

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

MBW
12-6-07
SCO'S / CO

20 November 1992

+++ NOTICE +++

In the case of Apex Contracting, Inc. versus the Florida Department of Transportation on Project No. 97864-3314 in Palm Beach and Martin Counties, Florida, both parties are advised that State Arbitration Board Order No. 4-92 has been properly filed on November 20, 1992.

H. Eugene Cowger

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

S.A.B. CLERK

NOV 20 1992

FILED

HEC/sfc

Copies of Order & Transcript to:

J. B. Lairscey, Jr., Director of Construction/FDOT

Frank D. Whitney, President/Apex Contracting, Inc.

STATE ARBITRATION BOARD

ORDER NO. 4-92

RE:

Request for Arbitration by
Apex Contracting, Inc. on
Job No. 97864-3314 in
Palm Beach and Martin Counties

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

H. Eugene Cowger, P. E. Chairman
Kenneth N. Morefield, P. E. Member
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a
request for arbitration commencing at 9:15 a.m. on Thursday,
September 24, 1992.

The Board Members, having fully considered the evidence
presented at the hearing,, now enter their order No. 4-92 in
this cause.

ORDER

The Contractor presented a request for arbitration of
a three part claim for additional compensation in the total
amount of \$147,296.77.

PART I \$85,543.77
Restoration of Eroded Areas at Box Culvert Sites

1. The Department of Transportation (DOT) instructed us to
limit sodding at the site of the box culvert extension to
that shown on DOT Standard Index No. 281 (5' upward from the
headwall and 5' beyond the ends of the headwall).
2. We advised DOT at that time that the quantity of sod
shown in the Standard Index is insufficient to effectively
control erosion and that we are being forced to accept the
burden on maintenance until final acceptance for something
over which we have no control.
3. As the result of insufficient sod to adequately protect
the areas from erosion severe erosion occurred at the culvert
sites and we were required to do considerable addition work
to regrade these areas. In some instances we had to repair an

area more than one time.

4. It is our position that severe erosion would have occurred regardless of when we accomplished the final dressing, because there was not enough sod to protect the areas disturbed by construction.

5. In some instances it was necessary to disturb areas outside the limits of construction shown in the plans in order to accomplish the work.

6. We requested that DOT accept the work in sections, but they refused to do so.

7. The equipment and labor costs in our claim computation were developed from daily reports, payrolls and time sheets.

PART II \$12,253.00
Payment for Work Done Under Muck Blanket Item

1. Our bid for this project placed the cost of providing a layer of material suitable for plant growth over graded areas in the unit price for Muck Blanket.

2. DOT notified us in November 1988 that the item Muck Blanket was being deleted from the work.

3. We stockpiled the muck removed from areas within the project, including muck used to construct temporary dikes, and allowed it to dry and removed rocks and roots.

4. Our claim is the amount included in the original contract for the item Muck Blanket.

PART III Release of Liquidated Damages
45 CD @ \$1,100 = \$49,500

1. We requested that the charging of contract time be stopped on March 2, 1989, the day that the first severe erosion around culverts occurred, because work after that date was essentially restoration of the eroded areas. Time charges were continued until May 12, 1989.

2. We were required by the contract to employ a DBE firm as a subcontractor for a portion of the work. We sublet work at some of the culvert extension sites to Tricon Development. We instructed them to begin work, but, after repeated efforts to get them on the job without success, were forced to

terminate the subcontract. We experienced a delay between June 15, 1989 and July 19, 1989 in locating and getting DOT approval of another DBE firm to do this work.

The Department of Transportation presented the following information in rebuttal of the claims:

PART I

1. The Contractor unnecessarily disturbed areas outside the limits of construction to stockpile materials.
2. Standard Index No. 281-Ditch Sodding is accepted practice in the industry.
3. The Contractor did not pursue the work of final dressing and sodding as culvert work progressed. If sod had been installed earlier, it would have developed a root system prior to the period when heavy rains occurred.
4. Rains that occurred after March 2, 1989 were not unseasonable.
5. We could not accept the culverts in sections because the Contractor did not complete them in an orderly manner.
6. In analyzing the Contractor's calculation of the amount claimed we found that our records showed fewer hours for work actually restoring areas within the limits of construction. In no case, should DOT be held responsible for restoration of areas outside the limits of construction.

PART II

1. We deleted the Muck Blanket item because we did not see the need for it.
2. The Contractor, on July 7, 1989 executed a Supplemental Agreement providing for deletion of the item Muck Blanket from the contract.
3. The Contractor did not mix the muck with the underlying soil and the in-place muck was not tested for organic content and pH as provided in specification for Topsoil. (Section 162)
4. The Contractor did not file a claim in regard to this

issue until August 24, 1989 which was after he executed the above mentioned Supplemental Agreement and after final acceptance of the project.

PART III

1. A significant amount of original contract work was accomplished after March 1, 1989.

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

PART I

1. In some cases, the headwall of a culvert was moved outward as much as 10 to 15 feet. The area between the old and new locations necessarily had to be disturbed, yet the plans provide for only 5 feet of sod above the new headwall.
2. The plans did not provide an item for Grassing, only an item for Sodding.

PART II

The Supplemental Agreement dated June 24, 1989 (executed by the Contractor on July 7, 1989) resolved the issue of payment for all grading work.

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

The Department of Transportation is ordered to compensate the Contractor for his claim as follows:

- PART I \$55,000.00
- PART II Nothing
- PART III Release 30 Calendar Days of assessed Liquidated Damages at \$1,100 per day.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$150 for Court Reporting costs.

The Contractor is directed to reimburse the State Arbitration Board the sum of \$74 for Court Reporting costs.

S.A.B. CLERK

NOV 20 1992

FILED

Tallahassee, Florida

Dated: 20 Nov 1992

Certified Copy:

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

20 November 1992
Date

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

K. N. Morefield
K. N. Morefield, P. E.
Member

John P. Roebuck
John P. Roebuck
Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

NOV 20 1992

APEX CONTRACTING, INC.)

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FILED

- and -)

PROJECT NO. 97864-3314

LOCATION: Broward County
to St. Lucie County,
Florida

DEPARTMENT OF TRANSPORTATION)

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Thursday, September 24, 1992

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

TIME: Commenced at 9:15 a.m.
Concluded at 10:20 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. Ken N. Morefield
Mr. John Roebuck

APPEARING ON BEHALF OF THE APEX CONTRACTING, INC.:

Mr. Gill Turner
Mr. Frank Whitney

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Neil Condy
Mr. Bud Hibbard
Mr. Eugene Perry
Mr. Charles Peterson

* * *

I N D E X

EXHIBITS	PAGE
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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. Ken Morefield was appointed as a member of
6 the Board by the Secretary of the Department of
7 Transportation. Mr. John "Jack" Roebuck was elected
8 by the construction companies under contract to the
9 Department 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. Our terms of office began July 1, 1991, and
13 will expire June 30, 1993.

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

17 (Whereupon, all witnesses were duly sworn by the
18 Chairman.)

19 CHAIRMAN COWGER: The documents which put this
20 arbitration hearing into being are hereby introduced as
21 Exhibit No. 1. That is the notice of arbitration
22 hearing and the request for arbitration that was
23 submitted by the contractor and all the attachments
24 that were sent with the request for arbitration. All
25 parties should have had copies of all of that for some

1 time.

2 Does either party have any other information it
3 wishes to put into the record as an exhibit?

4 (Discussion off the record)

5 CHAIRMAN COWGER: While we were off the record,
6 there was discussion of exhibits to be presented.
7 DOT has presented a package of information which is
8 identified as Exhibit No. 2. Each party has a copy of
9 that now and it is properly identified.

10 The contractor presented a package of information
11 which is identified now as Exhibit No. 3. All parties
12 have a copy of that and it's been properly identified.

13 Any objection to what I have said at this point
14 about the exhibits?

15 (Whereupon, Exhibit Nos. 1, 2 and 3 were received in
16 evidence.)

17 Does either party wish additional time to examine
18 the exhibits?

19 MR. WHITNEY: No.

20 CHAIRMAN COWGER: Hearing nothing we will
21 proceed. During this hearing the parties may offer
22 such evidence and testimony as is pertinent and
23 material to the controversy and shall produce such
24 additional evidence as the Board may deem necessary to
25 an understanding and determination of the matter before

1 it. The Board shall be the sole judge of the relevance
2 and materiality of the evidence offered.

3 The parties are requested to assure that they
4 receive properly identified copies of each exhibit
5 submitted during this hearing and to retain those
6 exhibits. The Board will furnish the parties a copy of
7 the transcript of this hearing along with its final
8 order, but will not furnish copies of the exhibits.

9 If you should need those exhibits, we can get
10 them for you, but we will not furnish them without
11 request.

12 The hearing will be conducted in an informal
13 manner. The contractor will elaborate on their claim
14 and then the DOT will offer rebuttal. Either party may
15 interrupt to bring out a point by coming through the
16 Chairman.

17 However, for the sake of order I must instruct
18 that only one person speak at a time. Also, so that
19 our court reporter will be able to positively identify
20 each person testifying, we ask that you introduce
21 yourself the first time you speak.

22 We are ready to proceed. Mr. Contractor, would
23 you like to present your case? We would like for you
24 to first state the total amount of your claim and then
25 proceed.

1 MR. WHITNEY: My name is Frank Whitney with Apex
2 Contracting. The total amount of our claim is
3 \$85,543.77. That is Claim 1, I'm sorry. The total
4 amount of our claim is \$135,043.77.

5 CHAIRMAN COWGER: May I interrupt you a minute.
6 That doesn't agree with the total I have.

7 MR. WHITNEY: Okay.

8 CHAIRMAN COWGER: Let me tell you what I see for
9 the various parts and you tell me if it's different and
10 then we will go from there. Part 1, \$85,543.77.

11 MR. WHITNEY: Right.

12 CHAIRMAN COWGER: Part 2, \$12,253.00. Part 3,
13 \$49,500.

14 MR. WHITNEY: Right.

15 CHAIRMAN COWGER: My total is \$147,296.77.

16 MR. WHITNEY: That's right.

17 CHAIRMAN COWGER: Now if you disagree, tell me
18 now.

19 MR. WHITNEY: That's correct.

20 CHAIRMAN COWGER: Okay, proceed on.

21 MR. WHITNEY: On Claim 1 -- you will have to bear
22 with me a minute. I wasn't too sure how this was going
23 to be handled.

24 MR. ROEBUCK: Let me ask a question, Mr. Whitney.
25 In this claim item, package 3 that you just submitted,

1 you allude to interest in here. There is a letter
2 relating to interest. Was that included in your claim?

3 MR. WHITNEY: No, it was not.

4 MR. ROEBUCK: Do you intend it to be a part of
5 your claim?

6 MR. WHITNEY: No, I would say we would not add
7 that. I would like to include it, yes, if it's
8 possible.

9 MR. ROEBUCK: I was just leafing through the
10 package. I didn't see an amount. Is it something that
11 can be calculated from the data that you submitted,
12 I assume?

13 MR. WHITNEY: Under those -- since we have done
14 it that way, we will exclude that with putting that in
15 there for a backup of what we had given to DOT on the
16 turnpike.

17 MR. ROEBUCK: You are excluding any claim for
18 interest?

19 MR. WHITNEY: Right. Our Claim 1 is based on the
20 fact that the original contract called for sodding of
21 the ends of the culverts and that was excluded.

22 At that time we notified the State that was going
23 to cause problems. I think at the time we asked them
24 to accept those -- accept the job in smaller portions
25 than the whole job. And I'm not sure that we -- I'm

1 not aware that we ever even had an answer for that
2 portion, a written answer anyhow.

3 Also, it was -- as these washouts occurred, it
4 kept enlarging the areas that we were repairing, and in
5 essence there to the -- there was not sufficient room
6 to do the project to start with. I think you are
7 allowed ten feet on each side of the canal, and we were
8 required to go further than ten feet to tie into the
9 slopes of the fields.

10 CHAIRMAN COWGER: May I ask a question about
11 that. I'm not sure I understood what you just said.
12 This contract, the areas in dispute at least, it's
13 primarily for extension of culverts?

14 MR. WHITNEY: Yes.

15 CHAIRMAN COWGER: That's what we're talking about
16 in Part 1, at least?

17 MR. WHITNEY: Yes.

18 CHAIRMAN COWGER: Where was there insufficient
19 area shown? Was it in the side ditches that come in?

20 MR. WHITNEY: The extension of the canals from
21 the culverts.

22 CHAIRMAN COWGER: Perpendicular to the road?

23 MR. WHITNEY: It was showing ten feet on each
24 side of that as the work area, or was that the
25 measuring area?

1 MR. CONDY: I don't think any limits for
2 construction were explicitly shown in the plans.

3 MR. TURNER: A lot of it just says variance times
4 variance.

5 CHAIRMAN COWGER: Let me ask you a question about
6 this. What we're talking about is the channel that
7 goes out perpendicular to the roadway from the end of
8 the culvert? Is that what we're talking about?

9 MR. CONDY: The regrading area consists of the
10 area between the shoulder and the headwall, which is
11 within the clear zone, around the outside of the head
12 walls, down the slopes to the channel, going out from
13 the head walls. And other areas disturbed by the
14 contractor that we determined, we deemed as outside the
15 limits of the construction.

16 CHAIRMAN COWGER: Okay.

17 MR. HIBBARD: Could I add. I'm Bud Hibbard with
18 the turnpike. The areas outside the normal
19 construction limit that he is referring to would be the
20 areas where the contractor had stockpiled material in
21 his work areas, and in some cases it exceeded the area
22 that we thought they ought to be using.

23 CHAIRMAN COWGER: May I ask one other question.
24 If we look at Exhibit 2, the first page of the exhibit
25 was a standard index drawing showing ditch paving and

1 sodding. Is the ten feet the summation of those two
2 five-foot dimensions that we see on there? Is that
3 what we're talking about?

4 MR. WHITNEY: No. There was a ten-foot area
5 instead of five-foot area, ten-foot dimension on each
6 side of the canal for muck blanket and regrading.

7 MR. TURNER: Topsoil.

8 MR. WHITNEY: Topsoil for those two areas.

9 MR. TURNER: That was related.

3
10 CHAIRMAN COWGER: Do either one of the Board
11 members have any questions about that?

12 MR. MOREFIELD: No.

13 CHAIRMAN COWGER: Okay, we can proceed on then.
14 We have your submittal, which pretty much sums up your
15 position on Part 1 of the claim. Between the cover
16 sheet and the correspondence attached -- and I think
17 the Board understands what the dispute is.

18 Do you want to expand any further on what your
19 position on why it is that you think you should be paid
20 for additional costs of repairing the erosion damage at
21 the culvert sites?

22 MR. WHITNEY: We had requested that this be done
23 in smaller sections and that was not granted. It put
24 an undue pressure on us to complete that whole job
25 without any erosion or without undue erosion. The sod

1 would have definitely prevented a lot of the erosion.
2 Like I said, when it was washed out, then we had to go
3 back, and we ended up cleaning the canal out again and
4 working in a larger area each time.

5 CHAIRMAN COWGER: Tell us a little bit, though,
6 to get it in the record, what happened during the
7 course of the project as to the dispute that arose over
8 how much sod should be placed at each site.

9 MR. TURNER: I'm Gilbert Turner with Apex. This
10 was way back in 1988. I believe there's a copy of a
11 letter in there that we first disputed the amount of
12 sod to be laid. We felt that it wasn't sufficient.

13 As you are familiar, there was another contract
14 just north of us at the time we started out laying sod
15 completely on two sites.

16 The turnpike or DOT decided it was going to run
17 too much money for that amount of sod. They cut it
18 back to just one strip along the edge of the road, the
19 shoulder and one strip around the box itself. And this
20 wasn't sufficient to hold the amount of rains that we
21 had at this period of time.

22 Some of these sites we did as many as four and
23 five times.

24 CHAIRMAN COWGER: Tell me a little more about --
25 you said one strip along the edge of the road and one

1 strip along the culvert. What is -- what does one
2 strip --

3 MR. TURNER: It's 18 inches wide, wasn't it,
4 Gene?

5 MR. PERRY: It was standard running sod.

6 MR. TURNER: It measures at about 18.

7 MR. PERRY: I don't know any limitation to one
8 strip. I don't remember that.

9 CHAIRMAN COWGER: I think we could probably
10 resolve this by looking at Exhibit 2 again, the
11 standard index drawing. Was the sodding done
12 essentially in accordance with this drawing --

13 MR. TURNER: No.

14 CHAIRMAN COWGER: -- or was less sod installed?

15 MR. TURNER: This is showing it being solid
16 sodding.

17 MR. CONDY: This is showing it sodded five feet
18 behind the headwall and five feet on either side of it.
19 Then we provided one strip along the edge of the
20 shoulder. If you picture the edge of the shoulder
21 running parallel with the end of the sod, we put one
22 strip of sod, one width along the edge --

23 CHAIRMAN COWGER: What did you do at the end
24 walls?

25 MR. TURNER: On the side walls we did basically

1 the five foot, yes, sir.

2 MR. CONDY: Around the ends of the end walls we
3 used about five feet, approximately five feet behind.

4 MR. TURNER: There was the period between the
5 strip between the headwall and the edge of the road
6 where we didn't have any sod.

7 MR. CONDY: There's 30 feet between the edge of
8 the travel lane to the headwall. So you take out, we
9 had in some cases a ten-foot shoulder. You had 20
10 feet, a strip of sod, then probably 14 feet or so of
11 barrier and then five feet of sod before the headwall.

12 CHAIRMAN COWGER: How many feet of barrier?

13 MR. HIBBARD: About 14.

14 MR. TURNER: Fourteen, fifteen feet. It varied.

15 MR. MOREFIELD: Was that grass?

16 MR. CONDY: No.

17 MR. MOREFIELD: Was it left to regenerate itself?

18 MR. CONDY: There was no provision in the
19 contract for grass. It was outside the limits of
20 construction that was necessary to construct the box
21 culvert extensions. That's one of our contentions.

22 CHAIRMAN COWGER: Was that area, that 14-foot
23 area that you're talking about between the edge of the
24 sod strip that ran along the edge of the road and the
25 top of the sod that was installed at the culvert

1 disturbed?

2 MR. CONDY: Yes.

3 CHAIRMAN COWGER: Was it necessary to disturb it
4 to do the construction?

5 MR. WHITNEY: Yes, sir.

6 MR. CONDY: A portion of it.

7 MR. TURNER: Especially the part where the
8 culvert was, you had to. There's no way you could keep
9 from it.

10 CHAIRMAN COWGER: Just roughly how many feet were
11 the culverts extended?

12 MR. CONDY: Ten to fifteen.

13 MR. HIBBARD: They varied.

14 MR. TURNER: Averaged about 14 foot.

15 MR. HIBBARD: The idea to achieve the 30-foot
16 clear zone. They varied all over the place.

17 CHAIRMAN COWGER: Ten to fifteen feet was --

18 MR. CONDY: Some of them two to three, but
19 I would say 10 to 15.

20 MR. PERRY: Some of them much less, no more than
21 two or three feet.

22 CHAIRMAN COWGER: As I understood it, there was
23 no provision in the contract for any sodding or seeding
24 or grassing of any kind in that area between the edge
25 of the sod strip along the pavement and the top of the

1 sod at the culvert?

2 MR. CONDY: No, but there weren't -- it wasn't
3 like there was a slope to protect, it was a mild
4 gradient between the shoulder and the headwall.

5 CHAIRMAN COWGER: Okay. Did you have anything
6 further to present on that then?

7 MR. WHITNEY: There was five foot shown on the
8 plans to be done there and there was only 18 inches put
9 in.

10 MR. TURNER: Eighteen inches was done up next to
11 the pavement.

12 MR. ROEBUCK: You had an open area.

13 CHAIRMAN COWGER: I think we understand this. Is
14 there anything you want to talk further about in regard
15 to your entitlement for compensation? I want you to
16 tell us a little, if you want to, about how you arrived
17 at the amount that you're claiming.

18 MR. TURNER: We took -- we have our time sheets,
19 our payrolls, certified payrolls and time sheets and
20 daily reports.

21 On February 28 a portion of the job was complete,
22 Gene had looked at it and we were ready for inspection.
23 We had an ungodly washout on March 2. We got it ready
24 again, then had another washout.

25 We only -- our claim is only for the days that we

1 worked to repair from washouts, not anything else. And
2 we kept track of it because at the time we did intend
3 to file a claim.

4 CHAIRMAN COWGER: In the package of information
5 that you submitted initially there's a letter from Apex
6 to Metric Engineering dated August 14, 1989, which sets
7 out the details of your claim, sums up to be the
8 \$85,543, and has attachments to it showing all of the
9 equipment that you rented, showing the materials you
10 purchased. It doesn't show any documentation for the
11 labor.

12 Can you tell us how you got those labor costs?
13 You explained the time period, but where did these
14 numbers in here come from?

15 MR. TURNER: We have that documentation. If
16 anybody needs to see it, we have it.

17 CHAIRMAN COWGER: Did it come out of your payroll
18 records?

19 MR. TURNER: Daily report, payroll records and
20 time sheets.

21 CHAIRMAN COWGER: That's all we need to know
22 right now. Unless you have anything else to say on the
23 issue, we would like to let DOT rebut now.

24 MR. WHITNEY: Let me add one more thing.

25 CHAIRMAN COWGER: Yes, sir.

1 MR. WHITNEY: We will let them go ahead then.
2 I will throw this in later. Go ahead.

3 MR. CONDY: It's the Department's contention that
4 they assumed no liability for the regrading because,
5 number one, the construction was performed, the sodding
6 was performed in accordance with the standard index,
7 281, which is accepted practice in the industry.

8 It's the Department's position that the
9 contractor also didn't diligently pursue the work in
10 sections and phases and adequately protect these bare
11 areas to establish a standard of grass in these sodded
12 locations without allowing the entire project to be
13 exposed to the elements.

14 The specifications for sodding require the
15 establishment of a stand of grass and they require the
16 maintenance of this grass until it's established and
17 until final acceptance.

18 We don't feel that the washouts would have
19 occurred if the establishment of the sod around these
20 end walls would have occurred.

21 We also don't feel that the rain that occurred
22 was unseasonal. It was typical for that time of year
23 in the area that we were working and the contractor
24 could have taken proper precautions.

25 CHAIRMAN COWGER: May I ask a question to clarify

1 something you said. I'm interested in the part about
2 he didn't pursue the work. Are you saying that as he
3 completed the work at a particular culvert site that he
4 did not pursue installing the sod at that time?

5 MR. CONDY: He did not complete the grading work
6 at that time. He did not install the sod. He didn't
7 give the sod an opportunity to establish a root system
8 that would have protected the head walls from erosion.
9 This was all performed in the latter stages of the
10 project, and the project-wide, over a project that was
11 many miles long.

12 CHAIRMAN COWGER: Anybody from DOT have anything
13 further to say about this issue of entitlement?

14 MR. HIBBARD: The Exhibit 1 -- one of the
15 exhibits that we have included in that package number
16 2, is a copy of notes that I made at the request of my
17 boss at the time showing the ongoing work week by week
18 starting with January 8th and going through May 7th.
19 It was a record of a synopsis from the dailies and
20 weeklies on the project at the time as to who was doing
21 what and in what amounts.

22 Obviously those notes were made for my own
23 purpose and they're not quantitative whether you say
24 minor or major or good or bad, but they do indicate
25 when there was no work being done by either Apex or

1 either of their subcontractors.

2 CHAIRMAN COWGER: These notes, when you say
3 minor, good or poor, is that the level of effort that
4 we're talking about?

5 MR. HIBBARD: It's the amount of production. For
6 instance, I'm quite sure that you would find in Apex's
7 records time on the project 7:00 to 5:30. That doesn't
8 mean anything happened there just because they were
9 there.

10 CHAIRMAN COWGER: Is the work that Amcar was
11 doing in any way related to this claim, this part of
12 the claim?

13 MR. CONDY: Yes, part of their subcontracting
14 included the embankment and sodding around the culverts
15 that they were extending.

16 CHAIRMAN COWGER: So Amcar was doing the grading
17 and starting?

18 MR. TURNER: On a portion of it, yes.

19 MR. MOREFIELD: One statement, DOT, you said they
20 didn't protect it or didn't make any effort to have an
21 established grass. What didn't they do that they
22 should have done or what didn't they do that would
23 have been normal practice when sod is placed around a
24 head wall to ensure root growth, et cetera, et cetera,
25 while you're waiting for rain?

1 MR. CONDY: Well, part of the contention is that
2 there was no time in there that gave the sod an
3 opportunity to establish root growth. There were areas
4 that were left bare and then sod was placed over large
5 areas of the project when the rains began to occur.

6 MR. MOREFIELD: You're saying when it was ready
7 for sod sod wasn't placed immediately or close to that?
8 Is that what you're saying?

9 MR. CONDY: Or the grading was taking an
10 inordinate amount of time. Grading was not finally
11 completed where they could place sod for some time
12 after the box culvert extension was completed.

13 These areas were left unprotected completely.
14 Part of the protection would be the sod itself.

15 Grading the areas around the head walls to direct
16 any rain coming off the roadway away from the head
17 walls would be one way of protecting it. No effort was
18 made to direct a runoff away from these areas.

19 MR. MOREFIELD: Thank you.

20 MR. HIBBARD: I would like to make a comment,
21 too, about the acceptance of the project in sections.
22 Apex did request that be done, and in fact it was done.
23 Sections of the project were accepted at different
24 times.

25 The first section that was accepted was an area,

1 I believe, that had -- practically all of it was
2 guardrail work. That was cleaned up, finished to our
3 satisfaction, and it was accepted.

4 The areas of box culverts that they requested be
5 accepted -- and I won't quote you which extensions were
6 involved because I'm not exactly sure now, but an area
7 including box culverts was requested for acceptance,
8 and in fact the problems with sodding and grading and
9 washouts were only part of the problem. The box
10 culverts themselves were not finished.

11 The project could not be -- that section of the
12 project could not be accepted, even if the grading had
13 been completed at that particular time.

14 CHAIRMAN COWGER: It seems to me like March 2 is
15 kind of a key date. They talked about this torrential
16 rain that occurred then. At that point in time was all
17 the work on the project except for the work that
18 subsequently had to be done to repair the washouts
19 completed?

20 MR. CONDY: No.

21 MR. HIBBARD: No.

22 CHAIRMAN COWGER: What other work might have been
23 left at that point?

24 MR. TURNER: The work -- when we bid this job we
25 had to sub a portion of it to a minority. We subbed

1 him a portion of the box culverts to be done
2 completely. That represented roughly 10 percent of the
3 project. The project was done on this March 2nd other
4 than the amount that the subcontractor had to do, the
5 amount our subcontractor had to do, which it lacked
6 quite a bit. I won't even say it was close.

7 CHAIRMAN COWGER: As I understand what you said,
8 on March 2nd some of the culvert sites were complete.

9 MR. TURNER: Yes, sir.

10 CHAIRMAN COWGER: The ones that weren't complete
11 were the ones that were the responsibility of your DBE.
12 Do you all think that's probably correct?

13 MR. HIBBARD: I wouldn't disagree with that,
14 that's a pretty accurate statement. The culverts that
15 were complete at the time had not been grassed and
16 dressed or dressed and grassed.

17 MR. TURNER: They were on March 2nd.

18 MR. HIBBARD: They were?

19 MR. TURNER: Yes, sir.

20 CHAIRMAN COWGER: On the sites that were complete
21 on March 2, and I don't want to belabor this too long,
22 on the ones that were complete on March 2nd, was the
23 sodding on these sites placed shortly before March 2nd?
24 I think that's what I hear you all saying, is that they
25 waited until pretty close to that time to install the

1 sod.

2 MR. HIBBARD: Yes.

3 CHAIRMAN COWGER: And therefore the DOT's
4 position is that if they had installed it as they went
5 along the sod would have been better established?

6 MR. HIBBARD: Absolutely.

7 CHAIRMAN COWGER: At the point this downpour
8 occurred. Okay.

9 MR. TURNER: Neil was talking about the accepting
10 of the thing. You all did agree to accept it in
11 portions, but our portion was 20 culverts. You don't
12 go out and get ready 20 culverts and sod them in a day.
13 It takes time to do all this, over a period.

14 MR. HIBBARD: That was exactly part of the claim.
15 We were saying we thought you ought to be doing them as
16 they went along.

17 MR. TURNER: I asked them to be accepted
18 individually.

19 MR. CONDY: At the time the sod was being placed
20 on this project, the box culverts started initially
21 right off at the beginning of the project. There were
22 box culverts under construction for probably in excess
23 of nine months.

24 MR. WHITNEY: I think what Gilbert is saying is
25 that you would not accept those culverts individually.

1 Then it was not much advantage to go ahead and do the
2 grading if it was going to wash away. The grading was
3 delayed. The sodding was done fairly soon after the
4 grading. The grading was late, not the sodding. You
5 can't put sodding down before you do the grading.

6 MR. TURNER: Also the fact that we felt the
7 amount of the sod that was set up was not going to hold
8 it anyway.

9 CHAIRMAN COWGER: I think we understand that. Is
10 there any further information that needs to be brought
11 out on this issue? Do you think it's pertinent?

12 I think we have all the information we need
13 unless either one of the Board members has a question.

14 One further question to DOT. You've taken the
15 the position that there's no compensation due.
16 Hypothetically if the Board should decide that there's
17 some compensation due, do you want to offer any
18 testimony as to the validity of the amount the
19 contractor is claiming?

20 MR. CONDY: Yes. We went through our records,
21 and based on the daily reports of construction and our
22 records for equipment, labor, materials, et cetera, our
23 total was substantially lower than the contractor's
24 based on the actual time spent on the restoration.

25 Also, of that time and effort and money spent, a

1 good portion of that the Department feels is well
2 beyond the limits of construction and should by no
3 means be under the Department's liability.

4 There were areas well outside the areas required
5 for the box culverts that were used for storing
6 equipment, materials, embankment, grading activities.
7 When grading activities were being performed, the
8 equipment extended sometimes probably a hundred feet
9 from the box culverts location, which we thought was
10 very unnecessary for the work.

11 CHAIRMAN COWGER: Let us refer just a moment if
12 we could to try to wrap this up, in the package of
13 information the contractor submitted as Exhibit No. 1
14 under claim number 1, there's a folder, a file folder
15 with a bunch of information in it.

16 About eight or ten pages back in there is a
17 letter dated May 24, 1990, by Metric Engineering, which
18 summarizes a position on the claim, but in particular
19 details an amount that looks -- what they consider to
20 be the amount that actually would be compensable if
21 there's any compensation to be made.

22 MR. CONDY: Correct. I wouldn't say that would
23 be the Department's position on the claim. This letter
24 was generated as part of a good-faith effort on behalf
25 of the Department to settle this up front.

1 The Department still feels that they have no
2 liability in this matter. A review is performed to
3 exercise our efforts to negotiate.

4 CHAIRMAN COWGER: You went through -- Metric went
5 through all the project records and they came up with
6 the number of hours and so forth and they converted it
7 into dollars. This constitutes what in Metric's
8 opinion was the work of actually repairing the work at
9 culvert sites excluding these areas that were material
10 storage areas and so forth?

11 MR. CONDY: No, these calculations were based
12 on the entire time spent. On the very last page we
13 deducted 50 percent as 50 percent of that area that
14 the effort was expended on was outside the limits of
15 construction, and that 50 percent of the area was
16 within the limits of construction.

17 CHAIRMAN COWGER: Okay. Does the contractor have
18 anything further to say?

19 MR. TURNER: Yes, sir. We met with Metric two or
20 three times and thought we were going to get -- and the
21 turnpike people and thought we were going to get this
22 thing settled without having to go to arbitration.

23 The time factor, ours, when Neil checked them,
24 DOT is not too different from ours. We only tried to
25 keep the hours that we felt we actually worked for

1 restoring. And Mr. Gene Perry was there just about
2 every day that we did this.

3 One of the biggest things in the time factor was
4 they didn't allow anything for the superintendent or
5 any expenses for the superintendent. This was a big
6 portion of the money part.

7 The other thing, on the equipment, his equipment
8 rental came up completely different from what we took
9 out of the Blue Book. And we had a lot of receipts
10 where we actually paid for the equipment, which is in
11 our report.

12 MR. CONDY: We used your invoice costs on the
13 majority of the equipment.

14 MR. TURNER: Just on the part that we owned came
15 up so different then.

16 MR. CONDY: That was only the pickup trucks --

17 MR. TURNER: Big trucks, flatbed trailers.

18 MR. CONDY: Pickup truck, pickup truck --

19 MR. TURNER: You didn't allow anything like -- we
20 were using a dozer on the job. We had a truck and
21 trailer to haul it out there. We didn't get any credit
22 for a trailer. You had to have the trailer to get the
23 equipment around.

24 CHAIRMAN COWGER: I think we have gone about as
25 far as we need to go with this. Does either member of

1 the Board have any questions about claim one? If not
2 we are going to leave it. All right. Let's go the
3 claim two.

4 MR. WHITNEY: Basically we would add to this that
5 we basically did this work -- we realize that we, when
6 we signed the supplemental agreement with all the
7 additions on this, which were -- it was the 24th day of
8 June when we finally got this supplemental agreement.
9 That's when it's dated. I'm not sure when we got it.
10 I signed it July 10th. We actually did, as far as we
11 are concerned, we did the work on that. None of that
12 material, to our knowledge, was hauled away from the
13 job. It was used.

6
14 At one time it was indicated that the material
15 was not suitable. We made it suitable because we took
16 the rocks and the roots out of the material and then
17 spread it and used it. Do you have anything to add to
18 that?

19 MR. TURNER: No. Not really. That pretty much
20 is it.

21 CHAIRMAN COWGER: To expedite things, because
22 I spent some time reading your claim, let me ask a
23 couple of questions.

24 First off, DOT, one thing we desperately need as
25 the Board, and if you don't have it with you now if you

1 could supply it to us, we need a copy of the special
2 provisions or supplemental specifications on this
3 project that covered topsoil, muck blanket, whatever it
4 is because it's pretty apparent that the project was
5 let under the Blue Book but apparently there must have
6 been a special provision or something in there that
7 modified the Blue Book. I'm having a hard time
8 figuring out what your position is.

9 MR. CONDY: I have it right here.

10 CHAIRMAN COWGER: Could I look at it?

11 MR. CONDY: Certainly.

12 CHAIRMAN COWGER: If you want, we will go ahead
13 and make the necessary copies before you leave if you
14 would like for us to. Am I correct in saying that 162
15 in the Blue Book was substantially modified?

16 MR. CONDY: Yes. It was completely deleted, and
17 this was substituted.

18 CHAIRMAN COWGER: Another question I have -- what
19 did you give me, the contract?

20 MR. CONDY: Yes.

21 CHAIRMAN COWGER: I'm looking for the bid items.
22 The only bid item in relation to this was muck blanket.
23 162-1 is the only bid item I see.

24 MR. CONDY: Correct.

25 CHAIRMAN COWGER: There was no bid item for muck

1 blanket. Is that true?

2 MR. PETERSON: Initially there was.

3 CHAIRMAN COWGER: I mean topsoil. There was no
4 bid item for topsoil?

5 MR. PETERSON: Correct.

6 CHAIRMAN COWGER: So whatever work was done in
7 that area was done under the item, or would have been
8 done under the item for muck blanket. Now there were
9 items for sodding --

10 MR. CONDY: Embankment, final dressing, sodding.

11 CHAIRMAN COWGER: But there was no grassing item,
12 seeding?

13 MR. CONDY: No.

14 CHAIRMAN COWGER: As I understand the situation,
15 what happened is fairly early on in the contract the
16 Department made the decision to eliminate the muck
17 blanket item from the work?

18 MR. CONDY: Correct.

19 CHAIRMAN COWGER: The contractor later, after the
20 contract was actually completed, signed a supplemental
21 agreement. Is that correct, that provided for
22 excluding the muck blanket?

23 MR. CONDY: It wasn't after the contract was
24 completed.

25 MR. WHITNEY: I signed it July 10th.

1 CHAIRMAN COWGER: According to my records, the
2 work was -- DOT accepted the project on May 12, '89,
3 so this supplemental agreement was signed after the
4 project was completed. I'm not sure that's pertinent,
5 but I wanted to make sure I got it in the record.

6 MR. HIBBARD: The date of the signature was after
7 the project was completed, yes.

8 CHAIRMAN COWGER: But you had furnished the
9 contractor with a letter much earlier?

10 MR. HIBBARD: And a copy of the work of the
11 supplemental agreement, too.

12 CHAIRMAN COWGER: As I understand it, as
13 originally planned, the muck blanket was to be used in
14 the areas around the box culvert extensions where you
15 were going to be placing sod?

16 MR. CONDY: Correct.

17 CHAIRMAN COWGER: The decision was made that --
18 and correct me if I'm wrong, the decision was made that
19 the soil that was going to be put in that area in
20 conjunction with the normal grading operations would
21 support growth of the sod, therefore, you didn't see
22 the need to have the muck blanket item?

23 MR. HIBBARD: Correct.

24 CHAIRMAN COWGER: Now we need to come back to the
25 contractor and let him try to explain to us a little

1 bit about why it is that he feels compensation under
2 the muck blanket item is appropriate because DOT
3 eliminated the work. As I recall --

4 MR. ROEBUCK: In November of '88.

5 MR. CONDY: Correct.

6 CHAIRMAN COWGER: DOT said that the work covered
7 under Section 162, which is the supplemental
8 specification entitled topsoil, under -- and there's
9 a pay item for muck blanket under that particular
10 section, that that kind of work was never accomplished.

9
11 I think to get right to the meat of it, I would
12 like for the contractor to tell us why it is he thinks
13 that he did accomplish the work covered under that pay
14 item.

15 MR. TURNER: Well, when we bid this thing, as we
16 read that paragraph you're looking at right there in
17 the proposal, that was to be -- to pay us, compensation
18 for putting this topsoil on this place and dressing it
19 down, mixing it up, working it up and so forth. We
20 just barely put enough money in there to cover the
21 expense of handling it, so to speak.

22 When this item was deleted, we still did this
23 same work, still did the same thing to it that was
24 originally set up, we just had no way of being
25 compensated for it, being paid for it. Now the pay

1 item was deleted, no work was deleted.

2 CHAIRMAN COWGER: That's a good way to put it.

3 MR. MOREFIELD: That's where you're losing me.

4 When you delete an item, you took it to mean that DOT
5 still told you to do the work for the deleted item or
6 did you have no instructions other than just delete the
7 item?

8 MR. TURNER: Delete the item. We still took the
9 same type of soil we removed for the excavation, which
10 was suitable for muck blanket. We hauled the stumps,
11 roots, rocks and so forth out of it. It is there on
12 the project.

13 MR. HIBBARD: Could I inquire what you did that
14 you wouldn't have had to do anyway regardless of --

15 MR. PETERSON: Under grading.

16 MR. TURNER: If the muck blanket hadn't been in
17 there we would have put this money in final dressing,
18 some other item is what we're saying.

19 MR. HIBBARD: You mean so far as your bidding?

20 MR. TURNER: So far as our bidding.

21 MR. WHITNEY: What would we have done differently
22 if you had left this in there?

23 MR. HIBBARD: You would have had to have had the
24 material sampled and passed sampling requirements.

25 MR. CONDY: It would have had to be mixed to the

1 proper depth and sampled to that depth. The mixing
2 wasn't performed.

3 MR. HIBBARD: There's a whole requirement for
4 muck blanket so far as placing it, manipulating it,
5 testing it and so forth.

6 MR. MOREFIELD: For the muck that he used,
7 I guess for whatever he was using it, it was used as
8 fill in this case?

9 MR. CONDY: Yes.

10 MR. MOREFIELD: Was he paid for it under
11 embankment?

12 MR. CONDY: Yes. The existing soil was not used
13 for embankment. That was placed for under truck
14 measurement.

15 MR. MOREFIELD: The material that he used he dug
16 up from there. I don't know what the pay item was.
17 You say it was an embankment item?

18 MR. TURNER: This embankment was paid for, was
19 off of -- outside the project. The only way we got
20 paid for embankment was truckload measurement. The
21 stuff we used there on the project we got no
22 compensation for.

23 In other words, if we had been bidding this job
24 to start with without the muck blanket, we would have
25 put this money someplace else. That's what it all

1 boils down to.

2 MR. MOREFIELD: Was any of this brought up in the
3 supplemental agreement that you signed?

4 MR. WHITNEY: No.

5 CHAIRMAN COWGER: Ken, just to make sure that you
6 understand what was testified to there, looking at the
7 contract, there's two bid items, final dressing and
8 borrow excavation. Just so we have it in the record as
9 to what we've really got there.

10 MR. MOREFIELD: There wasn't embankment.

11 CHAIRMAN COWGER: There was no embankment item is
12 the point I'm making.

13 Does anyone else have any more testimony that
14 they want to give in this matter?

15 MR. CONDY: Yes. As far as the Department's
16 position it's stated in these letters, but for the
17 record, number one, we deleted this item and directed
18 that no muck blanket would be required, early on in the
19 project prior to the work being performed. It was then
20 deleted by a supplemental agreement which was executed
21 by the contractor.

22 The Department within the contract the
23 specifications also allow for the engineer to delete
24 this work if it's determined to be unnecessary. The
25 specifications also require mixing of the material to

10

1 the required depth of six inches, the sampling and
2 other things. None of this work was performed.

3 We don't believe that the contractor suffered any
4 additional expenses.

5 The material that existed on the site at the
6 beginning of the box culvert extensions was used for
7 diking, was used in the contractor's operations for
8 diking off the canals and swales to prevent water
9 through the culverts while they were building the
10 culvert extensions.

11 This material was never stockpiled off to the
12 side for use as a muck blanket or topsoil layer. Upon
13 completion of the box culvert, it was just dug up and
14 used as backfill material around the culverts.

15 It's true that the contract only contained borrow
16 excavation based on truck measure, but it's felt that
17 full payment of the work necessary was done by the
18 final dressing items and other incidental items to the
19 box culvert construction.

20 CHAIRMAN COWGER: Let me ask you a question about
21 what you just testified to. You said the material that
22 was dug out around the culvert sites, I would call it
23 roadway excavation, was used to build dams and so forth
24 to isolate the site from water?

25 MR. CONDY: True.

1 CHAIRMAN COWGER: When those dams were removed,
2 where did that material go?

3 MR. CONDY: Backfill material around the culvert
4 extensions.

5 MR. TURNER: I'd like to answer that, please. It
6 was dipped out, it was stockpiled, it was let dry, to
7 get suitable, was spread out, the roots, rocks and so
8 forth were picked out of it, hauled off of the project.
9 There was actual work done with it.

10 If you had been there on the day-to-day
11 operations you would have saw it, Neil. I beg your
12 pardon.

13 CHAIRMAN COWGER: Was there any mixing of it
14 done, though?

15 MR. TURNER: Mixing as far as -- I'd say we
16 probably had to. We had disks, harrows, graders,
17 spreaders, dozers. We did it the same way we would
18 have done it if it had been there is what I'm saying.

19 CHAIRMAN COWGER: Does anybody have any further
20 testimony on this issue? I think we will go on to --
21 does either member of the Board?

22 Let's go on to Part 3 of the claim then. As
23 I understand Part 3 has to do with liquidated damages?

24 MR. TURNER: Yes, sir. This letter pretty much
25 explains itself. As I say, the biggest part of our

1 liquidated damages was caused by our DBE subcontractor.
2 We had problems from the start of this project. We
3 subcontracted to a qualified contractor. He was at the
4 preconstruction meeting. We gave him notice to go to
5 work, he did not. He never did show up. We had to get
6 him liquidated and sub to another one.

7 We asked for an extension, we never was granted
8 anything.

9 The second one we got wasn't much better than the
10 first, I guess you could say. The first guy at least
11 didn't mess nothing up, he just didn't show up. We
12 feel like a lot of it was from this.

13 CHAIRMAN COWGER: Reading your submittal, I saw
14 basically two things that it was based on. First, as
15 you said, was the time required to replace your DBE.
16 The other one had to do with the period of time which
17 you were working on --

18 MR. TURNER: Claim number 1.

19 CHAIRMAN COWGER: I think it's pretty well set
20 out in there --

21 MR. ROEBUCK: Gene, I see one letter that seems
22 significant, that you requested Metric to approve a
23 switch in DBEs about the first of June and about the
24 middle of July you got a letter back from Neil that
25 said still they couldn't approve the new person,

1 whoever the one was you wound up with.

2 MR. TURNER: It took quite a period of time.

3 MR. CONDY: That letter is misleading. They had
4 written a June 1 letter which is also in this package.

5 CHAIRMAN COWGER: Which package are we looking at?

6 MR. ROEBUCK: Claim 3 of Apex.

7 CHAIRMAN COWGER: I don't see a June 1 letter.

8 MR. ROEBUCK: You acknowledged it but I didn't
9 see it in the package. Do you see what I'm talking
10 about, that letter from Metric to you?

11 MR. CONDY: I've read it.

12 CHAIRMAN COWGER: I see in the March 10, 1989
13 letter to Neil Condy from Bonita Jones, in the third
14 paragraph, on July 1, 1988 we requested permission from
15 the State to change our DBE. I don't see a June --

16 MR. ROEBUCK: It's in Neil's letter. Do you see
17 Neil's letter of July 11? Couldn't find the backup of
18 June.

19 CHAIRMAN COWGER: I think that's a mistake in
20 that letter.

21 MR. ROEBUCK: Do you think it should have said
22 July?

23 CHAIRMAN COWGER: I think it should have said
24 July. Let's look, so we can get there quickly, let's
25 look in claim number 3, the contractor's original

1 package, it's the sixth page I think, a letter from
2 Metric Engineering dated July 11. I remember looking
3 through this and seeing that and just assuming that
4 date was wrong.

5 Does anybody dispute that that date should have
6 been July 1? I don't see how you could have made that
7 request on June 1 because you didn't decide to
8 terminate the subcontractor until June 15. So that had
9 to be July 1, Jack.

10 May I ask a couple of questions while you're
11 thumbing through that. I asked this earlier in
12 conjunction with Part 1 of the claim, but I want to ask
13 it again.

14 The period that the contractor is dealing with
15 now on these liquidated damages is between March 2 and
16 May 12. March 2 being the day the first torrential
17 downpour occurred and May 12 being the date DOT
18 accepted the project. These are both in 1989.

19 My way of calculating that turns out to be about
20 71 calendar days. He's not requesting the 71 calendar
21 days, but there was other work going on other than the
22 repair work during that time. Is that correct?

23 MR. HIBBARD: Yes, that's correct.

24 MR. ROEBUCK: The sub wasn't finished, the
25 minority wasn't finished.

1 MR. TURNER: And we had some punch list work
2 going on.

3 CHAIRMAN COWGER: The other question I had, which
4 I noticed in the package, I don't have the date of the
5 letter, but DOT granted a 13-day time extension at one
6 point, which would relate to that good faith offer you
7 made to settle the claim.

8 MR. CONDY: It was never granted.

9 CHAIRMAN COWGER: It was conditioned. You never
10 did grant it?

11 MR. CONDY: No, it was conditioned on acceptance
12 of the settlement offer.

13 CHAIRMAN COWGER: That time is not floating
14 around in there is what I'm trying to find out. Okay.

15 I notice the 31 days time was granted as
16 extensions somehow or another.

17 MR. CONDY: Weather related.

18 MR. TURNER: Part of it was overrun, too.

19 MR. CONDY: No, not that 31. That's separate.

20 MR. HIBBARD: There was 31 days granted for
21 weather delays.

22 MR. ROEBUCK: So that granting had nothing to do
23 with any of this other controversy?

24 MR. TURNER: That was before this time period.

25 MR. HIBBARD: Normal rain days throughout.

1 MR. CONDY: The extra work was 36 days on one
2 supplemental and five on the other.

3 CHAIRMAN COWGER: Twenty-six and five?

4 MR. ROEBUCK: Thirty-six and five. There's 41 in
5 the final.

6 CHAIRMAN COWGER: I have 31. I don't think we
7 need to --

8 MR. HIBBARD: The 31 and 41 are different things.

9 CHAIRMAN COWGER: I don't think we need to
10 belabor that any longer, but in addition to those 31
11 days, I notice that the sheet the contractor submitted
12 showed that the contract time overran by 56 days, but
13 that there was only 45 days liquidated damages.

14 I assume that difference is due to the overrun
15 of quantities. Is that correct, that the contractor
16 wasn't aware of? In other words, it was an accrued
17 time extension based on the fact that the final
18 contract amount exceeded the original contract amount?
19 Is that true or not?

20 MR. HIBBARD: It was a 36-day time extension that
21 was in the supplemental agreement, yes.

22 CHAIRMAN COWGER: I think we have enough on that
23 issue. Does either party wish to --

24 MR. TURNER: I would like to bring one point up.
25 You asked why we put this interest in here before.

1 I had talked to one of you all's attorneys back about
2 something else, Mr. McGonagill. I don't know if you
3 all know him, familiar with him. He's an attorney for
4 the State highway department.

5 MR. MOREFIELD: McGonagill.

6 MR. TURNER: Yes, sir. What he told me was
7 strictly off the record. This is the way he put it.
8 Anyway, there was a period in there, I don't know
9 whether you're aware of it or not, for, what, Neil,
10 three to four months that we did not receive any money
11 whatsoever because of change orders and money being
12 appropriated. I guess you just didn't have any money.
13 We didn't get paid anyway.

14 The question I asked him, and he said that he
15 doubted it very much can you charge liquidated damages
16 and penalties if you're not paying the contractor.

17 Now we didn't file this, but this is especially
18 why we just stuck this in there to remind us. We still
19 don't know whether you can or can't.

20 CHAIRMAN COWGER: We're talking about Exhibit 3,
21 which is your exhibit, and it's stuck in here because
22 of the fact there was a period of time during the
23 course of the work that the DOT was pretty slow in
24 paying you?

25 MR. TURNER: Just didn't pay us, wasn't slow.

1 They just didn't pay us for a period of three months.

2 MR. ROEBUCK: That's a statutory requirement that
3 interest is due after 30 days?

4 MR. MOREFIELD: There is, but I don't know.

5 CHAIRMAN COWGER: That statutory requirement
6 pertains primarily to final payment. This was periodic
7 payments.

8 MR. HIBBARD: This was periodic payments that
9 were not made during the time because of the money
10 crunch problem. It also is due to the fact that -- the
11 signing and time of that supplemental agreement.

12 MR. TURNER: We received a check on March 16 and
13 the next one we received --

14 MR. HIBBARD: You know, we could get into another
15 long discussion about that business. I don't know that
16 it's germane to this.

17 CHAIRMAN COWGER: I don't see in Exhibit 3 --

18 MR. ROEBUCK: He isn't putting it as part of the
19 claim, but he put it in as a sympathy matter and it
20 damn well is.

21 MR. HIBBARD: I agree with that.

22 MR. WHITNEY: Also in the exhibit we asked at
23 one of our meetings about that, and we did provide the
24 information that was requested, but we never got a
25 response from it. I'm referring to your letter of

1 January 13, Neil.

2 CHAIRMAN COWGER: But you're not claiming
3 anything for this at this point?

4 MR. WHITNEY: No.

5 CHAIRMAN COWGER: Okay, we have that. Do either
6 one of the Board members have any question about any
7 part of this claim?

8 MR. MOREFIELD: I don't.

9 MR. ROEBUCK: No.

10 CHAIRMAN COWGER: Either party have any
11 additional testimony they want to make or present?

12 This hearing is hereby closed. The Board will
13 meet in approximately 45 days to deliberate on this
14 claim, and you will have our final order shortly
15 thereafter.

16 (Whereupon, the hearing was concluded at 10:20 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
before 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 45 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 9th day of October,
A.D., 1992, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON,
STATE OF FLORIDA.

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

My Commission Expires June 27, 1994