

November 21, 1995

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Florida Department of Transportation
Turnpike District Construction
Southern Connector Extension
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Mike Cone
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RE: State Project No(s) 97922-3202 Section 3, Southern Connector Extension, Cone Constructors, Inc. Claim Against FDOT for Failure to Provide Adequate Access.

Transmitted herewith are the Disputes Review Board's findings and decision regarding access problems on the above referenced project.

Should additional information or requirements be needed, please feel free to contact me.

Respectfully submitted,



Jack Crittenden
Chairman

JC/hbb

**Disputes Board Memo
Florida Department of Transportation
Contract 97922-3302**

BACKGROUND

On November 7, 1995, the Disputes Board for contract 97922-3302 met to hear arguments from Cone Construction ("Cone") and the Florida Department of Transportation Engineer (the "Department") regarding an ongoing dispute pertaining to site access to the project, referred to as Section 3, of the Southern Connector Extension. The hearing opened with a brief review of procedures by Board Chairman Jack Crittenden. Cone presented their claim, followed by the Department's response to Cone's allegations. Cone then offered a short rebuttal. The Board asked questions of both parties during the course of the presentations.

Cone claimed that the Department had actively interfered with Cone's ability to use an access to the site, referred to as "International Drive," for hauling of embankment material. Cone claimed they had secured proper permission from Osceola County to use the International Drive access, and had relied on such access in preparing their bid and planning their work. Cone claimed on the day they began hauling embankment, the Department closed off this approved access route. Cone spent an additional thirty days securing another access route to the site, which Cone claims resulted in a minimum of a thirty day delay impact in the performance of the work on the project.

Following Cone's presentation, the Department offered a response to the contractor's claim. The Department demonstrated that thirteen days prior to the bids on the contract, an addendum was issued defining the Department provided site access ("North Access") through the adjacent project, Section 4, Right of Way ("ROW"). The Department argued that the North Access route should have been relied upon by Cone in preparing their bid and construction plan, and that reliance upon any other access was solely at Cone's risk. The Department denied that the Contractor had secured a right to use the International Drive access, since a portion of the access crossed another contractor's work area (Section 2). The Department believed that the use of the Section 2 ROW at this crucial bridge site, as a haul route, would result in serious disruption to the Section 2 Contractor. The Department concluded that they had never granted Cone permission to cross the Section 2 ROW; and that it was the Section 2 Contractor, and not the Department, that blocked Cone's access across that ROW.

Cone rebutted that Osceola County had granted permission to cross the Department ROW on Section 2, and the Department unilaterally blocked the ROW at Section 2. Cone also claimed the North Access had muck problems and would have resulted in an even greater delay to the job. Cone, therefore, claimed that their actions in securing a second southern access was the most appropriate relief for the problem. The Department did agree with Cone that muck problems were encountered on the North Access and would have resulted in a delay to a controlling item of work had Cone not secured a second southern access.

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information provided and reconvene at a later date to finalize their report. On November 21, 1995 the Board met to finalize their report on this dispute.

FINDINGS

The primary concern of this Board is the question as to whether Cone had suitable available access to the site in order to conduct their work. The North Access allowed by the Department was through a heavily wooded area that had not been cleared. In addition, that access was at the opposite end of the project from the most critical stretch of the road. Cone took reasonable measures to find and secure an access that would avoid the problems in developing the North Access.

It was clear that the International Drive access route had been used for hauling activities on previous road projects in the area, and Cone's subcontractors were on an approved list to use this route. Prior to hauling embankment, Cone obtained written permission from Osceola County to use the International Drive access. It is completely unreasonable to believe that Cone could have recognized that a small portion of the International Drive access route through the Section 2 ROW would have been denied to them.

Cone attempted to negotiate crossing of the Section 2 (Hardaway) work area, but Hardaway wanted Cone to construct the embankment east of International Drive and pay a \$ 250,000 fee before Hardaway would allow Cone to cross the 300 foot wide Southern Connector ROW on International Drive. This \$ 250,000 did not guarantee that Cone would be able to use anything other than the 300 foot wide right of way through the Hardaway project. Cone had obtained permission to use International Drive from Osceola County. However the Department's temporary ingress and egress license agreement with the owner, the Xenel Corporation, contained a clause that access could be terminated at anytime. This clause effectively precluded Cone from paying the Hardaway fee, because Hardaway could not guarantee access across the Xenel property.

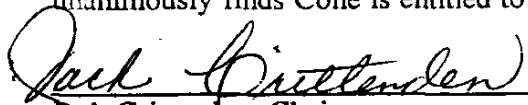
Upon beginning the hauling of embankment materials Cone was prevented from crossing the narrow Section 2 ROW because Hardaway had blockaded International Drive at that ROW. The Department refused to grant permission to Cone to cross the Section 2, ROW essentially halting all embankment construction on the project.

The Board does not believe that the Department actively interfered with Cone's access to the site. The legal right of Osceola County to grant permission for Cone to cross the Section 2 ROW would take a significant legal battle to resolve. The Department's actions in refusing to grant Cone permission to cross the Section 2 ROW may have been warranted in light of the potential impact on the Section 2 Contractor's activities. However, it is not clearly understood why the Department did not attempt to persuade the Section 2 Contractor to allow night time access though the Section 2 ROW. Night time access through Section 2 for embankment hauling was not allowed. Since the International Drive Access was not available on January 11, 1995, Cone was left with two options.

The first option was to use the North Access route provided by the Department. The second option was to find an alternate haul route. Had Cone chosen to use the North Access, there would have been a delay to the controlling work item based on muck excavation alone. In fact, the Board believes that had Cone pursued the North Access option, the delay resulting from the development of that access would have exceeded 30 days. Since it is the Departments responsibility to provide access, Cone would have been entitled to a compensable time extension for this impact. Cone, however, chose to mitigate the delay impact and cost associated with utilizing the North Access by seeking an alternate haul route. This would have allowed Cone to reduce the negative delaying impact of improving the North Access.

CONCLUSION

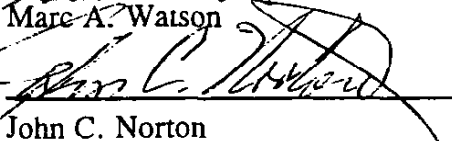
Based upon the information and the arguments of both sides as presented to the Board, the Board unanimously finds Cone is entitled to an equitable adjustment to their contract.



Jack Crittenden, Chairman



Marc A. Watson



John C. Norton