IN ARBITRATION

DENISON MINES (USA) CORP., a Delaware corporation et al.,

Claimants,

v.

KGL Associates, Inc., a Colorado corporation,

Respondent

INTERIM AWARD

Arbitrator: Paul J. Walstad

The evidentiary hearing in this matter was held in Salt Lake City, Utah for two weeks, i.e., November 4-8 and November 11-15, 2013. Prior to the hearing, counsel submitted to the Arbitrator numerous "Joint Exhibits," which included certain depositions, and Pre-Hearing Briefs. All witnesses were duly sworn and a "daily rough transcript" was made. Following the hearings, counsel submitted Post-Hearing Arbitration Briefs, Proposed Forms of Interim Award and Proffered Testimony of the two principals.

Having taken, thoroughly considered and weighed the evidence, the Arbitrator hereby makes the following discussion of facts and conclusions of law and makes this Interim Award. By stipulation of the Parties, this award was to be "reasoned" but limited in page length. This Award exceeds counsel's requested page limitation due to the complexity of some issues which require elaboration.

1. Denison Mines (USA) Corporate and Denison White Mesa, LLC ("Denison") is a uranium exploration and development company which owned or had interest in the White Mesa Mill in San Juan County, Utah ("mine") located near Blanding. The mine needed to expand its mine tailings containment system, and retained Geosyntec as the engineer and construction manager to, among other things,

design and construct Tailings Cell 4B ("Project"), including soil and rock excavation, engineered fill, subgrade preparation and installation of the cell liner. Mr. Harold Roberts is Denison's principal.

2. KGL Associates, Inc. (KGL) is a Colorado earthmoving and environmental construction company experienced in tailings cell construction and performing earthwork. Mr. Mark Kerr is its principal.

3. In March 2008, Denison solicited bids on a unit-price basis from which the base bid price was derived. The bid documents permitted Denison to request detailed data to determine the financial responsibility of the bidders to perform; however, importantly, no evidence was presented that Denison or its agent, Geosyntec exercised this right. Among other requirements, each bidder was to visit the site and familiarize itself with local conditions that could affect its cost, progress or performance of the work. A pre-bid conference was held by Denison at the site with potential bidders, including KGL; among the many items discussed, Denison and Geosyntec briefed the contractors on the presence of Indian ruins (IRs) within the Cell 4B footprint. According to Roberts' testimony, the bidders were "informed of the likelihood of archaeological sites and it was expected that consideration would be given in preparation of any bids. Nevertheless, it is now apparent that KGL failed to allow for the anticipated presence of archeological sites in their bid."

4. In 2008, KGL bid work required and its bid was substantially lower than other bids. Denison did not award the contract at that time for various reasons and all bids expired in May of 2008.

KGL'S ARGUMENT OF FRAUDULENT INDUCEMENT OF ITS CONTRACT

5. We now turn to the Project bid history that is centric to KGL's affirmative defense of alleged fraudulent inducement by Denison, by and through its agent Jim Cox of Geosyntec. Denison has attempted to dismiss the issue in short order, but I believe, due to its gravity, the defense requires some pages devoted to the facts and my weighing of them. KGL argues that this alleged fraudulent inducement, if true, trumps as a matter of law all of Denison's breach of contract claims and allows KGL to escape from liability for said claims and allows recovery by KGL of its claims.

6. When Denison wished to proceed with the Project, Geosyntec's representative, Jim Cox, asked KGL for a revised price without inclusion the liner for the 4B Cell, which would procured and installed by others (AEGL). On July 17, 2009, Cox transmitted a "Bid Worksheet" form to Kerr, stating, "Please fill out the attached bid worksheet with your new mob # etc. for all earthwork through subgrade prep. This is what we will use to finalize a contract." (Exh. 23) Kerr described this as follows: "The liner was removed from our scope of work and he asked us to bid through a number of line items for earthwork." (Tr. 456)

7. On July 20, 2009, Mr. Kerr finalized the revised pricing onto the Bid Worksheet providing a line item revised bid breakdown. Kerr testified... "pricing is increased and it doesn't have the liner items on it, okay, so we increased our price on the ground our items (sic) about $370,000." (Actual, $377,000.) Kerr's total revised price was $[redacted]. After Kerr completed "crunching numbers," Zoe Kimler, his assistant, inputted the numbers onto the form and at 10:15 a.m. on July 20, she transmitted the Bid Worksheet by email to Cox "for review" (Exhibit 25). The transmitting email from Zoe stated, "Attached is the current Bid Worksheet related to the Cell 4B construction. Please give Mark a call if you have any questions." Kerr received a call back from Cox a short time later.

8. Here is Mr. Kerr's testimony about the call from Mr. Cox during which the alleged fraudulent inducement occurred:

> Q. Okay. Well, then what happened next?
> A. The next I get a phone call from Mr. Cox and he is pretty aggravated and he's asking me why the price went up. And I gave him the same reasons that I'm talking about today, you know, margin, fuel, we'd waited quite a long time for this, and so any price increase over that time would have been reasonable, time is kind of money. And he was very, very aggravated and he told me started yelling at me on the phone and he advised me that we were getting very close to the second bidder at that time. (Tr. 461-462)

9. After Kerr's talk with Cox, Zoe testified regarding Mark's comments:

> He said he had talked with Jim and we needed to put together new numbers and get them sent over as soon as possible. That we were really close to the other bidders. And it was important -- we wanted this I don't know (sic) so we needed to get some new numbers to Jim for him to

review. *** I got new numbers from him [Kerr]. Put them in the bid worksheet and sent them over to Jim." (Tr. 1247)

10. Kerr's testimony regarding Cox's alleged statement during his hearing testimony about the 'second bidder' was:

> And all of that [about a 'second bidder' as Kerr would refer to it] of course was a lie, there was no -- we know this now, there was no second bidder and we know that we weren't -- we were [redacted] away from the second bidder. (emphasis added) (Tr. 462)

11. Despite his years of acquaintance and work with and for Roberts, the Denison officer in charge, Kerr, did not call him about Cox's call, nor did he seek confirmation from Roberts or anyone else about other possible bids on the new scope or KGL's competitive position among them. Roberts denied knowledge of the alleged conversation with Cox.

12. Mr. Kerr maintains he was anxious to be competitive and ensure that KGL obtained the work. He reduced his price on the Bid Worksheet by $325,600 to a revised price of $[redacted]. At 1:09 p.m., Zoe testified she transmitted the revised pricing to Cox.

13. In a deposition of Mr. Cox, taken in California, he was asked by KGL what occurred in this exchange with Kerr about re-pricing:

> Q. Okay. Thank you. Do you remember having any conversations with Mr. Kerr about his bid and how close he was to the next lowest bidder?
> A. No.
> Q. You don't remember any phone calls where you would have said, you're pretty close to the next lowest bidder as part of the bidding process?
> A. Absolutely not. I do not discuss next bidders pricing with anybody. Didn't happen.
> Q. Okay. You never said anything about the difference between Mr. Kerr's bid and anybody else's bid?
> A. Absolutely not.
> Q. Never told Mr. Kerr to confirm his pricing because there was significant spread between his bid and the next lowest bidder.
> A. Absolutely not. (Depo. pp. 11-12)
> ***
> [Qs referencing July 7, 2009 email, Cox to Kerr]
> Q. Tell me what's going on here. You're asking for some pricing information from KGL; correct?
> A. Correct. It had been almost a year since the original bid was done. I told Mark he deserved to be able to reprice the project based on labor rates or equipment costs or material increases and to give me a new price. And that's what he did.
> Q. And that would be used to finalize the contract?

A. Correct. (Depo. p. 17)
***
Q. So you asked for new pricing because of the passage of time, and Mr. Kerr gave you an amount that was modestly greater than the amount he put in his earlier bid for soil excavation?
A. Correct.
Q. Did this become the contract amount, the $[redacted] dollars?
A. No.
Q. Do you remember what the contract amount was?
A.[redacted], or – roughly.
Q. Right. $[redacted] dollars? (Depo, p. 19)
A. Okay, correct.
Q. Is it fair to say that you negotiated with Mr. Kerr to get him to reduce the $[redacted] dollar price to the $[redacted] dollar price?
A. No.
Q. Okay. How did the numbers change, do you know?
A. No. I believe that it was oversight in the process through Denison Mines. I did not talk to Mark about lowering his price and I don't know how it happened other than oversight.
Q. But you did not call --
A. I did –
Q. I'm sorry. Go ahead.
A. I did not talk to Mark about lowering his price, ever.
Q. But you would agree it was lowered as far as the contract sum was concerned?
A. I do agree with that.
Q. By over $300,000 dollars?
A. I agree.
Q. But you don't know how that happened?
A. I do not. (Depo. p. 20)

14. The question is, who is to be believed? Or was there a clear understanding by either about the statements of the other? Accepting for the sake of argument Kerr's version of the facts, was this colloquy allegedly between Cox and Kerr, as reported by Kerr a "fraudulent inducement" for KGL to enter into the subsequent Contract with Denison? I think not. The "Bid Worksheet" was just that, a "worksheet" and was part of the negotiation of the pricing of the private contract. Zoe stated she sent the first "worksheet" to Cox "for review." KGL's asked for comments or questions Cox might have, and Cox had some, again assuming this conversation ever occurred.

15. Let us assume *arguendo* that the conversation did occur. Only the two people on the phone know what was said. Cox, an older man and warhorse in construction, denies in his deposition that the conversation was as Kerr describes. What is not in dispute is the first transmittal to Cox. He does

not, by the depo transcript recall in his deposition the second transmission. He speculates possibly the adjustment made in Kerr's revised bid "was an oversight in the process through Denison Mines." It is his word against Kerr that there was any suggestion of lowering the bid price.

16. It is a commonly known standard process in the construction industry regarding bid spread difference, for owners internally to compare line items received from various bidders, not just the base, bid summary number. Kerr's testimony even makes that comparison, arguing, as I emphasized, "...we were [redacted] away from the second bidder." To what "second bidder" does Mr. Kerr refer to? He obviously recognizes there was a 'second bidder' and the evidence would lead us to believe that Kerr has in mind one of the bidders in 2008 that bid the first round after the pre-bid conference. Likewise, if the colloquy occurred as Kerr states, was Cox referring to the same 'second bidder' from 2008? It is reasonable to assume based upon the evidence and standard bidding processes, that Cox may have had before him or available to him the other bidder spreadsheets of 2008. As an experienced person in bidding, Cox would have compared the Kerr worksheet line items with his previous bid and possibly those of others in 2008. The worksheet provided a manner for comparison of specific line items, and it is probable, I believe under the circumstances and the foregoing testimony that if there was a reference by Cox to a 'second bidder' (which he emphatically denies), he was referring to the 2008 bids; and Kerr's comment quoted testimony above also mentions the 2008 bidder.

17. Further, the second price submitted by Kerr occurred while negotiations with Denison were still in play. Based upon standard bid negotiation practices for private contracts, as here, Kerr could have pulled back or withdrawn his re-priced bid. This was a bid review process, not a final negotiation. Kerr could have submitted under normal processes, revisions to his bid, up or down or, for whatever reasons, simply withdrawn from the negotiations. Until the contract was signed in October, the parties were negotiating. It is reasonable to construe that there is not reliance here by Kerr that he

was locked into his original or amended re-pricing. It was not a "material fact" upon which Kerr could have reasonably relied if he had a change of heart about his reduction and sought to recoup the sum. Even Cox, in his deposition, is emphatic that he doesn't know why the price which ultimately lower than the first one submitted by Kerr.

18. As described further below, the same bid processes were in play regarding the potential risk of the IRs as discussed during the walk through of the site in 2008. And other factors could also have warranted Kerr taking action to avoid assuming any risk. However, Kerr did not do so.

19. So that there is no doubt about what Mr. Kerr knew were his rights after the Cox call, we had the testimony of Mr. Kerr on intense cross examination by Denison during the hearings:

> Q. Okay. And then you have this conversation you claim you had with Jim Cox after that [the worksheet] was sent, and I believe you said he called you up mad as hell, told you you (sic) were dangerously close to the next low bidder et cetera et cetera and that resulted in you sending... [the worksheet]; is that fair?
> A. Yes.
> Q. Okay. Now the first thing I'm rather curious about, Denison through Geosyntec asked to you (sic) check your numbers, it had been a year, and when you did and raised your numbers, they told you you can't raise your prices, is that what I understand?
> A. No.
> Q. Okay. Then tell me what I'm misunderstanding.
> A. It wasn't they didn't tell us we couldn't raise our prices. They gave us trouble about raising our prices.
> Q. Oh, okay. No there's no record of your conversation with Jim Cox, correct I didn't see it in your journal.
> A. Okay. Well, if you didn't see it, I didn't jot it then.
> Q. And you didn't – when you sent your revised pricing on July 20th, 2009, roughly 1254 (sic), if I recall, you didn't say Jim, per your request I've reduced my pricing?
> A. You're referring to the second correspondence?
> Q. Yes.
> A. Well, it says revised bid worksheet. It doesn't say reduced, no.
> Q. Okay. But you didn't say per your request, Jim, here's the reduced or revised bid sheet?
> *** [objection]
> A. That I didn't say per your request.
> Q. Right.
> A. I did not say that. This document does not say that. And I don't recall saying those exact words, no.
> Q. So there's nothing in the e-mail that suggests that Jim Cox requested that you reduce your pricing and there's no journal entry that says that, correct?
> A. Correct.

Q. Okay. Now I think you said that Jim Cox told you you were getting dangerously close, I think is the words you used to the second low bidder. Correct?
A. Yes.
Q. Isn't that a good position for a contractor to be in, be right below but not equal to the second low bidder?
A. Yes.
Q. Okay. So why didn't you just state tell Jim Cox I'm sticking to my numbers, my numbers are what they are?
A. As I testified earlier, dangerously close. I thought he might call the second bidder immediately and award it to them, dangerously close could have been over the second bidder.
Q. Go ahead I'm sorry?
A. He didn't indicate that it was over, but it could have been.
Q. He told you it was dangerously close. It sounded to me like your numbers were just about right.
A. They were just about right according to him.
Q. Then why did you lower them?
A. Because maybe they were dangerously above.
Q. He didn't say that though did he?
A. No, he didn't.
Q. No, in fact, he didn't even say you were dangerously equal. He said you were dangerously close?
A. That's right.
Q. But you didn't?
A. That's right.
Q. You chose not to?
A. Yes.
Q. Okay. Have you ever been asked or been told by an owner to whom you've given a proposal or a bid that your numbers are too high?
A. I would – yeah, sure.
Q. It's pretty common, isn't (sic)?
A. It if you aren't the winning bid your numbers are too high.
Q. Well, even if you're in a negotiation setting like this, an owner can tell you your numbers are too high, correct?
A. Yes.
Q. Okay. And have you stood firm on your numbers just the same on occasion?
A. I expect.
Q. Okay. So you weren't required to lower your numbers?
A. He didn't tell me I was required to lower my numbers.
Q. And ultimately, you must have felt comfortable with your numbers? Yes?
A. Yes. (Tr. 939-953)

20. These statements are an admission against interest by Mr. Kerr. He took a risk in bidding and ultimately in lowering his numbers. There was no "inducement" or "fraud" here. And further, according to the evidence, there was never a claim by KGL subsequently of "bid mistake" or "error" in its bidding. Kerr assumed the risks associated with its bid, and KGL is bound thereby. Based upon

a preponderance of the evidence, I conclude that ultimately KGL's bid was unreasonably low, but this is the risk which KGL took, including an admitted failure to include any contingencies in the pricing for unknown impacts or the known potential IRs of which Kerr was warned and had fair knowledge of prior to signing the contract, as discussed more below.

KGL'S INSOLVENCY

21. The testimony presented by KGL's expert, Mr. Pedigo concluded that as of August 31, 2009, KGL was essentially "insolvent... it's (sic) liabilities significantly exceeded it's (sic) assets." Prior to contracting, Denison had not asked for KGL's financial statements and no performance and payment bonds were required. The record is lacking any evidence that KGL provided any notice or indication to Denison that KGL was not solvent and it lacked any financial ability to perform as required for this type of contract in conditions in the field of which Kerr was well aware.

22. Mr. Pedigo attempted in later testimony to which Denison had a continuing objection, to revise his insolvency conclusion by an unpersuasive re-classification of certain assets and liabilities and his reinterpretation of KGL's financial position.

23. KGL's insolvency, by a preponderance of the evidence, was a major 'Achilles' heel' for KGL and for its performance on the Project as discussed further below in some detail. It was, in my view, the major causative factor for what occurred.

THE INDIAN RUINS (IRs)

24. In early August, 2009, Kerr directed KGL's surveyor, Steve Hancock to survey the locations of the IRs marked by an archeologists with pipe markers. Mr. Hancock indicated in his deposition that on a previous project on which he worked for KGL in New Mexico, KGL was "surrounded by them [IRs]" which were discovered during commencement of construction, or so it seems from his description.

25. The facts support the conclusion that KGL, as a sophisticated bidder that had encountered IRs before, was or should have been aware of any potential impact of IRs upon their earthwork

operations at Denison's mine. In fairness to KGL, Kerr maintains that he was assured by Roberts that the IRs should be out of the way before they should affect KGL's work, but Roberts denies this call. With the Contract signed, KGL began its preliminary work. Kerr, if this call and assurance did in fact come from Roberts, Kerr maintains he didn't have to worry about the IRs. Nevertheless, the evidence shows that with the survey of Hancock, as discussed below, Kerr should, based upon his experience and knowledge that the IR issue was not yet resolved with the archeologists and Denison have been concerned. KGL proceeded in any event despite the high number of pipe markers for IRs that were to be surveyed by Hancock.

26. Mr. Hancock completed the survey of the Cell 4B IRs as determined by the archeologists. After receipt of this Hancock survey, the overall accuracy of which was not disputed, KGL did not ask Denison to revise its pricing or its proposed schedule due to the numerous IRs locations.

27. The proffered testimony of Harold Roberts indicates that in this 2009 time period, prior to the contract being signed, "KGL had another opportunity to include the likely presence of archaeological sites in their bid". KGL failed to seize this opportunity if Kerr/KGL felt that IRs were going to, or could seriously impact its performance and increase its costs. Mr. Kerr testified that he did not include any contingences in his final July, 2009 price of [redacted] (or the earlier price, for that matter) to allow for the possible impact of the IRs or other unknowns.

28. Based upon the testimony presented, the 40-acre 4B site appears to have provided opportunities to work around the IRs, including the fire pits, and to avoid a significant impact on the work. This may explain Mr. Kerr's lack of concern with the IRs as the work began. Yet, Kerr had sufficient knowledge based upon his sophistication and experience to appreciate the possible impact of the IRs. He assumed the risk.

29. On October 28, 2009, Denison and KGL entered into a contract ("Contract") under which KGL agreed to perform earthwork and related work for the construction of Cell 4B. The Contract required, *inter*

alia: (a) observance of Colorado law; (b) that KGL continue to work in the event of disputes or disagreements; (c) that KGL give written notice of a claim (i) for additional time within 5 days after the impacting event and/or (ii) for additional money within 10 days after the event giving rise to said claim; and (d) the work was to be commenced on or about October 28, 2009, and, subject to authorized adjustments, Substantial Completion (including the liner installed by others) was to be achieved by October 15, 2010. Line items were set which totaled the contract price.

30. In November the archeologists issued their final report, and while KGL maintains it didn't see the report, it was admitted a public record. Further as the twelve-man or more team of archeologists began to descend upon the site, setting up camps and so forth, the evidence available suggests that KGL management on the site should have been very concerned.

31. Based upon the record, Denison was willing from the beginning to adjust KGL's contract for the IRs if they were an impediment to KGL's work, KGL failed to give timely notice under the Contract of the difficulties which it was beginning to encounter with the IRs. I have to conclude this was due in part to KGL's mismanagement of its work as discussed below.

KGL'S MISMANAGEMENT

32. As performance began, the evidence presented indicates that KGL's management team was not up to the challenges posed by the Project conditions. According to Harold Roberts, KGL initially proposed a Superintendent with the requisite experience, and Denison was favorably impressed with him; however, KGL elected for its own purposes to assign that individual to another KGL project and brought on Mr. Robert Kowey as Superintendent. Kowey, based upon his own testimony, appears to have lacked the experience required by the nature of the Contract, including that he was to have "supervised the construction of at least two earthwork construction projects in the last five years." However, Mr. Kowey argued his experience at least technically met this requirement.

Ultimately, according to Mr. Roberts, Denison "was surprised by Robert Kowey's... lack of knowledge and awareness of the plans and specifications." Geosyntec discussed "either the replacement of Robert Kowey as superintendent or to request that an additional individual with the technical knowledge required by the plans and specifications be assigned by KGL."

33. Further, the facts indicate that KGL lacked the financial ability to cover its cash crunch without help from Denison. KGL proposed that Denison take back the Project. Denison refused and advised KGL that it must live up to its contractual obligations. KGL argued at this time and afterwards that the IRs and rock and soil issues were a having a negative impact upon KGL's work. Yet, the facts indicate that KGL should have anticipated those difficulties.

34. The preponderance of the evidence indicates that one of the causative factors for KGL's proposal to hand the project back to Denison was KGL's apparent continuing insolvency, a fact which KGL chose not to share with Denison. Rather, costly and unexpected difficulties were alleged by KGL as the cause of its financial challenges, which impacted its equipment and performance decisions and actions on the Project, including ultimately its non-payment of the equipment supplier, its blaster and others. Yet Denison was not given timely notice of such non-payments until much later.

35. A proposal by KGL to walk away from the job was rejected by Denison, but actions were taken by Denison to make accommodations beyond the strict contract terms and conditions to provide additional cash flow to KGL, including the modification of payment structures and the timing of payments.

36. KGL was well aware that Denison was under extreme pressure to have Cell 4B completed because of the need for increased tailings containment capacity for the mine. In view of its insolvency, even with project cash flow, KGL kept the pressure on for more accommodations.

37. KGL notified Denison in July of 2010 that without major concessions on Denison's part, including the partial release of retainage (which by the evidence, and the lack of bonds to protect Denison, was not justified), KGL would stop work and abandon the Project -- a recurring theme of KGL.

38. KGL argued it still had positive cash flow remaining on the Contract (which by this time had been converted by actions of the Parties to a lump sum); however, this alleged "positive cash flow" was illusionary; it failed to take into account, *inter alia*, repayment of advances due to Denison and major monies due KGL's equipment supplier and blaster, which totaled over $1.8 million. Denison, according to the evidence, was justified in refusing the terms suggested by KGL.

39. Counsel for KGL sent written threats of legal action, supported, the facts indicated, by incredible claims of mismanagement and negligence on the part of Denison and Geosyntec. KGL's allegations of threats tied the hands of Roberts, who up to that point had continued to believe in Mr. Kerr and had made major concessions to keep KGL going; however, Roberts felt "obligated as an office of a public corporation to report" to his higher-ups the KGL's attorney demands. This destroyed any possibility of the Parties working out a solution. Roberts testified that "KGL's subsequent performance was met with the requirement of strict conformance with the contract because it appeared that was being required of Denison. This was in direct response to KGL's escalation of the matter to its counsel."

40. Having just received a major Denison payment under the Contract and for accommodations, KGL abandoned and "terminated" its Contract on August 4, 2010. Based on the preponderance of the evidence, this abandonment was wrongful, was without sufficient grounds as a matter of law and was a material breach of contract by KGL.

COMPLETION BY DENISON

41. Denison found itself "in a very difficult situation" according to Roberts, with an incomplete project, "the liner subcontractor and materials were onsite and under contract to complete... in accordance

with the schedule." Further, "deadlines... to have the cell [4B] operational were not changed by KGL's decision." The facts indicate that KGL simply had no cash flow with which to continue the work. Nevertheless, KGL failed to indicate to Denison that it had been insolvent from the commencement of its work, and with no contingencies left, it was bankrupt."

42. I believe all reasonable Denison costs of completion after KGL's abandonment are justified for award. For example, Denison utilized certain employees or former employees of KGL and supervision and operators provided by others, and equipment which KGL had on the job at the time of abandonment. And additional equipment was also utilized, justified by the fact that the completion forces had to correct deficient work performed by KGL but not corrected prior to its departure. KGL's argument that Denison's approach for completion was too costly and time consuming is not supported by the preponderance of the evidence.

43. KGL argues in its defense that Denison's breaches and the withholding of monies claimed by KGL were the root causes of its difficulties. KGL's arguments are not compelling in view of early adjustments in the payment schedule by Denison, *inter alia*, its allowance initially of unit price billings by KGL that were beyond what the contract, and which should be recouped by Denison in the damage award.

44. The management of Geosyntec was not perfect by any means, but the facts do not support the KGL allegations of negligent or malicious mismanagement. In fairness to Geosyntec, early into the work Geosyntec was blind to KGL's underlying financial insolvency, was questioning the strength of KGL's management and so forth. These concerns and later actions by Geosyntec were justified as shown by the evidence. At one time Geosyntec, by its Mr. Irwin, demanded that Kowey resign. He did not, and Kerr continued to back its selection of superintendent. This is another risk which Kerr assumed.

45. A fair balancing of the financial data as a whole, including either analysis by Mr. Pedigo, considered in the best light possible, fails to support the proposition that KGL was a financially responsible

bidder or contractor on this Project from the beginning. By the preponderance of the evidence, had Denison agreed to the change orders as presented by KGL and paid monies, or released remaining retainage, there were NOT sufficient monies remaining in its Contract to save KGL from disaster; simply put, there was not enough money in the Contract as a whole, even with the pending change orders, which would have come close to paying off KGL's obligations to subcontractors, suppliers and other creditors. Thus, Denison's completion actions and decisions were justified.

46. KGL called an expert, Mr. Lynn Larsen, who attempted to provide a rationale for additional compensation beyond what the contract would allow. One approach of this expert was a "measured mile" analysis, particularly of the impact of the IRs, but the analysis was flawed. "Measured mile" was not a credible analysis of this particular Project because of the conditions of the Project and assumptions made by the expert which were impracticable or based upon hearsay and not in accordance with accepted applications of this method of analysis. And the expert failed to adequately consider KGL's knowledge of the extent of the IRs before contracting; and secondly the reasonable resolution of IR impacts by efforts of the archeologists to clear the IRs and eliminate step by step progress impediments. Mr. Larsen failed to opine credibly on the strength of KGL's management team, blaming the IRs and Geosyntec for KGL's difficulties. His analysis was "too remote or conjectural or speculative." City of Westminister v. Centric-Jones Constructors, 100 P.3d 472 (Colo. App. 2003).

KGL CLAIMS

47. The preponderance of the evidence does not justify any monetary award to KGL. This decision deserves some elaboration. KGL admits $6,557,836 in the nature of a credit to Denison. The recognition of these amounts as set forth in their Post-Hearing Proposed Form of Interim Award, is commendable and justified.

48. As to its overruns and other claims, KGL ultimately decided in its post-hearing submittals to rely upon the "total cost approach" for its recovery.

49. KGL's approach to proving that the total cost method should be applied for its relief is seriously lacking, and I so hold. Simply arguing that KGL meets the required elements, as further discussed below, is insufficient to support a finding that KGL is entitled to recover under a total cost method. In some cases 'total cost' may offer the only reasonable method for proving some claims so that relief can be appropriately accorded as a matter of law.

50. The elements for applicability of this method are generally recognized as the contractor must prove by a preponderance of the evidence each of the following:

(1) that the nature of the particular losses it suffered makes it impossible to attach a dollar figure to determine them with a reasonable degree of certainty. KGL arguably met this requirement; Mr. Larsen' failure to provide a credible analysis of the IR impact, supports this belief of impossibility.

(2) that the contractor's bid for the contract was both a realistic and accurate bid when made (or in a modified approach, the bid is adjusted for the contractor's errors in bidding); KGL fails this requirement. The preponderance of the evidence indicates KGL's bid was neither realistic nor accurate and no adjustment to the bid in the process of quantum analysis was offered by KGL. The KGL presentation also does not consider the failure of KGL to reasonably include contingencies in its bid for the IRs.

(3) that the contractor's actual costs spent on the project were reasonable under the circumstances. KGL fails to show by any suggested modifications to its total costs for its own mismanagement, correction of its deficient work or, in that matter, for any KGL fault. The weight of the evidence suggests that KGL's claimed total cost damages without any modification for its own fault, invalidates its position of entitlement utilizing this method. The overruns did occur, but without

sufficient proof, I cannot conclude, as to the total cost method, that its application and result as to costs is either reasonable or allowable as a matter of law; and,

(4) that the contractor was not responsible for its additional costs to complete the work because of its own delays and mismanagement. Here, KGL fails this element for the various reasons already stated in this opinion. Had KGL provided an analysis of costs which were due to its own fault, and adjusted those out of its total cost claim, such an adjustment would require the trier of fact to at least consider, based upon a preponderance of the evidence, whether that adjustment was reasonable. However, KGL failed to do so, arguing its costs were reasonable and fully due. When tied to their emphatic argument, as discussed above, that KGL's bid was reasonable, the trier of fact, applying the law, has no choice but conclude, based upon their presentation of damages, that the total cost method does not provide a reasonable basis for the award of damages to KGL.

(See e.g., Model Jury Instructions: Construction Litigation, Section of Litigation, ABA (Sandars, 2003) and citations) Also see City of Westminister v. Centric-Jones Constructors (cited above) and Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042 (Utah 1984).

51. KGL has not presented any other alternative, credible method that meets the test of allowable damages upon which an award may be made. Mr. Larsen's testimony was not credible , as aforesaid, and cannot be considered as providing an alternative.

52. KGL failed in its presentation of the total cost approach in the hearings and in its post-hearing briefs, to recognize sufficiently its faults and make serious adjustments to its total costs to ameliorate its difficulty in meeting the foregoing basic elements. The IRs were only a part of KGL's problems. KGL's approach in the final analysis was "all or nothing", including excessive overhead and profit markups (which in Colorado may violate the prohibition of the Colorado Courts of allowing recovery of more than the benefit of the contractor's bargain; see, e.g., City of Westminister v. Centric-Jones Constructors, cited above).

AWARD

1. Based upon the foregoing, and the preponderance of the evidence, Denison is awarded damages as are set forth below. In making this award, I require Denison to submit within twenty days of this date, or such other time as I may allow, verified statements based upon generally accepted accounting principles to confirm those amounts I have tentatively allowed, but for which I wish verification – these are noted by the letters "STV" for "Subject To Verification." This is not a request for an "audit," but rather for confirmation that the costs in the records total said amounts and that they do not arise from other causes. If an awarded amount is not indicated as "STV," then no further verification or accounting support is required by me. While testimony of the "STV" awards was provided during the hearings, the record and exhibits are somewhat confusing, particularly, because the Parties imposed a tight hearing time schedule which did not allow time for full examination of source records, the accounting conclusions and detailed cross examination in this area. This restriction affected the presentations of both Parties. The interest calculations also are "STV" and for which I wish an itemization for each interest entry. The STV submittals (excepting the interest calculations) must be consistent with and supported by hearing testimony and proffered exhibits, which should also be cited as to transcript and exhibit number.

Item	Principal	Pre-Award Interest (8%; C.R.S. §5-12-102) (all STV)	
Credit for Denison for Blast Advance to KGL. (STV)	$ 373,781	$ 102,733	(08/04/10 – 01/10/14)
DCN-002 (payments to KGL due to overbillings or non-scope items). (STV)	200,155	55,012	(08/04/10 – 01/10/14)
Tax Exemption. (STV)	144,398	39,688	(08/04/10 – 01/10/14)
Denison Completion Costs. (STV)	355,122	85,930	(01/01/11 – 01/10/14)
AEGL Standby/Delay. (STV)	192,833	41,589	(05/01/11 – 01/10/14)
Butler (equipment) Lien Settlement (STV)	1,540,531	345,754	(03/22/11 – 01/10/14)
Buckley (blaster) Lien Settlement (STV)	320,000	60,248	(09/03/11 – 01/10/14)
Future projected cost for Screening of Rock Contaminated Soil*	-0-	-0-	
5110 Insurance Recovery**	$ 131,880	TBD	
Subtotal STV	$ 3,258,700	$ 730,954	
Interest STV	730,954		
SUBTOTAL STV	$ 3,989,654		
Arbitrator Fees/Expenses	TBD		
Arbitration Costs/Transcript	TBD		
TOTAL	TBD		

*The contamination issue is one of shared fault or due to concessions or accommodations during KGL performance based upon the preponderance of the evidence before me. I do not allow same.

** Admitted by KGL. Denison should calculate interest from 30 days after receipt of the payment by KGL, STV.

2. Denison is further awarded reasonable attorney fees and costs pursuant to Utah Code Ann. 38-1a-101, *et seq.*, proof of quantum submitted on or before January 31, 2014; and

3. KGL is ordered to provide Denison on or before January 31, 2014, with original, signed and recordable Releases of KGL's Lien and Lis Pendens against the mine property.

Date: January 10, 2014; transmitted to Counsel of Record, January 11, 2014.

Paul J. Walstad, Sr., Arbitrator