

STATE ARBITRATION BOARD

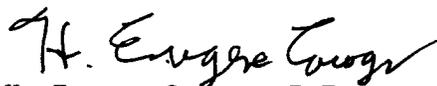
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NOTICE

In the case of Misener Marine Construction, Inc. versus the Florida Department of Transportation on Project No. 12001-3509 in Lee County, Florida, both parties are advised that State Arbitration Board Order No. 6-94 has properly filed on December 9, 1994.



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

S.A.B. CLERK

DEC 9 1994

FILED

Copies of Order & Transcript to:

Mr. J.B. Lairscey, P.E., Director of Construction/FDOT

Mr. William S. Humphreys, V.P. & Contracts Mgr./Misener Marine

STATE ARBITRATION BOARD

ORDER NO. 6-94

RE:

Request for Arbitration by
Misener Marine Construction, Inc. on
Job No. 12001-3509 in
Lee 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 11:10 a.m., on Monday,
October 24, 1994.

The Board Members, having fully considered the evidence
presented at the hearing, now enter their order No. 6-94 in
this cause.

ORDER

The Contractor presented a request for arbitration of a
claim in the amount of \$166,656.00. The amount claimed
represents the margin costs lost by the Contractor due to a
substantial decrease in the quantity of the item Trees
(Mangrove).

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

1. The final pay quantity for Trees was 1,488 less than the
plan quantity of 1,712 for that item. This prevented us from
recovering the \$166,656.00 we factored into that item when we
prepared our bid to cover certain margin costs for the

overall contract. This had a devastating effect on our contract earnings.

2. We factored margin costs into the Trees item relying on the Department of Transportation's estimate of quantity being reasonable. We had no reason to anticipate that there would be a major variation in the quantity of this item.

3. This gross error in the plan quantity for the item Trees, misled all bidders. Our bid unit price for this item was not challenged by the Department of Transportation (DOT) as unreasonable at the time the contract was awarded to us, even though our price was \$115.00 each and the next lower price submitted by any bidder was \$20.00

4. The plans for this project were developed in 1988, bids were received in 1990 and the error in the quantity for the item Trees was not discovered by DOT until 1992, after removal of existing Brazilian Pepper trees in the principal mitigation area. DOT had inspected and approved the plan quantity of Trees in October 1993. In view of these circumstances it is unreasonable to expect a bidder to have detected the plan error during a prebid site inspection.

5. The area in which mangrove trees were planted was substantially reduced due to revegetation that occurred after the plans were prepared and existence of riprap in the areas that were to be planted.

6. We planted mangrove trees to compensate for unauthorized dredging at one location, but only a portion of these trees were planted in a mitigation area shown in the plans.

Planting of some trees was eliminated because riprap existing in a mitigation area prevented such planting. We offered to enhance the riprap areas, at our expense, to allow trees to be planted, but DOT rejected our offer. Riprap was placed in the area at the South end of the Southbound bridge that the plans showed to be planted with mangrove trees. It was not suitable to plant mangrove trees at this location, because of exposure to wave action.

7. We are not asking for an equitable adjustment of the contract due to differing site conditions. The basis of our claim is that DOT misrepresented the work to be accomplished and breached its expressed warranty as to the completeness and accuracy of the contract plans.

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

1. We admit that the plan quantity for the item Trees was incorrect, because the actual littoral area suitable for planting mangrove trees within mitigation areas was smaller than shown in the plans and natural revegetation occurred in some areas between the time the plans were developed and work on planting of mangrove trees began. However, this reduction in quantity was beyond our control and was not done with malicious intent. The Contractor should have detected during his prebid site inspection that the quantity of Trees would vary substantially from the plan quantity.

2. A reduction of 595 Trees was due to assignable causes.

Unauthorized dredging by the Contractor resulted in a reduction of 275 Trees; riprap left in place in the mitigation area along the west side of the Southbound Roadway causeway at the request of the contractor resulted in a reduction of 148 Trees; and substitution of riprap construction for trees in the mitigation area at the South end of the Southbound Bridge resulted in a reduction of 172 Trees.

3. DOT has acted within its contractual rights and responsibilities in this instance. We cite Articles 2-3, 2-4, 5-4 and 9-6 and Subarticles 4-3.2.1 and 9-3.1 of the Standard Specifications to support our position. DOT is not responsible to assure that the final quantities will be in accordance with the estimated quantities and has the contractual right to increase, decrease or omit portions of work. The change in quantity of Trees does not constitute a significant change in the character of the work because Trees were not a major item of work as defined in the contract. The Contractor is not allowed to take advantage of any apparent error he discovers in the plans. We did not discover the limitation on planting area until an inspection of the job site in June 1992.

4. DOT does not reject bids because of unbalanced bid prices unless the bid is materially unbalanced to the extent that it would negatively impact DOT or cause there to be a different low bidder.

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

1. Calculation of the plan quantity for the item Trees was based on well defined areas shown in the plans and planting of trees at a fixed spacing. The actual areas planted varied substantially due to incorrect application of location criteria by the designer. The estimated plan quantity did not approach approximate.
2. The underrun in the item Trees was largely due to a plan error, not changes ordered by DOT.
3. The Contractor stated that, in preparing his unit cost for the item Trees, he relied on the plan quantity for that item being reasonably accurate.
4. Some of the underrun in the item trees was related to unauthorized dredging by the Contractor.

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

The Department of Transportation shall reimburse the Contractor in the amount of \$110,000.00 for his claim.

The findings of the Board in this instance are based on the particular set of circumstances on which the Contractor's claim was based.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$213.80 for Court Reporting Costs.

S.A.B. CLERK

DEC 9 1994

FILED

Tallahassee, Florida

Dated: 09 Dec 1994

Certified Copy:

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

09 December 1994
Date

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

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

DEC 9 1994

FILED

MISENER MARINE CONSTRUCTION,)
INC.)

- and -)

DEPARTMENT OF TRANSPORTATION)

PROJECT NO. 12001-3509

LOCATION: Lee County,
Florida

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Monday, October 24, 1994

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

TIME: Commenced at 11:10 a.m.
Concluded at 12:25 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. Edward Prescott
 Mr. Jack Roebuck

APPEARING ON BEHALF OF MISENER MARINE
CONSTRUCTION, INC.:

Mr. Brett Chabert
 Mr. Ron Henderson

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Glenn Ivey
 Mr. Rick Roberts
 Mr. Jay Segalla
 Mr. Ken Blanchard
 Mr. Joe McGill

* * *

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1, 2, 3 and 4 in evidence	4
CERTIFICATE OF REPORTER	39

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
4 Section 337.185 of the Florida Statutes.

5 Mr. Edward Prescott was appointed as a member of
6 the Board by the Secretary of the Department of
7 Transportation. Mr. John Roebuck was elected by the
8 construction companies under contract to the Department
9 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. Mr. Roebuck's and my term began July 1, 1993
13 and expire June 30, 1995. Mr. Prescott's term of
14 office began July 1, 1994 and expires 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 introduced as
21 Exhibit 1, request for arbitration submitted by the
22 contractor.

23 Exhibit 2 is the DOT's written rebuttal that was
24 furnished to the Board last week. And a copy of it was
25 furnished to the contractor last week. You all do have

1 that copy, do you not?

2 MR. HENDERSON: Yes, sir.

3 CHAIRMAN COWGER: Okay. Are there any other
4 exhibits to be presented?

5 (Discussion off the record)

6 CHAIRMAN COWGER: While we were off the record
7 Misner Marine submitted two additional exhibits, a
8 memorandum dated March 18, 1993, from Parsons,
9 Brinckerhoff, and a -- that will be identified as
10 Exhibit 3, a letter from Misner Marine dated October 8,
11 1992, will be identified as Exhibit 4.

12 (Whereupon, Exhibit Nos. 1, 2, 3 and 4 were received in
13 evidence.)

14 CHAIRMAN COWGER: DOT, do you need additional
15 time to examine those two exhibits, 3 and 4?

16 MR. IVEY: Yes, I haven't read this 4, Gene.

17 CHAIRMAN COWGER: We will pause after we finish
18 the opening statement then and let you have a little
19 time.

20 During this hearing the parties may offer such
21 evidence and testimony as is pertinent and material to
22 the controversy and shall produce such additional
23 evidence as the Board may deem necessary to an
24 understanding and determination of the matter before
25 it. The Board shall be the sole judge of the relevance

1 and materiality of the evidence offered.

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

8 The hearing will be conducted in an informal
9 manner. The contractor will elaborate on their claim,
10 and then DOT will offer rebuttal. Either party may
11 interrupt to bring out a point by coming through the
12 Chairman. However, for the sake of order, I must
13 instruct that only one person speak at a time, please.

14 We are going to pause now for just a brief period
15 to allow DOT and the Board members to read these
16 exhibits. We will go off the record for a moment.

17 (Brief pause)

18 CHAIRMAN COWGER: Okay. I think it would be
19 appropriate for the contractor to begin the
20 presentation of their claim at this time. If you will,
21 please, tell us at the beginning the total amount that
22 you're claiming.

23 MR. HENDERSON: My name is Ron Henderson with
24 Misner Marine Construction. The amount of our claim is
25 \$166,656.

1 First of all, I would like to thank everybody for
2 coming. I know it's a long drive for some, and looks
3 like some of you were already here anyway.

4 I would like to state right off the bat that this
5 is a monetary issue. That's why we're here. This is
6 an important issue to Misener Marine. We feel like
7 we've lost a lot of our margin out of this job.

8 The fact of the matter is when the job was bid,
9 and I do have the spread sheet from the bids, Misener
10 Marine was \$2 million low on this job. And I will have
11 to state here at this point in time, I believe from my
12 heart that had we bid the particular unit that's in
13 question at one penny or two pennies each, somehow they
14 would have been included in this project, regardless of
15 the physical restraints that we're going to talk about
16 later.

17 I think our case was stated basically in
18 Mr. Humphreys' letter of November 24, 1993, which
19 I assume everybody has a copy of.

20 Our case is based on, number one,
21 misrepresentation. At the time that the job was bid,
22 DOT, the Department, should have had accurate
23 information to provide all bidders with a reasonable
24 estimate of the number of plants to be planted on this
25 job. As such, Misener Marine relied on the accuracy of

1 those documents in pricing the project.

2 The reduced quantity is not based on changed
3 conditions at the planting site designated, but DOT,
4 the Department, apparently did not determine prebid,
5 preaward, whatever, that the planting site could not
6 accommodate the quantity that they specified in the
7 contract documents.

8 I would point out that I believe that is backed
9 up by some of the documents that the Department has
10 included with their analysis of our claim.

11 The other part of our claim is the, what we will
12 call the breach of warranty in that DOT has an
13 obligation to provide us with completeness and accuracy
14 of contract documents at the time of bid.

15 I'm not smart enough to know this, but our
16 attorneys have informed us that that is not only
17 express warranty but implied warranty, and that Florida
18 case law is clear that the owner has a duty to provide
19 accurate information to bidders that would not mislead
20 bidders in pricing work.

21 Our bid was based on a composite bid. The bottom
22 line is the total price of our job would not have
23 changed based on unit prices had we had reason to
24 suspect that the quantities that were given for the
25 particular item in question would change or they would

1 be subject to change, or if we even thought they were
2 in error at the time of bid.

3 I brought along the bid tabulation on this job.
4 There were some 177 bid items in this job. It's a \$36
5 million job. When you go to a bid letting, obviously
6 you cannot wait until the last minute to fill in bid
7 items. You fill in some early, you leave some empty or
8 blank for your cuts and adds and so forth that need
9 adjustment.

10 I don't think anyone at this table would think
11 that a permit requirement to plant mangroves would be
12 an item that would be subject to, if any change, a
13 cardinal change, such as has happened here.

14 So, we felt like that, the item in question, was
15 a safe item in which for us to place some of the final
16 cuts and adds and margin for the job.

17 I might point out, and I brought the spread
18 sheet, like I said, of the bid tabulations from the
19 people who bid the job. There was no objection raised
20 by DOT preaward to the unit price that we had on the
21 mangroves.

22 For the record, our price was \$115 a plant. The
23 closest price to us was \$20 a plant. But there was no
24 question of that by DOT at the time.

25 I know in the DOT's analysis they have cited

1 excerpts from the specifications. Our claim is not for
2 an equitable adjustment according to the
3 specifications. We believe that the misrepresentation
4 and the breach of warranty put this claim outside the
5 specifications. Again, we relied on these bidding
6 documents to prepare our bid, and we have suffered a
7 significant loss as a result of the DOT's
8 misrepresentation.

9 This is a cardinal change. Everyone who is in
10 the contracting business certainly should expect
11 changes to contract quantities. However, you through
12 years of experience should recognize areas where you
13 think those changes may occur. I don't think anyone
14 could have foreseen, and I don't think any of the other
15 bidders would have foreseen that the quantity of this
16 item would change so drastically.

17 As I said, as a result we have suffered from the
18 lack of the DOT's -- apparent lack -- of preliminary
19 investigation into the planting site.

20 Just kind of closing in our statement here,
21 I would say that in their analysis the Department has
22 said it's their intent to properly compensate the
23 contractor for their areas of liability and make them
24 whole from damages caused by the Department. That's
25 exactly why we're here. That's all we're asking for.

1 I brought this extra copy of this memo and the
2 letter which we can talk about later on, which I feel
3 like support our arguments. Thank you.

4 CHAIRMAN COWGER: We will be talking back and
5 forth on this item I'm sure.

6 DOT, I would like to hear your rebuttal.

7 MR. IVEY: Why are we here today? I don't
8 disagree with Ron that we're here over monetary issues.
9 In fact, it may have some impact upon Misener Marine's
10 margin for this project. However, I pose the question,
11 would we have been here today if the quantities had
12 overrun and Misner Marine had been paid. I suspect
13 not.

14 In late 1990 the replacement of the Edison bridge
15 in Ft. Myers was bid. Misner Marine was the lowest
16 responsive and responsible bidder.

17 Shortly after it was known that Misener would be
18 the construction contractor on the project, we had a
19 little meeting between the principals of Misener and
20 some of us at DOT to talk about means of achieving a
21 successful project completion. I believe we achieved a
22 successful project completion. It was a good project.

23 However, in the aftermath the focus seems to have
24 shifted from successful project completion to other
25 agendas.

1 Misener is claiming breach of contract by the
2 Department. This implies bad faith and intentional
3 deception, that the Department with malicious intent
4 inflated estimated quantities of mangrove to
5 intentionally mislead the bidders. This is, in fact,
6 not the case.

7 This contract is a unit price contract. The
8 contractor was paid the contract unit price for each
9 plant planted. Yes, the actual quantities differed
10 from the estimated quantities. Misener was a
11 contributor to this difference. It seems that during
12 the bidding process, the contractor chose to unbalance
13 his bid on this item to bid the item far in excess of
14 the cost of performing the work.

15 I submit to you that the Department has operated
16 within its contractual rights and responsibilities.

17 This claim is in direct opposition to the unit
18 price concept, and I think if you grant Misner Marine
19 relief on it, it is directly in opposition to the
20 contractual requirements. We are going to discuss some
21 specifics.

5
22 CHAIRMAN COWGER: What I started to say a while
23 ago, in your discussion, I would like for you to talk
24 about the specifics that you point out about areas that
25 plants were eliminated and so forth.

1 MR. ROBERTS: There were three definite areas
2 that we pointed out. The only reason that we brought
3 those to light is so that the Board would recognize
4 that it was not pure actions of the Department that
5 reduced the area. That Misener, in fact, had an active
6 role in this theirselves.

7 There was a portion that was eliminated due to
8 an accident that happened and some misunderstanding.
9 There was an area that was eliminated due to leaving
10 some existing rubble in. There was some area that was
11 eliminated due to allowable mitigation using rubble
12 instead of the plants to take place. That Misener did,
13 in fact, put the rubble in and was compensated for
14 that.

15 But DOT only pointed those out so that the Board
16 would recognize that the plants that were displaced
17 from the 224 that was actually put in, the difference
18 of the 1712 being 1400 and some-odd plants, DOT was not
19 totally responsible for that. But Misener by their own
20 actions participated.

21 That's not to take away from the contract. We,
22 DOT, when the plans were being in the design stages,
23 the designer used the information he had to generate an
24 accurate quantity and what he felt like was accurate at
25 that time.

1 Obviously, as the job progressed, the difference
2 in 1988 to 1992, when it was discovered the northwest
3 bank of the causeway would not accommodate the number
4 of plants, for whatever reason.

5 But DOT did not have superior knowledge at that
6 time. In fact, DOT had the same knowledge that Misener
7 had. They had people go out and investigate the site,
8 design the plans. Misener by turning in a bid, has
9 said that they have investigated the site and made the
10 same determination.

11 And when you have the presite investigation, you
12 look at the area, the environment, and you check the
13 documents along with the quantities. That's per
14 specifications.

15 MR. HENDERSON: Mr. Cowger, can I interrupt a
16 second? How do we handle rebuttals?

17 CHAIRMAN COWGER: Let him finish his statement
18 and --

19 MR. HENDERSON: He's covering so many subjects.

20 MR. ROBERTS: Everything is tied. I just didn't
21 want us to make an issue of -- DOT doesn't feel that
22 the displaced areas are a real issue, but they just
23 need to be brought up to point out why.

24 And then I moved on in, excuse me for getting
25 ahead, I moved on into the other area. I will stop

1 there and let him --

2 CHAIRMAN COWGER: Do you want to let him rebut?

3 MR. HENDERSON: I don't know that I got it all.

4 I would like to go back to the beginning. We were told
5 that the plans were put together from information that
6 was available. I would like to know what that
7 information was because anybody that knows about this
8 type of subject, which I'm going to admit we don't.

9 You know, we made a prejob site investigation,
10 but we're not experts on planting mangroves. I would
11 like to know what information the Department had that
12 told them that they could make these detailed drawings
13 and the drawings that show these areas to be mitigated,
14 even give us a diagram of how to plant them, and that
15 changed. How did that change?

16 I read one article in here that tells me -- and
17 I think there's other things in here, that those
18 drawings were done from aerial photographs. It says
19 that once the Brazilian peppers were removed, suddenly
20 they discovered that there was some rubble in that
21 area.

22 Did nobody walk the job site? I'm asking this
23 question, because to me the DOT had a duty. I mean if
24 the contractor looks at the drawings, they must assume
25 because of the details that are within the drawings,

1 that someone has walked that site, that knows about
2 mangroves, and put these details in there that tells us
3 how we're to mitigate that area once we remove -- and
4 it goes to even show the details of before and after --
5 trees that are being removed.

6
7 So, my first question is you said that the
8 designers made it from information they had available.
9 I would like to know that. Okay. And let me see if
10 I can find out where we started here with some of the
11 comments. We were told that -- I'm sorry?

12 MR. ROEBUCK: There is another question in that
13 regard. You mentioned something about the best you
14 knew in '88 as it related to '92. So, when you're
15 answering Ron's question, what was done in '88 to make
16 this determination?

17 MR. HENDERSON: Let's don't go from '88 to '92.
18 The job was awarded in 1990. Work started in 1990.
19 It's not like there's a four-year gap here, there's a
20 two-year gap.

21 Again, this is the heart of our case. We don't
22 feel like the DOT did proper investigation before they
23 put these plans out.

24 Glenn, you said that this malicious intent to
25 mislead bidders, I don't think that's the case.
I didn't say that. I don't think that's the intent.

1 However, the facts are that you all are the ones
2 that put these contract documents out. You all are
3 the ones who had the details of the plans of how the
4 hazardous plants or whatever were to be removed and how
5 the new ones were to go in. Misener Marine didn't make
6 those contract documents, nor did we have any input
7 into it.

8 The Department certainly has a staff that
9 includes people that are familiar with permits and so
10 forth. Misner Marine doesn't.

11 Continuing on, I don't know that I got everything
12 written down here, but it was said that we reduced the
13 planting. I know there were three instances cited in
14 DOT's analysis, and I would like to talk about all of
15 those.

16 The first one was that, I believe, the area that
17 rubble was in, that we couldn't plant it. Is that
18 correct? Is that the first one?

19 MR. CHABERT: That's correct.

20 MR. HENDERSON: That rubble was there in '88
21 apparently. It was certainly there when the job was
22 bid. Misner Marine didn't put that stuff there.

23 There is a letter in here referred to as an
24 exhibit by the Department, that I believe was written
25 by Walter Ward, that directs us to leave that rubble,

1 that existing rubble in as erosion protection.

2 Now, I don't think that in view of that directive
3 Misner Marine is going to go out there and remove that
4 in advance of replacing the plants. However, there was
5 nothing in here that said it couldn't be removed at a
6 later date or that that planting area couldn't be
7 enhanced.

8 I don't know that I need to sit here and read
9 the documents that they presented, but it says, "The
10 existing rubble concrete that has been placed along the
11 waterline throughout the mitigation area should remain
12 in place to continue to provide erosion protection."

13 This letter does not state that this eliminates
14 the planting area. And we all know that erosion
15 control is important enough that I personally didn't
16 question this letter. And there is nothing here that
17 I saw that precluded the fact that the rubble would
18 could not be removed at the time when the plantings
19 were to occur.

20 Continuing on. That somewhat addresses the first
21 item of areas that supposedly we had something to do
22 with or the three areas that were cited as a reduced
23 planting area.

24 I believe the second one was for the area where
25 we had the permit violation. We're not denying that.

1 It happened. It's unfortunate, but it happened.

2 If you go back to the consent order that was
3 signed by all three parties, including the DOT, I think
4 Jay in his letter cited 2,465 square feet. Actually,
5 the consent order is for 2800 square feet. It's
6 actually for more. But the way they arrived at the
7 2800 square feet is the actual impact area was 1,000
8 square feet, which is 111 plants.

9 DER as a penalty doubles it. That knocked it up
10 to 2,000. Then there was another 800 square feet added
11 that apparently was not an area that would be a
12 planting area. That's how the 2800 square feet and the
13 quantity that was assigned to that came up with.

14 The actual area that we impacted was 1,000 square
15 feet, and that is right in the consent order.

16 I believe the last area that was cited was the
17 area at the south end of the southbound bridge.

18 And, Brett, I will let you address that as to the
19 suitability of that site to receive mangroves to begin
20 with. It's kind of the same situation as we had up on
21 the north end.

22 MR. CHABERT: In my opinion it was never a
23 suitable area for planting mangroves. Number one, the
24 tidal action in it was a great deal more significant
25 than the other side of the bridge or the other side of

1 the river. In the wintertime the wave action there was
2 at its worst point on any point of the project. You
3 had the north wind that blew all the way across the
4 river and the wave action was really high for that
5 area.

6 You had no planting area. The plans show a
7 planting area there, but I was not under the opinion
8 that you could plant more than a couple of dozen plants
9 there.

10 MR. HENDERSON: I know it called for riprap along
11 the northeast corner. Did they just extend it all the
12 way around?

13 MR. CHABERT: Yes, we did extend riprap down
14 to -- there was a sea wall there. We extended it all
15 the way to the sea wall.

16 MR. HENDERSON: Okay. You know, the statement
17 was made that Misner Marine had an active part in
18 reducing the planting area. The only active part that
19 Misener had in reducing the planting area was the
20 result of the permit violation.

21 The actual damage in that area was to 1,000
22 square feet.

23 MR. CHABERT: If you were to go back to where the
24 violation occurred, the violation was not in a planting
25 area. It was at a higher elevation than the planting

1 area.

2 The problem arose when the DER told us they
3 didn't want us working in that part, in the area
4 adjacent to it.

5 MR. HENDERSON: I'm kind of skipping around here.
6 The memo from Jay Segalla, what I had highlighted on
7 that, as a result of the permit violation, we hired a
8 consultant, an ecologist out of Ft. Myers.

9 And as per this memo, when Mr. Erwin visited
10 the site, he -- I will read verbatim. "At this point
11 Mr. Erwin was discussing the project mitigation plan.
12 Mr. Erwin voiced his dissatisfaction with the project
13 mitigation plan. He was suggesting that the rock in
14 this area be relocated in order to facilitate planting.
15 He remarked that it did not appear that the designers
16 visited the project prior to design."

17 The reason I have distributed the letter of
18 October 8th is that as a settlement of not only the
19 permit violation, but in order to be able to plant
20 these plants that were originally in the contract, we
21 had proposed enhancing the planting area of the job
22 site at our cost.

23 MR. PRESCOTT: Is this the mitigation plan that
24 you're referring -- which mitigation plan is being
25 referred to?

1 MR. HENDERSON: He was referring to the
2 mitigation plan that was in the contract documents, the
3 planting of the mangroves, the 1712 mangroves. I'm
4 sure you all -- there were to be 1400 -- 1600 plants
5 were to be planted on the north end of the southbound
6 bridge. The remaining 112 were in that little area
7 that was eliminated at the south end.

8 MR. IVEY: Can we point those areas out on these
9 two photos? That's the south end. Gene has got the
10 north end.

11 (Discussion off the record)

12 CHAIRMAN COWGER: We went off the record long
13 enough for the Board to take a look at the plans and
14 look at some details. And any party, now if you feel
15 that something was said off the record that you feel
16 needs to get in the record, please be sure you state
17 it.

18 DOT -- well, Mr. Henderson, I guess, had you
19 completed your comments for the moment?

20 MR. HENDERSON: From the ones that I have been
21 able to write down, yes, sir, I have.

22 CHAIRMAN COWGER: If you think they're getting
23 too far ahead, please stop us and we will interrupt.

24 MR. HENDERSON: That's why I asked before.
25 I wasn't sure I could interrupt.

1 CHAIRMAN COWGER: Interrupt any time you want to,
2 and we will decide whether or not it's appropriate for
3 you to come in.

4 Okay. DOT, I think it would be appropriate for
5 you all to tell us a little bit for the record why it
6 is that the planting areas, in fact, changed. Because
7 this is what happened, I assume. You didn't change the
8 grid pattern for planting the plants, you changed the
9 area in which plants were to be planted. Is that
10 correct?

11 MR. SEGALLA: We increased the -- I don't know if
12 I can address it. We increased the elevations.
13 Because of the amount of riprap in the area, we
14 increased the elevations to give us a wider range of
15 planting. That was done between permit department and
16 the DER because I'm not an expert on mangroves by any
17 means.

18 They just determined that based on what was
19 existing they could plant and have a survival rate for
20 more plants on the wider elevation range. And that's
21 why my calculation, although approximate, is larger
22 than Ron's because I was basing my numbers on a larger
23 planting area, of which we planted on the remainder of
24 the job.

25 MR. HENDERSON: For the record, and everyone

1 knows this, we only planted 224 out of 1712, which in
2 my opinion is basically not even doing that contract
3 item.

4 CHAIRMAN COWGER: I don't think my question was
5 answered.

6 MR. HENDERSON: The area didn't change.

7 MR. IVEY: I'm not sure I understood the
8 question.

9 MR. HENDERSON: If your question is did the area
10 change where they were ultimately planted, the answer
11 is no. But the area had to be enhanced to do it. And
12 still we only planted 224 plants out of 1712.

13 If I may, I did not finish a minute ago because
14 I had started on the subject of my October 8 letter.
15 What I intended to show there was that we had actually
16 made a proposal to enhance that area along that
17 causeway at our cost to be able to plant those plants.
18 That was ultimately rejected.

19 Subsequently we even submitted a request to plant
20 the plants plus do the restitution for the permit
21 violation at the project dredge fill area. That was
22 rejected.

23 MR. MCGILL: Mr. Chairman, I just wanted to back
24 up and try to touch bases on some of the things that
25 have been talked about. You discussed the dates

1 between '88 and '92. When this project initially
2 started, of course everybody's attention was focused on
3 construction of the northbound bridge, really didn't
4 even get into this mitigation area. I mean it was not
5 of primary concern at that time.

6 When it became -- when it came to everyone's
7 attention, it was in '92, whenever Mr. Young with our
8 office was down to do a site review. And pointed out
9 the fact that it looked like there was going to be some
10 problems as far as planting the number of plants shown
11 in the contract.

12 So, that's the reason that we mention the '88 to
13 '92. Yes, the project did start in '90, but no one
14 really was even looking at this mitigation site at that
15 particular point in time. It wasn't really of concern
16 then.

17 The lateral shelf that's talked about, all this
18 existing rubble, riprap that's in place, Harper
19 Brothers, who were the subcontractor to Misener, was
20 doing the clearing and grubbing work. They were
21 constructing the rubble, riprap indicated in the plans
22 that's to be placed along the east side of the north
23 causeway.

24 They actually requested to leave all of that in
25 place. We denied that area on the east because it was

1 in direct conflict with the toe wall that was to be
2 constructed for the planned rubble riprap.

3 Ron referred to the letter from Walter Ward
4 indicating leave the rubble riprap in place. Of
5 course, you know, there was a whole lot of discussion
6 that went on prior to that letter being written. That
7 was a consensus of opinion. It was just documenting
8 what had previously been discussed in the field as far
9 as leaving this rubble riprap in place.

10 So, it was simply documentation of what had
11 occurred in the field prior to that date.

12 MR. HENDERSON: May I comment?

13 CHAIRMAN COWGER: Yes.

14 MR. HENDERSON: If I recall correctly, Mr. Ward's
15 letter was written in March of '92. Is that correct?

16 MR. MCGILL: Yes, March of '92.

17 MR. HENDERSON: And Mr. Young made his visit in
18 June of '92?

19 MR. MCGILL: Uh-huh.

20 MR. HENDERSON: I believe in the calendar, March
21 comes before June. Obviously there was some knowledge
22 of this problem at that point in time. All I'm saying
23 is that we have been told that the Department was not
24 aware of it until Mr. Young discovered it in June of
25 '92. Yet in March of '92 we were directed to leave the

1 rubble in place.

2 Again, I -- we had been told that Harper Brothers
3 verbally requested this and all of that. I don't have
4 any documentation that Misener Marine passed that
5 request on. I'm not saying it doesn't exist, but
6 I don't have it.

7 So, whatever discussions were held, I'm not sure
8 they were held in our presence. I'm not disputing that
9 that letter may not document prior discussions, Joe,
10 all I'm saying is that the letter in and of itself does
11 not preclude the plans at some later date. All that
12 letter states is that existing debris that is clearly
13 shown, I guess, as Jay says in those drawings, was to
14 remain as erosion protection.

15 You mentioned, you said you denied that because
16 it conflicted with the riprap. I might also point
17 out that we tore out, what, close to half a mile of
18 mangroves on that east side to be able to put in the
19 riprap.

20 MR. MCGILL: It was part of the job.

21 MR. HENDERSON: Granted. Absolutely it was, but
22 I just feel compelled to make the comment that we're
23 going now back to the four-year period, and I don't
24 believe that's the case. I think the case is
25 documented by a lot of comments that have been made

1 throughout here.

2 We were chastised by Jay that, during our site
3 investigation, that we didn't discover the riprap. My
4 question is if we were chastised for not finding it,
5 why would the DOT include it in the plans? Why would
6 they not find it? You all have the experts, we don't.

7 It also states that there was considerable
8 natural growth of mangroves since the times the plans
9 and permit documents were prepared. Again, we can do
10 all the presite investigations that we want, but the
11 DOT and the Department has the experts that should be
12 able to change the contract documents if, in fact, the
13 site has changed.

14 CHAIRMAN COWGER: Mr. Henderson, I don't think
15 you need to testify on that any further. I think we
16 fully understand that position.

17 DOT, the plans were, in fact, developed in 1988.
18 The project was let in 1990?

19 MR. ROBERTS: Correct.

20 CHAIRMAN COWGER: And really work on this
21 particular phase of the work wasn't done until 1992?

22 MR. ROBERTS: Correct.

23 CHAIRMAN COWGER: So, you have a series of
24 two-year gaps in there?

25 MR. ROBERTS: Yes. The issue of this particular

1 claim, and we've spent a lot of time hashing back and
2 forth instances that happened. In our opinion it
3 really does not have a lot of bearing on the real issue
4 here.

5 The real issue in my opinion by Misener's claim
6 is that the Department by inaccurate plan quantity of
7 an item misled the bidder and thus by doing that, we
8 breached the contract. And when we breached the
9 contract, then the specifications do not apply.

10 And DOT does not see this particular situation as
11 a breach of contract. We, for whatever reason, Misener
12 does not know, DOT does not know, the quantity for the
13 item was in error. It was obvious. There is no one
14 here that will argue that. The lateral shelf will not
15 support the planting of the plants that were to be put
16 in by the original plans.

17 But the question is if because there was an
18 error, does that mean that DOT breached the contract?
19 And that should be the question in this particular
20 item.

21 MR. HENDERSON: I would like to thank Mr. Roberts
22 because that is our case entirely and that is the
23 question here.

24 MR. ROBERTS: That is the question. DOT has
25 pointed out that Misener participated in a manner in

1 helping reduce the quantity, which we believe to be
2 factual, some of it unintentionally.

3 I would like to add a name, not that it is going
4 to mean that much. The individual with Harper Brothers
5 that requested to leave the rubble in, his name was
6 Ike Eppes. He's the man who made the request.

7 And also to touch base again on that particular
8 aspect of it, I was just thinking. You know, when this
9 was done, I guess that would be evidence of everyone's
10 innocence. Misener was not aware that by leaving the
11 rubble in it was going to reduce the number of
12 mangroves, neither was the Department, I guess. We
13 just kind of stumbled into this.

14 But nonetheless, be those issues as they are, the
15 real thrust of this is whether or not the Department
16 breached the contract with Misener and misrepresented
17 the quantity and caused damages to the company. We
18 don't believe we did. We believe the specifications
19 when we entered into a contract with Misner Marine
20 specifically addressed such issues.

21 One in particular would be the errors and
22 omissions, Article 5-4, the contractor, when we went in
23 to this agreement agreed to take no advantage of the
24 Department. We get into the specifications, Article
25 2-3. We believe that the specifications that we have

1 shown in our package still apply because the Department
2 does not feel that we have breached the contract with
3 Misener.

4 That would mean that nothing that we did was
5 within the confines of the contract. And that's not
6 the way the Department views this.

7 CHAIRMAN COWGER: I think we have heard enough on
8 the legalities of it. I will let you come in, Ken.

9 MR. CHABERT: Mr. Eppes may have requested that
10 they not have to take out the riprap rubble. He may
11 have done that, but I do know that on several occasions
12 at the time when we were ready to plant and we were
13 discussing the problem of the lack of planting area,
14 that I did ask Mr. Segalla if we could remove the
15 riprap rubble from the planting area, and I was told
16 no.

17 CHAIRMAN COWGER: Now, this discussion that's
18 taking place right now has to do with the area that
19 Harper asked to be left in place, and according to
20 the DOT's exhibit, that only involves 148 plants. Am
21 I correct?

22 MR. SEGALLA: Yes.

23 CHAIRMAN COWGER: Go ahead.

24 MR. HENDERSON: Again, I think you're right, we
25 don't need to belabor the legal issue here. I would

1 like to thank Rick for stating the issue more
2 eloquently than I probably could, what exactly is at
3 issue here. But I would take exception to the
4 specification he said we were taking advantage of the
5 errors and omissions. That is not the point here.

6 As I stated earlier, had we had reason to believe
7 that this item would change or reason to believe this
8 would change, the money would have been put elsewhere.
9 The bottom line of the \$36 million would not have
10 changed. There was no intent to take advantage of
11 errors and omissions. Who would think that the
12 quantity of a permit requirement would be reduced,
13 changed, whether slightly or significantly, certainly
14 not us.

15 So, again, we were not taking advantage of errors
16 and omissions. The bottom line of the project would
17 not have changed. We simply would have put that money
18 into another item. That appeared to be a safe item,
19 one that we left open.

20 CHAIRMAN COWGER: I think we have heard enough on
21 that particular point. Mr. Blanchard wanted to speak.

22 MR. BLANCHARD: I have a quick comment,
23 Mr. Chairman. It's been my experience with the
24 Department that we discourage -- well, we encourage
25 contractors to price their items, you know, properly.

1 We do not encourage items that are priced significantly
2 above or below what it is going to actually cost the
3 contractor to do a good job.

4 We do not encouraged unbalanced bids. However,
5 we do not reject unbalanced bids simply because they're
6 unbalanced. The only time we reject an unbalanced bid
7 is if it's materially unbalanced, which would mean that
8 it can -- we can see some way in which that unbalance
9 would negatively affect the Department or put us in a
10 situation where the apparent low bidder would end up
11 not being the low bidder.

12 So, since we do not reject automatically
13 unbalanced bids, the contractor has the responsibility
14 to examine his unit prices very carefully. And if he
15 chooses to bid an item above or below his actual cost,
16 that's his prerogative, but it's also his
17 responsibility.

18 As was pointed out earlier, if he had run into an
19 overrun situation, he would not have sent us a check;
20 therefore, why should we be responsible for his
21 underrun problem?

22 CHAIRMAN COWGER: Mr. Segalla?

23 MR. SEGALLA: I just wanted to comment. Ron said
24 he anticipated that if it was a permit item he expected
25 1712 plants. Well, it's a natural environment, and due

1 to the natural growth, I feel that the majority of the
2 reduction took place. And knowing that it's a natural
3 environment, I don't know why Misener would have
4 anticipated that that item would not change --

5 MR. HENDERSON: I stated --

6 MR. SEGALLA: -- either for better or worse of
7 the item.

8 CHAIRMAN COWGER: What you're saying now, I want
9 to make sure that one comment you made, and that was
10 you felt the majority of the reduction was due to
11 natural revegetation?

12 MR. SEGALLA: Yes.

13 CHAIRMAN COWGER: Now, Mr. Henderson.

14 MR. HENDERSON: Well, I stated in my opening
15 comments that, you know, we recognize -- we're a
16 contractor, we recognize quantities change. But this
17 is -- this isn't even a significant change, this is a
18 cardinal change.

19 Like I said, 224 out of 1712 is virtually an
20 elimination of that item. I would argue that point.
21 As regards Ken's comments, certainly we understand the
22 ramifications of unbalancing. But if anybody has ever
23 been in a bid letting, with this number of bid items,
24 you cannot assign what you think is your actual cost
25 plus margin to every item. It is physically

1 impossible.

2 CHAIRMAN COWGER: We understand that. I don't
3 think we need to comment any more on that.

4 MR. IVEY: Gene, can I make a comment?

5 CHAIRMAN COWGER: Certainly.

6 MR. IVEY: I just fail to understand why I would
7 put a significant amount of my margin in a per item
8 rather than putting the money in an item that I was
9 assured without any risk at all that I would receive.

10 MR. HENDERSON: Because if we had turned in a \$3
11 million or \$4 million mobilization you all would have
12 rejected it. We would have gotten a phone call, like
13 we didn't get, with the unit price on the plants.

14 We've had that happen. I've been in
15 Jack Krinton's office when they've called from
16 Tallahassee wanting to know why the price on such and
17 such an item was so.

18 MR. IVEY: And you had an explanation?

19 MR. HENDERSON: Sure we did. Like I said, we
20 were \$115 and the next closest was \$20. Nobody ever
21 questioned that.

22 MR. IVEY: I think Ken provided the accurate
23 explanation of that.

24 MR. HENDERSON: Sometimes they call, sometimes
25 they don't. I understand. In this case they didn't.

1 MR. IVEY: Whether they call or not depends on
2 how close your bid comes in to the estimate, unless
3 it's over an element of -- if they're close enough that
4 a particular bid item could materially change the
5 bidder's order and there is some question about the
6 quantity.

7 MR. HENDERSON: I fully agree. That's another
8 thing I said at the beginning. We were \$2 million low
9 on this job. The fact of the matter is had we put this
10 money elsewhere into another item, the bottom line
11 still wouldn't change. It still wouldn't change. We
12 would still be at \$36 million. The way I look at it,
13 we saved you all \$2 million.

14 MR. IVEY: Thanks.

15 MR. ROEBUCK: Let me ask a question, Mr. Segalla.
16 I'm not an environmental engineer by any stretch, but
17 these mangroves, I know they've been sensitive for a
18 long time. I've never heard of any being left out of a
19 job, but sometimes a few more being put in. A mangrove
20 growth, how would a contractor be able to anticipate 50
21 percent of the mangroves disappearing because of
22 regrowth? I don't think one of these stems will pop up
23 and sprout and be 18 inches high. Who knows that?

24 MR. SEGALLA: I wish I could answer your
25 question.

1 MR. ROEBUCK: You don't know that, nor do I.

2 MR. MCGILL: Just the environmentalists.

3 MR. ROEBUCK: That's a hard thing to ask a
4 contractor to know 50 percent. This is a substantial
5 change in quantity. This may not be the most
6 significant item in the job due to the total job scope,
7 but it's a damn significant item to Misener's margin.

8 MR. SEGALLA: How can you expect the Department,
9 in turn, to be able to anticipate that?

10 MR. ROEBUCK: Unless you have people that know
11 this. I don't know how you do.

12 MR. SEGALLA: I think if -- when you do your
13 review, if you look at the permit condition, I think
14 the 80 percent growth was met. The intention of the
15 permit was met. I guess it's unfortunate that a
16 specific number was put to that intention.

17 MR. ROEBUCK: Maybe a good lesson for the DOT
18 would be to put a range of these plants that would be
19 necessary based on such experience.

20 MR. BLANCHARD: May I suggest that the lesson to
21 be learned here is don't unbalance your bid.

22 MR. ROEBUCK: That's the contractor. He can do
23 what he wants.

24 MR. BLANCHARD: Then he has to be responsible for
25 his bid.

1 MR. ROEBUCK: Misener is saying they could do it
2 differently, but they were using a presumption that
3 environmental good doing is not going to be changed
4 very much.

5 MR. BLANCHARD: There were other items that were
6 safer.

7 MR. ROEBUCK: When you find something wrong it's
8 always in the front end to improve the cash flow.

9 CHAIRMAN COWGER: We don't need to argue about
10 that any more, gentlemen.

11 MR. ROEBUCK: That's a bad word to use here.

12 CHAIRMAN COWGER: Let's go ahead.

13 MR. CHABERT: To answer your question, the people
14 who planted the trees told us from seedling to 18
15 inches high takes about a year.

16 MR. HENDERSON: They had to transplant the plants
17 we contracted to get to the size that is called for.
18 The question that I've had in my mind is ever since
19 this came up, talking about this natural propagation,
20 is how long does it take for a seedling to manifest
21 itself such that you know, hey, that's a mangrove plant
22 coming out of the dirt there.

23 I don't know that answer. All I do know is that
24 this fellow told us that it would take a year. He
25 already had them growing, he had to transplant them to

1 a larger can to get them to 18 inches. That's all I do
2 know.

3 MR. MCGILL: I think if you went out there and
4 looked today, and I've already observed it on the
5 eastern side of this causeway where we put rubble
6 riprap, you will see numbers of mangroves that are
7 already growing up and up.

8 MR. ROEBUCK: Popping up through the rocks?
9 I saw that in some of these pictures here.

10 CHAIRMAN COWGER: Gentlemen, is there anything
11 else either party needs to say or wants to say?
12 I think we have spent enough time on this, frankly.

13 Mr. Roebuck, do you have any further questions?

14 MR. ROEBUCK: No, thank you.

15 MR. PRESCOTT: No questions.

16 CHAIRMAN COWGER: This hearing is hereby closed.
17 The Board will meet in approximately six weeks for
18 deliberation on this claim, and you will have our final
19 order shortly thereafter.

20 (Whereupon, the hearing was concluded at 12:20 p.m.)

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CERTIFICATE OF REPORTER

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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 proceedings; and that the transcript is
a true record of the testimony given.

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 2nd day of November, 1994.

Catherine Wilkinson
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 2nd day of November, 1994, by CATHERINE WILKINSON who
is personally known to me.

Kathleen Grow
KATHLEEN GROW
Notary Public - State of Florida
My Commission expires April 20, 1997
Commission # CC278204
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