

STATE ARBITRATION BOARD

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

23 March 1993

+++ NOTICE +++

In the case of Cone Constructors, Inc. versus the Florida Department of Transportation on Project No. 13130-3437 in Manatee County, Florida, both parties are advised that State Arbitration Board Order No. 1-93 has been properly filed on March 23, 1993.



H. Eugene Cowger, PE
Chairman & Clerk, S.A.B.

S.A.B. CLERK

MAR 23 1993

FILED

Copies of Order & Transcript to:

J.B. Lairscey, Jr., PE, Director Office of Construction/FDOT
Mike L. Cone, President/Cone Constructors, Inc.

STATE ARBITRATION BOARD

ORDER NO. 1-93

RE:

Request for Arbitration by
Cone Constructors, Inc. on
Job No. 13130-3437 in
Manatee County

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 9:50 a.m., January 27,
1993.

The Board Members, having fully considered the evidence
presented at the hearing,, now enter their order No. 1-93 in
this cause.

ORDER

The Contractor presented a request for arbitration of
a claim for additional compensation in the total amount of
\$105,771.08 (See Exhibit No. 4 for revised Total Cost
Summary) for costs he incurred in relation to breakwater
construction that was added to the contract by Supplemental
Agreement and later deleted from the contract by the
Department of Transportation.

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

1. In accordance with a Supplemental Agreement dated August

26, 1989, construction of a 1,400' breakwater was added to the work to be accomplished on this project. The Department of Transportation sent this Supplemental Agreement to us on October 6, 1989.

2. The plans for construction of the breakwater were the drawings contained in the DER permit. We were placed in the position of having to conduct field surveys and complete the design of the breakwater.

3. During January 1990, we began a field survey to complete the design and establish alignment of the bulkhead. We encountered a problem in determining the correct alignment for the bulkhead and could not get the Department to give us definitive answers to our questions. On February 7, 1990 we finally were able to complete the location survey for the bulkhead. The Department had advised us the DER wanted to review the as-staked location of the bulkhead. We began to commit equipment and personnel to the bulkhead work. DER did not respond in a timely manner and on February 8, 1990, we began to incur idle time for a portion of the crew and equipment which had been committed to the bulkhead work. We did not reassign these personnel and the loader to other work because, during this period, we anticipated DER approval any day.

4. On March 22, 1990 DER issued a permit for construction of the bulkhead but our design had been revised to reduce the length from 1,400' to 700'. Idle time costs terminated on this date because, since the reduction in length of the

bulkhead constituted a significant change in the scope of the work, it was necessary to begin re-negotiation of the prices previously agreed upon.

5. The unit prices increased because certain costs, such as construction and removal of the temporary access ramp, are not directly related to pay quantities.

6. While these negotiations were under way the Department notified us (June 5, 1990) that the bulkhead work was deleted from the contract.

7. We are seeking compensation for the management costs we incurred in relation to the breakwater portion of the Supplemental Agreement dated August 26, 1989 and in preparing our quotation for the revised bulkhead, for crew and equipment assigned to the bulkhead work between February 8, 1990 and March 22 and for lost revenues on the bulkhead work that was ultimately deleted from the contract. We are also asking for reimbursement of the costs we incurred in relation to arbitration and interest between June 5, 1990 and the date of the hearing before the State Arbitration Board.

8. It is our position that the Department did not deal fairly with us when it decided to cease negotiations on the cost of the revised bulkhead and delete the bulkhead work, which was now a part of a binding contract, for no other reason than to seek a better price for this work on a future project. We developed certain work product during the period when the bulkhead was a part of the contract. If we had not committed to the breakwater operation, we would have had the

opportunity to seek other work from which to generate revenue.

9. We are not able to document costs in the manner requested by the Department. eg: Our General Counsel does not break down his monthly billings, there is no record of the "busy work" work done by the labor assigned to the breakwater during the period we were awaiting a decision on the breakwater location.

10. The costs we are claiming are "bare bones" and do not include all of the extra costs we might claim.

The Department of Transportation rebutted the Contractors claim as follows:

1. There was sufficient information in the plans and the permit documents to allow a surveyor to locate the bulkhead in the field.
2. It was reasonable for us to question the revised unit prices submitted when the length of the bulkhead was reduced because the unit price for the breakwater increased by 59% (\$126 per sq. yd. to \$200 per sq. yd.) and the unit price for the turbidity barrier increased threefold. (\$6.35 per lin. ft. to \$18.00 per lin. ft.)
3. Article 9-6 of the Standard Specifications is our authority to delete the bulkhead work from this contract by payment to the Contractor of a fair and equitable amount covering all items of cost incurred prior to cancellation of such work.

4. We agree that the Contractor is due compensation for Management Costs incurred in relation to the Supplemental Agreement and subsequent re-negotiation. We do not agree the amount claimed for Management Costs is correct, principally because of lack of documentation of certain costs (eg: attorney fee and bonding company fee).

5. We cannot approve the delay costs (Inefficiency of labor and equipment awaiting decision from DER on breakwater location) because the Contractor has not documented that this personnel and equipment were not doing productive work.

6. The Contractor is not due Lost Revenues from the breakwater work because, since this work was not included in the original scope of work, his bid price could not have included such revenue.

7. It is our position that, regardless of the amount of additional compensation the Board may find due, the amount awarded to the Contractor cannot exceed \$31,735.46, the amount shown for the "breakwater claim" in the "documentation of pending claims" attached to the Qualified Acceptance Letter signed by the Contractor on June 1, 1992. Article 9-10 of the Standard Specifications includes the following: "The dispute or pending claim must be defined in writing and must accompany the Qualified Acceptance Letter The Contractor further agrees through the use of this option that any pending arbitration claim or suit must be limited to the areas defined in the Qualified Acceptance Letter." Webster's dictionary contains the following

in regard to the word "define": to determine or set down the boundaries of----to trace the precise outlines of----to determine or state the extent and nature of---to give the distinguishing characteristic of"

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

1. The parties agree that the summary of events included in the Contractor's request for arbitration is essentially factual.
2. The Contractor stated that the claim for interest should not begin until the date he filed his original claim (11/30/90) and that costs related to arbitration proceedings are a cost of doing business.
3. The Contractor was committed to construction of the breakwater over a period of several months. He began to mobilize personnel and equipment in anticipation that DER would issue a permit for construction of the breakwater in a timely manner.
4. DER has no contractual relationship with the Contractor in this instance.

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

In interpreting Article 9-10 of the Standard Specifications the phrase "limited to the areas defined in

the Qualified Acceptance Letter" the word "areas" is the operating word. Thus, the Contractor is confined to the breakwater area of the claim submitted with the Qualified Acceptance letter but is not confined to amount claimed for that area of his claim.

The Department of Transportation is ordered to compensate the Contractor \$41,500.00 for his claim.

NOTE: This award is conditioned on the Contractor having stipulated that the claim which is the subject of this arbitration is the only outstanding claim for additional compensation arising out of the contract.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$301.00 for Court Reporting Costs.

Tallahassee, Florida

Dated: 23 March 1993

Certified Copy:


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

23 March 1993
Date


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


K. N. Morefield, P. E.
Member


John P. Roebuck
Member

S.A.B. CLERK

MAR 23 1993

FILED

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

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CONE CONSTRUCTORS, INC.)

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DEPARTMENT OF TRANSPORTATION)

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PROJECT NO. 13130-3437

LOCATION: Manatee County,
Florida

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Wednesday, January 27, 1993

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

TIME: Commenced at 9:50 a.m.
Concluded at 11:15 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 CONE CONSTRUCTORS, INC.:

Mr. Mike Cone
Mr. Jim Guyer
Mr. Jim Lundy

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Marshall Dougherty
Mr. Ken Blanchard
Mr. Don Maxwell
Mr. Rick Roberts

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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.

8 Mr. Jack Roebuck was elected by the construction
9 companies under contract to the Department of
10 Transportation.

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

13 Ours terms of office began July 1, 1991, and
14 expire June 30, 1993.

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

18 (Whereupon, all witnesses were duly sworn.)

19 CHAIRMAN COWGER: The documents which put this
20 arbitration hearing into being are hereby introduced as
21 Exhibit No. 1. This is the contractor's request for
22 arbitration, the notice of arbitration that went out,
23 and all of the documents that were attached to the
24 contractor's request for arbitration.

25 Does either party have any other information it

1 wishes to put into the record as an exhibit? We will
2 go off the record just a moment.

3 (Discussion off the record)

4 CHAIRMAN COWGER: While we were off the record we
5 were discussing exhibits. The only other exhibit to be
6 presented is a package in a blue cover entitled
7 Breakwater Claim by FDOT analysis, which will hereby be
8 identified as Exhibit No. 2.

9 MR. BLANCHARD: Mr. Chairman, there's another
10 small four or five pages which is not attached to that.
11 You might want to mark that as a separate exhibit.

12 CHAIRMAN COWGER: Thank you, Mr. Blanchard. To
13 straighten out what we're talking about, inside the
14 package was a series of correspondence. On top of it
15 is a qualified acceptance letter signed by Cone
16 Constructors on June 1, 1992.

17 Did I get that right, Mr. Blanchard?

18 MR. BLANCHARD: Yes, sir. You should have five
19 copies of that.

20 CHAIRMAN COWGER: We will identify that as
21 Exhibit 3. Now, does everybody have that exhibit?

22 MR. GUYER: Yes, we have it.

23 MR. CONE: We have a third of it.

24 MR. GUYER: Here it is.

25 CHAIRMAN COWGER: Okay. Any further exhibits to

1 be presented then?

2 MR. CONE: Yes, sir. What we would like to do,
3 on behalf of Cone Constructors, I would like to give a
4 modified protocol summary, and the only thing that I've
5 done on this summary is just deleted one portion of our
6 claim after further review.

7 We feel like the foundation may not be accepted
8 on it, so what we would like to do is pass out an
9 amended cost summary, with the only change being one
10 line item. It's basically deleted -- some lost profits
11 were deleted.

12 CHAIRMAN COWGER: Will you pass it out to all the
13 parties. Give DOT one. Will everybody please identify
14 this document that Mr. Cone has just passed out as
15 Exhibit No. 4.

16 (Whereupon, Exhibit Nos. 1 through 4 were received in
17 evidence.)

18 CHAIRMAN COWGER: Can we discuss this just a
19 minute. This reduces the total amount of your claim
20 from 139,998.91 to 105,771.08, is that correct?

21 MR. CONE: Yes, sir. And it consists of the
22 deletion of one line item for the lost profits, and
23 some two or three additional costs, which we will
24 go through in our presentation, some costs since
25 October 23, 1992.

1 CHAIRMAN COWGER: I think I understand it.

2 Mr. Dougherty, do you understand it?

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

4 MR. CONE: This is for the spirit of compromise.

5 MR. DOUGHERTY: You're starting real well.

6 MR. CONE: A few more meetings and we will have
7 this thing wiped out.

8 CHAIRMAN COWGER: Does either party have any
9 additional testimony or exhibits they wish to present,
10 or does either party have a desire to have a little time
11 to examine the new exhibits?

12 MR. CONE: We are prepared.

13 MR. DOUGHERTY: We are ready.

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

21 The parties are requested to assure that they
22 receive properly identified copies of each exhibit
23 submitted during this hearing and to retain those
24 exhibits. The Board will furnish the parties a copy of
25 the transcript of this hearing, along with its final

1 order, but will not furnish copies of the exhibits.

2 What we have tried to do is cut down on the
3 mailing costs. You've got all the exhibits. We will
4 have them. If there's some controversy about them, we
5 will be glad to send them to you, but we are not going
6 to routinely send the exhibits to the parties with the
7 order is what it comes down to.

8 The hearing will be conducted in an informal
9 manner. The contractor will elaborate on their claim,
10 and then the DOT will offer rebuttal. Either party may
11 interrupt to bring out a point by coming through the
12 Chairman.

13 However, for the sake of order I must instruct
14 that only one person speak at a time. Also, so that
15 our court reporter will be able to produce an accurate
16 record of the hearing, please introduce yourself the
17 first time you speak.

18 Mr. Cone, it's appropriate now for you to begin
19 your presentation of your claim. We would request that
20 at the beginning of your testimony you tell us the
21 total amount of your claim.

22 MR. CONE: Shall I proceed?

23 CHAIRMAN COWGER: Yes.

24 MR. CONE: I'm Mike Cone, Cone Constructors,
25 Tampa. Total amount of claim, revised amount,

1 \$105,771.08.

2 With that on the table, I would like to thank the
3 Arbitration Board today for entertaining -- and the
4 time spent on letting -- allowing us to present the
5 claim. I appreciate DOT coming up here to help us
6 mediate this thing out for what we hope will be a happy
7 settlement.

8 I would like to state initially we feel like this
9 is something that shouldn't have gone on as far as it
10 has. I feel like arbitration is fortunately a good
11 thing, and I feel like this thing could have been
12 presented or settled in the field between us and DOT.

13 I think that on behalf of Marshall Dougherty
14 I think that in his good conscience he tried working
15 with us at several meetings to get this thing mediated.
16 I have been instructed by him that certain auditing
17 procedures occur within his department, and
18 unfortunately Cone just was not able to produce some
19 of the documents that they wanted.

20 One of them, without getting into the details at
21 this point, was certified payrolls. On this particular
22 project certified payrolls weren't required. They were
23 on the project, but the people in their make-busy work,
24 we did not have them under a certified payroll
25 scenario.

1 Let me start, if I may --

2 CHAIRMAN COWGER: Mr. Cone, may I interrupt you
3 just a moment. I meant to say this before I let you
4 get started.

5 In the interest of trying to expedite this thing,
6 let's all look at exhibit -- the portion of Exhibit 1
7 that's the contractor's book on his claim. Let's look
8 at page 41. Page 41, as I see it, is a summary going
9 back through page 51. It's a summary of the events
10 that occurred that are pertinent to this claim.

11 I'm thinking that maybe we could save time if the
12 parties would stipulate that that listing of events is
13 accurate. Now, do you all -- the contractor is
14 obviously going to stipulate to it.

15 DOT, can you stipulate that that listing of
16 events is accurate?

17 MR. DOUGHERTY: Well, on the way up here we
18 realized we didn't have our copy of this to discuss
19 last night, so we tried in vain to get a copy of it to
20 work with last night and we couldn't get it until this
21 morning. I cannot -- it's been a while. I cannot
22 fully remember reading through all of that.

23 As far as stipulating it's all correct, I would
24 say probably in general it would be.

25 CHAIRMAN COWGER: What I'm trying to get to is it

3
1 appears to me like the matter of entitlement to some
2 degree of compensation for the fact that you added some
3 work by supplemental agreement and deleted it is agreed
4 to, that there is some compensation due. And the
5 argument today is only over how much.

6 MR. DOUGHERTY: I will stipulate there were
7 expenses incurred by Cone Corporation, that yes, we
8 have attempted to give them. Those reasonable expenses
9 we would have no problem giving.

10 CHAIRMAN COWGER: Okay. Going along those lines,
11 then we will proceed on. You did not stipulate to it,
12 but I would think that the testimony would probably
13 relate more to the damages.

14 MR. DOUGHERTY: I think the timing is not the big
15 matter here. I think it's just the amount itself.

16 MR. CONE: Timing is an issue to us.

17 CHAIRMAN COWGER: Okay. I just thought maybe we
18 could expedite things, but it appears like we can't
19 really. Excuse me one second.

20 (Discussion off the record)

21 CHAIRMAN COWGER: Okay.

22 MR. CONE: What I'm going to do is make my
23 discussion very brief, and I would encourage anyone at
24 any point to interrupt me to answer a question that you
25 feel pertinent to the case, so feel free to interrupt

1 me.

2 I would like everyone to turn to page 87 in this
3 booklet. This is where our claim actually started.

4 Page 87 shows a supplemental agreement that Cone
5 Constructors entered into to build or actually design,
6 construct and build a breakwater on a contract that we
7 had previously had under structure D of the project
8 with DOT.

9 I would like to go to page 112, which indicates
10 a date -- we only got a two-sentence letter from
11 Mr. Mark Puckett that says, "The Department has decided
12 not to pursue construction of the breakwater at this
13 time. Thank you for your cooperation in this matter."

14 That's a nice, comfortable letter. And our
15 argument on this thing is the supplemental agreement
16 was done August 26, 1989. I received this letter from
17 Mark Puckett on June 5, 1990. So as any with negotiated
18 scenario, a lot of months passed in trying to get this
19 project brought off, get it started and built.

20 The basis of our claim is that they added
21 something to our contract, we went to contract with it,
22 and for no other reason besides the DOT thinking that
23 they could get a better price on the performance of
24 this work in a future competitive bidding scenario,
25 they opted to cancel our contract.

1 What bothers us, and I've asked Marshall this on
2 continuous times, is in the future when we go to
3 supplemental agreements, what assurances are there that
4 DOT, who we are negotiating with in good faith, that
5 there's any validity to supplemental agreements.

6 If these are processes that can be added or
7 deleted at any time, then it kind of shakes up the
8 overall program.

9 Now, one thing is we do agree with the fact that
10 the Department has the right to add or delete work at
11 any time at their pleasure, but what our argument is is
12 that certain work product was developed by Cone
13 Constructors during this period of time.

14 I want to go to page 120 in here. It's basically
15 broken down our summary of costs on actually what we
16 did.

17 I want to pass out, if we can, just get to the
18 bottom line a little bit. I want you to review the
19 breakwater deletion or compensation that we are asking
20 for for this work. It totals \$31,735.

21 CHAIRMAN COWGER: We are looking at Exhibit 4,
22 now, right?

23 MR. CONE: Right, Exhibit 4. Our subtotal is
24 31,735, which gives with page 120 in here. These
25 were costs that we have sat down on numerous occasions

1 with Marshall and he feels like they have admitted
2 liability for the performance of this work. It's just
3 a matter of how much money are we due.

4 Unfortunately, they can only come up with --
5 their offer was I think \$8,000.

6 What distresses us, the contractor, was this
7 occurred -- this work occurred in early 1990, and this
8 is 1993. And the question I ask is well, why don't you
9 at least pay us \$8,000, because that will help our cash
10 flow, but instead it was either a take it or leave it
11 scenario.

12 So the contractor in this case has received zero
13 dollars for the performance of this work. And unless
14 we took the \$8,000, then no settlement would occur.

15 What we have done is -- I don't think we need to
16 go into details here. I've brought it here what the
17 breakwater looks like. I don't think that's important
18 at this point. If you're interested in looking at it,
19 it's certainly right there.

20 Marshall and us in trying to get this thing
21 settled, I have supplied paychecks of the individuals
22 that were on standby.

23 If I can, Jim, let me let you walk through a
24 little bit of how this thing progressed from the time
25 of negotiation to actually getting out there and doing

1 the work.

2 MR. LUNDY: All right.

3 MR. CONE: Jim Lundy is our chief estimator for
4 Cone Constructors, who was very much familiar with this
5 project.

6 CHAIRMAN COWGER: Are you going to briefly tell
7 us about what transpired from the very beginning?

8 MR. LUNDY: My name is Jim Lundy with Cone
9 Constructors. It will be very brief.

10 CHAIRMAN COWGER: Fine.

11 MR. LUNDY: Basically they asked us to price out
12 an additional breakwater. We negotiated the price. A
13 supplemental agreement was issued and executed by all
14 parties.

15 In early 1990 we attempted to lay out the
16 breakwater, do our survey layout. There were problems
17 that occurred. The plans weren't specific. It took
18 several weeks to finally get a layout accomplished.

19 The permitting people came out to look at the
20 layout site. There were sea grasses that were found
21 there. During that time we had anticipated starting
22 work there. We had a crew that was just on standby.

23 When we found out we couldn't proceed with the
24 breakwater work, we just had to find make-busy work for
25 them, cleaning up the yard. We did find work for a few

1 pieces of equipment, but the one loader we couldn't
2 find work for, so we charged it to our costs.

3 We were verbally told on March 22 that FDOT was
4 going to cut the breakwater in half and not build the
5 entire part. We began negotiations then to come up
6 with a price for the lesser amount of the breakwater.

7 Before that occurred, we could settle on a price,
8 the DOT deleted the breakwater entirely from our
9 project.

10 MR. CONE: This -- keep going, Jim.

11 MR. LUNDY: How far do you want me to continue?

12 MR. CONE: Here's what I wanted to illustrate on
13 this thing. Right here is that point in time,
14 January 17. We mobilized to do this work. This work
15 was \$500,000, somewhere between \$300,000 and \$500,000
16 of work.

17 What we did is we sent a survey crew out there, a
18 foreman out there, equipment operators and equipment to
19 get this work done.

20 Well, we couldn't ever get anybody to sign off on
21 just when we went out there. We initially went out
22 there, laid it out. We couldn't get anybody to sign
23 off on if these limits were acceptable or not.

24 Here is where our costs came in, from
25 January 17th to over here when I get a letter, FDOT

1 informs Cone that the breakwater is deleted, a
2 two-sentence letter, to this point in time.

3 CHAIRMAN COWGER: What was that point in time you
4 just noted?

5 MR. CONE: June 5th.

6 MR. LUNDY: From January to June.

7 MR. CONE: This is where our costs start. From
8 January 17 to June 5 we went out there and lollygagged
9 on a project that, A, we were nonproductive on, which
10 is not our fault. Basically they gave us the limits of
11 this thing to do.

12 Rube Clarson, our own engineer, designed the
13 product that was finally built. When they canceled our
14 contract to do this work, they took our plan and
15 inserted it into another project that was coming up for
16 bid.

17 There was only one reason why they canceled our
18 contract, and that was because they thought that they
19 could get a bargain by putting it out for competitive
20 bid. And we got zero compensation for doing all of
21 this work.

22 It's kind of like we were led into this scenario.
23 We get out there, perform, and we to this date have
24 gotten not one nickel for doing this work.

25 What Marshall and I have agreed on, and how he's

1 come up with his \$8,000, is yeah, there's some
2 equipment out there.

3 These people we have, we don't have certified
4 payrolls. Our choices were this, we could either
5 fraudulently produce something, which we're not going
6 to do, or tell the truth, that the guys were doing
7 piddle work around the yard, and we weren't putting
8 them on a certified payroll.

9 So our costs are real. What we have been, what
10 we feel we have been, is very, very fair to build this
11 work. To build this work we are only charging for a
12 loader, a pickup and two individuals.

13 As you know, when we got out here to start this
14 work, we had a lot more equipment allocated to begin
15 this work. So during this period of time -- if you all
16 remember the construction industry in this period of
17 time, there was no work. DOT wasn't letting any work.
18 So, it was a famine situation. This to us was a very
19 big job.

20 Not only did our damages incur from here to here
21 (indicating), but for this period up here, which is
22 October 6, is when we received a fully-executed
23 contract.

24 So between here and here we kept our crews
25 organized in such a way that they would be available to

1 this point here (indicating).

2 So some of the intangible costs, there's no way,
3 we are not asking for at this arbitration. We are not
4 asking for the costs that we had in preparing this
5 thing. As you know, it takes two or three weeks of
6 coordination to move in on a breakwater job, a job
7 that's unique in nature down there, because I know we
8 had never done a breakwater down there. It's not like
9 we had a crew sitting on the wayside to do it.

10 Somewhere in here we were planning to get this
11 work accomplished. That's really what I want to show
12 on these exhibits, to show the amount of time that it
13 took us in drawing out this work.

14 Let me go down --

15 CHAIRMAN COWGER: May I interrupt you just a
16 moment, to clarify the record. Mr. Cone just a minute
17 ago pointed to a drawing here and said "during this
18 period here," and what he was referring to was the
19 period of approximately three weeks prior to
20 January 17, 1990.

21 MR. CONE: Right. Would I would like to do is
22 for summation here, so that we can hear rebuttal,
23 I would like to go to Exhibit 4 and just walk through
24 this because this is the meat of the matter.

25 These costs that have been highlighted here are

1 bare bones costs. If we wanted -- if we analyzed what
2 our actual costs are, then I'm sure they would be more
3 extensive, because there's things in here where we
4 mitigated the damages to us. We sent some of our
5 equipment over to other projects.

6 The only thing we're charging DOT for is the
7 actual equipment that we couldn't send somewhere else
8 because we had nowhere else to send it.

9 Just going down the line, there were certain
10 costs associated with estimating the breakwater. I say
11 this is \$1623 because that is for us to estimate this
12 breakwater we were told to go out there and give us a
13 drawing.

14 So not only is this a cost to estimate it, it was
15 a cost to go out there where they had to do soundings
16 in the bottom of the water, using boats, surveyors,
17 things like that.

18 Then we had one meeting on July 24, another
19 meeting, processing supplemental agreement, actual
20 survey layout of the breakwater. Then we sat around,
21 and then we, of course, designed it. I had to pay a
22 \$520 seal design on this.

23 We then met again to have some revisions to the
24 thing. Then we estimated the modified breakwater, and
25 then certain costs in preparing a claim up through

6

1 July 10, 1991.

2 Here is where it runs into the money, though.
3 That is our inefficiency costs due to the breakwater
4 delays. All we ask for is a pickup, a loader, and two
5 or three men that amounted to the \$17,885. That's
6 costs that we could not put anywhere else to another
7 job.

8 I believe in talking to Marshall he had a degree
9 of difficulty in understanding why I couldn't just put
10 those people somewhere else and put them to work, and
11 no one understood that the climate of the industry at
12 that point was there was no more work. Things were
13 tough out there.

14 Our GNA expense on there was 13 and a half
15 percent.

16 Down here on the lost revenues, and I think this
17 is really something we feel real strongly on. We are
18 not asking for lost profits. That's not what we are
19 asking for.

20 What we're asking for on this thing here is the
21 original contract with the DOT to do this work. We
22 had agreed on a 10 percent markup for profit and
23 overhead -- excuse me, for profit, \$41,272.

24 It breaks down to this. If we weren't going to
25 do this work, we could have taken that crew over

1 somewhere else and it would give us the opportunity to
2 make a profit somewhere else.

3 I compare this to the -- I don't know if you saw
4 in Engineering News Record where the five major
5 contractors went down to clean up Andrew in Miami.
6 They gave them a 5 percent profit.

7 Well, what they're saying, the same way we are
8 saying here, we brought in key personnel to do this
9 work expecting to get a reasonable profit. If we aren't
10 going to get a reasonable profit, what are we doing
11 here? Why don't we go off and do some other work.

12 MR. MOREFIELD: You said there was no place to
13 send them because you had no work. How is that not
14 conflicting?

15 MR. GUYER: The lack of money was months later on
16 the 3547 job. The work was two years down the road.

17 MR. CONE: You're right. I started planning on
18 October 6 that this job we were going to do -- and what
19 I could have done between October 6 -- if we hadn't
20 gone to supplemental agreement I know I would have
21 picked up a job somewhere between October 6 and -- of
22 1989 -- this is the crux. 1989, on October 6 I agreed
23 to do this work. So I immediately started organizing
24 our crews to do it. We didn't get a letter of intent
25 to cancel us until June 5 of the next year.

1 The point I'm saying is I could have taken this
2 crew and put -- and bid something else somewhere else
3 in the state and at least had the opportunity to
4 generate a bona fide return. As you know, everyone's
5 crews were scaled back. A lot of layoffs were being
6 incurred during this period.

7 We can't lose sight of how this thing came about,
8 and that was that DOT canceled our contract for no
9 other reason but one, and that was the opportunity for
10 them to get a project at a lower cost.

11 Well, that's all fine and good, but we're the
12 only ones, the only ones who got hurt on this deal.

13 Let me run on down. Then there's been an
14 interest expense since June 5, 1990 through January 27,
15 1993. And then we're asking for arbitration filing
16 costs. I don't know if that's bona fide or not, but it
17 is a cost of doing business, travel cost for us up
18 here.

19 When I saw this thing was not going anywhere,
20 I hired Talbot-Guyer Company, who is an engineering
21 consultant, who is here as our expert to answer any
22 questions regarding this. He is the one who made these
23 exhibits, who put our package together.

24 I would like to go to page -- because I think
25 this is important, go to page 134. This illustrates

7
1 the treatment that we as the contractor got. When you
2 read this thing, it shows the spirit of cooperation on
3 why we're here at this arbitration. I wouldn't have
4 had to put this booklet together, wouldn't have had to
5 hire Talbot-Guyer and Company to do this.

6 You look through these things. Number one, did
7 these people and equipment stay idle for 31 continuous
8 workdays, absolutely.

9 In other words, the DOT does not comprehend the
10 fact that on a half million job when you're operating
11 a small crew you can't just go to Eckerdts and get a
12 construction project and put them somewhere else to
13 work.

14 Does Mr. Clarson ultimately get compensated the
15 amount of the amount indicated? He signed and sealed
16 the contract. I think when Mr. Clarson uses his PE
17 seal, he is hired as an engineer. I don't mind paying
18 the man \$500.

19 At the time of the meetings discuss breakwater
20 price, verify actual hours. Were the personnel
21 involved already on the job as part of their normal
22 duties, absolutely. There are people out there
23 monitoring these things to make sure it got done.

24 Were the vehicles in use during any other part of
25 the workday on the actual job site? Obviously our

1 foreman, he's out there, it's kind of hard to say he
2 parked his truck there and observed this thing.

3 This is when it gets real nitpicky. On all
4 subject matter a letter and postage item is indicated.
5 Please verify these costs. Was any material delivered
6 by hand instead of by mail?

7 This has been the spirit of cooperation in
8 settling this issue. I can't comprehend going to
9 contract on October 6 and us finally getting a letter
10 on June 5 to not think that our costs weren't there.

11 Verify wage rates for all listed personnel
12 involved in this claim. I sent them canceled checks.
13 I was told that's not good enough.

14 Verify by invoice the amount paid as attorney's
15 fees. I think we have done that.

16 So, here is -- the way we sat back and analyzed
17 this thing, at the DOT's option, they are the ones who
18 pulled our contract. For them not to pay the contractor
19 any amount at all, no dollars, no nothing, but we get a
20 letter, thank you for your cooperation on this project.

21 Well, that's not the real world scenario. If
22 that's going to become a DOT habit, then we will not --
23 we cannot afford to go to supplemental agreements and
24 spend the time and efforts in designing the plans.

25 We drew the plans that were incorporated in the

1 next project that they put out to bid. We didn't get a
2 penny's worth of compensation for it.

3 If you will look at page 101. Page 101, this is
4 Reuben Clarson's. He's got his name signed there in
5 1990.

6 And this is -- we submitted this July 3, 1989.
7 And that's the final design right there that was
8 incorporated in the actual plans built.

9 So, in going over our breakdown, we are up to
10 105,000. Quite frankly, why we're up this high is
11 spending a lot of time and money going -- driving to
12 Bartow to sit down to try to settle this thing way
13 early in the project.

14 But when it comes to 1992, to settle an issue
15 that we should have been paid something for in 1990,
16 our costs just keep going up.

17 With that, I will close our discussion and be
18 available for any rebuttal questions.

19 CHAIRMAN COWGER: We will let DOT go to rebuttal,
20 but let me at this point ask a couple of questions.

21 Mr. Cone, in Exhibit No. 4, on the interest, you
22 started the interest running on June 5, 1990.

23 MR. CONE: That is correct.

24 CHAIRMAN COWGER: Give us a little explanation as
25 to why you think that's the appropriate date that the

1 interest should run from.

2 MR. CONE: Because the DOT informs Cone that the
3 breakwater is now deleted on June 5, 1990. On June 11
4 we filed a claim. That was only six days later we
5 filed a notice of claim.

6 And I feel that -- I do see this on November 30
7 we actually submitted the claim for 58,000. So I think
8 that number, in looking at it, maybe November 30 is the
9 proper date.

10 CHAIRMAN COWGER: Of what year?

11 MR. CONE: Of 1990. That's a good point. We
12 obviously can't charge interest until we submit a bill.

13 CHAIRMAN COWGER: Another question, if I could.
14 I think that's all we need on that one.

15 MR. CONE: Gene, if I could, I would like to hear
16 some conversation on this lost revenues on 34 and 37.
17 I think that, you know, this is a contractor's mindset.
18 I think that it's a real scenario.

19 In other words, if we have this crew here, you
20 know, industry can't survive without a profit. If this
21 crew is on standby from October 6th to the next year of
22 June 5, then we have lost the opportunity to go out and
23 at least have the opportunity to ask for or get a
24 profit.

25 CHAIRMAN COWGER: I think we understand that. We

1 understand what you're saying.

2 Let me ask one thing, Mr. Dougherty, if I could.
3 Several places it's been mentioned that, if we look at
4 page 101 of Exhibit 1 showing the design that was done
5 by Cone Constructors, is it true that Cone Constructors
6 did, in fact, do the design?

7 I see reference in the original supplemental
8 agreement that added the breakwater work to several
9 revised plan sheets that were being added. As
10 I understand it, that supplemental agreement added work
11 to the contract in addition to the breakwater that was
12 never deleted. There was some additional work that was
13 actually done under that supplemental agreement.

14 Did your drawing show any details at all for the
15 breakwater?

16 MR. DOUGHERTY: I will be honest with you,
17 I really can't remember. I know there was some work
18 done, and that they submitted this drawing. They are
19 stating they did it. I don't have any reason to doubt
20 that. I know that our permit drawings probably gave an
21 alignment of the breakwater.

22 As to the actual design and how it was to be
23 constructed --

24 CHAIRMAN COWGER: And in order to develop a
25 quote, I assume that the contractor had to go out

1 there, determine approximately where this thing was
2 going to be located, get some soundings so that he
3 could determine approximately how much stone it was
4 going to take to build the thing, and that was left for
5 him to do?

6 MR. DOUGHERTY: Yes.

7 CHAIRMAN COWGER: That's all I needed on that.

8 MR. CONE: On the soundings our survey crew went
9 out and indicated that there was a negative two
10 elevation up to a one point five.

11 You know, you have to get in a boat. It's not an
12 easy task. I think it's safe to say if DOT had gone to
13 an engineer to have it done based on what we get as
14 engineering fees, we would get at least a \$15,000 bill.

15 CHAIRMAN COWGER: I think I understand that.
16 There was one other question, just to make sure the
17 Board members understand. What was originally
18 negotiated was a breakwater that was about 1400 feet
19 long?

20 MR. DOUGHERTY: Correct.

21 CHAIRMAN COWGER: Then DOT then had to go after
22 Cone came up with the design and you had decided
23 precisely where the breakwater was going to be located,
24 Cone staked it out in the field, DER, am I correct, had
25 to review it in the field?

1 They determined then that a portion of the
2 breakwater was going to impact some sea grass, and they
3 said you couldn't build the breakwater through that
4 area, so you cut the length of the breakwater back.

5 And that opened a new round of negotiations on
6 the cost.

7 MR. DOUGHERTY: You are effectively covering my
8 rebuttal. If you would like to continue, you are doing
9 real well.

10 CHAIRMAN COWGER: That's all I wanted. I went
11 one step too far. I just wanted to get to the
12 circumstances. Now proceed.

13 MR. DOUGHERTY: Okay.

14 MR. CONE: Can I make a statement on that last
15 thing?

16 MR. DOUGHERTY: Sure.

17 MR. CONE: By shortening the breakwater, a
18 savings was made. What I'm being told is when it
19 came back for actual bid, I think the costs were
20 approximately the same as it was originally. Is that
21 correct, Jim?

22 MR. LUNDY: We never did really agree on a
23 breakwater for 700 feet long. We submitted a price for
24 309,000, we never really negotiated. If I remember
25 correctly, we built the breakwater under the other

1 contract for approximately 260,000.

2 MR. CONE: There was a savings to the Department.

3 CHAIRMAN COWGER: I think it's appropriate to let
4 DOT go on before we steal all of their testimony.

5 MR. DOUGHERTY: My name is Marshall Dougherty
6 with the DOT. A lot of what I was going to cover and
7 I went through last night was covered here by Mike.
8 I want to go through it again to state it for DOT's
9 side.

10 The specifications we feel are clear that we owe
11 Cone for work undertaken to provide the breakwater
12 estimate and layout. There's no qualms about that.
13 The breakwater was added after the contract execution
14 by supplemental agreement and was removed, also, after
15 execution of the original contract by us.

16 The reason -- and we haven't really covered it
17 too much here, the reason that DOT when it was
18 shortened down to 700 feet from the original 1400 feet,
19 the reason we stopped at that point was the prices that
20 were submitted by Cone for the reduced work effort, the
21 breakwater prices per bid item unit increased 59
22 percent.

23 And the humidity barrier increased by almost
24 300 percent over the agreed to prices in the original
25 supplemental agreement called for. DOT and for I think

1 any reasonable businessman to expect prices to increase
2 by 59 percent to 300 percent is a little too much to
3 bear. That is the time all the protraction and all the
4 delays started. We were in a quandary as to why the
5 prices escalated.

6 The letter that Mr. Cone pointed out on page 134
7 of his original exhibit where we were being nitpicky
8 and talking about cost, all those came after he
9 submitted his original claim to us, original work
10 effort to us.

11 I think they are very reasonable questions that
12 should be asked when prices jump by 300 percent on
13 some, 50 percent on others.

14 MR. CONE: Marshall, can I ask a question?
15 You're talking about the unit prices increasing?

16 MR. DOUGHERTY: Unit prices.

17 MR. CONE: I would like to clarify this because
18 unless you're out there on the site you don't know what
19 this is.

20 The breakwater is right here. Okay. We had to
21 build an access ramp, which is a nonpay item, to get
22 from the sea wall out to the actual breakwater. Are
23 you all following me?

24 In other words, there's a cost to the contractor
25 for getting from the sea wall out to the breakwater

1 that we had to not only amortize. When we amortized it
2 over the entire 1400 feet, the unit price was lower.
3 When we --

4 MR. ROEBUCK: Doubled it.

5 MR. CONE: It did. Whenever you shortened it the
6 unit price had to go up because the access road, if you
7 might call it, was a cost whether you did it ten square
8 feet or 1700 square feet.

9 With that, you go on. I wanted to justify why
10 the unit price went up. The overall pricing went down
11 because you shortened the project, but the unit price
12 went up.

13 MR. DOUGHERTY: The original claim when it came
14 in was for \$58,000. In that they had included lost
15 anticipated profits. And we asked for documentation to
16 support that amount.

17 The next time we saw the claim come in, the claim
18 was down to 31,000, and about \$700. Did not include
19 anticipated profit, but it had included the efficiency
20 man hours lost for this crew.

21 The continued negotiations went on. We were back
22 and forth on the telephone, back and forth in person,
23 by letter many times.

24 MR. CONE: That's correct.

25 MR. DOUGHERTY: Most of this dealt with the crew

1 time that had been added in the last submittal to
2 claim, the fact that we did not understand -- and we
3 were just asking -- didn't understand where the 31
4 days -- why the 31 days.

5 It's always the contractor's responsibility to
6 try to mitigate his losses and we understand that.

7 MR. CONE: I would like to say if we can talk
8 while going through this --

9 CHAIRMAN COWGER: How about letting Marshall
10 finish.

11 MR. CONE: I don't want to interrupt, but when
12 you say you didn't understand, I want to make it clear
13 as we talked on this, we were being told week to week
14 it's going to be two more days, five more days, three
15 more days. So we had this crew here.

16 If they had only told us up front that we're not
17 going to have a decision for 31 days, then I could have
18 sent these guys somewhere. I will not interrupt you
19 again.

20 CHAIRMAN COWGER: We understand that. Let him
21 finish.

22 MR. DOUGHERTY: We understand problems like that,
23 also. What we were after in all the negotiations with
24 this crew was to come up with a reasonable attempt.
25 Had they made a reasonable attempt to mitigate this

1 effort.

2 The reason we are asking for certified wage rates
3 or any other wage rates other than just pay stubs is to
4 find out did they try. Did they say -- at the end of
5 these two weeks did they realize work is not coming, we
6 need to do something to mitigate. We saw no
7 documentation of that, so that's the reason we took the
8 stance that we did.

9 It's frustrating. This is a very frustrating
10 process. It has been a very protracted process. From
11 our standpoint to reason these things, the reason this
12 was so frustrating was that we could never get what we
13 need as proper documentation to fulfill the use of
14 public dollars.

15 Payroll checks, we got payroll checks and
16 payroll, but, you know, payroll checks issued to a man,
17 and we're glad to know he kept him on his payroll and
18 paid him, but we didn't know what he was doing. There
19 was no record keeping from them to show that they were
20 doing, I think he said, the job work, the piddle work
21 that was being done. We never were shown good
22 documentation as to where the deficiencies occurred.

23 We were rocking along on this thing, and then
24 Mr. Guyer and Mr. Clarson came over. I wrote down here
25 and I will say this, they dropped a bombshell on us on

1 October 23. They requested a meeting to come over as a
2 last chance prior to arbitration to come in and discuss
3 this with us. And we came in to the meeting.

4 Mr. Clarson offered me a thick packet of
5 information. I opened it up, saw the number on the
6 bottom. I said a very nasty expletive, said it very
7 low to myself.

8 MR. CONE: Can we say that for the record,
9 Marshall?

10 MR. DOUGHERTY: The "S" word. It took me aback.
11 We didn't understand how we went from 31,000 to 139,000
12 just overnight as far as we were concerned. It was our
13 feeling at the time of that meeting that had we settled
14 for 31,000 everything would have been fine, that would
15 have been the end of the issue and off we go.

16 Still, from my standpoint, in dealing with all of
17 the records, and hopefully within our information here
18 it will show that, you know, we did what we had to do.
19 Here we are sitting.

20 I want to say some things. They have mentioned,
21 we realized the costs incurred to them. I think if you
22 will look through our six-page or seven-page
23 documentation up front, they keep talking about the
24 survey.

25 We had no problem with paying the surveyor.

1 I think they showed us an invoice on the surveyor of
2 \$2,597, we gave him \$2,573. Where the twenty dollars
3 is I don't have the figures in front of me, but we paid
4 for that virtually.

5 Some other things in my letter that Mike took
6 notice of, took exception to, verify the amount of
7 invoices paid for attorney's fees. We have never seen
8 more than one invoice where they paid \$2,000 in
9 attorney's fees. We can't justify paying \$2,000 to a
10 nonexisting attorney who did look at it or didn't look
11 at it.

12 There's \$200 in here for a bonding company to
13 review this information. Never saw an invoice on that.
14 I told them numerous times, gentlemen, you submit me an
15 invoice showing your expenses incurred, I will be happy
16 to do this.

11 17 Reuben Clarson in here, paid him \$500. They
18 submitted to me a check where that was their
19 documentation that they paid him for signing and
20 sealing on these plans, no questions asked, that amount
21 is included in what we came up with.

22 We have been as far as I'm concerned very fair
23 in trying to show to them, you provide us proper
24 documentation of costs, we will do that.

25 From their standpoint there are only really three

1 major differences if you look at what we're trying to
2 offer them and what they want. One is the attorney's
3 fees, which again we have never received invoices and
4 documentation so I don't see how we can pay that.

5 Bonding fees, \$200, \$2200, remaining amount of
6 about \$17,000, the idle crew costs which again I did
7 not outlaw, did not say positively no we would not pay.
8 I wanted more proof than just the fact that they were
9 there 31 days doing nothing, no productive work.

10 If they're working, they're doing some productive
11 work somewhere, whether it's cleaning up the yard,
12 whatever. That's work that has to be accounted for
13 somewhere in the overhead factors that are applied.
14 If they're working on another project, you know, or
15 did any other work on another project, that's still
16 considered productive work. We should have been given
17 credit for that. That was never provided to us.

18 So, those are the three stumbling blocks you
19 gentlemen will have to deal with.

20 MR. CONE: Gene, if I may --

21 CHAIRMAN COWGER: Excuse me just a minute. Does
22 that complete your testimony or is that --

23 MR. DOUGHERTY: I'm sorry?

24 CHAIRMAN COWGER: Does that complete your
25 testimony on one part of this?

1 MR. DOUGHERTY: Yes.

2 CHAIRMAN COWGER: I asked a compound question and
3 I got the answer I should have expected.

4 MR. DOUGHERTY: As far as I know, I think I'm
5 virtually through with my testimony and my rebuttal
6 because I think our findings and our documentation that
7 we provided you is fairly clear.

8 CHAIRMAN COWGER: In addition to what you've told
9 us, we need to review what you've said in these five
10 pages?

11 MR. DOUGHERTY: Yes. If you review those you
12 will probably understand what I was talking about a few
13 minutes ago. I am completed at this point, yes.

14 CHAIRMAN COWGER: Mr. Cone.

15 MR. CONE: Yes, sir, I would like to hit on the
16 issues that maybe is the crux of this claim. This is
17 important.

18 If there was a textbook case where they said,
19 "Mr. Cone, you're not going to need -- we are not going
20 to be able to give you the decision, the 30 days is
21 this."

22 I hate to say this, but Marshall has done a
23 good job in doing this. They really were on our team.

24 But there's a third factor that all of us are
25 missing and that is that DER was the decision maker on

1 this. It was up to DER to establish the limits.

2 So for 30 days the contractor got jacked around
3 with -- and DOT was just the messenger in this case.
4 They kept saying it's going to be three more days and
5 we will have an answer, it's going to be a week and we
6 will have an answer.

7 I didn't have the opportunity, if they had just
8 told me 30 days from now to come back to work,
9 I probably could have done something about it.
10 I probably could have gone out and made a profit on
11 whatever we did.

12 But it was one of those things -- you know, we go
13 to our field personnel, they get tired of sitting in
14 their pickup trucks all the day. He wanted backup.

15 Well, I said time and time again I'm not going to
16 falsely certify gentlemen to a project when we don't
17 have certified payrolls on that. So instead I gave him
18 the checks.

19 I said here, go interview our people, get sworn
20 testimony on what exactly they were doing. I gave them
21 make-busy work. They washed their trucks more than
22 they could possibly wash them. They did clean up, they
23 did, you know, all sorts of little things like that.

24 On the attorney fee issue, as you know, whenever
25 you get attorney's fees, it's not site specific. It

1 says general counsel for that month.

12
2 We wanted -- I wanted to know on this thing when
3 I got -- when I got just a two-sentence letter from DOT
4 saying thanks, but no thanks, we're going to delete
5 this work because we feel like we can benefit from
6 going somewhere else, I went to the attorney.

7 I said can they enlist to do a contract and then
8 just arbitrarily pull the thing? And I said if this is
9 a practice that's going to continue, what benefits or
10 protection do we have that we don't mobilize on a
11 project and get -- you know, incur damages with no
12 relief?

13 I would like to say this. This case probably
14 wouldn't be so sticky if Marshall and the DOT says
15 well, we're going to delete this work, period. But
16 that's not what happened. This is work -- we are going
17 to delete this work to try and get a better price. And
18 with no regard for the contractor.

19 What distressed me from day one, I told
20 Mark Puckett, the project engineer, I said Mark, pay us
21 something. Help us with cash flow. I show losses on
22 this job.

23 You know, bonding is tough. If you're not making
24 profits on jobs, you know, DOT questions your bonding
25 ability. This is just -- it's been a nightmare for us

1 from 1989.

2 This is something, as I stated, because the way
3 the system is, Marshall said he's got auditors coming
4 all over him. I can understand that. But auditors and
5 construction management don't necessarily see eye to
6 eye. That's my rebuttal to I think the attorney's
7 fees.

8 The 31 days, that's nothing in this week. I mean
9 today is Wednesday. And you say well, I will have an
10 answer next Tuesday. Well, that's almost a quarter of
11 the delay that we incurred. People don't mind doing --
12 people don't mind saying that to you in the field.

13 CHAIRMAN COWGER: I think we understand what
14 you're saying.

15 MR. CONE: Gene, the only good side of this
16 thing, and we're only talking about the negative of
17 what our hard costs are. We actually mobilized
18 equipment.

19 I'm not charging for a superintendent on this
20 job. The superintendent has to monitor the work
21 because there's coordination in ordering the rock,
22 ordering the bedding stone, lining up the trucks,
23 things like this, which I'm not charging for. I'm
24 charging for, you know, our hard costs.

25 We feel like if we had had the opportunity from

1 October to June we could have gone out and made a
2 profit with these crews.

3 Do you have anything?

4 MR. LUNDY: I don't have anything.

5 MR. DOUGHERTY: Do we get one last rebuttal to
6 the rebuttal?

7 CHAIRMAN COWGER: All right.

8 MR. DOUGHERTY: I appreciate Mike's words, and
9 I think we were being very fair. I think DOT was
10 trying to watch over as a spender of taxpayers'
11 dollars. I think we are entitled to do that from the
12 very start.

13 The hard costs that we have shown in our claim
14 and our claim analysis to the Board, to Cone is for
15 those costs that we can reasonably assume.

16 I had mentioned to Mike one time before,
17 understand, DER was controlling an item in a lot of
18 this delay. Why is that a cost DOT should bear?
19 That's what I was asking of Mike.

20 We tried to come up with some negotiations as far
21 as hours. I said are they 50 percent efficient, 20
22 percent efficient for this crew? We never got to an
23 amount that was agreeable. That's why that number was
24 left out of all of this.

25 It's something we were trying to compensate the

1 contractor for their hard costs that they incurred and
2 for the monies they expended.

3 MR. CONE: Gene, I would like to say one other
4 thing for the record and it's in my documents here. At
5 this time we only had, our company total-wise, only had
6 \$3,658,000 of work. And think about that number for
7 just a minute.

8 When I'm talking about how tight the industry
9 was, whenever I got the word that, you know, we spent
10 all this time here without making any income, I went
11 out and bought, literally bought project number 3546.
12 We bought that project at 13 and a half percent below
13 what we considered our costs.

14 So whenever they deleted \$400,000 or \$500,000 of
15 work that we were banking on, then that's more than 10
16 percent of our total workload for the entire
17 organization.

18 CHAIRMAN COWGER: I think we understand that.
19 Mr. Morefield had a question, I believe.

20 MR. MOREFIELD: To the DOT, is this the remaining
21 outstanding claim for this project? Is everything else
22 settled?

23 MR. DOUGHERTY: From my standpoint. I was shown
24 some literature this morning that indicates that it
25 would be, yes.

1 MR. MOREFIELD: I know you said that, I just
2 wanted to make sure --

3 CHAIRMAN COWGER: Mr. Blanchard, let me see if
4 I can make this real clear, to make it quicker. And
5 there's a couple of questions that go with this.

6 When the request for arbitration was sent to DOT,
7 they questioned the eligibility of this claim for
8 arbitration. Cone Constructors was then asked to
9 submit a rebuttal on that. They did.

10 The Board then determined that based on the
11 conditions stated in Cone's rebuttal that the claim
12 could be arbitrated.

13 Basically what we need to have an understanding
14 between the parties is that the only outstanding claim
15 against the Department on this particular contract at
16 this point is the claim relating to the breakwater.

17 The Board's order will very clearly state that,
18 and will very clearly instruct DOT to not pay the
19 amount of this claim, or not pay the amount that the
20 Board orders unless that's agreed to. And it is agreed
21 to. In other words, that's a condition of paying.

22 Now let me ask you something else if I could. In
23 that round of correspondence that I just described, DOT
24 took the position, and there's been nothing said about
25 this up to this point, and the Board has to have this

1 information.

2 In their letter of November 10, DOT stated that
3 the conditional letter of acceptance stated that the
4 amount of this claim was \$31,735.46.

5 MR. BLANCHARD: Mr. Chairman, that's what I'm
6 fixing to address.

7 CHAIRMAN COWGER: Okay. My question is what is
8 the DOT's position on the fact that the claim as
9 submitted now is greater? Is that what you're going to
10 address?

11 MR. BLANCHARD: That's exactly what I'm fixing to
12 address.

13 CHAIRMAN COWGER: I thought you all were through.
14 I didn't realize you were going to do that. Proceed.

15 MR. BLANCHARD: We have here in this exhibit,
16 which was submitted along with the blue cover book
17 there, a copy of two, actually it's one, but it's in
18 two parts, qualified acceptance letter from the
19 contractor, and attached to that was submitted a letter
20 from the contractor which went along with his qualified
21 acceptance, which detailed the specifics of his
22 qualified acceptance, which said that we owed him an
23 additional \$407,000 plus.

24 If you look at that letter, which is dated
25 June 1, the various issues, which relate to the

1 407,000, the only issue which addresss the breakwater
2 is for a total of \$31,735.46.

3 Now since then the contractor has decided to
4 withdraw his claims on all other issues except the
5 breakwater. We have that in this letter he sent to the
6 Board dated January 5, where he says, I'm quoting from
7 his letter: "Of the claims listed in our qualified
8 acceptance letter, we have resolved all of the issues
9 with the exception of the breakwater claim. We will
10 not pursue claims, any other claims other than the one
11 relating to the breakwater."

12 With that in mind, it's our opinion that standard
13 specifications quite clearly limit the contractor's
14 claim to the \$31,735.46 which is listed in his
15 qualified acceptance letter as the breakwater part of
16 his claims.

17 I also want to take a look at the total cost
18 summary which he has submitted where he does show
19 \$31,735.46 for the breakwater claim. He also shows
20 \$41,272.50 as costs that he wants to be reimbursed for
21 lost revenue on that job, which the contractor has
22 discussed at some length here.

23 We believe that is a serious legal issue there
24 because the breakwater was never included in the
25 original contract. The contractor's bid for this

1 project could not possibly have included the costs of
2 the breakwater or any profit due to construction of
3 breakwater because breakwater was not part of the
4 original scope of work. It was added later.

5 I have talked to several people who have been
6 around this business a long time. I can't find anyone
7 who can tell me of any precedent that's been
8 established to pay a contractor for lost revenues on
9 work which was never included in the original contract.

10 We know that contractors have their own ways of
11 allocating profit when they bid a job, but the
12 breakwater was never included in the contractor's bid.
13 And so this business of lost revenues we see as
14 something out of the blue which we can't find any
15 precedent for. We think it would be highly irregular
16 to pay anything on that account.

17 The only thing I would want to point out is the
18 41,000 he's claiming for lost revenues is larger than
19 the 31,000 which he says he spent on the work that he
20 did for the breakwater.

21 MR. CONE: Absolutely.

22 MR. BLANCHARD: The last thing I want to point
23 out was the negative revenue --

24 MR. CONE: We believe that.

25 MR. BLANCHARD: Okay. If we're not going to

1 pursue that any further I won't mention that.

2 MR. CONE: Mr. Cowger, I would like to respond to
3 that.

4 CHAIRMAN COWGER: Do you have anything further to
5 say?

6 MR. BLANCHARD: No, sir.

7 CHAIRMAN COWGER: You have already said quite a
8 bit about this, so make it brief.

9 MR. CONE: I will make it brief. What he says
10 just scares the hell out of me as a contractor because
11 the next time I get a contract, he's acting like this
12 supplemental agreement is not binding and -- as it ties
13 into the original contract.

14 Whenever I start looking at supplemental
15 agreements, am I to just ignore them because they
16 obviously don't have any relevancy? We are not talking
17 about deleting a portion of the work because it is
18 necessitated for safety or no budget or anything else.
19 At their option they deleted this thing because it
20 benefited the Department with complete disregard to the
21 contractor.

22 When we couldn't come to terms on this acceptance
23 letter, whenever we put down that 40,000 something,
24 whatever it was in the acceptance letter, that was
25 based -- I did that acceptance letter on the basis that

1 Marshall Dougherty told me that we could get this thing
2 resolved.

3 My attitude was the spirit of cooperation wasn't
4 there, so I felt like we should ask what we feel is
5 entitled to us for it. Quite frankly it did open up
6 my eyes whenever Jim Guyer came on board with us to
7 analyze this. He's the one who told us, Mike, your
8 crews -- you should have had the ability to go out and
9 make a profit somewhere.

10 I have to agree with that because it makes common
11 sense. If they had told me right up front the
12 supplemental agreement is void, we're not going to do
13 it, then I could have taken those crews and gotten a
14 job with some profit in it.

15 So, that's my point.

16 CHAIRMAN COWGER: Okay. I think we have --

17 MR. ROBERTS: I'm Rick Roberts. I would like to
18 add one thing concerning the crews that they have
19 requested some payments for that was idle and unable to
20 work.

21 On January 29 we notified them that, in a letter,
22 of the sheets to use for staking out the breakwater.
23 Also in that letter they were notified of the
24 requirements that DER would have to come out and
25 inspect the site.

1 The crew and -- the staking of this thing went
2 on. It wasn't until February 22 that the permits
3 office was notified that this thing was ready to be
4 inspected. This time frame went from the end of
5 January into March with this process taking place and
6 DER coming out and inspecting this.

7 February 19 I believe is the date that the thing
8 was staked. Their idle crew was turned in to start at
9 February 8, prior to the time that it was even staked.
10 And it was even unavailable for work at this time.

11 MR. CONE: I would like to comment on that. It's
12 because we were relying on sheet number 66 that DOT has
13 provided us, number 66. They gave us a sheet that
14 would not work out in the field. So, Jim --

15 MR. LUNDY: The plans they provided us for a
16 location sheet of the breakwater were not detailed
17 enough to accurately stake out the breakwater. During
18 that process, we tried many times to get a reference to
19 the main job baseline with offsets to stake out the
20 baseline.

21 If your plans had been accurate, we could have
22 staked that breakwater in early January and had the DER
23 out there in early January to review it.

24 MR. CONE: Was it Cone's responsibility --

25 MR. LUNDY: It's not Cone's fault or Cone's

15

1 responsibility that that survey did not occur timely.
2 It was the Department's fault that it didn't occur
3 timely.

4 MR. CONE: We weren't responsible for notifying
5 the DER.

6 MR. ROBERTS: That's correct.

7 MR. CONE: How could we -- we are just the
8 contractor.

9 CHAIRMAN COWGER: Did DOT have an inspector, a
10 project engineer on the job all the time this was going
11 on, that could have observed when the layout was
12 completed?

13 MR. DOUGHERTY: Yes, sir.

14 CHAIRMAN COWGER: Let me ask you a couple of
15 questions about this delay period and then I will quit.

16 What happened, as I understand it, was that when
17 Cone got on the job and mobilized and began to plan to
18 go to work, it was necessary for them to lay out the
19 alignment of the bulkhead with their survey crews
20 because they had responsibility for layout.

21 There's quite a bit of information in the
22 submittal from the contractor talking about problems
23 deciding how to lay out the bulkhead, where it was to
24 be located.

25 Can DOT tell us a little bit about that? The

1 contractor has given us quite a bit of information. We
2 haven't heard anything from DOT that says was there, in
3 fact, some confusion about where the location was and
4 how it was to be laid out?

5 MR. DOUGHERTY: From my own personal benefit, no,
6 I cannot say there was. What I can indicate to you is
7 that the surveyors they hired to lay out this
8 breakwater were having problems. We virtually
9 compensated them for their entire time. We recognized
10 all the time the surveyors had out there.

11 CHAIRMAN COWGER: I don't think we're talking
12 about that. We're talking about the time frame of the
13 overall --

14 MR. DOUGHERTY: Time frame of the overall --

15 CHAIRMAN COWGER: Mr. Roberts, were you on the
16 job?

17 MR. ROBERTS: No, sir, I was not.

18 CHAIRMAN COWGER: Excuse me. But it was
19 necessary for -- was it DER --

20 MR. DOUGHERTY: DER, Department of Environmental
21 Regulation.

22 CHAIRMAN COWGER: -- to review alignment of the
23 breakwater as staked and to make a decision as to
24 whether it was properly located from an environmental
25 standpoint?

1 MR. DOUGHERTY: I will say this, too. DER
2 marches to its own drummer, sir.

3 CHAIRMAN COWGER: We understand that. Before we
4 go much further, I have a question, now.

5 Mr. Cone, would you all go to page 16 of your
6 original exhibit which shows your wage rates and all
7 for the three people that were inefficient.

8 MR. CONE: Yes, sir.

9 CHAIRMAN COWGER: Page 16. Now let's go back and
10 look at page 31 as an example. Let's go to 28 or 27,
11 either one.

12 What I was trying to get to is -- I can't find
13 it. The rate that you're showing down there for those
14 people, that included their labor rate plus a labor
15 burden. That was the problem that I'm having.

16 MR. CONE: It's too low.

17 CHAIRMAN COWGER: No, that's not the question.
18 The question is it seems like it was in there twice,
19 that the labor burden was in there twice.

20 MR. LUNDY: Mr. Chairman, the labor burden rate
21 changed each year. We have one rate for 1989 and we
22 have another rate for 1990.

23 CHAIRMAN COWGER: To make it --

24 MR. LUNDY: Maybe that's the confusion.

25 CHAIRMAN COWGER: To make it simple, can you

1 explain to me just for Mr. Lee how you arrived at that
2 18.03 rate? Just for Mr. Lee, can you explain how
3 that's documented or not?

4 MR. CONE: That's on page 16, Jim. It says
5 Robert Lee. I can. Let me say this. Robert Lee, we
6 explained the \$18.03. That was based on 1990 wages.
7 He makes \$12 an hour, with a 50.24 percent labor
8 burden, which a total rate is 18.03.

9 CHAIRMAN COWGER: I see it now. Let's look at
10 page 28. Now, that's got an approximate 50 percent
11 labor burden on it.

12 MR. CONE: That's correct. I would like to say
13 right now we're up to 70 percent right now. It's going
14 out of sight.

15 CHAIRMAN COWGER: I will drop my question.
16 I wasn't questioning the amount of the burden, I was
17 questioning the fact that it looked like the labor
18 burden had been added in twice. And now I can't seem
19 to tie it together.

20 MR. CONE: Mr. Chairman, on a --

21 CHAIRMAN COWGER: Here it is. Wait a minute.
22 Let me ask you this. Let's look at page 17, which is
23 a different estimate. This one includes the cost to
24 Mr. Lundy and Mr. Clarson and Mr. Cone. All right.

25 Now if we go back, for instance, to page 27, or

1 28, either one, we've got a wage rate there for
2 Mr. Lundy --

3 MR. CONE: Is this the same Lundy?

4 MR. LUNDY: Mr. Chairman, there's two Lundys.
5 I'm one.

6 MR. CONE: We can only afford --

7 CHAIRMAN COWGER: I will drop all my questions.

8 MR. CONE: I can say this from management, we can
9 only afford one of the Lundys. The other one we can't
10 afford.

11 I have one other issue, if I can bring it up, and
12 it's what he was bringing up. The qualified acceptance
13 letter that we submitted to the DOT, it ties in to the
14 issue and not to the dollar amount.

15 If you're relating to the 1986 handbook, which
16 this job has been under -- you're looking at the 1990
17 handbook. So it's 1986. It only had to do with the
18 issue and not dollars.

19 MR. BLANCHARD: That's not true, Mr. Chairman.
20 The Blue Book specifies the contractor shall define his
21 claim, and the definition, check this out, the
22 definition of that specifically is that the contractor
23 shall define his claim physically in dollar amounts.

24 MR. CONE: It doesn't say that.

25 CHAIRMAN COWGER: Rather than arguing back and

1 forth across the table, let me read you what the
2 specification says.

3 MR. BLANCHARD: Okay.

4 CHAIRMAN COWGER: Then I'm going to let each
5 party make a quick comment on it. Here is what the
6 specification says. It has to do with the qualified
7 acceptance letter.

8 "The dispute or pending claim must be defined in
9 writing and must accompany the qualified acceptance
10 letter before payment under this option can be allowed.
11 The contractor further agrees that through use of this
12 option that any pending arbitration claim must be
13 limited to the areas defined in the qualified
14 acceptance letter."

15 That's all that's really pertinent to what we're
16 talking about.

17 Now there's two parts in there that I think you
18 all need to talk about a minute. Dispute defined in
19 writing, what does that mean, and limited to the areas
20 defined in the qualified acceptance letter.

21 Mr. --

22 MR. BLANCHARD: Can we go to Webster's dictionary
23 and look up the word defined?

24 CHAIRMAN COWGER: Mr. Blanchard, you are going to
25 get your opportunity to talk now.

1 MR. BLANCHARD: If we go to Webster's dictionary
2 definition of the word defined, that will answer your
3 question. Everybody accepts Webster's dictionary.

4 MR. CONE: I don't.

5 MR. BLANCHARD: Well, I'm sorry.

6 CHAIRMAN COWGER: Go on. What else do you have
7 to say?

8 MR. BLANCHARD: That will answer your question as
9 to explaining why we take the position that what you
10 have just read requires the contractor to specify the
11 details of his claim and the dollar amounts attached to
12 it.

13 MR. CONE: It doesn't say dollar amount, dates,
14 details.

15 MR. BLANCHARD: Dollar amounts, also.

16 MR. CONE: We argue with that.

17 CHAIRMAN COWGER: Let's hear your rebuttal,
18 Mr. Cone, and then we will wrap this up.

19 MR. CONE: We feel, Mr. Chairman, explicitly --
20 and it has to be this. I signed this acceptance letter
21 in what year?

22 MR. BLANCHARD: June 1.

23 CHAIRMAN COWGER: You signed it in 1992.

24 MR. CONE: Right. I don't think that dollars
25 could have any effect on it. I think it has to do with

1 the details of the claim because since 1992 we have
2 incurred additional costs, and that number can't
3 possibly be fixed.

4 MR. BLANCHARD: The job is over.

5 MR. CONE: I still have costs incurring. I'm
6 sitting here today and this is costing us money.

7 MR. BLANCHARD: I'm going back to the details of
8 the actual claim, not the consumer costs.

9 CHAIRMAN COWGER: What Mr. Blanchard is saying,
10 he's looking at costs that were incurred prior to
11 January 1992.

12 MR. BLANCHARD: Prior to completion of the
13 project.

14 MR. CONE: What we would like to say is we focus
15 on the term, on the areas of the claim, and if -- and
16 what we have done is deleted these other areas just for
17 the spirit of compromise. I didn't want to rehash
18 something that occurred in 1989. So what we have done
19 is forego these other issues to focus on one and get
20 this job finalized and put it to bed.

21 CHAIRMAN COWGER: Members of the Board, it's my
22 opinion that we have heard all the testimony on this
23 matter that we need to make a decision. Do either one
24 of you object to that or have any further questions?

25 MR. MOREFIELD: No.

1 MR. ROEBUCK: No.

2 CHAIRMAN COWGER: Okay. Does either party have
3 anything burning that they need to get out on the table
4 before we close?

5 MR. DOUGHERTY: No, sir.

6 MR. CONE: I would like to say, if I may, that
7 Marshall I think did go overboard. He always allowed
8 us to come into his office and discuss this claim very
9 openly on a day's notice.

10 From what I'm feeling, though, he was concerned
11 about the auditors and the proper backup. But as we
12 expressed to him time and time again, we can't just
13 generate something if it's not bona fide.

14 I would like to -- he does admit that we have
15 incurred some costs, I think it's just a matter of how
16 much.

17 CHAIRMAN COWGER: This hearing is hereby closed.
18 The Board will meet on March 10 to deliberate on this
19 claim, and you will have our order shortly thereafter.
20 Thank you, gentlemen.

21 (Whereupon, the hearing was concluded at 11:15 a.m.)

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CERTIFICATE OF REPORTER

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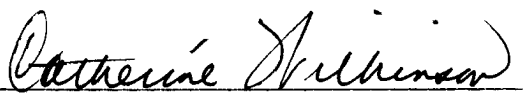
STATE OF FLORIDA)
COUNTY OF LEON)

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

DO HEREBY CERTIFY that the foregoing 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 59 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 17th day of February,
A.D., 1993, 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