

STATE ARBITRATION BOARD

**5615 23rd Street S.W.
Vero Beach, FL. 32968**

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November 12, 2004

NOV 18 2004

Bill Albaugh
Highway Operations
Florida Department of Transportation
605 Suwannee Street MS 31
Tallahassee, FL. 32399-5200

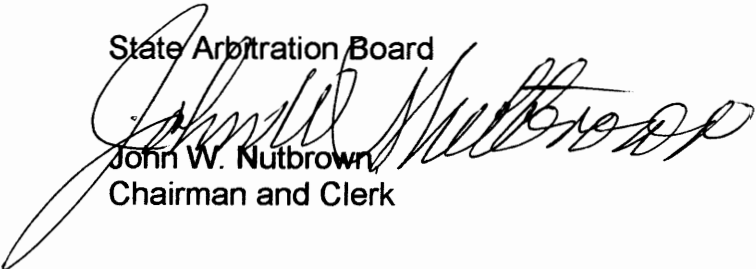
Re Arbitration Order 1 / 2004
DOT Fin Project No. 405935-1-52-01
Washington County, FL.

Dear Bill:

Find enclosed Arbitration Order 1 / 2004 for the above captioned project. A copy of the transcript is enclosed, and copies of the Contractors submittal and the Department rebuttal are being kept by Freddie Simmons for your use.

Sincerely;

State Arbitration Board



John W. Nutbrown
Chairman and Clerk

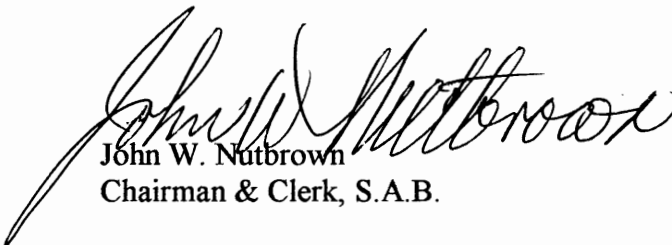
Cc: All Board Members

STATE ARBITRATION BOARD

Order No. 1-2004

/// NOTICE ///

In the case of Sandco, Inc. versus the Florida
Department of Transportation on Project No. 405935-1-52-01 in
Washington County, Florida, both parties are advised that the State
Arbitration Board Order 1-2004 has been properly filed with
The Clerk of the State Arbitration Board on November 11, 2004



John W. Nutbrown
Chairman & Clerk, S.A.B.

S.A.B. CLERK

NOV 11 2004

FILED

Copy of Order & Transcript to:

Bill Albaugh, Highway Operations

Steve Ghazvini, President, Sandco, Inc.

STATE ARBITRATION BOARD

Order No. 1-2004

RE: Request for Arbitration
Sandco, Inc.
State Project No. FPN 405935-1-52-01 in
Washington County, Florida

The following members of the State Arbitration Board participated:

John W. Nutbrown, Chairman
Freddie Simmons, Board Member
John C. Norton Board Member

Pursuant to a written notice, a hearing was held on a request for arbitration commencing at 9:30 AM July 16, 2004

The Contractor, Sandco, Inc presented a written request for arbitration of its claim in the total amount of \$104,779.20. The claim arises out of the withholding by the Florida Department of Transportation monies relating to adjustments in contract price for gasoline, diesel during the resurfacing of I-10 in Washington County, Florida. The Department of Transportation presented a written rebuttal and summary of position. The Board has considered the written submissions and the testimony and evidence presented at the hearing on July 16, 2004 and enters this Order Number 1-2004.

ORDER

The Board is unanimous in this decision.

During the hearing the Contractor alleged these unit prices for gasoline and diesel fuel were adjusted without proper authority and the Department did not follow the proper procedures as set by the Department and set forth in Section 9-2 of the Standard Specifications for Road and Bridge Construction, 2000 Edition.

It is the Contractor's contention that the unit price adjustments for fuel must be noted in the Supplemental Special Provisions in order for them to included in the current contract.

The Board found the only place this procedure is found is on Page 1 shown as Estimated Fuel Requirements for project. The page very clearly states this page is for "INFORMATIONAL PURPOSES ONLY". This page also states the following.

STATE ARBITRATION BOARD

Order No. 1-2004

IN PREPARING BIDS FOR THIS PROJECT THE BIDDER SHALL CONSIDER THAT THE DEPARTMENT OF TRANSPORTATION WILL MAKE ADJUSTMENTS IN PAYMENTS DUE THE CONTRACTOR FOR SELECTED ITEMS OF WORK. CONTRACT PRICE ADJUSTMENTS FOR GASOLINE AND DIESEL FUELS WILL BE MADE IN ACCORDANCE WITH SUPPLEMENTAL SPECIAL PROVISIONS CONTAINED IN THIS CONTRACT.

THE SELECTED ITEMS OF WORK AND THE FUEL FACTORS USED IN CALCULATING ADJUSTMENTS TO BE MADE ARE LISTED IN THE ABOVE ESTIMATED FUEL REQUIREMENTS FOR THIS JOB NUMMBER.

The Contractor contends that since the Supplemental Specisl Provisions for this project do not contain any mention of the fuel adjustment the Department has made these adjustments without proper authority. Section 9-2.1.1 Fuels states very clearly in the first paragraph "The Contractor will not be given the option of accepting or rejecting these fuel adjustments."

The Standard Specifications shows in Section 5-2 Coordination of Contract Documents. A list showing the governing order of documents in cases of discrepancy. This list shows Standard Specifications in this list and part of the Contract Documents.

The Board finds the Contractor has used the statement on Page 1 of the "Estimated Fuel Requirements" to base a claim that the Department adjusted the unit prices for gasoline and diesel fuel without the proper authority. This page clearly states it is an informational sheet only and is in no way a Contract Document. Section 9-2 of the Standard Specification clearly states the Contractor is not given the option of not using this specification. Finally Section 5-2 Coordination of Documents shows the Standard Specifications to be a Contract Document and is part of the Contract.

STATE ARBITRATION BOARD

Order No. 1-2004

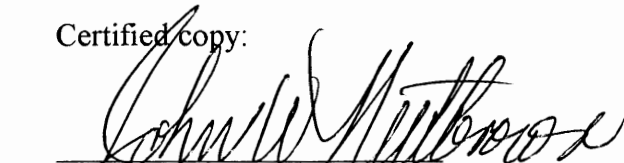
The Board makes no award to the Contractor in this order.

The Contractor shall reimburse the State Arbitration Board \$301.00 for court reporting costs.

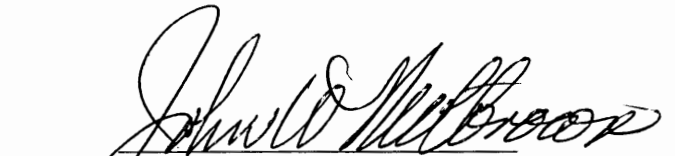
Vero Beach, Florida

Dated: November 11, 2004

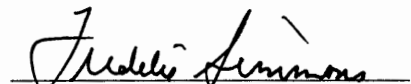
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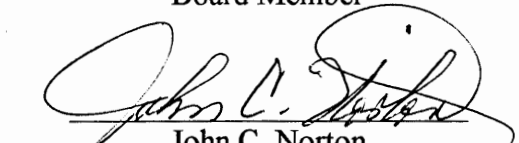
John W. Nutbrown
Chairman & Clerk



John W. Nutbrown
Chairman & Clerk



Freddie Simmons, P.E.
Board Member



John C. Norton
Board Member

STATE ARBITRATION BOARD
STATE OF FLORIDA

SANDCO, INC.)
)
)
)
) PROJECT NUMBER 405935-1-52-01
 - and -)
) LOCATION: Washington County,
) Florida
)
)
)
 DEPARTMENT OF TRANSPORTATION)
 _____)

COPY

PROCEEDINGS: Arbitration in the Above Matter

DATE: Friday, July 16, 2004

PLACE: 1007 Desoto Park Drive
Tallahassee, Florida

TIME: Commenced at 9:25 a.m.
Concluded at 10:30 a.m.

REPORTED BY: CATHERINE WILKINSON
CSR, CP
Notary Public in and for
the State of Florida at
Large

WILKINSON & ASSOCIATES
 Certified Court Reporters
 Post Office Box 13461
 Tallahassee, Florida 32317
 (850) 224-0127

APPEARANCES :

MEMBERS OF THE STATE ARBITRATION BOARD:

Mr. John W. Nutbrown, Chairman
Mr. Freddie Simmons
Mr. John C. Norton

APPEARING ON BEHALF OF THE CONTRACTOR:

Mr. Steve Ghazvini
Mr. Rod Moeller

APPEARING ON BEHALF OF THE DEPARTMENT OF TRANSPORTATION:

Mr. Steve Potter
Mr. Eddie Wilson
Mr. Steve Benak

* * *

I N D E X

EXHIBITS	PAGE
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P R O C E E D I N G S

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

Mr. Freddie Simmons was appointed as a member of the Board by the Secretary of the Department of Transportation.

Mr. John C. Norton was elected by the construction companies under contract with the Department of Transportation.

Those two members have chosen me, John Nutbrown, to serve as the third member of the Board and as Chairman.

Our terms expire on June 30 of 2007.

Will each person who will make oral presentations during the hearing please raise your right hand.

(Whereupon, all witnesses were duly sworn by the Chairman.)

CHAIRMAN NUTBROWN: The request for arbitration of a claim submitted by Sandco, Incorporated, including all attachments thereto and the administrative documents preceding this hearing are hereby introduced as Exhibit 1.

(Whereupon, Exhibit No. 1 was received in evidence.)

CHAIRMAN NUTBROWN: That includes the letter that

1 Mr. Benak wrote the Board. I was not sure that the
2 contractor had a copy. It was marked as Exhibit 1.

3 Does either other party have any other
4 information that you wish to enter into the record at
5 this time?

6 MR. BENAK: We have just a little -- it's nothing
7 different from the contract documents. It's our
8 rebuttal letter. Then we have some backup documents.

9 CHAIRMAN NUTBROWN: Do you have enough for
10 everybody?

11 MR. BENAK: It's out of the contract. We have
12 four of them. I will give one to you all. This is
13 just what my presentation is going to be. It along
14 with that letter is what it boils down to.

15 CHAIRMAN NUTBROWN: This folder will be entered
16 as Exhibit 2.

17 (Whereupon, Exhibit No. 2 was received in evidence.)

18 MR. MOELLER: To make it easy to follow us in the
19 contract document as well as the Standard
20 Specifications, we have made photocopies out of them so
21 we don't have to flip back and forth between them, to
22 follow along with our presentation.

23 If you would like -- I don't know that they need
24 to be entered into the record because they will be
25 referred to as Standard Specifications.

1 CHAIRMAN NUTBROWN: We will just mark it as
2 Exhibit 4, and then it's there.

3 MR. MOELLER: Okay.

4 CHAIRMAN NUTBROWN: Do you need to make copies?

5 MR. MOELLER: No, I have copies. I actually have
6 six.

7 MR. SIMMONS: Is that Exhibit 3 or did you have
8 one?

9 CHAIRMAN NUTBROWN: You are right. It's 3.
10 (Whereupon, Exhibit No. 3 was received in evidence.)

11 MR. MOELLER: I had anticipated passing them out
12 one at a time, but I will assemble them now.

13 CHAIRMAN NUTBROWN: We can take a break while you
14 do that.

15 MR. MOELLER: I also have excerpts with regards
16 to fuel adjustments from two other projects. I'm not
17 going to use them, but only as an example of
18 methodologies used on other projects. Just an example
19 of what is done. We would like to make those two part
20 of our Exhibit 3.

21 (Brief pause)

22 CHAIRMAN NUTBROWN: Has everybody had a chance to
23 review the items that have been put out?

24 During the hearing the parties may offer such
25 evidence and testimony as is pertinent and material to

1 the dispute being considered by the Board and shall
2 produce such additional evidence as the Board may deem
3 necessary to an understanding of the matter before it.

4 The Board, shall be the -- the Board shall be the
5 sole judge of the relevance and materiality of the
6 evidence offered.

7 The parties are instructed to ensure that they
8 receive properly identified copies of each exhibit used
9 in the proceeding.

10 You should retain these exhibits. The Board will
11 send the parties a copy of the court reporter's
12 transcript, along with our order, but will not furnish
13 copies of the exhibits.

14 As is typical in arbitration proceedings, this
15 hearing will be conducted in an informal manner. The
16 Board is not required to apply a legalistic approach or
17 strictly apply the rules of evidence as used in a civil
18 court proceeding.

19 We are primarily looking for information in
20 regards to the facts and the contract positions that
21 apply in this case.

22 The order of proceeding will be for the claimant
23 to present their claim, and then for the respondent to
24 offer rebuttal.

25 Either party may interrupt to bring out a

1 pertinent point by coming through the Chairman. I will
2 ask, please, just ask to be recognized. I will get you
3 in there. Please don't talk across the table and
4 please don't three or four of you talk at one time.
5 Cathy has only got one ear, I guess only one side is
6 working this morning. Don't put her in a bad spot.

7 With that we will proceed. The contractor may
8 proceed now.

9 (Brief pause)

10 MR. MOELLER: We basically have an outline of the
11 order I will use of going through the items that I'm
12 speaking about. If you would like to use it to make
13 notes on, it may help you keep notes on the relevant
14 subject I'm talking about.

15 I had anticipated at the top of that page marking
16 your booklets. At the last minute we made photocopies
17 of what we have turned into Exhibit 3. Those items at
18 the top of the page have already been placed into the
19 record.

20 Sandco believes that in this presentation that
21 the contract would be clearly supportive of our
22 position. However, we are hopeful the Board is
23 resolved and well settled in the rule that any
24 ambiguity in the contractor will be construed against
25 the drafter, that being the Department.

1 I would ask you to turn in Exhibit 3 to page one,
2 which is the -- within the special provisions for the
3 project, page number eight.

4 It's labeled in handwritten fashion, paragraph
5 one. In preparing bids for this project, the bidder
6 shall consider that the Department of Transportation
7 will make adjustments in the payments due the contract
8 for selected items of work.

9 The contract price adjustments for gasoline and
10 diesel fuels will be made in accordance with
11 supplemental special provisions contained in this
12 contract. Therefore, we must look to the supplemental
13 special provisions contained in this contract for
14 guidance when we make fuel adjustments.

15 The Department, I believe, has conceded in their
16 July 6 letter that when we look to the special
17 provisions we find there are, in fact, no provisions
18 contained in this contract that allow for any
19 adjustment in payment for gasoline or diesel fuel.

20 This is the argument between the two parties.
21 The Department argues that the special provision is
22 invalid and nonenforceable. Sandco argues that the
23 special provision is valid and enforceable.

24 Basically we have a discrepancy in the contract
25 documents. This is the argument.

1 I am now on item two. I am looking for
2 assistance in resolve discrepancies. I turn to page
3 35, which would be page two in Exhibit No. 3 -- page 35
4 of the Standard Specifications.

5 An excerpt beginning with the table at the bottom
6 guides us in the resolution of discrepancies and reads,
7 "In the case of discrepancies, the governing order of
8 documents is as follows. Item one, special provisions
9 are assigned the very highest priority. Technical
10 special provisions follow with plans, road design
11 structures and traffic operations, developmental
12 specifications, supplemental specifications."

13 And at the very bottom of the priority list is
14 Standard Specifications.

15 The Department argues that their position is
16 supported by item number 7, Standard Specifications at
17 the very bottom of the page.

18 Sandco argues that item one, special provisions
19 at the very top of the table, holds precedence and
20 supports Sandco's claim of improperly withheld
21 payments.

22 To support the Department's position, you will
23 have to conclude that the table provides that in cases
24 of discrepancy -- and I'm reading again from the top of
25 the table. You will have to read this in, "In case of

1 discrepancy the governing order of documents is as
2 follows. Item 7, Standard Specification sets the
3 highest precedence."

4 The table does not provide that. It provides
5 that it will have the lowest of these items listed.

6 To support Sandco's position we will ask that you
7 conclude that the table provides that in case of
8 discrepancy the governing order of documents is as
9 follows: Item one, special provisions has the highest
10 precedence and priority. We feel that is quite simple
11 and easy to understand and contractually relevant and
12 will we bring you to a conclusion allied with Sandco.

13 I then turn to page three in my Exhibit No. 3,
14 which is page eight of the Standard Specifications.
15 This is the definition section of the Standard
16 Specifications. Item B in definitions is special
17 provisions.

18 Special provisions are specific clauses adding to
19 or revising the Standard Specifications setting forth
20 conditions varying from or additional to the Standard
21 Specifications for a specific project.

22 Gentlemen, these special provisions were written
23 specifically for this project and exactly followed the
24 guidance provided by the Standard Specifications both
25 in precedence and in definition.

1 To support the Department's position, you would
2 have to conclude that special provisions do not add to
3 or revise the Standard Specifications, and that this
4 special provision we are talking about today may not
5 set forth conditions varying from or additional to the
6 Standard Specifications.

7 We don't know how you could come to that
8 conclusion.

9 Making reference to the July 6 letter from the
10 Department, the letter explains that, in part, the
11 Standard Specifications will only apply if no document
12 preceding it specifically addresses, mentions or
13 stipulates to contract price adjustments for gasoline
14 and diesel fuels.

15 Yet to support the Department's conclusion, you
16 will be asked to decide that the special provision --
17 and I will ask you to maybe flip back to page one of
18 Exhibit 3 -- that again is the special provision.

19 You will be asked to decide that this special
20 provision does not specifically address, mention or
21 stipulate to contract price adjustments for gasoline
22 and diesel fuels.

23 I will read an excerpt from paragraph one.
24 "Contract price adjustments for gasoline and diesel
25 fuels will be made in accordance with supplemental

1 special provisions contained in this contract."

2 We are asking you does this special provision
3 address, mention or stipulate to contract price
4 adjustments for gasoline and diesel fuels. Sandco's
5 position is that it does.

6 Oftentimes we look to the methods that the
7 parties to a contract conduct themselves during the
8 contract period in order to determine the
9 interpretation of the contract documents.

10 Reading again from item one of Exhibit 3, that
11 is the special provision, beginning with -- and if you
12 are following along with me on item five of my
13 read-along -- paragraph one of that special provision,
14 beginning with the language that reads, "In preparing
15 bids for this project, the bidder shall consider that
16 the Department of Transportation will make adjustments
17 in payments due the contractor for selected items of
18 work.

19 "Contract price adjustments for gasoline and
20 diesel fuels will be made in accordance with
21 supplemental special provisions contained in this
22 contract."

23 During the contract period, the Department
24 ignored this part of the special provisions throughout
25 the contract period. During the contract period,

1 Sandco complained that this special provision was being
2 ignored.

3 Now, item six in my read-along. Again, still on
4 page eight of the special provisions. I have labeled
5 it paragraph two. It reads, "The selected items of
6 work and the fuel factors used in calculating
7 adjustments to be made are listed in the above
8 estimated fuel requirement for this job number."

9 During the contract period the Department agreed
10 with this special provision and utilized the table at
11 the top of the page when it made contract price
12 adjustments.

13 Sandco, during the project period, did not
14 complain about the use of this special provision
15 because it holds special provision precedence.

16 Essentially the Department is here today to ask
17 you to ignore paragraph one and allow them to enforce
18 paragraph two.

19 I would like you to notice in the practice of the
20 contractor during the project that Sandco did not
21 complain about adjustments to bituminous materials
22 because no special provision amends the Standard
23 Specifications. Bituminous materials were adjusted
24 according to the tables shown in the special
25 provisions, and Sandco agrees that that is correct,

1 because is it not superseded by a special provision.

2 My item seven includes four items that I would
3 like you to make reference to.

4 Because the Department has at least four
5 different ways that it deals with fuel adjustments
6 contractually across the state -- excuse me, with
7 Sandco, you're being asked to determine which ones
8 should apply to this contract.

9 In our Exhibit 3, pages 87, 88 and 89 are
10 photocopied. That's a Standard Specification for
11 gasoline and diesel fuels. This applies to some
12 contracts.

13 The next item in your handout, Exhibit No. 3, is
14 a -- it's an excerpt from the special provisions. It's
15 labeled Leon County Highway 90.

16 That is an example of a second way that the
17 Department addresses gasoline and diesel fuel price
18 adjustments during a contract period.

19 At the time that you have the opportunity to
20 study this, you may find that you want to compare the
21 Standard Specifications to that special provision from
22 Highway 90 in Leon County and identify the slight
23 variations that exist between the two.

24 The next item in our handout is labeled Jackson
25 County, Highway 2.

1 In this case a third methodology utilized by the
2 Department is provided by special provision to the
3 contract in Jackson County on Highway 2.

4 Again, at your convenience in reviewing the
5 methodology utilized, you will find variations in that
6 method.

7 The fourth method that we know of, at least four
8 different methods utilized is the method utilized in
9 this project.

10 This project has dealt with gasoline and diesel
11 fuel adjustments on a single page by special provision
12 and represents the fourth method the Department
13 utilizes for fuel adjustments.

14 Sandco's request to this Board is that you find
15 that the special provisions of this project prevail.
16 They have precedence according to the coordination of
17 documents in the Standard Specifications, and that no
18 contract price adjustments for gasoline and diesel
19 fuels may be made.

20 That interest be paid to the contractor from the
21 date that funds were withheld during the project
22 period.

23 That concludes our presentation.

24 CHAIRMAN NUTBROWN: Jack, do you have any
25 questions?

1 MR. NORTON: No.

2 CHAIRMAN NUTBROWN: Freddie?

3 MR. SIMMONS: Wait until after they do theirs.

4 CHAIRMAN NUTBROWN: Do you want to go ahead?

5 MR. BENAK: Yes, we'll go ahead and get started.

6 Is your name Mr. Moeller?

7 MR. MOELLER: Yes.

8 MR. BENAK: The emphasis of this whole thing is
9 that one page in the special provisions is what he's
10 calling it. I think the reference is to a supplemental
11 special provision.

12 It says, "Contract price adjustments for gasoline
13 and diesel fuels will be made in accordance with
14 supplemental special provisions contained in this
15 contract."

16 I think he had a definition page in here. He was
17 referring to this as a special provision. A
18 supplemental special provision as added is a revision
19 to the special provisions that are revised, you know,
20 after the special provisions are already written and
21 made in.

22 On this project that didn't occur because that
23 special provision refers to contracts that are less
24 than a hundred days and no bituminous adjustment,
25 gas-diesel adjustment will be made.

1 That's why this thing is written here. It's
2 titled, the reference page that he is referring to, it
3 goes, "For informational purposes only."

4 It's got asterisks in front of it. He's
5 referring to it as a special provision.

6 Well, there is a page before it that is in the
7 special provisions, too, that has, if you will look at
8 this, the black book right here, it's under the tab
9 rebuttal attachments. It shows you the bituminous
10 material, gasoline, diesel fuel and natural gas index
11 for the month of February 2001.

12 It's this page right here (indicating document).
13 Do you see that page right there?

14 This is a page, I think, preceding or after in
15 the contract -- I don't know if we have the exact
16 contract, but it's right there next to this other page
17 that they are referring to.

18 If you will look down there it says, "The above
19 bituminous material, gasoline, diesel fuels and natural
20 gas prices are furnished pursuant to Section 9 of the
21 Department's specifications.

22 You take the whole specifications as a whole.
23 You start from the standard specs, number 7, and you
24 work up all the way to the top.

25 If you will read -- and this is the spec book

1 here, in section, coordination of contract documents.
2 It's I think two or three, four pages in the rebuttal.

3 I wanted to read something to you. He read a
4 little bit of it out of context. This is the
5 coordination of contract documents, 5-2 of the 2000
6 specifications.

7 These specifications, the plans, special
8 provisions and all supplemental documents are integral
9 parts of the contract. A requirement occurring in one
10 is as binding as though occurring in all.

11 All parts of the contract are complimentary and
12 describe and provide for complete work.

13 So, you can't just take one sentence out of a
14 part of the contract and say that it eliminates the
15 total specification.

16 If you will look back at that page that
17 Mr. Moeller is referring to, if you are going to delete
18 the Standard Specification, the special provision would
19 indicate it -- it would say special provision for
20 Section 9.

21 The Standard Specification is deleted and the
22 following is substituted. Then it would substitute in.

23 What they are trying to say is this one sentence
24 does away with the rest of the contract. That's not
25 how contracts work or contract law works.

1 What it boils down to is Section 9 in the
2 contract is in effect. When you see here that there is
3 something called a supplemental special provision, if
4 it's not there, then the rest of the contract is
5 complementary. You go back to where the next reference
6 is contained. It's not deleted. It's still there and
7 in effect with the contract.

8 So, the Standard Spec works. It's not deleted.
9 It's there. We applied the bituminous and the fuel
10 adjustments to the contract.

11 Let's see. Then you get to the Standard
12 Specifications. It's 9-2.1.2, gasoline and fuels.
13 It's in the rebuttal package. It's under the tab
14 rebuttal attachments. It's six pages in at the bottom
15 of the page. Are you all to it?

16 MR. SIMMONS: Where, Steve?

17 MR. BENAK: Right here, under the rebuttal.
18 There is a third tab, six pages in.

19 MR. MOELLER: This is copies of the Standard
20 Specification?

21 MR. BENAK: Yes, Standard Spec. You know, what
22 the contract says is that, "The contract price
23 adjustments will be made to reflect increases or
24 decreases in the prices of gasoline and diesel fuels
25 from those in effect during the month in which the bid

1 was received for this contract.

2 "The contractor will not be given the option of
3 accepting or rejecting this adjustment. This
4 adjustment will be made in accordance with the
5 following criteria."

6 Then it goes through the process of how the
7 adjustments are made.

8 MR. MOELLER: Steve, let me stop you a second,
9 because it appears this is a copy from something other
10 than the 2000 Standard Specifications.

11 When I look at page 87, although it's numbered
12 the same --

13 MR. BENAK: It's computer generated. The page
14 numbers come up different. We didn't want to confuse
15 anybody. It's the same spec. We didn't want to have
16 to copy the spec.

17 MR. MOELLER: Good enough.

18 MR. BENAK: It prints at a -- you can read it a
19 lot better. It's the same specification, the same part
20 of the contract.

21 Now, let's see. Really, that's the basis of our
22 position is that the Standard Specification has not
23 been deleted from the contract on special provision --
24 the special provision did not indicate that it was
25 deleted.

1 The reference is made. It's put in there in the
2 central office due to the variability of our contract
3 days. If it's a small number of days, then there's
4 another spec put in.

5 This job was how many days long?

6 MR. WILSON: 200 -- 208.

7 MR. BENAK: So, that spec was kicked out. That
8 note remains. So, that does not do away with the
9 Standard Specification.

10 That is really our position.

11 MR. SIMMONS: One more time. This note right
12 here, it's in there dependent on the length of the
13 contract time?

14 MR. BENAK: Right. If it's a hundred days or
15 less, then the fuel --

16 MR. WILSON: Okay. We've had three different
17 specs. I think if you will look back, whenever this
18 contract was let, the original spec didn't have any
19 time. Then we come back and changed it.

20 If it was a hundred days or less, then we didn't
21 do any fuel.

22 Then we changed the spec again to this one that
23 he's referring to here, the 365 days, or 5,000 tons on
24 the bid.

25 That's in the period. You know, like I say, we

1 have changed from originally where time didn't enter
2 in, we went to 100 days, then the industry didn't like
3 that. We went to the 365.

4 You know, those have to change. We do that
5 every -- update the specs every six months, whenever
6 the new work book comes out.

7 MR. SIMMONS: So, the adjustments on these dollar
8 figures we are talking about here to the diesel fuels
9 and the gasoline were based on the 9-2.1.2?

10 MR. WILSON: Right.

11 MR. SIMMONS: That equation thing? Is that
12 right, now?

13 MR. WILSON: Whenever this contract was bid, if
14 you look on that sheet there in front, when it tells
15 you what the price index is for that month that you
16 bid, if it fluctuates up or down more than 5 percent,
17 then that's the actual amount over the 5 percent is the
18 amount that is applied.

19 If you will look in your booklet there, you will
20 see that whenever this job was let --

21 MR. BENAK: This one right here, if you will look
22 right here, we have the printout. It looks just like
23 this.

24 CHAIRMAN NUTBROWN: A printout by the month.

25 MR. WILSON: That's what it is based on, the

1 monthly. If you will notice whenever the job was let,
2 it was up there in, what is that --

3 MR. BENAK: Well, this is just for unleaded
4 gasoline. It was 88.29 -- 88 cents when it was let.
5 Then if you will look down you will see there's numbers
6 one, two, three, four, five. Then at the top of the
7 page, six, seven, eight, nine and ten.

8 Those are when the estimates were done.

9 You can see the price. It was 88 and then it
10 went to 75, 85, 67, 60, 54, 58, 57, 61.

11 So, the -- during the life of the contract the
12 gas price went down. So the adjustments were made
13 accordingly. I wish we had some gas prices like that
14 now.

15 You know, it just happens. Usually, you know --
16 and it was done back, you know, years and years ago.
17 Was it '72 when the embargo --

18 CHAIRMAN NUTBROWN: Then there was a big jump.

19 MR. BENAK: This is a protection for the
20 industry, if it jumped around. Usually it goes up. In
21 this case it just happened that it went down.

22 MR. SIMMONS: As far as the numbers themselves,
23 there's no real dispute, is there? I'm not hearing
24 that, it's just whether you pay or don't pay, that's
25 the issue?

1 MR. BENAK: That's the issue.

2 MR. SIMMONS: These other jobs here that you had
3 these other -- saying we were doing them different
4 ways, the one in Leon County was bituminous. That
5 would be a different calculation. It wouldn't be the
6 same formula.

7 MR. MOELLER: The formula is different. I think
8 it's a two or three-page document. The gasoline and
9 diesel I believe begins at the very bottom.

10 The bituminous Standard Specification applied, as
11 near as I can tell, applied in every one of these
12 projects. It's the gasoline and diesel fuel that is
13 treated differently on the projects.

14 CHAIRMAN NUTBROWN: You mentioned a few minutes
15 ago that that formulation of the price change is done
16 differently on a job that's under a hundred days than a
17 job that's over?

18 MR. WILSON: If it's under a hundred days, it
19 don't get any adjustment.

20 Like I said, this spec has changed from where it
21 was -- there was no time limit. It went to a hundred
22 days, then it went to 365.

23 The reason it went to 365 days is this -- let's
24 just say we had a bridge job, which there wasn't a lot
25 of asphalt on it, you know, just approaches, but from

1 the time that the contract was actually let and
2 awarded, that it might be over 365 days before they got
3 to putting the approaches and the asphalt, and the
4 price could have fluctuated up there.

5 MR. SIMMONS: This job was done during the 100
6 daytime period requirement? No?

7 MR. BENAK: It didn't meet the 100-day criteria.

8 MR. SIMMONS: I mean it's over a hundred days?

9 MR. WILSON: Yes, that's what I'm saying. Had
10 it had been a hundred days or less, there wouldn't be
11 any -- it's a 200-day job.

12 Like I said, we have changed -- if it was -- this
13 isn't a job where it was generated off of -- it was
14 generated off of actual pay items. You know, whenever
15 we went to paying for this new system that we got with
16 a site manager, then the fuel was actually calculated
17 off a percentage of money that he earned that month.

18 You would put these gallons in. Then it's
19 calculated off of the percent of earnings that he
20 earned that month. It's a different calculation.

21 CHAIRMAN NUTBROWN: Okay, but the two jobs, Leon
22 County, Highway 90, which is basically as I understand
23 an asphalt job, was it less than a hundred days?

24 MR. WILSON: I don't know. I would have to go
25 look.

1 MR. MOELLER: Leon County was 330. Jackson
2 County was 70.

3 CHAIRMAN NUTBROWN: Okay. So, Jackson County
4 would not have any adjustments in it.

5 MR. WILSON: It's according to when it was let.
6 It would be according to when it was let.

7 MR. SIMMONS: I notice that's not 2000 specs on
8 the Jackson County job. So, it was, what, the '96?

9 MR. MOELLER: Actually it's newer than that. It
10 wouldn't be '04. It's got to be 2000 with that
11 supplement.

12 CHAIRMAN NUTBROWN: Jackson County was out of
13 time? That was the second project that you sent that
14 we returned because it was out of time.

15 MR. MOELLER: Actually, that was another project
16 in Jackson County. You are correct.

17 This project was a small project in Graceville.
18 It was a 70-day project.

19 MR. SIMMONS: Okay. You all have done quite a
20 bit of work in District 3, haven't you?

21 MR. MOELLER: Yes.

22 MR. SIMMONS: Have there been other jobs with the
23 same note in it where it went the other way and we owed
24 you money?

25 MR. MOELLER: No, sir.

1 MR. SIMMONS: Hasn't been anything like that?

2 MR. MOELLER: No, sir.

3 MR. WILSON: I think there have been.

4 MR. BENAK: There have been. It goes both ways.

5 MR. MOELLER: With the special provisions.

6 MR. SIMMONS: I was wondering if this note was in
7 there.

8 MR. MOELLER: The note was in Highway 98 from the
9 Panacea bridge around to the Turkey Creek -- it's
10 complemented by a special supplemental provision.

11 In those instances there is no argument because
12 the supplemental special provision is there as
13 indicated by the special provision.

14 I would think, just listening to this that what
15 has probably happened is the chances are this document
16 was originally put together with the thought that was
17 going to be less than a hundred days because there
18 would be no adjustment on a project less than a hundred
19 days, and that the follow-through necessary to
20 incorporate that portion of the supplemental special
21 provisions was not included.

22 One note doesn't delete the entire contract as
23 Steve suggested. In fact, as a matter of fact, we
24 don't argue with bituminous material.

25 The one sentence only deletes that section of the

1 Standard Specifications in the contract that it refers
2 to with regards to gasoline and diesel fuels. That is
3 the only place that it has precedence.

4 That's why I point out that the bituminous
5 adjustment isn't preceded by special provision.
6 Standard Specification applies there, absolutely.

7 The one sentence only deletes the Standard
8 Specifications regarding gasoline and diesel fuels.

9 MR. BENAK: That's the key. You used the word,
10 delete. It doesn't. There is no wording in there that
11 says delete.

12 MR. MOELLER: It doesn't allow adjustments unless
13 the adjustments are included in the supplemental
14 special provisions.

15 MR. BENAK: I agree with you. They are not
16 there. So, the rest of the contract is not deleted.
17 So, you have to take the whole contract together and
18 then once you read that contract, and if it -- you
19 know, if it got in here, we wouldn't, you know, delete
20 a provision out of the Standard Specification like
21 this.

22 You get your work book, and it would be done
23 properly. It would say Section 9 in the Standard
24 Specification is deleted and the following is
25 substituted. That's how you get these other ones in

1 there. That's how that works. It's been working that
2 way for years and years with contracts.

3 These -- really, these two pages in here are for
4 informational purposes. They were put in there for the
5 contractor to know that it's going to happen and it's
6 going to happen according to the contract, whether it's
7 done in the Standard Specs or whether it's done in a
8 supplemental specification or whether it's done in the
9 special provisions of -- do you have an example of
10 that?

11 MR. WILSON: Here is the contract right here.
12 Under foreseeable work, "Article 4-4, page 25 is
13 deleted and the following is substituted."

14 Then there's some that say, "Article 4-1, page 18
15 is expanded by the following."

16 So, like Steve is saying, it's going to tell you
17 whether it's deleted, expanded. If it's not, then you
18 refer back to your pecking order of five.

19 MR. MOELLER: We agree with that entirely. The
20 note says it will be in accordance with supplemental
21 special provisions contained in the contract, and if
22 it's not, then you go to your pecking order, which is
23 in the event of discrepancy, you rely on the special
24 provisions first. It tells us that adjustment will be
25 made according to the supplemental special provisions.

1 You guys say this is for informational purposes,
2 yet you agree with and use the second paragraph. You
3 use the table. You use everything on this page except
4 that sentence. You don't want to use that sentence.
5 Everything is valid but the sentence.

6 MR. BENAK: If you go to the next page in that
7 contract, it tells you to go to Section 9. That's that
8 other page that I showed you all that says -- yes,
9 there is a Section 9 in this contract.

10 MR. SIMMONS: That is the full contract?

11 MR. WILSON: Yes.

12 MR. BENAK: This is the letter I am referring to
13 in the contract that's part of the special provisions.
14 The next page is the one he is referring to.

15 There is his page. This is this page. Section 9
16 is still there. We are going to revise it by
17 Section 9, whether you start at the top of the special
18 provisions all the way to the bottom down to the
19 Standard Specs.

20 Section 9 has not been deleted out of the
21 contract. It's still there. So, that's why the
22 adjustments were made in Eddie's estimate section.

23 MR. MOELLER: This sentence you were referring
24 to, Steve, all it does is it sets the proctor. All it
25 does is set the proctor for the bituminous material,

1 gasoline and diesel fuel as required by Section 9.

2 In other words, it doesn't tell you that
3 Section 9 is incorporated fully. It tells you that
4 pursuant to Section 9 these prices are furnished.

5 MR. BENAK: So, there is a Section 9 in the
6 contract is what you are saying.

7 MR. MOELLER: We used it for bituminous
8 adjustment. It's not preceded by a special provision.

9 Gentlemen, I go back again to the well-settled
10 rule of ambiguities, it's got to be construed against
11 the drafter.

12 MR. BENAK: That is why there is a coordination
13 of documents in this Standard Spec that tells you in
14 the case of discrepancy you go down the list. Number
15 seven is still there and part of the contract. It's
16 not gone.

17 MR. GHAZVINI: The definition of special
18 provision based on the Department's definitions is when
19 it adds, subtracts, does something different than the
20 special provisions. Why would you include that in
21 there if all you want to say is we are going to make
22 the fuel adjustment according to Standard
23 Specifications? I mean that is a very simple matter.

24 If all you are going to do is according to
25 standard provisions, why would you not put in there,

1 hey, contractor guys, you all bidding, we are not
2 confusing you. The adjustment would be according to
3 Standard Specifications. That's it. Everybody is
4 done. Everybody knows what is going to happen.

5 You put the language in the special provision
6 that based on your definition changes the Standard
7 Specifications.

8 So we are sitting here looking at your document.
9 It says, look, we are changing the Standard
10 Specifications. How are we changing it? Well, look,
11 the gasoline price and the diesel price are going to be
12 adjusted according to what we are putting in this
13 contract in the supplemental special provisions.

14 Well, you go back in here, and there is nothing
15 in there. There is no adjustment. There is no way to
16 adjust.

17 This gentleman sat in here and said I don't know
18 during the past how many years there has been at least
19 three ways the Department has adjusted the fuel
20 themselves. We are looking at our contracts. We see
21 different, maybe slightly, you know, we see different
22 ways of adjusting the fuel.

23 There are different ways. There have been
24 different ways among the -- you know, the Department.

25 You have to look at it from our point of view.

1 How are we going to decide that this is going to be
2 done according to Standard Specifications.

3 You know, the order of precedence says that the
4 special provision prevails. You read that, you are
5 addressing only two items in there. You are not
6 addressing every item concerning fuel adjustment. You
7 are only addressing gasoline and diesel, nothing else.

8 That is the only two items we are asking not to
9 be deducted from us. There are no other items that you
10 have deducted from us that isn't according to contract
11 documents.

12 The contract means something. I think it ought
13 to mean something to the Department.

14 I think the Department has to explain if there is
15 anything, why, why there are so many different ways,
16 why do you not include it if you intended to include it
17 in the contract.

18 If you intended to include the standard
19 provisions in the contract, why would you not put the
20 straightforward sentence in there that the fuel
21 adjustment is going to happen to us and it's going to
22 happen according to Standard Specifications.

23 Moreover, you are saying that standard provisions
24 say that fuel adjustment happens. Well, why do you put
25 that in there if it is already granted by the standard

1 provision if you are not changing it, if you are not
2 changing it in the special provisions? Why are we
3 adding something in there? Why are we putting that in
4 there?

5 To me the standard, special provisions comes in
6 when you are trying to change something in there.
7 Otherwise, like you said, if it isn't in standard
8 provision, it is in there. Why do you add something to
9 it?

10 At the minimum, at the minimum -- this is not our
11 position -- our position is very clear, it is not in
12 there.

13 At the minimum I think the Department has to
14 agree this is ambiguous. At the very best it is very
15 ambiguous.

16 We did not draft this. The Department drafted
17 this.

18 I think the courts have said, I don't know, I'm
19 not an attorney, a layman, but the courts have said
20 this a long time ago, if there is an ambiguity, if it
21 is not clear, it is the responsibility of the drafter.
22 That is the Department.

23 MR. SIMMONS: Would you all say this note was
24 added from the central office?

25 MR. BENAK: They generate that. It's just added

1 into the contracts. Then the proper specs, you know --
2 they pull, depending on the contract time, they pull
3 out specific --

4 MR. SIMMONS: It's just part of this printout
5 when you print out these adjustments?

6 MR. WILSON: There is somebody over there that
7 does that. All we do is, like in District 3, put the
8 specs together. They get the plans, make sure that all
9 the specs -- they look at the spec package, put that
10 together.

11 Whenever it goes to Tallahassee, then Juanita and
12 them have somebody to put it together, pulls the
13 sheets. They pull that, generate that and the front
14 sheet.

15 MR. NORTON: Steve, for my information, in the
16 conformed specs here it starts right off, the first
17 thing, after the first page you have the diesel
18 adjustment, all the adjustments.

19 MR. BENAK: Right.

20 MR. NORTON: That's dated February 12, 2001.
21 Then you have supplemental spec package number two
22 dated February 6, 2001. Then you have supplemental
23 package number one dated November 15, 2000.

24 Is there some reason that there's no -- I don't
25 see where it says supplemental number three that would

1 then put this first section, I guess you would say, in
2 a supplemental spec package number three. Do you see
3 what I'm getting at?

4 MR. BENAK: Yes, sir.

5 MR. NORTON: I'm just asking.

6 MR. BENAK: These sheets -- like I said, they are
7 generated out of the central office. They are put in
8 right behind the --

9 MR. NORTON: The cover sheet.

10 MR. BENAK: -- the cover sheet.

11 MR. NORTON: What you are saying is this group of
12 sheets comes from the central office. It wasn't set
13 out as a supplemental or anything else?

14 MR. BENAK: It's the information for the
15 contractor to use. Our intent is fairly clear. We are
16 giving them all this information. We are saying this
17 is what we are going to base our adjustments on.

18 It's a 200-day contract. We are going to adjust
19 it in according to the Standard Specifications.

20 MR. SIMMONS: They are all in order, right?

21 MR. NORTON: It appears they are.

22 MR. MOELLER: If in fact it was clear, that note
23 would tell us it would be adjusted according to the
24 Standard Specifications and we wouldn't be here today.

25 MR. SIMMONS: These couple of letters in their

1 package, these are your letters. From reading them, it
2 looks like at the time --

3 MR. NORTON: Which one are you in?

4 MR. SIMMONS: In that black book, behind the
5 yellow tab, rebuttal.

6 MR. BENAK: The third tab.

7 MR. SIMMONS: The wording from you all is we are
8 surprised at the size of the adjustment. The next
9 letter says it's greater than any of our memory.

10 It looked like in these two letters it wasn't
11 necessarily the issue of the adjustment but how much
12 this adjustment was. Was that the tone I'm getting
13 from you at that time?

14 MR. MOELLER: Let me explain exactly how we get
15 to where we are today. These are questions posed by
16 Bob Myrick, who remains employed with Sandco, during
17 the project.

18 We went through the process in the order of
19 precedence in the contract documents.

20 From the accounting office I was asked
21 specifically to validate what the Department was doing
22 by opening the contract document. I opened the
23 contract document. It's exactly what anybody would do.

24 You look first to the special provisions, what do
25 they tell me to do. I went to the supplemental special

1 provisions, what do they tell me to do.

2 I wound up in a vacuum. I sat down to assemble
3 this adjustment myself and discovered that the contract
4 document is a void. There is no adjustment allowed.

5 At the time those first two letters were written,
6 we actually had not done that process, that legwork of
7 going through and looking for the procedure that the
8 contract guides you to.

9 It was the escalation of the deductions that
10 caused us to do that. At the time those letters were
11 written, it was unbeknown to us that that condition
12 existed.

13 I think if you look to -- actually, our first
14 letter was written directly to Clark Criderman.
15 I don't believe that's included as an excerpt. If it
16 is, we could put a date stamp on it because the date
17 that I found it, I wrote the letter.

18 We wrote that directly to Clark, who was the CEI
19 on the project.

20 That is the exact order in which we went about
21 it. That is how we -- that's why we found that,
22 following the guidance of the contract.

23 MR. GHAZVINI: Clearly our issue at this point in
24 time is not how much or too much or less, the whole
25 thing is the question of -- however, that does not --

1 we don't have all the say-so. We didn't have the final
2 say-so, so that does not preclude us, you know, if we
3 feel like according to what they say, they are taking
4 too much money, we should ask for information or
5 request for clarification.

6 MR. NORTON: You say that the fuel adjustment is
7 made on the amount of the monthly pay estimate. Is
8 that how it works?

9 MR. WILSON: On this job right here, if you look
10 at these pay items there, in your sheet there.

11 MR. SIMMONS: That's those.

12 MR. NORTON: Okay.

13 MR. WILSON: Those are the items that are going
14 to be -- to get it adjusted.

15 Like your clearing and grubbing on gasoline it's
16 32 gallons per acre. If you will notice there, they
17 was -- it was 17.69 acres on this. That's how it
18 generates the fuel.

19 MR. NORTON: Okay.

20 MR. WILSON: And what happens, in your estimates
21 as you go along there -- and the program, it's been
22 programmed, our estimate, to go to these items, pull
23 out those numbers and generate that fuel for that item.

24 Okay. Then what it does is it gets the
25 accumulation -- and it takes the difference over the

1 5 percent from what the bid month was.

2 That API is put in there every month. It goes in
3 there. It calculates the difference over 5 percent,
4 multiplies it times your gallons or your liters to get
5 your dollar amount.

6 CHAIRMAN NUTBROWN: The difference over the
7 original thing, the 5 percent stays the same throughout
8 the job because you are basing it on that, or are you
9 basing it on the adjusted?

10 MR. WILSON: You are basing it on your
11 adjusted -- like on this particular job right here, on
12 your gasoline, it was point 8829. Okay. It wouldn't
13 be adjusted unless it went over 5 percent -- 5 percent
14 over or 5 percent under.

15 Only the part that got adjusted was the
16 difference.

17 MR. NORTON: In other words, say 88 it's about
18 4 percent for 5 percent. If it got to --

19 MR. SIMMONS: 84 cents a gallon.

20 MR. NORTON: -- to 84 cents, then anything below
21 that got adjusted. The 5 percent stays there every
22 time.

23 MR. WILSON: Every time it stays there.

24 MR. NORTON: You are really adjusting going down
25 from, say, roughly 84 cents.

1 MR. WILSON: Right.

2 MR. NORTON: Your adjustment is that little bit,
3 not from 88 down.

4 MR. WILSON: And it would be the same thing if it
5 went up.

6 CHAIRMAN NUTBROWN: It's based on the amount of
7 work that was done during that pay period?

8 MR. WILSON: Right, per these items in this
9 contract.

10 MR. NORTON: Okay. Understood.

11 CHAIRMAN NUTBROWN: Do you have any other
12 questions?

13 MR. NORTON: No, I think that's everything
14 I have.

15 CHAIRMAN NUTBROWN: Okay. Mr. Moeller, have you
16 completed your presentation?

17 MR. MOELLER: We have, sir.

18 CHAIRMAN NUTBROWN: All right.

19 MR. GHAZVINI: I would like to add one sentence.
20 I'm not trying to speak for the Department's mouth or
21 anything, but I heard some discussion that this was not
22 put in by our department or that letter was put in by,
23 you know, Juanita Moore's department.

24 We have one contract. Again, who put it in there
25 to us is immaterial.

1 If that is something they do not necessarily
2 agree with, we have the same position that they have.
3 We do not agree with the way the contract was written.
4 We do not agree that it was clear.

5 To us, like I explained, this is a matter of we
6 are singled out for two items, gasoline and diesel. We
7 said these two items we are going to adjust them
8 according to what we are giving you in the supplemental
9 special provisions.

10 Those two were singled out, totally, possibly in
11 their opinion changing the Standard Specifications.

12 You go, there is nothing in there. That is
13 everything in the nutshell. There is nothing in there
14 to provide that adjustment.

15 The Department says -- the Department says we
16 really meant to say the contract price will be adjusted
17 according to standard provisions. They didn't need to
18 say that at all, if that's what they are insinuating it
19 was meant to be.

20 Whatever they meant it to be, to adjust it
21 accordingly is not in the supplemental provisions.
22 To us there is nothing there to adjust it by. There is
23 nothing in there to guide us on how they are going to
24 adjust it.

25 They should not adjust those two items. Those

1 are the only two items we have a disagreement with.

2 CHAIRMAN NUTBROWN: Anything else you want to
3 add? Steve, do you have anything to add?

4 MR. BENAK: No, sir.

5 CHAIRMAN NUTBROWN: Nobody? Do you have anything
6 else, Freddie?

7 MR. SIMMONS: No.

8 MR. NORTON: No.

9 CHAIRMAN NUTBROWN: Okay. The hearing is hereby
10 closed. The Board is going to try to meet following
11 this meeting and deliberate the problem. Once we get
12 the transcript, I would say it will probably take six
13 weeks to two months, and we will issue an order.

14 I thank everybody for their participation, and we
15 will proceed from there.

16 MR. MOELLER: Thank you.

17 MR. SIMMONS: Thank you all.

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

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CERTIFICATE OF REPORTER1
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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 30th day of July, 2004.



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