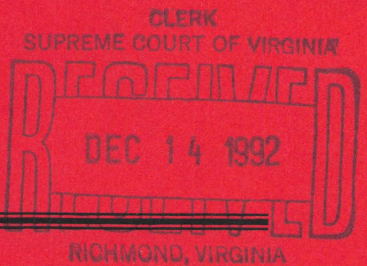


245 VA451



IN THE

Supreme Court of Virginia

RECORD NO. 921152

W. M. SCHLOSSER COMPANY, INC.,

Appellant,

V.

BOARD OF SUPERVISORS,
FAIRFAX COUNTY, VIRGINIA,

Appellee.

JOINT APPENDIX
Volume I

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Table of Contents - Volume I

Page Number

Amended Motion for Judgment Filed 7-10-91 With Attached Exhibits	1
A - Owner/Contractor Agreement and the General Conditions to the Contract	24
B - Memorandum Dated 5-7-84	129
C - Memorandum Dated 10-19-84	131
D - Memorandum Dated 12-2-86	134
E - Transmittal Dated 11-11-86	143
F - Transcript of Hearing Heard Before Fred K. Kramer, a Hearing Officer for the County of Fairfax, on 4-24-91.....	145
G - Decision by Fred K. Kramer Dated 5-16-91	338

Plaintiff's Motion for Change of Venue by Court Filed 7-9-91 With Attached Memorandum of Points and Authorities in Support of Plaintiff's Motion for Change of Venue by Court	344
Transcript of Hearing Heard Before the Honorable Jack B. Stevens on 7-12-91	348
Opinion Letter (Judge Stevens) Dated 10-22-91	374
Defendant's Plea in Bar to Amended Motion for Judgment Dated 12-3-91 With Attached Exhibits	376
1 - Letter Dated 8-14-89	382
2 - Order Entered 9-20-88	385
3 - Order Entered 10-31-91	389
4 - Letter Dated 11-21-89	394
5 - Letter Dated 6-6-91 (Judge Stevens)	398
Demurrer Filed 12-3-91 With Attached Memorandum of Points and Authorities on the Legality of Fred K. Kramer Serving as an Administrative Hearing Officer With Exhibits	404
1 - Fairfax County Purchasing Resolution Adopted 9-24-90	425
2 - Virginia Supreme Court Order Entered 6-27-88	455
3 - Letter Dated 5-25-90	467
4 - Virginia Procurement Law Study, Final Report Dated 11-1-80	471
5 - Letter Dated 6-16-76	624
6 - Unpublished Opinion Entered 8-15-91	628
7 - Memorandum Opinion Entered 9-23-91	638

Plaintiff's Opposition to Defendant's Plea in Bar to Amended Motion for Judgment Filed 2-3-92 With Attached Exhibit	641
A - Amended Motion for Judgment	650
Plaintiff's Opposition to Defendant's Demurrer Filed 2-3-92 With Attachments	679
Transcript of Hearing Heard Before the Honorable Jack B. Stevens on 4-3-92	697
Order Entered 4-24-92	722
Notice of Appeal Filed 5-20-92	724
Assignments of Error	726

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

**W.M. SCHLOSSER COMPANY, INC.
2400 51st Place
Hyattsville, Maryland 20781,**

Plaintiff,

v.

**BOARD OF SUPERVISORS,
FAIRFAX COUNTY, VIRGINIA
10700 Page Avenue
Fairfax, Virginia 22030**

Serve:

**Fairfax County Attorney's Office
Massey Building
4100 Chain Bridge Road
Fairfax, Virginia 22030,**

Defendant.

At Law No. 105733

AMENDED MOTION FOR JUDGMENT

Plaintiff, W.M. Schlosser Company, Inc. ("Schlosser"), respectfully moves this Court for judgment against Defendant, Board of Supervisors, Fairfax County, Virginia ("County" and/or "Owner"), and as grounds therefore, respectfully states as follows:

THE PARTIES

1. Plaintiff, W.M. Schlosser Company, Inc. is a general contractor in the construction industry with its principal place of business located at 2400 51st Place, Hyattsville, Maryland 20781.

2. Defendant is the Board of Supervisors for Fairfax.

County, Virginia.

3. This Court has jurisdiction pursuant to the provisions of Va. Code § 8.01-328.1, §§ 11-70 and 11-71, and § 15.1-508.

FACTUAL BACKGROUND

4. In or about July 1986, the County solicited bids for the performance of certain construction work relating to the renovation of the Old Courthouse, located in Fairfax County, Virginia (hereinafter the "Project"). The bid documents included, among other things, various drawings, specifications and addenda setting forth the work to be performed (collectively referred to as the "bid documents"). The Using Agency intended for the Project was the Fairfax County Juvenile and Domestic Relations District Court.

5. In or about August 1986, bids were submitted for the work to be performed as set forth in the bid documents. By memorandum dated August 26, 1986, the Fairfax County Juvenile and Domestic Relations District Court recommended that Schlosser, as the lowest bidder, be accepted for the Old Courthouse construction renovation. Likewise, by memorandum dated August 28, 1986, Fairfax County Department of Public Works, Project Management Division, concurred and recommended the award of the Contract to Schlosser as the lowest responsible bidder. Schlosser's bid price was \$5,485,000. The undisclosed County estimate totalled \$6,069,840.

6. On or about September 3, 1986, Schlosser was awarded the Contract (Contract No. CN-61154) for the renovation of the

Old Courthouse (Project No. 009149). Schlosser's Contract amount totalled \$5,485,000. A copy of the Owner/Contractor Agreement ("Agreement") and the General Conditions to the Contract ("General Conditions"), both of which form part of the Contract, are attached to the original Motion for Judgment as Exhibit A and are incorporated by reference herein.

7. Pursuant to Article 4 of the Agreement, both the County and Schlosser agreed that, "time was of the essence." Schlosser was required to achieve substantial completion within 1,065 calendar days from the date of the Notice to Proceed. Further, the Contract was to be performed in two phases and while work was proceeding in Phase I, Phase II was to remain occupied. As required by the Contract, Phase I was to be complete one year and eleven months after the Notice to Proceed and Phase II was to be complete two years and eleven months after the Notice to Proceed. The Notice to Proceed date was established by the County as November 17, 1986.

8. During Phase I of the work, Schlosser's Contract performance was significantly suspended and disrupted by the County due to design defects and differing conditions which the County knew or should have known existed. As a result, Schlosser's Phase I Contract performance was extended 259 calendar days and Schlosser suffered significant additional costs and damages for which Schlosser submitted a claim in the amount of \$1,179,028. The suspensions and disruptions were primarily attributable to: (1) electrical design defects; (2) a design defect with respect to the second floor Domestic

Relations space; and (3) a structural design defect in the grand stair area of the Project.

(1). Electrical Design Defects

9. The original electrical design for the Project contemplated running two different power currents to the Project at the same time. The existing current was a 120/208 service, which was needed to continue providing power to the occupied area of Phase II, during Phase I construction. The new power current was to be a 277/480 service and was to feed the Phase I areas first and eventually feed the Phase II area.

10. After Schlosser's Contract was awarded, Virginia Electric Power Company ("Vepco") advised they would not provide two different power services to the Project; indicating they never would have approved two services to the same building. Vepco's refusal to provide two services to the Project at the same time prevented bringing the new 277/480 electrical service to Phase I, while continuing the existing 120/208 electrical service to the Phase II occupied area. The County knew or should have known of this inherent design defect at the time bids were solicited and prior to the award of Schlosser's Contract. By itself, this design defect significantly suspended and disrupted the performance of critical electrical work.

11. Thereafter, when Schlosser began excavation work in the Phase I electrical/mechanical area, which was required to install a new electrical duct bank, Schlosser encountered existing electrical lines and gas lines that were not properly

located on the Contract drawings. When these existing utilities were discovered, all excavation work had to stop until the existing power lines were de-energized. Such de-energization, however, entailed de-energizing the existing Vepco transformer which was currently serving the Phase II occupied area of the Project. Since power had to continue being provided to the Phase II area of the Project, to resolve the problem required relocation of the existing Vepco transformer by installing a temporary transformer outside the Project. This permitted continued electrical service to the Phase II occupied area and allowed de-energization of the existing Vepco transformer, necessary to perform the excavation work in the electrical/mechanical area of the project.

12. The County had undisclosed superior knowledge of these potential problems with the Project's electrical design as early as 1984. By memorandum dated May 7, 1984, copied to Vincent M. Picciano, Director of Juvenile Court Services, the County advised that the existing Vepco transformer on the Project would require relocation. A copy of this memorandum is attached to the original Motion for Judgment as Exhibit B and is incorporated by reference herein. In addition, by memorandum dated October 19, 1984, the architect advised the County of the need to locate existing buried utilities in the new electrical/mechanical area of the Project because the existing information was inadequate. This memorandum indicated that an accurate site plan should be provided in order to minimize the potential for construction phase delays and additional costs. A

rcopy of this memorandum is attached to the original Motion for Judgment as Exhibit C and is incorporated by reference herein.

13. Despite the County's superior knowledge with respect to these potential problems, the Contract drawings and specifications (the "Contract documents") did not contemplate relocation of the existing Vepco transformer nor did they show the proper location of the existing buried utilities. Instead, they affirmatively misrepresented information which the County knew or should have known was false and/or misleading.

14. In addition to this misleading information, the County also knew or should have known that the electrical design reflected in the Contract documents was inadequate, defective and incomplete. The electrical design was based on 1981 Code requirements and not the 1984 Code requirements, which existed at the time the Project was bid and the Contract was awarded. Further, the electrical design failed to provide power to the new mechanical equipment for the Project and the electrical design was inadequate for the County's existing equipment that was to be re-used after the renovation was complete.

15. The Owner knew or should have known of these electrical design deficiencies prior to the award of Schlosser's Contract in 1986. The electrical design reflected in Schlosser's Contract documents was based on a 1981 design and was never updated prior to the bid solicitation in 1986, although the other aspects of the Project's design were updated. As a result of all of the above discussed undisclosed electrical design defects, critical electrical work in Phase I of the

Project was suspended and disrupted at least seven months.

(2). The Domestic Relations Space Design Defect

16. Phase I of the Project included renovation of the large Domestic Relations area on the second floor of the Courthouse. Schlosser was proceeding with work in this area when, on June 22, 1987, the County issued Schlosser a suspension of work notice. In its notice, the County advised Schlosser that the Using Agency had requested changes in the office layout. The Using Agency was the Fairfax County Juvenile and Domestic Relations District Court.

17. Prior to the County's solicitation of bids for the Project and the award of Schlosser's Contract, the County was well aware that the design of the Domestic Relations space required changes. These changes stemmed from a change in the Virginia Code which shifted responsibility for the child support collection system. By memorandum dated December 2, 1986, Vincent M. Picciano, Director of Court Services, Juvenile Court confirmed that these changes had been requested before the final plans were prepared for bidding. As stated in the memo:

At that time [i.e. before issuance of plans for bidding], in order to expedite the bidding process, the Court was asked to table any further changes in the design until the final plans were contracted on. After the Contract was awarded, we would then be able to submit our proposals as change orders. We are now doing so.

A copy of this memorandum is attached to the original Motion for Judgment as Exhibit D and is incorporated by reference herein.

18. In soliciting bids and awarding Schlosser's Contract based on the Contract drawings in question, the County affirmatively misrepresented the construction work required in the Domestic Relations area of the Project and the fact that the design for this area was suitable and complete. The County knew the design was defective due to Code changes and, undisclosed to Schlosser, the County did not intend to correct the known design defect until after Schlosser's Contract was awarded.

19. After Schlosser's work in the Domestic Relations area was suspended on June 22, 1987, it was not until April 8, 1988, that Schlosser eventually received a change directive for the design revisions to this area. As a result, Schlosser's performance of work in this critical area of the Project was suspended and disrupted for a period of 290 calendar days. This suspension also impacted critical follow-on work for the mechanical mezzanine area, located above the Domestic Relations space.

(3). The Grand Stair Area Structural Design Defect

20. On October 19, 1988, Schlosser suspended all work in the Phase I Grand Stair area of the Project due to an undisclosed structural defect which rendered the area unsafe and subject to the danger of potential collapse. Prior to this date, the County knew but failed to disclose to Schlosser the serious nature of this structural defect and the imminent danger which it presented. Indeed, the County and/or the County's architect knew or should have known of this existing structural

defect as early as May 1981, when the architect inspected the Project to verify the accuracy of existing construction plans. Further, by transmittal dated November 11, 1986, the County was provided structural design drawings for the Project dating back to 1928. A copy of this transmittal is attached to the original Motion for Judgment as Exhibit E and is incorporated by reference herein. Although subsequently requested, these drawings were never provided to Schlosser. Upon information and belief, these drawings disclose the defect in question.

21. Despite the County's superior knowledge of the existing structural defects, the County directed Schlosser to proceed with all work in the Phase I area of the Project, without disclosing the serious risk of imminent harm stemming from the design defect. Thereafter, in May 1988, the County issued Request for Proposal ("RFP") No. 69 to perform corrective work with respect to this existing design defect. However, the RFP and its accompanying drawings did not disclose the serious risk of imminent harm stemming from this defect. Rather, the drawings were misleading and failed to indicate that a two-story interior masonry wall would have to be completely supported by scaffold during the performance of the corrective work.

22. On August 30, 1988, Schlosser submitted a proposal to perform the corrective work in question. This proposal included only \$300 in costs for shoring and scaffolding because Schlosser remained unaware of the serious nature of the design defect in question and the fact that extensive scaffolding would be required. Thereafter, on September 14, 1988, the County met and

negotiated Schlosser's proposal, but did not disclose the extensive scaffolding work that would be required. It was not until October 18, 1988, after Schlosser had started the corrective work, that Schlosser was finally advised of the danger in question. Immediately, Schlosser suspended all work in the area to avoid risk of injury and/or damage.

23. Work then remained suspended in the Phase I Grand Stair Area until April 11, 1989, when Schlosser finally received from the County an approved shoring design. The extensive shoring work was completed by June 1, 1989. This allowed Schlosser to continue with follow-on work, necessary to achieve substantial completion for Phase I of the Project by July 5, 1989. As a result of the Grand Stair design defect and the County's failure to disclose the serious risk of danger involved, Schlosser's work in the critical Phase I Grand Stair area of the Project was suspended and disrupted at least 227 days.

24. The concomitant effect of the suspension and disruption stemming from the electrical design defects, the Domestic Relations space design defect and the Grand Stair area structural design defect resulted in suspension and disruption to Schlosser's Contract performance that extended completion of its Phase I work a total of 259 days, from October 17, 1988 through July 5, 1989. These suspensions and disruptions to Schlosser's Contract performance were due entirely to the fault, neglect and misrepresentations by the County with respect to the design of the Project, depicted in the Contract documents.

COUNT I
(Actual Fraud - Rescission)

25. The allegations contained in paragraphs 1 through 24 above are incorporated by reference as though fully set forth herein.

26. In contracting with Schlosser for the Project in question, Virginia Code § 11-35 required the County's procurement procedures to be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety. It also required the County to freely exchange with Schlosser information concerning the construction services for the Project.

27. Despite these Code requirements, prior to and during the course of Schlosser's Phase I Contract performance, the County acted with intent to conceal from Schlosser material facts and to falsely represent to Schlosser material facts, which Schlosser believed to be true and which Schlosser acted upon to its detriment and damage. Specifically, the County solicited from Schlosser a bid to perform the Contract work in question, based on plans and specifications which the County knew to be defective, falsely misleading, incomplete and inadequate, particularly with respect to the electrical design, the design of the Domestic Relations space, and the structural design in the Grand Stair area. Based on these plans and specifications, which Schlosser reasonably believed to be adequate and suitable for their intended purpose, Schlosser

agreed to perform the Contract work in question for a lump sum Contract amount of \$5,485,000 and specific Contract performance times for each phase of the Project. Due to the defective, falsely misleading, incomplete and inadequate plans and specifications, however, Schlosser's Contract performance was significantly suspended and disrupted, which caused Schlosser to incur additional costs and damages for which the County is liable.

28. In addition, during the course of Schlosser's Contract performance, the County requested Schlosser to perform structural corrective work in the Grand Stair area based on drawings which the County knew to be defective, falsely misleading, inadequate and incomplete. In doing so, the County acted with intent to conceal and/or falsely represent material facts. Schlosser agreed to perform the corrective work in question, based upon the drawings provided, which Schlosser reasonably believed to be suitable and adequate for their intended purpose. Due to the defective, falsely misleading, inadequate and incomplete drawings, however, Schlosser's Contract performance was significantly suspended and disrupted, which caused Schlosser to incur additional costs and damages for which the County is liable.

29. The aforesaid conduct of the County constitutes actual fraud. As a direct result of the County's actual fraud, the County has violated the aforesaid Code requirements and Schlosser has suffered damages in an amount totalling \$1,179,028. Due to the County's actual fraud, Schlosser is

entitled to rescission of the Phase I portion of the Contract, which is a severable portion of the Contract. Schlosser is also entitled to recovery of its damages under quantum meruit.

WHEREFORE, Plaintiff, W.M. Schlosser Company, Inc., prays this Court rescind the Phase I portion of the Contract and award judgment in favor of Schlosser against Defendant in the amount of \$1,179,028, plus interest, costs and attorney's fees together with such other relief as this Court deems just and proper.

COUNT II
(Constructive Fraud - Rescission)

30. The allegations contained in paragraphs 1 through 29 above are incorporated by reference as though fully set forth herein.

31. In contracting with Schlosser for the Project in question, . Virginia Code § 11-35 required the County's procurement procedures to be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety. It also required the County to freely exchange with Schlosser information concerning the construction services for the Project.

32. Despite these Code requirements, prior to and during the course of Schlosser's Contract performance, the County concealed and/or misrepresented to Schlosser material facts, which the County knew or should have known were false and misleading, and which Schlosser believed to be true; acting upon said facts to its detriment and damage. Specifically, the

County solicited from Schlosser a bid to perform the Contract work in question, based on plans and specifications which the County knew or should have known to be defective, falsely misleading, incomplete and inadequate, particularly with respect to the electrical design, the design of the Domestic Relations space and the structural design in the Grand Stair area. Based on these plans and specifications, which Schlosser reasonably believed to be adequate and suitable for their intended purpose, Schlosser agreed to perform the Contract work in question for a lump sum Contract amount of \$5,485,000 and specific Contract performance times for each phase of the Project. Due to the defective, falsely misleading, incomplete and inadequate plans and specifications, however, Schlosser's Contract performance was significantly suspended and disrupted which caused Schlosser to incur additional costs and damages for which the County is liable.

33. In addition, during the course of Schlosser's Contract performance, the County requested Schlosser to perform structural corrective work in the Grand Stair area based on drawings which the County knew or should have known to be defective, falsely misleading, inadequate and incomplete. Schlosser agreed to perform the change work in question, based upon the drawings provided, which Schlosser reasonably believed to be suitable and adequate for their intended purpose. Due to the defective, falsely misleading, incomplete and inadequate plans and specifications, however, Schlosser's Contract performance was significantly suspended and disrupted which

caused Schlosser to incur additional costs and damages for which the County is liable.

34. The aforesaid conduct of the County constitutes constructive fraud. As a direct result of the County's constructive fraud, the County has violated the aforesaid Code requirements and Schlosser has suffered damages in an amount totalling \$1,179,028. Due to the County's constructive fraud, Schlosser is entitled to rescission of the Phase I portion of the Contract, which is a severable portion of the Contract. Schlosser is also entitled to recovery of its damages under quantum meruit.

WHEREFORE, Plaintiff, W.M. Schlosser Company, Inc., prays this Court rescind the Phase I portion of the Contract and award judgment in favor of Schlosser against Defendant in the amount of \$1,179,028, plus interest, costs and attorney's fees, together with such other relief as this Court deems just and proper.

COUNT III
(Fraud in the Inducement - Rescission)

35. The allegations contained in paragraphs 1 through 34 above are incorporated by reference as though fully set forth herein.

36. In contracting with Schlosser for the Project in question, Virginia Code § 11-35 required the County's procurement procedures to be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of

impropriety. It also required the County to freely exchange with Schlosser information concerning the construction services for the Project.

37. Despite these Code requirements, prior to the award of Schlosser's Contract, the County acted with intent to conceal from Schlosser material facts and to falsely represent to Schlosser material facts, which Schlosser believed to be true, to fraudulently induce Schlosser's agreement to Contract. Specifically, the County solicited from Schlosser a bid to perform the Contract work in question, based on plans and specifications which the County knew to be defective, falsely misleading, incomplete and inadequate, particularly with respect to the electrical design, the design of the Domestic Relations space and the structural design in the Grand Stair area. Based on these plans and specifications, which Schlosser reasonably believed to be adequate and suitable for their intended purpose, Schlosser was induced to agree to perform the Contract work in question for a lump sum Contract amount of \$5,485,000 and specific Contract performance times for each phase of the Project. Due to the defective, falsely misleading, incomplete and inadequate plans and specifications, however, Schlosser's Contract performance was significantly suspended and disrupted which caused Schlosser to incur additional costs and damages for which the County is liable.

38. In addition, during the course of Schlosser's Contract performance, the County requested from Schlosser a proposal to perform structural corrective work in the Grand Stair area based

on drawings which the County knew to be defective, falsely misleading, inadequate and incomplete. In doing so, the County acted with intent to fraudulently induce Schlosser into performing the corrective work for a cost much less than should have been charged. Based upon the drawings provided, which Schlosser reasonably believed to be suitable and adequate for their intended purpose, Schlosser was induced to agree to perform the corrective work in question. Due to the defective, falsely misleading, incomplete and inadequate plans and specifications, however, Schlosser's Contract performance was significantly suspended and disrupted which caused Schlosser to incur additional costs and damages for which the County is liable.

39. The County's aforesaid conduct constitutes fraud in the inducement. As a direct result of the County's fraudulent acts to induce Schlosser into performing the Contract work and corrective work, the County has violated the aforesaid Code requirements and Schlosser has suffered damages in an amount totalling \$1,179,028. Due to the County's fraud in the inducement, Schlosser is entitled to rescission of the Phase I portion of the Contract, which is a severable portion of the Contract. Schlosser is also entitled to recovery of its damages under quantum meruit.

WHEREFORE, Plaintiff, W.M. Schlosser Company, Inc., prays this Court rescind the Phase I portion of the Contract and award judgment in favor of Schlosser against Defendant in the amount of \$1,179,028, plus interest, costs and attorney's fees,

together with such other relief that this Court deems just and proper.

COUNT IV
(Quantum Meruit)

40. The allegations contained in paragraphs 1 through 39 above are incorporated by reference as though fully set forth herein.

41. This action is based on the alternative theory of quantum meruit and stems from the County's actual fraud, constructive fraud and fraud in the inducement, as well as the County's material breaches, with respect to the severable Phase I portion of the Contract and the formation thereof.

42. As a result of the County's actual fraud, constructive fraud and fraud in the inducement and the County's material breaches, with respect to the severable Phase I portion of the Contract and the formation thereof, during Phase I of the project, Schlosser was required by the County to perform work and incur costs. Despite request, Schlosser remains unpaid for the reasonable value of such work and costs in an amount totalling \$1,179,028.

43. The County is liable to Schlosser for the unpaid reasonable value of such work and costs in quantum meruit. WHEREFORE, Plaintiff, W.M. Schlosser Company, Inc., demands judgment against Defendant in the amount of \$1,179,028, plus interest, costs and attorneys's fees together with such other relief as this Court deems just and proper.

COUNT V
(Breach of Contract)

44. The allegations contained in paragraphs 1 through 43 above are incorporated by reference as if fully set forth herein.

45. During the course of Schlosser's Phase I Contract performance, the County breached both express and implied contractual duties owed to Schlosser, including but not limited to:

- a. the implied duty to disclose material facts of which the County had superior knowledge;
- b. the implied duty not to substantially alter the pre-existing factual basis for the Contract;
- c. the implied duty to provide complete and accurate plans and specifications suitable for the purpose intended;
- d. the implied duty to act in good faith;
- e. the implied duty to cooperate with Schlosser during the performance of its Contract work;
- f. the implied duty not to hinder, disrupt, and/or delay the performance of Schlosser's Contract work;
- g. the implied duty not to actively interfere with the performance of Schlosser's Contract work; and
- h. the express duty not to suspend performance of the Contract work for an unreasonable period of time.

46. The County has also breached its Contract by failing and refusing to pay Schlosser for its additional costs and damages stemming from the County's unreasonable suspensions and

disruptions to the performance of Schlosser's Contract work.

47. As a result of the County's breaches of Contract, Schlosser has suffered damages in an amount totalling \$1,179,028.

WHEREFORE, Plaintiff, W.M. Schlosser Company, Inc., demands judgment against Defendant in the amount of \$1,179,028, plus interest, costs and attorney's fees, together with such other and further relief as this Court deems just and proper.

COUNT VI
(Administrative Decision Review)

48. The allegations contained in paragraphs 1 through 47 above are incorporated by reference as though fully set forth herein.

49. In accordance with the Contract requirements, by letter dated November 21, 1989, Schlosser submitted a claim for its additional costs and damages stemming from the County caused suspensions of work which resulted in 259 days of extended Contract performance on Phase I of the Project. The amount of said claim totalled \$1,179,028.

50. Schlosser pursued its claim through the administrative appeals process set forth in the Contract. By letter dated July 11, 1990, the Director of the Department of Public Works issued his decision denying the claim. Schlosser then appealed this decision to the County Executive, as required by the Contract.

51. A hearing with respect to Schlosser's appeal was heard before the County Executive's Designee, Mr. Frederick K. Kramer, Director of the Fairfax County Office of General Services, on

April 24, 1991. At the hearing, Mr. Kramer summarily denied Schlosser's claim, ruling as a matter of law that Schlosser was not entitled to recover its additional costs and damages from the County, under the Contract. A copy of the hearing transcript is attached to the original Motion for Judgment as Exhibit F and is incorporated by reference herein. (See pp. 182-191 for Mr. Kramer's ruling). On or about May 21, 1991, counsel for Schlosser received Mr. Kramer's written decision dated May 16, 1991, which denied Schlosser's claim for additional costs and damages. A copy of the Decision is attached hereto as Exhibit G.

52. In summarily denying Schlosser's claim, Mr. Kramer:

a. erred as a matter of law in denying Schlosser's claim for additional costs and damages stemming from the County's unreasonable suspensions of work, under the Changes clause of the Contract;

b. erred as a matter of law in denying Schlosser's claim based on ambiguous exculpatory provisions contained in the Contract;

c. erred as a matter of law in failing to strictly construe against the County exculpatory provisions contained in the Contract;

d. erred as a matter of law in enforcing exculpatory provisions contained in the Contract which are and/or should be void as against public policy;

e. erred as a matter of law in denying Schlosser's claim under alternative legal theories, rights and remedies, including

fraud and breach of Contract;

f. erred as a matter of law in finding that Schlosser had been appropriately compensated for all of its costs as provided for under the provisions of the Contract; and

g. made an arbitrary and capricious finding that Schlosser failed to comply with the notice provisions of the Contract since notice was not a basis for the Director of Department of Public Work's decision being appealed by Schlosser, and since the factual issue of notice was not the dispositive issue presented for Mr. Kramer to decide. Rather, only the dispositive legal issue of whether Schlosser's claim for additional costs could be recovered under the terms of the Contract was in issue. (See Exhibit F, pp. 93-97, 159-162 and 182-191). Mr. Kramer's May 16, 1991 decision is, therefore, so grossly erroneous as to imply bad faith.

53. In addition, the administrative appeal procedure set forth in the County's Contract violated Va. Code § 11-71, which expressly requires administrative appeal hearings to be before, "a disinterested person or panel." Mr. Kramer, as a county employee, is clearly not a "disinterested person," as contemplated by the statute.

54. Further, the County's administrative appeal procedure has denied Schlosser due process of law, in violation of the United States Constitution and the Commonwealth of Virginia Constitution.

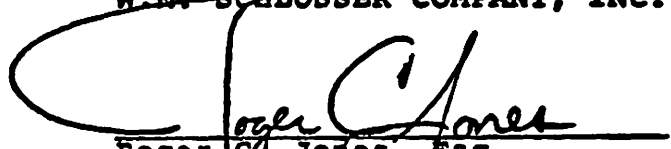
55. Schlosser has satisfied all conditions precedent necessary for the filing of this action, and this appeal from

Mr. Kramer's denial of Schlosser's claim has been commenced in a timely manner. The Court is respectfully requested to sustain Schlosser's appeal and award Schlosser its claimed additional costs and damages.

WHEREFORE, Plaintiff, W.M. Schlosser Company, Inc., demands judgment against Defendant in the amount of \$1,079,028, plus interest, costs and attorney's fees, together with such other relief as this Court deems just and proper.

Respectfully submitted,

W.M. SCHLOSSER COMPANY, INC.



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Dated: 7.10.91

Plaintiff's Amended Motion
for Judgment - Exhibit A

OWNER-CONTRACTOR AGREEMENT

FOR

FAIRFAX COUNTY

OLD COURT HOUSE RENOVATION

**CONTRACT NO. CN-61154
PROJECT NO. 009149**

CONTRACTOR:

W. M. SCHLOSSER COMPANY, INC.

SECTION C

OWNER-CONTRACTOR AGREEMENT

CONTRACT NUMBER: 61154

PROJECT NUMBER: 9149

THIS AGREEMENT, in three (3) copies, made this 3rd day of September, 19 86, by and between The Board of Supervisors, Fairfax County, Virginia (herein referred to as the "Owner"), whose mailing address is 4100 Chain Bridge Road, Fairfax, Virginia 22030 and

W. M. Schlosser Company, Inc. (herein referred to as the "Contractor"), whose mailing address is 2400 51st Place

Hyattsville, MD 20787

All correspondence, submittals and notices relating to or required under this Contract shall be sent in writing to the above addresses; unless either party is notified in writing by the other, of a change in address.

WITNESSETH:

WHEREAS it is the intention of the Owner to obtain the services of the Contractor in connection with the construction of Old Court House

Renovation hereinafter referred to as the "Project" or the "Work"; and

WHEREAS the Contractor desires to perform such construction in accordance with the terms and conditions of this Agreement,

NOW, THEREFORE, in consideration of the promises made herein and other good and valuable considerations, the following terms and conditions are hereby mutually agreed to, by and between the Owner and Contractor:

Article 1

DEFINITIONS

1.1 All terms in this Agreement which are defined in the Information for Bidders and the General Conditions shall have the meanings designated therein.

1.2 The Contract Documents are as defined in the General Conditions. Such documents form the Contract, and all are as fully a part thereof as if attached to this Agreement or repeated herein.

Article 2

STATEMENT OF THE WORK

2.1 The Contractor shall provide and pay for all materials, tools, equipment, labor and professional and non-professional services, and shall perform all other acts and supply all other things necessary, to fully and properly perform and complete the Work, as required by the Contract Documents.

2.2 The Contractor shall further provide and pay for all related facilities described in any of the Contract Documents, including all work expressly specified therein and such additional work as may be reasonably inferred therefrom, saving and excepting only such items of work as are specifically stated in the Contract Documents not to be the obligation of the Contractor. The totality of the obligations imposed upon the contractor by this Article and by all other provisions of the Contract Documents, as well as the structures to be built and the labor to be performed, is herein referred to as the "Work".

Article 3

ARCHITECT/ENGINEER

3.1 The Architect/Engineer (hereinafter referred to as the "A/E" and as defined in the General Conditions) shall be Hunter/Miller, Neer and Graef

a Joint Venture whose
address is 110 South Lee Street, Alexandria, Virginia 22314

provided, however, that the Owner may, without liability to the Contractor, unilaterally amend this Article from time to time by designating a different person or organization to act as its A/E and so advising the Contractor in writing, at which time the person or organization so designated shall be the A/E for purposes of this Contract.

Article 4

TIME OF COMMENCEMENT AND COMPLETION

4.1 The Contractor shall commence the Work promptly upon the date established in the Notice to Proceed. If there is no Notice to Proceed, the date of commencement of the Work shall be the date of this Agreement or such other date as may be established herein.

4.2 Time is of the essence. The Contractor shall achieve substantial Completion, as defined in the General Conditions, within 1065 calendar days from the date of Notice to Proceed or the date otherwise established for the commencement of Work. This time period shall be designated the Contract Time.

4.3 The Contractor shall also complete the following activities of Work within the interim Milestone dates indicated, as applicable:

Activity

DATE:

4.4 The liquidated damages incurred by the Owner due to the Contractor's failure to complete the Work within the Contract Time, including any extensions thereof, shall be \$ 300 per day for each consecutive calendar day beyond the Contract Time (Sundays and all holidays included) for which the Contractor shall fail to complete the Work.

4.5 The liquidated damages incurred by the Owner due to the Contractor's failure to complete each activity of Work designated in Article 4.3, above within the applicable interim Milestone date, as applicable, shall be as hereinafter stated for each Milestone, for each consecutive day beyond the Milestone date (Sundays and all holidays included) for which the Contractor shall fail to complete the activity of Work:

Phase One - one year and eleven months after Notice to Proceed, \$300 per day

Phase Two - two years 11 months after Notice to Proceed, \$300 per day

4.6 The amount of liquidated damages set forth in Articles 4.4 and 4.5 hereinabove shall be assessed cumulatively. The items of cost included in the assessment of liquidated damages are as defined in the General Conditions. This provision for liquidated damages does not bar Owner's right to enforce other rights and remedies against Contractor, including but not limited to, specific performance or injunctive relief.

Article 5

CONTRACT SUM

5.1 Provided that the Contractor shall strictly and completely perform all of its obligations under the Contract Documents, and subject only to additions and deductions by Modification or as otherwise provided in the Contract Documents, the Owner shall pay to the Contractor, in current funds and at the times and in the installments hereinafter specified, the sum of _____

Five Million, Four Hundred Eighty Five Thousand and 00/100

Dollars (\$ 5,485,000.00) (herein referred to as the "Contract Sum").

Article 6

PROGRESS PAYMENTS

6.1 The Contractor hereby agrees that on or about the First day of the month for every month during the performance of the Work he will deliver to the A/E an Application for Payment in accordance with the provisions of Article 9 of the General Conditions. This date may be changed upon mutual agreement, stated in writing, between the Owner and Contractor. Payment under this Contract shall be made as provided in the General Conditions.

Article 7

OTHER REQUIREMENTS

7.1 The Contractor shall submit the Performance Bond, Labor and Material Payment Bond and Certification of Insurance as required by the Contract Documents.

7.2 The Owner shall furnish to the Contractor, 30 sets of drawings and 30 sets of specifications, at no extra cost, for use in the Construction of the Work. Additional sets of drawings or specifications may be obtained by the Contractor by paying the Owner for the costs of reproduction, handling and mailing.

7.3 The Contractor shall perform at least 20 percent of the total Work with forces that are in the direct employment of the Contractor's organization.

IN WITNESS WHEREOF, the Board of Supervisors, Fairfax County,

Virginia (hereinbefore called the "Owner") by ~~resolution of the~~
County Executive

authorizing and directing the ~~same and adopted at a~~ meeting

thereof, ~~duly called and held in the~~ on Wednesday

the 3rd day of September, 1986, has caused these presents to be signed
by its Director, Department of Public Works and its corporate seal to be

hereunto affixed, attested by its Clerk of the Board, and

W. M. Schlosser Company, Inc., 2400 51st Place, Hyattsville, MD 20781

(hereinbefore called the "Contractor") has caused these presents to be signed

by its President and its Corporate seal to be hereunto affixed, as
hereinafter attested, all as of the day and year first above written.

(Owner) Board of Supervisors,
Fairfax County, Fairfax,
Virginia

By 
Director, Department of Public Works
(Seal)

Attest:


Clerk

W. M. Schlosser Company,

Contractor (SEAL)

By 
Andrew Schlosser

President

Attest:


David E. Thompson

Secretary

(ACKNOWLEDGEMENT OF OFFICER OF OWNER EXECUTING CONTRACT)

State of Virginia)
County of Fairfax)

ss:

On this 30th day of SEPTEMBER, 1986.

before me personally came and appeared John W. di Zerega
to me known, who being by me duly sworn, did depose and say that he is the _____

Director, Department of Public Works of
Fairfax County described in and which executed the foregoing instrument; that
by virtue of the authority conferred on him by law, he subscribes his name to
the foregoing instrument and that he executed the same for the purposes
therein mentioned. (Revised 06/15/83)

[Signature]
(Seal)
MY COMMISSION EXPIRES 4/3/90

(ACKNOWLEDGEMENT OF OFFICER OF OWNER ATTESTING CONTRACT)

State of Virginia)
County of Fairfax)

ss:

On this 2nd day of October, 1986.

before me personally came and appeared Ethel Wilcox Register
to me known, who being by me duly sworn did depose and say that she is the _____

clerk to the Board of Supervisors described herein which
executed the foregoing instrument; that she knows the seal of the said Board;
that she is the official custodian of such seal; that one of the impressions
appearing on said instrument is a true and correct impression of such seal;
and that she affixed it thereto and attested the same over her signature by
virtue of the authority in her vested.

[Signature]
(SEAL)
MY COMMISSION EXPIRES 4/16/90

(ACKNOWLEDGEMENT OF PRINCIPAL OF CONTRACTOR, IF A CORPORATION)

State of Maryland)
County of Prince Georges)

ss:

On this 22nd day of September, 1986.

before me personally came and appeared Andrew Schlosser
to me known, who, being by me duly sworn, did depose and say that he resides at
6104 Nightshade Court
Rockville, Maryland 20852; that he is the President
of W. M. Schlosser Co., Inc.
the corporation described in and which executed the foregoing instrument; that
he knows the seal of said corporation; that one of the seals affixed to such
instrument is such seal; that it was so affixed by order or authority of the
directors of said corporation; and that he signed his name thereto by like
order.

Mark A. Kazyra

(SEAL)

My Commission Expires: 7/1/90

(ACKNOWLEDGEMENT OF PRINCIPAL OF CONTRACTOR, IF A PARTNERSHIP)

State of _____)
County of _____)

ss:

On this _____ day of _____, 19____.

before me personally came and appeared _____
to me known, and known to me to be one of the members of the firm of _____

_____ described in and who executed the foregoing
instrument and he acknowledged to me that he executed the same as and for the
act and deed of said firm.

(SEAL)

My Commission Expires: _____

(ACKNOWLEDGEMENT OF PRINCIPAL OF CONTRACTOR, IF A PROPRIETORSHIP)

State of _____)
County of _____)

ss:

On this _____ day of _____, 19____.

before me personally came and appeared _____
to me known, and known to me to be one of the members of the firm of _____

_____ described in and who executed the foregoing
instrument and acknowledged that he executed the same.

(SEAL)

My Commission Expires: _____

NOTICE OF DISCLAIMER

TAKE NOTICE, that these General Conditions of Fairfax County, Virginia may contain language and Article or Paragraph headings or names, similar to or the same as the provisions of the "General Conditions of the Contract for Construction", published by the American Institute of Architects, AIA Document A-201, 1976 Edition.

TAKE NOTICE, however, that these General Conditions of Fairfax County, Virginia are substantially and materially different in many respects from the AIA Document A-201 and that certain additions, deletions or other modifications have been made to provisions similar to those contained in said AIA document.

The use of any language or article or paragraph format similar to or the same as AIA Document A-201 does not constitute an endorsement by the American Institute of Architects of this Fairfax County document.

TABLE OF CONTENTS

	<u>GENERAL CONDITIONS</u>	<u>PAGE NO.</u>
ARTICLE 1	<u>CONTRACT DOCUMENTS</u>	
1.1	Definitions.....	D-1
1.2	Execution, Correlation and Intent.....	D-3
1.3	Ownership and Use of Documents.....	D-4
ARTICLE 2	<u>ARCHITECT/ENGINEER</u>	
2.1	Definitions.....	D-4
2.2	Administration of the Contract.....	D-5
ARTICLE 3	<u>OWNER</u>	
3.1	Definitions.....	D-7
3.2	Information Possessed by Owner.....	D-8
3.3	Owner Paid Permits and Fees.....	D-8
3.4	Owner's Right to Stop Work.....	D-9
3.5	Owner's Right to Carry Out the Work.....	D-9
3.6	Suspension of Work.....	D-10
3.7	Use and Occupancy Prior to Final Acceptance by Owner.....	D-10
3.8	Right to Audit and Preservation of Records.....	D-11
ARTICLE 4	<u>CONTRACTOR</u>	
4.1	Definition.....	D-13
4.2	Review of Contract Documents.....	D-13
4.3	Contractor's Representations.....	D-13
4.4	Supervision and Construction Procedures.....	D-15
4.5	Labor, Materials and Equipment.....	D-15
4.6	Warranty.....	D-17
4.7	Contractor-Paid Taxes, Permits, Fees and Notices.....	D-17
4.8	Compliance.....	D-18
4.9	Allowances.....	D-20
4.10	Superintendent.....	D-20
4.11	Construction Schedule.....	D-20
4.12	Responsibility for Completion.....	D-24
4.13	Documents and Samples at the Site.....	D-26
4.14	Shop Drawings, Product Data, Samples and Manuals.....	D-26
4.15	Equal Products and Substitutions.....	D-29
4.16	Use of Site.....	D-32
4.17	Cutting and Patching of Work.....	D-33
4.18	Right to Publish.....	D-33
4.19	Site Clean Up.....	D-33
4.20	Patents, Royalties, etc.....	D-34
4.21	Indemnification.....	D-34
4.22	Non-Discrimination in Employment.....	D-35
4.23	Contract Security.....	D-36

ARTICLE 5	<u>SUBCONTRACTORS</u>	
5.1	Definitions.....	D-36
5.2	Award of Subcontracts and Other Contracts for Portions of the Work.....	D-37
5.3	Subcontractual Relations.....	D-37
5.4	Qualification Submittals.....	D-38
ARTICLE 6	<u>WORK BY OWNER OR BY SEPARATE CONTRACTORS</u>	
6.1	Owner's Right to Perform Work and to Award Separate Contracts.....	D-39
6.2	Mutual Responsibility.....	D-39
6.3	Errors.....	D-40
6.4	Owner's Right to Clean Up.....	D-41
ARTICLE 7	<u>MISCELLANEOUS PROVISIONS</u>	
7.1	Governing Law.....	D-41
7.2	Provisions Required by Law Deemed Inserted.....	D-41
7.3	Successors and Assigns.....	D-41
7.4	Contract Claims and Disputes.....	D-42
7.5	Attorney's Fees and Other Expenses.....	D-43
7.6	Rights and Remedies.....	D-43
7.7	Tests.....	D-44
ARTICLE 8	<u>CONTRACT TIME</u>	
8.1	Definition.....	D-45
8.2	Progress and Completion.....	D-46
8.3	Claims for Time Extensions.....	D-46
8.4	Change Order Work.....	D-48
8.5	Liquidated Damages for Delay.....	D-49
8.6	Time Extensions for Weather.....	D-49
ARTICLE 9	<u>PAYMENTS AND COMPLETION</u>	
9.1	Contract Sum.....	D-50
9.2	Schedule of Values.....	D-50
9.3	Application for Payment.....	D-51
9.4	Certificates for Payment.....	D-52
9.5	Progress Payments.....	D-53
9.6	Payments Withheld.....	D-53
9.7	Failure of Payment.....	D-55
9.8	Substantial Completion and Guarantee Bond.....	D-55
9.9	Final Completion and Final Payment.....	D-58
ARTICLE 10	<u>PROTECTION OF PERSONS AND PROPERTY</u>	
10.1	Safety Precautions and Programs.....	D-61
10.2	Safety of Persons and Property.....	D-61
10.3	Obligation of Contractor to Act in an Emergency.....	D-64

ARTICLE 11	<u>INSURANCE</u>	
11.1	Contractor's Liability Insurance.....	D-65
11.2	Contractor's Property Insurance.....	D-67
11.3	Effect of Submission of Certificates.....	D-69
11.4	Failure of Compliance.....	D-69
11.5	Owner's Insurance.....	D-70
ARTICLE 12	<u>CHANGES AND MODIFICATIONS IN THE WORK</u>	
12.1	Changes in the Work.....	D-70
12.2	Field Order.....	D-71
12.3	Request for Proposal.....	D-71
12.4	Proposed Change Order.....	D-71
12.5	Change Order.....	D-74
12.6	Unilateral Change Order.....	D-76
12.7	Decreases and Work Not Performed.....	D-77
12.8	Changes in Line and Grade.....	D-77
12.9	Subsurface Conditions Found Different.....	D-78
12.10	Claims for Additional Cost and/or Time.....	D-78
ARTICLE 13	<u>UNCOVERING AND CORRECTION OF WORK</u>	
13.1	Uncovering of Work.....	D-79
13.2	Warranty and Correction of Work.....	D-80
13.3	Acceptance of Faulty, Defective or Non-Conforming Work.....	D-82
13.4	No Limitation of Liability.....	D-82
ARTICLE 14	<u>TERMINATION OF THE CONTRACT</u>	
14.1	Contractor's Right to Stop Work or Terminate Contract.....	D-83
14.2	Owner's Right to Terminate Contract for Cause.....	D-83
14.3	Owner's Right to Terminate Contract for Convenience....	D-84
14.4	Contractor's Responsibilities Upon Termination.....	D-87
14.5	Disputes Upon Termination.....	D-89

DEPARTMENT OF PUBLIC WORKS
PROJECT ENGINEERING DIVISION

COUNTY OF FAIRFAX
VIRGINIA

ADVERTISEMENT FOR BID

OLD COURT HOUSE RENOVATION
CONTRACT NO. CN-61154
PROJECT NO. 9149

Sealed bids will be received by the Board of Supervisors, Fairfax County, Virginia for the renovation of the Old Court House located at 4000 Chain Bridge Road, Fairfax, Virginia 22030.

Description
The work shall include the following: Additions and improvements to the existing Court House located at 4000 Chain Bridge Road to include the renovation of approximately 135,000 S.F. of the building, to be performed in two phases. The renovation shall include in two phases asbestos removal, salvage and demolition, extensive millwork, a new cafeteria, and certain finish work. The renovation shall include all related structural, mechanical, heating and cooling, plumbing, electrical equipment, and all plant, labor, and material, temporary facilities and restoration to provide work complete and in place.

Bids will be received in the office of the Director of Project Engineering Division, Department of Public Works, County of Fairfax, Virginia on the First Floor, Pender Mill Building, 3930 Pender Drive, Fairfax, Virginia until 3:00 P.M. prevailing local time, August 14, 1986. Bids received after that time will not be accepted. Bids will be opened publicly and read aloud at 3:10 P.M., in the First Floor Bid Room, Pender Mill Building, 3930 Pender Drive, Fairfax.

A Pre Bid Conference will be held on July 28, 1986, at 1:30 P.M. in the First Floor Bid Room of the Pender Mill Building. All bona fide bidders are requested to attend.

Bidding Documents may be obtained commencing July 14, 1986 from the Project Engineering Division, Department of Public Works, First Floor of the Pender Mill Building, 3930 Pender Drive, Fairfax, Virginia 22030. The Bidding Documents may be obtained in accordance with the following Deposit-Purchase instructions:

A. Refundable Deposit (General Contractors Only):

1. By depositing a check made payable to the Director of Finance, Fairfax County, in the amount of \$100.00 per document. (Refundable maximum 3 sets).
2. Refund of Deposits:
 - a. In order to obtain a refund, Bidding Documents must be returned, in good condition, to the Project Engineering Division, First Floor, Pender Mill Building, 3930 Pender Drive, Fairfax, Virginia, 22030.
 - b. Deposits will not be returned to general contract bidders if returned drawings are torn, disordered, excessively marked up, incomplete or mutilated.

- c. No refund will be made for Bidding Documents that are returned to the Project Engineering Division more than 45 calendar days after the bid opening. All specifications, refundable or not, shall be returned.

B. Non-refundable Purchase (Extra Sets and Sub-contractors, etc.)

1. Extra documents are available at a cost of \$100.00 per set (non-refundable) to general contract bidders. Payment for non-refundable sets must be separate from deposit for refundable sets.
2. Sets of drawings will be furnished to subcontractors, material suppliers and others for a non-refundable cost of \$50.00 per set of drawings, \$2.00 per sheet of drawings, \$50.00 per specification, and \$.50 per page of specifications.

Anyone wishing to have bidding documents mailed to them must include an additional \$10.00 per set for handling and mailing. Payment for handling and mailing should be made by a separate check. A street address must be provided to permit U.P.S. delivery.

Bidding Documents are available for review on F. W. Dodge Film, when applicable, and at the following Plan Room locations:

1. F. W. Dodge Corp., 8728 Colesville Rd., Silver Spring, Md. 20910
2. Blue Reports, Inc., 5205 Leesburg Pike, Suite 1408, Falls Church, Va. 22041
3. Builder's Exchange of Richmond, 3207 Hermitage Rd., Richmond, Va. 23230
4. F. W. Dodge Corp., 2720 Enterprise Parkway, Suite 200, Richmond, Va. 23229
5. F. W. Dodge Division, Md. Executive Park, Oxford Bldg., Suite 635, 8600 LaSalle Road, Towson, Md. 21204
6. Roanoke Valley Chamber of Commerce, 14 W. Kirk Avenue, Roanoke, Va. 24011
7. Construction Market Data, 7505 Greenway Center Drive, Suite 001, Greenbelt, Md. 20770
8. Office of the A/E, Hunter Miller and Associates, Near & Graaf and Group Practice, A Joint Venture, 220 South Lee Street, Alexandria, Va. 22314

All questions concerning the project shall be submitted in writing to the Project Engineering Division, 703/691-2527. This office is the only point where information will be disseminated.

Bid Security in the amount of five percent (5%) of the proposal must accompany each proposal in accordance with Information to Bidders. No bid may be withdrawn for a period of forty-six days after the opening thereof.

The procedure specified under Section 11-54A(i) Code of Virginia shall apply: Whereby if the bidder wishes to withdraw his bid, the bidder must give notice in writing of his claim of right to withdraw his bid within two business days after conclusion of the bid opening procedure.

SECTION D

GENERAL CONDITIONS

ARTICLE 1

CONTRACT DOCUMENTS

1.1 DEFINITIONS

1.1.1 CONTRACT DOCUMENTS:

The Advertisement for Bids, Information for Bidders, Form of Bid, Owner-Contractor Agreement, Drawings, General Conditions and Special Conditions and any supplements thereto, Specifications and all Addenda issued prior to and all Modifications issued after execution of the Contract, shall form part of this contract and the provisions thereof shall be as binding upon the parties hereto as if they were herein fully set forth. Any soils, geotechnical or other reports, surveys and analyses which may be printed, bound or assembled with the Contract Documents, or otherwise made available to the Contractor for review or information under this Contract, are not adopted by reference into, nor are they part of the Contract Documents. A Modification is (1) a written Amendment to the Contract signed by both parties, (2) a written Change Order signed by both parties or (3) a written Field Order. The table of contents, titles, headings, running headlines and marginal notes contained herein and in said documents are solely to facilitate reference to various provisions of the Contract Documents and in no way affect, limit or cast light upon the interpretation of the provisions to which they refer.

1.1.2 CONTRACT:

The Contract Documents form the Contract for Construction. This Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or changed only by a Modification. Nothing contained in the Contract Documents shall create any contractual relationship between the Owner, or any agent, consultant, or independent Contractor employed by the Owner and any Subcontractor, Sub-subcontractor, supplier or vendor of the Contractor, but the Owner shall be entitled to performance of all obligations intended for his benefit, and to enforcement thereof.

1.1.3 WORK:

The term "Work" as used herein refers to work at the site of the project, is that normally done at the location of the project and includes all plant, labor, materials, supplies, equipment and other facilities and things necessary or proper for or incidental to the carrying out and completion of this contract. The term "Work" shall be construed to include material suitably stored and protected.

1.1.4 PROJECT:

The Project is the total construction of which the Work performed under Contract Documents may be the whole or a part.

1.1.5 FURNISH, INSTALL, PROVIDE:

The terms "Furnish" or "Install" or "Provide", unless specifically limited in context, mean: furnishing and incorporating a specified item, product or material in the work, including all necessary labor, materials, equipment to perform the work required, ready for use.

1.1.6 EXTRA WORK:

The term "Extra Work" as used herein, refers to and includes work required by the Owner, which, in the judgment of the Owner and A/E, involves changes in or additions to that required by the drawings, specifications and addenda in their present form.

1.1.7 NOTICE OF AWARD:

The written notice of the acceptance of the FORM OF BID from the Owner to the Successful Bidder.

1.1.8 NOTICE:

The term "Notice" as used herein shall mean and include written notice. Written notice shall be deemed to have been duly served when delivered to or at the last known business address of the person, firm or corporation for whom intended, or to his, their or its duly authorized agent, representative or officer; or when enclosed in a postage prepaid wrapper or envelope addressed to such person, firm or corporation at his, their or its last known business address and deposited in a United States mailbox.

1.1.9 MISCELLANEOUS WORDS OR TERMS:

Whenever they refer to the work or its performance, "Directed", "Required", "Permitted", "Ordered", "Designated", "Prescribed", and

words of like import shall imply the direction, requirements, permission, order, designation or prescription of the Owner or A/E, and "Approved", "Acceptable", "Satisfactory", "in the judgment of" and words of like import shall mean approved by or acceptable to or satisfactory to or in the judgment of the Owner or A/E.

1.2 EXECUTION, CORRELATION AND INTENT

- 1.2.1** The Owner-Contractor Agreement, shall be signed in not less than the number of copies specified in the said Agreement.
- 1.2.2** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. Words and abbreviations which have well-known technical or trade meanings are used in the Contract Documents in accordance with such recognized meanings.
- 1.2.3** Anything shown on the drawings and not mentioned in the specifications or mentioned in the specifications and not shown on the drawings shall have the same effect as if shown or mentioned respectively in both. Technical specifications take priority over general specifications and detail drawings take precedence over general drawings. Any conflict or inconsistency in the drawings shall be submitted by the Contractor to the A/E whose decision thereon shall be conclusive. In case of conflict or inconsistency between the drawings and the specifications, the specifications shall govern.
- 1.2.4** Should any work or material be required which is not denoted in the drawings and specifications either directly or indirectly, but which is, nevertheless, necessary for the proper carrying out of the intent thereof, it is understood and agreed that the same is implied and required and that the Contractor shall perform such work and furnish such materials as fully as if they were completely delineated and prescribed.
- 1.2.5** The Contractor may be furnished additional instructions and detail drawings to carry out the work included in the Contract. The additional drawings and instructions thus supplied to the Contractor will coordinate with the Contract Documents and will be so prepared that they can be reasonably interpreted as a part thereof. The Contractor shall carry out the work in accordance with the additional detail drawings and instructions.

1.2.6 The drawings and specifications are divided into sections for convenience and clarity only. The Contractor shall not construe this as a division of the work into various subcontractor units. The Contractor may subcontract the Work in such divisions as he sees fit, but he is ultimately responsible for furnishing all work shown on the drawings and in the specifications.

1.2.7 The provisions of this Contract cannot be amended, modified, varied or waived in any respect except by a Modification. The Contractor is hereby given notice that no person has authority to orally waive, or to release the Contractor from any of the Contractor's duties or obligations under or arising out of this Contract. Any waiver, approval or consent granted by Modification to the Contractor shall be limited to those matters specifically and expressly stated thereby to be waived, approved or consented to and shall not relieve the Contractor of the obligation to obtain any future waiver, approval or consent.

1.3 OWNERSHIP AND USE OF DOCUMENTS

1.3.1 All Drawings, Specifications, and memoranda relating to the Work are the property of the Owner and are to be used only for the Project.

1.3.2 The Contractor shall be furnished the number of sets of drawings and specifications, as set forth in the Owner-Contractor Agreement, free of charge by the Owner for use in construction. Additional sets of drawings and specifications may be obtained by paying printing, mailing, and handling charges.

ARTICLE 2

ARCHITECT/ENGINEER

2.1 DEFINITIONS

2.1.1 The term Architect/Engineer, hereinafter "A/E" or "Architect" or "Engineer", shall mean the consulting firm or County agency, or their duly authorized representatives, that is responsible for designing or engineering the work, and performing the activities specified herein. Such firm or agency and its representatives shall act severally within the scope of particular duties entrusted to them, unless otherwise provided for in the Contract.

2.1.2 The A/E is identified in the Owner-Contractor Agreement and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The A/E is further described as one of the following:

- 2.1.2.1 ARCHITECT, a person or other legal entity lawfully licensed to practice architecture in Virginia; or
- 2.1.2.2 ENGINEER, a person or other legal entity lawfully licensed to practice engineering in Virginia; or
- 2.1.2.3 The Director, Division of Project Engineering, Department of Public Works, County of Fairfax, Virginia, or his designee.
- 2.2. ADMINISTRATION OF THE CONTRACT
- 2.2.1 The A/E will provide services as hereinafter generally described.
- 2.2.2 The A/E will be an Owner's representative during construction and until the end of the one year guarantee period. The A/E will advise and consult with the Owner. The Owner's instructions to the Contractor may be forwarded through the A/E. The A/E will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise changed by Modification.
- 2.2.3 The A/E will visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the A/E will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of his on-site observations as an architect or engineer, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.
- 2.2.4 The A/E will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The A/E will not be responsible for or have control over the acts or omissions of the Contractor, Subcontractors, or any of their agents or employees, or any other persons performing any of the Work.
- 2.2.5 The A/E will inform the Owner and Contractor whenever in the reasonable opinion of the A/E any of the Work is proceeding contrary to the requirements of the Contract Documents and will be unacceptable. Failure of the Contractor to take corrective action

to make the Work conform to the Contract Documents will subject the Contractor to any and all remedies available to the Owner, including, without limitation, termination pursuant to Article 14 hereof. Such notification by the A/E will not be a cause for the Contractor to claim either delay of the Work or any increase in the Contract Sum.

- 2.2.6 The A/E, the Owner and other governmental representatives shall at all times have access to the Work wherever it is in preparation and progress. The Contractor shall provide facilities for such access so that the A/E, the Owner and other governmental representatives may perform their functions under the Contract Documents.
- 2.2.7 Where applicable, based on the A/E's observations and an evaluation of the Contractor's Applications for Payment, the A/E will determine the amounts owing to the Contractor and will issue Certificates for Payment in such amounts, as provided in Article 9.
- 2.2.8 The A/E will be an interpreter of the requirements of the Contract Documents.
- 2.2.9 The A/E will render interpretations necessary for the proper execution or progress of the Work, with reasonable promptness and in accordance with any time limit agreed upon. Either party to the Contract may make written request to the A/E for such interpretations.
- 2.2.10 All interpretations and decisions of the A/E shall be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. All claims, disputes or other matters or questions between the Contractor and Owner arising out of or relating to the interpretation of the Contract Documents or the performance of the Work, shall be resolved as set forth in Article 7.
- 2.2.11 Where applicable, the A/E's decision in matters relating to artistic effect will be final if consistent with the intent of the Contract Documents.
- 2.2.12 The A/E will have authority to reject work which does not conform to the Contract Documents. Whenever, in his opinion, he considers it necessary or advisable for the implementation of the intent of the Contract Documents, he will have authority to require special inspection or testing of the work in accordance with Subparagraph 7.7.2 whether or not such Work be then fabricated, installed or completed. However, neither the A/E's authority to act under this

Subparagraph nor any decision made by him in good faith either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the A/E to the Contractor, any Subcontractor, any of their agents or employees, or any other person performing any of the Work.

- 2.2.13 The A/E will review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data, Samples and Manuals, but only for conformance with the design concept of the Work and with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay. The A/E approval of a specific item shall not indicate approval of an assembly of which the item is a component.
- 2.2.14 The A/E's acceptance of materials or products on behalf of the Owner shall not bar future rejection of such items if they are subsequently found to be defective or inferior in quality or uniformity to the materials or products specified by the Contract, or if such items are not as represented by the Contractor.
- 2.2.15 When authorized by the Owner, the A/E will prepare Change Orders and will have authority to order minor changes in the Work as provided in Article 12.
- 2.2.16 As required, the A/E will conduct inspections to assist the Owner in determining the dates of Substantial Completion and Final Completion, will receive and forward to the Owner for the Owner's review written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of Article 9.
- 2.2.17 In case of the termination of the employment of the A/E, the Owner shall appoint a new A/E, who shall have the same status under the Contract Documents as the former A/E.

ARTICLE 3

OWNER

3.1 DEFINITION

- 3.1.1 The Owner is the Board of Supervisors of Fairfax County, Virginia and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term Owner means the Owner or its authorized representative.

3.1.2 The County of Fairfax will designate a single Owner's representative, with the title of Project Engineer, who will have the power to act, within the scope of his delegated authority, for and on behalf of the Owner, in accordance with the terms of the Contract.

3.1.3 The term "Owner" or "Owner's representative" specifically excludes any and all inspectors having building code or County ordinance responsibilities or jurisdiction under the requirements of the Building Permit.

3.2 INFORMATION POSSESSED BY OWNER

3.2.1 The Owner will make available for the Contractor's reasonable review, at the Owner's offices or together with the Contract Documents, certain boring logs, geotechnical, soils and other reports, surveys and analyses pertaining to the Contract site of which the Owner is aware and has in its possession. Any boring logs that are provided to the Contractor, are only intended to reflect conditions at the locations of the borings and do not necessarily reflect site conditions at other locations. Owner only warrants the accuracy of the boring logs actually provided to Contractor. Any reports surveys and analyses provided by Owner are for the Contractor's information only, and their accuracy and completeness are not guaranteed or warranted by the Owner or the A/E, and such reports are not adopted by reference into, nor are they part of the Contract Documents.

3.2.1.1 Notwithstanding any factual statement, conclusion, or any language or recommendations contained in such reports, the Contractor assumes full responsibility for inspection of the site and determination of the character, quality and quantity of any soil, surface or subsurface conditions that may be encountered or which may affect the work, and for the means and methods of construction that he employs when performing the work. Neither the Owner nor the A/E shall be liable for any additional work or costs arising as a result of any conclusions reached or assumptions derived by the Contractor from or based upon any such geotechnical, soils and other reports, surveys and analyses which the Owner makes available for the Contractor's information and review.

3.3 OWNER-PAID PERMITS AND FEES

3.3.1 The Owner will, where applicable, secure and pay for:

- .1 The Building Permit;
- .2 Sewer availability fees/front footage fee;

- .3 Water availability/meter connection fee;
 - .4 VEPCO and C&P permanent installation charges;
 - .5 Any easements required;
 - .6 Permits for work in Virginia Department of Highways and Transportation (VDH&T) right-of-way. The Contractor is required to comply with the General Requirement for work in the VDH&T right-of-way as outlined in the County of Fairfax Public Facilities Manual and VDH&T Manual for this work. Upon completion of all work in the VDH&T right-of-way, the VDH&T Personnel will conduct an inspection and issue a punch list. The Contractor will be responsible for completion of those items on the punch list and the written release of the Permit.
- 3.3.2. The Contractor's attention is directed to Article 4 describing other permits to be obtained and fees to be paid by the Contractor.
- 3.3.3 The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein including, but not limited to, Articles 6, 9 and 11.
- 3.4 OWNER'S RIGHT TO STOP WORK
- 3.4.1 If the Contractor fails to correct defective Work as required herein or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Owner to stop the Work shall not give rise to any duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.
- 3.5 OWNER'S RIGHT TO CARRY OUT THE WORK
- 3.5.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within seven days after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to any other remedy he may have, make good such deficiencies. In such case an appropriate Change Order shall be issued deducting from the payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for the A/E's additional services made necessary by such default, neglect or failure. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

3.5.2 Neither the Owner nor the A/E nor their officers, agents, assigns or employees are in any way liable or accountable to Contractor or his surety for the method by which work performed by the Owner, or at the Owner's direction, or any portion thereof, is accomplished or for price paid therefor. Notwithstanding, the Owner's right to carry out a portion of the work, maintenance and protection of the Work remains the Contractor's and Surety's responsibility as provided for in the Performance Bond and Guarantee of Contractor, pursuant, but not limited, to Articles 4 and 13.

3.6 SUSPENSION OF WORK

3.6.1 The Owner shall have the authority to suspend the Work, in whole or in part, for such periods and such reasons as the Owner or the A/E may deem necessary or desirable, in their sole discretion, including without limitation:

- .1 Unsuitable weather;
- .2 Other conditions considered unfavorable for the suitable prosecution of the Work; and/or
- .3 Other conditions considered adverse to the best interest of the Owner.

3.6.2 Any such suspension shall be in writing to the Contractor. The Contractor shall obey immediately such orders of the Owner and shall not resume the Work until so ordered in writing by the Owner. No such suspension of the Work shall be the basis of a claim by the Contractor for any increase in the Contract Sum or for any other damages, losses, costs or expenses whatsoever, if the suspension is for a reasonable time, under the circumstances then existing and the cause thereof is beyond the control and is without the fault or negligence of the Owner. The Contractor shall be entitled to an extension of the Contract Time subject to the provisions of Article 8 herein.

3.6.3 In the event of suspension of work, the Contractor will and will cause his subcontractors to protect carefully his, and their materials and work against damage or injury from the weather and maintain completed and uncompleted portions of the work as required by the Contract Documents. If, in the opinion of the A/E, any work or material shall have been damaged or injured by reason of failure on the part of the Contractor or any of his subcontractors to so protect same, such work and materials shall be removed and replaced at the expense of the Contractor.

3.7 USE AND OCCUPANCY PRIOR TO FINAL ACCEPTANCE BY OWNER

3.7.1 The Owner has the right to take possession of and use any completed or partially completed portions of the work, notwithstanding that the time for completing the entire work or any portions thereof may, or may not, have expired. The taking of possession and use by the Owner shall be in accordance with the provisions regarding Substantial Completion in Article 9. If such prior use delays the Work, the Contractor may submit a request for a time extension in accordance with the requirements of Article 8. The Contractor hereby waives any claims for additional costs, expenses or damages associated with the Owner's prior use and occupancy.

3.8 RIGHT TO AUDIT AND PRESERVATION OF RECORDS

- 3.8.1 The Contractor shall maintain books, records and accounts of all costs in accordance with generally accepted accounting principles and practices. The Owner or its authorized representative shall have the right to audit the books, records and accounts of the Contractor under any of the following conditions:
- .1 If the Contract is terminated for any reason in accordance with the provisions of these Contract Documents in order to arrive at equitable termination costs;
 - .2 In the event of a disagreement between the Contractor and the Owner on the amount due the Contractor under the terms of this Contract;
 - .3 To check or substantiate any amounts invoiced or paid which are required to reflect the costs of the Contractor, or the Contractor's efficiency or effectiveness under this Contract or in connection with extras, changes, claims, additions, backcharges, or other, as may be provided for in this Contract; and/or
 - .4 If it becomes necessary to determine the Owner's rights and the Contractor's obligations under the Contract or to ascertain facts relative to any claim against the Contractor which may result in a charge against the Owner.
- 3.8.2 These provisions for an audit shall give the Owner unlimited access during normal working hours to the Contractor's books and records under the conditions stated above.
- 3.8.3 Unless otherwise provided by applicable statute, the Contractor, from the effective date of final payment or termination hereunder, shall preserve and make available to the Owner for a period of three (3) years thereafter, at all reasonable times at the office of the

Contractor but without direct charge to the Owner, all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this Contract and relating to the Work hereunder, or to the extent approved by the A/E, photographs, micro-photographs, or other authentic reproductions thereof.

- 3.8.4 The Owner will make all payments required of it under this Contract subject to audit, under circumstances stated above, which audit may be performed at the Owner's option, either during the Contract time period or during the above record retention time period. Regardless of authorization, approval or acceptance, signatures or letters which are given by the Owner and are part of the Owner's control systems or are requested by the Contractor, the payments made under this Contract shall not constitute a waiver of the Owner's right to audit, nor shall payments constitute a waiver or agreement by the Owner that it accepts as correct the billings, invoices or other charges on which the payments are based. If the Owner's audit produces a claim against the Contractor, the Owner may pursue all its legal remedies even though it has made all or part of the payments required by this Contract.
- 3.8.5 If any audit by the Owner or the Owner's representative discloses an underpayment by the Owner, the Owner shall have the duty to pay any amounts found by the audit to be owed to the Contractor. If such audit discloses an overpayment, the Contractor shall have the obligation to reimburse the Owner for the amount of the overpayment. The Owner's right to reimbursement from the Contractor of the overpayment and the duty of the Owner and the Contractor to make reimbursements or payments as described in this Article shall not be terminated or waived until the Owner has completed its audit.
- 3.8.6 The Owner's right to audit and the preservation of records shall terminate at the end of three (3) years as stated hereinabove. The Contractor shall include this "Right to Audit and Preservation of Records" clause in all subcontracts issued by him and he shall require same to be inserted by all lower tier Subcontractors in their subcontracts, for any portion of the work. Should Contractor fail to include this clause in any such Contract or lower tier Contract, or otherwise fail to insure the Owner's rights hereunder, Contractor shall be liable to Owner for all cost, expenses and attorney's fees which Owner may have to incur in order to obtain an audit or inspection of or the restoration of records which would have otherwise been available to Owner from said persons under this clause. Such audit may be conducted by the Owner or its authorized representative.

ARTICLE 4

CONTRACTOR

4.1 DEFINITION

- 4.1.1** The Contractor is the person or entity identified in the Owner-Contractor Agreement and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term Contractor means the Contractor or his authorized representative.
- 4.1.2** This entire Contract is not one of agency by the Contractor for Owner but one in which Contractor is engaged independently in the business of providing the services and performing the Work herein described as an independent contractor.

4.2 REVIEW OF CONTRACT DOCUMENTS

- 4.2.1** The Contractor and his Subcontractors shall keep at the site of the Work at least one copy of the drawings and specifications and shall at all times give the A/E , inspectors, as well as representatives of the Owner access thereto. Further, said drawings shall be the approved sets issued to the Contractor by the appropriate County Permit agencies. The Contractor shall perform no portion of the Work at any time without the Contract Documents or, where required, approved Shop Drawings, Product Data, Samples or Manuals for such portion of the Work.

4.3 CONTRACTOR'S REPRESENTATIONS

- 4.3.1** By entering into this Contract with the Owner, the Contractor represents and warrants the following, together with all other representations and warranties in the Contract Documents:
- .1** That he is experienced in and competent to perform the type of work required and to furnish the plant, materials, supplies or equipment to be so performed or furnished by him;
 - .2** That he is financially solvent, able to pay his debts as they mature, and possessed of sufficient working capital to initiate and complete the Work required under the Contract;
 - .3** That he is familiar with all Federal, State, County, municipal and department laws, ordinances, permits, regulations and resolutions which may in any way affect the Work or those employed therein, including but not limited to any special acts relating to the Work or any part thereof;

- .4 That such temporary and permanent work required by the Contract Documents which is to be done by him will be satisfactorily constructed and fit for use for its intended purpose and that such construction will not injure any person, or damage any property;
- .5 That he has carefully examined the Contract Documents and the site of the Work and that from his own investigations, he has satisfied himself and made himself familiar with: (1) the nature and location of the Work, (2) the character, quality and quantity of surface and subsurface materials likely to be encountered, including, but not limited to, all structures and obstructions on or at the project site, both natural and man-made; (3) the character of equipment and other facilities needed for the performance of the Work, (4) the general and local conditions including without limitation its climatic conditions, the availability and cost of labor and the availability and cost of materials, tools and equipment; (5) the quality and quantity of all materials, supplies, tools, equipment, labor and professional services necessary to complete the Work in the manner required by the Contract Documents; and (6) all other matters or things which could in any manner affect the performance of the Work;
- .6 That he will fully comply with all requirements of the Contract Documents;
- .7 That he will perform the Work consistent with good workmanship, sound business practice, and in the most expeditious and economical manner consistent with the best interests of the Owner;
- .8 That he will furnish efficient business administration and experienced superintendent and an adequate supply of workmen, equipment, tools and materials at all times;
- .9 That he will complete the Work within the Contract Time and within Contract milestones;
- .10 That his Contract price is based upon the materials, systems and equipment required by the Contract Documents, without exception; and
- .11 That he has satisfied himself as to the feasibility and correctness of the Contract Documents for the construction of the Work.

D-14

4.4 SUPERVISION AND CONSTRUCTION PROCEDURES

- 4.4.1 The Contractor shall supervise and direct the Work, using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract; subject, however, to the Owner's right to reject means and methods proposed by the Contractor which are unsafe or otherwise not in compliance with the Contract Documents.**
- 4.4.2 The Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors and Sub-subcontractor's, suppliers, their agents and employees, and of other persons performing any of the Work and for their compliance with each and every requirement of the Contract Documents, in the same manner as if they were directly employed by the Contractor.**
- 4.4.3 The Contractor understands and agrees that he shall not be relieved of his obligations to perform the Work in accordance with the Contract Documents either by the activities or duties of the Owner or the A/E in their administration of the Contract or by inspections, tests, or approvals required or performed under Article 7 by persons other than the Contractor.**
- 4.4.4 Before starting a section of work, the Contractor shall carefully examine all preparatory work that has been executed to receive his Work to see that it has been completed. He shall check carefully, by whatever means are required, to ensure that his Work and adjacent, related work will finish to proper quality, contours, planes, and levels.**
- 4.4.5 The Contractor understands and agrees that the Owner and A/E will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and they will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The Owner and the A/E will not be responsible for or have control or charge over the acts or omissions of the Contractor, Subcontractors, or any of their agents or employees, or any other persons performing any of the Work.**
- 4.4.6 The Contractor shall employ no plant, equipment, materials, methods or persons to which the A/E objects and shall remove no portion of the Work or stored materials from the site of the Work.**

4.5 LABOR, MATERIALS AND EQUIPMENT

D-15

- 4.5.1 The Contractor will furnish all plant, labor, materials, supplies, equipment and other facilities and things necessary or proper for or incidental to the Work contemplated by this Contract, as required by and in strict accordance with the applicable Contract Documents and required by and in strict accordance with such changes as are ordered and approved pursuant to the Contract and will perform all other obligations imposed on him by this Contract. Final payment will not be made until the Work is so completed.
- 4.5.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.
- 4.5.3 Work and materials which are necessary in the construction but which are not specifically referred to in the specifications or shown in the drawings but implied by the Contract shall be furnished by the Contractor at his own cost and expense. Such work and materials shall correspond with the general character of the Work as may be determined by the A/E whose decision as to the necessity for and character of such work and materials shall be final and conclusive.
- 4.5.4 The Contractor shall perform at least that percentage of the Work specified in Article 7 of the Owner-Contractor Agreement, with forces that are in the direct employment of the Contractor's organization. The Contractor shall submit to the A/E within thirty (30) calendar days after award of the Contract for the Work, a designation of the Work to be performed by the Contractor with his own forces. The percentage of the Work to be performed under subcontract, shall be calculated by adding the amounts of all subcontracts and dividing this sum by the total amount of the Contract. No portion of the Contract shall be subcontracted or otherwise performed by a party not the Contractor, except with the written consent of the Owner.
- 4.5.5 The Contractor shall at all times enforce strict discipline, safety and good order among his employees and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him.
- 4.5.5.1 If any person employed on the Work by the Contractor shall appear to the A/E or Owner to be incompetent or to act in a disorderly or improper manner, such person shall be removed immediately at the request of the A/E or Owner, and shall not be reemployed except on written consent of the Owner.

- 4.5.6 No materials or supplies for the Work shall be purchased by the Contractor or by any subcontractor subject to any chattel mortgage, or under a conditional sale or other agreement by which an interest is retained by the seller. The Contractor warrants that he has good title to all materials and supplies used by him in the Work.
- 4.5.7 The Contractor shall provide approved sanitary accommodations. All wastes shall be covered, disinfected, incinerated or otherwise disposed of legally.
- 4.5.8 All equipment, apparatus and/or devices of any kind to be incorporated into the Work that are shown or indicated on the drawings or called for in the specifications or required for the completion of the Work shall be entirely satisfactory to the A/E as regards operations, capacity and/or performance. No approval, either written or verbal, of any drawings, descriptive data or samples of such equipment, apparatus, and/or device shall relieve the Contractor of his responsibility to turn over the same in good working order for its intended purpose at the completion of the Work in complete accordance with the Contract Documents. Any equipment, apparatus and/or device not fulfilling these requirements shall be removed and replaced by proper and acceptable equipment, etc. or put in good working order satisfactory to the A/E without additional cost to the Owner.
- 4.6 WARRANTY
- 4.6.1 The Contractor warrants to the Owner and the A/E that all materials and equipment furnished under this Contract will be new unless otherwise specified, and that all workmanship will be of first class quality, free from faults and defects and in conformance with the Contract Documents and all other warranties and guaranties specified therein. Where no standard is specified for such workmanship or materials, they shall be the best of their respective kinds. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective.
- If required by the A/E, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by the provisions of Article 13.
- 4.6.2 The Work included in this Contract is heretofore specified. The Contractor will be required to complete the Work specified and to provide all items needed for construction of the project, complete and in good order.
- 4.7 CONTRACTOR-PAID TAXES, PERMITS, FEES AND NOTICES

4.7.1 The Contractor shall pay all sales, consumer, use and other similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted at the time bids are received, whether or not yet effective. Taxes to be paid by the Construction Contractor shall include, but shall not be limited to, the Fairfax County Business, Professional and Occupational License Tax (a gross receipts tax).

4.7.2 Except as provided in Article 3, the Contractor will be responsible for obtaining and paying for all other fees, permits and licenses necessary for the proper execution of the work, including but not limited to:

- .1 Plumbing, Electrical, Mechanical Permits and inspections;
- .2 Temporary water meter, temporary electrical and C&P installations and temporary utility usage;
- .3 Temporary security lighting;
- .4 All other permits necessary in order to perform the Work shall be secured by the Contractor and fees necessary in order to perform the Work shall be paid by him as part of this Contract at no additional cost to the Owner.

4.7.3 The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, permits, resolutions and lawful orders of any public authority bearing on the performance of the Work; including but not limited to OSHA, Title 40.1 Chapter 3 of the Code of Virginia, and Title VII of the Civil Rights Act of 1964, as amended. All safety violations shall be corrected immediately upon receipt of notice of violation.

4.8 COMPLIANCE

4.8.1 All demolition and excavation shall comply with the rules and regulations for the prevention of accidents as issued by the Department of Labor and Industry of the Commonwealth of Virginia, and the County of Fairfax.

4.8.2 The Contractor shall comply and the construction shall conform with all applicable and current editions or revisions of the following codes, specifications and standards. In case of conflict, the order of precedence shall be as hereinafter listed:

- .1 Contract Documents;

- .2 Fairfax County Purchasing Resolution, dated Oct. 18, 1982, as amended;
- .3 Fairfax County Amendments to building codes;
- .4 The Virginia Uniform Statewide Building Code, as amended (BOCA and NEC);
- .5 The Department of Environmental Management, Fairfax County, Public Facilities Manual, Volumes I-III; and
- .6 The Virginia Department of Highways & Transportation Road and Bridge Specifications and the Road Designs and Standards.

4.8.3 If the Contractor (or any person in contract with Contractor relating to the subject project) knew, or should have known, that an error, inconsistency, omission, ambiguity, discrepancy, conflict or variance exists in the Contract Documents, or between the Contract Documents and any of the codes, specifications and standards set forth in 4.8.2 herein, the Contractor has the obligation to seek a clarification thereof from the Owner prior to the time the Work is performed which is affected by such error, inconsistency, omission, ambiguity, discrepancy, conflict or variance. The Contractor shall not be liable for damages relating thereto, if he has met this obligation. The Owner will welcome such a clarification request and, if deemed necessary by the Owner, the Owner will issue a written instruction clarifying the matter in question. Should Contractor fail to seek such a clarification thereof immediately upon the discovery of the need therefor, prior to the time the said Work is performed, the Contractor thereby waives, and agrees to indemnify and hold the Owner harmless from, any claim, suit or cause of action arising out of or related to such error, inconsistency, ambiguity, discrepancy, conflict or variance which Contractor (and any person in contract with Contractor relating to the subject project) knew or should have known existed prior to the time the Work was performed.

4.8.4 Any material or operation specified by reference to publications, published specifications of a Manufacturer, a Society, an Association, a Code, or other published Standard, shall comply with the requirements of the referenced document which is current on the date of receipt of bids. If the Contractor observes that any of the Contract Documents are at variance therewith in any respect, he shall promptly notify the A/E in writing. In case of a conflict between referenced document and Contract Documents, the Contract Documents shall govern.

- 4.8.5 If the Contractor performs any Work knowing it to be contrary to such laws, ordinances, permits, rules, regulations and resolutions and without such notice to the A/E, he shall assume full responsibility therefor and shall bear all costs attributable thereto.
- 4.8.6 The Contractor will be held responsible for locating all underground structures such as water, oil and gas mains, water and gas services, storm and sanitary sewers and telephone and electric conduits which may be encountered during the construction operation. He shall dig test holes to determine the position of the underground structures. The Contractor shall pay the cost of digging test holes and likewise he shall pay the cost of the services of the representatives of the owners of such utilities for locating the said utilities. The cost of determining the location of any and all utilities is to be included in the bid price.
- 4.9 ALLOWANCES
- 4.9.1 The Special Conditions will contain provisions for allowances, if such is applicable to this Contract.
- 4.10 SUPERINTENDENT
- 4.10.1 The Contractor shall employ a competent Superintendent and necessary assistants who shall be in attendance at the Project site during the progress of the Work. The Superintendent shall have full authority to represent the Contractor and all communications given to the Superintendent shall be as binding as if given to the Contractor.
- 4.10.2 It is understood that such Superintendent shall be acceptable to the A/E and Owner and shall be one who will be continued in that capacity for duration of this project, unless he ceases to be on the Contractor's payroll. The Superintendent shall not be employed on any other project during the performance of this Contract.
- 4.11 CONSTRUCTION SCHEDULE
- 4.11.1 The Contractor shall within thirty days after issuance of the Notice to Proceed, prepare and submit to the A/E and Owner for review, a practicable and feasible Construction Schedule showing the method by which the Contractor will comply with Contract Milestone and Completion date requirements as set forth in the Owner-Contractor Agreement. The schedule shall show in detail how the Contractor plans to execute and coordinate the Work. The Contractor shall use this schedule in the planning, scheduling, direction, coordination and execution of the Work. The Construction Schedule shall

encompass all of the work of all trades necessary for construction of the project and shall be sufficiently complete and comprehensive to enable progress to be monitored on a day-to-day basis. The Owner and A/E shall be provided with three (3) copies of all schedules, updates and reports or sorts required herein which shall be suitable for reproduction by the Owner.

- 4.11.2 It is the sole responsibility of the Contractor to prepare, maintain, update, revise and utilize the Construction Schedule as outlined in this Paragraph. The schedule shall be the sole overall Construction Schedule utilized by the Contractor in managing this project, provided, however, that Contractor may at its option employ and utilize other schedules based upon and consistent with the Construction Schedule. In general, it is the intent of this Paragraph to allow the Contractor to choose its own means, methods and construction procedures consistent with good practice and the Contract Documents.
- 4.11.3 If the Contractor should submit a schedule or express an intention to complete the Work earlier than any required Milestone or Completion date, the Owner shall not be liable to the Contractor for any costs or delay should the Contractor be unable to complete the Work before such Milestone or Completion date. The duties, obligations and warranties of the Owner to the Contractor shall be consistent with and applicable only to the completion of the Work on the Milestone and completion dates required in the Owner-Contractor Agreement.
- 4.11.4 Approval by the Owner and A/E of the Construction Schedule is advisory only and shall not relieve the Contractor of the responsibility for accomplishing the Work within each and every required Milestone and Completion date. Omissions and errors in the approved Construction Schedule shall not excuse performance which is not in compliance with the Contract. Approval by the A/E and Owner in no way makes the A/E and Owner an insurer of the Construction Schedule's success or liable for time or cost overruns flowing from its shortcomings. The Owner hereby disclaims any obligation or liability by reason of Owner and A/E approval of the Construction Schedule.
- 4.11.5 Contractor shall consult with and obtain information from principal Subcontractors necessary in preparation of the schedules, updates and revisions required herein. Contractor shall provide each principal Subcontractor with copies of the Construction Schedule and any revisions or updates affecting a Subcontractor's work. Contractor shall hold appropriate progress meetings with Subcontractors and shall direct and coordinate the work of

Subcontractors consistent with and as required herein. Owner and the A/E shall have the right to attend Subcontractor progress meetings but shall not be required to participate in such meetings or provide information to Subcontractors, except through the Contractor. Contractor shall keep up-to-date minutes of Subcontractor progress meetings and shall provide same to Owner and A/E. The Contractor shall ensure that each Subcontractor, Sub-subcontractor or supplier acknowledges and accepts the requirements of the Construction Schedule relating to their part of the Work.

- 4.11.6 If Contractor's Construction Schedule indicates that Owner or a separate Contractor is to perform an activity by a specific date, or within a certain duration, Owner or any separate Contractor shall not be bound to said date or duration unless Owner expressly and specifically agrees in writing to same; the Owner's or A/E's overall review and approval or acceptance of the schedule does not constitute an agreement to specific dates or durations for activities of the Owner or any separate contractor.
- 4.11.7 The Contractor's Superintendent shall maintain at the job site, an approved Construction Schedule, indicating actual monthly progress for those portions of the project on which work has been or is being performed.
- 4.11.8 If an extension or contraction of any Milestone or Completion Date is authorized by any Change Order issued by the A/E and Owner, the Contractor shall revise his Construction Schedule, Milestone and Completion Dates accordingly.
- 4.11.9 If, in the opinion of the Owner, the Construction Schedule does not accurately reflect the actual progress and sequence of the Contractor's performance of the Work, the Contractor shall revise the Construction Schedule, upon the Owner's request, and submit a revised Construction Schedule that accurately represents the progress and sequence of the Contractor's performance of the Work.
- 4.11.10 Owner shall have the right to approve any scheduling consultant that may be selected or retained by Contractor.
- 4.11.11 Contractor covenants and guarantees that Contractor will not:
 - .1 Misrepresent to Owner its planning and scheduling of the Work;
 - .2 Utilize schedules materially different from those made available to the Owner or any Subcontractors for the direction, execution and coordination of the Work, or which are not feasible or realistic;

.3 Prepare schedules, updates, revisions or reports which do not accurately reflect Contractor's actual intent or Contractor's reasonable and actual expectations as to:

- (a) The sequences of activities.
- (b) The duration of activities.
- (c) The responsibility for activities.
- (d) Resource availability.
- (e) Labor availability or efficiency.
- (f) Expected weather conditions.
- (g) The value associated with the activity.
- (h) The percentage complete of any activity.
- (i) Completion of any item of work or activity.
- (j) Project completion.
- (k) Delays, slippages, or problems encountered or expected.
- (l) Subcontractor requests for time extension, or delay claims of subcontractors, and
- (m) If applicable, the float time available.

4.11.12 Contractor's failure to substantially comply with the foregoing covenant and guarantee of Paragraph 4.11.11 shall be a substantial and material breach of contract which will permit Owner to terminate Contractor for default, or withhold payments under the Contract Documents, and shall entitle Owner to the damages afforded for misrepresentation or fraud by these Contract Documents or applicable law.

4.11.13 Should Contractor fail to substantially comply with the provisions of the Contract Documents relating to scheduling and execution of the Work by the overall project schedule, Owner shall have the right, at its option, to retain the services of scheduling consultants or experts (including attorneys if necessary in the opinion of the Owner) to prepare schedules, reports, updates and revisions of the schedule in accordance with the Contract Documents and to review and analyze same, in order to allow Owner and A/E to

evaluate the program of the Work by Contractor, to determine whether Contractor is substantially complying with the Contract Documents, and to direct such action of the part of the Contractor, as permitted by the Contract Documents, as required to ensure, under the Owner's schedule prepared hereunder, that Contractor will complete the Work within the Contract Time. All costs and expenses and fees incurred by Owner in preparing the schedule hereunder shall be charged to Contractor's account. If Contractor fails to substantially comply with the scheduling and execution of the work requirements of the Contract Documents, Contractor hereby agrees, in such instance, to comply with such Owner-prepared schedules, if any, or directions, and activity sequences and durations as Owner may reasonably require, without additional cost to the Owner (subject only to cost adjustments for such changes in the Work as Owner may direct), to ensure completion within the Contract Time.

4.11.14 The Construction Schedule shall be utilized by Owner, A/E and Contractor for submission, review and approval of monthly payment applications. The schedule must be updated by Contractor monthly with each progress payment application and submitted to the Owner and A/E for review with the progress payment application. Owner and A/E shall not be required to process and review Contractor's Application for Payment if Contractor has failed or refused to provide the scheduling update information required herein.

4.11.15 The type of schedule to be utilized on this project, along with its particular elements, shall be as specified in the Special Conditions, Section E.

4.12 RESPONSIBILITY FOR COMPLETION

4.12.1 The Contractor shall furnish such manpower, materials, facilities and equipment and shall work such hours, including night shifts, overtime operations and Sundays and holidays, as may be necessary to ensure the performance of the Work within the Milestone and Completion dates specified in the Owner-Contractor Agreement. If it becomes apparent to the A/E or Owner that the Work will not be Completed within required Milestone or Completion dates, the Contractor agrees that it will assume full responsibility to take some or all of the following actions, at no additional cost to the Owner, in order to ensure, in the opinion of the A/E or Owner, that the Contractor will comply with all Milestone and Completion date requirements:

.1 Increase manpower, materials, crafts, equipment and facilities;

- .2 Increase the number of working hours per shift, shifts per working day, working days per week, or any combination of the foregoing; and
 - .3 Reschedule activities to achieve maximum practical concurrency of accomplishment of activities.
- 4.12.2 If the actions taken by the Contractor are not satisfactory, the A/E or Owner may direct the Contractor to take any and all actions necessary to ensure completion within the required Milestone and Completion dates, without additional cost to the Owner. In such event, the Contractor shall continue to assume responsibility for his performance and for completion within the required dates.
- 4.12.3 If, in the opinion of the A/E or Owner, the actions taken by the Contractor pursuant to this Article or the progress or sequence of Work are not accurately reflected on the Construction Schedule, the Contractor shall revise such schedule to accurately reflect the actual progress and sequence of Work.
- 4.12.4 Failure of the Contractor to substantially comply with the requirements of this Article may be considered grounds for a determination by the Owner, pursuant to Article 14, that the Contractor is failing to prosecute the Work with such diligence as will ensure its completion within the time specified.
- 4.12.5 The Owner may, at its sole discretion and for any reason, other than when it becomes apparent to the A/E or Owner that the Work will not be completed within the required Milestone or Completion dates, require the Contractor to accelerate the Schedule of Performance by providing overtime, Saturday, Sunday and/or holiday work and/or by having all or any Subcontractors designated by the Owner provide overtime, Saturday, Sunday, and/or holiday work. In the event that the Owner requires overtime, Saturday, Sunday or holiday work by the Contractor's or his Subcontractor's own forces, and such requirement is not related in any way to the Contractor's apparent inability to comply with Milestone and Completion date requirements, the Owner shall reimburse the Contractor for the direct cost to the Contractor of the premium time for all labor utilized by the Contractor in such overtime, Saturday, Sunday or holiday work (but not for the straight time costs of such labor), together with any Social Security and State or Federal unemployment insurance taxes in connection with such premium time. However, no overhead supervision costs, commissions, profit or other costs and expenses shall be payable in connection therewith.

- 4.12.6 This provision does not eliminate the Contractor's responsibility to comply with the County noise ordinances, all VDH&T permit requirements and all other applicable laws, regulations, rules, ordinances, resolutions, and permit requirements.

4.13 DOCUMENTS AND SAMPLES AT THE SITE

- 4.13.1 The Contractor shall maintain at the site for the Owner one record copy of all Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record all changes made during construction, and approved Shop Drawings, Product Data, Samples and Manuals. These shall be available to the A/E and shall be delivered to him for the Owner upon completion of the Work.
- 4.13.2 The Owner may, at its option, furnish one set of mylar sepias at the beginning of the Contract. These are to be returned to the A/E prior to final payment, with the as-built information drawn on. During the course of the construction, they are available to the Contractor for general reproduction purposes.

4.14 SHOP DRAWINGS, PRODUCT DATA, SAMPLES AND MANUALS

- 4.14.1 SHOP DRAWINGS are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or any Subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.
- 4.14.2 PRODUCT DATA are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate a material, product or system for some portion of the Work.
- 4.14.3 SAMPLES are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.
- 4.14.4 MANUALS are manufacturer's installation, start-up, operating, maintenance and repair instructions, together with parts lists, pictures, sketches and diagrams which set forth the manufacturer's requirements, for the benefit of the Contractor and the Owner.
- 4.14.5 The Contractor shall review, approve and submit, with reasonable promptness and in such sequence as to cause no delay in the Work or in the Work of the Owner or any separate contractor, all Shop Drawings, Product Data, Samples and Manuals required by the Contract Documents.

- 4.14.5.1 Unless otherwise directed in writing, the Contractor shall submit not less than eight (8) copies of each Shop Drawing, Product Data, or Manuals to the A/E. Routing of said submittals will be from the Contractor to the A/E to the Owner. The Owner will return four (4) copies of each submittal directly to the Contractor.
- 4.14.5.2 Where the Contract calls for the submittal of manufacturer's data to the A/E for information only, such submittals shall be made before the commencement of any portion of the Work requiring such submission.
- 4.14.6 By approving and submitting Shop Drawings, Product Data, Samples and Manuals, the Contractor represents that he has determined and verified all materials, field measurements, and field construction criteria related thereto, or will do so, and that he has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.
- 4.14.6.1 Parts and details not fully indicated on the contract drawings shall be detailed by the Contractor in accordance with standard engineering practice. Dimensions on the contract drawings, as well as detailed drawings themselves are subject in every case to measurements of existing, adjacent, incorporated and completed work, which shall be taken by the Contractor before undertaking any work dependent on such data.
- 4.14.7 The Contractor shall not be relieved of responsibility for any deviation from the requirements of the Contract Documents by the A/E's approval of Shop Drawings, Product Data, Samples or Manuals under Article 2 unless the Contractor has specifically informed the A/E in writing of such deviation at the time of submission and the A/E has given written approval to the specific deviation. The Contractor shall not be relieved from responsibility for errors or omissions in the Shop Drawings, Product Data, Samples or Manuals by the A/E's approval thereof.
- 4.14.8 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or Manuals, to revisions other than those requested by the A/E on previous submittals.
- 4.14.8.1 No portion of the Work requiring submission of Shop Drawings, Product Data, Samples or Manuals shall be commenced until the submittal has been approved by the A/E as provided in Article 2. All such portions of the Work shall be in accordance with approved submittals.

- 4.14.9 For substances that are proposed for use in the project that may be hazardous to human health, the Contractor shall submit to the A/E, for information only, information on precautions for safety using these substances, including certification of registration by the Contractor with authorities under the respective Virginia and Federal Toxic Substances Control Acts.
- 4.14.10 Unless otherwise modified by the Owner in writing, the Contractor shall label or stamp and number all Shop Drawings, Product Data, Samples or Manuals as hereinafter prescribed.
- 4.14.10.1 In order to indicate that the submittals have been Reviewed and Approved by the Contractor as to conformance to the Contract Documents, the Contractor shall have made and shall use labels and/or a rubber stamp which shall materially conform to the following sample:

Submittal No. _____

For Contract No. _____ Project No. _____

Contractor: _____

REVIEWED and APPROVED for Conformance with the
Contract Documents

By: _____ Date _____
(Signature)

References:

Drawing Sheet No's.: _____

Specification Section No's.: _____

- 4.14.10.2 The Contractor shall utilize a ten character submittal identification numbering system in the following manner:
- .1 The first character shall be a D or S or M, which represents Shop/Working Drawing and other Product Data (D); Sample (S) or Operating/Maintenance Manual (M).
 - .2 The next five digits shall be the applicable Specification Section Number.
 - .3 The next three digits shall be the numbers 001-999 to sequentially number each separate item or drawing submitted under each specific Section number.

- .4 The last character shall be a letter, A-Z, indicating the submission or resubmission of the same drawing, i.e., A=1st submission, B=2nd submission, C=3rd submission, etc. A typical submittal number would be as follows:

D-03300-008-B

D Shop Drawing

03300 - Specification Section for Concrete

008 - The eighth different submittal under this specification.

B - The second submission (1st resubmission) of that particular drawing.

- 4.14.11 The Contractor shall submit a copy of each submittal transmittal sheet (for shop drawings, product data, samples or manuals) to the Owner simultaneously with the Contractor's submission of said drawings, data, samples or manual packages to the A/E.

4.15 EQUAL PRODUCTS AND SUBSTITUTIONS:

- 4.15.1 All materials, supplies and articles furnished shall, whenever specified and otherwise wherever practicable, be the standard products of recognized, reputable manufacturers. Unless otherwise specifically provided in the Contract Documents, the naming of a certain brand, make, manufacturer or article, device, product, material, fixture or type of construction shall convey the general style, type, character and standard of quality of the article desired and shall not be construed as limiting competition. The Contractor, in such cases, may with Owner approval, use any brand, make, manufacturer, article, device, product, material, fixture, form or type of construction which in the judgment of the Owner and A/E is equal to that specified. An item shall be considered equal to the item so named or described if (1) it is at least equal in quality, durability, appearance, strength, and design; (2) it will perform at least equally the specific function imposed by the general design for the work being contracted for or the material being purchased; and (3) it conforms substantially, even with deviations, to the detailed requirements for the item in the specifications. Approval by the Owner and A/E will be granted based upon considerations of quality, workmanship, economy of operation, suitability for the purpose intended, and acceptability for use on the project.
- 4.15.2 If the Contractor elects to use an equal product or substitution previously approved by an Addendum during bidding, and the Contractor (as a Bidder) did not provide the "Contractor Request For

D-29

Equal Product or Substitutions and Contractor's Representations" form prior to the opening of bids, he shall comply with the requirements of paragraph 4.15.4. However, it is not necessary to submit the data required in 4.15.3.

- 4.15.3 To obtain such approval on makes or brands of material other than those specified in Contract Documents, and not previously approved during the bidding, the Contractor's request for approval of any substitution shall include:
- .1 Complete data substantiating compliance of the proposed substitution with the Contract Documents;
 - .2 Product identification including manufacturer's name, address, and phone number;
 - .3 Manufacturer's literature showing complete product description, performance and test data, and all reference standards;
 - .4 Samples and colors in the case of articles or products;
 - .5 Name and address of similar projects on which the product was used and date of installation;
 - .6 For construction methods, include a detailed description for the proposed method and drawings illustrating same;
 - .7 Itemized comparison of proposed substitution with product or method specified and any cost reduction which shall benefit the Owner;
 - .8 Accurate cost data on proposed substitution in comparison with product or method specified; and
 - .9 All directions, specifications, and recommendations by manufacturers for installation, handling, storing, adjustment, and operation.
- 4.15.4 The Contractor shall also submit with his request for approval a sworn and notarized statement which shall include all of the following representations by the Contractor, namely that:
- .1 He has investigated the proposed product or method and determined that it is equal or better in all respects to that specified and that it fully complies with all requirements of the Contract Documents;

- .2 He will meet all contract obligations with regard to this substitution;
- .3 He will coordinate installation of accepted substitutions into the work, making all such changes and any required schedule adjustments, at no additional cost to the Owner, as may be required for the Work to be complete in all respects;
- .4 He waives all claims for additional costs and additional time related to substitutions which consequently become apparent. He also agrees to hold the Owner harmless from claims for extra costs and time incurred by other Subcontractors and suppliers, or additional services which may have to be performed by the A/E, for changes or extra work that may, at some later date, be determined to be necessary in order for the Work to function in the manner intended in the Contract Documents;
- .5 He will provide the same warranty and guarantee, and perform any work required in accordance therewith, for the substitution that is applicable to the specified item for which the substitution is requested;
- .6 Material will be installed, handled, stored, adjusted, tested, and operated in accordance with the manufacturers' recommendation and as specified in the Contract Documents;
- .7 In all cases new materials will be used unless this provision is waived by notice from the Owner or his A/E, or unless otherwise specified in the Contract Documents;
- .8 All material and workmanship will be in every respect, in accordance with that which in the opinion of the Owner or A/E, is in conformity with approved modern practice; (Revised 06/15/83)
- .9 He has provided accurate cost data on the proposed substitution in comparison with the product or method specified.

4.15.5 Subject to the provisions of any applicable laws, approval for substitutions or equal products shall be at the sole discretion of the Owner, shall be in writing to be effective, and the decision of the Owner shall be final. The Owner or A/E may require tests of all materials proposed for substitution so submitted to establish quality standards, at the Contractor's expense. After approval of a substitution, if it is determined that the Contractor submitted defective information or data regarding the substitution upon which

Owner's approval was based, and that unexpected or unanticipated extensive redesign or rework of the project will be required in order to accommodate the substitution, or that the substituted item will not perform or function as well as the specified item for which substitution was requested, the Contractor will be required to furnish the original specified item or request approval to use another substitution; the Contractor shall pay all costs, expenses or damages associated with or related to the unacceptability of such a substitution and the resultant utilization of another item and no time extension shall be granted for any delays associated with or related to such substitution.

4.15.6 If a substitution is approved, no change in brand or make will be permitted unless satisfactory, written evidence is presented to and approved by the Owner that the manufacturer cannot make scheduled delivery of the approved substituted item. Substitutions will not be considered for approval by the Owner if:

- .1 The proposed substitution is indicated or implied on the Contractor's shop drawing or product data submittals and has not been formally submitted for approval by the Contractor in accordance with the above-stated requirements, or
- .2 Acceptance of the proposed substitution will require substantial design revisions to the Contract Documents or is otherwise not acceptable to the Owner or A/E.

4.15.7 Except as otherwise provided for by the provisions of any applicable laws, the Contractor shall not have any right of appeal from the decision of the Owner condemning any materials submitted if the Contractor fails to obtain the approval for substitution under this Article.

4.16 USE OF SITE

4.16.1 The Contractor shall confine his operations at the site to areas permitted by law, ordinances, permits, easements, right-of-way agreements and the Contract Documents. The Contractor shall not unreasonably encumber the site, in the opinion of the Owner, with any materials, equipment or trailers nor shall he block the entrances or otherwise prevent reasonable access to the site, other working and parking areas, completed portions of the Work and/or properties, storage areas, areas of other facilities that are adjacent to the worksite. If the Contractor fails or refuses to move said material, equipment or trailers within 24 hours of notification by the Owner to so do, the Owner shall have the right,

without further notice, to remove, at the Contractor's expense, any material, equipment and/or trailers which the Owner deems are in violation of this paragraph.

4.17 CUTTING AND PATCHING OF WORK

4.17.1 The Contractor shall be responsible for all cutting, fitting or patching that may be required to complete the Work and to make its several parts fit properly and in accordance with the Contract Documents.

4.17.2 The Contractor shall not damage or endanger any portion of the Work or the work of the Owner or any separate contractors by cutting, patching or otherwise altering any work, or by excavation. The Contractor shall not cut or otherwise alter the work of the Owner or any separate contractor except with the written consent of the Owner and of such separate contractor. The Contractor shall not unreasonably withhold from the Owner or any separate contractor his consent to cutting or otherwise altering the Work. The Owner shall not be required to accept Work with a cut, splice, or patch when such cut, splice or patch is not generally accepted practice for the particular work involved or is otherwise unworkmanlike in the opinion of the Owner or A/E.

4.18 RIGHT TO PUBLISH

4.18.1 The Contractor agrees that he will not publish, cause to be published, or otherwise disseminate any information of whatever nature relating to the Work being performed under this Contract, except as may be approved by the Owner in writing.

4.19 SITE CLEAN UP

4.19.1 The Contractor at all times shall keep the Project site free from accumulation of waste materials or rubbish caused by his operations. Before final payment is made, the Contractor shall remove all of his waste materials, rubbish, scrap materials, debris, tools, construction equipment, machinery, surplus materials, falsework, temporary structures, including foundations thereof and plant of any description, from the Project site and put the site in a neat, orderly condition.

4.19.2 If the Contractor fails to clean up, as required herein, at any time during the performance of the Work or at the completion of the Work, the Owner may do so as provided herein and the cost thereof shall be charged to the Contractor.

4.20 PATENTS, ROYALTIES, ETC.

- 4.20.1** The Contractor guarantees to save harmless the Owner, its officers, agents, servants and employees from liability of any kind or nature, including cost, expense and attorney's fees on account of suits and claims of any kind for violation or infringement of any letters patent or patent rights by the Contractor, or by anyone directly or indirectly employed by him, or by reason of the use of any art, process, method, machine, manufacture, or composition of matter patented or unpatented in the performance of this Contract in violation or infringement of any letter or rights. The Contractor agrees to pay all royalties, fees, licenses, etc. required in respect of the work or any part thereof as part of his obligations hereunder without any additional compensation.

4.21 INDEMNIFICATION

- 4.21.1** It is hereby mutually covenanted and agreed that the relation of the Contractor to the work to be performed by him under this Contract shall be that of an independent contractor and that as such he will be responsible for all damages, loss or injury, including death, to persons or property that may arise or be incurred in or during the conduct and progress of said work as the result of any action, omission or operation under the Contract or in connection with the Work, whether such action, omission or operation is attributable to the Contractor, and Subcontractor, any material supplier, anyone directly or indirectly employed by any of them, or any other person. The Contractor shall make good any damages that may occur in consequence of the Work or any part of it. The Contractor shall assume all liability, loss and responsibility of whatsoever nature by reason of his neglect or violation of any Federal, State, County or local laws, regulations or ordinances.
- 4.21.2** The Contractor shall indemnify, hold harmless and defend the Owner and A/E, their employees, agents, servants and representatives from and against any and all claims, suits, demands, actions, costs (including attorney's fees) and damages of whatever nature, regardless of the merit thereof, which may be asserted against the Owner and/or A/E on account of any such damages or injuries, including death, arising out of or resulting from the performance of the Work or the failure to perform the Work, including jurisdictional labor disputes or other labor troubles that may occur during the performance of the Work, whether or not such damages or injuries, including death, are caused in part by the negligence of the Owner and/or A/E, their employees, agents, servants or

representatives; provided, however, that the Contractor shall not be obligated to indemnify the Owner and/or A/E hereunder for any damages or injuries, including death, caused by or resulting from the sole negligence of the Owner and/or A/E.

- 4.21.3 The indemnification obligations under this Article shall not be affected in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under worker's or workman's compensation acts, disability benefit acts or other employee benefit acts.
- 4.21.4 The obligations of the Contractor under this Article 4.21 shall not extend to the liability of the A/E, his agents or employees, arising out of: (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the A/E, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

4.22 NON-DISCRIMINATION IN EMPLOYMENT

- 4.22.1 During the performance of this contract, the Contractor agrees as follows:

- .1 The Contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the Contractor and the Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause;
- .2 The Contractor, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, will state that such Contractor is an equal opportunity employer;
- .3 Notices, advertisements and solicitations placed in accordance with Federal Law, rule or regulation, shall be deemed sufficient for the purpose of meeting the requirements of this provision; and
- .4 The Contractor will include the provisions of paragraphs .1, .2 and .3 above in every subcontract or purchase order of over \$5,000 so that the provisions will be binding upon every Subcontractor or vendor.

4.23 CONTRACT SECURITY

- 4.23.1 The Successful Bidder shall deliver to the Owner five (5) copies of a Performance Bond and a separate Labor and Material Payment Bond in a form acceptable to the Owner and each in an amount at least equal to one hundred percent (100%) of the contract sum as security for the faithful performance of the contract, and the payment of all persons performing labor and furnishing materials in connection with this contract. The amount of the Performance and Payment bonds shall be increased to the same extent the Contract Sum is increased due to modifications. The form of bonds shall be acceptable to the Owner and the surety shall be such surety company or companies as are acceptable to the Owner and as are authorized to transact business in the Commonwealth of Virginia. The cost of such bonds shall be included in the Contractor's proposal amount.
- 4.23.2 If the amount of all Work subcontracted to any one Subcontractor is in excess of \$10,000, the Contractor may at his option require such Subcontractor to furnish a Labor and Material Payment Bond with surety thereon, in the amount of fifty percent (50%) of the amount of the Subcontract. If such bonds are provided, the Contractor shall ensure that the surety corporation providing the bond for the Subcontractor, is licensed to do business in Virginia.
- 4.23.3 The Contractor shall ensure that all sureties providing bonds for the Project will give written notice to the Owner, at least thirty (30) days prior to the expiration or termination of the bond(s).
- 4.23.4 If, at any time, the Owner shall be or become dissatisfied with any surety or sureties then upon the Performance and Labor and Material Payment Bonds, or if for any other reason, such bond shall cease to be adequate security to the Owner, the Contractor shall within five (5) days after notice from the Owner to do so, substitute an acceptable bond(s) in such form and sum and signed by such other sureties as may be satisfactory to the Owner. The premiums on such bond(s) shall be paid by the Contractor. No further payment shall be deemed due nor shall be made until the new sureties shall have been qualified and accepted by the Owner.

ARTICLE 5

SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform or supply any of the Work at the site. The term Subcontractor is referred to throughout the Contract Documents as if singular in number and masculine in gender and means a Subcontractor or his authorized representative. The term Subcontractor does not include any separate contractor or his subcontractors.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform or supply any of the Work at the site. The term Sub-subcontractor is referred to throughout the Contractor Documents as if singular in number and masculine in gender and means a Sub-subcontractor or an authorized representative thereof.

5.1.3 The A/E will not deal directly with any Subcontractor or Sub-subcontractor or materials supplier. Communication by the A/E will be made only through the Contractor. Subcontractor, Sub-subcontractors or material suppliers shall route requests for information or clarification through the Contractor to the A/E.

5.2 AWARD OF SUBCONTRACT AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Subcontractors shall be subject to the approval of the Owner. The Contractor shall submit to the A/E prior to the award of any subcontract for work under this contract and fourteen (14) calendar days after the award of this contract, the proprietary names and the suppliers of principal items or systems of materials and equipment proposed for the Work, the names and addresses, business and emergency phones of the Subcontractors which he proposes to employ under this contract, as well as such other information as may be requested by the Owner or A/E. The Owner will approve or disapprove each Subcontractor and supplier based upon his apparent financial soundness and responsibility, his known or reported performance on previous similar work, and his available plant, equipment and personnel to perform the Work. The Contractor shall not employ a Subcontractor or supplier which has been disapproved by the Owner and shall resubmit names of proposed Subcontractors or suppliers until approvals are granted by the Owner. Disapproval of a proposed Subcontractor or supplier shall not affect the contract price.

5.2.2 The Contractor shall make no substitution for any Subcontractor, person or entity previously selected without the specific written approval by the A/E and Owner of such substitution.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 By an appropriate written agreement the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents assumes toward the Owner and the A/E. Said agreement shall preserve and protect the rights of the Owner and the A/E under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the Contractor-Subcontractor agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with his Sub-subcontractor's. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract, copies of all of the Contract Documents, and identify to the Subcontractor any terms and conditions of the proposed subcontract which may be at variance with the Contract Documents. Each Subcontractor shall similarly make copies of such Documents available to his Sub-subcontractor's. Each subcontract agreement shall insure that all appropriate provisions of the Contract Documents are complied with by the Subcontractor.

5.3.2 The provisions herein regarding Subcontractor approvals shall in no way affect the liability of the Contractor to Owner regarding performance of all obligations by or payment of Subcontractors. Approval to subcontract and of any given Subcontractor shall not to any degree relieve the Contractor of his obligation to perform or have performed to the full satisfaction of the Owner all of the work required by this Contract.

5.4 QUALIFICATION SUBMITTALS

5.4.1 Specific qualification submittals may be required of Subcontractors, installers and suppliers for certain critical items of the Work. Required qualification submittals are set forth in detail in the Technical Specifications and shall be collected and submitted by the Contractor to the A/E. All information required of a single Subcontractor, installer or supplier shall be contained in a single, complete submittal. The Contractor shall submit the required qualification information within ten (10) days after receipt of the A/E's request.

5.4.2 The Owner or A/E shall reject any proposed Subcontractor, installer or supplier, or any qualification submittals related thereto, for the following reasons:

- .1 The Contractor's failure to submit requested information within the specified time; or
 - .2 The Contractor's failure to provide all of the requested information; or
 - .3 The Contractor's submission of a Subcontractor, installer or supplier, or qualifications thereof, which are unacceptable in the judgment of the Owner or A/E.
- 5.4.3 Should the A/E or the Owner have reasonable objection to any proposed Subcontractor, installer or supplier, the Contractor shall submit another firm for approval by the A/E and Owner.

ARTICLE 6

WORK BY OWNER OR BY SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM WORK AND TO AWARD SEPARATE CONTRACTS

- 6.1.1 The Owner reserves the right to perform work related to the Project with his own forces, and to award separate contracts in connection with other portions of the Project or other work on the site under these or similar Conditions of the Contract.
- 6.1.2 When separate contracts are awarded for different portions of the Project or other work on the site, the term Contractor in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.2 MUTUAL RESPONSIBILITY

- 6.2.1 The Contractor shall afford other contractors and the Owner reasonable opportunity for the introduction and storage of their materials and equipment and the execution of their work and shall properly connect and coordinate the Work with such other work. The Contractor shall coordinate his Work with the Owners and other contractors to store his apparatus, materials, supplies and equipment in such orderly fashion at the site of the Work as will not unduly interfere with the progress of the Work or the work of any other contractors.
- 6.2.1.1 If the execution or result of any part of the Work depends upon any work of the Owner or of any separate contractor, the Contractor shall, prior to proceeding with the Work, inspect and promptly report to the Owner in writing any apparent discrepancies or defects in such work of the Owner or of any separate contractor that render it unsuitable for the proper execution or result of any part of the Work.

- 6.2.1.2 Failure of the Contractor to go inspect and report shall constitute an acceptance of the Owner's or separate contractor's work as fit and proper to receive the Work, except as to defects which may develop in the Owner's or separate contractor's work after completion of the Work and which the Contractor could not have discovered by its inspection prior to completion of the Work.
- 6.2.2 Should the Contractor cause damage to the work or property of the Owner or of any separate contractor on the Project, or to other work on the Site, or delay or interfere with the Owner's work on ongoing operations or facilities or adjacent facilities or said separate contractor's work, the Contractor shall be liable for the same; and, in the case of another contractor, the Contractor shall attempt to settle said claim with such other contractor prior to such other contractor's institution of litigation or other proceedings against the Contractor.
- 6.2.2.1 If such separate contractor sues the Owner on account of any damage, delay or interference caused or alleged to have been so caused by the Contractor, the Owner shall notify the Contractor, who shall defend the Owner in such proceedings at the Contractor's expense. If any judgment or award is entered against the Owner, the Contractor shall satisfy the same and shall reimburse the Owner for all damages, expenses, attorneys' fees and other costs which the Owner incurs as a result thereof.
- 6.2.3 Should a separate contractor cause damage to the Work or to the property of the Contractor or cause delay or interference with the Contractor's performance of the Work, the Contractor shall present directly to said separate contractor any claims it may have as a result of such damage, delay or interference (with an information copy to the Owner) and shall attempt to settle its claim against said separate contractor prior to the institution of litigation or other proceedings against said separate contractor.
- 6.2.3.1 In no event shall the Contractor seek to recover from the Owner or the A/E, and the Contractor hereby represents to the Owner and the A/E that it will not seek to recover from them, or either of them, any costs, expenses (including, but not limited to, attorney's fees) or losses of profit incurred by the Contractor as a result of any damage to the Work or property of the Contractor or any delay or interference caused or allegedly caused by any separate contractor.
- 6.3 ERRORS
- 6.3.1 The Contractor shall make no claim against the Owner because of or related to estimates, tests or representations of any kind affecting the Work made by any separate contractor, consultant or agent of the Owner which are in any respect erroneous.

6.4 OWNER'S RIGHT TO CLEAN UP

- 6.4.1** If a dispute arises between the Contractor and separate contractors as to their responsibility for cleaning up as required by Article 4, the Owner may clean up and charge the cost thereof to the contractor responsible therefore as the A/E or Owner shall determine to be just.

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 GOVERNING LAW

- 7.1.1** The provisions of this contract shall be interpreted in accordance with the laws of Virginia and in accordance with the laws, ordinances, regulations, permits and resolutions of Fairfax County.

7.2 PROVISIONS REQUIRED BY LAW DEEMED INSERTED

- 7.2.1** Each and every provision of law and clause required by law to be inserted in this Contract shall be deemed to be inserted herein and the Contract shall be read and enforced as though it were included herein and if through mistake or otherwise, any such provision is not inserted or is not correctly inserted, then upon the application of either party, the Contract shall forthwith be physically amended to make such insertion.

7.3 SUCCESSORS AND ASSIGNS

- 7.3.1** The Owner and the Contractor each binds himself, his partners, successors, assigns and legal representatives to the other party hereto and to the partners, successors, assigns and legal representatives of such other party in respect to all covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any monies due or to become due to him hereunder, without the previous written consent of the Owner and the Contractor's Surety.
- 7.3.1.1.** In the event the Contractor desires to make an assignment of all or part of the Contract or any monies due or to become due hereunder, the Contractor shall file a copy of consent of surety, together with copy of assignment with the Owner and A/E. In the event the Contractor assigns all or any part of the monies due or to become due

under this Contract, the instrument of assignment shall state that the right of assignees in and to any monies due to or to become due to Contractor shall be subject to prior liens and claims of all persons, firms and corporations that provided labor services or furnished material and equipment during the performance of the Work. The rights of assignees shall further be subject to the payment of any liens, claims, or amounts due to Federal or State governments.

7.4 CONTRACT CLAIMS AND DISPUTES

- 7.4.1** All claims, disputes or other matters or questions between the Contractor and the Owner or A/E arising out of or relating to the performance of the Work or any termination hereunder shall be decided by the Director of Public Works or his designated representative. The Director of Public Works or his designated representative shall issue his decision within thirty (30) days of his receipt of the claim, dispute or other matter.
- 7.4.2** The County Executive or a designee shall hear appeals of or protests to the Director of Public Works decision regarding claims, disputes or other matters or questions between the Contractor and the Owner or A/E arising out of or relating to the performance of the Work. The County Executive or designee shall provide for a hearing, the opportunity to present pertinent information and shall issue a written decision containing findings of fact. The findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner. Any party to the administrative procedure, including the Owner, shall be entitled to institute judicial review if such action is brought within thirty (30) days of receipt of the written decision of the County Executive or his designee. A party may not institute legal proceedings until all administrative remedies as set forth herein or as required by the ordinances or resolutions of Fairfax County have been exhausted.

7.5 ATTORNEYS' FEES AND OTHER EXPENSES

- 7.5.1** On account of the public monies being administered by the Owner to fund this Contract, the Contractor hereby agrees that he will not submit, assert, litigate or otherwise pursue any frivolous or unsubstantiated claims. In the event that the Contractor's claim, or any separate item of a claim, is without substantial justification, the Contractor shall reimburse the Owner for all costs and expenses associated with defending such claim or separate item, including but not limited to, attorneys' fees, audit costs, accountants' fees, expert witness' fees, additional A/E expenses and any other consultant costs.
- 7.5.2** If the Contractor breaches any obligation under the Contract Documents, the Contractor shall reimburse the Owner for all costs and expenses incurred by the Owner relating to such breach, including but not limited to attorneys' fees, audit costs, accountants' fees, expert witness' fees, additional A/E expenses and any other consultant costs.
- 7.5.3** If the Owner prevails in a claim brought against the Contractor, including but not limited to, claims for fraud or misrepresentation, overpayment, defective work, delay damages, and recovery of termination expenses, the Contractor shall reimburse the Owner for all costs and expenses incurred by the Owner relating to such claim, including but not limited to attorneys' fees, audit costs, accountants' fees, expert witness' fees, additional A/E expenses and any other consultant costs.

7.6 RIGHTS AND REMEDIES

- 7.6.1** The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law, not inconsistent with the Contract Documents.
- 7.6.2** No action or failure to act by the Owner, A/E or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.
- 7.6.3** Contractor agrees that he can be adequately compensated by money damages for any breach of this Contract which may be committed by the Owner and hereby agrees that, no default, act, or omission of the

Owner or the Architect, except for failure to make payments as required by the Contract Documents, shall constitute a material breach of the Contract entitling Contractor to cancel or rescind the provisions of this Contract or (unless the Owner shall so consent or direct in writing) to suspend or abandon performance of all or any part of the Work. Contractor hereby waives any and all rights and remedies to which he might otherwise be or become entitled, saving only its right to money damages.

7.7

TESTS

- 7.7.1** If the Contract Documents, laws, ordinances, rules, regulations, permits, resolutions or orders of any public authority having jurisdiction require any portion of the Work to be inspected, tested or approved, the Contractor shall give the A/E timely notice of its readiness so that the A/E may observe such inspection, testing or approval. The Contractor shall bear all costs normally chargeable to Contractor of such inspections, tests or approvals conducted by public authorities.
- 7.7.2** All materials and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination and test by the A/E, and other representatives of the Owner, at any and all times during the manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. Special, full-sized and performance tests shall be as described in the specifications. Without additional charge, the Contractor shall furnish promptly all reasonable facilities, labor and materials necessary to make tests safe and convenient.
- 7.7.3** The selection of bureaus, laboratories and/or agencies for the inspection and tests of supplies, materials or equipment shall be subject to the approval of the Owner. Satisfactory documentary evidence, including but not limited to certificates of inspection and certified test reports, that the material has passed the required inspection and tests must be furnished to the Owner by the Contractor prior to the incorporation of the materials in the Work or at such times as to allow for appropriate action by the Owner or A/E.
- 7.7.4** Inspection or testing performed exclusively for the Contractor's convenience shall be the sole responsibility of the Contractor. Tests required by Contractor's or Subcontractor's error, omission or non-compliance with the Contract Documents, shall be paid for by the Contractor.

- 7.7.5 It is specifically understood and agreed that an inspection and approval of the materials by the A/E or Owner shall not in any way subject the Owner to pay for the said materials or any portion thereof, even though incorporated in the Work, if said materials shall in fact turn out to be unfit to be used in the Work, nor shall such inspection be considered as any waiver of objection to the Work on account of the unsoundness or imperfection of the material used.

ARTICLE 8

CONTRACT TIME

8.1 DEFINITION

- 8.1.1 Unless otherwise provided, the Contract Time is the period of time specified in the Owner-Contractor Agreement for Substantial or Final Completion of the Work as defined herein, including authorized adjustments thereto. The Contractor shall complete his Work within the Contract Time.
- 8.1.2 The date of commencement of the Work is the date established in a Notice to Proceed. If there is no Notice to Proceed, it shall be the date of the Owner-Contractor Agreement or such other date as may be established therein.
- 8.1.2.1 The Contractor shall not commence work or store materials or equipment on site until written Notice to Proceed is issued or until the Contractor otherwise receives the Owner's written consent.
- 8.1.3 The date of Substantial Completion of the Work or designated portion thereof is the date certified by the A/E when construction is sufficiently complete, in accordance with the Contract Documents, so the Owner can occupy or utilize the Work or designated portion thereof for the use for which it is intended.
- 8.1.4 The date of Final Completion of the Work is the date certified by the A/E or Owner when the Work is totally complete, to include punch list work, in accordance with the Contract Documents and the Owner may fully occupy and utilize the Work for the use for which it is intended.
- 8.1.5 The term day as used in the Contract Documents shall mean calendar days unless otherwise specifically designated.

8.2 PROGRESS AND COMPLETION

8.2.1 All time limits stated in the Contract Documents are of the essence of the Contract.

8.2.2 The Contractor shall begin the Work on the date of commencement as defined herein. He shall carry the Work forward expeditiously with adequate forces and shall achieve Substantial and Final Completion as required by the Contract Documents.

8.3 CLAIMS FOR TIME EXTENSIONS

8.3.1 The time during which the Contractor is delayed in the performance of the Work, by the acts or omissions of the Owner, the A/E or their employees or agents, acts of God, unusually severe and abnormal climatic conditions, fires, floods, epidemics, quarantine restrictions, strikes, riots, civil commotions or freight embargoes, or other conditions beyond the Contractor's control and which the Contractor could not reasonably have foreseen and provided against, shall be added to the time for completion of the Work (i.e., the Contract Time) stated in the Agreement; provided, however, that no claim by the Contractor for an extension of time for delays will be considered unless made in compliance with the requirements of this Article and other provisions of the Contract Documents.

8.3.2 Neither the Owner nor the A/E shall be obligated or liable to the Contractor for, and the Contractor hereby expressly waives any claims against the Owner and the A/E on account of any indirect or

direct damages, costs or expenses of any nature which the Contractor, its Subcontractors, or Sub-subcontractor's or any other person may incur as a result of any delays, interferences, changes in sequence or the like, which are reasonable, foreseeable, contemplated, or avoidable by Contractor, arising from or out of any act or omission of the Owner or the A/E, or their agents, employees, consultants, independent contractors or any governmental representative, it being understood and agreed that the Contractor's sole and exclusive remedy in any such events shall be an extension of the Contract Time, but only as determined in accordance with the provisions of the Contract Documents.

8.3.3 The burden of proof to substantiate a claim for an extension of the Contract Time shall rest with the Contractor, including evidence that the cause was beyond his control. It shall be deemed that the Contractor has control over the supply of labor, materials, equipment, methods and techniques of construction and over the Subcontractors and suppliers.

D-46

- 8.3.4 In the event of Changes in the Work, any consideration by the Owner for a time extension will be made no later than when the Change Order is prepared.
- 8.3.5 No time extensions will be granted as a result of the Contractor's improper or unreasonable scheduling or for the Contractor's failure to have Shop Drawings, Product Data, Samples or Manuals submitted in ample time for review under a reasonable and agreed upon schedule.
- 8.3.6 Delays by Subcontractors or suppliers will not be considered justification for a time extension, except for the same valid reasons and conditions enumerated herein.
- 8.3.7 The Contractor acknowledges and agrees that actual delays due to changes, suspension of work or excusable delays, in activities which according to the schedule do not affect the Contract Time will not be considered to have any effect upon the Contract Time and therefore will not be the basis for a time extension.
- 8.3.8 The Contractor acknowledges and agrees that time extensions will be granted only to the extent that excusable delays exceed the available flexibility in the Contractor's schedule.
- 8.3.9 With respect to Suspensions of Work under Paragraph 3.6 herein, the Contractor shall be entitled to an extension of the Contract Time not to exceed the length of time that the Work was suspended (unless as determined under this Article and the other requirements of the Contract Documents that a further extension is justified and warranted) if the claim is submitted in accordance with the requirements of this Article, and if the suspension is not due to any act or omission of the Contractor, any Subcontractor or Sub-subcontractor or any other person or organization for whose acts or omission the Contractor may be liable. The Contractor's claim will be evaluated in accordance with the terms of this Article.
- 8.3.10 The Contractor shall not be entitled to any extension of time for delays resulting from any conditions or other causes unless it shall have given written notice to the Owner, within twenty (20) calendar days following the commencement of each such condition or cause, describing the occurrence, the activities impacted and the probable duration of the delay. The Contractor's complete claim submittal for a time extension shall be submitted no later than twenty (20) calendar days after cessation of the delay or the request of the Owner or A/E.

8.3.11 No such extension of time shall be deemed a waiver by the Owner of his right to terminate the Contract for abandonment or delay by the Contractor as herein provided or to relieve the Contractor from full responsibility for performance of his obligations hereunder.

8.4 CHANGE ORDER WORK

8.4.1 The Contractor shall make every reasonable effort to perform Change Order work within the Contract Time and in such manner as to have minimum delaying effects on all remaining work to be performed under the contract. If, however, the Change Order work results in an unavoidable increase in the time required to complete the project, an extension of the Contract Time may be granted to the Contractor for the Change Order work. The Contractor's request therefor shall be determined in accordance with the provisions of Article 8.3 herein and as follows:

- .1 If the time required for performance of the Change Order work has an unavoidable direct delaying effect on the primary sequence of work activities remaining after rescheduling (e.g., the critical path in CPM type scheduling), the overall contract time may be extended by the minimum number of days required for the Change Order work as mutually agreed upon by the Owner and the Contractor;
- .2 If the time required for performance of the Change Order work does not have an unavoidable direct delaying effect on the primary sequence of work activities but is ordered by the Owner at a time such that insufficient Contract Time remains for completion of the Change Order work (and any limited number of contingent work activities), the Contract Time may be extended by the minimum number of days required for the Change Order work as mutually agreed upon by the Owner and the Contractor but only for the Change Order work and contingent activities, all other unaffected work shall be performed within the Contract Time;
- .3 Failure of the Owner and the Contractor to agree on a Contract Time extension as specified in .1 and .2 above shall not relieve the Contractor from proceeding with and performing the Change Order work promptly, as well as in such manner as to have minimal delaying effects on all remaining work to be performed under the Contract. Such disagreement shall be resolved as soon as practical by negotiation.

8.5

LIQUIDATED DAMAGES FOR DELAY

8.5.1

The damages incurred by the Owner due to the Contractor's failure to complete the Work within required Milestone dates and the Contract Time, including any extensions thereof, shall be in the amount set forth in the Owner-Contractor Agreement, for each consecutive day beyond the Milestone dates or the Contract Time (Sundays and all holidays included) for which the Contractor shall fail to complete the Work.

8.5.2

The amount of liquidated damages provided in this Contract is neither a penalty nor a forfeiture and shall compensate the Owner solely for the Owner's inability to use the Work for its intended purpose, and is not intended to, nor does said amount include: (1) any damages, additional or extended costs, incurred by the Owner for extended administration of this Contract, or by the Owner's agents, consultants or independent contractors for extended administration of this Contract, or (2) any additional services, relating to or arising as a result of the delay in the completion of the Work. Owner shall be entitled to claim against Contractor for its actual damages and amounts not specifically included within the liquidated as set forth herein. Such costs shall be computed separately and together with liquidated damages, either deducted from the Contract Sum or billed to the Contractor.

8.6

TIME EXTENSIONS FOR WEATHER

8.6.1

The Contract Time will not be extended due to inclement weather conditions (herein defined as the conditions of precipitation, temperature or wind) which are normal to the general locality of Work site. The time for performance of this Contract includes an allowance for calendar days which, according to historical data, may not be suitable for construction work.

8.6.2

The Contractor, in his planning and scheduling of the Work as required by the Contract Documents, shall allow for the normal inclement weather for the locality of the Work site. If the Contractor believes that the Progress of the Work has been adversely affected and that it will directly result in a failure to meet a Contract Milestone date or Completion within the Contract Time, by weather conditions above and beyond the amount normally expected, he shall submit a written request to the A/E for an Extension of Time, pursuant to Paragraph 8.3.

8.6.3

Such request shall be evaluated by the A/E and Owner in accordance with the provisions of the Contract Documents and shall include a

comparison of actual weather statistics compiled by the Departments of Health and Public Works, Fairfax County, for the time of year, locality of the particular Work site with the days claimed by the Contractor and the historical data for that location and time of year. The decision of the Owner shall be final.

- 8.6.4 The Contractor shall not be entitled to any money damages whatsoever for any delays resulting from inclement weather, whether normal or abnormal, foreseeable or unforeseeable.

ARTICLE 9

PAYMENTS AND COMPLETION

9.1 CONTRACT SUM

- 9.1.1 The Contract Sum is stated in the Owner-Contractor Agreement and, including authorized adjustments thereto, is the total amount payable by the Owner to the Contractor for the performance of the Work under the Contract Documents. The Contract Sum includes, but is not limited to, the Contractor's profit and general overhead and all costs and expenses of any nature whatsoever (including without limitation taxes, labor and materials), foreseen or unforeseen, and any increases in said costs and expenses, foreseen or unforeseen, incurred by the Contractor in connection with the performance of the Work, all of which costs and expenses shall be borne solely by the Contractor. The Contractor agrees to assume all increases in costs of any nature whatsoever that may develop during the performance of the Work.

9.2 SCHEDULE OF VALUES

- 9.2.1 For Lump Sum Price Type Contracts, before the first Application for Payment, the Contractor shall submit to the A/E, in conjunction with the construction schedule specified in Article 4., a schedule of values allocated to the various portions of the Work, prepared on payment forms provided by the Owner and supported by such data to substantiate its accuracy as the A/E may require. This schedule of values, unless rejected by the A/E, shall be used as a basis for the Contractor's Applications for Payment.
- 9.2.2 For Unit Price type contracts, the Contractor shall utilize the payment request form provided by the Owner, wherein the schedule of values shall correspond with the individual unit price bid items. When so requested by the Owner, the Contractor shall provide a more detailed cost breakdown of the unit price items.

- 9.2.3 If approved by the Owner, Contractor may include in his schedule of value a line item for "mobilization" which shall include a reasonable amount for mobilization for the Contractor and his Subcontractors. The Contractor shall not front-end load his schedule of values.
- 9.3 APPLICATION FOR PAYMENT
- 9.3.1 The Contractor shall submit to the A/E an itemized Application for Payment on or before the day of each month designated in Article 6 of the Owner-Contractor Agreement. The Application for Payment shall be notarized, indicate in complete detail all labor and material incorporated in the Work during the month prior to submission, and supported by such data substantiating the Contractor's payment request as the Owner or A/E may require. The Contractor shall also certify that due and payable amounts and bills have been paid by the Contractor for work for which previous Certificates of Payment were issued and payments received from the Owner.
- 9.3.2 Payment may be made for the value of materials, which are to be incorporated into the finished Work, and which are delivered to and suitably stored and protected on the Work site. The Contractor shall provide releases or paid invoices from the Seller to establish, to the Owner's satisfaction, that the Owner has title to said material. Stored materials shall be in addition to the Work completed and shall be subject to the same retainage provisions as the completed Work. Material once paid for by the Owner becomes the property of the Owner and may not be removed from the Work site without the Owner's written permission.
- 9.3.2.1 Unless otherwise provided for in the Special Conditions, Section E, no payment will be made for any materials stored off or away from the Work site.
- 9.3.3 The Contractor warrants that title to all Work, materials and equipment covered by an Application for Payment will pass to the Owner either by incorporation in the construction or upon the receipt of payment by the Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances, hereinafter referred to as "liens"; and that no Work, materials or equipment covered by an Application for Payment will have been acquired by the Contractor or by any other person performing Work at the site or furnishing materials and equipment for the Project, subject to an agreement under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor or such other person.

- 9.3.4 The Contractor's Application for Payment shall provide that the payment request attests that all Work for which the request is made has been completed in full according to the drawings, specifications and other terms of the Contract Documents. By submitting his Application for Payment, the Contractor also represents that he has no knowledge that any Subcontractor or suppliers have not been fully and timely paid and that, insofar as he knows, the only outstanding items for payment with respect to the Contract are those to be paid from the funds for which Application is being made.

9.4 CERTIFICATES FOR PAYMENT

- 9.4.1 The A/E will, within seven (7) calendar days after the receipt of the Contractor's Application for Payment, either issue a Certificate for Payment to the Owner, for such amount as the A/E determines is properly due, or notify the Contractor in writing his reasons for withholding or adjusting a Certificate as provided in Paragraph 9.6.
- 9.4.2 After the Certificate for Payment is issued by the A/E, the Owner will review it and make any changes deemed necessary by the Owner's Representative. The issuance of the Certificate for Payment by the A/E does not waive or limit the Owners right to reduce the amount of the payment due to the Contractor as determined to be appropriate by the Owner.
- 9.4.3 The issuance of a Certificate for Payment will constitute a representation by the A/E to the Owner, based on his observations at the site as provided in Article 2 hereof and the data comprising the Application for Payment, that the Work has progressed to the point indicated; that, to the best of his knowledge, information and belief: (1) the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial or Final Completion, to the results of any subsequent tests required by or performed under the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in his Certificate); and that (2) the Contractor is entitled to payment in the amount certified. However, by issuing a Certificate for Payment, the A/E shall not thereby be deemed to represent that he has made exhaustive or continuous on-site inspections to check the quality or quantity of the Work or that he has reviewed the construction means, methods, techniques, sequences or procedures, or that he has made any examination to ascertain how or for what purpose the Contractor has used the moneys previously paid on account of the Contract Sum.

9.5

PROGRESS PAYMENTS

9.5.1

The Owner shall make payment in the manner and within seventeen (17) calendar days after receipt of the Certificate of Payment from the A/E based upon the Owner's approval or adjustment of said Certificate. The Contractor shall be paid the amount approved or adjusted by the Owner, less 5% retainage which is being held to assure faithful performance; provided however, that said retainage is not applicable to Time and Material Change Orders.

9.5.1.1

In relation to punch list or other uncompleted work and in lieu of a portion of the above specified five percent 5% retainage, the Owner may, at its sole discretion and upon recommendation from the A/E, elect to retain fixed amounts directly relating to the various items of uncompleted Work. All amounts withheld shall be included in the Final Payment.

9.5.2

The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's Work, the amount to which said Subcontractor is entitled, reflecting the percentage actually retained, if any, from payments to the Contractor on account of such Subcontractor's Work. The Contractor shall, by an appropriate agreement with each Subcontractor, require each Subcontractor to make payments to his Sub-subcontractor's in similar manner.

9.5.3

The Owner may, upon written request, furnish to any Subcontractor, if practicable, information regarding the percentages of completion or the amounts applied for by the Contractor and the action taken thereon by the Owner on account of Work done by such Subcontractor.

9.5.4

Neither the Owner nor the A/E shall have any obligation to pay or to see to the payment of any monies to any Subcontractor except as may otherwise be required by law.

9.5.5

No Certificate for a progress payment, nor any progress payment, nor any partial or entire use or occupancy of the Project by the Owner, shall constitute an acceptance of any Work not in accordance with the Contract Documents.

9.6

PAYMENTS WITHHELD

9.6.1

The A/E may decline to issue or the Owner may decline to accept the Certificate for Payment, or the Owner may withhold the payment

in whole or in part, if necessary to reasonably protect the Owner. If the A/E is unable to make representations as provided in subparagraph 9.4.3 and to certify payment in the amount of the application, he will notify the Contractor as provided in subparagraph 9.4.1. If the Contractor, the A/E and the Owner cannot agree on a revised amount, the A/E with the Owner's approval will promptly issue a Certificate for Payment for the amount for which he and the Owner are able to make representations with respect to payment due for work performed. The A/E and the Owner may also decline to certify or make payment or, because of subsequently discovered evidence or subsequent observations, they may nullify the whole or any part of any Certificate for Payment previously issued.

9.6.2 The Owner may withhold from the Contractor so much of any approved payment due him as may in the judgment of the Owner be necessary:

- .1** To protect the Owner from loss due to defective work not remedied;
- .2** To protect the Owner upon notice of the filing in court or in an arbitration proceeding as may be required in any third party contract, of verified claims of any persons supplying labor or materials for the Work, or other verified third party claims;
- .3** To protect the Owner upon reasonable evidence that the Work will not be completed for the unpaid balance of the Contract Sum;
- .4** To protect the Owner upon reasonable evidence that the Work will not be completed within the Contract Time, or any Contract Milestones as established by this Contract; or
- .5** To protect the Owner upon the Contractor's persistent failure to properly schedule and coordinate the work in accordance with or as required by the Contract Documents, or persistent failure to provide progress charts, revisions, updates or other scheduling data as required by the Contract Documents, or upon the Contractor's persistent failure to provide as-built drawings as required herein, or upon Contractor's failure to otherwise substantially or materially comply with the Contract Documents.

9.6.3 The Contractor shall, concurrent with his submission of the Construction Schedule, submit a practicable and realistic payment schedule showing the dates on which the Contractor will submit

each and every Application for Payment and the amount he expects to receive for each and every monthly progress payment. If during the performance of the Work, the Contractor expects to receive an amount for a monthly progress payment larger than that indicated on the payment schedule, the Contractor shall notify the Owner at least 30 days in advance of that payment so that the necessary allocation of funds can be processed. In the event the Contractor fails to submit a practicable and realistic payment schedule, the Contractor's Application for Payment shall be honored only to the extent that the Work is actually performed and that the proportion of payments made to the Contract Sum does not exceed the proportion of the Contract Time expired as of the time of the request.

9.7

FAILURE OF PAYMENT

If the Owner does not make payment to the Contractor within the twenty-four (24) calendar days after receipt of the Contractor's Application for Payment by the A/E through no fault of Contractor, and the Owner otherwise not being entitled under the Contract Documents or applicable law to withhold payment, then the Contractor may, upon seven (7) additional days' written notice to the Owner and the A/E, stop the Work until payment of the amount owing has been received. In such event, the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, which shall be effected by appropriate Change Order as provided herein.

9.8

SUBSTANTIAL COMPLETION AND GUARANTEE BOND

9.8.1

Unless otherwise specified in Article 9.9, when the Contractor considers that the Work, or a designated portion thereof which is acceptable to the Owner, is substantially complete as defined in Article 8, the Contractor shall request in writing that the A/E and the Owner perform a Substantial Completion inspection. Prior to such inspection the Contractor shall:

- .1 If applicable, secure a Non-Residential Use Permit for the Project or a designated portion thereof; and
- .2 Submit six (6) copies each of the Operations and Maintenance Manuals to the A/E as specified.

D-55

- 9.8.2 The A/E and the Owner shall determine whether the project is substantially complete and shall compile a punch list of items to be completed or corrected. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.
- 9.8.3 When the A/E and the Owner on the basis of their inspection determine that the Work or a designated portion thereof is substantially complete, the A/E will then prepare a Certificate of Substantial Completion which shall establish the Date of Substantial Completion and shall state the responsibilities of the Owner and the Contractor for security, maintenance, heat, utilities, damage to the Work and insurance. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such Certificate.
- 9.8.4 The Contractor shall have thirty (30) working days from the Date of Substantial Completion to complete all items on the punch list to the satisfaction of the A/E. The Owner shall have the option to correct or conclude any and all punch list items not completed by the Contractor within thirty (30) working days from the Date of Substantial Completion by utilizing its own forces or by hiring others. The cost of such correction of remaining punch list items by the Owner or others shall be deducted from the final payment to the Contractor.
- 9.8.5 Guarantees and warranties required by the Contract Documents shall commence on the Date of Substantial or Final Completion of the Work, or designated portion thereof, unless otherwise provided in the Certificate of Substantial or Final Completion, or the Contract Documents. Provided, however, that if Contractor does not complete certain punch list items within this time period, specified in 9.8.4, all warranties and guarantees for such incomplete Punch List items shall become effective upon issuance of final payment for the project.
- 9.8.5.1 The Contractor shall guarantee for a term of one (1) year from the date of Substantial and/or Final Completion, as appropriate, (unless otherwise provided for in the Certificate(s) of Substantial or Final Completion or the Contract Documents): (1) the quality and stability of all materials equipment and Work; (2) all the Work against defects in materials, equipment or workmanship; and

(3) all shrinkage, settlement or other faults of any kind whatsoever arising therefrom. The Contractor shall remedy at his own expense, when so notified in writing to do so by the Owner, and to the satisfaction of the Owner, the Work or any part thereof that does not conform to any of the warranties and guaranties described in the Contract Documents.

- 9.8.5.2 In order to make good the guarantee as herein required, the Contractor shall deposit with the Owner, before Final Payment, a Guarantee Bond(s) issued by a surety licensed to do business in Virginia and otherwise acceptable to the Owner, for the faithful performance of the guarantee. Said Bond(s) shall be for a period of one year, in accordance with the Certificate(s) of Substantial or Final Completion and in the amount of five percent (5%) of the final gross value of the Contract. When required in the Special Conditions, Section E, and in addition to the foregoing five percent bond, the Owner shall retain one percent (1%) of the final Contract Sum in Cash, for the one year term of the Guarantee.
- 9.8.5.3 The Contractor shall start repairs during the guarantee period, within five (5) working days after the receipt of notice from the Owner and if the Contractor shall fail to start such repairs within the said five (5) working days, the Owner may employ such other person or persons as it may deem proper to make such repairs and pay the expenses thereof out of any sum retained by it, provided nothing herein contained shall limit the liability of the Contractor or his surety to the Owner for non-performance of the Contractor's obligations at any time.
- 9.8.6 The issuance of the Certificate of Substantial Completion does not indicate final acceptance of the project by the Owner, and the Contractor is not relieved of any responsibility for the project except as specifically stated in the Certificate of Substantial Completion.
- 9.8.7 Upon Substantial Completion of the Work, or designated portion thereof, and upon application by the Contractor and certification by the A/E, the Owner shall make payment, reflecting adjustment in retainage, if any, for such Work or portion thereof, as provided in the Contract Documents.
- 9.8.8 Should the A/E and the Owner determine that the Work or a designated portion thereof is not substantially complete, he shall provide the Contractor a written notice stating why the project or designated portion is not substantially complete. The Contractor shall expeditiously complete the Work and shall re-request in writing that the A/E and the Owner perform a substantial completion inspection.

9.9

FINAL COMPLETION AND FINAL PAYMENT:

9.9.1

For all utility projects, and any other projects that may be so designated by the Owner, a Certificate of Final Completion shall be issued by the A/E prior to final payment. At the Owner's sole option, this Final Completion Certificate may operate in lieu of a Certificate of Substantial Completion. The Contractor, prior to application for Final Payment and within the time specified for completion of the Work, shall complete all Work, to include punch list items and provide operating manuals and as-built data, for the Work, as completed and in place. Said Certificate of Final Completion shall be issued, even if a Certificate of Substantial Completion has been issued previously and temporary authority to operate the Work has been granted.

9.9.1.1

The Certificate of Final Completion shall certify that all Work has been completed substantially in accordance with Contract Documents and is ready for use by the Owner.

9.9.2

For all projects where Substantial Completion Certificates have been issued for various portions of the Work, at differing times, the Contractor shall request and the A/E shall, prior to final payment, issue a Certificate of Final Completion which certifies that all required Work, including punch list items, has been completed in accordance with the Contract Documents.

9.9.3

Neither the final payment nor any remaining retainage shall become due until the Contractor submits to the A/E the following:

- .1 An Application for Payment for all remaining monies due under the Contract.
- .2 Consent of surety, if any, to final payment, unless otherwise waived by the Owner;
- .3 If required by the Owner, other data establishing payment or satisfaction of all such obligations, such as receipts, releases and waivers of claims arising out of the Contract, to the extent and in such form as may be designated by the Owner. If any Subcontractor refuses to furnish waiver of claims satisfactory to the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify him against any such claim. If any such claim remains unsatisfied after all payments are made, the Contractor shall refund to the Owner all monies that the latter may be compelled to pay in discharging such claim, including all costs and reasonable attorneys' fees;

- .4 As-built drawings, operation and maintenance manuals and other project close-out submittals, as required by the Contract Documents;
- .5 Construction releases as required by the Contract Documents from each property owner on whose property an easement for construction of this project has been obtained by the Owner, such release to be in the forms to be provided by the Owner. This release is for the purpose of releasing the Owner and the Contractor from liability, claims, and damages arising from construction operations on or adjacent to the easement and includes proper restoration of the property after construction. It shall be the Contractor's sole responsibility to obtain all such releases and furnish them to the Owner; and
- .6 A written certification that:
 - .1 The Contractor has reviewed the requirements of the Contract Documents,
 - .2 The Work has been inspected by the Contractor for compliance with all requirements of the Contract Documents,
 - .3 Pursuant to this inspection, the Contractor certifies and represents that the Work complies in all respects with the requirements of the Contract Documents,
 - .4 The Contractor further certifies and represents that all equipment and systems have been installed in accordance with the Contract Documents and have been tested in accordance with specification requirements and are operational, and
 - .5 The Contractor hereby certifies and represents that the Work is complete in all respects and ready for final inspection.

9.9.4 Upon receipt of the documents required in subparagraph 9.9.3 and upon receipt of a final Application for Payment, the A/E will promptly make such final inspection and, when he finds the Work acceptable under the Contract Documents and the Contract fully performed, he will promptly issue a final Certificate for Payment and, if required, a Final Certificate of Completion stating that to the best of his knowledge, information and belief, and on the basis of his observations and inspections, the Work has been completed in accordance with the terms and conditions of the Contract

Documents and that the entire balance designated in the final certificate for payment is due and payable. The A/E's final Certificate for Payment will constitute a further representation that the conditions precedent to the Contractor's being entitled to final payment as set forth in Subparagraph 9.9.4 have been fulfilled. Payment shall be made in full to the Contractor within thirty (30) calendar days of the date of the A/E's final Certificate of Payment provided that the requirements of Article 9 have been fulfilled, except for an amount mutually agreed upon for any work remaining uncompleted for which the Owner is entitled a credit under the Contract Documents. All prior estimates and payments, including those relating to change order work shall be subject to correction by this final payment.

- 9.9.5 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by the issuance of Change Orders affecting final completion, and the A/E so confirms, the Owner shall, upon application by the Contractor and certification by the A/E, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than the retainage stipulated in the Contract Documents, and if bonds have been furnished in accordance with the Contract Documents, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the A/E prior to certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

- 9.9.6 The making of Final Payment shall constitute a waiver of all claims by the Owner, except those arising from:

- .1 Unsettled claims;
- .2 Faulty, defective, or non-conforming Work discovered or appearing after Substantial or Final Completion;
- .3 Failure of the Work to comply with the requirements of the Contract Documents;
- .4 Terms of any warranties or guarantees required by the Contract Documents; or
- .5 Fraud or bad faith committed by the Contractor or any subcontractor or supplier during performance of work but discovered by Owner after Final Payment.

9.9.7

The acceptance of Final Payment shall constitute a waiver of all claims by the Contractor, except those previously made in writing and so identified by the Contractor, as unsettled at the time of the final Application for Payment. No payment, however, final or otherwise, shall operate to release the Contractor or his sureties from any obligations under this Contract or the Performance or the Guarantee Bonds

ARTICLE 10

PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. The requirement applies continuously throughout the Contract performance, until Final Payment is made, and is not limited to regular working hours.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

- .1 All employees on the Work and all other persons who may be affected thereby;
- .2 All the Work and all materials and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of the Contractor or any of his Subcontractors or Sub-subcontractor's. Machinery, equipment and all hazards shall be guarded or eliminated in accordance with the safety provisions of the Manual of Accident Prevention in Construction published by the Associated General Contractors of America, to the extent that such provisions are not in contravention of applicable law; and
- .3 Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give all notices and comply with all applicable laws, ordinances, rules, regulations, permits, resolutions and lawful orders of any public authority bearing on the safety of

D-61

persons or property or their protection from damage, injury or loss. By example, and not by limitation the Contractor must comply with the resolution adopted by the Fairfax County Board of Supervisors on February 7, 1983 as amended, pertaining to Better Construction Safety. Provisions outlined in this resolution shall be a Contract requirement. This Resolution is hereby expressly incorporated by reference and made a part hereof as if fully written out herein.

- 10.2.2.1 The Contractor shall at all times safely guard the Owner's property from injury or losses in connection with the Contract. He shall at all times safely guard and protect his own work and adjacent property as provided by law and the Contract Documents, from damage. All passageways, guard fences, lights and other facilities required for protection by local authorities or local conditions must be provided and maintained.
- 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities.
- 10.2.4 When the use or storage of explosives or other hazardous materials or equipment is necessary for the execution of the Work, the Contractor shall exercise the utmost care and shall carry on such activities under the supervision of properly qualified personnel.
- 10.2.5 The Contractor is responsible for the proper packing, shipping, handling and storage (including but not limited to shipment or storage at the proper temperature and humidity) of materials to be incorporated in the Work, so as to insure the preservation of the quality and fitness of the material for proper installation and incorporation in the Work, as required by the Contract Documents. For example, but not by way of limitation, Contractor shall, when necessary, place material on wooden platforms or other hard and clean surfaces and not on the ground and/or place such material under cover or in any appropriate shelter or facility. Stored materials or equipment shall be located so as to facilitate proper inspection. Material and equipment which is delivered crated shall remain crated until ready for installation. Lawns, grass plots or other private property shall not be used for storage purposes without the written permission of the owner or lessee unless otherwise within the terms of the easements obtained by the Owner.

- 10.2.6 In the event of any indirect or direct damage to public or private property referred to in Paragraphs 10.2.1.2 and 10.2.1.3, caused in whole or in part by an act, omission or negligence on the part of the Contractor, any Subcontractor, any Sub-subcontractor, or anyone directly or indirectly employed by any of them or by anyone for whose acts any of them may be liable, the Contractor shall at his own expense and cost promptly remedy and restore such property to a condition equal or better to than existing before such damage was done. The Contractor shall perform such restoration by underpinning, repairing, rebuilding, replanting, or otherwise restoring as may be required or directed by the A/E or Owner, or shall make good such damage in a satisfactory and acceptable manner. In case of failure on the part of the Contractor to promptly restore such property or make good such damage, the A/E or Owner may, upon two (2) calendar days written notice, proceed to repair, rebuild or otherwise restore such property as may be necessary and the cost thereof, or a sum sufficient in the judgment of the A/E or Owner to reimburse the owners of property so damaged, will be deducted from any monies due or to become due the Contractor under the Contract.
- 10.2.7 The Contractor shall designate a responsible member of his organization at the site whose duty shall be the prevention of accidents and the protection of material, equipment and other property. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and the A/E.
- 10.2.8 The Contractor shall not load or permit any part of the Work to be loaded so as to endanger the safety of any portion of the Work.
- 10.2.9 The Contractor shall give notice in writing at least 48 hours before breaking ground, to all persons, Public Utility Companies, owners of property having structures or improvements in proximity to site of the Work, superintendents, inspectors, or those otherwise in charge of property, streets, water pipes, gas pipes, sewer pipes, telephone cables, electric cables, railroads or otherwise, who may be affected by the Contractor's operation, in order that they may remove any obstruction for which they are responsible and have representative on site to see that their property is properly protected. Such notice does not relieve the Contractor of responsibility for any damages, claims, or defense or indemnification of all actions against Owner and A/E resulting from performance of such work in connection with or arising out of Contract.

- 10.2.10 The Contractor shall protect all utilities encountered while performing its work, whether indicated on the Contract Drawings or not. The Contractor shall maintain utilities in service until moved or abandoned. The Contractor shall exercise due care when excavating around utilities and shall restore any damaged utilities to the same condition or better as existed prior to starting the Work, at no cost to the Owner. The Contractor shall maintain operating utilities or other services, even if they are shown to be abandoned on the Contract Drawings, in service until new facilities are provided, tested and ready for use.
- 10.2.11 The Contractor shall return all improvements on or about the site and adjacent property which are not shown to be altered, removed or otherwise changed to conditions which existed prior to starting work.
- 10.2.12 The Contractor shall protect the Work, including but not limited to, the site, stored materials and equipment, excavations, and excavated or stockpiled soil or other material, intended for use in the Work, and shall take all necessary precautions to prevent or minimize damage to same or detrimental effect upon his performance or that of his subcontractors, caused by or due to rain, snow, ice, run-off, floods, temperature, wind, dust, sand and flying debris; for example, but not by way of limitation, Contractor shall, when necessary, utilize temporary dikes, channels or pumping to carry-off divert or drain water, and shall as necessary tie-down or otherwise secure the Work and employ appropriate covers and screens.
- 10.3 OBLIGATION OF CONTRACTOR TO ACT IN EMERGENCY
- 10.3.1 In case of an emergency which threatens immediate loss or damage to property and/or safety of life, the Contractor shall act, at his discretion and risk, to prevent threatened loss, damage, injury or death. The Contractor shall notify the Owner and A/E of the situation and all actions taken immediately thereafter. If, in the opinion of the Contractor, immediate action is not required, the Contractor shall notify the Owner and A/E of the emergency situation and proceed in accordance with the Owner's instructions. Provided, however, if any loss, damage, injury or death occurs that could have been prevented by the Contractor's prompt and immediate action, the Contractor shall be fully liable for all costs, damages, claims, actions, suits, attorney's fees and all other expenses arising therefrom or relating thereto.

- 10.3.2 Prior to commencing his work and at all times during the performance of the Work, the Contractor shall provide the Owner two, 24-hour emergency phone numbers where his representatives can be contacted.

ARTICLE 11

INSURANCE

11.1 CONTRACTOR'S LIABILITY INSURANCE

- 11.1.1 The Contractor shall purchase and maintain such insurance as will protect him from claims set forth below which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:
- .1 Claims under workers' or workmen's compensation, disability benefit and other similar employee benefit acts;
 - .2 Claims for damages because of bodily injury, occupational sickness or disease, or death of his employees; in case any work is sublet, the Contractor shall require the Subcontractor similarly to provide Workmen's Compensation Insurance for all of the latter's employees unless such employees are covered by the protection afforded by the Contractor. In case any class of employees engaged in hazardous work under this Contract at the site of the project is not protected under the Workmen's Compensation Statute, the Contractor shall provide and cause each Subcontractor to provide adequate insurance for the protection of his employees not otherwise protected;
 - .3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees;
 - .4 Claims for damages insured by usual personal injury liability coverage which are sustained (1) by any person as a result of an offense directly or indirectly related to the employment of such person by the Contractor, or (2) by any other person;
 - .5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; and

- .6 Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.**

11.1.2

Without limiting the above during the term of the Contract, the Contractor shall, at his own expense, purchase and maintain the following insurance with companies licensed to do business in the Commonwealth of Virginia and satisfactory to the Owner.

- .1 Workman's Compensation including Occupational Disease and Employer's Insurance.**
 - .1 Statutory Amounts and coverage as required by District of Columbia, Maryland, Virginia Workmen's Compensation Law including provision for Voluntary D.C. benefits as required by Labor Union agreements and including the "All States" endorsement.**
 - .2 Employers Liability At least \$500,000 each accident.**
- .2 Public liability and Property Damage Insurance The Contractor shall take out and maintain during the life of this Contract such Public Liability and Property Damage Insurance as shall protect him and any Subcontractor performing work under this Contract from claims for damages for personal injury including accidental death, as well as from claims for personal property damage which may arise from operations under this Contract, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by either of them. The Contractor shall procure insurance coverage for direct operations, sublet work, elevators, contractual liability and completed operations with limits not less than those stated below:**
 - .1 Bodily Injury Liability including Personal Injuries \$500,000 each person, \$1,000,000 each occurrence,**
 - .2 Property Damage Liability \$500,000 each occurrence , \$1,000,000 aggregate;**
- .3 Property Damages, including Broad Form Property Damage and Explosion, Collapse, Underground property damage coverages, and blasting, where necessary;**
- .4 Completed Operations Liability: Continuous coverage in force for one year after completion of Work;**

11/2/82

- .5 Comprehensive Automobile Liability Insurance, including coverage for owned, non-owned and hired vehicles with limits not less than those stated below:
 - .1 Bodily Injury Liability \$500,000 each person; \$1,000,000 each occurrence,
 - .2 Property Damage Liability \$250,000 each occurrence,
 - .3 Excess/umbrella policy raising the above limits to \$2,000,000; and
- .6 Liability insurance may be arranged by Comprehensive General Liability and Comprehensive Automobile Liability policies for the full limits required; Comprehensive General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an excess or umbrella liability policy.

11.1.3 The insurance required by Subparagraph 11.1 shall be written for not less than any limits of liability specified in the Contract Documents, or required by law, whichever is greater.

11.1.4 The insurance required by Subparagraph 11.1 shall include contractual liability insurance, including "Hold Harmless" insurance, applicable to the Contractor's obligations under Paragraph 4.21.

11.1.5 Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These Certificates shall contain a provision that coverages afforded under the policies will not be cancelled until at least thirty (30) days' prior written notice has been given to the Owner.

11.1.5.1 The Contractor shall furnish one copy of Certificates herein required for each signed copy of the Owner-Contractor Agreement and specifically set forth evidence of all coverage required by Paragraph 11.1. The form of the Certificate shall be AIA Document G705 or other similar form acceptable to the Owner. The Contractor shall furnish to the Owner copies of any documents that are subsequently issued amending coverage or limits.

11.2 CONTRACTOR'S PROPERTY INSURANCE

11.2.1 Unless otherwise deleted by the Special Conditions, the Contractor shall provide Builder's Risk and Fire and Extended Coverage Insurance to protect the Owner and Contractor and Subcontractors against loss caused by the perils insured in the amount of 100% of the insurable value of the project.

- 11.2.1.1 Protection for items of labor and materials in place or to be used as part of the permanent work, including surplus materials, temporary structures, and miscellaneous materials and supplies incident to the work are to be included in the policies required herein. The insurance shall further include coverage for vandalism and malicious mischief and Special Extended Coverage Endorsement.
- 11.2.1.2 Policy to be in Builder's Risk Completed Value Form, including the following:
- .1 Policies shall be written to include the names of Contractors and Owner and the words "as their interest may appear";
 - .2 All insurance shall be in effect on or before the date when construction work is to commence; and
 - .3 All insurance shall be maintained in full force and effect until the Date of the Final Payment of the Contract.
- 11.2.2 The Contractor shall purchase and maintain such boiler and machinery insurance as may be required by the Contract Documents or by law. This insurance shall include the interests of the Owner, the Contractor, Subcontractors and Sub-subcontractor's in the Work.
- 11.2.3 Any loss insured under Subparagraph 11.2.1 is to be adjusted with the Owner and made payable to the Owner as trustee for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause and of Subparagraph 11.2.6. The Contractor shall pay each Subcontractor a just share of any insurance monies received by the Contractor, and by appropriate agreement, written where legally required for validity, shall require each Subcontractor to make payments to his Sub-subcontractors in similar manner.
- 11.2.4 The Contractor shall file a copy of a Certificate of Insurance for Property Insurance coverage in accordance with the requirements of Subparagraph 11.1.5.
- 11.2.5 The Owner and Contractor waive all rights against (1) each other and the Subcontractors, Sub-subcontractor's, agents and employees each of the other, and (2) the A/E, if applicable, and separate contractors, if any, and their subcontractors, sub-subcontractor's, agents and employees, for damages caused by

fire or other perils to the extent covered by insurance obtained pursuant to this Paragraph 11.2 or any other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The foregoing waiver afforded the A/E, his agents and employees shall not extend to the liability imposed by Subparagraph 4.21. The Owner or the Contractor, as appropriate, shall require of the A/E, if applicable, separate contractors, Subcontractors and Sub-subcontractor's by appropriate agreements, written where legally required for validity, similar waivers each in favor of all other parties enumerated in this Subparagraph 11.2.5.

11.2.6 The Owner, as trustee, shall have power at its option, to adjust and settle any loss with the insurers.

11.2.7. If the Owner finds it necessary to occupy or use a portion or portions of the Work prior to Substantial Completion thereof, such occupancy shall not commence prior to a time mutually agreed to by the Owner and Contractor and to which the insurance company or companies providing the property insurance have consented by endorsement to the policy or policies. This insurance shall not be cancelled or lapsed on account of such partial occupancy. Consent of the Contractor and of the insurance company or companies to such occupancy or use shall not be unreasonably withheld.

11.3 EFFECT OF SUBMISSION OF CERTIFICATES

11.3.1 The Owner and A/E shall be under no obligation to review any Certificates of Insurance provided by the Contractor or to check or verify the Contractor's compliance with any and all requirements regarding insurance imposed by the Contract Documents. The Contractor is fully liable for the amounts and types of insurance required herein and is not excused should any policy or certificate of insurance provided by the Contractor not comply with any and all requirements regarding insurance imposed by the Contract Documents.

11.4 FAILURE OF COMPLIANCE

11.4.1 Should the Contractor fail to provide and maintain in force any and all insurance, or insurance coverage required by the Contract Documents or by law, or should a dispute arise between Owner and any insurance company of Contractor over policy coverage or limits of liability as required herein, the Owner shall be entitled to recover from the Contractor all amounts payable, as a matter of

law, to Owner or any other parties, including but not limited to the A/E, had the required insurance or insurance coverage been in force. Said recovery shall include, but is not limited to interest for the loss of use of such amounts of money, plus all attorney's fees, costs and expenses incurred in securing such determination and any other consequential damages arising out of the failure of the Contractor or insurance company to comply with the provisions of the Contract Documents, or any policy required hereby, or any other requirements regarding insurance imposed by law. Nothing herein shall limit any damages for which Contractor is responsible as a matter of law.

11.5 OWNER'S INSURANCE

- 11.5.1 The Owner, at his option, may purchase and maintain such insurance as will insure him against loss of use of his property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of his property, including consequential losses due to fire or other hazards however caused, to the extent covered by insurance under this Paragraph.

ARTICLE 12

CHANGES AND MODIFICATIONS IN THE WORK

12.1 CHANGES IN THE WORK

- 12.1.1 The Owner, without invalidating the Contract and without notice to the surety, may order a Change or Modification in the Work consisting of additions, deletions or other revisions to the general scope of the Contract, or changes in the sequence of the performance of the Work. The Contract Sum and the Contract Time shall be adjusted accordingly. All such Modifications in the Work shall be authorized by Change Order, and all Work involved in a Change shall be performed in accordance with the terms and conditions of this Contract. If the Contractor should proceed with a Change in the Work upon an oral order, by whomsoever given, it shall constitute a waiver by the Contractor of any claim for an increase in the Contract Sum and/or Contract Time, on account thereof.
- 12.1.2 When the Owner and Contractor have agreed upon a Modification in the Work, but a written Change Order Document has not yet been

D-70

executed, the Owner may, at its sole discretion and option, direct in writing the Contractor to proceed with the Change in the Work pending the execution of the formal Change Order. Contractor shall proceed in accordance with such direction.

12.2 FIELD ORDER

12.2.1 A Field Order is a written order to the Contractor signed by the Owner or A/E interpreting or clarifying the Contract Documents or directing the Contractor to perform minor changes in the Work. Any work relating to the issuance of a Field Order shall be performed promptly and expeditiously and without additional cost to the Owner and within the Contract Time, unless the Contractor submits a Proposed Change Order, defined below, which is approved by the Owner. Field Orders shall be numbered consecutively by date of issuance by the Owner or A/E.

12.3 REQUEST FOR PROPOSAL

12.3.1 A Request For Proposal describes a proposed Change in the Work. The Contractor is required to submit a complete proposal for the total cost and additional time, if any, necessary to perform the proposed Change in the Work. Requests For Proposals shall be numbered consecutively by date of issuance by the Owner or A/E.

12.4 PROPOSED CHANGE ORDER

12.4.1 A Proposed Change Order is a written request from the Contractor to the Owner requesting a change in the Contract Amount and/or Contract Time. A Proposed Change Order is submitted as a proposal in response to a Request For Proposal or as a claim for an increase in the Contract Sum or Contract Time pursuant to the issuance of a Field Order. A Proposed Change Order must be submitted within twenty (20) days of the issuance of a Request For Proposal or a Field Order. Proposed Change Orders shall be numbered consecutively by date of issuance by the Contractor. The Contractor shall also indicate on the Proposed Change Order the number of the Request For Proposal or the Field Order to which it responds.

12.4.2 In the case of a unit price contract, it is understood and agreed by the Contractor that the estimates of the quantities in unit price items are approximate only and presented solely for the purpose of comparing bids and may not represent the actual amount of work to be performed. The Contractor, therefore, understands and

agrees that the Owner reserves the right to increase, decrease or eliminate entirely the quantity of work to be done under any item, and if called upon to do more work under any item than named in the bidding quantity basis, he will perform all such additional work and accept as payment therefor, the unit price named in the proposal, subject to the 20% deviation limitations specified in subparagraph 12.4.2.2

- 12.4.2.1 The Contractor's Proposed Change Order shall be determined by applicable unit prices, if any, as set forth in the Contract.
- 12.4.2.2 However, if changes in quantities are greater or lesser than twenty percent (20%) of the original bid quantity and the total dollar change of that bid item is significant, the Owner shall have the right to review the unit price and negotiate a new unit price with the Contractor.
- 12.4.2.3 It shall be understood that such unit prices shall constitute full payment for the extra work performed, including plant, materials, labor, equipment, overhead, profit, and safety requirements.
- 12.4.3 If no such unit prices are set forth, then the Contractor's proposal shall be on a lump sum basis and shall be itemized and segregated by labor and materials for the various components of the Change in the Work (no aggregate labor total will be acceptable) and shall be accompanied by signed proposals of any Subcontractors who will perform any portion of the Change in the Work and of any persons who will furnish materials or equipment for incorporation therein.
 - 12.4.3.1 The portion of the proposal relating to labor, whether by the Contractor's forces or the forces of any of its Subcontractors, may include reasonably anticipated gross wages of Job Site labor, including foremen, who will be directly involved in the Change in the Work (for such time as they will be so involved), plus payroll costs (including premium costs of overtime labor, if overtime is authorized, Social Security, Federal or State unemployment insurance taxes and fringe benefits required by collective bargaining agreements entered into by the Contractor or any such Subcontractor in connection with such labor).
 - 12.4.3.2 The portion of the proposal relating to materials may include the reasonably anticipated direct costs to the Contractor or to any of its Subcontractors of materials to be purchased for incorporation in the Change in the Work, plus transportation and applicable sales or use taxes.

- 12.4.3.3 The proposal may further include the Contractor's and any of his Subcontractor's reasonably anticipated rental costs, except small hand tools, in connection with the Change in the Work (either actual rates or discounted local published rates).
- 12.4.4 Base Cost is defined as the total of labor, material and rentals as described in subparagraphs 12.4.3.1, 12.4.3.2 and 12.4.3.3. The actual net cost in money to the Owner for the Change in the Work shall be computed as follows:
- .1 If the Contractor performs the Change in the Work, his compensation will be the Base Costs as described above, plus a maximum mark-up of fifteen percent (15%) on such Base Costs for overhead and profit.
 - .2 If the work is performed by a bona fide Subcontractor, his compensation will be the Base Costs as described above plus a maximum mark-up of fifteen percent (15%) of the Base Cost for overhead and profit. The Contractor's compensation will be a maximum mark-up of five percent (5%) of the Subcontractors Base Costs for his overhead.
 - .3 If the work is performed by a bona fide Sub-subcontractor, his compensation will be the Base Costs as herein described plus a maximum mark-up of fifteen percent (15%) for overhead and profit. The Subcontractors compensation will be a maximum mark-up of five percent (5%) of the Sub-subcontractor's Base Costs for his overhead. The Contractor's compensation will be a maximum mark-up of five percent (5%) of the Sub-subcontractor Base Costs for his overhead.
- 12.4.5 The fifteen percent (15%) mark-up on the cost of labor and materials described above shall compensate the Contractor or Subcontractor or Sub-subcontractor for all indirect costs associated with or relating to the Change in the Work including, but not limited to, gross receipts tax, superintendent, small tools, reproduction, administration, insurance, bonds, safety, temporary structures and offices, all other general and administrative, home office and field office expenses.
- 12.4.5.1 The five percent (5%) mark-up on the cost of labor and materials described above shall compensate the Contractor or Subcontractor for all indirect costs associated with or relating to the change in the Work including but not limited to, gross receipt, tax, superintendent, reproduction, administration, insurance bonds.

12.4.6 In the event that it is necessary to increase the Contract Time in order to perform the Change in the Work, the Contractor shall provide an estimate of the increase in the Contract Time which shall be negotiated by the parties to the contract. The Contractor's request for a time extension shall be evaluated in accordance with the criteria described in Article 8.3.

12.4.7 If the Contractor's Proposed Change Order is rejected by the Owner as being within the scope of the Work required by the Contract Documents the Owner may, at its sole option and discretion, direct the Contractor to perform the Work which is the subject of the said Proposed Change Order; the Contractor shall then promptly proceed with said Work. Nothing herein shall excuse the timely performance by the Contractor of the Work because any Proposed Change Order is pending.

12.5 CHANGE ORDER

12.5.1 A Change Order is a written order to the Contractor signed by the Owner and the A/E, issued after execution of the Contract, authorizing a Change in the Work or an adjustment in the Contract Sum and/or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order. A Change Order signed by the Contractor indicates his agreement therewith, including the adjustment in the Contract Sum and/or the Contract Time. Change Orders shall be numbered consecutively by date of issuance by the Owner or A/E and shall, if applicable, indicate the number of the Field Order(s), Request For Proposal(s) and/or Proposed Change Order(s) to which it relates.

12.5.1.1 If the Owner and A/E determine that the Contractor's Proposed Change Order, submitted pursuant to Article 12.4 for a change in the Contract Sum or Contract Time, is acceptable, the Division of Project Engineering shall prepare and issue, or cause to be prepared and issued, a Change Order which will authorize the Contractor to proceed with the Change in the Work for the cost and time stated in the Proposed Change Order, or as otherwise may be agreed upon by the parties. The amounts stated in the Change Order for the cost and time to perform the Change in the Work shall be binding on the parties.

12.5.2 After issuance of the Change Order, the Contractor shall ensure that the amount of the Performance and Payment Bond coverage has been revised to reflect the increase in the Contract Sum due to the Change Order.

- 12.5.3 If the Contractor's Proposed Change Order is not acceptable to the Owner and the A/E or if the parties are unable to otherwise agree as to the cost and time necessary to perform the Change in the Work, the Owner may, at its sole option and discretion, direct the Contractor to perform the Work on a time and material basis. The Contractor shall then promptly proceed with the Work.
- 12.5.4 If the Owner and A/E elect to have the Change in the Work performed on a time and material basis, the same shall be performed, whether by the Contractor's forces or the forces of any of its Subcontractors or Sub-subcontractor's, at actual cost to the entity performing the Change in the Work (without any charge for administration, clerical expense, supervision or superintendent of any nature whatsoever, or the cost, use or rental of tools or plant). The percent mark-ups for the Contractor, Subcontractors and Sub-subcontractor's shall be described in subparagraphs 12.4.4 and 12.4.5.
- 12.5.4.1 Prior to starting the work on a time and material basis, the Contractor shall notify the A/E in writing as to what labor, materials, equipment or rentals are to be used for the Change in the Work. During the performance of the Change, the Contractor shall submit to the Owner daily time and material tickets, which shall list the categories and amounts of labor and equipment for which Change Order compensation is to be charged for the previous work day. Such tickets shall specifically include the following information: location and description of the Change in the Work, the classification of labor employed, including names and social security numbers of laborers, labor trades used, manhours, wage rates, insurance, taxes and fringe benefits, equipment and materials suppliers' quotations with detailed break-out and pricing, rental equipment hours and rates, and materials quantities and unit prices and such other evidence of cost as the Owner may require.
- 12.5.4.2 The Contractor shall commence submission of daily time and material tickets immediately upon commencement of the Change Order Work and continue to submit them until completion of the Change Order Work. The Owner may require authentication of all time and material tickets and invoices by persons designated by the Owner for such purpose.
- 12.5.4.3 The failure of the Contractor to provide any required authentication shall, if the Owner elects to treat it as such, constitute a waiver by the Contractor of any claim for the cost of that portion of the Change in the Work covered by a non-authenticated

ticket or invoice; provided, however, that the authentication of any such ticket or invoice by the Owner shall not constitute an acknowledgment by the Owner that the items thereon were reasonably required for the Change in the Work.

12.5.5

The Contractor shall submit its complete submission of the reasonable actual cost and time to perform the Change in the Work within twenty (20) days of the request of the A/E to do so. The Owner and the A/E shall review the costs and time submitted by the Contractor on the basis of reasonable expenditures and savings of those performing the Change in the Work. If such costs and time are acceptable to the Owner and the A/E, or if the parties otherwise agree to the actual reasonable cost to perform the Change in the Work, the A/E shall issue a Change Order for the cost and time agreed upon. The amounts stated in the Change Order for the cost and time to perform the Change in the Work shall be binding upon the parties.

12.5.6

The Contractor shall not be entitled to any amount for indirect costs, damages or expenses of any nature, including, but not limited to, so-called "impact" costs, labor inefficiency, wage, material or other escalations beyond the prices upon which the proposal is based, and which the Contractor, its Subcontractors or Sub-subcontractor's or any other person may incur as a result of delays, interferences, suspensions, changes in sequence or the like, for whatever cause, whether reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable, arising from the performance of any and all changes in the Work performed pursuant to this Article 12. It is understood and agreed that the Contractor's sole and exclusive remedy in such event shall be recovery of his direct costs as compensable hereunder and an extension of the Contract Time, but only in accordance with the provisions of the Contract Documents.

12.6

UNILATERAL CHANGE ORDER

12.6.1

In the event that the parties are unable to agree as to the reasonable cost and time to perform the Change in the Work and the Owner does not elect to have the Change in the Work performed on a time and material basis, the Owner and the A/E shall make a unilateral determination of the reasonable cost and time to perform the Change in the Work, based upon their own estimates, the Contractor's submission or a combination thereof. A Change Order shall be issued for the amounts of cost and time determined by the Owner and the A/E and shall become binding upon the Contractor unless the Contractor submits its protest in writing to the Owner

within thirty (30) days of the issuance of the Change Order. The procedure for the resolution of the Contractor's protest shall be as described in Article 12.10. Owner has the right to direct in writing the Contractor to perform the Change in the Work, which is the subject of such Unilateral Change Order. Failure of the parties to reach agreement regarding the cost and time of performing the Change in the Work, or any pending protest, shall not relieve the Contractor from performing the Change in the Work promptly and expeditiously. (Revised 06/15/83)

12.7

DECREASES AND WORK NOT PERFORMED

12.7.1

Should it be deemed expedient by the Owner or A/E at any time that the works are in progress to decrease the dimensions, quantity of material or work, or vary in any other way the work herein contracted for, the Owner or A/E shall have the full power to do so, and shall order and direct, in writing, such decreases to be made or performed without in any way affecting the enforcement of said Contract. The Contractor shall, in pursuance of such written orders and directions from the said Owner or A/E, execute the work thereby ordered and directed, and the difference in expense occasioned by such decrease or diminution so ordered shall be deducted from the amount payable under this Contract.

12.7.2

If work is not performed, and such deletion of work is not approved by the Owner, the A/E shall ascertain the amount of the credit due the Owner based on the reasonable value of the labor and materials so deleted, for the lesser amount of materials and labor required.

12.7.3

If work is deleted from the Contract by Change Order, the amounts to be credited to the Owner shall reflect the same current pricing as if the work were being added to the Contract at the time the deletion is ordered, and documentation will be required for a credit as specified in Article 12.5.4. If such deleted materials and equipment shall have already been purchased and stored on site and cannot be used in other projects, returned for credit or cannot be returned for credit at the price paid by the Contractor at the time of purchase, the Contractor shall be entitled, upon proper documentation and certification, to an adjustment in the pricing of the credit to avoid hardship to the Contractor. If necessary in order to establish such reasonable value, the Contractor may be required to submit a detailed breakdown of his original bid for the items or work involved.

12.8

CHANGES IN LINE AND GRADE

12.8.1

The Owner reserves the right through its A/E to make such alterations in the line and grade of various structures or pipe lines shown on the drawings, as may be necessitated by conditions found during construction or that in the judgment of the A/E appears advisable. The Contractor shall not claim forfeiture of Contract by reason of such changes by the Owner's A/E. In case of a unit price contract, if such changes increase the amount of the work or materials, the Contractor will be paid according to the quantity of work actually done at the prices established for such work under the Contract.

12.8.2

In case of a lump sum contract, the price for the work shall be negotiated as herein provided. If such alterations or changes diminish the quantity of work to be done, they shall not constitute a claim for damages or for loss of anticipated profits in the work which may be dispensed with, and the work as constructed shall be paid for in accordance with the Contract prices as established for such work under this Contract, as stated in the proposal submitted by the Contractor.

12.9

SUBSURFACE CONDITIONS FOUND DIFFERENT

12.9.1

Should the Contractor encounter subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, he shall immediately give notice to the A/E of such conditions before they are disturbed. The A/E shall thereupon promptly investigate the conditions and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once make such changes in the drawings and/or specifications as he may find necessary. Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustments as to extra and/or additional work and changes. However, neither the Owner nor the A/E shall be liable or responsible for additional work, costs or changes to the work due to material differences between actual conditions and any geotechnical, soils and other reports, surveys and analyses made available for the Contractor's review.

12.10

CLAIMS FOR ADDITIONAL COST AND/OR TIME

12.10.1

If the Contractor wishes to make a claim for an increase in the Contract Sum and/or Contract Time, he shall give the A/E written notice thereof within twenty (20) calendar days after the

occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the Work, except in an emergency endangering life or property in which case the Contractor shall proceed as provided in Article 10. No claim shall be allowed and no amounts paid for any and all costs incurred more than twenty (20) days prior to the time notice is given to the A/E as herein provided. Any change in the Contract Sum and/or Contract Time resulting from such claim shall be authorized by Change Order. The Contractor's complete claim submittal, for an increase in the Contract Sum, shall be submitted no later than twenty (20) calendar days after the work for which the claim is made has been completed or after the request of the Owner or A/E.

- 12.10.2 If the Contractor claims that additional cost or time is involved because of, but not limited to, (1) any written interpretation pursuant to Article 2, (2) any order by the Owner to stop the Work pursuant to Article 3 where the Contractor was not at fault, (3) failure of payment by the Owner pursuant to Article 9; the Contractor shall make such claim as provided in Subparagraph 12.8.1 or (4) any written order for a minor change in the Work issued pursuant to Article 12.10.1 .

ARTICLE 13

UNCOVERING AND CORRECTION OF WORK

13.1 UNCOVERING OF WORK

- 13.1.1 If any portion of the Work should be covered contrary to: (1) the request of the A/E or Owner; (2) requirements specifically expressed in the Contract Documents; or (3) the requirements of applicable Construction Permits, it must, if required in writing by the A/E or Owner be uncovered for their observation and shall be replaced at the Contractor's expense.
- 13.1.2 If any other portion of the Work has been covered which the A/E or Owner has not specifically requested to observe prior to being covered, the A/E or Owner may request to see such Work and it shall be uncovered by the Contractor. If such Work be found in accordance with the Contract Documents, the cost of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work be found not in accordance with the Contract Documents, the Contractor shall pay such costs unless it

be found that this condition was caused solely by the Owner, in which event the Owner shall be responsible for the payment of such costs. If such Work be found not in accordance with the Contract Documents and the condition was caused by a separate contractor, Contractor may proceed against said separate contractor as provided in Article 6.

13.2 WARRANTY AND CORRECTION OF WORK

13.2.1 The Contractor guarantees and warrants to the Owner all work as follows:

- .1 That all materials and equipment furnished under this Contract will be new and the best of its respective kind unless otherwise specified;**
- .2 That all Work will be of first-class quality and free of omissions and faulty, poor quality, imperfect or defective material or workmanship;**
- .3 That the Work shall be entirely watertight and leakproof in accordance with all applicable industry customs and practices, and shall be free of shrinkage and settlement;**
- .4 That the Work, including but not limited to, mechanical and electrical machines, devices and equipment shall be fit and fully usable for its intended and specified purpose and shall operate satisfactorily with ordinary care;**
- .5 That consistent with requirements of the Contract Documents the Work shall be installed and oriented in such a manner as to facilitate unrestricted access for the operation and maintenance of fixed equipment; and**
- .6 That the Work will be free of abnormal or unusual deterioration which occurs because of poor quality materials or workmanship.**

13.2.2 All Work not conforming to guarantees and warranties specified in the Contract Documents, including substitutions not properly approved and authorized, may be considered defective. If required by the A/E, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

13.2.3 The Contractor shall within five (5) working days after receipt of written notice from the A/E or Owner during the performance of the

Work, reconstruct, replace or correct all Work rejected by the A/E or Owner as defective, as failing to conform to the Contract Documents, or as not in accordance with the guarantees and warranties specified in the Contract Documents whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear all costs of reconstructing, replacing or correcting such rejected Work, including compensation for the A/E's additional services made necessary thereby.

- 13.2.4 If, within one year after the Date of Substantial or Final Completion of the Work or designated portion thereof or within one year after acceptance by the Owner of designated equipment or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be defective, not in accordance with the Contract Documents, or not in accordance with the guarantees and warranties specified in the Contract Documents, the Contractor shall correct it within five (5) working days after receipt of a written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This obligation shall survive termination of the Contract. The Owner shall give such notice promptly after discovery of the condition.
- 13.2.5 If at any time deficiencies in the Work are discovered which are found to have resulted from fraud or misrepresentation, or an intent or attempt to defraud the Owner by the Contractor, any Subcontractor or Supplier, the Contractor will be liable for replacement or correction of such Work and any damages which Owner has incurred related thereto, regardless of the time limit of any guarantee or warranty.
- 13.2.6 Any materials or other portions of the Work, installed, furnished or stored on site which are not of the character or quality required by the specifications, or are otherwise not acceptable to the A/E or Owner, shall be immediately removed and replaced by the Contractor to the satisfaction of the A/E or Owner, when notified to do so by the A/E or Owner.
- 13.2.7 If the Contractor fails to correct defective or nonconforming Work as required by Articles 13.2.3 and 13.2.4, or if the Contractor fails to remove defective or nonconforming Work from the site, as required by Article 13.2.6, the Owner may elect to either correct such Work in accordance with Article 3.5 or remove and store

materials and equipment at the expense of the Contractor. If the Contractor does not pay the cost of such removal and storage within ten days thereafter, the Owner may upon ten additional days' written notice sell such Work at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs that should have been borne by the Contractor, including compensation for the A/E's additional services made necessary thereby. If such proceeds of sale do not cover all costs which the Contractor should have borne, the difference shall be charged to the Contractor and an appropriate Change Order shall be issued. If the payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

13.2.8 The Contractor shall bear the cost of making good all work of the Owner, separate contractors or others, destroyed or damaged by such correction or removal required under this Article.

13.3 ACCEPTANCE OF FAULTY, DEFECTIVE OR NON-CONFORMING WORK

13.3.1 If the Owner prefers to accept faulty, defective or nonconforming Work, he may do so instead of requiring its removal and correction, in which case a Change Order will be issued at Owner's option, to reflect a reduction in the Contract Sum in an amount to be determined by the Owner and A/E.

13.4 NO LIMITATION OF LIABILITY

13.4.1 Nothing contained in this Article shall be construed to establish a period of limitation with respect to any other obligation which the Contractor might have under the Contract Documents. The establishment of the time period of one year after the Date of Substantial or Final Completion or such longer period of time as may be prescribed by law or by the terms of any warranty required by the Contract Documents relates only to the specific obligations of the Contractor to correct the Work, and has no relationship to the time within which his obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to his obligations other than specifically to correct the Work.

ARTICLE 14

TERMINATION OF THE CONTRACT

14.1 CONTRACTOR'S RIGHT TO STOP WORK OR TERMINATE CONTRACT

14.1.1 If the Work shall be stopped by order of the Court or any other public authority for a period of three consecutive months without act or fault of the Contractor or any of his agents, servants, employees or Subcontractors, the Contractor may, upon 10 days' notice to the Owner, discontinue his performance of the Work and/or terminate the Contract. The Contractor may recover from the Owner payment for all Work executed and for any proven loss sustained upon any materials, equipment, tools, construction equipment and machinery, including reasonable profit and damages. The Contractor shall not be obligated to pay to the Owner any excess of the expense of completing the Work over the unpaid balance of the compensation to be paid the Contractor hereunder.

14.2 OWNER'S RIGHT TO TERMINATE CONTRACT FOR CAUSE

14.2.1 The Owner, without prejudice to any other rights or remedy it may have, may by seven (7) days' notice to the Contractor, terminate the employment of the Contractor and his right to proceed either as to the entire Work or (at the option of the Owner) as to any portion thereof and may take possession of the Work and complete the Work by contract or otherwise as the Owner may deem expedient if, in the opinion of the Owner:

- .1 The insolvency, bankruptcy or financial condition of the Contractor will hinder or impede the Contractor's fulfillment of all contractual obligations, including completion within the Contract Time; or
- .2 The Contractor shall refuse or fail, after Notice from the A/E or Owner, to supply enough properly skilled workmen or proper material; or
- .3 The Contractor shall refuse or fail to prosecute the Work or any part thereof with such diligence as will insure its completion within the period herein specified (or any duly authorized extension thereof) or shall fail to complete the work within said period; or
- .4 The Contractor shall fail to make prompt payment to persons supplying labor or materials for the work; or

- .5 The Contractor shall refuse or fail to properly schedule and plan the Work, as specified herein, so as to perform the Work within the specified Milestone and Completion dates, or to provide scheduling or related information, revisions and updates as required by the Contract Documents; or
- .6 The Contractor shall fail or refuse to regard laws, permits, ordinances, resolutions, or the instructions of the Owner or A/E, or otherwise be guilty of a substantial violation of any provision of this contract.

14.2.2 If the Owner so terminates the employment of the Contractor, the Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the compensation to be paid to the Contractor hereunder shall exceed the expense of so completing the work (including compensation for additional managerial, administrative and inspection services and any damages for delay) such excess shall be paid to the Contractor.

14.2.3 If such expenses shall exceed the unpaid balance, the Contractor and his sureties shall be liable to the Owner for such excess. If the right of the Contractor to proceed with the work is partially or fully terminated, the Owner may take possession of and utilize in completing the Work such materials, appliances, supplies, plant and equipment as may be on the site of the terminated portion of the Work and necessary for the completion of the Work. If the Owner does not fully terminate the right of the Contractor to proceed, the Contractor shall continue to perform the part of the Work that is not terminated.

14.3 OWNER'S RIGHT TO TERMINATE CONTRACT FOR CONVENIENCE

14.3.1 The performance of work under this contract may be terminated by the Owner in accordance with this article in whole, or from time to time in part, whenever the Owner shall determine that such

termination is in the best interest of the Owner. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

14.3.2 After receipt of a Notice of Termination, the Contractor shall submit to the Owner his termination claim, in the form and with certification prescribed by the Owner. Such claim shall be submitted promptly but in no event later than three (3) months from

the effective date of termination, unless one or more extensions in writing are granted by the Owner upon request of the Contractor made in writing within such three (3) month period or authorized extension thereof. However, if the Owner determines that the facts justify such action, he may receive and evaluate any such termination claim at any time after such three (3) month period or any extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the Owner may determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination.

14.3.3 Subject to the provisions of subparagraph 14.3.2, the Contractor and the Owner may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of Work pursuant to this article, which amount or amounts may include a reasonable allowance for profit on Work completed; provided that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount if satisfactory to the Owner. Nothing in subparagraph 14.3.4 of this article, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Owner to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this article shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this subparagraph 14.3.3.

14.3.4 In the event of the failure of the Contractor and the Owner to agree, as provided in subparagraph 14.3.3, upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this article, the Owner shall pay to the Contractor the amounts determined by the Owner as follows, but without duplication of any amounts agreed upon in accordance with subparagraph 14.3.3.

14.3.4.1 With respect to all contract work performed prior to the effective date of the Notice of Termination, the total payment (without duplication of any items) shall consist of:

- .1 The cost of such work;
- .2 The cost of settling and paying claims arising out of the termination of Work under subcontracts or orders as provided in paragraph 14.4.1.3, exclusive of the amounts

D-85

paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of work under this contract, which amounts shall be included in the cost on account of which payment is made under (.1) above;

- .3 A sum, as profit on (.1) above, determined by the Owner to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (.3) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and
- .4 The reasonable cost of the preservation and protection of property incurred pursuant to paragraph 14.4.1.9 and the reasonable costs of settlement, including accounting, legal, clerical and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination and settlement of subcontracts thereunder.

14.3.4.2 The total sum to be paid to the Contractor under subparagraph 14.3.4.1 above shall not exceed the total Contract Sum as reduced by the amount of payment otherwise made and as further reduced by the contract price of Work not terminated. Except for normal spoilage, and except to the extent that the Owner shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor under 14.3.4.1 above, the fair value, as determined by the Owner, of property which is destroyed, lost, stolen, or damaged so as to become unusable or undeliverable to the Owner, or to a buyer pursuant to Article 14.4.1.7.

14.3.5 In arriving at the amount due the Contractor under this article there shall be deducted:

- .1 All unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this Contract;
- .2 Any claims which the Owner may have against the Contractor in connection with this Contract; and
- .3 The agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this article, and not otherwise recovered by or credited to the Owner.

D-86

14.3.6 If the termination hereunder be partial, prior to the settlement of the terminated portion of this Contract, the Contractor may file with the Owner a request in writing for an equitable adjustment of the price or prices specified in the Contract relating to the continued portion of the Contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

14.3.7 The Owner may, from time to time, and under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this Contract whenever in the opinion of the Owner the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this article, such excess shall be payable by the Contractor to the date on which such excess payment is repaid to the Owner upon demand, together with interest computed at the legal rate of interest for the period from the due date, such excess payment is received by the Contractor provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the A/E by reason of the circumstances.

14.4 CONTRACTOR'S RESPONSIBILITIES UPON TERMINATION

14.4.1 After receipt of a Notice of Termination pursuant to Article 14.2 or 14.3 and except as otherwise directed by the Owner, the Contractor shall:

- .1 Stop work under the contract on the date and to the extent specified in the Notice of Termination;
- .2 Place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the Work under the Contract as is not terminated;
- .3 Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

D-87

- .4 At the option of the Owner, assign to the Owner, in the manner, at the time, and to the extent directed by the Owner, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Owner shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- .5 Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Owner, to the extent he may require, which approval or ratification shall be final for all the purposes of this article;
- .6 Transfer title and deliver to the Owner in the manner, at the times, and to the extent, if any, directed by the Owner:
 - .1 The fabricated or unfabricated parts, work in process, completed Work, supplies, and other material procured as a part of, or acquired in connection with the performance of, the Work terminated by the Notice of Termination, and
 - .2 The completed or partially completed drawings, releases, information, manuals and other property which, if the Contract had been completed, would have been required to be furnished to the Owner;
- .7 Use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Owner, any property of the types referred to in 14.4.6 above, provided, however, that the Contractor:
 - .1 Shall not be required to extend credit to any purchaser, and
 - .2 May acquire any such property under the conditions prescribed by and at a price or prices approved by the Owner and provided further that the process of any such transfer or disposition shall be applied in reduction of any payments to be made by the Owner to the Contractor under this Contract or shall otherwise be credited to the price or cost of the work covered by this Contract or paid in such other manner as the Owner may direct;
- .8 Complete performance of such part of the Work as shall not have been terminated by the Notice of Termination; and

D-88

- .9 Take such action as may be necessary, or as the Owner may direct, for the protection and preservation of the property related to this Contract which is in the possession of the Contractor and in which the Owner has or may acquire an interest.

14.5

DISPUTES UPON TERMINATION

14.5.1

The provisions of 7.4 shall be applicable to any claim, dispute or other matter arising because of termination under this Article 14.

D-89

Plaintiff's Amended Motion
for Judgment - Exhibit B

FAIRFAX COUNTY, VIRGINIA

MEMORANDUM

TO: Larry Spaine, Director
Facilities Management Division **DATE** May 7, 1984 .

FROM: Richard P. Robertson
Project Management Division - DPW *RR*

FILE NO:

SUBJECT: Old Courthouse Renovation, Project 61/9149

REFERENCE:

The Mechanical Engineer is suggesting an enlargement of the existing boiler room and adjacent electrical room to house two new chillers. Attached is a plan showing the proposed ground floor expansion. The location of the security corridor addition is as originally planned for the First and Second Floors.

The room addition for the chillers would be only one story high. It is planned to place the two cooling towers (BAC# VXT N215) on the roof of this room, which would elevate the cooling towers to the First Floor level. Each tower would be, essentially, directly above the chillers.

Existing VEPCO transformer will require relocation.

I would like to proceed with this change, but request your review prior to final direction to the Architect. Please advise by May 11 if you have any objections or suggestions.

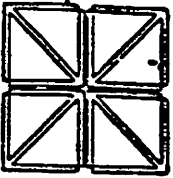
Thank you.

RPR:pg
Attachment: a/s
cc: Vincent M. Picciano, w/attachment
Dan Magorian, w/attachment
John W. di Zerega
Jack Stewart, w/attachment

See Project File

Plaintiff's Amended Motion
for Judgment - Exhibit C

Memo



er & Graef
Architects Group
Practice
Hunter, Miller +
Associates

A JOINT VENTURE

110 South Lee Street
Alexandria, Virginia 22314
(703) 548-0600

Job Number: 82.525.03 FFX CTY 61/9149
Project: Fairfax County Old Courthouse Renovation
From: David R. Gallagher *DRC*
To: Richard Robertson

Date: 19 October 1984

Re: Unknown Site Conditions.

Available information is insufficient for proper documentation of new site/utility work associated with this Project. Be advised that the following conditions exist:

1. ELECTRICAL - A new underground, direct-burial primary will be installed by Vepco from West Street to the new transformer pad location in the area between the Jail and the Courts wing. Existing information concerning sub-surface conditions in this area is inadequate. The potential for damage to other existing buried utilities in this area is real. An underground duct-bank is to be installed between the transformer pad and the electrical equipment room. Here too sub-surface conditions are unknown.
2. STORM SEWER SYSTEM - At present the condensate drain system is designed to exit the building to the West - tying into known storm sewer locations. Other storm sewer pipes exist but their locations are not known. These pipes could be used for condensate drains thus reducing the length of pipe run and improving head-room in the lower level.
3. FIRE MAIN - Actual hydrant location varies from "Record" location on City's drawings by approximately 100 feet. The position of the hydrant valve is known. Lacking evidence to the contrary, the engineer must assume that the pipe runs straight between valve and hydrant. In fact, it may not; thus, creating the potential for delays and additional cost.
4. SANITARY SEWER - Visual inspection by the Engineer has established a "rough idea" of the sanitary sewer location. Information concerning inverts and profile is non-existent. It appears that the new sewage system will have to include an ejector pump for Lower Level floor areas. Accurate invert information may prove this to be unnecessary, allowing deletion of this costly and maintenance intensive item.

Page Two

5. GAS - Meter locations shown on existing "Record Drawings" do not correspond to those observed in the field. The presense of underground gas mains on-site has been established. They appear to be of an inappropriate type of pipe. Their exact location (plan and profile) is unknown. One such gas line is located in the area which is to be excavated for the new chiller room construction with associated new underground electrical service, duct bank, fuel oil tank, and lines.

In order to minimize the potential for Construction Phase delays and additional cost, an accurate site plan should be provided. Such a plan should include the following:

1. An accurate location of all structures and site boundaries.
2. All utilities located "In Plan".
3. Sanitary Sewer located "In Plan" and profile.
4. Datum check and establishment of "Benchmarks" as required to correlate the topographic information indicated below.
5. Topographic information at all areas where new utility services are to be provided.
6. Topographic information at areas where exterior additions are proposed..
 - a. Chiller Room, Electric Service Pads, Dumpster Pad area, including elevation of lower level floor at existing loading area.
 - b. New entrance ramp and revised curbs and sidewalk, including elevation of first floor at existing point of entry.
 - c. New south egress stair exit to grade, including elevation of first floor at proposed point of exit.

As previously noted, the scope of site information requested above is intended to minimize the potential for construction phase problems. Less comprehensive site information will result in correspondingly greater "Risk" for the Owner. Please review the situation and advise us of your intentions.

Plaintiff's Amended Motion
for Judgment - Exhibit D

CL 54

FAIRFAX COUNTY, VIRGINIA

MEMORANDUM

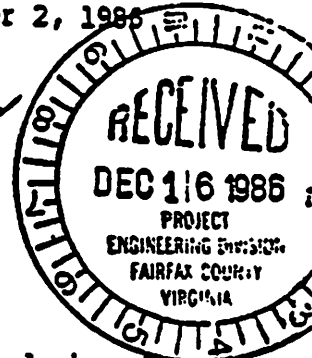
TO: Harry Furney, Project Engineer
Project Engineering
FROM: Vincent M. Picciano, Director of Court Services
Juvenile Court

DATE December 2, 1986

FILE NO:

SUBJECT: Change Orders for Old Courthouse Renovation

REFERENCE:



This memo delineates the changes we are requesting in the design for the renovation of the Old Courthouse.

The changes that we are requesting result from a variety of factors. Some items are changes we had requested before the final plans were prepared for bidding. At that time, in order to expedite the bidding process, the court was asked to table any further changes in the design until the final plans were contracted on. After the contract was awarded, we would then be able to submit our proposals as change orders. We are now doing so.

An issue that was discussed during the design process was the necessity for built-in security devices at the public entrances to all the courtrooms. The security devices do not appear on the plans and we are requesting that they be added.

The most extensive revision that we are requesting is due to a change in the function of the court's Domestic Relations Unit. In 1986, a change in the Code mandated that the child support collection system which had been the responsibility of the Virginia county courts would now be a state agency responsibility. This change led to a redesign of the function of our Domestic Relations Unit, which has altered the space requirements of that unit. Domestic Relations clients will now complete intake interviews and forms in the Domestic Relations Unit rather than being processed by the Central Intake Unit as has been done in the past. This added intake function requires space for additional clerical support, an expanded waiting area, a conference room, and forms storage.

In addition to the changes listed below, we also request a thorough review of the voice and data communication system plans. Our requirements for the courthouse include CRT and telephone hookups in each office and reception area. We are not certain that this capability is included in the existing plans.

The rooms affected by the changes we are requesting are identified by architectural room number, and are categorized by the court unit which will be occupying that space.

VMP:fec
0856B

135

Copy to: Michael J. Valentine, Chief Judge
Verdia L. Haywood, Deputy County Executive

Harry Furney, Project Engineer
IN RE: Change Orders for the Old Courthouse Renovation

I. Intake Unit

- A. Rooms 1121 and 1123 - Millwork item N-135, Intake Clerk's Counter
Change the section of plexiglass with 8 inch and 3 inch slots to a 4' x 4' sliding plexiglass window.
- B. Room 1124 - Millwork item N-139, Form Storage Wall Unit
Revise the dimensions for the forms storage wall unit. We need a minimum of 50 slots at 15" deep, 12" wide, and 9" high.
- C. Room 1110 - Mail Center
We will require millwork to provide a mail sorting station. We also need a cable hookup for a CRT in this area.

II. Clerk of the Court

- A. Room 1055 and 1070 - Millwork item N-103, Clerk's Counter
Change plexiglass portions to windows which can be opened and closed. Must be able to see through the windows when they are closed.
- B. Room 1109 and 1110 - Millwork item N-137, Clerk's Counter
Remove plexiglass panel to make an open counter.
- C. Room 1083 - File Clerk's Office
Add CRT hookup on wall dividing Room 1083 and 1080. This will allow placement of a terminal to be used for case file reviewing.
- D. Rooms 1053 and 1046
 - 1. Millwork item N-134, Court Recorder's Counter
Change section of plexiglass with 8-inch and 3-inch slots to a 4' x 4' sliding plexiglass window.
 - 2. Change in wall dividing Rooms 1053 and 1046
Move wall five feet (5') back into Room 1053 to align with the wall for Room 1052. This will give additional seating space in the waiting area. In the original plans, only the public access window and counter was to be moved forward, not the entire wall.

Harry Furney, Project Engineer
IN RE: Change Orders for the Old Courthouse Renovation

D. Room 1071 - Secure Corridor

Add built-in storage closet with locking doors for supplies in the secure corridor (Room 1071) outside of Rooms 1081 and 1086. This will give the Clerk of the Court and the judges a storage area for office supplies.

III. Courtrooms

- A. Built-in security metal detectors are to be installed at the public entrances to all the courtrooms pursuant to previous discussions on court security. A detector should be installed at the entrance to the corridor leading back to the D, E, F, and G courtrooms and judges' chambers. Detectors should be installed at each public entrance to courtrooms A, B, and C.
- B. All judges' benches need to have built-in storage for codebooks. This storage was discussed at previous meetings but we are not certain that it appears on the millwork plans. The minimum dimension requirements are 6 linear feet of shelves, at 12 inches high and 11 inches deep.

IV. Lobby

A. Room 1055, Millwork item N-102 - Information Desk

Build canopy or bulkhead with lighting over the desk. See the attached sketch.

B. Rooms 1058 and 1059

- 1. Reverse door swings on both doors.
- 2. Add adjustable shelving to Room 1059

V. Commonwealth's Attorney

A. Room 1032

Add door between 1032 and the hallway leading back to offices.

B. Room 1034

Change location of the door so it is placed directly across the hall from the door in Room 1033.

Harry Furney, Project Engineer
IN RE: Change Orders for the Old Courthouse Renovation

VI. Outreach Detention

A. Rooms 1016 and 1013

Add a door between these two offices. The door should be placed on the east (toward the front of the building) half of the wall.

B. Rooms 1010 and 1006

Plans call for the existing door to be blocked off. Change to leave the existing door as is.

VII. Probation

A. Rooms 2165 and 2166

Delete the wall dividing these two offices. This will provide a larger, open space for the reception and waiting area.

VIII. Administration

A. To increase the sizes of Rooms 2137, 2135 and 2131

1. Move the wall between Rooms 2131 and 2120 one foot (1') east.
2. Move the wall between Rooms 2135 and 2133 two feet (2') east.
3. Move the wall between Rooms 2137 and 2135 one foot (1') east.

B. Rooms 2134 and 2136

Move the outer wall toward corridor to align with the outer wall of Room 2132.

C. Room 2122

Delete the corridor (east/west) wall of this office and add a north/south wall nine feet (9') east of wall between 2122 and 2132.

This change will require the addition of a window heating unit in Room 2122.

Harry Furney, Project Engineer
IN RE: Change Orders for the Old Courthouse Renovation

D. Room 2102

Change the design for the kitchen area for the conference/training room to include a recessed coffee counter with under-counter dishwasher and refrigerator. See the attached design by Alan B. Cox.

IX. Domestic Relations Space

We would like this area redesigned. See the attached concept sketch. This sketch is intended only as a means of reflecting some of our requirements for the space; i.e., space for 15 positions, waiting area for 12 people, space for a receptionist and 3 clerical staff, a forms storage area, conference room, 2 CRT's and a printer. The sketch does not include the conference room but this must be addressed in the redesign. Our proposed redesign will affect Rooms 2068, 2070, 2073, 2074, 2075, 2076, 2093, 2094, 2095, 2096, 2101, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111.

X. Special Services

A. Room 2026

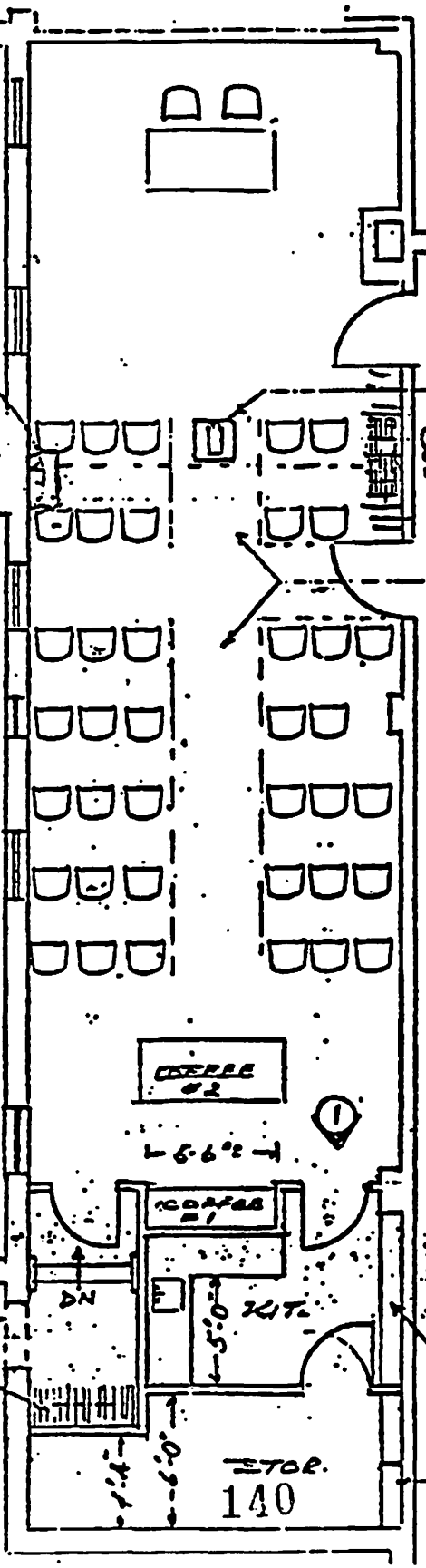
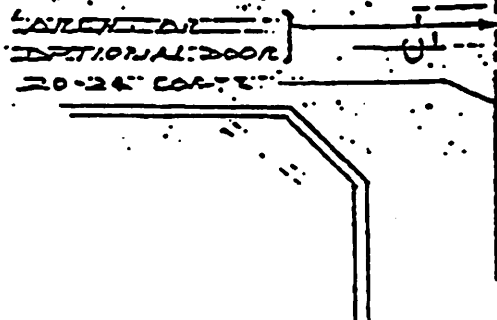
Change the wall between Rooms 2026 and 2046 to include a 4' x 4' plexiglass sliding window. The bottom of the window should be 3' off the floor. This will enable the clerks to view the waiting area.

0856B

solid bar

10'2 1/2" x 14'0" TYPICAL

SPACE SHOWN IN LECTURE CONFIGURATION W/ SEATING FOR 40 + 2 INSTRUCTORS. KITCHEN CONCEPT REVISED TO INCLUDE RECESSED COFFEE COUNTER...



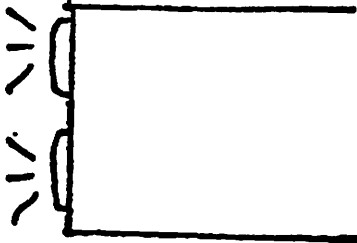
.....ELEVATION ①
RECESSED COFFEE COUNT.

FAIRFAX CITY
* CONFERENCE ROOM
#21002-59
12-16-83

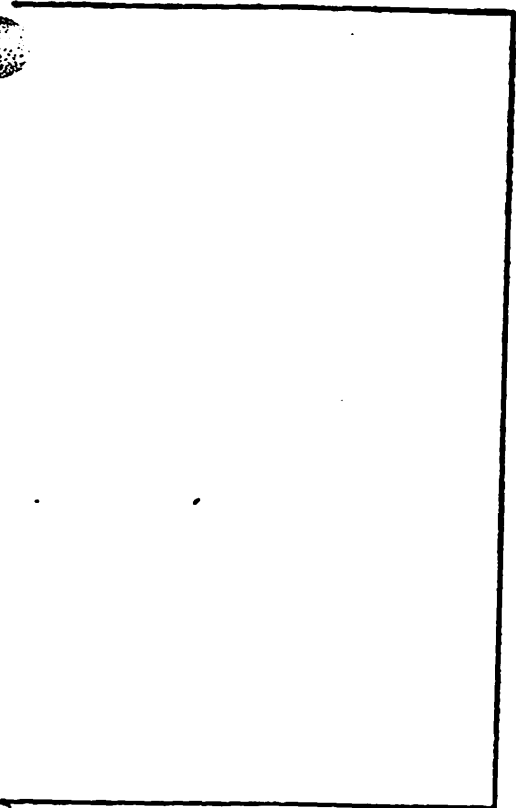
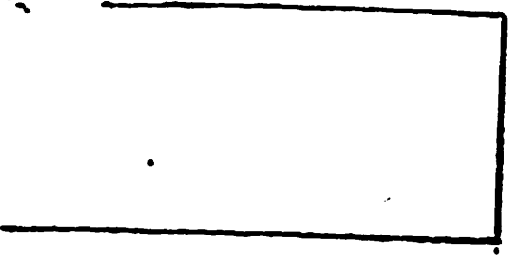
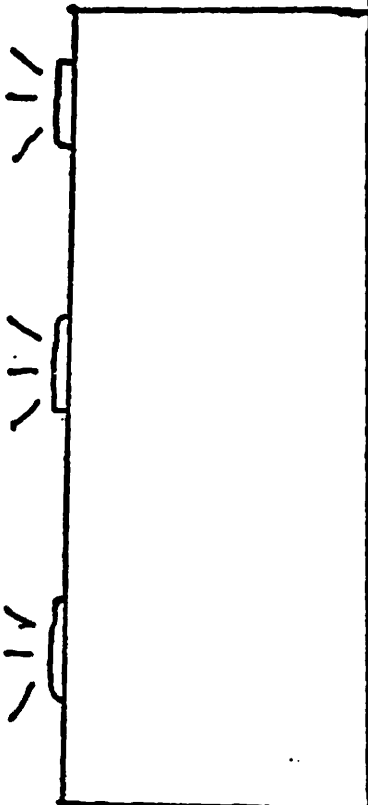
COUNTERS 6'0" W x 1'0" D
SHELVING 6'0" W x 1'0" D
TOTAL COUNTERS - 32 ft

Information Desk

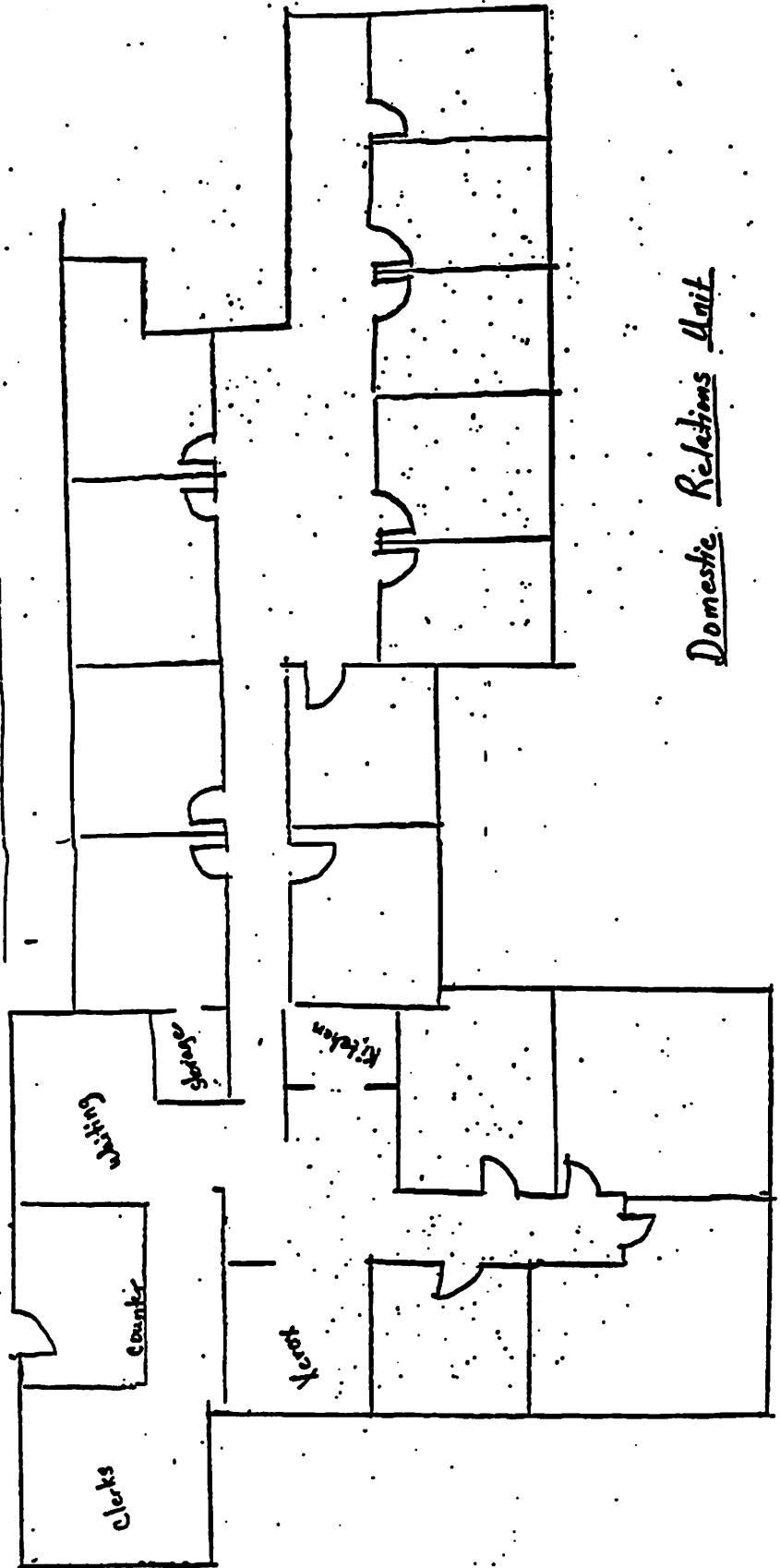
Side View



Front View



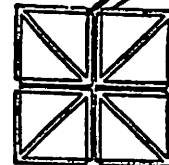
MAIN CORRIDOR



Domestic Relations Unit

Plaintiff's Amended Motion
for Judgment - Exhibit E

Transmittal



Neer & Graef
Architects Group
Practice
Hunter/Miller +
Associates

A JOINT VENTURE

225 N. Fairfax St.
~~110 South Lee Street~~
Alexandria, Virginia 22314 -2694
(703) 548-0600

Job Number: 85.525.10 FFX CTY 461/009149
Project: Fairfax County Old Courthouse Renovation
From: Stephen F. Ours *SFO*
To: Harry R. Furney

Date: 11 November 1986

We are sending you the following material:



Number of copies:	Description:	Set, sheet or document number:	Dated:
1*	Submittal D-02061-001-A, Schedule for Salvage/Demolition, Approved, as Noted.		6 Nov 86
1	Basement, First Floor and Second Floor Plans, w/ Framing indicated, prepared by William Deming, Architect.	1, 2 & 3	9 Apr 28
1	1951 Addition Structural Drawings, prepared by Robert A. Willgoos.	S1 - S4	10 Sep 51
1	Addition & Alterations to Fairfax County Courthouse, Structural Drawing, prepared by Dwight G. Chase, AIA.	S1	24 Apr 61

Action requested: Submittal (*only one copy received) is for your review
and distribution to the Contractor.

Drawings are intended to accompany the Submittal when returned
to the Contractor - See JV Memo, dated 11 November 1986.

Sent by: ☐ Our messenger ☐ Mail ☐ Other
☒ Your messenger ☐ Express

Plaintiff's Amended Motion
for Judgment - Exhibit F

V I R G I N I A

COUNTY OF FAIRFAX, ADMINISTRATIVE HEARING

-----X

W. M. SCHLOSSER, :

Appellant, :

Versus : CONTRACT NO. CN-61154

FAIRFAX COUNTY, :

Owner. :

-----X

Wednesday, April 24, 1991

Fairfax, Virginia

The above-entitled matter came on to be heard before Fred K. Kramer, a Hearing Officer for the County of Fairfax in the Massy Building, Conference Room 1, Chain Bridge Road, Fairfax, Virginia, beginning at 8:35 o'clock a.m. before B. Charles Hopchas, a Verbatim Court Reporter and Notary Public in and for the State of Virginia at Large, when there were present on behalf of the respective parties:

STABNER COURT REPORTING ASSOCIATES

(703) 691-1378 Fairfax, Virginia

APPEARANCES:

For the Petitioner:

HERMAN BRAUDE, ESQUIRE
 ROGER C. JONES, ESQUIRE
 Braude and Margulies, PC
 1828 L Street, Northwest
 Suite 900
 Washington, D.C. 20036

For the Contractor:

DENNIS R. BATES, ESQUIRE
 Senior Assistant County Attorney
 County of Fairfax, Virginia
 4100 Chain Bridge Road
 Fairfax, Virginia 22030

Also Present: Rockwell Moulton, Andrew Schlosser,
 Michael Cohen, Esquire, Howard J. Guba, Harry Furney, Robert
 Boxer, Jack Stewart, Harry Graef, Robert Windus, William
 Cross.

EXHIBITS

	<u>FOR IDENTIFICATION</u>	<u>INTO THE RECORD</u>
County Exhibit 1	173	173
County Exhibit 2	182	182
Appellant's Exhibit 1	175	175
Appellant's Exhibit 2	175	175
Appellant's Exhibit 3	179	179

(Exhibits were retained by the County.)

1 P R O C E E D I N G S

2 THE HEARING OFFICER: This is the appeal of the
3 W.M. Schlosser Company claim for additional costs stemming
4 from delays due to changes, design defects, suspensions of
5 work and differing conditions based on a letter dated
6 December 18th, 1990, to the then-county executive J.
7 Hamilton Lambert regarding the Fairfax Old Courthouse
8 renovation, contract number CN-61154, project number 9149.

9 In attendance today is Mr. Roger C. Jones,
10 counsel for Schlosser Company and Mr. Bates, counsel for the
11 County of Fairfax.

12 Before we get started into the process, perhaps
13 it would be appropriate to discuss a little bit the way we
14 may proceed and perhaps a difficulty that I've created, it
15 appears, by not informing you all about the exchange of
16 documents.

17 Mr. Bates, you didn't send Schlosser and
18 Company copies of those documents you transmitted via the
19 17th, your memorandum of April 17th?

20 MR. BATES: No. The reason for that is because
21 they had a fairly extensive Freedom of Information Act
22 request. And we knew the documents that they had access to,

1 and the documents that we submitted to you and we intend to
2 rely on were all included in the request that they made.

3 THE HEARING OFFICER: So they've already
4 previously received those?

5 MR. BATES: Right, right. And I don't know
6 whether I can say the same for them, but what I'd like to do
7 at this time is to have them make some sort of proffer or
8 representation of the nature of the documents that they
9 purport to rely on today and whether or not those documents
10 were obtained from the County or whether they were generated
11 separately and the County hasn't had an opportunity to see
12 any of them as of yet.

13 MR. BRAUDE: I'd like to make my appearance.

14 THE HEARING OFFICER: Sure.

15 MR. BRAUDE: Herman Braude of the firm of
16 Braude-Margulies.

17 Number one, that casual statement by Mr. Bates
18 that we had under the Freedom of Information Action, yes, we
19 had access to the County records, but that's assuming we
20 know what he's intending to rely upon, so we didn't get
21 copies of it.

22 I have no objection to what he's putting in. I

1 don't know -- I guess this first chart is merely a summary
2 of what the change -- or the time extensions were, so -- but
3 we, just because we have freedom of information access to
4 the County records on this project doesn't mean that we
5 aren't to be furnished copies of the documents that are
6 furnished to the Hearing Examiner.

7 THE HEARING OFFICER: Well, I think they would
8 have been. It's probably my fault for not pursuing it, and
9 if it creates a problem we can, you know, delay the process
10 or do whatever is necessary to ensure a fair opportunity for
11 all sides.

12 MR. BRAUDE: With regard to the defendant's
13 documents -- I mean -- no, the petitioner's documents -- are
14 we called the petitioners?

15 THE HEARING OFFICER: Appellant's.
16 Appellant's, whatever you want to call it.

17 MR. BRAUDE: Appellant's document's -- we have
18 merely put in documents obtained from the County under the
19 Freedom of Information Act and the contract documents.

20 There is one document that has been generated,
21 I guess, which is tab seven, which is the summary of -- that
22 we ask for Mr. Cross of what his testimony is going to be

1 today.

2 That's tab seven that I just was given a copy
3 of this morning. And that's merely his summary.

4 That is one document that is not part of the
5 correspondence between the parties or obtained from the
6 County's files. The other document is Exhibit A, which is a
7 summary of what we intend to present today. It's in graphic
8 form as to where the critical suspensions of work were.

9 THE HEARING OFFICER: Well, that appears, then,
10 outside of a few pages the -- to the documents, both parties
11 have had access and Mr. Bates, I guess if you feel that you
12 need additional time based on this cross testimony, then you
13 know, we can do something about that. Likewise, if
14 Schlosser feels the result of this exhibit summary, that you
15 need additional time, we'll be more than happy to do that.

16 Would you like a copy of that summary chart?

17 MR. BRAUDE: Yes, if possible.

18 THE HEARING OFFICER: Sure, let me get some
19 made.

20 Is there anything else that -- if there's
21 nothing else in that file I'd like it back, because it's
22 mine.

1 Is two copies adequate?

2 MR. BRAUDE: Fine.

3 THE HEARING OFFICER: Is there anything else we
4 need copied?

5 MR. BRAUDE: Yes, could we get this document
6 copies? That one, and -- thank you.

7 (Pause to have copies of documents prepared.)

8 THE HEARING OFFICER: It will be a few moments
9 to get that. Perhaps we can proceed.

10 MR. BATES: Before we proceed I have a couple
11 of comments for procedure's sake.

12 I notice that we have at least three attorneys
13 in the room. We have Mr. Cohen, Mr. Jones and Mr.
14 Margulies, and I think it would help me and the County to be
15 aware of who is going to present the case for Schlosser.

16 And I think that in any proceeding that there
17 is a representation about who is the official attorney and I
18 think it would assist everybody.

19 MR. BRAUDE: Mr. Jones will be the official
20 attorney. Mr. Braude will assist Mr. Jones in the
21 statements by Mr. Braude. So Mr. Braude and Mr. Jones will
22 do the presentation on behalf of Schlosser.

1 THE HEARING OFFICER: I think if we could try
2 to keep it an orderly process -- it is an informal process
3 as far as I'm concerned. We will obviously try to
4 accommodate both parties' concerns and issues.

5 What I'd like to do -- Mr. Bates, do you have a
6 problem with that as a joint --

7 MR. BATES: Well, the last time we had a
8 administrative hearing I think Mr. Braude appeared in his
9 own right, and at that point Mr. Braude was not licensed to
10 practice in the State of Virginia. Maybe that situation has
11 changed.

12 But we view this proceeding as a condition
13 precedent to any court action, and of course to the extent
14 that it is, it may create a problem if an attorney isn't
15 licensed to practice in the jurisdiction.

16 MR. JONES: Mr. Kramer, may I just say as the
17 attorney licensed in Virginia, we have here Mr. Cohen who is
18 general counsel for the Schlosser Company who is licensed to
19 practice in Virginia --

20 MR. BATES: I'm not suggesting that there isn't
21 an attorney --

22 MR. JONES: -- we have myself --

1 MR. BATES: -- in the room who --

2 THE HEARING OFFICER: Mr. Bates, let him
3 finish, please.

4 MR. JONES: We have myself, I'm an attorney
5 licensed to practice in Virginia. And Mr. Braude is my
6 partner, and he's been licensed to practice in Maryland and
7 in D.C. for, oh, twenty-five years, doing legal work in
8 Virginia extensively, and he's here under, you know, myself
9 and Mr. Cohen.

10 THE HEARING OFFICER: Let -- Mr. Bates, this is
11 an administrative hearing. It's not a judicial proceeding.
12 As far as I'm concerned you need not be an attorney to
13 represent your interests before this meeting.

14 Whether or not that jeopardizes your legal
15 rights is your problem, not my problem. The purpose we're
16 today is to determine whether Mr. diZerga made an
17 appropriate decision in reviewing your claims. And that's
18 the function.

19 MR. BRAUDE: I'd like to just correct one
20 thing, Mr. Kramer, on the record, is I don't believe I ever
21 attended any of these type of hearings before. This is my
22 first one.

1 THE HEARING OFFICER: Let me also, just so we
2 get off to the proper start, I would -- I do want each side
3 to allow the other side ample time to respond and not
4 interrupt. I don't want any arguments. We're going to keep
5 this orderly, professional, and everybody will get their
6 opportunity to speak and say whatever they'd like to, okay.

7 Sorry for the noise, it's just the ventilation
8 in this room is not the greatest and with the number of
9 people we have in here it's going to get a little warm.

10 Feel free as time goes on to get, you know,
11 comfortable, as far as I'm concerned.

12 Is there anything else that we need to address?

13 Yes, Mr. Bates?

14 MR. BATES: Yes, the only other point is that
15 I've noticed in Mr. Jones' submittal that there was a second
16 page of a letter to -- apparently to the subcontractors on
17 this particular job, Schlosser. And apparently the letter
18 requested certain information from subcontractors in
19 connection with this particular claim.

20 Now, in the usual case where you have a pass-
21 through of a subcontractor claim, the subcontractor has
22 already filed a claim against the owner for additional

1 compensation and the owner passes that claim through, quote
2 -- I'm sorry, the general contractor passes that claim
3 through to the owner for purposes of any subsequent hearing
4 or any subsequent issue.

5 It's our position that to the extent that the
6 subcontractors in this case cannot make any claim directly
7 against Schlosser then they should not be presenting any
8 claims in this particular hearing against the County.

9 So to the extent that page one of that letter
10 required the subcontractors to waive all of their claims
11 against Schlosser, then I don't believe Schlosser can come
12 in and be a conduit for a subcontractor claim against the
13 County.

14 MR. BRAUDE: Where is the waiver --

15 MR. BATES: So we would -- I'm sorry.

16 MR. BRAUDE: -- that you're referring to?

17 MR. BATES: We would object to a direct claim
18 by a subcontractor against the County in this particular
19 case. I've had some familiarity with Schlosser's practices
20 and I believe in paragraph nine of this form, subcontract,
21 there is a requirement for a subcontractor to waive all of
22 its claims directly against Schlosser.

1 If that's the case here we would object to the
2 separate presentation of subcontractor claims as indicated
3 in Mr. Jones' submittal.

4 THE HEARING OFFICER: Mr. Braude?

5 MR. BRAUDE: Yes, I guess unless Mr.
6 Schlosser's changed the contract that I wrote ten, fifteen
7 years ago, it is basically a pass-through type of
8 arrangement which allows a subcontractor to pass through the
9 claim against the subcontractors and makes Schlosser liable
10 to the subcontractors for any amounts recovered on their
11 behalf against the County. Let's see here --

12 MR. BATES: I agree with that, but I think Mr.
13 Braude would admit that that particular paragraph that he
14 authored also requires a subcontractor to waive any and all
15 claims against Schlosser. That the subcontractor has no
16 direct liability whatsoever. Or Schlosser has no direct
17 liability whatsoever, and --

18 THE HEARING OFFICER: Well, the issue as far as
19 I'm concerned, Mr. Bates, is that the County entered into a
20 contract with Schlosser and the only party that has standing
21 for us is Schlosser, period. The subcontractors have no
22 standing in this proceeding as far as I'm concerned.

1 MR. BRAUDE: Right, except for being a witness,
2 Your Honor, we -- this is a claim of Schlosser against the
3 County, a portion of which is on behalf of the
4 subcontractors.

5 Dennis, would you give him a copy of this
6 thing? I don't see any waiver in here.

7 MR. BATES: Well, you don't see page one and we
8 don't have page one. I think I indicated we don't have page
9 one. It's my fervent believe, however, that page one does
10 include some sort of condition which either amounts to a
11 waiver or is in fact an express waiver of liability.

12 So, I mean, it's up to you to -- or whoever
13 gets on the stand and I can ask about it -- to confirm or
14 deny that.

15 Again, I understand that in the normal course
16 subcontractors would be witnesses for general contractors'
17 claims against the owner.

18 But I once again for the record point out that
19 Mr. Jones has included separate claims from subcontractors
20 in his submittal, and to the extent those claims are being
21 made against the County, the County cannot be liable for
22 those claims if Schlosser is not liable for those claims.

1 And I don't think I hear anything from this
2 side of the table which indicates that Schlosser is liable
3 in any way, actually or potentially, for any subcontractor
4 claims in this case.

5 MR. BRAUDE: That is incorrect. You hear from
6 the other side of the table that Schlosser is completely
7 liable for anything that is recovered on behalf of Schlosser
8 for the subs' account.

9 MR. BATES: But your definition of contingent
10 liability simply says that if you recover from the County on
11 behalf of a sub, then you pay the sub. But if you don't
12 recover from the County you don't have any liability
13 whatsoever.

14 MR. BRAUDE: I'm not sure that that's true or
15 not true. I mean, if you have any facts to back that up,
16 fine and dandy.

17 I don't see it on the document that you just
18 presented. You can ask the subcontractor who is going to
19 testify. But you know, as far as I'm concerned, you know,
20 it is a matter of privity of a contract. The County's
21 privity of contract with W.M. Schlosser.

22 Schlosser's then privity of contract with Cross

1 and the other subcontractors' claims that are being made
2 pursuant to the subcontract procedures which allows for
3 pass-through claims against the owners in the name of W.M
4 Schlosser Company.

5 And that's standard procedure.

6 MR. BATES: Well, again I interpose a
7 continuing objection to the extent that this claim includes
8 subcontractor claims for which Schlosser is not directly
9 liable.

10 MR. BRAUDE: Well, you know, I have to say that
11 we're here on the appeal of the decision of Mr. diZerga, I
12 guess, the director. And he has never mentioned that, you
13 know, claims can't be passed through against the
14 subcontractors, and --

15 MR. BATES: It's a jurisdictional question, Mr.
16 Braude. The County is not liable to third parties. You
17 indicated yourself it's a question of privity of contract.

18 MR. BRAUDE: Well, we know that, you know, in
19 Maryland the rule is otherwise. I'm not sure, you know,
20 whether or not that's going to be affirmed or denied by the
21 Virginia Supreme Court when the issue is presently being
22 before them.

1 There is lots of conflicts of decisions and Mr.
2 Bates certainly will recognize that if, in fact, Schlosser
3 is liable to the subcontractors that we can have a pass-
4 through claim.

5 MR. BATES: I agree.

6 MR. BRAUDE: So the issue is whether or not,
7 you know, Schlosser is insulated from the subs. And I have
8 no knowledge right now that the subs have signed a release
9 or, you know, do not have a pass-through claim which
10 Schlosser is not liable for.

11 If he has some evidence in that regard, you
12 know, I don't mind him presenting it.

13 MR. BATES: I mean it's simple. I think we
14 can save a lot of time if Mr. Schlosser or someone on this
15 side of the table indicates whether or not it is of the
16 opinion that it has direct liability from the subs.

17 MR. BRAUDE: When you say direct liability what
18 do you mean?

19 MR. BATES: I mean that in the event -- I mean
20 that first of all the subs --

21 MR. BRAUDE: The subs can sue Mr. Schlosser.

22 MR. BATES: -- have filed a claim against Mr.

1 Schlosser and Schlosser had taken the position that it has
2 either actual or potential liability for the claim.

3 MR. BRAUDE: Yes.

4 MR. BATES: Now, what you've just indicated in
5 your paragraph nine basically says that Schlosser's position
6 is that if it can recover from the County then it passes
7 that money back --

8 MR. BRAUDE: There's no question about that.

9 MR. BATES: -- to the sub, all right. But that
10 does not -- it does not follow that in the event Schlosser
11 can't recover from the County that Schlosser has some
12 liability to the sub. And I think your answer to that will
13 be no.

14 MR. BRAUDE: Well, I'm not -- you're putting
15 words in my mouth. My answer to that is, I fear that the
16 subcontractors are free to sue W.M. Schlosser if they wish.
17 As far as I know there is no waiver or release signed by any
18 of the subcontractors in this regard. And if you have
19 knowledge differently, you know, then let me know.

20 MR. BATES: Well, can I ask this: Does anybody
21 know what page one of this letter says; Mr. Jones submitted
22 page two to me as part of his claims package and I think

1 it's reasonable for me to --

2 MR. JONES: Mr. Bates, I didn't submit that
3 claim package.

4 MR. BRAUDE: Do you know where page one is
5 of our --

6 MR. BATES: This is page one.

7 MR. BRAUDE: Oh, as I understand, okay, a
8 liquidation agreement -- you know, that it would be just a
9 pass-through agreement -- was proffered to Mr. Cross and Mr.
10 Cross refused to sign it.

11 So I can say as far as Mr. Cross is concerned,
12 yes, he is free to sue Schlosser and that there is no
13 liquidation agreement signed by Mr. Cross.

14 THE HEARING OFFICER: Mr. Bates, does that
15 satisfy your concern with respect to Mr. Cross?

16 MR. BATES: No, Mr. Kramer. I believe Mr.
17 Cross also has signed Schlosser's subcontractor agreement.
18 And again, I think that paragraph nine of that agreement as
19 Mr. Braude has summarized it, clearly indicates that it's
20 contingent that the only liability Schlosser has is where he
21 can pass through the sub's claim to the County.

22 And that certainly isn't any actual or

1 potential liability. It's all based on what Schlosser can
2 recover against the County on behalf of the sub, where
3 Schlosser has no direct liability with the sub.

4 MR. BRAUDE: I can proffer it's not correct;
5 that you did not refuse to sign any liquidation agreements
6 proffered by Mr. Schlosser?

7 MR. CROSS: I cannot remember signing any
8 document like that.

9 MR. BATES: Well, do you recall what your
10 subcontractor agreement says in connection with pass-through
11 claims?

12 MR. JONES: No, I do not.

13 MR. BATES: You don't have a copy of that here?

14 MR. BRAUDE: For the record, that's Mr. Cross.

15 MR. CROSS: I don't have a copy of it here, no.

16 MR. BRAUDE: The answer is that he refused to
17 sign a liquidation agreement, and as far as Mr. Cross is
18 concerned and as far as representation of counsel, there is
19 no release and there is -- of Schlosser independently -- and
20 he is free to pass through the claim, I guess to County.

21 MR. BATES: Is he free to sue you in case you
22 don't recover against the County?

1 MR. BRAUDE: That's the way I read the stats.

2 THE HEARING OFFICER: Well, if you stipulate to
3 that then I think --

4 MR. BRAUDE: Yes.

5 THE HEARING OFFICER: -- I mean, then fine,
6 then I think we can proceed.

7 MR. BRAUDE: Yes, unfortunately it happens all
8 the time.

9 THE HEARING OFFICER: Let the record note Mr.
10 Braude has stipulated to that effect.

11 MR. BATES: Well, I, you know, again, I'd just
12 note my objection for the record. They don't have the
13 subcontract here. And you know, suing Andrew Schlosser for
14 a subcontract arrangement is different from saying that
15 there is an agreement that they made prior to the lawsuit
16 that says he doesn't have any liability.

17 And that's what I'm saying paragraph nine says.

18 THE HEARING OFFICER: Well, suppose they amend
19 the agreement -- assuming there is one -- suppose Mr. Braude
20 is, and Mr. Rogers is it --

21 MR. CROSS: Cross.

22 THE HEARING OFFICER: -- Cross is amenable to

1 amending whatever contract is already in force orally by
2 stipulating, proffering today, that there is --

3 MR. BATES: They're not doing that. All
4 they're saying is that he can sue them. And of course their
5 defense is going to say -- is going to be, I don't have any
6 liability to you per paragraph nine of the contract.

7 You know, they're trying to do something
8 indirectly against the County that they can't do directly.

9 MR. BRAUDE: Mr. Bates, let's --

10 MR. BATES: And I don't mean to, you know,
11 belabor this, but I see the one paragraph.

12 MR. BRAUDE: Mr. Bates, number one is, I think
13 overtly they -- the subcontractor can pass through a claim.
14 As far as Mr. Cross is concerned, I can represent to you
15 that there was no liquidation agreement, no release of
16 Schlosser, and there is no release of Schlosser from
17 independent liability as far as Cross Electric is concerned.

18 MR. BATES: Well, what about the rest of them?

19 MR. BRAUDE: I don't really know. We don't
20 really represent the rest of them, but I guess, you know, as
21 far as pass-through, I don't know whether any of them
22 executed any release or --

1 MR. BATES: Well, to the extent that we don't
2 have the same representation on behalf of the other
3 subcontractors I object on the same grounds.

4 MR. BRAUDE: Mr. Bates, we represent W.M.
5 Schlosser Company with regard to this hearing and also as
6 far as Schlosser on behalf of subcontractors making claims.

7 So, you know, as far as our concern, this is a
8 claim between W.M. Schlosser and the County. It is not
9 between Cross and the County, it is not between any other
10 subcontractors and the County.

11 THE HEARING OFFICER: Well, and I think, you
12 know, Mr. Bates, to the extent that they've represented that
13 we will proceed with the hearing under that basis and if
14 there is a legal dispute on that, that is something that you
15 and the County Attorney's office can pursue in a legal vein.

16 MR. BATES: Well, it seems -- well, Your Honor,
17 okay. We can address it through the testimony. I don't
18 want to continue to belabor the point.

19 THE HEARING OFFICER: Let's do that. As it may
20 or may not become appropriate.

21 A preliminary matter, just I think for the
22 record.

1 Mr. Rogers, in your correspondence --

2 MR. JONES: Mr. Jones.

3 THE HEARING OFFICER: Sorry, Mr. Jones.

4 MR. JONES: That's okay.

5 THE HEARING OFFICER: I talk about Mr. Rogers,
6 I don't know why.

7 In your correspondence of December 18th, 1990,
8 you requested that we expect this hearing to be before a
9 disinterested person or panel, and then you subsequently
10 raised that issue in correspondence to me dated February
11 7th.

12 I am a disinterested person. I am also an
13 employee of Fairfax County. I am the director of general
14 services. I do have maintenance responsibilities. I did
15 have some involvement in the scope, the initial scope, of
16 the courthouse renovation. I have not been involved in a
17 day to day basis.

18 I have no knowledge of these claims, prior
19 knowledge, or any involvement in Mr. diZerga's decision or
20 in anything that has occurred up until this point in time.

21 I'd be more than happy to answer any questions
22 you might have. I don't view that I have a conflict, if you

1 will, and that I'm incapable of rendering a fair and
2 impartial decision.

3 MR. JONES: I have a comment and a question.

4 The question is, will your decision be
5 independent of review or is it comment from the Fairfax
6 County Attorney's office?

7 THE HEARING OFFICER: No, it will be
8 independent, it will be my decision. The County Attorney's
9 office will not be involved in this decision. And has not
10 been involved in this process.

11 The only thing that they've been involved is
12 they sent me, you know, the materials that I informed you
13 about this morning. I have not had any discussions with Mr.
14 Bates to my knowledge about this other than my secretary
15 trying to arrange a scheduled time in the hearing.

16 MR. BRAUDE: And my comment is strictly a
17 procedural exception, if you will. I have the greatest
18 respect for your position and your office, and I understand
19 you've been with the County for a long time.

20 The Code of Virginia, the Virginia Public Works
21 Act, sets up the administrative procedure for this type
22 hearing, and that Code mandates that it's to be before a

1 disinterested person or panel.

2 Our exception or objection, if you will, is
3 that if somebody is employed by the County and a claim is
4 against the County, then necessarily the decider of that
5 claim shouldn't be a County employee. It's a procedural
6 objection. I've raised it. I think we can go on. I'm just
7 noting it for the record.

8 THE HEARING OFFICER: Fine, so noted and we
9 will then proceed.

10 What I'd like to do, then, unless there's
11 something else, what I'd like to do is proceed giving you an
12 opportunity, Mr. Braude and Mr. Jones, to present your case
13 after which time we will give Mr. Bates and the County's
14 staff an opportunity to present their case.

15 The procedure before the -- appealing the
16 decision of the director of public works does involve the
17 swearing in of witnesses if there are any.

18 Will there be any witnesses for Schlosser
19 today?

20 MR. BRAUDE: Yes. Andrew Schlosser, the
21 president of Schlosser, who will be the first witness. The
22 second witness will be Bill Cross, I believe. And the third

1 witness will be Rockwell Moulton.

2 Mr. Moulton was the project manager. Mr. Cross
3 was the electrical subcontractor, Cross Electric.

4 THE HEARING OFFICER: And the Court Reporter
5 can swear in the witnesses at the appropriate time. They
6 will be under oath, and advise them of their obligations.

7 Mr. Braude?

8 MR. BRAUDE: Yes, I'd like to make an opening
9 statement if I may, if that's all right.

10 THE HEARING OFFICER: Yes, sir.

11 MR. BRAUDE: Basically we're here on the appeal
12 of the decision of Mr. diZerga, the director of public
13 works. And I believe it was dated July 11th, 1990, which in
14 our exhibits is tab 113.

15 Basically the way I read Mr. diZerga's
16 decision, he makes an interpretation, a legal interpretation
17 of the contract provisions and dismisses Schlosser's claim
18 for extended performance costs which is the subject of this
19 appeal on the basis of various contract provisions.

20 Namely paragraphs 12.4.5, which is covered
21 under the change order article of the contract, and
22 paragraphs 8.3.1 and 8.3.2 which is covered under the time

1 extension paragraphs of the contract.

2 Now, I basically feel, therefore, that the
3 issue to be decided by you is one of contract -- of
4 appropriate contract interpretation.

5 Let me state in general, however, that the
6 claim involves the delays and extended performance time of
7 what we call Phase I of the courthouse renovation project.
8 Phase I begins with the great -- or the grand stair, if
9 you're familiar with the courthouse --

10 THE HEARING OFFICER: Uh-huh, yes, I am.

11 MR. BRAUDE: -- as you walk in and go to the
12 left-hand side. It includes the lobby area which is the
13 entrance, the main entrance, and everything to the left of
14 it.

15 THE HEARING OFFICER: The courthouse print
16 shop.

17 MR. BRAUDE: Towards the print shop.

18 Phase II is the smaller section that remains to
19 be done. Phase I included the major mechanical and
20 electrical equipment. In other words, I think seven out of
21 eight air handling units. And what you'll hear testimony of
22 is a new addition to the building called a chiller room.

1 And the chiller room which was a new addition
2 to be built in the back of the building near the print shop,
3 if you're familiar with that location, contains two main
4 chillers, various new switch gear, new pumps and basically
5 mechanical and electrical equipment that services the
6 project.

7 There is also new equipment on the mezzanine
8 floor directly over what's called the domestic relations.
9 The domestic relations branch is housed on the second floor
10 of Phase I. And there will be lots of testimony concerning
11 the domestic relations section which is on the second floor.

12 On the mezzanine on top of that is a mechanical
13 area which houses certain air handling units, additional air
14 handling units.

15 THE HEARING OFFICER: You say that was all
16 Phase II?

17 MR. BRAUDE: That's Phase I. The domestic
18 relations is on the left-hand side of the building which is
19 part of Phase I, and a very important part of Phase I, in
20 fact takes up most of the -- at least fifty percent of the
21 second floor.

22 Above that is a mezzanine area which houses

1 some additional mechanical equipment.

2 THE HEARING OFFICER: And the chiller room --

3 MR. BRAUDE: Is adjacent --

4 THE HEARING OFFICER: -- that's Phase II?

5 MR. BRAUDE: No, Phase I also.

6 THE HEARING OFFICER: That was still part of
7 Phase I, okay.

8 MR. BRAUDE: A critical portion of Phase I. In
9 fact, before we get into the specifications let me just talk
10 about the chart which is Exhibit A, which basically is a
11 pictorial representation of what our claim is based upon,
12 and then I'll talk about the contract provisions, if I may.
13 Because that's what the issue is.

14 The first item is called "Electrical
15 Revisions," and basically the original plan that we will
16 present, it's part of the Exhibit, the original schedules on
17 this job, like any good contractor is the first thing that
18 you want to do is put in underground utilities.

19 And it was underground utility work basically,
20 a electrical duct bank to be put in underneath what was
21 going to be the chiller building which was the addition on
22 the back of the courthouse, the new addition to the back of

1 the courthouse to house the mechanical and electrical
2 equipment.

3 The contractor received an award in September
4 of 1986 and I believe got a notice to proceed in November of
5 1986. The contract called for a total performance time,
6 Phase I and Phase II, of three years less one month. It was
7 thirty-five months total less one month, I think it was one
8 thousand sixty-five days.

9 Basically it's very easy to picture Phase I,
10 Mr. Kramer, was going to be a two-year performance time less
11 one month. So it was basically twenty-three months to
12 finish Phase I. The one month would be to move from Phase
13 II to Phase I, the occupants. Phase II was supposed to be
14 remaining -- occupied.

15 And so the County figured there was going to be
16 a thirty-day period of time to move the occupants of Phase
17 II into Phase I. And then you would have approximately the
18 remaining period of time, which is basically one year, to
19 finish Phase II. Phase II was a smaller area and most of
20 the mechanical and electrical critical equipment was in
21 Phase I, including the new chiller room.

22 And that's the way the job was depicted. So

1 the original contract completion time was a milestone, only
2 a milestone, for Phase I. And for having the one year and
3 eleven months, the original contract milestone date was as
4 depicted on the bottom of this chart, October 17th, 1988.

5 Do you see that?

6 THE HEARING OFFICER: Uh-huh, yes, sir.

7 MR. BRAUDE: That was the original milestone,
8 substantial completion date, for Phase I.

9 In order to achieve that date Schlosser felt
10 that they could achieve that date well within that time
11 frame. And the first thing that they would normally do as
12 you will see from the original plan chart, is to put in the
13 underground utilities in the area of the chiller room, which
14 was then after the utilities were in, then you would put in
15 a slab, concrete slab on top of that, build the building,
16 put the roof on then hook up the mechanical and electrical
17 equipment and have power to the building provided.

18 Basically you were supposed to have -- maintain
19 power -- to Phase II. Remember, that's occupied. That was
20 an existing courthouse and that was to remain occupied while
21 the construction was going on in Phase I.

22 MR. BATES: Excuse me one second, Mr. Braude.

1 Is this the same as this?

2 MR. BRAUDE: This is a depiction of this. This
3 is the original CP -- the original chart. The original
4 schedule chart.

5 MR. BATES: Are you all going to submit that to
6 Mr. Kramer as well, or --

7 MR. BRAUDE: Yes, we will submit this to Mr.
8 Kramer.

9 MR. BATES: If you're going to do that then I
10 think hopefully you've got some reduced versions of it, or
11 --

12 MR. BRAUDE: I don't think we do. I think
13 -- as I understand we have the same size copies.

14 MR. JONES: I do.

15 MR. BRAUDE: Oh, we do have reduced? I think
16 it's the same size, isn't it?

17 MR. JONES: Yeah, their --

18 MR. BATES: I think we need to see it while
19 you're talking about it.

20 MR. BRAUDE: Do we have a copy for Mr. Bates?
21 Do you have a copy for me, or I have an extra copy. All
22 right.

1 THE HEARING OFFICER: We can share it when it's
2 appropriate. Just go ahead, I can follow you better orally
3 than --

4 MR. BRAUDE: The original chart has -- which is
5 dated in October of 1986, okay -- has on Phase I, site work.
6 So they were going to put in the underground electrical --
7 one of the major items that was shown on the contract
8 drawings is this electrical duct bank. That was going to be
9 put in early along with certain mechanical piping.

10 And basically that electrical duct bank was
11 supposed to be put in in March and April of 1987, all right.
12 After that they were going to then build the chiller
13 building in the spring of 1987.

14 Now, why is it important to build the chiller
15 building? Because that's where the mechanical and
16 electrical equipment is housed. And that's where the new
17 motor control centers which distributes permanent power to
18 the Phase I, the construction Phase I, comes from it.

19 You want that chiller building under roof. And
20 basically the plan chart shows that the power was supposed
21 to be on on October 1st, 1987. Now, you see that -- it's
22 really on the top line. I apologize. There is a little gap

1 and it says 10/1/87; do you see that?

2 THE HEARING OFFICER: Yeah, where underneath it
3 says "VEPCO energizes --

4 MR. BRAUDE: Yeah, but that is -- in fact you
5 will hear testimony --

6 THE HEARING OFFICER: Let's just pass that. I
7 see --

8 MR. BRAUDE: -- this was done 9/18, of '87.

9 THE HEARING OFFICER: So it's just past that,
10 the next dot up, yeah, I see it.

11 MR. BRAUDE: Right.

12 THE HEARING OFFICER: Planned energization,
13 yes.

14 MR. BRAUDE: It's the next dot up.

15 THE HEARING OFFICER: Yes.

16 MR. BRAUDE: Right. Basically the were
17 supposed to turn on the motor control centers, have
18 permanent power, after the chiller building was to be done
19 on 10/1/87. Now, that allows 1), to distribute power, to
20 run the mechanical and electrical equipment to do all the
21 finish operations. So you would have heat, you would have
22 humidity control because as you know on the new courthouse

1 there's a lot of finishes, there's a lot of mill work,
2 there's carpet tiles, there's vinyl wallcovering.

3 And you have intricate finishes that are
4 subject to dampness, humidity, and you need mechanical and
5 electrical equipment in operation to do the final finishes
6 for certain critical case work, mill work in the courtrooms.

7 So that was very critical as far as plan
8 performance. You wanted to build the chiller building. It
9 was discussed with the County in the pre-construction
10 conference. And that was the main critical areas, get the
11 electrical work, the mechanical equipment in operation in
12 this chiller building which is the only new addition, the
13 only new construction.

14 We will discuss that the County had problems in
15 it's design of the chiller building. We will show based
16 upon the Freedom of Information Act, the County, well before
17 this job was ever put out on the street, knew that there
18 were going to be problems in the chiller room areas.

19 And despite that let the job go out to
20 unsuspecting bidders and to unfortunately, an unsuspecting
21 W.M. Schlosser Company and Cross Electric, knowing or should
22 have known, that there was going to be substantial problems

1 in this area.

2 Two problems, two major problems that occurred
3 in this area that caused the late completion of the chiller
4 building and the late turning on of the new electric
5 service was number one, there was underground utilities that
6 were existing and servicing the existing transformers, VEPCO
7 transformers, which was mislocated or not located.

8 Now, normally that would be a differing site
9 condition to the County, but we will show documentary
10 evidence that the architect warned the County that they
11 must, back in 1984, locate those underground utilities,
12 otherwise that there was going to be what I classify
13 devastating delays in the construction, and forecast it in
14 '84 that unless the County located the utilities in a small
15 area -- I mean it's not throughout the courthouse, it's a
16 small area in the back of the courthouse -- and locate those
17 accurately that there was going to be devastating delays in
18 the construction.

19 Which of course, unfortunately did occur. It
20 was turned out that the original design could not work
21 because of the location of the existing utilities. The
22 utilities were in the way.

1 More devastating than that was the concept, the
2 electrical concept that was planned for the Phase
3 operations. Remember what I said, that Phase II was
4 existing offices -- and I'm not sure what they house --
5 where the county employees, the court employees would
6 maintain during the construction of Phase I.

7 Phase I was the new work. And new mechanical
8 equipment that was evidently designed in the '80s. And this
9 mechanical equipment was to be run on four-eighty voltage.
10 The existing equipment that was maintained in the courthouse
11 and in Phase II which is the existing operation was two
12 hundred and eight volt, three phase equipment.

13 So what you had was two -- a requirement for
14 two different power sources in order to have phased
15 operation. You needed the new four hundred and eighty
16 voltage to put on line the existing -- I mean the new
17 mechanical equipment, the air handlers, the chillers, the
18 pumps, running through this new motor control center and the
19 new switch gear, all right. That was all based upon four-
20 eighty voltage.

21 Unfortunately the existing building that had to
22 maintain was being run at that time on two hundred eight

1 volts. One hundred and twenty amps, two-o-eight.

2 The County failed to either coordinate or
3 didn't listen to VEPCO. VEPCO will not run to a building
4 two different powers. They will not run two hundred and
5 eighty volts as well as running four-eighty, which was the
6 original design concept.

7 Again, Mr. Cross will come up with the details.
8 But certainly the County either knew or certainly should
9 have known that the whole concept for phased design,
10 electrical design, was inaccurate and could not be adhered
11 to. And that they would have to come up with a completely
12 different concept on the electrical design in order to have
13 a phased operation.

14 Basically the evidence will show that they
15 finally decided to put in a temporary transformer, the
16 County did, and a step-down transformer, run the new power
17 to the new switch gear, a new transformer. They brought in
18 four-eighty. And then they would have a step-down
19 transformer which would step down the power and then still
20 service Phase II.

21 Until that new transformer was put in -- that
22 was not done until as shown on that date -- and my eyes are

1 pretty terrible -- until the new temporary transformer was
2 put on in September 18th, 1987. You see that as a milestone
3 there?

4 THE HEARING OFFICER: Is that the third line,
5 or dotted line where it says, "VEPCO energizes temporary
6 transformer?"

7 MR. BRAUDE: Yes. That's the temporary
8 transformer --

9 THE HEARING OFFICER: That's the new, quote,
10 unquote, "new" transformer you're talking about?

11 MR. BRAUDE: That is not the new transformer.
12 That is a temporary transformer.

13 THE HEARING OFFICER: Oh, okay.

14 MR. BRAUDE: There is a new transformer that
15 was put in --

16 THE HEARING OFFICER: Subsequently.

17 MR. BRAUDE: -- for the power. For the primary
18 power source. This was needed in order to rip out the old
19 transformer --

20 THE HEARING OFFICER: I see.

21 MR. BRAUDE: -- which was in the way of the
22 chiller building.

1 Now, there is documentation in here that says
2 also back in '84 that, you know, we're going to have to
3 relocate the temporary transformer -- the existing
4 transformer.

5 Now, again, we're going to get into the
6 contract provisions, but you know, to me, this is a clear-
7 cut case. There is correspondence in 1984 from the
8 architect to the County saying, you know, we're going to
9 have to relocate VEPCO's existing power transformer out of
10 the way of the chiller room -- or where we're going to build
11 the chiller room. In 1984.

12 This job isn't awarded until September, 1986.
13 And they never relocated VEPCO's transformer.

14 THE HEARING OFFICER: So it was the County's
15 responsibility to relocate power as opposed to yours?

16 MR. BRAUDE: Yes, it was the County's
17 responsibility to relocate the existing transformer which
18 they knew or should have known, as the memo that we obtained
19 under the Freedom of Information Act, knew it had to be
20 relocated back in 1984.

21 And to take it another step further, you know,
22 how devastating this electrical design was, we have

1 subsequently learned -- and one of the things that you have
2 to understand is under these procedures we don't have
3 discovery, we don't have depositions, the only thing that we
4 have is the Virginia Sunshine Act, the Freedom of
5 Information Act.

6 So until we obtained the documents, you know,
7 we have no way of knowing whether the County had superior
8 knowledge or should have had superior knowledge. There's no
9 way of establishing until we get access to the County files.

10 Based upon those documents and based upon, you
11 know, admissions, it is clear now that the entire electrical
12 design had not been updated and was known, or should have
13 been known to the County, it was not updated.

14 Apparently this job was on the drawing boards
15 for many years before it was issued. It was updated in the
16 middle eighties, we believe the documents show, for
17 architectural, structural and certainly mechanical, but the
18 electrical was never updated to reflect the 1984 National
19 Electric Code nor the new mechanical equipment, this four-
20 eighty new mechanical equipment.

21 The services, the electrical conduits, the
22 wiring was still based upon a previous design back in 1981.

1 No one, evidently, based upon what we now know as of today,
2 the County had to get this job on the street maybe before
3 the budget ended in 1986, October of 1986. I don't know
4 when the budget really ends, as the counsel pointed out, I'm
5 not really that familiar with County procedures.

6 But I would assume that they were in a rush to
7 get this job awarded before the budgetary process ends, and
8 maybe that is a total inference, but you know that -- I
9 don't really know whether it's the year-end or whatever.

10 And the County knew, failed to disclose or
11 certainly should have known that the electrical design was
12 completely incompatible with the mechanical system that was
13 going -- the new mechanical system that was going in.

14 The County knew or should have known that it
15 was incompatible with the phased operation. It was
16 incompatible with VEPCO requirements.

17 So what you have here as this first chart will
18 show is that we can't start the excavation, the under-slab
19 excavation for the new duct bank that was relocated because
20 of the existing utilities, until the temporary transformer
21 was energized, until we could dismount the existing
22 transformers, until we could relocate the existing power

1 source -- utility lines.

2 And so the day that we're supposed to -- I mean
3 it's less than two weeks before we're supposed to turn on
4 the power -- we don't even start the chiller building. We
5 don't start the actual digging of the duct bank that we were
6 supposed to do seven months before, approximately seven
7 months before.

8 We also don't -- now what we have to do is
9 build that chiller building, rough in the mechanical and
10 electrical work, do the concrete work in the dead of winter.
11 In winter-time we'll show that, you know, from the time that
12 it's supposed to be done during the spring and the summer
13 and the fall, now we're stuck in doing it in the bad winter
14 months.

15 We don't energize the new electrical service
16 until May 15th, 1988. So we're not saying that there is two
17 suspensions; we're saying, if you take the period of time
18 from the time we wanted permanent power, planned to have
19 permanent power until we actually got permanent power,
20 that's a seven and a half months suspension from being able
21 to turn on and utilize permanent power for Phase I.
22 Remember, this is Phase I.

1 We can't run the new mechanical equipment until
2 we have new four hundred and eighty voltage, the new power
3 source, and run it through his motor control centers and
4 distribute it to Phase I. And that's critical. You can't
5 run the air handling units, you can't run the chillers
6 without that. You can't maintain temperature control and
7 humidity control requirements so that you can do plastering,
8 finish, vinyl-asbestos -- I mean carpet, flooring.

9 You can't do mill work. You can't do -- unless
10 you take tremendous chances, you know, with tremendous punch
11 lists -- and the temp to do it. You have a big problem in
12 doing finishes that you would have in a courthouse.

13 Maybe you could take a chance and in an
14 apartment building where you only have drywall and just
15 replace some of the drywall that has mildew and dry rot.
16 Some contractors will do that, you know, when they don't
17 have permanent heat and permanent humidity control.

18 But you can't do that when you have
19 sophisticated finishes like we had in this courthouse.

20 So we say that seven, seven and a half months
21 is a suspension of work and that it was due to -- certainly
22 that was an unreasonable suspension and unreasonable time

1 frame because we only had two years. We don't even have the
2 permanent power until seven and a half months later than we
3 should have had. We don't build the critical mechanical and
4 electrical equipment that we should have built.

5 That was forecast back in '84 that there was
6 going to be major problems unless the County or the
7 architect or whoever plan this job properly. That's number
8 one.

9 The second area that we feel is a County
10 responsibility is what was called domestic relations, and
11 the only reason is that the domestic relations offices on
12 the second floor in Phase I is what was designated to be the
13 offices of the domestic relations.

14 We now know that the County before this
15 contract his the street was aware that there was a change in
16 the County Code requirement and that I think a charge for
17 payments was going to be a County function as opposed to the
18 state, and there was going to be wholesale changes in the
19 plans and specifications with regard to the areas marked for
20 domestic relations on the second floor.

21 There is a memorandum, I believe -- what's the
22 date of the memorandum -- that we've discovered where --

1 earlier performance where the County denoted an internal
2 memorandum saying well, we fouled up making these changes
3 that we know have to come because we wanted to get the job
4 on the street. And that may be some time in 1987. But it
5 indicates clearly that the County even knew even before the
6 job hit the street that there was going to be -- have to be
7 major changes in the second floor of Phase I.

8 Remember, Phase I is critical. You've got to
9 finish Phase I before you get to Phase II. And one of the
10 most critical things besides the finishes up there on the
11 second floor -- and if you walk immediately up above the
12 grand staircase -- that above that and passing through that
13 is numerous chases, mechanical and electrical chases, which
14 has vertical risers, both of them, mechanical vertical
15 risers and electrical vertical risers which services the
16 mezzanine area above that -- which is as I may recall the
17 third floor mezzanine -- that houses additional air handling
18 units. Additional mechanical and electrical equipment.

19 So these risers pass through the domestic
20 relations area in order to get to the mezzanine and service
21 this mechanical equipment.

22 County doesn't disclose that they contemplated

1 these major revisions. The contract, unbeknownst that this
2 was being planned or discussed or -- goes merrily ahead with
3 doing his rough-in work up there on the second floor. The
4 picture will show that in June of 1987 he's well on his way
5 to putting up the studs. He has all the drywall delivered
6 up there. They're doing the mechanical and electrical
7 rough-in.

8 Remember, the County knows and has known since
9 the beginning of the job and even earlier than the beginning
10 of the job that this is going to be major changes up in this
11 area. Somebody, I guess, wakes up finally and says, you
12 know, we're going to have to rip up everything he's doing.
13 We'd better stop him.

14 So they issue a stop order and that's the first
15 item on that line, on 6/22, 1987. Basically they stop all
16 work up on the second floor in the information -- domestic
17 relations area.

18 And we have a photograph, you know, normal
19 progress photo that was taken two weeks later, but I mean,
20 it was stopped and you'll see that they're ready to start
21 -- you know, at least they have all the drywall up there,
22 all of the studs are up there.

1 And it completely disrupted fifty percent or
2 more than fifty percent of the second floor activity. And
3 also stopped completion of the risers. You know, basically
4 everybody in our firm, you know, is a mechanical or
5 electrical -- I mean is an engineer or an architect. We let
6 Roger be an architect and Bob's an engineer, I'm an
7 engineer.

8 But you can't put up -- risers are done all the
9 way up. It's a vertical stack and you really want to
10 continue it all the way up there with your mechanical and
11 electrical. Nobody wants to do a piece of riser, because
12 you would then have separate testing and it's an inefficient
13 operation.

14 So the County during the first half of the job,
15 June of '87, finally says stop all the work now. Remember,
16 we know that they knew that there was going to be -- have to
17 be -- major changes when the job was issued. Certainly
18 there -- the memo is -- and would you find the memo; what;s
19 the date of the memo; it was early in the job that they
20 said, hey, you know, we're going to have to make these major
21 changes in domestic relations.

22 The County does not issue these changes,

1 finally, until April -- what's the date --

2 MR. JONES: April 8th.

3 MR. BRAUDE: -- April 8th, 1988. Sorry, that's
4 why I get the bigger version and not you, because I have
5 trouble seeing -- April 8th, 1988, they finally issue the
6 change order number five, directive to proceed with the
7 changes and the relocation of the second floor.

8 And the only thing that we're saying there is,
9 there's ten months of finish work that go behind it. Finish
10 the mechanical work on the mezzanine and everything else.

11 It was thought to be, you know, ten months
12 after that. You're basically starting from scratch. In
13 fact you're starting from minus scratch. You're not even
14 starting from zero because you've got to rip out everything
15 that's up there. You've got to rip out all the -- all the
16 work that's done has to be ripped out.

17 Well, nobody paid us for ripping out the work,
18 all right.

19 One of the things that -- the only reason I'm
20 really here is because I hear rumors about the County, okay,
21 that the County is now -- and I teach construction law at GW
22 -- and I mean the County's contract has been notorious

1 nationally, now, okay, and now, we'll get into it --

2 MR. BATES: And I object to any sort of
3 argument about the County's procurement policies at this
4 time, I think that the evidence ought to be presented as it
5 relates to this particular case and it probably will be more
6 expeditious to simply go ahead and present that evidence.

7 MR. BRAUDE: Well, this -- if in fact the
8 County as Mr. Bates will probably express in his opening has
9 completely insulated itself from liability for delays,
10 suspensions of work by merely issuing a change eventually,
11 okay -- in other words to get the cost down to less than a
12 hundred thousand or less than fifty thousand, whatever the
13 cost is in change order number five, and doesn't care that
14 it suspends the contractor for six or seven months or eight
15 months or a year, in this case ten months, from doing this
16 critical work on the second floor so that they can get it
17 down to their lower budget number or fifty thousand, they
18 could have waited five years to make sure the contractor
19 finally gives in and says okay, I'll do it for forty-five
20 thousand dollars and insulates themselves, it would be a
21 -- it would be -- let's assume contrary to business morale;
22 it would be contrary to equitable; it would be contrary to

1 fairness; and what I'm going to tell you, you know, after
2 this, it's contrary to contract documents and it's contrary
3 to law, national law, federal law and we believe even
4 Virginia law.

5 There's a duty of cooperation; there's a duty
6 of coordination; there's a duty of fairness, good faith;
7 standards that apply to not only private contracts but also
8 public contracts.

9 If the County feels that because they say, I
10 have a change order provision that allows you, Mr.
11 Contractor, a fifteen percent markup regardless of anything
12 that occurs, and I'm insulated, as long as I finally issue a
13 change order to you, eventually, when I get around to it,
14 and as long as I pay you that fifteen percent markup, I'm
15 home free.

16 What this illustrates in this chart -- and this
17 is our position -- is the time frame is between the stop
18 order, 6/22/87, and 4/8, '88. That is a suspension period
19 before the issuance of the directive to proceed.

20 That is, the suspension period the way I teach
21 it in law school is not covered by the change order. Even
22 in federal procurement you cannot get paid for a suspension

1 of work prior to the issuance of a change order under the
2 changes clause.

3 When we drafted that federal provision ensured
4 and said it specifically in the Federal Register that you
5 have to get paid under a suspension of work provision for
6 any delay that occurs before the issuance of a final change
7 order directive.

8 And what this chart illustrates is that the
9 period of time that we're seeking for the impact and delay
10 is between the period of the stop work order -- which this
11 was an official stop work order on June 22, '87 -- and the
12 time they finally directed us to proceed with the
13 modifications on the second floor, that two hundred and
14 ninety calendar days.

15 Now, we will show that -- two items that our
16 case is based upon. One, we're making an equitable
17 adjustment claim under the contract provisions, because the
18 way I read the contract provisions and the way I think that
19 you, Mr. Kramer, will look at that contract provisions, when
20 we look at that language the suspension of work contract
21 provisions allows for an adjustment in the contract under
22 the contract for a suspension of work that is not our fault

1 and that is of unreasonable duration.

2 And if -- when we go to the contract provisions
3 you will see that that is consistent. And that is the
4 contractual provision that we're seeking to get our monetary
5 adjustment funded. It's under the suspension of work which
6 is for an unreasonable period of time that is either the
7 County's fault or the County's obligation that we could not
8 avoid. And that certainly is true with regard to the
9 domestic relations item.

10 The last, and the one that's probably easiest
11 to demonstrate the extended performance affect is what we
12 call the grand stair.

13 Now, it's not the stair itself that's an issue.
14 It's the entire area, as you know, if you walk into the
15 vestibule in the main lobby, there are walls on the side of
16 the entrance lobby. These massive masonry walls -- well, it
17 turned out unbeknownst to the contractor that this building,
18 I guess, was built during the turn of the century, the
19 original Fairfax County Courthouse.

20 And over the years there have been substantial
21 modifications to the existing structure. Now, a County or
22 the public works agency of a County and the architect,

1 before they embarked on a major renovation job should in
2 fact review the as-built drawings that is in the County's
3 possession to see if the existing conditions that they are
4 going to spend six million dollars in renovating can work.

5 To verify that the existing structure itself is
6 a safe structure, if you're going to spend six million
7 dollars of the County taxpayers' money, you'd better know
8 that this building is supposed to stand and then to verify
9 the as-built conditions.

10 To this day Schlosser has never been provided
11 the as-built drawings. The as-built drawings has always
12 been in the County's possession. The as-built drawings, we
13 will show, was in fact given to the architects, you know,
14 when they were doing the design.

15 Amazingly enough is that the architects or the
16 engineers gave it back to the County. We believe that they
17 gave it back to the County because they smelled that there
18 was something wrong here. All right, that they smelled that
19 there was a major structural problem unbeknownst to the
20 contractor and unbeknownst to the public concerning the
21 existing structure.

22 We can't prove exactly that they knew that

1 there was -- that the building was unsafe while Phase I
2 construction was going on. We do have correspondence that
3 they started to get nervous in 1988. They got nervous in
4 1988, we know, from conversations with County
5 representatives, that they smelled that the existing masonry
6 walls may be a structural problem.

7 We certainly know that they called out
8 consultants when in fact we were in the midst of finishing
9 this job in the fall of 1988 who ascertained unquestionably
10 at that time that there was a major safety hazard with
11 regard to the existing structure, i.e., somebody had
12 modified those masonry walls to eliminate the underlying
13 structural support of these masonry walls in the grand stair
14 areas.

15 These walls, masonry walls, run all the way up
16 to the other side of the existing roof. Basically, as I
17 understand the situation, the walls were being maintained
18 almost all on a friction basis with no significant
19 underlying support.

20 There was in fact -- the walls were resting on
21 steel joists -- oh, no, the walls weren't resting -- the
22 walls were resting on thin concrete slab, sitting on this

1 concrete slab which was merely supported by thin steel
2 joists.

3 When any good consulting engineer looked, you
4 know, went down and looked at it, they noticed that the
5 entire structure, you know, had been over the years and I
6 don't know when it was, I suspect it was 1953, had been
7 taken apart on previous modifications of this building.

8 And this masonry wall which is, you know,
9 basically you know the building better than I do, the
10 building -- I mean this is a major portion of the building
11 which divides Phase I, Phase II, the offices spaces and
12 surrounds the major portion of the building.

13 Not only was it unsafe for the public it was
14 unsafe for the construction workers. And the contractor had
15 no way of knowing it. When there was minor changes being
16 made in the grand stair area the contractor merely had three
17 hundred dollars for underpinning or as temporary supports.

18 The didn't -- the contractor was unaware based
19 upon existing as-built drawings that the major underlying
20 support of those masonry walls had been taken away over the
21 years by somebody, okay, in the County.

22 At any rate the County issued, when they got

1 the reports from the consultant, issued a stop work order
2 -- oh, when the contractor was informed of the dangerous
3 situation he stopped work on October 19th, 1988. Under OSHA
4 he has a requirement to do it, you know, there was an
5 imminent collapse.

6 Over the years the architects, as I understand
7 it, refused to do a design. Refused to get involved, thus
8 contractor eventually had to get an underpinning
9 subcontractor, professional engineer, submit the design for
10 underpinning these walls to the County. The County finally
11 approved it saying, hey, I mean they approved the final
12 design because they didn't even want the structural joists
13 to contribute anything to the support of the walls.

14 Basically he had to go -- the underpinner had
15 to underpin these with needle columns all the way down to
16 the existing foundation. And then the County finally issued
17 a permit and approved that shoring design and that's
18 reflected on April 11, 1989. Which is that interim
19 document.

20 And therefore you have suspended -- had
21 constructive suspension of the grand stair work in the area
22 -- and you know the finishes in that area, you know, on the

1 grand stair.

2 That's, you know, that's a beautiful job to
3 tell you the truth. I don't want to praise my own client
4 but it really was, I was very impressed this morning. A
5 hundred and seventy-four calendar days. And then you had to
6 actually install the shoring within basically thirty-eight
7 work days which was agreed to, fifty-eight calendar days.

8 So basically the grand stair area, the finish
9 work, was not made available until June 1st, 1989. And a
10 month thereafter, and I understand right now where we
11 started on July 10, Phase I was substantially complete, but
12 approximately a month or a month and one week later they
13 finished -- they called back all the finish trades and did
14 all the finishing, the flooring, the mill work, the
15 painting, everything in that area within one month and
16 finally Phase I was completed.

17 Phase I was completed two hundred and fifty-
18 nine calendar days after the milestone where it should have
19 been, and that is the bottom line.

20 Now, the County certainly does not contend
21 that, you know, these delays were non-critical. And if they
22 do we'll hear the rebuttal. Certainly the electrical

1 delays, the chiller room, you know, delayed the whole
2 beginning of the job the way it was planned, okay. It was
3 planned like any good contractor, you put in utilities, you
4 get the mechanical and electrical equipment on the line, you
5 build the chiller room building, get this thing on the line
6 and then you do your finishes.

7 Certainly the second floor was, I think,
8 thirty-six hundred square feet of office space. Not only
9 that, it controlled the mezzanine area. That was suspended.
10 And certainly when finally it was officially recognized that
11 the grand stair area was in imminent danger of collapse that
12 was finally disclosed to the contractor in October of 1988,
13 and it was suspended for over six months or approximately -
14 - over six months until we get in there and then he finished
15 it. That was the last area substantially finished.

16 The County says, ha, I've got you this time,
17 Braude. I guess I handled the original courthouse, I don't
18 know, we used to talk about, you know, how these provisions
19 -- that's the last time I ever handled the job for equitable
20 construction.

21 And I guess after that the County figured that
22 they were insulated by having these changes clauses. Well,

1 let's look at the contract provisions. I think the
2 entitlement is there. What we're saying is --

3 MR. BATES: At the risk of yet again
4 interrupting your opening, Mr. Braude, let me just pose this
5 question: Don't you think it would be more appropriate to
6 cover the contract provisions in argument rather than in
7 opening? Because if you're going to talk about them you
8 obviously have to apply your interpretation.

9 MR. BRAUDE: The final decision as you see --

10 MR. BATES: So I would object to his reference
11 of contract provisions in the opening because opening is, as
12 you know, reserved for recitation of facts that the party
13 intends to prove as opposed to legal interpretation of the
14 guiding principles in the case.

15 MR. BRAUDE: Mr. Kramer, if you see the final
16 decision it just goes off on the contract provisions, right.
17 The final decision says, we're dismissing your claim because
18 of the changes clause. And the suspension of work clause.
19 And that is the gist of the final decision that we're here
20 to appeal to.

21 In other words, basically I could walk in here
22 and just argue the contract provisions, so I'm -- you know,

1 that is the gist. It is basically the correct
2 interpretation to be given to these contract documents, all
3 right. And that's what I'd like to review with you. So you
4 can understand our case.

5 THE HEARING OFFICER: Mr. Braude, why don't you
6 do that briefly --

7 MR. BRAUDE: Okay.

8 THE HEARING OFFICER: -- and then we can go
9 into it in more detail in your direct case.

10 MR. BRAUDE: Okay, in direct testimony.

11 All right, let's talk about -- we can see that
12 the changes clause allows merely, whatever, the fifteen
13 percent markup we're supposed to include overhead in direct
14 expenses and everything else.

15 But that doesn't mean that that nullifies every
16 other provision, and that doesn't mean that it nullifies the
17 County's obligations under the law.

18 Let's talk about the claims for time extension
19 that was also cited by Mr. diZerga in his final decision.
20 And that's paragraph 8.3.2, and you find that in the first
21 volume.

22 It's on D 46.

1 THE HEARING OFFICER: Now, I wonder, before we
2 get started -- we've been going about an hour and a half
3 -- I wonder if we could take a five minute break?

4 MR. BRAUDE: Yes, sir. I could use a drink of
5 water anyways.

6 THE HEARING OFFICER: Let's take five minutes.

7 (Brief recess.)

8 THE HEARING OFFICER: What we'll do, if it's
9 okay with the parties, we'll break at noon for lunch, or
10 somewhere between noon and twelve-thirty depending on how
11 things are going.

12 MR. BRAUDE: That's fine.

13 THE HEARING OFFICER: Okay, ready?

14 MR. BRAUDE: All right, the first one is the
15 final decision, I guess, cites 8.3.2, but it leaves out some
16 pertinent language. You see 8.3.2 says that it quotes that
17 the contractor's sole and exclusive remedy shall be an
18 extension of contract time, all right, in the final
19 decision.

20 Now, it doesn't call certain language that's
21 contained in paragraph 8.3.2. And that is, in the middle of
22 the paragraph, it states that that only applies -- that you

1 only get a sole and exclusive remedy at the time of
2 extension if in fact the delays, interferences, changes in
3 sequence, all alike, are reasonable; which are reasonable,
4 foreseeable, contemplated or avoidable by contractor.

5 These suspensions of work, these delays, were
6 unreasonable. They were not foreseeable, contemplated or
7 avoidable by W.M. Schlosser Company.

8 Now, that's the time extension claims, which
9 -- and we're saying these, you know, that you only can get a
10 time extension if in fact it's a reasonable delay, it it's
11 foreseeable, contemplated or could have been avoidable by
12 the contractor.

13 Now, if you go to the suspension of work
14 provision which is --

15 THE HEARING OFFICER: So your contention is, is
16 that the delays were unreasonable and therefore this
17 provision doesn't apply?

18 MR. BRAUDE: Right.

19 THE HEARING OFFICER: All right.

20 MR. BRAUDE: All right, and now we get also
21 -- because I want to try to look at the contract as a
22 coordinated document -- suspension of work. That is 3.6,

1 you find that on D 10, Mr. Kramer?

2 THE HEARING OFFICER: It's getting there.

3 Three-point-ten?

4 MR. BRAUDE: It's D 10.

5 THE HEARING OFFICER: Oh, D 10, I'm sorry.

6 MR. BRAUDE: And it's page 3.6.2.

7 THE HEARING OFFICER: Yes.

8 MR. BRAUDE: If you look at that provision it
9 has almost a similar language. If the suspension is for a
10 reasonable time under the circumstances then existing and
11 the cause therefore is beyond the control and is without
12 default or negligence of the owner.

13 If you have those two factors, then all you get
14 is the time extended. You get no compensation. So the
15 reverse, the inverse, is true. If it is our -- within the
16 control or the fault or the negligence of the owner and the
17 suspension is unreasonable, the contractor is entitled to
18 additional compensation.

19 It is -- one of the provisions of -- let's say
20 contract administration is -- and certainly contract
21 interpretation -- and it's universally accepted in every
22 contract -- the contract provisions aimed at relieving a

1 party from the consequences of its own fault and -- is not
2 received with favor by the Courts.

3 In other words, if you're going to have an
4 exculpatory provision, something that relieves the County
5 from its own fault, you'd better make it clear, convincing
6 and unequivocal. And certainly the reverse is true here.

7 The contract documents, the suspension of work
8 clause, allows for additional compensation under the
9 contract if the suspension of work is for an unreasonable
10 period of time and the County or its agents is at fault.
11 And that's what our position is.

12 Also, I'd like to point out there is no
13 provisions in here that, you know, aside from the changes
14 provision -- there's no provision in here saying, you know,
15 unequivocally no matter what we do you don't get a time
16 extension.

17 For instance, if you look at -- I mean you only
18 get a time extension, you're going to get no cost -- for
19 weather, for instance, I think it's 8.6.4. If you look at
20 8.6.4 it says, "the contractor shall not be entitled to any
21 money damages whatsoever for any delays resulting from
22 inclement weather whether normal or abnormal, foreseeable or

1 unforeseeable."

2 Well, it doesn't say that the contractor shall
3 not be entitled to any money damages whatsoever for delays
4 resulting from the fault or negligence of the County or its
5 agents, whether foreseeable, normal, unreasonable or
6 reasonable.

7 If in fact that's what it was intended to be, a
8 full exculpatory provision, then they should have utilized
9 different language in the contract. There is no language
10 that unequivocally allows the County no damages for delay.

11 And even if it was we would say this falls
12 within the exception for it, it would be intentional, it
13 would be not contemplated by the parties, all these delays
14 and everything else. And we say that is specifically
15 spelled out in the suspension of work clause.

16 But there are exceptions recognized nationally
17 to no damage for delay provisions and would be recognized in
18 Virginia and this would fall under it.

19 I'd also just briefly like to point out one
20 other provision in this contract, and that's the rights and
21 remedies, paragraph 7.4.1.

22 It says that the parties have available the

1 rights and remedies under the contract documents. But that
2 shall be in addition to and not in limitation of any --
3 7.4.1. No, 7.6.1, I'm sorry. It's my eyes. I ought to get
4 my magnifying glass and stop fooling around here.

5 And it says that the duties and obligations
6 imposed by the contract documents and the rights and
7 remedies available thereunder shall be in addition to and
8 not in limitation of any duties, obligations, rights and
9 remedies otherwise imposed or available by law not
10 inconsistent with the contract documents.

11 Well, in the law there is an obligation by
12 public agencies, by public contractual agencies to disclose
13 pertinent information to a construction contractor and
14 they're liable for the additional cost if the contractor is
15 misled by their failure to disclose either superior
16 knowledge or what the County should have known.

17 The County cannot remain silent with impunity.
18 And it also has the duty to disclose information that may
19 substantially and critically affect the contractors'
20 performance. And that wasn't done.

21 And that is true, especially when the owner
22 impliedly warrants the adequacy of the plans and

1 specifications, which we now know was defective.

2 I mean, they knew that they were going to have
3 to make changes for the domestic relations area. They knew
4 that they were going to have to make electrical
5 modifications and that the existing electrical design
6 wouldn't work.

7 And we feel that they knew or they should have
8 known, at least well before 1988 when the job was supposed
9 to be finished or Phase I was supposed to be finished in
10 October of 1988.

11 They knew that in fact the existing structure
12 was unsafe. And they certainly should have known that the
13 existing structure was unsafe.

14 So we're saying that because of the County's
15 breaches of contract, we would still have a right, even if
16 we didn't win under the suspension of work clause, we would
17 still have an extra contractual right for breaches of
18 contract or the failure of the County to reveal the
19 knowledge of the difficulties to be encountered in the
20 construction of the project.

21 We feel that there would be a breach of the
22 County's implied duties of cooperation. We feel that there

1 would be a breach of the County's implied duties of the
2 warranties of the adequacy of the plans and specifications.

3 Thank you, Mr. Kramer.

4 THE Hearing Officer; Thank you.

5 Mr. Bates, would you like to make some opening
6 comments?

7 MR. BATES: Yes.

8 First of all, I think that the comments that we
9 made earlier about the persons participating in the hearing,
10 with all due respect, become even more relevant in the wake
11 of Mr. Braude's opening argument.

12 I think that to the extent that he is
13 attempting to interweave federal concepts in order to
14 benefit his client is misleading the Hearing Officer.

15 The concepts that he attempts to apply to this
16 particular case do not exist in Virginia law. That is one
17 of the things that the County has consistently argued in
18 these cases involving Schlosser and other contractors.

19 To just begin to point out Mr. Braude's comment
20 or to elaborate on Mr. Braude's comment that expenses or
21 additional compensation based on prior delays cannot be
22 included change order, that is something which is an

1 exclusive element federal contract law.

2 And that particular concept arises out of the
3 federal government's procurement system. And permit me to
4 read a bit to the Hearing Officer, but in order to clarify
5 this once again, I must, because what we have here are
6 situations where attorneys are attempting to use federal
7 precedent to illuminate a Virginia public contract, which
8 was written against the background of Virginia law without
9 any intent to include federal precedent whatsoever.

10 Now, in the past and in this case, the County
11 has always pointed out the legal areas where federal and
12 state contract law agree.

13 However, it's always incumbent upon anybody
14 who's attempting to interpret a Fairfax County contract to
15 pay appropriate attention to the fact that Virginia has what
16 is known as the plain meaning rule.

17 And the plain meaning rule simply says that
18 when you interpret a contract in the absence of any
19 ambiguity, the literal terms of the contract govern the
20 rights and responsibilities of the parties.

21 You don't need to look to any outside sources.
22 You don't need to talk about any implied obligations. You

1 don't need to talk about any covenants of good faith and
2 fair dealing or any issues of superior knowledge.

3 And, in fact, the Supreme Court has said on
4 numerous occasions that even where the interpretation of a
5 contract may work a hardship or unfair result, that does not
6 give the judge the right to re-interpret or rework the
7 contract in order to make it fair.

8 That is the statement of the Virginia plain
9 meaning rule. And I've sort of jumped ahead of myself, but
10 let me just read a bit.

11 In United States versus Rice, and this is a
12 federal concern here, "The Government delayed commencement
13 of work for a number of months while they revised plans and
14 specs to compensate for an unsuitable soil condition.

15 "The Supreme Court granted an equitable
16 adjustment," which is one of the terms you'll hear thrown
17 around in this particular case, which does not exist in our
18 contract "for the change work but denied compensation for
19 the effect of the delays.

20 "This became the famous Rice doctrine, which
21 essentially denied contractor claims for delays caused by
22 changes.

1 "For a number of years following the
2 enunciation of the Rice doctrine, the contractors had a
3 great deal of difficulty in obtaining costs for delays."

4 And then the commentator skips down and says,
5 "There is a different, however, for delays which occur prior
6 to the issuance of a change order."

7 "In earlier cases, the Court of Claims," again
8 the Federal Court of Claims, "held that the Government had
9 the right to take a reasonable time in deciding whether to
10 issue a change without having to pay any compensation to the
11 contractor for damages."

12 "This established the rule that the changes
13 clause gave this period of delay to the Government as a free
14 period."

15 And the Board of Contract Appeals, Federal
16 Board of Contract Appeals naturally concluded that
17 "compensation could not be included in any equitable
18 adjustment under the changes clause."

19 THE HEARING OFFICER; Would you tell me what
20 you're reading from?

21 MR. BATES: This is the Bramble treatise on
22 construction law.

1 THE HEARING OFFICER; Okay.

2 MR. BATES: The '67 revision to the federal
3 government standard form construction contract changes
4 clause clearly maintained the rule which prohibits recover
5 for delay damages prior to issuance of a change order.

6 Now again, the point that he makes in this
7 particular case is that while the County gave changes to its
8 client, the parties could not have considered any prior
9 delays in those change orders because the law, quote, the
10 law precludes the submittal of prior costs in change orders.

11 And I don't believe that that is Virginia law
12 whatsoever. That's not the way the Fairfax County contract
13 operates under these circumstances.

14 And the evidence will clearly show that each
15 and every one of the circumstances confronted by the parties
16 on this particular job was accommodated in the form of a
17 change order.

18 The change order was negotiated and entered
19 into between the parties. The contractor received the two
20 hundred and fifty-nine days of additional time that he's
21 asking for.

22 In this particular case, the contractor

1 received all the costs that he thought were associated with
2 the changes in the work. And so the parties simply proceeded
3 to perform the work.

4 Now, essentially what this claim represents is
5 Schlosser's attempt to come back and get a second bite at
6 the apple.

7 What they're really saying is that yeah, well,
8 we got the change orders covering the work; however, they
9 didn't adequately compensate us for the costs that we
10 subsequently incurred on the site.

11 Now, the contract clearly covers a situation
12 like this. And Schlosser sort of attempted to rely on the
13 contract, but then Mr. Braude comes in and now he's also
14 relying on federal law as well.

15 What they did, they inserted what amounted to
16 be a reservation as is indicated in the claim: "As you are
17 also well aware . . ." That's on page two of their claim,
18 which is old courthouse renovations and extended performance
19 costs. That will be in 219PC0184.

20 "As you are well also well aware equitable
21 adjustment in contract . . ." I'm sorry. "Therefore we are
22 entitled to an equitable adjustment in contract price for

1 these delays. As you are well aware, each and every
2 proposal submitted to the owner expressly reserved our
3 rights to submit impact and delay costs at a later date.

4 "As you are also well aware, each formally
5 issued change order has such language on it and/or in the
6 case that it contained no such language W. M. Schlosser has
7 refused to sign the document."

8 So apparently what they have attempted to
9 accomplish or try to accomplish by that is to present this
10 sort of claim after the fact at the end of the job to ask
11 for additional money.

12 This is not a situation where the owner and the
13 contractor are disputing the existence of a delay on the job
14 from the standpoint of their being no acknowledge by the
15 parties of a change in the work.

16 There was acknowledgement by the parties of
17 each and every change in the work. The form of those
18 acknowledgements took basically the form of fifteen change
19 orders for which Schlosser was given direct and also
20 indirect, based on the formula in Article 12 of the contract
21 documents, compensation for all of their work.

22 It's also clear that the reservation that

1 Schlosser has attempted to create here expressly cited
2 Paragraph 12.10.1 of the General Conditions of the contract,
3 a paragraph that, by the way, Mr. Braude had not mentioned.

4 And obviously the reason why is because it is
5 dispositive of this entire case. 12.10.1 requires the
6 contractor to issue a notice of intent to file a claim
7 within twenty days of the time of the particular event or
8 occurrence which gave rise to the claim, and if he doesn't
9 do that, the claim is barred.

10 That permits the County to be aware of what
11 those circumstances are on the job, which gives rise to the
12 potential for additional payment.

13 The requirement of this notice as a condition
14 precedent to filing claim is well established. It doesn't
15 represent any sort of onerous or unfair procedure.

16 In fact, it's been in existence for about a
17 hundred years. It started at the turn of the century during
18 those old railroad construction contracts.

19 The analogous clause to 12.10.1 is also found
20 in Virginia Code Section 11.69(a), which also states that
21 the contract shall issue a notice of intent to file a claim
22 prior to submitting the claim.

1 The reason why that's so significant in this
2 particular case is because without filing that notice, the
3 County has no way of knowing what Schlosser wants, what
4 Schlosser is believing that it's entitled to.

5 So what we have here is a PCO Number 184WMS219,
6 which basically has a series of general allegations in it
7 regarding different site conditions, extreme number of
8 design changes, extreme length of time required by the owner
9 and the A/E in making decisions as to the contract changes
10 and the owner's delay in allowing us to contract areas.

11 We don't have anything in here about any sort
12 of knowledge of any design defect. We don't have anything
13 in here about even any specific chiller room, no specific
14 reference to the masonry, the grand stair.

15 There's no specific reference whatsoever to any
16 sort of electrical problems at all. So by virtue of their
17 failure to comply with 12.10.1, they have simply come in and
18 tried to submit a claim which they should have submitted
19 governed under 12.10.1 after the fact, after Phase I has
20 been totally completed.

21 And it's our position that 12.10.1 bars what
22 they are attempting to do here, even assuming that

1 everything else that Mr. Braude says is correct. 12.10.1 is
2 conditional. It's a condition precedent to payment, and
3 there is no way that they can argue that they've complied
4 with it.

5 The other significant part of 12.10.1 is that
6 it indicates that all compensation for claims, regardless of
7 what they are, under the contract is going to be paid under
8 Article 12 of the General Conditions.

9 Now, Article 12 of the General Conditions
10 contains the five and fifteen percent markup on direct costs
11 all change work, which is in essence the substitution for
12 the impact costs that Schlosser is attempting to obtain
13 here.

14 So there is no argument at all that the fifteen
15 change orders covered all of the changes in scope of work
16 that were referred to.

17 There also is no argument at all that the
18 direct costs for all that work were marked up the
19 appropriate fifteen percent and five percent as it applied,
20 and that compensation was given to Schlosser.

21 What ultimately Schlosser wants is additional
22 costs which are not permitted under the contract. They are

1 simply not permitted.

2 And there's a good reason for that. And I
3 don't want to belabor that point, but the reason is, of
4 course, is that the reason that the Federal Government
5 permits impact under these circumstances is that the Federal
6 Government has traditionally regulated the way contractors
7 submit their costs in a very, very detailed way.

8 The Federal Acquisition Regulations, better
9 known as the FAR, contain numerous provisions governing the
10 way that contractors submit costs to the Federal Government,
11 the way that those costs are verified, the way that the
12 contractors' accounting system must be kept and maintained
13 throughout the job in order to be sure that the so-called
14 impact of any changes in Federal Government work is
15 appropriately quantified and that the Federal Government
16 doesn't pay more than it should.

17 Now, the way it's handled here at the state
18 level is that we simply mark up the direct costs associated
19 with the change orders fifteen and five percent as is
20 equitable.

21 So, you know, again, the constant refrain here
22 or the constant theme here is that Mr. Braude's attempting

1 to apply Federal Government concepts to a contract which is
2 exclusively governed by Virginia law.

3 And you can't do that. It's never intended for
4 that to happen. The Federal Government have any intent to
5 affect the way local subdivisions of Virginia contract for
6 their goods and services.

7 There is no basis at all to argue that Federal
8 Government law applies in this particular case. And as I
9 say, there are certain areas, highly technical areas, where
10 the Federal Board of Contract Appeals and the Court of
11 Claims have made certain pronouncements on the way, for
12 example, you prove construction delays. And state courts
13 have adopted those.

14 But from the standpoint of the costs that are
15 included in a particular claim, this contract is the final
16 bible on what Schlosser is entitled to be paid.

17 And it's our position, just as it was the
18 position of the Director of the Department of Public Works
19 that Schlosser was paid for each and every aspect related to
20 changes in the work in changes one through fifteen.

21 They received their money. They got their
22 markup. And here they come, after the fact, far after the

1 twenty-day period that's required under 12.10.1, which by
2 their own representation they were going to submit their
3 additional claim in compliance with, asking for more money.

4 Now, as I say, as Mr. Braude's indicated and as
5 I say as well, an interpretation of this particular contract
6 will dispose of the case in its entirety without, in my
7 opinion, even reaching the question of what happened on the
8 job.

9 If they have some sort of theory that the
10 County conspired to withhold information -- that seems to be
11 going around -- if they have that sort of theory, then they
12 can bring that theory at whatever appropriate point they
13 feel that they should, but I don't see that in PCO Number
14 184.

15 I don't see anything about any covenant of good
16 fait and fair dealing in PCO184. PCO184 simply refers to
17 the fact that Schlosser did not sign off totally on changes
18 one through fifteen and that it reserved its right to come
19 back and ask for additional money.

20 Simply put, this case is decided based on
21 12.10.1 because 12.10.1, which governs all claims under the
22 contract, doesn't permit Schlosser to receive any additional

1 money.

2 It says Schlosser, if it's going to be given
3 any money for a claim, it's got to be given under Article
4 12, and Article 12 contains the markup which is designed to
5 compensate the contractor for its impact costs.

6 The two hundred and fifty-nine days that
7 Schlosser seeks in PC0184 is the exact number of days that
8 are included in changes one through fifteen.

9 Once again, there is no reason whatsoever for
10 the Hearing Examiner to even get beyond 12.10.1. And we are
11 prepared, however, to present evidence to show that the so-
12 called impact that Schlosser is protesting of at this point
13 certainly didn't occur, and if it did, it occurred by
14 Schlosser's own failure to man the job, to coordinate the
15 job, and to pursue the work in a diligent fashion.

16 The evidence will show that Schlosser failed to
17 include appropriate personnel on the job throughout the job.

18 The evidence will also show that the County had
19 to engage in extraordinary measures in order to encourage
20 and force basically Schlosser to dedicate more people to the
21 job; that Schlosser, perhaps through no fault of its own,
22 but nevertheless had numerous problems with the

1 subcontractors from the standpoint that they're on cash
2 flow, that there were numerous different supervisors on the
3 site, that in fact there had to be telephone calls made to
4 the main office of Schlosser in order to reiterate the fact
5 that this job was not proceeding in the way that it was
6 intended, and that if there were any problems in terms of
7 the coordination of work, sequence of work, or the following
8 through of activities, they were either Schlosser's
9 subcontractors' own making.

10 We don't dispute the fact that this is an old
11 building, that this is a renovation job, that there were
12 changes. There's no dispute on that.

13 That's why this case is much more easy to
14 determine than your typical case where you have an owner and
15 a contractor arguing about the very existence of
16 modifications in the work. We don't have that in this case
17 at all.

18 What we have is a situation where the County
19 paid Schlosser for each and every material modification in
20 the plans and specifications.

21 And all we're saying is that the contract
22 governed the way in which Schlosser received payment and

1 that Schlosser is precluded from asking for additional
2 payment under these circumstances.

3 Schlosser has also presented what I think
4 titled "Critical Suspensions of Work." I need to point this
5 out in the opening argument.

6 I'm not sure exactly what this is. I don't
7 think it's being offered by Mr. Braude to represent a
8 network schedule or a CPM schedule.

9 Perhaps, as he indicates, it's a pictorial
10 display of what he perceives to be the critical delays on
11 the job.

12 But I must tell you that in construction cases,
13 courts insist that delays, if they're going to be shown at
14 all, are going to be shown pursuant to well established
15 construction scheduling techniques.

16 And this is an area that there is some
17 unanimity in in federal and state law to the extent that you
18 have an expert who can come in and say that he familiarized
19 himself with all the job records and all of the other daily
20 reports and elements which govern the relationships between
21 the parties on the job and can then construct a recognized
22 construction schedule in order to determine which activities

1 were impacted, the courts accept those as evidence of delay.

2 And I'm not so sure whether this particular
3 picture here can be accepted as evidence of anything except
4 for Schlosser's own self-serving charge that perhaps the
5 County impacted it and it should get more money.

6 So unless and until perhaps Andy Schlosser or
7 someone else representing Schlosser can qualify this as a
8 construction schedule consistent with industry standards, I
9 would think that this is misleading and does not adequately
10 depict what happened on the site for purposes of any sort of
11 reasonable reliance.

12 Now, he mentions that the mechanical/
13 electrical issues in the chiller building were critical.
14 And when you say critical, you create a whole series of
15 other connotative implications.

16 Now, this is not a critical path construction
17 schedule, and I haven't seen one. I don't know whether
18 they're going to use one in this particular case.

19 But once again, to use these terms out of
20 context is misleading and I think it's better not to use
21 them at all if they're not going to support them with the
22 other technical elements associated with presenting evidence

1 in a construction case.

2 Now, the business about a suspension of work,
3 once again, suspension of work is a term of art in both
4 state and federal procurement law.

5 I am not sure whether he is alleging that the
6 County issued a suspension of work pursuant to that clause
7 in the contract or whether he is alleging that Schlosser has
8 deemed some impact that it incurred on the job to be
9 tantamount to a suspension.

10 I'm not aware of any suspension of all work
11 going on on this particular job. There may be a stop work
12 order. However, if there were, once again, that was covered
13 by the changes clause in the contract, and Schlosser was
14 paid for whatever costs he had thought it was going to occur
15 as a result of it.

16 The other major point I must make
17 -- and I realize that you've been sitting here listening for
18 quite a while, but Mr. Braude has taken significant time.

19 The other major point which is crucial,
20 absolutely crucial to any sort of presentation of a case
21 dealing with construction delays where you're asking for a
22 million dollars is to prove your costs.

1 All right. As I indicated, one of the reasons
2 why impact costs are permitted at the federal level is
3 because federal auditors have a right to go into the
4 contractor's operations and audit each and every element of
5 the contractor's job cost data to determine whether or not
6 the contractor in fact incurred the costs that he says he is
7 incurring.

8 Now, what we have in PC0184 is essentially a
9 series of gross figures which represent apparently what
10 Schlosser has incurred by way of damages.

11 We have -- on page two of that claim, we have
12 something called "Labor Efficient Loss," which totals
13 \$272,000.

14 Once again, there is no additional evidence in
15 this entire packet to support any sort of labor inefficiency
16 on the site.

17 Perhaps they're going to adduce that through
18 some expert opinion in this particular hearing which
19 involves some elaborate proof of the inefficiency, but
20 again, experts differ as to whether or not you can
21 reasonably prove any sort of labor inefficiency in a
22 construction site because of the technical nature of the

1 evidence that you must adduce.

2 Certainly it's easy for Andrew Schlosser to say
3 we had inefficiency or Mr. Cross or anybody else, but again
4 the reason why the contract deals with impact costs in the
5 way that it does is to avoid the County from being put in
6 this sort of position where you have people coming in and
7 making very conclusory, unilateral, self-serving statements
8 about what happened without any documentation whatsoever.

9 Once again, the standard of any sort of
10 construction delay case is that the contractor has to prove
11 by a preponderance of the evidence that delays occurred,
12 that the delays were a breach of contract, and that the
13 owner caused the delays and that he was damaged by the
14 delays.

15 Now, he's going to have to show that the County
16 caused the particular delays that he was talking about and
17 that the nature of the damages were not received by him or
18 contemplated to be received by him under the contract,
19 which, under these circumstances, he clearly cannot show.

20 Once again, I still maintain that there is no
21 evidence whatsoever that Schlosser has any direct liability
22 to the subcontractors in this particular case.

1 This particular letter, which we only got the
2 second page of and which I contend we still don't have any
3 adequate explanation concerning, clearing invites the
4 subcontractors to submit claims.

5 And it indicates, on page two at least,
6 something to the effect of, if you wish to participate, here
7 is what you have to submit.

8 Now, that doesn't sound like to me a general
9 contractor in a normal situation receiving a claim from his
10 sub arising out of the course of construction work.

11 What that sounds like to me is Schlosser's
12 attempt to simply be a conduit for the subcontractor in
13 order to avoid those claims.

14 It's our position that privity of contract bars
15 this sort of procedural mechanism where Schlosser has
16 acknowledged no actual or potential liability from its
17 subcontractors whatsoever.

18 I still maintain that that is the case. I
19 maintain that paragraph 9 of Schlosser's form contract says
20 that Schlosser will have no direct liability to its subs.

21 And if Schlosser doesn't have any direct
22 liability to its subs, then Schlosser cannot submit a

1 subcontract claim to the County.

2 And I think that if that is the case, then all
3 of the costs associated with Schlosser's subcontractors
4 should be excluded from this PC0184.

5 Going back to Paragraph 12, 10.1 which
6 Schlosser by its admission is relying on here, 12.10.1 is
7 designed for the County to be made aware of these particular
8 claims and costs as of the time they occurred in real time
9 on the job.

10 If they occurred, Schlosser is obligated to
11 submit the notice, I'm going to file a claim. Schlosser
12 then has a twenty-day period to do that. Schlosser also has
13 an additional period of time to file the actual claim after
14 the work is performed.

15 You can't hold the owner hostage by waiting
16 until the end of the entire job and submit a million-dollar
17 claim. You just can't do that.

18 And as I say, even if everything else Mr.
19 Braude said was correct, 12.10.1 bars his claim.

20 In effect, I don't wish to make too much of
21 this reservation of right because in effect, Paragraph
22 12.10.1 gave Schlosser a continuing right to file a claim.

1 So the fact that it had the statement on the
2 changes form that it reserved its right to file a claim
3 under 12.10.1 really is of no legal consequence. What it
4 was saying really is that it intended to come back and ask
5 for more money.

6 But in any event, 12.10.1 governed the
7 procedure by which it was going to do so, so that if say
8 ten, twenty days down the line, it found that there were
9 circumstances arising out of the original change order which
10 gave rise to a separate and distinct claim, it should have
11 given the notice to the County at that time, filed the claim
12 within the limitations period under 12.10.1 and then we
13 would be here on a claim arising out of 12.10.1.

14 That's not what happened. This PC0184 was
15 submitted numerous months -- I mean many days after the end
16 of Phase I. There was no prior notice whatsoever. And the
17 law in Virginia is clear that without the notice, you don't
18 have the claim.

19 The other point that I think is unanimous and
20 in state and federal procurement law is that not
21 withstanding the fact that a particular construction job
22 could have numerous change orders, it's a non sequitur to

1 assume that that automatically results in impact to the
2 contractor.

3 There has to be specific proof of impact.

4 There has to be specific proof of some effect on the
5 construction activity of a contractor. And there has to be
6 a direct showing that the County caused those effects on the
7 construction activity.

8 I don't see that in PC0184. And it's our
9 position that even if the contractor were entitled to impact
10 costs in the way that it believes it to be entitled, it
11 still can't show the requisite impacts to its work as
12 required by numerous construction law cases, both in federal
13 and in state law.

14 So again, his reference to the suspensions
15 clause, his references to the business about whether the
16 delay is reasonable or unreasonable, and his reference to
17 Article 12 governing the payment for changes all are made
18 absolute moot if you never perfect your right to submit a
19 claim in the first instance.

20 You need not go any further than 12.10.1 in
21 order to dispose of this particular case.

22 That's all I have.

1 THE HEARING OFFICER: Thank you, Mr.

2 Bates.

3 MR. BRAUDE; Mr. Kramer, may I explain the
4 procedure? I understand that we were here for an appeal of
5 Mr. diZerga's opinion. Mr. diZerga's opinion does not go
6 off on 12.10.1 at all.

7 He doesn't reflect any problems with regard to
8 our notice, you know. And I would just like to point out
9 that 12.10.1 falls under Article 12, the changes clause.

10 And I didn't think that there was any
11 significant notice issue. Certainly the County was aware of
12 all these suspensions of work and, you know, actual notice.

13 But we will put on just as a little protection
14 to talk about the notice provisions and also the County
15 doesn't recognize that there is a paragraph called 3.6.

16 I didn't make up that paragraph. We're not talking
17 about the federal contract. It says a suspension of work
18 contract is a suspension of work clause, which is under
19 Article 3, not under Article 12.

20 That is suspension of work, and, as the
21 County's attorney says, that is the term of the art. The
22 Rice Doctrine said, hey, you ought to have a suspension of

1 work clause.

2 After that, the Government came out with the
3 suspension of work clause that allowed -- well, the Corps of
4 Engineers didn't -- that allowed payment for delays and
5 impacts prior to the issuance of the change under the
6 suspension of work clause.

7 And this Fairfax County contract has the term,
8 "suspension of work." It's not like I make it up. It's
9 called "suspension of work."

10 And if you look at, for instance, tab fifty-
11 two, the County used that paragraph. They didn't say we're
12 suspending your work under the changes clause; we're
13 suspending your work under paragraph 326, the suspension of
14 work clause.

15 So they utilized that when they suspended the
16 various activities that we're complaining about under the
17 suspension of work clause.

18 The concept is the same is that the changes
19 clause don't kick in until after you get a directive to
20 proceed with a change.

21 We're talking about the delays that occurred
22 prior to the change directives saying, okay, now we're going

1 to answer the problem; now go ahead and proceed with the
2 change work, we know about the problem.

3 It is the prior period of performance that
4 we're talking about. And then it says, this is not a CPM.
5 This is only an illustration to illustrate to a hearing
6 examiner.

7 What we're complaining about is the time prior
8 to the issuance of the change, prior to the solving of the
9 problem; that is, the delays sitting around, interrupting
10 the work, and twiddling our fingers while the County's
11 figuring out what they're going to do.

12 THE HEARING OFFICER: I think that Mr. Bates -
13 - just before you proceeded, I think I would propose two
14 things.

15 One, I don't think we had officially assigned
16 these documents as exhibits and we ought to go ahead at some
17 point in time and do that just for the record.

18 Number two, I think as a dispositive issue
19 raised by the County, I think it would probably behoove us
20 to isolate the case at this point and try to deal with that
21 and see whether or not I agree with the County's position
22 that, in fact, you know, this appeal has no standing before

1 we proceed with hearing a lot of evidence into, you know,
2 the impact of damages, et cetera.

3 Is there an objection to proceeding in that
4 light?

5 MR. BRAUDE; No, I think that may be a good
6 idea to let us have a preliminary decision on it.

7 MR. BATES: Again, you know, what he says in
8 connection with our reliance on 12.10.1 is that, well, there
9 was actual notice.

10 Well, that's a Federal Government rule. That's
11 a federal precedent. The Federal Board of Contract Appeals
12 in numerous cases --

13 THE HEARING OFFICER: Mr. Bates, I'll give you
14 an argue that. What I would suggest we do is go ahead and
15 deal with that issue.

16 And I would like you to step me through, you
17 know, what you consider the rules and regulations as it
18 applies to this.

19 And we will certainly give Mr. Braude an
20 opportunity to do the same and see if I can reach a
21 conclusion or at least a preliminary conclusion that, you
22 know, there's no sense in proceeding or that there is sense

1 in proceeding, in which case we can move on.

2 Is that acceptable to the parties then?

3 MR. BATES: Yes.

4 THE HEARING OFFICER: Okay.

5 Mr. Bates, would you like to re-step

6 -- I mean, let us first deal with the issue of Mr. diZerga's
7 decision of July 11th.

8 MR. BATES: Okay.

9 Now, we will concede that there is no reference
10 to 12.10.1 in Mr. diZerga's decision of July 11th.

11 We will also indicate, however, as early as December 19th,
12 of '89, project engineering informed Mr. Rockwell Moulton,
13 the project manager for Schlosser, that PC0184 was denied on
14 the ground that impact costs are not permitted under the
15 contract and as well, the denial was based on 12.10.1.

16 You probably have that in your documents; do
17 you not? That's December 19th from Harry Furney to Rockwell
18 Moulton.

19 THE HEARING OFFICER: Can the appellant point
20 out what exhibit number that is?

21 MR. BRAUDE: One eleven.

22 THE HEARING OFFICER: One eleven?

1 MR. BRAUDE: Yes.

2 THE HEARING OFFICER:

3 MR. BATES: Now the other point is that Mr.

4 Jones the fact that the decision rendered by Mr. diZerga did
5 not rely on that particular paragraph; however, Schlosser is
6 relying on that paragraph.

7 When you look at Schlosser's own execution of
8 the changes forms in this particular case, it says that it
9 reserved the right to submit additional claims for costs and
10 time under 12.10.1.

11 And I point you to change order number two
12 where they in the description portion of that change order
13 --

14 THE HEARING OFFICER: Let me get that document.
15 Change order number two?

16 MR. BATES: Yes.

17 THE HEARING OFFICER: Do you happen to know the
18 exhibit number?

19 MR. BATES: I think if you hand me the
20 documents that I submitted, I can identify it.

21 If you look here.

22 THE HEARING OFFICER: Okay. And the point is?

1 MR. BATES: The point is that Mr. Jones'
2 statement that Mr. diZerga or the County was not relying on
3 paragraph 12.10.1 in denying the claim is misplaced because
4 it's clear that PC0184 was predicated upon compliance with
5 12.10.1 by Schlosser's own representation, which is stated
6 expressly in change order number two, and it's repeated
7 throughout these change orders.

8 Change order number three says the same thing.
9 It's that same clause. And it's correct. I mean, if they
10 in fact want to submit an additional claim, they have to
11 comply with 12.10.1.

12 That's a condition precedent to perfecting any
13 claim under the contract, regardless of what it is. Whether
14 it arises out of prior work, going into a change situation,
15 whether it's a pure delay, or whether it's some allegation
16 or anything else, if you are proceeding to obtain additional
17 costs and time under the contract, you must comply with the
18 provisions of 12.10.1.

19 And they recognized that. So I don't think
20 that it's appropriate for them to come in and say, well, the
21 County's not relying on that, because they were the ones who
22 reserved their right so to speak to proceed with PC0184.

1 Now, Mr. Braude indicates that, well, of
2 course, that's in there but the County had actual knowledge
3 that Schlosser was intending to get additional money.

4 Well, the actual knowledge rule is a Board of
5 Contract Appeals created rule, which doesn't apply in
6 Virginia law whatsoever.

7 Now, if I can assist you in locating some of
8 their language, I certainly would --

9 THE HEARING OFFICER: Sure.

10 MR. BATES: Okay.

11 Why don't we just take what the County's
12 submitted here, and I can -- because we have all the change
13 orders together.

14 THE HEARING OFFICER: For the benefit of the
15 appellant, make sure you identify the document so they can
16 follow because they don't have a copy.

17 MR. BATES: Okay.

18 These are the cover sheets on change orders one
19 through fifteen. And I don't believe Schlosser made this
20 reservation each and every time, but it was clearly done
21 enough times to be the basis for a conclusion that Schlosser
22 was aware of the requirement and in fact intended to base

1 their subsequent claim on that requirement.

2 Those are the cover sheets. If you look at --

3

4 MR. BRAUDE: Can I look over your shoulder just
5 to look at the cover sheets?

6 MR. KRAMER: Sure. Here, why don't you pull up
7 a chair?

8 MR. BATES: I am told that they made the
9 reservation --

10 MR. BRAUDE: Dennis, can you point out the
11 language on the first one?

12 MR. BATES: Okay.

13 I don't see the language on the first one.
14 There may have been --

15 MR. GUBA: It wasn't on the first one. The
16 first one was signed without reservations.

17 MR. BATES: Okay, it wasn't on the first one.

18 MR. BATES: On the second one, looking into the
19 description portion of the --

20 MR. BRAUDE: Okay, I see it in the second one
21 the language that you're talking about, "Should this firm
22 . . . "

1 MR. KRAMER: "Should the situation merit, our
2 firm may submit in accordance with General Conditions -- and
3 claims for additional costs and time and impact and any
4 claim associated with this change at a later date."

5 MR. BATES: What that also suggests is that at
6 the time that Schlosser entered into this change order, they
7 had not formed a conclusion that there was any prior
8 circumstance on the job which would give rise to any
9 additional claims for costs and time.

10 MR. BRAUDE: Right, okay.

11 MR. BATES: What they were talking about was
12 something to occur in the future. And they were saying,
13 okay for now, we've got our days, we've both our money, but
14 if we do anything in the future as the contract required --
15

16 MR. BRAUDE: Dennis, can you point out the
17 language on the other ones -- without looking over his
18 shoulder.

19 MR. BATES: If we go to change order number
20 three, page two, "Should the situation merit, our firm may
21 submit in accordance . . ."

22 MR. BRAUDE: All right.

1 MR. BATES: Change order four, page two.

2 MR. BRAUDE: Uh-huh.

3 MR. BATES: Change order five, page two.

4 And I think perhaps it was done by separate
5 letter on the rest of them.

6 MR. BRAUDE: Well, I can see that they didn't
7 sign the rest of them.

8 MR. BATES: Right.

9 Oh, and even if they didn't, the point is they
10 acknowledged the fact, and even if they hadn't acknowledged
11 the fact, but it certainly helps the County's position that
12 they acknowledged the fact that 12.10.1 governed any
13 subsequent claim.

14 MR. KRAMER: Based on the fact that they did it
15 in these preceding PCO's?

16 MR. BATES: Absolutely.

17 And 12.10.1 is a jurisdictional precedent as
18 will be presently demonstrated to any claim submitted
19 against the County.

20 MR. BRAUDE: So it's only the first couple that
21 they had that 12.10.1 with Rice?

22 MR. BATES: But even if they didn't -- but, Mr.

1 Braude --

2 MR. BRAUDE: They didn't even sign it.

3 MR. BATES: But, Mr. Braude, my point is even
4 if they had not made the reservation whatsoever, 12.10.1 is
5 in the contract.

6 It is the condition which governs the
7 perfection of any and all claims under the contract.

8 Now, if you go to 12.10.1, it basically says,
9 "If the contractor wishes to make a claim for an increase in
10 the contract sum or time," it's going to give the A/E
11 written notice within twenty days after the occurrence of
12 the even giving rise to such claim.

13 MR. BRAUDE: Which provision are you looking
14 at?

15 MR. BATES: 12.10.1. That's on page D-80.
16 D-80.

17 MR. BRAUDE: D-80?

18 MR. KRAMER: D-78.

19 MR. BATES: I'm sorry. I've got the wrong set.
20 It's the same language. It's got to give a twenty-day
21 notice.

22 MR. KRAMER: After the occurrence of the event?

1 MR. BATES: After the occurrence of the event
2 giving rise to such claim.

3 So assuming he had a belief that the
4 coordination of the electrical and mechanical work in the
5 chiller room gave rise to additional costs and time, he had
6 to give a twenty-day notice as of the time he recognized
7 that situation.

8 You can't wait until the work is over to give a
9 notice. And in this case, he never gave the notice, so the
10 issue of when the notice occurred is moot.

11 They are not saying they gave a notice
12 whatsoever.

13 MR. BRAUDE: We haven't started to respond to
14 you. We'll wait until you finish.

15 MR. BATES: Okay, fine.

16 MR. BATES: Now, the only thing that we have
17 here is PC0184. Also if you go down, it says, "This notice
18 shall be given by the contractor before proceeding to
19 execute the work except in an emergency endangering life or
20 property in which case the contractor shall proceed as
21 provided in Article 10."

22 There's no evidence of any emergency

1 endangering life or property as I know of.

2 It says "No claim shall be allowed and no
3 amounts paid for any and all costs incurred more than twenty
4 days prior to the time notice is are given to the areas
5 herein provided."

6 And here is the kicker in this particular case.

7 "Any change in the contract time and/or" --
8 sorry -- "Any change in the contract sum and/or contract
9 time resulting from such claim shall be authorized by change
10 order." All right, now, we have to assume that Schlosser
11 has even an -- in his argument of noncompliance. But if we
12 assume that Schlosser complied with this clause, that
13 Schlosser encountered additional incidents on the site which
14 gave rise to a request for more money Schlosser could only
15 be paid under Article 12.

16 And what does Article 12 tell us? It says that
17 you get a fifteen percent markup on your direct costs. You
18 do not get extended home office overhead, you do not get
19 extended general conditions, you do not get labor
20 inefficiency costs, you do not get any of the other impact
21 costs which are traditionally given under the federal
22 government procurement system that Mr. Braude's talking

1 about. Not at the state law. Because the fifteen percent
2 markup is designed to compensate the contractor for those
3 costs.

4 Now, we can sit here and talk all day long
5 about whether or not that's fair or unfair. But in Virginia
6 that issue is not relevant. It's only what the contract
7 says, which indicates what the parties agreed by the literal
8 terms contained in the contract.

9 MR. BRAUDE: I think the legislature already
10 said that it was unfair, didn't they?

11 MR. BATES: Well, but --

12 MR. BRAUDE: They had your stamp all over it,
13 didn't they?

14 MR. BATES: Well, but it didn't say it as to
15 this particular contract, all right.

16 MR. BRAUDE: They said you won't be able to do
17 it anymore, right?

18 MR. BATES: Perhaps, perhaps.

19 MR. BRAUDE: That's the one that you --

20 MR. BATES: But if you look at 12.5.6 it
21 basically says the contractor shall not be entitled to any
22 amount for indirect costs, damages or expenses of any nature

1 including but not limited to so-called quote, "impact costs,
2 labor inefficiency, wage material or other escalations
3 beyond the prices upon which the proposal is based, and
4 which the contractor, subcontractors or sub-subcontractors"
5 and so forth.

6 So again, what you have in essence is a claim
7 which doesn't comply with 12.10.1 and even if it did comply
8 with 12.10.1 it includes costs which are not permitted under
9 the changes clause in the contract.

10 So by dint of the contract provisions the claim
11 can't be granted. Even if everything else Mr. Braude is
12 saying is absolutely correct. He can't -- there can't --
13 there can be no equitable situation where Schlosser comes in
14 and bids on County requirements which includes clauses
15 limiting impact compensation.

16 And then they turn around and attempt to allege
17 that somehow they didn't get enough money. Because that was
18 their agreement, and they're not saying that this contract
19 is somehow unfair or that it was a product of unequal
20 bargaining power or that they didn't know what was in here
21 or anything else. Because they clearly indicated they knew
22 what was in here.

1 You can't read 12.10.1 without reading Article
2 12 of the general conditions which gives a measure of your
3 compensation.

4 Now, just one final thing, since we're into
5 this at this stage. This is not the first time Schlosser
6 has submitted a claim to Fairfax County where it failed to
7 comply with the notice provisions in a contract as a
8 condition precedent to payment.

9 MR. BRAUDE: What is that relevant to; are you
10 talking about other contracts?

11 MR. BATES: I'm talking about another -- I'm
12 talking about a legal precedent which was created by dint of
13 Schlosser's position in another case on this very same
14 thing.

15 MR. BRAUDE: Well, didn't you lose the other
16 case; didn't you lose a case on the subcontract provisions?
17 I was informed by Schlosser general counsel that the Eastern
18 District already ruled against you. And you're going to
19 inform the Hearing Examiner --

20 MR. BATES: Different case, different case, Mr.
21 Braude. Different case.

22 MR. BRAUDE: Oh, I thought you were starting to

1 -- didn't you already lose these issues before the Eastern
2 District --

3 MR. BATES: No, absolutely not.

4 MR. BRAUDE: -- and that you're appealing them?

5 MR. BATES: Absolutely not. The case that Mr.
6 Cohen and I have doesn't deal with additional compensation.
7 He will tell you that his case involves what the Housing
8 Authority obligated itself to pay from the very beginning.
9 So it's not a case dealing with any sort of extra work
10 whatsoever. That's his position. So how could that have
11 any relevance at all to the 12.10.1?

12 THE HEARING OFFICER: Mr. Bates, Mr. Braude, I
13 don't see the relevance of any prior cases --

14 MR. BRAUDE: You're wrong.

15 THE HEARING OFFICER: -- or any --

16 MR. BATES: Well, that's not the case I was
17 referring to.

18 THE HEARING OFFICER: -- or any court actions
19 that --

20 MR. BATES: That's not the case I was referring
21 to. The that case that I'm referring to --

22 MR. BRAUDE: Why should that be relevant, that

1 other case?

2 MR. BATES: Because it construed a notice
3 provision which is the same as this one. And Fairfax County
4 Circuit Court construed a notice provision that was the same
5 as this.

6 MR. BRAUDE: I mean, another case is relevant
7 if you win it, another case is irrelevant if you lose it; is
8 that what you're saying?

9 MR. BATES: No, I'm saying that the case you're
10 talking about doesn't -- based on what the court ruled
11 -- doesn't have to do with extras.

12 THE HEARING OFFICER: Okay, let's do this, Mr.
13 Braude. I'm going to allow Mr. Bates to make whatever
14 argument he wants, because it is an informal --

15 MR. BATES: All right, please.

16 THE HEARING OFFICER: -- hearing. I will also
17 permit you the opportunity to make whatever counter-
18 arguments you'd like.

19 Keep it brief, Mr. Bates.

20 MR. BATES: Yes, sir. Now, I will call your
21 attention to the asbestos abatement and renovation to health
22 administration building contract, contract number 6-0241-

1 22-08, where Schlosser bid on a contract. Part of the
2 subcontract work was asbestos abatement. And Mr. Kramer and
3 -- you're not aware of this, and as you've indicated earlier
4 you know, we've had no contact and I dug this out yesterday
5 because I have a very supportive paralegal in the County
6 Attorney's office.

7 But on March 31, 1988, you -- one of your
8 elements of an administrative appeals decision was that the
9 County's general conditions and instructions to bidders
10 first of all clearly states that the County didn't assume
11 any liability for the performance of a subcontractor, which
12 is not relevant here, because the argument that I have is
13 based on privity of contract as it relates to Virginia case
14 law as opposed to any express condition in the contract.

15 But the second provision, if you would bear
16 with me, Mr. Braude, with all your expertise at the federal
17 sector, the second provision basically says that you have in
18 here, the contractor failed to take appropriate action in a
19 timely manner when the problems became known.

20 And that in essence was a finding that the
21 notice provision in the contract barred the claim.

22 Now, it's not all that clear from your

1 decision, but where it is clear is in the decision of the
2 Fairfax County Circuit Court, which heard Schlosser's
3 -- I'm sorry -- which heard Schlosser's appeal of this
4 decision.

5 MR. COHEN: It was a subcontract claim of
6 business. We had nothing to do with it, Mr. Bates.

7 MR. BATES: Now, wait a minute -- on --

8 MR. BRAUDE: Let's hear it out.

9 THE HEARING OFFICER: Since I was the hearing
10 officer I'm familiar with the case, and the only relevance,
11 I think, was the issue of notice and --

12 MR. BATES: Of notice --

13 THE HEARING OFFICER: -- this was a case where
14 a subcontractor contended that a hidden damage existed and
15 he went ahead and proceeded, incurred a lot of expense and
16 damage, or Schlosser did at that point. But they failed to
17 provide an appropriate notice to the County informing them
18 that, and subsequently submitted a bill for, you know, or a
19 claim for additional dollars. And I ruled that they failed
20 to advise the County pursuant to the terms of the contract,
21 that there was going to be additional costs.

22 MR. BATES: And you ruled that Schlosser failed

1 to advise the County because Schlosser, although the
2 subcontractor was the real party in interest, quote, as it
3 were, Schlosser was the one going forth.

4 Now, on page three of Judge Jack B. Stevens'
5 decision of December 19th, 1988, after deciding that in fact
6 Schlosser could bring a subcontractor pass-through claim,
7 which was something the County was arguing against, on page
8 three of the opinion Judge Stevens says, quote, "The final
9 decision the Court reaches in defendant's pleas is the
10 failure of plaintiff to comply with paragraph 74 of the
11 general conditions of the contract, " which requires, quote,
12 "contractual claims whether for money or other relief shall
13 be submitted no later than sixty days after final payment.
14 However, written notice of the contractor's intention to
15 file such claim shall have been given at the time of the
16 occurrence or beginning of the work upon which the claim is
17 based.

18 "Paragraph 74 sets forth the conditions
19 preceding which must be set aside prior to bringing a
20 contractual claim. Parties to this contract specify that
21 these conditions were to be applicable in a proceeding where
22 a monetary claim is brought.

1 "On September 30th, 1986, plaintiff requested
2 the defendant to provide comments based on a claim for
3 additional work. The claim was filed after Wayne completed
4 the additional work which was the basis for the claim.
5 Plaintiff's failure to file a written notice of this claim
6 at the time of the occurrence or beginning of the work upon
7 which this claim is based bars this action."

8 Now --

9 THE HEARING OFFICER: I see the similarities,
10 Mr. Bates, but that was under the procurement rules and
11 regulations, not public works as general conditions which
12 has different provisions. Even though they may be parallel
13 they are different, and I've never seen that decision. I'd
14 be interested in getting a copy of it.

15 MR. BATES: Right, my position is that the
16 -- that not only are they parallel, they are substantially
17 similar in that they require a notice as a condition
18 precedent to perfecting the claim, just as 12.10.1 does.

19 THE HEARING OFFICER: And that is in essence
20 the County's argument, is the failure to provide notice
21 pursuant to --

22 MR. BRAUDE: I'm not really sure -- I mean,

1 okay, I don't want you to go through another speech.

2 Is it your position that we didn't give notice
3 or that we're stuck with 12.10 under the changes clause;
4 what's the position; I mean, are you saying that we didn't
5 give notice?

6 MR. BATES: Well, I think you heard both. I
7 think you didn't give a notice --

8 THE HEARING OFFICER: He's stipulated both.
9 Let's get by the first hurdle in terms of the notice
10 provision, because it seems to me that is pivotal to us
11 proceeding.

12 If you failed to properly provide the notice
13 pursuant to the terms and conditions of the contract, then
14 you have no standing in an appeal, as I would summarize, I
15 guess, the County's perspective.

16 MR. BRAUDE: Right. Number one, notice was
17 given. All right. Number two, the notice provision that
18 he's alluding to here, is under the changes clause, all
19 right.

20 What he is attempting to do is mix apples and
21 oranges. Some of the problems that the contractor had
22 during the performance of this job -- and I don't think

1 we're advising the work wasn't in the contract that was
2 done, because I think we got involved on this job because
3 -- well, I should tell you -- that he felt that the amount
4 he was getting compensated for under the changes clause
5 -- under the changes clause -- was insufficient, all right.

6 And he took issue with that. And that in fact
7 is why thereon he didn't even sign, executing the changes.
8 Some of the -- in other words let's assume he got fifty
9 thousand dollars for a change and he felt that he's really
10 entitled to sixty-five thousand dollars. And he took issue
11 with that because either maybe the fifteen percent
12 limitation or he felt that he wasn't getting paid for some
13 impact effect, you know, surrounding that change.

14 That is not -- we're not presenting here a case
15 surrounding the cost reimbursement of the change itself, all
16 right. That's not what we're talking about here. We're
17 talking about the impact effects of the various suspensions
18 of work and the failures to disclose by the County, not the
19 change work itself.

20 The paragraph 12.10.1 is found under Article 10
21 called -- Article 12 -- called changes. That is not the
22 paragraph under the miscellaneous paragraphs, Article 3.

1 What Mr. Bates, I guess, is saying in a round-
2 about way -- I don't think he's really saying that he didn't
3 have notice, or maybe he is, but you know, there's no
4 findings of fact on that prior thing and it wasn't even
5 raised by me to deserve his opinion, and I don't see how
6 -- I mean he even points out all the statements about 12.10,
7 citing 12.10 as in those provisions, all right.

8 And I'm sure that there are ample notice in
9 these books if that was an issue. In other words the issue
10 isn't notice. What I think Mr. Bates is really saying,
11 however, is that we lose basically because under the changes
12 clause, that we're stuck under the changes clause.

13 Isn't that you're really saying?

14 MR. BATES: I'm saying both, sir. I'm saying
15 that actual -- what you're talking about is that the County
16 had some actual knowledge that Schlosser had problems --

17 MR. BRAUDE: You had written notice. You had
18 actual notice, you had written notice. You suspend the
19 work.

20 How could you have no notice, I mean --

21 MR. BATES: Because we must have a notice of
22 intent to file a claim as it's required in the 12.10.1.

1 MR. BRAUDE: Well, you read all the statements,
2 notice of intent. If in fact they wanted to file a change
3 -- a claim under the changes clause, there's ample notices
4 here, okay. You looked at it. And all the proposals.
5 Every proposal they submitted has, you know, a reservation
6 of rights.

7 Every change order proposal that we're talking
8 about.

9 MR. BATES: But those proposals were introduced
10 with the phrase, should the situation merit or warrant. I
11 mean, that was not a contemporaneous intent to file a claim.

12 MR. BRAUDE: You can reserve that. In fact the
13 County went along with it. The County said, in fact, that
14 we're going to issue these changes unilateral, and you don't
15 even have to sign them. And he didn't sign them after that.

16 I mean, you're making up a story that has no
17 factual basis for it, you know, out of the clear blue.

18 MR. BATES: I'm not making up a story.

19 MR. BRAUDE: Yes, you are.

20 MR. BATES: I'm simply indicating what 12.10.1
21 requires.

22 MR. BRAUDE: There is nobody who is going to

1 come up here and testify that there was no notice -- I don't
2 even think from the County either -- that we weren't going
3 to make a claim, either under the changes clause or a claim
4 in general.

5 MR. BATES: Well, 12.10.1 requires the written
6 notice of intent to file a claim.

7 MR. BRAUDE: What do you want it, in blood?

8 MR. BATES: All you've done in your change
9 orders --

10 MR. BRAUDE: How about the change order
11 proposals?

12 MR. BATES: The change order proposal occurred
13 --

14 MR. BRAUDE: How about the written
15 correspondence?

16 MR. BATES: The change order proposal occurred
17 far beyond the twenty day period that you're talking about,
18 which gave rise to your claim.

19 MR. BRAUDE: If you give a notice of proposal
20 and we submit the proposal and say we reserve rights to make
21 claims, why isn't that notice?

22 MR. BATES: Because the notice must be

1 contemporaneous with the event or occurrence giving rise to
2 the claim. That's not a reservation of rights. All Moulton
3 was doing was saying, hey, we've got a change order here.

4 There may be a situation which transpires on
5 the job that results in our asking for more money and we
6 want to let you know that we're going to do that, if the
7 situation occurs.

8 That's not the same thing as saying, this
9 situation has arisen, this is our notice of intent to file a
10 claim and we're going to file it within the time period of
11 12.10.1. It's two different situations.

12 MR. BRAUDE: If in fact --

13 MR. BATES: We all knew you had the potential
14 to file --

15 MR. BRAUDE: Well, my turn. If, in fact -- you
16 know, let's talk about procedure, because this is my first
17 time exposed to procedure. People have warned me, pulled on
18 my coattails about it, okay.

19 But certainly if in fact we're going to be
20 blind-sided on a quote, "lack of notice," Mr. diZerga's
21 opinion that we're here on appeal does not mention 12.10.1
22 or that we failed to give notice.

1 We would line up, you know, the fifty
2 documents, you know, before the Hearing Officer showing that
3 we actually gave notice.

4 There is no issue here that we didn't -- that
5 the County didn't have notice. They actually suspended the
6 work. Look at paragraph 52; are you going to tell me that
7 there was no notice that you were suspending the work when
8 you suspended it; at tab 52.

9 MR. BATES: That's different from the technical
10 requirement of notice in the 12.10.1. You can't --

11 MR. BRAUDE: Did you know that you were
12 suspending the work when you issued the notices of
13 suspension?

14 MR. BATES: That's immaterial, Mr. Braude. The
15 --

16 MR. BRAUDE: What do you mean it's immaterial?

17 MR. BATES: -- the requirement of 12.10.1 means
18 that the County should be given the opportunity to be aware
19 of --

20 MR. BRAUDE: What case --

21 MR. BATES: -- there is going to be --

22 THE HEARING OFFICER: Let's not get

1 argumentative. Let both sides express their point of view.

2 MR. BRAUDE: Do you ever have -- can you cite
3 me one case that says your conclusion that if the County
4 has actual notice that that doesn't count?

5 MR. BATES: I can cite you numerous cases.

6 MR. BRAUDE: Show me one case, I'm talking
7 about --

8 THE HEARING OFFICER: Mr. Braude, Mr. Braude
9 -- both sides please respect one another's opportunities.

10 MR. BATES: As I've indicated, Mr. Kramer,
11 there are numerous Virginia cases and federal cases as well
12 --

13 MR. BRAUDE: On what?

14 MR. BATES: -- providing Virginia -- I mean
15 applying Virginia law which indicate that where a contractor
16 failed to meet the notice requirements in a contract by
17 submitting a written notice as a condition precedent to
18 filing a claim against the owner, that the claim is barred.

19 Now, it doesn't matter whether or not the owner
20 knew that these claims were going to be forthcoming. The
21 question is whether or not the formal notice provision was
22 complied with. It wasn't in this particular case.

1 Therefore the claim is barred.

2 Now --

3 MR. BRAUDE: Are you saying that the law is, if
4 the owner has actual notice --

5 MR. BATES: Absolutely right. That's what I'm
6 --

7 MR. BRAUDE: -- then it doesn't matter?

8 MR. BATES: Actual notice doesn't meet it.

9 MR. BRAUDE: And you have a Virginia case that
10 cites that?

11 MR. BATES: Well, I just cited one, that was
12 decided in Fairfax County. Involving your client.

13 MR. BRAUDE: I didn't hear them say that we had
14 actual notice.

15 MR. BATES: Well, he said you didn't comply
16 within those provisions in the contract.

17 MR. BRAUDE: But it didn't say that we had
18 actual notice and that if you didn't put it in writing
19 within the twenty days, you lose.

20 Do you have that kind of forfeiture clause
21 -- at any rate, Your Honor, let's talk about the major
22 situation here.

1 Article 12.10.1 wasn't cited by Mr. diZerga,
2 number one, as the basis for this opinion. Number two, it's
3 under the changes clause.

4 We're submitting our additional costs pursuant
5 to suspension of work and for the breach of contract of the
6 County. Breaching there, implied warranty of the adequacy
7 of plans and specifications; breaching their duty to
8 disclose superior knowledge; breaching their duty of
9 cooperation and good faith; as well as the suspension of
10 work clause.

11 We actually -- now don't concede that I'm
12 saying we didn't give notice, we gave notice even under
13 12.10.1. Every proposal says we are intending to make a
14 claim for additional work.

15 Now, are you saying, you know, we would not
16 look at notices for the three things that we're talking
17 about here. Certainly there is actual notice, you know, on
18 the County's suspension. We'll have to look and see if in
19 fact the next day we wrote saying we're going to have
20 additional costs because of this suspension of work, all
21 right, that you imposed.

22 Would that take care of you?

1 MR. BATES: Well, I mean I don't know what
2 would take care of me, but you haven't produced and nor do I
3 think you can any notice compliant with 12.10.1. All you've
4 talked about is the fact that --

5 MR. BRAUDE: It wasn't an issue in Mr.
6 diZerga's opinion, so, you know --

7 MR. BATES: Well, on December 19th you got a
8 letter from project engineering referring to 12.10.1.

9 MR. BRAUDE: And we appealed it and -

10 MR. BATES: And not only that --

11 THE HEARING OFFICER: Let -- let --

12 MR. BRAUDE: What?

13 THE HEARING OFFICER: Mr. Braude, let Mr. Bates
14 finish.

15 MR. BATES: And not only that, Mr. Braude, this
16 is in the contract. We're not saying that this notice is
17 some sort of intrinsic requirement. This is in the
18 contract.

19 There is no way that you can ask the Hearing
20 Examiner to interpret the contract and then turn around and
21 say well, Mr. diZerga didn't want --

22 MR. BRAUDE: All right, my turn. It's such a

1 white elephant that he's raising. Or a red herring.

2 One, he's assuming that there was no notice,
3 even though everybody had actual notice. Even though that
4 the County did the various suspensions of work, you know.
5 And there is not one case that I've known in twenty-five
6 years that says if I suspend the work -- I don't have
7 notice, but I've suspended the work --

8 MR. BATES: Well, that's different from a
9 notice of an intent to file a claim.

10 You know, Judge Ellis down in the Eastern
11 District back in March of 1990 in a case called McDivott
12 versus Marriot denied several claims based on the fact that
13 there was a notice clause analogous to this one which wasn't
14 complied with. The claim was barred. There was no inquiry
15 with respect to any actual notice.

16 Actual notice isn't entered into it. It's at
17 the --

18 MR. BRAUDE: You'd better read that case again,
19 then.

20 MR. BATES: Well, at the federal board of
21 contract appeals level many of those cases are disposed of
22 on the ground that there was actual notice because the

1 parties are out on a job arguing about who should get paid
2 for what.

3 MR. BRAUDE: No, what we do is put together,
4 you know, if in fact the board rules that we have to show
5 notice, okay, we'll put together all the actual notices that
6 we gave in writing.

7 MR. BATES: My point is, actual notice doesn't
8 comply with 12.10.1.

9 MR. BRAUDE: What are you -- I mean, what's the
10 magic language you said, okay? What do you have to comply
11 with? You know, is it a Dennis Bates language? The fact
12 that we're saying we're being damaged and that we're going
13 to make a claim?

14 MR. BATES: A prospective statement of the
15 potential for a claim is not what 12.10.1 requires.

16 MR. BRAUDE: Oh, so you're saying that we have
17 to actually put the claim in within the twenty days; is that
18 what you're saying, Dennis?

19 MR. BATES: I'm saying that you have to note
20 -- I'm saying that you have to note that there was an
21 occurrence or event on the site that gives you the right to
22 receive additional compensation, okay, and you have to do

1 that twenty days of the time you observe it. All right, if
2 you haven't done that, the fact that you generally say that
3 you're going to be potentially in the future filing claims
4 against the owner doesn't comply with 12.10.1.

5 MR. BRAUDE: You know, if in fact they say that
6 you're, you know, that we're suspending all work on the
7 second floor, okay --

8 MR. BATES: That's right.

9 MR. BRAUDE: -- all right, now, we're only
10 entitled to make a claim for if in fact that suspension of
11 work is for a long period of time, an unreasonable period of
12 time, right? You have a right without compensation to
13 suspend us for a reasonable period of time under the
14 circumstances.

15 Would you say the twenty days is a reasonable
16 time? I would say that maybe twenty days is a reasonable
17 time. Eight months ain't a reasonable time.

18 MR. BATES: Whenever you decide --

19 MR. BRAUDE: Ten months is not a reasonable
20 time.

21 MR. BATES: Whenever you decide that you have
22 been put in a situation by the owner --

1 MR. BRAUDE: Well, we did, at ten months, now,
2 we say it's an unreasonable period of time, bang, okay.
3 That's when we give it and you're saying well, I didn't give
4 you notice within the twenty days?

5 MR. BATES: I don't see a notice at all. It's
6 got to be twenty days of the event, okay. And all you've
7 done is file a proposed change order, WMS 219, which by
8 definition must be based on the changes clause in the
9 contract, and this business about breach of contract and
10 implied warranty and all of that is not included in here.

11 You people have submitted a request for a
12 change order.

13 MR. BRAUDE: Well, the contract says you are
14 subject to Virginia law if there is nothing, you know,
15 contrary and inconsistent with this contract.

16 So you know, don't feel that the County can't
17 be responsible for a breach of contract action.

18 Now, the reason that we're here is because this
19 administrative process may include breach of contract
20 action.

21 MR. BATES: Well, that's not what you're
22 alleging.

1 MR. BRAUDE: But certainly -- yes, we are
2 alleging primarily that under the contract as one vehicle we
3 can get paid on the contract for an unreasonably long
4 suspension of work, all right. And that the contract allows
5 us both on the time extension request of clause -- on
6 paragraph -- in Article 3 and in the suspension of work of
7 Article 3.

8 You suspended the various activities that we're
9 complaining about for your own benefit or for the County's
10 own benefit and you certainly had actual notice of it and
11 after an unreasonable period of time that becomes
12 compensable.

13 And what we intend to establish at this
14 hearing, that we were subjected to suspensions of work for
15 unreasonably long periods of time.

16 You have basically the suspension of work also
17 on the federal contract says, for an unreasonably long
18 period of time then you're entitled to be compensated.

19 Your contract saying the reverse and the
20 inverse doesn't -- has the same implications, the same
21 inference that a contractor can be reimbursed if the
22 suspension is for your own benefit, caused by you and is for

1 an unreasonable length of time.

2 It says you will not get compensated if in fact
3 the suspension is only for a reasonable time or it could
4 have been avoided by the contractor or was his fault. Or
5 contemplated by the contractor. That's not the cases that
6 we're seeking to have the Hearing Examiner review.

7 THE HEARING OFFICER: Mr. Bates, will you
8 address the issue of the fact that Mr. diZerga didn't
9 identify the timeliness issue in his decisions?

10 MR. BATES: It's easily addressed, and that is,
11 what they're saying is by virtue of the fact that Mr.
12 diZerga didn't include 12.10.1 in his decision that somehow
13 it's been waived as a basis to preclude the claim. However,
14 it can't be waived simply because it's an integral part of a
15 contract document that Schlosser is basing it's compensation
16 upon.

17 In other words, in order for a party to receive
18 compensation under a contract, it must plead and prove all
19 of the conditions precedent to such compensation.

20 So even if no one had said anything at all,
21 they still have an obligation to indicate that 12.10.1 was
22 met since it clearly governs claims for additional costs

1 and/or time.

2 We also want to indicate that there is no
3 inequity here, because they must acknowledge that on
4 December 19th of '89 they received a letter from project
5 engineering which included 12.10.1 in it.

6 They referred to 12.10.1 themselves in their
7 own proposed change orders -- I'm sorry -- in the change
8 order forms that they signed, and even the ones that they
9 didn't sign apparently, based on representations from my
10 client, they submitted a separate letter stating that they
11 were going to proceed pursuant to 12.10.1.

12 Now, if you're going to proceed pursuant to
13 12.10.1 it's totally inconsistent to come back in the
14 hearing where your claim has been denied by the owner and
15 say, well, the owner can't rely on 12.10.1.

16 It's my position that 12.10.1, because it's a
17 condition precedent, is also jurisdictional and it's pretty
18 clear in the law that jurisdictional bars to claims cannot
19 be waived by anybody, even a court.

20 So let's assume we went through this hearing
21 and I didn't mention anything about 12.10.1 and you ruled in
22 Schlosser's favor. We go to the Fairfax County Circuit

1 Court, it's my position that I could waive 12.10.1 -- I mean
2 I could raise 12.10.1 as a jurisdictional bar to the claim
3 at any stage of the proceeding, because it must be complied
4 with before anybody pays any money to Schlosser.

5 By virtue of that it's jurisdictional. They've
6 got actual knowledge of it, clearly, in this particular
7 case, because they were aware of it.

8 Now, the subset to that -- I don't know whether
9 you want me to go into the limitation on impact included in
10 12.10.1 or not -- but if you say that they have somehow
11 complied with 12.10.1 by virtue of actual notice, the
12 parties knew that there were controversies on the job and so
13 forth, 12.10.1 undoubtedly says that they are going to be
14 compensated based on Article 12 governing changes.

15 Their WMS number 219 which contains this one
16 million, one hundred and seventy-nine thousand, twenty-
17 eight dollars and forty-nine cents request for additional
18 compensation is entitled "Proposed Change Order."

19 Proposed change order. It's not a -- they're
20 not saying breach of contract; they're not saying the
21 contract should be rescinded and we want quantum meruit
22 damages or anything else. They are asking for a proposed

1 change order.

2 The proposed change order must be governed by
3 Article 12 of the contract, which says you get fifteen
4 percent on your direct costs. And that fifteen percent is
5 --

6 MR. BRAUDE: We're back to the same argument.

7 THE HEARING OFFICER: Well, then we get back to
8 I think the second argument.

9 MR. BATES: The second argument under the
10 notice.

11 THE HEARING OFFICER: This is the second
12 argument.

13 MR. BATES: And that fifteen percent is
14 designed to substitute for all of the claimed elements that
15 Schlosser has in WMS 219.

16 MR. BRAUDE: So this notice is really a
17 bootstrap theory that gets you back again to your changes
18 clause.

19 MR. BATES: No, no, no, you're misconstruing
20 it. It's two separate things. You have to do the notice
21 first in order to perfect your claim. Once you perfect a
22 claim

1 --

2 MR. BRAUDE: When do you give the notice under
3 your interpretation?

4 MR. BATES: My interpretation is, if you've got
5 some problem --

6 MR. BRAUDE: When do you give the notice?

7 MR. BATES: Let me respond. My interpretation
8 is, if you've got the problem with coordinating mechanical
9 and electrical elements in the chiller room you give the
10 notice within twenty days of your observation of that
11 problem.

12 MR. BRAUDE: All right, well, okay, so --

13 MR. BATES: All right, you give that notice and
14 once you give that notice you have to then proceed to give
15 the claim as it's indicated in here. "No claim shall be
16 allowed and no amounts paid for any and all costs incurred
17 more than twenty days prior to the time notice is given to
18 the A/E as herein provided."

19 MR. BRAUDE: All right, let me -- let's go to
20 the first area, all right? In February --

21 THE HEARING OFFICER: Did you finish, Mr.
22 Bates?

1 MR. BATES: Yes, I think so, yes.

2 MR. BRAUDE: In February of '87, all right, you
3 have in here a construction conference and notice that hey,
4 wait a minute, VEPCO tells us that we won't -- this is the
5 first problem, this notice is all, okay -- and you have
6 correspondence, I would assume --

7 MR. BATES: Yes.

8 MR. BRAUDE: -- VEPCO won't put two services
9 into this building, all right? This whole design is based
10 upon two different electrical services, all right.

11 In February of 1987, now, who knows -- our
12 cause doesn't get solved until what -- April, March of '87
13 and '80 -- notices, there's a construction conference,
14 there's written notices, there's minutes of a construction
15 -- where is that --

16 MR. BATES: There is, Mr. Braude.

17 MR. BRAUDE: What?

18 MR. BATES: Yeah, there is field orders and all
19 the field orders attached, we talked about that after
20 probably seven or eight progress meetings.

21 MR. BRAUDE: All right, now he's saying that
22 somebody from, you know -- my idea is good logic is always

1 good law.

2 He's saying that after we have this problem
3 with VEPCO we're supposed to know that this problem isn't
4 solved until seven months later. Until, you know, they work
5 out how they're going to solve the problem, how they're
6 going to relocate the line, where they're going to put the
7 temporary transformers.

8 You don't really know how long this is going to
9 last. The fact is, that okay, now that the problem is
10 solved here now you're put into winter concrete work, winter
11 operations, and now finally, when the problem is solved, you
12 can put in your underground conduit, which is underneath
13 this concrete slab.

14 Then you pour your concrete slab -- and so
15 you're supposed to figure out in February of '87 when the
16 first problem of this design comes up, in February of '87
17 you're supposed to know you're going to pour that concrete
18 slab seven months later or now a year later, into winter-
19 time and know how bad the winter conditions are going to be.

20 And you've asked to submit your claim within
21 twenty days?

22 MR. BATES: No, that's not what I said. You

1 know, you keep interrupting me so you didn't get the full

2 --

3 MR. BRAUDE: How could I interrupt you, you
4 never stop.

5 MR. BATES: At the end of this --

6 THE HEARING OFFICER: Mr. Braude, please, let
7 him finish. You have interrupted him on occasion.

8 MR. BRAUDE: I'm sorry.

9 MR. BATES: At the end of 12.10.1 it says the
10 contractor's complete claim submittal for an increase in the
11 contract sum shall be submitted no later than twenty
12 calendar days after the work for which the claim is made has
13 been completed or after the request of the owner or A/E.

14 So if you've got a situation where you have a
15 continuous series of impacts the of course the claim doesn't
16 come until the impacts are over. But in no instance can you
17 wait until the job is done, because this requires -- this is
18 a fore-pricing provision, which is designed to give the
19 owner an opportunity to be apprised of exactly what
20 conditions are out there on the job which are going to be
21 the subject of an additional claim.

22 So he goes out, he has the opportunity to

1 investigate that by dint of the notice before the claim
2 comes in.

3 But we're not saying that he has to be
4 clairvoyant to use a term of a local judge here. All we're
5 saying is that the notice is required to be given when
6 Schlosser observes the incident which touches off in its own
7 thinking -- it doesn't have to be valid or not valid -- but
8 once it believes its entitled to more money, it's got to
9 give us notice.

10 It can't say, well, you know, I've signed
11 fifteen change orders and after change order number three
12 there might be some situations on the job which give rise to
13 additional money. So I'm letting you know that.

14 That's really academic, because the contract
15 gives them a right to file additional claims. But those
16 claims must be filed in --

17 THE HEARING OFFICER: Let me see if I
18 understand, then, the County's argument is, number one, that
19 after this VEPCO issue arose and the suspension of work
20 occurred --

21 MR. BATES: Right.

22 THE HEARING OFFICER: -- that within a twenty

1 day period of time Schlosser failed to advise the County
2 that there would be potential cost increases resulting from
3 the suspension of work?

4 MR. BATES: That they have --

5 THE HEARING OFFICER: All right, that's number
6 one.

7 MR. BATES: Not potential, but they are going
8 to file a claim.

9 THE HEARING OFFICER: That they're going to
10 --

11 MR. GUBA: And there is no suspension of work
12 with that.

13 THE HEARING OFFICER: Well, let's just assume
14 there was.

15 And then secondly, upon conclusion --

16 MR. BATES: Of the work.

17 THE HEARING OFFICER: -- of the work, and in
18 this case I guess -- and somebody needs to define work, I
19 mean, because I think that's critical -- upon the conclusion
20 of what work and having incurred those extra costs it is
21 incumbent upon the company under Section 12 to in fact
22 notify the County within twenty days of the conclusion the

1 exact amount of costs.

2 MR. BATES: That's right.

3 THE HEARING OFFICER: And are you saying that
4 Schlosser failed in both the first and the second instance?

5 MR. BATES: Both the first and the second.

6 Essentially what they did was they waited until
7 Phase I was completed and then submitted a proposed change
8 order.

9 THE HEARING OFFICER: But did they do it within
10 twenty days of completion of Phase I?

11 MR. BATES: No.

12 MR. SCHLOSSER: I thought we did it before.
13 Originally.

14 THE HEARING OFFICER: I can see the company's
15 perspective in terms of, you know, people understanding that
16 work has been suspended. I, you know, might be forgiving on
17 the first instance.

18 But the second instance, when the work is
19 completed is another issue.

20 Mr. Braude, I'd like to, I guess, hear from you
21 concerning the second instance, when the work is completed
22 why the company failed to -- assuming you did -- failed to

1 notify the County of the actual cost increases?

2 MR. BRAUDE: Because it takes you a long time
3 to get the claims submitted. You can't do it partially. It
4 takes you a long time to just get the claims submitted by
5 all the subcontractors and everybody else.

6 THE HEARING OFFICER: Well, I understand the
7 administrative problems in doing that, but you signed the
8 contract with that provision; did you not?

9 MR. BRAUDE: Where does the contract say that
10 you must submit it within thirty days --

11 THE HEARING OFFICER: I thought it was twenty
12 days.

13 MR. BRAUDE: -- twenty days of the completion
14 of Phase I?

15 THE HEARING OFFICER: Well, it doesn't say
16 completion of Phase I. It says completion of work, okay.
17 12.10.1 --

18 MR. BRAUDE: The reason of the -- the work has
19 just been completed just now, as I understand it, that they
20 finished Phase II just now.

21 MR. BATES: Completion for the work upon which
22 the claim is based.

1 THE HEARING OFFICER: The contractor's
2 completed claim submittal for an increase in the contract
3 sum shall be submitted no later than twenty calendar days
4 after the work for which the claim is being made has been
5 completed, or after the request of the owner and/or A/E.

6 That's the last sentence of 12.10.1. And I
7 guess the most liberal, or maybe the most -- the
8 interpretation I would construe that is, when you completed
9 the work related to the suspension, you know, you were
10 obligated pursuant to this provision to submit those costs
11 within twenty days after the completion of that work.

12 So in the case of the electrical subcontractor,
13 when he completed those additional costs, for example, you
14 had twenty days to get a claim in related to that.

15 MR. BRAUDE: Well, I don't think there was any
16 prejudice to the County if in fact, you know, submitting
17 that claim was not applicable, okay. You know, basically
18 that is a type of forfeiture of provision, and I think every
19 court says until you can figure out what your costs are,
20 which may be not until the end of the job which -- I don't
21 know, when was this claim made --

22 MR. JONES: November 21st.

1 MR. BRAUDE: 1989?

2 MR. CROSS: Right.

3 MR. BRAUDE: November 21st, 1989. I guess
4 until they finish that culprit period of time they cannot
5 ascertain what their costs are. And in addition, what I say
6 is this provision, once again, falls under the changes
7 clause. It's still under Article 12, the changes clause,
8 you know, and what we're talking about is not related. I
9 understand --

10 THE HEARING OFFICER: I'm talking about the
11 suspension issue, and I understand your argument about the
12 suspension.

13 MR. BRAUDE: I'm talking about -- it says
14 claims for additional costs and/or time, all right. There
15 is an argument that could be made that once the change work
16 is done you better have all your costs in there, all right,
17 so as to be timely.

18 I have never seen that as a forfeiture because
19 there were so many proposals. I mean some -- he says it's
20 prospective. Nobody -- that's the way it's supposed to be,
21 all right. Prospective. And nobody can really ascertain,
22 you know, what their costs are until all the subs come up

1 with their computations, because the work -- a lot of the
2 change work is done by the subcontractors.

3 Not only -- the -- in every case, and he says
4 that the State of Virginia is something differently.

5 Every case says that the only way that a
6 contractor will lose under that type of provision is if the
7 County could show that they were prejudiced by not having
8 the costs submitted to them within twenty days.

9 Well, my argument to you is still that this
10 falls under -- if this was sitting there by itself under
11 another provision as opposed to the changes provision
12 -- it falls under the Article 12 -- if you couldn't construe
13 a clause as a forfeiture, forgetting about, you know, he's
14 conceding that we have actual notice, he says that doesn't
15 matter. So I mean it's a forfeiture because we didn't dot
16 our I's or cross our T's, you know, within that twenty days.

17 THE HEARING OFFICER: He's not saying that, I'm
18 saying that, and I --

19 MR. BRAUDE: I understand.

20 THE HEARING OFFICER: -- and I'm saying as an
21 example, I'm not making a ruling to that effect.

22 MR. BRAUDE: I understand, that, you know,

1 well, the fact of the matter is I have never really seen an
2 impact and delay claim or an extensive claim be made within
3 twenty days of the event being ceased. I'm talking about
4 the dollar amount. Because it's so difficult because you
5 don't have just one person. You have a multitude of
6 persons. They don't -- nobody keeps cost records on a daily
7 basis. By the time they put together their costs it's going
8 to take, you know, months before they figure out what their
9 costs are, you know, after the event is done.

10 THE HEARING OFFICER: But as a general
11 contractor, I mean, if you authorize additional work of the
12 subs, and in this case say the electrical sub, you don't
13 give him a blank check and say go do it; don't you get a
14 change order from him?

15 I mean, you get a proposal from him --

16 MR. BRAUDE: Right.

17 THE HEARING OFFICER: -- to do this additional
18 work --

19 MR. BRAUDE: Right.

20 THE HEARING OFFICER: -- so you know in advance
21 what that cost is going to be.

22 MR. BRAUDE: And that's the way it's supposed

1 to be done. It's supposed to be prospective, all right.

2 There is no issue here --

3 THE HEARING OFFICER: All right, but as an
4 example in this case with the VEPCO scenario --

5 MR. BRAUDE: He may give them a proposal to put
6 in -- to relocate this -- or basically VEPCO had to do it,
7 all right. VEPCO had to put in the power.

8 But let's assume that there was in fact a
9 proposal for putting up a temporary transformer pad, all
10 right, and utilizing temporary transformers. He gave them a
11 proposal, fifteen thousand dollars or whatever it was, all
12 right, to do it. And that is paid under the changes clause.
13 That is not an issue there.

14 If in fact we were saying, we don't want
15 fifteen thousand dollar for putting up that temporary
16 transformer, we want twenty thousand dollars, then I could
17 see that being an issue, saying well, you were supposed to
18 give me prospectively the cost and you're barred and it's in
19 a court in satisfaction. There's no court in satisfaction
20 argument here, as far as that goes. And you can't, you
21 know, hide in the bushes and then come out, you know, years
22 later saying I want twenty thousand dollars, not fifteen

1 thousand dollars for the change work itself.

2 The change work, as I understand and this is
3 not our claim, we are not seeking here any reimbursement
4 even though it was reserved for, you know, more money than
5 we got in the changes -- for the changes themselves.

6 I other words --

7 THE HEARING OFFICER: I hear you. You're
8 saying that the suspension of work is different than changes
9 --

10 MR. BRAUDE: Right.

11 THE HEARING OFFICER: -- and therefore you're
12 entitled to compensation and I think the County is saying
13 --

14 MR. BRAUDE: And you have to look at it --

15 THE HEARING OFFICER: -- that even if work
16 suspension were granted it's still your recourse is only
17 through the change order process and therefore you failed to
18 comply with the change order provisions and/or the change
19 order provisions limit you to the amount of compensation you
20 are permitted --

21 MR. BRAUDE: Right.

22 THE HEARING OFFICER: -- and you've already

1 received that so you're not entitled to any more, so --

2 MR. BRAUDE: Right --

3 THE HEARING OFFICER: -- you know, it's a --

4 MR. BRAUDE: -- it's the bootstrap and it comes
5 back to the same place.

6 THE HEARING OFFICER: Yes, it comes back to the
7 same place. The question is whether or not the contract, I
8 guess, provides as you interpret, for a different
9 compensation under Article 3 than under 12.

10 MR. BRAUDE: Right. And once -- and it doesn't
11 matter prospectively, okay. In other words you have to
12 determine it under the facts of each and every suspension of
13 work.

14 I'm not saying that every time there is either
15 a constructive suspension or an actual suspension we start
16 getting paid. The -- you know, there is some semblance of
17 sanity with regard to this Fairfax County. Whoever wrote
18 it said, I'm not going to be a total jerk, okay. I'm going
19 to say that if in fact I suspend the construction contractor
20 for what becomes an unreasonable amount of time under the
21 circumstances, and it can't be, you know, there's a time
22 that has to be administered when it becomes reasonable and

1 unreasonable as an add-on basis.

2 And if the contractor could avoid, of course,
3 and could contemplate, of course, then I will compensate,
4 him otherwise, you know, he eats the fifteen percent under
5 the changes clause, you know. And the fact of what Dennis
6 Bates is saying is that because there is some semblance of
7 justice in this contract, that he can't stand it, okay.

8 That, you know, there was no justice, it was
9 never intended to have any equity, any justice. And there
10 would be no way of a contract ever getting any additional
11 compensation besides the changes plus the fifteen percent.
12 And that's all you're stuck with.

13 Now, it doesn't matter, you know, whether it's
14 the notice provision or anything else. And I'm saying there
15 is the first thing in law that universally, if there is
16 going to be some sort of exculpatory provision, if you're
17 going to say regardless of my concealing; regardless of my
18 disclosure; regardless of my lousy plans and specifications;
19 the fact that I knew, you know, that I was going to make
20 major changes; the fact that I let you go ahead, you know; I
21 can mislead you by my silence and lull you into this or lead
22 you that this is a complete set of adequate plans and

1 specifications like was said in the pre-hearing conference.

2 I'm still going to work you over by saying, ha,
3 you can only get paid on the changes clause and you'd better
4 submit twenty days over some event all your costs. And it's
5 going to be only under the changes clause.

6 It falls down to the same thing. If you're
7 going to do that then you shouldn't have had the time
8 extension provision, what I referred to, the 8.3.2, because
9 you know, notice Mr. diZerga didn't quote in his final
10 decision the interim language, saying only, you only get a
11 time extension. Which is we get it, okay? I mean we got
12 the two hundred fifty nine calendar days as a time
13 extension. And I mean we're not talking about LD's, they
14 wouldn't rip us off that badly, okay?

15 And you know, and that's just so -- an
16 exclusive remedy. But what did he say? He left out as a
17 middle provision only when we didn't cause it, you know,
18 through our actions and inactions and only when it's a
19 reasonable delay.

20 You know that --

21 THE HEARING OFFICER: Is that the second
22 paragraph of 8.3.2?

1 MR. BRAUDE: Eight-three-two, the limiting
2 language. And that's the same language that you find in
3 3.6. The same language. We're not going to pay you for
4 delays if the suspension or delay is reasonable or that it
5 was contemplated or you could have avoided it. So, you
6 know, I'm here to prove those three or four items.

7 THE HEARING OFFICER: Yeah, you're here to
8 prove the opposite, that it wasn't reasonable --

9 MR. BRAUDE: Right, yes.

10 THE HEARING OFFICER: -- that it wasn't -- that
11 the County --

12 MR. BRAUDE: Knew, should have know.

13 THE HEARING OFFICER: -- knew, should have
14 known. And therefore you're entitled to --

15 MR. BRAUDE: And it was at fault.

16 THE HEARING OFFICER: -- more than --

17 MR. BRAUDE: And I couldn't have avoided it.

18 THE HEARING OFFICER: -- than the fifteen and
19 five percent, okay.

20 MR. BATES: Just let me interpose here. What
21 he's leaving out, however, is that there is no way that you
22 can be compensated under this contract without referring to

1 the changes clause. Even if you're saying that the
2 suspension was unreasonable or the delay was unreasonable,
3 what other scenario could there possibly be which would
4 result in an increase in the contract time or sum except for
5 a change order, which is exactly what Schlosser knew when it
6 submitted WMS 219 which has as bold as day a proposed change
7 order?

8 MR. BRAUDE: Well, you see the illogic of what
9 you're saying --

10 MR. BATES: I mean, so he comes in and says
11 it's an unreasonable suspension and it was a breach of
12 contract. Well, if he's going to say that I don't know
13 whether we even should be here, because he's got a different
14 claim.

15 He's not relying on WMS 219.

16 MR. BRAUDE: You get paid for this transformer
17 pad, all right? They're saying, you know, we're going to
18 pay you for this transformer pad, you pour the concrete, all
19 right, that's temporary transformer plus fifteen percent,
20 all right.

21 Let's assume that this is in the middle of the
22 building, which it was originally, all right, and we have to

1 build it on the outside and the building stays there, you
2 know, five million dollars, everybody twiddling their
3 thumbs, okay, for -- let's say nine months, seven months.

4 Okay, now you're entitled to be paid under the
5 changes clause and I'll give you the fifteen percent, thank
6 you very much.

7 I mean, is that how we drafted this language?
8 Is Fairfax County smarter than the rest of the world, that
9 they really get somebody to fill out a contract, come on
10 here, and bid it, and we're going to kill you. We're going
11 to slam you.

12 We're telling you, Mr. Contractor, that if the
13 delays aren't reasonable and if we cause it, okay, our fault
14 and you couldn't avoid it, okay, we're still going to screw
15 you under this Article 12.

16 MR. BATES: Well, Mr. Braude, I can -- this is
17 one area where your experience in federal contract law and
18 this contract converge.

19 MR. BRAUDE: Well, frankly --

20 THE HEARING OFFICER: Let him finish. It's his
21 turn.

22 MR. BATES: The equitable adjustment clause

1 that you guys are throwing around in your documents
2 essentially provides for the same sort of change to the
3 contract when there is additional compensation due to the
4 contractor as Article 12.

5 And of course under the equitable adjustment
6 clause as the federal level the contractor is entitled to
7 all of the elements that have been included in proposed
8 change order WMS 219.

9 The only distinction is that in this contract
10 they're not. So all we're saying is that regardless of the
11 scenario by which the contractor is asserting additional
12 entitlement to cost and time the way in which he gets paid
13 must be by a modification of the contract. That's the only
14 authority we have.

15 THE HEARING OFFICER: Let me just follow a
16 provision.

17 Mr. Bates, suppose that the County agreed
18 -- let's just suppose --

19 MR. BATES: Right.

20 THE HEARING OFFICER: -- that the delay was
21 unreasonable.

22 MR. BATES: Right.

1 THE HEARING OFFICER: And that the contractor
2 submitted a claim for something in excess of the fifteen
3 percent and five percent, but he did it in a timely manner
4 --

5 MR. BATES: Right.

6 THE HEARING OFFICER: -- in terms of within
7 twenty days after completion of the work.

8 What is your position with respect to title
9 -- or Article 12?

10 MR. BATES: Article 12 gives him the percentage
11 markups, fifteen percent on the direct cost that he incurs,
12 and in fact Mr. Schlosser was requested by public works to
13 submit additional direct costs arising out of these changes
14 that they're alleging --

15 THE HEARING OFFICER: So you are saying that
16 even if the County acted unreasonable --

17 MR. BATES: Right.

18 THE HEARING OFFICER: -- and delayed the
19 contractor that he is not entitled to anything more than his
20 direct cost plus five percent?

21 MR. BATES: Plus fifteen percent.

22 THE HEARING OFFICER: Fifteen plus five

1 percent.

2 MR. BATES: And that is consistent with the
3 federal practice. The only distinction is that the federal
4 practice permits separate payment for the impact costs that
5 are similar to what are included in 219. And we don't.

6 But we don't because of the contract.

7 MR. BRAUDE: There's two reasons why it's not
8 required -- the one that he's saying is right, because you
9 can get paid for your -- the impact affect on unchanged
10 work. Which overcomes the Rice doctrine on the federal
11 changes clause.

12 But what he's missing is that you also can and
13 must get paid under the suspension of work clause for a
14 delay that you're -- before the issuance of a change order.
15 You cannot get paid under the changes clause.

16 But regardless of it, what you asked is a very
17 relevant question and that actually occurred. Everybody
18 here will tell you that the contractor attempted, just like
19 you say, when they submitted their proposal for the nuts and
20 bolts cost of the change work, attempted to fill in a few
21 items for extended field conditions and everything else, and
22 that the County persistently says, no, under the changes

1 clause you get paid for the cost of your change plus fifteen
2 percent, get it out of your proposal.

3 Now, that's undisputed, is it not? Right?

4 MR. SCHLOSSER: That's correct, it's not
5 disputed by me.

6 MR. BRAUDE: Bill, isn't that true, what
7 happened to you, too? Nobody's going to dispute that, and
8 in other words -- so what is this argument of notice is, is
9 really just a red herring. I mean it still comes back to
10 the same thing, this -- the County's position maintained
11 throughout this job was that all we're going to ever pay
12 you, no matter what we do to you, is your cost plus fifteen
13 percent. And that's it.

14 And everybody will swear to that, and I would
15 think everybody on the other side will swear to it, too.

16 THE HEARING OFFICER: So then it really gets
17 down to a matter of interpretation --

18 MR. BRAUDE: Right.

19 THE HEARING OFFICER: -- of the contract as
20 opposed to the validity of the claims. If we interpret the
21 contract to say that you are not entitled under any
22 circumstances to more than the fifteen percent --

1 MR. BRAUDE: I'll go home.

2 THE HEARING OFFICER: -- the rest of it's moot.

3 MR. BRAUDE: Right. I mean I said that in the
4 first two sentences. I mean --

5 THE HEARING OFFICER: Was it -- well, I'm sorry
6 --

7 MR. BRAUDE: -- I'm sorry I amplified it for
8 the next hour and a half, but it was really my first two
9 sentences.

10 MR. BATES: The contrary, however, is not true,
11 and that is if you allow them to attempt to collect more
12 than the fifteen percent it becomes a matter of the
13 evidence.

14 THE HEARING OFFICER: I hear you, I understand
15 that. But the County's position is that there is no
16 entitlement beyond the fifteen percent.

17 MR. BATES: And that there is no entitlement
18 -- he keeps trying to link the fifteen percent limitation
19 with the requirement of notice, and I'm saying they're two
20 distinct issues. The notice is a condition preceding to
21 even filing the claim.

22 And simply for purposes of argument, that the

1 notices in fact were filed, he is limited to the fifteen
2 percent markup. And I don't believe --

3 MR. BRAUDE: So I go home anyways.

4 MR. BATES: That's right.

5 MR. GUBA: I can relate one incident where I
6 paid over the fifteen percent and the auditors picked it up
7 and I was required to collect it back from the contractor.

8 MR. BRAUDE: I'm not saying it's your fault, I
9 would say it's -- but I don't read that clause that way and
10 it's up to the Hearing Examiner how he reads the clause.

11 THE HEARING OFFICER: Well, we have a lot of
12 people here today. Let me ask for the ease of processing
13 this, would it make sense to proceed with the rest,
14 remainder of the case while all parties are here?

15 MR. BRAUDE: I mean, I really don't want to do
16 a worthless thing. If we're going to -- that would balance
17 the fifteen percent -- you have my issue, is that, you know,
18 I'm not going to say they left out a widget.

19 THE HEARING OFFICER: All right, then let me do
20 this. Let me see if I can -- because we're almost at lunch
21 time -- and maybe what we can do is if -- let's say we take
22 an hour, hour and a half for lunch. Give me an extra half

1 hour or an hour to do something.

2 If we can identify -- re-identify those
3 particular clauses I will take some time out at lunch to
4 review this. And when we come back I'll give you a decision
5 on the initial, and then we can either go forward or we can
6 drop it at that point. Or I guess we would go forward under
7 your theory for the legitimacy of the issue.

8 MR. BRAUDE: Yeah, I would prove that the
9 suspensions were unreasonable and were involved with the
10 County somehow.

11 THE HEARING OFFICER: Mr. Bates, do you want to
12 give me what you consider the salient paragraphs?

13 MR. BATES: Okay, the salient paragraphs are
14 initially 12.10.1, which requires a written notice of intent
15 to file a claim within twenty days -- twenty calendar days
16 after the occurrence of the event giving rise to such claim.

17 THE HEARING OFFICER: All right, what else;
18 anything else?

19 MR. BATES: When you go down -- also in
20 12.10.1, any change in the contract, some and/or contract
21 time resulting from such claim shall be authorized by a
22 change order.

1 And which then gets you to, first of all,
2 Article 12 -- 12.5, where you basically -- you're going to
3 have to read the entire changes article.

4 THE HEARING OFFICER: Which is 12 --

5 MR. BATES: Which is 12 -- which is Article 12.
6 Because essentially what Schlosser has done in this case is
7 to submit a proposed change order which is governed by
8 Article 12 which includes --

9 THE HEARING OFFICER: Okay, well, that's do-
10 able.

11 MR. BATES: All right, now, the other
12 significant clauses would be -- in Article 12 would be
13 12.4.4, that defines what the base cost, direct cost of the
14 work would constitute; and then the subparagraphs in 12.4.4
15 deal with the percentage markups.

16 You want to look at 12.4.5 and 12.4.5(1). And
17 then you also really want to look at 12.5.6. I also would
18 invite you to 8.3.10, which has the same twenty day
19 limitation in it that 12.10.1 has.

20 And then I would invite you to Article 7.4
21 which deals with the administrative procedures under the
22 contract. The reason for that, of course, is once again

1 it's our position that the only compensation, additional
2 compensation, must be made under the changes clause.

3 THE HEARING OFFICER: Well, I think that's
4 critical. If that is the case then that will focus the
5 issue.

6 MR. BATES: That's it.

7 THE HEARING OFFICER: Okay, Mr. Braude?

8 MR. BRAUDE: Yes, I would like to start off
9 with paragraph 7.6 called Rights and Remedies, in that the
10 rights and the remedies, duties and obligations -- the
11 rights and remedies shall be in addition to and not a
12 limitation of those available by law.

13 I'm paraphrasing. It says -- but that's what
14 it says. Those available by law.

15 And then you have back in 7.6.3, contractor
16 agrees that he can be adequately compensated by money
17 damages by any breach of the contract. So what I'm say is,
18 to you, that you know, even -- I can sue for breach of
19 contract, breach of the implied warranties of adequacy of
20 plans and specifications, breach of cooperation, breach of
21 their duty to disclose superior knowledge. Breach of their
22 duty not to hinder.

1 And that is certainly under 7.6.3 that I can
2 present that to the County and the County -- I think the
3 Supreme Court ruled that any public group can settle a
4 breach of contract action.

5 You know, we now in the federal system, we try
6 to put everything into the contract. But the ruling by the
7 Supreme Court is that the County -- the director and the
8 County executive -- can settle any breach of contract
9 action.

10 So what we're saying is under 7.6 we still have
11 that breach of contract, and even if he's right under this
12 laying down that we have -- we're stuck on the changes
13 clause for cost plus fifteen percent, we still have an
14 action of breach of contract that can be made findings by
15 you and that could be settled by the County executive, which
16 I understand you represent.

17 THE HEARING OFFICER: But let me restate; is
18 that not a new argument?

19 MR. BRAUDE: No. No, it's an alternative
20 theory.

21 THE HEARING OFFICER: Well, it's an alternative
22 theory but I guess now you're saying that the County's

1 actions or inactions were in fact -- let me see if I'm
2 interpreting this correctly -- if I fail to agree with your
3 theory on 7.6.1 --

4 MR. BRAUDE: Right.

5 THE HEARING OFFICER: -- then under 7.6.3 you
6 would take the approach that the County breached the
7 contract --

8 MR. BRAUDE: Right.

9 THE HEARING OFFICER: -- and the County
10 executive can in fact settle this case beyond that --

11 MR. BRAUDE: Administratively.

12 THE HEARING OFFICER: -- administratively.

13 Well, that might or might not be outside the
14 scope of the reason we're here, which is to review the
15 decision of the director of public works.

16 MR. BATES: And it's our position that it's way
17 outside the -- not only is it outside of the scope of WMS
18 219, it's outside of the scope of the administrative process
19 under the contract, which is why 7.4 I think is relevant.

20 MR. BRAUDE: Well, I don't think it's outside
21 the administrative process, I --

22 THE HEARING OFFICER: I hear you, we'll

1 proceed.

2 MR. BRAUDE: All right, the next one is
3 paragraph 8.3.2 or 8.3 in general. And that is claims for
4 time extensions. Now, he fails to really look at this. And
5 that talks about, you know, that you can get time for acts
6 and omissions of the owner, 8.3.1.

7 Now, they say in 8.3.2 that you can't get
8 compensation for those acts and omissions if in fact such
9 delays, interferences, changes, in sequence, okay, all
10 alike, are reasonable, foreseeable, contemplated or
11 avoidable by the contractor.

12 The reverse of that, therefore, is true, is
13 that --

14 THE HEARING OFFICER: I hear you.

15 MR. BRAUDE: -- you can, all right. Now, with
16 the provision that you do, all right. Now, I'd like to
17 point out the suspension of work paragraphs.

18 All right, now, I also would like to point out
19 8.6.4. It has nothing to do with it, but here's clear and
20 unequivocal language that says that you can't get any money
21 damages, breach, delays -- any money damages whatsoever
22 -- for weather delays, all right.

1 Now, what I'm saying is they could have said
2 that -- just taken out weather and put in, for acts of
3 omissions or of the County or its agents, all right. And
4 then he would have, instead of this bootstrap theory, you
5 know, that I'm relegated to everything under the changes
6 clause, the fifteen percent, that would be in accordance
7 with universally accepted provisions that if somebody is
8 going to disclaim responsibility for their own acts then
9 they'd better say it clearly, unequivocal, just like he
10 says, under the plain language of a contract.

11 If in fact it had similar language to 8.4.4,
12 then Dennis would have me. He would say, Virginia, too bad,
13 you say it's unconstitutional, go to the legislature just
14 like, you know, everybody evidently did to get around
15 Fairfax County, okay, you know. And I guess the governor
16 signed the law, you know, and the legislature agreed and we
17 wouldn't be here if the original version made it ex post
18 facto, okay, but I think it was prospective; isn't that
19 right?

20 MR. BATES: That's right.

21 MR. BRAUDE: So, you know, this is going to be
22 a one-shot deal, all right. It's not going to establish

1 precedent because future contracts of Fairfax County is not
2 -- Dennis is not going to be allowed to make those arguments
3 in future contracts under the state law, unless he gets
4 amendments, all right, on future contracts.

5 So it's a one-shot deal. What I'm saying is,
6 if you're going to shoot the contractor, all right, and if
7 you're going to tell him he's walking into a hornet's nest
8 and you can do whatever you want to him, okay, under this
9 fixed price sum, just give him the changes plus fifteen
10 percent -- what if there was no changes?

11 What if they decided okay, after spending over
12 ten months on the second floor after suspension of work, go
13 ahead and do it. You know you get fifteen percent of zero.
14 Thank you very nice.

15 Or a year and a half. Fifteen percent of zero
16 is zero, all right. I mean, if you're going to tell -- do
17 that to him, then you'd better clue him in on it, and that
18 is the law. You'd better make it clear and unequivocal.

19 All right, now, we go back, it's not like I'm
20 making up this argument, because basically you have to do
21 what I've done, and I'm really not familiar with Fairfax
22 County. I hear all these Virginia lawyers talk about it,

1 you know, and I don't really pay any attention until, you
2 know, Roger said, hey, take a look at this, okay.

3 I'm saying, yeah, you know, I look at it just
4 like you will and you read it, and it's clear as a bell to
5 me, okay. To me it's clear on the other side. He has to
6 establish beyond a doubt that I'm only relegated to changes
7 plus fifteen percent, because it's an exculpatory provision.

8 THE HEARING OFFICER: Just point me to the
9 provisions.

10 MR. BRAUDE: All right, you're right. It is
11 3.6. 3.6.2. Why put in the language, if the suspension is
12 for a reasonable time under the circumstances then existing,
13 and the cause thereof is beyond the control and is without
14 the fault or negligence of the owner, you know, you get no
15 compensation.

16 Isn't the reverse true?

17 THE HEARING OFFICER: That's it?

18 MR. BRAUDE: That's it.

19 THE HEARING OFFICER: That's it. Okay, why
20 don't we do an hour and a half. That will give me plenty
21 -- it should give me plenty of time to go over this --

22 MR. BRAUDE: Fine.

1 THE HEARING OFFICER: -- and we'll reconvene
2 then in an hour and a half.

3 MR. BATES: So that's one-thirty?

4 THE HEARING OFFICER: Yeah, just about. One-
5 forty, I guess. I've got nine minutes after --

6 MR. BRAUDE: Could we do it at a quarter to two
7 because my daughter is in Fairfax Hospital and I want to go
8 see her.

9 THE HEARING OFFICER: Fine, fine.

10 (Luncheon recess.)

11

1 A F T E R N O O N S E S S I O N

2 THE HEARING OFFICER: Just for the record
3 purposes, we'd like to have moved into the record Exhibits
4 for the County marked as Exhibit Number 1 is a memorandum
5 with attachments from Dennis Bates, senior assistant county
6 attorney, to myself, Fred Kramer, dated April 17th, 1991,
7 reference number 24355, consisting of one page, cover
8 memorandum and a series of attachments including change
9 orders one through fifteen, Mr. Bates, is what you said?

10 MR. BATES: Yes.

11 THE HEARING OFFICER: And a certificate of
12 substantial completion --

13 MR. BATES: And punch list.

14 THE HEARING OFFICER:

15 THE HEARING OFFICER: -- punch list items,
16 project schedule and various other documents.

17 Do you want anything identified or is that
18 adequate?

19 MR. BATES: You should also have the director's
20 decision up there.

21 THE HEARING OFFICER: That's attached to --

22 MR. BATES: Okay.

1 THE HEARING OFFICER: -- your letter, the
2 decision of Mr. diZerga dated July 11th, is the first
3 attachment to Mr. Bates' correspondence, a document
4 previously received during the appeal process.

5 Appellant was -- apparently received copies of
6 these documents via his Freedom of Information request and
7 other means prior to the hearing. There was a schedule, you
8 know, and I don't know where that went -- what is this, Mr.
9 Bates; what do you want to call this thing?

10 MR. BATES: This is a bar schedule depicting
11 the change orders and the period of time which was granted
12 by the County in connection with those change orders, being
13 change orders one through fifteen occurring in Phase I of
14 the contract.

15 THE HEARING OFFICER: So this would be the last
16 attachment to that --

17 MR. BATES: Yes.

18 THE HEARING OFFICER: -- to Exhibit Number 1.
19 And the appellant was provided copies of that today.

20 (The documents described above
21 were marked County Exhibit
22 Number 1 for identification and
23 were received into the record.)

1 THE HEARING OFFICER: For the appellant we have
2 Exhibit -- County Exhibit -- or Appellant Exhibit Number 1
3 which consists of two volumes entitled Schlosser Exhibits,
4 Fairfax Courthouse, Volume I and II --

5 MR. BRAUDE: It's Exhibit Numbers 1 through
6 --

7 THE HEARING OFFICER: A hundred and seventeen?

8 MR. BRAUDE: Yes, Exhibits 1 through 117. And
9 then we have --

10 THE HEARING OFFICER: Do you want to describe
11 any of those or --

12 MR. BRAUDE: That's -- it's documents relating
13 to the issues in this review here.

14 THE HEARING OFFICER: Contract document,
15 project schedules, contract performance, electrical
16 revisions --

17 MR. BRAUDE: Domestic relations suspension or
18 grand stair suspension --

19 THE HEARING OFFICER: Yes.

20 MR. BRAUDE: -- and then the claim documents.
21 We also have as Exhibit A this illustration of the
22 suspension which occurred on the project.

1 THE HEARING OFFICER: And the first exhibit,
2 just for the record, is the owner/contractor agreement for
3 this project.

4 In addition we have Appellant Exhibit Number 2
5 which is critical suspensions of work marked in an upper
6 right-hand corner Exhibit A which summarizes the -- it's a
7 snapshot, if you will, of the appellant's case in terms of
8 the time frames and suspension periods that occurred on the
9 job.

10 It's not intended to be the critical path but
11 illustrative only.

12 (The documents referred to above
13 were marked Appellant's Exhibits
14 Numbers 1 and 2 for identification
15 and were received into the record.)

16 THE HEARING OFFICER: Mr. Bates?

17 MR. BATES: I was going to also reference for
18 the record that the WMS claims documents occur at Exhibits
19 110 through 117 of Volume II.

20 THE HEARING OFFICER: Is there any other
21 exhibits you want to submit or get in at this time?

22 (No response.)

23 MR. BRAUDE: There were some documents

1 referenced in there under separate cover. They were large
2 bar charts which we have copies for you if you'd like them
3 to be part of the record.

4 THE HEARING OFFICER: Yeah, I mean if that's
5 going to be part of the official record we need to get that
6 in now. Just so we don't forget. Do you have one?

7 MR. BRAUDE: Yes, we have --

8 THE HEARING OFFICER: Mark that --

9 MR. BRAUDE: It's my understanding this is part
10 of Exhibit 57.

11 THE HEARING OFFICER: This is a separate
12 attachment applicable to Exhibit Number 1 of the Plaintiff
13 and is a further attachment to his Number 57 which is
14 contained in Volume II.

15 MR. BRAUDE: We also have -- that is -- I don't
16 know if you want it in the record or not, but we have marked
17 as Exhibits 1C, the contract specifications.

18 THE HEARING OFFICER: That's fine.

19 MR. BRAUDE: Is there any reason --

20 THE HEARING OFFICER: Let's go ahead, we'll get
21 them in.

22 MR. BRAUDE: We have --

1 THE HEARING OFFICER: If this is 1 -- your 1C,
2 is that -- did you have an A and a B?

3 MR. BRAUDE: One-A is in the book. 1B is in
4 the book, the volumes --

5 THE HEARING OFFICER: I see them, okay.

6 MR. BRAUDE: -- 1C is a separate volume, 1D is
7 in the book, 1E is in the book and 1F is the contract
8 drawings which we have a large roll that weighs probably
9 what, a hundred pounds, give or take --

10 MR. JONES: A substantial amount, yeah.

11 MR. BRAUDE: -- and we can bring those up if
12 you want or dump them wherever you would like them.
13 Whatever you would like to do with them.

14 We're referenced them as part of the record and
15 I don't think there's any -- I think it's important, it's a
16 part of the contract documents. We can make them part of
17 the official record or we can just -- you can designate one
18 of us as the custodian of that voluminous exhibit.

19 THE HEARING OFFICER: I don't have a problem
20 with that. Perhaps -- is it appropriate to designate the
21 County file as the official contract document file which
22 contains these building drawings?

1 MR. BRAUDE: Yes, that's fine, that's fine.

2 THE HEARING OFFICER: Fine, I would not need
3 those, then. Unless we're going to refer to them as we
4 proceed I don't need them for my records.

5 Go ahead, I'm sorry.

6 MR. BRAUDE: I've got a couple of other items
7 here. This is Exhibit 2A in the book, separate cover. This
8 is the CPM. Excuse me, 2B.

9 THE HEARING OFFICER: The other one you labeled
10 --

11 MR. BRAUDE: And I'm not sure if there's a
12 label on that or not, I didn't take it apart.

13 MR. BATES: Have we seen a copy of that?

14 MR. BRAUDE: That was presented at the pre-
15 construction conference, and if you don't have a copy we can
16 get you a copy.

17 THE HEARING OFFICER: You say 2A?

18 MR. BRAUDE: That's 2B.

19 THE HEARING OFFICER: What is that?

20 MR. BRAUDE: It's a CPM schedule, as planned.

21 MR. BATES: And we object to the inclusion of
22 the CPM schedule. It's never been part of any contract --

1 MR. BRAUDE: We'll withdraw it. We'll withdraw
2 it.

3 Exhibit 3 is the bar chart. This how Schlosser
4 contemplated performing the work and it was discussed in the
5 pre-trial motions and I think it's relevant and part of the
6 record. We also discussed the --

7 MR. BATES: Yeah, we'll let the bar chart come
8 in.

9 MR. BRAUDE: I just marked it Exhibit 3

10 THE HEARING OFFICER: That would be Appellant's
11 Exhibit 3?

12 MR. BRAUDE: Yeah, and it's four sheets, a bar
13 chart dated October 24th, 1986.

14 (The documents described above
15 were marked Appellant's Exhibit
16 Number 3 for identification and
17 were received into the record.)

18 MR. BRAUDE: The last item we have -- the last
19 one is -- I only have one copy, you're welcome to look at it
20 -- is a set of the original electrical plans that are color-
21 coded. It's going to be part of -- it's identified as
22 Exhibit 8, and you're welcome to look at it.

23 MR. BATES: Right, no objection.

1 MR. BRAUDE: If you'd like me to hold on to it
2 or if you'd like to keep it --

3 MR. JONES: Well, do you have the letter, too,
4 with it; the color-coded letter that --

5 MR. BRAUDE: No, no, we're just putting this
6 into evidence.

7 THE HEARING OFFICER: That's part of the
8 original documents is what you're saying?

9 MR. BRAUDE: Yes, right.

10 THE HEARING OFFICER: Well, I think by
11 designation we've indicated the County records --

12 MR. BRAUDE: Then I'd like to clarify that the
13 contract documents in evidence will be both the original bid
14 documents as well as the final as-built contract documents
15 for the project. There was significant revisions and you
16 can't tell from the final drawings what the initial drawings
17 looked like. These are the initial drawings that we've
18 marked as Exhibit 8.

19 THE HEARING OFFICER: And does that -- this
20 Exhibit -- I see.

21 MR. BRAUDE: Yeah, right.

22 MR. GUBA: We have a set of the bid documents.

1 THE HEARING OFFICER: Okay, so the Plaintiff's
2 Exhibit 8 as referenced in Volume I is actually the original
3 electric --

4 MR. BRAUDE: Drawings.

5 THE HEARING OFFICER: -- bid documents --
6 drawings, rather, which the County is the official holder on
7 of. I'd just recognize that, okay.

8 MR. FURNEY: The as-builts though are at the
9 architect's right now being reviewed. We do not have them
10 in our possession. We have the originals.

11 MR. GUBA: But -- of the as-builts. They sent
12 the originals to us, we transmitted a set of prints of those
13 to the architects.

14 THE HEARING OFFICER: Is there a need to -- and
15 I just ask for point of clarification -- is there a need to
16 identify those as exhibits for any reason, is any party -- I
17 mean this is just documents, file documents, if there's a
18 need to we can mark them as County Exhibits, you know, 2 and
19 3 or -- yeah, 2 and 3 if that's what you'd like to do. If
20 not --

21 MR. BRAUDE: Why don't we have the bid
22 drawings, County Exhibit 2, and the final as-built drawings

1 as County Exhibit 3.

2 THE HEARING OFFICER: Okay, that's fine.

3 (The documents described above
4 were marked County Exhibits
5 Numbers 2 and 3 for identification,
6 and were received into the record.)

7 THE HEARING OFFICER: When you say drawings you
8 mean drawings and specs -- specs are separate, so these are
9 the bid documents that were submitted to all bidders prior
10 to the procurement. And then 3 is the as-builts.

11 Is that it, Mr. Jones?

12 MR. BRAUDE: Yeah.

13 THE HEARING OFFICER: Prior to the recess I
14 indicated I would go back and look at the issue of the
15 suspension and the assertion by the plaintiff of damages
16 being permitted under the contract -- and I'm not trying to
17 interpret your words -- but in summary that the document
18 does not prohibit, if you will, the claim for indirect costs
19 as opposed to direct costs using principally Articles 3.6.2
20 and 7.6, 7.6.3, 8.3, 8.3.1 and 8.6.4, County's, and in
21 summary that because the suspension of work was not that of
22 the appellant's making and that it was in fact not
23 stipulated by county yet, but assuming it was an

1 unreasonable suspension of time or an unreasonable amount of
2 time that therefore damages, indirect damages, could in fact
3 be recovered.

4 The County asserted, I believe, under
5 provisions 12.01.1, principally Article 12 in its entirety,
6 but specifically 10.1, 12.4.4, 4.5 and 12.4.5(1) as well as
7 12.5.6 and Article 7.4 that they were not permitted -- I
8 reviewed that for the last hour and a half quite carefully.

9 And I guess it's my opinion that there's two
10 routes one could get here. One, using 3.6.2 which flows
11 through, I think then Articles 8.3.1; Articles 8.3.2 and
12 Article 8.3.9. I think Articles 8.3.9 and Articles 8.3.10
13 are controls. And Article 3.10 is also a control.

14 But we get back into Article 12.4.1, 4.3.1, 4.5
15 and ultimately I wind back at 12.5.6, the bottom line being
16 that even if we are to assume that it is reasonable to imply
17 that if the contractor was held up due to suspension of an
18 unreasonable amount of time that he might submit damages
19 that I believe Article 12.5.6 ultimately controls the
20 situation and in fact does not permit the recovery of
21 indirect costs or damages or expenses as so outlined in that
22 article.

1 I looked at another course of action and
2 reached the same conclusion using 12.10.2, which addresses
3 if the contractor's claims that additional costs or time is
4 involved because of, but not limited to, any written
5 interpretation pursuant to Article 2; any order by the owner
6 to stop work pursuant to Article 3 where the contractor was
7 not at fault, which I think gets back to the argument that
8 you made.

9 We still wind up with the payment provisions
10 being provided for in Article 12. I think Article 12.5.6 is
11 very, very clear, where it prohibits the entitlement to any
12 amount for indirect costs or damages or expenses of any
13 nature, et cetera.

14 And that's my ruling.

15 As for the breach on 7.6.3 -- let me look at
16 that again -- I also looked at that.

17 I think my reading of 7.6.3 would also apply
18 -- and let's read that, let me read it just for the record:
19 The contractor agrees that he can be adequately compensated
20 by money damages for any breach of this contract which may
21 be committed by the owner and hereby agrees, et cetera.

22 If you read 7.6.2, no action or failure to act

1 by the owner, A/E or contract shall constitute a waiver of
2 any right or duty afforded any of them under the contract
3 nor shall any such action or failure to act constitute an
4 approval of or an acquiescence in any breach thereunder
5 except as may be specifically agreed in writing.

6 And I guess my interpretation of 6.3 says that
7 no default act or omission of the owner or architect except
8 for failure to make payments as required by the contract
9 document shall constitute a material breach.

10 And since the County has not failed to make
11 payments, or at least you've not made a record that they
12 failed to make appropriate payments, I don't view that the
13 County is, in fact, in violation of the contract.

14 7.6.3 goes on where it says, to suspend or
15 abandon performance of all or any part of the work, so I
16 don't see that the County is, in fact, in breach of
17 contract.

18 MR. BRAUDE: For purposes of finality's sake,
19 will you -- I understand you just read your decision into
20 the record, but will you be issuing a letter to accompany
21 that?

22 THE HEARING OFFICER: I can. I was trying to

1 reference the provisions and kind of a logic that I --

2 MR. BRAUDE: Oh, I'm sorry, I didn't mean to
3 interrupt you. I thought you were --

4 THE HEARING OFFICER: No, that's all right. I
5 didn't articulate them orally. I was trying to articulate
6 them, you know, in terms of the provisions that I thought
7 were applicable and I'll be more than happy --

8 MR. BRAUDE: Sure.

9 THE HEARING OFFICER: -- to put that in a
10 written decision.

11 MR. BRAUDE: All I'm asking for is a dated
12 decision signed by you for purposes of if we decide to
13 pursue legal remedies for --

14 THE HEARING OFFICER: Sure, I understand that.

15 MR. BRAUDE: I didn't mean to interrupt you,
16 though, if you were going to continue --

17 THE HEARING OFFICER: Well, the only thing I
18 think that needs expounding was this issue of 12.10.2, where
19 it talked about a claim for, you know, a stop work order
20 pursuant to Article 3. It references that the contractor
21 shall make such claims as provided in subparagraph 12.8.1.

22 When you go there, there seems to be a little

1 inconsistency in the sense that 12.8.1 talks about the owner
2 reserves the right through the A and E to make alterations.
3 And I went through to 12.8.2 because it talks about in the
4 case of a lump sum contract, which this was -- and I think
5 that gets you back to the general provisions of Article 12
6 which all tie back.

7 I think ultimately it all ties back to the
8 12.5.6, and that's the operative provision that I see for
9 any adjustment to the contract.

10 MR. BRAUDE: So it's your ruling that any
11 adjustments to the contract regardless of the suspension
12 being unreasonable, a breach of contract would be tied to
13 the changes clause with the appropriate markups that's
14 stated in 12.5.6, fifteen percent or five percent, whatever
15 the case may be?

16 THE HEARING OFFICER: Yes, that's the way I see
17 it.

18 You know, if those provisions were not there or
19 if there were other provisions I think your logic --
20 certainly I followed that. And I read Article 3 as giving
21 that -- that alternative in the event that it was beyond the
22 contractor's provision, but Article 12 doesn't provide for

1 it. It cuts it off.

2 So that's my interpretation.

3 MR. BATES: Would you be interested in perhaps
4 having the parties expedite a copy of the transcript to
5 assist in your preparation of this --

6 MR. BRAUDE: Oh, I don't think -- all I want is
7 a cover letter, not a transcript. I mean --

8 THE HEARING OFFICER: I think since you are
9 having a transcript done I would appreciate receiving a
10 copy, you know, when you do get a copy, if you -- just for
11 my records and files.

12 However, in terms of providing you with a
13 written decision I don't think that's critical, Mr. Bates.

14 MR. BATES: Well, one of the things that I
15 would like to say at this stage is, the procedure governing
16 any appeal of this decision to court requires a written
17 decision containing findings of fact.

18 And certainly the -- to the extent that the
19 decision represents a legal interpretation of the contract
20 and the court is able to de novo -- on a de novo basis, I
21 should say -- interpret the contract in its own right.

22 However, I simply point out that the Virginia

1 Code Section of Evidence, 71, does require a written
2 decision issued by an administrative hearing officer
3 containing findings of fact. And I simply wanted to
4 expedite that to the extent that you were --

5 THE HEARING OFFICER: Well, I think I'll be
6 more than happy to just for the record purposes ask that
7 both parties submit, you know, their proposed findings of
8 fact. If you want that for the record. I don't know
9 whether that's necessary. It's all on the record.

10 MR. BRAUDE: Well, there's a ruling, you know,
11 on your interpretation. I mean basically we lost a motion
12 for summary judgment. That's the ruling --

13 THE HEARING OFFICER: Well, you're going beyond
14 me on this, I was trying to give you an interpretation of
15 this --

16 MR. BRAUDE: That's fine, as long as you just
17 give it to us in writing.

18 THE HEARING OFFICER: Okay.

19 MR. BATES: Well, I would say -- you know,
20 again, it's not a summary judgment posture here at all, but
21 in any event I think --

22 MR. BRAUDE: All I'm contemplating is a -- all

1 we're contemplating is a written decision. I think that's
2 what's required. So all we need is, you know, a paragraph
3 or a page letter, whatever you feel is necessary.

4 THE HEARING OFFICER: Fine, I'd be more than
5 happy to do that.

6 With respect to, you know, to if you will, an
7 issue that Mr. Bates raised earlier, that the scope of the
8 change orders and whether or not you were property
9 compensated for direct costs, is there no contention to
10 that; it's purely this indirect issue that's at stake?

11 MR. BRAUDE: Yeah, what's at issue --

12 THE HEARING OFFICER: Because I want to give
13 you the opportunity at this time to, you know, to raise any
14 further arguments in terms of additional compensation.

15 MR. BRAUDE: The only -- what we're asking for
16 is the losses and the expenses and the damages stemming from
17 the unreasonable suspensions of various construction
18 activities. Which we feel we should not be restricted to
19 the markups that are allowed in 12.5.6.

20 THE HEARING OFFICER: I understand that. I
21 guess just for the record I want -- I'm not sure that Mr.
22 Bates or the County ever acquiesced or agreed that there

1 were unreasonable delays. You know, I volunteered to make a
2 conclusion. If that is refuted, you know, we can, you know,
3 you can submit evidence, they can and we can address that
4 issue.

5 It just seems to me that if it were given that
6 they were unreasonable then your question is would you be
7 entitled to compensation and I guess I was saying --

8 MR. BRAUDE: No.

9 THE HEARING OFFICER: -- I didn't see it,
10 that's right.

11 MR. BRAUDE: Fine. That's your decision, you
12 know, we'll go from there.

13 But you know, the only thing is that if we have
14 to take some action that we just need a letter, that's all.

15 THE HEARING OFFICER: Sure, give me a couple of
16 days to do something and I'll put it in writing and send it
17 to all parties.

18 MR. BRAUDE: That'll be fine, thank you.

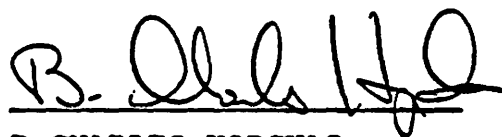
19 MR. BATES: Thank you.

20 THE HEARING OFFICER: Thank you.

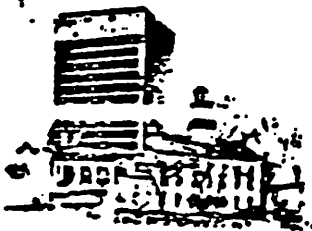
21 (Whereupon, at approximately 2:22 o'clock p.m.,
22 the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF COURT REPORTER

I, B. CHARLES HOPCHAS, a Verbatim Court Reporter, do hereby certify that I took the notes of the foregoing hearing by Stenomask, and reduced the same to typewriting; that the foregoing is a true record of said hearing to the best of my knowledge and ability; that I am neither related to nor employed by any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the action.



B. CHARLES HOPCHAS
Court Reporter



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030



OFFICE OF GENERAL SERVICES

May 16, 1991

CERTIFIED MAIL

Mr. Roger C. Jones
Mr. Herman M. Braude
Braude & Marguiles, PC
1828 L Street, N.W.
Suite 900
Washington, DC 20036

Reference: W.M. Schlosser Company Incorporated Claim for Additional Cost Stemming from Delay Due to Changes Designed Effects, Suspensions of Work, Different Conditions, etc. Appeal of the Decision of the Director of Public Works dated July 11, 1990, Fairfax Old Courthouse Renovation, Contract No. CN-C61154 Project No. 9149

Dear Messrs. Braude and Jones:

Pursuant to Acting County Executive Richard A. King's correspondence of January 10, 1991, I was appointed hearing officer to hear and determine the referenced appeal. As agreed to by the parties, an administrative hearing was held on April 24, 1991.

Present were the following:

APPELLANT - W.M. Schlosser Co.:

Rockwell Moulton
Andrew Schlosser
Michael Cohen.

COUNSEL FOR THE APPELLANT - Braude & Marguiles:

Roger Jones
Herman Braude
Robert Windus.

SUBCONTRACTOR - Cross Electric:

Bill Cross, Owner.

BRAUDE & MARGULIES

MAY 21 1991

Mr. Roger C. Jones
Mr. Herman M. Braude
Page - 2 -

APPELLEE - Fairfax County:

Dennis Bates, Senior Assistant County Attorney
Howard J. Guba, Director, Office of Capital Facilities
Harry Furney, Project Engineer, Project Engineering
Division
Robert Boxer, Director, Project Engineering Division
Jack Stewart, Chief Facilities Construction Branch.

APPELLEE'S ARCHITECT:

Harry Graef.

At the commencement of the hearing it was noted that Dennis R. Bates, on behalf of the County, submitted, via memorandum dated April 17, 1991, a series of documents related to the case. In summary these documents included a copy of the actual decision by the Director of the Department of Public Works, dated July 11, 1990, addressed to the W.M. Schlosser Company Incorporated, attention Mr. Moulton, copies of authorized change orders numbered 1 through 15; Certificate of Substantial Completion; a project schedule dated May 31, 1989; a series of punch list items; and copies of various other contract provisions and correspondence. The final item of that exhibit included a list of change orders for the entire project and the dates and amounts of those change orders covering the years 1986 through 1990. Mr. Bates indicated that all of the materials had previously been provided to the parties. This exhibit was identified as County Exhibit I.

The plaintiffs, represented by Messrs. Braude & Jones, introduced three exhibits -- the first one consisting of two volumes of 113 individual exhibits including copies of the actual contract documents, correspondence, schedules, drawings and other items related to the contract between the County and the W.M. Schlosser Company Incorporated.

Exhibit II (marked Exhibit A in the right-hand corner) was introduced as a schedule depicting and summarizing the plaintiff's allegations of suspensions that occurred on the job, and various other dates and points-in-time relating to completion of major milestones and other relevant information. Plaintiff's Exhibit III depicted a bar chart illustrating and detailing the construction phasing used for this project.

Both parties agreed that the actual bid drawings that were used and provided to all contractors for the initial bidding on this project would be marked as County Exhibit II, and that County Exhibit III would be the "as built" drawings when issued by the Architect to the County. The parties further agreed County Exhibits II and III would remain in the County's Department of Public Works contract file and be available, if necessary for review by either party.

Mr. Roger C. Jones
Mr. Herman M. Braude
Page - 3 -

A court reporter was present during the entire proceedings and a copy of the transcript for this hearing will be available in my file on this matter. Accordingly, I will not go into great detail in this decision.

As a result of the opening statements of both the attorney for William M. Schlosser Company, Mr. Braude, and that of the County Attorney's, Mr. Bates, we quickly reached consensus that there was a dispositive issue that needed addressing before a decision in the affirmative could be made. That dispositive issue was: If one assumed that the County did unreasonably delay the W.M. Schlosser Company could damages be paid to the contractor above and beyond those specified in the terms and conditions of the contract between the parties. The parties agreed prior to a break for lunch that it would be beneficial if the hearing examiner could render a decision upon return after the lunch break, as to whether or not amounts beyond those specified could be awarded (assuming for the sake of argument that the County had unreasonably delayed the contractor). It was noted by Mr. Bates that the County was not necessarily indicating or agreeing that they had unreasonably delayed the contractor, but if that were an assumption, could damages be paid to the contractor beyond those specified in the contract in Articles 7, 8 and 12.

At resumption of the hearing, after our lunch break, I rendered the following position: While recognizing the logic of the appellant may be plausible, Article 8.3 of the contract between the parties provides for payments and recognizes claims for time extensions by the contractor. Article 8.3.2 further provides for claims against the owner or A/E for any indirect or direct damages incurred or expenses of any nature which the contractor, subcontractors, or sub-subcontractors or any other person may incur as a result of any such delays, and that the contractor's sole and exclusive remedy in any such event shall be an extension of contract time.

However, with respect to suspension of work under Article 3.6, specifically, Article 8.3.9, states that if a claim is submitted in accordance with the requirements of the article and if the suspension is not due to any act or omission of the contractor any subcontractor or any other personal organization for whose act or omission the contract may be liable, then, the contractor's claim will be evaluated in accordance with the terms of this Article. Specifically, Article 8.3.10 states the contractor shall not be entitled to any extension of time for delays from any conditions or other causes unless it shall have given written notice to the owner within 20 calendar days following the commencement of each such condition or cause describing the occurrence, the activities impacted and the probable duration of delays and the contractor's complete claim

Mr. Roger C. Jones
Mr. Norman M. Braude
Page - 4 -

submittal for time extension shall be submitted no later than 20 calendar days after cessation of delay or the request of the owner or A/E. Further CHANGES IN THE WORK are addressed in Article 12 of the contract. Article 12 provides for the process for increasing or decreasing the contract sum and work that is to be performed by the contractor or required by the County. The contractor, when he believes there is an increase required as a result of change in scope of the work, i.e. in the instance of a claim of an unreasonable suspension, is required to submit a proposed change order which the appellant has done in this instance. The contractor is accordingly entitled to payments as outlined in and provided for in Article 12 and more specifically Article 12.4.3.1 through 12.4.5.1 defines and describes in detail what the contractor is entitled to. However, Article 12.5.6 of the contract appears to be the controlling article in such instances and provides as follows:

"The Contractor shall not be entitled to any amount for indirect costs, damages or expenses of any nature, including, but not limited to, so-called "impact" costs, labor inefficiency, wage, material or other escalations beyond the prices upon which the proposal is based, and which the Contractor, its Subcontractors or Sub-subcontractor's or any other person may incur as a result of delays, interferences, suspensions, changes in sequence or the like, for whatever cause, whether reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable, arising from the performance of any and all changes in the Work performed pursuant to this Article 12. It is understood and agreed that the Contractor's sole and exclusive remedy in such event shall be recovery of his direct costs as compensable hereunder and an extension of the Contract Time but only in accordance with the provisions of the Contract Documents."

Notwithstanding the provisions identified above, I also reviewed Article 12.10 which details the process for the contractor to follow and his entitlement for claims for additional costs and/or time, however, this process too is ultimately controlled by Article 12.5.6, which, in my opinion, controls whether or not the contractor is entitled to damages and so-called impact costs for labor and efficiency losses, wages, materials or other escalations beyond the prices upon which the proposal was based. The Contract's provisions, I believe, are clear, the Contractor and the County signed the contract agreeing to its terms. The contractor's sole and exclusive remedy is the recovery of his costs as defined in


Mr. Roger C. Jones
Mr. Herman M. Braude
Page - 5 -

Article 12 including those markup percentages for overhead, profit and other indirect costs included therein provided the proper notice and procedures have been followed.

The applicant also raised the issue of the County being in breach of contract under Article 7.6.3 and in that circumstance the contractor would be entitled to damages. Since this argument was not previously addressed in the appeal to Mr. di Zerega, it has not basis in this case. However, had such an argument been made, my review of the matter and conclusion is that the contractor would only have been entitled to such indirect costs or impact damages as defined in Article 12.5.6.

In summary, it is my finding the contractor failed to properly comply with the notice provisions of the contract and was appropriately compensated for all of its costs as provided for under the provisions of the contract between the parties. Accordingly, Mr. di Zerega's decision of July 11, 1990 is hereby upheld.

Sincerely,


Fred K. Kramer,
Director

cc: Dennis Bates, Senior Assistant County Attorney
John di Zerega, Director, Department of Public Works