

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Encon Arizona LLC,

Plaintiff,

v.

Kiewit Infrastructure West Company,

Defendant.

No. CV-19-05364-PHX-DLR
ORDER

This matter was tried to the Court on January 10, 11, 12, 13, 23, and 24, 2023. The parties have submitted written closing arguments and proposed findings of fact and conclusions of law. The Court has considered the evidence presented and the arguments of counsel.

I. FINDINGS OF FACT

1. This case stems from a \$600 million road construction project to upgrade freeway and surface road infrastructure in and around the I-15/US95 interchange in the heart of Las Vegas, Nevada known as Project Neon (“the Project”).

2. On November 9, 2015, Kiewit Infrastructure West Company (“Kiewit”) entered a contract with the Nevada Department of Transportation (“NDOT”), the Prime Contract for Project Neon (“the Prime Contract”), to act as the project’s Design/Builder.

3. On October 13, 2016, Kiewit subcontracted the design, fabrication, and delivery of precast concrete bridge girders to TPAC.

1 4. The primary girder type specified for Project Neon, and that TPAC agreed to
2 produce, is commonly known as Cal-Trans or California wide flange (“CAWF”).

3 5. The Material Contract incorporates the Prime Contract.

4 6. The Material Contract was structured as a unit price agreement between
5 Kiewit and TPAC.

6 7. The Material Contract has separate unit prices for the base scope of work and
7 for pricing of changes made pursuant to Section 4 of the Material Contract.

8 8. TPAC’s “Proposal Letter” dated February 1, 2016, shows unit pricing that
9 includes the cost of girder casting forms, and those unit prices are the same as the girder
10 unit prices shown in the “pricing of changes” table in the Material Contract.

11 9. Under the terms of the Material Contract, the Parties agreed that time was of
12 the essence for TPAC’s scope of work:

13 Seller shall prosecute the Work undertaken in a prompt,
14 efficient and workmanlike manner as to promote the general
15 progress of the entire construction, and shall not by delay or
16 otherwise, interfere with or hinder the Work of Contractor or
17 its subcontractor.

18 10. The Material Contract imposed several scheduling requirements and
19 remedies in the Material Contract:

20 **Section 5(a) (“Prosecution of the Work”):** “[TPAC] shall
21 prosecute the Work undertaken in a prompt, efficient and
22 workmanlike manner so as to promote the general progress of
23 the entire construction, and shall not, by delay or otherwise,
24 interfere with or hinder the work of [Kiewit] The time of
25 performance of the Work by [TPAC] is of the essence and
26 [TPAC] agrees to reimburse [Kiewit] **for all liquidated
27 and/or actual damages that may be assessed by the Owner
28 against [Kiewit]** which are attributable to or caused by
[TPAC’s] failure to perform the Work required by this
Contract within the time fixed or in the manner provided
herein.....

Attachment B, section AP-A1.C.: “[TPAC] shall make
schedule commitments, submit schedules and scheduling
information and submit any other required information to
[Kiewit] as is necessary for [Kiewit] to comply with its
schedule and reporting commitments to [NDOT] under the
Prime Contract.”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attachment B, section AP-C1 “Schedule”: “[TPAC] shall schedule its work in accordance with the [Kiewit]’s schedule and coordinate its work in accordance with [Kiewit]’s progress. . . . [TPAC]’s schedule is subject to modification by [Kiewit] as required to accommodate the overall project schedule, and other work that interfaces with [TPAC]’s work.”

Section 4 (“Changes”), subpart (a): [Kiewit] may at any time by written order of [Kiewit]’s authorized representative . . . make changes in, additions to and deletions from the materials to be furnished under this Contract, and [TPAC] shall promptly proceed with the performance of this Contract as so changed.

Section 6 (“Delays”), subpart (a): “In the event [TPAC]’s performance . . . is delayed or interfered with by acts of Owner, [Kiewit] or other subcontractors, or by any other events for which [TPAC] is entitled to a time extension under the terms of the Prime Contract, it may request an extension of the time for the performance of same”

Section 6 (“Delays”), subpart (b): “No allowance for an extension of time for any cause whatsoever shall be claimed by, or granted to, [TPAC] unless [TPAC] shall have made written request upon [Kiewit] for such extension within forty-eight (48) hours after the event giving rise to such request”

Section 3(b) (“Payment”) of the Subcontract: “[Kiewit] may deduct from any amounts due or to become due [TPAC] any sum or sums owed by [TPAC] to [Kiewit].”

Section 5 (“Prosecution of the Work”):

(a) . . . [TPAC] also agrees to pay to [Kiewit] any increased costs or other actual damages incurred or paid by [Kiewit] by reason of delay by [TPAC].

(b) . . . [Kiewit] may . . . furnish or secure elsewhere the necessary materials to remedy the situation, at the expense of [TPAC], including reasonable attorneys’ fees.

1 11. The Material Contract presented estimated quantities based on a tentative
2 engineering design at an estimated unit price per linear foot of various height girders.

3 12. This was a large, design-build project that the parties understood would
4 involve many design and scheduling changes—and changes to casting schedules—
5 primarily due to ongoing design development and revisions that were not finalized at the
6 time of entering into contract.

7 13. As a design-build project even at the point the Material Contract was entered
8 into, many aspects of the design of the girders were unknown, such as the final length,
9 number, and composition of the girders.

10 14. When the Material Contract was executed, the preliminary schedules and
11 girder quantity estimates were not finalized; consequently, the Material Contract did not
12 include a written schedule or final quantity of bridge girders.

13 15. It was not unusual in complex design-build highway construction for the
14 parties to enter into the Material Contract before “ready for construction” bridge designs and
15 drawings had been finalized for all bridges, and before final girder sizes and quantities had
16 been fully determined.

17 16. Instead of containing finalized bridge designs and drawings, the Material
18 Contract provided for delivery of precast girders upon a schedule to be coordinated by
19 Kiewit and TPAC’s designated Erect Manager.

20 17. Although referenced in Article 1 of the Material Contract as being attached
21 as Attachment A, the Material Contract did not contain any production or delivery schedule.
22 Such performance was to be coordinated between TPAC and Kiewit.

23 18. Because there was no set schedule, an implicit term of the Material Contract
24 was that both parties would act reasonably and in good faith to move the project forward in
25 their coordination of scheduling.

26 19. The Project involved three phases. The second phase had a deadline known
27 as the I-15 Milestone, a 252-day period in 2018.

28

1 20. The Prime Contract provided information to identify the I-15 Milestone date
2 of November 12, 2018, but TPAC did not know or rely on the Prime Contract deadlines for
3 the scheduling of its girder productions.

4 21. TPAC was reliant on Kiewit, the project's general contractor, for information
5 regarding the overall project as a schedule evolved.

6 22. Under the Prime Contract, Kiewit would be penalized \$100,000 for every
7 day the I-15 Milestone work went past the designated deadline.

8 23. Under the Prime Contract, Kiewit would receive incentive of \$100,000 for
9 every day that it completed the I-15 Milestone work before the designated deadline.

10 24. The Prime Contract does not specify the exact start date for work associated
11 with the I-15 Milestone.

12 25. Kiewit knew the precise interim milestone date for the completion of I-15 for
13 the Project.

14 26. Kiewit did not inform TPAC of the bridge girders needed for completion of
15 the I-15 Milestone.

16 27. March 6, 2018 was the Permitted Construction Close date that initiated the
17 November 13, 2018 deadline for the I-15 Milestone's completion, and November 13, 2018,
18 was the deadline to complete I-15.

19 28. No schedule prepared by Kiewit and provided to TPAC included the
20 construction deadline date identified as the I-15 Milestone.

21 29. Kiewit did not provide TPAC with the baseline Project construction schedule
22 that outlined the entire sequence of construction for the Project.

23 30. Shortly after contracting with Kiewit and committing to Project Neon, TPAC
24 entered a contract for the Connect 202 Project, which required three times the girder
25 production of Neon.

26 31. This created manpower and facility resource management issues for TPAC,
27 including having to balance its only two casting beds/lines between the two large jobs.

28

1 32. The CAWF forms for Neon could only be used on one of two girder casting
2 beds/lines at TPAC’s facility, known as “bed 480” (or the “480 line”), but the girders for
3 Connect 202 were casted using both the 480 and 450 beds/lines.

4 33. On April 6, 2016, Kiewit provided TPAC a summary listing of the bridge
5 girders that Kiewit contended aligned with the construction sequence in the baseline
6 construction schedule for the overall Project.

7 34. The April 6, 2016 summary identified a November 28, 2016 initial erection
8 date for the first bridge and listed January 22, 2019 as the last girder erection date.

9 35. Kiewit provided to TPAC another girder production schedule on August 19,
10 2016 that listed November 16, 2016 as the initial date delivery for the first girders for the
11 Project.

12 36. The August 19, 2016 schedule listed January 22, 2019 as the last identified
13 erection date for bridge girder production.

14 37. Fink was the most knowledgeable person at TPAC concerning casting
15 production and scheduling for the Project, until about April 2018 when he transitioned into
16 a different role at TPAC.

17 38. Scheduling for the project “was generally coordinated,” and there were many
18 coordination meetings where TPAC and Kiewit kept in communication with each other.

19 39. In addition to coordinating the schedule for girder production, TPAC
20 prepared construction shop drawings to outline the proposed design and materials used for
21 the fabrication of bridge girders for the Project.

22 40. Kiewit, as the contractor and architect/engineer, along with NDOT approved
23 TPAC’s submitted project submittals.

24 41. TPAC required approved shop drawings to order materials and begin
25 fabrication of precast girders.

26 42. TPAC received the initial set of approved shop drawings for girder
27 fabrication on September 23, 2016.

28

1 43. TPAC delivered its first set of bridge girders from November 3 to November
2 8, 2016.

3 44. On December 21, 2016, TPAC sent Kiewit a letter “providing the project
4 sufficient notice that delays in receiving final contract plans and erect schedules will cause
5 potential delays to the fabrication and deliver of the girders.” The December 21, 2016 letter
6 noted:

7 Since the project has been awarded there have been several
8 changes to schedule (erection sequence) and girder sizes. The
9 original schedule received April 4, 2016 had deliveries
beginning September 26, 2016.

10 45. In that same letter, as a consequence of committing to the Connect 202
11 project shortly after committing to Project Neon, TPAC provided Kiewit with dates when
12 it would utilize its facilities for girder production or “production openings” (or “production
13 windows”) as provided in Fink’s December 21, 2016 letter to Kiewit.

14 46. The purpose of proposing production windows was to allow TPAC to
15 coordinate its girder production so that, with its resources and facilities, it could timely
16 produce girders for both the Neon and Connect 202 projects.

17 47. Kiewit did not send a written response to the December 21, 2016 TPAC
18 correspondence to the proposed manufacturing windows, but Kiewit appeared to agree as
19 subsequent Kiewit production schedules fit into TPAC’s manufacturing openings.

20 48. On January 25, 2017, Kiewit issued a January 25, 2017, girder schedule
21 which moved the completion dates of all girder fabrication to June 2019.

22 49. From August 2016 to mid-March 2018, Kiewit provided TPAC at least ten
23 different girder production schedules that changed the delivery dates and sequence of
24 precast bridge girders needed for the Project, and which would most often not include all
25 Project bridges.

26 50. Kiewit provided TPAC an updated preliminary girder erection schedule on
27 January 25, 2017, approximately three months after the effective date of the Material
28 Contract.

1 51. The January 2017 preliminary schedule showed that, as of that that time,
2 Kiewit was considering erecting all but three bridges by September 2018.

3 52. The January 25, 2017, girder production schedule was the last girder
4 production schedule provided to TPAC by Kiewit that contained all bridges until the
5 schedule issued in March 2018.

6 53. When TPAC first began casting girders for Phase 1, the parties initially
7 followed the August 19, 2016 schedule, which was modified by multiple later schedules,
8 such as the schedules dated January 25, 2017 and July 7, 2017.

9 54. The deadline for producing Phase 1 girders for any particular bridge was
10 dictated by the latest applicable schedule at the time the particular bridge assignment was
11 given to TPAC.

12 55. The parties worked cooperatively in preparing future tentative schedules,
13 including during the summer and fall of 2017, in an effort to prepare a tentative schedule
14 for the 2018 girder production.

15 56. TPAC and Kiewit personnel communicated regularly during the summer of
16 2017 into October regarding completion of the 2017 season and planning for the 2018
17 schedule

18 57. Kiewit and TPAC held Project meetings and corresponded about proposed
19 fabrication and delivery dates of the requested bridge girders.

20 58. TPAC and Kiewit personnel resumed their 2018 schedule coordination
21 efforts in February and March 2018.

22 59. In February 2018, the overall Project was 5 days behind the I-15 Milestone
23 schedule, as reflected in the February Schedule Update to NDOT.

24 60. Kiewit grew concerned that it was not on track to meet the I-15 Milestone
25 date of November 12, 2018 and could face the contractual penalty of \$100,000 per day the
26 construction went past that deadline.

27 61. Kiewit's prepared February Schedule Update to NDOT predicted that Kiewit
28 would need to submit "Recovery Schedules on a monthly basis."

1 62. TPAC was not responsible for the Project being behind schedule.

2 63. To catch up with where the construction should be, Kiewit proposed an
3 aggressive March 2018 girder production schedule.

4 64. As the final schedule was reaching conclusion, Kiewit sent TPAC an email
5 on February 14, 2018, with the subject line “2018 Girder Schedule,” and attaching an Excel
6 spreadsheet titled “2018 TPAC Girder Schedule.”

7 65. Fink forwarded the email and attached schedule to TPAC personnel Scott
8 Krieger, stating in relevant part, “This is the schedule for Project Neon.”

9 66. Kiewit then sent TPAC an email on February 19, 2018, with the subject line
10 “Neon Schedule,” and attaching a pdf spreadsheet titled “Girder Schedule.”

11 67. Representatives for both parties met at TPAC’s office on February 28, 2018
12 to discuss the February 19 schedule and the potential removal of bridges from TPAC’s
13 scope of production.

14 68. The discussion at the February 28 meeting included the upcoming 2018
15 bridge girder casting season, order/sequence of various bridges, casting durations, and the
16 possible need to remove a bridge from the schedule.

17 69. Neither party’s schedule met project needs, unless one or more bridges was
18 removed from TPAC’s scope.

19 70. Kiewit was informed at the February 28 meeting that TPAC was not going
20 to meet the March 26 start date for the 2018 casting season.

21 71. By the time of Kiewit’s March 2018 update to NDOT, Kiewit’s prepared
22 Project schedule showed the I-15 Milestone to be 28 days behind schedule.

23 72. In its March 2018 update Kiewit informed NDOT that the only two bridges
24 that involved the setting of precast girders fabricated by TPAC on the critical path were
25 bridges 937S and the 3055 HOV Connector.

26 73. Kiewit grew more concerned about the looming the I-15 Milestone.
27
28

1 74. TPAC informed Kiewit that it would need to push back the first day of
2 casting to March 26, 2018. Then, during discussions in finalizing the March 17, 2018
3 schedule, TPAC requested April 2 as its start date under that schedule.

4 75. Jody Schott and his superior Gene Van Wagner of Kiewit met in person with
5 Dave Chapin of TPAC on March 9, 2018, to discuss why TPAC would be starting in late
6 March with an already tight 2018 casting schedule.

7 76. Kiewit sent TPAC an email on March 14, 2018, with the subject line “Casting
8 Schedule 3-12-18,” and attaching a pdf spreadsheet titled “TPAC Casting Schedule 3-12-
9 18.”

10 77. The email states, “This is the schedule that we reviewed with you a couple
11 weeks ago but for moving 936S ahead and 3053 ahead to optimize form changes. Also,
12 934N and 935N are pulled out of the casting sequence and listed at the bottom of the
13 schedule.”

14 78. Schott had a follow up scheduling conference call on March 16, 2018 with
15 Chapin, Fink, and Miske.

16 79. They continued discussing the need to remove a bridge from TPAC’s scope
17 and schedule, and they selected 935N.

18 80. At this same meeting, Fink suggested adjusting a few casting durations and
19 some other changes.

20 81. Kiewit’s and TPAC’s scheduling teams agreed to remove 935N from the
21 March 17 schedule.

22 82. The adjustments and revisions identified in the March 16, 2018 call were
23 subsequently submitted to TPAC in a proposed March 17, 2018, girder production schedule
24 that modified Kiewit’s February 19, 2018, and March 12, 2018 proposed girder production
25 schedules, moving up the delivery deadlines for several precast bridge girders remaining
26 in TPAC’s scope of work.

27
28

1 83. Schott’s March 31, 2018 letter to Dave Chapin confirmed the desire to
2 remove bridge 935N, and informed TPAC of significant liquidated damages it would face
3 if the current phase finishes late.

4 84. The letter also informed TPAC that Kiewit had been searching for another
5 fabricator and requested that Chapin to provide in writing any other options that TPAC may
6 have identified for supplying the 935N girders.

7 85. Also on March 31, 2018, in response to Fink’s request for the latest updated
8 schedule, Miske sent a copy of the March 17, 2018 schedule.

9 86. Fink did not respond to Miske and did not indicate that TPAC accepted the
10 March 17, 2018, schedule.

11 87. Fink testified that all of the schedules TPAC received from Kiewit were
12 merely a “wish list”—including the March 17, 2018 schedule developed after months of
13 discussions and particularly significant efforts to finalize it in February and March 2018—
14 and that TPAC was never under an agreed upon schedule that required certain girders to be
15 cast by certain dates.

16 88. Fink testified that “[TPAC] did not commit to that [March 17, 2018]
17 schedule.”

18 89. In a letter of March 31, 2018, Kiewit notified TPAC that it expected TPAC
19 to fabricate and deliver bridge girders by the dates listed in its proposed March 17, 2018
20 schedule.

21 90. After Kiewit revised and finalized the schedule to commence on April 2, and
22 despite having already removed bridge 935N from its scope, TPAC did not start until April
23 5, 2018.

24 91. By April 9, 2018, TPAC understood it was well behind the March 17, 2018
25 schedule, and considered hiring other girder manufacturers to supplement its production
26 obligations.

27
28

1 92. TPAC notified Kiewit by an April 13, 2018 letter that the girder production
2 dates set forth in Kiewit’s March 17, 2018 schedule were not achievable due to Kiewit’s
3 previous changes to the sequence of bridge girders and corresponding dates for delivery.

4 93. TPAC notified Kiewit in the April 13, 2018 letter that it has been unable to
5 locate a supplemental girder supplier.

6 94. Kiewit was concerned about TPAC’s ability to timely produce and deliver
7 girders for Bridges 935N and 3053.

8 95. In May 2018—and with TPAC’s approval—Kiewit transferred the
9 fabrication of bridges girders for bridges identified as 935N and 3053 to its affiliate Kie-
10 Con, Inc., an Antioch, California based precast concrete bridge girder company.

11 96. Kie-Con was the only viable option that either Kiewit or TPAC could find.

12 97. Although Kie-Con and Kiewit are legally separate entities, both companys’
13 profits are funneled to the same company.

14 98. Although TPAC suggested that Kiewit’s and Kie-Con’s relationship meant
15 that the contract for the manufacture and delivery of girders could not be an arm’s length
16 transaction, no evidence has been offered to support that suggestion other than their
17 relationship as sister corporations.

18 99. Although Kie-Con employee Farshad Mazloom, in an email of April 5, 2018
19 to Will Radak of Kiewit concerning construction and delivery of bridge girders for Bridge
20 935N, stated “We do not need any other agreements either as we are all the same company”
21 no evidence was offered to show that the agreements for the Kie-Con to construct the
22 girders for the three bridges was not an arm’s length transaction.

23 100. Under the Material Contract TPAC was to be paid \$748,313 for girders for
24 those three bridges.

25 101. Kie-Con charged \$1,697,726 or \$949,412 (the “Kie-Con premium”) more
26 than TPAC.

27
28

1 102. The communications between Kiewit and TPAC about the costs TPAC
2 agreed to assume for Kie-Con's production of girders did not clearly define what was
3 agreed.

4 103. Kiewit explained that there would be costs associated with Kie-Con's
5 overtime.

6 104. TPAC wrote that it agreed to be responsible for the \$350,000 cost to construct
7 girders for Bridge 935N.

8 105. It did not agree to a blank check for Kie-Con's work.

9 106. However, there was no evidence presented that the Kie-Con premium was
10 not reasonable.

11 107. There was no evidence presented about what profits were made by Kie-Con
12 or if the profits were typical and reasonable for the industry.

13 108. Because Kie-Con was unable to manufacture all the girders in the March
14 2018 schedule according to the schedule, it failed to perform the work in the manner
15 provided for in the Material Contract as it pertains to Bridges 935N and 3053.

16 109. That work was performed by Kie-Con.

17 110. Pursuant to the Material contract:

18 **Section 5 ("Prosecution of the Work"):**

19 “(a) . . . [TPAC] also agrees to pay to [Kiewit] any
20 increased costs or other actual damages incurred or paid
by [Kiewit] by reason of delay by [TPAC].”

21 “(b) . . . [Kiewit] may . . . furnish or secure elsewhere
22 the necessary materials to remedy the situation, at the
23 expense of [TPAC], including reasonable attorneys'
fees.”

24 111. Kiewit incurred the increased costs of the last-minute girder production by
25 Kie-Con.

26 112. In June, 2018, without TPAC's approval, Kiewit transferred the fabrication
27 of bridges girders for bridges identified as 936N to its affiliate Kie-Con.
28

1 113. TPAC had not expressed an unequivocal manifestation that it could not
2 fabricate Bridge 936N in timely fashion.

3 114. Kiewit was not justified in transferring the girder production for Bridge 936N
4 to Kie-Con.

5 115. TPAC completed girder fabrication for Bridge 937S on May 14, 2018.

6 116. Kiewit has made no allegation in this action that it was delayed in Bridge
7 937S at the time of setting these girders later in June.

8 117. TPAC's production rates in June 2018, did not support Kiewit's belief that
9 TPAC's production indicated its inability to fabricate Bridge 936N girders in the time
10 requested by Kiewit.

11 118. TPAC completed fabrication and delivery of Bridge 937N girders by August
12 31, 2018, several weeks ahead of schedule.

13 119. Kiewit's requested delivery date for 936N was September 20, 2018.

14 120. Kiewit achieved the I-15 Milestone twelve days early and was paid a
15 \$1,181,250.00 early completion bonus.

16 121. Kiewit was paid \$6,000,000 as an early completion bonus for achieving
17 Project substantial completion 60 days early.

18 122. By completing the I-15 Milestone 12 days early, Kiewit did not incur fixed
19 costs and overhead costs of \$140,000 per day or \$1,680,000.

20 123. Kiewit's acceleration of the Project, including the acceleration of the bridge
21 girders, rendered financial benefits to Kiewit of \$1,181,250.00 (early completion bonus)
22 and savings of \$1,680,000 ($\$140,000 \times 12$) for a total of \$2,861,250.00

23 124. Kiewit's decision to move the remaining bridge girder deliveries and
24 installation into calendar year 2018 resulted in Kiewit's achievement of early completion
25 of Project Substantial Completion for a bonus of \$6,000,000.

26 125. Kiewit claims damages for two girders produced by TPAC for Bridge 933N
27 that were cracked.

28 126. TPAC replaced the girders.

1 127. Although the girders were replaced, Kiewit claims damages for lost
2 productivity, additional lumber and crane costs, and division overhead/corporate G&A
3 costs as damages related to the cracked girders.

4 128. Kiewit claims that re-casting the girders delayed the delivery of the girders
5 by several weeks, and that they were not delivered with the required embedded inserts/pipe
6 sleeve used to facilitate Kiewit's construction of the Case in Place Deck and resulted in
7 additional girder erection costs of \$211,201,01.

8 129. The two girders were delivered on August 8 and August 9, 2018.

9 130. Kiewit failed to establish that recasting the girders caused the alleged loss of
10 productivity.

11 131. Kiewit did not support this claim with invoices, labor reports, or cost reports
12 to support the claim or the rates it used to calculate damages.

13 132. Kiewit failed to show that corporate overhead costs increased because of the
14 costs incurred in this claim.

15 133. Kiweit has not established the additional damages it alleges as result of the
16 recasting of the two girders for bridge 933N.

17 134. Kiewit also claims a variety of other damages totaling \$155,076.77.

18 135. Kiewit did not establish by a preponderance of evidence its right to recover
19 the "other damages" totaling \$155,076.77, for which it claims TPAC is responsible.

- 20 • 934 Steel Bridge Girder Haul (\$67,381.25)
- 21 • Garbro Concrete Bucket Purchase by TPAC
- 22 • 936 Girder Tie Down Lugs (\$9,860.67)
- 23 • 937 Girder Insert (\$1,556.89)
- 24 • Missed Bevel Plate Installation (\$3,406.31)
- 25 • 937N Trucking Issues (\$34,130.17)
- 26 • 3062 Girder Delay (\$31,966.10)
- 27 • 3057 underdeck lighting embeds (\$1,297.23)

28

1 136. Kiewit claims it lost three days of bonus based on the timing of the
2 completion of Bridge 937N.

3 137. Kiewit claims damages of \$300,000 for the alleged three days of lost
4 incentive payments at the rate of \$100,000 per day.

5 138. Bridge 937N was scheduled for completion on September 28, 2018, and was
6 completed 8 days early.

7 139. The early erection of Bridge 937N contributed to the early completion of I-
8 15 Milestone.

9 140. Kiewit has failed to prove that it incurred damages of \$300,000 for the
10 alleged three days of lost incentive payments at the rate of \$100,000 per day, as a result of
11 TPAC's alleged failure to timely deliver girders for Bridge 937N.

12 **II. CONCLUSIONS OF LAW**

13 141. Pursuant to the Material Contract that TPAC was obligated, with or without
14 its agreement, to comply with the March 17, 2018 Schedule:

15 142. TPAC has not shown that it was impossible for it to meet that schedule.

16 143. TPAC's failure to be ready to timely cast and deliver girders for Bridges
17 935N and 3053 entitled Kiewit to remove them from TPAC's scope of work.

18 144. TPAC was ready to timely cast and deliver girders for Bridge 936N when it
19 was removed from its scope of work.

20 145. Kiewit was not entitled to remove Bridge 936N from TPAC's scope of work.

21 146. Pursuant to Section 5(a) of the Material Contract TPAC agreed to pay Kiewit
22 an increased costs paid by Kiewit by reason of TPAC's delay.

23 147. Section 5(b) of the Material Contract authorized Kiewit to secure the
24 materials not provided timely by TPAC elsewhere at the expense of TPAC.

25 148. Although the cost of Kie-Con's work, compared to TPAC's contract price
26 was high, and despite the corporate relationship between Kiewit and Kie-Con, and the fact
27 that they knew that TPA may be responsible for paying the bill, to the benefit of the
28

1 corporation that held both Kiewit and Kie-Con, there was no evidence presented to show
2 that the Kie-Con contract was not reasonable under the circumstance.

3 149. The Court finds that TPAC bears the burden of establishing unreasonability
4 of cover sought by Kiewit, and that TPAC did not meet that burden at trial.

5 150. This matter involves the production, sale, and delivery of goods, and thus the
6 Arizona Uniform Commercial Code applies to this matter. Pursuant to A.R.S. § 47-2712,
7 upon the seller's breach, "the buyer may 'cover' by making in good faith and without
8 unreasonable delay any reasonable purchase of or contract to purchase goods in
9 substitution for those due from the seller." Further, the "buyer may recover from the seller
10 as damages the difference between the cost of cover and the contract price together with
11 any incidental or consequential damages (less expenses saved in consequence of the
12 seller's breach)." *Id.*

13 151. Kiewit bears the initial burden of proving that it met the prima facie
14 requirements for effective cover. Once Kiewit establishes its prima facie case, the burden
15 shifts to TPAC to prove Kiewit did not satisfy those elements. 12 Am. Jur. Proof of Facts
16 2d 145, § 13. Kiewit offered evidence meeting all five elements of effective cover:

- 17 (1) There was a breach by TPAC;
- 18 (2) Kiewit acted in good faith;
- 19 (3) Kiewit acted without unreasonable delay;
- 20 (4) Kiewit made a reasonable purchase of other goods; and
- 21 (5) The other goods were purchased as a substitute for those
22 due from seller.

23 *Id.* at § 3

24 152. Although there is cause for concern about whether this was an arms-length
25 transaction, because of the lack of evidence presented challenging the reasonableness of
26 Kie-Con's charges, the corporate relationship does not preclude Kiewit from recovering
27 amounts paid by Kiewit to Kie-Con.

28

1 153. Kie-Con was entitled to earn a profit for timely supplementing girder
2 production that TPAC could not fulfill.

3 154. Based on the lack of evidence that the Kie-Con premium was unreasonable,
4 the urgency of the need for the production of the girders, the fact that there was no other
5 entity known to either party that could produce the girders on such short notice, and the
6 higher labor costs in California than Arizona, labor overtime, a shipping distance which is
7 250 miles longer and higher costs of concrete mix and rebar in California, the Kie-Con
8 charges are not unreasonable.

9 155. Pursuant to the clear and unambiguous terms of the Material Contract, Kiewit
10 is entitled to recover its actual damages in the amount of \$733,151.80 for the premiums
11 paid by Kiewit to Kie-Con for Kie-Con's casting of girders for Bridges 935N and 3053.

12 156. Because TPAC was ready willing and able to timely manufacture and deliver
13 the girders for Bridge 936N, Kiewit is not entitled to recover the money paid Kie-Con for
14 the girders of that bridge.

15 157. Kiewit is not entitled to recover the Kie-Con premium of \$216,260.88 it paid
16 for the production and delivery of the girders for Bridge 936N.

17 158. Kiewit has not proven TPAC's alleged failure to produce and deliver girders
18 timely.

19 159. Kiewit has not proven that TPAC caused a three-day delay resulting in a loss
20 of incentive pay.

21 160. Kiewit may not recover as actual damages the three days of "incentive
22 bonus" equal to \$300,000 that it claims it would have received.

23 161. Kiewit has not proven by a preponderance of the evidence that it is entitled
24 to recover \$155,076.77 to compensate it for other miscellaneous charges relating to:

- 25 • 934 Steel Bridge Girder Haul (\$67,381.25)
- 26 • Garbro Concrete Bucket Purchase by TPAC (5,478.15)
- 27 • 936 Girder Tie Down Lugs (\$9,860.67)
- 28 • 937 Girder Insert (\$1,556.89)
- Missed Bevel Plate Installation (\$3,406.31)
- 937N Trucking Issues (\$34,130.17)

- 3062 Girder Delay (\$31,966.10)
- 3057 underdeck lighting embeds (\$1,297.23)

162. Kiewit has not provided sufficient foundation or explanation of the nature of the claims, or how TPAC caused or is legally responsible for these alleged damages or the reasonableness of the amounts claimed.

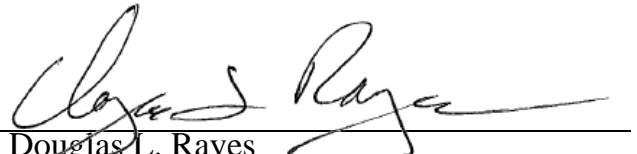
163. The unpaid balance owed TPAC at the completion of its work under the Material Contract \$1,618,620.

164. Kiewit is entitled to a setoff for the premium it paid Kie-Con for the fabrication and delivery of the girders for bridges 935N and 3053 in the amounts of \$733,128.08.

165. The balance owed TPAC under the Material Contract is \$885,491.92.

IT IS ORDERED that Counsel for Plaintiff shall submit a proposed form of judgment in accordance with the Findings of Fact and Conclusions of Law herein within 14 days of the date of this order.

Dated this 12th day of April, 2023.



Douglas L. Rayes
United States District Judge