

# STATE ARBITRATION BOARD

December 16, 1997


## NOTICE

In the case of Superior Paving, Inc. versus the Florida Department of Transportation on Project Nos. 16120-3502 and 16120-3503 in Polk County, Florida, both parties are advised that State Arbitration Board Order No. 2-97 has been properly filed on December 16, 1997.

S.A.B. CLERK

DEC 16 1997

**FILED**

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

Copies of Orders & Transcript to:

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

Willard R. Elsberry, President/Superior Paving, Inc.

## **STATE ARBITRATION BOARD**

**ORDER NO. 2-97**

**RE:**

Request for Arbitration by  
Superior Paving, Inc. on  
Job Nos. 16120-3502 & 16120-3503 in  
Polk 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 9:36 a.m. on Thursday, September 25, 1997.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 2-97 in this cause..

### **ORDER**

A Request for Arbitration of a Claim in the amount of \$209,066.88 was received by the State Arbitration Board on July 15, 1996. Subsequently the Contractor and the Department of Transportation reached agreement on certain aspects of the claim. A Supplemental Agreement dated August 12, 1997 provided compensation in the amount of \$78,913.01 and released liquidated damages for 62 calendar days previously assessed by the Department. It was agreed that the Contractor would revise the Request for Arbitration of a Claim in an amount not to exceed the amount of their original claim less the total of the amount added to the contract by the Supplemental Agreement and the dollar value of the liquidated damages previously released. The revised claim must deal only with issues covered under items A4, A5, A6 and A7 as set out in the Supplemental Agreement.

On September 11, 1997 the Contractor submitted a modified claim in the amount of \$95,433.87 to the State Arbitration Board.

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

PART R-1    Amount \$22,587.96    Overhead and Administrative Costs incurred during delay periods in addition to those for which compensation was provided by Supplemental Agreement.

We are entitled to overhead and administrative costs incurred during 37 calendar days of delay in addition to those days for which overhead was paid by the Department in the Supplemental Agreement dated August 12, 1997. This is essentially the period at the beginning of work when the Department suspended charging of contract time to allow for utility relocation to progress. We were involved in activities related to the contract during that period. Our acknowledgment of the condition in the Department's letter of December 10, 1992, whereby we agreed to not pursue any further claim in connection with our request for the suspension of contract time, was done under duress. Our intent in requesting the suspension was to mitigate damages and to avoid a claims situation.

PART R-2    Amount \$ 9,832.81    Profit @ 15% on the amount in Part R-1 of this revised claim and on the amount of Overhead paid per by Section (1)A-5 of the Supplemental Agreement dated August 12, 1997.

The amount claimed is for profit on all of the overhead and administrative costs we incurred, because work was delayed by the Department. These delays extended the time period we were committed to the project causing us to lose opportunities to pursue other profitable work.

PART R-3    Amount \$7,329.20    Difference between the amount claim and the amount paid per Section A-4 of the Supplemental Agreement dated August 12, 1997 for maintenance of traffic during the 62 calendar day period for which DOT granted an extension of the contract time in the Supplemental Agreement.

The amount claimed is based on our daily costs for extending maintenance of traffic during the 69 calendar days by which the work was delayed by the Department. This dispute is essentially over the difference between the daily rate calculated using the amount we bid for the lump sum item Maintenance of Traffic divided by the original contract time and the daily rate calculated by the Department based on the cost of a MOT Technician. We incurred maintenance of traffic costs in addition to flagging costs during the delay period such as construction signs for which separate payment is not made.

**PART R-4**    Amount \$4,099.00    Cost of removing and replacing friction course where the surface texture was deficient, because the mix contained latex.

Stings and globs of latex in the mix became apparent only after the mix had been placed and it cooled.

It is well documented that latex in the mix causes problems with physical characteristics and reaction of latex additive in the mix. The Department denied our request to delete latex from the mix for which we offered an appropriate credit. Prior to this request, the Department announced a policy of deleting latex in project areas involving frequent variations in width, acceleration lanes, intersection, etc.

After our hot mix supplier had blended latex with the asphalt to be used for production of friction course, the Department ordered work on this item to be delayed until a decision was made on the minor crack that had occurred in the structural course between the existing pavement and the widened pavement. Latex is believed to "set-up" into strings and blobs where held in a blended state for an excessive time.

**PART R-5**    Amount \$ 9,403.00    Cost of removing and replacing latex-asphalt friction course in areas where there were straight-edge deficiencies.

The Department enforced the specification straight-edge requirements on through lanes even though this was a job involving overlaying and widening of an existing road where the need to fit to the existing pavement and new curb and gutter which had to be fitted to existing conditions prevented us from achieving the required surface profile. These conditions were compounded by the presence of latex in the mix. We feel that the quality standards applied here were not justified under the circumstances.

**PART R-6**    Amount \$40,681.90    Interest at 13% per year in the amount of \$57,347.50 on the total amount of the original claim (\$147,719.38-excludes interest and claim preparation costs) less the interest in the amount of \$16,665.50 on the amount of liquidated released (\$34,720.00) which was paid for under Section (1)A-6 of the Supplemental Agreement dated August 12, 1997.

This is for interest between July 18, 1993, the date on which project was accepted by the Department and July 12, 1996, the date on which we filed the original Request for Arbitration. As the result of the Department paying us amounts due, we were forced to borrow working capital funds at 13%, the interest rate from unsecured loans

We gave timely notice of intent to file claim for additional compensation for each of the item that are a part of our claim. The Department made no effort to determine elements and totals for the events about which it had received notice of intent to claim equitable compensation in time and money and, thus placed the entire burden for documentation in this matter on the Contractor. They took no action toward seeking settlement until we filed the formal Request for Arbitration.

PART R-7      Amount \$ 1,500      Claim Review and Preparation Fees

In compiling our claim, we expended considerable clerical and professional time to compile, sort and trace the various relevant sources of information. Also, we paid the State Arbitration Board filing fee. We are seeking a portion of the costs incurred here.

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

PART R-1

The Contractor requested that the charging of contract time be suspended. Our letter approving the suspension which was acknowledged in writing by the Contractor contained a clause stating: "The suspension will be full and final compensation for the delays presented in your request. Acceptance of this time suspension, as indicated by your signature below, reflects agreement to pursue no further claim, financial or otherwise, in connection with the above request." The Contractor worked elsewhere during the suspension period thus generating company revenue.

PART R-2

Profit on extra costs due to delays is not justified. Paying profit on delays would increase the Contractor's profit margin beyond his original expectation. Traditionally the Department has not paid profit on delays. To do so would convey the message that "The profit margin for delay is as good or better than actual performance of contract work and there is certainly no risk for the contractor, only pure reward."

PART R-3

Certain fixed costs are assigned to the Maintenance of Traffic item that do not vary with the amount of time spent on the job. We think that we gave the Contractor the benefit of the doubt in our estimate that a MOT Technician would be working 4.5 hours on each delay day.

PART R-4

We found this section of friction course to be unacceptable, because the finished surface had blobs of something. We used latex in asphalt mixes for several years. We have now gone to use of Ground Tire Rubber in place of latex, because of the opportunity to recycle old tires. Our experience with storage of latex does not support the Contractor's positions on the characteristics of latex mixes and the effect of storage.

PART R-5

We applied the straight-edge requirements only to full width roadway. We recognize the difficulty in achieving a consistently smooth pavement under the conditions that existed on this job and, therefore, waived the thickness limitations to allow the Contractor full potential to meet the specification straight-edge requirements. Also, the Contractor was allowed to overrun the plan quantities for asphalt concrete structural course.

In a letter dated May 6, 1993, by which the Contractor requested waiving of straight-edge requirements in other areas of the project, he made the statement, "We overcame frequent changes in existing pavement elevations in the old pavement west of the original southbound travel lane, and believe the final surface course will not be adversely affected by the minor deviations detected in the final course before FC-4." This could be interpreted to mean that the structural course over the parts of the project for which a waiver was not requested had been straight-edged by the Contractor and no substantial deviations were detected.

PART R-6

Our position is that no interest is due the Contractor for any period of time preceding July 15, 1996 the date on which the Contractor first submitted a detailed breakdown of the amount he was claiming. In the Supplemental Agreement dated August 12, 1997, we paid interest on the amount of liquidated damages ultimately released in an attempt to negotiate an equitable settlement of this claim.

The Department does not determine from its records alone the amount that may be due a Contractor for a claim he submits. In particular, we cannot make a determination of the degree to which a Contractor operations were made inefficient. After the Contractor submits detailed cost information, we use our records to arrive at an equitable amount due the Contractor.

The Board in considering the testimony and exhibits presented found the following points to be of particular significance:

PART R-1

The Department benefited from the suspension of work during December of 1996, because it allowed time for utilities to be adjusted, thus avoiding a interference with the Contractor's operations.

PART R-4

Since the surface texture problem did not occur on other parts of the contract where latex was used, it appears that the circumstances were unique for the section of friction course in question here.

During the hearing, neither party to this dispute could ascertain whether blended latex-asphalt was in fact held in the plant storage tank for an extended period of time.

PART R-5

The project consisted of relatively short sections of work with the new pavement and curb grades controlled by the elevation of the existing pavement.

PART R-6

The Contractor did not submit a comprehensive claim until three years after the job was accepted.

Approximately one year was consumed in negotiating the partial settlement documented by the Supplemental Agreement dated August 12, 1997.

NOTE:

Since the amount of the claim actually presented to the Board for consideration was less than the amount of the claim originally submitted, \$1,000 of the original Board Administrative Fee was refunded to the Contractor. .

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

The Department of Transportation shall reimburse the Contractor in the amount of \$30,000 for his claim.


It is noted that the Department of Transportation agreed to adjust the pay quantities for the unit cost construction traffic control items to reflect the units in use on the job during the 62 calendar day time extension granted by the Supplemental Agreement dated August 12, 1997.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 324.70 for Court Reporting Costs.

Tallahassee, Florida

Dated: 12/15/97

Certified Copy:

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

12/16/97  
DATE

S.A.B. CLERK

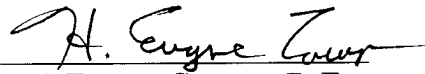
DEC 16 1997

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S.A.B. CLERK

DEC 16 1997

FILED

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

  
Bill Deyo, P.E.  
Member

  
John P. Roebuck  
Member



STATE ARBITRATION BOARD  
STATE OF FLORIDA

S.A.B. CLERK

DEC 16 1997

**FILED**

Superior Paving, Inc.,

- and -

DEPARTMENT OF TRANSPORTATION

PROJECT NO. 16120-3502

LOCATION: SR-655 (Recker Highway)  
Polk County

**ORIGINAL**

RE: Arbitration in the Above Matter

DATE: Thursday, September 25, 1997

PLACE: Florida Transportation Center  
1007 Desoto Park Drive  
Tallahassee, Florida

TIME: Commenced at 9:36 a.m.  
Concluded at 11:23 a.m.

REPORTED BY: Mindy Martin, RPR  
Notary Public in and for  
the State of Florida at Large

Wilkinson & Associates  
Certified Court Reporters  
Post Office Box 13461  
Tallahassee, Florida 32317

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

H. E. Cowger, Chairman  
 Bill Deyo  
 Jack Roebuck

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Ken Blanchard  
 Rick Langley  
 Rick Roberts

APPEARING ON BEHALF OF SUPERIOR PAVING, INC.

Al Dallas  
 Willard R. Elsberry

I N D E X

EXHIBITS

Exhibit No. 1 Received in Evidence	4
Exhibit No. 2 Received in Evidence	4
Exhibit No. 3 Received in Evidence	4
Exhibit No. 4 Received in Evidence	4
Exhibit No. 5 Received in Evidence	4
CERTIFICATE OF REPORTER	66

P R O C E E D I N G S

MR. 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 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 a third member of the board and as chairman. Our terms began on July 1, 1997, and expire June 30, 1999. Will all persons who will make oral presentations during this hearing please raise your right hand to be sworn in. Al is not going to say anything?

MR. DALLAS: I'm not going to say anything.

MR. ELSBERRY: Our agreement is that only two of us are supposed to speak.

(Whereupon, all witnesses were duly sworn by the chairman.)

MR. COWGER: The documents which put this arbitration hearing into being are hereby introduced as Exhibit Number 1. This is the original, Exhibit Number 1 consists of the original request for arbitration of a claim dated July 15th, 1996, and received by the State Arbitration Board on that same date by hand delivery.

Exhibit Number 2 is a supplemental request modifying

1 the claim. This is a letter, September 11th, from Superior  
2 Paving. And the modification is based on the negotiated  
3 settlement of some parts of the original claim which were  
4 documented by a supplemental agreement dated August 12th,  
5 1997.

6 The third exhibit, Exhibit Number 3, is DOT's  
7 evaluation of the contractor's claim, based on the revised  
8 claim, which is a bound booklet. That's all we need to say  
9 about that. Exhibit Number 4 is a package of information  
10 with a letter dated September 25th, 1997, today, presented  
11 by the contractor to the parties and the board prior to the  
12 beginning of this hearing. We'll mark that as Exhibit  
13 Number 4.

14 Exhibit Number 5 is a package of information  
15 submitted also just before the hearing by DOT. Let's go  
16 off the record just a minute, please.

17 (Discussion off the record)

18 (Whereupon, Exhibits No. 1, 2, 3, 4, and 5 were received in  
19 evidence.)

20 MR. COWGER: This is the talking notes that  
21 Mr. Roberts from DOT is going to be using this morning to  
22 present his rebuttal to the contractor's claim. He will be  
23 speaking from these notes, and these are just introduced  
24 for the benefit of the board to have some written  
25 information on what was said.

1 Does anybody else have any other exhibits that they  
2 wish to present for consideration?

3 MR. ELSBERRY: I guess I ought to mention that I have  
4 excerpts of videotape which was seen by Mr. Roberts during  
5 our negotiation sessions, seen in full. I don't propose to  
6 show all of it because it runs over 20 minutes, and I don't  
7 think we want to be bored with it. But there are some  
8 things in here that might be unique that would be of value,  
9 particularly to the people who have never seen the project  
10 and have never seen the tape. Mr. Roberts and I are both  
11 familiar with the contents of the tape.

12 MR. COWGER: Could the board keep the tape  
13 temporarily if we need to?

14 MR. ELSBERRY: Yes. You can have the tape.

15 MR. COWGER: I'm not sure we will.

16 MR. ELSBERRY: If you want to, you're welcome to have  
17 the tape. I only have the one copy, but you're welcome to  
18 it.

19 MR. COWGER: Mr. Roberts, if you have a problem with  
20 us having the tape and you not having a copy, tell us at  
21 some point, okay?

22 MR. ROBERTS: Okay.

23 MR. COWGER: And we'll make sure you get one too.  
24 But I wouldn't think you're going to need it, but we'll  
25 see.

1           Both parties now have had the opportunity to examine  
2           the exhibits. The one comment I need to make is that  
3           Exhibit Number 4, which was today's submittal by the  
4           contractor, contains some additional information that has  
5           not been seen by the DOT before.

6           Mr. Elsberry says that essentially the narrative  
7           deals with what he's going to be verbally presenting today,  
8           but there is an additional issue brought up about payment  
9           for temporary traffic control devices, and I think that can  
10          probably be resolved by the DOT and the contractor at this  
11          point. There's some mechanical problems in the estimate  
12          process.

13          We would like to offer DOT the opportunity at this  
14          point, since they have not seen this September -- they have  
15          not seen Exhibit Number 4 prior to today, that after we  
16          complete this hearing, just before we close, if DOT should  
17          like to request the opportunity to make a written statement  
18          in regard to this information covering any points that are  
19          new that they haven't seen before that they need time to  
20          study, they will be offered that opportunity with the  
21          understanding that the board must receive that written  
22          submittal by October the 15th. And as of the time the  
23          statement is presented to the board or sent to the board,  
24          they will also send a copy to the contractor so everybody  
25          will be informed.

1           I think we'll go on. During this hearing the parties  
2           may offer such evidence and testimony as is pertinent and  
3           material to the controversy and shall produce such  
4           additional evidence as the board may deem necessary to an  
5           understanding and determination of the matter before it.  
6           The board shall be the sole judge of the relevance and  
7           materiality of the evidence offered.

8           Parties are requested to assure that they received  
9           properly identified copies of each exhibit submitted during  
10          the course of the hearing and to retain these exhibits.  
11          The board will furnish the parties a copy of the court  
12          reporter's transcript of this hearing along with its final  
13          order but will not furnish copies of the exhibits to the  
14          parties.

15          The hearing will be conducted in an informal matter.  
16          First the contractor's representative will elaborate on  
17          their claim. And then the DOT will offer rebuttal. Either  
18          party may interrupt to bring out a pertinent point by  
19          coming through the chairman. However, for the sake of  
20          order, I must instruct that only one person speak at a  
21          time.

22          We're to the point now where it's appropriate for the  
23          contractor to begin his presentation. I would like to make  
24          a comment, though, in that regard before we start. The  
25          claim, as revised, contains essentially seven parts, and

1 I think it would be appropriate if first the contractor  
2 makes an opening statement that covers the general issues  
3 that he may want to cover and then go to dealing with each  
4 part of the claim individually.

5 And at the time that he completes his initial  
6 presentation, we'll give the department the opportunity to  
7 rebut; that is, as they each present part of the claim,  
8 we'll give them the opportunity to rebut, to put it in a  
9 little more orderly manner.

10 We do want to try to do our best to finish this  
11 hearing by 11:00, so let's try to keep it concise. The  
12 board has had the opportunity to review all the information  
13 submitted, so we're fairly familiar with what happened on  
14 the project. And I'm sure there are some specifics that  
15 the parties will want to bring out, but let's try not to  
16 ramble, if we can help it. Okay, Mr. Elsberry, if you'll  
17 go ahead and begin.

18 MR. ELSBERRY: Thank you very much, Mr. Cowger.

19 MR. COWGER: Excuse me just a minute. Either one of  
20 you board members have anything?

21 MR. ROEBUCK: The only thing I question, Mr. Elsberry  
22 submitted this claim good months ago and apparently paid a  
23 fee at the time. The claim has been reduced by a  
24 substantial amount --

25 MR. COWGER: We'll look at that.



1           MR. ROEBUCK: Have we sent his excess fee back to  
2 him?

3           MR. COWGER: We haven't done anything yet. But we  
4 will because the claim now is down below \$100,000. So if  
5 there's a rebate due, we'll give it back to him.

6           MR. ELSBERRY: Thank you, sir. I appreciate the  
7 opportunity to be here. And I will try to be concise. And  
8 if you will agree and the department will agree, I will say  
9 or stipulate that the words that are in this handout this  
10 morning are essentially what I intended to say. In the  
11 interest of time, since everybody has it, I'll try to avoid  
12 simply repeating it for the record. If you'll be willing  
13 to accede to that treatment, that method of presenting my  
14 statements, I think we can cut through what I'm going to  
15 say.

16           And then any rebuttal that the department wants to  
17 make, they already have this. I'll be happy to summarize  
18 it if you would care to hear it. I do want to show some  
19 excerpts from the tape. And I think perhaps it might be  
20 well to let me just make an overview, and then I'll show  
21 the initial stages of the tape and perhaps the last.

22           MR. COWGER: When you get to the tape, will you tell  
23 us the purpose of showing us the tape?

24           MR. ELSBERRY: Yes, sir.

25           MR. COWGER: Okay. Good.

1           MR. ELSBERRY: The overview of this is this is a  
2 contract for improving an existing road that was presumed  
3 by the designer to have certain physical characteristics,  
4 features and elevations and dimensions that proved not to  
5 be true. It's my belief that no actual field survey was  
6 done when they produced this plan, but that's beyond either  
7 my or perhaps your capability of determining.

8           The fact is that as we engaged in this project, we  
9 encountered significant problems, which I've emphasized  
10 from day one. The plans were unbuildable as presented to  
11 us in comparison with the features that were already  
12 present as transportation facilities.

13           Utility delays, unconscionable utility delays were  
14 both tolerated, and nothing practical was done about it by  
15 the department, which has the only authority to deal with  
16 utilities. The contractor can raise sand and raise hell  
17 about it, but it doesn't accomplish anything unless the  
18 department enforces it.

19           The job started off late because even after a 90-day  
20 acquisition period, when we were approaching the December  
21 1st starting date, it became apparent that literally  
22 nothing had been done as far as utility relocations were  
23 concerned in spite of some rather detailed schedules that  
24 were contained in the contract. As a result of this, we  
25 initially sought to defer the commencement of the starting

1       time. And I wrote a letter. And that's perhaps a  
2       substantial part of the problem in dealing with this delay  
3       business.

4               The letter offered to waive all penalties, all  
5       claims, monetary and otherwise, if the time was delayed.  
6       The department responded, in a letter from the district  
7       construction engineer. And in essence, I've taken the  
8       position in my written summary here today that I really  
9       was, at that time I felt like I was under duress to sign  
10      that letter, that here was an opportunity to forego having  
11      to present a claim and engage in a lot of rhetoric about  
12      the hows and whys. The simple fact was that we had already  
13      had infield site meetings with utility representatives.  
14      And the project engineer said we will get these people to  
15      move.

16             We knew there was a problem with the City of  
17      Winter Haven because it was an asbestos-containing water  
18      line, and they were not qualified to remove it themselves.  
19      They had to advertise it and the city charters had certain  
20      periods. But we were willing to work with that. We had no  
21      choice.

22             But as far as my view of that letter that  
23      Mr. Dougherty presented, either I signed it or I started  
24      off with about 37 percent of my time being charged out, and  
25      I was going to be engaged in a claim which I hoped to

1       avoid. I don't like to deal with claims. I don't like to  
2       have to have a protracted period such as we're engaged in  
3       today. Thus I signed it.

4               And to compound the matter and the way I represented  
5       it, and I sincerely apologize for this, I cannot find a  
6       copy of that letter in my file. Frankly, I had forgotten  
7       I had signed it. All I had was my own record of having  
8       offered, and then the department had, in fact, extended the  
9       starting time but only after charging an initial date of  
10      December 1st.

11             The second and the continuing matter of the utilities  
12      on the tape will show that we were faced with utility  
13      intrusion into operations even long after the original time  
14      had expired. There were numerous and repeated cause for  
15      utility adjustments. We had site meetings and the project  
16      engineer even missed some of those. We had complained  
17      about that.

18             MR. COWGER: May I interrupt you just a minute.

19             MR. ELSBERRY: Yes, sir.

20             MR. COWGER: The letter you mentioned that you  
21      couldn't find a copy of. In the DOT's exhibit --

22             MR. ELSBERRY: It's in DOT's --

23             MR. COWGER: -- under tab 2 is the letter.

24             MR. ELSBERRY: What's the index number?

25             MR. COWGER: Tab 2.

1 MR. ELSBERRY: Tab 2. That's correct.

2 MR. COWGER: Just for the record, that's where --

3 MR. ELSBERRY: That's what I'm referring to.

4 MR. COWGER: -- the letter appears and apparently the  
5 decision about 30 days or 32 days kind of swings on one  
6 sentence in that letter.

7 MR. ELSBERRY: I've taken the position, and I've  
8 expressed it here, that I felt compelled to sign this  
9 letter. My alternative was if I rejected it, the  
10 department was going to send me a weekly diary and say by  
11 the time we actually could get started in January, we would  
12 have lost 37 percent of the contract time available for  
13 this project.

14 It was a miserable situation. And the reason for the  
15 letter having to appear in the first place was because no  
16 one in the department enforced the contract provisions  
17 requiring utilities to relocate. Nothing had been done on  
18 the date the starting time was supposed to begin December  
19 1st.

20 MR. COWGER: Willard, I think from reading the  
21 record, we understand all that, and we're all on claim one  
22 right now. Can we go ahead and go to the video and get  
23 that behind us.

24 MR. ELSBERRY: Go with the video. I think the last  
25 thing is, I want to make this point, make it very clear,

1 I consider that the interface between the department  
2 personnel and our personnel, as we approached problems and  
3 encountered them and uncovered them, they could have been  
4 resolved had there been persons within the department who  
5 would have stood with us on the site and said, yes, we  
6 recognize this plan feature can't be built exactly as it  
7 is. However, we have to move on with this project. And if  
8 there are consequences from that that you have to bear and  
9 consequences that we have to bear, let's get it together.  
10 That wasn't done.

11 It reached a position in which we literally had  
12 nowhere to go. The utilities interfered, and the diaries  
13 themselves confirm that and they're included in the  
14 original claim, there was nowhere for the contractor to  
15 work. In fact, we moved off this job for three weeks and  
16 did another DOT job for which there was a complement from  
17 the project engineer, Mr. Whitman in Kissimmee. We  
18 encountered the same types of problem. The difference,  
19 there was no claim there. We went on because he met daily  
20 and we agreed on matters.

21 This is an important feature of what our claim is  
22 about. We lacked professional response when a problem was  
23 uncovered. There wasn't a resolution of it. And we were  
24 told in many cases, well, just build it per plans and  
25 specs. And it's physically impossible to have done so.

1           MR. COWGER: Willard, I think the board fully  
2 understands your position in that regard, and I would  
3 suggest to DOT that if you've got any rebuttal on that,  
4 this is an open hearing, and you can say whatever you want  
5 to. And I would suggest that you do say something about  
6 that, but I do have a question. Was the construction  
7 engineer inspecting handled by the department, or did you  
8 have a consultant out there?

9           MR. ROBERTS: It was handled by the department.

10          MR. COWGER: You did not have a consultant involved?

11          MR. ROBERTS: No, sir.

12          MR. COWGER: Okay.

13          MR. ROBERTS: Yes, we had a consultant inspector that  
14 was on the project, but that was under, it was kind of like  
15 a rent --

16          MR. COWGER: Rent-a-tech, okay.

17          MR. ROBERTS: Yeah, that kind of thing.

18          MR. COWGER: But you had a DOT employee as project  
19 engineer?

20          MR. ROBERTS: DOT employee as project engineer. If  
21 I may say so at this point, definitely there was some  
22 difficulties on that project, and the department is not  
23 here to say that we didn't have some problems. However, in  
24 regard to the lack of professionalism, that's a matter of  
25 perspective. The department certainly feels like that the

1 people responded. Obviously, we're not saying that we're  
2 Snow White, but we take exception to the fact that all the  
3 actions on the project were lacking professionalism. We  
4 had a couple of embarrassing incidents, but that was not  
5 the standard on this project.

6 (Whereupon, the video was shown and there was discussion  
7 off the record.)

8 MR. COWGER: DOT now is going to make any statements  
9 they wish to make about what was just shown on the video.  
10 And one thing, since we were off the record while the video  
11 was being shown, if there's anything, any comments that you  
12 made, Willard, that you need to get into the record that  
13 you made during the video, let's get them in there. But,  
14 again, brief, please, because we understand, I think we  
15 pretty well understand the circumstance.

16 MR. ELSBERRY: I don't want to be redundant. You've  
17 been exposed to it.

18 MR. COWGER: Go ahead.

19 MR. ROBERTS: Well, the department is not here to  
20 refute that fact that this project did have its share of  
21 problems. We had some utility problems. We had some minor  
22 grade difficulties. We had some drainage problems. And  
23 I think the fact that we executed a supplemental agreement  
24 shows the board the fact that the department did own up to  
25 those problems.



1           And most of the problems that were referenced during  
2           the viewing of the videotape have been addressed and paid  
3           in full by the department. We did not request any  
4           reduction in the claim. Or I should say we did not wind up  
5           paying a reduction in the claim submitted. We paid all  
6           those claims.

7           In reference to the grades shown by Superior Paving,  
8           Mr. Langley ran the grades on this project. He did not  
9           find them to be in agreement with Superior and himself had  
10          a meeting with Superior's consultant, Harvey Hall, and that  
11          meeting resulted in Harvey Hall agreeing with Rick Langley  
12          at that time. The reference has been made --

13          MR. COWGER: Excuse me just a minute. What was  
14          agreed to? That the plan elevations were not incorrect?

15          MR. ROBERTS: It was agreed at that meeting that the  
16          road could be built.

17          MR. COWGER: Okay. Enough said. Go ahead.

18          MR. ROBERTS: The only other comment that DOT would  
19          like to make, the reference has been made, the word massive  
20          has been used many times, and DOT would submit that this  
21          was a widening and resurfacing project with nominal  
22          problems and it's less than a half mile long. So the word  
23          massive seems a bit overused.

24          MR. COWGER: This job is one contiguous job, though?  
25          There's not two sections?

1 MR. LANGLEY: It's two sections.

2 MR. ELSBERRY: Two sections. Two separate  
3 intersections.

4 MR. COWGER: Two separate intersections?

5 MR. ROBERTS: Yes.

6 MR. COWGER: Go ahead.

7 MR. ELSBERRY: There are actually two sets of plans.  
8 They're in the same binder, but they're physically an  
9 entirely separate total --

10 MR. COWGER: Okay. That's good enough. Go ahead,  
11 Mr. Roberts.

12 MR. ROBERTS: Well, is it the department's turn to --  
13 it would be Superior's turn to address or add to --

14 MR. COWGER: You're ready to go to the individual  
15 parts?

16 MR. ROBERTS: Yes, the department is.

17 MR. COWGER: Let me say, I think the board saw from  
18 viewing the video, we got a lot of background information  
19 on what happened. As Mr. Roberts said, a lot of these  
20 issues that came out of what happened have been settled.

21 And the only part of the current claim that might get  
22 back into discussing some of the things that happened on  
23 the video are parts four and five dealing with replacing  
24 some failed, in quotes, latex mix and the areas where there  
25 were straightedge deficiencies that either corrective

1           action or a penalty was applied.

2           MR. ROBERTS: The department's position is the only  
3           unresolved claims on this job are time issues or material  
4           issues. That is really all that this hearing should be  
5           about.

6           MR. ROEBUCK: Well, there's some philosophical issues  
7           also, such as the department's not wanting to pay --  
8           recognize the profit in some of the overhead items.

9           MR. ROBERTS: Yes, sir, but those are time related.

10          MR. COWGER: I think we accept that. Willard, why  
11          don't you go on with going through your claim, then, part  
12          by part.

13          MR. ELSBERRY: All right. Thank you. On the delay  
14          claim, the department has approached it and has allowed  
15          certain of what we had presented. The remainder of my  
16          claim is premised on the fact that we approached this job  
17          and sought in good faith to complete it. And in December  
18          of 1992 we were not knowledgeable and aware of the problems  
19          that would be encountered and the difficulty of getting  
20          them resolved.

21          And this area, I don't want to beat a dead horse, but  
22          this is also the area in which I had made the complaint,  
23          and I was seeking diligently to resolve some of these  
24          problems when a former resident engineer made the comment  
25          to me that my people didn't know how to build a road. And

1       it went from bad to worse. And included in your file is a  
2       reprimand for Mr. Previte for his unprofessional,  
3       unprofessional conduct. I'm not going to say anymore about  
4       it. It speaks for itself.

5               MR. COWGER: I hope not.

6               MR. ELSBERRY: We felt compelled to sign, I felt  
7       compelled to sign this letter, and I regret that I did not  
8       have a copy in file, because I would have addressed it  
9       earlier in my claim. And Rick and I could have talked  
10      about that perhaps a little more. I still do feel that  
11      given the circumstances where we were faced with a loss of  
12      more than a third of our total contract time, and the  
13      department had taken a firm position, they had rejected our  
14      offer to waive all claims by starting the time, they, in  
15      fact, did charge the first day.

16              They said they would give it back to us, but I don't  
17      know whether that was ever done. It became a moot point  
18      because time has been resolved. It's been acknowledged  
19      that we had ample reason for the time. The matter of the  
20      delay is simply that there were delays in processing data.  
21      The presentation to us for the milling was delayed. The  
22      refusal to allow us to pave the 16120-3503, the Hatfield  
23      end, resulted -- there could have been elimination of a  
24      whole bunch of liquidated damages, because the only reason  
25      for not getting that one complete and accepted by the

1 department, because we were under prohibition from laying  
2 any asphalt on that until that crack item was resolved.

3 MR. COWGER: Let's try to cut through to the chaff on  
4 this thing. This claim deals with the extended home office  
5 overhead for the 32 days or whatever it was at the  
6 beginning of the project when the time was suspended.

7 MR. ELSBERRY: The department's position -- they  
8 granted us a substantial part of the -- their position is  
9 that they don't owe anything for the initial area.

10 MR. COWGER: And that's the whole dispute on this  
11 particular point, that initial 32 days that the time was  
12 suspended and whether you ought to be paid home office  
13 overhead for those 32 days.

14 MR. ELSBERRY: We were, in fact, obligated to prepare  
15 and produce an estimate for our subcontractors and  
16 submitted timely the proper documentation.

17 MR. COWGER: We understand all that. But what we  
18 don't understand --

19 MR. ELSBERRY: We also met with the utilities during  
20 this time, and we were seeking their performance. And  
21 throughout December we had weekly meetings.

22 MR. COWGER: But you were granted the 32-day --

23 MR. ELSBERRY: We were granted that time.

24 MR. COWGER: -- suspension. But the DOT's position,  
25 not to speak for you, but the DOT's position is when you

1 signed the letter and acknowledged the suspension of the  
2 work for that 32-day period, that in the letter was a  
3 statement that said that the contractor agrees to pursue no  
4 further claim, financial or otherwise, in conjunction with  
5 your request, meaning the request for suspension. Is that  
6 not true, DOT?

7 MR. ROBERTS: That is true.

8 MR. COWGER: So, now, I think we need to give the  
9 contractor just one more minute to explain why it is that  
10 he feels that that particular clause in that letter does  
11 not apply in this instance.

12 MR. ELSBERRY: I felt I had a gun at my head. I was  
13 going to be faced with an administrative matter, a  
14 headache, dealing with a claim if I didn't accept that.  
15 And premised on the knowledge I had then, they were  
16 jawboning with the utilities to go ahead and get out of the  
17 way so the contractor can get started.

18 MR. COWGER: We understand all that. How were you  
19 damaged, though? You know, home office overhead, but why  
20 is it that you felt that you're due all --

21 MR. ELSBERRY: Why we felt that way, we had  
22 originally contemplated this project would utilize our time  
23 during the 90 days. We had administrative matters to deal  
24 with, interface and the preconstruction conference. We had  
25 had the internal shop-drawing preparation. All of that

1       should have been handled in the 90 days. We were ready to  
2       go to work on December the 1st. We were forced not to.

3               We have expenses and overhead that goes on whether we  
4       are doing work or not; insurance, taxes, the apparatus that  
5       is necessary to sustain an operation in the field all goes  
6       on whether there's work going on or not. And that's the  
7       reason for -- my position is that we had work activities,  
8       alternatives, that we could have gone to that really is  
9       pushed out to the end of the job.

10              After 205 days, we should have been able to leave  
11       this job and go on to other things. We could not. We had  
12       to stick with this job. So the time element required to  
13       complete all the operations of this activity went from  
14       December 1st to July whatever it is. I don't remember the  
15       exact date but July 13th or 18th, whatever the final date  
16       of acceptance is.

17              MR. COWGER: I think we understand all that. DOT, do  
18       you have any comment on that? Because I want to leave this  
19       item.

20              MR. ROBERTS: Yes, we do. I provided you and entered  
21       into evidence Exhibit Number 5 that presents our rebuttal  
22       to this claim in its entirety. It deals with the letter of  
23       December the 1st of Mr. Elsberry. Superior Paving proposed  
24       the time suspension. They requested the letter of December  
25       the 1st when Superior says at this time it was a request

1       for time suspension on the job. And we're willing to waive  
2       any monetary claims related to this delay in starting time  
3       if we're not to incur time charges and commence maintenance  
4       of traffic and other operations that we know will not be  
5       productive.

6               The department, in response to Superior's request,  
7       then sent them a time suspension letter, which is Exhibit 2  
8       in the department's package. And it was signed and  
9       executed by Mr. Elsberry. And, Mr. Chairman, you've read  
10      the statement in the letter, which is very direct and to  
11      the point. Superior Paving signed that letter and I see no  
12      evidence of duress on the contractor's part.

13             If the contractor is under duress, whether it's a  
14      time suspension, a time extension, or a supplemental  
15      agreement, they will write a disclaimer or an exception on  
16      that document, sign it, and send it back and have it  
17      entered as a matter of record. There are no disclaimers or  
18      no exceptions on this document.

19             MR. COWGER: I think we've heard enough on that.

20             MR. ROBERTS: The department wanted to enter that in  
21      the record.

22             MR. COWGER: Okay. We've got you.

23             MR. ROBERTS: It was not a take-it-or-leave-it  
24      offer. The only other issue, the only other comment I have  
25      about this issue is the fact that Mr. Elsberry said during



1       the time suspension that he moved his crews off the project  
2       or never moved them on the project. Put them on another  
3       project to work for three weeks. The department feels that  
4       if this crew scheduled to work on this project were  
5       generating revenue, there was no unabsorbed overhead for  
6       that time period. Therefore, there are no damages due  
7       Superior Paving for this point.

8               If the crews were idle, that's another issue in  
9       itself. They were not. They were out generating revenue.  
10      Whether they generated it on this project or they generated  
11      it on another project, there was a need for his crews to be  
12      working. They were working. Therefore there is no  
13      entitlement at all.

14             MR. ELSBERRY: I'd like to respond briefly.

15             MR. COWGER: Just a second. Is that it?

16             MR. ROBERTS: Yes, sir.

17             MR. COWGER: Go ahead, Willard.

18             MR. ELSBERRY: I would like to respond to that last  
19      item. I felt we were under an obligation to mitigate the  
20      damages that were being imposed on us on this project. We  
21      did not need all of the equipment that was committed to  
22      that project on the other project.

23             We had also the obligation to return to this project  
24      if we had a resolution of how these grade changes were  
25      going to be and the questions that had not been resolved.

1       If they had been presented to us and changed, we would have  
2       been required to bring our forces back. We were, in fact,  
3       mitigating a loss rather than claiming double. So much of  
4       the equipment that was required for this job was left right  
5       on that job. We had nowhere else for it to go to be used.  
6       We did not require all this equipment. The other project  
7       did not have the base work and as much pipe work as this  
8       one.

9               MR. COWGER: Does the board agree we ought to go on  
10       to part two?

11              MR. ROEBUCK: Yes, let's move on.

12              MR. COWGER: Let's go to part two.

13              MR. ELSBERRY: Next item. My turn?

14              MR. ROEBUCK: Yes.

15              MR. ELSBERRY: The percentage request is fifteen  
16       percent. I've noted and I'll repeat myself, the  
17       department's response to me is outrageous. It assumes the  
18       contractor must simply endure whatever adverse impacts flow  
19       from the department's dereliction of duty. The contractor  
20       undertakes the construction work motivated by the  
21       opportunity to make a profit. He's interfered with, as in  
22       this case, and forced to forego other profitable  
23       contracts. He certainly ought to be compensated reasonably  
24       both for his actual delayed cost and opportunity lost. The  
25       percentage request of 15 percent applies to delay costs

1           only and is not an unreasonable amount per day and ought to  
2           be granted. And I stand on that.

3           MR. COWGER: DOT, let's have a rebuttal on that.

4           MR. ROBERTS: Well, the department takes exception to  
5           dereliction of duty. We do not feel like that we're guilty  
6           of that fact. The only other issue that I have, the only  
7           thing I have to bring to this, and you can see in Exhibit 5  
8           what we say and read what we say is standard procedure and  
9           upheld many times, that there should be no profit on  
10          delay.

11          And we feel like it would be setting precedence if we  
12          did pay profit on delay. In regard to this item, this is  
13          strictly profit on the overhead that the department does  
14          not agree with anyway and think that we have adequately  
15          documented and stated that it should be denied.

16          And the department maintains that there was no lost  
17          opportunity on the contractor's part. The crews were used  
18          completely and there's been no evidence presented to the  
19          department nor, to my knowledge, to this board that there  
20          was lost opportunity. And that statement does not apply.

21          MR. COWGER: Okay. DOT, I'd like to hear you say,  
22          though -- I think I hear what you're saying is that it's  
23          been standard practice over the years to not pay profit on  
24          delay claims.

25          MR. ROBERTS: That's correct.

1 MR. COWGER: And what's the justification for that?

2 MR. ROBERTS: That's in the department procedures.

3 MR. COWGER: No, no, no. What's the justification  
4 for it by the department?

5 MR. ROBERTS: The justification, the philosophy is  
6 that it rewards the contractor, and there's no motivation  
7 to help mitigate the delays and move forward with the work.

8 MR. COWGER: Mr. Elsberry?

9 MR. ELSBERRY: Okay. One last comment on that. The  
10 department granted the 62 days and allowed the delay claim  
11 to that extent. And to eliminate the allowance of a profit  
12 on that to me is like saying that we would not pay you for  
13 any overruns to the extent that there was a profit allowed,  
14 that you have predicated your bid on a certain amount of  
15 something that you're expecting out of it, and anything in  
16 excess of that is defaulted, belongs to the department.

17 It's comparable to some of the philosophy in the  
18 congress now where they want to say that there are tax  
19 expenditures. When they don't take the money away from you  
20 and they leave it in your hands, that's tax expenditure.  
21 This is the same way. I think the contractor in a  
22 capitalist society has a right to expect to make a profit  
23 on activity. We were forced in this case to remain on the  
24 job for 305 days where we anticipated, and it was through  
25 no particular reason of our own, should have been through

1           there with the 204 that we originally planned.

2           MR. COWGER: Now, just so we fully understand this  
3           thing, take but one more minute, as I understand it, this  
4           part of the claim deals with profit only on the delays.

5           MR. ELSBERRY: Extended overhead.

6           MR. COWGER: Yeah. On extended overhead. DOT  
7           originally paid, on the supplemental agreement, you paid  
8           him some profit on some things, right, that he had  
9           originally claimed?

10          MR. ROBERTS: We paid his claims at face value for  
11          some aspects of this claim, yes, we did. And if a profit  
12          was included in that, we paid it. But this claim is  
13          strictly profit on the overhead.

14          MR. COWGER: Strictly on the overhead.

15          MR. ROBERTS: And DOT would like to add one thing.  
16          And it's our understanding that Superior had calculated  
17          overhead exposure on this project for 305 days. The total  
18          project value is \$455,000. That would say that the  
19          overhead allocated to this project was \$211,060? That's a  
20          lot of -- that's nearly, that's \$200,000 worth of overhead  
21          on less than a half million dollar project. That's a  
22          substantial amount of overhead.

23          MR. COWGER: So what you're really doing is disputing  
24          the calculation of the home office overhead?

25          MR. ROBERTS: We never questioned Superior's daily

1 rate for overhead. What we're questioning is the fact that  
2 they should not be paid profit on overhead, that  
3 profit-makers for the project were busy in other places.

4 MR. COWGER: Okay. Willard, unless you've got  
5 something else to say, I think we've heard all we need to  
6 say on that.

7 MR. ELSBERRY: I think you can make your own  
8 judgments.

9 MR. COWGER: May I make a comment. Do you have any  
10 recollection of ever being paid profit on overhead on DOT  
11 work or on any work?

12 MR. ELSBERRY: Yes, sir.

13 MR. ROEBUCK: Yes, certainly. The cost of your job.  
14 You're going to mark up --

15 MR. ELSBERRY: Let's do a little hypothetical.

16 MR. DEYO: I don't think we need to pursue the  
17 discussion on whether or not he was paid on other jobs.  
18 We'll look at the facts on this. We've had enough  
19 discussion on --

20 MR. COWGER: Let's withdraw my question and move on.

21 MR. ROEBUCK: Thank you.

22 MR. ELSBERRY: All right. I was going to give you a  
23 hypothetical. If this were the only job a contractor had,  
24 and it was in a situation where he had no other  
25 alternatives and he sits and waits on this thing,

1 I definitely think you could see that it would not be fair  
2 for him to -- the recovery of a profit.

3 MR. COWGER: Let's go on to R-3.

4 MR. ELSBERRY: R-3, prorata increase in maintenance  
5 of traffic. I did not realize until Mr. Roberts' rebuttal  
6 how the department had come to its numbers. And I see now  
7 that what he's done, he's limited strictly to one  
8 maintenance of traffic technician. And I respond and say  
9 that construction work is not pursued in a vacuum. The  
10 maintenance of traffic, the lump sum item, covers matters  
11 that we normally know will not be paid through unit price  
12 items.

13 The fixed costs that are referred to are necessary.  
14 Lane closures are necessary and there's a direct effect in  
15 our efficiency and our ability to complete work, as it was  
16 in this case, particularly with the structures, the two  
17 inlet structures. We had to maintain lane closures, and we  
18 had to have flagmen at these operations.

19 Every instance in which there is an impairment and,  
20 in fact, you could, without impairment, say, utility delays  
21 or engineering decisions, you're required to be there an  
22 additional day. In a true sense, the direct costs that are  
23 related to the flagmen that are on the job are there, and  
24 they don't get paid by the units of production per day in  
25 pipe or yard or pavement or whatever, and that is a real

1 factor in maintenance of traffic in a lump sum.

2 The signs that are not paid for under units, we were  
3 forced to keep those there throughout the additional  
4 period. We even sought to eliminate by taking up all the  
5 signs during the curing period, and the decision came back,  
6 no, you can't do that. You've got to leave all the  
7 construction signs up.

8 So there are a number of factors that enter into  
9 maintenance of traffic. And I would simply repeat that  
10 I think the prorata method that was set up, it was  
11 reasonable in the beginning. I don't see any reason why it  
12 shouldn't be paid throughout the delay period.

13 MR. COWGER: Mr. Roberts, do you have anything to say  
14 about that, noting the fact that everything he just said  
15 has been pretty well covered in the exhibit number,  
16 whatever it was? Anyway, it's covered in the September  
17 25th letter from Superior, the one that was presented this  
18 morning.

19 MR. ELSBERRY: We had already talked about these unit  
20 price items, and I'm not -- I don't think we need to make  
21 any further comment about that.

22 MR. ROBERTS: Well, the department stands on the  
23 position that there are fixed costs in the maintenance of  
24 traffic item, and we have tried to identify those to you in  
25 our perspective. And we were seeking credit from Superior



1 Paving for the fixed costs. And we do not feel like that a  
2 prorata share for maintenance of traffic is deserved in any  
3 situation, because those fixed costs will bear that out.

4 Superior, their calculated rate was \$199 a day. I do  
5 not think that the \$199 a day will support two flagmen, an  
6 MOT technician, a pickup truck. That will not bear that  
7 out. The department has provided our rebuttal. We made an  
8 approach as to what we thought it should be in a job this  
9 size. We gave the benefit of the doubt that the technician  
10 would be working four and a half hours a day. Typically on  
11 a job like this, the technician has other duties also not  
12 related to maintenance of traffic. That's all the  
13 department has to say about that.

14 MR. COWGER: Let's go on to R-4. Did you have  
15 something else?

16 MR. ELSBERRY: Two flagmen wasn't all that was  
17 required. This was an intersection or multiple  
18 intersection job. In many cases, in some cases we had as  
19 many as six flagmen. Not for all the time, but two flagmen  
20 won't cover it.

21 MR. COWGER: We understand. Let's go on to R-4.

22 MR. ELSBERRY: R-4, milling and replace asphalt and  
23 concrete on Hatfield because of latex failure. My position  
24 is well known. I've objected to latex in projects that  
25 have frequent lane changes, widths, transitions. I also

1       feel that the department was culpable in this, halting the  
2       operations on March 10th.

3               I firmly believe that there would not have been  
4       quality problems with the bungee cord appearances in the  
5       mix had we been able to go ahead. And the area involved on  
6       that particular project, we saw it was eventually moved  
7       out, was probably less than 300 feet over the entire area.

8               MR. COWGER: How much did you have to remove?

9               MR. ELSBERRY: Sir?

10              MR. COWGER: What length did you actually remove?

11              MR. ELSBERRY: In the cracked area, only about 300  
12       feet. But I'm saying on the half day we had to remove one  
13       entire lane.

14              MR. COWGER: You got paid for the cracked area,  
15       though?

16              MR. ELSBERRY: Yes, sir.

17              MR. COWGER: The area where you removed the existing  
18       asphalt --

19              MR. ELSBERRY: I'm not talking about that area. I'm  
20       saying that the consequence, though, of holding everything  
21       hostage to a 300-foot long crack and delaying the use of  
22       this material that was in the plan.

23              MR. COWGER: That caused the contractor to hold the  
24       asphalt that had the latex mixed in it longer than he had  
25       originally anticipated.

1           MR. ELSBERRY: They had latex in their lines, and had  
2 we been able go ahead, I don't think we would have had this  
3 kind of problem. It showed up, I believe it was partly as  
4 a consequence of what the department had done. They had  
5 forced us to halt our operation. We didn't get back to  
6 this until, what was it, in May before we ever got back to  
7 it. And Macasphalt unfortunately didn't have any  
8 additional projects that required latex.

9           MR. COWGER: Can somebody tell me approximately what  
10 the length of the section that was removed and replaced is,  
11 you know, just a gross number?

12          MR. ROBERTS: We're looking it up.

13          MR. COWGER: Let's go on, while you all are looking.  
14 Do you have anything else, then?

15          MR. ELSBERRY: Here is Hatfield.

16          MR. COWGER: Let's let DOT come back and rebut, and  
17 we'll allow you to come back again if you like.

18          MR. ROBERTS: Superior Paving's presentation on the  
19 latex material is pure speculation. FDOT had used latex in  
20 asphalt successfully throughout the years. And I've given  
21 you a list, just a list of some projects that we had  
22 success. And they're included in our submittal.

23                 In 1988 legislation put into place Senate Bill 1192  
24 which required DOT to look for ways to recycle. One such  
25 step that we took was using ground tire rubber in lieu of

1 latex. Ground tire rubber was not mandated in this bill,  
2 nor was ground tire rubber a replacement for latex because  
3 of any deficiencies with latex.

4 Our experience with storage of this material has not  
5 revealed any unique material characteristics which would  
6 add credibility to the allegations by Superior Paving that  
7 the long storage period caused the material to solidify and  
8 come out in strings.

9 We, in preparation for this hearing, contacted  
10 Eric Gibson, general manger of Ultra Pave, which is a  
11 material supplier of asphalt products in the southeastern  
12 United States. He discounted the theory that if latex is  
13 stored for an extended duration it would cause difficulty  
14 with the finished texture of the mix.

15 Mr. Gibson also advised that the storage of material  
16 by many contractors is just in the 55 gallon drums that it  
17 comes in. And when there's a need for some of the  
18 material, a pump is put in the drum, it's pumped out, and  
19 used. Now, the only thing that material does while it's in  
20 those drums, and it may sit in there for weeks, it forms a  
21 skinned membrane on the top of any storage tank.  
22 Contractors know this. It's standard throughout the  
23 industry. They keep track of that.

24 As the drum gets lower, they will pull that out, put  
25 it in another drum, or as their storage silo draws down,

1       they will then add material. But they leave that skinned  
2       membrane in there as a protective coating for the remainder  
3       of the material. And there is no -- there were no problems  
4       to this job in texture related to any actions by the  
5       department, nor has it been proven that the use of the  
6       latex is the difficulty here.

7               MR. COWGER: Are you through?

8               MR. ROBERTS: Yes, sir.

9               MR. COWGER: Couple quick questions. First off, the  
10       problem here was that the FC-4 in this area was  
11       unacceptable because it had blobs of something, latex or  
12       something in it?

13              MR. ROBERTS: Yes, sir.

14              MR. COWGER: And you could tell that you were going  
15       to have a problem with durability of that section, maybe  
16       even appearance, right?

17              MR. ROBERTS: Yes, sir.

18              MR. COWGER: Now, all this discussion you gave about  
19       your discussion with the man from Ultra Pave interests me  
20       because it seems like, and correct me if I'm wrong, it  
21       seems like what he's talking about is pure latex material  
22       being stored in a drum. And I think what Mr. Elsberry is  
23       talk about, and, again, correct me if I'm wrong, is that  
24       his subcontractor blended the latex with some liquid  
25       asphalt and then held that material in his storage tank for

1 an extended period of time. Now, am I right or wrong  
2 there?

3 MR. ROBERTS: I'm not aware of that.

4 MR. COWGER: Mr. Elsberry, when you talk about having  
5 to, you know, you had the delay because of the crack and  
6 all of that kind of stuff, which it caused your  
7 subcontractor, Macasphalt, to not be able to pursue laying  
8 this friction course as they had originally anticipated, so  
9 the question is was blended latex asphalt held an undue  
10 amount of time, or are you talking about the fact that the  
11 raw latex was held?

12 MR. ELSBERRY: No. I'm talking about it was blended  
13 in the plant. The plant had been calibrated. They'd  
14 actually run their test. They were prepared to produce a  
15 mix, a quality-assured mix to lay on this project the  
16 morning of March 10th and because --

17 MR. COWGER: We understand, everybody accepts there  
18 was a substantial delay. The point is on March 10, is that  
19 the date that you just said?

20 MR. ELSBERRY: I think it's the 10th. Whatever  
21 Thursday was. We were set up. Wednesday they calibrated  
22 their line and did all their necessary quality assurance  
23 tests.

24 MR. COWGER: At that point in time, though, when he  
25 was ready to start laying the mix and you couldn't lay it

1           because of direction from DOT, was there material in the  
2           tank that had been in the asphalt storage tank that had  
3           been blended with the latex and then held?

4           MR. ELSBERRY: I don't personally know. I was told  
5           by Al who talked with the plant manager, the plant  
6           operator, Tiny, that they did, in fact, have this material  
7           all set and ready to go. It has to be prepared up front.  
8           And the production process isn't that anyone just simply  
9           pushes a button and adds latex to it. They've got to do  
10          this.

11          MR. COWGER: They do have to blend it with the liquid  
12          asphalt?

13          MR. ELSBERRY: They held this plant on standby  
14          Thursday and Friday. I even told Mr. Langley we'd lay it  
15          on Saturday if they would allow us to do it. And I was  
16          told on Friday afternoon at 6:00 you're directed to tear  
17          out that area and rebuild it. And we had to cancel with  
18          Macasphalt. They had no other run of latex required, FC-4,  
19          until we got back to this. And this is what we  
20          encountered.

21          They claim and they say their procedures were  
22          proper. Nevertheless, and we all agree, that there were  
23          what I called globs and bungee cords in the mix. I'd say  
24          in further regard to that, we experienced, we participated  
25          in experiments in the 1960s in Sumter County. We actually

1 prepared the base. Macasphalt laid the material. I was  
2 very much involved. I was an officer in Macasphalt at the  
3 time.

4 Bill McGee called Mr. Bolton six weeks after this  
5 material had been laid and said it was pushing and shoving  
6 worse than any he'd seen and it was a black eye.

7 MR. COWGER: I'm going to cut that off, because we've  
8 heard enough about that. I want to come back to DOT, and  
9 then we're going to go to R-5. Can you enlighten us any  
10 about whether the problem was with material that was a  
11 blend of asphalt cement and latex being held?

12 MR. ROBERTS: No, sir. We don't know that that  
13 happened.

14 MR. ROEBUCK: Was latex in the lines, in the lines to  
15 the mixture?

16 MR. ROBERTS: We don't know that that happened in  
17 this case, and we don't no know that Macasphalt was not  
18 running materials in other places. What I do remember  
19 about this job is that Macasphalt notified Superior by  
20 letter that they were busy, and they might not be able to  
21 furnish material to them on a drop of a hat notice.

22 I can't sit here and say Mac was not running FC-4  
23 with latex. All I can say and attest to is there was a  
24 letter saying they were busy. So if there was blend, the  
25 department is not aware of that. And I don't know that



1 Superior is absolutely aware of it. And no one knows  
2 whether or not Mac moved the material out of the lines and  
3 incorporated it in the mix. That's subjective.

4 MR. COWGER: Okay. Let's go to the next one, R-5.

5 MR. ELSBERRY: The next item is R-5, mill and replace  
6 latex mix and other rolling straightedge failures. Again,  
7 my position is pretty well said. I thought that we would  
8 be able to eliminate the latex because we had experienced  
9 problems with it in the past.

10 When there was a construction conference in  
11 Bradenton, Mr. Lairscey announced that was relief because  
12 this latex in the mix had been re-mandated because of  
13 political action, got it through the congress, was forced  
14 upon the department in this job, and he announced at that  
15 meeting that there would be relief from contractors who had  
16 projects, small projects, where there were numerous changes  
17 in lanes, decel, accel, radiuses and handwork.

18 We requested and offered a credit for the latex mix.  
19 It was denied. We tried our best to do what we could with  
20 it. And the results was that, it's a combination of  
21 things. The latex isn't the only thing. Again, I'll  
22 reiterate that we salvaged an area that had been a road, an  
23 existing road, in fact, had been built by a committee,  
24 and I felt that we were being forced to a quality standard  
25 that was not really justified in this project.

1 MR. COWGER: Is that it?

2 MR. ELSBERRY: And we did, in fact, replace those  
3 areas other than the one that I've referred to, that the  
4 rolling straightedge showed that there was no problem  
5 there. I simply decided I would just take the burden of  
6 accepting no compensation for that area, because anytime  
7 I felt that anytime we did a mill and resurface, there was  
8 a potential for creating two bumps instead of one.

9 MR. COWGER: DOT, before you rebut, to expedite this  
10 thing, let me explain a couple of things. First off, in  
11 the record it's clear you've got your straightedge  
12 deficiency reports. You've got a report in there that  
13 deals with how you treated each one of them, i.e., whether  
14 you required replacement of that section or whether you  
15 merely deducted the total cost or some part of the cost of  
16 the pavement. I don't care what it is. Some part of the  
17 cost of the pavement without requiring corrective action.

18 So you had two ways of handling it, replace or  
19 penalty. Or reduce pavement. Whatever you want to call  
20 it. So we need for you to verify is that correct, that  
21 statement I just made?

22 MR. ROBERTS: That is basically correct. We did have  
23 places that we allowed the contractor to leave deficient  
24 areas in place and we paid him for them.

25 MR. COWGER: So there's three situations.

1           MR. ROBERTS: Three situations. Left without pay,  
2 left with pay, and when we required removal.

3           MR. COWGER: Then the other thing we need to hear  
4 from you, then, is the contractor has said that the  
5 straightedge deficiencies were related to the nature of the  
6 work, the nature of that particular section, and, again,  
7 comes back to arguing about the latex having some effect on  
8 it. Now, keep in mind that the latex could have only  
9 affected friction course, because the latex did not exist  
10 in any of the structural courses.

11           So, DOT, I think what we want to hear is what you've  
12 got to say about whether the contractor is reasonable in  
13 stating that the problem was due to the nature of the job  
14 or due to latex. That's all we really want to hear.

15           MR. ROBERTS: DOT recognized some problems with  
16 this. We allowed the contractor to overrun or utilize more  
17 structural asphalt to remove any problem undulations in the  
18 existing grade out there. Now, DOT feels like that if we  
19 told the contractor, okay, you may go ahead and put this  
20 out, we waived the fitness requirements, then if we've got  
21 some difficulty, the contractor should be able to overcome  
22 that.

23           Okay. In this case, and I will refer you back to our  
24 submittal that we sent, I don't remember what exhibit you  
25 called it, but there's a letter from the contractor in

1       which he makes a statement that the only undulations out  
2       there, I'm paraphrasing here, are nominal and it appears  
3       that we're going to be able to handle meeting straightedge  
4       requirements. That is in his, it was a May 6th, 1993,  
5       letter by Superior Paving.

6               MR. COWGER: That letter is exhibit, item number  
7       five, or tab number five in Exhibit 3, just so we've got  
8       that in the record. Go ahead.

9               MR. ROBERTS: And there the contractor asked to waive  
10      the rolling straightedge in the turning lanes and adjacent  
11      to the curb area. And in there there is a paragraph in  
12      which he mentions that it looks like everything is going to  
13      be fine with the job. We're ready to proceed ahead. We  
14      just want you to waive in these extra areas.

15              The department agreed and we waived straightedge  
16      requirements on the entire project with the exception of  
17      the two through lanes, and that is the only place that we  
18      required the contractor to correct or assess penalties.  
19      And the other claim, he made a presentation based on the  
20      material globbing up and having strings, because the  
21      material sat in the lines too long or in the tank too  
22      long. This has absolutely nothing to do with that. It was  
23      straight line paving, full 12-foot width. It should have  
24      been no problem.

25              MR. COWGER: Are you through?

1 MR. ROBERTS: Yes, sir.

2 MR. COWGER: Quick question. You said two through  
3 lanes. Was the number two that you said?

4 MR. ROBERTS: Yes, sir.

5 MR. COWGER: I want to make sure I heard that right.  
6 Where were these turns located in relation to the center  
7 lane?

8 MR. ROBERTS: They were directly adjacent to the  
9 center line.

10 MR. ELSBERRY: No, sir.

11 MR. COWGER: So they were the inside lanes going in  
12 each direction? Is that what it amounts to?

13 MR. ROBERTS: With the exception of the turn lanes,  
14 they were directly adjacent to the center line.

15 MR. COWGER: Now, turn lanes, so we're sure we  
16 understand, this is full-width turn lanes, not the  
17 transition going into the turn lane or any transition that  
18 may have been coming out of the turn lane, right? Strictly  
19 where you had full-width paving, correct?

20 MR. ROBERTS: Sir?

21 MR. COWGER: Is that correct?

22 MR. DEYO: Are you talking about a tapered area?

23 MR. ROBERTS: There were some tapered areas outside.

24 MR. COWGER: But you waived the straightedge of that.

25 MR. ROBERTS: On the outside there were some tapered

1 areas, and we waived the straightedge in those tapers.

2 MR. COWGER: What I'm hearing said, I think, is  
3 that --

4 MR. ELSBERRY: If I might say --

5 MR. COWGER: Mr. Elsberry is referring to sheet S-4  
6 of the plans.

7 MR. ELSBERRY: Yeah. This is a marking sheet, the  
8 pavement marking sheet S-4 on 16120-3502. The existing  
9 road existed along here (indicating). The one that we're  
10 talking about the through lane is the one that the county  
11 had added west of the center line. The center lane had  
12 become used for transition and turns. There was a  
13 transition at the north end coming south, and the lane  
14 adjacent to the curb became the turn lane for traffic going  
15 into Palm and going into Sunshine Drive.

16 MR. COWGER: Now, that's the area you just talked  
17 about. Were there straightedge deficiencies that were --

18 MR. ELSBERRY: The straightedge deficiencies are in  
19 this area that originally was an added lane by the county  
20 which we said there was tremendous differences, undulations  
21 in the construction, and which we salvaged by handwork,  
22 leveling. We even set nail grades. And there was some  
23 areas there would be a massive difference, I use the word  
24 massive again, massive in relation to the three-quarters of  
25 an inch that was originally set up. There was some areas

1           it was six inches in a distance of less than 15 feet.

2           This is part of the reason we say that in that area  
3           in particular, between the intersection with Marshall Road  
4           on the north end of that project, which is 434, between  
5           station, get the right one if I can find it here.

6           MR. COWGER: Rick, can I borrow your set of plans?

7           MR. ELSBERRY: Looks like about 420.

8           MR. ROBERTS: (Handing documents to Mr. Cowger)

9           MR. COWGER: Okay. Thank you.

10          MR. ELSBERRY: 418 to the north is primarily where we  
11          had our problem.

12          MR. COWGER: Where again, now? What sheet were you  
13          looking at?

14          MR. ELSBERRY: I was looking at S-4 to show you the  
15          delineation of the main line.

16          MR. COWGER: Now, what were those stations again?

17          MR. ELSBERRY: Look on the comparable sheet. If you  
18          begin at sheet nine in the front, that's the beginning of  
19          the project. And about, let's see, sheet 11 and 12 show  
20          primarily what we're talking about.

21          MR. COWGER: Which side of the road, east or west?

22          MR. ELSBERRY: We're talking about the west side of  
23          the road.

24          MR. COWGER: Okay. That's good.

25          MR. ELSBERRY: You can see there the original

1 alignment of the old road. And then additions. There were  
2 two lanes added on the west in that block where the curb  
3 was placed and where those two structures are.

4 Again, what we're saying is that there are a lot of  
5 transitions in this job. Even though you're talking about  
6 total length, there was some straightaway, but there was  
7 really an awful lot of handwork involved in this job. The  
8 plans themselves were not predicated on a field survey.

9 MR. COWGER: I think we've heard that somewhere  
10 before. DOT, what do you have to say?

11 MR. ROBERTS: Well, the department doesn't agree that  
12 the handwork had anything to do with this. We still  
13 maintain that we allowed the contractor to use what asphalt  
14 he needed to get an acceptable plane. He straightedged the  
15 job himself prior to placement of the friction course, did  
16 not find any deficiencies that concerned him, and he  
17 proceeded laying the friction course. And then you turned  
18 up with the deficiencies in the straightedge. Therefore,  
19 the department doesn't feel that it's our fault.

20 If he straightedged it prior to placement of the  
21 friction course and then we had difficulties? If it was  
22 fine before the placement of the friction, what did the  
23 undulations and any allegations of the deficiencies in the  
24 plan have to do with this item? I submit that there is  
25 no --



1 MR. COWGER: Mr. Elsberry?

2 MR. ELSBERRY: I think I've said enough.

3 MR. COWGER: Okay. I've got one question.

4 MR. ELSBERRY: Yes, sir.

5 MR. COWGER: And then we're going to leave this  
6 thing. Back to what DOT said about straightedge  
7 deficiencies were only evaluated in two through lanes.  
8 First off, were all of the deficiencies on one project, or  
9 were some of them, were they scattered over both projects?

10 MR. ROBERTS: I don't know what -- what are the  
11 limits of the project?

12 MR. COWGER: You've got one at Avenue O and the other  
13 one at Hatfield Road.

14 MR. ROBERTS: Could you give me a station number.

15 MR. COWGER: Okay. The Avenue O job began at 433.  
16 No, it began at 411 and went to 433.

17 MR. ROBERTS: There was deficiencies on that job.

18 MR. COWGER: And the other one went from station 508  
19 to 518.

20 MR. ROBERTS: I don't find any deficiencies on that  
21 one.

22 MR. COWGER: So basically they were all confined to  
23 that one job. Now, looking at the typical section for that  
24 job, Mr. Elsberry, I'm looking at sheets five and six.  
25 I guess really I'm looking at six because -- no, wait a

1 minute. I'm looking at five because that's the typical  
2 section for record.

3 And what took place there was that there was an  
4 existing road there that was widened on either side with  
5 pavement and then it was paved shoulder added. And as  
6 I understand DOT's testimony -- oh, and the existing  
7 pavement varied in width from 24 foot to 36 feet. Now,  
8 looking at that typical section just a minute on page five,  
9 where is that 12-foot through lane in relation to the  
10 center line? Could it be --

11 MR. ROBERTS: It would be in this area outside the  
12 six foot, right of the center line of survey (indicating).

13 MR. COWGER: Okay.

14 MR. ROBERTS: Is that correct?

15 MR. LANGLEY: Uh-huh.

16 MR. COWGER: Okay. I think I understand it.

17 MR. ROBERTS: We had painted out the center line to  
18 allow turning movements into those.

19 MR. COWGER: So it was all over existing pavement,  
20 not in the widening area?

21 MR. ROBERTS: Some of the through lane was on  
22 widening.

23 MR. COWGER: Because of the way it was striped over?

24 MR. ROBERTS: Yes.

25 MR. COWGER: Okay. I've got you. Listen, I think

1           we've got enough on that one. Could we, if we promise to  
2           mail them back to you, could we keep this set of plans  
3           temporarily for information?

4           MR. DEYO: I can get a set of them.

5           MR. ROBERTS: Those are our record set of plans.

6           MR. COWGER: Note they've been returned.

7           MR. ROBERTS: We don't mind furnishing you a copy.

8           MR. COWGER: Bill said he'd get it. Mr. Deyo said  
9           he'd get it. Let's go on to item six. Before we start on  
10          item six, and what I'm interested in here is trying to  
11          expedite this thing, the dispute in item six is essentially  
12          over interest, time value of money, as Mr. Elsberry calls  
13          it.

14          And as I understand it, now, the calculation that the  
15          contractor has made for this is based on a period between  
16          July 18th, 1993, the approximate completion date of the  
17          project, and July 12th, 1996. That three years is what  
18          your interest calculation is based on, correct?

19          MR. ELSBERRY: Interest calculation is based on  
20          actual payments for borrowed funds and unsecured loans.

21          MR. COWGER: I understand all of that, but the date  
22          that --

23          MR. ELSBERRY: The period of time is from the  
24          acceptance date of the project until the filing of the  
25          arbitration claim. No payments have been received.

1           MR. COWGER: So you agree your calculation based on  
2           that three-year period does not include anything for the  
3           period from the date you filed for arbitration up to  
4           today?

5           MR. ELSBERRY: No, sir. No. In the memorandum that  
6           I put, which was simply for illustration, the modified  
7           claim identifies what that calculation is.

8           MR. COWGER: I had a little trouble understanding  
9           that. I just wanted to be sure I did.

10          MR. ROEBUCK: Four hundred days that he hasn't  
11          charged that.

12          MR. ELSBERRY: That calculation, incidentally, took  
13          into account credit for that portion of the period that the  
14          supplemental agreement number one applies. There was some  
15          allowance there, and I've taken that into account in that  
16          calculation of the supplement.

17          MR. COWGER: Yeah, I think we understand that. Now,  
18          I think the point that the board needs to know something  
19          about, because the whole thing turns on what looks to be,  
20          and I say looks to be, a substantial period of time that  
21          passed between completion of the job and the contractor  
22          filing his quantum or dollar part of his claim.

23                 You know, it's recognized that as the job progressed,  
24          the contractor gave notice of intent to file a claim as he  
25          went along, but we need to have some discussion about why

1       it was, first off, why was it three years before the claim  
2       was ever submitted, the quantum part of the claim was ever  
3       submitted, and I emphasize quantum because that's all we're  
4       talking about.

5               And the other question is prior to that submittal on  
6       somewhere in July of '96 at about the time you requested  
7       arbitration, it might have been a little different from  
8       that date, but somewhere in that vicinity, best we can  
9       tell, there was no quantum submitted by the contractor  
10      prior to that time. If there was, then we need to know  
11      about it.

12             MR. ELSBERRY: All right.

13             MR. COWGER: Now, if you'll go ahead and comment and  
14      we'll let Rick. And that's the last thing we need to  
15      discuss, I think.

16             MR. ELSBERRY: A conditional acceptance letter was  
17      filed with the department in November of 1994. And the  
18      letters cited \$152,723.78 was the amount due when the  
19      department shows \$7,452.72. On the project, \$148,606.64,  
20      and the department showed \$3,335.58. That was November 30,  
21      1994.

22             I am informed, I've been informed, after inquiry,  
23      that that information was not transmitted to the residence  
24      office. I made inquiry in the preparation of the  
25      arbitration claim that I be provided a copy of the

1 department's file on what they did to evaluate the various  
2 notices of intent to claim. And I was told that we don't  
3 have anything. We've got the engineers' diaries. We've  
4 got the estimates. We've got the dailies is what I'm  
5 talking about.

6 But there was nothing specific with regard to any of  
7 the items that I had presented to them in letter form  
8 asking the department to be on notice and maintain records  
9 and anticipate that the claim would be filed. Nothing was  
10 available. So I've made copies and that's included in the  
11 original filing for arbitration.

12 MR. COWGER: We remember seeing all that.

13 MR. ELSBERRY: That's the extent of the department's  
14 records. There was, in 1995, a notice of pending closeout  
15 in the department, and I filled out some rather extended  
16 detailed information. And I furnished a copy directly to  
17 Mr. Langley. And his response to me was a letter saying  
18 that, this is part of it here, saying that he acknowledged  
19 that information, but I would be required, I should furnish  
20 in detail, and he gave me a massive amount of stuff to  
21 produce and indicating nothing that the department had made  
22 evaluation or had compiled any documentation of the status  
23 of any of those notices that I had provided.

24 Then as time continued, I realized I had to protect  
25 myself and file an arbitration claim if the department

1       wouldn't agree to what had been -- there was no action  
2       taken on the materials that were furnished in July of '95.  
3       The department never responded to me saying we think you're  
4       crazy, we think that we owe you something. There was no  
5       further response other than demand for additional detailed  
6       information.

7               I feel very stringently that the department was  
8       derelict in not having made any kind of an evaluation under  
9       these circumstances. I had made explicit requests for time  
10      granting, and the response to that was to assess liquidated  
11      damages and to deduct pay items on the line items for those  
12      three lights, barricades, and signs. The burden was placed  
13      entirely on the contractor for documentation in this  
14      matter, and it took an extensive amount of time and  
15      preparation to do it.

16             MR. COWGER: I think we understand that now. I think  
17      it's time to let DOT rebut. But, again, to keep this thing  
18      as concise as we can, the contractor is saying that the  
19      DOT, I think what he's saying is that the DOT should have  
20      been analyzing these claims based on the notice of intent  
21      to file a claim.

22             And I think that maybe the DOT's position is that,  
23      well, we couldn't evaluate them, because we didn't have  
24      enough detail yet as specific to your claim, and we  
25      certainly didn't have the quantum part of it. Now, is that

1 a correct statement, DOT? Answer that first.

2 MR. ROBERTS: DOT, we didn't have a claim. Superior  
3 is basically saying that we had a situation on the job.  
4 DOT, you should have been keeping records of everything  
5 that was going on on the job, and then you should have  
6 wrote me a check based on your records, and that would have  
7 been acceptable.

8 We don't do that. We did keep records on the job.  
9 We were aware there was some situations. We have our daily  
10 reports. What we can't tell by our dailies or what we  
11 can't tell by our reports, while the crews were on the job,  
12 what inefficiency applies to the claim. We can't make  
13 those determinations.

14 Those determinations, once made by the contractor,  
15 submitted to the department, then we can take our records  
16 and make some type of evaluation if we agree or disagree on  
17 what inefficiency is shown that should be ours. We had  
18 nothing like that to look at.

19 I think that this claim speaks for itself. I don't  
20 think there's a lot of verbiage necessary at that point.  
21 We didn't have it for three years. Why should we pay  
22 interest on it.

23 I can tell you from the department's perspective,  
24 Mr. Elsberry presented that he's only asking for three  
25 years. This claim, this settlement, the SA, was arrived at



1 and was intended for settlement purposes only. We stuck  
2 with our bargain. Mr. Elsberry and I negotiated in good  
3 faith, and I stuck with what we agreed to.

4 We did pay him some interest on the liquidated  
5 damages. We paid him 48 months, I do believe, which is far  
6 more than the three-year period. But when we agreed to the  
7 days, the department paid liquidated -- paid the interest  
8 on those liquidated damages which amounted to something  
9 like \$16,600. And we paid everything that he asked on the  
10 direct claims. And so these things that we have disagreed  
11 with, we're saying that, you know, he didn't give us the  
12 claim anyway; why should we pay interest.

13 MR. COWGER: Now, let me ask you this. When were the  
14 liquidated damages, just roughly, when were the liquidated  
15 damages deducted from his payment? Sometime during, let's  
16 say, '93?

17 MR. ROBERTS: Probably at the processing of the -- or  
18 at the end of the -- yes, that would be fair.

19 MR. COWGER: Sometime in '93. Sometime after  
20 completion of the project but not years later.

21 MR. ELSBERRY: Estimate number nine, which is in the  
22 package I gave you about those line items --

23 MR. ROBERTS: And that's why the department  
24 acknowledged that, that we had his money for a long time,  
25 and we felt that he was justified in receiving that

1 interest.

2 MR. COWGER: We understand that.

3 MR. ROBERTS: I would like to say one other thing in  
4 reference to what Mr. Elsberry was alluding to the fact  
5 that the department was negligent in responding to his  
6 claim when he responded by submitting the certified or  
7 conditional acceptance letter.

8 Upon receipt of a conditional acceptance letter, the  
9 department will acknowledge that by writing the contractor  
10 a letter back which basically states this does not  
11 constitute your formal filing of a claim, that you have to  
12 take that up with the project engineer.

13 MR. COWGER: Okay. We understand that. That's  
14 pretty clear in the contract, right?

15 MR. ROBERTS: Yes, sir.

16 MR. COWGER: Mr. Elsberry, we're going to give you  
17 about a minute or so to come back on that, and then we're  
18 going to close out that item and quickly go to R-7 and  
19 close out the whole thing.

20 MR. ELSBERRY: All right. Preceding this project was  
21 another one on Kathleen Road we had filed claims on and had  
22 not been acted upon. Mr. Roberts, with me, we negotiated  
23 that one. We settled \$34,000 on a \$69,000, what was it, a  
24 \$69,000 project or something like that, a substantial  
25 amount.

1           MR. ROBERTS: I don't recall the value.

2           MR. ELSBERRY: And it took considerable time in  
3           processing that one. That one we had offered price  
4           proposals during the project. It impacted my ability to  
5           deal with this one. And I'll acknowledge that there had  
6           been a personal tragedy in my life that impacted this when  
7           Mr. Roberts was negotiating with me when my son was  
8           killed. And it impaired my ability to deal with it for at  
9           least three or four months. And I appreciate that fact and  
10          I acknowledge that in this proceeding. But there isn't  
11          anything I could have done about that.

12          I'll simply say that the department at all times  
13          after the acceptance date had full use of these  
14          facilities. I think that the merits of a substantial part  
15          of them have already been documented in supplemental  
16          agreement number one. And his question there as to why  
17          should the department be penalized for nonpayment, and  
18          I say who should be penalized for nonpayment? Should the  
19          contractor? In this case, I gave full value and beyond  
20          what was written in the contract. And I'm simply asking  
21          that it be restored to me in this manner. It's an  
22          equitable thing.

23          MR. COWGER: I've still got to ask this. During the  
24          life of the contract, while the contract time was still  
25          running up until July of '94? '93?

1 MR. ROBERTS: '93.

2 MR. COWGER: '93, can't keep those years straight,  
3 July of '93, was there any attempt during that period of  
4 time to negotiate settlement of any of the claims that  
5 were --

6 MR. ROBERTS: There were no claims to negotiate.

7 MR. COWGER: Because he had not submitted?

8 MR. ROBERTS: Had not been submitted.

9 MR. COWGER: Do you accept that?

10 MR. ELSBERRY: Yes, sir.

11 MR. COWGER: Okay. I'm through I think. Do you have  
12 any other questions?

13 MR. ROBERTS: I have one comment.

14 MR. COWGER: Sure.

15 MR. ROBERTS: On R-7 as related to --

16 MR. COWGER: Well, we're going to go to R-7.

17 MR. ROBERTS: Oh, we are? I thought we were through.

18 MR. COWGER: If we're through with R-6, let me  
19 comment on R-7. The contractor originally requested  
20 \$4,000. The department, in the supplemental agreement,  
21 compensated him \$2,500. So there's \$1,500 hanging out  
22 there yet, correct?

23 MR. ROBERTS: Correct.

24 MR. COWGER: The department -- I mean the board has  
25 already said, and I don't have the numbers in front of me,

1 but the board has already said that they're going to refund  
2 to the contractor a portion of his arbitration fee based on  
3 the fact that the claim that we actually heard was less  
4 dollars. So that's going to impact, going to reduce the  
5 \$1,500.

6 Now, frankly, I'm going to ask the other board  
7 members, do you think we need to discuss this anymore?

8 MR. ROEBUCK: We've turned it down quite often, those  
9 fees of preparation. Sometimes onerous. I think in this  
10 instance, we're going to return you, I believe, \$400 or  
11 \$500. I'm not sure of the fee schedule. I think this one,  
12 we've got a precedent set almost where we have not awarded.

13 MR. COWGER: The board has traditionally, to  
14 reinforce what Mr. Roebuck says, has treated the  
15 arbitration fee and the cost of preparing a claim as the  
16 cost of doing business and has never honored, to the best  
17 of our ability, that sort of claim. Do any of the board  
18 members have any further comment on that?

19 (No response)

20 MR. COWGER: Mr. Elsberry, do you have any further  
21 comment?

22 MR. ELSBERRY: I would like to comment on that. My  
23 sense and my judgment of the department's action with  
24 regard to dealing with this series of notices about the  
25 pending claim and the actual dealing with the claim is that

1       it relied upon the contractor's compilation and preparation  
2       to a significant extent and avoided its own internal costs  
3       of dealing with it by reference to the materials.

4               It did engage in Mr. Yoakam, who came to our office,  
5       to audit, Mr. Yoakam is a CPA, came to our office and, in  
6       fact, audited our records. And the department, based on  
7       his findings, I think you'll see in the supplemental  
8       agreement, came to a different evaluation of the overhead  
9       amount. We did not modify our claim to that. We stuck  
10      with what we had.

11             MR. COWGER: The board is not interested in hearing  
12      any more on this, because I just looked it up. You're  
13      going to receive a \$1,000 refund on the arbitration fee, so  
14      now we're down to only talking about \$500.

15             MR. ROEBUCK: Be happy. Quit right now.

16             MR. ELSBERRY: Thank you.

17             MR. COWGER: Unless either party has something really  
18      outstanding they want to say, we're are going to close.  
19      DOT?

20             MR. ROBERTS: The department did want to say  
21      something about R-7. However, all we would say is that we  
22      understand that you don't honor that request typically, but  
23      we would like the board --

24             MR. COWGER: We can close that out by saying we've  
25      already decided. He's not going to get any money for that

1 part. That's it.

2 MR. ROBERTS: We would like to state that the  
3 department feels that we paid money for that, and that was  
4 our good faith negotiation. And we included that in. If  
5 that's the way the department approaches it --

6 MR. COWGER: No use in discussing it anymore, because  
7 we've already told you, zero.

8 MR. ROBERTS: Well, I'm not interested in zero. I'm  
9 just telling you how we approached the whole claim as it  
10 relates. That was our attitude toward the whole claim.

11 MR. COWGER: That strictly relates to your good faith  
12 effort to settle this thing.

13 MR. ROBERTS: Absolutely.

14 MR. ELSBERRY: I'd like to say one thing here --

15 MR. COWGER: This is it, now.

16 MR. ELSBERRY: -- in Mr. Roberts' presence and the  
17 board's presence. I commend his professionalism in dealing  
18 with this. And he had an assignment to deal with from a  
19 department position. Although we didn't every agree on  
20 everything, we agreed on many things. And I want to  
21 express my appreciation to him for his professionalism in  
22 dealing with this matter.

23 MR. ROBERTS: Thank you.

24 MR. COWGER: We want to say that both parties have  
25 had opportunity to present their case. And we're going to

1 close the hearing out subject to any comments or questions  
2 that the board members may have. Does either party object  
3 to that?

4 MR. ROBERTS: No, sir.

5 MR. ELSBERRY: Last thing I would say today, we have  
6 been to the department, and we have initiated a conditional  
7 acceptance letter after the processing of supplemental  
8 agreement number one. And I'm assured that they will  
9 attempt to get us paid. And I would appreciate very much  
10 when we get it.

11 MR. COWGER: There's already a commitment from DOT,  
12 then, to adjust the temporary traffic control items to  
13 reflect the time extension?

14 MR. ROBERTS: We will follow up on that when we get  
15 back to the district.

16 MR. COWGER: Mr. Deyo, do you have any questions or  
17 comments?

18 MR. DEYO: No, sir.

19 MR. COWGER: Mr. Roebuck, you had a comment, I think.

20 MR. ROEBUCK: I'll make my comment now. As well as  
21 you presented your arguments here today in writing, maybe  
22 we ought to change our policy and have that done, and we  
23 could do this on the telephone, you know. Good job. Why  
24 in the world did we spend two hours after we had such a  
25 good presentation from both parties.



1           MR. DEYO: Here, here.

2           MR. COWGER: So you're saying the board ought to be  
3 encouraging more written submittals with no hearing.

4           MR. ROEBUCK: Right.

5           MR. COWGER: Doesn't apply to this job so -- a good  
6 comment. The hearing is hereby closed. The board will  
7 meet to deliberate on this claim in approximately six weeks  
8 or thereabouts. You'll have our final order shortly  
9 thereafter.

10          (Whereupon, the proceedings were concluded at 11:23.)

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CERTIFICATE OF REPORTER

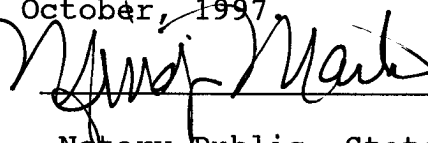
STATE OF FLORIDA )

COUNTY OF LEON )

I, MINDY MARTIN, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 10<sup>th</sup> day of October, 1997



Notary Public, State of Florida



Mindy Martin  
MY COMMISSION # CC594513 EXPIRES  
December 3, 2000  
BONDED THRU TROY FAIR INSURANCE, INC.