

STATE ARBITRATION BOARD

1022 LOTHIAN DRIVE
TALLAHASSEE, FLORIDA 32312
PHONE: (904) 385-2852

25 March 1991

+ + + NOTICE + + +

In the case of The Brewer Company of Florida, Inc. versus the Florida Department of Transportation on Project No. 90020-3552 in Monroe County, Florida, both parties are advised that State Arbitration Board Order No. 2-91 has been properly filed on March 25, 1991.



H. Eugene Cowger, P.E.
Chairman & Clerk, S.A.B.

S.A.B. CLERK

MAR 25 1991

FILED

HEC/sfc

Copies of Order & Transcript to:

R.D. Buser, PE Director of Construction/FDOT

Walter R. Brewer, Jr., Vice President/The Brewer Company of Florida, Inc.

STATE ARBITRATION BOARD

ORDER NO. 2-91

RE:

Request for Arbitration by
The Brewer Company of Florida, Inc. on
Job No. 90002-3552 in
Monroe County

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

H. Eugene Cowger, P. E. Chairman
Frank Carlile, P. E. Member
Sam Turnbull, P. E. Member

Pursuant to a written notice, a hearing was held on a
request for arbitration commencing at 10:00 a.m., Tuesday,
January 29, 1991.

The Board Members, having fully considered the evidence
presented at the hearing, now enter their Order No. 2-91 in
this cause.

ORDER

The Contractor presented a request for arbitration of a
two part claim for additional compensation in the total
amount of \$ 98,492.99.

The Contractor presented the following information in
support of his claim.

PART I Amount: \$68,107.85

We disagree with the unilateral reduction in the pay
quantity for Embankment (Bid Item No. 120-6) made by the
Department of Transportation approximately two years after
acceptance of the project. This quantity of Embankment is
valued at \$68,107.85.

1. The contract provides that the final pay quantity for
Embankment shall be the plan quantity.
2. In this situation, the Department of Transportation is the
claimant because they have stated that the plan quantity
should be abandoned in favor of actual measured quantities.
Therefore they have the burden of submitting substantial
proof supporting their position.
3. When we were beginning work, we found that, between
Stations 83+00 and 123+00, the elevation of the existing
ground on the south side of the northbound lane was

substantially lower than shown in the plan cross sections. We had a land surveyor verify this and notified the Department of Transportation of our intent to request a revision to the plan quantity for Embankment based on the plan error. This request was withdrawn after the Department's CEI consultant agreed that the final payment for Embankment would be based on the plan quantity.

4. Throughout the course of the work the Department made interim payments for Embankment based on plan quantities and did not notify us of their intent to base payment for this item on other than plan quantity until approximately 2 years after final acceptance of the project.

5. It appears that the cross sections of the final surface of the earthwork, on which the Department of Transportation based its calculations for reduction in the pay quantity for Embankment were taken in late 1989, two years after the work was performed. The surface is likely to have changed during that period of time.

6. The cross sections used by the Department of Transportation in calculating the adjustment to the plan quantity for Embankment were taken at 300 and 500 foot intervals and so do not accurately reflect the configuration of the final surface of the embankment. The Florida Department of Transportation Construction Manual says that roadway preconstruction cross sections must be taken every 100 feet for level or gently rolling terrain and every 50 feet for hilly terrain. Fill placed at crossovers and culverts, as directed by the Department of Transportation, increased the quantity of embankment.

7. Since we were not made aware of the Department's intent to pay for Embankment at less than plan quantity until two years after the project was completed, we were precluded from taking our own cross sections and providing other documentation to refute their reduction in payment.

8. In a memorandum dated May 24, 1990, Mark J. Moshier, DOT District Construction Engineer, stated that he had reviewed

the cross sections, including those plotted from "check sections", and found several inconsistencies. He recommended that the plan quantity for Embankment be paid.

Part II Amount \$30,385.14 (37 months @ \$821.22 per month)

We claim interest at the rate of one percent per month on \$82,122.84, the amount withheld from payment to us for the 37 month period following March 9, 1988.

1. We take the position that, in accordance with the provisions of Section 215.422 FS, final inspection and acceptance shall not take longer than 5 days and in accordance with the provisions of Section 337.141 FS, final payment is due the contractor within 75 days after final acceptance of the work. March 9, 1988 is 80 days after December 20, 1987, the date on which work was completed.
2. The amount withheld is the balance we claimed as due us in the conditional letter of acceptance which we executed on January 5, 1990.

The Department of Transportation rebutted as follows:

Part I

1. Article 9-3.2 of the Standard Specifications contains provisions for adjustment of the pay quantity when the pay quantity for any item is designated to be the original plan quantity.
2. A sentence in Article 120-12.2 (Method of Measurement-Embankment) of the Standard Specifications states: "The measurement shall include only material actually placed above the original ground line, within the lines and grades indicated in the plans or directed by the Engineer".
3. We made the deduction in the pay quantity for Embankment because, at numerous locations, the Contractor did not build the embankment up to the elevation of the plan final template.
4. We determined the adjustment in pay quantity by comparing field cross sections taken on the completed earthwork to the corresponding final cross sections shown in the plans.
5. That quantity was in excess of five percent of the plan

quantity for Embankment and its value exceeds \$500.

6. We agreed to increase the pay quantity for Embankment for the area between Station 83+00 and 123+00 when the Contractor furnishes us survey notes substantiating the difference in the elevation of the original ground surface. He has not furnished these notes to us.

7. The check cross sections on which the reduction in the pay quantity for Embankment were based were begun on December 2, 1986 and completed during January, 1987. The date of conditional acceptance of the project was October 6, 1987.

8. The inconsistencies referred to in Mr. Moshier's memorandum of May 24, 1990 are those between Stations 83+00 and 123+00.

9. There is no documentation of the alleged agreement to base the final pay quantity on plan quantity or of extra embankment work ordered to be done in certain areas of the project.

PART II

Section 337.141 FS further provides that final payment is not due until 45 days after receipt by the Department of all documents which are required by the contract from the Contractor. The last such document was received on March 9, 1990.

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

Part I

1. Field notes submitted as an exhibit verify that the check cross sections were taken during December 1986 and January 1987.

2. The cross sections on which the adjustment in the pay quantity for Embankment were based are at 300 foot intervals. These verification cross sections were taken approximately one year after grading work was essentially complete.

The Department did not take additional final cross sections to define the limits of the deficiency at a 300 foot interval cross section.

3. Considerable non-grading work was added to the contract and this work was accomplished over a period of approximately one year after the Contractor completed the grading work.

PART II

The Department of Transportation received the last document required by the contract to be submitted by the Contractor on March 9, 1990.

From the foregoing and in light of the testimony and exhibits presented, the State Arbitration Board finds as follows:

The Department of Transportation is directed to reimburse the Contractor for his claim as follows:

PART I \$ 68,107.85

The intent here is to pay the plan quantity for the item Embankment.

PART II \$9,000.00

The amounts awarded for PART I and PART II of this claim are in addition to the amount due the Contractor per Estimate No. 24.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$303.75 for Court Reporting Costs.

Tallahassee, Florida

Dated: 25 March 1991

Certified Copy:

H. Eugene Cowger
H. Eugene Cowger, P. E.
Chairman & Clerk, S.A.B.

25 March 1991
Date

H. Eugene Cowger
H. Eugene Cowger, P. E.
Chairman & Clerk

Frank Carlile
Frank Carlile, P. E.
Member

Sam P. Turnbull
Sam P. Turnbull, P. E.
Member

S.A.B. CLERK

MAR 25 1991

FILED

S.A.B. CLERK

MAR 25 1991

STATE ARBITRATION BOARD
STATE OF FLORIDA

FILED

THE BREWER COMPANY OF
FLORIDA, INC.

) ORIGINAL

- and -

) PROJECT NO. 90020-3552

) LOCATION: Monroe County,
Florida

DEPARTMENT OF TRANSPORTATION)
_____)

RE: Arbitration In The Above Matter

DATE: Tuesday, January 29, 1991

PLACE: Florida Transportation Center
1007 DeSoto Park Drive
Tallahassee, Florida

TIME: Commenced at 10:00 a.m.
Concluded at 11:45 a.m.

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

WILKINSON & ASSOCIATES
Certified Court Reporters
Post Office Box 13461
Tallahassee, Florida 32317

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
 Mr. Frank Carlile
 Mr. Sam Turnbull

APPEARING ON BEHALF OF THE BREWER COMPANY
OF FLORIDA, INC.:

Mr. Walter Brewer
 Mr. George Spofford
 Mr. George Toppino

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Tom Aldridge
 Mr. David Chason
 Mr. David Krug
 Mr. Ernest Garcia
 Ms. Nancy Aliff
 Mr. Gene Tharpe

* * *

I N D E X

EXHIBITS	PAGE
Exhibit No. 1 in evidence	4
Exhibit Nos. 2 through 10 in evidence	5
Exhibit No. 11 in evidence	61
CERTIFICATE OF REPORTER	69

P R O C E E D I N G S

1 1
2 CHAIRMAN COWGER: This is a hearing of the State
3 Arbitration Board established in accordance with
4 Section 337.185 of the Florida Statutes.

5 Mr. Frank Carlile was appointed as a member
6 of the Board by the Secretary of the Department of
7 Transportation. Mr. Sam Turnbull was elected by the
8 construction companies under contract to the Department
9 of Transportation.

10 These two members chose me, H. E. "Gene" Cowger,
11 to serve as the third member of the Board and as
12 Chairman.

13 Our terms of office began July 1, 1989, and
14 expire June 30, 1991.

15 Will all persons who intend to make oral
16 presentations or present written documents during this
17 hearing please raise your right hand and be sworn in.
18 (Whereupon, all witnesses were duly sworn by the
19 Chairman.)

20 CHAIRMAN COWGER: The documents which put this
21 arbitration hearing into being are hereby introduced
22 as Exhibit No. 1. This consists of the contractor's
23 request for arbitration and the documents that were
24 attached thereto.

25 Does either party have any other information it

1 wishes to put into the record as an exhibit?

2 (Discussion off the record)

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

4 CHAIRMAN COWGER: During the time we were off the
5 record, we sorted through the exhibits of the parties,
6 and we will now identify for the record the exhibits.

7 Exhibit No. 2, a DOT exhibit, a copy of
8 Section 9-3 out of the Standard Specifications book.

9 Exhibit 3 is a DOT exhibit, a letter from
10 Toppino, Incorporated, dated February 11, 1986.

11 Exhibit No. 4, a DOT exhibit, which is a set of
12 cross section notes.

13 DOT, am I correct in identifying that? That's
14 what it is?

15 MS. ALIFF: That's what it is.

16 CHAIRMAN COWGER: Exhibit 5 is a copy of the
17 estimates office record of final plans and documents,
18 approved 3-2-90.

19 Exhibit 6 is a single page document entitled
20 example of deduction on job number 90020-3552.

21 Exhibit 7 is a contractor's exhibit, a letter
22 dated November 30, 1990, to the State Arbitration
23 Board, with attachments.

24 Exhibit 8 is a copy of DOT specification book
25 dealing with section -- I should say Article 9-1.3.2

1 and other articles.

2 Exhibit 9 is a contractor exhibit, a memo dated
3 May 24, 1990, from Tom Aldridge, State Final Estimates
4 Engineer.

5 Exhibit 10 is a contractor exhibit, memorandum
6 dated May 21, 1990, to Mark Moshier, P.E., District
7 Construction Engineer.

8 That completes the identification of the
9 exhibits. Does anyone have any corrections or
10 additions, anything to that? If not, we will proceed.
11 (Whereupon, Exhibit Nos. 2 through 10 were received in
12 evidence.)

13 CHAIRMAN COWGER: Does either party desire to
14 have any additional time to examine the exhibits?

15 MS. ALIFF: No, sir.

16 MR. SPOFFORD: No, sir.

17 CHAIRMAN COWGER: During the hearing the parties
18 may offer such evidence and testimony as is pertinent
19 and material to the controversy and shall produce such
20 additional evidence as the Board may deem necessary to
21 an understanding and determination of the matter before
22 it. The Board shall be the sole judge of the relevance
23 and materiality of the evidence offered.

24 This hearing will be conducted in an informal
25 manner. The contractor will elaborate on their claim

1 and then the DOT will offer rebuttal.

2 Either party may interrupt to bring out a point
3 by coming through the Chairman. However, for the sake
4 of order, I must instruct that only one person speak at
5 a time.

6 Also, so that our court reporter will be able
7 to produce an accurate record of this hearing, please
8 introduce yourself the first time you speak.

9 We can proceed on. It's appropriate now at this
10 point for the contractor to begin presentation of his
11 claim.

12 MR. SPOFFORD: Mr. Chairman, I would like to
13 make a statement. I'm George Spofford, with Cummings,
14 Lawrence and Vezina.

15 What I would like to do is give you a brief
16 outline of what we think the dispute is, introduce the
17 parties again, and then let Mr. Toppino and Mr. Brewer
18 explain the details of it. I plan on taking a very
19 minor role in this proceeding, if I can.

20 What we have is a dispute which I think is fairly
21 well outlined in contractor's Exhibit 7, which I think
22 all of you have seen. I have provided an additional
23 copy of the claim for your reference if you haven't had
24 a chance to see it. The claim amount is for \$68,000
25 and change plus interest at about 1 percent per month

1 for some 37 months.

2 The dispute involves a unilateral deduct made by
3 the DOT some two years after the project was completed.
4 Toppino -- I'm sorry, Brewer received a final estimate
5 two years after the job was over. That was the first
6 indication they had that the DOT was going to make a
7 deduction of some \$68,000.

8 The deduction involves a recalculation by the
9 DOT of the embankment pay quantity. The contract
10 provided that the contractors would be paid on the
11 basis of plan quantities, and the DOT after the fact
12 felt that the cross sections were more accurate than
13 the plan quantity and made this deduction against the
14 pay amount.

15 The work on this job was completed in December
16 of '87. The final pay estimate was received,
17 I believe, in December of '89.

18 The contract provides that when payment is to be
19 based on the basis of plan quantities and a party
20 wishes to make a change because they feel there's an
21 error, then the DOT or the contractor can bring that to
22 the other party's attention and prove its case.

23 In this case the DOT is the claimant, since they
24 are the ones who have stated that the plan quantities
25 should be abandoned in favor of actual quantities.

1 The reason why I bring that up is the contract
2 clearly provides that the DOT has the burden of proof
3 in this instance. The DOT has the obligation set forth
4 in the contract, and that's Specification 9-3.2, which
5 is part of Exhibit 8, the second page of Exhibit 8.

6 The DOT has the burden of presenting substantial
7 proof supporting their position.

8 Brewer and Toppino from day one have been asking
9 for this information. The DOT never provided it.
10 Ultimately, we had to go through a public records
11 request and obtain some information. We don't believe
12 we got all the information as a result of our request.
13 But that's neither here nor there. I bring it up
14 because the DOT has the burden in this case.

15 That is an essential point because the
16 information that we have available from the DOT to date
17 doesn't indicate that their proof is very worthy.

18 I would like to bring your attention to the
19 remainder of the exhibits, that will be Exhibits 9
20 and 10, which are two letters, a memorandum, rather,
21 from Mr. Moshier and then a memorandum from Mr. Krug
22 that I think fairly accurately state the problem with
23 the DOT's case regarding their burden.

24 And with that I would like you to pay some
25 attention to those. We will get into those in more

1 detail later.

2 With that I would like to turn it over to
3 Walt Brewer to give you a description of the project
4 and the facts of what happened.

5 MR. BREWER: My name is Walter Brewer, with
6 the Brewer Company of Florida. We were the prime
7 contractor on this particular project down on Stock
8 Island.

9 Basically it was a resurfacing and milling
10 project where an inch and a half of asphalt was milled
11 off, or three inches of asphalt was milled off and an
12 inch and a half of asphalt was placed.

13 And there was some widening that was done on the
14 outside, and then embankment was placed to dress up and
15 grass. It was a typical resurfacing project.

16 We started the job and we noticed that the
17 existing cross sections were not right to what the
18 actual conditions were out there. We had some
19 discussion out there with Post, Buckley. We also had
20 our own surveyors take some shots.

21 After discussing with Post, Buckley, who was the
22 engineer in charge of the job, we had all decided that
23 plan quantity was going to be paid on this particular
24 project. So, we continued to progress with the job.

25 In the interim, the job that normally should have

1 taken 250 days took another 240 days to complete
2 because there were additional excavations required for
3 new light bases and there was new drainage structures
4 that were placed. And so it just kept on going and
5 going.

6 We were paid plan quantity as far as Post,
7 Buckley was concerned all the way throughout the entire
8 job. There was no hint from anybody that there was any
9 problem.

10 We, of course, got our -- most of our money for
11 the embankment. We gave it -- turned it over to our
12 subcontractor. Then they're going through the final
13 paperwork, and about two years after the fact the final
14 estimate is now completed. And we get a deduct of
15 \$67,000 from our money.

16 Now the money that we have already paid to our
17 subcontractor, as far as we were concerned, it was
18 okay.

19 The final estimates came back and they said the
20 reason why the deduct was was because the new road does
21 not match what the template was supposed to be. Well,
22 we knew this going in from the beginning of the
23 project. There's all kinds of different things that
24 have occurred out there on that job.

25 We knew it wasn't going to match when we started

1 building it, but it was like we had gotten with the
2 inspectors out there on the job, gotten with the DOT,
3 and everybody assumed it was going to be paid per plan
4 quantity. That's the crux of the whole thing.

5 During the project, before it started, nobody
6 brought up the fact that, hey, we have a problem out
7 here as far as Post, Buckley reviewing it.

8 CHAIRMAN COWGER: May I ask a question before we
9 go any further? You said that you were paid for the
10 embankment in accordance with plan quantity right up
11 through completion of the project and so that money was
12 paid to you by DOT and then later deducted? Is that
13 the case?

14 MR. BREWER: That's correct.

15 CHAIRMAN COWGER: When was the deduction made,
16 approximately?

17 MR. BREWER: About two years after. I don't have
18 the exact dates. In 1989 we got the final estimate.
19 We were doing progress payments up to that point.
20 Where the final estimate took a long time to get
21 completed because there were a lot of change orders
22 involved, everything else.

23 So, the money deducted was deducted right off
24 from our company.

25 MR. SPOFFORD: I believe that was December of

1 '89, the final estimate he received.

2 CHAIRMAN COWGER: The point is that the Brewer
3 Company had the money in their hands up until December
4 of '89?

5 MR. BREWER: We didn't have the money because we
6 got paid, we went and paid our subcontractor.

7 CHAIRMAN COWGER: But DOT paid you?

8 MR. BREWER: That's correct.

9 CHAIRMAN COWGER: Then sometime on or about
10 December of '89 deducted the money?

11 MR. BREWER: Correct.

12 CHAIRMAN COWGER: When you talk about template
13 not matching, so that we can understand, would you
14 expand just a little bit on what DOT said the problem
15 was at that point.

16 MR. BREWER: Well, from what I understand is that
17 DOT took the existing template that was on the plans
18 when it was bid, and they took shots -- Post, Buckley
19 went out and took shots two years after the job was
20 final inspected and matched those shots with what was
21 supposed to be the new final template.

22 CHAIRMAN COWGER: Now I don't want to get too
23 deep into that. That's not what I really wanted to
24 know. We will let DOT come back and talk about this.

25 When you talk about template, you're really

1 talking about the cross section of the existing ground
2 prior to construction? Isn't that what you're really
3 talking about?

4 MR. BREWER: Correct.

5 CHAIRMAN COWGER: That's all I wanted. Thank
6 you.

7 MR. SPOFFORD: Why don't you bring up the fact
8 that the original plans were based on -- wasn't it some
9 cross sections two years prior to the work?

10 MR. BREWER: Right. The original plans were
11 drawn in 1984, that we bid on.

12 CHAIRMAN COWGER: Okay. That was the end of my
13 question. So if you all want to proceed.

14 MR. BREWER: That's all I have. George?

4
15 MR. TOPPINO: I'm George Toppino. Just to
16 elaborate a little more on what Walter was saying. We
17 did notice in this letter that you see that I wrote to
18 Walter Brewer that we had a local surveyor come out and
19 check the stations that's really in question.

20 And they found that there was quite a
21 discrepancy. We have a -- we have some cross sections
22 showing what DOT said was there two years prior to us
23 starting the embankment work. And there's quite a
24 discrepancy. This is what we tried to point out.

25 So, inasmuch as where we're going to be paid plan

1 quantities, we started our work. We come to find out
2 now that they're saying that we put in more fill than
3 we should have put in.

4 What has happened here is the fact that because
5 of the erosion it changed the shape of everything. We
6 put in some 12,000 cubic yards of fill instead of the
7 10,000 and something. And this -- then they said it
8 doesn't fit the template.

9 Well, our sections from the local survey company
10 shows that the original DOT cross sections are nowhere
11 near what they were two years later.

12 CHAIRMAN COWGER: May I ask you a question at
13 this point? Just to clarify to make sure we understand
14 what we're saying, you had a private surveyor come out
15 and cross section the existing ground level before
16 construction?

17 MR. TOPPINO: Before construction.

18 CHAIRMAN COWGER: And you found out that did not
19 coincide with the cross section showing in the original
20 plans? Is that your testimony?

21 MR. TOPPINO: That's correct.

22 CHAIRMAN COWGER: Now is there any record
23 submitted of those cross sections?

24 MR. TOPPINO: We have them here.

25 CHAIRMAN COWGER: That's all I wanted to know.

1 MR. SPOFFORD: I would also like to have Walt
2 readdress some things that George brought up concerning
3 the change in site conditions. He might be able to
4 shed some light on that, also.

5 MR. BREWER: Well, the final cross sections that
6 Post, Buckley did, I think they were at every 300-foot
7 interval. Some of the areas they don't even show the
8 new culverts that have been placed out there, the turn
9 lanes. It just doesn't adequately reflect really what
10 is out there now, the finished project.

11 It's just, you know, we were very surprised at
12 something like that. It was our understanding from
13 talking with Post, Buckley that the initial part of the
14 construction that was going to be paid for plan
15 quantity because the plans were so screwed up. That's
16 how everybody perceived it.

17 MR. SPOFFORD: Mr. Chairman, I would like to, if
18 I can, direct the Board's attention to Exhibits 9 and
19 10 which are the two FDOT memoranda --

20 CHAIRMAN COWGER: Okay.

21 MR. SPOFFORD: -- which are from the personnel
22 that are on the job site. Those two gentlemen
23 supposedly would know more about what happened on that
24 job than any DOT person. They both state that they
25 recommend that the plan quantity for embankment be

1 paid.

2 They went out and did additional cross sections
3 to verify Post, Buckley's cross sections. If you look
4 at the second page of Mr. Moshier's memo, the final
5 paragraph, "Therefore, in view of the above,
6 I recommend the plan quantity for embankment be paid."

7 That is confirming Mr. Krug's memo which says the
8 same thing, which has an additional note by Mr. Moshier
9 saying that he agrees with Mr. Krug's assessment that
10 the plan quantity should be paid.

11 I think it's especially telling, if you look at
12 the first page of Exhibit 9, Mr. Moshier's memo, he
13 provides a laundry list of problems with the DOT's
14 method of calculating the deduct.

15 He identifies the original cross sections that
16 the DOT provided were suspect. That there's been
17 subsequent development within the project limits after
18 Brewer and Toppino finished the job and before Post,
19 Buckley did their cross sections upon which the deduct
20 is based.

21 He identifies the utility work that was done in
22 there. There was a pipeline, I believe a phone line,
23 as well as power lines put in there.

24 He also identifies erosion within the template
25 area.

5

1 This is a causeway down through the Keys. We
2 have photographs of the utility work that's been put in
3 there as well as excellent photographs of the erosion
4 that would explain why Post, Buckley's cross sections
5 are suspect.

6 And I think a lot of emphasis should be put on
7 this memorandum. We have additional memoranda from
8 Post, Buckley wherein they acknowledge that their
9 analyses are somewhat suspect. We haven't identified
10 those as an exhibit yet. If you would like to address
11 any questions on those issues to Mr. Toppino or
12 Mr. Brewer, we welcome them.

13 CHAIRMAN COWGER: Mr. Brewer, do you concur that
14 what Mr. Spofford said, everything he said is factual
15 since he didn't have firsthand knowledge? Just want to
16 get that in the record.

17 MR. BREWER: Yes.

18 CHAIRMAN COWGER: And this utility work was done
19 subsequent to the completion of the construction
20 contract? Is that the way I understand the testimony?

21 MR. BREWER: There was embankment that was placed
22 and then there was streetlighting work that was done
23 after the embankment was placed on our contract.

24 CHAIRMAN COWGER: Okay. But it was all in your
25 contract?

1 MR. BREWER: Yes, it was all in our contract.
2 But I think -- George will know better than I. After
3 the contract has been final accepted, I think more work
4 was done.

5 MR. TOPPINO: Yes. Even after the grassing was
6 done, the utility company had first elected to hang
7 their wires on their poles. Later they came back and
8 said no, we can't let the wire on the pole, we will
9 have to do it, use underground wire.

10 So they came and went through the project, went
11 through the -- most of this where this discrepancy lies
12 is in this.

13 And then after that came a petroleum line going
14 to Boca Chica. That was placed through there. Then
15 the telephone company come through and they run a line
16 through there.

17 This was all done from when -- even after the
18 grassing was done and before final cross sections were
19 done.

20 MR. SPOFFORD: In that two-year time frame?

21 MR. TOPPINO: Within that two-year time frame.

22 CHAIRMAN COWGER: Okay. I think that
23 satisfactorily answered the question that I had.

24 MR. TOPPINO: I would like to point out one
25 thing, if you don't mind. We felt inasmuch as this

1 whole project was done on a stationing of 300 and 500
2 feet, so much occurred within these 300 and 500 foot
3 stationing that it doesn't even show on the plans. We
4 have photographs that show that there's a crossover
5 section that doesn't appear, it just happened to fall
6 between stations.

7 And with 300 feet and 500 feet anything can
8 happen. And this we found to be true in several
9 instances.

10 There's a culvert across, going across the
11 highway that doesn't show. And in the meanwhile we
12 have to put fill out there and follow a contour as we
13 were ordered to do by DOT, or Post, Buckley -- DOT.

14 You can see in some of the photographs that we
15 have what really happened here that doesn't even appear
16 on the plans. But this report that we did without --
17 and in this case what they're saying we did it without
18 compensation.

19 CHAIRMAN COWGER: Okay. How many photographs are
20 there, just roughly?

21 MR. TOPPINO: Probably 30-odd.

22 MR. SPOFFORD: If you have a particular
23 question --

24 CHAIRMAN COWGER: I just wondered if it would be
25 all right with you all if we passed those photographs

1 around.

2 MR. TOPPINO: I did this probably a little
3 differently. What I did was number the photographs.

4 CHAIRMAN COWGER: Why don't you just let the
5 Board at least take a look at the photographs and then
6 if we want more detail, we will -- and then we will
7 pass them on down, let the DOT examine the photographs.

8 As we said earlier, these will not be exhibits.

9 MR. TOPPINO: Let me say this one thing. If you
10 will notice on the back here there's a number. This
11 number in this case happens to be 18. Eighteen
12 corresponds with an 18 on the plans to know where this
13 particular -- although it's written in stationing on
14 the back, it will correspond with the plans.

15 CHAIRMAN COWGER: What are you trying to depict
16 with these photos?

17 MR. TOPPINO: We're just showing that these
18 things don't look like the template that the DOT came
19 up with.

20 CHAIRMAN COWGER: Let's not do that for the
21 moment. I think it would be appropriate for us to go
22 ahead, unless you all have some additional -- I was
23 going to ask the Board members, if they have any
24 questions at this point.

25 MR. CARLILE: You said there were some cross

1 sections done by a private surveyor. Was that someone
2 you all retained?

3 MR. TOPPINO: Yes.

4 MR. CARLILE: This was done at what point in
5 time?

6 MR. TOPPINO: It was done prior to our
7 construction, before any embankment was done.

8 MR. CARLILE: What was the reason for this?

9 MR. TOPPINO: In this letter that you see that we
10 question the accuracy of the original cross section.

11 MR. CARLILE: This was before you say the
12 agreement was reached to use plan quantity?

13 MR. SPOFFORD: I think we need to correct that.
14 The contract provides they will be paid on the basis of
15 plan quantity.

16 MR. CARLILE: You also state there was an
17 agreement because there was discussion early on. If
18 there was an agreement, why did you need the cross
19 sections?

20 MR. TOPPINO: This was prior to it.

21 MR. BREWER: We were getting ready to start the
22 job. Post, Buckley was on board. We were trying to
23 figure out what we were going to do with this
24 embankment item. And everybody had an agreement that
25 it's going to be paid on a plan quantity basis. So, he

1 took shots around that one area that was -- looked like
2 it was going to take a lot of fill on it.

3 MR. CARLILE: It wasn't throughout the job?

4 MR. TOPPINO: No, it was only for stations 84 to
5 123. That's where the bulk of the fill is.

6 MR. CARLILE: Okay.

7 CHAIRMAN COWGER: May I interrupt just a minute
8 so we all know what we're talking about. The letter
9 you referred to a couple of times, Mr. Toppino, is
10 Exhibit 3, which is your letter to Mr. Brewer dated
11 February 11, 1986?

12 MR. TOPPINO: Yes, sir.

13 CHAIRMAN COWGER: And what the testimony says so
14 far is that prior to the beginning of construction,
15 the contractor questioned the cross sections of the
16 existing surface of the ground between stations 83 and
17 123.

18 And as I understand your testimony now, it was
19 resolved later in meetings where at least Post,
20 Buckley, the CEI consultant, agreed there would be
21 payment by plan quantity, and you all accepted that?

22 MR. TOPPINO: Yes, sir. Could I point out one
23 more thing, if you don't mind, sir. When this job was
24 started, Post, Buckley did not really -- was not really
25 on board. They didn't come on board until sometime

1 after. Their contract hadn't been consummated by the
2 time this job really got started.

3 CHAIRMAN COWGER: I'm not sure that's pertinent
4 to the dispute, is it?

5 MR. TOPPINO: Except that we were dealing with
6 DOT part of the time and then Post, Buckley.

7 CHAIRMAN COWGER: Okay. Do either one of the
8 Board members have any additional questions?

9 I think it's time we switched over and let DOT
10 have some time. And there will be opportunities for
11 you all to -- for the contractor to present anything
12 additional he wants to present.

13 MR. SPOFFORD: Before we leave this issue, we
14 pulled a selection of photographs to show some of the
15 erosion and some of the additional work. This is just
16 representative of what you will find in this package,
17 if you want to just real quickly look at them. It
18 gives you a pretty good idea.

19 The reason why we think that's relevant is that
20 is more in keeping with the conditions that Post,
21 Buckley encountered when they did their cross sections
22 upon which the deduct is based.

23 And it doesn't -- the condition when those
24 photographs were taken and Post, Buckley's cross
25 sections were taken don't reflect the work as it was

1 when Brewer and Toppino left the job.

2 CHAIRMAN COWGER: Okay. We will just let those
3 pass on down. I think it's appropriate now that DOT
4 begin their statements.

5 MS. ALIFF: Thank you, Mr. Chairman. If I may
6 just basically summarize some of the details and the
7 dates of this project and then I will turn it over to
8 Mr. Garcia and Mr. Krug and Mr. Aldridge.

9 The work on this project started on February 3,
10 1986. There were cross sections taken prior to
11 construction.

12 The only cross sections which were questioned
13 by Mr. Brewer or Mr. Toppino are the cross sections
14 set forth in the letter which we have submitted as
15 Exhibit 3, which is also the letter which Mr. Toppino
16 referred to in his comments.

17 This questions station 83 to station 123 of the
18 south side of the northbound lane. These were the only
19 portions of the original cross sections which were
20 questioned by either the contractor or the
21 subcontractor.

22 The embankment work on the project was completed
23 approximately November 23, 1986. And this is the --
24 where the essential disagreement in this claim occurs.

25 The cross sections which were taken by Post,

1 Buckley were not, in fact, taken two years after the
2 completion of the project as the contractor alleges
3 in his claim letter, but were taken beginning on
4 December 2, 1986 and finishing in January of 1987.
5 Therefore, the applicable cross sections which were
6 taken by Post, Buckley were taken as soon as they could
7 possibly be taken on this project.

8 The project work was actually completed on
9 October 6, 1987, almost ten months after the conclusion
10 of the cross sections. And the date of conditional
11 acceptance on the project is October 6, 1987. The date
12 of final acceptance on this project is January 19,
13 1988.

14 Finally, the paperwork which was submitted by
15 the contractor to final estimates allowing for the
16 Department to make the final payments was not submitted
17 until March 9, 1990.

18 It's basically the Department's position that the
19 embankment was paid according to plan quantity. We
20 would like to call your attention to provision 9-3.2.1
21 of the 1982 Standard Specifications.

22 You have been given two sets of Standard
23 Specifications regarding this project. The Standard
24 Specs which were submitted by the Department as Exhibit
25 No. 2 are from the 1982 specs. And I think --

1 MR. SPOFFORD: It's the same.

2 MS. ALIFF: You will agree that '82 are the specs
3 that apply to this particular project?

4 MR. SPOFFORD: Yes.

5 MS. ALIFF: The provisions are the same in both
6 specs. It's our contention they were paid according to
7 plan quantity.

8 I would like to call your attention to the two
9 exhibits that were submitted by counsel for the
10 contractor, numbers 9 and 10, and call your attention
11 to the fact that these refer to the same station
12 designations as set forth in Mr. Toppino's letter to
13 Mr. Brewer of February 11, 1986. This is only a small
14 portion of the entire project.

15 Basically if we take these particular stations
16 and -- that are set forth in Mr. Toppino's letter and
17 Mr. Moshier's memorandum, this amount represents only
18 \$6,180 of the entire amount deducted on the project.

19 We have represented to Mr. Toppino, and Mr. Krug
20 can address this, that we are willing to pay this
21 amount. And this is the amount which is questioned
22 in the letter of February 11, 1986, and also in
23 Mr. Moshier's memorandum of May 24, 1990, as well as
24 Mr. Krug's memorandum.

25 The reason this amount has not been paid to date

1 is simply because the contractor has not provided the
2 backup data to the Department to pay that amount.

3 Our position as to the allegations that the
4 project was surveyed two years after the completion of
5 the project is -- our position is that this allegation
6 is totally false.

7 If you gentlemen will examine Exhibit 4, which
8 are the notes from the cross sections which were done
9 by Post, Buckley, you will see that the dates of the
10 cross sections were, in fact, performed are all in
11 December of 1986, and going forth until January of
12 1987.

13 Therefore, the other factors which are addressed
14 by the claimant in their claim letter are simply not
15 applicable. The cross sections were, in fact, taken
16 immediately after the embankment work was done on the
17 project.

18 And with that statement, I would like to turn it
19 over to Mr. Garcia.

20 MR. GARCIA: I'm Ernest Garcia. I'm the area
21 engineer with the State Construction Office up in
22 Tallahassee.

23 To reiterate a couple of points that were made
24 and discuss the general aspects of this project, with
25 regard to when the original design cross sections were

1 taken, that, of course, is typically done several years
2 before a project is let.

3 The contractor has a right to examine the
4 original ground surface. And if he has any problems
5 with any section of it, so document it. He did in
6 sections 83 and -- station 83 and station 123.

7 The Department is willing to accept Phillips and
8 Trice's cross sections for that area and make those
9 additional payments based on the area where it did show
10 some erosion as such.

11 As for any of the rest of the project, Brewer
12 accepted those cross sections. He states so in his
13 letter.

14 I think you will see that most of the deductions
15 that have occurred -- and Tom Aldridge will go through
16 the methods that he used to make the deductions, which
17 are standard to any type of project like this. You
18 will find that most of the deductions are in areas that
19 were accepted by the contractor.

20 In Section 9-3.2 it states that, "For earthwork
21 items, any significant differences in the original
22 ground surface from that shown in the original plan
23 cross sections would result in an adjustment to the
24 plan quantity must be noted by the claimant," in this
25 case the contractor talking about those two stations,

1 "and properly documented by the appropriate level
2 notes."

3 George, we will get into the definition of plan
4 quantity as such.

5 MR. SPOFFORD: I want to make sure we understand
6 who the claimant is in this case. It's not the
7 contractor.

8 MR. GARCIA: We're talking about the areas where
9 you're saying there was a problem in the original
10 design cross sections and yours. We have taken and
11 accepted the survey notes. The only thing we're
12 waiting for is properly documented by appropriate
13 level notes acceptable to both the contractor and the
14 Department prior to disturbance of the original ground
15 surface.

16 If you can provide us with those notes, we have
17 no problem with paying the additional monies there.

18 CHAIRMAN COWGER: May I interrupt just a minute,
19 Mr. Garcia. So far your testimony is it dealt only
20 with the part of the dispute that deals with
21 differences between the original ground surface as
22 shown in the plans and the original ground surface as
23 measured by the contractor, surveyor between stations
24 83 and 123?

25 MR. GARCIA: Yes, sir.

1 CHAIRMAN COWGER: So that the Board can kind of
2 get this crystalized a little bit, there's really no
3 dispute on any quantity that's involved in the
4 difference between original ground elevation and as
5 shown in the plans and as it actually occurred except
6 between those stations that were noted. Is that
7 agreeable to both sides?

8 MR. TOPPINO: Well --

9 CHAIRMAN COWGER: We're only talking about things
10 that relate to differences in the original ground
11 surface. We're not talking now about anything to do
12 with the final ground surface.

13 MR. TOPPINO: When all this came to light is we
14 saw there was a considerable difference in one area.
15 We didn't notice any of the other because it looked
16 close enough and we did not actually physically go out
17 and check it.

18 This is where we said we would assume those.
19 Little did we realize as we got into the job with this
20 500-foot stationing as we got further down the line
21 that this didn't prove accurate at all, inasmuch as one
22 of the stations fell in an area that needed no fill and
23 then right next to it needed a lot of fill and we had
24 to continue that lot of fill for 500 feet.

25 CHAIRMAN COWGER: I think we understand that.

1 Question, the original cross section shown in the plans
2 were at what interval?

3 MR. ALDRIDGE: 300 and 500 feet.

4 CHAIRMAN COWGER: Some were 300 and some were
5 500? Is that the testimony?

6 MR. ALDRIDGE: Yes.

7 CHAIRMAN COWGER: Okay. Mr. Garcia, you may
8 proceed on, whatever you wish.

9 MR. GARCIA: Let me reiterate. They say we will
10 accept Florida DOT existing cross sections with the
11 exception of stations 83 to 123. I guess there's two
12 points I need to go over here. I will get Dave on one
13 of them and turn it over to Tom Aldridge on the other.

14 It seems to me there's a discussion that there's
15 some type of implied -- I guess implied, since it
16 doesn't seem to be documented, of some kind of
17 agreement that plan quantity will be paid to cover some
18 kind of extras or these other problems.

19 We don't accept that allegation at this point and
20 we have seen no documentation from anybody indicating
21 that we would accept, that we would pay plan quantity
22 based on some extras that the contractor would have to
23 do in other areas and such.

24 Now there is a memo from Mr. Moshier and from
25 Dave Krug talking about the acceptance of plan

1 quantity.

2 Basically they're talking about between those two
3 station numbers. Any recommendation that they would
4 have made to pay plan quantity for the total job would
5 have had to have concurrence from me as the area
6 engineer in the State Construction Office. And we did
7 not concur.

8 In fact, when I first heard about this problem
9 what I did was ask everybody to look at the cross
10 sections and see if there were any additional monies
11 that were due the contractor.

12 CHAIRMAN COWGER: May I kind of try to clarify
13 this. The contractor has testified that there was such
14 an agreement. The agreement being that payment for
15 plan -- for the embankment item would be based on plan
16 quantity. The DOT says there is no such agreement,
17 there was no such agreement.

18 I think one of the key points is that the
19 contractor has said that the agreement was between them
20 and Post, Buckley's representatives, number one.

21 And number two, the question I have is is there
22 any documentation anywhere of that agreement? Can the
23 contractor produce any documentation other than your
24 testimony?

25 MR. BREWER: No, sir.

1 MR. SPOFFORD: Other than the contract itself?
2 The contract, and correct me if I'm wrong, says that to
3 everybody who bid on it, that if awarded that the
4 contractor will be paid on the basis of plan quantities
5 for embankment. I don't know how much more express
6 agreement you can have than that.

7 CHAIRMAN COWGER: My question, though, is the
8 specific agreement between either Brewer or Toppino and
9 Post, Buckley, there's no documentation other than the
10 testimony that's been presented?

11 MR. SPOFFORD: And the fact that DOT paid
12 regularly throughout the job on that basis.

13 MR. BREWER: There was an agreement made,
14 otherwise we never would have proceeded like this.

15 CHAIRMAN COWGER: Okay. I think --

16 MR. TOPPINO: Could I point out one thing? Over
17 here in the Florida Department of Transportation
18 construction manual it says down here that "Roadway --
19 preconstructed cross sections for roadway must be taken
20 every hundred feet for level or gently rolling and 50
21 feet for every hilly terrain."

22 Well, this also I am sure means for a steep slope
23 that occurs here. Also "and where short breaks occur
24 in profile," which this definitely had. Something
25 needed to be done at 100 feet and 50 feet. This is

1 DOT's handbook.

2 MS. ALIFF: If I may address that.

3 CHAIRMAN COWGER: I think we understand that.

4 Let's go back to DOT and let you talk for a
5 while.

6 MR. KRUG: I'm David Krug, DOT. The letter that
7 has been referred to with my signature on it does refer
8 to stations 83+0 to 123+0.

9 The reason for that letter is that when this came
10 to be acknowledged that there was a problem with these
11 cross sections and these quantities, I was requested by
12 Mr. Moshier, the district construction engineer, to go
13 down and take these cross sections. We did. We found
14 them to be as shown pretty much according to the cross
15 sections taken by Phillip and Trice, who were employed
16 by Toppino.

10

17 This is the reason that the letter was written.
18 If that was the quantity that was at issue, I agree
19 with that. As has been stated, the contractor put in
20 extra material. However, extra material beyond what is
21 called for, as is stated in the contract or in the
22 provisions, will not be paid for.

23 The fact that the other cross sections were
24 accepted, no cross sections were ever taken, I think
25 that in stating the fact that plan quantity would be

1 paid, it is always plan quantity will be paid as long
2 as it provides what the provisions have been stated in
3 the spec book, that as long as it meets the reasonable
4 tolerances, therefore it will be paid.

5 Final Estimates determined when they received
6 this information that these tolerances had not been
7 met or had been exceeded, I guess I should say, and
8 therefore they determined that necessary deductions
9 needed to be made.

10 MR. GARCIA: Let me make one point. The cross
11 sections that were taken by Post, Buckley in December
12 of '86 and such were for the purpose of quality
13 assurance as well as final payments. They're not
14 quality control cross sections. Quality control on
15 that project is the responsibility of the contractor.

16 It is his responsibility to match the design
17 template. The design template -- let me get
18 Tom Aldridge to discuss exactly what plan quantity
19 means in this case and in terms of what gets paid based
20 on the design template in terms of any additional
21 material that's put in beyond it and any deducts that
22 are paid.

23 CHAIRMAN COWGER: The Board is very much
24 interested in hearing that. I think now we are finally
25 getting to the real beef of the dispute, which is over

1 the final cross section of the roadway as compared to
2 that shown in the plans.

3 I have one question, though, before we overlook
4 it. I have in front of me Exhibit 4, which are the
5 cross section notes from the survey made by Post,
6 Buckley in December and January of '86 according to the
7 dates on the upper right-hand corner of each page.

8 The location of these cross sections is the
9 question. Were they taken to coincide with the
10 original cross sections shown in the plans? In other
11 words, were they taken at those same stations?

12 MR. THARPE: Yes, they were.

13 CHAIRMAN COWGER: That's all I needed to know.
14 Mr. Aldridge, go ahead.

15 MR. ALDRIDGE: Yes, sir, I will give you an
16 overview of where we reacted to this estimate as
17 submitted to Final Estimates in Tallahassee.

18 Number one, we received the estimates package in
19 our office and performed an engineering audit. During
20 that audit we addressed the embankment as well as the
21 remainder of these items on the board, this contract.

22 During the course of our audit, we changed the
23 estimate to a net figure of \$65,464. We in checking
24 the estimate found there was \$17,823 of positive
25 changes that we gave the contractor as he had earned.

1 And we corrected that -- the prior estimates up to that
2 point.

3 Then on the negative side, we deducted some
4 \$83,287 of which was this embankment item. Part of
5 that was the embankment item. And we submitted that to
6 the contractor on 12-11-1989.

7 We reviewed the embankment item specifically
8 prior to submitting this to the contractor and as well
9 as afterwards, with the field staff.

10 This was the result of the letter dated May 24,
11 1990, was our resident engineer -- excuse me, our
12 district construction engineer had certain questions.
13 We cleared those up in a meeting later in June. He was
14 satisfied with the approach to our problem on this
15 embankment job as well as how we applied the
16 corrections.

17 The corrections applied were corrections to
18 the plan template versus the as-built template. It
19 describes it in some manner like this. I think we
20 passed everyone out a copy of this (indicating
21 document).

22 The yellow area is, in fact, the deducted area.
23 The red area is what our final cross section template
24 line fell at. These were taken from those notes that
25 were submitted to you prior to this discussion, the

1 package, I think, the independent surveyor came up
2 with.

3 Then the black line above it is the actual
4 template, the planned template line.

5 CHAIRMAN COWGER: Excuse me just a second. He's
6 testifying from Exhibit 6, correct?

7 MR. ALDRIDGE: Yes, sir, sorry.

8 MR. SPOFFORD: Do you know what station that is
9 for?

10 MR. ALDRIDGE: This is a general description
11 throughout the job.

12 MR. SPOFFORD: This doesn't tie it in --

13 MR. ALDRIDGE: This is not a specific station.
14 We do have the plans reports here and you're welcome to
15 inspect them.

16 MR. SPOFFORD: Does this have a date? When did
17 you do it?

18 MR. ALDRIDGE: I did it.

19 MR. SPOFFORD: When did you do it?

20 MR. ALDRIDGE: Today.

21 MR. SPOFFORD: This is just for illustrative
22 purposes?

23 MR. ALDRIDGE: That's correct.

24 CHAIRMAN COWGER: I don't think you need to
25 discuss that anymore. The Board understands what it

1 represents.

2 MR. ALDRIDGE: This is the general approach to
3 the job. In our discussion with the district, this is
4 what we explained after our meetings with them in June,
5 that we were -- that we, in fact, had a problem with
6 our cross sections of the as-built line versus the plan
7 line.

8 Now why are we involved in this particular
9 discussion? This was a plan quantity item. And plan
10 quantity under Section 9-3.2 is adjustable. It is not
11 a guaranteed lump sum.

12 With that, we were required to make an
13 adjustment. If the contractor -- and this is our
14 philosophy, did not build it, we do not pay for it.

15 Those cross sections when we applied them up
16 here, the contractor did not build within the template,
17 and those are the deducts we made.

18 After we submitted this to the contractor, we
19 also had a discussion on a certain station -- a
20 discussion on original ground line between station
21 83+00 to 123+00.

22 There was some -- a letter that was from the
23 contractor said he was willing to accept the original
24 ground lines through the remainder of the job but he
25 had certain cross sections that he would show that the

1 original plan line differed from what was actually
2 existing.

3 So we requested those cross section notes and we
4 had gotten a set of cross section sheets and made a
5 determination from the cross section sheets of some
6 difference between the plan original and the existing
7 original.

8 We have approximately 480-something cubic yards
9 that we calculated there for a deduct. I'm sorry, 309
10 cubic yards that would reflect a difference in the
11 original variance from existing and plan.

12 We did not apply that. We, in fact, asked the
13 contractor through our representative in the field to
14 submit the -- his survey notes and his level notes and
15 then we would go back and make that application. And
16 that never surfaced. So we stood firm with our deduct
17 of the difference between the original -- the plan
18 template and the as-built template.

19 Now during the course of the computations of this
20 thing -- and again we're working under Section 9-3.2,
21 where we saw a variance of more than \$500 or 5 percent
22 in the contract amount, we are required to go back and
23 make the alteration. And under that spec we address
24 the problem.

25 In our calculation of where there were close

1 areas, we went to the benefit of we would not make a
2 deduct. Those are in numerous areas throughout the
3 job.

4 Our final result is that we did change the
5 contractor's estimate on prior estimates by some 3,817
6 cubic yards. That was our deduct reflected as per this
7 example.

8 The value of that was some \$6,180. Is that
9 correct?

10 MR. CHASON: 76,000.

11 MR. ALDRIDGE: I'm sorry. That was the cubic
12 yards. Sorry. That was after -- we actually paid
13 6,400 in cubic yards for the volume instead of the plan
14 quantity. Of course, the plan quantity was adjusted by
15 these differences, not recalculated but adjusted.

16 That's our position in Final Estimates. Are
17 there any questions on that?

18 MR. BREWER: I have a question. Didn't you
19 deduct anything that was outside the plan template?

20 MR. ALDRIDGE: Deduct anything?

21 MR. BREWER: Material was outside the plan
22 template?

23 MR. ALDRIDGE: No, sir, we never calculated it
24 outside the --

25 MR. BREWER: That's what I mean. It shows up on

1 the cross sections but you never calculated it into the
2 final quantity.

3 MR. ALDRIDGE: We never calculated it.

4 MR. GARCIA: You don't get paid for anything
5 beyond --

6 MR. TOPPINO: We were directed in a lot of
7 instances to do what we did, not because we
8 particularly wanted to, but we were directed to.

9 Something else over here, I could show you on
10 these same plans that you're talking about, and by
11 physically talking out there, that this thing doesn't
12 look anything like what is on these plans.

13 I have one instance where Circle K is, new
14 Circle K. That was put in afterwards while we were
15 building a road. There is a concrete -- they have a
16 concrete ramp. We had to meet the concrete ramp.

17 The template shows that we are, oh, some 11
18 inches below the concrete ramp. We had to bring it up.
19 You folks come through there and show that we're down.
20 You're following the original template line.

21 We get over here on one area where there's a
22 crossover going to Enchanted Island. That's all paved
23 with a crossover. That doesn't show. There's a
24 section further up that shows where there was a
25 crossover. Because there's a conflict, that's taken

1 out. We had to regrade the whole median section. That
2 doesn't show on your template.

3 That doesn't show on your cross section. I don't
4 know what they cross sectioned. I think they just hit
5 and missed.

6 After we look at these for the errors they made
7 on these first stations, I'm sure they made the same
8 errors because they didn't get smarter as they went
9 down.

10 MR. ALDRIDGE: Mr. Toppino, these are
11 calculations as per the template and the plans. Any
12 alterations from the planned template have never been
13 submitted to Final Estimates in Tallahassee and not
14 described in any of our meetings.

15 MR. TOPPINO: I'm just sorry that Post, Buckley
16 didn't carry this a little further and bring it to your
17 attention.

18 MR. ALDRIDGE: And secondly, this was calculated
19 by average end area method. It's a crude method and
20 not an exact method but a fairly a reasonable method as
21 we both agreed to as per the specs.

22 Now those kind of arrangements are all settled
23 prior to entering the contract and are part of the
24 contract. We have held to plans and the contract and
25 its specs.

1 MR. TOPPINO: Do you realize that this job was
2 almost six miles long?

3 MR. ALDRIDGE: Yes, sir, I do.

4 MR. TOPPINO: You're talking about if you took
5 less than one tenth over this whole area is more than
6 what you're talking about, just one tenth over this
7 job. It would come out to more than what you're saying
8 that we're shy.

9 MR. GARCIA: If that were the case, we wouldn't
10 be having this meeting. We're not talking about a
11 quantity here that was evenly distributed throughout
12 the job. We're talking about deducts that were made
13 in specific areas. We don't feel that finals is
14 nitpicking in this case. This is not spread out over
15 the entire job.

16 Most of the project you met the designed
17 template. But any change in the designed template that
18 you would be, quote, directed to do -- and I would like
19 to know who directed you to do it.

20 MR. BREWER: Post, Buckley.

21 MR. GARCIA: Any change in your contract has to
22 be covered by a supplemental agreement. You gentlemen
23 have been around long enough to understand that you're
24 not going to get paid --

25 CHAIRMAN COWGER: All right. I think we're off

1 arguing about things the Board is not interested to
2 hear about. There's been quite a bit of testimony
3 about what Post, Buckley said about an agreement that
4 was reached prior to the beginning of the embankment
5 work.

6 DOT, did you have a representative on the
7 project?

8 MR. KRUG: Yes, sir. I served as program manager
9 on the project and was working with the consultants.

13 CHAIRMAN COWGER: So you, Mr. Krug, were pretty
10 much in daily contact with the consultant?

11 MR. KRUG: Well, when you say pretty much,
12 no, not pretty much, but I was not aware of any
13 disagreement. I mean nothing was ever discussed with
14 me that this is the terms of how Post, Buckley said
15 that they were going to pay. Even if they had, I would
16 say that plan quantity, as has been stated, it is plan
17 quantity unless an adjustment can be shown, if that
18 answers your question, sir.

19 MR. GARCIA: Mr. Brewer, you stated, or
20 Mr. Toppino stated that Post, Buckley wasn't on board
21 at the beginning of the project.

22 MR. TOPPINO: That's true.

23 MR. GARCIA: Was this agreement with Post,
24 Buckley or with the Department?
25

1 MR. BREWER: Post, Buckley was the project
2 engineer on the job, which was the representative for
3 DOT. They were the ones that we talked to. They're
4 the ones who made all the decisions as far as how we
5 were going to proceed with building this job.

6 MR. GARCIA: Mr. Kappel, I believe with Post,
7 Buckley has stated that no such agreement existed. He
8 knows -- he knows that if any did exist, they would
9 have to be documented in terms of --

10 MR. BREWER: That's what he said. Like you said,
11 we have been a long time, too. You just don't throw
12 away fill. The fill is out there. It's where it was
13 directed to be placed by the DOT.

14 Those cross sections are six years old on the
15 existing plans. I mean, you know, we just don't -- the
16 price of fill that's down there in the Keys, we just
17 don't go around and throw it away and say put it here,
18 put it there.

19 MR. GARCIA: What type of quality control did you
20 have during the project?

21 MR. BREWER: The owner was out there during the
22 entire time.

23 MR. TOPPINO: I was there from day one and never
24 moved from the job.

25 MR. BREWER: We have documentation from all the

1 equipment and materials that was out there and was
2 placed. If we had any idea we weren't going to be paid
3 for it, we certainly weren't going to -- you know, it's
4 crazy.

5 CHAIRMAN COWGER: I think we have heard enough on
6 that particular argument. Was the issue, to anybody's
7 knowledge, was the issue of the embankment not being
8 built to plan cross section brought up prior to or at
9 the time of final acceptance of the project by DOT?

10 MR. KRUG: Not to my knowledge.

11 CHAIRMAN COWGER: So, the issue was brought up
12 after the work was completed?

13 MR. KRUG: I think this has been said before, the
14 original contract called for widening and resurfacing
15 project. Earthwork was completed, sod was put down.

16 This contract was originally a 250-day contract.
17 There was a supplemental agreement for additional
18 electrical, lights, power source put in that was
19 requested by, I guess, Monroe County, City of Key West,
20 because the lights had been knocked out for some time.
21 This extended this project time by 240 days, I believe.

22 There was also another supplemental agreement for
23 some 22 days which extended this contract to be 521
24 days. Therefore, this contract sat dormant because no
25 work was being done as the prime contractor was waiting

1 for the electrical contractor to get in and do the
2 work.

3 This is the reason that there is such a time
4 loss from the time that basically the widening and
5 resurfacing project was completed and the entire job
6 was physically done and accepted, some 521 days from
7 the beginning.

8 CHAIRMAN COWGER: Another question then.
9 Mr. Aldridge, you mentioned that you made a submittal
10 to the contractor, apparently where you made your offer
11 of final payment, in December of '89. I think it's
12 agreed that the project was conditionally accepted back
13 in October of '87?

14 MR. ALDRIDGE: Yes, sir.

15 CHAIRMAN COWGER: And that that December of '89
16 point in time was the first time the contractor knew
17 that you were going to make this deduction, correct?

18 MR. ALDRIDGE: Yes, sir.

19 CHAIRMAN COWGER: Why was there such a lag of
20 time in there between acceptance of the -- conditional
21 acceptance or even final acceptance, which was just a
22 few months later, and the processing of the final
23 estimate or completion of the processing of the final
24 estimate?

25 MR. ALDRIDGE: Part of the answer is being

1 submitted from the district and then following through
2 the final estimate, and the way these jobs line up in
3 the process through Final Estimates in Tallahassee.

4 This job was never received -- the documentation
5 to force us -- not force us -- to bring us to a final
6 estimate figure. Force is the wrong word.

7 CHAIRMAN COWGER: I understand.

8 MR. ALDRIDGE: The actual documents that normally
9 put us in a priority mode, keeping this job at our
10 current level and process before an interest factor is
11 introduced into the contract wasn't submitted until
12 March of '90. So we had submitted, actually processed
13 the estimate almost a year before the actual
14 documentation would have required us to produce a final
15 estimate.

16 CHAIRMAN COWGER: The documents you're talking
17 about are documents to be submitted by whom?

18 MR. ALDRIDGE: By the contractor, sir. This
19 particular one was a PR-47. This is the Federal --

20 CHAIRMAN COWGER: You mean the delay was waiting
21 on the PR-47?

22 MR. ALDRIDGE: Yes, sir.

23 MR. GARCIA: The contractor can start the clock,
24 which statute sets, any time he gets all his paperwork
25 in.

1 CHAIRMAN COWGER: I understand.

2 MR. ALDRIDGE: Most of these jobs are, due to our
3 backlog, has been delayed.

4 CHAIRMAN COWGER: I will ask the contractor, was
5 there some reason for delaying the submittal of that
6 PR-47?

7 MR. BREWER: Not to my knowledge.

8 MR. SPOFFORD: Did you think you had everything
9 in that you needed to have in?

10 MR. BREWER: As far as I knew, we were going
11 right on schedule. You know this isn't the first DOT
12 job that's taken two or three years to get money from.

13 CHAIRMAN COWGER: Well, we don't want to get
14 too deep into that. Let me ask you this. In the
15 contractor's claim he has requested interest on the
16 amount in dispute for a period of 37 months,
17 approximately, which would be from sometime in late --
18 37 months from -- let's just go back three years from
19 the date of today. That would be January of '88, yet
20 the deduction was not made from your payment until
21 when?

22 MR. SPOFFORD: 12-89.

23 CHAIRMAN COWGER: So we're talking about a period
24 of almost two years in there that Toppino or Brewer had
25 the money. It's a little hard to understand why you're

1 requesting interest for that two-year period when you
2 had the money.

3 MR. SPOFFORD: Interest is computed on that basis
4 because we felt the delay in getting final payment was
5 unreasonable. Under the statute, the contractor is
6 entitled to be paid within a given period of time of
7 acceptance of the work. That's our reason why that
8 figure, that date was used.

9 CHAIRMAN COWGER: Okay.

10 MS. ALIFF: May we address that point?

11 CHAIRMAN COWGER: Sure.

12 MS. ALIFF: It's our position that it's not final
13 acceptance of the work but it's the date, as Mr. Garcia
14 referred to, which started the clock running, which
15 would be 1990.

16 Secondly, we fail to see how they can claim
17 interest for a period of time when they, in fact,
18 possessed the money and were earning interest on the
19 money. That's double dipping as far as the interest
20 situation.

21 MR. SPOFFORD: In order to address that, we don't
22 think it's double dipping because we feel if the DOT
23 had been on the up and up and had done their duty, this
24 job would have been closed out real soon after it was
25 completed. We think it's unfair for the DOT to take

1 advantage of the contractor in the way they have done,
2 is the way we look at it in this case.

3 MR. CARLILE: How does that relate to interest?

4 MR. SPOFFORD: If the project had been closed out
5 in a timely manner, as the contractor we think has a
6 right to expect, then they would have had the final
7 payment that much sooner, or would have known of the
8 deduct that much sooner, and it obviously would have
9 been accruing interest.

10 Just because the DOT keeps it to themselves and
11 doesn't tell the contractor that they're going to have
12 a deduct until two years after the job is over, it
13 shouldn't entitle the DOT to --

14 MR. CARLILE: How much money was withheld during
15 that period of time?

16 MR. SPOFFORD: 76,000?

17 MR. TOPPINO: I don't know.

18 MR. BREWER: Whatever the --

19 MR. TOPPINO: We have gotten our money -- Walter
20 paid us as the subcontractor.

21 MR. CARLILE: I'm just confused. From DOT's
22 perspective you got paid more than you were entitled.
23 You had the money up front. There was no loss in
24 interest. You are saying if you had closed it out
25 earlier --

1 MR. SPOFFORD: If they had closed it out in a
2 normal time frame, in a timely time frame, to put it
3 that way, then either the DOT would have paid Brewer
4 all it was entitled to and there wouldn't be any
5 payment of interest, or the issue of the deduct would
6 have been known. Instead the issue of the deduct
7 wasn't presented until two years later.

8 So Brewer didn't have the -- they weren't
9 triggered to even raise the issue until two years after
10 the date.

11 MR. CARLILE: I don't see how that's compatible
12 with paying interest, sorry.

13 MR. TOPPINO: I think maybe to clear it up, they
14 were holding his retainage all this time is where --
15 what they're really holding.

16 MR. SPOFFORD: This is not a situation where the
17 DOT is asking Brewer to write them a check. Brewer is
18 trying to get its retainage which it would have had had
19 the job been closed out on time. Since it took two
20 years longer than expected to even get the final
21 estimate --

22 MR. GARCIA: To reiterate, the DOT cannot close
23 out a project until the contractor submits his
24 paperwork. The DOT cannot unilaterally -- now we can
25 start the clock going possibly.

1 Part of the confusion in terms of these cross
2 sections, I think, occurs in that the cross sections
3 were taken at the proper time. There wasn't any time
4 for any erosion to occur or anything to concur at the
5 time the cross sections were taken.

6 However, they weren't plotted until a later time.

7 MR. ALDRIDGE: That's true.

8 MR. SPOFFORD: They weren't provided to the
9 contractor ever.

10 MR. GARCIA: They wouldn't be.

11 MR. ALDRIDGE: They were open to him.

12 MR. SPOFFORD: I disagree. He asked and never
13 received them. The contract provides the DOT will
14 provide that documentation. That's part of your
15 burden.

16 CHAIRMAN COWGER: I don't think that's pertinent.
17 We don't need to hear any more about that particular
18 aspect of the dispute about the cross sections.

19 A couple of questions. One, Mr. Aldridge, would
20 you go back and go back over again so we are sure to
21 get these dates correct. When was it that you received
22 the final documents that you needed from the
23 contractor?

24 MR. ALDRIDGE: On January, February -- March 9,
25 1990.

1 CHAIRMAN COWGER: And when was it that you sent
2 the contractor the final estimate that showed this
3 deduction?

4 MR. ALDRIDGE: December '86.

5 CHAIRMAN COWGER: Unh-unh.

6 MR. ALDRIDGE: Sorry. We submitted it in
7 December '89.

8 CHAIRMAN COWGER: You made an offer of final
9 payment in December of '89?

10 MR. ALDRIDGE: Yes, sir.

11 CHAIRMAN COWGER: That's all I needed to know.
12 Another question, Mr. Aldridge. There's been a lot of
13 discussion here about references to Article 9-3 of the
14 Standard Specifications and 9-1. My question is what
15 is the justification in the specifications for making
16 this deduction that you have made? I think the Board
17 needs to understand that.

18 MR. ALDRIDGE: Under Section 9-10, Final
19 Estimates office is required to produce a final
20 estimate with the actual quantities and amount of
21 monies due.

22 CHAIRMAN COWGER: But when the contract says that
23 payment shall be based on plan quantity --

24 MR. ALDRIDGE: Yes, sir, and the actual
25 calculations themselves fall under Section 9-3.2.

1 Restraints there are \$500 or 5 percent.

2 CHAIRMAN COWGER: Well, I still don't think my
3 question has been answered. My question is in 120-12.1
4 it says, "The pay quantity for embankment shall be the
5 plan quantity subject to the provisions of 9-3.2 and
6 9-3.4."

7 Then it goes onto tell you how to calculate that
8 plan quantity basically.

9 MR. ALDRIDGE: Yes, sir.

10 CHAIRMAN COWGER: Where does DOT get its
11 authority to make this deduction? In other words, to
12 change the plan quantity based on discrepancies between
13 the plan -- final template and final elevation of the
14 earthwork? Where do you all get that authority out of
15 your specifications?

16 MR. GARCIA: 9-10, acceptance and final payments.

17 CHAIRMAN COWGER: No, that's not satisfactory, as
18 I see it. If that's what you want to say, okay, but
19 where do you get the authority to adjust the plan
20 quantity? And that's what you're doing.

21 MR. GARCIA: Section 9-3.2, error in plan
22 quantity. "An error shall be deemed substantial if
23 the quantity will increase or decrease in excess of
24 5 percent of the original plan quantity for that item."

25 MR. ALDRIDGE: Let me submit this, too, on that

1 same section of 120-12 on page 136 at the top, it says,
2 "The pay quantity shall be the plan quantity provided
3 that the excavation was accomplished."

4 If you're looking at 120-12, method of
5 measurement.

6 CHAIRMAN COWGER: 120-12 point what?

7 MR. ALDRIDGE: Of course, that's an excavation
8 quantity there.

9 MR. TOPPINO: Right.

10 MR. ALDRIDGE: This is an embankment quantity.
11 Embankment on 120-12.2. "The pay quantity for the
12 embankment shall be at the plan quantity subject to
13 the provisions of 9-3.2 and 3.4 where payment for
14 embankment is not to be included and the payment for
15 the excavation is to be paid for in the cubic yard,"
16 and it reads on.

17 The measurements will provide a more accurate --
18 let's see, "Where payment for embankment is not to be
19 included in the payment for the excavation and is to be
20 part of a cubic yard basis for the item embankment, the
21 plan quantity to be paid for shall be calculated in the
22 average ending amount unless the engineer determines
23 that another method of calculation will provide a more
24 accurate result."

25 And that accurate result is the enforcement of

1 the actual as-built line.

2 MR. SPOFFORD: I would like to make sure we all
3 understand that the contractor, indeed, installed more
4 than the plan quantity. I don't know if that's what
5 Mr. Aldridge was trying to imply or not, about they're
6 not going to pay for what the contractor didn't do.
7 The contractor installed more than in excess of 10,000
8 cubic yards on this project.

9 I don't know if we need to make this an exhibit
10 or how you would like to handle it or if you would like
11 to verify that with the contractor. I think you need
12 to understand that.

13 MR. TOPPINO: We feel the biggest problem here
14 arose when we pointed out that there was an error and
15 it was up to DOT to come by and make this cross
16 section, not really us.

17 And at that time they would have probably done
18 like their handbook tells them they're supposed to do,
19 got this thing every 50 feet instead of 300 and 500
20 feet.

21 MR. ALDRIDGE: Let me continue on with this
22 paragraph that we were in a little while ago. "The
23 measurement shall include only material actually placed
24 above the original ground line within the lines and
25 grades indicated in the plans or directed by the

1 engineer." There's our authority.

2 CHAIRMAN COWGER: Where are we? We're in
3 120-12.2, second paragraph, near the end?

4 MR. ALDRIDGE: Yes, sir. "The measurement --

5 MR. SPOFFORD: Which brings us exactly to our
6 point. The original line, they don't know what the
7 original line was. What I would like to do is mark
8 this as Exhibit 11, which is correspondence from Post,
9 Buckley to the DOT where Post, Buckley acknowledges
10 here is our calculations but the previous -- let's see,
11 the original plan sections may have been taken from
12 those shown for a previous project and are therefore
13 subject to suspicion."

14 They don't know where the original plan line was.
15 I would like to make that Exhibit 11. There's two
16 letters in there that I think are relevant.

17 MR. ALDRIDGE: Our change is not with the
18 original ground line. It's with the as-built ground
19 line and the template.

20 CHAIRMAN COWGER: I understand.

21 MR. ALDRIDGE: It says in that same paragraph,
22 "Within the lines and grades indicated in the plans,"
23 in other words, the neat lines of the plans.

24 MR. TOPPINO: Or directed by the engineer.

25 That's what we went on. We didn't want to do this

1 extra work. We really didn't.

2 MR. ALDRIDGE: That direction, sir, must be a
3 written direction.

4 MR. TOPPINO: It says that?

5 MR. ALDRIDGE: Yes, sir.

6 MR. SPOFFORD: That's a tired refrain from the
7 DOT.

8 CHAIRMAN COWGER: I think it's time we wrapped
9 this thing up. What do you think, Mr. Turnbull,
10 Mr. Carlile?

11 MR. TURNBULL: Yes.

12 MR. CARLILE: Yes.

13 CHAIRMAN COWGER: Do you have any further
14 questions?

15 MR. CARLILE: No, I don't think I do.

16 CHAIRMAN COWGER: I think it would be appropriate
17 to let either side make a summation, since we have had
18 so much, if you so desire.

19 Before you start, the contractor just presented
20 Exhibit No. 11, which is a letter from Post, Buckley,
21 Schuh and Jernigan, dated November 2, 1989. We are
22 introducing that into the record. DOT, were you
23 furnished a copy of that?

24 MS. ALIFF: No, we were not.

25 MR. SPOFFORD: Here it is right here (handing

1 instrument to Ms. Aliff).

2 CHAIRMAN COWGER: Let's pause a minute and let
3 DOT to look at that Exhibit. It was just now
4 introduced.

5 (Brief pause)

6 (Whereupon, Exhibit No. 11 was marked for
7 identification.)

8 CHAIRMAN COWGER: Gentlemen, let's try to wrap
9 this up. Let's go back on the record.

10 The Board would like to have at the time we
11 complete and wrap this up the opportunity just to look
12 over those cross sections that DOT brought in. If you
13 all don't object, all we want to do is look to see what
14 is on those sheets. You all have seen them, haven't
15 you?

16 MR. SPOFFORD: No, sir. This is the first time
17 I even knew they existed.

18 MR. ALDRIDGE: Excuse me, isn't this a copy of
19 these plans?

20 CHAIRMAN COWGER: Let's go off the record again
21 then.

22 (Discussion off the record)

23 CHAIRMAN COWGER: Okay. We are going to go back
24 on the record and wrap up the testimony. We are back
25 on the record.

1 While we were off the record, the Board and the
2 parties examined a set of cross sections that were
3 prepared by the DOT that depict their method of
4 calculation of the deduction of embankment. These are
5 not the calculations, these are just drawings that
6 indicate how those deductions were made.

7 Mr. Turnbull, would you, now that we're back on
8 the record, would you restate the question you asked a
9 minute ago off the record?

10 MR. TURNBULL: I would like to know where is the
11 resident engineer or someone in authority throughout
12 the job from the -- the supervisor on the job from an
13 engineering standpoint.

14 CHAIRMAN COWGER: You mean from Post, Buckley?

15 MR. TURNBULL: Yes.

16 MR. THARPE: I can answer that. My name is
17 Gene Tharpe, from Post, Buckley. The resident engineer
18 that was on this project from the initial involvement
19 with Post, Buckley is in the hospital critically ill.
20 The project engineer who originally was on this project
21 is no longer with the firm.

22 I am here representing Post, Buckley, but my
23 involvement with the job began when I arrived in May of
24 1987 and concluded in late September or the first of
25 October 1987.

1 I prepared the calculations, did the calculations
2 of the deficient areas based on the cross sections that
3 were provided me by our surveyors and arrived at the
4 figures that we're dealing with.

5 CHAIRMAN COWGER: I think that's a satisfactory
6 answer to the question.

7 Mr. Turnbull, Mr. Carlile, do either one of you
8 have any further questions?

9 MR. CARLILE: No.

10 MR. TURNBULL: No.

11 CHAIRMAN COWGER: Now, does either party have
12 anything to add now that they feel needs to be added
13 based on the testimony that's come out?

14 MR. TOPPINO: I have only one thing to say.
15 Again, this job was done -- shouldn't have been done
16 with an instrument. When you do milling, you mill
17 three inches, put back an inch and a half, naturally it
18 changes everything.

19 In doing the embankment we had to start where the
20 asphalt leaves off, whatever it is. In some cases over
21 here we have these things with the Post, Buckley survey
22 over here, and it shows that the finish grade is down
23 nine inches, nine-tenths, not even nine inches down
24 below where it should have been. No way. If we milled
25 three, put back an inch and a half, it shouldn't be

1 there. There's discrepancies all the way through this
2 thing.

3 We had to work from a template. It's the
4 only thing you could use. We couldn't work from
5 instrumentation because you have to leave from the
6 paved asphalt.

7 And now everyone is coming in saying, well, these
8 are grades. In some cases the grades should have been
9 lower all the way through except there was an erosion.

10 CHAIRMAN COWGER: Okay. Mr. Brewer?

11 MR. BREWER: I would like to say that we did all
12 the work that we were supposed to do out there. My
13 subcontractor placed 12,723 cubic yards of limerock out
14 there for embankment.

15 We filed the plans and had the engineer out there
16 on the job directing us where to place the fill. We
17 had an inspector out there the entire time that we were
18 out there doing the job who is no longer with Post,
19 Buckley.

20 We had no notification that there was any problem
21 with the embankment. Had we known back when we were
22 out there doing construction that there was going to be
23 a problem with it, we certainly would have not gone
24 through the lengthy process of taking shots every 50
25 feet and verifying it.

1 In many instances I'm sure there's more
2 embankment out there than what we're getting paid for.
3 I have already paid my subcontractor on the basis of
4 that.

5 We have -- there's two letters that were written,
6 from Mark Moshier that works for the DOT, and
7 David Krug that works for the DOT, that specifically
8 addresses the fact that we should be paid for plan
9 quantity.

10 Now Mark Moshier did not say just in that
11 particular area we should get paid. He's talking
12 about plan quantity of the entire project.

13 That's all I have.

14 CHAIRMAN COWGER: DOT?

15 MR. GARCIA: To summarize, plan quantity is not a
16 lump sum-type payment. They still get paid for only
17 material that was placed within the template. If there
18 was any agreement to pay plan quantity based on some
19 extra work or such that the contractor provided, we
20 have seen no documentation of such, and in fact it
21 would not be legal and binding.

22 I find it difficult to believe that an inspector
23 was out there directing you to leave it high, leave the
24 template high in certain areas, leave it high five
25 inches here, six inches there. But again we haven't

1 seen any documentation or anything that shows us that
2 you were directed to leave it that way.

3 Any change in the template is a change in design,
4 has to be documented through supplemental agreement and
5 such.

6 Mark may have concurred at one point to pay plan
7 quantity maybe to avoid the problems involved in
8 arbitrations or for whatever reasons, maybe because
9 Dave Krug may have made that recommendation at one
10 point, but Mark wasn't on the job, Mark wasn't aware of
11 all of this.

12 Mark later had meetings with myself as well as
13 with Tom Aldridge where he saw what finals were
14 deducted and finals -- the same type of deductions that
15 they would make on numerous other projects.

16 You get paid for what you put in. If you don't
17 put it in, you don't get paid.

18 We have accepted the contractor's survey in
19 the areas where he did document he had a question.
20 Certainly the Department possibly should have gone out
21 and done their own survey in that area. We didn't, and
22 we are accepting theirs. If they provide us the notes,
23 we will pay them whatever is required. There we're
24 only talking \$6,000 or so. Do you have anything else
25 to add?

1 MR. ALDRIDGE: No, sir, that just about sums it
2 up.

3 CHAIRMAN COWGER: A couple of quick factual
4 questions. The Board asked that the Department furnish
5 us any contract documents that pertained to payment for
6 embankment. The only thing we have been furnished so
7 far is excerpts from the Standard Specifications.

8 Am I to take that to mean that there were no
9 special provisions or no supplemental specifications
10 altering the Standard Specifications in that regard?

11 MR. GARCIA: Not to my knowledge, sir.

12 MR. KRUG: That's correct.

13 CHAIRMAN COWGER: Can somebody right quickly tell
14 us what the plan quantity for embankment was and the
15 unit price? And then we are going to wrap this up.
16 I don't think any of those things are anything other
17 than just information the Board wants.

18 MR. ALDRIDGE: The plan quantity was 10,218 cubic
19 yards.

20 CHAIRMAN COWGER: 10,218 --

21 MR. ALDRIDGE: Cubic yards. Unit price was \$20.

22 CHAIRMAN COWGER: Okay. That answers my
23 question.

24 MR. ALDRIDGE: Is that right?

25 MR. CHASON: Yes, sir.

1 CHAIRMAN COWGER: I don't think I heard any new
2 evidence from the DOT in that last statement of theirs
3 other than arguments that have been pretty well
4 addressed before, so we are going to make the decision
5 to close out this hearing.

6 Mr. Turnbull or Mr. Carlile, do either one of you
7 have any questions?

8 MR. CARLILE: No.

9 MR. TURNER: No.

10 CHAIRMAN COWGER: This hearing is hereby closed.
11 The Board will meet again on March 14, 1991, to
12 deliberate on this claim, and you will have our order
13 shortly thereafter.

14 MR. ALDRIDGE: Excuse me, would you need these
15 cross sections?

16 CHAIRMAN COWGER: I don't think we need any of
17 that. We have seen everything we need. Okay.

18 (Whereupon, the hearing was concluded at 11:45 a.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA)
COUNTY OF LEON)

I, CATHERINE WILKINSON, Certified Shorthand Reporter
and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the proceedings were taken
by me at the time and place therein designated; that my
shorthand notes were thereafter reduced to typewriting
under my supervision; and the foregoing pages numbered 1
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proceedings.

I FURTHER CERTIFY that I am not a relative, employee,
attorney or counsel of any of the parties, nor relative or
employee of such attorney or counsel, nor financially
interested in the foregoing action.

WITNESS MY AND AND SEAL this, the 8th day of February,
A.D., 1991, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON,
STATE OF FLORIDA.



CATHERINE WILKINSON
CSR, CP, CCR
Post Office Box 13461
Tallahassee, Florida 32317

My Commission Expires June 27, 1994