



Florida Department of Transportation

JEB BUSH
GOVERNOR

605 Suwannee Street
Tallahassee, Florida 32399-0450

THOMAS F. BARRY, JR.
SECRETARY

August 12, 1999

MEMORANDUM

TO: *Tom Aldridge*
~~Lex Chance~~, State Estimates Engineer *w. H. Albaugh*

FROM: Bill Albaugh, Highway Operations Director

SUBJECT: STATE ARBITRATION ORDER NO. 02-99
 State Project No. 97102-3306 FAN: 2589171 52 01
 Hillsborough County
 CONTRACT # 18280

A copy of State Arbitration Board No. 02-99 is attached. The Department of Transportation is ordered to reimburse the Contractor in the amount of \$118,396.12 for his claim.

After careful review of the transcript and exhibits presented at the hearing, the Department has concluded that an appeal is not warranted. Therefore, please adjust the final estimate to reflect the Arbitration Board's decision.

The original of Arbitration Order 02-99 and the original certified transcripts of the hearing including exhibits are being sent to Records Management to be filed with the project records.

BA/wc
 Attachments
 cc: Mr. Jim Ely - w/attachments
 Ms. Pam Leslie - w/attachments
 Records Management ✓

STATE ARBITRATION BOARD

1022 Lothian Drive
Tallahassee, FL 32312-2837
Phone: (850)385-2410 or (850)385-2852 FAX: (850)385-2410

NOTICE

In the case of Cone Constructors, Inc. versus the Florida Department of Transportation on Project No. 97102-3306 in Hillsborough County, Florida, both parties are advised that State Arbitration Board Order No. 2-99 has been properly filed on August 5, 1999.

S.A.B. CLERK

AUG 5 1999

FILED



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

Copies of Orders & Transcripts to:
Mr. Greg Xanders, State construction Engineer/FDOT
Mr. Kent A. Selzer, Manager/Cone Constructors, Inc.

STATE ARBITRATION BOARD

ORDER NO. 2-99

RE:

Request for Arbitration by
Cone Constructors, Inc. on
Job No. 97102-3306
in Hillsborough County

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

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:31 a.m. on Friday, June 18, 1999

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 2-99 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the amount of \$ 98,506.00 plus interest at 10% per annum in the amount of \$ 19,890.12 for a total of \$118,396.12. The Contractor claims that they have not been paid the amount of \$98,506.00 due them in accordance with a written agreement entitled Final Settlement for Discrepancy in Final Quantities entered into between the parties on July 11, 1997. Interest is claimed for 737 days beginning on July 11, 1997.

When the Contractor's Request for Arbitration was submitted to the Department of Transportation, they responded with a letter dated April 22, 1999 stating that this claim cannot be heard by the State Arbitration Board, because the Request for Arbitration was not submitted within 3 years of the date of final acceptance of the work as required by 337.19 Florida Statutes. This statement was supported by legal justification (See Exhibit No. 3)

The Contractor responded to the Department of Transportation letter with a letter from their attorney, Michael R. Carey dated May 4, 1999. This letter provided legal arguments supporting the Contractor's position that the Department's sovereign immunity defense should be rejected and that the claim should be heard by the Board. (See Exhibit No. 4).

The State Arbitration Board met on May 12, 1999 to consider the arguments presented by the parties to this dispute. The decision of the Board was to schedule a hearing for the Contractor's claim on June 18, 1999. A Notice of Arbitration Hearing was issued May 28, 1999.

During the hearing, the Contractor presented a synopsis of the information supporting their claim as contained in the Request for Arbitration of A Claim submitted on February 23, 1999. In addition, the Contractor stated that they did not hear anything from the Department indicating

that payment in accordance with the agreement entered into July 11, 1997 would not be made by the Department until they received the August 3, 1998 letter from the Department stating that, in accordance with Florida Statute 337.19, the statutory limitations had expired and the contract was considered to be paid in full.

During the hearing, the Department's representative stated "We have nothing to submit".

The Board in considering the testimony and exhibits presented found it to be of particular significance that the Department failed to notify the Contractor of its intent to not make payment under the Final Settlement of Discrepancy in Final Quantities dated July 11, 1997 prior to their letter of September 4, 1998 giving notice that the Department was closing its files on the contract.

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 the amount of \$ 118,396.12 for their claim.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 48.60 for Court Reporting Costs.

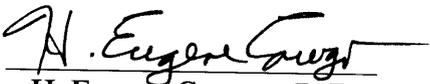
S.A.B. CLERK

AUG 5 1999

Tallahassee, Florida

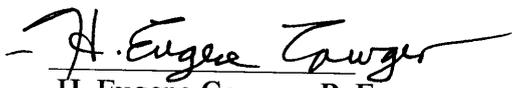
Dated: 8/5/99

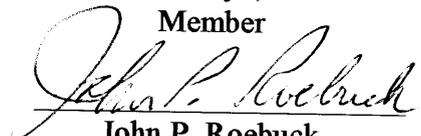
FILED


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

8/5/99
DATE

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. Kent Selzer

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Jim Martin

* * *

I N D E X

| EXHIBITS | PAGE |
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| Exhibit Nos. 1 through 4 in evidence | 5 |

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| CERTIFICATE OF REPORTER | 8 |
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P R O C E E D I N G S

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CHAIRMAN COWGER: All right. We are now going to move to State Project 97102-3306, in which Cone Constructors was again the contractor for.

What we are going to do now is the opening statement that I made in regard to the hearing will be identical to the one that we had for 97102-3303.

We will also have the same statement as I made earlier in regard to the 97102-3303 job concerning the correspondence that went back and forth by the contractor and the DOT in regard to whether or not the claim could be heard and the final decision of the Board.

After they received the request for arbitration, DOT submitted to the Board a letter from the office of the DOT general counsel office expressing a legal opinion that the Board has no subject matter jurisdiction to hear the contractor's claim, because the contractor did not file their request for arbitration within three years from the date of final acceptance of the project as required by the version of 337.19 of the Florida Statutes in effect at the time bids were received for this project.

The contractor's attorney responded with a letter rebutting the DOT position on whether or not the Board

1 could hear this matter. These letters are contained in
2 the record of this hearing.

3 As stated in the attachment to the notice of
4 arbitration, the Board met on May 12, 1999, to consider
5 the legal opinions furnished by the parties and decided
6 to schedule a hearing on the contractor's request for
7 arbitration.

8 The Board sees no reason to hear further
9 arguments on whether or not we should hear this matter.
10 Therefore, this hearing shall deal only with the issues
11 presented in the request for arbitration package.

12 We do need to stop just a moment now and identify
13 the exhibits. These are different from the 3303 job.
14 We have the request for arbitration by the contractor,
15 which we will identify as Exhibit 1. Again, the DOT
16 chose not to submit any written rebuttal to that
17 statement.

18 We have a fax sheet from the contractor which
19 details the amount of interest that he's claiming on
20 this project. We will identify that as Exhibit No. 2.

21 We have the letter from DOT dated April 22, 1999.
22 We will identify that as Exhibit 3. This exhibit has
23 to do with the Department's position on whether or not
24 the claim can be heard by the Arbitration Board.

25 We also have a letter from Mr. Carey, an attorney

1 for the contractor, dated May 4, 1999, rebutting the
2 DOT's statement in regard to eligibility of the claim
3 to be heard by the Arbitration Board. We will identify
4 that as Exhibit 4.

5 (Whereupon, Exhibit Nos. 1 through 4 were received in
6 evidence.)

7 CHAIRMAN COWGER: Now, it's time for the
8 contractor to go ahead and make his presentation.

9 MR. SELZER: Do you need to swear us in?

10 CHAIRMAN COWGER: Okay. Before the contractor
11 begins his presentation, we will swear the witnesses.
12 (Whereupon, all witnesses were duly sworn.)

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

16 Mr. Bill Deyo was appointed as a member of the
17 Board by the Secretary of the Department of
18 Transportation.

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

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

25 Our terms of office began July 1, 1997 and expire

1 June 30, 1999.

2 Okay. Now we are ready for the contractor to
3 begin.

4 MR. SELZER: The contractor and the Department
5 had a settlement negotiation on July 11, 1997, with
6 members of the Turnpike and Cone Constructors. We
7 reached an agreement for quantity adjustments in the
8 amount of \$98,506. That was on July 11, 1997.

9 Subsequent to that time we have not received
10 payment, which is what brought us to this arbitration.

11 We have calculated interest for 737 days at 10
12 percent, which is an additional \$19,890.12 for a total
13 request of \$118,396.12.

14 We understand that the interest rate may change
15 based on statutory findings, and we agree to that.
16 I believe that's all.

17 CHAIRMAN COWGER: Again, I will ask the same
18 question I did on the previous job. After the
19 settlement agreement was signed by the parties, you
20 heard nothing in writing from DOT other than their
21 notice that the three-year time for filing a claim had
22 expired?

23 MR. SELZER: That is correct.

24 CHAIRMAN COWGER: Okay. DOT's side.

25 MR. MARTIN: We have nothing to submit at this

1 time. We will just blame it on legal once again.

2 CHAIRMAN COWGER: Have both parties then
3 completed their presentations?

4 MR. SELZER: Yes, sir.

5 CHAIRMAN COWGER: Mr. Deyo, do you have any
6 questions?

7 MR. DEYO: No, sir.

8 MR. ROEBUCK: We look to you, Mr. Deyo, to
9 confirm the statutory interest rate.

10 CHAIRMAN COWGER: I made a note of that, and I'm
11 expecting him to call and let us know what it is so we
12 can consider that for deliberations.

13 MR. DEYO: I will send a copy of the State
14 substitutes and formula for the record.

15 CHAIRMAN COWGER: Yes, whatever the Comptroller
16 came up with for 1999. I have the statutes.

17 Okay. This hearing is hereby closed. The Board
18 will meet to deliberate on this claim on August 11, and
19 you will have our order shortly thereafter.

20 (Whereupon, the hearing was concluded at 9:40 a.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA)
COUNTY OF LEON)

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

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

Dated this 29th day of June, 1999.



CATHERINE WILKINSON
CSR, CP
Post Office Box 13461
Tallahassee, Florida 32317