

DISPUTE REVIEW BOARD RECOMMENDATION

June 27, 2005

E-Mailed June 27, 2005

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RE: FIN No. 258734 0 52 01, 2586350 1 52 01, 256350 1 56 01
Project No. 14140-3415, 14091-3501, 14091-6503
SR 56/I-75 Interchange
Pasco County

Subject: Global Claim Issues

Dear Sirs:

The Owner, Florida Department of Transportation (Department) and Contractor, Archer-Western Contractors, LTD (Archer-Western) requested a hearing to determine **entitlement** of Archer-Western) to **additional compensation and contract time for Global Claim Issues** on the above referenced project. Should entitlement be established, the Dispute Review Board (Board) was not to decide the quantum of such entitlement at this time, as the parties would attempt to negotiate the value of entitlement.

Pertinent issues, correspondence and other information relating to the Department's and the Contractor's positions were forwarded to this Board for review and discussion at the hearings that were held on March 31st, May 26th and May 27th 2005.

ISSUES:

- Issue 1 - Riprap Bag Quantities:
- Issue 2 - Silt Fence Quantities
- Issue 3 - Riprap – Ditch Lining
- Issue 4 - Riprap – Bank & Shore
- Issue 5 - Sod Quantity
- Issue 6 - Hay Bale Quantity
- Issue 7 - Bedding Stone Quantity
- Issue 8 - Driveway Fence – AW PCN #128
- Issue 9 - Erosion Control Quantity
- Issue 10 - Drainage Structure S-107 – AW PCN No. 133
- Issue 11 - Cypress Creek Bridge Guardrail Pad & Spillway
- Issue 12 - Time Extension Entitlement and Return of Liquidated Damages
 - Delays Associated with the South & North Mitigation Areas
 - Change from Seed & Mulch to Sod
 - Weather Days
 - Delayed Project Acceptance
- Issue 13 - PAYMENT OF "NO-EXCUSE" BONUS

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CONTRACTOR'S POSITION:

Due to the events beyond its control, Archer Western's work on the Project was delayed and disrupted. As a result of the foregoing breaches of warranty and contract by the Department, Archer Western is entitled to an extension of time of 261 days. A schedule analysis prepared by Consulting Service Systems, Inc. is included as Section 11 of this submission ("Schedule Analysis")¹. In accordance with the findings of the Schedule Analysis, Archer Western is entitled to a return of the liquidated damages currently held by the Department in the amount of \$1,958,267.61.

In addition to the time extension, Archer Western is also entitled to additional compensation. The additional compensation to which Archer Western is entitled arises from the performance of a significant amount of extra work, time related costs due to delays to the Project, disruption of individual work activities, acceleration efforts both constructive and by agreement, and significant costs incurred by Archer Western and its sub-contractors, for the complete revision of the Approved Schedule. A summary of the direct additional costs to which Archer Western is entitled is summarized below. In addition, Archer Western is entitled to certain time related costs as set forth below.

DIRECT COSTS DUE ARCHER WESTERN

1. Riprap Bag Quantities	\$26,498.10
2. Sod Claim ²	\$116,869.20
3. Hay Bales	\$12,157.20
4. Silt Fence	\$63,178.05
5. Riprap Ditch Lining, Bank, Shore and Bedding	\$43,029.88
6. Driveway Fence	\$1,650.14
7. Erosion Control	\$218,612.39
8. Drainage Structure S-107	\$1,364.61
9. Cypress Creek Bridge	\$6,951.20
10. No Excuse Bonus	\$31,044.12
Total Direct Costs	\$521,354.89

TIME RELATED COSTS DUE ARCHER WESTERN

1. Extended overhead costs for 129 days Daily rate is \$4,949.50/day as provided in Ex. 80	\$ 638,485.50
2. Extended MOT costs as calculated in Ex. 81	\$57,295.35

TOTA DUE \$ 1,217,135.74

Issue 1. RIPRAP BAG QUANTITY DISPUTE

The Contract Documents called for 246.2 cubic yards ("CY") of riprap bags to be installed on the Project. The Plans called for riprap bags to be installed at 17 swales, 8 pipe crossings, and 1 temporary crossing located in the two mitigation areas. In addition, bags were to be installed at 4 retention pond spillways. The total quantity paid to date is 348.4 CY. See FDOT pages 7 and 9 of Payment Estimate No. 44, Ex 1. Archer Western **purchased 451.0 CY of riprap bags** for the Project. See summary and copies of supplier invoices for riprap, Ex 2. The final amount installed by Archer Western was 422.3 CY, leaving a shortage of 73.9 CY @ \$350.00 = \$25,865. See Summary, Ex. 3.

¹ See original position papers for exhibits.

² The reader should note that the numerical order of cost issues is not the same as previously listed and should refer to the description..

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On August 4, 2002, the Department issued Tentative Final Estimate No. 42 showing a quantity of 276.3 CY of riprap bags. On August 20, 2002, Archer Western disputed the final payment quantity and requested additional payment for the balance of the riprap bags. Archer Western **substantiated the unpaid quantity with invoices totaling 16,251 bags or 451.1 CY**. Archer Western also requested additional payment for 9.3 CY of riprap bags that were added but eventually deleted from the Project. The cost requested for these additional bags, including applicable mark-up, was \$1,266.20. See Archer-Western Letter No. 852, Ex 4. On October 9, 2002, the Department responded to Archer Western's claim for additional payment responding that no additional payment would be made. See PBCS Letter No. 1000, Ex 5. On October 18, 2002, Archer Western again disputed the final quantity stating, "Throughout the project, there was a considerable amount of flows through these drainage structures. Silt from these flows obviously changed the ground level. **Any bags that were below the ground surface went unaccounted for.**" See Archer Western Letter No. 859, Ex 6.

On December 13, 2002, the Department adjusted the payment quantity to 348.4 CY as a result of field re-measurements of portions of the various structures. See PBCS Letter No. 1001, Ex 7. A subsequent review of the quantities revealed that a South Mitigation temporary creek crossing (S-416 & S-417) was not included in the updated quantity. It is impossible to verify the quantity of this structure, as this was a temporary structure, and was ultimately demolished before completion of the Project. The original payment quantity for this structure was **39.4 CY**. Archer Western's delivery tickets and receipts indicate that the quantity installed is **53.1 CY**.

The Daily Report of Construction dated July 26, 1999 indicates that 29 CY of riprap were installed at the creek crossing. See Ex. 8. The Daily Report of Construction dated August 11, 1999 shows that an additional 10.4 CY were installed at the same structure. See Ex. 9. These reports are consistent with the total of 39.4 paid in the Payment Estimate No. 3 dated August 16, 1999. See Ex. 10. Archer Western invoices show that 53.1 CY of riprap bags were delivered to the Project as of August 1999. The increase in the quantity of riprap bags installed by Archer Western was a direct consequence of the field orders given by PBCS. No additional payment was made under this pay item until July 2000. See Ex. 11.

In addition, **Swales No. 5 and No. 9 were constructed twice**. Swale No. 5 was constructed twice as a result of a survey error by Archer Western. This structure was re-measured as 17.41 CY on December 2002. This quantity has been deducted from Archer Western's claim. **Swale No. 9, on the other hand, was constructed twice as a result of an error by the Department's CEI**. This structure was originally installed in October 2000. On November 20, 2000, the Department notified Archer Western that Swale No. 9 was constructed outside the right-of-way. See PBCS Letter No. 587, Ex 12. On January 12, 2001, Archer Western notified the Department that the swale was placed in the wrong location as a result of direction by the CEI's field staff. See Archer Western Letter No. 520, Ex. 13. As this structure was constructed twice due to no fault of Archer Western, the Department is responsible for paying the cost of the riprap for both installations. The final configuration of this structure was measured to be 20.76 CY in December 2002. On January 17, 2003, Archer Western met with the Department's representatives regarding the payment of \$1,266.20 for the riprap bags for the deleted structures. **Archer Western and the Department agreed to split the costs of these bags.**

In conclusion, Archer Western has been **underpaid by 73.9 CY, 53.1 CY at the South Mitigation Crossing, 20.76 CY at Swale No. 9 and \$633.10 for the bags for the deleted structures and is entitled to an equitable adjustment in the amount of \$26,498.10.**

Issue 5. SOD CLAIM

The Contract Documents for the Project, as bid, called for **101,945 Square Yards ("SY") of sod and 772,178 SY of seed and mulch** to be placed throughout the Project limits. See Computation Book sheets, Ex. 14. Typically sod was to be placed at pond locations, slopes steeper than 3:1, around drainage structures, and along roadway shoulders with varying widths from 1'4" to 2'8". See Plan Sheets 3 and 12, Ex. 15. All other disturbed areas were to receive seed and mulch. Plan Sheet 9 and 16, Note 1 states, "The limits of sodding indicated are approximate and are to be adjusted where necessary, as directed by the engineer, to provide for continuity of construction or to suit the actual requirements." **Plan Sheets 9 and 16, Note 2 states, "All 2:1 slopes are to be staked sodded"**. See Ex. 16. In addition, Specifications at Section 575-3.3 states "On areas where the sod may slide, due to height and slope, the Engineer may direct that the sod be pegged, with pegs driven through the sod blocks into firm earth, at suitable intervals." See Specifications, Page 532, Ex. 17.

Department directives and other factors beyond the control of Archer Western caused the **quantity of sod to increase by 744%** and the quantity of seed and mulch to decrease by 68%. The final payment quantity for

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sod, as calculated by the Department, Pay Item 1-575-1, was 749,659 SY and the final payment quantity for seed and mulch, as calculated by the Department, Pay Item 1-570-2 was 246,240 SY. The **final payment quantity is understated by 111,304 SY**. Archer Western's delivery tickets and receipts clearly demonstrate that **860,963 SY of sod was delivered and placed** on the Project. See Spreadsheet, Ex. 18.

On August 4, 2000, Archer Western, in an attempt to lessen slope erosion, made a request to the Department to extend the limits of sod in the South Mitigation Area to allow placement of sod on the cell slopes where seed and mulch had been called for in the Plans. See Archer Western Letter No. 410, Ex. 19. On August 18, 2000, Archer Western received direction from the Department to extend limits of sod in the South Mitigation Area from the edge of the access road to toe of the 4:1 slopes. See PBCS Letter No. 502, Ex. 20.

On October 18, 2000, Archer Western sent the Department a Request For Information ("RFI") to clarify the method of payment for staking the sod since there was no pay item in the Contract Documents for this work. On October 26, 2000, the Department issued its response to RFI No. 75 and stated: **"No staking will be required unless we determine certain problem areas develop. These areas will be addressed on a case by case basis"**. See RFI No. 75 Reply, Ex. 21.

On January 12, 2001, the Department directed Archer Western to further extend and modify the limits of sod to include various medians and shoulder areas. See PBCS Letter No. 631, Ex. 22.

On February 18, 2001, the Department issued Payment Estimate No. 23 in which the sod quantity total was calculated to be 111,185 SY. This is the first pay estimate where the original plan quantity is exceeded. This amount represents only 13% of the total amount of sod eventually delivered and placed by Archer Western.

On March 29, 2001, the Project received 3.5" inches of rainfall during a 24 hour period. See PBCS Letter No. 700, Ex. 23. On April 17, 2001, Archer Western gave the Department a notice of claim related to recent rains and subsequent sod washouts. See Archer Western Letter No. 590, Ex. 24. On **April 23, 2001**, the **Department** acknowledged Archer Western's intent to claim and **requested a price for staking of the sod on the slopes**. See PBCS Letter No. 722, Ex. 25.

On April 5, 2001, the Department directed Archer Western to install sod on the back slope of ditches along County Road 581. See PBCS Letter No. 705, Ex. 26. On May 7, 2001, Archer Western submitted a price of \$.72 SY for staking the sod. See Archer Western Letter No. 614, Ex. 27. On May 11, 2001, the Department responded to Archer Western's proposal and requested additional information concerning the proposed price. See PBCS Letter No. 733, Ex. 28. On **May 29, 2001**, the Department **accepted** Archer Western's modified proposal of **\$.24 SY** and issued Work Order 9999-021-05 directing Archer Western to stake the sod placed on 3:1 to 2:1 slopes to prevent the sod from sliding down the slopes. See Work Order for Unforeseen Additional Work, Ex. 29.

On May 21, 2001, the Department again directed Archer Western to extend and modify the limits of sod throughout the Project. Many areas included in the new direction had previously been seeded and mulched and now required re-grading before the sod could be placed. See PBCS Letter No. 746, Ex. 30.

On June 5, 2001, another intense rainstorm, 2.5 inches of **rain** in a short period of time, **caused additional damage** to the sod in the ramp areas. See Department Stormwater Pollution Protection Plan Inspection Report, Ex. 31. Archer Western submitted a notice of claim for repair of the slopes and replacement of the sod. See Archer Western Letter No. 639, Ex. 32. On June 13, 2001, the **Department responded** to the notice of claim and stated that **the maintenance of the slopes was the responsibility of Archer Western**. See PBCS letter No. 768, Ex. 33. Archer Western applied for 42 rain days for the period of 6/6/01 – 8/10/01 and received 31 rain days from the Department. See Rain Log, Ex. 34.

On July 15, 2001, the Department issued Payment Estimate No. 28 wherein the sod quantity total is 223,727 SY. As of this date the original plan quantity had more than doubled. Ultimately this amount represented only 26% of the total sod eventually delivered and placed. On July 18, 2001, the Department again modified the sod requirements for the Project and agreed "...to pay for sodding of all slopes 6:1 and steeper. Slopes that have previously been seeded and mulched will be addressed on a case by case basis." See PBSC Letter No. 800, Ex. 35.

On August 1, 2001, Archer Western responded to the Department's assertion that the maintenance of the slopes was Archer Western's responsibility. Archer Western contended that the loss of sodded slopes was a direct result of the Department's failure to approve staking of the sod in October 2000 rather than a failure of maintenance by Archer Western. Archer Western also pointed out that **the Project had received numerous,**

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large volume, isolated rainstorms during the continuing "100-year drought". See Archer Western Letter No. 698, Ex. 36 and Associated Press Article dated March 16, 2001, Ex. 37.

On September 26, 2001, the Department responded to Archer Western stating, "the Department has declined to agree to pay for any weather related damage subsequent to April 26, 2001 at this time. **Specifically the Department believes that Archer Western accepted responsibility for any washouts subsequent to the date of the meeting on April 26, 2001.**" See PBCS Letter No. 843, Ex. 38. On October 17, 2001, Archer Western responded and stated: "Clearly, the mandate to sod the slopes during a 100-year drought, failure to provide timely direction to install "pegs" in the sod on the slopes, refusal to direct the use of temporary ground cover and the historical rainfall all contributed to the failure of the slopes. We believe that to place the total burden of this failure on Archer Western Contractors, Ltd. because of our statement of risk during a progress meeting is inappropriate. Additionally, we believe the responsibility of the areas that failed after April 26, 2001 due to the historic rainfall and those areas that failed which received the "pegs" should be the Department's." See Archer Western Letter No. 737, Ex. 39.

The real reason for the sod failure, slope failures, and the total break down of the Project's erosion control design, was the refusal and inaction of the CEI and the Department's representatives to properly utilize the erosion control pay items within the Specifications, to take the necessary corrective actions to overcome the defective erosion control specification, and to take the necessary and prudent preemptive corrective actions. Archer Western is not an erosion control specialty contractor. The accepted area practice for implementing erosion control is to copy the erosion control drawings included in the Plans, submit them as the contractor's plan, and then install what is shown. **If there is a failure of the erosion control system, it is the responsibility of the Department, not the contractor.** What should have happened on this Project is that once the steep elevated ramps were topped out and after the first failure occurred, the CEI should have acted decisively to direct Archer Western to amend the approved erosion control plan by lining the rough graded ramp curb and gutter lines with hay bales, backed up by a line of silt fence, and order the pegging of the sod, since it had not, as yet, taken root. Each of these owner-directed actions are "in scope" contract actions, and could have been used with the appropriate contract pay items to compensate Archer Western. These actions were not taken and an erosion control disaster occurred causing a major negative impact on Archer Western.

On February 17, 2002, the Department issued Pay Estimate No. 36 which included a cumulative sod total of 688,887 SY versus the actual installation of 711,355 SY. Pay Estimate No. 36 started a pattern of underpayment of sod quantities that continued through the completion of the Project.

On August 9, 2002, the Department issued **Tentative Final Estimate No. 42**, which included a **total of 749,659 SY of sod.** See Estimate No. 42 pages 8 and 10, Ex. 40. On August 29, 2002, Archer Western disputed the final sod quantity and attached signed delivery tickets and invoices totaling 860,963 SY. See Archer Western Letter No. 852, Ex. 41.

On October 9, 2002, the **Department responded** and stated: **"The material delivery tickets do not constitute a measurement of the final dimensions along the surface of the completed work and will not be used for payment.** Archer Western is encouraged to review the final estimate records for the breakdown of the quantities measured and paid for." See PBCS Letter No. 1000, Ex. 5.

On October 18, 2002, Archer Western responded as follows: **"The massive amount of sod installed, combined with the inability of the engineer's inspectors to accurately document the actual locations, resulted in a low sod quantity.** There were many occasions when the engineer's staff inquired of Archer Western's staff where sod represented in submitted certification tickets had actually been placed. This is evidence that the engineer could not accurately account for the sod placed. Archer Western requests the records documenting the sod quantities." See Archer Western Letter No. 859, Ex. 6.

Archer Western has reviewed the final estimate records and has determined that the **only areas documented to have received multiple sod placement were:**

Western 100-Year Compensation Area	5,244.
SR 56 Median Sta. 115+75 to 120+15	2,298.
I-75 Median Sta. 645+00 to 724+50	1,001.

See Archer Western Sod Analysis, Ex. 42.

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It is Archer Western's understanding that the final sod quantities were generally calculated by the Department using a final station-to-station survey of the roadway areas, measured pond, mitigation, and temporary sod areas as well as the above stated areas. Since the majority of the quantity (513,480 SY) was determined by a survey conducted after final placement, **any areas that received multiple placements due to wash outs, drought conditions, etc. during construction, but were not adequately documented by the Department, are, therefore, excluded from the final quantity.**

Since it is clear that Archer Western furnished and installed 111,304 SY of sod over and above the final quantity approved by the Department, **Archer Western is entitled to an equitable adjustment in the amount of \$116,869.20 (111,304 SY @ \$1.05).** Archer Western is also entitled to a **compensable time extension** in accordance with the Schedule Analysis set forth in Section 11 below.

Issue -6. HAY BALES

The **original plan quantity** for Hay Bales (Pay Item 104-10-1) was 28,462 for project 258734-1-52-01 ("I-75 Project") and 2,328 for project 256350-1-52-01 ("SR 56 Project") for a total quantity of **30,790**. See Compensation Book Pages, Ex. 43. The plan sheet note under the Summary of Hay Bales table for the respective projects provides in pertinent part as follows: "Note: **Quantities are based on 15 month construction time, with a replacement every three months**". See Plan Sheets 16 and 10, Ex. 44.

On August 4, 2002, the Department issued the tentative Final Estimate with a total Hay Bale quantity of 11,131. See Final Estimate Pages, Ex. 45. On October 23, 2002, Archer Western submitted correspondence documenting a total of 14,508 bales delivered and installed on the Project. The documentation included delivery tickets and a spreadsheet summary. See Archer Western Letter No. 860, Ex. 46. On October 9, 2002, the Department responded as follows: "Like the silt fence, there were many times that hay bales were damaged by Archer Western's equipment and had to be replaced". See PBCS Letter No. 1001, Ex 7. On several occasions during the Project Archer Western **requested the documentation outlining which hay bales were placed as a result of damage by Archer Western's equipment.** The Department through the CEI responded that **no records were kept detailing those bales placed at no pay.**

Archer Western is **entitled to an equitable adjustment in the amount of 3,377 @ \$3.60 = \$12,157.20** for this pay item.

Issue 2. SILT FENCE

The original **plan quantity** for Silt Fence (Pay Item 104-13-1) was 74,114 Lineal Feet ("LF") for project 258734-1-52-01 ("I-75 Project") and 133,044 LF for project 256350-1-52-01 ("SR 56 Project") for a total quantity of **207,158 LF**. This quantity was based on Project calculations multiplied by two, allowing for two replacements. See Compensation Book Pages, Ex. 47. The plan sheet note under the Summary of Silt Fence table for the respective projects provides: "**Note: Silt Fence has a life of 1 year**". See Plan Sheets 10 and 16, Ex. 48.

On August 4, 2002, the Department issued the tentative Final Estimate with a total Silt Fence quantity of 143,803 LF. See Final Estimate Pages, Ex. 49. On September 20, 2002, Archer Western submitted correspondence documenting a total of 241,000 LF delivered and installed on the Project. See Archer Western Letter No. 855, Ex. 50. On October 9, 2002, the Department responded as follows: "The material delivery tickets provided do not constitute a measurement of the final quantity furnished, installed, and accepted and will not be used for payment". See PBCS Letter No. 1000, See Ex 5. On October 18, 2002, Archer Western responded as follows: "The ultimate purpose of the silt fence is an environmental tool to control off-site sediment flow. **There were occurrences throughout the life of the project where multiple weather events, beyond the control of Archer Western, inundated the silt fence reducing its effectiveness to the point of needing replacement.** In an effort to immediately control future erosion, Archer Western did place additional silt fence at many locations where silt fence already existed. However, duplicate placement was done only in an effort to restore control to as many locations as possible at a time when daily inundations were a normal occurrence. We placed silt fence only at locations where the devices were compromised and ineffective." See Archer Western Letter No. 859, Ex. 6. On December 13, 2002, the Department reiterated its position in PBCS letter No. 1001. See Ex. 7.

Archer Western is **entitled to an equitable adjustment in the amount of 97,197 LF @ \$.65 = \$63,178.05** for this pay item.

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Issue 3. RIPRAP DITCH LINING

Issue 4. RIPRAP BANK AND SHORE

Issue 7. BEDDING STONE

On August 4, 2002, the Department issued the tentative Final Estimate with a Rip Rap Ditch Lining quantity (Pay Item No. 1-530-4) of 977.30 tons, a Rip Rap Bank and Shore quantity (Pay Item No. 2-530-3-3) of 4,908.80 tons and a Bedding Stone quantity (Pay Item No. 2-530-74) of 2,756.90 tons. See Final Estimate Pages, Ex. 51.

On February 27, 2003, Archer Western disputed the above quantities and **submitted additional delivery tickets for material installed on the Project and not accounted for in the Tentative Final Estimate.** See Archer Western Letter No. 862, Ex. 52.

The additional quantities are:

Rip Rap Ditch Lining	108.3 Tons	@ \$37.00/ton
Rip Rap Bank and Shore	486.67 Tons	@ \$34.82/ton
Bedding Stone	417.57 Tons	@ \$52.87/ton

In May 2003, the Department requested a certification that the material, outlined in Archer Western's February letter, was delivered to the Project. On May 12, 2003, Archer Western submitted the requested certification. See Archer Western Letter No. 864, Ex. 53.

Archer Western is entitled to an **equitable adjustment and an increase in the Contract Sum of \$43,029.88** for these pay items.

Issue 8. DRIVEWAY FENCE – AW PCN NO. 128

While constructing the five (5) driveways throughout the Project, Archer Western was required to **temporarily relocate and then permanently reinstall the right-of-way fence.** This work was required because the slope of the driveways extended onto the adjacent property. On November 12, 2003, Archer Western submitted its cost for this issue. See Archer Western Letter No. 874, Ex. 54.

Archer Western is **entitled to an equitable adjustment in the amount of \$1,650.14** for this issue.

Issue 9. EROSION CONTROL

During the period from June 4, 2001 to August 10, 2001, the Project received 37.5 inches of rainfall. The Department approved thirty-one of forty-two weather days requested for the same period. The Department **failed to give any consideration to "drying" days which necessarily follow significant rainfalls and prohibit the Contractor from getting heavy equipment into the field.** The excessive rainfalls, as well as other factors beyond its control, resulted in Archer Western performing a damage control function, repairing and replacing the damaged erosion control facilities. This repair and replacement work should not be construed as the routine maintenance required by the Contract Documents. The Specifications, Section 104-7.1 states, "The contractor shall, at his expense, provide routine maintenance of permanent and temporary erosion control features until the project is completed and accepted." See Specifications Page 108 Ex. 55. Although Archer Western was required to provide routine maintenance of the erosion control features, the Department had the responsibility to design adequate and sufficient temporary and permanent erosion control systems. The Department abrogated its responsibility in this regard and, as a result, **the temporary and permanent erosion controls systems, as designed and implemented by the Department, fell woefully short of adequate.** As a direct and proximate result of the Department's failure to adequately design and implement temporary and permanent erosion control systems, additional erosion control measures had to be installed by Archer Western at its expense. **The repair and replacement work performed by Archer Western is beyond any reasonable interpretation of a contractor's responsibility under the Specifications.**

The Department failed to adequately design the temporary and permanent erosion control systems as follows:

1. The Plans and Specifications **failed to provide proper buffer zones between steep slopes and adjacent wetland areas.**
2. The Plans and Specifications failed to provide adequate drainage control for the volume for the rain encountered throughout the life of the Project.

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3. *The Plans and Specifications failed to provide adequate grassing requirements causing the Department to progressively increase the sodding requirement throughout the Project.*
4. *The Plans and Specifications failed to provide for any means to temporarily divert large flows to secondary drainage facilities, so that repairs could be made in inundated areas of the Project.*
5. *The Plans and Specifications failed to properly assess the potential hazards associated with this environmentally sensitive Project.*
6. *The Plans and Specifications failed to provide for contingency devices in the event of failure of the primary erosion control devices.*

The Department failed to properly implement and manage the erosion control system as follows:

1. *The Department failed to authorize pegging of the sod on steep slopes in a timely manner.*
2. *The Department failed to implement Section 104-2 of the Specifications which allowed the Engineer, when confronted with unanticipated conditions, to direct the use of erosion control features or methods other than those in the Contract Documents.*
3. *The Department failed to implement Pay Item No. 104-1 which provided for the installation of Artificial Coverings for erosion control purposes.*
4. *The Department failed to adequately and timely order installation of Pay Item No. 1-570-10, Seed Grass — Quick Growing Type.*

On October 18, 2000, Archer Western issued RFI No.75 to clarify the method of payment for staking/pegging, as there was no pay item for that work. On October 26, 2000, the Department responded to RFI No.75 and stated: "No staking will be required unless we determine certain problem areas develop. These areas will be addressed on a case by case basis". See Response to RFI No. 75, Ex. 21.

On November 27, 2000, PBCS forwarded a November 8, 2000 letter from Southwest Florida Water Management District "SWFWMD" detailing unauthorized alteration to wetlands. Specifically SWFWMD notified PBCS that erosion devices installed at the ramp areas along I-75 had failed, allowing sediment to flow outside the Project limits and into adjacent wetlands. PBCS directed Archer Western to begin the removal of the off-site silt flows. See PBCS Letter No. 589, Ex. 56.

On December 1, 2000, Archer Western responded and outlined its plan to recover the off-site sediment. See Archer Western Letter No. 497, Ex. 57.

On March 29, 2001, the Project received 3.5" inches of rainfall during a 24 hour period. This rain event caused additional off-site silt flows. See PBCS letter No. 700, Ex. 58. On April 9, 2001, Archer Western outlined its plan to repair the slopes. See Archer Western Letter No. 593, Ex. 59. On April 17, 2001, Archer Western notified the Department of its claim related to recent rains and subsequent sod washouts. See Archer Western Letter No. 590, Ex. 24. On April 23, 2001, the Department acknowledged the intent to claim and requested a price for staking of sod on slopes. See PBCS Letter No. 722, Ex. 25. The work to repair washouts and replace sod at Ramp C was completed on April 21, 2001. Archer Western was eventually reimbursed for this cost in Payment Estimate No. 36, Pay Item 1-8888-005A. See Payment Estimate No. 36, Ex. 60.

On May 21, 2001, the Department directed Archer Western to modify the limits of sod throughout the Project. Many areas included in this direction had previously been seeded and mulched but had experienced significant erosion due to the inability of the directed grassing method to stabilize the soils. As a result of the erosion, these added areas required re-grading in order to permit sod placement. See PBCS letter No. 746, Ex. 30.

On May 29, 2001, the Department accepted Archer Western's proposal of \$.24 per SY to stake/peg the sod by issuing Work Order 9999-021-05 which directed Archer Western to stake sod placed on 3:1 to 2:1 slopes to prevent the sod from sliding down the slopes. See Work Order for Unforeseen Additional Work, Ex. 61.

On June 5, 2001, an intense rainstorm caused additional damage to the sod in the ramp areas. Archer Western submitted its notice of claim for repair of the slopes and replacement of the sod. See Archer Western letter No. 639, Ex. 32. On June 13, 2001, the Department responded to the notice of claim and stated that the maintenance of the slopes was the responsibility of Archer Western. See PBCS letter No. 768, Ex. 33.

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On July 6, 2001, PBCS directed Archer Western to construct additional berms and riprap check dams at Cypress Creek to control erosion that occurred. See PBCS letter #787, Ex. 62. On July 18, 2001, PBCS notified Archer Western that "As the result of several rain events in the past month, many of the erosion control devices throughout the project have been overwhelmed, resulting in significant amounts of sedimentation off-site in adjacent wetlands." The Department again modified the Project sod requirements and agreed "to pay for sodding of all slopes 6:1 and steeper. Slopes that have been previously been seeded and mulched will be addressed on a case by case basis." See PBCS Letter No. 800, Ex. 35.

On July 23, 2001, Archer Western responded to the sedimentation problem by pulling crews from production activities to concentrate on recovery activities. Archer Western also contracted outside companies, rented specialized equipment, and requested direction from R.H. Moore, Inc., an erosion control expert, to assist in the resolution of the situation. See Archer Western Letter No. 690, Ex. 63.

On August 1, 2001, Archer Western responded to the Department's assertion that the maintenance of the slopes was Archer Western's responsibility. Archer Western took the position that the loss of sodded slopes could be traced to the Department's failure to approve staking/pegging of the sod in October 2000 and the Project history of receiving large-volume-isolated rainstorms during the continuing "100-year drought". See Archer Western Letter No. 698, Ex. 36.

On September 26, 2001, the Department responded to Archer Western and stated: "the Department has declined to agree to pay for any weather related damage subsequent to April 26, 2001 at this time. Specifically the Department believes that Archer-Western accepted responsibility for any washouts subsequent to the date of the meeting on April 26, 2001." See PBCS letter No. 843, Ex. 38.

On October 17, 2001, Archer Western responded, "Clearly, the mandate to sod the slopes during a 100-year drought, failure to provide timely direction to install "pegs" in the sod on the slopes, refusal to direct the use of temporary ground cover and the historical rainfall all contributed to the failure of the slopes. We believe to place the total burden of this failure on Archer Western Contractors, Ltd. because of our statement of risk during a progress meeting is inappropriate. Additionally, we believe the responsibility of the areas that failed after April 26, 2001 due to the historic rainfall and those areas that failed which received the "pegs" should be the Department's." See Archer Western Letter No. 737, Ex. 39.

The additional erosion control measures involved the labor, equipment, and materials to remove sediment from inside as well as outside the Project limits. The additional work also included the regrading of various areas that had been previously seeded and mulched, to prepare for sod. Also, as a result of excessive erosion accumulation caused by factors outlined above, Archer Western performed additional work in desilting drainage structures toward the end of the Project. Archer Western is entitled to \$218,612.39 in additional compensation for this work. See cost summary attached as Ex. 64.

Issue 10. DRAINAGE STRUCTURE S-107 — AW PCN NO. 133

*Drainage structure S-107 was deleted from the Project per Plan Revision No. 15. This **structure had already been delivered to the job site at the time the plan revision was issued.** Archer Western is seeking the removal and disposal costs for this structure. On November 8, 2002 Archer Western submitted its cost for this issue. See Archer Western Letter No. 857, Ex. 65.*

Archer Western is entitled to an equitable adjustment in the amount of \$1,364.61 for this issue.

Issue 11. CYPRESS CREEK BRIDGE GUARDRAIL PAD and SPILLWAY REWORK

Per the Plans, Archer Western was to construct 4 miscellaneous asphalt / guardrail pads ("Guardrail Pads") as well as a concrete spillway adjacent to the Cypress Creek Bridge on SR 54. See Plan Sheet #30, Ex. 66. The Contract Documents did not clearly define how the pads were to be constructed causing Archer Western to incur additional cost for the construction. In addition, Archer Western constructed the concrete spillway 2 times as a result of CEI directions.

On July 13, 2001, Archer Western sent RFI No. 119 to the CEI requesting direction for the survey layout of the spillway. PBCS responded July 19, 2001 instructing Archer Western to simply install the spillway at the bottom of the ditch beginning at station 43+00. See RFI No. 119, Ex. 67.

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On August 1, 2001, Archer Western's concrete subcontractor, Exclusive Contractors, constructed the spillway per the Plans. During the month of August 2001, Archer Western constructed the 4 Guardrail Pads. In response to PBCS field inspectors' questions regarding the Guardrail Pads, Archer Western sent RFI No. 127 on August 27, 2001. PBCS responded that the spillway was not constructed correctly due to incorrect grade changes. PBCS directed that Archer Western reconstruct the spillway beginning at station 43+60. In addition, PBCS advised Archer Western the Guardrail Pads were incorrectly constructed. See RFI No. 127, Ex. 68.

On August 29, 2001, Archer Western advised PBCS that it considered the spillway reconstruction and the rework of the Guardrail Pads to be additional work. See Archer Western letter No. 714, Ex. 69. On September 11, 2001, Archer Western outlined its understanding of the methods required to construct the Guardrail Pads and spillway and simultaneously issued RFI No. 128 to further clarify the construction of the structures. On September 10, 2001, PBCS responded to RFI No. 127. The response required assistance from Beiswenger, Hoch & Associates ("BHA"), the Project Designer of Record, to correctly interpret the Specifications. See Archer Western letter No. 721, Ex. 70 and RFI No. 128, Ex. 71.

On October 26, 2001, Exclusive Contractors reconstructed the spillway at the new location. See Daily Report of Construction, Ex. 72. On November 26 - 28, 2001, Archer Western completed the rework of the Guardrail Pads. See Daily Reports of Construction, Ex. 73. Archer Western requests an increase of \$6,951.20 for this issue. See cost summary attached as Ex. 74.

Issue 12. SCHEDULE ANALYSIS

Archer Western was allotted 680 contract days to complete its work on the Project. Since contract day #1 was fixed as June 14, 1999, this implied an April 23, 2001 completion date. Archer Western's approved baseline schedule indicated completion on June 1, 2001, which included consideration of 39 planned suspension days.

In fact, completion was not granted by the Department until July 15, 2002 resulting in the assessment of 191 days of liquidated damages. See attached summary schedule "As-Planned vs. As-Built", Ex. 75. The assessment of liquidated damages was based on the following summary of contract time prepared by the Department:

A	CALENDAR DAYS ALLOWED BY CONTRACT	680
B	ACCRUED DAYS BY SUPPLEMENTAL AGREEMENT	0
C	GRANTED DAYS BY S.A. OR EXTENSION LETTER	97
D	EXTENDED BY WEATHER DAYS	103
E	TOTAL ALLOWED (A+B+C+D)	880
F	SUSPENDED	57
G	ELAPSED DAYS ALLOWED (E+F)	937
H	TOTAL DAYS ACTUALLY ELAPSED THRU 7/15/02	1128
I	OVERRUN	191
J	UNDERRUN	
K	END OF CONTRACT TIME	1/5/02
L	CONTRACT DAYS AS OF 7/15/02	1071

Issue Summary

There were several causes of the time overrun by Archer Western, all of which were beyond the reasonable control of Archer Western. In late 1999 Archer Western was required to perform additional subsoil excavation and backfilling in the Project mitigation areas for which it received additional payments in excess of \$500,000, without an equivalent extension of contract time. Due to extensive rainfall in the spring of 2001, the Department made a substantial modification to the Contract Documents by changing the ground coverings on the Project from primarily seeding to primarily sodding in an attempt to mitigate the effects of

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heavy rainfall. This took more time. In addition, from June 2000 to the end of the Project, Archer Western was denied certain days of time extensions for inclement weather including several days sought in the late spring and summer of 2001.

The delays referenced in the paragraph above extended the work on the Project into the winter of 2001/2002 just as the flow of the work required Archer Western to place the asphalt friction course. Due primarily to cold temperatures and some wet weather, there were substantial delays to placement of the friction course. This resulted in the friction course being completed on March 21, 2002 with the **entire Project opened to traffic on March 28, 2002**. After this time, Archer Western's primary work effort was devoted to the punch list, including repair of washouts throughout the Project. Despite the fact that the motoring public had complete use of the roadway as of March 28, 2002, the Department did not declare the Project complete until July 15, 2002. The **late declaration of completion was presumably due to the fact that the office trailer compound was not demobilized and returned to its previous condition** until that date. See attached detail schedule "As-Planned vs. As-Built", Ex. 75. The as-planned schedule, used for comparison and illustration only, is the November 2000 schedule which was in effect at the time that changes to the sod were first being made.

Specific Determination of Additional Contract Time

During the excavation of the Project mitigation areas, which began August 21, 1999, it became apparent that the **clays and sandy clays below plan template were unsuitable and not conducive to plant growth**. In order to alleviate this situation, the Department directed Archer Western to excavate the unsuitable material from between 6 inches and 24 inches below plan template, use this material in the roadway embankment, and replace material in the bottom of the mitigation areas with sand from an off-site borrow source. Although this directive shortened the haul distance for the unsuitable material, mitigating the Department's direct costs, it linked the disposal of the material to construction of the roadway embankment which was on the critical path. Based on average daily production rates to accomplish this changed work, Archer Western has calculated a **delay of 59 working days**. This corresponds to **69 contract days** based on a six-day work week. Archer Western is entitled to a compensable time extension of 69 days as a result of this issue.

The blanket change from seeding to sodding substantially increased the time required for Archer Western to place ground coverings on the Project. Instead of being a predominately seeding project (planned: 772,178 SY of seeding and 101,945 SY of sodding), the Project became primarily a sodding project (actual: 246,240 SY of seeding and 749,659 SY of sodding). In the Approved Schedule, 103 working days were devoted to these activities (roadway only, excluding mitigation areas and ponds). As-built there were about 175 days of sodding alone. While this does not translate directly to a day-to-day delay to the overall Project, **using the accrual method** of determining time extensions yields an extension of **15 days** due to the substantial increase in cost. The 15 days is based upon the quantity of sod paid by the Department. To the extent that Archer Western is entitled to be compensated for the additional 111,304 SY of sod requested in Section 3 above, Archer Western may be entitled to an additional 3 day compensable time extension for this issue. Archer Western is entitled to a compensable time extension of at least 15 days as a result of this issue.

During the life of the Project, Archer Western appealed the Department's rulings for weather time extensions on about forty days (without workday multiplier). Archer Western has reevaluated its appeals and determined that a minimum of **29 days** (with multiplier) should have been granted. These days are summarized on the attached chart entitled "Appealed Weather Days Carried Forward", Ex. 76. Jobsite soil conditions as indicated on the Department's daily reports have been heavily relied upon in making this determination. Archer Western is entitled to an excusable time extension of 29 days.

With the additional 113 day time extension noted above, the revised contract completion should have been extended by FDOT to at least April 28, 2002. Based on this extension, Archer Western would be entitled to at least **45 more weather days** as shown on the attached compilation of weather days after January 5, 2002. See Ex. 77. This includes at least ten days requested by Archer Western through January 16, 2002 and 35 days subsequently noted on the Department's weekly summary of its daily reports. The primary effect of this inclement weather was to delay the commencement of the asphalt friction course and delay completion of the friction course since the cold weather created gaps in its placement. The 45 days are compensable since "but for" the delays that pushed the friction course work into the January 2002 time frame, Archer Western would have completed the friction course prior to the fall of 2001, during good weather. Archer Western is entitled to a compensable time extension of 45 days as a result of this issue.

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On a practical and legal basis, the Department should have granted Project completion by the April 2002 date. On March 28, 2002 the friction course was complete, and the entire Project was opened to traffic. Any other significant work items were completed soon thereafter, and Archer Western was reduced to performing punch list work based on the punch list it received on April 12, 2002. The primary reason the Department withheld its certification of completion until July 15, 2002 was due to the fact that the office trailer compound was not demobilized and restored to its previous condition. Adding these criteria for Project completion is wholly counter to the letter from the Department's Construction Project Manager to Archer Western dated May 11, 1999 which states in part:

Upon completion of the project, the entire field office setup, including trailers; fencing; surfacing; and utilities are to be removed from the right of way and the area is to be cleaned and planted as necessary to allow its return to the preconstruction conditions. (Emphasis supplied)

Actual completion of the Project in April 2002 is consistent with Archer Western's scheduled time period between completion of the friction course and completion of the Project, which was thirteen days. In fact, **the Department's determination of Project completion was 116 days after completion of the friction course, or an extra 103 days.** Within these 103 days were also an additional 13 weather days recognized in the Department's weekly summary of its daily reports. Additionally, de facto time suspensions for Memorial Day and Independence Day that are not precluded by the Standard Specifications were also experienced by Archer Western in 2002. Archer Western is entitled to an excusable delay of 103 days.

This yields a total time extension due Archer Western of **261 days.**

Issue 13. PAYMENT OF "NO-EXCUSE" BONUS

On February 10, 2000, the Department notified Archer Western of a Temporary Suspension of work on the Project from Station 17+00 to Station 57+00. On June 8, 2000, the Department lifted the suspension. On June 22, 2000, Archer Western gave the Department its Notice of Intent to Claim as a result of the suspension of the work. On May 2, 2001 the Department issued Supplemental Agreement No. 14 ("SA 14") to compensate Archer Western for certain plan revisions and other costs related to the suspension of work. See SA 14, Ex. 78. One of the provisions of SA 14 was that Archer Western would receive a "No Excuse Bonus" of \$31,044.12 if Archer Western completed and opened to traffic the Cypress Creek Bridge and removed the existing bridge by August 15, 2001. It should be noted that the "No Excuse Bonus" was a bonus in name only. In reality, the \$31,044.12 was payment to Archer Western of direct costs incurred in connection with the revisions caused by SA 14.

On **September 27, 2001**, Archer Western, the contractor on the adjoining project, Cone and Graham ("Cone") and the Department executed a **Memorandum of Understanding** ("MOU"). See MOU, Ex. 79. The MOU benefited all the parties involved. The MOU allowed Cone to work within the limits of the Project, modified or deleted contract work and redefined the work limits of both the Archer Western and Cone projects. Specifically, the MOU altered Archer Western's Contract with the Department by deleting the demolition of the existing bridge over Cypress Creek and by eliminating a traffic switch over the newly constructed bridge over Cypress Creek Bridge. **In essence, the MOU modified SA 14 to reflect certain changes referenced in the MOU.**

The change effected by the MOU prevented Archer Western from collecting the \$31,044.12. This particular affect of the MOU on SA 14 was not considered during the formulation of the MOU. SA 14 addressed Plan Revision 10, which involved various activities on the SR 54 portion of the Project. The **plan revisions** resulted in an **82-calendar day extension** of the Contract Time. As part of SA 14, Archer Western negotiated a \$193,321.81 change order for the daily cost of the compensable portion of the time extension. The Department, realizing the potential for claims due to the potential delay from the adjoining project, wanted to make part of the negotiated cost a "No Excuse Bonus". The Department wanted to insure completion of Archer Western's contract work, to allow Cone to install the new bridge unimpeded and to prevent claims arising from conflicts and coordination issues on the adjoining project.

Archer Western did not achieve the requirement of the "No Excuse Bonus" because those requirements were changed and, in essence, eliminated by the MOU. As a result of the changes caused by the MOU, Archer Western believes the Department should pay the bonus for following reasons:

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- *The funds (\$31,044.12) comprising the bonus were generated from costs incurred by Archer Western due to changes directed by the Department that resulted in an extension to the Contract Time. In reality, this was not a conventional bonus.*
- *The Department benefited financially from the MOU.*
- *The MOU modified SA 14.*
- *There are no known claims associated with coordination or unimpeded progress of the adjoining Cone project.*
- *The payment of the "bonus" was not considered by the Department or Archer Western during the negotiation of the MOU.*
- *The coordination of the two projects was never addressed in either projects' contract documents.*
- *By providing the "claim free" coordination with the adjoining contractor, Archer Western met the intent of the "bonus".*
- *Withholding of payment by the Department, given the circumstances, is not fair and equitable.*

Beyond the above stated reasons, this issue is one of fairness. Archer Western worked diligently to make the coordination of the two projects a success and as the situation now stands, the reward is a \$31,044.12 penalty for doing so.

Archer Western is entitled to an equitable adjustment in the amount of \$31,044.12.

CONCLUSION

*Archer Western is entitled to a **return of \$1,958,267.61 in liquidated damages** currently being held by the Department and an **equitable adjustment** to its Contract Sum in the amount of **\$1,217,135.74**, plus pre judgment interest. Archer Western is entitled to an **extension of time of 261 days**.*

DEPARTMENT'S POSITION:

Issue 1 - Riprap Bag Quantities:

AW states in their claim package that the total quantity of Sand/Cement riprap paid to date is 348.4 cubic yards. The actual quantity paid to date is 387.8, which includes 39.4 cubic yards paid on pay estimate #45 dated January 12, 2004 (see exhibit 1). AW claims to have installed a total of 422.3 cubic yards. Therefore, AW's claimed quantity would result in a shortage of 34.5 cubic yards. AW breaks the issue into 3 items:

- 1. Underpayment for the riprap at two temporary crossings, S-416 and S-417 (13.7 cubic yards);*
- 2. Underpayment for re-work at swale #9 in the South Mitigation Area (20.76 cubic yards);*
- 3. No payment for riprap bags purchased based on FDOT direction but not used due to a change in the FDOT's direction.*

*For the first item, AW claims a shortage of 53.1 cubic yards. However, **39.4 cubic yards was paid on estimate #45** dated January 12, 2004 (see exhibit 1) for the temporary crossings, which leaves a **difference of 13.7 cubic yards**. AW states that the quantity of 39.4 cubic yards included for the riprap at the temporary structures S-416 and S-417 was consistent with the inspector's daily reports for July 26, 1999 and August 11, 1999. But, AW also claims to have purchased and installed 53.1 cubic yards of riprap based on field orders given by PBCS. At the time of the installation of the temporary crossings in 1999 and after the subsequent progress estimates, AW never questioned the quantity of riprap measured for payment at these temporary crossings. AW was provided quantities on a weekly basis and provided copies of all the inspectors' daily reports. This **temporary riprap was removed before the end of the project**. Therefore it is not possible to re-measure the riprap. Section 530-4.1 of the Special Provision states that*

***"The quantity of Riprap (Sand-Cement) to be paid for under this Section shall be the volume in cubic yards of sand actually used in the sand-cement mixture and grout, satisfactorily placed and accepted."** (emphasis added) (see exhibit 2)*

While AW may have purchased 53.1 cubic yards of material, there is not sufficient documentation provided by AW to indicate that an additional 13.7 cubic yards of material was installed and accepted on this project.

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It is the Department's position that AW has not presented sufficient documentation to justify entitlement to payment for an additional 13.7 cubic yards.

For the second item, AW claims that swale #9 in the South Mitigation Area had to be constructed twice and that AW should be compensated for both installations under the contract pay item for sand-cement riprap. In late 2000, after the installation of right-of-way stakes by AW, PBCS discovered that AW had constructed swale #9 off of the right-of-way. AW was notified of the construction error and asked for a corrective action plan (see exhibit 11). In response, AW claimed to have been directed by PBCS field personnel to install the swale off of the right of way. Ultimately, AW reconstructed swale #9 within the right-of-way. PBCS did not provide any direction for AW to construct the swale off of the right of way and AW has not provided any written documentation to substantiate its claim. **Since there is no written record of PBCS directing AW to install the swale off of the right of way, the Department finds no justification for entitlement to any additional payment for this item.**

For the third item, AW claims to have purchased sand/cement riprap bags at the direction of the Department that were not used. PBCS gave direction to AW on October 12, 2001 (see exhibit 3), to install sand/cement riprap in lieu of sod on the down-stream side of the ditch weirs along 1-75. On October 22, 2001, AW responded that the direction constituted additional work and would not be performed until all other contract work was complete (see exhibit 4). On October 31, 2001, (see exhibit 5) PBCS rescinded its direction and told AW to install sod as originally planned. AW claims that, contrary to its October 22, 2001 response that it would not undertake any of that work until the end of the project, the bags were purchased in response to the direction given by PBCS on October 12, 2001, and went unused due to the change in direction on October 31, 2001. A review of the documentation provided by AW to support its claim (see exhibit 6) indicates that no riprap was delivered between June 22, 2001 and November 5, 2001. In fact, based on the Hughes Supply invoice number 46415126-01, the order delivered on 11/5/2001 was placed on 11/11/2001; the day after PBCS rescinded its direction to AW to install the riprap at the weirs. Since the letter to AW rescinding the direction was given on October 31, 2001, AW had ample time to adjust its order accordingly.

Further, AW claims that an **agreement was reached** with the Department on **January 17, 2003**, to **split the cost of riprap bags** purchased by Archer-Western but not used. At a meeting on January 17, 2003, the Department agreed to **consider** splitting the cost for the unused riprap bags with AW if there was resolution on other outstanding issues that day. This **discussion was for settlement purposes only and did not constitute an agreement on entitlement**. There was not a firm agreement by the Department to split the cost and no other issues were resolved that day. AW did not act responsibly and cancel their order for sand/cement riprap bags. Therefore there is no entitlement to any additional payment related to this item.

In summary AW has been properly and fairly compensated for the quantity of sand/cement riprap that was satisfactorily furnished, placed and accepted. AW is not entitled to any additional compensation related to this issue.

Issue 2 - Silt Fence Quantities

AW **claims** that the final quantity for silt fence is **understated by 97,197 LF**. AW's assertion is based on delivery tickets for silt fence delivered to the project. Section 104-11 – Basis of Payment (Specifications) – reads

*"Temporary erosion and pollution control work required, **which is not attributable to the Contractor's negligence, carelessness, or failure to install permanent erosion controls (emphasis added)**, and which falls within the specifications for a temporary erosion control feature as described herein, shall be paid for under the applicable pay items listed below.." Further, the Specification reads "The length of floating turbidity barrier, relocated turbidity barrier, staked turbidity barrier and staked silt fence to be paid for shall be the total furnished, **installed and accepted at a new location...**(emphasis added)" (see exhibit 6.1)*

PBCS **contemporaneously measured** all silt fence considered to warrant payment under the specifications and **provided those quantities to AW** on a **weekly basis**. Only once during the project did AW object to the silt fence quantity. Further, the Department contends that AW was negligent in its contractual obligation to maintain the silt fence. During the course of the project, PBCS brought the need for maintenance to AW's attention (see exhibit 7). In addition, AW was provided copies of PBCS' inspection reports noting the need for maintenance (see exhibit 8). **AW would install new silt fence on top of the accumulated silt rather than**

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maintain the silt fence. Records were not kept for the silt fence installed to replace the silt fence damaged by AW or rendered unusable by AW's negligence. Therefore, it is not possible now to account for each and every foot of silt fence not paid for. Nevertheless, it is **not reasonable** for AW **to expect payment for silt fence based on delivery tickets.** AW has not provided sufficient documentation to support its claim for entitlement to payment for any additional silt fence.

Issue 3 - Riprap – Ditch Lining

AW claims that the final quantity for ditch lining riprap is understated by 108.3 tons, based on estimate #42. Subsequent to estimate #42, AW submitted additional delivery tickets and certified that the material was used on the project (see exhibit 9). Based on this additional information and review of the specific circumstances of the ditch lining riprap work, the Department processed estimate #45 which added 108.3 tons (see exhibit 1). AW has been fully compensated for the Riprap – Ditch Lining work and is not entitled to additional compensation for this issue.

Issue 4 - Riprap – Bank & Shore

AW claims that the final quantity for bank & shore riprap is understated by 486.67 tons, based on estimate #42. Subsequent to estimate #42, AW submitted additional delivery tickets and certified that the material was used on the project (see exhibit 9). Based on this additional information and review of the specific circumstances of the bank & shoring riprap work, the Department processed estimate #45 which added 465.1 tons (see exhibit 1). The net difference is 21.57 tons. This difference is due to the fact that AW submitted a duplicate delivery ticket - #22622. Exhibit 11 is a copy of the tally sheet from the quantity used to generate the quantity paid by the Department on estimate #45, which shows the inclusion of delivery ticket #22622. Exhibit 12 is a copy of the spreadsheet summary of the delivery tickets submitted by AW to justify their request for the additional 486.67 tons. AW has been fully compensated for the Riprap – Bank & Shore work and is not entitled to additional compensation for this issue.

Issue 5 - Sod Quantity

AW claims that the final quantity for the sod pay item (1-575-1) is understated by 111,304 SY. AW bases its position on the delivery tickets provided by its subcontractor. Section 575-4 of the Specifications (see exhibit 13) requires the area for payment to be calculated in accordance with Sub article 9-1.3.1 (see exhibit 14). Sub article 9-1.3.1 identifies the methods to calculate the payment area and **the method does not call for the use of delivery tickets.** Therefore, AW's demand for payment based on delivery tickets is not acceptable nor contractual. AW states it has completed a review of the PBCS quantity calculations and has determined that the calculated quantity is understated by 866 SY. As evidence, AW has provided a comparison tabulation of their quantity calculation against PBCS' quantity calculation and identified general areas of difference amounting to the 866 SY noted above. Based on AW's assertion of calculation discrepancy, PBCS has reviewed its quantity calculations for the general areas where a discrepancy was noted by AW and found errors resulting in an under-payment of only 321.3 SY. As a result of the PBCS analysis, the Department's position is that **AW is entitled to payment for an additional 321.3 SY of sod.** However, **the Department does not believe that AW has not submitted sufficient documentation to support entitlement for the remaining 110,983 SY.**

Issue 6 - Hay Bale Quantity

AW claims that the final quantity for hay bales is understated by 3,377 each. AW's assertion is based on delivery tickets for hay bales delivered to the project. Section 104-11 – Basis of Payment (Specification) – reads

"Temporary erosion and pollution control work required, which is not attributable to the Contractor's negligence, carelessness, or failure to install permanent erosion controls (emphasis added), and which falls within the specifications for a temporary erosion control feature as described herein, shall be paid for under the applicable pay items listed below."

PBCS **contemporaneously measured** all hay bales considered to warrant payment under the specifications and **provided these quantities to AW on a weekly basis.** Only once during the project did AW object to a payment quantity. Further, AW was negligent in its contractual obligation to maintain the hay bales. During the course of the project, PBCS brought the need for maintenance to AW's attention (see exhibit 7). In addition, AW was provided copies of PBCS' inspection reports noting the need for maintenance

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(see **exhibit 8**). AW would install new hay bales on top of the accumulated silt rather than maintain the hay bales. Records were not kept for the hay bales installed to replace the hay bales damaged by AW or rendered unusable by AW's negligence. Therefore, it is not possible now to account for each and every hay bale not paid for. Nevertheless, it is not reasonable for AW to expect payment for hay bales based on delivery tickets alone. **AW has not provided sufficient documentation to support its claim for entitlement to payment for an additional 3,377 hay bales.**

Issue 7 - Bedding Stone

AW claims that the final quantity for bedding stone is understated by 417.57 tons, based on estimate #42. Subsequent to estimate #42, AW **submitted additional delivery tickets** and **certified** that the material was **used on the project** (see **exhibit 9**). Based on this additional information, and review of the specific circumstances of the bedding stone work, the Department processed **estimate #45 which added 417.5 tons** (see **exhibit 1**). The **net difference is 0.07 tons (\$5.80)** which the Department considers to be de minimis. **AW has been fully compensated for the Bedding Stone work and is not entitled to additional compensation for this issue.**

Issue 8 - Driveway Fence — AW PCN #128

AW is claiming additional costs of \$1,650.14 for work required to relocate privately owned farm fence to facilitate construction of 5 driveways. **Although this position statement is being submitted strictly with regard to entitlement, it should be noted that the amount claimed on the original Qualified Acceptance Letter was \$1,500.00 (see exhibit 15).** The Department acknowledges that the work was performed. However, sub article **5-12** of the Specifications **requires AW to provide timely written notice** of their intention to claim for additional costs (see **exhibit 16**). **AW never provided any written notice** that the fences needed to be relocated or that AW was going to perform the work and seek additional compensation. Therefore, the Department was not afforded the opportunity to keep detailed records of the work effort. Additionally, if AW had provided the appropriate written notice, the Department could have had the property owners relocate the fences since the driveways were being constructed for their benefit. Clearly, with over 65 written notices of intent to claim submitted by AW, they understood the requirements of Section 5-12. Therefore, the Department finds no merit for additional payment for this item. **AW is not entitled to additional compensation for this issue because they did not provide the required written notice.**

Issue 9 - Erosion Control Quantity

The total amount claimed by AW for this issue is \$218,612.39. **Although this position statement is being submitted strictly with regard to entitlement, it should be noted that the amount claimed on the original Qualified Acceptance Letter was \$75,000.00 (see exhibit 15).** AW broke their claim for this issue down into 3 items:

1. Summer 2001 Erosion Cleanup
2. Re-Grade Work
3. Pipe De-silting

Summer 2001 Erosion Cleanup:

During the late spring and the summer of 2001, after an extended dry period, the Tampa Bay area returned to a normal rain pattern. At the onset of the rains, AW had placed much of the embankment material for the high fills at the SR 56 /I-75 interchange and many of these areas were exposed (see **exhibit 17**). As a result, **when the rains came**, there was **significant erosion that overwhelmed the poorly maintained erosion control devices**. AW argues that they should be compensated for re-grading the slopes and recovery of silt that flowed off-site because the Department was negligent in directing the implementation of erosion control devices and because the Department directed AW not to stake the sod on the slopes 3:1 and steeper.

The Department concurs there were a couple of 2:1 slopes that washed out after the sod had been placed. These slopes had been sodded but at the direction of the Department, the sod was not staked. Subsequent to these washouts, the Department directed AW to stake the sod on the slopes 3:1 and steeper, and requested a price for the work. The price was requested on 4/23/2001 (see **exhibit 18**). In the progress meeting on April 26, 2001, AW accepted responsibility for any future washouts (see **exhibit 19**). On June 5, 2001, heavy rain caused additional slope damage for which AW is requesting additional compensation. **The Department's position is that AW is not entitled to additional compensation for the washouts of the sodded slopes subsequent to AW's acceptance of responsibility on April 26, 2001.**

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Further, although some of the erosion occurred in areas that had been sodded, much of the erosion occurred on slopes that were not stabilized. Section 7-14 of the Specifications does allow the Department to pay for repair of damage due to the elements, however, it is only at the Department's discretion and then only to the extent that the damage is extensive or catastrophic in nature (see **exhibit 20**). In addition, Section 120-10 of the Specifications clearly requires the Contractor to maintain the earthwork throughout the life of the project and to repair any washouts at his own expense (see **exhibit 21**). Had AW sodded the slopes of the high fills as they were constructed and constructed temporary berms on the tops of the embankments to divert the storm water, many of the erosion problems could have been avoided.

As to AW's claim that the Department was negligent in directing the implementation of erosion control devices, the Department disagrees. Reference is made to **exhibit 21.1** – AW's Storm Water Protection Plan which specifies AW's plan control erosion. Reference is also made to **exhibit 21.2** – plans sheets 243, 244, 270 & 277 and **exhibit 21.3** – Special Provision 34. The notes on the plan sheets and the requirements of the Special Provision clearly required AW to submit a site specific erosion control plan that was consistent with their proposed construction means and methods. In addition, these plans sheets and the Special Provision clearly required AW to inspect and maintain the erosion control devices on a daily basis and to document their efforts. AW's Storm Water Protection Plan, while generic in nature, identified their acknowledgement of their obligation to comply with the contract requirements. **For AW to now claim the Department for its inability control the storm water during construction and AW's failure to protect the work is not reasonable.**

Re-Grade Work:

In their claim package, AW argues that the Department directed AW to sod areas that were previously seeded and mulched. In addition, AW argues that the Department's direction to sod these areas was "due to the inability of the directed grassing method to stabilize the soils." The Department agrees that there were areas that were sodded after the seed and mulch failed to materialize into a stand of grass. However, the Department contends that **the reason the seed and mulch failed to produce a stand of grass was due to the poor workmanship** of AW and its grassing subcontractor. Section 570-1 of the Specifications states in pertinent part

"The work specified in this Section consists of the **establishing** of a stand of grass on the slope, shoulders and other areas called for, by seeding, or by seeding and mulching. The work of grassing under this Section shall include seeding and fertilizing, mulching as required, **and maintaining** the grassed areas until the completion of the project." (emphasis added) (see **exhibit 22**).

AW failed to provide the **stand of grass required by the Contract**. Due to AW's failure to adequately maintain the work, the Department believed it was in its own best interest pay the additional cost of sodding the deficient areas in order to get the areas stabilized as quickly as possible to avoid legal action by the permitting agencies (see **exhibit 22.1**). The end result was beneficial to both the AW and the Department.

Finally, AW argues that they should be compensated for re-grading work. The Department contends that AW **was** compensated for the re-grading work in the areas that were seeded and mulched **and** sodded also. The final payment quantity for Pay item 1-162-1 – "Topsoil" was derived by the summation of the final sod quantity and the final seed and mulch quantity (less the areas of temporary sod). Because these quantities included the same areas, it means that AW was compensated for working the ground twice. Since AW was compensated for topsoil in these areas twice, the Department contends that AW is not entitled to additional compensation for the re-grade work.

Pipe De-silting

Lastly, AW claims that the Department should compensate them for the cost of cleaning out many of the drainage structures on the project. The Department does not agree that AW is entitled to be compensated for the costs AW incurred in cleaning the storm drainage system for two reasons. First and most important, AW never provided any written notice of its intent to claim for the costs associated with cleaning out the storm drains as required in Section 5-12 of the Specifications (see **exhibit 14**). Second, these are the same costs AW apparently attempted to back-charge to their subcontractor (see **exhibit 23**). Based on Wilson & Buist's letter, AW claimed that Wilson and Buist was deficient in protecting the structures. The Department concurs that the drainage structures were inadequately protected. However, the **Department does not agree that the**

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lack of protection by AW or its subcontractor entitles AW to additional compensation. Again, Section 7-14 of the Specifications (see **exhibit 20**) requires the contractor to protect the work until final acceptance.

AW did not provide proper written notice and generally ignored its contractual responsibility to protect and maintain the work from the elements and now expects the Department to pay the costs for the repair work. **AW is not, under the terms of the Contract, entitled to any additional compensation for this issue.**

Issue 10 - Drainage Structure S-107 – AW PCN No. 133

AW claims that S-107 was deleted from the project in plan revision #15, after their subcontractor acquired a precast structure. AW is seeking reimbursement for the costs of furnishing and disposing of the structure. The **Department concurs with AW's claim and does not contest their entitlement to compensation in the amount requested.** Compensation for this issue will be made upon the resolution of the remaining issues.

Issue 11 - Cypress Creek Bridge Guardrail Pad & Spillway

AW claims that the contract plans did not clearly show how the miscellaneous asphalt pad was to be constructed at the approach to the Cypress Creek bridge, causing AW to incur additional costs. In addition, AW claims that it was required to reconstruct a concrete spillway & flume at the Cypress Creek bridge approach. The Department disagrees with AW's claim that there was not enough information in the plans to construct the miscellaneous asphalt pads. There was **sufficient information contained in the plan set and the Standard Indexes to layout and construct the miscellaneous asphalt pads.** AW's surveyors were not familiar enough with the FDOT standards to layout the work properly and in a timely manner. Section 5-7.3 of the Specifications requires the contractor to perform the necessary calculations to layout the work (see **exhibit 24**). The work was ultimately completed without any design changes.

With regard to the spillway work, the **Department concurs that the concrete spillway had to be relocated because of a conflict with the end treatment for the guardrail.** The Department has offered to compensate AW for the cost of this work upon submittal of documentation for the subcontractor costs.

In summary, AW is not entitled to any additional compensation related to the miscellaneous asphalt pads for the guardrail at the Cypress Creek Bridge. However, the Department does not contest AW's entitlement to additional compensation for relocating the concrete spillway.

Issue 12 — Time Extension Entitlement and Return of Liquidated Damages

The project was completed 191 days late. AW claims that the late completion was the result of several causes beyond their control. Specifically, AW claims that it was denied additional time for:

1. The subsoil work in the mitigation areas,
2. The impacts from a change of seed & mulch to sod
3. Weather days that should have been granted.
4. Delayed Project Acceptance

Although this position statement is being submitted strictly with regard to entitlement, it should be noted that AW's original Qualified Acceptance Letter (see exhibit 15) listed 191 days and \$343,800.00 with no mention of additional MOT costs. In their global claim package, AW has requested 261 days, \$638,485.50 in extended overhead costs and \$57,295.35 in additional time related MOT costs.

Subsoil Work in the Mitigation Areas

With regard to the **subsoil work** in the mitigation areas, AW claims it is **due 69 compensable contract days.** This issue has previously been heard by the Disputes Review Board, which found no entitlement for additional time (see **exhibit 26**). Section 8 of the Operating Guidelines for Disputes Review Board -11/06/98 addresses the basis for a Reconsideration Hearing and suggests that a Reconsideration Hearing only be held "should new information surface" (see **exhibit 27**). It is the Department's position that AW has not presented any new information that wasn't available at the time of the original DRB hearing on this matter. **Therefore, the Board having previously addressed this issue of entitlement should not re-consider this issue and the Department does not believe that AW is entitled to any time extension related to the subsoil work.**

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Change from Seed & Mulch to Sod

With regard to the **change of seed & mulch to sod**, AW claims it is due **15 compensable contract days**. AW uses the accrual method to arrive at the number of days, which is inconsistent with the Contract. The Supplemental Specifications included a change to sub article 8-7.3.1 which states in pertinent part

"... Consideration for granting an extension of contract time shall be based on the extent that the time required to complete the original designated work impacts the contract completion schedule." (see exhibit 28).

The Department concurs that the quantity of sod was overrun. However, the change was conceived early in the project (see **exhibit 29**) and concurred with by AW. AW **never** provided any written notice of delay to the project in accordance with section 8-7.3.2 of the Specifications, which states in pertinent part

"A preliminary request for an extension of contract time shall be made in writing to the Engineer within ten calendar days after the commencement of a delay to a controlling item of work or the Contractor shall waive any rights to an extension of contract time for that delay." (emphasis added) (see exhibit 30).

Further, AW has not provided any schedule analysis to demonstrate how the change of seed and mulch to sod impacted the contract completion schedule. In fact, AW's own analysis states that the additional days of sodding "does not translate directly to a day-to-day delay to the overall Project". **It is the Department's position that AW is not entitled to additional contract time as a result of the change from seed and mulch to sod because timely written notice was not provided, and no contract based impact analysis has been provided to substantiate the claim.**

Weather Days

With regard to weather days, AW has requested additional weather days be granted for 24 actual days (29 factored days) between the dates of June 26, 2000 and January 4, 2002. A list of the days requested is shown below and copies of the daily reports for the days after 2/18/01 are included in **exhibit 46**:

Date	Day of Week
6/26/2000	Monday
6/27/2000	Tuesday
6/28/2000	Wednesday
7/31/2000	Monday
8/1/2000	Tuesday
8/4/2000	Friday
9/16/2000	Saturday
1/2/2001	Tuesday
1/3/2001	Wednesday
1/4/2001	Thursday
1/12/2001	Friday
6/6/2001	Wednesday
6/20/2001	Wednesday
6/25/2001	Monday
7/2/2001	Monday
7/3/2001	Tuesday
7/6/2001	Friday
7/31/2001	Tuesday
8/1/2001	Wednesday
8/3/2001	Friday

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9/7/2001	Friday
10/21/2001	Sunday
10/25/2001	Thursday
1/4/2002	Friday

Notwithstanding the fact that their request for weather days is not timely, **and the fact that an untimely request constitutes a full waiver as to entitlement**, the Department has reviewed the weather days that AW has requested during the contract time. For the period encompassing the above listed days, a summary of the weather letters (see **exhibit 32**) sent to AW by the Department and any appeal letters sent by AW is shown below:

Period	Date of FDOT Letter	Days Granted	AW Appeal	Additional Days Granted
6/11/00 to 6/18/00	11/7/00	0	Ltr. 498	1 (6/17)
6/19/00 to 7/16/00	11/16/00	3 (6/29, 6/30 & 7/1)	None	None
7/17/00 to 8/20/00	11/17/00	9 (7/26, 8/2, 8/3, 8/8, 8/12, 8/14, 8/15, 8/16, 8/17)	None	None
8/21/00 to 9/17/00	11/20/00	3 (8/29, 9/5, 9/6)	None	None
9/18/00 to 10/15/00	11/21/00	0	None	None
10/16/00 to 11/12/00	2/19/01	0	None	None
11/13/00 to 12/10/00	2/20/01	1 (11/14)	None ¹	None
12/11/00 to 1/14/01	2/21/01	1 (12/28)	Ltr. 587 on 3/30/01	None ²
1/15/01 to 2/18/01	4/20/01	0	Ltr. 610 on 5/7/01	9 (1/10, 1/19, 1/20, 1/22, 1/23, 1/24, 1/25, 1/16, 1/27) ²
2/19/01 to 3/18/01	4/23/01	0	Ltr. 611 on 5/7/01	1 (3/11)
3/19/01 to 4/15/01	4/24/01	3 (3/19, 3/20, 3/29)	Ltr. 612 on 5/7/01	1 (3/30)
4/16/01 to 5/20/01	6/25/01	0	None	None
5/21/01 to 6/10/01	8/9/01	0	Ltr. 711 on 8/15/01	None
6/11/01 to 7/15/01	9/28/01	9 (6/22, 6/23, 6/29, 7/9, 7/10, 7/11, 7/12, 7/13, 7/14)	None	None
7/16/01 to 8/19/01	10/1/01	17 (7/18, 7/19, 7/20, 7/21, 7/23, 7/24, 7/25, 7/26, 7/27, 7/28, 8/2, 8/4, 8/6, 8/7, 8/8, 8/9, 8/10)	None	None
8/20/01 to 9/16/01	11/28/01	2 (9/14, 9/15)	Ltr. 768 on 12/27/01	1 (9/4)
9/17/01 to 10/21/01	11/29/01	1 (9/27)	None	None
10/22/01 to 11/11/01	11/3/01	0	Ltr. 809 on 3/7/02	None
11/12/01 to 12/09/01	2/7/01	0	None	None
12/10/01 to 1/05/02	5/23/02	2 (1/2, 1/3)	None	None

¹ Letter #563 from AW dated March 7, 2001, specifically accepts weather day granted by FDOT.

² AW acknowledged agreement with resolution of appeal on August 27, 2001.

In comparing the additional days requested by AW to the project documentation, it was noted that AW requested 11 days (6/26/00, 6/27/00, 6/28/00, 7/31/00, 8/1/00, 8/4/00, 9/16/00, 1/2/01, 1/3/01, 1/4/01 & 1/12/01) during a period for which AW had previously agreed in writing not to pursue additional weather days (see **exhibit 33 - AW Transmittal Letter No. 1034 dated August 30, 2001**). **Based on AW's previous written agreement not to pursue additional weather days through 2/18/01**, AW is not entitled to any additional days during this period.

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As stated above, AW's request to review the other days is not timely. The weather letters sent to AW clearly identified the time frame that AW had to make any appeal. In some cases, timely appeals were made by AW and additional days were granted (see summary above). For the following periods, timely appeals were made but no additional time was granted:

Period
5/21/01 to 6/10/01
10/22/01 to 11/11/01

During these two periods, AW has requested 2 days (6/6/01 & 10/25/01). The daily report for 6/6/01 indicates that there was 0.3 inches of rain in the afternoon, that working conditions were Excellent to Good for more than 50% of the day, that the soil conditions were Dry to Wet and that work on the major work items was affected for less than 50% of the day. The daily report for 10/25/01 indicates that there was 0.4 inches of rain that affected a short section (300') of Ramp BB and 1000' of mainline SR 56. Other areas of the project were not affected and a full day was worked. Therefore, the Department does not believe AW is entitled to any additional weather days for these two periods.

The Department has reviewed the remaining weather days that AW requested during the period of contract time. An analysis of the daily reports for those days (which are included in **exhibit 46**), as well as AW's work plans (see **exhibit 34**) and the weather effect on the controlling items of work for each day is presented below:

Date	Day of Week	Planned Work Week	Actual Work Week	Controlling Work Item	Weather Effect on Controlling Work Item
6/20/2001	Wednesday	5 days	6 days	Earthwork 1-75 Phase 2	None
6/25/2001	Monday	5 days	7 days	Earthwork 1-75 Phase 2	Less than 50%
7/2/2001	Monday	5 days	6 days	Earthwork 1-75 Phase 2	Less than 50%
7/3/2001	Tuesday	5 days	6 days	Earthwork 1-75 Phase 2	None
7/6/2001	Friday	5 days	6 days	Earthwork 1-75 Phase 2	Less than 50%
7/31/2001	Tuesday	5 days	6 days	Earthwork & Base I-75 Phase 2	Less than 50%
8/1/2001	Wednesday	5 days	6 days	Earthwork & Base I-75 Phase 2	Less than 50%
8/3/2001	Friday	5 days	6 days	Earthwork & Base I-75 Phase 2	Less than 50%
9/7/2001	Friday	5 days	7 days	Earthwork & Base I-75 Phase 2	Less than 50%
10/21/2001	Sunday	7 days	7 days	Earthwork & Base I-75 Phase 2	Less than 50%
1/4/2002	Friday	5 days	6 days ²	Sodding 1-75 Phase 2 ¹	None

¹ Work Plan was Approved As Noted. PBCS took exception to the listing of **Activity** 3500.27 because the predecessor work had not been completed.

² Contract time was suspended for a portion of the week for the Holidays. AW worked on Saturday.

Based on the above analysis, the Department's conclusion is that AW is not entitled to any additional days during this period.

AW has also requested another **45 compensable days due to weather impacts that occurred after contract time expired**. The days requested are listed below along with the recorded effects on the Controlling Work Items. Copies of the daily reports for these days are included in **exhibit 46**.

Date	Day of Week	Planned Work Week	Actual Work Week	Controlling Work Item	Weather Effect on Controlling Work Item
2/2/02	Saturday	7 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	No Friction Placed
2/3/02	Sunday	7 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/4/02	Monday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	No Friction Placed, Sod Placed

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2/5/02	Tuesday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/6/02	Wednesday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/7/02	Thursday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	Friction affected more than 50%, sod placed
2/8/02	Friday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/9/02	Saturday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/10/02	Sunday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None – Not a scheduled workday
2/11/02	Monday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	No Friction, Sod Placed
2/12/02	Tuesday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/13/02	Wednesday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	None
2/14/02	Thursday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3**	No Friction Placed, Sod Placed, Structural Asphalt Placed
2/16/02	Saturday	6 days	6 days	Sod 1-75 Phase 2 & Friction Course 1-75 Phase 3*	No Friction Placed
2/18/02	Monday	6 days	6 days	Friction Course 1-75 Phase 3*	None
2/19/02	Tuesday	6 days	6 days	Friction Course 1-75 Phase 3*	None – Friction Placed 10 hrs.
2/20/02	Wednesday	6 days	6 days	Friction Course 1-75 Phase 3*	None – Friction Placed 10 hrs.
2/21/02	Thursday	6 days	6 days	Friction Course 1-75 Phase 3*	None – Friction Placed 10 hrs.
2/22/02	Friday	6 days	6 days	Friction Course 1-75 Phase 3*	Rain – No work
2/23/02	Saturday	6 days	6 days	Friction Course 1-75 Phase 3*	Rain – No work
2/24/02	Sunday	6 days	6 days	Friction Course 1-75 Phase 3*	None – Not a Scheduled Workday
					Workday
2/25/02	Monday	6 days	6 days	Friction Course 1-75 Phase 3*	None – Friction Placed 11.5 hrs.
2/26/02	Tuesday	6 days	6 days	Friction Course 1-75 Phase 3**	None – Friction Placed 10 hrs.
2/27/02	Wednesday	6 days	6 days	Friction Course 1-75 Phase 3*	None
2/28/02	Thursday	6 days	6 days	Friction Course 1-75 Phase 3*	None
3/1/02	Friday	6 days	6 days	Friction Course 1-75 Phase 3*	None
3/2/02	Saturday	6 days	6 days	Friction Course 1-75 Phase 3*	None
3/3/02	Sunday	6 days	6 days	Friction Course 1-75 Phase 3*	None – Not a Scheduled Workday
3/4/02	Monday	6 days	6 days	Friction Course 1-75 Phase 3*	None
3/5/02	Tuesday	6 days	6 days	Friction Course 1-75 Phase 3*	None
3/6/02	Wednesday	6 days	6 days	Friction Course 1-75 Phase 3*	None
3/7/02	Thursday	6 days	6 days	Friction Course 1-75 Phase 3*	None
4/3/02	Wednesday	???	6 days	???	More than 50%
6/24/02	Monday	???	5 days	???	More than 50%
6/25/02	Tuesday	???	5 days	???	More than 50%
6/26/02	Wednesday	???	5 days	???	More than 50%
6/27/02	Thursday	???	5 days	???	More than 50%

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6/28/02	Friday	???	5 days	???	More than 50%
7/1/02	Monday	???	5 days	???	More than 50%
7/2/02	Tuesday	???	5 days	???	More than 50%
7/3/02	Wednesday	???	5 days	???	More than 50%
7/12/02	Friday	???	5 days	???	More than 50%
7/13/02	Saturday	???	6 days	???	More than 50%

* Work Plan was Approved As Noted. PBCS took exception to the listing of Activity 3500.27 because the predecessor work had not been completed.

Based on the above listed information, only 13 of the days would have met the requirement for a weather day. However, Article 8-7.3.2 states in pertinent part

"...Such extension of time may be allowed only for days occurring during the contract time period or authorized extensions of the contract time period." (see exhibit 30)

*Clearly, the 45 days requested by AW are **after** the expiration of contract time (including all authorized contract time extensions). Hence, AW is not entitled to any additional weather days during the contract time period, the authorized contract time would not change and no additional time can be granted for this portion of the time issues.*

Based on the aforementioned reasons, AW is not entitled to additional time is for weather days.

Delayed Project Acceptance

AW claims that the "project completion" should have been granted in April 2002 because the entire project was opened to traffic. Further, AW claims that any other significant work items were completed soon thereafter and that "the Department withheld its certification of completion until July 15, 2002" because the office trailer compound was not demobilized and restored." To fully address AW's claims, the following facts must be stated:

- *Section 5-10.2 of the Supplemental Specifications allows the Contractor to request an inspection for acceptance of the project when all of the contract work is complete (see **exhibit 37**). AW requested an inspection for acceptance on April 5, 2002 (see **exhibit 38**). An inspection was conducted and a list of remaining work was provided to AW on April 12, 2002 (see **exhibit 39**). On May 7, 2002, AW requested another inspection for acceptance (see **exhibit 40**). An inspection was conducted on May 8, 2002 and a list of remaining work (copy of the April 12, 2002 list with remaining items) was provided on May 9, 2002 (see **exhibit 41**). On July 16, 2002, AW requested, in writing, another inspection for acceptance (see **exhibit 42**). However, based on a verbal request from AW, an inspection was conducted on July 15, 2002, and the project was final accepted effective that date (see **exhibit 43**).*
- *The location of the office compound was laid out by AW and approval of the location, in May 1999, was predicated on the assertion by AW that the location was on surplus property outside the limits of construction. Therefore, it was assumed by the Department in approving the office compound location that the project could be completed in its entirety, the office compound removed and the property restored. When AW staked the limits of construction for the relocation of SR-54 and the adjacent ditches (well after the office compound was constructed, but well before the project was opened to traffic) it then became apparent that the office compound had to be relocated before AW could complete the project in its entirety. AW was clearly aware of this fact. On May 20, 2002, AW demanded that PBCS vacate the project office (see **exhibit 44**) without providing an alternate location as required by the contract. Nevertheless, PBCS vacated the office on June 4, 2001. However, 2 weeks after the field office was vacated, AW had not removed the trailers or completed the work (see **exhibit 45**).*

*In Specification 5-11 the contract is clear that the project cannot be final accepted until all of the work is completed (see **exhibit 37**). It is the Department's position that AW did not adequately staff the project to complete the remaining items in a timely fashion, **Therefore, AW is not entitled to additional contract time, when due solely to AW's inaction, it took AW an extended period of time to complete the project after opening the roadways to traffic.***

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Conclusion

In conclusion, AW has requested additional compensation for twelve issues. As detailed in the discussion above, the Department has agreed to entitlement for several of the issues, and already compensated or have agreed to compensate AW in full for these issues. However, on all of the remaining issues AW is not entitled to additional compensation or contract time. The Department believes that, after careful review of the facts and the Contract requirements, the Board will concur with the Department's position.

DEPARTMENT'S REBUTTAL:

The Department has reviewed Archer-Western's (AW) position statement for the referenced issues and offers the following rebuttal for each issue:

Issue 1 - Riprap Bag Quantities:

AW did not provide any position statement beyond what was included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that AW has **not presented sufficient documentation** to justify entitlement to payment for an additional 13.7 cubic yards of sand-cement riprap.

Issue 2 - Silt Fence Quantities

AW claims that the final quantity for silt fence is understated by 97,197 LF. AW's assertion is based on delivery tickets for silt fence totaling 241,000 LF. However, in its position statement, AW notes that it has records showing the installation of only 187,330 LF and references an unsupported spreadsheet.

In their support for their position on this issue, AW repeatedly attempts to lay the blame for the alleged quantity under-run on the Department's direction or lack of direction with regard to the erosion control. The Department disagrees with AW's position on the responsibility for the planning of erosion control devices. Nevertheless, AW's argument regarding the Department's direction or lack of direction on erosion control implementation has nothing to do with this issue.

The question before the Board is whether or not AW has provided adequate documentation and proof to entitle them to additional payment under the contract pay items for silt fence. As presented in the Department's Position Package, there were many times that AW was not paid for silt fence because they chose to install new silt fence rather than maintain the existing silt fence as required by the contract (**see exhibit 1**). The Department maintains that AW has **not provided sufficient documentation** to support its claim for entitlement to payment for any additional silt fence.

Issue 3 - Riprap – Ditch Lining

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that AW has **been fully compensated for the Riprap – Ditch Lining work and is not entitled to additional compensation** for this issue.

Issue 4 - Riprap – Bank & Shore

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that AW has **been fully compensated for the Riprap – Bank & Shore work and is not entitled to additional compensation** for this issue.

Issue 5 - Sod Quantity

AW claims that the final quantity for the sod pay item (1-575-1) is understated by 111,304 SY. AW bases its position on the delivery tickets provided by its subcontractor and claims that AW has not been paid for sod washed off of slopes or that died because of drought conditions.

Although AW's argument that they should be paid for all of the sod delivered to the project seems logical, their argument is not founded in the contract. In fact, the payment for sod is much like the payment for

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embankment on this project. The Department paid for embankment in place, **not based on delivery tickets**. Had the Department paid for “loose” volume of embankment, the final quantity would have been significantly higher. Similarly, the delivery tickets for the sod represent “loose” measurements and do not account for shortages on the pallets, sod that was never placed, sod that was damaged or overlapped during placement or sod that was subsequently damaged by the contractor’s operations and required replacement. Further, the Department **did pay for some areas to be re-sodded**. These are areas that either washed out prior to pegging or as a result of perched ground water issues in the 100 year flood plain compensation area.

In their position statement, AW states that they were **not compensated for sod that washed out after the sod was pegged or sod that was replaced because it died from drought conditions**. AW is correct in their statements. However, AW is wrong in its position that they are entitled to be paid for this replacement sod. AW had a responsibility under Section 7-14 of the Specifications to

“take whatever action was necessary to protect the work from the elements and to rebuild, repair, restore and make good, without additional compensation, all injury or damage to any portion of the work...”(emphasis added)

In summary, PBCS accurately measured the sod acceptably placed on the project and with the exception of a minor calculation error, paid AW for the sod that AW was entitled to be compensated for under the contract. **AW is entitled to payment for an additional 321.3 SY of sod**. However, AW is not entitled to payment for the remaining 110,983 SY requested.

Issue 6 - Hay Bale Quantity

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has not provided sufficient documentation to support its claim for entitlement to payment for an additional 3,377 hay bales**.

Issue 7 - Bedding Stone

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has been fully compensated for the Bedding Stone work and is not entitled to additional compensation for this issue**.

Issue 8 - Driveway Fence – AW PCN #128

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW is not entitled to additional compensation for this issue because they did not provide the required written notice**.

Issue 9 - Erosion Control Quantity

The primary argument provided by AW in their position paper for this issue is that the Department was negligent in directing the implementation of erosion control devices. Again and again, AW quotes portions of Section 104 of the Standard Specifications to support their argument. But, never once does AW mention the notes on the SWPPP plan sheets (234, 244, 270 & 277). Nor does AW ever mention Special Provision 34 which modifies portions of Standard Specification 104. Why? Because the notes on the plan sheets and the requirements of the Special Provision clearly required AW to submit a **site specific** erosion control plan that was consistent with **their proposed construction means and methods**. In addition, these plan sheets and the Special Provision clearly required AW to inspect and maintain the erosion control devices on a daily basis and to document their efforts.

So, the questions before the Board on this issue are complex. First, **who is contractually responsible to select, implement and maintain the erosion control features**? Second, who is responsible for the consequences if the erosion control features fail to perform because they were **not selected, implemented or maintained properly**? Third, what is the extent of AW’s responsibility under the requirements of Sections 7-14 and 120-10.

The Department maintains that under the requirements of Special Provision 34 and the plan notes on the SWPPP plan sheets, as well as AW’s own Erosion Control Plan, AW is the responsible party. Further, under

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Sections 7-14 and 120-10, AW is responsible for all costs associated with re-grading and washouts, re-sodding any slopes not otherwise paid for by the Department, recovery of off-site silt and cleaning of drainage structures. AW is **not entitled to additional costs** for this issue.

Issue 10 - Drainage Structure S-107 – AW PCN No. 133

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **The Department concurs with AW's claim and does not contest their entitlement to compensation in the amount requested.** Compensation for this issue will be made upon the resolution of the remaining issues.

Issue 11 - Cypress Creek Bridge Guardrail Pad & Spillway

AW did not provide any position statement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW is not entitled to any additional compensation related to the miscellaneous asphalt pads for the guardrail at the Cypress Creek Bridge. However, the Department does not contest AW's entitlement to additional compensation for relocating the concrete spillway.**

Issue 12 – Time Extension Entitlement and Return of Liquidated Damages

In their Position Package, AW breaks the time issue down into 5 items:

1. Delays associated with the South and North Mitigation Areas,
2. Change from seed & mulch to sod,
3. Additional weather days during contract time,
4. Additional weather days after contract time,
5. Delayed project acceptance.

Delays Associated with the South & North Mitigation Areas

This issue was previously reviewed by the Board and no additional time was recommended because no time was warranted. **The Department maintains that the Board should not re-hear the issue and objects to the possibility that the Board will re-hear the issue.** AW's contention that the hiring of a scheduling expert to come up with a new approach for proving a delay is **not** new information. **AW had every opportunity to present its best case to the DRB at the original hearing.** AW could have retained a scheduling expert to prepare this same position for the 1st hearing but chose not to. A re-hearing of this matter would be contrary to the spirit of the Disputes Review Board concept, as well as the operating guidelines that were established at the beginning of the project. Nevertheless, the Department has reviewed the new approach of AW regarding this matter and continues to assert that **AW is not entitled to a time extension for issues related to the Mitigation Areas.**

Although AW provides 2½ pages of discussion regarding the matter, AW's "new information" or approach is succinctly stated in the 3rd paragraph on page 6 of their "Schedule Analysis".

"In Archer Western's baseline schedule, completion of the critical Ramp C embankment was originally scheduled for February 4, 2000. The **completion of the embankment work on Ramp C** with its links to both the South Mitigation Area and to subsequent embankment work on I-75 **is a valid milestone** to use for measurement of Project delays to that point in the Project. In fact, this work was **not completed until May 1, 2000 a delay of eighty-seven days.** Through that point in time the Department had **granted Archer Western twenty four days of weather extensions.** This **yields a total delay of sixty three contract days** which may be attributed to the circumstances encountered by Archer Western in the South Mitigation Area."

AW's new approach takes one activity (1212.02 – Fill & Embankment – Ramp C) that was on the critical path of the original (un-stated) baseline schedule, compares the planned completion date to a purported actual completion date that was 87 days later. AW's new approach is **flawed for several reasons.**

AW's new approach is flawed because it assumes that the entire difference between the planned and purported actual completion date for activity 1212.02 is the result of either weather or the subsoil excavation work. The Department disagrees with AW's assumption. In response to a letter sent by PBCS to AW

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concerning the progress of the work in late 1999, AW responded in writing (*see exhibit 2*). In their letter, AW acknowledged **problems with equipment availability** and **lower than planned production rates** due to their un-trained work force. Additionally, there were grade control issues in the mitigation areas as documented by PBCS letter number 319 dated December 30, 1999 (*see exhibit 3*). As a result of the grade control issues, it is the Department's position that AW spent a considerable amount of time excavating and replacing material that never needed to be excavated in the first place. **The effects of the aforementioned AW issues are not recognized or accounted for in the new approach presented by AW.** AW's new approach is also flawed because it **fails to recognize the 4 day time extension granted** on Supplemental Agreement #9 for issues related to the construction of the South Mitigation Area access road.

Most important though, AW's new approach is flawed because it is not consistent with the requirements of the Contract. Specifically, Supplemental Specification 8-7.3.1 provides for time extensions to be granted for unforeseeable work when

"...the time required to complete the additional designated work impacts the contract completion schedule."

The last paragraph of Special Provision 22 allows for time extensions when

"...time adjustments to the affected activities exceed the total float time along the affected paths of the base schedule current at the time of delay."

Section 8-7.3.2 of the Standard Specifications allows the Department to grant an extension of contract time when

"...a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid."

Supplemental Specification 1-14 defines the Controlling Item of Work as

"The activity or work item on the critical path having the least amount of total float. The controlling item of work will also be referred to as a Critical Activity."

Isolating one activity on the critical path of the un-stated baseline schedule is not consistent with the above listed contract requirements. **Therefore, AW has not provided a schedule analysis that is founded in the contract documents and is not entitled to additional time for this item.**

Change from Seed & Mulch to Sod

Although AW provided additional narrative in the "Schedule Analysis" portion of their Position Package, their position remains unchanged from the one stated in their Request for Equitable Adjustment dated February 19, 2004. In summary, AW is requesting 15 days based on the "accrual method" which was specifically deleted by Supplemental Specification 8-7.3.1. Further, AW failed to give any written notice, in accordance with Sections 5-12 or 8-7.3.2 of the Standard Specification, that the change would cause a delay to the completion of the project. **Therefore, the Department's position remains that AW is not entitled to additional contract time as a result of the change from seed and mulch to sod because timely written notice was not provided, and no contract-based impact analysis has been provided to substantiate the claim.**

Weather Days

With regard to weather days, AW has requested additional weather days be granted for 24 actual days (29 factored days) between the dates of June 26, 2000 and January 4, 2002.

As previously stated in the Department's Position Package, AW has previously agreed in writing not to pursue additional weather days prior to February 18, 2001. **Therefore, AW is not entitled to any additional days prior to February 18, 2001.**

For the remaining days that AW is seeking, the Department reviewed the "Weather Day Production Analysis" (AW's exhibit 18).

- For the days of June 6, 2001 and June 7, 2001, no daily production information is provided.
- For the day of June 25, 2001, the production rate listed was higher than the following day – June 26, 2001, yet the rain occurred on June 24, 2001.

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- For the days during the week of July 2, 2001 through July 7, 2001, the graph presented show a steady decline from the beginning of the week until the end of the week. Could this decline have been related to the July 4th holiday occurring during the middle of the week rather than the weather?
- For the days during the week of July 30, 2001 to August 4, 2001, no daily production information is provided. Further it is noted that there appears not to have been any productive work the prior week. Why wasn't there any productive work the prior week?
- For the days during the weeks of September 4, 2001 to September 9, 2001 and from October 20, 2001 to October 25, 2001, the chart shows that the embankment work was not a controlling item and no production information is provided.

The information presented by AW in their exhibit 18 inspires more questions than it answers. What are the production rates based on? Import truck tickets, on-site haul trucks or a combination of both. Did the import drop because there was more dirt on hand than the spread and compaction resources could handle? What was the equipment availability during the same periods? Was some of the equipment down? What was the labor availability during the same periods? What were the project resources working on? Was it recovery of silt from off-site due to AW's failure to control erosion?

Based on the above analysis, the Department's conclusion is that AW is not entitled to any additional weather days during between February 18, 2001 and the expiration of contract time on January 5, 2002.

AW has also requested another 45 compensable days due to weather impacts that occurred after contract time expired. As previously stated in the Department's Position Package, Article 8-7.3.2 states in pertinent part

"...Such extension of time may be allowed only for days occurring during the contract time period or authorized extensions of the contract time period."

The 45 days requested by AW are **after** the expiration of contract time (including all authorized contract time extensions). AW's argument for weather days after January 5, 2002, is wholly based on the assumption that they are entitled to all other time requested. As stated above and supported with contractual facts, **AW is not entitled to additional time on the other issues and therefore is not entitled to additional weather days after January 5, 2002.**

Delayed Project Acceptance

Consistent with the arguments in their Request for Equitable adjustment, AW claims that the "project completion" should have been granted in **April 2002** because the **entire project was opened to traffic.** Regardless of AW's assertion that project was not accepted because the office compound was not restored, the Department's position remains unchanged from its Position Package for the following reasons:

1. Specification 5-11 of the contract is clear that the project cannot be final accepted until all of the work is completed,
2. Section 1-52 defines the "work" as **"All labor, materials and incidentals required for the construction of the improvement for which the contract is made..."**
3. The "work" was not completed until July 15, 2002 (**see exhibit 4**).

AW did not adequately staff the project to complete the remaining items in a timely fashion. **Therefore, AW is not entitled to additional contract time.**

Conclusion

In conclusion, AW has requested additional compensation for twelve issues. To support its arguments, AW has **provided the Board with incomplete information and approaches that are not founded in the contract.** As we stated above and noted in our Position Package, the Department has agreed to entitlement for several of the issues, and already compensated or have agreed to compensate AW in full for these issues. On the remaining issues though, AW is not entitled to additional compensation or contract time.

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CONTRACTOR'S POSITION – REVISED SUPPLEMENTS:

The Contractor's rebuttal and supplemental information consisting of two (2) note book binders was received by the Board on May 16, 2005. The reader should refer to the these documents,

DEPARTMENT'S REBUTTAL:

The Department's "Rebuttal to Archer-Western's Revised Supplements – Global Claim Issues" was dated May 20, 2005.

The Department has reviewed Archer-Western's (AW) revised supplements to its original position statements for the referenced issues. AW has presented an interesting case consisting of many irrelevant details and "undisputed" facts. While the Department could take the time to actually dispute each of these alleged "facts", there is nothing to be gained by arguing every detail. The Department acknowledges AW's submittal for what it is; an attempt to complicate the issues and take the attention away from what matters, which arguably does not support AW's position. In fact, all of these issues can be resolved by answering two questions:

1. What is required by the Contract?
2. What does the written record show?

Issue 1 - Riprap Bag Quantities:

*AW did not provide any supplement beyond what was included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has not presented sufficient documentation to justify entitlement to payment for an additional 13.7 cubic yards of sand-cement riprap.***

Issue 2 - Silt Fence Quantities

AW claims that the final quantity for silt fence is understated by 97,197 LF. AW's assertion is based on delivery tickets for silt fence totaling 241,000 LF. However, in its position statement, AW notes that it has records showing the installation of only 187,330 LF and references an unsupported spreadsheet.

*In their revised supplement, AW makes several statements that the Department disagrees with. First, AW states that they installed **all** of the silt fence shown on the SWPPP sheets totaling 103,579 LF. AW **did not** install silt fence in all of the areas shown on the SWPPP sheets. There were several large areas of the project where the adjacent property was higher in elevation than the right-of-way and it did not make practical sense to install silt fence. A review of the aerial photographs taken throughout the life of the project supports this fact. Therefore, it is not reasonable or legitimate for AW to claim that they installed all of the silt fence shown on the SWPPP sheets.*

Second, AW states that their erosion control plan did not include removal of accumulated silt. While their plan may not have mentioned removal of silt, the Contract does. The fact is that AW was contractually required to remove accumulated sediment in accordance with section 104 of the Specifications. Approval of AW's erosion control plan did not negate AW's contractual requirement to remove accumulated sediment.

Third, AW incorrectly references section 9-3.2.1 of the Specifications as an argument that they should be paid the "plan quantity" for the silt fence. The method of measurement and payment for each pay item is clearly stated in the Specifications. For some items the quantity paid is the quantity actually installed while for other items the quantity paid is the "plan quantity". Section 104 of the Specifications clearly states that the quantity of silt fence to be paid for will be the quantity installed and accepted, not the "plan quantity". Further, section 9-3.2.1 of the Specifications addresses errors in quantities for items paid for under the "plan quantity" concept and is not applicable to silt fence.

*Therefore, the question before the Board is not whether the Department has adequately documented plan quantity errors as suggested by AW, but rather whether or not AW has provided adequate documentation and proof to entitle them to additional payment under the contract pay items for silt fence. **The Department maintains that AW has not provided sufficient documentation to support its claim for entitlement to payment for any additional silt fence.***

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Issue 3 - Riprap — Ditch Lining

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has been fully compensated for the Riprap — Ditch Lining work and is not entitled to additional compensation for this issue.**

Issue 4 - Riprap — Bank & Shore

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has been fully compensated for the Riprap — Bank & Shore work and is not entitled to additional compensation for this issue.**

Issue 5 - Sod Quantity

AW has submitted a completely new approach with completely new information on the sod issue. The Department is disappointed that AW chose to provide the Department with this information at such a late date in the dispute resolution process. Nevertheless, the Department has reviewed the accusations and unsubstantiated data and finds that AW's data is yet another attempt to mislead the Board.

While the approach that AW used may seem logical to someone not familiar with the Contract, it is not in accordance with the Contract. AW waited until too much time passed to be able to field verify the Department's information and will lead the Board to believe that because of that their method is the only valid method. In actuality, AW created this situation and should not be relieved of their original responsibilities due to their untimely research.

AW's data consists of three major arguments:

1. They digitized the cross sections to come up with a measurement.
2. They spot checked a cross sections in the plans against the Department's field measurements and did not feel that they matched.
3. Since there were no uneven measurements of length or width in the Department's records, AW concluded that the measurements must have been scaled off the plans.

With respect to item 1, Sections 575 and 9-3 of the contract documents require that sod be field measured. Again, AW has tried to use 9-3.2.1 (plan quantity concept) to justify their quantity. Contractually this is not acceptable. With respect to item 2, the Department field verified the 88 feet width of sod at station 649+00 which AW references in its supplement. Arguably, this is what AW should have done instead of making false accusations. The result of that field trip was that the Department's information is accurate. The Department welcomes AW to measure what can still be verified on this project and let us know where their field measurements differ from the Department's.

With respect to the last argument the Department refers you to the Basis of Estimates manual (*see exhibit 1*) which states that accuracy is to the square yard. Common engineering practice is to measure to one unit more accurate than the final accuracy required. This is what the Department did and it is the technically correct way to measure this item.

In conclusion, while AW has taken a new approach, they still have not based their position on the Contract or actual hard field data. The Department, therefore believes that AW has still failed to support their position. PBCS accurately measured the sod that was acceptably placed on the project and with the exception of a minor calculation error, paid AW for the sod that AW was entitled to be compensated for under the contract. **AW is entitled to payment for an additional 321.3 SY of sod. However, AW is not entitled to payment for the remaining 110,983 SY requested.**

Issue 6 - Hay Bale Quantity

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has not provided sufficient documentation to support its claim for entitlement to payment for an additional 3,377 hay bales.**

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Issue 7 - Bedding Stone

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW has been fully compensated for the Bedding Stone work and is not entitled to additional compensation for this issue.**

Issue 8 - Driveway Fence – AW PCN #128

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **AW is not entitled to additional compensation for this issue because they did not provide the required written notice.**

Issue 9 - Erosion Control Quantity

In their revised supplement AW makes several statements that the Department does not agree with. First AW states that the Department changed from seed and mulch to sod because it recognized problems with the erosion control design. In fact, the Department agreed to place sod in lieu of seed and mulch because they felt that it was in the best interest of everyone. At the time AW concurred that they thought it was a good idea. Historically sod is easier to place, easier to maintain, and provides a stand of grass quicker than seeding. So, it was a decision that benefited both parties involved.

Second, AW states that the erosion control devices could not handle the volume of water in 2001. The Department disagrees with this statement. Many of the erosion control devices were not properly maintained and AW failed to stabilize areas of the project in a timely manner (despite permit requirements to do so). AW had a philosophy (as they admitted in their supplemental submittal) of waiting until there were problems with the devices and then replacing them instead of performing simple, routine maintenance.

Thirdly, AW states that their plan was site specific because it incorporated the plan sheets. While that statement is correct, the plan did not specifically address the contractor's means and methods, schedule, etc.

Finally, AW references 104-1 which states "...as shown in the plans or as may be directed by the Engineer." What they fail to mention is Specification 104-2 which states "**Due to unanticipated conditions**, the Engineer may direct the use of control features..." (emphasis added). While there may have been some heavier than usual rainfall during a portion of 2001 the Department did not feel that the conditions were unanticipated. AW should have expected and been prepared for rain in Florida during the summer.

The Department feels that had AW properly maintained their erosion control measures they would not have incurred these costs. In fact, AW made a business decision to replace rather than maintain their erosion control devices.

The Department maintains that under the requirements of Special Provision 34 and the plan notes on the SWPPP plan sheets, as well as AW's own Erosion Control Plan, AW is the responsible party. Further, under Sections 7-14 and 120-10, **AW is responsible for all costs associated with re-grading and washouts, re-sodding any slopes not otherwise paid for by the Department, recovery of off-site silt and cleaning of drainage structures. AW is not entitled to additional costs for this issue.**

Issue 10 - Drainage Structure S-107 — AW PCN No. 133

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter. However, the Department does wish to re-emphasize its position that **The Department concurs with AW's claim and does not contest their entitlement to compensation in the amount requested. Compensation for this issue will be made upon the resolution of the remaining issues.**

Issue 11 - Cypress Creek Bridge Guardrail Pad & Spillway

AW did not provide any supplement beyond that included in their Request for Equitable Adjustment dated February 19, 2004. Therefore, the Department does not have anything to add to its position on this matter.

However, the Department does wish to re-emphasize its position that **AW is not entitled to any additional compensation related to the miscellaneous asphalt pads for the guardrail at the Cypress Creek Bridge.**

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However, the Department does not contest AW's entitlement to additional compensation for relocating the concrete spillway.

Issue 12 – Time Extension Entitlement and Return of Liquidated Damages

In their Supplemental Position Package, AW now breaks the time issue into 6 items:

- 1. Delays associated with the South Mitigation Area*
- 2. Additional Weather (pre 1/5/02)*
- 3. Change from seed & mulch to sod – (pre 1/5/02)*
- 4. Additional weather days (post 1/5/02)*
- 5. Sod (post 1/5/02)*
- 6. Delayed project acceptance*

Delays Associated with the South Mitigation Area

*As we have stated in our initial DRB position statement and our previous Rebuttal to AW's initial DRB position statement, this issue was previously reviewed by the Board and no additional time was recommended because no time was warranted. **The Department maintains that the Board should not re-hear the issue and objects to the possibility that the Board will re-hear the issue.** AW's contention that the hiring of a scheduling expert to come up with a new approach for proving a delay **is not** new information. AW had every opportunity to present its best case to the DRB at the original hearing. AW could have retained a scheduling expert to prepare this same position for the 1st hearing but chose not to. The Department continues to assert that **AW is not entitled to a time extension for issues related to the Mitigation Area, however has prepared the following.***

In its supplement, AW continues to assert that it is due 59 days based on a comparison of the planned completion date to the "actual" completion date for the embankment on Ramp C (Activity 1212.02). AW's approach continues to be flawed for several reasons.

- 1. AW's approach assumes that the entire difference between the planned and purported actual completion date for activity 1212.02 is the result of either weather or the subsoil excavation work. AW's approach fails to take into account:
 - a. AW had problems with equipment availability*
 - b. AW had lower than planned production rates due to their un-trained work force.*
 - c. There were grade control issues in the mitigation areas resulting in AW spending a considerable amount of time excavating and replacing material that never needed to be excavated in the first place.**

The effects of the aforementioned AW issues are not recognized or accounted for in the new approach presented by AW.

- 2. AW's approach is not consistent with the requirements of the Contract.*

Specifically, Supplemental Specification 8-7.3.1 provides for time extensions to be granted for unforeseeable work when

"...the time required to complete the additional designated work impacts the contract completion schedule."

The last paragraph of Special Provision 22 allows for time extensions when

"...time adjustments to the affected activities exceed the total float time along the affected paths of the base schedule current at the time of delay."

Section 8-7.3.2 of the Standard Specifications allows the Department to grant an extension of contract time when

"...a controlling item of work is delayed by factors not reasonably anticipated or foreseeable at the time of bid."

Supplemental Specification 1-14 defines the Controlling Item of Work as

"The activity or work item on the critical path having the least amount of total float. The controlling item of work will also be referred to as a Critical Activity."

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Isolating one activity on the critical path of the un-stated baseline schedule is not consistent with the above listed contract requirements. Therefore, AW has not provided a schedule analysis that is founded in the contract documents and is not entitled to additional time for this item.

In addition to their flawed analysis discussed above, AW has added a new element to the position which they describe as "Archer Western Revised Analysis Regarding DRB Decision". In this element, AW claims that the extra work in the South Mitigation area delayed excavation, slowed the spread rate of the embankment and that the embankment was slowed by a resource constraint. AW provides charts and graphs to illustrate its point. However, AW's argument is flawed for the following reasons:

- 1. AW does not recognize or acknowledge the lack of equipment necessary to meet the planned excavation rates under the best conditions.*
- 2. AW does not recognize or acknowledge the lack of equipment availability during the purported impact period due to mechanical problems.*
- 3. AW does not recognize or acknowledge the effects of weather during the purported impact period.*
- 4. AW's delay analysis is not consistent with the contract requirements for determining the effects of delays.*

As noted above, Supplemental Specification 8-7.3.1 provides for time extensions to be granted for unforeseeable work when

"...the time required to complete the additional designated work impacts the contract completion schedule."

And the last paragraph of Special Provision 22 allows for time extensions when

"...time adjustments to the affected activities exceed the total float time along the affected paths of the base schedule current at the time of delay."

AW's approach does not meet these contract requirements.

Weather Days – (pre 1/5/02)

In its supplement, AW has requested additional weather days be granted for 24 actual days (28 factored days) between the dates of June 26, 2000 and January 4, 2002.

As previously stated in the Department's Position Package, AW previously agreed in writing not to pursue additional weather days prior to February 18, 2001. Therefore, AW is not entitled to any additional days prior to February 18, 2001. In addition, AW's appeal of the weather days is not timely.

Notwithstanding the un-timeliness of AW's appeal, for the days between February 18, 2001 and January 5, 2002, that AW is seeking, the Department reviewed the Daily Reports and has provided a detailed analysis in the attached PowerPoint Presentation (see exhibit 2).

*The information presented by AW in their supplement does not address the primary question – "Were the pre determined controlling items of work effected more than 50% of the workday because of the weather?" The resounding answer is **NO!** Therefore, in accordance with section 8-7.3.2 of the Specifications, the Department cannot grant the requested weather days.*

Based on the above analysis, the Department's conclusion is that AW is not entitled to any additional weather days prior to January 5, 2002.

Change from Seed & Mulch to Sod (pre 1/5/02)

Although AW provided additional narrative in the "Schedule Analysis" portion of their Position Package, their position remains unchanged from the one stated in their Request for Equitable Adjustment dated February 19, 2004, for the sod placed prior to 1/15/2002. In summary, AW is now requesting 16 days based on the "accrual method" which was specifically deleted by Supplemental Specification 8-7.3.1. Further, AW failed to give any written notice, in accordance with Sections 5-12 or 8-7.3.2 of the Standard Specification, that the change would cause a delay to the completion of the project. Therefore, the Department's position remains that AW is not entitled to additional contract time as a result of the change from seed and mulch to sod because timely written notice was not provided, and no contract-based impact analysis has been provided to substantiate the claim.

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Weather Days – (post 1/5/02)

AW has also requested another 45 compensable days due to weather impacts that occurred after contract time expired. As previously stated in the Department's Position Package, Article 8-7.3.2 states in pertinent part

"...Such extension of time may be allowed only for days occurring during the contract time period or authorized extensions of the contract time period."

The 45 days requested by AW are **after** the expiration of contract time (including all authorized contract time extensions). AW's argument for weather days after January 5, 2002, is wholly based on the assumption that they are entitled to all other time requested. As stated above and supported with contractual facts, **AW is not entitled to additional time on the other issues and therefore is not entitled to additional weather days after January 5, 2002.**

Change from Seed & Mulch to Sod (post 1/5/02)

AW provided this new element in the narrative in the "Schedule Analysis" portion of their Position Package, their position is that AW is due 47 days for the sod placed after 1/5/2002. In summary, AW is now requesting 47 days based on their argument that the sod was added work and that liquidated damages cannot be assessed while added work is being performed. Again, AW presents a flawed position.

1. The seed and mulch areas were changed to sod well in advance of the expiration of contract time
2. The change made it easier for AW to provide the required stand of grass
3. AW failed to give any written notice, in accordance with Sections 5-12 or 8-7.3.2 of the Standard Specification, that the change would cause a delay to the completion of the project
4. AW has not provided a contractually based schedule analysis to prove any delay.

Therefore, the Department's position remains that AW is not entitled to additional contract time as a result of the change from seed and mulch to sod because timely written notice was not provided, and no contract-based impact analysis has been provided to substantiate the claim.

Delayed Project Acceptance

Consistent with the arguments in their Request for Equitable adjustment, AW claims that the "project completion" should have been granted in April 2002 because the entire project was opened to traffic. However, in their supplement, AW also states that the punch list was completed on May 7, 2002 and that a CEI representative concurs. Regardless of AW's assertions that project was complete by May 7, 2002, the Department's position remains unchanged from its Position Package for the following reasons:

1. Specification 5-11 of the contract is clear that the project cannot be final accepted until all of the work is completed,
2. Section 1-52 defines the "work" as "**All labor, materials and incidentals required for the construction of the improvement for which the contract is made...**"
3. There is no evidence of any concurrence by a CEI representative that the punch list was complete on May 7, 2002. There is absolutely no mention on the Daily Report (see exhibit 3).
4. The "work" was not completed until July 15, 2002

AW did not adequately staff the project to complete the remaining items in a timely fashion which is the cause for the late completion date.

Lastly, AW has argued that the project should have been accepted on May 7, 2002 and they are therefore due a time extension of 69 days. It is important to note that earlier acceptance of the project would not result a time extension, but would rather move the acceptance date back.

DISPUTE REVIEW BOARD RECOMMENDATION

Conclusion

In conclusion, AW has requested additional compensation for twelve issues. To support its arguments, AW has provided the Board with incomplete information and approaches that are not founded in the contract. As we stated above and noted in our Position Package, the Department has agreed to entitlement for several of the issues, and already compensated or have agreed to compensate AW in full for these issues. On the remaining issues though, AW is not entitled to additional compensation or contract time. As noted in our opening paragraph,

AW has attempted to complicate the issues and take the attention away from what matters

1. What is required by the Contract (see exhibit 4)?
2. What does the written record show?

BOARD FINDINGS:

- **Issue 1 - Riprap Bag Quantities:**

Based upon the information submitted and testimony given at the Hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities above that presented in the Tentative Final Estimate.

Section 530-4 Method of Measurement. Sub-Section 530-4.1 (In part)- Sand-Cement or Concrete Blocks: “The quantities to be paid for under this Section shall be the volume in cubic yards of concrete blocks used, or of sand actually used in the sand-cement mixture and grout, **satisfactorily placed and accepted.**”

- **Issue 2 - Silt Fence Quantities**

Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities above that presented in the Tentative Final Estimate.

Sub-Section 104-6.4.10 (In part): “(2) *Materials and Installation:* 5th para. After installation of sediment control devices, the Contractor will be required to repair portions of any devices damaged by his equipment and such repair all be at his expense. (3) *Inspection and Maintenance:* The Contractor shall inspect all temporary silt fences immediately after each rainfall and at least daily during prolonged rainfall. Any deficiencies shall be immediately corrected by the Contractor. In addition, the Contractor shall make a daily review of the location of silt fences in areas where construction activities have changed the natural contour and drainage runoff to ensure that the silt fences are properly located for effectiveness. Where deficiencies exist, additional silt fences shall be installed **as directed by the Engineer.**”

“Sediment deposits shall be removed when the deposit reaches approximately one-half of the volume capacity of the temporary silt fence as directed by the Engineer. Any sediment deposits remaining in place after the temporary silt fence is no longer required shall be dressed to conform with the Finished grade, prepared and seeded in accordance with Section 570.”

Section 104-10 Method of Measurement (In Part).

“When separate items for temporary erosion control features are included in the contract, the quantities to be paid for under this section shall be **(10) the length, in feet, of Staked Silt Fence;** etc.”

Section 104-11 Basis of Payment.(In Part)

“The length of floating turbidity barrier, relocated turbidity barrier, staked turbidity barrier and **staked silt fence to be paid for shall be the total furnished, installed and accepted at a new location,** regardless of whether materials are new, or used or relocated from a previous installation on the project Additional temporary erosion control features constructed as directed by the Engineer, shall be paid for as unforeseeable work. Such prices and payments shall be full compensation for construction and routine maintenance of temporary erosion control features and for mowing, as specified in this section.”

DISPUTE REVIEW BOARD RECOMMENDATION

- **Issue 3 - Riprap – Ditch Lining**

Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities above that presented in the Tentative Final Estimate. The Contractor requested payment for an additional 108.3 tons of ditch lining riprap and provided the Department with delivery tickets. Based on this additional information and after reviewing project records, the Department processed estimate No. 45 which included payment for the additional 108.3 tons of riprap. **The Contractor has been fully compensated for the Riprap-Ditch Lining quantities incorporated into this project.**

- **Issue 4 - Riprap – Bank & Shore**

Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities above that presented in the Tentative Final Estimate. The Contractor claimed the final quantity for bank & shore riprap was understated by 486.67 tons on estimate #42 and submitted tickets with certification that the material was used on the project. Based on this additional information and after reviewing the project records the Department processed estimate #45 which added 465.1 tons of riprap. The difference of 21.57 tons was due to a duplicate ticket submitted by the Contractor. **The Contractor has been fully compensated for the Riprap-Bank & Shore quantities incorporated into this project.**

- **Issue 5 - Sod Quantity**

Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities other than that acknowledged by the Department in their position papers (321.3 SY) and any other quantities that may have been damaged prior to staking approval by the Department. Evidence was not presented to the Board concerning this quantity.

Section 575-4 Method of Measurement (In Part). “The area of sodding shall be determined as specified in 9-1.3.1.”

Section 9-1.3.1 Final Calculation: “In measurement of items paid for on the basis of area of finished work, where the pay item is designed to be determined by calculation, the lengths and/or widths to be used in the calculations shall be the station to station dimensions shown on the plans; the station to station dimensions actually constructed within the limits designated by the Engineer; or the final dimensions measured along the surface of the completed work within the neat lines shown on the plans or designated by the Engineer. The method or combination of methods of measurements shall be those which will reflect with reasonable accuracy the actual surface area of the finished work as determined by the Engineer.”

- **Issue 6 - Hay Bale Quantity**

Based upon information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities above that presented in the Tentative Final Estimate.

SubArticle 104-6.4.9 Baled Hay or Straw: “This work shall consist of construction of baled hay or straw dams to protect downstream accumulations of silt. The baled hay or straw dams shall be constructed in accordance with the details shown in the plans or the Department’s Roadway and Traffic Design Standards. All baled hay or straw utilized shall conform with the provisions of 981-3.1 for dry mulch.

The dam shall be placed so as to effectively control silt dispersion under conditions present on this project. Alternate solutions and usage of materials may be used if approved.”

DISPUTE REVIEW BOARD RECOMMENDATION

104-7.1 General: *The Contractor shall, at his expense, provide routine maintenance of permanent and temporary erosion control features until the project is completed and accepted. If such erosion control features must be reconstructed due to the Contractors negligence or, in the case of temporary erosion control features, failure by the Contractor to install permanent erosion control features as scheduled, such replacement shall be at the Contractors expense. If reconstruction of permanent or temporary erosion control features is necessary due to factors beyond the control of the Contractor, payment for replacement will be under the appropriate contract pay item or items.*

104-10 Method of Measurement *"when separate items for temporary erosion control features are included in the contract, the quantities to be paid for under this Section shall be (7) the weight, in tons, of Baled Hay or Straw." (Sheet 16 of the Plans notes under Summary of Hay Bales, in part, "(1)Quantities are based on 15 month construction time, with replacement every three months, and a weight of 50 lb. for each bale. (4) Number of bales based on 3' length.")*

- **Issue 7 - Bedding Stone Quantity**

Based upon information submitted and testimony given at the hearing, the Board finds the Contractor is **ENTITLED** to additional quantities above that presented in pay estimate #45. The Contractor claimed the quantity for Bedding Stone shown on estimate #42 was understated by 417.57 tons and provided the Department delivery tickets certifying the material was used on the project. Based upon this new information the Department reviewed the project records and increased the quantity for Bedding Stone by 417.5 tons in pay estimate #45. The Final Pay Estimate should reflect the Total of 417.57 Tons increase as approved by the Department.

- **Issue 8 - Driveway Fence – AW PCN #128**

Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **ENTITLED** to be compensated for the temporary relocation and subsequent reinstallation of privately owned barbed wire fencing to facilitate the construction of various driveway locations along SR-56. The amount due is \$1,500.00 requested in Acceptance on Offer of Final Payment dated November 7, 2002. The Board determined this work was necessary to facilitate the construction of certain driveways and acknowledged by the Department the work was accomplished.

- **Issue 9 - Erosion Control Quantity**

Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional quantities above that referenced in the Departments Global Claim Issues, Volume 1 of 2, Exhibits 18 & 19. PBCS letter No. 722, dated April 23, 2001 and Weekly Progress Meeting Minutes No. 92, item 24 of Last Weeks Items.

- **Issue 10 - Drainage Structure S-107 – AW PCN No. 133**

Based upon information submitted and testimony given at the hearing, the Board agrees with the Department's position, *"The Department concurs with AW's claim and does not contest their entitlement to compensation in the amount requested. Compensation for this issue will be made upon resolution of the remaining issues."* The Board finds **ENTITLEMENT** for the Contractor and release of payment for this work.

DISPUTE REVIEW BOARD RECOMMENDATION

- **Issue 11 - Cypress Creek Bridge Guardrail Pad & Spillway**

Based upon information submitted and testimony given at the hearing, the Board agrees with the Department's position, "In summary, AW is **not entitled** to any additional compensation related to the miscellaneous asphalt pads for the guardrail at Cypress Creek Bridge. However, the Department does not contest AW's **entitlement** to additional compensation for relocating the concrete spillway." See Volume 1 of 2 of the Departments Global Claim Issues Position Package.

- **Issue 12 – Time Extension Entitlement and Return of Liquidated Damages**

Delays Associated with the South & North Mitigation Areas: Based upon the information submitted and testimony given at the hearing, the board finds insufficient data to Reconsider it's Recommendation dated July 22, 2002 which states: "Based on the materials supplied to the board and presentations to the Board at the DRB hearing the Board finds the Contractor, Archer Western Contractors, LTD., is **ENTITLED** to increased cost of \$209,279.34 and **NO ADDITIONAL TIME** during the period of unforeseen excavation and backfilling in the South Mitigation Areas."

Change from Seed & Mulch to Sod: Based upon the information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional time for changing from Seed & Mulch to Sodding.

Weather Days: Based upon information submitted and testimony given at the hearing, the Board finds the Contractor is **NOT ENTITLED** to additional time prior to the February 18, 2001 settlement, however after reviewing in detail the Daily Report of Construction for the period from June 6, 2001 to January 4, 2002, the last day of contract time, **find 15 days of non-factored time** the Contractor has **ENTITLEMENT** due to wet conditions preventing normal production rates.

- **Delayed Project Acceptance:** Based upon the information submitted and testimony given at the hearing, the Board recommends **ENTITLEMENT** to return of liquidated damages for the days from June 6, 2002, the day all punch list items were complete except where the job site offices were located, and July 15, 2002, the day the project received final acceptance.

- **Issue 13 – PAYMENT OF "NO-EXCUSE" BONUS:**

This issue was not included in the information presented nor discussed at the hearing, therefore, the Board has no comment concerning this issue.

It is sometimes argued that a DRB will provide a recommendation that ignores the contract or is somewhere in between the positions taken by each party; in effect, a compromise. **It is not the DRB's prerogative to substitute its own ideas of fairness and equity for the provisions of the contract. ...**³

³ DRBF Practices and Procedures Section 1 – Chapter 6

DISPUTE REVIEW BOARD RECOMMENDATION

BOARD RECOMMENDATION:

Based on the materials supplied to the Board and presentations to the Board at the DRB hearing the Board finds entitlement or no entitlement as noted on each issue.

This Board sincerely appreciates the cooperation of all parties and the information presented for its review in making this recommendation.

Please remember that a response to the DRB and the other party of your acceptance or rejection of this recommendation is required within 15 days. Failure to respond constitutes an acceptance of this recommendation by the non-responding party.

I certify that I have participated in all of the meetings of this DRB regarding these Issues and concur with the findings and recommendations.

Respectfully Submitted

Disputes Review Board

E. K. Richardson, P.E.; DRB Chairman

John W. Nutbrown; DRB Member

John H. Duke, Sr.; DRB Member

SIGNED FOR AND WITH THE CONCURRENCE OF ALL MEMBERS:

A handwritten signature in black ink, appearing to read "E. K. Richardson", with a large, stylized flourish at the end.

E. K. Richardson, P.E.

DRB Chairman