 (formerly C-459), Rows 48 – 50; McPartland Tr. 218-219.*

Respondent opposed the \$33,600.00 "Miscellaneous Backcharges" claim. *See, McPartland Tr. 344.*

Miscellaneous Backcharges Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$33,600.00 "Miscellaneous Backcharges" claim, it is denied and Claimant awarded:

0.00

Claimant Total

\$ 6,883,936.00

RESPONDENT

Respondent's damages are predicated on a comparison of Respondent's 2007 alleged completion costs and Respondent's computed, impact costs. The 2007 costs were based on a cost evaluation reviewed by Messrs. Bernier and Blouin. *See, R-11 at CAN 4980; R-19, Exhibit A; R-19, Exhibit B at CAN 16555-16560 and CAN 19996; R-19, Exhibit D; R-19, Exhibit K at CAN 19945; R-19A; R-20; R-35, Tab 1; R-38; Bernier Tr. 1929-1931; Bolyard Tr. 2691, 2819-2825; Bradley Tr. 2234, 2235, 2239, 2240; Hand Tr. 1659, 1715, 1716; Pilote Tr. 2014, 2015, 2020, 2024, 2038, 2039, 2042, 2043, 2048, 2060, 2067, 2070, and 2072. The final job cost summary was through July 31, 2011. See, R-19, Exhibit C; Pilote Tr. 2038.*

The Respondent acknowledges the importance of critical path delay. *See, Bolyard Tr. 2478-2481, 2486, 2493, 2494, 2499, 2501, 2503, 2504, 2506, and 2509-2513.*

The necessary determination is whether the Respondent's alleged damages are a result of non-concurrency, were not foreseeable, were not anticipated, are excusable, and are compensable.

On its counterclaims, Respondent is granted, for

Material

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Material" counterclaim against Claimant of \$289,535.00. Throughout the duration of the project, Respondent maintained cost records and job cost summaries during three sequential periods. However, Respondent did utilize three accounting software systems. *See, R-19, Exhibit B at CAN 19996; R-19, Exhibit C; R-20, page 20 and Exhibit 10; R-35, Tabs 1 and 2; R-36; R-37, Pilote Tr. 2102, 2105, and 2106.*

Claimant opposed the \$289,535.00 "Material", impact counterclaim alleging that the three accounting software systems introduced accounting system conversion errors. *See, R-19, Exhibit C; R-35, Tab 1; R-36; R-37, Pilote Tr. 2105, and 2106.*

Material Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$289,535.00 "Material", impact counterclaim from Claimant, it is denied and Respondent awarded:

\$ 0.00

Detailing

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Detailing" counterclaim in connection with shop drawings, design changes, Requests For Information, clarification requests, and control of fabrication, assembly, and disassembly against Claimant of \$51,432.00. *See, R-19, Exhibit C at CAN 16690; R-20, page 15 and Exhibit 10; R-35, Tab 3; Pilote Tr. 2127, 2128.*

Claimant opposed the \$51,432.00 "Detailing", impact counterclaim. *See, R-19, Exhibit A.*

Detailing Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$51,432.00 "Detailing", impact counterclaim, it is denied and Respondent awarded:

0.00

Miscellaneous and other (testing, etc.)

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Miscellaneous and other (testing, etc.)" counterclaim in connection with hole drilling, surveying, and delivery against Claimant of \$156,202.00. *See, R-9 at CAN 602-606; R-19, Exhibit C at CAN 16690; R-20, page 15; R-35, Tab 4; Bernier Tr. 1851, 1852, 1855, 1856, 1860, 1861, 1862; Pilote Tr. 2131.*

Claimant opposed the \$156,202.00 "Miscellaneous and other (testing, etc.)" counterclaim. *See, R-19, Exhibit A.*

Miscellaneous and other (testing, etc.) Conclusion

Respondent having persuasively justified its entitlement to and having persuasively established by a credible preponderance of testimonial and of documentary evidence its entitlement to the \$156,202.00 "Miscellaneous and other (testing, etc.)" counterclaim, it is granted and Respondent awarded:

156,202.00

Fabrication and Equipment Rental

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Fabrication and Equipment Rental" counterclaim in connection with equipment rental against Claimant of at least \$352,319.00. *See, R-19, Exhibit C at CAN 16690; R-20, page 15 and Exhibit 10; R-35, Tab 5; Pilote Tr. 2121, 2122, 2123.*

Claimant opposed the \$352,319.00 "Fabrication and Equipment Rental", impact counterclaim. *See, C-215; C-588; C-592; R-19, Exhibit A; Pilote Tr. 2121, 2122, 2123, 2199-2210.*

Fabrication and Equipment Rental Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$352,319.00 "Fabrication and Equipment Rental", impact counterclaim from Claimant, it is denied and Respondent awarded:

0.00

Painting

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Painting" counterclaim against Claimant of at least \$210,712.00. *See, R-3, R-4, R-6 through R-18; R-19, Exhibit C at CAN 16690; R-20, pages 15 and 16, and Exhibit 10; R-35, Tab 5; Pilote Tr. 2121, 2122, 2123.*

Claimant opposed the \$210,712.00 "Painting" counterclaim. *See, R-19, Exhibit A; Bolyard Tr. 2687-2694.*

Painting Conclusion

Respondent having persuasively justified its entitlement to and having persuasively established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$210,712.00 "Painting" counterclaim, it is granted and Respondent awarded:

210,712.00

Trucking

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Trucking" counterclaim against Claimant of \$474,660.00. *See, R-19, Exhibit B at CAN 19996; R-19, Exhibit C at CAN 16690; R-36; R-37; Bernier Tr. 1904, 1916-1918, 1929; Bradley Tr. 2293, 2294; Hand Tr. 1582-1586, 1650, 1651; Pilote Tr. 2083-2092, 2094-2098.*

Claimant opposed the \$474,660.00 "Trucking", impact counterclaim alleging missing invoices, accounting system conversions, or erroneous cost coding resulting in unreliable financial data. *See, Bradley Tr. 2324-2326; Pilote Tr. 2083-2092, 2094-2098.*

Trucking Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$474,660.00 "Trucking", impact counterclaim from Claimant, it is denied and Respondent awarded:

0.00

Direct Labor & Indirect Costs

A review of the relevant, related, or both, information below justifies the following resolution of this portion of the award sought by Respondent.

Respondent asserted a "Direct Labor & Indirect Costs" counterclaim in connection with shop drawings, design changes, Requests For Information, clarification requests, and delivery against Claimant of \$2,050,285.00. *See, R-19, Exhibit B at CAN 16555 and 19996; R-19, Exhibit C at CAN 16690.*

Claimant opposed the \$2,050,285.00 "Direct Labor & Indirect Costs", impact counterclaim. *See, Pilote Tr. 2039-2040.*

Direct Labor & Indirect Costs Conclusion

Not having established by a credible preponderance of testimonial or of documentary evidence its entitlement to the \$2,050,285.00 "Direct Labor & Indirect Costs", impact counterclaim from Claimant, it is denied and Respondent awarded:

0.00

Respondent Total

\$ 366,914.00

Accordingly, I AWARD as follows:

Within thirty (30) days from the date of transmittal of this Final Enlarged, Reasoned Award to the Parties, RESPONDENT shall pay to CLAIMANT, the "initial award" (C-536, TPJV 000 25888) sum of **SIX MILLION, FIVE HUNDRED SEVENTEEN THOUSAND, TWENTY-TWO DOLLARS AND NO CENTS** (\$6,517,022.00); less the amount that Claimant may now reimburse itself from escrow (approximately \$961,100.00), with interest on the remaining amount; i.e., \$6,517,022.00 - approximately \$961,100.00, at 9% per annum, without compounding, from September 19, 2008 (R-20, pg. 17, fn. 12; Canam Post Hearing Memorandum, pg. 14), until payment.

The Attorney's Fees and Expenses of each party shall be borne as incurred.

The compensation and expenses of the arbitrator shall be borne equally.

The Parties are to arrange to obtain all drawings or exhibits in the possession of the Arbitrator by January 1, 2016, after which date said documents shall be destroyed.

If any provision of this Final Enlarged, Reasoned Award or the application of any such provision to any person or circumstance is held invalid, the remainder of this Final Enlarged, Reasoned Award, and the application of such provision other than the extent to which it is held invalid, will not be invalidated or affected thereby.

~~This Final Enlarged, Reasoned Award is after full and complete consideration and in full and complete settlement of all claims, offsets, or counterclaims which were submitted or which could have been submitted in this Arbitration. All claims or counterclaims between the parties not expressly granted herein are hereby denied.~~

This Final Award shall be enforceable under the provisions of New York State law, CPLR Article 75; the Federal Arbitration Act, 9 USC Section 1 *et seq.*; and the United Nations Convention on Contracts for the International Sale of Goods as applicable.

An electronically transmitted version of this document is deemed an original.

June 4, 2015

Date