

STATE ARBITRATION BOARD

/// NOTICE ///

In the case of Anderson Columbia Co. Inc. versus the Florida Department of Transportation on Project No.48040-3546 in Escambia County, Florida, both parties are advised that State Arbitration Board Order No. 10-99 has been properly filed with the Clerk of the State Arbitration Board on January 19, 2000



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

S.A.B. CLERK

'JAN 19 2000

FILED

Copy of Order & Transcript to:

Greg Xanders, P. E., State Construction Engineer

T. H. McRae, President, Anderson Columbia

Copy of Order to:

Frederick J. Springer, Esquire
Vezina, Lawrence and Piscitelli, P.A.

STATE ARBITRATION BOARD

ORDER NO. 10-99

RE:

Request for Arbitration by
Anderson Columbia Co., Inc.
Job No. 48040-3546 in
Escambia County

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

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

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 10:45 a. m. on Tuesday, November 30, 1999.

The Board Members, having fully considered the evidence presented at the hearing, now enter their Order No. 10-99 in this cause..

ORDER

The Contractor presented a request for arbitration of a claim in the total amount of \$ 269,074.17. The claim includes payment for "spare conduit" under the pay item Conduit Under Pavement (Item 260-1-13) instead of under the pay item Conduit Underground (Item 260-1-12) as shown in the final estimate and for the amount shown due on Estimate No. 35- FINAL plus interest at 10% per year. (\$92,095.84) Payment of the amount due on the Final Estimate being withheld by the Department plus interest at 10% per year is also included. (\$176,978.33)

The Department filed a counterclaim in the amount of \$8,829.28 based on the costs they incurred in defending the Contractor's claim.

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

PART I (Spare Conduit)

A footnote to the pay item Conduit-Under Pavement on the Tabulation of Quantities Sheet in the plans stated "This item includes the conduit that runs the total length of the project for future use". Our electrical subcontractor based their prices for the conduit work on being paid for all conduit installed as "spare conduit" under the item Conduit-Under Pavement. The Department paid for all spare conduit except that installed under pavement that existed at the time of conduit

installation under the pay item Conduit-Underground which was bid at a much lower unit price than for the item Conduit-Under Pavement.

At the time we executed Supplemental Agreement No. 6 dated December 3, 1998 which documented the settlement agreement entered into by our firm and Department that essentially dealt with asphalt and delay issues, we considered payment for conduit to be an open issue to be resolved at the time of final payment. The Supplemental Agreement does not say that we waive our rights to final quantity issues or to future claims. How could we waive our rights to something we were not privy to. We filed this claim after we became aware of final pay quantities.

The attachment to our letter dated September 9, 1998 is a calculation of the \$2.4 Million settlement to be covered by Supplemental Agreement No. 6. There is no specific mention of payment for conduit.

We were not aware of work sheets which the Department contends document the conduit issue having been included in the settlement agreement until we received the Department rebuttal package. The work sheets are not dated, so we do not know their relationship to the settlement negotiations or when they were prepared.

We are claiming additional payment so as to reflect all "spare conduit" being paid for under the item Conduit-Under Pavement and for interest at 10% per annum from January 1, 1999. (\$7,698.02).

PART II (Retainage Withheld)

On June 23, 1999 we submitted a standard qualified acceptance of the amount indicated due us in the Final Estimate prepared by the Department. We had reserved the right to claim an additional \$70,000 as due based on the dispute over payment for conduit. The Department returned our Qualified Acceptance Letter stating that, in view of the Settlement Agreement documented by Supplemental Agreement No. 6, the letter was no longer appropriate and requesting that we submit a Regular Acceptance Letter.

It is our position that the Department has no right under the contract to take this action. They are merely attempting to use this as leverage to force us to abandon our claim for additional compensation for conduit work.

We are requesting that we be paid the \$171,269.33 due on the Final Estimate plus interest at 10% per annum from August 1, 1999 (\$5,709.00)..

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

PART I

The electrical subcontractor submitted a claim for additional compensation for conduit work to the Contractor by letter dated December 14, 1998 (after execution of Supplemental Agreement by the Contractor). However, the subcontractor was clearly made aware of the Department's position on this matter by a letter from Eisman & Russo, Inc. dated October 31, 1996. The last Monthly Estimate (#33) prepared by the CEI Consultant dated August 20, 1998, which was after

final acceptance of the project, showed the same pay quantities for conduit items as later shown in the Final Estimate.

The above documents that the Contractor was fully aware of the conduit payment issue at the time they executed Supplemental Agreement No. 6 which provided for full and final settlement of all claims the Contractor has or may have against the Department.

It is our position that Supplemental Agreement No. 6 was a global settlement of all claims including the electrical subcontractors claim involving payment for conduit.

PART II

The Department will release the amount due in accordance with the Final Estimate as soon as we receive an unqualified letter of acceptance of that amount as final payment. Since all claims were resolved by a Supplemental Agreement executed after final acceptance of the project, a Qualified Letter of Acceptance is not appropriate in this instance.

The Department stated that their counter claim is for the time of Department and CEI employees spent in preparing to defend a claim they intend to be frivolous.

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

PART I

The Settlement Agreement was to settle claims resulting from a series of complex issues that arose during construction. The Contractor documented additional compensation he contended was due using a total cost concept. The Department attempted to document the amount due using an actual cost concept. The amounts documented by each party differed considerably due to the extreme complexity of the issues. Therefore, a global settlement was negotiated between high level individuals from the Contractor and the Department's District Office. It appears that these negotiations were based on arriving at a mutually agreeable amount of money without tying the amount to specific issues.

The Contractor was aware of the dispute over payment for conduit and the Department's clearly stated position on this matter well before entering into settlement negotiations and executing Supplemental Agreement No. 6. The monthly progress estimates issued by the Department never gave any indication that spare conduit installed underground would be paid for under the item Conduit-Under Pavement. The Contractor should have considered the electrical subcontractor's claim during negotiations leading up to that Supplemental Agreement.

PART II

No evidence was provided to support the Department withholding payment of the amount due in the Department's offer of final payment until the Contractor submits a Regular Acceptance Letter.

From the foregoing and in light of the testimony and exhibits presented, the State Arbitration Board finds that the Department is to reimburse the Contractor for their claim as follows:

PART I

The State Arbitration Board finds that the settlement agreement between the Department and the Contractor included all issues in dispute including the dispute in regard to payment for the spare conduit. Therefore, the Contractor is due no additional compensation for conduit.

PART II

Pay the Contractor \$ 5,709.00, the amount claimed as interest on the amount withheld from final payment beginning about August 1, 1999.

The State Arbitration Board finds that nothing is due under the Department's counter claim.

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$ 259.30 for Court Reporting Costs.

S.A.B. CLERK

'JAN 19 2000

FILED

Tallahassee, Florida

Dated: 1/19/00

Certified Copy:

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

W. H. Albaugh
Bill Albaugh, P. E.
Member

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

John P. Roebuck
John P. Roebuck
Member

1/19/00
DATE

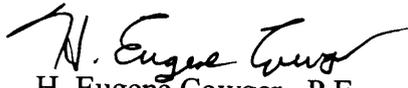
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Steve Benak
1-27-00

STATE ARBITRATION BOARD

ORDER NO. 10-99

/// NOTICE ///

In the case of Anderson Columbia Co., Inc. versus the Florida Department of Transportation on Project No. 48040-3546 in Escaambia County, Florida, both parties are advised that a Correction to State Arbitration Board Order No. 10-99 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.

S.A.B. CLERK

JAN 24 2000

FILED

Copy of Correction to Order to:
Greg Xanders, P. E., State Construction Engineer

T. H. McRae, President, Anderson Columbia

Frederick J. Springer, Esquire
Vezina, Lawrence and Piscitelli, P.A.

STATE ARBITRATION BOARD

CORRECTION

ORDER NO. 10-99

RE:

Request for Arbitration by
Anderson Columbia Co., Inc.
Job No. 48040-3546 in
Escambia County

Section 14 of the State Arbitration Board Procedures adopted August 16, 1999 provides as follows:

An Order will include an apportionment of the cost of the stenographic record between the parties as follows:

MULTI-PART CLAIM WITH AN AMOUNT AWARDED FOR SOME PARTS OF A CLAIM: The cost will be prorated between the parties in accordance with the number of parts of the claim for which an amount was awarded.

In view of the above, the following is substituted for the last paragraph of Order No. 10-99:

The Department of Transportation is directed to reimburse the State Arbitration Board the sum of \$129.65 for Court Reporting Costs.

The Contractor is directed to reimburse the State Arbitration Board the sum of \$129.65 for Court Reporting Costs.

S.A.B. CLERK

Tallahassee, Florida

Dated: 1/24/00

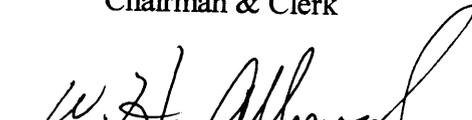
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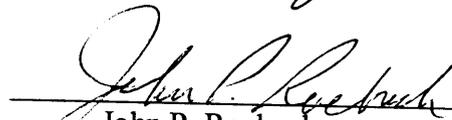
FILED

Certified Copy:


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


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


Bill Albaugh, P. E.
Member


John P. Roebuck
Member

1/24/00
DATE

APPEARANCES:

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. H. E. "Gene" Cowger, Chairman
 Mr. Bill Albaugh
 Mr. John Roebuck

APPEARING ON BEHALF OF ANDERSON COLUMBIA CO., INC.:

Mr. Tony Kuhl
 Mr. Donny Wilson
 Mr. Ted McRae
 Mr. Richard Rountree

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Peter Medico
 Mr. Steve Martin
 Mr. Steve Benak

* * *

I N D E X

| EXHIBITS | PAGE |
|--|------|
| Exhibit Nos. 1, 2, 3 and 4 in evidence | 4 |
| CERTIFICATE OF REPORTER | 51 |

P R O C E E D I N G S

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

Mr. Bill Albaugh was appointed by the Secretary of the Department of Transportation as the alternate member of the Board.

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

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

Our terms began July 1, 1999 and expire 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: The request for arbitration of a claim submitted by the claimant, including all attachments thereto, and the administrative documents preceding this hearing, are hereby introduced as Exhibit No. 1.

The rebuttal package provided by DOT, which is entitled primary rebuttal exhibit, is hereby introduced

1 as Exhibit No. 2.

2 Does either party have additional exhibits that
3 they wish to present at this time? We will go off the
4 record.

5 (Discussion off the record)

6 CHAIRMAN COWGER: There was a discussion of
7 exhibits. The contractor presented an exhibit called
8 summary of damages, a single page, which we will
9 identify as Exhibit 3. The DOT presented an invoice
10 document, which we will identify as Exhibit 4. That
11 document was dated November 30, 1999.

12 (Whereupon, Exhibit Nos. 1 through 4 were received in
13 evidence.)

14 CHAIRMAN COWGER: Any other things that need to
15 be introduced as an exhibit?

16 During this hearing the parties may offer such
17 evidence and testimony as is pertinent and material to
18 the dispute being considered by the Board and shall
19 produce such evidence as the Board may deem necessary
20 to an understanding of the matters before it.

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

23 The parties are instructed to assure that they
24 retain identified copies of each exhibit used in this
25 proceeding. The Board will send the parties a copy of

1 the court reporter's transcript, along with our order,
2 but we will not furnish you copies of the exhibits.

3 As is typical in arbitration proceedings, this
4 hearing will be conducted in an informal manner.

5 The Board is not required to apply a legalistic
6 approach or strictly apply the rules of evidence used
7 in civil court proceedings. We are primarily looking
8 for information in regard to the facts and the contract
9 provisions that apply to the 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.

13 Either party may interrupt to bring out a
14 pertinent point by coming through the Chairman, but
15 I ask you please to keep this orderly.

16 At this point in time it's appropriate for the
17 contractor to begin his presentation. We would like
18 for you to open your presentation with a statement as
19 to the exact amount of your claim.

20 MR. McRAE: My name is Ted McRae. Gentlemen, we
21 appreciate the opportunity to come and present this
22 claim. As submitted, and we have it marked Exhibit 9,
23 our total damages that we are requesting is
24 \$269,074.17.

25 This -- we really didn't like to use the word

1 claim because we didn't really think it was claim, but
2 we had no other vehicle on which to submit it except to
3 call it a claim.

4 In reality, we feel it's more of a final payment,
5 final contract payment issue. That's the way we have
6 requested it be done, is -- we are here representing,
7 of course, not only ourselves, Anderson Columbia
8 Company, but we are representing Ingram Signalization,
9 and we will ask them to speak in just a few minutes.

10 The issue -- there's two issues, and I'm sure we
11 will get into both before we are over.

12 The final issue, the notes on the plans clearly
13 says how one of the items of the conduit is to be paid.
14 That's the way the subcontractor understood it and
15 that's the way he priced it.

16 However, after work began, and during the
17 project, the Department determined that that must have
18 been an error in the plans and decided not to pay it on
19 that basis. And they did not pay on the basis of what
20 we believe the plans say should be paid.

21 There's two items of payment for conduit. One is
22 for conduit underground and one is for conduit under
23 pavement.

24 We feel that the note on the plans -- and it has
25 an asterisk that is referring to the conduit under

1 pavement, and it says this item includes the conduit
2 that runs the total length of the project for future
3 use.

4 We interpreted that to mean that the total length
5 of the project would include that conduit. That's the
6 quantities on the plans to also include that item.

7 The second issue that -- of course, there's a
8 difference between the price, approximately \$7 a foot
9 between the two items, and that's where most of the
10 \$84,000 comes from, is the dispute over the -- which
11 item that quantity should be paid under.

12 That equals approximately the \$70,000 plus the
13 interest.

14 Another issue that is part of the claim is the
15 Department has refused to release the retainage on the
16 contract. They would not accept a qualified acceptance
17 letter so we could proceed with the retainage. That's
18 another part of the claim, which \$171,000 is retainage
19 that we are due, plus the interest that had accrued on
20 the retainage since the time of the denial.

21 On this project we had a lot of delays, conflicts
22 that existed on the project. I'm not sure exactly the
23 number. I believe it was approximately a hundred and
24 something conflicts, utility conflicts primarily that
25 existed on the project.

1 In settlement negotiations with the Department,
2 which Mr. Rountree was -- he is here, and he was part
3 of the settlement agreement. Mr. Joey Anderson, who is
4 not here, was in the final settlement agreement, with
5 Mr. Benak and some others with the Department.

6 It was finally settled and a supplemental
7 agreement issued for the amount of \$2,400,000.

8 In the workup for the settlement, to justify the
9 settlement, nowhere in this claim, or nowhere in the
10 discussions that I'm aware of was Ingram's claim or
11 Ingram's dispute on the final quantities discussed
12 because we were not even aware or sure exactly how the
13 final quantity issues would be handled on this item.

14 So, we did not include it in the claims
15 discussion or the claims settlement.

16 In the items that have been furnished to you, you
17 will see that the claim has been worked up primarily on
18 asphalt issues and overrun in asphalt quantities.
19 That's primarily how the claim was arrived at and
20 resolved.

21 I'm sure the Department will argue that Anderson
22 waived all its rights, but Anderson asserts that it did
23 not waive all its rights. Nowhere in the supplemental
24 agreement does it say we waive our rights to final
25 quantity issues.

1 In fact, we would never be in the position of
2 waiving final quantity issues because we never know
3 what adjustments will be made on the final pay
4 estimates, so we can't waive something we are not privy
5 to.

6 At this time I would like to -- do I just make an
7 opening statement, Gene, or --

8 CHAIRMAN COWGER: Whatever you would like to do.
9 What I would like to make sure of, subsequent to
10 receiving the original request for arbitration,
11 I received from Fred Springer, the contractor's
12 attorney, a letter dated October 4th, dealing with the
13 second issue that Mr. McRae just talked about.

14 Does the DOT have a copy of that letter?

15 MR. MARTIN: Yes.

16 CHAIRMAN COWGER: Do the Board members, dated
17 October 4th?

18 MR. ROEBUCK: Yes.

19 CHAIRMAN COWGER: Good enough. I wasn't sure
20 that got distributed. Go ahead.

21 MR. McRAE: At this time I would like to turn it
22 over to Donny Wilson with Ingram and let him discuss
23 the -- his portion of this issue.

24 CHAIRMAN COWGER: Which is really going to be
25 issue one only.

1 MR. McRAE: Right.

2 MR. WILSON: Again, as Mr. McRae stated, in
3 installing the spare conduit through the total length
4 of the project, there were two pay items, number
5 630-1-12 for underground and number 630-1-13 for under
6 pavement.

7 It was our impression from the beginning that
8 because of the note on the plans -- the note on the
9 bottom of sheet 2-2, the tabulation of quantities, that
10 states that the pay items, with a single asterisk,
11 630-1-13, under pavement conduit, includes the conduit
12 that runs the total length of the project for future
13 use.

14 That's what we thought from the beginning. As
15 the job progressed, and as it was time to install the
16 conduit, it became apparent that there was maybe a
17 disagreement between us and the project engineer as to
18 how to pay for the conduit.

19 Tony Kuhl here was my project supervisor. At
20 that time I believe I sent the letter to Peter Medico,
21 requesting his position on the pay item note and
22 installation of the conduit.

23 I believe he did respond back at that time that
24 they were going to pay for the conduit or actual
25 conditions, and if we wanted to pursue it later, we

1 would have to go to a final quantities dispute or
2 whatever. At that time that was the way it was
3 handled.

4 You know, we didn't drop the issue internally.
5 We still discussed it on a weekly or monthly basis to,
6 you know, keep track of the quantities, you know, that
7 we would be pushing the issue to get paid per the plan
8 notes.

9 We waited until the end of the job until we got
10 the final quantities. We thought at that time it would
11 be a final quantities issue. That's when we denied
12 signing the letter of acceptance for the quantities and
13 that's what brought us here to this point.

14 CHAIRMAN COWGER: Let me interrupt you for a
15 second. This discussion you are talking about took
16 place when?

17 MR. WILSON: I believe my first letter is
18 dated --

19 MR. MARTIN: October 31, '96.

20 CHAIRMAN COWGER: Which was before the settlement
21 agreement was negotiated?

22 MR. MARTIN: Two years prior.

23 CHAIRMAN COWGER: Go ahead.

24 MR. WILSON: That's basically my position.
25 That's what we determined the whole time that we would

1 be paid for, based on the plan notes. We didn't find
2 out until the final quantity at the end of the job was
3 over with that that was it, we weren't going to get
4 paid for it, so I wouldn't sign the letter of qualified
5 acceptance.

6 MR. ROEBUCK: Were you billing Anderson for the
7 under pavement price for that spare conduit when you
8 installed it, in your monthly progress statements?

9 MR. WILSON: No, we got paid what the project
10 engineer would issue us on the monthly take-off, the
11 cut-off dates. Whatever quantities they counted in the
12 field is what we got paid for.

13 MR. ROEBUCK: On the basis of the underground,
14 not the under pavement?

15 MR. WILSON: Whatever conditions they actually
16 encountered is what they paid. Basically our position
17 is we are still owed the \$7 difference between the
18 underground payment item and the under pavement item.

19 MR. ROEBUCK: They didn't pay you anything on the
20 under pavement.

21 MR. WILSON: Yes, they paid us the under pavement
22 on the spare conduit and then for underground on the
23 spare conduit.

24 MR. MEDICO: That spare conduit went to two
25 different locations, it went under pavement and under

1 ground crossing under driveways, side streets.

2 MR. ROEBUCK: All of it the note says was to be
3 paid as under pavement unit price. Some it you paid
4 that way, some you didn't. Is your claim number
5 relating to all the conduit?

6 MR. WILSON: Yes.

7 MR. ROEBUCK: You didn't deduct the amount?

8 MR. KUHL: It relates to the fact that was only
9 paid to underground. The under pavement was taken into
10 consideration. There was a total of 17,000 conduit put
11 in for that spare run, where approximately 5,600 feet
12 was put in and paid for as under pavement and 11,208
13 feet was paid for as underground.

14 MR. ROEBUCK: That's the question.

15 MR. WILSON: It's 11,208 foot pavement unit.

16 MR. McRAE: The claim is just for the difference
17 that wasn't paid for.

18 MR. ALBAUGH: Have you made Columbia Anderson
19 aware of the difference, the dispute, whatever?

20 CHAIRMAN COWGER: Back in 1996? Is that your
21 question, Bill?

22 MR. ALBAUGH: Yes.

23 MR. WILSON: I have a letter to Peter Medico in
24 1996. I didn't send a letter I think to AC until --

25 CHAIRMAN COWGER: Who is Peter Medico?

1 MR. MEDICO: That's me. What I did was take
2 their letter to me and write a response and then copy
3 Anderson Columbia in on that response when Anderson
4 Columbia inquired about what this issue was about,
5 prior to the claim settlement.

6 CHAIRMAN COWGER: You are saying that Anderson
7 Columbia should have been aware or was aware of this
8 problem in '96?

9 MR. MEDICO: Yes. They were made aware in
10 writing.

11 MR. MARTIN: Also they responded in '97, on
12 October 20, '97. We have a letter from Anderson again
13 asking about the payment of the conduit.

14 CHAIRMAN COWGER: That was after the settlement
15 agreement was entered into?

16 MR. MARTIN: No, that was a year before, a full
17 year prior to the settlement.

18 CHAIRMAN COWGER: I understand now.

19 MR. BENAK: It's our Exhibit C.

20 CHAIRMAN COWGER: I've got you.

21 MR. WILSON: I would like to add, if I may,
22 Mr. Chairman, one other point. Like I said before, you
23 know, when I did notify Mr. Medico that we did have a
24 problem with the pay items, it was our impression that
25 the issue never died, never went away to us, and that

1 it would be handled on the final estimates.

2 We didn't pursue anything else to this point to
3 the final claim.

4 The final quantities came to us. So, of course,
5 we wouldn't -- that's the only thing we were aware that
6 we were going to do to pursue our payment.

7 MR. ALBAUGH: When you bid the project, you had
8 two different unit prices because there were two
9 different pay items, one for \$2, one for \$9?

10 MR. WILSON: Yes, sir.

11 MR. ALBAUGH: Why the difference?

12 MR. WILSON: One, you have to use a directional
13 boring rig to go under or cut and remove asphalt to get
14 under the pavement. Underground is a direct trenching
15 operation. It's cheaper.

16 MR. ALBAUGH: Were you able to use direct
17 trenching for that portion you were paid, the cheaper
18 price?

19 MR. WILSON: Yes.

20 MR. KUHL: And the larger quantities, the price
21 is cheaper than if it had been a lower quantity, of
22 everything being broke down. The price difference does
23 come into a factor there, the difference of the
24 quantity.

25 You are looking at the plan quantity of some

1 33,000 feet of under pavement conduit. When you are
2 putting that much in, you can actually do that much
3 cheaper than what you would if it was less. The price
4 difference would vary on it.

5 CHAIRMAN COWGER: To sum up what the contractor
6 said, to keep moving this thing along, then we need to
7 let DOT come back and rebut.

8 I think what your position is you relied on that
9 plan you quoted in preparing your bid. And you said to
10 yourself, we are going to be paid under the higher unit
11 price for all spare conduit?

12 MR. KUHL: Right.

13 CHAIRMAN COWGER: You costed the job in that
14 manner?

15 MR. KUHL: Right.

16 CHAIRMAN COWGER: The actual construction, some
17 of the spare conduit was placed under existing
18 pavement, but the rest of the spare conduit was
19 installed in a trench?

20 MR. WILSON: Correct.

21 CHAIRMAN COWGER: Now, do you have anything else?
22 You can come back later.

23 MR. KUHL: Throughout the project, even up until
24 the final note, I stayed in discussion with Mr. Medico
25 on trying to make sure we got paid for the under

1 pavement price. And he had told me he was going to
2 have to get with the project manager. So, therefore,
3 we had to wait until the end to find out. That was
4 after that 1996.

5 MR. WILSON: We weren't in on the discussions and
6 the -- the agreements between Anderson Columbia and,
7 you know, the DOT and the Marianna to settle the two
8 million. We were never asked to be there.

9 CHAIRMAN COWGER: We understand that. Mr. McRae,
10 do you have anything else?

11 MR. McRAE: I think one thing he is saying,
12 Mr. Kuhl has said, Mr. Chairman, is that even though
13 the Department or Mr. Medico wrote a letter saying he
14 was only going to pay what was under pavement as a
15 payment item, that they still had discussion about
16 that.

17 And his understanding is what Mr. Medico told
18 him, that that was a letter, but they were still going
19 to consider it, and it would be resolved at the final
20 pay quantity item, is that correct?

21 MR. WILSON: Correct.

22 MR. MARTIN: Final settlement.

23 MR. MEDICO: It's my understanding --

24 MR. McRAE: Couldn't be any final settlement. It
25 was never involved in the settlement.

1 MR. MEDICO: Whatever discussions we have about
2 philosophical issues about what should be paid, not
3 paid, what the plan notes say, don't say, what matters
4 is what the official response is in writing. That
5 carries what the Department's position is. How that
6 also describes how it was paid and backs up what our
7 actions were.

8 Any discussions that took place were merely to
9 help each other understand the issues. There was never
10 any commitment that, yes, we are going to open this up
11 for discussion outside the normal claim environment.

12 I think a number of times I encouraged the
13 gentlemen if they wanted to pursue this, they need to
14 do it in a claims venue because our hands were somewhat
15 tied in how they could get paid for this, based on our
16 interpretation of the contract.

17 CHAIRMAN COWGER: I think it would be appropriate
18 for DOT to now go ahead and let DOT make their
19 rebuttal. Obviously there will be an opportunity after
20 that for both parties to discuss it a little more. Are
21 you going to do it, Steve?

22 MR. BENAK: Yes, sir.

23 CHAIRMAN COWGER: Could you split it into two
24 things, dealing with what the plans said, and the issue
25 of whether or not there was entitlement for payment for

1 it, and then come back secondly about the settlement
2 agreement and whether or not this item was included in
3 the settlement? Is that appropriate?

4 MR. BENAK: Yes, sir, I will address that in the
5 response. I'm Steve Benak, district construction
6 engineer for District 3. What I'm going to try to do
7 in going through our rebuttal, if you will, I will get
8 our rebuttal out. I will go right now step by step and
9 walk you through the information that we have.

10 What I'm going to show first, there was a full
11 and final settlement of all issues known or unknown.

12 Number two, this was a known issue. The amount
13 that we have already paid for the spare conduit, we
14 agreed that there was some issues in the plans that we
15 had some difficulties with the plans, and these were
16 one of the issues that we used to legitimize the claim.

17 If you will open your package, on December 17,
18 '98, Anderson Columbia submitted a claim to the DOT on
19 behalf of Ingram Signalization. This is stated in
20 Anderson Columbia's request for arbitration in
21 Attachment A.

22 The Department does not dispute the merits of
23 Ingram's claim against Anderson Columbia.

24 The Department settled all issues, claims, causes
25 of action, demands, disputes and rights, of whatever

1 nature, known or unknown. This is attachment B in the
2 supplemental agreement.

3 If you will, open the package. Let's look at
4 that supplemental agreement, behind Tab B.

5 This is a \$2.4 million supplemental agreement.
6 Also we released liquidated damages, which brought the
7 total close to \$3 million.

8 The paragraph behind B where it says, "For the
9 consideration and promises made herein, receipt and
10 sufficiency whereof is hereby acknowledged, Anderson
11 Columbia Company, Incorporated, waives, indemnifies,
12 releases and forever discharges the State of Florida,
13 Department of Transportation, against any and all
14 issues, claims, causes of actions, demands, disputes
15 and rights of whatever nature of kind, known or
16 unknown, that Anderson Columbia Company, Incorporated,
17 has or may have against the State of Florida,
18 Department of Transportation, its employees, agents,
19 officers or otherwise, arising out of any occurrence,
20 event, fact or matter relating to State Project Number
21 48040-3506.

22 "Such waiver, release and discharges is made by
23 Anderson Columbia Company, Incorporated, in its
24 respective right and for its successors, executors,
25 agents, employees, assigns, subcontractors, sureties,

1 material men, suppliers and any and all other persons,
2 firms, corporations or other entities who may claim by
3 and through Anderson Columbia, Incorporated."

4 That's the language we entered into an agreement
5 with. We settled all issues on this job for the amount
6 settled, and release of liquidated damages.

7 So, that's the supplemental agreement that we
8 entered into after the job was through.

9 All right. Anderson Columbia holds the position
10 they did not know the dispute regarding the payment for
11 spare conduit. This is false.

12 On October 8, 1997, about one year prior to the
13 claims settlement, Anderson Columbia sent a letter to
14 Pete Medico advising that Anderson Columbia had
15 detailed knowledge about the conduit issue. That's
16 index number C. If you will turn there, you will see a
17 letter from Anderson Columbia signed by Brian Yerby,
18 which explains this same issue, the exact same issue we
19 are talking about.

20 This is a year before the claim settlement.

21 Mr. Brian Yerby requested that the spare conduit
22 be compensated under line item 631-13, under pavement.

23 The project engineer did not grant Mr. Yerby's
24 request but sent Mr. Yerby a copy of the letter to
25 Ingram dated October 31, 1996, which explains how the

1 conduit would be paid based on field conditions.

2 That's attachment B.

3 The final quantities for all signalization pay
4 items were finalized on estimate number 33 dated
5 8-20-98. Estimate number 33 was the final estimate
6 submitted by the CEI consultant.

7 No changes were made on estimate number 34 and a
8 tentative final estimate number 35, two signalization
9 pay items, that's attachment number E.

10 In addition, Ingram Signalization knew what the
11 final quantities were going to be in the spring of
12 1998. Mr. Tony Kuhl visited Eisman Russo's field
13 office while the project engineer was preparing the
14 signalization documentation for the final estimate.

15 Peter Medico made available to Mr. Kuhl final
16 quantity information on signalization pay items as
17 requested.

18 Both Anderson Columbia and the Department knew
19 there were numerous claims and issues and various
20 contractual disputes which accumulated during the life
21 of the contract and were unresolved.

22 It was an understanding held by all individuals
23 involved that the final settlement would include all
24 outstanding issues, attachment F.

25 If you turn to letter F, you will see it's a

1 letter from Anderson -- this is to Eisman. They
2 indicate in there that -- the second line there,
3 settlement of all outstanding issues on the above
4 referenced project. They refer to that several times
5 in that letter.

6 MR. MEDICO: At the end of that letter, Steve, it
7 shows other items from --

8 MR. BENAK: Next page.

9 MR. MEDICO: It's H. And also Mr. Yerby was
10 copied in on this letter as well.

11 MR. BENAK: It was the Department's intention to
12 settle this issue based on the merits of each issue and
13 the direct and indirect costs supported by the project
14 record. This approach would not have supported the
15 \$2.4 million settlement and was not the preferred
16 method of Anderson Columbia. That's attachment G.

17 Anderson Columbia would not negotiate point by
18 point but submitted a total cost claim. There was no
19 attempt to separate, describe the subcontractor issues.

20 That's attachment H. And H is -- let's see,
21 that's about the total claim.

22 Attachment I is computer printout, which was some
23 backup information for the total costs that we ended up
24 settling for. This included Ingram Signalization in
25 the total cost method. If you will flip the page on

1 attachment I, you will see the results of the entire
2 project cost data that was given to us to support our
3 total cost claim.

4 CHAIRMAN COWGER: Can I interrupt you a second.
5 This Exhibit I you are now looking at, who was that
6 done by?

7 MR. BENAK: Anderson Columbia.

8 CHAIRMAN COWGER: Thank you. This was prepared
9 during this negotiation period that we have been
10 talking about?

11 MR. BENAK: Yes, sir, that we arrived at the \$2.4
12 million figure.

13 CHAIRMAN COWGER: Your position is that this
14 indicates that it includes the signalization issue?

15 MR. BENAK: Yes, sir, in the total cost method.

16 MR. MARTIN: Includes some line items per
17 subcontractors and signalization contractors where they
18 had pay-outs.

19 MR. BENAK: All costs on the whole job. In
20 essence they converted the job to a cost plus method at
21 the end of the race.

22 CHAIRMAN COWGER: I understand that, but where in
23 Exhibit I -- I see on the first page you have a whole
24 bunch of items listed in the right-hand column. They
25 are called signalization?

1 MR. BENAK: Right. This was one page.

2 MR. MARTIN: This is it. This is the entire cost
3 accounting.

4 CHAIRMAN COWGER: What I'm looking at is the
5 first page of Exhibit I. It shows a whole bunch of
6 items dealing with signalization.

7 MR. McRAE: Can I answer that?

8 CHAIRMAN COWGER: Excuse me a second, Ted. Are
9 you saying that the issue that we are here to discuss
10 today was included in there somewhere?

11 MR. MEDICO: We don't know.

12 MR. BENAK: We don't know.

13 MR. MEDICO: It's anybody's guess. We couldn't
14 discern that document very well.

15 MR. McRAE: Can I speak, Mr. Chairman?

16 CHAIRMAN COWGER: Sure.

17 MR. McRAE: What this is, this is our total cost
18 on this job, every subcontractor every hour of every
19 day, every piece of equipment, everything else on that
20 job. They want that to use as documentation on the
21 total cost of this job.

22 It absolutely had nothing to do with Ingram's
23 portion of their not being paid as you all have already
24 admitted they should have been paid. So, you know, you
25 stuck this in here like it was part of it. It's not

1 even part of it. You could have stuck anybody in
2 there.

3 MR. BENAK: It was the method that was used to
4 arrive at a final settlement figure.

5 MR. McRAE: All that does is show the payouts to
6 Ingram during the course of the job. That's all this
7 is. It's the total cost of the job. It has nothing to
8 do with the claim.

9 MR. MEDICO: It calculates your total costs.
10 Anderson Columbia chose to use this method for claim
11 settlement because we couldn't document enough dollar
12 value when we went item by item.

13 MR. McRAE: If you look at the total claim, if
14 you look at the total claim in our package over here on
15 September -- that's number 6 -- this is -- instead of
16 the letter you quoted them, the one where you quoted
17 them where we asked for \$5 million for the total costs,
18 you should have quoted the one that was finally
19 resolved, which is in our package number 6, dated
20 September 9th. In there it gives you a breakdown of
21 everything that happened. There's nothing in there
22 about Ingram.

23 MR. BENAK: All I'm trying to do is --

24 CHAIRMAN COWGER: Excuse me. What were you
25 referring to when you said it shows nothing about

1 Ingram?

2 MR. McRAE: In our tab number 6, there is a
3 breakdown in the final agreement between the Department
4 and AC. There is a breakdown of how the claim was
5 resolved. There is absolutely nothing in there about
6 Ingram.

7 MR. MARTIN: Item H is other items. A lot of
8 these items are so vague it's hard to tell what they
9 are referring to.

10 MR. BENAK: If I may continue, I may clear some
11 of this up toward the end of my presentation.

12 CHAIRMAN COWGER: Go ahead. Sorry.

13 MR. BENAK: Okay. The Department of
14 Transportation negotiated with Anderson Columbia in
15 good faith to settle all outstanding issues on this
16 project. Successful negotiation resulted in global
17 settlement, agreement of \$2.4 million for full and
18 final settlement.

19 We have proven that Anderson Columbia and Ingram
20 Signalization knew the Department was going to pay for
21 the spare conduit prior to agreeing to the full and
22 final supplemental agreement. They knew how the
23 Department was going to pay.

24 Also, Anderson Columbia has demonstrated a
25 pattern in the past with another subcontractor, Phoenix

1 Construction --

2 MR. McRAE: I object to that. That's totally off
3 base and I resent it. I object to you putting that in
4 here. We have not had any pattern. Ingram has been
5 paid in full and settled and absolutely has nothing to
6 do with this claim whatsoever.

7 MR. BENAK: I'm just trying to show a pattern
8 that has happened in the past.

9 MR. McRAE: You are trying to prejudice this
10 court.

11 CHAIRMAN COWGER: Let me settle his objection.

12 MR. BENAK: Let me make my presentation.

13 CHAIRMAN COWGER: Let me settle his objection.
14 Do you all agree to strike that from consideration by
15 the Board?

16 MR. ROEBUCK: The reference to that? Yes.

17 CHAIRMAN COWGER: We will settle that by saying
18 the Board will not consider that statement. If it was
19 critical, we wouldn't do that, but --

20 MR. BENAK: Okay. We consider that this claim is
21 frivolous in that the people of the state of Florida
22 should not be made to pay this cost of this frivolous
23 claim.

24 Anderson Columbia has wasted our time, of myself,
25 Mr. Martin and my consultants in trying to defend this,

1 something that we have already settled.

2 We have already submitted our invoices for the
3 Board to consider. We respectfully submit our
4 counterclaim to cover the cost of defending this claim.

5 One other point I would like to make before
6 closing, if you would, turn to item G. This is our
7 claim package that we used in negotiating with
8 Mr. Joey Anderson and Mr. Gene Strickland in Marianna
9 the summer before the claim settlement was arrived at.

10 We had several meetings and tried to negotiate.
11 We shared this with Mr. Anderson and Mr. Strickland,
12 and I think there were a couple of more --

13 MR. MARTIN: Mr. Rountree was there, also.

14 MR. BENAK: We had 51 claims. We had other
15 issues we were trying to settle.

16 If you will notice, one, two, four pages into it
17 is -- what we were trying to do here is legitimize the
18 claim to come up with an amount to offer Anderson
19 Columbia.

20 The list of all the issues that we had at the
21 time. If you will notice on that fourth page in, it
22 says conduit under pavement. There is a number there.
23 \$84,397.82.

24 If you will then take their submittal by
25 Mr. Springer on his -- I don't know what page this

1 is -- it's his letter, page 3 of Mr. Fred Springer's
2 submittal from Anderson Columbia, and if you will
3 notice the amount they are asking for is \$84,397.82,
4 exactly the same that we have already allotted to in
5 our final settlement.

6 So, we did know about this issue when we were
7 settling it. We have shown that in our package, in
8 words, from our remembering, and in writing.

9 It is an issue that was full and timely settled,
10 it was a known issue. Even if it was an unknown issue,
11 it's settled by that document.

12 That's all we are saying. We have already made
13 payment to Anderson Columbia for this issue. We have
14 paid and we are through paying.

15 In essence what they are wanting us to do is pay
16 it again. How many times do we have to pay it? That's
17 all I have to say.

18 CHAIRMAN COWGER: May I ask one question about
19 your submittal. In your original rebuttal package the
20 last page deals with the counterclaim, then today you
21 submitted Exhibit 4 which is an invoice. Are those
22 two, as far as the counterclaim, those two are added?

23 MR. BENAK: Yes. The first is for Mr. Medico's
24 time and effort in putting this package together.

25 CHAIRMAN COWGER: This is Eisman Russo's cost.

1 MR. BENAK: The other items are the DOT's costs,
2 myself and Mr. Martin's costs.

3 CHAIRMAN COWGER: Just wanted to make sure of
4 that. I guess we need to let the contractor come back,
5 but I have a question.

6 Steve, when you were talking about Exhibit G a
7 minute ago, your statement was that in Exhibit G it's
8 clearly shown that the issue of how you are going to
9 pay for the spare conduit is covered in Exhibit G.

10 MR. BENAK: Yes, sir.

11 CHAIRMAN COWGER: What I'm looking for is where
12 that is. I'm looking at page 4 of that --

13 MR. ROUNTREE: Page 6, called a plan error.

14 MR. BENAK: Right.

15 CHAIRMAN COWGER: I'm looking in the DOT Exhibit
16 G, on the fourth page you have an item, conduit under
17 pavement, Ingram, and that \$84,000 shows there.

18 MR. ROUNTREE: Go forward two more pages.

19 CHAIRMAN COWGER: I will go two more pages.
20 There it says, I think what is going to be brought out,
21 and this is on a memo form from Eisman Russo, plans say
22 all spare conduit is paid for as under pavement and
23 contractor claims he was expecting payment as described
24 in the plans.

25 MR. BENAK: Yes, sir.

1 CHAIRMAN COWGER: Specifications require that to
2 be paid for under pavement, there must be pavement
3 present. Inspection plans conflict, plans prevail.

4 Okay. The only thing I want to bring up at this
5 point is DOT's testimony is that the information
6 contained in Exhibit G -- in Exhibit 2, Tab G documents
7 that the payment for this spare conduit was included in
8 the negotiations leading up to the settlement
9 agreement?

10 MR. BENAK: Yes, sir.

11 CHAIRMAN COWGER: You are using this to document
12 that?

13 MR. BENAK: Yes, sir.

14 CHAIRMAN COWGER: Okay. Now, keep that in your
15 mind a minute. In your rebuttal, DOT, you didn't even
16 mention anything about interpretation of the plan note
17 because your position is it was all settled anyway?

18 MR. BENAK: No, sir, I addressed it at the
19 beginning. We agreed.

20 MR. MARTIN: We lost it, we paid it.

21 CHAIRMAN COWGER: But you paid it under the
22 settlement agreement?

23 MR. MARTIN: Yes, sir.

24 MR. MEDICO: There's two sides that argument. If
25 you go either way, we decided to give the contractor

1 the benefit of the doubt on that issue.

2 CHAIRMAN COWGER: Okay.

3 MR. MEDICO: Also, the contractor's actions come
4 into play here, whereas you allowed them to put that
5 conduit in underground outside the limits of the
6 sidewalk where the plans show it to go into the
7 sidewalk. It's a little bit complicated, but we didn't
8 want to push the point.

9 MR. ALBAUGH: You led them to relocate it out
10 underneath the pavement for placement?

11 MR. ROEBUCK: Some of it.

12 MR. MEDICO: About --

13 MR. ALBAUGH: What part they were paid for is
14 underground they did?

15 MR. MEDICO: I'm sorry?

16 MR. ALBAUGH: The portion you paid for as
17 underground burial, you allowed them to relocate it so
18 it wouldn't be under pavement?

19 MR. MEDICO: Yes.

20 CHAIRMAN COWGER: I notice, too, in one of the
21 letters here, and I don't want to be too specific and
22 try to find it right now, but there was a comment where
23 Eisman Russo instructed the contractor to place the
24 spare conduit prior to placing any new pavement,
25 meaning sidewalk or anything else; in other words, go

1 ahead and put your conduit in so you don't have to bore
2 in under pavement.

3 MR. MEDICO: You still get paid under pavement
4 because it is physically under the pavement.

5 CHAIRMAN COWGER: I thought he was going to be
6 paid for underground because the pavement wasn't there
7 and it was not going to have to be jacked.

8 MR. MEDICO: If it was physically under the
9 sidewalk, we could pay for it under the sidewalk.

10 CHAIRMAN COWGER: How was he paid? Let me give
11 you a quick scenario. We have a section where we are
12 going to put in some six-inch sidewalk between the edge
13 of the road and the right-of-way or whatever.

14 The conduit was put in first, then the sidewalk
15 was poured over the top of the conduit. How was that
16 particular run of conduit paid for?

17 MR. MEDICO: If the sidewalk was put in first?

18 CHAIRMAN COWGER: No, the sidewalk was put in
19 after the conduit.

20 MR. MEDICO: That's very rare.

21 CHAIRMAN COWGER: Let's drop that. Okay. In the
22 interest of time now I think it's appropriate that the
23 contractor be allowed to come back to rebut this,
24 keeping in mind that the real issue to discuss now is
25 whether or not the payment for this spare conduit as

1 conduit under pavement was or was not addressed in the
2 settlement agreement.

3 MR. McRAE: Right. Okay.

4 CHAIRMAN COWGER: That's all we really need to
5 hear about, isn't it?

6 MR. McRAE: Mr. Chairman, Board members, the
7 Department has included a work sheet here that we have
8 just been discussing from Eisman Russo. We have never
9 seen this, never been privy to this. I don't know
10 when -- it's not dated. I don't know when they wrote
11 this up. I don't know if this was done prior to the
12 settlement or it was done yesterday, to be honest with
13 you. There's no date on any of it.

14 It is interesting to note that they're conceding
15 now they should have paid the man for his conduit as it
16 went along.

17 MR. MEDICO: We are not conceding that.

18 MR. McRAE: Yes, you are. You said you conceded
19 that.

20 MR. MEDICO: Not in that document. The purpose
21 of that document --

22 MR. McRAE: I'm saying when Steve first started
23 his thing he conceded that it should have been paid
24 that way all along. If it had been paid that way all
25 along, we wouldn't be here today.

1 MR. MEDICO: We are not saying that.

2 MR. MCRAE: It's interesting to note on this last
3 sheet they say it is a plan error. They've conceded
4 that it is a plan error and that the plans do prevail.

5 That's what we are saying. It was -- whether it
6 was a plan error or not, the man should have been paid
7 all along.

8 In this document they say, which includes
9 Ingram -- we don't know when they did this. We have
10 never seen this until they submitted this rebuttal the
11 other day.

12 I would like to ask if Mr. Rountree -- he was in
13 part of the settlement thing. I would like for him to
14 just take a couple of minutes and tell what he knows
15 about the settlement and whether Ingram was ever
16 discussed in the settlement.

17 He worked up the claim, was involved in the
18 settlement.

19 MR. ROUNTREE: From the get-go I wrote the two
20 letters that are in the rebuttal. I would like to
21 refer to the last letter.

22 I did attend a meeting in Marianna. At that
23 meeting was Mr. Steve Benak, Mr. Medico,
24 Mr. Steve Martin, Gene Strickland, myself,
25 Mr. Charlie Brown, Joey Anderson, Mr. Jimmy Rayborn.

1 CHAIRMAN COWGER: We are dealing with Exhibit H
2 in the DOT's package, or are we dealing with a letter
3 of September 9?

4 MR. ROUNTREE: September 9. We started out the
5 meeting, were discussing certain items of the claim.
6 It became very apparent after about 22 minutes that
7 Mr. Benak asked all the parties to be excused from the
8 meeting except he, Mr. Martin, Mr. Strickland and
9 Mr. Anderson.

10 At that point we all left. I think Mr. Medico
11 left. I did, Charlie Brown did.

12 I did not know what went on in that meeting until
13 today. I don't know what was discussed, what was
14 presented.

15 As Mr. McRae pointed out, that's the first time
16 I have ever seen those items in Eisman Russo's
17 calculations. I saw some calculations as far as on the
18 computer sheet for days of utility delays.

19 These letters were written based on utility
20 delays and the delay to the job early on in the first
21 year of the project, and the settlement of 2.4 million,
22 which was finally arrived at, was based on utility
23 impacts, delays to the project, and also time generated
24 by the overrun in the asphalt, which was some 47
25 percent.

1 Ingram's name never came up in any meeting that
2 I attended at any place, any time, anywhere.

3 The only subcontractor's name that came up was
4 Phoenix Construction because they had delays in the
5 early part of the job because they did the storm
6 drainage.

7 CHAIRMAN COWGER: So, Ingram wasn't delayed any
8 by the utility problems?

9 MR. ROUNTREE: Not to my knowledge, sir.

10 CHAIRMAN COWGER: Good enough. That's all I need
11 to know.

12 MR. ROUNTREE: That's it.

13 MR. McRAE: Let me say one thing in closing.
14 I know you want me to be as brief as possible, and
15 I appreciate that.

16 To us this is a final quantity issue. It should
17 have never been a final quantity issue. It should have
18 been paid as the job progressed, and like I said, we
19 would never have been here to start with.

20 We could not sign off in this supplemental
21 agreement of a final quantity. Suppose, for example,
22 that the Department underpaid us 5,000 tons of asphalt
23 for whatever reason. You say that probably wouldn't
24 happen, and it probably wouldn't happen. But suppose
25 the Department underpaid us 5,000 tons of asphalt.

1 Do you mean with the Department's position that
2 I would be signing my rights away to collect that 5,000
3 tons of asphalt? No. I didn't sign away my rights on
4 final quantity issues. I couldn't sign away my rights
5 or my subcontractor's rights because I never had
6 received the final quantities.

7 I was -- if that was the case, I will never again
8 sign a supplemental agreement if that was to be
9 interpreted that I was signing away final quantity
10 issue rights.

11 I think that's, again, what it boils down to,
12 that this is a final quantity issue. The quantities
13 were not paid in accordance with the plans, and the
14 Department has conceded that they should have been paid
15 that way all along.

16 MR. MARTIN: Mr. Chairman, it should also be
17 noted that those quantities did not change from the
18 time that estimate number 33 in August, when we were
19 doing the settlement meetings, until the final estimate
20 that was issued in February of '98 -- or February of
21 '99.

22 So, there was no change in the estimate from the
23 time that we were doing our negotiations to the time
24 the claim was submitted.

25 They knew what they were going to be paid, how

1 they were going to be paid. The difference, the
2 dispute was unresolved until the settlement issue,
3 until the settlement meetings, and it was considered
4 during the settlement negotiation that we had with
5 Mr. Anderson and Mr. Rountree and Gene Strickland.

6 MR. KUHL: I have something here. On the thing
7 about the quantities not changing on the estimates, in
8 this -- like I say, I talked with Peter Medico on the
9 issue.

10 On a couple of different occasions, it was said
11 that it would have to go through Jimmy Rayborn, et
12 cetera, and we felt it would not be appropriate to
13 bring up a claim issue until we got note of the final
14 quantities because we did not know if things would be
15 subject to change on the final quantities.

16 When we found out the final quantities, that's
17 when we pursued with the letters to file for the claims
18 for the extra quantities we feel we are entitled to.

19 MR. MARTIN: There was a dispute way back in
20 October of '96. It was unresolved.

21 The Department, or Eisman and Russo stated in
22 that letter how it was going to be paid. It was not
23 resolved until the settlement negotiation meetings in
24 August of '98.

25 So, even though it may not have been -- they may

1 not have issued an intent to file a claim, it was a
2 disputed quantity issue or a disputed issue. It was
3 well documented how the Department intended to pay for
4 it.

5 CHAIRMAN COWGER: Let me go back and ask
6 Mr. Rountree. You said there was a final meeting that
7 apparently resolved this issue that you weren't present
8 at?

9 MR. ROUNTREE: That's correct.

10 CHAIRMAN COWGER: Joey Anderson was present. Who
11 else did you say was at that meeting?

12 MR. ROUNTREE: Gene Strickland, Mr. Benak,
13 Mr. Hartley.

14 CHAIRMAN COWGER: Who is Gene Strickland?

15 MR. ROUNTREE: Vice-president of Anderson
16 Columbia at Marianna.

17 CHAIRMAN COWGER: So, you had two people there,
18 DOT had two?

19 MR. BENAK: Yes, I think I made the offer it
20 would be a little over a million dollars, which
21 incorporated this issue at that time. That was
22 unacceptable because like Peter was saying, it was an
23 item by item, claim by claim, issue by issue. We were
24 trying to come up with enough money to have the job
25 settled with issues on the job. This is one of the

1 issues that we negotiated and we were using as an
2 amount to come up with the --

3 CHAIRMAN COWGER: This was your initial offer to
4 try to settle?

5 MR. MEDICO: Counterproposal.

6 CHAIRMAN COWGER: Then somewhere along the way it
7 was increased. Now, who participated with that?

8 MR. BENAK: That was really a telephone
9 conversation with Edward Prescott, Jimmy Rogers, myself
10 and Joey Anderson.

11 CHAIRMAN COWGER: The only person from Anderson
12 Columbia who participated with that was Joey?

13 MR. BENAK: At that time we did not discuss
14 issues.

15 CHAIRMAN COWGER: You were just talking dollars?

16 MR. BENAK: He was talking total claim, how much
17 money he had lost on the job, and he needed a minimum
18 amount of money. That's all he was worried about.

19 MR. ROUNTREE: I will say the only sub that I was
20 aware of that was brought up at a meeting I attended
21 was Phoenix because they are involved in storm
22 drainage, and therein is where the impacts came from,
23 early on construction.

24 CHAIRMAN COWGER: All that says is that Ingram
25 didn't participate in these negotiations for the

1 settlement agreement.

2 MR. MARTIN: Neither did Phoenix.

3 CHAIRMAN COWGER: Your testimony, Steve, just to
4 make clear, in the telephone conversation that you just
5 testified to, that took place that caused the amount to
6 go from a million plus to 2.4 million, during that
7 conversation you did not discuss the Ingram issue?

8 MR. BENAK: It was just converted over to a total
9 claim. We were talking specific issues at our meeting.
10 Then from that point we wanted some backup, to back up
11 their total claim costs that they -- and at that point
12 Edward and Joey were just talking money. They weren't
13 talking issues at that time.

14 CHAIRMAN COWGER: I think we are about at the
15 point we can wrap up. I want to offer the contractor
16 one more opportunity.

17 MR. ALBAUGH: Have we really heard anything on
18 the second part of this issue?

19 CHAIRMAN COWGER: No, we need to go into that.

20 MR. ALBAUGH: The contractor has presented us
21 with the fact of not paying for retainage. Their first
22 part -- we haven't heard anything on that.

23 MR. ROEBUCK: Is the reason you won't sign a
24 qualified final letter --

25 MR. McRAE: We submitted a qualified letter of

1 acceptance to the Department. The Department refused
2 to accept it. The Department's position was you
3 settled everything, so you can't submit a qualified
4 letter of acceptance. They refused to pay the
5 retainage.

6 MR. ROEBUCK: That's the reason for the
7 retainage.

8 MR. McRAE: The Department is using the retainage
9 as leverage to try to get us to acquiesce. We wouldn't
10 do it because we had to represent Ingram.

11 The only thing I would say in closing is that if
12 you look at the claim, and it's in your package of how
13 the claim is, the claim was settled really on the issue
14 of primarily asphalt quantities.

15 I think in discussions it was agreed with the
16 Department that might be the most easiest way to
17 resolved tissues of the conflicts and the delays was to
18 price it out as asphalt overruns, and asphalt overruns
19 so much.

20 That's how it was handled. It was never involved
21 in any discussion that I have been told about by
22 Joey Anderson or Richard Rountree that Ingram was ever
23 involved in any of the settlement issues.

24 You know, it just amazes me that the Department
25 is taking the position that, yes, we agree that Ingram

1 should have been paid that way, when all along, even in
2 their letters, they are saying no, they shouldn't have
3 been paid.

4 You know, why did Ingram -- the Department is
5 going to switch this just for convenience to say it was
6 included in the claim? You know, it amazes me that the
7 Department's position in your letter, Pete, was that,
8 no, we are not going to pay you, we are not going to
9 pay you, and then all of a sudden they say it's
10 included in the claim.

11 MR. MEDICO: We were trying to justify a high
12 dollar amount to settle.

13 MR. McRAE: In that justification, Steve, had a
14 million dollars. We settled it for two million, four.
15 It was based on asphalt. It wasn't based on anything
16 to do with anything.

17 Like I said, if the Department had paid the way
18 they should have paid and the way the plans show from
19 day one, we would have never had this dispute. We
20 would never have signed this supplemental agreement if
21 we thought we were signing off on final quantity pay
22 issues.

23 MR. MEDICO: We don't want to forget that when
24 you are negotiating the claim, there's give and take on
25 both sides.

1 MR. McRAE: I understand that.

2 CHAIRMAN COWGER: Does the Board agree we have
3 heard enough on this particular argument?

4 MR. ROEBUCK: I want to be clear in my mind.
5 When we make a ruling on Ingram's claim, which is the
6 basis here, the retainage will go away?

7 MR. MARTIN: As soon as we get a qualified letter
8 of acceptance, then we will release the retainage. The
9 Department would be foolish to sign a qualified
10 acceptance when we paid a \$2.4 million claim in final
11 settlement.

12 MR. ROEBUCK: That's the only issue in getting
13 Ted paid, retainage?

14 CHAIRMAN COWGER: We can address that as an aside
15 in your agreement, as soon as you get an unqualified
16 acceptance letter you are going to release the money.

17 MR. McRAE: With the exception we have asked for
18 interest on that money. It should have been paid
19 approximately the first of August, and it hasn't been
20 paid.

21 CHAIRMAN COWGER: In a few little words can you
22 address that, the interest?

23 MR. BENAK: He's holding his own money is what it
24 boils down to. All he would have to do is give us a
25 letter, and we would release the money. We don't have

1 any release from them on this job.

2 MR. McRAE: You got a release, you just wouldn't
3 accept it.

4 MR. BENAK: We had a release. It was a
5 supplemental agreement for a full and final. Now
6 that's a contract document which is a full and final
7 acceptance.

8 CHAIRMAN COWGER: Where does the contract allow
9 you to do that?

10 MR. BENAK: For full and final settlement?

11 CHAIRMAN COWGER: No, to not pay based on a
12 qualified acceptance letter.

13 MR. MARTIN: As far as releasing retainage?

14 CHAIRMAN COWGER: Yes.

15 MR. MARTIN: We didn't have an acceptance. We
16 didn't accept the qualified acceptance because we
17 already had a full and final settlement of all issues.
18 The only options was for regular acceptance.

19 MR. McRAE: You could have accepted my qualified
20 acceptance. You could have accepted it and released my
21 retainage. You just chose not to. You had a qualified
22 acceptance which took the exception for this.

23 MR. MARTIN: Why should we accept a qualified
24 acceptance when we already paid 2.3 million --

25 MR. McRAE: I said you could.

1 MR. MARTIN: Would that be in the best interest
2 of the Department?

3 MR. McRAE: You tried to use it for leverage to
4 beat me over the head with it.

5 MR. MARTIN: Not for leverage.

6 MR. McRAE: Why didn't you release my money then?

7 MR. MARTIN: We could not release it until we had
8 an acceptance.

9 MR. McRAE: You had an acceptance. You just
10 didn't agree with it.

11 CHAIRMAN COWGER: I think we heard enough on
12 that.

13 I want to be sure now, to sum the thing up, what
14 the DOT's position here is that payment for the spare
15 conduit issue was included in the settlement agreement,
16 whether -- and basically you are saying that was done
17 in good faith to try to settle all the issues.
18 Basically isn't that what you are saying?

19 MR. MEDICO: That's the intent of the final
20 settlement, to make all claims go away.

21 CHAIRMAN COWGER: You have presented Exhibit G in
22 your rebuttal package to document, at least in your
23 mind, that it was, in fact, included in the settlement
24 negotiations.

25 MR. MARTIN: To reach the first dollar figure

1 that we had.

2 MR. BENAK: Yes, sir.

3 CHAIRMAN COWGER: Granted Exhibit G is a DOT
4 Eisman Russo document. Okay. Got that.

5 Mr. McRae, do you have anything further to say on
6 that one issue?

7 MR. McRAE: We have never been privy to that
8 document. I don't know when it was generated. We have
9 never been furnished that until they sent it in to you.

10 CHAIRMAN COWGER: It's your position that the
11 settlement agreement did not include the issue we are
12 here to discuss today?

13 MR. McRAE: Our position is this is a final
14 quantity issue. There is no way we could sign a
15 supplemental agreement and waive our final quantity
16 issue rights or that of our subs. It was never
17 included in the discussions or in the way the claim was
18 resolved.

19 CHAIRMAN COWGER: We are going to wrap this up.
20 I would like to offer Mr. Rountree the opportunity one
21 more time to comment on the negotiations. Is there
22 anything else you have to say?

23 MR. ROUNTREE: No, sir.

24 CHAIRMAN COWGER: Anything else compelling that
25 needs to come out?

1 MR. WILSON: My last point. If the DOT knew my
2 claim was a part of it and they were in agreement, why
3 wasn't my name in that claim mentioned on the
4 supplemental agreement for \$2.3 million?

5 CHAIRMAN COWGER: In the supplemental agreement
6 was --

7 MR. WILSON: I know it said subcontractors. I am
8 saying why wasn't Ingram Signalization conduit
9 mentioned as part of it? That's not even a question.

10 CHAIRMAN COWGER: It doesn't go into any detail
11 at all that I can find. It mentions -- does not
12 mention subcontractors at all, other than in that
13 release statement.

14 MR. BENAK: The release statement, yes, sir.

15 CHAIRMAN COWGER: Okay. Mr. Roebuck, do you have
16 anything?

17 MR. ROEBUCK: No.

18 CHAIRMAN COWGER: Mr. Albaugh?

19 MR. ALBAUGH: No.

20 CHAIRMAN COWGER: Okay. The hearing is hereby
21 closed. The Board will meet to deliberate on this
22 claim sometime in January, and the parties will be
23 furnished their order shortly thereafter.

24 (Whereupon, the hearing was concluded at 11:50 a.m.)

25

