

SAB Order  
2-2004

**ARBITRATION HEARING  
FOR  
FINANCIAL PROJECT NO.: 220800 1 52 01  
CONTRACT NO.: 21209**

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**STATE ARBITRATION BOARD**  
5615 23<sup>rd</sup> Street S.W., Vero Beach, FL. 32968  
Phone: (772) 299-3290 FAX: (772) 299-3568

**MEMORANDUM**

**DATE:** November 7, 2004  
**TO:** Jimmy Rodgers  
District III Director of Operations  
Florida Department of Transportation  
**FROM:** John W. Nutbrown, Chairman  
**RE:** REQUEST FOR ARBITRATION OF A CLAIM ON:

**STATE PROJECT NO:** FPN No. 220800-1-52-01  
**PROJECT LOCATION:** SR-77 From Bay County Line to North of Wausau  
Washington County

**CONTRACTOR:** Sandco, Inc.

The State Arbitration Board has received the attached Request for Arbitration of a Claim from the Contractor for the above subject projects.

A hearing has been scheduled on **December 17, 2004** in Tallahassee. You will receive a Notice of Hearing stating the exact time set for this hearing no later than twenty one (21) days prior to the hearing date.

**NOTE:** In accordance with the procedures adopted by the State Arbitration Board, the Department of Transportation must submit its primary rebuttal exhibit, including a summary of their position, directly to the Contractor and to each Member of the Board so that it is received not less than ten (10) days prior to the date of the hearing. Verbal testimony and simple exhibits may be submitted during the hearing. All exhibits submitted during the hearing shall be in quadruplicate, except a single copy of contract plans, specifications, supplemental specifications and special provisions and pay quantity calculations will be permitted.

**THE DEPARTMENT OF TRANSPORTATION IS REQUESTED TO MAKE AVAILABLE AT THE HEARING FOR EXAMINATION BY THE BOARD A COPY OF THE CONTRACT PLANS.**

**SAB MEMBERS**

John W. Nutbrown  
5615 23<sup>rd</sup> Street S.W.  
Vero Beach, FL. 32968  
Phone: 772/299-3290  
Fax: 772/299-3568

Freddie Simmons, P. E.  
State Highway Engineer  
Department of Transportation  
605 Suwannee Street MS 57  
Tallahassee, FL 32399-0450

John C. Norton  
5700 Memorial Hwy.  
Tampa, FL 33615  
Phone: 813/855-5211  
Fax: 813/886-0213

4/15/2002

# STATE ARBITRATION BOARD

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

Phone (772) 299-3290

FAX (772) 299-3568

## NOTICE OF ARBITRATION HEARING

**TO: Jimmy Rodgers** Title: District III Director (Operations)  
Florida Department of Transportation

**TO Mr. Steve Ghazvini** Title: President

**Contracting Firm: Sandco, Inc.**

**Mailing Address: 2811 E. Industrial Plaza Drive  
Tallahassee, FL. 32301**

**Re: State Project No. 220800-1-52-01  
Location of Project: SR-77 From Bay County Line to North of Wausau, Washington County**

Each of the above parties is hereby given notice that a hearing before the State Arbitration Board will be held in reference to the claim submitted on the above referred project in accordance with the following:

**DATE: December 17, 2004** TIME 9:30 AM

**LOCATION:** Florida Transportation Center Building  
1007 Desoto Park Drive, Tallahassee, FL.  
(On South side of Lafayette Street about ¼ mile East of DOT Headquarters Building)

The Claimant has advised that they will  will not  be represented by counsel at the hearing.

### THE CONTRACTOR WILL HAVE THE FOLLOWING PERSONS PRESENT AT THE HEARING:

<b>Name:</b>	Steve, Ghazvini	<b>Title:</b>	President
	Bob Myrick		Estimator
	Rod Mueller		Consultant

### THE CONTRACTOR HAS REQUESTED THAT THE DEPARTMENT OF TRANSPORTATION HAVE THE FOLLOWING PERSONS PRESENT AT THE HEARING:

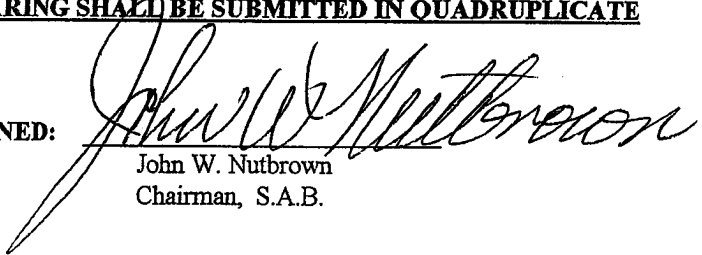
**Name:** Title:

**NON SPECIFIED**

**NOTE: ALL EXHIBITS PRESENTED AT THE HEARING SHALL BE SUBMITTED IN QUADRUPPLICATE**

**DATE:** November 7, 2004

**SIGNED:**

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

Contractor  
All Board Members  
Catherine Wilkinson & Associates

# STATE ARBITRATION BOARD

## REQUEST FOR ARBITRATION OF A CLAIM

CONTRACT NO.: 21209

CLAIMANT'S NAME: SANDCO, INC.  
MAILING ADDRESS: 2811-E INDUSTRIAL PLAZA DR. TLH. FL. 32301  
Street or P. O.Box City State Zip

STATE JOB NO.: 220 80015201

JOB LOCATION: WASHINGTON COUNTY.

The Claimant elects to:

Submit only the written information attached to this request and, subject to agreement by the Respondent party, waive an oral presentation to the Board.

OR

Participate in a hearing before the Board to present testimony and exhibits.

The Claimant (  ) will (  ) will not have an attorney present at the hearing.

If a hearing is held, the Claimant will be represented by the following persons:

Name:	Title:
<u>STEVE GHARVINI</u>	<u>PRESIDENT</u>
<u>BOB MYRICK</u>	<u>ESTIMATOR</u>
<u>ROD MOELLER</u>	<u>CONSULTANT</u>

The Claimant requests that the Respondent have the following persons present at the hearing:

Name:	Title:
_____	_____
_____	_____
_____	_____

**THE CLAIMANT ACKNOWLEDGES HAVING READ S 337.185, FLORIDA STATES AND THE OPERATING PROCEDURES OF THE STATE ARBITRATION BOARD.**

5/10/04 Behrad Ghazvini BEHRAD GHARVINI, PRES.  
DATE SIGNATURE TYPE OR PRINT NAME AND TITLE

**MAIL THIS FORM AND ACCOMPANYING DOCUMENTS TO THE OFFICE OF THE STATE ARBITRATION BOARD**

SANDCO, INC.  
2811-E INDUSTRIAL PLAZA DRIVE  
TALLAHASSEE, FLORIDA 32301  
PHONE 850-402-0811  
FAX 850-402-7674

Sandco Project # : 12-01  
Project Name : SR #77  
FPN: 22080015201  
Contract # : 21209  
County : Washington

May 9, 2004

Members of the State Arbitration Board  
5615 23<sup>rd</sup> S.W.  
Vera Beach, Florida  
32968

Re: Request for Arbitration

Dear Board Members,

Please accept the enclosed 4 copies of Sandco's request for arbitration for the referenced project. This request includes all particulars required of Sandco according to the State Arbitration Board Procedures.

This arbitration application specifically requests the Board Members to find the Department is indebted to Sandco. Specifically, Sandco requests the Board to find the Department should compensate Sandco for the following impacts, items of work performed in pursuit of the contract, and for improper reductions made by the Department to Sandco's proper earnings.

- 1) Fuel Adjustments \$36,378.70
- 2) Gravity Wall            a) Misc Asphalt            \$27,540.00  
   b) Unforeseen MOT       \$8,000.00
- 3) Stop Work Order / Unwarranted Work Restrictions \$44,331.87
- 4) Sod \$ 42,622.17
- 5) Water For Grassing \$13,245.94
- 6) Extended work hours resulting from errors and omissions in the MOT plans \$90,678.16

7) Regular Excavation \$ 71,500.00

8) Interest on Delayed Payments Since July 2002. \$ 42,509.11. ( Assumes payment by June 2004.)

All totaling \$ 376,805.95

Sandco's check in the amount of \$3,000.00 is attached covering the required Administrative Fee.

There was no DRB established for this project.

Sandco requests that the Arbitration Board find that in each instance Sandco is entitled to the requested payments.

Submitted on behalf of Sandco, Inc.

A handwritten signature in black ink, appearing to read "Rod Moeller". The signature is written in a cursive style with a long horizontal stroke at the end.

Rod Moeller

SANDCO, INC.  
2811-E INDUSTRIAL PLAZA DRIVE  
TALLAHASSEE, FLORIDA 32301  
PHONE 850-402-0811  
FAX 850-402-7674

Sandco Project # : 12-01  
Project Name : SR #77  
FPN: 22080015201  
Contract # : 21209  
County : Washington

May 9, 2004

Members of the State Arbitration Board  
5615 23<sup>rd</sup> S.W.  
Vera Beach, Florida  
32968

Re: Scope of Arbitration

Dear Board Members,

A Summary item of Entitlement has been identified by Sandco for the Boards attention. The item is a General Entitlement item of adversity rather than being specific to an item of work or portion of the project.

**1. Claims, Generally - Entitlement Decision Only**

The Department has taken the position that Sandco is estopped from entitlement to items contained within it's claims package of December 20, 2002, because the pending claims were not repetitively elaborated by Sandco within it's March 17, 2003 Qualified Acceptance Letter to the Department.

The qualified acceptance letter, <sup>1-1</sup> received from Sandco by the Department on March 18, 2003 mandates that **Pending Claims** may not be "Barred", Estopped, or influenced to "Any Effect", by Sandco's provision of the underlying (and required) Qualified Acceptance Letter.

Therefore, Sandco requests the Board bar the Departments June 12, 2003 summary denial of Sandco's claim in that ;

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1-1 See the highlighted portion of the standard FDOT Qualified Acceptance Letter, prepared by the FDOT, specifically preventing the exclusion of pending claims from the Estoppels the Department has now sought shelter under.



- 1) The FDOT Qualified Acceptance<sup>1-1</sup> Letter specifically prohibits the position the Department has taken
- 2) The Department failed to timely deny the proper claims of Sandco within 90 days as required by Supplemental Special Provision 5-12. This Special Provision requires that meritoriously denied claims must be denied by the Department within 90 days from receipt,<sup>1-2</sup> lest the claim shall be denied by the Departments default on the 91<sup>st</sup> day. See Sandco's letter<sup>1-3</sup> taking prompt exception to the Departments belated legal trickery.

### **Specific Summary Request of the Board**

Sandco requests the Board *deny* all shelter the Department seeks in it's June 12, 2003 letter (regarding claims), as creations of it's own failure to timely administer the contract, and Bar the Departments positions, based upon the conditions Sandco's Qualified Acceptance Letter was provided under.

Further the Board is requested to summarily validate Sandco's timely submission of claims for review and advice by this Arbitration Board.

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1-1

1-2 FDOT Summary Claim Denial, dated some 70 or so days late.

1-3 Sandco June 20, 2003 Letter



# Florida Department of Transportation

JEB BUSH  
GOVERNOR

Panama City Construction  
3633 Hwy 390  
Panama City, FL 32405

JOSÉ ABREU  
SECRETARY

June 12, 2003

UPS TRACKING NO  
1Z 226 9EW 03 4193 1115

Steve Ghazvini  
Sandco, Inc.  
2811-E Industrial Plaza Drive  
Tallahassee, Fl 332301

RE: FPN: 220800 1 52 02  
Contract No.: 21209  
County: Washington  
Description: ~~62-77~~ From Bay County Line to north of Wausau

Dear Mr. Ghazvini;

The following is a summary of claim issues previously submitted to the Department for consideration.

1	Extended Work Hours, Wausau	\$90,678.16
2	Straightedge Deficiencies	28,146.80
3	Stop Work Order	44,331.87
4	Additional Mot at Gravity Wall	8,000.00
5	Unforeseen Engineering (Box Culvert)	1,666.50
6	Miscellaneous Asphalt	27,540.00

Items 1 through 5 were not included in your Qualified Acceptance letter dated 3/14/03 and therefore will not be given any further consideration.

Item 6, Miscellaneous Asphalt was reviewed by this office and it is determined that no additional compensation is warranted. The plans clearly show the existing asphalt slope pavement. The plans also show that this existing asphalt slope pavement was to remain. This office does not believe that it was necessary to disturb the existing asphalt slope pavement, beyond what was shown in the plans, in order to construct the gravity wall. Therefore the Department denies your claim of \$27,540.00 for additional compensation for Miscellaneous Asphalt.

Should you have any questions concerning this matter, please call me at 850-872-4136.

Sincerely,

Stephen W. Potter, P.E.  
Resident Construction Engineer

SANDCO, INC.  
2811-E INDUSTRIAL PLAZA DRIVE  
TALLAHASSEE, FLORIDA 32301  
PHONE 850-402-0811  
FAX 850-402-7674

June 20, 2003

**VIA CERTIFIED MAIL,**  
**RETURN RECEIPT**

District Construction Engineer  
Mr. Edmonds M. Wilson  
Department of Transportation  
Post Office Box 607  
Chipley, Florida 32428

Re: Sandco Project No. 12-01  
Project Name: State Road 77  
FPN No.: 220800 1 52 01  
Contract No.: 21209  
County: Washington  
Our File No.: 482-00

Dear Mr. Wilson:

We have received the June 12, 2003 letter from Mr. Stephen W. Potter, P.E., Resident Construction Engineer, denying each of the claim items we previously submitted to the Department. We believe that the Department has acted improperly in rejecting Sandco's claims and urge you to reconsider this decision.

The Department summarily refused to consider any claim issues other than a \$27,540.00 Miscellaneous Asphalt claim on the grounds that the other items "were not included in [Sandco's] Qualified Acceptance Letter." The Department's position contradicts its own Qualified Acceptance Letter and is a clear breach of its obligation to pay Sandco.

The Qualified Acceptance Letter clearly provides:

Acceptance of such payment **shall not constitute any bar, estoppel, or have any effect as to those payments in dispute or the subject of a pending claim.**

Mr. Edmonds M. Wilson  
June 20, 2003  
Page 2

(Emphasis Added) The items submitted for Extended Work Hours, Wausau; Straightedge Deficiencies; Stop Work Order; Additional MOT at Gravity Wall; and Unforeseen Engineering (Box Culvert) were already presented to the Department and were "pending" as of the date of the Qualified Acceptance Letter. The Department cannot dispute this fact. Therefore, the Department has wrongfully denied these claims without consideration.

It is clear that the Department is attempting to use a technicality to avoid paying Sandco the additional monies it is due. We again request that the Department review these claims on the merits rather than using legal trickery to avoid paying what is due.

As for Sandco's claim for Miscellaneous Asphalt, we disagree with the Department's analysis of the facts and again believe that we are entitled to payment for this work under the terms of the Contract. If you are agreeable, we would like to meet with you and work to resolve these issues without the need for further legal or administrative proceedings.

We look forward to hearing from you.

Sincerely,



Behzad Ghazvini, President  
Sandco, Inc.

# Florida Department of Transportation

JEB BUSH  
GOVERNOR

Panama City Construction  
3633 Highway 390  
Panama City, Florida 32405

JOSE ABREU  
SECRETARY

Monday, December 06, 2004



Members of the State Arbitration Board  
5615 23<sup>rd</sup> S.W.  
Vera Beach, Florida 32968

RE: Financial Project No. 220800 1 52 01  
Contract No.: 21209  
Description: SR 77; From Bay County Line to a point North end curb & gutter in Wausau  
County: Washington

Dear Board Members:

The above project was Final Accepted on July 05, 2002. Sandco Inc. (Contractor) submitted an arbitration package that included seven (7) issues. They are as follows:

- ✓(1) Fuel Adjustments
- ✓(2) Gravity Wall (MOT and Misc. Asphalt)
- (3) Stop Work Order
- ✓(4) Sod
- ✓(5) Water
- (6) Extended Work Hours
- ✓(7) Regular Excavation

Of the seven (7) issues listed above the following were itemized in the Contractors Qualified Acceptance Letter:

- (1) Fuel Adjustments
- (2) Gravity Wall (Misc. Asphalt) ONLY
- (4) Sod
- (5) Water
- (7) Regular Excavation

As per section 9-9 of the Standard Specification only those items listed on the Qualified Acceptance letter can be claimed or arbitrated at a later date. A copy of the final acceptance letter and the Departments correspondence concerning the Qualified Acceptance letter is included for your reference. Therefore, the Department requests the Board accept only those items listed on the Qualified Acceptance letter for consideration.

However, should the board choose to consider all issues this package has been prepared to include all seven (7) issues. Each issue has been addressed separately with supporting documentation included in each section. The following summarizes the Departments position on each issue:

#### Issue 1 – Fuel Adjustments:

The Department contends that the fuel adjustments were made in accordance with Section 9-2 of the Standard Specification for Road and Bridge Construction, 2000 Edition, which is one of the governing documentation for this contract. The Department feels no additional reimbursement of funds is due to the contractor for this issue.

**Issue 2 – Gravity Wall (MOT and Misc. Asphalt) -**

The Department contends that the contract documents clearly indicate the requirements for the contractor to maintain traffic for the gravity wall construction and that adequate space for the construction was available. The Department's position is that a special detour was not warranted due to the belief that the construction of a detour would be a greater impact on the traveling public than the actual gravity wall construction. The Department's position is that the contractor original bid item maintenance of traffic covers this operation and no additional monetary compensation is due the contractor.

Also, Department contends that the contract plans clearly reveal that the existing asphalt slope pavement is to remain. The Department believes that it was not necessary for the contractor to disturb the existing asphalt slope pavement beyond the limits that were shown on the plans. The Department position is that no additional compensation is due for the replacement of this asphalt.

**Issue 3 – Stop Work Order –**

The Department contends that the stop work order was justified due to the amount of damage the erosion control devices had received and that the contractor was in violation of his NPDES permits. The Department also contends that the contractor was only supplying a token repair effort due to the amount of damage that was done to the erosion control devices. Also, the contractor was granted weather recovery days during this period to allow for this maintenance to be accomplished. Therefore, the contractor is not due monetary compensation for the manpower or equipment related to the stop work order.

**Issue 4 – Sod –**

The Department contends that the contractor intentionally graded outside the authorized limits of construction to offset the need for excavation borrow, that was bid on this contract at \$.01 / M3. This grading destroyed the established turf and had to be replaced. Therefore, the contractor is not entitled to monetary compensation for the additional sod placed outside the limits of construction.

**Issue 5 – Water –**

The Department contends that the water verified by the CEI is the quantity delivered on certified trucks and recorded on tally sheets by project inspectors. The Department's CEI has not verified invoices from the water supplier. The water supplier submitted documentation of unpaid bill letters to the CEI. The contractor utilized water during the milling operation in the milling machines, during the paving operation in compaction equipment, and also for cooling newly placed asphalt to expedite traffic control changes. Therefore, the contractor is not due additional monetary compensation for water billed by his supplier.

**Issue 6 – Extended Work Hours –**

The Department contends that the contract plans clearly address the depth of the milling and cover-up requirements. The contractors operation dictated the extended work hours, by milling longer sections that could not feasibly be resurfaced in one day. The curb & gutter section could have been divided into short sections that both sides could be milled and resurfaced during daylight hours eliminating a potential hazard to motorists. The straightedge deficiencies were not caused by stacking successive layers of asphalt, as suggested in the claim package, but from continual problems with electronic grade and slope control on the paver. The Department maintains that the contractor is not due additional monetary compensations for the extended work hours, for the loss due to asphalt rideability penalties, or for any work that was done to correct rideability penalties.

Monday, December 06, 2004

**Issue – 7 – Regular Excavation –**

The Department contends that the quantity of regular excavation in the contract plans has been verified by cross-sections and is correct. The contractor's calculations did not consider the thickness of asphalt added to the roadway; overbuild on curves or side roads connections. The contractor is not due additional monetary compensation for regular excavation.

Should you have questions concerning this matter, please do not hesitate to contact this office at (850) 872-4136.

Sincerely,



Stephen W. Potter, P.E.  
Resident Construction Engineer

SWP/MR/dl

**9-7.2 Non-Commercial Materials:** Provisions 9-7 do not apply to materials generally used as non-commercial, such as fill materials, local sand, sand-clay, or local materials used as stabilizer.

**9-8 Disputed Amounts Due the Contractor.**

The Department reserves the right to withhold from the final estimate any disputed amounts between the Contractor and the Department. The Department will release all other amounts due, as provided in 9-9.

**9-9 Acceptance and Final Payment.**

Whenever the Contractor has completely performed the work provided for under the Contract and the Engineer has performed a final inspection and made final acceptance (as provided in 5-10 and 5-11), and subject to the terms of 8-11, the Engineer will prepare a final estimate showing the value of the work as soon as the Engineer makes the necessary measurements and computations. The Engineer will correct all prior estimates and payments in the final estimate and payment. The Department will pay the amount of this estimate, less any sums that the Department may have deducted or retained under the provisions of the Contract, as soon as practicable after final acceptance of the work, provided that the Contractor has met the requirements of (a) through (g) below.

If the Contractor fails to furnish all required Contract Documents within 90 days of the Department's offer of final payment, the Department may suspend the Contractor's Certificate of Qualification under the provisions of Florida Administrative Code 14-22.012.

(a) The Contractor has agreed in writing to accept the balance due, as determined by the Department, as full settlement of his account under the Contract and of all claims in connection therewith, or the Contractor has through the use of the Qualified Acceptance Letter, accepted the balance due, as determined by the Department, with the stipulation that his acceptance of such payment does not constitute any bar, admission, or estoppel, or have any effect as to those payments in dispute or the subject of a pending claim between the Contractor and the Department. To receive payment based on a Qualified Acceptance Letter, define in writing the dispute or pending claim with full particular of all items of all issues in dispute, including itemized amounts claimed for all particulars of all items, and submit it as part of the Qualified Acceptance Letter. The Contractor further agrees, by submitting a Qualified Acceptance Letter that any pending or future arbitration claim or suit is limited to those particulars, including the itemized amounts, defined in the Qualified Acceptance Letter, and that he will commence with any such arbitration claim or suit within 820 calendar days from and after the time of final acceptance of the work and that his failure to file a formal claim within this period constitutes his full acceptance of the Engineer's final estimate and payment.

(b) The Contractor has properly maintained the project, as specified hereinbefore.

(c) The Contractor has furnished a sworn affidavit to the effect that the Contractor has paid all bills and no suits are pending (other than those exceptions

listed, if any) in connection with work performed under the Contract and that the Contractor has not offered or made any gift or gratuity to, or made any financial transaction of any nature with, any employee of the Department in the performance of the Contract. Include with the listed tort liability exceptions, if any, evidence of adequate insurance coverage as required in 7-12.1.

(d) The surety on the Contract bond consents, by completion of their portion of the affidavit and surety release subsequent to the Contractor's completion of his portion, to final payment to the Contractor and agrees that the making of such payment does not relieve the surety of any of its obligations under the bond.

(e) The Contractor has complied with and settled all requirements pertaining to any wage-rate provisions.

(f) The Contractor has furnished all required mill tests and analysis reports to the Engineer.

(g) The Contractor has submitted the Form FHWA-47 (formerly known as PR-47) Record of Materials and Labor on Federal-aid projects, to the Engineer for transmittal to the FHWA. This submittal is required on all Federal-aid contracts on the National Highway System, except those which provide solely for the installation of protective devices at railroad grade crossings, those which are constructed on a force account or direct labor basis, highway beautification contracts, and contracts for which the total final construction cost for roadway and bridge is less than \$1,000,000.

The rate of any prejudgment or post judgment interest assessed against either party to this Contract is 6% per annum.

**9-10 Interest Due on Delayed Payments.**

The Department will determine and pay any interest due the Contractor for delays in final payment in accordance with Section 337.141 of the Florida Statutes.

**9-11 Offsetting Payments.**

Section 337.145 of the Florida Statutes, providing for offsetting payments to the Contractor, is hereby made a part of this Contract:

(1) After settlement, arbitration, or final adjudication of any claim of the Department for work done pursuant to a construction contract with any party, the Department may offset such amount from payments due for work done on any construction contract, excluding amounts owed to subcontractors, suppliers, and laborers, which it has with the party owing such amount if, upon demand, payment of the amount is not made within 60 days to the Department.

(2) Offsetting any amount pursuant to (1) above shall not be considered a breach of Contract by the Department.



STATE ARBITRATION BOARD  
STATE OF FLORIDA

SANDCO, INC.

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)

) PROJECT NUMBER 220800-1-52-01

- and -

)

) LOCATION: Washington County,  
Florida

)

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DEPARTMENT OF TRANSPORTATION

)

)

**ORIGINAL**

PROCEEDINGS:

Arbitration in the Above Matter

DATE:

Friday, December 17, 2004

PLACE:

1007 Desoto Park Drive  
Tallahassee, Florida

TIME:

Commenced at 9:30 a.m.  
Concluded at 12:35 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 32317  
(850) 224-0127

## APPEARANCES:

## MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. John W. Nutbrown, Chairman  
 Mr. Bill Albaugh  
 Mr. John C. Norton

## APPEARING ON BEHALF OF THE CONTRACTOR:

Mr. Rod Moeller  
 Mr. Behzad Steve Ghazvini  
 Mr. Robert Myrick

## APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Stephen Potter

\* \* \*

## I N D E X

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

CERTIFICATE OF REPORTER

116

P R O C E E D I N G S

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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. Mr. Simmons is not here this morning. Mr. Bill Albaugh from that office is taking his place.

Mr. John Norton was elected by the construction companies under contract with the Department of Transportation.

These two members have chosen me, John Nutbrown, to serve as the third member of the Board and as Chairman.

Our terms expire on June 30, 2007.

Now, will each person who will make oral presentations during the hearing please raise your right hand and be sworn in.

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN NUTBROWN: The request for arbitration of a claim submitted by the claimant, including all attachments thereto, and the administrative documents preceding this hearing are hereby introduced as Exhibit No. 1.

Now, does either party have any additional

1 information that they want to distribute at this time?

2 MR. POTTER: Some excerpts from the Manual of  
3 Uniform Traffic Control Devices that may be referred  
4 to.

5 MR. MYRICK: We have a little handout, also, we  
6 would like to present.

7 CHAIRMAN NUTBROWN: The Board accepts this and  
8 will mark it as Exhibit 2.

9 MR. MYRICK: Here is one for each of you  
10 gentlemen.

11 CHAIRMAN NUTBROWN: This will be 3.

12 (Whereupon, Exhibit Nos. 1, 2 and 3 were received in  
13 evidence.)

14 CHAIRMAN NUTBROWN: The plan sheets furnished by  
15 the claimant were marked as Exhibit 3.

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

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

23 The parties are instructed to ensure that they  
24 receive properly identified copies of each exhibit used  
25 in the proceedings. You should retain these exhibits.

1 The Board will send the parties a copy of the court  
2 reporter's transcript, along with our order. It will  
3 not furnish copies of the exhibits at that time.

4 As is typical in arbitration proceedings, this  
5 hearing will be conducted in an informal manner. The  
6 Board is not required to apply a legalistic approach or  
7 strictly apply the rules of evidence used in civil  
8 court proceedings. We are primarily looking for  
9 information in regard to the facts and the contract  
10 provisions that apply to the case.

11 The order of proceeding will be for the claimant  
12 to present their claim and then for the respondent to  
13 offer rebuttal.

14 If you have a question or a pertinent point,  
15 I don't want conversation across the table. You will  
16 come through the Chairman, and I will recognize you and  
17 allow you to present that information.

18 Also, if we have any cell phones, I would  
19 appreciate it if they would be turned off.

20 Okay. Now, being that we have a claim that is  
21 multifaceted or a number of parts, I think the thing to  
22 do is we will go through the hearing. We will hear  
23 each issue, then if there's any summarization at the  
24 end, you can do it and the claimant can do it as he  
25 starts.

1           There is a discrepancy between the issues that  
2           have been placed in the claim as requesting the  
3           arbitration. The Board will hear all items that were  
4           submitted. In our order, if there's any change in  
5           that, the Board will so place it in the order.

6           Any questions?

7           MR. MOELLER: Did you say there is a discrepancy?

8           CHAIRMAN NUTBROWN: Yes, there are more items in  
9           your claim than there was in the original acceptance  
10          letter.

11          MR. GHAZVINI: Do you want to do each item and  
12          then go through the rebuttal and everything, then  
13          finish up and --

14          MR. POTTER: Back and forth on each item, yes.

15          CHAIRMAN NUTBROWN: For the Board, when I write  
16          the order, I have to write this item, this item, and  
17          where there are a number of items, then each item  
18          should be handled separately.

19          MR. GHAZVINI: I agree with you.

20          CHAIRMAN NUTBROWN: Okay. With that we can let  
21          the claimant go ahead and start.

22          MR. MOELLER: Jack, recognizing that discrepancy,  
23          is that a separate issue that you want to try to  
24          address today?

25          CHAIRMAN NUTBROWN: We can hear as to it, but we

1 are going to hear all the items that you have included.

2 MR. MOELLER: Okay.

3 CHAIRMAN NUTBROWN: If there are items that --  
4 and I would want to hear why, number one, there were  
5 two letters of acceptance, qualified acceptance, and  
6 then we can go from there.

7 MR. MOELLER: I think maybe we will just deal  
8 with it, because it's a broad issue. If you would like  
9 we can have a discussion on that right up front, so  
10 that tends to put a frame around that matter, and then  
11 proceed with the individual items, if you are fine with  
12 that.

13 CHAIRMAN NUTBROWN: All right.

14 MR. MOELLER: The claims on this project were  
15 submitted initially, if memory is serving me correctly,  
16 in early December of 2002. That was done at a time  
17 prior to receiving the qualified acceptance letter  
18 format from the DOT.

19 Those issues were on the table, received by the  
20 Department, and were under consideration. The final  
21 acceptance letter was delivered to us, was prepared on  
22 our part without the inclusion of the claim being a  
23 part of it because it had already been submitted.

24 We dealt in the final acceptance letter with the  
25 issues that were with respect to quantify. If there is

1 a pay item for it, a line item that says you've got an  
2 amount of material that should have been paid and  
3 wasn't paid, a discrepancy in quantities, then we made  
4 that argument in our qualified acceptance letter.

5 The Department recognized to us that that was --  
6 they considered that to be a problem shortly after  
7 receiving it from us and submitted to us a second  
8 qualified acceptance letter asking that we include any  
9 items in the -- that were in the previously submitted  
10 claim, also in the qualified acceptance letter.

11 We didn't recognize that they needed to have it  
12 duplicated, since they already had receipt of it.

13 MR. ALBAUGH: Was that request in writing?

14 MR. MOELLER: Yes, it was, and it was the source  
15 of the second qualified acceptance letter.

16 MR. ALBAUGH: Is that request in this package?

17 MR. MOELLER: It is, under final estimates, which  
18 is Tab 9. The first item under that tab is the initial  
19 qualified acceptance letter.

20 MR. ALBAUGH: I'm sorry --

21 MR. MOELLER: Under Tab 9. The first page is  
22 where they acknowledge receipt of the first qualified  
23 acceptance letter.

24 MR. ALBAUGH: Okay.

25 MR. MOELLER: The Department subsequently



1 delivered a second letter to us, and our response went  
2 back to them.

3 CHAIRMAN NUTBROWN: This letter is dated  
4 March 17. Is that --

5 MR. MOELLER: Yes, I believe that's correct. We  
6 may not have included it, again to avoid duplication,  
7 and I believe the date of it was in July. July of '03  
8 is when we received the second letter from the  
9 Department. We can follow up with that, because  
10 I don't see it in the package.

11 Steve, do you happen to have a copy?

12 MR. POTTER: I don't recall the letter.

13 MR. ALBAUGH: You are saying you submitted a  
14 qualified acceptance in December?

15 MR. MOELLER: In March. Keep in mind --

16 MR. ALBAUGH: That's the first one?

17 MR. MOELLER: Yes.

18 MR. ALBAUGH: Then they sent you a letter in  
19 July?

20 MR. MOELLER: Right.

21 MR. ALBAUGH: Saying -- it didn't contain  
22 everything, resubmit?

23 MR. MOELLER: Right. In other words, we  
24 submitted a claim. We submitted a claim in December of  
25 '02. In fact in the Department there is some

1 recognition of it. In the Department's tab --  
2 Department's summary of the claim.

3 MR. NORTON: What tab?

4 MR. ALBAUGH: About the fourth tab.

5 MR. MOELLER: It's a number of pages back.

6 CHAIRMAN NUTBROWN: Is that the letter that  
7 starts out with the first item being the additional  
8 labor or something of that nature?

9 MR. MOELLER: It's the thirteenth page back.  
10 It's a July 28 letter from Jimmy Miller.

11 MR. ALBAUGH: This is the letter you were  
12 referring to?

13 MR. MOELLER: Actually, I'm just trying to  
14 validate the content of what I'm telling you because  
15 I don't have the actual letter in this package.

16 Again, just in an effort to avoid the  
17 duplication. You wouldn't want to have two packages of  
18 the same claim in this package to review. To us that  
19 doesn't make a lot of sense.

20 Apparently -- at any rate, the July 28 letter, if  
21 you turn to page two of that letter, the last line,  
22 next to the last line, "Your qualified acceptance  
23 letter received July 24 is unacceptable."

24 And another one is provided. I would like the  
25 opportunity to follow up with a clear and concise

1 package where the Department sent it to us the first  
2 time, the Department sent it to us the second time.

3 Essentially the discrepancy is the claims went in  
4 in the time frame required, but the qualified  
5 acceptance letter had not yet been received from the  
6 Department.

7 We couldn't take positions with respect to final  
8 quantities in the claims because we didn't have that  
9 information from the Department yet.

10 Having submitted that information previously, it  
11 seemed -- the duplication of providing the claim a  
12 second time as an attachment to the qualified  
13 acceptance letter was -- would be an unusual inclusion  
14 that you would make a second copy of the claim and send  
15 it through the second time.

16 The Department took the position that it should  
17 have been attached, and the second time it went in it  
18 was attached. Therein lies what the Department has  
19 apparently called a discrepancy.

20 MR. ALBAUGH: Are you in accordance with this  
21 second letter? One of the things that the Department  
22 said was here is the second qualified acceptance form  
23 to fill out, but they also said that the total shall  
24 not exceed 238,480.

25 MR. MOELLER: I understand. The problem with

1 that position is that the qualified acceptance letters  
2 that are provided are provided with the third  
3 paragraph. I go to my Tab 1-1. It's a standard  
4 letter.

5 MR. ALBAUGH: That's 1-1?

6 MR. MOELLER: Yes, sir.

7 MR. NORTON: It's toward the back, Bill.

8 MR. ALBAUGH: Got it.

9 MR. MOELLER: In the third paragraph, the first  
10 sentence. It's actually a bit of a run-on sentence.  
11 "The qualified acceptance letter is provided to the  
12 Department" -- and I read from the letter -- "with the  
13 understanding that acceptance of such payments shall  
14 not constitute any bar, estoppel or have any effect as  
15 to those payments in dispute for the subject of pending  
16 claims."

17 In fact, we had pending claims. For the  
18 Department to take a position that this qualified  
19 acceptance letter has an effect on pending claims is  
20 contradictory to the manner in which we submitted it.

21 MR. GHAZVINI: The fact of the matter is they  
22 have provided and requested another qualified  
23 acceptance letter, and we have done it. Now, in their  
24 mind they may have tried to limit us to what they see  
25 just or they see qualified. I think that's a call for

1 the Board or --

2 MR. ALBAUGH: Obviously I think it's a call for  
3 the Arbitration Board. The Department takes one  
4 position, says here is your second chance, but they put  
5 a qualifier.

6 Your position is we are taking the second chance,  
7 but the door is wide open, and we can claim whatever we  
8 want.

9 All we are trying to do is understand.  
10 Ultimately we have to make a decision about which is  
11 right.

12 MR. MOELLER: I think the position -- we are not  
13 taking the position that we can claim whatever we want.  
14 In fact, the contract contains an element that gives us  
15 a deadline.

16 From the date of acceptance, which I believe  
17 would have been July 5, 2002, we had 180 days to file  
18 our claims. We did so.

19 I believe we are limited in that submittal that  
20 our qualified acceptance letter may not contain  
21 anything that wasn't also included in that claim  
22 package submitted within that time frame.

23 MR. ALBAUGH: You believe you are limited to --

24 MR. MOELLER: Limited only by the claim mandated  
25 that within 180 days it must be submitted. I think we

1 have no opportunity to go outside of that time frame.

2 If you are not submitted by the 180 days, under  
3 5-12 that we are required to submit by --

4 MR. ALBAUGH: So, we are not being asked at this  
5 point to consider anything that wasn't either in the  
6 December letter or the first qualified acceptance?

7 MR. MOELLER: Exactly. It's the claim and the  
8 qualified acceptance letter, period. We are not adding  
9 anything to the claim. I believe we are restricted  
10 from asking for anything that was not included in the  
11 claim. The door is not wide open.

12 MR. ALBAUGH: Okay. You can continue. I just --

13 MR. MOELLER: That would be my pitch on it.  
14 Steve has sat quietly through it. I think it's  
15 appropriate for him to make a response.

16 MR. POTTER: I think the contract is clear in 9-9  
17 subpart (a) that the contractor when he submits his  
18 qualified acceptance letter has to list all the issues,  
19 including any outstanding claim issues that are -- in  
20 order to set that amount aside for further  
21 consideration.

22 The contractor did submit a claim. It was filed  
23 in early January. Those claims were under review at  
24 the time this qualified acceptance letter was then  
25 submitted.

1           That qualified acceptance letter did not include  
2           several items that were included in the claim package.  
3           Because of that, there was no further consideration of  
4           those particular items in our review.

5           That was transmitted -- that decision was  
6           transmitted to the contractor in the December 12 letter  
7           of 2003.

8           I am not aware of the Department going back and  
9           asking Sandco to resubmit another qualified letter,  
10          qualified acceptance letter.

11          The July 28 correspondence you see is a result of  
12          them responding again probably based upon this June 13  
13          letter, submitted a revised qualified acceptance  
14          letter, which the Department said they could not do.

15          That was the gist of the July 28 letter. They  
16          indicated they cannot change the amount of the items  
17          that were listed in their previous March qualified  
18          acceptance letter.

19          That is all in accordance with the contract under  
20          9-9.

21          MR. ALBAUGH: Do we have a copy of --

22          CHAIRMAN NUTBROWN: That's exactly what I was  
23          going to ask for, do we have a copy of that letter?

24          MR. POTTER: Of which letter?

25          CHAIRMAN NUTBROWN: The letter requesting --

1 MR. NORTON: The second.

2 CHAIRMAN NUTBROWN: The second.

3 MR. POTTER: I don't believe there is such a  
4 letter.

5 MR. MOELLER: We can provide that to you. We  
6 will provide Steve with a copy of that as well. In  
7 fact, if you refer back to Jimmy Miller's letter, he  
8 indicates in his last sentence that a new qualified  
9 acceptance form is being enclosed for your completion.

10 MR. POTTER: I think what he is referring to  
11 there is there was -- as a result of the review of the  
12 claims and disputed quantities issues, we did pay an  
13 additional amount for water for grassing. So, that  
14 would have changed the quantity.

15 That part of that qualified acceptance -- water  
16 for grassing was part of the qualified acceptance, one  
17 of the items listed under the March qualified  
18 acceptance letter.

19 We paid some additional money. As we went back  
20 and reviewed, there was some additional water for  
21 grassing that we hadn't paid for. We paid for it.

22 That would affect that qualified acceptance  
23 amount by lowering it in the amount of \$1210. That is  
24 what Mr. Miller is asking to change the amount of the  
25 qualified acceptance by lowering it to that amount.



1 MR. GHAZVINI: Can I respond to that?

2 CHAIRMAN NUTBROWN: Uh-huh.

3 MR. GHAZVINI: I respectfully disagree with that.

4 In his letter he says, "Therefore, all qualifications  
5 by Sandco on this construction contract are limited to  
6 that value as specified in the original qualified  
7 acceptance letter and shall not exceed the amount of  
8 \$238,480.02."

9 That number is the same exact number as what we  
10 sent.

11 If he says we are reducing the amount by \$1210  
12 and you send us something new, first of all, he should  
13 limit that number himself, well, that 238 minus 1,200.

14 Second of all, why do you need a new qualified  
15 acceptance letter? You agree with some of them,  
16 disagree with some of them. You pay some of them, you  
17 don't pay some of them. Every time you agree to one,  
18 you don't come back and send us another one because we  
19 will agree to pay you a thousand dollars on this.

20 The Department has asked us to submit a new  
21 acceptance letter. If anything -- like this gentleman  
22 here said, maybe they are trying to restrict us to  
23 dollar values. They are not trying to restrict us to  
24 either adding or not adding any more claim items.

25 Maybe in their mind they are trying to restrict

1 us to the same original dollar amount. That's how it  
2 looks like to me.

3 We said we do not agree with that, that they can  
4 restrict us, you know, to the dollar values once -- if  
5 I can use the word -- the door is open or the  
6 discussion is there for us to submit another acceptance  
7 letter. Then it should be to us to qualify our  
8 acceptance letter however we want to qualify it.

9 MR. POTTER: Under the Department's submittal  
10 under the summary of the Department's claims, there is  
11 a March 31 letter from Mr. Edmond Wilson. That is an  
12 acknowledgement of the acceptance of the first  
13 qualified acceptance.

14 The page behind that is Sandco's qualified  
15 acceptance letter. It indicates an amount of \$238,000  
16 plus some change.

17 MR. ALBAUGH: Where is this?

18 CHAIRMAN NUTBROWN: It's under --

19 MR. NORTON: The Department's summary, right  
20 behind the spec section.

21 MR. POTTER: The page behind that letter.

22 MR. ALBAUGH: This is acknowledged in the first  
23 letter.

24 MR. POTTER: The page behind that is Sandco's  
25 qualified acceptance letter. It's in the amount of

1           \$238,480.02. And they list their items which they have  
2 qualified behind that.

3           MR. ALBAUGH: Where are those items listed?

4           MR. NORTON: Bill, right here. There.

5           CHAIRMAN NUTBROWN: There is a recap sheet.

6           MR. POTTER: I suspect what happened is in June  
7 when I submitted -- reviewed their claims and submitted  
8 my response to them, they in turn, if you go now to the  
9 July 28, 2003 letter that follows it, that's a few  
10 pages further back --

11          MR. NORTON: You've got it there.

12          MR. ALBAUGH: Okay.

13          MR. POTTER: If you turn two more pages back in,  
14 there is another qualified acceptance letter from  
15 Sandco with amounts that are different. You will see  
16 those that are crossed, that were submitted on the date  
17 of July 22.

18                 Sandco then increased the amount of their claim  
19 or their qualified acceptance letter which is in  
20 accordance with Section 9-9. They are not allowed to  
21 do that.

22                 Then that indicates the payment amount, the  
23 additional payment amount for additional water for  
24 grassing.

25          MR. MOELLER: I think what you will find is that

1 the increase is simply the inclusion of the claim that  
2 wasn't in the initial letter. We submitted our claims  
3 in good faith for review. We submitted our qualified  
4 acceptance letter with good faith for review. The  
5 qualified acceptance letter is specifically with regard  
6 to final quantities. That's the purpose of it is final  
7 estimates, what are the quantities.

8 The manner in which it's submitted -- and I think  
9 it boils down to this very easily. These are forms  
10 that the Department requires us to sign. This is the  
11 manner in which it's submitted.

12 It is submitted with that understanding that the  
13 submittal of this qualified acceptance letter will have  
14 no effect on pending claims. I don't think it goes any  
15 further. I think with that I will leave that issue  
16 with you.

17 MR. ALBAUGH: The first submittal, there is a  
18 list of items that are listed here. Are some of these  
19 items issues that we are now being asked to look at?  
20 As an example, water for grassing --

21 MR. MOELLER: Water for grassing is a final plan  
22 quantity.

23 MR. ALBAUGH: But it was in your original letter.

24 MR. MOELLER: The claim package, yes.

25 MR. ALBAUGH: It was in your --

1 MR. MOELLER: Qualified acceptance.

2 MR. ALBAUGH: Saying we still have the  
3 outstanding issue on water.

4 MR. MOELLER: We couldn't make final quantity  
5 issues when we submitted the claim because we didn't  
6 have the letter. We didn't have a qualified acceptance  
7 letter. It took our dead -- our deadline to file  
8 claims was prior to receiving the qualified acceptance  
9 letter. We didn't have the benefit of including those  
10 in the claim package.

11 MR. ALBAUGH: My point is it appears that water  
12 for grassing was an issue you said is still  
13 outstanding.

14 Whether you say claims or not, you identified  
15 that specifically in your first qualified acceptance  
16 letter.

17 MR. GHAZVINI: That is correct.

18 MR. MOELLER: We were well aware that was an  
19 issue at that time.

20 MR. ALBAUGH: You have listed eight or so items,  
21 maybe ten items here in your qualified acceptance  
22 letter. That's a field adjustment. That's one of your  
23 claim issues here. You put it -- it was in your first  
24 qualified acceptance letter.

25 Why from the Department's standpoint do we say

1 this is not an issue at this point, if it was in the  
2 first qualified acceptance letter?

3 MR. POTTER: I wasn't paying attention.

4 MR. ALBAUGH: Let me just real quickly -- as  
5 I understand, this is the first qualified acceptance  
6 right here and the Department's response to it. They  
7 gave this letter. I think you identified these were  
8 the issues that they said -- that had been resolved.

9 MR. POTTER: Those were the issues --

10 MR. ALBAUGH: Outstanding issues. Now they come  
11 to us asking for the field adjustment to be considered  
12 by arbitration. Is the Department's position we  
13 shouldn't be considering it?

14 MR. POTTER: The Department's position is that  
15 there's a couple of items that were submitted to the  
16 Arbitration Board that should not be considered.

17 MR. ALBAUGH: Only a couple?

18 MR. POTTER: Those were the items that were not  
19 submitted in the March 31 -- the March qualified  
20 acceptance. The other items that Sandco submitted  
21 should be on the table for consideration.

22 MR. ALBAUGH: Okay. There's only two issues.  
23 So, it's not just water for grassing is the only issue,  
24 it's all the issues except for two of them? What two  
25 are those?

1 MR. POTTER: It would be stop work order issued.  
2 The Department believes it should not be considered  
3 because it was not included in the original qualified  
4 acceptance letter.

5 MR. MOELLER: Which one was that?

6 MR. POTTER: Number three, stop work order.

7 The number six issue, extended work hours should  
8 also not be -- we believe should not be considered  
9 because it was not in the original qualified acceptance  
10 letter.

11 Backing up to item number two, which is the  
12 gravity wall issue, the first part of that, the MOT  
13 portion of that was not included in the first qualified  
14 acceptance letter, so we believe that should not be  
15 included for consideration.

16 MR. ALBAUGH: MOT, was that associated with the  
17 bearing wall?

18 MR. POTTER: The gravity wall issue.

19 MR. NORTON: Bill, I think if you will look, you  
20 will find the two different summaries there and there  
21 (indicating).

22 MR. ALBAUGH: Have the difference between?

23 MR. NORTON: Have the difference between the two.  
24 The first one is right at the back of the first  
25 qualified acceptance letter, and then you go back about

1 four more pages and you will find the other.

2 MR. MOELLER: It's not as though the Department  
3 was boondoggled by this. This was received by the  
4 Department as part of the claim package within the time  
5 frame required by the contract.

6 They had the information. They had the claim  
7 package. The claim package was being reviewed. They  
8 received a qualified acceptance letter that would have  
9 no effect on those claims.

10 The MOT, the extended work hours and the stop  
11 work order are all included in the original claim. We  
12 have not added one item to it.

13 MR. ALBAUGH: On the second qualified acceptance  
14 letter, and the issues, where do I see the stop work  
15 order, the claim for the stop work order?

16 MR. MOELLER: I'm at a little disadvantage. My  
17 booklet is not tabbed, the Department's response.

18 MR. ALBAUGH: This page here, which I believe is  
19 the second qualified acceptance letter which, you know,  
20 you had your first one, you modified it. Now we are  
21 sitting here today looking at issues. Which one would  
22 be --

23 MR. MOELLER: The last item, project claims.

24 MR. ALBAUGH: So, the stop work order, extended  
25 work hours?



1 MR. MOELLER: Are included in line item project  
2 claims.

3 MR. ALBAUGH: And the MOT gravity wall.

4 MR. NORTON: If you go to the next two pages you  
5 will find the breakdown of that 196 which includes this  
6 stop work order.

7 MR. ALBAUGH: Okay. Was that the extent of the  
8 claim that was outstanding at the Department at that  
9 time when you submitted the -- you say you submitted  
10 the first qualified acceptance letter, but you had a  
11 claim outstanding with the Department at that time.

12 MR. MOELLER: Yes.

13 MR. ALBAUGH: Was that the extent of the claim,  
14 these three issues, or was there more to it?

15 MR. MOELLER: If memory serves me right, yes,  
16 that was the extent of the claims.

17 MR. ALBAUGH: Is that --

18 MR. POTTER: The claim had five issues or six  
19 issues.

20 MR. ALBAUGH: And they were?

21 MR. POTTER: Extended work hours, some  
22 straightedge deficiencies.

23 MR. MOELLER: We waived that.

24 MR. POTTER: The stop work order.

25 MR. MOELLER: We relinquished that issue of the

1 straightedge issue.

2 MR. POTTER: Additional maintenance of traffic.  
3 Within your package if you will go to -- a couple of  
4 pages back, there are two letters to Sandco from me.  
5 That is the one that addresses the disputed quantities.

6 The first letter, two pages back, is a letter  
7 that addresses the claims. There were initially six  
8 claim issues that they submitted. At that time, you  
9 know, I informed them that items one through five were  
10 not included in the qualified acceptance letter, so  
11 there would not be any further consideration of those  
12 issues.

13 We addressed -- I addressed the miscellaneous  
14 asphalt, the remaining items of miscellaneous asphalt.

15 MR. MOELLER: Each of them, though, was in the  
16 original claim.

17 MR. POTTER: Those six were part of the original  
18 claim. Five of them weren't included in the qualified  
19 acceptance letter.

20 MR. ALBAUGH: I think I have asked everything  
21 I need for this particular issue.

22 CHAIRMAN NUTBROWN: Okay.

23 MR. POTTER: I just want to make a point. Before  
24 the first qualified acceptance letter was submitted,  
25 there was the issue of -- they said they didn't have

1 the final quantities. The final estimate, I've got on  
2 December 24 there was an estimate run, a final that was  
3 submitted, estimate number 13. So, that listed all the  
4 final quantities. The contractor received that final  
5 estimate.

6 So, they had all final quantities prior to  
7 preparing their final estimate -- their first qualified  
8 acceptance letter. It was subsequently modified when  
9 we reviewed the disputed issues under the first  
10 qualified acceptance letter and found that we had  
11 underpaid them for water. We paid them again. There  
12 was another estimate done, estimate number 14 which  
13 reflects that payment.

14 MR. MOELLER: The only items in that qualified  
15 acceptance letter that are not detailed are the items  
16 that were detailed in the claim package, with the  
17 understanding that the qualified acceptance letter  
18 would have no effect on those claims.

19 MR. ALBAUGH: I'm ready to move on to the next  
20 item.

21 CHAIRMAN NUTBROWN: Okay. Let's go to the first  
22 item in the claim, which is the fuel adjustment. The  
23 claimant has the Board's order relating to this item or  
24 a similar item.

25 Does the claimant have anything that he wants to

1 add that was not put in the first claim in which the  
2 Board has ruled on?

3 MR. MOELLER: A brief narrative would be the only  
4 thing I would like the opportunity to go through, Jack.

5 CHAIRMAN NUTBROWN: Okay.

6 MR. MOELLER: We are of the opinion that this  
7 project is bid without the inclusion of a fuel  
8 adjustment.

9 CHAIRMAN NUTBROWN: Let me stop you right there  
10 and ask you a question. This came up before. Where do  
11 you read in the documents that it is excluded?

12 MR. MOELLER: It's excluded by the special  
13 provisions telling us where we will find the equation  
14 to make fuel adjustments back. The special provisions  
15 tell us that will be located in the supplemental  
16 special provisions.

17 CHAIRMAN NUTBROWN: What is that sheet labeled?

18 MR. MOELLER: SP-1.

19 CHAIRMAN NUTBROWN: But it's informational only.

20 MR. GHAZVINI: We will let that go. We have been  
21 through this process one time. I think everybody's  
22 time is best served to just move on. Let's go on to  
23 the next item.

24 As you know, Jack, this was submitted before the  
25 ruling has come up on that item. Had we had the ruling

1 at that time we would have eliminated it. I think it's  
2 just best to move on.

3 CHAIRMAN NUTBROWN: All right. Also, there is --  
4 you put a strange request in your request for  
5 arbitration, the gravity wall. You are saying an  
6 entitlement decision only. This is not a dispute  
7 review board. This Board is going to rule on the --

8 MR. ALBAUGH: The amount and the entitlement.

9 CHAIRMAN NUTBROWN: It's not just entitlement.  
10 It's not a recommendation. It's an order. With that  
11 I would like you to go ahead and present your thing on  
12 it as far as the gravity wall is concerned.

13 MR. MOELLER: Very good. I would ask you to take  
14 a look at a couple of sheets in the construction plans,  
15 sheets 87 and 88, the cross sections.

16 MR. NORTON: Do we have those?

17 CHAIRMAN NUTBROWN: Those are in that package  
18 I think.

19 MR. NORTON: Part of the package you gave us this  
20 morning? They are not in mine.

21 CHAIRMAN NUTBROWN: No.

22 MR. NORTON: Doesn't mean we can't look at them.

23 MR. MYRICK: We do have some copies of the  
24 project plans.

25 MR. NORTON: These are the sheets he's looking

1 at?

2 MR. MYRICK: Yes, sir.

3 MR. MOELLER: The important issue here is to  
4 recognize the gravity wall, the location of it here,  
5 the face of it being 1.8 meters from the edge of the  
6 existing traveled lane. Also, I'd like to notice the  
7 step grade below or out towards the edge of the  
8 right-of-way.

9 MR. ALBAUGH: Let me ask a quick question. Is  
10 this guardrail or is this part of the gravity wall?

11 MR. NORTON: That's guardrail.

12 CHAIRMAN NUTBROWN: Is it set on top or inside?

13 MR. MOELLER: It's inside the gravity wall to be  
14 installed. It's new. There was one there that was to  
15 be removed. New gravity wall.

16 MR. ALBAUGH: The gravity wall is outside the  
17 guardrail?

18 MR. MOELLER: Yes.

19 MR. ALBAUGH: It would be further than the 1.8?

20 MR. MOELLER: Yes.

21 MR. ALBAUGH: The 1.8 is to the face of the  
22 guardrail.

23 MR. MOELLER: You are correct. The point is we  
24 are looking at a section of the project that is several  
25 thousand feet north of the south end of the project.

1 Motorists would have been in the project, inside the  
2 construction zone for an extended period at highway  
3 speeds. I believe the posted speeds are 55 or 60, at  
4 any rate highway speeds.

5 The gravity wall is located at the top of this  
6 slope. It's located in a curve that is shown from  
7 sheets 34 through 36. That curve is essentially an  
8 eighth of a circle. The gravity wall is about 700 feet  
9 long. We are working at highway speeds.

10 During this eighth of a circle, motorists also  
11 ascend or descend approximately 11 feet of vertical  
12 change.

13 The point I want to make is this is an area where  
14 motorists are not going to have good visibility. The  
15 construction plans include absolutely nothing with  
16 respect to a preferred MOT method, even though the --  
17 an element of the project is to include MOT plans.

18 We are of the opinion that the project should  
19 have been bid with a special detour that would have  
20 provided each bidder the opportunity to address the  
21 values of the special detour, which would have, chances  
22 are, constructed a temporary lane on the west side of  
23 the roadway, allowing the existing southbound lane to  
24 be utilized for northbound traffic, and the new  
25 temporary lane to be utilized for southbound traffic.

1           This would have allowed the crews an area to  
2 work. I take your point -- I'm sorry, I didn't catch  
3 your first name.

4           MR. ALBAUGH: Bill.

5           MR. MOELLER: The point, Bill, is the face of the  
6 guardrail is correct. I want you to recognize how much  
7 space do these guys need to work to build a gravity  
8 wall. We are talking about excavators, concrete forms,  
9 concrete trucks, and where might they be located.  
10 Would they be on that very steep slope?

11           The fact of the matter is that they need to be up  
12 on the top.

13           The CEI on the project encouraged Sandco to  
14 submit a number of different VECs under different  
15 methodologies to try to eliminate that gravity wall.

16           I believe in hindsight he recognized that there  
17 was going to be some problems with this area. We had  
18 no way to close the road and effectively for 24-hour  
19 periods. It's too long a curve to establish temporary  
20 guardrails in the mornings and take them back down or  
21 relocate them for the evening traffic, after the  
22 workday is shut down.

23           It's simply an area where there was nowhere to  
24 work.

25           Two things were required. It did, in fact,



1 require that traffic be shut down to one lane every day  
2 during excavations and concrete pours.

3 During that period, we employed pilot cars, a  
4 superintendent and MOT person to supervise the  
5 shut-down and the maintenance of traffic through that  
6 area so that items that just simply had to be delivered  
7 to the work zone from the traveled lane, so that they  
8 could occur safely.

9 In addition to that, much of the work was  
10 required to take place -- in order to avoid these MOT  
11 impacts to the traveled public, much of the work took  
12 place behind the gravity wall. The fork work, the  
13 personnel had to bring equipment and tools, tractors  
14 in. As much as possible we kept the highway open.

15 However, during that period we encountered on  
16 that slope an old and dry, brittle miscellaneous  
17 asphalt that had been placed over the existing sand.  
18 It's a very, very sandy area, the entire length of the  
19 job.

20 That miscellaneous asphalt was degraded  
21 significantly and restored by Sandco.

22 MR. ALBAUGH: Where was that asphalt located?

23 CHAIRMAN NUTBROWN: Down side --

24 MR. MOELLER: It's on this --

25 MR. ALBAUGH: The entire slope or the entire

1 distance of the barrier wall?

2 MR. MOELLER: Yes, sir. As a result Sandco  
3 utilized 17 loads of miscellaneous asphalt and placed  
4 that material by hand. You guys know what labor costs  
5 are and what it would take to get that material back  
6 there.

7 We have an existing unit price for miscellaneous  
8 asphalt. We have provided a request for the payment of  
9 those 17 loads to restore that slope under the agreed  
10 unit price.

11 We have asked for a per diem rate for MOT to  
12 avoid -- during the days when the traffic was, in fact,  
13 down to one lane. We have asked for the cost of our  
14 pilot car, our MOT personnel. We have utilized the per  
15 diem rate to avoid the entire process of review of  
16 every payroll and every -- we would be happy to have  
17 that happen, but it's a simple way for you folks to  
18 take a look at it.

19 It boils down to two things. One, there was  
20 nowhere to work. A prudent design engineer, as he  
21 prepares his MOT plans, recognizing these two limiting  
22 conditions, highway speeds, nowhere to work, and the  
23 steep slope, clearly should have prepared a temporary  
24 detour for an extended work item like this.

25 We believe that is a direct result of us

1 incurring these additional and unforeseen expenses.

2 MR. NORTON: You say there is an 11-foot  
3 difference along that wall. Is it up and down or is it  
4 all running uphill?

5 MR. MYRICK: What he's saying is the wall is  
6 built on a curve in a valley. At each end of the wall  
7 you climb up a hill. You drop down into a valley, take  
8 a big, hard curve the length of the wall, then you come  
9 back out of the valley.

10 MR. NORTON: From the low point to the high point  
11 is what you are saying?

12 MR. MOELLER: Yes. I think this slope is  
13 significantly more than that on the cross section. But  
14 as you travel the length of that curve, 11 feet of  
15 change in elevation at the centerline of the highway  
16 and an eighth of a circle as you travel through it.

17 CHAIRMAN NUTBROWN: Okay.

18 MR. NORTON: That's enough.

19 CHAIRMAN NUTBROWN: Do you have anything else you  
20 want to add to that?

21 MR. MOELLER: Gosh, this thing is metric. I will  
22 have to convert this. As far as the change on  
23 elevation from the bottom of that slope to the top of  
24 that slope, looks like it's seven meters --

25 MR. NORTON: Twenty feet.

1           MR. MOELLER: Yes, sir. You don't see it very  
2 often. When you stand at the top of this curve, it's a  
3 significant drop to the right next to the highway like  
4 that.

5           MR. ALBAUGH: So, your request in this case is  
6 for the cost of the asphalt, to replace the asphalt on  
7 the slope plus MOT?

8           MR. MOELLER: Yes, sir.

9           MR. ALBAUGH: When you were looking at this job  
10 originally to bid it, what did you take into  
11 consideration as far as MOT to build that wall and  
12 stuff?

13          MR. MOELLER: I have to defer to Mr. Ghazvini on  
14 that, as I was not involved in the bid process.

15          MR. GHAZVINI: To be honest with you, I don't  
16 recall. It's been a long time ago. A lot of the  
17 details of the construction unfortunately all of us do  
18 not see, including the engineers of the Department,  
19 until you get on the job and you see the severity of  
20 it.

21                 As a general rule, if there is such a situation,  
22 everybody understands they regroup, they change things.

23                 I really do not recall exactly what we figured,  
24 what we thought about. I know when we got on the job  
25 and we wanted to deal with this, it was a very extreme

1 situation as Rod said, the engineer, the CEI, he agreed  
2 with us, not necessarily in writing, but he agreed with  
3 us that this is a very, very impossible, very hard  
4 situation to build out.

5 As a result, entertained a VEC. We provided  
6 several methods. I think it required an engineer's  
7 stamp to say, yes, this is going to work. Frankly,  
8 time was running out.

9 We, against maybe everybody's will, we had to  
10 proceed and build it as it was so we don't get into a  
11 time situation.

12 That's the answer to your question about --

13 CHAIRMAN NUTBROWN: Steve, I notice somewhere in  
14 the narratives of either one side or the other there  
15 was a comment made that in this area the shoulder had  
16 been built prior to the wall being started. Is that  
17 correct?

18 MR. GHAZVINI: Well --

19 MR. MOELLER: Actually, what they did there  
20 was -- in fact, Steve, I believe you participated in  
21 this. The methodology that they recommended, because  
22 it was so subject to erosion was to change from a lime  
23 rock base to an asphalt base course.

24 And they wanted the guardrail, the old guardrail  
25 removed, then to place the black base -- as a matter of

1 fact, it was your suggestion. We utilized black base  
2 through that area so the edge of the existing roadway  
3 wouldn't be wide open to degradation. That was, in  
4 fact, I believe constructed prior --

5 CHAIRMAN NUTBROWN: Did that also reduce the work  
6 area --

7 MR. MOELLER: For the gravity wall.

8 CHAIRMAN NUTBROWN: -- by the width of that  
9 shoulder?

10 MR. MOELLER: It did.

11 CHAIRMAN NUTBROWN: You would have had an awful  
12 angle of repose.

13 MR. MOELLER: It was nasty.

14 MR. MYRICK: I think you can see that from the  
15 cross section, if you look from the depth to the  
16 subgrade under the wall verses the edge of the  
17 pavement.

18 MR. ALBAUGH: That's one of the questions I have  
19 that maybe you can help me understand. I look at this  
20 and say, well, that's a pretty severe situation, just  
21 like you folks are saying, that it's going to be -- I'm  
22 thinking, well, if I have to go out and build this,  
23 this is going to be a pretty difficult thing to  
24 undertake.

25 So, what I do is I consider that in putting my

1 bid together. I say look, under this circumstance of  
2 building this barrier wall here, I'm going to have to  
3 close a lane to traffic. I don't know how looking at  
4 the job trying to bid it I would say I would do  
5 anything else.

6 I am agreeing with your position. With what you  
7 said, where else are you going to work from.

8 In looking at it and bidding it, I will say I'm  
9 going to have to take a lane of traffic here during  
10 certain times. Maybe not the entire construction of  
11 it, but certainly when I have equipment in there, stuff  
12 like that.

13 Maybe I would be doing some form work or  
14 something without closing a lane, but certainly during  
15 any time when you have to have equipment in there,  
16 whether it's concrete trucks or equipment to get stuff  
17 moved around. Obviously you are going to have to do  
18 that. That's one of the things I would take into  
19 consideration in doing the bid.

20 From an owner's perspective, you know, I would  
21 assume they would expect the prospective bidders to  
22 take that into consideration.

23 So, if your competitors did that and put that  
24 cost in there, what you are saying, you know, we want  
25 additional compensation for maintenance of traffic.

1           The asphalt to me is sort of a different issue,  
2           but from the maintenance of traffic perspective, say  
3           your competitors did exactly as I'm saying, we better  
4           put in 12 days for MOT, and that's in their bid, and  
5           they didn't get the job because their bid was higher,  
6           and you get it because your bid is lower, but you  
7           didn't include that cost for that difficulty.

8           You know, like the asphalt as an example. This  
9           doesn't tell you what the conditions of the asphalt are  
10          until you get out there and start working and the  
11          asphalt starts falling apart and stuff like that.

12          I can see where you say, hey, we had no idea.  
13          Maybe the owner didn't have any idea that asphalt was  
14          going to happen. It did, but there was nothing we  
15          could do to remediate that.

16          So, it's a reasonable thing that was just  
17          unforeseen.

18          I'm really wondering about the MOT on that  
19          because I look at it and say, shoot, the first time you  
20          showed me this, this is a difficult situation, 1.8  
21          meters. You may have six or seven feet in there to  
22          work.

23          You are not going to get equipment in there, just  
24          like you say. I am agreeing with you. You are not  
25          going to get it in there. I need to take that into



1 consideration as part of my cost of constructing that.

2 MR. MOELLER: I would say that the obvious  
3 nature -- I recognize your point and take it, that  
4 maybe that should have been an element of the bid, and  
5 obviously we are of the opinion that it wasn't.

6 MR. ALBAUGH: You may not have included it in  
7 your bid, but your competitors may have, too.

8 MR. MOELLER: We back up in our position further  
9 still to the time when the engineer, in fact, put his  
10 MOT plans together. Is it an oversight that only this  
11 bidder has lived through, and it should have been in  
12 his bid?

13 I suggest that in the contemporary design and  
14 contemporary preparation of MOT plans, that under the  
15 circumstances it should be well demonstrated. Special  
16 detours are an item in the MOT that are created when  
17 you have highway speeds, when you have extended work  
18 positions.

19 MR. ALBAUGH: I understand your position. I'm  
20 not disagreeing.

21 MR. MOELLER: I would much rather have it. If we  
22 had that temporary detour there, we would, one, have a  
23 level playing field in the bidding.

24 MR. ALBAUGH: I am not disagreeing, but from a  
25 designer's standpoint they are saying there's multiple

1 ways of doing this. If I put an MOT there, it implies  
2 during the entire construction of that wall we are  
3 going to close one lane down.

4 That may not be necessary. There are times  
5 during that actual construction that you can do things  
6 without having to have a lane closed down, and the  
7 Department looks at it and says we want to optimize the  
8 number of lanes open.

9 Recognizing there are times we have to close  
10 lanes when there's equipment in there, but on the other  
11 hand, as soon as -- not to make the argument either  
12 way --

13 MR. MYRICK: Can I address that. You have made a  
14 valid point here. Obviously anybody that knows that  
15 would say, hey, we better put some more money in here  
16 for MOT or we have to plan it this way or that way. A  
17 prudent bidder would certainly do that.

18 On the other hand, we have a 16-mile project.  
19 Estimators aren't perfect either. We make mistakes.

20 It would seem to me that if you look at that  
21 angle of repose on that, that the edge of the roadway  
22 itself is in danger. The designer overlooked that.

23 If the guy that designed it can overlook it, it's  
24 easy to see how the rest of it --

25 MR. ALBAUGH: I agree. If a contractor overlooks

1 something in their bid, I don't know that you come to  
2 the owner and say you owe me money because I didn't --

3 MR. NORTON: Bill, the other thing is the  
4 contractor looking at this -- and I'm not taking sides  
5 or anything. I can understand your point.

6 The contractor looks at this and he says, if  
7 I put in extra MOT, are all the other guys going to do  
8 it. Just the opposite of what you said. He has a set  
9 of plans here. He has to bid them as he sees them.

10 He may say, I got to be careful here, too. They  
11 haven't shown me any special MOT on the drawings.

12 MR. ALBAUGH: I agree with you, but I've got a  
13 big problem with contractors who do that because the  
14 message you are now telling me is, well, I will claim  
15 it in the end.

16 MR. NORTON: Not claim it in the end. You go in  
17 there and you bid it as you see it.

18 MR. ALBAUGH: I agree. But if you are saying,  
19 well, if I include this cost in there --

20 MR. NORTON: You've got to bid it like you see  
21 it. As he said, it's a 16-mile job.

22 MR. ALBAUGH: Contractors do have a  
23 responsibility --

24 CHAIRMAN NUTBROWN: We are not getting anywhere.

25 MR. MYRICK: May I add one more thing.

1 MR. ALBAUGH: I may end up agreeing with you.

2 MR. MYRICK: The CEI is not here to defend  
3 himself, but we are sworn to tell the truth and I will  
4 do my best. He clearly recognized there was a problem  
5 in this area. He not only entertained VECPS, he  
6 initiated it. He suggested you guys might want to look  
7 at this, there may be a better way. It looks like a  
8 bad situation.

9 MR. ALBAUGH: I would say that's good that he's  
10 done that, and he should do that, and maybe even you  
11 folks, when you say, hey, there's a better way of doing  
12 this, that's the thing to do with VECPS. I agree with  
13 you. I'm not in disagreement, I'm just trying to  
14 understand how you are looking at it.

15 MR. MOELLER: I believe -- because I was there  
16 during the bid period, I don't deal typically with the  
17 bid process.

18 We overlooked it as being a special item. An  
19 interesting point to us, and this was very early in the  
20 job, I don't believe at preconstruction, but very early  
21 in the project. The CEI encouraged that we submit a  
22 VECPS to delete the gravity wall.

23 The interesting point as to his early recognition  
24 of it, in my opinion, is that he, in fact, is also the  
25 designer. I believe that they recognized there was an

1 issue. Certainly not prior to completing their  
2 drawings, but I think that they recognized there was an  
3 issue.

4 MR. POTTER: Let me point out different  
5 divisions --

6 CHAIRMAN NUTBROWN: Let them finish, Steve.

7 MR. MOELLER: We have made our points. That's  
8 where we are at. It was a hardship that affected us in  
9 ways we did not anticipate, and the two areas are  
10 I think quite simple.

11 MR. GHAZVINI: It was a case that an employee of  
12 the same company had to criticize his own fellow  
13 workers saying they did not do a good job on the  
14 design. Even though he tried his best to maybe help  
15 everybody in the process, it was a case that if I had  
16 come and said this guy didn't do a good job, you know,  
17 I'm asking for trouble. It doesn't happen. It doesn't  
18 happen.

19 CHAIRMAN NUTBROWN: Okay.

20 MR. POTTER: The -- Mr. Albaugh pretty much made  
21 my defense for me. It's not an unforeseen condition.  
22 The plans clearly showed the conditions in which the  
23 contractor would have to construct the wall. Anybody  
24 could reasonably conclude that you would have to do  
25 lane closures in order to do that.

1           The plans in Tab 2-A is the maintenance of  
2 traffic plan, control plan. It indicates that, you  
3 know, manual traffic, Manual of Uniform Traffic Control  
4 Devices and the 2000 roadway traffic design standards  
5 will be used as part of the maintenance of traffic on  
6 this project.

7           The contractor's own traffic control plan under  
8 Tab 2-B indicates that he's going to use that -- those  
9 two items in order to maintain traffic.

10           Under Tab 2-C you see another section of the --  
11 of -- well, there is a copy of the Standard Index 606,  
12 which is referenced in the traffic control plan, which  
13 shows a lane closure.

14           Exhibit 2 that I handed out earlier is an exhibit  
15 from the Manual of Uniform Traffic Control Devices,  
16 which tells you how to handle traffic in the event you  
17 have to use a lane closure and you have to use flaggers  
18 and all the items that they are requesting payment for.

19           So, the -- again, I don't think this was an  
20 unforeseen condition. The contractor should have been  
21 able to foresee that this would require lane closures.  
22 The traffic control plan indicated that lane closures  
23 were to be required and the lane closures were to be  
24 conducted in accordance with the two documents, the  
25 Manual of Uniform Traffic Control Devices and the

1 Standard Indexes, which outlined what he had to do in  
2 order to facilitate those lane closures.

3 The Department does not believe there's any  
4 additional compensation warranted for the maintenance  
5 of traffic on this particular issue.

6 As far as the miscellaneous asphalt, there is --  
7 the contractor began this thing by working on the down  
8 slope of the project. He had his equipment down there  
9 the first day on that. He began excavating and placing  
10 material down slope instead of on the area where he  
11 could -- had his lane closure. He could have deposited  
12 it in vehicles and removed it from the site.

13 This is an area that, you know, the plans show --

14 MR. ALBAUGH: You are saying they were down here  
15 on this berm?

16 CHAIRMAN NUTBROWN: They were behind the wall is  
17 the way I understand it.

18 MR. POTTER: If you look at sheet 2-B. They  
19 initially began by excavating for the footer of the  
20 wall and placing the material down here on this slope.

21 MR. ALBAUGH: Where was their equipment?

22 MR. POTTER: They had an excavator here. They  
23 had other equipment down slope, dozers and so forth,  
24 pushing the material around.

25 They were advised at that point that that wasn't

1 acceptable and they would be responsible for any damage  
2 that they would cause on that area down slope. That we  
3 were concerned about environmental issues, including  
4 erosion control. Right there is a lake, down slope of  
5 that is a lake, early on.

6 We feel like that work, the down slope was  
7 unnecessary and did not -- it was just a matter of  
8 convenience for the contractor to do it that -- to push  
9 that stuff down there. That we shouldn't have to  
10 compensate him for working outside those limits.

11 MR. ALBAUGH: Did they do that for the entire  
12 length of the wall or just in --

13 MR. POTTER: The damage was done initially. The  
14 miscellaneous asphalt was done --

15 MR. ALBAUGH: For the whole length?

16 MR. POTTER: Yes, because the equipment was  
17 working back and forth across there. Now, they stopped  
18 after that. And --

19 MR. ALBAUGH: The damage had already been done by  
20 then?

21 MR. POTTER: Yes. Under Tab 2-G, it's clear  
22 under that that this existing subpavement was to  
23 remain. If you look at the cross section in the upper  
24 left corner, it states that existing subpavement was to  
25 remain.



1 MR. MOELLER: That's an excerpt from a page in  
2 the plans?

3 CHAIRMAN NUTBROWN: It's page seven.

4 MR. ALBAUGH: Let me ask you, on the MOT issue,  
5 are there other MOT components of the plans where  
6 there's detours or lane closures showed for other  
7 activities?

8 MR. POTTER: Yes. For the paving operation there  
9 were lane closures.

10 MR. ALBAUGH: So, they showed the MOT details for  
11 paving operations. Any others?

12 MR. POTTER: There's maintenance of traffic plans  
13 during the -- in the curb and gutter section at the  
14 north end of the project, also.

15 MR. ALBAUGH: Related to a construction phase  
16 or --

17 MR. POTTER: Related to a phase.

18 MR. ALBAUGH: Let me ask you, in your experience,  
19 and this applies to other projects, not necessarily  
20 this project, but other projects where you may have a  
21 significant construction activity, such as this barrier  
22 wall, and we have other ones, other projects where we  
23 have significant things, is it typical or have you seen  
24 experiences where there's MOT plans for the  
25 construction of a -- it could be a barrier wall, could

1 be an outfall, various things, but just components of a  
2 project?

3 The reason I'm asking, is there a reasonable  
4 expectation on their part, because they are saying that  
5 there wasn't an MOT detail in there for the  
6 construction of this barrier wall. Should they have  
7 been expecting one?

8 MR. POTTER: I don't think so. There's always --  
9 when you get a construction project, like you mentioned  
10 before, it's the contractor's operations that affect  
11 whether you may have a lane closure or not.

12 That's the reason we reference the Standard  
13 Indexes, so they can use those items that are available  
14 to them or those standards in there as far as affecting  
15 the maintenance of traffic issues.

16 If they do have a lane closure, they are required  
17 to abide by those standard lane closures and the  
18 maintenance of traffic, uniform traffic control  
19 devices.

20 MR. ALBAUGH: I want to be as fair with them as  
21 I would be with the Department about any of these  
22 issues.

23 If they are saying, look, in our experience, what  
24 we would anticipate is to see an MOT plan, I can  
25 appreciate and understand that if it is somewhat of a

1 practice or it has been experienced where there were  
2 MOT plans to build something to this extent -- and it  
3 doesn't have to be a barrier, gravity wall or anything,  
4 it could be any kind of a construction activity,  
5 something that's going to encroach on the lanes far  
6 enough that there would be an MOT plan within the plans  
7 because -- I understand, usually there's MOT plans when  
8 you have different project phases.

9 If you are shifting traffic from one area to  
10 another, there's typically MOT plans. We would  
11 probably all expect that. That's somewhat as a  
12 standard. That's what I'm trying to get at with him,  
13 is would we typically see MOT plans for a component.

14 MR. NORTON: Bill (showing document to  
15 Mr. Albaugh).

16 MR. ALBAUGH: Like this.

17 MR. NORTON: That is what you are asking.

18 MR. ALBAUGH: This is a prime example of what I'm  
19 asking. There is a separate MOT plan on the extension  
20 of the culvert, like whether it was drainage or  
21 whatever, if there's a component. They see an MOT  
22 plan.

23 Now, that doesn't necessarily let anybody off the  
24 hook, whether there is or isn't a plan, because I think  
25 there's still some responsibilities to determine

1           constructability.

2                       When the Department or the designer is building  
3 something and says, look, if there's no other way to  
4 build this, extend this culvert without closing a lane,  
5 it just can't be done, so they do an MOT plan.

6                       Now, sometimes when there's discretion, you know,  
7 they may have this extension that says, well, look, if  
8 they constructed from here, which is doable, then they  
9 don't need to close a lane. If they do it over here,  
10 they are going to have to close a lane. That's the  
11 contractor's option, that sort of thing.

12                      But, you know, that is the point. If there's a  
13 certain expectation in there, I can see where the  
14 contractor may rely upon there being an MOT plan.

15                      MR. POTTER: Those specific, site-specific MOT  
16 plans are more commonly found where you have to do  
17 reduced lane widths, shifts in traffic, restriping in  
18 order to shift traffic. It's more common where you  
19 find those types of, in the plans, specific details in  
20 regard to those issues.

21                      As far as standard, during the day lane closures,  
22 in order to affect construction, the Standard Indexes  
23 deal with those particular issues.

24                      MR. ALBAUGH: So, what you are saying, the  
25 difference between this and maybe the other is that

1 this is a -- like a long duration, a week or two weeks  
2 or a month, and you have got a detour versus the  
3 construction of the barrier wall. It's just during the  
4 day while you are there.

5 MR. POTTER: Then the lane can be opened up at  
6 the end of the day.

7 MR. ALBAUGH: That's why you have detail versus  
8 not detail in the plans. Okay. Just wanted to  
9 understand that.

10 CHAIRMAN NUTBROWN: Steve, do you have anything  
11 else?

12 MR. POTTER: No.

13 MR. MOELLER: I have one quick rebuttal. I think  
14 Steve Ghazvini has one as well.

15 I would go back to the detail. It is on sheet 7.  
16 I think you said Tab 2-B. I think this is really what  
17 it boils down to. It tells us to remove and replace  
18 the miscellaneous asphalt pavement as required for the  
19 wall construction.

20 It boils down to what the Department considers to  
21 be as required. This curve had an existing guardrail  
22 on it. It was a dangerous situation. It had to be  
23 taken down in short sections.

24 A barrier wall had to be constructed and set in  
25 place once we were gone for the day each afternoon to

1 replace the guardrail that had been removed so that the  
2 wall could be constructed to its virtual identical  
3 location.

4 As a result of all of that activity that had to  
5 take place behind that barrier wall, behind that  
6 guardrail, and to maintain a safe condition so that if  
7 a motorist left the shoulder on that side he would be  
8 protected from going down that 20-foot hill and into  
9 the lake, that miscellaneous asphalt was damaged. It  
10 was replaced. We believe it's called for by the  
11 Department's own exhibit.

12 MR. NORTON: Is there a pay item for that  
13 particular asphalt?

14 MR. MOELLER: There is. It is miscellaneous  
15 asphalt. I don't have the knowledge that it is for  
16 this location. It's merely miscellaneous asphalt.

17 MR. NORTON: It's just miscellaneous asphalt.  
18 That's what that would be paid for, Steve?

19 MR. POTTER: And we did pay for miscellaneous  
20 asphalt in the area behind the wall that we felt like  
21 was justified in accordance with these plans.

22 The areas that were way down the slope, which is  
23 unjustified, is what they are disputing. We told them  
24 early on that we felt like that damage caused down  
25 there was not justified, and that they would be

1 required to restore that at their own expense.

2 MR. NORTON: Just for my information, does  
3 anybody know what the total square yards was or square  
4 meters versus what was paid for? I think there's a  
5 number. I believe your book gave something on that,  
6 didn't it?

7 MR. GHAZVINI: We probably can figure it. We do  
8 have the number of the loads, the tonnage because it  
9 pays by the tonnage. We do have the quantities.

10 MR. NORTON: I thought there was a number in here  
11 somewhere that gave square yards in one of the two  
12 books.

13 MR. POTTER: Under Tab 2-I is the final  
14 measurements for the area which we paid for at the  
15 guardrail -- at the barrier wall location.

16 MR. ALBAUGH: This is the area in square meters?

17 MR. POTTER: I'm sorry, square meters.

18 MR. ALBAUGH: You are paid for 111 --

19 MR. POTTER: Square meters.

20 MR. MOELLER: Square meters at the rate quoted  
21 here.

22 MR. POTTER: It's a square meter pay item. It's  
23 not what you are paid for.

24 MR. MYRICK: I have the dollar amount you asked  
25 for.

1 MR. POTTER: Your contractor is asking for  
2 \$27,540 for 306 tons.

3 MR. ALBAUGH: That's what the request is for, is  
4 306 tons additional?

5 MR. MOELLER: Actually, I take exception. I am  
6 looking at sheet 2. That's metric tons as opposed to  
7 by the square yard.

8 MR. ALBAUGH: How many tons did we pay for?

9 MR. MOELLER: That's what I was just looking for.

10 MR. GHAZVINI: There are other areas that also  
11 required asphalt, underneath the guardrails and things  
12 like that. If you try to compare exactly how much you  
13 paid us, it would be very hard right now, at least in  
14 my opinion.

15 MR. MOELLER: They paid a total of 163,  
16 I believe.

17 MR. MYRICK: 163.8. The sheet here says 163.8  
18 tons at \$90 a ton was what was actually paid for the  
19 entire project.

20 CHAIRMAN NUTBROWN: Okay. According to this you  
21 paid for 111.485 square meters. I think there's  
22 somewhere around 200 and -- what did we say, Jack?

23 MR. NORTON: 280.

24 CHAIRMAN NUTBROWN: Roughly 280 pounds per meter.

25 MR. NORTON: It's about seven square meters per



1 ton.

2 MR. POTTER: They are correct, it is paid for by  
3 the ton, but it's adjusted based upon -- the tonnage is  
4 calculated based upon a two-inch thick layer. If it  
5 exceeds that, it's adjusted to that.

6 CHAIRMAN NUTBROWN: What did it specify, Jack?

7 MR. NORTON: 132 kilograms per square meter.

8 MR. MOELLER: 110 kilograms.

9 CHAIRMAN NUTBROWN: That would be 242 pounds --

10 MR. POTTER: That's the spread rate that is used.  
11 If they exceed that spread rate in applying asphalt,  
12 the excess is not paid by the Department. By the same  
13 token, if it's less than that, it's adjusted and  
14 corrected.

15 CHAIRMAN NUTBROWN: Do we have anything  
16 constructive to add to this issue?

17 MR. GHAZVINI: Yes, sir. I think Steve is trying  
18 to actually tell the contractor what method to use to  
19 build this wall. I think that it is the contractor's  
20 option. I do understand. I agree the contractor  
21 should use due care to at least meet the intent of the  
22 plan. I understand that the Department had the desire  
23 to keep this slope there.

24 And, second, we did not have any desire to go  
25 tear down the slope. I think that is also clear.

1           Just to explain a little bit, you have a very  
2 steep slope here. Then you have to put an excavator or  
3 something down there to dig for the flat area for the  
4 wall to be set on. It is not just as simple as drawing  
5 a piece of paper and carving it out with a ruler and  
6 saying, oh, this day we will cut this thing out.

7           Once you grade this, you come back with a  
8 bulldozer and fine grade it to make it ready for the  
9 wall man to put his wall in.

10          You have spalled the asphalt off. You cut down  
11 below the grading. You cut initially several foot down  
12 below the existing grade because the wall goes so many  
13 feet deep. As a result of that, you get -- you are  
14 even so far away from the road to be able to reach some  
15 of these.

16          With the conventional equipment we use to work,  
17 if you want to grade behind this wall, you have to walk  
18 a piece of equipment back there.

19          These are the things the Department has not  
20 considered.

21          We have no intention or any desire to go walk on  
22 this slope. We had to because there was no other  
23 places to go.

24          If this slope has two inches of asphalt on it,  
25 obviously -- and an underlayer of sand, obviously it

1 would not withstand any --

2 CHAIRMAN NUTBROWN: What was the average height  
3 of the gravity wall throughout the construction?  
4 I don't think I saw it.

5 MR. MOELLER: Five to six feet.

6 MR. GHAZVINI: It was not very deep.

7 MR. MYRICK: Probably six feet, maybe five. It  
8 wasn't very tall. The problem was if you look at that  
9 cross section there, that slope is basically one to  
10 one. It's a very steep slope. You are in close  
11 proximity to the highway on the other side.

12 It's impossible to get out there and just draw  
13 neat lines and say this is all we are going to damage,  
14 we are not going to drop any dirt over the edge or, you  
15 know, any rocks or whatever.

16 CHAIRMAN NUTBROWN: Okay. Do we have anything  
17 else regarding that item?

18 MR. MOELLER: Jack, I would like to close with  
19 one --

20 CHAIRMAN NUTBROWN: I'm going to cut it short  
21 because we are dragging.

22 MR. MOELLER: We have an amount that has been  
23 paid for. I don't think any of us know how much of  
24 that, if any, might have been paid behind this gravity  
25 wall.

1           Our claim assumes that none has been paid for,  
2           but as I hear Steve, some of it may. The final  
3           estimate, and the supporting particulars will show us  
4           that a certain amount of miscellaneous asphalt got paid  
5           for somewhere else on the job. Some of it apparently  
6           got paid at this location.

7           If you could have your folks provide that to the  
8           Board as well as to us, because we don't know where it  
9           got paid at, that will help.

10           MR. ALBAUGH: I would actually believe that this  
11           number may represent what you are asking for. Is that  
12           true?

13           MR. POTTER: Yes.

14           MR. ALBAUGH: What he had said previously.

15           MR. MOELLER: Okay.

16           MR. ALBAUGH: They had paid for 111 square meters  
17           previously.

18           MR. MOELLER: Very good.

19           MR. ALBAUGH: We can go through and do some  
20           calculations to determine what that difference is.  
21           Just one real quick question. What was the condition  
22           of the asphalt slope prior to construction? Had it  
23           been there five years, ten years, 20 years?

24           MR. POTTER: It had probably been there for at  
25           least ten years. That was one of the reasons we didn't

1 want people down there on that particular slope. It  
2 was not a matter of construction debris when they're  
3 digging, it just happened to fall down the slope. It  
4 was actually their equipment down on that area that  
5 damaged the slope.

6 MR. ALBAUGH: Okay. That's all I have.

7 CHAIRMAN NUTBROWN: Okay. The next issue being  
8 the stop work order.

9 MR. MOELLER: Jack, this issue is regarding the  
10 idling of our equipment on site, idling of our  
11 personnel and the idling of our asphalt plant and  
12 paving operations.

13 We had significant rainfalls in the middle of the  
14 month. Would you like to wait for Jack to come back?

15 CHAIRMAN NUTBROWN: Let's go ahead and move  
16 slowly.

17 MR. MOELLER: For a five-day period, Bob Myrick  
18 was on site actually directing much of the work at that  
19 time. He was not on the job for the duration but was,  
20 in fact, on the job for this time. The rainfalls were  
21 very significant. The rainfalls were very erosive.

22 Job was sand from one end to the other, not a  
23 cohesive material on this job. As a result there was a  
24 significant amount of erosion control and work needed.

25 Sandco placed crews comprised from four to 20

1 personnel on those activities.

2 On the 19th, five days later, a DOT personnel  
3 I believe assigned to this type of matter, being  
4 erosion control, sedimentation controls, visited the  
5 project, wrote a memo to project personnel, and Metric  
6 issued a stop work order.

7 The result was the idling of all of our  
8 activities, other than those erosion controls and work  
9 that was ongoing.

10 The Department's own records show that we were  
11 actively engaged in the process. The stop work was  
12 unforeseen. The idling of the equipment was  
13 unforeseen. That is what we were asking for under this  
14 item.

15 I will defer to Bob for any specifics or details  
16 he would like to offer because he was there firsthand.

17 MR. MYRICK: Well, actually, it was some  
18 substantial damage to the project because of the rains.  
19 I can't find it here in my package, but the letter from  
20 Metric, the erosion control man, for lack of a better  
21 word, details that.

22 This is our contention. It was an unusual event.  
23 We got quite excessive rainfall. It caused a great  
24 deal of damage to the project.

25 We put people to work on it. We were, in fact,

1 working to correct our erosion controls.

2 I believe the letter is dated the 17th, but it  
3 was actually received by us on the 19th. And within  
4 one hour of that time we were issued a stop work order.  
5 That's unreasonable.

6 We didn't have a chance to do anything. We had  
7 been, in fact, out there working. We didn't have a  
8 chance to mobilize any extra forces if they saw that  
9 that was necessary.

10 They just walked up, said here is a letter,  
11 correct this, stop work. That's basically the way it  
12 happened. We felt like we should have been able to  
13 continue paving as we worked on erosion controls.

14 For about a four-day period there, we stopped  
15 work entirely except for erosion control and then were  
16 allowed to resume.

17 CHAIRMAN NUTBROWN: Okay. Steve?

18 MR. POTTER: There were rains that began in  
19 like -- on April 9 during this period. The contractor  
20 did not begin any type of -- there were severe rains  
21 that caused severe erosion.

22 Mr. Myrick did write a letter that was contained  
23 in, I think Tab 3-F, which acknowledges that rain and  
24 the severe erosion. In fact, he was requesting  
25 recovery days to make sure the Department gave him

1 recovery days in order to correct those erosion control  
2 issues.

3 They did not begin any of this putting people to  
4 work on this until after the 15th. The 15th, on the  
5 15th the Department notified them and told them that  
6 they needed to begin work correcting these issues, the  
7 erosion control issues.

8 There is a -- under 3-E there is a copy of the  
9 daily diary. I believe it's 3-E for the 15th that  
10 documents that. They were directed to do cleanup,  
11 erosion control cleanup.

12 The 16th, after all the rain had started, causing  
13 these issues.

14 The permits require the contractor to address  
15 these issues immediately. When they discover there are  
16 erosion control problems and the features have failed,  
17 they need to be corrected as soon as possible.

18 The time had passed where the contractor had not  
19 put any effort into correcting these issues. Their own  
20 erosion control plan states that they will correct  
21 these issues.

22 Their erosion control plans are under Tab 3-D.  
23 On the second page of that plan it says any erosion  
24 control devices not found to be properly working will  
25 be immediately repaired to make sure the sediment is



1 contained on the project.

2 The fact of the matter was that prior to the  
3 contractor beginning any efforts to repair the erosion  
4 controls, they were in violation of our permit  
5 requirements. They had left the project limits. There  
6 was no effort being done in order to correct that until  
7 they were told on the 15th to begin.

8 Once they were told on the 15th, they put a crew  
9 of approximately four people to work on that issue,  
10 while they continued to work on production items, such  
11 as culvert installations and curb and gutter and  
12 asphalt, while they were getting recovery days to  
13 repair erosion control issues.

14 After a period of time when we gave them a period  
15 of time to step up their efforts to repair the erosion  
16 control items on the project, they were not making any  
17 progress. That's why we issued the stop work order.

18 When they said they had between four to 20 people  
19 working on erosion control, the 20 is only after we  
20 issued the stop work order. Then they put a  
21 significant effort into repairing the erosion control  
22 issues.

23 Until then they were only making a token effort  
24 out there. They were not making any progress. We were  
25 in violation of our permit requirements. They were in

1 violation of their own erosion control plan.

2 That was the reason for issuing the stop work  
3 order, to make sure that the Department didn't get into  
4 any issues with the Department of Environmental  
5 Protection, and maintained the conditions of their  
6 permit.

7 MR. MYRICK: If I might. The rainfall didn't  
8 just occur on the 9th. I believe you've got the  
9 dailies there. It shows that it was for that entire  
10 week.

11 If you will notice, the 15th is a Monday. We  
12 came back to work on Monday. We didn't just sit on  
13 this thing from the 9th to the 15th.

14 I guess we did sit on it because the rain  
15 continued to fall. Let me clarify that. We didn't  
16 just go back to production items and completely ignore  
17 it. We were still in a situation of heavy rainfall for  
18 all that week.

19 We did have more people than four on it.  
20 Probably that first day or two we might not have  
21 realized the magnitude ourselves. I'm not sure without  
22 pulling out the records myself, how many people we had  
23 on the 15th working on it.

24 We did immediately put people to work on the  
25 erosion control. We were making some substantial

1 progress.

2 The erosion control plan the contractor  
3 submitted requires -- their plan required them to  
4 monitor after -- within 24 hours of a one-inch  
5 rainfall.

6 MR. POTTER: We did have some heavy rains. The  
7 contractor requested to recover because of the heavy  
8 rains.

9 Whether it be on a weekend or not, according to  
10 the plans and the permit requirement, mandated by the  
11 Florida Department of Environmental Protection, those  
12 things had to be checked and corrected after those  
13 rainfall events. They don't go by -- they have to  
14 monitor through the weekends if they aren't even  
15 working.

16 MR. ALBAUGH: Is the weekend an issue here? I'm  
17 looking at one of the diaries here for Sunday the 14th.  
18 You were out there milling and placing asphalt, you  
19 were working. It shouldn't really be an issue one way  
20 or the other whether these erosion control efforts were  
21 underway on the weekend. You were out there working.

22 I would understand that if you weren't working  
23 you could say you didn't know. Obviously if you were  
24 working efforts should have been made to correct at  
25 least at a minimum there.

1 MR. MOELLER: The rain that caused so much damage  
2 fell on the 9th, did I understand?

3 MR. MYRICK: I'm not sure exactly which date was  
4 the worst.

5 MR. MOELLER: I'm saying the 9th, 10th and 13th.

6 MR. GHAZVINI: I need to add something. These  
7 things do not happen in a vacuum on a job site. You  
8 have a day-to-day relationship with the inspectors.  
9 Obviously on the 15th when that memo was wrote in the  
10 daily report, the inspector did not say nothing is  
11 happening, these guys are not paying attention, he is  
12 doing his job. He said I told them to fix the problem.  
13 He is doing his job.

14 We had started working, too. Now, it may be a  
15 matter of different opinions as to what magnitude of  
16 force we need out there. Well, this can also result in  
17 us looking at it or through the Department looking at  
18 it, but obviously there has been a communication on the  
19 job site among us and the inspectors.

20 No one thought we were being irresponsible or  
21 anything like that. We have been responsive. We have  
22 added forces out there. Yet there is no indication at  
23 this time that we have not done or done the work as we  
24 need to.

25 Here comes somebody else whose job is erosion

1 control for the CEI. That's all he does. He comes  
2 through and he starts firing this out, you are not  
3 doing your job, the engineer of the CEI.

4 He gets nervous or he wants to respond to that.  
5 He shows his fist, iron fist to the contractor. That  
6 is what has happened in the field. We are going to  
7 stop you without giving you any chance to correct the  
8 problem.

9 Gentlemen, you don't take a grader operator and  
10 ask him to fix a silt fence. All you are doing is  
11 stopping the project. By stopping the guy running the  
12 milling machine, you are not adding to the forces of  
13 the erosion control people.

14 I don't see any notes here that after the 15th  
15 that says you are not doing a good job.

16 We have added to the forces ourselves. It was  
17 not warned to stop us from working and having all our  
18 equipment idle. It was not that you needed to get our  
19 attention. It was not that we were not working on it.

20 It was something you decided you want to do for  
21 whatever reason and as a result we got damaged. We  
22 were responding to the problems. Yes, it was an  
23 enormous rain. I think everybody agrees with that.

24 In looking at it, some of his response is it was  
25 excessive. This is a 16-mile road. It's an extensive,

1 you know, section of the road. Yes, it's going to take  
2 a few days to get all the problems fixed. It is a  
3 sandy area, also. That is correct.

4 So, can we fix everything in one day? Well, yes,  
5 if you bring maybe 100 or 200 people from all over in.  
6 Is it practical? Can it happen on the spur of the  
7 moment?

8 Frankly, a lot of you are involved in the  
9 construction business. Your involvement -- DEP or  
10 anybody when they come to the project site, they also  
11 understand that we just had an enormous rain.

12 They are looking at your response. They are  
13 saying are you fixing the problem or are you not fixing  
14 the problem, are you just ignoring it. That is there,  
15 also. It is not that they come on the job and just  
16 because there's erosion they stop everything.

17 Again, you know, the main issue that we have is  
18 this stop work order was not warranted. It did not  
19 help to resolve that problem. It hurt us. It cost us  
20 money. This is to me the -- the Department abused this  
21 power. It was not warranted.

22 MR. MOELLER: I would add this. When Si Chance,  
23 the erosion or environmental control specialist that  
24 works for Metric Engineering, he makes suggestions --  
25 he's making suggestions of issues that need to be dealt

1 with. There's nothing in his entire three-page review  
2 of the entire project that says this job needs to be  
3 shut down, that anything was of that nature whatsoever.

4 In fact, he's making suggestions in some  
5 instances that the restorations are deficient. He  
6 wants to see some additional items. He does it very  
7 constructively. Such a document would be a great thing  
8 to be able to give our people. We have station boards  
9 all the way up and down, and have him address those  
10 individual items as well.

11 There is nowhere in here that the environmental  
12 specialist says this job needs to be shut down.

13 MR. MYRICK: The thing is we do have an  
14 obligation to maintain environmental controls. That's  
15 part of the contract. Really, basically it's obvious  
16 to anybody. If you are out there disturbing the soil,  
17 you've got to do something to protect the environment.

18 If this is only a couple of days after the  
19 occurrence of the rainfall and so forth, and if there's  
20 so much damage, you know, that it warrants closure of a  
21 project, then really it ought to be considered -- it  
22 could probably be defined as the book defines it, as a  
23 catastrophic event, in which case we could ask for  
24 payment anyway. That's our contention.

25 There wasn't enough here to stop the job. If the

1 Department felt like there was, then they should pay us  
2 for it.

3 We had a huge amount of equipment and men and an  
4 asphalt plant, everything idled by this. That's all we  
5 are asking for is to be paid for that.

6 CHAIRMAN NUTBROWN: Anything else, Steve?

7 MR. POTTER: The permit requirement, again in the  
8 contractor's erosion control plan required them to  
9 address these issues immediately or within a certain  
10 volume of rainfall. A certain volume of water falls,  
11 then they are supposed to address it.

12 The Department's contention is they did not  
13 address it. They had to be reminded to begin doing it  
14 on the 15th.

15 When this did start, they did it with an  
16 insufficient number of people. Then they began to work  
17 on other production items to pull those people off of  
18 the erosion control restorations, to work on the  
19 production items, at the same time they are receiving  
20 the recovery days, to restore those erosion control  
21 issues.

22 Mr. Chance's memo documents failures of the  
23 erosion control features for this project. Some of  
24 them indicate severe erosion and safety issues that  
25 needed to be addressed. So, it was a serious problem.



1           The Department felt as if the contractor wasn't  
2           putting a significant amount of effort to that issue to  
3           correct these things, and was concentrating more on  
4           getting production issues done instead of correcting  
5           what was considered to be a serious problem, in  
6           violation of permit issues.

7           I'm the one that asks of Mr. Chance whether or  
8           not when he sent this report he felt we were in  
9           violation of our permit. He had indicated to me that  
10          they were. That they needed -- the contractor needed  
11          to put additional folks on that particular issue to  
12          resolve that so we wouldn't be, you know, found in  
13          violation.

14          We needed to make an attempt, a significant  
15          attempt to get this corrected or we could have been in  
16          trouble with the Department of Environmental Protection  
17          Agency. The fact is the contractor wasn't putting that  
18          effort forward.

19          MR. NORTON: Steve, are these all of the daily  
20          reports or are there others? You've got a daily report  
21          for 4-15. You just have one report here. Is that the  
22          only one you had on this job, or were there other  
23          inspectors who had daily reports, also?

24          The reason I ask, there are about -- I counted 40  
25          people on the payroll on this project. You are only

1 showing 18 or 19 on this daily report.

2 MR. POTTER: Apparently if there is another  
3 contractor, there would be a report for each  
4 subcontractor. If this is what Sandco had out there --

5 MR. NORTON: That's it for Sandco?

6 MR. POTTER: Yes.

7 MR. NORTON: A question to Sandco. Is that 40  
8 people on your project about right? I count that from  
9 the time sheets you gave us.

10 MR. MYRICK: I would say probably, yes, sir.

11 MR. NORTON: The time sheets here under your  
12 Tab 4, there are a bunch of time sheets. I counted --  
13 looks like somebody had colored them in. I counted  
14 about 40 people colored in there.

15 MR. MOELLER: When they are coded to this job,  
16 they are on this job. They code -- we refer to this  
17 job as 12-01. Those people are on this job.

18 MR. NORTON: All right. So, when the inspector's  
19 daily report shows 19 people working on the project --  
20 I don't have a daily time sheet for the 15th, for  
21 instance. Would there -- would 19 be right or did you  
22 have a lot more? All -- these all started on 4-22.

23 MR. ALBAUGH: Maybe because the 15th is a Sunday  
24 they had less people out there.

25 MR. NORTON: That's a Monday.

1           MR. MYRICK: Really, I hadn't noticed that  
2 before. I don't know how to respond to that. We feel  
3 like we kept good time sheets, good, accurate records.  
4 What our sheets show are the people that were there.

5           MR. NORTON: I am sure of that. I just don't see  
6 anything for the time period we are talking about here.  
7 They are all from the 22nd on.

8           MR. MYRICK: I hadn't really noticed the  
9 difference in the inspection report and our report  
10 before, just hadn't investigated it. I don't know what  
11 is going on.

12           MR. MOELLER: We could provide a supplement of  
13 our certified payroll. It's all turned in to the  
14 Department. We could provide a copy to Mr. Potter and  
15 a copy to the Board simultaneously, and it would be an  
16 exact duplication of the certified payroll that we were  
17 required to send.

18           MR. NORTON: I notice you have a job cost code  
19 here. Is there one that's erosion control? A lot of  
20 these are 2-10, 4-13. Is that erosion control or do  
21 you know?

22           MR. MOELLER: These are largely tied to the  
23 individual pay items. Our cost code is a mirror image  
24 of the pay item in the contract.

25           MR. NORTON: Okay.

1 MR. ALBAUGH: There are some time sheets in here  
2 with 4-15. If you go back to the next set, three or  
3 four pages back, you can see another set that starts  
4 with 4-15 to 4-21. So, you can pick off how many would  
5 have been there on the 15th, as an example.

6 MR. NORTON: Yes, there's some for the 15th.  
7 I get 22 on the 15th.

8 MR. ALBAUGH: Yes, about the same number. So, we  
9 are a lot closer with 19 and 22 versus 19 and 40. That  
10 was a big difference.

11 MR. NORTON: I was trying to figure if maybe that  
12 difference was who was working on erosion control.

13 CHAIRMAN NUTBROWN: I don't think that's a  
14 possibility unless you can go back and hunt it up by  
15 item.

16 MR. NORTON: You can't tell from the job cost  
17 coding how many it is.

18 CHAIRMAN NUTBROWN: Are there any further  
19 questions relating to this item by the Board? Okay.  
20 We will move on to item 5, which is the sod.

21 MR. MOELLER: On this item, gentlemen, we talked  
22 a lot about the sand and erosion on this site and the  
23 need for restoration of the site.

24 Sandco and the Department have disagreed on this  
25 item. I think as to whether or not sod was needed as

1           opposed necessarily to whether or not it was provided.

2                     In the back of our package under Tabs 6-2 and 5-3  
3 all of our quantities of sod are documented. These are  
4 the individual invoices from two vendors.

5                     We have -- my invoices tell me under -- I'm  
6 looking for a summary page. If you will bear with me a  
7 second.

8                     Under my Tab 6-2 in the appendix of my booklet,  
9 if you will flip two pages behind that, there is a  
10 summary page of the materials being delivered to the  
11 job by S and K Turf.

12                    This material was being placed by Sandco's crews  
13 in an effort to restore the entire project from the  
14 rains that we were just talking about and comply with  
15 the sod barriers for the project.

16                    We had simultaneously S and K Turf placing 37,000  
17 square meters while Sandco's crews placed -- and I will  
18 have to do the math for you, but each of these is a  
19 semi load.

20                    I am shooting in the dark, 25 to 30 semi loads of  
21 sod that were delivered in the first week of May.

22                    I don't think there's any dispute as to whether  
23 or not the material was placed. I have not heard one.  
24 It's just that we are talking about five acres of sod  
25 that was placed by Sandco.

1 Sandco contends that the Department came to the  
2 location where all of this sod was going down along the  
3 highway. After the sod was placed, they said we are  
4 not going to pay for that.

5 I haven't heard any argument about whether or not  
6 it was placed.

7 We contend that if the Department did not want to  
8 sod particular areas of this significant erosion, that  
9 that was sufficient enough to stop the job, that better  
10 direction could have been offered.

11 Sandco employed serious remedies to what the  
12 Department was documenting as being serious problems so  
13 that it wouldn't happen again, so that wouldn't occur  
14 again, in a condition that was highly erosive.

15 With that we feel the contract provides for  
16 payment per square meter of sod. We have placed the  
17 sod. We don't believe there is an argument as to  
18 whether or not we placed it. We would ask that you  
19 recommend the Department compensate us for the work we  
20 performed.

21 MR. GHAZVINI: I have something to add. Me and  
22 Bob were both present. We personally were involved in  
23 this one issue. This particular issue I was involved.

24 We go to the engineer of the job, Melvin Rose and  
25 John Reynolds, who was their project inspector, head

1 inspector.

2 There were several areas that previously had been  
3 seeded and mulched because of the excessive rains kept  
4 eroding. We showed it to them. They agreed, they  
5 agreed sod quantities can run over, it happens, it is  
6 not an issue.

7 We brought a crew from Tallahassee that did  
8 nothing but install this sod. On a daily basis, a  
9 daily basis we got with John Reynolds, who was the head  
10 inspector on the job. We got his consent, here is the  
11 area.

12 This is what they told us, the areas of necessity  
13 will be sodded, the areas have got to be stabilized.  
14 On a daily basis we got their consent to lay the sod.

15 Evidently the DOT project manager had complained  
16 to them, and that was what triggered all this. Like we  
17 paid for sod outside of the areas other than the plans  
18 show.

19 It has nothing to do -- the Department contends  
20 that we took the dirt from the shoulders and all that  
21 because we did not intend to haul borrow in there. I'm  
22 not arguing with that. This is not the reason.

23 They have used that argument to not pay us for  
24 seed and mulch. They said we are not going to pay you  
25 that. You have disturbed those areas at your own

1           desire, so we are not going to pay you for extra seed  
2           and mulch for those areas. We have foregone that.

3                     We have paid extra money. Instead of the regular  
4           seeding and mulching, we have paid extra money for the  
5           subcontractor to use the hardy seeding. A lot of the  
6           areas were hardy seeded. We thought that is an extra  
7           measure to help.

8                     This is a very sandy area. The shoulders are  
9           sandy.

10                    This is just pure as a result of the Department  
11           directing us to do this work.

12                    I have no doubt about this item. I was there  
13           myself. We discussed it with them. It came back after  
14           the fact. They have said they will not pay for this.

15                    It is very bad business on our part. I don't  
16           know, but when you are in the process of working with  
17           somebody, you call each other partners, we were  
18           partners. I don't think we should be treated like  
19           this.

20                    I think that is something that obviously they  
21           asked us to do. We did it. It was not done for our  
22           own convenience. It was done for all the measures that  
23           Steve was talking about.

24                    The project was in danger of being shut down.  
25           The project was in danger of being in violation.



1           We put this sod in with their consent with a  
2           daily notice. I would have a hard time saying we put  
3           all that sod down at our discretion. We are not  
4           stupid. We would not just keep laying sod to the tune  
5           of \$30,000 or \$40,000, and then the Department also  
6           said, no problem, do this, that's fine.

7           This is not the way things happened. It was  
8           really their concern. We brought it to their  
9           attention. They agreed with it. We proceeded. They  
10          decided at the end not to pay for it.

11          MR. MYRICK: If I can add one more thing. The  
12          CEI had about four inspectors on the job daily. Not  
13          one ever said, hey, you guys are placing sod in areas  
14          that don't need sod. We laid, I don't know how many  
15          truck loads of sod out there.

16          Steve and myself were up one day for some little  
17          informal meeting there under a shade tree in Wausau,  
18          and the project engineer Melvin says, hey, we are not  
19          going to pay for all that sod you guys are putting in.  
20          That is contrary to what the index shows. It just  
21          floored us. It's just like we took it on our own,  
22          which we did not.

23          I mean I even made the comment to him, we didn't  
24          sneak out there in the dark and do this. You had  
25          people here on the job.

1           We just feel like the whole thing was just  
2 completely unjustified.

3           CHAIRMAN NUTBROWN: If I understand this  
4 correctly, Sandco states that they installed 79,067.3  
5 square meters.

6           MR. MOELLER: Yes.

7           CHAIRMAN NUTBROWN: The Department says 58,276  
8 according to the sheet, is that right?

9           MR. POTTER: That's correct.

10          CHAIRMAN NUTBROWN: What is the unit price per  
11 sod?

12          MR. MOELLER: Typically about two bucks.

13          MR. POTTER: \$2.05.

14          CHAIRMAN NUTBROWN: Okay. Steve, it's your turn.

15          MR. POTTER: You have to understand how the  
16 contractor approached this project as far as the  
17 earthwork portion of it. His bid, as you can see in  
18 Tab 4-A, for excavation, borrow is at a penny per cubic  
19 meter. He's got very little money put in there.

20                 Essentially what the contractor did was to --  
21 when he went out there to work, he essentially mined  
22 the right-of-way to gather material to build up his  
23 shoulders, outside the limits of construction that were  
24 shown in the plans.

25                 He was -- under Tab 2-B, there is a copy of a

1 daily report of construction. In the last sentence,  
2 "Advised the contractor of shoulder dressing operations  
3 going outside limits of construction requiring the area  
4 to be grassed at no expense to the Department."

5 He was warned.

6 MR. NORTON: Where?

7 MR. POTTER: Tab 2-B -- i'm sorry, 4-B.

8 MR. MOELLER: What is the date of that?

9 MR. POTTER: The date of it is 2-11.

10 CHAIRMAN NUTBROWN: It's ahead of that. That  
11 time sheet right there that you have, what day is it?

12 MR. MOELLER: 2-11. That's a daily report.

13 CHAIRMAN NUTBROWN: The one I have here is dated  
14 day 178.

15 MR. MOELLER: This is 198.

16 MR. NORTON: 198.

17 CHAIRMAN NUTBROWN: 198.

18 MR. POTTER: That is the one I am referring to.  
19 The last sentence in the notes indicate that they were  
20 told that they would not be paid for that type of  
21 operation.

22 They are doing it outside the construction  
23 limits. They disturbed the soils out there. The  
24 Department already had established grass. They were  
25 not going to be compensated for going outside

1 construction limits.

2 Like I said, they did this in order to avoid  
3 having to haul in borrow material to -- for that  
4 project.

5 The estimate for borrow material, they were  
6 approximately 10,000 cubic yards shy of the plan  
7 quantity is the way the final estimate was produced.

8 They had to get that material from somewhere.  
9 They got it outside the construction limits. The  
10 Department does not feel like they should compensate  
11 the contractor for going outside the construction  
12 limits in order to mine material to avoid the expense  
13 of bringing in material to the project.

14 As a matter of fact, Section 9-1.4, which is  
15 under Tab 4-F, states that the engineer will not pay  
16 for surface over or greater than authorized or for  
17 material that the contractor has to move from outside  
18 the substation except as providing for written  
19 construction.

20 He had been advised not to do it. The difference  
21 in the sod that Sandco claims was placed and the sod  
22 that we have paid for was in those areas where they  
23 disturbed beyond the construction limits that was not  
24 necessary.

25 The Department did pay for additional sod to the

1           tune of approximately 17,000 additional square meters  
2           over and above the plan quantity. Those were in the  
3           areas where Mr. Ghazvini has stated that it was  
4           determined that it was necessary to prevent erosion.

5           Some of that erosion was caused by them going  
6           outside the construction limits in their grounding  
7           areas that were not necessary or were not called for  
8           under the plans.

9           MR. MYRICK: Are you finished? If I might,  
10          I just have to disagree with Steve's position there.  
11          We don't have any quarrel with his observation on the  
12          earthwork. We seeded and mulched those areas at our  
13          own expense as the daily diary noted that we would be  
14          required to. We did not place sod in other areas.

15          This issue over the sod is not over areas outside  
16          the construction limits. There are areas within the  
17          front slope of the project inside the construction  
18          limits.

19          MR. POTTER: Under Section 4-C of the  
20          Department's response, it lists the areas that -- the  
21          measurements, the measurements for the sod.

22          Mr. Myrick contends it was on the front slopes  
23          and areas that were inside the construction limits. He  
24          doesn't give us any measurements to back up that  
25          contention nor does he state where that sod was placed

1 or anything else.

2 MR. GHAZVINI: Steve, we feel like that is the  
3 Department's job to measure, not ours. We were  
4 directed to do the work. Usually contractors do not go  
5 measure and document where there is sod or other pay  
6 items left. This is what the Department does. The  
7 Department elected not to measure those.

8 It is -- you were not on the job. I'm sorry,  
9 I absolutely beg to differ with you. This is -- your  
10 statement is absolutely not true, absolutely not true.  
11 The areas that were disturbed were outside the limit of  
12 construction. Like Bob said, we don't have no  
13 complaint about that.

14 We paid for several thousands of seed and mulch  
15 additional above and beyond what the Department has  
16 paid because, you know, that was our cost.

17 Not a single pallet of this sod went into any  
18 areas that the Department did not approve and did not  
19 tell us in the field to go ahead and put in.

20 We did not put this sod on any areas that we  
21 elected to put on. We didn't go sod the slopes and say  
22 this is an area that needs sod.

23 The Department told us every day on a daily  
24 basis. We have the crew foreman that came from  
25 Tallahassee. His job on a daily basis was to get with

1 John Reynolds for him to authorize the areas. He  
2 absolutely did that every day.

3 If he needs to come in here and get under oath  
4 and swear that's what he did, he's willing to do that.  
5 He has done that. I have asked him specifically on a  
6 daily basis.

7 This sod was in some of the ditches that the plan  
8 did not call for. It was like in the slopes, seed and  
9 mulch. It had nothing to do with the areas that we  
10 disturbed that was not in the contract.

11 We paid for that. We absolutely paid for that.  
12 That was, I think, some of the things you have  
13 mentioned.

14 These were in the areas that John Reynolds  
15 directed us to put them in.

16 CHAIRMAN NUTBROWN: Does the Board have any  
17 questions?

18 MR. ALBAUGH: No.

19 CHAIRMAN NUTBROWN: Jack?

20 MR. NORTON: No, sir.

21 CHAIRMAN NUTBROWN: Okay. Water for the  
22 grassing. Before we even get started, I notice there's  
23 a bill in here from the City of Wausau. I guess I'm  
24 pronouncing that correctly. I found the bill to be  
25 very strange in the way it was presented, to the fact

1 that there were so many gallons at the well head and so  
2 forth and so on. All of a sudden there is a difference  
3 for which the contractor was billed.

4 Was there no meter on the job site?

5 MR. MOELLER: There is no meter on the job site.  
6 We agreed going into the project that we would utilize  
7 the meter provided by the City of Wausau. We ran an  
8 allocation of 20 percent to our paving, nongrassing and  
9 mulching operations.

10 The Department has taken a position contrary to  
11 that, that 20 percent is not the right number.

12 There is no other record other than the City of  
13 Wausau's meter, and our reliance upon that is a -- is  
14 really cut and dried in the presentation of 20 percent  
15 allowance for rollers and other items. The issue is  
16 really that simple.

17 CHAIRMAN NUTBROWN: Okay, Steve.

18 MR. POTTER: The contractor is relying on what  
19 the City of Wausau billed them for use as the basis of  
20 his claim.

21 The Department paid for water that was used for  
22 grassing based upon truck loads that were actually  
23 applied to the grassing items.

24 Section 5-B lists the daily log sheets that  
25 document the water that was used and paid for.



1           Section 5-A -- under 5-A it gives the section of  
2           the specifications that indicates how water is to be  
3           paid for and will be documented.

4           It states that the quantity of water ordered will  
5           be applied and which is actually used is to be  
6           determined by a metering device or a tank. They will  
7           be paid for kiloliters of water and such device should  
8           include all water authorized by the engineer used at  
9           the time of the work.

10           We previously mentioned water sheets indicate  
11           that the number of truck loads and the volume of the  
12           truck was 7.65 kiloliters. That's what they  
13           established and agreed on.

14           So, there was water that was used by the  
15           contractor on other aspects of this projects that were  
16           not used for water for grassing, which may account for  
17           what his difference is.

18           The specifications states how water should be  
19           paid for. Our Department documented the water that was  
20           used on the project. The contractor has not supplied  
21           any other information that indicates that difference  
22           was actually used for water for grassing.

23           So, we don't believe the contractor is due any  
24           additional compensation over and above what was paid  
25           for.

1 MR. ALBAUGH: How much did the Department pay for  
2 this? Do you have that number?

3 MR. POTTER: They paid 3,106 kiloliters.

4 CHAIRMAN NUTBROWN: What was that again?

5 MR. POTTER: 3,106.

6 MR. ALBAUGH: Kiloliters.

7 MR. MOELLER: I show a different number. I show  
8 2501.

9 MR. POTTER: That's probably an estimate number  
10 13. I went back and readjusted it based upon your  
11 first qualified acceptance letter. You asked us to  
12 look at it. We did. We found there was an additional  
13 605 kiloliters over and we paid that under estimate 14.

14 CHAIRMAN NUTBROWN: Does anybody off the top of  
15 their head know what a --

16 MR. ALBAUGH: What a kiloliter is?

17 CHAIRMAN NUTBROWN: Compared to a gallon.

18 MR. ALBAUGH: The kilo is going to mean a  
19 liter -- roughly four to one, four liters to one  
20 gallon.

21 CHAIRMAN NUTBROWN: That part I don't have a  
22 problem with.

23 MR. ALBAUGH: They paid 3,106,000 liters. So, if  
24 you divide that by four, it's roughly 800,000 gallons.

25 MR. NORTON: Imperial gallons.

1           CHAIRMAN NUTBROWN: They paid for that much and  
2 Sandco alleges that roughly 20 percent of that was used  
3 for other purposes?

4           MR. MOELLER: Our contention is that the  
5 quantity --

6           CHAIRMAN NUTBROWN: You say you reduce it by 20  
7 percent for other uses.

8           MR. ALBAUGH: That was the quantity they were  
9 billed.

10          CHAIRMAN NUTBROWN: I understand. You have been  
11 billed for 948,000 gallons, roughly 20 percent of that  
12 is a little over 108. I don't see a lot of difference.

13          MR. ALBAUGH: I'm not sure I have the final  
14 invoice there. I don't know.

15          MR. MOELLER: Our contention is 9124 kiloliters.

16          MR. NORTON: That you haven't been paid for?

17          MR. MOELLER: That is a total. You reduce the  
18 3106 and the remainder would be the dispute.

19          MR. ALBAUGH: So, they have approximately three  
20 times the Department paid for. They are a little over  
21 9,000, the Department paid a little over 3,000. So,  
22 they are three times what --

23          CHAIRMAN NUTBROWN: I see.

24          MR. MOELLER: 6,018 kiloliters is the dispute.

25          MR. ALBAUGH: 16,000?

1 MR. MOELLER: 6,018.

2 MR. NORTON: Is the 9124 after you have taken the  
3 20 percent?

4 MR. MOELLER: Yes, it is.

5 MR. NORTON: Okay.

6 MR. ALBAUGH: That one you were looking at was a  
7 monthly invoice.

8 CHAIRMAN NUTBROWN: I see it. That is a monthly  
9 invoice. Okay.

10 MR. GHAZVINI: You get your quantities from this  
11 log? There are no other items other than these logs,  
12 right, Steve?

13 MR. POTTER: I haven't totaled it up, but this is  
14 the documentation for what was used. The very last  
15 page you will see a footnote at the bottom, 3105.9.

16 MR. MOELLER: That's the total.

17 MR. GHAZVINI: It appears to me that these are  
18 only for the days that the actual, what they call it,  
19 seeding and mulching operation was going on. That's  
20 the only time they had recorded any water there.  
21 That's when somebody was seeding, which it appears to  
22 me that's our subcontractor doing the work.

23 We can go through the daily logs. There are  
24 several days that the sod operation was going on, which  
25 took a whole lot more than this time frame that they

1 have been out there seeding and mulching.

2 We had done the watering ourselves because they  
3 did not have a tanker. Their bid to us was they were  
4 not going to be responsible, we were supposed to water  
5 the things.

6 MR. MOELLER: We watered our sod, they watered  
7 their sod. I think that's probably what it boils down  
8 to. I don't see -- every one of the tankers is that  
9 7.65 kiloliters. I don't see Sandco's tanker being  
10 recorded at all.

11 MR. GHAZVINI: I'm trying to count the days. I'm  
12 only counting ten days that you all have counted the  
13 water. That's it. This is in the summertime for 16  
14 miles of road.

15 MR. MYRICK: You are in a dry period.

16 MR. GHAZVINI: Sixteen miles of road has been  
17 sodded. All of that did not happen in one day. The  
18 sod did not happen -- everything else had to stop.  
19 They laid sod. Just on the surface it appears to me  
20 there's a lot of days -- this is to me very much  
21 related to the seeding and mulching operation.

22 It looks like the same day they counted the  
23 amount of the seed, they counted the amount of the  
24 fertilizer, then they also counted the amount of the  
25 water. Several other days to maintain the sod out

1           there, in those sandy soils, nothing has been counted  
2           to me.

3                   CHAIRMAN NUTBROWN: Did the Department only  
4           require one application of water on this thing, in the  
5           dry season?

6                   MR. GHAZVINI: No, sir, no, sir.

7                   MR. POTTER: They would have been -- if it were  
8           extremely dry, it would have been recommended that they  
9           apply additional applications. In April we had floods.

10                   CHAIRMAN NUTBROWN: As you got later in the job  
11           it got dryer because you got into the summer months.

12                   MR. POTTER: It may have.

13                   CHAIRMAN NUTBROWN: Would the dailies for the  
14           project show it?

15                   MR. POTTER: The dailies would show weather  
16           conditions.

17                   CHAIRMAN NUTBROWN: I'm saying would the dailies  
18           show if additional water was applied?

19                   MR. POTTER: I'm not --

20                   CHAIRMAN NUTBROWN: They should.

21                   MR. GHAZVINI: This is the first time we have  
22           seen these logs. On the daily logs they have never  
23           kept any record, on the daily logs of the project.  
24           This is the log I am assuming for seeding and mulching  
25           operations.

1           On the daily logs the inspectors kept on the job,  
2 they never mentioned one first load of water that was  
3 used on that job. There's not one single load.

4           We have asked the question. They have said that  
5 they have not kept the record.

6           The only record that is left is -- and we don't  
7 have the record ourselves, also.

8           MR. MOELLER: Other than the City meter.

9           MR. GHAZVINI: The City of Wausau is the only one  
10 who has kept a record and has billed us for it. We  
11 have done the best that we could. We have not used  
12 water for anything else other than, like Steve said,  
13 for milling operations and for paving operations, the  
14 rollers.

15           We have allocated 20 percent of that amount.  
16 This is -- what they have billed us is --

17           MR. MOELLER: 9124, plus the 20 percent. I'm  
18 sorry.

19           MR. GHAZVINI: What is that 20 percent?

20           MR. MOELLER: They billed us 3,012,000 gallons.

21           MR. GHAZVINI: Out of that we have allocated 20  
22 percent of that. That is 600,000 gallons to our paving  
23 operation for the rollers. That's a lot of work.

24           MR. POTTER: There were other applications of  
25 water use during the course of construction. The

1 paving in Wausau, they used water to cool the pavement,  
2 in order to speed up the work that was done there.  
3 It's not just the rollers, was not the only  
4 application.

5 MR. GHAZVINI: 600,000 gallons we have allocated  
6 and you are saying that's not enough?

7 MR. POTTER: I'm saying our records do not -- and  
8 your records do not reflect where that water went, but  
9 our records, we reported, indicate that the amount of  
10 gallons we have used for water and grassing.

11 CHAIRMAN NUTBROWN: Does the Board have any  
12 questions relating to this issue?

13 MR. NORTON: No.

14 CHAIRMAN NUTBROWN: You don't? Bill?

15 MR. ALBAUGH: Just a clarification. How many  
16 gallons did the City bill you for?

17 MR. MOELLER: 3,012,000.

18 CHAIRMAN NUTBROWN: It's in their -- 3,012,901.

19 The next item relates --

20 MR. GHAZVINI: John, I'm sorry. One item related  
21 to the previous grassing item. We have paid our  
22 subcontractors for quantities of 396,167 square meters  
23 of seeding and mulching.

24 CHAIRMAN NUTBROWN: Give me that quantity again.

25 MR. GHAZVINI: Rough numbers, right at 400,000



1 meters squared, 396,167. It is actually in our  
2 document to you, also.

3 We got paid from the Department for 111,999.  
4 So, we have paid four times more than what the  
5 Department has paid us to our subcontractor for the  
6 seeding and mulching. That's what I was saying.  
7 That's what we have paid. We have assumed that  
8 responsibility and bear the cost of that.

9 MR. ALBAUGH: Let me ask one real quick question  
10 on that water. The three million is the total for the  
11 City, you paid the City?

12 MR. MOELLER: Yes.

13 MR. ALBAUGH: If you take 20 percent off that  
14 which would drop you down to 2.4 million gallons. If  
15 you divide that by four -- this is the engineering in  
16 me -- that's roughly 600,000 gallons. Not gallons, but  
17 liters. You had indicated you're asking for 900,000.

18 MR. MOELLER: Bill, I would do this. The number  
19 we got from the City is what it is. It's clear and  
20 simple. If I made a mistake, because is it my math, if  
21 I made a mistake in transferring it from gallons to  
22 liters --

23 MR. MYRICK: A gallon is not equivalent to a  
24 liter.

25 CHAIRMAN NUTBROWN: A gallon is roughly four

1           liters or a little less than four liters.

2                   MR. MYRICK: You multiply by four.

3                   MR. GHAZVINI: If you have gallons, you have to  
4 multiply.

5                   MR. MOELLER: It certainly deserves to validate  
6 the equation. If there is a math error, it belongs to  
7 me. I don't believe there is. I certainly hope not.

8                   MR. ALBAUGH: Okay. I'm ready for the next item.

9                   CHAIRMAN NUTBROWN: The next issue is the  
10 extended work hours.

11                   MR. MOELLER: This issue is one that is found in  
12 the northern limit of the project and in the town of  
13 Wausau. It's one that you just cannot see until your  
14 surveyor sets your pins.

15                   In the cross sections that we submitted earlier,  
16 you cannot recognize that this condition exists from  
17 the cross section because it tells us -- and I'm  
18 looking at what is sheet 6 of the construction  
19 drawings.

20                   The point being is that it gives us an amount  
21 that we should expect to mill to adjust the roadway and  
22 put the structure in place that the Department is  
23 looking for.

24                   In the final coordination, and only after the  
25 surveyor has given us pins and grades that the milling

1 machine should run to do all of the project parties,  
2 I believe, recognize that we were milling as much as 12  
3 inches of material, completely through the asphalt,  
4 completely through the base and down into the sandy  
5 materials that underlie this whole job.

6 There are mandates in this project that tell us  
7 that we have to put the base down and get the first  
8 structural course down. It has to all happen in one  
9 day. Well, that's easy enough to do, and we are  
10 prepared and coordinated with that.

11 The problem lies in that you cannot leave this 10  
12 and 12-inch drop-off at the centerline.

13 Within the first seven or eight days that we were  
14 on this project, we brought this issue to the attention  
15 of the CEI. We had intended to conduct this end of the  
16 project at the very start of the job, and it was in  
17 that coordination that we recognized it.

18 We asked the Department for some sort of guidance  
19 as to how they would do this, and how you keep the  
20 cross streets open -- because it is right in the center  
21 of their little town there. The speeds are low. That  
22 wasn't a major issue.

23 However, nothing came up from anybody involved in  
24 the project as to how you would mill this material down  
25 through to the point that you have no base and get it

1 all put back in place in a single day's operation.

2 As a result, we are required to engage in  
3 extended work hours that at times included 24-hour  
4 operations. I believe we have guys who actually put in  
5 close to 36 straight hours without leaving this job as  
6 a result of what that centerline offset is in the  
7 drop-off that would have been left had the operation  
8 not been maintained continuously.

9 We are of the opinion, as we were down at the  
10 guardrail -- gravity wall, on the south end of the job,  
11 that a thorough examination of this centerline profile  
12 would have shown the design engineer that this offset  
13 couldn't be conducted, that 24-hour operations were  
14 mandatory.

15 We believe it's something you cannot be expected  
16 to see at the time of the bid. What we are asking for  
17 in our submittal is the overtime that we are required  
18 to pay, in addition to our normal operating hours of  
19 ten hours a day.

20 We are asking for the overtime that occurred  
21 during these extended hours. That's merely what the  
22 issue is. We are not asking for -- and allowable  
23 mark-ups on those items.

24 We are asking for compensation for the unforeseen  
25 extended hours necessary to make this portion of the

1 project work.

2 MR. ALBAUGH: In reading through this part, just  
3 help me to understand this. As you just said, you are  
4 asking for the extra overtime hours, like I read in  
5 your thing, normally they are ten-hour days.

6 You have shown anything in excess of ten hours  
7 for your people and what those rates would be.

8 The thing I'm not sure I understand is the  
9 equipment part of it, in that when you throw equipment  
10 costs in there, like your asphalt plant and rollers and  
11 stuff like that, they're compensated on a per ton  
12 basis.

13 I understand the additional overtime because you  
14 have to pay an additional cost beyond what you would  
15 normally pay those folks. So, that makes sense to me  
16 under what you're asking.

17 The additional equipment costs --

18 MR. MOELLER: Equipment is static.

19 MR. ALBAUGH: Equipment is static. If your plant  
20 is running ten hours and you have to run it 12 hours,  
21 you are putting out so many tons, you are getting paid  
22 for those tons. It's paying for that equipment.  
23 There's not an additional cost to you.

24 MR. MOELLER: I have to agree with you.

25 MR. ALBAUGH: There's not an additional cost

1 because you run longer hours on the equipment.

2 MR. MOELLER: The equipment is a static Blue Book  
3 rate.

4 MR. MYRICK: We are in agreement on that.

5 MR. MOELLER: Should not be in there.

6 MR. MYRICK: Got a little enthusiastic.

7 MR. ALBAUGH: Okay. Just trying to understand.

8 MR. MOELLER: My apology for allowing that to be  
9 in there.

10 MR. ALBAUGH: We are talking a five-day period?

11 MR. MYRICK: Yes. The main issue is the project  
12 could not be built, in spite of the note on the typical  
13 sections, that says don't mill out any more in one day  
14 than you can cover up in that same day.

15 Well, if you look further back in those hand-outs  
16 that I gave you, we were milling as much as 11 inches  
17 in some places, seven and a half, eight inches in one  
18 stretch.

19 If you fill it all the way back up with the base  
20 and structural course, you've still got a drop-off of  
21 three to six inches, which is contrary to the index.

22 So, we could not do it the way this says. We  
23 pointed that out early on. There was agreement on  
24 behalf of the Department and the CEI, yet nobody made  
25 any provisions to give us any MOT plans or anything.

1           We had to just get out there, tie up basically  
2           our whole work force on this thing and work until it  
3           got done.

4           MR. GHAZVINI: As for a detour through the town  
5           of Wausau, they laughed at us. This was a very little,  
6           small town.

7           MR. MOELLER: Their streets are really bad.

8           MR. MYRICK: Possum capital of the world. You  
9           need to be there.

10          MR. GHAZVINI: It was a hard situation. There  
11          was no way to get a detour. They are trying to fix a  
12          real steep crown in the road. They claim that boats  
13          were dragging when people were coming to get across.  
14          To fix the problem, again, they wanted this put back to  
15          the proper cross slope.

16          CHAIRMAN NUTBROWN: What you are saying then is  
17          when you came through and did one side of the roadway  
18          or 3.66 meters, plus or minus, wide, that at the center  
19          point you had a drop-off that was greater than what  
20          could be --

21          MR. MOELLER: Yes.

22          MR. GHAZVINI: In actuality, we would take shots.  
23          We didn't actually mill. We would provide the proper  
24          cross slope. We figured by doing that we would end up  
25          with a severe drop-off, which was not really accounted

1 for.

2 MR. MOELLER: The surveyor recognized it early,  
3 as quick as he was setting points. We were seeing the  
4 cuts.

5 CHAIRMAN NUTBROWN: All right, Steve.

6 MR. POTTER: The Department's contention is under  
7 6-8 you have a copy of the typical notes. Note number  
8 5 indicates that the contractor shall restrict milling  
9 operations such that any lane being milled shall be  
10 repaved in the same day with 88 kilometers per meter.

11 The type of operation here was not unforeseen.  
12 The amount, the length of the operation was up to the  
13 contractor to determine as to what he could get done in  
14 the same day, in the length of time he wished to work.

15 As far as the transition to that, they are  
16 maintaining that because of that situation that there  
17 was still a drop-off.

18 Note number 3 on that page says that the  
19 contractor will provide suitable transition between  
20 milled areas of varying thickness in order to create a  
21 reasonably smooth riding surface.

22 So, that note covers the issue between the  
23 difference between the -- their -- the layers of  
24 pavement that they are suggesting was a problem.

25 We believe that the maintenance of traffic plan



1 and the notes in the typical sections covered the  
2 issues. The contractor just chose to bite off more  
3 than he could chew, I guess, in one operation.

4 He could have limited the length of that  
5 operation in order to avoid having to work the overtime  
6 that he did.

7 CHAIRMAN NUTBROWN: Does the Board have any  
8 questions?

9 MR. MOELLER: Quick rebuttal if I can. When I go  
10 back to note number 3 that Mr. Potter mentions, it says  
11 that the contractor provides suitable transitions for  
12 the longitudinal riding surface. We are not making a  
13 point about longitudinal ride. We are talking about  
14 the lateral drop-off. Note number 3 would not apply to  
15 what we are talking about. What we are talking about  
16 is a drop-off at the centerline.

17 I point then to sheet 6, the typical section  
18 number four, which is the area we are working in. It  
19 tells us that we will mill existing asphalt pavement  
20 180 millimeters, six inches. What we wound up milling  
21 is 360.

22 The problem was that as the note number 5 points  
23 out, that we put the ABC-3 down and the Superpave in a  
24 single day's operation was inadequate to provide the  
25 lateral drop-off at centerline that is dictated by the

1 requirements of maintenance of traffic. So, we were  
2 caught by this number being short.

3 I would point out, too, I'm not asking for a  
4 nickel for the additional milling. You know, the  
5 engineering is there, we were supposed to be running.  
6 We are just asking for the effects of the additional  
7 overtime.

8 MR. MYRICK: The thing is if you look at -- they  
9 are telling you to place your ABC-3, which is four  
10 inches and an inch and a half of Superpave in that  
11 lane. Then you're milling seven and a half, eight, up  
12 to 11 inches deep. So, you've got a drop-off as much  
13 as five and a half inches.

14 The only way you can restrict this operation is  
15 to do both sides in one day.

16 So, you have a milling operation, several passes,  
17 at least three paving operations. Then you have to  
18 switch traffic, go over to the other side and do the  
19 same thing.

20 I mean how short a length are we going to  
21 restrict our work area, 50 feet? It's just not  
22 practical. And what would be the effect on the roadway  
23 itself if we did that? You would have a joint every 50  
24 feet. I bet you would have a real great road everybody  
25 would be proud of. It just was not practical.

1           MR. NORTON: Am I understanding this correctly,  
2           that your cross slope was greater on the old road so  
3           that when you put the new road in, this road comes up,  
4           and you get this kind of thing when you get a finished  
5           road over here (indicating)?

6           MR. MYRICK: Yes.

7           MR. GHAZVINI: In the town of Wausau they have an  
8           excessive crown on the road. That is something they  
9           have told us, that people when they were trying to  
10          cross the road with their boats and trailers, they drag  
11          in the middle of the crown.

12          CHAIRMAN NUTBROWN: That's important in Wausau.

13          MR. MYRICK: Yes, it is.

14          MR. GHAZVINI: That's what they were trying to  
15          fix. The point is it does not matter if we had even  
16          taken a ten-foot section, a five-foot section, a  
17          one-foot section and had done the work, we would still  
18          have had the drop-off, being that one side that was  
19          existing road versus the new side.

20                 I mean it did not matter how much we took. It  
21          was just the old side, the side that was milled never  
22          did come back to match the final destination.

23                 Anything more than three inches then required  
24          either some sort of measures. We couldn't put no taper  
25          out there to put traffic back on it.

1           CHAIRMAN NUTBROWN: Any other questions from the  
2 Board regarding this item? Okay. We are down to the  
3 regular excavation.

4           MR. MOELLER: Gentlemen, this item is an item  
5 that was given a lump-sum bid item. We bid \$25,000  
6 on the item. The summary of earthwork tells me on  
7 sheet 11 --

8           CHAIRMAN NUTBROWN: I don't think it's in there.  
9 I don't think they furnished that sheet.

10          MR. MOELLER: I apologize. I worked under the  
11 assumption that each party would have a set of plans.

12                   In that table, the top left.

13          MR. POTTER: It's also in your workbook, under  
14 7-B of the Department's.

15          CHAIRMAN NUTBROWN: 7-B? Okay. It's in the  
16 book, too.

17          MR. MOELLER: We have a plan quantity of 1937  
18 cubic meters of regular excavation to conduct on the  
19 project. We have a unit price of \$25,000 for that item  
20 of work. In our second page it's tabbed 8-1.

21                   We show a mathematical analysis of the area that  
22 is required by regular excavation. That is the length  
23 of the roadway -- and you can validate this from the  
24 typical sections that we have given you. Typical  
25 section number one where it goes underneath the

1 shoulder base. That's sheet four.

2 CHAIRMAN NUTBROWN: We don't have that.

3 MR. MOELLER: Sorry, guys. Right here. It is  
4 the area just outside the existing paved roadway. It's  
5 the shoulder widening, where the shoulder base is  
6 required.

7 We picked this material up with the milling  
8 machine loaded it directly into dump trucks, the length  
9 of the project up and down both sides of the roadway.

10 We defined the length of the project as 24,200,  
11 and the width is shown in the typical section.

12 The thickness is dictated by the Department, and  
13 they will tell us what they will pay us with respect to  
14 that thickness.

15 That generates a cubic meter total of 7474 cubic  
16 meters. We have merely divided the 1937 shown in the  
17 summary of earthwork. It comes to a multiplier of  
18 3.86.

19 One of those was our original unit price of  
20 25,000. So, the overrun is 2.86, supporting our  
21 request for an additional payment of 71,500.

22 CHAIRMAN NUTBROWN: Okay. Steve?

23 MR. POTTER: The formula that was used is we  
24 believe an error in Mr. Moeller's calculations in that  
25 this contract required a build-up of pavement of 70

1 millimeters on the existing pavement.

2 From that new surface level the -- you place  
3 adjacent to it the shoulder base, which would have been  
4 40 millimeters -- no, 100 millimeters, excuse me. 100  
5 millimeter depth.

6 The difference is only 30 millimeters of  
7 excavation, the bottom or the existing surface, prior  
8 to build-up.

9 So, you know, in using Mr. Moeller's  
10 calculations, in our response, you can see that using  
11 that 30 millimeter difference, which is the actual  
12 excavation of the existing pavement, you come up with  
13 a -- cubic yards of 2,270 cubic meters.

14 That is assuming that is excavation throughout  
15 both sides of the project, based on -- when in fact it  
16 wasn't excavation on both sides of the project.

17 Some of the areas were in the areas where you had  
18 superelevation and you had to build up the shoulder in  
19 order to place the base on top of it. You were  
20 actually putting fill material in before you could put  
21 the base material.

22 There was no excavation required in those areas.  
23 There was no excavation required at intersecting  
24 roadways where the shoulder went across the  
25 intersecting roadways.

1           Taking all that into consideration, if you look  
2 at all that, the plan quantity of 1937 square cubic  
3 meters we believe is accurate and reflects the work  
4 that was done. As a matter of fact, he may have gotten  
5 by with having to do less excavation.

6           The earthwork calculations done by the contractor  
7 is included in section -- not the contractor, the  
8 consultant -- are included in section 7-A of the  
9 Department's response, which indicates there's some  
10 areas that require fill and some areas that require  
11 excavation. That's how we arrived at his number.

12           You can see in the cross section of the plans it  
13 didn't supply all the cross sections, but you can see  
14 areas where fill is required in order to construct the  
15 base, the base material. Otherwise the base would be  
16 hanging out there in thin air.

17           We disagree with the thickness that Mr. Moeller  
18 has indicated in his calculations of excavation  
19 required. We don't believe the total length had to be  
20 excavated. We base that upon our calculations of  
21 reduced thickness. The plan quantity is within reason.

22           MR. GHAZVINI: The first thing to look at is both  
23 shoulders, regardless of fill, cut. You've got some  
24 that are four to six inches of topsoil and grass to cut  
25 off. Where is the accounting for that? The Department

1 has not accounted for that.

2 You cannot put your base on top of grass and  
3 existing organic matter. You have to excavate that.  
4 That is a regular excavation item that the Department  
5 has never accounted for.

6 If you just figure those numbers, regardless --  
7 and I submit that the areas that even got filled, you  
8 still have to remove the organics and the grass off of  
9 it. It is immaterial whether you have cuts or fills.

10 It's immaterial how much you are raising. It  
11 matters some, I agree with you, but since you have to  
12 go -- since you have to go and actually excavate the  
13 organics and the sod and the grass that is out there on  
14 this shoulder, you have to excavate that much  
15 regardless, whether you are in a 70-millimeter field or  
16 60 or whatever that is.

17 If anything, you may have miscalculated that,  
18 actually the borrow for this job, as far as us getting  
19 paid. You have to lower it that much first to get the  
20 organics, then come back and maybe fill it to the  
21 proper grade and then place the base. That by itself,  
22 if you figure that by itself and you know you had to do  
23 it, both sides of the road, the whole length of the  
24 road, it gives you more quantity than we got paid.

25 CHAIRMAN NUTBROWN: Any other comments? Bill, do



1           you have any questions?

2           MR. ALBAUGH: No -- on the thickness excavation,  
3           that appears to be primarily the difference, but you  
4           have point 1016 liters?

5           MR. MOELLER: Right. The Department tells us --  
6           because you could have a choice of base. A contractor  
7           can oftentimes -- and I think in this case as well, has  
8           a choice. There are optional bases. He can choose  
9           from the table which base and how thick it should be.

10          The Department dictates to us that that -- that  
11          for purposes of creating this quantity, that you will  
12          use the ABC-3 quantity.

13          So, if we go and look for that quantity -- and  
14          help me out here, Bob, because you will go to it  
15          faster --

16          CHAIRMAN NUTBROWN: I personally understand what  
17          you are saying. I've seen it a number of times. They  
18          will specify that the lime rock option was used --

19          MR. MOELLER: Right. I can't increase my regular  
20          excavation by choosing lime rock. In other words, the  
21          Department dictates you will base it on the ABC-3.  
22          Therefore, my thickness is point 1016, based upon what  
23          the Department tells me the base that will be used.

24          I can still choose any base, but my choice of  
25          base is not going to modify that quantity.

1           MR. ALBAUGH: Based on their calculations here,  
2           what they are basing here, the project length and the  
3           width of the shoulder and using point 1016 meters,  
4           which roughly translates to three inches --

5           MR. POTTER: Four inches.

6           MR. ALBAUGH: Round it to four. And we are  
7           saying it ought to be significantly less than that?

8           MR. POTTER: We are saying it ought to be a  
9           little over an inch because of the fact that we had  
10          build-up on the roadway. He's assuming it's excavation  
11          below the existing pavement, where the bottom of the  
12          base would be.

13          That's incorrect. The bottom of the base -- and  
14          that's the way these calculations are, is only going to  
15          be 30 millimeters below the edge of the existing  
16          pavement.

17          MR. GHAZVINI: You still have to move the sod and  
18          the topsoil.

19          MR. ALBAUGH: That's all I have, Jack.

20          CHAIRMAN NUTBROWN: All right. Does anybody  
21          else, any of the Board have any questions?

22          Mr. Contractor, have you completed your  
23          presentation of the issue?

24          MR. MOELLER: Yes, we have. The only other item  
25          is with respect to interest. If you find that anything

1 is due to us, we will appreciate the consideration of  
2 interest on the delay.

3 CHAIRMAN NUTBROWN: That's required by statute as  
4 far as the Board is concerned. I notice you have gone  
5 through and done a lot of calculations.

6 The Board only -- if there is an award, the Board  
7 will only pay interest from the date of final  
8 acceptance.

9 MR. MOELLER: Okay.

10 CHAIRMAN NUTBROWN: Okay. Bill, do you have any  
11 other questions?

12 MR. ALBAUGH: No, I think that's it.

13 CHAIRMAN NUTBROWN: Steve, do you have anything  
14 else?

15 MR. POTTER: No.

16 CHAIRMAN NUTBROWN: Jack?

17 MR. NORTON: No.

18 CHAIRMAN NUTBROWN: Okay. The hearing is hereby  
19 closed. The Board will meet and deliberate on this  
20 claim in approximately six weeks. I apologize for the  
21 length of time. However, I personally went through two  
22 hurricanes and didn't see Freddie Simmons for two  
23 months. I will work diligently to get this thing  
24 closed out and get it back to everybody.

25 I appreciate your cooperation. I appreciate your

1 time. We will -- everybody have a nice -- a good  
2 holiday. We will go from there.

3 (Whereupon, the hearing was concluded at 12:35 p.m.)

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CERTIFICATE OF REPORTER

1  
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.

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 28<sup>th</sup> day of August, 2004.

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