

# STATE ARBITRATION BOARD

1022 LOTHIAN DRIVE  
TALLAHASSEE, FL 32312-2837

PHONE: (904) 385-2852 OR (904) 942-0781 FAX: (904) 942-5632

10 September 1993

## NOTICE

In the case of S & E Contractors, Inc. versus the Florida Department of Transportation on Project No. 10190-3420 in Hillsborough County, Florida, both parties are advised that State Arbitration Board Order No. 6-93 has been properly filed on September 10, 1993.

*H. E. Cowger*

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

S.A.B. CLERK

SEP 10 1993

**FILED**

Copies of Order & Transcript to:

Mr. J.B. Lairscey, Jr., PE, Director, Office of Construction/FDOT  
Mr. George E. Spofford, IV, Vice President/S & E Contractors, Inc.

STATE ARBITRATION BOARD

ORDER NO.6-93

RE:

Request for Arbitration by  
S & E Contractors, Inc. on  
Job No. 10190-3420 in  
Hillsborough 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 10:15 a. m. on  
Tuesday, July 20, 1993.

The Board Members, having fully considered the evidence  
presented at the hearing,, now enter their order No. 6-93 in  
this cause.

ORDER

The Contractor presented a request for arbitration of  
a claim for additional compensation in the amount of  
\$145,798.40. The amount claimed is for extended home office  
overhead costs amounting to \$132,544.00, alleged to have been  
incurred as a result of being forced to remain on the project  
eighty five (85) days longer due to changes to the work  
ordered by the Department of Transportation, plus interest at  
12 percent per year from September 10, 1992 through July 10,  
1993 (10 months). At the beginning of the hearing, the  
Contractor reduced the amount of his claim to \$136,531.12.  
The amount claimed for extended home office overhead was

reduced to \$120,824.00 and the period for which interest is claimed was changed to July 26, 1992 through September 26, 1993 (13 months). The amount claimed for extended home office overhead was reduced to eliminate duplication with the home office overhead included as a percentage overhead markup of the direct costs for Maintenance of Traffic and Extended Field Cost for which compensation was included in a Supplemental Agreement dated May 26, 1993.

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

1. The period of time required to complete the work on this project was extended due to design deficiencies. Work items were added for grading of median shoulders and removal of existing concrete that conflicted with the Concrete Barrier Wall. There were also major overruns in the pay items Concrete Barrier Wall and Reset Guardrail.
2. The work on this project was essentially on I-4 and working hours were limited to between 9:00 p.m. and 5:00 a.m. which, due to the time required to setup and removed traffic controls, resulted in a 6 1/2 hour working day.
3. The added work disrupted the flow of work on this project, but we could not demobilize any of our forces and use them elsewhere to earn company revenue.
4. Compensation for the extra work of removing existing concrete, additional Concrete Barrier Wall and additional Reset Guardrail amounted to approximately \$88,000 or 3.2 percent of the original contract amount. The Department of

Transportation has accepted that work was delayed by various causes beyond our control in the amount of 128 days which is 80 percent of the original contract time. Of those 128 days the Department of Transportation admitted that 61 working days or 85 calendar days of the delay were due to changes they made to the contract work.

5. The added work and overruns were on the critical path, thus extending the time for completion of the work. The revenue generated on the project during the time this work was underway was insufficient to carry our home office overhead.,

6. In the course have negotiations, we have agreed to reduce the number of days for which home office overhead is claimed to 38 days.

7. In preparing our bid for a project we rely on a process similar to the Eichleay formula to distribute home office overhead costs across the bid items. These costs have been audited and determined to be real costs.

8. We are of the opinion that the evidence clearly shows that we actually incurred uncompensated home office overhead damages as the result of factors that were within the control of the Department of Transportation.

9. The Department of Transportation is incorrect in applying decisions by the Federal Board of Contract Appeals to eliminate certain costs from our home office overhead. The Federal Board of Contract Appeals is governed by specific federal statutes which are not applicable here.

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

1. We admit that we made changes to the project that added new work and caused overruns in certain contract items. However, we do not agree that the Contractor has proven that he suffered uncompensated home office overhead costs as a result of those changes. Formulas, such as the Eichleay, are artificial assumptions used in the absence of verifiable information which is not the case here.
2. A percentage markup for Home office overhead was included in the unit prices for those bid items included in the original contract and those bid items added by Supplemental Agreement.
3. The Contractor was working on items included in the original contract concurrently with the added work so they were earning overhead on such items during that period. Thus, they earned all the home office overhead they projected to earn on this job, plus they earned home office overhead on extra work and overruns in pay items.
4. In all cases that have dealt with Eichleay, the situation was that there was (1) an outright suspension of work for an indefinite period of time, during which the Contractor could not go elsewhere to earn overhead, or (2) a series of disruptions that were one after the other with such frequency that they amounted to the same thing as a total suspension of the work. Neither of these situations apply here.

5. It is established that when the contract period is extended due to additional work rather than a suspension, the contractor is adequately compensated for home office overhead by receiving a percentage of overhead markup on direct costs added to the contract by modifications to the work.

6. In some cases State courts have adopted the Federal decisions that give rise to Eichleay. In such cases, they also were guided by the portions of the Federal regulations that disallow certain home office costs for compensation. Thus, if there is entitlement here, allowances for professional fees, contributions, travel and entertainment, bad debt, interest expenses and miscellaneous should be disallowed.

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

1. The only issue in dispute here is whether the Contractor should be compensated for home office overhead in accordance with any formula.
2. The Department of Transportation testified that removal of the existing slope pavement at various locations to allow construction of new concrete barrier wall was labor intensive hand work. It is obvious that this low production work slowed construction of the barrier wall. Also, the Contractor could not use his forces committed to this project to do work elsewhere.
3. The added work and some of the overruns of contract bid

items disrupted the flow of work during the short working day available to the Contractor. The Contractor was not able to average earning revenue on original contract work plus additional work at the rate anticipated when he allocated home office overhead to the pay items.

4. The Department of Transportation accepted that the extra work of removing existing concrete pavement, additional Concrete Barrier Wall and additional Reset Guardrail extended the time required to complete the project by 55 (13 + 21 + 21) working days (77 calendar days) or approximately 50 % of the original contract time. Additional revenue generated by these work items amounted to approximately \$88,000 or 3.2 percent of the original contract amount.

5. Even though they did not amount to a total suspension of the work, the series of disruptions to the work that occurred due to added work and overruns in original contract items had a substantial effect on progress on this project.

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

The Department of Transportation is ordered to compensate the Contractor for his claim in the amount of \$ 120,000.

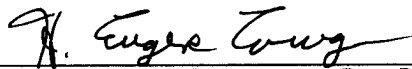
The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$388.00 for Court Reporting Costs.

The Board's decision on this claim, is based on the fact that, because of added work and delays beyond the Contractor's control, he is due home office overhead, in addition to that recovered as a percentage markup on new pay items and overruns in original contract items. The Board makes no judgement as to the applicability or non-applicability of the Eichleay formula for calculating extended home office overhead. The amount awarded the Contractor is based solely on the facts as presented and an applied by the Board to the particular set of circumstances in this case.

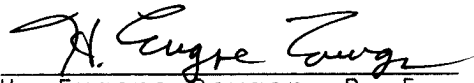
Tallahassee, Florida

Dated: 10 September 1993

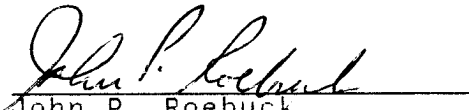
Certified Copy:

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

10 September 1993  
Date

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

  
K. N. Morefield, P. E.  
Member

  
John P. Roebuck  
Member

S.A.B. CLERK

SEP 10 1993

**FILED**



STATE ARBITRATION BOARD  
STATE OF FLORIDA

S.A.B. CLERK

SEP 10 1993

**FILED**

S & E CONTRACTORS, INC. )

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PROJECT NO. 10190-3420

- and - )

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LOCATION: Hillsborough  
County, Florida

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DEPARTMENT OF TRANSPORTATION )

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**ORIGINAL**

RE: Arbitration In The Above Matter

DATE: Tuesday, July 20, 1993

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

TIME: Commenced at 10:15 a.m.  
Concluded at 12:15 p.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 Morefield  
 Mr. Jack Roebuck

## APPEARING ON BEHALF OF S &amp; E CONTRACTORS, INC.:

Mr. Doug Ebbers  
 Mr. George Spofford  
 Mr. Greg Molin

## APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Mike Davidson, Attorney  
 Mr. Mike Irwin  
 Mr. B. J. Brown  
 Mr. Bud Ingerman  
 Ms. Catherine Spicola  
 Mr. Larry Zagardo

\* \* \*

## I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1 through 6 in evidence	4
CERTIFICATE OF REPORTER	80

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.

13 Our terms of office began July 1, 1993, and  
14 expire June 30, 1995.

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. That consists of the contractor's  
22 request for arbitration, and all of the documents  
23 attached thereto. Copies of all of that information  
24 was furnished to the DOT approximately three weeks ago.

25 Does either party have any other information it

1 wishes to put into the record as an exhibit?

2 (Discussion off the record)

3 CHAIRMAN COWGER: Okay, back on the record.

4 While we were off the record, there was discussion of  
5 exhibits and presentation of exhibits.

6 Exhibit No. 2 will be a package of information  
7 submitted by S & E Contractors in a bound folder.

8 Exhibit No. 3 is a copy of the final estimate for  
9 the project submitted by DOT. It's estimate number 13.

10 Exhibit No. 4 is a copy of a supplemental  
11 agreement dealing with reflective pavement markers  
12 submitted by DOT.

13 Exhibit 5 is a supplemental agreement dated  
14 March 27, 1992, submitted by DOT.

15 And Exhibit 6 is a copy of a supplemental  
16 agreement dated February 26, 1992, submitted by DOT.  
17 (Whereupon, Exhibit Nos. 1 through 6 were received in  
18 evidence.)

19 CHAIRMAN COWGER: Does either party wish to have  
20 additional time to examine the exhibits?

21 During this hearing the parties may offer such  
22 evidence and testimony as is pertinent and material to  
23 the controversy and shall produce such additional  
24 evidence as the Board may deem necessary to an  
25 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 of the  
5           exhibits submitted during this hearing and to retain  
6           these exhibits. The Board will furnish the parties a  
7           copy of the transcript of this hearing along with its  
8           final order, but will not furnish copies of the  
9           exhibits.

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

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

20          It's appropriate at this point in time for the  
21          contractor to begin his presentation. The Board likes  
22          for the contractor to open his presentation by telling  
23          us the total amount of his claim and then proceed from  
24          there, if you will, please.

25          MR. SPOFFORD: My name is George Spofford,

1 executive vice-president of S & E Contractors. The  
2 total amount of our claim -- that's jumping ahead a  
3 little bit, but that's fine. The claim amount is  
4 \$120,824. I will explain why that's different from the  
5 amount identified in the request for arbitration.

6 My role in this project was an administrator,  
7 contract review, change order review, supplemental  
8 agreements, that sort of thing.

9 Our supervisor Greg Molin, who is the project  
10 manager, oversaw staffing, safety insurance, and I have  
11 some knowledge of the project and the costs incurred.  
12 On my right is Doug Ebbers, president of S & E.

13 The project itself, so we are not operating in a  
14 vacuum, is the I-4 roadway from Tampa to Orlando. Our  
15 contract involved approximately 23 miles of safety  
16 improvements to that road. That's a two-lane -- two  
17 lanes each direction highway with a grass median in the  
18 middle.

19 We installed guardrails, concrete barrier walls,  
20 drainage improvements, some grading, those sorts of  
21 things on this project. The contract was let and  
22 anticipated to consume 160 days to complete. The  
23 contract amount was approximately \$2.8 million for that  
24 work.

25 The issue we have today is -- as I understand it,

1           there should only be one issue, and that is whether or  
2           not S & E is entitled to recover its extended home  
3           office overhead cost during an 85-day extension of the  
4           contract, an overrun time that we incurred because of  
5           extras added to the contract, extra work, changes, and  
6           the disruptions that were caused by that. And that  
7           extra work was a result of quantity or design errors in  
8           the plans.

9                        Like I said, at the beginning our request is for  
10           \$120,824, plus interest, as a separate line item.

11                       That number is different, approximately \$12,000  
12           less than the amount identified in our request for  
13           arbitration because when we looked at the calculation  
14           of damages and the way we calculated overhead, it  
15           struck us that we had recovered some overhead. It  
16           looked like we had recovered some home office overhead  
17           markup on the unit prices paid for with extra work.

18                       So what we attempted to do, we took the most  
19           conservative approach we could. We said you can't  
20           specifically identify the quantum of the dollar value  
21           that might have been included in those line items, so  
22           we said across the board we are going to take out 15  
23           percent from those to make sure there's no, I don't  
24           know what the phrase would be, double dipping, for lack  
25           of a better phrase.

1           We want to be paid for the work we did, the costs  
2 we incurred performing the extra work, but we obviously  
3 don't want to get paid more than what we are entitled  
4 to.

5           So that's why that number is different. We have  
6 tried to credit the DOT for money that we feel we might  
7 have already been paid.

8           The facts of the project briefly, it was a  
9 160-day duration. A copy of the contract is in  
10 Exhibit 1 that we provided.

11           Because of the extra work we had to perform, the  
12 grading, some barrier wall, guardrail, things we have  
13 identified in the claim package, our performance was  
14 extended beyond, more than 85 days.

15           During negotiations with the DOT, there was a --  
16 I will say a gentlemen's agreement, I felt there was,  
17 that we would settle on 38 days rather than go for the  
18 whole 85 days which the project truly was extended.

19           So, the DOT has paid our -- some of the extended  
20 costs we have incurred already for that time frame, for  
21 the 38 days. They paid for field office overhead,  
22 which is a time-sensitive damage. They paid for MOT,  
23 which is a time-sensitive damage, also.

24           I don't think there's a real dispute that this  
25 was a compensable delay, that our project was extended



1 beyond our controls, things that the DOT controlled,  
2 the problems with the design, the quantity take-off.

3 So, the DOT -- everybody recognized the time  
4 overran the original 168 days we originally  
5 anticipated. We feel there is a lot more than the 38  
6 days we have negotiated down to.

7 The DOT has paid us for field office overhead and  
8 MOT based on the 38 days. The issue we are here on  
9 today is well, you paid for those time-sensitive  
10 damages, we expect to be paid for our home office  
11 overhead for the same time frame.

12 It's been our experience in dealing with the DOT  
13 that home office overhead is routinely paid for  
14 compensable delays like this. We don't know why it  
15 wasn't paid on this one. We were foreclosed from  
16 really negotiating on it from the start. We were told  
17 no, you can't -- we won't even discuss home office  
18 overhead, you have to take it to Tallahassee, which we  
19 are willing to do.

20 We did the work, we are willing to incur the fee  
21 to get here. And we have incurred pretty good expense  
22 bringing three people out of our office in order to  
23 come and try to recover the cost.

24 Final acceptance of the project was in August, on  
25 August 10, 1992. And so we feel we are entitled to

1 recover interest at least from that date, probably from  
2 an earlier date, but we are willing to accept the  
3 August 10 date, since that's a fairly conservative  
4 date.

5 What I would like to do is turn it over to  
6 Greg Molin, who was our project manager. He lived and  
7 breathed this project, so he can give you a sense of  
8 what happened out there, what caused the extensions of  
9 time, the overruns, the disruptions, that sort of  
10 thing.

11 We can probably save a lot of time if we have an  
12 agreement there's no dispute this is a compensable  
13 delay for 38 days minimum, then we can do away with a  
14 lot of that.

15 I don't know, Mike and Mike, what your position  
16 is on that. Since you have already paid field office  
17 overhead and MOT for that time frame and we are trying  
18 to focus on that 38 days, if you want to agree to not  
19 get into the day-to-day activities, we can could that.

20 MR. DAVIDSON: I think we can agree that there  
21 is not a substantial fact dispute as to the fact that  
22 there were overruns and that you were asked to address  
23 those in your work.

24 I think we do have a discrepancy on the number  
25 of the 38 days. I know there has been an agreement to

1           that effect, and we will not dispute that there has  
2           been, but you have offered, made them an offer instead  
3           of going from 85 we are going to 38. I think the  
4           figure we are looking at is 85 calendar days, 61  
5           workdays, and we all agreed to tailor that down to 38  
6           days. We don't have any disagreement with that.

7                        We do think if you look at the strict facts of  
8           the case, in terms of how the job finished up, the days  
9           past projected date of finish, that you are talking  
10          about 19 days. Is that correct, Mike?

11                      MR. IRWIN: Probably about 13, 13 compensable.

12                      MR. DAVIDSON: Thirteen compensable days. Our  
13          latest review of the figures is showing when the  
14          project should have been finished, when it was  
15          finished, shows us with a 13-day gap instead of 38.

16                      MR. SPOFFORD: To maybe cut to the chase on some  
17          of this, if we agree with -- Mr. Cowger, cut me off if  
18          I'm in your area in trying to resolve this dispute --

19                      CHAIRMAN COWGER: Fine.

20                      MR. SPOFFORD: We disagree on the number of  
21          days, but whatever the number of days was, it was a  
22          compensable period.

23                      MR. DAVIDSON: I think we can agree to that. In  
24          other words, we will agree that whatever the number of  
25          days were that they were incurred by quantity overruns

1 that are the Department's responsibility rather than  
2 the contractor's.

3 MR. SPOFFORD: There was more than quantity  
4 overruns. There was the elevation errors --

5 MR. IRWIN: There is no dispute of facts. That's  
6 why I wanted to make sure everybody had a copy of the  
7 supplemental agreement. I wanted to make that known.  
8 There is no dispute we changed the contract, added new  
9 items, substantially overrun items. That's verified on  
10 the final estimate.

11 MR. SPOFFORD: Whatever the number of days is we  
12 will --

13 MR. DAVIDSON: I don't believe there's an issue  
14 as to compensability per day, it might be just the  
15 number of days.

16 MR. SPOFFORD: Is there an issue about the  
17 dollars per day? Say we arrived at 38 days. Is there  
18 a question of what the dollars per day are or is it --  
19 we have given you the backup to support our position.

20 MR. DAVIDSON: As I understand I think you want  
21 to be compensated based on the Eichleay formula. We  
22 don't believe the Eichleay formula applies in this  
23 case.

24 MR. SPOFFORD: Well, is there a dispute about  
25 what our daily home office overhead cost was?

4  
1 MR. DAVIDSON: I hate to sound kind of elusive,  
2 but if you're telling us you have audited daily costs,  
3 that the fact the costs are there doesn't mean they are  
4 our responsibility.

5 Secondly, if you've used a formula to compute  
6 them rather than to actually track them from your  
7 actual experience, the formula is subject to question.

8 MR. SPOFFORD: Okay. Then I am assuming there is  
9 a dispute about the dollars per day. We can deal with  
10 that. That's fine.

11 CHAIRMAN COWGER: Gentlemen, let me see if  
12 I understand. Really the issue that is in dispute is  
13 the number of dollars per day that the contractor feels  
14 he is due for home office overhead, and the other part  
15 of the dispute is whether he is due compensation at all  
16 for home office overhead?

17 MR. DAVIDSON: That is a major item, whether he's  
18 due compensation at all for home office overhead.

19 CHAIRMAN COWGER: So should we spend any more  
20 time talking about the 38 days? I think we ought to  
21 move on to the two basic issues that I just described.  
22 And then maybe if we need to come back and look at the  
23 number of days when we get through we can.

24 MR. DAVIDSON: That would be fine with the  
25 Department.

1                   CHAIRMAN COWGER: How about you all?

2                   MR. SPOFFORD: Seems fine.

3                   CHAIRMAN COWGER: Why don't we proceed along  
4 those lines and see where we end up.

5                   MR. SPOFFORD: Okay. Going back to Mr. Molin,  
6 I think his testimony is going to continue to be  
7 relevant because he will give you an idea of what the  
8 disruptions were, why we feel these formulas apply --  
9 since we couldn't demobilize. He is the one who  
10 actually knows what went on on that project.

11                   CHAIRMAN COWGER: May I interrupt and ask a  
12 question. First off, DOT, I heard you mention 19 days.  
13 I assume these supplemental agreements, the total  
14 amount of the time on the supplemental agreements turns  
15 out to be 19 days. Is that where that 19 days came  
16 from?

17                   MR. IRWIN: What it is -- I know we are getting  
18 into more of a roundtable discussion here.

19                   MR. DAVIDSON: Tell him why.

20                   MR. IRWIN: It's real simple here, if you look at  
21 Exhibit 1. You look at the 61 days. There is a  
22 question there --

23                   MR. DAVIDSON: Tell him what page.

24                   MR. IRWIN: Exhibit 1 --

25                   CHAIRMAN COWGER: Tab 3 of Exhibit 2.

1           MR. IRWIN: Looks like this right here  
2 (indicating).

3           CHAIRMAN COWGER: Right.

4           MR. IRWIN: It's got the four issues, 61 days,  
5 total additional work.

6           CHAIRMAN COWGER: Okay.

7           MR. IRWIN: It's real simple, Gene. The first  
8 issue, the six days, since we're talking days here, the  
9 six days is a supplemental agreement. This came on  
10 one of the supplemental agreements we gave, SA number  
11 one, I believe, that was negotiated.

12           We negotiated a unit price to do this work. And  
13 we negotiated six as the number of days. The costs and  
14 time were both agreed on, signed full and final by both  
15 the Department and the contractor.

16           So we are contending that he's not due any  
17 compensation for that six days because he has  
18 previously agreed that there was no additional  
19 compensation needed.

20           If you skip down to item number 3 and 4, those  
21 items are 42 days that are just purely for overruns on  
22 the contract. They are overrun of existing items that  
23 were bid, you know, and we overrun the items, we paid  
24 the unit price.

25           And our feeling was there that we paid based on

1           what the contractor bid. It seemed to us that  
2           certainly the figures that he bid for those units  
3           included compensation for the overhead.

4           So that is where we got 13 days because the 13  
5           days is time that we add on a supplemental agreement  
6           that we negotiated. And we did not resolve the issue  
7           of -- we did not negotiate that supplemental agreement  
8           full and final. We left an opening for the contractor  
9           to come back and pursue further compensation.

10           So that's why we got the 13 days we are looking  
11           at.

12           CHAIRMAN COWGER: Okay. I think that's good  
13           enough. Now let's let the contractor come on back in.  
14           I'm sorry, I think I confused things a little bit  
15           there.

16           MR. SPOFFORD: We will continue with Mr. Molin.

17           MR. MOLIN: My name is Greg Molin, project  
18           manager with S & E. I've been with S & E for about four  
19           years. Prior to that I was with Danus for nine years.  
20           I've been mainly involved with heavy highway, road  
21           building.

22           You would almost have to sort of live the job to  
23           get a taste of what it was all about. This job was  
24           built at night from 9:00 to 5:00, 90 percent of it was,  
25           on I-4, which is probably one of the worst highways



1 over there.

2 When you are working at night like that, first of  
3 all your productivity goes down. Second of all, you  
4 don't have a typical eight-hour working day. In turn  
5 what you have is about a six-and-a-half-hour working  
6 day mainly because your first 45 minutes into the  
7 project you're setting up lane closures and your last  
8 45 minutes you're taking them down. So you've already  
9 been limited to the amount of work you can perform.

10 About three or four weeks into the project we  
11 were into the embankment item, which from the beginning  
12 of the job was slated to add fill material in the  
13 median to bring up the existing four or five-to-one  
14 slope to a ten-to-one slope.

15 What we encountered was instead of adding  
16 material to it we found that the cross sections weren't  
17 correct on the plans, and now we have to take material  
18 out. So we have to add a piece of machinery. Now we  
19 are excavating material, loading it on trucks, hauling  
20 it to a temporary fill site so that we can use the  
21 material further down the road.

22 We end up settling for six days on this for that  
23 first part, and realistically it probably took more  
24 time to do it than just the six-day period. It's  
25 critical activity due to you can't do your asphalt for

1 your posting, you can't do the guardrail. It's like a  
2 critical path, everything is tied in together.

3 Then after that we encountered the extension of  
4 barrier wall which was an additional 962 feet of that,  
5 but before we could do that, we had to remove slope  
6 pavement.

7 And the slope pavement, each one of these bridges  
8 that we had to remove, in order to put this barrier  
9 wall, we were granted 21 days. This again is another  
10 critical item on the project.

11 The difficulty, it's hard to measure because each  
12 time you try to remove this slope paving you have to  
13 set up another lane closure at night, you've lost  
14 productivity. It's not just in one area. You've got  
15 over an 11 or 12-mile stretch is where these changes  
16 came into place.

17 The difficulty there is just on that alone. And  
18 then your crews that are tied in with these people,  
19 because it is somewhat sporadic, you've lost  
20 production, not just on this site, but you can't use  
21 the availability of those crews when you need them on  
22 other sites for S & E.

23 Now the barrier wall follows the same path as  
24 slope pavement removal, which again is not your typical  
25 slip forming. It was all hand-formed work on the

1 barrier wall.

2 And these days were granted, which all ties into  
3 being critical activities for the time pit crews, along  
4 with the other duties they have, inlets, adjustments,  
5 et cetera, on the project.

6 The last one that is in dispute is the 21 days  
7 for the 4600 foot of reset guardrail. This again is a  
8 critical activity because it was a continuous thing  
9 throughout the project where you would be in different  
10 areas, you may want to reset 50 foot, sometimes 15  
11 foot, maybe 300 foot.

12 But to measure the level of difficulty would  
13 be -- first you have to go in remove this, remove the  
14 posts, regrade it, redrive your posts, reset the  
15 asphalt, the posts and the guardrail again so now you  
16 have a threefold operation again. And this all is tied  
17 in with critical path because of the guardrail being  
18 the main driving factor on the project.

19 MR. SPOFFORD: I think you're done with your  
20 initial presentation, and I have a couple of issues  
21 I would like to make sure the Board understands or  
22 appreciates, and Greg may have not brought up or may  
23 have gone by.

24 At any point did the DOT admit you were being  
25 delayed and your progress was being extended as a

6

1 result of these extras?

2 MR. MOLIN: Yes. Well, that's what we negotiated  
3 down. B. J. and I and at that time Dave Vogel were  
4 getting these approved. We negotiated it down.

5 I know a lot of them I would start up, most of  
6 them were probably knocked down by 25 percent actual  
7 time. They were agreed on delays, actual delays. We  
8 needed time to go on further into the project.

9 MR. SPOFFORD: At any time were you able to  
10 demobilize your forces and take your people and put  
11 them on other more productive revenue-producing  
12 activities, other jobs or projects?

13 MR. MOLIN: No. Economically it's not cost  
14 worthy to do something like that because now -- you've  
15 got work, and even though it's intermittent, you can't  
16 afford to move crews over to new projects and back onto  
17 this project when you've lost actually four or five  
18 hours of good crew time when you do something like  
19 that. It's not really cost effective to try to move  
20 crews to another site.

21 MR. SPOFFORD: What was your last day of work on  
22 the project?

23 MR. MOLIN: The 26th of June.

24 MR. SPOFFORD: Do you recall when the final  
25 acceptance notice came out? Do you recall what that

1 date was?

2 MR. MOLIN: The 29th of -- actual acceptance was  
3 the 10th of August.

4 MR. SPOFFORD: Let's turn it over to Doug Ebbers,  
5 who can walk everybody through how the overhead  
6 calculation was arrived at, the source of the figures,  
7 and the fact that -- these are real costs that we have  
8 incurred.

9 MR. EBBERS: My name is Doug Ebbers, president  
10 of S & E Contractors. My role is actually kind of  
11 multifaceted. I was involved with the original  
12 estimate for the project. As president of S & E,  
13 I typically would review all bids, all estimates that  
14 are prepared by our company. And I did so in this  
15 particular job.

16 I've got a rasp in my throat, could I get a glass  
17 of water?

18 (Brief pause)

19 MR. EBBERS: Continuing on, I was involved in the  
20 initial estimate. I had very carefully tracked with  
21 our original estimator the productivity that we  
22 anticipated on the project, the 160-day completion  
23 time that was originally allocated.

24 After we were successful on the project, my role,  
25 although somewhat removed from the project, was still

1 to monitor the job. Probably most important was to  
2 review monthly costs until complete.

3 We very quickly found that this project was not a  
4 very healthy one for us. The project from fairly early  
5 on started to suffer and ultimately the project did end  
6 up losing quite a bit of money.

7 Part of what we have emphasized to DOT all  
8 through our initial presentation of the claims is that  
9 all we tried to receive compensation for is just what  
10 is a fair and equitable reimbursement of extra costs.  
11 We have not tried to go back and certainly make  
12 ourselves whole on the project by any stretch of the  
13 imagination.

14 As Greg had alluded to, it was a very difficult  
15 job, very restricted construction period during the  
16 middle of the night, right smack in the middle of I-4.

17 A lot of the things that we encountered had a  
18 significant impact because in that six and a half hours  
19 that you're limited to work, you are going to get done  
20 whatever you are going to get done in that six and a  
21 half hour period, and then you have to wait until the  
22 following night.

23 During the course of the project there were two  
24 supplemental agreements issued, as mentioned earlier,  
25 one for revising the median shoulders along the side of

1 the road.

2 We were given a grand total of six days. And  
3 that was to redo shoulders I think in approximately 11  
4 miles of road. So it was a very, very minimal amount  
5 of time that was given.

6 Additionally, we were given 13 days for  
7 retrofitting significant amount of concrete barrier  
8 wall. And that was it. We had a total of 19 days that  
9 were added by time extension.

10 In addition to that, we had 25 weather days and  
11 I think a real significant item is we were given 23  
12 days for what were called special events. DOT asked  
13 us to not work over the Thanksgiving holiday period.  
14 There was a major football game at Tampa stadium one  
15 weekend. We were asked not to work during that period.  
16 There was a presidential visit to Tampa one time.  
17 Again we were asked not to work.

18 In total there were 23 days of time extension  
19 granted for what were called special events.

20 Then in the end we negotiated with the DOT this  
21 breakdown that I have seen passed around earlier, a  
22 total of 61 days, working days, which when adjusted to  
23 calendar days actually was 85 calendar days.

24 When you total this up, the project was granted  
25 128 days of time extension. That's an 80 percent

1           overrun. So it started at 160 days and ended up at  
2           288.

3                       So, clearly the project had a significant change  
4           from what it was originally anticipated.

5                       CHAIRMAN COWGER: May I interrupt. I think  
6           I misheard a number. What was that, 128 or 108?

7                       MR. EBBERS: 128 days of total time extension out  
8           of which we were -- by supplemental agreement had only  
9           received payment at unit prices that were already in  
10          the contract for 19 of those days.

11                      So, to truly get reimbursement for our extended  
12          costs it was at the end of the project that we sat down  
13          with Mike Irwin and his staff to negotiate those extra  
14          costs.

15                      I initially met with B. J. Brown and  
16          Sandy Piccirilli with the DOT to negotiate those costs,  
17          wanting to make as a project head, although it was a  
18          very, very difficult one and not a profitable one for  
19          us, nonetheless it was a successful one in many ways.

20                      The relationship with the DOT staff was very  
21          good. We heard a lot of accolades about our people.  
22          The project was subsequently nominated for a special  
23          projects award by DOT. During the course of the job  
24          S & E had come up with a new method of using a concrete  
25          slip form paver to lay the asphalt out for guardrail.



1           There was a lot of upbeat, kind of atta boys for that.

2           The project finished on a positive note. We  
3           didn't want to end the project on a sourer note with a  
4           somewhat bitter dispute over the claims. Our whole  
5           goal when we sat down with the staff was to reach as  
6           fair and equitable number as we could.

7           On that basis we agreed to compromise our days  
8           down to 38 days. Staff said fine, we agree. They paid  
9           us 38 days for maintenance of traffic costs at \$1600  
10          per day, because by contract we had to have a  
11          designated crew that did nothing but MOT all during the  
12          night to make sure we did not have any problems with  
13          traffic, because again we are closing a lane down in a  
14          two-lane expressway.

15          Secondly, we were given 38 days of extended field  
16          costs. There's a breakdown in here where they paid for  
17          our superintendent, our field trailers, and just some  
18          very modest extended field costs.

19          When I very first sat down with DOT staff to  
20          review this same package, the -- almost the first words  
21          out of Mr. Irwin's mouth were with regard to the home  
22          office overhead. He said, Doug, I'm sorry, my hands  
23          are tied. That is not something I can negotiate here  
24          at district level. We have been told by the lawyers  
25          in Tallahassee that we are not to pay any extended

1 overhead costs.

2 He referred to a memo that had been sent down  
3 from general counsel's office to basically all  
4 districts saying thou shall not pay extended overhead.  
5 And if you -- particularly if you mention, what I guess  
6 is a dirty word in the industry, the Eichleay formula,  
7 well, absolutely not, you're not going to be paid.

8 So basically we were shut down at the district  
9 level. Mr. Irwin and his staff had said look, if you  
10 feel you are entitled to it and we are hearing you  
11 telling us that you feel you are, your only recourse  
12 would be to file for arbitration. So that's why we're  
13 here today.

14 I never heard in the course of those discussions  
15 any dispute about the 38 days. That was a compromise  
16 position. And as you can see from supplemental  
17 agreement number 4, that is the number of days that we  
18 were ultimately paid.

19 What I would like to do real quickly is just walk  
20 through how we calculated extended overhead. And we  
21 included in our book -- and Gene, I'm not sure what  
22 page it is -- a breakdown. Your exhibit will be just a  
23 little bit different than mine.

24 MR. MOREFIELD: What is the title on the top?

25 MR. EBBERS: Administrative costs computation.

1                   CHAIRMAN COWGER: The number in the lower  
2 right-hand corner of that page, 4,625,518?

3                   MR. EBBERS: Yes.

4                   CHAIRMAN COWGER: That puts us all on the same  
5 page, is what I'm trying to do.

6                   MR. EBBERS: I think it's probably easier to  
7 start at the bottom of the page and look at the  
8 footnotes. In fact, going way to the bottom on number  
9 3, you will see total home office overhead, see page 22  
10 of audited financial statements.

11                   In your booklet, the last page should be page 22.

12                   CHAIRMAN COWGER: Okay.

13                   MR. EBBERS: And in the package that was  
14 originally submitted to DOT, it's the same page but our  
15 auditors have prepared a separate recap as well that  
16 says home office overhead at the top.

17                   MR. ROEBUCK: Same sheet, just an excerpt from  
18 your statement, right?

19                   MR. EBBERS: Right. That's page 22. In any  
20 event, we are referring to the same sheet, same  
21 breakdown. That 4,625,000 is the number that we used  
22 for purposes of a computation.

23                   The reference earlier to, well, you know, how do  
24 you track it for a specific job, overhead is tracked  
25 company-wide. I'm not aware of probably any company

1 that would track overhead on a job basis. It's just  
2 simply not done.

3 MR. ROEBUCK: Your \$30 million worth of revenue,  
4 more or less, you've got about a 15 percent item in  
5 there. That's probably what you are applying in your  
6 bid items?

7 MR. EBBERS: Yes, sir. If you calculate it  
8 exactly, it's 14.6 percent. We run roughly 15 percent  
9 overhead.

10 MR. ROEBUCK: George mentioned you had about 15  
11 percent you were crediting.

12 MR. EBBERS: Correct, on some of the unit price  
13 items. So that's really one of the key components of  
14 the computation is the 4 million, 6 overhead.

15 Stepping up to footnote one, the project was  
16 slated for 160 days. You divide it by 365 calendar  
17 days. Therefore, it was 43 percent of a year, 43.8,  
18 which times our sales for that year, proportionate  
19 period, we would have completed \$13,800,000 worth of  
20 sales during that period of time.

21 If you then step back up -- I will skip by number  
22 2 and skip up to the top of the page. Walk through the  
23 computation. Basically what you do is take the  
24 original contract price of 2,700,000, divide it by the  
25 total billings we would have done during that same

1 period, times what overhead was to be carried during  
2 that 160 days.

3 This project had \$401,000 of overhead. A quick  
4 check back on that 400,000 is to divide it by the 2  
5 million, 7 price. You will find again it's right at 15  
6 percent.

7 MR. ROEBUCK: Close to 15.

8 MR. EBBERS: Fifteen percent overhead. The  
9 formula works. People like to throw stones at  
10 Eichleay. There's other methods of calculating --

11 MR. ROEBUCK: You don't have to give him credit  
12 on this sheet, do you? He's the one that created it.

13 MR. EBBERS: The bottom line is the formula does  
14 actually work. You can cross check it, look at it both  
15 ways.

16 Ultimately what it yields is a per-day overhead  
17 of \$3,488. Very simply we have taken that daily cost  
18 times the 38 days and our initial claim was for  
19 \$132,544.

20 I heard Mr. Irwin mention earlier that the DOT is  
21 trying to say somehow that, well, we had some overhead  
22 built into our other unit prices. That just simply is  
23 not the case.

24 First of all, we compromised on the total days  
25 from 61 days down to 38 in the spirit of reaching a

1 quick settlement with DOT. We had prepared those  
2 documents before going into the meeting only to find  
3 out that the district was not even going to consider  
4 paying extended overhead, and that we would have to  
5 come back up here. Hindsight being what it is, I wish  
6 I hadn't offered to compromise.

7 MR. ROEBUCK: Spoke too quickly.

8 MR. EBBERS: I did. I should be up here asking  
9 for 61 days of extended overhead.

10 In using that as kind of a frontal point, if you  
11 take our actual extended time times the days, and even  
12 making some allocation -- not making some, but making a  
13 full allocation for any overhead that would be built  
14 into unit prices, in theory -- and I've run a quick  
15 calculation of that. We have 22 days that we passed  
16 on, that we offered to give up.

17 So it's roughly 77,000 less a maximum overhead  
18 built into those unit prices of about 12,000.  
19 Basically we have already compromised on \$65,000 worth  
20 of extended costs.

21 So, truly we are here today just to get still  
22 the compromise we were trying to get last fall.  
23 I met with Mr. Irwin initially in October and then  
24 subsequently in March. March is when we concluded the  
25 other items, the direct costs that we had, and then

1           shortly on the heels of that we went ahead and filed  
2           for arbitration.

3           MR. SPOFFORD: A few things that I want to touch  
4           on. Based on my involvement with S & E, I met with  
5           sureties, I met with lenders, I have been with the tax  
6           people, whether it's IRS or State of Florida. And  
7           without fail we always end up talking about overhead G  
8           and A, what goes into it, is it accurate.

9           These are real costs. People like to say, well,  
10          it's a formula, it doesn't track actual costs. Well,  
11          that's horse apples because we verified it. The tax  
12          people have been all over it. It's been audited by  
13          CPAs. It's a formal sealed audit. Our sureties rely  
14          on the information, our lenders rely on it. The  
15          \$401,000 allocated to this job is accurate.

16          We have to rely on this type of formula to bid.  
17          We have shown over the past 11 years that this is a  
18          valid way for us to track our general and  
19          administrative costs.

20          So we know that's an accurate way to go about it.  
21          It's a real cost. It's not something that we  
22          fabricated. This is the only way the contractors can  
23          recover their G and A costs. It's the only way I can  
24          allocate it to a project like this. It's a real cost,  
25          a real number, it's been verified.

1           MR. EBBERS: For our closing point, too, I think  
2           that people who don't have to live our side of seeing  
3           overhead costs go on day after day and when projects  
4           are delayed not being able to cover those costs always  
5           say, well, we don't understand, explain that to us.  
6           How are you losing overhead?

7           MR. ROEBUCK: Why didn't you quit paying your  
8           insurance.

9           MR. EBBERS: Right. We still paid your \$2.7  
10          million contract price. And from a layman's  
11          perspective, the best analogy I can use is to refer to  
12          someone's salary. If for sake of discussion you're  
13          told by an employer I'm going to pay you \$800 a week,  
14          that's a salary of \$41,600.

15          You say fine, you accept that. You reasonably  
16          expect that for the next 52 weeks or one year you're  
17          going to get \$41,600, that's your salary.

18          Come to find out there's -- it's not a 12-month  
19          period, it's 14 months. And you say, well, look, I'm  
20          not getting paid what I was originally bargaining for.  
21          That salary is not extended over a 14-month period.  
22          And your employer said that's the salary, that's the  
23          price you originally bargained for.

24          Your costs continue to go on. And basically we  
25          have been paid, yes, the same contract dollars, but



1           it's over 80 percent more time. And if you can't shift  
2           those people to other income producing activities, that  
3           overhead is unabsorbed, which is the key word that  
4           Eichleay uses. So truly you've lost the ability to  
5           cover that fixed cost.

6                   CHAIRMAN COWGER: You know, I think the Board  
7           understands what you're saying. I think we can move  
8           on.

9                   Let me ask you one question. In explaining the  
10          sheet that we were looking at, one thing that I didn't  
11          pick up on was in footnote number 1 you've got a figure  
12          of 31,588,000, which I believe you said was the  
13          revenue, total revenue. Now where did that number come  
14          from?

15                   MR. EBBERS: Also from the audited financial  
16          statements. It would be page 19 of the audited  
17          statement. Our statements are a consolidation of three  
18          companies, S & E Contractors, Sterling Equipment and  
19          Foresight. Page 19 shows a breakdown of the three.

20                   CHAIRMAN COWGER: I see. Now these figures are  
21          1991, right?

22                   MR. EBBERS: Yes, sir, that's correct.

23                   CHAIRMAN COWGER: Okay. Anybody have any further  
24          questions before we let DOT begin their rebuttal?

25                   MR. MOREFIELD: No.

1 MR. ROEBUCK: No.

2 CHAIRMAN COWGER: Okay.

3 MR. DAVIDSON: I would like to clear up some  
4 minor matter before we go on to the major issue of  
5 entitlement.

6 I've noticed on their audited statement that they  
7 have included a number of items that are traditionally  
8 totally disallowed under the Eichleay computation.

9 Eichleay has been beat about since 1960 when  
10 Eichleay got the contract to install a missile base in  
11 Pennsylvania, which is where the whole thing came from.

12 As always interpreted by the Board of Contract  
13 Appeals excluded allowances for professional fees,  
14 contributions, travel and entertainment, bad debt,  
15 interest expenses, and they don't allow anybody to  
16 throw a miscellaneous category at them.

17 So all those things have got to be deducted from  
18 their formula.

19 Secondly, with all respect to Mr. Ebbers, and  
20 I understand his difficulties with this job. I think  
21 the relationship he established with the Department's  
22 personnel is as he represented, a very friendly and  
23 cooperative relationship.

24 However for him to state that it's not true that  
25 he put his office overhead costs into his bid item is a

1 business ingenious because any contractor doesn't  
2 include their home and field office overhead in their  
3 bid item.

4 If you don't put it into your bid, you don't get  
5 it back out of your bid. For him to say he didn't put  
6 it into his bid is to say he never intended to recover  
7 it, which I think Mr. Ebbers will certainly tell you he  
8 intended to recover his home office overhead, ergo, it  
9 must have been in his bid price items.

10 Now I'm going to turn it over to Mr. Irwin right  
11 now and let Mr. Irwin address some of the matters that  
12 he's more capable of addressing. Then I will address  
13 the Eichleay entitlement as the case law has  
14 interpreted it.

15 MR. SPOFFORD: Since Mr. Davidson has argued some  
16 law, I would like to address that if I may.

17 CHAIRMAN COWGER: Okay.

18 MR. SPOFFORD: My point is Mr. Davidson stated  
19 the items included in our G and A expenses are not  
20 allowed by the Eichleay formula. That's incorrect.

21 The Eichleay decision was decided by a Board of  
22 Contract Appeals. The Board of Contract Appeals is  
23 governed by specific statutes, Federal regulations and  
24 those sort of things, the Department of Defense  
25 circulars.

1           Those are specific Federal statutes. Those  
2           statutes, there is a specific statute that says these  
3           are recoverable overhead items, anything other than  
4           those are not recoverable. Those are incorporated in  
5           every Federal contract. That's not part of our  
6           contract here. We are not bound by those CFRs or  
7           Department of Defense regulations.

11           The State of Florida Court of Appeals has said  
8           Eichleay is good law, Eichleay is what governs  
9           contractors in Florida. And there is no set list of  
10           allowable overhead items.

11           If you ask ten different CPAs you will probably  
12           get ten different answers on what is allowable G and A.  
13           Every auditor, CPA, surety, lender, every one of them  
14           has agreed these are acceptable G and A expenses. This  
15           is what we rely on to run our business. These are  
16           acceptable G and A expenses.

17           The second item Mr. Davidson brought up -- and  
18           maybe Mr. Ebbers ought to address this. We didn't say  
19           home office overhead was not included in our bid.

20           MR. ROEBUCK: You didn't say that. That barrier  
21           wall overhead couldn't carry the whole job.

22           MR. SPOFFORD: Exactly. The overhead definitely  
23           was not in the compromise figures that we arrived at.

24           MR. ROEBUCK: Didn't you reduce it by some of  
25

1           those items, by 15 percent or so?

2           MR. SPOFFORD: Yes. If the board understands  
3           that --

4           MR. ROEBUCK: Did you get that, Gene?

5           CHAIRMAN COWGER: Let's say that one more time.  
6           The relationship between allocating overhead costs to  
7           work that was in the supplemental agreement by unit  
8           prices.

9           MR. SPOFFORD: The best way to explain that, if  
10          you take an example where you have a hundred items to  
11          be performed on a project, a hundred different bid  
12          items, each one when you bid the job bears its share of  
13          home office overhead.

14          Like Mr. Davidson said, you have to do that if  
15          you're going to track your costs. You have some leeway  
16          in there, but you have to allocate it amongst those  
17          items.

18          The only way you can recover that overhead is if  
19          you can perform as many of those items as possible each  
20          day.

21          Say we are planning on doing 100 items. The DOT  
22          suspends operation on all but one. That one item is a  
23          flagman who creates a revenue stream of \$50 a day on a  
24          \$2 million project, \$3 million project.

25          Now we have revenue coming in at the whopping sum

1 of \$50 a day and there may be some home office overhead  
2 on that \$50 a day. I'll be damned if we are recovering  
3 our home office overhead on those 99 other items that  
4 aren't going forward.

5 Granted it wasn't a hundred percent suspension of  
6 work in this situation. Work was ongoing. We had one  
7 flagman out there. He was getting his small share of  
8 overhead for the company. We are not recovering our  
9 true costs until all those items are back into  
10 operation.

11 That's essentially what happened here. Granted  
12 it wasn't one flagman, but by extending the critical  
13 path work out, we weren't able to perform all the other  
14 items, the other 100 items every day like we planned  
15 on. So that's why these few items they paid us on  
16 can't recover 100 percent of our overhead for the time  
17 that work was done.

18 Regardless of that, we have already recognized  
19 that hey, to the extent there is a potential for double  
20 payment there, it's difficult to identify exact  
21 dollars. If there's a potential there, DOT, we are  
22 going to give you the credit for that. We've already  
23 done that. That's why our numbers have been changed.

24 MR. DAVIDSON: Very briefly, George and I seem to  
25 part on the issue of law here. If you read any of the

1 Federal decisions that deal with Eichleay, they all  
2 disallow exactly what I told you they disallow. The  
3 Federal regulations that govern Eichleay awards and say  
4 you can or cannot have this, all disallow what I told  
5 you.

6 The State courts have not specifically addressed  
7 that issue but they have adopted the Federal decisions  
8 that give rise to Eichleay. Those Federal decisions  
9 are governed by those same Federal regulations and they  
10 have found them applicable. If you buy Eichleay at all  
11 you must buy it lock, stock and barrel, not just the  
12 parts that you like.

13 MR. ROEBUCK: We continue using the word, but  
14 Mike, isn't it true that we are using a good proven  
15 accounting principle? Whoever was the first --

16 MR. DAVIDSON: No, sir, Eichleay is a very  
17 abusive accounting principle. It assumes certain  
18 things on a job that are just not necessarily so. It  
19 assumes that overhead is recovered on a uniform month  
20 to month, same rate basis. You have to know on a job  
21 you don't get paid the same every month. You get paid  
22 for how much you work in a month. Eichleay assumes you  
23 recover the same amount each month regardless of work  
24 performed.

25 CHAIRMAN COWGER: I think we need to let

1 Mike Irwin go ahead now. DOT really hasn't had the  
2 opportunity to say much. Let's kind of stay on that  
3 side of the table.

4 MR. IRWIN: Gene, just to let you know a little  
5 bit of background, the project, you know, as George  
6 stated, we are not -- we have no disagreement as far as  
7 the work that was done, you know, and I think we've had  
8 several conversations amongst ourselves and with S & E  
9 about how well they have performed on this job.

10 We were very pleased. We really wanted to  
11 commend them for doing a good job. It was a difficult  
12 job, working at night on the interstate. It was a very  
13 difficult job. I was out there several times myself,  
14 as most of the people in here remember.

15 Anyway, getting to the negotiations, we had  
16 received a claim for about 300,000 for, you know,  
17 several of these different items. We were in the  
18 process of sitting down to negotiate.

19 Looking at, you know, the items, the 38 days  
20 from where we got the 38 days from the standpoint of  
21 compensable was -- I just wanted to make you understand  
22 that when we were negotiating the 38 days, we had, as  
23 Doug said, we had already resolved, so to speak, in our  
24 negotiations, the Eichleay or the home office overhead  
25 issue because at that time we were under the direction



1 to not pay home office overhead under Eichleay or home  
2 office overhead at all at that time. We were under  
3 that direction from the central office.

4 So, he was correct in what he said, that we  
5 were -- basically our hands at the district were tied,  
6 as far as negotiating something on the Eichleay in the  
7 home office.

8 When we were looking at the 38 days we weren't  
9 even thinking about compensable time for home office  
10 overhead. We were at a point of we were trying to  
11 negotiate a fair and equitable settlement of a claim  
12 that was submitted for additional work and impacts for  
13 additional work on the other items.

14 You know, basically the breakdown that the  
15 contractor had that I held up before basically details  
16 the time that we were discussing.

17 So in relation to this arbitration here, and we  
18 are talking about home office overhead, if we were to  
19 look at that now, we would look at, you know, the 85  
20 days comes to 61 workdays.

21 To restate a little more detail what I said  
22 before, the items 3 and 4 for the most part, the 42  
23 days and for the most of the 61 days that are claimed  
24 here, they are based on overruns.

25 To use Doug's same example, you know, the

1           understanding and the standpoint of the Department  
2           would be if you hired -- the example of the paycheck,  
3           if you hired somebody and said I'm going to give you  
4           \$800 a month for a year and then you extended it 14  
5           months, well, the Department feels like we came back  
6           and said S & E, we are going to extend it to 14  
7           months, but we are going to pay you \$800 a month for  
8           these two months we are extending it.

9                        We don't feel the Department extended the time  
10           without extending the money because we did pay,  
11           especially with these 42 days here. We paid all the  
12           overruns per the contract unit price that the  
13           contractor had bid.

14                       And on another sideline thing, on the same issue  
15           as far as overruns go, you know, there was a point  
16           about midway through the contract when the Department  
17           decided to let a subsequent project that would go from  
18           where this project ended, go all the way to the Polk  
19           County line.

20                       And we were looking at putting the plans  
21           together. We were approached by a couple of  
22           representatives from S & E and made the offer --  
23           I don't think it was ever in writing, I think it was  
24           just a verbal offer -- that they would like to extend  
25           all of the contract unit prices by probably several

13 1 hundred percent and just negotiate that to do the  
2 whole -- all the way to the Polk County line.

3 Certainly we are not making a major argument out  
4 of that because I don't even have that in writing. Our  
5 understanding was if the contractor could absorb  
6 overrunning the contract by probably -- the whole  
7 contract by probably 150 to 200 percent, then this  
8 overrun that we added here didn't affect him. That was  
9 just another thing that went into our thinking.

10 The -- so that really resolves in our mind 42 of  
11 the 61 days that would not be compensable for home  
12 office overhead, recovering costs for home office  
13 overhead under any method because we felt like it was  
14 recovered under the unit prices that were bid.

15 Then going back up to item number 1, again that  
16 was the grading and excavation of the median. One  
17 thing that I think, you know, at least I think that  
18 Greg might have stated, I don't know if it was  
19 incorrect or maybe my thinking is wrong, but my  
20 understanding was he said it was 11 miles that had to  
21 be regraded, but from what I understood, there was only  
22 this item of six days and this item that we negotiated  
23 was for only about three or three and a half miles of  
24 the job that had to be regraded.

25 It wasn't -- I wanted you to have a correct

1           understanding.  It wasn't that we regraded 11 miles,  
2           because six days certainly wouldn't be enough to  
3           regrade 11 miles.  It was only about three, three and a  
4           half miles.  We felt six days was more than adequate  
5           for that.

6                     And I think at the time that S & E agreed to  
7           that, too.  That's why they signed that supplemental  
8           agreement full and final and did not reserve the right  
9           to come back and ask later for more recovery of more  
10          costs.  I think, you know, that's a key point for  
11          that -- at least this six days, that we do have a  
12          signed contract with, you know -- executed with S & E  
13          that says they would not ask for the costs that they're  
14          asking for now.

15                    Then that really leads us to the 13 days, that as  
16          far as the additional work that was done, that 13 days  
17          we did negotiate to do the work.  We felt like, you  
18          know, we did pay, you know, a good price to have this  
19          work done.

20                    What we are talking about, to put it so that you  
21          understand the work we are talking about, on this  
22          project, what was the total project amount --

23                    MR. SPOFFORD:  2.8 million.

24                    MR. IRWIN:  We are talking about \$17,000 worth  
25          of work as far as the addition, what we added to the

1 contract. We are talking about, in this supplemental  
2 agreement, \$17,000 worth of work on a \$2.8 million job.  
3 We are not talking about a major change here that  
4 resulted in these 13 additional days. We feel like the  
5 13 days were adequate. That is something we did  
6 negotiate.

7 So we thought it was adequate. We paid. We  
8 realized at the time that Doug didn't accept the 17,000  
9 as full and final for that work. But it needed to be  
10 done, so we negotiated that price and pursued it.

11 That's where -- when I state the 13 days, that's  
12 where I was really coming from. We feel like our --  
13 the thinking on home office overhead, you know,  
14 personally my thinking is that if, you know, the  
15 contractor is damaged and there's proven damages, then  
16 he should be able to recover those costs.

17 And that's one of the, I guess one of the  
18 problems that we had here in looking at this for  
19 entitlement or whatever you want to call it, if the  
20 contractor was damaged.

21 And again, our feeling was we did extend the  
22 contract, but we feel like we paid the contractor  
23 adequately and well for the extension and the change  
24 that we did. And the only thing that would really be  
25 even left to discuss right now would be the 13 days on

1 the slope paving, on the 17,000 that we negotiated as  
2 far as what is not tied up in the way of a loose end.

3 And we feel like the -- as far as the -- that's  
4 the reason that we feel like the home office would not  
5 be recoverable. We don't see the damage there from a  
6 real sense standpoint.

7 So that really leads us into Eichleay because as  
8 far as what we feel like would be entitled in the way  
9 of damages, as I understand it, that's one of the  
10 things that Eichleay would assume. This assumption  
11 that Eichleay makes is that when the project extends,  
12 the home office is damaged regardless of what happens  
13 and the other work and earnings.

14 That's why I asked Mike to be here because he  
15 knows more about, from the Department's standpoint of  
16 where we're coming from on the Eichleay.

17 Really, that's all I have to say about our  
18 position.

19 CHAIRMAN COWGER: Before we move to that, let's  
20 go over this sheet we were just looking at a minute,  
21 this extra work chart. I'm looking at the one that's  
22 in Exhibit No. 2, Tab 3, or Exhibit 3. That's what you  
23 just went over, Mike?

24 MR. IRWIN: Yes, sir.

25 CHAIRMAN COWGER: Just so I understand, now,

1 item number 1, grading and excavation was covered by  
2 supplemental agreement.

3 MR. IRWIN: Yes, sir.

4 CHAIRMAN COWGER: The contractor there put no  
5 disclaimer in the supplemental agreement.

6 MR. IRWIN: That's correct.

7 CHAIRMAN COWGER: Item number 2 was a  
8 supplemental agreement. There was a disclaimer in that  
9 one. The work covered there, it's a little hard to  
10 read the supplemental agreement and fully understand  
11 what happened, but the work covered there basically had  
12 nothing to do with the concrete barrier wall itself, it  
13 had to do with modifications to the existing slope  
14 pavement and all that had to be made to accommodate --

15 MR. IRWIN: The slope paving was in conflict with  
16 the barrier wall. This is all handwork, very labor  
17 intensive-type work.

18 CHAIRMAN COWGER: Item number 3, overrun on  
19 concrete barrier, number 4, overrun on reset guardrail.  
20 Those are not covered by any document anywhere other  
21 than in your estimate. Those are strictly overruns?

22 MR. IRWIN: Yes, sir.

23 CHAIRMAN COWGER: Just wanted to be sure we  
24 understood that.

25 MR. DAVIDSON: I would like to draw the panel's

1 attention to one additional item. The reservations --  
2 and this is significant -- the reservations in a couple  
3 of supplemental agreements are wedded to Article 5-12  
4 of the Standard Specifications.

5 I will read to you what it says, it's uniform  
6 where there are so-called reservations. "Contractor  
7 takes exception to the adjustments of the contract  
8 made by the engineer but agrees to perform the work,  
9 accept compensation determined herein by the engineer  
10 without prejudice to any claim which the contractor  
11 may submit pursuant to Article 5-12 of the Standard  
12 Specifications."

13 If you read Article 5-12 of the Standard  
14 Specifications, it addresses compensation for work and  
15 materials. It says nothing about overhead. The  
16 contractor has made no reservation of rights to claim  
17 for overhead by that reservation.

18 CHAIRMAN COWGER: We are not going to listen to  
19 that. The Board is not going to listen to that kind of  
20 argument. Now, if you all want to sit here and turn  
21 this into a court of law, fine. We are not going to  
22 listen to that kind of argument. We will go on.

23 MR. DAVIDSON: Fine.

24 MR. MOREFIELD: On the 42 days, does the  
25 contractor agree that they were paid the unit price



1           that they bid for those overruns, and did that include  
2           your overhead for the units?

3           MR. ROEBUCK: On the barrier wall only.

4           MR. MOREFIELD: Barrier wall and guardrail, for  
5           the 42 days.

6           MR. EBBERS: If I could, those overruns in time  
7           were covered by supplemental agreement number 4 wherein  
8           we specifically reserved our right to get our home  
9           office --

10          MR. MOREFIELD: That's not what I'm asking. Was  
11          your overhead included in the unit price you were paid  
12          for that amount, that overrun, the original contract  
13          amount?

14          MR. EBBERS: In those unit prices, yes.

15          MR. MOREFIELD: Did you back that out?

16          MR. SPOFFORD: Yes, that's where the 12,000 --

17          MR. ROEBUCK: The 12,000, whatever that was.

18          MR. MOREFIELD: I'm trying to get at what was it  
19          that you backed out. You backed out your overhead --

20          MR. ROEBUCK: Some barrier walls --

21          MR. MOREFIELD: Do you have any calculations of  
22          how you backed that out?

23          MR. SPOFFORD: The 15 percent.

24          MR. EBBERS: To quickly put that into

25          perspective, I just ran those numbers out on those two

1 items, we did \$71,000 of additional work, quantity  
2 overrun work, via those two items, plus the 17,000 that  
3 Mike Irwin referred to. So we did \$88,000 of overrun  
4 work, which is 3.2 percent of the contract price. But  
5 the time went over 80 percent.

6 And just to put it in perspective, it's back to  
7 George's analogy of getting paid \$50 a day for a  
8 flagman. Yes, we had overhead built in, but in  
9 proportion of the time, it didn't begin to cover home  
10 office overhead.

11 MR. ROEBUCK: That 80 odd thousand dollars, the  
12 15 percent being about 12, that's the 12 you took off  
13 your initial claim to get it down to 120, more or less?

14 MR. EBBERS: Yes, sir.

15 MR. SPOFFORD: There's one thing, I think, that  
16 bears emphasizing that Mr. Irwin raised. He stated  
17 that S & E, and I don't know if this happened or not,  
18 but I'm relying on him telling the truth, that some  
19 S & E employees or personnel contacted him and said  
20 hey, let's extend 100 percent of the items out for 100  
21 or 200 percent.

22 Because someone made that offer, the fact that  
23 they extended or overran one or two items means we  
24 should accept the overhead we got for those one or two  
25 items. Well, that makes our point. Had they offered

1 to extend all of the bid items, we would have gotten  
2 100 percent of our overhead. They only extended one or  
3 two items. We didn't get our overhead on the rest of  
4 them.

5 CHAIRMAN COWGER: I think the Board understands  
6 that. Let's let the DOT talk. I think you are ready  
7 to talk specifically about Eichleay, aren't you?

8 MR. DAVIDSON: Yes, sir.

9 CHAIRMAN COWGER: Can we take about a two-minute  
10 break.

11 (Short recess)

12 MR. DAVIDSON: I will discuss the application of  
13 the Eichleay formula for a moment. It's the Eichleay  
14 formula for which the contractor is seeking recovery  
15 for its home office overhead. It's not announced any  
16 other to recover home office overhead, such as the  
17 direct cost method, the Hudson formula, the Alleghaney  
18 formula, the Cardalette formula or any other direct  
19 formula for acquiring home office overhead. They've  
20 devoted themselves exclusively to Eichleay, so I think  
21 we ought to talk about Eichleay.

22 One of the things you have to ascertain before  
23 you apply any formula is what really happened because  
24 the formulas are artificial assumptions that are  
25 engaged in the absence of verifiable information.

1           That's their purpose.

2                     We will agree that trying to figure out just what  
3           day, what secretary worked on what job in support of  
4           the field operations when you have a multiple number of  
5           jobs going on is a very difficult if not impossible  
6           task to perform. That's why these artificial formulas  
7           are employed. In the application of formulas, you  
8           can't overlook the realities of a job.

9                     One of the things the contractor presumed in his  
10          argument is that it was working only on those items  
11          that it wanted overhead for during the period of time  
12          in question and was not working on any other items that  
13          would have earned home office overhead on those other  
14          items.

15                    We have heard no testimony from them that on  
16          these days in question we worked only on the barrier  
17          walls, only on this, only on that, which is part of our  
18          claim, and we weren't working on some other job to make  
19          our overhead on that portion of the job.

20                    If you look at the construction records you will  
21          find they were. They are asking, inadvertently  
22          perhaps, amounts to a double dip in overhead on these  
23          items because they were working elsewhere on the job to  
24          earn that same overhead they're talking about in their  
25          contract.

1 More to the Eichleay recovery method itself.  
2 There are a legion of cases on the Eichleay formula  
3 that have come out but they all stayed pretty close to  
4 one substantial proposition of law. That is that  
5 Eichleay is meant to substitute for the contractor's  
6 inability to earn its overhead.

7 And what is meant by that is when the owner on  
8 the job comes out and says to the contractor stop work,  
9 we've got a problem here and I'm suspending the work,  
10 but I can't tell you how long it's going to last,  
11 I can't tell you when it will start back up.

12 I can't let you release your men and machinery to  
13 other jobs to go earn your money over there, I'm just  
14 keeping you here for an indefinite period of time, then  
15 Eichleay is a formula that can be used to cover the  
16 contractor's overhead expenses for the time the owner  
17 kept him idle and unable to earn its overhead as it  
18 earns its direct costs by performing work on the job.

19 It's also been used in situations where there  
20 has been a series of minor delays or a series of  
21 disruptions so constant, so complete in the application  
22 of their -- of the consequences to the job that they  
23 amount to the same thing as the owner coming out and  
24 saying stop work and I'll let you know when I get  
25 around to it when you can come back. Don't take your

1 men and equipment elsewhere, don't go earn overhead  
2 elsewhere, just stay here and remain idle.

3 So all the cases that have dealt with Eichleay  
4 have dealt with an outright suspension of work for an  
5 indefinite period of time, during which the contractor  
6 couldn't go elsewhere to earn overhead, or a series of  
7 disruptions that were one after the other with such  
8 frequency that they amounted to the same thing as a  
9 total suspension of the work.

10 Absent those circumstances, the Eichleay formula  
11 has never been recognized to apply in any proceeding,  
12 in any board or court of law. That's what we're  
13 dealing with here today. The contractor has chosen  
14 that formula to advance its claim. The Department did  
15 not choose that formula for the contract.

16 So, the first element that you have to examine  
17 here really when you think about applying Eichleay as  
18 compared to some other method of acquiring your home  
19 overhead costs is was there a suspension of work by the  
20 owner or was there a series of delays caused by the  
21 owner that amounted to a total suspension of the work.

22 I probably shouldn't use the word delay. Was  
23 there a series of disruptions that the owner caused  
24 which basically amounted to the owner comes up and says  
25 you can't work here today, you can't work there, can't

1 work there. Without those three areas to work in, you  
2 can't work in the fourth one either.

3 The idea being that the contractor has been  
4 prevented from working so that it can't earn its  
5 overhead. That's the only set of circumstances  
6 Eichleay has ever applied. That's another reason the  
7 Department has difficulty applying it in this case.

8 In this case there was no suspension of the work,  
9 no series of disruptions to the work that amounted to a  
10 total suspension where the contractor was unable to  
11 earn its overhead.

12 We think through the pay items that it did earn  
13 and perform that included the overhead. They  
14 eventually earned all the overhead they projected to  
15 earn on this job, plus the overhead they expected to  
16 earn while the additional work was being done.

17 So, while we appreciate the good work that they  
18 did and we appreciate their willingness to negotiate  
19 with us on all these items that are here before the  
20 Board today and we have already resolved at a different  
21 level, the problem the Department is having is with all  
22 respect to the contractor, they want to use Eichleay in  
23 a way that every court and every Board has said you  
24 can't use Eichleay.

25 Now I'm just going to read to you a couple of

1 paragraphs of one of the lead decisions on Eichleay so  
2 you understand I'm not just making all this up. The  
3 case is called CBC Enterprises, Incorporated versus  
4 United States, a case out of the U.S. State -- United  
5 States Claims Court, issued in September 1991.

6 It was reviewed by the Federal Appeals Court for  
7 the Washington, D.C. circuit. And it was reviewed by  
8 them in October of 1992. And they upheld the Court of  
9 Claims decision.

10 What the Court of Claims decision stated in  
11 pertinent part here is basically this --

12 MR. SPOFFORD: Can I have a copy of that?

13 MR. DAVIDSON: Sure. I will give it to you in  
14 just a minute.

15 They started with the review of the two lead  
16 cases. One of the lead cases, the Capital Electric  
17 case that breathed Eichleay into life when it was just  
18 about to die a number of years ago.

19 It said, "Both before and after Capital Electric,  
20 various Boards of Contract Appeals have recognized that  
21 in certain circumstances the use of Eichleay is  
22 appropriate to calculate home office overhead damages,  
23 equitable adjustments resulting from a suspension of  
24 work," and I emphasize the word "suspension."

25 However, "The ASBCA," -- that's the Armed



1 Services Board of Contract Appeals -- "has warned that  
2 the application of the Eichleay formula for delays  
3 involving a suspension of work is not automatic. The  
4 contractor must show that it has, in fact, suffered  
5 some damage as a result of the delays.

6 "The defendant contends the Eichleay formula is  
7 inappropriate for calculating home office overhead  
8 damages, whereas under the present circumstances  
9 extension of the contract performance period is due to  
10 additional work."

11 Well, that's what we have here. We have an  
12 extension of the contract period due to additional  
13 work.

14 They go on further to say, "In defendant's view  
15 when the contract period is extended due to additional  
16 work rather than a suspension, the contractor is  
17 adequately compensated by receiving a percentage of  
18 overhead markup on direct costs added to the contract  
19 by the contract modification.

20 "Plaintiff on the other hand argues that the  
21 Capital Electric and Eichleay both recognize that the  
22 Eichleay formula is applicable to extended home office  
23 overhead for periods of contract extensions as well as  
24 suspension."

25 Now that's what the contractor is doing here

1           today. They're saying the Eichleay formula should be  
2           used for periods of contract extension due to  
3           additional work as well as for periods of suspension.

4                       Now here is what the court went and said. "For  
5           the following reasons the court finds plaintiff is not  
6           entitled as a matter of law to compensation for  
7           extended home office overhead due to additional work by  
8           using the Eichleay formula."

9                       They rejected the Eichleay formula and said you  
10          can't use it for compensation due to additional work on  
11          an extended contract.

12                      They said this, "When a contract period is  
13          extended for additional work rather than a suspension  
14          of work, home office overhead generally can be  
15          calculated more accurately by applying a percentage  
16          overhead markup to direct costs rather than by use of  
17          the Eichleay formula.

18                      "This is so because by definition a suspension of  
19          work means that little or no work is being performed  
20          with a corresponding decrease in direct costs incurred,  
21          thus applying a percentage overhead markup to direct  
22          costs would produce little or no overhead and would not  
23          adequately compensate the contractor for overhead costs  
24          incurred.

25                      "On the other hand, when changes are made to

1           add work" -- and that's what we did in this work --  
2           "and the performance period is extended solely to  
3           accommodate the extra work" -- and that's what we  
4           did -- "as in the present situation there is an ongoing  
5           level of work which usually produces sufficient  
6           direct costs such that the contractor is adequately  
7           compensated by applying a percentage of overhead markup  
8           to direct costs."

9                         So, this court, U.S. Court of Claims, under  
10           circumstances indistinguishable from those here today  
11           in principle, that is a situation where a contractor  
12           wants to use Eichleay to recover overhead for a period  
13           of time not caused by a suspension of work, but for a  
14           period of time caused by an addition of work to the  
15           contract, they came before the court, and the court  
16           flatly rejected their claim and said you cannot use  
17           Eichleay.

18                         That decision was reviewed by the U.S. Court --  
19           U.S. Circuit Court of Appeals for the Washington, D.C.  
20           district.

21                         They said -- let me get to it here. Here we go.  
22           In that case, by the way, there was an amicus curiae  
23           brief submitted, an amicus curiae brief is a friend of  
24           the court brief submitted by a party that's not  
25           involved in the litigation but has a general interest

1 in the subject matter.

2 They said this, "CBC and amicus curiae argue that  
3 the use of Eichleay should be permitted in any instance  
4 in which a contract modification results in an erosion  
5 of direct costs because percentage markup of the  
6 decreased additional costs will not allocate a fair  
7 proportion of home office overhead to the contract.

8 "This desire to extend availability of the  
9 Eichleay formula to pure contract extensions" -- that's  
10 what we have here, folks, a pure contract extension --  
11 "would likely transform use of the formula from an  
12 exception to a rule making the formula applicable to  
13 nearly every contract."

14 In our view, CBC seeks a drastic shift in the  
15 circumstances under which the Eichleay formula has been  
16 available. We decline the invitation to stand  
17 availability of the Eichleay formula on its head.

18 Eichleay requires at least some element of  
19 uncertainty arising from suspension, disruption or  
20 delay of contract performance, such delays are sporadic  
21 and of delay and uncertain duration. It's impractical  
22 for the contractor to take on other work during these  
23 delays.

24 And what they said here in affirming the Court of  
25 Claims decision was that when you have a situation

1 where the contractor has experienced an extended  
2 performance period caused by additional work, the use  
3 of the Eichleay formula is forbidden as a matter of  
4 law.

5 We didn't write those decisions, didn't  
6 participate in those decisions, didn't make the  
7 decision to use Eichleay as our recovery vehicle under  
8 additional time for additional work. We didn't do  
9 that, the contractor did.

10 The Department feels it would be going contrary  
11 to established law and would subject us to considerable  
12 criticism if we started using the Eichleay formula by  
13 standing it on its head and using it under  
14 circumstances that courts of competent jurisdiction  
15 have repeatedly said we cannot use.

16 That's why we resisted the Eichleay formula's  
17 application today, other than the facts as Mr. Irwin  
18 discussed, to do so would be contrary to established  
19 law.

20 CHAIRMAN COWGER: Do either one of the Board  
21 members have any questions of Mr. Davidson? We will  
22 make sure that kind of soaks in before we move on.

23 MR. DAVIDSON: I realize it was kind of lengthy.  
24 Unfortunately the courts do kind of write in long  
25 sentences.

1                   CHAIRMAN COWGER: What were you reading from?

2                   MR. DAVIDSON: Reading from the actual decisions  
3 that the court issued.

4                   CHAIRMAN COWGER: How many pages is the decision?

5                   MR. DAVIDSON: George has them in front of him.  
6 You can count them up.

7                   MR. SPOFFORD: About 10.

8                   CHAIRMAN COWGER: Let's go ahead and introduce  
9 that as an exhibit. We will arrange to get copies of  
10 them made after the hearing is over.

11                  MR. DAVIDSON: Very good.

12                  CHAIRMAN COWGER: We will call that Exhibit 7  
13 and 8.

14                  (Whereupon, Exhibit Nos. 7 and 8 were received in  
15 evidence.)

16                  CHAIRMAN COWGER: Are you ready for Mr. Spofford  
17 to come back?

18                  MR. EBBERS: I would like to briefly respond  
19 first, Gene, and then I will let George clean up behind  
20 me.

21                  I certainly can't make any attempt to argue the  
22 legal theory that Mr. Davidson has done. I didn't  
23 think that that was the way these arbitration  
24 proceedings were conducted, and we didn't come prepared  
25 here to submit case studies.

1           And George is here as our lay person, an  
2           operations manager, not as an attorney, which we so  
3           noted on our arbitration proceedings.

4           Mr. Davidson's arguments might sound good on the  
5           surface of it, but it doesn't fit reality and not  
6           common sense. One of the first things I heard him say  
7           was that the work we did was not the only thing that  
8           was performed.

9           Mr. Molin testified and I did, also, and DOT  
10          staff has affirmed all along that this project was very  
11          unusual. The work that we were doing was on a critical  
12          path.

13          And while there may have been some, I'm not sure,  
14          there may have been some work that was being done  
15          concurrently, the items that the DOT extended were on  
16          the critical path, and therefore they extended the  
17          completion time. And as we have testified, they were  
18          insufficient to carry the overhead that we needed to  
19          support our operation.

20          He also makes extensive arguments about how  
21          Eichleay only applies when you've got stop work  
22          conditions or total suspension conditions, or a series  
23          of delays, and therefore they culminate in it.

24          Well, I'm here to tell you, that's exactly what  
25          we had out there. This project had 128 days of time

19           1           extension. It overran its time by 80 percent from what  
          2           was originally anticipated.

3                    We were told to stop work 23 days because of  
4           presidential visits, Thanksgiving, football games and a  
5           number of other reasons.

6                    In addition to that, we had another 61 days of  
7           time that was added. The project was not just any --  
8           and he quotes and called it a significant point -- pure  
9           contract extensions. That's BS. That's totally  
10          opposite of what happened out there.

11                   It wasn't just a simple case of well,  
12          Mr. Contractor, will you please extend this out. The  
13          job had major design flaws that had to be cured. You  
14          know, why did these contract quantities overrun? They  
15          overran because there were design flaws in it.

16                    Again on a critical path, working out in the  
17          middle of Interstate 4, those things caused the project  
18          to extend.

19                    For those of us who lived and breathed that  
20          project I can assure you that our critical path was  
21          extended and therefore our overhead was extended.

22                    As to the application of Eichleay and calling it  
23          an artificial formula, again that's just absolutely not  
24          the case. As I explained, the overhead that was  
25          included in our bid fits the 15 percent that our



1 audited statements confirmed that our overhead runs 15  
2 percent.

3 You know, you would argue, well, is it the same  
4 in January as it is in February as it is in March.  
5 Basically, yes, overhead runs basically the same. Our  
6 light bill is the same, salaries are basically  
7 constant. All we are talking about is when there is a  
8 break or an extension in a project time there's  
9 overhead that's been unabsorbed or it's an extended  
10 cost. So it's certainly not an artificial formula. It  
11 very much applies.

12 I have run other formulas. They will net out  
13 about the same dollars. Pick six different formulas  
14 you're going to end up with about the same bottom line.

15 MR. IRWIN: Gene, could I interject one thing  
16 very quickly?

17 CHAIRMAN COWGER: Wait just a second. Are you  
18 through?

19 MR. EBBERS: Yes.

20 MR. IRWIN: Just to make sure that we clear up  
21 something, the time extension we are talking about is  
22 the additional time to do the work. The stop work is  
23 what Doug was talking about.

24 You know, all of those times, those stop work  
25 suspension times were either in the contract that he

1 bid on and he knew that he couldn't work when he bid  
2 the job, or he at his request -- like vacations and  
3 things that he requested, he requested vacation time be  
4 suspended. Those were up front.

5 MR. MOREFIELD: Are you saying then that --  
6 I don't know. He said, for example, Thanksgiving,  
7 games, presidential visits, was that in?

8 MR. IRWIN: The only thing I remember, the  
9 presidential visit was something that came up on us.  
10 That was one day. That was in -- I think that was in  
11 the contract. Wasn't that in the contract, the  
12 football game?

13 MR. BROWN: The football game, special events at  
14 the stadium. He couldn't work on those weekends.

15 MR. MOREFIELD: That was in the contract when he  
16 bid it you're saying?

17 MR. BROWN: The holidays were requested by the  
18 contractor. Time was suspended, was not counted  
19 through the holidays, Thanksgiving, Christmas.

20 MR. MOREFIELD: The only thing in the contract  
21 was special events at the stadium?

22 MR. IRWIN: Yes, but --

23 MR. MOREFIELD: Thanksgiving is a holiday he  
24 requested?

25 MR. IRWIN: The time we suspended, I don't want

1           you to get confused thinking about time suspensions and  
2           extensions. I don't think we're really talking about  
3           the times when the work was stopped and time was  
4           suspended. We are talking about the added time that it  
5           took to do the additional work that was added by the  
6           overhead.

7                   MR. MOREFIELD: Let me clear up one more thing,  
8           Gene. If I understood what you were saying, Mike,  
9           somewhere in the point, the 3488, whatever, I think  
10          that was the formula came up with that much per day.

11                   You are saying that he was out there doing other  
12          work, so therefore he was getting reimbursed for some  
13          overhead, and that 3488 shouldn't apply without  
14          deducting that out, notwithstanding things that you're  
15          saying the Federal guys say you shouldn't include in  
16          the formula.

17                   And what you're saying is that you were doing the  
18          concrete barrier wall and the reset guardrail, et  
19          cetera, was your main amount of work, realizing you may  
20          have been doing some other things, too.

21                   Did I summarize that?

22                   MR. DAVIDSON: I think that's our position.

23                   MR. EBBERS: As a final measure we went ahead and  
24          deducted the overhead off those items.

25                   MR. ROEBUCK: To make sure there's no mix-up.

1           MR. MOREFIELD: You're saying -- I just made a  
2 note -- you are saying the time was more critical than  
3 the quantities as it related to the overhead.

4           MR. EBBERS: Much more so.

5           MR. MOREFIELD: That's not what you're saying,  
6 I'm saying, trying to paraphrase you.

7           MR. ROEBUCK: The contract for the special events  
8 shutdowns was mentioned in the contract but without any  
9 specificity? You didn't know what days they would be?

10          MR. MOLIN: What we are talking about, ball  
11 games, state fair where the traffic was so backed up on  
12 I-4 that we requested -- one night we actually started  
13 and we actually opened back up, as I recall. We also  
14 had the strawberry festival that also had the same  
15 problems, three or four days.

16          MR. ROEBUCK: Did the contract give you those  
17 dates and tell you that you would be down on those  
18 dates?

19          MR. EBBERS: No, sir, nor the presidential visit  
20 or the other ones we mentioned.

21          MR. ROEBUCK: The 23 days you mentioned, the  
22 special events are not covered in the contract.

23          MR. EBBERS: That's correct.

24          CHAIRMAN COWGER: Are you saying, Mike, that 23  
25 days included some vacation days and things you

1           wouldn't really call special events?

2           MR. IRWIN: The standard language we put in the  
3           contract says special events, state of events you  
4           wouldn't work on those dates. We admit there wasn't a  
5           detailed list of the days, how many -- the days that  
6           the events were planned.

7           MR. EBBERS: Nobody had anticipated what they  
8           were. If we asked for Thanksgiving off, which if we  
9           did, I would be more than happy to concede that it was  
10          done, I'm sure, not because we were ultimately real  
11          concerned. It was done because I-4 was going to be  
12          jammed up with Thanksgiving, with travelers.

13          CHAIRMAN COWGER: I think we need to cut off on  
14          this and let Mr. Spofford come in next.

15          MR. SPOFFORD: To the extent I'm able to rebut  
16          Mr. Davidson's legal argument, given that I've only  
17          received the cases just now, I note in reading them,  
18          first it's Court of Claims, last time I checked, Court  
19          of Claims was D.C.

20          The case repeatedly states, I direct the Board to  
21          pages 190, 191, repeatedly states that these principles  
22          set forth in here apply in general, that generally --  
23          let me see if I can get a quote.

24          "When a contract period is extended for  
25          additional work rather than a suspension of work, home

1 office overhead generally can be calculated more  
2 accurately by applying a percentage of overhead markup  
3 to direct costs rather than use of Eichleay."

4 Then again it states, "Where there is an ongoing  
5 level of work which usually produces sufficient direct  
6 costs such as that the -- such that the contractor is  
7 generally adequately compensated by applying a  
8 percentage of overhead markup to direct costs."

9 I think we have beat this horse to death in this  
10 situation. We didn't have a case where we had other  
11 work ongoing when these critical path items were  
12 extended.

13 Mr. Molin testified that these were critical path  
14 items. They extended the performance. The DOT has  
15 admitted that it's compensable time, it's critical  
16 path, otherwise they wouldn't have extended the time or  
17 given us the compensation for it.

18 We didn't have other items ongoing that could  
19 bear the overhead expenses that we had on this job.  
20 It's not a situation like we had in here.

21 That's about the best I can do addressing  
22 Mr. Davidson's arguments given the time I've had to  
23 look at the cases.

24 To wrap up, we have shown that these items of  
25 extra work disrupted and delayed our work. They were

1 critical path items that extended our performance.

2 The DOT has already paid us delayed damages, if  
3 you will, for 38 days of the 85 we were actually  
4 impacted. They paid us for the field office overhead,  
5 the MOT.

6 They made some arguments that we waived our  
7 rights. We did the best we could to reserve our  
8 rights. We were using the language DOT gives us when  
9 we say hey, we have some more claims, they say use this  
10 language. That's the language we used.

11 CHAIRMAN COWGER: You don't need to talk about  
12 that issue anymore.

13 MR. SPOFFORD: We did the best we could to  
14 credit the DOT for what might have been thought as  
15 double dipping. All we are looking for is our actual  
16 costs.

17 We bent over backwards on that project. It's not  
18 directly relevant, but we had two guys almost killed by  
19 drunk drivers out there. We toughed it out. We sent  
20 our guys back out there every night.

21 All we're after is give us the money we are  
22 entitled to to recover our costs. We couldn't reassign  
23 our forces on this project. Mr. Molin testified about  
24 that. It wasn't a situation where we could go give  
25 them another job. This was work on a day-to-day,

1 week-to-week basis.

2 DOT never told us you are going to be shut down  
3 for six months on January 1, go get other work. It was  
4 a situation where as the project was being built they  
5 would say, hey, add another 300 feet or 50 feet of  
6 guardrail, remove this barrier wall, something like  
7 that. We didn't have the opportunity to reallocate our  
8 forces.

9 We haven't seen the directive from the  
10 Tallahassee lawyers.

11 (Brief pause)

12 CHAIRMAN COWGER: Go ahead.

13 MR. SPOFFORD: Our last work was substantially  
14 complete on June 26, 1992. The certificate of final  
15 completion was August 10, 1992. We have been without  
16 payment for this work since then.

17 The work probably should have been paid for  
18 including our overhead when work was performed well  
19 before June 26, but at a minimum, again the most  
20 conservative date we can arrive at would be the  
21 August 10 date for recovery of interest on the  
22 principal.

23 I think you have a pretty good appreciation for  
24 what we went through on this project and why we are  
25 here instead of being back home building projects. To



1 the extent you can see fit to award overhead, we would  
2 appreciate it.

3 CHAIRMAN COWGER: Does DOT have anything further  
4 to say?

5 MR. IRWIN: No, sir.

6 MR. DAVIDSON: I think just real briefly. It  
7 seems to me a large part of the argument we have had  
8 before the Board today, or presentation -- I'm so  
9 used to being in a court of law that I call it  
10 argument -- has been done in good faith and in good  
11 spirit here.

12 I think that the two parties are just apart on  
13 one particular thing more than anything else. And if  
14 it had been asked in a different way it might have been  
15 responded to in a different way.

16 What is really happening here is we are getting  
17 hung up I think not on overhead itself but overhead as  
18 defined and computed by the Eichleay formula. And  
19 I don't mean to beat too hard on this, but it was the  
20 contractor who chose that method of overhead  
21 recoupment.

22 They could have asked for it a number of  
23 different ways. They chose not to. We can't come back  
24 to Doug Ebbers or anybody else and say, no, Doug, we  
25 are going to redo your whole thing for you and then we

1 will tell you how to submit this thing. We will write  
2 your claim for you. That's not what we're supposed to  
3 do.

4 I'm sure if we did, Doug would take great  
5 exception to us writing his claim.

6 What we are really talking about here is does the  
7 contractor meet the entitlement criteria for an award  
8 of overhead under Eichleay. It may meet an award for  
9 other reasons and other purposes using other methods of  
10 computation and other common sense methods, and it may  
11 not. That's largely your judgment to decide.

12 The application of the Eichleay formula is what  
13 has prevented the Department from considering the  
14 matter further and having to bring it to you all here  
15 because that was the contractor's chosen method, and we  
16 really believe as a matter of law we can't make an  
17 Eichleay award under these circumstances.

18 MR. EBBERS: Gentlemen, that is exactly the  
19 opposite of what I was told. I was told by Mr. Irwin  
20 and his staff that we were asking for extended home  
21 office overhead. It didn't matter what computation  
22 method we were using. That never, ever was mentioned  
23 to me.

24 If they had said please recalculate it using  
25 some other method, I would have been happy to do that.

1 I certainly wouldn't have waited a year to come up here  
2 and arbitrate this.

3 MR. SPOFFORD: We do that all the time.

4 MR. EBBERS: And furthermore, we have amended the  
5 calculation, not so much the use of Eichleay, but we  
6 have just amended our calculation to make sure that  
7 it's as perfected a method as we can. So we're not  
8 just strictly relying on Eichleay. We are not here  
9 over Eichleay, we are here over extended overhead  
10 expenses.

11 CHAIRMAN COWGER: May I ask a couple of  
12 questions. At the very beginning we talked about the  
13 total amount of the claim being \$120,824. Does that  
14 show up in Exhibit 2 at any point?

15 MR. EBBERS: No.

16 MR. ROEBUCK: That was just verbally given to us?

17 MR. SPOFFORD: Right. That's why I wanted to  
18 raise it at the first so we are all working off the  
19 same number.

20 CHAIRMAN COWGER: Now, that number differs from  
21 what you requested in your written submittal.

22 MR. SPOFFORD: By about \$12,000.

23 CHAIRMAN COWGER: Which was 132.

24 MR. SPOFFORD: Right, first paragraph of my  
25 request for arbitration letter I believe has the

1 original fee.

2 CHAIRMAN COWGER: Okay, I've got it. Now what  
3 you're saying is that you have reduced that and the way  
4 that reduction was made was to go in and take work  
5 that, for instance, overruns applied to 15 percent home  
6 office overhead factor to the dollar amount and reduce  
7 the 132 by that amount?

8 MR. SPOFFORD: Right, to the extent we could  
9 isolate particular items they paid us for. Some things  
10 like the --

11 MR. MOREFIELD: Do you have that detailed  
12 calculation?

13 MR. SPOFFORD: No, I do not.

14 MR. MOREFIELD: Do you have something you can  
15 give us to show us how you arrived at it?

16 MR. SPOFFORD: I can walk you through it right  
17 quick. Let me get a copy of it.

18 MR. ROEBUCK: You had it awfully close.

19 MR. EBBERS: Yes.

20 MR. MOREFIELD: I'm looking to see how it backs  
21 out to each individual item, not as a general 15  
22 percent off the top.

23 MR. SPOFFORD: That's not what it is. It's not  
24 15 percent off the total amount.

25 MR. MOREFIELD: I know. I assume you did it in

1 detail. That's why I wanted to know how you took it  
2 off.

3 MR. SPOFFORD: If you look at the data we  
4 submitted previously, like the borrow, extra borrow  
5 work, that's just direct costs, no overhead in there.

6 CHAIRMAN COWGER: Is there any reason why you  
7 couldn't prepare a written submittal and send it to us?

8 MR. SPOFFORD: Sure.

9 CHAIRMAN COWGER: We would like to have that then  
10 by no later than August 15.

11 MR. SPOFFORD: We will get it quicker than that  
12 if we can get a resolution quicker.

13 CHAIRMAN COWGER: We will get to that in a  
14 minute.

15 Does either party have any additional testimony  
16 they wish to submit? Either member of the Board have  
17 any questions?

18 MR. DAVIDSON: I would just like to ask if we see  
19 anything interesting in what they submit, may we have a  
20 day or two after that to comment on it?

21 CHAIRMAN COWGER: Yes. To get it straight, when  
22 you submit that to the Board, we would like you to  
23 submit it in writing, send a copy of it to Mike Irwin.

24 And let's change that date to August 10, and then  
25 if you all have any comments that you would like to

1 submit on that, Mike, get them to us by the 25th. That  
2 will give them 14 days to do it.

3 MR. EBBERS: What I would like to ask, because  
4 I think it's very relevant to that, is the time that we  
5 conceded that we already compromised, this is just to  
6 quickly show on that same recap what we have already  
7 given up in addition to this.

8 CHAIRMAN COWGER: Do you want to put that into  
9 the recap you are going to give us?

10 MR. EBBERS: It would be very easy to do that.

11 CHAIRMAN COWGER: We have no objection to that as  
12 long as you submit everything you send us to DOT and we  
13 will give them one last opportunity to rebut that in  
14 writing to the Board.

15 MR. EBBERS: I think it's important to note that  
16 we compromised before we came here today and now we  
17 have compromised again a step further today.

18 CHAIRMAN COWGER: Meaning the reduction from 132  
19 to 120?

20 MR. EBBERS: Yes.

21 CHAIRMAN COWGER: All right. This hearing is  
22 hereby closed. The Board will meet sometime around  
23 September 1. The original date for the next Board  
24 meeting has been disrupted. We're not sure when we  
25 will meet again. At that time we will deliberate on

1           the claim and you will have our final order shortly  
2           thereafter.

3           (Whereupon, the hearing was concluded at 12:15 p.m.)

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STATE OF FLORIDA )

COUNTY OF LEON )

I, CATHERINE WILKINSON, Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing hearing; and that the transcript is a true record of the testimony given by the witness.

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

Dated this 5<sup>th</sup> day of August, 1993.

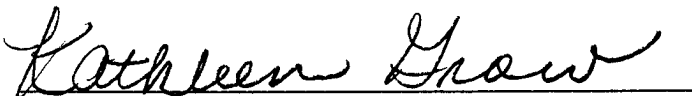


CATHERINE WILKINSON  
CSR, CP, CCR  
Post Office Box 13461  
Tallahassee, Florida 32317

STATE OF FLORIDA )

COUNTY OF LEON )

The foregoing certificate was acknowledged before me this 5<sup>th</sup> day of August, 1993, by CATHERINE WILKINSON who is personally known to me.



KATHLEEN GROW  
Notary Public - State of Florida  
My Commission expires April 20, 1997.  
Commission # CC278204  
BONDED THRU TROY FAIN INSURANCE, INC.