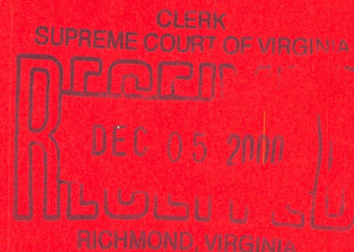


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In The  
**Supreme Court of Virginia**

RECORD NO. 001849



**T.L. GARDEN & ASSOCIATES, INC.**  
**t/a LIFE SAFETY SYSTEMS,**

*Appellant,*

v.

**FIRST SAVINGS BANK OF VIRGINIA,**

*Appellee.*

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**JOINT APPENDIX**

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*Counsel for Appellee*



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IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

T.L. GARDEN & ASSOCIATES, INC.  
t/a LIFE SAFETY SYSTEMS  
7048-M Tech Circle  
Manassas, Virginia 20109

Plaintiff,

v.

FAY ALLEN KENNEDY,  
15404 Weldin Drive  
Woodbridge, Virginia 22193

- and -

FIRST SAVINGS BANK OF VIRGINIA,  
Serve:

Barbara J. Fried, Esquire  
6551 Loisdale Court, Suite 900  
Springfield, Virginia 22150

Defendants.

At Law No. 47245

**MOTION FOR JUDGMENT**

Plaintiff T.L. Garden & Associates, Inc. t/a Life Safety Systems (hereinafter referred to "LSSI") hereby files this Motion for Judgment against Fay Allen Kennedy (hereafter referred to as "Kennedy") and First Savings Bank of Virginia (hereinafter referred to as "FSB"), and in support thereof states as follows:

**The Parties**

1. Plaintiff LSSI is a corporation in good standing and qualified to do business in the Commonwealth of Virginia with its principal place of business at 7048-M Tech Circle, Manassas, Virginia 22110.

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PRINCE WILLIAM COUNTY VA.  
CLERK  
DEPUTY

2. Plaintiff LSSI is in the business of supplying and installing fire alarm systems.

3. Defendant Kennedy is an individual and resident of the Commonwealth of Virginia and he resides at 15404 Weldin Drive, Woodbridge, Virginia 22193. Defendant Kennedy is not a member of the armed services pursuant to the Soldiers and Sailors Act.

4. Defendant FSB is a corporation in good standing and qualified to do business in the Commonwealth of Virginia with its principal place of business at 6551 Loisdale Court, Springfield, VA 22150.

5. Defendant FSB's Agent for Service of Process in the Commonwealth of Virginia is Barbara J. Fried, Esquire whose business address is 6551 Loisdale Court, Suite 900, Springfield, Virginia 22150.

6. BIP, Inc. is a corporation in good standing and qualified to do business in the Commonwealth of Virginia with its principal place of business at 14851 Build America Drive, Woodbridge, Virginia 22191. BIP, Inc. entered into a subcontract Agreement on April 10, 1998 with Plaintiff LSSI.<sup>1</sup>

7. The venue is proper in this forum under 8.01-261 of the Virginia Code as Plaintiff and Defendant Kennedy reside in Prince William County and because a significant portion of the events giving rise to this action occurred in Prince William County.

---

<sup>1</sup>BIP, Inc. filed for bankruptcy protection in the Eastern District of Virginia, Alexandria Division, on July 28, 1998, Case No. 98-15327-MVB hence the necessity of Plaintiffs' recourse to Defendant Kennedy as guarantor.



8. This Court has personal jurisdiction over each of the Defendants pursuant to Section 8.01-328.1 of the Virginia Code, since each of the Defendants transacts business in this Commonwealth and/or contracted to supply services in this Commonwealth.

**COUNT ONE**  
**Breach of Contract**  
**(Personal Guarantee of Defendant Kennedy)**

9. Plaintiff reincorporates and realleges Paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff LSSI and BIP entered into a subcontract agreement on or about April 10, 1998 in which LSSI was to furnish and install fire alarm systems at the United States Pentagon's Navy Annex project, Contract No. MDA-9469763003. See Appendix A.

11.. Pursuant to the subcontract, BIP agreed to pay LSSI for the satisfactory performance of LSSI's work, subject to additions and deductions by change order or other subcontract provisions, the total sum of \$314,000. See Appendix A, Contract, ¶2.

12. Pursuant to the subcontract, LSSI was entitled to progress payments of 100% of the work in place which BIP and the owner, the United States Government, approved and for which the United States Government had paid BIP See Appendix A, Contract, ¶4.1.

13. Plaintiff LSSI was entitled to be paid progress payments in the amount of 100% of the materials stored in LSSI's warehouse or off-site for which BIP, Inc. and the United States Government had approved and for which the Government had paid BIP Approval of payment for such stored items on or off-site was to be based on submission

by LSSI of evidence satisfactory to BIP and the United States Government. See Contract, ¶4.2.

14. Subsequent to the execution of the contract and prior to LSSI's performance of same, LSSI advised BIP's President, Defendant Kennedy, that it would not equip or install the fire alarm system at the Pentagon is Navy Annex Project Contract No. MDA-9469763003, until Defendant Kennedy personally guaranteed the contract entered into by the parties and obtained a line of credit or some other form of security to make sure LSSI would be paid for its work.

15. Subject to the execution of the contract and prior to LSSI's performance, Fay Allen Kennedy, President of BIP, submitted a credit application on behalf of BIP to LSSI for the purpose of obtaining credit in consideration of \$314,000, the agreed price of the subcontract agreement. See a copy of the credit application attached hereto as Appendix B.

16. As consideration of the extension of credit of \$314,000 by LSSI to BIP, Fay Allen Kennedy executed a personal guarantee on May 4, 1998. See Appendix C.

17. Pursuant to the executed Guarantee of Fay Allen Kennedy, Defendant Kennedy agreed to pay all sums of money due from BIP to LSSI as it related to the subcontract agreement entered into by the parties.

18. On April 23, 1998, LSSI advised BIP that materials and parts were in its warehouse ready for pickup and LSSI invoiced BIP in the amount of \$289,000 pursuant to the contract.

19. On May 4, 1998, materials were picked up from LSSI's warehouse and delivered to the Navy Annex pursuant to Service Ticket No. 32848.



20. The materials were received and accepted by BIP on May 4, 1998 by Rodney L. Smith. Mr. Smith executed Service Ticket No. 32848 acknowledging that service had been performed to the complete satisfaction of BIP See Appendix D.

21. On May 5, 1998, the materials were picked up from LSSI's warehouse and delivered to the Navy Annex pursuant to service invoice ticket no. 32856.

22. The materials were received and accepted on May 5, 1998 by Defendant Kennedy who executed service ticket no. 32856 acknowledging that service had been performed to the complete satisfaction of BIP See Appendix E.

23. Defendant BIP has received payment for the materials that relate to Invoice No. 25701 from the United States Government. See Appendix F.

24. Plaintiff invoiced BIP \$289,000 pursuant to Invoice 25701 for these materials. See Appendix G.

25. Plaintiff acknowledges partial payments in the amount of \$66,113.95 on Check No. 15101 dated May 22, 1998 and \$131,214.05 on Check No. 15126 dated June 4, 1998 from First Savings Bank of Virginia, however \$91,672 remains due, owing and uncontested as it relates to these invoices.

26. On June 9, 1998, LSSI advised Defendant Kennedy that the materials as noted on LSSI's service ticket No. 33011 were ready for pickup and that the amount due for these materials pursuant to LSSI's Invoice No. 25878 was \$18,328.00.

27. Defendant Kennedy acknowledged and accepted these materials on June 11, 1998 by executing Service Ticket No. 33011 acknowledging that service had been performed to the complete satisfaction of BIP See Appendix H.

28. Defendant BIP has received payment for the materials that relate to Invoice No. 25878 from the United States Government. See Appendix I.

29. Plaintiff LSSI billed BIP \$18,328.00 for these materials and has not received payment. See Invoice No. 25878 attached hereto as Appendix J.

30. BIP filed bankruptcy on July 28, 1998 and \$110,000 remains due, owing and uncontested on Invoices 25701 and 25878.

31. Defendant Kennedy, as the guarantor for BIP, is obligated to pay the indebtedness in the amount of \$110,000.

32. Pursuant to the Personal Guarantee executed by Defendant Fay Allen Kennedy, LSSI is entitled to interest at 18% per annum or .04931 per day on this outstanding invoice from July 10, 1998. As of August 25, 1998, the interest due and owing on this outstanding invoice is \$2,495.34.

33. Plaintiff LSSI is entitled to attorney's fees in the amount of 25% or \$27,500 pursuant to the executed credit application and Personal Guarantee incorporating same.

WHEREFORE, Plaintiff demands that judgment be entered:

- (1) against Defendant Kennedy in the amount of \$110,000;
- (2) that LSSI be awarded interest at a rate of 18% per annum or .04931 per day from July 10, 1998;
- (3) that Plaintiff be awarded attorney's fees in the amount of 25% or \$27,500.00; and
- (4) that Plaintiff be awarded such other and further relief that this Court may deem just and proper.

**COUNT TWO**  
**Fraud in the Inducement**  
**(FSB)**

34. Plaintiff reincorporates and realleges paragraphs 1 through 33 as though fully set forth herein.

35. Subsequent to the execution of the subcontract agreement on April 10, 1998, but prior to LSSI's performance of same, LSSI advised BIP that it would not equip or install the fire alarm system at the Pentagon Navy Annex, Contract No. MDA-9469763003 until it received a personal guarantee from Defendant Kennedy and obtained a line of credit or some other form of security which would guarantee LSSI payment for materials supplied and work performed on the United States Government's Navy Annex Project, Contract No. MDA-9469763003.

36. Subsequent to the execution of the contract on April 10, 1998, Plaintiff received a letter from BIP on April 28, 1998 which advised that BIP was outsourcing the project accounting on the subject project and that Defendant FSB was to provide this service. See Appendix K.

37. BIP's letter of April 28, 1998 expressly states:

"Using FSB simple insured<sup>2</sup> process provides far more than simply a check writing service. In a nutshell, FSB tracks the job production, performs the accounts payable function, and provides timely cost status reports. We believe this outsourcing will expedite both project production in general and payments to you in specific."

38. On April 29, 1998, Plaintiffs received a letter from Defendant FSB in which the Bank's President, Jeffrey C. Constantz stated:

"I am writing this letter on behalf of BIP, Inc. to confirm that, upon payment from the Government, FSB will reserve an amount from Contract No. MDA-9469763003 sufficient to pay your invoice for equipment supplied for this contract." See Appendix L.

---

<sup>2</sup>Emphasis added.

39. Defendant FSB had no intention of reserving an amount from Contract No. MDA-9469763003 sufficient to pay LSSI's Invoice for equipment supplied.

40. Defendant FSB's false representation as to reserving an amount sufficient from Contract MDA-9469763003 for and on behalf of LSSI was made intentionally and knowingly with the intent to mislead LSSI to store, equip and supply materials on the Navy Annex Project.

41. Plaintiff LSSI relied on FSB's representation that FSB would reserve an amount from Contract No. MDA-9469763003 sufficient to pay LSSI's invoice for equipment stored and supplied on Navy Annex Project Contract and executed a letter of intent sent to it by FSB on May 5, 1998.

42. In reliance on the April 29, 1998 letter from Defendant FSB, Plaintiff LSSI supplied materials to BIP and invoiced FSB on Invoice Nos. 20701 and 25878 pursuant to Service Ticket Nos. 32848, 32856, and 33011 in the total amount of \$307,328. Plaintiff acknowledges payments from FSB in the amount of \$66,113.95 on Check No. 15101 dated May 22, 1998 and \$131,214.05 on Check #15126 dated June 4, 1998.

43. Defendant FSB received money from the Pentagon contracting office sufficient to pay Invoice Nos. 25701 and 25878, however Defendant FSB failed to reserve said amount to pay LSSI's invoices pursuant to the letter of intent of April 29, 1998.

44. Pursuant to the payment letter of intent and the contract between LSSI and BIP, LSSI is entitled to interest at the rate of 18% per annum or .04931 per day from July 10, 1998. As of August 25, 1998, LSSI is entitled to interest in the amount of \$2,495.34.

WHEREFORE, Plaintiff demands that judgment be entered:

- (1) against Defendant Kennedy in the amount of \$110,000;
- (2) that LSSI be awarded interest at a rate of 18% per annum or .04931 per day from July 10, 1998 for a total of \$2,495.34; and
- (4) that Plaintiff be awarded such other and further relief that this Court may deem just and proper.

**COUNT THREE**  
**Breach of Fiduciary Duty**

45. Plaintiff reincorporates and realleges the allegations contained in Paragraphs 1 through 44 above.

46. Defendant FSB was a fiduciary as defined by Section 8.01-2(e) of the Virginia Code.

47. Based upon FSB's letter of April 29, 1998 and LSSI's execution of same on May 5, 1998, FSB was to establish an escrow account to reserve an amount for Contract MDA-9469763003, sufficient to pay LSSI's invoices for equipment supplied for the Contract.

48. Defendant FSB has received payment from the Government, in trust, for materials supplied by LSSI and invoiced under Invoice No. 25701 and 25758.

49. FSB failed to reserve an amount from Contract MDA-9469763003 to pay LSSI's invoices for equipment supplied and thus breached its fiduciary duty to LSSI. FSB's material breach of its fiduciary duty has caused LSSI damage in the amount of \$110,000.

50. LSSI seeks interest at a rate of 18% per annum from July 10, 1998 or .04931 per day. As of August 25, 1998, LSSI is due interest in the amount of \$2,495.34.



51. LSSI seeks punitive damages in the amount of \$330,000 as a result of intentional and offensive behavior.

WHEREFORE, Plaintiff demands that judgment be entered:

- (1) against Defendant Kennedy in the amount of \$110,000;
  - (2) that LSSI be awarded interest at a rate of 18% per annum or .04931 per day from July 10, 1998 for a total of \$2,495.34;
  - (3) that Plaintiff be awarded punitive damages in the amount of \$330,000;
- and
- (4) that Plaintiff be awarded such other and further relief that this Court may deem just and proper.

#### DEMAND FOR TRIAL BY JURY

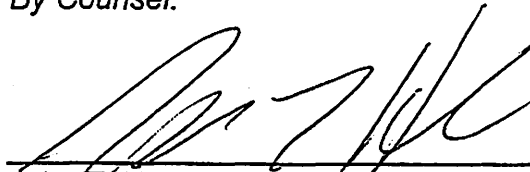
Plaintiff respectfully requests that this matter be tried by a jury on all Counts.

Dated: \_\_\_\_\_

9/22/98

T.L. GARDEN & ASSOCIATES, INC.

By Counsel:



John T. Husk, Esq. VA Bar #32801  
LA W OFFICE OF SEATON & HUSK, L.P.  
7700 Leesburg Pike  
Crescent Plaza North, Suite 201  
Falls Church, VA 22043  
(703) 506-1601; Fax: (703) 506-1606

## APPENDIX A

## SUBCONTRACT AGREEMENT

This SUBCONTRACT, made this Third day of March, 1998, by and between B.I.P., INC. Company (hereinafter B.I.P., Inc.) and (LSS), Life Safety Systems, 7048-M Tech Circle, Manassas, VA 22170 (hereinafter "Subcontractor").

### WITNESSETH:

Whereas, B.I.P., Inc. and US Pentagon (hereinafter "Owner"). Owner, as used herein, includes all Owner's representatives, including, as appropriate, the Architect, have entered into a contract dated March 6, 1998 for the construction of Fire Alarm System according to the Contract Documents listed in Rider "B" attached hereto and made a part hereof and available for Subcontractor's review during normal working hours at B.I.P. Electrical's office, and

WHEREAS, B.I.P., Inc. desires to subcontract certain work specified in the Contract Documents, and Subcontractor desires to perform said work at the prices and upon the terms and conditions hereinafter expressed;

NOW, THEREFORE, in consideration of the mutual agreements herein expressed, the parties do contract as follows:

#### 1. SCOPE OF WORK

Subcontractor shall perform all work and furnish all labor, materials, equipment, scaffolding, tools, supervision, supplies, applicable taxes, freight, insurance and all other things necessary for the construction and completion of fire alarm system work described in Rider "A" attached hereto and made a part hereof and work incidental thereto, in strict accordance with the Contract Documents except as may be specifically provided by the terms of this Subcontract Agreement. Subcontractor shall have only the rights which B.I.P., Inc. has under its Contract with the Owner, and Subcontractor shall assume all obligations, risks and responsibilities which B.I.P., Inc. has assumed towards Owner in its contract with the Owner.

#### 2. CONTRACT PRICE

B.I.P., Inc. agrees to pay subcontractor for the satisfactory performance of subcontractor's work, subject to additions and deductions by change order or other Subcontract provisions, the total sum of Three Hundred Fourteen Thousand No/100 Dollars, (\$314,000.00 in accordance with Section 4.

#### 3. PERFORMANCE AND PAYMENT BONDS

##### 3.1 Bonds

☐ a. Immediately upon receipt of this Subcontract, Subcontractor shall at the expense of \_\_\_\_\_ furnish to B.I.P., Inc. performance and payment bonds, in a form and from a surety acceptable to B.I.P., Inc. in the full amount of this subcontract.

☐ b. No bond required. Section 3.1a is not applicable when box is checked.

3.2 Additional Security. If Subcontractor has not been required to furnish bonds, B.I.P., Inc. may at any time, instruct Subcontractor, in writing, to provide performance and payment bonds within ten (10) days, in a form and from a surety acceptable to B.I.P., Inc. in an amount up to the then current full value of the Subcontract. B.I.P., Inc. will reimburse Subcontractor the amount of the bond cost. In the event Subcontractor can not provide such bonds, B.I.P., Inc. may request other security as it deems appropriate, at its sole discretion, or it may terminate the Subcontractor for default.

#### 4. PAYMENT

4.1 Progress Payments. Progress payments shall be due Subcontractor in the amount of 100 % of the work in place which B.I.P., Inc. and Owner have approved and for which Owner has paid B.I.P., Inc.. For the purpose of determining progress payments, Subcontractor shall furnish B.I.P., Inc. before its first application for progress payment, a Schedule of Values satisfactory to B.I.P., Inc.. If B.I.P., Inc. disapproves of Subcontractor's Schedule of Values, B.I.P., Inc. shall establish a reasonable breakdown which shall serve as the basis for progress payments.

4.2 Stored Materials. Unless otherwise provided in the contract Documents, Subcontractor shall be paid its progress payments in the amount of 100 % of the work in place which B.I.P., Inc. and Owner have approved and for which Owner has paid B.I.P., Inc.. Approval of payment for such stored items on or off site shall be based on submission by Subcontractor of evidence satisfactory to B.I.P., Inc. and Owner to protect Owner's and B.I.P., Inc.'s interest in such materials and equipment, including transport to the site.

4.3 Time of Payment. Subcontractor shall submit progress payment applications in a form satisfactory to B.I.P., Inc. no later than the 20th day of each payment period for work performed up to and including the 25th day of payment period, indicating work completed and, to the extent allowed under Section 4.2, materials suitably stored during the preceding payment period. Receipt of payment from the Owner for each progress payment application shall be a condition precedent to any obligation of B.I.P., Inc. to pay Subcontractor.

4.4 Failure of Subcontractor to Make Payment. Subcontractor shall ensure that all its subcontractors, employees, and suppliers are paid all amounts due in connection with this Subcontract. B.I.P., Inc. may withhold any progress payments until Subcontractor submits evidence satisfactory to B.I.P., Inc. that all amounts due in connection with this Subcontract have been paid. Further, in its sole discretion, B.I.P., Inc. may pay any and all persons who have not received payment due in connection with this Subcontract, whether or not a lien has been filed. If B.I.P., Inc. is required to pay or indemnify any person hereunder, Subcontractor shall immediately reimburse B.I.P., Inc. for the full amount of such cost. Subcontractor shall also immediately reimburse B.I.P., Inc. for any amounts paid under B.I.P., Inc.'s payment bond in connection with this Subcontract, or other B.I.P., Inc. payment relating to a failure of Subcontractor to make payment, and indemnify B.I.P., Inc. for any other costs associated therewith.

4.5 Partial Lien Waivers and Affidavits. When required by B.I.P., Inc., Subcontractor shall provide, in a form satisfactory to B.I.P., Inc. and Owner, partial lien or claim waivers and affidavits from Subcontractor and its subcontractors and suppliers for all prior payments to Subcontractor as part of each request for partial payment other than the initial request.

4.6 Payment Not Acceptance. Payment to Subcontractor is specifically agreed not to constitute or imply acceptance by B.I.P., Inc. or Owner of any portion of Subcontractor's work.

4.7 Transfer of Title. All materials and work covered by progress payments received by Subcontractor shall be the property of B.I.P., Inc. or if Contract Documents so provide, the property of the owner.

4.8 Right to Withhold Payment. B.I.P., Inc. may withhold amounts otherwise due under this Subcontract or due under any other contractual arrangement between the parties to compensate B.I.P., Inc. for costs B.I.P., Inc. has incurred or may incur for which Subcontractor may be responsible hereunder or otherwise. Appropriate adjustments to withholding shall be made when the exact amounts owed hereunder are determined.

4.9 Final Payment. Final payment, subject to withholdings permitted hereunder, shall be made after: (1) Subcontractor's work has been completed and approved by Owner; (2) evidence satisfactory to B.I.P., Inc. that Subcontractor has satisfied all payrolls, bills for materials and equipment, and all known indebtedness connected with Subcontractor's work; (3) the entire Project is certified complete by the Owner; and (4) B.I.P., Inc. has been paid in full for the entire Project. Receipt of final payment from the Owner shall be a condition precedent to any obligation of B.I.P., Inc. to make final payment to Subcontractor.

#### 5. SCHEDULE OF WORK

5.1 Time of Performance. Subcontractor will proceed with the work in a prompt and diligent manner, in accordance with B.I.P., Inc. directives and B.I.P., Inc.'s schedule, revised if necessary, as the work progresses. TIME IS OF THE ESSENCE. Subcontractor shall not be entitled to additional compensation for compliance with schedule revision, except to the extent that the Contract Documents entitle B.I.P., Inc. to additional compensation and such reimbursement is obtained from the Owner.

5.2 Subcontractor's Schedule. If requested by B.I.P., Inc., Subcontractor shall submit to B.I.P., Inc. a detailed schedule for performance of the work, in a form acceptable to B.I.P., Inc. which shall comply with all scheduling requirements of the Contract Documents.

5.3 **Priority of Work.** Subcontractor will coordinate its work with the work of *B.I.P., Inc.*, other subcontractors and Owner's other builders, if any, to prevent or mitigate delays or interferences in the completion of any part or all of the Project. *B.I.P., Inc.* shall have the right to decide the time, order, and priority in which various portions of the work shall be performed and all other matters relative to the timely and orderly conduct of Subcontractor's work.

## 6. SUBCONTRACTOR'S LIABILITY

6.1 **Scope.** Subcontractor shall be liable to *B.I.P., Inc.* for all costs *B.I.P., Inc.* incurs as a result of Subcontractor's failure to perform this Subcontract in accordance with its terms. Subcontractor's failure to perform shall include the failure of its suppliers and/or subcontractors of any tier to perform. Subcontractor's liability shall not be limited to: (1) damages and other delay costs payable by *B.I.P., Inc.* to Owner, (2) *B.I.P., Inc.* increased performance costs, such as extended overhead and increased performance costs resulting from Subcontractor-caused delays or improper Subcontractor work, (3) warranty and rework costs, (4) liability to third parties, including other subcontractors of *B.I.P., Inc.*, (5) excess costs of procurement, and (6) attorney's fees and related costs of resolving disputes with Subcontractor related to Subcontractor's performance.

## 7. CHANGES AND CLAIMS

7.1 **Changes.** *B.I.P., Inc.* may, either, unilaterally or by direction of Owner, without notice to sureties, make changes in the work covered by this Subcontract at any time. Any changes to the Subcontract shall be in writing and Subcontractor shall perform the work, as changed, without delay. If Subcontractor does not submit a price quotation within seven (7) days to *B.I.P., Inc.* for changes requested by Owner, *B.I.P., Inc.* may use its best estimate of the proposed changes as it affects Subcontractor in its quotation to Owner, which estimate shall be the maximum amount due Subcontractor for such work.

7.2 **Claims.** Any claims for adjustment in price, time, or other Subcontract provisions, shall be submitted to *B.I.P., Inc.* in writing, in sufficient time for *B.I.P., Inc.* to submit claims to Owner in accordance with the Contract Documents. If directed by *B.I.P., Inc.*, Subcontractor shall certify the completeness and accuracy of its claim as a condition to its consideration by *B.I.P., Inc.* or Owner.

7.3 **Claims Relating to Owner.** If Subcontractor submits a claim to *B.I.P., Inc.* arising out of or relating to problems caused by or which are the responsibility of the Owner, Subcontractor agrees to be bound to *B.I.P., Inc.* to the same extent that *B.I.P., Inc.* is bound to Owner by the terms of the Contract Documents and by any and all decisions or determinations made by a Court or the party or board so authorized in the Contract Documents to decide disputes between *B.I.P., Inc.* and Owner, whether or not Subcontractor is a party of such proceedings. *B.I.P., Inc.* shall be liable to Subcontractor for no more than Subcontractor's equitable share of any recovery from the Owner. *B.I.P., Inc.* agrees to present to the Owner, in adjustments, timely submitted, whenever the Contract Documents permit *B.I.P., Inc.* to do so, and *B.I.P., Inc.* reasonably believes such claim is valid. Subcontractor agrees to furnish all documents, statements, witnesses, and other information required by *B.I.P., Inc.* for investigating and presenting Subcontractor's claims and to pay or reimburse *B.I.P., Inc.* for all expenses and costs including legal fees, if any, incurred in connection with Subcontractor's claims. *B.I.P., Inc.* has final authority to settle all claims submitted to the Owner. No dispute shall interfere with a progress of construction and the Subcontractor shall continue with its work as directed.

7.4 **Claims Relating to *B.I.P., Inc.*** As a precondition to any action against *B.I.P., Inc.* or its bonding company, Subcontractor agrees to exhaust through *B.I.P., Inc.* the remedies available under the Contract Documents, including suit for breach of contract against owner through *B.I.P., Inc.* Notwithstanding any other provisions of the Contract Documents to the contrary, in no event shall *B.I.P., Inc.* be required to submit to arbitration any claim, dispute or other matter in question between *B.I.P., Inc.* and Subcontractor arising out of or relating to this subcontract agreement or the Contract Documents.

7.5 **Owner Damages.** If the Owner recovers liquidated or other damages against *B.I.P., Inc.* then *B.I.P., Inc.* may assess against the Subcontractor the portion of the Owner's damages that represent the Subcontractor's share of the responsibility. The amount of such assessment for Owner damages shall not exceed the amount assessed against *B.I.P., Inc.* plus the portion of costs and attorney's fees *B.I.P., Inc.* incurred in defending against the Owner's claim for damages arising out of or in relation to the Subcontractor's work.

## 8. INSPECTION AND ACCEPTANCE

8.1 **Inspection of Work.** Subcontractor shall provide appropriate facilities at all reasonable times for inspection by *B.I.P., Inc.* or Owner of the work and materials provided under this Subcontract, whether at the Project site or at any place where such work or materials may be in preparation, manufacture, storage, or installation.

8.2 **Correction of Defective Work.** Subcontractor shall promptly replace or correct any work or materials which *B.I.P., Inc.* or Owner shall reject as failing to conform to the requirements of this Subcontract. If Subcontractor does not do so within a reasonable time, *B.I.P., Inc.* shall have the right to do so and the Subcontractors shall be liable to *B.I.P., Inc.* for the cost thereof. If, in the opinion of Owner, it is not expedient to correct or replace all or any part of rejected work or materials, then *B.I.P., Inc.* at its option, may deduct from the payments due, or to become due, to Subcontractor, such amounts as, in Owner's judgment, will represent: (1) the difference between the fair value of the rejected work and materials and the value thereof, if it complied with this Subcontract; or (2) the cost of correction, whichever is higher.

8.3 **Remedy for Wrongful Rejection.** Subcontractor's remedy for wrongful rejection of work by *B.I.P., Inc.* or Owner shall be limited to *B.I.P., Inc.*'s remedy under the Contract Documents, if rejection is by the Owner or by, *B.I.P., Inc.* shall be liable for any increased costs caused by its wrongful rejection of work if the Owner was not involved in said rejection.

8.4 **Acceptance.** The work shall be accepted by Owner according to the terms of the contract Documents. However, unless otherwise agreed in writing, entrance and use by Owner or *B.I.P., Inc.* shall not constitute acceptance of the work.

## 9. SUBMITTALS

9.1 **Timely Submission.** Subcontractor shall timely prepare and submit to *B.I.P., Inc.* all shop drawings, manufacturers' literature, samples and material lists as may be necessary to describe completely the details and construction of its work under the Contract Documents. Such submittals shall be made in sufficient time so as not to delay performance of the project. Any deviation from the Contract Documents shall be clearly identified in the shop drawings, and so state, in writing, in separate correspondence. Approval of such shop drawings shall not relieve the Subcontractor of its obligation to perform such work in strict accordance with the Contract Documents, not of its responsibility for the proper matching and fitting of its work with contiguous work.

9.2 **Status.** If requested by *B.I.P., Inc.*, Subcontractor shall furnish periodic progress reports on its work including information on the status of materials and equipment under this Subcontract, which may be in the course of preparation or manufacture.

## 10. CLEANUP

Unless *B.I.P., Inc.* otherwise directs or agrees, Subcontractor shall, at its own expense clean and remove from the Project all rubbish and debris resulting from the performance of its work and, at the completion of its work in each area of the Project, perform such cleaning as may be required. Such removal shall be done in a manner that will impede neither the progress of the Project nor other trades.

## 11. LAWS, PERMITS, FEES AND PATENTS

11.1 **Compliance.** Subcontractor shall give all notices and comply with all laws, ordinances, rules, and regulations bearing on the performance of its work on the Project. Subcontractor shall secure and pay for all permits and Governmental fees, licenses, and arrange inspections necessary for the proper execution and completion of Subcontractor's work. Subcontractor shall comply with Federal, State, and local tax laws, Social Security Acts, Unemployment Compensation Acts, and Workers' or Workmen's Compensation Acts, occupational safety and health regulations insofar as applicable to the performance of this Subcontract. Subcontractor shall be duly licensed to operate under the laws of the applicable jurisdictions.

11.2 **Hold Harmless.** Subcontractor agrees to indemnify and hold *B.I.P., Inc.* harmless against the payment of any and all losses, costs, expenses contributions, taxes, or premiums which may become due or payable under Federal, State, or local laws arising out of Subcontractor's failure to comply with the laws outlined in Section 11.1 above, including any interest or penalties. Subcontractor waives any and all claims for additional compensation because of any increase in taxes, contributions, or premiums unless Owner pays *B.I.P., Inc.* such increases incurred by Subcontractor.

11.3 **Patents and Royalties.** Subcontractor agrees to pay all royalties and license fees owed by reason of performance of Subcontractor. Subcontractor agrees to defend all suits or claims for infringement of any patent rights, due to the inclusion of patented materials in the Subcontractor's work, that may be brought against *B.I.P., Inc.* or Owner, and agrees to indemnify *B.I.P., Inc.* and Owner for all loss, including costs and expenses on account thereof.

## 12. HEALTH AND SAFETY

12.1 **Responsibility of Subcontractor.** As relates to the Subcontractor's work, Subcontractor is responsible for the safety of the general public or workers engaged on or in the vicinity of the Project. Subcontractor agrees to comply with all Federal, State, municipal and local laws, ordinances, rules, regulations, codes, standards, orders, notices, and requirements concerning safety, as shall be applicable to the work, including among others the Federal Occupational Safety and Health Act of 1970, as amended, and all standards, rules, regulations and orders which have been or shall be adopted or issued thereunder, and with the safety standards *B.I.P., Inc.* established during the progress of the work.

12.2 **Stoppages Ordered by *B.I.P., Inc.*** When so ordered by *B.I.P., Inc.*, Subcontractor shall stop any part of the work which *B.I.P., Inc.* deems unsafe until corrective measures, satisfactory to *B.I.P., Inc.* have been taken, and Subcontractor agrees that it shall not have nor make any claim for damages growing out of such stoppages. Should Subcontractor neglect to take such corrective measures, *B.I.P., Inc.* may do so at the cost and expense of subcontractor and may deduct the cost thereof from any payments due or to become due

12.3 Hold Harmless. Subcontractor agrees to indemnify and hold B.I.P., Inc. harmless for all damages, costs and attorney's fees arising out of or relating to, Subcontractor's violation of this Section, or for any accident involving its work.

### 13. REPRESENTATIONS, INTERPRETATION AND INVESTIGATION

13.1 Representations and Investigation. Subcontractor represents that it is fully qualified to perform this Subcontract. Subcontractor acknowledges that prior to the execution of this Subcontract, it has (a) by its own independent investigation ascertained: (1) the work required by the Subcontract; (2) the conditions involved in performing the work; and (3) the obligations of the Subcontract and the Contract Documents; and (b) verified all information furnished by B.I.P., Inc. or others and satisfied itself as to the correctness and accuracy of that information. Any failure by the Subcontractor to independently investigate and become fully informed will not release Subcontractor from its responsibilities under this Subcontract.

13.2 Interpretation. The parties intend that all terms of this Subcontract are to be considered as complimentary. However, in the event of a conflict between or among the terms of this Subcontract Agreement or the Contract Documents, the higher standard or greater responsibility for Subcontractor shall prevail.

13.3 Inconsistencies and Omissions. Should inconsistencies or omissions appear in the Contract Documents, the Subcontractor shall notify B.I.P., Inc. and identify the inconsistency or omission, in writing, within three (3) working days of the Subcontractor's discovery thereof. Upon receipt of Subcontractor's notice, B.I.P., Inc. shall instruct the Subcontractor as to the measures to be taken, if any, and the subcontractor shall comply with B.I.P., Inc.'s instructions.

13.4 Field Measurements. Notwithstanding the dimensions given on the plans, specifications and other Contract Documents, it shall be the obligation and responsibility of the Subcontractor to take such measurements as will ensure the proper matching and fitting of the work covered by this Agreement and contiguous work.

### 14. TERMINATION FOR CONVENIENCE

B.I.P., Inc. shall have the right to terminate this Subcontract for its own convenience for any reason whatsoever. If this Subcontract is terminated for B.I.P., Inc.'s convenience, Subcontractor shall comply with all of B.I.P., Inc.'s termination instructions and shall be entitled to receive payment for work actually performed and a reasonable overhead and profit in connection with such work, except that if B.I.P., Inc.'s Contract with Owner is also terminated for convenience, termination settlement and costs to Subcontractor shall be as provided in the Contract Documents, and in the amount actually received by B.I.P., Inc. from Owner. Subcontractor shall not be entitled to any recovery of profit or unabsorbed overhead in connection with not actually performed or future work.

### 15. SUBCONTRACTOR'S FAILURE OR INABILITY TO PERFORM

15.1 Causes for Termination. If, in the opinion of B.I.P., Inc. Subcontractor shall at any time: (1) refuse or fail to provide sufficient properly skilled workmen or materials of the proper quality; (2) fail in any respect to prosecute the work according to the current schedule; (3) cause, by any action or omission, the stoppage or delay of, or interference with, the work of B.I.P., Inc. or of any other builder or subcontractor; (4) submit a false or misleading lien or claim waiver; (5) fail to make payments to subcontractors, employees and suppliers or (6) otherwise fail to comply with all provisions of this Subcontract or the Contract Documents then, after serving three (3) days written notice, unless the condition specified in such notice shall have been eliminated with such three (3) days, B.I.P., Inc., at its option:

a. without voiding the other provisions of this Subcontract and without notice to the sureties, may take such steps as are necessary to overcome the condition, in which case the Subcontractor shall be liable to B.I.P., Inc. for all consequent costs, plus interest, and reasonable attorney's fees thereof;

b. terminate the Subcontract for default; or

c. seek specific performance of Subcontractor's obligations hereunder, it being agreed by Subcontractor that specific performance may be necessary to avoid irreparable harm to B.I.P., Inc. and/or Owner.

15.2 Demand for Assurance. In the event B.I.P., Inc. becomes concerned about Subcontractor's ability to continue performance, B.I.P., Inc. may demand adequate assurance from Subcontractor or its successors in the interest of timely future performance of the Subcontract. Failure to comply with such a demand within ten (10) days of receipt of the demand shall entitle B.I.P., Inc. to terminate Subcontractor for default.

15.3 B.I.P., Inc.'s Rights Upon Termination for Default. In the event of termination for default under Section 15.1 and 15.2 above, B.I.P., Inc. may, at its option: (1) enter on the premises and take possession, for the purpose of completing any work, or all materials and equipment of Subcontractor; (2) require Subcontractor to assign to B.I.P., Inc. any or all of Subcontractor's subcontracts and purchase orders involving the Project; or (3) either itself or through others complete the work by whatever method B.I.P., Inc. may deem expedient. In case of termination for default, Subcontractor shall not be entitled to receive any further payment until the work shall be fully completed and accepted by the Owner. At such time, if the unpaid balance of the price to be paid exceeds the expense incurred by B.I.P., Inc., such excess shall be paid by B.I.P., Inc. to Subcontractor. If such amount due B.I.P., Inc. shall exceed such unpaid balance, then Subcontractor shall pay B.I.P., Inc. the difference and reasonable attorney's fees.

15.4 Recourse Against B.I.P., Inc. If B.I.P., Inc. wrongfully terminates Subcontractor, B.I.P., Inc. shall be liable to Subcontractor for the costs B.I.P., Inc. would have paid if B.I.P., Inc. would have terminated Subcontractor for convenience. Subcontractor's remedy hereunder shall be exclusive. Nothing hereunder shall prevent B.I.P., Inc. from withholding monies from Subcontractor under other provisions of the Contract Documents.

### 16. WARRANTY

16.1 Scope of Warranty. Subcontractor warrants to the Owner and B.I.P., Inc. that all materials and equipment furnished shall be new, unless otherwise specified, and that all work under this Subcontract shall be of good quality, freed from faults and defects and in strict conformance with the Contract Documents. All work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. This warranty shall be in addition to, and not in limitation of, any other warranty or remedy required by law or by the Contract Documents.

16.2 Term. Subcontractor warrants its work for the same period as B.I.P., Inc. warrants the work to the Owner under the Contract Documents. If the Contract Documents do not state a specific warranty period, the Subcontractor warrants its work for a period of one year from the date of Substantial Completion of the entire Project.

### 17. INSURANCE

17.1 Policies. Before commencing the work, subcontractor shall procure and maintain at its own expense until final acceptance of the work, upon all of its operations and the operation of any of its subcontractors, suppliers or materialmen on the Project hereunder, the following policies of insurance, with Subcontractor, B.I.P., Inc., Owner and Architect as named-insured parties:

a. Worker's Compensation and Employer's Liability Insurance. Subcontractor shall procure and maintain Worker's Compensation and Employer's Liability Insurance covering all of its employees in conformance with the laws of any state, district or territory of the United States of America in which the work under the Contract Documents is to be performed, except that such insurance shall not have a limit of liability less than \$100,000 for any one accident.

b. Comprehensive General Liability. Subcontractor shall procure and maintain Comprehensive General Liability with broad form coverage to include all operations of insureds under the Contract Documents, coverage for completed operations, and coverage for all liability assumed hereunder with the following limits:

Bodily Injury -	\$500,000/\$500,000 per occurrence
Property Damage -	\$250,000/\$250,000 per occurrence

#### c. Comprehensive Automobile Liability.

Bodily Injury -	\$300,000/\$300,000 per occurrence
Property Damage -	\$200,000/\$200,000 per occurrence
or	
Combined single Limit of \$500,000 including bodily injury and property damage.	

#### d. Umbrella Liability. Subcontractor shall procure and maintain an Umbrella Liability policy with limits of:

\$3 million -	interior subcontractors
\$5 million -	interior structural subcontractors
\$10 million -	outside structural subcontractors

17.2 Notice and Right to Pay Premiums. Subcontractor shall provide B.I.P., Inc. with copies of certificates of insurance coverage and proof of payment of all premiums. Insurance policies shall provide for notification to B.I.P., Inc. of non-payment of any premium and give B.I.P., Inc. the right to make the premium payment thereunder within a reasonable time. Any premium payments made by B.I.P., Inc. shall be deducted from amounts due Subcontractor under the Subcontract. Insurance policies shall provide for 30 days prior written notice to B.I.P., Inc. of cancellation.



18.1 Subcontractor's Performance. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, B.I.P., Inc. (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their officers, directors, agents, and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out or resulting from the disease, or death, or injury to or destruction of tangible property (other than the Subcontractor's work itself) including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder, and (2) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other obligation of indemnity which would otherwise exist as to any party or person described in this Section 18.

18.2 No Limitation Upon Liability. In any and all claims against the Owner, B.I.P., Inc. (including its affiliates, parents and subsidiaries) and other contractors or subcontractors, or any of its officers, directors, agents or employees, by any employees of the Subcontractor, anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, the indemnification obligation under this Section 18 shall not be limited in anyway by any limitation on the amount of type of damages, compensation or benefits payable by or for the Subcontractor under Worker's or Workmen's Compensation Acts, disability benefit acts or other employee benefit acts.

#### 19. LABOR POLICY.

19.1 Project Personnel. Subcontractor and its subcontractors or suppliers shall not employ anyone engaged in subcontract work whose employment may be objected to by B.I.P., Inc. or Owner.

19.2 Work Stoppage. Should any workers performing work covered by this Subcontract engage in a strike or any other stoppage or cease to work due to picketing or a labor dispute of any kind, said circumstances shall be deemed a failure to perform the work on the part of the Subcontractor due to the conditions and terms set forth in Section 15.

19.3 Equal Employment Opportunity. Subcontractor shall not discriminate against any employee or employment applicant because of race, sex, color, creed or national origin. Subcontractor shall allow access to its books, records, and accounts by representatives of B.I.P., Inc. or Owner for purposes of investigations to ascertain compliance with the provisions of this Section. These requirements shall be in addition to any similar provision of Equal Employment Opportunity in the Contract Documents. If Subcontractor fails to comply with the Equal Employment Opportunity provisions of this Subcontract, Subcontract may be terminated for default as specified under Section 15 of this Subcontract.

#### 20. ASSIGNMENT AND SUBCONTRACTING

20.1 Assignment. Subcontractor agrees that it will not transfer, assigned or delegate the subcontract, or any payment due thereunder, without the written prior consent of B.I.P., Inc. which consent shall not be unreasonably withheld.

20.2 Subcontractors. Subcontractor agrees that all subcontractors and lower-tier suppliers and subcontractors will be subject to all terms and conditions of this Subcontract and the Contract Documents. B.I.P., Inc.'s consent to any subletting shall not be deemed to create any contractual relationship between B.I.P., Inc. and any Subcontractor or supplier to whom the work or any portion thereof is sublet.

#### 21. PRIVACY

Until this Subcontract is complete and final payment is made, Subcontractor shall not, without the written consent of B.I.P., Inc. perform any work directly for Owner or the Owner's tenants. Subcontractor agrees that all work on this Project shall be handled and processed by B.I.P., Inc. and that Subcontractor will not communicate directly with the Owner's representatives without B.I.P., Inc.'s consent.

#### 22. LIENS

If at any time, there shall be evidence of any lien or claim for which, if established, B.I.P., Inc. or Owner might become liable or which should, in any event be charged to Subcontractor, B.I.P., Inc. shall have the right (1) to require Subcontractor to have same discharged by posting a bond with the appropriate authorities, or otherwise, within five (5) days of notice; (2) to retain, out of any payment due or thereafter to become due, any amount sufficient to indemnify the parties against said lien or claim, including bond premiums and attorney's fees and to apply the same in such manner as B.I.P., Inc. deems necessary to secure protection and/or satisfy such claims and liens. Should there be insufficient unpaid balance to cover the costs incurred in discharging such a lien or claim, Subcontractor shall reimburse B.I.P., Inc. and/or Owner the difference between the payments due Subcontractor and the costs incurred. Prior to final payment, Subcontractor shall provide B.I.P., Inc. a release of liens and claims for all work performed under Subcontract, as well as any other evidence B.I.P., Inc. or Owner may require to demonstrate that there are no other liens or claims whatsoever.

#### 23. ATTORNEY'S FEES

Notwithstanding any other provision of the Contract Documents to the contrary, should B.I.P., Inc. employ an attorney to institute suit or discharge a lien or recover on a surety bond given by Subcontractor under this Subcontract Agreement or otherwise protect B.I.P., Inc.'s interest in any matter arising under this Subcontract Agreement, B.I.P., Inc. shall be entitled to recover from Subcontractor its reasonable attorney's fees and all other associated fees, costs and charges.

#### 24. NOTICE

All notices shall be addressed to the parties at the addresses set out herein and shall be considered as delivered when postmarked, if dispatched by registered mail, or when received in all other cases.

#### 25. ADVERTISING

Subcontractor shall not place any signs, billboards or posters on any portion of the site, building, property or fences (temporary or permanent) surrounding the same, except upon prior written permission received from B.I.P., Inc., and then only of a size, material, color and type at a location approved by B.I.P., Inc.

#### 26. SEVERABILITY AND WAIVER

The partial or complete invalidity of any one or more provisions of this agreement shall not affect the validity or continuing force and effect of any other provision. The Failure of either party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant, condition or rights as respects further performance.

#### 27. COMPLETE AGREEMENT

This Agreement is solely for the benefit of signatories hereto and represents the entire and integrated agreement between the parties hereto, and supercedes all prior negotiations, representations, or agreement either written or oral. No other agreements, representations, warranties, or other matters, oral or written, shall bind the parties.

#### 28. TITLES

The titles given to the Sections of the Agreement are for ease of reference only and shall not be relied upon or cited for any other purpose.

IN WITNESS WHEREOF, the parties, by their duly authorized representatives, have hereunto executed this Subcontract, on the day and year above written.

By: B.I.P., Inc.

By: Life Safety Systems

14851 Build America Drive

7048-M Tech Circle

Woodbridge, Virginia 22191

Manassas, Virginia 22170

# B.I.P. Inc.

## Electrical Contractors

14851 Build America Drive, Woodbridge, VA 22193

Phone: (703) 492-7760 Fax: (703) 494-6072

Licensed \* Bonded \* Insured

VA - MD - DC

April 9, 1998

LSS

RIDER A

RE; FOB #2 FIRE ALARM SYSTEM EQUIPMENT

Three Hundred Fourteen Thousand and No/ Dollars. ( 314,000.00.)

1 CONTROL PANEL CONSISTING OF

1 CAB31\	7 PS8B
7 CAB3-R	1 PT-IS
1 CMIN-RM	8 BC-1
7CM2N	2 PS1270
16 ZAS-2	14 PS12120
1 FCCA	2 IOP-3
PS8BR-RM	1 RMOF

DPS MONITOR OF FOB. #2

1 CAB 3  
1 CMIN  
1 ZAS-2  
2 SHM  
1 LDR 400

# B.I.P. Inc.



## Electrical Contractors

RIDER A

14851 Build America Drive, Woodbridge, VA 22193

Phone: (703) 492-7760 Fax: (703) 494-6072

Licensed \* Bonded \* Insured

VA - MD - DC

- 27 5395 SIGNAL POWER EXTENDER
- 1 GRAPHIC ANNUNCIATOR BACK BOX INCLUDED
- 148 SIGA-270.MANUAL PULL STATIONS
- 758 SIGA-SMOKE DETECTOR, PHOTO
- 22 SIGA-HRS HEAT DETECTOR 135 FT
- 52 SIGA-CT1 MONITOR MODULE
- 120 SIGA-CR CONTROL MODULE
- 98 SIGA-CC1 SIGNAL MODULE
- 509 757-7A-T STROBE ADA 15/75
- 509 757-SB SURFACE BACKBOX
- 658 7193-11 SURFACE BACKBOX
- 176 1504-AQ MAGNETIC DOOR HOLDER
- 4 V285-001 HEAT DET.
- 32 52R-N5 RED ROTATING BEACON
- 112 6830-1 FIREFIGHTERS TELEPHONE
- 112 6831-1 BOXES FOR TELEPHONES

### PROGRAMMING

ALTERNATE: TO ADDD FOB #2 TO THE COLOR GRAPHICS COMPUTERS AT THE PENTAGON AND PLACING ONE AT FOB #2

COLOR GRAPHIC DISPLAY AT DPS FOR FOB#2

1 LOT OF ENGINEERING AND PROGRAMMING TO ADD THE FOB #2 TO THE PENTAGON COLOR GRAPHICS PACKAGE.

COLOR GRAPHICS DESIGN

PROGRAMMING COLOR GRAPHICS

- 1 IBM INDUSTRIAL GRADE COMPUTER CGP-1
- 1 FIBER OPTIC INTERFACE FIB/20
- 1 COLOR GRAPHICS SOFTWARE DESIGN
- 1 SOFTWARE PROGRAMMING
- 1 FIELD TECH INSTALLATION & CHECK OUT

MAIN FACP PANEL WILL BE TERMINATED BY LSS

## APPENDIX B

Life Safety Systems, Inc.

## CREDIT APPLICATION

- PLEASE TYPE OR PRINT -

DATE 5/4/98

ACCT. NAME B.I.P. INC. CORP. ☒ TRUST ☐  
ADDRESS 14851 BUILD AMERICA DRIVE PART. ☐  
CITY/ZIP Woodbridge 22191 PROPRIETORSHIP ☐  
MAILING ADDRESS ☐  
CITY/ZIP ☐  
TEL. NO. (BUSINESS) (703) 492-7760 (HOME) ☐  
FED. ID NO. 54-1820471 SOC. SEC. NO. 250-13-0055

### PRINCIPALS

NAME <u>FAU AKENUE</u>	NAME <input type="checkbox"/>
HOME ADDRESS <u>15404 WELDON DRIVE</u>	HOME ADDRESS <input type="checkbox"/>
CITY/ZIP <u>Woodbridge 22193</u>	CITY/ZIP <input type="checkbox"/>
SOC. SEC. NO. <input type="checkbox"/>	SOC. SEC. NO. <input type="checkbox"/>

### BANK REFERENCES

SAVINGS BANK NAME <u>FIRST SAVING BANK</u>	ADDRESS <u>6551 LOISDALE COURT</u>
TEL. NO. <u>(703) 922-5122</u>	<u>Springfield VA 22150</u>
CHECKING BANK NAME <u>SAME</u>	ADDRESS <input type="checkbox"/>
ACCT. # <u>10200046</u>	TEL. NO. <input type="checkbox"/>

### SUPPLIERS/COMMERCIAL REFERENCES (2 MUST BE LOCAL & ACTIVE)

1. NAME <u>FERGUSON ENTERPRISES</u>	ADDRESS <input type="checkbox"/>
<u>JOHN HUSSEY</u>	TEL. <u>(703) 490-5511</u>
2. NAME <u>BRANCH ELECTRIC</u>	ADDRESS <input type="checkbox"/>
<u>MICHAEL HENDERSON</u>	TEL. <u>(703) 560-2500</u>
3. NAME <u>SCSC</u>	ADDRESS <input type="checkbox"/>
<u>GERALD FITZGERALD</u>	TEL. <u>(301) 210-0250</u>
4. NAME <u>HILL</u>	ADDRESS <input type="checkbox"/>
<u>BRIAN MOORE</u>	TEL. <u>(800) 879-8010</u>

AMOUNT OF CREDIT REQUESTED: \$ 314,000 ANNUAL SALES: \$ 1,500,000

I hereby certify that all statements accompanying and contained in this application are true and made for the purposes of obtaining credit and in consideration of \$ 314,000 selling to me or my agent(s), I agree to the following terms:

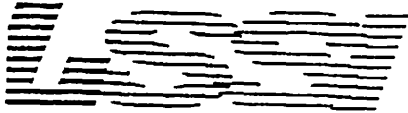
- (1) To pay the account in full by 30 days.
- (2) To pay service charge for late payment, computed at an annual percentage rate of .04931% per day (18% annual rate).
- (3) If this account is placed for collection, I agree to pay all reasonable charges for collection, including attorney's fees. I further agree that a charge of 25 % of the claim shall be considered reasonable as an attorney's fee and 30% of the claim shall be considered reasonable as a collection fee.
- (4) The undersigned authorize any credit investigation needed for action on this credit application and hereby indemnify the above company and Trade Credit Corporation, from any liability resulting from their credit survey. It is also acknowledged and agreed that accounts receivable information may be reported by the company to various consumer and commercial credit agencies.

BY: [Signature] BY: ☐  
TITLE: PRESIDENT TITLE: ☐

SIGNATURE MUST BE THAT OF A PRINCIPAL. If property is owned joint names, all signatures required.



## APPENDIX C



Life Safety Systems, Inc.  
PERSONAL GUARANTY

In consideration of the extension of credit by T.L. Garden & Assoc., Inc. trading as Life Safety Systems, Inc.

to: ALLEN KENNEDY PERSONAL GUARANTY  
D.I.P. INC., 14851 BUILD AMERICA DR, WOODBRIDGE VA. 22191

(hereinafter referred to as "The Customer"), and for other valuable consideration, the undersigned hereby agrees to pay all sums of money now due and hereafter, to become due from the Customer, including without limiting the generality of the foregoing, legal and other costs of attempts to collect said sums from Customer and the undersigned, and lawful interest on said sum.

The liability of the undersigned shall be primary, and if more than one person or entity signs this agreement, shall be joint and several, and shall not be affected by any discharge, extension of time, release of security, acceptance of compromise or any other modification of the liability of the Customer, and shall not be dependent upon recourse to any remedies against the Customer, except that the undersigned shall receive credit for any sum received on Customer's account. The undersigned hereby waives any notice of time and amount of extension of credit to the Customer, as well as rights of set-off, redemption and counterclaim which may be alleged to exist in favor of Customer.

This agreement is intended to cover a running account or accounts by the Customer and will remain in full force and effect until 14 days after withdrawal by writing sent by registered mail, return receipt requested and received at the above address and effect with respect to all sums of money that are due and that become due from Customer as a result of transactions through and including the date 14 days after said withdrawal is received. No rights against the undersigned are waived by failure to exercise any rights against the Customer upon his default. The incorporation, merger, reorganization or sale of Customer's business shall not operate as a termination of this guaranty. The undersigned hereby agrees to pay any and all of said sums, together with all legal and other costs including attorney's fees of enforcing this agreement contained herein both as against the customer and the undersigned.

This agreement is a binding/legal contract and shall be interpreted under the Laws of the same.

Witness my/our hand(s) this 5/4 day of MAY 19 98.

Allen Kennedy  
(individually)

(USE NO TITLES WHEN SIGNING,  
e.g. President, Trustee, etc.)

\_\_\_\_\_  
(individually)

\_\_\_\_\_  
(individually)

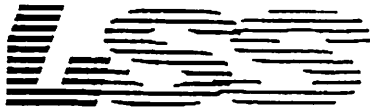
T.L. Garden President  
WITNESS by

## APPENDIX D



## APPENDIX E





# Life Safety Systems

48-M Tech Circle • Manassas, Virginia 20109 • 703 631-7476 • Fax 703 330-0086

5 May 98

TECHNICIAN

Tony

JOB #

JOB SITE		WORK AUTHORIZED BY:		TIME/DATE	NC FINAL
FOB 2					
ADDRESS		TIME IN	TIME OUT	TRAVEL TIME	
STATE ZIP		SYSTEM		MANUFACTURER	<input type="checkbox"/> JOB COMPLETED
PERSON TO CONTACT		<input type="checkbox"/> CLOCK <input checked="" type="checkbox"/> FIRE <input type="checkbox"/> AUDIO <input type="checkbox"/> N.C.		<input type="checkbox"/> CPU <input type="checkbox"/> SECURITY <input type="checkbox"/> TV/ANTENNA <input type="checkbox"/> OTHER	<input type="checkbox"/> JOB INCOMPLETE
BILL TO		CUSTOMER COMPLAINT			
E BIP Elect					
ADDRESS					
STATE ZIP					
OWNER TELEPHONE #		CUST P O NUMBER			

MATERIAL REQUIREMENTS				
PART #	DESCRIPTION	UNIT PRICE	EX	
202-7A-T	Strobe			
3 CAB/4DR	Door			
621	Heat Det			
Sigra-HRS	Heat Det			
Sigra-CT1	Input Mod			
Sigra-CC1	Input Mod			
Sigra-CR	Control Ro			
1504-N5	Door Holder			
Sigra-Q78	Pull Station			
6832-1	Backbox			
757A-SB	Backbox			
Sigra-PS	Smk Det			
757-7A-T	Horn Strobe			
6830-1	Handset Station			
27193-11	Backbox			

SUBTOTAL		OWNER/MGR. NOTIFIED <input type="checkbox"/> YES <input type="checkbox"/> NO, IF NOT WHY.	
TAX		VISA #	
MATERIAL TOTAL		Expiration date	
		Name on VISA card	
<input type="checkbox"/> SURVEY <input type="checkbox"/> INSTALLATION <input type="checkbox"/> BILLED SERVICE <input type="checkbox"/> CALL BACK <input type="checkbox"/> WARRANTY <input checked="" type="checkbox"/> PARTS		SERVICE AGREEMENT <input type="checkbox"/> SCHEDULED MAINTENANCE <input type="checkbox"/> EMERGENCY <input type="checkbox"/>	
		SIGNATURE	
		PRINT NAME	
		Rodney L. Smith	
		RODNEY L. SMITH	

NORMAL WORKING HOURS ARE FROM 7:00-15:30 OR 3:30 PM, WORK PERFORMED OUTSIDE THIS TIME FRAME WILL BE BILLED AS OVERTIME  
A MINIMUM CHARGE WILL BE BILLED FOR EMERGENCY SERVICE CALLS AFTER 18:00 HRS.

## APPENDIX F



**FIRST SAVINGS BANK  
OF VIRGINIA**

68-7330  
2560

FIRST SAVINGS BANK  
OF VIRGINIA  
SPRINGFIELD, VA 22150

VOID AFTER 90 DAYS

**S** 1510  
05/22/98

DATE \_\_\_\_\_

\*\*\*\*\*\$66,113 DOLLARS AND 95 CENTS

\$66,113.95\*

PAY \_\_\_\_\_

THOMAS L. GARDEN

LSSI

7048 TECH CIRCLE

MANASSAS, VA 22110

TO  
THE  
ORDER  
OF

AUTHORIZED SIGNATURE

⑆015401⑆⑆256073302⑆⑆0102 0004 6⑆⑆



**FIRST SAVINGS BANK  
OF VIRGINIA**

68-7330  
2560

FIRST SAVINGS BANK  
OF VIRGINIA  
SPRINGFIELD, VA 22150

VOID AFTER 60 DAYS

**S** 15126

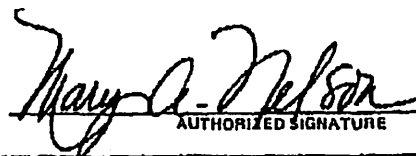
DATE 06/04/98

PAY \*\*\*\*\*\$131,214 DOLLARS AND 5 CENTS

\$131,214.05\*

TO  
THE  
ORDER  
OF

LSSI

  
AUTHORIZED SIGNATURE

⑈015126⑈ ⑆256073302⑆ 0102 0004 6⑈

FIRST SAVINGS BANK OF VIRGINIA, SPRINGFIELD, VIRGINIA 22150

DATE	AMOUNT	ACCT. NO.	DISBURSEMENT
------	--------	-----------	--------------

**S** 15126

06/04/98

131,214.05

LSSI

PLEASE DETACH THIS STUB BEFORE DEPOSITING - KEEP FOR YOUR RECORDS

## APPENDIX G



Lifa Safety Systems

7048-M Tech Circle • Manassas, Virginia 20109  
703 631-7476 • Fax 703 330-0086

25701

Invoice

TO:

SHIP TO:

BIP ELECTRIC  
14851 BUILD AMERICA DRIVE

FOB#2 NAVY ANNEX

WOODBIDGE VA 22191

NO.	SALESMAN NO.	PURCHASE ORDER NO.	SHIP VIA	COL	PPD	DATE SHIPPED	TERMS	INVOICE DATE
						04/23/93	NET 30 DAYS	04/23/93 2
QTY. SHIPPED	QTY. BACK ORDERED	ITEM NO.	DESCRIPTION			UNIT PRICE	DISC. %	EXTENDED PR
2.00		FIB-20	FIBER OPTIC CARD					
1.00		PT-1S	SYSTEM PRINTER					
1.00		SHM-F	SHORT HAUL MODEM-FEMALE					
148.00		SIGA-278	PULL STATION					
70.00		SIGA-CC1	SGL INPUT MODULE					
30.00		SIGA-CR	CONTROL RELAY MOD					
52.00		SIGA-CT1	SGL INPUT MODULE					
22.00		SIGA-HRS	HEAT DETECTOR					
638.00		SIGA-PS	PHOTO SMOKE DETECTOR					
660.00		SIGA-SE	BASE					
2.00		SO-20	FIBER OPTIC CARD					
1.00		Z	SUBTOTAL			289000.00		289000.00

TERMS: NET 30 DAYS.  
T.L. GARDEN & ASSOC.  
RESERVES THE RIGHT TO  
ASSESS A 1.5% INTEREST  
CHARGE ON ACCOUNTS  
OVER 30 DAYS.

SALE AMOUNT 289,000.00

MISC. CHARGES  
SALES TAX  
FREIGHT .00

*L. L. Thompson*



Life Safety Systems

7048-M Tech Circle • Manassas, Virginia 20109  
703 631-7476 • Fax 703 330-0086

INVOICE

25701

B TO:

SHIP TO:

BIF ELECTRIC  
14851 BUILD AMERICA DRIVE

FOB#2 NAVY ANNEX

WOODBRIDGE VA 22191

NO.	SALESMAN NO.	PURCHASE ORDER NO.	SHIP VIA	COL	PPD	DATE SHIPPED	TERMS	INVOICE DATE
						04/23/98	NET 30 DAYS	04/23/98 1

QTY. SHIPPED	QTY. BACK ORDERED	ITEM NO.	DESCRIPTION	UNIT PRICE	DISC. %	EXTENDED PR
176.00		1504-N5	120 VAC DOOR HOLDER			
658.00		202-7A-T	STROBE			
658.00		27193-11	BACKBOX			
1.00		3-ANNCPU	ANNUNCIATOR & CPU			
1.00		3-ASU/FT	AUDIO SOURCE UNIT			
1.00		3-CAB14B	BACKBOX			
1.00		3-CAB14DR	DOOR-RED			
8.00		3-CAB7B	BACKBOX			
1.00		3-CGP1-FW-	CLR GRAPHIC FIREWORKS TCH SCR			
9.00		3-CHAS7	CHASSIS ASSY			
9.00		3-CPU	CENT PROC UNIT			
1.00		3-EVDRX	RACK MOUNT			
1.00		3-EVDVRA	SWITCH DRIVER			
1.00		3-EVPWRA	POWER SUPPLY			
1.00		3-LCD	LIQUID CRYSTAL DISP MOD			
27.00		3-LRMF	BLANK LRM FILLER			
9.00		3-PPS/M	PRIMRY PWR SUP W/LOCAL RAIL MD			
1.00		3-RCC7R	BATTERY CAB			
9.00		3-RS485	NETWORK COMM CARD			
9.00		3-SSDC	SGL SIGA DRIVER CONTROLLER			
27.00		5395	EXTENDER PANEL			
112.00		6830-1	HANDSET STATION			
112.00		6832-1	BACKBOX			
509.00		757-7A-T	HORN STROBE			
509.00		757A-SB	BACKBOX			
8.00		BC-1	BATTERY CAB			

TERMS: NET 30 DAYS.  
T.L. GARDEN & ASSOC.  
RESERVES THE RIGHT TO  
ASSESS A 1.5% INTEREST  
CHARGE ON ACCOUNTS  
OVER 30 DAYS.

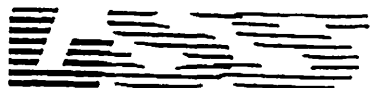
SALE AMOUNT

MISC. CHARGES  
SALES TAX  
FREIGHT

*Thank You*  
-31-



## APPENDIX H



# Life Safety Systems

18-M Tech Circle • Manassas, Virginia 20109 • 703 631-7476 • Fax 703 330-0086

11 Jun 98
TECHNICIAN Tony
JOB #

JOB SITE FOB 2			WORK AUTHORIZED BY:			TIME/DATE			NC FINAL		
ESS			TIME IN			TIME OUT			TRAVEL TIME		
STATE ZIP			SYSTEM			MANUFACTURER			<input type="checkbox"/> JOB COMPLETED		
N TO CONTACT			<input type="checkbox"/> CLOCK <input checked="" type="checkbox"/> FIRE <input type="checkbox"/> AUDIO <input type="checkbox"/> N.C.			<input type="checkbox"/> CPU <input type="checkbox"/> SECURITY <input type="checkbox"/> TV/ANTENNA <input type="checkbox"/> OTHER			<input type="checkbox"/> JOB INCOMPLETE		
BILL TO BIP Elect			CUSTOMER COMPLAINT								
ESS											
STATE ZIP											
CUST P O NUMBER											

MATERIAL REQUIREMENTS				SERVICE PERFORMED
PART #	DESCRIPTION	UNIT PRICE	EXT. PRICE	
3-Chas 7	Chassis Assy			
3-CPU	CPU PCB			
3-RS485	Network PCB			
3-SSDC	Data PCB			
3-LCD	Display			
3-ASU/FT	Audio Source Unit			
3-PPS/M	Power Supply			
3-LRM/F	Blank Filler			
PT-15	Printer			
FIB/20	Fiber Optic PCB			
50-20	Data Comm PCB			
SHM-F	Short Haul Modem			
757-7A-T	Horn Strobe			
12V50AH	Battery			
3-EVDVRA	Switch Driver			
3-EVDVRA	Flash. c. Mod			
3-EVPUA	Pwr Supply			

SUBTOTAL		OWNER/MGR. NOTIFIED <input type="checkbox"/> YES <input type="checkbox"/> NO, IF NOT WHY.	
TAX		VISA #	
MATERIAL TOTAL		Expiration date	
		Name on VISA card	
SURVEY INSTALLATION BILLED SERVICE CALL BACK WARRANTY PARTS		SERVICE AGREEMENT <input type="checkbox"/> SCHEDULED <input type="checkbox"/> MAINTENANCE <input type="checkbox"/> EMERGENCY	
		SIGNATURE <i>Way A Kennedy</i> PRINT NAME WAY A KENNEDY	

NORMAL WORKING HOURS ARE FROM 7:00-15:30 OR 3:30 PM, WORK PERFORMED OUTSIDE THIS TIME FRAME WILL BE BILLED AS OVERTIME  
A 3 HOUR MINIMUM CHARGE WILL BE BILLED FOR EMERGENCY SERVICE CALLS AFTER 18:00 HRS.

## APPENDIX I



DEPARTMENT OF DEFENSE  
WASHINGTON HEADQUARTERS SERVICES  
1155 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1155



DATE: 98 AUG 06

TO: B.I.P. Electrical Company  
ATTN: Allen Kennedy

FROM: Crystal Johnson  
Pentagon Facilities Contracting Office

REF: MDA946-97-C-3003  
FB#2 Fire Alarm Installation

This memo serves as written verification of payment to date and balance due to date as follows:

Total Fire Alarm Installation Contract Value	\$1,200,000.00
Progress Payment #1	\$102,504.57
Progress Payment #2	\$329,277.25
<u>Progress Payment #3</u>	<u>\$201,962.67</u>

Balance Due

*Progress Payment #4*

\$566,255.51

- 189,000.00

If you have any questions concerning the above please feel free to contact me.

\$ 377,255.51

Thank You,

Crystal F. Johnson  
Contract Specialist



## APPENDIX J

INVOICE

TO:  
BIP ELECTRIC  
14851 BUILD AMERICA DRIVE  
WOODBIDGE VA 22191

SHIP TO:  
FOB#2 NAVY ANNEX

NO.	SALESMAN NO.	PURCHASE ORDER NO.	SHIP VIA	COL	PPD	DATE SHIPPED	TERMS	INVOICE DATE
						06/17/98	NET 30 DAYS	06/17/98

QTY. SHIPPED	QTY. BACK ORDERED	ITEM NO.	DESCRIPTION	UNIT PRICE	DISC. %	EXTENDED PR
1.00		2	EQUIPMENT	18328.00		18328.00

TERMS: NET 30 DAYS.  
T.L. GARDEN & ASSOC.  
RESERVES THE RIGHT TO  
ASSESS A 1.5% INTEREST  
CHARGE ON ACCOUNTS  
OVER 30 DAYS.

*Thank You*

SALE AMOUNT	18,328.00
MISC. CHARGES SALES TAX FREIGHT	.00
TOTAL	\$18,328.00

## APPENDIX K

# B.I.P. Inc.



## Electrical Contractors

14851 Bullid America Drive, Woodbridge, VA 22193

Phone: (703) 492-7760 Fax: (703) 494-6072

Licensed \* Bonded \* Insured

VA - MD - DC

FOB NO.2 ( Navy Annex ) Henderson Hall

Dear Mr. Garden:

We have elected to out source project accounting on the subject project. We have engaged First Savings Bank of Virginia (FSB) to provide this service. However, using FSB simple insured process provides far more than simply a check writing service. In a nutshell, FSB tracks the job production, performs the accounts payable function, and provides timely cost status reports. We believe this outsourcing will expedite both project production in general and payments to you in specific.

The following presents the billing procedure to be used on the subject project.

1. Develop your invoices as you would in the normal course of business.
2. Submit your invoice on draw day.
3. Your invoice will be reviewed. We will attach the appropriate Contractor Disbursement Voucher for further processing.
4. We will compile all similar invoices and other cost. With the aid of your invoice our draw will be submitted to the owner, or the owners representative, for approval.
5. Once the draw has been approved by the owner, or owners representative, it will be forwarded to FSB for processing.

Notes: On your second, and all subsequent draws, no additional funding is allowed without having received a Lien Release for previous payments.

As is the industry norm: The owner's representative, usually and architect, establishes percentage complete for each invoice period. This percent complete determines available funds on a line item basis. Therefore, the available funds determines what determines what amount on funds may be expended on any cost category for a specific invoice period.

Once contract funds are received from the owner or lender and the funds are good...

6. FSB will process the transmitted information and generate your check.

---

"Let Us Give You the Power You Need"



# B.I.P. Inc.

## Electrical Contractors

14851 Build America Drive, Woodbridge, VA 22193

Phone: (703) 492-7760 Fax: (703) 494-6072

Licensed \* Bonded \* Insured

VA - MD - DC

7. FSB will transmit your check and original backup data back to us for distribution.
8. Providing that FSB decides to generate payment on net 15 LSSI will provide 2% Discount. At Net 20 - 1% Discount And at Net 30 - 1/2% Discount.

In summary, you should notice little, if any, difference in the processing of your draw. Please give us a call with questions or concerns. Or should you feel the need call Mr. William McSorley, Loan officer (703) 922-5122.

Fay Allen Kennedy, President  
B.I.P. Inc.

---

William McSorley, Loan Officer  
First Savings Bank Of Virginia

---

Thomas L. Garden, President  
Life Safety System Inc.

---

## APPENDIX L



NORTHERN VIRGINIA OFFICE  
6551 LOISDALE COURT, SUITE 150  
SPRINGFIELD, VA 22150  
(703)922-5122

FREDERICKSBURG OFFICE  
10693 COURTHOUSE ROAD, BREEZEWOOD CENTRE  
FREDERICKSBURG, VA 22407-7143  
(540)898-8787

FACSIMILE TRANSMITTAL COVER LETTER

PLEASE DELIVER THE FOLLOWING PAGE(S):

DATE: 4/22/98

TO:

Tom Carden  
L558

FROM:

Jeff Constante

FAX #: (703) 313-0829

RE:

BZP Navy Annex

NUMBER OF PAGES, INCLUDING THIS COVER LETTER:

2

SHOULD YOU NOT RECEIVE ALL PAGES, PLEASE CALL (703) 922-5122

NOTES:

per Mr Kennedy's request  
here is your payment letter

THIS INFORMATION TRANSMITTED BY THE FACSIMILE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTRY NAMED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

**FSB**  
**FIRST SAVINGS BANK**  
**OF VIRGINIA**

**NORTHERN VIRGINIA OFFICE**  
6351 Lisdale Court, Suite 150, Springfield, Virginia 22150  
(703) 922-5122

**FREDERICKSBURG OFFICE**  
10693 Courthouse Road, Breezewood Centre, Fredericksburg, Virginia 22407-7743  
(540) 398-8737

Via Fax (703) 330-0086

April 29, 1998

Thomas L. Garden  
LSSI Life Safety Systems  
7048 Tech Circle  
Mannassas, VA 22110

Re: Navy Annex Project Contract MDA9469763003

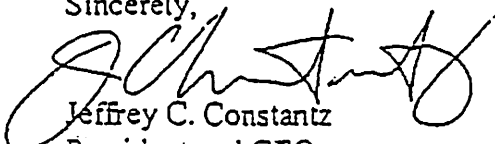
Dear Mr. Garden:

I am writing this letter on behalf of BIP, Inc to confirm that, upon payment from the government, FSB will reserve an amount from contract number MDA9469763003 sufficient to pay your invoice for equipment supplied for this contract.

We understand from BIP that your payment terms include a ~~2%~~ <sup>1%</sup> discount for payment within 15 days; ~~a 1% discount for payment within 30 days; and, a 1% discount for payment within 30 days.~~ BIP will not be entitled to any discount for payment after 30 days. Allen Kennedy is interested in maximizing his discount and the contracting officer has indicated that payments on invoices should be received within 10 days of acceptance.

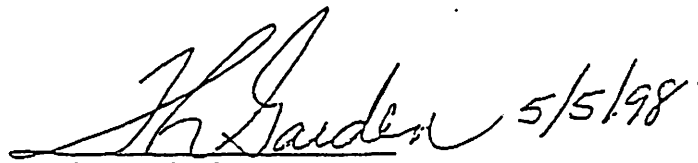
Please fax back to us this letter signed and please provide us with a copy of your invoice to be paid. If it is more convenient for you, please provide us with wiring instructions.

Sincerely,

  
Jeffrey C. Constantz  
President and CEO

Seen and Agreed:

\_\_\_\_\_  
F. Allen Kennedy  
BIP, Inc

 5/5/98  
Thomas L. Garden  
LSSI Life Safety Systems

OUR CONTRACT STATES 100% PAYMENT OF ALL  
INVOICES WITHIN OUR 1% 15, NET/30 DAYS.  
ALL INVOICES OVER 30 DAYS ARE SUBJECT TO A .04931% PER  
D. - A. - AGREEMENT

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

T L GARDEN & ASSOCIATES, INC. )

Plaintiff, )

v. )

FAY ALLEN KENNEDY )

and )

FIRST SAVINGS BANK OF VIRGINIA, )

Defendants. )

Case No. Law 47245

GROUND OF DEFENSE OF FIRST SAVINGS BANK

NOW COMES First Savings Bank of Virginia ("FSB"), by counsel, and in response to the Plaintiff's Motion for Judgment, says as follows:

1. The allegations of Paragraph 1 Of the Motion for Judgment are admitted, based upon FSB's information and belief.

2. The allegations of Paragraph 2 Of the Motion for Judgment are admitted, based upon FSB's information and belief.

3. The allegations of Paragraph 3 of the Motion for Judgment are admitted, based upon FSB's information and belief.

4. The allegations of Paragraph 4 Of the Motion for Judgment are admitted.

5. The allegations of Paragraph 5 Of the Motion for Judgment are admitted.

6. The allegations of Paragraph 6 of the Motion for Judgment are admitted, based upon FSB's information and belief.

7. The allegations of Paragraph 7 of the Motion for

Judgment constitute the Plaintiff's conclusions of law, which FSB is not required to admit or deny.

8. The jurisdictional allegations of Paragraph 8 of the Motion for Judgment are admitted.

9. Having previously responded to the allegations of Paragraphs 1 through 8 inclusive of the Motion for Judgment, FSB is not required to respond to this Paragraph 9.

10.- 33. FSB lacks sufficient information or belief to admit or deny most of the allegations of Paragraphs 10 through 33 of the Motion for Judgment, which are therefore denied, save and except as follows, which are admitted:

(a) Documents attached to the Motion for Judgment as Exhibits A through L, inclusive (the "Exhibits"), are believed to be true copies of the original documents, which speak for themselves as to their contents.

(b) FSB, based upon its information and belief, admits that LSSI entered into a subcontract with BIP, Inc., but states that the rights between those parties are governed by documents contained in the Exhibits.

(c) FSB admits that BIP, Inc. filed bankruptcy on July 28, 1998, and believes that approximately \$110,000.00 was due from BIP, Inc. under the subcontract to the Plaintiff on the bankruptcy filing date.

34. Having previously responded to the allegations of Paragraphs 10 through 33 inclusive of the Motion for Judgment,

FSB is not required to respond to this Paragraph 34.

35. FSB lacks sufficient information or belief to admit or deny most of the allegations of Paragraphs 35 of the Motion for Judgment, which are therefore denied.

36. The allegations of Paragraph 36 of the Motion for Judgment are admitted, based upon FSB's information and belief gained from examination of the copy of the April 28, 1998 letter contained in Appendix K to the Motion for Judgment.

37. The allegations of Paragraph 37 of the Motion for Judgment are neither admitted nor denied, because the document speaks for itself.

38. The allegations of Paragraph 38 of the Motion for Judgment are neither admitted nor denied, because the document speaks for itself, save and except that is admitted that FSB did send the letter of April 29, 1998 to Plaintiff, a copy of which is contained in Appendix L to the Motion for Judgment.

39. The allegations of Paragraph 39 of the Motion for Judgment are denied.

40. The allegations of Paragraph 40 of the Motion for Judgment are denied.

41. The allegations of Paragraph 41 of the Motion for Judgment are denied.

42. The allegations of Paragraph 42 of the Motion for Judgment are denied, save and except those allegations alleging payments made by FSB to the Plaintiff, which are admitted.

43. The allegations of Paragraph 43 of the Motion for

Judgment are admitted in so far as they state that FSB received certain monies on behalf of BIP, Inc., and that FSB did not pay the Plaintiff all of the money on behalf of BIP, Inc., that Plaintiff wishes that it had been paid, but are denied to the extent that the allegations suggest or imply that FSB had a legal duty to "reserve" monies for Plaintiff beyond the payments made to the Plaintiff described in Paragraph 42 of the Motion for Judgment.

44. The allegations of Paragraph 44 of the Motion for Judgment are denied.

45. Having previously responded to the allegations of Paragraphs 1 through 44 inclusive of the Motion for Judgment, FSB is not required to respond to this Paragraph 45.

46. The allegations of Paragraph 46 of the Motion for Judgment are denied.

47. The allegations of Paragraph 47 of the Motion for Judgment are denied.

48. The allegations of Paragraph 48 of the Motion for Judgment are denied, save and except that part of the allegations which states that FSB received monies on behalf of BIP, Inc., from the federal government, which is admitted.

49. The allegations of Paragraph 49 of the Motion for Judgment are denied.

50. The allegations of Paragraph 50 of the Motion for Judgment are denied.

51. The allegations of Paragraph 51 of the Motion for



Judgment are denied.

NOW, having fully responded to the Motion for Judgment, FSB states the following:

#### GROUND OF DEFENSE

##### First Defense

A cause of action for fraud in the inducement under Virginia law requires that there be actual reliance by the damaged party upon the alleged intentional material misrepresentation. *Brame v. Guarantee Finance Co.*, 139 Va. 394, 408, 124 S.E. 477, 481 (1924). There was no actual reliance by the Plaintiff upon any representation, express or implied, by FSB.

##### Second Defense

Plaintiff suffered no damages as the result of any act by FSB.

##### Third Defense

Plaintiff suffered no damages of any kind whatsoever.

##### Fourth Defense

No representation made by FSB to the Plaintiff was false.

##### Fifth Defense

If any representation made by FSB to the Plaintiff was false, FSB did not know the representation to be false and the

representation was made inadvertently.

#### Sixth Defense

If any representation made by FSB to the Plaintiff was false, such representation was immaterial.

#### Seventh Defense

If any representation made by FSB to the Plaintiff was false, FSB did not make the representation with an intent to mislead.

#### Eighth Defense

FSB intended to fulfill, and did fulfill, every representation it made to the Plaintiff.

#### Ninth Defense

Va. Code § 8.01-2(e) does not, as a matter of law, create a fiduciary relationship between the Plaintiff and FSB, and no express or implied representation of FSB created such a relationship.

#### Tenth Defense

FSB's alleged conduct does not demonstrate actual malice or circumstances amounting to a willful and wanton disregard of the plaintiff's rights such as to support an award of punitive damages, even if a breach of fiduciary duty is proven. See generally, *Avocet Development Corp. v. Mclean Bank*, 234 Va. 658,

666, 364 S.E.2d 757 (1988). Absent such conduct, and explicit allegations of such conduct in the Motion for Judgment, Plaintiff is not entitled to punitive damages as a matter of law.

WHEREFORE, First Savings Bank of Virginia prays that the Motion for Judgment be dismissed; that FSB be awarded its costs and attorney fees; and that it be awarded such other and further relief as is just and proper.

Respectfully submitted, this the 27<sup>th</sup> day of January, 1999.



---

First Savings Bank of Virginia  
By Counsel

Gary M. Nuckols, VSB 14399  
Douglas Scott, VSB No. 28211  
DURRETTE, IRVIN & BRADSHAW, P.C.  
600 East Main Street, 20th Floor  
Richmond, Virginia 23219

☎ (804) 775-6900

📠 (804) 775-6911

CERTIFICATE OF SERVICE

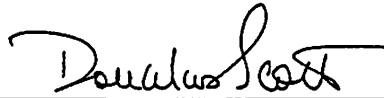
The undersigned hereby certifies that a true copy of First Savings Bank's Grounds of Defense was served upon the following persons by depositing copies of the same in the United States Mail, first class postage prepaid, addressed to:

John T. Husk, Esquire  
Law Office of Seaton & Husk, L.P.  
7700 Leesburg Pike  
Crescent Plaza North, Suite 201  
Falls Church, Virginia 22043  
Counsel for T L GARDEN & ASSOCIATES, INC.

and

Mr. Fay Allen Kennedy  
15404 Weldin Drive  
Woodbridge, Virginia 22193  
Defendant

on this, the 27<sup>th</sup> day of January, 1999.



\_\_\_\_\_  
Douglas Scott

\\NTSERVER\VOL1\DAS\BANKRPT\FSB\_LSSI Prince William Cir. Ct Grounds of Defense 1\_24\_99 final.doc

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

T.L. GARDEN & ASSOCIATES, INC. )  
t/a LIFE SAFETY SYSTEMS )

Plaintiff, )

v. )

FIRST SAVINGS BANK OF VIRGINIA )

Defendants. )

At Law No. 47245

STIPULATIONS OF FACT AND EXHIBITS

T.L. GARDEN & ASSOCIATES, INC., t/a LIFE SAFETY SYSTEMS ("Plaintiff") and FIRST SAVINGS BANK OF VIRGINIA ("Defendant") hereby stipulate to the following facts and exhibits for the purpose of trial of this matter on October 20, 1999:

1. Prior to May 21, 1998, B.I.P., Inc. ("BIP") was indebted to Defendant on two promissory notes, a line of credit note with a balance due of approximately \$322,000 and a variable commercial note with a balance of approximately \$83,000 ("loans").

2. As security for payment of the loans, BIP had assigned to Defendant payments which were due to BIP from the United States Government on its Navy Annex Contract No. MDA-9469763003 ("Government Contract").

3. Plaintiff was a sub-contractor of BIP on the Government Contract.

4. The President of Plaintiff and President of Defendant signed a letter dated April 29, 1998 which is Joint Exhibit 1.

5. The Defendant received from Plaintiff a letter dated May 5, 1998 regarding its Invoice no. 25701 requesting payment of \$197,328.00 due net thirty days thereafter (June 5,

1998), which is Joint Exhibit 2 ("First Invoice").

6. On May 21, 1998, Defendant received from the United States Government the first payment due to BIP under the Government Contract which had been assigned by BIP to the Defendant as security for its loans, in the amount of \$431,781.82 ("First Payment").

7. From the First Payment which it received, the Defendant made the following disbursements on the following dates:

- A. May 21, 1998: \$332,196.08 to Defendant as payment in full of the amount owed by BIP on its line of credit loan.
- B. May 22, 1998: \$27,565.29 to BIP for "payroll."
- C. May 22, 1998: \$2,552.50 to GTE.
- D. May 22, 1998: \$3,354.00 to First Choice.
- E. May 22, 1998: \$66,113.95 to Plaintiff.

8. On or about May 28, 1998, Defendant received a copy of a letter from the Plaintiff stating that there was balance due by June 5, 1998 of \$131,214.05 on its First Invoice. This letter is Joint Exhibit 3.

9. On June 4, 1998, Defendant received from the United States Government another payment due to BIP on the Government Contract in the amount of \$201,962.67 ("Second Payment").

10. On June 4, 1998 Defendant paid Plaintiff the sum of \$131,214.05 representing payment in full on its First Invoice. The remainder of the Second Payment was paid by Defendant to BIP for its operating expenses.

11. On June 9, 1998, Defendant received a fax transmittal from Plaintiff requesting a payment of its Invoice No. 25878 in the amount of \$110,000.00, due net thirty days, which is Joint Exhibit 4 ("Second Invoice").

12. On July 9, 1998 Defendant received from Plaintiff a fax transmittal stating tha

its Invoice no. 25878 had been revised and the amount of \$116,672.00 was due on that date, which is Joint Exhibit 5 ("Revised Second Invoice").

13. On July 16, 1998 BIP filed for Chapter 11 Reorganization in the United States Bankruptcy Court for the Eastern District of Virginia and gave notice of said filing to Defendant.

14. On July 25, 1998 the Defendant received from the United States Government another payment due to BIP on its Government Contract in the amount of \$189,061.17 ("Third Payment").

15. Because BIP had filed for bankruptcy, Defendant was required by law to turn over the entire Third Payment to the United States Bankruptcy Court to be applied by it for the benefit of BIP's creditors.

16. Subsequent to BIP filing for bankruptcy, Plaintiff has received to date additional payments through the Bankruptcy Court on its subcontract with BIP in the total amount of \$60,000.00.

17. As part of BIP's ongoing Chapter 11 Reorganization, there may be further funds available for payment to BIP's creditors.

Respectfully submitted,

SEATON & HUSK, L.P.

By: 

John T. Husk (VSB # 32801)  
2240 Gallows Road  
Vienna, Virginia 22182  
(703) 573-0700  
Counsel for Plaintiff

BROOKS, SUITERS & SATTLER, P.C.

By: 

Larry T Suiters (VSB #8110)  
2000 North 14th Street, Suite 210  
Arlington, Virginia 22201  
(703) 527-1775  
Counsel for Defendant First Savings  
Bank of Virginia

**FSB**  
**FIRST SAVINGS BANK**  
**OF VIRGINIA**

JOINT EXHIBIT 1

**NORTHERN VIRGINIA OFFICE**  
8351 Lindsale Court, Suite 130, Springfield, Virginia 22160  
(703) 822-1122

**FREDERICKSBURG OFFICE**  
10633 Courthouse Road, Breezewood Centre, Fredericksburg, Virginia 22407-7743  
(540) 898-8787

Via Fax (703) 330-0086

April 29, 1998

Thomas L. Garden  
LSSI Life Safety Systems  
7048 Tech Circle  
Mannassas, VA 22110

Re: Navy Annex Project Contract MDA9469763003

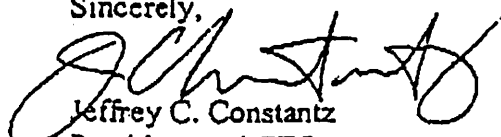
Dear Mr. Garden:

I am writing this letter on behalf of BIP, Inc to confirm that, upon payment from the government, FSB will reserve an amount from contract number MDA9469763003 sufficient to pay your invoice for equipment supplied for this contract.

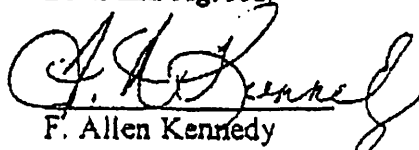
We understand from BIP that your payment terms include a ~~1%~~ <sup>2%</sup> discount for payment within 15 days; a ~~1%~~ <sup>2%</sup> discount for payment within 30 days; and, a ~~1%~~ <sup>2%</sup> discount for payment within 30 days. BIP will not be entitled to any discount for payment after 30 days. Allen Kennedy is interested in maximizing his discount and the contracting officer has indicated that payments on invoices should be received within 10 days of acceptance.

Please fax back to us this letter signed and please provide us with a copy of your invoice to be paid. If it is more convenient for you, please provide us with wiring instructions.

Sincerely,

  
Jeffrey C. Constantz  
President and CEO

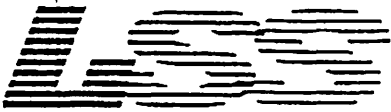
Seen and Agreed:

  
F. Allen Kennedy  
BIP, Inc

 5/5/98  
Thomas L. Garden  
LSSI Life Safety Systems

OUR CONTRACT STATES 100% PAYMENT OF ALL  
INVOICES WITHIN OUR 1% 15, NET/30 DAYS.  
ALL INVOICES OVER 30 DAYS ARE SUBJECT TO A .04931% PER  
DAY (1% ANNUAL RATE) ENCLOSED COPY OF CREDIT AGREEMENT





Life Safety Systems

JOINT EXHIBIT NO. 2

May 5, 1998

Mr. Allen Kennedy  
B.I.P. Electrical Company  
14851 Build America Drive  
Woodbridge, Va. 22193  
FAX 703-494-6072  
703-492-7760

Subject: Invoice Number 25701 Dated 4/23/98  
Revised due to Partial Shipment 5/5/98  
EST Fire Alarm Equipment  
FOB No. 2 [Navy Annex] Henderson Hall

The materials picked up from our warehouse on 5/4 & 5/5/98 are as noted on the attached Service Invoice Tickets no. 32848 dated 5/4/98 & Service Ticket no. 32856.

The revised amount of our invoice no. 25701 dated 4/23/98 is

\$ 197,328.00

The terms our purchase order with BIP is 1% 15 days net 30 days and .04931 per day { 18 % annual rate } on all outstanding balances.

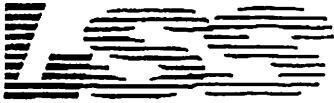
The above noted one percent discount is due by 5/20/98. After that date net 30 applies. 6/5/98

The balance of the equipment will be provided after receipt of the payment on the above noted invoice.

If you have any questions please call.

Sincerely Yours;

Thomas L. Garden  
President



*Life Safety Systems*

JOINT EXHIBIT NO. 3

*RT  
BPA*

May 28, 1998

Mr. Allen Kennedy  
B.I.P. Electrical Company  
14851 Build America Drive  
Woodbridge, Va 22193

Subject: Invoice Number 25701 Dated 4/23/98  
Revised due to Partial Shipment 5/5/98  
EST Fire Alarm Equipment  
FOB No. 2 [Navy Annex] Henderson Hall

The revised amount of our invoice no. 25701 dated 5/5/98 is \$197,328.00. We received a partial payment on 5/22/98 for \$66,113.95. The remaining balance of \$131,214.05 is due net 30 days, which is 6/5/98. Effective 6/6/98 interest charges will start on the unpaid balance.

The balance of the equipment in our warehouse will not be released until the \$197,328.00 is paid in full. Upon delivery of these additional materials an invoice will be reissued for payment of \$91,672.00.

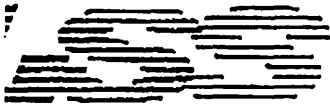
Sincerely.

Thomas L. Garden  
President

7048-M Tech Circle • Manassas, Virginia 20109 • 703 631-7476 • Fax 703 330-0086

[www.tlgls.com](http://www.tlgls.com)

e-mail: [LSSI@erois.com](mailto:LSSI@erois.com)



*Life Safety Systems*

JOINT EXHIBIT NO. 4

June 9, 1998

Mr. Allen Kennedy  
B.I.P. Electrical Company  
14851 Build America Drive  
Woodbridge, Va. 22193

Subject: Invoice Number 25878 Dated 6/9/98  
EST Fire Alarm Equipment  
FOB No. 2 [Navy Annex] Henderson Hall

The materials in our warehouse as noted on our service ticket no. 33011 are ready for pick up.

The amount of our invoice no. 25878 dated 6/9/98 for these materials is

\$110,000.00

The terms of our purchase order with BIP is 1% 15 days net 30 days and .04931 per day { 18% annual rate } on all outstanding balances.

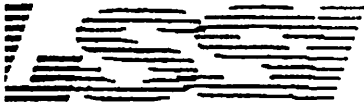
The above noted one percent discount is due by 6/24/98. After that date net 30 applies.

If you have any questions please call.

Sincerely Yours:

Thomas L. Garden  
President

LSSI CUM 00020



Life Safety Systems, Inc.

JOINT EXHIBIT NO. 5

FIRE ALARM, NURSE CALL, INTERCOM, CCTV, SOUND,  
TELEPHONE, SECURITY, LAN

## FAX TRANSMITTAL COVER SHEET

DATE: 7/9/98

TO: BILL McSORLEY

COMPANY: FIRST SAVINGS BANK OF VA

FROM: LINDA

SUBJECT: PAYMENT FROM BIF ELECTRIC

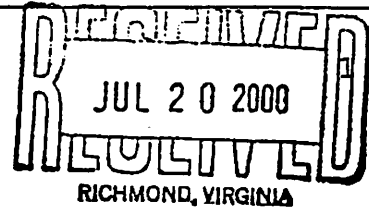
# OF PAGES INCLUDING COVER SHEET: 1

INVOICE # 25878 DATE 6/9/98 IS DUE  
FOR PAYMENT TODAY, IN THE AMOUNT OF \$ 116,672.00

PLEASE LET US KNOW WHEN WE WILL  
BE ABLE TO PICK UP OUR CHECK.

ORIGINAL

CLERK  
SUPREME COURT OF VIRGINIA



1 V I R G I N I A

2 IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

3 -----X  
4 T. L. GARDEN & ASSOCIATES, INC., :  
5 t/a Life Safety Systems, :

6 Plaintiff, :

AT LAW: 47245

7 versus, :

8 FIRST SAVINGS BANK OF VIRGINIA, :

9 Defendant. :  
10 -----X

Manassas, Virginia

Wednesday, October 20, 1999

11  
12 The above-entitled action came on to be heard before  
13 the Honorable Richard J. Jamborksy, a judge in and for  
14 the Circuit Court of Prince William County, in Courtroom  
15 4, Manassas, Virginia 22030, beginning at approximately  
16 10:10 o'clock a.m. when there were present on behalf of  
17 the respective parties:  
18

DD00-063

19  
20  
21  
22  
23  
FILED  
2000 JUL -6 PM 3:03  
CIRCUIT  
PRINCE WILLIAM  
COUNTY  
BY  
CLERK

Anita B. Glover & Associates, Ltd.  
10521 West Drive  
Manassas, Virginia 22030

## 1 APPEARANCES:

2 For the Plaintiff:

3 JOHN T. HUSK, ESQUIRE  
4 Law Office of Seaton & Husk, L.P.  
2240 Gallows Road  
5 Vienna, Virginia 22182

6 For the Defendant:

7 LARRY T. SUITERS, ESQUIRE  
8 Brooks, Suiters & Sattler  
2000 N. 14th Street, Suite 210  
Arlington, Virginia 222019  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

C O N T E N T S:

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Thomas Garden	43	62	80	--
Jeffery Constantz	82	87	103	--
Fay Allen Kennedy	105	108	111	--

E X H I B I T S:IDENTIFICATION

(Note: All exhibits were stipulated to and entered into evidence before the testimony began.)

Joint Exhibit Number 1 . . . . .	52
-- Letter of April 29, 1998	
From Mr. Constantz to Mr. Garden	
Joint Exhibit Number 2 . . . . .	55
-- Letter written by Mr. Garden	
for collection of \$197,328	
Joint Exhibit Number 3 . . . . .	56
-- Letter written by Mr. Garden	
for collection of outstanding monies	
Joint Exhibit Number 4 . . . . .	59
-- Letter written by Mr. Garden	
for collection of outstanding monies	
Joint Exhibit Number 5 . . . . .	104
-- Letter written by Mr. Garden	
for collection of outstanding monies	

P R O C E E D I N G S

(The Court Reporter was duly sworn by the court.)

THE COURT: Am I correct that the plaintiff has requested a jury?

MR. HUSK: Yes, Your Honor.

THE COURT: Did the defense want a jury?

MR. SUITERS: No.

THE COURT: Do you have your instructions and your verdict forms?

MR. HUSK: We have agreed on the instructions, Your Honor.

MR. SUITERS: We have also, Your Honor, pretty much -- we have stipulated and we have prepared a stipulation of facts and joint exhibits to really narrow the case down from what it is.

I do not know if the Court is aware, but this is only proceeding at this point on count two, which is the count against First Savings Bank for tortious claim of intentional fraud.

The defendant, Kennedy, has filed for bankruptcy so that it cannot be pursued against him and it is my understanding that count three is being dropped.

THE COURT: So there is one issue that is



1 going to be presented to the jury and that is whether or  
2 not fraud and the induced figures are clear, cogent and  
3 convincing evidence that the defendant fraudulently  
4 induced the plaintiff into providing these goods or  
5 services?

6 MR. HUSK: That is correct, Your Honor.  
7 Mr. Suiters and I have gone to a lot of effort to try and  
8 streamline this for you so we can move this case along.

9 THE COURT: Okay. Let me see the  
10 instructions, please, against the heart and guts of the  
11 case.

12 MR. SUITERS: Would those be the ones  
13 dealing with the fraud?

14 THE COURT: The fraud.

15 MR. SUITERS: Yes. Let me just sort those  
16 out if I could Your Honor.

17 THE COURT: The burden is clear, cogent  
18 and convincing evidence; right?

19 MR. HUSK: From what I understand, yes.

20 THE COURT: And your client is a  
21 businessman and certainly the First Savings Bank of  
22 Virginia is a business institution; right?

23 MR. HUSK: That is correct.

1 THE COURT: Would you introduce me to your  
2 client?

3 MR. HUSK: Sure. This is Thomas Garden,  
4 Your Honor.

5 THE COURT: Thomas Garden?

6 MR. GARDEN: Yes.

7 THE COURT: How are you this morning?

8 MR. GARDEN: I am fine.

9 THE COURT: Good. And who is  
10 representing --

11 MR. SUITERS: This is Jeffery Constantz.  
12 He is the president of the First Savings Bank.

13 THE COURT: I am sorry. I could not hear  
14 you?

15 MR. SUITERS: Jeffery Constantz.

16 THE COURT: Constantz. How are you Mr.  
17 Constantz?

18 MR. CONSTANTZ: Fine.

19 THE COURT: If you would all have a seat.

20 MR. SUITERS: Would you also like to see  
21 our stipulations, Your Honor?

22 THE COURT: Yes.

23 MR. SUITERS: Attached to it are the five

1 joint exhibits that we have stipulated to.

2 THE COURT: I would like to talk to Mr.  
3 Garden and Mr. Constantz just for a minute. In many ways  
4 it is a lot easier to talk to you two gentlemen than it  
5 is for a lot of people who come to court. The reason  
6 that I think it is easier is because I think you will  
7 have a better appreciation of what I am about to say.

8 Your attorneys have probably discussed  
9 this with you too, but you have not heard it from my lips  
10 and I think it is important that you hear it.

11 You know everything that is written about  
12 the law today tells us that coming into a courtroom to  
13 settle your dispute is about the worst possible way to do  
14 it. Everybody agrees that it is better to come to court  
15 than to duel or to duke it out on the streets with your  
16 fists or something, but short of that, this is not the  
17 best way to settle it.

18 I do not care whether it is Chief Justice  
19 Carrico of the Virginia Supreme Court or members of the  
20 U.S. Supreme Court or law scholars, all that is written  
21 about the law today is telling us that this adversary  
22 system of justice is just not a desirable way to settle  
23 your dispute.

1                   And, as businessmen, you realize this  
2                   better than most of the people in our society, because  
3                   you know first of all that it is very, very expensive.  
4                   And you know that being involved in a lawsuit is a very  
5                   destructive process. It is destructive in the sense that  
6                   it takes up your energies and particularly with business  
7                   persons, energies that could be geared towards making  
8                   money as opposed to being involved in a lawsuit and it is  
9                   very time consuming. And it is also emotionally hard on  
10                  people even if you are a seasoned business person.

11                  And, the other thing is, it is very  
12                  destructive because when you are through with this and  
13                  you all are through cross-examining each other on the  
14                  stand and going through all the stuff that you have been  
15                  through, your bridges are burned and there is not going  
16                  to be any relationship between you all anymore after this  
17                  trial is over.

18                  And, of course, the other thing about it  
19                  is no matter how fair the jury and I try to be, since you  
20                  are involved in what is just a fancy name, adversary  
21                  system -- a fancy name for a contest, somebody is going  
22                  to walk out of here a loser and may decide to appeal it,  
23                  and it is going to put off the ultimate disposition for a

1 longer period of time and it is going to cost you more  
2 money and you are going to lose more sleep and you are  
3 going to waste more of your constructive energies on a  
4 destructive process rather than on some endeavor that  
5 makes money.

6 The worst thing about it is, is that while  
7 you have every right to a jury you are playing a form of  
8 roulette. If this were the Cardinal/Redskin game on  
9 Sunday, I could look at the two teams, I could look at  
10 the statistics, I could look at the strength of the  
11 personnel and attempt to pick a winner. But the other  
12 horrible thing about this adversary system of justice  
13 that we have in this country is the fact that you are  
14 going to trust your fate to seven people who are  
15 strangers.

16 Further, it is my understanding, that this  
17 is a new term of court so they do not have much  
18 experience as being jurors. As business people, it  
19 strikes me as bizarre that you would take something as  
20 important as this issue and trust it to seven people who  
21 have no business background or expertise that know  
22 absolutely nothing about it and let them make this  
23 decision.

1 I have been a judge for thirty-one years  
2 this coming November and I tell you I cannot predict what  
3 juries are going to do. I read this file yesterday  
4 afternoon. I could not for a moment try to tell you what  
5 this jury is going to do today in this case.

6 I would urge that you reexamine your  
7 position and your motive in being here. Think about what  
8 I said and see if you can reach some agreement. I simply  
9 cannot see where this is doing either one of you any  
10 good.

11 Now I know that you both have very  
12 competent lawyers and I want you to do what your  
13 attorneys think is in your best interest, but my guess is  
14 they have had some conversations about settlement and I  
15 would urge that you make one final shot at it before we  
16 call those seven strangers in here for the roll of the  
17 dice.

18 So would you all step outside just for a  
19 minute and talk some more and see if you can make any  
20 progress. If you cannot, then we will get started. If  
21 it appears that you are about to make progress, we will  
22 give you more time and I will be reading the instructions  
23 and your stipulations while you are doing that, okay?

1 Thank you.

2 (Brief recess.)

3 MR. SUITERS: Your Honor, I do not think  
4 we are making a lot of progress, but we will know in just  
5 a minute.

6 THE COURT: Well, while we are waiting,  
7 let me tell you what I suggest and you tell me what you  
8 think about this.

9 I think that once we get the jury -- that  
10 I have had a copy made for each juror of the stipulations  
11 and the exhibits and I will give them that.

12 MR. SUITERS: I think that is a good idea.

13 THE COURT: Also, now, I am wondering  
14 whether or not we shouldn't give them the instructions  
15 that you gave me, each one of them.

16 MR. HUSK: That is fine by us, Your Honor.

17 MR. SUITERS: All right.

18 THE COURT: If you find that the letter  
19 dated April 29th, 1998, required the defendant, etcetera,  
20 that finding instruction.

21 MR. SUITERS: Yes.

22 THE COURT: And the one on the damages?

23 MR. SUITERS: All right.

1 THE COURT: When I go through my voir  
2 dire, I will just make a very general statement and then  
3 let you all explain in a lot more detail in your opening  
4 statements what the case is about.

5 MR. SUITERS: All right.

6 THE COURT: Then we will give them the  
7 stipulations -- or we can give them the stipulations  
8 ahead of time.

9 MR. SUITERS: It might be easier at the  
10 beginning, Judge, because I imagine our opening  
11 statements will track some of these stipulations.

12 THE COURT: Okay. As soon as we get them  
13 sworn in, then I will give them the stipulations.

14 MR. SUITERS: All right.

15 THE COURT: Then I will give them the  
16 instructions. Then you all can give your opening  
17 arguments.

18 MR. SUITERS: Well can I ask one other  
19 thing, Your Honor? Would it be appropriate -- there is a  
20 claim, of course, for punitive damages.

21 THE COURT: Right.

22 MR. SUITERS: There has nothing been done  
23 in discovery or anything, but would it be possible that



1 if they are going to inquire about the financial standing  
2 of the bank that that not occur -- I mean it is only  
3 going to take two or three questions and call my witness,  
4 but that occur until after -- because there is going to  
5 be a motion to strike at the end. That has been decided.

6 THE COURT: Do you have any problem with  
7 that?

8 MR. HUSK: No, Your Honor. That is fine.

9 THE COURT: Okay. Then let's see -- what  
10 is Mr. Garden's first name?

11 MR. HUSK: Thomas.

12 THE COURT: Mr. Thomas Garden. What is  
13 counsel's full name?

14 MR. HUSK: John Husk.

15 THE COURT: John Husk.

16 MR. HUSK: H-U-S-K.

17 THE COURT: H-U-S-K.

18 MR. HUSK: Right.

19 THE COURT: And Mr. Larry Suiters?

20 MR. SUITERS: Yes and it is Jeffery  
21 Constantz. C-O-N-S-T-A-N-T-Z.

22 THE COURT: Okay. Let's ask the jury to  
23 come in.

1 MR. HUSK: I would like to have Mr.  
2 Kennedy -- he is a witness. I would like to have him  
3 wait outside.

4 THE COURT: Oh, I am sorry. That's right.  
5 Would you wait outside until your name is called please?  
6 Thank you.

7 (The jury enters the courtroom.)

8 THE COURT: Ladies and gentlemen, the case  
9 that we are going to try today is a civil case. And I am  
10 going to tell you about it and ask you some questions  
11 after you get sworn.

12 THE CLERK: Ladies and gentlemen of the  
13 jury, as I call your name please stand and remain  
14 standing; John Davis, Suzanne Hemmer, Jimmy Crews,  
15 Kathryn Shipley, Kenneth Spence, John Miller, Constance  
16 Helmlinger, Tommy King, Julia Geris, Lynda Miller,  
17 Patricia Miller, Edward Barnes, David Emdee.

18 Raise your right hands please.

19 (The jury was sworn.)

20 THE COURT: Ladies and gentlemen, in this  
21 case there was a business transaction involving services  
22 that were performed by the plaintiff and the plaintiff  
23 was expecting to be paid and alleges that it was not

1 paid. In fact, the plaintiff was not paid and is  
2 alleging that the defendant fraudulently induced them to  
3 do something. And when they allege fraud, they have to  
4 prove it by clear and convincing evidence. That is the  
5 allegation.

6 The attorneys are going to go into a lot  
7 more detail when they explain this case to you and I am  
8 going to let them do that, but I want to introduce to you  
9 the parties.

10 So the plaintiff, the person who brings  
11 the suit and who alleges the fraud is T. L. Garden and  
12 Associates, Inc., trading as Life Safety Systems. The  
13 person representing the plaintiff is Mr. Thomas Garden.  
14 Would you stand Mr. Garden and face these ladies and  
15 gentlemen?

16 MR. GARDEN: (Complied with the Court's  
17 request.)

18 THE COURT: Thank you. The plaintiff's  
19 attorney is Mr. John Husk. The defendant, that is the  
20 institution being sued, is First Savings Bank of Virginia  
21 and the representative from First Savings Bank of  
22 Virginia is Mr. Jeffery Constantz. Would you stand  
23 please?

1 MR. CONSTANTZ: (Complied with the Court's  
2 request.)

3 THE COURT: The person who represents Mr.  
4 Constantz is defense counsel, Mr. Larry Suiters.

5 MR. SUITERS: Good morning.

6 THE COURT: I would like to know if any of  
7 you ladies and gentlemen know any of the people that I  
8 have just introduced to you? Do any of you work for, own  
9 stock in or have any business connection or business  
10 dealings or relationship with either T. L. Garden and  
11 Associates Inc., trading as Life Safety Systems or First  
12 Savings Bank of Virginia?

13 The plaintiff, Life Safety Systems, is in  
14 the business of supplying and installing fire alarm  
15 systems; does that ring any bells with you that you ever  
16 had -- ring any bells, that may not be the best way to  
17 describe it (laughter). Does that trigger anything so  
18 far as having any business dealings with these people?

19 Now I am going to ask you a series of  
20 questions and I do not want you to answer until after I  
21 have asked all of the questions. When I am through  
22 asking the questions, if you have a yes answer to any of  
23 these questions, please raise your hand and we will talk

1 about it privately at the bench.

2 Do any of you ladies and gentlemen not  
3 live in Prince William County or one of the political  
4 subdivisions within Prince William County? Have any of  
5 you been convicted of treason or felonies or high crimes?  
6 Do any of you not read, write or speak and understand the  
7 English language?

8 Do any of you have lawsuits pending in  
9 this Circuit other than a divorce, custody or domestic  
10 relations case? If you have a yes answer to any of those  
11 questions, would you please raise your hand?

12 Now, I have told you that this is a  
13 business dispute involving an allegation of fraud and the  
14 attorneys will tell you more about it. But as a result  
15 of what I have told you so far, does anyone know any  
16 reason whatsoever why you would be unable to render a  
17 fair and impartial verdict in this case based solely upon  
18 the law and the evidence presented? Okay, Mr. Husk, you  
19 may inquire.

20 MR. HUSK: Good morning. Do any of you  
21 have any problems serving on a jury today, business or  
22 otherwise? Need to get to work? Have any of you had any  
23 problems with contractors? Have any of you had problems

1 with a bank or banking institution? I do not have any  
2 further questions.

3 MR. SUITERS: I have no questions, Your  
4 Honor.

5 THE COURT: Now since the plaintiff has  
6 the burden of proof, the plaintiff's lawyer gets to have  
7 the first word with you and, at the end of the case, the  
8 plaintiff's lawyer gets to have the last word with you.

9 Plaintiff's counsel may make an opening  
10 statement outlining his case and then defense counsel  
11 will have an opportunity to make an opening statement,  
12 but neither one of those gentlemen is required to make an  
13 opening statement.

14 The plaintiff first introduces evidence  
15 and then at the conclusion of the plaintiff's evidence,  
16 the defendant has the right to introduce evidence if it  
17 wants to, but it does not have to introduce evidence at  
18 all.

19 At the conclusion of the defendant's  
20 evidence, if it chooses to introduce evidence, the  
21 plaintiff would have the right to introduce rebuttal  
22 evidence.

23 At the conclusion of all the evidence,

1 further instructions will be given to you after which the  
2 attorneys may make their closing arguments and then you  
3 retire, select a foreperson, deliberate and arrive at a  
4 unanimous verdict.

5 One thing that will be a little different  
6 in this case, is that there are a number of facts and  
7 exhibits that the parties and the attorneys have already  
8 agreed to. In other words, they are not going to have to  
9 prove them because they have agreed that these are true  
10 things that have happened in this case and they are going  
11 to tell you about that when they make their opening  
12 statements to you.

13 No statement or ruling or remark or even  
14 facial expression which I may make or have during the  
15 course of this trial is intended to indicate to you my  
16 opinions to what these facts are, because in this  
17 determination you and you alone decide upon the facts and  
18 you do it on the basis of the evidence, and in this case,  
19 the stipulations or agreements as to what the facts are.  
20 You do it on the basis of the evidence and the  
21 stipulations.

22 Now the evidence consists of the testimony  
23 of witnesses, any exhibits admitted into evidence, any

1 facts agreed upon between the parties, and the admission  
2 of evidence in court is governed by rules of law. So  
3 this means that from time-to-time, it may be the duty of  
4 the attorneys to make objections and my duty as judge is  
5 to rule on those objections and decide whether or not you  
6 can consider certain evidence.

7 You must not concern yourself with the  
8 objections or the court's reasons for the rulings on the  
9 objections. You must not consider testimony or exhibits  
10 in which an objection was sustained or which has been  
11 ordered stricken.

12 If an objection is overruled, then you may  
13 consider that evidence together with all the other  
14 evidence of the case. The opening statements and the  
15 closing arguments of the attorneys are intended to help  
16 you in understanding the evidence and applying the law,  
17 but they are not evidence, except in this case when the  
18 attorneys talk to you about the stipulations of facts and  
19 exhibits that will be evidence, because it is agreed to.

20 You and you alone must decide on the  
21 credibility of the witnesses. You may consider the  
22 appearance and manner of the witnesses on the stand,  
23 their intelligence, their opportunity for knowing the



1 truth and for having observed the things about which they  
2 have testified, their interest in the outcome of the  
3 case, their bias, and if any has been shown, their prior  
4 inconsistent statements, but whether they did knowingly  
5 testify untruthfully as to any material fact in the case.

6           You should not arbitrarily disregard the  
7 reasonable testimony of a witness. However, after you  
8 have considered all the evidence in the case, then you  
9 may accept or discard all or part of the testimony of a  
10 witness that you think proper.

11           You should use your common sense in  
12 considering the evidence and you may draw reasonable  
13 inferences from the evidence. But you may not indulge in  
14 guess-work or speculation.

15           But the consideration of these things and  
16 all the other circumstances of the case, you should  
17 determine which witnesses are more believable and weigh  
18 their testimony accordingly.

19           Now you may not discuss the case during  
20 recesses. You may not remain in the presence of any one  
21 discussing it. You may discuss the case only in the jury  
22 room when all members of the jury are present, and you  
23 may only start your discussions after all the evidence is

1 in and you have received all of the instructions. So you  
2 need to keep an open mind and not decide any issue until  
3 this case is submitted to you for your deliberations and  
4 instructions from the court.

5 (Counsel submitted their jury strikes.)

6 THE CLERK: After I call your name, please  
7 step down and have a seat in the courtroom: John Davis,  
8 John Miller, Constance Helmlinger, Lynda Miller, Patricia  
9 Miller, David Emdee.

10 For the record, I will call the names of  
11 the persons on the jury. Would you please stand and  
12 remain standing when your name is called: Suzanne  
13 Hemmer, Jimmy Crews, Kathryn Shipley, Kenneth Spence,  
14 Tommy King, Julia Geris, Edward Barnes.

15 (The jury was sworn.)

16 THE COURT: Ladies and gentlemen, we have  
17 that list of stipulations of facts and exhibits and I am  
18 going to ask -- I am going to give each one of you one  
19 and I would not read it -- begin reading it until counsel  
20 starts their opening statement to you and then you might  
21 track it with their opening statements because that would  
22 give you further explanation of it. Thank you.

23 Okay. Go ahead Mr. Husk.

1 MR. HUSK: Thank you, Your Honor. Good  
2 morning ladies and gentlemen. My name is John Husk. I  
3 am counsel for T. L. Garden and Associates. I just want  
4 to take a few minutes this morning just to give you a  
5 brief overview of our case and why we believe that First  
6 Savings Bank of Virginia is liable to T. L. Garden and  
7 Associates, Inc. from the fraud and abuse.

8 Basically, Tom Garden is T. L. Garden and  
9 Associates, Inc. It is a Manassas-based company. What  
10 they do is they supply fire alarm systems materials and  
11 things along those lines -- what they call really for  
12 those of us that know -- they call themselves a systems  
13 integrator. And basically what he does is school  
14 systems, government jobs. He goes ahead and installs  
15 materials for fire alarm systems to get them all set up.

16 Well, Mr. Garden is what they call a  
17 subcontractor. He, in April of 1998, entered into a  
18 contract with a gentleman with the company named B.I.P.  
19 Electrical. B.I.P. Electrical had a government contract  
20 on the Navy Annex and Tom's company was to supply the  
21 fire alarm materials on that project.

22 Tom and B.I.P. Electrical entered into a  
23 contract in which Tom was to be paid a total of \$314,000,

1 but really the materials themselves were roughly about  
2 \$289,000.

3 They entered into this contract in mid-  
4 April of '98 and what ended up happening was -- in the  
5 normal course of Tom's business -- once he negotiates the  
6 contract, he goes ahead and runs a credit check on people  
7 that he is thinking of doing business with.

8 Well he did that with this B.I.P.  
9 Electrical and I do not know a nice way to put it, but it  
10 did not come back favorable and Tom told the president of  
11 B.I.P. Electrical that I cannot do business with you. I  
12 am not going to supply this job due to your background.

13 Well, long story short, Tom gave this  
14 gentleman -- this company -- a few options, none of them  
15 which were accepted. The gentleman came to him, the  
16 president of B.I.P. Electrical, the gentleman's name you  
17 will be hearing a lot today, Faye Allen Kennedy, who is  
18 the president -- he came to him and said, I have a  
19 working relationship with this bank and this bank  
20 happened to be First Savings Bank of Virginia.

21 What ended up happening was that this  
22 gentleman, Mr. Kennedy, told Tom, hey, give this guy a  
23 call, we have a relationship. Mr. Garden did not know

1 what the extent of the relationship was. At best he  
2 thought they were outside -- did some accounting for him.  
3 He did not know anything about their relationship.

4 Tom -- the testimony will reflect -- Tom  
5 called Mr. Constantz, who is sitting here and is the  
6 representative for First Savings Bank. And basically  
7 what was discussed was that First Savings Bank would  
8 reserve the amount of money to pay Tom's invoice to cover  
9 the initial payment -- the payment from the government --  
10 to ensure Tom in a letter form that he would be sure to  
11 pay him and to reserve on the government contract to pay  
12 Tom's materials. This was done at the end of April,  
13 April 29th, 1998.

14 The dispute here is that it did not  
15 happen. The letter, as you will see and has been  
16 stipulated to as Exhibit Number 1 states that -- does not  
17 mention anything about First Savings Bank having a  
18 secured interest in the receivables of B.I.P. Electrical.  
19 And by that, I mean that they have first rights to any  
20 monies received. It does not mention that.

21 It does not mention that there was an  
22 outstanding line of credit. Basically, First Savings  
23 Bank extended money to B.I.P. Electrical at some point.

1 There was an outstanding balance on that amount, roughly  
2 \$322,000. My client did not have any knowledge of that.

3 Well, as you might imagine, what happened  
4 was that when the initial payment came in from the  
5 government, the one that was supposed to pay Tom -- it  
6 was supposed to be reserved for his materials -- First  
7 Savings Bank paid themselves. They paid themselves down  
8 all the money they were owed.

9 And that was automatically a breach of  
10 what the agreement was. Tom did not have any  
11 understanding about this and knowing the background on  
12 this, First Savings Bank, in fact, paid themselves. So  
13 instead of paying down the amount on their invoice in its  
14 entirety, they did not do it. They did not pay for all  
15 the materials.

16 What you will hear today, ladies and  
17 gentlemen, is that First Savings Bank will say they did  
18 not pay down. And I want to say briefly why they would  
19 say that. Tom, before he shipped any of the supplies --  
20 in order to get paid by the government, you need to send  
21 in a requisition form. The government does not just pay  
22 randomly. They need to know, okay, how much is your fire  
23 alarm system going to be worth and B.I.P. Electrical --

1 you know, we are not just going to pay. If you tell us  
2 \$500,000, we are not going to pay that. We want to know  
3 the exact amount.

4 Well, Tom did an invoice. The invoice  
5 prior to the agreement was First Savings Bank. That  
6 invoice was sent in and the government paid that \$289,000  
7 on that invoice. First Savings Bank will state that,  
8 hey, look, Tom's initial invoice was not \$289,000, it was  
9 only \$197,000. And the reason they will say that is Tom  
10 did a partial shipment on or about May 5, 1998, and he  
11 wrote a letter to Faye Allen Kennedy, president of B.I.P.  
12 Electrical and said, look, I acknowledge we made just a  
13 partial shipment, the \$197,000 is due presently, but once  
14 that is paid, we will be shipping out these other  
15 materials we have stored in our warehouse.

16 So Tom had already ordered the materials  
17 and had them all stored there ready for shipment. Now,  
18 ladies and gentlemen, the crux of our case is that Tom  
19 would never have gone into this agreement, never would  
20 have shipped, never would have lost what they call his  
21 lien rights because once you ship to a government job,  
22 you lose all your rights on the materials. You cannot  
23 lien a government job. He never would have shipped it.

1 He never would have been involved in this mess but for  
2 First Savings Banks actions and he was intentionally  
3 misled.

4 You will hear testimony and we are not  
5 trying to hide it, yes, he filed bankruptcy. So did  
6 B.I.P.'s president file for bankruptcy. You will hear  
7 testimony today that Life Safety Systems had been paid  
8 some money through the bankruptcy court, and they were  
9 paid \$60,000.

10 What we are seeking here today is a base  
11 amount of \$31,000, ladies and gentlemen, plus we are  
12 saying that it is punitive in nature and that we are  
13 seeking punitive damages. We hope that you will agree  
14 with us and that you will find our testimony credible and  
15 believable and clear and convincing to find for us.  
16 Thank you.

17 MR. SUITERS: Good morning, ladies and  
18 gentlemen. My name is Larry Suiters and I represent  
19 First Savings Bank. It is a small community bank.

20 You have heard Mr. Husk give you his  
21 client's version of the facts and the evidence that you  
22 are going to be hearing today. We have managed to  
23 stipulate to most of the significant points as well as a



1 number of the exhibits.

2 This case is a claim, it is a civil claim,  
3 but it is probably the most egregious type of civil claim  
4 that can be made against anybody and that is that they  
5 have intentionally, willfully, with knowledge and design  
6 committed a fraudulent act against somebody else. In  
7 this case, they allege my client did that against Mr.  
8 Garden with the intent to defraud him, to induce him to  
9 do something he would never have done with the result  
10 that he has suffered a loss. And the Court has already  
11 instructed you that that requires clear convincing  
12 evidence because of the nature of the claim.

13 What we have here is a situation in which  
14 there is a significant party who is not present. By way  
15 of background, in 1998, before there was any involvement  
16 with Mr. Garden, my client, the bank, had made some  
17 substantial loans to another company, B.I.P. Electric.  
18 That is going to be referred to probably throughout the  
19 trial as Mr. Kennedy, because Mr. Kennedy is B.I.P.  
20 Electric just like Mr. Garden is Life Safety Systems.

21 Mr. Kennedy had borrowed several hundreds  
22 of thousands of dollars from the bank. Now, not  
23 surprisingly, to do that the bank required that he

1 provide them with some security or some assurance that  
2 they would get paid for this.

3 Mr. Kennedy was an electrical contractor  
4 and he had secured from the government a very substantial  
5 contract, well into seven figures, to do electrical  
6 contracting in connection with the Navy Annex.

7 A government contract means that you get  
8 paid in installments as the work progresses. To secure  
9 themselves, the bank got from Mr. Kennedy an assignment  
10 of that contract. That is the best way you can secure  
11 yourself if you are dealing with somebody that has got a  
12 government contract because that means then that the  
13 government, when it makes these installment payments,  
14 rather than sending them directly to Mr. Kennedy, and  
15 then it would be up to Mr. Kennedy what he did with them,  
16 they would send them to the bank. And that way the bank  
17 would be assured that it would be paid and that was in  
18 place.

19 And then, during the course of Mr.  
20 Kennedy's business, he decided that he needed some fire  
21 alarm supplies in order to fill his contract so he and  
22 Mr. Garden began negotiating. Their arrangement had  
23 nothing to do with the bank. They entered into an

1 agreement whereby Mr. Garden was going to provide Mr.  
2 Kennedy with some supplies for his contract.

3           They struck a deal. The amount of the  
4 contract was agreed to, the amount of the profit -- and  
5 it was discussed and agreed to -- the bank had no  
6 knowledge of this, had nothing to do with it. They were  
7 not a party to that.

8           When the deal was finally struck between  
9 the two of them, Mr. Kennedy said to Mr. Garden, well,  
10 look, I am going to need some credit from you to do this.  
11 I believe Mr. Garden's testimony will be that he had some  
12 dealings some years past with Mr. Kennedy and did not  
13 think that his credit was too good so he said, well,  
14 before I can do that, you are going to have to fill out a  
15 credit application and I am going to have to do a credit  
16 check on you to see if you can stand up and justify me  
17 extending you the credit for this.

18           Mr. Kennedy did it, he checked it out as  
19 Mr. Husk indicated and came back and said, I am sorry,  
20 but your credit is not good enough. You are going to  
21 have to do something better than that or else I am not  
22 going to be able to provide this to you.

23           During the course of these discussions,

1 Mr. Kennedy related -- he will testify there was no risk  
2 to Mr. Garden, that Mr. Kennedy had a banking  
3 relationship with my client's bank, that he had assigned  
4 his government contract to that bank. And so Mr. Garden  
5 said, well why don't you get your bank to give us what is  
6 called a letter of credit. Well that is in effect the  
7 bank's guarantee. To get a letter of credit from a bank  
8 they are saying that, in this case, Mr. Kennedy, does not  
9 pay you what he is supposed to pay you under the  
10 contract, we will step into it and pay you out of our  
11 resources.

12 The bank was approached about this and  
13 they said, I am sorry, this is your deal. We are not  
14 going to give you a letter of credit. This is a deal  
15 between the two of you. We are not going to provide you  
16 with a letter of credit.

17 Finally, what was agreed to and it took  
18 the form of one letter, which is the Joint Exhibit 1  
19 which is provided to you, and one short telephone  
20 conversation that took place between Mr. Garden and Mr.  
21 Constantz and Mr. Kennedy, took the form of this letter  
22 agreement.

23 THE COURT: If everybody will look, it is

1 the first one after the stipulation of facts.

2 MR. SUITERS: Joint Exhibit 1 and it is on  
3 the letterhead of First Savings Bank of Virginia and it  
4 is dated April the 29th and it is addressed to Mr. Garden  
5 and you will see that there is some interlineations in it  
6 and it is signed by all of the parties.

7 This letter was finally generated by the  
8 bank and taken by Mr. Kennedy and given to Mr. Garden.  
9 And when Mr. Garden got this, he will testify that he  
10 then called the bank, had a very brief discussion. Most  
11 of it had to do with the few little changes that are  
12 noted here and the handwritten portion at the bottom.

13 But the sole dispute here is that this  
14 agreement says that the bank will reserve out of the  
15 contract. Now remember the contract is a multi-million  
16 dollar contract extended over a period of time, an amount  
17 to pay your invoice. And at the end it says please send  
18 us a copy of your invoice to be paid.

19 Mr. Garden got this. He made the changes  
20 to it. He had the brief discussion with my client and he  
21 signed it, as you will see, on May the 5th, 1998, that is  
22 right next to his signature. And you will see by Exhibit  
23 Number 2 that on that same date, May the 5th, 1998, a

1 letter was generated by Mr. Garden and it says subject,  
2 invoice number 25701, requesting a payment of \$197,328.  
3 It is an invoice that requires payment and that has to be  
4 paid by June the 5th, 1998, in order to prevent interest  
5 from accruing on it.

6 Now, what happened was that what the bank  
7 got from the government, according to the assignment that  
8 he had, the first payment which was something in excess  
9 of \$400,000. And that first payment was received, and  
10 this is stipulated to, on May the 21st, 1998. That is  
11 stipulation number 6, \$431,000. From that, they paid  
12 themselves part of what they were owed, not all, but  
13 part. They paid down their line of credit loan with Mr.  
14 Kennedy. Why wouldn't they? They had an assignment.  
15 They were secure. They were priority.

16 Out of that they made the following  
17 additional payments that is shown in stipulation number 7  
18 including a partial payment to Mr. Garden of \$66,000 on  
19 his invoice. Now they paid that before June the 5th.

20 When Mr. Garden got this partial payment,  
21 he sent another letter saying, well, you know I got your  
22 partial payment -- this is Exhibit Number 3 -- but that  
23 leaves a balance of \$131,214 that is owed to me on my

1 invoice and it is due by June the 5th.

2           Soon after that, the bank got in a second  
3 payment from the government and that was for \$201,000 and  
4 that is stipulation number 9. They received that on June  
5 the 4th by electronic transfer from the government. That  
6 same day, they paid Mr. Garden the balance due on his  
7 invoice of \$131,000. So that before June the 5th, 1998,  
8 Mr. Garden had been paid the entire amount of the invoice  
9 that he had submitted for payment.

10           Now what happened in the interim was that  
11 Mr. Garden still was owed some money and we did not get  
12 the next payment in from the government until July 25th.  
13 If we had been able to distribute that money, everything  
14 would have been fine.

15           Big problem. Several days before that,  
16 B.I.P., Mr. Kennedy's company filed for bankruptcy  
17 protection, Chapter 11, reorganization.

18           And that meant that we could not  
19 distribute that money. We had to turn it over to the  
20 bankruptcy court, which we did. We could not pay  
21 ourselves. We could not pay Mr. Garden. We could not  
22 pay anybody else. We turned over that money which is  
23 \$131,000, I believe, I think that is Exhibit -- no,

1     \$189,000. Pardon me, that is stipulation number 14.  
2     That money was turned over to the bankruptcy court.

3                 Subsequently, B.I.P. and Mr. Kennedy's  
4     company is still undergoing bankruptcy reorganization.  
5     They may or may not come out of bankruptcy. But, in the  
6     meantime, Mr. Garden has been paid an additional \$60,000  
7     out of the bankruptcy court on what he is owed and as  
8     stipulation number 17 says, he may get it all before it  
9     is all over. We do not know. It all depends.

10                What Mr. Garden is claiming is very simply  
11     this, that my client defrauded him because what was meant  
12     by this letter of April the 29th, Exhibit 1, they are  
13     saying that what we agreed to do was basically to have to  
14     reserve out of that first \$400,000 payment, the entire  
15     amount that he claimed he was due under the contract  
16     whenever it was completed. Not pay ourselves or anybody  
17     else.

18                Now remember, we have a secured position.  
19     We had taken the steps to protect ourselves. There is  
20     nothing in this letter that says we are going to  
21     subordinate or we are going to release our priorities,  
22     rights to you. He is saying that that constitutes fraud.  
23     I think he will testify that there was never any



1 discussion about whether the bank was subordinate,  
2 whether the bank had priority rights or anything at the  
3 time this letter was signed. It never came up.

4 And one of the elements in this case, the  
5 Court will instruct you is that fraud has to -- the  
6 fraudulent misrepresentation has to be as to a past or an  
7 existing fact that existed as of that time.

8 And the evidence will be from Mr. Kennedy  
9 and others that Mr. Garden knew that the bank had this  
10 assignment. He knew that they had protected themselves.  
11 Mr. Garden will testify that he has been in business for  
12 over twenty years, almost half of his business is with  
13 government contracts. He knows how government contracts  
14 work and he knows that if you want to protect yourself  
15 and you are dealing with somebody that has a government  
16 contract, you get an assignment of that contract. That  
17 is how you protect yourself.

18 And the only reason he did not get an  
19 assignment when he found out that Mr. Kennedy's credit  
20 was not any good, was because he knew we had it. He  
21 could not get it. We had it. He struck his deal. We  
22 honored our agreement which was we will pay your invoice.  
23 He submitted the invoice for \$197,328. That is all he

1 was due at the time.

2 This contract was being performed over a  
3 period of time. The government does not pay all the  
4 money up front. They pay it in stages to make sure the  
5 work is done, the same as the subcontractor. He  
6 submitted his invoice, we honored it, we paid it. The  
7 only reason we have not been able to pay the rest is  
8 because of the intervening bankruptcy over which we have  
9 no control and the funds have been turned over to the  
10 bankruptcy court.

11 Our position is that the bank did exactly  
12 what it said it would do and that this worked exactly as  
13 it was supposed to work and if it had not been for the  
14 bankruptcy of Mr. Kennedy, there would not be any  
15 problem. But we have no control over that. We are  
16 governed by the bankruptcy law which says that when we  
17 got that last payment in July, we had to turn it over to  
18 the court and the court then decides among the various  
19 creditors of Mr. Kennedy, who gets what.

20 But certainly there has been no fraud in  
21 this case. These are two sophisticated businessmen. He  
22 struck the deal he wanted to with Mr. Kennedy. He does  
23 not have any complaint against the bank. And at the end

1 of the case, we will ask you to return the verdict in  
2 favor of the bank. Thank you.

3 THE COURT: Now, when I gave you those  
4 preliminary instructions, I said at the end of all the  
5 evidence that I was going to give you more instructions  
6 and I will. So we are going to do things a little  
7 differently with the consent of the lawyers in this case.  
8 I am going to give you some instructions now because I  
9 think it will help you to listen to the evidence if you  
10 know what law is going to apply.

11 The burden is on the party charging fraud  
12 to prove it by clear and convincing evidence. When the  
13 party has the burden of proving an issue by clear and  
14 convincing evidence, he must produce evidence that  
15 creates in your minds a firm belief or conviction that he  
16 has proved the issue.

17 In this case, actual fraud is a  
18 misrepresentation of an existing material fact by the  
19 defendant, knowingly and intentionally made with the  
20 intent to mislead the plaintiff, which the plaintiff  
21 relied upon, with the result that plaintiff was damaged  
22 by it.

23 A material fact is one which influences a

1 person to act or not to act. In deciding whether fraud  
2 exists, you may take into consideration the relative  
3 knowledge of the parties, their respective motives and  
4 intentions, the closeness of their relationship, the  
5 actions of the parties, the nature and character of the  
6 transaction and all the other surrounding facts and  
7 circumstances.

8 If you find that the letter dated April  
9 the 29th, 1998, which is Joint Exhibit 1 required the  
10 defendant to reserve from the first payment that it  
11 received by assignment of the government contract, the  
12 full amount of plaintiff's subcontract with B.I.P., and  
13 if you further believe by clear and convincing evidence,  
14 that at the time the defendant signed the April 29th,  
15 1998, letter, it intentionally and knowingly made a false  
16 representation of material fact to the plaintiff with the  
17 intention to mislead the plaintiff into taking action  
18 based upon the representation and that plaintiff took  
19 action in reliance on the representation, and that  
20 plaintiff's reliance on the representation caused the  
21 plaintiff damage, then you shall return your verdict in  
22 favor of the plaintiff.

23 You shall find your verdict for the

1 defendant if the plaintiff fails to prove by clear and  
2 convincing evidence any or more of the elements of  
3 intentional fraud as listed above.

4 Okay. Did everyone memorize that? I  
5 would like for you to stand and repeat it. (Laughter)

6 The lawyers have agreed that you may have  
7 copies of these instructions which is really helpful and  
8 you are fortunate to be seeing these two lawyers in  
9 action because it is such a good way to make things  
10 clear.

11 So what we are going to do is give each  
12 one of you a set of those instructions and you do not  
13 need to sit and read this, you listen to the evidence.  
14 In fact, we would ask that you not read this while the  
15 witnesses are testifying, but you will be able to look at  
16 it in more detail and digest what we just read to you,  
17 okay?

18 I think that the way to put them order  
19 would be that -- start with I -- would be your first  
20 instruction. The first one you will want to look at is I  
21 followed by H, J, M.

22 Now there is one other instruction -- oh,  
23 I forgot -- and the ones on proof -- those are K and L --

1 I would put those at the beginning. K and L would come  
2 even before I. And then there is going to be one last  
3 one and it relates to the damages.

4 You know lots of times people will sue to  
5 get compensated for something that they lost. And that  
6 is what the plaintiff, Mr. Garden, is doing in this case.  
7 He is alleging that he lost money as a result of this and  
8 he wants to be compensated, but he is carrying it a step  
9 further and he is saying since the defendant committed a  
10 wrong, that is the fraud, then we want the defendant to  
11 be punished for that and that is why we have this  
12 instruction in.

13 If you find that the plaintiff is entitled  
14 to be compensated for its damages and if you further  
15 believe by the greater weight of the evidence that the  
16 defendant acted with actual malice towards the plaintiff  
17 or acted under circumstances amounting to a willful and  
18 wanton disregard for plaintiff's rights, then you may  
19 also award punitive damages -- they are punishment  
20 damages to the plaintiff to punish the defendant for its  
21 actions and to serve as an example to prevent others from  
22 acting in a similar way.

23 If you award punitive damages, you must

1 state separately in your verdict the amount that you  
2 would allow as compensatory damages and the amount that  
3 you allow as punitive damages.

4 Okay. You can call your first witness.

5 MR. HUSK: I would like to call Thomas  
6 Garden to the stand.

7 Whereupon,

8 THOMAS L. GARDEN,  
9 the plaintiff, was called for examination by counsel on  
10 his own behalf, and, having been first duly sworn by the  
11 court, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. HUSK:

14 Q. Mr. Garden, would you please state your  
15 full name and address please?

16 A. Thomas L. Garden, 14932 Alpine Bay Loop,  
17 Gainesville, Virginia.

18 THE COURT: Now, if at any time you  
19 cannot hear either the lawyer or the witness, raise your  
20 hand. Thank you. Okay, one person did not hear the  
21 question and the answer.

22 BY MR. HUSK:

23 Q. I just asked his name and address.

1                   What is your occupation, Tom?

2           A.       I am owner and president of T. L. Garden &  
3 Associates trading as Life Safety Systems.

4           Q.       What kind of stuff do you do?

5           A.       We are a systems integrator in a vertical  
6 marketer. We provide systems in the school market, the  
7 health-care market and the federal government.

8           Q.       How long have you been in business?

9           A.       Twenty-one and a half years.

10          Q.       At some point in 1998, did you enter into  
11 a contract with a company by the name of B.I.P.  
12 Electrical?

13          A.       Yes, I did.

14          Q.       What was the extent of that contract?

15          A.       It was to provide a fire alarm system for  
16 a federal office building number two in the amount of  
17 \$314,000.

18          Q.       Of the \$314,000, is that just for your  
19 labor or how is that broken down?

20          A.       In most contracts it consists of two  
21 elements, material and labor. Since we are mostly a  
22 material supplier, the majority of our contracts are  
23 material. In the case of this one, it was \$289,000 for



1 material.

2 Q. And you testified -- you entered into the  
3 contract at some point in April; is that correct?

4 A. Yes.

5 Q. Did you begin performing on the contract  
6 right away?

7 A. No.

8 What we do -- well, this was a two-part  
9 contract. We had cooperated in the design of it over the  
10 previous seven or eight months with a group of people for  
11 the federal government, and then we negotiated with Mr.  
12 Kennedy to provide the equipment.

13 Q. Now when you say Mr. Kennedy, Mr. Kennedy  
14 is whom?

15 A. B.I.P. Electric.

16 Q. Is he the president?

17 A. Yes.

18 Q. And so you negotiated with Mr. Kennedy to  
19 this contract, and my question was did you begin  
20 performing right away?

21 A. Initially what we did is we did a credit  
22 check on Mr. Kennedy because up to that point we did not  
23 have a contract and we had to establish his ability to

1 pay for the services.

2 Q. Did you do a credit check on Mr. Kennedy  
3 or B.I.P. Electric?

4 A. B.I.P. Electric.

5 Q. And what was the result of that credit  
6 check?

7 A. It came back negative.

8 Q. Negative that you would not do business  
9 with him?

10 A. We said that someone must be paying their  
11 bills in the normal term, thirty days, and his report  
12 came back that he was not doing that.

13 Q. As a result of the credit check, what did  
14 you do?

15 A. I then went back to Mr. Kennedy and I said  
16 we cannot extend to you credit in the amount of \$314,000.  
17 There are approximately three ways we can do business.  
18 One is a joint check with the federal government, C.O.D.  
19 as you need the equipment, you pay for it, and the third  
20 is in the form of a guarantee from another party such as  
21 a letter of credit from a bank.

22 Q. And did you offer any one of those options  
23 to him or all three?

1           A.       Well, because the contract was going to be  
2 ongoing, I suggested C.O.D. He could just take it as he  
3 needed it.

4           Q.       In contracts such as this, do you bill on  
5 an interim basis? Do you bill for entire amounts? How  
6 do you bill your material cost?

7           A.       This is considered a fairly large system  
8 which we have done a number of, and it is generally --  
9 the contractors would like to receive all materials up  
10 front. Have them stored at the job site so that labor  
11 which is a big part of their contract, and is the biggest  
12 liability they have, because if they get held up for any  
13 reason, it affects their labor.

14                   And so they prefer to have all materials  
15 on-site at the front-end of a contract and then have no  
16 reason for their labor to be held up. And so that is how  
17 it is generally done.

18           Q.       Was it done that way in this case?

19           A.       In this case, since Mr. Kennedy did not  
20 have good credit, initially because the contract, we felt  
21 we were going to work out something with him in one of  
22 those three ways, I ordered all of the equipment to come  
23 to my warehouse.

1                   And I have a fairly large warehouse and I  
2 store materials there until people pay for them and then  
3 we deliver them.

4                   In the case of this contract, we ordered  
5 them and they came into the warehouse and were sitting in  
6 our warehouse.

7           Q.       And what was the total amount?

8           A.       \$289,000.

9           Q.       Now, Mr. Garden, once you gave Mr. Kennedy  
10 his three options, did he accept any of those three as  
11 far as making payment to you?

12          A.       He said that he wanted to go back and talk  
13 with some people and find out what he could do, and this  
14 went on for a number of weeks. And then finally he came  
15 to me and he said he would like to have me talk with his  
16 banker.

17          Q.       And who was his banker?

18          A.       First Virginia.

19          Q.       First Virginia or First Savings?

20          A.       First Savings.

21          Q.       Subsequent to the conversation that you  
22 had with Mr. Kennedy, did you in fact talk to anyone at  
23 First Savings Bank?

1           A.       I did not talk to anyone until Mr. Kennedy  
2 directed me to Mr. Constantz.

3           Q.       And when approximately was that?

4           A.       I was in Jacksonville, Florida, at a  
5 business meeting in late April, and I received a call  
6 from Mr. Kennedy that he wanted me to talk to Jeff  
7 Constantz, and so he gave me his number and I called him.

8           Q.       Mr. Constantz, as far as you knew what was  
9 his position there?

10          A.       He was president of the bank.

11          Q.       What was the subject matter of your  
12 conversation with Mr. Constantz?

13          A.       He told me that -- he asked me what it  
14 would take for me to do business with Mr. Kennedy, and I  
15 said that I would like a letter of credit.

16          Q.       In response to your suggestion of a letter  
17 of credit, what resulted?

18          A.       He said that he could not do that, and he  
19 said he would not. But he would provide a letter that  
20 would state specifically that he would reserve the amount  
21 of our invoices for materials when the money came from  
22 the government to his bank, and he would pay us within  
23 thirty days.

1                   And we even had discussions about  
2                   discounting because the government pays within fifteen  
3                   days on this type of contract.

4                   Q.       Did you advise Mr. Constantz at any time  
5                   what the amount of your subcontract was?

6                   A.       I believe that there was discussion at the  
7                   phone conversation in the amount of the contract,  
8                   \$314,000.

9                   Q.       Did you ever advise Mr. Constantz of the  
10                  amount of materials that were to be supplied, the dollar  
11                  amount?

12                  A.       No, just the amount of the contract  
13                  because we were trying to establish a way to get the  
14                  credit.

15                  Q.       As a result of your conversation with Mr.  
16                  Constantz, did he -- did you -- strike that.

17                             Before your conversation with Mr.  
18                  Constantz, did you know what kind of relationship B.I.P.  
19                  had with First Savings Bank?

20                  A.       I was told that -- by B.I.P. Electric, Mr.  
21                  Kennedy, that he would develop a relationship with the  
22                  bank that would see that his company would not be in  
23                  charge of the money, but a third party would be in charge

1 of the money and make sure that we got paid for our  
2 materials.

3 Q. Before your conversation with Mr.  
4 Constantz, did you know whether F.S.B. had a lien on the  
5 accounts receivable?

6 A. No.

7 Q. Did you know whether F.S.B., before your  
8 conversation with Mr. Constantz, had a variable  
9 commercial note with Mr. Kennedy for B.I.P.?

10 A. I do not believe I did.

11 Q. As a result of your telephone conversation  
12 with Mr. Constantz, afterwards were you aware of the  
13 relationship between B.I.P. and First Savings Bank, the  
14 business relationship, what the extent of it was?

15 A. Well, there was a discussion at one time  
16 as we were going through this process that this would  
17 possibly be the bank that he had done a loan for his  
18 building in, the building he operates out of.

19 Q. Did you have any knowledge, after your  
20 conversation with Mr. Constantz, of a line of credit  
21 between B. I.P. and First Savings Bank?

22 A. No, I did not know that.

23 Q. Subsequent to your telephone conversation

1 with Mr. Constantz in April of '98, did you have any  
2 other contact with him?

3 A. No.

4 Q. No telephone conversations?

5 A. No.

6 Q. Mr. Garden, I would like for you to take a  
7 look at what is Joint Exhibit Number 1. Could you  
8 identify this document for me?

9 A. This is the April 29th letter. Is that  
10 what you are talking about?

11 Q. Correct.

12 A. This letter was written by Jeff Constantz,  
13 president of the bank, to me, and it basically said that  
14 they would reserve the monies for equipment supplied  
15 under this contract and see that I got paid.

16 Q. That was your understanding?

17 A. Yes. In a timely fashion.

18 Q. Now, Mr. Garden, let me ask you this.  
19 This letter is dated April 29, 1998. Had you issued an  
20 invoice at all as it relates to this project, this  
21 equipment?

22 A. Because we had the equipment shipped to  
23 our warehouse, it arrived approximately about April 20th.



1 Mr. Kennedy had asked me, that since the equipment was  
2 still in my warehouse, to issue an invoice for the amount  
3 of the equipment which was \$289,000, and this is done on  
4 a number of jobs that we do where equipment will come in,  
5 we will issue the invoice, and then he can submit it for  
6 requisition and payment within fifteen days.

7 Q. Submit it to whom?

8 A. To the federal government on this  
9 contract.

10 Q. And you generated an invoice for the  
11 materials?

12 A. Yes.

13 Q. And who did you give that invoice to?

14 A. Allen Kennedy.

15 Q. Do you know if Mr. Kennedy submitted it to  
16 the government?

17 A. Yes, I do.

18 He did submit it to the government. That  
19 was the reason for generating it.

20 Q. Did it ever come to your attention, Mr.  
21 Garden -- while you were negotiating this contract or  
22 subsequently in your conversations with Mr. Constantz,  
23 and execution of this Joint Exhibit 1, April 29, 1998,

1 did it ever come to your attention that any monies would  
2 not be paid until your equipment was on site?

3 A. No, we did not discuss those details.

4 What we discussed was payment for invoiced  
5 amounts of equipment.

6 Q. And that discussion you had with Mr.  
7 Constantz?

8 A. Yes.

9 Q. As a result of receiving this letter, Mr.  
10 Garden, were you aware of the -- did this letter indicate  
11 to you the business relationship B.I.P. had with First  
12 Savings Bank?

13 A. It basically says that they are going to  
14 be the person administrating funds to make sure that they  
15 are not used for other things, which was one of my  
16 concerns.

17 Q. As a result of receiving this letter, did  
18 you believe that first monies would be taken to pay off a  
19 line of credit?

20 MR. SUITERS: I think the agreement -- the  
21 letter speaks for itself.

22 THE COURT: Sustained.

23 BY MR. HUSK:

1           Q.       You ultimately executed this letter, did  
2 you not?

3           A.       Yes, I did, when I came back from my trip.

4           Q.       Subsequent to the execution of this  
5 letter, did you deliver any materials to the Navy Annex?

6           A.       Yes, we delivered some.

7           Q.       Mr. Garden, I turn your attention to Joint  
8 Exhibit Number 2. Could you identify this document for  
9 me?

10          A.       This is a letter that we sent, our  
11 company sent, to Allen Kennedy, under my signature,  
12 discussing that he had picked up an amount of equipment  
13 \$197,328 on this date, all right, because Mr. Kennedy had  
14 decided he would take partial shipment rather than total  
15 shipment.

16                   So, I was reminding him by this letter  
17 that this is a form of a collection letter, what he owed  
18 us.

19          Q.       Were you expecting to be paid \$289,000 or  
20 \$197,000?

21                   MR. SUITERS: Again, objection, Your  
22 Honor. If the witness is testifying as to the exhibit,  
23 the exhibit speaks for itself.

1 THE COURT: Sustained.

2 BY MR. HUSK:

3 Q. Mr. Garden, with regard to Exhibit Number  
4 2, do you know whether this was ever received by First  
5 Savings Bank?

6 A. We faxed some of the correspondence to  
7 First Savings. All right. I am not sure that this one  
8 got faxed, but when we were doing payment we faxed things  
9 to them to make sure they were aware of what was going  
10 on.

11 Q. Right from the start?

12 A. Uh-huh. Yes.

13 Q. Mr. Garden, could you turn to Joint  
14 Exhibit Number 3.

15 Mr. Garden, can you identify this document  
16 for me?

17 A. Yes.

18 This is a letter from me to Allen Kennedy  
19 reminding him of the outstanding balance that had not  
20 been paid.

21 Q. Had you been paid some monies?

22 A. Yes.

23 As the letter said, we received \$66,000

1     which was not the \$197,000. This letter was a second  
2     letter that I wrote. It was like a collection letter. I  
3     was already seeing that our original game plan that I  
4     would be paid for the full amount of that \$289,000  
5     invoice was being changed.

6             Q.       What made you believe that?

7             A.       Well because I submitted the invoice for  
8     \$289,000 so that they could be paid that amount from the  
9     government. And then they came in and took a partial  
10    shipment so that they would only end up paying me  
11    \$197,000.

12                    And, then on top of that, they are getting  
13    paid in ten to fifteen days and they are paying me  
14    \$66,000 of the \$197,000 and they had already received  
15    payment.

16                    And it was just -- they were just starting  
17    a process of not doing what we had set out to do. And my  
18    company had provided the paperwork so whereby they would  
19    be able to get \$289,000. And that money did not come to  
20    us as it should have.

21                    So this letter was a second letter, a  
22    collection letter, reminding them of the \$197,000 they  
23    did take, and that there was a balance outstanding on

1 that.

2 Q. Did you contact -- beside this letter, did  
3 you contact Mr. Kennedy via telephone?

4 A. Yes. He and I talked about it.

5 Q. As a result of the conversation?

6 A. I also talked to a Bill McSorley with the  
7 bank, a loan officer.

8 Q. As a result of your conversation with Mr.  
9 McSorley, what were the --

10 A. I told him that I was unhappy about what  
11 was starting to occur on this contract, and that I had  
12 submitted an invoice for \$289,000 which I believe they  
13 had been paid for in full, and that they had started to  
14 only pay me partials against it, and that it was  
15 unacceptable.

16 And he told me that they had had some  
17 other things come up that they had to pay but that they  
18 would see that I got paid.

19 Q. Do you know how much money First Savings  
20 Bank received, if any at all?

21 A. I do not know the exact amount they  
22 received. I had heard that they had received on the  
23 first draw like \$400,000, but I did not see any of the

1 documentation.

2 Q. Mr. Garden, how come you did not just stop  
3 the project right then?

4 A. Mainly because I still had equipment in my  
5 warehouse, and on previous government contracts I had the  
6 opportunity to discuss with the government if there were  
7 problems with the contractors, and we were not quite at  
8 that point, but I felt I would have that option, and I  
9 would then be able to resolve the issue.

10 Q. Mr. Garden, turn to Exhibit Number 4,  
11 Joint Exhibit Number 4. Can you identify this document  
12 for me?

13 A. This is another collection letter where we  
14 are telling Mr. Kennedy money that is outstanding.

15 Q. Let me just turn your attention -- go back  
16 to Exhibit Number 3 for a moment, Mr. Garden.

17 On this Exhibit Number 3, did you send  
18 this to First Savings Bank?

19 A. I believe that we did, because we were  
20 sending all the information relative to collection to  
21 them. We would send it or fax it to them.

22 Q. Did you indicate a specific amount that  
23 was still in your warehouse?

1 MR. SUITERS: The document speaks for  
2 itself, Your Honor.

3 THE WITNESS: Yes, that is what it says.

4 THE COURT: Sustained.

5 BY MR. HUSK:

6 Q. Turn with me to Exhibit Number 4?

7 A. Four?

8 Q. Yes. Can you identify this document again  
9 for me?

10 A. This is a letter of collection which I  
11 wrote to Allen Kennedy of B.I.P. and reminded him of the  
12 amount of the outstanding monies owed.

13 Q. Did you ever send this to anyone at First  
14 Savings Bank?

15 A. I am not sure, but I would have to check  
16 with one of my people to make sure, but I believe our  
17 standard policy was that we would fax to them or mail to  
18 them copies of everything related to the money.

19 Q. Mr. Garden, let me ask you this. At this  
20 juncture, did you have any reason to believe that First  
21 Savings Bank had not reserved a full amount from your  
22 initial invoice?

23 A. Yes. That was based on two elements.



1                   One, they had altered the method in which  
2 we were going to be paid. After we submitted the  
3 \$289,000, they had started piecemealing payments against  
4 that invoice.

5                   And the second thing was my discussions  
6 with Bill McSorley, the loan officer. He was telling me  
7 they were wanting to pay other things and I had to sit  
8 and wait and be patient.

9                   Q.       Would you have shipped any of your  
10 materials if you thought that Exhibit Number 1 was not to  
11 reserve the full amount of your contract?

12                  A.       If I had realized where we were headed, I  
13 would not have started the process. No, I would not have  
14 shipped things, the equipment.

15                  Q.       Mr. Garden, you are aware B.I.P. filed  
16 bankruptcy; are you not?

17                  A.       Yes, I am.

18                  Q.       From the bankruptcy matter, have you been  
19 paid any monies?

20                  A.       Yes, \$60,000. And that \$60,000 that we  
21 were paid was part of that original \$289,000 that we  
22 invoiced and they were paid for. We were able to get  
23 \$60,000 through the arbitration of the bankruptcy.

1 Q. How much are you claiming you are owed?  
2 How much are you claiming you are damaged?

3 A. The remaining balance of the material is  
4 \$31,000 something and that is on that original \$289,000.

5 MR. HUSK: No further questions.

6 THE COURT: Before we cross-examine, let's  
7 take a ten-minute break and then we will have cross-  
8 examination. Step down, please.

9 (The jury departed the hearing room.)

10 (There was a brief recess from 11:35 a.m. to 11:47  
11 a.m.)

12 (The jury returned to the hearing room.)

13 THE COURT: Okay, go ahead.

14 CROSS-EXAMINATION

15 BY MR. SUITERS:

16 Q. Now, Mr. Garden, you said that you have  
17 been in business for over twenty years?

18 A. Yes, that is correct.

19 Q. And am I correct that a substantial part  
20 of your business both now and over the years has been  
21 dealing in government contracts?

22 A. Thirty or forty percent of it.

23 Q. Thirty or forty percent of it. And would

1     you consider yourself a sophisticated businessman?

2             A.       I think I have experience. I do not know  
3     what sophisticated means, but I am experienced.

4             Q.       As part of your ongoing business, you have  
5     a need on a frequent basis to make decisions regarding  
6     credit of the people you are dealing with. That is part  
7     of your business, isn't it?

8             A.       Yes.

9             Q.       Now, the bank had nothing to do with you  
10    and Mr. Kennedy getting together on your contract; did  
11    it?

12            A.       No.

13            Q.       In fact, you had never had any dealings  
14    with First Savings Bank or Mr. Constantz?

15            A.       No.

16            Q.       You did not know him?

17            A.       No.

18            Q.       And the only time you have ever had any  
19    discussion with him was that very brief telephone  
20    discussion that you testified to which led up to the  
21    letter which is Joint Exhibit Number 1?

22            A.       Yes.

23            Q.       Now you testified that after you and Mr.

1 Kennedy had struck your deal, and he had asked you for an  
2 extension of credit, that you had a credit report run?

3 A. Yes.

4 Q. You filled out a credit report and you had  
5 a credit check on him, and it came back not so good?

6 A. Yes.

7 Q. Now didn't that credit report show that  
8 First Savings Bank had filed U.C.C. filings showing that  
9 it had an assignment of his government contract?

10 A. The one that I had, it did not show that.  
11 What it showed was the local payment of the people in the  
12 area, the first credit check I did.

13 Q. Did your credit check not show that he had  
14 borrowings from financial institutions such as First  
15 Savings Bank?

16 A. The first credit check that I did that  
17 showed up negative was done with a local group, okay, and  
18 it deals strictly with suppliers not bankers. And he was  
19 doing business in the Washington community. And the  
20 first credit check I did with him did not show anything  
21 but how he paid his bills with suppliers.

22 Q. And that is because of the type of credit  
23 check you elected to have? I mean you could have had a

1 more exhaustive credit check which would have shown you  
2 what obligations he had secured which is shown by the  
3 public records?

4 A. Well, at that time, I did not have a  
5 relationship with Dunn and Bradstreet, which is a  
6 sophisticated kind of credit check.

7 Q. But in any event, this government contract  
8 that Mr. Kennedy had was a multi-million dollar contract,  
9 isn't that correct?

10 A. The one that he had that I was a part of  
11 was a million-four.

12 Q. A million four hundred thousand dollars.

13 A. Yes.

14 Q. Now how did you think Mr. Kennedy was  
15 operating in terms of his payroll and his expenses if he  
16 had such bad credit and if he was not getting some  
17 financing from somebody?

18 A. As far as how he was operating, I did not  
19 delve into that as deeply as how I was going to get paid.

20 Q. Now, based upon your experience and  
21 particularly with reference to government contracts, the  
22 best way for you to be sure that you are going to be paid  
23 when somebody is dealing in a government contract, is to

1 get either an assignment of the contract or to have a  
2 joint check issued with the government which sends its  
3 check payable jointly to, in this case, Mr. Kennedy and  
4 to you?

5 A. Yes.

6 Q. And the reason you did not do this is  
7 because you knew that the bank already had an assignment  
8 of that and they were ahead of you on that; isn't that  
9 true?

10 A. No.

11 What occurred is I asked him to do a joint  
12 check. I never asked for an assignment because an  
13 assignment was not something that I was thinking of in my  
14 relationship with him. What I was thinking of was  
15 C.O.D., joint check and a letter of credit.

16 And he chose not to do the C.O.D. or the  
17 joint check. There was not a discussion about  
18 assignment.

19 Q. Well, didn't Mr. Kennedy tell you that he  
20 had already made an assignment of this contract to the  
21 bank?

22 A. No, he did not.

23 Q. But I guess what I am having difficulty

1 understanding is since you were on notice that this Mr.  
2 Kennedy was a credit risk, why you did not say the way to  
3 solve this problem for me is Kennedy give me an  
4 assignment of your contract? But you did not do that?

5 A. I have never done that because as a  
6 subcontractor I have never done that. In the twenty-plus  
7 years I have never done that.

8 Q. That does not mean that you could not do  
9 it or that would not be the way to do it if it was  
10 available?

11 A. It has never been something that I used.  
12 It is used generally by much larger contractors than I  
13 am.

14 Q. In any event, as I understand it, that one  
15 of the alternatives that you presented to Mr. Kennedy was  
16 to have his bank, which was First Savings Bank, give you  
17 a letter of credit; is that correct?

18 A. I did not know who his bank was. I said  
19 you could get a letter of credit from a bank.

20 Q. And that means, does it not, that in  
21 effect that the bank is substituting its credit for Mr.  
22 Kennedy, so that you would be relying on the credit of  
23 the bank?

1           A.       Yes.

2           Q.       And when you found out who his bank was  
3 and had discussions with the bank about that, they told  
4 you flat out that they were not going to do that; isn't  
5 that correct?

6           A.       He said, no, he would not issue a letter  
7 of credit.

8           Q.       Now, you testified that sometime in April  
9 of 1998, you had this brief telephone discussion with Mr.  
10 Constantz at the bank that led up to the letter which is  
11 Joint Exhibit Number 1; is that correct?

12          A.       Yes.

13          Q.       Now, was Mr. Kennedy part of that  
14 discussion as well?

15          A.       No. It was just myself and Mr. Constantz  
16 on the telephone when I talked about this.

17          Q.       Are you sure that Mr. Kennedy was not  
18 there, that you had a conference call?

19          A.       I am not clear on that. I do not think he  
20 was. It was just the two of us.

21          Q.       In any event, you testified as to what  
22 that conversation was and that following that, as I  
23 understand it, Mr. Constantz then sent you this letter



1 which is Joint Exhibit Number 1, which is dated April the  
2 29th, 1998?

3 A. Yes.

4 Q. Now you did not sign it immediately; did  
5 you? It was signed by you on May the 5th?

6 A. That is because I was away.

7 Q. And even as sent to you, you made some  
8 changes in it, didn't you, which are obvious from the  
9 letter?

10 A. I made the changes because in the  
11 discussion that I had with Mr. Constantz he mentioned  
12 that they would be receiving payment in fifteen days or  
13 less, and they would definitely be interested in  
14 discounts if we offered them. So I put those in that  
15 letter.

16 Q. But, in any event, when you got this  
17 letter, you just did not accept it, sign it, and send it  
18 on? You reviewed it, you made some changes, and then you  
19 signed it and sent it back; isn't that correct?

20 A. Right. Because of what the letter said at  
21 the top and I had already submitted an invoice for  
22 \$289,000. I put on there --

23 Q. If you could just answer my question?

1 A. Yes.

2 Q. I understand.

3 Now, let's look at -- do you have that  
4 Joint Exhibit Number 1 there?

5 A. Yes.

6 Q. Okay, thank you. All right, I am going to  
7 ask you some questions about it.

8 First of all its reference is to the Navy  
9 Federal Annex Contract and the contract number. That is  
10 the contract that Mr. Kennedy had; is it not?

11 A. Yes.

12 Q. That is the \$1,400,000 contract?

13 A. Yes.

14 Q. It is not your subcontract?

15 A. No.

16 Q. And the letter says that the bank will  
17 reserve an amount from the contract; isn't that what it  
18 says?

19 A. Yes, to pay my invoices.

20 Q. It says from the contract. It does not  
21 say --

22 MR. HUSK: Objection, Your Honor. The  
23 letter speaks for itself.

1 MR. SUITERS: Well, I am trying -- It does  
2 not say anything about the first installment; does it?  
3 It says from the contract.

4 THE COURT: I have sustained this  
5 objection.

6 MR. SUITERS: I am sorry. I  
7 misunderstood. I am sorry.

8 THE COURT: That is because I did not  
9 respond immediately, but I do sustain the objection.

10 MR. SUITERS: Okay, fine.

11 BY MR. SUITERS:

12 Q. Now -- and it says sufficient to pay your  
13 invoice for equipment supplied; is that correct?

14 A. Yes.

15 Q. And then in the last paragraph it asks you  
16 to please provide the bank with a copy of your invoice to  
17 be paid; correct?

18 A. Yes.

19 Q. And you signed that on May the 5th?

20 A. Yes.

21 Q. Turn to Exhibit Number 2, Joint Exhibit  
22 Number 2.

23 Now that is a letter which is also dated

1 May the 5th, the same day that you signed the contract,  
2 the agreement?

3 A. Yes.

4 Q. It is directed to Mr. Kennedy. It refers  
5 to an invoice, and it says the revised amount of our  
6 Invoice Number 25701 is \$197,328, and it said it needs to  
7 be paid in full by June the 5th, 1998, or else there  
8 would be interest; is that correct?

9 A. Yes.

10 Q. So isn't this the invoice that you sent in  
11 response to the request of the bank to send an invoice?

12 A. No.

13 Q. It is not?

14 A. No.

15 Q. It is just coincidence that it is dated  
16 the same date?

17 A. This is a letter of collection. The only  
18 invoice sent at this time was the \$289,000, which was  
19 sent on 4/23/98.

20 Q. When do you send out letters of  
21 collection, the same day that you send out the invoice?

22 A. In cases like this where there is a  
23 certain concern about the customer we are doing business

1 with, we send out clarifications. And this letter was  
2 sent out because Mr. Kennedy had come to my office and  
3 said he needed --

4 MR. SUITERS: Objection, Your Honor. I am  
5 going to object to Mr. Kennedy. He is not --

6 THE COURT: I will overrule the objection.

7 MR. SUITERS: All right.

8 THE WITNESS: He came to my office and he  
9 said we do not want all of the equipment at this time.  
10 We only want this part because we have to put equipment  
11 on the job site so that the government will pay our first  
12 requisition, okay.

13 And I said to him, but I invoiced you for  
14 \$289,000, why are we stepping it down? He said, because  
15 we only want this amount now. And so I did not revise  
16 the invoice. I sent a letter stating that the amount  
17 that he took was \$197,328.

18 And he had to have the equipment on the  
19 site to be paid his requisition.

20 Q. Now, as I understand it, the process was  
21 for you to send invoices or these letters, whatever you  
22 call them, to Mr. Kennedy for transmittal to the bank for  
23 payment?

1           A.       The only thing that I found that he would  
2 transmit to the bank for payment was my invoice like the  
3 one for \$289,000.

4           Q.       How do you know that?

5           A.       Well, because when I made that invoice up,  
6 he told me he was taking it to put it in his requisition  
7 to be paid so the government would pay that amount and  
8 send it to the bank, and then I would be paid for that.

9                   This letter was the concern on my part  
10 that it had changed, and I was just saying it did change  
11 to this amount, and I want to be paid for this amount  
12 quickly.

13          Q.       Now, there is no dispute, is there, Mr.  
14 Garden, that First Savings Bank paid you \$197,328 on or  
15 before June the 5th, 1998?

16          A.       No, they paid me that.

17          Q.       They paid you that.

18          A.       In two payments.

19          Q.       That is right.

20          A.       Not in one.

21          Q.       But if they would have paid it in five  
22 payments, as long as it was paid by June the 5th, it did  
23 not make any difference; did it? Your invoice said it

1 was due by the 5th of June.

2 A. Well, the original invoice was \$289,000.  
3 They altered that transaction and then they paid  
4 something less, okay, even though in my mind they  
5 received \$289,000.

6 Q. You never sent your invoice for \$289,000  
7 to the bank; did you?

8 A. Mr. Kennedy came by and picked it up.

9 Q. All right. My question was, did you ever  
10 send it to the bank?

11 A. No, I did not send it.

12 Q. So you do not know whether the bank ever  
13 got that or not?

14 A. No. I do not know that.

15 Q. But would it be fair to say you assume  
16 they got Exhibit Number 2 because -- and Exhibit Number  
17 3, which follows up on it, because in fact they paid you  
18 that amount by June the 5th, 1998?

19 MR. HUSK: Objection. It calls for  
20 speculation.

21 THE WITNESS: I would assume that the bank  
22 got all the documents because it --

23 THE COURT: Objection, overruled.

1 THE WITNESS: I would assume the bank got  
2 the original -- every document --

3 BY MR. SUITERS:

4 Q. I did not ask you that.

5 A. I would say they got the invoice and they  
6 got this one and they got every letter because it dealt  
7 with money, and they are money people. And the reason I  
8 was doing business with him was that the bank wrote that  
9 letter.

10 Q. Now, even though you say you had in your  
11 warehouse all of this equipment, \$289,000 worth, in fact,  
12 you never released -- you did not release more than  
13 \$197,328 worth upon this payment; did you? You did not  
14 release the entire \$289,000 when you only got this  
15 payment.

16 You only released \$197,000 worth of  
17 equipment; isn't that correct?

18 A. Yes. But I am going to say something --

19 THE COURT: It is cross-examination I have  
20 been trying to give you leeway, but your counsel will  
21 give you an opportunity during redirect.

22 THE WITNESS: Okay.

23 BY MR. SUITERS:



1           Q.       Now, subsequent to the filing of the  
2 bankruptcy by Mr. Kennedy, you have continued to release  
3 equipment and get paid through the bankruptcy court; is  
4 that correct?

5           A.       I have released equipment to him in two  
6 manners, one, the bankruptcy court, and then for  
7 additional materials that he bought, they were C.O.D.

8           Q.       And your work under that contract is still  
9 ongoing; isn't it?

10          A.       Well, it is done basically this week.

11          Q.       This week. So, now we are in 1999 and it  
12 is just finishing up now so it has been ongoing.

13                    Would you please tell me specifically what  
14 constitutes the fraud that the bank committed against you  
15 intentionally and willfully and maliciously. What  
16 material --

17                   MR. HUSK: Objection. It calls for a  
18 legal conclusion.

19                   THE COURT: Overruled.

20           BY MR. SUITERS:

21          Q.       What material fact did they knowingly and  
22 intentionally and willfully misrepresent to you?

23          A.       In my opinion, what they did was -- I did

Garden - Cross

1 not want to do business with Mr. Kennedy, okay. But  
2 after talking with Jeff Constantz, he said to me that all  
3 the money from this is going to flow from the government  
4 directly to us, and we will reserve the money to pay your  
5 invoices. All right.

6 And we will be receiving the money in ten  
7 to fifteen days because that is the cycle on this  
8 contract.

9 I believe that my original invoice of  
10 4/23/98 for \$289,000 was part of the original submission  
11 for a requisition and that they were paid all of it.  
12 Okay. And that after receiving the money, they started  
13 altering how they were going to pay me, such as they gave  
14 me \$66,000, and then they gave me the balance when I got  
15 upset with them against the \$197,000.

16 They also had Mr. Kennedy come out to my  
17 place and take something less and say we only want you to  
18 bill us right now for this, regardless of what we have  
19 done before.

20 So, I drew the conclusion that the bank,  
21 under Mr. Constantz, was taking and manipulating the  
22 money for some purpose other than me, even though they  
23 had encouraged me to go into this agreement based on this

1 letter, okay, that they would reserve it. And I believed  
2 initially that they would.

3 Q. And these actions occurred between the  
4 time of the letter and the time you got your first  
5 payment of \$197,000?

6 A. It started occurring in that month of May  
7 in that I did not get paid in fifteen days as we thought  
8 I would. And it just moved on from there.

9 Q. And as I understand it, you fault the bank  
10 for having paid itself first out of the assignment that  
11 it had?

12 A. I did not know that they had done that  
13 until we had got into this, okay. I just knew that I had  
14 not gotten paid.

15 Q. You never had a discussion about that; did  
16 you?

17 A. No. I did not know what they were doing  
18 with the money. I knew they had been paid, but I did not  
19 know where the money went.

20 Q. And Mr. Constantz did not misrepresent to  
21 you because you never had that discussion; did you? You  
22 never asked him? That never came up in your discussion;  
23 did it?

## Garden - Redirect

1           A.       The only thing that came up in our  
2 discussion was as one businessman to another, he said I  
3 will reserve the money for your invoices for materials.  
4 Which I later said to myself that he did not do that.  
5 Because if he did, I would have been paid in fifteen  
6 days, thirty days at the maximum.

7           MR. SUITERS: I have nothing further.

8           THE COURT: Any redirect?

9           MR. HUSK: Just briefly, Your Honor.

10                   REDIRECT EXAMINATION

11           BY MR. HUSK:

12           Q.       Tom, if you would turn to Joint Exhibit  
13 Number 4. Did you release materials on or around June,  
14 1998?

15           A.       Yes.

16           Q.       The amount of materials you released, was  
17 that the balance of the \$289,000 invoice?

18           A.       Based on this \$110,000? It was something  
19 in addition to that.

20           Q.       But out of the \$110,000, was the balance  
21 of the \$289,000 included in that invoice?

22           A.       Yes.

23           Q.       Did Mr. Constantz in your one conversation

1 and this letter, lead you to believe that you would not  
2 get paid?

3 MR. SUITERS: Objection, Your Honor, that  
4 is leading. I think he is leading the witness.

5 THE COURT: Let me hear your question  
6 again?

7 MR. HUSK: I can rephrase, Your Honor.

8 BY MR. HUSK:

9 Q. Tom, was it your understanding that upon  
10 payment by the government that your materials would be  
11 paid?

12 MR. SUITERS: Objection, Your Honor. I am  
13 going to object to that. He has testified as to what the  
14 conversation was between he and Mr. Constantz.

15 MR. HUSK: I am asking what his  
16 understanding is.

17 THE COURT: Well, you may ask him what his  
18 understanding was.

19 BY MR. HUSK:

20 Q. Was that your understanding?

21 A. My understanding was that I would be paid  
22 when the government paid them for my invoices.

23 MR. HUSK: No further questions, Your

1 Honor.

2 THE COURT: You may step down. Thank you.

3 (Witness excused.)

4 THE COURT: Do you have other evidence?

5 MR. HUSK: No, Your Honor.

6 (The jury was excused at 12:09 o'clock p.m., so  
7 the Court could take up a legal argument, and returned at  
8 12:20 o'clock p.m.)

9 (No transcript was ordered of this portion of the  
10 trial.)

11 \* \* \* \* \*

12 MR. SUITERS: I call Mr. Constantz to the  
13 stand.

14 Whereupon,

15 JEFFERY CONSTANTZ,

16 a witness, was called for examination by counsel for the  
17 defendant, and, having been first duly sworn by the  
18 court, was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SUITERS:

21 Q. Mr. Constantz, state your name and your  
22 position, please?

23 A. Jeffery Constantz. I am the president of

1 First Savings Bank.

2 Q. You have heard the testimony of Mr. Garden  
3 today. Prior to the one telephone discussion you had  
4 with Mr. Garden about which he testified, had you ever  
5 had any contact or dealings with Mr. Garden or his  
6 company up to that point?

7 A. No.

8 Q. Now, do you recall getting the telephone  
9 call from Mr. Garden that he testified to?

10 A. Yes, I do.

11 Q. And would you tell us what that  
12 conversation was?

13 A. It was an effort to establish some method  
14 by which Mr. Garden would be paid from Allen Kennedy's  
15 Navy Annex Contract. Initially they had asked for a  
16 letter of credit which would essentially be putting the  
17 bank on the hook for those payments by way of a guarantee  
18 of those payments.

19 We were not willing to do that. And the  
20 letter that we have before us was the result of that  
21 conversation. That was what we were willing to do in  
22 terms of seeing that Mr. Garden was paid from the  
23 proceeds of that Navy Annex Contract.

1           Q.       All right. Was there ever any discussion  
2 at that time between you and Mr. Garden about the fact  
3 that he would be paid in full whatever he claimed he was  
4 owed out of the first payment that you received on that  
5 contract?

6           A.       No.

7                   And in fact the letter states it exactly  
8 the way we intended it, which was that he would be paid  
9 -- he would look to the contract in its entirety to be  
10 paid. We were an assignee, a direct assignment of that  
11 contract, so that monies were going to flow through First  
12 Savings Bank on that, and we were going to pay his  
13 invoices as they came in.

14          Q.       Now, the contract that is referred to in  
15 that letter is the one that he testified to that Mr.  
16 Kennedy had with the government for about \$1.4 million  
17 dollars?

18          A.       Correct.

19          Q.       The one that he testified to is still --  
20 he just finished up his work up on recently?

21          A.       Correct.

22          Q.       Now, following your discussion with Mr.  
23 Kennedy -- pardon me, with Mr. Garden, did you then



1 prepare and send him this letter which is Joint Exhibit  
2 Number 1?

3 A. Yes.

4 Q. And did you ask him in that letter to send  
5 you a copy of his invoice?

6 A. Yes.

7 Q. Up to that point, to your knowledge, did  
8 the bank have any kind of an invoice or anything from Mr.  
9 Garden for what he was going to do?

10 A. Not that I am aware of.

11 Q. Was there any discussion between you and  
12 Mr. Garden in that conversation as to what the amount of  
13 his contract was for the material portion with Mr.  
14 Kennedy?

15 A. I do not recall a specific discussion of  
16 those dollar amounts.

17 Q. Now, with reference to Exhibit Number 2,  
18 Joint Exhibit Number 2, which Mr. Garden has  
19 characterized as a collection letter, it references an  
20 invoice requesting payment of \$197,328 by June the 5th,  
21 1998. Did the bank receive that?

22 A. I believe we did.

23 Q. And that amount was paid by the bank from

1 funds that came in on the government contract?

2 A. That is correct.

3 Q. Other than what you have just testified to  
4 and what you heard Mr. Garden testify to as far as the  
5 discussion that took place between the two of you when he  
6 was calling you from Florida, was there anything else  
7 that you could recall that was said of any significance  
8 as it relates to this matter?

9 A. None that comes to mind.

10 Q. Prior to this discussion with Mr. Garden  
11 and prior to this letter, the bank had made loans to  
12 B.I.P. and to Mr. Kennedy; is that correct?

13 A. That is correct. We had an ongoing line  
14 of credit on him.

15 Q. And how were those loans secured?

16 A. Through assignment of his government  
17 contract.

18 Q. And when you do that, are there any public  
19 documents that are recorded to show that there is --

20 A. There is a 1940 Assignment of Claims Act  
21 that you need to comply with where you have the  
22 government acknowledging, the contract officer, et  
23 cetera, confirming those assignments, and also you are

1 filing public documents, U.C.C. recordings.

2 Q. And were those recorded at the time you  
3 had your discussion with Mr. Garden?

4 A. Yes.

5 MR. SUITERS: I have nothing further.

6 CROSS-EXAMINATION

7 BY MR. HUSK:

8 Q. Mr. Constantz, other than the Department  
9 of Defense contract for the Navy Annex contract, how many  
10 other contracts did you have assignment rights to with  
11 B.I.P.?

12 A. I do not recall specifically, but I think  
13 there were maybe one or two others.

14 Q. You do not recall though?

15 A. Not as I am sitting here. I seem to  
16 recall he was doing work for Food Lion and a church and  
17 possibly one other.

18 Q. Did it come to your attention at any time,  
19 Mr. Constantz, or did anybody advise you that the  
20 government would not pay on the next invoice on the Navy  
21 Annex Contract without L.S.S.I.'s equipment being brought  
22 in?

23 A. I think that we were aware that L.S.S.I.'s

1 equipment was essential to completing the contract. I  
2 think Mr. Kennedy had --

3 Q. My question to you is were you aware that  
4 no further monies would be issued until that equipment  
5 got on site?

6 A. That was what generated our conversation,  
7 Mr. Garden's and mine.

8 Q. Is that a yes?

9 A. Yes.

10 Q. At the point that this was brought to your  
11 attention, how much outstanding was owed on the line of  
12 credit?

13 A. We had a line of credit that was roughly  
14 \$300,000.

15 Q. Was Mr. Kennedy actively working any of  
16 the other contracts, the Food Lion contract?

17 A. He had as I recall, two or three others,  
18 but this was his biggest one.

19 Q. His biggest one? Would it be fair to say  
20 the one that would be able to have your line of credit or  
21 any other commercial loans paid down the quickest?

22 A. Yes, I would say that was a fair  
23 statement.

1 Q. You said you had a telephone conversation  
2 with Mr. Garden at some point; is that correct?

3 A. That is correct.

4 Q. During the course of that conversation,  
5 did you ever tell Mr. Garden the nature of your  
6 relationship with B.I.P.?

7 A. I do not believe that it was discussed.

8 Q. You did not advise Mr. Garden that you had  
9 a line of credit?

10 A. I do not recall discussing our  
11 relationship, B.I.P.'s and the bank's relationship,  
12 financial relationship. He did not ask about it.

13 Q. And you did not volunteer?

14 A. I did not volunteer information about our  
15 financial relationship as we probably would not with any  
16 of our customers.

17 Q. Did Mr. Garden advise you during the  
18 course of that conversation that it was his concern that  
19 when he went to Mr. Kennedy or B.I.P., that given his  
20 credit situation that Mr. Garden may not get paid?

21 A. During that conversation, Mr. Garden was  
22 definitely interested in First Savings Bank handling  
23 money and forwarding money to him prior to it going to

1 Mr. Kennedy, which we were in position to do with the  
2 assignment.

3 The money was going to come to us and we  
4 were happy to do that, make sure that the money did not  
5 go through to Mr. Kennedy, but went to Mr. Garden on his  
6 invoices.

7 Q. Were you aware, or are you aware, that on  
8 a government contract if shipment is made, you lose all  
9 lien rights?

10 A. I am aware that being in first lien  
11 position with an assignment would pretty much block out  
12 any other assignment or lien right, and that is why we  
13 were having the conversations, because we had that  
14 priority lien position.

15 Q. I guess my question to you is, were you  
16 aware that if Mr. Garden shipped item number one to the  
17 job site, that he would lose his only lien rights?

18 A. That makes sense.

19 Q. With regard to Exhibit Number 1, Joint  
20 Exhibit Number 1, is it your testimony that it was  
21 F.S.B.'s intent to just reserve monies as the contract  
22 went along; is that correct?

23 A. That is correct.

1 Q. When you did receive payment, what did you  
2 do with the money?

3 A. We dealt with it in a normal course. We  
4 curtailed the line of credit that the money had been  
5 assigned, the contract had been assigned.

6 Q. Curtailed means you had paid yourself?

7 A. That is correct.

8 Q. Let me ask you this, what you did with the  
9 first check, is that Stipulation Number 7 on page 2?

10 A. Can you state that again?

11 Q. Sure. On page 2 of the Joint Stipulation.

12 A. Exhibit Number 2?

13 Q. Well, actually the stipulation attached to  
14 the exhibit.

15 A. Page 2, number 7.

16 Q. Is it fair to say that it was not your  
17 intent on this letter to reserve an amount to  
18 sufficiently pay Mr. Garden's \$289,000 invoice as a  
19 result of this first check that you received?

20 A. If you are referring to the Exhibit 1, the  
21 letter indicates that we were going to reserve from the  
22 entire contract.

23 Q. So you had no present intent when you

1 wrote that letter to reserve monies to pay Mr. Garden's  
2 material on the first payment?

3 A. The way that it was to function was we  
4 were not going to return any money to Allen Kennedy until  
5 Mr. Garden's invoices were satisfied.

6 Q. Okay. Let me turn your attention to  
7 number 7 here. You did eventually get monies in, right,  
8 the first payment?

9 A. Correct.

10 Q. On Joint Stipulation Number 6, is it  
11 correct to say that you received \$431,781?

12 A. That is what it states.

13 Q. Is it correct to say that besides paying  
14 -- I assume that is your line of credit that you paid  
15 down first?

16 A. Correct.

17 Q. It appears that the second item listed  
18 here is you paid \$27,565.29 to B.I.P.?

19 A. I would have assumed that that was somehow  
20 negotiated between Mr. Garden and Mr. Kennedy.

21 Q. Well, I am not asking for your assumption.  
22 I am just asking what you did with the money?

23 A. That is what it clearly states here was



1 that the \$27,565.29 went to B.I.P. payroll.

2 Q. And wasn't it your testimony that -- it  
3 was your understanding that no monies would go to B.I.P.  
4 until Garden's invoice was paid?

5 A. That was how that letter was set up.

6 Q. Irrespective of whether you thought you  
7 were going to pay yourself first or whatever?

8 A. Uh-huh.

9 Q. And the result of you writing the letter  
10 on April 29, 1998, did Mr. Garden deliver equipment on  
11 site?

12 A. I believe he did.

13 Q. And is it fair to say with his delivery of  
14 that equipment, you got paid?

15 A. Allen Kennedy got his first invoice paid  
16 on that contract shortly thereafter.

17 Q. Do you know how government contracts are  
18 broken down as far as payments? Do they just send you a  
19 check without a breakdown?

20 A. From our financing side, we are really not  
21 into the detail of it. There would be a billed amount.  
22 We would typically advance a percentage of that billed  
23 amount, and then it would be paid. We would kind of

1 track it on that basis.

2 Q. My question to you is though, what was the  
3 government paying?

4 A. A billed invoice.

5 Q. What I am asking is how the invoice the  
6 government paid, how is it broken down? Do you know if  
7 Mr. Garden's equipment invoice was submitted to the  
8 government?

9 A. I do not.

10 Q. On Joint Exhibit Number 1, Mr. Constantz,  
11 your letter fails to state that you will pay yourself  
12 first on the bond payment; doesn't it?

13 A. It does not state anything about that.

14 Q. Does it state anything about having a  
15 first lien right?

16 A. No, it does not.

17 Q. Does it state anything about being paid on  
18 collateral loans?

19 A. No, it does not.

20 Q. Is it fair to say that based upon your  
21 letter, Mr. Garden delivered equipment?

22 A. Mr. Garden delivered equipment shortly  
23 after this letter was sent to him.

1 Q. Mr. Constantz, I would like to turn your  
2 attention to Joint Exhibit Number 2. Do you recall  
3 seeing this letter?

4 A. I would not have been in a position to  
5 have received these invoices back and forth.

6 Q. Is that your handwriting on top?

7 A. This is Exhibit Number 2?

8 Q. Yes.

9 A. Or Exhibit Number 3?

10 Q. I am sorry, Exhibit Number 3.

11 A. Exhibit Number 3, I did see it and that is  
12 my handwriting on top.

13 Q. When you received this letter, what did  
14 you do?

15 A. It did not appear to me to require any  
16 action. It appeared to me to be stating what was  
17 remaining unpaid under that invoice and reciting credit  
18 terms for that unpaid amount.

19 Q. Did you take any steps to see how the  
20 initial payment was paid out?

21 A. I do not recall taking any steps.

22 Q. What steps were in place at First Savings  
23 Bank to make sure that Mr. Garden's invoice was going to

1 be reserved?

2 A. Since we were at the early stages of the  
3 contract, and it was a million four contract, I do not  
4 think that any specific steps were taken at that time.  
5 You know, as the billing would progress, we forwarded  
6 amounts.

7 I think that we paid up to \$200,000 out of  
8 the first few invoices that were paid by the government.  
9 So I think everything was functioning normally at that  
10 point.

11 Q. Mr. Garden sent you an invoice, and based  
12 upon that invoice, you were paid. What did Mr. Garden  
13 have to -- based upon the invoice the government paid  
14 you; correct?

15 MR. SUITERS: Objection.

16 THE COURT: I have lost the question.  
17 Please start again.

18 MR. HUSK: Sure. Sure.

19 BY MR. HUSK:

20 Q. Mr. Constance, what I am asking you is  
21 that when Mr. Garden sent you -- delivered the materials,  
22 you were paid on them? First Savings Bank received  
23 payment from the government?

1           A.       I think there are actually two activities  
2 going on. He is submitting invoices to Allen Kennedy who  
3 is submitting them to the government and then we are  
4 simply receiving those payments as the assigned  
5 institution.

6                   We are not really involved in the  
7 preparing or reviewing invoices. We are simply there to  
8 receive payment.

9           Q.       On Joint Exhibit Number 3 the one that you  
10 saw on May 28th, based upon this letter, were you advised  
11 that there were additional materials to be shipped?

12           A.       There is a line in this letter that says  
13 the balance of equipment in our warehouse will not be  
14 released until the \$197,000 is paid in full.

15           Q.       How about subsequent materials?

16           A.       Upon delivery these additional materials  
17 and invoice will be issued for \$91,000.

18           Q.       And is it your testimony that you took no  
19 steps to make sure that that was going to be paid or  
20 reserved?

21           A.       I would have assumed that Mr. Kennedy and  
22 Mr. Garden would have been in active discussion back and  
23 forth about how to perform their contract.

1 Q. Okay. Well, let me ask you this. With  
2 regard to the reservation of monies, was that something  
3 that First Savings Bank did, a loan, or was that in  
4 consultation with Mr. Kennedy?

5 A. I guess Mr. Kennedy was interested in  
6 performing on his contract. He was interested in Mr.  
7 Garden providing the equipment, and we were willing to  
8 hold that money not paid to Mr. Kennedy, pay it to Mr.  
9 Garden, as it came in from the government.

10 Q. Your testimony is that on the first check  
11 you received from the government, you paid Mr. Kennedy  
12 roughly about \$27,000; is that correct?

13 A. Which I did not have any personal  
14 involvement in that occurring, but I am assuming that  
15 that was in somehow cooperation with Mr. Garden.

16 Q. But you do not know what Mr. Garden knew  
17 or did not know? That is just your speculation, right?

18 A. Correct.

19 Q. Mr. Constantz, turn to Exhibit Number 4.  
20 Do you recall receiving this letter?

21 A. I do not.

22 Q. Turn to Stipulation Number 11. You would  
23 agree with me that First Savings Bank did receive this

1 facsimile?

2 MR. SUITERS: It is stipulated.

3 MR. HUSK: Stipulated.

4 BY MR. HUSK:

5 Q. Is it correct to say that no monies were  
6 paid as it relates to this letter, no further monies were  
7 paid.

8 A. I kind of lose track of exactly which of  
9 these have been paid at this point.

10 Q. Okay. Maybe this will make this easier  
11 for you.

12 MR. SUITERS: Your Honor, that is why we  
13 stipulated. I mean we stipulated all of this.

14 THE COURT: It is stipulated.

15 MR. HUSK: That's fine, Your Honor.

16 BY MR. HUSK:

17 Q. Mr. Constantz, with regard to payments  
18 received, it would be Stipulation Number 9, you did in  
19 fact receive -- F.S.B. did in fact receive a second  
20 payment; did it not?

21 A. That is correct.

22 Q. On the second payment, how much was paid  
23 to Life Safety Systems?

1 A. As I am sitting here, I do not --

2 Q. On Exhibit Number 9, is it fair to say  
3 that it is stipulated that \$201,000 was paid?

4 A. It says here another payment in the amount  
5 of \$201,962 was received from the government.

6 Q. It is Stipulation Number 10, it appears as  
7 though you paid Life Safety Systems roughly \$131,000; is  
8 that correct?

9 A. That is correct.

10 Q. What did you do with the rest of the  
11 money?

12 A. Again, I seem to recall some active  
13 communication between Kennedy and Mr. Garden.

14 Q. That is not my question. What did you do  
15 with the rest of the money?

16 A. I am not quite sure what was paid out of  
17 the difference.

18 MR. SUITERS: I think we have stipulated  
19 all of this.

20 THE COURT: It says the remainder was paid  
21 by the defendant to B.I.P. for its operating expenses.

22 BY MR. HUSK:

23 Q. That is different than what your testimony



1 was as to the intent of your April 29, 1998 letter; isn't  
2 it?

3 A. I do not think it is entirely  
4 inconsistent. We held those monies available to Mr.  
5 Garden. He, in working with Mr. Kennedy, modified that  
6 and some amount was paid, and certainly if Mr. Garden  
7 insisted that the whole \$201,962 go to him, we would have  
8 honored that. But at that point, I think --

9 Q. Well, let me ask you this, Mr. Constantz.  
10 What you just said, you do not have any independent  
11 knowledge whether Mr. Garden knew how much you got at  
12 all, do you?

13 A. I do not know what was in Mr. Garden's  
14 mind.

15 Q. What I am asking is, did First Savings  
16 Bank reserve the monies here, this \$201,962.67, or pay  
17 part of it to B.I.P.?

18 A. I believe we did reserve it as  
19 contemplated by the letter, and where it was --  
20 subsequently Mr. Kennedy negotiated for a different use  
21 of it.

22 Q. Negotiated with you?

23 A. No, negotiated with Mr. Garden.

1 Q. How do you know that?

2 A. That is my recollection from --

3 Q. You can recollect that, but you are not  
4 sure?

5 A. I am pretty sure that those two discussed  
6 how to use the payment that we were holding, and they had  
7 some mutual understanding that certain bills needed to be  
8 paid.

9 Q. As you sit here today though, you have no  
10 evidence of that; right?

11 A. No, I do not.

12 Q. How much money do you -- do you have any  
13 money left on your line of credit? Are you part of the  
14 bankruptcy?

15 A. Yes, we are.

16 Q. In what capacity are you in the  
17 bankruptcy?

18 A. We are owed close to a \$100,000 on a piece  
19 of property.

20 Q. Commercial property?

21 A. His headquarters.

22 Q. His headquarters? B.I.P.'s headquarters?

23 A. Yes.

1 MR. HUSK: Nothing further.

2 THE COURT: Any redirect?

3 MR. SUITERS: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. SUITERS:

6 Q. Mr. Constantz, I want you to look at the  
7 stipulation. You testified earlier when I asked you that  
8 the only invoice that you are aware of that had been  
9 received following your letter was Exhibit Number 2,  
10 which states that there is \$197,328 due by June the 5th?

11 A. Correct.

12 Q. Now, looking at the stipulations, isn't it  
13 a fact that by June the 5th that entire invoice had been  
14 paid by you out of payments that had been received by the  
15 government?

16 A. Correct.

17 Q. Now, at that time, did you apply any  
18 excess funds to other bills that were due with B.I.P.?

19 A. I believe there was a request to use the  
20 proceeds.

21 Q. Then according to the stipulation the -- I  
22 notice in Exhibit Number 3 that Mr. Garden says that  
23 after he got paid his \$197,000, he was going to invoice

1 you for the balance of \$91,672, which if you add it  
2 together is \$289,000.

3 Exhibit Number 4, is that the next request  
4 for payment that you got from Life Safety Systems?

5 A. It appears to be.

6 Q. That is for \$110,000, not \$91,000; isn't  
7 that correct?

8 A. Correct.

9 Q. And then Exhibit Number 5, was that sent  
10 directly by Life Systems to the Bank, and that revises  
11 Exhibit Number 4 up from \$110,000 --

12 MR. HUSK: Your Honor, the exhibits speak  
13 for themselves.

14 THE COURT: Go ahead.

15 BY MR. SUITERS:

16 Q. -- to \$116,000 plus; correct?

17 A. Correct.

18 Q. Based upon this, do you know how much the  
19 contract between Mr. Kennedy and Mr. Garden was ever for?  
20 How much --

21 A. We were set up to pay these invoices as  
22 they came in.

23 MR. SUITERS: I have nothing further, Your

1 Honor.

2 THE COURT: Okay. You may step down.

3 Thank you.

4 (Witness excused.)

5 THE COURT: Who is your next witness?

6 MR. SUITERS: I call Mr. Kennedy.

7 THE COURT: Mr. Kennedy.

8 MR. SUITERS: I think he is out in the  
9 hall.

10 Whereupon,

11 FAY ALLEN KENNEDY,

12 a witness, was called for examination by counsel for the  
13 defendant, and, having been first duly sworn by the  
14 court, was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. SUITERS:

17 Q. State your name and your occupation,  
18 please?

19 A. Yes. My name is Fay Allen Kennedy and I  
20 own the company of B.I.P., president of B.I.P. Electrical  
21 Company.

22 Q. And you are acquainted both with the  
23 plaintiff, Mr. Garden, and with Mr. Constantz; is that

1 correct?

2 A. Yes, I am.

3 Q. Now, did there come a time in  
4 approximately April of 1998 when you and Mr. Garden and  
5 his company entered into a contract for materials on a  
6 government contract that you were performing?

7 A. That is correct.

8 Q. And did you apply for credit to Mr.  
9 Garden?

10 A. Yes, I did.

11 Q. And did he basically turn you down and  
12 said that something else had to be worked out?

13 A. Right. That is correct.

14 Q. Now, in your discussions with Mr. Kennedy,  
15 at that time or at any time leading up to the letter of  
16 -- first, may I approach the witness and show him this?

17 THE COURT: Yes.

18 BY MR. SUITERS:

19 Q. This is Joint Exhibit Number 1 which is a  
20 letter of April the 29th which you have signed; is that  
21 correct?

22 A. That is correct.

23 Q. Now, my question to you, Mr. Kennedy, is

1 after Mr. Garden said that you were going to have to make  
2 some other arrangements for credit, and leading up to the  
3 signing of that letter, did you have any discussions with  
4 Mr. Garden concerning the fact that your government  
5 contract, which he was bidding on, had been assigned to  
6 First Savings Bank?

7 A. Yes, I did.

8 Q. How did that come about?

9 A. It came about because we needed the  
10 financing for payroll and as much as for material also.  
11 And we worked out the deal.

12 Q. To the best of your knowledge and  
13 recollection, did that discussion with Mr. Garden occur  
14 before or about the time of that letter agreement?

15 A. I had discussed with him that we had other  
16 ways of getting the money to pay him since he was not  
17 going to get credit. And I discussed, you know, talking  
18 about the banker would be able to back me and I would be  
19 able to get him paid.

20 Q. And during the course of that, did you  
21 explain to him that the Bank -- you had assigned your  
22 contract to the Bank?

23 A. No. To be exact, if I recall correctly, I

Kennedy - Cross

1 am trying to remember. I do know whether I told him that  
2 it was assigned over to the Bank at that time. But I  
3 did, if I am not mistaken, I think I showed him some  
4 documents that, you know, we had signed over to the Bank.

5 MR. SUITERS: I have no further questions.

6 CROSS-EXAMINATION

7 BY MR. HUSK:

8 Q. Mr. Kennedy, you are not sure what you had  
9 told Mr. Garden or what you did not tell him or what you  
10 showed him or what you did not show him; are you?

11 A. There has been a lot of conversation  
12 between me and Mr. Garden.

13 Q. Do you recall a letter on your letterhead  
14 to Mr. Garden on April 28th, 1998, the day before the  
15 contract was executed, or the agreement Exhibit Number 1  
16 was executed, in which you advised Mr. Garden that you  
17 had elected to out-source your accounting on the  
18 government contract property?

19 Do you recall that?

20 A. I do not remember the letter, I mean not  
21 right off. You say that it is an Exhibit?

22 Q. It is not an exhibit, but I can show you.

23 A. I would like to see it.



Kennedy - Cross

1 MR. HUSK: May I approach.

2 THE COURT: Yes.

3 MR. SUITERS: I do not know what the  
4 relevance is of that, but the Bank is not a party to  
5 that.

6 MR. HUSK: The relevance, Your Honor, if I  
7 may, is that Mr. Kennedy's testimony is one thing, and  
8 what he actually represented is something else.

9 THE COURT: And what?

10 MR. HUSK: And what he actually  
11 represented to Mr. Garden is something else.

12 THE COURT: All right, go ahead.

13 BY MR. HUSK:

14 Q. Mr. Kennedy, do you recognize that  
15 document?

16 A. This is on my letterhead. I will  
17 recognize this. Do you mind if I take a brief second  
18 here.

19 (Brief pause for reading document.)

20 Q. Is that something that you generated?

21 A. This is something that I generated.

22 Q. Is it accurate to say that and maybe --  
23 can you tell me the date on which that was --

Kennedy - Cross

1 A. Okay. The date on here was --

2 Q. How about on the top, Mr. Kennedy?

3 MR. SUITERS: Excuse me, that is --

4 BY MR. HUSK:

5 Q. Do you recall faxing this?

6 A. By me not being a signature to this, I do  
7 not know whether I generated it or not, but I would have  
8 to represent this because it came on my letterhead.  
9 There is no signature on it. But I know that it came  
10 from our company.

11 Q. Does it indicate that you have elected to  
12 out-source the accounting on the contract that you and  
13 Mr. Garden had?

14 A. If I am not mistaken, I think this is a  
15 rough draft. This is not a final but it is a rough draft  
16 of what I gave him.

17 Q. And you gave that to Mr. Garden?

18 A. Yeah, for his approval.

19 Q. And do you recall whether Mr. Garden  
20 approved or not approved it?

21 A. Obviously he did not approve it because we  
22 did not sign on this.

23 Q. And you were advising him in that letter

Kennedy - Cross

1 or are you advising him in that letter that you have out-  
2 sourced the accounting, not assigned the contract for  
3 instance?

4 A. Do you mind if I take a few minutes to  
5 read it and make sure?

6 Q. Go ahead.

7 (Brief pause for reading the document.)

8 A. The only thing I can say about this is  
9 that we might have used the wrong choice of words maybe.

10 Q. Do you know the difference between outside  
11 accounting source that F.S.B.'s role was going to be  
12 according to that letter, or assigning contract rights?  
13 Do you know the difference between the two?

14 A. Excuse me, but this is something that was  
15 a draft. This is not a --

16 Q. But did you ultimately send that to Mr.  
17 Garden?

18 A. Pardon?

19 Q. Did you ultimately send that to Mr.  
20 Garden?

21 A. It was a fax that was sent to him.

22 THE COURT: Anything else of this witness?

23 MR. HUSK: No, Your Honor.

Kennedy - Redirect

1 THE COURT: Any redirect?

2 REDIRECT EXAMINATION

3 BY MR. SUITERS:

4 Q. Just to be clear, Mr. Kennedy. Mr. Garden  
5 did not accept this? He was not happy with this, was he?

6 A. He did not accept it.

7 MR. SUITERS: Thank you.

8 THE COURT: May the witness be excused?

9 MR. SUITERS: Yes.

10 THE COURT: You are excused. Thank you  
11 for coming. If you could give that document back.

12 (Witness excused.)

13 THE COURT: Is there any other evidence or  
14 testimony in this case?

15 MR. SUITERS: Not from the defendant, Your  
16 Honor.

17 THE COURT: Any more evidence or testimony  
18 from the plaintiff?

19 MR. HUSK: No, Your Honor.

20 THE COURT: Okay. We are going to take  
21 our luncheon break and I would like for you to come back  
22 at quarter of two. Thank you. And I would like for  
23 counsel to remain.

## Kennedy - Redirect

1 (The jury departed the hearing room.)

2 THE COURT: Mr. Suiters, I deny your  
3 Motion to Strike and I need to know what additional  
4 instructions we are going to have. I would like for you  
5 -- the plaintiff to number and for the defense to letter  
6 and I would like for you to get rid of any duplicates and  
7 then I would like for you to submit the agreed  
8 instructions in one pile and the ones that you really  
9 need in another pile.

10 MR. SUITERS: I think, Your Honor, the  
11 ones that we have already submitted are agreed.

12 THE COURT: Right. I understand.

13 MR. SUITERS: And I think we have some  
14 others that are also agreed.

15 THE COURT: Okay.

16 MR. HUSK: Your Honor, Mr. Suiters and I  
17 have gone through this expecting you to --

18 THE COURT: Okay. Thank you. All right,  
19 then. Will ten minutes per side be sufficient for  
20 closing arguments?

21 MR. HUSK: I think ten minutes will be  
22 fine. I do not know if Larry needs more than ten  
23 minutes?

## Kennedy - Redirect

1 MR. SUITERS: That is for both?

2 THE COURT: Yes.

3 MR. HUSK: I thought you said per side?

4 MR. SUITERS: No. No. I mean for both  
5 your closing and rebuttal?

6 THE COURT: You would have a total of ten  
7 minutes and the defense would have ten minutes.

8 MR. HUSK: We could use a little bit more.

9 THE COURT: Twelve.

10 MR. HUSK: Okay. Well, Your Honor, I will  
11 take two minutes more, that is fine.

12 THE COURT: Let's start at quarter of two.  
13 Thank you.

14 (Lunch recess.)

15 THE COURT: Is there anything before I ask  
16 the jurors to come in?

17 MR. SUITERS: Your Honor, I just want to  
18 say that I am not sure looking at those additional  
19 instructions that have been submitted that it seems to me  
20 that some of them, specifically, C, D, E, F and G are  
21 going to be confusing in terms of whether this is  
22 contract or a tort.

23 THE COURT: Did you submit those?

1 MR. SUITERS: Well, you prepare these in  
2 advance but I would, at this time, withdraw those that  
3 have been submitted because I think this is a very narrow  
4 issue and it is a tort claim and all the other  
5 instructions deal with that.

6 THE COURT: Well, I did not mean that in a  
7 critical sense, but I agree with you. So C through G are  
8 withdrawn. Please ask them to come in.

9 (The jury enters the courtroom.)

10 THE COURT: Ladies and gentlemen, you must  
11 not base your verdict in any way upon sympathy, bias,  
12 guess-work or speculation. Your verdict must be based  
13 solely upon the evidence and the instruction of the  
14 court.

15 You are the judges of the facts, the  
16 credibility of the witnesses and the weight of the  
17 evidence. You may consider the appearance and manner of  
18 the witnesses on the stand, their intelligence, their  
19 opportunity for knowing the truth and for having observed  
20 the things about which they have testified. Their  
21 interest in the outcome of the case, their bias, and if  
22 any has been shown, their prior inconsistent statements  
23 or whether they had knowingly testified untruthfully as

1 to any material fact in the case.

2 You may not arbitrarily disregard  
3 believable testimony of a witness. However, after you  
4 have considered all the evidence in the case, then you  
5 may accept or discard all or part of the testimony of a  
6 witness that you think proper. You are entitled to use  
7 your common sense in judging the testimony.

8 For these things and all the other  
9 circumstances of the case you may determine which  
10 witnesses are more believable and weigh their testimony  
11 accordingly.

12 The burden is on the party charging fraud  
13 to prove it by clear and convincing evidence. But the  
14 party having a burden of proving an issue by clear and  
15 convincing evidence, he must produce evidence that  
16 creates in your minds a firm belief or conviction that he  
17 has proven the issue.

18 In this case, actual fraud is a  
19 misrepresentation of an existing material fact by the  
20 defendant, knowingly and intentionally made with the  
21 intent to mislead the plaintiff, which the plaintiff  
22 relied upon with the result that the plaintiff was  
23 damaged by it.



1           A material fact is one which influences a  
2 person to act or not to act. In deciding whether fraud  
3 exists, you may take into consideration the relative  
4 knowledge of the parties, their respective motives and  
5 intentions, the closeness of their relationship, the  
6 actions of the parties, the nature and character of the  
7 transaction and all the other surrounding facts and  
8 circumstances.

9           If you find that the letter dated April  
10 the 29th, 1998, which is Joint Exhibit Number 1, required  
11 the defendant to reserve from the first payment it  
12 received by assignment of the government contract, the  
13 full amount of plaintiff's subcontract with B.I.P., and  
14 if you further believe by clear and convincing evidence  
15 that at the time the defendant signed the April 29th,  
16 1998 letter, it intentionally and knowingly made a false  
17 representation of a material fact to the plaintiff with  
18 the intention to mislead plaintiff into taking action  
19 based upon the representation, and that plaintiff took  
20 action in reliance on the representation and that  
21 plaintiff's reliance on the representation caused  
22 plaintiff damage, then you shall return your verdict in  
23 favor of plaintiff.

1                   You shall find your verdict for the  
2 defendant, if the plaintiff failed to prove by clear and  
3 convincing evidence any or more of the elements of  
4 intentional fraud as listed above.

5                   If you find that the plaintiff is entitled  
6 to be compensated for its damages and if you further  
7 believe by the greater weight of the evidence, that the  
8 defendant acted with actual malice towards the plaintiff  
9 or acted under circumstances amounting to a willful and  
10 wanton disregard of the plaintiff's rights, then you may  
11 also award punitive damages to the plaintiff to punish  
12 the defendant for his actions and to serve as an example  
13 to prevent others from acting in a similar way.

14                   If you award punitive damages, you must  
15 state separately in your verdict the amount you allow as  
16 compensatory damages and the amount you allow as punitive  
17 damages.

18                   Okay, you may argue.

19                   MR. HUSK: Ladies and gentlemen, I want to  
20 first say that I appreciate your attention in this  
21 matter. My initial statement will be to say, hey, look  
22 you have to use common sense in this case.

23                   Why would Mr. Garden even enter into an

1 arrangement that First Savings Bank is talking about.  
2 Let's look at -- Mr. Garden knew Kennedy was a credit  
3 risk and said I am not going to do anything. I am not  
4 going to do anything at all until I get some assurances  
5 that my invoice is going to be paid.

6 Well, here comes the white knight, First  
7 Savings Bank, who says, well, look, Mr. Garden, we will  
8 reserve an amount to make sure your invoice is paid. Mr.  
9 Garden's testimony was that he went ahead and submitted  
10 an invoice so it could be processed by the government.  
11 In fact, First Savings Bank did receive a check  
12 ultimately after the agreement was signed.

13 What did they do? Mr. Constantz's  
14 testimony was, well, we really did not mean that. That  
15 was not what our intent was. We did not mean at that  
16 point that -- we were going to pay you some time in the  
17 future. Why would Garden do that? It does not make any  
18 sense. Garden is expecting to get his money for his  
19 materials right away.

20 The money comes in and they pay  
21 themselves. Who else do they pay? Look at your  
22 stipulations. Look at the stipulations of the facts and  
23 exhibits. Who else do they pay? Well, they pay B.I.P.

1 You remember Mr. Constantz saying, well, my agreement and  
2 my intent on the letter was not to -- that B.I.P. was not  
3 going to get the money, you know. But whatever the rest  
4 is was going to be Garden and Garden would have it. Well  
5 it did not happen.

6 Garden supplied this contract relying upon  
7 the April 29th letter. Garden has been damaged. Garden  
8 has admitted that he has received monies. Garden says,  
9 hey, I am owed \$31,962. That is his loan on materials.  
10 He is not asking for anything other than what he agreed  
11 to in April.

12 Ladies and gentlemen, you have to  
13 determine who really is being truthful here. Is it  
14 Constantz when he knows his money is tied up in a guy  
15 that is a credit risk, or is it Garden who has no reason  
16 to not agree to it if he has been assured he is going to  
17 be paid.

18 Why do you think that Garden would assert  
19 his credit and get involved with B.I.P. if he did not  
20 think he was going to get paid?

21 Basically what they have done here is they  
22 have just switched the creditors in the bankruptcy. Tom  
23 Garden is sitting down there in Alexandria, in Federal

1 District Court in Alexandria with a hole in his pocket,  
2 and it would not have happened but for First Savings  
3 Bank's actions. Thank you.

4 MR. SUITERS: Ladies and gentlemen, I was  
5 waiting for Mr. Husk to comment on what it was that we  
6 said specifically that was a fraudulent misrepresentation  
7 of an existing fact. Just as I was listening for Mr.  
8 Garden to testify to what that was.

9 The only evidence that you have to deal  
10 with here on that issue is that very, very brief  
11 telephone conversation between Mr. Garden and Mr.  
12 Constantz and the letter that followed. You will recall  
13 that I asked Mr. Garden specifically what is it that you  
14 said that the bank did. What material fact did they  
15 willfully, wantonly and intentionally misrepresent to you  
16 in either that conversation or in that letter.

17 And his response was -- first of all he  
18 never testified that there was any discussion with Mr.  
19 Constantz about whether or not there would be a payment  
20 to him in full out of the first disbursement from the  
21 government. That never came up. There was no discussion  
22 about the fact that the bank had a prior security  
23 position. The bank testified that it was public

1 knowledge. It was recorded in the -- he ran a credit  
2 check. Those things were not misrepresented because they  
3 were never discussed. The only thing that was discussed  
4 is what was in this contract.

5 This is not a contract case in this  
6 agreement. We are not talking about somebody who claims  
7 that they had an agreement and there was a breach of that  
8 agreement and as a result they had suffered damages.

9 One thing that is clear is that both of  
10 these parties have been damaged by their relationship in  
11 different ways with Mr. Kennedy. Mr. Garden complains  
12 that he is sitting in bankruptcy court over \$31,000. We  
13 are out \$100,000. The only difference is that Mr. Garden  
14 has only shipped the supplies based upon payment by the  
15 bank, and subsequent to the bankruptcy, he has received  
16 payment for materials from the bankruptcy court. And if  
17 you look at the stipulations you will see the last  
18 stipulation is that he still stands to receive additional  
19 monies on this from the bankruptcy court. We advanced  
20 that \$100,000 in cash to Mr. Kennedy. We are out that.

21 Now, the law is that there has to be an  
22 actual misrepresentation of an existing material fact,  
23 knowingly and intentionally made, with the intent to

1 mislead the plaintiff. That simply has not happened.

2 Mr. Garden testified that it was his  
3 belief, and I will give him the benefit of the doubt,  
4 whether that was the belief at the time or whether it is  
5 now with the benefit of twenty-twenty hindsight when  
6 things have gone sour. It was his belief that what this  
7 letter said was that we agreed that we are going to pay  
8 you before we pay anybody else out of the first payment.  
9 Before we pay ourselves or anybody else.

10 Ladies and gentlemen, the agreement just  
11 does not say that. The letter says we are going to pay  
12 you out of this government contract, which was a  
13 \$1,300,000 contract, which was going to be paid over a  
14 period of time on which he was still working as recently  
15 as last month.

16 It does not say anything about the fact  
17 that we are going to pay you before we pay ourselves  
18 because that was never discussed. It never came up. It  
19 was never misrepresented because it never came up. The  
20 fact is -- and this is interesting -- the letter says  
21 based upon your invoice for equipment.

22 Now, the instructions say you can apply  
23 your common sense to this case. And one of those

1 applications I would suggest is what is meant by an  
2 invoice? An invoice is when somebody sends you a bill  
3 and says please pay.

4 Now Mr. Garden signed this letter on May  
5 the 5th, 1998. Exhibit Number 2 is a letter from him  
6 referencing an invoice requesting a payment of \$197,328.  
7 Now he says that it is just coincidence that this letter,  
8 which is an invoice, is dated the same day as he signed  
9 the letter which asked him to send the bank an invoice.  
10 That is the only invoice they ever got.

11 He testified that he gave Mr. Kennedy his  
12 total invoice for \$289,000. He never testified, because  
13 he could not, that he knows that the bank ever got that.  
14 And when Mr. Kennedy was on the stand, he never asked him  
15 whether or not he, Mr. Kennedy, had ever given the bank  
16 that \$289,000 invoice.

17 And Mr. Constantz testified that this was  
18 the only invoice that they had. Now how would the bank  
19 know assuming that Mr. Garden's interpretation has some  
20 validity, how would they know how much to set aside  
21 whether it was out of the first payment or out of any  
22 other payments? And the reason I say that is this, they  
23 paid him \$197,000. Now remember he says that he told



1     them it was \$289,000. He has never introduced as an  
2     exhibit that invoice, if it exists. We have introduced  
3     any number of other exhibits. That invoice has never  
4     been introduced. But he says it was \$289,000.

5                 Now he was paid \$197,000. If you look at  
6     Exhibit Number 2, that is the one where he was saying,  
7     okay, you paid me the first \$66,000 and now you pay me  
8     the balance of \$131,000 due by June the 5th and he was  
9     paid by June the 5th. There is no question about it.

10                Then he says upon payment of that, I will  
11     invoice you for the balance of \$91,672. If you add  
12     \$91,672 to \$197,000 you get \$289,000. But look what  
13     happens after that. Look at Exhibits 4 and 5. He did  
14     not invoice for the balance of \$91,672. His next  
15     invoice, number 4, ups that to \$110,000. So we do not  
16     have a \$289,000 contract, we have a \$307,000 contract.

17                And then Exhibit Number 5 is a revision of  
18     Exhibit Number 4 saying that has been revised up to  
19     \$116,672. So now we do not have \$289,000, you do not  
20     have \$307,000, you have got \$314,000.

21                The only invoice we ever received was the  
22     one for \$197,328 that called for payment on or before  
23     June the 5th or else interest would accrue. No

1 questions, no stipulations, it was paid in full by that  
2 date.

3 The intervening bankruptcy is a problem  
4 here for everybody, but there was no fraud committed by  
5 this bank. I ask you to search for the misrepresentation  
6 of an existing fact that was made by Mr. Constantz in his  
7 telephone discussion as related to you by both Mr. Garden  
8 and he, as well as in this letter. You will not find it  
9 because it does not exist. He never misrepresented.

10 Mr. Husk says well why would Mr. Garden  
11 agree to go into this contract unless he knew that he was  
12 going to be paid. He said it is just common sense. Well  
13 that works both ways, ladies and gentlemen.

14 The bank was sitting here in a security  
15 position, on public record, that it had an assignment of  
16 these funds. Why would it agree to say that we will  
17 agree to release that, to subordinate ourselves of that  
18 so that you and others can be paid ahead of us? That is  
19 not real life and that is not what happened.

20 They paid themselves as they were entitled  
21 to be paid. They paid the invoice that was submitted to  
22 them and if it were not for the intervening bankruptcy,  
23 they would have been able to take care of the rest of it.

1 They have no control over that and as I said, they have  
2 been hurt as much or more by that bankruptcy than Mr.  
3 Garden has because he still stands to be paid out of that  
4 bankruptcy, possibly, according to the stipulation.

5 But keep in mind, this is what we call a  
6 tort action, a wrong, a willful, intentional, malicious  
7 act done by design at the time and it has to have been  
8 entered into by the bank at the time that letter was sent  
9 out or the conversations took place. Nothing after that  
10 makes any difference because it has to be a  
11 misrepresentation of a past or an existing fact on which  
12 Mr. Garden relied.

13 What he thought is not what is important  
14 here. It is what the parties said and what they wrote.  
15 And even after he got the letter, he did not just sign it  
16 and send it back, he reviewed it, he looked at it, he  
17 made changes to it and sent it back. There is nothing in  
18 there that says, wait a minute, you did not say here that  
19 you are going to pay me in full out of the first  
20 installment. We have got to change that.

21 There is nothing here that says in the  
22 event you all are in a secured position that you are  
23 going to subordinate yourself and let me be paid ahead of

1 you. He did not raise that issue. The reason he did not  
2 is because they were never discussed. It was never part  
3 of the deal.

4 There has been no fraud and I ask that you  
5 return a verdict of no fraud.

6 MR. HUSK: I am the last voice that you  
7 get to hear on this case and I will just be brief.

8 Mr. Constantz made no inquiry, nothing.  
9 It just does not appear that First Savings Bank did  
10 anything as to inquire as to invoices and what had not  
11 been paid. They paid themselves. Basically, they paid  
12 B.I.P., but they did not pay Garden.

13 The bottom-line here is without Garden  
14 supplying the equipment -- FSB does not see dime one.  
15 Okay, that is the testimony. No equipment, no money.  
16 You did not see Mr. Constantz say, hey, look, we have got  
17 a receivable lien. You saw Mr. Kennedy, Mr. Kennedy  
18 said, well, I thought I did, but when we showed him the  
19 letter he said, maybe I am wrong, maybe I did put on that  
20 I was just sending this out to the bank for outside  
21 accounting.

22 The question is was the April 29, 1998  
23 letter intended to get Garden to perform on the contract,

1 to supply the contract, so that they would get paid.

2 Ladies and gentlemen, you need to come  
3 back for the plaintiff in this. Thank you.

4 THE COURT: When you go back into the jury  
5 room, the first thing you need to do is to elect a  
6 foreperson and then it will be the duty of that person to  
7 see to it that your deliberations proceed in an orderly  
8 fashion so that everybody gets a chance to be heard.

9 It is rarely helpful when you go into the  
10 jury room to say, I think we ought to do this or I think  
11 we ought to do that, before everybody has had an  
12 opportunity to be heard. Because if you go in and you  
13 take an emphatic position before everybody has had an  
14 opportunity to be heard, then human nature makes it tough  
15 to change your mind if after you listen to everybody  
16 else, there may be some good reason to change your mind.  
17 So that is why you want to give everybody an opportunity  
18 to express their thoughts and then start thinking about  
19 how you think the case ought to come out.

20 You should reach a unanimous verdict and  
21 in doing this you need to consider the opinions of your  
22 fellow jurors. You should never surrender your own  
23 conscientious opinion simply to reach a verdict.

1                   So you need to go in and deliberate and  
2                   make sure that everybody has an opportunity to be heard  
3                   and give it your best shot. You will have the verdict  
4                   forms, three of them, because there is a punitive damage  
5                   claim and you will have the exhibits and you will have  
6                   those instructions which I bet you have memorized by now  
7                   over lunch. Thank you, very much.

8                   (The jury departs the courtroom for  
9                   deliberations.)

10                  THE COURT: I want to tell Mr. Marsh of  
11                  the Circuit Court or somebody, that the next time these  
12                  two lawyers come out here to try a case I want him to  
13                  call me so I can preside over it. It is such a delight  
14                  to preside over a trial like this because sometimes over  
15                  the years I have wondered about how much information we  
16                  truly want jurors to get in arriving at truth. I hope  
17                  that they arrive at truth in this, but I am not sure I  
18                  know what it is, but at any rate, it was a joy to work  
19                  with both of you and see that you seemed so concerned  
20                  about having the information made available to them. So  
21                  I wish both of you well.

22                  MR. SUITERS: Thank you, Your Honor.

23                  MR. HUSK: Thank you, Your Honor.

1 (Recess for jury deliberations.)

2 THE COURT: It is my understanding that we  
3 have a verdict and it is my belief that the jury was out  
4 for approximately one hour.

5 Members of the Jury have you reached a  
6 verdict?

7 JURY FOREMAN: Yes, we have, Your Honor.

8 THE COURT: Is your verdict unanimous?

9 JURY FOREMAN: Yes, sir.

10 THE COURT: We the Jury on the issues  
11 joined between T. L. Garden & Associates, Inc. trading as  
12 Life Safety Systems, the plaintiff, and First Savings  
13 Bank of Virginia, the defendant, find in favor of T. L.  
14 Garden & Associates, Inc., trading as Life Safety  
15 Systems, and fix their compensatory damages at \$31,672  
16 plus interest from October 20th of 1999. And, we further  
17 fix punitive damages in favor of T. L. Garden &  
18 Associates, Inc., trading as Life Safety Systems in the  
19 amount of eighteen percent or \$5,700.

20 Are there any motions while the jury is  
21 still present?

22 MR. SUITERS: Not while the jury is still  
23 present, Your Honor.

1 THE COURT: Thank you, very much. We  
2 appreciate your work. You were very attentive.

3 MR. SUITERS: Your Honor, I make a motion  
4 to set aside the verdict as being contrary to all the  
5 evidence. I understand that the motion to strike was not  
6 sustained and it went to the jury and maybe I am being  
7 optimistic, but it is because the court wanted the jury  
8 to have a chance to render its verdict.

9 But there simply was not any evidence of a  
10 misrepresentation of a material fact. If you believe the  
11 testimony that was given or any of the exhibits here  
12 today, what Mr. Garden testified to was what he thought  
13 was meant by that agreement which was that he would be  
14 paid everything out of the first payment. He admitted  
15 that that was never discussed.

16 The whole business about whether the bank  
17 was in a priority position, Your Honor, never came up.  
18 It was never discussed. There was no misrepresentation.  
19 It was never discussed. The only invoice that we know  
20 that was submitted to the defendant was the invoice that  
21 was stipulated in Exhibit Number 2 which was paid in  
22 full.

23 What more could represent the intent of



1 this defendant in terms of whatever this agreement meant  
2 was that when it was asked to submit an invoice, on the  
3 same date that the defendant signed the letter, they  
4 submitted that document on May the 5th requesting  
5 payment, \$197,328 by June the 5th and it was paid.

6 And now you have punitive damages, I mean  
7 there is just not anything in this case that would -- it  
8 shocks my conscience. We hear now that everybody sues  
9 for punitive damages for everything. We read about what  
10 happens in Alabama and all of these places, but they all  
11 come out of cases which are so outrageous and so  
12 egregious that while you may not agree with it, at least  
13 you could find some basis for believing that they should  
14 be assessed in terms of setting some type of example.

15 In this case, the most we have is a  
16 legitimate difference of opinion between businessmen as  
17 to what a document meant. And as I say, there was no  
18 fraud here. I asked Mr. Garden what the  
19 misrepresentation was because that is the gravamen of the  
20 case and he said, well, it was because I was supposed to  
21 get paid out of the first installment, but he also  
22 admitted that was never discussed. So how could it have  
23 been a misrepresentation of a material fact?

1 I know that it is not frequent for a court  
2 to set aside a jury verdict, but I really believe that  
3 this is a case that screams for the court to apply the  
4 law and the heavy burden that rests upon the plaintiff in  
5 this case to the facts. The facts are very simple and  
6 straight-forward. The only thing that is in question  
7 here is what was the misrepresentation of the material  
8 fact and there was not any.

9 The fact that nothing was discussed does  
10 not mean that it was misrepresented. They never had any  
11 reason to discuss it. It was never raised. It was never  
12 discussed. There was no misrepresentation. We got the  
13 invoice. We paid it and we would have paid the rest if  
14 it were not for the intervening bankruptcy.

15 MR. HUSK: Your Honor, I think the jury  
16 and the jury system needless to say is in place for one  
17 reason. I believe these jurors looked at the facts. The  
18 jury instructions said, look, who do you believe on the  
19 stand. It is a question of the interpretation of Exhibit  
20 Number 1. Tom Garden says, hey, upon payment you are  
21 going to pay my materials. That did not happen.

22 I think what is important here and I think  
23 probably what the jurors locked onto was what was not

1 said. Did Mr. Constantz say anything about the lien, and  
2 did Mr. Kennedy testify that the day before they signed  
3 the contract it was out-sourced accounting.

4 Your Honor, it would be a travesty to  
5 overturn this. The punitive damage award is, if you will  
6 look at Exhibit Number 1, sets forth Mr. Garden's terms  
7 of his contract. Mr. Constantz was aware of that. He  
8 did not change it. He did not agree to it and the terms  
9 are set forth there.

10 Your Honor, I will tell you that based  
11 upon representations made, Mr. Garden supplied the job  
12 and was damaged by it. It was a material  
13 misrepresentation of fact that they were going to reserve  
14 the money and they did not do it.

15 Your Honor, I think it would be a travesty  
16 if you overturned this verdict.

17 MR. SUITERS: Can I just say one other  
18 think, Your Honor. As I look at it, this was not a case  
19 where the credibility of the witnesses were really that  
20 much an issue in terms of them testifying as to different  
21 things.

22 Mr. Constantz never testified that he said  
23 we were going to reserve this money that you claimed was

1 due to you out of the first payment. He said it never  
2 came up and Mr. Garden never said it came up in their  
3 discussion. He said that that is the way that he  
4 interpreted it, the letter that followed and that was his  
5 interpretation of on.

6 And, as I said, giving him the benefit of  
7 the doubt, maybe that is his interpretation. But the  
8 interpretation that we have on it is just as reasonable  
9 and the fact is that they did not have to chose between  
10 Mr. Garden and Mr. Constantz and who was telling the  
11 truth as far as whether or not that was part of their  
12 understanding, because they both agreed that it was never  
13 discussed. So that is why we think it should be set  
14 aside.

15 THE COURT: Okay. What day do we hear  
16 motions?

17 THE CLERK: On Fridays.

18 THE COURT: I would like for you all to  
19 pick a Friday motions day and I would like to have some  
20 written argument. Once you pick the Friday motions day,  
21 then you should check with me to make sure that I am  
22 available on that Friday.

23 MR. SUITERS: It would be here, Your

1 Honor, is that correct?

2 THE COURT: Yes. And then I would like to  
3 have a written argument from the defense ten days ahead  
4 of time and then give plaintiff five days thereafter and  
5 then you may have two days before we hear it for  
6 rebuttal.

7 MR. SUITERS: How do we contact you, Your  
8 Honor?

9 THE COURT: You can do it through Pat  
10 Hubert at the Clerk's Office.

11 MR. SUITERS: The clerk's office here?

12 THE COURT: Yes.

13 MR. SUITERS: All right.

14 THE COURT: So you all get some mutually  
15 agreeable Friday and I will review it. Thank you.

16 MR. SUITERS: Thank you.

17 MR. HUSK: Thank you.

18 (The Jury departed the courtroom at approximately  
19 3:10 o'clock p.m.)

20

21

22

23

CERTIFICATE OF REPORTER

I, DEBRA J. DILL, a verbatim court reporter and a notary public in and for the Commonwealth of Virginia at large, duly sworn to tell and truly report the foregoing proceeding, do hereby certify that the transcript of proceeding is true and correct to the best of my knowledge and ability, and that I have no interest in said proceeding, financial or otherwise, nor through relationship with any of the parties in interest, nor their counsel.

  
DEBRA J. DILL

INSTRUCTION     A    

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

R B

INSTRUCTION B

You must not base your verdict in any way upon sympathy, bias, guesswork or speculation.

Your verdict must be based solely upon the evidence and instructions of the court.

RJD



INSTRUCTION H

A material fact is one which influences a person to act or not to act.

295

INSTRUCTION     I    

In this case, actual fraud is a misrepresentation of an existing material fact by the Defendant, knowingly and intentionally made, with the intent to mislead the Plaintiff, which that Plaintiff relied upon with the result that Plaintiff was damaged by it.

RSE

INSTRUCTION     J    

In deciding whether fraud exists you may take into consideration the relative knowledge of the parties, their respective motives and intentions, the closeness of their relationship, the actions of the parties, the nature and character of the transaction and all of the other surrounding facts and circumstances.

RJD

INSTRUCTION       K      

The burden is on the party charging fraud to prove it by clear and convincing evidence.

299

INSTRUCTION     I    

When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue.

299

INSTRUCTION M

If you find that the letter dated April 29, 1998, which is Joint Exhibit 1, required the Defendant to reserve from the first payment it received by assignment of the Government Contract, the full amount of Plaintiff's subcontract with BIP, and if you further believe by clear and convincing evidence that at the time the Defendant signed the April 29, 1998 letter it intentionally and knowingly made a false representation of a material fact to the Plaintiff with the intention to mislead Plaintiff into taking action based upon the representation, and that Plaintiff took action in reliance on the representation and that Plaintiff's reliance on the representation caused Plaintiff damage, then you shall return your verdict in favor of Plaintiff.

You shall find your verdict for the Defendant if the Plaintiff failed to prove, by clear and convincing evidence, any or more of the elements of intentional fraud as listed above.

*Plaintiff*  
*vs.*

*299*

INSTRUCTION       N      

If you find that the Plaintiff is entitled to be compensated for its damages, and if you further believe by the greater weight of the evidence that the Defendant acted with actual malice toward the Plaintiff or acted under circumstances amounting to a willful and wanton disregard of the Plaintiff's rights, then you may also award punitive damages to the Plaintiff to punish the Defendant for its actions and to serve as an example to prevent others from acting in a similar way.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

297

We, the jury, on the issues joined between T. L. Garden and Associates, Inc., t/a Life Safety Systems, the Plaintiff, and First Savings Bank of Virginia, the Defendant, find in favor of T. L. Garden and Associates, Inc., t/a Life Safety Systems and fix their compensatory damages at \$ 31,672.00

plus interest, if any, from OCT. 20, 1999  
(date)

and we further fix punitive damages in favor of T. L. Garden and Associates, Inc., t/a Life Safety Systems in the amount of

\$ 1870 / 5,700.00

Tommy E King  
FOREMAN

TOMMY E KING  
(PLEASE PRINT FOREMAN'S NAME)

10/20/99  
DATE

T. L. Garden and Associates Inc.  
t/a Life Safety Systems

vs.

First Savings Bank of Virginia

Law Number 47245





THIRTY-FIRST JUDICIAL CIRCUIT OF VIRGINIA  
PRINCE WILLIAM COUNTY  
CITIES OF MANASSAS AND MANASSAS PARK

022.8

Judges  
Ierman A. Whisenant, Jr.  
Frank A. Hoss, Jr.  
William D. Hamblen  
Richard B. Potter  
LeRoy F. Millette, Jr.

April 14, 2000

Circuit Court Chambers  
9311 Lee Avenue  
Manassas, Virginia 20110  
(703) 792-6010

Retired Judges  
Arthur W. Sinclair  
H. Selwyn Smith

John T. Husk, Esquire  
2240 Gallows Road  
Vienna, Virginia 22182

Larry T. Suiters, Esquire  
2000 North 14th Street, Suite 210  
Arlington, Virginia 22201


Re: T. L. Garden & Associates, Inc. t/a Life Safety Systems  
v. First Savings Bank of Virginia  
At Law No. 47245

Dear Counsel:

This letter is to confirm my telephone call to each of you this afternoon. The Honorable Richard J. Jamborsky, Judge Designate, called today, as he promised, and advised that he has reviewed and considered your motions and has entered a Final Judgment Order for the Defendant for the reasons argued by defense counsel. Mr. Suiters will prepare the appropriate Order, circulate it for endorsement and submit it to the Court for entry.

Thank you for your cooperation.

Very truly yours,

  
Patricia Ann Hoover  
Administrative Assistant

cc: Honorable Richard J. Jamborsky, Judge Designate

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VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

T.L. GARDEN & ASSOCIATES, INC. )  
t/a LIFE SAFETY SYSTEMS )

Plaintiff, )

v. )

At Law No. 47245

FIRST SAVINGS BANK OF VIRGINIA )

Defendant. )

FINAL ORDER

THIS MATTER came before the Court on the motion of the Defendant, First Savings Bank of Virginia, that the jury verdict entered in favor of the Plaintiff on October 20, 1999, awarding both compensatory and punitive damages, be set aside; upon the Defendants' Motion and Memorandum of Law to Set Aside the Jury Verdict; the Plaintiff's Memorandum in Opposition to Defendant's Motion for Set Aside Jury Verdict and the Defendant's Reply Memorandum; and

THE COURT having considered the memoranda filed by the parties herein finds that the jury verdict in favor of the Plaintiff should be set aside on the grounds that it is contrary to the law and the evidence;

NOW, THEREFORE, It is

ADJUDGED, ORDERED AND DECREED as follows:

1. That for the reasons contained in the Defendant's Memoranda filed herein, the jury verdict entered in this matter in favor of the Plaintiff on October 20, 1999 on the grounds that it is contrary to the law and the evidence; and

BK 0166 PG 1895

2. Final Judgment is entered in this matter in favor of the Defendant, First Savings Bank of Virginia.

3. The Clerk shall forthwith provide a certified copy of this Order to counsel for each party.

4. AND THIS ORDER IS FINAL.

ENTERED this 15<sup>th</sup> day of May, 2000.

  
RICHARD J. JAMBORSKY,  
JUDGE DESIGNATE

WE ASK FOR THIS:

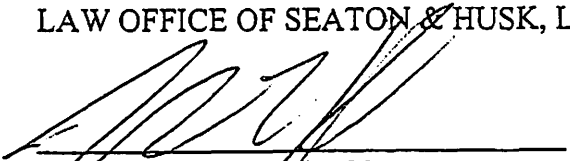
BROOKS, SUITERS & SATTLER, P.C.

By: 

Larry T Suiters (VSB #8110)  
2000 North 14th Street, Suite 210  
Arlington, Virginia 22201  
(703) 527-1775  
Counsel for Defendant, First Savings Bank of Virginia  
(703) 527-1775 (Telephone)  
(703) 524-7610 (Fax)

SEEN AND EXCEPTED TO FOR THE REASONS CONTAINED IN PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE JURY VERDICT AND THE TRIAL RECORD:

LAW OFFICE OF SEATON & HUSK, L.P.

  
John T. Husk, VSB #32801  
2240 Gallows Road  
Vienna, Virginia 22182  
Counsel for Plaintiff, T.L. Garden & Associates, Inc. t/a Life Safety Systems  
(703) 573-0700

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### ASSIGNMENT OF ERROR

The Circuit Court erred under §8.01-430 of the Virginia Code in setting aside the Jury's verdict when conflicting inferences could be drawn as to whether First Savings Bank, in its April 29, 1998 letter, intentionally and knowingly made a false representation of material fact to the Plaintiff with the intention to mislead Plaintiff into supplying materials on the government contract based upon the representation and that Plaintiff took action relying on the representation resulting in damage to Plaintiff; and in resolving the conflicting inferences the Jury's verdict was dependent on the weight to be given upon the testimony of the witnesses in determining their credibility.