

STATE ARBITRATION BOARD

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May 13, 1998

NOTICE

In the case of White Construction Company, Inc, versus the Florida Department of Transportation on Project No. 53090-3506 in Jackson County, Florida, both parties are advised that State Arbitration Board Order No. 4-98 has been properly filed on May 13, 1998.



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

S.A.B. CLERK

MAY 13 1998

FILED

Copie of Order & Transcript to:

Jimmy Lairsey, P.E., Director of Construction/FDOT

Luther M. White, Jr., Vice President/White Construction Co.

STATE ARBITRATION BOARD

ORDER NO. 4-98

RE:

Request for Arbitration by
White Construction Co., Inc.,
Job No. 53090-3506 in
Jackson 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 10:15 a.m. on Wednesday, March 11, 1998.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 4-98 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the total amount of \$39,240.00. This amount represents the liquidated damages and the additional damage recovery/user cost equal to liquidated damages as assessed by the Department of Transportation. This is in accordance with Subarticles 8-10.1 and 8-10.2 of the 1991 Edition of the Department of Transportation Standard Specifications for Road and Bridge Construction as amended by the Supplemental Specifications, thereto dated 1994.

During the hearing the Contractor requested that their claim be amended to include interest due on unpaid amounts at the rate of 10% per year.

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

1. The DOT Final Estimate for this project dated August 21, 1995 included deductions in the amount of \$19,620.00 for liquidated damages and \$19,620 for "other" which was noted as an assessment for failure to complete work within the approved contract time in accordance with Subarticle 8-10.1 This was based on our completing the work 18 calendar days late.

2. By letter of May 30, 1995, we requested an extension of allowable contract time because our DBE signing subcontractor was delayed in completing post mounted speed limit, route marker and stop signs due to a shortage of reflective sheeting encountered by their supplier of sign panels. All other contract work other than these signs and thermoplastic pavement markings was completed within the allowable contract time. If at that point, the Department had suspended charging of contract for 30 days, the curing period for the final course of asphalt pavement prior to placing thermoplastic pavement markings as required by the project specifications, the signing work would have been completed during that curing period. The Department used a technicality, the signs not being completed, to justify refusing to suspend time when all work, other than the signs and pavement markings was completed. .

3. Without these signs in place, the facility was being utilized to its fullest extent by the traveling public.

4. It is our position that the delay in completing the signing work was due to a problem encounter by the sign panel supplier in obtaining necessary reflective sheeting and we made very effort to have the DBE subcontractor complete his work. By the time we were made aware of this delay, time was too short to arrange for another supplier to furnish these sign panels. We have not been able to get documentation that the delay in delivery of the sign panels was due to an industry-wide shortage of reflective sheeting because the DBE subcontractor is bankrupt.

5.. Even though the order for the sign panel was placed several months after work began, under normal conditions, there was sufficient time to fabricate the sign panels and install the signs prior to the end of the allowable contract time.

6. The statute under which the assessment of an additional damage recovery/user cost equal to liquidated damages was authorized was repealed by the 1994 Florida Legislature.

7.. Our estimator approved the Conditional Acceptance letter showing an amount due us of \$20, 610.60 which included liquidated damages assessed in the amount of \$19,620.00 and a dispute over payment for side drain pipe in the amount of \$990.60. He overlooked that additional damage recovery/user cost equal to liquidated damages had been deducted from the Final Estimate in addition to the regular liquidated damages, because was not familiar with this concept of doubling liquidated damages.

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

1. The Contractor did not furnish documentation that the inability of the sign panel, fabricator to obtain reflective sheeting was beyond the fabricators control, such as due to an industry- wide shortage, with his request for an extension of the allowable contract time or subsequently.

2. The contract for this project was executed on November 16, 1994 and the signing subcontractor did not place an order for the sign panels until March 3, 1995, well into the work.
3. The contract provides that suspension of charging of contract time for the curing period prior to installation of thermoplastic pavement markings will not begin until all other contract work is completed.
4. The contract contained the clause providing for additional damage recovery/user cost equal to liquidated damages. We recently offered to release the amount assessed for this reason because the law authorizing such deduction was repealed in May 1994, which is prior to the date on which bids were received for this project. We would have released this amount at the time the Qualified Letter of Acceptance if the Contractor had notified of the assessment of double liquidated damages us at that time.
5. The amount reserved by the Contractor in the Qualified Letter of Acceptance for claims included the \$19,620.00 only one time. Since the claim for \$990.60 has been settled, the amount eligible for inclusion in a claim is only \$19,620.00.
6. We object to the Contractor being allowed to add an amount for interest to their claim during the hearing.

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

1. The sign panel fabricator originally committed to deliver the signs by May 1, 1995 which would have allowed ample time to install them prior to expiration of the allowable contract time. On May 23, 1995, the DBE signing subcontractor notified the Contractor the fabricator had given notice that the signs would not be completed until June 2, 1995. The Contractor's position is that there was not sufficient time remaining to arrange for the sign panels to be furnished by another fabricator.
2. On the date that bids were received for the work, the law authorizing assessing additional damage recovery/user cost equals to liquidated damages had been repealed. The Department now recognizes that "double liquidated damages" did not apply to this contract. Therefore, the \$19,620 reserved in the Qualified Letter of Acceptance for claims is for liquidated damages.
3. The Department did not take the initiative to release the "double liquidated damages" until after receiving a letter dated January 6, 1998 from the Contractor's Attorney.

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

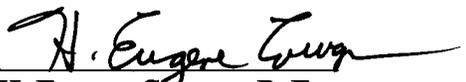
The Department of Transportation shall reimburse the Contractor in the amount of \$44,000.00 for his claim. This includes release of all liquidated damages assessed, release of the amount withheld for additional damage recovery/user costs equal to liquidated damages and interest on the amount withheld for additional damage recovery/user costs.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 181.90 for Court Reporting Costs.

S.A.B. CLERK
MAY 13 1998
FILED

Tallahassee, Florida

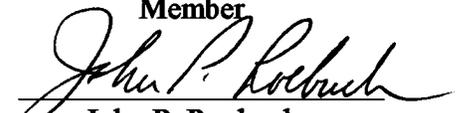
Dated: 5/13/98


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

Certified Copy:


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


Bill Deyo, P.E.
Member


John P. Roebuck
Member

5/13/98
DATE

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

APPEARING ON BEHALF OF WHITE CONSTRUCTION CO., INC:

Mr. Berney King
 Mr. Glenn Sever
 Mr. Luther White, Jr.

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steven Benak
 Mr. Steve Martin
 Mr. J. B. McCrary

* * *

I N D E X

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CERTIFICATE OF REPORTER

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P R O C E E D I N G S

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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. E. Cowger, to serve as the third member of the Board and as the Chairman.

Our terms began July 1, 1997 and expire June 30, 1999.

Will all persons who will make oral presentations during the hearing or submit any documents during the 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 being introduced as Exhibit No. 1. This is the request for arbitration from the contractor and everything that was attached to that request.

We also have as another exhibit, Exhibit 2, which is a document that was submitted to the Board and to

1 the contractor prior to the hearing entitled claims
2 statement, project 53090-3506. It's a one-page
3 document with a whole series of attachments.

4 Does either party have any other information it
5 wishes to put into the record as an exhibit? Hearing
6 nothing, we will move on.

7 (Whereupon, Exhibit Nos. 1 and 2 were received in
8 evidence.)

9 CHAIRMAN COWGER: During this hearing, the
10 parties may offer such evidence and testimony as is
11 pertinent and material to the controversy and shall
12 produce such additional evidence as the Board may deem
13 necessary to an understanding and determination of the
14 matter before it.

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

17 The parties are requested to assure that they
18 have received properly identified copies of each
19 exhibit submitted during the course of the hearing and
20 to retain these exhibits. The Board will furnish you a
21 copy of the court reporter's transcript of this
22 hearing, along with its final order, but will not
23 furnish you copies of the exhibits, since you already
24 have them.

25 The hearing will be conducted in an informal

1 manner. First the contractor's representative will
2 elaborate on their claim. Then the Department of
3 Transportation will offer rebuttal.

4 Either party may interrupt to bring out a
5 pertinent point by coming through the Chairman.
6 However, for the sake of order, please only one person
7 speak at a time.

8 Before the contractor begins his presentation,
9 I wanted to make note of one other thing. We got a
10 letter dated March 9 from White Construction Company
11 which basically said they do not intend to have an
12 attorney at this hearing. And I called Steve Barton on
13 Monday and informed him of that.

14 So, we will put this in the record as Exhibit 3,
15 but that's basically all it said, is that there would
16 not be attorneys here to represent the parties.
17 (Whereupon, Exhibit No. 3 was received in evidence.)

18 CHAIRMAN COWGER: Okay. Mr. White, would you
19 like to begin?

20 MR. WHITE: Well, it's relatively simple, but
21 Berney has more background on it and I'm just going to
22 let him run through what happened if we can.

23 MR. KING: Basically what happened, we had a DBE
24 subcontractor that failed to get the permanent signs up
25 at the end of the job. We couldn't get the time

1 suspended for curing the friction course. There was
2 about \$14,000 or \$15,000 worth of signs.

3 We requested an extension, which was denied. We
4 come back later and requested it again. They said,
5 well, if you had furnished documentation that there was
6 an industry-wide shortage of signs, which is what our
7 subcontractor said, then they would consider it.

8 Well, we got what information we could get from
9 him. In the meantime, they wanted more information.
10 They wasn't satisfied with what we got. But our
11 subcontractor had gone bankrupt and we can't get
12 nothing from him.

13 The way I feel, the public was using the facility
14 to its fullest extent other than \$14,000 worth of
15 signs. We done everything we could to get the signs
16 up. We notified him well in advance of putting them
17 up. We did every effort we could to get the signs up.

18 We couldn't get another supplier. The time was
19 so short when we found out he wasn't going to get them
20 up. It wasn't but probably a two or three-day deal to
21 put the signs up. We never got the signs up. We never
22 got any of our cure period, which was 30 days, for the
23 friction course. Had we got that, there wouldn't have
24 been any liquidated damages.

25 That's basically it.

1 MR. WHITE: The signs he couldn't put up
2 according to him was because his man hadn't made the
3 signs.

4 MR. KING: He was having a problem getting them
5 from the fabricator. Something to do with some type of
6 sheeting or something they said. They got a little old
7 vague letter from the fabricator. I admit the letter
8 was kind of vague.

9 When I went back to get some more information
10 from them when Steve sent the letter and denied it the
11 last time, they was going to get something, and in the
12 meantime they went bankrupt and we couldn't get nothing
13 from them.

14 I think it's a shame to want to charge \$40,000
15 liquidated damages for \$15,000 worth of signs.

16 CHAIRMAN COWGER: That it for the moment? You
17 all can come back later.

18 Let me ask a question about what you just said.
19 As I understand what you said, the time was never
20 suspended for the curing period?

21 MR. KING: No, sir, that's right.

22 CHAIRMAN COWGER: Do you know why that was?

23 MR. KING: Well, we didn't have the signs up, the
24 permanent signs up. Technically they're not supposed
25 to suspend it until the permanent signs is up the way

1 I understand it.

2 CHAIRMAN COWGER: Okay, and if the time had been
3 suspended during that 30-day curing period, you would
4 have incurred no liquidated damages, is that what it
5 amounts to?

6 MR. KING: That's correct.

7 CHAIRMAN COWGER: Just wanted to make sure we
8 understood the testimony. Who wants to speak for DOT
9 then?

10 MR. BENAK: I'm going to let Mr. Martin, since
11 he's more familiar with the activities on this job,
12 Mr. Martin and Mr. McCrary.

13 MR. MARTIN: What we had, of course, the
14 contractor didn't demonstrate that there was an
15 industry-wide shortage. That was the basis of the
16 denial of the time extension.

17 Also, there was not a problem -- they didn't
18 address the problem in the cover letter here which
19 showed that they didn't even bring it up. Their sub
20 didn't bring it up as an issue until May 23, which is
21 well into the contract.

22 The signs were, I think they said they had
23 ordered them for delivery for May 1. So, May 23 they
24 write back to Power South saying where are our signs.

25 There is a very lengthy time period. They were

1 ordered March 3rd, which was well into the contract,
2 also. The contract started January 5.

3 So, they didn't order their signs until March 3.
4 Then the first question that this was a problem with it
5 was May 23.

6 And in the letter, as far as the industry-wide
7 shortage, what they had said, what the fabricator had
8 said -- let's see where it is -- "We have had a few
9 problems with some reflective sheeting on a few jobs."

10 That's in his letter, in Exhibit B. That
11 certainly doesn't constitute an industry-wide shortage
12 in our opinion. So, of course, the time extension was
13 denied. But we did discuss the double liquidated
14 damages with White, and we did offer to --

15 MR. KING: When did you do that, though?

16 MR. MARTIN: This was after --

17 MR. KING: That was just in the last day or two.

18 MR. MARTIN: It wasn't brought to our attention.

19 MR. KING: You had to know it. It's been showing
20 on the estimate for years.

21 MR. MARTIN: You took a qualified acceptance.
22 According to your qualified acceptance, we offered you
23 the full amount that you qualified. You still refused
24 it. I mean it was -- what was it, \$19,000?

25 The Department has offered to reimburse

1 everything that White has qualified in its qualified
2 acceptance. That was \$19,640. You qualified \$20,610.
3 That's the most that we can do. I mean that's what you
4 had qualified, and that's what we were agreeing to do,
5 to reimburse.

6 MR. KING: I don't think -- you have double
7 assessed the liquidated damages. That's what you've
8 done.

9 CHAIRMAN COWGER: Let me find out something. The
10 qualified acceptance letter included something less
11 than a thousand dollars for some other item?

12 MR. MARTIN: Yes, sir.

13 CHAIRMAN COWGER: That's how you got to the
14 20,000. That's been resolved somehow or another. The
15 only thing we are here to talk about is the liquidated
16 damages, the \$19,000.

17 MR. MARTIN: \$19,640.

18 CHAIRMAN COWGER: Now, at one time the DOT did
19 assess what I would call double liquidated damages to
20 reflect the penalty that was set up in the law, many
21 years ago.

22 Now at some point in time, before the qualified
23 acceptance letter was signed by the contractor, had you
24 released that? Because you have released that now,
25 haven't you?

1 MR. MARTIN: No, sir.

2 MR. KING: No, sir.

3 CHAIRMAN COWGER: Now, wait a minute, the claim
4 would be \$38,000 if they hadn't --

5 MR. KING: They hadn't released it.

6 CHAIRMAN COWGER: Well, there's some confusion
7 here. Let me start over. You are holding 19,000 plus
8 now in liquidated damages? You are withholding nothing
9 for penalties, right?

10 MR. MARTIN: No, it's double liquidated damages
11 is what we're holding. That's according to the Florida
12 Statutes at that time.

13 CHAIRMAN COWGER: I thought we weren't here to
14 argue that. I thought I read in your claims
15 statement --

16 MR. DEYO: That's what he's explaining now.

17 MR. BENAK: The law was changed after this job.
18 All right. We -- before the double liquidated damages
19 got implemented, but the contract still contained the
20 clause for double liquidated damages, so it was
21 automatically -- a lot of these jobs got automatically
22 double liquidated.

23 All right. At the end of the contract, this is
24 with this estimate -- there's Exhibit F is the
25 qualified acceptance of the -- then the last page is

1 the estimate.

2 CHAIRMAN COWGER: I saw that.

3 MR. BENAK: It clearly shows on there that we
4 deducted double liquidated damages, and they submitted
5 this qualified acceptance here saying this is what you
6 owe us.

7 So, Mr. King was saying that we knew about it.
8 We didn't know anything about it. All we knew about
9 was this right here.

10 So, we are waiting for a claim to come in, the
11 first claim that comes in is, what, last month or the
12 month before, where they notified us that, hey, you all
13 have done this to us.

14 And we said, okay, we will pay you. Then that's
15 when we got into the disagreement at that point.

16 CHAIRMAN COWGER: Let me ask you this. We are
17 looking at estimate number 10, which is the final
18 estimate. Isn't that what you had in front of you just
19 a minute ago?

20 MR. BENAK: Yes, sir.

21 CHAIRMAN COWGER: We are looking at page 6. It
22 shows liquidated damages, 19,620. Then down there
23 below that, a couple of other lines down it shows
24 other, 19,620.

25 MR. BENAK: Yes, sir.

1 CHAIRMAN COWGER: So, this really reflects 38 --
2 39,000 something being deducted.

3 MR. ROEBUCK: You haven't been paid.

4 CHAIRMAN COWGER: Is that where it stands today?

5 MR. BENAK: Yes, sir.

6 MR. MARTIN: That's what we're withholding, yes.

7 CHAIRMAN COWGER: What you are saying is since
8 the qualified acceptance letter only excluded the
9 19,620 one time, that's all he can claim at this point?
10 Is that the point you are trying to make? I'm a little
11 confused there.

12 MR. KING: I think our man overlooked the other.
13 When it said other, I think when he done the qualified
14 acceptance, he didn't realize he was doing the double
15 dipping.

16 CHAIRMAN COWGER: Let me ask you all, is what
17 I said right or not?

18 MR. BENAK: What we are saying is we weren't
19 aware of the double liquidated damages. The qualified
20 acceptance didn't bring it to light. If they would
21 have brought it to light, we would have released the
22 liquidated damages.

23 CHAIRMAN COWGER: What was the date of the
24 qualified acceptance letter? It's in here somewhere,
25 isn't it?

1 MR. MARTIN: November 9.

2 CHAIRMAN COWGER: Of '95?

3 MR. MARTIN: Yes, sir.

4 CHAIRMAN COWGER: Which was after this final
5 estimate was issued?

6 MR. MARTIN: Yes, sir. They have to review that
7 estimate in detail, and that's --

8 CHAIRMAN COWGER: So, he's got that in hand when
9 he writes the qualified acceptance?

10 MR. MARTIN: Yes, sir.

11 CHAIRMAN COWGER: Let's let the contractor come
12 back and explain or rebut that, if he would like, so we
13 can get it all out on the table about that.

14 MR. KING: I don't think our man realized it when
15 he done the close-out. He's retired -- Don Foley. We
16 had never seen one with a double assessment. When he
17 sent in his acceptance letter, all he thought they had
18 was the \$19,000, which is all we wanted. But it was
19 liquidated damages. He didn't realize they had done it
20 twice.

21 CHAIRMAN COWGER: He just missed it is what you
22 are saying?

23 MR. KING: Yes. He certainly wouldn't have put
24 down on the letter for half of it. That would have
25 been kind of stupid.

1 MR. BENAK: We don't have any problem with giving
2 it back.

3 CHAIRMAN COWGER: The penalty part?

4 MR. BENAK: Right. That's what we offered
5 Luther.

6 CHAIRMAN COWGER: Isn't that what you said here
7 about the third from the last paragraph? You said in
8 response, of your claims statement, in response to the
9 double charging liquidated damages to the contractor as
10 per Statute Number 337.18, the Department has waived
11 these charges due to the statute being repealed in May
12 of 1994, which was before this job was let.

13 All right. Now, so what are we here to talk
14 about, the liquidated damages?

15 MR. BENAK: No, not the double liquidated
16 damages. The LDs, the beginning LDs.

17 CHAIRMAN COWGER: The liquidated damages versus
18 the penalty.

19 MR. DEYO: For verification on the part of the
20 Department, is the intent to proceed with releasing the
21 double part?

22 MR. BENAK: Yes, sir.

23 MR. DEYO: You intend to go through with that?

24 MR. BENAK: Yes.

25 MR. DEYO: The claim is reduced on the

1 contractor's behalf just to outstanding liquidated
2 damages in the amount of \$19,600 or whatever it is?

3 MR. BENAK: Yes, sir.

4 MR. DEYO: That's what we are here for. The
5 claim amount will be reduced. The only part in
6 contention is for liquidated damages. It's not 39,000.
7 But they have not agreed to accept that.

8 MR. KING: I feel like they owe us interest on
9 the money.

10 MR. MARTIN: But we didn't have -- you didn't ask
11 for the money until, what, last month. We weren't
12 aware of it. You said in your qualified acceptance
13 letter that you had reviewed the estimate in detail and
14 this is what was lacking. Why would we pay interest on
15 that? Because you waited two years to ask for it.

16 MR. KING: Because you had the money.

17 MR. DEYO: That's documented in the --

18 MR. WHITE: Berney, correct me if I'm wrong.
19 I think Steve called Berney last week and offered to
20 give us back the 19,000 extra if we wouldn't come to
21 arbitration.

22 MR. KING: That's right.

23 MR. MARTIN: No, that was not --

24 MR. KING: Yes, you did.

25 MR. MARTIN: I called and I said would that be

1 acceptable, we are going to release the double
2 liquidated damages, will that satisfy you.

3 The argument here is if this time extension is
4 warranted or not. If that's what we're here --

5 CHAIRMAN COWGER: If that's what we're here to
6 discuss, then let's get on with it. It is agreed, as
7 Bill said a minute ago, it is agreed you will release
8 the penalty.

9 MR. MARTIN: Yes, sir.

10 CHAIRMAN COWGER: That's all we need to know.
11 Now I heard in there --

12 MR. MARTIN: I'd like to clarify that,
13 Mr. Cowger. That was not any kind of a bargaining or
14 we will do this if you will do that.

15 MR. KING: You misled me very much so. When you
16 called me, that's what you said.

17 CHAIRMAN COWGER: Gentlemen, we are not
18 interested in hearing all that because we have the
19 issue focused now finally.

20 MR. KING: That's fine.

21 CHAIRMAN COWGER: The only thing I hear different
22 now, at some point, Steve, you need to come back, and
23 you did partially, they are now claiming interest.

24 Let me ask first, if you all are going to claim
25 interest, how much are you claiming interest on? The

1 19 or the 38?

2 MR. WHITE: The 39.

3 CHAIRMAN COWGER: 39, sorry. At what rate?

4 MR. KING: Whatever the going rate is. I think
5 it's about 10 percent.

6 MR. BENAK: Now are we adding claims as we go
7 along now? I thought we were supposed to have all the
8 claims on paper before we get here.

9 CHAIRMAN COWGER: Well, we have allowed in the
10 past interest to be introduced in a hearing as an
11 issue. It's pretty easy for you to rebut that,
12 I think, as to whether or not -- and you all need to
13 rebut it.

14 I'm just trying to get what they said out, and
15 one of your rebuttals is that it was brought in during
16 the hearing instead of prior to the hearing.

17 If you all have got anything else to say about
18 the amount of interest that ought to be paid, let us
19 know.

20 Let's go on now and get to the issue. The
21 contractor has already discussed the liquidated
22 damages.

23 Let's get back on it as to what DOT's position is
24 as to why they have the right to impose the liquidated
25 damages. You have already given us part of it, talking

1 about you didn't think that there was an industry-wide
2 shortage. Is there really anything else you want to
3 say about it?

4 MR. MARTIN: Well, you know, according to the
5 specs, you know, all items of work has to be completed
6 prior to suspending time for the cure period. In this
7 case that was not accomplished.

8 The Department's position, just seems like there
9 was some confusion in coordination of their suppliers
10 and their subcontractors.

11 There was certainly not an industry-wide
12 shortage. We didn't have any problems on any other
13 jobs as far as, you know, getting in the reflective
14 sheeting or any other problems with signs.

15 Do you have anything to add to it?

16 MR. McCRARY: One thing we need to add to that,
17 in the denial of the time extension, in Mr. Benak's
18 letter he did clearly state that he would consider
19 additional information that could be brought forth to
20 indicate that an industry-wide shortage existed, but
21 that was never brought forth.

22 MR. KING: As I said, the fellow went bankrupt.
23 We made attempts to get more. I had numerous attempts
24 with the subcontractor to get more documentation.

25 MR. WHITE: If I remember what the specs say,

1 Steve, you said all items definitely say substantially
2 complete before you can suspend time? Isn't that the
3 word in there?

4 MR. MARTIN: I think it's substantially complete.

5 MR. DEYO: All contract pay items. I believe
6 it's contract pay items.

7 MR. KING: I think that's right.

8 MR. WHITE: You can't do that until you put the
9 thermoplastic down until after your cure time.

10 MR. DEYO: That's the exception in the specs that
11 allows you suspension of time.

12 MR. BENAK: That's the -- (indicating). It's in
13 our rebuttal.

14 MR. DEYO: We have been over that several times.

15 MR. WHITE: It's been done several times. One of
16 the spec books has that word suspension in there. No
17 need arguing over that I don't suppose.

18 It does -- like Berney said, the road was fully
19 functional. Yes, we had some trouble with our
20 minority. And his reason was he couldn't get his signs
21 to put up. I believe all of these were just either
22 single or double posted, no footers, nothing of
23 consequence.

24 MR. KING: Just regular post mounted signs.

25 MR. MARTIN: I think there was 16 of them.

1 MR. DEYO: For a clarification, on the
2 industry-wide shortage, that means unavailability of
3 materials, sign sheeting or whatever to all sign
4 manufacturers.

5 Did you make an attempt to go to another
6 fabricator of interstate signs, which is in your claim
7 package?

8 MR. KING: I went back to the subcontractor and
9 told him he needed to give us documentation that proved
10 there was an industry-wide shortage. He said yeah, he
11 would do that. He never done anything I don't reckon.
12 Probably then he was going downhill.

13 MR. WHITE: He was already in trouble.

14 MR. DEYO: The subcontractor went bankrupt, but
15 the Interstate Signs, which was the fabricator --

16 MR. KING: They were the supplier. As far as
17 I know, they've never been paid for the signs.

18 MR. ROEBUCK: That's what I read in here. That
19 may be why you had a little trouble. They didn't want
20 to ship any more.

21 MR. WHITE: We bailed him out and got caught with
22 it on other projects.

23 MR. KING: Even bought the signs, then had to get
24 somebody else for him on another job after that, had to
25 get somebody else to put the signs up.

1 MR. WHITE: But if I understand it right, even if
2 you all would have said we will stop it for the 30 days
3 if you will get the signs up, in that 30 days would we
4 still have made it?

5 MR. KING: Oh, yeah.

6 MR. WHITE: It overlapped. It was charging for
7 something that if we had been granted the 30-day cure
8 period it would never have happened in the first place.
9 The signs would have been up in that same 30 days. Is
10 that right, Steve?

11 MR. MARTIN: That's right.

12 CHAIRMAN COWGER: I'm interested in knowing a
13 little something about the signs. In the DOT's exhibit
14 in Tab D, the third page is a purchase order issued by
15 Power South to buy the signs. It lists a total of 16
16 signs.

17 I'm interested in a little bit of information on
18 what kind of signs these were. What did they say on
19 them, do you recall?

20 MR. MARTIN: Most of them were stop signs,
21 weren't they?

22 MR. McCRARY: Yes.

23 MR. MARTIN: Standard single post. There are two
24 of them that are multi-post.

25 MR. KING: I imagine some of them were route

1 markers, speed limit signs. Typical rural signs out
2 there in the road.

3 CHAIRMAN COWGER: Some of them might have been
4 speed limit signs?

5 MR. MARTIN: Possibly, yes.

6 CHAIRMAN COWGER: What was up there during the
7 construction period? Were these signs replacing old
8 signs? What were these new signs to do?

9 MR. KING: There was still speed limit signs up
10 I'm pretty sure from the construction where they had
11 them up.

12 MR. MARTIN: For the 45.

13 MR. KING: I'm pretty sure they were still up.

14 CHAIRMAN COWGER: Were those legally enforceable
15 45s or were they advisory plates?

16 MR. MARTIN: They were regulatory signs. I don't
17 know if they would have been up or not. Do you know if
18 they were removed?

19 MR. McCRARY: I don't know at this point.

20 MR. MARTIN: There was no reason for them to be
21 there. We normally take them down.

22 MR. WHITE: We don't take them down until they
23 put the new ones up. I'm assuming they were there.

24 MR. KING: I'm assuming they were up.

25 MR. WHITE: I know the stop signs were.

1 MR. KING: We don't normally take them down until
2 they put the new ones up.

3 CHAIRMAN COWGER: Interstate was furnishing the
4 sign panels. Were they also furnishing the posts, do
5 you know? Never mind. Drop the question. Don't need
6 to know that. Okay. I'm through asking questions
7 I think.

8 MR. DEYO: Good.

9 CHAIRMAN COWGER: For the record Mr. Deyo said
10 good. Anybody else have anything to say?

11 MR. ROEBUCK: From the information submitted it
12 looks like the fellow ordered his signs in a timely
13 manner. He would have got them in eight weeks if he
14 had paid for them.

15 Then they sent this letter that you're trying to
16 use to sell Steve that there was some problem with the
17 thing. It probably was a money thing. They
18 nevertheless said they had a problem. Every one of the
19 Power South jobs was at least a month or two later than
20 the delivery he had requested.

21 There was more to it than having these letters,
22 but the letters indicate there was a problem that they
23 weren't too happy dealing with Power South. You are
24 about right, he still owed them money.

25 MR. KING: In the end finally later on after this

1 job was done we had a job in Marion County we actually
2 bought the signs for Power South. They had a problem
3 apparently.

4 We didn't know it at the time, but when we got to
5 the other job down there, that's when, of course,
6 Steve Martin and Steve Benak well know about Power
7 South. They had problems all over the district
8 I think, also.

9 MR. MARTIN: We did.

10 MR. ROEBUCK: Just looks like his problems caused
11 the delay.

12 MR. WHITE: They jumped into something that they
13 didn't know what they were doing, is what it boils down
14 to. About like me trying to go out there if I hadn't
15 never built a road before and start tomorrow. They got
16 in trouble pretty quick.

17 In the meantime to satisfy minority requirements,
18 us and other contractors were using them.

19 MR. DEYO: Did you make attempt to find another
20 sub to install them? How did you get them installed?

21 MR. KING: Well, we didn't have the signs. The
22 time period had done got critical.

23 MR. DEYO: Once you learned, though -- in your
24 package, you don't indicate the steps taken once you
25 found out that there was a problem with Power South.

1 MR. KING: It had done got there then that the
2 time was in that two or three-week period you knew you
3 wasn't going to find somebody to get the signs
4 fabricated and put it in two or three weeks. You had
5 to just tough it out.

6 MR. WHITE: There again, what Berney was being
7 told, we were relying on the 30-day cure period to bail
8 Power South out. You were down there in a month being
9 through with the job. We just wouldn't have had time
10 to get somebody else to take care of it I don't think
11 in time.

12 How many days did it actually run over, 25?

13 MR. KING: Twenty-one days -- 19 or 21.

14 MR. MARTIN: Eighteen.

15 MR. DEYO: Eighteen days over.

16 MR. WHITE: If he had got through anyway in what
17 should have been the cure period, the Department can do
18 whatever they want to. Looks to me like they could
19 have gone back and give the 30 day, didn't even have to
20 have the 30 days -- whatever it took to bail him out.

21 CHAIRMAN COWGER: As I understand the signs were
22 ultimately installed during what would have been the
23 cure period, but you didn't suspend during that period.
24 From the time the cure period was over the signs were
25 all up?

1 MR. MARTIN: No, I think --

2 MR. DEYO: No, you've got a time breakdown.

3 MR. MARTIN: The signs were installed after the
4 thermoplastic or during -- when the thermoplastic was
5 being --

6 MR. McCRARY: About concurrent with the
7 thermoplastic as best I remember.

8 MR. KING: But had they got the cure period, they
9 would have been.

10 CHAIRMAN COWGER: If you had got the cure
11 period -- I understand now. I misunderstood. I got it
12 now.

13 Quick question, on the DOT's notice of
14 completion, you've got a date of conditional acceptance
15 and then a date work completed. Is the conditional
16 acceptance the date that actually all the thermoplastic
17 was completed and then there's, what, a --

18 MR. MARTIN: Forty-five day RPM adhesion period.

19 CHAIRMAN COWGER: It only shows 30 in here.

20 MR. MARTIN: Isn't it 45 days?

21 MR. BENAK: It used to be 45, they lowered it to
22 30.

23 CHAIRMAN COWGER: The difference in those two
24 dates is -- what did you call it?

25 MR. MARTIN: Reflective pavement marking,

1 adhesion period for the glue.

2 CHAIRMAN COWGER: In other words, you don't
3 accept those for 30 days to make sure they are
4 sticking? Is that basically what it amounts to?

5 MR. MARTIN: Yes, sir.

6 CHAIRMAN COWGER: Okay. Does either party have
7 anything else they need to say?

8 MR. BENAK: You wanted us to rebut the interest
9 on the verbal claim.

10 CHAIRMAN COWGER: Yes.

11 MR. BENAK: I think we have already indicated
12 that what we had, we had a qualified acceptance that
13 indicated an amount of money on that. By the Florida
14 Statutes, the contractor is limited to that amount of
15 claim. Really, regardless.

16 I don't even know when -- there was an attorney
17 letter that came over to our attorney in the district,
18 and I forget what month that was. Was it last month?

19 CHAIRMAN COWGER: January 6th. I've got the
20 letter here, too.

21 MR. BENAK: It came here, got to me. That's when
22 we -- after that we made the offer to release those
23 liquidated damages at that point.

24 MR. MARTIN: The penalty portion.

25 MR. KING: Why didn't you all just send the check

1 on? We would have took it.

2 MR. WHITE: You knew you were violating the law.

3 MR. BENAK: Didn't know it until right then. You
4 know, that's the truth. If we had known about it, if
5 they had told us right at the end of the job, we would
6 have released it at that point. It was automatically
7 taken out of the amount.

8 CHAIRMAN COWGER: But you are still holding the
9 39,000 something?

10 MR. BENAK: Yes, sir.

11 CHAIRMAN COWGER: You are willing to release the
12 19?

13 MR. ROEBUCK: He is going to do that.

14 CHAIRMAN COWGER: But you haven't done it yet.

15 MR. BENAK: As far as -- we didn't know there was
16 a claim outstanding until, what, two months ago. Now
17 they're trying to back up the claim from that point to
18 whenever the -- I guess the job was over.

19 MR. KING: I might point out one thing. We
20 did -- we wrote Mr. Benak two more letters, one not too
21 awful long ago and another one six months prior to
22 that. We never got one bit of response from Mr. Benak
23 regarding the time extension that we kept asking him
24 about. He didn't respond to them.

25 MR. BENAK: On this job?

1 MR. KING: On this job. I've got copies of them
2 if you want to see them.

3 MR. MARTIN: We addressed the time two separate
4 times.

5 MR. KING: We wrote you a letter a year and
6 something later and six months later and you never
7 addressed either one of them.

8 MR. MARTIN: You sent us a letter six months ago
9 and then one just a few weeks ago for the time?

10 MR. KING: Yes, and you never addressed either
11 one of them.

12 MR. WHITE: More than a few weeks ago.

13 MR. DEYO: That's not in our package.

14 CHAIRMAN COWGER: It isn't? You've looked?

15 MR. DEYO: Yes.

16 MR. KING: I've got a copy of it right here if
17 you want to see it.

18 MR. MARTIN: We responded to it two different
19 times, Berney.

20 MR. KING: I know you did, but you didn't respond
21 the last two times. One time was a year and something
22 after is what I'm saying.

23 CHAIRMAN COWGER: The last letter I see in the
24 correspondence package that was submitted with your
25 claim is June 12, 1997.

1 MR. KING: Yes, we never got a response to that
2 one.

3 CHAIRMAN COWGER: That's the one you are claiming
4 you never got a response to.

5 MR. MARTIN: That's what we had in the letter,
6 too. We never could find any of that.

7 CHAIRMAN COWGER: Was there a letter later than
8 that?

9 MR. KING: There was two letters sent, one about
10 June and then there was one about January something.

11 CHAIRMAN COWGER: I have one here, also, in --
12 got one January of '96 and then June of '97.

13 MR. ROEBUCK: That's the two, yes.

14 CHAIRMAN COWGER: Your contention is you never
15 got a response to either one of those?

16 MR. KING: Got one for the first two times we
17 asked, but other than that, we never got any more. I'm
18 just pointing that out. There's really nothing you can
19 do about it.

20 CHAIRMAN COWGER: Okay.

21 MR. WHITE: Looks to me like -- Don Foley has
22 done a lot of these qualified acceptances and the
23 Department sneaks a statute in there on him and he
24 overlooks it because it was on there twice.

25 How is he supposed to know what other is when

1 it's the same amount as up at the top.

2 And Steve has had our money all these years using
3 it. Why doesn't he owe us interest on that, too? The
4 specs is right there. You don't deny you had the
5 money.

6 MR. MARTIN: You told us you reviewed the
7 estimate in detail.

8 MR. WHITE: We made a mistake.

9 MR. MARTIN: We are paying interest on your
10 mistake?

11 MR. WHITE: You had our money.

12 CHAIRMAN COWGER: Gentlemen, let's not argue
13 about that. Is there anything else? As I like to say,
14 we're down to arguing now. Anything else?

15 Mr. Roebuck, Mr. Deyo?

16 MR. ROEBUCK: No, sir.

17 MR. DEYO: No, sir.

18 CHAIRMAN COWGER: We are getting ready to close.
19 This hearing is hereby closed. The Board will meet to
20 deliberate on this claim in about six weeks, and you
21 will have our final order shortly thereafter.

22 (Whereupon, the hearing was concluded at 10:50 a.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA)
COUNTY OF LEON)

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

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

Dated this 19th day of March, 1998.



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