

# STATE ARBITRATION BOARD

ORDER NO. 2-00

## NOTICE

In the case of Mitchell Borthers, Inc. versus the Florida Department of Transportation on Project No. 53020-3545 in Jackson County, Florida, both parties are advised that State Arbitration Board Order No. 2-00 has been properly filed on September 12, 2000



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

Copies of Order & Transcript to:

Jimmy Rodgers  
DOT District 3 Director (Operations)

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

## **STATE ARBITRATION BOARD**

**ORDER NO. 2-00**

**RE:**

Request for Arbitration by  
Mitchell Brothers, Inc. on  
Job No. 53020-3545  
in Jackson 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., Alternate Member  
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:30 a. m. on Tuesday, July 25, 2000.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 2-00 in this cause.

### **ORDER**

The Contractor presented a six (6) part claim in the total amount of \$348,053.30. Four parts are based on alleged extra work and related delays, one part is based on a delay to completion of the work allegedly caused by the Department of Transportation and a part is based on release of the liquidated damages assessed by the Department of Transportation.

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

In the Department's written rebuttal to the Contractor's claim, submitted prior to the hearing, there was a statement questioning the Board's authority to hear the claim. Their position is that, in accordance with Section 337.19 F.S. and since the Contractor elected to use a Qualified Acceptance letter in accordance with Article 9-9(a) of the 1994 Supplemental Specifications to the 1991 Standard Specifications, it is required that a Request for Arbitration of a Claim be filed within 820 calendar days after final acceptance of the work. In addition, they quoted a sentence from Section 337.185(5) F.S. which states: "When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the Board shall have power only to determine proper interpretation and application of the contract provisions which are involved."

At the beginning of the hearing the Contractor submitted a written statement responding to the Departments statement in regard to the 820 days limit on filing for arbitration of a claim. They claim that, in commencing this arbitration, they relied on the language in the Qualified Acceptance Letter, a Department form letter, which read: "It is understood on our part that any pending Arbitration claim or suit must be commenced within three (3) years of final acceptance of the work." They pointed out that the 820 day deadline in Section 337.19 of the Florida Statutes applies only to filing a suit against the Department and Section 338.185 (State Arbitration Board) is silent on a limitation period applicable to filing for arbitration.. They argue that the Department waived the 820 day limitations period contained in the contract by placing a longer limitations period in its Qualified Acceptance Letter.

Since presentation of the Contractor's written statement at the hearing did not afford the Department the opportunity for review by their attorney of the legal points contained therein, the Board offered the Department the opportunity to submit a written statement of rebuttal to that statement within ten (10) days after closure of this hearing. The Board agree not to issue its Order on this matter until after giving consideration to that written statement. The Department submitted the rebuttal to the Board in a letter dated July 28, 2000. They again referred to Article 9-9(a) of the 1994 Supplemental Specifications as it relates to the conditions applicable to the Contractor exercising the option to use a Qualified Acceptance Letter. They took the position that a form letter signed and sent to the Department by the Contractor is a unilateral submittal and cannot change the contract .

Subsequent to receipt of the Department's letter of July 28, 2000 the Board considered all arguments presented by the parties in regard to whether the failure to file the Request for Arbitration within the 820 limitation period constitutes full acceptance of the Department's offer of final payment. The Board decided that, in view of the statement contained in the Qualified Acceptance Letter form prepared by the Department, as a matter of equity it is appropriate for the Board to proceed with issuance of an order on this matter.

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

PART 1    \$80,927.70            Error in Plan Quantity--Borrow Excavation (Truck Measure)

The actual quantity of Borrow Excavation (Truck Measure) substantially underran the plan quantity, because, even though the plan quantity for Borrow Excavation spread over the area of the outside shoulder reflects an average depth of 10 inches of borrow material to be placed, there were in fact areas of the outside shoulder which were above finished grade. Thus, we had to excavate and move dirt excavated from the shoulder down the road to use as fill and we did not receive payment for that work. .

The Department used the actual truck measured quantity of Borrow Excavation as the final pay quantity.

A footnote under the Summary of Earthwork on Sheet No. 4 of the plans states "Earthwork has been calculated using the limerock base option. If another option is construct, there shall be no revision to earthwork quantities for which payment is made by plan quantity." In preparing our bid, we planned to use RAP material for base construction and thus interpreted the plan note to

mean the pay quantity for Borrow Excavation (Truck Measure) would be the plan quantity. We accepted the risk of being paid the plan quantity even if the actual quantity of the item overran. It is our position that, since we elected use to the RAP base option, payment for the earthwork item Borrow Excavation (Truck Measure) is to be based on the plan quantity for that item.

Since the final pay quantity for the item Borrow Excavation (Truck Measure) was substantially less than the plan quantity, we did not recover some of the costs assigned to the bid unit price for that item.

A hand written note in our log, indicates that the Department Inspector on the project, after talking to final estimates, told our job superintendent that payment for Borrow Excavation would be based on the plan quantity. If we, instead, had been told that we were to be paid only for the measured quantity of Borrow Excavation, we would have picked up the excess dirt on the shoulders, hauled it off and then hauled it back to so that the quantity would be measured and paid for as Borrow Excavation.

We are due additional compensation for the difference between the plan quantity and the quantity on which the Department based final payment for Borrow Excavation (Truck Measure) at the contract unit price for that item.

**PART 2    \$81,975.03   PLUS 14 DAYS**

**Repairs to Existing Pavement on Westbound Roadway**

After we milled and placed asphalt leveling on the outside lane of the Westbound roadway, traffic caused the existing pavement and base to deteriorate. This was due to wet subsoil conditions and/or unstable soil that existed beneath the existing road. We repaired the road and the Department agreed that we would be compensated for the work and be granted additional contract time.

We submitted costs for this extra work and a justification for the additional days required to do this work to the Department, but have not been able to reach agreement with them. The dispute here is over the amount due and the number of days to be granted.

The dispute is over the costs we are claiming for asphalt, additional Maintenance of Traffic and home office overhead. We are claiming payment for the asphalt mix used in the repair work at the contract unit price for Miscellaneous Asphalt, because this work was piecemeal in nature which fits the work associated with that pay item.

The additional amount we are claiming for Maintenance of Traffic is that work, such as flagging, that is associated with the Lump Sum pay item not the unit price pay items.

**PART 3    \$ 62,384.94        Changes to Work of Reworking Shoulders**

During construction of the project, the Department added to the work reworking of the median side shoulders. We were unable to reach agreement with the Department on the cost of this work. Therefore, they offered a Supplemental Agreement which acknowledged that additional

compensation is due and offered payment of \$13,477.86, the amount they unilaterally determined. to be fair, and to grant nine (9) additional contract days.

Since the plan quantities for Borrow Excavation for Reworking Shoulders indicated an average depth of 10 inches of borrow material to be place on the outside shoulders, we anticipated no excavation on the shoulders. We, therefore, planned to lightly harrow the shoulders, spread borrow material and finish grade the shoulders. During construction we discovered that the shoulders were higher than finish grade in most areas. This significantly changed the scope of the work. Instead of constructing the outside shoulders as planned we had to do extensive mixing of the soil on the existing shoulders to make it suitable for use. We then excavated high areas and moved the excavated soil longitudinally on the job.

The unit price of \$0.30 per square yard we bid for Reworking Shoulders was based on some of the costs for shoulder work being spread across the Borrow Excavation item. As explained in PART 1, we did not recover these costs under that item, because a plan error caused a substantial underrun in the pay item for Borrow Excavation.

Our claim is based on a unit price of \$1.50 per square yard of shoulder reworking. Of this price, \$0.90 is for mixing of the existing shoulders and \$0.60 is for reworking the shoulders. The \$0.60 is higher than the unit price we bid for Reworking Shoulders to compensate for the costs we did not recover due to the underrun in the quantity of Borrow Excavation.

**PART 4 \$ 7,232.59 PLUS 1 DAY**  
Asphalt Hot-Mix Improperly Rejected (Temperature)

The Department rejected ten (10) loads of structural asphalt mix at the job site, because their measurements indicated that the temperature of the mix exceeded the allowable tolerance. The Departments thermometer was checked and found to be inaccurate. After these loads were returned to our plant, the temperature was measured again using a properly calibrated thermometer and these loads were found to be acceptable. The loads were returned to the job and six (6) were placed. The Department rejected the other four (4) loads, because the temperature of these loads was now allegedly below the allowable tolerance. We dispute whether the temperature of these loads was in fact outside of the specification range.

Our claim is based on delay time for labor and equipment during the period when disposition of the ten (10) loads of mix was being resolved, costs related to the four (4) loads of mix that were ultimately rejected and Maintenance of Traffic costs and Home Office Overhead we incurred during the delay period.

**PART 5 \$ 57,813.04 PLUS 46 DAYS**  
Department Caused Delays in Acceptance of Pavement (Straight-edging)

The Department took the position that charging of contract time must continue until all work including correction of straight-edge deficiencies is completed.

The Friction Course was completed on February 7, 1997 and the curing period, during which charging of time was suspended, ended March 9, 1997. The thermoplastic pavement markings were completed on March 13, 1997.

The Department could have straight-edged the finished pavement during the 30 days curing period, but delayed straight-edging until March 11<sup>th</sup> and we did not receive the test report until March 17<sup>th</sup>. We disputed the accuracy of this testing and had difficulty in getting the Department to schedule an on-site review of the results. On April 11<sup>th</sup> we received a corrected straight-edging report and on May 1, 1997 we completed corrections.

Because of the delays to completion of the work caused by the Department's failure to straight-edge the finished pavement surface and respond to our concerns in regard to accuracy of the results in a timely manner, we are claiming additional compensation for the Maintenance of Traffic costs and Home Office Overhead we incurred during the 46 day period between March 17, 1997 and May 1, 1997.

RELEASE OF LIQUIDATED DAMAGES ASSESSED \$ 57,720.00

It is our position that all Liquidated Damages assessed by the Department should be released because of the Department caused delays to the work described in the various parts of our claim,

INTEREST

At the hearing, the Contractor submitted a written statement claiming prejudgment interest from the date of final acceptance of the project (May 1, 1997).

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

The Department took the position that any offers of payment for the issues involved here, except for the unilateral payment previously made for one item, were made in order to avoid litigation. Therefore, entitlement for each part of the claim, other than those costs included in the unilateral payment, is not admitted at this time.

The last correspondence received from the Contractor on the issues involved in this arbitration was in 1988, over a year before they filed a request for arbitration.

It appears that the Contractor may have elected to file for arbitration after they realized that the law precluded them from filing a suit.

PART 1.

There are two pay items for earthwork on this project-Regular Excavation-Lump Sump and Borrow Excavation (Truck Measure)-per cubic yard.. The specifications provide that the quantity of Borrow Excavation (Truck Measure) shall be based on measurements taken in trucks. This item is not specified to be a lump sum pay item.

The footnote to the Summary of Quantities refers only to the quantity of excavation and associated fill required to construct the base. The contractor is taking a portion of the note out of context when he claims that it is applicable to the item Borrow Excavation.

Shortly after our Inspector told the Contractor that payment for Borrow Excavation (Truck

Measure) would be based on the plan quantity, our Resident Engineer advised the Contractor that this was an incorrect interpretation.

The Contractor elected to move the dirt cut from shoulders down the road without treating it as borrow. If handled as borrow, they would have been paid under the item Borrow Excavation (Truck Measure).

## PART 2.

We made an offer of settlement to the Contractor on March 30, 1998 in an attempt to avoid litigation and heard nothing further from them on the matter until the request for arbitration was filed.

We feel that a fair unit price for the asphalt work is \$45.00 per ton (contract unit price for Asphaltic Concrete Surface Course plus 25%). Some handwork was involved, but most of the asphalt was placed with the Contractor's equipment.

Maintenance of traffic devices used on this project were paid for under the contract per day items.

In accordance with Subarticle 4-3.2.3 of the Supplemental Specifications, the markups to labor, equipment and materials included in the cost figures submitted by the Contractor are to include all indirect costs such as Home Office Overhead.

The Construction Diary indicates no work was performed in the pavement repair areas on five of the days on which the Contractor claims this extra work impacted progress on the job.

## PART 3.

The plans did not show reworking of the median shoulders. After milling and placing the asphalt structural course, it was apparent that reworking of these shoulders was necessary to avoid a significant drop off. We instructed the Contractor to do this work at the contract unit price of \$0.30 per square yard for Reworking Shoulders with payment for any borrow material required at the contract unit price for Borrow Excavation. (Total amount for reworking shoulders = \$13,477.56) The Contractor disputed this method of payment. We then agreed to make payment for the work on the median shoulders at \$0.66 per square yard, the statewide average for the item at that time. We consider this to be fair compensation for the additional work on the median shoulders. Most of the median shoulder area was below the finish grade elevation. The Contractor hauled fill, some of which was cut from the outside shoulder, to bring the median shoulders up to grade. This fill was measured in trucks and paid for at the contract unit price for Borrow Excavation.

The Contractor is claiming additional compensation for mixing of the material on the outside shoulders to make it suitable for use as fill on the median shoulders. We did not direct him to use this material as borrow material. He could have furnished borrow from an off project source.

It is our position that the unilateral Supplemental Agreement covering reworking of the median shoulders provides fair compensation for all the extra work for which the Contractor is claiming additional compensation.

PART 4.

In an attempt to settle this claim, we accepted responsibility for what occurred and offered payment for the idle labor and equipment and for the cost of the four (4) loads of mix not used at the prices submitted by the Contractor. We refused to pay the costs claimed for Maintenance of Traffic and Home Office Overhead. The Department paid for all Maintenance of Traffic costs under the per day items for traffic control devices. Subarticle 4-3.2.3 provides that the markups for labor, equipment and materials, which were used by the Contractor in calculating additional costs incurred, include all indirect costs such as Home Office Overhead.

PART 5.

The Contract requires the Contractor to provide traffic control during straight-edging of the pavement. We made several efforts to coordinate the straight-edging with the Contractor's representative, but this proved difficult at best. We then notified the Contractor that this operation would take place on March 11, 1997. We notified the Contractor of the results and a meeting was held on March 20, 1997 to discuss these results.

The Contractor did not complete taking cores of the Friction Course for payment determination, another operation which was required to be completed prior to acceptance of the work, until March 24, 1997. Thus, regardless of straight-edging, acceptance could not have been made prior to March 24, 1997.

The Contractor chose to delay correction of the straight-edge deficiencies until a meeting could be held with the District Bituminous Engineer. They did not contact that District Bituminous Engineer to arrange a meeting until April 8, 1997. The meeting was held on April 11, 1997 and the Contractor was advised of the corrections to be made at that time. Some, but not all of the areas with straight-edge deficiencies were accepted with at reduced payment. The contractor did not begin corrective action until April 25, 1997.

It is our position that the Contractor was responsible for the delays, because of their failure respond to our attempts to coordinate with them to provide traffic control and their failure to accomplish in a timely manner the corrections to the Friction Course as required by the specifications.

RELEASE OF LIQUIDATED DAMAGES

The Final Estimate shows 30 days of liquidated damages assessed.

INTEREST

Even if the Board finds entitlement for some parts of the claim, interest is not justified for the period after 1998 when the Contractor ceased further negotiations on their claims.



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

PART 1.

The footnote to the Summary of Earthwork Table in part reads, "There shall be no revision to earthwork quantities for which payment is made by plan quantity". (emphasis added) The specifications do not provide that the method of measurement ( i.e. payment) for Borrow Excavation is to be based on plan quantity.

PART 2.

Neither the Contractor nor the Department provided documentation for the unit prices they used in determining the amount due for the asphalt item, therefore, a unit price between \$45.00 per ton and \$100.00 per ton appears to be equitable compensation. .

PART 3.

The Department included reasonable payment for reworking of the median shoulders in the Unilateral Payment dated January 20, 1997.

When the plan quantity for Borrow Excavation is compared to the plan quantity for Reworking Shoulders it is reasonable to conclude that the grading work on the outside shoulders was predominately fill with little excavation. Even if the contractor had treated soil excavated from the outside shoulders as borrow, the work would have differed from that of the item Borrow Excavation.

The Contractor did not provide a meaningful justification for the unit price he is claiming for the work of reworking shoulders. The work actually accomplished on the shoulders differs from that described in the specification for the item Reworking Shoulders, because substantial excavation was required.

PART 4.

The difference between the amount offered by the Department and the amount claimed is solely in Maintenance of Traffic and overhead.

PART 5.

The amount claimed is solely related to Maintenance of Traffic, Home Office Overhead and replacement of thermoplastic pavement marking and raised pavement markers damaged during correction of the straight-edge deficiencies in the Friction Course.

RELEASE OF LIQUIDATED DAMAGES

The Department recognized that progress of the work was delayed in conjunction with occurrences related to some Parts of the contractor's claim.

INTEREST

The Board finds that interest at 10% per the annum is due on the amounts awarded by the Board from May 1, 1997 through August 1, 1998.

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

The Department of Transportation is directed to reimburse the Contractor for of this claim as follows:

The Department of Transportation is directed to pay the Contractor \$124,000.00 for his claim.

This amount includes release of liquidated damages for 11 calendar days and interest due.

The Department of Transportation is directed to make payment to the Contractor the amount of \$13,477.86 in accordance with the Unilateral Payment dated January 20, 1997 (payment for reworking of median shoulders) if this amount has not been included in earlier payments to the Contractor.

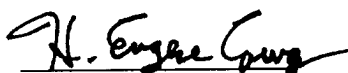
The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 200.60 for Court Reporting Costs.

The Contractor is directed to reimburse the State Arbitration Board the sum of \$ 200.60 for Court Reporting Costs.


Tallahassee, Florida

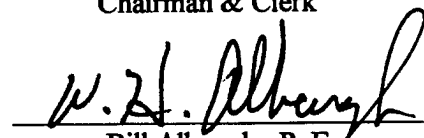
Dated: 9/12/00

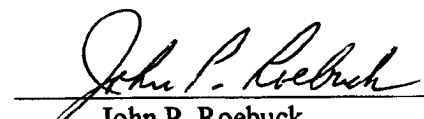
Certified Copy:

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

9/12/00  
DATE

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

  
Bill Albaugh, P. E.  
Alternate Member

  
John P. Roebuck  
Member

STATE ARBITRATION BOARD  
STATE OF FLORIDA

MITCHELL BROTHERS, INC.	)	
	)	
	)	
	)	
- and -	)	PROJECT NO. 53020-3545
	)	LOCATION: Jackson County,
	)	Florida
	)	
DEPARTMENT OF TRANSPORTATION	)	
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**ORIGINAL**

RE: Arbitration In The Above Matter

DATE: Tuesday, July 25, 2000

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

TIME: Commenced at 9:45 a.m.  
Concluded at 11:55 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

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

APPEARING ON BEHALF OF MITCHELL BROTHERS, INC.:

Mr. Eddie Mitchell  
 Ms. Donna Jarriel

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Martin  
 Ms. Gabriella Corbin

ALSO PRESENT:

Mr. John B. Coxwell

\* \* \*

I N D E X

EXHIBITS	PAGE
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P R O C E E D I N G S

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

Mr. Freddie Simmons was appointed as a member of the Board by the Secretary of the Department of Transportation.

The Secretary also appointed Bill Albaugh as an alternate member to serve on the Board, and Mr. Simmons was unable to be here this morning, so Mr. Albaugh is sitting in in his place.

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

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

The terms of the Board expire June 30, 2001. I had already -- I have already resigned from the Board effective July 1 of this year. Mr. John Coxwell has been appointed as the new Chairman of the Board. He was selected by the other two Board members.

It was decided that since this hearing was postponed from June 12, and I had been involved in the matter and had prepared for the hearing, that I would go ahead and conduct this hearing instead of

1 Mr. Coxwell.

2 So, that's the way it stands today. Are there  
3 any objections to that? Okay. This will be the last  
4 time you will see me as Chairman.

5 MR. MARTIN: Will Mr. Coxwell have any input into  
6 the Board's decision?

7 MR. COXWELL: On this matter, no.

8 CHAIRMAN COWGER: He's strictly an observer. We  
9 have another hearing after this, and he will be the  
10 Chairman for it. It's a brand-new claim.

11 Will each person who will make an oral  
12 presentation during the hearing please raise your right  
13 hand and be sworn in.

14 (Whereupon, all witnesses were duly sworn.)

15 CHAIRMAN COWGER: The request for arbitration of  
16 the claim submitted by the claimant, including all  
17 attachments thereto and the administrative documents  
18 preceding the hearing are hereby introduced as  
19 Exhibit 1.

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

21 CHAIRMAN COWGER: Does either party have any  
22 other information -- the DOT's primary rebuttal  
23 statement, which was submitted to the Board after they  
24 received the claimant's request for arbitration is  
25 hereby identified as Exhibit 2.

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

2 CHAIRMAN COWGER: Now, does any party have any  
3 other information they wish to put into the record as  
4 an exhibit?

5 MR. MARTIN: Yes, sir, I would. This is Florida  
6 Statutes that's relevant in this matter.

7 CHAIRMAN COWGER: Okay. We will introduce this  
8 as Exhibit 3. It is a copy of a portion of Florida  
9 Statute 337.185, and the entire Section 337.19.

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

11 CHAIRMAN COWGER: This has to do with supporting  
12 the DOT's position that they made in their rebuttal  
13 statement as to whether or not the Board has  
14 jurisdiction to hear this claim.

15 MR. MARTIN: That's correct.

16 CHAIRMAN COWGER: Because the claim was filed  
17 more than 820 days after acceptance of the contract.  
18 Is that basically what it says?

19 MR. MARTIN: Yes, sir.

20 CHAIRMAN COWGER: Mr. Mitchell, I believe you  
21 have something to be submitted that has now been  
22 circulated to the Board members and to DOT. It's a  
23 statement by Donna Jarriel, comptroller for Mitchell  
24 Brothers, addressing the issue of whether or not the  
25 Board has jurisdiction to hear this claim.

1 All parties have been presented a copy of this  
2 now. I realize the DOT hasn't had much of an  
3 opportunity to read it, but I think it speaks for  
4 itself.

5 Now, the question is, DOT, do you understand what  
6 is in that letter? Have you had time to digest it yet?  
7 Would you like a couple more minutes?

8 MR. MARTIN: This was written by you, Donna?

9 MS. JARRIEL: It was written by the attorney.

10 MR. MARTIN: It's an attorney's interpretation?

11 MS. JARRIEL: It's got legal arguments in it.

12 MR. MARTIN: We may need to have our attorneys  
13 review it. If this is -- I'm certainly not qualified  
14 to review an attorney's work product.

15 CHAIRMAN COWGER: So, you didn't really have a  
16 comment at this point?

17 MR. MARTIN: No, sir.

18 CHAIRMAN COWGER: Would you like to reserve the  
19 right?

20 MR. MARTIN: Yes.

21 CHAIRMAN COWGER: We are going to have the Board  
22 go out at this point and caucus on this issue. If we  
23 should decide to proceed with the hearing, then you  
24 will have the opportunity, DOT, to present one rebuttal  
25 to the letter you have in front of you, Exhibit 4,



1 after the hearing.

2 MR. ROEBUCK: After the fact.

3 MR. MARTIN: I don't understand.

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

5 CHAIRMAN COWGER: If we proceed on, based on what  
6 we know right now, it will still give you the right to  
7 rebut that statement. The Board will consider that  
8 before it issues its ruling.

9 If the Board at this point in time should decide,  
10 well, we erred in having the hearing, then we will  
11 throw the whole thing out basically.

12 MR. MARTIN: Okay.

13 CHAIRMAN COWGER: The Board does need to caucus  
14 based on what we have in front of us now, on what we  
15 are going to do, whether we are going to have the  
16 hearing or not.

17 Again, if we proceed, you all have the right to  
18 submit a rebuttal. Today being the 25th of July,  
19 whatever two weeks from today is would be your  
20 deadline.

21 MR. MARTIN: You are going to make your decision  
22 based on the information --

23 CHAIRMAN COWGER: On what we have in front of us,  
24 including the letter.

25 MR. ROEBUCK: We have also encountered this

1 before with the same documents.

2 MR. MARTIN: You've used Florida Statutes and  
3 understand the relevance of the Florida Statutes I gave  
4 you?

5 CHAIRMAN COWGER: Yes. Let us caucus, and we  
6 will give you our decision. If appropriate, we will  
7 give you a little bit of background on the decision.  
8 (Discussion off the record)  
9 (Whereupon, Mr. Tim Avitable entered the room.)

10 CHAIRMAN COWGER: Is he going to testify?

11 MR. MITCHELL: Yes.

12 CHAIRMAN COWGER: How about let me give you the  
13 oath. If you will raise your right hand, please.  
14 (Whereupon, the witness was duly sworn.)

15 CHAIRMAN COWGER: After the caucus out of the  
16 room, the Board has decided we will hear the issues.  
17 The DOT has the opportunity within the next two weeks,  
18 two weeks from today, to present a written rebuttal.

19 Prior to issuing our order, we will take that  
20 letter into consideration. There is the possibility  
21 that we could say, okay, we didn't have the right to  
22 hear this matter.

23 We think that in view of what has happened so  
24 far, we ought to go ahead. Everybody is here. We  
25 ought to go ahead and conduct the hearing as if none of

1           this had happened.

2                   MR. MARTIN: Can you explain the basis of your  
3           decision?

4                   CHAIRMAN COWGER: No, we don't choose to do that.  
5           We discussed that. We said we will not reveal that.

6                   MR. MARTIN: You can't tell me what the basis of  
7           your decision is?

8                   CHAIRMAN COWGER: The Board doesn't want to get  
9           into that at this point. When we did the previous one,  
10          that's been used as kind of a precedent here to some  
11          degree, although DOT objects to us as using that as a  
12          precedent because they claim the circumstances are  
13          different, we did not in the order tell why. We just  
14          said we decided to hear it.

15                  Now, I think you can draw a conclusion from what  
16          has been said here in all of this where it will come  
17          from, but I don't want to say it.

18                  Okay. Not okay, but we will proceed on. I see  
19          no reason to discuss this any more.

20                  MR. MARTIN: Mr. Cowger, that's the primary basis  
21          of, you know, what we are here for. We still adamantly  
22          believe that this shouldn't even be an arbitration.  
23          That's going to be one of the things we discuss in our  
24          rebuttal. Can we still do that?

25                  CHAIRMAN COWGER: You have the right to do that.

1       As I said earlier, the Board will consider whatever you  
2       put in your rebuttal before we issue the order. And we  
3       may decide at that point in time with the additional  
4       information you submit, that you are right and we may  
5       throw the whole thing out.

6               MR. MARTIN: Should that have been done prior to  
7       the Board caucusing, us to try to explain our position?

8               CHAIRMAN COWGER: Well, it might have been  
9       better, but I don't think you are being prejudiced here  
10      at all because we have said that we are going to  
11      consider whatever you send.

12              MR. MARTIN: Once we give our primary rebuttal,  
13      then you will recaucus and reconsider?

14              CHAIRMAN COWGER: Yes, the Board will sit  
15      together and discuss it one more time before we issue  
16      the order. It leaves open the possibility that we will  
17      decide that we shouldn't have heard it. In that case  
18      we could throw the whole thing out. I'm sure that  
19      won't be the end of it if we should do that.

20              MR. MARTIN: It would be the end of it. There's  
21      no recourse. There's no legal recourse at this point.

22              CHAIRMAN COWGER: I don't know. I'm not an  
23      attorney. I don't know if there's a legal recourse or  
24      not.

25              MR. MARTIN: The contractor can't sue the

1 Department. So what other recourse do they have?

2 CHAIRMAN COWGER: Why can't they sue the  
3 Department?

4 MR. MARTIN: It's exceeded the time limit.

5 CHAIRMAN COWGER: I don't want to get into that.  
6 I don't think the Board wants to get into that, do we?

7 MR. ROEBUCK: We don't sit here as lawyers.  
8 That's the problem.

9 MR. MARTIN: It's pretty clear, it's written in  
10 the specs, it's written in the Florida Statutes. His  
11 primary rebuttal here, this additional information was  
12 prepared by his attorneys. And now we are not going to  
13 be discussing legal matters?

14 CHAIRMAN COWGER: We are going to consider them  
15 because you are going to have the opportunity to  
16 present them. The only reason for having the hearing  
17 is that everybody is here. The Board has made a  
18 preliminary determination that we can hear it. So,  
19 while we are here, we are going to have the hearing.

20 MR. MARTIN: You can't share with us the basis  
21 for your decision that you will hear the arbitration?

22 CHAIRMAN COWGER: What do you think, gentlemen?

23 MR. ALBAUGH: The Board doesn't give verbal  
24 rulings, do we?

25 CHAIRMAN COWGER: I don't think we want to get

1           into that. We understand where you are coming from.  
2           We will consider what you submit, but let's go on.

3                   During this hearing the parties may offer such  
4           evidence and testimony as is pertinent and material to  
5           the dispute being considered by the Board, and shall  
6           produce such additional evidence as the Board may deem  
7           necessary to an understanding of the matter before it.  
8           The Board shall be the sole judge of the relevance and  
9           materiality of the evidence offered.

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

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

21                   We are primarily looking for information  
22           regarding the facts, and the contract provisions that  
23           apply to this case.

24                   The order of proceeding will be for the claimant  
25           to present their claim and then for the respondent to

1 offer rebuttal.

2 Either party may interrupt to bring out a  
3 pertinent point by coming through the Chairman, but we  
4 ask that you please be orderly.

5 We have found that it works better if we let the  
6 contractor make his presentation, then the Department  
7 come back, and then we will open it up to  
8 across-the-table discussion.

9 If there is an issue that comes up that either  
10 party just feels they can't wait, we will consider  
11 letting you interrupt. We need to keep the hearing  
12 moving, and I think it will be a lot better if we  
13 basically have one side present their case, have a  
14 rebuttal, and then open it up to discussion.

15 This claim, as I see it, has five distinct parts  
16 to it. Actually, it has five distinct parts plus  
17 another part dealing with release of liquidated  
18 damages.

19 I think it would probably expedite things and  
20 make it a little simpler for all of us if we would kind  
21 of go through these claims one at a time, contractor  
22 present his side, DOT rebut. We will put that issue  
23 behind us, then we will go to the next issue.  
24 Otherwise, I think we will get confused.

25 We do realize there is some potential for overlap

1       between claim one, which is the dispute over payment  
2       for borrow excavation, and claim three, which is the  
3       dispute over payment for reworking the shoulders.

4               We will deal with that as we go along. We will  
5       go through part one. Then when we get to part three,  
6       any overlap we will handle at that time.

7               I note that in several instances the DOT has  
8       recognized entitlement, but agreement could not be  
9       reached on the additional compensation due. This is on  
10      some of the claims.

11              So, we will keep that in mind as we go through  
12      this. And I'm assuming that DOT has not come prepared  
13      to change their position on any offers they have made  
14      up to this point?

15              MR. MARTIN: Excuse me?

16              CHAIRMAN COWGER: The only dispute is on the  
17      amount of money to be paid. All we are really here to  
18      talk about is the difference?

19              MR. MARTIN: No, sir. It's totally different  
20      now. Those offers were made two years ago in order to  
21      avoid litigation. It's totally different now. You  
22      know, we need to revisit the merit of those, where we  
23      had initial offers, because those offers were made in  
24      an attempt to avoid litigation in a lot of cases.

25              CHAIRMAN COWGER: I thought you weren't going to



1 bring your attorney. No, I'm just teasing.

2 Again, we will try to expedite these things and  
3 deal with each issue as fast as we can. You are saying  
4 your offer doesn't stand?

5 MR. MARTIN: That's correct.

6 CHAIRMAN COWGER: But at the time it was offered,  
7 you felt that was a realistic approach?

8 MR. MARTIN: To avoid litigation.

9 CHAIRMAN COWGER: Only to avoid litigation?

10 MR. MARTIN: Yes, sir. We did pay unilaterals on  
11 issues where we were certain that additional work had  
12 occurred and the additional compensation was merited.  
13 We did actually do unilateral payments to make sure the  
14 contractor received payment for that.

15 CHAIRMAN COWGER: On the unilateral payment,  
16 there was one unilateral payment that was proposed like  
17 \$13,000 on one of the issues. Has that payment, in  
18 fact, been made?

19 MR. MARTIN: Yes.

20 CHAIRMAN COWGER: You have an executed  
21 supplemental agreement or whatever?

22 MR. MARTIN: A unilateral payment.

23 CHAIRMAN COWGER: Do you agree you got that  
24 money, Mr. Mitchell?

25 MR. MITCHELL: Yes.

1           CHAIRMAN COWGER: That went on through and that  
2           is not in dispute. That \$13,000 at whatever time it  
3           was offered is settled.

4           MR. MARTIN: I think it's five days or nine days.

5           MR. ROEBUCK: Nine.

6           CHAIRMAN COWGER: Okay. Let's go on to part one  
7           then. Mr. Mitchell, would you like to proceed, please,  
8           sir?

9           MR. MITCHELL: All right.

10          CHAIRMAN COWGER: The Board has had the  
11          opportunity to read your initial presentation, so  
12          I think we have read it and understand what you are  
13          saying pretty well. It would be a matter of expanding  
14          on part one any way you see fit.

15          MR. MITCHELL: Having read the summary, and  
16          everybody has a copy of the summary that we sent,  
17          I guess I would just add to that from the standpoint of  
18          whenever we bid the job, based on the quantities that  
19          they were showing and the work that we had to do to do  
20          the shoulder work.

21          If you take and reduce that quantity of borrow,  
22          you know, that we had to use, and us go out and do the  
23          shoulder work on the project itself, if we don't have  
24          that quantity of dirt where we figure, you know, the  
25          work that we are going to be doing is actually figured

1           into the dirt.

2                   By taking out that dirt, they've taken out the  
3           money that we are going to be getting compensated for,  
4           you know, for placing and doing all the work that had  
5           to be done on the shoulders.

6                   What, in fact, we ended up doing was moving a lot  
7           of dirt on the job. In other words, instead of it  
8           being like they had explained it, you know, we would go  
9           in there and put ten inches of dirt all the way up one  
10          side of the road and all the way down the other side of  
11          the road on the shoulders and possibly do it in a day  
12          or two, we ended up going in there and actually taking  
13          dirt here off the road and putting it 300 or 400 foot  
14          down here in another place and just over and over.

15                  Our biggest thing was moving a lot of dirt around  
16          on the road that we weren't getting paid for instead of  
17          just physically bringing the dirt in, you know,  
18          spreading it on the side of the road and getting paid  
19          for it.

20                  Is there any question as far as what I'm  
21          explaining? Are you all familiar enough with the road  
22          work to understand what I'm saying?

23                  CHAIRMAN COWGER: Oh, yes.

24                  MR. MITCHELL: In other words, the road instead  
25          of being ten inches low all the way through or eight

1        inches or seven or five, there were places that were  
2        too high and places that were too low. We ended up  
3        moving dirt with equipment physically back and forth,  
4        which reduced the amount of dirt that was coming in.

5                Even though we did the work, we didn't get  
6        compensated for it other than the fact that we felt up  
7        front we were getting compensated for it.

8                We met on the job. We have some correspondence  
9        to that effect. We were told that we would get  
10       compensated for it.

11               CHAIRMAN COWGER: Can you tell us who told you  
12       that?

13               MR. MITCHELL: Here is a note on this particular  
14       day here.

15               "In a meeting between Gene Cassel of Mitchell  
16       Brothers and Bill Neal of DOT regarding starting  
17       shoulder work, it was agreed after Bill Neal talked to  
18       final estimates that earthwork would be paid for by  
19       plan quantity.

20               "His decision was reversed by Steve Potter and/or  
21       Gabby Corbin."

22               MR. MARTIN: Excuse me, Mr. Mitchell, what is  
23       that that you are reading from?

24               MR. MITCHELL: This is his notes, Gene Cassel.

25               CHAIRMAN COWGER: That's an internal note of

1           yours?

2                   MR. MITCHELL:   Yes.

3                   MR. MARTIN:   Did he keep a journal or a log?  Is  
4           that from his log?

5                   MR. MITCHELL:   That I don't know.  This is just  
6           for this --

7                   MR. MARTIN:   Could we get a copy of his entire  
8           log?

9                   MR. MITCHELL:   This is just for this particular  
10          meeting here.

11                   MS. CORBIN:   Is that Gene Cassel's writing?

12                   MR. MITCHELL:   Yes.

13                   MR. MARTIN:   He made it just recently or at the  
14          time of the job?

15                   CHAIRMAN COWGER:  He said prior to the shoulder  
16          work.

17                   MR. MARTIN:   So, that note was made back in '97  
18          or '98?

19                   MR. MITCHELL:   I'm assuming.  I mean Gene hasn't  
20          worked with us in a --

21                   MS. JARRIEL:   A long time.  It was probably  
22          written in '97.

23                   MR. MITCHELL:   That's basically where we are --  
24          this was a -- you know, our situation as far as, you  
25          know, being -- the only way we are compensated for that

1 is --

2 CHAIRMAN COWGER: Members of the Board, I think  
3 we have heard enough on that issue, don't you? Okay.  
4 That was a handwritten thing, though, right?

5 MR. MITCHELL: Yes.

6 CHAIRMAN COWGER: That's all I want to know.

7 MR. MITCHELL: Do you want to pass it around?

8 CHAIRMAN COWGER: Not unless DOT wants to see it.  
9 Does that complete your presentation for the moment?

10 MR. MITCHELL: I might state that increase or  
11 decrease in quantities, the engineer reserves the right  
12 to make in writing any time during the work such  
13 changes in quantities and such alterations in the work  
14 as are necessary to satisfactorily complete the  
15 project.

16 I guess basically what we went on, you know, what  
17 we were told at the time was, you know, you are out  
18 there working on a job and you are building a job and  
19 you look at something and discuss it, that's basically  
20 all you've got to go on. You can't just stop two or  
21 three days.

22 We proceeded on with the work. We did the  
23 balancing from one area to the other. Basically the  
24 way the DOT is looking at it right now, we did it at no  
25 compensation.

1           We stand behind the fact that the only way we  
2           were getting compensated for that is from the  
3           standpoint we were told we would be getting paid plan  
4           quantity, which is the way we bid the job.

5           CHAIRMAN COWGER: You say you bid the job based  
6           on plan quantity. Then prior to the start of the  
7           earthwork you were told payment would be for plan  
8           quantity. So, on those two pieces of information you  
9           proceeded?

10          MR. MITCHELL: That's correct.

11          CHAIRMAN COWGER: Are we ready to let DOT come in  
12          now or do you have another point? I think we  
13          understand everything you have said.

14          Let's let Steve come on back in now and -- and  
15          before you start, let's keep in mind in your rebuttal  
16          to part one, you've made a pretty clear statement on  
17          what your position is as to whether or not the borrow  
18          was to be paid for by plan quantity or not. You can  
19          expand on it, but I don't see any reason to repeat  
20          that.

21          MR. MARTIN: I wasn't. I will go ahead and  
22          address this issue. I would like to come back to the  
23          main topic. I want to go ahead and address this one  
24          while it's fresh on everyone's mind.

25          CHAIRMAN COWGER: Okay.

1           MR. MARTIN: With this contract there were two  
2           distinct pay items: the pay item for lump-sum regular  
3           excavation, which was not a plan quantity item, and  
4           then you had truck measure borrow. That was not a plan  
5           quantity item. It was truck measure based on how many  
6           trucks were delivered to the project to meet the borrow  
7           requirements of the project.

8           The quantities were estimated based on all of the  
9           excavation being removed from the project. The  
10          contractor chose not to do that. He chose to try to  
11          incorporate the regular excavation on the project  
12          within the project.

13          So, what he did with that lump-sum regular  
14          excavation by moving the existing material around, he  
15          also cut his borrow quantity.

16          He was paid lump sum by the regular excavation  
17          with full contract costs and he was paid for every  
18          truck load of borrow that was imported to the job under  
19          the proper pay item, under truck measure borrow  
20          material. Those were the two items.

21          It seems that what the contractor is trying to do  
22          is to lump these two separate pay items together and  
23          treat it as one excavation item, which is not the case  
24          to this contract.

25          The note that is referred to in his approach



1       here, let's see, we have it as attachment 1-B. If you  
2       will take a look at the note that he made his initial  
3       case on, it says earthwork has been calculated using  
4       round-off base option. If another option is  
5       constructed there will be no revision to earthwork  
6       quantities unless payment is made by plan quantities.  
7       (Brief pause)

8               MR. MARTIN: This note which is referred to on  
9       the summary of earthwork, it refers to regular  
10      excavation, whereas a base option, you know, you may  
11      have the quantities based on the lime rock base option.

12             If the contractor had opted to use, say, asphalt  
13      base, then it would have required less regular  
14      excavation, but we would have paid the same lump-sum  
15      amount for the regular excavation.

16             That note is being taken out of context as far as  
17      the borrow excavation.

18             That's basically it. I mean you can read  
19      everything else that we had included, but --

20             CHAIRMAN COWGER: I think we have probably heard  
21      enough on that issue unless either side has anything  
22      else. Do you have a rebuttal to anything that was  
23      said?

24             MR. MITCHELL: I think my rebuttal is basically  
25      going back to what he said. You've got a situation out

1           there on the road where you've got -- he's saying that  
2           the contractor elected not to haul the dirt off and  
3           hailed the dirt back. If we had hauled it off and  
4           hailed it back, he would have paid -- that's exactly  
5           our point.

6                     We went there prior to doing the work. We met  
7           with DOT, DOT's representative. We discussed the  
8           matter.

9                     Had they said no, we are not going to pay you, we  
10          want you to haul this dirt off, and we are going to pay  
11          you to haul it off, and we want you to turn around, do  
12          a U-turn and haul it back, and we are going to pay you  
13          to haul it back, then that's what we would have done.

14                    We met with them. We discussed it. It was  
15          agreed that instead of hauling it off and hauling it  
16          back, we were going to haul it from here down the road  
17          and dump it out, and that was it, or we were going to  
18          push it down the road or we were going to do whatever  
19          it took to get that job built.

20                    We were going to be paid plan quantity.

21                    What Steve said is the basis of what we are  
22          trying to -- I mean we have been saying here and have  
23          agreed to with DOT all along, had they said, you  
24          know -- when that meeting happened, if they had said,  
25          no, we are not going to pay you, we want you to haul it

1 down the road, like I say, make a U-turn and haul it  
2 back, we are going to pay you both ways, I guess maybe  
3 that's what we would have just done, which is exactly  
4 what Steve said.

5 He said if we had hauled it off we would have  
6 paid them. If we had hauled it back, we would have  
7 paid them. It was decided ahead of time that was  
8 redundant.

9 CHAIRMAN COWGER: I think we need to hear  
10 something from you on that, Steve.

11 MR. MARTIN: We are not aware of the meeting that  
12 Gene Cassel had with Bill Neal. Gabriella was  
13 responsible and in charge of that project. She was on  
14 site at times. Are you aware of any meeting or any  
15 direction that Bill Neal had given?

16 MS. CORBIN: Yes, some kind of meeting like that  
17 happened. Bill Neal when he came to my office and he  
18 told us he had done that, I said you cannot do that.  
19 That is not right. We can not pay borrow, truck  
20 measure borrow, plan quantity concept. Then we come  
21 back with Mr. Potter.

22 We contact Mr. Gene Cassel and we told him we --  
23 we contacted Mitchell Brothers and said we will -- you  
24 know, what Bill told you is wrong.

25 MR. MITCHELL: The problem is all this is after

1 the fact.

2 MR. MARTIN: How much after the fact? Was that  
3 immediately after the meeting?

4 MS. CORBIN: Yes, it was like within days.  
5 I can't recall exactly what days and all that.  
6 I cannot recall to be honest with you all here, but it  
7 wasn't like after all the work was done.

8 MR. MITCHELL: We contend that it was after the  
9 work was done. The work was done based on what we were  
10 told.

11 MS. CORBIN: No, sir.

12 CHAIRMAN COWGER: May I make sure I understand  
13 your testimony. It is that when you made the decision  
14 that, no, it could not be paid for by plan quantity, it  
15 was done shortly after the decision had been issued by  
16 your inspector in the field, the project engineer?

17 MS. CORBIN: It's my recollection that was the  
18 case.

19 CHAIRMAN COWGER: You overruled him very shortly?

20 MS. CORBIN: Yes, that's my position.

21 CHAIRMAN COWGER: Was that passed on down to the  
22 contractor?

23 MS. CORBIN: Yes, we called him.

24 CHAIRMAN COWGER: I don't think we need to hear  
25 any more on part one. Anything burning to be said?

1           MR. MARTIN: I would like to go ahead and give  
2           our position on the overall claim package. It may  
3           speed up things, also, from our end. You know, as we  
4           stated in the very first rebuttal, we feel like the  
5           Florida Statutes is clear that this issue should not go  
6           to arbitration or to any type of litigation.

7           As far as the Department, this contract is final.  
8           It's been paid off. And by the, I guess a lapse of 820  
9           days, then, you know, it's paid off.

10          CHAIRMAN COWGER: Let's stop a minute. Hold your  
11          thought. Do we need to hear this?

12          MR. ROEBUCK: No.

13          CHAIRMAN COWGER: Let's go on to something else.  
14          You've said that once. You have it in writing.

15          MR. MARTIN: I haven't said anything, Mr. Cowger,  
16          about this. You made your decision before I could even  
17          say anything about it. This was our primary --

18          CHAIRMAN COWGER: Please speed it up. You have  
19          it in writing, your position.

20          MR. MARTIN: Okay, but --

21          CHAIRMAN COWGER: You are going to have the  
22          opportunity to rebut it. I don't see why we are  
23          spending time today to go back over this same issue.

24          MR. MARTIN: We don't even feel like we should be  
25          spending time here at all.

1           CHAIRMAN COWGER: We have already ruled on that.  
2           Why are we going to continue to argue about something  
3           we have ruled on?

4           MR. MARTIN: You have given us a verbal ruling.  
5           You have not given us a basis for it. The rest of it  
6           is pretty clear cut.

7           CHAIRMAN COWGER: We don't want to hear any more  
8           about it.

9           MR. MARTIN: We did attempt to settle some of  
10          these because -- you know, to avoid litigation. We  
11          made unilateral payments where we felt like it was  
12          justified. We tried to negotiate in good faith with  
13          the contractor to get them resolved. It just didn't  
14          happen.

15          It's been -- 1998 was the last correspondence  
16          that we had with the contractor concerning these  
17          issues. We made offer letters to the contractor, and  
18          there was no response that we have received from those  
19          letters.

20          Then all of a sudden here it comes where  
21          they've -- they've elapsed the time where they can go  
22          to court with it, and then we go before arbitration.  
23          The rest of these are pretty self-explanatory.

24          CHAIRMAN COWGER: From your standpoint is what  
25          you are saying?

1           MR. MARTIN: Yes. You've got what you need. As  
2           far as the Department is concerned, we are finished  
3           with our rebuttal.

4           CHAIRMAN COWGER: We are going to give the  
5           opportunity to the contractor to spend a little time on  
6           each of these parts of the claim. Then if you wish to  
7           rebut then, okay. If you want to stand on what you  
8           just said, that's okay, too.

9           I think in fairness -- and I think there's some  
10          questions the Board may have about a couple of  
11          technical issues. Let's go on to part two.

12          Now, in the DOT's written response, written  
13          rebuttal to issue two, they primarily address the  
14          difference of 27,000 plus dollars between what they  
15          offered and what the DOT is now claiming on part two.

16          The DOT has already said, well, we are  
17          withdrawing the offer. Is that correct, Steve?

18          MR. MARTIN: Yes.

19          CHAIRMAN COWGER: We understand all of that. The  
20          Board will take that into consideration. Let's go on.

21          Do you have anything to add to part two that you  
22          haven't already put down in writing, Mr. Mitchell?

23          MR. MITCHELL: In part two?

24          CHAIRMAN COWGER: Yes. This has to do with  
25          repair of the existing base and pavement that

1           deteriorated.

2                   MR. MITCHELL:  (No response)

3                   CHAIRMAN COWGER:  Let me say this.  What it  
4           involves is during construction a portion of the  
5           existing road began to deteriorate and it was necessary  
6           to go in there and do some restoration work on the  
7           existing pavement before you could do the work shown in  
8           the contract.

9                   So, therefore, the contractor went in there, as  
10          I understand it, removed some of the pavement, in some  
11          cases removed the base and replaced them both.  Isn't  
12          that basically what happened?

13                  MR. MARTIN:  You are presenting his case,  
14          Mr. Cowger?

15                  CHAIRMAN COWGER:  What?

16                  MR. MARTIN:  You are presenting his case to the  
17          Board?

18                  CHAIRMAN COWGER:  No, I'm saying what  
19          I understand from what I read.  I'm not presenting his  
20          case.  I'm stating the facts as I read them.

21                  If you disagree with the facts, say so.  Do you  
22          disagree that -- with the facts that there was some  
23          base and pavement removed and replaced?  That's all I'm  
24          asking.

25                  MR. MARTIN:  No, sir, we don't disagree with



1           that.

2                   CHAIRMAN COWGER:   Now you do disagree with it --  
3           and I will make your case now, you do disagree at this  
4           point in time that that was extra work to be paid for,  
5           or do you?

6                   MR. MARTIN:   At the time we attempted to settle  
7           this issue to avoid any future litigation, that was the  
8           primary reason that we were willing to settle this  
9           issue.

10                  CHAIRMAN COWGER:   Okay.

11                  MR. MARTIN:   You have an acceptance letter where  
12           we had made an offer to the contractor over two years  
13           ago, March 30 of '98.   We never received any type of  
14           response for that.

15                  CHAIRMAN COWGER:   Okay.   Let me ask you a  
16           question, just out of my own curiosity.   I noticed in  
17           looking through some of the correspondence and the  
18           numbers that were presented that in doing the, I assume  
19           the base restoration, there was some lime rock base  
20           material used and some granite material used.

21                  What was the granite material used for?   I'm a  
22           little confused there.   Do you know?   Did you use the  
23           granite in the base or under the base or something?

24                  MR. MITCHELL:   Do you remember, Tim?

25                  MR. MARTIN:   Was there underdrain?

1 MR. AVITABLE: I don't know.

2 CHAIRMAN COWGER: It's not a real important  
3 question. If you can't come up with it, I don't think  
4 it's important, just that --

5 MS. CORBIN: It was for drainage purposes. The  
6 roadway was not draining properly.

7 CHAIRMAN COWGER: You might have put it under the  
8 base?

9 MS. CORBIN: That's correct. That's the way we  
10 did it.

11 MR. MITCHELL: On this particular item, I need to  
12 familiarize myself with it. There was a distinct  
13 problem in the road as far as drainage. There was  
14 water trapped under the road.

15 When the equipment got on the roadway, it started  
16 tearing the roadway up. So, DOT directed on what to do  
17 and we proceeded to do it. I don't think DOT ever --  
18 as Steve said, they never denied responsibility for it.

19 We did the work. I think based on the  
20 documentation that's here, that the real difference,  
21 I believe, in what DOT felt was proper and what we felt  
22 was proper --

23 CHAIRMAN COWGER: We are talking about dollars  
24 now?

25 MR. MITCHELL: Yes, was in the asphalt itself.

1 I think that was the -- as far as the labor and  
2 equipment and stuff, I think we were pretty much  
3 together on that. However, we might have -- there was  
4 a difference or two there, but not substantial.

5 Now, on the asphalt, what we were doing is we  
6 were actually cutting out areas and putting in -- we  
7 weren't doing the whole road or whatever. We were just  
8 doing isolated places. We were out here, you know,  
9 with labor and construction-type equipment, not, you  
10 know -- not just a paver and a roller.

11 So, basically our feelings were, our contentions  
12 were that we were putting down the asphalt, which was  
13 just miscellaneous work. That's what we would be paid  
14 for is miscellaneous asphalt.

15 They've come back and contended that we should be  
16 just getting paid for Type S asphalt. As per our,  
17 I guess, bid price in the plans or whatever, like  
18 I say, our justification on that is that it was  
19 isolated work. It was not mainline work like we bid to  
20 do that work for.

21 We did have an item in the bid for miscellaneous  
22 asphalt. You know, that's basically the only thing  
23 that you could really use in a circumstance like that.

24 As far as Type S asphalt, the specs themselves  
25 say that you can't lay it over a certain thickness.

1       Most of the areas that we put this in was, you know,  
2       laid thick enough that we could bridge over the bad  
3       material that was underneath it and then come back, you  
4       know, and do more on top of that.

5               So, looking at the numbers -- and I'm sure that's  
6       what you all are going to be looking at, that seems to  
7       me to be the big item there would be the miscellaneous  
8       asphalt.

9               MR. ROEBUCK: That seems about half of the  
10       difference, and then the MOT and --

11              MR. MITCHELL: Right. I think the MOT was  
12       self-explanatory. Let me look at that to make sure.  
13       This says the very fact that the Department included  
14       pay items for specific MOT devices as well as an item  
15       for maintenance of traffic, that is evidence of payment  
16       for maintenance of traffic in addition to specific  
17       devices.

18              Maintenance of traffic covers flag persons,  
19       cones, and so forth. It is the resident engineer's  
20       recommendation that the payment for maintenance of  
21       traffic is denied.

22              What they are basically saying there is this was  
23       no different than the rest of the job. If there was no  
24       payment for maintenance of traffic just because they  
25       paid for the signs, they wouldn't have a maintenance of

1 traffic item to start with.

2 We do incur those costs. That's the reason we  
3 added that in there.

4 As far as -- I guess again this is a valid cost  
5 resulting from the delay incurred by Mitchell Brothers,  
6 as a result of having to repair the existing roadway  
7 and proceeding with regularly scheduled work.

8 What we are saying there we are not double  
9 dipping or whatever. We are extending the life of that  
10 job.

11 We could have been working somewhere else that  
12 day. We could have been working somewhere else those  
13 days, however many days it was, on somebody else's job,  
14 having our resources directed towards another job, but  
15 yet we were working on that job which extended all  
16 these costs.

17 CHAIRMAN COWGER: Now, assuming that DOT does pay  
18 you something for this part of your claim, that's an  
19 assumption, you were developing revenue during those  
20 ten days. Maybe not at the rate you anticipated but  
21 you were developing revenue because you were doing work  
22 you were going to get paid for, is that correct?

23 MR. MITCHELL: That's correct.

24 CHAIRMAN COWGER: Let's let DOT come back and  
25 make some rebuttal. I have one question about the

1 entitlement part of it. That is, do you agree that the  
2 work was piecemeal in nature, that sort of thing?

3 MR. MARTIN: We still contend that there is no  
4 entitlement based on what we have discussed earlier.  
5 Two years ago there was entitlement. We attempted to  
6 settle it with the contractor. He chose not to settle  
7 it. It went on for two years.

8 As far as the Department is concerned, you know,  
9 this job is paid off. This issue is paid off.

10 CHAIRMAN COWGER: Mr. Martin, you are repeating  
11 yourself. Answer my question. My question was do you  
12 all agree that the nature of this repair work, whether  
13 it was compensable or not, was piecemeal?

14 MR. MARTIN: Was piecemeal?

15 CHAIRMAN COWGER: As opposed to one continuous  
16 section.

17 MR. MARTIN: It was not a continuous operation.

18 CHAIRMAN COWGER: Now, would you address anything  
19 you have to say about the dollar part of it. As I see,  
20 looking at your previous analysis, whether it's any  
21 good or not, it came down to the difference of the  
22 \$27,000 was based on a dispute over how much per ton  
23 the asphalt should be paid.

24 Mitchell was claiming \$100 a ton, DOT was  
25 offering \$45, which is the bid unit price for Type S-1

1 plus 25 percent to, I assume, to make some allowance  
2 for the piecemeal nature of the work. That's one  
3 dispute.

4 The other two disputes are the DOT says you are  
5 not doing anything for maintenance of traffic under  
6 your lump-sum item. That's not to be increased. And  
7 the other thing is you do nothing for home office  
8 overhead.

9 Isn't that basically the three differences?

10 MR. MARTIN: Two years ago that was our argument.

11 CHAIRMAN COWGER: We heard that. I qualified my  
12 statement, I'm comparing what you offered two years ago  
13 to what you are offering today. The Board will  
14 consider whether or not that's valid when we  
15 deliberate.

16 Would you answer the question about, that is the  
17 base -- that was, not is, but was -- that was the basic  
18 dispute two years ago?

19 MR. MARTIN: Yes, the MOT and the asphalt costs.  
20 He already had his equipment and labor costs included  
21 in that.

22 CHAIRMAN COWGER: I think we understand about the  
23 difference in the price.

24 MR. ROEBUCK: Yes.

25 CHAIRMAN COWGER: I think we understand about the

1           MOT, what the two parties' position is. You got a  
2           lump-sum item. The contractor is saying you should  
3           extend, adjust that lump-sum item to take into  
4           consideration the fact that I was out there longer.

5           MR. MARTIN: And we paid for all those per-day  
6           items, for each per-day item.

7           CHAIRMAN COWGER: You did pay for the per-day  
8           items.

9           MR. ROEBUCK: You both presented good documents.  
10          We don't need to get so indepth. It's pretty clear  
11          when you read this thing the equity. That's why we may  
12          be a little brief. I think we can pass on from there.

13          CHAIRMAN COWGER: Does either side, the parties  
14          have anything further to say? Hearing nothing, we will  
15          go on to part three. Mr. Mitchell?

16          MR. MITCHELL: All right.

17          CHAIRMAN COWGER: This has to do, also, with the  
18          reworking of the shoulders. Steve, the bid item, was  
19          that what the bid item was?

20          MR. MARTIN: Yes, square yard item, reworking  
21          shoulders.

22          MR. MITCHELL: I guess, there again, what we are  
23          looking at here is a situation where the DOT gave us a  
24          unilateral agreement regarding reworking of the  
25          existing shoulders in which the Department acknowledges



1           that additional compensation is due Mitchell Brothers  
2           for the work.

3                   However, the sum that they gave us was not  
4           sufficient to cover the costs. Basically what we did  
5           was -- I think the documentation that you have  
6           basically states, you know, what our position is on the  
7           cost of us doing this work that they have agreed was  
8           extra.

9                   I think that's the big issue here, is just the  
10          dollar amount.

11                   I believe based on shoulder work, they were just  
12          using a number of 66 cents because it was a statewide  
13          average. What we were doing was looking at our cost  
14          based on the fact of what we had to work with and what  
15          our numbers would have been, you know, dealing with  
16          what we had.

17                   CHAIRMAN COWGER: Could you give us a little  
18          explanation as to why the great disparity between the  
19          dollar and a half and 66 cents that was offered? By  
20          the way, as I understand, DOT paid for all of the  
21          shoulder rework after measuring it at 30 cents a square  
22          yard.

23                   MR. MARTIN: No.

24                   CHAIRMAN COWGER: Plus you had a unilateral  
25          supplemental agreement that paid for the -- paid an

1 additional 36 cents? It was between 66 and 30?

2 MR. MARTIN: Yes, sir.

3 CHAIRMAN COWGER: For the reworking that was done  
4 on the median shoulders only?

5 MR. MARTIN: Yes, sir. 20,421 square yards  
6 additional.

7 CHAIRMAN COWGER: As long as we understand where  
8 the -- how you arrived at the \$13,000.

9 Okay, now, go ahead, Mr. Mitchell.

10 MR. MITCHELL: We submitted a bid on the project  
11 based on a bid price for shoulder work which  
12 encompassed the use of borrow material brought in to  
13 the project, which would have been about ten inches of  
14 material. This was based on the DOT quantity, which  
15 was suitable for standard methods of shoulder work.

16 However, due to the FDOT's error in plan quantity  
17 of borrow material, existing material on the shoulders  
18 at the project site had to be used, which material was  
19 contaminated with mulch, debris and unsuitable matter.

20 That required extensive rework to us to make it  
21 suitable and stable per specifications.

22 The significant change in the character of the  
23 work clearly exceeded the cost of that originally  
24 estimated, thus an adjustment of price was required per  
25 Section 93-2.1 and 43-2.1 of the FDOT specifications.

1           The adjusted price request is based on the  
2           following, and this being the reasoning for the price  
3           being submitted.

4           The actual mixing or the extra burden of existing  
5           grass and existing dirt was 90 cent a square yard,  
6           which would be a price that would be very reasonable as  
7           far as the statewide average.

8           Reworking the shoulders at 60 cent a square yard,  
9           with a total adjusted price of 1.50 per square yard.

10          This would give you a shoulder and a median  
11          rework of 63,219 square yards at a dollar and a half,  
12          which was 94,000, less amounts paid.

13          CHAIRMAN COWGER: Okay. We are following you  
14          here in your Tab 21, I believe is where we are.

15          MR. MITCHELL: To answer your question as far as  
16          justifying, I think that was your question --

17          CHAIRMAN COWGER: Right.

18          MR. MITCHELL: You said what were the reasons for  
19          the disparity. That would be -- I guess it goes back  
20          to there again our price -- our price of 30 cent was  
21          based on using 13,000 yards of borrow because we had  
22          part of our money in our shoulder work in that.

23          So, had we not had that borrow, then our price on  
24          doing these shoulders, you know, would have been much  
25          more.

1           CHAIRMAN COWGER: I think we understand what you  
2           are saying.

3           Now let me go back, let's look at Exhibit 21,  
4           which I think is what Mr. Mitchell is reading from.  
5           Down there in the middle you say adjusted price request  
6           is based on the following, and then you go down there  
7           to actual mixing with the extra burden of existing  
8           grass and existing dirt at 90 cents a square yard,  
9           rework the shoulders at 60.

10          Now, I don't quite understand that. You are  
11          taking the extra cost of, as you have explained, of  
12          having to rework the material that was cut off the  
13          shoulders. You've spread that over the entire  
14          reworking of shoulders. You came up with 90 cents a  
15          square yard, or you are going to apply the 90 cents a  
16          square yard to all the shoulders.

17          MR. MITCHELL: We ran brace mixers through it  
18          several times to try to get it broke down enough to  
19          utilize it in the shoulders.

20          CHAIRMAN COWGER: While that was still in place  
21          before you picked it up?

22          MR. MITCHELL: Yes. Plus or minus. There again,  
23          where we are doing a Type B stabilization, which is  
24          basically running a brace mixer through it several  
25          times, you know, it's normally going to run around a

1           dollar and a half itself.

2                   On this particular thing, we did it for 90 cents.  
3           That's the cost factor that we are looking at there.  
4           I mean as far as a justification of that number and,  
5           you know, a historical cost factor within our own  
6           business, that was a reasonable price, a reasonable  
7           estimate of what we felt like it was costing.

8                   CHAIRMAN COWGER:  You mentioned you thought that  
9           in your opinion you thought the dollar and a half is  
10          about your usual price for what, now?

11                  MR. MITCHELL:  For stabilizing or mixing existing  
12          soils, you know, breaking them down.

13                  CHAIRMAN COWGER:  Okay.  I think, unless you have  
14          something you really need to get out, I would like to  
15          hear DOT's side.  Mr. Martin?

16                  MR. MARTIN:  All right.

17                  CHAIRMAN COWGER:  We are only here now, I think  
18          basically to talk about the -- I will withdraw that.  
19          Go ahead.

20                  MR. MARTIN:  The same argument with this issue.  
21          It applies to all of these issues.  We still feel the  
22          820 days have expired.  We've got full and final  
23          acceptance of this project.

24                  As far as this particular issue, we had an  
25          existing unit price for reworking shoulders of 30 cents

1 a square yard. We had a drop-off problem with the  
2 inside median that was not included in the reworked  
3 shoulder item. The plans called for outside shoulders  
4 only. It was a safety hazard.

5 You had the same drop-off on the inside. It  
6 might have been even more drastic on the inside as it  
7 was the outside because we were increasing the pavement  
8 thickness.

9 So, what we did, we did direct the contractor to  
10 do the additional work to rework the median shoulders.  
11 It was at an additional 20,421 square yards.

12 We used the rework shoulder item. It was the  
13 same nature of work. There was a borrow requirement  
14 for the inside shoulder that paid additional truck  
15 measure borrow for any additional borrow that was  
16 required for it.

17 We doubled the price, more than doubled the  
18 price, the unit price that they came up with for  
19 unilateral payment was 66 cents per square yard. We  
20 adjusted the contract by adding nine days for the  
21 additional work.

22 The Department was not obligated to make an  
23 adjustment at all since it was the same nature of work.  
24 We paid for additional borrow, as we had -- we had  
25 contract prices to do the work. It was not a major

1 item of work.

2 According to the specification, you know, there  
3 was -- it was not even warranted a change.

4 CHAIRMAN COWGER: We understand that, Mr. Martin.  
5 It was -- you've already stated that in your written  
6 statement. We have that in your -- we have that  
7 information that your argument says that item shouldn't  
8 have been adjusted price-wise because of the 5 percent  
9 limitation in the specs.

10 MR. MARTIN: We did make the adjustment mainly in  
11 an effort for the drop-off. We had problems with the  
12 drop-off. We wanted to get it accomplished as quickly  
13 as we could.

14 CHAIRMAN COWGER: Let me ask you a question. In  
15 that -- on that median shoulder, if anybody can answer  
16 this, either side, was all of that filled? Was there  
17 any cut on the median shoulder? I know there was cut  
18 on the outside shoulder that the contractor said he  
19 didn't anticipate. What about on the inside or the  
20 median shoulder? Was that all filled?

21 MR. MITCHELL: It was plus and minus.

22 MR. MARTIN: I think the majority of it was  
23 filled because that was our main concern was the  
24 drop-off there.

25 CHAIRMAN COWGER: Okay. Was any of the material

1 cut from the inside -- let me start over. Was any of  
2 the material cut from the outside shoulder and picked  
3 up and used as nonpaid borrow you might call it, used  
4 on the inside shoulder?

5 MR. MARTIN: No, sir. That's what I just asked  
6 Gabriella about. That material that was excavated was  
7 stockpiled, then it was brought back in. It was truck  
8 measure borrow.

9 CHAIRMAN COWGER: All the material he cut from  
10 the outside shoulder was handled that way? He might  
11 have moved some just longitudinally down the road?

12 MR. MARTIN: Some of it he balanced on the  
13 outside shoulders. From what I understand, any excess  
14 was stockpiled somewhere on the job site.

15 CHAIRMAN COWGER: For use where?

16 MS. CORBIN: The inside shoulder. He was paid as  
17 borrow for that.

18 CHAIRMAN COWGER: Okay. What do you have to say  
19 about his price, the dollar and a half? Do you have  
20 anything to say about that?

21 MR. MARTIN: Just real extreme because it was the  
22 same type work he had bid 30 cents a yard, then all of  
23 a sudden it's a dollar and a half a square yard. You  
24 know, we were paying for the additional borrow  
25 requirement, also.



1           CHAIRMAN COWGER: Okay. Is that all you have to  
2 say at this point?

3           MR. MARTIN: Yes.

4           CHAIRMAN COWGER: Do you have anything else,  
5 Mr. Mitchell?

6           MR. MITCHELL: Yes, on what we are discussing  
7 here as far as the medians, I guess, keeping in mind if  
8 there was any material hauled back there, which I'm not  
9 saying that there wasn't, it was extremely minor.

10           The amount of borrow that was utilized on the  
11 whole job that was paid for was only a couple of  
12 thousand yards. That was the entire project, outside  
13 shoulders, inside, wherever. Any of it might have been  
14 gone and paid for. That was the extent of it.

15           In the rebuttal on item three, DOT's rebuttal,  
16 I guess it's about the fourth paragraph down, they  
17 state at the end of the paragraph, "By utilizing his  
18 material" -- in other words, the material on the  
19 roadway, which goes back to what I talked about  
20 earlier. "By utilizing his material, the contractor  
21 saved hauling and material costs."

22           Well, you know, DOT is looking at what the  
23 contractor saved. Well, we are contending we didn't  
24 save anything. It cost us money because you have --  
25 yeah, maybe we didn't haul that, but the DOT saved what

1           they're not paying us for.

2           MR. MARTIN: If you will read on there,  
3           Mr. Mitchell, it talks about the borrow, also, the  
4           material that was brought back to the project, paid for  
5           as borrow excavation.

6           MR. MITCHELL: Well, that's what I'm saying,  
7           Steve. The total amount for the whole job was -- I'm  
8           talking about not only the work for the job, but all  
9           the extra work, all of it added together was just over  
10          2,000 yards.

11          MR. MARTIN: 2400, something like that.

12          MR. MITCHELL: That's only a small percentage of  
13          what was originally -- that we anticipated when we bid  
14          the work.

15          Any savings -- you are looking at it like we  
16          saved money. The person who saved money, if you don't  
17          pay us for the work we did, is DOT. They are the ones  
18          saving it because they're not paying for that borrow.

19          That's the whole deal. It's not what the  
20          contractor saved. The contractor was out there doing  
21          the work, building the job. It's what DOT saved by  
22          finagling this thing to where, you know, this quantity  
23          that they had in the plans was not being paid for.

24          The work that we are doing on the shoulders,  
25          instead of using ten inches of borrow, which that's

1           what that would calculate to, ten inches of continuous  
2           borrow where we could just lay it off and shave it,  
3           period, at 30 cent and be done with it, and made money  
4           at 30 cent, we are having to go out there and contend  
5           with moving this dirt around and all, dealing with it.  
6           It's costing us a dollar and a half.

7                     That's it in a nutshell.

8                     CHAIRMAN COWGER: I think, to try to summarize  
9           this up so we can go on to the next item, as  
10          I summarize what is being said here is that DOT's  
11          position is that by using the material that they cut  
12          off of the shoulders as borrow, they saved the cost of  
13          having to buy off-site borrow material and the cost of  
14          hauling the off-site borrow material to the project  
15          site.

16                    MR. MARTIN: That was just a point made, one  
17          point that was made.

18                    CHAIRMAN COWGER: Yes, but that's what is being  
19          discussed here.

20                    What Mr. Mitchell is saying, I don't see how  
21          I saved money because it cost me more to use this  
22          material off the project than it would have to go get  
23          the borrow.

24                    MR. MITCHELL: If I had gone to get the borrow,  
25          I would have got paid for it. That's the whole point.

1           CHAIRMAN COWGER: Okay. I think we have heard --  
2 go ahead.

3           MR. MARTIN: He did get paid for the borrow that  
4 you brought in to bring that ten foot up, to rework  
5 that shoulder. You were paid truck measure borrow for  
6 that quantity.

7           MR. MITCHELL: You are not getting the point,  
8 Steve. If that shoulder needed ten inches of borrow  
9 across the whole width of it, whether it be nine foot  
10 wide or whatever that particular shoulder was --

11          CHAIRMAN COWGER: We are talking about the  
12 outside shoulder --

13          MR. MITCHELL: Ten inches thick, and I went and  
14 got the borrow and brought it in at contract price,  
15 then bladed it over for my grass at 30 cents a square  
16 yard, we would have made our anticipated quantity.

17          MR. MARTIN: I don't know where you are getting  
18 the ten inches.

19          MR. MITCHELL: If you take the square yards on  
20 your project and divide it by the amount of borrow you  
21 figure on your project, it's ten inches thick  
22 throughout the project. That's where you are coming up  
23 with the ten inches.

24          CHAIRMAN COWGER: On the outside shoulder is all  
25 we are talking about right now as I understand.

1           MR. MARTIN: We cut everything, the ten foot,  
2           hauled off -- regular excavation and then backfilled it  
3           with imported borrow.

4           MR. MITCHELL: That's not counting anything.  
5           That's saying if you take the quantity in your job, the  
6           square yards, you are figuring ten inches.

7           CHAIRMAN COWGER: Gentlemen, we are down to  
8           arguing. We are going on the part five. The Board has  
9           enough information to make a decision.

10          As I understand, there is no part four of the  
11          claim. It jumps to part five, correct? Okay, again,  
12          this is part five having to do with the loads of  
13          asphalt that were rejected for ultimately being too  
14          cold.

15          Again, the DOT has -- again, back to Mr. Martin's  
16          original comment two years ago, said okay, there is  
17          entitlement. It was only about, a little over 2,000 --  
18          about \$1500 difference in the amount.

19          So, I think all we need to talk about today in  
20          order to expedite things is what does anyone have to  
21          say about the fact that DOT did not agree to the amount  
22          the contractor claimed?

23          As I understand it, the DOT basically agreed to  
24          all the costs except they did not agree to adjust the  
25          lump-sum item, maintenance of traffic, and they did not

1 agree to any home office overhead.

2 MR. MARTIN: That's taking the assumption that  
3 you are starting off with what we offered two years  
4 ago.

5 CHAIRMAN COWGER: That's what I said. You know,  
6 we understand what your position is, that all offers  
7 are off the table, but we've got to deal now with  
8 the -- now, if you have some other facts to offer on  
9 why he shouldn't be paid other than the fact that we  
10 just made this offer in good faith, fine.

11 MR. MARTIN: Your whole approach to this just  
12 indicates to me that you are just completely  
13 disregarding our argument.

14 CHAIRMAN COWGER: No, we are not, but we've heard  
15 it about seven times already.

16 MR. MARTIN: And you will hear it two more times.

17 CHAIRMAN COWGER: I suggest that you don't bring  
18 it up again. I am instructing you, don't bring that  
19 issue up again about the 820 days. You've said it five  
20 times. That's enough. We will consider it. We will  
21 also consider the statement that you made that all  
22 offers are off the table. We can't just disregard that  
23 evidence that we have either.

24 Anyway, let's go on to -- is there anything new  
25 that either party has to offer about whether or not

1 four truck loads of material were ultimately returned  
2 to the plant and found to be too cold, therefore, were  
3 unacceptable, and that basically is what the  
4 contractor's claim is based on, is payment for those  
5 four truck loads, right, and associated delays?

6 MR. MITCHELL: I believe what -- I'm trying to  
7 get straight here. It was contended to be too cold on  
8 the job. Their thermometer was wrong. When it got  
9 back to the plant it wasn't too cold.

10 CHAIRMAN COWGER: We have all that information.

11 MR. MITCHELL: My thing on the maintenance of  
12 traffic and home overhead just reverts back to what we  
13 have said before.

14 CHAIRMAN COWGER: It's the same position every  
15 time this comes up. Okay, Mr. Martin?

16 MR. MARTIN: We attempted to settle it just like  
17 the other issue. That's all I better add since I've  
18 been instructed.

19 CHAIRMAN COWGER: You have been instructed to  
20 stand pat.

21 MR. MARTIN: The issue is pretty clear there were  
22 some problems with thermometers. The mix was out of  
23 tolerance.

24 CHAIRMAN COWGER: Temperature-wise?

25 MR. MARTIN: Yes.

1           CHAIRMAN COWGER: But there's evidence to support  
2           the fact that the thermometer that was used to reject  
3           the ten loads initially was not accurately calibrated  
4           or whatever, broken, whatever it may be?

5           MR. MARTIN: It hadn't been calibrated within the  
6           specified time limits.

7           MR. MITCHELL: I think when all this was said and  
8           done, everybody disagreed there -- the mix wasn't out  
9           of tolerance, it was just the thermometer checking it.  
10          Everybody agreed the mix was fine.

11          I really don't know why they didn't just do a  
12          supplemental agreement on whatever they thought was  
13          right and then argue about the difference at the time.  
14          That's the same with several of these things.

15          CHAIRMAN COWGER: There was no unilateral  
16          supplemental agreement as I understand on anything  
17          except the \$13,000 that we talked about earlier?

18          MR. MARTIN: That's correct.

19          MR. MITCHELL: The DOT agreed they were  
20          responsible. Why they didn't do that, I don't know.

21          MR. MARTIN: Well, you never responded back to  
22          any of our offers or correspondence, Mr. Mitchell.

23          CHAIRMAN COWGER: Board, I suggest we go on to  
24          item six.

25          MR. ROEBUCK: Yes.



1           CHAIRMAN COWGER: Let's go to six, having to do  
2 with errors in straightedging.

3           MR. ROEBUCK: Delays in straightedging.

4           CHAIRMAN COWGER: Delays due to contractor  
5 alleged errors in straightedging. Basically that's  
6 what he started off with anyway.

7           And let me ask you a question before we start.  
8 Did the specifications require the friction course to  
9 be straightedged or the structural course or both?

10          MR. MARTIN: Both.

11          CHAIRMAN COWGER: All right. Did the structural  
12 course pass?

13          MR. MARTIN: No, sir. The contractor is  
14 responsible for the straightedge of the structural  
15 course. It was monitored by the Department.

16          CHAIRMAN COWGER: What about the friction course,  
17 who straightedges it?

18          MR. MARTIN: The Department does. Our quality  
19 assurance group out of materials. The contractor has  
20 to be present during the straightedging. It's a joint  
21 effort.

22          CHAIRMAN COWGER: There was no dispute at the  
23 time the structural course was straightedged, it only  
24 came up after the friction course was straightedged, or  
25 do we know that?

1           MR. MARTIN: The dispute on the number of  
2 tolerances?

3           CHAIRMAN COWGER: Right.

4           MR. MARTIN: The dispute was -- the number of  
5 places that were out of tolerance, the three-sixteenths  
6 of an inch tolerance.

7           CHAIRMAN COWGER: On the friction course?

8           MR. MARTIN: Yes. A lot of those places were out  
9 of tolerance with the structural course, also.

10          CHAIRMAN COWGER: What does the spec say about,  
11 as far as the structural course, if they straightedge  
12 it, the contractor straightedges it, under DOT  
13 observation, at the project level or not? When the  
14 contractor is straightedging the structural course,  
15 does the DOT witness that?

16          MR. MARTIN: Yes.

17          CHAIRMAN COWGER: Does he do it with a rolling  
18 straightedge?

19          MR. MARTIN: Yes.

20          CHAIRMAN COWGER: What does the contract say  
21 about if deficiencies are discovered in straightedging  
22 the structural course, about correction of those before  
23 placing the friction course, if anything?

24          MR. MARTIN: Should be repaired prior to friction  
25 course.

1           CHAIRMAN COWGER: Okay. I don't want to get too  
2           deep into that issue. I think I've heard enough on the  
3           straightedging of the structural course. The contract  
4           clearly did require the friction course to be  
5           straightedged and corrected, if necessary. Correct?

6           MR. MARTIN: For those that are outside the  
7           three-sixteenths tolerance.

8           CHAIRMAN COWGER: Okay. I think we need to go  
9           through a little bit, Mr. Mitchell, explaining the --  
10          your position on this whole matter.

11          I note somewhere in here I found a whole bunch of  
12          dates that we have written down here, kind of a time  
13          line of when the curing began and when the work was  
14          accepted.

15          You have a whole series of intermediate points in  
16          there. So, we do have that information in front of us.

17          As I see it, what has happened here is the  
18          thermoplastic work was completed on March 13. The  
19          project was completed on May 1 of 1997. The DOT  
20          continued to charge time until all the work was  
21          completed.

22          That's where the 46 days comes from, is that  
23          correct?

24          MR. MITCHELL: I think going back, I think one of  
25          the keys back to the root of this thing is -- Tim, you

1           need to give me any input if you have any. Whenever we  
2           laid the friction course, DOT -- notified DOT, you  
3           know, you need to go ahead and straightedge.

4           Well, they didn't straightedge it until after the  
5           curing period was over. That was 30-something days  
6           right there.

7           At that point things just kind of escalated from  
8           there. We had to wait for them to straightedge it.  
9           Then when they did straightedge it, we checked -- we  
10          went to do the work and actually checked some of the  
11          places they had straightedged.

12          DOT said they were deficient. Yet we checked  
13          them and they weren't deficient.

14          We went back out with them to look at those  
15          areas. Yes, in fact, they really weren't deficient.

16          So, they -- we basically had to get back with the  
17          materials people or whoever and instead of doing --  
18          let's just say instead of doing six places that were  
19          deficient, there was only two places or something along  
20          those lines.

21          So, when all that was worked out, we went out and  
22          did those two places and then restriped it and that was  
23          the end of it.

24          CHAIRMAN COWGER: Restriped it because it had  
25          already been striped?

1           MR. MITCHELL: Yes, we had already put the  
2 thermoplastic.

3           CHAIRMAN COWGER: Just wanted to make sure  
4 I understood.

5           MR. MITCHELL: We were doing all these things in  
6 a systematic-like way. By them not straightedging it,  
7 after we got delayed, it just threw everything into  
8 a -- you know, into a delay situation.

9           CHAIRMAN COWGER: Do you have anything further to  
10 say on the delay?

11          MR. MARTIN: I would like to comment on the --

12          CHAIRMAN COWGER: Let's let Mr. Martin come in.  
13 While he is talking you can be looking through your  
14 notes, Mr. Mitchell, to see if you want to add  
15 anything.

16          MR. MARTIN: That's not correct on the friction  
17 course and the straightedging. The straightedging is  
18 the responsibility of the district materials office in  
19 conjunction with the contractor. If you will read our  
20 response, it details, you know, what happened when.

21          The contractor is also responsible for the MOT  
22 out there when our materials people are doing the  
23 straightedge.

24          That was a big issue. It gives the times when  
25 the contractor was notified. I think there was like a

1 six-week period there that had elapsed that they had  
2 made numerous attempts to schedule it with the  
3 contractor.

4 It wasn't the contractor waiting on us to do the  
5 straightedge.

6 CHAIRMAN COWGER: In other words, you are saying,  
7 I think we have here that the straightedging was done  
8 on March 11, and you are saying it would have been done  
9 much earlier? Is that a correct statement?

10 MR. MARTIN: Yes, we normally do it --

11 CHAIRMAN COWGER: If you had been able to  
12 coordinate the maintenance of traffic with the  
13 contractor.

14 MR. MARTIN: Yes, because we always try to do it  
15 within that curing period of time.

16 CHAIRMAN COWGER: Your contention is you started  
17 before the curing period had elapsed? That's pretty  
18 obvious.

19 MS. CORBIN: Tried to contact the contractor,  
20 tried to contact them to try to schedule. I think at  
21 this time Mr. Gene Cassel was leaving Mitchell  
22 Brothers. You didn't come onto the job until we did  
23 the repairs. You did not come to the job until at the  
24 end (indicating Mr. Avitable).

25 MR. MARTIN: And the contractor did not finish

1 coring the friction course for payment until March 24th  
2 of '97. That was well after the straightedging, also.  
3 We didn't even have our cores for thickness adjustments  
4 until March 24.

5 CHAIRMAN COWGER: What has that got to do with  
6 the issue? Was that --

7 MS. CORBIN: It has to do with the fact that time  
8 cannot be stopped. That's his contention. He is  
9 saying that time kept running. He is arguing that we  
10 delayed him and that we had to pay him all these days,  
11 you know. We cannot stop time on the job until work is  
12 done. Part of the work is coring for pavement.

13 CHAIRMAN COWGER: I was asking how the cores got  
14 involved in this. Is it required that the cores be  
15 taken before the project is accepted?

16 MS. CORBIN: Yes. It is a time line that we can  
17 show you.

18 CHAIRMAN COWGER: Let me ask one other question  
19 before we go on, and then I will let you finish and  
20 then let Mr. Mitchell come back one more time on part  
21 six.

22 He testified that there was a problem with some  
23 of the straightedge deficiencies, and I'm using my own  
24 words here, not actually being straightedge  
25 deficiencies, that some of those deficiencies were

1 eliminated.

2 Now, he inferred, I think, that the actual number  
3 of deficiencies ended up being pretty small. Now,  
4 comment.

5 MS. CORBIN: Based on my recollection, there were  
6 18 deficiencies. Then Mr. Cassel, or Bill -- David  
7 I believe his name was -- they decided that they said  
8 there was not that many.

9 They contacted Frank Crease, and a meeting was  
10 set up with Frank Crease and Steve Parton, who was the  
11 resident engineer. We met at the job, went over the  
12 situation.

13 In order to remove and replace so many areas, a  
14 concession was made that in the best interest of the  
15 project we just leave it in place like that.

16 MR. MARTIN: With the penalties.

17 CHAIRMAN COWGER: Instead of correcting, you  
18 decided on a penalty. I understand.

19 MS. CORBIN: It was going to be too much of a  
20 patch-up job. We rode the project that day and  
21 concessions were made. Then it was sent back to the  
22 contractor to correct it. It's in the deficiency  
23 report.

24 CHAIRMAN COWGER: Can you tell me how many areas  
25 there were then ultimately that had to be fixed? I'm



1 not sure it's important, but --

2 MS. CORBIN: I don't have that document with me.

3 MR. ROEBUCK: He said two. Does that sound  
4 reasonable?

5 MR. MITCHELL: I was just using a number.

6 MS. CORBIN: That is incorrect.

7 MR. MITCHELL: I'm not sure how many. I was  
8 saying there was six, then there might have been two,  
9 or it could have been 18 and we might have done four or  
10 five.

11 CHAIRMAN COWGER: Okay. DOT, do you have  
12 anything else to say at this point on six?

13 MR. MARTIN: No, sir, not on six.

14 CHAIRMAN COWGER: Contractor, do you want to come  
15 back? Do you have anything else to say?

16 MR. MITCHELL: Yeah. I think it all boils down  
17 to just what I was saying earlier. In a letter of  
18 April 2nd to -- it states that Mitchell Brothers --  
19 it's from Mitchell Brothers to DOT.

20 "I am not sure you are aware of what has been  
21 happening on the above-referenced project and I would  
22 like to bring you up to date. Bill Neal did send me a  
23 letter concerning corrective action directed by the  
24 Florida Department of Transportation to be performed by  
25 Mitchell Brothers."

1           Immediately upon receipt of that letter, I called  
2           Bill Neal and requested a meeting on the job to examine  
3           and discuss the deficiencies.

4           Bill Davis and myself met Bill Neal and Pat on  
5           the project on the first deficiency.

6           We then proceeded to place a 15-foot straightedge  
7           directly over an area marked five-sixteenths layer,  
8           which would mean it was out of tolerance and it would  
9           have to be removed and repaired.

10          The deficiency between the surface and the bottom  
11          of the straightedge measured one-eighth of an inch.  
12          I asked Bill Neal what was his comment, to which he  
13          stated I didn't do the straightedging and can't do  
14          anything.

15          I then stated that any further straightedging  
16          would be useless since we could not make a decision.

17          And I guess what I'm saying here is this whole  
18          thing here, there's no way that Mitchell Brothers could  
19          proceed under the circumstances.

20          I mean we are going to be out there taking up  
21          work that's correct when DOT is saying it's deficient  
22          and it's not.

23          And we were ready and willing to do the work, but  
24          the straightedging that had been done, it was obviously  
25          not correct. We couldn't move forward.

1           You know, for them to come back and just hammer  
2           us because of something they did wrong is just  
3           absolutely not right. We suffered the expense and the  
4           delay, you know. That's basically where we are coming  
5           from.

6           It said upon return to Tallahassee Bill Davis  
7           contacted Mr. Frank Crease with the Florida Department  
8           of Transportation requesting another meeting, and to  
9           date no such meeting has been scheduled.

10          And in the interim our crews have returned and  
11          confirmed that the deficiencies are not as stated and  
12          as was -- as per the list provided prior to the  
13          friction course.

14          Additionally, I wish to point out that the  
15          straightedging was not accomplished until after the  
16          30-day curing period for the friction course, and this  
17          issue could have been resolved long ago.

18          It definitely is not Mitchell Brothers' fault  
19          that FDOT could not provide the proper straightedging  
20          in a timely manner. We have performed the straightedge  
21          testing and have photographs of the areas in question.

22          It would seem prudent to resolve as many of these  
23          areas as possible prior to removing and filling and  
24          prior -- prior to removing and filing claims. However,  
25          if this is the position you wish to take, please advise

1           us so we may document the existing conditions and file  
2           the claim.

3           CHAIRMAN COWGER: Gentlemen, I think we have  
4           heard all we need to on that.

5           MR. MARTIN: One short comment.

6           CHAIRMAN COWGER: I think you have rebutted  
7           everything he said except --

8           MR. MARTIN: Well, you know, all of the  
9           correct -- none of the corrections were changed. What  
10          happened, this report remained the same. Some of them,  
11          you know, anything that exceeded the three-sixteenth  
12          tolerance required removal.

13          Upon the contractor's request, we had our  
14          bituminous engineer Frank Crease come out and evaluate  
15          those areas that exceeded the tolerance. On his  
16          recommendation we opted to delete some of those in  
17          place and still assess the penalty.

18          So, none of these were changed. Some of them  
19          were not required to be removed. We opted to leave  
20          them in place and assess the penalty.

21          CHAIRMAN COWGER: We already heard that from her  
22          basically. I understand your need to emphasize it.

23          MR. MITCHELL: If you look at the documentation  
24          that's in our -- what we submitted, you will see that  
25          there is actually places that's not -- like he said, we

1       are not just taking things off because we think it will  
2       be all right, we are taking things off because they  
3       were in tolerance, period.

4               CHAIRMAN COWGER: I'm ready to move on to part  
5       six -- through part six.

6               The only thing we have left to discuss is the  
7       liquidated damages that were claimed. The contractor's  
8       claim totals an extension of 61 days. I assume what  
9       he's trying to do is get relief from the liquidated  
10      damages that have been assessed up to this point.

11              Now, the question that I have to DOT, the  
12      contractor has indicated in his submittal that 30 days  
13      of liquidated damages were assessed at \$1925. Is that  
14      correct? Is that the way it stands to date?

15              MR. MARTIN: Yes, sir.

16              CHAIRMAN COWGER: So, the final estimates shows  
17      or the estimate still shows 30 days.

18              I think we can wade through the rest of this  
19      pretty well in the documents that the contractor and  
20      DOT have submitted.

21              The only thing I want to sum up on part six,  
22      which is the straightedge deficiency issue. The  
23      contractor is claiming 46 days extension of the  
24      allowable contract time from the period -- for the  
25      period there at the end of the project, and the DOT is

1       saying he is due nothing because we cannot accept the  
2       work until all -- we cannot accept the project until  
3       all work is completed. Is that correct?

4               MS. CORBIN: That's correct.

5               CHAIRMAN COWGER: Okay. Once the -- quick  
6       question -- once the thermoplastic, original  
7       thermoplastic was down, then the only work remaining to  
8       be done was to core the pavement, straightedge it and  
9       correct any deficiencies that might result from either  
10      of those two tests, is that correct?

11              Okay. Now, I've summed that up. Does anybody  
12      else have anything else to say? Mr. Roebuck?

13              MR. ROEBUCK: No.

14              CHAIRMAN COWGER: Mr. Albaugh?

15              MR. ALBAUGH: No.

16              CHAIRMAN COWGER: Okay. The hearing is hereby  
17      closed. The Board will meet to deliberate on this  
18      claim in approximately six weeks, and the parties will  
19      be furnished an order shortly thereafter.

20              Wait a minute. I'm sorry, we will have to reopen  
21      the hearing a minute to get it on the record.

22              Mr. Mitchell has just presented -- I've not had  
23      the opportunity to read it, but it's a sheet called  
24      calculation of interest. And I think what it  
25      addresses, and correct me if I'm wrong, it addresses

1           the legal position of your firm on whether or not  
2           interest is due and how much the interest should be in  
3           the way of a -- set per annum.

4           MR. MITCHELL: Yes. It just calculates it up to  
5           date, to the present time.

6           CHAIRMAN COWGER: What it does, it establishes  
7           the contractor's legal right to collect interest and  
8           then it goes through and toward the end, once we  
9           establish that the interest is due, once you establish  
10          that the interest is due, in your mind, then it goes  
11          through -- and the rate of that interest -- then it  
12          goes through and does this calculation of how much is  
13          due or a method to calculate it. It doesn't  
14          actually -- okay.

15          DOT, I know you haven't had a chance to look at  
16          this thoroughly. Do you want to, assuming the Board  
17          would award something somewhere in this process, do you  
18          want to dispute whether or not interest is due? And  
19          also, obviously you don't have a chance to study the  
20          calculation.

21          MR. MARTIN: Yes, sir. It would be disputed  
22          based on what items that we actually had control of.  
23          An offer of payment was made several years ago on  
24          several different items. The Department would  
25          certainly not be responsible for any interest on

1 anything like that.

2 If any payment is recommended by the Board --

3 CHAIRMAN COWGER: You are saying that from date  
4 of offer of final payment, a qualified acceptance  
5 letter, up to this point there's been a long period of  
6 time elapsed that the matter hasn't been brought  
7 forward, right?

8 MR. MARTIN: Yes.

9 CHAIRMAN COWGER: Then how could DOT be  
10 responsible for that period?

11 MR. MARTIN: We attempted to settle some of these  
12 issues years ago, and the contractor never responded to  
13 those issues.

14 MR. MITCHELL: I would respond to that. If  
15 there's dollar amounts that they knew that they owed us  
16 or felt that they owed us, then they don't hesitate to  
17 do a unilateral supplemental agreement on things that  
18 are like that.

19 That's what should have been done back then when  
20 they knew they owed us that money. I think it would be  
21 only right, and then argue about the difference.

22 CHAIRMAN COWGER: Gentlemen, do you agree to go  
23 ahead and close it out? The hearing is hereby closed.

24 MR. MARTIN: Will this be added to the  
25 arbitration?



1           MR. ROEBUCK: It's a methodology. We've used the  
2 same thing here. It didn't help us here.

3           CHAIRMAN COWGER: We will consider this, but we  
4 will also consider the fact that DOT did not have the  
5 right to rebut it. I think as far as how the interest  
6 is calculated, the Board can deal with that. We have  
7 heard -- the primary thing you said I think in this  
8 thing is if there should be any entitlement, you don't  
9 think it ought to stretch out, the interest ought to  
10 stretch out to that level or whatever they've claimed  
11 today. We understand that.

12          MR. MARTIN: Can I make one other point?

13          CHAIRMAN COWGER: We didn't say we accept it, we  
14 do understand what you are saying. We might accept it.

15          MR. MARTIN: On the first issue, the entitlement  
16 here, you know, whether the Board should listen to this  
17 hearing or not, I know that -- and I appreciate you  
18 bearing with me on this but, you know, to the  
19 Department it's clear and it's in the best interest of  
20 the Department to follow this interpretation.

21                 The Florida Statutes are clear. The Florida  
22 Statutes haven't changed the contract, the 820 days.  
23 The specification details an arbitration hearing is  
24 included in a suit.

25                 What this does, if this Arbitration Board is

1       going to hear this past the 820 days, that's going to  
2       open up any case, you know, whether it be finally  
3       accepted five years or ten years ago.

4               What is going to keep contractors from coming in  
5       with all of these closed out jobs that they missed as  
6       far as suits to bring it before the Arbitration Board?  
7       That's a concern of the Department, and why the Board  
8       chose to even allow this hearing.

9               CHAIRMAN COWGER: We are going to close the  
10       hearing, but I have one statement to make about that.  
11       That is that whatever decision the Department makes --  
12       whatever decision the Board makes in regard to whether  
13       or not this matter can be heard is applicable only to  
14       the situation that existed on this particular project.

15              The only reason we are talking about precedent is  
16       that we had a set of virtually identical circumstances  
17       on that other project.

18              Okay. We will adjourn.

19       (Whereupon, the hearing was concluded at 11:55 a.m.)

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CERTIFICATE OF REPORTER

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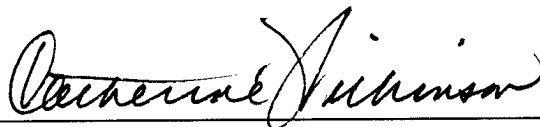
STATE OF FLORIDA )

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 14<sup>th</sup> day of August, 2000.

  
\_\_\_\_\_  
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