

1987

Moon Lake Electric Association, Inc. v.
Ultrasystems Western Countries, Inc., an
dIndustrial Indemnity Company : Brief of
Appellant

Utah Court of Appeals

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Clark B. Allred; Gayle F. McKeachnie; Nielsen & Senior; A. Dennis Norton; David W. Slaughter; Snow, Christensen & Martineau; Attorneys for Respondent.

George E Mangan; George E. Mangan, APC; Machele Fitzgerald; Attorneys for Appellant.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCUMENT
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CKET NO. 870122-CA

IN THE COURT OF APPEALS OF THE
STATE OF UTAH

MOON LAKE ELECTRIC)
ASSOCIATION, INC.,)

Plaintiff/Appellant,)

vs.)

ULTRASYSTEMS WESTERN)
CONSTRUCTRS, INC., and)
INDUSTRIAL INDEMNITY COMPANY,)

Defendant/Respondent.

SUPPLEMENT TO BRIEF
OF APPELLANT

Case No. 870122

GEORGE E. MANGAN (2068), of
George E. Mangan, APC, and
Machelle Fitzgerald (4037)
47 North Second East
Roosevelt, Utah 84066
801-722-2428
Attorneys for Plaintiff/Appellant

CLARK B. ALLRED
GAYLE F. McKEACHNIE
NIELSEN & SENIOR
363 East Main Street
Vernal, Utah 84078
801-789-4908
Attorneys for Defendant/Respondent
Ultrasystems Western Constructors, Inc.

A. DENNIS NORTON
DAVID W. SLAUGHTER
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
801-521-9000
Attorney for Defendant/Respondent
Industrial Indemnity Company

RECEIVED

SEP 25 1987

Court of Appeals

**IN THE COURT OF APPEALS OF THE
STATE OF UTAH**

| | | |
|-------------------------------|---|----------------------|
| MOON LAKE ELECTRIC, |) | |
| ASSOCIATION, INC., |) | |
| |) | |
| Plaintiff/Appellant, |) | SUMMARY OF ARGUMENTS |
| |) | [SUPPLEMENT TO BRIEF |
| vs. |) | OF APPELLANT] |
| |) | |
| ULTRASYSTEMS WESTERN |) | |
| CONSTRUCTORS, INC., and |) | |
| INDUSTRIAL INDEMNITY COMPANY, |) | Case No. 870122 |
| |) | |
| Defendant/Respondent. |) | |

The Summary Judgment entered in this case was improper because there were contested issues of material fact, supported by the depositions and affidavits filed by Moon Lake before the Judgment was signed.

Ultrasystems was not entitled to Summary Judgment as a matter of law, because the mistake made by Armstead in preparing the bid was an error in judgment, not a mistake of fact or clerical error.

There were no conditions precedent to Moon Lake's acceptance of the bid, nor was Moon Lake's acceptance conditional because Ultrasystems knew that the condition precedent was met, and the conditions for acceptance did not apply.

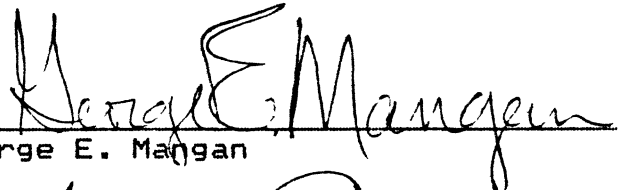
The fact that Moon Lake, as a matter of sound business practice, was going to pass on its costs incurred in this project

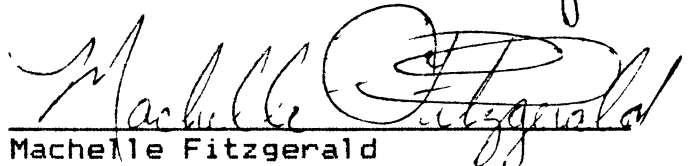
to its only consumer in the area did not mean Moon Lake did not incur damages.

The confusion with the Court concerning the affidavits submitted by Moon Lake justify setting aside the Summary Judgment.

RESPECTFULLY SUBMITTED this 24th day of September, 1987.

ATTORNEYS FOR PLAINTIFF/APPELLANT:


George E. Mangan


Machele Fitzgerald

CERTIFICATE OF MAILING

I do hereby certify that on the 24th day of September, 1987, I mailed a true and correct copy of the foregoing SUMMARY OF ARGUMENTS [SUPPLEMENT TO APPELLANT'S BRIEF], postage prepaid, to Clark B. Allred, Gayle F. McKeachnie, NIELSEN & SENIOR, Attorneys for Ultrasystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078; and to A. Dennis Norton, David W. Slaughter, SNOW, CHRISTENSEN & MARTINEAU, Attorneys for Industrial Indemnity Company, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, Utah 84145; by depositing the same in the United States Post Office at Roosevelt, Utah.


Attorney

ADDENDUM TO BRIEF OF APPELLANT

ADDENDUM TO BRIEF OF APPELLANT

Complaint, p. 1-17.

Record, pp. 336-338,

Ultrasonics Memorandum, No. 1, p. 340.

Ultrasonics' Memorandum, Undisputed Facts, No. 10, p. 341.

Ultrasonics' Memorandum, Undisputed Fact, No. 17, p. 5, p. 343.

Armstead Affidavit, pp. 355-359.

Record, p. 364.

Bid Bond, p. 405.

Record p. 409.

Record, pp. 410-412.

Record, pp. 416-431.

Record, pp. 434-440.

Record, 449-467.

Record, pp. 468-470.

Affidavit of George E. Mangan, pp. 473-477.

Record, p. 478-479.

Record, pp. 482-488.

Record, p. 490.

Record p. 504.

Record, pp. 514, 515.

HUNT DEPOSITION

Hunt Deposition, pp. 3-4.

Hunt Deposition, p. 6.

Hunt Deposition, p. 11.

Hunt Deposition, pp. 18-19.

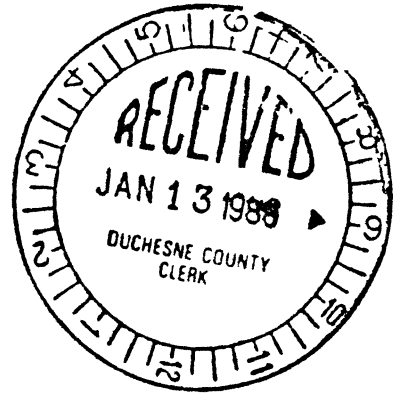
Hunt Deposition, p. 24.

Hunt Deposition, pp. 27-28;

Hunt Deposition, p. 32.

Hunt Deposition, p. 37

GEORGE E. MANGAN (2068), of
GEORGE E. MANGAN, APC
Attorney for Plaintiff
47 North Second East
Roosevelt, Utah 84066
801-722-242



IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

MOON LAKE ELECTRIC ASSOCIATION,)
INC,)

Plaintiff,)

vs.)

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., and)
INDUSTRIAL INDEMNITY COMPANY,)

Defendants.)

C O M P L A I N T

Civil No. 86-CV-11-D

Plaintiff complains of defendants and for cause alleges:

1. Plaintiff is a Utah Corporation, that is authorized to do business in the State of Utah and Colorado as a public utility, having a certificate of convenience and necessity from both states.

2. Defendant Ultrasystems Western Constructors, Inc., hereafter Ultrasystem, is a corporation organized under the laws of the State of California, and who has represented to Moon Lake that it has been qualified to do business in that territory that has been certified as plaintiff's Service Area.

3. Defendant Industrial Indemnity Company is a corporation organized under the laws of the State of California, and is

authorized to issue proposal or bid bonds to assure the faithful performance of contractors in connection with bidding and the awarding of bids.

4. On or about August 27, 1985, plaintiff solicited bids from several contractors to construct certain improvements for plaintiff at a Substation identified as the "Rooks California Substation" in the Rangley Oilfield, Rio Blanco, Colorado. All bids were to be delivered to plaintiff at its office in Roosevelt, Utah. (See attached Exhibit "A", which is made a part hereof by reference.

5. As part of the bid requirements, plaintiff required all contractors submitting bids to also submit a good and sufficient bid bond, to guarantee the faithful performance of the terms of their bid. (See provision 4 of Exhibit "A".)

6. On or about September 12, 1985, plaintiff received at its Roosevelt office, a bid from defendant Ultrasonics, to construct the improvements advertised in Exhibit "A". (A copy of 3 pages of defendant's bid, which copies indicate the amount of defendant Ultrasonics bid are attached hereto as Exhibit "B" and made a part hereof by reference.)

7. Defendant Ultrasonics' bid included the required "bid bond", which was issued by defendant Industrial Indemnity Company. (See attached Exhibit "C" which is made a part hereof by reference.)

8. Upon opening the bids, plaintiff ascertained that defendant Ultrasonics was considerably less than that of other

bidders and would probably be awarded the bid. The gross of defendant's bid was \$213,300.00.

9. Prior to awarding the bid, plaintiff specifically contacted the defendant Ultrasonics, Inc., to verify the terms of said defendant's bid, and to determine if it intended to be bound by the same.

10. The defendant Ultrasonics's agents did acknowledge to plaintiff's agents, both verbally and in writing, that said bid was as correct and that plaintiff could rely upon the same. (See attached Exhibit "D" which is made a part hereof by reference.)

11. Based on defendant Ultrasonics, Inc.'s assurance to plaintiff that it intended to be bound by its written bid, and because defendant Ultrasonics Inc.'s bid was the lowest received, plaintiff did, on September 18, 1985, award the contract to the defendant Ultrasonics, Inc. (See attached Exhibit "D", which is made a part hereof by reference.)

12. On or about September 25, 1985, but after plaintiff had awarded defendant Ultrasonics Inc., the contract, defendant Ultrasonics, Inc., notified plaintiff that it would be unable to perform the contract for the amount bid, and would require that plaintiff pay said defendant a substantially greater amount in order to perform the contract. (See attached Exhibit "F", which is made a part hereof by reference.)

13. Plaintiff duly notified defendant Ultrasonics, Inc., that plaintiff expected defendant to perform as per its bid, or that plaintiff would call defendant's bid bond.

14. Defendant Ultrasystems, Inc., has failed and/or refused to perform as per its bid to plaintiff, and plaintiff has made demand upon defendant Ultrasystems, Inc., and/or upon the defendant Industrial Indemnity Company to pay to plaintiff the bid bond, which was 10% of defendant's bid or \$21,330.00. (See attached Exhibit "G", which is made a part hereof by reference.)


15. Both of the defendants have failed or refused to pay to plaintiff the required Bid Bond, despite plaintiff's demand for the same.

16. Defendants' refusal to pay plaintiff the amount of the bid bond is without merit, and there is no reason for the refusal of the defendants to pay to plaintiffs said \$21,330.00. Because defendants' actions are without merit, plaintiff is entitled to the award of a reasonable attorney's fee as provided in §78-27-56, U.C.A.

17. The actions of the defendants constitute an intentional violation of the express terms of their written contract with plaintiff, and has been designed to hamper, harass, annoy and otherwise delay plaintiff. By reason of defendants' outrageous conduct and/or refusal to perform, plaintiff is entitled to both special and punitive damages against each of the defendants in an amount sufficient to both compensate plaintiff fairly and/or to make public examples of the defendants and to discourage the defendants, and others who are similarly situated, from engaging in such similar conduct.

WHEREFORE, plaintiff prays for judgment against defendant in

the principal sum of \$21,330.00, together with interest as allowed by law, attorney's fees, special and/or punitive damages in such an amount as the court may find to be reasonable, costs of court, and any other legal or equitable relief the court may find should be granted.


George F. Mangan
Attorney for Plaintiff

August 27, 1985

Gentlemen:

Moon Lake Electric Association, Inc. is receiving proposals for the construction, including all necessary labor, material, and equipment, of the Rocks California Substation:

1. Bids should be submitted in writing to our Roosevelt Office not later than 10:00 a.m. Sept. 12, 1985.
2. Proposals must be submitted on the enclosed forms. Bidders name, address, license number (if a license is required by the State), and bid opening date and hour must appear on the envelope in which the proposal is submitted.
3. It is the responsibility of the bidder to carefully examine all aspects of the project including scope of work, drawings and specifications, site and soil conditions, equipment required, bonding and contracting requirements, licensing and regulatory considerations, general local conditions and all other matters that may affect the cost and completion time of the project.
4. Each proposal must be accompanied by a bid bond in an amount equal to ten percent (10%) of the bid price. Bid bonds of the bidders submitting the three low proposals will be held until a proposal is accepted and a satisfactory contractor's bond is furnished by the successful bidder. Bid bonds of the three low bidders will be returned within sixty (60) days from the bid opening date. Bid bonds of the other bidders will be returned within ten (10) days from the bid opening date.
5. The successful bidder will be required to execute two (2) additional counterparts of the proposal and to furnish a contractor's bond in triplicate in a penal sum not less than the contract price. Failure of the bidder to execute such counterparts or to furnish contractor's bond within ten (10) days after written notification of acceptance of the proposal by Moon Lake Electric shall entitle Moon Lake Electric to enforce the bid bond in accordance with its terms.

EXHIBIT "A"

August 27, 1985
Page 2

6. Project site is on Chevron Oil property. All contractors and employees on the site shall be subject to Chevron Oil Company regulations. (Refer to copy of Safety Specification 3.31).
7. Interested parties are invited to a pre-bid meeting which will be held at the main Chevron Oil Company Office at the Chevron California Site near Rangely, Colorado on September 5, 1985, at 9:00 a.m..
8. Successful bidder will be notified by September 18, 1985.

Yours truly,

A handwritten signature in cursive script that reads "Bruce Hunt". The signature is written in dark ink and has a fluid, somewhat stylized appearance with a long horizontal stroke at the end.

Bruce Hunt
Substation Engineer

ROCKS CALIFORNIA SUBSTATION
(Station Name)

STATION CONSTRUCTION UNITS

PAGE 1 OF 1

| NO. | NAME AND DESCRIPTION OF CONSTRUCTION UNIT | NO. OF UNITS | UNIT PRICE | | | EXTENDED PRICE - LABOR AND MATERIALS |
|-----|---|--------------|------------|-----------------------------|---------------------|--------------------------------------|
| | | | LABOR | SUB-MATERIALS (PER UNIT) | LABOR AND MATERIALS | |
| B | 138 KV 3-A-FRAME DEADENDS | 2 | | | | |
| | 138 KV 2-A-FRAME DEADENDS | 4 | | | | |
| | 138 KV 3-COLUMN TRANSFER BUS DEADEND | 1 | | | | |
| | 138 KV 2-COLUMN TRANSFER | 1 | | | | |
| | BUS DEADEND | | | | | |
| | 138 KV 2-COLUMN 19-FT BUS SUPPORT STANDS | 14 | | | | |
| | 138 KV 2-COLUMN 10-FT BUS SUPPORT STANDS | 8 | | | | |
| | 138 KV SWITCH STANDS | 4 | | | | |
| | 120 KV ARRESTER STANDS | 3 | 50400 | 1000 | 51400 | 51,400 |
| | 138 KV BUS WORK | 1 | | | | |
| C | 69 KV METERING STRUCTURE | 1 | | | | |
| | 69 KV BUS/TERMINAL STRUCTURE | 1 | | | | |
| | 69 KV P.T. STAND | 3 | | | | |
| | 69 KV CCVT STAND | 2 | | | | |
| | 69 KV BUS WORK | 1 | | | | |
| | 12.5 KV METERING STRUCTURE | 2 | | | | |
| | 12.5 KV BUS/TERMINAL STRUCTURE | 2 | | | | |
| | 12.5 KV BUS WORK | 2 | | | | |
| | 138 KV AIR SWITCH | 20 | 2900 | 1000 | 3900 | 3,900 |
| | 69 KV AIR SWITCH | 4 | | | | |
| C | 12.5 KV AIR SWITCH | 2 | | | | |
| | 120 KV ARRESTERS | 12 | 3400 | 1500 | 4900 | 4,900 |
| | 60 KV ARRESTERS | 9 | | | | |

EXHIBIT B

| UNIT NO. | NAME AND DESCRIPTION OF CONSTRUCTION UNIT | NO. OF UNITS | UNIT PRICE | | | EXTENDED PRICE - LABOR AND MATERIALS |
|----------|---|--------------|------------|-------|-------|---|
| | | | LABOR | OTHER | TOTAL | |
| 1. | BOND | | - | 2400 | 2400 | |
| 2. | 10 EA. HPS LIGHT FIXTURES | | 1850 | 2000 | 3850 | |
| 3. | 1000 10/12 TERMINATIONS | | 9440 | 100 | 9540 | |
| 4. | APPLY STERILANT (FURNISHED BY OWNER) TO SOIL | | - | 400 | 400 | |
| 5. | GROUTING | | 4320 | 2700 | 7020 | |
| 6. | SET CONTROL PANELS | | 2000 | 100 | 2100 | |
| 7. | STATION SERVICE | | 1000 | 300 | 1300 | |
| 8. | CHECK OUT | | 2800 | - | 2800 | |



Proposal or Bid Bond

Company

Home Office

EXHIBIT "C"

Bond No. YS859-7301

Premium \$ INCLUDED IN BID
SERVICE UNDERTA

KNOW ALL MEN BY THESE PRESENTS:

THAT

ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.
16845 Von Karman Ave.
Irvine, Ca. 92714

(hereinafter called the Principal) as Principal, and INDUSTRIAL INDEMNITY COMPANY,
a corporation created and existing under the laws of the State of California,
with its principal office at Orange, California, (hereinafter called the Surety),
as Surety, are held and firmly bound unto

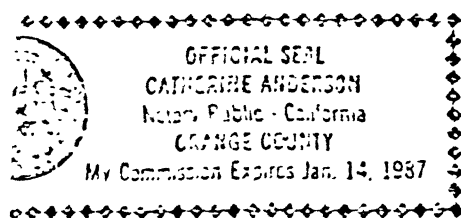
MOONLAKE ELECTRIC ASSOCIATION, INC.
188 West 2nd North
Roosevelt, Utah 84066

(hereinafter called the Obligee), in the full and just sum of -----

TEN PER CENT (10%) OF TOTAL AMOUNT BID-----Dollars (\$ -----10%-----),
good and lawful money of the United States of America, to the payment of which sum of money well
and truly to be made, the said Principal and Surety bind themselves, their and each of their heirs,
executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal herein is submitting a proposal for

California
Orange } SS.



183) Corporate - Ca

On September 11, 1985, before :

Catherine Anderson

the undersigned Notary Public, personally appeared

Michael A. Quigley

- ☒ personally known to me
☐ proved to me on the basis of satisfactory evidence

to be the person(s) who executed the within instrument as Attorney-in-fact or on behalf of the corporation the named, and acknowledged to me that the corporation executed it.

WITNESS my hand and official seal.

Notary's Signature


Catherine Anderson

all men by these presents:

INDUSTRIAL INDEMNITY COMPANY, a corporation organized and existing under the laws of the State of California, its principal office in the City of San Francisco, State of California, does hereby make, constitute and appoint

-----MICHAEL A. QUIGLEY-----

lawful attorney-in-fact for it and in its name, place and stead to execute on its behalf as surety, bonds, undertakings, stipulations and all contracts of suretyship and to attach its corporate seal to such obligations in favor of all obligees, provided the liability of the Company as surety under his authority in no one instance shall exceed the sum of --UNLIMITED--

ing to itself full power of substitution and revocation.

Power of Attorney is made and executed in accordance with the resolution adopted by unanimous consent of the Executive of the Board of Directors of INDUSTRIAL INDEMNITY COMPANY on January 3, 1983, reading as follows:

SOLVED, that the Chairman of the Board or President or Executive Vice President or Senior Vice President or Vice President of the Company, in conjunction with the Secretary or an Assistant Secretary of this Company, or the Secretary's designee, be, and be authorized to execute, acknowledge or verify Powers of Attorney qualifying selected attorneys-in-fact to act under such Power of Attorney to execute on behalf of Industrial Indemnity Company bonds, undertaking, stipulations, consents and all contracts of suretyship, and to attach the corporate seal thereto;

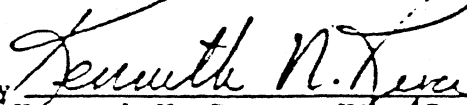
SOLVED, FURTHER, that the signatures of said officers so authorized by this Company may be printed facsimile, lithographed or otherwise reproduced, and that the facsimile signature of any person who shall have been such officer of this Company at the time of such execution, acknowledgment or verification may continue to be used for the purpose hereinabove stated and will be valid for this Company, notwithstanding the fact that he may have ceased to be such officer at the time when such instruments shall be executed.

In witness whereof, INDUSTRIAL INDEMNITY COMPANY has caused these presents to be signed and its corporate seal to be affixed by its proper officers, at the City of San Francisco, California, this 12th day of February 1985

Attest:

INDUSTRIAL INDEMNITY COMPANY


Mary Mueller, Designated Secretary

By 
Kenneth N. Ryan, Vice President

California

San Francisco

SS.

On February 12, 1985, before me
C. H. Brown

the undersigned Notary Public, personally appeared
Kenneth N. Ryan and Mary Mueller

☒ personally known to me

☐ proved to me on the basis of satisfactory evidence

to be the person(s) who executed the within instrument as

Vice President and Designated Secretary

C. H. BROWN

NOTARY PUBLIC - CALIFORNIA

CITY & COUNTY OF SAN FRANCISCO

My Commission Expires July 7, 1987

I, the undersigned, a Notary Public in and for the State of California, do hereby certify that I have compared the Power of Attorney granted herein and the resolution recited herein with the originals on file in the principal office of said Company, and that the same are correct transcripts therefrom and of the whole of the instrument, and that said Power of Attorney has not been revoked but is still in full force and effect.

In witness whereof, I have hereunto subscribed my name as such officer and affixed the seal of INDUSTRIAL INDEMNITY COMPANY at the City of San Francisco, California, this 11th day of September 1985


Notary's Signature

Mary Mueller, Designated Secretary of INDUSTRIAL INDEMNITY COMPANY, do hereby certify that I have compared the Power of Attorney granted herein and the resolution recited herein with the originals on file in the principal office of said Company, and that the same are correct transcripts therefrom and of the whole of the instrument, and that said Power of Attorney has not been revoked but is still in full force and effect.

In witness whereof, I have hereunto subscribed my name as such officer and affixed the seal of INDUSTRIAL INDEMNITY COMPANY at the City of San Francisco, California, this 11th day of September 1985


Mary Mueller, Designated Secretary

WESTERN CONSTRUCTORS
INCORPORATED

September 13, 1985

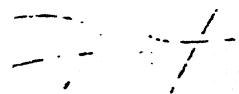
ssrs. Ken Winder and Bruce Hunt
ONLAKE ELECTRIC ASSOCIATION, INC.
3 West 2nd North
Coevelts, Utah 84066

Gentlemen:

As per our telephone conversation with Bruce Hunt on September 13, 1985,
this letter is to confirm that the figures listed under total labor,
materials and other column are the correct figures to be carried
over to the extended price labor and materials column.

In addition Bruce requested that we supply him with a unit price
for control cable installed above and beyond the 25,000 L.F. listed
on the bid sheet. We will install additional control cable at
\$.15 per linear foot.

Very truly yours,



Quentin Evers
Administrative Manager

QE/t1

EXHIBIT - D

ACCEPTANCE

to the approval of the Administrator, the Owner hereby accepts the
ing Proposal of the Bidder, ULTRA SYSTEMS WESTERN CONSTRUCTORS INC.

_____ for the construction of the following
ons or other major facilities:

ooks California Substation, \$ 213,300.00

_____ Substation, \$ _____

_____ Substation, \$ _____

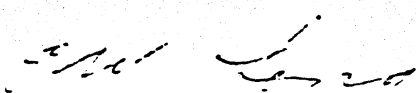
_____ \$ _____

_____ \$ _____


The total contract price is \$ _____

MOON LAKE ELECTRIC ASSOCIATION, INC.

Owner

By 

President


Secretary

September 18, 1985

Date of Contract

EXHIBIT "E"

ULTRASYSTEMS
WESTERN CONSTRUCTORS
INCORPORATED

9-25-85

MOON LAKE ELECTRIC ASSOCIATION
P.O. BOX 278
SEVELT, UTAH 84066

RE: BRUCE HUNT

ROCKS CALIFORNIA SUBSTATION

GENTLEMEN:

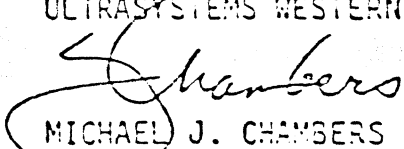
PER OUR CONVERSATION THIS AFTERNOON REGARDING THE ABOVE MENTIONED SUBJECT I REGRET TO INFORM YOU OF A DISCREPANCY IN OUR PROPOSAL. UPON REVIEW OF OUR BID DOCUMENTS IN PREPARATION OF A CONSTRUCTION BUDGET AND SCHEDULE, IT WAS DISCOVERED THAT THE ALUMINUM WELDING OF CONDUCTORS, BARS AND TERMINALS HAD INADVERTANTLY BEEN LEFT OUT. DUE TO THE SIGNIFICANCE OF THIS ERROR AND THE COST INVOLVED, U.W.C.I. MUST EITHER WITHDRAW OUR PROPOSAL OR INCREASE OUR PROPOSAL BY \$75,000.00 TO TOTAL CONTRACT AMOUNT OF \$298,300.00. THIS INCREASE REFLECTS ESTIMATED COSTS FOR THE WELDING AS STATED ABOVE AND DOES NOT INCLUDE ANY FEE OR CONINGENT COSTS. I AM CONFIDENT THAT U.W.C.I. CAN PERFORM ALL WORK INVOLVED WITHIN THE TIME FRAME ALLOTTED AND IN A PROFESSIONAL MANNER CONSISTENT WITH MOON LAKE'S NEEDS.

IF I CAN BE OF ANY ASSISTANCE OR CLARIFY ANY QUESTIONS YOU MAY HAVE, PLEASE DO NOT HESITATE TO CONTACT ME. I REALIZE TIME IS OF THE ESSENCE IN THIS CONTRACT AND LOOK FORWARD TO RESOLVING THE SITUATION AT THE EARLIEST DATE POSSIBLE. IT WAS U.W.C.I. INTENT TO LAYOUT AND BEGIN FOR GROUNDING GRID SYSTEM STARTING 9-26-85; AND UPON NOTIFICATION OF A RESOLUTION WE WOULD MAINTAIN THE 9-26-85 START DATE.

I SINCERELY APOLOGIZE FOR THE PREDICAMENT AND HOPE THAT IT DOES NOT CAUSE TOO MUCH INCONVENIENCE FOR YOU.

SINCERELY,

ULTRASYSTEMS WESTERN CONSTRUCTORS INC.


MICHAEL J. CHAMBERS
PROJECT MANAGER

file
G. EVERS

EXHIBIT "F"

October 22, 1985

Industrial Indemnity Company
P.O. Box 7365
San Francisco, California 94120

Re: Claim on Bond No. YS859-7301
By Moon Lake Electric Association, Inc.
Against: Ultravsystems Western Constructors, Inc.
Our File No. 15-118-85

To Whom It May Concern:

This office represents Moon Lake Electric Association, Inc., of Roosevelt, Idaho.

On August 27, 1985, Moon Lake Electric advertised for bids for the construction of the Pooks-California Substation at Rangley, Colorado. Said advertisement is enclosed as Exhibit "A". In response to that advertisement, Ultravsystems submitted a bid for \$213,300.00 (See Exhibit "B"), together with the required Bid Bond issued by your Company (See Exhibit "C").

Ultravsystems bid was substantially lower than that of the other bidders. As a result, Moon Lake's Engineers contacted the appropriate authorities at Ultravsystems to confirm the bid. Not only was the bid verbally confirmed, but Mr. Grant Evers, Ultravsystems Administrative Manager, sent a letter of confirmation (See Exhibit "D"). In reliance upon that assurance, Moon Lake awarded the bid to Ultravsystems (See Exhibit "E").

On September 25th or 26th, Mike Chambers of Ultravsystems sent by Federal Express, the enclosed letter, either demanding more money, or to be released from the bid (See Exhibit "F"). Moon Lake refused to be pressured into such a position, and determined to accept the next lower bid. Management of Moon Lake has requested that I file this claim against Ultravsystems Bid Bond in the sum of \$21,330.00.

In conformance with the provisions of the bid bond you furnished, please send to this office, your check in the sum of \$21,330.00, made payable to Moon Lake Electric Association, Inc. This should be done within ten (10) days so as to avoid litigation and other expenses.

Sincerely yours,

Debra E. Mangan
Attorney at Law

DM/aa

cc: Grant J. Farl, General Manager, Moon Lake Electric

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Defendant -
Ultrasystems Western
Constructors, Inc.
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

FILED
JUDICIAL DISTRICT COURT DUCHESNE
STATE OF UTAH

NOV 13 1986

ROGER K. MAMET, Clerk

By MBF per

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

| | |
|-----------------------------------|-----------------------------|
| MOON LAKE ELECTRIC ASSOCIATION,) | |
| INC.,) | MOTION FOR SUMMARY JUDGMENT |
| Plaintiff,) | |
| vs.) | |
| ULTRASYSTEMS WESTERN) | |
| CONSTRUCTORS, INC., and) | |
| INDUSTRIAL INDEMNITY COMPANY,) | |
| Defendants.) | Civil No. 86-CV-11D |

Defendant Ultrasystems Western Constructors, Inc., pursuant to Rule 56 of the Utah Rules of Civil Procedure hereby moves the Court to enter a summary judgment in its favor, dismissing the Plaintiff's Complaint for no cause of action.

This Motion is brought upon the grounds that there are no material issues of fact in dispute and based on those facts Defendants are entitled to a judgment as a matter of law. Defendants are entitled to an order of dismissal for the following reasons:

1. Defendant, Ultrasystems Western Constructors, Inc., made

an error in submitting its bid. That error was made in good faith, without gross negligence and Defendant gave prompt notice of the error. Pursuant to State vs. Union Construction Co., 339 P.2d 421 (Utah 1959), equity should prevent forfeiture of the bid bond.

2. The bond is to guarantee payment of actual damages incurred by the Plaintiff. In the present case the Plaintiff incurred no damages since Chevron reimbursed Plaintiff for all additional costs caused by Ultrasystems withdrawal of its bid. Petrovich vs. City of Arcadia, 222 P.2d 231 (Cal. 1950).

3. Plaintiff failed to follow the conditions precedent for the bond to take effect, including furnishing evidence that the financing has been firmly committed to cover the costs of the project as required by the bond and by failing to accept Ultrasystems bid prior to notice of the error and withdrawal of the bid.

The specific grounds, the facts and law in support of this Motion are set forth more fully in the Memorandum supporting this Motion.

DATED this / 0 day of November, 1986.

NIELSEN & SENIOR
Attorneys for Defendant -
Ultrasystems Western
Constructors, Inc.

By: 

Clark B. Allred

2

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

I, Mary Chapman, being duly sworn, state:

That I am employed at the office of NIELSEN & SENIOR, for Clark B. Allred, Attorney for Ultrasystems Western Constructors, Inc., Defendant herein, that I have served the attached MOTION FOR SUMMARY JUDGMENT upon counsel by placing a true and correct copy thereon in an envelope duly addressed as follows:

George Mangan
47 North Second East
Roosevelt, Utah 84066

Mr. David Slaughter
10 Exchange Place
11th Floor
Box 3000
Salt Lake City, UT 84110

and have deposited the same in the United States mail at Vernal, Utah, postage prepaid thereon, on the 11th day of November, 1986.

Mary Chapman
Mary Chapman

Subscribed and sworn to before me this 11th day of November, 1986.

Rolene Smith
Notary Public
Residing at Vernal, Utah

My commission expires:

Oct 22, 1988

for substation engineering and design) and the Affidavits of Richard Armstead, Michael Chambers and Clark Allred, submitted in support of this Motion.

1. Ultrasystems is a construction company involved in various construction projects throughout the United States.

2. The Plaintiff, Moon Lake Electric, is a rural electric cooperative. Winder deposition page 4, line 20.

3. In 1985 Moon Lake Electric proposed to construct for Chevron, an electrical substation near Rangely, Colorado. That substation is known as the Rooks California Substation. Hunt deposition pages 3 & 4.

4. The bidding and construction of the substation involved three (3) phases. The phase which is the subject of this action was the construction of the superstructure and above ground facilities. Hunt deposition page 6.

5. Ultrasystems was not on the original list of bidders for the erection of the superstructure. At the request of Mike Chambers, a project manager for Ultrasystems, Ultrasystems was furnished copies of the bid documents. Hunt deposition pages 9 and 10.

6. The bid documents provided to Ultrasystems by Moon Lake included a letter dated August 27, 1985, blueprints and a document entitled Contractor's Proposal. Hunt deposition page 11. The August 27, 1985 letter and the Contractor's Proposal are

attached as Exhibits "A" and "B" to Allred Affidavit.

7. The documentation was provided to Mr. Richard Armstead of Ultrasystems for preparation of the bid. Armstead Affidavit.

8. Based upon Mr. Armstead's review of the construction drawings he determined that the conductors, bus bars and terminals could be connected by various methods, including bolting, coupling or welding. Mr. Armstead determined from the documents that it was up to the bidder as to the type of coupling to be used. Mr. Armstead therefore prepared the bid planning on using bolting and coupling to make the connections. Mr. Armstead's specialty is electrical work. He is not familiar with welding, particularly aluminum welding and the additional costs and expense of aluminum welding. Armstead Affidavit.

9. Bolting or other methods of connection other than welding are acceptable methods for connecting conductors, bus bars and terminals. However, it was the intent of Moon Lake that the conductors, bus bars and terminals be connected using aluminum welding. Hunt deposition page 38.

10. The blueprints, except in a few limited instances, do not refer to how the conductors, bus bars and terminals are to be connected. The reference to welding is in the materials list. Hunt deposition page 37, Armstead Affidavit.

11. Based upon his understanding that the conductors, bus bars and terminals could be connected by bolting rather than

Ultrasonics had the apparent low bid. Mr. Hunt contacted Ultrasonics with two (2) questions he had regarding the bid. One question related to the per unit cost of control cable in Unit K of the bid and the other question related to the manner in which the columns had been filled out in Ultrasonics bid. Hunt deposition pages 18 and 19.

15. On September 19, 1985, Moon Lake scheduled a meeting with Ultrasonics. The purpose of the meeting was for Moon Lake to become acquainted with Ultrasonics and its personnel, to assist Moon Lake in making a determination on awarding the bid. Winder deposition pages 16 through 19.

16. Mr. Hunt was aware that the Ultrasonics bid on Units A and B was low. On September 24, 1985, Mr. Hunt informed Mr. Chambers that Ultrasonics bid on Units A and B was very low. Chambers Affidavit, Hunt deposition, pages 24 and 29.

17. Mr. Chambers relayed that information to Mr. Armstead. Mr. Armstead then met with other construction personnel of Ultrasonics to review the bid to determine if there was a problem. After reviewing the bid, it was determined that Mr. Armstead had made an error and that Moon Lake had intended to have the conductors, bus bars and terminals welded. The costs of welding is substantially higher than connecting those items by bolting. The bid which had been submitted by Ultrasonics had been kept low in an effort by Ultrasonics to establish itself

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Defendant -
Ultrasonics Western
Constructors, Inc.
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH
NOV 12 1983
ROGER K. MARETT, Clerk
By YMB Per

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

| | |
|-----------------------------------|---------------------|
| MOON LAKE ELECTRIC ASSOCIATION,) | |
| INC.,) | |
| Plaintiff,) | AFFIDAVIT OF |
| vs.) | RICHARD ARMSTEAD |
| ULTRASYSTEMS WESTERN) | |
| CONSTRUCTORS, INC., and) | |
| INDUSTRIAL INDEMNITY COMPANY,) | |
| Defendants.) | Civil No. 86-CV-11D |

STATE OF MAINE)
COUNTY OF) ss.

I, Richard Armstead, being first duly sworn, deposes and states that:

1. I am an employee of Ultrasonics Western Constructors, Inc..
2. I have personal knowledge of the contents of this Affidavit.
3. I was requested by Ultrasonics to prepare the bid for the electrical work on the Rooks, California substation.

4. My specialty involves electrical work. I am not familiar with welding and do not have experience regarding aluminum welding.

5. The construction drawings I received from Moon Lake did not indicate how the conductors, bus bars and terminals were to be connected.

6. Those items can be connected by various methods, including bolting, coupling or welding. Since the drawings did not specify how the documents were to be connected, I determined that it was up to the discretion of the bidder and therefore I prepared the bid planning to use bolting and coupling to connect those items.

7. After the bid had been submitted, I had various contacts from Kenneth Winder and Bruce Hunt of Moon Lake. At that time, they had questions regarding the columns on the bid sheet and questions regarding the per unit installed price of control cable. At no time did they question me regarding Ultrasonics bid in Unit A where the mistake was made.

8. On September 19, 1985, I met with Kenneth Winder of Moon Lake, a Chevron representative and Michael Chambers. Moon Lake had requested the meeting to get better acquainted with Ultrasonics, since it was the apparent low bidder. At that meeting we discussed some minor items that required aluminum welding. I inquired about any local welders with a

portable unit that could handle those small items. At no time did Mr. Winder clarify that welding was required for the connecting of the bus bars, terminals and connectors. I left that meeting thinking only a couple of small items required welding.

9. On September 24, 1985, Mr. Hunt of Moon Lake informed Michael Chambers that Ultrasystems bid appeared to be quite low, particularly in Units A and B. That information was relayed to me by Mr. Chambers. I then met with other representatives from Ultrasystems to review our bid.

10. In reviewing the bid we determined that Moon Lake probably intended to have the bus bars, terminals and conductors welded rather than joined by coupling and bolting. There is no reference to that method of connecting on the construction drawings. The only reference being on the materials list.

10. The cost of welding is substantially higher than the cost of bolting and coupling the items.

11. The bid submitted by Ultrasystems was very low, with very little profit and was issued for the purpose of establishing ourselves with Moon Lake as being proficient in electrical work.

12. To weld the joints would cost an additional SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00). Our initial bid had been TWO HUNDRED THIRTEEN THOUSAND THREE HUNDRED DOLLARS (\$213,300.00). This additional cost would cause substantial loss

and hardship to Ultrasystems on the bid.

13. On September 25, 1985, immediately after determining the error on the bid, a letter was prepared and delivered to Bruce Hunt of Moon Lake Electric informing him of the error and offering to do the project for TWO HUNDRED EIGHTY-EIGHT THOUSAND THREE HUNDRED DOLLARS (\$288,300.00), which was our original bid plus the additional SEVENTY-FIVE THOUSAND DOLLAR (\$75,000.00) for the welding.

14. The mistake I made when submitting the bid was a good faith mistake and was a result of my lack of expertise regarding welding, the failure of the construction drawings to specify that the items were to be connected by welding and my reliance on past experience that conductors, bus bars and terminals could be joined by bolting and coupling, which was substantially cheaper. Upon determining my mistake we gave immediate notice to Moon Lake.

DATED this 5TH day of NOVEMBER, 1986.

Richard A. Armstead
Richard Armstead

Subscribed and sworn to before me this 5th day of November, 1986, by Richard Armstead.

My commission expires:

12-91

Carol A. Smith
Notary Public
Residing at 1000 Lake

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

I, Mary M. Chapman, being duly sworn, state:

That I am employed in the office of NIELSEN & SENIOR,
Clark B. Allred, Attorney for ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.
herein, that I have served the attached Affidavit of Richard
Armstead

upon counsel by placing a true and correct copy thereon in an
envelope duly addressed as follows:

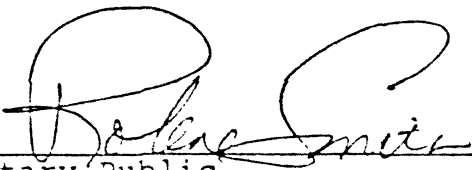
George Mangan
47 North Second East
Roosevelt, UT 84066

David Slaughter
10 Exchange Place
11th Floor, Box 3000
Salt Lake City, UT 84110

and have deposited the same in the United States mail at Vernal, Utah,
postage prepaid thereon, on the 11th day of November, 1986.

Mary M. Chapman

Subscribed and sworn to before me this 11th day of
November, 1986.



Notary Public
Residing at Vernal, Utah

My Commission expires:

Oct 22, 1988

ML

EXHIBIT "A"

MOON LAKE ELECTRIC ASSOCIATION • PO BOX 278 • 188 WEST 2ND NORTH • ROOSEVELT, UTAH 84066 • PH 722-

August 27, 1985

Gentlemen:

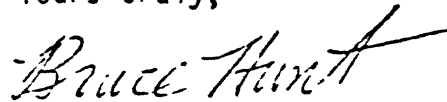
Moon Lake Electric Association, Inc. is receiving proposals for the construction, including all necessary labor, material, and equipment, of the Rooks California Substation:

1. Bids should be submitted in writing to our Roosevelt Office not later than 10:00 a.m. Sept. 12, 1985.
2. Proposals must be submitted on the enclosed forms. Bidders name, address, license number (if a license is required by the State), and bid opening date and hour must appear on the envelope in which the proposal is submitted.
3. It is the responsibility of the bidder to carefully examine all aspects of the project including scope of work, drawings and specifications, site and soil conditions, equipment required, bonding and contracting requirements, licensing and regulatory considerations, general local conditions and all other matters that may affect the cost and completion time of the project.
4. Each proposal must be accompanied by a bid bond in an amount equal to ten percent (10%) of the bid price. Bid bonds of the bidders submitting the three low proposals will be held until a proposal is accepted and a satisfactory contractor's bond is furnished by the successful bidder. Bid bonds of the three low bidders will be returned within sixty (60) days from the bid opening date. Bid bonds of the other bidders will be returned within ten (10) days from the bid opening date.
5. The successful bidder will be required to execute two (2) additional counterparts of the proposal and to furnish a contractor's bond in triplicate in a penal sum not less than the contract price. Failure of the bidder to execute such counterparts or to furnish contractor's bond within ten (10) days after written notification of acceptance of the proposal by Moon Lake Electric shall entitle Moon Lake Electric to enforce the bid bond in accordance with its terms.

August 27, 1985
Page 2'

6. Project site is on Chevron Oil property. All contractors and employees on the site shall be subject to Chevron Oil Company regulations. (Refer to copy of Safety Specification 3.31).
7. Interested parties are invited to a pre-bid meeting which will be held at the main Chevron Oil Company Office at the Chevron California Site near Rangely, Colorado on September 5, 1985, at 9:00 a.m..
8. Successful bidder will be notified by September 18, 1985.

Yours truly,

A handwritten signature in cursive script that reads "Bruce Hunt". The signature is written in dark ink and is positioned above the printed name and title.

Bruce Hunt
Substation Engineer



Company

Home Office

Proposal or Bid Bond

EXHIBIT "C"

Bond No. YS859-7301

Premium \$ INCLUDED IN BID
SERVICE UNDERTAK

KNOW ALL MEN BY THESE PRESENTS:

THAT

ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.
16845 Von Karman Ave.
Irvine, Ca. 92714

(hereinafter called the Principal) as Principal, and INDUSTRIAL INDEMNITY COMPANY,
a corporation created and existing under the laws of the State of California,
with its principal office at Orange, California, (hereinafter called the Surety),
as Surety, are held and firmly bound unto

MOONLAKE ELECTRIC ASSOCIATION, INC.
188 West 2nd North
Roosevelt, Utah 84066

(hereinafter called the Obligee), in the full and just sum of -----

TEN PER CENT (10%) OF TOTAL AMOUNT BID-----Dollars (\$ -----10%-----),
good and lawful money of the United States of America, to the payment of which sum of money well
and truly to be made, the said Principal and Surety bind themselves, their and each of their heirs,
executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal herein is submitting a proposal for

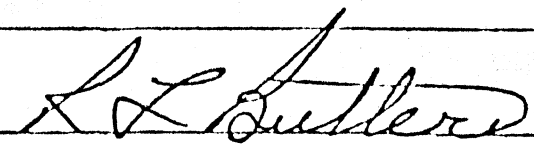
ROOKS CALIFORNIA SUBSTATION
Location of project Rangely, Colorado
BID DATE: September 12, 1985

NOW, THEREFORE, if the bid or proposal of said Principal shall be accepted, and the contract
for such work be awarded to the Principal thereupon by the said Obligee, and said Principal shall
enter into a contract for the completion of said work and furnish bonds as required by law, then this
obligation shall be null and void, otherwise to remain in full force and effect.

PROVIDED, HOWEVER, neither Principal nor Surety shall be bound hereunder unless Obligee
prior to execution of the final contract shall furnish evidence satisfactory to Principal and Surety that
financing has been firmly committed to cover the entire cost of the project.

Signed, sealed and dated this 11th day of September 1985

ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.


Principal

INDUSTRIAL INDEMNITY COMPANY

AM-1 11/17/85

_____ for the construction of the following
substations or other major facilities:

| | | |
|------------------|----------------|------------|
| Pooks California | Substation, \$ | 213.300.00 |
| | Substation, \$ | |
| | Substation, \$ | |
| | | \$ |
| | | \$ |

The total contract price is \$_____

MOON LAKE ELECTRIC ASSOCIATION, INC.

Owner

By

Prešident

Lucius G. Everett
Secretary

September 18, 1985

Date of Contract

A. DENNIS NORTON (A2425)
DAVID W. SLAUGHTER (A2977)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Industrial Indemnity Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

FILED
7th DISTRICT COURT DUCHESNE
NOV 17 1985
ROGER K. MAHETT, Clerk
BY 15 ncr

IN THE SEVENTH JUDICIAL DISTRICT COURT
DUCHESNE COUNTY, STATE OF UTAH

MOON LAKE ELECTRIC
ASSOCIATION, INC.,

Plaintiff,

vs.

JOINDER IN MOTION
FOR SUMMARY JUDGMENT

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., and
INDUSTRIAL INDEMNITY
COMPANY,

Civil No. 86-CV-11D

Defendants.

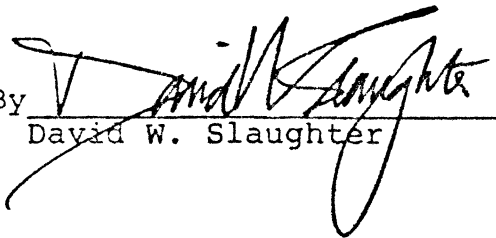
Defendant Industrial Indemnity Company hereby joins
in the motion by defendant Ultrasystems Western Constructors,
Inc. for summary judgment dismissing plaintiff's complaint for
no cause of action.

Summary judgment should be granted in favor of
Industrial Indemnity Company upon the same grounds and for the
same reasons as set forth in the Memorandum accompanying Ultra-
systems' Motion in this matter.

DATED this 14th day of November, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By



David W. Slaughter

CERTIFICATE OF MAILING

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Marsha Van Otten, being first duly sworn, states:
that she is employed by the law offices of Snow, Christensen
& Martineau, attorneys for Industrial Indemnity Company
herein; that she mailed a true and correct copy of the
attached Joinder in Motion for Summary Judgment, postage
prepaid, first class mail, the 14th day of November, 1986.

Clark B. Allred, Esq.
Nielsen & Senior
363 East Main
Vernal, Utah 84078

George E. Mangan, Esq.
47 North Second East
Roosevelt, Utah 84066

Marsha Van Otten
Marsha Van Otten

SUBSCRIBED AND SWORN to before me this 14th day of
November, 1986.

John E. L. Shook
NOTARY PUBLIC

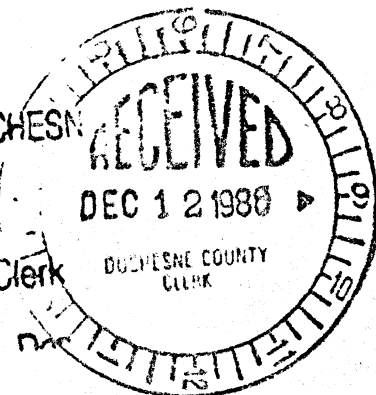
My Commission Expires:

8/30/87

Residing in Salt Lake City, Utah

GEORGE E. MANGAN (206B), of
GEORGE E. MANGAN, APC
Attorney for Plaintiff
47 North Second East
Roosevelt, Utah 84066
801-722-2428

FILED
JUDICIAL DISTRICT COURT DUCHESNE
STATE OF UTAH
DEC 12 1988
ROGER K. MARETT, Clerk



IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

MOON LAKE ELECTRIC
ASSOCIATION, INC.,

Plaintiff,

vs.

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., AND
INDUSTRIAL INDEMNITY COMPANY,
Defendants.

)

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MEMORANDUM IN OPPOSITION TO
DEFENDANT'S ULTRASYSTEM'S
MOTION FOR SUMMARY JUDGMENT
AND FOR SUMMARY JUDGMENT FOR
MOON LAKE ELECTRIC
ASSOCIATION, INC.

Civil No. 86-CV-110

Plaintiff, Moon Lake Electric Association, Inc., ("Moon Lake"), through its attorney, George E. Mangan, submits the following Memorandum in Opposition to defendant Ultrasystems's Western Constructors, Inc.'s ("Ultrasystems") Motion for Summary Judgment.

UNDISPUTED FACTS

Plaintiff agrees that the following which are enumerated as "Undisputed facts" in defendant Ultrasystems Memorandum, are in fact undisputed.

1. Admit. Ultrasystems is an experienced contractor in this field of construction.

2. Admit. Further, Moon Lake has a Certificate of Public Convenience and Necessity to serve in designated areas of Utah and Colorado.

3. Admit.

4. Admit. However, Defendant Ultrasonics was involved in an earlier phase of the construction as the successful low bidder.

5. Admit. Ultrasonics was furnished the same bid documents as all other bidders on the project.

6. Admit. Further, the documents furnished to defendant Ultrasonics included the materials list that the successful low bidder was expected to furnish.

7. Admit. Mr. Arastead was an agent of the defendant Ultrasonics that Moon Lake was instructed to leave the bid documents with.

8. Plaintiff can neither admit nor deny. The plaintiff solicited for bids based on the specifications set forth in all the bid documents. Defendant Ultrasonics had all the bid documents. One who is specialized in electrical work should know how electrical connections are made by looking at a materials list.

9. Admit. Further, it was not only Moon Lake's intent that the connections be by welding, but aluminum welding is specified in the materials list.

10. Admit.

11. Moon Lake does not know the subjective thoughts of Areteed or any other bidder. Moon Lake must rely on all of the bid specifications furnished to all of the bidders, and presume that an experienced contractor understands the plain meaning of the same.

12. Admit.

13. Admit. In addition, such a bid bond was specifically required by Moon Lake of all bidders and such a bid bond is a standard procedure in the construction industry.

14. Admit. As Mr. Hunt's deposition indicated, Moon Lake inquired of defendant Ultrsystems as to ascertain if Ultrsystems had in fact made a mistake in its addition in its columns. Moon Lake was giving defendant Ultrsystems a chance to rectify any mistake that might have been made by Ultrsystems. Ultrsystems confirmed that its figures were correct in a letter of September 13, 1983. (See attached Exhibit "A".)

15. Admit. And as indicated in the Winder and Hunt depositions, Moon Lake wanted to verify that defendant Ultrsystems was capable of completing this phase of the project.

16. Admit. It takes no mathematical genius to review the differences in the five (5) bids Moon Lake received on the project.

17. Moon Lake is without sufficient information or knowledge to admit or deny this as an undisputed fact.

18. Moon Lake is without sufficient knowledge to admit or

deny this. However, the letter referenced in paragraph 18 is attached hereto as Exhibit "C" and made a part hereof by reference. The letter makes no reference to the "actual costs... for the aluminum welding." Further, said letter was neither dated nor sent until after Moon Lake had informed defendant Ultrasonics that it was the low bidder.

19. Admit that there was a meeting on September 25, 1965. Ultrasonics neglects to point out that Mr. Hunt, as Moon Lake's agent, engaged in a lengthy discussion about the project with Ultrasonics agents prior to notifying them that Moon Lake had awarded Ultrasonics the bid. In addition, the letter in question was not prepared until after that meeting (see first line of Exhibit "C"). Further, as Mr. Hunt points out in his deposition, he had given Ultrasonics the "acceptance" prior to any claim by Ultrasonics that it had made a mistake. The acceptance form utilized by Moon Lake is a standard form used by Rural Electric Associations, but inasmuch as no Rural Electric Association funds were being used, the Administrators approval was not relevant. (See Deposition of Kenneth Winder.)

20. Admits, but questions relevancy.

21. Admits, but questions relevancy.

22. Admits. As a public utility and a cooperative, the rules and regulations governing and/or regulating Moon Lake require that any extension or enhancement of service for the benefit of any consumer(s) that is not otherwise necessary for the integrity of the systems, must be borne by the consumer.

Such a requirement is standard in Moon Lake's industry. Whether Moon Lake does or does not have out-of-pocket expenses is not the fact in question. Whether Moon Lake is awarding bids for projects paid for by Moon Lake as a system or by a Moon Lake consumer, the integrity of the bidding process must be maintained. That was the ultimate question that Moon Lake had to answer when it was faced with Ultrasonics' demand for more money or it would withdraw the bid.

23. This is an argument rather than a statement of fact. Because Moon Lake is without information, does not make the same a fact. Moon Lake will address the argument portion of this statement below.

24. Ultrasonics knew of both Moon Lake's and Chevron's involvement in the project, and Ultrasonics was trying to "establish itself with Chevron and Moon Lake." See Undisputed Fact 17. Ultrasonics never requested Moon Lake to furnish evidence "that financing had been finally committed to the entire cost of the project." Ultrasonics knew it had been committed. Ultrasonics had already performed on another phase of the project and was well aware that the funding had been finally committed. Moon Lake had no occasion to furnish Ultrasonics with proof that financing had been committed, since Ultrasonics did not request the same.

25. Purely argumentative and conclusionary. Cannot be admitted. Further, in this factual situation, the test is not "good faith mistake" as is indicated in plaintiff's argument

below.

In addition to the above, plaintiff submits the following as relevant and undisputed facts.

26. Moon Lake required that a bid bond accompany each bid or proposal submitted to it. (See defendant's Exhibit "A", No. 4.)

27. The successful bidder would be required to enter into a "contractor's bond". The contractor's bond was to be a penalty bond. (See Ultrasystems' Memorandum, Exhibit "A", No. 5.)

28. Moon Lake specifically stated that it was "the responsibility of the bidder to carefully examine all aspects of the project, including . . . drawings and specification . . . equipment required". (See Ultrasystems' Memorandum, Exhibit "A", No. 3.)

29. Moon Lake specifically required the bid bond would be forfeited if the bidder did not execute two (2) counterparts of the proposal and furnish a contractor's bond within ten (10) days of acceptance of the bid. (See Ultrasystems' Memorandum, Exhibit "A", No. 5.)

30. Plaintiff could determine, and, in fact, did determine, that the conductors, bus bars and terminals were to be connected by using aluminum welding from the blueprints and materials list. (See Ultrasystems' Memorandum, Undisputed Facts, No.s 10, 17, and Affidavit of Richard Armstead.)

31. Richard Armstead is not familiar with welding, particularly aluminum welding, and the cost and expense

associated therewith. (See Ultrasystems' Memorandum, Undisputed Facts, No. 8.)

32. Ultrasystems confirmed its bid on September 13, 1985. (See Moon Lake's Exhibit "A".)

33. Ultrasystems' mistake was a misinterpretation of the specifications upon which the bid was based, made because the employee preparing the bid lacked the knowledge and expertise to determine the requirements of those specification. (See Ultrasystems' Memorandum, Undisputed Facts No.s 8, 10, 17 and Affidavit of Richard Armstead.)

34. No Rural Electric Administration funds were used in the Rooks California Substation project. (See Deposition of Kenneth Winder.)

DISPUTED FACTS

Plaintiff submits the following as disputed facts.

1. Ultrasystems acted in bad faith when it had Richard Armstead prepare the bid, as Mr. Armstead lacked the knowledge and expertise to determine that Moon Lake required the superstructure to be joined by aluminum welding. (Contra, defendant's Memorandum, Undisputed Facts, No.s 23 and 25.)

2. Moon Lake accepted Ultrasystems bid on September 18, 1985. (See Moon Lake's attached Exhibit "B".)

3. Ultrasystems first informed Moon Lake of the mistake in a conversation on September 25, 1985, and later sent Moon Lake a letter via Federal Express, dated September 25, 1985, informing

Moon Lake of its intention to withdraw the bid or increase the bid. (see Moon lake Exhibit "C" and Depositions of Kenneth Winder and Bruce Hunt.)

ARGUMENT

I. ULTRASYSTEMS' MISTAKE WAS A "MISTAKE OF LAW", AND THEREFORE, IT WAS NOT ENTITLED TO RESCIND ITS BID AND PREVENT FORFEITURE OF ITS BOND

Both 52 ALR2d 792 and 2 ALR4th 991, distinguish between a mistake of fact and a mistake of law or judgment. Under some circumstances, most courts allow a bidder to rescind his bid, and not forfeit his bond, if a mistake of fact has been made by the bidder. 2 ALR4th 991, defines a mistake of fact as "a state of mind or belief that is not in accord with the facts." 2 ALR4th at 995. Mathematical mistakes and clerical errors in transcribing figures, omitting figures or transposing figures are listed as mistakes of fact.

Black's Legal Dictionary, 5th Edition, 1979, p.903, defines mistake of law as "a mistaken opinion or inference, arising from an imperfect or incorrect exercise of judgment, upon (the) facts." (Citations omitted.) In 2 ALR4th 991, a misinterpretation of the specifications upon which the bid was based is classified as a mistake of law.

In this case, even Ultrasystems, however reluctantly, admits that the blueprints and materials list supplied the facts necessary to draw the conclusion that Moon Lake required the superstructure's conductors, bus bars and terminals to be

aluminum welded. (See Ultrasystems' Memorandum, Undisputed Facts, No. 10.) Ultrasystems also admits that Mr. Armstead, who is "not familiar with welding" determined or interpreted that "it was up to the bidder as to the type of coupling to be used." (Ultrasystems' Memorandum, Undisputed Facts, No. 8.) Subsequently when Armstead and other Ultrasystems construction personnel reviewed the bid, Armstead's mistake was found. (Ultrasystems' Memorandum, Undisputed Fact, No. 17, p.5.) The unescapable conclusion is that Ultrasystems had all the facts necessary for it to determine that Moon Lake required the superstructure be joined by aluminum welding. But, Armstead failed to make that determination because he lacked expertise and familiarity with welding, and in particular, aluminum welding. Therefore, the mistake was a mistake of law and does not fall within the purview of the cases which allow a bidder to rescind his bid without forfeiting his bond.

II. ULTRASYSTEMS DID NOT ACT IN GOOD FAITH AND/OR WAS NEGLIGENT IN ASSIGNING ARMSTEAD TO PREPARE THE BID.

Although a bid, once opened and declared, is considered in the nature of an irrevocable option or contract right of which the contracting authority cannot be deprived without its consent, rescission may be had for a material and inadvertent mistake of fact, brought home to the authority before it has changed its position to its detriment, where the mistake was not the result of neglect of a legal duty or lack of good faith on the part of the bidder, enforcement of the contract would be unconscionable, and the offeree may be placed in status quo, in the legal sense

of suffering no damage except certain inconveniences connected with the loss of the proposed deal. M. E. Kemper Constr. Co. v Los Angeles, 37 Cal. 2d 696, 235 p.2d 7 (1951).

"* * * equity will relieve against forfeiture of a bid bond, (a) if the bidder acted in good faith, and (b) without gross negligence, (c) if he was reasonably prompt in giving notice of the error in the bid to the other party, (d) if the bidder will suffer substantial detriment by forfeiture, and (e) if the other party's status has not greatly changed, and relief from forfeiture will work no substantial hardship on him, * * *". State v Union Construction Co., 9 Utah 2d 107, 399 P.2d 421 at 421 (1959), quoting Puget Sound Painters, Inc. v State of Washington, 45 Wash.2d 819, 278 P.2d 302, at 304, (1955).

Ultrasonics assigned one man, Armstead, to prepare the bid. Armstead apparently lacked expertise in welding, and therefore, lacked the knowledge to correctly determine Moon Lake's welding requirements from the blueprints and materials list. Ultrasonics did have personnel who could and did determine the welding requirements, and the cost thereof. Moon Lake does not dispute that Armstead did the best he could, based on his knowledge and expertise. But, Ultrasonics acted in bad faith and/or was negligent by assigning the preparation of the bid to a person of limited expertise without assigning other people with welding expertise to assist in preparation of the bid.

III. DAMAGES

Ultrasonics argues that Moon Lake sustained no damages

because Chevron reimbursed Moon Lake for all the additional costs caused by Ultrasonics' withdrawal of its bid. Using that logic, few businesses would ever sustain damages as most, if not all, losses and costs are passed on to the consumers of goods and services produced by the business. That plaintiff will be "reimbursed" for any damages by its consumers if defendant does not pay for plaintiff's damages, does not mean that plaintiff did not incur damage. Even if plaintiff anticipates the amount of damage, and recovers that amount from its consumers before plaintiff actually incurs or pays the cost of the damages, the damage still occurs. That Moon Lake will pass on its damages to a consumer does not make the damages disappear.

IV THERE ARE NO RELEVANT CONDITIONS PRECEDENT FOR THE BID BOND TO TAKE EFFECT.

This argument by defendant Ultrasonics is spurious at best and without merit.

Defendant Ultrasonics knew that no Rural Electric Association funds were being used on this project. Ultrasonics knew that the same acceptance form had been used by Moon Lake when Ultrasonics bid was awarded an earlier phase of this project. Ultrasonics knew that Moon Lake was a Rural Electric Association Cooperative and used Rural Electric Association approval forms in connection with its bidding procedures. Defendant Ultrasonics also knew when it made the bid in question and received from Mr. Hunt the "Acceptance" (Plaintiff's Exhibit "B"), that the Administrator would not be involved in either approving or notifying Ultrasonics to proceed. Ultrasonics had

been 'down that path with Moon Lake before and knew how the system worked. To now grasp at straws and claim that Ultrasonics was expecting the Administrator to approve the bid, would be to belie the actual facts.

Most public contracts are subject to special provisions respecting manner of execution and requirements as to validity. Most of them are required to be in writing. Consequently, "acceptance" as used in most of the cases does not mean the formation of a contract as in the law of private contracts, but is simply descriptive of some act indicative of approval or award, with the intent of subsequently executing a formal contract. 52 ALR2d 792 at 793.

Certainly the approval of the administrator would be a special provision as contemplated above. And, as no administrator's (REA) funds were involved in this project, the Rural Electric Association could not disapprove any contract Moon Lake entered into concerning the project. (See Deposition of Kenneth Winder.) Further, Moon Lake annually submits a work plan to Rural Electric Association which outlines all work that will be done on Moon Lake's system during the coming year. The administrator reviews and then accepts or rejects the same. Moon Lake's plan for 1985, which included the subject project, was approved by the administrator. No other approval was required or contemplated by law or was given to Ultrasonics in the earlier phase that Ultrasonics had been awarded. The bidding, etc.,

involved in that phase followed the exact procedures as followed in this phase.

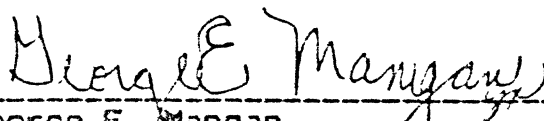
V PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Based on the uncontested facts, and the law argued by plaintiff above, the plaintiff believes that there are no material facts in dispute, and that as a matter of law, plaintiff is entitled to judgment against defendants as prayed for in plaintiff's complaint, including costs, attorney fees and interest.

CONCLUSION


The Motion of the defendant Ultrasonics ought to be denied and plaintiff ought to be awarded a Summary Judgment as a matter of law.

DATED this 10th day of December, 1986.


George E. Mangan
Attorney for Plaintiff

CERTIFICATE OF MAILING

I do hereby certify that on the 10th day of December, 1986, I mailed a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT ULTRASONICS' MOTION FOR SUMMARY JUDGMENT, postage prepaid, to Clark B. Allred, Gayle F. McKechnie, NIELSEN & SENIOR, attorney for Defendant Ultrasonics Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84076; and to Mr. David Slaughter, 10 Exchange Place, 11th Floor, Box 3000, Salt Lake City, Utah 84110; by depositing the same in the United States Post Office at Roosevelt, Utah.


Attorney

4

INCORPORATED

September 13, 1985

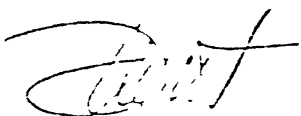
Messrs. Ken Winder and Bruce Hunt
MOONLAKE ELECTRIC ASSOCIATION, INC.
188 West 2nd North
Roosevelt, Utah 84066

Gentlemen:

As per our telephone conversation with Bruce Hunt on September 13, 1985, this letter is to confirm that the figures listed under total labor, materials and other column are the correct figures to be carried over to the extended price labor and materials column.

In addition Bruce requested that we supply him with a unit price for control cable installed above and beyond the 25,000 L.F. listed on the bid sheet. We will install additional control cable at \$.15 per linear foot.

Very truly yours,



Quent Evers
Administrative Manager

QE/t1

Exhibit "A"

ACCEPTANCE

ect to the approval of the Administrator, the Owner hereby accepts the
going Proposal of the Bidder, ULTRA SYSTEMS WESTERN CONSTRUCTORS INC.

_____ for the construction of the following
ations or other major facilities:

Forks California Substation, \$ 213,300.00

Substation, \$ _____

Substation, \$ _____


\$ _____

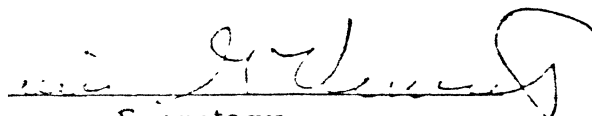
\$ _____

The total contract price is \$ _____

MOON LAKE ELECTRIC ASSOCIATION, INC.

Owner

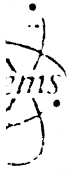
By 
President


Secretary

September 18, 1985

Date of Contract

Exhibit "B"



ULTRASYSTEMS
WESTERN CONSTRUCTORS
INCORPORATED

9-25-85

MOON LAKE ELECTRIC ASSOCIATION
P.O. BOX 272
ROOSEVELT, UTAH 84066

ATTN: BRUCE HUNT

RE: ROOKS CALIFORNIA SUBSTATION

GENTLEMEN:

PER OUR CONVERSATION THIS AFTERNOON REGARDING THE ABOVE MENTIONED PROJECT I REGRET TO INFORM YOU OF A DISCREPANCY IN OUR PROPOSAL. UPON REVIEW OF OUR BID DOCUMENTS IN PREPARATION OF A CONSTRUCTION BUDGET AND SCHEDULE, IT WAS DISCOVERED THAT THE ALUMINUM WELDING OF CONDUCTORS, BUS BARS AND TERMINALS HAD INADVERTANTLY BEEN LEFT OUT. DUE TO THE MAGNITUDE OF THIS ERROR AND THE COST INVOLVED, U.W.C.I. MUST EITHER WITHDRAW OUR PROPOSAL OR INCREASE OUR PROPOSAL BY \$75,000.00 TO TOTAL CONTRACT AMOUNT OF \$288,300.00 THIS INCREASE REFLECTS ESTIMATED COSTS FOR THE WELDING AS STATED ABOVE AND DOES NOT INCLUDE ANY FEE OR CONTINGENT COSTS. I AM CONFIDENT THAT U.W.C.I. CAN PERFORM ALL WORK INVOLVED WITHIN THE TIME FRAME ALLOTTED AND IN A PROFESSIONAL MANNER CONSISTENT WITH MOON LAKE'S NEEDS.

IF I CAN BE OF ANY ASSISTANCE OR CLARIFY ANY QUESTIONS YOU MAY HAVE, PLEASE DO NOT HESITATE TO CONTACT ME. I REALIZE TIME IS OF THE ESSENCE IN THIS CONTRACT AND LOOK FORWARD TO RESOLVING THE SITUATION AT THE EARLIEST DATE POSSIBLE. IT WAS U.W.C.I. INTENT TO LAYOUT AND TRENCH FOR GROUNDING GRID SYSTEM STARTING 9-26-85; AND UPON NOTIFICATION OF A RESOLUTION WE WOULD MAINTAIN THE 9-26-85 START DATE.

I SINCERELY APOLOGIZE FOR THE PREDICAMENT AND HOPE THAT IT DOES NOT CAUSE TOO MUCH INCONVENIENCE FOR YOU.

SINCERELY,

ULTRASYSTEMS WESTERN CONSTRUCTORS INC.

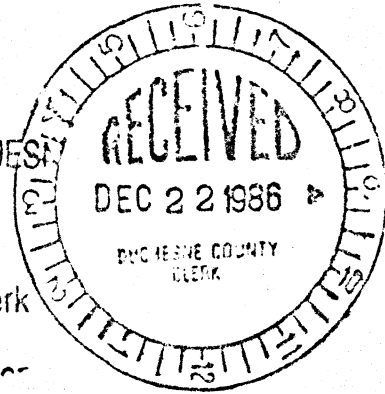

MICHAEL J. CHAMBERS
PROJECT MANAGER

cc file
Q. EVERS

Exhibit "C"

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Defendant -
Ultrasystems Western
Constructors, Inc.
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

FILED
DISTRICT COURT DUCHESNE
STATE OF UTAH
DEC 22 1986
ROGER K. MARETI, Clerk



IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

| | |
|-----------------------------------|------------------------|
| MOON LAKE ELECTRIC ASSOCIATION,) | |
| INC.,) | DEFENDANT ULTRASYSTEMS |
|) | REPLY MEMORANDUM |
| Plaintiff,) | Re: Motion for |
|) | Summary Judgment |
| vs.) | |
|) | |
| ULTRASYSTEMS WESTERN) | |
| CONSTRUCTORS, INC., and) | |
| INDUSTRIAL INDEMNITY COMPANY,) | |
|) | |
| Defendants.) | Civil No. 86-CV-11D |

Defendant, Ultrasystems Western Constructors, Inc. hereby submits the following Reply Memorandum in support of its Motion for Summary Judgment and in reply to the Memorandum in Opposition filed by the Plaintiff.

In light of the Plaintiff's Memorandum, Ultrasystems will briefly set forth the standards required under Rule 56. Rule 56(c) provides that summary judgment should enter forthwith if the discovery, pleadings and affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(e) provides

that when a motion for summary judgment is supported by affidavits and other sworn testimony, such as depositions, that the adverse party may not rest upon mere allegations or denials, but must respond by affidavit or with other admissible facts showing that there is a genuine issue for trial. A party cannot rely on allegations or denials on a motion for summary judgment, but must set forth admissible specific facts showing that there is a genuine issue for trial. Thornock vs. Cook, 604 P.2d 934 (Utah 1979); Hall vs. Fitzgerald, 671 P.2d 224 (Utah 1983).

Defendant Ultrasystems, in its previous Memorandum, set forth specific facts it claimed were undisputed. Those facts were supported by sworn testimony either by affidavit or by depositions. The Plaintiff in its opposing Memorandum has not disputed any of Ultrasystems facts and has not submitted any affidavit or other admissible testimony disputing those facts. The Plaintiff's Memorandum in general admits the facts, often with commentary which is unsupported, or else states that the Plaintiff is without sufficient information or knowledge to admit or deny the fact. Rule 56 requires that mere denials are insufficient and that specific facts must be set forth.

On pages six and seven of Plaintiff's Memorandum,, Plaintiff submits its undisputed facts. (Nos. 26-34) Again, those claimed undisputed facts are unsupported by affidavits or other admissible evidence as required by Rule 56. Ultrasystems would

submit that numbers 29, 32 and 33 are not true and are not supported by the affidavits and admissible facts before the Court. Number 29 refers to paragraph 5 of Exhibit "A" on the Allred Affidavit. Paragraph five does not provide that the Bid Bond would be forfeited, but rather provides that Moon Lake is entitled to enforce the Bid Bond in accordance with its terms. The terms of the bond provides for damages, which in this case there are none. On number 32 the admissible facts show that Ultrasystems confirmed two parts of its bid on September 13, 1985. See Ultrasystems undisputed fact number 14 with its references to the Hunt deposition. Number 33 is the Plaintiff's summary of Ultrasystems facts 8, 10 and 17. Facts 8, 10 and 17 with their references are more accurate than the summary.

Finally, Plaintiff's Memorandum submits what it terms disputed facts. See page 28. Again, Plaintiff submits no affidavits or other admissible evidence to support its claims. A review of the affidavits on file and the depositions will show that there are no facts what support which Plaintiff claims to be disputed. On number 1, the Affidavit of Richard Armstead and the depositions of Hunt and Winder show there was no bad faith by Mr. Armstead or by Ultrasystems. See Ultrasystems facts 23 and 25 with its references. On number 2, the testimony of Plaintiff's own agent in his depositions shows that the acceptance occurred on September 25. See Ultrasystems undisputed fact number 19 and

the reference thereto.

The Court has before it sworn depositions and affidavits. There are no contradictions or disputes regarding the facts set forth therein as it relates to the issues before the Court. The Plaintiff in its opposing Memorandum has not set forth, as required by Rule 56, any affidavits or other admissible evidence showing any disputed facts. Under Rule 56 there are no facts in dispute and Defendant Ultrasystems would submit that based on the undisputed facts it is entitled to judgment as a matter of law.

REPLY TO PLAINTIFF'S ARGUMENT

Plaintiff's Memorandum citing certain ALR articles spends time discussing the differences between a mistake of fact and a mistake of law. That is not the test in the State of Utah. The test in the State of Utah is set forth in State vs. Union Construction Co. 339 P.2d 421 (1959). Plaintiff does not claim nor set forth any facts showing that Ultrasystems does not meet the standard of State vs. Union Construction. Furthermore, the mistake is a mistake of fact as defined by Plaintiff.

In part two, Plaintiff alleges that Defendant Ultrasystems acted in bad faith or was negligent. The Plaintiff, however, has submitted no evidence to support that allegation and the deposition of both Mr. Winder and Mr. Hunt state that they have no evidence showing that Ultrasystems did not act in good faith. Hunt deposition page 39. Winder deposition pages 25 and 30. The

undisputed Affidavit of Mr. Armstead shows that he did act in good faith.

In part three, Plaintiff makes some kind of claim that there are no damages because Chevron was a consumer and that like all losses are passed on to the consumer. That is not the facts of this case. That is why Ultrasystems through discovery has attempted to obtain a copy of the contract. It will show that this is not a consumer relationship. In the depositions of Mr. Hunt and Mr. Winder, they stated that the substation was built for Chevron, is owned by Chevron and that Chevron paid all costs incurred by Moon Lake, including overages, overhead, interest etc. for the construction of the substation. This is not a consumer situation.

In part four, Plaintiff attempts to avoid the clear language of the bond, which contained a condition precedent. This is an action by the Plaintiff on the bond and therefore the terms of the bond must be complied with before relief can be granted as requested by the Plaintiff.

The Plaintiff has submitted no affidavit or other admissible evidence showing any material dispute of fact. The facts are undisputed and based on the law in this State and the documents of the parties, Defendant Ultrasystems is entitled to the relief

requested and it is respectfully requested that the Court grant its Motion for Summary Judgment.

DATED this 17 day of December, 1986.

NEILSEN & SENIOR
Attorneys for Defendant -
Ultrasystems Western
Constructors, Inc.

By:


Clark B. Allred

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

I, Mary Chapman, being duly sworn, state:

That I am employed at the office of NIELSEN & SENIOR, for Clark B. Allred, attorney for Ultrasystems Western Constructors, Inc., Defendant herein, that I have served the attached DEFENDANT ULTRASYSTEMS REPLY MEMORANDUM Re: Motion for Summary Judgment upon counsel by placing a true and correct copy thereon in an envelope duly addressed as follows:

George Mangan
47 North Second East
Roosevelt, Utah 84066

David Slaughter
10 Exchange Place
11th Floor
Box 3000
Salt Lake City, UT 84110

DATED this 17th day of December, 1986.

Mary Chapman
Mary Chapman

Subscribed and sworn to before me this 17th day of
December, 1986.

Elizabeth M. Anderson
Notary Public
Residing at Vernal, Utah

My commission expires:

Sept. 25, 1990

GEORGE E. MANGAN (2068), of
GEORGE E. MANGAN, APC
Attorney for Plaintiff
47 North Second East
Roosevelt, Utah 84066
801-722-2428

FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH

JAN 26 1987

ROGER K. MARETT, Clerk

By CS, Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

MOON LAKE ELECTRIC
ASSOCIATION, INC.,

Plaintiff,

vs.

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., AND
INDUSTRIAL INDEMNITY COMPANY,
Defendants.

SUPPLEMENTAL AFFIDAVIT
OF
KENNETH A. WINDER

Civil No. 86-CV-11D

STATE OF UTAH }
 : ss
COUNTY OF DUCHESNE }

Kenneth A. Winder being first duly sworn, upon his oath
deposes and says:

1. I am employed by Moon Lake Electric Association as the
Manager of Engineering. I possess a Bachelor's degree in
Engineering from Brigham Young University.

2. In the course of my employment at Moon Lake Electric, I
supervised the design of the substation at Rangley Colorado,
which is known as the "Rooks California Substation" and is the
subject matter of this litigation.

3. I also supervised the assembling of all of the
documents and specifications for the construction of the Rooks
California Substation, and specifically approved all of the same.

Page 1

Affidavit - Kenneth A. Winder
Moon Lake Electric v. Ultra Systems
[January 22, 1981]

419

13-118-588

Record, Page 449

Said approval involved the following: a consideration and review of the customers that Moon Lake would be servicing from said substation; the integration of the substation into Moon Lake's existing facilities; present and anticipated loads with substation facilities to serve same; alternative locations and designs; contracting, etc.

4. I was responsible for recommending to the Management of Moon Lake Electric that the documents and specifications for the Rooks California Substation were in proper order so as to submit the same for bids. I also recommended to Moon Lake's management that Moon Lake advertise for bidders.

5. It was my professional decision that the construction of the Rooks California Substation should be done in phases. The first phase involved the following: Site preparation, concrete foundation work, control house erection and fencing.

The second phase involved the actual assembling of the substation, which is the bid that is the subject matter of this litigation.

6. Moon Lake Electric has a standard bidding procedure that it follows in all of its bids. Some of Moon Lake's Bids have to be approved by the REA Administrator when REA funds are involved. When non-REA funds are used, Moon Lake is not required to secure approval from the REA Administrator. The Rooks California Substation did not involve any REA funds.

7. Moon Lake advertised for bids for foundation work, on the first phase, and the lowest bidder that was acceptable to

Moon Lake was UltraSystems. UltraSystems was engaged in performing the duties required of it in the Phase One bid, when Moon Lake advertised for bidders on the phase that is involved in this litigation. UltraSystems requested to be considered as a bidder on Phase Two, and was supplied with the necessary documents in order to bid on the same.

8. Prior to the date bids were due, Mr. Hunt from my staff answered inquiries of any representatives from UltraSystems or other bidders requesting any clarification or information concerning the bid, the specifications, etc.

9. The materials required were specified in the material list attached to the request for bids. These specific materials were being furnished by Moon Lake and had already been ordered. As a result, there were no options provided for. All information on the drawings supplied to each bidder was specifically "keyed" to the material lists. I personally gave final approval of and ordered all materials to be used in the substation.

10. It is my opinion that there could be no question in the mind of any experienced bidder or contractor as how the Rooks California Substation was to be built. The instructions on the installation information furnished to each bidder specified that the bus bars, conductors, and terminals were to be joined by welding as required by the specific material being furnished by Moon Lake.

11. It is neither customary nor usual in the trade or for Moon Lake to discuss such matters as the "welding" at any

meetings after the bids are received. Further, after the bids are received, it is too late to be discussing as an option, any matters which are specifically required..

12. Prior to September 18, 1985, I was informed by my Substation Engineer, Bruce L. Hunt, that a representative of UltraSystems had informed him that UltraSystems had purposefully submitted a "low bid" in "order to get the job and to establish [itself] as a electrical contractor in this area." This fact was also expressed to me by a representative of UltraSystems in a meeting held with UltraSystems on September 19, 1985. Moon Lake recognizes that low bids are occasionally submitted for that purpose, and was not surprised by the same.

13. As I indicated above, UltraSystems was already acting as a contractor for Moon Lake on phase one of the Rooks California Substation. I have found it to be common in the industry for a contractor that is already in the area and "geared up" for work, to submit a lower bid, in order to get another job.

14. When requested, it is customary for Moon Lake to share information concerning what other bidders have bid, and amount apportioned to different items, but only after Moon Lake's Board of Directors have approved the bidder and accepted a bid.

15. Moon Lake's Board of Directors accepted UltraSystems bid on September 18, 1985. On September 19, 1985, I personally notified UltraSystems that its bid had been accepted and to get its contractor's bond in place. At a later date, I also

authorized Mr. Hunt to reveal to UltraSystems what the other bids had been.

16. On September 25, 1985, I was informed by Bruce L. Hunt that a representative of UltraSystems had contacted him to indicate that UltraSystems felt it had made a mistake in its bid and that it had to have \$75,000.00 more in order to perform.

17. I then met with Moon Lake's General Manager, Grant Earl, and with George E. Mangan, Moon Lake's General Counsel, to discuss the situation. It was determined that inasmuch as UltraSystems had known about the other bids before deciding to change its bid, that Moon Lake would not consider its request for additional funds, and would require strict compliance with the bid submitted by UltraSystems.

18. Subsequently UltraSystems submitted to Moon Lake a new bid proposal. A copy of that proposal is attached to Mr. Hunt's Supplemental Affidavit as Exhibit "B". In its new proposal, UltraSystems did not mention that its original bid was based on bolted connectors, nor that the original bid was valid as to bolted connectors. Exhibit "B" clearly indicates that UltraSystems claimed that it had "inadvertently missed adding in the \$75,000.00 for welding."

19. There was no compulsion by or on behalf of Moon Lake or any representative of Moon Lake to "force" or require UltraSystems to even submit a bid. Moon Lake "invited" bids from several contractors, which included UltraSystems. This is a normal practice in the industry. Those who submit bids are free

to determine if they are willing or even want to enter into a contractual arrangement with Moon Lake on certain specified terms. UltraSystems determined that it wanted to contract with Moon Lake on the terms that Moon Lake specified. Moon Lake has only attempted to get UltraSystems to honor the contractual obligation UltraSystems voluntarily assumed.

20. Moon Lake has never represented that it would excuse a bidder from performing simply because the bidder utilized the services of one of its employees which the bidder, by hind sight, considers to be without sufficient experience or competency to prepare the bid submitted.

21. At no time and in no manner has UltraSystems explained or attempted to explain how it arrived at the \$75,000.00 figure that it "inadvertently" left out of its bid. I can not understand how or when the \$75,000.00 figure was arrived at by any of the representatives of UltraSystems.

22. Reference to welding of the rigid bus is found in Section V of the specification attached to the Bid Document. Also, the material list attached to the Bid Document specifies the weld type connectors to be used. There was nothing in any of the bid documents or specifications furnished by Moon Lake that even suggested that it was "up to the discretion of the bidder" to select the connectors to be used.

23. All bidders, including UltraSystems, knew that Moon Lake was furnishing the materials. As a result, none of the bidders could deviate from the bid material list or the bid

documents. When I reviewed the specifications prepared by Mr. Hunt, I carefully verified that the specifications were clear not only as to the type of connector, but that the catalog number for each connector was specified.

24. None of the other contractors submitting bids for the project complained to me about the specifications or otherwise indicated that they had any difficulty reading and understanding Moon Lake's bid documents and specifications.

25. I have read the affidavits of Michael Chambers and Richard Armstead. The meetings that they refer to in their affidavits occurred subsequent to UltraSystems submitting its bid. As a result, I cannot see how anything discussed in any such meeting could have any influence on UltraSystems preparing its bid.

26. None of UltraSystems agents have attempted to deny that Moon Lake specified weld-type connectors in the material list furnished by Moon Lake. It has been difficult for me to understand how Mr. Armstead could assume that UltraSystems could make a "bolted connection" of weld-type connectors.

27. Moon Lake has never recognized, nor does anyone else in the industry recognize, the right of a contractor to unilaterally alter design specifications or to unilaterally substitute non-specified materials for specified materials.

28. I recognize that there are occasions when a bidder is unable to meet a specification exactly. In those instances, it is the standard in the industry that the bidder submit in writing

with his bid proposal, those exceptions he desires to make in the specifications. Moon Lake or any other purchaser can then make a determination to either accept or reject the deviating proposal.

29. I also recognize that there are occasions when a bidder may feel that an alternative would be beneficial to the purchaser [Moon Lake] and/or the bidder. In that event, the alternative is identified as an alternative, and that alternative is submitted in writing along with a bid the proposal called for by the purchaser. Then the purchaser determines what consideration, if any, it wishes to give to the alternative proposal. It is a general practice of Moon Lake NOT to consider an alternative proposal, unless other parties submitting bids are aware that alternatives will be considered.

30. I have carefully reviewed UltraSystems bid on several occasions. I cannot find where UltraSystems took any exception to Moon Lake's Bus design. Further, I can not find where it submitted an alternative with its proposal.

31. Contrary to the implication in paragraphs 9, 10 and 13 of Mr. Armstead's affidavit, Mr. Hunt did not just contact UltraSystems regarding its bid. Mr. Hunt and I personally reviewed each of the bids that were submitted in order that I could understand them. While I had Mr. Hunt contact UltraSystems, I also had him contact other bidders, to have them clarify points on their bid proposals. During these contacts, I instructed Mr. Hunt to be careful not to divulge to any bidder, pertinent information about another bidder's proposal or the

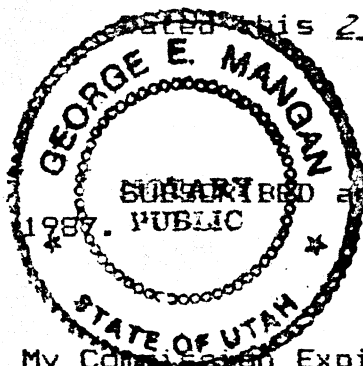
relative positions of the bids. It is the custom and procedure in Moon Lake's Engineering Department to make these kind of inquiries and evaluations prior to submitting any of the bids to the Board of Directors for its approval or rejection.

32. Moon Lake believes in allowing qualified contractors to have an equal opportunity to participate in the bidding process. Moon Lake considers it to be inappropriate to re-negotiate a bid once a bid has been accepted. This is particularly so after the bidder has been made aware of what the other contractors bid.

33. Moon Lake has never assumed nor represented that it would assume the responsibility for the competency or qualifications of any of its bidders, and particularly for UltraSystems. Moon Lake received and accepted the bid from UltraSystems in good faith, believing it to be a legitimate proposal. I have found in my experience that there is always a wide range in the bids, and that occasionally a contractor will intentionally submit a low bid so as to better establish himself with Moon Lake or another purchaser. There was nothing in the information furnished to Moon Lake by UltraSystems that would suggest that UltraSystem's bid was anything more or less than what it represented itself to be, namely a firm and unequivocal bid.

34. Moon Lake felt it was in its best interests not only for the project being bid, but for future bidding procedures, not to allow a bidder to renegotiate a bid once it had been let.

35. Moon Lake is not attempting to punish UltraSystems for having utilized unqualified or incompetent staff in preparing a bid. Moon Lake is simply attempting to establish that a written proposal with specified terms and conditions are "for real" contracts, and that a contractor must intend to do what the documents specify, or not get involved.



My Commission Expires:

3-12-88

Witnessed this 23 day of January, 1987.

Kenneth A. Winder
Kenneth A. Winder

Subscribed and Sworn to before me this 23rd day of January, 1987.

George E. Mangan
Notary Public

Residing at: Roosevelt, Ut.

CERTIFICATE OF MAILING

I hereby certify that on this __ day of January, 1987, I did mail a copy of the foregoing Affidavit of Kenneth A. Winder to Clark B. Allred & Gayle McKeachnie of NIELSEN & SENIOR, Attorneys for Defendant UltraSystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078, and to David Slaughter, Attorney for Defendant Industrial Indemnity Company, 10 Exchange Place, 11th Floor, Box 3000, Salt Lake City, Utah 84110, postage prepaid, by depositing the same in the U.S. Mail at Roosevelt, Utah.

George E. Mangan
George E. Mangan, Attorney

GEORGE E. MANGAN (2068), of
GEORGE E. MANGAN, APC
Attorney for Plaintiff
47 North Second East
Roosevelt, Utah 84066
801-722-2428

FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH

JAN 26 1987

ROGER K. MARETT, Clerk

By CS . Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

MOON LAKE ELECTRIC
ASSOCIATION, INC.,

Plaintiff,

vs.

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., AND
INDUSTRIAL INDEMNITY COMPANY,
Defendants.

SUPPLEMENTAL AFFIDAVIT
OF
BRUCE LEGRAND HUNT

Civil No. 86-CV-11D

STATE OF UTAH }
 : ss
COUNTY OF DUCHESNE }

Bruce LeGrand Hunt being first duly sworn, upon his oath
deposes and says:

1. I am employed by Moon Lake Electric Association as a
Substation Engineer. I possess a Bachelor's degree in Physics
from Brigham Young University.

2. In the course of my employment at Moon Lake Electric, I
designed the substation at Rangley Colorado, which is known as
the "Rocks California Substation" and is the subject matter of
this litigation. I was also responsible for assembling all of
the documents that were distributed amongst the prospective
bidders.

Page 1

Affidavit - Bruce L. Hunt
Moon Lake Electric v Ultra Systems
[January 22, 1987]

459

13-118-588

Record, Page 459

3. When my deposition was taken by Mr. Clark Allred on September 25, 1986, I was asked to produce the certain documents. Included in those documents was a letter from me to all of the bidders, dated August 27, 1985. That letter is Exhibit 1 to my deposition, and Exhibit "A" to Mr. Allred's affidavit of November 11, 1986. I incorporate said Exhibit "A" in this affidavit by reference to the same.

4. I would underscore paragraph 3 of Exhibit "A", which provides that "It is the responsibility of the bidder to carefully examine all aspects of the project including scope of work, drawings and specifications, and all other matters that may affect the cost and completion time of the project.

5. I also underscore both paragraphs 4 and 5. Paragraph 4 deals with furnishing "a bid bond in an amount equal to ten percent (10%) of the bid price." It also provides that the bond of the three low bidders "will be held until a proposal is accepted and a satisfactory contractor's bond is furnished by the successful bidder.

6. Paragraph 5 explains that the successful bidder must "execute two (2) additional counterparts of the proposal and to furnish a contractor's bond in triplicate in a penal sum not less than the contract price."

7. All of the information mentioned in my letter of August 27, 1987, was included in the bidding that Moon Lake Electric did on this project. Further, it is a universally accepted industry

and contracting practice, to include such provisions in all pre-bid instructions.

8. Prior to submitting its bid, I received inquiries from the representative from UltraSystems and other bidders requesting clarification and/or information concerning the bid or an explanation of the specifications furnished by Moon Lake Electric.

9. Prior to September 18, 1985, I was personally informed by a representative of UltraSystems that UltraSystems had purposefully submitted a "low bid" in "order to get the job and to establish [itself] in this area." Moon Lake recognizes that low bids are occasionally submitted for this purpose, and was not surprised by the same.

10. UltraSystems was already acting as a contractor for Moon Lake on another phase of the Rooks California Substation. Where a contractor is already geared up at a location, it is also common for that contractor to submit a lower bid.

11. The representatives of UltraSystems were anxious to secure information about the other bids that were submitted. Moon Lake does share that information in most cases when requested, and then only after Moon Lake's Board of Directors have approved the bidder and accepted the bid.

12. Moon Lake's Board of Directors accepted UltraSystems bid on September 18, 1985. UltraSystems's representative was promptly notified that their bid had been accepted and to get

their contractor's bond in place as specified in paragraph 5 of my letter to all contractors. (See Exhibit "A")

13. On September 24, 1985, I met with UltraSystems representative in Rangle, Colorado, and shared with him the information I had received from the other bidders. That information revealed that UltraSystems was \$101,500 lower than the next bidder. In particular, it was ascertained that Ultra Systems was significantly lower in part "A" of the bid.

14. This meeting was six days after Moon Lake's Board of Directors had accepted UltraSystems bid and UltraSystems had been notified by Kenneth A. Winder that it had been awarded the bid.

15. On September 25, 1985, I was contacted by an UltraSystems representative. This representative of UltraSystems informed me that it had made a mistake in its bid and that it had to have \$75,000.00 more in order to perform.

16. UltraSystems thereafter submitted to Moon Lake a new bid proposal. A copy of that proposal is attached hereto as Exhibit "B". In this proposal, UltraSystems did not mention that its original bid was based on bolted connectors, nor that the original bid was valid as to bolted connectors. Exhibit "B" clearly indicates that UltraSystems claimed that it had "inadvertently missed adding in the \$75,000.00 for welding."

17. I know of no compulsion by or on behalf of Moon Lake or any representative of Moon Lake to "force" or require UltraSystems to even submit a bid. Moon Lake "invited" bids from several contractors, which included UltraSystems. This is a

normal practice in the industry. Those who submit bids determine that they are willing to enter into a contractual arrangement with Moon Lake on certain specified terms. UltraSystems voluntarily agreed to contract with Moon Lake on the terms specified. Moon Lake has only attempted to get UltraSystems to honor the contractual obligation UltraSystems voluntarily assumed.

18. It was carefully and thoroughly explained to all the bidders, including UltraStystems that Moon Lake had already ordered the materials and that the bidders would be required to install the same only. None of the bidders indicated that they were furnishing the materials.

19. Reference to welding of the rigid bus is found in Section V of the specifications attached to the Bid Document. Also, the material list attached to the Bid Document specifies the weld type connectors that were being furnished. There was nothing in any of the bid documents or specifications furnished by Moon Lake that even suggested that it was "up to the discretion of the bidder" to select the connectors to be used. I and the other staff had tried to make that fact clear in our specifications by not only stating the type of connector, but by even including the catalog number for the same.

20. None of the other contractors submitting bids for the project had any difficulty reading and understanding Moon Lake's bid documents and specifications.

21. I have read the affidavits of Michael Chambers and Richard Armstead. The meetings that they refer to in their affidavits occurred subsequent to UltraSystems submitting its bid. As a result, I cannot see how anything discussed in any such meeting could have any influence on UltraSystems preparing its bid.

22. None of UltraSystems agents have attempted to deny that Moon Lake specified weld-type connectors in the material list furnished by Moon Lake. It has been difficult for me and the other employees of Moon Lake to understand how Mr. Armstead could, in good faith, assume that UltraSystems could make a "bolted connection" using the weld-type connectors specified in the materials list.

23. Moon Lake has never recognized, nor does anyone else in the industry recognize, the right of a contractor to unilaterally alter design specifications or to unilaterally substitute non-specified materials for specified materials.

24. I recognize that there are occasions when a bidder is unable to meet a specification exactly. In those instances, it is the standard in the industry that the bidder submit in writing with his bid proposal, those exceptions he desires to make in the specifications. Moon Lake or any other purchaser can then make a determination to either accept or reject the deviating proposal.

25. I also recognize that there are occasions when a bidder may feel that an alternative would be beneficial to the purchaser [Moon Lake] and/or the bidder. In that event, the alternative is

identified as an alternative, and that alternative is submitted in writing with the proposal called for by the purchaser. Then the purchaser determines what consideration, if any, it wishes to give to the alternative proposal. It is a general practice of Moon Lake NOT to consider an alternative proposal, unless other parties submitting bids are aware that alternatives will be considered.

26. I have carefully reviewed UltraSystems bid on several occasions. I cannot find where UltraSystems took any exception to Moon Lake's Bus design. Further, I can not find where it submitted an alternative with its proposal.

27. Contrary to the implication in paragraphs 9, 10 and 13 of Mr. Armstead's affidavit, I did not just contact only UltraSystems regarding its bid. I personally reviewed all of the bids that were submitted in order that I could understand each of the bids. While I did contact UltraSystems, I also contacted other bidders, and asked each of them to clarify points on their bid proposals. During these contacts, I was careful not to divulge to any bidder, pertinent information about another bidder's proposal or the relative positions of the bids. It is the custom and procedure for me to make these kind of inquiries and evaluations prior to management submitting any of the bids to the Board of Directors for its approval or rejection.

28. Moon Lake believes in allowing qualified contractors have an equal opportunity to participate in the bidding process. Moon Lake considers it to be inappropriate to re-negotiate a bid

once a bid has been accepted. This is particularly so after the bidder has been made aware of what the other contractors bid.

29. Moon Lake has never assumed nor suggested that it would assume the responsibility for the competency or qualifications of any of its bidders, and particularly for UltraSystems. Moon Lake received and accepted the bid from UltraSystems in good faith, believing it to be a legitimate proposal. I have found in my experience that there is always a wide range in the bids, and that occasionally a contractor will intentionally submit a low bid so as to better establish himself with Moon Lake or another purchaser. There was nothing in the information furnished to Moon Lake by UltraSystems that would suggest that UltraSystems bid was anything more or less than what it represented itself to be, namely a firm and unequivocal bid.

30. Moon Lake felt it was in its best interests not only for the project being bid, but for future bidding procedures, not to allow a bidder to renegotiate a bid once it had been let.

31. Moon Lake is not attempting to punish UltraSystems for having utilized unqualified or inexperienced staff in preparing a bid. Moon Lake is simply attempting to establish that a written proposal with specified terms and conditions are for valid contracts, and that a contractor must intend to do what the

documents specify, or not be involved.

Dated this 23rd day of January, 1987.



Bruce LeGrand Hunt
Bruce LeGrand Hunt

SUBSCRIBED and Sworn to before me this 23rd day of January,

George E. Mangan
Notary Public
Residing at:

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of January, 1987, I did mail a copy of the foregoing Affidavit of Bruce LeGrand Hunt to Clark B. Allred & Gayle McKeachnie of NIELSEN & SENIOR, Attorneys for Defendant UltraSystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078, and to David Slaughter, Attorney for Defendant Industrial Indemnity Company, 10 Exchange Place, 11th Floor, Box 3000, Salt Lake City, Utah 84110, postage prepaid, by depositing the same in the U.S. Mail at Roosevelt, Utah.

George E. Mangan
George E. Mangan, Attorney

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Defendant
Ultrasystems Western
Constructors, Inc.
363 East Main Street
Vernal, Utah 84078
Telephone: (801) 789-4908

FILED
IN DISTRICT COURT DUCHESNE
COUNTY, UTAH
FEB 2 1987
HUGEN. MARRETT, Clerk
By CS Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

| | |
|-----------------------------------|---------------------|
| MOON LAKE ELECTRIC ASSOCIATION,) | |
| INC.,) | SUMMARY JUDGMENT |
| Plaintiff,) | |
| vs.) | |
| ULTRASYSTEMS WESTERN) | |
| CONSTRUCTORS, INC., and) | |
| INDUSTRIAL INDEMNITY COMPANY,) | |
| Defendant.) | Civil No. 86-CV-11D |

The above captioned matter came before the Court pursuant to Motions for Summary Judgment filed by all parties. Defendant, Ultrasystems Western Constructors, Inc., filed its Motion for Summary Judgment claiming that it is entitled to judgment as a matter of law on three grounds. Defendant, Industrial Indemnity Company, joined in that Motion and moved for summary judgment on the same grounds. Plaintiff, Moon Lake Electric Association, Inc., in its Memorandum in Opposition to the Defendants' Motion for Summary Judgment also moved for summary judgment.

The Defendants filed three affidavits in support of its Motion together with accompanying Memoranda. The Plaintiff


submitted Memoranda in support of its position. Defendant, Ultrasystems', Memorandum in Support of its Motion for Summary Judgment has set forth undisputed facts, which facts are supported by the pleadings, the depositions of Kenneth A. Winder and Bruce L. Hunt and the affidavits. The Plaintiff has not submitted any affidavits or other documents showing any dispute as it relates to those facts. The Court therefore finds that the facts, as listed, are undisputed, that they are supported by admissible evidence on file and that based on those undisputed facts the Defendants are entitled to judgment as a matter of law on the grounds set forth in Ultrasystems' Motion for Summary Judgment. The Court being fully advised, therefore;

ORDERS, ADJUDGES AND DECREES that:

1. Defendants' Motion for Summary Judgment is hereby granted and judgment is hereby entered dismissing Plaintiff's Complaint with prejudice.

2. Plaintiff's Motion for Summary Judgment is hereby denied.

DATED this 30 day of January, 1987


Richard C. Davidson
District Judge

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

I, Mary Chapman, being duly sworn, state:

That I am employed at the office of NIELSEN & SENIOR, for Clark B. Allred, attorney for Ultrasystems Western Constructors, Inc., Defendant herein, that I have served the attached SUMMARY JUDGMENT upon counsel for the Plaintiff by placing a true and correct copy thereon in an envelope duly addressed as follows:

George Mangan
47 North Second East
Roosevelt, Utah 84066

David Slaughter
10 Exchange Place, 11th Floor
Box 3000
Salt Lake City, Utah 84110

DATED this 22nd day of January, 1987.

Mary Chapman
Mary Chapman

Subscribed and sworn to before me this 22nd day of January, 1987.

Robert Smith
Notary Public
Residing at Vernal, Utah

My commission expires:

Oct 22, 1988

Fitzgerald, attorney at law. Michelle personally drafted the response to the defendants as well as plaintiff's own motion for Summary Judgment.

4. I was confined at the Duchesne County Hospital from December 10, 1986 to December 17, 1986. I was then discharged to my home, where I spent most of my time in bed with a cast on my left leg up to my thigh, and on pain medication. I ceased taking the pain medication on or about January 6, 1987, and had the cast cut down to below my knee on January 9, 1987.

5. I started returning to my office on a part time basis on January 6, 1987. As a result of being out of my office for nearly a month, there was a great deal of correspondence to take care of and phone messages to return.

6. On or about January 13, 1987, I was able to review this file and determined that it would be in the best interests of my client to file counter-affidavits to those that the defendant UltraSystems had filed. I contacted the clerk of the Court to see if the Court had ruled on the Motions. I was told that no rulings had been made, but to check with the Judge. Due to the appointment of Judge Davidson to the Court of Appeals, I was unable to locate the Judge. I left word at his office that I would be filing affidavits in this matter and to please advise the Judge accordingly. I was assured that the Judge would be given the message.

7. I then contacted the engineers for the plaintiff and asked them to comment on the affidavits and arguments of the

plaintiff. These were returned to my office on or about January 19, 1987. I again tried to contact the Judge to inform him that the affidavits were on their way. The Judge was out of his office. I left word with the Judge's Secretary, Pat Swim. At that time I again inquired if the court had ruled on the pending motions for summary judgment. The secretary advised me that she was unaware of a decision.

8. I completed the affidavits for the engineers on or about January 22, 1987, and mailed them on or about January 23, 1987, to both the court and opposing counsel.

9. I received a copy of the Minute Entry, dated January 15, 1987, in the mail on either January 24, 1987 or January 26, 1987. I was shocked by the same, and immediately called the Judge's office in Vernal. Judge Davidson was not in, but his secretary informed me that Mr. Allred had brought a Order in for the Judge's signature. I asked the secretary to leave a message for the Judge to please contact me before signing the same. I also called for Mr. Allred, but he was not in.

10. On January 26, 1987, I received an unsigned copy of the Order granting the defendants Summary Judgment.

11. On January 27, 1987, I ascertained at the office of the Duchesne County Clerk that no official Order had been entered in the official records of the Court. On that date, I indicated to Judge Davidson that I would like to discuss the matter with the Judge and Mr. Allred the next day in Vernal.

12. I attended the bar luncheon honoring Judge Davidson, on January 28, 1987 at the Lamplighter in Vernal. Mr. Allred was not in attendance. At the conclusion of the meeting, I inquired of the Court if the court was aware of the supplemental affidavits that I had filed on behalf of the plaintiff. I was of the understanding that the Court was, and that the Court was considering setting aside the Summary Judgment and deferring the matter to another Judge.

13. I believe that there is good and reasonable grounds under both Rules 59 and 61, URCP, for the court to vacate its previous Order granting the defendant Summary Judgment. In particular, the supplemental affidavits, unless controverted by the defendants, set forth facts that would mandate the granting of Summary Judgment in favor of the plaintiff and against the defendants. In any event, the plaintiff is entitled to have its day in court to present the evidence set forth in the supplemental affidavits.

14. When considering the totality of the circumstances, and in particular my health conditions, as well as the validity and truthfulness of the affidavits previously filed with the Court on behalf of the plaintiff, I am of the opinion that it is in the interest of justice and equity for the court to grant plaintiff's Motion herein. Unless the court grant's this motion, a substantial injustice will be done, and error in the application of the law will be allowed to stand.

Dated this 7th day of February, 1987.

Page 4

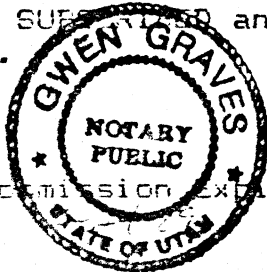


M-116-588

Mocon Lake Elect. v. UltraSystems
Affidavit of George E. Mangan

George E. Mangan
George E. Mangan

SUBSCRIBED and Sworn to before me this 1st day of January, 1987.



My Commission Expires:

Gwen Graves
Notary Public
Residing at: Nella, UT

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of January, 1987, I did mail a copy of the foregoing Affidavit of George E. Mangan to Clark B. Allred & Gayle McKeachnie of NIELSEN & SENIOR, Attorneys for Defendant UltraSystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078, and to David Slaughter, Attorney for Defendant Industrial Indemnity Company, 10 Exchange Place, 11th Floor, Box 3000, Salt Lake City, Utah 84110, postage prepaid, by depositing the same in the U.S. Mail at Roosevelt, Utah.

George E. Mangan
George E. Mangan, Attorney

GEORGE E. MANGAN (2068), of
GEORGE E. MANGAN, APC
Attorney for Plaintiff
47 North Second East
Roosevelt, Utah 84066
801-722-2428

FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH

FEB 3 1987

ROGER K. MARETT, Clerk

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

MOON LAKE ELECTRIC
ASSOCIATION, INC.,

Plaintiff,

vs.

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., AND
INDUSTRIAL INDEMNITY COMPANY,
Defendants.

MOTION FOR NEW TRIAL
OR TO SET ASIDE
SUMMARY JUDGMENT

Civil No. 86-CV-110

Based on the Affidavit of counsel, and the attached Memorandum of Law, plaintiff requests the court to either grant the plaintiff a new trial or to set aside the Summary Judgment. Said motion is made pursuant to Rules 59 and 61 URCP. Plaintiff alleges that is in the interest of justice and equity for the court to grant the plaintiff the relief requested. Plaintiff represents that the supplemental affidavits furnished by the plaintiff, as well as the depositions that defendants only referred to, but did not publish, clearly establish the injustice that will be accomplished if said Summary Judgment is allowed to stand. Further, plaintiff will have no alternative but to appeal the decision of the court if the court on its own motion does not grant the relief requested. Plaintiff believes that it is in the interest of judicial economy and efficiency if this matter is

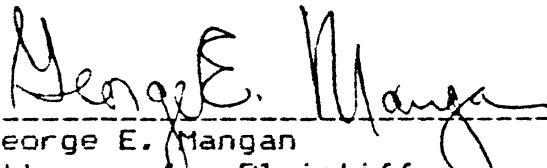
Page 1

M-113-588

Moon Lake v. UltraSystems
Motion for New Trial/ etc.

heard in its entirety by the lower court, and is not presented for appeal at this time.

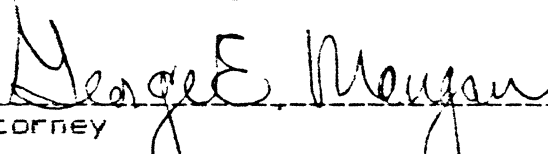
Dated this 7th day of February, 1987.



George E. Mangan
Attorney for Plaintiff

CERTIFICATE OF MAILING

I do hereby certify that on the 7th day of February, 1987, I mailed a true and correct copy of the foregoing Motion for a New Trial or to Set Aside the Summary Judgment, postage prepaid, to Clark B. Allred & Gayle McKeachnie, NIELSEN & SENIOR, attorneys for Defendant Ultrasystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078; and to Mr. David Slaughter, 10 Exchange Place, 11th Floor, Box 3000, Salt Lake City, Utah 84110; by depositing the same in the United States Post Office at Roosevelt, Utah.



Attorney

DAVID W. SLAUGHTER (A2977)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Industrial
Indemnity Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE SEVENTH JUDICIAL DISTRICT COURT
DUCHESNE COUNTY, STATE OF UTAH

MOON LAKE ELECTRIC ASSOCIATION,
INC.,

Plaintiff,

vs.

ULTRASYSTEMS WESTERN
CONSTRUCTORS, INC., and
INDUSTRIAL INDEMNITY COMPANY,

Defendants.

INDUSTRIAL INDEMNITY'S
MEMORANDUM IN RESPONSE TO
PLAINTIFF'S MOTION FOR NEW
TRIAL OR TO SET ASIDE
SUMMARY JUDGMENT

Case No. 86-CV-11D

Defendant Industrial Indemnity Company, through its
attorney of record offers the following response to plaintiff's
Motion for New Trial or to Set Aside Summary Judgment in the
entitled action.

I. PROCEDURAL BACKGROUND

The present action has been pending before this court since
plaintiff's complaint seeking recovery upon a contractor's bid

FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH

FEB 1 1987

ROGER K. MARETT, Clerk

773P

bond was filed in January 1986. On September 19, 1986, defendant Ultrasonics deposed key Moon Lake employees Bruce Hunt and Kenneth Winder, and, relying in part upon their testimony, filed a motion, dated November 11, 1986, seeking summary judgment dismissing plaintiff's action. Ultrasonics' motion was based upon undisputed facts and relied upon three separate and independently justified legal arguments:

(1) That Ultrasonics' bid should be excused, upon a mistake of fact, made without negligence and in good faith, and of which plaintiff was promptly advised immediately after discovery and before it presented any contract for Ultrasonics' signature [Ultrasonics Memorandum in Support of Motion for Summary Judgment at 8-10];

(2) That plaintiff failed to satisfy conditions precedent to the bid bond itself, barring its claim [id. at 13-14]; and

(3) That plaintiff suffered no damages as a result of Ultrasonics' failure to contract upon its bid and therefore had and has no claim upon the bid bond at issue [id. at 10-13]. Defendant Industrial Indemnity joined in Ultrasonics' motion on or about November 14, 1986.

On December 10, 1986, plaintiff offered a memorandum (without counteraffidavit) opposing defendants' motion. Ultrasonics filed a reply memorandum on or about December 17

and requested the court's ruling on its motion. Plaintiff thereafter filed (1) a December 17 "Addendum" to its earlier memorandum in opposition, and (2) a December 24 "Response" (this time with counteraffidavits) to Ultrasystems' Reply.

By Minute Entry dated January 15, 1987, the court granted defendants' motion and judgment was entered on January 30, 1987, dismissing plaintiff's action. Plaintiff has now responded with a Motion for New Trial or to Set Aside Summary Judgment, offering lengthy "Supplemental Affidavits" of Moon Lake's Bruce Hunt and Kenneth Winder and an affidavit of counsel explaining why the proffered affidavits were not furnished earlier and arguing that information in the affidavits somehow justifies a reconsideration of the summary judgment entered. Plaintiff's motion and argument is without merit.

II. ARGUMENT

Plaintiff's motion is not only unfounded under the circumstances, but offers no substantive justification for setting aside the Court's summary judgment.

A. Plaintiff's Motion is Unfounded in Law or Fact.

Rule 59, Utah Rules of Civil Procedure sets out specific grounds for granting a new trial and it is well-established that a trial court has no discretion to grant a new trial

absent a showing of one of the grounds specified. Tangaro v. Marrero, 373 P.2d 390 (Utah 1962). Although plaintiff claims grounds of "accident or surprise," "insufficiency of evidence" and "error in law" [Plaintiff's memorandum at 1], there is no basis in attorney Mangun's affidavit or on the record in this case for such an argument or reliance upon any of these grounds.

At the time granted by this Court, defendants' motion for summary judgment had been pending for nearly three months and plaintiff had (and in fact had taken full advantage of) ample opportunity to respond. Plaintiff was not surprised by evidence, it was "surprised" by the judgment - a judgment which was, as explained below, fully appropriate as a matter of law upon undisputed material facts.

B. Defendants Remain Entitled to Summary Judgment.

Plaintiff's ultimate argument upon its present motion is that there are existing issues of material fact that should have defeated defendants' motion and which therefore require a reconsideration of the summary judgment entered in defendants' favor. Specifically, plaintiff relies upon untimely "supplemental" affidavits to take issue with Ultrasystems' argument that bidding errors excused any obligation to sign plaintiff's contract upon bid acceptance.

Plaintiff continues to miss the important point that, even if its proffered supplemental affidavits were properly admissible and even if they did raise factual issues impacting Ultrasonics' arguments that it should be excused from its bid for "mistake," plaintiff's prima facie claim upon the bid bond remains defeated by undisputed facts upon plaintiff's own admissions at deposition.

Regardless of other issues raised, the fact remains undisputed on the record (and unaddressed in plaintiff's present motion) that plaintiff has incurred no damages of any sort as a result of Ultrasonics' having withdrawn its bid after award. The summary judgment granted is correct and appropriate as a matter of law on this fact alone. Without damage, plaintiff has no cognizable claim or right whatsoever under the bid bond upon which it must rely in its claims against Industrial Indemnity.

Plaintiff has persisted in arguments that the bid bond amount should simply be surrendered, without reference to damage, but has offered no authority for its position, either in law or in fact. As well explained in Ultrasonics' original memorandum in support of its motion for summary judgment, (at pp. 10-13) and as supported by reason and relevant case law, a bid bond is not by nature a forfeiture bond, unless by its terms it clearly states otherwise, but serves to protect a

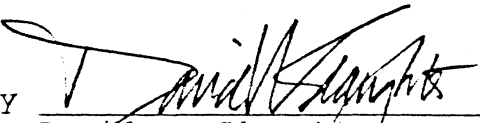
contracting owner from damages, if incurred, and to the extent of the bond amount, suffered in consequence to a contractor's failure or inability to contract in accordance with the terms of its bid.

III. CONCLUSION

Plaintiff clearly has no argument in fact, law, justice or judicial economy to have the Court's ruling or judgment set aside. Its present motion should be denied.

DATED this 12th day of February, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By 

David W. Slaughter
Attorneys for Industrial
Indemnity Company

SCMDS20

CERTIFICATE OF SERVICE

STATE OF UTAH)
 ss.:
COUNTY OF SALT LAKE)

Cynthia Northstrom, being first duly sworn, states: That she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Industrial Indemnity Company herein; that she mailed a true and correct copy of the foregoing Industrial Indemnity's Memorandum in Response to Plaintiff's Motion for New Trial or to Set Aside Summary Judgment, postage prepaid, first class mail, the 12th day of February, 1987, to the following:

George E. Mangan, Esq.
George E. Mangan, APC
47 North Second East
Roosevelt, Utah 84066


Clark B. Allred, Esq.
Nielsen & Senior
363 East Main Street
Vernal, Utah 84078


Cynthia Northstrom

SUBSCRIBED AND SWORN to before me this 12th day of February, 1987.

My Commission Expires:

8/30/87


NOTARY PUBLIC
Residing in Salt Lake City, Utah

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FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH

FEB 20 1987

ROGER K. MARETT, Clerk

CS

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

| | |
|-----------------------------------|--------------------------|
| MOON LAKE ELECTRIC ASSOCIATION,) | |
| INC.,) | |
| Plaintiff,) | MEMORANDUM IN OPPOSITION |
| vs.) | TO PLAINTIFF'S MOTION |
| ULTRASYSTEMS WESTERN) | FOR A NEW TRIAL |
| CONSTRUCTORS, INC., and) | |
| INDUSTRIAL INDEMNITY COMPANY,) | |
| Defendants.) | |
| | Civil No. 86-CV-11D |

Defendant, Ultrasystems Western Constructors, Inc., submits the following Memorandum in Opposition to Plaintiff's Motion for a New Trial. Ultrasystems submits that the Motion should be denied for four reasons which will be discussed more fully herein. The reasons are:

1. The grounds given in the Motion for a New Trial were considered by Judge Davidson prior to his signing the Summary Judgment on January 30, 1987. This is evidenced by the fact that the Affidavits of Mr. Winder and Mr. Hunt had been filed January 23, 1987, and that counsel for Plaintiff, Mr. Mangan, had discussed the matter with Judge Davidson on January 28, 1987.

P. Swin 2-20-87

490

Record, Page 490

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

| | | |
|--------------------------------------|---|---------------------|
| MOON LAKE ELECTRIC ASSOCIATION, |) | |
| INC., a Utah corporation, |) | |
| |) | |
| Plaintiffs, |) | <u>R U L I N G</u> |
| |) | |
| vs. |) | |
| |) | |
| ULTRASYSTEMS WESTERN CONSTRUCTORS |) | |
| INC. and INDUSTRIAL INDEMNITY et al) |) | |
| |) | |
| Defendants. |) | Civil No. 86-CV-11D |

The Court having fully considered the pleadings herein rules as follows.

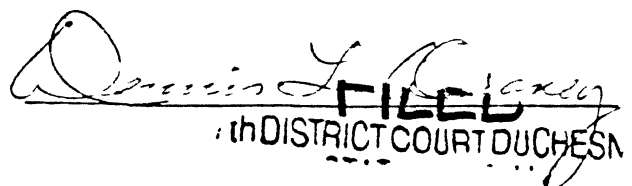
The Court finds no basis under Rule 59 U.R.C.P. for granting a new trial when in fact no trial was held. Additionally the Court finds nothing in the record which would provide grounds under Rule 59 or Rule 60 to set aside the Summary Judgment granted by the previous judge. The pleadings herein indicate that all matters now presented by Plaintiff were considered by Judge Davidson prior to the time he signed the final order.

Therefore, Plaintiff's Motion for a New Trial or to Set Aside the Summary Judgment is denied.

DATED this 16th day of March, 1987.

BY THE COURT:

cc: George E. Mangan
Clark B. Allred
A. Dennis Norton


FILED
7th DISTRICT COURT DUCHESNE

MAR 19 1987

ROGER K. MARSH, Clerk

1 QUESTIONS, WE ARE NOT COMMUNICATING, LET ME KNOW AND I'LL
2 TRY AND REPHRASE THE QUESTION SO WE UNDERSTAND WHERE WE ARE
3 GOING.

4 A OKAY.

5 Q VERY GOOD. GIVE ME A LITTLE BIT ABOUT YOUR
6 EDUCATIONAL BACKGROUND. DID YOU GRADUATE FROM HIGH SCHOOL?

7 A YES. I GRADUATED FROM OREM HIGH SCHOOL.

8 Q WHEN?

9 A 1965.

10 Q WHAT TYPE OF A POST HIGH SCHOOL EDUCATION HAVE YOU
11 HAD?

12 A I ATTENDED BYU AND GRADUATED FROM BYU WITH A
13 BACHELORS DEGREE IN PHYSICS IN 1969.

14 Q ANY OTHER DEGREES?

15 A NO.

16 Q COULD YOU TELL ME A LITTLE BIT ABOUT YOUR WORK
17 EXPERIENCE SINCE YOU GRADUATED FROM BYU?

18 A I WORKED FOR TEN YEARS FOR DIXIE-ESCALANTE
19 ELECTRIC, AND I HAVE WORKED FOR FIVE YEARS THIS NOVEMBER FOR
20 MOON LAKE ELECTRIC.

21 Q WHAT ARE YOUR DUTIES WITH MOON LAKE?

22 A IT IS SUBSTATION ENGINEERING AND DESIGN,
23 PRIMARILY.

24 Q MY UNDERSTANDING OF THE PROJECT WE ARE INVOLVED IN
25 IN THIS CASE IS KNOWN AS THE ROCKS CALIFORNIA SUBSTATION;

1 IS THAT CORRECT?

2 A YES.

3 Q WHERE IS THAT LOCATED?

4 A IN THE RANGELY OIL FIELD NEAR RANGELY, COLORADO.

5 Q WHAT'S THE PURPOSE OF THIS PARTICULAR SUBSTATION?

6 A THIS WAS TO MEET THE ELECTRICAL NEEDS OF THE LOADS
7 IN THAT AREA.

8 Q WHAT EXACTLY DOES A SUBSTATION DO OR WHAT IS IT
9 USED FOR?

10 A THIS PARTICULAR SUBSTATION RECEIVES BULK POWER AND
11 THEN REDISTRIBUTES IT AT LOWER VOLTAGE TO THE END USE
12 CUSTOMER.

13 Q IS THIS SUBSTATION TO BE OWNED BY MOON LAKE?

14 A THE SUBSTATION IS TO BE OWNED BY CHEVRON OIL.

15 Q WHO PROVIDES THE ELECTRICITY THAT GOES THROUGH THE
16 STATION?

17 A MOON LAKE.

18 Q WHO ARE THE END USERS?

19 A CHEVRON OIL, PRIMARILY.

20 YOU HAVE TO UNDERSTAND THAT THERE ARE TRANSMISSION
21 LINES ORIGINATING AT THE SUBSTATION THAT INTERCONNECT WITH A
22 GRID.

23 Q BUT CHEVRON IS THE PRIMARY USER, IS THAT WHY THEY
24 ARE THE OWNER OF THE SUBSTATION?

25 A YES.

1 DOWN INTO SEVERAL DIFFERENT CONTRACTS?

2 A YES.

3 Q WHAT WAS THE BREAK-DOWN?

4 A THERE WAS A CONTRACT FOR THE BELOW GRADE WORK.
5 THE FOUNDATIONS. THERE WAS A CONTRACT FOR THE CONSTRUCTION
6 OF A CONTROL BUILDING, AND A CONTRACT FOR THE ERECTION OF
7 THE SUPERSTRUCTURE AND ABOVE-GROUND FACILITIES.

8 Q THERE WERE THREE CONTRACTS?

9 A YES.

10 Q WHO HAD THE CONTRACT FOR THE FOUNDATION?

11 A ULTRASYSTEMS.

12 Q WHO HANDLED THE CONTRACT FOR THE CONTROL BUILDING?

13 A RASMUSSEN CONCRETE.

14 Q SO THE ERECTION OF THE SUPERSTRUCTURE IS THE ONE
15 THAT WE ARE INVOLVED WITH IN THIS DISPUTE?

16 A RIGHT.

17 Q WHO FINALLY DID THE WORK ON THAT?

18 A MIKE J. THIEL.

19 Q IN YOUR ESTIMATE OF THE COST DID YOU BREAK IT DOWN
20 AS TO THESE THREE CONTRACTS?

21 A NO.

22 Q HAS ALL THE WORK BEEN COMPLETED ON THE SUBSTATION?

23 A YES.

24 Q IT'S IN OPERATION?

25 A YES.

1 MR. MANGAN: CLARIFY WHAT YEAR, THOUGH.

2 THE WITNESS: 1985.

3 MR. ALLRED: WHAT I WOULD LIKE TO DO NOW IS HAVE
4 YOU REVIEW, AND MAYBE WE COULD TAKE JUST A SHORT BREAK, WHAT
5 I UNDERSTAND TO BE THE DOCUMENTS THAT WERE SUBMITTED FOR THE
6 BIDS. I HAVE DEPOSITION EXHIBIT 2, AND I HAVEN'T BOTHERED
7 TO MARK THIS SET OF PLANS. MAYBE WE CAN TAKE A BREAK AND
8 LOOK THIS OVER AND MAKE SURE I HAVE A COMPLETE SET OF DOCU-
9 MENTS.

10 (WHEREUPON A RECESS WAS TAKEN.)

11 (WHEREUPON DEPOSITION NO. 2 WAS MARKED FOR
12 IDENTIFICATION.)

13 Q (BY MR. ALLRED) YOU HAVE HAD A CHANCE TO REVIEW
14 EXHIBIT 2, WHICH PURPORTS TO BE A CONTRACTOR'S PROPOSAL, AND
15 THE BLUEPRINTS I PROVIDED TO YOU; IS THAT CORRECT?

16 A YES.

17 Q ARE THOSE THE DOCUMENTS THAT WERE PROVIDED TO THE
18 BIDDERS, INCLUDING ULTRASYSTEMS, ON THE SUPERSTRUCTURE
19 CONTRACT?

20 A THE DOCUMENT INDICATES THAT THERE WERE DRAWINGS
21 FOR THE CALIFORNIA SUBSTATION, SHEETS 3 THROUGH 9, MAILED
22 OUT. SHEETS 4 AND 7 ARE NOT IN THIS.

23 Q OTHER THAN SHEETS 4 AND 7 IS THIS A COMPLETE SET
24 OF THE INFORMATION THAT WAS PROVIDED?

25 A YES.

1 THE FOLLOWING DAY.

2 Q WHO WAS INVOLVED IN DOING THAT?

3 A I PRIMARILY DID THAT REVIEW.

4 Q WHAT DID YOU DETERMINE AFTER YOU HAD REVIEWED THE
5 BIDS IN MORE DETAIL?

6 A IT APPEARED THAT ULTRASYSTEM'S BID WAS STILL THE
7 LOW BID.

8 Q DID YOU COME TO ANY OTHER CONCLUSIONS?

9 A SUCH AS?

10 Q I DON'T KNOW. THAT'S WHY I WAS ASKING YOU.

11 A I REALLY DIDN'T.

12 Q DID YOU HAVE ANY CONCERNS ABOUT ANY OF THE BIDS?

13 A IN MY EVALUATION I DID HAVE QUESTIONS ON ALL OF
14 THE BIDS, AND I BY PHONE CALL CALLED THE VARIOUS BIDDERS FOR
15 CLARIFICATION ON THE POINT ON WHICH I HAD A QUESTION.

16 Q DID YOU HAVE QUESTIONS ON ULTRASYSTEM'S BID?

17 A YES.

18 Q WHAT AREAS DID YOU HAVE QUESTIONS ON?

19 A IN THE PROPOSAL THAT THEY HAD SUBMITTED THEY HAD
20 NOT FILLED OUT THE PER UNIT PRICING THE WAY THAT I HAD
21 ANTICIPATED IT SO I WAS ABLE TO IDENTIFY PER UNIT THE COSTS.
22 I WASN'T SURE I WAS ABLE TO ACCURATELY DETERMINE THE TOTAL
23 COST FROM THE WAY THEIR DOCUMENT HAD BEEN FILLED OUT.

24 (WHEREUPON DEPOSITION EXHIBIT NO. 3 WAS
25 MARKED FOR IDENTIFICATION.)

1 Q (BY MR. ALLRED) WHILE WE ARE ON THAT LIST LET ME
2 SHOW YOU EXHIBIT 3, WHICH AS I UNDERSTAND IT IS THE BID THAT
3 WAS--WELL, THAT PORTION OF ULTRASYSTEM'S BID THAT SETS FOR
4 ITS DOLLAR AMOUNT; IS THAT CORRECT?

5 A PARDON?

6 Q IS EXHIBIT 3 ULTRASYSTEM'S PORTION OF THEIR BID
7 THAT SET FORTH THE DOLLAR AMOUNT THAT THEY WERE BIDDING ON
8 THE PROJECT?

9 A YES. EXCUSE ME. THIS IS NOT--IT APPEARS THAT IT
10 IS, YES.

11 Q YOU WERE INDICATING YOU HAD SOME QUESTION
12 REGARDING UNIT PRICES ON THERE. NOW THAT YOU HAVE REVIEWED
13 EXHIBIT 3 COULD YOU EXPLAIN TO ME A LITTLE BIT MORE WHAT YOU
14 WERE TALKING ABOUT THERE?

15 A FOR EXAMPLE, UNDER UNIT "A" THERE IS A QUANTITY OF
16 CERTAIN TYPE OF STRUCTURES LISTED. FIRST LINE IS 3-A-FRAME
17 DEADENDS, QUANTITY TWO. SECOND LINE WOULD BE 2-A-FRAME DEAD
18 ENDS, QUANTITY FOUR, AND SO ON.

19 A UNIT PRICE WAS NOT ESTABLISHED FOR EACH OF THESE
20 TYPES OF STRUCTURES, BUT IT APPEARS THAT THEY WERE LUMPED
21 AND COMBINED IN THE COLUMN UNDER UNIT PRICE, LABOR AND
22 MATERIALS. I WAS NOT SURE THAT THAT UNDER "A", FOR EXAMPLE,
23 \$51,400.00, WAS THE UNIT PRICE OR THE TOTAL PRICE.

24 Q WHAT DID YOU DO TO CLARIFY THAT QUESTION?

25 A I CALLED RICHARD ARMISTEAD AND ASKED HIM IF THAT

1 THOSE FIGURES?

2 A AS I RECALL THE LOW AMOUNTS OCCURRED IN THE FIRST
3 UNITS.

4 Q "A" AND "B"?

5 A "A" AND "B". I DON'T NORMALLY WORRY ABOUT THAT
6 TOO MUCH, SINCE QUITE OFTEN IT'S DETERMINED BY WHICH AREA
7 THE CONTRACTOR WANTS TO PUT HIS COST INTO WHEN HE SUBMITS
8 THE BID.

9 Q IN YOUR DISCUSSION WITH MR. ARMISTEAD ON THE OTHER
10 CONCERNS DID YOU INDICATE TO HIM THAT YOU HAD ANY CONCERN
11 ABOUT HOW LOW HIS BID WAS AND THERE MAY BE SOME PROBLEMS IN
12 THE CALCULATIONS OR THE UNDERSTANDING OF THE AMOUNT OF HIS
13 BID?

14 A I HAVE TO BE VERY CAREFUL IN TALKING TO BIDDERS
15 FOR CLARIFICATION, THAT I DO NOT DIVULGE THEIR APPARENT
16 STANDING BEFORE THE BIDS WERE EVALUATED.

17 Q SO ALL YOU DISCUSSED WITH HIM WAS THE POINTS THAT
18 ARE CLARIFIED IN THE LETTER, THE UNIT BID, MOVING THE UNIT
19 PRICE OVER TO THE FURTHEST COLUMN, AND THE AMOUNT OF THE
20 UNIT BID ON THAT CABLE?

21 A YES.

22 MR. MANGAN: WELL, PARDON ME. YOU ALSO DISCUSSED
23 WITH HIM YOU MAY NEED ADDITIONAL CABLE. THAT'S WHY THE
24 FIFTEEN CENT BID.

25 THE WITNESS: YES. WAS THAT NOT WHAT YOU SAID?

1 Q WHO NOTIFIED ULTRASYSTEMS ON THIS PARTICULAR
2 MEETING?

3 A THAT WOULD HAVE BEEN KEN WINDER.

4 (WHEREUPON DEPOSITION EXHIBIT NO. 5 WAS
5 MARKED FOR IDENTIFICATION.)

6 Q (BY MR. ALLRED) I WANT TO SHOW YOU EXHIBIT 5.
7 HAVE YOU EVER SEEN THIS DOCUMENT BEFORE?

8 A YES.

9 Q DO YOU KNOW IF THAT WAS EVER DELIVERED TO ULTRA-
10 SYSTEMS?

11 A YES.

12 Q DO YOU KNOW WHO DELIVERED IT TO THEM?

13 A I DELIVERED THIS TO MIKE CHAMBERS IN THE ULTRA-
14 SYSTEMS TRAILER.

15 Q WHEN?

16 A ON SEPTEMBER--ON OR ABOUT THE 24TH.

17 Q ON THE 26TH IS MY UNDERSTANDING WHEN ULTRASYSTEMS
18 NOTIFIED YOU OF A DEFECT IN THEIR BIDDING. DID THAT OCCUR
19 AT THE SAME TIME AS THIS NOTICE WAS GIVEN?

20 A YES.

21 Q WHAT GAVE RISE TO THE MEETING WITH MIKE CHAMBERS
22 IN HIS TRAILER ON THE 24TH?

23 A HE REQUESTED THAT HE NEEDED SOME ACCEPTANCE
24 EARLIER, AND I TOLD HIM I WOULD BRING THAT OVER TO HIM ON
25 THE 25TH.

1 Q OKAY.

2 A IN THE MEANTIME HE INDICATED THAT HE HAD DIS-
3 COVERED A PROBLEM WITH THEIR BID.

4 Q WHEN DID HE TELL YOU THAT?

5 A THAT WAS WHEN I ARRIVED.

6 Q ON THE 25TH AT HIS TRAILER?

7 A YES. IN FACT, IT WAS TOWARD THE END OF OUR VISIT.

8 Q WHAT DID HE TELL YOU THE PROBLEM WAS?

9 A HE SAID THAT THERE WAS A PROBLEM THAT SOME COSTS
10 HAD NOT BEEN PROPERLY CALCULATED IN THEIR BID, AND THEY
11 DIDN'T FEEL THEY COULD HONOR THIS BID.

12 Q DID HE TELL YOU WHAT THE COSTS WERE THAT WERE NOT
13 FIGURED IN THE BID?

14 A IT WAS PRIMARILY DUE TO WELDING OF THE BUTTS.

15 Q AND THAT WAS AT THE SAME MEETING YOU PROVIDED TO
16 ULTRASYSTEMS EXHIBIT 5?

17 A YES.

18 Q I NOTICE AT THE TOP IT SAYS IT'S SUBJECT TO THE
19 APPROVAL OF THE ADMINISTRATOR. WHO IS THE ADMINISTRATOR?

20 A THAT IS REA.

21 Q DID THEY APPROVE THIS ACCEPTANCE?

22 A IT WAS NEVER SUBMITTED FOR THEIR APPROVAL.

23 AT THE VERY TIME THAT I DELIVERED IT THEY
24 INDICATED THEY WOULD NOT HONOR THIS BID.

25 (WHEREUPON DEPOSITION EXHIBIT NO. 6 WAS

1 Q WHEN WAS THAT MEETING HELD? ALSO ON THE 26TH?

2 A I DON'T REMEMBER. I BELIEVE IT WAS.

3 Q WHAT DID YOU DECIDE? I GUESS WHAT YOU DECIDED WAS
4 TO AWARD IT TO THE NEXT LOWEST BIDDER AT THAT TIME?

5 A WELL, WE HAD DETERMINED THAT IT WOULD BE THE
6 APPROPRIATE COURSE OF ACTION, AND CHEVRON CONCURRED AND
7 SUPPORTED US IN THIS.

8 Q AND AFTER THAT FELL THROUGH IT WENT TO THIEL; IS
9 THAT CORRECT?

10 A YES.

11 Q WHEN WAS HE NOTIFIED IT WOULD BE AWARDED TO HIS
12 COMPANY?

13 A WE PLACED A PHONE CALL TO HIM FROM THAT MEETING TO
14 SEE IF HE COULD EVEN STILL DO THE WORK. HE INDICATED THAT HE
15 COULD, THERE WOULD BE SOME PROBLEM IN DOING THE WORK AS HE
16 HAD PREVIOUSLY BEEN INFORMED THAT HE WAS NOT THE LOW BIDDER
17 AND DISPATCHED HIS CREWS TO OTHER LOCATIONS.

18 Q WHAT WAS AGREED ON HIS PROBLEM? WAS THERE SOME
19 TIME GIVEN TO HIM?

20 A WE AGREED THERE WOULD BE A CHARGE ASSOCIATED WITH
21 REMOBILIZING HIS PEOPLE. THERE WOULD BE SOME ADDITIONAL
22 EXPENSE HE WOULD INCUR BECAUSE HAVING LOST TIME--GOOD TIME
23 WITH DECENT WEATHER, WARM DAYS. WE WOULD NOW BE MAKING
24 THOSE DAYS UP WITH LATE WINTER DAYS, SHORT DAYS, DARK HOURS,
25 COLDNESS. THERE WOULD BE SOME ADDITIONAL COSTS FOR PEOPLE

1 WISE CONNECTED?

2 A I DETERMINE THAT IN THE DESIGN THAT IS SUBMITTED.

3 Q NOW, IF I'M THE PERSON MAKING THE BID HOW DO I
4 DETERMINE WHETHER THEY WOULD BE BOLTED, COUPLED, WELDED, OR
5 OTHERWISE CONNECTED?

6 A IN REFERRING TO THE CONTRACTOR'S PROPOSAL THERE
7 ARE A NUMBER OF ITEMS IN THERE THAT IDENTIFY AS REQUIRING
8 WELDING, WHICH AN EXPERIENCED CONTRACTOR WOULD RECOGNIZE
9 THIS IS A WELDED BUS DESIGN.

10 Q YOU ARE REFERRING TO THE MATERIALS LIST TO WHERE
11 IT INDICATES THEY ARE REQUIRED TO BE WELDED?

12 A YES.

13 Q ANYWHERE ELSE ON THE DOCUMENTS THAT IT WOULD
14 INDICATE WELDING IS REQUIRED RATHER THAN BOLTING OR
15 COUPLING?

16 A UNDER THE SPECIFICATIONS GIVEN IN THE DOCUMENT IT
17 TALKS ABOUT PARAGRAPH 5, INSTALLATION OF BUS.

18 Q DOES THAT HAVE A PAGE ON IT OR A HEADING?

19 A THAT WAS A SPECIFICATION ATTACHED TO THE DOCUMENT
20 ENTITLED "ROCKS CALIFORNIA SUBSTATION".

21 MR. MANGAN: SECTION "I" OR WHAT?

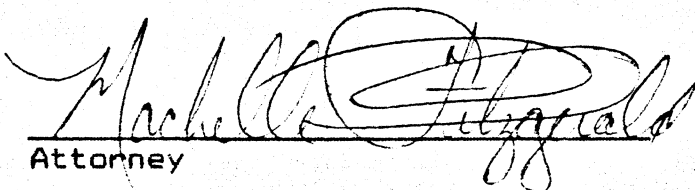
22 Q (BY MR. ALLRED) THIS IS PART OF EXHIBIT 2, I
23 BELIEVE.

24 A YES.

25 Q NOW, WHAT ROMAN NUMERAL ARE YOU REFERRING TO?

CERTIFICATE OF MAILING

I do hereby certify that on the 24th day of September, 1987, I mailed a true and correct copy of the foregoing ADDENDUM TO BRIEF OF APPELLANT, postage prepaid, to Clark B. Allred, Gayle F. McKeachnie, NIELSEN & SENIOR, Attorneys for Ultrasystems Western Constructors, Inc., 363 East Main Street, Vernal, Utah 84078; and to A. Dennis Norton, David W. Slaughter, SNOW, CHRISTENSEN & MARTINEAU, Attorneys for Industrial Indemnity Company, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, Utah 84145; by depositing the same in the United States Post Office at Roosevelt, Utah.


Attorney