

Thursday 4/17/03
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Dispute Review Board
HEARING RECOMMENDAT
US-19 Pinellas County, Flori
Financial Project No. 257095-1-

March 12, 2003

Michael A. Horan, P.E., President
 Ajax Paving Industries
 510 Gene Green Road
 Nokomis, FL. 34275-3624

Patrick S
 Resident
 Florida Dept. of Transportation
 3204 Gulf to Bay Blvd.
 MS 7-1150
 Clearwater, FL. 33759

Subject: Request for hearing stemming from alleged delays and request for additional time caused by additional utilities or locations not shown on construction plans or anticipated prior to commencing construction.

Gentlemen:

A hearing was held on March 3, 2003 to hear oral arguments and review submitted positions on the above captioned project relating to a request for hearing by the contractor regarding a request for additional time caused by alleged utility conflicts in a number of different locations.

CONTRACTORS POSITION:

Summary of Claim Status

The project was officially accepted on November 20, 2001. On March 28, 2003 Ajax submitted the claim enclosed for their review. After many letters, meetings, and negotiating Ajax and the Department made a partial settlement in the amount of \$91,330.41. This figure included the reduction of liquidated damages in the amount of \$51,488.00 by virtue of an additional 16 days allotted Ajax, and an additional amount of \$39,842.41 to compensate Ajax for various items as enumerated in the attached summary of final claim negotiations.

Issues in Dispute

The dispute is as summarized in the attached "Contract Claim Issues Summary". Ajax is requesting an additional 28 days contract time (3 rain days + 25 contract days), 34 days (44days - 10 days) of Unabsorbed Home Office Overhead, and 28 days of additional maintenance of traffic. The Department and Ajax have agreed to the daily compensation rates of Home Office Overhead and Maintenance of Traffic, and assuming the Department will pay increased quantities of MOT items at contract unit prices, it is not necessary for a ruling on compensation. Ajax is also requesting the DRB to resolve the issue of interest applied to the unilateral agreement which was paid on December 12, 2002, and any amount found in favor of Ajax of the dispute in question. The Department and Ajax can negotiate an amount.

The AJAX Position

Admittedly the original schedule as submitted by Ajax was not a good one, but the Department approved it. It was difficult during the course of the project to update a poor schedule, especially with the detail that would have been needed to appropriately look at each activity. Ajax worked closely with the Department personnel on a daily basis and both sides tried to resolve problems as they were encountered. The "Schedule Narrative and Claim Analysis" speaks to the specific conflicts, and plan errors encountered by Ajax and Pepper Contracting that delayed the completion of widening, curb, sidewalk, and drainage. In addition critical items such as pavement removal overran 22%, 100mm sidewalk overran 18%, and 150mm sidewalk overran 28%, Optional base overran 13%, and asphalt overran 35% which added an additional 69 days to project completion time. Pepper was impacted, but chose to work with the Department and move throughout the project to minimize the economic impact of the changes and conflicts. Yet the ultimate time delay impacted the project significantly.

Ajax has also shown that signalization was delayed 168 days due to conflicts and plan errors with existing utilities throughout the project, as well as substantial quantity overruns as outlined in our original claim package. Ultimately the signalization, including loop installation was the critical activity that delayed the timely completion. The Departments dailies and correspondence submitted in the claim documents substantiate that conflicts and plan errors existed at almost every corner in some fashion. Plans did not show potential conflicts which when found resulted in additional boring and conduit to rectify. Our subcontractor worked around many conflicts and incurred costs due to lost production and inefficiency of having to continually move while conflicts were resolved. Highway Safety Devices also chose the course of working with the Department to lessen any financial impact by moving crews around the project, but again the time to complete all items was impacted severely.

Loop construction is and has been a contentious item between the Department and Ajax. The loops were scheduled to be installed from June 5, 2001 and completed on July 17, 2001. Due to increased amounts of superpave asphalt tonnage and the aforementioned delays impacting signal items that preceded loop installation, the loop construction did not start until August 10, 2001. It was discovered that the loops could not be installed in the structural course because of the lack of proper thickness of asphalt. The Department and the City of St. Petersburg made the decision to install the loops in the Friction Course. Friction Course was completed on October 25, 2001 and the loops were completed on November 10, 2001. At a minimum the Department should allow time from October 26, 2001 to November 10, 2001 a total of 15 days.

From November 11, 2001 to November 20, 2001 (final contract day) Ajax and our subcontractors were completing punch list items that were primarily related to signalization and concrete work. Pepper correctly, disputed many of the punch list items, and between November 11, 2001 and November 15, 2001 a dispute ensued that was finally resolved on November 15 as to the extent of the punch list to be performed. It is Ajax's position that the Department should allow time for the dispute to resolve itself and time to complete the work.

In summary it is our position that the Department should have allowed time during the course of the project in the amount of 123 days minimum for utility conflicts, quantity overruns and plan errors. Had the Department done so Ajax would have completed 79 days early (123 days from

claim narrative -44 days charged = 79 days early). Prior to the negotiated time increase the contract time ended as of October 7, 2001. Ajax accelerated the completion of the project whereas October 25, 2001 attained substantial completion. As you can see in the time analysis when given appropriate rain days (3 rain days not yet granted 10/10/01, 10/14/01, 10/25/01) + (16 days unilateral), brings the contract time to October 26, 2002 inclusive. **Ajax accelerated all items of work in the final three months, and thereby reduced the time of completion to a 25 day extension (44 days - 16 days - 3 days = 25 days) avoiding a more lengthy acceptance date. Twenty-five days can be found in the documents provided in the original claim documents. Ajax encountered another rain day on 10/31/01 which should be taken into account with additional days.**

The Project Engineer, Mr. Gillett throughout the project insisted on not getting into a letter writing contest and led Ajax to believe if we worked out the conflict delays that in the end the project days would take care of themselves. We relied on his word and kept our word until it was apparent that Ajax would be charged liquidated damages and the many delays, conflicts and plan errors were all but forgotten. In fairness, the date of our claim submittal was well within the allowed by specification. Furthermore, had Ajax realized the lack of follow through on verbal agreements and documentation by the Department, the claim would have been in process even before project acceptance, and submitted for review at an earlier date.

The Departments position that Ajax delayed the project due to poor management and the fact that the Friction Course started late and finished late as the sole reason of the twenty five day delay is not valid. Documented delays and indecision of the Department as well as poor plans and utility conflicts are indisputably the reasons for delays throughout the project.

Pepper Contracting Services

Attached please include Pepper's position paper, as part of this document to substantiate their remarks as to the Departments position relative to their performance.

SUB CONTRACTORS POSITION:

Please use this letter in conjunction with your position paper for the upcoming DRB Hearing, which I understand is scheduled for February 10, 2003.

As you are aware, Pepper Contracting performed the sidewalk, ramps, curb and drainage aspects of this project. Our subcontract amount was initially \$850,000 and increased to slightly over \$900,000 due to quantity overruns. I will address several aspects of this project and its completion that I believe are relevant to the claim that AJAX submitted to FDOT:

1. Design Deficiencies & Utility Conflicts

This project had numerous design deficiencies and utility conflicts that impacted our work. An outline of these impacts, and their supporting correspondence, are included in your March 2002 claim package.

The majority of the design deficiencies and utility conflicts consisted of light poles not shown on the drawings, unforeseen foundations, elevation and grade problems, and a wide variety of utility conflicts (water, phone, electric and drainage). Conflicts with the City of St.Petersburg water mains, GTE and Florida Power existed at almost every intersection, along the 5-mile length of this project at some point in time.

The number and frequency of the impacts made this a challenging project. We were frequently forced to stop working in one area and move to another. Our foreman and supervisory staff had to spend a lot of time addressing the conflicts and working out resolutions. This had obvious impacts to our productivity.

A number of the utility conflicts took extended periods of time to resolve. A vivid example is the intersection of 13 Ave. N. and US 19. AJAX's claim package includes a March 22,2001 letter from Pepper describing conflicts at all four (4) comers of this intersection. Attached is a copy of a FDOT letter dated May 24,2001, a full 2 months later, with a resolution for 3 out of

Mr. Gillett emphasized not getting into a letter writing campaign and fostered a spirit of cooperation and trust. In response, Pepper Contracting did not press for additional compensation for many of the above described impacts. In return, we trusted that FDOT would be cooperative in granting additional contract time.

This spirit of cooperation and partnering is evident in Mr. Gillette's December 6, 2001 letter to AJAX, which states:

Again, I wish to stress the Department's desire and eagerness to review all the facts and information relating to any delays which were not in AJAX's control, and come to an agreement as to the appropriate number of days entitled "

However, from Pepper's perspective, this statement does not square with FDOT's subsequent refusal to grant additional contract time. Our understanding is that FDOT has granted very little time to AJAX for the above described impacts. Rather, FDOT has been punitive by withholding substantial liquidated damages.

4. Pepper Contracting's Performance

The project records reflect that Pepper hit this project running. We jumped to a quick start and were diligent in pressing ahead with our work, in spite of the many conflicts and impacts.

Pepper started its work in mid-September 2000. Month after month, we consistently kept our work ahead of the other aspects of the project. Eight months later, in mid-May 2001, we demobilized for a 6-week period. We discussed this demobilization in advance with Randy

Duran, AJAX's project superintendent, and he agreed that it was reasonable in light of the status of Pepper's work compared to the other aspects of the project.

We understand, that FDOT has suggested that this demobilization period had an impact on the final completion date of the project, in their response to AJAX's request for additional contract time. This is completely invalid for the following reasons:

- a. Pepper's work was completed concurrently with the rest of the project. Upon returning to the project in early July 2001, we kept the progress of our work in line with the other aspects of the project. I have carefully reviewed the FDOT daily reports and project records, and it is very clear that the friction course, signalization, stripping, sodding and related aspects of work, all finished concurrently with Pepper's concrete and drainage work. Our work did not hold up the project.
- b. Pepper made sure that we prioritized the critical aspects of the project, within the constraints of the above described impacts. Pepper completed the traffic separators as soon as the median areas were ready for us, and completed the curb work on a timely basis, in advance of AJAX's friction course installation. Throughout the project, Pepper monitored the other aspects of the project to make sure that we were keeping pace.
- c. The project was built in a sequence from the south end to the north. Apparently, FDOT is suggesting that Pepper could have worked ahead on the north end of the project, during the middle part of 2001. We do not agree that this is a reasonable position. The intersections were the critical aspects of this project. Pepper worked in tandem with the signalization contractor in the intersections. The pavement removal was completed in advance for the signalization contractor. We then waited on them, before completing our work. This allowed for an orderly sequence of lane closures, work areas, and work activities. Yes, we could have completed small portions of work independent of the intersections and ahead of this coordinated sequence of operations, but it would have been inefficient and opened up more areas of the project unnecessarily.
- d. FDOT wrote a July 15, 2002 letter to AJAX in response to your March 2002 claim package. In this letter, FDOT comments about letters between AJAX and Pepper written late in the project, concerning the late completion of the project. Clearly there was frustration on the part of AJAX and Pepper's project staff. The goal was to get the project done as quickly as possible. FDOT's refusal to grant additional contract time had everyone on edge. I do not find it remarkable that AJAX was being firm with Pepper and all of your subcontractors about expediting the work, and the potential of liquidated damages. In turn, Pepper was pointing the various reasons the project was finishing late.

5. Substantial Completion and Punch List(s) Completion

FDOT prepared a preliminary punch list dated October 17, 2001 (copy attached). The project records reflect that the project was then substantially completed on or before October 25, 2001.

FDOT then prepared Punch List #2 dated November 5, 2001 (copy attached). Pepper took issue with a number of the items on this list. FDOT listed approximately 13 locations of sidewalk, driveways, etc. that had "cracks". Pepper believed that most of these locations were cracked or damaged due to non-construction traffic, beyond our control. FDOT wanted the areas replaced, but would not agree to pay for them. Finally, on November 15th we reached a resolution of these items with AJAX and FDOT. Attached is a Friday, November 16th letter from Pepper that outlines this resolution, and our request for an approval to proceed from AJAX.

Pepper then mobilized a crew on Monday, November 19th and completed the last of the punch list work on the 19th and the 20th. On these same two days, AJAX, Highway Safety Devices, and Alford Fence completed the last of their punch list work.

Pepper believes that this sequence of events and completion status is significant. The friction course and all significant aspects of the project were completed on or before October 25, 2001. The punch lists dated October 17 and November 5 do not contain any significant work activities. The last critical work activity was the completion of the loop detectors and related signalization work. As you are aware, this work had to follow behind the friction course due to the thinness of the existing asphalt at the side streets.

In summary, we believe that FDOT should grant additional contract time for the reasons outlined above. Further, we believe that FDOT should have suspended contract time on or about October 25th based on the substantial completion of the work and the compensable time delay in completing the signalization work.

We believe that FDOT should be appreciative that it avoided a significant claim amount for the many impacts that occurred on this project. The granting of additional contract time is not only warranted, but a bargain for FDOT.

DEPARTMENTS POSITION:

After our two recent meetings to discuss your original claim package and, subsequent information you provided in our October 17, 2002 meeting, the Department of Transportation proposes the following items as issues we've agreed to:

1. Regular Excavation: Increase the final quantity of pay item 2120-71, Regular Excavation, to a final quantity of 6830 M3. This quantity is as follows.

- Final estimate field measured quantity' for Optional Base was increased approximately nine percent (8,54%) due to a computation error. The increased

quantity. is 12,984 M2 (field measured final quantity) less 11,962 M2 (planned quantity) equals 1,022 M2.

- Calculate the volume by multiplying the depth of excavation of 0.270M times the increased area of 1,022 M2 equals 275.94 M3. Adding this volume to the original final quantity of 6,554 M3 equals 6.830 M3.
- At the original unit price of \$18.77 per M3, the additional 276 M3 equates to \$5,179.40 versus the Ajax claimed \$15,600.00.
- Ajax is entitled to this increase due to a plan error in the original area calculation used to support the regular excavation volume.
- The Department is offering a 2-day time extension for this additional excavation. The value of these 2 days equates to the return of liquidated damages of \$3,218.00 per day for a total of \$6,436.00.
- No compensation for indirect impacts of delay to a controlling item of work is justified on this item.
- Total compensation and time for this issue is \$11,615.40 and 2 days.

2. Superpave Asphaltic Concrete: Adjustment in the unit price as described in section 4-3.1(B) for an increase in a major item of work, as defined 1-3, section 1-3, increased in excess of 125% of the original contract quantity for pay item 2334-1-4, Superpave Asphaltic Concrete. The price adjustment is only applied for the metric tonnage placed in excess of 125% of the original contract item quantity of 7,509 MT.

- At the negotiated unit price, for the quantity placed above 125% of the original quantity' at additional \$22.59 per MT. in addition to the original unit price of \$43.25 per MT..
- The quantity subject to the negotiated price adjustment is the final quantity of 10,133 MT less 125% of the original quantity of 7,509 MT for a total of 747.15 MT.
- At the additional negotiated unit price of \$22.59 per MT, the 747.15 MT above 125% equates to \$16,878.12 additional compensation due to Ajax versus the claimed \$25,321.74.
- The Department is offering a 9-day time extension for this additional tonnage. The value of these 9 days equates to the return of liquidated damages of \$3,218.00 per day for a total of \$28,962.00.
- No compensation for indirect impacts: of delay to a controlling item of work is justified on this I item.
- Total compensation and time for this issue is \$45,840.12 and 9 days.

3. **Curb and Gutter:** Copies of *the* field measurement made by the Department were provided to Ajax for resolution of claimed plan quantity of curb and gutter. This item was field measured and to date no supporting evidence has been presented by Ajax to support this claim. The Department's position is unchanged on this item, until such time as clear and convincing evidence is presented by Ajax to dispute our measurements.

- Total compensation and time for this issue is \$0.00 and 0 days versus the Ajax claimed \$21,240.96.

4. **Handrail:** The Department agrees and will increase the final quantity of handrail at the original contract unit price reflect the authorized and measured length for an addition of \$603.38.

- The Department is offering a 3-day time extension for the additional time to acquire the extra handrail. The value of these 3 days equates to the return of liquidated damages of \$3,218.00 per day for a total of \$9,654.00.
- Total compensation and time for this issue is \$10,257.38 and 3 day's versus the Ajax claimed \$603.38.

5. **Texturized Pavement:** Ajax agrees to withdraw the claim for additional pavement texturizing due to a field decision to minimize an installation error of their subcontractor.

- Total compensation and time for this issue is \$0.00 and 0 days.

6. **Extra Work Items:** The Department agrees to compensate Ajax for the extra work items authorized for the additional 54" RCP storm drainage installation, headwall removal, miscellaneous foundation removal for new signal foundations and the temporary patch on US 19 due a void over an existing box culvert.

- The Department is offering a 2-day time extension for the above extra work. The value of these 2 days equates to the return of liquidated damages of \$3,218.00 per day for a total of \$6,436.00.
- Total compensation of \$7,136.54 for the above extra work versus the Ajax claimed \$7,136.54. Total compensation and time for this issue is \$13,572.54 and 2 days.

7. **Total Cost claim for LS MOT:** Request for payment of Maintenance of Traffic based on the difference between Ajax's bid /cost amounts versus the total cost reported to perform MOT on the project. The supporting documentation submitted to date by Ajax does not clearly and consistently indicate a verifiable cost representation of Ajax's actual cost / expense. Ajax has presented several different methods to calculate a total claimed MOT cost for this project. In an effort to partner on this disputed item the Department offers the following:

- 2 days of MOT support for additional excavation due to plan error.
- 9 days of MOT support for additional superpave asphalt operations due to overrun of original item.

- Calculated daily labor rate for a three-man MOT crew: \$843.18 per day (10 hour shift).
- Calculated daily equipment rate for a three-man MOT crew: \$70.00 per day (10 hour shift).
- Total compensation for a three-man MOT crew for 11 days equals \$10,044.98 versus the Ajax claimed \$111,339.38.
- No adjustment will be made for daily devices for any of the additional days granted by this agreement.

8. Time Claim on Alleged Loop Installation Delay: Unresolved dispute of time due Ajax on the cutting of traffic signalization loops. It is and remains the Department's position that this item was not the sole or controlling factor in the late completion of this project. Many issues contributed to the late completion. As a result of this unresolved item, the Department request Ajax considers mutually agreeing with us to take this disputed item to our DRB for consideration solely on entitlement.

In summary, this offer equates to a total of 16 additional days and \$91,330.42 of associated cost. The 16 additional contract days will result in the removal of liquidated damages for 16 days and Ajax will receive a return value in liquidated damages of \$51,488.00. The Department will assess liquidated damages for the remaining 28 day overrun in contract time for a total value of \$90,104.00.

BOARDS REVIEW AND FINDINGS:

During regular progress meetings and jobsite visits by the Board it was noted by project team members numerous times as to the contractor having to change work locations because of utility conflicts or problems allegedly preventing him from working in certain locations. In this case it is unfortunate the Board has no meeting minutes to refer to and a considerable period of time has passed since the actual events took place.

The Contractor changed project managers at least three times during the project and each time efficiency was jeopardized with these changes. Each project manager has his or her own style and considerable lost motion or momentum each time a change is made.

Review of the Departments package showed jobsite staffing to average less than 20 man days from September, 2000 until late July, 2001 when a great surge to finish the project was made with the staffing levels rising considerably. Review of the monthly Pay Estimates showed months when income barely covered the cost of the MOT items. Even with the alleged conflicts it seems the Contractor could have forced the conflict issues in a more advantageous way to achieve a timely completion.

During the hearing proceedings Department testimony admitted a mathematical error had been made in the calculation of the time due the Contractor. This amounted to one or two days.

The Contractors updated schedule did not show revisions for the alleged utility conflicts nor did it change the proposed completion date.

It should be noted that during each DRB project meeting the Chairman asked all parties what problems and challenges were pending and each time received the answer that everything was fine and the project would finish on time. In every case both parties agreed to this position.

The Standard Specifications Section 5-12.2.2 is very clear as to the requirements required of the Contractor when filing a claim for delay.

5-12.2.2 Claims For Delay: Where the Contractor deems that additional compensation or a time extension is due on account of delay, differing site conditions, breach of Contract, or any other cause other than for work or materials not expressly provided for in the Contract (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, the Contractor shall submit a written notice of intent to the Engineer within ten days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, the Contractor shall also submit a preliminary request for time extension pursuant to 8-7.3.2 within ten calendar days after commencement of a delay to a controlling work item, as to such delay and providing a reasonably complete description as to the cause and nature of the delay and the possible impacts to the Contractor's work by such delay. The timely providing of a written notice of intent or preliminary time extension request to the Engineer are each a condition precedent to any right on behalf of the Contractor to request additional compensation or an extension of Contract Time for that delay, and the failure of the Contractor to provide such written notice of intent or preliminary time extension request within the time required shall constitute a full, complete, absolute and irrevocable waiver by the Contractor of any right to additional compensation or a time extension for that delay. On projects with an original Contract amount of \$3,000,000 or less within 90 calendar days after final acceptance of the project in accordance with 5-11 , and on projects with an original Contract amount greater than \$3,000 ,000 within 180 calendar days after final acceptance of the project in accordance with 5-11, the Contractor shall submit full and complete documentation as described in 5-12.3. There shall be no Contractor entitlement to any monetary compensation or time extension for any delays or delay impacts, whatsoever, that are not to a controlling work item, and then as to any such delay to a controlling work item entitlement to any monetary compensation or time extension shall only be to the extent such is otherwise provided for expressly under 4-3 or 5-12, except that in the instance of delay to a non-controlling item of work the Contractor may be compensated for the direct costs of idle labor or equipment only, at the rates set forth in 4- 3, 2(c) , and then only to the extent the Contractor could not reasonably mitigate such idleness.

5-12.3 Content of Written Claim: As a condition precedent to the Contractor being entitled to additional compensation or a time extension under the Contract, for any claim, the Contractor shall submit a written claim to the Department which will include for each individual claim, at a minimum, the following information:

- (a) A detailed factual statement of the claim providing all necessary dates, locations, and items of work affected and included in each claim;
- (b) The date or dates on which actions resulting in the claim occurred or conditions resulting in the claim became evident;
- (c) Identification of all pertinent documents and the substance of any material oral communications relating to such claim and the name of the persons making such material oral communications ;
- (d) Identification of the provisions of the Contract which support the claim and a statement of the reasons why such provisions support the claim, or alternatively, the provisions of the Contract which allegedly have been breached and the actions constituting such breach;
- (e) A detailed compilation of the amount of additional compensation sought and a breakdown of the amount sought as follows:
 - (1) documented additional job site labor expenses;
 - (2) documented additional cost of materials and supplies;
 - (3) a list of additional equipment costs claimed, including each piece of equipment and the rental rate claimed for each;
 - (4) any other additional direct costs or damages and the documents in support thereof;
 - (5) any additional indirect costs or damages and all documentation in support thereof.
- (f) A detailed compilation of the specific dates and the exact number of calendar days sought for a time extension, the basis for entitlement to time for each day, all documentation of the delay, and a breakout of the number of days claimed for each days claimed for each identified event, circumstance or occurrence.

Further, the Contractor shall be prohibited from amending either the bases of entitlement or the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted hereunder, and any circuit court, arbitration, or other formal claims resolution proceeding shall be limited solely to the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted hereunder. This shall not, however, preclude a Contractor from withdrawing or reducing any of the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted hereunder at any time.

Review of the information submitted by the Contractor did not substantiate the requirements set forth in the Standard Specifications as shown above.

BOARDS RECOMMENDATION

The Board after careful consideration, discussion and deliberation finds the level of documentation presented by both sides is insufficient to fully recognize and explain all parts of the problem.

The Board finds the Contractor is **not entitled** to additional time other than one day admitted by the Department to be owed due to mathematical error in calculation of the days relating to the Superpave overrun and one weather day.

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 both parties.

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

Respectfully Submitted

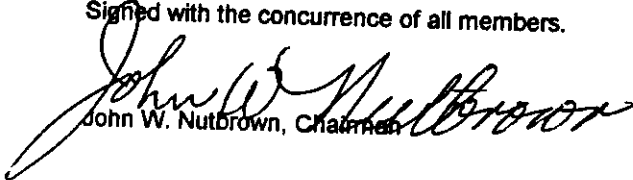
Disputes Review Board:

John H. Duke, Board Member

Rammy Cone, Board Member

John W. Nutbrown, Chairman

Signed with the concurrence of all members.


John W. Nutbrown, Chairman