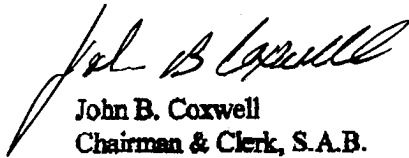


# STATE ARBITRATION BOARD

ORDER NO. 4-00

## NOTICE

In the case of S & E Contractors, Inc. versus the Florida Department of Transportation on Project No. 10040-3528 in Hillsborough County, Florida, both parties are advised that State Arbitration Board Order No. 4-00 has been properly filed on October 2, 2000.

  
John B. Coxwell  
Chairman & Clerk, S.A.B.

Copies of Order & Transcript to:

John F. Temple, District 7 Director of Operations  
FL Department of Transportation

Doug J. Ebberts, CEO ✓  
S & S Contractors, Inc.

## STATE ARBITRATION BOARD

ORDER NO. 4-00

RE:

Request for Arbitration by  
S & E Contractors, Inc.  
on Job Nos. 10040-3528 & 10040-3534  
in Hillsborough County

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

John B. Coxwell, P.E., Chairman  
Bill Albaugh, P. E. DOT Alternate Member  
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 11:58 a.m on Tuesday, July 25, 2000.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 4-00 in this cause..

### ORDER

The Contractor presented a claim in the total amount of \$146,714.24 for costs overruns they allegedly incurred in construction of concrete gravity type retaining walls on this project. The amount claimed is \$ 170,573.10 less the amount to be paid to the Contractor under a Unilateral Payment dated August 12, 1998 (\$23,8958.95) and signed by the Department's District Secretary on April 21, 2000.

The Contractor presented the following in support their claim:

**SEE: ARBITRATION EXECUTIVE SUMMARY Dated May 15, 2000**

In essence the Contractor's position is that the retaining walls on this project were modified in the field to the extent that there was a substantial change in the character of that work which had an impact on the cost of performance.

The Contractor contends that the extensive deviation from the plan details for retaining walls could not have been anticipated in advance and the changes caused each wall to be custom built. There were numerous variations in height, transitions in height and curved sections at the end of runs of retaining wall.

The amount claimed includes: Direct Field Cost Overruns; Indirect Field Overhead; Extended Home Office Overhead and Interest.

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

**SEE: See the Department of Transportation Primary Rebuttal as contained in their letter to the State Arbitration Board dated July 13, 2000.**

We reached the following conclusions from our analysis of the various parts of the Contractor's claim.

**Direct Field Costs:**

**Retaining Wall Yield:**

It is not appropriate to determine additional costs using the total cost concept, because this would lead to the Department paying for inefficiencies introduced by the Contractor and his use of unattainable production rates in preparing his bid.

We used the difference in yield (cubic yards of concrete placed/lineal feet of retaining wall constructed) resulting from the field changes to arrive at a fair and equitable adjustment in payment to the Contractor for the additional labor and equipment costs caused by the field changes. We initiated a UNILATERAL PAYMENT dated August 12, 1998 adding the pay item Extra Work-Retaining Wall at a lump sum price of \$23,858.95 and signed by the Department's District Secretary on April 21, 2000.

**Delays/Impacts**

In our opinion, the Contractor bid the retaining wall work too aggressively thus arriving at an unattainable production rate in view of the nature of this complex urban project.

For the most part, we advised the Contractor of changes to the retaining wall prior to commencement of the work in a particular area of the project.

Our analysis of the project records and discussions with the Department's personnel who were on the job, indicates that delays to the retaining wall work caused by field changes were minimal and impact of waiting for answers on changes and deletions was not nearly what the Contractor has implied in his claim.

**Extended Indirect Field and Home Office Overhead:**

It is obvious that the retaining wall work on this project was not a controlling or critical path item which is confirmed by the Contractor's schedule. The retaining wall subcontractor performed work on other projects during the life of this project. Also, they performed work on sidewalk, curb, inlets, pipe and conduit items subsequent to completion of the retaining walls so they would have incurred extended project costs regardless of the alleged impacts.

**Interest:**

The Board should rule on this item based on their findings in regard to eligible additional costs.

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

The changes to the work, made after construction began, changed the character of the retaining wall work.

The Contractor incurred some additional costs for project supervision

Nothing was submitted to establish that work on this project was suspended or to support failure of the Subcontractor to recover Home Office Overhead costs due to occurrences on this project.

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 pay the Contractor \$68,541.00 for his claim. This amount includes interest due.

The Department of Transportation is directed to assure that the \$28,858.95 due per the Unilateral Payment dated August 12, 1998 and signed by the Department's District Secretary on April 21, 2000 is paid to the Contractor in addition to the amount awarded by the State Arbitration Board.

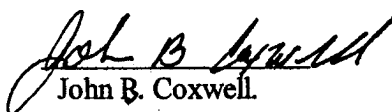
The Department of Transportation is directed to assure that payment is made to the Contractor for the item Concrete Class I (Retaining Walls) as shown in the Final Estimate of Construction for Job 10040-3528 and Job No. 10040.3534 dated August 3, 2000. (395.90 C.Y. @ \$268.08 per C.Y. = \$106,132.97)

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 373.00 for Court Reporting Costs.

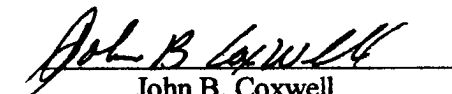
Tallahassee, Florida

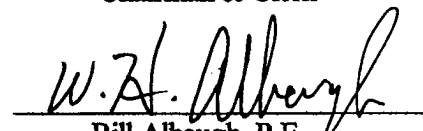
Dated: 9/28/00

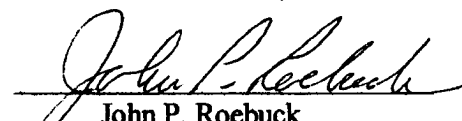
Certified Copy:

  
John B. Coxwell  
Chairman & Clerk SAB

9/28/00  
DATE

  
John B. Coxwell  
Chairman & Clerk

  
Bill Albaugh, P.E.  
Alternate Member

  
John P. Roebuck  
Member

STATE ARBITRATION BOARD  
STATE OF FLORIDA

S & E CONTRACTORS, INC.	)	
	)	
	)	
	)	
	)	PROJECT NO. 10040-3528
- and -	)	
	)	LOCATION: Hillsborough
	)	County, Florida
	)	
DEPARTMENT OF TRANSPORTATION	)	
<hr/>		

**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 11:58 a.m.  
Concluded at 1:45 p.m.

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

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

CATHERINE WILKINSON & ASSOCIATES (904) 224-0127

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. John B. Coxwell, Chairman  
 Mr. Jack Roebuck  
 Mr. Bill Albaugh

APPEARING ON BEHALF OF S & E CONTRACTORS, INC.:

Mr. Doug Ebbers  
 Mr. Clayton Gibbs  
 Mr. Al Hocalar

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Larry Zagardo  
 Mr. Mike Kopotic  
 Mr. Richard Speck  
 Mr. Chris Frock  
 Mr. Farhad Zafaranian

\* \* \*

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1 and 2 in evidence	5
Exhibit No. 3 in evidence	6
Exhibit Nos. 4, 5 and 6 in evidence	6

CERTIFICATE OF REPORTER	70
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P R O C E E D I N G S

1  
2 CHAIRMAN COXWELL: All right. Let's get started.  
3 This is an arbitration hearing on FDOT project number  
4 10040-3528. It's brought by S & E Contractors on  
5 behalf of Pepper Contracting. That's correct?

6 MR. EBBERS: Correct.

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

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

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

16 These two members chose me, John Coxwell, to  
17 serve as the third member of the Board and as the  
18 Chairman.

19 Our terms expire June 30, 2001.

20 At this time each person that's going to give  
21 oral presentations during this hearing, please raise  
22 your right hand and be sworn in.

23 (Whereupon, all witnesses were duly sworn.)

24 CHAIRMAN COXWELL: The request for arbitration  
25 claim submitted by the claimant, including all

1           attachments thereto and the administrative documents  
2           preceding this hearing are hereby introduced as  
3           Exhibit No. 1.

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

6           MR. ROEBUCK: Let me interrupt a minute and  
7           introduce Bill Albaugh as the alternate.

8           CHAIRMAN COXWELL: I'm sorry. Freddie Simmons  
9           couldn't be here today and Bill Albaugh will be the  
10          stand-in for Freddie. The Secretary appointed him in  
11          case Freddie couldn't be here, so he will be sitting in  
12          for Freddie today.

13          MR. EBBERS: To answer your question, we did  
14          bring some additional information. I have it here.

15          CHAIRMAN COXWELL: Did you give this to the  
16          Department? Have they seen this information?

17          MR. EBBERS: Yes and no. Most of what is in here  
18          are excerpts out of our claim. Just to facilitate our  
19          presentation, we've put them in a binder form.

20          CHAIRMAN COXWELL: Okay.

21          MR. EBBERS: There are a couple of new things in  
22          here, and I'm trying to think from memory now, but most  
23          of it is project records and things that the DOT has  
24          access to. I don't think they will be surprised.

25          CHAIRMAN COXWELL: We will give them a chance to



1 look at it.

2 MR. EBBERS: Really, it's just to facilitate our  
3 presentation rather than working through our larger  
4 claims forms.

5 MR. ZAGARDO: These are claims and specs that you  
6 asked for as part of your letter. I do have a couple  
7 of additional items to pass out. I don't know if they  
8 will be relevant or not.

9 CHAIRMAN COXWELL: Okay. Pass them out.

10 MR. ROEBUCK: Do you want to identify this thing  
11 as Exhibit 1 and this thing as Exhibit 2?

12 CHAIRMAN COXWELL: Yes, the S & page will be  
13 Exhibit 1 and the DOT as Exhibit 2.  
14 (Whereupon, Exhibit Nos. 1 and 2 were received in  
15 evidence.)

16 MR. EBBERS: Mr. Coxwell, sorry to add to it, but  
17 we have three letters that were not bound in the other  
18 book we just passed out. They are just project  
19 letters, one from DOT and two from the contractor's  
20 side, that we want to make special reference to.

21 CHAIRMAN COXWELL: Okay, that will be --

22 MR. ROEBUCK: Are they included in this big book  
23 here?

24 MR. EBBERS: No, they are not.

25 CHAIRMAN COXWELL: That will be Exhibit 3, if you

1 will pass them out.

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

3 MR. EBBERS: And the last item we have is a job  
4 cost detail record from another DOT job to use as a  
5 point of reference. We do have copies of all of these.  
6 We have plenty to pass around.

7 CHAIRMAN COXWELL: Go ahead, pass them around.

8 All right. These will be 4, 5 and 6.

9 (Whereupon, Exhibit Nos. 4, 5 and 6 were received in  
10 evidence.)

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

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

19 The parties are instructed to assure that they  
20 receive properly identified copies of each exhibit used  
21 in these proceedings. You should retain these  
22 exhibits. The Board will send the parties a copy of  
23 the court reporter's transcript, along with our order,  
24 but will not furnish copies of the exhibits.

25 As is typical in arbitration proceedings, these

1           hearings will be conducted in an informal manner.

2           The Board is not required to apply legalistic  
3           approach or strictly apply the rules of evidence used  
4           in civil court proceedings. We are primarily looking  
5           for information in regard to the facts of the contract  
6           provisions that apply to this case.

7           The order of proceedings will be for the claimant  
8           to present their claim and for the respondent to offer  
9           rebuttal.

10          Either party may interrupt at a pertinent point  
11          by going through the Chairman. Please keep this  
12          orderly.

13          We would really prefer that you -- the claimant  
14          present their case, the respondent come in after. But  
15          if you see something in there that you don't think can  
16          wait and it's really pertinent, we will allow you to  
17          interrupt.

18          Are there any attorneys here? Okay.

19          With that, Mr. Contractor, would you like to go  
20          ahead and present your case?

21          MR. EBBERS: Yes. Let me ask a question if  
22          I could. I had asked Gene Cowger this on the phone.  
23          We will have an opportunity for a brief rebuttal?

24          CHAIRMAN COXWELL: Yes. You will present, they  
25          will respond. Then after that we will have a rebuttal

1 back and to across, if need be, until we hear enough  
2 that we want to decide that we've heard enough, then we  
3 will move on.

4 I understand that there's two or three parts to  
5 this claim, but it's all primarily a claim on one item,  
6 and we will just kind of keep it at that.

7 MR. EBBERS: Very good. We do plan to save a few  
8 comments for, I guess what I would call rebuttal stage  
9 after DOT has had their opportunity to go.

10 MR. ROEBUCK: Bear in mind, we've been through  
11 these two books. There's no need to read those to us.  
12 Just kind of summarize.

13 CHAIRMAN COXWELL: And let me say, we have yours  
14 first, and you did -- I want to say you did an  
15 outstanding job of presenting your case.

16 Then when the Department sent theirs, they did an  
17 outstanding job in rebutting the case. I just want to  
18 tell you both you did a great job of presenting what  
19 you have.

20 Now, with that, go ahead.

21 MR. EBBERS: Very good. Well, hopefully the oral  
22 part is somewhat easier than the paper side because  
23 there's certainly a lot of work done to putting a  
24 claims package together.

25 If I could, just sort of briefly describe how we

1 would like to do this, just to give you a heads up.  
2 I will start just by giving a brief overview of the  
3 claim and some background information.

4 I'm going to turn it over to Clayton and  
5 Al Hocalar next to Clayton to talk about some specifics  
6 in the field, then ask them to give it back to me just  
7 to close with a brief discussion of what the damages  
8 are, the dollar damages are and what we think our basis  
9 is under the contract.

10 I have three hats in this. I think it will be  
11 important to describe that. First of all, I was the  
12 majority owner and president of S & E Contractors for  
13 about 17 years. That's basically in the past. We  
14 closed or ceased operations in 1997.

15 The company still exists on paper, but it's just  
16 in a wind-down stage.

17 In 1995 we had a very tragic loss on a project in  
18 Jacksonville, Florida, that basically brought the  
19 company to its knees. We had about \$80 million of work  
20 in a contract and spent about two years closing those  
21 projects out, narrowly avoiding bankruptcy. I'm glad  
22 to tell you we were able to do that.

23 The reason that has some relevance, a couple of  
24 things. One, with my S & E hat on, and this is a copy  
25 of our original bid, it's not germane to what we are

1       doing here, but my role at that time, as I grew my  
2       business by having been an estimator and very much  
3       involved in bidding projects, was to have reviewed this  
4       bid, so I am very familiar with the project and how the  
5       bid was developed.

6               The second hat that I wear in this thing, and  
7       again, it's unique in that late 1997 I was contacted by  
8       Clayton Gibbs and Terry Osborn, and I was in a  
9       consulting role. They asked for my help in putting  
10      together a claims package, since I have kind of been  
11      there, done that, had that experience over the years,  
12      unfortunately.

13             So, the primary book that you are looking at here  
14      today, or that we submitted to this Board was turned in  
15      in March of 1998. I was the primary drafter of that.

16             The third, and only true because we are now  
17      sitting here in the year 2000, is as of the first of  
18      this year I joined Pepper Contracting as a shareholder.  
19      So, I am a one-third owner of Pepper Contracting.

20             I wanted to make real sure that was clear.  
21      There's no agenda there, that's just the way things  
22      have worked out. I really have seen this thing from  
23      all those different hats.

24             I want to briefly say that Larry Zagardo and  
25      I have worked together on other jobs. I did meet

1 Larry Zagardo and Mike Kopotic in March of '98, shortly  
2 after the claim package was turned in. There is a lot  
3 of background there. I want the Board to know I'm not  
4 coming in just sort of shotgunning this after the fact.

5 A brief description, and I know you have received  
6 our brief description of the claim, you have received  
7 our executive summary. I would like to just hit the  
8 highlights of that. I'm not going to reread this  
9 document by any means.

10 But briefly, this was a fairly significant DOT  
11 project on U.S. 41 in north Tampa, about two-and-a-half  
12 miles long, very urban section of 41, quite a number of  
13 businesses and commercial properties that were adjacent  
14 to the roadway.

15 I think something that's very germane to the  
16 claim, it's a case of DOT -- not saying it in a  
17 negative way -- but trying to create a new road, edge  
18 of right-of-way to edge of right-of-way, putting as  
19 much in there as you can, and you have sidewalks,  
20 retaining walls going very close to the limits of the  
21 right-of-way available for the project.

22 S & E was the prime. Pepper Contracting had a  
23 very pivotal role. They had a 2.4 million dollar  
24 subcontract, doing most of the underground utility work  
25 and all of the concrete work in the project.

1           The heart of this claim -- and as Mr. Coxwell  
2           said, it's essentially one issue and it has to do with  
3           retaining walls.

4           During the course of the project, from our view,  
5           every section of the retaining wall on this project was  
6           redesigned.

7           The construction team, both the contractor and  
8           the DOT staff, found, as we began to build these walls,  
9           that the design locations and the design wall heights  
10          did not work.

11          The decision was made to re -- let me rephrase  
12          that. The decision was made to direct the work in the  
13          field.

14          I'd like to make a point on that because I think  
15          that there really were two options that DOT had at that  
16          point in time. One would have been to -- recognizing  
17          that there were fairly significant design flaws --  
18          would have been to say time out, let's put the set of  
19          plans back to the design engineers and ask them to  
20          start over again.

21          That option was not taken. Rather, DOT project  
22          staff directed the work in the field.

23          From our viewpoint, we really don't view that as  
24          their having made any bad decisions. In fact, to the  
25          contrary, we think Kim Jackson, who is not here today,



1 but he was the DOT project manager, probably made very  
2 good decisions.

3 CHAIRMAN COXWELL: You put all that in your  
4 material.

5 MR. EBBERS: I understand.

6 CHAIRMAN COXWELL: All that is in there. We  
7 understand.

8 MR. EBBERS: Okay. Having said that, let me step  
9 you through the impacts that occurred. If you could  
10 take the small blue book that I've handed out.

11 CHAIRMAN COXWELL: First, have you all had a  
12 chance to look at that and see if it's --

13 MR. EBBERS: Mike, did you go all the way  
14 through?

15 MR. KOPOTIC: Quickly.

16 CHAIRMAN COXWELL: Let him look at it. If  
17 there's something objectionable in there, he can make  
18 it known.

19 MR. EBBERS: If you open the tab that says  
20 impacts on the blue sheet that's sort of the header  
21 sheet, I've listed six documents, I guess it is. You  
22 will see the tab designation on the right. That just  
23 identifies where they would be found inside the larger  
24 book.

25 So, all of these are documents that were already

1 provided before today. Again, I just thought it would  
2 make it much easier here.

3 I would like to very briefly touch on a few  
4 things. If you could look at the first one, the impact  
5 analysis. It shows the extent of the impact that this  
6 had on Pepper Contracting. They bid this to take 37.2  
7 workdays. It actually took 94.

8 Then converting those to calendar days and  
9 calendar weeks, that's relevant when we talk about our  
10 damages because under the calendar days where you see  
11 82.93, on our damage calculation we round it off to 83  
12 days. There's a damage calculation associated with  
13 that.

14 The same thing with calendar weeks, the 11.84.  
15 I will show it to you in a moment, but that ties into  
16 one of our other work sheets. That's basically that  
17 sheet.

18 The document immediately behind it I wanted to  
19 just make a couple of quick comments. Again, this was  
20 turned in to DOT previously. It's a summary of  
21 impacts, just taking them off of our daily reports.  
22 DOT talks about it in there, the booklet that was  
23 prepared for arbitration.

24 Our point to the Board here is that if you look  
25 at all of the documents that we have that describe

1        impacts -- and this is just one of many -- this  
2        document was never intended to be the end-all, to show  
3        all impacts. It's basically just a recap off the daily  
4        reports that basically show when did the foreman  
5        actually have to stop or redirect.

6                What it doesn't talk about is all of the  
7        productivity impacts which we describe in other  
8        documents.

9                So, that's basically what we want to say.

10               The next two, which are the colored ones, are  
11        very key. Again, they are in the big book.

12               We met with Larry Zagardo and Mike Kopotic with  
13        DOT, and I believe the date was March 15. At that  
14        meeting Mr. Zagardo had asked if we could go back and  
15        take our initial claim and break it down into yet  
16        another level of detail. You will see we did that and  
17        it's dated March 24, about a week after we met.

18               What is relevant, and what we hope to explain to  
19        the Board today, is there really were three design  
20        errors that occurred in the project.

21               I would like to list them. One was that this  
22        project was bid as plan quantity for the retaining  
23        walls. It was found after the work was started that  
24        there was a very significant bust in the cubic yards  
25        per running foot or lineal foot of wall. DOT --

1           there's really no argument about that. It's pretty  
2           much -- that part is black and white.

3                   What I understood Mr. Zagardo to ask us that  
4           particular day is to break it into components so we  
5           have a yield impact category.

6                   Then there's basically two productivity impacts.  
7           These are separate from the yield impact.

8                   As you see summarized on the sheet under the  
9           delays, we had a stop-start sequence, some grade  
10          changes and out of sequence work. We had roughly two  
11          days minimal.

12                   And then the extra work was the addition of short  
13          sections of walls, the custom forming of these  
14          retaining walls, which is really the heart of our  
15          claim, that at DOT's directions these walls were  
16          basically custom fit to the field applications, and  
17          then there was some removal and replacing of sections  
18          as they were being built.

19                   And the last very, very significant one is  
20          addition of typicals and radiuses. So, there's a lot  
21          of information on this document. I could spend a lot  
22          of time talking about it, and I didn't want to do that.

23                   This really takes our claim and breaks it into  
24          considerable level of detail.

25                   CHAIRMAN COXWELL: Okay.

1           MR. EBBERS: The next document, days of  
2           performance, this is similar but it essentially takes  
3           the days of impact. And the first line is how we bid  
4           the project. The second is based upon the addition of  
5           630 lineal feet of additional wall, what impact that  
6           had.

7           The third line is the impact of the yield, cubic  
8           yard per lineal foot yield impact. And then last is  
9           the productivity impacts of, again, the custom work in  
10          the field and the typicals and radiuses.

11          Again, it would take some level of detail, but  
12          you will find all of these tie in to one another at  
13          various times, the ten days, the 8.3 tie to the prior  
14          work sheet, as the 38.5 days do. There's two days of  
15          delay in roughly 36 and a half days of extra work.

16          The last item that's in this impact section is a  
17          letter to Mr. Zagardo dated March 26, sent by Mrs.  
18          Osborn. As it says, "Pursuant to Larry's request  
19          attached is a summary of impact days."

20          And you will see we titled this productivity  
21          impacts. It just takes it day by day all the way  
22          through, a total of 1740 man hours. Under the  
23          calculations, it comes down to 36.26 crew days. You  
24          can take that same 36 days and tie it back into the two  
25          sheets that we just looked at a moment ago of

1 productivity impacts.

2 So, on that point, or ending at that point, I'd  
3 like to pass it over to Clayton Gibbs and Al Hocalar to  
4 describe, since they were the ones out in the field.  
5 I think it's key to our position here to establish for  
6 you Board members that this work was field directed by  
7 DOT. The control of the work basically was taken out  
8 of the contractor's hands.

9 Again, we don't see that as a bad thing because  
10 we think DOT, dealing with the designers that were  
11 there, probably did a good thing in terms of how this  
12 was customized into the existing condition.

13 I will let Clayton take it from there.

14 MR. GIBBS: Okay. The first thing I want to  
15 review is basically the notices that I had given out.

16 First, on October 26, 1995 --

17 CHAIRMAN COXWELL: Hold up. Which one are you on  
18 now? Which exhibit?

19 MR. EBBERS: It's not one of those.

20 MR. GIBBS: It's just a letter that was sent in  
21 my original claim.

22 CHAIRMAN COXWELL: Whereabouts in there would we  
23 find it?

24 MR. GIBBS: It should be --

25 MR. EBBERS: I really don't believe that letter

1 is in here.

2 CHAIRMAN COXWELL: Well, if it's not in here and  
3 we don't have it, we don't want to hear it.

4 MR. GIBBS: Okay.

5 MR. EBBERS: Let me have one the red books if  
6 I could. Only because this claim went through a level  
7 of maturation. This was the original submittal to DOT  
8 in 1995 and 1996. And then due to the claim just not  
9 moving, it was supplemented by this. I think all  
10 Mr. Gibbs is trying to do is say back in '95.

11 CHAIRMAN COXWELL: But we can't just let you pick  
12 and choose what you want to present to the Board and  
13 what you want to oral argue about.

14 MR. ROEBUCK: Is that the claim for \$60,000 or  
15 \$70,000, something in that order?

16 MR. EBBERS: Yes.

17 MR. ROEBUCK: It matured in a great deal in the  
18 last two years.

19 MR. EBBERS: Yes and no. We will touch on that.  
20 It did grow in size.

21 MR. GIBBS: Okay. So, even though there's a  
22 document that I can't say it was the original notice  
23 that was submitted to the Department, the Department  
24 was aware of, that letter is a letter that was out  
25 there, you don't want me to say that?

1           CHAIRMAN COXWELL: I don't mind you saying it,  
2 but we're not going to let you expand on it. Nobody  
3 else has seen that letter.

4           MR. GIBBS: I'm trying to establish some dates of  
5 notification.

6           CHAIRMAN COXWELL: Go ahead from there.

7           MR. GIBBS: We started the project back in June  
8 of 1995. By October of 1995 we had noticed that our  
9 yield was way off. We had sent a letter out informing  
10 S & E and the DOT that there appeared to be an error in  
11 the yield quantity, and that we were requesting some  
12 type of compensation to be able to pay for this  
13 difference in yield.

14           What we had found is that there seemed to be an  
15 error in the DOT's calculations on their computation  
16 book. And that the height that they had listed was the  
17 total height of the wall that we were installing, and  
18 they didn't take that one foot into consideration.

19           So, that was our initial notice.

20           CHAIRMAN COXWELL: How long had the -- how long  
21 had you been building these walls?

22           MR. GIBBS: June of 1995 we had started on the  
23 gravity walls. Then by October of 1995 is when we  
24 first noticed for sure that there was a major bust or  
25 major problem with the yield.



1           MR. ROEBUCK: Was it a typical cross section with  
2           varying heights?

3           MR. GIBBS: Yes. What they had was, on the  
4           plans, was a location that showed this several --  
5           several straight locations as noted on the plans. Then  
6           they had an average of the total amount of concrete  
7           that was on the job, that was in the bid.

8           MR. ROEBUCK: So, three-foot wall, something of  
9           that nature, though the wall would vary from two to  
10          five?

11          MR. GIBBS: The average of the wall throughout  
12          the job based on lineal footage was a four-foot high  
13          wall, 1.9 cubic yards.

14          CHAIRMAN COXWELL: That was an average, some  
15          could be one, some could be eight?

16          MR. GIBBS: Absolutely. We found out in the  
17          process that there was an error based on the average  
18          yield. We started looking into it. What we found when  
19          we went back and got a copy of the computation book was  
20          that the height they had listed was the total height we  
21          were installing in those areas.

22          What resulted was there was an error in the comp  
23          book calculations. That was our first initial notice  
24          to the DOT.

25          MR. ROEBUCK: Per lineal foot, there was an

1 error?

2 MR. GIBBS: Yes. We were running way under. At  
3 this point I thought it was going to be a 40 percent  
4 bust is what it was coming up with.

5 Then on April 22, 1996, we had not heard  
6 anything, so we sent another letter out informing them,  
7 okay, this has been a six-month period, we haven't  
8 heard anything back from the DOT on trying to resolve  
9 it through an essay or something, and it was going to  
10 be our intent to file a claim.

11 Then in August of 1996, we started putting our  
12 claim together. I believe on -- August of 1996. And  
13 then on 2-19, I believe, of '97, it was submitted to  
14 the DOT in the other part of the claim.

15 Okay. Then in October of 1997, there was another  
16 letter that went out that came from it, which we just  
17 submitted.

18 That shows that, what you just submitted on the  
19 exhibit, October 23, 1997, a letter from S & E to the  
20 Department informing them that they hadn't received any  
21 supplemental agreements and had been waiting very  
22 patiently.

23 At that time we were still trying to, even on the  
24 gravity wall portion, trying to resolve it through an  
25 essay.

1           Then in December there's another exhibit, of 5th,  
2           Dean Ankers had written back that it's still been  
3           several weeks where Larry had written back to  
4           Dean Ankers, after several weeks on the telephone, and  
5           that there was supposed to be a summary of issues still  
6           considered outstanding. Okay. And that there was  
7           still some issues of some claims, but still the thing  
8           had not been resolved.

9           So, it was still an ongoing issue, and we were  
10          still trying to resolve it through an essay of some  
11          type.

12          Between December and January the issues was to  
13          appoint --

14          MR. ROEBUCK: This is '97?

15          MR. GIBBS: Yes, December of '97 and January of  
16          '98. There was still some question out there as to the  
17          actual quantity of gravity wall that was installed on  
18          the job.

19          We had gone out in January of 1998 and remeasured  
20          with Baugh Engineering, a representative of the DOT,  
21          and Richard Speck, and Al Hocalar and I believe Cathy  
22          from S & E. The four of them had gone out and  
23          remeasured the wall to try to verify the quantity.  
24          That was still an issue that was still floating around  
25          that couldn't be resolved yet.

1           Once January of 1998, between then and March of  
2           1998, we were finally informed that, no, it wasn't  
3           something that could be resolved through an essay, that  
4           it would have to be resolved in a claim.

5           So, in March of 1998 is when this revised package  
6           of the claim was then submitted.

7           Okay. So, that kind of gives you an outlook of  
8           '95, okay, we went into '96, '97, and then into '98 and  
9           now we are at this point right now, as far as trying to  
10          get this gravity wall issue resolved.

11          The issue of the gravity wall itself, as far as  
12          the errors, when it started out, like I said back in  
13          October of '96, what had happened on the job was we  
14          started to build the gravity walls.

15          In the process of building the gravity walls,  
16          what had happened, there was several entrances that  
17          went to businesses that the DOT felt, hey, look, we  
18          really need to take a look at this and stop the wall  
19          short.

20          So, when we first started the installation of the  
21          gravity wall, we were told to, okay, come on out and  
22          install the gravity wall from this point to this point.

23          Ken Jackson at the time wanted to verify the  
24          height of where the wall needed to be.

25          What we did, we had survey lay it out. Once

1 survey laid it out, we put a string line up with  
2 stakes, took the string line. Ken would look at the  
3 string line and adjust it accordingly to try to match  
4 the ground area that was there.

5 At this time we were told to stop the wall  
6 shorter than what it had called for on the plans. The  
7 reason being that they did not know where they wanted  
8 the transitions or what they wanted to do to tie in the  
9 private property.

10 So, when Al constructed the wall, what he did was  
11 stopped it one to two sections shorter in most cases in  
12 order to give us room to be able to transition to the  
13 private property.

14 Al will go on in a little while here to try to  
15 describe what I will -- Al will be using pictures to  
16 describe and show you what we are talking about.

17 So, what we ended up with was at that time the  
18 DOT said, okay, look, we can't really tell you where to  
19 end or where to transition or where to tie in these  
20 gravity walls. They directed us to stop at that point.

21 Then once S & E regraded the areas to the private  
22 property, then at that time they could direct us of how  
23 they wanted to do the tie-ins to the driveways, private  
24 properties, whatever.

25 CHAIRMAN COXWELL: All right. It's your

1 testimony that they would instruct you to build a  
2 portion of the wall, stop, move to another location?

3 MR. GIBBS: Yes.

4 CHAIRMAN COXWELL: That's your testimony?

5 MR. GIBBS: Yes, at some later date. The later  
6 date varied on several issues. What we found was that  
7 in some cases there wasn't the right-of-way to go back  
8 on private property. So, we couldn't go back in until  
9 a right-of-way entry was obtained and the DOT had to  
10 get that. So, in those cases they had to wait until  
11 that was done.

12 On the other portion of it, why we had to wait  
13 was the grading needed to be done to allow the DOT to  
14 determine how they wanted this wall to go in because it  
15 was not part of the original design.

16 If you will look on the plans, the plans  
17 themselves show that the entire wall on this project  
18 was a straight wall. There were no transitions, there  
19 was no curves, 45-degree bends or anything that went  
20 back into private property.

21 Okay. So, that's basically what had happened on  
22 the job was we finally came back, after the area was  
23 graded, and then Al would go down through and get with  
24 the DOT and physically lay out where the wall needed to  
25 go because in some cases we just tapered down.

1           In other cases we may have come in and put a  
2           45-degree bend and gone back in. On another case there  
3           might have been a couple of 45-degree bends, and on  
4           another case there might have been a 90-degree bend.

5           In each instance it was a special, custom built  
6           gravity wall that was short sections with a minimum  
7           yield.

8           So, based on that, that's kind of an overall  
9           picture of what we did on the gravity wall, plus there  
10          was sections that were deleted on the project that were  
11          noted in their claim.

12          Then there were other sections that were added.  
13          A lot of the added sections were later on the job,  
14          also, due to the fact that we didn't really know what  
15          was going to be required until the grading, at least  
16          the rough grading was done.

17          At that time the DOT felt yes, we need a gravity  
18          wall put in here, come and put it in.

19          I think you will see that there's a lot of days  
20          that we had when we went down, moved in, moved out of  
21          the job.

22          A lot of it is due to these conditions that, hey,  
23          didn't know it at that time, we couldn't proceed with  
24          the work, had to come back in, construct a small  
25          section, then move off, come back again.

1           A lot of days we moved in and off the job were as  
2           a result of not knowing at the time what we were going  
3           to do and still needing in some cases right of entries  
4           or -- right of entry acquisitions.

5           Al, if you want to go on as far as some specific  
6           areas. And most of this, I don't know if you've got  
7           it, but there are photographs in the original claim.

8           CHAIRMAN COXWELL: Go ahead, Al.

9           MR. HOCALAR: If you look at the third picture at  
10          the bottom -- third page at the bottom picture, that  
11          was a straight wall. That wall averaged anywhere from  
12          five to six foot.

13          MR. GIBBS: It should say Scotty's on it.  
14          There's a sign that says Scotty's on it.

15          MR. ROEBUCK: Where is it in the book?

16          MR. HOCALAR: Section 5 under Tab 11. It's going  
17          to be about the third page back.

18          CHAIRMAN COXWELL: Okay.

19          MR. HOCALAR: When we started first doing that  
20          wall, when we -- we normally pour a gravity wall at a  
21          30-foot -- maximum section. That's how you would  
22          achieve the most out of any form work. We would pour  
23          30, skip 30, pour 30, skip 30. That's how we would set  
24          up our forms.

25          Before we came into the entrance of the driveway,



1 Richard told us we need to stop short of it to  
2 determine exactly where the entrance was going to go.  
3 So, we left it two sections behind. We pulled off that  
4 whole section and we went to another spot.

5 When we came back at a later date, we actually --  
6 the reason we left the two sections out here, he said  
7 it would make a better tie-in if we had a longer  
8 transition versus a shorter transition.

9 In the field we would actually shoot the existing  
10 wall, shoot the existing property, prorate the wall,  
11 then custom fit all the wall to make it fit as they  
12 wanted it.

13 We would go in, cut the forms, you know, whatever  
14 it would take. It would actually take about two to  
15 three times longer to do any type wall like this versus  
16 if you pour 30, skip 30. That was one error. The  
17 other side of the driveway is the same thing.

18 MR. GIBBS: If you will go back one sheet.

19 CHAIRMAN COXWELL: Okay.

20 MR. HOCALAR: The top picture. The same thing  
21 happened. The angle point, we stopped 30 foot short of  
22 that. That's where we started the wall. We went  
23 northbound to the other entrance. When we actually --  
24 they actually grade this area, we will wind up doing  
25 this entrance. That's what we wound up doing here,

1           too.

2                   We would shoot the top of the wall, shoot the  
3           existing, prorate everything on site while the crew was  
4           there waiting, while they were laying the forms in, we  
5           would install all the wall.

6                   The next picture, which is the next one, same  
7           thing, we wound up with the --

8                   MR. ROEBUCK: How much further are you going?

9                   MR. HOCALAR: The next page over.

10                  MR. GIBBS: It will be the Scotty's on top.

11                  MR. HOCALAR: That's another entrance.

12                  MR. GIBBS: That's another entrance to Scotty's.

13                  CHAIRMAN COXWELL: Okay. I think we've got your  
14           point there.

15                  MR. HOCALAR: Well, this happened in pretty much  
16           all the sections that we had to pour. Instead of  
17           finishing and continuing off the wall at one shot, we  
18           had to actually stop, come back at a future date, shoot  
19           the top of the wall and actually custom fit everything  
20           according to the exact locations of the areas.

21                  This happened in, oh, pretty much in every area,  
22           if you look at it.

23                  MR. GIBBS: If you look through some of the  
24           pictures, all of the pictures are not there.

25                  MR. HOCALAR: The worst one -- we don't have a

1 picture of it, but I think Richard can remember that,  
2 in front of the Fina. Remember that wall? We had to  
3 put the gravity wall in. Then we decided the gravity  
4 wall wasn't going to work. We had to put a nine-inch  
5 car stop on top of it. We stopped the wall short.  
6 Then we came back later on.

7 We were going to put the tapers on the wings. We  
8 couldn't do that. The contractor had to give them some  
9 kind of a -- I guess where the driveways would go to --  
10 so we left all the tapers out.

11 We would go back at a later date, try to do all  
12 the tapers. It would take the same amount of time. It  
13 would take a day to mobilize the crew there, set the  
14 wall up, pour it. I would have to leave then come back  
15 another date, strip the wall, clean up, versus if you  
16 would go in on a short section, you would do it pretty  
17 much in two days and get out.

18 MR. GIBBS: I think you have the idea of  
19 basically what happened on the job. I will just let  
20 you know that Al has been doing this concrete work for  
21 over 14 years. He's probably one of the best.

22 I'm sure Richard can agree that when he was on  
23 the job, Al is not a person that's inefficient. Al is  
24 a person that will go down through and produce to the  
25 best of his ability every single day on the job.

1           What happened on this job wasn't something that  
2           Al was inefficient about. What happened was that we  
3           ended up with a job that had a lot of numerous changes  
4           in the transitions of the walls, with the relocation of  
5           the walls, with the change in the height of the walls,  
6           with the deletion of the walls.

7           We even had sections where we had gone down  
8           through -- for example, on the southwest corner of  
9           Barrison and Nebraska. We had mobilized down there to  
10          install a gravity wall. When we got there and checked  
11          the elevations, we noted that the top of the wall was  
12          close to existing ground.

13          We got with Richard and at that time we were told  
14          no, delete the wall there, after we had already  
15          mobilized it. That's basically what happened on the  
16          job. It was a specially built, custom, gravity wall.

17          The inefficiency that Larry referred to on  
18          numerous occasions on his rebuttal, we totally disagree  
19          with it. We feel that Al is a very efficient person.  
20          I'm sure that Richard can concur with that. I know in  
21          our March 25 meeting, even out in the field, it was  
22          discussed on the efficiency of Al, and he agreed. Al  
23          is a very efficient person. He did not stand around  
24          being inefficient.

25          CHAIRMAN COXWELL: Let's wait for that until we

1           get back in rebuttal after you get your shot at them  
2           later.

3           MR. GIBBS: Okay. Other than that, that's pretty  
4           much the examples and stuff and what had happened as to  
5           the gravity wall. I will let Doug take it over as far  
6           as the damages.

7           MR. EBBERS: If I could refer to our small blue  
8           notebook again, the tab that says design errors.

9           CHAIRMAN COXWELL: Okay.

10          MR. EBBERS: The first page behind the blue  
11          sheet, it's just a very simple summary of the  
12          quantities on the job, bid at 2,350 feet, stated on the  
13          drawings, point one eight nine or point one nine cubic  
14          yards per lineal feet, bid quantity was 445 cubic  
15          yards.

16          In the end it went to 2,980, so an increase of  
17          630 feet of wall was added. You can see the lower  
18          yield, a 30 percent bust in the yield, which is very  
19          significant.

20          So, even though 600 feet of wall was added, we  
21          still ended up some 50 cubic yards less on the pay  
22          quantity.

23          Mr. Roebuck I believe, or one of you, had asked  
24          about the height of the wall. From a contractor's  
25          perspective this was an absolutely ideal project as far

1 as the bid.

2 There was significant quantity, 2,350 feet, 445  
3 cubic yards. That's a very nice size project.

4 Better yet, the average was a four-foot wall.  
5 So, even though it was a mix of different heights, the  
6 overall average was four feet. That's perfect.

7 You form the four-foot forms. As you go down in  
8 size, the -- because as Al Hocalar said, you pour these  
9 sections of walls in a 30-foot maximum section because  
10 there has to be a construction joint.

11 Basically your productivity is based on doing two  
12 30-foot sections of wall per day. Whether you are  
13 forming and pouring a two and a half foot wall or a  
14 four-foot wall, you are going to get two 30-foot  
15 sections per day by the time you prep it, form it, pour  
16 it, strip it, rub it, do all these activities.

17 So, very significant to us that what was a very  
18 clean, high productivity job turned out to be a very  
19 slow, custom built job.

20 If you could flip to the next two pages, and  
21 I feel like I'm trying to rush in saying this, but  
22 these two pages really tell the story. And if you look  
23 here, you can see the plan original stations on the  
24 left, the revised locations in the middle, and then  
25 we've just written on here how much it moved, either to

1           the left or to right. I know that sounds a bit  
2           awkward, but basically whichever direction it was is  
3           where the wall moved.

4           You will see that every single section of wall  
5           was moved. Every single section of wall had  
6           essentially a new height established.

7           Offsets were added, radius sections were added,  
8           plus we have highlighted in here the deletions of  
9           certain sections.

10          I think there were four areas that were deleted.  
11         Al didn't touch on those, but at least a couple of  
12         those he would physically go out there, set it up, and  
13         then get the area prepped, forms set, and then DOT  
14         would look at it and say no, we don't need this section  
15         of wall, tear down what you've done and move on to  
16         another area.

17                 CHAIRMAN COXWELL: Let me ask a question here.  
18         I know you stated and you've showed where you had to  
19         jump around, but would you not anticipate some jumping  
20         around in lieu of cutting your forms down to stay on a  
21         varying wall?

22                 Wouldn't you try to build all your four-foot  
23         walls and then go to your two foot and three foot and  
24         keep cutting your forms down instead of just to build a  
25         form and custom build each form and move ahead?

1 MR. HOCALAR: Can I touch on that?

2 CHAIRMAN COXWELL: Sure.

3 MR. HOCALAR: You would not move around like that  
4 in a certain case, but you would try, when you go from  
5 beginning station to end station, as a foreman, I would  
6 not go back to that station to finish it off. As  
7 I would pull in, I would finish the whole thing off,  
8 move all my forms to the next station.

9 And in this case we wound up going two to three  
10 times back to the same station to try to finish it.

11 CHAIRMAN COXWELL: I understand that.

12 I understand what you are saying, but I was just trying  
13 to get it in my head. Normally building a project with  
14 forms, you kind of use your forms as the need occurs,  
15 that you don't normally cut them down and then add to  
16 them, add to them, cut them down, build them back. Go  
17 ahead.

18 MR. GIBBS: Let me go into that a little bit.

19 Yes, you are right. You would try to go down, get your  
20 four-foot walls, but there's also the consideration of  
21 how the job had to be built sequentially. So, that was  
22 also part of the consideration.

23 There were two things that were involved. To  
24 kind of answer your question a little bit, yes, that's  
25 correct, that's how we would typically do it is start



1 with a four-foot wall and cut it down.

2 CHAIRMAN COXWELL: Let's let Mr. Ebbers go ahead.

3 MR. EBBERS: If I could get you to go to the  
4 damages tab in the small blue binder. I'm sorry, in  
5 the front of this, I think it's the very front of your  
6 book, is an extra copy of the executive summary that we  
7 submitted.

8 If you would, please, go to page three of that.  
9 Maybe you can hold your finger there a little bit.  
10 What I will be doing is just briefly touching on these,  
11 the breakdown of these amounts, the first one being  
12 direct field cost, 74,000.

13 Now, if you would please go back to that damage  
14 tab. There's a fairly simple one-page summary here  
15 that shows based upon final last bills, with DOT paying  
16 395 cubic yards at Pepper's unit price of 2.30.

17 The project generated \$90,000 of revenue. Then  
18 you see our cost, 97,000 labor, 24 for equipment,  
19 44,000 for materials for a total cost of 165.

20 What Pepper is looking for is reimbursement on  
21 the 74,000 difference.

22 Down below you can see just for comparison  
23 reasons we said okay, if you take that 74,000, divide  
24 it by 395, it would be an increase of \$188 per cubic  
25 yard.

1           When Mr. Gibbs referred to the October 1995  
2           letter that he sent to DOT, in that letter -- and this  
3           is after just a few months working on the job, he asked  
4           for a unit price adjustment of \$149 and change, just a  
5           touch under \$150 a yard.

6           That was before all of the tapers and radius  
7           sections came into play. Nobody even knew those were  
8           going to be added.

9           We think that's very significant because in  
10          advance of the work being done, to a large extent  
11          Pepper did give DOT, which is important, in a claims  
12          situation, one they gave notice, two they said roughly  
13          here is the extent of what the costs will be.

14          One other point I want to make, the direct costs  
15          that we refer to on here are all included in much  
16          greater detail inside of the large claim book.

17          Then if you will go the next page back behind the  
18          one we were just looking at, you will see it summarized  
19          by week. Nothing new, it's just the overall weekly  
20          total of labor and equipment.

21          One other point I want to make on the direct  
22          cost, the method that was used by Pepper, and it's  
23          their corporate style, I guess you would say, on DOT  
24          projects, is to default to the approved DOT mark-ups  
25          that are inside the standard specification books, 25

1       percent of labor, whatever it is on materials and  
2       equipment.

3               So, all of the pricing was done that way. Pepper  
4       actually uses a lower equipment rate than the Blue Book  
5       rate. So technically it's in DOT's favor at this  
6       point. That's the process that was used.

7               CHAIRMAN COXWELL: Okay. Moving along.

8               MR. EBBERS: Moving along, the next item is  
9       extended performance costs. We are on the same sheet,  
10      there's a one page, immediately behind the direct  
11      costs.

12              Again, this is the same document that's in the  
13      larger claim book. The period of time, 11.8 weeks ties  
14      in with that work sheet that I told you earlier.  
15      That's the total period of time that was extended.

16              Basically Pepper is looking for reimbursement of  
17      supervision costs.

18              Because of the nature of the changes that was  
19      going on, this was not a typical job, so a much larger  
20      degree of supervision was involved. A guy named  
21      Phil Grabriel and a guy named Ted Hunter from Pepper  
22      were providing that support.

23              Also, it's the corresponding impact to other  
24      jobs. As Pepper's crews had to be mobilized and  
25      demobilized off this job because of the changes that

1        occurred. You know, on very, very short notice they  
2        would have to find work, go back to another project.

3                Again, supervision time was needed, stage-up work  
4        onto other projects, making sure materials and lay-out,  
5        all the things that go on as a contractor to make sure  
6        your crew is going to go to a project and be able to  
7        hit the ground running.

8                We think this is a very valid part of our claim  
9        in addition to the direct costs of Al's crews.

10               The next tab is extended home office costs. Once  
11        again, this ties in with the work sheet that I showed  
12        you earlier that's basically 83 calendar days.

13               This is mathematically prepared based on what in  
14        the industry is referred to as the Eichleay formula.  
15        That's basically the law here in Florida at this stage.  
16        The application of this we think is appropriate for  
17        several reasons. One is the disruption in the  
18        performance of the work. It took 94 days instead of 37  
19        days.

20               That extended the project completion costs. And  
21        the theory behind this, and it's much more of a  
22        practical matter than it is theory, is that when your  
23        revenue gets disrupted on the job, overhead costs still  
24        go on. When a project is delayed through no fault of  
25        your own, particularly because of design errors,

1 overhead costs need to be reimbursed as well.

2 If you go to the one sheet behind that, I have  
3 quoted some excerpts out of the CPAM, which is the DOT  
4 guideline to its project managers.

5 These are direct quotes -- I'm sorry, it's not in  
6 yours. It's in mine. Let me just read it for a  
7 moment. DOT's own document says compensation for  
8 unabsorbed fixed overhead costs on any project may be  
9 allowed when the overhead costs can be supported and is  
10 reasonable.

11 Then under home office overhead they say these  
12 are overhead-type expenses in a contractor's home  
13 office which are not directly assigned to individual  
14 projects but which must be recovered by the contractor  
15 through individual project billings.

16 So, we believe it's very clear, supportive from  
17 DOT's own documents, that that was appropriate.

18 CHAIRMAN COXWELL: Okay.

19 MR. EBBERS: As support to the calculation, we  
20 have just included a page out of Pepper's audited  
21 financial statements, in the -- should be the next  
22 document or the next page.

23 Then can you see in bold print, there's some  
24 typed entries on there. That's how the calculation was  
25 done for the extended overhead cost.

1                   CHAIRMAN COXWELL:   Okay.

2                   MR. EBBERS:   The next sheet is entitled  
3                   unabsorbed home office expenses.   And this is a new  
4                   document that DOT has not seen.

5                   We went back and said, all right, what actual  
6                   costs for home office expenses have we had, broke it  
7                   down into project meetings, assembly of all of claim  
8                   packages.

9                   If you look at the history of this thing, it's  
10                  almost five years in time.   Beginning in October of  
11                  1995, as Mr. Gibbs said, when he first gave DOT notice,  
12                  first said, look, I think it's going to run about \$150  
13                  more a cubic yard.

14                  Stepping their way through, a court consulting,  
15                  with my time assembling this package, I've got probably  
16                  twice the hours, and then the costs here today for  
17                  arbitration.

18                  What we would like to suggest to the Board, we  
19                  have asked for 19,000 in extended overhead costs.   We  
20                  have provided detail for about 22,000.   We are not  
21                  looking for more.   We would just like to get one or the  
22                  other.

23                  CHAIRMAN COXWELL:   Okay.

24                  MR. EBBERS:   I guess going back to the quote in  
25                  the CPAM where it says DOT will pay it if you can prove

1       it or show actual costs, well, we are showing actual  
2       costs.

3               The next document I think is important even given  
4       the comments I have heard here today.  It's just a  
5       brief recap of the retaining wall history.

6               Again, October of 1995, Clayton Gibbs asked for a  
7       unit price adjustment.

8               If you take that \$150 times the 395 cubic yard  
9       final quantities, Pepper said to DOT early on, this is  
10      going to cost \$59,000.  Again, that was before all the  
11      tapers, radiuses and turn sections were added.

12              In August of '96, at the same time the work  
13      finished -- because they completed the work in  
14      August -- they prepared an addendum that added another  
15      10,000.  So, Pepper was looking to DOT, even in 1996,  
16      for roughly \$69,000.

17              Our claim package in 1998, after auditing all of  
18      the job cost records and playing this thing out in the  
19      greatest of detail, bumped that number to 74,000, as  
20      I mentioned based upon DOT standard mark-ups.

21              That is a result of \$4700.  One reference is made  
22      to this claim having grown.  That's all it has grown.

23              Had DOT bellied up to the bar in 1996 and given  
24      the unit price adjustment, plus this \$10,000 add-on for  
25      all the paper and radiuses, we wouldn't be here today,

1 and they would have paid 69,000.

2 As all of us know when you are asked to go back  
3 to revisit, revisit, revisit, part of that process is,  
4 okay, what else do I have that needs to go in this.  
5 That's when the supervision costs and home office  
6 overhead costs were added.

7 We don't take any embarrassment at that. We  
8 think it's appropriate. As I have already described,  
9 I think there's very clear authority to pay both the  
10 supervision costs and the home office costs.

11 CHAIRMAN COXWELL: I think we've got the gist of  
12 that.

13 MR. EBBERS: Last but not least, the last part,  
14 there's two copies. One is the March claim. We did  
15 ask for interest in this March '98.

16 Then if you look at the detail as it's been  
17 submitted here, obviously with the passage of time --  
18 and basically we are dealing with four years, almost  
19 right to the -- on the nose, August of '96 to -- we are  
20 here in late July. It's a four-year period.

21 Then looking at the final breakdown in our claims  
22 package, whatever is awarded for Pepper Contracting  
23 impacts there needs to be the standard prime contractor  
24 mark-up in that detail as well.

25 So, we respectfully are looking for Pepper's



1           underlying cost of 111,000, plus interest, plus the  
2           prime contractor mark-up. That wraps it up.

3           CHAIRMAN COXWELL: Thank you. DOT, go ahead.

4           MR. ROEBUCK: This latest booklet, did you see  
5           anything to object to?

6           MR. ZAGARDO: I've not seen anything so far.

7           MR. ROEBUCK: You won't need any further time  
8           after this hearing to rebut it?

9           MR. ZAGARDO: I don't think so. First, I would  
10          like to comment on the inefficiency that Doug and  
11          Clayton had talked about regarding Al. My comments  
12          were not an attack on Al's ability to build a wall.

13          As I reference in my rebuttal, on pages nine and  
14          ten, item two, they talked about the many job duties  
15          that Al was performing on this project as well as the  
16          many projects in the Tampa Bay area that they had to go  
17          to. That was the inefficiency that I was referring to,  
18          and not Al's abilities. Richard has had good things to  
19          say about Al. Al can build a wall.

20          CHAIRMAN COXWELL: I think the Board got that.

21          MR. ROEBUCK: Which wall?

22          CHAIRMAN COXWELL: I think we got your intent.

23          MR. ZAGARDO: One other comment to make regarding  
24          the wall. Again, on page seven where I talked about  
25          the one section of wall that was like 178 foot in

1 length, and the as-bid time to build that section of  
2 wall was three days, and basically 150 man hours.

3 In actuality it took seven days and 270 man  
4 hours. Basically that was about an 80 percent increase  
5 in man hours.

6 In reading the daily reports, I think Al and his  
7 crew did a good job in identifying impacts as minimal  
8 as they were.

9 CHAIRMAN COXWELL: Were there any changes in that  
10 section that you --

11 MR. ZAGARDO: Not that I'm aware of.

12 MR. GIBBS: I will respond to that later.

13 MR. ZAGARDO: Perhaps length. I don't know. So,  
14 that's one of the other comments I wanted to make  
15 regarding that. I think perhaps the scope was  
16 difficult as opposed to maybe a typical job.

17 As Doug referred to earlier, about all these  
18 items that we had to build within DOT right-of-way, JPA  
19 Road, gravity walls, lighting, et cetera, et cetera.  
20 It was a difficult project, difficult scope, perhaps  
21 not an attainable production rate assumed when putting  
22 the bid together.

23 We spent quite a few months with Pepper meeting  
24 and discussing this issue in an attempt to understand  
25 their point of view. We even met out in the field, to

1 jog some memories.

2 What I concluded were the impacts on the issues  
3 were -- let me go back and restate that.

4 I concluded that the impacts for this issue were  
5 indicative of the impacts identified in the summary  
6 sheet, which Pepper and Doug had put together, which  
7 were minimal DOT impacts, as identified in my rebuttal.

8 I have reviewed all of Pepper's daily reports,  
9 every one that was in that book several times. It  
10 appears that, you know, Al's crew did a good job in  
11 identifying any delays, impacts, no matter how minimal  
12 they may have been.

13 Frankly, I only came across a handful that would  
14 have indicated DOT impact.

15 We made changes to the wall. We don't disagree  
16 with that. There were certainly changes made. We had  
17 additions, we had deletions. We did not see any  
18 significant changes as by definition or specifications.

19 We deem this as a nonmajor item of work as well  
20 by our contract specifications.

21 I really couldn't find anywhere in  
22 correspondence, documentations or otherwise that would  
23 support the extent of the impacts that are identified  
24 in this claim.

25 Jack, I think earlier you had some questions

1           about the retaining wall?

2                   MR. ROEBUCK:   Yes.

3                   MR. ZAGARDO:   You have your plan and profile  
4           sheets that identified where your gravity wall was to  
5           be placed.  On the cross sectional sheets they show  
6           approximately the height the retaining wall would be.  
7           We had a scale to identify those heights.

8                   MR. KOPOTIC:   On that point looking through the  
9           plans, they do show, as they do in the plan profiles,  
10          gravity wall to gravity wall.  Most of the ones you  
11          will find are very short sections less than a hundred  
12          feet, approximately a hundred feet.  That in and of  
13          itself, you are picking up and moving two locations  
14          consistently, constantly throughout the project.

15                   In addition to that, the plans indicate the  
16          driveways, the numerous driveways throughout this whole  
17          project.  It would not be unreasonable to believe that  
18          you are going to be transitioning for driveways in  
19          these areas.

20                   One of the things that was stated earlier was  
21          that they had to hopscotch around.  I just wanted to  
22          clear the record.  That's not to mean that I -- the  
23          project runs south to north.  So that's not to mean  
24          that due to the phasing they were jumping to the east  
25          side and to the west side, back and forth.

1           The phasing on the plans was to build, construct  
2           the west side first, so that whole run of wall was  
3           available once, in fact, the proper grading was done,  
4           the proper surveying was done, et cetera, et cetera.

5           Design errors was bought up a lot of times  
6           earlier. I think due to the fact we are saying that  
7           there were driveways we had to accommodate or there was  
8           a break in a swale due to a driveway, there were tapers  
9           or transitions that had to match the natural ground and  
10          fit existing conditions. It doesn't lend itself to  
11          design error.

12          Also, it was mentioned a few times in their  
13          discussion -- and while the delays are being presented  
14          to the DOT as changes were made, design errors, and we  
15          incurred these delays, it is noted in the dailies, and  
16          it was noted a couple of times during their  
17          presentation that there were delays experienced due to  
18          waiting on the grading or the survey work that was  
19          needed by the prime contractor before any work could be  
20          done.

21          In addition to that, I believe there was some  
22          delays due to some of the utilities that had to be  
23          placed within the project limits, along with some of  
24          the lighting and signalization work that had to be  
25          done.

1 CHAIRMAN COXWELL: This was a total JPA job?

2 MR. HOCALAR: Yes.

3 MR. ZAGARDO: Yes, sir. One other comment

4 I would like to make is that the retaining wall was  
5 never a critical or controlling item of work on this  
6 project.

7 CHAIRMAN COXWELL: The Board read that in the  
8 document.

9 MR. ZAGARDO: Nor did it ever become one as far  
10 as I know.

11 MR. ROEBUCK: When it became apparent there were  
12 some interferences due to the size of these walls, the  
13 contour of them, the driveways, things of this sort,  
14 and you got into the '98 thing and you were still  
15 trying to get the quantities pinned down and you got  
16 that handled, then at some point you just said we can't  
17 work out a supplemental agreement.

18 Was there any reason that you didn't think you  
19 should have made an effort to negotiate something at  
20 this time in '98?

21 MR. ZAGARDO: We did try to negotiate a  
22 settlement.

23 MR. ROEBUCK: I couldn't find anything in the  
24 documents.

25 MR. ZAGARDO: We did try to negotiate a

1 settlement, but we were so far apart at the time there  
2 was no way we were probably going to get to resolution.

3 MR. ROEBUCK: A \$60,000 or \$70,000 area where  
4 they submitted some offers for settlement in that  
5 regard?

6 MR. ZAGARDO: We didn't agree to the 60,  
7 whatever, some-odd-thousand dollars. We -- certainly  
8 I don't believe Pepper was going to settle for anything  
9 less than that. We couldn't agree with the 60,000  
10 number either.

11 MR. ROEBUCK: Did you continue -- and I will ask  
12 both of you the same question -- did you continue to  
13 pay the bid unit price for the lineal feet of wall, and  
14 you have been paid the bid price for the 2900 feet of  
15 wall?

16 MR. EBBERS: Based on cubic yards, yes.

17 CHAIRMAN COXWELL: You did put in a unilateral  
18 there for --

19 MR. ALBAUGH: For 23,000.

20 MR. ZAGARDO: The 23,000 was to make up for what  
21 Pepper was deeming as their low yield, which was like  
22 20,000, 21,000 and change.

23 We paid the delays as they identified in their  
24 claim, which was around \$2300.

25 CHAIRMAN COXWELL: Okay.

1           MR. ZAGARDO: One other comment I need to make  
2           is -- I don't think there was any dispute on the  
3           quantity that we paid, Jack. That was a cubic yard  
4           item. As far as I know, there was no dispute on that.

5           We did measure several times out there. Finally  
6           we got to a number where everyone was happy with.  
7           Obviously the unit price was not an issue, or an issue  
8           that they were unhappy with.

9           Since processing the -- we had two supplemental  
10          agreements that were processed late, over the last year  
11          or two. Our final estimates office -- and I only  
12          noticed this over the past two weeks -- the actual  
13          quantity paid for in the final estimate is higher than  
14          what we had had in our original estimate that we had  
15          sent over to our district final estimates office.

16          Originally we had around 395. In actuality final  
17          estimates came back in and paid something in the  
18          neighborhood of 470 some-odd-thousand dollars. It's in  
19          part -- that estimate is part of the hand-out that  
20          I had provided all of you today.

21          CHAIRMAN COXWELL: Was that extra in the  
22          retaining wall?

23          MR. ZAGARDO: I think it was an error in their  
24          calculation. That is something that Carla Ferness, our  
25          district final estimates engineer -- and she's been out



1           for a little bit of time -- I have not had a chance to  
2           talk to her or speak to her on it.

3                     We had paid 395 some-odd cubic yards and it  
4           turned out to be somewhere in the neighborhood of 478  
5           I think. 478.3.

6                     CHAIRMAN COXWELL: You think that was in error?

7                     MR. ZAGARDO: We believe that was in error.

8                     MR. ALBAUGH: Are you talking about these  
9           estimates that you gave us?

10                    CHAIRMAN COXWELL: Are you saying they didn't  
11           actually pay it or they paid it in error?

12                    MR. ZAGARDO: I think some of the site source  
13           documents that they were using were incorrect.

14                    MR. ALBAUGH: These two estimates show a payment  
15           of 485 cubic yards.

16                    MR. ZAGARDO: On page six.

17                    MR. ALBAUGH: Right. There's 334.5, then on page  
18           three of the second estimate, at the very top, class  
19           one concrete retaining walls, shows 151.3.

20                    MR. ZAGARDO: Those were our original numbers.

21                    MR. ALBAUGH: Does that mean there was 480 --  
22           485.85 yards paid?

23                    MR. ZAGARDO: No. I'm not sure if we've got the  
24           pages mixed up there.

25                    MR. ALBAUGH: I'm talking about these two pages

1           there, the top item.

2           MR. ZAGARDO: There's two projects under this  
3 contract.

4           MR. ALBAUGH: Right. That's the first  
5 project's --

6           MR. ZAGARDO: It would be these two numbers here.

7           MR. ALBAUGH: What is this second estimate for?

8           MR. ZAGARDO: The second estimate is on the  
9 10040-3534 project. That was the second project.

10          MR. GIBBS: Both one job?

11          MR. ZAGARDO: One contract, two project numbers.  
12 If you add those two figures together, I think you get  
13 478.3.

14          MR. ALBAUGH: Were these the same project? This  
15 one, the second one you showed me, this and this is the  
16 same project?

17          MR. ZAGARDO: Same project, just --

18          MR. ALBAUGH: You are saying this is the final  
19 estimate?

20          MR. ZAGARDO: This is final estimate.

21          MR. ALBAUGH: Which is the seven yards less than  
22 the previous one. So, estimates decreased the quantity  
23 a little bit?

24          MR. ZAGARDO: Actually, they increased it a  
25 little bit. Just so you understand, Bill, what we

1           turned over to our final estimates office was  
2           approximately 395 cubic yards, which S & E and Pepper  
3           didn't disagree with.

4                   When they processed the supplemental agreements  
5           and finally final accepted the job and did their final  
6           estimates, they calculated a quantity of 478.3 cubic  
7           yards, approximately 70 to 80 cubic yards more than we  
8           had come up with.

9                   MR. ALBAUGH: I'm trying to understand this  
10          because it's one of the contentions they've made. So,  
11          you paid them for -- it's actually 479.3 yards. One of  
12          their contentions in the calculations is that the  
13          project ended up at considerably less than that,  
14          which --

15                   MR. KOPOTIC: 395.

16                   MR. ALBAUGH: Yet they've been paid 480  
17          something. What is the difference there?

18                   MR. ZAGARDO: We feel very strongly that our  
19          final estimates office used incorrect information in  
20          calculating that number.

21                   MR. ALBAUGH: Are you saying it's going to be  
22          adjusted downward?

23                   MR. ZAGARDO: It will be adjusted back to what  
24          our original figures were, down to 395. I need to  
25          contact our final estimates office.

1 MR. ALBAUGH: You've been paid for 480 something?

2 MR. EBBERS: I don't think we have been paid.

3 MR. ZAGARDO: Actually, you have. You would have  
4 gotten a copy of the final estimates.

5 MR. EBBERS: All of this is new to me. I'm not  
6 aware of any payment in recent months that the  
7 Department has issued on this job. I really don't  
8 believe the money has gone out.

9 MR. ALBAUGH: I'm just trying to understand this.  
10 One of the contentions here is a lot of these  
11 calculations it says a lower yield and this sort of  
12 thing is based on 395. I'm looking at estimates that  
13 say 479, which is actually higher than the 445.

14 CHAIRMAN COXWELL: It sounds like to me that what  
15 they did was take the plan quantity and increased it by  
16 the footage that was built. That's what it sounds like  
17 to me was probably done.

18 MR. GIBBS: That's what it sound like to me,  
19 also.

20 MR. EBBERS: From where we are sitting, quite  
21 honestly, whether it's 395, which we believed it should  
22 be, or this 470 quantity, Pepper's costs are really  
23 what we are trying to recover.

24 Now, I guess in concept -- and again this is all  
25 just coming to us today, we didn't know about this, but

1           should we somehow find out that 479 is the right  
2           quantity, and if that decreases Pepper's unreimbursed  
3           costs, well, we are not trying --

4           CHAIRMAN COXWELL: We understand that. We are  
5           just trying to --

6           MR. ALBAUGH: Part of that was yield, also.

7           CHAIRMAN COXWELL: Somewhere down the line we  
8           would ask that the Board be made aware of what that  
9           number is. That's going to really determine -- that's  
10          information we have to have.

11          MR. ZAGARDO: We can do that, of course. All of  
12          our calculations, Pepper's included, are based on that  
13          395 cubic yards. That's what we went into thinking  
14          this. This only came across. I just happened to be  
15          looking at the final estimate and saw this adjustment.  
16          I've not had a chance to talk to our final estimates  
17          people.

18          CHAIRMAN COXWELL: If you would in the next two  
19          weeks, send us a copy of the corrected statements.

20          MR. ALBAUGH: Because one of the contentions they  
21          are making is that the yield was lower, therefore,  
22          that's explaining why the higher cost on a per yardage  
23          basis.

24          If these numbers hold true, it gives a different  
25          understanding to it.

1           CHAIRMAN COXWELL: Like Mr. Ebbers said, they may  
2 not even have a claim if this is the case. At least  
3 it's going to have a lot of bearing on it.

4           MR. ZAGARDO: We understand that. We feel  
5 strongly that it was an error.

6           CHAIRMAN COXWELL: I understand your concept of  
7 it.

8           MR. ALBAUGH: We need to know what that number  
9 is.

10          CHAIRMAN COXWELL: Yes. Okay, do you have  
11 anything else?

12          MR. KOPOTIC: I guess we reserve the right to  
13 discuss whatever it is.

14          CHAIRMAN COXWELL: We will certainly give you  
15 that opportunity.

16          The Board is -- I think we have heard enough. We  
17 will give you a shot at anything you want to rebut over  
18 there.

19          MR. EBBERS: As I said, we did want to save a  
20 couple of things to say. We wanted to give them a  
21 chance to make their position.

22          Clayton, if you could lead off. I have a couple  
23 of quick things to close.

24          MR. GIBBS: I have gone through Larry's rebuttal.  
25 I had a bunch of things that I had actually written

1 down to refer to. I don't know if it's really  
2 necessary.

3 These are the highlights I want to put on it. He  
4 had come up with numerous dates in here that said we  
5 appeared to pull off the job to go and do other work.  
6 That wasn't the case.

7 What we had was this project we were going to do  
8 gravity wall. We would not pull off doing gravity wall  
9 to go do another job. I had other crews.

10 What was happening on the job, as I said before,  
11 we had gotten to the point where we completed the  
12 gravity wall as far as we could.

13 What we did, if we ran into a problem that all of  
14 a sudden there was a utility conflict or a decision  
15 couldn't be made or we lacked survey, whatever.

16 We did not keep the crew there. We put them  
17 either on other work or we pulled them off the job to  
18 mitigate any costs on the gravity wall. That's well  
19 documented in our time sheets. I'm sure Richard can  
20 agree.

21 Any time something happened, it was not something  
22 we stood there and waited for a decision. We did not  
23 pull off the job to just arbitrarily go and do work  
24 somewhere else.

25 Any time we did pull off jobs was a result of

1       possible problems we ran into on the gravity wall, and  
2       in order to keep the costs down on the gravity wall, we  
3       would pull off the job, go and do another item of work.

4             All our time sheets are specific in showing that.  
5       In fact, I pulled out a couple that Larry had referred  
6       to where he had stated that, okay, we had four hours,  
7       his number four, a delay in the crew for the survey  
8       party, Pepper's daily reports of 6-12 and 8-4.

9             If you look at that, what we have are those hours  
10      that we're waiting for bottom line elevation, they are  
11      not included in our gravity wall claim. Those hours  
12      that Larry was looking at is a separate cost against  
13      survey.

14            Every time we ran into a problem, we tried to  
15      document this thing very well, just like you said, with  
16      Al's crews, we ran into a survey problem. It was not a  
17      cost to put against the gravity wall. We put it as a  
18      back charge against survey.

19            If it was some other problem, we would document  
20      it with some type of a code.

21            Another one, he said, okay, here is the daily  
22      report that shows the concrete trucks --

23            CHAIRMAN COXWELL: Where are you at?

24            MR. GIBBS: I've got Larry's rebuttal. Under  
25      section -- page -- findings and conclusions, on page



1           ten, I'm just going down through. He had made points  
2           in here that part of his concern of why we were  
3           inefficient was that we had these delays.

4                   Well, what I'm trying to point out, these delays  
5           he's referring to were cost coded not to the item but  
6           to a separate item. They are not part of our claim.

7                   If there was a concrete, this number 5, he says  
8           Florida Mining was late.

9                   Well, if you will look on the time sheet, we have  
10          a separate cost code for the delay. It was not  
11          included in the cost code of the gravity wall.

12                  So, what I'm trying to tell the Board, guys, our  
13          inefficiencies that Larry is referring to as far as  
14          days that we moved on and off jobs, there was a reason  
15          we moved on and off jobs. We wanted to mitigate any  
16          costs we had against the gravity wall. If there was  
17          days we ran into the delays, we separated those costs  
18          and put them on a separate cost code.

19                  The costs you see on this job are costs we had  
20          for the time we actually put in installing the gravity  
21          wall.

22                  There is not time here for us to travel to  
23          another job. There is not cost in here or time in here  
24          for, you know, a lateral cost that may have happened on  
25          another job.

1           All right. These are real costs. I'm sure that  
2           Richard -- I can look at him today and he can agree,  
3           that -- this is like Larry and Mike have said, I've got  
4           a man here that has 14 years of experience building a  
5           gravity wall, and he did not arbitrarily go out here  
6           and just take his time to build this thing.

7           The project turned into, just like Larry referred  
8           to and Mike referred to, is a job that on the plans --  
9           and I have copies that I've highlighted that I could  
10          can pass out if you want to look at, a job that shows a  
11          straight gravity wall, straight, no transitions, no  
12          tapers. Even the cross sections on the job show  
13          nothing like we installed, that the pictures show in  
14          this plan. It's nothing.

15          What we ended up with was a custom built job, a  
16          job that was well-designed in the field by the DOT.

17          All we are asking for is, guys, we build a job  
18          that's a very good looking job that is an excellent  
19          job, has quality to it, but as a result of doing it we  
20          incurred additional costs. We are entitled to those  
21          costs.

22          The inefficiencies, that's why I want to say  
23          that. The last argument that I want to make is that he  
24          referred to my bid being inaccurate. I'm the guy that  
25          put the estimate together.

1           Okay. What I have passed out was a job cost on  
2           another job we have just completed. Okay. This job is  
3           a -- another DOT job. It is Turtle Road. It was just  
4           constructed in 1999.

5           All right. It's the same type of project. It  
6           has gravity wall. That shows a completed quantity of  
7           442.5 cubic yards. The average height that this wall  
8           ended up was 4.5 lineal feet.

9           So, typically this job on Turtle Road is very,  
10          almost identical to the same job that we had on  
11          Nebraska Avenue, that the height of the wall was four  
12          feet high, this one ended up four and a half feet high.

13          Nebraska Avenue when they bid the job, the  
14          average yield in it, based on the lineal footage, was  
15          supposed to be a four-foot high wall.

16          Okay. What we ended up with was a job that our  
17          labor and equipment costs, as my sheet shows you, and  
18          that's our actual cost on the job, was \$54,020. My  
19          cost per cubic yard based on that is \$122.08.

20          With a 15 percent mark-up, which is what our bid  
21          had, our unit cost with the mark-up for equipment and  
22          labor to do that work is \$140.39.

23          Now, the reason we were able to keep this job at  
24          that unit price is we built it without transitions that  
25          weren't shown on the plans. We built it without

1       tapers. We built it without any special custom gravity  
2       wall. We built basically what was on the plans.

3               The only thing that changed on this job was that  
4       the height changed somewhat from what was originally  
5       designed. That is the only thing that changed.

6               What we are trying to say is, guys, here is a job  
7       and four years later in 1999, that went through that,  
8       is typically almost the same yardage, the same yield,  
9       but you are telling me we bid the job too aggressively,  
10      we are saying wrong.

11              If we built the job very close to what the DOT  
12      showed, what we are saying is, guys, we can do it.  
13      And four years later we did do it.

14              CHAIRMAN COXWELL: Okay.

15              MR. EBBERS: Last couple of comments.  
16      Mike Kopotic, I believe, had said that there is sort of  
17      an implied understanding that if you see driveways on a  
18      drawing that it's implied that you would then have to  
19      build transitions.

20              Picking up where Clayton left off, that's  
21      absolutely not true.

22              DOT on this Turtle Road project very diligently  
23      just had the walls cut off. You end the wall with a  
24      straight section and transition it with earthwork.  
25      That's the custom at least in my 20 years of work

1 experience that we have done.

2 If DOT would say we are going to build a two and  
3 a half mile road project with roughly 2500 lineal feet  
4 of wall and have you bid it blind as to any transitions  
5 and tapers and all of that, how would one bid that?

6 To me, what I do think is understood is that you  
7 are going to have some tight quarters, you are going to  
8 have to make these walls fit, you know, adjacent to  
9 utilities and all of that. That's understood.

10 What was bid was a straight section of wall, with  
11 straight terminus ends, not something custom built.

12 CHAIRMAN COXWELL: I think we have heard all  
13 that. We understand where you are coming from.  
14 I think we understand from your documents. Like I said  
15 earlier, you presented us with great documents. DOT  
16 has presented us with great documents.

17 Do you have anything further to add?

18 MR. ZAGARDO: I just have one comment that I want  
19 to make. I want to emphasize a point. I've said it  
20 before, but I want to say it again.

21 Al did a good job, I think, in identifying  
22 delays. He started identifying these delays or impacts  
23 very early on on the job. He was identifying minimal  
24 impacts as much as an hour and a half delay, waiting on  
25 Ken Jackson for an answer.

1           There's a handful of daily reports on this  
2           project that support that. That is it. If there were  
3           others, they are not reflected on any of these daily  
4           reports. That's the point I wanted to make.

5           CHAIRMAN COXWELL: Okay.

6           MR. KOPOTIC: I have one more, if I could. The  
7           basis -- the basis being used right now is to take plan  
8           quantity, divide it by lineal footage. That will give  
9           you the production rate.

10          I do want it noted that a review of the cross  
11          sections for both of these projects provides a  
12          tremendous amount of information that the walls --  
13          numerous locations where walls are one and a half to  
14          two feet high and probably in the minority of the areas  
15          where they are shown to be four and five foot high.

16          MR. GIBBS: Can I just rebut that one?

17          CHAIRMAN COXWELL: Short.

18          MR. GIBBS: If you go back through and take the  
19          cross sections that are on the wall and take the  
20          computation book, both the cross sections and your  
21          computation book show that the height is correct.

22          Do you see where I'm coming from, Mike?

23          MR. KOPOTIC: No, I don't.

24          MR. GIBBS: Your cross sections on the plans and  
25          the comp book, the height that he's showing match up.

1           What we ran into in the field, and that's what  
2           I did in October of 1996, what happened in the field  
3           was the height of the wall was not constructed per the  
4           plans. The height of the wall changed. That's why in  
5           October of 1995 I wrote the letter.

6           The only other comment I want to say is --

7           CHAIRMAN COXWELL: We've heard enough.

8           MR. ALBAUGH: I have just one question.

9           MR. GIBBS: The only other comment I want to say  
10          is that Al Hocalar documented not all the facts on the  
11          job. As he tried to say himself about how he stood  
12          there with Ken Jackson and everybody else when we did  
13          these tapers and everything else, and with Richard, it  
14          is not documented.

15          All we did was go out there and try to build the  
16          wall with the best direction.

17          CHAIRMAN COXWELL: I think we are getting now to  
18          appear to be saying the same thing over and over.

19          I don't think we need to hear any more of that.

20          Does the Board have anything?

21          MR. ALBAUGH: I just have one question. In your  
22          claim, what you have submitted here to us as of today,  
23          does it take into consideration the unilateral  
24          supplemental agreement process?

25          MR. EBBERS: Yes, we note that in the executive

1 summary that the unilateral is pending.

2 MR. ALBAUGH: What do you mean pending?

3 MR. EBBERS: It's not paid.

4 MR. ALBAUGH: It hasn't been paid?

5 MR. ZAGARDO: Was executed in April. It should  
6 have been paid. Is there an issue with the surety,  
7 Doug?

8 MR. EBBERS: No, just DOT cutting a check.

9 MR. ALBAUGH: If that's being paid then --

10 MR. EBBERS: That should be taken out. We did so  
11 note that.

12 CHAIRMAN COXWELL: I remember it being in there.  
13 They did show that. Okay, if there's nothing else,  
14 each one of you will get a transcript, and within two  
15 weeks you will let us know the right quantity from  
16 final estimates?

17 MR. ZAGARDO: Yes, sir.

18 CHAIRMAN COXWELL: And within six weeks we will  
19 meet and render our decision, our opinion.

20 MR. EBBERS: If I could, just one last point. If  
21 you go to the tab in the book that says contractual  
22 basis, our little binder, he --

23 CHAIRMAN COXWELL: Okay, which tab?

24 MR. EBBERS: The last one, contractual basis.  
25 And right behind the roadway plans preparation manual,



1           there should be two paragraphs highlighted.

2                     DOT's current practice provides for final payment  
3           under plan quantity, it says estimated quantities to be  
4           calculated, really the second paragraph is the key.  
5           Limit stations coordinates must be detailed, and so on.

6                     That goes right to the heart of our claim.  
7           Experienced foreman, been there, done that, many, many  
8           times. A bid that squares even in year 2000 with  
9           another DOT job.

10                    Gentlemen, there's no reason why Pepper should  
11           have pulled onto this project and lost money with an  
12           experienced crew other than the errors, the design  
13           errors that occurred because Mr. Hocalar -- I don't  
14           think he said this, but he told us this many times,  
15           he's never had a job like this where every move he  
16           made, every wall section, every part of it was  
17           basically directed by DOT in the field.

18                    Again, I don't know why DOT is hesitant to  
19           acknowledge that.

20                    Pepper's records are so detailed, there's no  
21           reason why they should have gone to this job and  
22           taken a loss.

23                    CHAIRMAN COXWELL: Okay. That concludes the  
24           hearing.

25                    (Whereupon, the hearing was concluded at 1:45 p.m.)

CERTIFICATE OF REPORTER

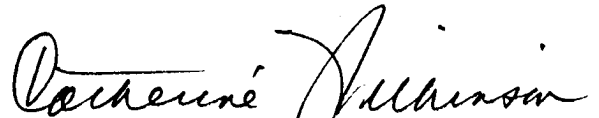
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Dated this 14<sup>th</sup> day of August, 2000.



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