

Road Racket

Some Florida highway contractors are building court cases as they construct roads. The state settles up eagerly — and generously.

By Cynthia Barnett

In September 1995, Anderson Columbia Co., one of the largest road builders in Florida, won a \$12-million Department of Transportation contract to widen a 3.6-mile strip of State Road 96 that fronts a busy Pensacola business district.

The contract specified that the project should be completed in 20 months, by June 1997. Anderson Columbia finished more than a year late, in July 1998. The delay was due in part to DOT's construction plans, which required numerous revisions. But the company was to blame as well: It neglected the job for six months to do various other projects, according to DOT records. Overall, DOT rated the quality of Anderson Columbia's work on the project as poor.

But later in the summer of 1998, when Anderson Columbia demanded an additional \$5.9 million for the project, neither timeliness nor quality seemed to matter. DOT District 3 Secretary Edward Prescott negotiated a settlement with Anderson Columbia Chairman Joe Anderson III in a telephone call that included two other District 3 employees, engineer Steve Benak and operations director Jimmy Rodgers. The DOT's only documentation of the negotiation is a piece of scratch paper scribbled by Benak on Sept. 18, 1998:

"I had offered \$1.5 million on 8-12-98," Benak's note reads.

"Joey wanted \$3.4 million.

"Jimmy offered \$2 million.

"Joey lowered to \$2.9 million.

"Edward settled at \$2.4 million if Joey would send in back

up documentation.

"Joey agreed."

And so the DOT officials coughed up the extra millions — for work that wasn't delivered on time, and that the agency had deemed poor. They did so despite a consulting engineer's recommendation that Anderson Columbia should receive only \$108,931 in additional payments. The DOT officials also allowed Anderson Columbia to send in backup paperwork later, when agency rules require up-front justification for every dime.

It's neither unusual nor inappropriate for road contractors to file claims for additional payments. Unanticipated problems such as sinkholes or hidden utility lines can make it impossible to bring a highway project in for the bid price. Often, the DOT and the contractors work out claims on the job, with what's known as supplemental agreements. If they can't agree, there's an appeals process that can, all else failing, end up in court.

But both DOT and industry insiders say that in recent years, some contractors have used the claims process to re-engineer the low-bid system — they underbid to win the job and then try to make their profits with supplemental claims and lawsuits. In some cases, contractors have tried to make as much from the claims as they did on the original contract. After completing a \$34-million Interstate-75 widening project in Marion County, for example, White Construction demanded \$30 million in additional payment. The DOT, which tends to lose lawsuits, is often willing to settle — even without proof that contractors deserve the money. From the time they make their bids, complains Gregory Xanders, the

ON 9-18-98

TELEPHONE CONF. WITH JOEY ANDERSON
J. RODGERS, H.E. PRESCOTT, MYSELF —

I HAD OFFERED 1.5 MILLION ON 8-12-98

JOEY WANTED 3.4 MILLION. JIMMY OFFERED 2 M.

JOEY LOWERED TO 2.9 MILLION —

EDWARD SETTLED AT 2.4 MILLION IF JOEY WOULD
SEND IN BACK UP DOCUMENTATION. JOEY AGREED.

SJB



“The contractors get greedy.”
 Longtime Florida road builder John Coxwell got out of the business in part because of the claims game. He says some contractors bid impossibly low and make the profit up later in claims.

DOT’s state construction engineer, “Some of the companies are trying to build a court case instead of a road project.”

The figures tell the story: Over the past five years, Florida road builders have demanded more than \$185 million in claims from the DOT. In 1996-97,

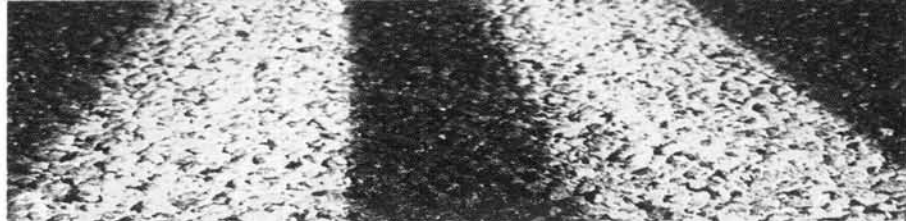
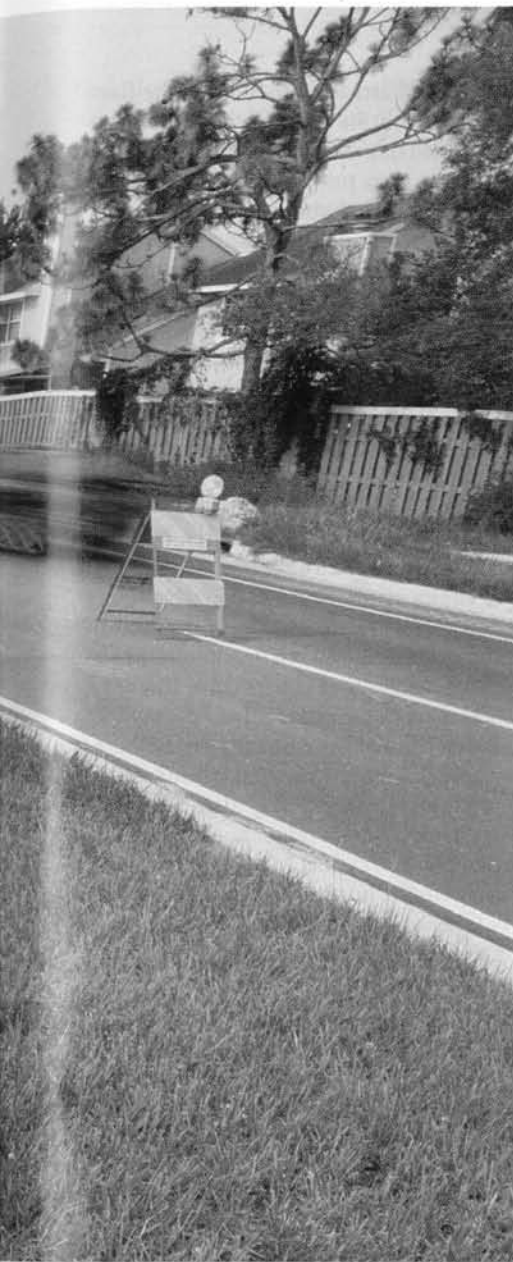
the agency paid out a total of \$20.9 million in settlements. That figure grew to \$41.3 million in 1997-98 and to \$65.4 million in 1998-99 — a 217% increase in just three years. The growing sum paid out in claims is eating up an increasing percentage of Florida’s highway construction budget, up from 2.5% in 1996-97 to 3.2% in 1997-98 to 4.8% of the total in 1998-99. The figures don’t include the cost of consultants and lawyers who investigate and litigate claims.

Not all road builders are inclined to work the system. Former DOT Secretary Ben Watts, now with Carter & Burgess engineering firm in Orlando, sums it up this way: “The vast majority of the contractors who do public work don’t approach business that way. I had contractors that I would have had do

any project in Florida with just a handshake. And then there were contractors who, in my opinion, saw every new contract as a starting point for claims.”

In the past five years, just five companies accounted for 44% of all claims-related lawsuits against the DOT (See “Lawsuit Happy,” page 96). Anderson Columbia accounted for 18% of all lawsuits. In the same time frame, the company was awarded 14% of DOT’s contracts. White Construction, with 9% of contracts, accounted for 13% of litigated claims.

But even builders who never take the transportation department to court say it’s becoming more difficult not to get dragged into the claims game. John Coxwell, a highly respected Jacksonville contractor who built highways in Florida for 44 years, sold his JB Coxwell



Biggest Florida-based Road Builders

Here are the DOT's top 10 Florida road contractors based on total contracts over the past five years, along with five-year state contract totals and their cumulative average grades on DOT projects over the past two years.

COMPANY	HEADQUARTERS	5-YEAR STATE CONTRACT TOTALS	AVERAGE GRADE ON DOT PROJECTS*
<i>Anderson Columbia</i>	Lake City	\$300,718,924	86
<i>APAC-Florida</i>	Sarasota	\$134,848,861	93
<i>Community Asphalt</i>	Hialeah	\$124,049,783	83
<i>Cone & Graham</i>	Tampa	\$128,655,068	87
<i>Cone Constructors</i>	Tampa	\$192,044,058	87
<i>Couch Construction**</i>	Jacksonville	\$130,697,748	96
<i>Hubbard Construction</i>	Winter Park	\$353,500,291	91
<i>Smith & Co.</i>	Weston	\$162,261,305	87
<i>Walsh Group Ltd.</i>	Fort Lauderdale	\$113,887,553	78
<i>White Construction</i>	Chiefland	\$226,720,656	76

*Highest possible grade: 100

**Recently purchased by APAC-Florida.

Contracting in 1997 to Couch Construction, which now has been bought out by APAC. Why did he sell the family business? "I got out of the business because it's become a dogfight," Coxwell says. "The contractors get greedy; they bid impossibly low; and they manufacture claims. A contractor has two choices at that point: He can play the game, or he can go out of business. It's that simple."

DOT is also to blame

Coxwell admits that over the years, he felt forced to play the game, too. "Everybody has become part of it," he says, "everybody in the contracting industry."

There's no question that contractors need a mechanism for charging more as they encounter hidden utility lines or find plan errors, two of the major factors that lead to claims. And DOT brings a lot of

its problems on itself, contractors say. Often, the agency doesn't respond promptly to problems and to necessary contract changes. The road builder has little choice but to keep his employees working and his machines running, while hoping to resolve the bills later. "We'd have a lot less claims if we could just shut roads down and stop working until conflicts are worked out," says Bob Bureson, president of the Florida Transportation Builders Association, an industry group. "But we can't do that."

Anderson, chairman of Anderson Columbia, says that some projects, such as the State Road 96 widening in Pensacola, present such complicated drainage and other puzzles that they are impossible to solve on-site. "The goal is to get these projects built and get the traveling public safe and moving," he says. "You can't solve some of these things in one day, and you've got to keep working."

That doesn't explain why a few companies, including Anderson Columbia, account for most claims that reach the lawsuit stage, while other firms are able to successfully negotiate additional payments with DOT on the job, never ending up in court. Anderson says it's simply a matter of numbers: Since his company has the lion's share of Florida's highway contracts, it's reasonable to expect it to account for a bigger share of the lawsuits as well. Others say DOT employees play a significant role. Some project managers are more dif-

icult to work with than others, they say.

Neither poor oversight by DOT nor lawsuits are inevitable. Engineer Bill McDaniel, a vice president with URS Corp. in Tampa, is a former secretary of DOT District 7, which covers the Tampa Bay region. On one large bridge rebuilding project, he recalls, the contractor set up lawyers in an on-site trailer the first week of construction. McDaniel put his foot down. "I came in and said cost overruns and huge claims aren't going to happen on this job," he says. "I asked what we needed to do to ensure we didn't have a lot of claims on the project." To his surprise, the contractor told him exactly what it would take: He said his last DOT job had been a nightmare, that he'd lost money due to poor plans and poor response and that he feared things would be even worse on an old bridge project. Mostly, the contractor wanted fast responses to problems, and McDaniel made sure he got them. The lawyers left the job site and the project

Retooling the Agency

Tom Barry has to slim down the DOT even as the state embarks on a \$6-billion highway improvement program.

The young, bearded man seems out of place at the monthly meeting of the Florida Transportation Commission, an oversight board whose members and their audience tend to be gray-haired and blue-suited. Dressed in chinos and a short-sleeved shirt, he looks like he might be there to set up the slide projector. But soon, he's called to the podium: "Mr. Secretary, can we hear your report?"

Tom Barry, who this month begins his fourth year as secretary of the DOT, ambles up in his signature dock shoes-sans-socks. At 44, he's poised to lead the \$4.5-billion department through one of its greatest periods of change. The Legislature has ordered a \$500,000 study of the agency that's expected to recommend major downsizing and reorganization. At the same time, DOT is embarking on one of the most ambitious road-building periods in its history. The \$6-billion Mobility 2000 will speed up projects in Florida's 20-year road-improvement plan to be built between one and 10 years sooner. Interstates 4, 10, 95 and 75 are all up for major improvements under the plan, which focuses on expanding trade and tourism routes, relieving urban congestion and improving Florida's emergency evacuation.

Once nicknamed the Department of Trouble, DOT used to be known for financial crises and corruption. Secretaries served an average of two years before being ousted or quitting. All that has changed under Barry and his predecessor, Ben Watts, who is credited with cleaning up the financial messes and modernizing DOT considerably in the early 1990s. But while the agency has cleaned up corruption left over from the days of the old Road Board, when contracts were awarded in Tallahassee hotel rooms, DOT hasn't been able to shake other problems. Construction time and cost overruns on highway projects remain high. On average, projects take 30% longer than contracts stipulate. The average cost overrun is about 12% per project.

Meanwhile the agency is bloated: DOT hasn't significantly reduced its 10,000-employee staff even as it has contracted out more and more work. Florida's DOT is the

most privatized in the country, with private contractors handling 75% of design, 100% of construction and 70% of routine maintenance. But the agency hasn't downsized accordingly. About 1,200 employees work in the central office in Tallahassee, which is responsible for policy and oversight. About 7,500 work in the agency's eight district offices, which build and maintain 12,000 miles of roads and 6,000 bridges on the state highway system and which help local governments develop airport, rail, seaport and transit facilities. Another 1,200 operate the state's tollbooths; about 400 are in DOT's enforcement division; and about 175 work in a Gainesville lab that tests road materials.

David Brown, an Orlando lawyer appointed by Gov. Jeb Bush to the transportation commission, is leading the study of the agency. He describes Barry as ideal to lead DOT's transition because he's able to bring an engineer's objectivity even to the retooling of his own agency.

Brown, Watts and others describe Barry — the only Lawton Chiles appointee left in Bush's administration — as a squeaky clean public servant who has strong opinions that he's willing to shelve if his bosses disagree. Despite Barry's enthusiasm for high-speed rail, for example, he supported the governor when Bush killed the project. Despite some of his employees' anger at highway contractors who are constantly suing the department, Barry downplays the lawsuits and encourages strong partnerships with the industry. And despite spending his entire career working for DOT — he started out in 1979 in the department's District 4 office in Fort Lauderdale after earning his bachelor's in civil engineering from Penn State — he is remarkably unworried about the imminent reorganization. "In my opinion, a review of everything that we do, of every function, is not unreasonable," he says.

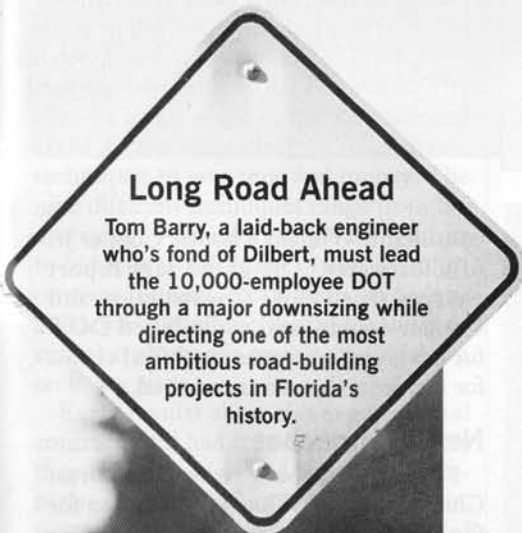
Barry, a fan of the cartoon strip Dilbert, is remarkably unworried about most things, say staffers, who also note he's conscientious about not taking himself too seriously. Barry has his staff reading a management book called "Who Moved My Cheese?" a quick parable about dealing with change. He says the biggest challenge he faces in the reorganization is asking employees to embrace change when they know the end result will be far fewer



Steve Leukanech

employees. His mantra: "No one should think that any of the discussions are a reflection of their work effort or product. It is just time for us to realize that the world is changing, and we need to be prepared to change with it."

His biggest challenge on Mobility 2000? Simply being able to deliver what he told the Legislature he could, particularly as his department reorganizes amid escalating tension with at least some of Florida's highway contractors. Two of the top 10 contractors in the state have been investigated for criminal activity related to road projects. "We're up for that challenge as well, or we wouldn't have made the proposals," Barry says. "The governor and the Legislature had the confidence to give us additional revenues. I think that says a lot about us and our partners." □



Settlement Payments

Year	Amounts paid out by DOT in supplemental claims	Percentage of highway construction budget
1996-97	\$20.9 million	2.5%
1997-98	\$41.3 million	3.2
1998-99	\$65.4 million	4.8

came in on budget. "We feared the worst," McDaniel says, "but when we got people talking to each other, it worked out."

A lawyer who has frequently represented Anderson Columbia and other companies in lawsuits against the DOT says he finds it ludicrous that a contractor would plan a costly claims process from the start of a project. "No one likes claims," says Joe Lawrence, a partner in the Fort Lauderdale law firm of Vezina, Lawrence & Piscitelli, whose Tallahassee office is across the street from the Transportation Builders Association. "No one ever walked into a project wanting to employ lawyers at a later point," he says.

But clearly, as McDaniel's story illustrates, some contractors do just that. And too often, the DOT hands millions of dollars over to contractors with scant evidence that they are due the money, according to a draft of a DOT Inspector General's audit out this month. The audit, a review of 49 large claims, finds that the DOT approves claims in all stages of the process without proper documentation. DOT settled the claims for about \$54 million — 43% of the more than \$124 million contractors had asked for. But the auditors found that the department's own financial and engineering analyses supported just 29% of the \$54 million.

Multimillion-dollar claims that reached the DOT General Counsel's Office also were settled without evidence. In one case, White Construction filed a \$5.9-million lawsuit against the department. Numerous DOT analyses of the claims showed White and its subcontractor had caused their own problems. The agency had paid out \$586,596 to resolve problems for which it believed it had some responsibility. But the day before a trial was to start, DOT District 3 officials and

the firm's lawyer, Lawrence, reached a \$4.2-million settlement. The officials never documented that White Construction deserved the \$4.2 million.

Losing in court

So why is the DOT so quick to settle? It's impossible to discount the considerable political influence that companies like Anderson Columbia bring to bear. But on a more practical level, the DOT has good reason to fear losing in court. Lawrence boasts that in 12 years of litigating against the DOT, his firm has won all 20 cases that went before a jury. In all 20, the jury came back with much more money than the DOT offered, Lawrence says. "If the DOT is concerned about losing cases before judges and juries, it's because judges and juries don't believe the DOT's position."

Others say it's because the contractors can afford better legal resources than the DOT, whose staff lawyers juggle heavy claims caseloads while dealing with a myriad of other DOT issues as well. Says retired contractor Coxwell: "A good attorney who is going to get 30% or 40% is going to work much harder on the case than a DOT attorney who makes \$60,000 a year working on 20 different claims."

Coxwell believes there are only two ways the DOT can get a handle on illegitimate claims: "They've either got to start winning some cases, or they should put some people in jail."

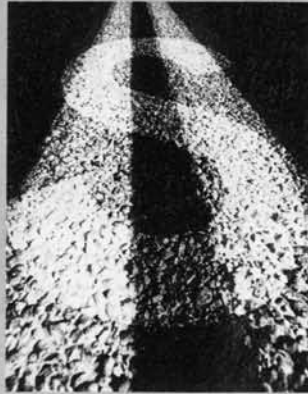
DOT Secretary Tom Barry handles the issue gingerly. He ordered the DOT Inspector General's audit that's so critical of his agency's settlements. But he clearly prefers the peacemaker's stance. He says he has no proof that any contractor bids low purposefully to rake in claims later. And if the DOT is paying too much, he says, that's the agency's fault — not the contractors.

The Claims Game

So do road builders deserve all those millions they demand in claims? In many cases, the answer is yes. But others, as in the following case of Tallahassee's Mitchell Bros., raise a lot of questions:

In 1995, according to DOT records, Mitchell Bros. was simultaneously working on the DOT's Tharpe Street project in Tallahassee and the city of Tallahassee's Blair Stone Road extension. During the Tharpe job, the company filed claims with DOT stating numerous pieces of equipment were idle. During the same period, Mitchell Bros. declared the same equipment idle on the Blair Stone job in claims to the city. At the same time, the company was filing claims with the Leon County School Board demanding payment for the same idle equipment.

The contractor also sought \$231,264 from the city of Tallahassee for a total of 792 days the company said its project manager, Eugene Cassels, was idle. In Cassels' idle period, however, he was project manager on the DOT's



Tharpe Street project and other projects.

In 1998, Mitchell Bros. was the low bidder on a DOT project on Tallahassee's Pensacola Street. Almost immediately, the company began filing claims. They included double-billing for equipment and personnel and contained overlapping claims for delay. The company went so far as to claim it was delayed for more days than had elapsed on the contract. In one claim, according to DOT documents, the company encountered a minor problem that caused a short delay, for which

Litigation

Here are the most litigious of Florida's highway contractors, based on the number of their claims that turned into lawsuits over the past five years:

COMPANY	NUMBER OF LAWSUITS
Anderson Columbia	14
White Construction	10
Asphalt Pavers	3
Florida Rock & Sand Co.	3
Misener Marine Construction	3

DOT approved a \$900 change order. The company stopped work and submitted a claim for \$158,684.88 — even though the work had been completed in four hours.

Overall, on a 216-day contract time period, Mitchell Bros. claimed 296 days of delay, which is neither mathematically possible nor rational, according to a DOT letter to the company informing President Edward Mitchell Jr. of the agency's intent to deny him from bidding future DOT projects. Mitchell's response? He's taking the DOT to court. □

"If the department has signed off on settlements without proper documentation," he says, "that's our bad."

Quietly, however, Barry's administration has been cracking down on contractors far more harshly than that of his predecessor, Watts, who carries a sterling reputation as the secretary who cleaned up DOT a

decade ago. This spring, for example, the DOT booted Cone Constructors, another one of the largest road builders in Florida, from its \$75-million job to build sections of the Suncoast Parkway because the company failed to pay \$2.4 million to subcontractors. Currently, the agency is investigating Tallahassee's Mitchell Bros. for exorbitant double-billing on claims. (See "The Claims Game," above.)

Most notably, this spring DOT investigators worked with the statewide prosecutor for the first time to indict a road builder for filing fraudulent claims. White Construction had filed \$30 million in claims against DOT related to the widening of Interstate 75 through Marion County in 1994 and 1995. The company's original bid for the work was \$31.8 million, and DOT had paid \$34 million after change orders and unforeseen problems. DOT officials settled with White for \$6.9 million on the eve of a jury trial in 1997. But lawyers in the General Counsel's Office who'd worked on the case were convinced the claims had been fraudulent. In March, a statewide grand jury agreed. White Construction was indicted on 12 counts of grand theft and racketeering. Also indicted was the company's claims

consultant, William Thomas Cooper Jr. of Clearwater. The grand jury report charges that White Construction and Cooper double- and triple-billed DOT for labor and equipment and filed claims for incidents that never occurred.

New approaches

Family members who have run Chiefland-based White Construction for five decades declined to be interviewed for this story because of the criminal case. But Lawrence, the company's lawyer on the claims issue, says the indictment should worry Florida companies that do business with the state. Lawrence asks: If the DOT had a problem with the claims, why did the agency settle them? If the agency found new information, why didn't it return to court within the year allowed and attempt to have the settlement overturned? "It should send a shiver down people's spine that the DOT seems to have its own private police department," Lawrence says. "They haven't won in civil court and so they've taken a new approach. Maybe they're going to be successful, but that doesn't mean it's right."

As the DOT turns up the heat on contractors, as well as on DOT employees suspected of wrongdoing, Barry prefers to



talk about his efforts to work more closely with the road-building industry. Contractors have to make a profit to stay in business, he says, and he's pushed the department to help make that happen, by trying to respond more quickly to on-the-job problems. His administration also has worked with the industry on new specifications that better assess the costs of projects upfront to try to cut down on surprises later.

Burleson, the head of the road builders industry association, applauds those efforts, as well as DOT's Dispute Resolution Board, chaired by Coxwell, aimed at settling claims before they turn into lawsuits. "When you're dealing with people who know the business, you're going to get disputes resolved a lot quicker," says Burleson. "It's not like talking to a jury where you can fake them out."

Some, including Watts, believe the state should move away from awarding contracts to the lowest bidder, as it becomes more clear that system doesn't produce either the best value or the best roads. The Florida Legislature in 1996 authorized DOT to try some alternative contract techniques to save time and money. The nine different techniques range from bid averaging — an effort to get contractors to bid true to minimize claims — to incentives for early completion, to design-build, which combines the design and construction phases of a project, cutting down on faulty plans.

Early results show the experimental contracts still had cost overruns, but less than traditional low-bid contracts. Alternative contracts had an average cost overrun of 3.6% compared to an average of 12.4% for traditional contracts in 1997-98. The alternative contracts had an average time overrun of 7.1% compared to 30.7% for traditional contracts.

The low-bid system, which many believe is the best way to keep favoritism out of government contracting, isn't likely to be tossed out any time soon, however. And some say that in the long run it probably doesn't matter what type of contracts DOT uses. Like any other industry, they say, most companies are going to stay within the boundaries of good business practices while a few are going to push the limits. Greed is the taproot, observes another former DOT secretary, Kaye Henderson of Tampa. "Greed subsidizes with the threat of exposure," he says, "but look out — it's going to pop up in some other form." □



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