

STATE ARBITRATION BOARD

1022 LOTHIAN DRIVE

TALLAHASSEE, FL 32312-2837

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NOTICE

In the case of Cone Constructors, Inc. versus the Florida Department of Transportation on Project No. 14620-3610 in Pasco County, Florida, both parties are advised that State Arbitration Board Order No. 7-98 as been properly filed on September 14, 1998.



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

S.A.B. CLERK

SEP 14 1998

FILED

Copies of Order & Transcript to:

Greg Xanders, P.E., Director of Construction/FDOT

Mr. Jim Lundy, Project Administrator/Cone Constructors, Inc.

STATE ARBITRATION BOARD

ORDER NO. 7-98

RE:

Request for Arbitration by
Cone Constructors, Inc. on
Job No. 14620-3610 Main Street in New Port Richey
Pasco 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 1:00 p.m. on Friday, July 31, 1998.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 7-98 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the total amount of \$35,447.41 plus release of liquidated damages of \$76,340.00 assessed by the Department of Transportation because the project was not completed within the original contract time as extended.

The Contractor presented the following information in support of each part of their claim:

Conflict of Proposed GTE Manhole with Existing GTE Buried Conduit \$35,47741

1. During construction, our subcontractor encountered a conflict between a proposed General Telephone Company (GTE) Manhole No. 76 and nine existing GTA underground cables that were in conduit. These cables were live and had to be kept in service until the new cable system was in place. Due to the close proximity of Manhole No. 76 to an existing GTE Manhole to the west and an existing water main which prevented relocation of Manhole No. 76 further to the east, the existing conduit could not be relocated sufficiently to clear setting of the new precast manhole unit.

2. We met with DOT and GTE representatives the next day in an attempt to resolve this problem. GTE refused to propose a solution. It was proposed by DOT that the precast unit be set in a location toward the centerline clear of the underground conduits and then pulled into its final location under the conduits. This proved not to be feasible because of an existing power pole along the right of line and the need to place equipment on adjacent private property in order to pull the unit into place. We submitted a price quotation to change the manhole to a cast in place unit which covered the cost of the delay to make this change and an additional 35 Calendar Days contract time. Later we submitted a price quotation for our subcontractor to break up the conduit to provide the flexibility needed to relocate the existing cables. Both of these quotations were refused by DOT. The ultimate solution was that GTE broke up the existing conduit and our subcontractor could then relocate the existing cables. Seventeen (17) days elapsed before work could resume at this location.

3. The 17 day delay caused our firm and our subcontractor to incur additional costs due to disruption of the planned sequence of work and increased the time required to complete the project. Lack of cooperation by GTE once the problem surfaced increased the delay. GTE took the position that the manhole could have been constructed under the existing conduits using normal construction methods. We disagree.

4. Subarticle 7-11.6.1 states that DOT will make the necessary arrangements with utility owners for removal or adjustment of utilities where such work is essential to the performance of the required construction, provided that normal construction procedures are used by the Contractor. Article 5 of the DOT/GTE Joint Project Agreement provides that the utility shall cooperate with the DOT's Contractor so as to not delay the work.

Liquidated Damages 32 Calendar Days @ \$1924.00 per day = \$76,340.00

Manhole Conflict with GTE Conduit 17 C.D.

Addressed above.

Incorrect Fabrication of Traffic Signal Pole 12 C. D.

1. The manufacturer of the pole for a mast arm traffic signal incorrectly fabricated this unit, causing the mast arm to not be in the correct position relative to the road. This resulted in a delay to completion of the traffic signal.

2. This delay occurred during the period between completion of the asphalt surface course and installation of permanent pavement markings. DOT refused to suspend charging of contract time during this "cure period" until after the traffic signal was completed, because the specifications required that this suspension does not apply until all other work is complete.

3. DOT should grant an extension of contract time in the amount of 12 Calendar Days, because, since this delay was caused by a third level party, it was beyond the control of our specialty subcontractor.

Installation of Skimmer 3 C.D.

1. DOT acceptance of this project was delayed 3 Calendar Days after all other work had been satisfactorily completed awaiting installation of an oil skimmer in Structure S-3D.
2. We did not install the skimmer at completion of the structure because of the potential for vandalism. We overlooked installing it as the project neared completion.
3. Full use of the completed project was not impacted by lack of the oil skimmer.

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

Conflict of Proposed GTE Manhole with Existing GTE Buried Conduit \$35,47741

1. Construction of the new GTE underground system was included in the highway construction contract. The pay items Cable (Relocate) and Conduit (Remove) were included. The utility specifications take precedence over Subarticle 7-11.6.1 of the Standard Specifications in this instance.
2. The Contractor chose not to use the item Utility Locate (Underground) prior to beginning work on the manhole in order to identify the conflicts in advance. The cables in question were shown in the plans provided to the Contractor.
3. Acceptance of the Contractor's proposal to construct a cast-in-place manhole was not in the best interest of the Department. The additional cost and time proposed by the Contractor was substantial and there was a possibility that the existing GTE conduits would have been in conflict with the construction operations for a cast-in-place manhole, because a trench box probably would have been used. The plans provided for a cast-in-place type GTE Manhole at another location, but this was because existing cables passing through the manhole were to remain.
4. A substantial portion of the delay was caused by the Contractor pursuing alternate methods to construct the manhole. Once the decision was made that GTE would break up the existing conduit for a distance sufficient to gain enough slack in the cables so that the Subcontractor could relocate it out of the way of construction operations, work on the manhole promptly resumed.

5. The idle equipment and various types of fixed overhead costs claimed are unrealistic.

Liquidated Damages

Manhole Conflict with GTE Conduit

Addressed above.

Incorrect Fabrication of Traffic Signal Pole

1. Subarticle 8-7.3.2 of the Standard Specifications states that a time extension due to delay in deliver of custom manufactured equipment will not be considered unless the Contractor furnishes documentation that the delay was caused by factors over which the manufacturer could not be reasonably expected to exercise control. This is not the case here. Correspondence documents that the manufacturer knew of the error ten day before it was discovered in the field. Prompt action by the manufacturer would have reduced the delay period.

2. The specifications covering suspension of time during the curing period provide that all other work must be completed prior to beginning this suspension.

Installation of Skimmer

We gave written notice to the Contractor on December 3, 1996 that the oil skimmer had not been installed. This was sufficient notice to allow the Contractor to install the skimmer prior to December 16, 1996, the date all other work was completed. Thus, time charges were continued until the skimmer was in place, December 19, 1996.

During the hearing DOT pointed out that their Final Estimates Office added four chargeable days, because the contract time, as adjusted, had expired at the time a suspension was authorized for the Thanksgiving 1996 Holiday. DOT agreed to remove these days from those charged.

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

Conflict of Proposed GTE Manhole with Existing GTE Buried Conduit \$35,47741

1. The plan items for Cable (Remove) Conduit (Remove) covered removal of cable and conduit after the cable had been deactivated.

2. Several options were considered by DOT and GTE as to how to resolve the conflict problem,

but the ultimate solution was apparent to all from the beginning.

3. It was not documented that operations other than those of the Utility Subcontractor were impacted by this delay.

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 for his claim as follows:

Conflict of Proposed GTE Manhole with Existing GTE Buried Conduit

\$ 10,000.00 (Includes the \$3,371.84 claimed by the utility subcontractor)

Liquidated Damages

Reduce the total number of Calendar Days of Liquidated Damages charged to eight (8).

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 294.40 for Court Reporting Costs.

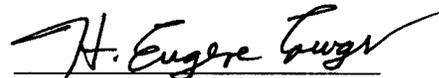
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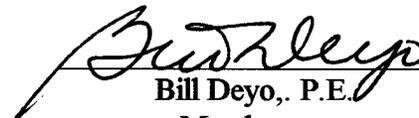
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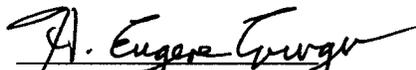
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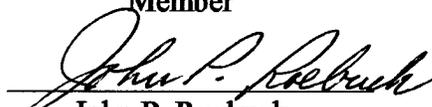
Dated: 9/14/98


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

14 September 1998
DATE

STATE ARBITRATION BOARD

1022 Lothian Drive
Tallahassee, Florida 32312-2837
Phone: 850/385-2410 FAX: 850/385-2410
E-Mail: hecowger@aol.com

MEMORANDUM

DATE: June 2, 1998

TO: Jimmy Lairscey, P.E., Director of Construction/FDOT

FROM: H. Eugene Cowger, P. E., Chairman

RE: REQUEST FOR ARBITRATION OF A CLAIM ON:

STATE PROJECT NO.: 14620-3306

PROJECT LOCATION: Main Street from VanBuren to East of
Congress Street (Nebraska Avenue)
New Port Richey, Florida (Pasco County)

CONTRACTOR: Cone Constructors, Inc.
6735 S. Lois Av (PO Box 22869)
Tampa, FL 33622-2869

The State Arbitration Board has received the attached Request for Arbitration of a Claim from the Contractor for the above subject project.

A hearing has been scheduled on Friday, July 31, 1998. You will receive a Notice of Hearing stating the exact time set for this hearing no later than twenty one (21) days prior to the hearing date.

Note:

In accordance with the procedures adopted by the State Arbitration Board, the Department of Transportation shall submit its primary rebuttal exhibit, including a summary of their position, directly to the Contractor and to the Board so that it is received not less than ten (10) days prior to the date of the hearing. Verbal testimony and simple exhibits may be submitted during the hearing. All exhibits submitted during the hearing shall be in quadruplicate, except a single copy of contract plans, specifications, supplemental specifications and special provisions and pay quantity calculations will be permitted.

SEND REBUTTAL PACKAGES TO CHAIRMAN COWGER; MR. JOHN P. ROEBUCK AT 2922 HAWTHORN RD, TAMPA, FL 33611 & MR. BILL DEYO, P.E., FDOT, 605 SUWANNEE ST, TALLAHASSEE, FL 32399-0450 MAIL STATION NO. 57.

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

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

APPEARING ON BEHALF OF CONE CONSTRUCTORS, INC.:

Mr. Jim Lundy
Mr. Eric Sims

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. John Brandvik
Mr. Robert Grimsley

* * *

I N D E X

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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 Arbitration Board established in accordance with Section 337.185 of the Florida Statutes.

Mr. Bill Deyo was appointed as 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 Chairman.

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

Will all person 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. This is the original contractor's request for arbitration, along with a package of information that was attached thereto.

We also have a rebuttal package here that all parties have in their possession, including the Board

1 members, dated July -- excuse me, a rebuttal package
2 prepared by DOT which we will identify as Exhibit 2.

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

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

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

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

16 The parties are requested to be sure that you
17 have properly identified copies of each exhibit because
18 when we send you the final order here in a few weeks,
19 we will not send you the exhibits. Everybody has the
20 exhibits already.

21 The hearing will be conducted in an informal
22 manner. First the contractor's representative will
23 elaborate on their claim, and then the Department of
24 Transportation will offer rebuttal.

25 Either party may interrupt to bring out a

1 pertinent point by coming through the Chairman.
2 However, for the sake of order, I must instruct that
3 only one person speak at a time.

4 Are we ready then for the contractor to begin his
5 presentation -- if you will hold off one second.

6 (Brief pause)

7 CHAIRMAN COWGER: An opening statement would
8 certainly be worthwhile. Since this is not a really
9 large claim, if we could just kind of keep on the
10 point, keep this thing moving to where we can get
11 through as quickly as we can.

12 I don't want to restrict anybody from saying
13 whatever needs to be said to get your point across, but
14 let's try to stay away from anything superfluous if we
15 can.

16 You all are familiar with this. As I understand,
17 the project was a job that was let by DOT, but the
18 plans were prepared by the City of New Port Richey or
19 someone under their direction, and there was a joint
20 agreement in the contract providing for certain utility
21 construction and relocation work to be done by the
22 contractor. Is that all correct?

23 MR. SIMS: Correct.

24 MR. ROEBUCK: Were the job specs the current DOT
25 specs or were they prepared by the County?

1 MR. GRIMSLEY: The job specs?

2 MR. ROEBUCK: Were they DOT? '91, '94?

3 MR. GRIMSLEY: They were DOT, '94.

4 CHAIRMAN COWGER: It was supplemented by some
5 technical specifications for the GTE work.

6 MR. SIMS: Okay. First I would like to thank the
7 Board for hearing our issues, and I would also like to
8 thank the DOT for being here today.

9 If you could, it might help to turn to Tab 3 of
10 our package. Basically what you see there is a
11 breakdown of the time, the dollars associated with our
12 request for arbitration.

13 The first one is manhole number 76 conflict with
14 GTE conduits. The time requested is 17 days through
15 the associated liquidated damages and the additional
16 cost of \$35,477.41.

17 The second issue is the incorrect traffic
18 signalization pole base. We requested 12 days of time,
19 no additional costs.

20 The skimmer correction of structure S-3D, time
21 requested was three days, again, no additional costs.

22 Our total we are requesting is 32 days of
23 additional time and \$35,477.41. With those 32 days, we
24 are looking to get our liquidated damages adjusted on
25 final estimate.

1 I will give you a quick introduction to the three
2 items.

3 CHAIRMAN COWGER: Before you get into this,
4 I think it would be very beneficial to all the parties
5 if we deal with -- there's really three issues you are
6 bringing up.

7 MR. SIMS: I will do that.

8 MR. ROEBUCK: Let you do part one, then let them
9 respond to it, and we can keep it all together.

10 CHAIRMAN COWGER: Because they are pretty
11 distinct.

12 MR. SIMS: The first one I would like to start
13 with, since it's the smallest issue, is the skimmer
14 S-3D. And, first of all, we are guilty, we left the
15 skimmer out of the structure.

16 Here's what happened. It was to be installed in
17 phase one of the project. Skimmers are notorious for
18 disappearing off the job site. They get stolen or
19 damaged.

20 The installation of the skimmer was an oversight
21 by both the DOT and Cone. The key here is that the
22 Department had functional use of the project on
23 December 15th, traffic was flowing through the project
24 at that time.

25 On the tentative final estimate, the FDOT was not

1 going to charge Cone for the liquidated damages on that
2 skimmer. However, on final estimate they charged us an
3 additional four days of liquidated damages.

4 The long and short of it is that Cone should not
5 have been charged with liquidated damages for such a
6 minor deficiency.

7 MR. LUNDY: It really was a minor incident. The
8 Department wasn't going to do it, then here after the
9 fact they did charge us liquidated damages.

10 They did have functional use of the property.
11 The public was driving up and down the highway. It was
12 nothing wrong. It was an oversight. Basically we are
13 guilty of it and we are asking for your mercy. That's
14 basically it.

15 MR. BRANDVIK: The four days we are talking about
16 are really not associated with the skimmer. The four
17 days are from an estimate processing where you had time
18 suspended over the Thanksgiving holiday.

19 And Estimate's position that based on their
20 interpretation of the specification that time cannot be
21 suspended if there is no more time on the contract.

22 The skimmer work was completed on the 19th of
23 December, as I understand.

24 MR. GRIMSLEY: Skimmer was done on the 19th.

25 MR. BRANDVIK: The last day of work on the job

1 was the 19th. The discrepancy is that based on our
2 field staff's analysis, that was the 301st chargeable
3 contract day.

4 When Estimates reviewed the contract, they found
5 that time was suspended for your operations over the
6 Thanksgiving holiday, when you were already out of
7 contract time.

8 MR. LUNDY: Let me get this straight if I'm
9 hearing this.

10 CHAIRMAN COWGER: Let me go ahead and do what you
11 are going to do to see if I can understand this thing,
12 to try to expedite this.

13 As I understand it, the contractor's position is
14 that the resident engineer said that the work was
15 completed on December 19th.

16 MR. BRANDVIK: That's correct.

17 CHAIRMAN COWGER: But you all continued to charge
18 days until the skimmer was installed.

19 MR. BRANDVIK: That's not correct.

20 MR. ROEBUCK: No.

21 MR. BRANDVIK: Time stopped on December 19th.
22 The skimmer was installed on December 19th.

23 The problem is that upon a review of the time
24 file, which our estimates department does, they
25 determined that the resident office had erred in

1 granting a time suspension for the Thanksgiving holiday
2 because the contractor was out of contract time.

3 CHAIRMAN COWGER: We understand that. Now,
4 I guess I better let you come back.

5 MR. LUNDY: All I want is to kind of clarify
6 exactly what Mr. Brandvik is saying. If by some
7 instance we are due time on item one and item two, then
8 this will really become a nonissue. You can reapply
9 the Thanksgiving holiday period and this will go away.

10 MR. BRANDVIK: Yes.

11 MR. LUNDY: So, if we get time in one or two to
12 push us past this holiday period, then item three will
13 go away.

14 MR. BRANDVIK: That's correct.

15 MR. GRIMSLEY: It would have to be like 20 days
16 or something like that.

17 MR. BRANDVIK: I will tell you this because quite
18 frankly this particular project was never brought to
19 me. In essence this claim was handled by Mike Irwin
20 and he has written the last piece of correspondence to
21 Cone denying it in its entirety.

22 My position specifically on that issue, since you
23 started there is I will give you the four days. I will
24 give you a time extension for four days. That's what
25 it's going to require.

1 MR. ROEBUCK: That solves that problem.

2 CHAIRMAN COWGER: Wait a minute, right now?

3 MR. BRANDVIK: Right now. Quite frankly, the
4 Board only needs to rule on issue one and issue two.

5 MR. ROEBUCK: Good.

6 MR. LUNDY: Thank you.

7 CHAIRMAN COWGER: We really appreciate that.

8 MR. BRANDVIK: It's not going to be that easy
9 from this point forward.

10 MR. ROEBUCK: Four days, okay.

11 CHAIRMAN COWGER: Now we will go to which part
12 now?

13 MR. SIMS: I want to go to the traffic
14 signalization pole.

15 During the course of the work, the traffic
16 signalization pole was found to have an incorrectly
17 manufactured base. The remanufacturing of the new pole
18 caused the delay to the project completion schedule.

19 Cone will demonstrate that the delay caused by
20 the incorrectly manufactured traffic signalization pole
21 was beyond the control of the contractor and the
22 specialty subcontractor.

23 The Department is required to grant time
24 extensions for delays that are beyond the control of
25 the contractor, therefore, Cone is due an additional 12

1 contract days due to the delay.

2 The pole -- the replacement pole was installed on
3 November 23, 1996, and subsequently thereafter the
4 signalization poles -- lights were in effect.

5 Both Cone and the Department agree that the
6 incorrectly manufactured pole delayed the project a
7 minimum of 12 days, and in the FDOT's February 26th
8 letter they state this.

9 You can see that it says, "During the time the
10 project remained closed to traffic due to incorrectly
11 manufactured mast arm pole, this caused the traveling
12 public 12 days of loss of ability of use to the
13 completed roadway."

14 There's no argument over the amount of time.
15 Your argument is entitlement to a time extension.
16 Here is why Cone is due a time extension. This delay
17 was beyond the control of the contractor, the specialty
18 subcontractor and the distributor of the pole.

19 It was the manufacturer, Valmont, who made the
20 mistake, three tiers down.

21 Article 8-7.3.2, contract time extension, states
22 that, "The Department may grant an extension of
23 contract time when a controlling item of work is
24 delayed by factors not reasonably anticipated or
25 foreseeable at the time of bid."

1 This is such a factor. Neither the contractor
2 nor the subcontractor could have reasonably anticipated
3 this delay.

4 The February 26th letter from the Department
5 states that this item was critical and it did delay the
6 project.

7 Further, this article states in general, the
8 contractor shall furnish substantiating letters from a
9 representative number of manufacturers of such
10 materials or equipment clearly confirming that the
11 delay was in no way the fault of the contractor.

12 The manufacturer sent two substantiating
13 letters stating that the fault was theirs, not the
14 contractor's.

15 Further, the request for time extension due to
16 delay in delivery of custom manufactured equipment such
17 as traffic signalization equipment, highway lighting
18 equipment, et cetera, will not be considered unless the
19 contractor furnishes documentation that is ordered for
20 such equipment and was placed in a timely manner.

21 Cone furnished this proper documentation.

22 In addition to the original pole -- in addition,
23 the pole was received over a month prior to finding the
24 problem. This clearly demonstrates that both the
25 contractor and subcontractor placed the order in a

1 timely manner.

2 In addition, the subcontractor for the
3 signalization pole -- the subcontract was issued on
4 January 16th of '96, 11 months before this conflict,
5 and the subcontractor attended the preconstruction
6 conference.

7 The Department should grant the contractor a time
8 extension based on the following facts: the Department
9 recognizes that the contractor cannot control the
10 manufacturing or delivery of processes of certain
11 critical specialty items. The signalization pole was
12 critical to the project completion schedule.

13 The incorrect manufacturing of the signalization
14 pole was beyond the control of the contractor. The
15 contractor did order and receive the original material
16 in a timely manner.

17 Based on these facts and in accordance with the
18 specifications, a 12-day time extension is justified
19 and should be granted to Cone Constructors.

20 CHAIRMAN COWGER: Are you through with part two
21 then?

22 MR. SIMS: Yes, sir.

23 CHAIRMAN COWGER: Go ahead.

24 MR. GRIMSLEY: The DOT doesn't refute the 12
25 days. The job was delayed 12 days by the incorrect

1 manufacture of the signal pole.

2 Section 8-7 of the Standard Specifications states
3 the Department may grant a time extension if the delay
4 of a controlling work item is beyond the control of the
5 contractor or the supplier and the delay was caused by
6 factors over which the manufacturer could not be
7 reasonably expected to exercise control.

8 Valmont's letter states that proper measurements
9 were not taken when mounting the simplex to the pole.
10 It's the Department's position that reasonable control
11 can be taken when taking measurements.

12 Valmont's letter dated December 11th also states
13 that they had prior knowledge of the incorrectly
14 manufactured signal pole ten days prior to the
15 installation date.

16 If you look on their letter, it states that they
17 were notified on October 19th. The problem wasn't
18 discovered in the field until the 28th of October.

19 Valmont did nothing to recall the pole. Thus, if
20 Valmont had recalled the pole, it would have saved ten
21 days of remanufacturing time, and we probably wouldn't
22 be here on this issue right now.

23 Section 7-10.6 of the Standard Specifications
24 states that, "Placing of permanent pavement markers on
25 all final asphalt concrete surfaces shall not be

1 accomplished prior to 30 days after the placement of
2 the final surface.

3 "The charging of contract time will be suspended
4 during the 30-day period if all other work, including
5 final dressing and clean-up, has been completed."

6 This caused the -- the incorrectly manufactured
7 signal pole caused us to charge time during the asphalt
8 cure period because this work had not been completed.

9 The Department was able to suspend two days to
10 November 23rd and 24th, the remainder of the cure
11 period after the pole was installed.

12 So, it's the Department's position that if proper
13 measurements were taken during the -- by the
14 manufacturer, the pole would not have been manufactured
15 incorrectly.

16 MR. BRANDVIK: More importantly, let me add this.
17 Typically in this scenario, recognizing that as the
18 prime contractor you only have so much control over
19 your subs, and they only have so much control over
20 their suppliers, the manufacturers, I would in turn say
21 that I would not expect that Cone Constructors should
22 be responsible for these liquidated damages.

23 However, the sub at a minimum I think, who is
24 there dealing directly with the supplier, and they
25 would turn around to the supplier as far as I'm

1 concerned.

2 Well, we've got a letter, if you look in the
3 rebuttal package, that's under Tab 2, maybe midway
4 back, it's a letter from MPG and Company dated
5 November 6, 1997.

6 CHAIRMAN COWGER: Which tab was that?

7 MR. BRANDVIK: Under Tab 2. It's --

8 CHAIRMAN COWGER: Dated January 16th?

9 MR. BRANDVIK: No, 11-6-97. You've got to go
10 back, I thought it was right near --

11 CHAIRMAN COWGER: There it is, it's almost at the
12 back. About five or six pages from the back.

13 MR. BRANDVIK: If you read the first sentence in
14 what is actually the third paragraph, it says quite
15 simply, "Throughout my involvement in this matter, we
16 have acknowledged our responsibility for the 12 days of
17 liquidated damages as per the FDOT."

18 So, the subcontractor, MPG is accepting that they
19 will eat the cost for those 12 days of liquidated
20 damages, so Cone Constructors is not going to be held
21 accountable for those monies. You have it right here,
22 I will eat those costs.

23 The fact that this was a third-tier manufacturer
24 or supplier I don't believe relieves someone from the
25 responsibility. Certainly it is not the Department's

1 fault that the manufacturer didn't make the proper
2 measurements.

3 Here you have your sub relieving you of the
4 responsibility of carrying that financial burden. I'm
5 quite frankly surprised this is even an issue.

6 MR. LUNDY: Well, this gentleman evidently wrote
7 you the letter. We were in the process of holding
8 money until we got this issue settled. And --

9 MR. BRANDVIK: His letter to you, if I -- he's
10 also got a letter in here to Cone Constructors. You go
11 two pages further towards the front. It's addressed to
12 Eric from Gary Green of MPG stating that Cone
13 Constructors was withholding 26 days of liquidated
14 damages and that they recognized that they were
15 responsible for 12 and they wanted the other 14
16 released.

17 MR. LUNDY: Again, this was waiting until we got
18 this issue settled before we settled with our
19 subcontractor because there's many times -- a prime
20 example of it is when a sub is doing the work, the DOT
21 pays us for it on the estimate.

22 We turn around and pay our subcontractor. The
23 DOT takes the money back and we have no recourse of
24 getting our money back from our subcontractor.

25 This happens time and time again. We weren't

1 going to settle this issue until we got resolution
2 with the Department.

3 The fact of it is that this specification gives
4 relief to the contractor for errors in this case.
5 That's all we're asking for is relief for this 12 days
6 of liquidated damages that you assessed against us in
7 accordance with the contract specifications.

8 MR. SIMS: We feel that MPG -- we don't want to
9 hold MPG's money, we don't want to hurt MPG. The only
10 reason we are holding their money is because the true
11 culprit, which is Valmont, would not fess up.

12 As a matter of fact, Valmont's distributor of the
13 pole, Wesco, sued Cone in court. We went to mediation.
14 We've actually paid Wesco for the poles because they
15 were in a lawsuit with us and we -- like I say, we felt
16 that was in our best interest to not try to keep
17 fighting Valmont. They refused to take any part of it
18 whatsoever.

19 Valmont is one of the largest manufacturers of
20 poles probably I know in the southeast. I know they
21 supplied all of the materials on most of our Polk
22 County jobs. They are doing it on our Suncoast
23 Expressway project. They are a very large
24 manufacturer.

25 They flatly refused to take any responsibility.

1 Wesco refused to take any responsibility.

2 That leaves us and MPG who are the two parties
3 not responsible for it. We would like to pay MPG their
4 money.

5 CHAIRMAN COWGER: I think we have enough on that
6 issue, because we are going to have to spend some time
7 on the other part.

8 I do have one question to be sure I understand
9 this. If you hadn't had this 12-day period between --
10 well, the 12 days we are talking about in dispute here,
11 if the pole hadn't been installed at the beginning of
12 that 12-day period, then a suspension would have
13 started or would have been in force at least for the
14 cure period?

15 MR. GRIMSLEY: Work continued -- it's in my
16 package the days that work continued that time could
17 have been suspended during the cure period. It
18 wouldn't have been as many. We only were able to
19 suspend time for two days of the 30-day cure period.

20 CHAIRMAN COWGER: That's without the tail end,
21 right?

22 MR. GRIMSLEY: Right. You would have to subtract
23 12 days off of that. At that point we could have
24 suspended time.

25 CHAIRMAN COWGER: My question, though, is did

1 the -- the pole not being in place, which as
2 I understand it, was one factor in keeping the road
3 from being open to traffic.

4 MR. GRIMSLEY: Correct, because we couldn't place
5 the signal in operation.

6 CHAIRMAN COWGER: All right. Did that cause 12
7 days of suspension for the cure period not to occur?

8 MR. SIMS: Yes.

9 CHAIRMAN COWGER: Was that the only cause?

10 MR. SIMS: For those 12 days, it was. Now,
11 again, it goes back to I originally asked for 26 days
12 with MPG. The DOT wrote us a letter saying 12 days.
13 Without arguing from the 12 to the 26 days --

14 MR. LUNDY: We are not going to argue the
15 difference between the 12 or 26. We are accepting
16 the 12.

17 CHAIRMAN COWGER: We are not arguing about that
18 either. I'm trying to find out exactly how the 12 days
19 fit into the big picture.

20 MR. SIMS: It would have been 12 more days of
21 cure period.

22 CHAIRMAN COWGER: Could you have opened the road
23 if the signal was there before the striping was done?
24 Would you have done that?

25 MR. GRIMSLEY: Before the striping was done, no.

1 CHAIRMAN COWGER: You couldn't do the striping
2 until 30 days had elapsed.

3 MR. BRANDVIK: Before the thermoplastic was done.
4 If there had been paint striping we would have opened
5 the road.

6 CHAIRMAN COWGER: If this hadn't existed at all,
7 the problem with the pole, would the road have remained
8 closed to traffic until the thermoplastic was in place?

9 MR. GRIMSLEY: No. The road would have been
10 opened. We would have placed temporary striping. We
11 had to keep the road closed until the thermoplastic was
12 placed.

13 MR. BRANDVIK: One other comment I want to make.
14 Eric talked about the fact that Valmont -- Valmont has
15 written a letter. I mean there are letters in here
16 from the manufacturer admitting they made a mistake.
17 You've got a letter from your sub admitting that they
18 will accept responsibility.

19 I can't understand how you could possibly think
20 that DOT, because of a provision you want to pull out
21 of the specs that says if you couldn't control it, it
22 needs to reimburse you for this money, when in fact
23 you've got the two people responsible for it saying we
24 admit we made the mistake, and you have a sub who says
25 I admit I made it, and I will take the financial heat

1 for it.

2 MR. DEYO: I understand that, too, but I think
3 notwithstanding the time factor was not in their
4 control on the fabrication part. That's the point
5 I hear you making is that the fabrication of the mast
6 arm was clearly outside of their control.

7 The money issue, third party, that's real, but
8 the reference to the specification, you are saying the
9 fabrication was not under your control and the specs
10 allow DOT to revise your time calculation?

11 MR. LUNDY: Yes, sir. That's basically it. Just
12 by the specifications.

13 MR. DEYO: There are two things. You are correct
14 (indicating Mr. Brandvik), and they have a reason for
15 going against the specifications.

16 MR. LUNDY: The money issue on the other end of
17 it, we are not bringing up our legal costs or other
18 costs associated with it. All we want is the money
19 given back for LDs just in accordance with the specs.
20 Then we will be happy.

21 MR. BRANDVIK: Let me add, because Robert was
22 just pointing out one other thing to me. I guess we
23 could quote right from the spec book itself because you
24 wanted it to reference --

25 MR. GRIMSLEY: Within the same section they are

1 quoting.

2 MR. BRANDVIK: Outside of the contractor's
3 control, but it goes beyond that. Just so we are
4 clear, I don't want to read out of a report. I will
5 read out of the spec book. I can read it right into
6 the record.

7 CHAIRMAN COWGER: How about doing this, just give
8 us the section number, we will put that in the record
9 and we will go on. We can read.

10 MR. BRANDVIK: Sure. I want to give you the
11 specific one. It's Section 8-7.3.2.

12 CHAIRMAN COWGER: Okay. Do the Board members
13 agree we ought to go on to part one? Let's move on to
14 the other part. I think we have heard all we need to
15 hear about that. We are going to spend some time on
16 this.

17 MR. SIMS: Manhole 76 conflict. During the
18 course of the work Cone encountered a conflict between
19 the new precast manhole number 76 and the existing nine
20 utility conduits. The conflict was caused by a delay
21 to the project completion schedule.

22 Cone will demonstrate that the delay at manhole
23 number 76 was the result of a conflict unforeseen at
24 the time of bid and beyond the control of the
25 contractor.

1 The lack of cooperation by the utility company in
2 supplying a solution increased the delay.

3 The contractor had to alter its planned method,
4 manner and duration of construction due to the conflict
5 between manhole number 76 and the existing utility
6 conduits.

7 The contractor is due \$35,477.41, and an
8 additional 17 contract days due to the conflict.

9 I will give you a brief description of what
10 occurred. After excavating, investigating and
11 surveying the location of manhole number 76 on
12 July 23rd, our utility specialty subcontractor
13 requested a meeting with the Department, GTE and Cone
14 to discuss the conflict between the existing GTE
15 telephone conduits and this new precast manhole to be
16 installed.

17 The new precast manhole was shown in the plans to
18 be installed 22 feet east of an existing manhole;
19 however, the existing manhole was only 15 feet from the
20 new precast manhole. There was not enough slack in the
21 existing conduits to allow the lines to be moved north
22 out of the way of the new manhole.

23 The new manhole could not be moved further east
24 due to an existing water main that blocked it.

25 When we had the meeting that was scheduled for

1 the next day of July 24, Cone and Heuer were both on
2 site for the meeting; however, GTE's construction
3 supervisor came to the site and refused to meet on the
4 24th and stated that a 48-hour notice would be required
5 for the meeting.

6 This meeting was then rescheduled and held on
7 Friday, July 26th, 1996, with all parties in
8 attendance.

9 At that meeting GTE's supervisor stated that he
10 had a solution, but he refused to give recommendations
11 to the contractor.

12 There was an idea of setting a boom truck, which
13 was delivering the manhole, on private property. That
14 was discussed. Heuer was going to look and review this
15 and other options that might be available.

16 The basic result of the meeting was that Heuer
17 would explore options on installation of the box and
18 offer his solutions.

19 They filled in the excavation to protect the
20 adjacent roadway.

21 On July 29th Heuer confirmed that the private
22 property was not a viable solution. They decided that
23 a cast-in-place box was the only option available
24 without moving the cables.

25 Heuer's solution was relayed to the Department in

1 our letter number 124 on August 2nd. Heuer's
2 recommendation was to switch to a cast-in-place
3 manhole.

4 In the letter Cone requested an emergency meeting
5 with the Department and GTE to resolve this issue.

6 The meeting was held on August 6th, and at that
7 meeting Cone provided a cost breakdown for a
8 cast-in-place manhole to ensure a quick and timely
9 decision could be made.

10 Heuer reiterated that the conduits must be
11 relocated if a precast manhole was to be used. And at
12 that meeting GTE provided a solution. This solution
13 was to break the conduits and strip them, to give
14 enough slack in the conduits to allow them to be
15 relocated.

16 The Department requested a price from Cone to
17 strip and relocate the existing GTE lines. Cone
18 provided this price in letter number 126. However, GTE
19 decided to strip the conduits itself. See the FDOT
20 letter of August 6th in which the DOT states that GTE
21 will strip conduits.

22 On August 7th Heuer reexcavated and exposed
23 existing lines from the existing manhole 15 feet to the
24 west to 20 feet east of the location of the new
25 manhole. GTE forces broke and stripped the conduits,

1 and Heuer's personnel shifted the conduits.

2 On August 8th Heuer could resume the work, and
3 they installed the precast manhole. Let me show you
4 the details.

5 CHAIRMAN COWGER: Before you do that, this is a
6 good place to ask you a quick question factually.
7 I heard you say that when they stripped the conduit off
8 the cables they stripped it both ways from the existing
9 manhole? Those cables didn't go through the manhole or
10 those conduits?

11 MR. SIMS: I believe it was nine, and correct
12 me --

13 MR. GRIMSLEY: Twelve to begin with.

14 MR. SIMS: Twelve to begin. I think four of them
15 were vacant. The other nine actually went into the
16 existing utility box.

17 MR. GRIMSLEY: Three of them bypassed the
18 manhole.

19 CHAIRMAN COWGER: That's why you went to the west
20 on those three to give you a little more slack, right?

21 MR. SIMS: What happened, as you can see --

22 MR. LUNDY: This is the DOT's pictures. We just
23 blew them up for a little clarity.

24 MR. SIMS: As you can see, here are the conduits.
25 You can see, this is where the existing manhole is.

1 You can even see that there's a large -- here it is
2 right here. Can you see the break in the conduit right
3 here?

4 Now how much they stripped off, I think the DOT
5 will say they didn't do much stripping. Well, they
6 fractured them, they split. You can see where they're
7 broke. There's your trench box. The key is to get
8 them around this trench box in between this pole. They
9 had to be broken so that the DOT could allow it.

10 CHAIRMAN COWGER: This is the power pole you were
11 talking about in this picture here?

12 MR. SIMS: Yes.

13 CHAIRMAN COWGER: That is, too.

14 MR. SIMS: The breaking of the conduits was
15 essential to shifting the conduits around the trench
16 box. There was no way to shift these conduits without
17 the breaks.

18 Then we will review the specifications for the
19 utilities.

20 CHAIRMAN COWGER: Let's not spend a lot of time
21 on this issue because we can read this. This is all
22 canned language. We are familiar with it.

23 MR. SIMS: Basically, the one thing, the specs
24 tell us that the DOT has to take care of the utilities.
25 The Department and GTE had a contractual obligation to

1 resolve this conflict. Article 5 of the JPA, and I can
2 read that to you right here, that basically reads that
3 the utilities shall cooperate with the FDOT's
4 contractor so as to not delay the work of FDOT's
5 contractor.

6 MR. LUNDY: This was out of the DOT package.
7 This is the joint agreement with GTE we never had privy
8 to until they basically --

9 MR. SIMS: Article 6 says all such work to be
10 coordinated with the construction of the project in a
11 manner that will not cause delay to the FDOT
12 contractor.

13 GTE did not follow their agreement. They refused
14 to meet. They knew of a solution but they refused to
15 supply it until substantial time had passed.

16 The FDOT didn't enforce the JPA with GTE. They
17 didn't make GTE provide the solution they had
18 available.

19 FDOT denial is based on the premise that the
20 original contract contained all the necessary
21 information pay items required to place the manhole
22 using the normal means and methods.

23 However, in his own letter of August 6th,
24 Mr. Grimsley states, "GTE will break the existing
25 conduits to allow your subcontractor to relocate the

1 cables for the placement of GTE manhole number 76."

2 Upon the Department's request, we provided a
3 price for this additional work. The engineer
4 determined that this breaking of the conduits would be
5 essential to the performance of the required
6 construction. Once this essential portion was
7 performed, Cone proceeded with normal construction
8 methods and set the manhole.

9 And that is the basic premise of our request.

10 MR. LUNDY: This letter was sent right here in
11 this time period (indicating), down near the end of it.
12 So, then after they -- we had done the excavation, it
13 did take them a few minutes to break the cables, then
14 took a few more minutes for us to move them out of the
15 way. You know, half a day or so, set the box, then go
16 on our way.

17 It's a shame that this little bit of work
18 couldn't have been done early up here instead of this
19 song and dance that we went through for a solution.

20 Basically that's the time we are asking for
21 there, the dollars we spent there.

22 CHAIRMAN COWGER: Are you all through for the
23 moment?

24 MR. LUNDY: Yes, sir.

25 MR. SIMS: Yes.

1 CHAIRMAN COWGER: Quick factual question. DOT,
2 there was a mention made that the two boxes, the
3 existing and new box were a little closer together than
4 shown on the plans. True or not in your mind?

5 MR. GRIMSLEY: They were -- the manhole that was
6 shown on the plans was in the correct location. It was
7 up to the Cone survey party to lay out the proposed
8 manhole. I assume they laid it out in the correct
9 position.

10 CHAIRMAN COWGER: I don't know how pertinent it
11 is, but you are saying there was not an error in the
12 plans?

13 MR. GRIMSLEY: The existing manhole was in the
14 correct position. If Cone laid out the manhole five
15 foot closer to the existing, that may have happened, if
16 they are claiming it was 15 feet.

17 MR. LUNDY: The fact was that the new manhole
18 could not be moved further away from the existing
19 because of an existing waterline, utility line.

20 MR. ROEBUCK: The waterline had you buffaloed?

21 MR. LUNDY: The waterline was in the way, so
22 either we were going to meet on this issue or the
23 waterline issue.

24 MR. SIMS: It was a highly constricted area. The
25 cables went around the corner. The simple fact was

1 there wasn't enough slack. You couldn't expose them
2 enough to get enough slack to move them out of the way,
3 to set the manhole, no more means and methods.

4 MR. LUNDY: Our subcontractor was concerned about
5 the risk that he was taking of breaking these conduits
6 himself, and interruption of service. I mean we were
7 glad for GTE to do the work.

8 CHAIRMAN COWGER: Let's let DOT come in now. I'm
9 sorry I interrupted.

10 MR. GRIMSLEY: It is the DOT's position that
11 manhole 76 was placed using normal construction
12 methods. Out of Cone's package they describe normal
13 construction methods of how they would set the manhole.

14 In our photo outlay, it's a photograph, pictorial
15 of how the manhole was actually set. Cables were
16 exposed, as you can see in the photograph, page one.
17 They were shifted over to one side, as you can see on
18 page two.

19 The ground was excavated to the proper depth, as
20 shown on page three, and the manhole was placed using a
21 boom truck located adjacent to the excavation.

22 When we first heard about this issue, Cone's
23 subcontractor wanted to change the manhole to a
24 poured-in-place manhole at a greatly additional cost
25 and a six-week time extension, which would have delayed

1 the project even further.

2 Still, the cables probably would have been in the
3 way to do that work because a trench box probably would
4 have had to be set to do the forming. The cables had
5 to be relocated.

6 GTE's JPA had a relocation pay item for the
7 conduit. They provided this in this plans as one
8 method to pay the contractor to relocate cables that
9 could not be deactivated until the new system was put
10 in place.

11 They also provided pay items for locates,
12 underground and underpavement, which they stated in the
13 technical provisions which were to be used on the
14 on-site of the project to look for conflicts so they
15 could be addressed in a timely manner.

16 Cone Constructors and their subcontractor chose
17 not to use these pay items to look for conflicts or to
18 find out where GTE's cables were located.

19 The locates required the contractor to physically
20 dig them up, shoot the elevation with survey and
21 offset, station and offset. With the relocation pay
22 item, Cone got paid to relocate the cables out of the
23 way.

24 The technical special provisions for GTE stated
25 up front that their old system could not be deactivated

1 until the new system was put in place.

2 It was also shown in the Department's plans, in
3 the JPA, plan and profile section, the existing manhole
4 and the cables. It also showed the proposed manhole to
5 be placed underneath the existing cables.

6 GTE's existing cables were shown in the correct
7 location. As far as when they called somebody out on
8 site to meet about the problem, they did not contact
9 the contact person located in the relocation schedule
10 for GTE.

11 And I assume that the person they did contact
12 wanted to get in touch with the engineer who came to
13 the preconstruction meeting.

14 They had an on-site inspector out there most of
15 the time while work was being performed for GTE. The
16 person they contacted was not familiar with the
17 situation at hand and probably had to get more
18 information or get the right person on the job to begin
19 with.

20 In the very end, the manhole was set using normal
21 construction methods. The existing site conditions did
22 not change between July 23rd and August 7th. Manhole
23 76 was placed 22 feet to the east of the existing
24 manhole.

25 There was enough slack in the conduits to allow

1 them to be relocated. The conduits still came out of
2 the existing manhole and went around the corner of
3 Nebraska Avenue.

4 The final location of manhole 76 was still five
5 feet west of the existing water main. The manhole was
6 placed on August 8th between the roadway and
7 right-of-way line and did not need to be shifted.

8 The power pole was braced before the contractor
9 attempted to set the GTE manhole, and the contractor on
10 the project had been working around braced power poles.
11 As an example S13, right across from this manhole.

12 The use of the -- the use of this specification
13 by Cone, the Department argues, because the technical
14 special provisions and the plans by governing the order
15 of documentation override the Standard Specification.

16 The Department gave Cone Constructors the right
17 to install, remove, relocate GTE's facilities by virtue
18 of the JPA.

19 Cone's use of that specification is for when
20 utilities are relocating ahead of the project or during
21 the project by themselves.

22 Cone had full responsibility and full control
23 over the cables. Now, they were placing them, removing
24 them, working around them.

25 MR. BRANDVIK: Let me add this. The question

1 becomes a problem is identified, the sub says we can't
2 put this manhole in place, these conduits are in the
3 way.

4 Our solution is we want a poured-in-place
5 structure for 60 grand additional money. We need to
6 eliminate this precast structure, put in
7 poured-in-place. Here is our price.

8 We don't think the precast is going to work. So,
9 that is the offered solution.

10 Now, that offered solution was not going to be in
11 the best interest of the Department. Quite frankly, it
12 wasn't in the best interest of the sub.

13 So, ultimate question from -- and to be honest
14 with you, this is some of the first time I'm hearing
15 this, is whether or not breaking this conduit was
16 considered a reasonable work effort.

17 Quite frankly it's my opinion that had we -- had
18 the meeting occurred, we will pull them out of the way,
19 we maybe are not going to get enough slack, we probably
20 would have said fine, break them right there, put the
21 manhole in place.

22 That's the only difference between pure, normal
23 construction methods in terms of let's bring in the
24 truck, let's set the trench box in, set the manhole in,
25 pull the conduits out of the way.

1 The only difference is that GTE physically broke
2 the conduit in some locations to allow a little more
3 flexibility.

4 Beyond that there was nothing different than what
5 would have been expected under normal circumstances.

6 The plans show clearly the existing conduit is
7 going to run right through the middle of this proposed
8 manhole.

9 The plans would clearly tell you when you are
10 looking at this that you are going to have to pull this
11 conduit out of the way. If we are going to build this
12 as a precast, we are going to have to excavate this
13 conduit, pull it out of the way.

14 As soon as that would have started, if the
15 decision had been made, we have taken enough slack, I'm
16 confident GTE would have said we will break the
17 conflict, it will still stay in service, let's go
18 forward and be done with it.

19 The problem I see is that the sub Heuer's
20 solution was let's not do precast, let's get rid of
21 that pay item, bring in a new item, poured-in-place
22 manhole. Then we can negotiate a new price, get it
23 done the way we want to have it done, not necessarily
24 the way the plans have outlined it.

25 That is sort of my synopsis of the situation.

1 CHAIRMAN COWGER: Whose proposal was that? Was
2 that the subcontractor's?

3 MR. BRANDVIK: The cast-in-place, yes.

4 MR. SIMS: It was the subcontractor's because on
5 manhole number 72 they did something similar. There
6 was a portion of the cables that remained in place.
7 When they built their box, put in their sheeting and
8 shoring, they built that around the cables.

9 Some of the cables they were able -- some of the
10 cables needed to go outside of the box. They excavated
11 like 300 feet each way. They shifted them out of the
12 way. A portion of them stayed in there, were part of
13 this new poured-in-place manhole.

14 They built their trench -- didn't use a trench
15 box. They used shoring. As a matter of fact, they had
16 a problem with their shoring.

17 MR. LUNDY: The whole thing is that just a few
18 weeks before that, the solution to a similar problem
19 was cast-in-place box, and we did it. So, they came up
20 with the cast-in-place, this one. It was not out of
21 the way.

22 MR. BRANDVIK: That was in the plans that way as
23 I understand.

24 MR. GRIMSLEY: That was a poured-in-place in the
25 plans because it was around GTE existing facilities

1 that were to remain in place. That was their starting
2 point on the project. They had to let the cables come
3 into the box. That's where all the splices would be
4 made.

5 They didn't want to cast in place one because
6 they would have no way of bringing the existing into
7 the box.

8 MR. SIMS: That is correct, but the key here is
9 that there was the -- the question was if there's not
10 enough slack to move them out of the way, how do you
11 take care of that?

12 Well, Heuer only knew of one way to do it without
13 relocating the cables, which was their opinion and
14 even -- would have been yours because you told them
15 they needed to break them, that that was the only way
16 to get those cables out of the way.

17 You had two options, you could build a
18 cast-in-place manhole or come up with a solution which
19 GTE had of two weeks beforehand, which was to break the
20 conduits and move them out of the way.

21 As far as -- first of all, let's go back to your
22 statement regarding we didn't call. First of all, we
23 requested the meeting. Your people called, and
24 I believe they talked to the inspector on the job who
25 got the GTE construction supervisor out on the job.

1 He's the one who came out. He did not say
2 I can't make this decision. He did not make any
3 statement other than we will require 48 hours for a
4 meeting, we will come back in 48 hours.

5 MR. LUNDY: Got in his truck and left.

6 MR. GRIMSLEY: Who by the DOT called? I sure
7 didn't.

8 MR. SIMS: I don't know if it was you or
9 Bob Little, the GTE guy.

10 MR. LUNDY: Inspector on site.

11 MR. SIMS: Or the GTE guy. The GTE construction
12 supervisor came out there. He said we will not meet.
13 We called an emergency meeting. We wanted to get it
14 resolved.

15 You are telling me that because we didn't call
16 the right guy that we are going to be --

17 CHAIRMAN COWGER: I think we have heard enough of
18 that. We have heard both sides of that. Seems to me
19 like -- is it possible that this GTE guy was trying to
20 invoke some requirement out of the one-call law or
21 something that says you've got to give 48 hours notice?

22 MR. LUNDY: Not that I know of.

23 CHAIRMAN COWGER: That's beside the point.

24 MR. ROEBUCK: John may have mentioned something
25 that confused me. Cone -- Heuer or whoever, could have

1 moved those conduits, and you knew you had the chance
2 to break them. What is your liability if you tear into
3 that damn conduit?

4 MR. LUNDY: That was a major concern of our
5 subcontractor was the liability if he broke those
6 cables. It was even considered extra work for those
7 cables to be broke. That's why he asked us to price it
8 out. We priced the work out of breaking the cables,
9 but the decision was made that GTE's man would break
10 the cables and not us.

11 We were really thankful for it, to tell you the
12 truth.

13 MR. ROEBUCK: Did your boss know you were going
14 to price an item like that?

15 MR. SIMS: We did break one of GTE's cables out
16 with a backhoe and it was \$8,000.

17 (Brief pause)

18 CHAIRMAN COWGER: There was an item in the
19 contract for conduit removed. Am I right in assuming
20 that that was removal of conduit that was either empty
21 or surrounding a deactivated cable, is that right?

22 MR. SIMS: Yes.

23 CHAIRMAN COWGER: Because it's never come up that
24 there was a pay item for breaking this conduit.

25 MR. LUNDY: The two items in there, one was

1 removal, and if I remember right, and correct me if I'm
2 wrong, but I think the specs required us to cut it in
3 six foot lengths and deliver it to --

4 MR. GRIMSLEY: The cable.

5 MR. LUNDY: To GTE. The other item was relocate.
6 That's exactly the pay item we used.

7 CHAIRMAN COWGER: That was cable relocate. That
8 had nothing to do with the conduit.

9 MR. LUNDY: Correct. That was the exact item we
10 used once the conduit got broken, then they paid us to
11 do those moves.

12 CHAIRMAN COWGER: Now, did you, in bidding the
13 job, did you realize that these cables -- in this
14 vicinity think that were shown in the plans were in
15 conduit? Did you have any idea?

16 MR. LUNDY: I can't answer yes or no on that.

17 CHAIRMAN COWGER: Robert, you might be able to
18 tell us. The plans don't show --

19 MR. ROEBUCK: Cables and conduits?

20 MR. GRIMSLEY: They have pair cable and -- they
21 have it both. Obviously they did because they had a
22 pay item for conduit removal.

23 CHAIRMAN COWGER: Somewhere on the job.

24 MR. GRIMSLEY: We had cables and conduit removed.

25 CHAIRMAN COWGER: Let's leave that issue for a

1 moment. I think we know enough about that. Let me ask
2 you, what was actually done is the conduits that
3 bypassed the manhole, you broke the -- GTE broke the
4 conduit off of -- or the cable on both sides of the
5 manhole to allow it to get enough slack?

6 MR. GRIMSLEY: No. The manhole was west of the
7 proposed manhole. The existing was west of the
8 proposed.

9 They went approximately 24 feet to the east of
10 the proposed manhole and broke the conduits because
11 that's right where a joint fell. They broke them right
12 at that point.

13 Three of the conduits went past the existing
14 manhole. It had more flexibility because we could
15 strip them further back and allow more relocation.

16 CHAIRMAN COWGER: Once the -- to keep from
17 wasting a lot of time on this, once the conduit was
18 stripped from all these cables --

19 MR. GRIMSLEY: We didn't strip them, we broke
20 them.

21 CHAIRMAN COWGER: Broken. Once the conduit was
22 broken so that you had a flexible situation, then Cone
23 could pick those cables up, pull them back, get them
24 out of the way?

25 MR. LUNDY: Relocate them, yes.

1 CHAIRMAN COWGER: The issue is really the fact
2 that the whole thing came basically down to who was
3 going to break the conduit, didn't it?

4 MR. GRIMSLEY: The slack in the conduits,
5 I believe Cone had mentioned it in their presentation,
6 didn't really come up until August 6th. We were
7 arguing about a precast manhole and a poured-in-place
8 manhole before that. It really never came up that
9 somebody needed to, until the 6th, as Cone had stated.

10 MR. LUNDY: The reason it didn't come up until
11 the 6th is because that was GTE's idea that he wouldn't
12 tell us on the first day.

13 MR. ROEBUCK: If he had the idea.

14 MR. LUNDY: If he had the idea we could have done
15 it the first day and not been delayed a couple of
16 weeks.

17 MR. GRIMSLEY: The relocation pay item appeared
18 in the plans for Cone's disposal of use. I mean the --
19 on the 23rd they had tried -- if they had picked up the
20 cable and tried to move them, which they didn't do, and
21 the slack issue would have come up.

22 CHAIRMAN COWGER: Okay. Do you argue with what
23 has been said, though, that GTE never brought up the
24 idea of breaking the conduit until August 6th, and they
25 could have brought it up earlier?

1 MR. GRIMSLEY: Nobody brought up the slack in the
2 conduit for that to be an issue.

3 MR. SIMS: I have to disagree with that. I think
4 that the crux of the issue was that there was not
5 enough slack, that they could not -- that the other men
6 were almost too close, and it did not allow them enough
7 slack. I disagree with that. I think that was brought
8 up on July 24th.

9 CHAIRMAN COWGER: Once the conduit broke off, did
10 they have enough slack?

11 MR. BRANDVIK: Was the conduit exposed by order
12 and they made a decision? They had dug up all the
13 conduit on July 23rd?

14 MR. LUNDY: The big problem was the width of this
15 room. It's an existing box here, setting a new box
16 here. You can't take the conduits that are in that box
17 and move them out of your way --

18 MR. BRANDVIK: You tried or --

19 MR. LUNDY: -- without cracking.

20 MR. BRANDVIK: You tried or Heuer said there's
21 not enough distance to do it?

22 MR. LUNDY: If that was the problem that there
23 was a consideration or that we hadn't tried or it
24 couldn't be done, then if he would have put in his
25 letter, "Cone, we think there's enough in the regular

1 bid for you to do the work, that you haven't tried
2 this, then there's no issue.

3 He put in his letter there is an issue. This is
4 how we are going to resolve it so you can go back to
5 work.

6 MR. GRIMSLEY: That's when it came up there was
7 an issue. If on the 23rd Heuer had gone out and tried
8 to relocate the conduit, and then the issue had come
9 up, it would have been resolved the same way, on the
10 23rd.

11 CHAIRMAN COWGER: I think we are down to arguing.
12 Would the Board members agree we have enough?

13 MR. BRANDVIK: Can I ask a question that will be
14 on the record, and then the Board can tell me. In your
15 ruling do you rule exclusively on entitlement or do you
16 rule on costs?

17 CHAIRMAN COWGER: We are going to rule on both in
18 this case. We are going to talk a little bit about the
19 costs before we depart here. I'm not trying to quit
20 entirely. I'm trying to get the entitlement issues up,
21 then I want to talk about the costs a little bit.

22 Let's try to wrap the entitlement part up.

23 MR. ROEBUCK: In your contract, which is privy
24 between GTE and the Department, what latitude do you
25 have to assess damages against them for allowing such a

1 delay to occur?

2 MR. BRANDVIK: We have the latitude to do that
3 if -- GTE has to be convinced that, in fact, they were
4 the cause of the delay. That's why I'm asking the
5 question had the -- had Heuer dug up all this conduit
6 and made an attempt to pull the conduit back and that
7 had happened and it had failed, then I would say -- and
8 then they went to GTE and said, hey, this isn't going
9 to work.

10 And GTE said we can't tell you what to do, and
11 then they start talking about cast-in-place, I could
12 see that.

13 It sounds as if this is too close, we don't want
14 to try to pull this conduit back, we want to do
15 something else -- that's just what I'm hearing.

16 CHAIRMAN COWGER: Are you arguing it might have
17 been possible to pull those cables out of the way
18 without breaking the conduit?

19 MR. BRANDVIK: I don't know. I wasn't there.

20 CHAIRMAN COWGER: I said might.

21 MR. BRANDVIK: What Robert has been saying, all
22 of the damages -- that's why I asked the question about
23 entitlement versus money, all of these damages are
24 based on idle equipment, we have extended overhead
25 costs. I think they are unrealistic quite frankly.

1 The question becomes why did it take from
2 July 23rd to August 6th to make the decision that quite
3 frankly could have been made on July 23rd.

4 MR. LUNDY: I agree.

5 MR. BRANDVIK: Your position is it was made
6 because GTE, you know, wouldn't say we will break them,
7 but I mean I wasn't there to see if they were exposed
8 and somebody tried to pull them back.

9 And that question was asked of GTE and they said
10 no, we are not going to do that. GTE's position is,
11 and they've stated it to us, the manhole could have
12 been constructed under what they would deem normal
13 construction practices. The only difference was that
14 they ended up breaking this conduit to allow some
15 additional slack.

16 So, GTE's position is clear with the Department.
17 Right now, they have no liability on this. That's
18 where they stand.

19 But, yes, we do have the capability of
20 recovering, and in many cases we do, when the utility
21 companies will recognize -- and GTE has in the past --
22 they will recognize that they have created this delay.

23 MR. LUNDY: I would like to add one more thing
24 about the monetary end of it. The field office and the
25 extended field costs and those other items, we in this

1 particular one, we have already discounted and used
2 what we had negotiated on previous items on this
3 project.

4 We had already agreed to certain numbers of costs
5 per day on previous items on these contracts. These
6 costs are reflected on here on prior agreements. They
7 are not anything that are excessive. They've already
8 been reduced once.

9 CHAIRMAN COWGER: Let me go and ask John one
10 question about GTE's position. GTE's position in
11 essence was that you didn't have to relocate these
12 cables, you could have built the box?

13 MR. BRANDVIK: No, their position was you had to
14 relocate, all along, the cables had to be relocated.
15 I don't think GTE has ever disputed -- I don't want to
16 speak for them, but the plans clearly show that the
17 existing conduit, slash, cable goes right through the
18 middle of this proposed box.

19 In this particular case, both the cable and
20 conduit was in the location shown in the plans, so was
21 the existing box. The true question was could enough
22 slack be obtained to set the trench box and set the
23 cast -- precast structure.

24 The apparent answer is no, because ultimately the
25 decision was made to break those conduits. The

1 question was was an attempt made by Heuer on July 23rd
2 to pull those conduits, and then they said we can't
3 pull them enough to get our trench box in.

4 I don't think it was. It was looked at as that
5 box is too close. We are not even going to try it
6 because we are going to break it; therefore, our
7 solution is we want cast-in-place.

8 CHAIRMAN COWGER: I think we've got that now.

9 Let's go back a second on DOT's Exhibit No. 3-C,
10 look at these photographs. The first page, you've got
11 three photographs on it. All I want to know is in that
12 lower left-hand corner down there, that man you see
13 over there, where is he standing in relation to the new
14 box?

15 MR. GRIMSLEY: The one where it only shows half
16 his back?

17 CHAIRMAN COWGER: Yes.

18 MR. GRIMSLEY: The box is west of him, the
19 existing box.

20 MR. SIMS: To his left-hand side.

21 MR. GRIMSLEY: You can see the box in the right
22 hand photograph.

23 CHAIRMAN COWGER: You can see the cable is going
24 around the corner, so this picture is looking east.

25 MR. GRIMSLEY: The one in the lower right-hand

1 corner is looking west, and the one in the lower left
2 is looking east.

3 CHAIRMAN COWGER: Okay. That's all I wanted to
4 know.

5 MR. SIMS: As a matter of fact, you can see there
6 was a substantial amount of conduit stripped off that
7 one that goes over the top of --

8 MR. ROEBUCK: Ten or fifteen feet.

9 MR. GRIMSLEY: Wait. If you notice the two
10 different colors, the black and the orange, the black
11 was an old variety GTE conduit which if you stepped on
12 it, it broke. It's not -- it wasn't like the PVC. It
13 was made of a different material.

14 CHAIRMAN COWGER: Okay. Let's try to move on a
15 little bit. I still think we need to address one issue
16 that I'm not sure was clear. I promised John we would
17 come back and talk a little bit about the dollars.

18 The first question that comes to my mind, in
19 looking at the dollars, you've got a cost in there for
20 the subcontractor, which covers kind of like his down
21 time for three days, two days at the beginning and then
22 a day when he came back, the day when he actually did
23 the work.

24 The first question I had was what was he doing in
25 those nine days in between? Was he working on the

1 project?

2 MR. SIMS: To be honest with you, I'd have to go
3 back and look at the record.

4 CHAIRMAN COWGER: Withdraw the question. Next
5 question. Looks like from that point on down in your
6 cost breakdown you keep talking about the 17 days that
7 you apply the Eichleay to and then you use it for
8 calculating Cone's extended field office management
9 costs, then we have additional -- let's stay with those
10 two.

11 Well, then you have another one for Cone delay
12 costs for over ten days.

13 The first thing that pops out to me is how did
14 this affect, this whole thing affect the overall
15 project? I assume that the subcontractor was only
16 doing the utility work, so how did it affect Cone's
17 operations? You've got all this stuff --

18 MR. SIMS: Once the utility box was set, then you
19 could bring the cables across the road. The cables
20 actually came from the -- from this side over here --
21 if you are looking at it like this, the cables came
22 across the road over here so that -- then they had to
23 connect to the box. The new cables had to be
24 installed. It connected the whole -- started the whole
25 project.

1 CHAIRMAN COWGER: You have explained that, now
2 how did this affect Cone's operations?

3 MR. SIMS: We had to -- we couldn't get a lot of
4 our curb done in that area because that was right
5 around where our curb was.

6 We had to hold off on doing the roadway in that
7 area because they were trying to work and install
8 the -- excavate and install this box.

9 MR. LUNDY: This work was on our original
10 schedule. This work was critical. Prior to -- there
11 was not a CPM required on this job, but we did one
12 anyway. This was on the critical path.

13 CHAIRMAN COWGER: You submitted a CPM before this
14 happened?

15 MR. LUNDY: We did a CPM. We didn't submit one,
16 it wasn't required. We did submit a bar chart
17 schedule.

18 CHAIRMAN COWGER: When did you prepare that CPM,
19 before or after this happened?

20 MR. LUNDY: Before the project began.

21 CHAIRMAN COWGER: Mr. Grimsley, I think we ought
22 to give you an opportunity to rebut that, see what you
23 have to say.

24 MR. GRIMSLEY: If you look at the photographs in
25 the lower right-hand corner, you can see how the

1 distance between the manhole -- if you look on top of
2 the hill where you see a mixer and a water truck, no
3 curb had been placed down to that point, the
4 stabilization wasn't in.

5 Actually some of the clearing and grubbing hadn't
6 even been completed at that time, plus we had work on
7 Congress to do.

8 There was work out there that Cone could be doing
9 to come down to the manhole.

10 CHAIRMAN COWGER: To make sure I understand what
11 the contractor just said. They are saying that the
12 fact that this particular manhole could not be
13 installed and the related work done around it delayed
14 the curb operations and maybe some other operations in
15 the vicinity of the manhole, and that the, according to
16 Cone's position, this was on the critical path.

17 This had to do not only with the area that had
18 to be opened up to do the manhole work, but did
19 I understand you to say there was also a place near
20 here where these cables crossed the road?

21 MR. SIMS: They went directly at a 90-degree
22 angle across the road.

23 If I may say, our daily delay costs for the
24 manhole, we basically charged three hours a day because
25 we knew there was other work that was being

1 accomplished, but of that we took three hours a day for
2 delay costs to our labor and our equipment.

3 MR. LUNDY: We didn't take the full time.

4 MR. ROEBUCK: A third or something like that?

5 CHAIRMAN COWGER: That is this \$5,600 cost?

6 MR. LUNDY: Yes, sir, that equates to one-third.

7 CHAIRMAN COWGER: Your Eichleay costs, they were
8 the four per day for 17 days, right?

9 MR. SIMS: Yes, sir.

10 CHAIRMAN COWGER: Then the extended field office
11 management cost, and then I'm going to quit asking
12 questions, you charged for 17 days for looks like,
13 correct me if I'm wrong, the entire cost of utilities
14 to the trailer, and some costs being emphasized for
15 personnel that were project management-type people for
16 17 days.

17 MR. LUNDY: We took one-third of their time,
18 one-third of the project superintendent and half the
19 time for the operations guy. We didn't take the full
20 time for any of those people.

21 This is what -- and we had used this, is what we
22 had negotiated on previous issues, and it was
23 acceptable then and that's why we kept that same number
24 because it just would be --

25 MR. ROEBUCK: You had already developed it.

1 MR. LUNDY: Something we already developed and
2 agreed to.

3 MR. BRANDVIK: Do you agree with that statement?

4 MR. GRIMSLEY: I agree on the issue that we did
5 establish a per day cost.

6 MR. BRANDVIK: For field office?

7 MR. GRIMSLEY: Uh --

8 MR. BRANDVIK: Was it a thousand dollars a day?
9 I guess that's what the question is.

10 MR. GRIMSLEY: I can't remember right offhand
11 what the exact cost was.

12 MR. LUNDY: What was the fellow who negotiated
13 with us?

14 MR. GRIMSLEY: It was Alan.

15 CHAIRMAN COWGER: Gentlemen, I think we have all
16 the information we need to rule on this thing. Let's
17 give each party the opportunity to make a summary and
18 then we will stop.

19 MR. LUNDY: Well, our summary is brief. We want
20 to thank you for hearing it. It's a shame we couldn't
21 have worked it out. We tried project, resident and
22 district level. I think it's a cut and dried issue.
23 I don't know why it got this far. Thank you.

24 CHAIRMAN COWGER: You have four days liquidated
25 damages released already.

1 MR. LUNDY: I hope I can get my air conditioner
2 repaired.

3 MR. BRANDVIK: I have nothing further.

4 CHAIRMAN COWGER: Mr. Deyo? Mr. Roebuck? All
5 right. This hearing is hereby closed. The Board will
6 meet to deliberate on this claim in approximately six
7 weeks and you will have our final order shortly
8 thereafter.

9 (Whereupon, the hearing was concluded at 2:25 p.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA)
COUNTY OF LEON)

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

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

Dated this 6th day of August, 1998.



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