


STATE ARBITRATION BOARD

ORDER NO. 3-99

/// NOTICE ///

In the case of White Construction Company, Inc. versus the Florida
Department of Transportation on Project No. 46040-3533 in Bay
County, Florida, both parties are advised that State Arbitration Board
Order No. 3-99 has been properly filed on August 25, 1999.



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

S.A.B. CLERK

AUG 25 1999

FILED

Copy of Order & Transcript to:

Greg Xanders, P. E., State Construction Engineer

Luther M. White, Jr, Vice-President, White Construction Co., Inc.

Copy of Order to:

Frederick J. Springer, Esquire, Vezina, Lawrence & Piscitelli, P.A.

STATE ARBITRATION BOARD

ORDER NO. 3-99

RE:

Request for Arbitration by
White Construction Co., Inc. on
Job No.46040-3533 in
Bay 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 10:20 a. m. on Friday, June 18, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 3-99 in this cause..

ORDER

The Contractor presented a request for arbitration of a two part claim in the total amount of \$ 172,904.00 plus interest and costs. . Part I deals with recovery of liquidated damages assessed by the Department of Transportation. The Contractor cited three factors which they contend justified extension of the allowable contract time or non-charging of contract days. Part II deals with recovery of home office overhead incurred by the Contractor due to those delaying factors addressed in Part I that were non-weather related.

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

PART I Release of Liquidated Damages 71 days @ \$1,924/day = \$ 136,604.00

a) Shortage of FC-2 Aggregate 30 Days

We had originally planned to use aggregate furnished from a Chattahoochee source to produce the Friction Course.. We placed an order for this material in April 1996. As the work neared completion, we received a letter from our supplier documenting that this particular aggregate continues to be in short supply due to low water conditions at their production facility. We had already placed an order for the needed aggregate with an out of state source. We were delayed in producing the Friction Course by the time required to gain approval of a new design mix and while awaiting delivery. On July 23, 1996, in response to a letter from the CEI Consultant pointing out that it is unlikely that the project could be completed before contract time expired, we sent them a letter requesting a contract time extension of 30 days. The Department of Transportation denied this request.

There was work other than Friction Course and RPMs remaining to be done on July 23, 1996, but we did not see any reason to pursue this work since completion of the Friction Course was the controlling item of work at that time.

It is our position that this shortage of a critical material is justification for granting a time extension as provided in Subarticle 8-7.3.2 of the Standard Specifications.

b) Shortage of Reflective Pavement Markers (RPMs) 36 Days Delay

We assumed that a 30 day suspension of time charges was in effect from August 25, 1996 through September 22, 1996 to provide a curing period between placing of the final asphalt surface and installation of the RPMs as provided in the Specifications. .

Our RPM Subcontractor included the RPMs needed for this job in a large order placed on September 9, 1996. Historically Stimsonite, the supplier, has delivered RPMs within 10 days of an order being placed.

Stimsonite back ordered these RPMs, because they could not meet the demand for RPMs due to an increase in orders in advance of the Department on September 27, 1996 removing PacTec RPMs from the Department's Qualified Products List. Our RPM Subcontractor attempted to find an alternate source of Stimsonite RPMs without success.

The same shortage was accepted as justification for an extension of the contract time on a job in DOT District 2.

It is our position that the unavailability of RPMs is justification for granting a time extension in accordance with Subarticle 8-7.3.2 of the Standard Specifications.

c) 6 Days Which the Department Failed to Grant as Weather Days

There were seven days during the life of the work during which weather prevent effective progress which the Department did not grant as weather days.

PART II Recovery of Home Office Overhead 66 days @ \$ 550/day = \$36,300.00

We seek to recover our extended overhead costs for the days during which work was delayed by shortage of critical materials as detailed in PART I of our claim.

INTEREST

We seek interest on any amount awarded by the State Arbitration Board beginning on the date the project was accepted by the Department. .

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

PART I

a) Only seven days of the original contract time remained at the time the Contractor gave us

formal notice of the delay to the work caused by inability of their original supplier to timely furnish Friction Course aggregate.

In their request for extension of the allowable contract time (July 23, 1996), the Contractor stated "The only remaining work at the end of this week would be the friction course and the permanent pavement markings". The Project Diary indicates that work remained to be done on items such as shoulder reworking, sodding, grassing & mulching, jacking and boring, conduit, placing asphalt in turnouts, curb & gutter, sidewalk and installing signs. Reworking of shoulders and seed & mulch must be completed prior to placing of Friction Course. Thus, Friction Course was not the controlling item of work at that time. The Standard Specifications require all other work to be completed at the time contract time is suspended.

b) The RPM Subcontractor did not place an order for the RPMs until 28 days after the contract time had expired. (August 12, 1966 to September 9, 1996)

The Contractor did not provide documentation that DOT District 2 granted an extension of contract time for the same shortage of RPMs. In any event, we could not recognize entitlement to additional time because the allowable contract time had been expired 28 days when the Subcontractor placed his order for RPMs.

We did not suspend charging of contract time during the "curing period" per Article 710-6 of the 1991 Edition of the Standard Specifications, because all other work, including final dressing and cleanup, had not been completed.

c) The Contractor waived their rights to any additional contract time for the period preceding our letter of August 14, 1996 by not appealing the Department's decision within 10 days from receipt of that letter.

Of the seven (7) days identified by the Contractor, only five (5) were in fact "weather days" Of the five (5), one is a day which was previously recognized as a "weather day" and two were after the contract time, as extended, had expired.

We recognize two (2) additional "weather days" in addition to the twelve (12) "weather days" granted in the August 14, 1996 letter to the contractor from ICF Kaiser Engineers, the CEI Consulting Engineer.

The Department previously granted a 14 day suspension of time charges between 6/30/99 and 7/13/96 for Contractor's vacation and agree to grant an additional six (6) days for the Memorial Day and Labor Day Holidays when the Specifications prohibited work by the Contractor.

PART II

The Contractor had control over the aggregate and RPM delays.

The Department did not direct any suspension of work on this job and the Contractor continued to make revenue throughout this job. The Contractor did not submit any evidence to prove that they incurred unrecovered costs.

It is not appropriate to apply the Eichleay method in this instance.

INTEREST

We think that any interest should begin at the time the Contractor filed for Arbitration.

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

PART I

In their rebuttal statement, the Department determined that 68 is the correct number of days of liquidated damage that should be assessed. This is based on the 85 calendar days allowed by the original contract, plus 14 days for weather delays (includes the 2 additional "weather days" agreed to by the Department in their rebuttal statement), plus 20 days during which charging of contract time was suspended for Contractor Vacation and two (2) Holiday Weekends. Thus, assessment of liquidated damages began on August 17, 1996 and continued through October 23, 1996, the date of Conditional Acceptance.

a) The Board was unable to find a specification reference to all other work being completed as a condition for granting an extension of the allowable contract time.

The Friction Course was completed on August 25, 1996.

b) The Subcontractor did not place an order for the RPMs until approximately twenty (20) days after completion of the Friction Course.

The Contractor should have been aware that, under the circumstances, the Department could not issue a suspension for the Friction Course Curing Period. The following wording is included in Subarticle 710-6.1 of the Standard Specifications (1991 Edition) in regard to the curing period prior to placing RPMs, "The charging of contract time will be suspended during the 30 day period if all work, including final dressing and cleanup has been completed." (EMPHASIS ADDED)

It is estimated that placing of the RPMs required approximately four (4) days.

PART II

The Department of Transportation did not direct the Contractor to suspend operations. The delays caused by shortages of aggregate and RPMs were in no way related to action or inaction by the Department or a discrepancy in the contract documents.

INTEREST

The Contractor was aware shortly after final acceptance of the project on November 22, 1996 that liquidated damages had been assessed, but did not pursue his claim for their release until filing of a Request for Arbitration of a Claim on December 8, 1998.

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

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

PART I

Reduce the number of days of Liquidated Damages assessed from 68 Calendar Days to 56 Calendar days.

PART II

Nothing

INTEREST

Pay the Contractor the sum of \$1,500.

The Contractor is directed to reimburse the State Arbitration Board the sum of \$ 92.70 for Court Reporting Costs.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 92.70 for Court Reporting Costs.

S.A.B. CLERK

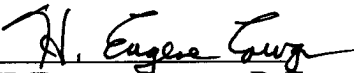
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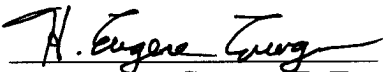
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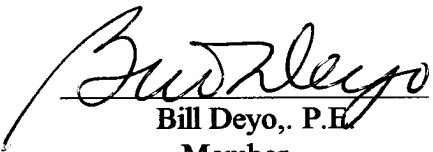
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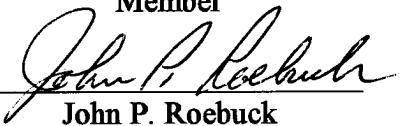
Dated: 25 August 1999

Certified Copy:


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


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


Bill Deyo, P.E.
Member


John P. Roebuck
Member

25 August 1999

DATE

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

AUG 25 1999

FILED

WHITE CONSTRUCTION CO., INC.)

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PROJECT NO. 46040-3533

- and -

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LOCATION: Bay County,
Florida

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DEPARTMENT OF TRANSPORTATION)

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ORIGINAL

RE:

Arbitration In The Above Matter

DATE:

Friday, June 18, 1999

PLACE:

Florida Transportation Center
1007 Desoto Park Drive
Tallahassee, Florida

TIME:

Commenced at 10:20 a.m.
Concluded at 11:10 a.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

CATHERINE WILKINSON & ASSOCIATES (904) 224-0127

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

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

Mr. Burney Keen
 Mr. Luther White, Jr.
 Mr. Timothy Jones

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Julian McCrary
 Mr. Roland Tiller
 Mr. Steve Benak
 Mr. Keith Hinson

* * *

I N D E X

EXHIBITS

PAGE

Exhibit Nos. 1 and 2 in evidence

4

CERTIFICATE OF REPORTER

37

P R O C E E D I N G S

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

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

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

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

Our terms began July 1, 1997 and expire June 30, 1999.

Will all persons who will make oral presentations during the hearing please raise your right hand and be sworn in.

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN COWGER: The documents which put this arbitration hearing into being are hereby introduced as Exhibit No. 1. That exhibit is the request for arbitration submitted by the contractor along with various attachments to that document.

We also have a rebuttal statement from DOT that's in a package, and it will be introduced as Exhibit 2.

1 Are there any other exhibits to be presented?

2 Hearing nothing, we will move on.

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

4 CHAIRMAN COWGER: During this hearing, the
5 parties may offer such evidence and testimony as is
6 pertinent and material to the controversy, and shall
7 produce such additional evidence as the Board may deem
8 necessary to an understanding and determination of this
9 matter.

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

12 The parties are requested to assure that they
13 receive properly identified copies of each exhibit
14 submitted during the course of this hearing, and to
15 retain these exhibits. The Board will furnish the
16 parties a copy of the court reporter's transcript of
17 this hearing, along with its final order, but will not
18 furnish copies of the exhibits.

19 The hearing will be conducted in an informal
20 manner. First the contractor's representative will
21 elaborate on their claim. Then the Department of
22 Transportation will offer rebuttal.

23 Either party may interrupt to bring out a
24 pertinent point by coming through the Chairman.
25 However, for the sake of order, I must instruct that

1 only one person speak at a time.

2 We are ready for the contractor to begin his
3 presentation. Before you start, though, it seems to me
4 that this all has to do with the matter of liquidated
5 damages that were assessed, plus extended overhead for
6 a certain number of days.

7 The Department has also -- excuse me, the
8 contractor has also indicated that they want to claim
9 interest on the amount due, the amount that the Board
10 may determine to be due, and also on costs during -- we
11 have nothing further on that matter other than what you
12 have stated.

13 We need to know from the contractor just exactly
14 what it is you are claiming, as far as the interest is
15 concerned. We need to know the time period that you
16 are claiming interest for, and in particular we need to
17 have the interest rate that you are claiming.

18 To simplify the interest rate issue, we became
19 recently aware of a statute, the Board did, 337.141,
20 which is in effect at this time.

21 In essence it talks about payment for settlement
22 of claims. It says that for each day after 30 days
23 after settlement of a claim, the Department shall pay
24 to the contractor interest at the rate set forth in
25 55.03.

1 Section 55.03 of the Florida Statutes in essence
2 says that on January 1 of each year the State
3 Comptroller will set the interest rate.

4 Mr. Deyo will check with their fiscal department
5 to find out what interest rate was established for 1999
6 by the State Comptroller, and the Board intends that if
7 there is any interest due we will use that rate.

8 So, you really don't need to address the rate
9 unless you want to contest what I just said. It's
10 pretty clear in the law. And what we think -- we don't
11 know what that rate is, but we think it will be
12 somewhere 10 percent or higher.

13 Okay, this really is a two-part claim, one
14 dealing with liquidated damages and the other one
15 dealing with extended overhead.

16 I will suggest that we try to go through the
17 liquidated damages part of it, then have a brief
18 discussion of the extended overhead or Eichleay method
19 overhead as a short, separate discussion, after we
20 complete the discussion on the liquidated damages.
21 They overlap some, but I think that would probably be a
22 better way to do it.

23 Contractor, if you will proceed, we are ready to
24 go.

25 MR. WHITE: Burney has put together a little

1 summary on this. This job is a little bit old. I will
2 let him kind of go through what we felt like what time
3 should have been granted.

4 MR. KEEN: Well, on May 11th the Department
5 representative, which I think was ICF Kaiser, wrote us
6 a letter that they were having a Gulf Coast [triathlon
7 on the project and we couldn't work that day. The best
8 I can tell, they charged us a day for that day. That
9 was on May 11, '96.

10 Sometime -- and I can't remember -- I didn't
11 write the dates down, but we requested a 30-day time
12 extension for material shortages for the friction
13 course of FC-3.

14 We had our original design set up using Martin
15 Marietta materials from Chattahoochee. That's how we
16 bid the job. We had placed the order in April for the
17 materials.

18 We got a letter from Bill Wallace, a
19 representative from Martin Marietta, stating that the
20 low river and the shortage of materials, and it didn't
21 look like we were going to be able to get the
22 materials.

23 We were getting materials at that time. We had
24 another project going in, obtaining them materials on
25 20 down there.

1 CHAIRMAN COWGER: Can I interrupt you a second.
2 Same source?

3 MR. KEEN: Same source. Right. Finally we
4 figured out, well, we ain't going to be able to get
5 them. We will have to hunt another source, which was a
6 more expensive source. We went and got them shipped in
7 by rail from Vulcan.

8 That entailed that we had to get a new design
9 mix. That normally takes about two to three weeks to
10 get a new design mix. Mr. Benak denied on 8-9-96
11 denied our request for that.

12 Then the best I can remember -- the friction
13 course and the permanent pavement markings was complete
14 basically at that time.

15 Then on September 27th we requested a 36-day
16 extension due to the unavailability of RPMs by our DBE
17 subcontractor, AmeriSeal.

18 We furnished documentation provided by AmeriSeal,
19 which we -- weren't required to use them, but we had to
20 use a DBE subcontractor. He was one we had available.

21 Mr. Benak also denied that time extension. We
22 furnished additional documentation with a denial again
23 by Mr. Benak on February 4, 1997.

24 According to our letter wrote by the project
25 engineer, the job was finished, complete except some

1 punch list items on 9-12-96, but the job was finally,
2 conditionally accepted on October 23, 1996, 41 days
3 later.

4 To the best of my recollection, the traveling
5 public was utilizing the facility to the fullest extent
6 other than the RPMs not being in place.

7 The other thing that I noticed, the original
8 contract amount was \$1,384,000. The final contract
9 amount was \$1,429,000. That was 3.3 percent greater
10 than the original contract.

11 If you multiply the 3.3 percent times the 97
12 days, which was the adjusted days, then we would be due
13 three days for the over-run of the job.

14 When you took the 30 days for the friction course
15 material and redesign, 36 days we requested for the RPM
16 shortage, the one day for the triathlon, and then we
17 went back and looked at the weather days and felt like
18 we were due seven days. Of course I noticed last
19 night when I was looking at it that Mr. Benak and them
20 had responded to that. I think they agreed to two
21 days.

22 The total days that we felt like due was 77 days.
23 Based on that, there wouldn't have been any liquidated
24 damages had we got approval.

25 CHAIRMAN COWGER: Liquidated damages finally

1 assessed were for 71 days, is that correct?

2 MR. KEEN: I believe that's correct.

3 CHAIRMAN COWGER: Okay. What else do you have to
4 say?

5 MR. KEEN: That's about it, other than we would
6 like to request the return of the liquidated damages
7 plus the interest. We feel like we are really due it.

8 MR. WHITE: We can't really pick it -- pick out
9 the days accurately. Tim was on the job personally.
10 At some point I don't think -- I know we didn't get
11 part of it because something happened there. We didn't
12 get all of our cure time.

13 Then we had an oil spill. There is a letter,
14 when a line broke on a roller when we were laying the
15 friction course. It got fixed.

16 Then when the district got down there and
17 straight edged the job several weeks later, they found
18 a fuel spill, an oil spill that we don't even think we
19 did. And assumed it was the same one we had already
20 fixed. Tim had to move back down there and fixed one
21 that turned out not to be even the one that we had.

22 MR. JONES: Right.

23 MR. WHITE: The time was running all this time.

24 CHAIRMAN COWGER: That work was done during the
25 time the time was running, the repair work?

1 MR. WHITE: It didn't appear that it ever stopped
2 until they done the straightedge. Then you had to go
3 fix it. Either it stopped and started back when they
4 found the oil spot, which we don't think we did. It
5 was done after we left.

6 It's just general procedure when you have a
7 friction course patch, you wait until you have the
8 plant up. We weren't running that friction course
9 anywhere else. So, time rocked along there two or
10 three more weeks. The first day he run the friction
11 course, he run the equipment down there, removed it and
12 fixed it.

13 Later we realized, like I say, the time kept
14 running.

15 MR. KEEN: I think we got all of the cure period
16 time. I think I looked at that last night. I think we
17 got all the cure period time.

18 MR. WHITE: When the buttons finally came in,
19 they turned back in --

20 MR. JONES: The diaries never showed when the
21 buttons was put down. It shows when the thermoplastic
22 was completed. There was a length of time between the
23 time the thermoplastic was completed to the stop, and
24 we done the patch. I think we done the patch --

25 CHAIRMAN COWGER: I don't think we need to hear

1 any more about that issue.

2 DOT, that's not in the original submittal.

3 I don't know if you are prepared to rebut that or not.

4 Is there anybody here that knows about that? May not
5 be, since it was a project occurrence.

6 MR. BENAK: We would have to go back and study
7 the daily diaries and --

8 MR. WHITE: The dailies indicate --

9 MR. JONES: They don't indicate anything about
10 the oil spot.

11 MR. KEEN: There is a letter. I've got a copy of
12 it somewhere.

13 MR. WHITE: It told us to go back and extend this
14 same patch that we did do that was patched -- you can't
15 even tell where it was at. It was dug out by hand and
16 fixed then. When Timmy went back to fix the other one,
17 it was in a different location.

18 CHAIRMAN COWGER: Let's try to wrap that up. If
19 you all want to pursue that any further from the
20 contractor's standpoint, if you will furnish the Board
21 some documentation, even if it's just a statement, plus
22 that letter you are talking about in regard to this
23 issue, giving us dates specific when this occurred. We
24 will consider it.

25 If you want to furnish that to us in the next

1 couple of weeks --

2 MR. WHITE: We don't need it if somebody could
3 find it in the goodness of their heart to justify this.

4 CHAIRMAN COWGER: When this thing is over, after
5 you hear the DOT's presentation, furnish the Board and
6 Mr. Benak a copy of the information you send us, and we
7 will consider it. Are you through then now for the
8 moment?

9 MR. WHITE: Yes.

10 CHAIRMAN COWGER: You also have the opportunity
11 to come back.

12 DOT, have you got the project diaries with you?

13 MR. HINSON: All we have is the one that's
14 included in the package.

15 MR. KEEN: I have them out there in the truck if
16 we need them.

17 CHAIRMAN COWGER: The DOT's project diaries?

18 MR. KEEN: Yes.

19 CHAIRMAN COWGER: When we finish, if you would
20 remember to go get them and look up two dates for me.
21 The date on which you began placing FC-3 on the job
22 would be very helpful, and the date that you began
23 placing the RPMs would be very helpful, to kind of put
24 all this thing in perspective.

25 MR. JONES: There is no record of the RPMs being

1 placed in the diary.

2 CHAIRMAN COWGER: Huh? In the diary?

3 MR. JONES: Right. I could not find where it had
4 been placed.

5 MR. KEEN: I will get them and scan it. It won't
6 take but a minute.

7 CHAIRMAN COWGER: I would like to see them before
8 you all leave, just to see what it says.

9 Okay. Now we are ready to go to the DOT for
10 their -- you all are going to mention the interest and
11 all later?

12 MR. WHITE: Yes.

13 CHAIRMAN COWGER: Let's go ahead and try to get
14 the liquidated damages issue behind us next. DOT, we
15 are ready for you.

16 MR. BENAK: Okay. I'm Steve Benak. I will try
17 to present our presentation we have in here. If you
18 will notice, it's broken up into rebuttal one, rebuttal
19 two and rebuttal three. That's where our comments are
20 going to be coming from. Then we have backup to
21 rebuttals right behind each one of them that address
22 the issues that are in here.

23 I'm going to go on into rebuttal number one.
24 It's the second tab in. I will just go over that with
25 you all.

1 Issue number one, which is the time extension for
2 30 days. The basis of the time extension was a letter
3 from Martin Marietta, also dated July 23, which
4 indicated the crush gravel course aggregate that White
5 Construction ordered in April was in short supply.

6 The point to note, the contract time was 85 days,
7 and July 23 was day number 78. Therefore, there were
8 only seven contract days left when the Department was
9 notified of White's decision to obtain a new design mix
10 and new source of materials.

11 The contractor also stated in the added comments
12 section on the second page of the contractor's time
13 extension, 1-A, if you will turn to the yellow tab,
14 there are his comments.

15 The only remaining item of work at the end of
16 this week will be the friction course and the permanent
17 pavement markings; however, additional work, other than
18 the items mentioned, were performed as noted on the
19 daily reports of construction.

20 Items such as reworking shoulders, sodding,
21 jacking and boring, placement of type S, turn-outs,
22 curb and gutters, sidewalks, installing signs, seeding,
23 mulch, installing conduits were performed after the
24 contract time had expired. It says look to -- these
25 are all daily diaries stating that work was done after

1 this request.

2 After reviewing the daily reports, it's clear
3 that other items of work as mentioned above are not
4 being completed. Items of work such as rework
5 shoulders and seed and mulching are clearly shown on
6 the contractor's work progress schedule to be completed
7 prior to the friction course.

8 Look at 1-C. You will see their progress
9 schedule. You will see we got them highlighted for
10 you. Seed and mulch, then you turn the page. The
11 friction course is after the seed and mulch and rework
12 shoulders. So, the controlling item of work, they're
13 not ready to do the friction course at this time.

14 It says, therefore, contrary to the contractor's
15 time extension request, the asphalt friction course is
16 not a controlling item of work. The Department noted
17 in the time extension request denial dated August 9,
18 1996, that all other items of work had not been
19 completed as required by the Standard Specifications.

20 If you will turn to Attachment D, you will see
21 the time extension denial. Then the next page, if you
22 will look at the appropriate contract specifications,
23 with -- we've got it in bold, that require these items
24 to be done prior to the friction course.

25 That was the main reason of the denial for this,

1 because they're not ready to do friction course.
2 They've got to do all this first, then they can do
3 friction course.

4 CHAIRMAN COWGER: Are you finished with that
5 item?

6 MR. BENAK: That's item number one.

7 CHAIRMAN COWGER: Let me ask a couple of
8 questions, if I could. That work progress schedule
9 that you referred to as Exhibit No. 1-C, as I recall,
10 the original contract time on this job was 85 days.
11 This schedule goes to 105.

12 It must reflect some kind of a time extension or
13 something that was granted or suspension? I don't know
14 how this -- how it got out there beyond the original
15 contract time.

16 MR. KEEN: I think -- let me interrupt. I think
17 they wrote a letter asking us to submit a new progress
18 schedule when we said we couldn't finish it on time.
19 I think --

20 MR. BENAK: This is the one we got out of their
21 submittal, I believe.

22 MR. KEEN: I think that's what happened, and we
23 projected again when we would finish. Them items he
24 was talking about wasn't completed prior to placing the
25 friction course. There wasn't no rush to complete them

1 because we knew we didn't have the friction course
2 material to do the work with. Steve didn't mention
3 that part. That was one of the problems, too.

4 MR. BENAK: I copied this schedule out of their
5 submittal. I didn't think about looking --

6 CHAIRMAN COWGER: It's not a big deal, but what
7 he says is logical, isn't it, that this was submitted
8 after they realized they were going to run out of time?

9 MR. KEEN: I think ICF Kaiser requested a new
10 progress schedule and said that it looked like it
11 wasn't going to be finished on time. I think I done
12 them a new one.

13 MR. BENAK: The relevancy here, I think, is even
14 at this time you realized you had to do work prior to
15 the friction course. That's the point we are making,
16 even the contractor realized that contractually his
17 obligation to do his work before the friction course is
18 put down.

19 CHAIRMAN COWGER: Okay. I think that is probably
20 a reasonable explanation. I had a question. According
21 to what I was able to extract from the records that you
22 submitted with your exhibit -- or with your rebuttal,
23 I should say, the last piece of correspondence in
24 that -- or the last daily record in there was dated
25 August 17, 1996.

1 Would that indicate to you that that was the last
2 time any so-called other work was done? Because that
3 work was seeding and mulching.

4 MR. BENAK: From what I can see it says seed
5 grass, mulch material.

6 CHAIRMAN COWGER: That's probably it, isn't it?

7 MR. BENAK: If you look through the daily
8 diaries --

9 MR. JONES: May I say something. On that job,
10 the majority of that job was curb and gutter. It took
11 one Saturday morning to go down the shoulder there what
12 had to be seeded and mulched.

13 CHAIRMAN COWGER: You are saying that probably
14 was the last day that you did any work other than maybe
15 friction course, or friction course for sure and any
16 RPMs?

17 MR. JONES: Yes, but seed and grass was a real
18 small part of what had to be done. One Saturday
19 morning it was done.

20 MR. KEEN: Mr. Cowger, I found a letter here
21 where Kaiser wrote us and requested a new -- he said
22 approaching the 85-day construction time table, and we
23 are at contract day 77, please submit a revised
24 schedule indicating your expected completion date.

25 CHAIRMAN COWGER: What is the date of that

1 letter?

2 MR. KEEN: July 19th.

3 CHAIRMAN COWGER: '96, right?

4 MR. KEEN: Yes. That's where that schedule come
5 from. We submitted another one.

6 CHAIRMAN COWGER: That's enough on that. It
7 wasn't a great big deal anyway. Thank you.

8 Okay, I will let you go on now, Steve.

9 MR. BENAK: If you will turn to your rebuttal
10 number two in the handout, this is a request for 36
11 days due to shortage of reflective pavement markers.
12 White Construction's subcontractor AmeriSeal ordered
13 the reflective pavement markers on September 9, 1996,
14 from their supplier, Stimsonite. The order was placed
15 28 days after the contract time had expired.

16 This is in Attachment 2, back there toward the
17 back. Is that S-2? Okay. White Construction noted in
18 the request for arbitration that District 2 recognized
19 the contractor's entitlement to additional time for the
20 same shortage of reflective pavement markers involving
21 AmeriSeal and Stimsonite. However, there was no
22 Department documentation from District 2 included in
23 the request.

24 In spite of lack of documentation, it would still
25 be difficult for District 3 to recognize entitlement

1 due to the fact the contract time had expired 28 days
2 prior to the order being placed.

3 Also, one of the things we are talking about,
4 RPMs, they are pretty much on-shelf items. I think
5 I had Keith here look on the Internet for vendors for
6 RPMs. There was a vast list of vendors available.

7 You know, what we are saying is if they needed to
8 get RPMs they could find RPMs. They weren't in short
9 supply or anything. That's it for number two.

10 CHAIRMAN COWGER: Okay. Before we move on to the
11 third item, Mr. Contractor, do you all have anything
12 that you want to say about this issue of the reflective
13 pavement markers? I found some things in the
14 correspondence, and I'm not going to get into detail,
15 but I found some things in your package that dealt with
16 these issues that have not been mentioned here today.

17 MR. WHITE: I think the reason he didn't order
18 them until that day was because that's when they became
19 available to order.

20 MR. KEEN: I don't know. The only thing I know,
21 we used AmeriSeal and we used them because we had to
22 fulfill the DBE goal on the job. We kept them apprised
23 of when we would need the stuff.

24 I don't know, but they -- the story I got from
25 them, and we wrote two or three letters telling them

1 about the problem we was having, that supposedly our
2 subcontractor was having in obtaining the RPMs.

3 I know we went back and got some additional
4 documentation from AmeriSeal to try to justify the time
5 extension, the reason they weren't found.

6 All I know is that it was somebody else doing the
7 work. I didn't get into it a whole bunch.

8 I do know the letter from him said you can see
9 that the RPM order for this job was placed in plenty of
10 time for normal conditions. Our PO was back ordered.

11 CHAIRMAN COWGER: I don't want to make the
12 contractor's case, but I think the Board needs a little
13 more information from DOT or the contractor on this
14 issue of availability of those RPMs.

15 If you will look in the contractor's request for
16 arbitration package at Tab 2, the second page is a
17 letter dated April 14, 1997, from AmeriSeal. It talks
18 there about an industry-wide shortage, and that
19 Stimsonite, the people you bought the RPMs from, was
20 the only RPM manufacturer in good standing remaining on
21 the Florida qualified products list.

22 The DOT testified that they went back and looked
23 through their records and found that there were other
24 vendors that could supply these, but the issue of --
25 was Stimsonite the only one that's on -- that was on

1 the DOT's qualified products list at that time? That's
2 the only thing we need to know about.

3 MR. WHITE: Also on that same page that you are
4 referring to, you see where Mr. Lairscey had removed
5 somebody that apparently had been used at times, from
6 the --

7 MR. DEYO: I think we have enough information on
8 it date-wise. You are talking a September time frame.
9 That is after the job was to be complete.

10 CHAIRMAN COWGER: All right.

11 MR. DEYO: I don't think we need any additional
12 information on the industry-wide shortage after the
13 dates mentioned in here.

14 CHAIRMAN COWGER: DOT, as I recall, in your
15 rebuttal you never brought up the issue of
16 industry-wide shortage in this particular instance.
17 You are hanging it on the fact that the 28 -- that he
18 ordered the RPM 28 days after the time expired.

19 It may not be an issue, but I thought if there
20 was anything else we could find out about it, we needed
21 to find out. I agree with Mr. Deyo, I think we can
22 move on.

23 MR. KEEN: We probably wouldn't have ordered them
24 28 days after the time expired had we gotten the time
25 extension for the friction course that was definitely

1 due.

2 MR. DEYO: I think for the record there is enough
3 information date-wise in here that the Board will have
4 good deliberations on that issue.

5 Mr. Roebuck, do you agree?

6 MR. ROEBUCK: Yes.

7 CHAIRMAN COWGER: Where are we now? We should be
8 on issue number three, is that right?

9 MR. DEYO: That's correct.

10 CHAIRMAN COWGER: Which is the weather days.

11 MR. BENAK: This is concerning issue number
12 three, in Tab -- in rebuttal number three.

13 What we did, we went back, even after the -- were
14 given weather days during the lifetime of the job.
15 There's some wording on there, failure to make an
16 appeal or provide specific facts supporting your
17 position within ten days from receipt of notice shall
18 constitute a waiver of any right to appeal this
19 decision at a later date.

20 We didn't receive anything from White for an
21 appeal I think until when we got this package.

22 We went back and looked at them anyway. What we
23 are saying is we found two more days for weather. We
24 went through and analyzed it over again.

25 So, in essence that's what we are talking about.

1 This is backup of the information we went through and
2 analyzed, looking at all the days all over again. Then
3 we found two more days.

4 CHAIRMAN COWGER: Those were weather days?

5 MR. BENAK: There were two days that should have
6 been granted, 7-15-96 and 7-16-96.

7 CHAIRMAN COWGER: Okay. You are willing to
8 concede to those two days?

9 MR. BENAK: Yes.

10 CHAIRMAN COWGER: I think your rebuttal
11 statement, number three, pretty well covers everything
12 in relation to this matter?

13 MR. BENAK: Yes, sir.

14 CHAIRMAN COWGER: As I read the thing, you found
15 five days that meet the criteria for weather that were
16 not granted. One of them overlapped with a day
17 previously granted. In other words, you had already
18 granted a day for that day. Two of them occurred after
19 the contract time had expired.

20 MR. BENAK: Yes, sir.

21 CHAIRMAN COWGER: Okay. So, if for some reason
22 the contract time should be extended by the Board, then
23 we need to go back and look at those days to determine
24 whether or not they should be granted or not.

25 MR. BENAK: Yes, sir.

1 CHAIRMAN COWGER: The contractor didn't get the
2 opportunity to say anything on this issue. Do you have
3 anything further to say at this point about the weather
4 delays?

5 MR. WHITE: I think actually we found seven
6 that's in our package.

7 CHAIRMAN COWGER: Unless you've got something
8 really outstanding to present, the Board can sit down
9 and sort through all this and decide what to do about
10 those weather days. Do we need to discuss that issue
11 any more?

12 Then we have two more things to talk about, the
13 extended overhead, 66 days at \$550 a day. I guess --
14 DOT did not address that issue in its rebuttal package
15 at all.

16 MR. BENAK: Can I --

17 CHAIRMAN COWGER: You didn't address it at all.
18 We do need to hear from DOT on the matter.

19 Before we do, let me clarify something. As
20 I understand, the 66 days that you are claiming there
21 correlates with the 30 days that you're claiming for
22 the aggregate shortage and the 36 days that you are
23 claiming for the reflective pavement markers, is that
24 correct?

25 MR. WHITE: Yes, sir.

1 CHAIRMAN COWGER: You are not trying to get
2 anything for weather delays? It's clear that is not
3 eligible.

4 MR. WHITE: It goes a step further. It's got the
5 seven days that we determined by the daily -- that's
6 right for the 66 days, though, right.

7 CHAIRMAN COWGER: The rationale for the 66 days
8 is related strictly to the material shortages, you
9 might say?

10 MR. WHITE: Yes.

11 CHAIRMAN COWGER: Just wanted to make sure we
12 have that straight.

13 Mr. Contractor, what else do you all have to say
14 about the issue of extended overhead?

15 MR. WHITE: Well, we were asking for the overhead
16 on the 66 days. Mr. Benak was real generous in paying
17 the interest on it. We would like for him to pay the
18 interest on the whole amount if he would.

19 CHAIRMAN COWGER: I think what the Board needs is
20 some explanation of why you think the extended overhead
21 even applies for those 66 days. Do you have anything
22 further to present on that?

23 MR. WHITE: Not really, nothing other than the
24 job was sitting there tied up. The overhead was
25 running on it.

1 Maybe we didn't make it plain enough, but on that
2 material shortage, we would have trucked that material
3 right down the road from the plant. We had to rail
4 this material in.

5 I doubt 30 days was ample time. Did you have the
6 new materials in and on the yard within 30 days even?
7 I doubt it.

8 MR. JONES: No. It was a two component mix. We
9 had an FC-2 material already on the yard. We ordered
10 screenings. Most of the time when you order anything
11 from the rail, from Vulcan, you have a pretty good
12 delay on getting it.

13 I've never got anything in 30 days before.

14 CHAIRMAN COWGER: Where was it having to come to?

15 MR. JONES: It was coming to Cottondale.

16 CHAIRMAN COWGER: That's where the rail site was?

17 MR. JONES: Yes, sir.

18 CHAIRMAN COWGER: We will give you an opportunity
19 to rebut if you want to after DOT makes their
20 statement. We would like to hear what DOT has to say
21 about the extended overhead.

22 MR. BENAK: If you get back to the basis of who
23 had control over these delays, the contractor had the
24 control over these delays. The Department didn't bid
25 the job to have a certain type of aggregate from a

1 certain source. The job was bid for asphalt to be
2 laid. The contractor had control over that.

3 Considering for overhead, the Department didn't
4 direct a suspension for this job. The job continued
5 on. They were making revenue as the job went along.
6 They didn't back out anything for that. They just were
7 charging the whole time, even if they were working that
8 day laying asphalt and making money. The overhead was
9 being absorbed at that time for that job.

10 They didn't show me what other jobs they had
11 going on in the area that they could go to to absorb
12 the overhead, other DOT jobs, other private work.

13 CHAIRMAN COWGER: You are saying they did have it
14 you think?

15 MR. BENAK: They had plenty of work going on at
16 the time. The Eichleay method is used for when the
17 Department directs a suspension and we run the
18 contractor off for a period of time. I think it's been
19 used in one court case that I know of.

20 It's inappropriate to be used in a fashion like
21 this. Just to say that we owe them overhead is wrong.
22 You have to go back to, you know, the entitlement for
23 any delay has to be the Department's fault in that we
24 run them off and there's a time suspension for a period
25 of time, and then overhead runs at that time.

1 We did not -- the Department didn't have control
2 of this, of these issues.

3 CHAIRMAN COWGER: To sum up what you just said,
4 basically you are saying the DOT did not suspend time.

5 MR. BENAK: We did not suspend time on the job,
6 no, sir.

7 CHAIRMAN COWGER: There are two other points.
8 The contractor, in your opinion, had other places to go
9 work.

10 MR. BENAK: Yes, sir.

11 CHAIRMAN COWGER: Which means that there's no
12 evidence in your mind that he was damaged by this as
13 far as his home office overhead is concerned?

14 MR. BENAK: Right. Yes, sir.

15 CHAIRMAN COWGER: Does that give a pretty good
16 summation of what you just said, hit the high points?

17 MR. BENAK: Yes, sir.

18 CHAIRMAN COWGER: Okay, Mr. Contractor, what else
19 do you have to say about that, about the overhead
20 items?

21 MR. WHITE: I know you are probably familiar with
22 it, but back to that material shortage. When you get
23 Martin Marietta material from Chattahoochee there, they
24 don't mine that material there. I know you know that.
25 I don't know if Mr. Deyo and Mr. Cowger do, but they

1 have to barge that material in and crush it right
2 there.

3 The man's letter says -- I've seen that happen
4 before. If they don't open some of them gates on that
5 dam, the barges can't go up the river.

6 Like Burney said a while ago, if we had been
7 given some consideration for the time extension, we
8 wouldn't even be here.

9 I do see in our sub's letter where it was on our
10 job in District 2 that we asked for a time extension
11 for the RPMs at the same -- he says it's our job -- and
12 they granted it.

13 CHAIRMAN COWGER: Do you know whether the
14 circumstances were identical?

15 MR. WHITE: Let me rephrase that. He says
16 concurrent with this job that we are referring to.

17 MR. KEEN: I think the RPMs is the biggest part
18 of the time overrun, really. I think the majority of
19 the time that was charged, that cost all the LDs is a
20 result of the RPMs.

21 I know Mr. Benak says we have control of it, but
22 we don't have a whole lot of control of what the subs
23 and suppliers can do. We should have, but we don't.

24 MR. BENAK: If the Board would, contract document
25 873.2, in the second sentence, talking about contract

1 time extensions. It says, "Such extensions of time may
2 be allowed only for delays occurring during the
3 contract time period or authorized extension of
4 contract time period."

5 We have already noted that they were well past
6 the contract time period before they ordered their
7 RPMs.

8 MR. KEEN: That was part of what I was telling
9 you, Steve. The reason it was past that time is they
10 were waiting on the friction course to get down.
11 I think part of that time was tied in to the friction
12 course deal, I think.

13 I don't know. I would have to study it more than
14 I've studied it to be able to tell you that. It took
15 them two days to put down them RPMs.

16 CHAIRMAN COWGER: It's typical it doesn't really
17 take very long once you get them, right?

18 MR. JONES: No, sir.

19 CHAIRMAN COWGER: Flowing through all of this,
20 there was a 30-day suspension period between the time
21 the FC-3 was finished and the 30-day cure period had
22 elapsed. And the DOT did grant that suspension, right?

23 MR. KEEN: Yes. You are talking about the cure
24 period. Yes, they did suspend the time for the cure
25 period.

1 CHAIRMAN COWGER: Just want to make sure we have
2 all the facts right.

3 MR. KEEN: Getting back to the RPMs, the
4 subcontractor said that he asked for a suspension of
5 time on the job with a like case, of what we are
6 talking about, a shortage of RPMs in the second
7 district, which was running concurrently with the Bay
8 County job.

9 He didn't say it was one of our jobs, which I
10 don't believe it was. The DOT did grant the suspension
11 in the second district for the shortage.

12 CHAIRMAN COWGER: Do you have anything further,
13 DOT, to say about that specific issue? About the thing
14 that happened in District 2?

15 MR. BENAK: They didn't provide any documentation
16 from District 2 showing where they had gotten time. If
17 District 2 had given them time, I'm sure it was during
18 the contract time period, during the life of the
19 contract.

20 CHAIRMAN COWGER: You don't know that for sure,
21 but you also don't know that wasn't the case, right?
22 You don't know?

23 MR. BENAK: No, sir.

24 CHAIRMAN COWGER: Okay. Do we have anything
25 else? I have one more question in general if we are

1 through with all the issues.

2 My question has to do I think with the interest.
3 I think we've already laid out for you if any interest
4 is determined to be due, at what rate it will be paid.

5 The other issue is can you give us an
6 approximation of the period of time over which you
7 would be claiming interest? Not the number of days,
8 but beginning when and ending when.

9 MR. WHITE: Well, I guess it should start upon
10 acceptance date of the job would be the proper place to
11 start.

12 CHAIRMAN COWGER: Okay.

13 MR. BENAK: I think they usually start adding
14 interest whenever a claim is made. I think that's the
15 appropriate spot for interest to be started. That's,
16 I guess, when they submitted their claim to the Board.

17 CHAIRMAN COWGER: There is correspondence in the
18 package that indicates they requested time extensions
19 or suspensions, I don't remember which it was, that
20 were pretty much at the same time that the shortage
21 occurred. Correct?

22 MR. BENAK: The job was going -- addressed the
23 issues as they were going on.

24 CHAIRMAN COWGER: Okay.

25 MR. WHITE: Well, like I say, Mr. Benak knows

1 this, but when we had to back it up and order stone by
2 the rail, the 30 days was an arbitrary number to try to
3 give us enough time to finish the job, Steve. That's
4 what it was for.

5 But you can't call and get rail car material in
6 and have the line mix run and delivered in 30 days.
7 You can't do it. All we was asking for was just enough
8 to get us by the end of the job. I bet you it was
9 closer to two months getting it.

10 The friction course material, we make a lot of
11 our own rock. Maybe the Board could let us start using
12 cabbage grove rock.

13 CHAIRMAN COWGER: For friction course?

14 MR. KEEN: I don't believe they got but about
15 three or four stones you can use.

16 MR. DEYO: Does it meet the abrasion test?

17 MR. WHITE: Yes. The only thing lacking is
18 something called -- that the Feds come up with, that it
19 didn't have enough silicone in it, too pure of a
20 formation. It's too good.

21 CHAIRMAN COWGER: It's a little more than that.
22 Okay. Anything else? We can sit here and chat the
23 rest of the day, but I think we might as well wrap this
24 up.

25 Mr. Deyo, do you have any questions?

1 MR. DEYO: No, sir.

2 CHAIRMAN COWGER: Mr. Roebuck?

3 MR. ROEBUCK: No.

4 CHAIRMAN COWGER: This hearing is hereby closed.

5 The Board will meet to deliberate on this claim on
6 August 11, 1999, and you will have our final order
7 shortly thereafter.

8 (Whereupon, the hearing was concluded at 11:10 a.m.)

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CERTIFICATE OF REPORTER

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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 29th day of June, 1999.


CATHERINE WILKINSON
CSR, CP
Post Office Box 13461
Tallahassee, Florida 32317