

STATE ARBITRATION BOARD

ORDER NO. 4-99

/// NOTICE ///

In the case of Baxter's Asphalt and Concrete, Inc. versus the Florida
Department of Transportation on Project No. 46030-3513 in Bay
County, Florida, both parties are advised that State Arbitration Board
Order No. 4-99 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

Copies of Order & Transcript to:
Greg Xanders, P. E., State Construction Engineer
Mrs. Kathy B. Sloan, Vice-President, Baxter's Asphalt & concrete, Inc.

STATE ARBITRATION BOARD

ORDER NO. 4-99

RE:

Request for Arbitration by
Baxter's Asphalt and Concrete, Inc. on
Job No.46030-3513 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 11:25 a. m. on Friday, June 18, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 4-99 in this cause..

ORDER

The Contractor presented a request for arbitration of a two (2) part claim in the total amount of \$249,209.52. PART I deals with released of liquidated damages assessed by the Department. PART II deals with reimbursement for additional costs incurred by the Contractor caused by an alleged significant change in the character of drainage work order by the Department.

The Contractor submitted the Request for Arbitration of a Claim to the Board more than 820 days after final acceptance of the project by the Department.

Subsequent to submitting their Request for Arbitration, the Contractor submitted to the Board a letter, dated April 6, 1999, from their Attorney expressing a legal opinion that the 820 days limit after final acceptance of the work on a project for filing a suit as contained in 337.19(2) F. S. does not apply to initiating arbitration under 337.185 F.S. This statement was supported by legal justification.

The Department of Transportation Office of General Counsel responded with a letter to the Board dated April 9, 1999 stating legal justification supporting that this matter cannot be heard by the Board, because a Request for Arbitration must be filed within the 820 days after the date of final acceptance. This position was based on: (1) an opinion that 337.19(2) is a limited waiver of sovereign immunity not a statute of limitation and the sovereign immunity of the State resumed after expiration of the 820 day period and (2) in accepting the Department's offer of final payment without qualification, the Contractor waived their rights to all future claims.

The Contractor's attorney responded to the Board with a letter dated April 24, 1999 emphasizing that: (1) 337.19(2) F.S. does not apply to arbitration, because arbitration is not a "suit"; (2) 377.185 does not mention a time limit for filing for arbitration by the State Arbitration Board; (3) the State waives sovereign immunity when it enters into a contract and (4) the Department sent the Contractor a Qualified Acceptance form letter containing a three (3) year limit on filing.

The Department of Transportation Office of General Counsel responded with a letter to the Board dated April 30, 1999 reiterating that the Board has no subject matter jurisdiction over the Department here, because 337.19(2) F.S. puts a temporal limit upon the waiver of the Department's sovereign immunity. It was also pointed out that the 337.19(2) was amended from a three (3) years limit to a 820 day limit effective about one year before the Contractor executed the Qualified Acceptance Letter,

The State Arbitration Board met on May 12, 1999 to consider the arguments presented by the parties to this dispute. The decision of the Board was to schedule a hearing for the Contractor's claim on June 18, 1999. A Notice of Arbitration Hearing was issued May 17, 1999.

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

PART I Released of Liquidated Damages
162 Calendar Days @ \$1,320 = \$ 213,840.00

Our original claim statement was based on the information contained in our letter of April 15, 1998 by which we requested additional compensation and release of Liquidated Damages. We did not receive a response from the Department to this letter until we received the Department's rebuttal exhibit. We then prepared a New Claim Summary (Exhibit #3). In this summary we agreed with the Department's analysis of delays caused by weather conditions and factors other than the delay caused our by having to replace our DBE Subcontractor for the drainage work. The Department said that the 29 recognized delay days which occurred prior to expiration of the allowable contract time are eligible, but the 36 eligible delay days which occurred after expiration of the allowable contract time are not eligible.

Our claim for release of Liquidated Damages based on the delay caused by having to replace our Black DBE Subcontractor, S & L Construction and Remodeling (S&L), to complete the drainage work stands as originally submitted on May 9, 1995 we were instructed to perform additional work consisting of four (4) ditch bottom type inlets and 154' of French Drain (24"). It took until May 30, 1995 to resolve the flow line elevations for the new inlets. S&L was having difficulties in completing the original work and refused to perform the additional drainage work at the contract unit prices. We contend that the work required by the revisions differed substantially from the character of the drainage work shown in the plans and that new unit prices should have been negotiated. The Department insisted that the work be done at the contract unit prices.

We made every reasonable effort to get S&L to complete the drainage work but were not successful. They ultimately refused to do the added work and we then found it necessary to terminate the subcontract (8/21/95) for poor performance. We could not complete the drainage work with our own forces, because this was work we were obligated to have already done by a Black DBE contractor. We then set out to find another DBE subcontractor to complete the drainage work, but could not locate one. After considerable discussion with the Department in regard to a good faith effort to find another DBE to do the drainage work and whether the work done by S&L would apply to the DBE goal, we gained approval to complete the drainage work using a non-DBE Subcontractor (Churchwell Dozer) (9/5/95). In past compliance reviews the compliance officer has questioned why a DBE subcontractor did not get paid the amount shown in the DBE Utilization Form. Drainage work resumed on September 5, 1999. A considerable amount of time was consumed in establishing with the Department that a good faith effort had been made to replace the Black DBE Subcontractor who was not performing and to locate another subcontractor to complete the drainage work.

It is our position that 97 Calendar Days of Liquidated Damages should be released because of the delay in substituting drainage subcontractors which was a factor beyond our control. This is for the period between May 30, 1995 (the date flow line elevations for the added inlets were determined by the Department) and September 5, 1995 (the date on which drainage work resumed).

PART II \$35,369.65

This part of our claim covers the additional costs we incurred when we found it necessary to replace our original drainage subcontractor. See the second and third paragraphs under PART I for an explanation of replacing our original Black DBE drainage subcontractor with a non-minority drainage subcontractor.

S&L Contracting was unwilling to undertake the additional because they quoted the prices for the inlets and French Drain that were too low to cover costs. The character of the work for the added inlets and French Drain was substantially different from the original work to be done under those items. There were severe utility conflicts in the areas where French Drain was added.

We incurred substantial added costs when it became necessary to have Churchwell Dozer complete the drainage work. The amount we are claiming is based on the prices quoted to us by Churchwell Dozer for installation and the invoiced cost of the inlets and pipe less the amount we received in payment at the contract unit prices for Inlets (Type G) and French Drain (24").

INTEREST

We are due interest on the amount withheld from our payments for any amount awarded by the Board, because this money was either withheld or not included in payments to us by the Department since 1995.. At the time we submitted our Request for Arbitration of a Claim, it was our understanding that adding interest to the total amount claimed would cause our claim to exceed the \$250,000 limit on claims that can be heard by the Board.

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

PART I

It is important to recognize that the Contractor did not begin work on this 215 calendar day contract until day 63. The Contractor failed to aggressively pursue the work on this project, thus causing the allowable contract time to be exceeded.

We did not grant the 29 days of additional time due, because the Contractor refused to sign an acknowledgment that they would not pursue any claim financial or otherwise in connection with these delays. We could not grant the 36 days of additional time because they were days after the allowable contract time expired. (8/9/95). Subarticle 8-7.3.2 (Contract Time Extensions) of the Standard Specifications that are applicable to this contract provides: "Such extension of time may be allowed only for delays occurring during the contract time period or authorized extensions."

As it turned out, S&L completed more than 2% of the contract work, the Black DBE goal, even though they did not complete the amount of work shown in the Contractor's DBE utilization form. When it was proven that the Black DBE Contractor could not perform the remaining drainage work, the Contractor could have completed this work with their own forces.

The drainage work resumed on September 5, 1995 and was completed on September 12, 1995. The friction course work began on September 5, 1995 and was completed on October 26, 1995 (Contract Day -75).

It is our position that the drainage work was not controlling item of work on this 15 miles long job.

The only additional days due are the 29 recognized delay days which occurred prior to expiration of the allowable contract time.

PART II

The Contractor was fully aware of the 2% Black DBE goal and was fully responsible for all activities of the project, including the bid unit prices. The added work did not significantly change the character of the work (see Subarticle 4-3.2.1 of the Standard Specifications) because it did not differ materially in kind or nature from the original work under the pay items Inlets and French Drains and did not increase a major item (see definition in Subarticle 1-24 of the Standard Specifications) by in excess of 25%.

It is our position that the Contractor was obligated to complete the added drainage work at the contract unit prices.

INTEREST

The Department offered no rebuttal on paying interest.

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

PART I

The Contractor did not know until after the drainage work was complete that the Department would not enforce the dollar amount shown in the DBE Utilization Form to be sublet to S&L and would consider the Black DBE Goal as having been met by S&L being paid 2% of the contract amount. Locating another subcontractor to complete the drainage items took considerable time. The Contractor did not effectively pursue removal of S&L from the project when it became apparent that they could not complete the drainage items.

The Department agreed that an additional 29 calendar days of contract time is justified by events that occurred within the allowable contract time.

PART II

The Department's DBE utilization requirements forced the Contractor to employee another subcontractor who had no incentive to quote a reasonable price. More existing underground utilities existed in the area where French Drain was added than existed in the areas where the plans showed French Drain to be constructed.

INTEREST

Liquidated Damages have been were withheld based on the number of day for which extension of the allowable time is justified 1995 and the Contractor incurred added costs for drainage work in 1995.

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

Release 94 Calendar Days of Liquidated Damages @ \$1,320 per day in a total amount of \$124,080.

These days include the 29 delay days occurring the allowable contract time the calendar days which the Department agreed were justified.

PART II

Pay the Contractor \$ 15,000.00.

INTEREST

Pay the Contractor \$ 40,000.00

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 224.80 for Court Reporting Costs.

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S.A.B. CLERK

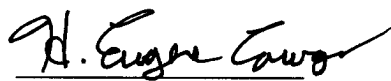
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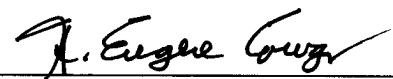
Tallahassee, Florida

Dated: 25 August 1999

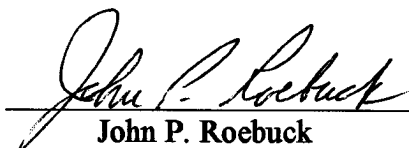
Certified Copy:


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

25 August 1999
DATE


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


Bill Deyo, P. E.
Member


John P. Roebuck
Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

AUG 25 1999

FILED

BAXTER'S ASPHALT AND
CONCRETE, INC.

- and -

DEPARTMENT OF TRANSPORTATION

PROJECT NO. 46030-3513

LOCATION: Bay County,
Florida

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 11:25 a.m.
Concluded at 12:45 p.m.

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

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

APPEARANCES:**MEMBERS OF THE STATE ARBITRATION BOARD:**

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

**APPEARING ON BEHALF OF BAXTER'S ASPHALT AND
CONCRETE, INC.:**

Mr. David Sloan
Mr. Jim Huggart, Jr.
Ms. Kathy Sloan

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

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

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I N D E X**EXHIBITS****PAGE**

Exhibit Nos. 1 through 4 in evidence

4

CERTIFICATE OF REPORTER

44

P R O C E E D I N G S

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

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

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

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

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

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

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN COWGER: The documents which put this hearing into being are hereby introduced as Exhibit No. 1. This was the contractor's request for arbitration and all the documents that were attached to that request. That request was received by the Board and forwarded on to the DOT.

The DOT then prepared a rebuttal statement, which

1 will be identified as Exhibit No. 2, entitled primary
2 rebuttal exhibit to request for arbitration on Job
3 46030-3513.

4 There are some other exhibits here that I want to
5 identify that will be discussed. These were presented
6 before going on the record. There will be ample
7 opportunity during the course of the hearing to discuss
8 these.

9 One is a document entitled new claims summary
10 submitted by the contractor, with attachments. That's
11 Exhibit 3.

12 The DOT submitted a document entitled for the
13 record, which was a one-page document with a
14 considerable amount of documentation, you might say,
15 attached to it. That will be Exhibit 4.
16 (Whereupon, Exhibit Nos. 1 through 4 were received in
17 evidence.)

18 CHAIRMAN COWGER: Off the record we discussed
19 briefly Exhibits 3 and 4. The parties have agreed --
20 and correct me if I'm wrong, the parties have agreed
21 that there's nothing in either one of those exhibits
22 that would prohibit them from adequately presenting
23 their case at this hearing.

24 Okay. During this hearing the parties may offer
25 such evidence and testimony as is pertinent and

1 material to the controversy, and shall produce such
2 additional evidence as the Board may deem necessary to
3 an understanding and determination of the matter before
4 it.

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

7 The parties are requested to assure that they
8 receive properly identified copies of each exhibit
9 submitted during the course of this hearing and to
10 retain these exhibits.

11 The Board will furnish the parties a copy of the
12 court reporter's transcript of this hearing, along with
13 its final order, but will not furnish copies of the
14 exhibits.

15 The hearing will be conducted in an informal
16 manner. First the contractor's representatives will
17 elaborate on their claim, then the Department of
18 Transportation will offer rebuttal.

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

23 Before we proceed, I want to add to the opening
24 statement. I have a statement I want to read to you.

25 Subsequent to submitting their request for

1 arbitration, the contractor submitted to the Board a
2 letter from their attorney expressing the legal opinion
3 that the 820-day time limit after final acceptance of
4 the work on the project for filing a suit, as contained
5 in article -- in Section 337.19 of the Florida
6 Statutes, does not apply to initiating arbitration
7 under Section 337.185 of the Florida Statutes.

8 DOT responded to the request for arbitration, and
9 the legal opinion furnished by the contractor's
10 attorney, with a letter from the DOT Office of General
11 Counsel expressing a legal opinion that this matter
12 cannot be heard by the Board because the request was
13 not filed within 820 days after final acceptance as
14 required by Section 337.19 of the Florida Statutes.

15 The contractor's attorney responded with a letter
16 rebutting the DOT position on whether or not the Board
17 could hear this matter.

18 The parties each sent the Board another letter
19 supporting their position. All of these letters are
20 contained in the record of this hearing.

21 As stated in the attachment to the notice of
22 arbitration the Board issued for this meeting, we wish
23 to advise that the Board met on May 12, 1999, to
24 consider the legal opinions furnished by the parties
25 and decided to schedule a hearing on the contractor's

1 request for arbitration.

2 The Board sees no reason to hear further
3 arguments on whether or not we should hear this matter.
4 Therefore, this hearing shall be only with the issues
5 presented in the request for arbitration package.

6 In relation to this, Exhibit No. 4 sort of
7 rehashes the issue of eligibility. The Board has taken
8 a look at that, and having taken a look at it, has
9 decided we will not change our position on the matter,
10 and the only new thing in there is the last paragraph
11 dealing with Florida Statute 337.185(5), which states,
12 when a valid contract is in effect, defining the
13 rights, duties and liabilities of the parties with
14 respect to any matter in dispute, the Board shall have
15 power to determine only the proper interpretation and
16 application of the contract provisions which are
17 involved.

18 What is being said here is, again, the Board
19 doesn't have the right to hear this because there's no
20 contract in effect at this time. The Board will
21 consider that in their deliberations and seek legal
22 advice if necessary.

23 I think that's all we need to say today
24 addressing the issue of whether or not the matter is
25 eligible for arbitration.

1 So, now we will go to the real issues to be heard
2 by the Board dealing with contract time.

3 I think it's proper now that the contractor begin
4 their presentation.

5 MS. SLOAN: I'm Kathy Sloan of Baxter's Asphalt,
6 for anybody that doesn't know that. Our claim is a lot
7 simpler than our original submission. Once we received
8 the rebuttal from DOT, we eliminated several issues, so
9 therefore, it's become a lot more simple.

10 We agree with DOT on the 29 days that they had
11 offered us. The only reason we did not accept them is
12 that they asked us to sign away our rights to other
13 days we may have been entitled to, so therefore, we
14 chose not to sign off at that point.

15 We also agree with DOT on the other 36 days,
16 which I counted out of their rebuttal package that we
17 would have been entitled to if we had not run out of
18 contract time.

19 If DOT had agreed with some of the other issues
20 and had extended the time based upon that, they would
21 have been able to consider those days and grant those
22 36 days.

23 So, if the Board sees that we are entitled to
24 time for other issues, that those days would hopefully
25 become eligible to be granted. That comes to a total

1 of 65 days that we agree on.

2 That brings us to the only issue that we disagree
3 on, and that is the fact that we had a black DBE
4 subcontractor that was required to work on this
5 project. We only had one bid submitted for any phase
6 of work, and that was SL Construction.

7 DOT in their rebuttal states that the only work
8 left for SL to perform was a small amount of extra work
9 that the contractor was asking to perform. Since this
10 work was added to the contract and not part of the
11 original work submitted to SL, the prime contractor
12 could have feasibly completed this work himself.

13 Well, this is not a true statement because there
14 was original contract work left on SL Construction's
15 portion of their subcontract. There was \$10,646 out of
16 a \$64,000 contract.

17 So, therefore, the prime contractor could not
18 have come in there and done that work for them. We
19 pushed them all that we could to get the work done, but
20 we couldn't have done it for them. DOT would never
21 have allowed that. We would not have been paid for
22 that portion of the work.

23 In addition to that, Baxter's Asphalt Company
24 could not have feasibly performed the work, even the
25 additional work, because we are not really qualified to

1 do that type of work. We are not set up for it. It's
2 not our area of expertise.

3 So, therefore, after much dragging around on the
4 job, we were -- DOT allowed us to have SL Construction
5 removed from the project.

6 I think DOT has to admit that we did have a
7 serious performance problem or they would never have
8 allowed us to remove SL Construction from the job.
9 However, DOT has given us no consideration for
10 liquidated damages or additional costs in this matter.

11 We hired Churchwell Dozer to come in and complete
12 the contract that SL had left, and also the additional
13 work that DOT had added to the contract.

14 It only took Churchwell Dozer eight days to
15 perform the work that was left and the additional work.
16 It took SL Construction 157 days when they finally
17 pulled off the job and refused to do any more of the
18 work.

19 The reason that SL refused to do the balance of
20 their contract and the additional work is because DOT
21 would not work with them on doing a supplemental
22 agreement, which I think there is some technicality
23 about the supplemental agreement as to why they
24 wouldn't do it.

25 However, SL Construction did a poor job of

1 bidding on their work. They bid the work too cheaply.
2 Therefore, they didn't want to do any extra work
3 because they didn't have any money in the original
4 work. They wouldn't perform. They were just dragging
5 around saying that they were going to do the work, but
6 they never would do it.

7 They held us up tremendously on this job. If you
8 look at the work progress schedule that was approved by
9 DOT, the amount of time that SL said they should be
10 able to perform the original work was 80 days. It took
11 157, and they didn't complete it.

12 So, if you take the 157 days that the work is not
13 complete, and then it took 29 days to get permission
14 from DOT to remove SL Construction, to try to find
15 another subcontractor who could do the work quickly --
16 and there was not another black minority subcontractor
17 or even another DBE that we could find to complete the
18 work.

19 Churchwell was able to get in and do the work and
20 get out in a reasonable length of time.

21 So, we are asking -- this was a total of 194 days
22 to complete the drainage work on this project, when it
23 should have only taken 80. We are asking for 97 days
24 of reimbursement for liquidated damages for this
25 overrun of time on drainage work due to circumstances

1 beyond our control.

2 In summary, there's 29 days that we agree with
3 DOT that we are due. There's 36 days that we agree
4 with DOT but we were out of contract time, so they
5 could not offer those to us.

6 We are asking for 97 days on this issue with SL
7 Construction, which comes to 162 days. At \$1,320 a
8 day, that's \$213,840.

9 In addition to the liquidated damages, we are
10 asking for reimbursement for the difference between
11 what we were paid by DOT and what we had to pay --

12 CHAIRMAN COWGER: Can I interrupt you a moment?
13 Is this a good place to stop and let's deal with the
14 time issue before we move on to that, because this is a
15 dollar issue, right?

16 MS. SLOAN: Yes, sir.

17 CHAIRMAN COWGER: The reason I want to interrupt
18 you, I want to make sure I understand. As far as the
19 weather delays and other delays detailed in your
20 April 15 letter and rebutted issue by issue in the DOT
21 package, you are saying, again as far as weather delays
22 and delays not related to the problem you had with the
23 subcontractor, that you would accept 65 days as being
24 what is due?

25 MS. SLOAN: What we agree on, right. Between

1 what they could offer us and what they could not
2 because of the contract time expiring.

3 CHAIRMAN COWGER: As far as you are concerned --

4 MS. SLOAN: Those issues we agree on. The other
5 issues we have dropped. In reading through their
6 rebuttal package, it's become a lot simpler claim.

7 CHAIRMAN COWGER: Then the other part having to
8 do with the problem with nonperformance of your
9 subcontractor is where the 97 days comes from?

10 MS. SLOAN: Yes, sir.

11 CHAIRMAN COWGER: You add those two together, you
12 get the 162. That's what you are --

13 MS. SLOAN: That's what we're asking for.

14 CHAIRMAN COWGER: Just wanted to make sure
15 I understood. Let's let DOT rebut that before you come
16 back with the second part of your claim.

17 MS. SLOAN: All right.

18 MR. McCRARY: I'm Jim McCrary representing DOT in
19 this matter. I'm an employee of Metric Engineering.
20 Metric Engineering was CEI contractor during that
21 particular project.

22 The contractor had stated in their original
23 claim, in section EE that -- just a statement that was
24 in there, all of which would have been unnecessary if
25 our DBE contractor had completed his work.

1 So, the contractor's claim to a large extent
2 results from the inability of S & L Construction to
3 effectively complete the work that was required on this
4 project.

5 However, the contractor, Baxter's Asphalt, was
6 fully aware of the requirement for 2 percent of the
7 work to be done by a DBE, black, disadvantaged business
8 enterprise.

9 The bid process which was given at the time of
10 bid were the responsibility of the contractor. The
11 specifications for this project under subarticle A-1.1
12 states that the Department recognizes the subcontractor
13 as an employee or an agent of the contractor;
14 therefore, the contractor, Baxter's Asphalt, is fully
15 responsible for all activities of the project,
16 including the work of S & L Construction. This
17 includes the pricing that was established by the
18 competitive bidding process.

19 The issue concerning the overrun of two work
20 items -- and that's what the additional work really is
21 comprised of, which was some inlets and some French
22 drains, and the contractor's position that a
23 supplemental agreement is necessary when revised
24 pricing is not in compliance with the contract
25 documents.

1 The specifications, subarticle 1-23 defines a
2 major item of work as one that constitutes an amount of
3 work greater than 5 percent of the original contract
4 amount.

5 Five percent of this contract would have been
6 \$125,400. S and L only proposed to do \$64,285.48 worth
7 of work, according to the -- to the utilization
8 schedule.

9 The volume of the additional work required by
10 contract prices was \$19,636, which would have been a
11 total of \$83,921.48 for all of the work, all the
12 drainage work, and all the work that was assigned to
13 S and L.

14 Item 004, the supplemental specifications address
15 conditions requiring supplemental agreements where it
16 specifically states that additional or unforeseen work
17 of the type already provided for by the contract for
18 which there is a contract price will be paid at such
19 contract price.

20 This is an expansion of specification subarticle
21 4-3.2.3, which is covered under the supplement to the
22 '94 supplement to the '91 specifications, and under
23 this particular project was covered under the
24 supplemental specifications as part of the contract
25 document.

1 Specification subarticle 4-3.2.1 states if
2 alterations or changes in quantities do not
3 significantly change the character of the work to be
4 performed under the contract, the altered work will be
5 paid for as provided elsewhere in the contract.

6 The term significant change, according to
7 subarticle 4-3.2.1, shall be construed to apply only to
8 the following circumstances: A, when the character of
9 work is altered, differs materially in kind or nature
10 from that involved or included in the original proposed
11 construction, or B, when a major item of work as
12 defined by the contract is increased in excess of 125
13 percent or decreased below 75 percent of the original
14 contract amount.

15 So, relative to the contractor's position that
16 the contract should have been amended by supplemental
17 agreement to change the pricing established through the
18 competitive bidding process, the Department has shown
19 it is completely prohibited by the contract documents
20 that we have just discussed.

21 One, there was no significant change. And two,
22 the amount of work did not constitute a major item of
23 work. And three, the prices were established by the
24 contractor during the competitive process.

25 As Ms. Sloan has stated earlier, the time issues

1 on this project have arisen as a result of the failure
2 of the contractor to adequately and aggressively pursue
3 the completion of the contract.

4 One thing I would point out, the contractor did
5 not begin work until day 63 of the contract. The
6 additional drainage work was requested on May 9, 1995.
7 This work did not start until September 5, 1995. And
8 it was finished on September 12, 1995.

9 As the drainage work was being done, friction
10 course also began on September 5, 1995, and was
11 finished on October 26, 1995. This was at day minus 75
12 of the contract time. Time was suspended until
13 November 27, 1995 for curing.

14 Pavement deficiencies in thermoplastic were
15 finally completed on day minus 176.

16 CHAIRMAN COWGER: The minus means beyond the
17 contract time?

18 MR. McCRARY: Yes. The Department reevaluated
19 the weather days. We found five additional days, which
20 may be given for a total of six days when you add the
21 factor.

22 The other delay days were 23 days. The
23 contractor had been previously offered these days
24 through time extensions, but had refused to accept that
25 offer.

1 The majority of the other time issues are ones
2 that occurred after time expired. The specification,
3 subarticle 8-7.3.2 states that time extensions may be
4 allowed only for delays which occurred during the
5 contract period or authorized extensions of the
6 contract time.

7 The Department's position is that the claim of
8 the contractor should be entirely denied except for the
9 additional 29 days that we have addressed. The
10 Department's position that there are no provisions
11 within the contract documents to render any validity to
12 the balance of the claim.

13 CHAIRMAN COWGER: That statement now applies to
14 both the time and to some degree -- well, clearly it
15 applies, also, to part two of the claim, which we will
16 be hearing later. We kind of got the cart before the
17 horse on part of it.

18 Anyway, a quick question. The next to the last
19 paragraph you agree that 29 days would be appropriate
20 to grant. Up above there, when you've got -- okay,
21 never mind. Withdraw the question, I've got the wrong
22 number my head.

23 Okay. Let me ask, to make sure we understand
24 what is happening here. Going back to Exhibit 3, which
25 was the new claim summary submitted by the contractor,

1 that was arrived at by adding 29 days, which the DOT
2 has agreed to, that that would be appropriate.

3 And then another 36 days that the DOT says they
4 could have granted but they couldn't grant them because
5 those events occurred after the contract time expired.
6 Is that --

7 MR. MCCRARY: That's correct.

8 CHAIRMAN COWGER: So, if you take out of the
9 equation the fact that the contract time had expired,
10 you would grant 36 days under those conditions? Not
11 saying that's appropriate, just trying to get the
12 numbers to where I can understand them. Okay. Got
13 that.

14 Do we need to discuss then any further anything
15 in regard to the weather, et cetera, delays at this
16 point? I want to make it clear, now, I'm not saying
17 that you were wrong in not granting those 36 days that
18 are related to events that occurred after the contract
19 time had expired. All I'm trying to get straight is
20 where that number 65 comes from. Okay. Good enough.

21 MR. DEYO: I think both have stipulated, the way
22 I understand.

23 MS. SLOAN: We agree.

24 MR. DEYO: They agree with the analysis.

25 CHAIRMAN COWGER: Okay. So, I think that we

1 don't need to talk about anything else now except the
2 time and the dollars related to the subcontractor
3 problem. Does everybody agree to that? Okay. DOT has
4 kind of given a little rebuttal on that issue. Let's
5 hear the front side of it, Kathy.

6 MS. SLOAN: Like I said before, we only had one
7 black DBE quote on this DOT project. So, we were
8 forced to use this one.

9 He was obviously not qualified. He wasn't even
10 qualified to know how to bid a job because he didn't --
11 and I'm sure they've done this, but if they looked at
12 his quote, what they paid him versus what they've paid
13 for the same work on other DOT jobs, they would see
14 that they did not know what they were doing when they
15 bid this work.

16 They obviously didn't know what they were doing
17 on how to progress with this work either because we
18 pushed them as hard as we knew how, and we could not
19 get the work out of them.

20 A lot of this problem occurred when DOT in May
21 made the additional -- added the additional work to
22 their contract. They did not want to do that work at
23 that price. I really can't blame them. They wouldn't
24 even finish the work that they had under contract.

25 I think we are all smart enough in this room to

1 know that DOT, until you show that you have a very,
2 very serious problem with a minority subcontractor, you
3 cannot have that subcontractor removed from that job.
4 You cannot do the work for them.

5 They are trying to say we could have done the
6 work for them. Well, we couldn't. We all know that.

7 We were between a rock and a hard place. We
8 didn't have anywhere to turn except enough time goes by
9 that they would see that we did have a serious problem,
10 and finally in August we were able to remove them from
11 the job.

12 DOT allowed us to put a nonblack DBE on the job
13 to get the job completed. I guess we would still be
14 sitting there now if that hadn't happened.

15 CHAIRMAN COWGER: Are you finished? Is this a
16 good breaking point?

17 MS. SLOAN: Yes. David had something to say.

18 CHAIRMAN COWGER: Let him ask a question and then
19 you can come back.

20 MR. ROEBUCK: You mentioned there was \$10,000
21 left on the S and L contract?

22 MS. SLOAN: Yes.

23 MR. ROEBUCK: I guess Churchwell cost you 35,000
24 to clean up the job?

25 MS. SLOAN: Right.

1 MR. ROEBUCK: That's where your final claim was,
2 that he had never been paid, right? Is it 45,000?
3 You've got \$35,000 in your claim for drainage, and yet
4 S and L was not paid 10,000. So, you cleaned that up,
5 added a little more to it for the 35,000?

6 MS. SLOAN: Right. That's pretty much the way --
7 the additional work was done by Churchwell as well as
8 the remaining work.

9 MR. ROEBUCK: The cleaning up?

10 MS. SLOAN: Yes. And they did not do it at
11 S and L's price, I can assure you.

12 MR. SLOAN: Could I say something?

13 CHAIRMAN COWGER: If they are through. Oh,
14 sorry, go ahead.

15 MR. SLOAN: Looking back on this job with
16 S and L, the problem with the French drain was the only
17 thing that they contested. Their position on that was
18 the French drain was almost double. That's why they
19 wanted to enter into a supplemental agreement on the
20 French drain part.

21 I know that doesn't probably fall in the category
22 for the total drainage, but just to clarify what their
23 position was and why they didn't finish, that was their
24 position on it.

25 We tried every way we could to get them to do it.

1 As Kathy said, we tried to get them to finish up the
2 other stuff, as far as the mitered ends and all that
3 stuff up and down the job. You can only do so much
4 with people when they're not performing, especially in
5 that situation.

6 CHAIRMAN COWGER: Briefly, what did the French
7 drain consist of?

8 MR. SLOAN: Originally there were three boxes
9 with, I think, a hundred and something feet of pipe.

10 MR. TILLER: 142, I believe.

11 CHAIRMAN COWGER: The French drain --

12 MR. SLOAN: It's a slotted pipe.

13 CHAIRMAN COWGER: It's recharging the
14 groundwater, not accepting the water?

15 MR. SLOAN: These were large pipe that go under
16 the road, large slotted pipe with three boxes and
17 without the pipe.

18 CHAIRMAN COWGER: Just wanted to make sure we
19 were working on the right terminology.

20 MR. SLOAN: They did put the cross drain under
21 the road, but we couldn't get them to finish the other
22 stuff.

23 CHAIRMAN COWGER: Is that it? Now we will let
24 DOT have some time. Somebody wanted to say something.

25 MR. ROEBUCK: I was going to ask some questions.

1 Did you have a paid pipe supply for S and L?

2 MR. SLOAN: I ended up buying some.

3 MS. SLOAN: They had no credit whatsoever. We
4 did not know they didn't have the pipe ordered.

5 MR. SLOAN: To bid for DBE, you don't have to
6 show performance. You just fill out the paperwork.

7 MS. SLOAN: You just get the paperwork approved.
8 You don't have to show performance.

9 MR. McCRARY: One thing I would like to point
10 out, the DBE contractor, S and L, they probably didn't
11 meet the utilization goal they were scheduled to, but
12 they actually met the 2 percent goal of the contract.
13 So 2 percent of the contract amount would have been
14 about \$58,180. I believe they actually performed
15 \$53,000 worth of work.

16 MS. SLOAN: It took them long enough.

17 CHAIRMAN COWGER: Is that right? They met the 2
18 percent goal as far as the amount of work they actually
19 completed, but they didn't complete their subcontract.
20 Is that basically what it amounts to?

21 MS. SLOAN: Yes.

22 MR. ROEBUCK: And they had to pay somebody to
23 come in and clean it up for them.

24 MR. BENAK: I can tell you normally on the jobs
25 we do in District 3, if the contractors desire to

1 remove a DBE from the contract, they have to go through
2 what we call a good-faith effort. They have to contact
3 other DBE subcontractors. We work with them. If they
4 really want to remove that subcontractor or employee,
5 as the contract says, they have that right to do so.
6 We work with them.

7 You know, at times we don't hire DBEs back. It
8 depends, you know, on what we have to do out on the
9 job. It's up to the contractor to initiate that and
10 get it done in a timely manner.

11 MS. SLOAN: I might say that we did follow those
12 procedures. We looked for another DBE. We looked for
13 a black DBE. We looked for any DBE. We had total
14 communication with DOT on it, but you do have to show
15 nonperformance by the DBE in order to get cooperation
16 with the State.

17 They admit we had a problem. It's just how big
18 of a problem was it. And they gave us no consideration
19 for it.

20 CHAIRMAN COWGER: Comes down to whose risk is
21 this, what it amounts to, is it strictly the
22 contractor's risk or does DOT have any responsibility.
23 That's what it really comes down to.

24 MR. DEYO: I have a question on the 2 percent.
25 Is it your contention that the S and L folks had

1 actually done -- satisfied the 2 percent requirement so
2 that the remaining work on that subcontract could have
3 been performed by the prime or another sub if they had
4 gotten it approved? It did not have to be a DBE sub at
5 that point?

6 MR. MCCRARY: The contract requirements was 2
7 percent, 2 percent for the black DBE. That was the
8 goal set forth in terms of the contract.

9 The contract amount was \$2,509,000. And 2
10 percent of that amount would have been \$50,180. As
11 Ms. Sloan just stated, the work completed by S & L
12 Construction, before they were removed from the
13 project, was \$53,689.

14 So they, in effect, did complete the 2 percent
15 requirement for the DBE black contractor.

16 MR. DEYO: The prime contractor met the DBE goal
17 as set forth in the contract.

18 MR. MCCRARY: That's the way it appears to us
19 from this information.

20 CHAIRMAN COWGER: Is this not kind of after the
21 fact, though, but during the time the contractor was
22 going through this problem trying to replace the DBE
23 subcontractor was or was not there any discussion
24 about, well, you've already met the goal?

25 MR. MCCRARY: I don't have any information on

1 that.

2 CHAIRMAN COWGER: I think what it comes down to
3 is you are justifying why you ultimately allowed a
4 non-DBE to come in and finish the drainage work, that
5 you had really met the goal as far as DOT is concerned.

6 MR. BENAK: We are analyzing this as we get the
7 information right here now. That's an observation we
8 are making.

9 MR. ROEBUCK: In many instances you have to waive
10 that requirement of the job.

11 MR. BENAK: In many instances they make a good
12 faith effort or they can't do the work or abandon the
13 job, and then we will say, well, we've got three
14 subcontractors here, we want to use this one, and we
15 will say, yeah, go ahead and use them.

16 CHAIRMAN COWGER: Okay. Somebody over here on
17 the contractor's side has something to say about all
18 this?

19 MR. HUGGART: I'm with Baxter's Asphalt. I am
20 Jim Huggart. I met with Dalton Carter in Chipley after
21 the decision had been reached by our firm, and Metric
22 Engineering had concurred, and DOT was in favor of
23 discussing the removal of S and L as a subcontractor.

24 In meeting with Mr. Carter that day, he was
25 discussing with me what we needed to do as far as

1 paperwork and all the documentation that was going to
2 be required to be able to do this. We had never done
3 it before.

4 I was concerned because it was a DBE. We had
5 entered into a contract with the man. DOT approved it,
6 so forth and so on.

7 He reminded me that we needed to document
8 everything we were doing so that there could be no
9 misunderstanding or mistake, or it could be
10 misunderstood by anybody of why we were removing this
11 firm from the job. That we also needed to get out and
12 actively solicit and continue our solicitation for
13 DBEs, be it black or anything, to try to complete this
14 drainage work.

15 Now based on that conversation, we went further.
16 I think there's one letter in the file, the only one we
17 could even find was from Coastal Materials, that would
18 even consider quoting the job. They didn't want any
19 part of it at that time because of their work load.

20 Consequently, we ended up with Churchwell to do
21 the job, just to get us out of there.

22 It was involved. Nobody mentioned to me at the
23 time -- first time I had ever done it -- nobody
24 mentioned to me at the time to say, hey, S & L
25 Construction has fulfilled their contract as far as the

1 State is concerned. The way I was looking at it, they
2 hadn't fulfilled their contract.

3 What we had on paper filed with the DOT was the
4 exact amount of that subcontract, not necessarily 2
5 percent of it.

6 Now, I know things can be changed, but I've also
7 gone through some compliance reviews and even been
8 taken to task several times on previous jobs where
9 compliance officers would come in and say, well, why
10 didn't this DBE subcontractor get paid for this or
11 this. The reason they didn't get paid for it was the
12 quantity was changed. We didn't get paid for it.

13 They are looking for anything that is different
14 from that subcontract.

15 So, we didn't even discuss this with Mr. Carter.

16 MR. BENAK: That's the same thing we talked about
17 earlier, the quantity of the overruns. What we were
18 trying to do was get a few more quantities for the work
19 that was being done. That was all in compliance with
20 the DBE.

21 You have an analysis at the end where you go
22 through, why didn't they reach this goal. Well, they
23 didn't reach this goal because there was an underrun of
24 this material, there was an underrun of this, this.
25 They didn't reach their goal. It's explainable.

1 This is just going the other way, you have an
2 overrun of the same work that was being done.

3 MR. DEYO: It was within the 5 percent limitation
4 that you had --

5 MR. BENAK: Yes.

6 CHAIRMAN COWGER: Was the character of the work
7 any different, the work added? I think you added some
8 inlets and some French drains. Was the character of
9 that work any different from the work shown in the
10 original plans?

11 MR. SLOAN: All the French drains were
12 considerably different than the other drains on the
13 job, considering the size of the pipe and where they
14 were working around the Sprint cables, the gas lines.
15 That was a little bit different than putting in side
16 drains with mitered ends.

17 CHAIRMAN COWGER: Wait a minute, now.

18 MS. SLOAN: There was also a length, a period of
19 time in the month of May where DOT could not tell us
20 what type to order. We had to wait until the 30th of
21 May in order to even know what to order.

22 CHAIRMAN COWGER: The type of pipe, is that what
23 we are talking about?

24 MR. HUGGART: No, what it was, it was the invert
25 grade elevations on some of the inlets as far as to

1 make sure that the project as it was being modified was
2 going to drain properly.

3 I think they had a meeting down there on May 30,
4 Metric Engineer's office, and all of this was finally
5 ironed out, so that the inlet boxes could be ordered
6 correctly.

7 MS. SLOAN: I did not bring this out in that
8 claim summary because that would include the time frame
9 that we were being held up with the subcontractor.

10 MR. HUGGART: S & L Construction was very -- from
11 inception when he was first advised about the
12 additional work that was going to be done on the job,
13 he was never receptive to it at all. We continued to
14 encourage him to try to be receptive.

15 The last word that we thought it was operating
16 under was I don't want to do the work at this price,
17 I'm losing money and so forth and so on. DOT should
18 have designed the job differently.

19 These were all his excuses. We understand
20 contract overruns. This was kind of hard for us to
21 understand because it wasn't a big part of the job, but
22 it was a big part of this little guy's work.

23 As Mr. Sloan pointed out, it did occur in a very
24 critical, delicate area of the project. It was more
25 than just simple cross drain or side drain

1 construction.

2 Anyway, we were operating under the opinion that
3 what he was going to do, he was going to proceed on
4 with it, even though he was resistant to the idea, and
5 since we weren't going to get any more money, we would
6 file a claim at the end of the job and sit down and
7 hash it out.

8 Now, that's the procedure we were continuing to
9 work with the man on. Then at the very last, when it's
10 almost time to come down and put the structures in
11 place, he just completely refuses and balks. No way,
12 he's not going to do it for any price anymore.

13 So, that's pretty much what we were left with.

14 CHAIRMAN COWGER: I have a couple more questions,
15 but I want to make sure everybody has had their say on
16 what we've talked about.

17 MR. BENAK: These are regular items out of the
18 contract that it overran.

19 CHAIRMAN COWGER: I got a little confused on
20 something David said there, talking about the character
21 of the work. The inlets, there was a price for them in
22 the contract. They were essentially the same as the
23 ones -- the added ones were essentially the same as the
24 ones in the contract?

25 MS. SLOAN: That's right.

1 CHAIRMAN COWGER: On the French drain, was there
2 not a bid item for the identical size and type of
3 French drain that was added? In other words, you just
4 had an overrun?

5 MR. TILLER: Right.

6 CHAIRMAN COWGER: What he's saying, though, they
7 were in a location -- I think I heard him say they were
8 in a location where they were more difficult to
9 install.

10 MR. SLOAN: Because of the -- they are a lot
11 larger than the side drain pipes throughout the job.
12 Where they were having to put it, there was a gas line
13 right downtown in Mexico Beach, gas lines, telephone
14 lines, cables. So, that part of it was what made the
15 difference.

16 Now like I said before, his problem with that was
17 the French drain was almost double, that part of it.
18 That's why he felt like he should get more money, you
19 know, through a supplemental agreement. I guess that's
20 why he balked and wouldn't finish.

21 CHAIRMAN COWGER: There was clearly an item in
22 the contract for the slotted pipe with the crushed
23 stone and filter fabric and all, whatever, around it?

24 MR. SLOAN: Yes.

25 MS. SLOAN: May I make a statement?

1 CHAIRMAN COWGER: Sure.

2 MS. SLOAN: Ironically, the amount of money that
3 S and L requested for the additional work is almost the
4 amount of money that we're asking for in our claim from
5 Churchwell.

6 MR. SLOAN: That's what he charged.

7 MS. SLOAN: The difference in what we had to pay
8 Churchwell. SL obviously made a serious mistake when
9 they bid their work.

10 CHAIRMAN COWGER: Let's go to, I guess it's part
11 of Exhibit 1, the April 15, 1998 letter from Baxter to
12 Metric Engineering, where they originally detailed
13 their claim. Let's go to page six of that letter --
14 excuse me, page five. I want to make sure we
15 understand how this additional expense was derived.

16 Starting there in the middle of the page we have
17 install seven inch, et cetera, at \$2500 each. Now,
18 that \$2500 is just the price -- I'm not sure what that
19 is. What is the \$2500 including? Is that furnish and
20 install?

21 MR. HUGGART: No, that's just the installation,
22 the labor for putting the boxes in.

23 CHAIRMAN COWGER: Install only. Okay. Does the
24 same thing apply then to the drainpipe?

25 MR. HUGGART: Yes, sir.

1 MR. DEYO: It's just the labor.

2 MR. HUGGART: We had furnished all of the
3 materials. Not to get ahead of it, but you can see
4 there --

5 CHAIRMAN COWGER: Down under materials, this is
6 strictly materials, as it says?

7 MR. HUGGART: Yes. That's the drain boxes and
8 the French drainpipe.

9 CHAIRMAN COWGER: Okay. What about the aggregate
10 and the filter cloth and all that that is part of the
11 French drain? That's not included anywhere in here?

12 MR. HUGGART: No, sir. Churchwell had furnished
13 that under his miscellaneous installation price.
14 I think he calls it consumable materials or something
15 of that nature.

16 CHAIRMAN COWGER: Then go on to page six where we
17 talk about the deducts, but we have a total labor and
18 materials of \$55,000 plus. Then we are taking off some
19 things, inlets and drainpipe. I assume that those
20 prices in there are the unit prices that are bid?

21 MR. HUGGART: Yes, sir, that's correct.

22 CHAIRMAN COWGER: From that we end up with the
23 35,369. The only documentation that we have in your
24 package is invoices for the materials, is that correct?

25 MR. HUGGART: No, sir. There's invoices for the

1 materials, there's a statement there from Churchwell.

2 CHAIRMAN COWGER: I've got that now. It's a
3 quote from them.

4 MR. HUGGART: I did not include a copy of the DOT
5 estimate number 10, which gives you the deduct prices.

6 CHAIRMAN COWGER: That's okay. We understand
7 that. We can accept what you've got there, I think,
8 unless DOT has got some reason to rebut those unit
9 prices or anything.

10 MR. HUGGART: The document there, document D from
11 Churchwell, that's the billing after they had completed
12 the job.

13 CHAIRMAN COWGER: Are we talking now about the --
14 okay, that's the letter from Churchwell, September 13,
15 1995.

16 MR. HUGGART: Yes, sir.

17 CHAIRMAN COWGER: Billing for a hundred percent
18 completion.

19 MR. HUGGART: Yes.

20 MS. SLOAN: So, we paid Churchwell, then we paid
21 for the materials.

22 CHAIRMAN COWGER: I've got that. I know that
23 DOT's position is that this is all the contractor's
24 risk and you don't have any responsibility at all.

25 Just as a hypothetical for the moment, what do

1 you have to say about the reasonableness of this
2 expense; in particular, the \$55,000 that they're
3 claiming that it cost them to do the additional work?
4 Is that all we are talking about here?

5 MR. BENAK: We analyzed it at statewide average
6 prices? I don't think we've done that. No, we haven't
7 done that. We haven't looked at the reasonableness of
8 these prices.

9 CHAIRMAN COWGER: Okay. Do either one of the
10 Board members have any further concern about this one
11 issue that we are talking about here? Okay.

12 MR. BENAK: One other point I would like to make,
13 and I think Julian already went over it, is that this
14 work that was being done is not a total delay to the
15 contract. I noticed you all were writing dates down,
16 acting like this is going to be a total delay to the
17 contract.

18 The contractor was doing other work during this
19 period. Julian's submittal -- when they started this
20 work, they were doing friction course. So, what I'm
21 saying is that there is other controlling items that
22 were going on. This was a noncontrolling item on the
23 job.

24 MS. SLOAN: However, there were not controlling
25 items going on for the entire 157 days that this DBE

1 was on the project.

2 MR. BENAK: You talk about overlap of work. This
3 work could have been done any time during the life of
4 the contract while they're doing their other
5 controlling items that are going on on the project.
6 You know, just by the dates they started this work, you
7 know, we even let it go over when they were doing
8 friction course.

9 CHAIRMAN COWGER: Okay.

10 MR. SLOAN: We wish it had been done earlier.

11 CHAIRMAN COWGER: Was this a curb and gutter job
12 or roadway type typical section basically?

13 MR. SLOAN: Roadway.

14 CHAIRMAN COWGER: The French drain and the
15 additional inlets were remote from the pavement to some
16 degree?

17 MR. SLOAN: They were about seven foot off the
18 edge of the pavement.

19 CHAIRMAN COWGER: Could you have done all of the
20 roadway work as far as the -- the pavement work as far
21 as base and paving and all --

22 MR. SLOAN: No, sir.

23 CHAIRMAN COWGER: -- and done this work later?

24 MR. SLOAN: Not according to the contract. They
25 said you are supposed to have all your structural work

1 done before you do the friction course, if you read the
2 notes in the contract.

3 CHAIRMAN COWGER: But you could have done the
4 other asphalt work?

5 MR. SLOAN: We did.

6 MR. BENAK: There was 15 miles available to them.
7 It goes through Tyndall Air Force Base.

8 CHAIRMAN COWGER: Fifteen miles?

9 MR. BENAK: 15.7 miles long.

10 CHAIRMAN COWGER: Okay. That answers that
11 question. Does either party have anything further that
12 they want to say about the issues that were -- that we
13 have discussed up to this point? We are getting ready
14 to close out now.

15 MS. SLOAN: May I bring up one thing. I would
16 like to ask the Board to consider -- I don't know how
17 much you would allow us on our claim for the minority
18 subcontractor.

19 I would like you to consider also the fact that
20 I feel we are due some interest on money that was
21 withheld from our contract. For one thing, they
22 withheld double liquidated damages on us for quite a
23 while. We had to go to the Secretary of Transportation
24 to get that straightened out. They were supposed to
25 have paid us some interest, but they did not. That's

1 in the claim of April 15th.

2 I couldn't add the interest on our claim that was
3 submitted to the Board formally because our claim would
4 have run over the \$250,000.

5 CHAIRMAN COWGER: It was in the original claim,
6 though?

7 MS. SLOAN: Yes, sir.

8 MR. DEYO: I have a question on it, since you
9 brought that up again. In their original claim, Baxter
10 references April 15, 1998 submittal that was sent
11 return receipt? You did receive that? It's never
12 acknowledged in any of your documentation. But you do
13 have that?

14 MR. BENAK: Yes, sir.

15 MS. SLOAN: They didn't respond to it.

16 MR. DEYO: No response was ever sent to Baxter
17 from FDOT?

18 MS. SLOAN: There was no response until we got
19 the rebuttal from the arbitration file. That's why
20 some of the items were removed. Once we went through
21 the rebuttal, we agreed then with some of the issues.

22 MR. DEYO: On DOT's side, other than the return
23 receipt, they had no response from DOT on these issues?

24 MR. BENAK: I think we addressed this through the
25 time extension. We were trying to settle the claim.

1 MS. SLOAN: You had not addressed the interest on
2 the liquidated damages or interest on any other items.

3 MR. DEYO: You just considered that the time
4 issue had been addressed in previous correspondence
5 where you are talking about the 24 days or whatever,
6 the weather days?

7 MR. BENAK: We submitted --

8 MR. HINSON: There was some days offered that she
9 had mentioned previously. The only reason she didn't
10 accept them she said was because there were other
11 issues that she would have had to accept, also. So as
12 far as there was some time offered --

13 MS. SLOAN: They make you sign off on it now and
14 give up your rights to any other claims.

15 CHAIRMAN COWGER: Does that include monetary
16 claims or claims for additional time?

17 MR. BENAK: All claims.

18 CHAIRMAN COWGER: So, just to make sure
19 I understand what was just said, when you grant a
20 request for time extension, you have the contractor
21 countersign the letter, and in there they must agree
22 that that settles all issues?

23 MS. SLOAN: That's right.

24 CHAIRMAN COWGER: All claims regarding these
25 issues.

1 MR. DEYO: Pertaining to those issues.

2 MS. SLOAN: That's why we did not accept those
3 days. They don't automatically give them to you.

4 CHAIRMAN COWGER: Okay. Anything else?

5 MR. ROEBUCK: A question of Ms. Sloan. The 80
6 days that you say this pipe work should have been
7 completed in your letter, was that confirmed by S and L
8 and did everybody sign off on that, and did you turn
9 that in? Is that what he showed?

10 MS. SLOAN: Isn't that what he turned in to you?

11 MR. HUGGART: Yes.

12 MR. ROEBUCK: Those 97 days that it overran, you
13 got impacted by it?

14 MS. SLOAN: Yes, sir. It was more than 97.

15 I can only ask for 97.

16 CHAIRMAN COWGER: What she did was cut her claim
17 back to keep it within the \$250,000.

18 MS. SLOAN: I didn't want to bother to go through
19 the court process.

20 MR. BENAK: One point, there's not a CPM on this
21 project, it's just a chart. This was submitted by
22 Mr. Huggart. I don't know if he incorporated any
23 schedule from the subcontractor or not.

24 MS. SLOAN: Well, you signed off on it.

25 MR. BENAK: Uh-huh.

1 MR. HUGGART: I wouldn't commit anything, Steve,
2 that they hadn't approved of because they are going to
3 do the work.

4 CHAIRMAN COWGER: Okay. Mr. Roebuck, do you have
5 any further questions?

6 MR. ROEBUCK: No.

7 CHAIRMAN COWGER: Mr. Deyo?

8 MR. DEYO: No.

9 CHAIRMAN COWGER: This hearing is closed. The
10 Board will meet to deliberate on this claim on
11 August 11, 1999, and you will have our final order
12 shortly thereafter.

13 (Whereupon, the hearing was concluded at 12:45 p.m.)

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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 30th day of June, 1999.


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