

STATE ARBITRATION BOARD
1022 Lothian Drive
Tallahassee, Florida 32312

May 17, 1990

+ + + NOTICE + + +

In the case of Ajax Paving Industries, Inc. versus the Florida Department of Transportation on Project No. 01040-3515 in Charlotte County, Florida, both parties are advised that State Arbitration Board Order No. 1-90 has been properly filed on May 17, 1990.

H. E. Cowger

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

S.A.B. CLERK

MAY 17 1990

FILED

HEC/sfc

Copies of Order & Transcript to:

R.D. Buser, P.E., Director, Office of Construction/FDOT

Mark O. Minich, Operations Manager/Construction; Ajax Paving Industries, Inc.

STATE ARBITRATION BOARD

ORDER NO. 1-90

RE:

Request for Arbitration by
Ajax Paving Industries, Inc. on
Job No. 10040-3515 in
Charlotte County

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

H. Eugene Cowger, P. E. Chairman
Frank Carlile, P. E. Member
Sam Turnbull, P. E. Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:30 a.m., Tuesday April 10, 1990.

The Board Members, having fully considered the evidence presented at the hearing,, now enter their order No. 1-90 in this cause.

ORDER

The Contractor presented a request for arbitration of a claim for additional compensation in the amount of \$90,105.58 to cover additional costs in grading and final dressing work caused by having to perform this work within a narrower right of way than that shown in the plans.

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

1. The right of way width shown in the plans is 100 feet. At the preconstruction conference we were advised by the Department of Transportation that the actual width of the right of way is 60 feet. The Department of Transportation issued a Supplemental Agreement to modify the drainage structures to fit the actual right of way and a Change Order reducing the width of the roadway shoulder from eight (8) feet to six (6) feet to allow shoulder and front slope grading to be accomplished within the available right of way.
2. Grading work was changed from essentially placing fill material with a road widener as a continuous operation and shaping with a grader to variable operations involving

use of a gradall/backhoe type machine, dozers, small tractors and greatly increased hand work. Also, it was necessary to excavate material from the shoulders and slopes, load it on trucks and haul it along the project.

3. The change in the scope of the work substantially increased our cost for the grading work.

4. The Department of Transportation has agreed that we are due additional compensation but we have not been able to negotiate a settlement with them on the amount due.

5. Our project records indicate that Contract Laborers, used for traffic control, were on the project in addition to those shown in the Department's records.

6. We do not agree with the methodology used by the Department of Transportation to arrive at the amount of additional compensation due us. The Work Progress Schedule Chart indicates the overall time period during which a category of work is planned to be underway. We did not anticipate continuous work on the earthwork items during the entire period of time shown for that category. Therefore, the proration of costs used by the Department of Transportation is invalid.

7. We feel that the total cost approach is the correct way to calculate the additional amount due. Using this approach, the cost of trucking and materials must be included in determining the actual cost. We wish to point out that trucking costs were higher than those included in the bid prices because the changed method of operations made it necessary to haul excavated material along the project, in addition to hauling borrow material to the project.

8. During construction, the Department of Transportation did not advise us of any inefficiencies in our earthwork operations.

The Department of Transportation rebutted as follows:

1. We agree that the Contractor is due additional compensation.

2. The Contractor did not give us a formal notice of intent to file a claim and advise us to keep cost records related to the extra work. He did state in a letter dated January 19, 1987 " ---differing site conditions will undoubtedly lead to a claim for increased costs."

3. The principle areas of dispute over the amount of additional compensation due are:

a. We disallowed the Contract Laborers included in the Contractor's claim because our project records do not show these laborers.

b. The Contractor claims that the road widener was on the project during 46 days. Our project records indicate that this piece of equipment was on the project during 18 days and was in use on only 7 of those days.

4. The Work Progress Schedule Chart submitted by the Contractor indicated that the Contractor would need 50 calendar days to perform earthwork. The Contractor used 64 Calendar Days to perform earthwork.

5. We calculated the additional compensation due by determining the average daily cost of labor and equipment using hours from our project records, wage rates per the contractor's payroll records, owned equipment rates per the Blue Book and the cost of rental equipment as invoiced to the Contractor. This average daily cost was multiplied by 14, the number of additional calendar days over which the Contractor was performing earthwork.

6. The amount we determined for additional compensation does not include the cost of materials or trucking because compensation for these costs is included in compensation under the contract items.

7. The total cost approach used by the Contractor in calculating the additional amount due is not an appropriate concept for determining additional compensation because it does not take into consideration inefficiencies in operations which are under the Contractor's control.

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

1. The parties to the dispute agree that extra work was accomplished. The disagreement is over the amount of compensation due the Contractor.

2. The Department of Transportation records indicate that earthwork operations were under way on 36 days over a period of 64 calendar days. The number of calendar days in the overall period during which earthwork operations were under way is not related to the number of working days required to accomplish this work.

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

The Department of Transportation is ordered to compensate the Contractor for his claim in the amount of \$ 56,000.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 234.00 for Court Reporting Costs.

Tallahassee, Florida

Dated: 17 May 1990

Certified Copy:

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

17 May 1990
Date

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

Frank Carlile
Frank Carlile, P. E.
Member

Sam P. Turnbull
Sam P. Turnbull, P. E.
Member

S.A.B. CLERK

MAY 17 1990

FILED

STATE ARBITRATION BOARD
STATE OF FLORIDA

S.A.B. CLERK

MAY 17 1990

FILED

AJAX PAVING INDUSTRIES, INC.)
)
)
)
)
and)
)
)
)
DEPARTMENT OF TRANSPORTATION)
)
_____)

PROJECT NO. 01040-3515

LOCATION: Charlotte County,
Florida

Catherine Wilkinson

RE: Arbitration In The Above Matter

DATE: Tuesday, April 10, 1990

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

TIME: Commenced at 9:30 a.m.
Concluded at 10:55 a.m.

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

WILKINSON & ASSOCIATES
Certified Court Reporters
Post Office Box 13461
Tallahassee, Florida 32317

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
 Mr. Sam Turnbull
 Mr. Frank Carlile

APPEARING ON BEHALF OF AJAX PAVING INDUSTRIES, INC.:

Mr. Mark Minich

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Marshall Dougherty
 Mr. Ken Blanchard
 Mr. Steve Miller
 Mr. Tom Tyner

* * *

I N D E X

EXHIBITS	PAGE
Exhibit Nos. 1, 2 and 3 in evidence	4
CERTIFICATE OF REPORTER	54

P R O C E E D I N G S

1 1
2 CHAIRMAN COWGER: This is a hearing of the State
3 Arbitration Board established in accordance with
4 Section 337.185 of the Florida Statutes.

5 Mr. Frank Carlile was appointed as a member
6 of the Board by the Secretary of the Department of
7 Transportation. Mr. Sam Turnbull was elected by the
8 construction companies under contract to the Department
9 of Transportation. These two members chose me,
10 Gene Cowger, to serve as the third member of the Board
11 and as Chairman.

12 Our terms of office began July 1, 1989, and expire
13 June 30, 1991.

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

17 (Whereupon, all witnesses were duly sworn by the
18 Chairman.)

19 CHAIRMAN COWGER: The documents which put this
20 arbitration hearing into being are hereby introduced as
21 Exhibit No. 1.

22 Does either party have any other information it
23 wishes to put into the record as an exhibit? We will go
24 off the record.

25 (Brief pause)

1 CHAIRMAN COWGER: Back on the record. During the
2 time that we were off the record, the parties introduced
3 some exhibits. I will now describe the exhibits.

4 Exhibit No. 1, as previously mentioned, is
5 the notice of arbitration hearing, the request for
6 arbitration of a claim, and everything that was attached
7 to that request.

8 Exhibit No. 2 is a packet of information
9 introduced by the Department of Transportation called --
10 entitled claim evaluation, April 10, 1990. And along
11 with it are two other sets of documents called Ajax
12 field records and FDOT daily reports.

13 The contractor submitted an exhibit which we have
14 identified as Exhibit No. 3, which is a handwritten
15 statement consisting of three pages. Am I right,
16 Mr. Minich?

17 MR. MINICH: Yes.

18 CHAIRMAN COWGER: The third page wasn't stapled is
19 the reason I asked the question.
20 (Whereupon, Exhibit Nos. 1, 2 and 3 were received in
21 evidence.)

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

25 During this hearing the parties may offer such

1 evidence and testimony as is pertinent and material to
2 the controversy and shall produce such additional
3 evidence as the Board may deem necessary to an
4 understanding and determination of the matter before it.
5 The Board shall be the sole judge of the relevance and
6 materiality of the evidence offered.

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

13 Also, so that our court reporter will be able to
14 produce an accurate record of this hearing, please
15 introduce yourself the first time before you speak.

16 Mr. Minich, it is appropriate for you to present
17 your presentation at this time. The Board would like
18 you to state the total amount of your claim and then
19 proceed on from there.

20 MR. MINICH: The total amount of our claim is
21 claimed in our original letter as \$90,105.58.

22 CHAIRMAN COWGER: Thank you.

23 MR. MINICH: Do you want me to go ahead now?

24 THE COURT: Yes.

25 MR. MINICH: I will read a little bit from my

1 notes here. Again, this arbitration hearing is centered
2 around the method of determining compensation for
3 recognized different site condition due to a plan error
4 on the job.

5 Ajax has made claim to the Department. The
6 Department has reviewed our claim. We have negotiated,
7 and at this time our difference is the method in coming
8 up with what the damages are suffered by Ajax.

9 The Department's response to our claim disputes a
10 portion of our equipment costs and does not recognize
11 any of the costs that we incurred using rental labor due
12 to the method that they keep records in the field.

13 They did not pick up the -- on their daily sheets
14 the rental labor people on the job each day because our
15 foreman is not required to keep that on his daily time
16 sheets. They were taking their records from our daily
17 time sheets. We pay those things off of invoices.

18 The other difference, the portion that the
19 Department differs with us is on the equipment cost,
20 we claim substantially more for road widener.

21 However, their records indicate active and
22 inactive periods for the road widener where our records
23 indicate only that the piece of equipment was on the job
24 for a certain amount of time. We invoiced them, put the
25 claim together for that piece of equipment for the total

1 time that it was on the job.

2 We have modified our stance on that issue, giving
3 the Department the benefit of the doubt for the active
4 days, as I will review here further in this summary.

5 We feel that the Department's response does not
6 propose an equitable solution or settlement based on the
7 actual costs incurred.

8 I have attached a summary here of the component
9 costs as presented to the FDOT. I should say that
10 really on the second page here the only costs that
11 were -- the labor cost was not disputed by the
12 Department. That cost is not disputed.

13 The equipment cost was disputed. We were
14 substantially more than the 35,859.50. We have modified
15 our position to what they say was done out there. The
16 rental equipment was undisputed. That was undisputed.

17 The rental labor, they did not recognize that
18 \$8,550. That is for labor force personnel that we used
19 on that job to maintain traffic and any extra labor that
20 was required. We provided them with backup on that.

21 The material is the material that was purchased
22 for the job. The Department did not recognize this in
23 their analysis of the claim, but that gets back to the
24 two different ways of analyzing this claim.

25 And the trucking, that trucking was for delivery

1 of the material plus the way the job had to be
2 constructed we had to use trucking in an inefficient
3 manner to load trucks for a grade-all type operation and
4 that type thing to excavate material back off the job.

5 We have come up with a claim, total cost of
6 construction on this project of \$114,709.82 using the
7 modified -- modifying our position to try to take into
8 account the Department's position on the equipment.

9 We have been paid through progress estimates a
10 total of \$34,363. So, the total of our modified claim,
11 which is different from the original claim of 90,000 is
12 is \$80,346.82. And earlier on in negotiations we had
13 modified -- we had offered the Department if they would
14 settle, I think it was \$79,000 figure, very close to
15 this \$80,000 figure.

16 That's where we're at. I've got five points on
17 the last page that I would like to go over.

18 First of all I guess I should explain what the
19 differences were on the job. I'm assuming everyone
20 knows that, but we don't know that. Am I assuming too
21 much at this time?

22 CHAIRMAN COWGER: May I interrupt you a minute?

23 MR. MINICH: Yes.

24 CHAIRMAN COWGER: I would like to ask Mr. Carlile
25 and Mr. Turnbull would you like to have someone explain

1 what the dispute is about?

2 MR. CARLILE: Just briefly.

3 CHAIRMAN COWGER: If you would give us a quick
4 synopsis of what happened, what was changed. Before you
5 proceed on, let's get the DOT to come in and if they
6 want to offer any rebuttal that they might have to your
7 statement as to what the basis for the claim is or what
8 your entitlement is. Let's stay away from the cost for
9 a moment.

10 MR. MINICH: I'm sorry, in the original claim it
11 is outlined. I will go through it again.

12 This claim is based on difference site conditions
13 encountered on the project. The project was -- the
14 plans were formulated and bid with work to be on a
15 resurfacing and roadway side drainage project within a
16 100-foot right-of-way.

17 Prior to starting the work it was determined that
18 the right-of-way which was shown in the plans was in
19 error, and rather than a 100 foot right-of-way there was
20 a 60-foot right-of-way. The plans were bid with the
21 100-foot right-of-way, the actual was 60 feet.

22 There was due to this a supplemental agreement
23 issued addressing the changes required in shortening up
24 the drainage structures on this project and increasing
25 unit costs to cover those changes in the drainage work.

1 And specifically what happened was that this -- we
2 had to shorten the front slope on the project anywhere
3 from 50 to 70 percent. I think they ended up being two
4 to four feet and I think they were originally planned
5 for six foot, and ended up between two to four foot
6 wide, the shoulders.

7 I think the original -- I have to get back to
8 the dimensions. I have the plans here. It was a
9 substantial shortening up of the front slopes.

10 CHAIRMAN COWGER: Might I interject. In going
11 through this, to try to speed things up a little bit,
12 going through the information you submitted, the
13 right-of-way was reduced from 100 feet to 60 feet?

14 MR. MINICH: Yes.

15 CHAIRMAN COWGER: The distance then from the edge
16 of the pavement to the right-of-way line, which was the
17 area in which you constructed the shoulders and the
18 front slope of the ditch, the back slope, was therefore
19 reduced from 50 feet -- no, excuse me, from --

20 MR. MINICH: About --

21 CHAIRMAN COWGER: -- from 36 feet to 16 feet?

22 MR. MINICH: Yes.

23 CHAIRMAN COWGER: So, that's basically what
24 happened?

25 MR. MINICH: That's what we have. We were

1 required to work in a 16-foot area that was originally
2 supposed to have been a 30-foot area. And most of that
3 area was from the ditch to the back slope or to the
4 right-of-way line.

5 We ended up with working a job that was not
6 accessible to a motor grader and conventional-type
7 equipment. We had to bring a backhoe, grade-all. It
8 was much less productive.

9 We proceeded with the job. I put the Department
10 on notice that we were having problems. The problem was
11 already the focus of a supplemental agreement on the
12 drainage structures. We went ahead with the work.

13 The Department -- the original work progress chart
14 identified the proposed first and last working day of
15 each major work item as required in 8-3.2.

16 Number two -- I'll just go through these real
17 quick. The Florida Department of Transportation was
18 aware of the plan error and its possible effects on the
19 work.

20 Number three, we informed the Department in
21 writing that this VSC was causing increased cost of
22 construction and that we would keep track of it and
23 recommended that they do the same.

24 We completed the changed work in a professional,
25 workmanlike manner and as expeditiously as the

1 conditions would allow. The work was closely monitored
2 by the Department and no problem with construction
3 methods or quality was experienced. Never once did they
4 inform us that we were being unproductive or anything
5 else on the job.

6 Ajax feels based on this, and based on the
7 information that we have given to the Department in
8 modifying our position to reflect their concerns on the
9 equipment costs, we feel that we should be compensated
10 for our actual costs to do the work.

11 The Department's offer -- all of their offers to
12 date would require Ajax to suffer financial loss for
13 unanticipated, unforeseeable work due to their plan
14 error, every response.

15 All we're asking is that we be able to recover
16 what it cost us to do the work which we documented to
17 them. I don't have a lot of pages and books to say
18 that. We have given them that. We have negotiated it.
19 I don't believe they dispute our costs. I guess at that
20 point I will turn it over and we feel it is a simple
21 matter.

22 MR. CARLILE: Mr. Chairman, may I ask a question?
23 Both parties agree there was additional work. Was a
24 supplemental agreement entered into to perform the work?

25 MR. MINICH: There was a supplemental agreement

1 entered into for the drainage structures because they
2 had to be modified. There were revised plans issued for
3 those modifications. There were notes, there were
4 letters issued changing the shoulder width so we could
5 pull the shoulder in. Pulled it all the way down to two
6 foot in some places so we could build the project.

7 In the letter that was proposed to me, at one time
8 the Department asked that rather than even giving us a
9 supplemental agreement they asked me to sign a letter
10 that would relieve them of all future claims on this job
11 if they would reduce the shoulder width to two foot,
12 which was the only thing we really could do and build
13 the job. I felt they were trying to get something out
14 of us that they really shouldn't be asking for.

15 We proceeded in good faith telling them -- we put
16 them on notice that we felt we would have a claim. We
17 did not get a supplemental agreement for any additional
18 work because they did not recognize this.

19 As a matter of fact, they asked us if we reduced
20 the shoulder width in return what we want from you is a
21 disclaimer on any future claim, which we would not sign.
22 We felt that was an unreasonable request.

23 MR. CARLILE: Fine.

24 CHAIRMAN COWGER: Might I ask another question.
25 DOT, do you have any rebuttal for anything that's been

1 said so far as far as the scope of the changes that were
2 made and as to whether or not the contractor is entitled
3 to some compensation?

4 MR. DOUGHERTY: Right up front I'll say that yes,
5 we feel he is due some compensation. The change in the
6 plans -- there is a change order issued. I think the
7 date is sometime in January of '87. That changed the
8 shoulder width from an eight-foot planned shoulder to
9 a six-foot width. Let me make sure of the date on the
10 change order.

11 CHAIRMAN COWGER: Is this the one dated January 7,
12 1987, supplemental agreement?

13 MR. DOUGHERTY: No, sir, it's a work order, change
14 order. Go back two sheets beyond that long sheet.

15 MR. BLANCHARD: The change order to document the
16 changes that were being made to the --

17 MR. DOUGHERTY: This is dated January 26, 1987.
18 It admits on there the change is necessitated due to a
19 plan right-of-way width error on the design.

20 I would like to offer the fact that the Department
21 went back -- I just recently went back and looked at
22 the right-of-way map that was used to establish the
23 hundred-foot right-of-way. That was drawn back in 1952.
24 All better laid plans, we never acquired but we thought
25 we were going to.

1 Also on that right-of-way plan sheet is a notation
2 of the maintained right-of-way limits which we found to
3 be very close to those obtained in the field during this
4 construction contract.

5 A 60-foot right-of-way width might be a bare
6 minimum. It did not stay 60 feet throughout the
7 project. It varied in width according to the maintained
8 fence line and mowing areas. It did not go less than
9 60, but it certainly was more than 60 in some areas,
10 also.

11 As far as the change in scope, I believe that's
12 basically all we need to say on that.

13 CHAIRMAN COWGER: Let me ask another question
14 about that supplemental agreement that we are referring
15 to. Is there any real connection between that
16 supplemental agreement and this claim?

17 MR. DOUGHERTY: Who are you asking that to, sir?

18 MR. BLANCHARD: I don't think so, Mr. Chairman.

19 MR. DOUGHERTY: The supplemental agreement was
20 issued in the area of drainage and drainage-related
21 work. As I understand this claim, it strictly deals
22 with the borrow and final dressing quantity.

23 MR. MINICH: I believe it has a lot to do with
24 it. It has to do with the reason it was changed was
25 to shorten the lengths of pipe that -- of side drain

1 extensions and that type of thing that were supposed
2 to go out in the shoulder.

3 What it indicates is it indicates having to move
4 the ditch up closer to the edge of the pavement. That
5 was the reason for the drainage, supplemental agreement.

6 CHAIRMAN COWGER: I don't think there's any
7 dispute here today that there was a change in the
8 typical section, that the ditch had to be constructed in
9 a more restricted right-of-way closer to the edge of the
10 pavement than the plans showed. So I think that's a
11 given here.

12 My question, though, is was there ever any intent
13 that this supplemental agreement in any way at all dealt
14 with the work of grading?

15 MR. DOUGHERTY: No, sir.

16 MR. MINICH: No.

17 CHAIRMAN COWGER: It just had to do with the
18 changing of the length of the pipe?

19 MR. MINICH: Yes, sir.

20 MR. DOUGHERTY: To read the reasons for the
21 supplemental, one of the reasons was the narrow
22 right-of-way required the construction of end walls
23 within the clear recovery area. I say it's all
24 drainage-related effort.

25 MR. BLANCHARD: Those changes to the drainage

1 structures documented in that supplemental, the same
2 supplemental provides for payment for those changes
3 through the drainage structures.

4 MR. DOUGHERTY: That's correct.

5 MR. MINICH: Yes.

6 MR. BLANCHARD: That issue of the drainage
7 structure should be settled in that supplemental.

8 CHAIRMAN COWGER: It did not deal with the
9 grading? That's all I wanted to know.

10 MR. BLANCHARD: Right, right.

11 CHAIRMAN COWGER: Okay. Do any of the Board
12 members have any other questions about that particular
13 issue at this point? Okay. I think we understand then
14 what the change in the scope of the work was. Did DOT
15 have something else over here?

16 MR. BLANCHARD: Go ahead, Marshall.

17 MR. DOUGHERTY: I want to go through mine, if
18 I could. Several things. I was going to mention the
19 change order and supplemental agreement work to be done.
20 I would like to go through my packet if I could just
21 briefly.

22 Mr. Minich had indicated in his information
23 that we just saw that, you know, there were never any
24 problems with the workmanlike manner and the expeditious
25 work.

1 I would like to bring note to the fact that
2 Mr. Buser did issue a delinquent letter on this project
3 to the firm. Let me see if I can find the chronology
4 and give you the date on that. February 19, 1987. The
5 reason for that, of course, was unknown, as far as the
6 contractor's information was concerned.

7 The other thing I wanted to mention was that we
8 never in this Department -- and this is before my time,
9 but I talked with all my people -- we never received a
10 formal letter of intent to file a claim.

11 We received a letter dated January 19, 1987, from
12 the contractor identifying corrective actions and the
13 letter also contained the statement, "These changes
14 based on different site conditions will undoubtedly lead
15 to a claim for increased costs."

16 Never were we advised to go out and keep track of
17 the actual costs incurred.

18 If I could, Mr. Minich did go through this
19 morning -- and we provided that information on how we
20 arrived at our number. I'm glad to see he went through
21 and agreed with some of our work effort.

22 The labor effort, in my packet I tried to analyze
23 labor. We have prepared a chart showing all of the
24 labor classifications, the major labor classifications
25 we have. It's titled total labor cost for earthwork at

1 the top.

2 We are in disagreement with Mr. Minich as far as
3 the flagging effort or the -- how did he put it -- labor
4 forces, the rental forces, rental labor forces that came
5 in.

6 Mr. Tyner, who is our project engineer, visited
7 the project daily. Our daily records, which I feel
8 to be fairly accurate, indicate just the number of
9 laborers. They don't necessarily break out whether
10 they're rental labor or whether they're working as
11 flagmen or physical laborers on the job, just gives them
12 as laborers. Using that concept, we agreed fairly close
13 with the labor effort that Ajax shows save the rental
14 labor effort.

15 CHAIRMAN COWGER: We are looking at the second
16 page then of the total labor cost, and the comparison
17 is right there at the bottom?

18 MR. DOUGHERTY: That was the comparison we had,
19 yes, sir. Now Mr. Minich has come in close to the
20 \$2,000 effort. The thing I'm trying to show on the
21 far right-hand column on that second page, we have a
22 flag, Ajax labor cost or 796 hours. We differ by that
23 much. We cannot verify those hours by our field
24 records.

25 CHAIRMAN COWGER: As I understand it, in adjusting

1 his claim, his number is very close to yours? Is that
2 correct, Mr. Minich?

3 MR. MINICH: Yes.

4 MR. DOUGHERTY: We then looked at the equipment
5 cost and Mr. Minich came in exactly on our equipment
6 cost, so it's kind of hard to argue with him and rebut
7 that.

8 Rental equipment and trucking, we have a statement
9 down here that Ajax was compensated at contract unit
10 price for all materials used to complete this work.
11 Final quantity was less than plan, therefore the
12 trucking cost should have been less. We didn't really
13 consider trucking to be a major issue in this claim. We
14 are recognizing Mr. Minich's cost of rental equipment
15 and feel we are compensating him totally for that cost.

16 Our total analysis, we tabulated the total labor
17 costs incurred, same was done for equipment. These were
18 added together with the cost of the rental equipment.
19 This was prorated over the actual days that Ajax needed
20 to complete this work effort.

21 One of the things that we did mention and did
22 note, and Mr. Minich has agreed with us, but I think
23 it's worthy of note, if we look at the equipment costs
24 in our chart concerning equipment, it's labeled total
25 equipment costs at the top, it lists three different

1 types of equipment that was used on the project.
2 It shows grader, loader and widener. It shows the
3 difference between what we have in the records and what
4 Mr. Minich has in the records.

5 As far as the grader was concerned, we fairly much
6 agreed. We said that he had 46 equipment days. He said
7 he had 46, we said he had 41. The majority of that time
8 is that Mr. Minich says that he was on the job one week
9 longer than what we say he was. So we were fairly close
10 there. We were fairly close in the loader.

11 The widener was one area that in Mr. Minich's
12 original claim he had showed 46 days of use out of 46
13 days of equipment being on the job. We had shown 18
14 days of equipment that was out there on the job with
15 only seven days of active use.

16 That caused us concern as to, say, the accuracy or
17 the -- of his daily records or his average records.

18 So, that was -- that was one of the things that
19 we noted. That was one of the reasons we held more
20 credence to our records, which I would hope that we
21 would, than to contractor's records.

22 MR. BLANCHARD: Can we go off the record for a
23 moment?

24 (Discussion off the record)

25 CHAIRMAN COWGER: Back on the record.

1 MR. DOUGHERTY: Okay. Again, our total analysis,
2 we figured that the labor evaluation was worth 20,000 --
3 21,000, plus or minus. His equipment was at 35. He
4 gave us the 35.

5 His rental equipment we paid him or we're
6 compensating him for the entire cost of his rental
7 equipment that he claimed was specialized and
8 extensively used on the project.

9 We came up with a total labor and equipment charge
10 for the earthwork and final dressing of somewhere around
11 \$66,500.

12 According to the work progress schedule, he said
13 the work was to be accomplished in 50 days, it actually
14 took him 64, of which he physically worked 36 days on
15 the job, according to our records, which gave an average
16 daily cost of \$1844.51. Because he was 14 days over,
17 we told him we would compensate him those 14 days times
18 average cost, which would come out to be 25,800 and
19 some-odd dollars, plus 10 percent. Our total
20 recommended settlement was \$28,405.51.

21 CHAIRMAN COWGER: Now what you were just reading
22 from was a sheet entitled claim evaluation?

23 MR. DOUGHERTY: Yes, sir. Picture is worth a
24 thousand words.

25 MR. BLANCHARD: Can I interject. You said you

1 did mention that the equipment hours, cost that you're
2 offering were based upon the contractor's invoices for
3 rental equipment?

4 MR. DOUGHERTY: That is correct.

5 MR. BLANCHARD: The entire invoice price which
6 he --

7 MR. DOUGHERTY: Right. We went through and we
8 tried to be very liberal in our interpretation. I keep
9 going back to the equipment. I don't mean to do that,
10 but I have to.

11 There were several cases where we saw the
12 equipment would be used three days out of five. We know
13 for a rental agreement that he would pay for those other
14 two days, so we ended up including those as actual days
15 of equipment used or active on the job.

16 So, that was a liberal approach we used just in
17 the effort of trying to establish a fair price.

18 MR. BLANCHARD: The other issue that the
19 contractor mentioned was the labor, right? The rental
20 labor?

21 MR. DOUGHERTY: That's correct. That's what I was
22 talking about, the 796 some-odd hours that we do not
23 have a record of.

24 MR. BLANCHARD: Then the other issue was the
25 material. He mentioned he had not been compensated for

1 material.

2 MR. DOUGHERTY: We paid him unit price for
3 all materials placed on the project. Because the
4 right-of-way difference, there was less material placed
5 there, less than our total bid price that he had been
6 paid.

7 CHAIRMAN COWGER: May I ask a couple of questions.
8 Let's look at this form entitled claim evaluation.
9 Could you explain the column FDOT records, the column
10 Ajax records, would be a calculation made in the same
11 manner, prorated according to the number of days
12 actually worked as compared to the 50 days shown on
13 the work progress schedule?

14 MR. DOUGHERTY: That is correct.

15 CHAIRMAN COWGER: But applying that formula, you
16 might say, to the cost submitted by Ajax?

17 MR. DOUGHERTY: That's correct.

18 CHAIRMAN COWGER: That's how you get the \$35,400?

19 MR. DOUGHERTY: That's what the Department feels
20 would be an equitable claim if we let their numbers
21 stand.

22 CHAIRMAN COWGER: Now let me ask another couple
23 of questions. Let's look at the information Mr. Minich
24 submitted in Exhibit 3 just for purposes of us
25 understanding. The second page was an attachment page

1 that showed a breakdown of how he arrived at his claim?

2 MR. DOUGHERTY: Yes, sir.

3 CHAIRMAN COWGER: As I understand it, the
4 Department of Transportation essentially agrees with
5 that first figure for labor?

6 MR. DOUGHERTY: Yes, sir.

7 CHAIRMAN COWGER: On the equipment, the second
8 figure called equipment, how does that relate to --

9 MR. DOUGHERTY: It's on the notice, sir.

10 CHAIRMAN COWGER: So it's the same? You are
11 essentially in agreement there?

12 MR. DOUGHERTY: Yes, sir.

13 CHAIRMAN COWGER: The third figure is the rental
14 equipment, and you used the exact same figure the
15 contractor used there?

16 MR. DOUGHERTY: Yes, sir, sure did.

17 CHAIRMAN COWGER: The rental labor, material and
18 trucking are not shown anywhere in the DOT calculations.
19 In other words, you totally disallowed those three
20 items?

21 MR. DOUGHERTY: Yes, sir. We paid him through the
22 contract unit price for those items.

23 CHAIRMAN COWGER: We need to let the contractor
24 come back now to explain a little bit more, but I think
25 the point that needs to be made at this point is that

1 the DOT has used an entirely different method of
2 arriving at the cost of -- the additional cost to the
3 contractor from what the contractor used.

4 You had prorated it based on the number of days
5 the contractor worked on the project in comparison to
6 what his work progress schedule showed. The contractor
7 has developed his claim based on what is known as the
8 total cost concept?

9 MR. DOUGHERTY: Yes, sir.

10 CHAIRMAN COWGER: Just so we understand. One
11 question, again referring to Attachment No. 3, the
12 second page, DOT, there's a statement on there, amount
13 paid through progress estimates of \$34,363. Is that --
14 do you agree that's a correct amount or can you tell us?

15 MR. DOUGHERTY: I know that the contract bid price
16 for those two items of work was around \$36,000.

17 CHAIRMAN COWGER: What were the two items?

18 MR. DOUGHERTY: They were borrow and final
19 dressing. One was -- I think the final dressing was
20 around the \$7,900 item and the borrow was the remainder.

21 And knowing that with the reduced right-of-way
22 there would be reduced materials for borrow, I could
23 believe probably 34,000 would be a correct number.
24 I cannot verify that specifically, but I would, you
25 know -- best guess.

1 CHAIRMAN COWGER: We could say this is essentially
2 correct?

3 MR. DOUGHERTY: Yes, sir, at this time.

4 CHAIRMAN COWGER: Mr. Minich? We're ready for you
5 to come back now.

6 MR. MINICH: A couple of things. Again, we're on
7 a basic difference, and I think you've done a good job
8 of identifying the differences, the difference of coming
9 up with the total cost method of what it cost to do the
10 work versus what we have been compensated.

11 First of all we feel that we were not responsible
12 for the reasons for the extra work nor could we have
13 anticipated what the costs could have been.

14 The second thing is that the Department has chosen
15 to interject the work progress chart, and in using that
16 in their analysis of the claim. They gave us this the
17 first time we met with them to try to settle this claim.

18 My point in the work progress chart is that the
19 specification requires us on the work progress chart to
20 show the first and the last day. The original work
21 progress chart identified the proposed first and last
22 day of work on the major items of work.

23 The work was changed. The work progress chart was
24 never modified. It was never done. At that time we --
25 I don't know whether that was an oversight on our part,

1 on the Department's part or whatever, but there was
2 never a change in the work progress chart that I have,
3 unless you have something different.

4 MR. MILLER: If I could be recognized,
5 Steve Miller, DOT. You had that opportunity any time
6 throughout the job to update your work progress schedule
7 and you did not.

8 MR. MINICH: I understand that. I went back and
9 figured the workdays given in with the -- there was a
10 time suspension due to wet weather on this job early on
11 on the project plus there was the contractor's vacation
12 all totaling 45 and around 14 -- around 60 days worth of
13 contract time suspension early on in this project prior
14 to this work being done.

15 If you take those 60 days and go from the first
16 day, let those 60 days out and look at it, we pretty
17 much did do the work reasonably in the kind of bounds
18 that were called on our original work progress chart.

19 They said there was a letter of delinquency issued
20 on the project. There was a letter of delinquency
21 issued on the project. Our response to the letter
22 of delinquency was that there were different site
23 conditions on the job and it was taking us a bit longer
24 to do a portion of the contract. We ended up being
25 three days delinquent on this job, three days out of 110

1 days, less than 3 percent. We built the job on time.

2 CHAIRMAN COWGER: Excuse me just a second. There
3 was not extension of the allowable contract time then?

4 MR. MINICH: No.

5 CHAIRMAN COWGER: That supplemental agreement we
6 were looking at --

7 MR. MINICH: In that supplemental agreement, we
8 didn't claim. Originally there were three days. Ended
9 up adding four in the end.

10 MR. DOUGHERTY: Supplemental agreement was done
11 early in the project, added four days, and you finished
12 calendar day 117 versus 114.

13 MR. MINICH: 114 and I ended up getting three days
14 liquidated damages. I'm not disputing that, we did end
15 up -- they've given us everything unless out of this
16 something else would come. I'm not sure how that works.

17 We feel that we have provided records. We did the
18 work. Again, I say in a workmanlike manner. We kept
19 track of our costs. The real, only costs -- and we
20 feel to keep track, it's made mention that we were
21 compensated on a unit price basis for the material.

22 Well, that's not -- I mean the unit price basis
23 not only included the material and the trucking, it also
24 includes the labor, the installation, the profit, the
25 overhead, everything else is in one -- we only had two

1 places to recover grading costs in this job, borrow
2 excavation item and final dress item. We had two items
3 to recover those costs.

4 All costs are included in those, not just material
5 costs. If we want to look at a claim, we have to
6 recognize all costs associated with building those items
7 and then how much the compensation was on those items.

8 We were not able because of the way -- when we
9 bid the job, most jobs like that, the trucking and the
10 material installation is set up on a production-type
11 basis where the trucks are contracted by the yard, dump
12 it in a widener box, then you put down 1500 to 2,000
13 yards a day. This job called for 8,000 yards of
14 material.

15 We easily had 1500 yards a day through a road
16 widener on a normal shoulder buildup operation. It's an
17 easily attainable figure.

18 On this job we were not able to do that. Not only
19 were we not able to contract with truckers to haul it by
20 the yard because it was not a production operation, we
21 would have to get them there, hold them up because we
22 had to spot dump. We had to dig material back out.
23 There were all kinds of things associated that was
24 different and we had to play it by ear as we went along
25 on this job.

1 Our costs are our costs. We submit that we should
2 be compensated for our costs. We should not have to
3 sustain a loss for something that was unforeseeable to
4 us and something that we felt that the Department just
5 wanted us to do and not say anything about at the time.

6 They said well, we'll change the right-of-way --
7 we will change the shoulder width down if you will agree
8 to sign something here saying you won't claim for it.

9 We thought that was unreasonable. It kind of
10 typified their response to the problem at the time. We
11 didn't sign the letter. They in effect did -- they did
12 then go ahead and make the changes with more prodding
13 and negotiation to allow the changes in the
14 right-of-way, which they had to do. We couldn't build
15 it the other way. The right-of-way was less.

16 CHAIRMAN COWGER: I think we understand that.
17 I have a question, though. Can you just give us a quick
18 synopsis of how you had intended to build the job when
19 you bid it as opposed to the way you actually built
20 it. In other words, what was the difference in the
21 operations?

22 MR. MINICH: The way we intended was to use a road
23 widener and dump trucks, dump the dirt, put it down
24 through the road widener in one continuous fashion up
25 one shoulder and down the other and final dress it with

1 a grader right behind. It was to be a continuous
2 operation and would be completed in ten days. We
3 allowed two weeks.

4 We show on our work progress chart a time slot of
5 60 calendar days in the work progress chart to perform
6 ten days of work sometime in that 60-day period.

7 CHAIRMAN COWGER: I think we understand that. Let
8 me ask you, describe to us what a road widener is.

9 MR. MINICH: That's a side delivery machine. You
10 dump the material in the front of the machine and it
11 delivers the material off to the side onto the shoulder.
12 It's a belt machine.

13 CHAIRMAN COWGER: Now how did you actually build
14 the job?

15 MR. MINICH: Some through a road widener. We were
16 still able to put some through a road widener. It was
17 limited. Some material we had to spot dump. Some
18 material due to the closeness of the thing we were not
19 able to control the amounts of material as well due to
20 the restricted right-of-way.

21 We had -- we had to keep more of the equipment,
22 the grader -- the final dressing was the biggest part of
23 the difference. The grader had to work a lot with one
24 wheel up on the pavement.

25 In reaching down in we had to get small tractors

1 in there, dozers, grade-alls, everything else to finish
2 this on a much narrower width, where the original width
3 showed we would have been able to run a motor grader all
4 up and down.

5 CHAIRMAN COWGER: Let me ask this question of
6 someone. Did the original ditch line stay about like
7 it was or did you actually go in and grade not only the
8 shoulder and the front slope but did you actually go in
9 and grade the ditch and the back slope?

10 MR. MINICH: The ditch line stayed.

11 MR. TYNER: Basically we did not go in and cut a
12 ditch per se. We tied the front slope into the existing
13 ditch or to the existing elevation, as it so existed.
14 We did not go and cut ditches and back slopes because it
15 was just not necessary on the project.

16 One side of the project we tied the front slope
17 into the existing ditch and we restricted the existing
18 ditch. We still had reasonable drainage, but we
19 extended the slope to tie into the existing ditch.

20 If you try to stay with a minimum front slope --

21 CHAIRMAN COWGER: If the job had been built in
22 accordance with the plans, if the 100-foot right-of-way
23 would have been there, how would it have been done
24 differently?

25 MR. TYNER: It wouldn't have been very much

1 difference in our opinion, would use the same
2 procedure.

3 CHAIRMAN COWGER: Even if you had built the job
4 in accordance with the plans, had the full right-of-way
5 there, you wouldn't have regraded the ditch, you
6 wouldn't have moved the ditch out?

7 MR. MINICH: The sections showed that you would
8 have had to.

9 MR. MILLER: The typical section showed -- in
10 the packet, if you will go back, we have a copy of the
11 typical section.

12 CHAIRMAN COWGER: Let's go off the record.

13 (Discussion off the record)

14 CHAIRMAN COWGER: Back on the record. The typical
15 section in the plans showed an eight-foot shoulder, two
16 feet of which was paved. So you really only had a
17 six-foot dirt shoulder?

18 MR. MILLER: Correct.

19 CHAIRMAN COWGER: You changed that to four foot.
20 You tried to keep the front slope at four to one but
21 didn't necessarily do that all the time.

22 MR. MILLER: Let me make another comment about
23 the typical you're looking at. Normally in new
24 construction-type projects you will have existing cross
25 section on the typical section. You will have the new

1 proposed template superimposed on there showing the new
2 shoulders and slopes and ditches.

3 If you will notice, there's not -- it does not
4 show regrading ditches and what have you, changing the
5 location of the ditches, even on the existing typical at
6 a hundred feet.

7 CHAIRMAN COWGER: The next sheet following the
8 one we were looking at entitled Exhibit B, is that an
9 attempt there to show the actual situation?

10 MR. MILLER: That was an attempt to show that
11 we did not have 50 feet of right-of-way on that side
12 because of the fence and where the power pole is in
13 relation to the centerline. Before the job was awarded
14 I wrote a memo to the district office advising them we
15 had this discretion on the typical.

16 CHAIRMAN COWGER: How about on the other side?
17 You still had the right-of-way restriction on the other
18 side?

19 MR. MILLER: We just didn't show the difference on
20 what would be the left side or the west side, although
21 it wasn't 50 feet.

22 MR. TYNER: I'm sure that it wasn't.

23 MR. DOUGHERTY: East side was more --

24 MR. MILLER: East side is the one that had the
25 fence.

1 CHAIRMAN COWGER: What is shown on the typical,
2 the right-hand side?

3 MR. DOUGHERTY: Yes, sir.

4 CHAIRMAN COWGER: Mr. Carlile, Mr. Turnbull, do
5 you have any further questions at this point about the,
6 I guess what we might call entitlement situation?

7 MR. CARLILE: I was just going to ask for
8 clarification from the Department on your claim
9 evaluation summary. Are you saying this last number is
10 the bottom line number difference? How does that relate
11 to the numbers above?

12 MR. DOUGHERTY: I wanted to have time, if I could,
13 Mr. Cowger said that we did not use the total cost
14 approach like the contractor. To a degree we did.
15 Those numbers at the top where it says claim evaluation,
16 the 20,981, the 35,869 and the 9551 are what we consider
17 to be the total amount of effort expended in the
18 grading, final dressing and borrow activities, above
19 and beyond -- that's total, sorry.

20 We go in. So, the 66,000 and using our numbers,
21 the way we figured it, that 28,405 is the bottom line.
22 That's what we feel they are due above and beyond what
23 they originally bid for those two contract items.

24 CHAIRMAN COWGER: Or you might say above and
25 beyond what they have already been paid.

1 MR. DOUGHERTY: Using the total cost approach,
2 yes.

3 CHAIRMAN COWGER: I think the Board understands
4 the total cost concept approach. What you have done is
5 not the total cost concept approach as I see it because
6 the total cost concept approach is merely calculating
7 what it cost to do the work, subtracting what he got
8 paid for the work, which is what is on the contractor's
9 attachment sheet. That's not to talk about the merits
10 one way or the other. I'm just trying to define how we
11 or I view total cost concept.

12 May I ask you a couple of questions, though,
13 before we get too far away from this. Looking again at
14 the contractor's Exhibit No. 3 and the attachment sheet,
15 as I understand it now, looking at the fourth item,
16 rental labor, DOT allowed nothing.

17 MR. MINICH: That's correct.

18 CHAIRMAN COWGER: Material they allowed nothing
19 and trucking they allowed nothing.

20 Now going back to the rental labor, I think what
21 I heard said was that the reason you didn't allow
22 anything there was because there were no records to
23 indicate what that was.

24 MR. DOUGHERTY: Our records indicated total number
25 of labor force per day on that operation. We assigned

1 those in the labor numbers that we came up with
2 originally.

3 They agreed pretty much with what Mr. Minich had
4 as labor. His rental labor was an item that was --

5 MR. MILLER: Let me expand on that, also. We
6 checked with the inspector that kept these records. He
7 confirmed to us that the -- that any flagman labor was
8 included with that labor on our daily reports.

9 CHAIRMAN COWGER: Mr. Minich, I think it's
10 appropriate that you tell us now what your position on
11 the rental labor is.

12 MR. MINICH: Our position on the rental labor is
13 that we used for flag labor on this job -- we had a crew
14 of people that we used on this job that the Department
15 has picked up that we use for actual work on the job --
16 laborers, equipment operators, everything, that were on
17 our payroll.

18 Any other people that we required to flag traffic
19 or additional labor, we hired from a rental labor force
20 agency. They were on the job. We have the invoices
21 to back that up, that they were on the job the days.
22 I don't know why the Department's records are as they
23 are. I don't know, I'm sure that it was Darrell that
24 was out there that was keeping track of this.

25 I believe that normally their foreman gets

1 together with our foreman and goes over the number of
2 labor hours that we used on the job. Our work sheets
3 that we submit, which I think are in here --

4 CHAIRMAN COWGER: He's referring to Exhibit No. 2,
5 Ajax field records.

6 MR. MINICH: Our field records I just flipped
7 open to some of them, our guy has two men labor force,
8 traffic control. We hand wrote in -- now that was his
9 writing -- we have handwritten 19 hours on that one
10 because that's what we were invoiced for that day, 22
11 hours --

12 MR. DOUGHERTY: What day was that, Mark?

13 MR. MINICH: On the 16th. Friday the 16th.

14 CHAIRMAN COWGER: What month?

15 MR. DOUGHERTY: January 16th. Okay.

16 MR. MINICH: Down in remarks. See, all the other
17 hours he took off were in the top left-hand corner of
18 our labor sheet. Down in remarks, because we don't keep
19 these guys' hours, he just puts on there, our foreman on
20 the job, that he had rental labor on the job.

21 On this day he had two men labor force traffic
22 control. We have written in 22 hours when we went back
23 and researched it on the billing. He signs their
24 tickets every day. We researched it. That's what we
25 come up with.

1 MR. DOUGHERTY: On our records it shows on
2 January 16, labor, our records shows 16 hours, which
3 would be two men if they stay an eight-hour day. You've
4 got 22 and we have 16.

5 CHAIRMAN COWGER: What day are we looking at?

6 MR. DOUGHERTY: January 16, 1987.

7 CHAIRMAN COWGER: This work sheet or this time
8 sheet of the contractor's shows 19 hours for traffic
9 control, labor force. Now let's look --

10 MR. MINICH: We show a total that day of 43 hours.

11 CHAIRMAN COWGER: Does not include the 19, is that
12 correct?

13 MR. MINICH: As you can see, our total was 43
14 hours that day for labor, for internal labor. It was 43
15 hours, 25 plus 10 plus 8.

16 CHAIRMAN COWGER: That does not include the 19?

17 MR. MINICH: No.

18 CHAIRMAN COWGER: All right. Now which of those
19 people are showing up there as laborers?

20 MR. MINICH: I don't understand the DOT's records.
21 I've not had a chance to go over this, but on that same
22 day --

23 MR. DOUGHERTY: We are showing 56 hours.

24 MR. MINICH: You are showing 56, but you're
25 showing eight hours -- 16 hours for a supervisor. He

1 had eight hours that day, Ron Elg. Our supervisor,
2 we pay him for an eight-hour day every day. He's a
3 salaried guy. We show him eight hours. You show him
4 for 16 hours that day. I guess I'm not following that.
5 On your records --

6 MR. TYNER: Excuse me, Mr. Cowger. As far as the
7 supervisor, we had one supervisor there every day, which
8 is Ron, as you indicated. You also had a foreman, which
9 we included as a supervisor. That's why it would be
10 more hours. That's the way it was shown on our daily
11 reports.

12 MR. MINICH: Who would that have been?

13 MR. TYNER: The Farabee gentleman.

14 MR. MINICH: He was the equipment operator.

15 MR. TYNER: He kind of run the show. We showed
16 him as a supervisor.

17 MR. MINICH: Those four guys are equipment
18 operators and laborers.

19 MR. DOUGHERTY: You were showing 43 hours of labor
20 out there on the 16th and we were crediting you with 56.

21 CHAIRMAN COWGER: Which day are we looking at
22 again?

23 MR. DOUGHERTY: January 16th.

24 MR. MINICH: Showing 43 plus 19. I'm saying I'm
25 showing that.

1 CHAIRMAN COWGER: We are looking at DOT's
2 exhibit called total cost-labor earthwork. We are
3 looking at the contractor's daily report for that same
4 date. On the DOT sheet we are showing Ajax records for
5 labor as ten hours. Which person is that, can you
6 tell?

7 MR. MINICH: From our sheet?

8 CHAIRMAN COWGER: Then we go on over and show for
9 equipment operators, we show 25. Let's just assume that
10 the bottom person there, Farabee is labor and the other
11 three are equipment operators.

12 MR. MINICH: That's correct. That would be from
13 our phasing.

14 CHAIRMAN COWGER: DOT records show 16. Now that
15 came off of your daily records, correct, not off of the
16 contractor's records?

17 MR. DOUGHERTY: Not off of the contractor's.

18 CHAIRMAN COWGER: Now when we get over to the
19 supervisor, Ajax records show eight, which would just be
20 a one eight-hour day. He doesn't necessarily show up on
21 here. And then DOT records show 16.

22 MR. DOUGHERTY: That's correct.

23 CHAIRMAN COWGER: I don't understand that.

24 MR. TYNER: That's just what I mentioned now. We
25 showed the job foreman as a supervisor.

1 CHAIRMAN COWGER: So, you had two people.

2 MR. BLANCHARD: Foreman and the superintendent.

3 MR. TYNER: And what we thought was the job
4 foreman, Mr. Farabee, we showed him as the supervisor.

5 MR. BLANCHARD: Superintendent and foreman.

6 CHAIRMAN COWGER: Then that last column --

7 MR. DOUGHERTY: Twenty hours.

8 CHAIRMAN COWGER: Should be the numbers shown on
9 here for flagging, for flagmen. There's an hour
10 discrepancy, but I don't care for us to discuss that.

11 MR. DOUGHERTY: Our field records, our daily
12 reports did not pick up the additional hours.

13 MR. MINICH: The other thing that I would like
14 to bring up is that I think that the Department has
15 arbitrarily gone in, and in my previous conversations
16 with them has not paid attention, I believe, to our
17 total labor costs for the day.

18 During this one they said 16 hours on this day in
19 question for supervisors, even considering that Farabee,
20 who you're talking about, was the foreman. He got paid
21 ten hours that day. So even by your own, the way you
22 were determining this, that would have been 18 hours.
23 However, you were saying -- I don't know where you came
24 up with 16. We paid him for ten hours that day.

25 I don't think you were trying to take a look at

1 productive time or effort. We have got service time.
2 We've got to go back to the plant and get supplies,
3 whatever that is.

4 He got paid for ten hours that day, is what his
5 payroll was for that day, a day's work. I don't know
6 what the discrepancy is in your records from our
7 records. These are payroll records, is actually what
8 those people got paid.

9 MR. DOUGHERTY: We don't know what our discrepancy
10 is with you either.

11 CHAIRMAN COWGER: I think we have heard enough on
12 that. I want to ask one more thing. Where DOT shows
13 this total labor cost earthwork, flagging Ajax records,
14 now that column is strictly from the Ajax daily reports,
15 DOT has already stated, I believe, that they had no
16 record of that.

17 MR. DOUGHERTY: That is correct.

18 CHAIRMAN COWGER: We need to explore that just a
19 little bit more. Is it DOT's position that those people
20 were not on the job or is it DOT's position that those
21 people that the contractor is claiming as rental labor,
22 flagmen, were included in the number of laborers or the
23 labor hours shown on DOT's reports, or for whatever
24 reason did you disallow the flagging?

25 MR. TYNER: We are looking on the daily report

1 for that day, FDOT daily report. We show two common
2 laborers at 16 hours. We show a superintendent, two
3 foremen, three skilled.

4 CHAIRMAN COWGER: What you're saying, Mr. Tyner,
5 is that on that report where it shows two common
6 laborers, in accordance with your records, that includes
7 anyone that was on the job in the capacity of a laborer,
8 including flagmen?

9 MR. TYNER: Yes, sir.

10 CHAIRMAN COWGER: Mr. Minich, what do you have to
11 say about that?

12 MR. MINICH: I'm saying they picked up everybody
13 that we had on our payroll. I don't know why. I can't
14 vouch for the completeness or incompleteness of their
15 records.

16 CHAIRMAN COWGER: The people that you refer to as
17 rental labor, were they essentially flagmen?

18 MR. MINICH: Essentially. Sometimes we picked up
19 a couple of extra ones. If we had a lot of extra
20 handwork that day, to do some raking. Essentially they
21 were flagmen, yes.

22 CHAIRMAN COWGER: Why did you handle it that way?
23 I'm not sure this is important, but why did you use
24 rental labor instead of putting them on your payroll?

25 MR. MINICH: Temporary employment. I mean it's

1 just so temporary we don't -- it's such a high cost to
2 us to put people on the payroll, get them eligible for
3 benefits, everything like that, that anything that's
4 temporary employment under three months we opt to go the
5 rental labor force.

6 CHAIRMAN COWGER: I think we understand that.
7 DOT, do you have any way to substantiate whether or not
8 the contractor did, in fact, use rental labor on the
9 project? Can anybody remember?

10 MR. TYNER: Yes, sir, he did use rental labor on
11 the project, no doubt. He has records in his packet
12 to show that they were there.

13 As far as the number, if I might, I have went back
14 and discussed with my lead inspector since this item
15 came up the difference between the rental labor. He
16 assures me that he included the rental labor on his
17 daily reports.

18 CHAIRMAN COWGER: Let's go on and ask about the
19 trucking. I think we understand about the material. We
20 don't need to talk about that.

21 DOT, why was it, again, that the trucking was
22 disallowed?

23 MR. DOUGHERTY: Because the trucking of the
24 materials, the borrow material, was incorporated in the
25 lump sum or the bid unit price for that material, and we

1 paid him for those materials brought in and placed on
2 the job under contract price.

3 CHAIRMAN COWGER: Did the quantity of borrow
4 excavation vary substantially from that shown in the
5 plans?

6 MR. DOUGHERTY: It decreased and it decreased in
7 an amount, 15 percent, that would be understandable when
8 you reduce the right-of-way.

9 CHAIRMAN COWGER: Mr. Minich, what do you have to
10 say about that?

11 MR. MINICH: About the reduction in quantity?
12 Yes, about reduction in quantity and the type of work,
13 it slowed down productivity. Whenever you slow down
14 productivity you increase costs, you increase trucking
15 costs.

16 The only cost that didn't increase was what it
17 cost to buy a yard of material because we bought it from
18 a commercial pit. He charges the same if I buy one
19 yard or 10,000 yards. Everything else is a production
20 item involved in this job, everything else is.

21 CHAIRMAN COWGER: That's not really what I wanted
22 addressed. I wanted addressed specifically any comments
23 you might have on the fact that the trucking costs were
24 disallowed.

25 MR. MINICH: I don't think -- I think it's just

14
1 due to the way the Department chose to look at this
2 thing based on the workdays and they didn't choose to
3 look at the total cost approach method of looking at the
4 project. I don't think there's anything that they're
5 doing that's inherently wrong here.

6 I think as I get back to it, my original thing,
7 I think the arbitration is centered around the method of
8 determining compensation that we both agree is due in
9 some fashion. We agree -- we say that the total cost of
10 it, we used to analyze this thing, and the Department
11 has done quite a bit of work at taking alternative ways
12 of looking at it, and I'm sure they've come up with ways
13 that would best represent their case. Okay? And that's
14 where we're at.

15 MR. DOUGHERTY: The only thing the Department
16 feels regarding the total cost approach is it doesn't
17 allow for the inefficiencies. That's basically the
18 reason.

19 CHAIRMAN COWGER: I noted in some of the
20 correspondence that's included in Exhibit 1, back rather
21 early on in the dispute there's a letter from Ajax dated
22 October 10, 1989 in response to a letter from DOT
23 apparently requesting some additional information to
24 back up the claim.

25 The statement I'm interested in is the statement

1 that Mr. Minich made, "We have been advised by our
2 attorney that due to the confidential and trade secret
3 nature of bidding tabulation sheets we respectfully
4 decline your request for this information."

5 Was the DOT ever given the opportunity later to
6 see that information or has it -- has that position been
7 maintained consistently?

8 MR. MILLER: It has been maintained. I wrote
9 the letter requesting that information. I did get
10 from Mr. Minich a copy of his invoices and the other
11 information that he did not submit with his original
12 claim. But the bid tabulations he respectfully
13 requested not to submit to me.

14 CHAIRMAN COWGER: Okay. Mr. Minich, in
15 conjunction with that, again, early on you submitted
16 that the total cost that you estimated to you for doing
17 the work, which is the subject of this claim, was
18 \$36,986.80?

19 MR. MINICH: Yes.

20 CHAIRMAN COWGER: Can you tell us, was that -- did
21 that come from your bidding sheets and the costs that
22 were assigned to the two items, borrow excavation and
23 grading? Is that essentially what --

24 MR. MINICH: It came from our bidding sheets, but
25 it substantially is all the money that was to be paid in

1 those two items. It was a small amount less than what
2 the actual amount was bid on those two items.

3 CHAIRMAN COWGER: If we took the total amount bid
4 on those two items and compared it to this \$36,000, it
5 would be close?

6 MR. MINICH: I think it's within \$1500. Borrow
7 excavation, add them up --

8 MR. MILLER: I would say that's reasonably true.

9 MR. MINICH: That's what we were going to charge
10 the State to do that, yes.

11 Our position on the confidentiality has always
12 been that whenever we've got into something like this
13 that we have maintained due to the competitive nature
14 of our business that we do not want the way that we bid
15 jobs to be open for public review. That's the way we
16 have always maintained that and continue with that.

17 CHAIRMAN COWGER: The purpose was not to get into
18 a dispute as to whether or not you had to open that up,
19 the question was had you ever opened it up and had DOT
20 ever seen it later. Okay. I think we're very close to
21 wrapping this up. Does either side have any issues that
22 they want to bring forth?

23 MR. MILLER: I'd like to make one other statement
24 about the final construction of the typical section.
25 Even after the changes that were made, we still ended

1 up with, in most cases on that project, at least a
2 four-to-one front slope, some cases maybe a little less,
3 three to one.

4 But in most cases we still constructed a
5 four-to-one front slope off of the adjusted shoulder.
6 In some cases, the shoulder ended up being eight feet as
7 originally anticipated, some areas seven, some areas
8 where we had to cut it down to a minimum of six which we
9 documented on the change order.

10 It was not constructed entirely with a six-foot
11 shoulder throughout the length of the job or with a
12 shoulder front slope of any less than three to one in
13 any area that we had.

14 Any ditch grading done on that project was done
15 in and around the drainage structures to tie in the
16 existing ditch to the cross drain extensions that had to
17 be closed up.

18 CHAIRMAN COWGER: Did the plans include cross
19 sections?

20 MR. MILLER: No.

21 MR. TYNER: No, not to my knowledge.

22 CHAIRMAN COWGER: I mean roadway cross sections
23 every hundred feet.

24 MR. DOUGHERTY: No, sir.

25 MR. MILLER: It was not a cut-and-fill type.

1 CHAIRMAN COWGER: It was a widening shoulder job.

2 MR. DOUGHERTY: Those of us in DOT would love to
3 have that opportunity.

4 CHAIRMAN COWGER: Mr. Minich.

5 MR. MINICH: Only one other thing to say. I think
6 what we have established here is that there was a job
7 that was bid for a uniform type of construction. It
8 would have had to be changed to meet the differing
9 conditions in the field. We ended up building the job
10 that admittedly was a variable job. Some of it was like
11 it was originally planned, some of it was quite a bit
12 different.

13 We went through a job, we really were not even
14 able to come up with a consistent method of doing this
15 job in the final. We had to change plans as we went in
16 the field. It was variable. Some places it was all the
17 way down restricted. Some places we were able to get
18 full width, but it was a variable job all the way
19 through. We feel that's what led to the disagreement.

20 CHAIRMAN COWGER: Mr. Turnbull, do you have any
21 questions?

22 MR. TURNER: No.

23 CHAIRMAN COWGER: Mr. Carlile?

24 MR. CARLILE: No, I don't.

25 CHAIRMAN COWGER: This hearing is hereby closed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

The Board will meet on May 15 to deliberate this claim
and you will have our order shortly thereafter.
(Whereupon, the proceedings were concluded at 10:55
a.m.)

CERTIFICATE OF REPORTER

1
2 STATE OF FLORIDA)
3 COUNTY OF LEON)

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

6 DO HEREBY CERTIFY that the foregoing proceedings were
7 transcribed by me at the time and place therein designated;
8 that my shorthand notes were thereafter reduced to
9 typewriting under my supervision; and the foregoing pages
10 numbered 1 through 53 are a true and correct record of the
11 aforesaid proceedings.

12 I FURTHER CERTIFY that I am not a relative, employee,
13 attorney or counsel of any of the parties, nor relative or
14 employee of such attorney or counsel, nor financially
15 interested in the foregoing action.

16 WITNESS MY AND AND SEAL this, the 25th day of April,
17 A.D., 1990, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON,
18 STATE OF FLORIDA.

19 
20 CATHERINE WILKINSON
21 CSR, CP, CCR
22 Post Office Box 13461
23 Tallahassee, Florida 32317

24 My Commission Expires June 27, 1990
25