

CF



Florida Department of Transportation

JEB BUSH
GOVERNOR

605 Suwannee Street
Tallahassee, Florida 32399-0450

THOMAS F. BARRY, JR.
SECRETARY

August 12, 1999

MEMORANDUM

TO: *Tom Aldridge*
~~Lex Chance~~, State Estimates Engineer

FROM: Bill Albaugh, Highway Operations Director *W.H. Albaugh*

SUBJECT: STATE ARBITRATION ORDER NO. 01-99
State Project No. 97102-3303 FPN: 2589141 52 01
Hillsborough County
CONTRACT # 18171

A copy of State Arbitration Board No. 01-99 is attached. The Department of Transportation is ordered to reimburse the Contractor in the amount of \$32,700.18 for his claim.

After careful review of the transcript and exhibits presented at the hearing, the Department has concluded that an appeal is not warranted. Therefore, please adjust the final estimate to reflect the Arbitration Board's decision.

The original of Arbitration Order 01-99 and the original certified transcripts of the hearing including exhibits are being sent to Records Management to be filed with the project records.

BA/wc

Attachments

cc: Mr. Jim Ely - w/attachments
Ms. Pam Leslie - w/attachments
Records Management ✓

STATE ARBITRATION BOARD

1022 Lothian Drive

Tallahassee, FL 32312-2837

Phone: (850)385-2410 or (850)385-2852 FAX: (850)385-2410

NOTICE

In the case of Cone Constructors, Inc. versus the Florida Department of Transportation on Project No. 97102-3303 in Hillsborough County, Florida, both parties are advised that State Arbitration Board Order No. 1-99 has been properly filed on August 5, 1999.

S.A.B. CLERK

AUG 5 1999

FILED



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

Copies of Orders & Transcripts to:
Mr. Greg Xanders, State construction Engineer/FDOT
Mr. Kent A. Selzer, Manager/Cone Constructors, Inc.

STATE ARBITRATION BOARD

ORDER NO. 1-99

RE:

Request for Arbitration by
Cone Constructors, Inc. on
Job No. 97102-3303
in Hillsborough County

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

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:10 a.m. on Friday, June 18, 1999

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 1-99 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the amount of \$ 27,206.67 plus interest at 10% per annum in the amount of \$ 5,493.51 for a total of \$32,700.18. The Contractor claims that they have not been paid the amount of \$27,206.67 due them in accordance with a written agreement entitled Final Settlement for Discrepancy in Final Quantities entered into between the parties on July 11, 1997. Interest is claimed for 737 days beginning on July 11, 1997.

When the Contractor's Request for Arbitration was submitted to the Department of Transportation, they responded with a letter dated April 22, 1999 stating that this claim cannot be heard by the State Arbitration Board, because the Request for Arbitration was not submitted within 3 years of the date of final acceptance of the work as required by 337.19 Florida Statutes. This statement was supported by legal justification (See Exhibit No. 3)

The Contractor responded to the Department of Transportation letter with a letter from their attorney, Michael R. Carey dated May 4, 1999. This letter provided legal arguments supporting the Contractor's position that the Department's sovereign immunity defense should be rejected and that the claim should be heard by the Board. (See Exhibit No. 4).

The State Arbitration Board met on May 12, 1999 to consider the arguments presented by the parties to this dispute. The decision of the Board was to schedule a hearing for the Contractor's claim on June 18, 1999. A Notice of Arbitration Hearing was issued May 28, 1999.

During the hearing, the Contractor presented a synopsis of the information supporting their claim as contained in the Request for Arbitration of A Claim submitted on February 23, 1999. In addition, the Contractor stated that they did not hear anything from the Department indicating that payment in accordance with the agreement entered into July 11, 1997 would not be made by the Department until they received the August 3, 1998 letter from the Department stating that, in accordance with Florida Statute 337.19, the statutory limitations had expired and the contract was considered to be paid in full.

During the hearing, the Department's representative stated "We have nothing to submit".

The Board in considering the testimony and exhibits presented found it to be of particular significance that the Department failed to notify the Contractor of its intent to not make payment under the Final Settlement of Discrepancy in Final Quantities dated July 11, 1997 prior to their letter of August 3, 1998 giving notice that they considered the contract to be paid in full.

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

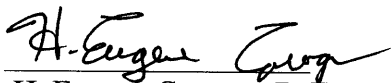
The Department of Transportation shall reimburse the Contractor the amount of \$ 32,700.18 for their claim.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$78.00 for Court Reporting Costs.

Tallahassee, Florida

Dated: 8/5/99

Certified Copy:


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

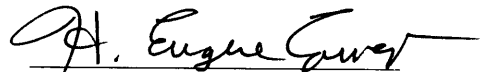
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DATE

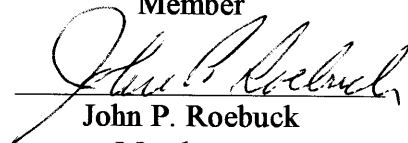
S.A.B. CLERK

AUG 5 1999

FILED


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


Bill Deyo, P.E.
Member


John P. Roebuck
Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

AUG 25 1999

CONE CONSTRUCTORS, INC.)

FILED

- and -)

PROJECT NO. 97102-3303

LOCATION: Hillsborough
County, Florida

DEPARTMENT OF TRANSPORTATION)

COPY

RE:

Arbitration In The Above Matter

DATE:

Friday, June 18, 1999

PLACE:

Florida Transportation Center
1007 Desoto Park Drive
Tallahassee, Florida

TIME:

Commenced at 9:10 a.m.
Concluded at 9:30 a.m.

REPORTED BY:

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

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

CATHERINE WILKINSON & ASSOCIATES (904) 224-0127

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

APPEARING ON BEHALF OF CONE CONSTRUCTORS, INC.:

Mr. Kent Selzer

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Jim Martin

* * *

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1 and 2 in evidence	4
Exhibit Nos. 3 and 4 in evidence	6

CERTIFICATE OF REPORTER

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P R O C E E D I N G S

CHAIRMAN COWGER: This is a hearing for project number 97102-3303, the project where Cone Constructors is the prime contractor.

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

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

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

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

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

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

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN COWGER: The documents which put this arbitration hearing into being are hereby introduced as Exhibit No. 1. That is the request for arbitration

1 submitted by the contractor and everything that was
2 attached to it.

3 The Department chose to not submit a formal
4 written rebuttal statement on this project. Yesterday
5 the Board received by fax a statement from the
6 contractor detailing the amount of interest that he is
7 claiming on this project. That has been distributed to
8 all of the parties and the Board, and we will identify
9 that as Exhibit 3.

10 Does either party have any other information they
11 wish to put into the record as an exhibit?

12 MR. MARTIN: No, sir.

13 CHAIRMAN COWGER: No? All right.

14 MR. SELZER: What was Exhibit 2?

15 MR. ROEBUCK: Wasn't that 2, Gene, not 3?

16 CHAIRMAN COWGER: That was 2. Correct that if
17 you will, please. The fax from the contractor was
18 Exhibit 2.

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

21 CHAIRMAN COWGER: During this hearing, the
22 parties may offer such evidence and testimony as is
23 pertinent and material to the controversy, and shall
24 produce such additional evidence as the Board may deem
25 necessary to an understanding and determination of the

1 matter before it. The Board shall be the sole judge of
2 the relevance and materiality of the evidence offered.

3 The parties are requested to assure that they
4 receive properly identified copies of each exhibit
5 submitted during the course of this hearing and to
6 retain these exhibits.

7 The Board will furnish the parties a copy of the
8 court reporter's transcript of this hearing, along with
9 its final order, but will not furnish copies of the
10 exhibits.

11 The hearing will be conducted in an informal
12 manner. First the contractor's representative will
13 elaborate on their claim. Then the Department of
14 Transportation will offer rebuttal.

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

19 We are ready to proceed, but I have an opening
20 statement that goes with this particular project.

21 After receiving the request for arbitration, DOT
22 submitted to the Board a letter from the office of the
23 DOT general counsel expressing a legal opinion that the
24 Board has no subject matter jurisdiction to hear the
25 contractor's claim because the contractor did not file

1 their request for arbitration within three years from
2 the date of final acceptance of the project as required
3 by the version of Section 337.19 of the Florida
4 Statutes, which was in effect at the time bids were
5 received for this project.

6 The contractor's attorney responded with a letter
7 rebutting the DOT's position on whether or not the
8 Board could hear this matter.

9 These letters are contained in the record of this
10 hearing. We need to identify those. Exhibit 3 will be
11 the May 4th letter -- strike the May 4th. Will be the
12 April 22nd letter from DOT to the Board.

13 Exhibit 4 will be the May 4 letter from attorney
14 Michael Carey, representing the contractor, rebutting
15 the DOT statement.

16 (Whereupon, Exhibit Nos. 3 and 4 were received in
17 evidence.)

18 CHAIRMAN COWGER: As stated in the attachment to
19 the notice of arbitration, the Board met on May 12,
20 1999, to consider the legal opinions furnished by the
21 parties and decided to schedule a hearing on the
22 contractor's request for arbitration.

23 The Board sees no reason to hear further
24 arguments on whether or not we should hear this matter.
25 Therefore, this hearing will deal only with the issues

1 presented in the request for arbitration package.

2 Do we have any comments on that?

3 MR. SELZER: No, sir.

4 MR. MARTIN: No.

5 CHAIRMAN COWGER: We are ready to proceed.

6 Mr. Selzer, if you will start.

7 MR. SELZER: Thank you. This is kind of a
8 combination of three projects that Cone had at the
9 Veterans Expressway. We will concentrate on 3303, but
10 I think it's pertinent to address all three of them at
11 the same time based on the fact that that's how the
12 State kind of handles some of these issues.

13 Cone met with the -- submitted a conditional
14 acceptance to the State per this -- the State's final
15 engineer's directive. We were told to meet with
16 Jim Moulton.

17 We met with Jim Moulton and Mr. Wegman, and
18 subsequent to that we came to a settlement negotiation
19 for additional quantity adjustments to the contract.

20 After that fact -- excuse me, let me go back. At
21 that time we reached an agreement on three projects:
22 3303, 3306 and 3307.

23 Subsequent to that, the State did honor the 3307
24 agreement, processed a new final estimate, which was
25 final estimate number 24. Cone was paid for that part

1 of the negotiation on that part of the project only.

2 On the 3303 and 3306 projects, that settlement
3 negotiation was not honored.

4 We have had numerous discussions with
5 Mr. Moulton, Mr. Wegman and also Mr. Reynold Meyer
6 throughout the course of the time of the settlement
7 negotiations up to this arbitration hearing.

8 We received no notice, dispute, problem with the
9 processing of the settlement negotiation other than the
10 fact they were trying to process it and trying to run
11 through final estimates.

12 Cone did not hear back from the State until a
13 formal written notice that the time had expired and,
14 therefore, we were not entitled to the additional work
15 that we performed on the project. That's what brought
16 us here today.

17 CHAIRMAN COWGER: Okay. Tell us the amount that
18 you are claiming, including mentioning the interest.

19 MR. SELZER: Yes, sir. The final settlement that
20 Cone reached with the Department for the quantities was
21 \$27,206.67. That was reached on July 11, 1997. It was
22 originally reached back in June, on June 6, 1996, but
23 there were some additional discussions that went on for
24 approximately one year.

25 Bringing us up to date where we are today, using

1 a 10 percent statutory rate for interest, for 737 days
2 would be an additional \$5,493.51, for a total request
3 of \$32,700.18.

4 MR. ROEBUCK: That's for job 3303?

5 MR. SELZER: Yes, sir.

6 CHAIRMAN COWGER: In calculating the interest,
7 I note you started on final settlement for discrepancy
8 and final quantities, July 11, 1997. I don't have it
9 right in front of me, but is that the date that you --
10 the date of that letter which was the alleged
11 settlement agreement?

12 MR. SELZER: That's the second summary
13 negotiation with Jim Moulton and Mike Cone when they
14 renegotiated or came up with the final negotiated
15 figure on July 11, 1997. That's correct.

16 CHAIRMAN COWGER: Okay.

17 MR. ROEBUCK: The general condition in this
18 project was that the rate on unpaid claims was 10
19 percent per year? Is that where the 10 percent came
20 from?

21 MR. SELZER: No, the 10 percent came from legal
22 advice, based on a statutory interest rate is 10
23 percent for unpaid items.

24 MR. ROEBUCK: In the '91 specs I think it stated
25 that claims after 30 days not paid would be at 1

1 percent a month.

2 MR. SELZER: Correct.

3 MR. ROEBUCK: Was that the general condition?

4 MR. SELZER: Yes, I'm sorry, the 1991 standard
5 was a part of our contract.

6 MR. ROEBUCK: Do you want to confirm that? It
7 was 6 percent on late payments, but it was 30 days
8 after the claim was negotiated it was 1 percent a
9 month.

10 MR. MARTIN: I believe there's been some time
11 changes in there. There's a couple of years it was a
12 little bit lower than 1 percent.

13 MR. ROEBUCK: Which one was he operating under?

14 MR. SELZER: We did have the 1991 standards.

15 MR. DEYO: The statutes changed and allow 10
16 percent max now.

17 MR. ROEBUCK: Now?

18 MR. DEYO: Or any claim submitted after 1997.

19 MR. SELZER: Yes.

20 MR. DEYO: I think it's July 1, 1997.

21 MR. ROEBUCK: I didn't know when the date was
22 that it changed.

23 MR. DEYO: I can verify that.

24 CHAIRMAN COWGER: I don't want to get too deep
25 into this, but somewhere -- I don't know whether it was

1 in this project or one of the other ones, there was a
2 quote on an interest rate, quote, in some of the
3 correspondence dealing with the interest rate and
4 referred to Section 337.141 of the Florida Statutes.

5 It reads, "For each day after 75 days or 30 days
6 after settlement of a claim the Department shall pay to
7 the contractor interest at the rate set forth in
8 Section 55.03 Florida Statutes."

9 When you go to 55.03 -- I don't have it in front
10 of me, but when you go to it, it says that on January 1
11 each year the State Comptroller shall set an interest
12 rate to apply to all judgments issued during that year.
13 And I think, I'm not sure, but I think it's prime rate
14 or something like that plus 5 percent. I'm not sure.

15 Rather than arguing about it today, could we
16 suggest that --

17 MR. ROEBUCK: Does anybody have that statement
18 confirming the interest?

19 MR. DEYO: We have that, but I don't have it with
20 me.

21 CHAIRMAN COWGER: Could you get it?

22 MR. DEYO: Sure.

23 CHAIRMAN COWGER: Can we agree among the Board
24 that we will pay at that rate since that's what the law
25 says?

1 MR. DEYO: We'll find out.

2 MR. SELZER: You are saying whatever the law
3 says?

4 CHAIRMAN COWGER: Right.

5 MR. SELZER: Absolutely. That's fine.

6 CHAIRMAN COWGER: I think -- it's not likely to
7 be lower than 10 percent.

8 MR. MARTIN: Like I say, it's changed every July.
9 I think now it's back up to 12 percent, but I'm not
10 positive.

11 MR. DEYO: It was a variable rate because of
12 inflation and all. I will verify what it is.

13 MR. ROEBUCK: For this '97 time frame.

14 MR. DEYO: In the event of any award, the
15 interest rate would not be contested. It would be in
16 accordance with the law.

17 MR. SELZER: Fine.

18 MR. ROEBUCK: Okay.

19 CHAIRMAN COWGER: I believe that completes the
20 contractor's presentation.

21 One quick question. As I understand it, you
22 heard nothing, in writing at least, from the DOT as to
23 why that settlement agreement was never paid?

24 MR. SELZER: That's correct -- well, until the
25 last correspondence which came, which was included in

1 Exhibit 1, where they said the time had expired.

2 CHAIRMAN COWGER: But there was no other reason?

3 MR. SELZER: No.

4 CHAIRMAN COWGER: Okay, Mr. Martin.

5 MR. MARTIN: We have nothing to submit.

6 CHAIRMAN COWGER: You are not going to submit
7 anything at all explaining why this happened?

8 MR. MARTIN: (Shaking head negatively)

9 MR. ROEBUCK: Blame it on final estimates.

10 MR. MARTIN: If you want to say where it fell
11 down, it fell down in the legal department.

12 CHAIRMAN COWGER: Are you satisfied?

13 MR. DEYO: Yes.

14 CHAIRMAN COWGER: Are you satisfied?

15 MR. ROEBUCK: Yes.

16 CHAIRMAN COWGER: Is there any reason for us to
17 go on with this hearing any further? Can we close?

18 MR. ROEBUCK: To clarify job 3306 in a formal
19 way.

20 CHAIRMAN COWGER: We will start over again with
21 3306.

22 MR. ROEBUCK: We can't do it by a postscript on
23 this?

24 CHAIRMAN COWGER: When we get to it, I will make
25 it short.

1 MR. ROEBUCK: Okay.

2 CHAIRMAN COWGER: The hearing is hereby closed.

3 The Board will meet to deliberate on this claim in
4 approximately six weeks. In fact, the exact date will
5 be August 11th. And you will have our final order
6 shortly thereafter.

7 (Whereupon, the hearing was concluded at 9:30 a.m.)

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CERTIFICATE OF REPORTER

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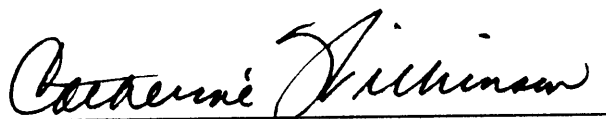
STATE OF FLORIDA)

COUNTY OF LEON)

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

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

Dated this 29th day of June, 1999.



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