

1987

Moon Lake Electric Association, Inc., v.
Ultrasystems Western Constructors, Inc., and
Industrial Indemnity Company : Brief of
Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MOON LAKE ELECTRIC ASSOCIATION,)
INC.,)

Plaintiff/Appellant,)

vs.)

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

Defendants/Respondents.)

Case No. 870212-CA

(Category No. 14b)

BRIEF OF RESPONDENTS

Appeal from the Seventh Judicial District
Court of Duchesne County, State of Utah
The Honorable Dennis L. Draney, Judge.

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Court of Appeals

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INC.,)	
Plaintiff/Appellant,)	
vs.)	Case No. 870212-CA
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STATEMENT OF JURISDICTION

It is respondents' position that plaintiff's Notice of Appeal in this action was untimely and that the Supreme Court (and therefore the Utah Court of Appeals, to which this case was transferred under § 78-2a-3(2)(h), Utah Code Annotated) has no jurisdiction over the attempted appeal of the court's summary judgment of dismissal entered on January 30, 1987.

Any jurisdiction in this Court would necessarily be limited to a consideration of the trial court's denial of plaintiff's motion for new trial, such jurisdiction deriving from the Supreme Court's original appellate jurisdiction under § 78-2-2(3)(i), Utah Code Annotated, and Rule 4(a), R. Utah S.Ct.

NATURE OF THE PROCEEDINGS BELOW

Opposing parties filed Motions for Summary Judgment. After considering Memoranda filed by both parties upon positions that there were no material facts in dispute, the Court granted Defendant's Motion. Plaintiff then filed a Motion for a New Trial, which was denied upon the trial court's conclusion that there was no basis under Rule 59 of the Utah Rules of Civil Procedure to grant a new trial, when no trial had been held, and upon the further holding that, in any event, there was no basis under Rule 59 or Rule 60 of the Utah Rules of Civil Procedure to set aside the Summary Judgment granted by the trial court. The Plaintiff then filed its Notice of Appeal, appealing the decision of the trial court denying its Motion for a New Trial.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendants submit the following as issues on appeal:

1. May the Plaintiff properly seek reversal of a Summary Judgment by a Motion for a New Trial?
2. Does an improper Motion for a New Trial extend the time to file a Notice of Appeal from the entry of a Summary Judgment?
3. Should the Plaintiff be allowed to file a Motion for a New Trial and claim there are disputed facts after the entry of Summary Judgment when it had conceded there were no facts in dispute in arguments on the Motion for Summary

Judgment?

4. When the granting of a Summary Judgment is based on three (3) separate grounds, each of which independently justifies the judgment, should the judgment be reversed if one of the grounds is not sustainable on appeal?

5. Should Plaintiff be entitled to forfeiture of Defendant's bid bond when Defendant's bid contained an error, made in good faith, which error was known by the Plaintiff and immediately brought to Plaintiff's attention by Defendant upon discovery by Defendant?

6. Is the Plaintiff entitled to collect money under a bid bond when Plaintiff has incurred no damages?

7. Is the Plaintiff entitled to enforce forfeiture of a bid bond when it did not comply with the conditions precedent set forth on the bid and the bond?

STATUTES INVOLVED

Rule 56 of the Utah Rules of Civil Procedure:

(c) The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(e) Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 2.8 of the Rules of Practice of the Seventh Judicial District Court:

(d) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which movant relies.

(e) The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

STATEMENT OF THE CASE

Plaintiff filed this action seeking forfeiture of a bid bond furnished by contractor/principal Ultrasystems Western Constructors, Inc., (Ultrasystems) and Industrial Indemnity Company, its surety. Following discovery, Ultrasystems and Industrial Indemnity filed a Motion for Summary Judgment on November 10, 1986. (R. 336, 410, addendum 1) The Motion sought a judgment dismissing the Complaint for no cause of action, on three separate grounds. (1) That an error in Ultrasystems' bid was made in good faith, justified Ultrasystems withdrawal of its bid, and that equity should prevent forfeiture of the bid bond, State vs. Union Construction Company, 339 P.2d 421 (Utah 1959); (2) that Plaintiff had incurred no damages, Petrovitch vs. City of Arcadia, 222 P.2d 231 (Cal. 1950); and (3) that Plaintiff had in any event failed to fulfill all the conditions precedent for the bond to take effect.

Pursuant to Rule 2.8 of the Rules of Practice of the Seventh Judicial District Court, Ultrasystems submitted a list of undisputed facts upon which the Defendants were entitled to judgment as a matter of law. (R. 339) Ultrasystems also filed supporting affidavits. (R. 355, 360) At the request of Plaintiff's counsel, Defendants stipulated in writing to an extension of time to December 10, 1986 for Plaintiff to file any Opposing Memorandum. (R.

413) On December 10, 1986 Plaintiff filed its Opposing Memorandum agreeing that Defendants' list of facts were undisputed, but arguing that Plaintiff was entitled to Summary Judgment. (R. 416) Ultrasystems responded to Defendants' Motion on December 17, 1986 (R. 434) and requested a ruling on the Motions. On December 19, 1986 the Plaintiff filed an Addendum to its Memorandum in Opposition (R. 441), followed by a December 24 Response to Ultrasystems' Reply Memorandum. (R. 443) On January 15, 1987 the Court, by Minute Entry, granted Defendants' Motion for Summary Judgment, (R. 448) and entered Judgment on January 30, 1987. (R. 468 Addendum 2)

Plaintiff responded by a Motion for a New Trial, (R. 479) filed with a Memorandum (R. 471) and Affidavits. (R. 449, 459, 473) The Court, by Minute Entry, denied the Motion for New Trial on March 10, 1987 (R. 504 Addendum 3) and on March 27, 1987 signed the Order denying the Motion for New Trial. (R.512, Addendum 4) On March 18, 1987 Plaintiff filed its Notice of Appeal of the Court's Minute Entry of March 10, 1987 denying the Motion for a New Trial. (R. 511)

The facts underlying the present appeal are summarized in the statement of undisputed facts contained in Ultrasystems' Memorandum in Support of its Motion for Summary Judgment. (R. 339) These facts were submitted in

separate numbered sentences and referred to the portions of the record which supported those facts as required by Rule 2.8(d). Those facts, undisputed by Plaintiff, are as follows:

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. (R. 514 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. (R. 515 Hunt deposition pages 3 and 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. (R. 515 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. (R. 515 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. (R. 360, 364, 366)

7. The documentation was provided to Mr. Richard Armstead of Ultrasystems for preparation of the bid. (R. 355 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. (R. 355 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. (R. 515 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. (R. 515 Hunt deposition page 37, R. 355 Armstead Affidavit)

11. Based upon his understanding that the conductors, bus bars and terminals could be connected by bolting rather than welding, Mr. Armstead submitted Ultrasystems bid in the amount of TWO HUNDRED THIRTEEN THOUSAND THREE HUNDRED DOLLARS (\$213,300.00). That bid was submitted September 12, 1985. (R. 355 Armstead Affidavit) The bid as submitted is Exhibit "B" to Allred Affidavit. (R. 360, 366)

12. In addition to Ultrasystems bid, four (4) other bids were received for the substation. Those bids were by Thiel, TIC, Lamb Engineering and ESS. The bids were broken down in units, being Units A through O. The error on Ultrasystems bid was in Unit A. The total bid and the bid on Unit A for the five bidders are as follows: (Copies of the bids are attached as Exhibits "C-F" of Allred Affidavit R. 360, 396)

<u>BIDDER</u>	<u>TOTAL BID</u>	<u>UNIT A</u>
Ultrasystems	\$213,300.00	\$ 51,400.00
Thiel	\$314,800.00	\$115,315.00
TIC	\$396,637.00	\$211,677.00
Lamb Engineering	\$410,924.00	\$169,079.00
ESS	\$419,692.00	\$204,708.00

13. In addition to the bid, each bidder, pursuant to the request of the August 27, 1985 letter, furnished a bid bond. A copy of Ultrasystems bid bond is Exhibit "G" to the Allred Affidavit. (R. 360, 405)

14. The bids were reviewed by Mr. Hunt and Mr. Winder on September 12 and 13, 1985. A review of those bids indicated that Ultrasystems had the apparent low bid. Mr. Hunt contacted Ultrasystems 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 Ultrasystems' bid. (R. 515 Hunt deposition pages 18 and 19)

15. On September 19, 1985, Moon Lake scheduled a meeting with Ultrasystems. The purpose of the meeting was for Moon Lake to become acquainted with Ultrasystems and its personnel, to assist Moon Lake in making a determination on awarding the bid. (R. 514 Winder deposition pages 16 through 19)

16. Mr. Hunt was aware that the Ultrasystems bid on Units A and B was low. On September 24, 1985, Mr. Hunt informed Mr. Chambers that Ultrasystems' bid on Units A and B was very low. (R. 445 Chambers Affidavit, R. 515 Hunt deposition pages 24 and 29)

17. Mr. Chambers relayed that information to Mr.

Armstead. Mr. Armstead then met with other construction personnel of Ultrasystems 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 Ultrasystems had been kept low in an effort by Ultrasystems to establish itself with Chevron and Moon Lake. The cost for aluminum welding would be an additional SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) which would cause a substantial loss to Ultrasystems. (R. 355 Armstead Affidavit)

18. Immediately upon determining the mistake and the loss which would be caused to Ultrasystems, a letter was prepared to Moon Lake stating the mistake and offering to do the work as bid if Moon Lake would pay the actual costs of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) for the aluminum welding. Exhibit "I" to Allred Affidavit. (R. 360, 408)

19. On September 25, 1985, Mr. Armstead and Mr. Chambers met with Mr. Hunt and at the meeting Ultrasystems delivered to Mr. Hunt its letter outlining the mistake in the bid. At that time, Mr. Hunt delivered to Mr. Armstead and Mr. Chambers notice from Moon Lake accepting the bid. The form, however, stated that the acceptance was subject to

the approval of the administrator (Rural Electric Administration). (Armstead Affidavit R. 355 Hunt deposition pages 27 and 20) Copies of Ultrasystems letter and Moon Lake's acceptance are attached as Exhibits "I" and "J" to Allred Affidavit. (R. 360, 408, 409)

20. On September 26, 1985, Mr. Hunt and Mr. Winder met with other representatives of Moon Lake and Chevron and determined to award the bid to the next highest bidder and to seek forfeiture of Ultrasystems bid bond. (Hunt deposition page 32)

21. The next highest bidder, Thiel, was contacted on September 26, 1985. Moon Lake agreed to pay Thiel FIFTEEN THOUSAND DOLLARS (\$15,000.00) in addition to the amount bid by Thiel. Thiel started work on October 3, 1985. (Winder deposition pages 28 and 29)

22. Moon Lake has a contract with Chevron regarding the construction of the substation. That contract provides that Chevron was to be the owner of the substation and that Chevron was to reimburse Moon Lake for all costs and expenses incurred in the construction of the substation. Pursuant to that contract, Chevron has paid to Moon Lake the contract price paid to Thiel, including the additional FIFTEEN THOUSAND DOLLARS (\$15,000.00) and Chevron has paid to Moon Lake all wages, costs and expenses including overhead for Moon Lake employees on the project and has paid

Moon Lake for any interest incurred on monies paid by Moon Lake which was reimbursed by Chevron. Moon Lake has no out-of-pocket costs which have not been reimbursed by Chevron. (Winder deposition pages 31 and 33, Hunt deposition page 33)

23. Moon Lake has no facts that would show that Mr. Armstead on behalf of Ultrasystems did not make a good faith mistake when he submitted the bid, and that upon ascertaining his mistake did not give prompt notice to Moon Lake. (Hunt deposition page 39, Winder deposition pages 25 and 30)

24. The bid bond submitted by Ultrasystems provides that neither principal nor surety is bound until the contractor, Moon Lake, furnishes evidence that financing that has been firmly committed to the entire cost of the project. No evidence was ever submitted to the Defendants that financing had been committed for the entire cost of the project. (Hunt deposition page 33, Winder deposition pages 31 through 37)

25. The error on Ultrasystems' bid was a good faith mistake, was a result of Mr. Armstead's lack of expertise regarding welding and his failure to determine from the construction drawings that Moon Lake intended to have the superstructure joined by welding rather than other acceptable method. (R. 355 Armstead Affidavit)

SUMMARY OF ARGUMENT

1. A Summary Judgment is a final order. Plaintiff's Motion for a New Trial was an improper means to seek a reversal of the Summary Judgment, and did not toll the time to appeal the Summary Judgment. As Plaintiff's Notice of Appeal was filed more than 30 days after entry of the Summary Judgment, this Court has no jurisdiction and the appeal should be dismissed.

2. Rule 2.8 of the Rules of Practice of the District Court and Rule 56 of the Utah Rules of Civil Procedure require a party opposing a Motion for Summary Judgment to set forth, in writing, specific material facts that are in dispute. The Plaintiff admitted the facts relied on by the Defendants in their Motion for Summary Judgment, and in fact claimed that it was entitled to Summary Judgment, in its favor, on those same facts. Only after the trial court granted Defendant's Motion did the Plaintiff file Affidavits claiming for the first time that facts were in dispute. Plaintiff did not, in its Motion for a New Trial nor in its brief before the trial court, set forth specific disputed facts, but rather has made unsupported conclusory allegations.

3. The trial court granted Defendants' Motion for Summary Judgment on three (3) separate, independent grounds. Plaintiff now contends that there are facts in

dispute on one of those grounds. Even if there were disputed facts as to one of the basis relied on by the court, the remaining two (2) reasons for granting the Judgment remain unchallenged, valid and independently sufficient for the Judgment.

4. The purpose of a bid bond is to protect the Plaintiff against any damages incurred if the successful bidder wrongfully withdraws its bid. Ultrasystems, acting in good faith, made an honest mistake in its bid, gave prompt notice of the error to Plaintiff, and Plaintiff incurred no loss. Plaintiff was reimbursed for all cost of building the structure and any other costs associated with Ultrasystems' error, and therefore, has suffered no damages. Equity and the law of this State do not allow forfeiture under these circumstances.

ARGUMENT

POINT I

A MOTION FOR A NEW TRIAL IS NOT A PROPER METHOD TO SEEK REVERSAL OF A SUMMARY JUDGMENT AND DOES NOT EXTEND THE TIME PERIOD TO APPEAL THE SUMMARY JUDGMENT.

Plaintiff originally appealed from the trial court's March 10, 1987 ruling denying Plaintiff's Motion for New Trial. (R. 505) Plaintiff has apparently abandoned that challenge in favor of an argument against the court's granting Defendants' Motion for Summary Judgment. Plaintiff did not timely appeal the Court's decision for Summary Judgment and its present appeal should be restricted to a question of whether the Motion for New Trial was appropriate and whether the trial court abused its discretion in denying that Motion.

Rule 58(a), Utah Rules of Civil Procedure, provides that the trial court may grant a new trial for one of seven (7) causes listed therein. The Motion must be filed within ten (10) days after entry of the judgment and must be supported by affidavits setting forth specific facts which support one of the grounds set forth in Rule 59. Tangaro vs. Marrero, 373 P.2d 390 (Utah 1962)

The trial court signed the Summary Judgment on January 30, 1987. Plaintiff filed its Motion for a New Trial on February 7, 1987. On March 10, 1987 the court entered its ruling denying Plaintiff's Rule 59 Motion. (R. 504)

The Summary Judgment entered by the trial court on January 30, 1987 was a final, appealable order. There is no provision under either Rule 59 or Rule 56 for challenging a Summary Judgment. The language of Rule 59 in fact assumes that a Motion for New Trial follows a trial. Defendants have been unable to locate any law in Utah that would support an argument that one may file a Motion for a New Trial to challenge the granting of a Summary Judgment. The ruling by the trial court that there was no basis under Rule 59 for the granting of a Motion for a New Trial was appropriate as a matter of law. It follows that the Motion did not toll the period for Plaintiff's appeal.

In Burgers vs. Maiben, 652 P.2d 1320 (Utah 1982) the Supreme Court held that an improper Motion for a New Trial does not extend the time in which to file a Notice of Appeal. Judgment in the instant case was signed and entered on January 30, 1987. Plaintiff had 30 days from January 30, 1987 to appeal the Summary Judgment, and failed to do so. This Court therefore, has no jurisdiction to consider this appeal to the extent Plaintiff seeks a reversal of the Summary Judgment.

As to the limited issue of the propriety of the Court's denial of Plaintiff's Motion for a New Trial, there is no record basis for the present appeal.

POINT II

PLAINTIFF SHOULD NOT BE ALLOWED TO RAISE LATE "ISSUES OF FACT" AFTER INITIALLY ARGUING THAT IT WAS ENTITLED TO A SUMMARY JUDGMENT BECAUSE NO MATERIAL FACTS WERE IN DISPUTE.

Rule 56 of the Utah Rules of Civil Procedure enables the trial court to grant judgment as a matter of law when it is apparent that there is no genuine issue as to any material fact. Rule 56(e) requires that specific facts offered as undisputed, be set forth, based on personal knowledge, admissible at trial and be material to the applicable rule of law. Norton vs. Blackham, 669 P.2d 857 (Utah 1983) and Regan Outdoor Advertising, Inc., vs. Lundgren, 692 P.2d 776 (Utah 1984) Opinions and conclusions are not sufficient to create an issue of fact. Webster vs. Sill, 675 P.2d 1170 (Utah 1983) If a party fails to file opposing affidavits the trial court can conclude that there is no genuine issue of fact. Any issues that are raised in post judgment motions or affidavits which are not timely filed are raised too late and may not be considered. Franklin Financial vs. New Empire Development Company, 659 P.2d 1040 (Utah 1983)

To assist the trial court in determining whether there are material issues of fact in dispute, Rule 2.8 of the Rules of Practice in the Seventh District Court sets forth the procedure that the parties must follow. Rule 2.8(d) requires the moving party, in his statement of points and

authorities, to set forth a concise statement of material facts to which the movant contends no genuine issue exists. Those facts must be set forth in separate numbered sentences and refer with particularity to the portion of the record upon which the moving party relies. Rule 2.8(e) requires that any opposing memorandum raising an issue of fact describe the disputed facts in separate numbered sentences, also referring with particularity to those portions of the record upon which the opposing party relies. If a material fact is not specifically controverted by the opposing party it is deemed admitted for the purpose of summary judgment.

Ultrasystems complied with Rule 2.8 in its Memorandum in Support of its Motion for Summary Judgment which cited undisputed facts based on specific portions of the record or supporting affidavits. Plaintiff did not specifically dispute any of the Defendants' undisputed facts in its opposing memorandum. (R. 416) In fact, it admitted most of the stated facts, sometimes with unsupported comments, and simply stated that it could neither admit nor deny others.

Plaintiff did list, at page 7 of its Memorandum (R. 422) three facts it claimed were disputed. Defendants, however, do not dispute number 3. The other "disputed" facts were conclusory at best and referred to no support in the record. The first item Plaintiff claimed to be disputed was a claim that Ultrasystems acted in bad faith when it had

Richard Armstead prepare the bid. The affidavit of Richard Armstead, as well as the depositions of Plaintiff's representatives, Mr. Hunt and Mr. Winder, showed there was no facts to support a claim of bad faith. (R. 355, Hunt deposition page 39, Winder deposition pages 25 and 30) In its response to Defendant, Ultrasystems', Reply Memorandum, Plaintiff ultimately agreed that there was no factual issue when it admitted that the issue of bad faith was a legal question for the court.

The only other fact Plaintiff contended was in dispute was a claim that Plaintiff accepted Ultrasystems bid on September 18, 1985. (R. 422) When it was pointed out to Plaintiff that its own agent, in its own documents, showed that the acceptance occurred September 25, 1985, Plaintiff made no further claim that that was a disputed fact. (R. 355, 360, 408, 409 and Hunt deposition page 20, 27)

By its present Brief (at page 10) Plaintiff still claims that there is an issue of material fact, yet even as before the trial court, it fails to state any specific fact that is in dispute, or give any citation to the record. Plaintiff relies only upon conclusory and unsubstantiated allegations that Ultrasystems and its agent, Mr. Armstead, acted in bad faith in preparing the bid. Mr. Armstead has submitted an uncontroverted Affidavit showing that he acted in good faith and that he made an honest mistake in

preparing the bid. Furthermore, both of Plaintiff's agents, Mr. Hunt and Mr. Winder, stated in depositions that they knew of no facts that would show that Mr. Armstead or Ultrasystems acted in bad faith, and neither described any facts that contradict Mr. Armstead's Affidavit. (Hunt deposition page 29, Winder deposition pages 25 and 30)

When Defendants' Motion for Summary Judgment was before the trial court, Plaintiff agreed with the Defendants' list of undisputed facts and even moved for Summary Judgment on those same facts. Plaintiff filed three separate Memoranda objecting to Defendants' Motion but furnished no affidavits challenging any of the facts relied on by the Defendants. Only after the trial court granted Defendants' Motion did Plaintiff attempt to raise "issues" by "Supplemental Affidavits" and a Motion and Memorandum for a New Trial. Only at that late date did Plaintiff claim there were any issues of fact. None of those claims, even now, are coupled with any specific facts.

The court determined that Defendants were entitled to judgment as a matter of law on the record facts. There are no facts in dispute which are material to the issues raised in the Motion for Summary Judgment. The ruling by the trial court should be sustained.

POINT III

THE SUMMARY JUDGMENT SHOULD BE SUSTAINED ON ANY
ONE OF THE THREE SEPARATE AND INDEPENDENT GROUNDS
RELIED UPON BY THE TRIAL COURT.

The Defendants sought summary judgment on three grounds:

1. Defendant, Ultrasystems, made an error when it submitted its bid. That error was made in good faith, without gross negligence and, under the law of State vs. Union Construction Company, 339 P.2d 421 (Utah 1959), equity should prevent forfeiture of the bid bond. (It is on this ground alone that Plaintiff, by continued, unsupported, conclusory allegations, seeks to raise issues of fact)

2. The bond was to assure payment of any actual damages incurred by Plaintiff as a result of a withdrawal of the bid. The Plaintiff was fully reimbursed for all costs incurred as a result of Ultrasystems withdrawal of its bid and therefore suffered no damages. Petrovich vs. City of Arcadia, 222 P.2d 231 (Cal. 1950) Plaintiff has never claimed, either to the trial court or on appeal, that there are issues of fact in dispute on this question.

3. Plaintiff failed to follow the conditions precedent for the bond to take effect including furnishing evidence that the financing had been firmly committed to cover the costs of the project as required by the clear language of the bond. Plaintiff has not claimed that there

are issues of fact in dispute on this issue.

The trial court, in its ruling, found that Defendants were entitled to judgment of no cause of action on all three grounds set forth in the Motion for Summary Judgment. This Court can and should sustain the trial court's ruling on any or all of those grounds. The Plaintiff's only claim of disputed facts is on the first ground alleged in the Plaintiff's Motion. Even if this Court were to determine that there were disputed facts that were material to that issue, this Court should sustain the ruling of the trial court on either of the other two grounds.

A. Ultrasystems' Withdrawal of its Bid was a Result of an Error Made in Good Faith. Plaintiff was Given Prompt Notice of the Error and Plaintiff has Suffered No Loss as a Result of the Withdrawal of the Bid. Therefore, the Bid Bond Should Not Be Forfeited.

In State vs. Union Construction Company, 339 P.2d 421 (Utah 1959), the Defendant submitted a bid for the construction of five miles of road in Garfield County. Defendant also submitted a bid bond deposit of five (5%) percent. After the bid was accepted, the Defendant determined that it had made an error in the exact route of the roadway and refused to perform. The mistake was caused by Defendant's agent relying on old stakes which designated that the road would go through loose soil rather than a new survey which placed the road through a great amount of rock. Defendant determined that it would cost an additional

TWENTY-NINE THOUSAND DOLLARS (\$29,000.00) to construct the road on the new survey. Plaintiff was given notice of the error two (2) days after the acceptance of the bid. The Court refused to allow the forfeiture of the bond and stated,

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 been greatly changed, and relief from forfeiture will work no substantial hardship on him. Id. 421

See also, New York vs. John W. Rouse Construction Company, 274 N.Y.S.2d 981 (1966) (Defendant did not realize lock gates were to be fabricated in one piece); Clinton County Department of Public Works vs. American Bank and Trust Company, 268 N.W.2d 367 (Mich. 1978) (Contractor left out of his bid calculations the restoration process) and Puget Sound Painters, Inc., vs. Washington, 278 P.2d 302 (Wash. 1954) (Plaintiff misunderstood the calculations regarding the length of the bridge towers).

In the present case Ultrasystems meets all of those elements and is entitled to be relieved from forfeiture of the bond. Richard Armstead was the employee who prepared the bid for Ultrasystems. His specialty involves construction of electrical facilities of the type required by Plaintiff. He prepared the bid planning on using bolting

and coupling as the means to connect the conductors, bus bars and terminals. Only after the bid was submitted did he learn that Plaintiff wanted the connections made by aluminum welding, a more expensive method. The only reference to welding was in the materials list. There was no such reference on the drawings used to prepare the bid. (Armstead Affidavit R. 355)

Plaintiff admits that there is no evidence that Mr. Armstead did not make a mistake and that he did not act in good faith. Plaintiff rather contends that Ultrasystems acted in bad faith by having Mr. Armstead prepare the bid. No facts are cited to support that claim.

There is no question that prompt notice was given to Plaintiff. The error was determined September 24, 1985 and written notice was given to Moon Lake on September 25, 1985. Likewise, there is no question that Ultrasystems will suffer a substantial detriment if the bond is forfeited. Pursuant to law and the contract between Ultrasystems and Industrial Indemnity Company, Ultrasystems is ultimately liable for any payment on the bond. If the Court allows forfeiture on the bond as requested by Plaintiff, Ultrasystems will incur a detriment in the amount of TWENTY-ONE THOUSAND THREE HUNDRED THIRTY DOLLARS (\$21,330.00). Finally, there is no question that Plaintiff's status has not changed and it has not incurred a hardship. In fact, Plaintiff has not been

damaged at all as a result of the withdrawal of the bid because it has obtained full reimbursement for all costs incurred in building the structure, including interest and any overtime paid to its employees.

Plaintiff also argues that Ultrasystems made a mistake of law and cites Boise Junior College District vs. Mattefs Construction Company, 450 P.2d 604 (Id. 1969). In that case the Idaho Court refused to forfeit the bid bond when the facts showed the Defendant forgot to include the cost of glass in its bid. State vs. Union Construction Company and other cases using the same test did not make a distinction between mistakes of fact and mistakes of law. Even if that were the test, the mistake in this case, like that in Boise Junior College, was a mistake of fact.

Based on the undisputed facts, Ultrasystems meets the requirements set forth in State vs. Union Construction Company to avoid forfeiture, and was fully entitled to the court's Summary Judgment dismissing Plaintiff's action.

B. The Bond Submitted by Ultrasystems is for Payment of Actual Damages Incurred by Plaintiff Upon the Withdrawal of Ultrasystems Bid. Since Plaintiff Incurred No Damages, it is Entitled to No Relief on the Bond.

The liability of a surety is generally no greater than that of the principal. Turner vs. Wexler, 538 P.2d 877 (Wash. 1975), and the general rule is that a surety is liable only for payment of actual damages caused by the

principal. Butler vs. Union Pacific Insurance Company, 509 P.2d 1184 (Oregon 1973)

There are two general types of bonds. There are penal or penalty bonds and indemnity bonds. If the bond is construed to be a penalty bond, then the face amount of the bond is forfeited regardless of the amount of damages. If the bond is determined to be an indemnity bond, then the Plaintiff is entitled to recover the actual damages up to the face amount of the bond. To avoid unjust forfeitures and windfalls, most bonds are construed to be indemnity bonds.

In General Insurance Company of America vs. City of Colorado Springs, 638 P.2d 752 (Colo. 1982), the Court stated that a bond is to be interpreted according to the standards governing the construction of contracts in general and that a determination should be made from the language of the instrument itself, together with any collateral documents such as the contract. The Court further stated that the determination of the type of a bond is a question of law. See also, Board of Supervisors of Fairfax County vs. Ecology One, 245 S.E.2d 425 (Va. 1978).

The California Court in Petrovich vs. City of Arcadia, 222 P.2d 231 (Cal. 1950) considered a case factually similar to the present case. Neither the bid nor the invitation for bids contained any language declaring that the bond was to

be forfeited as liquidated damages. The Court in construing the bond as an indemnity bond stated:

Forfeitures in the nature of penalty are not favored; and language must be so construed as to avoid a forfeiture if that is possible (citations omitted)....In the present case we are of the opinion that the agreement does not provide for either a penalty or liquidated damages since the language in relation to the bid bond contained in the executed bid form adopts no more than the words of guarantee in the bid invitation. Words indicating that the full sum of the bond would be forfeited or treated as liquidated damages could readily have been used. To construe words actually used otherwise than in accordance with their plain meaning would result in unauthorized changes in or additions to the language of the instruments and would base the conclusion upon uncertain or doubtful inference contrary to the language expressly employed. The wording of the bid invitation and the executed bid was of the city's own choosing and should not be held to extend the bidder's and the surety's hazards beyond its fair meaning. Id. 236

The bond submitted by Ultrasystems is similar to the bid bond in General Insurance Company of America vs. City of Colorado Springs and Petrovich vs. City of Arcadia. The language of the bond contains words of guarantee, not forfeiture. See Addendum 5. If Moon Lake wanted a penalty bond, it could have so requested in the bid documents. The August 27, 1985 letter which accompanied the bid documents required that a bid bond be furnished, but did not require that it be a penalty bond. (Addendum 6, paragraph 4). Furthermore, paragraph 5 does not provide for forfeiture of the bid bond, but rather provides that it will be enforced according to its terms. Some of the bidders did submit a

penalty bond as a bid bond. See Thiel bond attached to Allred Affidavit as Exhibit "H". (R.406)

The law in this State does not support forfeiture and requires that contracts, such as the bid bond be strictly construed to avoid forfeitures. Biesinger vs. Behunin, 584 P.2d 801 (Utah 1978); Jones vs. Thorvaldson, 392 P.2d 483 (Utah 1964) Ultrasonics' bid bond indemnified Plaintiff against any actual loss in the event Ultrasonics unjustifiably withdrew its bid and refused to perform.

The only damages Moon Lake is entitled to recover under the indemnity bond are its actual damages. It is undisputed that Moon Lake has suffered no actual damages because of its contract with Chevron, and Chevron is not a party to this action.

C. Moon Lake did not Comply with the Conditions Precedent for the Bid Bond to Take Effect.

Prior to the bid bond taking effect and the surety and principal being bound thereby, Plaintiff was required not only to accept Ultrasonics' bid, but also to comply with certain conditions precedent set forth on the bond. The bond contains the following paragraph:

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. (Addendum 5)

It is undisputed by Plaintiff that no evidence was provided

either to the principal or the surety that financing had been firmly committed to cover the entire cost of the project. (Hunt deposition page 33, Winder deposition pages 25 and 30)

The bid document further provides that the bid of Ultrasonics had to be accepted and the contract awarded to Ultrasonics before the bond would come into effect. In the present case, both Plaintiff's acceptance and Ultrasonics' notice of error and withdrawal of its bid were submitted at the same meeting on September 25, 1985. However, the acceptance of the bid by Plaintiff was conditional. The acceptance states:

Subject to the approval of the administrator the owner hereby accepts the foregoing proposal of the bidder. (R. 409)

The administrator was the Rural Electric Administration. Plaintiff admits that it never obtained the approval of the administrator, but argues that since the administrator's funds were not involved, its acceptance was not necessary. That, however, is not the language of the conditional acceptance. Since the acceptance was conditional, Ultrasonics clearly withdrew its bid prior to any final acceptance of the bid and therefore the bond did not come into effect.

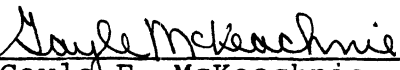
CONCLUSION

It is apparent on the foregoing that the Summary Judgment dismissing Plaintiff's action, as well as the Court's Order denying Plaintiff's Motion for New Trial, must withstand Plaintiff's appeal. To the extent Plaintiff's appeal challenges the Summary Judgment, it is clearly untimely, and the trial court acted fully within prescribed law and procedure in not allowing a reconsideration of the Judgment, by "new trial" or otherwise. Both Order and Judgment should be upheld.

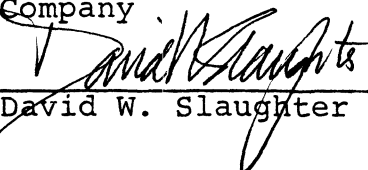
Respectfully submitted this 30 day of October, 1987.

NIELSEN & SENIOR
Attorneys for Respondent
Ultrasystems Western
Constructors, Inc.

By: 
Clark B. Allred

By: 
Gayle F. McKeachnie

SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Respondent
Industrial Indemnity
Company

By: 
David W. Slaughter

ADDENDUM

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

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).

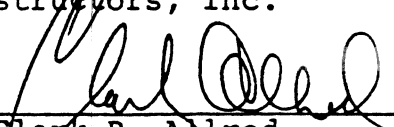
3. Plaintiff failed to follow the conditions precedent for the bond to take effect, including furnishing evidence that the financing has been firmly committed to cover the costs of the project as required by the bond and by failing to accept Ultrasystems bid prior to notice of the error and withdrawal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

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
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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

~~FILED
DISTRICT COURT
DUCHESE COUNTY, UTAH
MAR 24 1987
DUCHESE COUNTY CLERK
BY _____ DEPUTY~~

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
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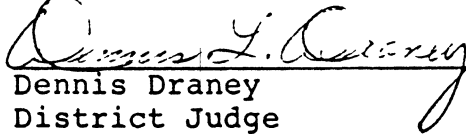
IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

MOON LAKE ELECTRIC ASSOCIATION,)	
INC., a Utah corporation,)	ORDER
)	
Plaintiff,)	
)	
vs.)	
)	
ULTRASYSTEMS WESTERN)	
CONSTRUCTORS, INC., and)	
INDUSTRIAL INDEMNITY, et al.,)	
)	
Defendants.)	Civil No. 86-CV-11D

The above captioned matter came before the Court pursuant to Plaintiff's Motion for a New Trial. The Court having reviewed the Motion and the Memoranda filed in support and in opposition of the Motion and being fully advised and having entered its Ruling;

IT IS HEREBY ORDERED that Plaintiff's Motion for New Trial is denied.

DATED this 27th day of March, 1987.


Dennis Draney
District Judge

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

MOON LAKE ELECTRIC ASSOCIATION,)
INC., a Utah corporation,)

Plaintiffs,)

vs.)

ULTRASYSTEMS WESTERN CONSTRUCTORS)
INC. and INDUSTRIAL INDEMNITY et al)

Defendants.)

R U L I N G

Civil No. 86-CV-11D

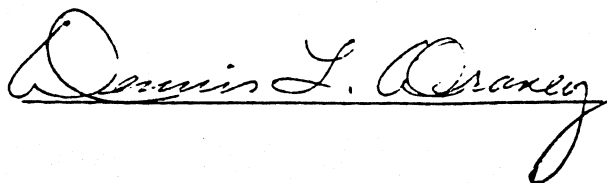
The Court having fully considered the pleadings herein rules as follows.

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



Proposal or Bid Bond

Company

Home Office

Bond No. YS859-7301

Premium \$ INCLUDED IN BID BOND
SERVICE UNDERTAKING

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

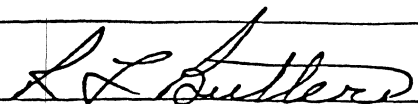
ROOKS CALIFORNIA SUBSTATION
Location of project Rangely, Colorado
BID DATE: September 12, 1985

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.

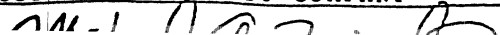
PROVIDED, HOWEVER, neither Principal nor Surety shall be bound hereunder unless Obligee
prior to execution of the final contract shall furnish evidence satisfactory to Principal and Surety that
financing has been firmly committed to cover the entire cost of the project.

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

ULTRASYSTEMS WESTERN CONSTRUCTORS, INC.


Principal

INDUSTRIAL INDEMNITY COMPANY





MOON LAKE ELECTRIC ASSOCIATION • PO BOX 278 • 188 WEST 2ND NORTH • ROOSEVELT, UTAH 84066 • PH 722-244

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:

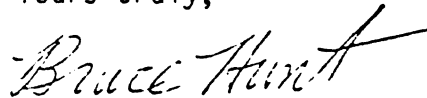
1. Bids should be submitted in writing to our Roosevelt Office not later than 10:00 a.m. Sept. 12, 1985.
2. Proposals must be submitted on the enclosed forms. Bidders name, address, license number (if a license is required by the State), and bid opening date and hour must appear on the envelope in which 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.

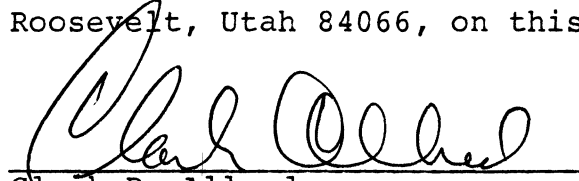
Yours truly,

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

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondents to George E. Mangan, 47 North Second East, Roosevelt, Utah 84066, on this 30 day of October, 1987.


Clark B. Allred