

# STATE ARBITRATION BOARD

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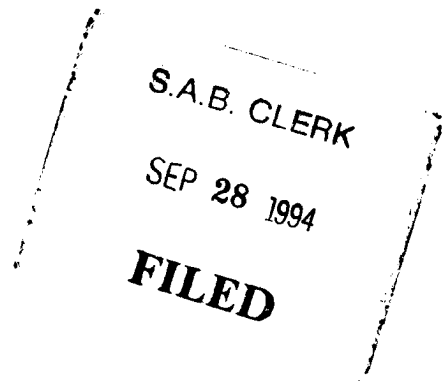
28 September 1994

## NOTICE

In the case of Mitchell Brothers, Inc. versus the Florida Department of Transportation on Project No. 55060-3545 in Leon County, Florida, both parties are advised that State Arbitration Board Order No. 3-94 has been properly filed on September 28, 1994.



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



Copies of Order & Transcript to:

Mr. Jimmy B. Lairscey, Director Office of Construction/FDOT  
Mr. Edward M. Mitchell, Jr., President/Mitchell Brothers, Inc.

STATE ARBITRATION BOARD

ORDER NO. 3-94

RE:

Request for Arbitration by  
Mitchell Brothers, Inc.  
on Job No. 55060-3545 in  
Leon County

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

H. Eugene Cowger, P. E. Chairman  
Edward Prescott, P. E. Member  
John Roebuck, Member

Pursuant to a written notice, a hearing was held on a  
request for arbitration commencing at 9:44 a.m., on Friday,  
August 19, 1994.

The Board Members, having fully considered the evidence  
presented at the hearing, now enter their order No. 3-94  
in this cause.

ORDER

The Contractor presented a request for arbitration of a  
three part claim plus a request for release of 30 Calendar  
Days liquidated damages assessed by the Department of  
Transportation. The total amount claimed is \$67,648.10.

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

PART I Amount claimed: \$27,350.02

1. On August 2, 1993 the Department of Transportation (DOT)  
brought to our attention a plan error. A section of traffic  
separator could not be constructed in accordance with the  
plan dimensions, because the existing traffic separator to

which it was to be connected was narrower than the planned traffic separator. On August 9, 1993, DOT requested prices for construction of Type "F" curb and gutter and 6" thick sidewalk to be constructed in lieu of traffic separator at this location. On August 11, 1993, we submitted the unit prices as requested and on August 17, 1993, DOT rejected these unit prices, even though the total cost was \$800 less than the cost of the traffic separator being replaced. They then instructed us to construct the traffic separator in accordance with the original plans. On August 24, 1993, it was agreed that Type "F" curb and gutter and 6" thick sidewalk would be constructed at this location with payment at the contract unit prices per lineal foot price for the traffic separator.

2. This delay in reaching a decision on how to construct the traffic separator delayed beginning work on this controlling item of work between August 2, 1993 and August 24, 1993. We could not issue a subcontract for this work until a decision was made on what to build at this location.

3. The delay in reaching a decision on how to construct the traffic separator disrupted our planned sequence of operations on this project.

4. This 22 Calendar Day delay caused us to incur additional costs for maintenance of traffic, job site overhead and home office overhead.

PART II (Contractor Part Three) Amount Claimed: \$6,082.75

The Contractor stated that he had decided to withdraw

this part of his claim.

PART III (Contractor Part Four) Amount Claimed: \$4,775.33

1. The plan quantity for pavement markers was 685. After installing 822 pavement markers, an overrun of about 30%, our pavement marking subcontractor exhausted his supply of markers. He made provisions for a reasonable overrun in the quantity of pavement markers, but he encountered an excessive overrun due to a plan error. It was necessary for him to order additional pavement markers from his supplier and these were delivered by air freight.

2. We located gore areas, turn arrows, turn lanes, any specific abnormal striping, stop bars by station prior to beginning work. We did not attempt to locate the existing pavement markers, because the new ones are installed in accordance with the DOT design standards.

3. A local supplier had pavement markers on hand but his price was substantially higher.

4. Work was delayed for five days awaiting delivery of additional pavement markers.

5. As a result of this plan error we incurred additional costs for air freight, maintenance of traffic, job site overhead and home office overhead.

RELEASE OF LIQUIDATED DAMAGES ASSESSED

Amount Claimed: 30 Calendar Days @ \$920 = \$29,440.00

1. All work, except for pavement markings and installation of axle sensors, was completed on September 18, 1993. On that date, DOT advised us that charging of contract time was

suspended for a period of 30 days while the friction course pavement cured. This action is documented in DOT Daily Reports of Construction. We were directed by DOT to not install the axle sensors until the curing period because the finished pavement surface would be less marked up if installation was done in October, when the weather was cooler. No work was done during this 30 day period.

2. After all work was completed, we were advised by DOT that the suspension was being disallowed and 32 Calendar Days liquidated damages were assessed on the Semifinal Estimate.

3. It is our position that these liquidated damages should not have been assessed because we acted in good faith.

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

PART I

1. At a meeting on August 4, 1993 we were informed by the Contractor that he would be able to begin work on this project in about two weeks.

2. We could not approve the unit price the Contractor submitted for Type "F" curb and gutter and 6" thick sidewalk because they were considerably higher than the Districtwide average unit prices for these items.

3. The traffic separator could have been constructed as shown in the plans with a transition to the existing traffic separator.

4. Maintenance of traffic items were erected on this project

on August 17, 1993 (Calendar Day 24) and traffic separator was first shown as a controlling item of work in the Work Plan submitted by the Contractor for the week of August 22nd through August 28th.

5. The Contractor's work progress schedule shows beginning work on traffic separator on the 10th day. Ten days after beginning of work is August 27, 1993.

6. No payment has been made for the traffic separator pending the Contractor executing the Supplemental Agreement that covers this work.

### PART III

1. Note No. 4 on Plan Sheet No. 3 reads, "The contractor shall be responsible for documenting the existing signs and markings within the project limits before construction is started and this information is to be used in conjunction with the placement of temporary and permanent makings and permanent signing." This documentation should have alerted the Contractor to the overrun before work began.

2. According to Article 8-7.3.2 of the Standard Specifications a time extension can be granted if an area-wide shortage of a material exists. A local supplier has indicated that he stocks 200 to 300 pavement markers at all times. Therefore, an area-wide shortage did not exist.

### RELEASE OF LIQUIDATED DAMAGES ASSESSED

1. The specifications state that charging of contract time will be suspend for curing of the asphalt pavement after all work other than pavement markings is completed. Work other

than pavement markings, installation of axle sensors, was done subsequent to expiration of the curing period.

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

PART I

1. The Contractor's superintendent stated that he was not assigned to the project until seven to ten days after time charges began and he had to put things together before work could begin.
2. The planned sequence of work was disrupted by the delay in arriving at a decision on how to construct the traffic separator.
3. The Department rejected the unit prices submitted by the Contractor for small quantities of Type "F" Curb and Gutter and Concrete Sidewalk 6" based on consideration of Districtwide average unit prices for those items.

PART II

Pavement markers are to be installed in accordance with DOT design standards, not replaced in the location of existing pavement markers.

LIQUIDATED DAMAGES ASSESSED

At the time all work except for pavement markings and sensors was completed, DOT advised the Contractor that charging of contract time was suspended for up to 30 days.

The Contractor acted in a reasonable manner to mitigate the

delay caused by the substantial overrun in Raised Pavement Markers.

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

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

PART I

Pay the Contractor \$12,000.00

PART III

Pay the Contractor \$1,000.00

LIQUIDATED DAMAGES

Release the thirty two (32) days liquidated damages that were assessed.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$275.20 for Court Reporting Costs.

S.A.B. CLERK

SEP 28 1994

FILED

Tallahassee, Florida

Dated: 28 Sept 1994

Certified Copy:

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

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

H. E. Prescott  
H. E. Prescott, P. E.  
Member

John P. Roebuck  
John P. Roebuck  
Member

28 September 1994  
Date





APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman  
Mr. Edward Prescott  
Mr. Jack Roebuck

APPEARING ON BEHALF OF MITCHELL BROTHERS:

Ms. Donna Jarriel  
Mr. William Davis  
Alan Cummings, Esquire

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Benak  
Ms. Lori Kietzer  
Mr. Frank Pate

\* \* \*

I N D E X

EXHIBITS

Exhibit No. 1 in evidence 3  
Exhibit No. 2 in evidence 4

CERTIFICATE OF REPORTER 56

P R O C E E D I N G S

1  
2 CHAIRMAN COWGER: This is a hearing of the State  
3 Arbitration Board established in accordance with Section  
4 337.185 of the Florida Statutes. Mr. Edward Prescott was  
5 appointed as a member of the Board by the Secretary of the  
6 Department of Transportation. Mr. John Roebuck was elected  
7 by the construction companies under contract to the  
8 Department of Transportation. These two members chose me,  
9 H. E. Cowger, to serve as the third member of the Board and  
10 as chairman.

11 Our terms of office began July 1 of 1993 as  
12 applicable to Mr. Roebuck and myself. Mr. Prescott's term  
13 of office began July 1, 1994. All of our terms of office  
14 expire June 30, 1995.

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

18 (Whereupon, the witnesses were duly sworn by the chairman.)

19 CHAIRMAN COWGER: The documents which put this  
20 arbitration hearing into being are hereby introduced as  
21 Exhibit No. 1. This consists of the request for  
22 arbitration that was submitted by the Contractor and all of  
23 the attachments thereto.

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

25 CHAIRMAN COWGER: In accordance with the procedure of

1 the Board, the Department was required to submit a written  
2 rebuttal for review by the Board and the Contractor prior  
3 to the hearing. This submittal was received and furnished  
4 to the Board and the Contractor and it is hereby introduced  
5 as Exhibit No. 2.

6 (Whereupon, Exhibit No. 2 was received in evidence.)

7 CHAIRMAN COWGER: Does either party have any other  
8 information it wishes to put into the record as an exhibit?

9 (No response)

10 CHAIRMAN COWGER: Hearing nothing, we have no  
11 additional exhibits, then. During this hearing the parties  
12 may offer such evidence and testimony as is pertinent and  
13 material to the controversy and shall produce such  
14 additional evidence as the Board may deem necessary to an  
15 understanding and determination of the matter before it.

16 The Board shall be the sole judge of the relevance of  
17 materiality of the evidence offered. The parties are  
18 requested to assure that they receive properly identified  
19 copies of each exhibit submitted during this hearing and to  
20 retain these exhibits. This should not be a problem if no  
21 more exhibits are submitted, because everybody has all the  
22 exhibits at this point. The Board will furnish copies of a  
23 transcript of this hearing to the parties along with its  
24 final order, but will not furnish copies of the exhibits.

25 The hearing will be conducted in an informal manner.

1 The Contractor will elaborate on their claim and then the  
2 DOT will offer rebuttal. Either party may interrupt to  
3 bring out a point by coming through the chair. However,  
4 for the sake of order, I must instruct that only one person  
5 speak at a time.

6 Also, so that our court reporter will be able to  
7 produce an accurate record of this hearing, please  
8 introduce yourself the first time you speak. Are we ready  
9 to proceed? The Contractor can make his opening statement.

10 MR. CUMMINGS: You wanted to say something, Ed, on  
11 the record?

12 MR. PRESCOTT: Yes. I'll say something on the  
13 record. Two things, one is that Mr. Alan Cummings  
14 indicated at the beginning of this hearing process that he  
15 would not be making any presentations or elaborations in  
16 regard to this hearing of the Arbitration Board.

17 In regard to the hearing of this matter by myself on  
18 this Arbitration Board, I feel like that I will be able to  
19 evaluate the information that's received at this hearing  
20 and make a fair and equitable decision in regard to any  
21 decision that the Board has on my behalf. So I feel like  
22 that I can sit on this Board and hear this particular case  
23 and make a fair and equitable decision about it.

24 MR. CUMMINGS: Let me just say one thing, and I don't  
25 want to belabor this, and when I said I wasn't going to

1 make a presentation or elaboration, I'm not going to make a  
2 presentation, because I don't have any facts to offer, so  
3 I didn't raise my hand to be sworn in.

4 And I've known Ed Prescott for a long time. And I've  
5 always known him to be a fair fellow, so I don't have any  
6 problem with that. The only question I had was whether or  
7 not, as part of his, just, duties in this particular  
8 district, whether this issue had come to him already in  
9 another forum through Steve, perhaps, or however it might  
10 come to you and had already made a decision, you know, been  
11 advised and so forth.

12 So I think your forum here is to make a decision  
13 based on what you hear here as opposed to what you may have  
14 already been prejudiced by what you heard outside this  
15 room. And if that were true, that's the only question  
16 I had, Ed, was had you already been involved in the  
17 situation.

18 MR. ROEBUCK: Mr. Cummings, though, I've sat here for  
19 two or three years and I would say in his chair, whoever  
20 sits there, will obviously have had some involvement in  
21 half or more of the matters that come to this Board, for  
22 some reason. I don't think he could say he would always be  
23 divorced from everything here or he'd be disqualifying  
24 himself on every hearing. In his job, he's in contact with  
25 these districts and on difficult problems of negotiating

1 claims. I would say that prior to him, Ken Morefield,  
2 he obviously was involved.

3 Now, in one instance over the last three or four  
4 years, I have disqualified myself when I was too deeply  
5 involved with a Contractor and I knew too much about his  
6 claim and had a problem with it. I disqualified myself.

7 MR. CUMMINGS: Uh-huh. Well, let me make it very  
8 clear, I'm not asking Ed to disqualify himself. All I want  
9 to know is has he already had involvement with it, has it  
10 come up to his attention, and that's all the question that  
11 I had. And I think Mitchell Brothers is entitled to know  
12 that.

13 MR. BENAK: Let me say something.

14 CHAIRMAN COWGER: Yeah, I think it would be  
15 appropriate to let Steve make a comment, because he wanted  
16 to say something.

17 MR. BENAK: I'm Steve Benak. I'm district  
18 construction engineer in District Three. On this  
19 particular job, I've not even had the opportunity to review  
20 the claim. The claim was submitted or these claims were  
21 submitted when this -- first we knew about it was when it  
22 was submitted to the Arbitration Board. We haven't had a  
23 chance to review it before it got to the Arbitration  
24 Board. We didn't make a ruling on it. Ed didn't make a  
25 ruling on it. I didn't make a ruling on it. Tom Shafer,

1           who's not here, didn't make a ruling on it either. It  
2           didn't get denied throughout the Department. It didn't go  
3           through the Construction Claims Review Board to be reviewed  
4           before it came to this panel, so Ed has had -- hasn't had  
5           any involvement in this claim before it got to this point.

6           MR. CUMMINGS: That's fine. We needed just to know  
7           that, so we know whether we're speaking to an audience,  
8           these people, when they start giving facts, will know  
9           whether they're speaking to an audience that's already  
10          advised, already fully advised, or whether they need to go  
11          into more detail and whatever.

12          And I see the letter that's signed by Ed Prescott and  
13          I just assumed then that somebody wrote it for you and it  
14          got your signature without any -- you know, I know how  
15          those things happen. I do that myself.

16          MR. BENAK: That was on a onetime extension that was  
17          submitted on this job which was appealed and ruled on by  
18          Edward at that time. So that's just a time extension.  
19          That's not a claim.

20          MS. JARRIEL: But I think we filed a claim in the  
21          letter that proceeded that one.

22          MR. BENAK: No, ma'am.

23          MS. JARRIEL: Yes. The letter that he responded to  
24          when he --

25          MR. BENAK: You may have given us a notification of



1 the claim. A notification and a claim are two different  
2 things.

3 MS. JARRIEL: But we did notify that --

4 MR. BENAK: We were notified -- the first time the  
5 claim package came to us was when this was sent to the  
6 Arbitration Board.

7 MR. CUMMINGS: Okay. We're advised. We're ready.

8 CHAIRMAN COWGER: Okay. Now, you raised an issue  
9 that one of the requirements of the Board is that the  
10 claim, before it comes to arbitration, had been reviewed by  
11 DOT and each part of the claim rejected by DOT. The Board  
12 relies on the DOT to make us aware of that -- we have no  
13 way of knowing that for sure -- to make us aware of that  
14 when we send you the original claim package which was  
15 submitted to DOT back on May the 23rd, 1994, from the  
16 Board.

17 So I just want to make it clear that we expect the  
18 DOT at that point in time to raise any issues such as we  
19 haven't acted on this claim at that point in time, and  
20 I thought that was pretty clearly understood by the DOT.  
21 If it's not, we're sorry, but that's the way it's supposed  
22 to be.

23 So the Board is not going to take into consideration  
24 in this hearing the fact that DOT has not reviewed and  
25 rejected these claims. And I think from the package you've

1 submitted, you've had adequate opportunity to review and we  
2 can deal with it here today. Does anybody object to that?

3 MR. CUMMINGS: No.

4 MR. PRESCOTT: No.

5 MR. BENAK: (Shaking head negatively)

6 CHAIRMAN COWGER: Okay. I think we've got that  
7 behind us then, and we can go ahead with the presentation  
8 of the claim if we can have that. And before we start,  
9 I assume that we can deal with these one part at a time.  
10 There's three parts, one, three and four. Let's have the  
11 Contractor deal with part one, the DOT rebut, and we'll go  
12 with that sequence.

13 MS. JARRIEL: I'm Donna Jarriel. I'm the controller  
14 for Mitchell Brothers. And one thing I would like to do  
15 is, although our claims are numbered one through four, we  
16 have a third issue, a fourth issue, a fifth issue, with is  
17 release of the liquated damages. That has to do with the  
18 cure the period. I'd like to address that first, because  
19 I think that's one of the most cut and dried areas.

20 We had laid down the friction course on the project,  
21 and we were notified by the project engineer that time was  
22 going to stop for a 30-day cure period -- or time was being  
23 stopped. And that was on Saturday, September 18th. And  
24 the daily reports of construction for the time period  
25 between September 18th through October 17th indicate that

1 that was contract day 56. Each day progressive showed  
2 contract day 56. It substantiates that there was a 30-day  
3 time stop.

4 No work was performed during this time, which when  
5 you have the time being stopped, you know, we can't perform  
6 any work. So we just pulled off the job for the 30-day  
7 cure period. We went ahead after that 30 days and went in  
8 and completed the project. In December we got our  
9 tentative final estimate or we got estimate number three,  
10 I believe it was, at which point showed -- well, let me  
11 back up.

12 In November we got a conditional acceptance of the  
13 job which showed 94 contract days. Well, the contract was  
14 only a 62-day project. And to our knowledge, based on the  
15 DOT daily reports, 64 days were indicated on the DOT daily  
16 report. When we got the conditional final acceptance, it  
17 indicated 94 days. So the time had not been stopped for  
18 the cure period. That was the only semi-notification we  
19 received.

20 In November we got our estimate number three and our  
21 tentative final estimate which indicated liquidated damages  
22 were being held for this time period. Again, we had not  
23 received any formal notification of any delinquency.  
24 Subsequent to that we never received anything. We got our  
25 final estimate a few months later which again indicated

1 they were going to hold the liquidated damages.

2 We are requesting that the 30 days for that cure  
3 period, the time's extension be honored, that they release  
4 our liquidated damages for that as we were given no  
5 opportunity to work during that period. There was no way  
6 we could minimize -- you know, proceed any faster because  
7 every indication was that time had been stopped. So that's  
8 the first item I want to address.

9 MR. ROEBUCK: I found that confusing. Could we let  
10 the State respond to that?

11 CHAIRMAN COWGER: Now, let me say, are you through?

12 MS. JARRIEL: On that particular item.

13 CHAIRMAN COWGER: Okay. Now, because that is not  
14 really --

15 MR. BENAK: Is this a new claim?

16 CHAIRMAN COWGER: Well, this is not part one, two or  
17 three. This was in the claim package, but it was --

18 MR. ROEBUCK: As part of the liquidated damage thing,  
19 but not specifically, you know. It was -- well, what do  
20 you say.

21 CHAIRMAN COWGER: In the Contractor's submittal under  
22 claim summary, there was a paragraph in there dealing with  
23 released liquidated damages. And there was nothing in the  
24 package that expanded on that directly.

25 MS. JARRIEL: Well, there was a letter where we had

1 requested --

2 MR. ROEBUCK: Correct.

3 MS. JARRIEL: -- for them to correct that and also  
4 copies of the dailies showing that time had been suspended.

5 MR. ROEBUCK: Yeah, but there was no response,  
6 I don't think, in the DOT's. So I would just like to find  
7 out what their --

8 MR. BENAK: What happened was work was done after the  
9 cure period started. That wasn't caught by the project  
10 engineer; it was caught by my final estimate section. And  
11 the specification indicates that 30-day cure period will be  
12 enacted if all work items are completed. There was some  
13 work done in that 30-day cure period, so they backed off  
14 for 30 days.

15 MR. DAVIS: What work was that?

16 MS. KIETZER: Adding of the Piezo electric axle  
17 sensors were installed after the cure period.

18 MS. JARRIEL: But not during the cured period.

19 MS. KIETZER: No, not during the cure period. So  
20 they negated the curing period because not all work had  
21 been completed on the project to warrant a suspension of  
22 time. That was done in the final estimates --

23 MR. DAVIS: My name is Bill Davis. I'm the project  
24 superintendent at Mitchell Brothers. We were directed by  
25 your office to not install that Piezo sensor until after

1 the curing period, because you all did not want the  
2 friction course tracked at that intersection. That was the  
3 bottom line.

4 We had the people scheduled. They came in. The day  
5 after, while we were doing temporary striping to put this  
6 in, we were instructed not to place the Piezo sensors at  
7 that time and we did not place them, because they did  
8 not -- it was 90-degree days right in that period of time,  
9 and they did not want the friction course marked up going  
10 into that intersection. All the preliminary work on that  
11 Piezo sensor, all the underground, everything was done at  
12 this time.

13 MS. JARRIEL: And I just want to point out, too, the  
14 very fact that no one said time is not being stopped gave  
15 us no opportunity, if you weren't going to stop the time,  
16 to reduce the amount of time of the contract. We pulled  
17 off the job for 30 days based on the fact that time had  
18 been stopped.

19 Had anybody at any point said, oh, by the way, time  
20 is not stopped, it's still running, you know, you need to  
21 do this, I guarantee you that they would have been out  
22 doing it. But to come back after the job was fully  
23 accepted, and say, oh, by the way, we're taking back our 30  
24 days, is just not acceptable. I mean, you know, there's no  
25 way that we can minimize anything that would have occurred

1 during that time period.

2 CHAIRMAN COWGER: Let me try to sum this up to keep  
3 this thing moving. And after I sum it up, if either party  
4 objects to what I'm saying, please say so. But from what  
5 I've heard, what happened was that on September the 18th --

6 MR. ROEBUCK: Eighteenth.

7 CHAIRMAN COWGER: -- the DOT's field people stopped  
8 charging contract time for a 30-day suspension period. And  
9 the records, DOT's daily reports indicated that throughout  
10 the life of the project. So there must have been some  
11 agreement at that point that the time had been suspended.

12 Then, later on, after the job was finished, DOT went  
13 back and looked at their records and determined that,  
14 really, there was not eligibility to suspend the charging  
15 of contract time, waiting for the curing of the asphalt  
16 pavement, because there was one item of work dealing with  
17 traffic sensors; is that what it was?

18 MR. BENAK: Piezo electric sensors.

19 CHAIRMAN COWGER: That had not been installed. So,  
20 therefore, again, after the project was completed at some  
21 point in time, the Department disallowed the suspension.  
22 The Contractor has testified that he was instructed not to  
23 install those sensors during the period prior to September  
24 the 18th and that they were installed later, I assume in  
25 conjunction or essentially in conjunction with installation

1 of the pavement markers?

2 MR. DAVIS: Installation of pavement markers and  
3 thermoplastic striping, yes, sir.

4 CHAIRMAN COWGER: Now, that's the summary. I see  
5 it. Let me ask you one question. Time charges were again  
6 initiated after the 30-day suspension period expired for  
7 the period of time during which the pavement markers and  
8 the sensors were being installed; is that the way it  
9 worked?

10 MS. KIETZER: (Nodding head affirmatively)

11 MR. DAVIS: Uh-huh.

12 MR. BENAK: (Nodding head affirmatively)

13 MR. PRESCOTT: I'd like to ask one question. Did the  
14 Department notify the Contractor during this 30-day  
15 suspension time that contract time would be charged?

16 MR. BENAK: During the 30-day period?

17 MR. PRESCOTT: Yes.

18 MR. BENAK: I don't know.

19 MR. ROEBUCK: He said not. He said after the fact.

20 MR. BENAK: Yeah, it was -- we deleted the time when  
21 it came into final estimates because of the work that was  
22 done. This all boils back to the fact that we had to do  
23 that by the specifications. If we were notified of a claim  
24 of this nature, we could have negotiated this. You know,  
25 the first, like I said before, the first we knew about it



1 was when it was submitted here.

2 MS. JARRIEL: Well, I'd like to address that, too.  
3 At the time -- we wouldn't have had a claim on this until  
4 the time of the letter of final acceptance. At that point,  
5 that's the first notification we had that this was really  
6 going -- this was the way it was when we got the final  
7 estimates. Up until that point, we wrote a letter back  
8 requesting that the liquidated damages and the time be  
9 corrected. I had no response to that letter. There really  
10 is no claim until we got the offer of final acceptance and  
11 the final estimates.

12 MR. BENAK: Well, you indicated it was on a tentative  
13 final which is far in advance of that.

14 MS. JARRIEL: Right, and that's when I responded that  
15 there appeared to be an error on the final, on the  
16 tentative final; could it be corrected.

17 MR. BENAK: But for me to pay that I'd have to have a  
18 vehicle to do that. To do that would be a claim. If you'd  
19 have filed a claim, I could have negotiated it.

20 MS. JARRIEL: No one responded to my letter either.  
21 So at that point we did not know how it was going to be  
22 handled, whether it was going to be taken off and the  
23 estimate corrected or it was going to remain since there  
24 was no response to it.

25 MR. BENAK: Well, I think our response, was, you know

1 to leave it off of the estimate. You all realized that.

2 CHAIRMAN COWGER: You know, I think the Board, unless  
3 either one of the members have any further questions,  
4 I think we've heard enough testimony on this particular  
5 subject. Does either party want to say anything else?

6 MR. BENAK: No.

7 CHAIRMAN COWGER: Could we then go back now to part  
8 one?

9 MS. JARRIEL: Yeah. I wanted to take care of that  
10 one first since it was sort of --

11 CHAIRMAN COWGER: It does kind of interrelate to some  
12 of the rest of this to some degree, I suppose.

13 MR. ROEBUCK: Yes.

14 MS. JARRIEL: Okay. Claim Number One has to do with  
15 changing from a four-foot traffic separator to a sidewalk  
16 curb and gutter combination in the median.

17 MR. DAVIS: Do you want me to take it?

18 MS. JARRIEL: I'll let you explain what happened on  
19 that.

20 MR. DAVIS: Prior to -- well, time had started on the  
21 job prior to our mobilization to start this job. There was  
22 an on-site meeting between myself, Lori, and Frank. And  
23 there was someone else at that meeting, I'm not sure who it  
24 was, regarding the traffic separator.

25 It was the DOT that actually brought it to our

1 attention that this was not a four-foot traffic separator  
2 existing there. To have placed a four-foot traffic  
3 separator tying into the existing curb and gutter there  
4 would have left about a seven- to ten-inch jog out into an  
5 existing through traffic lane.

6 The DOT requested prices to modify this to what was  
7 an existing condition. The DOT determined the quantities  
8 that were to be used. We submitted them and a submittal as  
9 to our unit prices to install this 24-inch curb and gutter  
10 and six-inch sidewalk. We received a letter approximately  
11 five days later that this was rejected because of the  
12 price.

13 I never did really understand this price thing, but  
14 I went back to DOT approximately two weeks after this.  
15 And I told them, I asked them if we could install the  
16 24-inch curb and gutter and the six-inch sidewalk for the  
17 same price as what we had in the four-foot traffic  
18 separator. The DOT agreed to this.

19 At this point we went ahead and began working on the  
20 traffic separator. We had already begun milling. We had  
21 already had the shoulders in place at this time. This  
22 existing traffic separator was out in one of the through  
23 lanes and in this area that had to be repaired.

24 What it boils down to is the prices that we gave them  
25 to put the correct structure in the roadway was actually

1           \$800 cheaper than the contract amount to place a four-foot  
2           traffic separator. This is the reason I'm saying I don't  
3           understand why it was rejected for pricing. It makes no  
4           sense whatsoever to me, but I think it's actually \$800 --  
5           the prices that we quoted them were actually \$854 cheaper  
6           than what the contract amount was to place the four-foot  
7           traffic separator. And this rocked on for a period of  
8           about 22 days trying to get an answer and trying to get  
9           this thing resolved before we could go to work.

10           MR. ROEBUCK: There's some things I didn't understand  
11           there either. I did my arithmetic. It looked like it was  
12           500 odd dollars difference, but nonetheless, it was a  
13           lesser amount than it was going to be to get changes over.  
14           You better ask the lady that did this work.

15           MR. DAVIS: I've broached this subject before, and  
16           I never have received an answer to this question.

17           MR. ROEBUCK: Ms. Kietzer, could you enlighten us?

18           MR. BENAK: Is it our turn now?

19           MR. ROEBUCK: Huh?

20           MR. BENAK: Is it our turn?

21           MR. ROEBUCK: Yeah.

22           CHAIRMAN COWGER: Let me ask you, though, before you  
23           all start, are you going to rebut that statement about the  
24           cost?

25           MS. KIETZER: I'm Lori Kietzer, project engineer in

1 charge of this project. We have a district set of average  
2 prices for curb and gutter, for sidewalk, etc., statewide  
3 averages, and these were completely way off the range. My  
4 boss could not, for this curb -- no what matter the price  
5 of the traffic separator was, we were dealing with some  
6 curb and gutters and sidewalk, the way we looked at it.

7 We could not justify this price, sending it over to  
8 Chipley with these per foot and per square yard prices.  
9 I don't remember what the exact districtwide and statewide  
10 averages were, but they were considerably under this. And  
11 we could not send it to Chipley with that. That's why they  
12 were denied. I was in conference with my boss, Tom Shafer,  
13 resident engineer.

14 MS. JARRIEL: But at the same time, you guys agreed  
15 to pay for it at the traffic separator price, which  
16 actually --

17 MS. KIETZER: That was not my decision that was  
18 made.

19 MR. ROEBUCK: Thank you, Ms. Kietzer. That's the way  
20 I felt as well. I just know it's difficult to come up with  
21 a firm estimate number on small quantities of work  
22 sometimes.

23 MS. JARRIEL: Right.

24 MR. ROEBUCK: And obviously a Contractor is going to  
25 be guided by what his original bid was, so it's typical --

1 MS. KIETZER: That's true, but we had less quantities  
2 out there. We were going from four-foot considerably  
3 down. He was using less material. It was going to be less  
4 work. It was going to be less everything, but he wanted  
5 still the same amount of money.

6 MR. DAVIS: No. Traffic separators is a one-pour  
7 operation. Curb and gutter and sidewalk is two pours.

8 MS. JARRIEL: But the fact is the curb and gutter  
9 prices were still cheaper than the traffic separator.

10 MR. BENAK: What I want to know is why don't you sign  
11 the supplemental agreement and we can pay you?

12 MS. JARRIEL: Because now we have to discuss this  
13 issue.

14 MR. BENAK: What's left? We want to settle the  
15 issue.

16 CHAIRMAN COWGER: Well, they've never signed --

17 MR. BENAK: And the supplemental agreement is sitting  
18 out there to be signed.

19 CHAIRMAN COWGER: The supplemental agreement that's  
20 in this package --

21 MR. BENAK: Right.

22 CHAIRMAN COWGER: -- has never been signed.

23 MR. ROEBUCK: Never been signed.

24 MR. BENAK: They never signed it.

25 CHAIRMAN COWGER: So they've never been paid anything

1 for this work.

2 MR. BENAK: We're willing to do it if they'll just  
3 sign it and send it back.

4 MS. JARRIEL: Well, at the time -- but right now  
5 we're addressing the delay that was incurred due to the  
6 fact that this decision went back and forth.

7 MR. BENAK: Okay. I think, Lori, you need to get  
8 into your --

9 MS. KIETZER: Okay. Let's see. I've got on my  
10 Exhibit 2 in everybody's book is my narrative or my  
11 response to these claims. And I'll go ahead and go through  
12 it if everybody is ready.

13 Claim Number One in my book is Exhibit A which is the  
14 written that I was given out in the field and then also  
15 Exhibit B which is what we received in the Contractor's  
16 package.

17 "The Contractor submitted a claim on 8-25-93 and  
18 asked for a 22-day time extension. They also claim they  
19 were unsure of how to construct the traffic separator. The  
20 Department denies this claim for the following reasons:  
21 Project personnel requested an on-the-job meeting with the  
22 contract prior to the start of contract time. The  
23 Contractor was unable to meet with the Department until  
24 8-4-93.

25 "On this date the Department requested prices for

1 Type F curb and gutter and six-inch concrete sidewalk,"  
2 which is my Exhibit C, which is showing -- I'm giving him  
3 quantities, approximate quantities and asking for prices.

4 "On 8-12-93 the Department received prices from the  
5 Contractor," which is Exhibit D. And that's where he's got  
6 \$18 per foot and \$60 per square yard. "On 8-17-93 the  
7 Department responded with a letter denying the proposed  
8 prices and with instructions to construct the traffic  
9 separator according to the plans."

10 That would be Exhibit E. That traffic separator  
11 could have been, could have been constructed at four foot.  
12 He would have just had a four-foot wide and then you'd have  
13 to taper it --

14 MR. ROEBUCK: Taper it in.

15 MS. KIETZER: Taper it back into what was existing.  
16 It could have been done.

17 "On 8-24-93 the Contractor requested permission to  
18 install Type F curb and gutter and six-inch sidewalk in  
19 lieu of a four-foot separator at the original price of the  
20 four foot separator." The Department agreed to that  
21 proposal. That was a phone call to my boss made by  
22 Bill Davis.

23 "On 8-25-93 the Contractor submitted an intent to  
24 file a claim," which goes back to my Exhibit A. "The  
25 Department responded with a letter dated 9-7-93 denying



1           this claim." That's my Exhibit F. And that letter right  
2           there pretty much sums up what the whole circumstance was  
3           is on this letter F.

4                        "On 9-28-93 the Contractor wrote a letter agreeing  
5           to the changes and a supplemental agreement was executed."  
6           That would be G is his letter agreeing and then H is the  
7           supplemental agreement which has not yet been signed.

8                        "The Contractor's work progress schedule chart shows  
9           pavement removal starting on workday number one," which is  
10          I, on his approved schedule. Pavement removal is on day  
11          one. Okay. "This activity would need to be completed  
12          before any work on the traffic separator could begin.  
13          Pavement removal on this project began 8-24-93," Exhibit J,  
14          and that is highlighted DOT diary. And that was when he  
15          started his pavement removal.

16                        "Maintenance of traffic items were not erected on  
17          this project item until 8-17-93," Exhibit K showing that  
18          was the first day he went to work. And that's day 24 of  
19          the contract. "The first work plan was submitted on  
20          8-17-93 with paved shoulder listed as the controlling item  
21          of work." That's Exhibit L. He is not showing the traffic  
22          separator yet.

23                        "Work on the traffic separator is shown to begin  
24          work on day number ten", in his Exhibit I on his work  
25          progress. Since work started 8-17-93, this would make the

1 first work date on the traffic separate as 8-27-93," which  
2 he started on the 24th. "The traffic separator is not  
3 listed as a controlling item of work until 8-23-93," which  
4 is Exhibit M. He shows the traffic separator for the first  
5 time. I think that's pretty much what I've got on that.

6 MR. PRESCOTT: Ms. Kietzer, could I ask one  
7 question. Now, you indicated that you had reached  
8 agreement and received in writing from the Contractor an  
9 agreement to place the separator.

10 MS. KIETZER: Right. That was on -- he wrote a  
11 letter to us which is on Exhibit G, dated September 28th.

12 MS. JARRIEL: That's a month after.

13 MR. PRESCOTT: Okay.

14 MS. JARRIEL: The formal letter is long after that  
15 agreement.

16 MS. KIETZER: Right. Basically my Exhibit F --

17 MR. PRESCOTT: The verbal agreement was made when?

18 MS. KIETZER: Was made, item two of my Exhibit F, my  
19 letter kind of recapping this thing: "At this point it was  
20 your decision not to build the four-foot traffic separator  
21 and transition it to the existing traffic separator. On  
22 8-24-93 you requested from T. P. Shafer, P. E., permission  
23 to install curb and gutter and sidewalk in this area. He  
24 approved this request and work progressed on these items."

25 MR. PRESCOTT: On 8-24 there was an agreement.

1 MS. KIETZER: Right, 8-24 there was a phone call  
2 conversation.

3 MR. PRESCOTT: And the traffic separator became a  
4 controlling item of work on 8-23?

5 MS. KIETZER: 8-23 is the first date they list it as  
6 a controlling item.

7 MS. JARRIEL: Right. At that point there was an  
8 agreement on how the work was to progress. There was no  
9 agreement as far as was there going to be any time  
10 extension on anything. It was just agreement on the cost,  
11 8-24.

12 CHAIRMAN COWGER: Did you complete your question  
13 yet?

14 MR. PRESCOTT: Yes, sir.

15 CHAIRMAN COWGER: Let me ask a question, if I could.  
16 When this issue of the traffic separator first came up,  
17 I heard the statement that said that the Contractor could  
18 have constructed the traffic separator in accordance with  
19 the plan by merely transitioning in some length back to the  
20 existing traffic separator which was narrower.

21 But I've also seen from the documents that that's not  
22 really what DOT wanted done. DOT wanted the traffic  
23 separator extended at the same width as the existing  
24 traffic separator; is that true?

25 MS. KIETZER: We had contacted the designer, prior to

1 getting with the Contractor, to make sure that that's --  
2 and he said, yes, the original intent of the plans was to  
3 build it the original length, all the way down. That was  
4 his -- he had gotten erroneous measurements.

5 MR. BENAK: I think what we're trying to show is that  
6 we reached agreement and there wasn't any delay in reaching  
7 that agreement. And that's what we're trying to show you.

8 MR. DAVIS: Can I say something here. Pavement  
9 removal was listed from day one as our controlling item of  
10 work. Pavement removal in the area around the -- on the  
11 existing traffic separator is what the pavement removal was  
12 covered in.

13 This existing traffic separator, if I had removed it  
14 on day one -- now, all these conversations concerning the  
15 changing it and all had taken place prior to our going to  
16 work on the job. That's the reason there was no pavement  
17 removal done on day one. We did not know what we were  
18 going to do at this time.

19 MR. BENAK: Yeah, that's exactly right. You all  
20 weren't ready to get over there. You all didn't even erect  
21 any MOT until --

22 MS. KIETZER: The 17th.

23 MR. BENAK: -- the 17th. You were busy somewhere  
24 else.

25 MS. KIETZER: The first controlling work item I have,

1 I have something paved shoulders here. It has nothing to  
2 do with pavement removal. That was dated 8-16 through  
3 8-21.

4 MR. DAVIS: Again, we had had the conversation 8-4  
5 about the traffic separator.

6 MS. KIETZER: I told -- when I brought it to your  
7 attention that I needed prices because we wanted to have  
8 the curb and gutter, basically what was there --

9 MR. DAVIS: And these were submitted --

10 MS. KIETZER: And you also told me at that time it  
11 was going to be at least two weeks before you were even  
12 going to be able to get out on that project, so we should  
13 have plenty of time.

14 MR. DAVIS: I don't remember the two-week  
15 conversation, but --

16 MS. KIETZER: I have a witness also right here  
17 that --

18 MR. PATE: There was a statement made not once but  
19 several times.

20 MS. JARRIEL: But the fact is is when the Department  
21 changes something, it does affect how you're going to  
22 progress on the job. I mean, it does.

23 MS. KIETZER: I don't see how this had any effect on  
24 anything that was going to be affecting this job, changing  
25 from four foot down to about 32 inches.

1           MS. JARRIEL: Bill, didn't you go through and show  
2 what you planned on doing and then how you actually had to  
3 do it?

4           MR. DAVIS: This is a little involved. When we  
5 originally bid the job and set the job up and scheduled  
6 this job, we figured it in this sequence: Mobilization,  
7 maintenance of traffic, pavement removal, traffic  
8 separator, base repairs, milling, and then the rest of the  
9 job.

10           The way it had to be built, essentially, because of  
11 this delay with the traffic separator, was mobilization,  
12 maintenance of traffic, milling, shoulder placement,  
13 structural course, then the delay over the traffic  
14 separator, then the pavement removal, and then the actual  
15 traffic separator and base repair.

16           This existing traffic separator impacted the edge of  
17 the inside travel lane. You know, we were required to do  
18 some extra work in here getting this travel lane passable  
19 after, because the structural course had already been  
20 placed on the through lanes at the time that we built the  
21 traffic separator. What I'm trying to say is that it  
22 completely turned our schedule topsy turvy to have to --

23           MS. KIETZER: I've got Exhibit I here submitted by  
24 and approved by the Department as their schedule of  
25 operations: Number one, mill; number two, resurface all

1 milled areas; number three, concurrently with the milling,  
2 the turn lane, traffic separator, and shoulder pavement  
3 will be constructed. But that is shown as concurrently  
4 with. That is not shown as the first thing we're going to  
5 do is do pavement.

6 The first thing you're saying is mill, we're going to  
7 mill this. We are going to put our structural course  
8 down. Concurrently with that, while we're doing that, we  
9 are going to get this other --

10 MR. DAVIS: It could have been done, and it could  
11 have been done easily.

12 MS. KIETZER: That's what was submitted to the  
13 Department.

14 MR. DAVIS: And we could have met your schedule.

15 MS. KIETZER: That's not my schedule; this is you.

16 MR. DAVIS: My schedule listed on the first day over  
17 there as --

18 MS. JARRIEL: And that letter is dated June 22nd so  
19 that's before --

20 MR. DAVIS: The first item of work I've got is  
21 pavement removal on the schedule that was approved in  
22 Chipley.

23 MR. BENAK: I think we've got enough documentation to  
24 show that we did not delay this change. We've got the  
25 documentation in the file to convey that to the Board,

1 and I think we've really said enough about it.

2 CHAIRMAN COWGER: Let me ask a couple questions, if  
3 I could. Looking at the Contractor's claim on number one,  
4 he's claiming a 22-day delay beginning on August the 2nd,  
5 '93, through or to August the 24th. I think that's the  
6 22-day period you're talking about.

7 MR. ROEBUCK: Uh-huh.

8 MR. DAVIS: (Nodding head affirmatively)

9 CHAIRMAN COWGER: All right, now, but work did not  
10 begin -- well, first off, this meeting to discuss the  
11 traffic separator took place on August the 4th. Apparently  
12 it had been brought up, the issue had been brought up prior  
13 to August the 4th, but the meeting had not been held.

14 MR. DAVIS: Yes, it was brought up --

15 MS. KIETZER: I'm sorry, but, no, that is not true.  
16 It had not been brought up until before -- what we --  
17 Frank Pate, my inspector, had tried to get a meeting with  
18 Mr. Davis out on the project. We had never mentioned  
19 anything about the traffic separator to Mr. Davis until  
20 August 4th.

21 CHAIRMAN COWGER: Okay.

22 MR. PRESCOTT: Lori, let me ask one question. The  
23 time request for this 22 days is between 8-4-94 and  
24 8-24-94.

25 MR. BENAK: Right.



1           MR. PRESCOTT: But the controlling item of work for  
2 this -- the traffic separator that's involved here did not  
3 even become a controlling item of work until 8-23-94?

4           MS. KIETZER: Correct.

5           MR. PRESCOTT: Irregardless of the decision, it was  
6 not even a controlling item of work on this project until  
7 8-23-94?

8           MS. KIETZER: Correct.

9           MR. PRESCOTT: Okay. I understand.

10          CHAIRMAN COWGER: Now, the question I've got, to  
11 finish up what I started on, the Contractor did not begin  
12 work until 8-17, even though contract time started on  
13 7-25. How about explaining to me, Mr. Davis, why it is  
14 that you waited until the 17th to start work.

15          MR. DAVIS: There was several extenuating  
16 circumstances. One of them was a -- I inherited this  
17 project from another project manager that had done all the  
18 preliminary paperwork and had set everything up. We were  
19 actually seven to ten days, I think, inside the project  
20 before I ever really knew the project existed. I can't be  
21 any more honest than that about it.

22          At that time I started scrambling and trying to put  
23 the thing together and trying to wrap up some others thing  
24 where I could get to it to get it taken care of. There was  
25 a -- you know, and I think we got it together pretty good

1           considering that none of the EEO work had been done or any  
2           of this stuff and able to get to work by 8-17.

3           CHAIRMAN COWGER: Okay. I think that answers that.  
4           Do you care to expand on that anymore?

5           MR. DAVIS: No, sir, I don't believe I do.

6           CHAIRMAN COWGER: All right. I think we've probably  
7           addressed the issue of entitlement as far as we need to go  
8           at this point in time. In the event that the Board should  
9           find some entitlement, I need to ask a couple of questions  
10          about your compensation request. You've got a maintenance  
11          of traffic item there of \$166.67 a day. How was that  
12          arrived at?

13          MS. JARRIEL: That's just taking the lump sum amount  
14          for the project and computing it on a daily basis.

15          CHAIRMAN COWGER: Lump sum divided by 60?

16          MS. JARRIEL: Sixty-two, I believe -- 60, yes, 60  
17          days.

18          CHAIRMAN COWGER: Okay. Job site overhead, and while  
19          we're at it, home office overhead. We find no  
20          documentation anywhere of either one of those figures.

21          MS. JARRIEL: Your job site overhead consists of  
22          your superintendent, his truck, and facilities, temporary  
23          facilities. And that's all that makes up that number. As  
24          far as the job site overhead goes, that's based on our  
25          overhead for the whole company on this particular year was

1           computed at seven percent and then seven percent of the  
2           contract price based on the date and then broken down into  
3           a daily cost.

4           CHAIRMAN COWGER:   Essentially the Eickley formula?

5           MS. JARRIEL:   No, it's --

6           CHAIRMAN COWGER:   Similar to that.

7           MS. JARRIEL:   Right.  It's we have seven percent  
8           built in for overhead and then just taking that out on a  
9           daily basis.

10          CHAIRMAN COWGER:   This is seven percent of what, the  
11          contract amount?

12          MS. JARRIEL:   Right.  And then breaking it down into  
13          a daily basis.

14          CHAIRMAN COWGER:   The problem with that is right now  
15          we have no documentation for that.  I understand how you  
16          arrived at the job site overhead, the factors you put in  
17          there, but there's nothing in here to justify those  
18          numbers; am I correct?

19          MS. JARRIEL:   No, you are correct.

20          CHAIRMAN COWGER:   Okay.  Does either party have  
21          anything else to say about part one or either one of the  
22          Board members?

23          MR. PRESCOTT:   (Shaking head negatively)

24          MR. ROEBUCK:   It might be well that next -- if you  
25          bring that overhead item back, to bring a recent audited

1 statement or something and showing your revenues and how  
2 you generated the seven percent.

3 MS. JARRIEL: Yeah, I have all those numbers.

4 MR. ROEBUCK: I know, but that's a means of verifying  
5 it.

6 MS. JARRIEL: I have all those numbers.

7 CHAIRMAN COWGER: Okay. With that, we'll close out  
8 part one and go to part two.

9 MR. ROEBUCK: There ain't no part two. It's three.

10 CHAIRMAN COWGER: Part three. I'm sorry.

11 MR. DAVIS: As far as we're concerned, on part two --

12 MS. JARRIEL: Or claim number three.

13 MR. DAVIS: Or claim number three, however you want  
14 to look at it, Mitchell Brothers is willing to waive part  
15 three totally. We could fight it out, but it's not worth  
16 it monetarily or any other way to pursue this small claim  
17 because of the cost that would be incurred in doing so.  
18 And we'll just agree to waive it.

19 CHAIRMAN COWGER: We appreciate the savings in time  
20 that that's going to make for us.

21 MR. PRESCOTT: Sure do.

22 MR. ROEBUCK: That's right. Yeah.

23 CHAIRMAN COWGER: Okay. I guess we'll go on to part  
24 four, then.

25 MS. JARRIEL: Part four really has two issues, part

1 of it is money, but part of it is time. In this particular  
2 claim, this occurred at the very end of the job. As stated  
3 in the claim, there was a claimed -- this has to do with  
4 reflective pavement markings -- there was a claimed  
5 quantity of 685 markers on this job.

6 We were using an MBE subcontractor, Gaines & Sons,  
7 for the striping and the pavement markers. He had already  
8 placed a considerable overrun of 822 markers when he ran  
9 out. At that point it's like 30 something percent over  
10 planned quantities. And he ran out of markers. We got  
11 with him to get with his supplier and have some new markers  
12 airfreighted in which, again, we're talking a time lapse  
13 there to get them in and then allowing time to put them  
14 in.

15 We had requested on the job site a time extension of  
16 a couple of days, and I think it was officially five days,  
17 just to allow for time to get them in, which every  
18 indication was, the five days would be acceptable. Again,  
19 after -- we then did a written submittal for a time request  
20 for a time extension on October 25th. And on November 4th  
21 we received a letter -- again, everything is done by now --  
22 stating that there would be no time extension.

23 I don't think our request for five days was  
24 unreasonable. We then appealed that decision because of  
25 numerous things involved: The fact that we are using a

1 small MBE. He does not keep thousands of dollars' worth of  
2 inventory on hand. And he had already put down a  
3 considerable -- he was prepared for an overrun, but not the  
4 size overrun that was on this job.

5 Basically, we just felt like our request was very  
6 reasonable. That appeal was also denied. So at this time  
7 we are now looking for the time as well as the delay costs.

8 CHAIRMAN COWGER: And the additional costs for  
9 airfreighting the markers, right?

10 MS. JARRIEL: Right. The cost of the markers  
11 themselves were paid on the estimate, so there's no  
12 additional cost due for that, but there was additional cost  
13 for airfreighting them in.

14 CHAIRMAN COWGER: Is that it?

15 MS. JARRIEL: That summarizes that claim. I feel  
16 like it's a fairly simple claim, and it's amazing to me  
17 that we're even here having to discuss this one, but we  
18 are.

19 CHAIRMAN COWGER: Okay, DOT?

20 MR. BENAK: Lori is going to go through her  
21 submittal.

22 MS. KIETZER: Okay. Claim Number Four, which is  
23 Exhibit BB of where, again, we've got this in the package.  
24 "The Contractor claims he incurred a delay due to a  
25 shortage of pavement markers due to an error in the plans.

1           The Department denies this claim for the following  
2 reasons: According to plan sheet three, signing and  
3 pavement marking note number four, the Contractor shall be  
4 responsible for documenting the existing roadway markings,"  
5 which is CC of your exhibits which states, "The Contractor  
6 shall be responsible for documenting the existing signing  
7 and markings within the project limits before construction  
8 is started. And this information is to be used in  
9 conjunction with the placement of temporary and permanent  
10 markings.

11           If the existing markings were documented prior to the  
12 start of the milling operation, the overrun in pavement  
13 markers would have been discovered. This would have given  
14 the subcontractor ample time to stock his inventory. The  
15 Contractor also claims it took five days to order, receive,  
16 and place the additional pavement markers." This goes back  
17 to his original claim of Exhibit BB.

18           "According to the Standard Specifications 8-7.3.2, a  
19 time extension can be granted if a shortage is due to an  
20 area-wide shortage, an industry-wide strike, or a natural  
21 disaster." That would be Exhibit DD which states that  
22 same -- "A local supplier has indicated that he stocks 200  
23 to 300 pavement markers at all times." That would be  
24 Exhibit EE. That's Marpan. He's local.

25           "This fact eliminates the area-wide shortage.

1           Therefore, the Department denies the claim," which would be  
2           Exhibit FF on their appeal for additional contract time.

3           MS. JARRIEL: One thing, we used well over 200 more.  
4           I think that's been pretty well documented. But I believe  
5           Bill said that one of the things they looked into the day  
6           that this came up was the fact that that local supplier's  
7           costs were considerably higher than our subcontractor's  
8           costs.

9           Now, at that point since there was such a high  
10          percentage of overrun, we could have come back to the  
11          Department and said, okay, because we've used so much more  
12          than this, we'll put them in, but we need to negotiate a  
13          price increase. It didn't seem that that was a reasonable  
14          way to go. We felt that time was a much more reasonable  
15          way to proceed.

16          So rather than come back and negotiate a price  
17          increase, we requested time, which, again, verbally on the  
18          job site appeared to be acceptable. This, again, the  
19          decision was made after the fact.

20          MR. BENAK: What it all boils down to, if that was a  
21          major item of work, we could have done that. It's not a  
22          major item of work so --

23          MS. JARRIEL: To our subcontractor it is.

24          MR. BENAK: Well, to the project it is not. It took  
25          five days to get some pavement markers that were readily



1 available in the area. You know, that's why it was  
2 denied. We just can't understand why they don't go out and  
3 get it, bring it, and put it down.

4 MS. JARRIEL: I believe the letter from the supplier  
5 says they have 200 to 500.

6 MR. CUMMINGS: Two hundred to 300.

7 MS. JARRIEL: Two hundred to 300?

8 MR. BENAK: Well, that was one supplier.

9 MS. KIETZER: That was one supplier.

10 CHAIRMAN COWGER: Let's not argue about that  
11 anymore. I think the Board can deal with that issue. We  
12 know the facts now.

13 MR. ROEBUCK: Yeah.

14 CHAIRMAN COWGER: Let me ask you a couple questions.  
15 Is it true that the Contractor, the paving marking  
16 Contractor was delayed five days, regardless of the cause  
17 of it? Is five days the number of days that it actually  
18 was delayed?

19 MR. PATE: I think it was actually only delayed like  
20 two or three days.

21 MR. DAVIS: I think it was three.

22 MS. KIETZER: It was about three --

23 MR. PATE: He realized he was running short prior to  
24 running out of what he had. And they began to make the --

25 MR. DAVIS: As a matter of fact, we went and borrowed

1           some from the city.

2           MR. PATE: Two to three days.

3           CHAIRMAN COWGER: What's the basis, then, for five  
4 days if you were only delayed two to three?

5           MS. JARRIEL: Five days is what we initially  
6 requested, because we weren't sure how quick they would get  
7 in.

8           CHAIRMAN COWGER: Okay. But the actual delay was  
9 more like --

10          MS. JARRIEL: Two days.

11          CHAIRMAN COWGER: -- three days?

12          MS. JARRIEL: Correct.

13          MR. PRESCOTT: Could I ask the Contractor at what  
14 point did you recognize that there was going to be an  
15 overrun on this project of pavement markers? Was that on  
16 day one of the contract?

17          MR. DAVIS: No, sir.

18          MS. JARRIEL: No. This was right when the  
19 subcontractor was putting them down.

20          MR. PRESCOTT: I see. It wasn't on day one of the  
21 contract that you recognized that there was going to be an  
22 overrun. So you started some work, but didn't know there  
23 was going to be an overrun.

24          MS. JARRIEL: Right. This is one of the very last  
25 items of work to be placed.

1           MR. PRESCOTT: And that's when you all determined  
2 that there was going to be an overrun was at the end of the  
3 project?

4           MS. JARRIEL: Right. This is, I think, the last item  
5 to be placed.

6           CHAIRMAN COWGER: How long it did take to install  
7 these pavement markers, the ones that were installed before  
8 the break? How many days, just roughly?

9           MR. DAVIS: A day.

10          CHAIRMAN COWGER: A day? Okay.

11          MR. PATE: I think it was more like two days. This  
12 DBE was very slow in his process and progress of work.

13          MR. DAVIS: Extremely.

14          MR. PATE: Extremely slow.

15          CHAIRMAN COWGER: But you went out there and did not  
16 discover, for whatever the reason may be, he did not  
17 discover that he was short of having enough pavement  
18 markers until he got up close to the end of installing the  
19 ones that he had. All right.

20                 Now, let me ask you a question about this plan note  
21 that you've quoted from plan sheet three. Somebody give me  
22 an opinion of what that note is on there for. Is that on  
23 there to cover this kind of situation?

24          MR. DAVIS: My opinion is it's on there to locate  
25 gore areas and turn arrows. That's what I -- catalogue of

1           striping on the job, that's what I locate, is the gore  
2           areas, turn arrows, turn lanes, any specific abnormal  
3           striping, stop bars, these are all recorded by station  
4           number, this kind of stuff. I do not go out there and  
5           locate pavement markers. They've covered in the standards  
6           and it's a standard placement procedure.

7           CHAIRMAN COWGER: Basically, then, I think from what  
8           Mr. Davis is saying, the purpose of the note, in his  
9           opinion, is that any pavement markings or signs that have  
10          to be reinstalled at the end of the project in the exact  
11          location they were in before work began is what he's  
12          required to document.

13          MR. DAVIS: (Nodding head affirmatively)

14          MR. PRESCOTT: Mr. Cowger, that's not correct. And  
15          I'd like to indicate to you that the purpose of it is not  
16          to go back and just install them where they previously  
17          existed. They're to be installed in accordance with the  
18          MUTCD. That requires changes that may have to be  
19          identified to make that change. That's why it's asked to  
20          be done at the start of the project.

21          CHAIRMAN COWGER: But really what you're trying to do  
22          is identify where they were to begin with --

23          MR. PRESCOTT: No, that's not correct.

24          MR. ROEBUCK: Where they want to be --

25          MR. PRESCOTT: I want you to understand that is not

1 correct and that is not what the Department wants. What  
2 the Department wants is the pavement markings, traffic  
3 control markings that are on that pavement are to be  
4 established in accordance with the MUTCD.

5 CHAIRMAN COWGER: Okay. I understand that.

6 MR. PRESCOTT: They may not where they existed before  
7 this plan --

8 CHAIRMAN COWGER: But purpose of this note is to  
9 document what existed --

10 MR. PRESCOTT: No, no, no. That's not what I just  
11 said.

12 MS. JARRIEL: But that's what the note says.

13 MR. CUMMINGS: That's what the note says.

14 CHAIRMAN COWGER: Read what the note says, though,  
15 please.

16 MR. PRESCOTT: I'm saying that the pavement markings  
17 on the project are to be installed in accordance with the  
18 MUTDC. That's part of the contract.

19 CHAIRMAN COWGER: Okay.

20 MS. JARRIEL: So this note does not apply to this  
21 situation; is that what we're saying?

22 MR. PRESCOTT: MUTDC applies to this contract.

23 CHAIRMAN COWGER: Steve, do you have anything further  
24 to say on that issue dealing with the note?

25 MR. BENAK: Let me read it again.

1 CHAIRMAN COWGER: (Handing document to Mr. Benak)

2 MR. CUMMINGS: In this moment of silence let me say  
3 that --

4 MR. PRESCOTT: I thought there wasn't going to be any  
5 comments, Mr. Cummings, from you from the start of this  
6 hearing. And I would like to ask that we not hear any.

7 MR. CUMMINGS: Well, let me tell you what --

8 MR. PRESCOTT: No, no.

9 MR. CUMMINGS: -- I'm not a potted plant. And I do  
10 not intend to sit here.

11 MR. PRESCOTT: I understand that.

12 MR. CUMMINGS: There is a notification, Mr. Prescott,  
13 that I will be here. These people had every right to bring  
14 their attorney; they didn't do so. You are misinterpreting  
15 what I said before I came in here. I have the right to be  
16 here. I have the right to speak while I'm here. You have  
17 no right to tell me that I cannot speak.

18 CHAIRMAN COWGER: Okay. Let's not get into an  
19 argument across the table. Let's let Mr. Cummings say what  
20 he wants to say, and the Board will decide later on whether  
21 it wants to consider it.

22 MR. CUMMINGS: Right. Well, this goes back to the  
23 very issue we had in the beginning about whether the people  
24 who come to make a decision here come without a prejudice.  
25 Obviously, there is some prejudice here on the part against

1 Mitchell Brothers and me as their attorney if I'm requested  
2 not to speak by the Department's representative.

3 And we could go back into a number of lawsuits that  
4 exist between Mitchell Brothers and the Department which  
5 involve, personally, defendants such as Mr. Benak, which we  
6 would suggest to this arbitration panel come out into a  
7 form of denying time back when it's been given on a cure  
8 period. But we will put that aside and go back to the note  
9 just for a moment.

10 Now, on this note, I don't believe that it could ever  
11 be interpreted that a Contractor, nor has it ever been  
12 interpreted that a Contractor would go out and count  
13 delineators. And when delineators and how they're supposed  
14 to be put back down is under another particular provision  
15 in the Standard Specifications, it tells you how many, what  
16 the spacing is, and so forth.

17 So counting delineators at the beginning to support a  
18 position that the Department is taking that we should have  
19 known that there was going to be a 50 percent overrun,  
20 their problem, their 50 percent overrun nevertheless  
21 shifted back to us because of a perverted construction of  
22 the note, I don't believe that you all are going to count  
23 this. Thank you.

24 MR. BENAK: Can I respond to that, please?

25 MR. PRESCOTT: I would like to indicate that at no

1 time did I indicate that Mr. Cummings could not participate  
2 in this. This was a decision that he made at the start of  
3 the hearing.

4 MR. CUMMINGS: Not correct.

5 CHAIRMAN COWGER: Steve?

6 MR. BENAK: Even if, you know, we're talking about  
7 counting pavement markers, you know, even with that note,  
8 if they went out there and counted them and we came up with  
9 a shortage, it's our position that even if it was wrong in  
10 the plans, they can go out and get it within a couple  
11 hours. And it took a few days to get it. That's all --  
12 that's what we're looking at here.

13 CHAIRMAN COWGER: Okay. What you're saying, Steve,  
14 is that they could have got the pavement markers quicker  
15 than they did.

16 MR. BENAK: Right, exactly right.

17 MS. JARRIEL: Again, there was an exorbitant price  
18 difference. And our subcontractor could not afford to eat  
19 that. So we would have had come to back and, again,  
20 negotiate a supplemental agreement, because he would have  
21 had to have been compensated the difference. A time  
22 extension, three days, five days, was a much more  
23 reasonable way to go.

24 Now, I've got to say right now, the fact that we're  
25 here right now, we were not looking for delays -- damages,



1 costs on that claim. All we wanted was the time it took to  
2 get them in so he wouldn't have to expend the extra  
3 dollars. The fact that five days was not even allowed at  
4 three days, the fact it was denied, is why we're here.

5 We were not looking for additional compensation. We  
6 would have been willing to say give us a couple days, let  
7 him get his stuff in, we'll walk away. The fact it was  
8 denied is why we're sitting here.

9 CHAIRMAN COWGER: I think we've heard enough on  
10 that. And it's unfortunate that we got into some of the  
11 across-the-table conversation that we got into, because  
12 I don't really think it was necessary. I think the Board  
13 understood the circumstances before we got into that. At  
14 least I did.

15 MR. CUMMINGS: I'm like a vampire. If I don't get to  
16 drink a little blood each day --

17 CHAIRMAN COWGER: Okay. Let me ask now, again, we've  
18 got to make an assumption that the Board found some reason  
19 for entitlement. Is there documentation anywhere of these  
20 airfreight costs?

21 MS. JARRIEL: Yes. And that's included with the  
22 claim. There's a copy in the subcontractor's --

23 CHAIRMAN COWGER: It's included. Okay. I can't find  
24 it right now, but I'll take your word for it.

25 MS. JARRIEL: Right. The subcontractor provided us

1 with a bill for that.

2 CHAIRMAN COWGER: Oh, here it is. Oh, okay. I see  
3 it.

4 MR. ROEBUCK: Yeah, the sub.

5 CHAIRMAN COWGER: Again, on maintenance of traffic,  
6 whatever length of time that there was out there during  
7 which there was a delay because the subcontractor had to  
8 obtain pavement markers, what was the extent of the  
9 maintenance of traffic costs incurred by the Contractor?  
10 I'm not talking about the dollars. I'm talking about what  
11 physical effort was going on during that period of time  
12 that would justify paying additional for maintenance of  
13 traffic.

14 MR. DAVIS: Construction signs were still up which  
15 they were being paid for --

16 MS. JARRIEL: Not after the contract was stopped.

17 MR. DAVIS: That's right. The contract time had been  
18 stopped. We still had the -- the signing was still up and  
19 still in place.

20 CHAIRMAN COWGER: Okay.

21 MR. DAVIS: It was still a legal construction zone.

22 CHAIRMAN COWGER: Basically, it was just the signs,  
23 though?

24 MR. DAVIS: Basically, it was--

25 CHAIRMAN COWGER: And markers and barricades and

1           whatever else might have been out there?

2           MR. DAVIS: Some of the signs on this particular job  
3           were placed on tripods, because they were in concrete  
4           paving areas and this type of stuff. And there was some  
5           maintenance involved with them as to trucks blowing them  
6           over and this kind of stuff, but --

7           CHAIRMAN COWGER: Okay. In regard to the job site  
8           overhead, and I think this the last question I've got, did  
9           Mitchell have a job site office on this small project?

10          MS. JARRIEL: No, and I've not charged for an office.

11          MR. ROEBUCK: Just the truck.

12          CHAIRMAN COWGER: Mr. Davis, you were the  
13          superintendent?

14          MR. DAVIS: Yes, sir.

15          CHAIRMAN COWGER: What about your involvement during  
16          that period of time? Were you on this job exclusively, or  
17          were you on other work?

18          MR. DAVIS: I would say my time was split 50/50.

19          CHAIRMAN COWGER: Okay. Do either one of the Board  
20          members have any additional questions? Mr. Prescott,  
21          Mr. Roebuck?

22          MR. PRESCOTT: No.

23          CHAIRMAN COWGER: I think we've got one more comment  
24          from DOT.

25          MR. PATE: Yes, we've got a comment there, because he

1 would come by like of the morning, check with them, then  
2 he'd go on and make -- he might spend two to two and a half  
3 hours on the job. And I believe -- we don't have document  
4 of it in here, because we didn't know it was going to be  
5 situation that was coming up, but on our daily diaries it  
6 is documented how much time Mr. Davis spent out there.

7 CHAIRMAN COWGER: Who did you check with? You said  
8 he came out on the job --

9 MR. PATE: He come out there and get with Mr. Gaines,  
10 you know.

11 CHAIRMAN COWGER: Who's Mr. Gaines?

12 MR. PATE: He was the DBE.

13 MR. ROEBUCK: Sub.

14 MR. PATE: The one putting down the -- the sub. He  
15 was the sub. And our inspector was out there, and he would  
16 document what times Mr. Davis was there.

17 MS. JARRIEL: Well, Mr. Davis was not available full  
18 time to any other job.

19 MR. PATE: Yeah, but he just indicated that he was  
20 there 50/50. He wasn't there 50/50. He was there about  
21 two hours.

22 MS. JARRIEL: Including paperwork. He's including  
23 all his daily work.

24 CHAIRMAN COWGER: I think we've got enough  
25 information.

1 MR. ROEBUCK: Yeah.

2 CHAIRMAN COWGER: Steve?

3 MR. BENAK: I just wanted to add that when this was  
4 scheduled in July, prior to that I had contacted Mitchell  
5 Brothers in an attempt to try to negotiate this situation  
6 out. I tried again another time, and then I had my  
7 resident engineer try to negotiate with them, also. So  
8 it's not like we just cut them off here and then didn't try  
9 to talk to them. We were trying to talk to them and tried  
10 to deal with this claim outside of this Board.

11 CHAIRMAN COWGER: I understand.

12 MR. BENAK: I talked to Eddie personally one time and  
13 he indicated to me he was too busy and Donna another time  
14 and she indicated to me that he was too busy to talk to  
15 me.

16 So, you know, Mr. Cummings indicated that I'm,  
17 I guess, being punitive against them. I don't do that.  
18 I treat everybody the same way. And I think everybody in  
19 the industry knows that. And that's what I try to do.  
20 And I do not, you know, I do not treat Mitchell Brothers  
21 any different from any other Contractor that I deal with.  
22 I wanted to get that on the record.

23 MS. JARRIEL: Well, I just want to add --

24 MR. ROEBUCK: Mr. Cowger apologizes from the Board to  
25 you, Steve.

1           CHAIRMAN COWGER: Does the Board --

2           MR. CUMMINGS: I only come once every five years.  
3 It's not like I'm a big nuisance.

4           CHAIRMAN COWGER: Does the Board concur that these  
5 type of statements about the bias on the part Mr. Benak  
6 will not be considered in our deliberations?

7           MR. ROEBUCK: Yes.

8           MR. PRESCOTT: Yes.

9           MR. ROEBUCK: Yes.

10          CHAIRMAN COWGER: That ought to wrap that up.  
11 Anything else to be said from the parties?

12          MS. JARRIEL: Well, I did want to add, that, too, all  
13 the requests we made early in this project go right down to  
14 the pavement markers. All this happened anywhere from a  
15 year to nine months ago. These were reasonable requests.  
16 It's unfortunate that we have to take up the Board's time  
17 and come to arbitration on this.

18          Again, I say I don't -- Mitchell Brothers was not  
19 unreasonable in any of this. The fact that the liquidated  
20 damages were held, the fact that a minimal time extension,  
21 which we thought at the time was actually going to save  
22 money for the Department was denied, that's why we're here,  
23 because we had made some reasonable requests; we were  
24 denied.

25          CHAIRMAN COWGER: Okay. I think unless there's

1 something that's really gnawing on someone, we'll close the  
2 hearing at this point.

3 The hearing is hereby closed. The Board will meet in  
4 approximately six weeks to deliberate on this claim.  
5 You'll have our final order shortly thereafter. Thank  
6 you.

7 (Whereupon, the hearing was concluded at 10:53 a.m.)

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CERTIFICATE OF REPORTER

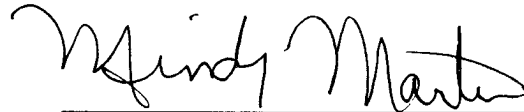
STATE OF FLORIDA )

COUNTY OF LEON )

I, MINDY MARTIN, Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings; 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 attorneys or counsel connected with the action, nor am I financially interested in the action.

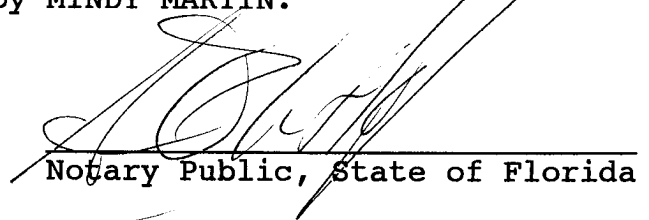
Dated this 2nd day of September, 1994.



MINDY MARTIN  
Registered Professional Reporter  
Post Office Box 13461  
Tallahassee, Florida 32317

STATE OF FLORIDA )  
COUNTY OF LEON )

and The foregoing certificate was acknowledged before me this day of September, 1994, by MINDY MARTIN.

  
Notary Public, State of Florida

Personally Known \_\_\_\_\_  
Produced Identification \_\_\_\_\_  
Type \_\_\_\_\_



SARA MARTIN HUFF  
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November 3, 1997  
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