

STATE ARBITRATION BOARD

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TALLAHASSEE, FL 32312-2837
PHONE: (904) 385-2852 OR (904) 942-0781 FAX: (904) 942-5632

NOTICE

In the case of Clark Construction Co., Inc. versus the Florida Department of Transportation on Project No. 47000-3601 in Pasco County, Florida, both parties are advised that State Arbitration Board Order No. 6-96 has been properly filed on October 31, 1996.

S.A.B. CLERK

OCT 31 1996

FILED



H. Eugene Cowger, P.E.
Chairman & clerk, S.A.B.

Copies of Order & Transcript to:

Jimmy B. Lairscey, P.E., Director of Construction/FDOT

Debbie Roberts, Secretary-Treasurer/Clark Construction Co., Inc.

STATE ARBITRATION BOARD

ORDER NO. 6-96

RE:

Request for Arbitration by
Clark Construction Co., Inc.
Job No. 47000-3601 in
Calhoun County

The following members of the State Arbitration Board participated in the disposition of this matter:

H. Eugene Cowger, P.E., Chairman
Bill Deyo, P. E., Member
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 11:55 a.m. a. m. on Thursday, September 26, 1996

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 6-96 in this cause..

ORDER

The Contractor presented a request for arbitration of a four part claim in the total amount of \$183,113.25

At the beginning of testimony, it was revealed that a hearing was held before a Department of Administrative Hearings Hearing Officer on July 30, 1996 concerning a Notice of Delinquency issued by the Department of Transportation in regard to this project. The Notice of Delinquency was issued on April 15, 1996, because the allowable contract time, as extended, had expired and work on the project had not been completed. During the course of that hearing, the Department announced its intention to withdraw the Notice of Delinquency and subsequently filed with the Department of Administrative Hearings a " Notice of Withdrawl of Notice of Delinquency and Motion for Relinquishment and Remand of Jurisdiction."

The Contractor pointed out that he had requested a postponement of this Arbitration Hearing until certain documents in regard to the DOAH Hearing are available. This request was denied by the State Arbitration Board with provision that the Contractor would be allowed to submit such documents to the Board subsequent to the hearing.

The Contractor entered a copy of the "Notice of Withdrawal of Notice of Delinquency and Motion for Relinquishment and Remand of Jurisdiction" in evidence. The Contractor requested permission to submit the unavailable documents to the State Arbitration Board subsequent to this hearing, but before the Board deliberates on the claim. The Board gave the Contractor the opportunity to submit these documents with the understanding that the Department may submit a written statement of their position in regard to the documents submitted by the Contractor.

By a letter dated September 27, 1996, the Department submitted to the Board a copy of a Division of Administrative Hearings Order dated August 14, 1996 titled "Order Granting Motion to Dismiss and Relinquish Jurisdiction but Retaining Jurisdiction to Rule on Motion for Attorney's Fees." At that time, they also submitted "Position of DOT Regarding Status of Clark Delinquency." In essence, the position stated by DOT is, since the DOAH Hearing on Delinquency was terminated before it was concluded, there were no findings. DOT stated that a DOT Final Order dismissing the delinquency has been prepared for the signature of the Secretary of Transportation.

By letter dated October 9, 1996, Cummings, Lawrence & Vezena, P.A., the Contractor's Attorneys, submitted to the Board a copy of the transcript of the DOAH Hearing (The DOAH stamp on the transcript indicates that it was received by DOAH on October 9, 1996).

It is the understanding of the Board that a Final Order by the Secretary of Transportation is necessary in order to finalize the "Notice of Withdrawal of Notice of Delinquency and Motion for Relinquishment and Remand of Jurisdiction". The Board was furnished a copy of a Department of Transportation Final Order dated October 14, 1996 dismissing the delinquency proceeding. It is noted that a copy of the Final Order was furnished to Clark Construction Co., Inc.

The State Arbitration Board took the above into consideration during its deliberations.

The Contractor submitted the following information in support of his claim:

PART I \$136,244.00 Release of Liquidated Damages (86 Calendar Days @ \$1,584.00/day)

1. On August 12, 1995, core borings taken at the location of the drilled shafts revealed that an artesian condition, not indicated in the plans, existed at a subsurface elevation that will affect the construction techniques for the drilled shafts. This changed condition necessitated design revisions.

2. The Department granted additional contract time for the period between August 12, 1995 and October 2, 1995 to allow time for design changes and acquiring materials to construct the now required permanent casings. However, they refuse to recognize the lack of progress on the work between October 3, 1995 and December 7, 1995 caused by them. We were delayed during that period, because the Department had not issued a written notice to proceed with the extra work resulting from discovery of the artesian condition.

3. We began work on the revised drilled shafts on November 20, 1995, prior to receiving written authorization, because the Department had threatened to suspend our qualification to bid on Department work due to failure to maintain progress on this project.

4. We made several submittals of the Drilled Shaft Installation Plan required by the specifications before finally receiving approval by the Department. We were close to reaching agreement with the Department on a Drilled Shaft Installation Plan at the time the artesian condition was discovered. The artesian condition changed the installation techniques forcing a new round of submittals.

5. We were reluctant to be too specific on the details in our Drilled Shaft Installation Plan, because we have found from experience that the Owner tends to be inflexible in approving changes to the plan we find to be necessary to fit field conditions.

6. We could not complete negotiation of a price for the additional work caused by the changes in the drilled shaft construction techniques until approval of the Drilled Shaft Installation Plan. We continue to have an on going dispute with the Department over this cost.

7. We contend that the allowable contract time should be extended to cover the period beyond that covered by the January 10, 1996 Supplemental Agreement and December 7, 1995, the date on which the Department gave use written authorization to proceed with the revised drilled shaft work. This should remove all liquidated damages that have been assessed.

8. We request that the State Arbitration Board consider the information contained in the transcript of the DOAH hearing covering the above described delaying factors.

PART II \$ 21,384.00 Extra Work in Construction of Drilled Shafts

1. The changes to the drilled shaft construction techniques required us to furnish a permanent casing for the drilled shafts in Bent Nos. 2 and 3 and to use more expensive construction means.

2. We contend that the additional work involved here is the cost of furnishing permanent casing material plus added costs to install the permanent casing and related changes to our operations.

3. The amount claimed is the difference between our quote of \$252.00 per foot of Permanent casing and the \$90.00 per foot offered by the Department.

PART III \$ 1,704.33 Additional Maintenance of Traffic Costs

This is a proration of the bid unit price for Maintenance of Traffic for the period represented by the 87 days that the total contract days charged exceeded the final contract time allowed by the Department. The unit price for various construction traffic control devices in place for that same time period is also included in this PART. The Department refused to pay for these devices that were in place on the job after the allowable contract time expired.

PART IV \$ 23,800.92 Extended Overhead (143 Calender Days @ \$166.44 /day)

This is home office overheard for the number of days that the total contract days charged (377) exceeded the original contract time (234).

The Department of Transportation rebutted each part of the Contractor's claim as follows:

PART I

1. On August 31, 1995, after additional exploratory coring to better identify the artesian condition, we gave the Contractor written notice that permanent casings would be required. The Contractor gave us written notice that he could acquire the necessary material by October 2, 1995. The Supplemental Agreement dated January 10, 1996 granted 46 calendar days of contract time to cover the period between August 18, 1995 and the date the Contractor said casing would be available.
2. The several Drilled Shaft Installation Plans submitted by the Contractor beginning on April 27, 1995 did not meet the requirements of the specifications, because they lacked sufficient detail. We furnished written comments on the sixth version on September 25, 1995 indicating six specific issues that needed to be addressed. The next submittal addressed only two of these issues.
3. The Contractor did not furnish a quotation for doing the additional work until October 24, 1995.
4. We attempted several times to contact the Contractor to initiate negotiations on the unit price he proposed, but could not get him to respond. We issued a Notice of Default due to lack of progress on November 8, 1995 in order to force the Contractor to negotiate. The Contractor submitted an acceptable Drilled Shaft Installation Plan within five days and began work on the drilled shafts within eleven days.

5. The Contractor worked on the job a total of 123 days. This is less than the 234 days allowed in the original contract.

PART II

1. We determined the Contractor's quotation for the permanent casing work to be excessive. The only change in the work effort was furnishing of permanent steel casing to be left in place.
2. We could not complete negotiations on the unit price until an acceptable Drilled Shaft Installation Plan was submitted by the Contractor and they would meet with us to negotiate...

PART III

The specifications for this project provide that compensation shall not be made for maintenance of traffic costs incurred after expiration of the allowable contract time as may be extended by the Department.

PART IV

There is no justification for reimbursing the Contractor for extended overhead, because the additional time required to complete the work was not the result of action or inaction by the Department.

From the foregoing and in light of the testimony and exhibits presented, the State Arbitration Board finds as follows:

The Department of Transportation shall reimburse the Contractor for each part of his claim as follows:

PART I Release thirty five (35) calendar days of the total number of days of the Liquidated Damages on the Final Estimate for this project.

PART II An \$10,000.00 additional compensation for the additional work of constructing permanent casings.

PART III \$700.00 as additional compensation for maintenance of traffic costs. This is an approximate proration of the amount claimed based on the period of time represented by the thirty five (35) calendar days of Liquidated Damages hereby released.

ORDER 6-96

PART IV \$5,000.00 to cover unrecovered overhead costs.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$292.80 for Court Reporting Costs.

S.A.B. CLERK

OCT 31 1996

FILED

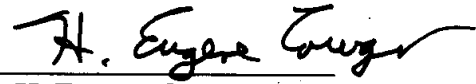
Tallahassee, Florida

Dated: 31 October 1996

Certified Copy:



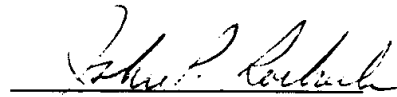
H. Eugene Cowger, P.E.
Chairman & Clerk, S.A.B.



H. Eugene Cowger, P.E.
Chairman & Clerk



Bill Deyo, P. E.
Member



John P. Roebuck
Member

31 October 1996

DATE

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

OCT 31 1996

FILED

CLARK CONSTRUCTION CO., INC.)

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PROJECT NO. 47000-3601

- and -

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LOCATION: Calhoun County,
Florida

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DEPARTMENT OF TRANSPORTATION)

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ORIGINAL

RE:

Arbitration In The Above Matter

DATE:

Thursday, September 26, 1996

PLACE:

Florida Transportation Center
1007 Desoto Park Drive
Tallahassee, Florida

TIME:

Commenced at 11:55 a.m.
Concluded at 1:25 p.m.

REPORTED BY:

CATHERINE WILKINSON
CSR, CP
Notary Public in and for
the State of Florida at
Large

WILKINSON & ASSOCIATES
Certified Court Reporters
Post Office Box 13461
Tallahassee, Florida
(904) 224-0127

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
Mr. Jack Roebuck
Mr. Bill Deyo

APPEARING ON BEHALF OF CLARK CONSTRUCTION CO., INC.:

Mr. Colby Clark
Mr. Paul Wilson

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Benak
Mr. Sam Weede
Mr. Dale Harris
Ms. Gabriella Corbin
Mr. Steve Potter

* * *

I N D E X

EXHIBITS

PAGE

Exhibit Nos. 1 and 2 in evidence

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CERTIFICATE OF REPORTER

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P R O C E E D I N G S

CHAIRMAN COWGER: This is a hearing of the State Arbitration Board established in accordance with Section 337.185 of the Florida Statutes.

Mr. Bill Deyo was appointed as a member of the Board by the Secretary of the Department of Transportation.

Mr. John Roebuck was elected by the construction companies under contract to the Department of Transportation.

These two members chose me, H. Eugene Cowger, to serve as the third member of the Board and as Chairman.

Our terms began July 1, 1995 and expire June 30, 1997.

I want to identify the exhibits now that we have in hand. The first exhibit is the contractor's request for arbitration and all of the package of information that was furnished with the request.

Exhibit 2 is the blue notebook submitted by DOT, which is their rebuttal to the request for arbitration. Both of these documents have been in the hands of the Board and of the parties for some time now. So, they've had adequate time to review those documents.

Are there any other documents that either party wishes to enter into the hearing at this time?

1 Hearing nothing, we will proceed on.

2 (Whereupon, Exhibit Nos. 1 and 2 were received in
3 evidence.)

4 CHAIRMAN COWGER: Will all persons who will make
5 oral presentations during this hearing please raise
6 your right hand and be sworn in.

7 (Whereupon, all witnesses were duly sworn.)

8 CHAIRMAN COWGER: During this hearing the parties
9 may offer such evidence and testimony as is pertinent
10 and material to the controversy, and shall produce such
11 additional evidence as the Board may deem necessary to
12 an understanding and determination of the matter before
13 it.

14 The Board shall be the sole judge of the
15 relevance and materiality of the evidence offered.

16 The parties are requested to assure that they
17 receive properly identified copies of each exhibit
18 submitted during the course of this hearing, none so
19 far, and to retain these exhibits. The Board will
20 furnish the parties a copy of the transcript of this
21 hearing along with its final order, but will not
22 furnish copies of the exhibits.

23 The hearing will be conducted in an informal
24 manner. First the contractor's representatives will
25 elaborate on their claim, and then the Department of

1 Transportation will offer rebuttal.

2 Either party may interrupt to bring out a
3 pertinent point by coming through the Chairman.
4 However, for the sake of order, I must instruct that
5 only one person speak at a time.

6 Before we go into the contractor beginning the
7 presentation of his claim, first off, I'd like to ask
8 you all at the beginning of your presentation to please
9 submit to us the total dollar amount that you're
10 claiming. If you have that in your original submittal
11 package, with the request, we need to substantiate
12 whether or not that amount still applies. So, if you
13 will just state the total amount that you are claiming.

14 MR. ROEBUCK: The 183, is that the total?

15 MR. CLARK: Yes.

16 CHAIRMAN COWGER: I guess we can go ahead and
17 settle that, the total amount is \$183,113.25.

18 A couple of things, first off, three parts of the
19 claim relate to contract time, one way or the other,
20 the time extension, the traffic control, and the
21 overhead all relate to the contract time.

22 In each of those instances the contractor is
23 contending that the time should be extended adequately
24 to cover the -- to make him whole on liquidated damages
25 assessed, and that for traffic control and overhead

1 there were additional amounts of time that he incurred
2 during the life of the project that he is seeking
3 compensation under the items of traffic control and
4 overhead.

5 The point of all of this, and we will get into it
6 in detail, is that I think maybe what we need to do is
7 talk rather than each of those items as far as the time
8 is concerned. We maybe ought to as quickly as possible
9 get to the point of saying -- of talking about the
10 delays to the project and the time aspects of it and
11 try to cover those three items together.

12 Then, of course, the fourth item is a separate
13 item dealing with the drill shaft installation which
14 comes back to a dispute over the unit price for the
15 permanent casing.

16 So, if we could kind of deal with those two as
17 two issues and kind of deal with the time first and
18 then come to dealing with the casing issue, as best we
19 can, I think that would be a good way to handle it.
20 Does everybody agree? Okay.

21 The other thing, in reading this presentation by
22 the contractor, maybe in the DOT's part, too, there was
23 mention of the fact that DOT at one point in time
24 initiated action to declare the contractor delinquent,
25 remove his qualification to bid on work, and out of

1 that arose a request from the contractor that there be
2 an administrative hearing on the matter of delinquency.

3 Now, since delinquency and liquidated damages or
4 time extensions aren't necessarily the same thing but
5 they all relate to the same set of facts, what the
6 Board needs to hear at some point in time is was there,
7 in fact, a hearing held and if so, what were the
8 results of that hearing.

9 MR. BENAK: I'm Steve Benak. I will go ahead and
10 address that. The Department pursued the delinquency
11 through a hearing. We went one day to the hearing and
12 withdrew at that point. So, we are not pursuing
13 delinquency at this point.

14 MR. ROEBUCK: Have you formalized anything in
15 that regard?

16 MR. BENAK: We withdrew from the hearing.

17 MR. CLARK: I'm Colby Clark, Clark Construction.
18 The attorneys for the State at that time has not filed
19 the papers that they are required to file for the --
20 all they had was a request of the administrative
21 officer that they withdrew their delinquency or their
22 claim of delinquency against Clark Construction.

23 He omitted -- the attorney admitted that he
24 overlooked filing the paper. He had not filed it yet,
25 with documents back to the administrative hearings, but

1 he is doing it, to withdraw. The documents have not
2 been filed yet.

3 So, we have no transcript, no nothing, no order
4 yet, besides just the withdrawal, the State is
5 withdrawing their claim of delinquency against us, and
6 that one day of testimony.

7 CHAIRMAN COWGER: Steve, approximately when was
8 the hearing held?

9 MR. BENAK: Last month.

10 CHAIRMAN COWGER: Okay. That's good enough.

11 MR. BENAK: No, it was July 31st is when it was.

12 CHAIRMAN COWGER: So to make sure we understand
13 what happened, the DOT withdrew from the hearing. Now,
14 there must have been a joint agreement to do that, the
15 DOT and the contractor's representative must have
16 agreed at that point that they would terminate the
17 hearing and some agreement was reached on that.

18 MR. BENAK: I don't know if any agreement was
19 reached at that point. We decided to withdraw from the
20 delinquency, the DOAH hearing.

21 CHAIRMAN COWGER: You couldn't do that
22 unilaterally, could you? Didn't the contractor have to
23 agree?

24 MR. BENAK: I don't know, to be honest with you.

25 MR. CLARK: We didn't agree. They just withdrew

1 their complaint -- after one day of testimony.

2 MR. POTTER: We are just not pursuing delinquency
3 on the matter.

4 CHAIRMAN COWGER: I stand corrected. Now, the
5 contractor mentioned a document. Is there anybody here
6 that can tell us about this document that he's talking
7 about that the DOT attorney is supposed to be drawing
8 up?

9 MR. CLARK: I heard from my attorney,
10 Mary Piccard, had informed me -- I don't understand the
11 procedures of the law or the administrative hearing at
12 all, but the attorney said the Florida Department of
13 Transportation was supposed to have a formal document
14 to the administrative hearings on it, and the time,
15 I think the delinquency as I understood, based upon
16 time.

17 So, there's supposed to be some type of
18 resolution to it, but I didn't --

19 CHAIRMAN COWGER: Steve, do you have any --

20 MR. BENAK: There won't be a resolution to the
21 time, the resolution is we are not pursuing
22 delinquency.

23 MR. DEYO: Which means they can still bid.

24 CHAIRMAN COWGER: You are not going to pursue
25 delinquency.

1 MR. BENAK: Right.

2 CHAIRMAN COWGER: You are not familiar with what
3 this document he is referring to may contain.

4 MR. BENAK: I don't know what he's referring to.

5 CHAIRMAN COWGER: Bill, do you have anything to
6 offer on that, what might have happened?

7 MR. DEYO: I think if we withdrew on delinquency,
8 the time issue still stands. Withdrawing delinquency
9 allows the contractor to still bid on jobs and you
10 don't have to go through a court process.

11 The hearing officer should issue a final order
12 saying that the DOT withdrew the claim of delinquency
13 on this job.

14 MR. CLARK: I have -- I didn't think I should go
15 into it, but I have -- it wasn't in the file. I don't
16 know if you all want to look at it. I can get some
17 copies of this made --

18 MR. DEYO: Does it have a direct bearing on the
19 testimony as it relates to the time issue? That's
20 three-fourths of the claim.

21 CHAIRMAN COWGER: What is that document? What is
22 it called?

23 MR. ROEBUCK: Notice of withdrawal, notice of
24 delinquency, motion for relinquishment and remand of
25 jurisdiction.

1 CHAIRMAN COWGER: Okay. That's a motion by the
2 parties or by a party? This is, what, a draft of it?
3 No, this is the motion.

4 MR. CLARK: The motion.

5 CHAIRMAN COWGER: Rather than spend a lot of time
6 further on this thing, I think it's good we got it out
7 on the table, but I haven't looked at this. Does this
8 say anything that's pertinent?

9 MR. DEYO: (Examining document) No.
10 (Discussion off the record)

11 CHAIRMAN COWGER: What we have agreed is that we
12 are going to give the contractor the opportunity to
13 furnish the Board a copy of an order or whatever this
14 document that the DOT attorney is preparing to the
15 Board before we do our deliberations on this matter.

16 Now, I assume, Steve, that you will get a copy of
17 it at this point, also, and you will have -- since it
18 just came up today, we will accept that. We would hope
19 that that will come in within the next couple of weeks.

20 At that point we will also offer the DOT an
21 opportunity to submit, if they wish, a written
22 statement on their position in regard to this document,
23 which will be furnished to the contractor, a copy of
24 whatever statement they make they will furnish to the
25 contractor and to the Board.

1 But we will consider both the document that's
2 being prepared and the DOT's statement in regard to
3 that document in our deliberations when we get to it.
4 But we need all of that. We need the document being
5 prepared by DOT let's say by, hopefully ten days from
6 now, and we need the DOT's statement within 25 days
7 from now.

8 Is there any problem with everybody
9 understanding? So, we are hoping to have in hand
10 within 15 days the DOT prepared documents and within
11 ten days thereafter any statement that DOT wants to
12 make. Okay?

13 MR. ROEBUCK: Are we going to make copies of that
14 and distribute it?

15 CHAIRMAN COWGER: Yes, I think that would be a
16 good idea. Let me see a copy of it. I never saw it.

17 MR. ROEBUCK: If we are going to use it, we ought
18 to let everybody see that.

19 MR. CLARK: I had just gotten that a few minutes
20 ago from across the street.

21 MR. DEYO: This is by Ray Cocklin, Assistant
22 General Counsel for DOT. By order -- and this is dated
23 August 2nd. The effective ruling extends the
24 expiration of the contract time approximately 68 days
25 beyond March of 1996.

1 FDOT had calculated expiration of contract time
2 in reliance on time granted in the supplemental
3 agreement -- that's order number two, thus under such a
4 ruling contract time would not be expired as of the
5 notice of delinquency.

6 That's why they backed off on delinquency.
7 Sounds like somebody at DOT is agreeing to 68 days.
8 That's part of supplemental agreement number 2, which
9 has a direct bearing on the bulk of your claim, which
10 is for 86 days of liquidated damages.

11 MR. CLARK: A correction on that time. After
12 going back, I said there was no other -- the amount of
13 the claim, let me -- I got one other document I would
14 like to give. I didn't see it in here, and I thought
15 it was in here.

16 All it is is the last estimate of the project
17 that we received. It lists the time in our claim right
18 here. It's a little different. We show we had a time
19 extension of 86 days in liquidated damages, and the
20 last estimate that we received only showed 63.

21 So, there might be an adjustment in time, on the
22 amount of our claim because we are not asking for
23 liquidated damages back for time, you know, that wasn't
24 charged against us. It could have been due to weather
25 days or something that came after. These could have

1 been original days but we were granted additional
2 weather days that are not reflected here. I'm not
3 sure.

4 CHAIRMAN COWGER: What you are looking at is a
5 final or semifinal estimate?

6 MR. CLARK: Yes, sir.

7 CHAIRMAN COWGER: They only show 68 --

8 MR. CLARK: Sixty-three days of liquidated
9 damages on this last estimate, estimate number 12.

10 MR. WEEDE: What is the date on that?

11 MR. CLARK: 6-20.

12 MR. BENAK: We haven't seen the actual --

13 CHAIRMAN COWGER: Steve, does that sound
14 reasonable the actual number of days for liquidated
15 damages was 63 days?

16 MR. CLARK: That's what was given to us
17 (indicating).

18 CHAIRMAN COWGER: Therefore, any claim for
19 liquidated damages, the total amount of liquidated
20 damages that were actually assessed was only 63 days
21 instead of 87.

22 MR. CLARK: That's the last record we had.

23 CHAIRMAN COWGER: Okay. I think we have
24 discussed that enough now as far as the administrative
25 hearing and the actual amount of liquidated damages.

1 I think it's appropriate now for the contractor to go
2 ahead and begin his discussion of the claim.

3 MR. CLARK: I'm Colby Clark, president of Clark
4 Construction. This is the first arbitration I've been
5 to, so I'm really not familiar with all of the
6 procedures, but I want to present the information that
7 we've got here on our claim in the order -- the first
8 three concern time, the fourth one concerns -- one of
9 the three concerns drill shafts, permanent casing, and
10 the other three pertains to time.

11 We were -- we had an administrative hearing on
12 our DOT claim in that Clark Construction was in
13 delinquency. After a day of testimony the State
14 withdrew their complaint against us, and the
15 transcripts I will provide to you all, I think explains
16 a lot of all -- it will cover everything in here, these
17 letters, the dates, the time they were submitted, the
18 problems that we got into.

19 Hopefully it will be pretty much a summary of the
20 total scope of the claim.

21 CHAIRMAN COWGER: This is a transcript of the
22 hearing?

23 MR. CLARK: Of the hearing. It just was not
24 available to us right now. I tried to get this
25 arbitration hearing postponed until I could get that

1 information up, but we decided to deny it.

2 The problem, our main claim is based upon time.
3 During this process, the job consisted of the
4 construction of drill shafts on this project. During
5 the preliminary probing of the holes, artesian wells
6 were discovered. By discovering these artesian wells,
7 it changed the scope of the work, changed the condition
8 in our mind.

9 The letters we've got, I think it was on --
10 I don't have the dates on that -- August 12th -- that
11 we requested time be suspended then because due to
12 the -- due to these wells. That time be restarted once
13 a decision was made, a price could be agreed upon, and
14 a method could be determined on construction of these
15 holes.

16 And during this time, and I think it took from
17 August 12th to roughly December 7th is when we first
18 got our letter back from the Department of
19 Transportation to resume work. However, work started
20 earlier, on November 20th, due to another letter that
21 the Department wrote.

22 It took I think it's a total of 68 plus the 46
23 days they gave us in our supplemental agreement which
24 we protested to. We didn't agree with the time or the
25 money that they offered us on the drill shaft. We

1 proposed a price of \$252 a foot and a time extension
2 for the duration of the time.

3 After several weeks of negotiations no agreement
4 could be made, and the State did a supplemental
5 agreement, a fair and equitable settlement and all, and
6 we signed it with protest, not relinquishing our right
7 to protest the claim.

8 So, the whole basis of our claim is we were not
9 allowed time from the time the artesian wells were
10 discovered until the time the letter was given back
11 from the Florida Department of Transportation on notice
12 to proceed with the work.

13 According to the specifications on any
14 supplemental agreement you cannot begin work unless you
15 receive a letter from the Department instructing you to
16 go back to work.

17 That's where our 68 days is based on. It's based
18 on that request. The State originally gave us 46 days
19 of time extension because of this matter, but work --
20 we requested another 68 days total.

21 That's what the administrative hearing was about,
22 delinquency in time.

23 And the other part, just briefly touching on the
24 drill shafts, permanent casing, the letter we
25 submitted, it was \$252 a foot --

1 CHAIRMAN COWGER: Can we do something -- to
2 interrupt you a minute, Mr. Clark. I think it might be
3 appropriate, since it's a pretty much separate issue,
4 if we let DOT rebut that part about the time and then
5 come back and talk about the dollar amount on the
6 supplemental agreement.

7 MR. CLARK: Okay.

8 MR. POTTER: The Department doesn't contest the
9 fact that the discovery of artesian water delayed the
10 project. That's why we agreed to give the contractor
11 46 days that he requested. That was the time he had
12 asked for.

13 The other time that he's talking about, the 68
14 days, there was a period of time in there where the --
15 we were trying to get the contractor -- once he was
16 notified of the artesian water, the Department acted
17 within a reasonable time to instruct the contractor as
18 to what the remedy was. The remedy was installing
19 permanent casing.

20 That -- then we proceeded, you know, asked the
21 contractor to give us a price in regards to that
22 permanent casing.

23 As you can see in Exhibits E and F, the
24 contractor was notified on 8-31 of what the remedy is;
25 that is, to install permanent casing.

1 Exhibit F is the first time we got a price from
2 the contractor in regards to that casing. It took
3 nearly two months for him to give us that price.

4 During this time we, being the staff in the
5 Marianna construction office, was calling and trying to
6 get the contractor to give us the price, without
7 success.

8 And at the same time, as an example, by Exhibits
9 Y, FF, JJ and MM, are letters that were written to the
10 contractor expressing concern over the lack of progress
11 on the contract.

12 So, we were trying to get the contractor to
13 pursue the work and get the -- give us a price so that
14 we could, you know, go ahead with the work that was
15 done without success.

16 Even if the contractor had given us the price
17 early on, in a reasonable time, he still would not have
18 been able to go to work because he didn't have an
19 approved drill shaft plan. It took the contractor
20 seven months to submit an approved and acceptable drill
21 shaft plan.

22 MR. DEYO: Excuse me, this was required by
23 contract documents?

24 MR. POTTER: By contract documents.

25 The contractor indicated on his initial progress

1 schedule that the -- that he would begin removing the
2 existing culvert on the job by day five and have it
3 completed by day 40, and the drill shaft would begin by
4 day 20 and be completed by day 80.

5 You know, as you can see in the Exhibit I, the
6 actual work on removing the structure did not begin
7 until day 55. And the work on the drill shaft did not
8 begin until day 99.

9 The Department in an effort to move the project
10 along and not to delay it any further allowed the
11 contractor to do some of the test work prior to
12 receiving an approved drill shaft plan. You know, we
13 are trying to be cooperative and get the project
14 moving, so they allowed him to do the core tests even
15 before having the acceptable drive shaft plan.

16 It's interesting to note that once the Department
17 issued notice of possible default proceedings that
18 within five days of that the contractor had an
19 acceptable drill shaft plan submitted and began work
20 within 11 days after that.

21 Exhibit I, which is this exhibit behind us, also
22 demonstrates that -- the amount of time that it
23 actually took to do the work. The work actually took
24 123 days to complete the project. That's the amount of
25 time the contractor spent on the project.

1 So, there were plenty of days in which the
2 contractor could have worked. There were 45 weekends,
3 excluding the time period which we gave him the 45
4 days, that he could have worked.

5 All that -- and there was an additional 84
6 weekdays in which the contractor chose not to work
7 during the contract period.

8 MR. DEYO: How many again, 84?

9 MR. POTTER: Right. There was a total of 174
10 days in which the contractor could have worked and did
11 not work on this project.

12 What is evidenced by that is there was plenty of
13 time within the allowable contract time to get this
14 project completed.

15 MR. CLARK: On his letter that we could have gone
16 back to work prior to that, and on evidence in here
17 concerning authorization from the State of Florida
18 authorizing us to go back to work, that letter was
19 dated December 7th.

20 So, at that point that was -- this is a small
21 bridge. It was a three-span bridge. The culverts were
22 removed. Everything had been performed up to this
23 point except for the substructure of the bridge.

24 Now all the substructure rested on the drill
25 shaft. There was no other work could be performed at

1 this time except for the drill shaft.

2 Until we got an acceptable method of installation
3 of the permanent casing, which was some question -- and
4 I will let Mr. Paul Wilson in just a second elaborate
5 on it -- concerning the artesian wells and the design
6 of that elevation of the permanent casing to offset the
7 artesian well -- the height of it was in question,
8 which was considered to change our method of
9 installation.

10 But the time that they gave us, they gave us they
11 said 46 days on that supplemental agreement. That time
12 was not added to that contract until after the first of
13 the year.

14 So, during this time of August 12th to
15 December 7th, time was being charged against our
16 company. And we had a letter dated, I think
17 November -- it's in here, November 20th, placing our
18 company in default.

19 And that was -- the State was not recognizing any
20 time extension from August 12th through December 7th.
21 There was no recognition at all during that time. Time
22 was being charged against us. And the problem was that
23 the request for the permanent casing which was not set
24 up on this project.

25 A letter, let's see, DD, this Exhibit DD in the

1 back shows a letter dated September 13th, 1995, from
2 myself. That's in reference -- they base the 46 days,
3 it's been my understanding, on a line in that first
4 paragraph that states, "After talking to Russo, we feel
5 we can have permanent casing on site by October 2,
6 1995, if we can agree on the amount of payment for the
7 permanent casing."

8 At that time we had not had any agreement. They
9 base their 46 days that they gave us in their
10 supplemental contract from August 12th to October 2nd.
11 We still did not have an approved subcontract at that
12 time.

13 They mention the number -- the delay in the time
14 of submittal of the drill shaft plan and approval. The
15 reason it was -- because of the permanent casing
16 method, the procedure we would use, it might -- the
17 procedure that was -- using the permanent casing might
18 cause additional equipment that was not originally set
19 up on this project. So, you know, additional costs
20 would be incurred by us.

21 I'll let Mr. Paul Wilson at this time talk about
22 the installation plans which he submitted several times
23 to the DOT.

24 CHAIRMAN COWGER: Can we, before he begins,
25 I think this is a good breaking point to ask a couple

1 of questions if we could.

2 Listening to what both sides have said and
3 looking at all the documents that were submitted prior
4 to this hearing, I think it's of particular interest
5 that -- let me first ask a question.

6 As of August 12, 1995, the date that the artesian
7 flow was discovered, what was going on at that point in
8 time as you were coring from the surface down to some
9 distance below the final tip of the drill shaft in
10 order to determine the soil conditions below the tip --
11 the bottom of the drill shaft? No work had begun on
12 the drive shaft, so at this point, other than that
13 coring?

14 MR. WILSON: That's correct.

15 MR. CLARK: Yes, sir.

16 CHAIRMAN COWGER: Is it not normal that those
17 cores be taken after the shaft is installed? Not after
18 the concrete is placed, but after you do the drilling
19 down to the bottom of the shaft? That's when you
20 normally take the cores?

21 MR. BENAK: It happens both ways, sir.

22 CHAIRMAN COWGER: That's the answer to the
23 question, go no further. It can go either way.

24 But up until August 12th, which was some 80 plus
25 or minus days into the contract, no work had begun on

1 the drill shaft.

2 And the reason no work had begun as I understand
3 it, at that point -- and this was prior to the time the
4 artesian flow was discovered, there was not an
5 acceptable drill shaft installation plan, and prior to
6 August 12th plans had been submitted, sent back with
7 comments from DOT.

8 Then you were kind of in a negotiation stage you
9 might say, to try to get the contractor to address the
10 issues brought forth by the DOT's geotechnical
11 engineer.

12 So, prior to August 12th, what was really
13 happening is you were trying to arrive at an acceptable
14 drill shaft installation plan. Then there was a period
15 of time between August 12th and I guess September 1st
16 when the DOT notified the contractor that the permanent
17 casing would be required.

18 Beginning at this point then you had two factors
19 impacting the progress. One, you still didn't have an
20 acceptable drill shaft installation plan, which is now
21 under a different set of conditions, so, you might say
22 that this is a separate time period.

23 And the other thing, of course, is trying to get
24 agreement on how much the permanent casing was going to
25 cost.

1 Now from the standpoint of time, doesn't that
2 pretty well sum it up?

3 And DOT, I think before we leave that, it's in
4 the record, but just briefly what is your position
5 about the period of time before August 12th, why you
6 didn't have -- why the contractor had not submitted an
7 acceptable drill shaft installation plan? Does
8 somebody want to talk about that a minute or so?

9 MR. WEEDE: Frankly, I didn't consider it in
10 compliance with the specifications.

11 CHAIRMAN COWGER: There was a chain of
12 correspondence going back and forth about the issue,
13 and the DOT's position at this point -- and then I will
14 let you come in, Mr. Wilson --

15 MR. WILSON: That's fine. I'm happy to sit here.

16 CHAIRMAN COWGER: The DOT's position at that
17 point was that the plan was not adequate, in accordance
18 with the specifications. Now, I think it's time to let
19 Mr. Wilson talk a moment.

20 MR. WILSON: May I ask a couple of questions so
21 I know what is permissible? Is history, backup
22 permissible on this?

23 CHAIRMAN COWGER: History on this project or --

24 MR. WILSON: As to why this may have occurred.

25 MR. DEYO: We will tell you when you get out of

1 bounds.

2 MR. WILSON: Like I say, I've never been to one
3 of these.

4 CHAIRMAN COWGER: You have a Board that can weigh
5 the testimony. If we decide during our deliberations
6 that this isn't appropriate, we will throw it out.

7 MR. WILSON: A minute on Russo. Russo is a drill
8 shaft contractor. That's what we do for a living.
9 History-wise, we have probably done, since the Federal
10 government put Skyway in the picture and started using
11 drill shafts in bridges in the southeast, we've
12 probably done 50 bridges North Carolina, 20 in South
13 Carolina. We have done a hundred bridges.

14 We have done two in the state of Florida.

15 The first one we did, our installation plan was,
16 quote, unquote, a little loose, and we got beat up on
17 severely.

18 CHAIRMAN COWGER: This is in Florida?

19 MR. WILSON: Yes, sir. The second one we decided
20 to be a little more specific. And that's where some of
21 the delays came about and how procedures would be. We
22 were in negotiations on how things would do and would
23 not do before the artesian water.

24 I think we were pretty close on what we were
25 going to do. Had no permanent casing before the

1 artesian water was shown. I think we had reached an
2 agreement there. It will probably come down the pike
3 pretty quick. I think it was close enough that
4 everybody would say let's go do the test borings.

5 I'm not trying to speak for the State, I'm
6 speaking for Russo.

7 When the artesian water was encountered, we
8 immediately offered a solution using a product called
9 barite, with a bay rolling drilling fluid. This was
10 unacceptable, I understand because nobody had any
11 history of barite, and they were worrying about some
12 aquifers. I have no idea why it was not accepted, but
13 that's why I think.

14 Then it came back to casing. Casing became a
15 problem because what elevation was the casing to be
16 stopped. Was it to be two feet above the top of the
17 grade or was it to be 12 feet above the top of the
18 grade.

19 CHAIRMAN COWGER: We are talking about the top of
20 the casing?

21 MR. WILSON: The top of the casing. This
22 requires different type drilling equipment if it's 12
23 feet than what you would use if it's two feet. That
24 would be more expensive.

25 That discussion got real strong. I think at the

1 end we never did solve it. We decided we would go
2 build the job, let's get it behind us. I don't think
3 we ever solved that problem.

4 But we did write a drill shaft plan that was
5 acceptable. And that probably was really not resolved
6 other than we was going to get the job done, and we
7 decided we could do it.

8 Now, that's the reason it took -- and I assume
9 they -- they used the term seven months. That's from
10 the date of award on through, because once the artesian
11 water -- the job was finished in -- it was finished
12 within five months so it couldn't have been seven
13 months trying to get an installation plan. The job was
14 finished in early December as far as Russo was
15 concerned.

16 We were trying just to make sure that we
17 understood how we were going to play and what the rules
18 were on our installation plan.

19 CHAIRMAN COWGER: Can somebody tell me when were
20 the drill shafts completed?

21 MR. WILSON: December 16th I think is a real
22 close date.

23 MR. DEYO: When was the supplemental agreement
24 processed? You said December 7th. Was that the
25 approved date on there?

1 MR. CLARK: That was the date the letter -- the
2 Department of Transportation authorized us to begin
3 work on the supplemental agreement.

4 MR. DEYO: Okay. Which included the casing?

5 MR. CLARK: Sir?

6 MR. DEYO: Which included the casing?

7 MR. CLARK: Which included the casing.

8 MR. DEYO: At a nonagreed upon price of \$90 a
9 foot?

10 MR. CLARK: Right.

11 MR. BENAK: Realize, and I think Steve brought
12 this up before, these people were unapproachable. You
13 couldn't get ahold of them. They were trying to
14 negotiate with them for a price. That's why the
15 default letter was sent out because we could not get
16 anything out of them to talk to them. They would not
17 answer any of the calls from the people in the field,
18 so they initiated the default, which brought them to
19 the table where we could discuss some things and get
20 the plan in an acceptable manner that met the contract
21 requirements.

22 CHAIRMAN COWGER: Steve, to just expand just
23 slightly on what you said, looking at the record, after
24 I wrote some of these things down, September 1st, DOT
25 gave the contractor a letter telling them the permanent

1 casing would be required.

2 At that point in time I assume that the
3 negotiations should have started on the price.

4 MR. BENAK: Right.

5 CHAIRMAN COWGER: And the original, I guess
6 preliminary notice of delinquency or default was issued
7 in November, roughly two months later.

8 MR. BENAK: We tried the best we could to work
9 with contractors and try to work problems out, and, you
10 know, that's what we try to do.

11 MR. CLARK: The price really cannot be settled
12 because we did not know the method at that time, what
13 equipment would be required. We really had to get a
14 drill shaft plan in place before we could assess our
15 additional costs we had.

16 Like Mr. Wilson said, if we were going to be 12
17 feet above the ground, 13 feet, it would take
18 additional equipment than if we were two feet.

19 If we gave them a price, as we did on these
20 casings, we had to get an approved drill shaft plan,
21 approved before we could realistically come to an
22 agreement on it. We had no idea of the method we were
23 going to install them. Is that right?

24 MR. WILSON: That's right.

25 MR. BENAK: Another point I would like to make is

1 that he had proposed the utilization of temporary
2 casings prior to this. Therefore, the equipment would
3 be the same.

4 This would go into the next claim, also, that,
5 you know, it's not a total change of equipment. The
6 equipment would be there to do this, it would just be
7 that we would provide the material. Instead of using
8 the same casing over and over again, you leave it
9 there, you get another one, you bring it, and you
10 continue on.

11 But with material costs -- so, that will ease on
12 over into the next issue, also. But he brought it up,
13 so it needs to be discussed.

14 MR. WILSON: I'm not quite sure I understand
15 that.

16 CHAIRMAN COWGER: Why don't you wait until you
17 get to the point of talking about the dollars on the
18 casing issue, but let me ask you this, or ask the
19 parties this. The price that the contractor quoted for
20 the permanent casing, \$210 I believe it was, did that
21 include work in addition to furnishing and installing
22 the permanent casing? Additional work in addition to
23 that?

24 Because I hear this testimony going on about the
25 installation procedure was different, after you got

1 into the artesian flow. There was discussion about
2 drilling mud, there's a lot of -- there's discussion
3 about how high the drilling rig had to set above the
4 natural ground in order to accommodate the top of the
5 permanent casing elevation.

6 So, did the price that you quoted, the \$210 a
7 lineal foot, did it include costs other than merely
8 furnishing and installing the permanent casing?

9 MR. WILSON: Yes.

10 CHAIRMAN COWGER: DOT, do you understand it that
11 way? How did you take it to --

12 MR. POTTER: It's my understanding that in
13 earlier drill shaft plan submittals that they had
14 proposed using temporary casing anyway, so, the methods
15 would be the same. It was just simply leaving the
16 casing in place instead of removing it after the shaft
17 was drilled. So, that would be a simple matter of just
18 a materials cost.

19 CHAIRMAN COWGER: Okay. When we get to the part
20 about the cost, I think, Mr. Wilson, you need to talk a
21 little bit about whether there were differences in the
22 installation technique due to encountering the artesian
23 flow. I assume you will do that, right?

24 MR. CLARK: Wouldn't that have bearing on time,
25 though? That's what we're talking about, approval of

1 drill shaft plan, as far as time, you know, on this
2 thing, getting the approval, five months on -- well, we
3 started back on November 20th, after our letter of
4 default from the Department.

5 But if they had granted us 46 days like they had
6 written up they did in the supplemental agreement
7 number 2, you know, at that time, you know, the time
8 frame on the project would not have been that critical,
9 but they charged time on the project from August 12th
10 through this period.

11 Then they came back after the first of the year,
12 wanted to sign a supplemental agreement back to that
13 time, back off of it.

14 That time, we were behind the 25 percent or
15 whatever the requirement is, to be declared in default,
16 but no consideration was given at that time.

17 MS. CORBIN: I wrote that. It was very difficult
18 for me to get ahold of him. I called several times.
19 There was no answer. I left messages again and again
20 for him to call me back and he never did.

21 CHAIRMAN COWGER: During this period of time,
22 though, when you were trying to contact him about the
23 price, though, the drill shaft installation plan was
24 still up in the air, had not been approved?

25 MS. CORBIN: That's correct.

1 CHAIRMAN COWGER: The contractor's testimony is
2 he said I couldn't give you a price until he got that
3 settled. Now, all I'm doing is repeating his
4 testimony. I'm not commenting on the validity of it or
5 anything. That's just what I hear.

6 So, if DOT has something to say to rebut that,
7 I think now would be a good time to bring it up.

8 MR. BENAK: I wasn't paying attention, I was over
9 here talking.

10 CHAIRMAN COWGER: We were talking about the issue
11 of the contractor couldn't be reached to get a quote
12 for the permanent casing, and the contractor said that
13 he couldn't really give you a quote until the drill
14 shaft installation plan had been agreed upon. I would
15 assume pretty close to being agreed upon, so he would
16 know the exact scope of the work that he had to do. Is
17 that true or not?

18 MR. BENAK: This document over here indicates on
19 the bottom, as you see the orange, that's when the
20 plans were submitted, isn't that right, Steve?

21 Through there, there were several iterations of
22 the plan during that time. And there were several
23 instances of -- and Sam will have to talk to this about
24 talking with the contractor to see what the contract
25 documents would need.

1 They would be submitted. They would lack some
2 things. He would ask for a resubmittal. They would
3 resubmit it, then take some things off they had on
4 before.

5 So, it was time after time after time that the
6 document was being submitted and -- it's on the bottom
7 (indicating chart).

8 MR. ROEBUCK: Gene, point to August 12th up there
9 on the date line.

10 CHAIRMAN COWGER: At the bottom of this work
11 progress schedule, the as-built, we have a series of
12 little orange bars which indicates what dates -- the
13 dates on which the DOT received the original
14 installation plan or revisions thereto, and somewhere
15 out here in the middle of November you received the
16 last installation plan, and apparently it was a
17 approved along about that time.

18 MR. BENAK: This job was a small culvert. It was
19 an emergency job. It was a job taken out by a no-name
20 storm. It was just washed out. We were trying to put
21 it back in a fast fashion. We couldn't get any
22 cooperation out of the contractor. The only way we
23 could talk to him was to declare him in default.

24 Once we did that, we got cooperation. We got the
25 plan, we got negotiations restarted. That's the reason

1 we did it, because we couldn't -- we could not talk --
2 they wouldn't talk to us, so we forced them to.

3 MS. CORBIN: November 8th was the letter. Five
4 days later the contractor submitted a plan we could
5 approve. He submitted it on a Monday. We approved it
6 that Monday, the contractor was notified the same
7 morning that it had been approved, that he was notified
8 to go to work. We called Mr. Clark into my office that
9 Friday to talk to me.

10 MR. CLARK: This is an outline of all the
11 submittals that the State says they were trying to get
12 up with me, that letters was sent, that drill shaft
13 plans was being submitted.

14 The reason we were declared in default and tried
15 to begin work, we were really outside the State
16 specifications because we didn't have a notice to
17 proceed. We went to work.

18 We didn't realize all the procedures and all.
19 Time was being charged. We were going to be kicked off
20 the bidders' list. A letter was sent to my bonding
21 company where -- with this letter of default our
22 bonding company would not write any more bonds on us
23 until this thing was settled.

24 It was real critical. It was important that we
25 got this thing settled. Highway lettings, we depend on

1 the highways. We do a lot of work in Florida. If we
2 are removed from the bidders' list, it has a serious
3 impact on our company.

4 They came up with that supplemental agreement
5 which was signed on the 1st and the 10th, the day it
6 was dated. That was two months after we begin work.
7 So, I don't understand the delay in them providing that
8 document to us if they wanted us to go back to work
9 prior to it, because we began work without a signed
10 supplemental agreement.

11 CHAIRMAN COWGER: I think it's pertinent, since
12 you brought up this chronological listing of events,
13 which is Exhibit D, as in dog, in the DOT rebuttal
14 package, that on November 13th the Department approved
15 the drill shaft plan.

16 And on December 7th they are saying that they
17 were still trying to get the contractor to give them --
18 to negotiate with them -- not to give them, but to
19 negotiate with them on a price for the permanent
20 casing.

21 So, you've got several weeks that passed in there
22 during which the contractor surely had the full scope
23 of what was to be done.

24 MR. CLARK: We were working during that period.
25 We began working somewhere around the 20th. We began

1 working prior to December 7th because of the default
2 letter we were given.

3 CHAIRMAN COWGER: You were installing permanent
4 shaft -- casing at that time?

5 MR. CLARK: Yes, without an agreement, just
6 because we were declared in default. At that time we
7 wanted the job to go through quickly to clean up this
8 mess. We had no choice but to do it because we was
9 fixing to be off the bidders' list.

10 CHAIRMAN COWGER: A quick question. How many
11 bents were there in this bridge? It was obviously an
12 abutment on either end.

13 MR. HARRIS: Three. There were four sets of
14 piles, two end bents, two intermediate.

15 CHAIRMAN COWGER: Were they all on drill shaft?

16 MR. HARRIS: Yes, sir.

17 MR. CLARK: This was a real restricted bridge,
18 small span. You had to do your drive shafts because
19 the working area was so limited.

20 MR. HARRIS: Only the intermediate bents required
21 the permanent casing. The end bents did not.

22 CHAIRMAN COWGER: So, you had two bents that
23 required permanent casing?

24 MR. HARRIS: Yes.

25 CHAIRMAN COWGER: Okay, where do we want to go

1 from here now as far as dealing with the time issue?
2 I know we got a little bit off. Does either party have
3 anything more they want to say about that before we go
4 into the discussion of the dispute over the unit price?

5 MR. POTTER: I think it's important to know that
6 Steve started to relay that in the submittals that the
7 contractor would submit a drill shaft plan with a
8 series of steps in it, and some of those steps would be
9 approvable and others they had to take issue with.

10 And the next submittal, you know, would address a
11 couple of those issues that the Department had concerns
12 about, and then some of those things that were
13 approvable were not in what would be taken out of the
14 next phase.

15 MR. WEEDE: If I can give a specific example --

16 CHAIRMAN COWGER: Just a moment. You are the
17 geotechnical engineer dealing with this?

18 MR. WEEDE: Yes. Cleaning sediments off the
19 bottom of the shaft is a very critical issue. Our
20 specification is very strict on the shaft cleanliness
21 requirements. Even in the plan, the final cleaning
22 equipment is something that needs to be provided.

23 On the August 23rd correspondence, adequate
24 cleaning was proposed. I believe it was a down hole
25 pump. On submittal received 9-13, there was no final

1 cleaning procedure included in that submittal.

2 And it wasn't included until I believe the last
3 plan that was submitted which had that down hole pump
4 in it.

5 MR. DEYO: Were you taking each one of these
6 submittals as a total new submittal and not a revision
7 to the previous to address your comments?

8 MR. WEEDE: Oftentimes earlier comments were not
9 addressed and I would try to note them in each one that
10 I reviewed.

11 CHAIRMAN COWGER: Did I hear you say that when
12 you got a subsequent plan that it not only addressed
13 your previous comments but sometimes changed other
14 things that you hadn't commented on and, therefore,
15 created another deficiency? Is that what you are
16 saying?

17 MR. WEEDE: No, sir, I'm not trying to say that.

18 MR. DEYO: The sediment cleaning was an example,
19 sounds like it was.

20 MR. WEEDE: That's a very critical aspect of the
21 drill shaft --

22 MR. POTTER: Some of the concerns were addressed.
23 If there were six, they would address two and then
24 remove one of the approvable ones out of the next
25 submittal. That's how the course of things went.

1 At one point in time they were told if you will
2 address six specific issues then your plan could be
3 approvable. And in turn, then the next submittal they
4 addressed maybe two.

5 CHAIRMAN COWGER: Do you have any idea about when
6 in time-wise that you offered them the deal about the
7 six?

8 MR. POTTER: It's on September 25th. It's
9 Exhibit EE.

10 CHAIRMAN COWGER: Okay.

11 MR. WILSON: I think I should address some of
12 that.

13 CHAIRMAN COWGER: Who said that?

14 MR. WILSON: I did.

15 CHAIRMAN COWGER: Go ahead.

16 MR. WILSON: I am the one who wrote the plan
17 probably. I think I did. I found out that if you are
18 detail specific that can be very detrimental to your
19 health. So, we try to be somewhat ambiguous in the
20 fact that we have more than one way to attack any
21 specific problem that might come up.

22 And in doing this, we have had our plans turned
23 down more than once. From previous history we were not
24 straight enough or ambiguous enough, and we are
25 required to do some things that were absolutely --

1 well, that's another job. But what we were trying to
2 do --

3 MR. DEYO: In general approach?

4 MR. WILSON: Yes, sir. We were not trying to be
5 verbatim and specific. I think that was the problem
6 because we have found that if you do that and it
7 doesn't work, there's no relief.

8 MR. DEYO: You are held to that.

9 MR. WILSON: There's no relief.

10 MR. CLARK: Whether or not we had an approved
11 drill shaft plan, we did not receive a letter until
12 December 7th to begin work. If we had received a
13 letter on November 5th or in September to begin work,
14 you know, we might could have. We don't know. We
15 didn't have an approved plan, so that could be a
16 controlling item.

17 Getting the letter from the State on December 7th
18 instructing us to go back and pursue work on the
19 supplemental agreement was a controlling item, even
20 though we did work outside of the guidelines.

21 You know, the approval of the drill shaft plan
22 didn't delay it. It was delayed on authorization by
23 the Florida Department of Transportation.

24 MR. BENAK: We directed him to go back to work
25 and we defaulted him. We directed him to go right back

1 to work. We couldn't talk to him, so that's the only
2 way we could talk to him, and that got him back to the
3 job.

4 MR. CLARK: That's not the Department's procedure
5 according to their own specifications in there, which
6 is Section 43 -- 4-3.2.3.

7 And it says, "No work covered by a supplemental
8 agreement shall be performed before written
9 authorization is given by the engineer. Certain
10 written authorization shall meet the price and other
11 pertinent information that is required and shall be
12 reduced to written contract document form."

13 CHAIRMAN COWGER: I think we have heard that
14 several times and we can remember that, I believe.

15 MR. DEYO: It's in the book. That's some of that
16 specific stuff you were talking about.

17 MR. CLARK: This is the only time it really helps
18 me today. Usually it's against me.

19 CHAIRMAN COWGER: Let's talk about this matter of
20 default so we have in the record a little better what
21 happened.

22 According to what was in the exhibit, on
23 November 8th, Charles Goodman issued a notice of
24 default letter, and that's what triggered the
25 contractor to go to work in accordance with what DOT

1 has said.

2 Several months later on April 15th, 1996, the
3 Secretary of Transportation issued a final notice of
4 delinquency, and that -- is that the point at which the
5 hearing -- administrative hearing was triggered?

6 MR. BENAK: That triggered the administrative
7 hearing.

8 MR. DEYO: They have ten days to request --

9 MR. BENAK: On delinquency, not default. He
10 cured the default when he returned back to work.

11 CHAIRMAN COWGER: So, there is a point that
12 you've made that there is a difference. One is default
13 and one is delinquency.

14 MR. CLARK: Both of them were revolving around
15 the same time. At that date we felt like if we had
16 been granted the time we should have we wouldn't have
17 been declared delinquent on that date.

18 CHAIRMAN COWGER: This was the April 15th?

19 MR. CLARK: Yes, sir.

20 CHAIRMAN COWGER: We understand that.

21 Okay, what else have we got to say about the
22 contract time issue?

23 I had a question. In the area of this project,
24 with the type of structure, the type of waterway that
25 went over -- I assume it was just a creek, wasn't it?

1 MR. POTTER: Yes, sir.

2 CHAIRMAN COWGER: Would you normally be
3 installing the drill shafts in the dry or in the wet?

4 MR. WEEDE: Wet.

5 CHAIRMAN COWGER: Wet. But originally this
6 contract looked like it might -- until you hit the
7 artesian flow, did it look like you maybe could do it
8 with the dry installation technique or was that ever a
9 consideration?

10 MR. WILSON: We have bad terms. In the wet is a
11 slurry operation. Now, he said we are going to use
12 temporary casing. That's a different term altogether.

13 MR. WEEDE: Excuse me, Paul.

14 MR. WILSON: We just need to be sure we have the
15 terms correct.

16 MR. WEEDE: In my opinion, looking at the site,
17 I never considered it to be a dry hole. From the onset
18 I considered it would have to be poured with fluid in
19 the excavation.

20 MR. WILSON: Russo bid the job probably not to
21 have any outside drilling mud, only the water and the
22 clay that's there and using temporary casings. I think
23 everybody agrees to that.

24 MR. DEYO: When he was out making copies, Jack
25 had a question. On the liquidated damages in your

1 rebuttal and your rebuttal, DOT's rebuttal, it says 86
2 days have been withheld. Have we got a good figure we
3 can look at?

4 MR. ROEBUCK: It sounded like you backed off.

5 MR. CLARK: That's all the records I had.
6 I based it -- we based it upon other information that
7 we never did get. I guess -- I think my sister put
8 this claim together, helped put the numbers. She
9 called DOT and they said 86 days. When we get down to
10 it, my last estimate that we had, estimate 12, it only
11 showed 63 days.

12 MR. ROEBUCK: I wrote 63. Does the DOT have a
13 number? How much did you assess?

14 MS. CORBIN: Eighty-six days.

15 MR. CLARK: It was? Okay, I didn't have --

16 MR. DEYO: We will operate on 86 days.

17 MR. ROEBUCK: DOT confirms that it was 86 days.
18 Colby brought up the question.

19 CHAIRMAN COWGER: He's only been assessed on 63
20 days, right?

21 MR. DEYO: No.

22 MR. ROEBUCK: That's wrong.

23 MR. DEYO: Ms. Corbin says it's 86 days.

24 CHAIRMAN COWGER: So, 86 days is the --

25 MR. ROEBUCK: Is there any question?

1 MS. CORBIN: It's 86 days, contract day 377 and
2 time is -- 291, according to our records, it would be
3 86 days.

4 CHAIRMAN COWGER: The point I think I'm trying to
5 make here, I'm still confused in that that portion of
6 the claim dealing with the time extension really what
7 you're asking for is total release of any liquidated
8 damages that has been assessed?

9 MR. CLARK: Yes, sir.

10 CHAIRMAN COWGER: And if only 63 days have been
11 assessed --

12 MR. ROEBUCK: That's not right. He pulled a
13 number out of the air.

14 MR. CLARK: I got the information that they gave
15 us, might have been verbal. When we got our last
16 estimate, which is estimate 12, I never did revise it.
17 All it showed was 63 days of liquidated damages.
18 I never did have any documents or anything reflecting
19 86.

20 CHAIRMAN COWGER: The actual number of days
21 assessed was 86?

22 MR. POTTER: What is the date on that?

23 MR. CLARK: Sixty-three.

24 MR. POTTER: The project wasn't finished until
25 July 4th. So, there's probably another estimate beyond

1 that.

2 MR. DEYO: We just won't use that number.

3 MR. CLARK: I just didn't see the last estimate.

4 MR. DEYO: We will operate on the 86 days as
5 stated.

6 MR. CLARK: Yes, sir. I apologize.

7 CHAIRMAN COWGER: I think we ought to go on to
8 the discussion of the unit price on the casing.

9 MR. CLARK: Yes, sir. We have done touched bases
10 on some of it, concerning the installation, the
11 difference in installation.

12 I will let Mr. Paul Wilson, since Russo was the
13 contractor who was going to install it, they provided
14 the price to us. We forwarded it on to the Department.

15 MR. WILSON: We priced casing for this project as
16 the cost of material plus the transportation, plus
17 different equipment if we needed it to handle it, plus
18 I don't think there was any coating on this material.
19 The elevation that was set to, time lost that we
20 anticipated any time lost because of this, and came up
21 with a number that we gave Clark Construction Company
22 for temporary -- for the casing.

23 Now, this is not anywhere near the same thing as
24 temporary casing. The fact that this is one piece of
25 pipe set to an elevation and coming up to an elevation,

1 which is going to be cut off if it's higher than the
2 cut-off of the grade.

3 In our opinion we didn't have a number in there.
4 There may be history -- everybody has their own history
5 of cost. It's not a big quantity. Maybe it is in some
6 people's eyes. Whatever it cost us, that's the only
7 place we hadn't put any money back.

8 MR. CLARK: They use the State average. The
9 State came up with \$91.88. Well, there's other items
10 on that project, too. That includes you've got
11 mobilization, different type items that include
12 different costs.

13 We all know mobilization, you've got a lump sum.
14 It don't cost -- you are allowed to put 10 percent or 8
15 percent into it. It's not really the true cost of
16 mobilization, it's helping get some of the materials to
17 the project.

18 You know, if this casing had been in the project
19 when we bid it, we would have bid it at \$252 a foot and
20 not \$90 a foot. Our price would have reflected it.

21 Because that price not only included the
22 installation of it, it included the removal of it. You
23 had to remove the casing from the -- above the ground,
24 from my understanding, to down right below the ground,
25 right to the elevation of the ground. All of your

1 exposed casing had to be removed.

2 They did not want the casing exposed. You poured
3 it full of concrete, go back and saw it and cut it,
4 remove it, then all you've got is exposed concrete
5 above the ground.

6 CHAIRMAN COWGER: But the unit -- the quantity of
7 casing went to the top of the casing prior to being cut
8 off, right?

9 MR. CLARK: Yes, sir.

10 CHAIRMAN COWGER: I think what I hear -- heard
11 Mr. Wilson say was that the cost for -- that he quoted
12 for the permanent casing included costs over and above
13 merely the cost of furnishing and installing the
14 casing.

15 MR. WILSON: There is time that we had on the
16 project -- we don't have a mobilization charge.
17 There's three or four items we put none in. That
18 casing took some lost time up, yes.

19 When we started drilling the job with our outside
20 contractor, we started mobilization, and we had to back
21 up twice on the project. That may have been in-house
22 money, but it's in-house money.

23 MR. CLARK: We chose to go ahead and drill the --
24 do exploratory holes, pour the casing, to try to
25 eliminate any delays that we got in. We were afraid if

1 we got in there with the drill rigs, the core rigs, and
2 starting to do our drill shafts, then we have a
3 problem, we have additional equipment standing there,
4 the cost would be greater.

5 The most efficient way for the State we felt like
6 and for us, it's pretty normal now to go in and
7 predrill, take cores below the estimated till.
8 That way you know what you're going to get into before
9 you actually perform the work.

10 CHAIRMAN COWGER: Did the issue of whether or not
11 you would be allowed to use drilling mud really become
12 significant or not?

13 MR. WILSON: It took some time because we wanted
14 to argue our point in the procedure letters that we
15 thought we could do it this way. We wanted to argue
16 our point. So, yes, sir, it took time. I guess there
17 was two letters I wrote saying we still wanted to use
18 drilling mud.

19 CHAIRMAN COWGER: If you had been allowed to use
20 drilling mud, would you have had to have the top of the
21 permanent casing seven feet above the ground?

22 MR. WILSON: We didn't feel like we would,
23 because the mineral, barite, which is barium, we can
24 weight that up to about two times specific gravity.
25 Whether or not that would hold it down, I guess it's

1 going to be a trial and error thing.

2 CHAIRMAN COWGER: I noticed something else I had
3 a question about. In all of the documentation, there
4 was a big discussion about the trenching. Did that end
5 up being a problem?

6 MR. WILSON: There's always a problem with
7 trenching in Florida.

8 MR. WEEDE: First of all, the slurry that Paul
9 proposed I am sure would be feasible; however, our
10 specifications are specific on what type of materials
11 you use to make slurry.

12 And the other issue, it would have been a
13 weighted mud and would have been much heavier. We have
14 limits within our specifications where the mud has to
15 be within specific ranges.

16 CHAIRMAN COWGER: It would have been too heavy?

17 MR. WEEDE: What would have been acceptable or
18 not, that would have been another can of worms
19 I couldn't have answered. That would have been a
20 statewide issue.

21 CHAIRMAN COWGER: Do you have any idea why it is
22 you have a maximum on the weight of the drilling mud?

23 MR. WEEDE: Yes, you can have too thick a slurry.
24 It can be coating on the rebar. On the sides of the
25 shaft, it could cake up on there, you can use friction

1 resistance on the sides.

2 MR. WILSON: And we are getting viscosities,
3 weights, all these things confused. There are all
4 kinds of problems. What brings on one, brings on two.
5 By weighting it like this, we are not increasing the
6 viscosity, which is what you're talking about here.

7 MR. WEEDE: Yeah, but there are two issues there.
8 I wouldn't know what the -- offhand what effect that
9 would have had.

10 CHAIRMAN COWGER: I think that's enough on that.

11 MR. HARRIS: I'd like to say one thing. On the
12 permanent casing, there was no different equipment used
13 to install permanent casing from the temporary. There
14 was not one extra piece of equipment placed on the
15 project.

16 CHAIRMAN COWGER: Is that true?

17 MR. WILSON: That's true.

18 CHAIRMAN COWGER: Now, was the fact -- did the
19 fact that the top of the permanent casing had to be
20 seven feet above the ground have any impact?

21 MR. WILSON: I don't think we ever did that.
22 Now, that was a factor, and we decided that wasn't
23 going to happen. And we went on to work and it didn't
24 happen.

25 CHAIRMAN COWGER: So, you did not install the

1 permanent casing to seven feet above the ground?

2 MR. CLARK: No, sir, didn't have to.

3 MR. WILSON: That was an argument that went all
4 the way through, the problem being the drilling we had
5 on the site was a 700 tech something. That means
6 nothing to anybody. The underrotary-type clearance,
7 this is where the pin and the auger goes in, is about
8 seven feet.

9 All right. Now, your auger is about three to
10 four feet long, or your mud bucket or anything else.
11 So, you either have to jack the rig up or do something
12 to get over that seven foot.

13 CHAIRMAN COWGER: That didn't turn out to be an
14 issue?

15 MR. WILSON: No. That's what we were arguing
16 about.

17 MR. CLARK: At the time we submitted this, the
18 price and all -- we are sitting here with hindsight.
19 We know how much it cost us now. We know the procedure
20 to use. At that time we did not know what we were
21 going to use.

22 MR. WILSON: I think the project was three weeks
23 after we got there, ten days. So, it wasn't -- there
24 was no difficulty in doing the project. Once we got
25 through arguing, there were no problems.

1 MR. CLARK: The Department, after redoing our
2 initial cores, came in with their own core rigs, their
3 own personnel, and they double checked a lot of the
4 holes again.

5 And they determined, I think they determined the
6 ones that was in question would start the holes above
7 the artesian level, didn't we?

8 MR. WEEDE: That was final decision.

9 MR. CLARK: Final decision. We left the holes
10 above -- that's the reason the casing was able to be --
11 leave it down because we stopped them above the
12 artesian.

13 MR. WEEDE: I wasn't aware of that until today.

14 CHAIRMAN COWGER: What, that they didn't bring
15 the permanent casing up above -- seven feet above the
16 ground?

17 MR. WEEDE: Yes.

18 MR. CLARK: We had to remove and cut anyway after
19 the casings were put in, still had some removal.

20 MR. WEEDE: The -- our investigation was to
21 determine how high the artesian was going to rise and
22 to evaluate whether or not we had to get into it or if
23 we felt comfortable in tipping it right above it.

24 MR. HARRIS: He had the opportunity to put the
25 casing down to the bottom of the original ground line

1 and form on up with an -- a conduit form that he could
2 just unbolt and take right off, but he just chose to
3 leave the casing sticking up, therefore he had to cut
4 some off.

5 CHAIRMAN COWGER: We are not here to worry about
6 the cost of cutting the casing off I don't think. It
7 might be some minor part of it.

8 The original intent of the approval of the drill
9 shaft plan, the final approval was for the permanent
10 casing to be seven feet above the ground to counter
11 balance the artesian flow, so you make sure you had no
12 flow upward up through the hole.

13 As it turned out during the construction, they
14 were able to get by with the permanent casing being
15 somewhat lower than that by demonstrating that there
16 was no upward flow through the shaft, even though you
17 didn't maintain the water level quite that high.

18 MR. WILSON: We didn't have any water coming out
19 of the top of the casing.

20 MR. HARRIS: No water came out. I think
21 Mr. Weede's point was to make sure we addressed this
22 matter in case it happened and the contractor wasn't
23 going to say I wasn't aware of that, don't know how to
24 do it.

25 MR. WILSON: I do recall that we brought four

1 mats down there to jack ourselves up if we had to.

2 CHAIRMAN COWGER: I think we have about heard all
3 the testimony we can stand for today, but I guess
4 there's a substantial difference in what the contractor
5 quoted, the \$210 lineal foot, and what the DOT
6 considered to be fair and equitable of \$90 a lineal
7 foot for the permanent casing.

8 Now, we've heard testimony from the contractor
9 about why he feels that 210 is reasonable. Is there
10 anything further to be said about that?

11 MR. DEYO: It's 252.

12 CHAIRMAN COWGER: Whatever.

13 MR. DEYO: A difference of \$162.

14 CHAIRMAN COWGER: I stand corrected, \$252 was the
15 quote. Okay. I don't hear anything. Does DOT have
16 anything they want to say to support the \$90 other than
17 what you have already got in the record?

18 I think we can move on then. Does either party
19 have anything else that they would like to put into the
20 record before we close the hearing?

21 Hearing nothing, Mr. Deyo, do you have any
22 further questions?

23 MR. DEYO: No, sir.

24 CHAIRMAN COWGER: Mr. Roebuck?

25 MR. ROEBUCK: No, sir.

1 CHAIRMAN COWGER: This hearing is hereby closed.
2 The Board will meet to deliberate on this claim in
3 approximately six weeks, and you will have our final
4 order shortly thereafter.
5 (Whereupon, the hearing was concluded at 1:25 p.m.)

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CERTIFICATE OF REPORTER

1
2 STATE OF FLORIDA)
3 COUNTY OF LEON)

4 I, CATHERINE WILKINSON, Court Reporter, do hereby
5 certify that I was authorized to and did stenographically
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8 I FURTHER CERTIFY that I am not a relative, employee,
9 attorney or counsel of any of the parties, nor am I a
10 relative or employee of any of the parties' attorney or
11 counsel in connection with the action, nor am I financially
12 interested in the action.

13 Dated this 17th day of October, 1996.

14
15 
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