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Arkansas
State Claims Commission
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BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

☐ Mr.
☐ Mrs.
☐ Ms.
☐ Miss

Rosiek Construckion Co., Inc., Claimant

vs.

State of Arkansas, Respondent
AR Highway Dept.

Do Not Write in These Spaces

Claim No. 16-0047-CC
Date Filed July 20, 2015 (Month) (Day) (Year)
Amount of Claim $ 2,523,914.79
Fund AHTD
Breach of Contract

COMPLAINT

Rosiek ConstructionCo., Inc. (Name), the above named Claimant, of 2000 E. Lamar Blvd., Ste. 410 (Street or R.F.D. & No.) Arlington, TX 76006 (City) (State) 817-277-4342 (Zip Code) (Daytime Phone No.) County of Tarrant represented by Jack East III (Legal Counsel, if any, for Claim) of 2725 Canteell Rd., Ste. 202 Little Rock, AR 72202 (Street and No.) (City) (State) (Zip Code) 501-372-3278 (Phone No.) 501-376-0949 (Fax No.) says:

State agency involved: Ark. State H'way Com'n & AHTD Amount sought: $2,523,914.79

Month, day, year and place of incident or service: 10/18/2011 through 04/23/2014

Explanation: See Complaint and Exhibits attached.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof? Yes (Yes or No); when? 01 (Month) 09 (Day) 2015 (Year); to whom? AHTD Resident Engineer & ChiefvEngineer (Department); and that the following action was taken thereon: Claims Denied

and that $ 0 was paid thereon: (2) Has any third person or corporation an interest in this claim? NO; if so, state name and address

(Name) (Street or R.F.D. & No.) (City) (State) (Zip Code)

and that the nature thereof is as follows: ; and was acquired on , in the following manner:

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

STEVE ROSIEK
(Print Claimant/Representative Name)

(Signature of Claimant/Representative)

SWORN TO and subscribed before me at Arlington, TX. (City) (State)

on this 15th (Date) day of July (Month), 2015 (Year)

Dallas Kent Bless
(Notary Public)

DALLAS KENT BLESS
Notary Public, State of Texas
My Comm. Expires 12-30-2016

My Commission Expires: 12 (Month) 30 (Day) 2016 (Year)

SF1- R7/99

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC.	**CLAIMANT**
V.	**NO._____**
ARKANSAS STATE HIGHWAY COMMISSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT	**RESPONDENTS**

COMPLAINT

Claimant Rosiek Construction Co., Inc. ("Rosiek") files this Complaint and Claim Narrative with the Arkansas State Claims Commission against the Arkansas State Highway Commission ("ASHC") and the Arkansas Highway and Transportation Department ("AHTD"), and alleges:

PARTIES, JURISDICTION AND NATURE OF CLAIM

1. Rosiek is a corporation based in Texas.

2. ASHC is constitutionally created by Amendment 42 to the Constitution of Arkansas and is vested with powers and duties for administering AHTD.

3. AHTD is the transportation department for the State of Arkansas.

4. Jurisdiction and venue are properly before the Arkansas State Claims Commission.

5. This is an action for breach of contract.

FACTUAL ALLEGATIONS

6. On October 18, 2011 Rosiek entered into a contract ("Contract") with ASHC to construct a railroad overpass bridge and approaches on Arkansas State Highway 18, in Blytheville, Arkansas ("Project").

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7. The Project was designed by and was to be administered by AHTD.

8. Before Rosiek began Project work, there were issues on the Project that had not yet been addressed by AHTD, which included several utility conflicts. These issues resulted in Rosiek beginning work almost two months later than called for under the Contract, through no fault of Rosiek.

9. During the course of the Project, there were three major issues that arose for which Rosiek now requests compensation in time and/or money: Pile Tip Design Error, BNSF Railroad Structural Steel Delay, and Contract Time Extension.

10. Regarding the Pile Tip Design Error, the Contract plans provided three possible design configurations for the steel pile tips: (1) a conical-shaped tip: (2) a flat 2" steel plate; or (3) a flat ¾" steel plate with ¾" vaned tips. Rosiek reasonably relied upon Contract plans as providing viable options, and Rosiek elected to use the vaned tips for all the piling.

11. As thoroughly detailed within Rosiek's Claim Narrative, attached as Exhibit A, the vaned tips used by Rosiek were inadequately designed and did not match the barrel design strength or equal the required driving conditions. AHTD erred in allowing the under-designed vaned tip to be based as an alternate in the Contract drawings.

12. Rosiek suffered damages as a result of AHTD representing that the under-designed vaned tip was a suitable alternate for the piling work on the Project.

13. During the course of the Project, Rosiek had made arrangements to begin setting steel beams over the BNSF railroad track after February 20, 2013. At a February 20, 2013 meeting, Rosiek was informed by AHTD *for the first time* that no

track time would be given Rosiek until a later date due to the BNSF railroad two year ahead rolling schedule for track work and closures.

14. ASHC failed to make any reference to the BNSF look-ahead schedule in the Contract.

15. Steel erection was significantly delayed because of ASHC's failure to reference the BNSF look-ahead schedule in the Contract and AHTD's failure to timely inform Rosiek of these scheduling restrictions. Rosiek suffered damages as a result of these failures, and was forced to work through inclement weather in the second half of 2013 and through the winter of 2013/2014 to complete the Project.

16. Absent the railroad delay, work could have been completed prior to the second half of 2013 and well in advance of the winter of 2013/2014.

17. Although AHTD has partially addressed the structural steel delay by not charging time during the delay and providing a time extension for a follow-on delay related to placing the stay-in-place deck forms on the structural steel and the reinforcing steel, there has been no monetary compensation for this delay to Rosiek.

18. Rosiek suffered damages as a result of ASHC's failure to reference the BNSF look-ahead schedule in the Contract and AHTD's failure to timely inform Rosiek of these scheduling restrictions.

19. AHTD failed to grant a sufficient number of weather days to Rosiek from July 2013 to November 2013.

20. Rosiek repeatedly requested a Contract time extension under Specification Item 108.06(d)(2)d due to abnormal weather conditions. AHTD refused to grant Rosiek

that requested time extension based on an incorrect application of Specification Item 108.06(c).

21. As a result of AHTD's failure to grant a sufficient number of weather days to Rosiek from July 2013 to November 2013, Rosiek has been damaged with charges of 258 days of both liquidated damages and the Daily Road User Cost.

22. Adjacent to Rosiek's Project was Project No. 100740, which was being performed by another contractor. Rosiek's Project is one portion of a two-part project to construct a bypass through Blytheville; Project No. 100740 was the other portion and was for the construction of the approaches to the bypass being built on Rosiek's Project.

23. When the last day of Contract time was charged on Rosiek's Project, work on Project No. 100740 was only 7.87% complete.

24. Rosiek has been damaged by AHTD as a result of AHTD's assessment of Daily Road User Charges against Rosiek. Daily Road User Charges are assessed when a contractor has caused "interference and inconvenience to the road user." Here, however, it is not possible for Rosiek to inconvenience a road user when Rosiek's Project could not be accessed by a road user until Project No. 100740 is completed. AHTD's assessment of Daily Road User Charges against Rosiek is improper and unreasonable. This amount being held by AHTD is purely an additional penalty in addition to the liquidated damages being held.

25. AHTD failed to use the Partnering process mandated in the Contract which aggravated the possible resolution of the Project issues and the damages sustained by Rosiek.

26. The damages suffered by Rosiek are detailed in the Claim Narrative attached as Exhibit A.

RELIEF REQUESTED

27. Rosiek is entitled to recover damages from ASHC and AHTD in the sum of $ 2,523,914.79 as follows:

Pile tip design error -	$760,922.54
Structural steel delay compensation-	$881,528.78
Flagger compensation-	$195,463.47
Road User Costs-	$280,000.00
Liquidated Damages-	$56,000.00
Early completion bonus-	$350,000.00
Total-	$2,523,914.79

WHEREFORE, Claimant Rosiek Construction Co., Inc. respectfully requests that the Arkansas State Claims Commission will grant its claims for relief as stated herein, and for all other legal, just and proper relief to which Claimant is entitled.

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EXECUTIVE SUMMARY

Rosiek Construction Co., Inc. ("Rosiek") is headquartered in Arlington, Texas. It has had a place of business in Arkansas since 1969, when it built the bridge over the Arkansas River at Morrilton. On October 18, 2011 Rosiek entered into a contract ("Contract") with the Arkansas State Highway Commission ("ASHC") to construct a railroad overpass bridge and approaches on Arkansas State Highway 18, in Blytheville, Arkansas ("Project"). The Project was designed by and was to be administered by the Arkansas Highway and Transportation Department ("AHTD"). The Contract amount was $10,954,060.37 with 200 working days allotted for completion.

The Project was a 1,002.18 feet long bridge constructed to span the BNSF Railroad and included 437.82 total feet of approach embankment, 160.91 feet on the west end of the bridge and 276.91 on the east end of the bridge. In order to be viable for public transportation, the adjacent AHTD Project No. 100740 had to be complete to link the bridge to local streets on both sides of the bridge. The embankment and roadway for Project No. 100740 is 5,335.02 feet long, with 3,501 feet to the west of Rosiek's Project and 1,834.02 feet to the east of Rosiek's Project. Project No. 100740 includes the requirement to pave the 437.82 feet of embankment Rosiek constructed adjacent to the bridge.

Rosiek planned and scheduled the Project with the intent to earn the early completion bonus provided for in the Contract. However, before Rosiek began Project work, there were issues on the Project that had not yet been addressed by AHTD. These issues, which included several utility conflicts, impeded construction on seven of the eight intermediate bents on the bridge and, through no fault of Rosiek, resulted in Rosiek beginning work almost two months later than called for under the Contract.

During the life of the Project, there were three major issues that arose for which Rosiek now requests compensation in time and/or money: Pile Tip Design Error, BNSF Railroad Structural Steel Delay, and Contract Time Extension.

Rosiek's first major order of work on the Project was to drive the foundation piling. Almost immediately, Rosiek discovered that there was an error in the pile tip design, i.e., the tip was substantially under-designed by AHTD. This design error caused Rosiek to spend substantially more time than planned driving the piling, especially in Bents 7, 8, and 9, and more time clearing the bents to permit follow-on concrete substructure work. At the same time, the additional work Rosiek was required to undertake to support the pile driving operation also hindered Rosiek's ability to concurrently begin the concrete substructure and progress as scheduled. This early Project delay impacted Rosiek's work throughout the Project by forcing Rosiek to perform unplanned work through the 2012/2013 winter season and causing Rosiek to expend overtime to complete the Project. Rosiek is requesting a 53 working day time extension for this issue and compensation in the amount of $760,922.54.

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The bridge's superstructure was supported by structural steel beams, and Rosiek was delayed in setting those beams over the BNSF Railroad because of the BNSF Railroad work schedule that had been established two years earlier but that AHTD failed to disclose to Rosiek. Because the delay in erecting the structural steel and associated delays were so lengthy, it forced Rosiek to work through inclement weather in the second half of 2013 and through the winter of 2013/2014 to complete the Project. Absent the railroad delay, work could have been completed prior to the second half of 2013 and well in advance of the winter of 2013/2014. AHTD has partially addressed the structural steel delay by not charging time during the delay and providing a time extension for a follow-on delay related to placing the stay-in-place deck forms on the structural steel and the reinforcing steel. But there has been no monetary compensation for this delay which Rosiek is requesting in the amount of $881,528.78.

In the aftermath of the BNSF Railroad delay, Rosiek requested a 67 working day time extension in the July 2013 to November 2013 time period based on its determination that Project delays forced it to work during these days when the Project should have been otherwise completed. Rosiek has also identified 39 days within this time period that merit a time extension based on inclement weather.

The Project Special Provisions contain stringent requirements for when a railroad flagger must be on site. Notice requirements to have a flagger on the Project and to remove a flagger from the Project combined with the physical conditions of the work in relation to the railroad tracks essentially makes flagging a full-time position. Rosiek planned on completing the Project by December 17, 2012. Cost for railroad flaggers after that date total $195,463.47, and Rosiek is requesting reimbursement for that amount.

In addition to these three issues, Rosiek seeks return of the liquidated damages (28 days @$2,000 per day= $56,000) and Daily Road User Cost (28 days @$10,000 per day= $280,000) being withheld by AHTD. Rosiek further requests that Rosiek be paid the maximum early completion bonus of $350,000 permitted by the Contract.

Based on the merits of the time extension requests for the three Project issues, the double penalty of liquidated damages and Daily Road User Costs should be returned to Rosiek. In addition to the time extension requests, Project No. 100740 was not completed at the same time as Rosiek's Project to enable the public to timely use the bridge and approach roadways. The bridge was substantially complete on March 26, 2014 and is still not in use. When the last day was charged on Rosiek's Contract, Project No. 100740 was only 7.87% complete; a year after Rosiek had completed its work, Project No. 100740 had advanced only to the point of 12.28% completion. By the Contractual language used to define the Daily Road User Cost, Rosiek could not have possibly caused any "interference and inconvenience to the road user." Rosiek should not be charged with any Daily Road User Costs.

Rosiek intended to complete the Project to achieve the maximum bonus permitted under the Contract. Based on the events on the Project and corresponding delay days requested, the payment of this $350,000.00 bonus to Rosiek is warranted.

A. INTRODUCTION

The Project

On October 18, 2011 Rosiek entered into its Contract with the ASHC to construct a railroad overpass bridge and approaches on Arkansas State Highway 18, in Blytheville, Arkansas, Project No. 100705, Federal Aid Project STP-STPS-STPH-HSIP-FRAP-9051(5) & 9050. **[Exhibit 1]** The Project was designed by and was to be administered by AHTD. The Contract amount was $10,954,060.37 with 200 working days allotted for completion. **[*See* Exhibit 1]**

Rosiek was awarded the Project based on competitive bids submitted to ASHC on September 7, 2011. The Contract was bid using the A+C Bidding Method. Using the A+C Bidding Method, a contractor bids his estimated cost to complete all bid items for the "Specified Site Use Work" under part A of the bid package. **[Exhibit 2]** For Part C, a contractor then determines the number of working days required to complete the "Specified Site Use Work" and reach substantial completion (in this case, not to exceed 200 days).

The number of working days the contractor selects are multiplied by a predetermined dollar amount stated in the contract as the Daily Road User Cost ($10,000 per working day for this Contract) and then added to the Part A total. This sum is used to determine the low bidder for the Project and is for the purpose of the award only. The Contract defines the Daily Road User Cost as "[t]he amount which represents the average daily cost of interference and inconvenience to the road user." **[*See* Exhibit 2]**

The Contract also provides that the contractor is to be assessed the Daily Road User Cost "for every working day in excess of the stated number, up to the time in which the Specified Site Use Work is substantially complete." **[*See* Exhibit 2]** Furthermore, the liquidated damages to be assessed on the Project are "separate and in addition to the Daily Road User Cost." **[*See* Exhibit 2]** Liquidated damages were established as $2,000 per working day. **[*See* Exhibit 1]**

In addition to these penalty provisions of the Contract, there is also an early completion provision which permits the contractor to receive a $10,000 per day payment (or "bonus") for up to 35 working days for every day the contractor is substantially complete with its work prior to the number of contract days the contractor selects in its bid (in this case Rosiek selected 200 days), including granted extensions of contract time. **[*See* Exhibit 2]**

Rosiek received its notice of award on September 15, 2011 **[Exhibit 3]**; entered into its Contract with ASHC on October 18, 2011; received its notice to commence work on November 2, 2011 **[Exhibit 4]**; and attended the Pre-Construction Conference with AHTD on November 9, 2011. **[Exhibit 5]** The Project and Contract time could not be

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started on the eleventh day after the notice to commence work as contemplated by the Contract because of the utility conflicts affecting most of the bridge bents. **[Exhibit 6 (Utility delays are reflected in AHTD Daily Reports from November 14, 2011 through December 20, 2011; reports from those end dates are included in Exhibit 6.)]**

Prior to the Pre-Construction Conference, there was an initial understanding between Rosiek and AHTD that Contract time would not begin until December 5, 2011 due to the utility delays. However, at the Pre-Construction Conference, AHTD and Rosiek further agreed that Contract time would not begin in December 2011 because the utility conflicts had not yet been resolved. With the December 2011 weather conditions and the desire of Rosiek's piling subcontractor to mobilize in January 2012, AHTD and Rosiek mutually agreed that actual work would not start until January 2012.

The Project is .273 miles (1,440 feet) in length and consists of earthwork, minor drainage structures, chain link fence, erosion control items, a complete plate girder and W-beam bridge (1,002.18 feet long), maintenance of traffic, and miscellaneous items. **[Exhibit 7]**

- Completed bridge.

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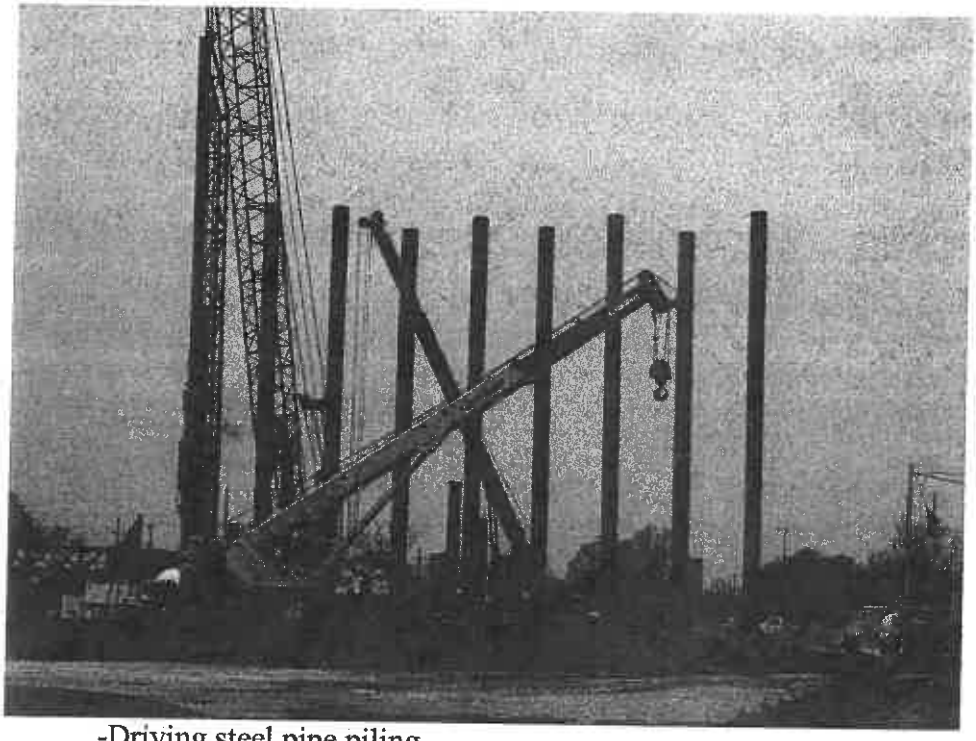
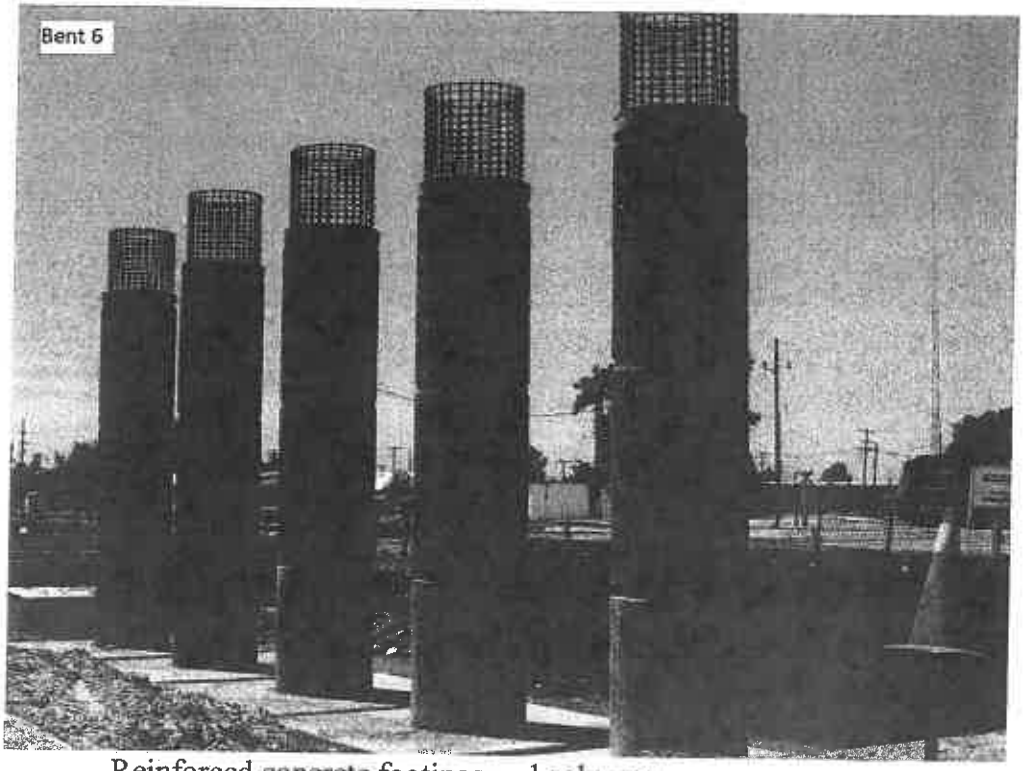
The bridge is oriented from west to east with two abutments and eight intermediate bents (Abutment #1 to Abutment #10 going west to east). The bridge is founded on round steel pipe piling (24-inch diameter x .500" thick) which are filled with concrete after driving. The balance of the substructure consists of cast-in-place, reinforced concrete footings, columns, and caps.

Each of the eight intermediate bents has five foundation footings and columns topped by the bent cap. Nine piles are in each of the footings. The abutments each have nine piles which are topped by a reinforced concrete cap.

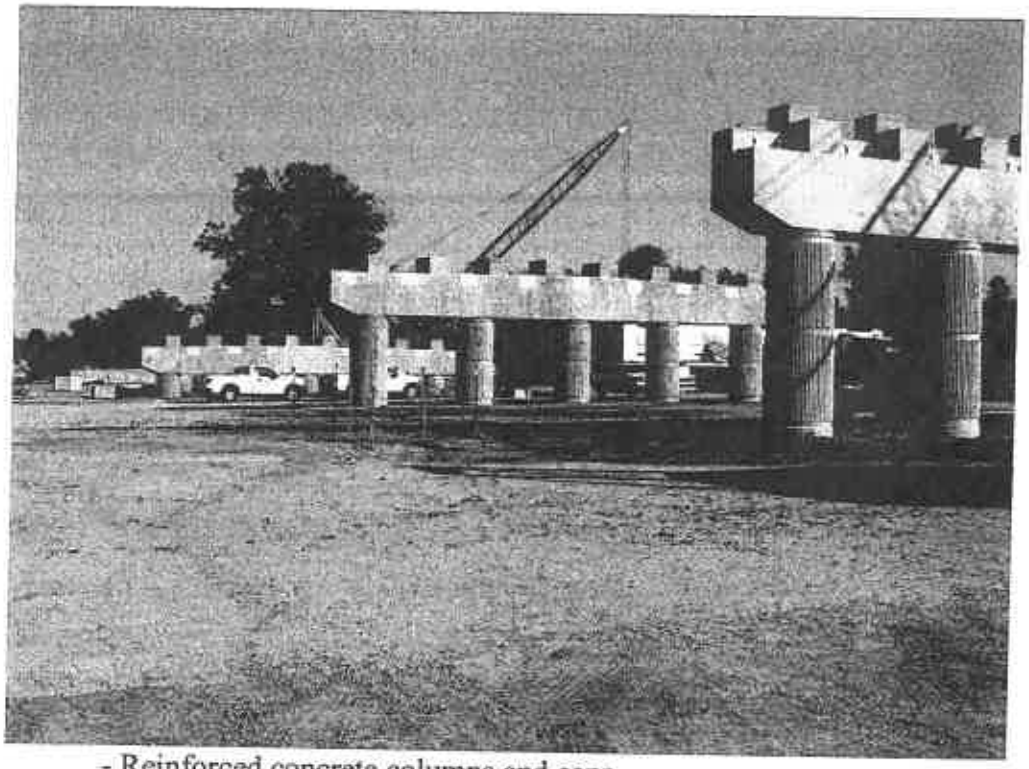


-Driving steel pipe piling.

-Concrete-filled steel pipe piling prior to footing concrete placement.

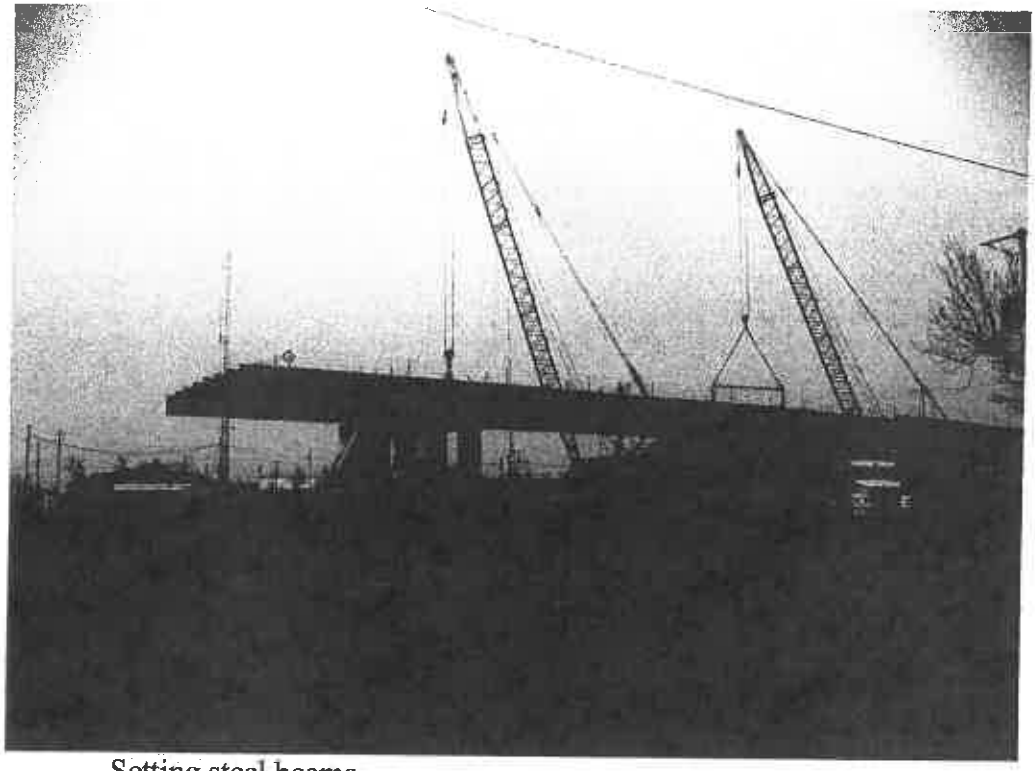


-Reinforced concrete footings and columns.



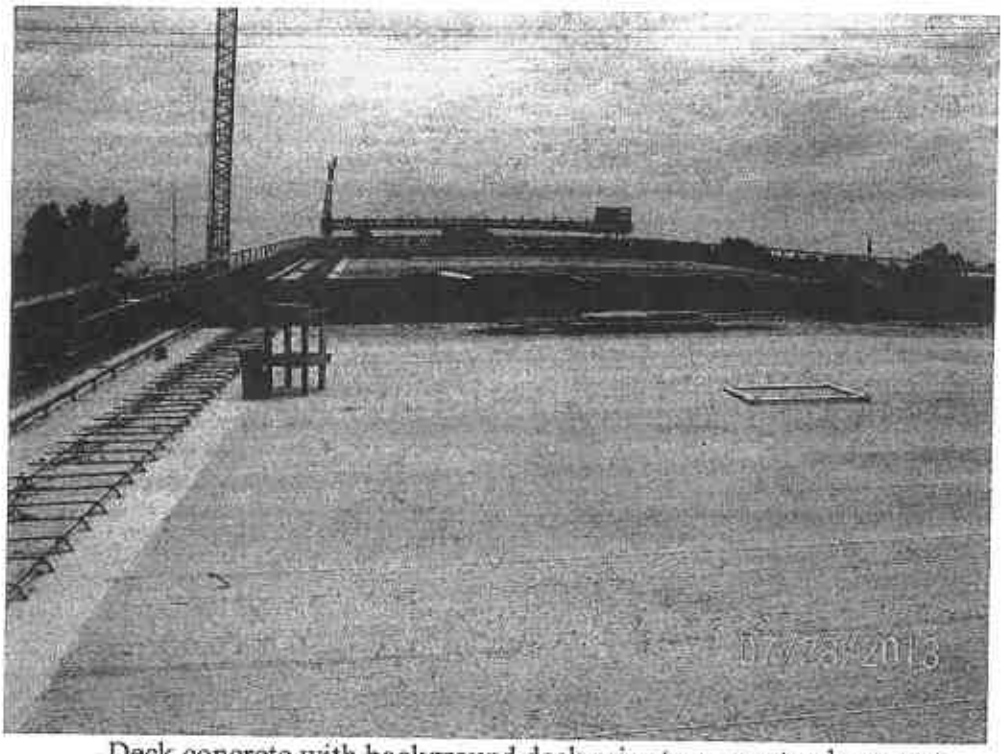
- Reinforced concrete columns and caps.

The bridge superstructure is comprised of steel beams which are grouped into three steel divisions designated as Divisions 1, 2, and 3 going west to east. Each of these steel divisions contains three spans of beams. The three superstructure spans adjacent to each abutment (Divisions 1 and 3) consist of composite W-beams with each set of three spans being 285 feet in length. The three main spans (Division 2), which includes the span over the BNSF tracks, consist of continuous composite plate girders which are a total of 430 feet long. The reinforced concrete bridge deck is placed on permanent steel deck forms which have been welded to the structural steel.



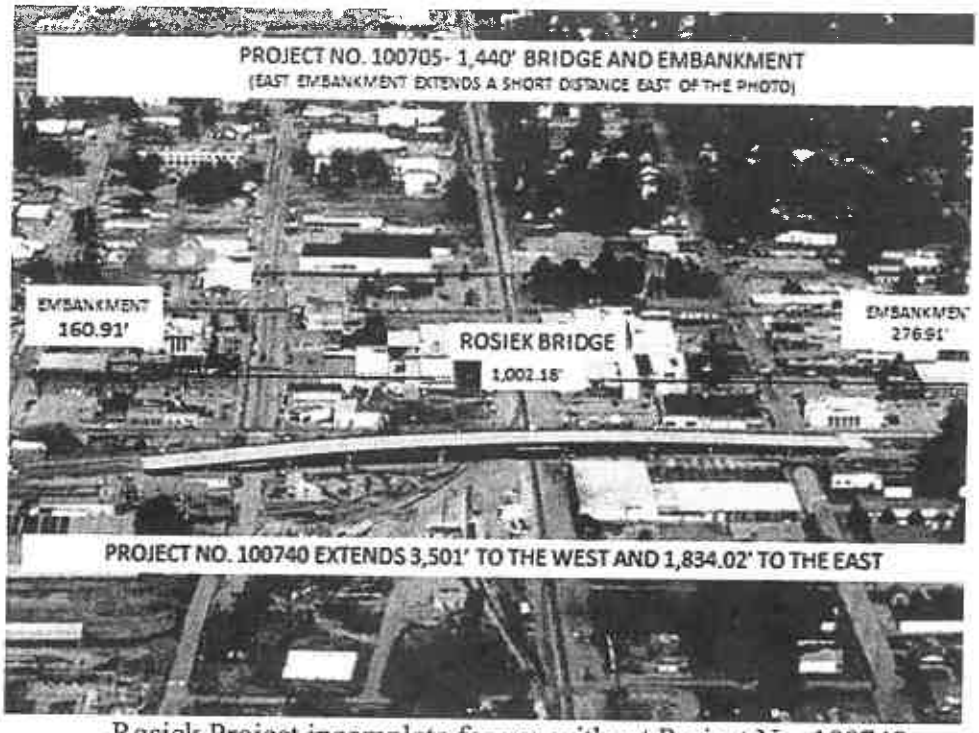
-Setting steel beams.

-Structural steel beams spanning the concrete caps.

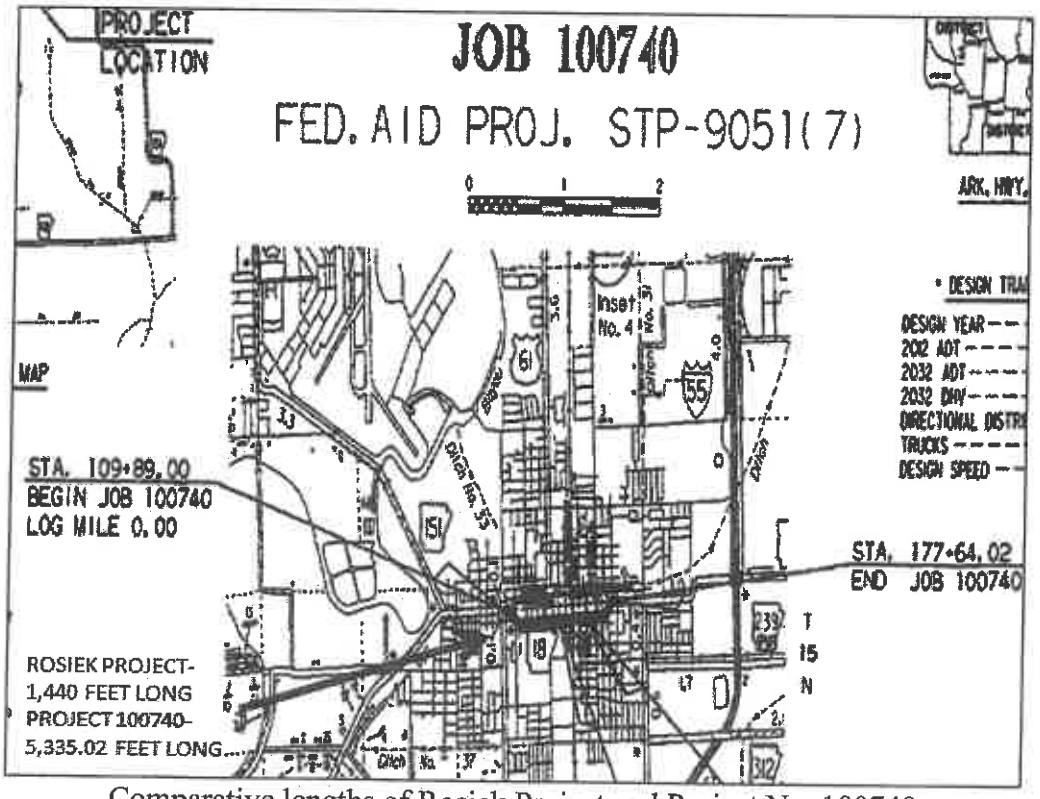


-Deck concrete with background deck prior to concrete placement.

As a separate and distinct entity, the Project is not viable for public transportation. This is because AHTD let two different contracts to construct projects to permit traffic to cross the BNSF tracks: Rosiek's Project and Project No. 100740 (bid in the amount of $6,529,285.50). **[Exhibit 8]** Rosiek's Project consisted of only 437.82 total feet of embankment and base work adjacent to the bridge (160.91 feet on the west and 276.91 feet on the east) which was to be paved and completed by the Project No. 100740 contractor. Construction of a total of more than an additional mile (5,335.02 feet) of roadway approaches required in Project No. 100740 is necessary to connect the bridge to the local streets on both sides of the bridge.



-Rosiek Project incomplete for use without Project No. 100740.



-Comparative lengths of Rosiek Project and Project No. 100740.

Rosiek's Project Plan

To plan the sequence of its work, Rosiek developed a CPM network schedule RC76 with a data date of December 5, 2011 and presented this schedule to AHTD at the preconstruction conference. **[Exhibit 9]** This schedule shows an orderly sequence of work for piling, footings, columns, caps, structural steel, and concrete deck with work progressing from west to east for all of these phases of the work. The Project completion date shown in this schedule is December 17, 2012. In order to meet this schedule it was necessary for Rosiek to construct these Project features with a substantial degree of concurrency. For example, the construction of the concrete footings in a bent had to closely follow the pile driving in that bent.

This schedule indicates that Rosiek intended on completing the Project in 165 working days over a period of 379 calendar days and that Rosiek planned on working through the 2011-2012 winter period. Therefore, the schedule shows Rosiek meeting the completion date to achieve the maximum bonus payment.[1]

Project Commencement and Performance

The Project site was not ready for construction to occur when AHTD gave Rosiek its notice-to-proceed. The impediments to Rosiek starting work are listed below:

Bent(s)	Issue
2,3,4	Underground sewer not removed
5,6	Railroad agreement not completed
7	Overhead electrical line not removed
9	Underground fuel tank not removed

These impediments were not cleared until the first quarter of 2012.

Of the intermediate bents, Bent 8 was left as the only possible place for Rosiek to begin its pile driving operations. Therefore, in order to be productive, Rosiek began driving piling at Bent 8 and changed its sequence of work from its originally scheduled sequence of working from west to east to working from east to west.

As the Project progressed, Rosiek was faced with a series of Owner-created problems as discussed below. These events delayed the Project and required Rosiek to expend additional costs to complete its work.

In order to place the discussion of what happened on the Project in some chronological context, relevant key dates are listed below:

[1] For construction management purposes, Rosiek also developed a schedule showing a work suspension during the 2011-2012 winter period to cover the possibility that work through the winter would not be possible. This schedule showed a December 3, 2012 completion date using 194 working days. **[Exhibit 10]** This meant that Rosiek would have to work 29 days through the winter of 2011/2012 to achieve the maximum possible bonus. In fact, Rosiek worked fifty days during that time period. **[*See* Exhibit 11]**

October 18, 2011- Contract entered into between Rosiek and ASHC.

December 5, 2011- Originally planned first day of charged Contract time.

January 3-5, 2012- Footing excavation then pile driving began at Bent 8. **[Exhibit 11 includes AHTD Daily Reports between construction beginning on January 3, 2012 and the end of the winter suspension on March 15, 2012 which indicates that Rosiek was able to perform work on 50 days during this time frame.]**

March 21, 2012- Actual first day of charged Contract time following the 2011/2012 winter suspension period. **[Exhibit 12]**

December 17, 2012- Project completion date in Rosiek's initial schedule. This reflects 165 working days and 379 calendar days.

November 15, 2013- Last day of actual charged Contract time due to weather conditions. **[Exhibit 13]** Contract time totaling 248 working days accrued. Project was 28 days late based on the adjusted completion time. The contractor for Project 100740 was completely shut down for the 2013/2014 winter season with no time being charged due to weather starting after October 11, 2013. **[Exhibit 14]**

March 26, 2014- Project substantial completion noted in AHTD daily report, 478 days later than planned completion date. **[Exhibit 15]**

April 23, 2014- AHTD cleared Rosiek to leave the Project, 516 days later than Rosiek planned on being complete.[2]

The Project overran its adjusted Contract completion time by 28 working days. This has been determined by the difference of the Contract days charged less the adjusted Contract days allowed (248 days charged less 220 days allowed). As a result, AHTD is withholding the following sums from Rosiek and has not awarded Rosiek the bonus Rosiek anticipated earning:

Item	Amount
Liquidated Damages- 28 Days @$2,000	$ 56,000
Daily Road User Cost- 28 Days @$10,000	$ 280,000
Bonus Not Earned- 35 Days @$10,000	$ 350,000
TOTAL	**$686,000**

The withholding of these sums is unwarranted, and Rosiek should be awarded the bonus it set out to earn.

[2] This date is based on verbal discussions between Rosiek and AHTD personnel.

Rosiek's Claim Submissions

Rosiek has previously identified the series of events that led to its time and cost overruns and charges, and Rosiek submitted these claim issues to the AHTD Resident Engineer. The subjects and dates of these submissions are summarized below and are incorporated by reference into this document.

Subject of Claim	Submission Date
Pile Tip Design Error	November 17, 2014
Bent 4 Reinforcement Steel Modification [3]	August 12, 2014
BNSF Railroad Structural Steel Delay	October 23, 2014
Contract Time Extension	November 25, 2014
Daily Road User Cost	November 6, 2014
Special Provision: Partnering Requirements	September 12, 2014

These claim issues were submitted on a stand-alone basis and provided a detailed justification for Rosiek's entitlement to additional time and money and release of withheld funds.

The purpose of the balance of this document is to provide a more concise explanation of the effects that these claim issues had on Rosiek and to provide a more succinct summary and consolidation of the damages contained in the five remaining, unresolved issues.

[3] This issue has been settled by the parties. See **Exhibit 16**.

B. CLAIM ISSUES

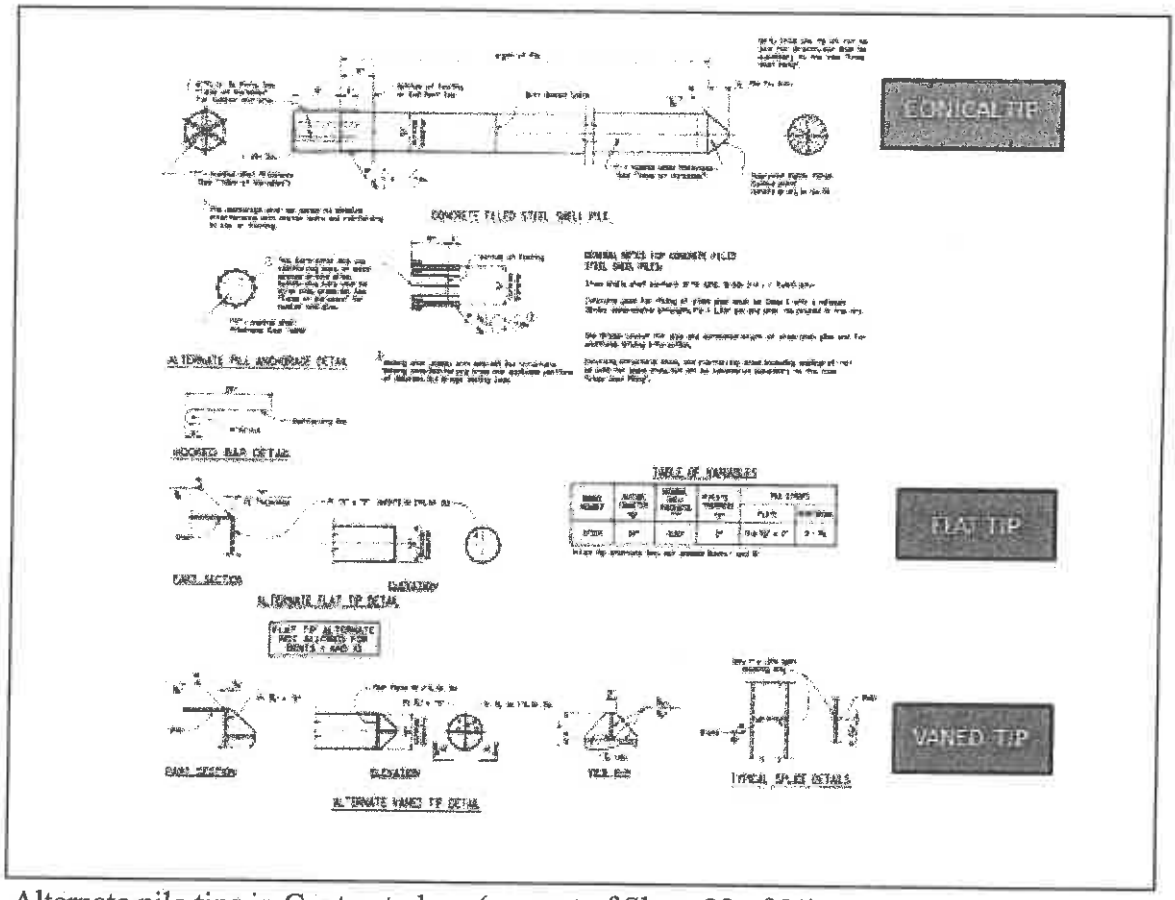
The five remaining claim issues that Rosiek submitted to the AHTD Resident Engineer are discussed below. Each claim section begins with a summary of the effect each claim issue had on Rosiek.

1. PILE TIP DESIGN ERROR

The error in the pile tip design caused Rosiek to spend substantially more time driving the piling, especially in Bents 7, 8, and 9, and more time clearing the bents to permit follow-on concrete substructure work. At the same time, the additional work Rosiek was required to undertake to support the pile driving operation also hindered Rosiek's ability to concurrently begin the concrete substructure and progress the substructure work. This early Project delay impacted Rosiek's work throughout the Project by causing Rosiek to work through the 2012/2013 winter season and expend overtime to complete the Project.

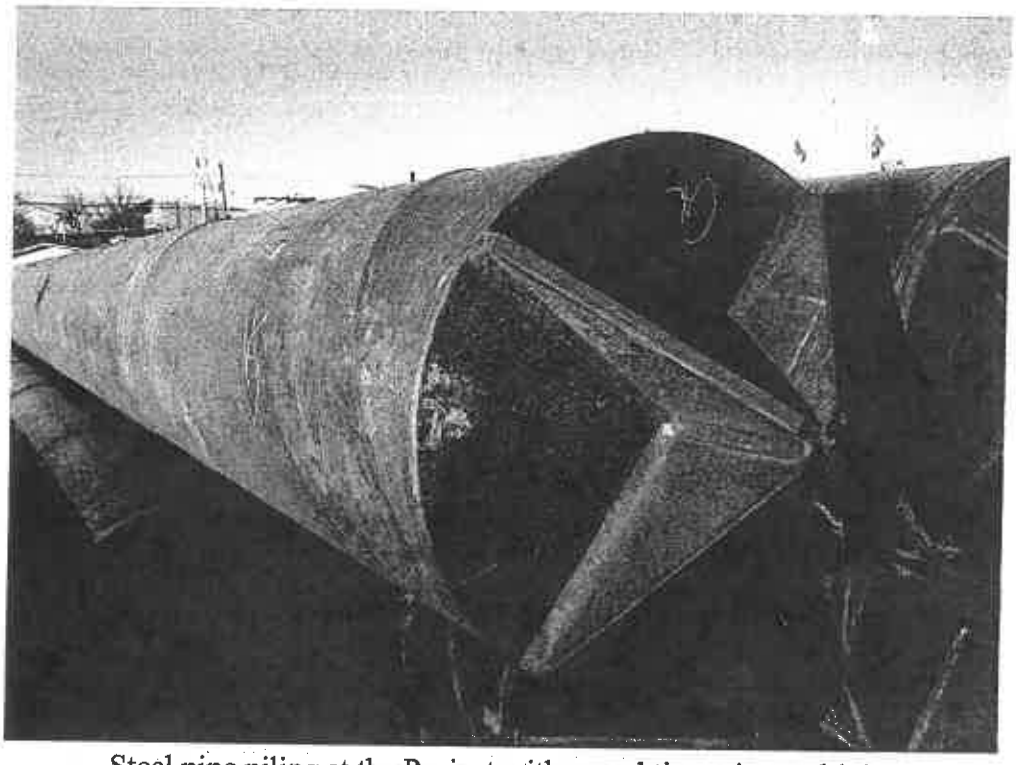
The Contract plans require the pile to be driven to a minimum tip elevation of 195.5' with a minimum safe bearing load of 115 tons per pile. The driving procedure used and accepted by AHTD was to pre-bore each pile hole from the bottom of footing elevation to 10 feet deep, insert the pile, drive the pile to the template, remove the template, and complete driving the pile to the required minimum tip elevation.

Contract plans indicated that the piles were to be round steel pipe pile, 24" x .500" with three possible design configurations for the steel tips: (1) a conical-shaped tip; (2) a flat 2" steel plate; or (3) a flat ¾" steel plate with ¾" vaned tips. Because each of these tips was provided for in the plans, Rosiek reasonably assumed each would be accurately designed for its intended purpose. Primarily due to the requirement for the abutment pile to have a pointed tip and because it was provided as an alternate design, Rosiek elected to use the vaned tips for all the piling.

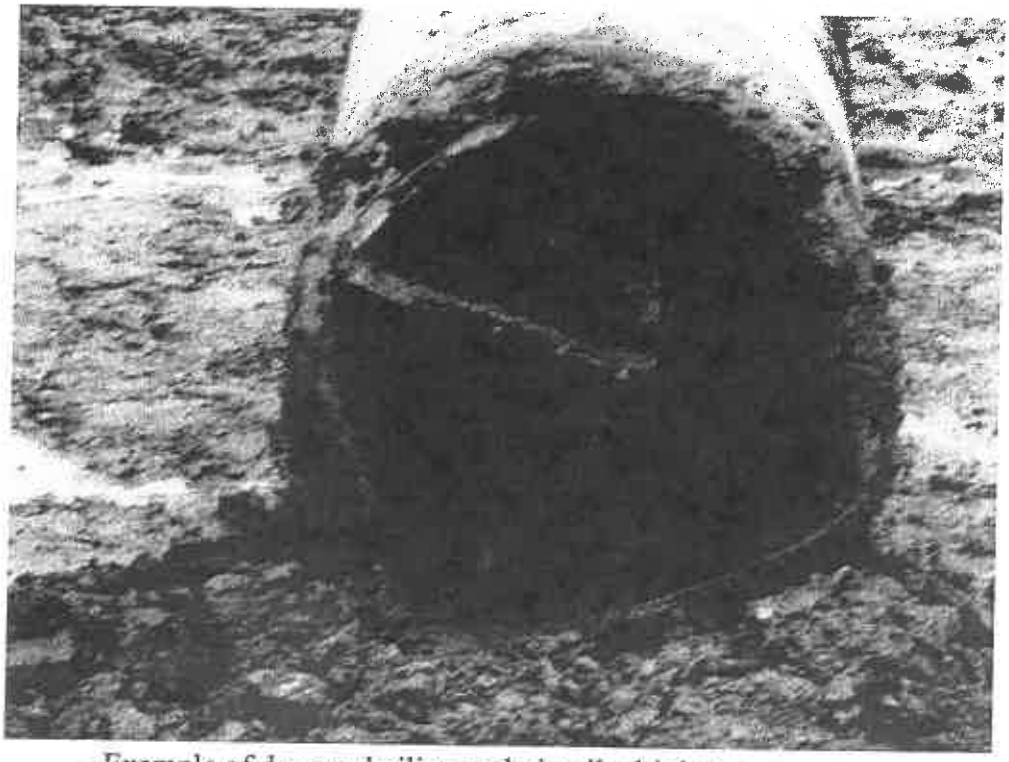


-Alternate pile tips in Contract plans (excerpt of Sheet 29 of 91).

Early during the pile driving, a number of the piling were damaged to the extent that AHTD rejected the use of those piles in the foundation. This resulted in Rosiek having to extract and replace them. A pile was first damaged on January 17, 2012. On January 23, 2012, AHTD directed Rosiek to stop driving production pile until the cause of the damage to the pile could be determined. **[Exhibit 17]** The borings provided by AHTD show that Rosiek should have been able to drive the pile to the minimum tip elevation and safe bearing load without reaching refusal (20 blows per inch) or damaging the pile, but the piles were being damaged. **[Exhibit 18 contains more pictures of the damaged piling in addition to the photographs below.]**



-Steel pipe piling at the Project with vaned tips prior to driving.



-Example of damaged piling early in pile driving operation.

Two of the damaged piles were extracted on January 24, 2012. After AHTD, Rosiek, and Skyline Steel (the steel pile supplier) examined the damaged pile, it was evident that the cause of the failure was due to an inadequately designed vaned tip which could not withstand the maximum driving resistance required to reach the minimum tip elevation. The maximum driving resistance is the amount of resistance which must be overcome in order to drive a pile to the minimum tip elevation and achieve the minimum bearing resistance required.

AHTD permitted Rosiek to resume driving the production pile on January 26, 2012. **[Exhibit 19]** As of January 27, 2012, thirty-two (32) pile had been driven to the required elevation without jetting and with no damage to the pile and were therefore accepted by AHTD. Eight (8) pile had been damaged during driving and had to be replaced.

Rosiek requested a meeting with AHTD (and suggested that the AHTD design engineer attend the meeting) to attempt to resolve the problem with the pile failing and to find a solution to eliminate any further damage to the pile when the pile were being driven. The meeting was held on January 30, 2012 at the AHTD Project field office. **[Exhibit 20]** Those in attendance were representatives of Rosiek, AHTD and Skyline Steel. When the meeting began, the AHTD District 10 Construction Engineer said he did not see a need for the design engineer to be at the meeting and he had not asked him to attend. Rosiek asked AHTD if AHTD could provide the calculated load the barrel of the pile and the pile vaned tips could withstand before failure occurred, and the response was that AHTD could not do so at that time (evidencing the need for AHTD's design engineer's presence, as the design engineer would have such information readily available). The District Construction Engineer asked the supplier if it could provide this information, and the supplier stated it could do so in a few days.

When Rosiek received the design load calculations from the supplier, it was immediately sent to the Resident Engineer for review. The calculations for the steel pile components indicated widely divergent failure load ratings for the various tips which could not have been expected based on the three approved designs in the plans. The contract drawings show a steel pile with a round pipe, 24" x .500" barrel. The pile barrel has a failure load rating of 830 tons as verified by the supplier. **[Exhibit 21]** The forged conical point tip has a failure load rating in excess of 800 tons per the manufacture of conical pile tips, DFP Foundation Products.

The failure load rating for the other two alternate tips, a fabricated 2" flat steel plate tip and a fabricated ¾" steel plate with ¾" vaned tip are less than for the conical point tips. The 2" flat plate tip has a failure load of 752 Tons, while the **¾" vaned tip estimated failure at only 278 Tons.** **[*See* Exhibit 21]** This is the obvious reason the vaned tips failed. The failure was not due to Rosiek's driving method, but due to an inadequate design of the vaned tips which did not match the barrel design strength or equal the required driving conditions.

Both Rosiek and AHTD had all of this information readily available by the end of January 2012. In order to retrospectively examine this issue, Rosiek retained an expert in foundation design and construction, Dr. Dan A. Brown, to review the pile driving design and construction for the benefit of the Claims Commission. Dr. Brown's report is included at **Exhibit 22**, and his findings about the vaned tips support the conclusions Rosiek reached during the Project.

A summary of Dr. Brown's conclusions are that:

1. Rosiek's use of the hammers were appropriate and well-suited for the soil conditions;
2. The pile itself had sufficient strength to be driven to the minimum tip elevation if a suitably strong tip were provided;
3. The vaned tip was structurally inadequate.

On the Project, once the low estimated failure load of the vaned tips became known, Rosiek began jetting all pile while driving in hopes of not damaging additional pile. (Calculations made during the life of the Project revealed that the vaned tip would need to have a base plate thickness of at least 1 ½" with minimum 1" vanes to be an equivalent alternate to the 2" plate or the forged conical point.) The vaned tip shown does exceed the minimum safe load of 115 tons but fails to meet the maximum driving resistance which would be applied to the pile during production driving to meet the Contract minimum tip requirements. These requirements call for a minimum tip elevation to be met before driving to the minimum safe load bearing capacity.

Rosiek began air jetting on January 31, 2012 at Bent 8 and continued until February 2, 2012. **[Exhibit 23]** On February 6, 2012 Rosiek began water jetting at Bent 8. **[Exhibit 24]** During the period between air jetting and water jetting, Rosiek had to place water hose, build a water jet, build a containment pond for the excess water caused by the water jetting, and make provisions for disposal of the water. Rosiek continued water jetting until all the piles were driven. **[Exhibit 25 denotes water jetting on AHTD Daily Report dated June 26, 2012, the last day of pile driving on the Project.]** This required relocating water lines, water pits, and disposal locations during the water jetting operation to manage the water.

Had the vaned tip been correctly designed, all of the steel pipe pile could have been driven to the minimum tip elevation with the minimum safe load bearing without the use of jetting. AHTD erred in allowing the under-designed vaned tip to be used as an alternate in the Contract drawings. Because the Contract stated the vaned tip was an "alternate," there was no need for using any other tip for the piling. The first forty piling, including the piles that did not fail, were driven without water jetting. Rosiek was then required to water jet all future pile after the failure load of 278 tons for the vaned tip was determined by Skyline Steel. AHTD never furnished Rosiek with the design calculations for the piles and/or the pile tips.

Some tips even failed after Rosiek began jetting. A large percentage of the pile driven after jetting began still had a final load exceeding the estimated load limit (278 tons) of the vaned tip. The weak vaned tip deprived Rosiek of the opportunity to drive pile full depth without jetting, as other contractors in the area were doing when driving pile with the 2" plate. AHTD became aware that the vaned tip was inferior and offered Rosiek no relief in the matter. Contract drawings for other similar AHTD projects show the thickness of the 2" plate increasing or decreasing in relationship to the diameter of the steel pile while the thickness (¾") of the vaned tip base plate stays the same regardless of the diameter of the steel pile. **[Exhibit 26]**

When, or if, AHTD had performed a drivability analysis, AHTD would have realized that the maximum driving resistance required to reach the minimum tip elevation and minimum safe load required by the plans would have exceeded the failure load of the vaned tip. When the failures occurred, it was not known that the contractor was exceeding the maximum design load limit estimated during the Project at 278 tons for the vaned tip. Subsequent calculations after Project completion by Dr. Brown have revealed that this capacity was, in fact, only 113 to 138 tons.

Once Rosiek recognized the load limit of the vaned tip, it immediately began driving the pile to only four (4) blow counts per inch and then began water jetting to prevent damage to the vaned tip due to its low failure design. This greatly decreased Rosiek's pile driving production rate and drastically increased its costs.

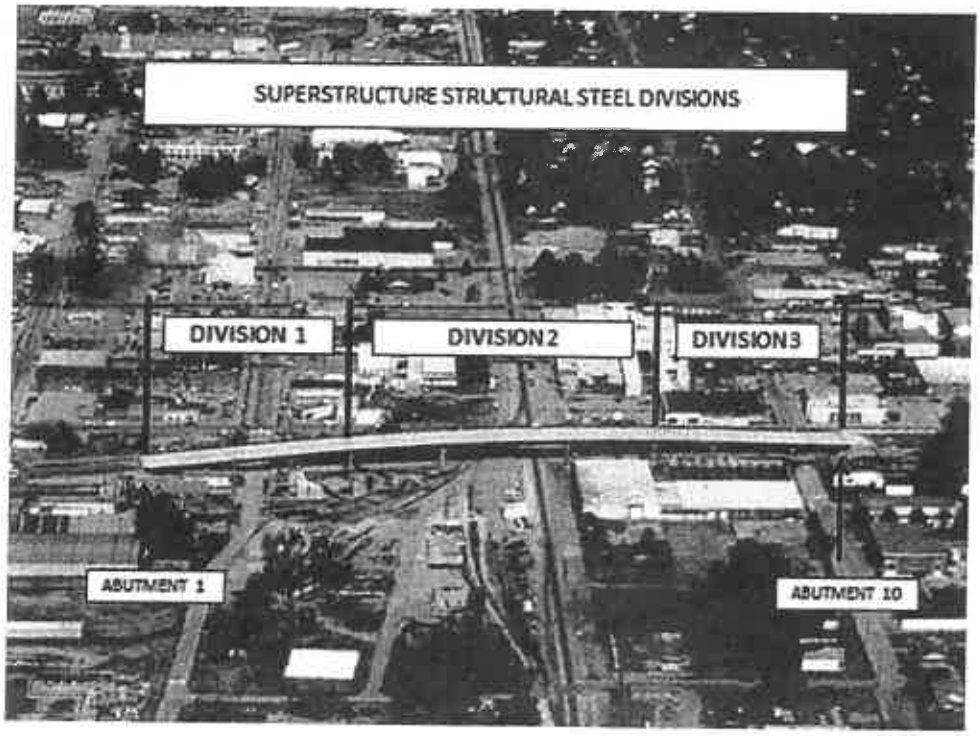
Ultimately, a total of sixteen (16) steel piles were damaged of which twelve (12) steel piles had to be replaced due to the inadequately designed vaned tip. Damage occurred to the pile using both hammers Rosiek used (the Delmag Pile Hammers, D36-32 and D46-32), and when jetting and not jetting. Rosiek unsuccessfully requested that it be permitted to cut off the pile when penetration of the pile slowed rather than damaging the pile. This request was based on the fact that the total bearing for the nine piles in each footing had achieved a combined total tonnage far greater than that of the Contract design requirements.

AHTD has never supplied Rosiek with an analysis of the load limits of the steel pile components as Rosiek requested, nor did AHTD provide any input from the design engineer which would have been a reasonable approach to contract administration once the pile failure became prevalent. The vaned tip in the dimensions shown in the plans should never have been represented as an alternate because of its low failure load in comparison to the conical point and the 2" flat plate. As it turned out, the ¾" vaned tip is the weak link in the chain, and AHTD is responsible for that weak link by presenting it as a viable alternate in the Contract drawings.

2. BNSF RAILROAD STRUCTURAL STEEL DELAY

Because the delay in erecting the structural steel and associated delays were so lengthy, Rosiek was forced to work through inclement weather in the second half of 2013 and through the winter of 2013/2014 to complete the Project. Absent the railroad delay, work could have been completed prior to the second half of 2013 and well in advance of the winter of 2013/2014.

The bridge superstructure consisted of structural steel members spanning the ten bents of the bridge. The structural steel was designed in three divisions designated as Divisions 1, 2, and 3 numbered from west to east. A major portion of the Division 2 steel actually spans the railroad tracks, and this steel is the subject of the claim.



Rosiek's initial plan was to erect the steel from west to east, consistent with industry practice to work from the beginning of the bridge to the end. However, due to the conflicts with the footings, Rosiek was soon forced to change its plan and instead begin erection of the steel at the east end of the bridge and proceed backwards changing its planned sequence to Divisions 3, 2, and 1.

Then, due to the problems Rosiek experienced with embankment construction as discussed under the section entitled "Contract Time Extension," Rosiek was once again forced to change its steel erection sequence in the fall of 2012, this time to Divisions 3, 1, and 2. Rosiek made this further change because placing the steel beams at the ends of the bridge was a prerequisite for building the backwalls at each abutment which had to be

constructed to finalize the embankment work. **[Exhibit 27]** Because the embankment construction had revealed so many unanticipated problems, Rosiek had hoped to complete that work as soon as possible.

Steel was first erected in Division 3 from October 16, 2012 to November 8, 2012. The structural steel was erected in Division 1 from January 31, 2013 to February 20, 2013. From this date, a detailed chronology of events for the Division 2 steel follows:

February 20, 2013:

A meeting was held at Rosiek's field office regarding the bridge beam erection over the BNSF Railroad. Those present were representatives from AHTD, Rosiek, Garver (a BNSF subcontractor) and the BNSF Roadmaster, Dustin Blackshear. (Isaac Chan, the newly appointed representative overseeing the Project on behalf of BNSF did not attend the meeting.) Rosiek had made arrangements to begin setting beams over the railroad after the February 20, 2013 meeting. During the February 20, 2013 meeting, Rosiek was informed by AHTD through the BNSF Roadmaster (Dustin Blackshear) that no track time would be given Rosiek until March 18, 2013. **[Exhibit 28]**

This was due to scheduling by the railroad which has a two year look ahead rolling schedule for track work and closures. This was the first time Rosiek was informed of this BNSF work schedule, as ASHC failed to make any reference to the BNSF look-ahead schedule in the Contract. Steel erection for Division 2 was then initially delayed until March 18, 2013 due to the BNSF work schedule. **(26 Calendar day delay)**

March 18, 2013:

BNSF track work was still ongoing. BNSF delayed track clearance time again until March 25, 2013. **(7 Calendar day delay) [Exhibit 29]**

March 25, 2013:

BNSF track work was still ongoing. BNSF delayed track clearance time again until April 1, 2013. **(7 Calendar day delay)**

April 1, 2013:

BNSF track work was still ongoing. BNSF delayed track clearance time again until April 8, 2013. **(7 Calendar day delay) [Exhibit 30]**

April 8, 2013:

BNSF has delayed track clearance time again until April 10, 2013. **(2 Calendar day delay) [Exhibit 31]** Rosiek was informed by the BNSF representative that April 10,

2013 was a good date to begin steel erection. Beams were released for shipment on April 9, 2013, with delivery on April 10, 2013.

April 10, 2013:

BNSF canceled the track clearance time again until April 15, 2013. **(5 Calendar day delay) [Exhibit 32]** This time beams were loaded and in transit. Rosiek had to unload and stockpile the beams on the job site. **[Exhibit 33]**

April 12, 2013:

Rosiek was notified by the BNSF Roadmaster that beginning on April 15, Rosiek would be allowed a 6-hour window daily for two weeks to erect structural steel over the railroad tracks.

April 14, 2013:

As of April 14, 2013, the Project had been delayed **54 calendar days** due to the BNSF scheduling conflict which stopped Rosiek from erecting beams across the railroad tracks.

AHTD stated it would not resume time charges until June 8, 2013. AHTD stated the delay period was for **54 calendar days** (February 20, 2013 to April 14, 2013), but the time period AHTD used to not charge Contract time for the delay was from April 15, 2013 to June 7, 2013. **[Exhibit 34 is the partially executed version of Change Order #6 which indicated that Rosiek would be granted a 54 day time extension for this issue.]** Time charges then resumed on Monday, June 10, 2013.

April 15, 2013:

BNSF was scheduled to give Rosiek track time beginning on April 15, 2013, from 8:00am to 2:00pm daily and continuing for the following two weeks. Work started on the center span of structural steel in Division 2, however the delay continued until Rosiek could reach a point (placement of the metal decking) where it could perform follow-on work effectively without delay.

Change Order #6 added an additional 16 working days (30 calendar days) time extension to the Contract after time began on June 10, 2013. **[Exhibit 35]** Because the DBE subcontractor placing the stay-in-place deck forms and the reinforcing steel had been forced to demobilize from the Project due to the railroad steel delay, this time was granted to permit the subcontractor to remobilize to the Project to resume the work it was performing when the delay began.

The relevant days and dates that comprise how AHTD made its determination of the 54 day and 30 day time periods are summarized in **Exhibit 36.**

3. CONTRACT TIME EXTENSION

With AHTD not granting a sufficient number of weather days to Rosiek from July 2013 to November 2013, Rosiek has been charged with 28 days of both liquidated damages and the Daily Road User Cost. Granting sufficient weather days in this time frame alone would relieve Rosiek of all these charges, even without a time extension being approved for any other claim items.

Rosiek's original request for a Contract time extension under Item 108.06(d)(2)d was provided to Mr. Deric Wyatt, Resident Engineer, on July 3, 2013 based on abnormal weather conditions. **[Exhibit 37]** The Resident Engineer incorrectly responded to this request on July 29, 2013 based on Item 108.06(c), but he also alluded to a need for more information from Rosiek. **[Exhibit 38]**

Item 108.06(c) provides that time will be assessed when "conditions allow the Contractor to effectively utilize 60% of normal forces and equipment to prosecute the work required at that time, for at least 60% of the Contractor's normal work hours." Item 108.06(d)(2)d provides that an extension of time will be considered if "[w]eather conditions or the condition of the ground or materials were significantly abnormal and these conditions significantly delayed the work." **[Exhibit 39, Section 108.06 AHTD General Provisions]**

Rosiek provided the additional information requested by the Resident Engineer on August 7, 2013. **[Exhibit 40]** The Resident Engineer's follow-up response was again incorrectly based on Item 108.06(c) and not Item 108.06(d)(2)d. The Engineer's September 3, 2013 letter stated that Contract time was charged based "on the value and quantity of work items available." **[Exhibit 41]** This was also incorrectly determined because time charges are to be based on the resources required "to prosecute the work required at the time," meaning that work which controls the completion time for the Project.

Without the aid of a CPM schedule, the Engineer is left to decide if a day is a charged day or not and if the work being performed is critical or not. Often this decision is left up to Project personnel who may or may not have the correct understanding in determining what constitutes a contract working day other than using the criterion "if the contractor works, charge him" or as provided in Item 108.06(c), 60% of the work force for 60% of the work hours. This method only works provided the specifications are interpreted and enforced correctly.

The specification states it this way because time is not to be charged on non-critical work which is being performed solely because the contractor is working. The key to interpreting this requirement is to understand ***"work required at that time,"*** **not** that day. If AHTD had consulted Rosiek's CPM schedule on this Project, the Resident Engineer would have known that the embankment became critical on the schedule by July 2013 and stayed critical until that work was completed. This time lost was not

because of anything Rosiek did wrong but because of the abnormally rainy weather Rosiek endured and worked around during the second year of the Project.

It is obvious the Resident Engineer did not make a distinction between Item 108.6(d)(2)d and Item 108.06(c) in the Standard Specifications. In this usage, "considered" should be interpreted as whether or not the contractor met all of the required criteria in Item 108.06(d)(2)d for a time extension, which Rosiek had. Rosiek is not questioning how time was being charged during this period, but is requesting an extension of time to the Contract due to abnormal conditions beyond the control of Rosiek (weather) while time was being charged.

After much back-and-forth between Rosiek and the AHTD, wherein Rosiek sought a time extension under Item 108.06(d)(2)d, AHTD continued to reject Rosiek's requests. **[*See* Exhibits 42, 43, 44, 45, 46, 47, 48]** There are statements in the AHTD March 24, 2014 rejection letter **[Exhibit 48]** with which Rosiek disagrees:

1. The letter states "there were substantial periods of good working conditions for embankment construction that were not utilized in 2012."

   During the first half of 2012 Rosiek unsuccessfully attempted many times to prepare the areas that were to receive embankment. (As shown on the Project estimates, the first payment for embankment was paid on Estimate 18, August 12, 2012.) **[Exhibit 49]** This was not due to Rosiek's lack of trying but due to conditions beyond Rosiek's control, RAIN. These areas were too wet. The areas were aerated, undercut, reprocessed and still were unstable. The early part of the embankment work in 2012 was lost to unstable soil conditions due to excess moisture. Very little embankment could be completed and meet AHTD standards until the whole area was better stabilized. In July 2012, the AHTD agreed to lime stabilize some of the area so the embankment could proceed. **[Exhibit 50]** After the region's less rainy months of August and September 2012, Rosiek processed the embankment when possible, but work was often slowed due to autumn rain. Rosiek would get the work area ready for embankment and then would have to dry the dirt at the pit or bring in moist dirt and dry it on site. Then it would rain again.

   This Project had Geosynthetic Internal Reinforced Embankment, not regular embankment. This is earth embankment with Geogrid placed full width and length in every 18" vertical lift of the embankment. It is placed in sections 12' long and at the width of the roadway. The area Rosiek had to work in was only 161' long on the west end and 277' long on the east end with a -5% fall on both ends of the bridge. The procedure was to place the first two vertical lifts of the special embankment, construct the abutment cap to the required construction joint, then place special embankment to a point just below the required construction joint, top of abutment cap. Next the structural steel beams had to be erected, then the back wall and wing walls had to be constructed.

Once the abutment was constructed, the remainder of the special embankment could be placed using the Geogrid. This was required at both abutments. Rosiek kept working on the embankment during the winter of 2012/2013 with little progress due to continued unfavorable weather conditions. During the first half of 2013, Rosiek continuously reworked embankment due to excess moisture conditions. Rosiek could work the embankment so it would pass the density test, but it would then fail the stability test. This is a problem other contractors in the area were also experiencing. Finally, by the fourth quarter of 2013, the embankment and Geogrid work was completed so that all embankment dependent work remaining could also be completed.

2. The letter states that until mid-November 2013 the required item of work was the bridge work.

   This statement is incorrect. In July 2013 the critical items of work shifted from the bridge work to the embankment because of all of the weather delays Rosiek had encountered. **[Exhibit 51]** After this shift there continued to be many days when concrete work was being performed, but it was too wet for embankment work. Contract time was still being charged to the Project throughout this period. This is why Rosiek is due a time extension.

To imply that the embankment work was not critical is inaccurate. Embankment was always a very important item for the final completion of the Project. There were numerous times when Rosiek was charged a working day just because concrete work could be performed. As previously stated, Rosiek believes this was due to a misinterpretation of the specifications. Item 108.06(d)(2)d appears in the specifications precisely for this reason. This subarticle states that if the contractor is unable to complete the work in time then he may request a time extension to the contract. The reason for requesting a time extension is because Contract time was being charged while Rosiek could not work To imply that the embankment work was not critical is inaccurate. Embankment was always a very important item for the final completion of the Project. There were numerous times when Rosiek was charged a working day just because concrete work could be performed. As previously stated, Rosiek believes this was due to a misinterpretation of the specifications. Item 108.06(d)(2)d appears in the specifications precisely for this reason. This subarticle states that if the contractor is unable to complete the work in time then he may request a time extension to the contract. The reason for requesting on the critical item, the embankment.[4]

[4] AHTD was well aware of the long term difficulties associated with embankment construction caused by the poor weather. ***See, e.g.,* Exhibits 52 and 53.**

4. DAILY ROAD USER COST

With Project No. 100740 not yet completed by another contractor, it is unreasonable to charge a Daily Road User Charge if the Project could not be used anyway. Rosiek has caused no "interference and inconvenience to the road user" because there can be no road user until Project No. 100740 is completed. Granting Rosiek at least twenty-eight days of the time extension requests in the various other claims would also relieve Rosiek of these road user charges.

There are two bases for relieving Rosiek from the assessment of the $280,000 of Daily Road User Costs (28 days @$10,000 per day). The contractor for Project No. 100740 has not yet completed its work. Also, in the various claims presented by Rosiek, Rosiek is seeking extensions of Contract time totaling at least 74 working days.

The issue of the time extension requests has been addressed elsewhere in this document. This section will address whether assessment of the Daily Road User Cost should be made on this Project based on examining the rationale for this type charge as defined in the Contract.

Rosiek's Contract for Project No. 100705 was let on September 7, 2011 to construct the bridge overpass over the BNSF Railroad on Arkansas State Highway 18 in Blytheville, Arkansas. This Project is one portion of a two-part project to construct a bypass through Blytheville from US Highway 61 to Holland Street, diverting traffic from downtown. Project No. 100740 to construct the approaches was first let on July 25, 2012 with the bid(s) being rejected.[5] The job was rebid on September 12, 2012 with the bid(s) being accepted. Logically, AHTD's intent was that both jobs would be completed at about the same time so the public would be able to access the entire new roadway. **[Exhibit 55 (see comment on the exhibit's second page by the AHTD District Construction Engineer that verifies this statement).]**

When the last day of Contract time was charged on Rosiek's Project, work on Project No. 100740 was only 7.87% complete. **[Exhibit 56]** Based on this information, it would have been impossible for Project No. 100740 to be completed in conjunction with Rosiek's Project. It is therefore not possible that Rosiek is the cause of the public being prevented from accessing Rosiek's part of the new Blytheville bypass.

Rosiek was awarded the Contract to construct the railroad bridge overpass and only a short portion of the earthwork at each bridge abutment. RLP Construction was

[5] **Exhibit 54** indicates that the July 25, 2012 bids were rejected. Deferring the letting to September 12, 2012 further raises a question as to the propriety of charging Rosiek with the Daily Road User Cost. Rosiek's first day of charged contract time was March 21, 2012. A September 2012 letting implies Project No. 100740 construction will start in about mid-November 2012. This creates an eight month separation between the two project start dates. There is only a 65 working day (200 – 135 days), or about a three month, difference between the planned project durations. Thus, absent any delays, AHTD built in a structural five month lag between the project completion dates due to the late completion of Project No. 100740.

awarded the contract to complete the roadway on either side of the bridge to include associated storm drainage and utilities (Project No. 100740). As it now stands, it appears that RLP Construction will not complete the bridge approaches for about 1 ½ years or more after Rosiek's bridge completion date of April 23, 2014. As of March 1, 2015, Project No. 100740 was only 12.28% completed in terms of work in place. **[Exhibit 57]** In more than one year, the status of the work completed on Project 100740 advanced only 4.41%.

The Daily Road User Cost is contractually defined as "the average daily cost of interference and inconvenience to the road user." Because the bridge approaches of Project No. 100740 will not be completed until long after Rosiek completed its bridge, Rosiek has not interfered with or inconvenienced the road user. Rosiek is therefore requesting payment of the Daily Road User Cost being withheld by the AHTD. This amount being held by AHTD is purely an additional penalty in addition to the liquidated damages being held.

Rosiek has not interfered with the road user in gaining access to the completed BNSF Railroad bridge, and has not created any delay or inconvenience to the road user in gaining access to the bridge. The problem that exists is that both projects were not completed together which denies the use of the roadway as a whole to everyone.

The intent of the specification is obviously to encourage the contractor to complete its work as soon as possible and minimize all delays. Rosiek believes it has complied with this specification, but the public is still unable to access their portion of the Project due to conditions beyond their control and beyond the control of Rosiek.

5. SPECIAL PROVISION: PARTNERING REQUIREMENTS

The failure of AHTD to use the Partnering process mandated in the Contract does not give rise to additional damages beyond those compiled in the other five claims. However, this failure aggravated the possible resolution of several of these issues which may have been alleviated by the use of Partnering.

The Special Provision "Partnering Requirements" states that AHTD encourages the Contractor to participate in Partnering. **[Exhibit 58]** Nowhere in the Contract does it set forth that AHTD shall no longer encourage a "cohesive partnership agreement" on this Project after the contractor submits his bid. This special provision gives a bidder the strong impression that Partnering can be expected.

AHTD made no attempts to contact Rosiek in reference to Partnering prior to the preconstruction meeting. The Special Provision states that, in order to obtain a successful partnering relationship, AHTD **shall** arrange for a development/team building workshop prior to the preconstruction meeting. AHTD never complied with this provision of the Contract. AHTD 2003 Edition of the Resident Engineers Manual, Section 108.10, directs the Resident Engineer on how he shall address partnering if it is included in the Contract. Section 108.10 of the Resident Engineer Manual also explains that the utilization of the Special Provision "Partnering Requirements" is only optional on the part of the contractor. **[Exhibit 59]** Just like the Special Provision, the Resident Engineers Manual does not say anything about partnering being optional on the part of AHTD.

Rosiek asked AHTD early in the Project about Partnering, and it was stated that AHTD did not do much Partnering. Rosiek was told that there was not going to be any Partnering program adopted by AHTD for this Project. In the Special Provisions and the RE Manual's "Mission Statement" in the sample "Partnering Charter" and the "Project Objectives" in the same sample, they all point to the importance of completing a project within the contract time or earlier as being an integral part of the required Partnering.

Delays on the Project hindered Rosiek from starting its work. Then, soon after commencement of the Project, the problem with the pile vaned tips occurred because the vaned tips were under-designed. At a January 30, 2012 meeting to address the pile failures that were occurring, the AHTD Resident Engineer was again asked about "Partnering", and again it was stated that AHTD did not do much "Partnering" in this district. The Resident Engineer reiterated that there was not going to be a Partnering program adopted by the AHTD for this Project.

The under-designed pile tips is an example of the type of problem that could have been resolved with a more satisfactory result had Partnering been adopted on the Project, and early resolution of these problems would have lessened AHTD's exposure to damages.

C. DAMAGES

Quantum Methodology

The various amounts claimed include the direct costs of labor, material, and equipment; extended costs directly related to the Project that Rosiek was required to expend because Rosiek remained on the Project longer than planned, such as costs of supervision, equipment, and supervisor's transportation; additional flagging costs for the railroad; sums being withheld by AHTD for liquidated damages; and the Daily Road User Cost as well as the bonus Rosiek anticipated earning.

Direct costs have been claimed for the Pile Tip Design Error claim. These costs have been supported by contemporaneous records maintained on the Project on a daily basis. Additionally, relevant material and equipment invoices have been accumulated to support claimed costs.

On the Pile Tip Design Error and BNSF Railroad Structural Steel Delay claims, Rosiek has claimed time-related costs to include costs for jobsite supervision, equipment, and supervisor's transportation. The jobsite costs have been calculated using Rosiek's job cost accounting system with the calculations resulting in an average daily rate for the years 2012 and 2013 except for the 2014 costs included in the BNSF Railroad Structural Delay claim which uses a calculation for 2014. The per diem rates for equipment utilization and supervisor's transportation are based on the development of equipment lists which are applicable for various time periods on the Project. The Dataquest Blue Book referenced in the Contract Documents has been used to calculate the costs for contractor-owned equipment.

Because Rosiek anticipated completing the Project no later than December 17, 2012, railroad flagging costs have been included for those services paid for by Rosiek after the planned completion date. These costs are based on invoices from the railroad.

Amounts for liquidated damages, the Daily Road User Cost, and early completion bonus are based on the amounts specified in the Contract and on the determination by AHTD as to the status of Project Completion.

Damages

A consolidated summary of the damages sought by Rosiek is listed below. The list also includes working day time extensions sought and calendar day amounts which are the basis of the calculation for time related damages:

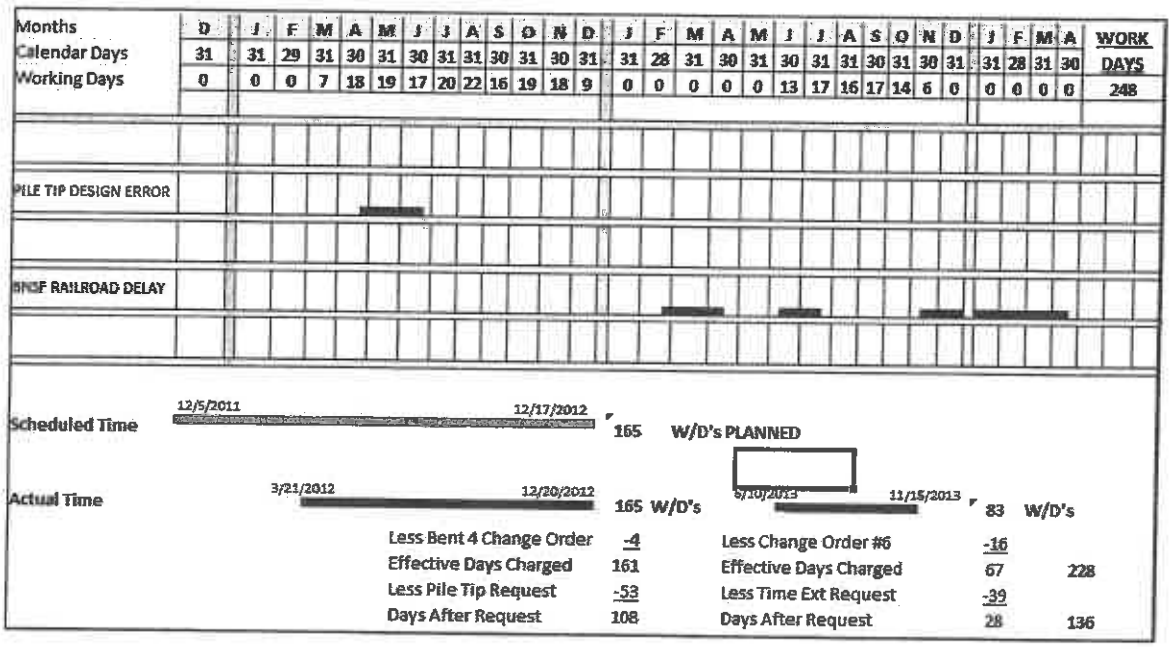
Item	Calendar Days to Determine Damages	Amount	Working Day Time Extensions
Pile Tip Design Error	90	$ 760,922.54	53
BNSF RR Steel Delay	248	$ 881,528.78	
Contract Time Extension		N/A	39 (up to 67)
Additional Flagging Costs		$ 195,463.47	
Daily Road User Cost		See Below	
Partnering		$ 0.00	
SUBTOTAL		**$1,837,914.79**	
Return Daily Road User Cost		$ 280,000.00	
Return Liquidated Damages		$ 56,000.00	
Earned "Bonus"		$ 350,000.00	
SUBTOTAL		**$ 686,000.00**	
SUBTOTAL		**$2,523,914.79**	**92**
	TOTAL	**$2,673,914.79**	

Rosiek is requesting a total of a 53 working-day time extension for the Pile Tip Design Error which occurred in 2012. Additionally, Rosiek is asking that Contract time be extended for at least the 39 days on which there was inclement weather from July to November 2013. In order to be relieved of the time related charges, liquidated damages and the Daily Road User Cost, Rosiek must be able to show that Rosiek is entitled to at least 28 of those 92 days. Once Rosiek is granted the 28 days, then it becomes eligible to begin accruing days for its early completion bonus.

By the 2012/2013 winter time suspension, Rosiek had been charged 165 of the 200 working days of Contract time. Taking into account the 53 working day time extension requested for pile tips and the 4 working days agreed to for the Bent 4 cap would result in those effective time charges being reduced to 108 working days (165-53-4=108). This would leave Rosiek 92 working days of Contract time to complete the Project.

Due to the BNSF structural steel delay, Project time charges did not resume until June 10, 2013. Considering the sixteen (16) working days of Contract time extension granted in Change Order #6, Rosiek was charged with only 67 working days of Contract time in 2013 and 2014 to complete the Project. (Final time charges of 248 days - 16 days -165 days charged in 2012= 67 working days)

A depiction of the Project time charges is shown below as well as the time periods for which Rosiek is seeking extended Project costs **[*See also* Exhibit 60]:**



These various calculations have several implications in terms of time related charges assessed against Rosiek, whether Rosiek is due its early completion bonus, and whether Rosiek should have been on the Project beyond mid-2013 and into the winter of 2013/2014. Granting Rosiek the 53 days sought for events occurring in 2012 would relieve it of both liquidated damages and the Daily Road User Cost charges. It would also make Rosiek eligible for 25 days of early completion payments. A determination that at least 10 of the 39 days sought for weather in July through November 2013 are, in fact, valid time extensions would then make Rosiek eligible for all of its early completion bonus.

Due to the delay at the BNSF Railroad and the balance of the 2012/2013 winter time suspension, time charges were effectively suspended from February 20, 2013 through June 7, 2013, a total of 108 calendar days or about 78 working days. This calculation indicates that had Rosiek been able to work fully and efficiently during this 108-day suspension, there was adequate time for it to complete the Project prior to the resumption of time charges on June 10, 2013, i.e., there were 78 working days available and only 67 effective working days actually charged in 2013 to complete the Project.

Completion of the Project by June 2013 would have meant that Rosiek would not have been subjected to any of the unusually wet weather that occurred in the latter half of 2013, nor would it have had to work through the 2013/2014 winter which resulted in Project completion being delayed until April 23, 2014.

Even without considering the inclement weather in the second half of 2013, Rosiek's actual, as-built progress working through the bad weather indicates that it would have avoided working through the 2013/2014 winter absent the BNSF Railroad delay. Rosiek completed the concrete placement of the bridge barrier rail on November 4 and 5, 2013. **[Exhibit 61]** Pushing this date back by eighty-four calendar days (BNSF Railroad delay, 54 calendar days as calculated by the AHTD plus the related 30 calendar days for Change Order #6) implies a barrier rail completion date of August 13, 2013.

This would have left ample time for Rosiek to complete its remaining work which included transition rail, concrete rip rap, joint sealer, concrete sidewalks, bridge painting, and bridge deck surface treatment prior to winter and the winter suspension beginning on December 21, 2013. In this instance Rosiek would have been able to complete the Project sometime in early to mid-November 2013.

Instead, Rosiek's final work and Project completion were impeded by the winter weather. Transition rail, concrete rip rap, joint sealer, concrete sidewalks, bridge painting and bridge deck surface treatment were all elements of Rosiek's work that were affected by the winter weather it had to be performed in.

But for the BNSF Railroad delay, Rosiek would not have needed to remain on the Project from November 16, 2013, the day time charges stopped due to seasonal wet and cold weather, to April 23, 2014 (159 calendar days). For this reason, Rosiek has included the costs for extended jobsite overhead and equipment costs for that period as part of its BNSF Railroad claim in addition to the 89 days of delay for the railroad itself calculated below by Rosiek. (This is a slightly greater amount than calculated by AHTD.) This results in a combined total of 248 (89 + 159) calendar days of extended Project costs.

1. PILE TIP DESIGN ERROR

The damages Rosiek seeks for the pile tip design error are:

(1) Jetting Cost and Pulling/Repairing Pile with Failed Tips Cost **[Exhibit 63]:**	$ 173,997.87
(2) Extra On-Site Supervision: Cost **[Exhibit 64]:**	$ 92,860.02
(3) Extra Material/Transportation Cost **[Exhibit 65]:**	$ 45,377.58
Total Direct Costs for Piling	$ 312,235.47
Extended Job Site Costs **[Exhibit 66]**	$ 327,328.29
Subtotal	**$ 639,563.76**
(6) Acceleration (Labor Only) **[Exhibit 67]**	$ 121,358.78
Total Cost [Exhibit 62]	**$ 760,922.54**

The cost elements of this claim include the actual additional costs for the jetting and pulling/repairing piling with failed tips; costs associated with Rosiek supplementing its planned jobsite supervision to assist in managing the problems associated with the pile tip design error; purchase of replacement steel piling and pile tips and equipment transportation; and time related costs for jobsite overhead, equipment, and supervisor's transportation. Also included is the premium portion of the overtime expended on the Project.

The cost for jetting and pulling/repairing piling was calculated by Rosiek based on contemporaneous records maintained on the jobsite on a daily basis. The costs consist primarily of labor and owned and rented equipment. Both the labor and equipment have been recorded on daily timesheets that include both hours worked and relevant hourly rates. Rental equipment costs are based on equipment company invoices. Owned equipment rates are based on the rates in the Dataquest Blue Book.

Rosiek supplemented its on-site supervisory personnel with Mr. Ronnie Lawrence who was needed to manage the on-site difficulties including those associated with the pile tip design error. Among Mr. Lawrence's work effort was the designing of the pile jetting system as well as overseeing the jetting operation. Additional costs requested are for Mr. Lawrence's salary, transportation costs, and living and travel expenses.

The Extra Material Costs consist of the additional piling and pile tips Rosiek purchased to replace the damaged piling and tips. These costs are based on invoiced prices. The Extra Transportation Costs were incurred by Rosiek to transport equipment to and from the jobsite at an internal rate of $4.00/mile.

Rosiek developed an average calendar day per diem cost for its extended jobsite overhead from its job costs reports for the years 2012 and 2013. These costs include on-site supervisory and administrative staff, utilities, supplies, and railroad flaggers and inspectors. Additionally, standby equipment costs were calculated per calendar day using Dataquest Blue Book standby rates. Similarly, extended per diem costs for supervisor's transportation were calculated using Dataquest Blue Book operating rates.

The Labor Acceleration is included in the pile tip design error claim because adding two months time at the very beginning of a one-year Project frustrated Rosiek's ability to complete its work in a timely and efficient manner. Rosiek attempted to accelerate its work by expending overtime throughout the construction of the Project it did not anticipate spending in an attempt to maintain its Project plan. The overtime calculation is based on Rosiek's payroll and job cost records and includes only the premium time.

Time Requested:

The specific days for a working day time extension request are as follows with the number of calendar days used to calculate the additional time related costs also included:

March 29, 30, 2012	2
April 2-4, 9-13, 16-20, and 23-27, 2012	18
May 1-4, 9-11, 14-18, 22-25, and 29-31, 2012	19
June 6-8, 11, 13-15, 18-22 and 25-26, 2012	14
Additional Working Days Requested	53
(Number of Calendar Days)	(90)

Due to the conflicts at the bridge bents, the only location available for Rosiek to begin its pile driving work was at Bent 8. The final order in which the work was performed was Bents 8, 7, 9, 10, 6, 1, 5, 4, 3 and 2 due to the utility conflicts.

In order to measure its delay, Rosiek adjusted its planned schedule to take into account the actual start date for the piling on January 5, 2012 instead of the December 5, 2011 date shown in its original schedule. The sequence of pile driving from west to east was maintained as well as the planned driving durations. **[Exhibit 68]** After adjusting its schedule, Rosiek planned to complete pile driving on March 28, 2012. This would have occurred under normal pile driving conditions with minimal delays. When it became apparent that the vaned tip shown in the contract drawings was under-designed for field driving conditions, jetting was then required on all pile and additional time was required to accomplish this added operation. The completion date, when all pile had been driven was June 26, 2012, fifty-three (53) working days and ninety (90) calendar days later than planned. **[Exhibit 69]**

2. BNSF RAILROAD STRUCTURAL STEEL DELAY

Rosiek is seeking the following damages due to the BNSF Railroad Structural Steel Delay.

(1) Extended Jobsite Costs	
February 20, 2013 through April 14, 2013 and June 10, 2013 through July 15, 2013 **[Exhibit 71]**	$ 399,899.51
November 16, 2013 through December 31, 2013 **[Exhibit 72]**	$ 187,429.53
January 1, 2014 thru April 23, 2014 **[Exhibit 73]**	$ 294,199.74
Total [Exhibit 70]	**$ 881,528.78**

The damages related to this claim are all time related and have been calculated in a manner similar to the time related costs in the previous claim.

The primary difference is that the costs have been calculated for the relevant delay periods in 2013 using average per diem rates for jobsite overhead and equipment for 2012 and 2013. A lesser rate has been calculated for 2014 for jobsite overhead and

equipment as the Project was being completed in recognition of the fact that these per diem rates are less than the 2012/2013 rates.

Time Requested:

An extension of time is not being sought because an eighty four (84) calendar day time extension has already effectively been granted by AHTD through both issuance of a change order and by not charging Contract time. But Rosiek was not compensated for job site overhead and extended equipment costs for the 54 calendar days for the railroad delay or for the 30 calendar days added by Change Order #6. Rosiek is requesting job site overhead and equipment for the additional time that was required to man the Project due to this delay.

However, as opposed to the 84 calendar days determined by AHTD, Rosiek has adjusted this amount to 89 calendar days for its damages calculation. AHTD based its granting of 16 working days (30 calendar days) to allow Rosiek's subcontractor to remobilize to resume placing the stay-in-place deck forms and reinforcing steel. Instead of remobilizing on the July 10, 2013 date, which is the assumption in the change order, BW Construction, Inc. did not remobilize until July 15, 2013. **[Exhibit 74]**

But for the BNSF Railroad delay, Rosiek would not have needed to remain on the Project from November 16, 2013 (the day time charges stopped due to seasonal wet and cold weather) to April 23, 2014 (159 calendar days). For this reason, Rosiek has also included the costs for extended jobsite overhead and equipment costs for that period as part of its BNSF Railroad claim in addition to the 89 days of delay for the railroad itself. This results in a combined total of 248 (89 + 159) calendar days of extended jobsite overhead and equipment costs.

3. CONTRACT TIME EXTENSION

Rosiek is attempting to recover only time related charges for liquidated damages and the Daily Road User Cost and the payment for the early completion bonus based on this claim that arose during the period from July to November 2013.

In its claim submission to the Resident Engineer, Rosiek requested 67 working days due to the fact that the Project delays forced Rosiek to work during these days when the Project should have otherwise been completed. In its claim submission, Rosiek also advanced its view that it should have been awarded an additional 39-day time extension due to inclement weather during this time period. Each of these determinations will be addressed in turn.

Time Requested (Delayed Completion):

The dates requested for a time extension are:

July 8-12, 15-19, 24-26 & 29, 2013	14 Working Days
August 1-2, 13-16, 19-23, & 26-30 2013	16 Working Days
September 3-6, 9-13, 16-19, 23, 25-27, 2013	17 Working Days
October 3-4, 8-11, 21-25, & 28-30, 2013	14 Working Days
November 4-5, & 12-15, 2013	6 Working Days
Number of Working Days	67 Working Days
	(131) Calendar Days

Item 108.06(d)(2)d states that an extension of time will be considered if "[w]eather conditions or the condition of the ground or materials were significantly abnormal and these conditions significantly delayed the work. For consideration of the time extension based on weather conditions, the Contractor shall submit, in writing, documented evidence of the condition that existed for the specific days requested. The Engineer will verify the validity of the request."

Contract time was being charged during the period of July 2013 through November 2013. However, embankment could not generally be performed during that period because of abnormal amounts of rain. This fact has been acknowledged by the Resident Engineer. **[*See* Exhibits 52 and 53]** One of the required items of work on the Project was embankment which needed to be constructed so access could be gained to the bridge and so the abutments could be completed to permit bridge deck placements to proceed.

An analysis of the time charges on the Project shows that time charges would have been avoided during the 67 work days discussed above from July to November 2013 considering Project delays.

Due to the delay at the BNSF Railroad and the balance of the 2012/2013 winter time suspension, time charges were effectively suspended from February 20, 2013 to June 7, 2013, a total of 108 calendar days or 78 working days. This calculation indicates that had Rosiek been able to work fully and efficiently during this 108-day suspension, there was adequate time for it to complete the Project prior to the resumption of time charges on June 10, 2013, i.e., there were 78 working days available and only 67 working days actually charged.

Completion of the Project by June 2013 would have meant that Rosiek would not have been subjected to any of the unusually wet weather that occurred in the latter half of 2013, nor would it have had to work through the 2013/2014 winter which resulted in Project completion being delayed until April 23, 2014.

Time Requested (Weather):

The dates requested for a time extension are:

July 8-12, 15, 16, 24-26, 29, 2013	11 Working Days
August 1-2, 13-16, 19-21	9 Working Days
September 23, 25, 26, 2013	3 Working Days
October 3-4, 21-25, 28-30, 2013	10 Working Days
November 4-5, 12-15, 2013	6 Working Days
Number of Working Days	39 Working Days

Item 108.06(d)(2)d states that an extension of time will be considered if "weather conditions or the condition of the ground or materials were significantly abnormal and these conditions significantly delayed the work. For consideration of the time extension based on weather conditions, the Contractor shall submit, in writing, documented evidence of the condition that existed for the specific days requested. The Engineer will verify the validity of the request."

Contract time was being charged during this period. However, embankment could not generally be performed then because of abnormal amounts of rain. This fact has been acknowledged by the Resident Engineer. **[*See* Exhibits 52 and 53]** One of the required items of work on the Project was embankment which needed to be constructed so access could be gained to the bridge and so the abutments could be completed to permit bridge deck placements to proceed.

Between July 8, 2013 and November 15, 2013 the thirty-nine working days listed above are days that were charged as working days on the Rosiek Project that were not charged on the adjacent Project No. 100740 because of the weather and ground conditions. On both projects the embankment was significantly delayed due to abnormal weather conditions. It is inconceivable that AHTD would not assess working days on Project No. 100740 due to weather and ground conditions but would continue assessing Contract time on Rosiek's Project.

The effects of the embankment delays may be illustrated for Rosiek's Project by an examination of its schedule dated August 7, 2013. **[Exhibit 75]** By this time the bridge and embankment work were virtually dual critical paths. The bridge's total float was zero, and thus critical; the embankment work showed a total float of one day. Thus, rainy weather, which may not have affected the bridge but delayed the embankment, would immediately change the critical path to the embankment justifying the requested time extension.

4. ADDITIONAL FLAGGING COSTS

Special Provision 1.05 Railway Flagger Services **[Exhibit 76]** defines the requirement for BNSF Railroad flagging services on the Project, and Rosiek anticipated providing these services through its planned December 17, 2012 completion date. In its previous submission of claim issues, Rosiek had priced out this requirement as part of its extended jobsite costs. However, in this document Rosiek has calculated its costs based on its anticipated Project completion date.

Due to AHTD-caused Project delays, these services were required through February 26, 2014. The total amount Rosiek paid for flagger services from December 18, 2012 through February 26, 2014 was $195,463.47. **[*See* Exhibit 77 for invoice summary.]**

Special Provision 1.05.01 required Rosiek to give the railways roadmaster "a minimum of thirty (30) working days advance notice when flagging services will be required." It was further required that "if such services are no longer necessary, the Contractor must give the Roadmaster five (5) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements."

Coupled with these notice requirements, there was also a very broad requirement as to when a flagger would be required. Special Provision 1.05.02 states in part that:

> Unless determined otherwise by Railway's Project Representative, Railway flagger will be required and furnished when Contractor's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions…

The Special Provision then lists five very general conditions during which a flagger is required. The notice requirements and the physical conditions present when the flagger was required essentially made the flagger a full-time position. For example, the flagger was required any time Rosiek moved a piece of equipment across the tracks which occurred several times a week. As to the tip over radius of the crane, a flagger was required when one of Rosiek's cranes was positioned within 100 feet of the tracks. Based on the track layout, there were essentially three sets of tracks on the Project which further broadened the requirement for a flagger.

5. DAILY ROAD USER COST

For the reasons thoroughly discussed above, Rosiek requests that the $280,000 withheld for Daily Road User Cost be paid to Rosiek.

6. SPECIAL PROVISION: PARTNERING REQUIREMENTS

Although no costs are directly attached to or claimed pursuant to AHTD's failure to abide by the contractual requirements and partner with Rosiek, Rosiek includes this item as a supplement to its rationale to recover time related charges and payment for early completion based on this claim issue.

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC. CLAIMANT

V. No. 16-0047-CC

ARKANSAS STATE HIGHWAY COMMISSION
AND ARKANSAS HIGHWAY AND
TRANSPORTATION DEPARTMENT RESPONDENTS

ANSWER

Comes the Respondent and for its Answer to the Complaint, states:

1. Respondent admits those allegations contained in paragraph 1 of the Complaint.

2. Respondent admits those allegations contained in paragraph 2 of the Complaint.

3. Respondent admits those allegations contained in paragraph 3 of the Complaint.

4. Respondent admits those allegations contained in paragraph 4 of the Complaint.

5. Respondent denies those allegations contained in paragraph 5 of the Complaint and specifically denies that there has been any breach of contract.

6. Respondent admits those allegations contained in paragraph 6 of the Complaint.

7. Respondent admits those allegations contained in paragraph 7 of the Complaint.

8. Respondent denies those allegations contained in paragraph 8 of the Complaint.

9. Respondent denies those allegations contained in paragraph 9 of the Complaint.

10. Respondent denies that there was a Pile Tip Design Error. Respondent admits that contract plans provided three possible design configurations and that Claimant elected to use the vaned tips for all the pilings. Respondent denies the remainder of paragraph 10.

11. Respondent denies those allegations contained in paragraph 11 of the Complaint.

12. Respondent denies those allegations contained in paragraph 12 of the Complaint.

13. Respondent admits that at a partner meeting on February 20, 2013, both Claimant and Respondent were advised *for the first time* by a representative of the railroad

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that BNSF railroad would not allow track time until a later date. Respondent denies the remaining portion of paragraph 13.

14. Respondent denies those allegations contained in paragraph 14 of the Complaint. The Contract required Claimant to coordinate with the railroad to obtain this information and schedule the work.

15. Respondent denies those allegations contained in paragraph 15 of the Complaint.

16. Respondent denies those allegations contained in paragraph 16 of the Complaint.

17. Respondent denies those allegations contained in paragraph 17 of the Complaint as it implies the Respondent improperly withheld compensation. No monetary compensation was due pursuant to the contract specifications.

18. Respondent denies those allegations contained in paragraph 18 of the Complaint.

19. Respondent denies those allegations contained in paragraph 19 of the Complaint.

20. Respondent admits that it has denied a contract extension under Specification Item 108.06(d)(2)d due to abnormal weather conditions, but denies that it has incorrectly applied Specification Item 108.06(c). Respondent denies all other allegations contained in paragraph 20 of the Complaint.

21. Respondent denies that it has failed to grant a sufficient number of weather days to Claimant. Respondent admits that it has properly charged 258 days of liquidated damages and daily road user cost. Respondent denies that claimant has been legally damaged. Respondent denies all other allegations contained in paragraph 21 of the Complaint.

22. Respondent admits that Project 100740, which was adjacent to Claimant's project, was being performed by another contractor. Respondent denies all other allegations contained in paragraph 22 of the Complaint.

23. Respondent admits that pursuant to Estimate #10, dated 11/21/2013, 7.87% of the

work was complete on Job 100740 and that pursuant to Estimate #11, dated 6/22/2014, 7.96% of the work was completed on Job 100710.

24. Respondent denies those allegations contained in paragraph 24 of the Complaint.

25. Respondent denies those allegations contained in paragraph 25 of the Complaint.

26. Respondent denies that Claimant has been damaged, as outlined in Exhibit A to the Complaint.

27. Respondent denies those allegations contained in paragraph 27 of the Complaint.

28. Affirmatively pleading, Respondent states that some or all of Claimant's claimed damages were caused by a Third-Party or Parties and that Claimant should pursue recovery of those damages from the Third-Parties, including BNSF Railroad.

29. Affirmatively pleading, Respondent states that some or all of Claimant's claimed damages were caused by Claimant's own contributory fault or negligence and that Claimant's own contributory fault or negligence should bar or mitigate Claimant's damages according to Arkansas law.

WHEREFORE, Respondent prays that the Complaint be denied and dismissed.

Respectfully submitted,

Arkansas State Highway Commission &
Arkansas State Highway and Transportation
Department

BY: David Dawson

David Dawson, Ark. Bar # 93087
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501.569.2165
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CERTIFICATE OF SERVICE

I, David Dawson, Attorney for Respondents, certify that I have placed a true and correct copy of the forgoing in the U.S. Mail, first class, postage prepaid and via email to the attorney for Claimant, Jack East, III, 2725 Cantrell Road, Suite 200, Little Rock, AR 72202 on this 6th day of August 2015.

David Dawson

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC.	**CLAIMANT**
V.	**NO. 16-0047-CC**
ARKANSAS STATE HIGHWAY COMMSSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT	**RESPONDENTS**

PREHEARING BRIEF

Claimant Rosiek Construction Co., Inc. files this Prehearing Brief pursuant to the Arkansas State Claims Commission's August 12, 2015 correspondence setting this matter for hearing, and states:

Introduction

Rosiek has had a place of business in Arkansas since 1969, when it built the bridge over the Arkansas River at Morrilton. Rosiek has successfully performed more than 10 projects in Arkansas through the years – six with the Arkansas Highway and Transportation Department ("AHTD").

On October 18, 2011 Rosiek entered a contract ("Contract") with the Arkansas State Highway Commission ("ASHC") to construct a railroad overpass bridge and approaches on Arkansas State Highway 18, in Blytheville, Arkansas, Project No. 100705, Federal Aid Project STP-STPS-STPH-HSIP-FRAP-9051(5) & 9050 ("Project"). The Project was designed by and was to be administered by AHTD. The original Contract amount was $10,954,060.37 and 200 working days allotted for completion.

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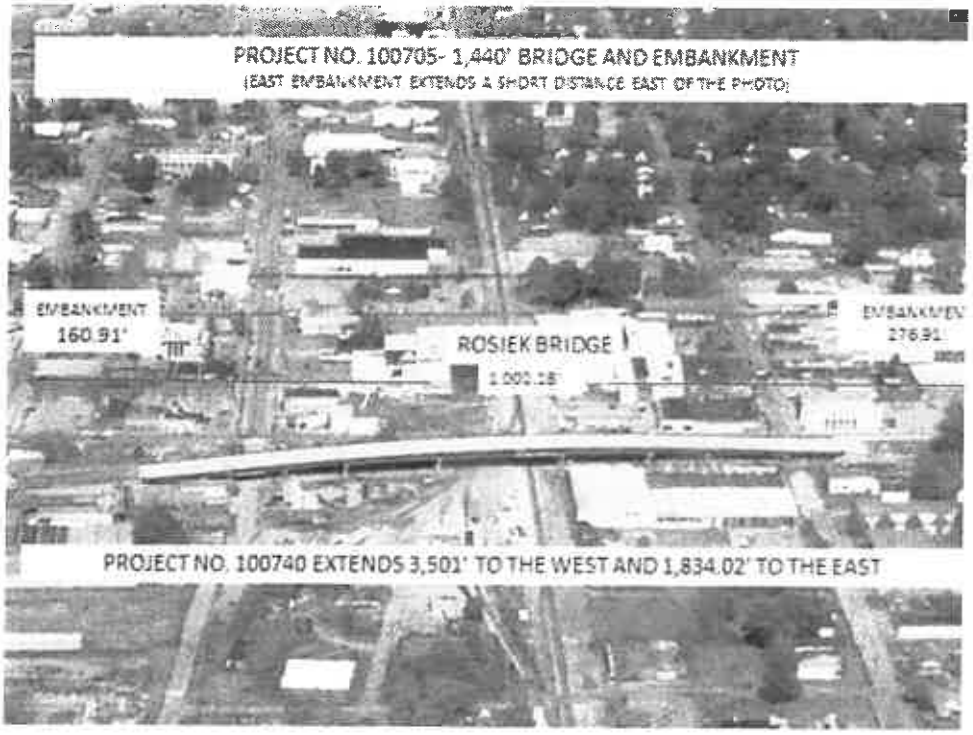
The Project was a 1,002.18 feet long bridge constructed to span the BNSF Railroad and included 437.82 total feet of approach embankment,[1] 160.91 feet on the west end of the bridge and 276.91 on the east end of the bridge. In order to be used for public transportation, the adjacent AHTD Project No. 100740 had to be complete to link the bridge to local streets on both sides of the bridge.[2] Until the other project was complete, the bridge was not usable.



Rosiek planned and scheduled the Project with the intent to earn the $350,000.00 early completion bonus provided for in the Contract. However, before Rosiek began Project work, there were issues on the Project that had not yet been addressed by AHTD. These issues[3]

[1] Bridge approach embankment is the fill material beneath a bridge structure and extending beyond a structure's end for the full embankment width, plus an access ramp. The bridge approach embankment also includes any embankment that replaces unsuitable foundation soil beneath the bridge approach embankment.

[2] The embankment and roadway for Project No. 100740 is 5,335.02 feet long, with 3,501 feet to the west of Rosiek's Project and 1,834.02 feet to the east of Rosiek's Project. Project No. 100740 includes the requirement to pave the 437.82 feet of embankment Rosiek constructed adjacent to the bridge.

[3] The impediments to Rosiek starting work included an underground sewer impeding work on Bents 2, 3 and 4, an incomplete railroad agreement on Bents 5 and 6, an overhead electrical line impeding work on Bent 7, and an underground fuel tank impeding work on Bent 9. These impediments were not cleared until the first quarter of 2012. Of the intermediate bents, Bent 8 was left as the only possible place for Rosiek to begin its pile driving operations.

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impeded construction on seven of the eight intermediate bents[4] on the bridge and, through no fault of Rosiek, resulted in Rosiek beginning work almost two months later than called for under the Contract.

During the life of the Project, there were three major issues that arose for which Rosiek now requests compensation in time and/or money: Pile Tip Design Error, BNSF Railroad Structural Steel Delay, and Contract Time Extension.

Pile Tip Design Error

Rosiek's first major order of work on the Project was to drive the foundation piling.[5] Almost immediately, Rosiek discovered that there was an error in the pile tip design in that the tip was substantially under-designed by AHTD. This design error caused Rosiek to spend substantially more time than planned driving the piling, especially in Bents 7, 8, and 9, and more time clearing the bents to permit follow-on concrete substructure work. At the same time, the additional work Rosiek was required to undertake to support the pile driving operation also hindered Rosiek's ability to concurrently begin the concrete substructure and progress as scheduled. This early Project delay impacted Rosiek's work throughout the Project by forcing Rosiek to perform unplanned work through the 2012/2013 winter season and causing Rosiek to expend overtime to complete the Project. Rosiek is requesting a 53 working day time extension for this issue and compensation in the amount of $760,922.54.

The Contract plans require the pile to be driven to a minimum tip elevation of 195.5' with a minimum safe bearing load of 115 tons per pile. The driving procedure used and accepted by

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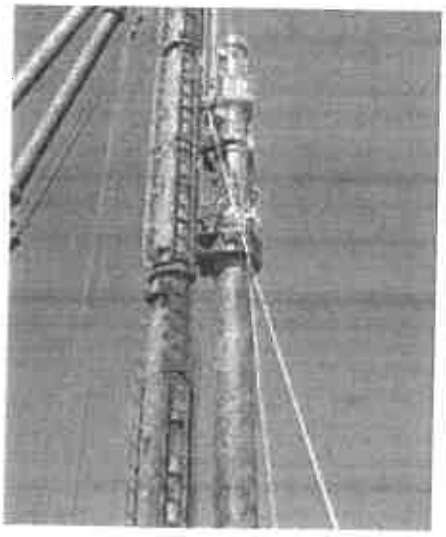
Therefore, in order to be productive, Rosiek began driving piling at Bent 8 and changed its sequence of work from its originally scheduled sequence of working from west to east to working from east to west.

[4] Bents are parts of a bridge's substructure. A "bent" is a rigid frame that supports a vertical load and is placed transverse to the length of a structure. Bents are commonly used to support beams and girders.

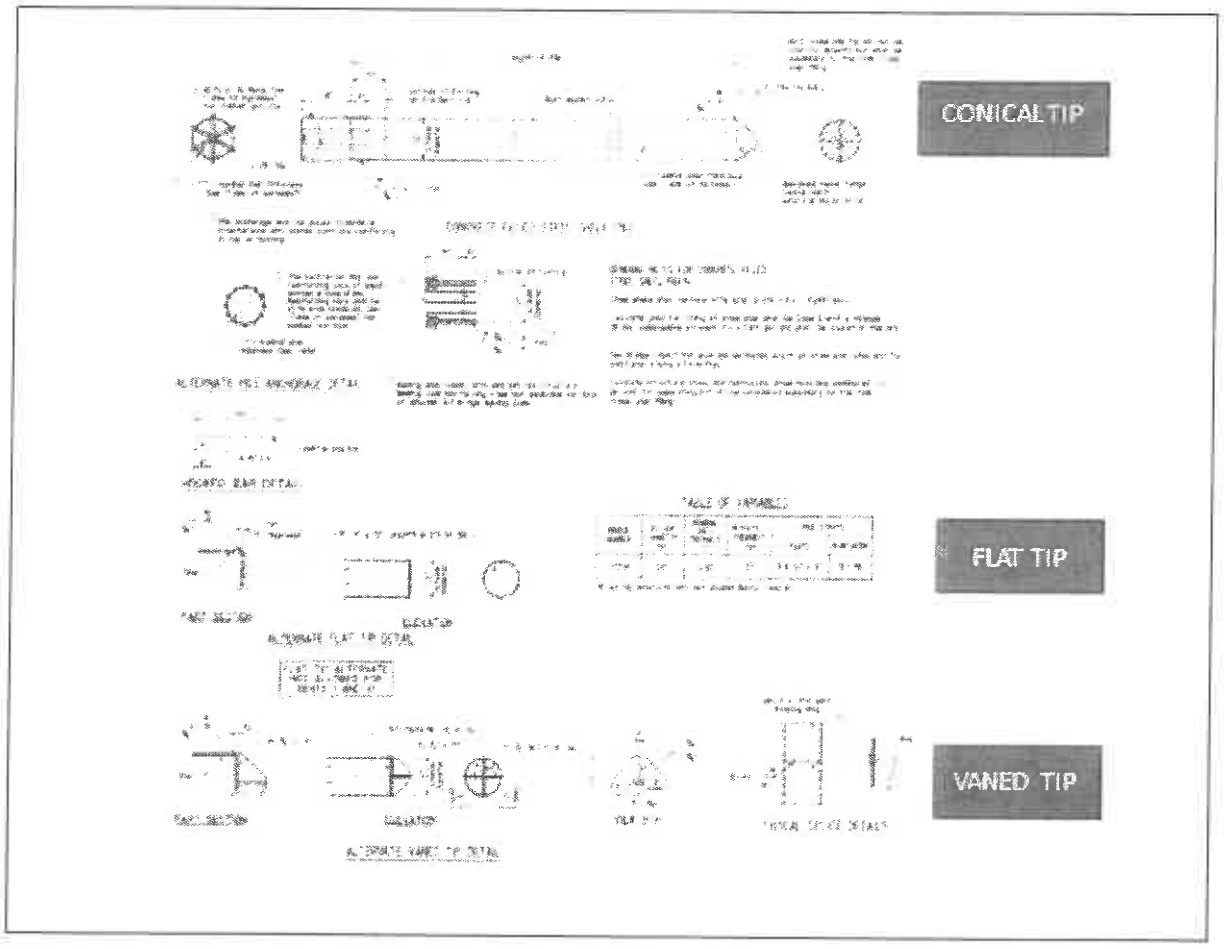
[5] Pile foundations are deep foundations. They are formed by long, slender, columnar elements typically made from steel and/or reinforced concrete. Pile foundations are used for large structures, and in situations where the soil under is not suitable to prevent excessive settlement.

AHTD was to pre-bore each pile hole from the bottom of the footing elevation to 10 feet deep, insert the pile, drive the pile to the template, remove the template, and complete driving the pile to the required minimum tip elevation.



Images of the Delmag Pile Hammer driving pile.

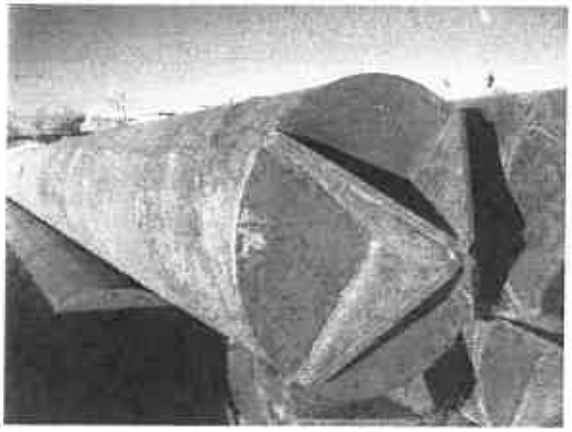
Contract plans indicated that the piles were to be round steel pipe pile, 24" x .500" with three possible design configurations for the steel tips: (1) a conical-shaped tip; (2) a flat 2" steel plate; or (3) a flat ¾" steel plate with ¾" vaned tips.



Alternate pile tips in Contract plans (excerpt of Sheet 29 of 91)

Because each of these tips was provided for in the plans, Rosiek reasonably assumed each would be accurately designed for its intended purpose. Primarily due to the requirement for the abutment pile to have a pointed tip and because it was provided as an alternate design, Rosiek elected to use the vaned tips for all the piling.

Early during the pile driving, a number of the piling were damaged to the extent that AHTD rejected the use of those piles in the foundation. This resulted in Rosiek having to extract and replace them.[6] A pile was first damaged on January 17, 2012. On January 23, 2012, AHTD directed Rosiek to stop driving production pile until the cause of the damage to the pile could be determined.



Vaned Tips prior to Driving

Damaged Piling

Two of the damaged piles were extracted on January 24, 2012. After AHTD, Rosiek, and Skyline Steel (the steel pile supplier) examined the damaged pile, it was evident that the cause of the failure was due to an inadequately designed vaned tip which could not withstand the maximum driving resistance required to reach the minimum tip elevation. The maximum driving resistance is the amount of resistance which must be overcome in order to drive a pile to the minimum tip elevation and achieve the minimum bearing resistance required.

AHTD permitted Rosiek to resume driving the production pile on January 26, 2012. As of January 27, 2012, 32 pile had been driven to the required elevation without jetting and with no

[6] As discussed further herein, the first two piles were extracted on January 24, 2012.

visible damage to the pile and were therefore accepted by AHTD. Eight pile had tip failures during driving and had to be replaced.

Rosiek requested a second meeting with AHTD (and requested that the AHTD design engineer attend the meeting) to attempt to resolve the problem with the pile tips failing. The meeting was held on January 30, 2012 at the AHTD Project field office. Those in attendance were representatives of Rosiek, AHTD and Skyline Steel. When the meeting began, the AHTD District 10 Construction Engineer said he did not see a need for the design engineer to be at the meeting and he had not asked him to attend. Instead, the AHTD Construction Engineer told Rosiek that they needed to start jetting the piling to avoid further damage. Rosiek asked AHTD if AHTD could provide the calculated load the barrel of the pile and the pile vaned tips could withstand before failure occurred, and the response was that AHTD could not do so at that time (evidencing the need for AHTD's design engineer's presence, as the design engineer would have such information readily available). The District Construction Engineer asked the supplier if it could provide this information, and the supplier stated it could do so in a few days.

When Rosiek received the design load calculations from the supplier, it was immediately sent to the Resident Engineer for review. The calculations for the steel pile components indicated widely divergent failure load ratings for the various tips which could not have been expected based on the three approved designs in the plans. The contract drawings show a steel pile with a round pipe, 24" x .500" barrel. The pile barrel has a failure load rating of 830 tons as verified by the supplier. The forged conical point tip has a failure load rating in excess of 800 tons per the manufacture of conical pile tips, DFP Foundation Products.

The failure load rating for the other two alternate tips, a fabricated 2" flat steel plate tip and a fabricated ¾" steel plate with ¾" vaned tip are less than for the conical point tips. The 2"

flat plate tip has a failure load of 752 tons, **while the ¾" vaned tip estimated failure at only 278 tons**. This is the obvious reason the vaned tips failed. The failure was not due to Rosiek's driving method, but due to an inadequate design of the vaned tips which did not match the barrel design strength or equal the required driving conditions.

The Commission will hear testimony from Rosiek's foundation design and construction expert, Dr. Dan A. Brown, who has opined:

1. Rosiek's use of the hammers was appropriate and well-suited for the soil conditions;
2. The pile itself had sufficient strength to be driven to the minimum tip elevation if a suitably strong tip was provided;
3. The vaned tip was structurally inadequate.

After the low estimated failure load of the vaned tips became known, Rosiek was still required by the AHTD to jet all pile while driving in hopes of not damaging additional pile tips. (Calculations made during the life of the Project revealed that the vaned tip would need to have a base plate thickness of at least 1 ½" with minimum 1" vanes to be an equivalent alternate to the 2" plate or the forged conical point.) The vaned tip shown does exceed the minimum safe load of 115 tons but fails to meet the maximum driving resistance which would be applied to the pile during production driving to meet the Contract minimum tip requirements. These requirements call for a minimum tip elevation to be met with a minimum safe load bearing capacity.

Rosiek began air jetting[7] on January 31, 2012 at Bent 8 and continued until February 2, 2012. On February 6, 2012 Rosiek began water jetting at Bent 8. During the period between air jetting and water jetting, Rosiek had to place water hose, build a water jet, build a containment pond for the excess water caused by the water jetting, and make provisions for disposal of the

[7] Jetting may loosen dense soil deposits with the help of water or air. To achieve this, water or air is discharged with pressure near a particular point or along sides of pile.

water. Rosiek continued water jetting until all the piles were driven. This required relocating water lines, water pits, and disposal locations during the water jetting operation to manage the water.

Had the vaned tip been correctly designed, all of the steel pipe pile could have been driven to the minimum tip elevation with the minimum safe load bearing without the use of jetting. AHTD erred in allowing the under-designed vaned tip to be used as an alternate in the Contract drawings. Because the Contract stated the vaned tip was an "alternate," there was no need for using any other tip for the piling. The first forty piling, including the 8 piles with tips that did fail, were driven without water jetting. Rosiek was then required to water jet all future pile after the failure load of 278 tons for the vaned tip was determined by Skyline Steel. AHTD never furnished Rosiek with their design calculations for the piles and/or the pile tips.

Some tips even failed after Rosiek began jetting. A large percentage of the pile driven after jetting began still had a final load exceeding the estimated load limit (278 tons) of the vaned tip. The weak vaned tip deprived Rosiek of the opportunity to drive pile full depth without jetting, as other contractors in the area were doing when driving pile with the 2" plate. AHTD became aware that the vaned tip was inferior and offered Rosiek no relief in the matter. Contract drawings for other similar AHTD projects show the thickness of the 2" plate increasing or decreasing in relationship to the diameter of the steel pile while the thickness (¾") of the vaned tip base plate stays the same regardless of the diameter of the steel pile.

Once Rosiek recognized the load limit of the vaned tip, it immediately began driving the pile to only four (4) blow counts per inch and then began water jetting to prevent damage to the vaned tip due to its low failure design. This greatly decreased Rosiek's pile driving production rate and drastically increased its costs.

Rosiek was only able to successfully drive the failed piles after Rosiek switched from using the vaned tip to the flat plat tip. Damage occurred to the pile tips using both hammers Rosiek used (the Delmag Pile Hammers, D36-32 and D46-32), and when jetting and not jetting. Rosiek unsuccessfully requested that it be permitted to cut off the pile when penetration of the pile slowed rather than damaging the pile. This request was based on the fact that the total bearing for the nine piles in each footing had achieved a combined total tonnage far greater than that of the Contract design requirements.

AHTD has never supplied Rosiek with an analysis of the load limits of the steel pile components as Rosiek requested, nor did AHTD provide any input from the design engineer which would have been a reasonable approach to contract administration once the pile failure became prevalent. The vaned tip in the dimensions shown in the plans should never have been represented as an alternate because of its low failure load in comparison to the conical point and the 2" flat plate. As it turned out, the ¾" vaned tip is the weak link in the chain, and AHTD is responsible for that weak link by presenting it as a viable alternate in the Contract drawings.

The damages Rosiek seeks for the pile tip design error are:

1. Jetting Cost and Pulling/Repairing Pile with Failed Tips Cost:[8]	$173,997.87
2. Extra On-Site Supervision:[9]	$ 92,860.02
3. Extra Material[10]/Transportation Cost:[11]	$ 45,377.58
Total Direct Costs for Piling	$312,235.47

[8] The cost for jetting and pulling/repairing piling was calculated by Rosiek based on contemporaneous records maintained on the jobsite on a daily basis. The costs consist primarily of labor and owned and rented equipment. Both the labor and equipment have been recorded on daily timesheets that include both hours worked and relevant hourly rates. Rental equipment costs are based on equipment company invoices. Owned equipment rates are based on the rates in the Dataquest Blue Book.

[9] Rosiek supplemented its on-site supervisory personnel with Mr. Ronnie Lawrence who was needed to manage the on-site difficulties including those associated with the pile tip design error. Among Mr. Lawrence's work effort was the designing of the pile jetting system as well as overseeing the jetting operation. Additional costs requested are for Mr. Lawrence's salary, transportation costs, and living and travel expenses.

[10] The Extra Material Costs consist of the additional piling and pile tips Rosiek purchased to replace the damaged piling and tips. These costs are based on invoiced prices.

[11] The Extra Transportation Costs were incurred by Rosiek to transport equipment to and from the jobsite at an internal rate of $4.00/mile.

4.	Extended Job Site Costs:[12]	$327,328.29
	Subtotal	$639,563.76
5.	Acceleration (Labor Only):[13]	$121,358.78
	Total Costs	**$760,922.54**

The time requested in connection with the pile tip design error includes:

March 29, 30, 2012	2
April 2-4, 9-13, 16-20, and 23-27, 2012	18
May 1-4, 9-11, 14-18, 22-25, and 29-31, 2012	19
June 6-8, 11, 13-15, 18-22 and 25-26, 2012	14
Additional Working Days Requested	53
(Number of Calendar Days)	(90)

Due to the initial conflicts at the bridge bents,[14] the only location available for Rosiek to begin its pile driving work was at Bent 8. The final order in which the work was performed was Bents 8, 7, 9, 10, 6, 1, 5, 4, 3 and 2 due to the utility conflicts. In order to measure its delay, Rosiek adjusted its planned schedule to take into account the actual start date for the piling on January 5, 2012 instead of the December 5, 2011 date shown in its original schedule. The sequence of pile driving from west to east was maintained as well as the planned driving durations. After adjusting its schedule, Rosiek planned to complete pile driving on March 28, 2012. This would have occurred under normal pile driving conditions with minimal delays. When it became apparent that the vaned tip shown in the contract drawings was under-designed for field driving conditions, jetting was then required on all pile and additional time was required

[12] Rosiek developed an average calendar day per diem cost for its extended jobsite overhead from its job costs reports for the years 2012 and 2013. These costs include on-site supervisory and administrative staff, utilities, supplies, and railroad flaggers and inspectors. Additionally, standby equipment costs were calculated per calendar day using Dataquest Blue Book standby rates. Similarly, extended per diem costs for supervisor's transportation were calculated using Dataquest Blue Book operating rates.

[13] The Labor Acceleration is included in the pile tip design error claim because adding two months time at the very beginning of a one-year Project frustrated Rosiek's ability to complete its work in a timely and efficient manner. Rosiek attempted to accelerate its work by expending overtime throughout the construction of the Project it did not anticipate spending in an attempt to maintain its Project plan. The overtime calculation is based on Rosiek's payroll and job cost records and includes only the premium time.

[14] *See* f.n. 1, *supra.*

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to accomplish this added operation. The completion date, when all pile had been driven was June 26, 2012, 53 working days and 90 calendar days later than planned.[15]

BNSF Railroad Structural Steel Delay

The bridge's superstructure[16] was supported by structural steel beams, and Rosiek was delayed in setting those beams over the BNSF Railroad because of the BNSF Railroad work schedule that had been established two years earlier but that AHTD failed to disclose to Rosiek. AHTD concedes that this delay is not due to any fault of Rosiek because the AHTD has granted Rosiek a time extension associated with this delay; as a result, Rosiek's claim for the BNSF Railroad is purely an issue of monetary compensability for those delays. Because the delays in erecting the structural steel and associated delays were so lengthy, it forced Rosiek to work through inclement weather in the second half of 2013 and through the winter of 2013/2014 to complete the Project. Absent the railroad delay, work could have been completed prior to the second half of 2013 and well in advance of the winter of 2013/2014.[17]

AHTD asserts that Rosiek is not entitled to these delays pursuant to the terms of the AHTD's required C1 Agreement between Rosiek and BNSF, and the alleged existence of BNSF's two year look ahead schedule that impacted Rosiek's Project work. A copy of the C1

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[15] Rosiek directs the Commission to the holding of *Hous. Auth. of City of Texarkana v. E. W. Johnson Const. Co.*, 264 Ark. 523, 533, 573 S.W.2d 316, 322 (1978) ("We are persuaded that where, as here, the owner supplies plans and specifications to a contractor detailing the work to be performed, the owner implicitly warrants the adequacy and suitability of the plans and specifications for the purpose for which they are tendered. We are further persuaded that this implied warranty is not nullified by any stipulation requiring the contractor to make an on-site inspection where the repairs are to be made and a requirement that the contractor examine and check the plans and specifications… where delays result, as here, because of faulty specifications and plans, the owner will have to respond in damages for the resulting additional expenses realized by the contractor. Moreover, the owner's breach of its implied warranty may not be cured by simply extending the time of the performance of a contractor's assignment.").

[16] On a bridge, the portion of the structure that is the span and directly receives the live load is referred to as the superstructure. In contrast, the abutment, piers, and other support structures are called the substructure.

[17] AHTD has partially addressed the structural steel delay by not charging time during the delay and providing a time extension for a follow-on delay related to placing the stay-in-place deck forms on the structural steel and the reinforcing steel. However, there has been no monetary compensation for this delay (which Rosiek is requesting in the amount of $881,528.78).

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Agreement is attached as Exhibit A. A review of that C1 Agreement establishes that the primary focus of that Agreement was Rosiek's insurance and indemnity requirements on behalf of BNSF, coupled with a requirement to provide 3 weeks advance notice of times and dates for proposed work windows. *There is no mention of a two-year look ahead agreement which would impact Rosiek's work.* Although the C1 Agreement makes clear that BNSF "will not be responsible for any additional costs or expenses resulting from a change in work windows," there is no statement within the C1 Agreement that suggests AHTD would not bear that same responsibility. In fact, the C1 Agreement specifically provides that "[a]dditional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project." There would be absolutely no reason for Rosiek to maintain accounting records of the expenses resulting from a change in work windows if those delays were not compensable, and the C1 Agreement makes plain that such compensation is not to be collectable from BNSF.

The bridge superstructure consisted of structural steel beams spanning the ten bents of the bridge. The structural steel was designed in three divisions designated as Divisions 1, 2, and 3 numbered from west to east. A major portion of the Division 2 steel actually spans the railroad tracks, and this steel is the subject of the claim.

Steel was first erected in Division 3 from October 16, 2012 to November 8, 2012. The structural steel was erected in Division 1 from January 31, 2013 to February 20, 2013. On February 20, 2013, a meeting was held at Rosiek's field office regarding the bridge beam erection over the BNSF Railroad. Those present were representatives from AHTD, Rosiek, Garver (a BNSF subcontractor) and the BNSF Roadmaster, Dustin Blackshear.[18] Rosiek had made arrangements to begin setting beams over the railroad after the February 20, 2013 meeting.

[18] Isaac Chan, the newly appointed representative overseeing the Project on behalf of BNSF did not attend the meeting.

During the February 20, 2013 meeting, Rosiek was informed by AHTD through Mr. Blackshear that no track time would be given Rosiek until March 18, 2013. This was due to scheduling by the railroad which has a two year look ahead rolling schedule for track work and closures. This was the first time Rosiek was informed of this BNSF work schedule, as ASHC failed to make any reference to the BNSF look-ahead schedule in the Contract.

Rosiek went to great procedural lengths to depose Ms. Cheryl Townlian in advance of this hearing to determine whether or not Rosiek should have known of a two year look ahead schedule which would impact its Project work. Ms. Townlian, who served as the BNSF Manager of Public Projects for over a decade, and who was the BNSF Manager of Public Projects in connection with this Project, testified that she had *never* heard of a two year look ahead schedule, and did not believe that such a document even existed. It is incredulous that AHTD would assert that Rosiek bears some responsibility to know of a document and work around that document when the BNSF representative in charge of scheduling and coordination does not believe such a document even exists.

Steel erection for Division 2 was then initially delayed until March 18, 2013 due to the BNSF work schedule, which represents a 26 calendar day delay. As of March 18, 2013, BNSF track work was still ongoing. BNSF delayed track clearance time again until March 25, 2013, which represents a 7 calendar day delay. On March 25, 2013, BNSF delayed track clearance time again until April 1, 2013, which represents a 7 calendar day delay. On April 1, 2013, BNSF delayed track clearance time again until April 8, 2013, which represents a 7 calendar day delay. On April 8, 2013, BNSF delayed track clearance time again until April 10, 2013, which represents a 2 calendar day delay.

Rosiek was informed by the BNSF representative that April 10, 2013 was a good date to begin steel erection. Beams were released for shipment on April 9, 2013, with delivery on April 10, 2013. However, on April 10, 2013, BNSF canceled the track clearance time again until April 15, 2013, which represents a 5 calendar day delay. Because the beams were loaded and in transit, Rosiek had to unload and stockpile the beams on the job site.

On April 12, 2013, Rosiek was notified by the BNSF Roadmaster that beginning on April 15, Rosiek would be allowed a 6-hour window daily for two weeks to erect structural steel over the railroad tracks.[19] As of April 14, 2013, the Project had been delayed 54 calendar days due to the BNSF scheduling conflict which stopped Rosiek from erecting beams across the railroad tracks.

AHTD stated it would not resume time charges until June 8, 2013. AHTD stated the delay period was for 54 calendar days (February 20, 2013 to April 14, 2013), but the time period AHTD used to not charge Contract time for the delay was from April 15, 2013 to June 7, 2013. Time charges then resumed on Monday, June 10, 2013.

Application of the Specifications to Rosiek's Time Extension Request Following the BNSF Railroad Delay

In the aftermath of the BNSF Railroad delay, Rosiek requested a 67 working day time extension in the July 2013 to November 2013 time period based on its determination that Project delays forced it to work during these days when the Project should have been otherwise completed. Rosiek has also identified 39 days within this time period that merit a time extension based on inclement weather.

[19] On April 15, 2013, work started on the center span of structural steel in Division 2, but the delay continued until Rosiek could reach a point (placement of the metal decking) where it could perform follow-on work effectively without delay. (Change Order No. 6 added an additional 16 working days [30 calendar days] time extension to the Contract after time began on June 10, 2013. Because the DBE subcontractor placing the stay-in-place deck forms and the reinforcing steel had been forced to demobilize from the Project due to the railroad steel delay, this time was granted to permit the subcontractor to remobilize to the Project to resume the work it was performing when the delay began.)

With AHTD not granting a sufficient number of weather days to Rosiek from July 2013 to November 2013, Rosiek has been charged with 28 days of both liquidated damages and the Daily Road User Cost. Granting sufficient weather days in this time frame alone would relieve Rosiek of all these charges, even without a time extension being approved for any other claim items.

Rosiek's original request for a Contract time extension under Item 108.06(d)(2)d was provided to Mr. Deric Wyatt, Resident Engineer, on July 3, 2013 based on abnormal weather conditions. The Resident Engineer incorrectly responded to this request on July 29, 2013 based on Item 108.06(c), but he also alluded to a need for more information from Rosiek.

Item 108.06(c) provides that time will be assessed when "conditions allow the Contractor to effectively utilize 60% of normal forces and equipment to prosecute the work required at that time, for at least 60% of the Contractor's normal work hours." Item 108.06(d)(2)d provides that an extension of time will be considered if "[w]eather conditions or the condition of the ground or materials were significantly abnormal and these conditions significantly delayed the work." A side-by-side comparison of these specifications follows:

(c) **Working Days.** When the contract time is specified in working days, time will be assessed for each day on which, in the judgement of the Engineer and subject to the limitations below, conditions allow the Contractor to effectively utilize 60% of normal forces and equipment to prosecute the work required at that time, for at least 60% of the Contractor's normal work hours, regardless of whether the Contractor actually works.

The Engineer will not assess a working day when conditions exist beyond the control and without the fault of the Contractor that prevent the utilization of forces and equipment as defined above. Also, for the purpose of assessment of working days, inaccessibility to a portion of the work due to utility conflict or utility work, either of which prevents utilization of forces and equipment as defined above, will be considered as an adverse working condition for time exceeding that specified in the Contract for the utility adjustment. The ability of vendors, suppliers, and subcontractors to provide materials and/or services is considered within the Contractor's control for the purpose of assessment of working days.

Should the Contractor prepare to begin work on any day on which inclement weather, or the conditions resulting from the weather, prevent the work from beginning at the usual starting time, and the crew is dismissed as a result, the Contractor will not be charged for a working day whether or not conditions change during the day and the rest of the day becomes suitable for construction operations.

Time from December 21 through March 15, inclusive, will not be assessed against the contract time.

Saturdays and Department recognized holidays, other than those designated above, which may be declared by the Department for certain special or unusual circumstances, will be optional to the Contractor as working days, and time will not be assessed unless work is performed that requires inspection. If work is performed, contract time assessment will be based upon the same conditions as a normal working day.

Contract time will be assessed during a Partial Work Order period according to Subsection 108.02(b)(3).

Contract time will not be assessed during a full suspension of the work as ordered by the Engineer. During a partial suspension of the work as ordered by the Engineer, the contract time will be assessed in direct proportion to the ratio of the money value of the items not suspended to the total contract amount.

At the end of each estimate period, the Engineer will furnish the Contractor a written statement showing each working day charged during the preceding period and the total number of working days charged to date. If the Contractor disagrees with the working days charged by the Engineer, then the Contractor shall, within 10 calendar days after receipt of the statement, give the Engineer written notice of such disagreement and the reasons therefor. Subsequent handling of this dispute shall be according to Subsection 105.01. If the Contractor fails to protest the Engineer's determination of working days charged within the 10 calendar day period, the Contractor shall be deemed to have accepted the time charged for that period as correct and no subsequent request for review will be considered.

(d) **Extension of Contract Time.** If the Contractor is unable to complete the work within the contract time as specified, at any time prior to the final acceptance of the project, a written request may be made to the Engineer for an extension of time. This request must contain specific dates and the detailed circumstances relative to the time extension desired. The Contractor's contention that insufficient time was specified is not a valid reason for an extension of time.

All extensions of time, except extensions due to overruns, will be documented by Change Order.

Any extended time for completion shall be in full force and effect the same as though it were the original contract time.

(2) An extension of time will be considered, based upon documented evidence submitted by the Contractor, if:

d. Weather conditions or the condition of the ground or materials were significantly abnormal and these conditions significantly delayed the work. For consideration of a time extension based on weather conditions, the Contractor shall submit, in writing, documented evidence of the conditions that existed for the specific days requested. The Engineer will verify the validity of the request.

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Rosiek provided the additional information requested by the Resident Engineer on August 7, 2013. The Resident Engineer's follow-up response was again incorrectly based on Item 108.06(c) and not Item 108.06(d)(2)d. The Engineer's September 3, 2013 letter stated that Contract time was charged based "on the value and quantity of work items available." This was also incorrectly determined because time charges are to be based on the resources required "to prosecute the work required at the time," meaning that work which controls the completion time for the Project.

Without the aid of a CPM schedule, the Engineer is left to decide if a day is a charged day or not and if the work being performed is critical or not. Often this decision is left up to Project personnel who may or may not have the correct understanding in determining what constitutes a contract working day other than using the criterion "if the contractor works, charge him" or as provided in Item 108.06(c), 60% of the work force for 60% of the work hours. This method only works provided the specifications are interpreted and enforced correctly.

The specification states it this way because time is not to be charged on non-critical work which is being performed solely because the contractor is working. The key to interpreting this requirement is to understand "***work required at that time***," **not** that day. If AHTD had consulted Rosiek's CPM schedule on this Project, the Resident Engineer would have known that the embankment became critical on the schedule by July 2013 and stayed critical until that work was completed. This time lost was not because of anything Rosiek did wrong but because of the abnormally rainy weather Rosiek endured and worked around during the second year of the Project.

It is obvious the Resident Engineer did not make a distinction between Item 108.6(d)(2)d and Item 108.06(c) in the Standard Specifications. In this usage, "considered" should be

interpreted as whether or not the contractor met all of the required criteria in Item 108.06(d)(2)d for a time extension, which Rosiek had. Rosiek is not questioning how time was being charged during this period, but is requesting an extension of time to the Contract due to abnormal conditions beyond the control of Rosiek (weather) while time was being charged.

After much back-and-forth between Rosiek and the AHTD, wherein Rosiek sought a time extension under Item 108.06(d)(2)d, AHTD continued to reject Rosiek's requests. These rejections were improper for numerous reasons, but particularly because Rosiek engaged in many attempts to prepare the areas that were to receive embankment, but due to rain conditions beyond Rosiek's control the areas were too wet for embankment operations. Rosiek aerated, undercut, and reprocessed the soils, but the soils remained unstable due to the excess moisture. In July 2012, AHTD agreed to lime stabilize some of the area so the embankment could proceed. After the region's less rainy months of August and September 2012, Rosiek processed the embankment when possible, but work was often slowed due to autumn rain. Rosiek would get the work area ready for embankment and then would have to dry the dirt at the pit or bring in moist dirt and dry it on site. Then it would rain again. Rosiek kept working on the embankment during the winter of 2012/2013 with little progress due to continued unfavorable weather conditions. During the first half of 2013, Rosiek continuously reworked embankment due to excess moisture conditions. Rosiek could work the embankment so it would pass the density test, but it would then fail the stability test. This is a problem other contractors in the area were also experiencing. Finally, by the fourth quarter of 2013, the embankment and Geogrid work was completed so that all embankment dependent work remaining could also be completed.

There were numerous times when Rosiek was charged a working day just because concrete work could be performed. As previously stated, Rosiek believes this was due to a

misinterpretation of the specifications. Item 108.06(d)(2)d appears in the specifications precisely for this reason. This subarticle states that if the contractor is unable to complete the work in time then he may request a time extension to the contract. The reason for requesting a time extension is because Contract time was being charged while Rosiek could not work on the critical item, the embankment.

Rosiek is seeking the following damages due to the BNSF Railroad Structural Steel Delay.

Extended Jobsite Costs:

February 20, 2013 through April 14, 2013 and June 10, 2013 through July 15, 2013:	$ 399,899.51
November 16, 2013 through December 31, 2013:	$ 187,429.53
January 1, 2014 thru April 23, 2014:	$ 294,199.74
Total:	**$ 881,528.78**[20]

An extension of time is not being sought for the BNSF Railroad Structural Steel Delay claim because an 84 calendar day time extension has already effectively been granted by AHTD through both issuance of a change order and by not charging Contract time.[21] By so doing, AHTD agreed that Rosiek was not at fault for this delay. But Rosiek was not compensated for job site overhead and extended equipment costs for the 54 calendar days for the railroad delay or for the 30 calendar days added by Change Order #6. Rosiek is requesting job site overhead and equipment for the additional time that was required to man the Project due to this delay.

[20] The damages related to this claim are all time related and have been calculated in a manner similar to the time related costs for the pile tip design error claim. The primary difference is that the costs have been calculated for the relevant delay periods in 2013 using average per diem rates for jobsite overhead and equipment for 2012 and 2013. A lesser rate has been calculated for 2014 for jobsite overhead and equipment as the Project was being completed in recognition of the fact that these per diem rates are less than the 2012/2013 rates.

[21] Note: as opposed to the 84 calendar days determined by AHTD, Rosiek has adjusted this amount to 89 calendar days for its damages calculation. AHTD based its granting of 16 working days (30 calendar days) to allow Rosiek's subcontractor to remobilize to resume placing the stay-in-place deck forms and reinforcing steel. Instead of remobilizing on the July 10, 2013 date, which is the assumption in the change order, BW Construction, Inc. did not remobilize until July 15, 2013.

But for the BNSF Railroad delay, Rosiek would not have needed to remain on the Project from November 16, 2013 (the day time charges stopped due to seasonal wet and cold weather) to April 23, 2014 (159 calendar days). For this reason, Rosiek has also included the costs for extended jobsite overhead and equipment costs for that period as part of its BNSF Railroad claim in addition to the 89 days of delay for the railroad itself. This results in a combined total of 248 (89 + 159) calendar days of extended jobsite overhead and equipment costs.

Railroad Flagger

The Project Special Provisions contain stringent requirements for when a railroad flagger must be on site. Notice requirements to have a flagger on the Project and to remove a flagger from the Project combined with the physical conditions of the work in relation to the railroad tracks essentially makes flagging a full-time position. Rosiek planned on completing the Project by December 17, 2012, and Rosiek anticipated providing these flagging services through its planned completion date.

Due to AHTD-caused Project delays, these services were required through February 26, 2014. The total amount Rosiek paid for flagger services from December 18, 2012 through February 26, 2014 was $195,463.47, and Rosiek is requesting reimbursement for that amount.

Liquidated Damages, Road User Costs and Early Completion Bonus

In addition to the forgoing issues, Rosiek seeks return of the liquidated damages (28 days @$2,000 per day= $56,000) and Daily Road User Cost (28 days @$10,000 per day= $280,000) being withheld by AHTD. Based on the merits of the time extension requests for the foregoing Project issues, the double penalty of liquidated damages and Daily Road User Costs should be returned to Rosiek. In addition to the time extension requests, Project No. 100740 was not completed at the same time as Rosiek's Project to enable the public to timely use the bridge and

approach roadways. The bridge was substantially complete on March 26, 2014 and is still not in use. When the last day was charged on Rosiek's Contract, Project No. 100740 was only 7.87% complete; a year after Rosiek had completed its work, Project No. 100740 had advanced only to the point of 12.28% completion. As this matter proceeds to hearing before the Claims Commission, Rosiek understands that Project No. 100740 *is still incomplete*. By the Contractual language used to define the Daily Road User Cost, Rosiek could not have possibly caused any "interference and inconvenience to the road user" because there can be no road user until Project No. 100740 is completed. Rosiek should not be charged with any Daily Road User Costs,[22] and this amount being held by AHTD is purely an additional penalty in addition to the liquidated damages being held.

Rosiek further requests that Rosiek be paid the maximum early completion bonus of $350,000 permitted by the Contract.[23] Rosiek intended to complete the Project to achieve the maximum bonus permitted under the Contract. Based on the events on the Project and corresponding delay days requested, the payment of this $350,000.00 bonus to Rosiek is warranted.

The Project overran its adjusted Contract completion time by 28 working days. This has been determined by the difference of the Contract days charged less the adjusted Contract days allowed (248 days charged less 220 days allowed). As a result, AHTD is withholding the following sums from Rosiek and has not awarded Rosiek the bonus Rosiek anticipated earning:

[22] Granting Rosiek at least twenty-eight days of the time extension requests in the various other claims would also relieve Rosiek of these road user charges.

[23] There is also an early completion provision which permits the contractor to receive a $10,000 per day payment (or "bonus") for up to 35 working days for every day the contractor is substantially complete with its work prior to the number of contract days the contractor selects in its bid.

Item	Amount
Liquidated Damages- 28 Days @$2,000	$ 56,000
Daily Road User Cost- 28 Days @$10,000	$ 280,000
Bonus Not Earned- 35 Days @$10,000	$ 350,000
TOTAL	**$686,000**

The withholding of these sums is unwarranted, and Rosiek should be awarded the bonus it set out to earn.

Damages Summary

A consolidated summary of the damages sought by Rosiek is listed below. The list also includes working day time extensions sought and calendar day amounts which are the basis of the calculation for time related damages:

Item	Calendar Days to Determine Damages	Amount	Working Day Time Extensions
Pile Tip Design Error	90	$ 760,922.54	53
BNSF RR Steel Delay	248	$ 881,528.78	
Contract Time Extension		N/A	39 (up to 67)
Additional Flagging Costs		$ 195,463.47	
Daily Road User Cost		See Below	
Partnering		$ 0.00	
SUBTOTAL		**$1,837,914.79**	
Return Daily Road User Cost		$ 280,000.00	
Return Liquidated Damages		$ 56,000.00	
Earned "Bonus"		$ 350,000.00	
SUBTOTAL		**$ 686,000.00**	
TOTAL		**$2,523,914.79**	**92**

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"C-1"Agreement
Between
BNSF RAILWAY COMPANY
and the
CONTRACTOR

BNSF RAILWAY COMPANY
Attention: Manager Public Projects

Railway File: _____
Agency Project: Job 100705, Hwy. 18/BNSF R.R. Overpass (Blytheville)(S)

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated October 18, 2011, with the **Arkansas State Highway and Transportation Department** ("State") for the performance of certain work in connection with the following project: Job 100705, Hwy. 18/BNSF R.R. Overpass (Blytheville)(S) over the BNSF tracks at MP 237.1 in Blytheville Arkansas. Performance of such work will necessarily require contractor to enter **BNSF RAILWAY COMPANY** ("Railway") right of way and property ("Railway Property"). The Contract provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for the State (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

Accordingly, in consideration of Railway granting permission to Contractor to enter upon Railway Property and as an inducement for such entry, Contractor, effective on the date of the Contract, has agreed and does hereby agree with Railway as follows:

Section 1. RELEASE OF LIABILITY AND INDEMNITY

Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway's and Contractor's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railway's property or right-of-way. **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF RAILWAY, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR INCLUDES ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST RAILWAY UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE LOCOMOTIVE INSPECTION ACT, WHENEVER SO CLAIMED.

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

In addition to any other provision of this Agreement, in the event that all or any portion of this Article shall be deemed to be inapplicable for any reason, including without limitation as a result of a decision of an applicable court, legislative enactment or regulatory order, the parties agree that this Article shall be interpreted as requiring Contractor to indemnify Railroad to the fullest extent permitted by applicable law. **THROUGH THIS AGREEMENT THE PARTIES EXPRESSLY INTEND FOR CONTRACTOR TO INDEMNIFY RAILROAD FOR RAILROAD'S ACTS OF NEGLIGENCE.**

It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement survive any termination of this Agreement.

Section 2. TERM

This Agreement is effective from the date of the Contract until (i) the completion of the project set forth herein, and (ii) full and complete payment to Railway of any and all sums or other amounts owing and due hereunder.

Section 3. INSURANCE

Contractor must, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

A. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of $5,000,000 each occurrence and an aggregate limit of at least $10,000,000 but in no event less than the amount otherwise carried by the contractor. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limit to the following:

- Bodily Injury and Property Damage
- Personal Injury and Advertising Injury
- Fire legal liability
- Products and completed operations

This policy must also contain the following endorsements, which must be indicated on the certificate of insurance:

- The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- Waver of subrogation in favor of and acceptable to Railroad.
- Additional insured endorsement in favor of and acceptable to Railroad.
- Separation of insureds.
- The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

It is agreed that any workers' compensation exclusion does not apply to ***Railroad*** payments related to the Federal Employers Liability Act or a ***Railroad*** Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.

No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy with regard to the work being performed under this agreement.

B. Business Automobile Insurance. This insurance must contain a combined single limit of at least $1,000,000 per occurrence, and include coverage for, but not limited to the following:

- Bodily injury and property damage
- Any and all vehicles owned, used or hired

The policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- Waiver of subrogation in favor of and acceptable to Railroad.
- Additional insured endorsement in favor or and acceptable to Railroad.
- Separation of insureds.
- The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

C. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

- Contractor's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- Employers' Liability (Part B) with limits of at least $500,000 each accident, $500,000 by disease policy limit, $500,000 by disease each employee.
- ksjdf

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- Waiver of subrogation in favor of and acceptable to Railroad.

D. Railroad Protective Liability insurance naming only the ***Railroad*** as the Insured with coverage of at least $5,000,000 per occurrence and $10,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- Endorsed to include the Limited Seepage and Pollution Endorsement.
- Endorsed to remove any exclusion for punitive damages.
- No other endorsements restricting coverage may be added.
- The original policy must be provided to the ***Railroad*** prior to performing any work or services under this Agreement

In lieu of providing a Railroad Protective Liability Policy, Licensee may participate in Licensor's Blanket Railroad Protective Liability Insurance Policy available to contractor.

Other Requirements:

All policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

Contractor agrees to waive its right of recovery against ***Railroad*** for all claims and suits against ***Railroad***. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against ***Railroad*** for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against ***Railroad*** for loss of its owned or leased property or property under contractor's care, custody or control.

Contractor is not allowed to self-insure without the prior written consent of ***Railroad.*** If granted by ***Railroad***, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by contractor in lieu of insurance. Any and all ***Railroad*** liabilities that would otherwise, in accordance with the provisions of this ***Agreement***, be covered by contractor's insurance will be covered as if contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

Prior to commencing the Work, contractor must furnish to ***Railroad*** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) must contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify ***Railroad*** in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision must be indicated on the certificate of insurance. Upon request from ***Railroad***, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

Ebix BPO
PO Box 12010-BN
Hemet, CA 92546-8010
Fax number: 951-652-2882
Email: bnsf@ebix.com

Any insurance policy must be written by a reputable insurance company acceptable to ***Railroad*** or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provide.

Contractor represents that this ***Agreement*** has been thoroughly reviewed by contractor's insurance agent(s)/broker(s), who have been instructed by contractor to procure the insurance coverage required by this ***Agreement***. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above. Not more frequently than once every five years, ***Railroad*** may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by contractor, contractor must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming ***Railroad*** as an additional insured, and requiring that the subcontractor release, defend and indemnify ***Railroad*** to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify ***Railroad*** herein.

Failure to provide evidence as required by this section will entitle, but not require, ***Railroad*** to terminate this ***Agreement*** immediately. Acceptance of a certificate that does not comply with this section will not operate as a waiver of contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by contractor will not be deemed to release or diminish the liability of contractor including, without limitation, liability under the indemnity provisions of this ***Agreement***. Damages recoverable by ***Railroad*** will not be limited by the amount of the required insurance coverage.

For purposes of this section, ***Railroad*** means "Burlington Northern Santa Fe Corporation", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS

The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Contract, and the Contractor Requirements set forth on Exhibit "C" attached to the Contract and this Agreement, , including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site.

Section 5. TRAIN DELAY

Contractor is responsible for and hereby indemnifies and holds harmless Railway (including its affiliated railway companies, and its tenants) for, from and against all damages arising from any unscheduled delay to a freight or passenger train which affects Railway's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be billed, as further provided below, for the economic losses arising from loss of use of equipment, contractual loss of incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, or subcontractors, or by the Railway performing work under this Agreement. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment, Contractor will be billed the current freight train hour rate per train as determined from Railway's records. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

Additionally, the parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts between Railway and its customer(s). Under these arrangements, if Railway does not meet its contract service commitments, Railway may suffer loss of performance or incentive pay and/or be subject to penalty payments. Contractor is responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to a train delay caused by Contractor or its subcontractors.

The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. Damages for train delay are currently $382.20 per hour per incident. **THE RATE THEN IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF TRAIN DELAY PURSUANT TO THIS AGREEMENT.**

Contractor and its subcontractors must give Railway's representative (Bentley Tomlin) 3 weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.

Contractor and subcontractors must plan, schedule, coordinate and conduct all Contractor's work so as to not cause any delays to any trains.

Kindly acknowledge receipt of this letter by signing and returning to the Railway two original copies of this letter, which, upon execution by Railway, will constitute an Agreement between us.

ROSIEK CONSTRUCTION CO., INC.
Contractor

By: M R Rosiek

Printed Name: MICHAEL R. ROSIEK

Title: VICE PRESIDENT

BNSF Railway Company

By: Cheryl Townsend 1/26/12

Name: Cheryl Townsend
Manager Public Projects

Accepted and effective this 1st day of November, 2011.

Contact Person: Harry A. (Hank) Jones (Cell - 956-693-7990)

Address: 2000 E. Lamar Blvd., #410

City: Arlington

State: TX Zip: 76006

Fax: (817) 277-5083

Phone: (817) 277-4342
E-mail: rcci@rosiek.net

Form 106; Rev. 06/01/05

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC.	**CLAIMANT**
v.	**NO. 16-0047-CC**
ARKANSAS STATE HIGHWAY COMMISSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT	**RESPONDENTS**

ROSIEK CONSTRUCTION CO., INC.'S FIRST REQUEST FOR PRODUCTION

Pursuant to Arkansas Rule of Civil Procedure 34, as adopted by the Arkansas State Claims Commission, Claimant Rosiek Construction Co., Inc. requests that Respondents, Arkansas State Highway Commission and Arkansas Highway and Transportation Department produce the following items for inspection and/or copying at the office of Jack East III, 2725 Cantrell Rd., Ste. 202, Little Rock, AR 72202 on the 6th day of October, 2015, or at such other time and place mutually agreeable to the parties.

DEFINITIONS AND INSTRUCTIONS

1. As used herein, the term "ASHC" shall refer to Respondent, Arkansas State Highway Commission, its agents, employees, representatives, consultants, experts, and all other persons acting on its behalf, including its attorneys.

2. As used herein, the term "AHTD" shall refer to Respondent, Arkansas Highway and Transportation Department, its agents, employees, representatives, consultants, experts, and all other persons acting on its behalf, including its attorneys.

3. As used herein, the term "Rosiek" shall refer to Claimant, Rosiek Construction Co., Inc., its agents, employees, representatives, consultants, experts, and all other persons acting on its behalf, including its attorneys.

4. As used herein, the term "BNSF" shall refer to non-party, BNSF Railway, its agents, employees, representatives, consultants, experts, and all other persons acting on its behalf, including its attorneys.

5. As used herein, the term "Project" shall refer to the construction of the railroad overpass bridge and approaches on Arkansas State Highway 18 in Blytheville, Arkansas.

6. As used herein, the term "Contract" shall refer to the contract between Rosiek and ASHC to construct the railroad overpass bridge and approaches on Arkansas State Highway 18 in Blytheville, Arkansas.

7. "Document" means and includes, but is not limited to, all writings, documents, contracts, tangible things, typing, letters, correspondence, memoranda, confirmations, drafts, notes, work papers, bills, ledgers, status reports, daily diaries, daily reports, minutes of meetings, records, journals, entries in journals, financial statements, audit reports, financial data, status sheets, contract status reports, tax returns, calendars, schedules, studies, summaries, reports, charts, books, drawings, diagrams, exhibits, video tapes, photographs, movies, tapes, recordings, transcripts, contracts, purchase orders, subcontracts, amendments, proposals, estimates, invoices, delivery tickets, load tickets, checks, data sheets, computer print-outs, data processing cards, and the like, as well as any and all copies or reproductions of the same,

irrespective of form, whether sent or received, and all copies or reproductions thereof which are different in any way from the original, regardless of whether designated confidential, privileged or otherwise.

8. "Relating to" means concerning, respecting, referring to, summarizing, digesting, embodying, reflecting, establishing tending to establish, delegating from, tending not to establish, evidencing, not evidencing, comprising, connected with, commenting on, responding to, disagreeing with, showing, describing, analyzing, representing, constituting or including.

9. In responding to these requests, please furnish all documents available to you including documents in the possession of your attorneys, or their investigators, or all persons acting on your behalf, including but not limited to your employees, agents, officers or representatives and not merely such information known of your own personal knowledge.

10. In producing documents requested herein, please produce documents in full, without abridgement, abbreviation or expurgation of any sort.

11. With respect to all documents requested, please segregate such documents in accordance with the numbered paragraphs herein.

12. If a document is called for under more than one Request, it should be produced in response to the first Request and a notice appended to it stating the other Request(s) to which it is claimed that such document is responsive.

13. If copies or drafts exist of documents, the production of which has been requested herein, please produce and submit for inspection and copying each and every

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copy and draft which differs in any way from the original document or from any other copy or draft.

14. The words "and" and "or" shall be construed conjunctively and disjunctively as necessary to make the request inclusive rather than exclusive.

DOCUMENTS REQUESTED

REQUEST FOR PRODUCTION NO. 1 All contract documents between ASHC, AHTD, Rosiek, BNSF and any contractor, subcontractor, sub-subcontractor, supplier, materialman, architect, engineer, other consultant and any other person or entity relating to the Project.

REQUEST FOR PRODUCTION NO. 2 All work schedules, critical path schedules and any other schedule relating to the Project.

REQUEST FOR PRODUCTION NO. 3 All documents and correspondence between ASHC, AHTD, Rosiek and BNSF relating to the Project.

REQUEST FOR PRODUCTION NO. 4 All documents and correspondence received by and sent from ASHC relating to the Project.

REQUEST FOR PRODUCTION NO. 5 All documents and correspondence received by and sent from AHTD relating to the Project.

REQUEST FOR PRODUCTION NO. 6 All documents and correspondence relating to the Project.

REQUEST FOR PRODUCTION NO. 7 All design documents relating to the Project including any revisions, updates and/or clarifications.

REQUEST FOR PRODUCTION NO. 8 All plans and specifications relating to the Project, including any revisions, updates and/or clarifications.

REQUEST FOR PRODUCTION NO. 9 All reports, logs, diaries and the like relating to the Project.

REQUEST FOR PRODUCTION NO. 10 All invoices relating to the Project.

REQUEST FOR PRODUCTION NO. 11 All accounting records and backup documentation relating to the Project.

REQUEST FOR PRODUCTION NO. 12 All requests for compensation and/or contract time that Rosiek submitted relating to the Project, to include signed, approved change orders, proposed change orders, requests for information and all supporting documentation and narratives.

REQUEST FOR PRODUCTION NO. 13 All minutes of all meetings relating to the Project.

REQUEST FOR PRODUCTION NO. 14 All analyses of the costs of changes, delays, and extra costs relating to the Project.

REQUEST FOR PRODUCTION NO. 15 All documents relating to any claims or disputes between ASHC, AHTD, Rosiek, BNSF relating to the Project.

REQUEST FOR PRODUCTION NO. 16 All correspondence and documents relating to any defective work and alleged defective work performed on the Project.

REQUEST FOR PRODUCTION NO. 17 All documents relating to any claims and defenses you may have in this action.

REQUEST FOR PRODUCTION NO. 18 All drafts, earlier versions and the like, of the documents requested above.

Jack East III
2725 Cantrell Rd Suite 202
Little Rock, AR 72202
(501)372-3278
Bar ID No. 75-036

Brad Copenhaver
Christian Cutillo
Vegina, Lawrence & Pincitelli, P.A.
The Walker Lee House
413 East Park Avenue
Tallahassee, FL 32301
850-224-6205
bcopenhaver@vlplaw.com
ccutillo@vlplaw.com

CERTIFICATE OF SERVICE

I, Jack East III, Attorney at Law, do hereby certify that I have served the foregoing by depositing a copy in the United States Mail, Postage prepaid, this 19 day of August, 2015, addressed to:

David Dawson
Arkansas Highway & Transportation Dept.
P.O. Box 2261
Little Rock, AR 72203-2261

Jack East III

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BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC. CLAIMANT

V. NO. 16-0047-CC

ARKANSAS STATE HIGHWAY COMMISSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT RESPONDENT

RESPONDENT'S RESPONSES TO ROSIEK CONSTRUCTION CO., INC.'S FIRST SET OF REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1 All contract documents between ASHC, AHTD, Rosiek, BNSF and any contractor, subcontractor, sub-subcontractor, supplier, materialman, architect, engineer, other consultant and any other person or entity relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 2 All work schedules, critical path schedules and any other schedule relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 3 All documents and correspondence between

ASHC, AHTD, Rosiek and BNSF-relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 4 All documents and correspondence received by and sent from ASHC relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 5 All documents and correspondence received by and sent from AHTD relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No.

100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 6 All documents and correspondence relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 7 All design documents relating to the Project including any revisions, updates and/or clarifications.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to

inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 8 All plans and specifications relating to the Project, including any revisions, updates and/or clarifications.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 9 All reports, logs, diaries and the like relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 10 All invoices relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to

inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 11 All accounting records and backup documentation relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 12 All requests for compensation and/or contract time that Rosiek submitted relating to the Project, to include signed, approved change orders, proposed change orders, requests for information and all supporting documentation and narratives.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 13 All minutes of all meetings relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No.

100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 14 All analyses of the costs of changes, delays, and extra costs relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 15 All documents relating to any claims or disputes between ASHC, AHTD, Rosiek, BNSF relating to the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 16 All correspondence and documents relating to any defective work and alleged defective work performed on the Project.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 17 All documents relating to any claims and defenses you may have in this action.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

REQUEST FOR PRODUCTION NO. 18 All drafts, earlier versions and the like, of the documents requested above.

RESPONSE: This information is contained within the job files for Construction Job No. 100705, which files are located at Respondent's office in Little Rock, Arkansas. At a mutually agreed upon time, Respondent will permit Claimant, or someone acting on Claimant's behalf to inspect these files and Respondent will provide copies of all documents requested at the inspection.

ARKANSAS STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT

By: David Dawson

David Dawson
Staff Attorney
Arkansas Bar No. 93087
AHTD, Legal Division
~~P. O. Box 2261~~
Little Rock, AR 72203-2261
(501) 569-2277
(501) 569-2165

CERTIFICATE OF SERVICE

I, David Dawson, certify that I have served the foregoing upon the Claimant by mailing a true copy of same this the 22 day of September, 2015 to:

Mr. Jack East
Attorney at Law
2725 Cantrell Rd., Suite 202
Little Rock, AR 72202

David Dawson

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC. CLAIMANT

V. NO. 16-0047-CC

ARKANSAS STATE HIGHWAY COMMISSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT RESPONDENT

RESPONDENT'S ANSWERS TO
ROSIEK CONSTRUCTION CO., INC.'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1: Identify each person who is believed or known by you, your agents, or your attorneys to have knowledge regarding any of the issues raised by the pleadings in this matter, and describe in detail the nature and subject matter of each person's knowledge regarding any of the issues raised by the pleadings in this matter.

ANSWER: Aaron Vowell, AHTD Resident Engineer; Johnathon Mormon, AHTD Dist. 6 Maintenance Engineer; Deric Wyatt, AHTD Dist. 7 Maintenance Engineer; Brad Smithee, AHTD Dist. 10 Maintenance Engineer; Alan Walter, AHTD Dist. 10 Construction Engineer; Walter McMillan, AHTD Dist. 10 Engineer; Jerry Trotter, AHTD Staff Construction Engineer; Logan Hardin, AHTD Advanced Construction Field Engineer; Teresa Wright, AHTD Staff Construction Engineer; Mike Sebren, AHTD State Construction Engineer; Tony Crafton, AHTD Asst. Resident Engineer; Frank Vozel, Retired AHTD Deputy Director and Chief Engineer; Ralph Hall, Retired AHTD Deputy Director and Chief Engineer; David Plugge, AHTD Sr. Bridge Design Engineer; Stewart Linz, AHTD Staff Heavy Bridge Maintenance Engineer. These individuals have knowledge of the overall construction project, how the work was progressed, including methods and timing. The Resident Engineers and Construction Field Engineers will have more knowledge with regard to working days charged and change orders given, and methods used to drive the piles. Mr. Plugge and Mr. Linz have knowledge with

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regard to the vane tip design.

INTERROGATORY NO. 2: For each allegation in Rosiek's Complaint that you deny:

a. state the factual basis for your denial;

b. identify each document upon which you rely in whole or in part in denying the allegation;

c. identify each person known by you to have relevant knowledge of the basis of your denial of the allegation; and

d. identify all efforts undertaken by you to determine the truth or falsity of the allegation (to the extent you consulted persons identify such persons; to the extent you consulted document(s),identify the document(s)).

ANSWER:

a). Respondent's Answer, paragraph 5: Respondent does not believe that the contract has been breached.

Respondent's Answer, paragraph 8: Resident Engineers and Field Engineers state that work was available in other areas of the project that was not affected by utility work.

Respondent's Answer, paragraph 9: Respondent does not agree that the contract allows additional payment to Claimant for the three issues listed in paragraph 9 of the complaint.

Respondent's Answer, paragraph 10: Respondent does not agree that there was a pile tip design error. Claimant exceeded the limits of the tips and tried to drive them with excessive force. Respondent informed Claimant that any damage from excessive force would be Claimant's responsibility. The construction plans stated that water jetting may be required. When jetting was employed, the tips operated as designed.

Respondent's Answer, paragraph 11: See narrative under Respondent's Answer, paragraph 10, above.

Respondent's Answer, paragraph 12: See narrative under Respondent's Answer, paragraph 10, above.

Respondent's Answer, paragraph 13: A special provision in the contract required the Claimant to deal with the Railroad regarding the scheduling of work. Respondent first became aware of any railroad delay on February 20, 2013. Although the delay was not caused by Respondent, Respondent did not charge time during the Railroad delay. Claimant was not damaged because Claimant was able to continue working on the job and progress 25% of the job during the time of the railroad delay.

Respondent's Answer, paragraph 14: Claimant had the responsibility to coordinate any look-ahead schedule with the Railroad pursuant to the Special Provision. Respondent was not privy to this information, as Respondent would not have any knowledge of the Contractor's particular needs or schedule.

Respondent's Answer, paragraph 15: See narrative under Respondent's Answer, paragraphs 13 and 14, above.

Respondent's Answer, paragraph 16: Respondent did not charge time during the Railroad delay and the Claimant progressed 25% of the project during this time.

Respondent's Answer, paragraph 17: Claimant is not due additional monetary compensation from the Respondent. Any delay was the Railroad's fault, from which additional compensation should be pursued. Additionally, Claimant's inefficiency may have caused some of their claimed additional costs.

Respondent's Answer, paragraph 18: See narrative under Respondent's Answer, paragraphs 13,

14 and 16, above.

Respondent's Answer, paragraph 19: Respondent charged time pursuant to the terms of the contract. Claimant was able to utilize 60% of normal forces and equipment for at least 60% of the normal work hours on the days that were charged, considering the type of work involved with this particular job.

Respondent's Answer, paragraph 20: Respondent's personnel determined that Claimant was able to utilize 60% of normal forces and equipment for at least 60% of the normal work hours on the days that were charged, considering the type of work involved with this particular job.

Respondent's Answer, paragraph 21: See narrative under Respondent's Answer, paragraphs 19 and 20, above.

Respondent's Answer, paragraph 22: Job 100740 was a separate contract.

Respondent's Answer, paragraph 24: Claimant agreed to assessment of road user cost as part of the contract and Respondent has administered the contract pursuant to its terms. Claimant is seeking a benefit for which it did not contract.

Respondent's Answer, paragraph 25: The Partnering provision was voluntary. Claimant never requested formal Partnering. Job progress meetings were held on a regular basis which allowed possible resolution of project issues. Respondent's regular communication and progress meetings did not delay the progress of the job and formal Partnering would not have changed that. Respondent did not unreasonably delay its responses to Claimant's communications.

Respondent's Answer, paragraph 26: Respondent does not agree that Claimant was damaged as outlined in the Claim Narrative.

Respondent's Answer, paragraph 27: Respondent does not agree that Claimant is entitled to the amount of damages listed.

b). No specific documents were identified in response to this request. This answer will be supplemented if any documents are identified.

c). Those AHTD employees listed in response to Interrogatory No. 1 have relevant knowledge of the basis of Respondent's denial of the allegations.

d). Those AHTD employees listed in response to Interrogatory No. 1 were consulted to determine whether to admit or deny Claimant's allegations.

INTERROGATORY NO. 3: Specify each and every reason and state the factual basis for why you have not paid Rosiek all amounts sought by Rosiek for the work Rosiek performed on the Project.

ANSWER: See response to interrogatory No. 2. Rosiek was paid in full pursuant to the terms of the contract and is not due any additional compensation.

INTERROGATORY NO. 4: Specify the amount that you believe Rosiek is owed that remains unpaid for the Project work performed.

ANSWER: None.

INTERROGATORY NO.5: Identify with specificity all facts and documents relating to your allegations within Paragraph 28 of your Answer that some or all of Rosiek's claimed damages were caused by a Third-Party or Parties and that Claimant should pursue recovery of those damages from the Third-Parties, including but not limited to identifying all alleged third-parties, what claims those third-parties are allegedly responsible for, and under what specific basis you deny responsibility for those claims and attribute responsibility to a third-party.

ANSWER: Any alleged damages associated with the delay caused by the Railroad should be pursued against BNSF Railroad. A Special Provision in the Contract required the Claimant to coordinate its schedule with the Railroad. This was not Respondent's responsibility.

INTERROGATORY NO.6: Identify with specificity all facts and documents relating to your allegations within Paragraph 29 of your Answer that some or all of Rosiek's claimed damages were caused by Rosiek's own contributory fault or negligence, including but not limited to identifying all instances of alleged contributory fault or negligence and what claims those alleged instances bar or mitigate.

ANSWER: Claimant failed to properly coordinate its schedule with BNSF Railroad pursuant to the requirement of the contract. Claimant failed to utilize the proper method for driving the piles, thereby damaging the pile tips by asserting excessive pressure. Claimant did not utilize its workforce on days that were acceptable work days pursuant to the contract and Claimant's progression of the overall project was inefficient.

INTERROGATORY NO. 7: Regarding the design of the pile tip, identify the person that designed the three alternate pile tip designs within the Project plans, how that person submitted the proposed alternates to you, what methods were employed in the design of the pile tip, and all documents that support your denial that there was a Pile Tip Design Error.

ANSWER: The three alternate pile tips have been used successfully in Arkansas for over 25 years. They have been a design standard for that time and original designs are no longer available. David Plugge and Stewart Linz decided to increase the strength for the two widely used tips for this particular job. Their calculations for the "flat tip" and "vaned tip" are

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attached. Other documents regarding the Pile Tips are attached which may be used to support Respondent's denial that there was a Pile Tip Design Error.

ARKANSAS STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT

By: David Dawson

David Dawson
Staff Attorney
Arkansas Bar No. 93087
AHTD, Legal Division
P. O. Box 2261
Little Rock, AR 72203-2261
(501) 569-2277
(501) 569-2165

CERTIFICATE OF SERVICE

I, David Dawson, certify that I have served the foregoing upon the Claimant by mailing a true copy of same this the 22 day of September, 2015 to:

Mr. Jack East
Attorney at Law
2725 Cantrell Rd., Suite 202
Little Rock, AR 72202

David Dawson

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BRIDGE DIVISION

ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT

MADE BY AP DATE 2011 SHEET NO. _____

CHECKED BY _____ DATE _____ JOB NO. 100705

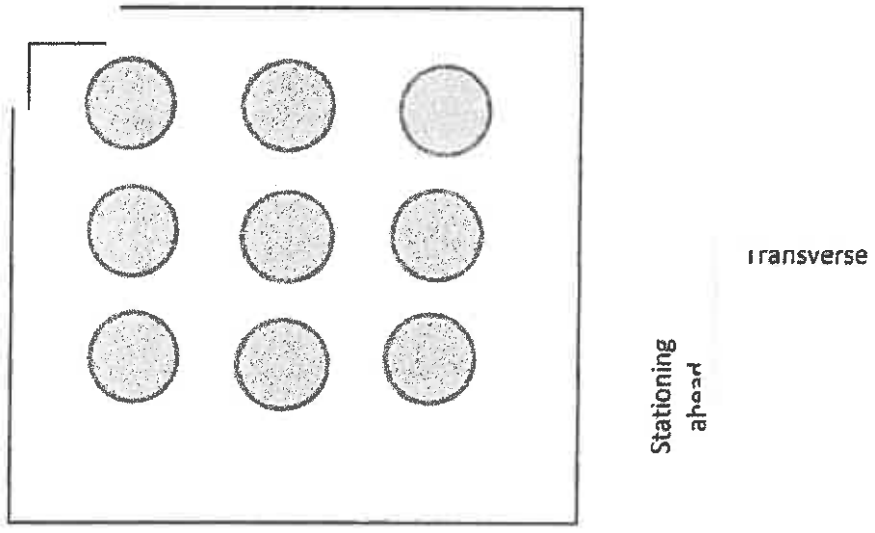
CALCULATIONS FOR _____ BRIDGE NO. _____

Yeary, Kyle W.

From:	Linz, Stewart
Sent:	Tuesday, February 07, 2012 8:16 AM
To:	Wyatt, Deric
Subject:	RE: Lost pile tips

Tracking:	**Recipient**	**Read**
	Wyatt, Deric	Read: 2/7/2012 8:22 AM

What is the location of this pile? I assume footing 3 is the center footing.



Stew

From: Wyatt, Deric
Sent: Monday, February 06, 2012 5:45 PM
To: Linz, Stewart
Subject: FW: Lost pile tips

Stewart,

Would the contractors request below even be considered? though I would check and see before submitting it formally with drawings and etc..

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Thanks!

Deric

From: Ronnie Lawrence [mailto:rlawrence_rosiek@att.net]
Sent: Monday, February 06, 2012 3:39 PM
To: Wyatt, Deric
Cc: Rosiek Arlington; Rosiek Blytheville AR
Subject: Lost pile tips

Deric,

In bent 8, footing #3 we were unable to retrieve the two pile tip when we pulled the damaged pile. When we tried to redrive a pile it was damaged from the first tip. I would like to see if we can omit the two pile, #4 and #8 and just add extra rebar to the flooring steel. The design if for 1,035 tons and we currently have 3,743 tons of capacity without the two pile.

Thanks,

$\frac{115 \text{ tons}}{\text{pile}} * 9 \text{ piles} = 1{,}035 \text{ tons}$

Ronnie Lawrence
Rosiek Construction Co., Inc.
2000 E. Lamar Blvd. #410
Arlington, TX 76006
(Ofc)817-277-4342
(Fax)817-277-5083
rlawrence_rosiek@att.net

$\frac{3{,}743 \text{ tons}}{7 \text{ piles}} = 534.7 \text{ tons/pile}$

Per 805.09 (a)(2), practical refusal is when the safe bearing calculated is two times the required safe bearing value. Based on this email, an average calculated safe bearing value of 534.7 tons/pile was being achieved. Jetting should have been used any time this calculated safe bearing capacity was over 2(115 tons/pile) = 230 tons/pile.

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Yeary, Kyle W.

From: Wyatt, Deric
Sent: Monday, February 06, 2012 11:49 AM
To: Linz, Stewart
Cc: Hardin, Logan
Subject: FW: RCCI/AHTD 014
Attachments: RCCI 014.pdf

Stewart,

Here are the load capacities Sky Line Steel came up with for the 3/4" Vane Tip, 1" Vane Tip, 2" Flat Plate, and 0.500" Steel Shell Pile.

Thanks!

Deric

From: Rosiek Construction Co., Inc. [mailto:rcci@rosiek.net]
Sent: Monday, February 06, 2012 11:42 AM
To: Wyatt, Deric
Cc: RONNIE LAWRENCE; Blytheville RCCI
Subject: Re: RCCI/AHTD 014

Please see the attached letter from Rosiek Construction Co., Inc.

Thank you,
Jennifer Browning
Rosiek Construction Co., Inc.

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ROSIEK CONSTRUCTION CO., INC.

REPLY TO:

2000 E. Lamar Blvd. #410
Arlington, Texas 76006
Phone: (817) 277-4342
Fax #: (817) 277-5083
E-mail: RCCI@ROSIEK.NET

148 Sardis Road
Morrilton, Arkansas 72110
Phone: (501) 354-3547
Fax #: (501) 354-0204

February 6, 2012

Arkansas State Highway & Transportation Department
1169 S. Highway 119
Osceola, Arkansas 72370

Attn: Mr. Deric Wyatt, P.E.
Resident Engineer

RCCI/AHTD 014

RE: Job No. 100705
Hwy. 18/BNSF R.R. Overpass
Str. & Apprs. (Blytheville) (S)
FAP: STP-STPS-STPH-HSIP-
FRAP-9051(5) & 9050
Mississippi County
Pile Calculations

Dear Mr. Wyatt:

On Monday, January 30, 2012, a meeting was held at the project site to discuss Steel Shell Pile failures which have occurred during pile driving operations. Present were representatives of the Contractor, Rosiek Construction Co. Inc., the Owner, AHTD and the Fabricator, Skyline Steel, LLC.

The concern of the Contractor and the Fabricator is the overall design of the Steel Shell Pile. Standard design practices would call for all materials used in the pile design to be of near or equal load capacity. Then the design would allow the pile to be driven to near refusal before experiencing failure. AHDT representatives present were unable to address the design concerns of the Steel Shell Pile the Contractor had without consulting the Project Design Engineer. AHTD representatives asked if the Fabricator could determine the failure load of the materials being used in the design of the Steel Shell Pile.

Attached are the calculations of the materials specified by AHTD for manufacture and fabrication of the Steel Shell Pile per contract drawings. The calculations (See Attached) were conducted by Mr. Alwyn McDowall P.E. of the engineering department of Skyline Steel, L.L.C.

If you have any questions regarding this matter, please contact me at (870) 776-1575.

Sincerely,

ROSIEK CONSTRUCTION CO., INC.

Harold Weir, P.E. FOR HARRY JONES

Harry Jones
Project Manager

1 of 2

MATERIAL USED FOR SHELL PILE SHOWING ESTIMATED LOAD FAILURE

24" X .500" Steel Shell Pipe	Calculated Load Failure	830 Tons
¾ x 24" Vane Tip	"	278 Tons
2" x 24" Dia. Flat Plate	"	752 Tons
1" x 24" Vane Tip	"	495 Tons

All above practical refusal value of 230 tons.

Note: All acceptable pile driven as of 1/27/2012 had an average of 469 Tons applied per pile and averaged 12 blows per inch.

Subject: FW: Calculations

From: Noone, Strider (Strider.Noone@arcelormittal.com)

To: rlawrence_rosiek@att.net; rosiek_cci@sbcglobal.net; rcci@rosiek.net;

Date: Friday, February 3, 2012 9:25 AM

Ronnie / Hank,

Attached are the calculations that Alwyn came up with. Please call me with any questions or concerns.

I apologize for the delay. Alwyn said it took longer than he thought it would.

Thank you,

Strider Noone | Sales

Skyline Steel

Sales

1120 NASA Parkway Suite 225

Houston, TX 77058 U.S.A.

T +1.281.992.4000 | **F** +1.281.335.8321 | **M** +1.713.503.6976

www.skylinesteel.com

From: McDowall, Alwyn
Sent: Friday, February 03, 2012 8:24 AM
To: Noone, Strider
Subject: FW: Calculations

The calculations are based on Roark's Formulas for Stress and Strain 8th Edition. I attached the 2 pages from the book that I used for the calculations.

Call me if you have any questions.

Thanks

Alwyn McDowall | Civil Engineer

Business Development Manager

South East Region

7380 Sand Lake Rd, Suite 135

Orlando, FL 32819 U.S.A.

Tel 1(321) 274-9283 | **Fax** 1(973) 795-1491 | **Cell** 1(201) 247-2992

www.skylinesteel.com

From: McDowall, Alwyn
Sent: Friday, February 03, 2012 9:14 AM
To: Noone, Strider
Cc: Levins, Kurt
Subject: Calculations

Strider,

Sorry for the delay with these. It took longer than anticipated.

Attached is a copy of the calculations. Review them and let me know if you have any questions

Alwyn McDowall | Civil Engineer

Business Development Manager

South East Region

7380 Sand Lake Rd, Suite 135

Orlando, FL 32819 U.S.A.

Tel 1(321) 274-9283 | **Fax** 1(973) 795-1491 | **Cell** 1(201) 247-2992

www.skylinesteel.com

Subject: FW: 1 inch thick Vane Tips

From: Noone, Strider (Strider.Noone@arcelormittal.com)

To: rlawrence_rosiek@att.net; rcci@rosiek.net; rosiek_cci@sbcglobal.net;

Date: Friday, February 3, 2012 9:57 AM

Attached is Alwyn's calculations if a 1" vaned tip was used. This was not one of the alternates shown on the plans.

Thank you,

Strider Noone | Sales

Skyline Steel

Sales

1120 NASA Parkway Suite 225

Houston, TX 77058 U.S.A.

T +1.281.992.4000 | **F** +1.281.335.8321 | **M** +1.713.503.6976

www.skylinesteel.com

From: McDowall, Alwyn
Sent: Friday, February 03, 2012 9:56 AM
To: Noone, Strider
Subject: 1 inch thick Vane Tips

Alwyn McDowall | Civil Engineer

Business Development Manager

ICI

South East Region

7380 Sand Lake Rd, Suite 135

Orlando, FL 32819 U.S.A.

Tel 1(321) 274-9283 | **Fax** 1(973) 795-1491 | **Cell** 1(201) 247-2992

www.skylinesteel.com

Project: CONCRETE FILLED 24" x 0.500 STEEL PIPES **Date:** 02/03/12

3/4" THICK VANE TIP

$$\sigma_{max} = \beta \frac{q a^2}{t^2}$$

$\theta = 90°$

$\alpha_1 = 0.179$

$\alpha_2 = 0.050$

$\beta = 0.457$

$a = 12$ in

$t = 0.75$ in

q = Load / Unit Area

Max Load

$$36{,}000 \text{ psi} = 0.457 \times q \times \frac{12^2}{0.75^2} \Rightarrow q = 307.7 \frac{\text{lb}}{\text{in}^2}$$

$$q = \frac{L}{A} \Rightarrow L = qA = 307.7 \frac{\text{lb}}{\text{in}^2} \cdot 452.4 \text{ in}^2$$

$$= \frac{39{,}210 \text{ lbs}}{2000} = 69.6 \text{ tons}$$

$$69.6 \times 4 = \boxed{278 \text{ TONS}}$$

Max DEFLECTION

$$\gamma_{max} = \frac{-\alpha_2 q a^4}{E t^3} = \frac{-0.050 \times 307.7 \times 12^4}{29{,}000{,}000 \times 0.75^3} = \boxed{0.026 \text{ in}}$$

8 Woodhollow Road • Parsippany, NJ 07054 • (866) 8 SKYLINE • engineering@skylinesteel.com • www.skylinesteel.com

Project: Concrete Filled 24" x 0.500 Steel Pipes **Date:** 02/03/12

A-MLP-DOWNLOC

WELD STRENGTH

$$\frac{3}{16}\text{ in} \times 75.4\text{ in} \times 70{,}000\ \frac{\text{lb}}{\text{in}^2} = \frac{989{,}625}{2000} = 495\text{ tons}$$

PIPE CAPACITY

24" x 0.500 A252 Gr 3 (45 ksi)

$L = \sigma \cdot A$

$= \frac{45\ \frac{\text{kip}}{\text{in}^2} \times 36.9\ \text{in}^2}{2}$

$= \boxed{830\text{ Tons}}$

Cross Sectional Area

$A = \frac{\pi}{4}(D_1^2 - D_2^2)$

$A = \frac{\pi}{4}(24^2 - 23^2) = 36.9\ \text{in}^2$

FLAT PLATE

2" thick A36

$A = \text{Plate Area} = \frac{\pi D^2}{4} = \frac{\pi 24^2}{4} = 452.4\ \text{in}^2$

$\sigma_{max} = \beta \frac{q a^2}{t^2}$

$\theta = 180°$

$\beta = 0.602$

$\alpha_1 = 0.393$

$\alpha_2 = 0.089$

a = outer radius = 12

t = plate thickness = 2

q = Load/unit Area

MAX LOAD

$\sigma = 36{,}000\ \text{psi}$

$36{,}000\ \text{psi} = \frac{0.602 \times q \times 12^2\ \text{in}^2}{2^2\ \text{in}^2}$

$q = 1661\ \text{psi}$

$q = \frac{L}{A} \Rightarrow L = qA = 1661\ \frac{\text{lb}}{\text{in}^2} \cdot 452.4\ \text{in}^2$

$= \frac{751{,}495\text{ lb}}{2000} = 376\text{ tons} \times 2 = \boxed{752\text{ tons}}$

MAX DEFLECTION

$\gamma_{max} = \frac{-K_2 q a^4}{E t^3} = \frac{-0.089 \times 1661 \times 12^4}{29{,}000{,}000 \times 2^3} = \boxed{0.013\text{ in}}$

8 Woodhollow Road • Parsippany, NJ 07054 • (866) 8 SKYLINE • engineering@skylinesteel.com • www.skylinesteel.com

Project: CONCRETE FILLED 24"X0.500" STEEL PIPE PILES **Date:** 02/03/12

1" THICK VANE TIP

$\theta = 90°$ $\quad a = 12$ in

$K_1 = 0.179$ $\quad t = 1.00$ in

$K_2 = 0.050$ $\quad q =$ LOAD/UNIT AREA

$\beta = 0.457$

$$\gamma_{MAX} = \beta \frac{q a^2}{t^2}$$

MAX LOAD

$$36{,}000 \text{ psi} = \frac{0.457 \times q \times 12^2}{1.00^2} \Rightarrow q = 547 \frac{lb}{in^2}$$

$$q = \frac{L}{A} \Rightarrow L = qA = 547 \times 452.4 = \frac{247{,}462.8 \text{ lbs}}{2000}$$

$$= 123.7 \times 4$$

$$= 495 \text{ TONS}$$

MAX DEFLECTION

$$\gamma_{MAX} = \frac{-K_2 q a^4}{E t^3} = \frac{-0.050 \times 547 \times 12^4}{29{,}000{,}000 \times 1^3}$$

$$= \boxed{0.020 \text{ in}}$$

Notation: W = total applied load (force); w = unit line load (force per unit of circumferential length); q = load per unit area; M_o = unit applied line moment loading (force-length per unit of circumferential length); θ_o = externally applied change in radial slope (radians); y_o = externally applied radial step in the vertical deflection (length); y = vertical deflection of plate (length) θ = radial slope of plate; M_r = unit radial bending moment; M_t = unit tangential bending moment; Q = unit shear force (force per unit of circumferential length); E = modulus of elasticity (force per unit area); ν = Poisson's ratio; γ = temperature coefficient of expansion (unit strain per degree); a = outer radius; b = inner radius for annular plate; t = plate thickness; r = radial location of quantity being evaluated; r_o = radial location of unit line loading or start of a distributed load. F_1 to F_8 and G_1 to G_{10} are the several functions of the radial location r. C_1 to C_8 are plate constants dependent upon the ratio a/b. L_1 to L_{29} are loading constants dependent upon the ratio a/r_o. When used as subscripts, r and t refer to radial and tangential directions, respectively. When used as subscripts, a, b, and o refer to an evaluation of the quantity subscripted at the outer edge, inner edge, and the position of the loading or start of distributed loading, respectively. When used as a subscript, c refers to an evaluation of the quantity subscripted at the center of the plate.

Positive signs are associated with the several quantities in the following manner: Deflections y and y_o are positive upward; slopes θ and θ_o are positive when the deflection y increases positively as r increases; moments M_r, M_t, and M_o are positive when creating compression on the top surface; and the shear force Q is positive when acting upward on the inner edge of a given annular section.

Note: Bending stresses can be found from the moments M_r and M_t by the expression $\sigma = 6M/t^2$. The plate constant $D = Et^3/12(1 - \nu^2)$. The singularity function brackets $\langle\ \rangle$ indicate that the expression contained within the brackets must be equated to zero unless $r > r_o$, after which they are treated as any other brackets. Note that Q_b, Q_a, M_{ro}, and M_{to} are reactions, not loads. They exist only when necessary edge restraints are provided.

General plate functions and constants for solid and annular circular plates

$$F_1 = \frac{1+\nu}{2}\frac{b}{r}\ln\frac{r}{b} + \frac{1-\nu}{4}\left(\frac{r}{b} - \frac{b}{r}\right)$$

$$F_2 = \frac{1}{4}\left[1 - \left(\frac{b}{r}\right)^2\left(1 + 2\ln\frac{r}{b}\right)\right]$$

$$F_3 = \frac{b}{4r}\left\{\left[\left(\frac{b}{r}\right)^2 + 1\right]\ln\frac{r}{b} + \left(\frac{b}{r}\right)^2 - 1\right\}$$

$$F_4 = \frac{1}{2}\left[(1+\nu)\frac{b}{r} + (1-\nu)\frac{r}{b}\right]$$

$$F_5 = \frac{1}{2}\left[1 - \left(\frac{b}{r}\right)^2\right]$$

$$C_1 = \frac{1+\nu}{2}\frac{b}{a}\ln\frac{a}{b} + \frac{1-\nu}{4}\left(\frac{a}{b} - \frac{b}{a}\right)$$

$$C_2 = \frac{1}{4}\left[1 - \left(\frac{b}{a}\right)^2\left(1 + 2\ln\frac{a}{b}\right)\right]$$

$$C_3 = \frac{b}{4a}\left\{\left[\left(\frac{b}{a}\right)^2 + 1\right]\ln\frac{a}{b} + \left(\frac{b}{a}\right)^2 - 1\right\}$$

$$C_4 = \frac{1}{2}\left[(1+\nu)\frac{b}{a} + (1-\nu)\frac{a}{b}\right]$$

$$C_5 = \frac{1}{2}\left[1 - \left(\frac{b}{a}\right)^2\right]$$

TABLE 11.2 Formulas for Flat Circular Plates of Constant Thickness

25. Solid circular plate with a uniformly distributed load q over the shaded segment

$\sigma_{max} = (\sigma_r)_{max} = \beta \dfrac{qa^2}{t^2}$

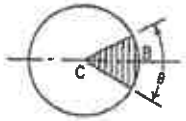
$y_{max} = \alpha \dfrac{qa^4}{Et^3}$ on the symmetrical diameter at the value of r given in the table

Edge	Coefficient	θ			
		90°	120°	180°	
Supported	α	0.0244, $r = 0.39a$	0.0844, $r = 0.30a$	0.345,	$r = 0.15a$
	β	0.306, $r = 0.60a$			
Fixed	α	0.00368, $r = 0.50a$	0.0173, $r = 0.4a$	0.0905,	$r = 0.20a$
	β	0.285, $r = a$			

Values for $\nu = \frac{1}{3}$

(Ref. 39)

26. Solid circular plate, uniform load q over the shaded sector



For simply supported edges:

$\sigma_{max} = \sigma_r$ near the center along the loaded radius of symmetry (values not given)

σ_r at the center $= \dfrac{\theta}{360}\sigma_r$ at the center of a fully loaded plate

$y_{max} = -\alpha_1 \dfrac{qa^4}{Et^3}$ at approximately $\frac{1}{4}$ the radius from center along the radius of symmetry (α_1 given in table)

For fixed edges:

$\sigma_{max} = \sigma_r$ at point $B = \beta \dfrac{qa^2}{t^2}$

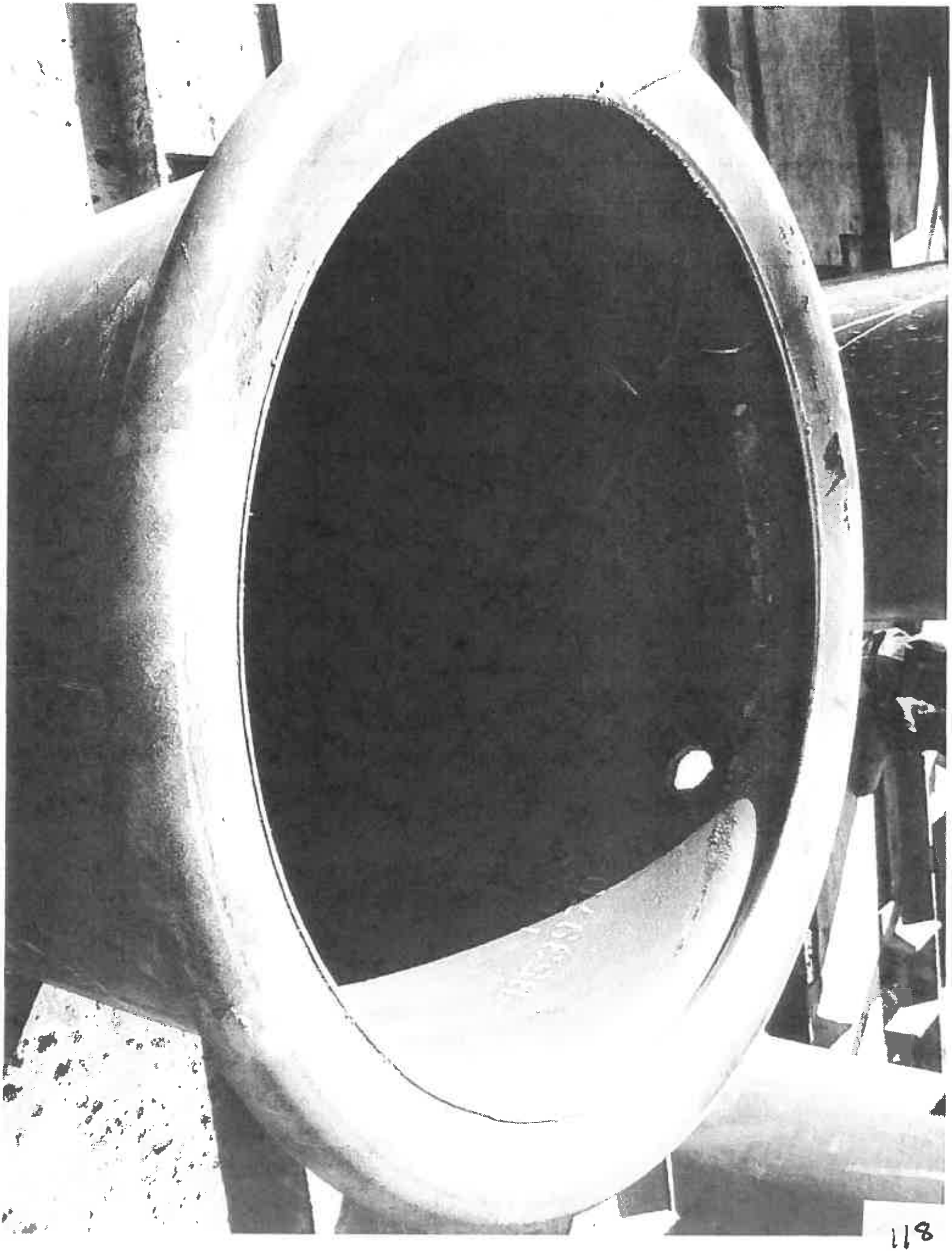
$y_{max} = -\alpha_2 \dfrac{qa^4}{Et^3}$ at approximately $\frac{1}{4}$ the radius from center along the radius of symmetry (β and α_2 given in table)

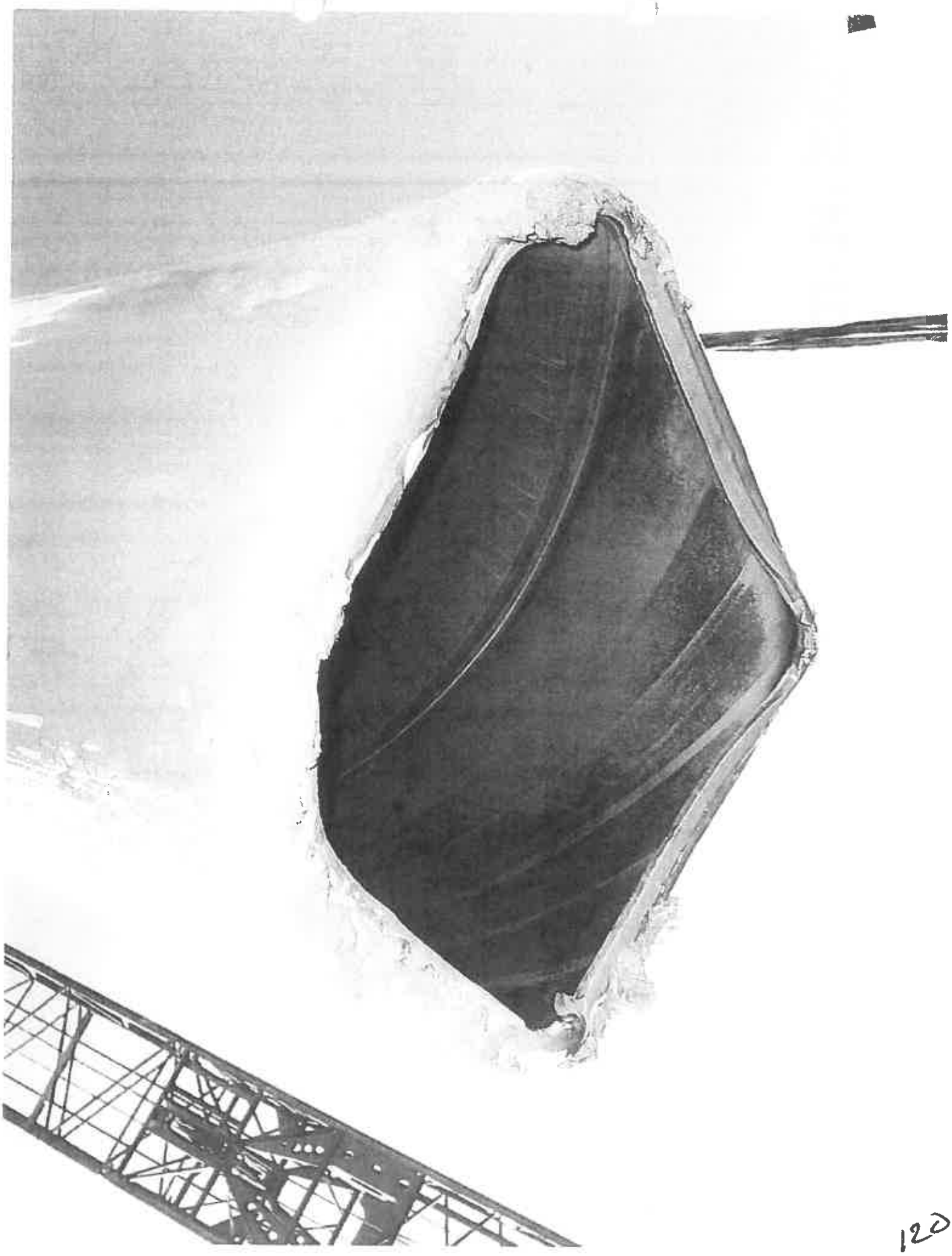
Edge condition	Coefficient	θ					
		30°	60°	90°	120°	150°	180°
Simply supported	α_1	0.061	0.121	0.179	0.235	0.289	0.343
Fixed	α_2	0.017	0.034	0.050	0.064	0.077	0.089
	β	0.240	0.371	0.457	0.518	0.564	0.602

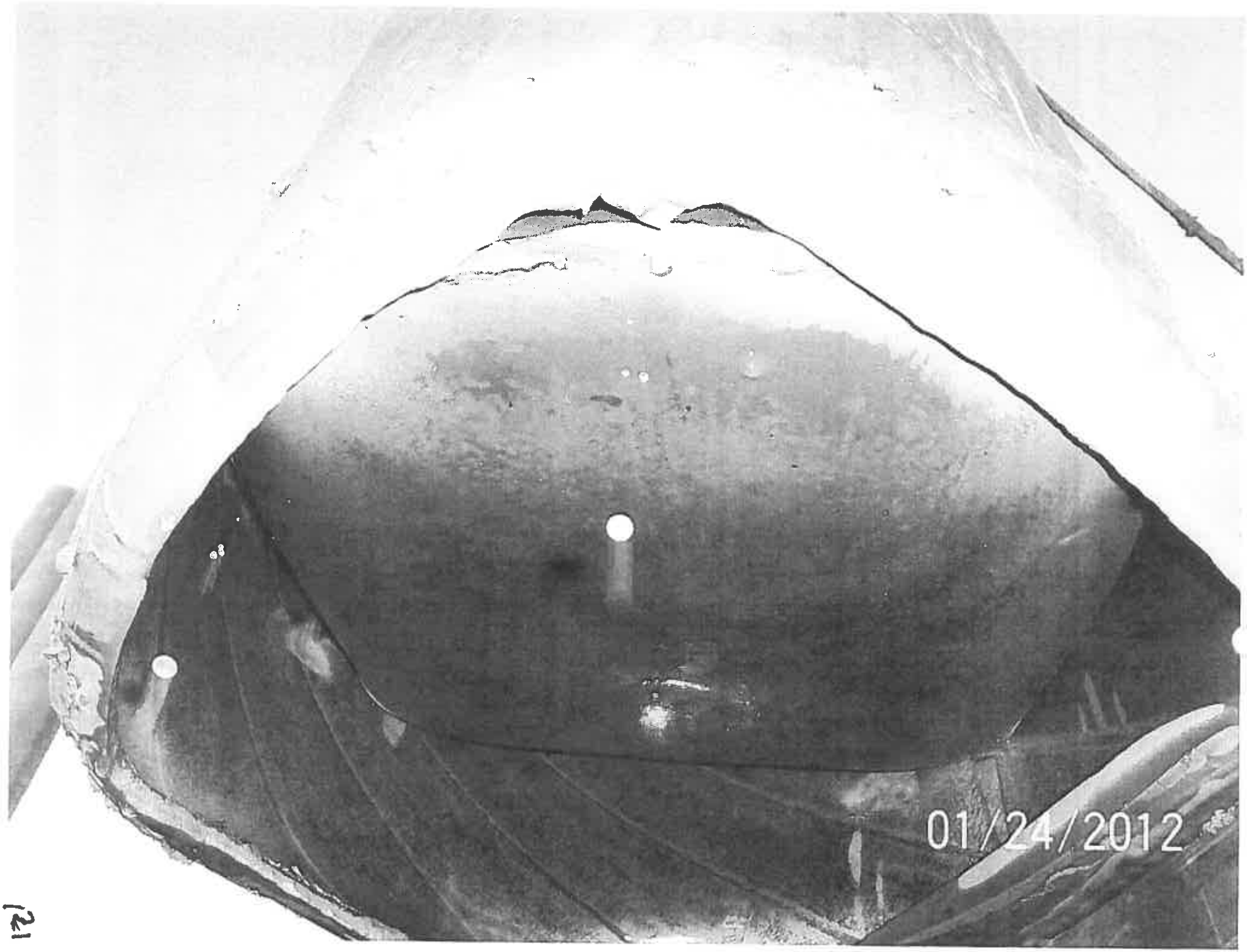
[*Note:* For either edge condition $y_c = (\theta/360)y_c$ for a fully loaded plate.]

(Ref. 38)

TABLE 11.2 Formulas for Flat Circular Plates of Constant Thickness (*Continued*)







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01/24/2012

01/24/2012

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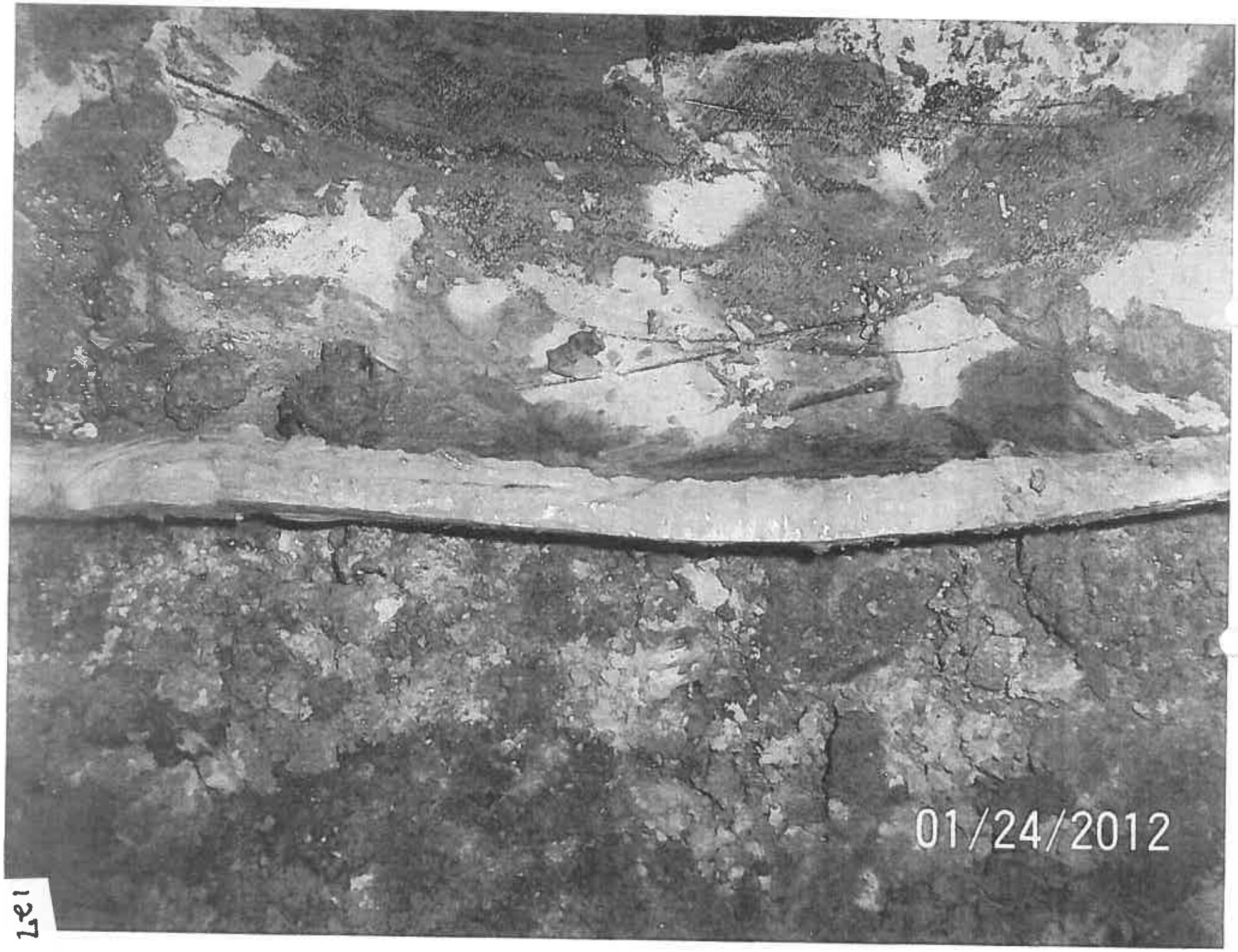

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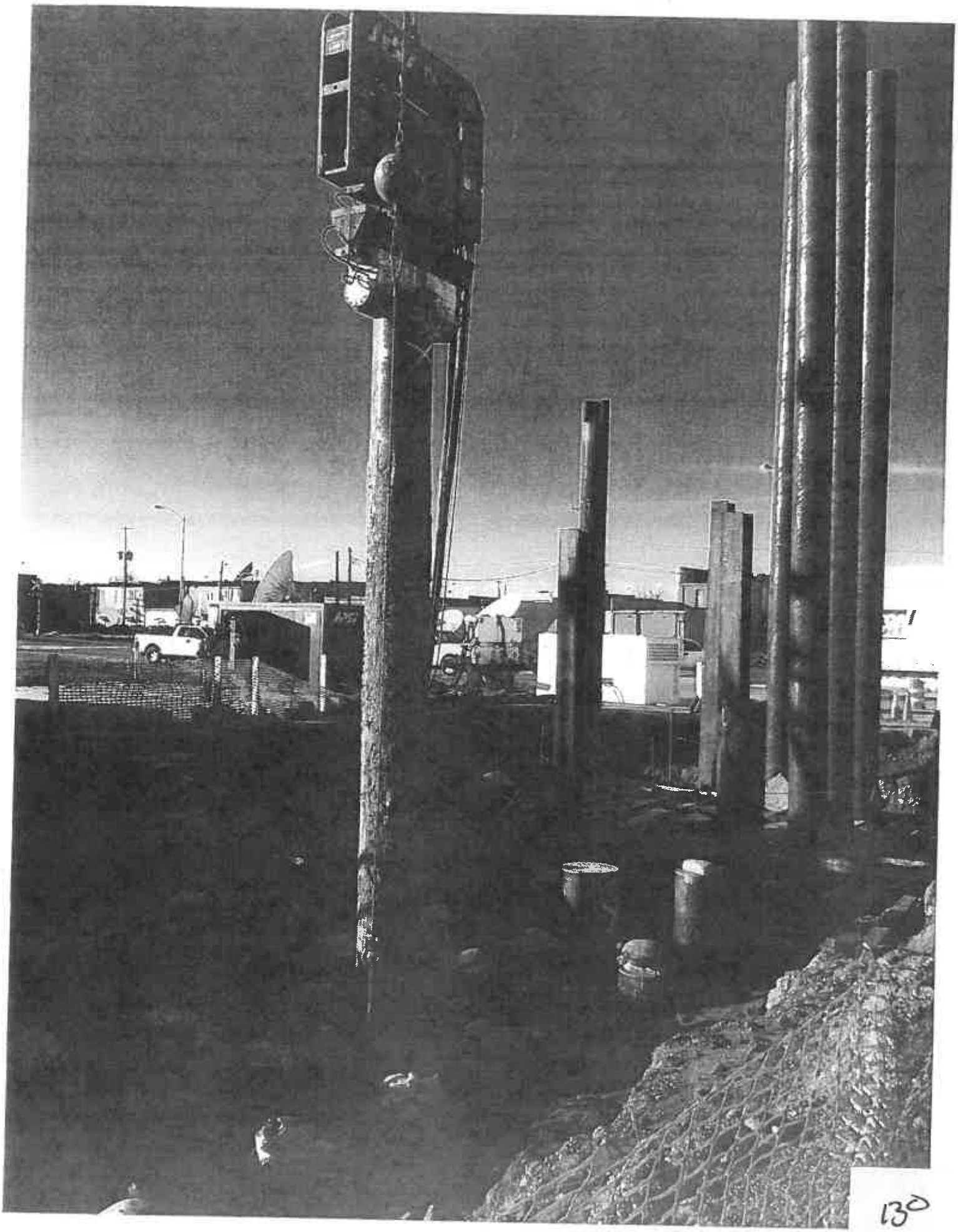
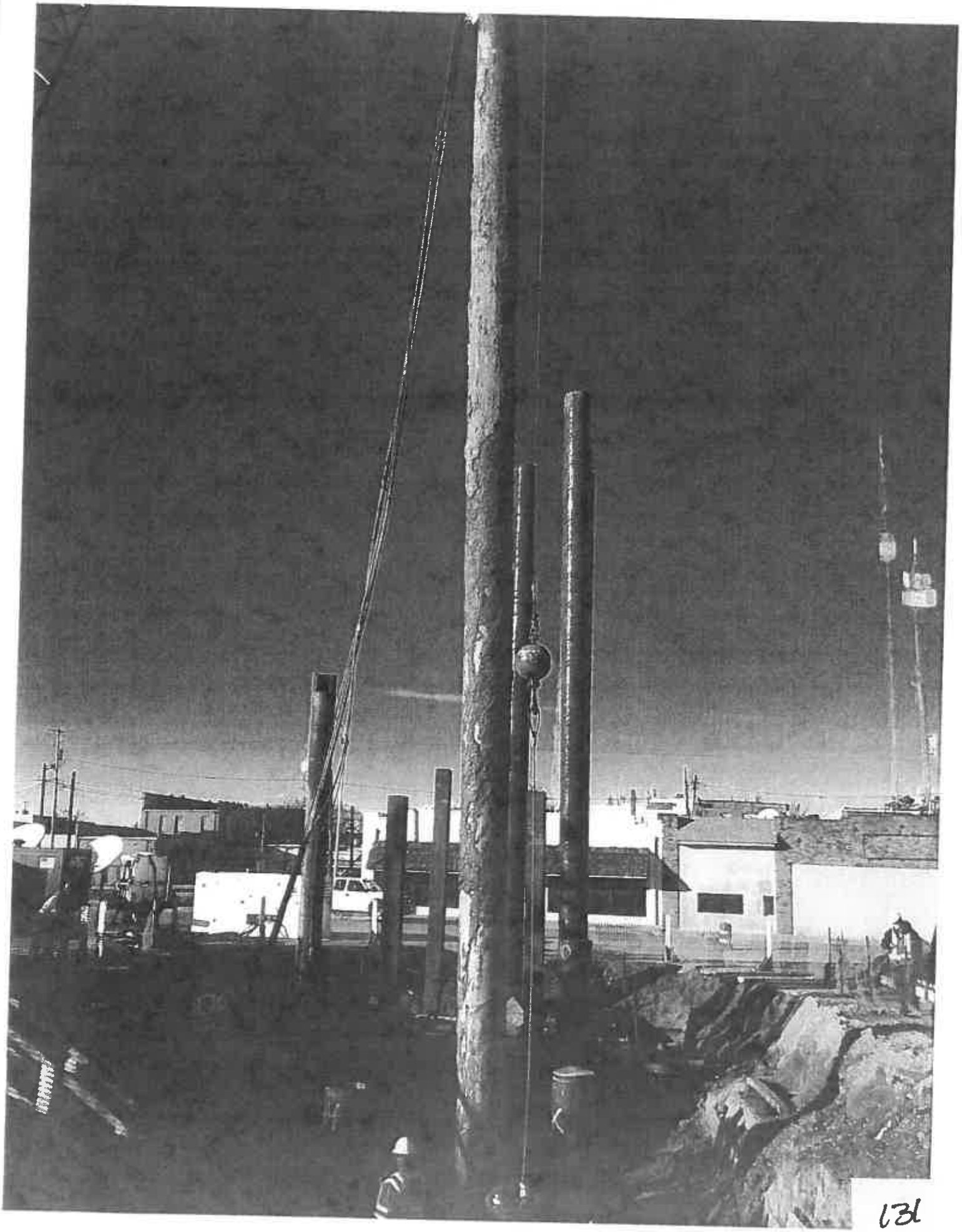
01/24/2012





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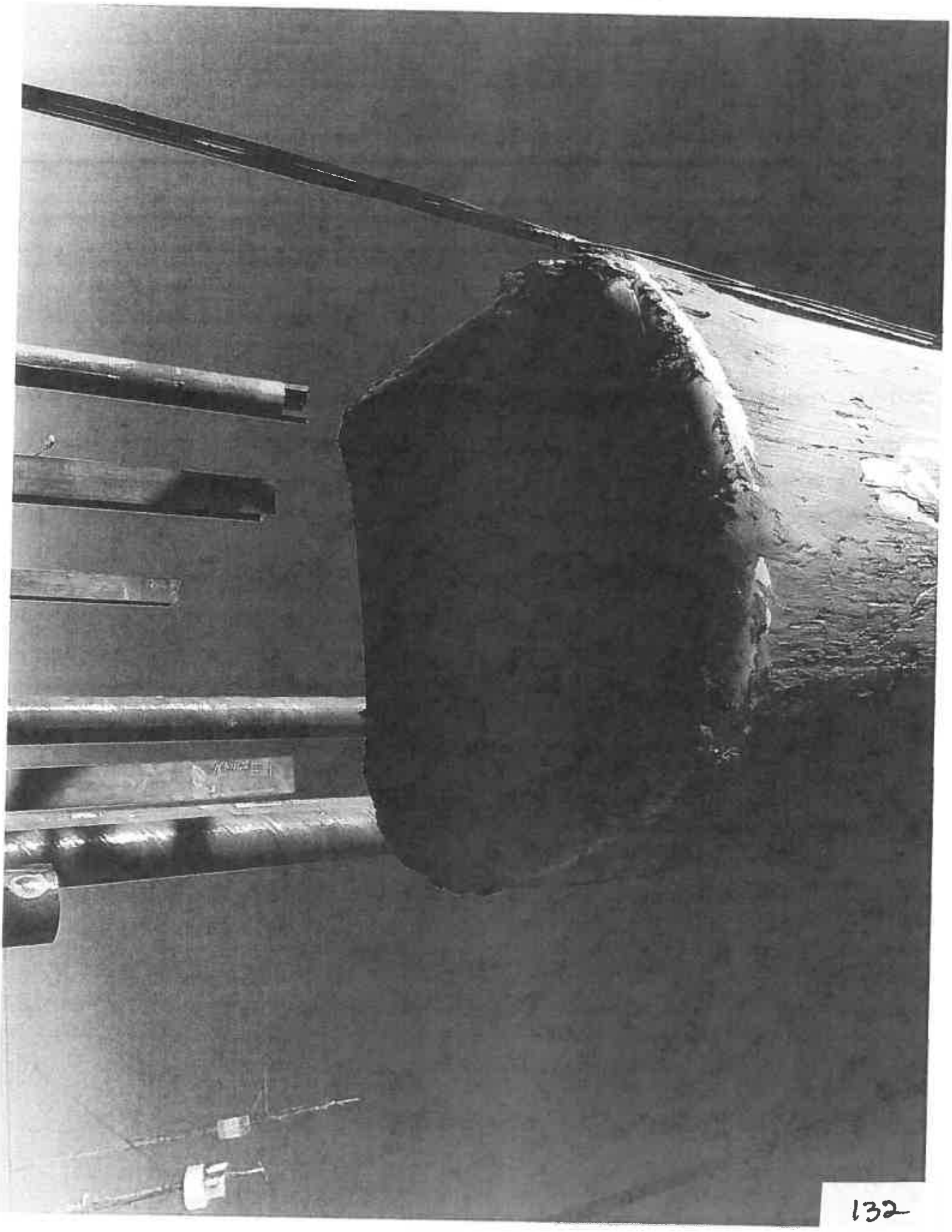

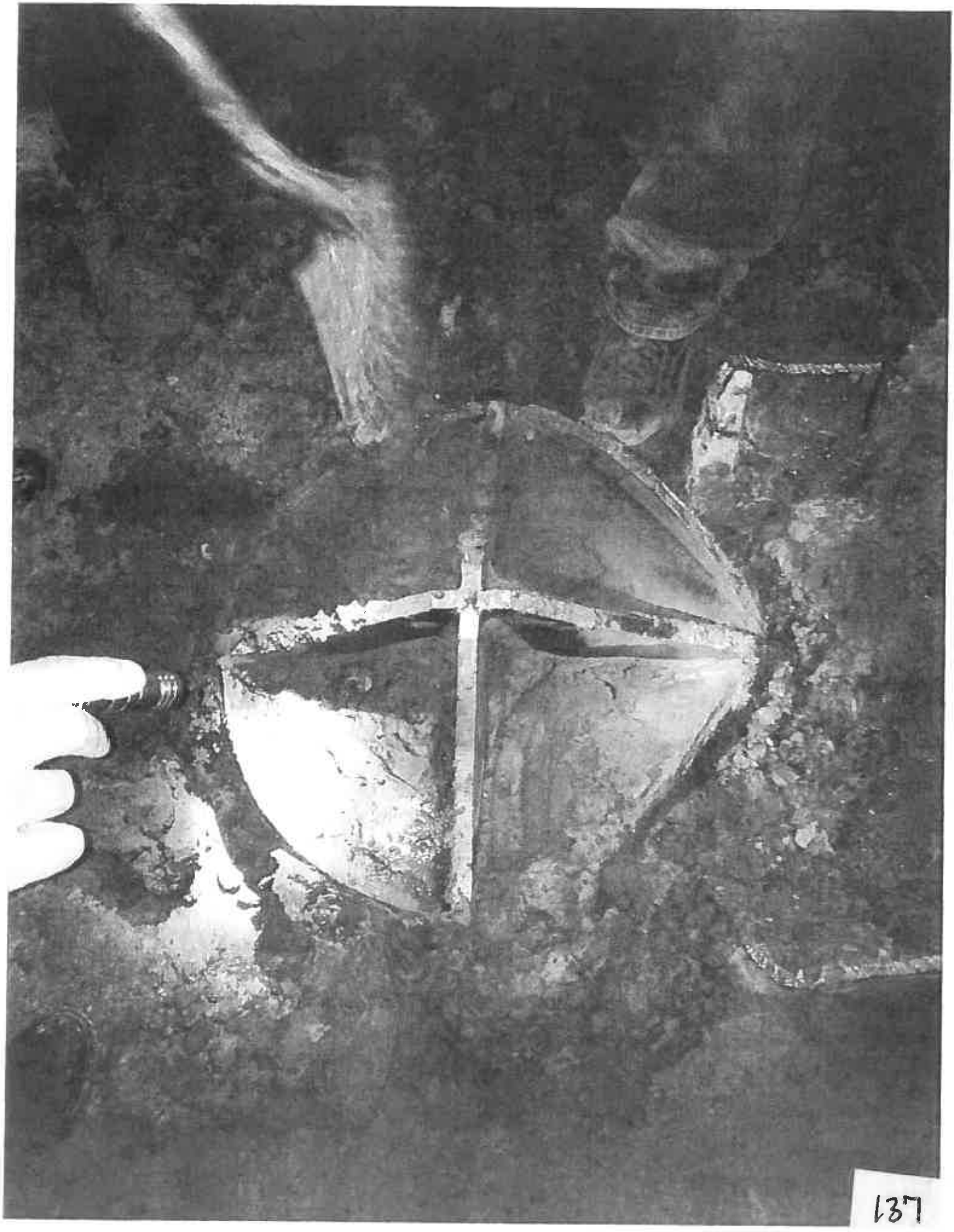

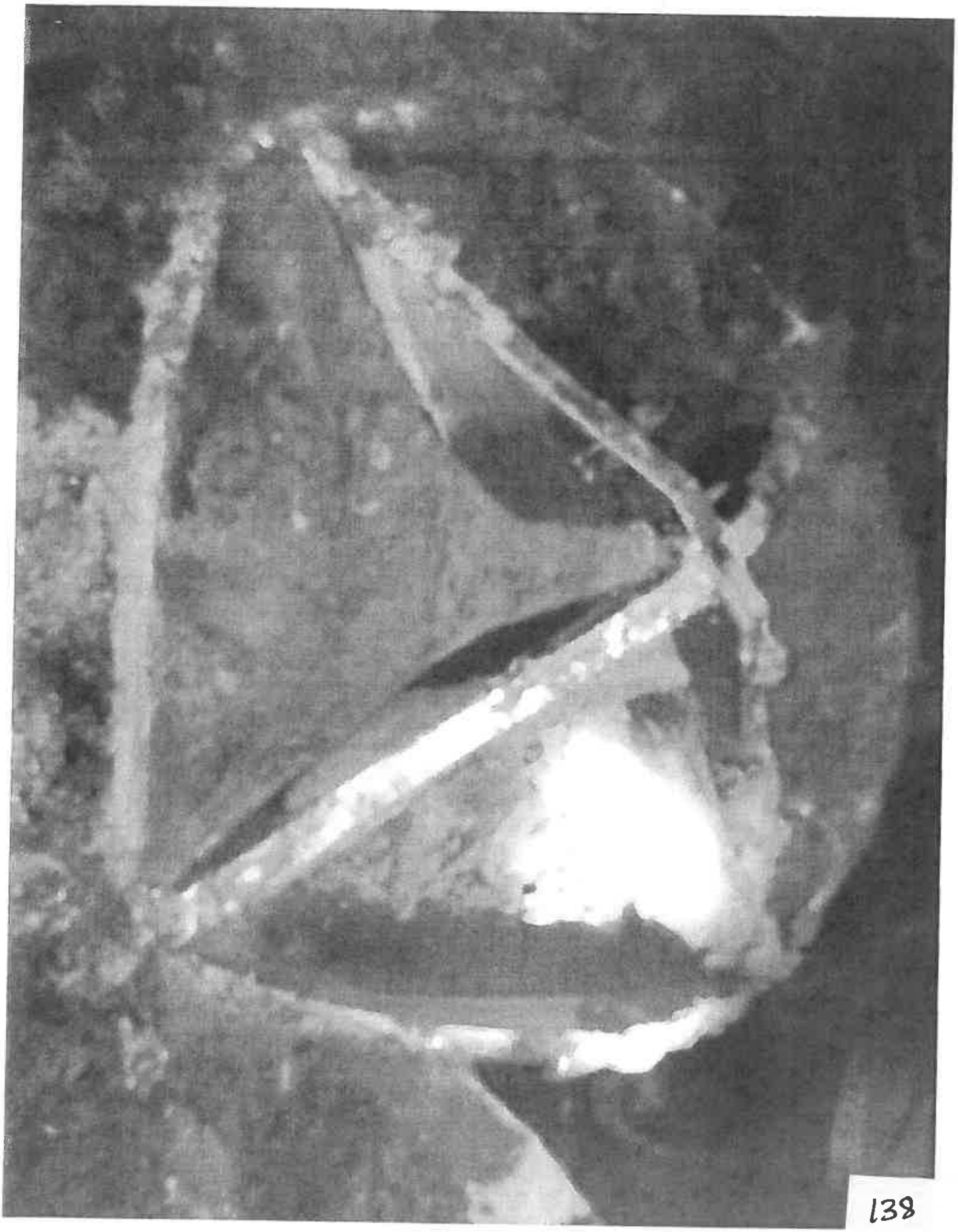

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC. **CLAIMANT**

V. **NO. 16-0047-CC**

ARKANSAS STATE HIGHWAY COMMISSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT **RESPONDENT**

CLAIMANT'S RESPONSES TO RESPONDENT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Claimant Rosiek Construction Co., Inc. responds to Respondent's First Set of Interrogatories and Requests for Production of Documents, and states:

General Objections

1. Rosiek objects to each interrogatory and request for production to the extent they seek to impose obligations beyond those imposed by the Arkansas Rules of Civil Procedure and applicable Arkansas law.

2. Rosiek objects to each request that calls for the disclosure of information that is confidential information, proprietary business information, or a trade secret.

3. Rosiek objects to each request that calls for the disclosure of information protected by the attorney-client privilege, the work product doctrine, or any other available privilege or protection.

Responses and Specific Objections

INTERROGATORY NO. 1: Please state the names, addresses, and telephone number, and relation to the Claimant, of all persons who you intend to call as a witness at the hearing of this matter.

ANSWER:

OBJECTION. Discovery is ongoing in this matter, and Rosiek reserves the right to supplement or amend this list as necessary. This list shall in no way be construed as a limitation on the persons that Rosiek may call for testimony before the Commission. Subject to this objection and reservation of rights, Rosiek states:

1. Ronnie Lawrence: Superintendent/Contract Mgr.
   2000 E. Lamar Blvd. #410
   Arlington, TX 76006
   (817) 277-4342
   Mr. Lawrence is also a project manager. Mr. Lawrence was initially sent to the jobsite to assist in resolving the pile driving problem. Mr. Lawrence worked with the pile driving subcontractor and initiated and oversaw the jetting. Mr. Lawrence was on site when the railroad delay took place and is familiar with how it affected the project including the structural steel erection. Mr. Lawrence is familiar with the BNSF Railroad communications and the overall claim.

2. Harry (Hank) Jones: Project Manager
   2000 E. Lamar Blvd. #410
   Arlington, TX 76006
   (817) 277-4342
   Mr. Jones would know about the claims as far as what caused the problems, delays, and extra work. Mr. Jones is also familiar with the communications and notices with the BNSF Railroad.

3. Steve Rosiek: Co-President
   2000 E. Lamar Blvd. #410
   Arlington, TX 76006
   (817) 277-4342
   Mr. Rosiek is familiar with the claim and has an understanding of the sequence of events, delays and damages.

4. Kent Bless: Bookkeeper/Controller
   2000 E. Lamar Blvd. #410
   Arlington, TX 76006
   (817) 277-4342
   Mr. Bless was responsible for the accounting documentation and detailed sorting/documentation of costs associated with the extra work and delays.

5. Mike Rosiek: Co-President
   2000 E. Lamar Blvd. #410
   Arlington, TX 76006

(817) 277-4342
Mr. Rosiek has a general understanding of the claim, sequence of events and damages.

6. Cheryl Townlian
   Upon information and belief, Ms. Townlian is the Manager of Public Projects for BNSF and had involvement and knowledge of the BNSF scheduling issues involved in Rosiek's claim.

7. Emanuel Banks, P.E.
   AHTD Deputy Director and Chief Engineer
   Upon information and belief, Mr. Banks has involvement and general knowledge of all issues involved in Rosiek's claim.

8. Ralph Hall, P.E.
   AHTD Deputy Director and Chief Engineer (Retired)
   Upon information and belief, Mr. Hall has involvement and knowledge of issues involved in Rosiek's claim, including scheduling items.

9. Frank Vozel, P.E.
   AHTD Deputy Director and Chief Engineer (Retired)
   Upon information and belief, Mr. Vozel has involvement and knowledge of issues involved in Rosiek's claim, including scheduling items.

10. Walter McMillan, P.E.
    AHTD District 10, District Engineer, P .E.
    Upon information and belief, Mr. McMillan has involvement and knowledge of all issues involved in Rosiek's claim.

11. Brad Smithee
    AHTD District 10, District Construction Engineer, P.E.
    Upon information and belief, Mr. Smithee has involvement and knowledge of certain issues involved in Rosiek's claim, including the pile driving tip claim, BNSF coordination issues and scheduling items.

12. Deric Wyatt
    AHTD District 10, Resident Engineer, P.E.
    Upon information and belief, Mr. Wyatt has involvement and knowledge of certain issues involved in Rosiek's claim, including the pile driving tip claim, weather issues and scheduling items.

13. Logan Hardin
    AHTD District 10, Project Engineer, P.E.
    Upon information and belief, Mr. Hardin has involvement and general knowledge of all issues involved in Rosiek's claim.

14. All witnesses identified by Respondents.

INTERROGATORY NO. 2: Please state briefly the nature and substance of the expected testimony of each person listed in your response to the preceding Interrogatory.

ANSWER: *See* Objection and Answer to Interrogatory No. 1.

INTERROGATORY NO. 3: Please state whether or not you will present any documentary evidence at the hearing for this matter. If your answer is in the affirmative, please provide:

a) a description of each such document you propose to introduce;

b) the facts to be presented or described by each such document; and

ANSWER:

OBJECTION, to the extent that this request seeks information protected by the attorney client privilege and work produce doctrine. Subject to this objection, Rosiek states that Rosiek may present documentary evidence at the hearing and such documentary evidence has already been or will be produced to Respondents in accordance with the requests for production herein. Further, discovery is ongoing in this matter, and Rosiek's provision of documents in response to this interrogatory and the requests for production herein is limited to documents presently within Rosiek's possession or control and not subsequently discovered.

REQUEST FOR PRODUCTION NO. 1: Unless already provided with those documents attached to your Complaint, please provide a copy of each document referred to in the preceding Interrogatory.

ANSWER:

See Answer to Interrogatory No. 3, Request for Production Nos. 2-5.

INTERROGATORY NO. 4: Please state the names, addresses, and telephone numbers of all persons, if any, whom you or your attorney will call as an expert witness at the hearing for the matter. State briefly the nature and substance of the proposed or expected testimony of each such expert witness and the grounds for each opinion.

ANSWER:

OBJECTION, to the extent that this request seeks information protected by the work produce doctrine. Further, discovery is ongoing in this matter, and Rosiek reserves the right to supplement or amend this list as necessary. This list shall in no way be construed as a limitation on the experts that Rosiek may call for testimony before the Commission. Subject to this objection and reservation of rights, Rosiek states:

Lou Wenick
Consulting Service Systems, Inc.
348 North Cove Blvd.
Panama City, FL 32401
(850) 784-4779
Mr. Wenick has reviewed, evaluated and opined on the issues presented by Rosiek's claim and is expected to testify as to those issues. The grounds for Mr. Wenick's opinions are based on Mr. Wenick's education, training and experience, review of project records and interviews of persons with knowledge regarding the Project.

Dan Brown
Dan Brown and Associates
P.O. Box 309
Jasper, TN 37347
(423) 942-8681
Dr. Brown has reviewed, evaluated and opined on the pile tip design error at issue in Rosiek's claim and is expected to testify as to that issue. The grounds for Dr. Brown's opinions are based on Dr. Brown's education, training and experience, review of project records and interviews of persons with knowledge regarding the Project.

REQUEST FOR PRODUCTION NO. 2: Please provide a copy of each expert's most recent resume and/or curriculum vitae, all written reports of his/her findings upon completion, and a copy of all documents reviewed, or relied upon by each expert.

ANSWER:

Rosiek shall produce these documents as kept in the usual course of business for inspection and copying during normal working hours at the places at which the documents are presently and usually stored at a mutually agreeable time.

INTERROGATORY NO. 5: Please list the name of every person from whom you or someone on your behalf has taken a statement, either written or oral, by court reporter, tape recorder, or otherwise, with regard to this lawsuit or the Project that is subject of this lawsuit. For each person supply his/her address, telephone number, age, and occupation.

ANSWER:

None.

REQUEST FOR PRODUCTION NO. 3: Unless already provided with those documents attached to your Complaint, please provide a copy of any and all documentation supporting your answer to the preceding Interrogatory.

ANSWER:

N/A

REQUEST FOR PRODUCTION NO. 4: Unless already provided with those documents attached to your Complaint, please provide a copy of any non-privileged notes, memoranda, photographs, or other documents in your possession or control that relate in any way to the allegations and/or claims made in your Complaint.

ANSWER:

Rosiek shall produce these documents as kept in the usual course of business for inspection and copying during normal working hours at the places at which the documents are presently and usually stored at a mutually agreeable time.

REQUEST FOR PRODUCTION NO. 5: Unless already provided with those documents attached to your Complaint, please provide a copy of all correspondences, facsimiles, agreements, emails, text message reports, or other written or electronic communication related to the Project between the following parties: Rosiek Construction and AHTD.

ANSWER:

Rosiek shall produce these documents as kept in the usual course of business for inspection and copying during normal working hours at the places at which the documents are presently and usually stored at a mutually agreeable time.

REQUEST FOR PRODUCTION NO. 6: Unless already provided with those documents attached to your Complaint, please provide copies of all exhibits, demonstrative aids, or other things that Blackstone plans to show or introduce at the hearing in this matter.

ANSWER:

OBJECTION. Rosiek objects to the request as vague and ambiguous as there is no identification of who Blackstone is, and Rosiek knows of no entity reasonably referred to as Blackstone in this matter, however, Rosiek will produce all such documents sufficiently in advance of the hearing to avoid surprise on Respondent's part.

Jack East III
2725 Cantrell Rd Suite 202
Little Rock, AR 72202
(501)372-3278
Bar ID No. 75-036

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CERTIFICATE OF SERVICE

I, Jack East III, Attorney at Law, do hereby certify that I have served the foregoing by depositing a copy in the United States Mail, Postage prepaid, this 8th day of December, 2015, addressed to:

David Dawson
Arkansas Highway & Transportation Dept.
P.O. Box 2261
Little Rock, AR 72203-2261

Jack East III

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

ROSIEK CONSTRUCTION CO., INC.	**CLAIMANT**
V.	**NO. 16-0047-CC**
ARKANSAS STATE HIGHWAY COMMSSION AND ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT	**RESPONDENTS**

ROSIEK CONSTRUCTION CO., INC.'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant Rosiek Construction Co., Inc. files its Proposed Findings of Fact and Conclusions of Law pursuant to the Arkansas State Claims Commission's August 12, 2015 correspondence setting this matter for hearing, and states:

Findings of Fact and Conclusions of Law

A hearing on the above-referenced matter was held before the Arkansas State Claims Commission on February 11, 2016, at 101 East Capitol Avenue, Suite 410, Little Rock, Arkansas 72201. On the basis of the testimony and other evidence presented, the Commission makes the following findings of fact and conclusions of law:

1. On October 18, 2011 Rosiek entered a contract ("Contract") with the Arkansas State Highway Commission ("ASHC") to construct a railroad overpass bridge and approaches on Arkansas State Highway 18, in Blytheville, Arkansas, Project No. 100705, Federal Aid Project STP-STPS-STPH-HSIP-FRAP-9051(5) & 9050 ("Project").

2. The Project was designed by and was to be administered by the Arkansas Highway and Transportation Department ("AHTD").

3. The original Contract amount was $10,954,060.37 and 200 working days allotted for completion.

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4. The Project was a 1,002.18 feet long bridge constructed to span the BNSF Railroad and included 437.82 total feet of approach embankment,[1] 160.91 feet on the west end of the bridge and 276.91 on the east end of the bridge.

5. In order to be used for public transportation, the adjacent AHTD Project No. 100740 had to be complete to link the bridge to local streets on both sides of the bridge.[2]

6. Until adjacent Project No. 100740 was complete, the bridge was not usable.

7. Rosiek planned and scheduled the Project with the intent to earn the $350,000.00 early completion bonus provided for in the Contract.

8. Before Rosiek began Project work, there were issues[3] on the Project that had not yet been addressed by AHTD. These issues impeded construction on seven of the eight intermediate bents[4] on the bridge and resulted in Rosiek beginning work almost two months later than called for under the Contract.

Rosiek's Pile Tip Design Error Claim

9. Rosiek's first major order of work on the Project was to drive the foundation piling.[5]

---

[1] Bridge approach embankment is the fill material beneath a bridge structure and extending beyond a structure's end for the full embankment width, plus an access ramp. The bridge approach embankment also includes any embankment that replaces unsuitable foundation soil beneath the bridge approach embankment.

[2] The embankment and roadway for Project No. 100740 is 5,335.02 feet long, with 3,501 feet to the west of Rosiek's Project and 1,834.02 feet to the east of Rosiek's Project. Project No. 100740 includes the requirement to pave the 437.82 feet of embankment Rosiek constructed adjacent to the bridge.

[3] The impediments to Rosiek starting work included an underground sewer impeding work on Bents 2, 3 and 4, an incomplete railroad agreement on Bents 5 and 6, an overhead electrical line impeding work on Bent 7, and an underground fuel tank impeding work on Bent 9. These impediments were not cleared until the first quarter of 2012. Of the intermediate bents, Bent 8 was left as the only possible place for Rosiek to begin its pile driving operations. Therefore, in order to be productive, Rosiek began driving piling at Bent 8 and changed its sequence of work from its originally scheduled sequence of working from west to east to working from east to west.

[4] Bents are parts of a bridge's substructure. A "bent" is a rigid frame that supports a vertical load and is placed transverse to the length of a structure. Bents are commonly used to support beams and girders.

[5] Pile foundations are deep foundations. They are formed by long, slender, columnar elements typically made from steel and/or reinforced concrete. Pile foundations are used for large structures, and in situations where the soil under is not suitable to prevent excessive settlement.

10. The Contract plans require the pile to be driven to a minimum tip elevation of 195.5' with a minimum safe bearing load of 115 tons per pile.

11. The driving procedure used and accepted by AHTD was to pre-bore each pile hole from the bottom of the footing elevation to 10 feet deep, insert the pile, drive the pile to the template, remove the template, and complete driving the pile to the required minimum tip elevation.

12. Contract plans indicated that the piles were to be round steel pipe pile, 24" x .500" with three possible design configurations[6] for the steel tips: (1) a conical-shaped tip; (2) a flat 2" steel plate; or (3) a flat ¾" steel plate with ¾" vaned tips.

13. Because each of these tips was provided for in the plans, Rosiek reasonably assumed each would be accurately designed for its intended purpose.

14. Because the abutment pile was required to have a pointed tip and because it was provided as an alternate design, Rosiek elected to use the vaned tips for all the piling.

15. Early during the pile driving, a number of the piling were damaged to the extent that AHTD rejected the use of those piles in the foundation. A pile was first damaged on January 17, 2012. This resulted in Rosiek having to extract and replace them.[7] The borings provided by AHTD show that Rosiek should have been able to drive the pile to the minimum tip elevation and safe bearing load without reaching refusal (20 blows per inch) or damaging the pile, but the piles were being damaged.

16. On January 23, 2012, AHTD directed Rosiek to stop driving production pile until the cause of the damage to the pile could be determined.

[6] The abutment pile was required to have a pointed tip.
[7] The first two piles were extracted on January 24, 2012.

17. AHTD permitted Rosiek to resume driving the production pile on January 26, 2012.

18. As of January 27, 2012, 32 pile had been driven to the required elevation without jetting and with no damage to the pile and were therefore accepted by AHTD. Eight pile had been damaged during driving and had to be replaced.

19. Rosiek requested a meeting with AHTD (and requested that the AHTD design engineer attend the meeting) to attempt to resolve the problem with the pile failing. The meeting was held on January 30, 2012 at the AHTD Project field office. Those in attendance were representatives of Rosiek, AHTD and Skyline Steel. The AHTD District 10 Construction Engineer did not request the design engineer to attend. At that meeting, Rosiek asked AHTD if AHTD could provide the calculated load the barrel of the pile and the pile vaned tips could withstand before failure occurred. Given AHTD's design engineer's absence, AHTD was unable to do so.

20. Instead, the supplier provided the load calculations. After Rosiek received the design load calculations from the supplier, Rosiek sent the design load calculations to the Resident Engineer.

21. The calculations for the steel pile components indicated divergent failure load ratings for the various tips which Rosiek could not have expected based on the three approved designs in the plans. The contract drawings show a steel pile with a round pipe, 24" x .500" barrel. The pile barrel has a failure load rating of 830 tons as verified by the supplier. The forged conical point tip has a failure load rating in excess of 800 tons per the manufacture of conical pile tips, DFP Foundation Products. The failure load rating for the other two alternate tips, a fabricated 2" flat steel plate tip and a fabricated ¾" steel plate with ¾" vaned tip are less than for

the conical point tips. The 2" flat plate tip has a failure load of 752 tons, **while the ¾" vaned tip estimated failure at only 278 tons**.

22. The failures experienced during Rosiek's driving operations were not due to Rosiek's driving method,[8] but due to an inadequate design of the vaned tips which did not match the barrel design strength[9] or equal the required driving conditions.

23. The first forty piling, including the piles that did not fail, were driven without jetting.[10] Rosiek was then required to jet all future pile after the failure load of 278 tons for the vaned tip was determined by Skyline Steel.

24. Rosiek began air jetting on January 31, 2012 at Bent 8 and continued until February 2, 2012. On February 6, 2012 Rosiek began water jetting at Bent 8. During the period between air jetting and water jetting, Rosiek had to place water hose, build a water jet, build a containment pond for the excess water caused by the water jetting, and make provisions for disposal of the water. Rosiek continued water jetting until all the piles were driven. This required relocating water lines, water pits, and disposal locations during the water jetting operation to manage the water.

25. Some tips even failed after Rosiek began jetting. Rosiek was only able to successfully drive the failed piles after Rosiek switched from using the vaned tip to the flat plat tip.

26. Ultimately, a total of 16 steel piles were damaged of which 12 steel piles had to be replaced due to the inadequately designed vaned tip. While the vaned tip was used, damage

[8] Rosiek's use of the hammers was appropriate for the soil conditions.
[9] The pile itself had sufficient strength to be driven to the minimum tip elevation if a suitably strong tip was provided.
[10] Jetting may loosen dense soil deposits with the help of water or air. To achieve this, water or air is discharged with pressure near a particular point or along sides of pile.

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occurred to the pile using both hammers Rosiek used (the Delmag Pile Hammers, D36-32 and D46-32), and when jetting and not jetting.

27. Rosiek is entitled to damages in connection with AHTD's representation in the Contract plans that the flat ¾" steel plate with ¾" vaned tip was a permissible alternate for the tip design. *Hous. Auth. of City of Texarkana v. E. W. Johnson Const. Co.*, 264 Ark. 523, 533, 573 S.W.2d 316, 322 (1978) ("We are persuaded that where, as here, the owner supplies plans and specifications to a contractor detailing the work to be performed, the owner implicitly warrants the adequacy and suitability of the plans and specifications for the purpose for which they are tendered. We are further persuaded that this implied warranty is not nullified by any stipulation requiring the contractor to make an on-site inspection where the repairs are to be made and a requirement that the contractor examine and check the plans and specifications... where delays result, as here, because of faulty specifications and plans, the owner will have to respond in damages for the resulting additional expenses realized by the contractor. Moreover, the owner's breach of its implied warranty may not be cured by simply extending the time of the performance of a contractor's assignment.").

28. Rosiek is entitled to damages in connection with the pile tip design error totaling $760,922.54 as follows:

1. Jetting Cost and Pulling/Repairing Pile with Failed Tips Cost:[11]	$173,997.87
2. Extra On-Site Supervision:[12]	$ 92,860.02
3. Extra Material[13]/Transportation Cost:[14]	$ 45,377.58

[11] This cost is calculated based on contemporaneous records maintained on the jobsite on a daily basis. The costs consist primarily of labor and owned and rented equipment. Both the labor and equipment have been recorded on daily timesheets that include both hours worked and relevant hourly rates. Rental equipment costs are based on equipment company invoices. Owned equipment rates are based on the rates in the Dataquest Blue Book.

[12] This cost pertains to Rosiek's supplementation of its on-site supervisory personnel with Mr. Ronnie Lawrence who was needed to manage the on-site difficulties including those associated with the pile tip design error. Among Mr. Lawrence's work effort was the designing of the pile jetting system as well as overseeing the jetting operation. These costs represent Mr. Lawrence's salary, transportation costs, and living and travel expenses.

[13] The Extra Material Costs consist of the additional piling and pile tips Rosiek purchased to replace the damaged piling and tips. These costs are based on invoiced prices.

Total Direct Costs for Piling	$312,235.47
4. Extended Job Site Costs:[15]	$327,328.29
Subtotal	$639,563.76
5. Acceleration (Labor Only):[16]	$121,358.78
Total Costs	**$760,922.54**

29. Rosiek is entitled to a 53 day time extension[17] in connection with the pile tip design error as follows:

March 29, 30, 2012	2
April 2-4, 9-13, 16-20, and 23-27, 2012	18
May 1-4, 9-11, 14-18, 22-25, and 29-31, 2012	19
June 6-8, 11, 13-15, 18-22 and 25-26, 2012	14
Additional Working Days Requested	53
(Number of Calendar Days)	(90)

[14] The Extra Transportation Costs were incurred by Rosiek to transport equipment to and from the jobsite at an internal rate of $4.00/mile.

[15] This cost is calculated using an average calendar day per diem cost for Rosiek's extended jobsite overhead from its job costs reports for the years 2012 and 2013. These costs include on-site supervisory and administrative staff, utilities, supplies, and railroad flaggers and inspectors. Additionally, standby equipment costs were calculated per calendar day using Dataquest Blue Book standby rates. Similarly, extended per diem costs for supervisor's transportation were calculated using Dataquest Blue Book operating rates.

[16] The Labor Acceleration cost is merited because adding two months time at the very beginning of a one-year Project frustrated Rosiek's ability to complete its work in a timely and efficient manner. Rosiek accelerated its work by expending overtime that it did not anticipate throughout the construction of the Project to maintain its Project plan. The overtime calculation is based on Rosiek's payroll and job cost records and includes only the premium time.

[17] Due to the initial conflicts at the bridge bents, the only location available for Rosiek to begin its pile driving work was at Bent 8. The final order in which the work was performed was Bents 8, 7, 9, 10, 6, 1, 5, 4, 3 and 2 due to the utility conflicts. Rosiek's delay is measured by adjusting its planned schedule to take into account the actual start date for the piling on January 5, 2012 instead of the December 5, 2011 date shown in its original schedule. The sequence of pile driving from west to east was maintained as well as the planned driving durations. After adjusting the schedule, Rosiek could have completed (and planned to complete) pile driving on March 28, 2012 under normal pile driving conditions with minimal delays. The completion date, when all pile had been driven was June 26, 2012, 53 working days and 90 calendar days later than planned.

BNSF Railroad Structural Steel Delay

30. The bridge superstructure[18] consisted of structural steel beams spanning the ten bents of the bridge. The structural steel was designed in three divisions designated as Divisions 1, 2, and 3 numbered from west to east. A major portion of the Division 2 steel actually spans the railroad tracks, and this steel is the subject of the claim.

31. Steel was first erected in Division 3 from October 16, 2012 to November 8, 2012.

32. The structural steel was erected in Division 1 from January 31, 2013 to February 20, 2013.

33. On February 20, 2013, a meeting was held at Rosiek's field office regarding the bridge beam erection over the BNSF Railroad. Those present were representatives from AHTD, Rosiek, Garver (a BNSF subcontractor) and the BNSF Roadmaster, Dustin Blackshear. Rosiek had made arrangements to begin setting beams over the railroad after the February 20, 2013 meeting. During the February 20, 2013 meeting, Rosiek was informed by AHTD through Mr. Blackshear that no track time would be given Rosiek until March 18, 2013 because of scheduling by the railroad which had a two year look ahead rolling schedule for track work and closures. This was the first time Rosiek was informed of this BNSF work schedule, and the BNSF look-ahead schedule is not mentioned in the Contract.

34. Ms. Cheryl Townlian, who served as the BNSF Manager of Public Projects for over a decade, and who was the BNSF Manager of Public Projects in connection with this Project, testified that she had never heard of a two year look ahead schedule, and did not believe that such a document even existed. Rosiek does not bear responsibility to know of a document and work around that document when that document is not referenced by Rosiek's Contract and

[18] On a bridge, the portion of the structure that is the span and directly receives the live load is referred to as the superstructure. In contrast, the abutment, piers, and other support structures are called the substructure.

when the BNSF representative in charge of scheduling and coordination does not believe such a document exists.

35. Steel erection for Division 2 was then initially delayed until March 18, 2013 due to the BNSF work schedule, which represents a 26 calendar day delay. As of March 18, 2013, BNSF track work was still ongoing. BNSF delayed track clearance time again until March 25, 2013, which represents a 7 calendar day delay. On March 25, 2013, BNSF delayed track clearance time again until April 1, 2013, which represents a 7 calendar day delay. On April 1, 2013, BNSF delayed track clearance time again until April 8, 2013, which represents a 7 calendar day delay. On April 8, 2013, BNSF delayed track clearance time again until April 10, 2013, which represents a 2 calendar day delay.

36. Rosiek was informed by the BNSF representative that April 10, 2013 was a good date to begin steel erection. Beams were released for shipment on April 9, 2013, with delivery on April 10, 2013. However, on April 10, 2013, BNSF canceled the track clearance time again until April 15, 2013, which represents a 5 calendar day delay. Because the beams were loaded and in transit, Rosiek had to unload and stockpile the beams on the job site.

37. On April 12, 2013, Rosiek was notified by the BNSF Roadmaster that beginning on April 15, Rosiek would be allowed a 6-hour window daily for two weeks to erect structural steel over the railroad tracks.[19]

38. As of April 14, 2013, the Project had been delayed 54 calendar days due to the BNSF scheduling conflict.

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[19] On April 15, 2013, work started on the center span of structural steel in Division 2, but the delay continued until Rosiek could reach a point (placement of the metal decking) where it could perform follow-on work effectively without delay. (Change Order No. 6 added an additional 16 working days [30 calendar days] time extension to the Contract after time began on June 10, 2013. Because the DBE subcontractor placing the stay-in-place deck forms and the reinforcing steel had been forced to demobilize from the Project due to the railroad steel delay, this time was granted to permit the subcontractor to remobilize to the Project to resume the work it was performing when the delay began.)

39. AHTD stated it would not resume time charges until June 8, 2013. AHTD stated the delay period was for 54 calendar days (February 20, 2013 to April 14, 2013), but the time period AHTD used to not charge Contract time for the delay was from April 15, 2013 to June 7, 2013. Time charges then resumed on Monday, June 10, 2013.

40. Following the BNSF Railroad delay, Rosiek requested a 67 working day time extension in the July 2013 to November 2013[20] time period based on its determination that Project delays forced it to work during these days when the Project should have been otherwise completed.

41. Rosiek requested a Contract time extension under Item 108.06(d)(2)d on July 3, 2013 based on abnormal weather conditions.

42. The Resident Engineer responded to this request on July 29, 2013 based on Item 108.06(c), instead of Item108.06(d)(2)d under which the request was made.

43. Item 108.06(c) provides that time will be assessed when "conditions allow the Contractor to effectively utilize 60% of normal forces and equipment to prosecute the work required at that time, for at least 60% of the Contractor's normal work hours."

44. Item 108.06(d)(2)d provides that an extension of time will be considered if "[w]eather conditions or the condition of the ground or materials were significantly abnormal and these conditions significantly delayed the work."

45. In connection with the request for a Contract time extension, Rosiek provided certain additional information requested by the Resident Engineer on August 7, 2013. The Resident Engineer's follow-up response was again based on Item 108.06(c), stating that Contract time was charged based "on the value and quantity of work items available."

[20] Thirty-nine days within this time period merit a time extension based on inclement weather.

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46. Time charges are to be based on the resources required "to prosecute the work required at the time," meaning that work which controls the completion time for the Project.

47. Time is not to be charged on non-critical work which is being performed solely because the contractor is working. Rosiek's CPM schedule on this Project shows that the embankment became critical on the schedule by July 2013 and stayed critical until that work was completed. The time lost was because of the abnormally rainy weather Rosiek faced.[21]

48. The Resident Engineer did not make a distinction between Item 108.6(d)(2)d and Item 108.06(c) in the Standard Specifications. Rosiek met all of the required criteria in Item 108.06(d)(2)d for a time extension, and is entitled to an extension of time to the Contract due to abnormal conditions beyond the control of Rosiek (weather) while time was being charged.

49. Because the delays in erecting the structural steel and associated delays were so lengthy, it forced Rosiek to work through inclement weather in the second half of 2013 and through the winter of 2013/2014 to complete the Project. Absent the railroad delay, work could have been completed prior to the second half of 2013 and in advance of the winter of 2013/2014.[22]

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[21] Rosiek engaged in many attempts to prepare the areas that were to receive embankment, but due to rain conditions the areas were too wet for embankment operations. Rosiek aerated, undercut, and reprocessed the soils, but the soils remained unstable due to the excess moisture. In July 2012, AHTD agreed to lime stabilize some of the area so the embankment could proceed. After the region's less rainy months of August and September 2012, Rosiek processed the embankment when possible, but work was often slowed due to autumn rain. Rosiek would get the work area ready for embankment and then would have to dry the dirt at the pit or bring in moist dirt and dry it on site. Then it would rain again. Rosiek kept working on the embankment during the winter of 2012/2013 with little progress due to continued unfavorable weather conditions. During the first half of 2013, Rosiek continuously reworked embankment due to excess moisture conditions. Rosiek could work the embankment so it would pass the density test, but it would then fail the stability test. By the fourth quarter of 2013, the embankment and Geogrid work was completed so that all embankment dependent work remaining could also be completed.

[22] AHTD partially addressed the structural steel delay by not charging time during the delay and providing a time extension for a follow-on delay related to placing the stay-in-place deck forms on the structural steel and the reinforcing steel. However, AHTD did not monetarily compensate Rosiek for this delay.

50. Rosiek was not compensated for job site overhead and extended equipment costs for the 54 calendar days for the railroad delay or for the 30 calendar days added by Change Order Number 6.

51. But for the BNSF Railroad delay, Rosiek would not have needed to remain on the Project from November 16, 2013 (the day time charges stopped due to seasonal wet and cold weather) to April 23, 2014 (159 calendar days).

52. AHTD argued that Rosiek is not entitled to these delays pursuant to the terms of the C1 Agreement between Rosiek and BNSF. However, the primary focus of that C1 Agreement was Rosiek's insurance and indemnity requirements on behalf of BNSF, coupled with a requirement to provide 3 weeks advance notice of times and dates for proposed work windows. Although the C1 Agreement makes clear that BNSF "will not be responsible for any additional costs or expenses resulting from a change in work windows," there is no statement within the C1 Agreement that suggests AHTD would not bear that same responsibility. The C1 Agreement specifically provides that "[a]dditional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project." The import of the provision is that Rosiek was required to maintain accounting records of the expenses resulting from a change in work windows because those delays were compensable, and collectable from AHTD.

53. Rosiek is entitled to the following damages[23] due to the BNSF Railroad Structural Steel Delay:

[23] The damages related to this claim are all time related and are calculated in a manner similar to the time related costs for the pile tip design error claim. The costs have been calculated for the relevant delay periods in 2013 using average per diem rates for jobsite overhead and equipment for 2012 and 2013, and a lesser rate has been calculated for 2014 for jobsite overhead and equipment as the Project was being completed.

Extended Jobsite Costs:

February 20, 2013 through April 14, 2013 and June 10, 2013 through July 15, 2013:	$ 399,899.51
November 16, 2013 through December 31, 2013:	$ 187,429.53
January 1, 2014 thru April 23, 2014:	$ 294,199.74
Total:	**$ 881,528.78**

Railroad Flagger

54. The Project Special Provisions contain stringent requirements for when a railroad flagger must be on site. Flagging is a full-time position given the notice requirements to have a flagger on the Project and to remove a flagger from the Project combined with the physical conditions of the work in relation to the railroad tracks.

55. Rosiek planned on completing the Project by December 17, 2012, and Rosiek anticipated providing these flagging services through its planned completion date.

56. Due to AHTD-caused Project delays, flagging services were required through February 26, 2014. Rosiek is entitled to reimbursement for the amount Rosiek paid for flagger services from December 18, 2012 through February 26, 2014, which totals $195,463.47.

Liquidated Damages, Road User Costs and Early Completion Bonus

57. The Project overran its adjusted Contract completion time by 28 working days. This has been determined by the difference of the Contract days charged less the adjusted Contract days allowed (248 days charged less 220 days allowed). As a result, AHTD has withheld the following sums from Rosiek and has not awarded Rosiek the bonus Rosiek anticipated earning:

Item	Amount
Liquidated Damages- 28 Days @$2,000	$ 56,000
Daily Road User Cost- 28 Days @$10,000	$ 280,000
Bonus Not Earned- 35 Days @$10,000	$ 350,000
TOTAL	**$686,000**

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58. Based on the merits of the time extension requests for the foregoing Project issues, Rosiek is entitled to return of the liquidated damages and Daily Road User Costs.

59. Specifically regarding AHTD's assessment of Daily Road User Costs, Project No. 100740 was not completed at the same time as Rosiek's Project to enable the public to timely use the bridge and approach roadways. When the last day was charged on Rosiek's Contract, Project No. 100740 was only 7.87% complete; a year after Rosiek had completed its work, Project No. 100740 had advanced only to the point of 12.28% completion. By the Contractual language used to define the Daily Road User Cost, Rosiek did not cause any "interference and inconvenience to the road user" because there could be no road user until Project No. 100740 was completed.

60. Rosiek is entitled to the maximum early completion bonus of $350,000.00 permitted by the Contract.[24] Rosiek planned to complete the Project to achieve the maximum bonus permitted under the Contract. Based on the events on the Project and corresponding delays, the payment of this $350,000.00 bonus to Rosiek is warranted.

61. For the foregoing reasons, ASHC breached the Contract and AHTD mis-administered the Contract, and Rosiek is entitled to damages.

62. A consolidated summary of the damages due to Rosiek follows:

[24] The early completion provision permits the contractor to receive a $10,000 per day payment (or "bonus") for up to 35 working days for every day the contractor is substantially complete with its work prior to the number of contract days the contractor selects in its bid.

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Item	Calendar Days to Determine Damages	Amount	Working Day Time Extensions
Pile Tip Design Error	90	$ 760,922.54	53
BNSF RR Steel Delay	248	$ 881,528.78	
Contract Time Extension		N/A	39 (up to 67)
Additional Flagging Costs		$ 195,463.47	
Daily Road User Cost		See Below	
Partnering		$ 0.00	
SUBTOTAL		**$1,837,914.79**	
Return Daily Road User Cost		$ 280,000.00	
Return Liquidated Damages		$ 56,000.00	
Earned "Bonus"		$ 350,000.00	
SUBTOTAL		**$ 686,000.00**	
SUBTOTAL		**$2,523,914.79**	**92**
	TOTAL	**$2,673,914.79**	

Signed for and with the concurrence of the majority of members on _____, 2016:

_____
Jimmy Simpson, Chair

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ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

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April 6, 2016

Via Facsimile – 501-682-2823

Ms. Brenda Wade, Director
Arkansas State Claims Commission
101 East Capitol Avenue, Suite 410
Main Street Mail
Little Rock, AR 72201-3823

Re: *Rosiek Construction Co., Inc. vs. AHTD*
Claim No. 16-0047-CC

Dear Ms. Wade:

After mutual discussions, neither party to this action will file an appeal of the Claims Commission's decision. Please forward the Commission's opinion to the Claims Review Subcommittee for review and approval. Thank you.

Sincerely,

David Dawson
Staff Attorney

/DD

cc: Jack East, III – 501-376-0949

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STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim $ 2,523,914.79 **Claim No.** 16-0047-CC

Rosiek Construction Co, Inc. **Claimant**

vs.

AR Highway & Transportation Dept. **Respondent**

State of Arkansas

Date Filed July 20, 2015

Attorneys Jack East III, Attorney
Brad Copenhaver, Attorney
Christian Cutillo, Attorney **Claimant**

David Dawson, Attorney **Respondent**

Type of Claim Breach of Contract

FINDING OF FACTS

This Claim was originally filed for breach of contract in the amount of $2,523,914.79 against Arkansas "Highway & Transportation Department. Present at Hearing February 11, 2016 was the Claimant, represented by Jack East III, and the Respondent, represented by David Dawson, Staff Attorney. The Claims Commission herby unanimously finds for the Claimant, Rosiek Construction Co, Inc. in the amount of $1,292,386.01.

A hearing on the above-referenced matter was held before the Arkansas State Claims Commission on February 11, 2016, at 101 East Capitol Avenue, Suite 410, Little Rock, Arkansas 72201. On the basis of the testimony and other evidence presented, the Commission makes the following findings of fact and conclusions of law:

1. On October 18, 2011, Rosiek entered a contract ("Contract") with the Arkansas State Highway Commission ("ASHC") to construct a railroad overpass bridge and approaches on Arkansas State Highway 18, in Blytheville, Arkansas, Project No. 100705, Federal Aid Project STP-STPS-STPH-HSIP-FRAP-9051(5) & 9050 ("Project").

2. The Project was designed by and was to be administered by the Arkansas Highway and Transportation Department ("AHTD").

(See Back of Opinion Form)

CONCLUSION

Upon consideration of all the facts, as stated above, the Claims Commission hereby unanimously allows this claim in the amount of $1,292,386.01 **and will include the claim in a claims bill to be submitted to the 91st General Assembly, Fiscal Session 2016, for subsequent approval and payment.**

Date of Hearing February 11, 2016

Date of Disposition March 11, 2016

Chairman

Commissioner

Commissioner

***Appeal of any final Claims Commission decision is only to the Arkansas General Assembly as provided by Act #33 of 1997 and as found in Arkansas Code Annotated §19-10-211.*

3. The original Contract amount was $10,954,060.37 and 200 working days allotted for completion.

4. The Project was a 1,002.18 feet long bridge constructed to span the BNSF Railroad and included 437.82 total feet of approach embankment, 160.91 feet on the west end of the bridge and 276.91 on the east end of the bridge.

5. In order to be used for public transportation, the adjacent AHTD Project No. 100740 had to be complete to link the bridge to local streets on both sides of the bridge.

6. Until adjacent Project No. 100740 was complete, the bridge was not usable.

Rosiek's Pile Tip Design Error Claim

7. Rosiek's first major order of work on the Project was to drive the foundation piling.

8. The Contract plans require the pile to be driven to a minimum tip elevation of 195.5' with a minimum safe bearing load of 115 tons per pile.

9. Rosiek elected to use the vaned tips for all the piling.

10. Early during the pile driving, a number of the piling were damaged to the extent that AHTD rejected the use of those piles in the foundation.

11. On January 23, 2012, AHTD directed Rosiek to stop driving production pile until the cause of the damage to the pile could be determined.

12. AHTD permitted Rosiek to resume driving the production pile on January 26, 2012.

13. The failures experienced during Rosiek's driving operations were not due to Rosiek's driving method, but due to an inadequate design of the vaned tips which did not match the barrel design strength or equal the required driving conditions.

14. Rosiek began air jetting on January 31, 2012.

15. Rosiek is entitled to damages in connection with the pile tip design error totaling $760,922.54.

16. The contract requirement that the Contractor coordinate with the Railroad to schedule work windows for performing work across the tracks are included as a Special Provision in the construction contract. Rosiek signed a C-1 agreement with the Railroad outlining theserequirements.

17. BNSF Manager of Public Projects, Cheryl Townlian, testified that the Contractor had the responsibility to schedule work windows with the Railroad, not the Respondent. She also testified that the AHTD was never informed about a two year look-ahead schedule that she didn't think existed.

18. Delays due to BSNF Railroad are charged to Rosiek per its assumption of risk to Contract and railroad right of preemption.

Railroad Flagger

19. The Project Special Provisions contain stringent requirements for when a railroad flagger must be on site. Flagging is a full-time position given the notice requirements to have a flagger on the Project and to remove a flagger from the Project combined with the physical conditions of the work in relation to the railroad tracks.

20. Rosiek planned on completing the Project by December 17, 2012, and Rosiek anticipated providing these flagging services through its planned completion date.

21. Due to AHTD-caused Project delays, flagging services were required through February 26, 2014. Rosiek is entitled to reimbursement for the amount Rosiek paid for flagger services from December 18, 2012, through February 26, 2014, which totals $195,463.47.

Liquidated Damages, Road User Costs and Early Completion Bonus

22. The Project overran its adjusted Contract completion time by 28 working days. This has been determined by the difference of the Contract days charged less the adjusted Contract days allowed (248 days charged less 220 days allowed). As a result, AHTD has withheld the following sums from Rosiek and has not awarded Rosiek the bonus Rosiek anticipated earning:

Item	Amount
Liquidated Damages - 28 Days @ $2,000	$56,000
Daily Road User Cost - 28 Days @ $10,000	$280,000
Bonus Not Earned - 35 Days @ $10,000	$350,000
TOTAL	**$686,000**

23. Based on the merits of the time extension requests for the foregoing Project issues, Rosiek is entitled to return of the liquidated damages and Daily Road User Costs.

24. Rosiek is not entitled to the maximum early completion bonus of $350,000.00 permitted by the Contract. Delays related to BNSF Railroad are charged to Rosiek.

25. For the foregoing reasons, AHTD partially breached the Contract and Rosiek is entitled to damages.

26. A consolidated summary of the damages due to Rosiek are as follows:

Item	Amount
Pile Tip Design Error	$760,922.54
Additional Flagging Costs	$195,463.47
Return Daily Road User Costs	$280,000.00
Return Liquidated Damages	$56,000.00
TOTAL	**$1,292,386.01**