

STATE ARBITRATION BOARD

ORDER NO. 8-99

/// NOTICE ///

In the case of Jensen Civil Construction versus the Florida Department of Transportation on Project No. 78040-3509 in St Johns County, Florida, both parties are advised that State Arbitration Board Order No. 8-99 has been properly filed with the Clerk of the State Arbitration Board on January 24, 2000.



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



Copy of Order & Transcript to:

Bill Albaugh, P. E., Director of Highway Operations
Department of Transportation

Stephen F. Jensen, President
Jensen Civil Construction

Copy of Order to:

Alan Cummings, Esquire
Cummings & Snyder, P.A.

STATE ARBITRATION BOARD

ORDER NO. 8-99

RE:

Request for Arbitration by
Jensen Civil Construction on
Job No. 78040-3509 in
St Johns County

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

H. Eugene Cowger, P.E., Chairman
Greg Xanders, P. E., Alternate Member
John Roebuck, Member

The Contractor requested that Mr. Bill Albaugh not sit as a member of the State Arbitration Board for this hearing, because he chaired the Department Claims Review Committee which had previously ruled on the claim to come before the Board here. In view of the request, the Secretary of the Department of Transportation appointed Mr. Greg Xanders as a member of the Board for this hearing.

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:10 a.m. on Tuesday, November 30, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 8-99 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the total amount of \$ 163,171.06. The Department made payment for construction of the base portion of connections defined by the Contractor as turnouts and the grading and subgrade work incidental to turnout construction under the pay items Base Optional (Base Group 9)(10" Limerock) and Stabilization (Type B). The Contractor contends that this work should have instead been paid for under the pay item Turnout Construction, an item which was not included in the Plan Summary of Quantities.

The Contractor submitted the following information in support of their claim:

1. In bidding this project we reasonably assumed that the pay item Base Optional (Base Group 9)(10" Limerock) included only limerock base work to be done within the limits shown in the Plan Typical Section. We thought that, in accordance with the provisions of the bidding documents and our knowledge of Department practice, the more expensive limerock base work and grading and stabilizing work incidental thereto be constructed in areas outside the Typical Section would be paid for under the pay item Turnout Construction. We are used to Department plans containing a pay item note calling attention to costs that are associated with an established pay item being included in payment under another pay item and in this case there was no such pay item note relating to Turnout Construction. We realized the plan quantity for Base Optional (Base Group 9)(10" Limerock) included areas outside the Typical Section, but, in the absence of a plan note instructing us to include the cost of constructing turnouts in that item, thought that the pay item Turnout Construction had inadvertently omitted and the Department would correct this error during construction.
2. We did not factor the higher costs related to turnout construction into our bid unit price for Base Optional (Base Group 9)(10" Limerock).
3. The Department agreed to adding an item for Turnout Construction by Supplemental Agreement to cover the cost of turnouts added to the work. They, therefore, recognize that construction of turnout base is more expensive than construction of base within the Typical Section.
4. The Department's argument that use of the pay item Turnout Construction applies only to resurfacing/ milling jobs is invalid. Article 286.1 of the Standard Specifications does not limit the work of turnout construction to only resurfacing and widening-resurfacing projects. The phrase "on resurfacing and widening-resurfacing projects" applies only to "extension of existing turnouts."
5. We found other Department projects that provided for new construction or reconstruction which contained the pay item Turnout Construction.
6. The Basis of Payment Article in Section 286 of the Standard Specifications states that turnout construction shall be paid for at the contract unit price for Turnout Construction. The plan notes are silent on how the Contractor is to be paid for turnout work.
7. Note No. 2 on Standard Index No. 515 provides a definition of "Turnout". This definition does not distinguish between turnouts on projects designated as resurfacing projects and those not so designated.

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8. The Department's argument that the item Turnout Construction is unnecessary, because the turnouts were detailed with the same structural design as the main roadway not per Index No. 515 is invalid. The turnout details are not inconsistent with Index No. 515, because the index allows thicker sections than shown in a table contained therein.

9. The Department's argument that the CPM indicates that we included the costs of constructing turnout base in the item Base Optional (Base Group 9) (10" Limerock) is invalid. It is required that the CPM be based on dollar amounts shown in the contract, so we could not include amounts to be added later.

The total costs we presented for construction of turnouts includes only the costs we tracked for construction of the turnouts detailed in the plans. We are claiming the difference in these costs and the amount we were paid for construction of the turnouts shown in the plans under the item Base Optional (Base Group 9)(10" Limerock).

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

1. Article 286-1 (DESCRIPTION) of the Standard Specifications describes the work under the item Turnout Construction as, ".....turnout construction or extension of existing turnouts on resurfacing and widening-resurfacing projects." The Intent and Scope article in the Special Provisions calls for multi-lane construction. Thus, since this project is not a "resurfacing or widening-resurfacing project" the Turnout Construction item is not applicable to the project.
2. The plan quantity for the pay item Base Optional (Base Group 9)(10" Limerock) obviously included the area of street and driveway connections detailed in the plans. Therefore, a bidder should have known to factor all costs related to constructing these connections into his bid unit price for that item.
3. The plan cross sections at even Stations that pass through a connection showed the base for connections to be 10 inches thick. Thus, it was obvious that the connections detailed in the plans were not Turnouts as detailed in Index No. 515, but rather were extensions of the roadway base.
4. The plans provide profiles for the connections designated as side streets and driveways. If these connections were to be classified as turnouts the profiles shown in Index No. 515. would have been applied.
5. Our practice is to use the item Turnout Construction only at locations adjacent to pavement which is being resurfaced on milled. This is documented by our review of plans for other projects.

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6. The CPM submitted by the Contractor shows base construction activities in only two time intervals and the sum of the Budgeted Costs for these two Activities equals the contract amount for the item Base Optional (Base Group 9)(10" Limerock). This indicates that the Contractor included the costs for constructing turnout base in that item.

7. Note No. 15 on Plan Sheet 21 reads, "Proposed turnouts and driveways not shown on plans shall be constructed at the location of existing turnouts and driveways in accordance with the Roadway and Traffic Standards." Therefore, Index No. 515-- TURNOUTS is not applicable to the connections detailed in the plans.

8. We paid for construction of turnouts not detailed in the plans under the item Turnout Construction established by Supplemental Agreement.

It is the Department's position that there is no ambiguity in the contract documents. They clearly provide that the work of constructing base for turnouts is to be paid for under the item Base Optional (Base Group 9)(10" Limerock).

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

1. The designer provided details for all connections to the through roadway shown in the plans apparently in order to assure that they would be constructed in accordance with Department policy for driveway connections.

2. The plans did not include a Summary of Turnouts, as is typical of many Department projects where payment for turnout base and work incident thereto is to be made under the item Turnout Construction. However, the information presented does not conclusively demonstrate that a Summary of Turnouts is always included when there is an item for Turnout Construction.

3. The Board does not interpret the wording "...turnout construction or extension of existing turnouts on resurfacing and widening-resurfacing projects." contained in the Description article of Section 286 as limiting the work under that item to turnout construction on only resurfacing and widening-resurfacing jobs.

4. The Board's interpretation is that turnouts are typically connections to residential or business properties and do not include dedicated street intersections. Approximately 40% of the area of base construction outside the limits of the Plan Typical Section was in connections to businesses.

5. A portion of the limerock material in the turnout base was paid for under the item Commercial Materials for Driveway Maintenance.

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

The Department shall reimburse the Contractor the sum of \$72,000.00 for his claim.

This amount arrived at by applying a 40% factor to the additional cost claimed and then adjusting it upward to take into consideration that the additional cost for turnouts was greater than the additional costs for street intersections and pavement widening. The amount was reduced by an estimated value for the limerock material paid for under the item Commercial Materials for Driveway Maintenance which was incorporated into the base in turnouts.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 312.30 for Court Reporting Costs.

S.A.B. CLERK

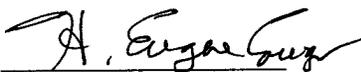
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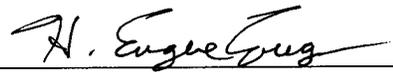
Tallahassee, Florida

Dated: 1/24/00

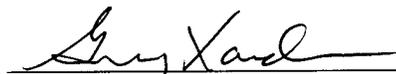
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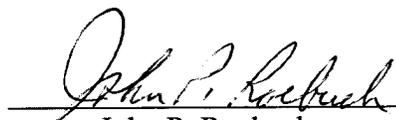
H. Eugene Cowger, P. E.
Chairman & Clerk SAB



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



Greg Xanders P. E.
Alternate Member



John P. Roebuck
Member

1/24/00
DATE

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
 Mr. Gregory A. Xanders
 Mr. John Roebuck

APPEARING ON BEHALF OF JENSEN CIVIL CONSTRUCTION:

Mr. Roger Bailey
 Mr. Steve Jensen
 Alan Cummings, Esquire

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Greg Davis
 Mr. Archie Montgomery
 Mr. Kenneth Bryan
 Mr. Jeff Williams
 Mr. Bill Craig
 Mr. Doug Geiger
 Jack Leonard, Esquire

* * *

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: Okay. We will go on the record. This is a hearing of the State Arbitration Board established in accordance with Section 337.185 of the Florida Statutes.

Jensen Civil Construction requested that Mr. Bill Albaugh not sit as a member of the Board for this hearing because he chaired the Department of Transportation claims review committee which previously ruled on the claim to come before the Board today.

Therefore, the Secretary of Transportation appointed Mr. Greg Xanders as a member of the Board for this hearing.

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 on July 1, 1999 and expire on June 30, 2001.

Will each 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: Requests for arbitration of a

1 claim submitted by the claimant, including all
2 attachments thereto and the administrative documents
3 preceding this hearing are hereby introduced as Exhibit
4 No. 1. Everybody should have a copy of that.

5 Does either party have any other information they
6 wish to put into the record as an exhibit?

7 MR. LEONARD: We do. Doug, would you submit
8 that.

9 CHAIRMAN COWGER: Let's go off the record for a
10 minute.

11 MR. CUMMINGS: We have a book like this that some
12 copies are being collated across the street. She will
13 bring it in as soon as we get it collated and give it
14 to you then.

15 (Discussion off the record)

16 CHAIRMAN COWGER: We were off the record when
17 those statements were made.

18 MR. LEONARD: I will be more than glad to repeat
19 them.

20 CHAIRMAN COWGER: What has happened here while we
21 were off the record is that the contractor's attorney
22 has proposed to introduce as an exhibit a notebook of
23 information, and the DOT has objected to the notebook
24 being introduced because they have not had prior
25 knowledge of the existence of this exhibit.

1 Do the parties agree that I've pretty well summed
2 it up?

3 MR. LEONARD: You have.

4 MR. CUMMINGS: I have no idea what they have
5 offered.

6 CHAIRMAN COWGER: Well, you have a copy there in
7 front of you.

8 MR. CUMMINGS: We will be on an equal footing,
9 Gene, because this is the first time I've seen this,
10 too.

11 CHAIRMAN COWGER: Let's pause for a minute or
12 two, go off the record, and everybody take a look at
13 the DOT's package, and -- off the record.

14 (Discussion off the record)

15 CHAIRMAN COWGER: You all have completed your
16 examination?

17 MR. LEONARD: Yes, and the Department has no
18 objection.

19 CHAIRMAN COWGER: Back on the record, Mr. Leonard
20 just made the statement they have no objection to the
21 contractor's exhibit. I assume that's all now that
22 we've got in the way of exhibits to be introduced.

23 MR. CUMMINGS: You've got one of the books, Gene,
24 and here is the other.

25 CHAIRMAN COWGER: No, I don't have a book.

1 I need one.

2 MR. CUMMINGS: Here you go.

3 CHAIRMAN COWGER: Now the three Board members and
4 DOT all need copies of the book.

5 Now, DOT presented an exhibit consisting
6 essentially of things that were in the contract, in the
7 plans, possibly in their final estimates book. All of
8 those things, apparently, the contractor has seen prior
9 to today.

10 There is a sheet at the front talking about --
11 it's titled quantities, I guess. Could somebody from
12 DOT explain that sheet.

13 MR. GEIGER: That's Jensen's CPM that they
14 presented to us. All I did was pull out the individual
15 items. It's showing the schedule, the quantities
16 attached to each item of work that Jensen presented to
17 the Department of Transportation.

18 CHAIRMAN COWGER: Okay. Then there are some
19 photographs.

20 MR. LEONARD: Would you explain those, Doug.

21 MR. GEIGER: I just wanted to show the top two
22 pictures on that are before photos, and the bottom two
23 pictures are after photos, to show the construction
24 that was involved in this project. I will go over that
25 a little more later on.

1 CHAIRMAN COWGER: I think that would be good to
2 hold off on that for a little while. We will identify
3 that package as Exhibit 2.

4 The contractor presented a notebook entitled cost
5 documentation for turnout construction. We will
6 identify that as Exhibit 3, and as previously stated,
7 the DOT has no objection to the introduction of this
8 document. I assume the contractor had no objection to
9 the introduction of Exhibit 2?

10 MR. CUMMINGS: No.
11 (Whereupon, Exhibit Nos. 1, 2 and 3 were received in
12 evidence.)

13 CHAIRMAN COWGER: Okay. During this hearing the
14 parties may offer such evidence and testimony as is
15 pertinent and material to the dispute being considered
16 by the Board, and shall produce such additional
17 evidence as the Board may deem necessary to an
18 understanding of the matter before it.

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

21 The parties are instructed to assure that they
22 maintain or retain, I should say, properly identified
23 copies of each exhibit used in this proceeding because
24 the Board will send copies of the court reporter's
25 transcript, along with our order, but will not furnish

1 additional copies of the exhibits to the parties.

2 As is typical in arbitration proceedings, the
3 hearing will be conducted in an informal manner. The
4 Board is not required to apply a legalistic approach or
5 strictly apply the rules of evidence used in civil
6 court proceedings.

7 We are primarily looking for information in
8 regard to the facts, and the contract provisions that
9 apply to this case.

10 The order of proceeding will be for the claimant
11 to present their claim and then for the respondent to
12 offer rebuttal. Either party may interrupt to bring
13 out a pertinent point by coming through the Chairman.
14 Please keep this orderly.

15 As previously pointed out, the Board intends for
16 this hearing to be conducted in a less formal manner
17 than a courtroom proceeding. The members of the Board
18 are individuals who are knowledgeable with highway
19 construction work and how construction contracts are
20 typically administered.

21 We are not attorneys, therefore our knowledge of
22 the law applicable to the case at hand may be limited.
23 We are here to learn about the facts and the provisions
24 of the contract documents that are applicable to the
25 matter before us.

1 Please be assured that the Board will make an
2 effort to assure that the parties have full opportunity
3 to offer such evidence as is relevant and material to
4 the dispute, and will require the parties to produce
5 such evidence as the Board deems necessary to an
6 understanding and determination of the matter before
7 it.

8 In some instances the Board may need to hear
9 applicable legal arguments to guide us in reaching an
10 equitable decision. However, we will not permit
11 extensive legal debates during the hearing because they
12 may be of limited value to the arbitration proceeding
13 and may overly complicate the process.

14 The attorneys present are requested to refrain
15 from presenting any legal arguments until the end of
16 the hearing.

17 After legal presentations, if the Board finds it
18 needs additional legal details in regard to the case,
19 we will ask the attorneys to present written legal
20 memorandums to each of the members of the Board within
21 ten days after the close of this hearing.

22 We don't normally anticipate that happening, by
23 the way.

24 MR. LEONARD: We are disappointed.

25 CHAIRMAN COWGER: I'm sure you are. Okay, now

1 I believe we are ready to proceed. The order, as
2 I said, is for the claimant to begin by presenting his
3 points and then we will go to the DOT.

4 I would like for the claimant to first state the
5 total amount that they are claiming and then proceed.

6 MR. JENSEN: We are claiming \$163,171.06.

7 I wanted to start out with explaining how we bid
8 the project. When we did our initial look at the
9 project, we did a take-off of the quantities associated
10 with the project and noted that there was not an item
11 for turnouts. Normally you would have an item for
12 turnouts for the side streets.

13 We also noted that the lime rock quantity that
14 was given for base was too high for the main line, so
15 it appeared that some of the turnouts may have been
16 included in that item of work.

17 We produced our bid, and we did not include the
18 turnout cost in the main line bid item. Our
19 expectation was that the item had been left out, and
20 that we would get an additional pay item for turnouts.
21 That's how we bid the project.

22 Our rationale for doing that is that we have
23 always received additional pay items added to the
24 contract for work items that were specified in the
25 specifications but were not included in the original

1 bid documents.

2 We have never had it occur that the cost or
3 payment for a specified pay item would be expected to
4 be included in another pay item without it being noted
5 in the plans that way. We are used to seeing a pay
6 item note if the intention is for the costs and the
7 revenue associated with any pay item of work to be
8 included within another pay item.

9 In fact, on this project the concrete Class 2 end
10 walls, which is item 400-2-2 included a note that told
11 you to include various items of work in that item that
12 there were other pay items for.

13 So, it was clearly stated how you would get paid
14 for the costs and how you would get your revenue for
15 the work associated with the pay items. That was not
16 the case with the lime rock, and there was no
17 indication that you were to include the cost of any
18 turnouts in the lime rock price.

19 When we started the project, we notified the CEI
20 that this item was missing. He originally agreed with
21 our presentation that that item was missing. He was
22 later overruled by the Department.

23 We provided documentation to that, both in our
24 letter that we had presented on the issues he signed
25 and then later a retraction of that by him where the

1 Department had said that we didn't deserve the
2 additional pay item.

3 They have argued that the turnout specification
4 is not applicable to this project, and they've cited
5 spec 286, a copy of which we provided in this detail as
6 well as in the formal presentation that Mr. Cummings
7 presented to you all.

8 Specifically, what they have said is that
9 turnouts are not applicable to reconstruction projects.
10 However, if you read the literal specification on 286,
11 the work specified in this section consists of turnout
12 construction or extensions of existing turnouts on
13 resurfacing and widening projects.

14 The word "or" that's placed in that first
15 sentence is very important relative to the
16 understanding of the section. It says the work
17 specified in this section consists of turnout
18 construction, period.

19 You know, that "or" is disjunctive. It's not
20 inclusive. You can't take that "or" and apply it to
21 say, well, that means the "or" extensions of existing
22 turnouts on widening and resurfacing projects
23 eliminates the need for a pay item on a regular
24 reconstruction project.

25 Secondly, there's a lot of other jobs that have

1 been bid that way. We presented that information in
2 here. We have a tablet of -- this is just a partial
3 tablet of other jobs that the Department has bid
4 throughout the state that are not widening and
5 resurfacing projects that include turnout pay items in
6 the project.

7 So, it is inconsistent to say that that item
8 there doesn't apply to this project because it's a
9 reconstruction project, where they are using it in all
10 these different -- they've got bridges, bypass,
11 additional reconstruction, minor intersections. There
12 is no -- it is not logical that that would hold true
13 when they are using it all over the state.

14 CHAIRMAN COWGER: Excuse me, is that display
15 there in your package?

16 MR. JENSEN: Yes. Additionally, on this project
17 there were turnouts that had to be added to the project
18 that weren't shown on the original drawings.

19 For that work we were given a supplemental
20 agreement and paid for that work in addition to the
21 contract, and we did not do that work or agree to do
22 that work at the unit prices that they applied to the
23 work that was shown on the plans. We got a new pay
24 item, new unit prices for that work.

25 Those turnouts were in the reconstruction

1 agreement. They were added. They weren't -- one end
2 of the job has milling and resurfacing on it. The ones
3 they added, they weren't in that area. They were in
4 the area where they had reconstruction.

5 If you were going to follow that argument, then
6 we would only have gotten paid for the lime rock, would
7 only have gotten the units that were shown.

8 The second argument the Department makes is that
9 since the lime rock quantity is large enough to include
10 the turnouts, that that eliminated the need for a
11 turnout pay item.

12 Again, there is no pay item note that instructs
13 you, include the cost of turnout construction in the
14 lime rock base. That is the note you would normally
15 see if that was their intention. That note doesn't
16 exist.

17 Additionally, the quantity of earthwork for the
18 project -- it's a unit price earthwork contract -- does
19 not include turnouts in the earthwork quantity unless
20 they hit on a cross section.

21 As the cross sections were drawn, if they had a
22 turnout, you had the earthwork associated with the
23 turnout in the quantity. If the cross section doesn't
24 have a turnout, it's not included in any quantity.
25 There is no compensation set up to pay the contractor

1 for that. That is part of the pay item for the
2 turnout. It includes the earthwork, the rock work.

3 So, by not having it included in the dirt work
4 item, the Department's position is that, well, the lime
5 rock item is big enough to cover it, and you are
6 supposed to have assumed and put all the costs
7 associated with building turnouts in the lime rock
8 item, and yet there's no note directing us to do that.

9 That's it in a nutshell.

10 CHAIRMAN COWGER: Before DOT starts, I'd like to
11 ask a couple of questions, if I could. Before we get
12 away and forget it, let's talk about the quantum part
13 of your claim just a minute, in the event that the
14 Board might decide there was some entitlement.

15 Looking at that, what I'm trying to find out is
16 you have given some costs in there. I assume those
17 costs were your total costs to build all of what you
18 define as turnouts?

19 MR. JENSEN: Yes.

20 CHAIRMAN COWGER: Then you took off from that the
21 amount that you had been paid per square yard under the
22 roadway lime rock base item?

23 MR. JENSEN: Yes.

24 CHAIRMAN COWGER: Roadway being your
25 interpretation?

1 MR. JENSEN: Yes.

2 CHAIRMAN COWGER: Is there any place we have any
3 further documentation of those costs other than in that
4 summary?

5 MR. CUMMINGS: I think that's what we gave you.

6 MR. JENSEN: Yes.

7 CHAIRMAN COWGER: That's in here?

8 MR. JENSEN: Yes, detailed equipment, labor. We
9 tracked it. We recognized there was a problem right in
10 the beginning, and we tracked it all the way.

11 CHAIRMAN COWGER: Do those costs include just the
12 base construction, or do they include the base and
13 anything that it did to prepare the turnout for placing
14 of the base, you know, grading work? I assume there
15 was no --

16 MR. BAILEY: What we did is we tracked the cost
17 of building the turnouts in our computer, our cost code
18 system. We set up two cost codes for constructing the
19 turnouts. One for when we built the southbound roadway
20 and the northbound roadway.

21 It included everything required, as far as the
22 earthwork, subgrade and also the base course.

23 The other incidental work, you know, which the
24 specifications really allow you to have curb work,
25 whatever, we did not include in there. There are other

1 items that the specifications allows you to have, but
2 we did not include.

3 When we also got paid for some of the turnouts
4 by a change order, by a supplemental agreement as
5 turnouts --

6 CHAIRMAN COWGER: We understand that --

7 MR. BAILEY: When we tracked the costs we didn't
8 track those turnouts separately because at the time we
9 didn't know if we would be paid for it.

10 We came up with an average unit price for
11 turnouts. We subtracted the quantities we got paid for
12 in the supplemental agreement and applied that average
13 unit price for the ones we did not get paid for.

14 CHAIRMAN COWGER: Okay.

15 MR. ROEBUCK: The supplemental agreement
16 turnouts, you didn't deduct that from your claim?

17 MR. BAILEY: Yes, we did. We deducted it from
18 the quantities. It was included in averaging the unit
19 costs for constructing turnouts. Then we deducted that
20 quantity when we applied the new costs to the claim.

21 MR. ROEBUCK: The only deduction you show is for
22 the lime rock?

23 MR. BAILEY: The other quantity had already been
24 deducted in the dollar amount of costs.

25 CHAIRMAN COWGER: The deduction was based on so

1 many square yards of lime rock at the contract unit
2 price which you were paid for?

3 MR. JENSEN: The first deduction was if there is
4 a hundred square yards and ten square yards were paid
5 for as a supplemental agreement, the first quantity you
6 see is 90 square yards.

7 Everything was run -- what we were asking for
8 originally was only work where there had been no
9 supplemental agreement for.

10 CHAIRMAN COWGER: And then what?

11 MR. JENSEN: Then we deducted from our total
12 request for reimbursement anything the Department had
13 paid for as -- you know, they paid for lime rock --

14 MR. ROEBUCK: Under the main line item?

15 MR. BAILEY: Yes.

16 CHAIRMAN COWGER: How did you determine that?
17 Did you just pick it off the plans basically?

18 MR. BAILEY: The quantity of the supplemental
19 agreement terms?

20 MR. ROEBUCK: Quantity of lime rock, the main
21 line lime rock that you deducted here.

22 MR. BAILEY: From a take-off of the plans.

23 CHAIRMAN COWGER: In your cost summary.

24 MR. JENSEN: Everything was based on the same
25 quantity.

1 CHAIRMAN COWGER: Good enough.

2 MR. XANDERS: I have a question. The bid you had
3 asphalt by the square yard, three inch at 5.98. Seems
4 like I saw in your package here the asphalt for the
5 turnouts was by the ton.

6 MR. BAILEY: We originally in our claim to the
7 Department requested to get paid for the asphalt, also,
8 as a separate pay item. And since that time we
9 withdrew that part of the claim.

10 MR. XANDERS: Okay.

11 CHAIRMAN COWGER: The hot mix placed in the
12 turnouts is not at issue today?

13 MR. BAILEY: No, sir. The revised book you got
14 this morning takes out any reference to the asphalt
15 portion of the claim.

16 CHAIRMAN COWGER: Okay. Rather than getting any
17 further off track, I think it's time to let the DOT
18 rebut the entitlement part of the claim.

19 MR. LEONARD: Our presentation will be made by
20 Doug Geiger from Reynolds, Smith and Hills.

21 MR. GEIGER: What I will do is walk you through
22 this latest submittal and then go back and address some
23 of Steve's items that he brought up. We will use our
24 previous submittal to refute what they have here.

25 What I have shown here -- you can take this clip

1 off and unfold that schedule for me, please.

2 What this is, the first two sheets are the CES
3 sheets that Jensen bid the project on in December of
4 1995. It is showing quantity and the dollar value.
5 That's for your stabilization, your base, and your
6 asphalt.

7 Okay. There is no item on here for turnout
8 construction. There was no item in the CES sheet for
9 turnout construction.

10 Then the second or third sheet, what I have here
11 is the schedule.

12 In doing the job we had numerous utilities on the
13 job. We did not have a CPM provided in the special
14 provisions so we asked Jensen to provide a CPM for this
15 project, which we paid them for the provision of the
16 CPM.

17 When they developed the CPM they had to include
18 the dollar value, resources and quantity for each one
19 of the items of construction activity. I highlighted
20 it here. It shows the resource, which is your pay item
21 in your contract, the dollar value is the budgeted
22 cost. That dollar value adds up to the same dollar
23 value that was originally in the CES sheets.

24 Down at the bottom, the quantity associated with
25 that activity, that quantity also matches what is shown

1 on the CES sheet. At the beginning of the project
2 there was no item for turnout construction. They
3 didn't include it in their CPM.

4 This was issued at the beginning of the job where
5 they submitted it to us. They had numerous chances to
6 revise or bring up an item of turnout construction. At
7 that time it was never brought to our attention that
8 there was an issue of turnout construction.

9 The quantity, as you go through later on, you
10 will see the quantities of what they call turnouts and
11 we call driveways is about 10 percent of the total lime
12 rock item. We felt that was also an item, if there was
13 a 10 percent bust they would have brought it to our
14 attention earlier than the eve of construction.

15 Also, just to show, we've all been working on
16 this, so this is not -- this may be our final meeting
17 on this, but we have all been working together on it.

18 We also went before the claims review committee.
19 The claims review committee ruled in our favor. That's
20 the last sheet there for that first package.

21 CHAIRMAN COWGER: Let me back you up just a
22 second to your sheet here that's based on the CPM.
23 What do the red and green mean?

24 MR. GEIGER: Red is a critical path item and the
25 green just shows the end of the activity.

1 CHAIRMAN COWGER: Okay. What are you depicting
2 here with the bars?

3 MR. GEIGER: The duration of the activity.
4 That's also shown in the third column there. It's the
5 duration of activity and workdays.

6 CHAIRMAN COWGER: The dollars don't show up in
7 there, it's just the duration?

8 MR. GEIGER: Dollars are the budgeted cost here
9 in the column next to the phase. This column right
10 here at the top, you will see a budgeted cost.

11 CHAIRMAN COWGER: I've got you.

12 MR. GEIGER: That's the dollar value that they
13 had to associate with each activity. The CPM
14 specification requires them -- the dollar value has to
15 equal the dollar value of the contract.

16 CHAIRMAN COWGER: When I come down to the
17 249,219, that's the total cost of doing the base work?

18 MR. GEIGER: That is the total cost for that
19 activity of base work. If you add that base work with
20 the next one down, in the lime rock further on down,
21 the 285,709 resource, if you add those together, you
22 will come up with the dollar value of the lime rock.

23 CHAIRMAN COWGER: Which would be around 500,000?

24 MR. GEIGER: Yes, sir, which would equal what
25 dollar value was shown on the CES sheet that they had

1 submitted with their bid.

2 MR. XANDERS: You made a statement that the
3 quantity for the lime rock included about 10 percent
4 for the turnouts?

5 MR. GEIGER: Yes. And we will get to that next.

6 CHAIRMAN COWGER: Does this \$500,000 equate --

7 MR. GEIGER: Back to the CES sheet.

8 CHAIRMAN COWGER: Go ahead, sorry.

9 MR. GEIGER: Okay. So, that's one of our reasons
10 why we didn't feel like we owed them.

11 The next submittal package I have here is the
12 four photos. The top two are before. You can see the
13 date on one very vaguely in the top left, 4-17-95.

14 Then directly below it is a photo in a similar
15 area. I just wanted to show the gentlemen that this
16 was not a milling and resurfacing project or a widening
17 project. It was total reconstruction.

18 CHAIRMAN COWGER: We understand that. What it
19 amounted to is you had -- what did you have, a two-lane
20 facility with a passing lane in the middle, and you
21 converted it to a four-lane facility with a full
22 median?

23 MR. GEIGER: Yes, sir.

24 CHAIRMAN COWGER: Curb and gutter. Go ahead.

25 MR. GEIGER: The next page, this summarizes --

1 the first two pages are out of the comp book. They are
2 entitled side streets and entrances. It's showing the
3 original quantity and the final quantity for Type 3
4 asphalt, base group nine and stabilization.

5 The numbers on the left-hand side are the
6 locations. There's 42 of them. The numbers on the
7 right side or the letters on the right side are the
8 pages that are shown. We are going to go through some
9 of these with you gentlemen.

10 You can see on page B here at the bottom, I've
11 highlighted where it says side street, subtotal. You
12 can see that's about 8,000 square yards for each one of
13 those items.

14 MR. XANDERS: Where are you?

15 MR. GEIGER: Page B, that I lighted about
16 two-thirds of the way down.

17 CHAIRMAN COWGER: Eight thousand four something?

18 MR. GEIGER: Yes. I thought that was a
19 significant quantity that they would have caught during
20 the bid process.

21 CHAIRMAN COWGER: Now, they did not have access
22 to these sheets?

23 MR. GEIGER: No, they didn't, at bid time.

24 CHAIRMAN COWGER: You are saying in their bid
25 preparation they still should have caught it? That's

1 your position?

2 MR. GEIGER: That's our position. On sheet C --
3 you are going to have to work with me here. We are
4 referencing from page A back to the individual sheets.
5 I want to go over these driveways or side streets, as
6 we call them.

7 MR. XANDERS: Let me ask you, is base a plan
8 quantity item?

9 MR. GEIGER: Yes.

10 MR. LEONARD: As shown on the CPM.

11 MR. XANDERS: They would have been paid for that?
12 Does their claim subtract out that 9,000 square yards
13 of side street?

14 CHAIRMAN COWGER: They were paid for it, right,
15 at the contract unit price for base?

16 MR. GEIGER: Yes.

17 MR. ROEBUCK: They credited it in their claim,
18 the \$68,000.

19 CHAIRMAN COWGER: We have had access, by the way,
20 the Board has too many of these sheets that you are
21 getting ready to talk about, so kind of keep that in
22 mind. You don't need to get into a lot of detail.

23 MR. ROEBUCK: You don't need to talk about every
24 driveway.

25 MR. GEIGER: Then let's do something here.

1 I will take you to sheets D and E, D as in dog and E as
2 in elephant. Number 4 on D, I have highlighted number
3 4 on D.

4 And letter E, we have highlighted a cross section
5 at station 717, there on the right-hand side. You can
6 see, if you look below it, station 716 and line
7 yourself up with the curb, you can see that section
8 shows some full depth construction outside the curb
9 line. That's one of them.

10 There's over nine sections like that in our plans
11 and specifications. On the main line we have about 106
12 cross sections. Of those, nine of them, about 10
13 percent, showed full depth construction.

14 Let's go to sheets H and I. This one is very
15 clear. On H you have locations 11 and 12. On sheet I
16 you have locations 11 and 12.

17 Okay. We are going almost 30 feet past the curb
18 line, full depth construction.

19 CHAIRMAN COWGER: Rather than getting into this
20 any deeper about the issue you are discussing, can we
21 get the parties to stipulate that these cross sections
22 do show full depth base?

23 MR. LEONARD: We will so stipulate.

24 CHAIRMAN COWGER: The contractor. Now, not the
25 significance of that, just that the plans do, in fact,

1 show it.

2 MR. CUMMINGS: I think it has to be a caveat
3 because I don't think it shows it for every --

4 MR. ROEBUCK: Where there are cross sections you
5 acknowledge there was some detail --

6 MR. JENSEN: And also make the point where there
7 is not cross sections there is no detail, and the
8 earthwork portion of the work never comes into any
9 calculations.

10 CHAIRMAN COWGER: Let's let Mr. Geiger go back
11 then. I just didn't want you to get too deep into
12 that. We understand it.

13 MR. GEIGER: Let's go to sheet S. Down there in
14 the middle, at about between station 768 and 769 we
15 added a driveway. That one was added. We paid that
16 under SE number 8.

17 This is an urban job. These urban jobs are very
18 dynamic. They are not stagnant.

19 We felt during the construction process, and we
20 told Jensen at the partnering meeting, any changes we
21 make, they could include the cost of these separate
22 driveways and median changes in their estimate of the
23 quantities in an estimate to calculate their bid.

24 At bid time work -- that's how we understand it
25 to be, you come up with your quantities for driveways,

1 side streets and your main line and combine those two
2 quantities production dollar value to come up with the
3 average bid price.

4 We felt after the bid time they could not do that
5 bid average and come up with a fair quantity to
6 increase their -- or a fair dollar value for that
7 particular item of work.

8 That is why after the job was let, whenever we
9 added a driveway or made a median change, we
10 negotiated. We basically did cost plus.

11 CHAIRMAN COWGER: I think we understand that.

12 MR. GEIGER: Okay.

13 CHAIRMAN COWGER: Any driveways that are added
14 are not in dispute?

15 MR. GEIGER: Right. That's why we did pay a
16 premium dollar for that, because that's what it took
17 them to do the work.

18 At bid time we felt like they could have come up
19 with a fair enough difference in quantities to know
20 there was a difference between main line, side streets,
21 and they would have been able to use those two
22 quantities to come up with a dollar value that would
23 cover both work.

24 Okay. That's pretty much all for that package.
25 Now we are going to go back to the book --

1 CHAIRMAN COWGER: Before you leave that, while we
2 are looking at the plans, it looks to me like on this
3 job the designer made great effort to detail any
4 connections. When I say connections, I'm talking about
5 either driveway connections going into businesses or
6 whatever it may be, and then also what I call street
7 intersections.

8 You've got two different categories basically of
9 what is being discussed today as turnouts. Is this
10 typical of the way the plans are drawn today, to show
11 that much detail on an urban job?

12 MR. GEIGER: This is one of my first urban jobs.
13 I couldn't tell you for sure.

14 MR. CRAIG: If it's a big intersection I think we
15 usually have it on, depending on the plans, if the
16 station falls there.

17 MR. BRYAN: We always have pretty good detail on
18 them.

19 CHAIRMAN COWGER: The reason for that may be due
20 to the changes in the rules dealing with driveway
21 connections and access to the public and all?

22 MR. GEIGER: That's kind of what we felt. There
23 was 12 pages of intersection profiles with numerous
24 intersection profiles on each page. We felt like this
25 wasn't just your, okay, let's go ahead and throw a

1 driveway in here and call it a turnout. There was
2 definitely a motive or specific intent to show all
3 these connections.

4 CHAIRMAN COWGER: All right. Now, as far as you
5 are concerned then, as far as the issue at hand here,
6 you are really not differentiating between what
7 I described as driveway connections and intersections?
8 You've got them all lumped together?

9 MR. GEIGER: Yes, sir.

10 CHAIRMAN COWGER: And the contractor has, too?

11 MR. BAILEY: What the spec book 515 called a
12 turnout is what we put in our quantities.

13 CHAIRMAN COWGER: What about these streets?
14 Let's specifically look at Exhibit 3, page D. On the
15 left-hand side you have got an intersection with Owens
16 Avenue.

17 Now, how are you treating that, Mr. Contractor?
18 Is that something that you are considering as a turnout
19 as far as your claim is concerned?

20 MR. BAILEY: Yes, sir, I think we are. Let me --
21 we have listed every one we specified in the book,
22 every single one and what the quantity was associated
23 with it.

24 CHAIRMAN COWGER: We can look that up.

25 MR. JENSEN: You should be able to look right

1 here and check for Owens.

2 MR. BAILEY: We have Owens Avenue, 298 square
3 yards.

4 CHAIRMAN COWGER: When we talk about the quantity
5 in what I would call the through roadway, I can't pick
6 up right offhand -- can't pick this right out, but
7 there must have been some places where you have an
8 acceleration or deceleration lane on the outside?

9 MR. GEIGER: Only up at A1A.

10 CHAIRMAN COWGER: Only at the beginning of the
11 job? Good enough. Let's drop that. I understand now.

12 MR. XANDERS: Was there a quantity in the CES for
13 a turnout construction?

14 MR. GEIGER: No, sir.

15 MR. XANDERS: I thought I read there was a small
16 amount.

17 CHAIRMAN COWGER: No, that item was added for
18 those additional turnouts.

19 MR. CRAIG: The plans tell in the directions to
20 do that.

21 CHAIRMAN COWGER: Go ahead, Doug.

22 MR. GEIGER: Now, we are back to our original bid
23 package that we gave you. We want to go over some of
24 the items in here. I'm sure you all have had it and
25 studied it, but we would like to go over it one more

1 time.

2 Okay. Let's go to Tab 2. Tab 2 we show the bid
3 blank. You know the job was bid in December of '95.
4 In our second page of that, the special provisions do
5 not call out widening or milling and resurfacing. It's
6 new construction, multi lane construction. That's
7 important. We feel that's important when you go to the
8 next tab, note 3, where it says the work described in
9 this section. This is section 286.

10 I understand what Steve is saying about turnout
11 construction, but we feel if turnout construction is
12 called for, then we go back to 286. Then the order
13 applies if you've got existing turnouts or resurfacing
14 or widening-resurfacing projects, which this project
15 was not. The widening-resurfacing was total new
16 construction and turnouts were not called for in the
17 plans or specifications or the CES sheet.

18 That's one of the reasons why we denied this --
19 not denied it, but denied it later on.

20 Let's go to Tabs 8 and 9. There we are showing
21 the plans did not -- or the CES sheet they bid on did
22 not -- they call for full depth construction. No place
23 in there is it shown for turnout construction.

24 Tab 10, there is our note where we note 15 that
25 is highlighted, proposed turnouts and driveways not

1 shown on plans, constructed, existing at the location
2 of existing turnouts and driveways in accordance with
3 the roadway and design standards.

4 CHAIRMAN COWGER: That's not at issue here. We
5 are not talking about turnouts and driveways not shown.

6 MR. GEIGER: The only issue with that is that's
7 why we were going to pay them different, not the plan
8 quantity.

9 MR. WILLIAMS: The designer thought about it,
10 purposely didn't include that in the original --

11 MR. CUMMINGS: Is there anything in that note
12 that is suggesting anything about payment? Doesn't it
13 say only about construction?

14 MR. JENSEN: That's at Tab 10.

15 MR. GEIGER: I guess that's why we felt like we
16 owed them, another reason why we felt we owed them more
17 money on the turnouts we added after bid, besides we
18 told them --

19 MR. JENSEN: Our point being that it only refers
20 to design. It doesn't refer to payment.

21 CHAIRMAN COWGER: Frankly, I think that's pretty
22 clear. I don't know how significant that is, but
23 I think that statement is correct, it only pertains to
24 how turnouts are to be designed. Okay. Go ahead.

25 MR. GEIGER: Okay. Let's go back to -- in our

1 correspondence -- I think that's Tab 4. The job was
2 let December of '95. This issue of turnouts came up in
3 April of '97. Now, that I feel is a significant amount
4 of time to go by before we are aware of a compensation
5 request that initially added up to \$300,000. You know,
6 that's just too much of a time to raise your hand and
7 say, by the way, we have a plan on the eve after the
8 job has been over almost six months in delay, and in an
9 urban area, these people are wanting their roadway
10 completed.

11 And we are saying you have a plan there, you need
12 to make a decision or we are not going to do any more
13 work here.

14 MR. XANDERS: The job was let when?

15 MR. GEIGER: December of '95.

16 CHAIRMAN COWGER: So, we can say the work began
17 sometime fairly early in '96, and you are saying the
18 issue didn't even come up until '97, at least a year
19 later?

20 MR. GEIGER: Yes, sir.

21 CHAIRMAN COWGER: That was also at the time they
22 were going to start constructing the base?

23 MR. GEIGER: Yes, sir.

24 MR. BAILEY: None of the turnouts had been
25 constructed before the issue was brought up.

1 MR. GEIGER: That's right, none of the turnouts.

2 Let's go to Tab 15. Tabs 15 and 16 were two
3 projects they mentioned on their board and brought to
4 our attention that did have turnout construction. In
5 both of these projects Palatka Construction was
6 involved.

7 I was involved in the other project, the 312
8 project. That project did have milling and
9 resurfacing. That is the only place they had a turnout
10 construction. It was about 44 yards on one and a
11 similar quantity, 200 square yards in another. It was
12 in an area where there was milling and resurfacing.

13 The areas where there was total new construction,
14 we did not pay turnout construction. We did not have
15 an item for turnout construction.

16 Then on the board, also, we called -- Steve
17 afforded us the opportunity to check these projects out
18 beforehand. Yes, there was turnouts on some of them,
19 but like when we talked to the resident people or the
20 people we could get in contact with, myself and
21 Jeff Williams did this, there were areas like the bike
22 path.

23 There was asphalt over a sand driveway, or
24 another one down in Leon County was a minor street.
25 They had main line widening but they also had minor

1 street widening that they did have turnout construction
2 on. It wasn't turnout construction on the new
3 construction portion of the project. It was off a
4 milled, resurfaced part of the project.

5 So, that's where they did pay the turnout
6 construction. So, those were applicable. They follow
7 the standard, what we feel is the intent of the
8 specifications.

9 Another thing that didn't come out in our
10 presentation that we feel like the Board ought to know,
11 when we went ahead and built these driveways, side
12 streets, turnouts, they brought in new lime rock. We
13 paid them as commercial material for the lime rock. We
14 allowed them to leave that lime rock in place and use
15 it as the base.

16 That amounted to over \$200,000 of overrun on
17 commercial material. So, we felt that was of benefit
18 to Jensen, the traveling public. It was a win-win to
19 everybody. We feel they have already been compensated
20 for a lot of this material already.

21 CHAIRMAN COWGER: You are saying this commercial
22 material for driveway construction was for temporary
23 access basically. Then when it came time to do the
24 permanent construction, they were allowed to reuse that
25 lime rock as part of the permanent base?

1 MR. ROEBUCK: Leave it in place?

2 MR. GEIGER: Yes.

3 MR. CRAIG: And get paid for it.

4 MR. GEIGER: Under ten-inch base and commercial
5 material.

6 CHAIRMAN COWGER: That was in accordance with the
7 specs, right? Did the plans and the specs somewhere
8 allow that to take place?

9 MR. GEIGER: Didn't say it couldn't take place,
10 I will put it that way. I think it was originally 33
11 yards, and we have used -- I can't remember the figure,
12 but it was over \$200,000 worth of commercial material.

13 MR. XANDERS: When you say you overran the
14 commercial material, does that mean the designer didn't
15 have sufficient quantities in the first place? Why
16 would we overrun it that much to provide temporary
17 access?

18 MR. GEIGER: The grade changed so much from what
19 was there and what we ended up with. It was three feet
20 of grade change. You built it in such a way that you
21 had half -- you built the northbound and southbound
22 separate. You had like a three-foot cut between the
23 roadway to the new roadway, so we filled that whole
24 section in with lime rock to get access.

25 We tried to keep the grade to allow cars in. It

1 wasn't like we went straight across. They worked to
2 minimize the quantity, but that's what it took.

3 Now, we could have used dirt and capped it with
4 lime rock or something else, but we went ahead and
5 allowed lime rock to be used.

6 CHAIRMAN COWGER: That's kind of a -- the
7 quantities kind of reach up in the air and grab the
8 numbers for the designer anyway, isn't it? He really
9 doesn't know?

10 MR. GEIGER: He used the standard five cubic
11 yards per -- 30 cubic yards per mile.

12 CHAIRMAN COWGER: That's kind of reaching up in
13 the air and grabbing it. Okay. What else do you have?

14 MR. BRYAN: Don't have anything else.

15 MR. CRAIG: I will add one thing. We talked with
16 Roger and Donny Gates twice. Roger we talked to once
17 over there at Doug Geiger's office and once in
18 Jacksonville.

19 Kenneth Bryan has been with DOT about 40 years.
20 We've done work off and on with Donny. Donny told us
21 he knew damn good and well he said this is the way you
22 all get paid for turnouts, but if he didn't ask he
23 wouldn't know.

24 Donny agreed with us he was just asking for
25 money. Just wanted to let you all know that.

1 CHAIRMAN COWGER: Who is Donny?

2 MR. CUMMINGS: He's dead.

3 CHAIRMAN COWGER: He worked for Jensen? Who did
4 he work for?

5 MR. CRAIG: He worked for Jensen at the time.

6 MR. JENSEN: I remember a conversation where
7 I was told -- are we going to start down this line?
8 Golly.

9 CHAIRMAN COWGER: Okay.

10 MR. CRAIG: If you don't want it, take it out.

11 CHAIRMAN COWGER: Before we leave the DOT's
12 position, we are looking over this exhibit presented by
13 the contractor, which was included in his original
14 submittal package.

15 Do you have any specific comments on this exhibit
16 entitled partial list of State projects with turnouts,
17 meaning I believe they had a separate pay item for
18 turnouts?

19 MR. GEIGER: Some of those we have researched the
20 ones where we can get ahold of somebody on those
21 projects. What our research was was that turnout
22 construction did apply because it was a milling and
23 resurfacing.

24 MR. CRAIG: Or widening.

25 MR. WILLIAMS: Every new construction job, most

1 of them, is going to have some tie-in or taper back to
2 existing. They had very small quantities on most of
3 those.

4 MR. GEIGER: Jeff came up with the quantities for
5 each one of those.

6 MR. WILLIAMS: Yes.

7 MR. GEIGER: They were very small quantities.

8 MR. WILLIAMS: Just like the job we presented in
9 the package here was new construction, but we did have
10 some minor turnout construction, and we hadn't included
11 it in the contract for the tie-ins. It wasn't in front
12 of that driveway during the main line.

13 MR. GEIGER: We are not denying that pay item is
14 used, but from our research that was done, it was used
15 correctly on the projects we were able to contact
16 somebody on, which may have been about five or six out
17 of the list. It was used correctly.

18 None of them were in the magnitude of this, were
19 they, Jeff, of 8,000 square yards?

20 MR. WILLIAMS: Correct. Turnout construction was
21 used properly on these projects according to the specs.

22 CHAIRMAN COWGER: According to the specs. You
23 know, that's subject to dispute I'm sure. Your
24 position is it was covered, DOT.

25 We are talking more -- I think right in the last

1 couple of minutes we've been talking more about
2 precedent, what had been the precedent in the past
3 because that's what this exhibit we were just looking
4 at attempts to display. Am I right?

5 MR. JENSEN: This job that you all brought out in
6 your packet, it's a Hernando County project for the
7 milling and resurfacing?

8 MR. GEIGER: It's a Leon County one.

9 MR. JENSEN: I have a complete set of a Hernando
10 County job. It's a total reconstruction. The pay item
11 quantity for turnouts in this job is 4,429 square
12 yards.

13 MR. ROEBUCK: Is that a multi laning
14 reconstruction?

15 MR. JENSEN: Multi laning reconstruction. It's
16 not a curb and gutter section job, but it's a multi
17 lane, reconstruction turnout payout of the whole thing.

18 MR. GEIGER: Is that State Road 50?

19 MR. CUMMINGS: Do you want these plans, Gene, in
20 evidence for this job?

21 CHAIRMAN COWGER: No. We can look at them. Is
22 this one, DOT, that you all didn't -- this job is
23 listed over there on that board, right?

24 MR. JENSEN: Our research on that was we just
25 looked up every single job with any type of a

1 description because they were honing in on the fact
2 that it had to be milling and resurfacing. We found
3 every job with a different description that had that
4 item.

5 Then we heard the argument it's only on the
6 milling and resurfacing portion of the project. We
7 tried to find a project where that wasn't true. We
8 didn't research all of them, we just tried to find an
9 example.

10 CHAIRMAN COWGER: Where did you go to find these
11 plans?

12 MR. BAILEY: In the monthly advertisements for
13 bid.

14 MR. JENSEN: That's just the monthly
15 advertisement.

16 CHAIRMAN COWGER: These are all about the same --

17 MR. BAILEY: They were all in '96, '97, '98,
18 I believe.

19 CHAIRMAN COWGER: Were these plans you had in
20 your office?

21 MR. JENSEN: No.

22 MR. BAILEY: Every month we get the DOT
23 advertisement for bid.

24 CHAIRMAN COWGER: I've got you now. You weren't
25 looking at the plans, but the ad.

1 MR. JENSEN: The description of the job and
2 whether it had the item or not.

3 MR. CRAIG: I think Roger asked about the
4 settlement plans once. The two settlement plans in St.
5 Johns County, the way we interpret the thing, it looks
6 like that was done like we interpreted it.

7 MR. GEIGER: This particular one wasn't on our
8 list.

9 MR. JENSEN: We went searching for one to back up
10 our position after they came back. It wasn't just a
11 description, it was how it was used.

12 CHAIRMAN COWGER: The job you are talking about a
13 minute ago is one where you have actually looked at the
14 plans?

15 MR. JENSEN: We have the plans (indicating). We
16 started looking for a bigger quantity. Once we found a
17 bigger quantity, we asked for a copy of the plans.

18 CHAIRMAN COWGER: Okay. I think we have that
19 one. That job is on your board?

20 MR. BAILEY: No, sir, that was one we found after
21 we put the board together.

22 MR. JENSEN: As a matter of fact, we pointed this
23 out at the last meeting we had. That job was being bid
24 the day we met in Tallahassee to discuss this issue.
25 We said how can you say you don't use it for this when

1 you are bidding a job today with it. That's sense.
2 I think that was bid -- well, whenever our hearing was
3 last time.

4 MR. CRAIG: About a year ago.

5 CHAIRMAN COWGER: I think we are wandering all
6 over at the moment. Would everybody agree that we are
7 at the point to where we maybe ought to begin summing
8 this up?

9 MR. LEONARD: Yes, I think Alan and I would like
10 to sum it up.

11 MR. CUMMINGS: Roger, let me ask if you have
12 anything to say in response.

13 MR. JENSEN: I have a few issues. One was the
14 CPM. He brought that up, Doug did, that we are
15 required to balance our numbers on this CPM submitted
16 to what we bid. Obviously if we are looking for
17 additional costs for an item, there's no way to include
18 it on the CPM in balance to the bid. It wasn't proper
19 to show it on the CPM.

20 You all asked the question, and I'm sure you all
21 recognize it, we don't get the comp book.

22 CHAIRMAN COWGER: We understand that.

23 MR. JENSEN: We don't have that information.

24 This 515 index was an issue relative to design,
25 but I think we discussed that. Everybody agreed that's

1 just a note on the design.

2 They brought up the issue of how we got paid for
3 the commercial material. We also didn't make any claim
4 relative to the issue that the designer had missed the
5 fact that you needed all this commercial material to
6 make this job come together.

7 It was a major problem to maintain access to the
8 residences and build this job. That quantity should
9 have been large enough to compensate us for it. It
10 would have alerted us to the fact, look at the problem
11 we are going to have. We asked for no claim relative
12 to that.

13 Our costs on the lime rock and earthwork on this
14 job were significantly impacted by our ability to
15 maintain access to these driveways. We felt we were
16 compensated for that by the way they handled the
17 commercial material item.

18 It was in no way intended that that commercial
19 material item was to spill over to take care of our
20 claim issue. We made no claim to the impact of having
21 to have that. It was significant.

22 There is a huge gap between where you are and
23 where you have to go. The extension of these temporary
24 connections was well beyond the right-of-way of the job
25 in order to get people in and out of the project.

1 So, anyway, relative to that issue, I don't have
2 anything else right now.

3 MR. BAILEY: Just to expound on that point, the
4 commercial material that we used for the driveways, we
5 didn't make a windfall on the lime rock. The
6 quantities substantially overran by about 6,000 tons
7 from what we figured we would have to buy and what we
8 actually did buy for the project. We did not make a
9 windfall in our use of lime rock on the job.

10 The turnouts were a different character of work.
11 Many of them were built at night when -- so we could
12 maintain access to and from the residences,
13 condominiums and so forth.

14 CHAIRMAN COWGER: We understand that. This lime
15 rock that was used for commercial material for driveway
16 maintenance, DOT says that material was incorporated
17 into the base. Some of it, in my view, probably wasn't
18 because it was either outside the limits of the base,
19 beyond the limits of the final turnout, or below the
20 base limits. So, some of that material probably ended
21 up not being in the new base, is that --

22 MR. BAILEY: Well --

23 CHAIRMAN COWGER: -- reasonable?

24 MR. BAILEY: When we cored the job, thicknesses
25 were over thick. It was below the base is probably --

1 CHAIRMAN COWGER: Over thick turnouts?

2 MR. BAILEY: The base they considered the main
3 line.

4 MR. JENSEN: A lot of that being as the job got
5 basically chopped up into a bunch of pieces between
6 every turnout, as you maintain traffic.

7 CHAIRMAN COWGER: Let's go to summary now. We
8 have to finish.

9 MR. CUMMINGS: Thank you.

10 CHAIRMAN COWGER: Before we start that, I want to
11 correct something in identifying the exhibits.

12 I failed to identify the DOT rebuttal package, which
13 was submitted some time ago. We are going to identify
14 that as Exhibit 4.

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

16 CHAIRMAN COWGER: Go ahead.

17 MR. CUMMINGS: Thank you. Obviously any time
18 there is a summation by an attorney in a situation like
19 this, you don't want to be redundant. You all are very
20 knowledgeable about this. You hear these facts. They
21 are told to you, you immediately grasp them.

22 So, the summary, lawyers like me run a risk of
23 saying things to you all that are obvious to you
24 already. I apologize for being redundant for things
25 that you probably already know.

1 On the other hand lawyers have a compunction to
2 say things that I know are fairly obvious. If I don't
3 do that, I will walk out of here feeling bad. I know
4 you all don't want me to feel bad for the rest of the
5 day, so please bear with me.

6 If you look at this, this is just a matter of
7 contract. Is Jensen supposed to be paid under the
8 contract for turnout construction under a pay item for
9 turnout?

10 It is a matter of contract. What does the
11 contract say? It says under turnout construction the
12 quantity determined as provided above shall be paid at
13 the contract unit price of turnout construction. This
14 is part of the contract, section 286. It's not read
15 out of the contracts, not amended out. It's there.

16 It says if there are indeed on this project
17 turnouts, then Jensen is supposed to be paid under
18 turnouts. That hasn't been done. The contract hasn't
19 been followed. They ought to be paid under that.

20 What the Department would like for the
21 arbitrators in this case to do is to read out an entire
22 section of the contract through bits and pieces of
23 things such as, well, we had enough lime rock estimated
24 in the job to cover most of the turnouts.

25 You can't read out the contract, an entire

1 section by looking at such bits and pieces of
2 information.

3 I will move along here. I do feel like I am
4 going to wax poetic, but the poetry is lost on
5 everybody but myself.

6 On the turnout construction on the 286 it says --
7 the way the Department is reading this is nonsensical.
8 It's fifth grade grammar. It says the work specified
9 in this section consists of turnout construction, boom,
10 one sentence, or extension of existing turnouts on
11 resurfacing and widening-resurfacing projects.

12 One is turnout construction, first of a compound
13 sentence, first grade; second, extensions of
14 resurfacing, widening-resurfacing projects.

15 The DOT would have you read out the first entire
16 sentence of the compound sentence, first entire phrase.

17 Not only that, it doesn't make any sense. You
18 can flip through this book and every pay item, every
19 pay section starts out the same way.

20 I can flip over here. It says roof drains, work
21 specified in this section says the construction of pipe
22 drains for the discharge from buildings alongside the
23 project.

24 Well, this phrase that's in the contract, which
25 tells you what is going to be included, multi lane road

1 construction, road widening, resurfacing, landscaping,
2 signalization, signing, pavement markers -- the
3 Department says if it doesn't include the word turnout
4 construction, then I'm sorry, you don't get paid for
5 turnout construction as the contract says.

6 All of you know when you get a general
7 description such as this, it doesn't include every pay
8 item. This has got about ten different descriptions,
9 and you have about 50 something pay items in here.

10 I look back up at the document the DOT presented,
11 it says mailboxes. For heavens sake, it doesn't say
12 mailboxes in the description. I guess you read that
13 out, don't pay for mailboxes.

14 Those kind of arguments don't make any logical
15 sense. Not only do they not make any logical sense,
16 but they fall squarely when you look at what the
17 contract says.

18 If you conclude as arbitrators, yes, indeed there
19 are turnouts here, the contract says they are to be
20 paid for turnouts under the specifications, it seems to
21 me that ends the issue.

22 The Department's worry about what maybe they wish
23 they had done or wanted to say and hoped that bidders
24 might conclude doesn't change the contract.

25 There is no inconsistency or anything here that

1 deletes an entire section, specification out of the
2 contract.

3 As Steve pointed out earlier, when they wanted to
4 do it, they knew how to do it. When they wanted to
5 include a specification section that's found in the
6 specs into another pay item, they clearly said it. He
7 gave you the testimony on that.

8 Well, that -- you know, that I think is very
9 patently clear. I won't go on further. Thanks for
10 bearing with me.

11 CHAIRMAN COWGER: That it?

12 MR. LEONARD: I would agree with Mr. Cummings
13 that this dispute is determined by the contract.
14 Absent from the contractor's presentation was any
15 testimony that the contract as written is ambiguous.
16 I submit that the contract is not ambiguous, and it's
17 clear on its face.

18 The contract contained numerous plan and profile
19 and cross section sheets for each of the driveways and
20 the side street intersections that were to be
21 constructed. They were clear as a bell. There was no
22 ambiguity about those.

23 The summary of quantities for the lime rock, for
24 the base and for the asphalt, and for the subgrade were
25 clear. The totals balanced. There was no bust in the

1 quantities.

2 It was known to the contractor at the time of bid
3 what all the quantities were for both main line
4 construction and for the driveways and intersections.
5 It was known to the contractor because it was
6 articulated on their CPM schedule. It balanced to the
7 cubic yard what was shown in the CES schedules.

8 For this reason we don't think that any reference
9 to any other jobs has any connection to this case. We
10 think that the plans were clear that they were to
11 construct these driveways and side street intersections
12 in the same fashion that they were to construct the
13 main line. There was no differentiation.

14 They knew -- they testified that they noted at
15 the time of bid there was no pay item for turnout.

16 Plan note 15 on page 21 of the plans, which we
17 have included at Tab 10 in our materials, clearly
18 alerted them that any turnouts that were not depicted
19 on the plans were to be constructed in accordance with
20 standard index 515.

21 However, those side streets and driveways that
22 were depicted on the plan were to be constructed in
23 accordance with the plan, and that they were not to be
24 constructed in accordance with 515 and, therefore,
25 section 286 does not apply.

1 I might point out that under 5-2 of the Standard
2 Specifications it gives an order of priority, and that
3 the plans take precedence over the Standard
4 Specifications.

5 The plans were clear on their face, that they
6 were to construct all of the driveways and all of the
7 side street intersections to full depth construction,
8 that quantities were clearly indicated in the summary
9 of quantities. There was no bust. They were on
10 notice.

11 So, what I suggest to this Board is that there
12 was no plan error by the omission of a pay item for
13 turnouts. This was a deliberate omission by the
14 designer of record. It wasn't an error at all.

15 The only error was an error in the bidding and
16 failing to include in the contractor's bid the
17 anticipated costs for the construction of the driveways
18 and the side street intersections.

19 If there was any error to that effect, it was a
20 unilateral error by the contractor for which the
21 Department has no responsibility.

22 They made a bidding error, they have to eat it.
23 There is no reason to shift that to the Department
24 because the plans were clear on their face, and there
25 was no quantity bust.

1 I have some case law that -- I don't know if the
2 panel wants to see it, but I have some case law that
3 suggests when there is a unilateral bidding error, that
4 there is no relief.

5 I would cite as the first case on that, and
6 I will provide these cases to the Board --

7 CHAIRMAN COWGER: Excuse me, Board, do we want to
8 hear this?

9 MR. LEONARD: If you are interested in the case
10 law.

11 CHAIRMAN COWGER: I don't think we are interested
12 in the case law. Let's shorten it up by leaving that
13 out. I think we are familiar with that well enough.

14 MR. LEONARD: That being the case, I would submit
15 there is no ambiguity on the plans. They knew what
16 they were bidding on as evidenced by their own CPM
17 schedule.

18 MR. CUMMINGS: Gene, let me make a couple of
19 comments --

20 CHAIRMAN COWGER: Wait, are you finished?

21 MR. LEONARD: Yes.

22 MR. CUMMINGS: Clearly, we heard all the talk
23 about the plans. The plans don't address how you get
24 paid for the work. There's nothing in these plans that
25 addresses how you get paid for the work. We are not

1 arguing whether the plans are clear or not clear and so
2 forth. There is no consideration whether the plans
3 take precedence or don't take precedence.

4 What tells you how you get paid is the Standard
5 Specifications, and there's nothing in any of the
6 documents that say that isn't the way we are going to
7 pay you. There's no inconsistency. There is no worry
8 about what takes precedence.

9 The note 15 -- you all recognize the note 15 just
10 tells you how you are going to construct things. It
11 doesn't tell you how you are going to get paid.

12 If you look at what note 15 refers to, it talks
13 about the thickness of lime rock. It says the
14 Department may require other pavement criteria where
15 other conditions warrant.

16 Note 15 did not change that turnouts were built
17 any way other than in accordance with whatever this --
18 what is this called?

19 MR. BAILEY: Index 515.

20 MR. CUMMINGS: They were all built in accordance
21 with index 515. The Department has the right to change
22 the criteria however it wants to with regard to the
23 thickness of lime rock, which it did. I understand
24 many additional turnouts were built with the same
25 thickness of lime rock, nine inches.

1 The most important thing is to tell you there are
2 two different things, the plans, whether or not they
3 show you how it's built, that's fine. How do you get
4 paid? That's the standard specs. It tells you.

5 They've read out the whole provision in this
6 document because of something about the way the plans
7 told you how you build it.

8 That's all I've got to say.

9 CHAIRMAN COWGER: Excuse me just a second. When
10 you talk about how you are going to get paid, you are
11 addressing turnouts?

12 MR. CUMMINGS: Yes.

13 CHAIRMAN COWGER: Go ahead.

14 MR. LEONARD: I would submit Mr. Cummings is
15 factually in error when he said the driveways and side
16 streets were all constructed in accordance with 515.

17 I would submit that the evidence is that none of
18 them were constructed in accordance with 515. Rather
19 they were all constructed in accordance with the plans,
20 which has deeper depth of lime rock than 515.

21 I just wanted to make that point. They knew how
22 to construct in accordance with the plans.

23 MR. ROEBUCK: We apologize, he's an attorney.

24 MR. CUMMINGS: I'm still right. It says the
25 Department can give different criteria.

1 MR. BAILEY: It tells you in 515 the construction
2 connection in accordance with table 515, which gives a
3 recommended minimum. Then it has a note in there the
4 Department can vary the thickness to meet the local
5 conditions. They were built in accordance with that.
6 It was consistent with index 515.

7 MR. LEONARD: The way they were paid was for the
8 pay item for lime rock, for base, for sub grade, for
9 stabilization. They've been paid for all the work
10 they performed on this job. That concludes our
11 presentation.

12 MR. JENSEN: He made the statement that we
13 pointed out no ambiguity. In that argument we still
14 don't get paid for the dirt work. I still don't get
15 paid. Even though that argument -- I still don't get
16 paid. I have to do everything other than lime rock for
17 free.

18 CHAIRMAN COWGER: What you are saying is you were
19 paid separately under an item of turnout construction.
20 Your bid for that item would have included the dirt
21 work and the stabilizer?

22 MR. JENSEN: Exactly.

23 CHAIRMAN COWGER: There was no stabilizer under
24 the driveway connections?

25 MR. GEIGER: Yes, there was. We paid

1 stabilization under the driveway.

2 MR. JENSEN: They paid the stabilization --

3 CHAIRMAN COWGER: By the square yard?

4 MR. JENSEN: Yes.

5 CHAIRMAN COWGER: Even if it was just going into
6 a local business as opposed to a street intersection?

7 MR. GEIGER: Oh, yes. They did the work.

8 CHAIRMAN COWGER: Everything that had base on it
9 was stabilized?

10 MR. JENSEN: But they did not pay the excavation
11 costs.

12 MR. GEIGER: The only thing we can say about
13 that, though, is that where his particular cross
14 section was averaged over a hundred feet, not the 20 or
15 30 or 40 feet width that it actually was. Nobody went
16 out there and actually --

17 MR. JENSEN: My point is he is saying I did not
18 testify to an ambiguity. I want to make a point there
19 is absolutely an ambiguity. You can't go both ways.

20 If you are going to tell me every square of lime
21 rock included in a turnout poured into a lime rock
22 item, then you damn well better figure out every ounce
23 of dirt, not by the cross section, you better do a
24 cross section for every turnout including the dirt.
25 Put a damn pay item note in there and we are not

1 sitting here.

2 MR. BAILEY: Also, there are other items of work
3 that the specs would have allowed us to claim for in
4 the turnout.

5 MR. JENSEN: Yes.

6 MR. BAILEY: Anything incidental, and we didn't
7 present that in our --

8 CHAIRMAN COWGER: Okay, I think we have about
9 heard enough. Let me ask you a couple of real quick
10 questions to clarify things.

11 There were no notes in the plans or summary of
12 quantity referring to the turnouts themselves, other
13 than what was mentioned about in the standard index
14 drawing? There was nothing in the plans itself that
15 said turnouts will be paid for under item whatever?

16 MR. LEONARD: No.

17 CHAIRMAN COWGER: Just making sure of that.

18 The DOT's position -- I'm trying to make sure
19 I understand -- is that the contractor should have
20 recognized that the quantities shown for lime rock base
21 material ten inches thick included something in
22 addition to that which was in the roadway?

23 MR. LEONARD: That is correct.

24 CHAIRMAN COWGER: Your position is it should have
25 been apparent to him?

1 MR. LEONARD: The plans were clear.

2 MR. BAILEY: That would have also required the
3 contractor to do a take-off prior to the bid.

4 CHAIRMAN COWGER: Do you normally do that?

5 MR. BAILEY: Yes, sir.

6 MR. LEONARD: And their CPM schedule suggests
7 that they did do that.

8 CHAIRMAN COWGER: I think I heard you say earlier
9 that -- from what you said earlier on, yeah, you
10 recognized it, but you just assumed it was a plan error
11 and that there was going to be an item for turnouts
12 added?

13 MR. CUMMINGS: Exactly.

14 MR. JENSEN: We did not average in the cost of
15 the turnout item.

16 CHAIRMAN COWGER: You wouldn't be here if you
17 did.

18 MR. ROEBUCK: You didn't pick up the extra fill
19 requirements for the driveway connections either?

20 MR. JENSEN: No.

21 MR. GEIGER: It was really an excavation, a cut.

22 MR. JENSEN: We never picked that up.

23 MR. LEONARD: We think that was a unilateral
24 mistake by the bidder. They should have included it in
25 their bid. The plans were clear.

1 CHAIRMAN COWGER: I think we have heard enough.

2 MR. ROEBUCK: I do, too.

3 CHAIRMAN COWGER: Does either side have anything
4 compelling?

5 MR. CUMMINGS: No, just the age old problem, one
6 side said enough, the other side wants to say more.

7 CHAIRMAN COWGER: The hearing is hereby closed.
8 The Board will meet to deliberate on this claim shortly
9 after the first of the year, and the parties will be
10 furnished an order shortly thereafter.

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

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