

**STATE ARBITRATION BOARD**

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

28 June 1991

\*\*\* NOTICE \*\*\*

In the case of Cone Constructors, Inc. versus the Florida Department of Transportation on Project No. 13030-3522 in Manatee County, Florida, both parties are advised that State Arbitration Board Order No. 3-91 has been properly filed on June 28, 1991.

*H. E. Cowger*

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

S.A.B. CLERK

JUN 28 1991

**FILED**

HEC/sfc

Copies of Order & Transcript to:

J.B Lairscey, P.E., Director of Construction/FDOT  
Mike L. Cone, President/Cone Constructors, Inc.

STATE ARBITRATION BOARD

ORDER NO. 3-91

RE:

Request for Arbitration by  
Cone Constructors, Inc. on  
Job No. 13030-3522 in  
Manatee 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 9:45 a.m., Thursday, May 30, 1991.

The Board Members, having fully considered the evidence presented at the hearing,, now enter their order No. 3-91 in this cause.

ORDER

The Contractor presented a request for arbitration of claim for additional compensation in the amount of \$40,274.85.

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

1. There was an error in the plan quantity for the item Class IV Concrete-Substructure which resulted in the final pay quantity for that item being 207.5 cubic yards less than the plan quantity of 1,317 cubic yards. It is unreasonable to expect a bidder to discover an error of this nature in the short time available to prepare his bid for this major project.
2. Our bid unit price for this item was calculated by estimating the equipment and labor required to construct the bridge caps and adding the cost of forming and miscellaneous materials and the concrete.
3. We discovered the error in the plan quantity when we poured the first cap.
4. Our equipment, labor and material costs, excluding the reduction in the quantity of ready mixed concrete purchased,

were not reduced by the reduction in the quantity of concrete.

5. By reducing the payment to us by the underrun in the quantity of Class IV Concrete Substructure times the bid unit price for that item, the Department of Transportation is taking unfair advantage of an error in the plans.

The Department of Transportation rebutted the Contractor's claim as follows:

1. The pay quantity for the item in dispute is designated in the Standard Specifications to be the original plan quantity. Article 9-3.2.1 of the Standard Specifications allows the Department to revise the pay quantity when there is an error in the plan quantity in excess of five percent of the original plan quantity. In this case the error was 16 percent of the plan quantity.

2. Article 9-3.1 of the Standard Specifications provides that when a change in the plans results in an increase or decrease in the original contract quantities, and the work added or eliminated is of the same general character as that shown in the plans, the Contractor shall accept payment in full at the original contract unit price for the actual quantity of work done. It is our position that the general character of the work did not change and, therefore, payment to the Contractor should be for actual quantity at the original contract unit price.

3. In discussing this situation with other contractors we found that it is common practice for a bidder to verify plan quantities for bridge concrete items by take offs.

4. We disagree with the Contractor's statement that the equipment and labor required to accomplish the work in question was unchanged. It is unreasonable to visualize that a 16 percent reduction in concrete quantity did not reduce the work effort required to perform this work.

5. A Supplemental Agreement adding expansion joint assemblies caused the final pay quantity for structural concrete to substantially exceed the original plan quantity. This

resulted in the Contractor receiving an increase in payment of \$69,241.66.

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

1. There was no change to the dimensions for the bridge caps from those shown in the plans. Thus, the forming and miscellaneous materials required were unaltered from that required per the original plans.
2. The time available to the Contractor to prepare his bid on this \$5.6 Million contract was relatively short.

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 in the amount of \$30,000.00 for his claim.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$157.50 for Court Reporting Costs.

Tallahassee, Florida

Dated: 28 June 1991

Certified Copy:

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

28 June 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

JUN 28 1991

**FILED**

STATE ARBITRATION BOARD  
STATE OF FLORIDA

CONE CONSTRUCTORS, INC.     )  
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 DEPARTMENT OF TRANSPORTATION )  
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PROJECT NO. 13050-3522  
 LOCATION: Manatee County,  
 Florida

ORIGINAL

RE:                                 Arbitration In The Above Matter

DATE:                             Thursday, May 30, 1991

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

TIME:                            Commenced at 9:45 a.m.     —  
                                    Concluded at 10:35 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 CONE CONSTRUCTORS, INC.:

Mr. Mike Cone  
 Mr. J. L. Cone  
 Mr. Jim Lundy  
 Mr. William "Jake" Wagenrodt

## APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Marshall Dougherty  
 Mr. Ken Blanchard

## ALSO PRESENT:

Mr. Ken Morefield

\* \* \*

## I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1 and 2 in evidence	4
CERTIFICATE OF REPORTER	34

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 of  
6 the Board by the Secretary of the Department of  
7 Transportation. Mr. Sam Turnbull was elected by  
8 construction companies under contract to the Department  
9 of Transportation.

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

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

14 Will all persons who intend to make oral  
15 presentations or present exhibits during this hearing  
16 please raise your right hand and be sworn in.

17 (Whereupon, all witnesses were duly sworn.)

18 CHAIRMAN COWGER: The documents which put this  
19 arbitration hearing into being are hereby introduced as  
20 Exhibit 1. Exhibit 1 is the request for arbitration  
21 submitted by the contractor and all of the attachments  
22 thereto and also includes the notice of arbitration  
23 issued by the Board to notify the parties of this  
24 hearing.

25 Does either party have any other information it

1 wishes to put into the record as an exhibit. Can we go  
2 off the record a minute?

3 (Discussion off the record)

4 CHAIRMAN COWGER: While we were off the record,  
5 there was a discussion of submittal of exhibits. DOT  
6 has submitted Exhibit 2, a package entitled  
7 substructure contract claim.

8 Does the contractor wish to have a few minutes to  
9 examine this exhibit before we proceed?

10 MR. MIKE CONE: Yes, sir.

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

13 CHAIRMAN COWGER: Let's go a little further and  
14 then we will let you do that.

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

22 The hearing will be conducted in an informal  
23 manner. The contractor will elaborate on their claim,  
24 and then the DOT will offer rebuttal. Either party may  
25 interrupt to bring out a point by coming through the



1 Chairman.

2 For the sake of order, I must instruct that only  
3 one person speak at a time.

4 Now we will pause for a short period.

5 (Brief pause)

6 CHAIRMAN COWGER: At this point it is appropriate  
7 for the contractor to make his opening statement as to  
8 the claim.

9 MR. MIKE CONE: Okay. Thank you. What we would  
10 like to do is use this picture on the wall up here as  
11 an exhibit, if we can, just for visual references.

12 MR. DOUGHERTY: It's apropos, isn't it?

13 MR. MIKE CONE: The situation was this.

14 CHAIRMAN COWGER: Excuse me, just a minute. For  
15 the record, Mr. Cone is pointing to the photograph of  
16 the project that is on the wall of the building here.  
17 It will not be an exhibit. Everybody can look at it at  
18 this point.

19 MR. MIKE CONE: What happened is we took out  
20 plans to bid this particular project on State Road 64.  
21 The plans had a substructure concrete item on there, of  
22 course, including the pile driving, the superstructure.  
23 The amount of yardage on a substructure concrete was,  
24 at bid time, was, what, 1273 yards.

25 MR. LUNDY: 1,317.

1           MR. MIKE CONE: 1,317 cubic yards. What we did  
2 when we looked at this job, we figured the entire labor  
3 and equipment necessary to build the substructure. We  
4 took the cost of our barges, our cranes and manpower  
5 and divided it into that cubic yardage to come up with  
6 a unit price for the DOT.

7           What happened is we came out here, our project  
8 superintendent ordered concrete for the first cap. And  
9 he ended up with eight yards too much concrete because  
10 he used the plan quantity.

11           So then they started looking at reasons why they  
12 had too much concrete and it was determined that the  
13 dimensions used for the DOT calculations were in error.

14           So, what happened is that the DOT has come back  
15 to us and reduced the amount of quantity, pay quantity.  
16 But what our contention is is that the work has  
17 remained the same whether you've got a larger quantity  
18 or a lesser quantity.

19           The point being if the DOT had given us the  
20 directive to eliminate one of the bents, for instance,  
21 an end bent or a particular pier, then there would  
22 have been a savings on our end as far as we would get  
23 through the job quicker.

24           What we're saying is that the -- just because the  
25 quantity has been reduced on this particular cap, that

1 the DOT is paying us less money but yet our costs are  
2 the same.

3 To this date -- and can I ask questions at this  
4 time, Gene?

5 CHAIRMAN COWGER: Whatever you would like to do.

6 MR. MIKE CONE: We don't know why or where the  
7 error is in the DOT quantity. I was wondering if DOT  
8 could give us an answer at this time.

9 MR. DOUGHERTY: No, not really. I'm not sure  
10 where the quantity bust came from, Mike. From my  
11 understanding it was in the beam seats themselves.

12 MR. MIKE CONE: In other words, the beam seats,  
13 they just overcalculated the quantity?

14 MR. DOUGHERTY: Overcalculated the quantity.

15 MR. MIKE CONE: I would like to introduce  
16 Jake Wagenrodt at this time and I basically want him to  
17 confirm the fact that where the beam seat is 12 inches  
18 wide or five inches wide, the same amount of labor and  
19 equipment is necessary to form up that beam seat.

20 The material, of course, there would be a  
21 decrease in material. That's not what we're asking  
22 for compensation for. We're only asking for the  
23 compensation as relates to the labor and equipment  
24 necessary to construct that beam seat.

25 In other words, you still have got to take the

1 barge out, have the cranes there, have the carpenters  
2 there. It's just a matter of the dimension change of  
3 which to do the form work. So that's basically what  
4 our claim is -- bottom line is.

5 CHAIRMAN COWGER: Did you -- were you going to  
6 have somebody else testify?

7 MR. MIKE CONE: Unless there's any questions,  
8 I don't think it's necessary.

9 CHAIRMAN COWGER: Okay. I understood you to say  
10 that one of your people was going to talk about the  
11 additional or the lack of additional cost to do the  
12 forming.

13 MR. MIKE CONE: This is Jake Wagenrodt. He was  
14 the man on the job site. I'm in the office in Tampa  
15 so I can't be a credible witness as relates to this.

16 Jake, is it your understanding basically that the  
17 labor and equipment was the same whether the beam seat  
18 was this dimension or --

19 MR. WAGENRODT: Whether you move it a foot or  
20 five inches, like Mike said, it still takes the same  
21 amount of people. The actual forming, getting ready  
22 for the placement of concrete is where your time is.  
23 The actual pouring, you know, is minute, in the time  
24 period really to construct it all.

25 MR. MIKE CONE: We're acknowledging the fact

1           that the pouring time -- in other words, if we're not  
2           putting the material in the form work, there's a very  
3           minute savings there because you're not swinging that  
4           extra material and dumping into your forms.

5           But what we're saying is that the DOT has reduced  
6           a pay quantity without reducing the workload. And I'm  
7           not saying that -- to this date as recognized we don't  
8           know why the DOT quantity was wrong. Evidently it was  
9           just one of the design engineers, whether a consultant  
10          to DOT, I don't know, just made an error in  
11          calculation.

12          CHAIRMAN COWGER: I don't think that's  
13          particularly pertinent myself as to why it occurred.

14          MR. MIKE CONE: It's not.

15          CHAIRMAN COWGER: DOT, I think it's appropriate  
16          at this point that we allow you to present your  
17          rebuttal.

18          Before you begin, though, I would like to say  
19          that we did have a while off the record there to review  
20          what you have submitted, and let's try not to be too  
21          repetitive on what you've already submitted. Let's try  
22          to keep that brief if we can. I don't want to restrict  
23          you in any way at all, but just keep in mind that we've  
24          got most of your position in front of us. And, of  
25          course, you may want to rebut something that Mr. Cone

1           said. Please proceed.

2           MR. DOUGHERTY: Okay. I will try not to be --  
3 I don't want to go through this. You all can read  
4 probably as well as I can talk anyway.

5           DOT's position basically is that we think the  
6 specifications that we quoted in our rebuttal is fairly  
7 clear, fairly straightforward in how you're supposed to  
8 approach a problem similar to this, and that's why we  
9 took the course that we did.

10          Secondly, the information supplied to us as far  
11 as the documentation of the costing was not in the form  
12 that we could necessarily hold to be true. It was a  
13 typewritten piece of paper given to us with no  
14 supporting documentation. We took it at face value.

15          One other note, too, is that we have in our  
16 standard supplemental agreement procedures today -- and  
17 I know the industry was involved in it -- have come up  
18 with an area of certain limitations or bounds within  
19 error or quantity changes in which we do renegotiate  
20 price.

21          And in today's standards we're looking at a  
22 25 percent decrease in quantity before we actually  
23 renegotiate a price. So in using today's standards  
24 back then, though they weren't in vogue back then, they  
25 were under formulation that entire time, that it still

1 doesn't even qualify under those guidelines.

2 Other than that, I would say as submitted that's  
3 our stance.

4 MR. BLANCHARD: Mr. Chairman, I would like to add  
5 to Mr. Dougherty's presentation here just a couple of  
6 points, if I may.

7 The contractor mentioned that a decrease was made  
8 to the contract which did not decrease the amount of  
9 work that he had to perform. I want to mention that  
10 there were increases also made to the contract, sizable  
11 in quantity, and they're spelled out. I won't go  
12 through the details, but they're spelled out in our  
13 document there. And some of these increases did not  
14 increase the amount of work that had to be -- did not  
15 increase the workload. So, you know, it works both  
16 ways.

17 The other point I wanted to make is that I've  
18 talked to several contractors just recently when I knew  
19 this hearing was going to be held to confirm some  
20 thoughts that I had. I have been told by several  
21 contractors that they don't normally go into a bid  
22 blind accepting the Department's numbers, quantities,  
23 they usually find it to their benefit to sit down and  
24 make their own take-off on items like this so they know  
25 exactly what they're bidding. And if the contractor

1 didn't do that, I would think he probably should have.

2 I want to also mention the numbers that the  
3 contractor put in his request here for arbitration, as  
4 Marshall mentioned, well, they're just numbers which we  
5 don't know where they came from. In other words, the  
6 contractor did not supply us with a copy of the bid  
7 documents to back up his argument.

8 I might also mention one final point. The amount  
9 of concrete that we're talking about here, the  
10 difference between what the Department's engineer's  
11 estimate was and what was actually placed is really  
12 kind of minor when you consider the amount of concrete  
13 on the job as a whole, the amount of work involved in  
14 the job as a whole, the amount of additional work that  
15 was included in the contract above and beyond what was  
16 there originally. That's all I have to say.

17 MR. MIKE CONE: Gene, I would like to --  
18 Mr. Chairman, I would like to rebut the DOT's position  
19 on that. We figure we were deducted \$40,000 worth of  
20 labor and equipment which we don't consider a minor  
21 item on this particular job.

22 DOT's argument since this problem has come up has  
23 been that, well, we gave you a supplemental agreement  
24 to do some other work on the job that was payment for  
25 work totally unrelated to the substructure.



1           So, they're basically telling us that, well, we  
2           give you a change order here in this supplemental  
3           agreement so forget about this over here with the  
4           substructure.

5           Well, we can't live that way. The DOT is hanging  
6           their hat on a standard specification about a variation  
7           in quantities. The DOT has the right, of course, to  
8           eliminate a portion of the job or decrease the  
9           quantities. And that's not what the issue is here.

4  
10          We're saying that they didn't tell us to --  
11          Mr. Contractor, don't build this particular cap here or  
12          we want to shorten the bridge up. You know, you're not  
13          going to have to do this necessary form work extending  
14          the bridge or shortening the bridge.

15          We're saying our work remained the same. Our  
16          forms -- we built the bridge according to plans and  
17          specs. The plans didn't change any, just the pay  
18          quantity.

19          I would like at this time -- they brought up a  
20          good point here. I want to introduce Jim Lundy, who is  
21          the estimator on the job. He's going to pass around  
22          our estimate that we used on the substructure and let  
23          him explain it for a minute on how we actually  
24          calculate substructure concrete.

25          As far as the contractor being able to do

1 take-off on every quantity on the job for this job --  
2 it was --

3 MR. DOUGHERTY: 5.6 million.

4 MR. MIKE CONE: It would be impossible for the  
5 contractor in ten days to do all the quantity  
6 calculations, verifications on a \$5 million job.

7 MR. BLANCHARD: We're talking about significant  
8 quantities. Concrete on the job is a significant  
9 quantity.

10 MR. MIKE CONE: In other words, we can't  
11 calculate in ten days all the quantities on a \$5  
12 million job. We just don't have the manpower to do it.

13 Jim, why don't you just point out some things on  
14 there.

15 MR. LUNDY: This is our --

16 CHAIRMAN COWGER: Before we start, may  
17 I interrupt a minute, before we start on that, because  
18 you're now beginning to talk about the amount of  
19 damages. And up to this point we have essentially  
20 talked about the entitlement to damages. Let's kind of  
21 wrap that up before you start. If you will wait just a  
22 minute, please.

23 DOT, talking about the entitlement now, do you  
24 have anything further to say?

25 MR. DOUGHERTY: No, sir, not at this time.

1           CHAIRMAN COWGER: I've got a couple of questions  
2 based on the submittals that DOT has made. One of the  
3 specifications that you quote here on page two of  
4 Exhibit No. 2 talks about payment based on plan  
5 quantity.

6           Was the particular item involved here, the  
7 particular pay item designated to be paid for by  
8 original plan quantity?

9           MR. DOUGHERTY: As far as we know, it was a plan  
10 quantity item, yes, sir.

11          CHAIRMAN COWGER: Okay. I think it would be  
12 appropriate for you to go ahead.

13          MR. MIKE CONE: If it's on a plan quantity basis,  
14 then the question I'm asking is why are we paid on plan  
15 quantity.

16          MR. DOUGHERTY: Plan quantities are established  
17 on those items that we feel fairly secure in our  
18 ability to estimate.

19          In this particular case, this specification says  
20 that if we find a substantial error, which in this  
21 particular case they said was 5 percent or more, then  
22 we can alter that quantity amount.

23          In this particular case, oddly because you all  
24 found there was eight yards extra on the first cap you  
25 were pouring, that we looked at and determined there

1 was, that there was a 16 percent differential.

2 So we went in and changed the quantity. We went  
3 back through a detailed analysis again and came up with  
4 an 1100 yards of concrete and altered the quantity  
5 accordingly.

6 MR. MIKE CONE: Did our workload decrease with  
7 that shortage of yardage in your estimation as an  
8 engineer?

9 MR. DOUGHERTY: Some, yes. Exactly how much,  
10 I don't know.

11 MR. MIKE CONE: What would you estimate  
12 percentage-wise?

13 MR. DOUGHERTY: I would have no idea. One of  
14 the points we brought out was the information we were  
15 supplied with the original claim did not give us the  
16 leeway or documentation to go in and calculate that.

17 MR. MIKE CONE: Well, see, our problem is that,  
18 as with every contractor that DOT knows, we don't want  
19 to release our estimating information for public  
20 knowledge.

21 I would like to spend two minutes if I can  
22 explaining how we estimated this job or how Jim Lundy  
23 estimated this job. I think it will solidify our point  
24 that shows that the work -- our actual work was never  
25 decreased.

5           1                   Jim, just explain this note down here at the  
2                                   bottom.

3                   MR. DOUGHERTY: Mr. Cowger had a question.

4                   CHAIRMAN COWGER: Let me ask the board members.  
5                   Do you have any further questions about the  
6                   entitlement?

7                   MR. CARLILE: Yes, I had a couple of questions  
8                   either way. Normally on any job the quantities, you  
9                   will have either overruns or underruns. In those cases  
10                  where there is a considerable overrun, is the quantity  
11                  normally paid at the original unit price, whatever the  
12                  quantity is determined to be? You can only make  
13                  adjustments for the unit price?

14                  MR. MIKE CONE: In certain instances if the  
15                  quantities increase or decrease, the contractor accepts  
16                  the contract unit price.

17                  In our particular instance here is that we relied  
18                  on a quantity to be a correct quantity. We took our  
19                  total labor and equipment, divided it into that  
20                  quantity.

21                  We have given the DOT -- when I asked for payment  
22                  for the material, but our point is it's not like they  
23                  deleted a portion of the bridge, you know, deleted a  
24                  whole work item. In other words, our work remained the  
25                  same. That's why this is a unique situation.

1           MR. CARLILE: That's what I'm trying to get at.  
2 Normally you do not adjust the unit price for an over  
3 or underrun. For example, on an embankment, you  
4 wouldn't normally do that.

5           MR. MIKE CONE: That's a good point you brought  
6 up embankment. Okay. You're building a fill job, you  
7 don't haul as much dirt. Well, then your job is  
8 shortened because your trucks aren't running out there,  
9 you're not having to spread the fill.

10           Say you had a thousand yards and you could do  
11 that in, you know, half a day, and you only take, you  
12 know, 500 yards, you can do that in a quarter of a day.  
13 So there's a savings. It doesn't cost the contractor  
14 as much money.

15           In this case that bridge took us the exact same  
16 amount of time to build whether it's got, you know, ten  
17 yards in it or 12 yards in it. Because our labor and  
18 equipment remained fixed. That's why I wanted to show  
19 the estimate. It was just a matter of him saying that  
20 it would take a total of 34 cap pours to build this  
21 bridge.

22           Now with the DOT decreasing the quantity, it's  
23 not like it took us 33 cap pours. The same amount of  
24 pours were necessary. The same amount of days were  
25 necessary to make this cap pour.

1           We had the wrong information.

2           In other words, for future references, the DOT  
3           could just make error calculations on future jobs and,  
4           you know, come 5 percent off or 10 percent off on the  
5           quantity, and there wouldn't be any relief to the  
6           contractor as far as getting paid for that exact amount  
7           of work and labor necessary.

8           MR. CARLILE: I understand that for the typical  
9           underrun-overrun situation normally they make an  
10          adjustment. You're saying --

11          MR. MIKE CONE: This is a unique situation.

12          MR. CARLILE: Your position is it's not any  
13          different than a typical underrun?

14          MR. DOUGHERTY: Based on the specifications we  
15          looked at it as basically a typical underrun-type  
16          situation.

17          Again, I want to say, as Mike indicated, some of  
18          their privileged information, had they supplied that to  
19          us, maybe we could have taken a different position.  
20          It's kind of a moot point now because we're at this  
21          point in the process.

22          MR. MIKE CONE: We brought the information.

23          MR. DOUGHERTY: I appreciate that. Whether that  
24          alters the stance we took based on the information we  
25          had, I don't believe it would.

1           MR. BLANCHARD: That's something we have to  
2 analyze. It's not something we could do here in two  
3 minutes anyway.

4           The other part of this thing is I can't  
5 understand, it seems to me a decrease in the volume of  
6 concrete that's placed means less form work, less form  
7 material, less labor in placing the concrete. The  
8 concrete has to be placed, vibrated. If you've got  
9 less concrete to place, you've got less concrete to  
10 vibrate, to finish.

11           So, the labor work, the finishing work,  
12 everything is less.

13           MR. CARLILE: Let me ask you this, if the  
14 material had only been 10 percent of that original  
15 estimate would you make that same statement?

16           MR. BLANCHARD: Sure. Oh, you're saying a big  
17 difference?

18           MR. CARLILE: The issue is whether or not we  
19 cross that threshold.

20           MR. BLANCHARD: Right, I couldn't make that same  
21 statement in that case. You're right. What I'm saying  
22 is the percent difference here is not significant  
23 enough to warrant, you know, what the contractor is  
24 saying.

25           MR. CARLILE: That's all I had.



1                   CHAIRMAN COWGER: I think we have everything now.  
2 I want to go to Exhibit 1, the contractor's submittal,  
3 his request for arbitration.

4                   Under the tab on summary of claim, the last page,  
5 it starts off, "The 1986 FDOT Standard Specifications."  
6 Is everybody there?

7                   I just wanted to ask Mr. Cone, isn't that really,  
8 that first paragraph on that page, or maybe the whole  
9 page, really what you were trying to say a minute ago?  
10 Doesn't that sum it up pretty well?

11                   MR. MIKE CONE: Yes, sir, that's correct.

12                   CHAIRMAN COWGER: Just wanted to point that  
13 paragraph out.

14                   MR. MIKE CONE: Mr. Chairman, I would like to  
15 respond to his comment there. That's why we brought  
16 Jake Wagenrodt up here. He should be down in Stuart  
17 today building a bridge, but we felt like it was  
18 important that he come here.

19                   He's the man in the field that can make the real  
20 determination if labor and equipment is decreased or  
21 increased based on amount of concrete you order from  
22 the plant. And what he's verified today, in fact, is  
23 that we figure two cap pours per week. And if that cap  
24 has one or two yards less in it, it's still going to  
25 take two cap pours per week.

1           And that's all I wanted to ask, if there's any  
2 questions whether we had a time savings developed,  
3 I wanted Jake to verify that's not the case.

4           CHAIRMAN COWGER: I think what the Board is  
5 interested in knowing a little bit more about now is in  
6 your submittal you gave a summary of your cost. You  
7 call it the fixed cost.

8           And then you come down -- I'm looking at  
9 Exhibit 1 again. It's the second page under the tab  
10 summary of claim. You break down how you got the bid  
11 unit price of \$245 and how you came up with the, what  
12 you call your actual unit price of 278.

13           I think what the Board needs to see is a little  
14 bit more detail as to how you arrived at some of those  
15 fixed costs. It's already been discussed that DOT  
16 requested that information. I assume that the reason  
17 that you have not submitted it is that it's considered  
18 to be proprietary information as to how you bid a  
19 project.

20           I think the Board needs to be able to, in  
21 conjunction with the DOT representative, spend just a  
22 few minutes looking at that information. I realize it  
23 may not provide much time for rebuttal, DOT, but let's  
24 take a look at it anyway.

25           Before we get to that, let me ask one more

1 question of DOT. You submitted this supplemental  
2 agreement increasing the work to the tune of 368 plus  
3 thousand dollars?

4 MR. DOUGHERTY: Yes, sir.

5 CHAIRMAN COWGER: Is there any relationship  
6 between this work that's being added by this  
7 supplemental agreement and the work that's in dispute  
8 here today?

9 MR. DOUGHERTY: This related to -- well, I can't  
10 say positively one way or the other right now. I'd  
11 have to get into it.

12 CHAIRMAN COWGER: Let me rephrase the question.  
13 That wasn't a very good question. Does the work  
14 covered by the supplemental agreement in any way  
15 involve changes to the caps?

16 MR. DOUGHERTY: No, sir.

17 CHAIRMAN COWGER: That's really what I wanted to  
18 know.

19 MR. TURNBULL: That's the only question I had.

20 MR. DOUGHERTY: If I may, I think our point here  
21 was that, you know, we went back in and increased  
22 volumes of quantities on other areas.

23 MR. BLANCHARD: Volumes of concrete.

24 MR. DOUGHERTY: Volumes of concrete. And at that  
25 time, you know, as far as I know, we used unit prices

1 that we had been given before with no, you know --  
2 accordingly, if you're going to increase the quantity,  
3 the cost should go down. If you're going to decrease  
4 the quantity, the cost should go up.

7  
5 In this particular case we did not lower the  
6 cost. I think I'm alluding to what Mr. Blanchard said.  
7 There's some give and take from both sides in this  
8 area.

9 MR. BLANCHARD: I guess I wasn't specific enough  
10 when I mentioned there were increases in the contract.  
11 I was talking about increases in quantities of concrete  
12 as well as increases in other things.

13 CHAIRMAN COWGER: Okay. I think now let's let  
14 Mr. Cone present whatever he would like to present us  
15 in the way of documentation of his fixed costs.

16 MR. MIKE CONE: Mr. Chairman, thank you. On  
17 that issue, just to clarify it, that change order or  
18 supplemental agreement was worked totally unrelated to  
19 substructure concrete. It was for doing some back wall  
20 work at a different phase of the job than the  
21 substructure portion.

22 Jim, if you could just quickly run down this.  
23 We're talking about the number of days, how we figure  
24 the job.

25 MR. LUNDY: When we got the set of plans, we

1 looked at the substructure concrete. We selected a  
2 crew and equipment to do the work. It was a lot of  
3 work. There were some barges needed.

4 We took the number of different segments of it.  
5 There was -- I believe there was eight end bent pours  
6 and 34 different cap pours. We estimated the time it  
7 would take for each one of those.

8 We multiplied that by the labor, by our crew that  
9 we picked, and by the equipment that we selected.

10 And this quantity that you all reduced did not  
11 affect that work at all. The work remained the same.

12 We poured the same number of bents, poured the  
13 same number of caps. We just had a quantity reduction.  
14 No reduction in our -- no savings in our labor and  
15 equipment.

16 CHAIRMAN COWGER: May I interrupt now. In the  
17 discussion we're having right now, let's confine it to  
18 how you arrived at these prices because we have already  
19 argued the entitlement part of it.

20 MR. MIKE CONE: Mr. Chairman, based on that sheet  
21 there, we have come up with a daily equipment cost  
22 of -- between the equipment and labor it was \$214,000  
23 based on Exhibit No. --

24 MR. LUNDY: At the bottom there's a summation of  
25 the labor and equipment columns. Those correlate to

1 that same fixed cost that we talk about on the second  
2 page that we were looking at earlier.

3 MR. MIKE CONE: We're saying to build all the  
4 substructure of the job it would cost us 232,000.  
5 That excludes any concrete at all. There wasn't any  
6 concrete, any materials as far as permanently  
7 incorporated in the project.

8 So we took the 232,000 and divided by the plan  
9 quantity and came up with a unit price. If that plan  
10 quantity -- if the contractor had known in advance the  
11 plan quantity was going to be lower, our unit price  
12 would have been higher because of the division.

13 CHAIRMAN COWGER: May I ask one more time. We  
14 are three engineers that understand how most of this is  
15 constructed or how this claim is constructed. Again,  
16 all we're interested in is how did you arrive at those  
17 fixed costs. It's on that sheet?

18 MR. MIKE CONE: Yes, sir, that sheet is it.

19 MR. LUNDY: I will be happy to answer any  
20 questions you've got on that, Marshall.

21 CHAIRMAN COWGER: I think you're hitting it right  
22 there.

23 MR. DOUGHERTY: Jim, you're showing a one cubic  
24 yard concrete bucket. You had to swing that bucket 200  
25 less times right out front. That means whatever is

1 swinging it swung 200 times less.

2 How many times a day did it swing? How much  
3 effort is involved? We have no way of knowing. You're  
4 showing 125 days here for every one of these  
5 operations. Realizing you're not going to need 225  
6 days -- you're cutting your quantity of concrete you're  
7 moving.

8 Because it's sitting out there on the job doesn't  
9 necessarily mean it's being worked or is useful, the  
10 bucket or whatever. In other words, you lowered the  
11 quantity. I'm just saying that to say that you needed  
12 that one yard bucket out there all the time --

13 MR. J. L. CONE: But our costs were the same.

14 MR. DOUGHERTY: I think I understand.

15 MR. LUNDY: The cost of the bucket was assigned  
16 to that item whether it was sitting out there -- it set  
17 out there just the same amount of time as it would have  
18 been if the concrete plan quantity had been greater or  
19 less. It set out there the same amount of time.

20 MR. MIKE CONE: That substructure took 125 days.  
21 It didn't matter -- now if you eliminated a cap or end  
22 bent, maybe it would have taken 120 days, but that's  
23 not what happened here.

24 CHAIRMAN COWGER: May I ask a question? Is it  
25 your intent to not introduce this as an exhibit?

1           MR. MIKE CONE: We would like it just reviewed  
2 and if there's anything you feel is in error on that,  
3 we certainly --

4           MR. DOUGHERTY: I'm not going to be able to look  
5 through it in a minute or two minutes or an hour's  
6 time. I don't know whether you would want to let me  
7 have this.

8           CHAIRMAN COWGER: That was exactly what he said,  
9 no.

10          MR. DOUGHERTY: I understand that. You've got to  
11 understand from the Department's standpoint it's hard  
12 to analyze figures that are put on a piece of paper  
13 without backup or supporting documentation.

14          CHAIRMAN COWGER: We understand.

15          MR. J. L. CONE: Let me make a statement. The  
16 State talks about they don't have any supporting  
17 documents. They have a weekly -- they have a daily  
18 report, a weekly report, a monthly report of everything  
19 that we do and their inspectors and project engineers  
20 are on the job, so why don't they have their own  
21 corroborating figures or be able to tell us one way or  
22 the other? That's what they're there for.

23                I don't understand that when they say they can't  
24 back up any of our figures. They can take their own  
25 reports and look at our figures and either prove them



1 or disapprove them.

2 MR. DOUGHERTY: We can document whether or not  
3 pieces of equipment are in the field or are being  
4 utilized but none of that can substantiate how you came  
5 up with your bid unit price nor how it would alter  
6 should work decrease or increase.

7 MR. BLANCHARD: The other thing that bothers me,  
8 Mr. Chairman, is that the contractor is basing his  
9 entire argument on the number of days that he took to  
10 build the job. And I know enough about the business  
11 that I know contractors compute their costs based upon  
12 man hours and equipment hours.

13 And if you're pouring less concrete, it's going  
14 to require less man hours or less equipment hours to do  
15 that work.

16 MR. MIKE CONE: That's totally in error in this  
17 particular case. You're in Tallahassee making that  
18 decision but Jake is in the field. Am I wrong, Jake?

19 MR. WAGENRODT: No, you're right.

20 MR. BLANCHARD: I see enough construction  
21 projects to know that's the way contractors spend money  
22 is man and equipment hours.

23 CHAIRMAN COWGER: I think we're down to arguing  
24 again. What we're really wanting to look at is not how  
25 the contractor constructed the job but how he put

1 together his bid because that's really the exhibit that  
2 we're looking at.

3 He's displaying to us with this information in  
4 greater detail how he arrived at those figures that he  
5 said his bid was based on. I want to pass that on to  
6 the other members of the Board and let them take a look  
7 at it.

8 MR. DOUGHERTY: I would like to say, if I may,  
9 it's one of the unfortunate parts of a claim situation  
10 like this that there are a lot of things the  
11 contractors are going to need to open up and let us  
12 see in order to let us properly analyze a claim.

13 Heretofore maybe the attitude of your office is,  
14 no, we don't want to do that, but in something like  
15 this I believe it's almost mandatory.

16 MR. MIKE CONE: I understand that. It's not that  
17 we don't want to do that, it's just that it's all  
18 formula. And competition, as you know, can look at  
19 that and it's something we don't like to make a  
20 practice of.

21 But as you know, you've only got three or four  
22 major pieces of equipment -- your barges, your crane,  
23 your tugboat. It takes no time to calculate what  
24 that's worth. It's just a matter of minutes.

25 MR. DOUGHERTY: Again, Mike, like Ken said, most

1 contractors deal with time, manpower and equipment on  
2 the job, whether there's excess hours in a day or not,  
3 you know, most contractors aren't concerned with that.  
4 They want to know what a productive effort is.

5 In this particular case, we had no record to  
6 understand how you even came up with your prices.

7 CHAIRMAN COWGER: Again, I think we're down to  
8 arguing. I think both sides have made their points.

9 I have one more question of the contractor.  
10 Looking again at the summary of the add-on for profit  
11 as shown on that summary, elsewhere it shows that to be  
12 overhead and profit. Tell us a little bit about that  
13 \$7.92. What does that cover?

14 MR. MIKE CONE: It's primarily overhead and  
15 profit. We came up with a base cost of, at bid time of  
16 \$238. What we wanted to do was just -- came up with a  
17 bid of 245 because we felt like we were going to  
18 allocate \$7.92 to overhead and profit, which isn't very  
19 much in turn, but the industry is in a very tight  
20 situation.

21 CHAIRMAN COWGER: In preparing your bid, where do  
22 you assign -- and part of the answer may be on that  
23 sheet that just passed through here. Where do you  
24 assign the cost for the your direct project overhead?  
25 Is it in that \$7.92 or is it spread across those other

1 units?

2 MR. LUNDY: I don't exactly understand what  
3 you're asking. The job site overhead cost?

4 MR. CHAIRMAN: Yes.

5 MR. MIKE CONE: It's in the 7.92. In other  
6 words, in all of our direct costs the 238, before you  
7 add the 7.92, the 238 includes the actual foreman and  
8 labor out there. The 7.92 includes the superintendent,  
9 his vehicle, his insurance, bonds, things like that  
10 just to manage the project.

11 CHAIRMAN COWGER: Let me have that a minute to  
12 see if I understand it. You've answered my question.

13 MR. MIKE CONE: One thing interesting about  
14 concrete work, to figure out what a contractor is  
15 figuring for labor and equipment is real easy because  
16 all you have to do is back up material costs.

17 The concrete on this job was \$60.64 for the  
18 concrete and the waste factor. It's real easy on  
19 concrete to figure out what your labor and equipment  
20 cost is versus another form of construction.

21 CHAIRMAN COWGER: I want to put one statement in  
22 the record, and I want to give this information back to  
23 Mr. Cone. In looking at the information that is being  
24 considered as proprietary and which will not be an  
25 exhibit, am I correct in saying that in the labor cost

1           you do not show any cost for a superintendent?

2           MR. MIKE CONE: That is correct.

3           CHAIRMAN COWGER: That's all I wanted to say.

4           MR. MIKE CONE: Or the field office, telephone,  
5           electricity, water, any of that stuff.

6           CHAIRMAN COWGER: Okay. Does either side have  
7           any further comments? Mr. Turnbull, do you have any  
8           questions?

9           MR. TURNBULL: I don't.

10          CHAIRMAN COWGER: Mr. Carlile?

11          MR. CARLILE: No.

12          CHAIRMAN COWGER: The hearing is hereby closed.  
13          The Board will meet on June 26th to deliberate on this  
14          claim and you will have an order shortly thereafter.  
15          (Whereupon, the hearing was concluded at 10:35 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  
through 33 are a true and correct record of the aforesaid  
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 HAND AND SEAL this, the 11<sup>th</sup> day of June,  
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