

# STATE ARBITRATION BOARD

ORDER NO. 7-99

## /// NOTICE ///

In the case of Gator Asphalt Paving, Inc. for Sentry Barricades, a Subcontractor versus the Florida Department of Transportation on Project Nos. 13075-3429 & 13075-3430 in Manatee County, Florida, both parties are advised that State Arbitration Board Order No. 7-99 has been properly filed with the Clerk of the State Arbitration Board on October 26, 1999.



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

S.A.B. CLERK

OCT 26 1999

**FILED**

Copy of Order & Transcript to:

Greg Xanders, P. E., State Construction Engineer

Charles A. Walker, Project Manager  
Gator Asphalt Paving, Inc.

Copy of Order to:

F. Alan Cummings, Esquire, Cummings & Snyder, P. A.  
Attorney for Hypower, Inc.

# STATE ARBITRATION BOARD

ORDER NO. 7-99

RE: Request for Arbitration by  
Gator Asphalt Paving, Inc. for Sentry Barricades (A Subcontractor)  
Job Nos. 13075-3429 and 13075-3430 in  
Manatee County

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

H. Eugene Cowger, P.E., Chairman

Bill Albaugh, P. E., Member

John Roebuck, Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 10:15 a.m. on Wednesday, September 29, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 7-99 in this cause..

## ORDER

Gator Asphalt Paving, Inc. authorized Sentry Barricades, a Maintenance of Traffic Subcontractor on these projects, to act as their agent in pursuing claims arising out the work subcontracted to Sentry Barricades.

Sentrty Barricades presented a request for arbitration of a claim in the total amount of \$93,379.21 as compensation for additional costs they alleged to have incurred, due to a substantial increase in utilization of Variable Message Signs on the work ordered by the Department of Transportation during the life of the contract.

The Board received a letter dated September 3, 1999 from P. Gregory Jones, DOT Assistant General Counsel requesting that the Board direct the Contractor's attorney to provide a writing to the Department attorneys five business days prior to the hearing setting forth the

claimant's legal issues, if any, to be raised at the hearing and any case law relied upon in asserting these positions. After considering the reasoning contained in Mr. Gregory's letter, the Board determined that, in view of the nature of arbitration proceedings, it is not appropriate to direct the Contractor's attorney as requested and so advised Mr. Jones by letter dated September 10, 1999.

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

- a) The Traffic Control Plan included in the original plans called for use of two Variable Message Signs (VMS) and one Highway Advisory Radio during each phase of construction.
- b) In preparing our quoted unit price for the Variable Message Signs, we anticipated using two VMSs that we acquired from another contractor at a price that was substantially less than the current price for new VMSs. The other VMSs we owned were committed to other projects where we were providing construction traffic control.
- c) At the beginning of construction, the Department decided to delete the Highway Advisory Radios from the work and revised the Traffic Control Plan to minimize inconvenience to the traveling public during construction. In conjunction with these changes, they increased the number of Variable Message Signs to be utilized at any one time from two to as many as nine. Some of the messages displayed on additional VMSs could have been conveyed just as well with fixed message signs. We objected to the increase in the number of VMSs at that time. We consider this to be a promiscuous over-use of Variable Message signs and are of the opinion that the Department increased utilization of VMSs to take advantage of the low price bid for these units.
- d) The substantial increase in the required number VMSs forced us to acquire four additional VMSs at much higher price than the two we purchased for use on these projects and at times to rent additional VMSs at \$50.00 per day. This was a substantial capital investment for our small firm, thereby, reducing our borrowing capacity. These dollars will produce more revenue flow if

they had been invested in other types of traffic control devices. We had no foreseeable need for the additional VMSs we were forced to purchase after these projects were completed.

e) It is our position that the changes to the Traffic Control Plan made by the Department changed the overall character of the work involved in furnishing VMSs on these projects and we are entitled to compensation for the additional costs we incurred due to the substantial increase the numbers of VMS. We are claiming additional compensation to reimburse us for the actual cost we incurred in furnishing the increased number of VMSs. The unit price per each per day for the additional VMSs is based on the average of unit prices bid for these units on other Department projects where we furnished construction traffic control during 1996, 1997 and the first half of 1998.

We consider this to be a fairness issue.

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

On September 20, 1999, the Department's attorney submitted a written rebuttal of the claim to the Board with a copy to the Contractor. The rebuttal addressed several legal issues concerning interpretation of the contract and the subcontract between Gator Asphalt Paving and Sentry Barricades. The Board considered the legal issues raised by the Department's attorney in light of the quasi-legal nature of arbitration proceedings. This rebuttal also contained a factual synopsis of the circumstances involving the claim including reference to Articles 1-24 and 4-3.2.1 of the Departments Standard Specifications which are applicable to the contract as these Articles relate to significant changes in the character of work.

a) We do not consider this to be an issue of fairness, but instead a matter of interpretation of the provisions of the contract.

b) Subarticle 4-3.2.1 of the Standard Specifications allows the Department to make changes in quantities as necessary to satisfactorily complete the work. It, also, provides for an adjustment in

payment resulting from a changes to the work by the Department only if such changes result in a significant change in the character of the work. The changes made do not constitute a "significant change" as defined in this Subarticle. The changes did not materially alter the nature of the work paid for under the item Sign Variable Message (Temporary) nor result in an increase in the quantity for a major item of work. exceeding 125%. The bid item was not a major item of work as defined in Subarticle 1-24.

- c) We revised the traffic control plan to remove public dissatisfaction with lane closures that had occurred on previous jobs. We added VMSs to comply with Federal Aid Requirements and on major feeder routes and cross streets to notify the public in advance of construction hazards. Price was not a consideration. VMSs get the attention of a driver better than fixed message signs. At the same time we eliminated the Highway Advisory Radio unit, because these units had not performed satisfactorily in the vicinity.
- d) Sentry Barricades exaggerated its alleged price for the item Sign Variable Message (Temporary).

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

- a) After bids were received for the projects from which this claim arose, the Department made a substantial change in the plan traffic control details. This was done to correct the traffic control plan based on problems that had been encountered on earlier I-75 jobs which had traffic control plans similar to the one originally shown in the plans for the projects being considered here. Changes included adding VMSs on the mainline and on cross roads. There was no way a bidder could have anticipated these changes.
- b) The unit price bid for the item Sign Variable Message (Temporary) was considerably less than the typical unit price for this item.

c) It was reasonable for Sentry Barricades, in preparing their quotation to Gator Asphalt Paving, to conclude that only two or three VMSs would be required on these projects.

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 in the amount of \$ 25,000.00 for their claim.

The Board wishes to point out that their decision in regard to the matter before it in this instance is based on the particular circumstances that occurred on these projects. During construction, the Department substantially revised the character of the overall work shown in the Traffic Control Plan.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 344.50 for Court Reporting Costs.

S.A.B. CLERK

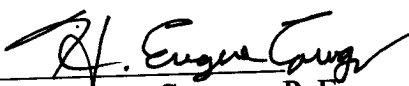
OCT 26 1999

**FILED**

Tallahassee, Florida

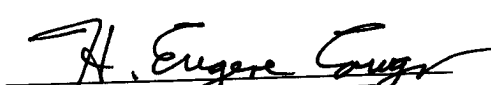
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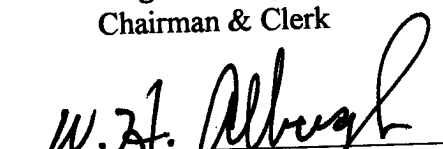
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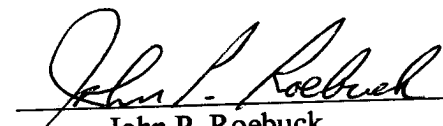
  
H. Eugene Cowger, P. E.  
Chairman & Clerk SAB

10/26/99

DATE

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

  
Bill Albaugh, P. E.  
Alternate Member

  
John P. Roebuck  
Member

STATE ARBITRATION BOARD  
STATE OF FLORIDA

S.A.B. CLERK

OCT 26 1999

GATOR ASPHALT PAVING, INC. )  
for Sentry Barricades, )  
subcontractor )

**FILED**

- and - )

PROJECT NO. 13075-3429 &  
13075-3430

LOCATION: Manatee County,  
Florida

DEPARTMENT OF TRANSPORTATION )

**ORIGINAL**

RE: Arbitration In The Above Matter

DATE: Wednesday, September 29, 1999

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

TIME: Commenced at 10:15 a.m.  
Concluded at 11:40 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 Albaugh

APPEARING ON BEHALF OF GATOR ASPHALT PAVING, INC.:

Ms. Connie Hubbard  
 Mr. Robert Schindler  
 Al Cummings, Esquire

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Bob Wade  
 Mr. Kelly Lamendola  
 Mr. Chut Conklin  
 Gregory Jones, Esquire  
 Mr. Ricky Langley

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I N D E X

EXHIBITS	PAGE
Exhibit No. 1 received in evidence	4
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Exhibit No. 4 received in evidence	5
Exhibit No. 5 received in evidence	11

CERTIFICATE OF REPORTER

65



P R O C E E D I N G S

CHAIRMAN COWGER: This is a hearing of the State Arbitration 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. Deyo could not be present today, so Mr. Bill Albaugh, the alternate member appointed by the Secretary, as provided in the law, is serving for this session of the Board. We have two hearings today, and he will be sitting in on both of them.

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

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

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

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

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN COWGER: The request for arbitration of the claim submitted by the claimant, including all attachments thereto and the administrative documents

1 preceding the hearing are hereby introduced as  
2 Exhibit 1.

3 (Whereupon, Exhibit No. 1 was received in evidence.)

4 CHAIRMAN COWGER: We will also introduce as  
5 Exhibit 2 a notebook submitted by the Department of  
6 Transportation.

7 MR. JONES: Excuse me, the Department has a  
8 modification to that that I would like to submit to the  
9 Board.

10 CHAIRMAN COWGER: We will look at the  
11 modification in a moment and determine whether we will  
12 accept it, depending on what you put in.

13 Anyway, Exhibit 2 will be the original rebuttal  
14 statement made by DOT, which is contained in a black  
15 notebook.

16 (Whereupon, Exhibit No. 2 was received in evidence.)

17 CHAIRMAN COWGER: We also have from DOT, and we  
18 will make that Exhibit 3, a fax with some attachments  
19 that amends the exhibit list that was included in  
20 Exhibit 2. Am I correct in that?

21 MR. JONES: It was an amended exhibit and witness  
22 list.

23 (Whereupon, Exhibit No. 3 was received in evidence.)

24 CHAIRMAN COWGER: Now, does either other party  
25 have any other information they wish to put into the

1 record as an exhibit? We are not looking for the plans  
2 or contracts or anything voluminous, but just something  
3 that you can pass around.

4 MR. SCHINDLER: This is the original plans.

5 MS. HUBBARD: This is what we did our estimates  
6 from.

7 CHAIRMAN COWGER: Do you have more than one set  
8 of those?

9 MS. HUBBARD: Yes.

10 CHAIRMAN COWGER: Let's mark that as Exhibit 4.  
11 We may at some point want to refer to those. If you  
12 would, pass them out. Identify the copy you keep as  
13 Exhibit 4, if you will, and if the board members and  
14 DOT will identify their copies.

15 (Whereupon, Exhibit No. 4 was received in evidence.)

16 CHAIRMAN COWGER: Is there anything else that we  
17 need to have submitted? You mentioned that you had  
18 some additional submittals?

19 MR. JONES: On behalf of the Department of  
20 Transportation, I have an amended presentation. I've  
21 already provided Mr. Albaugh with a copy of that.  
22 I have a copy here for Mr. Roebuck, and I have an  
23 original copy in a notebook form tabbed for the  
24 Chairman, which we would like to have submitted.

25 What I have done is I've put together all the

1 requests for claim, the notice of hearing, and  
2 correspondence that has been submitted in this  
3 proceeding, plus the various pleadings that I have  
4 filed, the witness and exhibit list. The witness and  
5 amended exhibit lists, our presentations, objections  
6 and our request for underlying data have been attached  
7 with Exhibits A through K.

8 Then I have the evidence that was previously  
9 submitted also presented in the same format and also  
10 numbered consecutively 1 through 19.

11 This includes the additional exhibits of 16, 17  
12 and 18, which were the items that were set forth in the  
13 amended witness and exhibit list previously submitted.

14 Exhibit 19 is an excerpt from our presentation  
15 which is the factual synopsis, which I have extracted  
16 from that what I believe to be all items that might be  
17 argumentative that set forth primarily just a factual  
18 synopsis of what happened in this case, to facilitate  
19 the presentation of evidence.

20 If that's accepted as an exhibit in this case,  
21 then that may facilitate movement of the proceedings  
22 along instead of having to cover each one of these  
23 items with direct testimony.

24 Also, I have included now in this document,  
25 Exhibit 15, which was previously identified in our

1 original exhibit list as being documents pertaining to  
2 various subcontracts that Sentry may have been a party  
3 to with regard to DOT.

4 The delay in presenting this was based on the  
5 fact that there was such a short time from the filing  
6 of this arbitration until this hearing, and we had to  
7 research extensive records to find this information,  
8 and we only recently got it within the last day or two.

9 I've made copies. I presented a copy of this  
10 earlier, this entire package earlier today to  
11 Mr. Schindler while we were waiting for the Board to be  
12 able to convene.

13 I would like to have this marked as a part of the  
14 proceedings at a minimum, and I would request that the  
15 Exhibits 1 through 19 be admitted into evidence.

16 CHAIRMAN COWGER: What was the one that had the  
17 synopsis? What exhibit was that?

18 MR. JONES: That was Exhibit 19. What I tried to  
19 do that, it's an excerpt of the original presentation,  
20 taking out any item paragraphs that might be considered  
21 argumentative and trying to present a factual  
22 progression of developments in this case that we might  
23 be able to use as evidence to move this case along  
24 without having to have my client go over each one of  
25 those individual paragraphs.

1 CHAIRMAN COWGER: First off, we are not going to  
2 let that happen anyway. We don't want you to get into  
3 that much detail in the testimony. We want the essence  
4 of the dispute. I will get into that in a minute.

5 The contractor only, as I understand it, this  
6 morning got a copy of this book?

7 MR. JONES: No, no. The only thing -- I gave him  
8 a copy of that book this morning. The only thing that  
9 is new in there is Exhibit 19 and Exhibit 15.

10 Exhibit 19 is an extract of the prior  
11 presentation. It was timely submitted. Exhibit 15 are  
12 computer printouts showing prior projects in which  
13 Sentry has apparently alleged that they were a  
14 subcontractor providing message signs. That's used to  
15 substantiate our argument with regard to what a fair  
16 rental value of the units were.

17 CHAIRMAN COWGER: On Exhibit 15, just a real  
18 quick question, does this include only the projects  
19 that Sentry listed, or are there additional projects  
20 that they were subcontractors on?

21 MR. JONES: I will let Mr. Langley respond to  
22 that because his office researches --

23 MR. LANGLEY: It's both. The pay item history  
24 itself, some are their projects and some are other  
25 projects.

1 CHAIRMAN COWGER: That you are sure they were the  
2 subcontractor for the maintenance of traffic items?

3 MR. LANGLEY: These projects have a pull-out that  
4 show the -- this is the list they had given us. This  
5 is where we pulled our information from.

6 CHAIRMAN COWGER: These are not necessarily jobs  
7 that Sentry was involved in, or are they?

8 MR. LANGLEY: This run sheet, what it is, there  
9 are two parts. The front sheet gives the statewide  
10 averages does include some of their projects and other  
11 projects, other contracts that they were not involved  
12 in.

13 These other sheets are specifically -- are  
14 information specifically from those projects that they  
15 had listed.

16 CHAIRMAN COWGER: Let me see if I can sum it up.  
17 The first sheet is the statewide average listing in  
18 Exhibit 15 for that particular pay item?

19 MR. LANGLEY: That's correct.

20 CHAIRMAN COWGER: The rest of them are bid  
21 tabulations taken out of jobs which illustrate what the  
22 price bid for the variable message signs was on those  
23 jobs?

24 MR. LANGLEY: That's correct, which they were  
25 involved in, supposedly.

1 MR. ROEBUCK: This is the detail for that cover  
2 sheet summary?

3 MR. LANGLEY: No, what it is, you will see in our  
4 presentation when we are making -- we are making two  
5 points here. The first one has to do with statewide  
6 averages themselves. That's what this first sheet is  
7 about, just a listing of projects where the statewide  
8 averages are derived from.

9 These other sheets back here is a listing of all  
10 the items, the contracts which our point is to point  
11 out the quantities and the amounts, for several of the  
12 projects that they had noted in their submittal to us  
13 for the claim.

14 CHAIRMAN COWGER: Okay, it appears to me that  
15 there's nothing new in this notebook that would cause  
16 the contractor to be able to -- not to be able to rebut  
17 anything in it at this point.

18 If the contractor sees that differently, when we  
19 get into the hearing, we would ask that you make a  
20 statement on it, but let's withhold that for a moment.

21 If you think you need time to review what is in  
22 here, we will consider that later on in the hearing.

23 We will proceed and we will accept this as an  
24 exhibit, with the condition that the contractor does  
25 have the right to come back and make a comment strictly



1 on whether anything has been put in here that  
2 blindsides him, shall we say.

3 I don't see it that way, but you may.

4 MR. JONES: I'm sorry, what exhibit number will  
5 that be?

6 CHAIRMAN COWGER: Five.

7 (Whereupon, Exhibit No. 5 was received in evidence.)

8 CHAIRMAN COWGER: Now, that's all we've got to  
9 present, right, in the way of exhibits at this point?  
10 Okay. We just kind of like to get that out of the way  
11 early.

12 During the hearing the parties may offer such  
13 evidence and testimony as is pertinent and material to  
14 the dispute being considered by the Board, and shall  
15 produce such additional evidence as the Board may deem  
16 necessary to an understanding of the matter before it.

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

19 The parties are instructed to ensure that they  
20 receive properly identified copies of each exhibit used  
21 in this proceeding and retain them.

22 The Board will send the parties a copy of the  
23 court reporter's transcript, along with our order, but  
24 we will not furnish exhibits at that time because  
25 you've already got them.

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

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

10          The order of proceedings will be for the claimant  
11 to present their case, and then for the respondent to  
12 offer rebuttal.

13          Either party may interrupt to bring out a  
14 pertinent point by coming through the Chairman. Please  
15 keep it orderly.

16          Since there are attorneys present, and this is  
17 something that has not been the case in many, many past  
18 hearings before this Board -- we've had it a few times,  
19 but only a few -- I want to expand my opening statement  
20 for the benefit of the attorneys present and the  
21 parties.

22          As previously pointed out, the Board intends for  
23 this hearing to be conducted in a less formal manner  
24 than court proceedings.

25          The members of the Board are individuals who are

1 knowledgeable about highway construction work and how  
2 construction contracts are typically administered. We  
3 are not attorneys, therefore, our knowledge of the law  
4 applicable to the case at hand may be limited.

5 We are here to learn about the facts and the  
6 provisions of the contract that are applicable to the  
7 matter before us.

8 Please be assured that the Board will make every  
9 effort to assure that the parties have full opportunity  
10 to offer such evidence as is relevant and material to  
11 the dispute and will require the parties to produce  
12 such evidence as the Board deems necessary to an  
13 understanding and determination of the matter before  
14 it.

15 In some instances the Board may need to hear  
16 applicable legal arguments to guide us in reaching an  
17 equitable decision. However, we will not permit  
18 extensive legal debates during this hearing because  
19 they may be of limited value to the arbitration  
20 proceedings and may overly complicate the process. We  
21 are trying to keep it simple.

22 Attorneys are requested to refrain from  
23 presenting any legal arguments until the end of the  
24 hearing. And after any legal presentations, if the  
25 Board finds that it needs additional details in regard

1 to the case, we will ask the attorneys to present  
2 written legal memorandums to each of the Board members  
3 within ten days after the close of this hearing.

4 We certainly don't anticipate that in this case.  
5 We will have to see how it works out. We kind of feel  
6 like most likely that's not going to be the case where  
7 we are going to have to have statements, legal  
8 memorandums when we finish. I think we will be able to  
9 get enough out on the table to make our decision.

10 Okay, we are ready to proceed then with the  
11 contractor making his statement. Then we will give the  
12 DOT the opportunity to rebut.

13 MR. JONES: Mr. Chairman, one more thing I want  
14 to bring to your attention. I forgot to give these to  
15 you. Pursuant to the memorandum, I have brought the  
16 original contract, which is FDOT's Exhibit 1, which is  
17 incorporated in the manual I gave you.

18 And also pursuant to your Board's request, I also  
19 have a complete copy of the plans, which have been  
20 marked as FDOT Exhibit 14, which is incorporated in the  
21 manual.

22 CHAIRMAN COWGER: You've only got one set of  
23 those?

24 MR. JONES: Right.

25 CHAIRMAN COWGER: As long as we understand that

1 everybody has got a copy of it, and the Board will use  
2 those strictly for reference, most likely during our  
3 deliberations. I appreciate you bringing them.

4 Okay, are we ready to proceed?

5 MR. SCHINDLER: Okay. First off, I'm  
6 Robert Schindler, and I'm pleased to hear this is not  
7 going to be a legalistic situation.

8 MR. ROEBUCK: Do you want to excuse Alan?

9 MR. SCHINDLER: Especially since we didn't even  
10 know how to fill out the forms.

11 MR. CUMMINGS: I can just walk across the street.

12 MR. SCHINDLER: We asked him to help us because  
13 we didn't know how to fill out the forms. We've never  
14 filed a claim in seven years. I asked him to help us  
15 work through the methodology of how this thing is  
16 approached.

17 CHAIRMAN COWGER: For your edification in the  
18 future, we have recently published a rather detailed  
19 set of procedures as to how the Board operates, which  
20 if you ever get into this situation again or any  
21 contractor, and it should give you a lot better  
22 guidance than you've had in the past.

23 I'm not trying to cut Alan out of work.

24 MR. SCHINDLER: Basically we approached this,  
25 I guess, from a legalistic aspect of how -- not the way

1 the presentation is from the DOT, but just a fairness  
2 issue.

3 We originally bid, as we showed on Exhibit B,  
4 this project for I-75 where they were widening the  
5 road. The original plans called for two highway  
6 advisory radios to broadcast safety messages to the  
7 public, which we have.

8 We are the only barricade company in the state  
9 that I'm aware that has radios. We have quite a few of  
10 them, six.

11 In looking at the plans, we see that there are  
12 two radios, and there are two VMBs, plus like a  
13 floating VMB for lane closures.

14 The -- one of the VMBs is tied in to the radio  
15 advertising that the public should turn into a certain  
16 station to listen to the broadcast.

17 Well, subsequent to that the plan was changed.  
18 Of course, the radios that we are thinking we are going  
19 to get \$49,000 from because they are bidding to install  
20 those at \$24,500 apiece.

21 Subsequent to that, the plans were changed and  
22 they were eliminated.

23 CHAIRMAN COWGER: They were changed after the  
24 bid?

25 MR. SCHINDLER: Yes. In addition, we didn't have

1 any excess VMBs at the time, but the day before we  
2 submitted the bid, I acquired two used diesel VMBs from  
3 Superior Paving or somebody at \$6,000 apiece, which is  
4 a fraction of what new ones are.

5 That would enable us to put these inexpensive  
6 VMBs out on this job, and with highway advisory radio  
7 we thought we would make some money.

8 The bottom line is the expensive units were taken  
9 off the job, and to compensate for the expensive unit  
10 being taken off the job -- and since now we can't tell  
11 the public what is going on by radio, now the DOT  
12 decided they wanted to tell them what was going on by  
13 variable message boards.

14 We had bid those variable message boards at very  
15 inexpensive prices because we thought there were only  
16 going to be a couple of them. It turned out that two  
17 and a fraction turned out to be nine.

18 And we immediately objected to the contractor and  
19 said wait a minute, this is not the project we got  
20 involved in here.

21 But they said it was our responsibility under the  
22 contract. We had to supply it or they would go get  
23 them from somebody else and they would back-charge us.  
24 We had no alternative but to figure out a way to get  
25 all the VMBs out there.

1           We went out and leased four of them for somewhat  
2           close to about \$19,000 apiece or \$20,000 apiece,  
3           something like that. It's in the record here, roughly  
4           \$80,000, which for our little company was a big chunk  
5           of money.

6           We stripped a couple from another job on a  
7           temporary basis. As those were needed from time to  
8           time, we also rented them from Bob's Barricades for \$50  
9           apiece.

10          Anyway, the upshot of it was we tied up a  
11          tremendous amount of our borrowing capacity, paying  
12          Bob's Barricades 50 bucks a day when we had to to  
13          provide additional ones for the jobs that we had  
14          stripped, and supplied what the contractor, Gator  
15          needed for this job, to now flash many, many additional  
16          messages, which were originally expected to be done by  
17          radio.

18          In summary then, basically what happened was the  
19          DOT took advantage of a cheap price on VMBs to tell the  
20          public what was happening and got rid of the more  
21          expensive unit, which would have been doing pretty much  
22          the same thing.

23          I've looked through all this legalistic stuff in  
24          this thing that I was given this morning, and it talks  
25          about lots of ways you're supposed to provide evidence



1           and that sort of thing.

2                   I didn't know I was supposed to do all that.

3           I just thought I would submit copies of --

4                   CHAIRMAN COWGER: I will interrupt you and tell  
5           you we don't need to hear about all of that. We can  
6           deal with it as we go on.

7                   MR. SCHINDLER: Anyway, I did the best I could.  
8           I supplied the copies of the invoices where we bought  
9           the stuff and showed that we bought the inexpensive  
10          models. They were bought a day before we submitted the  
11          bid on a flier because we didn't know we were going to  
12          get it.

13                   We kind of figured since we were the ones with  
14          the radios, that would help and we would have a good  
15          shot at getting this done.

16                   We think from a fairness issue we were taken  
17          advantage of. They found that they could accomplish  
18          notifying the public by altering the way they did it,  
19          by taking advantage of an inexpensive price on a  
20          particular unit and exceeding the quantities by 300  
21          percent and eliminated the expensive unit.

22                   If I had taken that same \$80,000 and put it into  
23          barricades and lights at a typical, you know, 29 cents  
24          or 28 cents or something like that per day for this  
25          time period, that would have been \$359,000 of income

1       versus this relatively nominal amount of money we got  
2       for these VMBs.

3               I'm not trying to claim \$359,000, but that's  
4       money we didn't have, frankly, because we're not a big  
5       company.

6               It tied up our borrowing capacity at that point  
7       in time. We were restricted on bidding new jobs  
8       because of how we had to put all this money into these  
9       four units that we had no expectations we would ever  
10      have a need for.

11              We acknowledge that, you know, sometimes jobs  
12      overrun in time and some particular circumstance comes  
13      up where you need something and you didn't have it  
14      before, but we have gone over these plans extensively.  
15      It showed exactly what the wording on the VMBs was  
16      supposed to be, what it was used for, and instead lots  
17      of other things were thrown into that situation, and we  
18      were kind of hung out to dry.

19              We had no alternative but to supply these things,  
20      otherwise Gator would not -- would have gone to some  
21      other barricade company. They would have charged us  
22      back, and that would have been even more expensive to  
23      us.

24              Do you have anything to add?

25              MS. HUBBARD: You should address the average

1 pricing, how we arrived at that.

2 MR. SCHINDLER: The DOT has -- again, there's --  
3 I had included in our -- I think the last page of our  
4 exhibits, I went through and provided the jobs that we  
5 had done involving VMB prices.

6 They included some items which were, as the DOT's  
7 thing that they just showed you, shows there were some  
8 items that were not bid, but the contractor needed  
9 those things after the fact, and came to us to rent  
10 VMBs. We submitted those VMBs on those jobs.

11 I don't know why they wouldn't have that in their  
12 records because surely they would have reimbursed --  
13 the DOT would have reimbursed the contractor when they  
14 paid us. Even though it might have been a bid item,  
15 they should still have that record that they payed for  
16 that.

17 Had I known about that ahead of time, I would  
18 have tried to find out from the contractor how that  
19 worked.

20 MS. HUBBARD: I think those are supplementals.  
21 Those aren't shown here as to what pricing.

22 MR. SCHINDLER: Those aren't submitted on the  
23 thing that they showed that's attached to this booklet.  
24 It just says not a bid item. They weren't bid items,  
25 some of these, but we gave the DOT the numbers to look

1 it up because, you know, to validate -- if we had said  
2 that we got \$44, they could have looked at the  
3 supplemental order.

4 MR. ROEBUCK: It's probably on that list.

5 MS. HUBBARD: No, it's not -- are you talking  
6 about this? It's not in there.

7 MR. SCHINDLER: They just write on this not a bid  
8 item, but it was still done.

9 MS. HUBBARD: It was a State job that was paid  
10 for by State funds. Surely there is a record.

11 CHAIRMAN COWGER: What are we talking about?

12 MR. ROEBUCK: Some of their units that they used  
13 in their --

14 CHAIRMAN COWGER: On other jobs?

15 MR. SCHINDLER: To come up with the average  
16 included some jobs that was not part of the original  
17 bid item but was added after the fact. And the  
18 contractor is saying I need two VMBs, and we supplied  
19 those.

20 Well, in this thing they provided here, they only  
21 provided the bid stuff. I'm not sure. I haven't had a  
22 chance to look at this.

23 CHAIRMAN COWGER: So I can understand, what you  
24 are saying is there are some other jobs that the DOT  
25 does not have, by looking through bid records, where

1       you furnished variable message signs under a  
2       supplemental agreement; therefore, it wouldn't have  
3       shown up in the original bid.

4               Are some of those on the that list that you have  
5       in front of you?

6               MR. SCHINDLER: We listed all the ones we had in  
7       that time frame with the DOT's numbers. They pulled  
8       out the bid numbers, but from what I can see, it  
9       doesn't look like they dealt with the ones that didn't  
10      have it originally bid.

11              If I had known that ahead of time -- I don't  
12      know, I guess we would have gone to the contractor or  
13      somebody and asked for some copies.

14              Anyway, that's how we -- when we came up with the  
15      calculation. So basically that differential between  
16      what we -- the quantity that we thought we were going  
17      to be using on that job and what we actually did use on  
18      that job, and the difference in price between what we  
19      normally would get for those VMBs versus this low price  
20      that we got.

21              Anyway, that's the bottom line of why we thought  
22      we were being treated unfairly. We objected to it at  
23      the beginning as soon as it happened, and we were told  
24      we had to do it.

25              MS. HUBBARD: We objected all the way through.

1 Every time they would order a variable message board  
2 and say why are you putting up a variable message board  
3 when you could put up a sign. You are saying what the  
4 sign says. Why didn't you use a sign.

5 CHAIRMAN COWGER: We want to hear a response to  
6 that from DOT when it is their turn.

7 MR. SCHINDLER: Part of our original thing, we  
8 show that way back in early April we were saying, hey,  
9 wait, this is not legitimate. But we had to do it, so  
10 we did it.

11 CHAIRMAN COWGER: Have you completed your initial  
12 presentation? All right. Without stirring up  
13 Mr. Cummings down there, hopefully, under what part of  
14 the contract do you say that you're due additional  
15 compensation? How do you justify it?

16 Mr. Cummings, you could say if you want.

17 MR. SCHINDLER: I have no idea because I'm not a  
18 lawyer, but it just seems to be a fairness issue. If  
19 we are going to supply something and we make a -- if we  
20 are going to build a road and it was a two-mile road  
21 and the plans call for us to build a sidewalk on one  
22 block, and we just threw a low price in for that  
23 sidewalk, and the DOT comes in and says oh, look at  
24 this cheap price for this sidewalk, let's do the whole  
25 road with a sidewalk, that's unfair.

1           This seems unfair, throw the radios out, put  
2           these cheap VMBs in and all these messages on them,  
3           which wasn't part of the project. And I don't know if  
4           that's legal. I don't know if we are entitled to  
5           anything based on that, but it seems to me to be  
6           unfair.

7           CHAIRMAN COWGER: We understand that.

8           MR. CUMMINGS: If you want me to, I can wait  
9           until the end and tell what you the legal theories are.

10          CHAIRMAN COWGER: I'm interested in the contract,  
11          what part of the contract is this claim being brought  
12          under. That's what the Board is interested in, what  
13          does the contract say.

14          MR. CUMMINGS: When you bring a case for  
15          additional compensation, you don't -- it's not brought  
16          under a particular contract. But if you want to say  
17          why they are entitled to the money as a matter of law,  
18          which is the dovetail with the contract obviously.

19          Gene, it's that, number one, that the Department  
20          is not free, just the same as any other owner is not  
21          free, to get a contract with a lot of prices on it and  
22          then once they're into the contract, pick and choose  
23          between various items and overrun or underrun just  
24          because they like one price better than another price.

25          That is a fundamental principal of law here.

1           They can't do that.

2                   And if the -- the second thing is that estimated  
3           quantities are -- there is a rule of reason that goes  
4           along with the implied amount of aggregate.

5           MR. JONES: Now we are getting into legal  
6           argument. I object to that.

7           CHAIRMAN COWGER: Your objection is noted, but  
8           I will let him finish.

9           MR. CUMMINGS: I thought I was answering your  
10          question. If I am not, I will be quiet.

11          CHAIRMAN COWGER: No, you are not. Where does  
12          the contract say that the Department ought to at least  
13          consider adjusting these prices?

14          MR. CUMMINGS: Then I don't understand your  
15          question because I don't think that you will find that  
16          in the contract, in the DOT contract or any owner's  
17          contract that says when I breach the contract I'm  
18          supposed to adjust --

19          CHAIRMAN COWGER: That's enough. I don't want to  
20          hear any more of that right now. You still haven't got  
21          to the question. Maybe it will come out.

22          MR. CUMMINGS: There is a breach of contract  
23          here. I can explain it to you later on.

24          CHAIRMAN COWGER: We don't need to hear about  
25          that, I don't think. The DOT will have an opportunity



1 later on after we get the factual stuff out on the  
2 table to comment on what you just said, if they so  
3 desire.

4 What we are trying to find out is what are the  
5 facts. I think we've pretty well got that. The other  
6 thing, what does the contract say. I'm not sure we got  
7 that, but let's go ahead and let DOT rebut. It will  
8 probably come out.

9 MR. JONES: At this point can my client question  
10 Mr. Schindler?

11 CHAIRMAN COWGER: Any time, but I think we would  
12 like right now, if you've got it in your mind, we would  
13 like to hear a little summary of what DOT's position  
14 is, then if you want to ask questions about the factual  
15 issues that they presented, certainly you will be free  
16 to do that.

17 MR. LANGLEY: Okay. Starting off -- I was hoping  
18 this would not be a legal issue-type thing either.  
19 I don't think this is a fairness issue either. I want  
20 to keep it a contract issue and show how in the  
21 contract we can make changes to the contract. I want  
22 to cite specific areas where that is the case.

23 I want to first start off by saying that the  
24 Department does not feel that we owe Sentry Barrier or  
25 Gator any more money than what we have paid them. We

1 have paid them for all units, for each unit per day  
2 that were used on the project. We do not feel they  
3 were due any further compensation for that.

4 Getting into my argument here, the specification  
5 4-3-2.1 states, "Significant changes in the character  
6 of the work. The engineer reserves the right to make,  
7 in writing, at any time during the work, such changes  
8 in quantities and such alterations in the work as are  
9 necessary to satisfactorily complete the project. Such  
10 changes in quantities and alterations shall not  
11 invalidate the contract nor release the surety, and the  
12 contractor agrees to perform the work as altered."

13 It also goes on to state further, "If the  
14 alterations or changes in quantities significantly  
change the character of the work under the contract,  
whether or not changed by any such different quantities  
or alterations, an adjustment, excluding loss of  
anticipated profits, will be made to the contract.

Further down it says, "If the alterations or  
changes in quantities do not significantly change the  
character of the work to be performed under the  
contract, the altered work will be provided elsewhere  
the contract."

Now, the term significant change, now we do not  
know that this change was made in the  
ERINE WILKINSON

1 adding more boards to the project was a significant  
2 change, in the fact that within the contract it defines  
3 significant change, which it states it as when the  
4 contractor -- when the character of the work is  
5 altered, differs materially in kind or nature.

6 We don't feel that the work here has differed  
7 materially in kind or in nature.

8 There was an item originally on the contract for  
9 variable message boards for use out there on the  
10 project. The Department made a determination that we  
11 needed more of these boards.

12 And I'm going to let Bob expand on that more in  
13 just a moment, but I also want to finish up with the  
14 definition of significant change.

15 The other point is that it has to be a major item  
16 of work and be in excess of either 125 percent or be  
17 below 75 percent of the original contract amount.

18 Now, a major item of work is defined as any item  
19 of work having an original contract value in excess of  
20 5 percent of the original contract amount.

21 The variable message board item did not, was not  
22 greater than 5 percent of the original contract,  
23 therefore, it did not qualify as a major controlling  
24 item of work.

25 At this point I want to let Bob expand a little

1        have paid them for all units, for each unit per day  
2        that were used on the project. We do not feel they  
3        were due any further compensation for that.

4                Getting into my argument here, the specification  
5        4-3-2.1 states, "Significant changes in the character  
6        of the work. The engineer reserves the right to make,  
7        in writing, at any time during the work, such changes  
8        in quantities and such alterations in the work as are  
9        necessary to satisfactorily complete the project. Such  
10       changes in quantities and alterations shall not  
11       invalidate the contract nor release the surety, and the  
12       contractor agrees to perform the work as altered."

13               It also goes on to state further, "If the  
14       alterations or changes in quantities significantly  
15       change the character of the work under the contract,  
16       whether or not changed by any such different quantities  
17       or alterations, an adjustment, excluding loss of  
18       anticipated profits, will be made to the contract.

19               Further down it says, "If the alterations or  
20       changes in quantities do not significantly change the  
21       character of the work to be performed under the  
22       contract, the altered work will be provided elsewhere  
23       in the contract."

24               Now, the term significant change, now we do not  
25       feel that this change that was made in adding the --

1 adding more boards to the project was a significant  
2 change, in the fact that within the contract it defines  
3 significant change, which it states it as when the  
4 contractor -- when the character of the work is  
5 altered, differs materially in kind or nature.

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20 5 percent of the original contract amount.

21 The variable message board item did not, was not  
22 greater than 5 percent of the original contract,  
23 therefore, it did not qualify as a major controlling  
24 item of work.

25 At this point I want to let Bob expand a little

1 bit on why we needed the additional boards.

2 MR. WADE: I'm Bob Wade, resident construction  
3 engineer for the Sarasota construction office. Prior  
4 to that I was a resident engineer of Lakeland  
5 construction.

6 My first day at Sarasota construction was the  
7 11th of March, and my marching orders from that first  
8 day was fix the MOT on the interstate. That project  
9 was, I believe, the last of four projects.

10 The public was very dissatisfied with the MOT on  
11 the preceding three. The reasons were, in summary,  
12 were the phasing of the job would leave one lane  
13 barricaded off on the side of the road, the interstate  
14 that wasn't being worked on. The speed limit was  
15 reduced to 55 on the two lanes. The public didn't see  
16 anybody working for up to a year at a time.

17 The radios in the Sarasota area, for whatever  
18 reason, we had a lot of interference, static and  
19 problems with. The public just wasn't getting the  
20 word.

21 There were some other considerations the contract  
22 had on the phasing, inside, outside lanes.

23 One of the first things I did was revisit this  
24 job, which I still had time to react to.

25 My background includes design. I consider myself

1 competent in MOT design.

2 I removed the public's dissatisfaction with the  
3 two lanes by changing the MOT so the unused portion of  
4 the roadway by the contractor would be three lanes and  
5 the running speed would be returned to the interstate  
6 speed limit.

7 When that happened, going from two to three  
8 lanes, the Federal requirement -- this is a Federal aid  
9 project, we have to put the VMBs on the other side.  
10 Two lanes we get away with one; three lanes we need one  
11 on each side because it's just the Federal rules.

12 The radio wasn't working, hadn't worked on  
13 preceding jobs. We eliminated it. In order to get the  
14 message across, we needed additional signs.

15 We also included in there major feeder routes,  
16 interchange, cross streets, to the MOT plant to notify  
17 the public in advance. It was one of the real sorry  
18 parts of the original MOT.

19 This was coming to me from the district secretary  
20 and -- the district secretary and the district  
21 construction engineer.

22 We put the package together, which corrected  
23 these three items.

24 I hate to admit this in front of my boss, but  
25 price wasn't looked at until we were putting the

1 package together. We were told to fix the MOT problem.  
2 I put together a package that was submitted to the  
3 district secretary and the district construction  
4 engineer. They said it would work.

5 We went to it. At that point we started pricing  
6 it. So, price wasn't a consideration. Keeping the  
7 public informed, keeping the work zone safe was the  
8 reason we made the changes.

9 CHAIRMAN COWGER: Are you at a convenient pausing  
10 point?

11 MR. WADE: I would like to make one other point.  
12 We did consider fixed signs. That was a point you  
13 made. The public doesn't see them. They don't see the  
14 traffic, construction ahead signs, but the variable  
15 message board gets their attention. It focuses them in  
16 on the problems we had. The fixed signs are like  
17 invisible, like we painted them white and didn't put  
18 any letters on them. That's one of the reasons the  
19 messages were conveyed by the MS. The radios weren't  
20 there. The fixed signs weren't being read.

21 Honest to God, I didn't look at the prices until  
22 after the MOT plans were approved. I hate telling my  
23 boss that, but that's the way it worked.

24 Sir, that's about a convenient stopping point.

25 CHAIRMAN COWGER: Let me ask a couple of



1 questions. Just to keep the Board from having to study  
2 the plans, let me go back over the maintenance of  
3 traffic scheme as shown in the original plans, and  
4 correct me if I make a misstatement.

5 As I understand, the original maintenance of  
6 traffic scheme was to close one lane throughout the  
7 entire length of the project, at least in one  
8 direction. Was it both or one direction?

9 MR. WADE: Both sides. After he worked one side,  
10 it ended up that side, when we shifted to the other  
11 side of the interstate, the southbound, then we would  
12 keep one lane closed even though we were no longer  
13 working on that side of the roadway.

14 CHAIRMAN COWGER: You were basically going in  
15 there initially and closing one lane for the entire  
16 length of the project and the entire time frame of the  
17 project and reducing the speed limit to 55 miles an  
18 hour in the other two lanes, and that turned out to be  
19 an unacceptable situation.

20 Okay, now you determined, DOT determined that  
21 they wanted to change the maintenance of traffic scheme  
22 basically.

23 Did the contractor have anything to do with that  
24 change? Did they cause that to happen, request  
25 anything?

1 MR. WADE: We were the ones that said there's no  
2 reason to keep a lane closed if you are not working  
3 there.

4 CHAIRMAN COWGER: You initiated it.

5 MR. WADE: The contractor had input, but his  
6 input was mainly whether we worked inside or outside  
7 lanes first. We bundled that, helped him out on that  
8 as part of the overall.

9 CHAIRMAN COWGER: Basically what did the work  
10 consist of, replacing the pavement?

11 MR. WADE: Removing the pavement in its entirety,  
12 putting in new lime rock base, brought it up with  
13 asphalt.

14 CHAIRMAN COWGER: Okay. So, the lane that was  
15 closed was not always the same lane? As work  
16 progressed in accordance with the original maintenance  
17 of traffic scheme, it was not always the same lane? As  
18 work progressed, you changed the lanes to be closed?

19 MR. WADE: Using the shoulders, we shifted  
20 traffic over so we had half of the northbound or half  
21 of the southbound to work on at one time.

22 CHAIRMAN COWGER: The original scheme was to keep  
23 two lanes in one direction. What you ended up was  
24 keeping three lanes open all the time?

25 MR. WADE: No, sir. On the side the contractor

1           was working on was two lanes. On the side he wasn't  
2           working, three lanes.

3           CHAIRMAN COWGER: If he wasn't working, there was  
4           no reason to close the lanes, right?

5           MR. WADE: But the proceeding projects had the  
6           lanes closed. Even my wife when she drove that was  
7           upset with it.

8           CHAIRMAN COWGER: Okay. I certainly understand  
9           the perception of the public, too. You've got a lane  
10          closure and no work going on for months, what in the  
11          world are these guys doing. Okay. I think that  
12          answers my question.

13          MS. HUBBARD: Sir, number one, our project did  
14          not have that problem because we didn't have lane  
15          closures up 24 hours a day. That was the other  
16          project.

17          If you look at the plans and go through sign by  
18          sign, it appears that they were using three lanes.  
19          They shut one lane down and then shifted two lanes.  
20          So, they always had two lanes, not three lanes.

21          MR. WADE: The section now is three lanes. The  
22          section before we started was three lanes. The  
23          original MOT showed two lanes the duration of the  
24          project.

25          CHAIRMAN COWGER: In both directions?

1 MR. WADE: Started on one side, until they  
2 completed the work on that side, shifted over to the  
3 other side. The area they had completed remained two  
4 lanes.

5 MS. HUBBARD: They put in a shoulder and shifted  
6 the two lanes.

7 CHAIRMAN COWGER: I think this is getting into  
8 argument. Do the Board members understand?

9 MR. ROEBUCK: Yes.

10 CHAIRMAN COWGER: I think we have the factual  
11 point of that out on the table. Okay. Now, where were  
12 we?

13 MR. LANGLEY: I would like to make a point, too,  
14 that although there were MOT changes out there, it  
15 still did not change the nature or the scope of that  
16 item itself or the use of the VMB boards. It may have  
17 required more of them. It did not change the nature of  
18 the scope of the work.

19 MS. HUBBARD: Can I add one thing. On the  
20 highway advisory radios, they were never tried on this  
21 project, never tried by our company. We have I-4  
22 covered with them, and they work fine. I object to  
23 them saying they didn't work.

24 CHAIRMAN COWGER: I don't think we need to hear  
25 any more on that either. I appreciate that little bit

1 of information. I think we know enough about why the  
2 changes were made now.

3 MR. LANGLEY: Continuing, here again, I would  
4 like to say that we do not feel the contractor is due  
5 any further compensation because of the fact they had  
6 not set forth any contractual provision that has been  
7 breached.

8 I also would like to make a point that by  
9 awarding them any kind of amount, awarding any kind of  
10 compensation to them for this is going to significantly  
11 impact the basic elements of the low bid process, what  
12 we feel -- it's going to open the flood gates for  
13 contractors to come in wanting to renegotiate any item  
14 that they feel like the cost was not covered in the  
15 work itself.

16 Therefore, that's why we are standing strong on  
17 this issue and we do not feel they should be awarded  
18 anything.

19 I would like to address their analysis for  
20 compensation itself and just show some flaws in case  
21 that you do find they are due some kind of  
22 compensation. I would like to address the analysis of  
23 that.

24 MR. JONES: What we have here, Mr. Chairman, we  
25 have blown up Exhibits 16 and 17 for the benefit of the

1 Board so he can point out the things on these. These  
2 are also exhibits in your --

3 MR. ROEBUCK: In the fax that you sent.

4 MR. JONES: Correct, and in the new pamphlet  
5 I gave you, there are 16 and 17 in there.

6 MR. ROEBUCK: We have plenty of paper.

7 MR. LANGLEY: The contractor basically took  
8 projects that they had done -- it had been several  
9 years to come up with an average cost that they felt  
10 they should be compensated for these boards.

11 How they came up with that average is they  
12 totaled up the projects they did within that year, came  
13 up with the average, then averaged those to come up  
14 with an average per unit per day.

15 This is not really -- well, this is not a proper  
16 way of coming up with an average because you need to  
17 look at the quantity of the boards that are used on a  
18 particular project.

19 This is where the -- this discussion earlier on  
20 this information about these -- about the items  
21 themselves, this is where we derived our information  
22 that we received. We were only able to locate  
23 specifics on four projects itself.

24 It's my understanding, too, that we had requested  
25 information on these other projects and had not

1 received it yet.

2 We went with what we had. We came up with an  
3 amount. You can see we've looked at, basically  
4 multiplied the quantity on that project times the unit  
5 cost, came up with an amount, and then came up with the  
6 totals down here, came up with an average.

7 You can see it comes up much less than the \$66  
8 per day. We came up with \$35 per day.

9 Now, first, we feel the most -- the best way to  
10 handle this would be to pay, if you do give them  
11 compensation, to I guess, to come up with something  
12 that they should be paid, we would look at statewide  
13 averages and come up with an average of all of the --  
14 that's what this Exhibit No. 15 is. It lists all the  
15 projects that were let between July of '96 and July of  
16 '98. It lists the quantities and the unit prices for  
17 those projects. It came up with an average of \$27.24.

18 If you multiply that times the number of boards  
19 used -- actually we came up with the difference that  
20 they had already paid, Exhibit 17, per Exhibit 17.

21 There is a difference of \$6.29 additional that  
22 they might be owed. And if you multiply that times the  
23 quantity that was used, it's only an additional 14,000.

24 I guess there's two ways you can look at this.  
25 You can pay it through the statewide average, or also

1 look at it from an actual cost standpoint. We also  
2 came up with a determination for that.

3 We looked at the cost of the two original  
4 variable message boards and then the cost for  
5 additional variable message boards, came up with a  
6 total of \$84,800. And with the amount that has been  
7 paid for the boards, \$69,000. The difference of that  
8 is 15,000.

9 Now I will refer to the third one, which is  
10 Exhibit 18. So, if you look at that, you also take --  
11 that's the cost of excess revenues. If you also take  
12 in the -- I should say Exhibit 18 also shows the loss  
13 of big gross profit. The cost of the original two VMBs  
14 was \$12,000. They anticipated revenues of \$20.95 times  
15 1,094 units, which was the original item. So the  
16 anticipated loss of profit should have only been  
17 \$10,119.

18 When you total those up, that comes up with a  
19 maximum loss of only \$26,000 instead of the \$92,000  
20 which they have presented to us.

21 Those are the errors that we have found in  
22 calculating with, I guess, compensation to them, if  
23 they are due compensation.

24 But let me reiterate once again we do not feel  
25 they are due anything. This is an issue that could



1 open the flood gates for many cases going to  
2 arbitration, looking for renegotiation of prices after  
3 the work is done.

4 I will even go so far as to say if a decision is  
5 made against us that we will certainly have to carry  
6 this further, because I find --

7 CHAIRMAN COWGER: The Board is not interested in  
8 that. You can threaten the other side, but don't  
9 threaten the Board. If you want to appeal, that's  
10 fine.

11 MR. LANGLEY: No problem. Just trying to iterate  
12 that it's a very important issue to us.

13 CHAIRMAN COWGER: Okay. Let me ask you a  
14 question about Exhibit 16, just a second.

15 Under per contractor, that's a straight -- that  
16 bottom line 66.08, that's a straight average of all the  
17 prices that are shown?

18 MR. SCHINDLER: Are you asking me?

19 CHAIRMAN COWGER: Yes.

20 MR. SCHINDLER: Yes.

21 CHAIRMAN COWGER: That 66.08 is the straight  
22 average for three years.

23 MR. SCHINDLER: Yes.

24 CHAIRMAN COWGER: I will ask DOT then, their  
25 corrected calculations are what I would call a weighted

1 average, basically. You've taken --

2 MR. LANGLEY: That's correct.

3 CHAIRMAN COWGER: You've multiplied the units by  
4 the unit price, came up with the total, divided the  
5 units into that total.

6 MR. LANGLEY: That's correct.

7 CHAIRMAN COWGER: Just so we understand what you  
8 did. Making sure we understand that.

9 I want to go back and apologize for my reaction  
10 to saying you are going to appeal this. What you are  
11 saying to us is that this is important enough for you  
12 as far as a precedent that could be set?

13 MR. LANGLEY: Yes, sir, absolutely.

14 CHAIRMAN COWGER: That you don't want to let it  
15 stand if the Board rules against you.

16 MR. LANGLEY: Yes.

17 CHAIRMAN COWGER: That's really of no concern to  
18 the Board. The precedence we will consider it, the  
19 fact that you want to take it to a higher level, that's  
20 fine.

21 MR. LANGLEY: Yes, sir.

22 CHAIRMAN COWGER: We aren't interested in that.

23 MR. LANGLEY: The precedent is what I am trying  
24 to --

25 MS. HUBBARD: Maybe I need to -- I think a 300

1 percent overrun should be addressed somewhere, somehow  
2 by somebody.

3 CHAIRMAN COWGER: Somehow you need to talk about  
4 that in a little bit more detail. But anyway, does  
5 either party, before we get to the -- letting the  
6 attorneys come in, and hopefully we can keep that  
7 brief, does anybody else have any factual or  
8 contractual things they want to present?

9 MR. SCHINDLER: Could I ask some questions on  
10 his --

11 CHAIRMAN COWGER: Sure.

12 MR. SCHINDLER: Rick, first, on Exhibit 16, the  
13 first board you put up, if we can look at that. You  
14 said you had, on these items that say not applicable,  
15 N/A, you said you requested information from, but  
16 hadn't received it yet. From whom have you requested  
17 information?

18 MR. LANGLEY: That's my understanding.

19 MR. JONES: We requested -- for the record, it's  
20 in our documents. We had requested your office to  
21 provide us with documents showing that you actually had  
22 those contracts.

23 CHAIRMAN COWGER: The Board is aware of that and  
24 accepts the fact that does exist. Mr. Cummings is  
25 aware of it.

1 MR. SCHINDLER: You asked us for information?

2 MR. JONES: Yes, we asked your attorney. The  
3 documents that show the contract, we couldn't find  
4 where there is evidence that you actually were paid a  
5 certain amount of money per sign per day, that sort of  
6 thing.

7 MS. HUBBARD: That does change the way --

8 CHAIRMAN COWGER: Do you have any other issues  
9 that you want to bring up?

10 MR. SCHINDLER: Yes, I would like to ask down  
11 here, you said that you had some problems with radios  
12 in the past. Did you make any effort to determine the  
13 manufacturer of those radios versus the radios that  
14 would have been provided for this job by me?

15 MR. WADE: My analysis of it, that was  
16 immaterial. The public was dissatisfied. They weren't  
17 using them. If we continued they still wouldn't be  
18 using them because they did not have a pattern set.

19 I'm not knocking your radios, I'm saying that the  
20 people who supplied the radios for the project right  
21 prior to this one, there was a lot of static, people  
22 just wouldn't tune it in. They weren't using it.

23 If they are not using it, they are not getting  
24 the information. If they are not getting the  
25 information, it negatively impacts the MOT, safety

1 issues.

2 MS. HUBBARD: They are using them on I-4 and they  
3 seem to be working quite well, and 75 is just as  
4 important.

5 CHAIRMAN COWGER: Okay --

6 MR. SCHINDLER: One more question, Rick. You  
7 said that you were concerned because other people might  
8 try to renegotiate after the fact? We tried to present  
9 this before the fact. Way back when the project was  
10 just starting, we were complaining. You were told from  
11 the start.

12 CHAIRMAN COWGER: Let me close that out real  
13 quick. It was after the bids were accepted and  
14 received that you made your original protest because  
15 that's the time, the point in time you realized they  
16 were going to increase the number on you, after the  
17 work was under way.

18 I don't think we need to hear any more about  
19 that. Mr. Albaugh has a couple of questions.

20 MR. ALBAUGH: A few questions for both sides.  
21 It's just not clear to me, we got a copy of a bid list  
22 you submitted to bid on this project, and one of the  
23 points you had made earlier, and I wanted to get this  
24 clear, you bid highway advisory radios at \$24,500 each.

25 MR. SCHINDLER: Plus maintenance.

1 MR. ALBAUGH: And then there is an additional  
2 maintenance item. That was \$49,000. In looking at the  
3 contract, the bid contract was \$4395 per unit, which is  
4 one sixth of the price you gave the contractor.

5 The reason I'm interested in understanding this,  
6 because one of the claims you've made is that they cut  
7 out a real high dollar item for you and replaced it  
8 with a cheaper one, when in fact the contract bid  
9 price, and I have that here, I don't understand why the  
10 difference.

11 MS. HUBBARD: We don't understand why contractors  
12 bid the way they do either.

13 MR. ALBAUGH: You submitted this price to the  
14 contractor at \$24,000 each. He bid, and I understand  
15 they have the right, the discretion to bid differently,  
16 and apparently they bid it at \$4395, which trying to  
17 look at it from the other perspective is they really  
18 didn't cut -- they didn't save a lot is what you are  
19 contending, you were going to make a lot. You weren't  
20 going to make it under this pay item.

21 MS. HUBBARD: They may have been aware that the  
22 DOT feelings on previous projects that they did not  
23 like highway radios and felt pretty confident they  
24 could get them ruled out.

25 If that's what happened, they should have taken

1           it and presented it to somebody before the bid and said  
2           we are going to take these out of here because we know  
3           they don't work on other projects, let's get them out  
4           of here. We would have changed our bid on that.

5           MR. ALBAUGH: You are right, I understand the  
6           contractor looking at that. But the Department looking  
7           at it from making changes, they are coming out and  
8           looking at a maintenance of traffic change, if they  
9           would have left it as the original plan, you would have  
10          only been paid \$8700 approximately.

11          MR. SCHINDLER: No, we would have paid what we  
12          bid.

13          MR. ALBAUGH: The contractor would have only  
14          received \$8791 for this. Where he makes up the  
15          difference, you know, is between you and him.

16          MS. HUBBARD: Actually he probably added it into  
17          the mobilization to the contract.

18          CHAIRMAN COWGER: We understand how those things  
19          work. Are you saying that your subcontract, under your  
20          subcontract with Gator, you would have been paid the  
21          \$24,000?

22          MR. SCHINDLER: No, because that was pulled out.

23          MR. CUMMINGS: If it had gone forward.

24          CHAIRMAN COWGER: What did your subcontract with  
25          Gator say?

1 MR. JONES: That's Exhibit 3 in the package, if  
2 you would like to take a look at.

3 CHAIRMAN COWGER: Which package?

4 MR. JONES: The one I gave you this morning.  
5 That's Exhibit 3, and Exhibit 4 is the authorization to  
6 sublet that was submitted by Gator.

7 CHAIRMAN COWGER: I don't see the radios in  
8 there.

9 MR. SCHINDLER: They took the radios out before  
10 the contract was made.

11 CHAIRMAN COWGER: I've got you.

12 MR. SCHINDLER: Bottom line is we are not trying  
13 to claim we lost the radios.

14 MR. ALBAUGH: The contractor took it out of your  
15 subcontract?

16 MR. ROEBUCK: He never bought the radios.

17 CHAIRMAN COWGER: By the time they entered into  
18 the contract, it had already been deleted.

19 MR. SCHINDLER: We never claimed the \$50,000.  
20 The crux of our claim is because they took the radios  
21 out it made them use the VMBs much more.

22 MR. ALBAUGH: One other quick question. I notice  
23 under the contract there was a payment for the highway  
24 advisory radio, according to the estimate. It's  
25 Exhibit 15.



1 CHAIRMAN COWGER: You are talking about the final  
2 estimate where it shows actual payment?

3 MR. ALBAUGH: Well, let me get the --

4 CHAIRMAN COWGER: You need an explanation of  
5 that.

6 MR. ALBAUGH: Exhibit 11.

7 MR. JONES: It may be in a payment to Gator.  
8 Gator may have got it from another subcontractor.

9 MR. ALBAUGH: All I want to see is one used on  
10 the job. On Exhibit 11, the first page there, the  
11 fifth pay item down.

12 CHAIRMAN COWGER: Which book are we in?

13 MR. JONES: The new one.

14 CHAIRMAN COWGER: I've got it right here.

15 MR. ALBAUGH: The fifth pay item now shows there  
16 is a payment for one.

17 MR. JONES: No, no --

18 MR. LANGLEY: No payment was made.

19 MR. ALBAUGH: Then I'm looking at it wrong here.

20 MR. LANGLEY: Where are you working at?

21 MR. ALBAUGH: Highway advisory radio furnished  
22 and installed.

23 CHAIRMAN COWGER: It shows one unit being paid  
24 for.

25 MS. HUBBARD: One unit.

1 CHAIRMAN COWGER: That's interesting.

2 MS. HUBBARD: So --

3 MR. ALBAUGH: Apparently -- I am asking questions  
4 at this point. It appears that one was used?

5 MR. ROEBUCK: At \$4,000.

6 CHAIRMAN COWGER: Mr. Wade can probably tell us  
7 what happened.

8 MR. WADE: I brought the overruns and underruns  
9 for both of your contracts. It is showing zero  
10 payment. The underrun was exactly the same as the  
11 original amount for both of these contracts.

12 MR. ALBAUGH: That appears to be the final  
13 estimate.

14 MR. WADE: The final estimate should have been  
15 zero. We may have overpaid them.

16 CHAIRMAN COWGER: Do you think there was an error  
17 in this estimate 25?

18 MR. WADE: I didn't think there was, but --

19 MR. ALBAUGH: The final one --

20 CHAIRMAN COWGER: Is there a later one?

21 MR. ALBAUGH: No, I think this is it. It's  
22 certified --

23 MR. CUMMINGS: The question can be answered by  
24 asking Mr. Schindler. Did they ever use your radio on  
25 the project?

1 MR. SCHINDLER: No. They may have used somebody  
2 else.

3 MR. CUMMINGS: Wouldn't these guys know?

4 MR. LANGLEY: I don't know factually why it was  
5 used.

6 CHAIRMAN COWGER: I think we've got an answer.

7 MR. ALBAUGH: The only other thing that I have  
8 was just in bidding the MOT items. Is it your  
9 experience generally that MOT items overrun on  
10 contracts?

11 MR. SCHINDLER: Usually there is a time frame.  
12 The time was actually shorter on this job.

13 MR. ALBAUGH: Did you anticipate that when you  
14 did some bidding -- I know you went out and bought  
15 these two variable message boards, and you were able to  
16 get a cheaper rate because of that, but did you  
17 anticipate there may be some overruns in these items?

18 MR. SCHINDLER: Because of time, yes. Typically  
19 jobs last longer than they are supposed to, though this  
20 one didn't, but that same machine, the same machine  
21 would have still been out there doing that.

22 MR. ALBAUGH: It is a time overrun, no doubt.

23 MR. SCHINDLER: The way the plans were written,  
24 what the messages were supposed to say, there was no  
25 reason to have anything else added to this.

1 MR. ALBAUGH: That's all I have.

2 MR. LANGLEY: I have a question. Have you been  
3 paid the original contract price for all the extra  
4 message boards used on the job?

5 MR. SCHINDLER: Yes, except for the ones that  
6 Gator supplied.

7 CHAIRMAN COWGER: Okay.

8 MR. JONES: We may have one or two more questions  
9 if you will give us a second.

10 CHAIRMAN COWGER: Go ahead.

11 MR. LANGLEY: Why was leasing other boards not an  
12 option? Why was purchasing the only option you had?

13 MR. SCHINDLER: We did lease them, acquired four  
14 on a long-term lease. The alternative, we could have  
15 possibly gone to someone like Bob's Barricades and  
16 rented one, but he was leasing them to us for \$5 a day.

17 MR. LANGLEY: The invoices you submitted are  
18 lease prices?

19 MR. SCHINDLER: They are full pay items. We  
20 bought the units, went to the leasing company and they  
21 leased them back to us. It cost us more than that. We  
22 didn't even claim the full amount. We established what  
23 the cost of the unit was.

24 MR. LANGLEY: The new message boards that you  
25 bought for this project, have you continued to use them

1 on other projects?

2 MR. SCHINDLER: Whenever possible, yes.

3 MR. LANGLEY: Have you been paid for their use?

4 MS. HUBBARD: Right now we have four sitting in  
5 the yard.

6 MR. SCHINDLER: I don't know whether we did or  
7 not.

8 CHAIRMAN COWGER: You have four sitting in the  
9 yard not in use?

10 MR. SCHINDLER: Right now is different. The  
11 period of time afterwards, sometimes they are used,  
12 sometimes they are not.

13 MS. HUBBARD: Sometimes you get \$125 a day for  
14 them, which is real, real nice.

15 CHAIRMAN COWGER: I don't think we need any more  
16 on that. I have a couple of real quick questions. The  
17 original variable message boards, the two shown on the  
18 plans, what was it intended that they say?

19 MR. WADE: We have to refer to the plans.

20 CHAIRMAN COWGER: Was it a changeable message?

21 MS. HUBBARD: It's on this part of the exhibit  
22 where it says road construction ahead, tune to 1610 for  
23 information. That was the first one you were supposed  
24 to have.

25 The second one was supposed to say trucks use

1 blank lane and strictly -- whatever.

2 MR. CUMMINGS: Speed limit strictly enforced.

3 MS. HUBBARD: Speed limit strictly enforced, 55  
4 miles per hour.

5 CHAIRMAN COWGER: You have two signs on the same  
6 side?

7 MS. HUBBARD: Yes. You can't put three on the  
8 interstate, but you can put two.

9 MR. SCHINDLER: And periodic lane closures.

10 MS. HUBBARD: We would take the contract days,  
11 divide them out, say oh, two units, it's shown in the  
12 plans, two units, plus one for lane closures, so we  
13 were real comfortable with the estimate quantity.

14 CHAIRMAN COWGER: Okay. Let me ask Mr. Wade, can  
15 you recall what did you put on the signs ultimately?  
16 What did they say, do you know? Not in precise detail,  
17 but --

18 MR. WADE: We used some of them on the  
19 interchange to advise people on the feeder road to the  
20 interchange when we would be working and it would  
21 affect the interchange.

22 Again, the MOT plan is published as a starting  
23 point. You have to watch the way the drivers use them,  
24 the way the public needs it. It's changing all the  
25 time if you are doing your job properly.

1 CHAIRMAN COWGER: Some of them were put on side  
2 roads as opposed to putting them on the interstate?

3 MR. WADE: Yes.

4 MS. HUBBARD: One more point. When they did  
5 their maintenance of traffic plan change, that sign,  
6 they didn't show any of these other locations, but they  
7 knew they were going to have ramp changes and all that  
8 other stuff, but they still maintained two variable  
9 message boards, even after they did the change. They  
10 still maintained the two.

11 CHAIRMAN COWGER: Was a supplemental agreement  
12 necessary to affect all these maintenance of traffic  
13 changes or not?

14 MR. WADE: For the plan changes, I believe  
15 supplemental agreement two was the main change,  
16 although three and six also affected the MOT.

17 CHAIRMAN COWGER: Okay. I don't want to get into  
18 that in any more detail. I just wanted to find that  
19 out.

20 Okay, before we go to letting the attorneys  
21 having their brief say, do either of the Board members  
22 have any more questions?

23 MR. ROEBUCK: No.

24 MR. ALBAUGH: No.

25 CHAIRMAN COWGER: Gentlemen, I think we have

1 heard a lot, but I think that it would be appropriate  
2 to let the DOT attorney kind of close out with any  
3 legal discussion or basically anything else you want to  
4 cover.

5 MR. CUMMINGS: Let the DOT close out and let me  
6 say something?

7 CHAIRMAN COWGER: Sure, I don't mean -- they will  
8 close out your side and you will close out your side.

9 MR. JONES: Could we have the claimant, since  
10 it's his case, and I will rebut him?

11 CHAIRMAN COWGER: You are right. I've got it  
12 backwards.

13 MR. CUMMINGS: Okay, let me say, Gene, and bear  
14 with me, please, have patience with me. I am only a  
15 lawyer and I've been a lawyer for so long it's hard for  
16 me to be anything else than a lawyer.

17 Sometimes when I'm dealing with engineers, I have  
18 to try to have great patience with them when they are  
19 explaining something to me that I can put into a legal  
20 context.

21 Please have great patience when you want to make  
22 the reverse transition.

23 You asked me a question earlier. The question  
24 was what contract provision allows them. I started to  
25 go off in other directions about what the law is.



1 I will refer you to the contract provision.

2 I want you to know -- I want to focus on the  
3 words changes to the character of the work or changes  
4 in the character of the work, what that phrase means.

5 Obviously this is a highway project. If you look  
6 at it only as a highway project, it's always going to  
7 be a highway project. When that phrase changes in the  
8 character of the work, it doesn't refer to it going  
9 from a highway project to a vertical building. You  
10 bring that down to all types of levels.

11 You know, you have noted and I know in your past  
12 experience where you've changed the lime rock base to  
13 an asphalt base, but now the asphalt base has to be  
14 done in the gore areas, where there is as much  
15 production as you can get.

16 Where you've got an asphalt price, but that  
17 asphalt price is for paving the main line where you can  
18 blow and go and make a lot of money.

19 That is always considered change in the character  
20 of the work. Now I'm going around in a circle and  
21 I have to work real hard. With a change in the  
22 character of the work, you negotiate a different price.

23 By the same extent if you went from steel girders  
24 on a bridge to concrete girders on a bridge, well, is  
25 it a bridge but they are a change in the character of

1 the work and you negotiate a new price.

2 Now, this contract provides in specification  
3 4-3.2.1, "If the alterations or change in quantities  
4 significantly change the character of the work under  
5 the contract, whether or not changed by any such  
6 different quantities or alterations, an adjustment,  
7 excluding loss of anticipated profits, will be made to  
8 the contractor."

9 That is a change in the character of the work  
10 that that standard spec provides that the contractor is  
11 going to be paid for the additional costs, excluding  
12 loss of anticipated profits. That's why they are here.

13 It's impossible when you look at all the  
14 different types of changes in the character of the work  
15 where contractors have been compensated, asphalt main  
16 line to asphalt gore area being one of the glaring  
17 examples, to say going from radios to multiplying from  
18 two to nine the variable message boards is not a change  
19 in the character of the work for this particular aspect  
20 of the work.

21 I don't know how you could get a bigger, better  
22 change in the character of the work from radios to  
23 message boards.

24 And to the same extent that's been allowed under  
25 all types -- this is less routine and it hasn't come up

1           probably before you or the DOT, but it's more glaring  
2           as a change in the character of the work than all of  
3           the other changes in the character of the work that  
4           this Board and the DOT has looked at, because they are  
5           more routine and they are confronted with more and more  
6           routine basis.

7           I see that DOT wants to bring this forward. They  
8           think this is some kind of precedent, I think it is  
9           not. It's just a change in the character of the work.  
10          The standard specs provide for them to be paid.

11          I hope that answers your question.

12          CHAIRMAN COWGER: It does. Thank you.

13          MR. CUMMINGS: Thank you for your patience.

14          CHAIRMAN COWGER: Do you have anything else at  
15          this point?

16          MR. CUMMINGS: Not that I'm going to expose to  
17          you with the pain of having my wrists slapped.

18          CHAIRMAN COWGER: We will let the DOT come back  
19          and have their attorney speak. If there is anything  
20          that the Board feels needs to have rerebuttal, we will  
21          allow Mr. Cummings to come back. Let's see what  
22          happens.

23          MR. JONES: This is really a very simple case.  
24          It's a matter of a quantity overrun, which is  
25          authorized under the contract.

1           They seem to be now arguing that this is a change  
2           in the character of the work, when in fact the  
3           subcontract, Exhibit 3, entered into between Gator and  
4           Sentry does not provide for any radios, it provides  
5           solely -- a number of items, but solely for the message  
6           boards.

7           Whether or not Sentry bid the radios and stuff is  
8           not pertinent here at all, because that was lost when  
9           this contract was formed.

10          There is a merger clause in the subcontract where  
11          it says all prior negotiations by our -- are merged  
12          into this contract.

13          The contract specifically says message board.  
14          So, there is no change in the character. The only  
15          change is in the quantity. And character and quantity  
16          are not the same thing, as the Board knows.

17          This is simply a matter of an overrun, which is  
18          authorized pursuant to the specification that we have  
19          discussed here today. They've presented no other  
20          contract provision that would permit them to get a  
21          recalculation of the rental value in this case.

22          What they're attempting to do is to rewrite their  
23          contract. You will recall this is a pass-through  
24          claim. They are asserting essentially through Gator to  
25          us. They are bound by that subcontract.

1           That subcontract, of course, incorporates all the  
2           provisions of the prime contract. In that case we have  
3           the authorization under the specification to change  
4           their quantities. We did that. We told you our  
5           reasons here today, which are valid.

6           I don't see anywhere in the contract that we have  
7           to have valid reasons for doing it, we are simply  
8           permitted to do it.

9           I would submit to you that they've acknowledged  
10          that they've been paid the contract price for the  
11          quantities; therefore, they should receive nothing at  
12          all from this claim. They have simply not proven their  
13          case.

14          MR. CUMMINGS: Let me just say one thing.

15          CHAIRMAN COWGER: Wait a minute. Are you  
16          finished?

17          MR. JONES: Yes.

18          MR. CUMMINGS: When one lawyer sees the other  
19          lawyer pause for more than three seconds, we jump in  
20          and assume they are finished.

21          I look at that and I kind of laugh about it  
22          because this is an overrun case, but why is it an  
23          overrun case? Because there was a change in the  
24          character of the work.

25          That's like saying I'm going to build a bridge

1 over this small stream and then I decide later on I'm  
2 not going to build a bridge with girders, I'm going to  
3 use an embankment and put in a huge culvert in there.

4 Well, I've got a price for embankment and now I'm  
5 going to have a huge overrun with embankment because  
6 I'm going to go over with a culvert and not have a  
7 bridge anywhere there.

8 Obviously there is a change in the character of  
9 the work, I went from a bridge to a culvert. Now it is  
10 an overrun job because it just overran  
11 embankment. That begs the question.

12 As far as the subcontract is concerned, the  
13 subcontract is based on the cloverleaf, Sentry's prices  
14 that it had in its deal with Gator. And if the project  
15 was -- if the radios were going to be used, it was only  
16 changed by the DOT, which affected the entire  
17 arrangement with these people after Gator had the  
18 prices of Sentry and Sentry was bound to them, and  
19 after the bid had been let and so forth. That means  
20 nothing. That's enough.

21 CHAIRMAN COWGER: One other thing. We heard, and  
22 we've heard in some of the proceedings that preceded  
23 the hearing, this business about -- and I wouldn't  
24 bring it up except the Board may need to know a little  
25 bit more about this business of the pass-through claim.

1                   And specifically the DOT has raised the issue  
2                   about what the subcontract said about the prime  
3                   contractor's responsibility to the prime -- the prime  
4                   contractor's responsibility to the sub as far as  
5                   changes in quantity and all.

6                   Can anybody just very, very briefly --

7                   MR. CUMMINGS: I can do that very briefly or very  
8                   lengthily. They've raised the issue. If they want to  
9                   tell you what that is, I will rebut it. If you just  
10                  want to hear from me, I'm even gladder.

11                  CHAIRMAN COWGER: It's out there on the table.

12                  MR. CUMMINGS: Do you want to hear it?

13                  MR. ROEBUCK: It's in the documents.

14                  MR. JONES: It was called objection to the  
15                  pass-through claim.

16                  MR. CUMMINGS: Gene, that is strictly a legal  
17                  issue. If you want me to give you these cases where  
18                  I've underlined these things, I can give it to you.

19                  MR. SCHINDLER: Is this what you are talking  
20                  about (indicating)?

21                  MR. CUMMINGS: I can just respond to it.

22                  CHAIRMAN COWGER: I withdraw the question.

23                  I don't think we want to hear all that. Are we close  
24                  to being wrapped up?

25                  MR. JONES: I need to respond to counsel, since

1 I'm on rebuttal. He seems to be characterizing the  
2 change in the character of the work.

3 Gator's work may have expanded with regard to the  
4 MOT, it certainly didn't change. Certainly the work of  
5 Sentry with regard to providing sign boards didn't  
6 change. The only thing was with regard to quantities.  
7 There is no change with regard to the scope and nature  
8 of the work.

9 CHAIRMAN COWGER: That's been said two or three  
10 times already. We understand you want to emphasize it,  
11 but I think that's enough.

12 Now, Mr. Contractor, have you completed your  
13 presentation?

14 MR. SCHINDLER: Yes, sir.

15 CHAIRMAN COWGER: DOT?

16 MR. JONES: Yes, sir.

17 MR. LANGLEY: Yes.

18 CHAIRMAN COWGER: Either one of the Board members  
19 have any further questions?

20 The hearing is hereby closed. The Board will  
21 meet to deliberate on this claim in a month or so --  
22 I'm not going to give you a specific date -- and the  
23 parties will be furnished our order shortly thereafter.  
24 (Whereupon, the hearing was concluded at 11:40 a.m.)

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CERTIFICATE OF REPORTER

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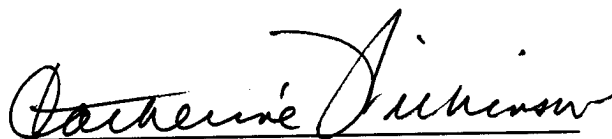
STATE OF FLORIDA )

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  
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I FURTHER CERTIFY that I am not a relative, employee,  
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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 15<sup>th</sup> day of October, 1999.

  
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