

STATE ARBITRATION BOARD

1022 Lothian Drive
Tallahassee, Florida 32312-2837
Phone: 850/385-2410 FAX: 850/385-2410
E-Mail: HECOWGER@AOL.COM

July 10, 2000

Mr. Bill Albaugh, P.E.
Director of Highway Operations
Florida Department of Transportation
605 Suwannee Street Mail Station 31
Tallahassee, FL 32399-0450

Re: State Job No. 87080-3502
Dade County

Dear Mr. Albaugh,

The enclosed Order of the State Arbitration Board directs the Department of Transportation to reimburse the Board the sum of \$473.50 to cover the cost of Court Reporting for the hearing on this matter.

On October 25, 1999 the Board transmitted a copy of the Court Reporter's Invoice and a copy of the Order to the State Construction Office. To date, we have not received payment.

Will you please check into this and arrange for the Board to be reimbursed.

Sincerely,



H. Eugene Cowger, P.E.
Chairman.

STATE ARBITRATION BOARD

ORDER NO. 9-99

/// NOTICE ///

In the case of Pan American Construction L.B., f/u/b/o Hypower Inc. a Subcontractor versus the Florida Department of Transportation on Project No. 87080-3502 in Dade County, Florida, both parties are advised that State Arbitration Board Order No.9-99 has been properly filed with the Clerk of the State Arbitration Board on October 26, 1999.



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

S.A.B. CLERK

OCT 26 1999

FILED

Copy of Order & Transcript to:

Greg Xanders, P. E., State Construction Engineer

Ernest Duffo, Pan American Construction, L.P.

Copy of Order to:

Mike Piscitelli, Esquire, Vezina, Lawrence & Piscitelli
Attorney for Hypower, Inc.

STATE ARBITRATION BOARD

ORDER NO. 9-99

RE:

Request for Arbitration by
Pan American Construction L.B., f/u/b/o Hypower, Inc., a Subcontractor
Job No. 87080-3502 in
Dade County

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

H. Eugene Cowger, P.E., Chairman
Bill Albaugh, P. E., Alternate Member
John Roebuck, Member

Pan American Construction, L.P., the prime contractor, provided to the Board an authorization for Hypower, Inc., a subcontractor for the electrical and traffic signal work, to act as Pan American's agent in pursuing claims arising out of work subcontracted to Hypower.

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 11:50 a.m. on Wednesday, September 29, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 9-99 in this cause..

ORDER

Hypower, Inc. presented a request for arbitration of a claim in the amount of \$269,002.12 plus a 10% prime contractor markup. The claim addresses additional direct expenses and delays and disruption to their work incurred by Hypower due to alleged design deficiencies, differing site conditions, unanticipated utility conflicts, changes to the work made by the Department, extensions of contract unit prices to additional work and changes to the design made by shop drawings.

Hypower, the subcontractor, presented the following information in support of their claim:

As a result of owner caused factors every facet of our work was disrupted and ~~took~~ additional time and effort was needed to perform throughout the project.

- a) Our Delay Summary (Figure 1) demonstrates that the work was planned to be completed in September of 1997 and could not be completed until February 1998, a period of four months during which we were forced to be committed to the project. It also shows that work was disrupted from the start of the project and we were forced to resequence our work.
- b) There were numerous conflicts between mast arm pole locations as shown in the plans and existing field conditions. We submitted requests for information early in the work and the Department took excessive time in responding.
- c) After they were installed, the Department rejected and required replacement of connectors for grounding conductors to ground rods. We contend that the originally installed connectors met the specification requirements. ("C" Clamps vs. Split Bolt Connectors)
- d) During construction of foundations and conduit, we encountered unanticipated underground utilities and differing site conditions.
- e) The Department required removal of 16 addition existing light poles after all other work had been completed.
- f) Overruns in contract items affected the cost of the work and the schedule.

Hypower's claim consisted of five parts as follows:

- g) Subarticle 9-10 of the Standard Specifications does not apply to the interest rate due, because the Board does not issue a judgement so may assess interest at the statutory rate of 10%.

Section I Scheduling and Impacts

Hypower presented a scheduling analysis to demonstrate the impact of the various owner caused changes and delays and disruption on completion of the work under two methods of analysis

BASE SCHEDULE vs. IMPACTS (Figure No. 2)

This schedule depicts the originally planned schedule (Base Schedule) by activity vs. a schedule developed adding to the Base Schedule the time affects of the various various owner caused additions to the work and delays and disruptions (Impacts). Hypower contended that this figure indicates completion of the work in March 1998 if they had not taken action to mitigate the affects.

AS-BUILT SCHEDULE vs. IMPACTS (Figure No. 3)

This schedule depicts the Base Schedule vs. the As-Built Schedule Hypower contended that this figure indicates completion of the work in January 1998 thus demonstrating the that their mitigation efforts were successful and that the work would have been completed months earlier if the Department had not imposed additional work .

The delays and disruptions to the work fell into two categories: (1) Entitlement to Addition Costs and Time (Changes); and (2) Contractual Entitlement to Additonal Time (Delays and Disruptions).

Hypower presented documents they allege prove;

- a) Changes to the work made by the Department and the associated delays in receiving instructions from the Department had a direct impact on costs.
- b) The affect of delays and disruptions to the work on progress due to having to resequence operations and deviations from Hypower's planned means and methods. No direct costs were assigned to this category

Section III Home Office Overhead and Direct Project Overhead

Hypower presented calculations for their firm's Daily Home Office Overhead Rate (\$161.52 per day). They also presented calculations for the Direct Project Overhead Rate (\$101.80 per day) applicable to this project and the resulting cost overrun based on 100 days delay. The 100 days delay was derived from the Schedule and Impact portion of this claim (Section I)

Section IV Labor and Equipment Inefficiencies

Hypower presented information on the cost of labor inefficiencies they allege to have occurred due to the delays and changes detailed in their claim. They contend that these inefficiencies impeded their ability to produce work at the levels which were expected and contained within their original contract estimate. They contend that they planned to complete work on one side of the street in a continuous manner and then work on the other side of the street as shown in the plans, but were forced to jump around to continue to work.

Hypower calculated a 49% loss in efficiency based on a comparison of the conduit productivity on rate on this project and on other projects on which they worked. (A "Measured Mile" comparison)

Hypower presented information on additional costs they allege to have incurred due to inefficient utilization of equipment on this project caused by changes and differing site conditions encountered. The calculated standby costs were based on the 100 days delay per the Schedule and Impact portion of this claim (Section I)

Section V Quantum Summary

This portion of the claim submittal details the amount claimed under Sections I through IV plus profit and bond.

As the result of discussion during the hearing in regard to appropriateness of equipment rates used by Hypower, subsequent to the hearing, Hypower submitted a revised Quantum

Summary which increased the amount claimed to \$292,556.72 plus a 10% prime contractor markup. The direct costs claimed went down and the equipment inefficiency went up as a result of changes to equipment rates.

The Department of Transportation rebutted Hypower's claim as follows:

- a) Our position is that the Contractor is due additional compensation for certain direct costs they incurred, but is not due anything additional for the delays he alleges to have impacted completion or for inefficiencies.
- b) Except for the extra work of removing existing light poles, the work on this project was substantially completed five weeks prior to the Hypower's planned completion date. During the seven months between substantial completion and final acceptance the work done was punch list items, removal of existing poles and pole replacement. Hypower did this work on ten days by sending out a single crew each day.
- c) No delays or inefficiencies were experienced by Hypower as a result of any factors that are the responsibility of the Department. Rights to additional compensation were waived by the Prime Contractor by their agreeing to time extensions or time suspensions granted.

Responses to specific Sections of the claim:

Section I

Project records show that Hypower skipped around on the project and worked on non-consecutive days on light poles and mast arms regardless of whether sites were being impacted. They mobilized each day from their Miami office, so moving to a different work site, because of changes did not cause them to incur added cost. They did not keep equipment on the job during the seven month extension period.

The prime contractor waived all right to recover delay costs by executing Supplemental Agreements or agreeing to time extensions or time suspensions granted.

Section II

We analyzed each of the extra direct costs presented by Hypower and included this analysis in our rebuttal. In some instance we found that compensation is due for direct costs.

We analyzed each of the time delays claimed by Hypower and included these in our rebuttal. We found that the Department is not responsible for any of the delays. We did find that Hypower is due compensation for work related to muck encountered at six light poles and remobilization to remove street light poles, even though they did not claim anything for these items. (See II B-2 & B-8)

Section III

No compensation for Home Office Overhead is due, because work was substantially completed ahead of the schedule submitted by Hypower and, as previously explained, the work added was covered by Supplemental Agreements that included compensation for overhead and standard markups.

Section IV

Only nine of the 30 delaying issues cited by Hypower were the responsibility of the Department and four of the nine occurred after substantial completion. The remaining five which were were minor conflicts were not a basis for an overall efficiency loss claim.

We disagree with Hypower's inefficiency calculations, because they were based on conduit production which was not impacted by the claim issues and we cannot confirm the conduit production rates shown for other jobs.

The Labor and Burden shown are all estimated. Hypower should have been able to demonstrate actual costs. Equipment inefficiency was estimated using a 100 day delay period which did not occur.

Section V

Our position is that Hypower is due \$10,,589.29 for their claim.

The Bond Markup should be 1.5% instead of 2.5% and interest due should be calculated at 6% per annum per Subarticle 9-10 of the Standard Specifications which covers prejudgement and postjudgement interest to be assessed.

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

- a) Even though some discrepancies in plan locations and conflicts are typical to projects of the nature of this one, there was a relatively high number of conflicts with underground utilities and other underground obstructions on this project..
- b) The prime contractor agreed to suspensions of the contract time after August 1997 without reservation for extended overhead costs. It appears that Hypower worked this project in conjunction with other work which was generating revenue during the alleged delay periods and no evidence was presented to show how these delays impacted their ability to obtain other work.
- c) It appears that Hypower did not have a significant amount of equipment committed to the work during the period for which they are claiming compensation for idle equipment.
- d) Supplemental Agreements executed by the prime contractor covered payment for portions of some of the items claimed by Hypower.

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 \$ 80,000.00 for this claim. This amount does not included anything for a prime contractor markup.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$473.50 for Court Reporting Costs.

SEARCHED

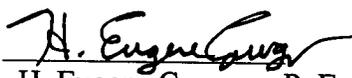
OCT 26 1999

FILED

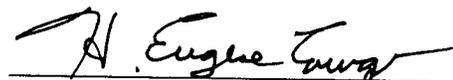
Tallahassee, Florida

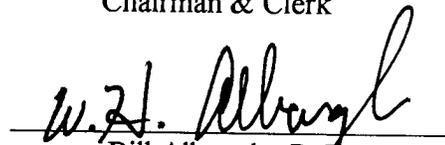
Dated: 10/26/99

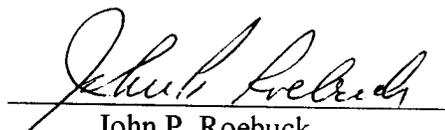
Certified Copy:


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

10/26/99
DATE


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


Bill Albaugh, P. E.
Alternate Member


John P. Roebuck
Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK
1999 9 29
FILED

PAN AMERICAN CONSTRUCTION,)
L.B., f/u/b/o Hypower, Inc.,)
a subcontractor)
)
)
- and -)
)
)
)
DEPARTMENT OF TRANSPORTATION)
_____)

PROJECT NO. 87080-3502
LOCATION: Dade County,
Florida

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Wednesday, September 29, 1999

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

TIME: Commenced at 11:50 a.m.
Concluded at 2:10 p.m.

REPORTED BY: CATHERINE WILKINSON
CSR, CP
Notary Public in and for
the State of Florida at
Large

WILKINSON & ASSOCIATES
Certified Court Reporters
Post Office Box 13461
Tallahassee, Florida
(904) 224-0127

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
 Mr. Jack Roebuck
 Mr. Bill Albaugh

APPEARING ON BEHALF OF PAN AMERICAN CONSTRUCTION, L. B.
 AND HYPOWER, INC.:

Mr. Ernest Duffo
 Mr. Bernard Paul-Hus
 Mr. Jack Kaufmann
 Mike Piscitelli, Esquire

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Mark Hamilton
 Mr. Valentine Onuigbo
 Mr. Mark Croft
 Clay McGonagill, Esquire

* * *

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1, 2 and 3 received in evidence	4
Exhibit No. 4 received in evidence	5
CERTIFICATE OF REPORTER	94

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. Bill Deyo was appointed as a member of the
6 Board by the Secretary of the Department of
7 Transportation. However, Mr. Deyo was unable to be
8 with us today due to an out-of-state conflict, so
9 Mr. Bill Albaugh is sitting in his place.

10 The Secretary of Transportation appointed
11 Mr. Albaugh as the alternate member of the Board as
12 provided by the Florida law, so he will be serving for
13 this session of the Board, the hearings we are having
14 today. And he will, of course, be the one to
15 deliberate with the other two members.

16 Mr. John Roebuck was elected by the construction
17 companies under contract to the Department of
18 Transportation.

19 These two members chose me, H. Eugene Cowger, to
20 serve as the third member of the Board and as Chairman.

21 Our terms began July 1, 1999 and expire June 30,
22 2001.

23 Will each person who will make oral presentations
24 during this hearing please raise your right hand and be
25 sworn in.

1 (Whereupon, all witnesses were duly sworn.)

2 CHAIRMAN COWGER: The request for arbitration of
3 a claim submitted by the claimant, including all
4 attachments thereto, and the administrative documents
5 that may have preceded this hearing date, are hereby
6 introduced as Exhibit No. 1.

7 We have a rebuttal package that was submitted by
8 the DOT, that we will identify as Exhibit 2.

9 Are there any other exhibits that need to be
10 introduced at this point in time?

11 MR. PISCITELLI: I have just a recap of the
12 damages summary that we submitted that includes
13 interest and contractor mark-up. I have an alternate
14 summary that's based upon the final job cost reports
15 just as a means of comparison. I would like the Board
16 to review those.

17 MR. MCGONAGILL: Do you have copies?

18 MR. PISCITELLI: They are coming over.

19 CHAIRMAN COWGER: We will identify that as
20 Exhibit 3.

21 (Whereupon, Exhibit Nos. 1, 2 and 3 were received in
22 evidence.)

23 CHAIRMAN COWGER: Okay. We have identified these
24 two pages together as Exhibit 3. It's titled Hypower's
25 quantum summary, Hypower's alternative quantum summary.

1 We are going to proceed on then. During this
2 hearing the Board --

3 MR. CROFT: Did you ask both of us if we had --

4 CHAIRMAN COWGER: I'm sorry.

5 MR. CROFT: We are also going to submit -- this
6 just like an as-built lay-out of the job. I did not
7 reproduce it for obvious reasons. It's quite lengthy.
8 We did previously provide a copy to the contractor. We
9 are going to make just a brief reference to it, and
10 I want to leave it with you.

11 CHAIRMAN COWGER: The contractor has seen this
12 before today?

13 MR. PISCITELLI: Yes.

14 CHAIRMAN COWGER: Okay. Since the contractor has
15 a copy, we will just go ahead and introduce that as
16 Exhibit 4. Do you want them back?

17 MR. CROFT: You can keep this.

18 (Whereupon, Exhibit No. 4 was received in evidence.)

19 CHAIRMAN COWGER: The Board only has one copy.
20 That's okay as long as the contractor has one. We can
21 all sit and look at it together, the Board, that is.
22 All right. Anything else?

23 During this hearing the parties may offer such
24 evidence and testimony as is pertinent and material to
25 the dispute being considered by the Board, and shall

1 produce such additional evidence as the Board may deem
2 necessary to an understanding of the matter before it.

3 The Board shall be the sole judge of the
4 relevance and materiality of the evidence offered.

5 The parties are instructed to assure that you
6 receive properly identified copies of each exhibit.
7 You should retain these exhibits because the Board will
8 not furnish you additional copies of the exhibits when
9 we furnish you a copy of the court reporter's
10 transcript and our order.

11 As is typical in arbitration proceedings, this
12 hearing will be conducted in an informal manner. The
13 Board is not required to apply a legalistic approach or
14 strictly apply the rules of evidence used in civil
15 court proceedings.

16 We are primarily looking for information in
17 regard to this -- in regard to the facts and the
18 contract provisions that apply to this case.

19 The order of proceeding will be for the claimant
20 to present their claim and then the respondent to offer
21 rebuttal.

22 Either party may interrupt to bring out a
23 pertinent point by coming through the Chairman, but we
24 ask that you please keep it orderly.

25 Since we have attorneys involved, I need to make

1 an additional short statement.

2 As previously pointed out, the Board intends for
3 this hearing to be conducted in a less formal manner
4 than a court proceeding.

5 The members of this Board are individuals who are
6 knowledgeable of highway construction work and how
7 contracts are typically administered in highway work.
8 We are not attorneys, therefore, our knowledge of the
9 law applicable to the case at hand may be limited.

10 We are here to learn about the facts and
11 provisions of the contract that are applicable to the
12 matter before us today.

13 Please be assured that the Board will make an
14 effort to assure that the parties have the full
15 opportunity to offer such evidence as is relevant and
16 material to the dispute, and will require the parties
17 to produce such evidence as the Board deems necessary
18 to an understanding of the determination of the matter
19 before it.

20 In some instances the Board may need to hear
21 applicable legal arguments to guide us in reaching an
22 equitable decision. However, we will not permit
23 extensive legal debates during a hearing because they
24 obviously are of limited value to the arbitration
25 proceedings and may overcomplicate the process.

1 Attorneys are requested to refrain from
2 presenting any legal arguments until near the end of
3 the hearing. After any legal presentations, if the
4 Board finds that it needs additional legal details with
5 regard to the case, we will ask the attorneys to
6 present written legal memorandum to each of the members
7 of the Board within ten days after the close of this
8 hearing.

9 We don't normally expect that we are going to ask
10 for legal memoranda. It just has to be based on an
11 individual case-by-case basis.

12 Okay. I have completed my opening statement.
13 It's now appropriate for the contractor who is the
14 claimant in this case to present his arguments. Keep
15 in mind as we go through the presentation by either
16 side, if there is something that really needs to be
17 brought up at that point, come through the Chair and we
18 will allow you to interrupt.

19 Okay. The contractor's side.

20 MR. PISCITELLI: Is it appropriate for me to make
21 a brief opening statement?

22 CHAIRMAN COWGER: Sure, whatever you want to do.

23 MR. PISCITELLI: It occurred to me last evening
24 in reviewing the submittal that we provided that while
25 it captures many of the events that occurred on the

1 job, it may not capture adequately the overall problem
2 which led to what we believe to be substantial
3 inefficiencies and overruns in various categories.

4 As Mr. Kaufmann and Mr. Paul-Hus will point out,
5 this is a job that was, from the electrical
6 subcontractor's point of view, by the way, making it
7 clear, this is a job that was essentially engineered,
8 designed I should say in the field.

9 It appears that the designer did not do an
10 extensive, if any, site survey prior to issuing the
11 plans and specifications to determine whether they were
12 buildable as issued.

13 For example, if where he showed there was a mast
14 arm, if you could put it there, or if there was
15 something in the way.

16 I don't know, you don't do discovery in this
17 situation, so we don't have information as to precisely
18 what was done, but I know sometimes the Department
19 makes the decision for an economic purpose not to do
20 extensive predesign site surveys and rather to adjust
21 those problems in the field.

22 It appears to us that that is what occurred here.
23 The problem that we have run into and run into in the
24 past is their idea of what an adjustment in the field
25 and the consequences are is different than what the

1 contractor's idea is.

2 The fact of the matter is -- and it's reflected
3 in the letter that's in the rebuttal from Parsons,
4 Brinkerhoff, the fact of the matter is the plans as
5 they were prepared for the electrical work and the
6 signalization work simply could not be built without a
7 substantial number of relocations.

8 Although there was apparently a meeting in April
9 at which an approach to that was agreed to, that
10 approach was not a solution. The approach was simply
11 how we are going to identify the problem in the future.

12 And if you read the minutes of the meeting and
13 the Parsons' letter which says everything was fixed at
14 this April 1 meeting, that's just simply not what
15 happened.

16 The minutes themselves make clear that what was
17 established at the April 1st meeting was that there
18 were a lot of problems with the plans, and there were
19 going to have to be a lot of relocations and locating
20 done by the contractor in the field.

21 Now, that in and of itself does not solve the
22 problem. The problem is solved when the contractor
23 gets a written directive or gets a written amendment to
24 the plans which tells him what to do. It's not an
25 efficient way to operate, as you know, to simply point

1 and click in the field.

2 What happened as a result of the fact that the
3 plans in this case were not buildable as issued is that
4 the contractor's efficiency was substantially damaged.
5 That is affected or evidenced not only by the fact that
6 the building -- the fact that they were hopscotching
7 around the project, but also by the fact that they had
8 substantial inefficiencies in their conduit operations
9 and their overruns in their various categories.

10 The DOT response is, well, shoot, you just picked
11 where you wanted to work every day. You just work
12 wherever you want to. As long as you have work, you
13 are fine.

14 We've all heard that in response to any sort of
15 inefficiency claim or delay claim. We know that's not
16 true. We know you've got to have the ability to
17 sequence your work. The intent here was to go up one
18 side of the street and go back down the other. What
19 happened is they worked all over in a hopscotch manner.

20 What you lose in that situation, which these guys
21 will tell you, you lose the ability to be efficient.
22 You lose the institutional knowledge when you go back
23 to start over some place that you left over two weeks
24 ago because now you know where the mast arm is going.
25 You have to recreate the work that was done two weeks

1 ago.

2 All of that is the sort of inefficiency items
3 that you can't capture on the street, you can't capture
4 during the project, you can only capture in retrospect.

5 That's what we have attempted to do here in two
6 ways, in the ways the textbook reflects to do it, which
7 is a measured mile, a measured mile compared against
8 comparable projects, and also in a cost variance
9 methodology, using the budget cost versus the actual
10 cost for the various items.

11 Part of the Department's response was -- let me
12 say in addition to the relocations, there was a
13 substantial amount of utility conflicts that had to be
14 dealt with.

15 And although the general note in the plans says
16 generally we are just telling you kind of where this
17 stuff is, when you start moving the mast arms, then you
18 run into other utilities and other utility problems.

19 One consequence of that on this job is that
20 Hypower spent a substantial amount more in locations
21 from their subcontractor who was doing locations than
22 they had budgeted because they didn't anticipate having
23 to look in places other than where the plans indicated
24 they should have to look.

25 There also was a problem on the project with

1 muck. It changed the site conditions, which are not --
2 or unacceptable site conditions, which is not something
3 you would anticipate finding in a roadway, which also
4 impacted their ability.

5 The presentation in our book, in our claim book
6 was divided into A's and B's. And I'm not sure that
7 the Parsons guy who did the response understood exactly
8 what we were up to, although I thought it was fairly
9 clear.

10 The A items, 1 through 15 are intended to be
11 items, which although they also had impacts, they had
12 direct costs that were not compensated.

13 The B items were not claims for direct costs,
14 although Parsons thought they would give us money on
15 one of them, which is fine. But the B items are
16 intended to be indicative, evidentiary of the
17 inefficiencies that led to our inefficiency in delay of
18 claim.

19 That's why there are no dollars attached to the B
20 items. They are presented as evidentiary of the
21 inefficiencies.

22 Before I get into any specifics or talk about
23 specifics, the other point I wanted to make is that the
24 Parsons response discusses in detail, well, you've got
25 substantial completion on this date, it was ahead of

1 this date, how could you have an impact.

2 The fact of the matter is substantial completion
3 was relatively irrelevant to Hypower and its work, but
4 Hypower unquestionably, and Parsons agrees with this,
5 was called out to the project to do a lot of work after
6 substantial completion.

7 The major item or one major item being changing
8 the C-clamps to slip bolts. We will talk about that in
9 some detail, but that was an item that the DOT watched
10 us put in the C-clamps throughout the whole project,
11 then we got to the end and they came back and gave us a
12 punch list that said you need to change these 270
13 connections.

14 There were also poles that needed removal, and
15 the designer didn't know who owned them when he did the
16 design. When it came up to the end, we were ordered to
17 remove poles because they weren't owned by the people
18 he thought they were owned by. Again, well after
19 substantial completion.

20 The point being that the home office, at least of
21 Hypower, had to dedicate resources to this project well
22 after substantial completion and up into the point of
23 final acceptance.

24 That's the reason our home office overhead claim
25 runs up until that date. It's appropriate because

1 that's the date on which they continue to dedicate
2 resources to the home office resources.

3 It's not correct, by the way, as Parsons says,
4 that we tried to make a home office overhead claim for
5 the regular contract period. They said we
6 misunderstood the calculation. We use that as you are
7 supposed to use that to derive your Eichleay daily
8 formula for daily rate. We didn't apply it to that,
9 just applied it to the extended performance period.

10 I think rather than go through each of these
11 items myself piece by piece, it would be better to have
12 Jack and Bernard talk about that and answer your
13 questions.

14 I do want to talk about what we did in these
15 damages summaries that I gave you this morning. The
16 one that's titled Hypower's quantum summary is exactly
17 the same thing as what is in the book, with the
18 exception of adding interest and calculating the prime
19 contractor mark-up. That's calculated at 5 percent --
20 excuse me, 10 percent of the first 50,000 and 5 percent
21 on the amounts above that. We hadn't calculated it in
22 our claim that was submitted.

23 The alternative summary is a response in effect
24 to some of the Parsons' criticism. Parsons said, well,
25 you had a theoretical delay period at least as it

1 relates to project overhead, and that's not something
2 that we should be looking at.

3 What we have done in the alternative summary, to
4 give you another way to look at it, is this. The home
5 office overhead is the same. This all comes off of the
6 cost records of Hypower, and it's the variance between
7 the budgeted amount and the actual dollars, because one
8 of the criticisms was from Parsons, you should use
9 actual dollars.

10 This is a variance between the budget amounts and
11 the actual dollars for these particular items. The
12 labor overrun was \$112,000, which is remarkably close
13 to the inefficiency calculations we did using the
14 measured mile.

15 The equipment overran a small amount, and the
16 explanation is that this equipment in the job cost
17 records is the result of a year end truing up of actual
18 equipment costs on the project.

19 As they went along, it was showing an overrun of
20 much more than this, but when they got to the end of
21 the year and went back and captured all of their
22 equipment costs for the year and then delegated or
23 allocated, I should say, that to the project, it came
24 down significantly because their equipment had been
25 used rather extensively during that period.

1 So, this is not -- that number is not based on
2 the Blue Book rates as the specification would suggest.
3 This is an in-house delegation of actual costs,
4 probably lower than what a real damage amount would be,
5 but it is what the books show.

6 The direct project overhead overrun, again, is
7 right off the books. That is the as-bid variance from
8 the -- as expended, and the subcontract overrun is what
9 I mentioned before. That is, of that amount, about
10 20,000 of that is F. R. Aleman doing locates, which we
11 did not anticipate having to do, and certainly having
12 to do to the extent that they were required.

13 The rest of it is the same calculation, that was
14 done at the bottom of the other one.

15 So, that's -- trying to give you a check in
16 response to the Parsons' criticism of the methodology.
17 I don't agree with Parsons, but I want to be able to
18 provide you with an alternative so if you are concerned
19 about the fact that some of the numbers are estimates
20 or measured miles, then this is a way to check those
21 numbers.

22 I guess the appropriate thing would be to go
23 through each of the eight items and kind of respond to
24 what Parsons has said about them.

25 We can do that one of two ways, I can step out of

1 the equation and have Jack and Bernard explain it or
2 I can ask them questions or you can ask them questions.
3 I will do whatever the Board wants me to do.

4 CHAIRMAN COWGER: Let me ask a question. Based
5 on these two papers you presented that are now
6 Exhibit 3, what is the total amount the contractor is
7 now requesting? Is it 281 or 329?

8 MR. PISCITELLI: It's 329 with the mark-up.

9 CHAIRMAN COWGER: Which is the same as --

10 MR. PISCITELLI: There are two differences, we
11 calculated interest, we calculated the mark-up.

12 CHAIRMAN COWGER: The 329 is what you are
13 claiming now?

14 MR. PISCITELLI: Yes. Now, let me put a footnote
15 next to that. You will find as we go through these
16 that there is -- we have some uncertainty as to a final
17 estimates issue. We thought we had it figured out
18 until last night, and now we don't have it figured out.

19 There's some money in there that's final
20 quantities, and frankly we are not sure where we are at
21 in that. It's about \$20,000. These guys can talk
22 about it better than I can.

23 CHAIRMAN COWGER: Okay. It would appear that --

24 MR. MCGONAGILL: Excuse me, Mr. Chairman.

25 Mr. Piscitelli, then based on what you just said, am

1 I correct in understanding then that you are saying of
2 this higher number that you submitted, the 329,673,
3 that there is roughly 20,000 in there that you're not
4 real sure about, but it is a final quantities issue?
5 That's in there?

6 MR. PISCITELLI: It is in there. And, yes, you
7 may have paid us, but we can't tell that from the paper
8 trail.

9 CHAIRMAN COWGER: Now, can it be shown that you
10 did get paid the \$20,000, then that comes off the 329?

11 MR. PISCITELLI: Yes.

12 MR. ROEBUCK: Are any of the gentlemen with you
13 from Pan Am?

14 MR. PISCITELLI: Yes. I should have introduced
15 them.

16 I didn't address the issue of supplemental
17 agreements which was brought up by Parsons. You said
18 don't talk about legal issues. At some point I do have
19 a response.

20 CHAIRMAN COWGER: You may have to bring that up.
21 What concerns me, in the interest of trying to move
22 through this thing in an expeditious manner, when you
23 look at the original claim as submitted, you have all
24 of these numbered sheets that document various amounts
25 claimed. I don't think that we need to go through each

1 one of those 15 and -- 15 items in great detail because
2 we can read what has been said.

3 Looking at DOT's rebuttal, somewhere in here they
4 have a document called summary sheet, which is in the
5 part called introduction.

6 As I understand it, let's look at the, I guess
7 you would call them the direct cost issues.

8 DOT has gone through there and made an analysis
9 of the amount claimed, Parsons' analysis and DOT's
10 analysis. I assume that DOT's position is that where
11 they show an amount under DOT's analysis that that
12 amount is due?

13 MR. CROFT: Correct.

14 CHAIRMAN COWGER: The part about Parsons'
15 analysis doesn't really apply to what you agree is due,
16 it's just put in there for information?

17 MR. CROFT: It's shown for information and to
18 show that in most cases their position was the same as
19 our position.

20 I would like to speak to -- I think there are
21 four specific areas where we had a difference, a major
22 difference, and I would like to explain why.

23 CHAIRMAN COWGER: We may get into that. Then in
24 the B group we have something similar there, a similar
25 summary. Again, what DOT is agreeing to is the last

1 column. I don't know if there are even any in there.

2 And in the B group I only see two, B-2 and B-8
3 where DOT agrees that there is something due. Of
4 course, the bottom line here is we are comparing 66,000
5 against 10,000.

6 MR. PISCITELLI: The B group we didn't present as
7 items for individual dollar amounts. We presented it
8 in support of our inefficiency in delay claim.

9 MR. ROEBUCK: They brought the item up as a
10 problem to the contractor, but they didn't quantify the
11 dollar value of it.

12 MR. MCGONAGILL: Excuse me. Mr. Piscitelli, what
13 you are saying as I understand is all the items in B
14 were simply back-up for all dollars claimed in A.

15 MR. PISCITELLI: No. They are back-up for the
16 inefficiency in delay, the indirect elements.

17 MR. ROEBUCK: The overhead and stuff they put
18 into their claim, the eight items total \$66,000 on your
19 part, more or less?

20 MR. PISCITELLI: Right.

21 MR. ROEBUCK: That's the specific quantitative
22 items they could put a value to.

23 MR. CROFT: Our response to B, obviously they are
24 not just asking for zero dollars. When we say zero
25 dollars, of course we felt there was no impact to those

1 issues. The ones where we have assigned a value is
2 because we felt there was some direct cost involved.
3 We still don't believe there was any impact to delay in
4 those issues.

5 CHAIRMAN COWGER: So, we can say the B group as
6 far as the DOT's rebuttal package is dealing only with
7 direct costs?

8 MR. CROFT: No, what I said is our rebuttal, when
9 it says zero, means we don't believe there were any
10 legitimate delays, so there's no delay-associated costs
11 to those issues.

12 CHAIRMAN COWGER: Where you do have a dollar
13 amount you say there may be some costs involved due to
14 delays?

15 MR. CROFT: Not due to delays. I think I also
16 stated in my description on those particular ones that
17 there was not a delay issue, but it was an issue where
18 there was some crew costs, you know, one or two days
19 that they should be reimbursed for.

20 MR. MCGONAGILL: For inefficiencies or --

21 MR. CROFT: For extra work for a -- I think there
22 was one issue we assigned a value to. There was one or
23 two days was the only reference on that issue in the
24 whole job that we found the records where it was
25 encountered and perhaps, even though we don't have

1 detailed records because it was never presented or
2 noticed to us specifically, but we assigned a value and
3 estimated a crew cost.

4 MR. ALBAUGH: Are the inefficiencies the result
5 of delays? That's what it basically --

6 MR. PISCITELLI: The essence of it is an
7 inability to work in a prescribed manner. Interference
8 is a better word than delays.

9 MR. ALBAUGH: Is it a combination of both? The
10 reason I'm asking is I'm trying to understand, you
11 know, part of it is reading through it and
12 interpreting. Is it that it ran longer, that your
13 schedule -- you are looking at your plan schedule
14 versus the actual schedule, there was some additional
15 time on the end, so is the inefficiency part wrapped up
16 in that?

17 MR. PAUL-HUS: When the consultant -- we have
18 them an impacted schedule, if you look at the way those
19 schedules are impacted, you will see the impact
20 activities, interference activities.

21 However you want to describe it, we've run into
22 an issue and you have to stop and wait for a response
23 and then come back and go on with the work again. What
24 he did in essence is he placed those into the critical
25 path to show the effect it was having on the work,

1 starting and stopping.

2 It's a combination, for example, running up on a
3 mast arm foundation, realizing that the design location
4 won't work, having to escalate that back to the
5 designer for a fix, then having it flow back down to
6 us, for us to go back, relocate it, move on with the
7 work.

8 Meanwhile other things are going on. We have to
9 go back and fill up that gap that we left behind. It's
10 no longer part of the original production sequence.
11 Basically it's coming in and filling in the gap.

12 MR. ALBAUGH: That's basically a delay.

13 MR. PAUL-HUS: Now instead of doing two-mast arm
14 foundations or three-mast arm foundations, I'm
15 mobilizing to do only one. I'm not able to efficiently
16 use my manpower and equipment over a period.

17 When you take all the different locations this
18 happened, all the hopscotching over the job -- for
19 example, if I was running conduit between two bases and
20 the bases had to be moved, but I ran the conduit and
21 I am now tying in those two pieces.

22 Effectively what used to be 400 feet in one day
23 just became 400 feet in two days, and I just ended up
24 with a 50 percent inefficiency to come back and locate
25 the end of the conduit, dig it up, tie the two pieces,

1 do the backfilling.

2 By the time you end up with that, you've shot
3 another day. Instead of 400 feet in one day we've done
4 200 feet in two days.

5 I'm not citing any specific instances, just that
6 the efficiencies couldn't be measured on a day-to-day
7 basis, we had to wait until the end, go back and
8 measure it. Based on if this had not happened here's
9 what we would have done, but it did happen, here is
10 what it really was.

11 MR. ALBAUGH: You are saying it's inefficiencies,
12 part of it is delay and because of the sequencing and
13 other things, but part of it is -- I noticed in some of
14 their comments, the project was basically done ahead of
15 schedule for the most part, but then there were three
16 or four months at the end, and that's part of the
17 inefficiency I assume you are talking about in that
18 there was something that occurred three or four months
19 after the job was basically done?

20 MR. PAUL-HUS: Not giving the time extensions in
21 the job, we did come back.

22 MR. ALBAUGH: That's one thing I'm interested in,
23 time extensions. One of the things they note is that
24 additional compensation by the contractor, prime
25 contractor was waived when they signed supplemental

1 agreements.

2 MR. PISCITELLI: It's sort of a legal issue, if
3 you don't mind. If you want me to comment on that.

4 MR. ALBAUGH: I don't know.

5 CHAIRMAN COWGER: Do you want to reserve that
6 until you get to that part?

7 MR. PISCITELLI: Whenever you want me to.

8 CHAIRMAN COWGER: What did the supplemental
9 agreement cover?

10 MR. PISCITELLI: Quantity more than anything.

11 MR. CROFT: Quantities and specifically the light
12 pole removal which is a couple of their B items.

13 CHAIRMAN COWGER: You had to add new items for
14 light pole removal or just increase the number they
15 had?

16 MR. CROFT: I basically increased the number.
17 Supplemental agreed to perform them at the unit cost
18 basically, and some time was added for those issues as
19 well. No -- it was standard, supplemental agreement.
20 No rights were reserved for any additional costs
21 related to that.

22 CHAIRMAN COWGER: This supplemental agreement
23 primarily, what it primarily did was document overruns
24 for the additional -- were there new pay items added?

25 MR. CROFT: It was combined with some other

1 elements which were prime contractor's issues, not
2 related to this.

3 CHAIRMAN COWGER: Don't have anything to do with
4 this?

5 MR. CROFT: You can go through them if you want
6 to.

7 MR. MCGONAGILL: Those essays are part of the
8 package and the language as to what it entailed and
9 what was being addressed, the standard paragraph.

10 CHAIRMAN COWGER: We can look for that.

11 MR. MCGONAGILL: It's fairly obvious.

12 MR. ALBAUGH: We can go on.

13 CHAIRMAN COWGER: I think we need to go on. Let
14 me ask a couple of specific questions about your
15 notebook, Mr. Contractor.

16 I want to look just a minute in the part entitled
17 section one. I'm a little confused by these schedules
18 you've got shown in here. Figure number two, impacted
19 schedule. Are we all together? Fairly close to the
20 front. Right ahead of section two. Figure number two,
21 impacted schedule.

22 I am a little confused about this color coding.
23 I think the yellow bar indicates that is the way you
24 planned to build the job, is that correct?

25 MR. PAUL-HUS: Correct. That's what it says.

1 CHAIRMAN COWGER: What you call the early bar, is
2 that really what that is? In your narrative you call
3 it something else. I think impacted schedule.

4 MR. PAUL-HUS: The title of the schedule is
5 impacted, is the impacted schedule. That's the title
6 of the schedule. In other words, he took the
7 as-claimed schedule and put the impacts in there to see
8 how it would have affected the as-planned.

9 In other words, assuming that the job was built
10 exactly the way it was planned, taking -- given the
11 impacts that we do know exist, plugging those in
12 sequence, what effect does that have on final
13 acceptance.

14 That's why if you look at the final acceptance
15 line, it shows final acceptance pushed all the way out
16 to March 3rd.

17 What he's saying is that is how much of an impact
18 the known impacts should have had on the schedule had
19 the job been built exactly as planned.

20 CHAIRMAN COWGER: Could have had. So, this is
21 really the base schedule, which was the original plan
22 schedule versus how it -- these various things that
23 occurred could have impacted the schedule?

24 MR. PAUL-HUS: Correct.

25 CHAIRMAN COWGER: Not the way it actually

1 occurred.

2 Now we will go to item number three, figure
3 number three, and that -- I assume that the yellow
4 lines are the same as they are in figure number two,
5 but the green lines now become what actually happened.
6 They become the actual impact, right?

7 MR. PAUL-HUS: I believe that's correct.

8 CHAIRMAN COWGER: Because this ends up showing
9 completion at an earlier date than figure two does.

10 MR. PAUL-HUS: Correct. In other words, the job
11 didn't take as long as it --

12 CHAIRMAN COWGER: As it might have, with the
13 impacts. What does the -- I will get away from this.
14 Last question, what do the blue lines say? Let's look
15 at figure three. That's the only one I'm really
16 interested in with regard to the blue lines. Do they
17 indicate a delay to a specific, what do you call it,
18 activity?

19 MR. PAUL-HUS: They are delay activities added by
20 the scheduler to show the duration that it took to
21 resolve an issue.

22 CHAIRMAN COWGER: Okay.

23 MR. PAUL-HUS: In other words, from the time the
24 question was posed to the time an answer was received
25 so that work could resume, that's what those items are

1 intended to reflect.

2 CHAIRMAN COWGER: Let me ask you, on figure
3 three, on the first page, let's look at the first blue
4 line down near the bottom. It comes under the item --
5 well, it comes under the two items install conduit and
6 interconnect conduit. So, those are original
7 activities.

8 Now we come to D-09, impact 9, cable revisions.
9 Are you saying that the blue line indicates that that
10 was an impact that occurred that's related to the
11 conduit items, the conduit activities?

12 MR. PAUL-HUS: It was based on something
13 submitted during the procurement process, took a while
14 to get solved.

15 MR. KAUFMANN: Interconnect conduit on the
16 original document was shown to be on one side of the
17 street and was going to have to be moved to the other
18 side.

19 CHAIRMAN COWGER: I'm not too interested in that.
20 What the blue line shows -- let me sum it up to see if
21 I am correct. What the blue line shows on D-09 down
22 near the bottom, the issue of a problem here arose
23 early in November and was not resolved until early in
24 April.

25 MR. PAUL-HUS: Correct. Let me just do it this

1 way. When it says impact 9, that's B-9. You would go
2 to B-9 to get the explanation for what that is.

3 CHAIRMAN COWGER: Okay. I got that.

4 MR. PISCITELLI: That's the easiest way to have
5 you bounce back and forth between the impacts. That
6 was the purpose of the B items was to explain what
7 these impacts and this impacted schedule was. That
8 would be the best way to then tie it together without
9 having to have the logic lines on here.

10 CHAIRMAN COWGER: Okay. I have something else,
11 but when I think of it I will come back to it. Do you
12 all agree, Jack and Bill, there's no need to go through
13 this whole notebook and look at each individual item?
14 We can look at it.

15 The DOT, I assume -- I have not compared them
16 exactly, but I'm assuming they've looked at each of
17 these numbered tabs in the book and have made some kind
18 of a written rebuttal to it.

19 MR. PISCITELLI: The only thing I would say, we
20 do have a response to many of your rebuttal items. One
21 place they said we didn't do the work, and we did. I'd
22 like to present that.

23 CHAIRMAN COWGER: That's no problem, but if we
24 could just stay away going through item by item and
25 rebuttal by rebuttal.

1 MR. ALBAUGH: If we just cover the significant
2 things. I have a few questions to clarify some things.

3 CHAIRMAN COWGER: I do, too.

4 MR. ALBAUGH: Just the significant things.

5 CHAIRMAN COWGER: Before we get into that,
6 I think it might be appropriate to let DOT come back at
7 this point and make kind of an overall statement to
8 address what Mr. Piscitelli has said up until now, and
9 then we will certainly come back and give you all the
10 opportunity to rebut DOT's rebuttal in specific areas.
11 You've already given us your overall rebuttal, right?

12 MR. PISCITELLI: Right.

13 CHAIRMAN COWGER: Clay, why don't you go ahead.

14 MR. MCGONAGILL: I would like to defer to
15 Mark Croft from District 6, assistant district
16 construction engineer, and let him do our opening.

17 CHAIRMAN COWGER: That's fine.

18 MR. CROFT: I think I fairly well summarized our
19 position in our rebuttal. We don't believe that a
20 delay occurred. The job was substantially completed
21 five weeks before their schedule indicates it was going
22 to be completed. They did not have equipment,
23 resources out on the job during that next several-month
24 period that there were suspensions in place.

25 They came back, completed punch list work, which

1 was work they had to do anyway, that could have been
2 potentially performed during that five-week section.

3 A lot of the work was issues which we don't
4 believe we were responsible for anyway. I gave you the
5 issue of the C-clamps. That was an issue where they
6 were responsible for to begin with.

7 During that time they spent what we have
8 documented as ten days sending a single crew out to the
9 job to perform various elements of work.

10 I don't think a supporting argument for an
11 inefficiency is to say that they were impacted out of
12 their home office, or for any overhead.

13 As we touched on, all of the -- the job -- they
14 did not run over the approved contract time. All of
15 the time that was used on this job was either approved
16 as part of a supplemental agreement, weather days, or
17 agreed and approved time suspensions.

18 So, as far as we believe, no additional
19 time-related costs should be compensable during that
20 period.

21 CHAIRMAN COWGER: Let me ask you this. You said
22 their work was done within the original contract time?

23 MR. CROFT: No, not within original, within the
24 approved.

25 CHAIRMAN COWGER: As extended.

1 MR. CROFT: I think it finished on, working from
2 memory, on day 177. The original contract time was
3 150. Fifty-one days were added by either the
4 supplemental agreement or weather time extensions.

5 CHAIRMAN COWGER: Let me have those first two
6 days you said approximations of. 177?

7 MR. CROFT: Day 177 versus the original contract
8 time was 150 days.

9 CHAIRMAN COWGER: How do you get 51 days out of
10 that?

11 MR. CROFT: They finished before the adjusted
12 contract time.

13 MR. MCGONAGILL: The 177 was when they
14 substantially completed. The 150 was the original
15 contract time, and the approved contract time,
16 including supplemental agreements, time granted and
17 weather days was 201.

18 CHAIRMAN COWGER: Okay. Original as extended,
19 and the 177 was substantial completion. Of whose work?
20 Hypower's work or the prime's work?

21 MR. CROFT: I think both actually. There was
22 only a couple of elements. There was some handrails
23 that the prime had to do that was a current issue that
24 I think was part of the first suspension. But I think
25 most of the work was substantially completed.

1 CHAIRMAN COWGER: I've got you. Now, we
2 interrupted you. Can you get back on track?

3 MR. CROFT: Without going into detail on the
4 issues, which I'd like an opportunity to speak to about
5 four of them, our rebuttal, we did address every one of
6 those 30 issues that they raised.

7 We only found nine of them to have some validity,
8 and out of those nine only five occurred during the
9 first 177 days of the contract when they were
10 performing the original scope of work, primary work on
11 the contract.

12 So, there is very limited number of issues which
13 they had some valid complaint as far as a few hours of
14 crew delay.

15 CHAIRMAN COWGER: You have indicated that in your
16 rebuttal? You've pulled out those nine items?

17 MR. CROFT: Yes. I think I highlighted them.
18 That's pretty much it. I think I touched on this in my
19 rebuttal on the labor and equipment. I indicated their
20 inefficiency was presented based on conduit production,
21 which if you look through those 30 items, there is
22 almost very little reference even to conduit placement
23 on the job.

24 I don't see the correlation between the
25 comparison of what they are doing.

1 Also, they indicated the costs were estimated.
2 I guess today they will try to present some actual
3 costs, which again they may be actual costs, but it
4 doesn't indicate whether those efficiencies or
5 inefficiencies are theirs or ours.

6 Again, they refer to a theoretical 180-day delay,
7 which didn't occur. It actually was substantially
8 complete before the contract time was expired.

9 CHAIRMAN COWGER: Let me interrupt you just a
10 minute. You said that all the work was substantially
11 complete on calendar day 177. Did Hypower do any work
12 after that time as far as this work that was added, to
13 go in and jerk out some poles and things of that sort?

14 MR. CROFT: The pole removal which was done
15 afterward, the additional 15 poles, extra poles, and
16 then the replacement of the light poles that were hit
17 by vehicles, and then punch list work.

18 MR. MCGONAGILL: That was in the ten days that
19 you indicated they were out there after day 177.

20 MR. ALBAUGH: The 15 pole removal, was that
21 after? Was that part of the original contract or a
22 supplement?

23 MR. CROFT: It was part of the supplement where
24 the work was performed I think around October.

25 MR. ALBAUGH: There was a supplemental agreement

1 done after the substantial completion then?

2 MR. CROFT: I would have to look at the dates.

3 MR. MCGONAGILL: I think there was a procurement
4 for the extra.

5 MR. ALBAUGH: They had it substantially complete
6 after 177, and then basically there was additional work
7 that was handled by supplemental, the 15 pole removal?

8 MR. CROFT: Yes.

9 MR. ONUIGBO: There was one light pole that they
10 had removed and that was the last 30 poles.

11 MR. CROFT: There was 13 added by one
12 supplemental, two by the last one.

13 MR. ALBAUGH: Okay.

14 MR. MCGONAGILL: Both of those supplementals took
15 care of time and money issues, right?

16 MR. CROFT: Yes.

17 MR. PISCITELLI: We disagree with that.

18 MR. MCGONAGILL: That was our understanding.

19 MR. CROFT: Within the SA, on the 13 poles, they
20 mentioned they were entitled to remobilization, which
21 we don't think they really had any costs, but we
22 assigned a value in our rebuttal for that. That figure
23 wasn't specifically addressed in the supplemental
24 agreement, but it did make mention of it.

25 MR. PISCITELLI: The SAs were issued well after

1 the work was done, just so we are clear.

2 MR. ROEBUCK: In the supplemental agreements was
3 Hypower privy to every claim that you had when you
4 initiated -- when the contractor Pan Am initiated and
5 signed the SA?

6 MR. PISCITELLI: We were not a part -- Bernard,
7 were you a part of the supplemental agreements that
8 related to your work?

9 MR. PAUL-HUS: No, other than we had submitted
10 some stuff and it actually had been rejected. It looks
11 like once we saw the supplemental agreements, and we
12 didn't see it until very much later, that some of that
13 had been wrapped in. Certainly not all of it, not
14 everything that we submitted notice of claims for.

15 It looks like everything that was directly
16 related to quantity increases was, but nothing that
17 transcended quantity increases, any of the other things
18 that we put in notice for.

19 CHAIRMAN COWGER: Let me make a statement, and
20 either party correct me if I'm wrong. DOT is saying
21 the two supplemental agreements should have wrapped all
22 of this up. Isn't that in essence what you are saying?

23 MR. CROFT: I'm saying it should have wrapped up
24 the time issue, and it wrapped up specially the pole
25 removal issues, and the quantity overrun issues.

1 MR. ALBAUGH: Can we tie those pole removals to a
2 particular number here? Like are they saying there was
3 an additional cost, and can we tie that like to --

4 MR. CROFT: B-8 was the 13 poles. A copy of the
5 SA is attached in our rebuttal in that section B-8.
6 And B-14 was the three other poles that were moved.

7 That was the three other poles that were removed
8 later, one of which was an original contract
9 requirement pole that was missed in the initial
10 removal. A copy of that supplemental is also attached
11 to that section.

12 CHAIRMAN COWGER: Let me finish my question, if
13 I could. Going back to the contractor's side of the
14 issue about the supplemental agreements, I think
15 I heard you say that supplemental agreements did not
16 address the claims that you had given notice of prior
17 to the time of the supplemental agreement being
18 executed, correct?

19 MR. PAUL-HUS: Correct. It only dealt with
20 increased quantities.

21 CHAIRMAN COWGER: We will have to look at the
22 supplemental agreements to see what they say.

23 MR. MCGONAGILL: Mr. Chairman, if Mark was to
24 proffer -- are you through with your opening?

25 MR. CROFT: Yes.

1 MR. MCGONAGILL: If I might, there were four
2 items in response to Mr. Piscitelli's opening, and
3 I wanted to supplement Mr. Croft on if I could.

4 CHAIRMAN COWGER: Sure.

5 MR. MCGONAGILL: The first was the statement by
6 Mr. Piscitelli that Hypower intended, pursuant to their
7 shown as-planned schedule to proceed in a systematic
8 way from north to south, or on a continuous run.

9 In fact, if you look at the Department's analysis
10 and you look at this exhibit, which is charted out
11 based on the daily diary entries of exactly where they
12 were, when they did certain foundations, and
13 installations of poles and so forth, that substantially
14 throughout the contract period, without regard to any
15 of the alleged impact periods, that's not the way
16 Hypower did their work.

17 They hopscotched all over from day one.
18 Regardless of their claim saying it's based on the
19 initial as submitted schedule, their own work effort
20 through our daily diaries as documented shows that's
21 not the way they did it. They did hopscotch on their
22 own throughout the project.

23 The second point was --

24 CHAIRMAN COWGER: May I interrupt you a moment.
25 When you talked about hopscotched on their own --

1 MR. MCGONAGILL: They didn't do it
2 systematically.

3 CHAIRMAN COWGER: Regardless of the matters
4 brought up.

5 MR. MCGONAGILL: Right. That on their own, the
6 way they proceeded with their work, it was piecemeal
7 moving. Again, this Exhibit I think will show you.

8 MR. CROFT: Let me interject. If you look at the
9 as-built schedule, you will see that on mast arms and
10 light pole bases, which are the bulk of the supposed
11 delays that they have indicated here, the way that they
12 performed the work, it will support that those items
13 were never critical.

14 They actually probably on the average only sent a
15 crew out and worked on those items about once a week,
16 even though they had many locations available to work.

17 MR. MCGONAGILL: Then a second comment I had was
18 with regard to the C-clamp issue. Our documents will
19 show that very early on, as required by the contract,
20 Hypower submitted a shop drawing that showed what type
21 of clamps they intended to install. They weren't the
22 C-clamps they ultimately used.

23 DOT approved that. In fact, they went about
24 doing the installation of the C-clamps, and there was
25 that issue of what they were using was raised at one

1 point. The DOT -- at no time did Hypower submit a shop
2 drawing that was DOT approved for the C-clamps. In
3 Hypower's prior work on other jobs it shows they knew
4 what was required.

5 The last thing, substantial completion, the
6 argument of the substantial completion date was really
7 irrelevant because Hypower was out there after that for
8 a substantial period.

9 Again, the DOT's rebuttal exhibit is based on
10 daily diaries, what actually went on on the project.
11 Again, in only ten days out of that seven-month period
12 after day 177 did Hypower ever come out there for any
13 purpose, either punch items or the extra poles, which
14 DOT paid for under their supplemental agreement.

15 Those were the only additional comments that
16 I had.

17 CHAIRMAN COWGER: Let me go back on the C-clamp
18 issue just a second.

19 There were shop drawings submitted for the
20 C-clamps that were approved?

21 MR. MCGONAGILL: They were not for C-clamps.
22 There was a shop drawing as required. There was a shop
23 drawing submittal that was required by Hypower for how
24 they were going to make the connections.

25 And they submitted that a year -- excuse me, not

1 a year, but --

2 MR. CROFT: Before the job --

3 MR. MCGONAGILL: Before the job got substantially
4 under way and they started installing. What it
5 provided for was not C-clamps. It provided for an
6 approved acceptable connection which DOT approved.
7 Okay.

8 MR. CROFT: Required them to install --

9 MR. MCGONAGILL: Submitted --

10 MR. CROFT: To highlight, this was a discrepancy
11 between Parsons' analysis where they recommended
12 payment on that issue and ours. Parsons didn't realize
13 the C-clamps are not an approved connection. They are
14 not approved not just by the maintaining agency but not
15 approved by the Department.

16 The Department required a welding connection in
17 our standards index. That was, you know -- we are not
18 arguing over whether or not they installed something
19 that the Department normally approves. The item they
20 installed was not approved by either party.

21 MR. PISCITELLI: Can we reply to that?

22 CHAIRMAN COWGER: I will let you come right back.
23 What was the C-clamp connecting? Were these on the
24 overhead span wires?

25 MR. CROFT: Grounding rods.

1 CHAIRMAN COWGER: Okay. Now --

2 MR. PISCITELLI: This is an issue where they
3 don't even agree with their own consultant. Jack, can
4 you explain this?

5 MR. KAUFMANN: C-clamps aren't used to connect
6 the ground rods, they are used to connect the ground
7 conductors. When this issue came up with our previous
8 meetings, we asked DOT to provide us with a copy of the
9 submittal documents that they claim they had that we
10 gave them for the C-clamp product, or something similar
11 that we were planning to use for this purpose.

12 What they provided us with were the cut sheets,
13 the submittals that we provided them for ground rods
14 and connections to ground rods, but not for what you
15 would use a C-clamp for. The C-clamp is a crimp
16 connection that is used to crimp parallel conductors,
17 more or less tie two conductors together, two wires
18 together, not a ground rod. That's a totally different
19 connection.

20 So, basically what is happening is the DOT's
21 design documents require CAD welding, Dade County
22 maintaining agency requires a mechanical connection.
23 They have a specific connection that they prefer to
24 see, but that's not in our contract to provide.

25 We provided a mechanical connection, a C-clamp,

1 which is acceptable by the national electrical code.
2 And it never -- a cut sheet was never provided to the
3 DOT. It's an acceptable method by national electrical
4 code.

5 They wanted a mechanical connection. They don't
6 specify a split-bolt connection like Dade County was
7 expecting or wanted.

8 MR. PAUL-HUS: That's not a split bolt either.
9 That's commonly referred to as an acorn.

10 CHAIRMAN COWGER: To boil this down, you
11 installed a certain type of clamp. The DOT insisted on
12 a different type of clamp.

13 MR. PAUL-HUS: No, the County did.

14 MR. KAUFMANN: County did.

15 CHAIRMAN COWGER: The County through the DOT.
16 So, there was a change from the type of clamp you
17 installed to the type they wanted.

18 MR. KAUFMANN: Yes, at the end of the job.

19 MR. ROEBUCK: Your approved shop drawing showed
20 the County's approved plan?

21 MR. PAUL-HUS: There is no shop drawing. This is
22 a typical butt splice. You have two pieces of number
23 six grounding conductor. You just need to splice it
24 together, this is a C-clamp. You will see it is NEC
25 approved. There is no spec on it. It's just a

1 mechanical connection. That's what we use in the
2 course of -- if you were doing the metro rail station,
3 putting two ground connectors together.

4 We had this across many jobs, many jobs finishing
5 at the same time. We didn't know it when we were
6 putting this stuff in. We sure knew it at the end.
7 They wanted a split test.

8 There is nothing in the specs that says that, no
9 standards. These are on handwritten lists and
10 requirements from the Dade County inspectors.

11 If we did do it by DOT standards we would do it
12 with a CAD weld. It's clear they don't want CAD weld,
13 they want the mechanical connection. If you go to
14 Broward County, another DOT job, it's completely
15 different.

16 Palm Beach County it's something different.
17 There are no written standards or specifications which
18 led to all the confusion on these issues.

19 CHAIRMAN COWGER: Does DOT agree?

20 MR. CROFT: He just said the DOT requires CAD
21 welding. They did not do CAD welding or propose to do
22 CAD welding. Had they proposed to do CAD welding, we
23 would have had an argument over whether or not we were
24 requiring a change to our specification.

25 What they provided was never approved by the

1 Department, not in our specs or the County's.

2 MR. KAUFMANN: If we had done CAD welding, would
3 we have been required to remove it and replace it with
4 mechanical connections?

5 CHAIRMAN COWGER: Excuse me, the specifications
6 or the contract documents call for CAD welded
7 connections.

8 MR. ROEBUCK: In the standard details.

9 CHAIRMAN COWGER: Now, the County would not
10 approve it, if he had done it?

11 MR. CROFT: The County probably would not have
12 approved it. At least they would not have liked it.
13 We may or may not have argued the point, you know, and
14 made the change.

15 CHAIRMAN COWGER: He ended up using some kind of
16 a clamp connection, but it turned out to be the wrong
17 one to suit the County? Is that summing it up well or
18 not?

19 MR. CROFT: I don't know if he wants to suit the
20 County, but he used a different type of connection.

21 MR. ROEBUCK: Is that what happened?

22 CHAIRMAN COWGER: Okay, I interrupted
23 Mr. Valentine.

24 MR. ONUIGBO: This is just a general statement,
25 prior to we having a meeting, I think it was on

1 April 4th of '97, we had some other projects prior to
2 that, 79th Street, for instance. We have the same
3 meeting, you know, a general meeting for
4 presignalization, prelight installation.

5 That's an issue that came up with the County
6 there, the Department of Transportation and them, and
7 we specified -- I mean the County specified that
8 particular C-crimp, split bolts was what was required
9 by the County. They agreed they would use it.

10 MR. KAUFMANN: The C-crimp?

11 MR. ONUIGBO: No, the split bolts. You also
12 had that on 79th Street. That was the agreement.

13 MR. CROFT: They were aware before --

14 MR. PISCITELLI: Wait, that's a point. There was
15 a job where they accepted the C-clamps.

16 MR. KAUFMANN: Then if we go to Broward County
17 they won't accept C-crimps they want the CAD welds.

18 CHAIRMAN COWGER: I think we have heard enough on
19 that issue. How substantial a part of the overall
20 issue is this C-clamp? Is it a pretty big part of it
21 or not?

22 MR. PISCITELLI: It's about ten grand in direct
23 costs, but it was a significant post substantial
24 completion issue. In other words, it came up post
25 substantial completion and the remedial work had to be

1 done.

2 MR. CROFT: It appears that it took about three
3 days to change out.

4 The main point we have is that this issue was
5 discussed before they even started.

6 Had they raised it as an issue and said no, it's
7 not part of the contract, we will not give you the
8 split bolts unless you pay me extra, we would only have
9 been dealing with the change in material costs and any
10 labor, if there was any additional, not the complete
11 replacement of all the work.

12 CHAIRMAN COWGER: Do you think we understand
13 that?

14 MR. ROEBUCK: I'm getting a better feeling for
15 it.

16 CHAIRMAN COWGER: Where were we. Clay, were you
17 through?

18 MR. MCGONAGILL: Yes, sir.

19 MR. KAUFMANN: That's a good example of how well
20 the job was engineered and organized.

21 MR. MCGONAGILL: From what I heard Mr. Croft just
22 say was that the issue of the C-clamps was addressed
23 before they started installing them. DOT told them,
24 you know, at that point the issue could have been
25 resolved, but the contractor chose to go ahead in spite

1 of DOT's --

2 MR. KAUFMANN: I don't remember receiving any
3 directive with them telling us to do that. If there's
4 a document in there saying that, I will agree with you.

5 MR. PISCITELLI: It's not in the minutes of that
6 meeting.

7 MR. PAUL-HUS: You know, from my point of
8 frustration, not being that I -- I don't have daily
9 involvement with the projects, as you all know, but
10 I do know that probably the largest frustration and
11 where I think the source of this frustration comes from
12 is when we allow the Dade County helpful hints list to
13 become part of our specs without it ever being part of
14 our specs.

15 That's always been a frustration for signal
16 contractors. You have a maintaining agency who has
17 their own ideas on how this should be built. The jobs
18 are designed one way, then they have to be built the
19 other way. Sometimes it's required to be incorporated
20 in the specs, sometimes it isn't.

21 When you are bidding a job on a low bid
22 environment, the estimator looks in those specs, bing,
23 bang, boom, that's what he bids. You show up on the
24 job, you've got what I call Ernie's helpful hints.
25 Ernie is one of the Dade County inspectors.

1 They say you will build it this way. I don't
2 care what the plans say. All of a sudden you have
3 friction on the job, people scrambling, we already
4 bought this, now they want that.

5 This all ties back to that lack of coordination,
6 which I know everybody feels that same frustration from
7 time to time.

8 Why it has to get this far out of control on
9 these jobs, you know.

10 CHAIRMAN COWGER: That's an interesting piece of
11 information. Let me go back, though, and address this
12 meeting or discussion or whatever it was that took
13 place prior to any of these C-clamps being installed.

14 Did I hear somebody from DOT say that this issue
15 was discussed prior to any clamps being installed?

16 MR. ONUIGBO: Yes.

17 CHAIRMAN COWGER: Was it resolved?

18 MR. ONUIGBO: In the field, yes. The
19 superintendent agreed that he was going to install the
20 split bolts.

21 CHAIRMAN COWGER: Before he ever installed any.

22 MR. MCGONAGILL: That was some period of time
23 prior to them actually starting to install the
24 C-clamps.

25 MR. ONUIGBO: On the 82nd, yes. We had that

1 meeting on the 79th.

2 MR. PISCITELLI: Some are on a different job, a
3 meeting on a different job.

4 MR. ROEBUCK: Not on this job?

5 MR. ONUIGBO: We also had some meetings on this
6 job, too. We just got a verbal on that April 4th.

7 MR. ROEBUCK: The minutes do not reflect it.

8 CHAIRMAN COWGER: This meeting you are talking
9 about occurred on another job that involved DOT and
10 Hypower. You are saying they should have transferred
11 that knowledge over to this job?

12 MR. ONUIGBO: Yes, sir, because we actually
13 referred to 82nd on this particular job.

14 MR. CROFT: He is saying both. He is saying it
15 was discussed on other jobs and also at the
16 presignalization meeting on this job it was discussed.

17 CHAIRMAN COWGER: And it was decided at that
18 point to use what kind of connectors?

19 MR. ONUIGBO: Split bolts, because Dade County
20 was also involved in that meeting.

21 CHAIRMAN COWGER: We need to hear what the
22 contractor has to say about that. That's kind of an
23 issue I don't think we heard anything on before.

24 Now, I guess we need to -- that seems pretty
25 critical. We need to talk about that right now. What

1 is your recollection?

2 MR. KAUFMANN: Of this meeting?

3 CHAIRMAN COWGER: Yes, whether or not you were
4 instructed to use the split bolt connectors before you
5 ever made the first connection.

6 MR. KAUFMANN: The only time I've ever been
7 instructed to use split bolt connectors in writing is
8 after I had already used the C-clamps.

9 MR. ALBAUGH: How about verbally?

10 MR. KAUFMANN: I've talked to a lot of
11 contractors and DOT personnel -- not really DOT
12 personnel, but contractors, split-bolt versus about CAD
13 welding, C-bolt issues.

14 They are talking about two specific projects in
15 Dade County that require these C-clamps. There was
16 another one we did up on 37th Avenue which wasn't even
17 with this contractor where we used them. There are
18 some still installed there. Then we go to another
19 county and it's CAD welding.

20 My position on it every time when I meet with
21 anybody is you are not getting split bolts. You give
22 me a letter directing me to use split bolts and I'm
23 going to send you a letter back claiming extra costs.

24 CHAIRMAN COWGER: They are more expensive?

25 MR. KAUFMANN: Labor intensive.

1 MR. ALBAUGH: I understand that, but he said
2 there was a discussion.

3 MR. KAUFMANN: The discussion was not with me.

4 MR. ALBAUGH: Was a Hypower representative there?

5 MR. ONUIGBO: Yes, his superintendent Ron Dean.

6 MR. KAUFMANN: My superintendent is not
7 authorized to do that.

8 MR. PISCITELLI: There are minutes of that
9 meeting that don't reflect that. If this is such a big
10 issue, why wasn't it addressed there?

11 MR. KAUFMANN: Why wasn't it addressed there?

12 MR. ONUIGBO: It wasn't such a big issue then.

13 MR. KAUFMANN: Obviously it was.

14 MR. CROFT: It apparently was not documented
15 right. However, to me that means you should have gone
16 and done the CAD weld. That's what the contract
17 required. On your own you went out and put C-clamps,
18 which definitely were not approved earlier in writing
19 by the Department or the County. I don't know why you
20 would have done that.

21 If you are saying you are not going to alter the
22 contract unless you get written direction, you should
23 have put in CAD welds.

24 MR. PAUL-HUS: We've use them on other FDOT jobs
25 in District 6. We do know that Dade County will not

1 accept CAD welds. We do know that they want a
2 mechanical connection. Some jobs we have out there had
3 C-clamps, some of them we have split bolts. Both of
4 them are ideal for that purpose.

5 Why the preference exists I don't know. It
6 certainly is more to maintain than a split bolt or
7 C-crimp.

8 MR. KAUFMANN: The fact is there is no
9 consistency. It's always a whimsical request based on
10 one specific individual. We can't always be expected
11 to know --

12 MR. ALBAUGH: Do we need any more of this?

13 CHAIRMAN COWGER: I think we are through with
14 this issue.

15 MR. CROFT: This kind of highlights an issue when
16 I went into B-15, you know, where Hypower, you know,
17 has not brought to our attention any changes. Here is
18 an issue where they say it was installed two different
19 ways on different jobs.

20 Then ask us before you put them in what do you
21 want, DOT, and this is what it is going to cost if you
22 want split bolt. Didn't happen.

23 CHAIRMAN COWGER: Okay. Just a quick summary.
24 I think what I'm hearing is that Valentine there said
25 that there was a meeting on this specific project where

1 the contractor was instructed to use split bolt
2 connectors.

3 The contractor says we have no knowledge of that,
4 at least the people here don't. Mark says it's not
5 documented. That particular set of instructions at the
6 meeting isn't documented.

7 So, we are kind of left hanging here a little bit
8 because neither one of you from the contractor's side
9 were at the meeting, right? It was your project
10 superintendent.

11 MR. KAUFMANN: Correct.

12 CHAIRMAN COWGER: We are not saying that anybody
13 is not telling the truth, we are saying that's not too
14 well documented.

15 MR. MCGONAGILL: Mr. Chairman, in addition,
16 Valentine, you indicated it wasn't just on instruction,
17 they agreed, understood and agreed to install the --

18 MR. ONUIGBO: The split bolts. In that meeting
19 we usually have an RFI qualification.

20 CHAIRMAN COWGER: I think the Board feels we have
21 heard enough on that issue. I'm not sure where we
22 stand at this point.

23 MR. PISCITELLI: Mr. Paul-Hus is not shown as
24 being at the minutes of that meeting.

25 CHAIRMAN COWGER: Where are those minutes?

1 MR. MCGONAGILL: Tab 9. They're the sixth page
2 back. It's an April 7th letter.

3 CHAIRMAN COWGER: Okay. I'm not sure where we
4 stand in this thing now.

5 MR. ROEBUCK: Let me ask a question just of a
6 broad nature. In your supplemental agreement, Pan Am,
7 have you collected any money for Hypower that they
8 haven't been paid?

9 MR. DUFFOO: Every money received that is
10 supposed to be paid to Hypower I believe has been
11 already given to Hypower.

12 MR. ROEBUCK: I thought that may have been some
13 of the \$20,000 item that you kind of were leaving
14 floating.

15 MR. PISCITELLI: Bernard has to explain that.

16 MR. PAUL-HUS: Whatever quantities they were paid
17 for, since there were no added items to the job, they
18 simply pass on to us the quantities, unit prices to us.
19 To date whatever quantities they've been paid for,
20 we've been paid for.

21 Where we have the difference, near the end of the
22 job we submitted our final quantity audits. We double
23 checked our measurements and submitted those. There is
24 a difference of what we asked to be paid and what we
25 were paid. That's it, you know, it's what we pay you,

1 goodbye. If you don't like it, submit a claim. So, we
2 did it.

3 MR. ROEBUCK: You got closed out more or less,
4 but you think there may be some disputed money
5 involved?

6 MR. DUFFOO: Right.

7 MR. PAUL-HUS: Each and every time we had any of
8 these issues that are in A and B, there's RFIs, all
9 kinds of things where rights are reserved. They
10 weren't ever addressed still to this day, which is why
11 we basically put the claim together.

12 MR. ALBAUGH: What we heard in that case, the
13 \$20,000 difference, the potential for 20,000, is you
14 may have received 20,000?

15 MR. PAUL-HUS: No, that's not even at the price
16 item. That's incidental to the grounding conductor.

17 MR. ALBAUGH: I had misunderstood that.
18 I thought you told us --

19 MR. PAUL-HUS: I'm sorry, I'm screwed up on the
20 sequence. There's \$27,000 in units that we say we
21 installed that we weren't paid.

22 MR. ALBAUGH: That's not what I had understood
23 earlier.

24 MR. PAUL-HUS: I'm sorry.

25 MR. ALBAUGH: The 329,000, the sheet that we have

1 been provided --

2 MR. PAUL-HUS: It's included in the claim.

3 MR. ALBAUGH: There was a discussion that there
4 may have been \$20,000 paid in there that's not taken
5 into account in the claim at this point?

6 MR. PAUL-HUS: That's right. We couldn't tell if
7 the units -- we can't tell from the documentation that
8 we have whether those units in SA-3 and 4 were actually
9 paid to us or not because we were actually paid for
10 quantities installed. It's just total quantities.
11 It's not broken out by location.

12 MR. ALBAUGH: Just wanted to make sure there
13 wasn't something hanging out there that you weren't
14 paid for that you are claiming.

15 MR. CROFT: I think -- as far as responding to
16 notices or RFIs, all the RFIs were responded initially
17 in the job. I know they were submitted very late in
18 the process.

19 Basically Hypower didn't take advantage of the
20 90-day procurement on this job to identify any
21 potential problem areas and ask for clarification.
22 They waited until we were already past the 90 days and
23 into the next month, then we granted a suspension. And
24 the job for even highlighting or asking for
25 clarification on locations.

1 So, I don't think there are any unresponded RFIs.
2 And there are very few notices on any of these claim
3 issues at all.

4 MR. ALBAUGH: I have read through all of this
5 stuff previous to coming here, and I just have a few
6 questions to maybe clarify some things that I maybe
7 didn't understand, or maybe some significant issues.
8 That C-clamp stuff was one of those. We talked about
9 that enough.

10 CHAIRMAN COWGER: We don't want to hear any more
11 about that.

12 MR. ALBAUGH: I had just a couple that I would
13 like to clarify for myself. Again, I don't think we
14 want to go through all of these, but the ones that
15 weren't clear to me, number A-2 as an example, there
16 was an issue there. After reading everybody's side,
17 I'm still not clear on that.

18 There was a conflict with the storm sewer.
19 Apparently the storm sewer was broken. There were
20 repairs made to the storm sewer.

21 I guess from what the Department said, Aleman
22 made the repairs, and now I see in here that you are
23 wanting compensation for those repairs even though you
24 did not compensate Aleman? I'm not understanding,
25 I think, part of that.

1 MR. PAUL-HUS: We will concede this issue. How
2 is that? We've gone back and we looked at it, looked
3 at it from their point of view. It shouldn't be there.

4 MR. ALBAUGH: Then A-2 is not an issue.

5 CHAIRMAN COWGER: You are withdrawing that?

6 MR. MCGONAGILL: That should come off the money
7 that they're asking for, too.

8 MR. PAUL-HUS: Correct.

9 MR. ALBAUGH: Okay. The next one I had --

10 MR. PISCITELLI: You are not going to get that
11 lucky again.

12 MR. ALBAUGH: The others are not that type thing.
13 I had a question on -- let's look in your book, under
14 A-1 -- and again I'm just trying to understand how some
15 of these rates are established.

16 On A-1, the first page is an equipment cost of
17 \$1102.78. I look back for the supporting documentation
18 you have back there, which shows the third page back
19 there, which shows an auger truck, as an example, a
20 boom truck, auger truck, skid, and it totals up to that
21 \$1102.78 or whatever. So, I'm seeing for item number
22 one here there's 1100.

23 If you just go back to the page about five or six
24 pages before that, on page 59, before section A-1, page
25 59 of your section, there is a listing there. You list

1 out equipment.

2 I -- when I looked at this, I perceived you were
3 trying to establish what various rates are for various
4 pieces of equipment.

5 I go down through there, and I look at like the
6 auger figure as an example there. This is on page 49.
7 There is an equipment rate of \$141.67.

8 When I go back to that number one again, to the
9 supporting page, third page in, it has an auger rate of
10 156.15.

11 Now, there's a difference there in a few dollars,
12 but what really throws me a bit, on page 59 it says it
13 is a daily rate, and yet on the claim it's charging
14 \$156 an hour for an auger truck.

15 Can you explain that to me? I'm not saying you
16 are wrong, I'm having a problem following the rates
17 here.

18 MR. PAUL-HUS: No, he made a mistake.

19 CHAIRMAN COWGER: Which is the correct one?

20 MR. PAUL-HUS: The 156 an hour would be correct.

21 CHAIRMAN COWGER: That's, what, hourly or daily?

22 MR. PAUL-HUS: That's hourly. It's a super
23 expensive, high maintenance piece of equipment to drill
24 those drill shaft foundations with.

25 What looks like happened here is this boils down

1 to the difference between taking a monthly rate and
2 dividing it by 176 and what an hourly rate is for
3 operating costs.

4 At the time these things were being billed --
5 probably the biggest difference in cost between our
6 proposal and their rebuttal is the way the equipment
7 costs are calculated.

8 MR. ALBAUGH: That's part of what made me start
9 looking and seeing why are there differences, what you
10 are saying you are entitled to, here is how you billed
11 your rates.

12 On page 59 then the question about that, the
13 equipment Blue Book rate for that auger is \$4200.

14 MR. PAUL-HUS: That's what I'm saying. That's
15 the wrong rate.

16 MR. ALBAUGH: That \$4200 is wrong?

17 MR. PAUL-HUS: It would definitely be higher. We
18 made a mistake, used the wrong rate.

19 MR. ALBAUGH: Even if you take something else
20 there, is 473 for a pickup truck wrong?

21 MR. PAUL-HUS: No, I believe that would be a
22 proper rate.

23 MR. ALBAUGH: So \$31 a day would be the proper
24 rate, and on here you are charging \$11 an hour. I am
25 just seeing a lot of differences in the rates.

1 MR. PAUL-HUS: We have work orders priced during
2 the job using the rates we charged. When the
3 consultant went back and put them together, he didn't
4 correlate them when he did them.

5 MR. ALBAUGH: If they were close, if both of them
6 were hourly and there was \$10 difference --

7 MR. PAUL-HUS: The other factor, too, this year
8 is ownership only, no operating costs, if I remember
9 correctly. I would have to pull out the book to look
10 at it.

11 MR. ALBAUGH: On Blue Book?

12 MR. PAUL-HUS: Blue Book is broken up by
13 ownership and operating costs. I believe if we read
14 this it talks about the ownership costs being asked for
15 here. Obviously you can't operate and own a pickup
16 truck for \$473 a month, no matter how hard you try.

17 The big difference there is -- and I would have
18 to pull out the books, but it doesn't explain the
19 disparity. I would have to look at it, too.

20 This is ownership only. This is based on a much
21 higher rate for hourly. This is based on taking the
22 monthly rate divided by 176, which would definitely
23 give you a large disparity between the two.

24 MR. PISCITELLI: Is that something we can
25 supplement? We can easily go to our consultant.

1 CHAIRMAN COWGER: Yes. I think we need some more
2 information.

3 MR. CROFT: They used some daily rate. They did
4 not use 176.

5 MR. MCGONAGILL: It carries over to a lot of the
6 different items.

7 MR. ALBAUGH: It's not just this one. I've seen
8 that, trying to figure out. As you pointed out, I'm
9 seeing a big difference between what the Department is
10 saying you are entitled to and what you are claiming.
11 I was just trying to reconcile why the differences.

12 If you can do something to, you know, redo this
13 and show what the appropriate number is, that would
14 help us.

15 CHAIRMAN COWGER: Where do you think that the
16 disparity is? Is it on page 59, back in Exhibit 1, or
17 do you know?

18 MR. PAUL-HUS: I believe the biggest disparity is
19 how we priced our work orders, the rates we used in our
20 work orders. The DOT argues we should take the monthly
21 rate divided by 176, and we used the daily rate.

22 MR. ALBAUGH: Is that what the specifications
23 say?

24 MR. MCGONAGILL: No, the specifications say you
25 use the 176.

1 CHAIRMAN COWGER: Where was the daily rate used?

2 It was used back here on page 59?

3 MR. PAUL-HUS: No, 59 is -- those are stand-by
4 rates. Those are calculated by the spec.

5 MR. ALBAUGH: Those are by the Blue Book.

6 CHAIRMAN COWGER: The ones back here under
7 Tab 1 --

8 MR. ALBAUGH: Is not in accordance with the way
9 the contract specified.

10 MR. CROFT: Page 59 is not. They took 50 percent
11 of the daily rate, not 176; 50 percent of 176 which is
12 the monthly.

13 MR. MCGONAGILL: They are still using daily rate
14 there versus converting it to monthly.

15 MR. PISCITELLI: Just to be legalistic, when
16 I send you that, I'm going to send you my legal
17 argument.

18 MR. MCGONAGILL: Why the contract doesn't apply?

19 MR. PISCITELLI: Right. Two years beyond the
20 fact.

21 CHAIRMAN COWGER: Are you ready to drop that for
22 now?

23 MR. MCGONAGILL: And we will have an opportunity
24 to respond to whatever they supplement?

25 CHAIRMAN COWGER: Yes, you furnish it to the

1 Board and DOT within ten days from now, then DOT, we
2 will give you another ten days to respond. So, 20 days
3 from now we should have everything.

4 MR. ALBAUGH: I think that as far as specific
5 questions of what I read through, that's most of the
6 questions I had.

7 CHAIRMAN COWGER: Now, I remember Mr. Piscitelli
8 saying that he had some comments that they wanted to
9 make on specific items in DOT's rebuttal.

10 MR. MCGONAGILL: Excuse me, Mr. Chairman, before
11 we go to that kind of closing part of it --

12 MR. PISCITELLI: I'm not going to be done for a
13 long time.

14 MR. MCGONAGILL: In reference to Exhibit 3, there
15 are two sheets. Since Mr. Albaugh was asking about the
16 equipment, I thought this might be the time to get some
17 clarification from Hypower why they are using a 2.5
18 percent for bond when our experience in standard is 1
19 percent.

20 Then secondly, with regard to interest, how they
21 calculate that, at what rate, since the contract
22 clearly provides 6 percent.

23 MR. PISCITELLI: No, I don't see, not in this
24 contract.

25 MR. MCGONAGILL: Yes. This is under the 1996

1 spec book.

2 MR. PISCITELLI: '91.

3 MR. MCGONAGILL: With a '94 supplement. We can
4 get a copy of it, but it says 6 percent.

5 MR. PISCITELLI: I will have to go back and look.

6 CHAIRMAN COWGER: Where does it say that? Not
7 specific quotes, but what is the 6 percent addressing?

8 MR. MCGONAGILL: It says prejudgment interest
9 will be paid at 6 percent, simple interest.

10 CHAIRMAN COWGER: What is this calculated on?

11 MR. PISCITELLI: It's the legal rate of interest.

12 MR. MCGONAGILL: Again, the contract says 6
13 percent. What they are trying to apply is the 10
14 percent in Florida Statutes which specifically -- and
15 this is a 337 transportation code section.

16 That provision says specifically that it doesn't
17 address, doesn't apply to prejudgment interest on
18 disputed claims, it only applies when there's a
19 supplemental or a final determination amount if DOT
20 fails to pay within the time period that's required to
21 be paid.

22 For example, if we delay payment on an executed
23 supplemental agreement, if we fail to submit the final
24 offer of payment within 75 days of final acceptance.
25 That's what that provision says.

1 Again, it specifically excepts out disputed
2 claims. And our contract says, and I don't have
3 specific recall of this section, is that it
4 specifically references 6 percent on prejudgment
5 interest. It also says that on agreed amounts the
6 statutory rate, and it cites the section, applies in
7 that instance.

8 CHAIRMAN COWGER: The statutory rate in this
9 instance is 10 percent, right?

10 MR. MCGONAGILL: Yes, sir, but that applies --
11 for example, if you issued an order saying we owe them
12 a hundred dollars, from that point forward if we failed
13 to timely pay it within 15 or 20 days, whatever you
14 tell us, then the statutory rate would apply to that.

15 CHAIRMAN COWGER: So, you are talking about
16 prejudgment versus postjudgment?

17 MR. MCGONAGILL: Yes, sir. And we can provide
18 you a copy of that.

19 CHAIRMAN COWGER: We have a copy of that law.
20 It's come up before.

21 MR. MCGONAGILL: I apologize that I don't
22 immediately recall the section.

23 MR. PISCITELLI: I sure am not seeing it. You
24 would think it would be under measurement of payment.

25 MR. MCGONAGILL: Again, it's the '91 spec book

1 supplemented by whatever the cover sheet on the
2 contract says.

3 MR. PISCITELLI: It says '94. It's not in the
4 '91 spec book.

5 MR. MCGONAGILL: I haven't clarified it --

6 CHAIRMAN COWGER: We don't have time to sit here
7 and listen to much more of that.

8 Mr. Piscitelli, if you want to say something in
9 your statement about what interest rate applies, please
10 do.

11 MR. PISCITELLI: Okay.

12 MR. MCGONAGILL: Then on the 2.5 percent bond,
13 why --

14 MR. CROFT: Let me point out, talking about this
15 exhibit, they are showing profit of 10 percent.
16 I don't know whether that can be allowed on the
17 indirect costs. It definitely should not be included
18 in the direct costs. The direct costs are -- include
19 mark-ups.

20 They use the standard of the DA mark-ups in the
21 contract. I believe it included in that same 10
22 percent profit and two and a half percent bond in that
23 66,000. So, they already have it in there. It's not
24 appropriate to be there at all, period. They are
25 charging it in both places.

1 CHAIRMAN COWGER: I understand you. So noted.

2 Now, Bill --

3 MR. ALBAUGH: I'm done.

4 CHAIRMAN COWGER: Let's take a look now at
5 whatever the contractor feels are points in the DOT's
6 rebuttal that they need to rerebut. I assume it's in
7 regard to some of the numbered tabs.

8 MR. PISCITELLI: Yes.

9 (Brief pause)

10 CHAIRMAN COWGER: Let's go on, and we are going
11 to let the contractor kind of address the specific
12 rebuttal points that he objects to.

13 MR. MCGONAGILL: It was not in the '91
14 supplements.

15 (Discussion off the record)

16 MR. PISCITELLI: Do you want me to go forward?

17 CHAIRMAN COWGER: Yes, we are ready.

18 MR. PISCITELLI: I'm going to try to do the ones
19 that I think need a quick rebuttal. I will start with
20 A-6 very quickly, relocating a light base.

21 For some reason they took out one piece of
22 equipment they had that we used, which was a crane. No
23 explanation for why that wasn't included. It's not a
24 debate over a rate, it just doesn't appear in the
25 response.

1 When I'm talking about the response, I'm talking
2 about the book. I didn't realize there was some
3 distinction between Parsons' response and the book.
4 I think I'm talking about the book.

5 MR. MCGONAGILL: Which item was that?

6 MR. PISCITELLI: A-6.

7 MR. CROFT: You are saying Parsons did not
8 include it?

9 MR. PISCITELLI: I think it's you. If I'm
10 defaming you by saying that, that's an accident.

11 MR. CROFT: We are showing a boom truck.

12 MR. PISCITELLI: We had both in our claim. There
13 is no explanation for why you took it out.

14 MR. CROFT: You had a crane and a boom truck?
15 Why would you need both?

16 CHAIRMAN COWGER: What are you saying?

17 MR. PISCITELLI: That we had these pieces of
18 equipment there, which we used to perform this
19 operation. They appear to have removed one without an
20 explanation.

21 CHAIRMAN COWGER: DOT removed one in their
22 calculation. That's good.

23 MR. MCGONAGILL: Our question is why would you
24 need two?

25 MR. PAUL-HUS: There wasn't two. There was only

1 one. There wasn't a crane truck and boom truck.
2 Obviously that's the same piece of equipment. In the
3 calculations we are looking at --

4 MR. MCGONAGILL: It's on page -- section 6, the
5 first page under A-6. You can see --

6 MR. CROFT: What happened was Parsons reviewed an
7 earlier first crack that we had done. We updated it.
8 Looked at ours, we put it back in this case. That's
9 why you see a lot of these, the number actually
10 increased from what Parsons had actually --

11 MR. ALBAUGH: You are saying there should just be
12 one, a crane truck?

13 MR. PAUL-HUS: That's all we asked for. Crane
14 truck, boom truck, same deal.

15 MR. MCGONAGILL: So, Mike, you are going to go
16 on.

17 CHAIRMAN COWGER: You ended up dropping that
18 objection?

19 MR. PISCITELLI: I guess I did.

20 MR. PAUL-HUS: Mike, that was because of Parsons.
21 We were looking at Parsons. We might have to go back
22 and look at theirs again.

23 CHAIRMAN COWGER: Before you go on, what is in
24 this Blue Book is Parsons' or DOT's?

25 MR. CROFT: All the numbers there are ours.

1 MR. MCGONAGILL: There is a copy of the Parsons'
2 report in there in the front of it, but the sections
3 are all DOT.

4 CHAIRMAN COWGER: When we get down to the
5 numbered tabs the first sheet is usually a summation.
6 That's DOT.

7 MR. CROFT: In most cases what Parsons did is
8 they agreed with the position, either with the
9 contractors or with ours. The number they presented
10 was an earlier number that we had estimated and
11 provided to them at that time.

12 So, you know, it's not that they actually looked
13 at dailies and tried to figure out ours and actual
14 equipment and changed it.

15 CHAIRMAN COWGER: Okay. Can we go on?

16 MR. PISCITELLI: Let's jump to A-8. Seven will
17 just start a big fight, but it's all documented. Let's
18 go to A-8.

19 They say we asked to use existing pipe instead of
20 putting in new conduit. Our people's recollection is
21 the DOT was the first to suggest that. But putting
22 that aside, existing pipe was utilized and it did
23 require some repair.

24 The fact of the matter is if we had put in new
25 conduit, it would have been about a \$2700 item. So

1 even if they pay for the repair of the pipe as we
2 requested, it's less than it would have been to put in
3 the new conduit.

4 MR. MCGONAGILL: What about all your indirects
5 and inefficiencies that you've added in for that item?

6 MR. PISCITELLI: We have not added them in for an
7 item in any fashion. We used them in a cumulative
8 basis. If you consider that to have a significant
9 effect, that would be up to the Board. I would suggest
10 it is one of many, many.

11 A-9 we have talked about and A-10, temporary
12 relocation of traffic control. They say we didn't do
13 the work. We did the work. We now have a swearing
14 match.

15 It's temporary and it's undone, but I can tell
16 you that we spoke with our superintendent who remembers
17 this explicitly, says we did the work, had to do the
18 work, because without it we would have been in the way
19 of some kind of handicap ramp.

20 It's a small item. Apparently there is no
21 documentation either way other than our submittal.

22 MR. CROFT: Should we be rebutting at this point?

23 CHAIRMAN COWGER: Yes. Let's take them item by
24 item.

25 MR. CROFT: We don't show any records of actual

1 performance. They basically requested could they use
2 an existing controller. At first we said okay, we
3 don't have a problem with you using an existing
4 controller pad.

5 Then they came back and said, oh, by the way, we
6 want to be paid extra to do this. At that point we
7 said forget it, just install a new one as required.

8 MR. PISCITELLI: None of that is memorialized
9 other than our submittal. We can get an affidavit from
10 someone saying we did the work.

11 CHAIRMAN COWGER: We are not going to get into
12 that over a \$600 item, I hope.

13 MR. PISCITELLI: A-11, reinstall new service load
14 center. This is an issue of whether we were required
15 to install a pull with a service load center, with a
16 concrete pull. They say you are silly to expect to be
17 able to use the FP&L pole.

18 The fact is if you go to the plans, the specs for
19 the service load center does not include the pole as
20 one of the items to be installed. The plans, I'm told,
21 sometimes will add that, but in this case they don't
22 add that. There is simply nothing telling us that the
23 pole must be installed.

24 Now they say you've got the standards. But the
25 standards just show there is a pole. It doesn't

1 indicate clearly that the pole has to be installed by
2 the contractor.

3 The spec would trump the standards at any rate
4 and the hierarchy. Our point is if you want us to
5 install a pole, make it clear, don't say make it -- as
6 it usually is done. The spec here does not support
7 their position.

8 CHAIRMAN COWGER: You anticipated using an
9 existing pole?

10 MR. PISCITELLI: Yes.

11 MR. CROFT: I think our index speaks for itself.

12 CHAIRMAN COWGER: You made that argument?

13 MR. CROFT: Yes. There is no indication that
14 the, you know, the utility would allow them to put it
15 on their own pole.

16 MR. PISCITELLI: That's apples and oranges. Our
17 response to that is if we are supposed to provide the
18 pole, tell us.

19 MR. MCGONAGILL: Quite candidly, it's not
20 reasonable for a contractor or subcontractor to expect
21 that DOT has authority to direct what is going to go on
22 on a utilities pole. They obviously knew the pole --
23 to make that argument they can make it, but common
24 sense will tell you that custom and usage is DOT
25 doesn't have that kind of authority.

1 MR. PISCITELLI: The specs say this item is made
2 up of the following components: weather head, conduit,
3 service wire, metal base, service disconnect assembly.

4 If you want us to give you a pole, tell us.

5 CHAIRMAN COWGER: Okay.

6 MR. PISCITELLI: That's all the specifics I think
7 I need to address in addition to what we provided in
8 writing.

9 CHAIRMAN COWGER: Okay.

10 MR. MCGONAGILL: We still haven't heard anything
11 about the 2.5 percent bond.

12 MR. ROEBUCK: The bond premium isn't fixed.

13 MR. CROFT: It is fixed in those standard
14 mark-ups. It's --

15 MR. MCGONAGILL: It's always 1 and a half
16 percent.

17 MR. PISCITELLI: One and a half percent is the
18 standard mark-ups? Then make it that.

19 MR. ROEBUCK: We've had them in here for less.
20 That's the thing.

21 MR. MCGONAGILL: We were just asking because
22 we've never seen it for 2.5. We were asking what the
23 basis is other than them just putting it down.

24 MR. CROFT: Obviously this job is now completed,
25 long past due.

1 MR. MCGONAGILL: Are they going to send that to
2 the surety?

3 MR. PISCITELLI: You get audited.

4 CHAIRMAN COWGER: You are going to pay on the
5 final contract amount, right?

6 MR. PISCITELLI: Oh, yes.

7 CHAIRMAN COWGER: What did you agree to, 1 and a
8 half percent?

9 MR. ROEBUCK: That's the standard limit.

10 MR. PISCITELLI: That's fine.

11 MR. MCGONAGILL: With the mark-ups for labor and
12 everything --

13 CHAIRMAN COWGER: Contractor and DOT agree to 1
14 and a half percent. Good. Got something we agree on.

15 Okay. I've got a couple of questions, but before
16 I get to those, how close are we to being wrapped up?

17 MR. PISCITELLI: Bernard wants to, if you don't
18 mind, speak a little bit to the issue of the scheduling
19 matters.

20 CHAIRMAN COWGER: I think that might help.

21 MR. PAUL-HUS: Where the 100 days came from, it
22 is theoretical, based on the scheduling analysis. The
23 whole reason we did this is to show that had we just
24 stuck our heads in the sand and done it exactly as the
25 impacts would have allowed the job to go, we would have

1 finished much, much later.

2 The job supposedly finished before the contract
3 time ran out. The job finished before the contract
4 time was ever extended.

5 We asked for the time. The job was rejected or
6 wasn't responded to for a long, long time, therefore,
7 you know it's rejected.

8 Therefore, we are still under the impression that
9 if we don't finish by a certain date, we are going to
10 have to not only fight about that, but about liquidated
11 damages.

12 So, we do whatever it takes now, go back out
13 there, fill in the gaps of all the places.

14 We didn't hopscotch around because our guys just
15 showed up and picked somewhere to work one day.
16 That's -- I'm rather certain that after doing so many
17 jobs these guys know to pick up and leave where they
18 left off yesterday, just like when you come in, turn on
19 your lights in the morning and you pick up right where
20 you left off last night.

21 We were forced to hopscotch around the job
22 because of all the impacts and the things we read. The
23 schedule shows that. One of the biggest differences we
24 have with DOT in looking at how these problems affect a
25 job, they look at it on a day-by-day basis.

1 We look at it from the time we bring the issue up
2 to the time it gets elevated to the boss, then back to
3 the response, then go back and fix it.

4 That was the whole idea of doing this, to input
5 the impacts into the middle of that duration to show
6 the effect it would have.

7 In essence these impacts did extend out this job
8 100 days. We did what it took to finish the job only
9 27 days later than it would have otherwise been
10 completed. Then a few months later time is extended to
11 the job, therefore it looks like in retrospect the job
12 was done within the original contract time.

13 It wasn't. That original contract time was the
14 150 days, not to mention the 150 days, that's Pan
15 American's duration. Hypower has to squeeze into the
16 middle of that.

17 So, therefore, when we look at this, impact, the
18 reason we use this CPM schedule, it is the thing that
19 shows the sequence of the work, how each of the
20 activities relate to one another, insert the impacts to
21 show how that ripples out through the end of the job,
22 then to show the next schedule, to show how we've
23 managed to not only get the job done, but to mitigate a
24 bunch of the damages in spite of it all, in spite of
25 the fact we didn't have change orders, in spite of the

1 fact we didn't know we could get time extensions, in
2 spite of the fact that none of the changes were dealt
3 with during the course of the project, they were dealt
4 with afterwards.

5 I just wanted to kind of clarify where we were
6 coming from with our whole argument on the schedule.

7 CHAIRMAN COWGER: I think we understand what you
8 are saying.

9 MR. PAUL-HUS: Thank you.

10 CHAIRMAN COWGER: Couple of quick questions.
11 There was some discussion in here about the fact that
12 you encountered some things underground, particularly
13 rock and muck and that sort of thing, in installing
14 some of the foundations or whatever it is, poles,
15 whatever you had to install.

16 Did the plans have a detailed soil survey that
17 would have indicated anything about those conditions?
18 Maybe not site specific, but that you could draw an
19 inference that, yeah, I'm liable to encounter some
20 rock, I'm liable to encounter some muck? The
21 contractor is saying no.

22 MR. PAUL-HUS: There are no boring logs.

23 CHAIRMAN COWGER: I don't think I need to hear
24 any more about that. That's probably not really a
25 pertinent question. It helps a little bit.

1 What did this job consist of the prime contract?
2 Had a lot of lighting work, but what was Pan American's
3 part of the job?

4 MR. CROFT: Milling and resurfacing, some over
5 milled areas.

6 CHAIRMAN COWGER: Job was milling and resurface
7 with what, lighting and signals?

8 MR. MCGONAGILL: If you look at our introduction,
9 there's two or three sentences there that very quickly,
10 it says, this work under this contract was milling and
11 resurfacing of State Road 934 from such and such to
12 such, and also includes constructing roadway,
13 embankment, bridge rail and curb and gutter, sidewalk,
14 sign and pavement markings, roadway and lighting
15 signalization.

16 About a two mile job, 1.4 million. The roadway
17 lighting and signalization comprised approximately 50
18 percent of the contract work dollars.

19 CHAIRMAN COWGER: You said roadway lighting and
20 the signalization?

21 MR. MCGONAGILL: Yes.

22 CHAIRMAN COWGER: Not the signs?

23 MR. MCGONAGILL: No, this reference says roadway
24 lighting and signalization comprised approximately 50.3
25 percent.

1 CHAIRMAN COWGER: I can go back to that.

2 MR. MCGONAGILL: It gives you the award date, the
3 general information you are asking about, Mr. Chairman.
4 That's on page one.

5 CHAIRMAN COWGER: When we talk about conflicts
6 with mast arm, were those signal mast arms or lighting
7 mast arms?

8 MR. KAUFMANN: Both. Mast arm is the signal mast
9 arm, but we had conflicts with the lighting foundation.

10 CHAIRMAN COWGER: What did the mast arms conflict
11 with?

12 MR. KAUFMANN: I will give you my story, if
13 you've got just a second, on how this works. It's not
14 just this job, it's every job we encounter.

15 That's why we end up in places like we are today
16 here, because what happens is we get a set of documents
17 like this. There's no real lay-out or engineering
18 involved. It's done by the cookie cutter method.

19 They take bid items, stick them in there,
20 identify quantities. They draw these things on the
21 corners of all these intersections.

22 Nobody really goes out there to see what is
23 there, and if this will work. They know they need a
24 mast arm there, they know it needs to be a certain
25 length, it needs to face a certain direction, and they

1 put it there.

2 CHAIRMAN COWGER: Does it tell you which
3 direction specifically the mast arm should go? Shows
4 you the pole location, where the headers will be. So
5 what did you run into in the way of conflicts?

6 MR. KAUFMANN: What typically happens is we go
7 out. The first thing we do is try to pinpoint these
8 locations of the mast arm. Sometimes we get a
9 coordinate. Sometimes there is nothing at all and the
10 DOT has to provide us with some information so the
11 general contractor can shoot it in.

12 On this job the DOT had to provide some
13 information so the contractor could shoot them in.

14 However they were provided, so they got laid out.
15 Once they are laid out, then they start popping up
16 within the middle of wheelchair ramps.

17 CHAIRMAN COWGER: It's the pole?

18 MR. KAUFMANN: The pole, on its foundation or an
19 underground utility or against a building, abandoned
20 foundations, all kinds of different things.

21 So, the typical response is, when we encounter a
22 conflict like this, well, just move it five feet or two
23 feet this way, something, to dodge the obstruction.

24 With these mast arms it's like threading the eye
25 of a needle, because if you take a mast arm that's

1 designed for a specific corner of a specific
2 intersection, you have to meet parameters and
3 constraints imposed by National Transportation Safety
4 Board. The arm has to stick out so far, it has to be
5 so far from the stop bar, et cetera --

6 CHAIRMAN COWGER: I don't want to interrupt you,
7 but I understand all of that. It was a matter of
8 I didn't understand what the conflict was. The
9 conflict was you couldn't put the pole where the plans
10 showed?

11 MR. KAUFMANN: You couldn't put it where the
12 plans showed. You have a menagerie.

13 CHAIRMAN COWGER: I envisioned the mast arm
14 having some kind of a conflict. I couldn't figure that
15 out.

16 MR. KAUFMANN: Sometimes that happens, too.

17 MR. CROFT: Can I respond briefly to that?

18 MR. ROEBUCK: Sure. We don't have many
19 electrical subcontractors come in.

20 MR. CROFT: As he said, that is fairly typical.
21 What is also typical is that a signalization contractor
22 will at the beginning of the procurement period go out
23 and identify every one of those potential conflicts.
24 He will say I have a problem here, DOT, where do you
25 want me to put this.

1 We will identify a location well in advance of
2 its fabrication. If it results in a longer length arm,
3 we will adjust it, I need a longer one, 66 foot instead
4 of 64 foot, whatever. That's how most signalization
5 jobs typically occur.

6 It's sort of an expected. We don't know exactly
7 what is there. We know we have utilities in the area.
8 We identify them.

9 This contract specifically puts the
10 responsibility on the contractor to locate the
11 utilities. The intention is to avoid the conflicts.

12 MR. KAUFMANN: That's exactly what we did in the
13 beginning of this contract. We have letters that
14 document it.

15 MR. CROFT: His RFIs were received after a 90-day
16 procurement period expired. What typically would have
17 been done well in advance of fabrication, well in
18 advance of day one of the contract started, and we
19 wouldn't be having any argument about impacts, due to
20 those adjustments.

21 CHAIRMAN COWGER: Let me sum up what you said. A
22 provision in the contract somewhere says the contractor
23 is responsible for determining the location of
24 underground utilities?

25 MR. CROFT: Yes.

1 CHAIRMAN COWGER: That says that in the contract?

2 MR. PISCITELLI: What it says is that as shown in
3 general or shown in general, something like that.

4 I didn't quote that --

5 CHAIRMAN COWGER: Kind of weasel words.

6 MR. MCGONAGILL: And place the responsibility on
7 the contractor to locate and verify. Can we at least
8 agree to that? It says it's in general. It places the
9 responsibility on the contractor to locate them.

10 MR. CROFT: Says they are approximate in the
11 contract.

12 CHAIRMAN COWGER: There's two instances, one
13 where you encounter a utility not shown on the plans.
14 That's one instance. The other is you encounter one
15 that was shown on the plans but it's not where it was
16 shown. Do both of those situations apply here?

17 MR. PAUL-HUS: Yes, and --

18 CHAIRMAN COWGER: Just so we can get an overall
19 feel for this.

20 MR. PAUL-HUS: How do we get to the point I know
21 to go out and double check the work beforehand? What
22 on earth ever made me think during the procurement
23 period I needed to do locates, dig up the ground, find
24 those obstructions, bury them back, tell you about it
25 and have you fix them. That doesn't seem to be what

1 the contract calls for.

2 CHAIRMAN COWGER: I don't think that's what you
3 said, Mark.

4 MR. CROFT: That's not what I said. Most of the
5 adjustments occurred and were identified in the field
6 or were aboveground obstructions.

7 MR. KAUFMANN: No, that's not true.

8 MR. CROFT: Conflict with ramps.

9 MR. PISCITELLI: Why doesn't the designer look at
10 it? Who has the responsibility, the guy who has a year
11 to design it or the guy who has two weeks?

12 MR. MCGONAGILL: In this contract we put that on
13 you.

14 MR. CROFT: Nobody said you are responsible for
15 those costs. We said it's normal for a signalization
16 contractor to identify those conflicts at the beginning
17 of the procurement period and work with the agency to
18 identify and adjust for those.

19 CHAIRMAN COWGER: Now, you are saying that some
20 of this should have occurred during the 90-day
21 procurement period, and to your knowledge it did not.
22 They waited until after the 90-day procurement period
23 to begin to submit RFIs? What is your position?

24 MR. PAUL-HUS: The RFIs were actually submitted
25 prior to the notice to proceed. The procurement period

1 we have a set of mast arms. We are told exactly what
2 the lengths will be. These are precise. In fact,
3 there is a bid item for every two-foot increment.

4 The drawings are engineered. You are going to
5 put the foundation on a set location. If anything
6 moves, we have to make a modification.

7 That would take, if you look at the individual
8 documents to back this up, most of these conflicts are
9 subsurface conflicts. There is no way for us to know
10 it. We ran into abandoned foundation, utilities
11 underground, various things.

12 Even when you take a full-blown survey of every
13 one of these things ahead of time to identify the
14 problems, I don't know that we are responsible to go
15 out and survey the job during the procurement period.
16 The idea of the procurement period is to buy things,
17 things that are specifically drawn out here.

18 CHAIRMAN COWGER: I think we understand that.
19 What you are saying, let me sum it up, is your RFIs
20 came after you discovered that there was a problem,
21 either through excavation and finding that there was an
22 underground conflict or after the work was specifically
23 laid out so you could tell that, hey, this pole
24 conflicts with a wheelchair ramp.

25 Until the layout was done, are you saying you

1 couldn't tell whether it was a conflict?

2 MR. KAUFMANN: Exactly.

3 CHAIRMAN COWGER: And Mark is saying the lay-out
4 should have been done earlier, I guess, or something.
5 I think we have heard enough on that.

6 MR. PISCITELLI: The only other thing I would
7 say, when you are thinking about that, read what the
8 definition of the procurement period is in the
9 contract.

10 CHAIRMAN COWGER: Okay. Let me ask you a
11 question that probably might be construed as being
12 improper, but I'm going to ask it anyway. I do this
13 every once in a while.

14 Mr. Contractor, this type of job, was it not
15 reasonable for you to anticipate when you bid the job
16 that you were going to encounter some of these type
17 problems just due to the nature of the work and your
18 past experience?

19 MR. PAUL-HUS: Yes, and our hourly units are
20 based on what our past production shows.

21 CHAIRMAN COWGER: You are saying this was over
22 and above what you would normally anticipate?

23 MR. PAUL-HUS: Correct. We don't bid the jobs
24 for the jobs to be built perfectly. There is
25 contingency built into our hourly units that we use to

1 bid the jobs.

2 CHAIRMAN COWGER: DOT, since I asked the
3 question, I want to make sure you all have a chance to
4 comment on that if you so desire.

5 MR. CROFT: As far as whether or not he -- well,
6 that's basically what I was saying, I think, that
7 normally you anticipate a certain number of underground
8 conflicts or adjustments.

9 I don't know whether he's factored those in here
10 or not. I would say at least in my recent experience
11 with this company, they've submitted claims on just
12 about every job. So apparently they have not
13 anticipated any that we are aware of.

14 MR. PISCITELLI: That's really an unfair thing to
15 bring in front of the Board. If we submit claims and
16 they are defensible claims, there is nothing wrong with
17 that. To try and trash the company by saying we always
18 submit claims, that's not fair.

19 CHAIRMAN COWGER: Gentlemen, we can solve that by
20 saying we will strike that from consideration.

21 MR. ROEBUCK: You guys haven't been here before.

22 CHAIRMAN COWGER: Okay. I think we are at the
23 point where we can close this thing out. Does either
24 party have anything they want to say, need to say?

25 MR. CROFT: I just want to note that we did find

1 in the supplemental specifications the section 004,
2 conditions requiring supplemental agreement which
3 spells out all of the rates that apply on this
4 contract, which are the 176 Blue Book.

5 MR. MCGONAGILL: That is the 4-3.

6 MR. CROFT: And 1 and a half percent bond.

7 CHAIRMAN COWGER: Can we do this? We've got
8 submittals coming back and forth. When you all send
9 your rebuttal back to whatever the contractor sends,
10 put a copy of that in there so we will have it. Would
11 you do that, please?

12 MR. CROFT: Sure.

13 CHAIRMAN COWGER: Mr. Contractor, you know that's
14 going to be in there?

15 MR. PISCITELLI: I heard you.

16 CHAIRMAN COWGER: If you want to comment on it,
17 okay. But we are asking for the -- specifically what
18 it said in the contract to be submitted to the Board so
19 we can look at it. I don't think it's in any of these
20 stacks of stuff we've got, is it?

21 MR. PISCITELLI: No.

22 CHAIRMAN COWGER: Mr. Albaugh, do you have any
23 further questions?

24 MR. ALBAUGH: No.

25 CHAIRMAN COWGER: Mr. Roebuck?

1 MR. ROEBUCK: No.

2 CHAIRMAN COWGER: The hearing is hereby closed.

3 The Board will meet to deliberate on this claim in four
4 to six weeks, and the parties will be furnished our
5 order shortly thereafter.

6 (Whereupon, the deposition was concluded at 2:10 p.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

