

**STATE ARBITRATION BOARD**

**5615 23<sup>rd</sup> Street S.W.  
Vero Beach, FL. 32968**

**Phone (772) 299-3290**

**FAX (772) 299-3568**

February 28, 2004

Bill Albaugh  
Highway Operations  
Florida Department of Transportation  
605 Suwannee Street MS 31  
Tallahassee, FL. 32399-5200

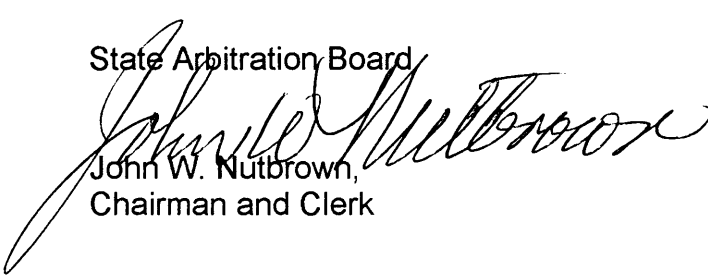
Re Arbitration Order 3 / 2003  
DOT Fin Project No. 219359-1-52-01  
Jackson County, FL.

Dear Bill:

Find enclosed Arbitration Order 3 / 2003 for the above captioned project. A copy of the transcript is enclosed, and copies of the Contractors submittal and the Department rebuttal are being kept by Freddie Simmons for your use.

Sincerely;

State Arbitration Board



John W. Nutbrown,  
Chairman and Clerk

Cc: All Board Members

**STATE ARBITRATION BOARD**

Order No. 3-2003

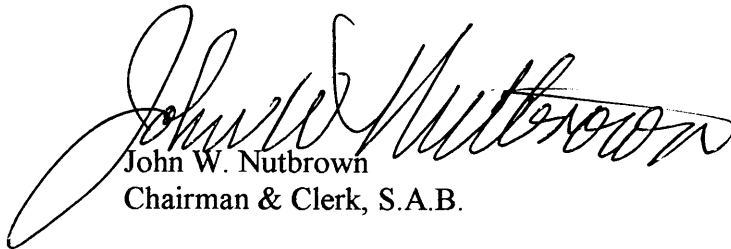
**S.A.B. CLERK**

**FEB 18 2004**

**FILED**

**/// NOTICE ///**

In the case of White Construction Co., Inc. versus the Florida  
Department of Transportation on Financial Project No. 219359-1-52-01  
in Jackson County, Florida, both parties are advised that the State  
Arbitration Board Order 3-2003 has been properly filed with  
The Clerk of the State Arbitration Board on January 15, 2004



John W. Nutbrown  
Chairman & Clerk, S.A.B.

Copy of Order & Transcript to:

Bill Albaugh, Highway Operations

Luther White, Jr. Vice President Construction Co., Inc.

# STATE ARBITRATION BOARD

Order No. 3-2003

RE: Request for Arbitration  
White Construction Co., Inc.  
State Financial Project No. 219359-1-52-01  
Jackson County, Florida

The following members of the State Arbitration Board participated:

John W. Nutbrown, Chairman  
Ken Leuderalbert, Board Member  
Robert G. Burleson, Board Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:00 am May 5, 2003

The Contractor, White Construction Co., Inc., presented a written request for arbitration of its claim in the total amount of \$60,040.00. The claim arises out of disagreements with the Florida Department of Transportation relating to unforeseen unsuitable material, shoulder repair and excessive assessment of liquidated damages in the resurfacing of SR-276 in Jackson County, Florida. The Department of Transportation presented a written rebuttal and summary of position. Prior to the opening of the hearing the Contractor reduced its claim to \$19,884.00. The Board has considered the written submissions and the testimony and evidence presented at the hearing on May 5, 2003 and enters this Order Number 3-2003

## **ORDER**

The Board is unanimous in this decision.

During testimony the Board questioned as to how cost records were kept and how the claim was computed as to cost. The Contractor stated he did not have records as to what equipment was used for each part of the claim and relied on the Department's Daily Reports. From testimony given the Board was unable to compare the claim amounts against the Contractors records and unable to ascertain the validity of the claimed amount.

Testimony by the Department's representative stated the Contractor had not followed the requirements of Section 5-12 of the Standard Specifications, better known as the claim specification. Specifically, the Contractor did not provide written notification of intention to file claim prior to beginning work. By not following the procedure set forth in this specification the Contractor had not allowed the Department to track the actual labor and equipment related to this matter. Section 5-12 of the Standard Specification also states that by failing to notify the Engineer of intent to file a claim the Contractor has waived any right to claim for additional monies relating to these items.

Discussion during the hearing brought out that the Department had shorted the Contractor a total of three days. This is discussed in the transcript on Page 27, Lines 4 thru 17.

**STATE ARBITRATION BOARD**

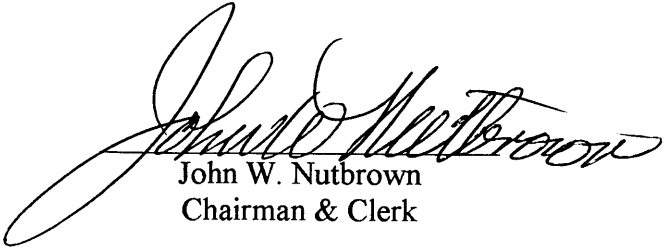
Order No. 3-2003

The Department is ordered to compensate the Contractor \$4,399.00 including interest for three days of liquidated damages.


The Department shall reimburse the State Arbitration Board \$233.00 for court reporting costs.

Vero Beach, Florida

Dated: January 15, 2004

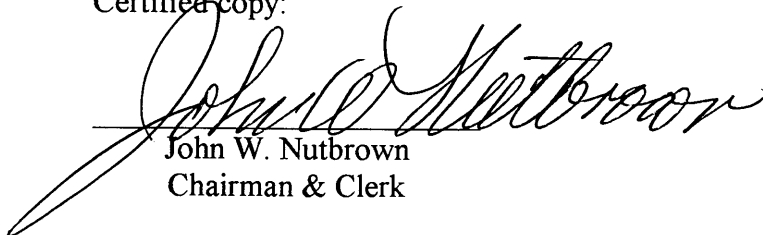


John W. Nutbrown  
Chairman & Clerk




Ken Leuderalbert  
Board Member

Certified copy:



John W. Nutbrown  
Chairman & Clerk



Robert G. Burleson  
Board Member

1

STATE ARBITRATION BOARD  
STATE OF FLORIDA

WHITE CONSTRUCTION CO., INC. )  
  )  
  )  
- and -                                ) PROJECT NUMBER 53110-3500  
  )  
  ) LOCATION: Jackson County,  
  ) Florida  
  )  
DEPARTMENT OF TRANSPORTATION )

PROCEEDINGS:                   Arbitration in the Above Matter  
DATE:                           Monday, May 5, 2003  
PLACE:                         1007 Desoto Park Drive  
                                     Tallahassee, Florida  
TIME:                         Commenced at 9:00 a.m.  
                                     Concluded at 10:00 a.m.  
REPORTED BY:                 CATHERINE WILKINSON  
                                     CSR, CP  
                                     Notary Public in and for  
                                     the State of Florida at  
                                     Large

WILKINSON & ASSOCIATES  
Certified Court Reporters  
Post Office Box 13461  
Tallahassee, Florida 32317  
(850) 224-0127

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

2

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. John W. Nutbrown, Chairman  
Mr. Ken Leuderalbert  
Mr. Robert Burleson

APPEARING ON BEHALF OF THE CONTRACTOR:

Mr. Matthew Michalak  
Mr. Timothy Jones  
Mr. Luther White III

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:  
Steve Potter, P.E.

\* \* \*

I N D E X

EXHIBITS	PAGE
Exhibit No. 1 received in evidence	4
Exhibit No. 2 received in evidence	4

CERTIFICATE OF REPORTER                                 32

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

3

P R O C E E D I N G S

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

Mr. Freddie Simmons was appointed as a member of the Board by the secretary of the Department of Transportation and is replaced today by Mr. Ken Leuderalbert. Mr. Simmons is ill.

Mr. John C. Norton was elected by the construction companies under contract with the Department of Transportation. Mr. Norton is being replaced by Mr. Bob Burleson.

Mr. Norton has a conflict due to the fact that he and Mr. Mitchell work out of the same office and are associated.

These two members chose me, John Nutbrown, to serve as the Chairman of the Board. Our terms expire June 30, 2003.

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

(Whereupon, all witnesses were duly sworn.)

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

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

4

preceding this hearing are established and introduced as Exhibit 1.

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

CHAIRMAN NUTBROWN: Does either party have any information that they wish to place in as an exhibit? Anything additional?

MR. MICHALAK: I have a few. This is a summary.

CHAIRMAN NUTBROWN: Matt, would you make sure everybody has a copy.

MR. MICHALAK: I have copies for everyone.

CHAIRMAN NUTBROWN: The four sheets attached, additional compensation summary, the shoulder repair compensation summary, excessive liquidated damages assessed by DOT and the time line associated with that document are entered as Exhibit 2.

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

CHAIRMAN NUTBROWN: Okay. Everybody has a set they can examine it.

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

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

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 The parties are instructed to ensure that they  
2 receive properly identified copies of each exhibit used  
3 in this proceeding.

4 You should retain these exhibits. The Board will  
5 send the parties a copy of the court reporter's  
6 transcript along with our order, but will not furnish  
7 copies of the exhibits.

8 As is typical in arbitration proceedings, the  
9 hearing shall be conducted in an informal matter. The  
10 Board is not required to apply legalistic approaches or  
11 strictly apply the rules of evidence used in court  
12 proceedings.

13 We are looking for information regarding the  
14 facts and the contract provisions that apply to this  
15 case.

16 The order of proceedings will be for the claimant  
17 to present their claim and then for the respondent to  
18 offer rebuttal.

19 Either party may interrupt to bring a point out;  
20 however, I would request that you come through the  
21 Chairman. We will keep it orderly.

22 I also request that if you've got a cell phone,  
23 put it on silent or turn it off.

24 We have no attorneys here. So, with that will  
25 the claimant begin with his presentation.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 So, the time used was 259 contract days.

2 The Exhibit I handed out -- I don't have a board  
3 for this, but this shows how we arrived at the contract  
4 time.

5 Initially White Construction Company submitted a  
6 qualified letter of acceptance on November 13, 2002.  
7 In our book that we presented that is under footnote  
8 number 4.

9 Originally they had seven claims, two issues on  
10 quantity.

11 The initial request or qualified acceptance was  
12 \$484,508.46.

13 Most of those issues have been resolved. A few  
14 of those issues, there wasn't sufficient documentation  
15 that we could be able to obtain or to verify some of  
16 those issues.

17 Those issues were either resolved prior to being  
18 brought to the Board or there wasn't sufficient  
19 documentation for it to be documented clearly.  
20 Initially the Board was asked -- or three issues were  
21 brought to the Board.

22 As we show on the board up here, one was  
23 unforeseen unsuitable material issue. The other was a  
24 shoulder repair issue, and the third issue was  
25 excessive liquidated damages assessment.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 MR. MICHALAK: These boards are just copies of  
2 the exhibits that we have previously handed out. We  
3 will start with my name is Matthew Michalak. I'm a  
4 consultant, I have been asked to present White's claims  
5 in this arbitration hearing.

6 Mr. Luther White III is the representative of  
7 White Construction Company, and Mr. Timmy Jones was the  
8 supervisor for White on the construction project.

9 White Construction Company was the prime  
10 contractor on the project on State Road 276 in Jackson  
11 County, Florida, project number 53110-3500.

12 The project runs from State Road 167 to State  
13 Road 10, to U.S. 90, in the vicinity of Marianna,  
14 Florida, approximately 5300 meters in length or 3.3  
15 miles.

16 The scope of work included milling, widening,  
17 resurfacing, shoulder and associated work on the  
18 existing highway.

19 The specifications was the 1998 edition of the  
20 Standard Specifications, in the specifications package  
21 for the project and the supplemental specifications for  
22 the project.

23 The original contract time was 180 contract days.  
24 The contract time began on January 14, 2000 and final  
25 acceptance was 259 days later on September 28, 2000.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 Since the issue has been brought to the Board,  
2 the State has issued some additional information, the  
3 reevaluation of those issues, and the unforeseen  
4 unsuitable material issue has been resolved.

5 So now we are asking -- there is no request for  
6 additional compensation on that issue.

7 The shoulder repair issue remains unresolved and  
8 remains the same.

9 The excessive assessment of liquidated damages,  
10 there's been some reevaluation on both sides, and White  
11 has reevaluated that and dropped it from 24,000 to  
12 13,376.

13 So, the total of the two issues that we are  
14 bringing today is \$19,884 rather than the \$60,040.

15 We will start with the shoulder repair. During  
16 the course of the project, both the Department and  
17 White Construction was aware there were areas of the  
18 shoulder that were failing due to existing unsuitable  
19 subgrade that was unforeseen and unexpected at the time  
20 White bid the project.

21 To correct the problem, White Construction milled  
22 the shoulders and added some asphalt.

23 The Department was aware of the problem and the  
24 method that White Construction used to correct the  
25 problem at the time that White presented its formal

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

notice of intent letter for the claim for extra work.

The problem was corrected on August 22, 2000 and August 25, 2000. Those are two dailies that are listed in footnote number 10.

Mr. Timmy Jones was White's construction supervisor on the project. If you would like, he can give you a little more insight of exactly what took place and how the repair work was done.

MR. JONES: Okay. I'm not with White now. I want to make that clear. I haven't been with them since last September.

During the time we were doing this job, it had a type B stabilization. Some of this material that is under this roadway is highly plastic. The type B is where you mix it in with a mixer, roughly a foot deep.

We were having lots of rain. Some of these areas were actually pumping. It didn't show up until we started putting the asphalt on it. It had a lime rock base. We put rock on it. Then we put the asphalt on it, and that shoulder busted up.

DOT and I was aware of this all along once we started placing the asphalt.

We didn't -- I had asked, I guess Dave, who was the project engineer -- they switched project engineers on that job. I think in the beginning Ricky Kay was

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

the project engineer, but I'm not sure about that. Dave came in there.

It was raining constantly. We got everything else done. At the point we got ready to where we was ready to kind of put the friction on, they directed us to fix the pumping areas.

We went in there and milled the asphalt out and lime rock, part of the lime rock, and put extra thickness of the asphalt in at these locations.

MR. MICHALAK: DOT knew what you were doing, they were aware of the situation?

MR. JONES: (Nodding head affirmatively)

MR. MICHALAK: Okay. On that particular issue, we think the reasonable costs of that additional work, a reasonable estimate of that cost is \$6,508.

As I mentioned earlier, the specifications of the project was the 1999 standards for road and bridge construction. In Section 4-3.2.3, which is under Exhibit I in our book, it says where the cost is negotiated, submit an estimate to the Department in terms of labor, materials, equipment, overhead and other expenses incurred solely as a result of additional unforeseen work.

It lists various methods to compute the base, or the labor, equipment, et cetera. The equipment cost

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

was based on the Blue Book cost plus the 7.5 percent mark-up.

The labor costs, you add 25 percent mark-up. The general liability insurance and bond, you mark up 1.5 percent for the total additional costs.

A reasonable estimate of additional unforeseen costs incurred by White Construction related to this issue is based upon equipment and labor, as noted on the Department's daily reports of construction for August 22 and 25, year 2000.

Again, those are listed in footnote number 10. Both of those footnotes record that the work related to the shoulder repair that took place on these days would also indicate that additional work beyond that work also took place.

Now, the dailies don't record the specific amount of work, the time versus each issue.

So, in speaking with Mr. Jones, a reasonable indication was about a half a day on each day was associated with that work. So, we have computed reasonable costs based on a half a day or half the hours shown on those dailies associated with the work and half of that time associated with other work as related to this issue.

The equipment hours and description are based on CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

the Department's dailies and the information and also from Mr. Timmy Jones and from Tom Ford's appraisal of White's equipment.

If we look at footnote 10, as I said, it shows you the dailies and then Exhibits C -- do you have C there, Jack?

CHAIRMAN NUTBROWN: C or D?

MR. MICHALAK: C. The DOT dailies don't list the specifics, a bulldozer, pan, and don't list the specific model numbers. White does not keep track of specific pieces of equipment by job or activity.

Mr. Jones has a pool of equipment that he uses on his jobs in his area. He gave me this indication that this pool of equipment that could have been or was used on that project. We don't know the specific pieces of equipment, but this was a pool that he had.

So based on the description from the FDOT dailies and based on the pool of equipment that Mr. Jones indicated that he had available, we then took White's -- an appraisal of White Construction's equipment, which was under Exhibit E. From that we looked at the different pieces of equipment which has a model number, which has the year.

Based on that, we go to Exhibit D. Then we computed those items of equipment using the Blue Book CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 formula.

2 Then for the rate of the equipment using the  
3 claim, we used the least expensive piece of equipment  
4 from that pool for that particular description of  
5 equipment.

6 In other words, if he had -- if the dailies said  
7 a dozer and Mr. Jones said I had on that job maybe a  
8 D-6 or a D-4, maybe I had two D-4s -- I'm not saying  
9 this is what he used, but just as an example.

10 Then we went to the appraisal to determine which  
11 was the oldest D-4 or D-6, used the Blue Book rates to  
12 compute, and then used the cheapest or the least  
13 expensive piece of equipment. It doesn't necessarily  
14 mean that it was the exact piece of equipment, but it  
15 was the least expensive. So it could have been a more  
16 expensive piece of equipment.

17 Again, the hours, usage came from the  
18 Department's daily reports of construction. The  
19 mark-ups for the equipment was, again, according to the  
20 specifications that we mentioned earlier.

21 For the labor, again, the hours in the  
22 classification came from the FDOT dailies. Again, it  
23 lists the type of person and the hours. Again, we  
24 don't have a record of exactly which people worked on  
25 that item on those days. We have classification.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 We went back and looked at what White charges, a  
2 normal reasonable rate for that classification, and  
3 that is the rate that was used to arrive at the labor.

4 Again, based on the hours shown on the dailies,  
5 the classification shown on the dailies, and a  
6 reasonable rate that White charges for those  
7 classifications.

8 The labor burden rate that White uses is under  
9 Exhibit H. It's 36.18 percent. That comes from  
10 White's files and their accounting.

11 Again, the mark-up of the 25 percent is according  
12 to the specifications 4.3.2.3.

13 Then the general liability, insurance and bond of  
14 1.5 percent, and the total is again from the same  
15 specifications.

16 Then we have additional MOT costs for one day,  
17 half a day each. One day, that is based on the MOT pay  
18 item of 12102-1, if you look under Exhibit A.

19 That's a lump sum pay item. It's the second item  
20 on the first page. It's a lump sum for the job. The  
21 original contract time was 180 days.

22 That equates to \$828.83 per day. We are asking  
23 for one day. The total reasonable costs of \$6,508 for  
24 that issue.

25 The last issue is excessive liquidated damages

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 assessed by the Department. The Department incorrectly  
2 assessed 36 days of liquidated damages. That's in  
3 footnote 11 where they did the computation. Calendar  
4 days overrun, that's 36. That's about a third of the  
5 way down on the right side.

6 Above that you will notice it says calendar days  
7 elapsed, 260. That's also incorrect.

8 Then by Exhibit A, again, which is the final pay  
9 estimate, the last --

10 CHAIRMAN NUTBROWN: I'm sorry, which one?

11 MR. MICHALAK: Exhibit A, final pay estimate,  
12 next to the last page. You will see where they  
13 assessed 36 days.

14 Since the initial submittal to the Board, both  
15 White and the State have reevaluated the numbers for  
16 the liquidated damages.

17 As we indicated earlier, the issue of the  
18 unsuitable material -- initially we had some days in  
19 there, additional days requested for contract time for  
20 that issue. That has been resolved. We are not asking  
21 for any days. So, some of those days can go away.

22 As it stands now, if we look at what is on here  
23 and this sheet, I think the State -- the Department and  
24 White both agree that the time used was 259 days rather  
25 than the 260 days.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 The original contract time, we are both in  
2 agreement that it's 180 days.

3 I think we are both in agreement now that the  
4 additional contract time which has been granted for  
5 additional work is four days.

6 White is asking for one additional day for the  
7 shoulder repair work, which has not been granted by the  
8 Department.

9 We are both in agreement that the Department has  
10 granted 42 days for the effects of weather, and White  
11 is requesting seven additional days for the effects of  
12 weather, and those dates are listed as January 28,  
13 2000, March 19, 2000; April 2, 27, 28; July 30 and  
14 August 6.

15 The Department indicates that January 28 should  
16 not be granted as a day. If we look, they are saying  
17 that day, even though the weather was unsuitable for  
18 more than 50 percent of the time, that one of White's  
19 subcontractors worked that day.

20 Well, White is contending that that work -- that  
21 they were not able to work that day, and their work was  
22 a controlling item of work.

23 On April 27 and April 28, there had been a  
24 tremendous amount of rain the previous number of days.  
25 On those days White did recovery work, reestablishing

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127



1 the erosion control.

2 Now, the dailies indicate that there was erosion  
3 control work, rework done, but it doesn't indicate that  
4 it was a recovery day.

5 Again, Mr. Jones was on the project. He can  
6 relate to those two issues.

7 MR. JONES: Like I said before, in the beginning,  
8 the first part of that job was real wet. I know one  
9 time DEP actually come out there and got onto us. They  
10 had like an eight or ten-inch storm, and it blew all of  
11 that out, especially down around that culvert.

12 I know -- I don't know -- I haven't reviewed the  
13 diaries to see if they give us time for that, but  
14 I know it took us two or three days to recover from  
15 that, digging the sand out of the stream and taking  
16 care of the erosion just to take care of the DOT.

17 In my opinion a lots of time my opinion of a  
18 rainy day or wet day or weather day varies from an  
19 inspector's day.

20 Just like say the subcontractor went out there.  
21 He's doing pipe. He might be out there cleaning,  
22 raking forms, opening up the ditches and so forth.

23 Out on the shoulder, like I said before, this is  
24 real rich material, clay materials even with plastic in  
25 it. You can't put a piece of equipment out there in

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 that material.

2 The inspector may look at it, well, that  
3 subcontractor worked. He's over there fiddling with  
4 his pipe, but we are not out there able to work.

5 So, sometimes I feel like the inspectors are not  
6 truly fair with the weather days. I can't sit here and  
7 say this day or that day on this particular job that  
8 was or wasn't. I guess that should have been done as  
9 the job was going on.

10 I do know that this job was wet. If you will  
11 look at DOT's reports, in the beginning it was  
12 extremely wet. In the end, right at the end it got  
13 extremely dry.

14 We had a problem with even the sod, the grass we  
15 put down living there.

16 I think time was actually run somewhere in the  
17 20 -- close to 30 days from the time we completed  
18 everything until on account of the sod being dead from  
19 drought.

20 We had a subcontractor doing the sod, Suwannee  
21 Valley Grass. Of course, he was fighting this battle  
22 all over the state of Florida. He does work not only  
23 for us, but for several other contractors in the state.

24 He wasn't able to come get to the replacement of  
25 the sod and all. There was no way that he could water

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 all the work that he had under contract.

2 We had a problem there at the end, too, with the  
3 weather that was not accounted for from it being too  
4 dry.

5 So, I think lots of times, again, that your  
6 inspectors don't take all this into consideration.  
7 I disagree.

8 I worked up a schedule, but I don't have it with  
9 me, mainly for time back before I left White  
10 Construction, not only on this job but on several jobs.  
11 I met with Mr. Potter on several of them. We worked  
12 out several of them.

13 This particular job here I did not meet with  
14 Mr. Potter, didn't discuss it prior to me leaving White  
15 Construction. I had worked it up, asked the secretary  
16 of mine to mail it.

17 I had worked up a bunch of weather days and  
18 utility delays. Matt didn't take the utility days as  
19 far as the time and claim -- which my intent wasn't a  
20 claim, my intent was just to recover and explain why it  
21 took me and my people, you know, 30 some-odd days more  
22 to do something than it should have.

23 What I was working up was trying to explain what  
24 did go on as far as the delay in liquidated damages.

25 In the beginning of that job, we had a precon

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 meeting. Me, Mr. Potter and all the utility companies  
2 walked down through that job. I pointed out what  
3 needed to be done.

4 CHAIRMAN NUTBROWN: Excuse me, Mr. Jones. The  
5 utility is not part of this hearing. We are only  
6 talking about the weather issue and the days that Matt  
7 has listed in the claim as far as being weather days.  
8 Anything as far as utility delays is not part of this  
9 hearing.

10 MR. JONES: I thought we were talking about  
11 liquidated damages. I was trying to explain that  
12 I guess is what I was trying to do.

13 What I'm saying, not only weather days, and  
14 I don't know whether I should or not say, but there  
15 were utility delays. That's not brought up in this  
16 issue. We are not -- all I'm trying to do is let you  
17 all know what happened. I'm not trying to mislead or  
18 gain in any kind of way.

19 There was plenty of opportunities for the  
20 Department to grant the time and they probably would  
21 have if we had probably had a meeting on this job prior  
22 to it getting here. I left the company before that.

23 MR. MICHALAK: If I can just explain, there were  
24 probably a bunch of other days that we didn't put in  
25 our claim here.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

As we come down, White believes that 234 days should be modified to contract time, revised contract time. And 234 from the time used of 259 equals 25 days overrun, which we think is the correct number. The Department has assessed 36 days or 11 days greater. At the rate of 1,218 per day, it's 13,376.

That's the conclusion of our presentation.

CHAIRMAN NUTBROWN: Okay. Mr. Potter?

MR. POTTER: First of all, the Department does not believe that this hearing is required. Basically, for the reason that this has never been presented in the form of a claim to the Department prior to being submitted to the State Arbitration Board.

I think your own procedures indicate that any dispute of issues must have been previously submitted to the other party and negotiated on, and that negotiation not been resolved prior to submitting to the Board.

White Construction never has submitted any information directly to the Department in regards to any of these issues. The only thing they have submitted to the Department is the qualified acceptance letter.

We have not negotiated with White Construction. We have not -- Mr. Michalak, if I'm pronouncing that

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

correctly, has indicated that some issues have been resolved. That has been withdrawn. We have never discussed any of these issues with White. They have been invited to submit their claim to the Department and they have failed to do so.

Going beyond that, the -- as was noted, the issues regarding the unsuitable material was withdrawn.

The shoulder repair issue, first of all, the work was done. The daily reports indicate work done on August 22 and 25.

The claim was never -- no claim was ever submitted to the Department. We did not receive it until 8-30. The letter was written on 8-25. The Department received it on 8-30.

The Department did not have an opportunity to keep accurate records. And as you have seen, there were no accurate records kept by the contractor.

The specifications are clear on this. There is a case that says, "When a contractor deems extra compensation is due for work or material not clearly covered by the contract or ordered by the engineer, the contractor shall notify the engineer in writing of the intention to make a claim for extra compensation before beginning claim work.

"The contractor -- if the contractor does not

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

give such notification and does not afford the engineer proper opportunity to keep strict account of the actual costs, then the contractor waives the claim for extra compensation."

That is section 5-12 of the Standard Specifications.

We believe in this case the contractor has waived his right to a claim. What you have heard today, there are no -- White did not keep any accurate records. They are making assumptions based upon two daily reports that indicates they had to make some repairs.

Other than Mr. Jones' testimony, there's nothing in those daily reports that says that the repairs were necessary due to unsuitable material on the shoulders.

My conversation with our project personnel don't recall unsuitable materials in the shoulders as being a cause for those repairs. Those repairs could have well been required because of equipment damage or deficient workmanship or any other reason.

We don't have any accurate records of the length of the repair or where the repair was at on the project.

There's nothing that indicates or supports that any of this was required because of unsuitable material.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

Mr. Jones has stated that the shoulder repair -- that there was a lot of rain and stuff because of this shoulder repair. The costs -- yet the shoulder repair allegedly was done at the end of the project in which Mr. Jones again stated that at the end of the project the weather was extremely dry.

So, I don't know which one of those he wants to present.

Basically the Department feels like there is not -- first of all, that this claim is invalid because we were not given the opportunity to keep accurate records.

The contractor failed to notify the Department in a timely manner and has waived that claim.

Besides that -- beyond that there is no way to accurately calculate how the costs on repairs, if they actually did occur, which we disagree with, there is no way to reasonably calculate those costs.

On the issue of liquidated damages, we do agree that we are in error. The contract days were actually 259 days. The contractor originally sought eight additional weather days. The Department initially during the course of the project granted 41 weather days.

The contractor appealed the number of weather

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 days. The Department reviewed those weather days  
2 during the course of the project and granted the  
3 additional weather days.

4 In my documentation that's 3-3 where we granted  
5 additional weather days.

6 The contractor is requesting now seven additional  
7 weather days. Four of those eight weather days were  
8 Sundays. They are 3-19, 4-1, 7-30 and 8-6. They are  
9 all Sundays.

10 The contractor never established a pattern of  
11 working on Sundays. You will see from the controlling  
12 items of work sheet, which are Exhibits 3-4 through  
13 3-15. I apologize because they are not in --

14 CHAIRMAN NUTBROWN: Give us the dates that you  
15 say are Sundays.

16 MR. POTTER: 3-19, 4-1, 7-30 and 8-6.

17 CHAIRMAN NUTBROWN: They have 4-2 here. That  
18 the reason I raised the question.

19 MR. BURLESON: It would have to be the 2nd.

20 CHAIRMAN NUTBROWN: April 2 is the other one?

21 MR. POTTER: Yes. I apologize. Okay. Those  
22 four days are Sundays.

23 In exhibits -- in my package, Exhibits 3-4 to  
24 3-15 are the controlling items of work sheet for the  
25 project that indicate it was only a six-day work week.

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 The -- three of the days -- of the three days,  
2 the contractor and his subcontractor worked full days  
3 on the controlling items of work. Those days were  
4 January 28, April 27 and April 28.

5 The daily work reports that were submitted in  
6 White's package indicate full days of work on those  
7 particular days.

8 Originally they had asked for January 19 as a  
9 weather day, but the Department had granted that in the  
10 appeal process.

11 Also, additionally, because of the unsuitable  
12 material issue, the contractor had asked for nine  
13 additional weather days. That issue has been  
14 withdrawn.

15 We have -- the Department disagrees with the --  
16 with the additional weather day or the additional day  
17 for repair of the shoulder. We do not agree that that  
18 should be granted.

19 The contractor has not proven that that is  
20 anything other than just general repair work that is  
21 required under the contract.

22 There are three additional days the Department  
23 agrees that the contractor should receive. Those are  
24 time for -- three additional days for driveway  
25 replacements. The work order was sent to the

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 contractor and they had failed to execute that, or a  
2 time extension offer was sent to the contractor and  
3 they failed to execute that time extension offer.

4 An additional day, a fourth day is for a work  
5 order that was not granted. The date for a work order  
6 that was not granted to the contractor.

7 So, there are four days -- three days, I'm sorry.  
8 Wait a minute, no, it was --

9 CHAIRMAN NUTBROWN: Steve, I thought your letter  
10 had a note in your rebuttal that there were --

11 MR. POTTER: There's two days that were offered  
12 for work associated with inlet reconstruction and for  
13 other additional work.

14 In addition to that, there was one additional day  
15 that was granted in a work order that the contractor  
16 was not given. So there was a total of three days, not  
17 four days. I'm sorry.

18 Subsequent to this review of this information,  
19 the Department again forwarded an offer for those three  
20 days to White Construction, and they have not responded  
21 to it. The offer was made to Luther White, Junior, in  
22 a meeting that we had on a different project  
23 approximately ten days ago, and we have not received a  
24 response to that offer either.

25 So, in summary, their original contract time was  
CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

1 180 days. Weather days granted were 42. Time  
2 extension was three days. A work order of one day,  
3 which makes allowable contract time 226 days.

4 That is subtracted from the 259 days of days  
5 used. That leaves the number of liquidated damages 33  
6 days.

7 CHAIRMAN NUTBROWN: Steve, do you have anything  
8 else?

9 MR. POTTER: No.

10 CHAIRMAN NUTBROWN: Okay, Ken, do you have any  
11 questions?

12 MR. LEUDERALBERT: No, sir.

13 CHAIRMAN NUTBROWN: Bob?

14 MR. BURLESON: Your additional MOT costs that  
15 you've got, is that simply a daily value?

16 MR. MICHALAK: Yes.

17 MR. BURLESON: Any breakdown of what would be  
18 included in that?

19 MR. MICHALAK: It's a lump-sum item.

20 MR. BURLESON: I understand that.

21 MR. MICHALAK: It doesn't cover the --

22 MR. BURLESON: Were there policemen required?

23 MR. MICHALAK: They were doing shoulder repair  
24 work, so whatever flagmen were required.

25 MR. BURLESON: Were there police out there?

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

29

1 CHAIRMAN NUTBROWN: Mr. Jones, was there any  
 2 off-duty police used on that job?  
 3 MR. JONES: I truly don't remember. The best way  
 4 for me to determine that would be to look at the item  
 5 sheets and see if there was a summary for off-duty  
 6 officers. If there was, then that would have been  
 7 required on lane closure. I don't remember. Some of  
 8 those jobs have them, some didn't.  
 9 MR. POTTER: I don't recall any off-duty police  
 10 officers. If there were, they are normally compensated  
 11 by a particular pay item in the contract.  
 12 MR. BURLESON: I didn't see it as a pay item is  
 13 why I was asking. That's it.  
 14 CHAIRMAN NUTBROWN: Anything else? Anybody else  
 15 have any comments they want to make?  
 16 MR. JONES: The only thing I would like to say,  
 17 Mr. Potter had mentioned which way would I want to go,  
 18 dry or wet. The shoulder damage was done when it was  
 19 wet by -- in the job. The job had dried out enough  
 20 that it had quit pumping and we milled the top off and  
 21 replaced it with asphalt.  
 22 Then it continued to rain, continued to pump. It  
 23 was an undercut situation.  
 24 Had the time not run, well, then that's -- as  
 25 long as it did, then it would have been an undercut

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

30

1 early on.  
 2 The Department was aware of it. The people in  
 3 the field was aware of it. At that time we were not in  
 4 a claim sending -- on everything.  
 5 I notified the office of it. Bernie King was the  
 6 one to send the letters out and all. I'm sure at the  
 7 time we done -- prior to doing this work our office was  
 8 notified.  
 9 I don't know where the let-down part of the  
 10 letter coming from them were, but to add extra work for  
 11 me to explain like that, I always notified the office  
 12 and then in most cases Luke, Junior. And they  
 13 determined the claim situation, whether they would send  
 14 the letter or not.  
 15 The Department was aware of the material pumping  
 16 CHAIRMAN NUTBROWN: Mr. Potter, is this contract  
 17 day for day or weather, or is there one plus one, like  
 18 one day rain, one day recovery? Does this contract  
 19 have that clause in it?  
 20 MR. POTTER: It's a -- it's not day for day.  
 21 It's the factored issue. The contractor wants a  
 22 six-day work, then a factor of five to it.  
 23 When we look at weather days, we consider  
 24 recovery days as part of that.  
 25 CHAIRMAN NUTBROWN: As additional rain days?

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

31

1 MR. POTTER: Yes, additional rain days. That was  
 2 the old way to do it. Now the situation has changed  
 3 under the new specs.  
 4 CHAIRMAN NUTBROWN: Mr. Michalak, have you  
 5 completed your presentation?  
 6 MR. MICHALAK: Yes.  
 7 CHAIRMAN NUTBROWN: Mr. Potter, have you  
 8 completed your rebuttal?  
 9 MR. POTTER: Yes.  
 10 CHAIRMAN NUTBROWN: Okay. Mr. Leuderalbert, do  
 11 you have any questions that you want to ask or any  
 12 comments that you want to make?  
 13 MR. LEUDERALBERT: No, sir.  
 14 CHAIRMAN NUTBROWN: Mr. Burleson?  
 15 MR. BURLESON: No, sir.  
 16 CHAIRMAN NUTBROWN: The hearing is hereby close  
 17 The Board will meet immediately following this to try  
 18 to deliberate it. Hopefully within the next six weeks  
 19 to two months we will have an order issued as to our  
 20 findings.  
 21 I want to thank you all for coming, and  
 22 I appreciate your participation. We will do our best  
 23 to get it done.  
 24 MR. MICHALAK: Thank you very much.  
 25 (Whereupon, the hearing was concluded at 10:00 a.m.)

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127

32

1 CERTIFICATE OF REPORTER  
 2 STATE OF FLORIDA )  
 3 COUNTY OF LEON )  
 4 I, CATHERINE WILKINSON, Court Reporter, do hereby  
 5 certify that I was authorized to and did stenographically  
 6 report the foregoing proceedings; and that the transcript is  
 7 a true record of the testimony given by the witnesses.  
 8 I FURTHER CERTIFY that I am not a relative, employee,  
 9 attorney or counsel of any of the parties, nor am I a  
 10 relative or employee of any of the parties' attorney or  
 11 counsel in connection with the action, nor am I financially  
 12 interested in the action.  
 13 Dated this \_\_\_\_\_ day of May, 2003.  
 14  
 15  
 16 CATHERINE WILKINSON  
 17 CSR, CP  
 18 Post Office Box 13461  
 19 Tallahassee, Florida 32317  
 20  
 21  
 22  
 23  
 24  
 25

CATHERINE WILKINSON & ASSOCIATES (850) 224-0127