STATE ARBITRATION BOARD

ORDER NO. 11-99

10/4/07 MSW

/// NOTICE ///

In the case of Murphree Bridge Corporation versus the Florida Department of Transportation on Project No. 50020-3526 in Gadsden County, Florida, both parties are advised that State Arbitration Board Order No. 11-99 has been properly filed with the Clerk of the State Arbitration Board on January 19, 2000.

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

S.A.B. CLERK
JAN 19 2000
FILED

Copy of Order & Transcript to:

Greg Xanders, P. E., State Construction Engineer

Tom Murphree, President, Murphree Bridge Corporation

Copy of Order to:

Louie W. Seay Jr. Projects Manager
Peavy & Son Construction Co., Inc.

STATE ARBITRATION BOARD

ORDER NO. 11-99

RE:

Request for Arbitration by
Murphree Bridge Corporation f.b.o. Peavy and Son Construction Co.
Job No. 50020-3526 in
Gadsden County

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

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 11:a.m. on Tuesday, November 30, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 11-99 in this cause..

ORDER

Per written notice, Murphree Bridge Corporation authorized Peavy and Son Construction Co., Inc., a subcontractor, to present a claim arising out of the work on this project sublet to Peavy and Sons.

The Subcontractor presented a request for arbitration of a claim in the total amount of $ 43,994.10. This claim is a two part claim arising from alleged underpayment by the Department of Transportation for the items Borrow Excavation and Concrete Box Culvert Desilting.

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

PART I $41,089.10 Underpayment for Borrow Excavation (Truck Measure)

The Specifications provide that the method of measurement for the item Borrow Excavation (Truck Measure) shall be made on a loose volume basis in trucks. The truck measure volume determined by the Department was 23,567 M^3 In preparing the Final Estimate, the Department reduced the quantity for this item to 19,187 M^3, a reduction of 4,380 M3.

Our records indicate that the total quantity of Borrow Excavation hauled to the job was 24,949.82 M^3 which is 5,706.82 M^3 greater that the final pay quantity determined by the Department.

The Department told us that the deduction was made, based on cross sections taken after completion of the work.

We agree that the front slopes may be somewhat full. However, we think this was caused by slippage of the embankment because it was unstable due to heavy rains that occurred. We did the best we could under the conditions to redress the embankment. It was not possible to dress the slopes from the bottom using a bull dozer.

We were not told during construction of the embankment that the slopes were full.

The bid unit price for Borrow Excavaton (Truck Measure) was low.

Our claim is based on 5,706.82 M^3 of Borrow Excavation (Truck Measure) at the contract unit price of $ 7.20 per M^3.

PART II $2,905.00 Underpayment for Concrete Box Culvert Desilting

A Supplemental Agreement provided for leaving an existing concrete box culvert in place and extending it instead of removing the culvert as shown in the plans. This Supplemental Agreement established a pay item Concrete Box Culvert Desilting per M^3. At the time the Supplemental Agreement was executed we questioned the plan quantity established for the desilting item.

We were told that the plan quantity for desilting was based on the culvert being half full of silt.

We contend that the culvert was in fact full. Water could not flow through it prior to it being cleaned out and you could not see any light by looking in the end of the culvert. .

Our claim is based on the total interior volume of the box culvert which increases the pay quantity for Concrete Box Culvert Desilting by 20 M^3. Thus our claim is for 20 M^3 as the unit price of $ 145.45 per M^3 as established by the Supplemental Agreement which amounts to $2,905.00.

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

PART I

The Standard Specifications require the contractor to provide all horizontal and vertical controls necessary to construct the work in conformance with the plans and specifications and also set out construction tolerances for final shaping of earthwork.

Cross sections taken after construction was completed indicated that fill material was placed above the lines and grades shown in the plans in excess of the construction tolerances allowed. Article 120-12.11.1 (Method of Measurement-General) of the applicable Standard Specifications

reads "The volume of all material washed, blown or placed beyond the authorized roadway cross section shall be determined by the Engineer and the quantity so determined shall be deducted from the quantity of Roadway Excavation or Borrow Excavation to be paid for."

After the work was completed final cross sections were taken and the multi-line earthwork program was used to calculated the actual quantity placed in the embankment. The construction tolerances set out in the specifications were applied in these calculations.

The quantity of Borrow Excavation (Truck Measure) placed outside the plan limits as adjusted to apply the construction tolerances allowed by the specifications, was determined using the multi-line earthwork program. The quantity was were adjusted upward using the Shrinkage Factor (1.35) and the Bulkage Factor (1.25) shown on Sheet No. 24 of the plans.

PART II

The prime contractor did not make a request to adjust the Supplemental Agreement quantity for Concrete Box Culvert Desilting at the time the document was executed. Peavy and Son did request that the quantity be deleted based on their review of a feasible flow line elevation (the flow line of the outfall ditch was higher than the flow line of the culvert). This request was denied, because it was decided to clean out the outfall ditch as extra work in order to make the box culvert, as extended, functional.

The quantity of silt to be removed was determined by the Engineer of Record from a field survey conducted on November 21, 1997. Our calculations based on these field notes show the quantity to be 21.4 M^3.

One December 5, 1997, the Engineer of Record observed and documented that there was a base flow of water through the culvert.

Per our calculations the total volume of the culvert is 39.076 M^3. The final pay quantity for Concrete Box Culvert Desilting was 26 M^3. Thus, the total additional quantity if the culvert had in fact been completely fulled with silt would be 13.076 M^3, not 20 M^3 as claimed by the Contractor.

It is our position that the Contractor was properly compensated for this pay item.

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

PART I

1. The Department admitted that water seeped out of the embankment making it unstable to some degree. This caused it to be difficult to control regrading of the slopes that was necessary after original construction of the embankment.

2. The Contractor was responsible under the contract for establishing all horizontal and vertical controls necessary to construct the work in accordance with the plans and specifications, including setting grade stakes and slope stakes.

3. Under the circumstances that existed during the work, it was extremely difficult for the Contractor to control the elevation of the slopes and for Department's inspector to verify conformance with the plan elevations during construction.

PART II

The testimony presented did not support the Contractor's position.

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

The Department is ordered to compensate the Contractor for each part of his claim in accordance with the following:

PART I $ 15,500.00

PART II Nothing

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of $ 101.70 for Court Reporting Costs.

The Contractor is directed to reimburse the State Arbitration Board the sum of $ 101.70 for Court Reporting Costs.

Tallahassee, Florida

Dated: 1/19/00

S.A.B. CLERK

JAN 19 2000

FILED

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

Certified Copy:

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

1/19/00
DATE

Bill Albaugh, P. E.
Member

John P. Roebuck
Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

MURPHREE BRIDGE CORPORATION)
)
)
)
) PROJECT NO. 50020-3526
- and -)
) LOCATION: Gadsden County,
) Florida
)
)
DEPARTMENT OF TRANSPORTATION)
)

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Tuesday, November 30, 1999

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

TIME: Commenced at 11:55 a.m.
Concluded at 12:50 p.m.

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

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

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
Mr. Bill Albaugh
Mr. John Roebuck

APPEARING ON BEHALF OF MURPHREE BRIDGE CORPORATION:

Mr. Louie W. Seay, Jr.

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Martin
Mr. Steve Benak
Mr. Tom Shafer
Mr. Garrett Martin

* * *

I N D E X

PROCEEDINGS

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

Mr. Bill Albaugh was appointed by the Secretary of the Department of Transportation as the alternate member of the Board.

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

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

Our terms began on July 1, 1999 and expire June 30, 2001.

Will each person who will make oral presentations during this hearing please raise your right hand and be sworn in.

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN COWGER: The request for arbitration of the claim submitted by the claimant, including all attachments thereto and the administrative documents received in this hearing, are hereby introduced as Exhibit 1.

The Board and the contractor have received a rebuttal package from DOT, which will be identified as

Exhibit No. 2.

Let me verify, Mr. Seay, you all did receive that package?

MR. SEAY: Yes.

CHAIRMAN COWGER: Okay. Have you got any problem with the adequacy of time to review it?

MR. SEAY: No.

CHAIRMAN COWGER: Just to be sure.

I want to make a point that through my efforts we have expedited the process here in order to try to get all the requests that the Board had on hand out of the way this year. We appreciate the cooperation of everyone in that.

No other exhibits are to be submitted, so we will move on.

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

CHAIRMAN COWGER: During this hearing the parties may offer such evidence and testimony as is pertinent and material to the dispute being considered by the Board, and shall produce such additional evidence that the Board may deem necessary to an understanding of the matter before it.

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

The parties are instructed to assure that they receive properly identified copies of each exhibit used in this proceeding. You should retain these exhibits. The Board will send the parties a copy of the court reporter's transcript, along with our order, but we will not furnish copies of the exhibits.

As is typical in arbitration proceedings, this hearing will be conducted in an informal manner. The Board is not required to apply a legalistic approach or strictly apply the rules of evidence used in civil court proceedings.

We are primarily looking for information in regard to the facts, and the contract provisions that apply to this case.

The order of proceeding will be for the claimant to present their claim, and then for the respondent to offer rebuttal.

It is appropriate at this point for the contractor to begin his claim presentation. I will ask at the beginning of your presentation that you please state the amount of your claim.

MR. SEAY: This project was a railroad overpass bridge project in Gadsden County. The total amount we are requesting, based on the exhibit we submitted, is $41,089.10.

Basically what the dispute arises from is --

MR. ROEBUCK: Let me interrupt you. Didn't you have a second claim on silting for another $2900?

MR. SEAY: Yes, it's included in --

CHAIRMAN COWGER: It's all in the 41?

MR. SEAY: The other claim was for 29,000, 2900 and five dollars. The total amount was $43,994.10.

That breaks down three ways. We hauled borrow to the job. The job called for it to be truck measure. During the project, we were raising the level of the roadway approximately six to seven feet and expanding the roadway out. We had to remove the old bridge and expand it out to a 24-foot roadway with five-foot shoulders.

Once we removed the old bridge and started our earthwork, we experienced a tremendous amount of water coming out of the old embankment, making the embankment very unstable.

We brought this to Mr. Shafer's attention. He agreed we would put out borrow material, and the next morning in certain areas, not all of them, it had washed down the hill.

Anyway, we did that primarily just for the record.

During the course of the job, we had almost built the embankment. I guess we were probably 90 percent

through with it.

A hurricane came. I cannot remember which one. It did not hit Tallahassee, but we experienced three days of not heavy rains, but constant rains from daylight to dark. It was around Thanksgiving a couple of years ago.

Anyway, what happened, the new embankment we placed on the old embankment slipped approximately 2,000 yards, went across the railroad track. The balance just slid down the embankment. It's a very steep embankment. It never happened before.

We were contacted by Mr. Shafer. He looked at the job. He said, you know, make us a price on restoring the embankment. This is an act of God. Nobody could foresee it. We did it. Seems like we were paid somewhere around $18,000 to replace this embankment up the hill. Still very unstable.

We got it up the hill, got it stabilized. We put sod on it. We experienced some more slippage when the sod was going down, but not to the extent we did before.

Anyway, after we had pulled the shoulders or the embankment back up, we went ahead and finished the job. When we received the final offer of payment on the job, we found out that the Department had deducted 4300

cubic meters from the job.

I talked to Garrett. He said that's based on cross sections, based on it being overfull.

When we got into it, according to our records, we hauled an additional 1467 cubic meters of material to the job. But, you know, we had agreed with the amount of dirt that they said we hauled, their people and our people agreed every day. Basically we agreed on the amount of dirt that was hauled to the job except for this 1400 cubic meters, which they don't have a record of.

I've got our records in here. To be honest, some of it could be topsoil that I'm not aware of. They were supposed to be very specific.

Basically the lion's share of our claim is because we put the embankment up on a site condition that we were not aware of, that nobody was aware of, that was very unstable. The embankment slipped. We repaired the embankment.

It was very difficult to repair. We had an excavator with a 50-foot reach, you know, pulling this dirt back uphill. I think we had that there for about six weeks, you know, doing it.

We were paid a fair price for replacing the embankment.

It's our contention that since the embankment was so unstable, once we completed the embankment we had to go from the point where we had restored the embankment up to a certain point. We had to complete the job.

There are some areas which I'm sure are full, according to the cross sections -- I have no reason to disagree, but they are not overfull.

By the same token, we put out over 5,000 cubic meters, less than was called for to start with. Basically 28,000 cubic meters were called for. We put out 23,000 cubic meters.

Then because of the fullness of the slope in selected areas, this was reduced down to 19,000 cubic meters, which is a deduction of almost $32,000 just based on the final cross sections.

Mr. Shafer, am I right about the embankment being very unstable?

MR. SHAFER: Yes, I didn't hold my hand up to testify, but I will do so now.

CHAIRMAN COWGER: You didn't intend to answer any questions?

MR. SHAFER: Yes, but I will tell the truth. It was an unstable situation. There was water coming out of the embankment which was kind of unusual.

MR. SEAY: Yes, because there was no water source

other than what had been in there for years, other than the box culvert had stopped up, which I will get to it in a minute.

MR. ROEBUCK: The difference you are claiming, could it be you were paid for by truck measure for that dirt and then they deducted it?

MR. SEAY: That's exactly right. We agreed on the number of yards. I say yards, but 23,000 cubic meters. We agreed. We actually hauled according to my records, which, you know, there may be some -- I'm sure there's some truth in there -- but we are satisfied with the 23,000 cubic meters if we get paid for it.

We hauled it in by truck measure. But then when they did the final cross slopes on the job, they say the, you know, the embankment was full. So, they took the net amount of the overage, which was, I believe, around 2300 cubic meters. They multiplied it by the 45 percent factor that DOT used, then took that and multiplied it by a 25 percent factor, which DOT also uses when converting truck measure to embankment, and they came up with deducting 4300 cubic meters.

CHAIRMAN COWGER: Excuse me just a second, so we don't have a problem with the testimony. I think that factor that you called 45 percent was actually 35.

MR. ROEBUCK: Thirty-five. It's in the notes.

MR. SEAY: Thirty-five?

CHAIRMAN COWGER: I just don't want that to be outstanding as a conflict in the testimony. DOT --

MR. SEAY: I stand corrected, it is 35.

CHAIRMAN COWGER: Go ahead.

MR. SEAY: So, anyway, we ended up being paid for 19,187 meters when we, in fact, hauled 23,437 meters. In spite of being paid by DOT to do corrective work based on, I'm not going to say improper design, but just unforeseen site conditions because nobody could have really, you know, foreseen that.

You know, to us we find it strange that DOT would pays us $20,000 for recovery work and then come back and deduct out $31,000 at the end of the job when it was a truck measure job.

Bearing in mind nobody told us you will get the shoulders too full. We were just getting the shoulders to what we thought would be acceptable.

We were hauling the dirt from 12 miles away. It's not like we had a pit right next to it that we could make a lot of extra money. The job overran over 25 percent to start with.

We feel like -- we feel like in this situation based on the site conditions on this particular job -- and we set grade stakes out there.

The man we had that started this job, that built the lion's share of embankment before he died, he was one of the best field superintendents -- he's the best we ever had, and I think he's probably the best Cockswell ever had. He had done Four Points and major jobs all over the state. We were lucky to have him. He died during the job.

He set his own grades. The grades we set to start with were what was required from the plans.

We did not anticipate all the dirt sloughing off and moving down the hill.

We did the slide corrections and everything. And the shoulders could have been full, but we put them back, you know, so that they would stay.

We had to work -- we had to finish the slopes based on what we were able to do after the storm recovery efforts.

Is everybody pretty clear on the earthwork? I don't want to beat a dead horse.

CHAIRMAN COWGER: Hearing all that, now is what you are trying to tell us is that the unstable nature of the embankment due to whatever cause it may be contributed to the embankment being constructed full?

MR. SEAY: It ultimately contributed to the overrun in the dirt and the deduction from the

Department. Had it been very stable, we could have put bulldozers on the slope. We could not put bulldozers on the slope. We had to work the slope with a long stick excavator.

CHAIRMAN COWGER: Might I suggest that we let DOT rebut part one, and then we will come back and talk about part two, the desilting. That certainly won't take long.

DOT, what do you have to say about, I guess, the issue, what Mr. Seay has said?

MR. GARRETT MARTIN: The quantities that we came up with, the only difference we really have is based on the deduction made at the end of the job, which falls in line with the specifications of the project and just the final payment procedures that we have in place, which were mentioned in my rebuttal.

I would also like to mention that some of the records that Mr. Seay submitted on these about Reginald Morrison, I would just like for you to note that that subcontractor never came to the project. He was never there.

It makes me feel like the records he is submitting are not very accurate at all.

Also, the -- talking about the storm damages, the unforeseen conditions that he feels like they received,

which that's not included in his package that he gave us earlier, but to comment on that, there was several work orders that were made during the life of the job, and the -- what happened is after the damage was there, we asked the prime contractor to get with all the subs and to come up with the estimates that they felt like it would take to repair the damage from the storms and these special occurrences out there.

So, they did that. They submitted a price and the quantities they felt like would be adequate to cover all of these damages. That was pretty much what we went with.

So, there wasn't any -- I feel like a lot of those unforeseen conditions were covered in those work orders.

I would have brought that today, but I didn't realize that would become an issue.

CHAIRMAN COWGER: I don't think it's really an issue, other than the fact that the embankment was unstable to some degree and the contractor is saying that the unstableness of the embankment caused the embankment to kind of fluff, you might say, or it was fuller than it should have been.

What do you have to say about that? Do you have any comment on that? You were on the job, weren't you?

MR. GARRETT MARTIN: Yes. I don't see how that would really -- we have a shrinkage and a bulkage factor applied to it.

MR. ROEBUCK: Is that part of the spec? Your truck measure and his truck measure are about the same. It's whether he got paid for truck measure or whether he is to get paid on net embankment. The 4,000 meters is about the difference in the compaction, the shrinkage.

MR. GARRETT MARTIN: Right. According to the specifications that were in the contract, if he exceeded these tolerances that were there, we were supposed to do maintenance deduction for that amount. The deduction includes that shrinkage and bulkage, which we applied that even to the quantities he did get paid for.

Those factors increase the amount of material that's being talked about by about maybe 70 percent, something like that.

He gets extra money for material that he brings in to begin with, and so it's also deducted, any material for overpayment or overfill.

MR. BENAK: Can I make one comment right here. From what I'm seeing is that we had a storm event that we paid on a supplemental agreement or work order in

which we added more dirt to the project. We filled in washouts.

MR. SHAFER: We didn't add dirt to the project, just brought dirt back up.

MR. BENAK: Just brought it back up and fixed it?

CHAIRMAN COWGER: You did not add anything to the template as shown in the plans, you just replaced what was washed away?

MR. BENAK: Some was washed up and other brought back up.

MR. SHAFER: As far as the instability of the embankment is concerned, I don't think that the filling up the embankment affects the stability of that embankment one way or the other. As a matter of fact, the extra burden would probably make it a little bit more unstable.

We are closer to the template, and this is -- just from an engineering guess, that if you load that -- if you have an unstable bank and you fill it up, it's going to be more unstable. I don't think that argument is really a valid argument, the instability cause.

Now, he says he couldn't bring a dozer up and down it. That could very well be, but there's other ways to finish the embankment without the dozer.

CHAIRMAN COWGER: You are saying the inability to bring in the dozer could have been the case, but there are other ways it could have been handled?

MR. SHAFER: Yes.

MR. GARRETT MARTIN: And we paid for that in some of the damage repair costs.

CHAIRMAN COWGER: Just to get a couple of things clear in my mind. The DOT agrees, and apparently it's documented by truck tally tickets or something, to a certain quantity of material that was truck measured, which was -- and then to that you applied an adjustment based on the cross sectioning procedure and the multi-line earthwork stuff that you've got in your exhibit.

That difference of 4380 yards between those two is strictly the adjustment that is made, and you do not dispute the quantity of material that was hauled. Your dispute is that he placed some of it outside the template?

MR. GARRETT MARTIN: Yes.

MR. SHAFER: That is correct.

CHAIRMAN COWGER: Now when you ran the multi-line earthwork on the thing, did you allow some tolerance before you started making the deduction? In other words, if you had a slope here that was a certain

elevation, according to what you've submitted, DOT, there was a tolerance in the embankment.

MR. GARRETT MARTIN: Right.

CHAIRMAN COWGER: Did you consider that in making these calculations?

MR. GARRETT MARTIN: Well --

CHAIRMAN COWGER: In other words, just as a hypothetical, let's say he was allowed two-tenths of a foot. I know this was a metric job, but let's talk in terms I understand. Let's say it was two-tenths, that a two-tenths construction tolerance was allowed.

When you made the multi-line earthwork calculations, did you make them, taking into consideration that two-tenths tolerance?

MR. GARRETT MARTIN: Yes, that would -- that was built in.

MR. STEVE MARTIN: Yes. With multi-line earthwork, it takes into account that tolerance, the two-tenths or whatever it converts to in metric, and then anything beyond that two-tenths is what is calculated in your final result for your multi-line.

CHAIRMAN COWGER: That's where the surplus was?

MR. SHAFER: It gives you the tolerances.

CHAIRMAN COWGER: Mr. Seay, do you have any argument about that?

MR. SEAY: Just one thing to clarify. This is a picture of the embankment. This area right here is what happened when the embankment slid downhill. We could not put any equipment in here. You couldn't even walk down here. It was almost like quicksand.

What we had to do was keep an excavator up here, drag this material back up. It never got stable enough for us to work it with a bulldozer.

When we pulled this back up, this was so soupy we had to spread it over a long period.

It filled up the bottom more than, you know, it normally would. We did all we could.

We then put sod on it as quick as possible to keep it from happening again. We were concerned, because the sod, part of this embankment was sodded before. And the sod alone, we believe, with all the additional weight from the water is the reason the entire slope slid.

We did the work in good faith. Nobody told us that the shoulders were overfull. I think you can go look at them, you know.

The embankment is very, very steep to start with. I think it's one and a half to one, something like --

MR. GARRETT MARTIN: Something like that.

MR. SEAY: You can't hardly walk down it without

falling. You can walk down bracing yourself with your hand.

The embankment was so unstable, you know, that I'm sure we are probably over the template. I would admit that. The reason we are over it is because the embankment slid. Rare occurrence.

We were paid to restore it. In our restoring we did what we could to restore it.

We could not pull the bulldozers out there to get to the actual template, and the shoulders probably are a little bit fuller.

But by the same token, we used 6,000 -- almost 6,000 meters less dirt than was called for in the plans to start with.

Hindsight is 20-20. We should have gone back and, you know, just requested to change the embankment dirt at some point or whatever.

Basically I think you all can see our position. DOT paid us because it was unstable.

From that point on, rather than file a claim for that, and we probably wouldn't have anyway. We appreciate the Department paying us for the recovery work. That's never happened.

I've been in it 25 years and never been paid for that.

Again, $32,000 deduction off your last estimate -- and I could have had other exhibits. I got this yesterday. I looked at it. Once we agreed on the quantities and everything, I could have brought all kinds of exhibits about the storm water damage. That's immaterial.

We agree on the quantity of dirt that was hauled. We just don't agree on whether we should be paid for it or not. I believe we should be paid. First of all, I believe it's better embankment. It's not as steep. I don't know how DOT will ever maintain it, it's so steep.

But with all the material there, we put it in place. It was not our intent to overfill the embankment because of the price we had on the dirt. 7.20 for embankment dirt is cheap anyway, about $4 a yard cheaper, but the job is located within a mile of our office.

With regard to the dirt, I think it will be up to you all to decide whether the subsurface conditions contributed to our hauling more dirt in there.

Once we got this material dressed back up as best we could, then we had to start from this point and finish out the embankment. We couldn't just stop there because, quote, all the dirt had been hauled. We had

to build the embankment on up, you know, to a pleasing slope or functional slope.

CHAIRMAN COWGER: Let me ask you a couple of questions because I think we are about through with this particular part of the claim. Looking at the -- there was some testimony there a moment ago when Mr. Seay was doing a sketch showing a cross section of the job where he indicated that in his thoughts, at least, that the excessive fill is near the total of the slope, is that correct?

MR. SEAY: I would say probably the lion's share would be.

CHAIRMAN COWGER: Can we tell that from looking at the multi-line cross section information that's in the DOT exhibit at Tab 7, I believe? No, that's not right.

MR. GARRETT MARTIN: Eight.

CHAIRMAN COWGER: That's what it is. Can we tell from looking at those -- we know that there was a surplus material outside of the template plus tolerance. We can't tell where in the cross section it occurred, can we?

MR. GARRETT MARTIN: It's in here. I have some drawings of the cross section in my car outside I could bring in.

CHAIRMAN COWGER: What do they show?

MR. GARRETT MARTIN: I don't recall, but it draws out how the -- it gave a plot of what this information shows.

MR. ROEBUCK: Sounds like what his story is is plausible.

MR. GARRETT MARTIN: Yes.

MR. ROEBUCK: Where that stuff is sloughing down the slope?

MR. SEAY: It was not stable enough to bring it all the way back up to the top.

CHAIRMAN COWGER: You are saying you have some cross sections out in the car that were based on the multi-line earthwork?

MR. ALBAUGH: We might want to have him get those.

CHAIRMAN COWGER: Don't do it right now. Wait a moment. We will bring it in after we finish part two. We do need to look at those. I think it's important.

MR. GARRETT MARTIN: Okay.

CHAIRMAN COWGER: In your memorandum of November 23rd, which is your primary rebuttal exhibit, there's a lot of discussion in here about construction tolerances, page 2, 120-11.2.

MR. GARRETT MARTIN: Right.

CHAIRMAN COWGER: Then you talk about the multi-line earthwork. I want to pursue Mr. Roebuck's question a minute more. Where in the contract documents does -- when earthwork is paid for by truck measure, where does the contract documents allow you to make a deduction like you did? How do you substantiate that deduction?

MR. GARRETT MARTIN: In other words, how do I know when to apply that deduction?

CHAIRMAN COWGER: Where does the contract allow you to do it?

MR. GARRETT MARTIN: It's --

CHAIRMAN COWGER: I think in deliberating the Board will ask that question of itself. Right, Mr. Roebuck?

MR. ROEBUCK: Yes.

CHAIRMAN COWGER: Am I expounding on what you asked?

MR. ROEBUCK: Yes. It's obviously their policy because they do a lot of cross section work, but if you are buying a job by truck measure, you buy it that way. You keep track of the truck measurements, qualify the truck volume. That's how you get paid.

MR. GARRETT MARTIN: In specification 120-11.2 on page 2 of the rebuttal, the first sentence of that

quote in there is, "In final shaping of the surface of earthwork, a tolerance of 90 millimeters above or below the plan section will be allowed with the following exceptions."

So, from that spec that's where I feel like we are able to make that determination.

CHAIRMAN COWGER: I think that's good enough. Now, we brought this question up, the Board brought this question up. The contractor didn't even raise the issue, but I think it's appropriate for us to know.

I'd like to offer the Department the opportunity, if they want, to study that question and present any more information on the document -- why the contract allows you to make this deduction, subsequent to the hearing. We will allow that, but your submittal can only cover that one issue, the question that the Board asks.

So, whatever you all want to do about that is fine. If you do furnish us something, it's got to be furnished by the 15th of December.

MR. STEVE MARTIN: It's in the spec. That's the only place that I'm aware of.

CHAIRMAN COWGER: That's the only place you all want to refer to?

MR. BENAK: That's the --

MR. GARRETT MARTIN: That's the only part in the contract.

CHAIRMAN COWGER: If you think about it between now and December 15th, send it in and send the contractor a copy. If we don't hear from you by December 15, you will stand on what you submitted. Of course, if they submit something, you have the opportunity to rebut that. If they don't submit anything, then it's gone.

MR. STEVE MARTIN: Just on the issue of the deduction?

MR. ROEBUCK: How you can take plan quantities on truck measure and police that up however you wish, and pay them on that basis until the final estimate shows up.

MR. SEAY: Part of our contention is the final estimate is five or six months after the job has been done. It's already been sodded. Had we known that we had hauled 4,000 yards, meters, you know, 5800 yards of material out there over that we were not going to be paid for, it's very possible we could have dressed part of the shoulders from the downhill side, moved that dirt out into the pasture on the one side and possibly had use of it later on another job. It's possible. I am not saying we wouldn't have done it.

MR. ALBAUGH: Let me ask a question along the lines of what you are saying. Who is responsible for setting the grades of these slopes and such?

MR. SEAY: We set the grades initially. The Department has your baselines and everything.

MR. ALBAUGH: You set the grades that you placed the fill to?

MR. SEAY: Yes.

MR. ALBAUGH: When you set the grades and placed the fill, did you recognize you were overgrading?

MR. SEAY: No.

MR. ALBAUGH: Why not?

MR. SEAY: You are talking about a slope 90 feet long. We would have a stake typically at the bottom, at the center and one at the top.

When the embankment slid, it slid basically all down to the bottom. Then we dressed it up as best we could.

MR. ALBAUGH: Did you have to reset the grades?

MR. SEAY: We didn't reset the grades, but we did the best we could with the material and the water constantly coming out of it. We hauled sand to this job.

MR. ALBAUGH: I don't dispute you had difficulty and you did that. My question was going to at what --

if you went in and set the grades again and found that this material wouldn't stay in place and, therefore, you had to leave it beyond the grade you had set, were you aware of that?

MR. SEAY: We were not aware of that at that time. We set grades. You know, we basically did the best we could with the long stick excavator. We tried to get equipment down around the bottom to push it up from the bottom. That was impossible. You couldn't even walk around there. We had this material which had gone over two rows of hay bales.

We did clean it up in the field, after the job was complete, basically months later.

This material was so unstable, we pulled it back onto the right-of-way and as far up the hill as we could possibly pull it.

MR. SHAFER: And you were paid for doing that?

MR. SEAY: And we were paid for doing that, but then we were deducted $30,000 when we didn't get it back into the exact right place.

CHAIRMAN COWGER: We have enough on that issue. Let's go to issue number two, desilting of the culverts.

MR. SEAY: What you had basically was a three foot by three foot box culvert about 120 something feet

long, which was basically full of sand, limbs and stumps.

We proposed to leave that culvert in place and eliminate about $15,000 worth of pipe work, which the Department agreed to, and said okay, that's fine, but if we are going to do that, we need to desilt the culvert.

It just appeared wasteful to tear out this culvert, which was seven feet deep in the ground, and put a pipe in lower than the culvert, or I think it was about a foot higher than the culvert, because without any other work, it would silt in, too.

They agreed, and we came up with a plan to desilt it. They did a supplemental agreement.

They acted on good faith. They figured it was somewhere around 26 cubic yards of material in this culvert. I had checked, and as soon as we got the supplemental agreement, I wrote Garrett a couple of letters, telling him double check the quantities. There's more dirt in there than that.

Anyway, what you had was this culvert was packed completely full of dirt. The culvert, the way it was built initially, you had a -- I will call it a grade beam for lack of another word. Ten foot in from each side there was a grade beam approximately one foot

thick from the top and eight or ten inches wide.

Well, at the bottom end of the culvert, it looked like there was only maybe a foot and a half of dirt because this grade beam came down.

Behind that grade beam, it was packed all the way to the other grade beam, which was ten foot from the other end.

It looked like you had approximately this much dirt all the way through the culvert (indicating). Once you got it cleaned out and that grade beam was there, you know, the dirt was packed, basically the entire three feet by three feet all the way back to the other one.

In fact, in order to clean the culvert, we also entered into a supplemental agreement. We had to dig a tail ditch, over a thousand feet at a cost of about $15,000 so that the, you know, the culvert, once we desilted it, would function, which we did, and we were paid for, paid a fair price.

Based on Garrett's measurements, the additional amount I requested, the cubic yards, meters I have requested, is more than is in the culvert. I requested a payment for an additional 20 cubic yards. I think there's only an additional 14 cubic yards. That's assuming the culvert was packed from one end to the

other.

I don't know exactly how much is in there. I feel like there was close to 40 cubic yards in there. That's what it would be if it was packed from one end to the other, and except for ten feet, that's basically what was in the pipe.

It wasn't just silt. There was limbs and stumps in there, which is very difficult to get out when you are digging. In fact, I tried to get them to delete that out of the contract prior to our -- you know, we entered into a supplemental agreement. I saw how much was in there.

Originally I figured we could put people in there to dig it out, but it was too packed and the materials was in there.

I tried to get it deleted back out of our contract. Garrett said no, it needs to be cleaned. I said you can't do it unless you clean the tail ditch. So, we cleaned the tail ditch.

We do feel like we are due additional compensation on the silt simply because of the volume.

CHAIRMAN COWGER: Was this a three by three box culvert? Is that what it was?

MR. SEAY: 127 feet long.

CHAIRMAN COWGER: What was the size of the box

itself?

MR. SEAY: Three by three. And you had grade beams ten foot in. We extended the culvert as part of the contract.

MR. GARRETT MARTIN: Three by four.

CHAIRMAN COWGER: It was -- the existing culvert was something like 120 feet long?

MR. SHAFER: 34.9 meters, whatever that is in feet.

CHAIRMAN COWGER: All right. Don't give me that.

MR. SEAY: Somewhere between the 26 yards we were paid for and the 46 I'm requesting will be the right amount. Probably around the 38 to 40-yard range.

CHAIRMAN COWGER: All right. Let's hear -- you would be willing to accept 12 to 14 yards --

MR. ROEBUCK: Meters.

MR. SEAY: Based on Garrett's calculations. There's only 40 meters in the entire culvert. You had a little bit of opening on each end, but it wasn't very much.

MR. SHAFER: The water was flowing through it.

MR. SEAY: Water was seeping through it.

MR. SHAFER: Water was seeping through it.

MR. SEAY: That's because you had a head on the other side about four foot deep.

CHAIRMAN COWGER: Let's let DOT come back so we can wrap this up. I think the only issue we are here to talk about is how much dirt was in the culvert basically.

MR. GARRETT MARTIN: We came up with a quantity for the silt that was in there, when we were starting to do this supplemental agreement for this desilting, we had our field crew go out and we took some shots in that area of the fill. We only went up to the inlet side and the outlet side of either side.

We took those shots. Of course, we could look through the culvert and see, you know, about -- at least at a glance what it looked like in there.

MR. ROEBUCK: At least ten feet?

MR. SEAY: You could not see all the way through the culvert, though.

MR. GARRETT MARTIN: Well, the beam -- anyway, let me get back to what I was saying. We took those shots. Those were also plotted. We gave those to the engineer of record. He plotted them out. He came up with a quantity of 26 cubic meters being the amount of material that was in there that should be removed.

It was hard to tell at any given time how much silt was in there. There was a lot of silt that went through that culvert. Some of it even went downstream,

which they were paid to clean that out.

That amount, that was the best -- the best we could tell, as far as records go, you know, how much was there. That was the only documentation I had that I could go on was those sections. And just by looking at it, you know, common sense as to how much looked like it was actually in the culvert.

There was a beam -- I don't agree there was as many beams as he is talking about was in there. And I didn't see any stumps or limbs. None of our crew did.

There was one beam in the top portion of the culvert, looked to me like it was only about halfway through there.

I don't understand, you know, why that was there, but it was just inside the structure, in the top portion. I don't feel like it had a lot to do with a buildup of silt inside there.

MR. SHAFER: Actually, that beam would have taken room away from the silt that was in there. It displaced the silt. I don't know why that was in there. That's a strange box.

MR. SEAY: At some point it will become a dam if the silt built up.

MR. SHAFER: But from there on it wouldn't have

any silt in it. It's just -- the best we could document was that 26 yards.

CHAIRMAN COWGER: I don't understand what this grade beam is. You have a three by three square culvert.

MR. SHAFER: It's three by four. But there was a beam inside there. I have no idea -- it could have been a baffle. I don't know what it was.

MR. GARRETT MARTIN: If it was a baffle, I don't know --

CHAIRMAN COWGER: Where was this beam? Was at cross the cross section?

MR. SEAY: It was across the top. If you look through the culvert you could see it.

MR. SHAFER: If this were the box, it came across the top (indicating). If this is the box, then this beam went right across here. Nobody went in there to see how wide it was.

CHAIRMAN COWGER: Was there one on both ends?

MR. SHAFER: There was one on the upstream end.

MR. SEAY: You could see the one on the upstream end easy. There was one on each end.

MR. SHAFER: I didn't see one on the downstream end, but I could see it on the upstream end.

CHAIRMAN COWGER: It came down about a foot?

MR. SHAFER: I would say maybe. It was hard -- you couldn't get back in there and measure it. It is no doubt there was something there, a control baffle or something.

MR. ROEBUCK: An engineer figures he needs some support for that railroad track above.

MR. SHAFER: It was way back from the railroad.

CHAIRMAN COWGER: You mentioned you had a supplemental agreement to clean out the outfall from the box culvert. Which was done first, the desilting or the cleaning out of the outfall?

MR. SEAY: We cleaned the outfall out first.

CHAIRMAN COWGER: Does anybody recall after the outfall was cleaned so water could flow away from the culvert, was there water flowing through the culvert?

MR. SHAFER: Yes, sir, there was. Actually, we got onto private property and cleaned that ditch all the way back to God knows where.

MR. GARRETT MARTIN: I don't believe there was any time that water couldn't flow through the culvert.

MR. SEAY: Water would seep through it, but it never flowed through it. First, on the discharge end, we excavated that ditch out three or four feet when we got onto the private property there.

MR. GARRETT MARTIN: On the outlet side?

MR. SEAY: On the outlet side going down to the lady's house.

MR. SHAFER: That was the agreement you all had with the lady?

MR. SEAY: Yes, we got permission to do that.

CHAIRMAN COWGER: I believe we have probably heard enough. Does either side have anything they've got to present? Is there anything that is left?

MR. GARRETT MARTIN: I could show you the plots if you want to see those.

CHAIRMAN COWGER: Yes, we want to see those. The Board will examine those plots along with the contractor, if he desires to stay immediately after we close the hearing.

Okay. Then I will ask Mr. Roebuck and Mr. Albaugh if you have any questions.

MR. ROEBUCK: No.

MR. ALBAUGH: No.

CHAIRMAN COWGER: Hearing nothing, the hearing is hereby closed. The Board will deliberate on this claim shortly after January 1st and the parties will be furnished our order shortly thereafter.

(Whereupon, the hearing was concluded at 12:50 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, CATHERINE WILKINSON, Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings; and that the transcript is a true record of the testimony given.

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 parties' attorney or counsel in connection with the action, nor am I financially interested in the action.

Dated this 9th day of December, 1999.

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