STATE ARBITRATION BOARD
1022 LOTHIAN DRIVE
TALLAHASSEE, FL 32312-2837
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NOTICE

In the case of Bergeron Land Development, Inc. versus the Florida Department of Transportation on Project No. 97861-3356 in Broward County, Florida, both parties are advised that State Arbitration Board Order No. 4-96 has been properly filed on October 31, 1996.

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

S.A.B. CLERK
OCT 31 1996
FILED

Copies of Order and Transcript to:

Jimmy B. Lairscey, P.E., Director of Construction/FDOT
Jim Cardaman, Project Manager/Bergeron Land Development, Inc.

STATE ARBITRATION BOARD

ORDER NO. 4-96

RE:

Request for Arbitration by:
Bergeron Land Development, Inc.
Job No. 97861-3356 in
Broward County

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

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:15 a. m. on Thursday September 26, 1996.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 4-96 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the total amount of $ 9,386.37. This amount consists of the payment adjustment made by the Department of Transportation for concrete placed on September 16, 1993 because the compressive strength of the cylinders representing that concrete was less than the specified minimum compressive strength (5,500 psi) plus interest at one percent per month from October 30, 1993

The Contractor and his concrete supplier presented the following information in support of this claim:

1. In accordance with the specifications applicable to this project, the Department adjusted payment for the concrete in question based on the average compressive strength of two test cylinders (4,770 p.s.i.) made at the project site. Three core taken from the in-place concrete to verify the structural adequacy of the retaining wall in which the concrete was placed had an average compressive strength of 6,410 psi.

2. The quality control tests taken as part of the Level I Quality Control Plan of our concrete supplier during the period when this concrete was produced indicate that Class IV Concrete produced at the plant supplying the project consistently had a compressive strength exceeding the specified minimum of 5,500 p.s.i.)

3. It is our position that our Level I Quality Control data and the test results of the cores taken from the structure show that the test cylinders used to make the payment adjustment were not representative of the Class IV Concrete placed on September 16, 1993. We also question whether the test cylinders were properly cured. The range of the test cores strengths (5,760 p.s.i., 6,500 p.s.i. and 6,960 p.s.i.) does not indicate inconsistency in concrete production. This range is likely to have been due to variation in the techniques used in placing the concrete. 1

4. On or about April 1, 1994, the Department adopted amendments to Section 346 Portland Cement Concrete of the Standard Specifications that allow use of tests on cores taken from the structure to be substituted for cylinder tests if the compressive strength of the cylinder test is in excess of 500 p.s.i less than the specified minimum strength. The formula for making a pay adjustment was also revised to reduce the amount of a penalty. We are of the opinion these amendments were made after the Department recognized that the earlier specification was deficient.

5. The Department has refused to use the strength value of cores in the making their acceptance determination (pay adjustment) in this instance.

6. Our position is that, in determining the pay adjustment, the average compressive strength of the cores should be substitute for the average compressive strength of the test cylinders. This would cancel the pay adjustment.

7. Interest should be paid at the rate of one percent per month beginning October 20, 1993, the date on which the pay adjustment was made.

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

1. The is no evidence to substantiate that the test cylinders used to determine the pay adjustment were not made in accordance with the DOT procedure for making concrete test cylinders. In accordance with the specifications, the Contractor is responsible for furnishing an acceptable curing facility for the test cylinders.

2. It is possible that the project Level II Quality Control was not effective introducing the possibility for excessive mixing water to be added or excessive time in the mixer to occur.

3. The technician who made the test cylinders was certified in accordance with DOT procedures.

4. The range of the compressive strengths of the three cores taken from the retaining wall (5,760 p.s.i. to 6,960 p.s.i.) indicates that the concrete produced on the day in question was not consistent in properties.

5. The concrete supplier's representative present when the test cylinders were made offered no objection as to the manner in which the cylinders were made.

6. It appears that the concrete supplier's Level I Quality Control was not functioning well during the month the concrete in question was supplied.

7. The specifications applicable to this job clearly state that cores will not be considered in calculating pay adjustments for deficient strength.

8. The Department has authorized by Supplemental Agreement modification of other contracts to use the later version of Section 346. On this project, the Contractor did not request application of the newer specification until after a pay adjustment was made by the Department.

9. Allowing a change in the specifications in this instance would be circumventing the competitive bidding process.

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

1. The reduction in payment for low strength concrete represented approximately 50 percent of the unit price for the bid item Class II Concrete which includes costs such as constructing forms and placing forms in addition to the as delivered cost of the concrete. Subsequent to the bid date for this project, the Department of Transportation revised Section 346 of its Standard Specifications (Subarticle 346-12.7) to make the formula for imposing reductions in payment for low strength concrete realistic.

2. The evidence did not substantiate that there were deficiencies in casting the test cylinders in question.

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

The Department of Transportation shall reduce the pay adjustment for the low strength concrete placed on September 16, 1993 to $2,192.23. This is the amount calculated using the formula contained in the later version of Section 346.

The Department of Transportation shall pay the Contractor $1,000.00 in interest.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of $255.00 for Court Reporting Costs.

S.A.B. CLERK
OCT 31 1996
FILED

Tallahassee, Florida
Dated: 31 October 1996

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

Certified Copy:

Bill Deyo, P. E.
Member

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

John P. Roebuck
Member

31 October 1996
DATE

STATE ARBITRATION BOARD
STATE OF FLORIDA

BERGERON LAND DEVELOPMENT, INC.

- and -

DEPARTMENT OF TRANSPORTATION

PROJECT NO. 97861-3356

LOCATION: Broward County, Florida

ORIGINAL

RE: Arbitration In The Above Matter

DATE: Thursday, September 26, 1996

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

TIME: Commenced at 9:15 a.m.
Concluded at 10:30 a.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 Deyo

APPEARING ON BEHALF OF BERGERON LAND DEVELOPMENT, INC.:

Mr. Jim Cardaman
Mr. Richard Sampiere
Mr. Jerry Haught

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Ken Blanchard
Mr. Dorion Ogle
Mr. Bill Sears
Mr. Bill Todd

* * *

I N D E X

PROCEEDINGS

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

Mr. Bill Deyo was appointed a member of the Board by the Secretary of the Department of Transportation.

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

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

Our terms began July 1, 1995 and expire June 30, 1997.

Will all persons who will make oral presentations during this hearing please raise your right hand and be sworn in.

(Whereupon, all witnesses were duly sworn.)

CHAIRMAN COWGER: The documents which put this arbitration hearing into being are hereby introduced as Exhibit No. 1. That is the notice of arbitration hearing, the request for arbitration submitted by Bergeron, the contractor, and everything that was attached to that request for arbitration.

The request package was furnished to the DOT and

all of the Board members in advance of this hearing.

Exhibit 2 is a rebuttal, a single-page rebuttal by DOT that was submitted to the Board on May 15th and transmitted to the contractor at that time.

Are there any other exhibits which either party wishes to put into the record at this time?

(Discussion off the record)

CHAIRMAN COWGER: Back on the record. I'm going to identify the exhibits now that were distributed during the break. I have a bid blank on project number 97861-3356, as submitted by DOT. That will be Exhibit 3.

Exhibit 4 is another bid blank on job 72160-3506, et cetera, the Acosta Bridge, as submitted by DOT.

By the way, those of you that are out there looking at these, please identify your exhibits as I read them out by number so we can use that later on in the record.

Exhibit 5 is another bid blank for job number 12001-3509, the Edison Bridge, again, submitted by DOT.

Exhibit 6 is a set of test results by producer dealing with plant number 86129, Rinker Materials Concrete is the producer. This was submitted by DOT.

Exhibit 7 is a package submitted by the

contractor consisting of several documents. The front document is a chart relating -- compressive strength to date cast for quality control tests run by CSR Rinker at their Pompano plant on mix number 04-0045.

I'm not going to go in and describe the rest of the attachments. I think everybody has the same package.

MR. SEARS: We only got a single page.

CHAIRMAN COWGER: Okay, in that case then I will identify the rest of the package. The rest of the package consists of -- did you find it?

MR. SEARS: I've got it. I thought that was separate.

CHAIRMAN COWGER: All right. We will go on without going any further.

(Whereupon, Exhibit Nos. 1 through 7 were received in evidence.)

CHAIRMAN COWGER: Okay. Does either party want any additional time at this point to examine the exhibits? Hearing nothing, we will proceed on.

During this hearing the parties may offer such evidence and testimony as is pertinent and material to the controversy and shall produce such additional evidence as the Board may deem necessary to an understanding and determination of the matter before

it.

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

The parties are requested to assure that they receive properly identified copies of each exhibit submitted during the course of this hearing and to retain these exhibits. The board will furnish a copy of the court reporter's transcript of this hearing, along with its final order, but will not furnish the parties copies of the exhibits.

The hearing will be conducted in an informal manner. First the contractor's representatives will elaborate on their claim and then the Department of Transportation will offer rebuttal.

Either party may interrupt to bring out a pertinent point by coming through the Chairman. However, for the sake of order I must instruct that only one person speak at a time.

We have reached a point now where the contractor should begin his presentation.

In the interest of trying to expedite this hearing, and to not constrain anybody from anything they may want to introduce, I think it might be a good idea for me to express the issue as the Board sees it from the documents that were submitted prior to today.

The issue and the sole issue is the reduction in payment for Class 4 concrete pavement placed in a structure on a particular day, and the reduction in payment was based on the acceptance test that represented the concrete placed on that day being less than the specified minimum compressive strength of 5500 psi. That's what we're here to discuss.

The contractor has got some positions on this and so does DOT. I think that's all I will say at this point. I may want to introduce some other things as to understanding this later, but I think it would be appropriate for the contractor to begin now.

MR. CARDAMAN: I will start out and go ahead and represent the amount that we're claiming, as was stated in our acceptance of the revised final payment and our letter of July 26, 1996. We were looking at a claim amount which was a reduction in the pay amount for the concrete of $6,801.72 plus any applicable interest that would be due from the time in which the pay reduction occurred, which I believe was the September or October estimate of 1993, and we are looking at approximately 38 months of interest. The combined total is $9,386.37.

CHAIRMAN COWGER: 9386.37?

MR. CARDAMAN: That's correct.

CHAIRMAN COWGER: Thank you.

MR. CARDAMAN: I might note the contractor was very conservative. He only asked for 1 percent on the interest.

MR. BLANCHARD: One percent per month?

MR. CARDAMAN: That's correct.

CHAIRMAN COWGER: Before you proceed on, so we will have it in the record, a question of the DOT. Assuming that the Board should find that the contractor is due compensation, does that 10-93 date appear to be correct?

If you can't answer that now, somebody might look at it and when you start your rebuttal be sure and tell us whether you think that is the proper date; in other words, the date on which the payment was first taken away from an estimate.

That's basically what you are --

MR. CARDAMAN: It occurred on the September estimate. I calculated the interest from October 30th.

CHAIRMAN COWGER: How about checking that out.

MR. SEARS: The work was done in September.

MR. CARDAMAN: I didn't start the interest until October.

MR. SEARS: Okay.

CHAIRMAN COWGER: Proceed. I will try not to

interrupt.

MR. CARDAMAN: With that I would like to offer to the Chair to pass on to Jerry from Rinker and he will present the merits of the claim.

MR. HAUGHT: Okay, I will try to keep this as brief as I can. Just as a quick summary of the dates involved here. September 16th is the date in question, the subject of this claim.

On that date pertinent information that's available from a testing standpoint are cylinders cast by the DOT, the acceptance test results as well as cores obtained from the structure.

Also pertinent to this claim is the 9-17-93 concrete placement, which was the next day, obviously. On that date there was also a compressive strength failure on the DOT acceptance cylinder.

The contract mandates that the supplier perform Level I QC testing. On this date we also tested the same load of concrete that the DOT did. So, we've got both contractor and Department compressive strength results from that date.

Just going through the results quickly, this graph that is Exhibit 7 I guess, it just lays out the data that's at issue.

The first set of data is the contractor's Level I

QC data mandated by the Department. This is internal testing that Rinker performed on the -- on various job sites out of the Pompano Beach plant. All this data is on the mix in question in this claim, which is 04-0045, Class 4, 5500.

The average strength on the data over the time frame from May '93 through October '93 for this mix with Rinker's data is 6,977 psi.

Standard deviation is 419 psi, generally indicating good control over concrete production.

CHAIRMAN COWGER: What was that average value again?

MR. HAUGHT: 6,977 psi.

CHAIRMAN COWGER: Thank you.

MR. HAUGHT: That is on I believe the 28 test. I'm sorry, yes, 28 compressive strength results. The line that's shown on the graph is the running average of three of the individual compressive strength results.

The triangles that are also plotted on there are the DOT acceptance test results from the 9-16 and 9-17-93 placement.

The 9-16 placement, the Department's acceptance result was 4,770 psi at 29 days. The 9-17 placement, the DOT result was 5,390 psi at 28 days.

Rinker Level I QC testing on the same load of concrete from the 9-17 date was 6,750 psi, a difference between the Department's acceptance and the Level I QC of 1360 psi.

The X that's plotted on the 9-16 placement is the 46-day average core result. Department testing on the cores obtained from the retaining wall itself. That is 6,410 psi. Again, F prime C is 5500 psi.

Something I didn't plot on here, which I regret right now, is the 28-day equivalent core strength as mandated by the Department in 346. The 28-day equivalent strength is 5,899 psi based on the Department's formula for correlation of 46-day core results to 28-day cylinder strengths.

Still a difference, even using that equivalency equation, it's still over a thousand psi above the acceptance cylinders.

Some of the key things that I think are -- that should be viewed in the assessment of this penalty are, as I spoke before, the comparison testing on the 9-17 placement. That placement was never cored because it was inaccessible. Our intentions were to core it as well, but we couldn't access it at the time of the coring.

Also at issue, I referenced the 28-day equivalent

core strength of 5,899 psi. The cores were obtained in time to achieve a 42-day compressive strength on the cores. Through no fault of the contractor, the equivalency equation is now part of the issue, and it should have never been.

The cores were provided in a timely manner to do 42-day testing as mandated by the specification.

Also at issue is the fact that the 9-16 placement, the acceptance test has a note on it that says cores -- or cylinders tested late due to late arrival. The standard test date is 28 days of age. They were not tested until 29 days, indicative of a field curing situation.

The condition --

CHAIRMAN COWGER: Excuse me, while you are pausing just a second, the cores are tested by DOT?

MR. HAUGHT: That's correct. Obtained by the contractor, tested by DOT.

CHAIRMAN COWGER: Thank you.

MR. HAUGHT: Back to the 9-16 placement, which is the subject of the claim. The cylinders were subjected to essentially field curing during the entire time frame from date of cast through date of test. They got to the DOT lab after the due date of test.

The curing box the contractor provided, a

basically cattle trough, insulated water cured environment. However, the curing trough was placed outside between two trailers exposed to direct sunlight.

Curing boxes typically, due to the heat and hydration of the concrete put in it, unless they are controlled, will be warmer than ambient temperature.

The second portion of Exhibit 7, Section 6.3, this is the Florida method, FM 1-T 023, which was a governing document for curing of test specimen. Section 6.3 states that the field curing shall be between 60 and 80 degrees.

This document has since been changed, but it was after the date of this contract. That number is now 73.4, plus or minus three degrees.

The next section of Exhibit 7 is weather information from NOAA. I apologize for the fax, but the timing was not -- I didn't get it in in time. This is official NOAA temperature data for Pompano Beach, which is the location of this project.

Typical ambient temperatures are low nineties as a high during the day. I think the hottest it got during the curing time of this particular specimen was 93 degrees.

Night temperatures were in the mid seventies

throughout the curing time of this, of the 9-16-93 concrete cylinders.

The next issue I want to talk about is the -- and I've mentioned it briefly, is the fact that we are applying a 28-day equivalency equation to the core data.

And again I want to state that it is more than a thousand psi above the acceptance data, even using the equivalency equation. And the equivalency equation is applied through no fault of the contractor. It was due to shipping of the cores from the project to the DOT lab, processing them. They ran into a weekend, and it got pushed to Monday.

Now I want to touch briefly on the specifications. 346, Section 10 of this contract provides for discarding of cylinder -- individual cylinder results if there is any evidence of improper molding, curing.

I don't know how there could be evidence of a cylinder, improper curing, but it provides for exclusion of the acceptance test results if anything is not done in accordance with the prescribed -- with the prescribed specifications.

This Section 10 was not invoked in this claim. Essentially the curing and the entire process was

deemed to be acceptable and in accordance with the specifications.

Also I want to touch on some issues related to Section 10 tied to the actual specification that prevents paying on core results.

This section of the specification was under revision at the time of this project. I do not contest what the contract says regarding payment on acceptance cylinders. It was recognized both within industry and the Department that something was wrong with the specification. It was under revision, and the revision did not come out until March of 1994, essentially about six months after this project.

The current specifications we wouldn't be sitting here today, it would not be an issue. Payment would have been on the cores, and it would have been -- it would be a moot point.

I guess I also would like, since we were provided the primary rebuttal exhibit prior to the hearing, I would like to address a couple of issues that show up.

CHAIRMAN COWGER: Before you go to that, may I ask something. The specification, the 346 specification that applied to the job that we're here to discuss today, I don't think the contract -- the

Board was ever furnished a copy of that. We've got a copy of the upgraded specification that was adopted apparently in March.

MR. HAUGHT: The Department's Exhibit 3 is the specification that was governing this contract.

MR. CARDAMAN: I have a full copy. You can pass that down.

CHAIRMAN COWGER: Well, let's see what we've got here.

MR. DEYO: You have the penalty portion in there.

CHAIRMAN COWGER: That's all we're interested in, is it not? Okay. That's good.

MR. DEYO: You don't need the whole thing.

MR. HAUGHT: The only thing missing from this one is the section that provides for the review of the curing, handling, processing of the cylinders and the discarding of the results if there's any indication of something being --

MR. CARDAMAN: That is an issue, isn't it? That's one of the points you were bringing up.

MR. SEARS: I was confused. I thought you said the coring and the cylinder curing was deemed by Rinker to be acceptable. I misunderstood that?

MR. HAUGHT: Pardon me?

MR. SEARS: I thought after you went through all

those exhibits you said the coring and cylinder curing Section 10 was deemed acceptable.

MR. HAUGHT: No.

MR. SEARS: Okay.

MR. HAUGHT: That's part of the issue is the curing of the acceptance cylinders.

MR. SEARS: Okay.

MR. HAUGHT: We do not have -- there is no issue from us on the core handling other than the timing of the breaks from when the cores were obtained until they were tested.

MR. SEARS: Okay.

MR. CARDAMAN: Is the core result not questionable because of the variance between it and the -- your graph of the QC where you make your routine checks?

MR. HAUGHT: That is one of the issues I wanted to address pertaining to the primary rebuttal exhibit, references to the spread between the individual cores being an indication of inconsistent quality. I can move into that now if that's where we want to go.

The primary rebuttal exhibit, there's really two key things in it that we take issue with. The first one being the fourth paragraph where it states, "If a specification is more stringent, the price of the

concrete reflects this condition. For the Department to selectively consider or delete a portion of this specification could be construed using unfair practices to other concrete producers due to the bidding process."

The only comment I can make on that is that no contractor bids a job -- I mean the assumption during a bid is that testing is going to represent the product. That's the base assumption. Bids are not based on -- that's the primary premise.

In this case the data indicates that the evaluation used to assess the penalty does not represent the concrete that's in place. It does not represent the structure that we're driving over right now.

The second thing that I take issue with on the primary rebuttal is the second to the last paragraph, the last two sentences. "The core strengths did show a variance of 1200 psi range from 6960 to 5760 psi, which indicates the quality of concrete was not consistent. If the lowest test value of 5760 psi was utilized, the resultant 28-day equivalent strength would not have achieved the 5500 psi requirement."

My objection to this is it misses the entire point for obtaining three cores from a structure. The

three cores are not to evaluate the consistency of the concrete as delivered. The cores are affected by consolidated -- consolidation-related issues, entrapped air voids, a number of different things.

Three cores are mandated by all specifications, not just the Department's, to look for an outlier.

The range on the cores has nothing to do with the quality of the concrete or the consistency of the concrete. There's a lot of other variables that come into play with it.

Core testing is tricky. There's a lot of variables that can affect it. That is why we have the three cores. The spread on the results is not indicative of a consistency of the product -- the problem.

CHAIRMAN COWGER: May I ask a question. (Examining document) Okay, I'm satisfied.

MR. HAUGHT: This pretty much concludes -- and I would like to close with just some brief statements. The pay item in this claim is a retaining wall footing. Concrete cores from this retaining wall footing, no one disputes that they indicate that the concrete in that structure is above 5500 psi.

Therefore, we should be paid based on the end result of that footing. It has achieved a specified

strength and should be accepted at no penalty.

Also, I would comment that we operate under these specifications every day of the week. Every specification has to have engineering judgment applied to it. You need to look at the data that you get. You need to evaluate what you have and make a decision.

And sometimes it's not black and white. In this case it's not black and white, and the penalty was assessed based on black and white -- on a black and white basis.

Jim, that's about all I have to say, if you have anything to add.

MR. CARDAMAN: No, I think you have very well covered it. I have nothing further. We would turn it back to the Chair to give to the Department at this point.

CHAIRMAN COWGER: Before we do that, does either one of the Board members have any questions that they would like to present?

MR. ROEBUCK: The points I would ask about, you made an issue that the acceptance cylinders were poorly field cured and not even taken to the lab until after the 28 days. Your temperature data shows they weren't cured at 68 degrees during the time they stayed in the field.

MR. HAUGHT: During the course of the investigation into this problem, the investigation into the handling of the cylinders was left in the Department's -- within their scope, as basically mandated by the specification. It never occurred at the time of the investigation of the problem.

MR. ROEBUCK: So, that was an explanation of why perhaps the cylinders were of low value? You drilled the concrete. The concrete exonerated itself completely with the core testing.

Your defense is you wanted the breathing room of the specs. You proved the concrete was okay, and yet the specs said you can't use this for -- to replace the cylinder test. That was during that time when we had a serious flaw in the specs.

Your point is you are trying to let the cores prove your -- the concrete you sold was -- met the specs?

MR. HAUGHT: Exactly.

MR. ROEBUCK: So, the horrible penalty involved in these low breaks is another point that you are not contesting? They assessed you a penalty far greater than the penalties today?

MR. HAUGHT: Yes.

MR. ROEBUCK: So, the point is you are trying to

let the core stand for the concrete?

MR. HAUGHT: That's correct.

MR. ROEBUCK: Okay.

CHAIRMAN COWGER: I did have one question. On Exhibit 7, just so that I understand for sure, so the Board understands, what this represents is the quality control test by Rinker over a period of I believe you said 28 days, that sort of spans the period in question?

MR. HAUGHT: That's correct.

CHAIRMAN COWGER: Now, the other question I had is has anybody put together what the acceptance cylinders during this period of time on this particular project might have shown?

I realize that these QC tests now that were taken by Rinker was not necessarily on concrete shipped to this project, it was on a particular design mix that is the same design mix as the Class 4 5500 psi concrete on this project, but some of these cylinders may have been taken on concrete that was shipped to other jobs?

MR. HAUGHT: That is correct.

CHAIRMAN COWGER: You are contending, I think, that you've got a uniform quality control process?

MR. HAUGHT: We are controlling our production. We are not controlling individual jobs. That is the

intent of the Level I QC plan requirements in the standard operating procedures.

CHAIRMAN COWGER: Before DOT starts, then I think it would be good if the Board could see a plot or a chart showing us what the acceptance test on this particular mix, design mix, showed during this period of time. Maybe not the full 28 sets of tests or the span of several months as Rinker shows, but just a few tests in that vicinity.

Are you all prepared to present something like that or could you?

MR. SEARS: Exhibit 6 shows all the cylinders that we broke.

CHAIRMAN COWGER: These are your acceptance cylinders?

MR. SEARS: For that mix.

CHAIRMAN COWGER: On this project or any project that might have gone through?

MR. SEARS: Any project.

MR. DEYO: I have a point. You're addressing the specification that was included in the contract, the 346 saying it was under revision?

MR. HAUGHT: Yes.

MR. DEYO: The section that we have here on the specs indicates it was approved in '91, started in

probably July of '91. This contract was awarded in October of '92. So, it was on several projects.

The question I would have with you, you supplied concrete under this specification to other projects during this time period?

MR. HAUGHT: Yes, we had. I would interject a comment that this is not the only penalty that has been assessed to Rinker Materials under this specification. We know what the contract says. We read it just like everyone else does.

When we feel that we have a problem and the quality of the concrete does not meet 5500, we ante up. We operated under this contract for the length that it existed. And we paid numerous other penalties that we felt were justified.

The difference between those and this case is we don't feel that these are justified.

MR. DEYO: You have not contested any penalties on any other jobs then that were under this specification for concrete?

MR. HAUGHT: No, sir. I can't tell you how many penalties we have paid under this contract, but there have been cases.

CHAIRMAN COWGER: This is the only one at this time, though, that's in dispute?

MR. HAUGHT: This is the only one where we firmly believe that the quality of the concrete exceeds that specified.

CHAIRMAN COWGER: Okay, DOT, time for you to go ahead.

MR. SEARS: Okay. Jerry brought out some things that wasn't in his original representation, specifically that our cylinders were not cured properly. We have no evidence that they were not cured like they've been cured throughout the whole life of this project.

He's only contesting to failures that happened in the life of this project that had two bridges on it. All of our cylinders are cured the same way. All of them but two have passed. He's only questioning our material handling and our curing tanks for this period of -- he's speculating that they got to the plant late. There's no documentation that shows that it was field cured or --

MR. CARDAMAN: I think the lab report shows that it got to the lab late. It's referenced on the lab report.

MR. BLANCHARD: How late?

MR. CARDAMAN: One day late.

MR. BLANCHARD: That should mean it should have

higher strength, not lower strength. That's to your advantage.

MR. HAUGHT: Well, I will let you continue, Bill. I apologize.

CHAIRMAN COWGER: You are going to make a note of that and come back to it? You have the opportunity to.

MR. SEARS: Our point is you were speculating that it was in the field. We think it might have been at the lab and they tested it two days late.

CHAIRMAN COWGER: We understand.

MR. SEARS: There was a total of about 650 yards of Class 4 concrete. Independent assurance testing is done for every 400 yards. That would require at least one IA test. We, in fact, took four IA tests during this project.

There were no discrepancies between the IA test, which is done right next to the resident engineer's test, the same mix, they do the tests right next to each other.

Rinker is trying to compare our field tests done at the site of discharge with his plant test done at the plant.

MR. HAUGHT: Not true.

MR. SEARS: Okay.

CHAIRMAN COWGER: May I interrupt you a minute

and ask you a question. Where do you -- your quality control cylinders, obviously the samples are taken out of a ready mix truck. Is the truck still at the plant or do you send somebody to the job site?

MR. HAUGHT: The SOP mandates that we test on the job site.

CHAIRMAN COWGER: Your QC samples are taken at the job site, not at the plant. Okay. There was a little confusion interjected there and I wasn't sure.

MR. SEARS: I understand.

CHAIRMAN COWGER: I understand that now. Go ahead.

MR. SEARS: Our Exhibit 6 shows the testing that was done at that plant for that mix design. We represent that after September 9th there was a definite decrease in the strengths from that mix.

CHAIRMAN COWGER: May I ask a question while you're on Exhibit 6. It shows the date reported. Does it show anywhere in here the date the sample was taken? I don't see that.

MR. ROEBUCK: You have to back up about 28 days. You have to back up about a month.

MR. SEARS: That's not a part of this program, no.

CHAIRMAN COWGER: So, the 10-15-93 date reported

correlates with the set of cylinders that are in question here? Okay. Good enough.

MR. SEARS: Rinker's Exhibit 7 there only shows the two bad cores. Again, it misrepresents the two bad cylinders, it misrepresents all the cylinders that were taken that were cured the same way that passed that we feel had good concrete. We had the same technician.

CHAIRMAN COWGER: Is the point you're making that from your acceptance data as shown in Exhibit 6 there's no indication of any problem with the manner in which the cylinders were made or tested on any other dates?

MR. SEARS: Right.

CHAIRMAN COWGER: There was another set of cylinders that was made that were slightly below strength that were made on the 17th of September. Are those shown in this printout? I was trying to figure out where they might be.

MR. HAUGHT: It's A-4036.

CHAIRMAN COWGER: Okay.

MR. SEARS: Exhibit 6, at the top of page five.

CHAIRMAN COWGER: That was cast 9-17. Okay. Good enough. What was the purpose -- again on Exhibit 6, you've got a couple of other strengths highlighted, 9-14 and 9-15. Those are the report dates. What was the purpose of highlighting those?

What are you trying to illustrate?

MR. SEARS: That these are listed chronological, and we think there was a problem in September and October and through October 15th at their plant.

MR. DEYO: A trend.

CHAIRMAN COWGER: That's exactly what I had in mind, it was some sort of a trend. But that trend, apparently on 10-18, the second test on page five of Exhibit 6, it jumped back on up there and stayed on up there through the remainder of the project.

MR. SEARS: That's correct.

CHAIRMAN COWGER: So, your point is that between sometime I guess mid August up through mid September, plus or minus, the point you're making is that there must have been some sort of a problem with their quality control?

MR. SEARS: Not speculating as to what happened, but yes, that's what we're trying to show.

CHAIRMAN COWGER: The data that's shown in Exhibit 6 might be a con -- a conclusion might be drawn from that that says what I just said.

MR. ROEBUCK: Did you test whether your testing technician took a vacation, the good guy?

MR. SEARS: Actually, I personally did not.

(Discussion off the record)

MR. BLANCHARD: Mr. Chairman, can I elaborate on that presentation Mr. Sears just made having to do with the cylinders being broken a day late would have been to the contractor's advantage, not the Department's. It would have broken stronger.

The contractor's contention that the cylinders were not cured properly, if that, in fact, had happened, was not a failing on the part of the Department, it was a failing on the part of the contractor.

The specifications require that the contractor provide and maintain the facilities for curing the cylinders at the proper temperature and everything else.

So, he gets sloppy and wants to get reimbursed from the Department, I don't understand that.

The next point I want to make is -- has to do with Mr. Roebuck's contention that the specs were flawed. I want to know what that flaw was. I have been working in the concrete -- as the Department's concrete specialist, specifications specialist on concrete for several years. I'm not aware of any flaw in that spec.

The concrete specifications have been revised occasionally just like all of our specifications have.

The particular spec that was in place during this project was subject to a varying interpretation as far as whether or not cores would be allowed for the purposes of determining pay adjustments. That's not a flaw.

The question as to whether or not cores -- the intent of the Department's specs at that time was that cores would be allowed for determining structural adequacy, but not for determining pay adjustments.

Now, that may not have been -- that may not have been, should I say, written in such a way as to be interpreted the way the intent was, but we gave the contractor the benefit, all benefit of the doubt by allowing the cores to be taken for pay adjustments.

Now on a later edition of the spec, which came into effect, which was approved in '94, we made it quite clear there should be no cores taken for pay adjustments. But because of some possible misinterpretation on the Bergeron in his contract, we gave the contractor the complete benefit of the doubt and allowed the cores for pay adjustments. So, again, you got a break here.

You know, again, I don't know what Mr. Roebuck is referring to in terms of a flaw. I don't understand that.

Also, I want to point out that the producer's test data here refers to his Level I plan which, you know, I'm sure is accurate, but it's not conclusive in itself because we have also got to look at the Level II plan requirements, none of which has been presented here.

The Level II plan controls concrete on the site. Now, the producer says he took his samples on the site, but our acceptance samples are taken during the progress of the pour, after several yards of concrete has been discharged from the mixer truck.

We don't have any truck that gets here or quality control concrete reports to show if any water had been added to the concrete or if the concrete had been sitting there in the drum for an inordinate amount of time before the point arrived at which the acceptance cylinders were taken.

We don't have any of that information. I don't see how we can attach much credence to one plan in itself unless we have Level II plan information to go along with it.

The other item about the cores is that I think we all know that cores generally break higher than cylinders to begin with.

MR. ROEBUCK: No, no, Ken.

MR. BLANCHARD: Yes, I know that.

CHAIRMAN COWGER: Let's let them rebut that if they want to, Jack. Go ahead.

MR. BLANCHARD: This has been my experience in the 28 years I have been working in concrete. I don't know what these gentlemen, their experience has been, but my experience has been that cores always break higher than cylinders. Tests have been made by a number of agencies that have shown that.

But this Level I plan sheet here shows that these cores that the X here is a bit below the average of all of his Level I cylinders, when I would expect it to be a bit above the average of the Level I cylinders if the cores, you know, were indeed up to strength like they should have been.

So, that there gives me a -- that gives me a hint that there was probably something wrong with the concrete. Okay.

The next point I want to bring up is Mr. Haught's concerns about the range of the core strengths not indicating any lack of consistency in the concrete.

And there again, my experience has shown that when we break cylinders, when we break cores, if we've got good concrete, the strengths are generally going to

be pretty close together. They are going to be nestled close together. The further apart the individual cylinders or cores, core strength results, the more indication there is that there is inconsistent concrete.

His concern about -- the contractor's concern about interpreting the specs, black and white, we did allow the concrete to remain in place, but the specification, by definition the specification is specific. It requires certain actions to be taken if you don't meet certain requirements.

And in this case the strength was not meant, so, the specifications require we reduce the pay.

That's all I want to say at this time, Mr. Chairman.

CHAIRMAN COWGER: Okay. Mr. Blanchard, are you a professional engineer in the state of Florida?

MR. BLANCHARD: Yes, I am.

CHAIRMAN COWGER: Thank you. I just wanted to get that in the record.

Okay, DOT, do you have any further rebuttal?

MR. SEARS: Yes, we tried in our rebuttal exhibit -- Rinker took exception to two of the parts. The first objection was where we talk about trying to get a new spec on the job. That's actually what we

thought Rinker was after, that we adopt this new specification to this project.

That's where we went up to the -- the turnpike district went up to the central office and were told that the Department cannot apply a new specification retroactively after the failure. If it's a new spec that revolves around safety, making it more safe for the pedestrians or the traffic, then we do beforehand negotiate a supplemental agreement and adopt that change into our contract.

But never retroactively you can't -- the reasons that we were given for not applying retroactive specs were that you're circumventing the competitive bid process unless you get a price adjustment.

Reality is that you can't get a price adjustment after the fact and you know what the damages are, if it was a car accident or whatever kind of lawsuit. And it imposes an unacceptable precedent on the Department. The amount of liability the Department would be open to is uncalculatable, that it would be an enormous number.

The Department is unwilling to be burdened by consequences which cannot be foreseen as a result of such an action. And we felt that Rinker was not here for the $9,000 that's on the table today, that they are

here to set this precedent.

And the Department is just not willing to open up to that liability. It's uncalculatable liability. The Department would have a resistance to change our specifications in the future to better specifications if it's going to be retroactive and open up all of our history of how we have interpreted the specs in the past.

So, our main rebuttal was towards the fact that they wanted to change the specification, not that our technician was questioned in his sampling procedure.

CHAIRMAN COWGER: Are you through then?

MR. ROEBUCK: In your statement you made a comment that you went up to the turnpike headquarters to get that decision?

MR. SEARS: No, our central office, Charles Goodman.

MR. BLANCHARD: The construction engineer.

CHAIRMAN COWGER: Can I ask you a question about Exhibits 5 and 6. These are on other projects. One of them the bids were received in 1989 and another one in 1990. Tell me briefly what was the purpose of submitting those exhibits?

MR. OGLE: I supplied those because the contractor made reference to those two projects in his

claims packet. In one paragraph on a letter of April 27, 1994, the letter is from Jerry Haught to Jim Cardaman, project manager.

He's talking -- let's see, these pages aren't numbered.

MR. SEARS: About halfway through his exhibit rebuttal.

MR. OGLE: It's a letter from Rinker. If you look down at the very last paragraph. "Several instances of payment based on core results, despite Section 10.3, have occurred in the past. The most notable of which occurred on major bridge projects in Districts 2 and 7" -- which that should be 2 and 1 -- "FDOT projects nos. 12001-3509 and 72160-3506."

So, I supplied those bid blanks with those concrete specs if the contractor was going to reference those in his claim.

CHAIRMAN COWGER: Okay.

MR. HAUGHT: I stand corrected. I apologize.

CHAIRMAN COWGER: Before we go to the contractor's rebuttal, or rerebuttal, let me make sure I understood what Mr. Blanchard said in regard to what the contract provisions for this particular project that we're talking about today said.

On this project it was not acceptable to use

cores for determining pay reductions, period.

MR. BLANCHARD: That was the intent, the Department's intent.

CHAIRMAN COWGER: Don't tell me about the intent. Tell me what the contract said.

MR. BLANCHARD: The interpretation, if the interpretation were clear, we wouldn't be here, Mr. Chairman.

MR. SEARS: No, it's clear.

CHAIRMAN COWGER: Now, wait a minute. Let's talk about --

MR. BLANCHARD: It's clear to us, but not clear to the contractor.

MR. SEARS: I think he has accepted that. Have you?

MR. HAUGHT: Kind of like getting a wisdom tooth pulled, you know. It's done, you take it.

CHAIRMAN COWGER: You talked about -- Mr. Deyo said you just talked about intent. What I want to know is what does the contract say.

MR. BLANCHARD: In our opinion it says that cores should not be used for pay adjustments.

CHAIRMAN COWGER: I don't think there's any dispute about that as far as what the contract specifically says. The contract says in here under

this -- it's a little confusing, but under determination of structural adequacy, there's a sentence that says, "in this specification core strengths are used only for determination of structural adequacy, not for pay adjustments."

MR. BLANCHARD: Right.

CHAIRMAN COWGER: That's the point I'm trying to make. That's what the contract says.

MR. BLANCHARD: That's what the contract says. It's clear in our opinion.

CHAIRMAN COWGER: We will give the contractor the opportunity to rebut that if he wants to, but that sentence that I just read out of the specifications for this particular project is pretty clear.

MR. BLANCHARD: It's pretty clear to us, also. Thank you.

CHAIRMAN COWGER: Okay. I don't want to confuse it by saying anything else, but on the later specifications that were adopted in March of '94, that don't apply to this project, but on that particular project there was some changes made in the specifications that allow the use of cores provided that the deficiency exceeds 500 psi in this case?

MR. BLANCHARD: Correct.

CHAIRMAN COWGER: Okay. One other thing that

I wanted to mention quickly. I'm trying to determine where is the part of this specification that says how the penalty will be calculated or the reduction in payment?

MR. BLANCHARD: Okay, that particular piece is not -- we have it here, but I'm not sure if that's included in your submittal.

CHAIRMAN COWGER: To simplify things real quickly, in reviewing everything --

MR. DEYO: It's in the complete package.

CHAIRMAN COWGER: That's on this project?

MR. DEYO: Yes.

CHAIRMAN COWGER: That's the only copy I have.

MR. CARDAMAN: You can take that.

CHAIRMAN COWGER: I'm going to drop my question at this point. If DOT has completed now with their rebuttal, we will give the contractor the opportunity to rerebut and then if DOT has anything to say we will come back to you.

MR. CARDAMAN: I would like to go ahead and start. I would like to ask Jerry a question.

Jerry, are there any other projects that Rinker will gain from if some sort of precedence is set on this case?

MR. HAUGHT: At this time, no. The specification

has been revised. All the contracts we are currently operating under do not have this onerous penalty tied to it. The only reason we are here today is not to set a precedent but to get paid for concrete that's proven to be of high quality. That's the only reason.

MR. CARDAMAN: The reason you would not be setting precedence is because there are extenuating circumstances on this particular issue in that the Level I QC report was totally different from what the 28-day break test was.

So, precedence would not be set, and in my opinion, we don't feel that by not setting precedents that the Department will be taking any risks on any other projects that were similar to this that other contractors come out of the woodwork and go after the Department for, because this is a special exception relative to the fact that there were problems with our variance between the various tests that were taken.

With regard to the suitability of the storage site, the box was fabricated to the standard requirements. It was kept in a location that was acceptable to the project personnel from the Department, and especially the consultant. There was a consulting firm involved in this project.

It was visited on almost a daily basis when we

were into the serious bridge pours, and there was never any complaints registered by the Department and/or the consultant to the effect that it was not an acceptable facility. If it was, we certainly would have made changes.

Another question to Jerry. Jerry, was there any other projects that you have been involved in or that you know of other contractors who have been involved in where this type of a situation occurred, where there was something particular, like a big variance in the testing and the owner, DOT or otherwise, ultimately went back and gave back the reduction?

MR. HAUGHT: After reviewing the contracts that are Exhibits 4 and 5, I would not like to answer that because if I don't have the contract in front of me, I don't want to make a statement that may or may not be true.

CHAIRMAN COWGER: Gentlemen, I don't think that question is appropriate even because I don't know of any way that anyone from the contractor nor materials supply industry could know the answer to it anyway. It would just be an opinion.

MR. OGLE: I have the contracts for both of those jobs if you need them, the Edison and the Acosta.

CHAIRMAN COWGER: Also, I don't think we need to

hear any more testimony if the Board members agree about the curing facilities and all. I think we understand that issue well, and we will take that into consideration. Let's try to not talk about that any more in this hearing.

MR. CARDAMAN: I have nothing else unless Jerry has any further rebuttal to the rebuttal.

MR. HAUGHT: In the face of what the Chairman just said, I would like to -- the DOT's own acceptance test report where it notes the cylinders arrived, and that's the last I will say about that.

CHAIRMAN COWGER: We have a copy of that. I haven't heard the contractor's representatives say anything at all about what DOT said about late tests are to the contractor's advantage. Do you have any rebuttal to that?

MR. HAUGHT: Yes, I would like to address that issue. What Mr. Blanchard is -- what I read into it, and correct me if I'm reading wrong, is that by curing a cylinder in a hotter environment you enhance compressive strength.

MR. BLANCHARD: I'm not accepting your contention that the curing environment was not according to specifications. If I am -- if I did, then I would be accusing the contractor, of again, even -- not

following Department specs by not providing adequate facilities.

I am assuming he did provide adequate facilities. If he didn't, why didn't he? He should have. That's his responsibility. It's not our responsibility to be checking on that.

CHAIRMAN COWGER: Mr. Blanchard, I don't think we need to get into that anymore. I'm not sure my question was answered, though.

MR. ROEBUCK: If I might ask Jerry a question. Would you please respond to Mr. Blanchard's comments about cores and cylinders and how the national industry looks at that?

MR. HAUGHT: The Department of Transportation is the only agency that I'm aware of that feels that concrete cores should break higher than companion cylinders. The NRMCA has studies that indicates that is not the case, ACI, American Concrete Institute has studies that say this is not the case.

In general the industry, the correlation between cylinders and cores is 85 percent. The cores should break 15 percent, on the average, 15 percent lower than companion cylinders. There's been a lot of research documenting this.

This is, again, a source of frustration with me

and with the Department. It is not an industry recognized position that cores should break higher than cylinders.

MR. BLANCHARD: Mr. Chairman, may I?

CHAIRMAN COWGER: I don't think we need any more on that unless you've got some specific document to quote or something.

MR. BLANCHARD: The Department's experience is that cores generally break higher than cylinders.

CHAIRMAN COWGER: Okay. I don't think we need to hear any more on that. What else do you have?

MR. HAUGHT: That's all I have.

CHAIRMAN COWGER: Let me go back and ask something because I'm sure that it will likely come up when the Board deliberates this matter.

Looking at Exhibit 1, about halfway back there's a letter from Rinker dated April 27th to Mr. Cardaman. In that letter it says, in the first paragraph after the numbered sentences, 1, 2, 3, the third sentence in that paragraph says, "Assessing pay penalties solely on the basis of compressive strength of concrete cylinders, as referenced by Section 10.3, is arbitrary and punitive in nature."

Now, I haven't heard anything said about that. Maybe I shouldn't bring it up, but I can't help but

bring it up because I think it's going to be something that we are going to be thinking about at least.

I guess to the contractor, or to Rinker, is that still a position that you would take?

MR. HAUGHT: Yes.

CHAIRMAN COWGER: Do you wish to expand on that any more?

MR. HAUGHT: The latest specifications -- there's no question it's punitive. They are assessing a penalty and it's punitive, arbitrary.

The new specification allows you to look at cores for pay. The old specification was cleanly just arbitrary, black and white, forget what the cores say, the cylinders passed.

We still feel that is the case.

CHAIRMAN COWGER: Okay. To get into the record, too, in going through all of this information that was submitted to us, on this particular project the penalty factor turned out to be point 4671 percent of the contract unit price of $340 a cubic yard. It was applied to 37.54 cubic yards of concrete.

So, in essence -- essentially the contractor was assessed a penalty of almost half of the bid unit price for the concrete. I am not commenting yea or nay, I'm saying that's what it said.

If you calculated that same reduction in payment, using the same strength values, under the more reasonable specification, the penalty would only be a little over $2,000.

MR. DEYO: That's irrelevant. Strike that from the record.

CHAIRMAN COWGER: Well, is it?

MR. DEYO: I don't think that applies.

MR. CARDAMAN: Why is it irrelevant? It brings up the fact that this is a specification that's been around less than ten years.

MR. DEYO: The punitive dollar amount for another contract is not under this specification, is not germane to the specs that we are looking at. That should be the opinion of the Board.

CHAIRMAN COWGER: Let me, if I can, explain why I brought this out, because there's two things that have happened.

The Board will have to sit and decide about whether or not it's appropriate to apply a later specification. We will deal with that ourselves.

There's two things that happened between the time the spec that this job was let under and the more recent specification.

First, the more recent specification allows the

use of cores, and second, the penalty is substantially less. I just wanted to get that out on the table and get those two things out so that we would have them in the record. Whether it's pertinent or not, I don't know.

MR. DEYO: Those points have already been made by both sides, so it's in the record.

CHAIRMAN COWGER: Okay, DOT?

MR. SEARS: The DOT tries to be fair when we manage the contracts, but some of these things aren't under our control. We can't rewrite the spec and get the penalty based on $2,000 and adjust things like that. That's just not in our jurisdiction to do that.

I find it hard to see how this is flowing from bad cylinders to changing the spec. It's going like this and you're trying to say bad cylinders, now change the specs. That just doesn't flow for me.

CHAIRMAN COWGER: That's really two separate issues in the dispute. So, that's what it comes down to. One doesn't flow to the other. I agree with you.

Okay, does either party have anything else they would like to put into the record? Either one of the Board members have any further questions or comments?

Okay. The hearing is hereby closed. The Board will meet to deliberate on this claim in about six

weeks, and you will have our final order shortly thereafter.

(Whereupon, the hearing was concluded at 10:30 a.m.)

CERTIFICATE OF REPORTER

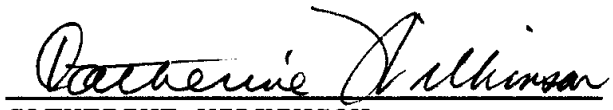
STATE OF FLORIDA)

COUNTY OF LEON)

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

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

Dated this 15th day of October, 1996.



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