

STATE ARBITRATION BOARD

**5615 23rd Street S.W.
Vero Beach, FL. 32968**

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DEC 22 2005

December 1, 2005

Ananth Prasad
Chief Engineer
Florida Department of Transportation
605 Suwannee Street MS-57
Tallahassee, FL. 32399-0450

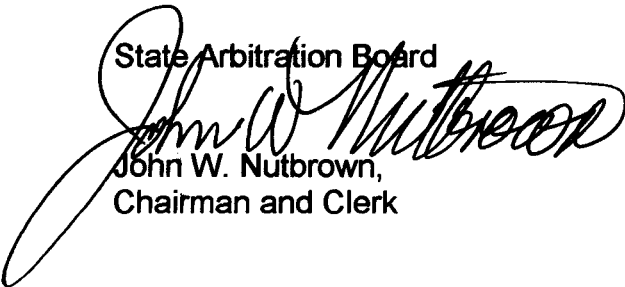
Re Arbitration Order 1 / 2005
DOT Fin Project No. 194008-1-52-01
Glades County, FL.

Dear Ananth:

Find enclosed Arbitration Order 1 / 2005 for the above captioned project. A copy of the transcript is enclosed, and copies of the Contractors submittal and the Department rebuttal are being kept by Ken Leuderalbert for your use.

Sincerely;

State Arbitration Board



John W. Nutbrown,
Chairman and Clerk

Cc: All Board Members

STATE ARBITRATION BOARD

Order No. 1-2005

S.A.B. CLERK

DEC 03 2005

FILED

**///NOTICE///
///**

In the case of Better Roads, Inc. versus the Florida Department of Transportation on Financial Project No. 194008-1-52-01 in Glades County, Florida, both parties are advised that the State Arbitration Board Order 1-2005 has been properly filed with The Clerk of the State Arbitration Board on November 10, 2005

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

Copy of Order & Transcript to:

Ananth Prasad, Chief Highway Engineer

Joe L. Turner, President, Better Roads, Inc.

STATE ARBITRATION BOARD

Order No. 1-2005

RE: Request for Arbitration
Better Roads, Inc.
State Project No05020-3503 in
Glades County, Florida

The following members of the State Arbitration Board participated:

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:30 AM on August 19, 2005 in Tallahassee, Florida

The Contractor, Better Roads, Inc., presented a written request for arbitration of its claim in the total amount of \$485,098.00 The claim arises out of site conditions and direction by the Florida Department of Transportation requiring extra labor for grading slopes which were much steeper than show on plans to lack of Right of Way, special guardrail posts required of telephone cable not shown on plans and other items in Glades County, Florida. The Department of Transportation presented a written rebuttal and summary of position. The Board has considered the written submissions and the testimony and evidence presented at the hearing on August 19, 2005 and enters this Order Number 1-2005

ORDER

The Board is unanimous in this decision.

Prior to Starting the hearing Chairman Nutbrown explained that a Dispute Review Board was convened for this project and that he had been appointed as a member. Since this creates a conflict of interest Chairman Nutbrown disqualified himself from participating in the hearing and appointed John L. Norton to chair the hearing and Robert G Burleson to replace him on the Board for this hearing.

The hearing was conducted in The Transportation Center, Tallahassee, Florida. Testimony was given by both the Contractor and the Department. The Board deliberated and reached a decision, however prior to issuing this order the Department put forth an offer of settlement which was accepted by the Contractor. The Board will issue no order in this matter other than that shown below for the reimbursement of Court Reporter fees.

STATE ARBITRATION BOARD

Order No. 1-2005

The Department shall reimburse the State Arbitration Board \$450.50 for court reporting costs.

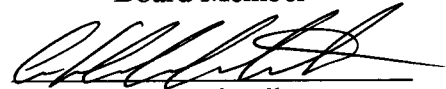
The Contractor shall reimburse the State Arbitration Board \$450.50 for court reporting costs.

Vero Beach, Florida

Dated: November 10, 2005

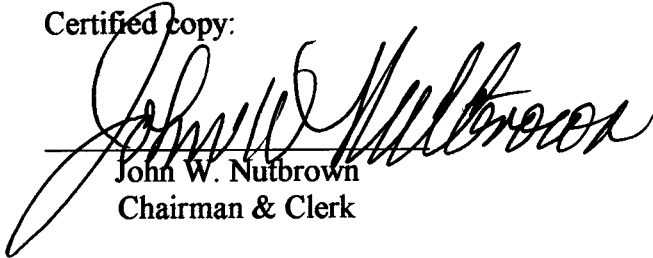


Robert G. Burleson
Board Member

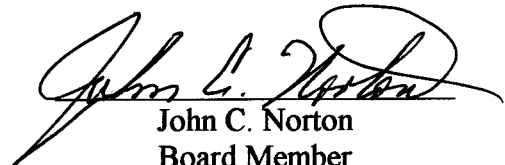


Ken Leuderalbert
Board Member

Certified copy:



John W. Nutbrown
Chairman & Clerk



John C. Norton
Board Member

1 STATE ARBITRATION BOARD
 2 STATE OF FLORIDA
 3 BETTER ROADS, INC.)
 4)
 5 and)Project No. 194008-1-52-01
 6 DEPARTMENT OF TRANSPORTATION)Location: SR-78 from
 7 -----)North of Dike Road to the
 8)Okeechobee County Line
 9)Glades County, Florida
 10
 11 VOLUME 1 of 1
 12 PROCEEDINGS: Arbitration in the Above Matter
 13
 14 DATE: August 19, 2005
 15 TIME: Commenced at 9:30 a.m.
 16 Concluded at 12:15 p.m.
 17 PLACE: Florida Transportation Center
 18 1007 DeSoto Park Drive
 19 Tallahassee, Florida
 20 REPORTED BY: MONA L. WHIDDON
 21 Court Reporter and Notary Public
 22 in and for the State of Florida at large
 23
 24 WILKINSON & ASSOCIATES
 25 Certified Court Reporters
 Post Office Box 13461
 Tallahassee, Florida 32317
 (850) 224-0127

1 **APPEARANCES**
 2
 3 MEMBERS OF THE STATE ARBITRATION BOARD:
 4 MR. JOHN W. NUTBROWN, CHAIRMAN
 5 MR. JOHN C. NORTON, ACTING CHAIRMAN
 6 MR. KEN LEUDERALBERT
 7 MR. BOB BURLESON, ACTING BOARD MEMBER
 8
 9 ON BEHALF OF THE CONTRACTOR:
 10 MR. GORDON ELLERY
 11 MR. BILL HUMPHREYS
 12 MR. JOE TURNER
 13
 14 ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:
 15 MS. SHARON HEDRICK
 16 MR. TERRY MUSE
 17 MS. DEBBIE HUNT
 18 MR. JOHN SANDS
 19 MS. ANGELA SIST, CONSULTANT
 20
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 25 CERTIFICATE OF REPORTER Page 110

1 PROCEEDINGS
 2 CHAIRMAN NUTBROWN: This is a hearing of the
 3 State Arbitration Board, established in
 4 accordance with Section 337.185 of the Florida
 5 Statutes.
 6 Mr. Ken Leuderalbert was appointed as a
 7 member of the Board by the Secretary of the
 8 Department of Transportation.
 9 Mr. John Norton was elected by the
 10 construction companies under contract to the
 11 Department of Transportation.
 12 And those two members have chosen me,
 13 John Nutbrown, to serve as the third member of the
 14 Board and as Chairman. Our terms expire on
 15 June 30th, 2007.
 16 Will each person who will make oral
 17 presentations during the hearing please raise your
 18 right hand and be sworn in.
 19 (Whereupon, all witnesses were duly sworn by the
 20 Chairman.)
 21 CHAIRMAN NUTBROWN: The request for
 22 arbitration of a claim submitted by, in this
 23 case, Better Roads, including all attachments
 24 thereto, and the administrative documents
 25 preceding this hearing, are hereby introduced as

1 Exhibit No. 1, which would include a copy of the
 2 contract and the plans in the center of the
 3 table.
 4 (Whereupon, Exhibit No. 1 was received in evidence.)
 5 CHAIRMAN NUTBROWN: Does either party have
 6 any other information that they wish to put into
 7 the record as an exhibit?
 8 MS. HEDRICK: Yes, I do. Only because of an
 9 oversight, there were two actual dispute review
 10 board hearings related to this project, and only
 11 one of the actual recommendations was placed in
 12 the package. So, I do have a copy of the other.
 13 I have a copy of both of them, but --
 14 CHAIRMAN NUTBROWN: All right. You need to
 15 give -- do you need it, Joe, or do you have it?
 16 MR. TURNER: I'm sure we have it. I don't
 17 remember which one was put in and which one was
 18 not.
 19 MS. HEDRICK: I have five copies of all the
 20 recommendations of this project, all the DOT
 21 recommendations. It was a recommendation on the
 22 original contract time issue, and then the
 23 subsequent hearing on the four issues related to
 24 the utilities and guardrail, and then a corrected
 25 copy of the recommendation of that item.

1 CHAIRMAN NUTBROWN: All right. Those will
2 be accepted as Exhibits 2 and 3.
3 MS. HEDRICK: And 4, the corrected.
4 CHAIRMAN NUTBROWN: And 4, the corrected
5 version.
6 MR. TURNER: We definitely should have a
7 copy of that today.
8 MS. HUNT: I would just say take one and
9 pass it that way, each one. No, take one and
10 pass it. There's five of the same copy.
11 MR. TURNER: Okay.
12 MS. HUNT: You should have three different
13 sets.
14 CHAIRMAN NUTBROWN: We have Exhibits 2, 3
15 and 4 that have been submitted. Joe, do you need
16 any time to examine any of this or --
17 MR. TURNER: No.
18 (Whereupon, Exhibit Nos. 2, 3 and 4 were received in
19 evidence.)
20 CHAIRMAN NUTBROWN: Okay. During the
21 hearing, the parties may offer such evidence and
22 testimony as is pertinent and material to the
23 dispute being considered by the Board, and shall
24 produce such additional evidence as the Board may
25 deem necessary to an understanding of the matter

1 and two ears, and she cannot hear conversations
2 across the table, so please don't talk across the
3 table.
4 If you have got a cell phone, shut it off.
5 And with that, we will go.
6 Now, this hearing is a little bit unusual to
7 the fact that this project had a Dispute Review
8 Board on it, of which I was a member. I have
9 stepped down. The only way that I will be
10 involved with the process is the fact that I am
11 the Chairman and the clerk.
12 I will be responsible for, once the
13 information is given to me, drafting the order.
14 The order will then be approved by the other
15 parties and signed by the other parties. And the
16 only part of it that I will have is the actual
17 typing of it.
18 Mr. Jack Norton is going to take my place as
19 Chairman. Mr. Bob Bursleson, with FDDB, will take
20 my place as a Board member. With that, I'll turn
21 it over to Mr. Norton and get out of the way.
22 MR. NORTON: Good morning. We have got
23 before us a claim today which has some definite
24 contract provisions in it, and there are some
25 very real questions about whether it's admissible

1 before it.
2 The Board shall be the sole judge of the
3 relevance and materiality of the evidence offered.
4 The parties are requested to identify
5 anything else that they have as it comes out, if
6 it comes out during the hearing.
7 The Board will send the parties a copy of
8 the court reporter's transcript, along with our
9 order. And we will not furnish copies of the
10 exhibits back again.
11 As is typical in an arbitration proceeding,
12 this hearing will be conducted in an informal
13 manner. The Board is not required to apply a
14 legalistic approach or strictly apply the rules of
15 evidence used in civil court proceedings. We are
16 primarily looking for information in regard to the
17 facts and the contract provisions that apply to
18 the case.
19 The order of proceeding will be for the
20 claimant, which in this case is the contractor, to
21 present their claim. And then for the Department
22 or Respondent to offer their rebuttal.
23 Either party may interrupt to bring a
24 pertinent point by coming through the Chairman.
25 And, please, this lady has ten fingers, I think,

1 or not.
2 We are going to go ahead and hear it, and
3 then we will talk among ourselves and make a
4 decision as to the admissibility of it.
5 And with that, who is going to start for
6 your side. Bill, do you want to start?
7 MR. HUMPHREYS: Yes, sir. Do you want me to
8 stand or is it okay if I sit?
9 MR. NORTON: You can sit. It's informal.
10 You can take your tie off, if you want.
11 MR. HUMPHREYS: That might look like you
12 have me worried. My name is Bill Humphreys. I
13 am a construction consultant. My part in this is
14 I was retained by Better Roads earlier this year
15 to help assemble the April 29th claim
16 presentation that is before the Board now.
17 And Mr. Turner has asked me to make the
18 opening remarks today. If I wasn't on the job, if
19 there are factual questions about the project,
20 Mr. Turner or Mr. Ellery will answer them.
21 My opening statement has four parts. The
22 first, briefly, I want to list the issues that
23 Better Roads is bringing before the Board today,
24 including the amount of compensation with the time
25 extension that Better Roads is requesting for

1 each.
 2 I would like to give a brief overview of
 3 each of the issues that are pertinent to this
 4 claim. I would like to offer a response to the
 5 Department's August 8th position summary and
 6 rebuttal that we received last week, and then give
 7 a brief conclusion.

8 MR. NORTON: That's fine.
 9 MR. HUMPHREYS: Okay. The issues being
 10 brought before the Board by Better Roads today
 11 are issues that arose during construction of a
 12 Department of Transportation project that was
 13 begun in May of 2002 and completed in May of
 14 2003.

15 This was a \$5,681,000 lump sum road
 16 improvement project in Glades County, State Road
 17 78, which is a two-lane rural road. The length
 18 was eight and three-quarter miles.

19 The issues that Better Roads is bringing
 20 before the Board today include, one, a request for
 21 a time extension for compensable construction
 22 delays.

23 And, two, a request for compensation for
 24 compensable construction delays.

25 Number three, a request for a noncompensable

1 time extension for an insufficient amount of time
 2 specified for the original contract work that
 3 Better Roads considers this to be a defective
 4 specification.

5 Number four, a request for return of
 6 liquidated damages withheld by the Department.

7 Number five, a request for compensation for
 8 one item of additional work.

9 And number six, a request for interest
 10 on amounts that Better Roads believes it is owed
 11 by the Department.

12 Better Roads completed this project over two
 13 years ago. Better Roads is still owed money for
 14 original contract work and is owed money for
 15 additional work and for delays. The amount that
 16 Better Roads is seeking at this hearing is
 17 \$447,902 plus interest.

18 All of these issues that I have just
 19 described are described in detail in the claim,
 20 the two notebooks that has been submitted to the
 21 Department and to the Board.

22 The compensation and time extensions
 23 requested for each of these six issues is as
 24 follows. First, issue number one, time extensions
 25 for construction delays. Better Roads is

1 requesting a total of 93 days for time extension
 2 for construction delays.

3 The 93 days includes, first, 36 calendar
 4 days for additional work to overcome the defective
 5 design of the embankment slope on the left side of
 6 the roadway. This includes 28 days for additional
 7 time dressing the left slope, and eight days for
 8 repairing washouts that were the direct result of
 9 the defective design.

10 Number two, six calendar days for a conflict
 11 between the new guardrail installed for this
 12 project and existing buried Sprint telephone
 13 cables.

14 Number three, 51 days for a delay associated
 15 with a design change and additional work ordered
 16 by the Department to overcome a conflict between
 17 the new guardrail installation and the existing
 18 large diameter cross drains. This delay included
 19 the time necessary for the Department to design a
 20 solution, and issue a field supplemental
 21 agreement, and for the contractor to procure the
 22 necessary materials and to construct a special
 23 guardrail at 12 locations.

24 Claim item number two, compensation for
 25 these 93 days of compensable delay. Better Roads

1 is requesting a total compensation of \$237,979 in
 2 compensation for additional direct costs and
 3 indirect costs incurred as a result of the 93 days
 4 of compensable delay.

5 This amount includes 68,368 for additional
 6 maintenance of traffic for 93 days, \$42,406 for
 7 additional project supervision for 93 days, and
 8 \$171,467 for compensation for the indirect impact
 9 of delays.

10 For the purposes of determining compensation
 11 in accordance with Article 5-12.6.2.2, Better
 12 Roads has subtracted ten days from the 93 days of
 13 actual delay, and is requesting compensation for
 14 indirect impacts for only 83 days.

15 The total of these numbers that I have just
 16 read off are a total calculated just as real costs
 17 would be, a total of \$282,241.

18 As explained in the claim and the notebook,
 19 Better Roads is requesting only \$237,979 out of
 20 the 282 because Better Roads is limited by a
 21 previous qualified acceptance letter that they
 22 submitted that has the lower amount in it. In
 23 other words, we reduced what we really think we
 24 are owed by \$44,262 to stay within the qualified
 25 acceptance letter.

1 Claim item number three, a noncompensable
 2 time extension to increase the amount of time
 3 allowed for construction in the original contract.
 4 Better Roads is requesting a time extension of 74
 5 calendar year days for this issue.

6 It is the position of Better Roads that
 7 there was a significant error in the schedule
 8 created by the Department that was used by the
 9 Department to determine the amount of contract
 10 time to be allowed for this project. This amounts
 11 to a defective specification.

12 The error was in the amount of time allowed
 13 for embankment construction. According to the way
 14 that the Better Roads reads the Department's
 15 schedule, the Department allowed 30 days for this
 16 item of work.

17 Given the amount of embankment work
 18 required, and given the nature of the embankment
 19 work, 30 days was a completely unrealistic
 20 allowance of time.

21 Since the specifications were based upon an
 22 estimate that, in the opinion of Better Roads, was
 23 in error, the specification was defective and
 24 should have been corrected by the Department when
 25 it became obvious there was a problem. This was

1 not done.

2 As a general observation, Better Roads would
 3 like to point out that the advertised Department's
 4 engineer's estimate for this project was
 5 approximately \$3.3 million and 220 calendar days
 6 to complete the work.

7 The project was bid twice, and the low bid
 8 was 5.7 million in round numbers, or over
 9 60 percent more than the Department's estimate.
 10 While this fact alone does not necessary indicate
 11 that there was a problem with the Department's
 12 estimate of time, it is an indication.

13 Claim item number four, request for return
 14 of liquidated damages assessed by the Department.
 15 The Department withheld an amount of \$193,080 as
 16 liquidated damages for 60 days at \$3,218 a day.

17 It is the position of Better Roads that if
 18 the Department had granted time extensions for
 19 additional work and for delays, as the Department
 20 should have done under the provisions of the
 21 contract, Better Roads completed the work ahead of
 22 schedule and not behind schedule. Therefore,
 23 there was no reason to assess liquidated damages.

24 Claim item number five, Better Roads is
 25 requested \$16,843 compensation for one item of

1 extra work. At the end of the job, the FDOT
 2 inspector directed Better Roads' seeding and
 3 sodding subcontractor to install sod in a location
 4 where sod was not required in the original
 5 contract.

6 The Department has taken the position that
 7 the Department will not pay for this work because
 8 a written change order was not issued directing
 9 Better Roads to install the sod. Better Roads
 10 does not agree with this position.

11 It was common practice for the sodding
 12 subcontractor to work closely with the FDOT
 13 inspector. When the inspector directed the
 14 subcontractor to install the sod, the
 15 subcontractor did so. The subcontractor believed
 16 the inspector was acting in good faith and had the
 17 authority to order the work, so the subcontractor
 18 installed the sod. Therefore, it is the position
 19 of Better Roads that the Department should pay for
 20 the work.

21 Last item six, Better Roads is requesting
 22 interest on amounts that Better Roads believes it
 23 is owed by the Department. The amount of interest
 24 requested through April 25th, 2005, is \$37,196.

25 It is Better Roads' understanding that if

1 the Board finds that the Department owes
 2 compensation to Better Roads for the items
 3 previously listed, the Board will determine the
 4 amount of interest that Better Roads is entitled
 5 to.

6 Now I would like to give a brief factual
 7 overview of the claim that Better Roads has
 8 brought before the Board today.

9 MR. NORTON: Go ahead.

10 MR. HUMPHREYS: This claim is essentially
 11 all about construction delays that in the opinion
 12 of Better Roads are the responsibility of the
 13 Department.

14 I say this claim is all about delays,
 15 because with one minor exception, all of the
 16 compensation that Better Roads is seeking in this
 17 claim, including return of retainage, is tied to
 18 delays of controlling items of work. The one
 19 minor exception is the claim item for compensation
 20 for installing sod.

21 There are two types of delays included in
 22 Better Roads' claim. There are three delays that
 23 are compensable delays, and there is one delay
 24 that Better Roads has classified as a
 25 noncompensable delay.

1 I would like to briefly describe the
 2 compensable delays first, because approximately
 3 one half of the money requested in this claim is
 4 compensation for these three compensable delays.

5 The first delay that significantly impacted
 6 completion of the project was a result of problem
 7 of the design of the roadway embankment slope on
 8 the left side. It was a requirement of the
 9 contract that the existing roadway embankment be
 10 widened on both sides, so that the traffic lanes
 11 could be widened, and so the paved shoulders could
 12 be added where none existed before.

13 There was also additional widening on the
 14 left side for installation of guardrail where
 15 there was no guardrail before.

16 Outside the clear zone, the plans required
 17 Better Roads to build a new embankment slope no
 18 steeper than three to one if there was no
 19 guardrail, and no steeper than two to one if a new
 20 guardrail was going to be installed.

21 In almost all locations on the left side,
 22 there was a guardrail. So, for the biggest part
 23 of the job, the steepest slope allowed was two to
 24 one.

25 As Better Roads began placing new embankment

1 material on the left slope, it was discovered that
 2 in many areas there was not enough room within the
 3 roadway to construct a two-to-one slope outside
 4 the clear zone. A two-to-one slope downward from
 5 the outside edge of the clear zone would extend
 6 beyond the right-of-way line.

7 As a solution to this problem, the
 8 Department directed Better Roads to build a slope
 9 as steep as was necessary to stay inside the
 10 right-of-way line, even if this meant constructing
 11 a slope steeper than two to one. Better Roads did
 12 this, but the result was more work and slower
 13 progress.

14 In the areas where the slope was steeper
 15 than two to one, equipment could not be put on the
 16 slope to dress the slope. Any machine work that
 17 Better Roads was able to do had to be done from
 18 the top. A lot of hand labor was involved in the
 19 dressing operation.

20 In some areas, Better Roads was directed to
 21 leave existing trees in place to help stabilize
 22 the slope. Obviously this made dressing the slope
 23 with a machine from the top difficult, if not
 24 impossible in some places.

25 It should be brought to the attention of the

1 Board that this design problem is not readily
 2 obvious upon looking at the cross sections in the
 3 plans. This is because the cross sections are
 4 drawn incorrectly. This may be why this problem
 5 occurred in the first place.

6 In the cross sections in the plans, the top
 7 of the two-to-one slope is shown as starting at a
 8 point just outside the guardrail. However, this
 9 is not correct. The top of the two-to-one slope
 10 on the left side actually began five point
 11 five meters outside the edge of the roadway, which
 12 is approximately seven and a half feet farther
 13 toward the right-of-way line than as drawn in the
 14 cross sections. In other words, if you look at
 15 the cross sections in the plans, a lot of the
 16 two-to-one slope, it shows it right at the
 17 right-of-way line, or maybe just past it.

18 But they aren't drawn correctly. You really
 19 get the wrong impression when you look at that.
 20 That's not how it was in the field, and the reason
 21 is apparently there was a drafting error in
 22 drawing the cross sections.

23 The issue pertinent to Better Roads' claim
 24 is how much additional time was necessary to
 25 construct the left slope as a result of the

1 defective design. As stated in the claim, it is
 2 the opinion of Better Roads that a reasonable
 3 measure of the delay caused by the defective
 4 design of the slope is the difference in the
 5 amount of time necessary to dress the left slope
 6 as compared to the time to dress the right slope.
 7 Better Roads spent 43 working days dressing the
 8 left side slope.

9 The slope on the right side, where there was
 10 more room to work within the right-of-way, where
 11 more machines could be used on the slope itself,
 12 was dressed in 23 working days. The difference
 13 was 20 working days or 28 calendar days based upon
 14 a five-day workweek.

15 This is the time extension that Better Roads
 16 is requesting in its claim, just for the delay
 17 associated with the initial dressing of the left
 18 slope.

19 As further consequence of the steep and
 20 unstable slope on the left side, Better Roads
 21 spent six working days repairing washouts and
 22 slope failures after the slope was constructed,
 23 dressed, and the sod was installed. This work
 24 would not have been necessary if Better Roads
 25 could have built the slope to a two to one or

1 flatter as shown in the plans.
 2 At the time that the repairs were made, this
 3 was a controlling item of work, therefore Better
 4 Roads is entitled to a time extension for these
 5 six working days or eight calendar days based on a
 6 five-day workweek.

7 So, the total time extension that Better
 8 Roads is entitled to for this problem of the left
 9 slope is 28 additional days necessary to dress the
 10 slope, plus the eight days necessary to make
 11 repairs because the slope was not stable, for a
 12 total of 36 calendar days.

13 Having a good understanding of how this
 14 36-day delay impacted the overall project is one
 15 of the keys to understanding Better Roads' claim.
 16 First, in assessing liquidated damages, and in its
 17 analysis of the guardrail installation delays, the
 18 Department focuses on January 30th, 2003, as the
 19 required completion date for the project.

20 It is the position of Better Roads that once
 21 the problem with the left slope was recognized,
 22 January 30th, 2003, should have no longer been
 23 considered as the required completion date.

24 Clearly Better Roads' progress was impacted
 25 by the defective design of the left slope. This

1 is documented in the meetings -- the progress
 2 meetings and the minutes of the DRB meetings. As
 3 soon as this problem was recognized, including
 4 recognition of the impact that the problem was
 5 having on construction, a time extension should
 6 have been granted by the Department.

7 Using Better Roads' assessment of the impact
 8 of 36 calendar days, the required completion date
 9 should have been changed from January 30th to
 10 March 7th, 2003, based solely on this one delay.
 11 In other words, this problem was recognized well
 12 in advance of the January 30th date. And if a
 13 change order had been written at that time to
 14 allow for that, the January 30th date would have
 15 been moved forward before Better Roads ever got to
 16 it, and it would have never been delinquent.

17 The second thing that's important about this
 18 embankment slope problem was as a result of this
 19 slope work taking longer than expected, the
 20 guardrail subcontractor was delayed in starting
 21 his work. The embankment had to be in place
 22 before Alford could install the guardrail. The
 23 guardrail construction was a controlling item of
 24 work.

25 As a result of the delay in completing the

1 embankment slope, Alford was not able to begin its
 2 work until January 20th, 2003. It would have not
 3 served any purpose for Alford to have mobilized
 4 sooner because once Alford caught up with the
 5 slope construction, he would have had to have
 6 demobilized. There would have been nowhere for
 7 him to work.

8 This brings us to the second compensable
 9 delay. This was the delay that resulted from the
 10 Department having to change the design of the
 11 guardrail in 12 areas where it was discovered that
 12 there was a conflict between the guardrail as
 13 originally designed and the cross drain extensions
 14 constructed earlier in the project. This conflict
 15 was discovered in the field on January 23rd, 2003.

16 In the opinion of Better Roads, there's two
 17 different ways to analyze the number of days of
 18 impact that resulted from this design change.

19 According to Article 8-7.3 of the contract,
 20 adjusting contract time, and I quote, "The
 21 Department will base the consideration for
 22 granting an extension of contract time on the
 23 extent that the time normally required to complete
 24 the additional designated work delays the contract
 25 completion schedule," end quote.

1 The change in the design of the guardrail
 2 delayed contract completion until May the 2nd,
 3 2003. To the best of Better Roads' knowledge,
 4 there's never been any disagreement between the
 5 Department and Better Roads concerning whether or
 6 not the project could have been completed any
 7 sooner than May the 2nd, based solely on the time
 8 that it took to design and fix the guardrail
 9 conflict problem, procure the special order
 10 guardrail materials, and install the special
 11 sections of guardrail.

12 The special guardrail material was delivered
 13 to the job site on Friday, April 25th, and by May
 14 the 2nd, the special guardrail was installed and
 15 the project will be finally accepted.

16 According to the provisions of Article
 17 8-7.3, a very strong argument could be made that
 18 Better Roads is entitled to a time extension from
 19 the date that the guardrail problem was first
 20 discovered, or January 23rd until the date that
 21 the change order work was completed on May the
 22 2nd.

23 This is a reasonable way of looking at this
 24 delay, because no matter what Better Roads did on
 25 the project after January 23rd, there was no way

1 to complete the project any sooner than May the
 2 2nd. Using this analysis, Better Roads is
 3 entitled to a time extension of 100 calendar days
 4 for this delay. This 100 days agrees very closely
 5 with the 104-day time extension that Better Roads
 6 requested on March 17th, 2003, right after the
 7 State issued the supplemental agreement of the
 8 guardrail without any time in it.

9 There's a second way to analyze the number
 10 of days of delay that resulted solely from this
 11 guardrail redesign change order. In the second
 12 method of analysis, the total duration of the
 13 impact, or 100 days, is reduced to take into
 14 account the fact that Alford was able to work in
 15 other locations while waiting on the supplemental
 16 agreement, and while waiting on the special order
 17 materials for the special guardrail.

18 This is the method of analysis used by
 19 Better Roads in the claim before the Board today.
 20 Using this method of analysis, Better Roads is
 21 entitled to a time extension of 51 calendar days
 22 out of the total of 100 days of actual impact.
 23 This is the number of days, this 51, claimed by
 24 Better Roads for this issue.

25 There was a third compensable delay. This

1 delay also involved guardrail construction. As a
 2 concept of the conflict between the new guardrail
 3 and a buried Sprint telephone cable, it was
 4 necessary for Alford to stop work from
 5 February 20th through February 25th, 2003, or for
 6 a period of six calendar days.

7 Guardrail construction was a controlling
 8 item of work when this conflict arose, therefore
 9 Better Roads is entitled to a six calendar day
 10 time extension for this delay.

11 The total of these three compensable delays
 12 that I have just described is 93 calendar days.
 13 These delays are not concurrent. These days are
 14 plotted in bar chart schedule form behind Tab 3 in
 15 book one of the claim. The purpose of this chart
 16 is to demonstrate that none of the time extensions
 17 requested by Better Roads are concurrent.

18 Before leaving the subject of the guardrail
 19 construction delays, I would like to interject two
 20 comments concerning the position that the
 21 Department took on these delays when this matter
 22 was brought to a disputes review board hearing in
 23 November of 2003.

24 First, the Department took the position
 25 that, had Better Roads started the guardrail work

1 earlier in the project, and I quote of the
 2 Department, "Better Roads would have been aware of
 3 the delays at an earlier date, allowing for
 4 earlier discovery and resolution of the special
 5 guardrail post issues," end quote.

6 Concerning the special guardrail posts that
 7 the Department decided to install where the
 8 guardrail was in conflict with the cross drains,
 9 the fact of this matter is that the Department was
 10 or should have been aware of this problem at the
 11 very beginning of the project.

12 One of the first items of work was to extend
 13 the cross drains to accommodate the wider roadway.
 14 There were discussions between Better Roads and
 15 the Department about how shallow the cross drains
 16 were at that time. There were discussions about
 17 possible solutions to the problem. These included
 18 replacing the cross drains with a deeper pipe, or
 19 perhaps placing heavy plates over the cross
 20 drains.

21 The point is, the Department knew
 22 approximately six months prior to the start of
 23 guardrail construction that there was not much
 24 cover over these cross drain pipes.

25 Concerning the conflicts between the

1 guardrail and the Okeechobee Utility Authority
 2 water main and the conflicts with the buried
 3 Sprint telephone service, the Department knew
 4 about these no later than November of 2001, or six
 5 months before the start of the project and more
 6 than one year before the start of the guardrail
 7 construction.

8 These conflicts were discussed at the
 9 utility preconstruction meeting. Since the
 10 Department knew or should have known about all of
 11 these guardrail conflicts well in advance of the
 12 start of guardrail construction, it is not
 13 reasonable for the Department to take the position
 14 that, had Better Roads and Alford started
 15 guardrail construction earlier in the project,
 16 these delays would have had less impact on the
 17 project.

18 The other position of the Department that
 19 Better Roads does not agree with is the
 20 Department's interpretation of Article 8-7.3.2 of
 21 the contract, contract time extensions.

22 The Department has taken the position
 23 that -- and again I quote the Department,
 24 "Finally, had the contractor completed all other
 25 items of work prior to the last allowable contract

1 day, he would have been eligible for a time
 2 extension for all delays required to acquire the
 3 materials and complete the installation of the
 4 guardrail.

5 "As the contractor had not completed all
 6 regular items of work, contrary to his conclusion,
 7 no time extension can be allowed during the time
 8 frame he was completing the original pay item work
 9 outlined in the contract," end quote.

10 Better Roads doesn't agree with this
 11 position for two reasons. First, this is not what
 12 the contract says. The contract says that in the
 13 case of unforeseen work, an extension of contract
 14 time will be based on the extent that the time
 15 normally required to complete the additional work
 16 delays the contract completion schedule.

17 The contract does not say that all
 18 non-change order work must be finished before a
 19 time extension can be granted.

20 Secondly, the contract says, and I quote,
 21 "The Department may allow such extension of time
 22 only for delays occurring during the contract time
 23 period or authorized extension of the contract
 24 time period," end quote.

25 Clearly, if the Department orders additional

1 there was a significant error in the project
 2 schedule developed by the Department and used to
 3 determine that 220 days was a correct amount of
 4 time to allow for construction.

5 This error amounts to a defective
 6 specification, and the contract should have
 7 modified to correct this error, just as the
 8 contract would be modified to correct any other
 9 error discovered after the contract was awarded.

10 As I mentioned earlier, the error was -- in
 11 the opinion of Better Roads, the error was in the
 12 amount of time allowed by the Department for
 13 embankment construction. It appears that the
 14 Department allowed only 90 -- excuse me, only 30
 15 days for this item of work.

16 Given the amount of embankment work required
 17 and given the nature of the embankment work, it is
 18 the opinion of Better Roads that 30 days was a
 19 completely unrealistic allowance of time.

20 Better Roads' opinion is supported by the
 21 fact that it actually took Better Roads 94 working
 22 days to build the left and right embankments.
 23 Converted to calendar days, based upon five
 24 workdays per week, this is 132 calendar days.

25 If this 132 calendar days is reduced to

1 work that impacts a critical path item, the
 2 Department has an obligation to extend the
 3 contract time. In this -- in that case, the
 4 change order work will fall within the allowed
 5 contract time as extended.

6 If Better Roads' understanding of the
 7 Department's position on this matter is correct,
 8 then what the Department is saying is that once
 9 contract time is desired, the Department has the
 10 right to add as much change order work as it wants
 11 without adding any more time.

12 That is, the contractor would be required to
 13 perform all of the change order work, while at the
 14 same time the Department is assessing liquidated
 15 damages. Obviously, this is not the intent of the
 16 contract.

17 I will now move on to an explanation of
 18 Better Roads' claim request for a 74-day
 19 noncompensable time extension. In addition to its
 20 request for a 93-day extension for compensable
 21 delays, Better Roads' claim also includes a
 22 request for a 74-day noncompensable time
 23 extension.

24 This request for a time extension is based
 25 upon the fact that in the opinion of Better Roads

1 eliminate the additional time that it took Better
 2 Roads to dress the left slope as a result of the
 3 left slope design problem, which is another claim
 4 item, the total actual time to construct both
 5 slopes was 104 calendar days. This is more than
 6 three times the 30 days allowed by the Department
 7 in its schedule that was used to determine
 8 contract time.

9 The difference in the time that should have
 10 been allowed, or approximately 104 calendar days,
 11 and the time actually allowed for 30 calendar days
 12 is 74 calendar days. Better Roads is now
 13 requesting that a time extension of 74 calendar
 14 days be added to the 220 days originally allowed
 15 for construction to account for what Better Roads
 16 considers to be a defective specification.

17 This concludes my overview of the time
 18 extension requests included in Better Roads'
 19 claim. Earlier in my remarks, I briefly described
 20 each item of compensation that Better Roads is
 21 requesting in the claim. The details for each
 22 item are included in the claim itself.

23 Unless there are questions about the
 24 compensation portion of the claim, I do not plan
 25 to add anything further at this time.

1 MR. NORTON: Okay.

2 MR. HUMPHREYS: The next item I would like
3 to speak to is Better Roads' response to the
4 Department's August 8th, 2005 decision summary
5 and rebuttal submitted to the Board in response
6 to Better Roads' request for arbitration. We
7 received that last week and we didn't have time
8 to respond in writing, so we would like to
9 respond now, if that's okay.

10 MR. NORTON: Go ahead.

11 MR. HUMPHREYS: Before I -- excuse me.

12 MS. HEDRICK: May I address the Board? It
13 would be nice if we had the opportunity to
14 present our position before he rebuts it. I'm
15 not sure on the actual procedures in the order of
16 testimony, but I would request that we be allowed
17 to present our position before they present the
18 rebuttal of it.

19 MR. NORTON: I think we can allow the Board
20 to go ahead and you can present your position,
21 and then we will give you a rebuttal here.

22 MR. HUMPHREYS: What I have here is strictly
23 based on the position we got in writing last
24 week.

25 MR. NORTON: Right, and that's what they are

1 going to present.

2 MS. HEDRICK: I think the logical order
3 would be to allow us to present that position and
4 then for them to be allowed to rebut it. Thank
5 you.

6 MR. NORTON: All right. She's going to go
7 ahead, and then you are going to rebut. Sharon,
8 you may go ahead now.

9 MS. HEDRICK: Thank you and the Board for
10 allowing us to submit our position in our
11 rebuttal related to Better Roads' submittal on
12 State Road 78 project in Glades County.

13 Representing the Department is myself,
14 Sharon Hedrick; Terry Muse; John Sands, the
15 district construction engineer; Debbie Hunt, the
16 director of transportation operations; and
17 Angela Sist, a claims consultant retained by the
18 Department to analyze the claims submitted by
19 Better Roads on this project.

20 With that said, I'm going to go through the
21 basics of our position. The major item we would
22 like to address is Better Roads' entitlement to
23 even pursue this issue as a claim before the
24 Board.

25 There's two key facts where the Department

1 feels there is no entitlement for Better Roads to
2 pursue this issue. They are both related to the
3 failure of Better Roads to meet their contractual
4 obligations to preserve their rights.

5 The first item deals with the timeliness of
6 the submittals by Better Roads. The second item
7 is related to their failure to properly certify
8 the packages that were submitted.

9 On the first issue regarding the timeliness
10 of the submittal, the contract clearly states that
11 within 180 days of the final acceptance, the
12 contractor is required to submit his full and --
13 claim documentation.

14 As you can see from just a little quickie
15 visual, the project started on May 20th, 2002;
16 final acceptance occurred on May 2nd, 2003. 180
17 days from that date would make the required
18 submittal date October 29th of 2003.

19 The first package submitted by Better Roads
20 was submitted on January 29th and received by the
21 Department on January 30th of 2004. That is a
22 full 273 days from final acceptance, or over three
23 months late.

24 The second package we received from Better
25 Roads was received by the Department on May 11th,

1 2005. That's a full 740 calendar days beyond
2 final acceptance of the project, or nearly over
3 two years after final acceptance.

4 In summary, this claim was not submitted in
5 the time frames required by the contract.

6 The second item we would like to address is
7 the required certification of the contractor's
8 package. The contract clearly states that the
9 contractor is required to certify his claim in
10 oath in writing in accordance with Florida law.
11 He did not do so. The January submittal, while it
12 obtained a written certification, it was not
13 properly notarized, indicating that the oath was
14 sworn.

15 In summary, there are contractual
16 requirements that the contractor must fulfill in
17 order to preserve his rights to proceed with these
18 claims. He clearly failed to do so.

19 He's required to submit a notice of intent
20 to file his claim, his preliminary request, an
21 actual time extension request, and the claim with
22 complete and full documentation. These are all
23 conditions precedent for him to even be allowed to
24 proceed in this forum, circuit court, arbitration
25 or any other formal claims resolution proceeding.

1 In fact, he failed to submit the claim
 2 within the required time. And it constitutes, as
 3 defined by the contract, a full, complete,
 4 absolute and irrevocable waiver of his right to
 5 seek additional compensation or time extension for
 6 this claim.

7 In summary, he failed to submit his claim
 8 within 180 days. He failed to properly certify
 9 the claim. He has no entitlement to pursue this
 10 claim before this Board. In fact, we actually
 11 request the Board adjourn and make a ruling as to
 12 whether this claim and proceeding should be
 13 allowed to continue.

14 MR. NORTON: All right. As I said at the
 15 start of the hearing, we understand your
 16 position. We know that it is a very serious
 17 position, and we will go ahead and hear both
 18 sides, and then we will make our decision.

19 MS. HEDRICK: Okay.

20 MR. TURNER: Is it proper for us to make a
 21 statement regarding this at this time?

22 MR. NORTON: You will get your chance, Joe.

23 MR. TURNER: Okay.

24 MS. HEDRICK: Okay. You are requiring us to
 25 proceed. We will address items B and C as well

1 in our package. If you want to hear the issues
 2 related to this, first the determination has to
 3 be made as to which claim are you even looking at
 4 and evaluating. There were two packages
 5 submitted on this project.

6 Additionally, each of the packages contained
 7 portions that are invalid in accordance with the
 8 terms of the contract. I'll address both of those
 9 issues.

10 The first issue is, which claim are you even
 11 going to evaluate as a Board. Once again, the
 12 contract clearly states that he is prohibited from
 13 amending either the basis of his entitlement or
 14 the amount of the compensation or time that he's
 15 requested on those issues.

16 The only thing he's allowed to do is to
 17 withdraw or reduce any of the issues and the
 18 monies requested.

19 As I said earlier, the contractor has
 20 submitted two separate claims. The two packages
 21 have three significant differences. The first
 22 difference is that the May submittal added that
 23 request for the 74 days, noncompensable days for
 24 what he terms a defective specification.

25 The second difference related to the two

1 packages was the May claim increased the request
 2 for compensable time extension and revised how
 3 many days he was asking for between the various
 4 issues that he submitted.

5 The third difference was that the May claim
 6 actually -- he did eliminate the requested
 7 nine-day time extension; however, he was still
 8 requesting the same overall number of days, thus
 9 the reattribution of the days within the claim
 10 package.

11 So, clearly, we weren't -- we are not even
 12 sure which claim -- if any of them were to be
 13 considered valid, which claim is he even asking
 14 for. So, which claim is even going to be allowed
 15 to proceed.

16 Clearly, the May, 2005 claim does not
 17 conform to the requirements of the specification,
 18 and that claim should not be allowed to proceed.
 19 So, the Department has focused most of our
 20 presentation and position on the January
 21 submittal.

22 I would like to discuss briefly the invalid
 23 portions of the claim. The invalid portions --
 24 the first invalid portion relates to the qualified
 25 acceptance letter submitted by the contractor.

1 The first issue related to that is to the amount
 2 of the claim that was submitted.

3 Better Roads submitted their qualified
 4 acceptance letter for the project on August 4th,
 5 '03, in the amount of \$350,892.60. Both the
 6 January and May packages increased this amount
 7 by -- to the \$447,902, excluding interest that was
 8 included.

9 Clearly, the contract does not allow him to
 10 amend the amount of compensation requested beyond
 11 that qualified acceptance letter. Therefore,
 12 \$97,000 worth of that January package should not
 13 be even considered by the Board because it was in
 14 excess of the qualified acceptance letter.

15 The second relates to the addition of an
 16 item. Better Roads' qualified acceptance letter
 17 did not identify the sod issue in the request for
 18 compensation for what they deem was extra work
 19 requested by the Department. It was not
 20 identified in that submittal within the qualified
 21 acceptance letter, but both the January and the
 22 May claims included that \$16,843 request for sod.
 23 Thus, the Board should not even consider that
 24 additional 600 -- \$16,843 since it was not
 25 identified in the qualified acceptance letter.

1 The second part of the claim that we feel
2 that the Board shouldn't even consider because
3 it's invalid in accordance with the contract
4 related to their request for job site supervision
5 in addition to the 8 percent calculation for
6 indirect impacts allowed by the contract.

7 The specification clearly states that we
8 will pay the contractor for his job site overhead
9 and other indirects in accordance with the
10 formula. It further states that there is no other
11 job site overhead or any other indirect impacts of
12 delay compensable beyond that 8 percent
13 calculation. The contract clearly limits all of
14 his indirect costs to that 8 percent.

15 Therefore, in his submittal, there's an
16 additional \$42,406 he had requested separately for
17 job site supervision, and that should not be
18 allowed to continue and should not be considered
19 by the Board.

20 The third item that wasn't in accordance
21 with the requirements of the contract related to
22 extended performance costs for MOT. The
23 specification in the contract clearly require that
24 he is to request compensation for his actual idle
25 labor, equipment and material costs incurred.

1 In fact, Better Roads in their qualified
2 acceptance letter identified \$698.39 as their
3 daily MOT rate. They arrived at this figure --
4 let me go on first -- in their claim, they
5 actually increased this amount to a \$735.14
6 calculation. Clearly, Better Roads wasn't even
7 sure what their actual costs were.

8 What they did was they took a lump sum
9 project, provided us with a figure that
10 essentially said, this is what we included in our
11 original bid for maintenance of traffic. Which
12 they did not provide any supporting documentation
13 as to that fact. They took that dollar figure,
14 prorated it across the number of contract days for
15 the project, to arrive at a daily figure.

16 The Department actually, in our evaluation
17 of the claim, contracted with Steve Yokum, who is
18 a certified public accountant, well versed and
19 knowledgeable in construction claims. He
20 performed what we term a preliminary audit, not an
21 in-depth audit of every item on their cost, but an
22 overall view of the costs utilized by Better Roads
23 for the project.

24 He arrived at a total dollar figure that
25 Better Roads actually had cost coded to the

1 project. He in turn did, as Better Roads did,
2 prorated it across the days and only arrived at
3 \$397.34. That figure itself doesn't even
4 represent their actual costs.

5 To this date, Better Roads has not even
6 submitted what their actual costs related to MOT
7 were for the items they termed as delays to the
8 contract, or as the compensable days for the
9 contract. Therefore, nobody actually knows what
10 costs might be actually attributed to MOT.

11 The specifications of the contract limits
12 any recovery for compensable days to the actual
13 costs for the incorrect labor, equipment,
14 materials. He clearly overstated his MOT rate,
15 and that item should be not be allowed to proceed
16 in its entirety.

17 The fourth item is related to the 220-day
18 original contract duration issue that was added to
19 the May 2005 package. This particular issue was
20 the subject of a binding DRB hearing. The DRB
21 issued that recommendation on that hearing on
22 February 24th, 2003.

23 The recommendation clearly stated that the
24 contractor was not entitled to amend the calendar
25 days contained in the duly executed contract.

1 Consequently, contract time is not a specification
2 contract. It is the terms of the contract. No
3 more than the contractor's dollar amount submitted
4 is a specification to the contract.

5 He is clearly not entitled to amend those
6 calendar days as recommended by the Board. There
7 is no -- the contractor never rejected that
8 ruling, therefore, it became binding on all
9 parties.

10 In summary, the DRB recommendation is
11 binding and that new item added should not be
12 considered by the Board.

13 Our last item is related to the prejudgement
14 interest. Specifications require that
15 presettlement and prejudgement interest is only
16 recoverable beginning 60 days from the receipt of
17 the duly certified claim package. He failed to
18 properly certify the January submittal.

19 The actual May submittal, if you calculate
20 60 days after that fact, interest, if any, would
21 only begin to accrue on July 11th, 2005.
22 Therefore, if any, should only begin to accrue on
23 that July 11th date, and any interest claim prior
24 to that date should not be considered by the
25 Board.

1 In summary, the first item as we stated,
 2 clearly you should not even be considering the
 3 issues presented in here beyond the contractor's
 4 failure to meet his contractual obligations to
 5 preserve his rights to have this hearing. He did
 6 not submit it timely, and he did not properly
 7 certify it.

8 If the Board chooses to overlook those clear
 9 contractual obligations, then you have to decide
 10 which claim are you even going to evaluate.
 11 Clearly, the May claim didn't conform to the
 12 specifications.

13 And then the last item is, if you were to
 14 decide on which claim you were even going to
 15 evaluate, you have to consider that there are
 16 invalid items in both packages.

17 The amounts and items were not as identified
 18 in the qualified acceptance letter as required by
 19 the contract. They included extended performance
 20 costs for job site supervision in addition to what
 21 is allowed by the contract. That item is clearly
 22 covered within the 8 percent calculation.

23 They actually submitted extended MOT costs.
 24 While we, at this point, don't know what their
 25 actual costs were, they are clearly in excess of

1 what could even be reasonably determined to be
 2 actual costs.

3 They have asked for a revision to the
 4 original contract duration established for the
 5 project. That has already been the subject of a
 6 binding DRB ruling. And they are requesting
 7 prejudgement interest earlier or in an amount that
 8 exceeds that allowed by the contract.

9 With this I'm going to turn it over to
 10 Angela, who is actually going to address a more
 11 detailed analysis of the actual items Better Roads
 12 submitted.

13 MS. SIST: In an effort not to have
 14 everything go down if something happened to one
 15 of these slide presentations, I split them into
 16 two. Fortunately, everything went just fine.

17 My name is Angela Sist. I was asked by the
 18 district to perform an independent evaluation of
 19 the claim, the January 2004 claim that was
 20 submitted by Better Roads.

21 In addition I have also reviewed the May
 22 2005 claim that was submitted just a couple of
 23 months ago. If at any time I address an issue in
 24 this particular presentation, it is geared
 25 specifically to the information contained in the

1 January 2004 claim and those dollar amounts and so
 2 forth. But again, I'm prepared to address
 3 anything in the May claim as well.

4 First of all, we looked at an overall
 5 project analysis, project delays. We looked at
 6 the claim itself, an analysis of the claim, and
 7 then we have conclusions based on those two
 8 analyses.

9 The original contract duration, again, was
 10 the 220 calendar days. On the May 20th, 2002
 11 date, that put the original contract completion
 12 date as the 25th of December of 2002.

13 There were 36 calendar days of time
 14 extension granted throughout the project for
 15 weather and holiday suspension. So the required
 16 contract completion date was amended to 30 January
 17 of 2003.

18 In addition, on June 4th of 2003, that was
 19 approximately one month after final acceptance,
 20 the Department issued a letter extending a 32
 21 calendar day time extension for the guardrail
 22 installation that was associated with FSA number
 23 two, although FSA number two on its face indicated
 24 that it was full and complete settlement.

25 There was a note added on the second page of

1 FSA number two that said that in the event that
 2 there were delays, that the Department would look
 3 at the issue and determine what those delays were.

4 The Department did look at that issue, as
 5 soon as the project was done and the guardrail
 6 installed, and determined that approximately 32
 7 calendar days of delay may have been caused.

8 The project, however, it didn't finish on
 9 the 3rd of March of '03, which is what those 32
 10 calendar days would have extended it to, it
 11 actually finished on May 2nd of 2003. That was
 12 the official final acceptance date.

13 That is 60 calendar days beyond the time
 14 extensions that have been granted and were
 15 reviewed by the Department for FSA number two. It
 16 is those 60 calendar days that the Department
 17 assessed liquidated damages for.

18 We performed an analysis of the delays, just
 19 looking at the project documentation that was
 20 available. We compared the as-planned information
 21 to as-built information. As-planned information
 22 that was available for this project included a
 23 single project schedule that was dated
 24 November 15th of 2001, as well as correspondence
 25 and meeting minutes that indicated how the

1 contractor intended to build the project.

2 As-built information, daily reports,
3 correspondence and meeting minutes, to tell us
4 where the work was performed, if there were any
5 impacts and what those impacts were and how long
6 it actually took to perform the various
7 activities.

8 The as-planned project schedule was quite
9 basic. Again, it was submitted by the contractor,
10 and it was dated November 15th of 2001. It is
11 comprised of nine separate activities, and it is a
12 220 calendar day schedule, which is exactly what
13 was dictated by the terms of the contract.

14 Half of the activities identified on this
15 schedule aren't associated with actual work. They
16 are maintenance of traffic, erosion control. And
17 I realize that's work, but when I say "actual
18 work," it wasn't associated with the slopes that
19 we have heard quite a bit about. There is no
20 activity on this schedule specifically identifying
21 just the construction of the slopes.

22 As you can see, all the activities on this
23 schedule are quite a long time duration. The
24 activities may be difficult to read from all the
25 way back there, and I did include a copy of this

1 with the report. So, you do have a copy in the
2 written materials.

3 But it has mobilization, clearing and
4 grubbing, maintenance of traffic, earthwork,
5 erosion control, drainage, subbase, base and
6 surface grassing, traffic control aides.

7 There's other missing items from that list.
8 There's no guardrail scheduled. And we have heard
9 quite a bit about the delays incurred because of
10 the guardrail, and we were told that it was
11 critical, it was a controlling item. And I
12 believe that to be true, but we don't have any
13 time specifically identified in the schedule as to
14 how long the guardrail is expected to take or when
15 it is expected to be performed.

16 So, we had to look at other project
17 documents to figure out what contractor's plan was
18 to actually perform all of the work that was
19 within the scope.

20 As of January 20th of 2003, looking at what
21 was in the project scope and what had been
22 performed and all the available documents, we see
23 that there are no outstanding claims for time,
24 from the project commencement date up to
25 January 20th of 2003.

1 And when we look at what is happening on the
2 project as far as what's been recorded in the
3 daily reports, correspondence and meeting minutes,
4 we can see that as of January 20th of 2003, we are
5 just ten days away from that contract required
6 completion date. And we know that from everything
7 that's recorded in the available information, no
8 guardrail has even been started. There's no final
9 surface put on the road, no final striping.

10 So, we have a few activities yet to be
11 performed, but yet the contract time that is
12 identified as yet to be allowed, going to
13 January 30th of 2003, is just a little over --
14 about a week and a half of time. And we
15 definitely have more than a week and a half worth
16 of work to perform.

17 And this is exclusive of any delays that
18 were incurred on the guardrail yet. And the
19 slopes are still underway at this point. So, the
20 delays for the slopes did not push this out.
21 There's no documentation in the available project
22 documents that there were any outstanding time
23 extensions for the contract work.

24 If we look at what we are able to find in
25 the project documents as to how long it's going to

1 take to do the guardrail, friction course, and
2 final striping, which are the major activities
3 that are yet to be performed, we see in meeting
4 minutes from Wednesday, January 8th of 2003, it
5 says no guardrail has been installed, estimate, 60
6 days to install.

7 So, we know from the date when the guardrail
8 starts, that Better Roads was estimating that it
9 would take approximately two months just to
10 install that guardrail. When we get to
11 January 20th, when the guardrail installation
12 starts, as of January 20th, that becomes critical,
13 when we get to where the guardrail starts, we need
14 60 days to do that work.

15 In addition, in evaluating the project,
16 estimated that the friction course and final
17 striping represented approximately an additional
18 14 days' worth of work.

19 So, based on my analysis, as of
20 January 20th, when the guardrail became critical,
21 there was approximately 74 calendar days of
22 original contract scope work yet to be performed.

23 When we add those 74 calendar days to
24 January 20th, that pushes us out to a forecast
25 project completion date of the 3rd of April of

1 2003. And once again, that is prior to any of the
2 impacts that we've just heard about because of
3 interference with the guardrail or the change to
4 the guardrail design.

5 On January 20th was the first day when they
6 actually started guardrail. So, none of that had
7 occurred yet. That represents 63 calendar days
8 beyond the contract allowed completion date. It
9 is that 63 calendar days that I believe Better
10 Roads was responsible for, prior to any of the
11 impacts occurring because of the guardrail or
12 other issues that have been discussed.

13 The actual final acceptance date occurred on
14 May 2nd of 2003, which leads me to the conclusion
15 that after the work that was under the original
16 contract terms was performed, there was just 29
17 days of delay incurred beyond the time that was
18 forecast to be required to perform the original
19 contract scope. And I will discuss those 29 days
20 a bit further as we go through the impacts that
21 did occur to the guardrail installation.

22 From January 20th through February 25th,
23 once the guardrail installation got underway,
24 there were conflicts experienced or incurred
25 because of the water main and telephone, the

1 Sprint lines, and we heard that discussed earlier.
2 That has been evaluated at six workdays or the
3 eight calendar days. And I believe that Better
4 Roads has agreed that that is an appropriate
5 assessment of that delay.

6 From February 25th until March 11th, work
7 progressed. But on March 11th, FSA number two was
8 issued, and that was involved with the redesign of
9 the guardrail because of the impact of the CMP.
10 The new guardrail posts had to be ordered.
11 Footers had to be installed. When posts were
12 delivered, they had to be installed.

13 That has been evaluated as 21 calendar year
14 day impact. That impact results in adding to the
15 eight days that we discussed earlier for the other
16 water main and telephone conflicts, in a total
17 impact or delay of 29 calendar days as a result of
18 delays to the guardrail installation, which was
19 definitely the critical item at that point in the
20 project.

21 The little asterisks next to each of the
22 days are to explain whether those days are
23 compensable or not. The eight days associated
24 with the water main and telephone conflicts are
25 noncompensable because they fell within the first

1 ten days of delay experienced on the project.

2 In addition, the 21 calendar days of delay
3 associated with the new guardrail posts is broken
4 up into a couple of components. Four calendar
5 days were due to added work. And I don't want to
6 bore you with the nitty-gritty details. The
7 day-by-day, blow-by-blow account is in the report.

8 But when we looked at the work that had to
9 be performed as of March 11th when that added work
10 was identified, and put it into the schedule at
11 that point in time, it extends the forecast
12 completion date by just four days. Those four
13 days are for added work. The compensation for
14 that added work is addressed in the FSA.

15 In addition, there were delays incurred
16 after the FSA was issued. And those delays were
17 associated with the guardrail posts were not
18 delivered as was forecast by Better Roads. We
19 have not penalized them for that late delivery.
20 We are actually extending the delay and the impact
21 as compensable to the extent that that delay was
22 the cause of the forecast completion date being
23 pushed out.

24 And the analysis shows that 17 days of
25 additional delay were incurred because of the late

1 delivery of the guardrail posts. Two of those
2 days fill out the first ten days of noncompensable
3 delays. Remember, we had eight days a few minutes
4 ago. So, now we have taken care of the full first
5 ten days of noncompensable delay. Subtracting
6 that from the 17 days of late delivery delay,
7 leaves us with 15 days that we have assessed as
8 potentially compensable delay.

9 The total guardrail delay, again, it's 29
10 calendar days. Four calendar days,
11 noncompensable, because they were associated with
12 added work. And under the terms of the
13 specifications, there was no additional
14 compensation for that.

15 The first ten days of delay after that are
16 noncompensable. They are associated with delays,
17 not added work. That left us with 15 calendar
18 days of potentially compensable delay. And,
19 again, that was associated with the late delivery
20 of the guardrail posts.

21 If we have 15 days of compensable delay,
22 multiplying that out at the \$2,065.87 that is what
23 you calculate when you use the 8 percent formula
24 in the specifications, you get the total of
25 \$30,988.05 that is potentially due Better Roads

1 for the additional delay incurred because of the
 2 late guardrail delivery.

3 Just as a note, MOT costs would not be
 4 allowed on top of that. FSA number two was quite
 5 clear that all MOT costs were already addressed
 6 and accommodated within the cost of the FSA. The
 7 only thing that was left open was a time extension
 8 for a -- and potential cost for that other time
 9 extension, but MOT costs were explicitly called
 10 out as being full and total settlement under the
 11 FSA.

12 This is just a quick overview of the
 13 analysis that we did of Better Roads' claim. Once
 14 again, this is specific to the January 2004 claim.
 15 I'll be happy to entertain any questions you may
 16 have on the May 2005 claim.

17 The claim was comprised of six major
 18 components. We heard Mr. Humphreys review those
 19 components for us. The days were associated with
 20 three of those components; the first three listed.
 21 That was the project difficulty, and that was
 22 associated with the slope construction.

23 The FDOT claim extension offer for 32 days,
 24 that was the June 4, 2003 letter that I referenced
 25 earlier, where DOT evaluated the delay impact as a

1 were associated with what were construed by Better
 2 Roads to be compensable delays, which we have
 3 evaluated being just 15 days of compensable delays
 4 for \$30,000 versus the more than \$200,000 that was
 5 requested by Better Roads in the January claim.

6 Just as sort of a side-by-side comparison of
 7 what's in the claim, the delays, asks for 89 days
 8 at almost \$241,000. Our analysis shows that
 9 Better Roads is due 29 days potentially, at a
 10 maximum of \$30,988.

11 The liquidated damages, Better Roads is
 12 saying that they are responsible for none. They
 13 are asking for the recovery of \$193,000. Our
 14 analysis shows that Better Roads would actually be
 15 responsible for 63 days of delay. And although
 16 the Department has only assessed 60 days for the
 17 purposes of reconciling my analysis, I show that
 18 Better Roads would be responsible for another
 19 \$9,6534 for the additional three days of
 20 liquidated damages that were not previously
 21 assessed.

22 Interest calculations, Better Roads is
 23 asking for \$12,168. Our assessment is there would
 24 be no interest calculation because the LDs that
 25 were assessed were actually smaller than what is

1 result of the guardrail change. My analysis said
 2 29 days, the DOT was a bit more generous, perhaps,
 3 when they said 32 days.

4 In addition, the January plan had 18 days
 5 for reconstruction of washouts. The total was --
 6 excuse me, it wasn't -- recovery days was nine,
 7 but it was noncompensable. But all together, that
 8 represented 89 days of delay.

9 The last two items on the list were
 10 financial claims. That was involved with the
 11 request for the recovery of the liquidated damages
 12 that had been withheld. Sixty days of liquidated
 13 damages had been withheld by the Department, as
 14 well as the reimbursement for sod that Better
 15 Roads has alleged was performed at the direction
 16 of the Department.

17 If we break those items into the components
 18 or the categories of costs, you can see that the
 19 first three categories of costs are extended home
 20 office, extended MOT and general site conditions.
 21 That's the bulk of the claim. That's half of it,
 22 more than half of it right there.

23 After that, you have the liquidated damages
 24 plus interest and the sod issue. So, more than
 25 half of the claim costs in the January 2004 claim

1 actually a true picture of what Better Roads was
 2 responsible for. And interest was calculated on
 3 the recovery of those LDs. If there is no
 4 recovery due, there would be no interest.

5 And finally, the sod issue. Better Roads is
 6 asking for \$16,842 for sod. We found no record in
 7 any of the project documents that the Department
 8 directed Better Roads to install any additional
 9 sod. And I have read every daily report, every
 10 piece of correspondence, every meeting minute and
 11 everything else that's there. It doesn't appear.
 12 The first time it appears is in the claim.

13 Finally, the claim is a total of \$461,000.
 14 And by the way, my number disagrees slightly with
 15 Better Roads. I used the backup calculation
 16 numbers that they have. And there was misprint or
 17 typos or miscalculations of their summary numbers.
 18 This number does add up in conformance or in
 19 agreement with their backup numbers.

20 And our analysis shows that Better Roads may
 21 be due a total of \$21,334. And that is taking the
 22 compensation that FSA number two held out for any
 23 delays that may have been incurred because of the
 24 guardrail post change. That is \$30,000. Reducing
 25 that by the additional three days of liquidated

1 damages that my analysis shows Better Roads to be
2 responsible for, net results of \$21,334.05.

3 Conclusions on project delays. The time
4 extensions granted by the Department exceed the
5 time extensions that were due. Again, my analysis
6 showed 29 days of time extension for the
7 guardrail. The Department had extended the offer
8 for 32 days. That was in excess of what is
9 actually due.

10 FSA two, compensation for the additional --
11 left open, compensation for the additional days of
12 delay that may have been incurred. Our analysis
13 shows that that is 15 days of compensable delay.
14 That would represent a total of \$30,988.05.

15 Liquidated damages were assessed for just 60
16 days. Our analysis shows that actually Better
17 Roads is responsible for 63 days of liquidated
18 damages. The additional liquidated damages for
19 those three days would represent a total of
20 \$9,654.

21 Putting these together, you end up with a
22 net of \$21,334.05 that may be due Better Roads for
23 the additional delays incurred because of the
24 guardrail.

25 The claim analysis shows that there's no

1 entitlement for any additional delays beyond those
2 that we have just discussed.

3 Project difficulty of 30 days was requested.
4 We have not found evidence that that was formally
5 claimed in a timely fashion.

6 Reconstruction of washouts for 18 days.
7 That is absolutely, positively concurrent with the
8 guardrail delays.

9 We heard mentioned earlier by Mr. Humphreys
10 that the number of days of delays that are
11 requested are not concurrent. That's not what
12 counts. What counts is if you are doing work on
13 the critical path. In this case, we were
14 installing the guardrail.

15 The amount of delay that occurred in
16 addition to the 60 days that was planned to do the
17 guardrail is the impact to the critical path.
18 Concurrent with that time period, the 60 days that
19 was planned to install the guardrail, plus the
20 time of the impact or delays is -- under that, or
21 subsumed within that, are the reconstruction of
22 any washouts. That was performed during that same
23 time period.

24 What was critical was installing the
25 guardrail, finishing the original project scope

1 work, and awaiting the delivery of the new
2 guardrail posts. The reconstruction of the
3 washouts did not extend the project end date one
4 bit. Therefore, there was no entitlement to those
5 18 days.

6 Finally, the weather recovery days that were
7 included in the January claim, they are not in the
8 May claim anymore, and rightfully so. If you look
9 at each of the dates that are identified, there
10 are duplications of dates. For instance, there is
11 a date of -- and I'm making the date up, because I
12 don't have the dates in front of me right at the
13 moment. But if you look, you have January 21st
14 listed twice. You have February 3rd listed twice.

15 In addition, the items that they cited as
16 the reason for those being weather recovery days,
17 fog or whatever the weather conditions that
18 existed, were not cited in any of the project
19 documents. And were not cited in the daily
20 reports. The weather conditions in the other
21 daily reports, they were contrary to what was
22 listed in the claim.

23 Again, the weather recovery days have been
24 dropped from the May claim. I'm assuming that
25 that's Better Roads' recognition that those nine

1 days requested in the January claim simply were
2 not appropriate. Summarily, we have no
3 entitlement for any additional days of delay than
4 those identified for the guardrail posts in FSA
5 number two. Therefore, there is no recovery of
6 LDs that is due. And if there's not that, there's
7 no interest due on those liquidated damages.

8 And lastly, as I mentioned, there have been
9 no evidence that the additional sod that Better
10 Roads priced at \$17,000, that that was installed
11 and/or directed by the DOT. The only
12 documentation that we have on that is a page in
13 the claim that says that it's this many square
14 meters at this unit grade, and that equals 16,000
15 some odd dollars.

16 We have received no evidence that the costs
17 were actually incurred, no invoices or anything of
18 that nature, and no evidence that the DOT actually
19 directed that work to be performed. And I am
20 done.

21 MR. MUSE: If I could summarize just real
22 quickly, Angela's presentation focused on,
23 essentially, an analysis of the items contained
24 in Better Roads' claim. It is still the
25 Department's position that they have waived any

1 of their rights to any recovery under these
2 claims because of their failure to protect those
3 rights and to submit their documents in
4 accordance with the contract.

5 MR. NORTON: All right. Do you want to take
6 a five-minute break, and then we will let them
7 present their rebuttal?

8 (Brief recess)

9 MR. NORTON: All right. Bill, do you want
10 to go ahead with your rebuttal now?

11 MR. HUMPHREYS: Yes, thank you. I have a
12 prepared rebuttal based on the notebooks, and
13 what they just made their presentation from was
14 basically their notebooks, so that won't change.

15 I made a few notes during the presentation
16 I would like to address first, just real briefly.
17 Ms. Hedrick asked, you know, which claim we want
18 to proceed. It really doesn't matter. Both of
19 them are for \$447,902, plus interest. So, they
20 are the same. It is just a matter of presenting
21 it differently.

22 Ms. Sist raised several issues, one about
23 the concurrency and nonconcurrency of claim items.
24 We don't think there is any concurrency in our
25 schedule. If you look at the bar chart, we think

1 we have taken all the concurrency out. It's maybe
2 just a matter of a difference of opinion about
3 where you assign the guardrail delay.

4 We have tried to account for that. I
5 understand their analysis is different than ours,
6 but we don't believe there is any concurrency in
7 ours.

8 There are a lot of things in the
9 Department's detailed analysis about the delay
10 that we obviously don't agree with. I'm not going
11 to go into that. I think our analysis is pretty
12 clear, I think theirs is clear. I think the Board
13 has enough experience they can sort through both
14 of them and come to their own conclusion. But we
15 obviously don't agree with their analysis.

16 The issue of the sod, I'm not sure what the
17 Department is saying. I'm not sure if they are
18 saying they deny that the sod was ever planted.
19 No, there's not documentation.

20 The inspector, Billy Tindal, went up to the
21 sodding guy and told him to plant it, he did.
22 Yes, maybe somebody should have written it down,
23 but Billy Tindal, the inspector, didn't even go to
24 Gordon Ellery, the prime contractor, he went to
25 the sub, the sub did it. The sod was planted.

1 Maybe the paperwork didn't catch up with it,
2 but I think that's just as much the Department's
3 fault. If they wanted the sod, they should have
4 written it down, but that's not the way things
5 normally went on this job.

6 The issue about the weather days in the
7 first claim versus the rewritten claim in April,
8 I'm not sure what the point of that is. We took
9 all the weather out of the first claim, because we
10 did a fresh analysis. And second, to be honest,
11 we found some mistakes in the first one where, you
12 know, one day or a couple of days were listed
13 twice. Obviously, if it's not right, it's not
14 right.

15 The issue about fog not being a weather day,
16 I understand about the 50 percent rule and
17 everything. But the fact of the matter is,
18 because of the slope delay and the guardrail
19 delay, it threw this whole job into a different
20 time of year than it was bid. Fog did impact the
21 job.

22 Nevertheless, we took all that out of the
23 second analysis, because even if you had it in
24 there, it's a legitimate -- it would probably be
25 concurrent with the slope or the guardrail delays.

1 So, you know, we weren't trying to hide anything.
2 We took it out because we didn't think it was
3 appropriate. It's not that it didn't happen.

4 Most of the Department's analysis about how
5 much time Better Roads is entitled to for the
6 guardrail delays is based on when they would have
7 finished the original work anyway, and they are
8 saying that's all noncompensable time, you don't
9 get a time extension. And just the little bit
10 that's left over, that's what you are entitled to.

11 As I said earlier, we don't agree with that
12 type of analysis, and we think it's flawed because
13 it is the "could of, should have" analysis. And
14 we tried to base ours on what really happened.

15 For instance, the Department makes the point
16 that it would have taken 60 days to do the
17 guardrail. We definitely don't agree with that.
18 There were 46,832 feet of guardrail. Alford
19 estimated he could do 1800 feet a day. That's 26
20 working days.

21 Obviously, Alford didn't work seven days a
22 week, and he wasn't able to work continuously,
23 because he was jumping around to dodge the water
24 line, the Sprint line, everything else. But he
25 could have done the job probably in half that time

1 if it had been critical, if he had to.

2 The paving could have been done like five

3 days behind the guardrail, and the marking five

4 days behind that. The bottom line, if it hadn't

5 been for the slope problem, all this finishing up

6 train of Alford, the friction course and the

7 marking could have started in December, and we

8 think it could have been finished on time.

9 But, you know, it is a just different method

10 of analysis, and the Board will have to decide

11 which they think is most appropriate.

12 I would like to go to my prepared statement

13 about the Department's response to our request for

14 arbitration.

15 I would like to go through their -- the key

16 points that they make individually. But before I

17 do that, I would like to make a general statement

18 concerning the conduct of Better Roads and the

19 Department during the course of the project, as

20 the conduct relates to contract administration,

21 and specifically to Sections 4, 5 and 8 of the

22 Standard Specifications.

23 Better Roads thinks that it's important to

24 make the Board aware of how the contract was

25 administered by the Department during the course

1 controlling items of work. This is not how the

2 Department administered this contract.

3 Let me give a few examples. Number one,

4 shortly after Better Roads began working on the

5 left roadway embankment, the Department recognized

6 that there was a serious problem with the design.

7 There were several references to this in the

8 minutes of progress meetings and the minutes of

9 the regular Disputes Review Board meetings.

10 Better Roads began placing embankment late

11 in July of 2002. The problem had to become

12 obvious by no later than late July or early

13 August. The Department's response to this problem

14 was to verbally instruct Better Roads to make the

15 slope as steep as necessary to keep the embankment

16 within the right-of-way, even if this meant

17 constructing a slope steeper than the maximum

18 slope allowed in the plans.

19 Additionally, Better Roads was instructed

20 not to clear trees in some areas, because it was

21 felt that leaving the trees would help hold the

22 slope that was too steep in place.

23 Better Roads was instructed to use hand

24 labor to move the material away from the fence at

25 the right-of-way when a slope failed and slid

1 of the work, because now that Better Roads' claim

2 has turned into a dispute, it appears that the

3 Department is relying heavily on contractual

4 defenses such as lack of notice, untimeliness, and

5 deviation from the strict language of the

6 specifications regarding submitting a claim.

7 While Better Roads is prepared to address

8 all of these contractual issues, Better Roads

9 wants the Board to know why we think that raising

10 these types of defenses at this time is

11 inappropriate and unreasonable.

12 The contract is clear that the Department

13 has the right to make changes to the project

14 during the course of the work if the Department

15 thinks changes are necessary. The contract is

16 also clear that if the Department makes changes

17 that result in additional cost or results in a

18 delay to the completion of the project, the

19 Department will issue a supplemental agreement or

20 a unilateral payment agreement for the changes.

21 Additionally the contract is clear that the

22 contractor is not to proceed with the change order

23 work until the Department has issued the necessary

24 supplemental agreement or unilateral payment

25 agreement. Change order work includes delays to

1 because it was too steep.

2 Technically, these instructions were all

3 changes to the contract. These were changes to

4 the clearing and grubbing spec, changes to the

5 embankment construction specification, and

6 directives for additional work. These changes

7 were significant in terms of cost and contract

8 design. Despite the significance of these

9 changes, the Department never did issue any type

10 of directions in writing and never did issue any

11 type of contract change order.

12 Number two, progress meeting minutes for

13 the February 24th, 2003 progress meeting.

14 Wilson Miller included the following statement

15 under the heading design changes, and I quote,

16 "Guardrail post in conflict with corrugated metal

17 pipe. Rick Ward forwarded the plans to the

18 contractor on February 14th waiting on the price.

19 Time for this extra work will be addressed

20 separately by letter, along with other time

21 issues, i.e., water main and Sprint conflicts."

22 End quote.

23 The last part of this entry is referring to

24 the two delays to the guardrail installation work

25 that had already occurred. One was a conflict

1 between the guardrail posts and an eight-inch
2 water main that occurred on January 21st, and the
3 other was a conflict with Sprint underground cable
4 discovered on February 13th.

5 The delay that resulted from the water line
6 conflict was relatively minor. The delay that
7 resulted from the Sprint conflict, was not minor.

8 The point is, according to the contract, the
9 Department should have addressed each of these
10 conflicts and resulting delays with some type of
11 work order or supplemental agreement at the time
12 that these conflicts arose and before the
13 contractor made changes to his operation.

14 The Department did not do this. In fact,
15 the Department never did contractually address
16 these conflicts during the course of the job, even
17 though the second conflict resulted in Alford
18 having to demobilize from the job site on two
19 separate occasions for lack of a place to work.

20 Instead of issuing a change order of some
21 type as the contract requires, the Department
22 chose to furnish an analysis of all the guardrail
23 conflicts in a letter to Better Roads after the
24 job was over.

25 Example number three. Regarding the

1 conflict between the new guardrail and the cross
2 drains that I talked about previously, this
3 conflict was discovered by Alford on January the
4 23rd, 2003.

5 March the 11th, 2003, the Department issued
6 a field supplemental agreement that included a
7 design change for the guardrail at 12 cross drain
8 locations. The FSA included a price for the work
9 but no additional contract time. Rather than
10 addressing time in the supplemental agreement that
11 should have been done according to the contract,
12 the Department included the following statement in
13 the FSA. "It is acknowledged by all parties that
14 additional time is required to do this work;
15 however, the consideration of time for this issue
16 as well as any other time issues will be addressed
17 separately by letter," end quote.

18 Not including a time extension in this FSA
19 was not in accordance with the contract. This
20 change order had a significant impact on
21 completion of the project. As of the date of this
22 submittal agreement, 47 days had already elapsed
23 since this conflict had impacted a controlling
24 item of work.

25 Further, Better Roads included in its price

1 proposal to the Department for the change order
2 work a request for an additional time extension of
3 49 days for material procurement, and for
4 accomplishing a change order work after receipt of
5 a notice to proceed.

6 Clearly according to the contract, some
7 allowance for a time extension should have been
8 included in this supplemental agreement, but it
9 was not. Instead the time extension was only
10 addressed in a letter written by the Department
11 after the project had been completed. And even
12 then, the letter did not address compensation for
13 the delay.

14 Contractually, not only was the Department
15 not timely in addressing a time extension for
16 delay, the Department did not address the cost
17 impacts of the delay.

18 Number four, another example of the
19 Department not following its own contract is the
20 manner in which the Department handled Better
21 Roads' claim. Better Roads submitted its claim on
22 January 30th, 2004. The Department did not
23 respond to this claim until March 4th, 2005, or
24 over 13 months later.

25 According to the contract, the contractor

1 should have expected a response to its claim
2 within 120 days after the claim was submitted.

3 These examples of how the contract was
4 administered are not presented to be
5 argumentative. Rather these are brought to the
6 attention of the Board to demonstrate that it is
7 unreasonable for the Department to now take the
8 position that the Department is not responsible
9 for compensating Better Roads for additional costs
10 that were incurred that would otherwise be a
11 responsibility of the Department, simply because
12 Better Roads did not strictly follow the
13 provisions of the contract regarding submitting a
14 claim.

15 Such a position is unreasonable because the
16 Department itself has not strictly followed the
17 provisions of the contract. Further, there is
18 absolutely no evidence that the Department has
19 suffered any damages whatsoever as a result of any
20 of the problems with the claim of Better Roads
21 that the Department is now alleging.

22 On the other hand, Better Roads has suffered
23 damages of over \$450,000 as a result of the
24 Department not fulfilling its contractual
25 obligations.

1 I would now like to address each of the more
 2 significant issues raised by the Department and by
 3 the Department's consultant in their responses to
 4 Better Roads' request for arbitration.

5 Number one, the Department's consultant
 6 found that there were no outstanding claims for
 7 time for the time period of project commencement,
 8 May 20th, 2002 through January 20th, 2003.
 9 Therefore, this time period is not addressed in
 10 this analysis. This means that consultant did not
 11 review the issue of the defective design of the
 12 left roadway embankment slope and the resulting
 13 delay in its delay analysis.

14 As stated previously, the issue of the
 15 design of the left slope of the roadway embankment
 16 is a key element of Better Roads' claim. And the
 17 defective design of the slope had a significant
 18 adverse impact upon completion of the project. It
 19 is the opinion of Better Roads that any analysis
 20 that does not address this issue is not complete.

21 The Disputes Review Board recognized the
 22 impact of the slope problem. The problem was
 23 documented in the minutes of several DRB meetings.
 24 The issue was considered by the Disputes Review
 25 Board in the hearing held on November 3rd, 2003,

1 to consider time extensions.

2 The Board suggested that the Department add
 3 an additional 30 days to the 32 days that the
 4 Department was offering as a time extension. And
 5 the Board specifically cited the problems
 6 encountered during construction of the, and I
 7 quote, steep slopes and a limited right-of-way,
 8 end quote, in making this suggestion.

9 If the Department's reasoning for not
 10 considering or not granting time for this issue is
 11 lack of claim notice, Better Roads does not agree
 12 with this position. Notice is not required in the
 13 case of a defective specification.

14 And practically speaking, the Department had
 15 actual notice of this problem from the very
 16 beginning of its impact on the project. The
 17 matter was discussed numerous times. The
 18 Department gave instructions to Better Roads
 19 concerning how to address the problem. The
 20 Department was in no way prejudiced by any lack of
 21 notice.

22 Rather, it was Better Roads that was
 23 impacted by the extra work that was required, and
 24 the Department not issuing a supplemental
 25 agreement to correct the design problem, and

1 compensate Better Roads accordingly.

2 Number two, it is the Department's opinion
 3 that Better Roads' claim was not timely because it
 4 was not submitted within 180 days of final
 5 acceptance. Better Roads does not agree that its
 6 claim was not timely.

7 Better Roads was not aware until almost two
 8 months after final acceptance that the Department
 9 intended to assess liquidated damages. Better
 10 Roads was led to believe that during the last
 11 months of the job liquidated damages had been
 12 assessed because contractually the contract time
 13 had not yet been extended beyond January 30th,
 14 2003. And that as a result of the way FDOT's
 15 payment system works, the Department had to
 16 withhold liquidated damages for the time being.

17 Better Roads was told verbally in meetings
 18 and in writing in a supplemental agreement that
 19 time extensions would be addressed at a later
 20 date. Better Roads fully expected the time
 21 extensions would be granted, at least to the date
 22 that Better Roads and Alford were able to complete
 23 installation of the special guardrail, and that no
 24 liquidated damages would be assessed.

25 A DRB hearing was held concerning time

1 extensions on November 3rd, 2003, or 185 days
 2 after final acceptance. The Disputes Review Board
 3 issued its recommendations on November 15th,
 4 2003, 197 days after final acceptance. On
 5 November 25th, 2003, the Department issued its
 6 decision not to accept the recommendation of the
 7 Board. This was 207 days after final acceptance.

8 The Department then issued a second offer of
 9 final payment dated January 15th, 2004, or 258
 10 days after final acceptance. Better Roads did not
 11 know that the Department intended to continue with
 12 its dispute regarding the liquidated damages until
 13 November 25th, 2003. After receiving the
 14 Department's offer of final payment dated January
 15 the 15th, 2004, Better Roads submitted its claim
 16 and its qualified acceptance letter on
 17 January 30th, 2004, or 15 days later. Better
 18 Roads does not consider this untimely, given the
 19 circumstances of this dispute.

20 Additionally, according to Article 5-12.2.1
 21 of the specifications, the contractor has 180 days
 22 after receipt of a final estimate to submit its
 23 claim if the claim involves a quantity dispute.
 24 Again, the date of the last offer of final payment
 25 was January 15th, 2004. If the determination of

1 the appropriate number of days of liquidated
2 damages is considered as a quantity issue, then
3 Better Roads' claim was not only timely, within
4 the spirit and intent of the contract, but it was
5 technically timely as well.

6 Number three, it is the Department's opinion
7 that Better Roads' claim was not properly
8 certified because it was not notarized. Better
9 Roads agrees that the original claim certification
10 was not notarized, but does not agree that this
11 means that Better Roads did not submit a proper
12 claim. When Better Roads submitted its claim on
13 January 30th, 2004, Better Roads was not aware of
14 the requirement that a claim certification be
15 notarized. Article 5-12.9 of the specifications
16 does not directly mention this requirement.

17 The Department accepted the claim and gave a
18 receipt to Better Roads for its claim. The
19 Department did not notify Better Roads that there
20 was a problem with the certification as submitted.
21 It is not that the claim was not certified, the
22 claim was merely not certified with a notarized
23 statement. Once the issue was raised by the
24 Department in March, 2005, which was over a year
25 after the claim was submitted, Better Roads

1 getting the claim submitted quickly than in
2 spending a lot of time including an exhaustive
3 presentation of the issues. The Department was
4 just as aware of all the facts pertaining to the
5 issues as Better Roads was. It was Better Roads'
6 goal to get a claim in at the earliest date
7 possible and hope that the claim would result in
8 discussions between Better Roads and the
9 Department, and that the dispute would be settled.

10 After over a year went by and there were no
11 indications that the Department intended to try to
12 settle the claim, Better Roads realized that there
13 was a good chance that the claim would have to be
14 pursued outside of the Department, either through
15 arbitration or litigation. At that point, Better
16 Roads decided that it needed to put together a
17 more comprehensive claim that could be understood
18 by someone that was not involved in the project
19 during construction. This was the reason behind
20 the claim that was submitted by Better Roads on
21 April 29th, 2005, the claim that's before the
22 Board today.

23 This April 29th, 2005 claim is not a new
24 claim in the sense that Better Roads has changed
25 the basis of entitlement or has asked for more

1 promptly submitted a notarized claim
2 certification.

3 Number four, the Department points out that
4 Better Roads submitted two versions of its claim,
5 and that contrary to the supplemental
6 specifications of the contract, the number of days
7 of delay and assignation of the days of delay are
8 different in the two versions of the claim.
9 Better Roads agrees that there is some difference
10 in the number of days of time extension requested
11 for compensable delays in the two versions of
12 their claim, but does not agree that this amounts
13 to a material difference in the claim itself. The
14 fact that Better Roads changed the way that the
15 delay days were assigned to the various causes of
16 delay between the first version of the claim and
17 the second, did not change the basis of the claim,
18 and did not change the amount of compensation that
19 Better Roads is seeking in its claim.

20 Better Roads first submitted its claim on
21 January 30th, 2004. This claim was prepared in a
22 short period of time after it became known that
23 the Department intended to continue to withhold
24 liquidated damages. At the time the claim was
25 prepared, Better Roads was more interested in

1 compensation than was originally requested. The
2 issues have not changed. The issues are still the
3 defective design of the left slope, the guardrail
4 delays, the sod planted at the end of the job that
5 has not been paid for, and liquidated damages.

6 Issue five raised by the Department. The
7 Department notes that the amount of Better Roads'
8 claim is in excess of the amount of the qualified
9 acceptance letter of August, 2003. Better Roads
10 does not agree that this is material to the claim.

11 It has been clear for more than the last
12 year and a half that the amount of money that
13 Better Roads is seeking is the amount stated in
14 the January, 2004 qualified acceptance letter, not
15 the August, 2003 letter that was submitted before
16 Better Roads even prepared its claim.

17 The first offer of final payment was given
18 by the Department on July 14th, 2003, about two
19 months after the job was over. Better Roads'
20 qualified acceptance letter in response to this
21 offer did not refer to a claim because there was
22 no claim at that time. Better Roads was merely
23 documenting that it was the opinion of Better
24 Roads that Better Roads was entitled to additional
25

1 compensation for maintenance of traffic work and
 2 for general conditions as a result of the extended
 3 period of performance, and that Better Roads
 4 expected the withheld liquidated damages to be
 5 returned.

6 Better Roads submitted its claim on
 7 January 30th, 2004, once it was known what the
 8 nature of the dispute was and what the particulars
 9 of the claim were. As of August, 2003, Better
 10 Roads did not know what the Department's final
 11 position regarding liquidated damage and time
 12 extensions would be. Better Roads did not know
 13 this until the Department issued its second offer
 14 of final payment on January 15th, 2004.

15 A qualified acceptance letter, including the
 16 amount of Better Roads' January 30th, 2004 claim
 17 was submitted to the Department. Better Roads is
 18 not now seeking more compensation than the amount
 19 included in the January, 2004 qualified acceptance
 20 letter, which is the one that is applicable to
 21 Better Roads' claim today.

22 Issue six. It is the opinion of the
 23 Department that the issue of compensation for
 24 installing sod that was not included in the
 25 original contract shall not be considered by the

1 Board because this item was not included in the
 2 qualified acceptance letter of August, 2003.
 3 Again, it is the position of Better Roads that it
 4 has been clear since January, 2004, that the
 5 amount of Better Roads' claim is the amount
 6 included in the January, 2004 qualified acceptance
 7 letter, not the August, 2003 qualified acceptance
 8 letter. It has been clear since that time that
 9 the sod issue is a part of Better Roads' claim.
 10 Better Roads requests that the Board consider this
 11 item on its merits.

12 Issue seven. It is the opinion of the
 13 Department that Better Roads' claim includes an
 14 amount for supervision for the extended period of
 15 performance that is not allowed because it is
 16 included in the amount already allowed as
 17 compensation or indirect cost as specified in
 18 Article 5-12.6.2.2 of the contract. Better Roads
 19 does not agree with the Department's position in
 20 this matter.

21 According to the contract, the compensation
 22 that the contractor is entitled to under Article
 23 5-12.6.2.2 of the specifications is for the
 24 indirect impacts of delay. The article is very
 25 clear that we are talking about indirect impacts

1 under that provision. Indirect is the key word in
 2 this provision.

3 The cost of a working superintendent is a
 4 direct job cost and not an indirect job cost.
 5 Direct costs are compensable under Article
 6 5-12.6.2.1, which is the preceding one in the
 7 book, not Article 5-12.6.2.2. A working
 8 superintendent is a direct cost, and not a general
 9 job site overhead expense.

10 Issue number eight, it is the opinion of the
 11 Department that the amount claimed by Better Roads
 12 for maintenance of traffic during the extended
 13 period of performance is overstated by
 14 approximately 45 percent. Better Roads does not
 15 agree with the Department's position on this
 16 matter. The Department has indicated that Better
 17 Roads is entitled to the actual direct cost
 18 incurred for MOT, and that a preliminary audit by
 19 the Department indicates that Better Roads' actual
 20 cost was only \$397 per day, not the 735 per day
 21 included in the claim. Better Roads does not know
 22 what is included in this \$397 per day figure, but
 23 Better Roads does know that the actual cost
 24 exceeded that amount.

25 Almost all work that was performed on this

1 project had to be performed within the confines of
 2 a lane closure, with one-way traffic passing in
 3 the open lane. The average MOT crew was three
 4 employees, plus a truck, plus MOT devices, plus
 5 supervision. The cost of labor and the truck and
 6 the devices, including the markups allowed in the
 7 contract, was approximately \$843 per day.

8 Not included in this amount is the liability
 9 for uninsured risk that a contractor is exposed to
 10 in a project such as this where the roadway is
 11 being used by cars and trucks at the same time as
 12 construction is taking place. If an allowance of
 13 one-half of 1 percent of the contract value is
 14 added to this risk, this adds another \$130 per day
 15 to the cost of MOT. This means that the overall
 16 actual cost of MOT on this project on a daily
 17 basis was approximately \$972 a day.

18 Again, Better Roads has used an amount of
 19 \$735 a day in its claim, and thinks that that
 20 figure is more than reasonable. Aside from the
 21 issue of reasonableness, it is common practice on
 22 FDOT jobs in Florida where a time extension for
 23 change order work is involved, to estimate the
 24 additional cost of maintenance of traffic based
 25 upon a daily amount derived by dividing the total

1 MOT price for the project by the number of days
 2 included in the original contract.

3 The Department has agreed in the past that
 4 this is a fair way to estimate the cost of
 5 additional MOT work. And it is likely that one
 6 reason the Department has done this is because
 7 this limits the Department's exposure to liability
 8 claims. Better Roads requests that the Board
 9 consider using this average daily rate method for
 10 the claim that is now before the Board.

11 Issue nine, it is the opinion of the
 12 Department that the Board should not hear Better
 13 Roads' claim for a time extension for not enough
 14 time allowed for construction in the original
 15 contract. According to the Department, this
 16 should not be considered as a claim item, because
 17 Better Roads did not take exception to the
 18 recommendation of the project Disputes Review
 19 Board when this claim item was referred to the DRB
 20 during the course of the project.

21 Better Roads does not agree with the
 22 Department's position on this matter. This matter
 23 was brought before the Disputes Review Board in a
 24 hearing held on February 24, 2003. The list of
 25 Board findings that came out of this hearing

1 and delays, interest should not begin to accrue
 2 before July 11th, 2005. Better Roads does not
 3 agree with this position. Better Roads stands by
 4 its argument that its original claim was proper as
 5 submitted on January 30th, 2004.

6 If the Board agrees, then prejudgment
 7 interest should be determined based upon this date
 8 as specified in Article 5-12.5 of the specs.

9 That concludes our response to DOT's
 10 rebuttal. All I have left is a closing statement,
 11 if I can give that right now. It is very brief.

12 This was a difficult project, despite a
 13 serious problem with the embankment design, and
 14 despite several significant conflicts with
 15 installation of the guardrail at the end of the
 16 project, when guardrail installation was a
 17 controlling item of work.

18 Better Roads successfully completed not only
 19 all of the work required by the contract, but
 20 additional work as well. Not only has Better
 21 Roads not been reimbursed for the additional cost
 22 it incurred for the extra work, but Better Roads
 23 has not even been paid the full amount of the
 24 original contract.

25 It is Better Roads' opinion that there is no

1 includes, and I quote, "The DRB is not authorized
 2 to amend, modify or change the terms of the
 3 contract," end quote. The Department is now
 4 taking the position that the Arbitration Board
 5 should not hear this issue because Better Roads
 6 did not take exception to the DRB's
 7 recommendation.

8 While it's true that Better Roads did not
 9 dispute the DRB ruling on this issue, Better Roads
 10 was not required to dispute the ruling. The DRB's
 11 decision on March 4th, 2003, and follow-up letter
 12 on the same date merely indicates that the DRB
 13 does not have jurisdiction to and, therefore,
 14 cannot amend the terms of the contract.

15 The DRB didn't make a ruling that the DRB
 16 believed that contract time was sufficient. The
 17 DRB merely determined that it lacked jurisdiction
 18 to change the terms of the contract. Better Roads
 19 reiterates that it considers the amount of time
 20 included in the contract to be a defective
 21 specification and asks the Board to consider this
 22 issue on its merits.

23 Issue ten, the Department has stated that if
 24 it is determined that the Department owes
 25 compensation to Better Roads for additional work

1 way for the Department to justify its position
 2 that it does not owe any additional compensation
 3 to Better Roads. The work was completed over two
 4 years ago. During this period, the Department has
 5 never made a good faith effort to reach a
 6 reasonable settlement with Better Roads.

7 The Department has not been willing to
 8 discuss the issues that make up this claim based
 9 upon the facts of the project and the merits of
 10 the issues. Instead, the Department for the most
 11 part has relied on technical contractual reasons
 12 for why Better Roads should not be paid for work
 13 that Better Roads performed. This has been the
 14 case from June, 2003 right up to the present time.

15 It is obvious to Better Roads that last
 16 week's response by the Department to Better Roads'
 17 request for arbitration was drafted by an
 18 attorney. The response has very little to do with
 19 the facts of the embankment problem or the facts
 20 of the guardrail delays. Rather, the response is
 21 principally about the technical contractual
 22 reasons why, in the opinion of the Department, the
 23 Board should not even consider Better Roads'
 24 claim.

25 It is Better Roads' opinion that the

1 Department's position has been and continues to be
2 unreasonable and at odds with the spirit and
3 intent of the contract. Better Roads respectfully
4 requests that the Board correct this situation.
5 Better Roads requests that the Board find that the
6 Department owes Better Roads \$447,902 plus
7 applicable interest. That concludes our prepared
8 remarks.

9 MR. TURNER: I do have a couple of notes
10 that I had made during Ms. Sist's presentation.
11 One thing that she spoke about was a guardrail
12 post delivery, the special posts, that they were
13 17 days late arriving. That was the first time
14 that any of us that were involved with the
15 project ever heard that, and we are wondering
16 where that information came from.

17 MS. SIST: May I respond? It was based on
18 your projected delivery date that was included
19 with the number of days when you submitted your
20 pricing and the number of estimated days for each
21 of the stages of the work.

22 MR. TURNER: We may have estimated a time,
23 but these obviously were special posts that were
24 manufactured. So, it was kind of like when they
25 are ready, they are ready.

1 MS. SIST: Precisely. And that's exactly
2 the reason why I assessed it as being compensable
3 and excusable.

4 MR. TURNER: Okay. My other question also
5 for you is, you were talking about the washouts
6 and the 18 days. And I think you basically said
7 that this didn't have any bearing on the critical
8 path. Well, in fact, it does, because it -- all
9 this dressing of all of these slopes had to be
10 done before the guardrail could proceed. So,
11 very definitely, anything to do with these slopes
12 had to precede the guardrail installation. So,
13 I'll take exception to that statement.

14 MS. SIST: If you look at the dates when the
15 washout repairs were done, it was at a time that
16 we were awaiting the guardrail delivery, or
17 guardrail was being installed. I looked at each
18 and every one of those days. My assessment was
19 that none of the days when the washout repairs
20 were being performed affected the guardrail
21 progress. Once again, if we were waiting for
22 delivery of the posts you could have done --

23 MR. TURNER: No, no, not the special posts,
24 not the special posts, but we're talking about
25 all the guardrail. Any time that we had a

1 washout on the slopes, it prevented us from
2 proceeding with the guardrail.

3 MS. SIST: I would agree, but what was
4 driving the end date at one point was awaiting
5 the delivery of the special posts. If you are
6 performing other work concurrent with waiting for
7 that, that's the farthest item out, that's
8 driving the end date. Whatever you do in that
9 interim, unless it affects the forecast end date,
10 it . . .

11 MR. TURNER: Right, and we agree very much,
12 that the special guardrail post did drive the end
13 rate. We are very much in agreement with that
14 statement. Thank you.

15 MS. SIST: I agree too.

16 MS. HEDRICK: Could we have 5, just to
17 compare? Certainly, in rebuttal of this
18 testimony, they prepared before this hearing. We
19 prepared notes, and we would like to compare
20 notes that the Department took to make sure that
21 we address each item that they produced in their
22 rebuttal.

23 MR. NORTON: All right. Are you ready,
24 Sharon?

25 MS. HEDRICK: I just wanted to rebut a few

1 points made by Bill in his rebuttal to our
2 testimony. The first is specifically related to
3 his contention that the contract specifications
4 regarding the contractor's requirement to
5 preserve his right to proceed in this forum, say
6 that -- he essentially says that this is -- that
7 is not a relevant issue, and this isn't a legal
8 forum.

9 Our position is, this is a legal forum,
10 established by Florida Statutes, and equivalent to
11 a civil court proceeding, so it is absolutely
12 relevant that the terms of the contract be
13 established in this forum. And that his failure
14 to fulfill those terms of the contract, and
15 preserve his rights is absolutely relevant. And
16 that is a key point in this whole proceeding.

17 Beyond that, we also wanted to make the
18 point that the terms of the contract dictates that
19 all issues be submitted and ruled on by a Disputes
20 Review Board, all disputed issues. In fact, two
21 issues were submitted to a DRB. Quantum was
22 established in those two -- entitlement was
23 established in those two rules, but quantum was
24 never determined by the Dispute Review Board,
25 therefore, that is another basis as to why this

1 board shouldn't even consider the quantum portions
2 of the claim. It was never heard and required by
3 the contract by the Dispute Review Board for the
4 project.

5 The next point related to the two qualified
6 acceptance letters. The first qualified
7 acceptance letter submitted by Better Roads is the
8 relevant qualified acceptance letter. There was a
9 revised offer of final payment made. That was
10 strictly to compensate for the Dispute Review
11 Board hearing that was held on the project. The
12 estimate only was to pay the three thousand
13 dollars for the Board members that Better Roads
14 was required to pay.

15 And in turn, Better Roads took that and
16 resubmitted a qualified acceptance letter and
17 increased the amounts. And that is strictly not
18 allowed within the terms of the contract.

19 He also made the statement, we don't care
20 which claim you look at, they are the same amount.
21 Clearly, Better Roads has changed their position
22 on these issues many times. We are at the point
23 where we are not even exactly sure what the issues
24 are, how many days are related to each issue, and
25 what the actual damages were.

1 Case in point: They cited some additional
2 figures for MOTs in here. Those have not been
3 submitted to the Department, provided to the
4 Department, and they are not in any of the
5 position papers in any of the claims submitted by
6 Better Roads, or supported.

7 There was one other example that Angela had
8 caught on to.

9 MS. SIST: Just the differences between the
10 claims. As I mentioned during my presentation,
11 he focused on the January 2004 claim. One of the
12 most significant difference in the January 2004
13 and May 2005 claim was the additional request for
14 74 days of noncompensable time due to project
15 difficulty.

16 As far as I can tell, that is the same issue
17 that is associated with the 28 days of compensable
18 time requested with the difficulties of
19 constructing the slopes. So, I'm having a little
20 difficulty of my own reconciling some of the new
21 information that was presented in the May claim,
22 because it does appear that there is, at the very
23 least, an overlap or a double-counting of some of
24 the days that are being associated with delays
25 that may have or may not have been incurred on the

1 project.

2 MS. HEDRICK: And just one final point.
3 Better Roads and Mr. Humphreys indicated that,
4 you know, the Department failed to follow its own
5 contract. That is absolutely irrelevant. I
6 mean, it is the contractor's contractual
7 responsibility to determine what the impacts are
8 for issues, and determine what his damages are so
9 we can properly evaluate them.

10 And if he doesn't give us notice, the notice
11 that he's being damaged in some way and allows us
12 the opportunity to even track and evaluate the
13 issues, we have no way to make that determination.

14 In closing, we think that the terms of the
15 contract are absolutely relevant. He has
16 irrevocably waived his rights to this hearing, and
17 the Board should uphold our request that these
18 issues not be heard by the Board. Thank you for
19 your time.

20 MR. NORTON: Okay. Ken, do you got any
21 questions?

22 MR. LEUDERALBERT: Not at this time.

23 MR. NORTON: Bob, I know you have got some,
24 because I do too.

25 MR. BURLESON: I have got a couple.

1 MS. HEDRICK: You have been writing away
2 over there.

3 MR. BURLESON: And first, let me say, don't
4 try to read anything into these questions,
5 because I do take very seriously the terms of the
6 contract. But one thing that hits me right in
7 the face, it is not a big number, but has anybody
8 asked the inspector whether he instructed for
9 that sod to be placed or not?

10 MS. HEDRICK: I absolutely can't answer that
11 question at this point.

12 MR. BURLESON: Why wouldn't you have?

13 MS. HEDRICK: Because it didn't even show up
14 into a package until way after the requirements
15 of the contract. It was never showing up --

16 MR. BURLESON: Even at that point.

17 MR. SANDS: It wasn't included in the
18 qualified acceptance letter either.

19 MS. HEDRICK: I don't know that he is even
20 available anymore for us to ask, I guess.

21 MR. BURLESON: That is probably the reason.
22 I think I heard Angela say, and I just wanted to
23 be sure, because I don't -- I didn't read it this
24 closely. Did you all give a time of 60 days in
25 one of the meetings in January that would take

1 you to do the guardrail?
 2 MR. NORTON: That was, I believe Angela said
 3 that there was a progress meeting. Angela?
 4 MS. SIST: I did show you that, those
 5 meeting minutes that said 60 days. And then in
 6 the subsequent meeting minutes, after progress
 7 was underway on the guardrail, they said it would
 8 take an additional 45 days.
 9 So, everything that was in the document was
 10 consistent with an estimated tubation of 60 days
 11 to do the guardrail work. Or it was in the
 12 January 8th meeting minutes, the first
 13 appearance of the estimate. And then in a
 14 subsequent set of meeting minutes it has the
 15 additional, remaining duration of 45 days
 16 identified.
 17 MR. SANDS: Bob, was your question the time
 18 extension or the original schedule?
 19 MR. BURLESON: No, no. The original
 20 schedule for the guardrail before they knew about
 21 the other problems.
 22 MR. SANDS: Right, they are -- in the
 23 meeting minutes they say, hey, it is going to
 24 take us at least 60 days to do this work. It is
 25 still included in the guardrail.

1 shall submit full and complete claim
 2 documentation as described in 5-12.3 as the final
 3 estimate claim dispute issues, within 90 or 180
 4 days respectfully. We did that. We were within
 5 180 days of the offer of final payment, which the
 6 estimate came with.
 7 MR. NORTON: What is your quantity that you
 8 are disputing?
 9 MR. TURNER: The liquidated damages.
 10 MR. NORTON: The liquidated damages and the
 11 sod, I guess?
 12 MR. TURNER: Yes.
 13 MS. HEDRICK: The liquidated damages aren't
 14 a pay item in the contract.
 15 MR. TURNER: It doesn't say a pay item. It
 16 says, final quantity. To me a liquidated damage
 17 is a final quantity.
 18 Let me just give you some examples of why I
 19 think this is a very important part of this
 20 particular specification. Recently, we have got
 21 another job that you are going to hear about
 22 before too long, but we got the offer of final
 23 payment a year after the job was completed, so how
 24 could we be expected to file our claim in 180 days
 25 after final acceptance and get the final estimate

1 MR. TURNER: And I think our answer is, if
 2 it's in those minutes, then that's probably, you
 3 know -- it's not any different than the slope
 4 issues being in the minutes. If it's in the
 5 minutes, that's probably what happened.

6 MR. BURLESON: Okay. I'm afraid mine are
 7 more in the term of comments than questions, so
 8 I'm going to be quite.

9 MR. NORTON: Okay. I have got one question,
 10 and I guess Joe or whoever wants to answer it.
 11 But there is a specification requirement that
 12 says that you will have your claim in within 180
 13 days?

14 MR. TURNER: Yes.

15 MR. NORTON: You have admitted in your claim
 16 that you didn't make that.

17 MR. TURNER: No. Let me tell you what our
 18 whole situation is premised on.

19 MR. NORTON: All right.

20 MR. TURNER: And it is 5-12.2.1. And it
 21 says that, 90 days after final acceptance of the
 22 project, or 180 days after final / you know,
 23 depending on the dollar amount. However, for any
 24 claim or part of a claim that pertains solely to
 25 final estimate quantity dispute, the contractor

1 and the offer of final payment a year later. We
 2 have two jobs like that right now that I could
 3 bring to you.

4 MS. HEDRICK: That is irrelevant to this
 5 dispute.

6 MR. MUSE: Without having all of the facts,
 7 I don't think that it is appropriate to --

8 MR. TURNER: Why is it irrelevant?

9 MR. SANDS: Because it has nothing to do
 10 with this case.

11 MR. TURNER: It has everything to do with
 12 it.

13 MR. NORTON: Woe, woe, the court reporter
 14 can only get one of you, so talk one at a time,
 15 please.

16 MR. TURNER: That is our take on it. And we
 17 believe that --

18 MR. NORTON: Okay. So, essentially, you are
 19 saying that five days, 12.2.1 is your defense for
 20 the 180 days.

21 MR. TURNER: Right, and read the whole
 22 paragraph.

23 MR. NORTON: All right.

24 MR. SANDS: Except that we would disagree
 25 with that, it is not a quantity. And I guess you

1 have already got that.

2 MR. NORTON: I'm about to ask you. Let me

3 have your answer to what he's just brought forth.

4 MS. HEDRICK: I need to see it.

5 MR. TURNER: Can I make one more statement?

6 I'll put it in a little bit different fashion

7 than, had you not put liquidated damages on in

8 January or February of this year, sometimes we

9 don't see these until the final estimate, and all

10 of a sudden, a year goes by, I have got no

11 liquidated damages on the next to last estimate.

12 And I get the last estimate, and there's 90 days

13 of liquidated damages.

14 According to the way, their theory, if it's

15 a year after, I should have already filed, but I

16 don't know that the liquidated damages are even

17 coming. Many times these negotiations go on for

18 several months. And many times, they get settled

19 or we believe that they are going to be settled.

20 But in this case, it was not. But that is the

21 position that we are put in. And we are put in

22 this on quite a few jobs. Like I say, I have two

23 right now where the final payment offer didn't

24 come through for a year.

25 MR. NORTON: Okay, do you need the specs,

1 determination. We decided at that point that we

2 weren't even going to look at the claim because

3 it wasn't submitted in a timely manner. And it

4 was different than every issue that had been

5 heard. And the specification clearly states that

6 if we don't answer, he has to assume that it's

7 denied. So, our position is that it was denied.

8 MR. NORTON: Okay.

9 MS. HEDRICK: Whether you agree with that or

10 not, that's what the contract says.

11 MR. NORTON: Bob, you got any other

12 questions?

13 MR. BURLESON: No.

14 MR. NORTON: Ken?

15 MR. LEUDERALBERT: Yeah. On that field, I

16 think I heard --

17 MS. HEDRICK: Field submittal agreement.

18 MR. LEUDERALBERT: -- field submittal

19 agreement, that it was for the dollar amount.

20 And that the days would be determined later, is

21 that --

22 MS. HEDRICK: We were -- we were in dispute

23 as to the number of days that were appropriate.

24 Better Roads requested a certain amount, our

25 position was that it was a lesser amount. In

1 Sharon? He has them.

2 MS. HEDRICK: Actually, I'm all right.

3 Liquidated damages are a penalty to the contract,

4 they are not an item of the contract. That is

5 the basis of our argument. We keep going down,

6 you know, we were led to believe, or, you know,

7 we thought we were going to get this, nobody ever

8 told us we were going to have liquidated damages.

9 That still doesn't waive his responsibility to

10 protect his rights in accordance with the

11 contract. He signed a contract saying that he

12 agreed to the terms of that contract. He's

13 waived his right to this dispute.

14 MR. NORTON: Let me ask one more question of

15 you, and then I'll shut up. You have got -- you

16 have a hearing 185 days since the end of the

17 contract; a Disputes Review Board hearing.

18 MS. HEDRICK: Right.

19 MR. NORTON: Shortly after that, they

20 present a claim, or 90 days or so after that they

21 present a claim. And then it's almost a year

22 before you answer him. Why didn't you come back

23 within a couple of days and say, you missed 180

24 days, you are done.

25 MS. HEDRICK: Actually, we had made that

1 order to proceed and get the work done, we agreed

2 to the compensation for the request and would

3 address the time issues later, which we did, in

4 granting them those 32 days.

5 MR. LEUDERALBERT: In what time was the

6 contractor notified of those 32 days?

7 MS. HEDRICK: That was in the --

8 MS. SIST: June 4th, 2003, which was one

9 month after the work was completed. Guardrail

10 was finished May 2nd of 2003, which coincided

11 with the final acceptance date.

12 MS. HEDRICK: And additionally, his

13 assertion that he was never told he was going to

14 have liquidated damages, that's absolutely

15 untrue. There were several progress meeting

16 minutes which essentially state, and cancel

17 liquidated damages as they are going along. He

18 was fully aware that there would be liquidated

19 damages assessed in this contract.

20 MR. TURNER: Again, Ken, I think, if I could

21 throw my two cents' worth, as far as, it was

22 everybody's intent to get on with the work. I

23 think the biggest thing, the reason that the time

24 wasn't addressed when the FSA was issued in the

25 first place, is because we weren't sure how long

1 it was going to take to get those special posts.
 2 And we didn't have a delivery date, so there was
 3 no way that we could really -- anyone could
 4 really put an accurate date on what that end date
 5 was. But let's go ahead and agree that it is
 6 worth X amount of dollars and proceed, and we
 7 will address the time later. And that's exactly
 8 what the SA says.
 9 MR. LEUDERALBERT: That's all I have.
 10 CHAIRMAN NUTBROWN: Anybody else?
 11 Contractor is done, Department is done. We will
 12 adjourn the meeting, thank you.
 13 The Board will meet to deliberate this item
 14 within the next six weeks, and shortly thereafter
 15 we will try to get an order out.
 16 (Whereupon, the proceedings were concluded
 17 at 12:15 p.m.)
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1 CERTIFICATE
 2
 3 STATE OF FLORIDA:
 4 COUNTY OF LEON:
 5 I, MONA L. WHIDDON, Court Reporter, certify that I was
 6 authorized to and did stenographically report the foregoing
 7 proceedings and that the transcript is a true and complete
 8 record of my stenographic notes.
 9
 10 DATED this 14th day of September, 2005.
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MONA L. WHIDDON
 Court Reporter
 Wilkinson & Associates
 Tallahassee, Florida
 (850) 224-0127 FAX (850) 576-6176

1 CERTIFICATE OF OATH
 2
 3 STATE OF FLORIDA
 4 COUNTY OF LEON
 5
 6 I, the undersigned authority, certify that the foregoing
 7 deponent personally appeared before me and was duly sworn.
 8
 9 WITNESS my hand and official seal this, the 14th day of
 10 September, 2005.
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MONA L. WHIDDON, Court Reporter
 Notary Public, State of Florida
 My Commission Expires: 9/11/2008
 No. CC967282