

1981

# Highland Construction Co. v. LaMar D. Stevenson et al : Brief of Respondents

Utah Supreme Court

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HIGHLAND CONSTRUCTION COMPANY,  
a Utah corporation,  
  
Plaintiff and Appellant,  
  
vs.  
  
LaMAR D. STEVENSON d/b/a LaMAR D.  
CONSTRUCTION COMPANY, UNITED STATES  
FIDELITY AND GUARANTY COMPANY, a Mary-  
land Corporation, and SHELL OIL  
COMPANY, a Delaware corporation,  
  
Defendants and Respondents.

Civil No. 17099

LaMAR D. STEVENSON d/b/a LaMAR D.  
CONSTRUCTION COMPANY,  
  
Third-Party Plaintiff,  
  
vs.  
  
THE STATE OF UTAH and THE UTAH STATE  
DEPARTMENT OF TRANSPORTATION,  
  
Third-Party Defendants.

RESPONDENTS' BRIEF

Appeal from the Judgment of the Fourth District Court  
for Duchesne County, Honorable Allen B. Sorenson, Judge

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FILED

JAN 29 1981

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IN THE SUPREME COURT  
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RESPONDENTS' BRIEF

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Respondents, LaMar D. Stevenson, d/b/a LaMar D. Construction Company (hereinafter referred to as "Stevenson" or "respondent") and United States Fidelity and Guarantee Company (hereinafter referred to as "USF&G" or "respondent") hereby submit the following brief:

### STATEMENT OF NATURE OF CASE

Respondents concur in the appellant's statement of the nature of the case.

### DISPOSITION IN DISTRICT COURT

Respondents concur in the appellant's statement of the disposition in the District Court.

### RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the trial court's findings of fact and conclusions of law and affirmation of the trial court's judgments dismissing all of Highland's claims and awarding Stevenson attorneys fees and costs. Respondents further seek affirmation of the trial court's declaratory judgment declaring that Stevenson had rightfully backcharged Highland in the sum stated. In addition, respondents pray for their costs incurred in connection with this appeal pursuant to Rule 54(d)(3) U.R.C.P., including attorney's fees under §14-1-8 U.C.A. (1953) and under Section 6(e) of the subcontract.

In the alternative, and in the event that any portion of the findings or judgment in favor of respondents is reversed, respondents seek reversal of the dismissal of their third-party claims against the State of Utah.

### STATEMENT OF FACTS

This Court, like virtually every other appellate court in the United States, has always followed two firmly established, fundamental rules in reviewing the facts on appeal. The first fundamental principle provides that on appeal, the decision of the trial court is entitled to a presumption of validity and the appellate court is required to view the evidence, and any



inferences drawn therefrom, in the light most favorable to sustaining the decision. Oberhansly v. Earle, 572 P.2d, 1384 (Utah 1977). The second fundamental principle provides that where the evidence presented in the trial court is in conflict, the appellate court assumes that the trial court believed those aspects of the evidence that supports his findings. Fillmore City v. Reeve, 571 P.2d, 1316 (Utah 1977), and Terry's Sales, Inc. v. Vander Veur, 618 P.2d 29 (Utah 1980).

Although on page 18 of its brief, the appellant expressly recognizes these fundamental principles, they are completely disregarded by the appellant in its presentation of the "facts" in its brief. In direct violation of the principle that the facts and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondents, appellant's brief presents the facts, along with the inferences it draws from the facts, in the light most favorable to the appellant. This Court has repeatedly rejected such an approach. Thomson v. Condas, 493 P.2d 639, 27 Utah 2d 129 (1972). In addition, in presenting the "facts" appellant has ignored the facts running contrary to its position, and has resolved all disputes of fact in its favor.

In view of appellant's disregard of the principles governing the review of facts on appeal, a complete restatement of the facts consistent with the governing principles, is necessary.

### FACTS

(Prior to the commencement of the trial, counsel met and agreed upon certain facts which were stipulated to and read into the record on the morning of trial. The stipulation of facts is found on pages 638 to 651 of

the record. Accordingly, citations to those pages refer to stipulated facts.)

In the early part of 1976, the State solicited bids on a road construction project to be performed in Duchesne County under the name of Utah Department of Transportation, Duchesne River Road Project, Project No. RS-0256(2). Early in the summer of 1976, bids were submitted by several different contractors, including Highland. At the bid opening it was revealed that Highland was the low bidder and it was anticipated that Highland would be awarded the contract. All of the bids were, however, subsequently disqualified. (R. 645)

On or about July 27, 1976, a second bidding was held with both Highland and Stevenson again submitting bids. (R. 645)

In the course of preparing Highland's bids, Highland's President, Bryan Bergener, drove through the project site five or six times, while stopping and walking through it on one occasion. (R. 801)

During his inspections of the project site, he observed a number of indications of swampy or wet conditions including marsh grass, cattails, alkali, surface water and seepage from the canal running along the roadway. (R. 806)

A special provision of the general contract (which was incorporated by reference into the subcontract) provided in part:

The bidder is required to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms before submitting a proposal. Furthermore, the materials report, soil survey plans and profiles, and test data pertaining to the proposed work are available for the bidder's inspection at the Materials Test Division, 757 West 2nd South, Salt Lake City, or the district office. The submission of a bid shall be considered prima facie evidence that the

Bidder has made the required examinations and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and contract. (Plaintiff's Exhibit No. 6)

The Soil Survey Materials Report referred to in the above contract provision provided in a section entitled, "Physical Conditions Along Project" (found on page 1 of the report):

Soil Type and Range: Project soil range from very plastic A-(9) (In-situ weathered shale) to non-plastic A-1-a silty, sandy gravel.

Drainage: Natural surface drainage varies from good to poor. Some water accumulates in marshy and saturated zones that occur where irrigation water seeps from irrigation ditches and canals. The main area in which saturation zones occur lies between station 850+00 and station 910+00. (Emphasis added) (Defendants' Exhibit No. 20 and Plaintiff's Exhibit No. 9)

A map of the project attached to the soil survey report and received in evidence as Exhibit 33 contained the notation "some seepage from canal to drainage ditch marsh and saturated areas."

In spite of the fact that the Soil Survey and Materials Report was available to Highland, and in spite of the requirement that it be examined in preparing a bid, Highland did not examine the report in preparing either of its bids. (R. 648-649; 841-842; 1112-1113)

When the bids were opened at the second bidding on the Duchesne River Road Project (which took place on or about July 27, 1976), Stevenson was the low bidder, and on or about July 27, 1976, Stevenson was awarded the general contract on the project. (R. 645-646) It was Stevenson's intention to have his own company do the earth moving work, as he had made arrangements to rent earth moving equipment and did not anticipate subcontracting that work

out. (R. 1234) However, shortly after he was awarded the contract, two different construction companies contacted him requesting that he subcontract the earth moving work to them. The first to contact Mr. Stevenson was John Wayne Lloyd who offered to perform items 3 and 4 of the contract, those being the "roadway excavation" and "granular barrow" items. (R. 1234-1235, R. 312-313, and plaintiff's Exhibit 6) Mr. Lloyd offered to do the roadway excavation work for \$1.10 per cubic yard and the granular barrow work for \$1.60 per cubic yard. (R. 1235 and R. 936).

The second person contacting Stevenson regarding subcontracting the earth moving work was Bryan Bergener of Highland Construction Company. The initial contact was made by Bergener contacting Stevenson by telephone at his home approxiamtely on August 1, and Stevenson agreed to meet with him on August 3. (R. 1235-1236).

At the August 3 meeting, Stevenson informed Bergener of Lloyd's offer and of Stevenson's desire to have his own company perform the work. However, Stevenson ultimately agreed to allow Highland to perform the earth moving work at \$1.20 per cubic yard for the roadway excavation and \$1.80 per cubic yard for the granular barrow. At the August 3 meeting an oral agreement was reached between Stevenson and Bergener (acting on behalf of Highland) which provided that Highland would perform the earth moving operations on the project, including all of the work incidental to those operations such as clearing, watering, and rolling, and would prepare the road grade to the point that it was ready for graveling and oiling. While Highland was performing its work, Stevenson would install the pipes and culverts at various points crossing the roadway and would construct a concrete lined ditch along a por-

tion of the roadway. (R. 1237-1239).

As part of the stipulation of facts, it was stipulated that Highland knew at the time it entered into the subcontract that it would be necessary for the work on the pipes, ditch, structures and utilities to be carried on while Highland was engaged in its earth moving operations, and that Highland knew that the work on the utility items and structures would inevitably cause some inconvenience and interference with Highland's operations, and that it would not be possible for Stevenson to eliminate such inconvenience and interference. (R. 646)

Paragraphs 105.07 and 105.06 of the Standard Specifications for Road and Bridge Construction (1970 edition) (which were incorporated by reference into the subcontract) provide in relevant part:

It is expected that there will be a reasonable amount of inconvenience and delay by reason of contractors working within the limits of the same project . . ."

It is understood and agreed that the contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions as shown on the plans, and that no additional compensation will be allowed for any delays, inconvenience, or damage sustained by him due to any interference from the said utility appurtenances or the operation of moving them.

At the August 3 meeting where the oral subcontract was made, Stevenson did express a willingness (to the extent that it was reasonably feasible) to conduct his operations so that they did not unreasonably interfere with Highland's operations. Stevenson did not, however, guarantee to Highland that it would not experience any inconvenience, interference or delay. Stevenson did not agree, or even discuss with Bergener, paying additional compensation for inconvenience, interference or delay, and assumed no



responsibility for Shell's operations. In fact, some interference, inconvenience and delay was anticipated as a normal part of such a construction project. (R. 1237-1239).

Highland began moving its equipment onto the project site on August 6, and spent the first week in clearing operations. (R. 824). On August 9 a preconstruction meeting was held with the project engineer and the various contractors and subcontractors. (The preconstruction meeting is discussed at length in the brief of Shell Oil Company, and to avoid unnecessary duplication, the events of that meeting are not rediscussed here.)

On August 11, Highland moved its scrappers to the project and began earth moving operations. (R. 825). On August 12, Highland began encountering some areas of mud and unstable subgrade conditions (referred to herein as "soft spots"). To construct a stable road base, it was necessary for Highland to subexcavate the soft spots and fill them with granular material. The subexcavation and filling of the soft spots required Highland's efforts on parts of seven working days, those being August 12, 13, 16, 17, 18 and 19, and subsequently, a portion of September 27. (Defendants' Exhibit 26)

At the instruction of the Project Engineer, a State Inspector assigned full time to the project, Karlton Lund, kept detailed records of the labor, time and equipment used in sub-excavating and filling the soft spots. Highland's Grade Superintendent, Wayne Davies, worked closely with Lund in keeping such records and conferred daily with Lund and verified the figures. (R. 1455-1457)

On August 19, with Highland being fully aware of the unstable subgrade condition problems, and being fully aware of the delays and problems



being encountered by Shell, Highland presented a subcontract document to Stevenson, which it had prepared, and both parties signed it. (R. 1035) The subcontract document contained no provision providing for additional compensation to be paid to Highland due to the soft spots or delays. (Plaintiff's Exhibit 2).

While Highland was performing the excavation work and building the road grade, Stevenson worked on the installation of the pipes and culverts and the construction of the concrete-lined ditch. Before Stevenson could commence construction of the ditch, it was necessary for Highland to cut away part of a hillside and Stevenson was required to wait for that excavation to take place before the ditch construction could begin. (R. 374-375) Although the subcontract document provided for Stevenson's installation of the pipes in advance of Highland's operation, Stevenson, to minimize the hindrance to Highland, installed the pipes behind Highland's operation. (R. 1242; 1250-1258) Even Highland's President, Bergener, conceded that it was better for Stevenson to install the pipes behind Highland's operation rather than in advance. (R. 1034) Stevenson elected to use this approach, to assist Highland, even though it was more expensive and difficult for him to do so.

Highland's operation experienced no more than reasonable and usual and unavoidable hindrance and interference from the other operations on the project. (R. 1025-1026; 1242; 1250-1258; 1465; 1455; 1450; 646; 1016)

Highland's operation did, however, experience some inefficiencies of its own making. (R. 1319-1322; 695; 1452-1455)

Stevenson did, on a very few occasions, make some limited use of Highland's equipment. However, such use was always done with Highland's con-

sent and part of such use was to assist Highland in completing its work. (R. 1255; 1189-1190) Highland was paid for the use of its equipment. In fact, Stevenson was prepared at trial to establish that he had been overcharged and Highland had been overpaid for equipment use. (R. 497) However, Highland presented no evidence at trial of the extent of use of its equipment, and consequently, it was unnecessary for Stevenson to present such evidence.

The subcontract document expressly provided:

Sub-contractor agrees that all work performed by it hereunder shall be done subject to the final approval of contractor and/or the owners' designated representative.

In spite of the foregoing provision, on October 6, 1976, Highland removed its equipment from the project without properly completing its work. Portions of the work did not comply with the required specifications and Stevenson was required to re-do the work at his expense. Highland also failed to properly clean up and finish some of the grade slopes as it was obligated to do under the subcontract, and Stevenson was required by the State Inspector to perform this work. The deficiencies in Highland's work were remedied by Stevenson at his expense, and Highland was back-charged by Stevenson for such work at an amount below Stevenson's actual cost of performing it. (R. 1279-1289; R. 1457-1460)

Due to Highland's not completing its work early enough in the year, Stevenson could not perform the oiling and graveling operations until the following spring, at which time the project was completed and accepted by the state.

Although payment or tender of payment was made to Highland of all

of the amounts due and owing under the subcontract, Highland refused to accept the contract price, and in January of 1977, submitted a formal claim demanding approximately \$60,000 over and above the subcontract price. (Plaintiff's Exhibit No. 58) (Under the entire subcontract Highland was only anticipating a total of approximately \$82,000.) (Plaintiff's Exhibit 2) Highland's claim was passed on to the Project Engineer for consideration. Although most of the items set forth in Highland's claim were rejected, the Project Engineer did award an additional amount for the sub-excavation and refilling of the soft spots, based on the time and equipments records kept by Lund. (Defendants' Exhibit No. 26) The portions of the additional award for soft spots due to Highland under the terms of a subcontract were passed on by Stevenson to Highland. (R. 1434; 1132-1138; and Plaintiff's Exhibit 32)

The award of additional compensation to Highland for work on the soft spots was paid pursuant to the provisions of the Standard Specifications for Road and Bridge Construction (1970 edition) which were incorporated by reference into the subcontract. Provision 104.02 of the Standard Specifications provides that where "extra work" is performed, such work is to be paid for as provided under subsection 109.04. Subsection 109.04, entitled: "Extra Force Account Work" provides that where "extra work" is performed, the state may pay for such work "on a force account basis." Subsection 104.04 then sets forth the formula to be used where extra work is paid for on such basis. That formula basically provides that the contractor will be reimbursed for his labor costs and will receive payment for the use of his equipment at the hourly rate set forth in the Equipment Rental Rates Schedule published by the Utah State Department of Highways. (Defendant's Exhibits 31 and 59)

The Equipment Rental Rates established by the State Department of Highways were actually more than Highland's costs. (R. 1323-1324; 973-983; Exhibits 39 through 43)

The approach used in computing the compensation due to Highland for the soft spots was not only consistent with the terms of the subcontract, but was also consistent with the requests made in Highland's own claim. (See pages 16-21 of Plaintiffs' Exhibit 58). In its claim and in the portion dealing with the soft spots, Highland specifically referred to §§104.02 and 109.04 of the Standard Specifications and requested payment pursuant thereto. (See pages 16-21 of Plaintiffs' Exhibit 58)

On July 8, 1977, the present action was filed by Highland against Stevenson and USF&G. Subsequently, Stevenson brought the State into the action as a third-party defendant and Highland amended its complaint to add Shell as an additional defendant.

Highland's claims in the action fell into five basic categories:

- 1) Its claims that the plans and specifications supplied by the State were defective in failing to reveal the existence of the unstable sub-grade conditions.
- 2) Its claims of unreasonable hindrance to its operations by Stevenson.
- 3) Its claims of unreasonable hindrance to its operations by Shell.
- 4) Its claims for payment for Stevenson's use of its equipment.
- 5) Its claims against Stevenson and USF&G for attorneys fees and costs pursuant to the Utah Public Work bonding statutes, §14-1-1, et.seq., UCA



(1953, as amended 1963). (See R. 162-179)

In alleging its claims, Highland did not set forth a separate and distinguishable amount claimed either under each claim or against each defendant, but merely prayed for a cumulative total covering all claims and all defendants. (R. 162-179)

This action was tried, without a jury, before the Honorable Allen B. Sorensen, commencing September 10, 1979, and continuing through September 13, 1979, and thereafter recommencing after continuance by the Court on November 13, 1979 and continuing to conclusion on November 15, 1979.

Prior to the commencement of the trial, it was stipulated that evidence with respect to attorneys fees need not be presented at trial, but that consideration by the Court of an award of attorneys fees would be deferred until after the Court's ruling on the merits of the case in chief. (R. 547-550; 1192) The remaining four of Highland's basic claims were tried. On Highland's claim of defective plans and specifications and for additional compensation due to the unstable sub-grade conditions, the Court ruled that the plans were not defective, that the physical evidence at the project site and the available soils reports placed Highland on notice of the unstable subgrade conditions prior to its subcontracting with Stevenson. The Court further ruled that Highland was not entitled to any additional compensation due to the unstable conditions. The Court further found that although Highland was not entitled to additional compensation, that the State had voluntarily kept records and paid Highland (through Stevenson) on a force account basis all amounts which Highland would have been entitled to receive had it been entitled to additional compensation as a result of such

conditions. (R. 570-579)

With respect to the claims of unreasonable hindrance and interference, the Court found that neither Highland or Stevenson had unreasonably hindered or interfered with Highland's operations. (R. 570-579)

With respect to Highland's claim for additional compensation for the alleged use of its equipment by Stevenson, the Court found that due to Highland's failure to present evidence on such claim, that Highland had failed in its burden of proof on that portion of its case. (R. 570-579)

Inasmuch as Highland was not the "prevailing party" under §14-1-8, UCA (1953, as amended 1963), Highland's claims for attorneys fees and costs were denied.

With respect to Stevenson's counterclaims, the Court ruled that Highland had breached the subcontract by failing to properly complete its work and found that Stevenson's back charges to Highland resulting from such breach of the subcontract were proper. The Court further found that Stevenson was the "prevailing party" within the meaning of §14-1-8 UCA (1953, as amended 1963), and that Stevenson was entitled to recover his attorneys fees and costs from Highland. The remaining three claims of Stevenson's counterclaim were denied by the Court. (R. 570-579)

In accordance with the stipulation of counsel at the commencement of trial, consideration of the claims for attorneys fees was deferred until after the entry of the Court's memorandum decision. By further stipulation of counsel, a hearing on the attorneys fees and costs claim was waived, with that issue being submitted to the Court on stipulated facts. (R. 547-550). Highland offered no evidence on the attorneys fees and costs issues contrary



to the evidence submitted by Stevenson by stipulation and the Court awarded fees and costs to Stevenson in the amount set forth in the stipulation. (R. 570-579, R. 599-600 and R. 602-605)

Subsequent to the Court's entry of its findings of fact and conclusions of law and its judgment, this appeal was filed. (R. 607-608)

### ARGUMENT

The points raised by the appellant in its brief all deal with factual, rather than legal issues. All of these factual issues were in dispute at the trial level and were ruled on by the trial court after hearing the conflicting evidence. Appellant's brief in effect amounts to no more than an attempt by the appellant to reargue the facts. While the arguments made by appellant in its brief may have been appropriate in its closing argument at trial, it is not appropriate for the appellant to ask this Court to reweigh the factual evidence on appeal. As this Court recently stated in its decision in the Terry's Sales, Inc., et al. v. Henry VanderVeur 2d, et al., 618 P.2d 29 (Utah 1980),

The contention plaintiff makes . . . in practical effect amounts to an argument that his version of what occurred is more credible than that of the defendant. The major obstacle to his successful urge of that position is the standard rule that the credibility of witnesses and of the evidence is for the trial court to determine.

Of all the rules of law expressed in the decisions of appellate courts, there is perhaps none so well established or as often repeated as is the following rule expressed in the Utah Supreme Court case of Casey v. Nelson Brothers Constn. Co., 24 Utah 2d 14, 465 P.2d 173 (1970):

The defendants attack upon the judgment is that the

evidence does not support the finding that it was guilty of the breach of the contract, nor the amount of damages awarded; and particularly so because the plaintiff did not keep the road grader available for use during the remainder of the contract. The answers to the defendant's contentions are found in the so-often repeated rule: That where there is a dispute in the evidence we assume that the trial court believed those aspects of the evidence, and drew the inferences which could fairly and reasonably be drawn therefrom, which tend to support the findings; and that upon our review of the record in that light, if there is a reasonable basis in the evidence to support them they will not be disturbed. Id. at page 174.

This same rule is repeated in Barrett v. Vickers, 24 Utah 2d 334, 471 P.2d 157 (1970),

The answer to appellants' attack on the findings and judgment as found in the traditional rules of review: That due to the trial court's prerogatives and advantaged position the presumptions favor his findings and judgment; that where there is dispute and disagreement in the evidence we assume that he believed those aspects of it and drew the inferences fairly to be derived therefrom which give them support; and if upon our survey of the evidence in that light, there is a reasonable basis to sustain them they will not be disturbed. Id. at page 159.

Literally scores of other Utah Supreme Court decisions reaffirm these well established principles. However, the principles are so well established that no useful purpose would be served in citing further cases.

Accordingly, the standard on appeal is not whether the trial court's findings on the factual questions were right or wrong or whether they were correct or in error, as the appellant contends, but merely whether they are supported by any substantial evidence. It is respectfully submitted that if there is evidence in the record upon which such findings could have been based, they stand and are not subject to attack on appeal.

POINT I. THE TRIAL COURT'S RULING THAT THE PLANS AND SPECIFICATIONS WERE NOT DEFECTIVE IS SUPPORTED BY THE EVIDENCE.

Both at the trial court and on this appeal Highland has claimed that the plans and specifications were defective in that they would not have placed a reasonable contractor on notice of the possible existence of unstable subgrade conditions. (R. 881-882)

This contention presented a factual issue which was ruled on by the court. After hearing extensive evidence, the court ruled that the plans were not defective. (R. 570-579) This ruling is clearly supported by substantial evidence.

Prior to submitting Highland's bids and prior to Highland's entering into a subcontract with Stevenson, Highland's President, Bryan Bergener, visited the project site five or six times. (R. 801) During his inspections of the project site, he observed a number of indications of swampy or wet conditions including marshgrass, cattails, alkali, surface water and seepage from the canal running along the roadway. (R. 806) A special provision of the general contract (which was incorporated by reference into the subcontract) provided in part:

The bidder is required to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions and contract forms before submitting a proposal. Furthermore, the materials report, soil survey, plans and profiles, and test data pertaining to the proposed work are available for the bidders inspection at the Materials Test Division, 757 West 200 South, Salt Lake City, Utah, or the district office. The submission of a bid shall be considered prima facie evidence that the bidder has made the required examination and is satisfied as to the conditions to be encountered in performing the work. . . (Plaintiff's Exhibit No. 6)

The Soil Survey Materials Report referred to in the special provi-

sion provided in the "Physical Conditions Along Project" section (found on page 1 in the report):

Soil Type and Range: Project soil range from very plastic A-(9) (In-site weathered shale) to non-plastic A-1-a silty, sandy gravel.

Drainage: Natural surface drainage varies from good to poor. Some water accumulates in marshy and saturated zones that occur where irrigation water seeps from irrigation ditches and canals. The main area in which saturation zones occur lies between station 850+00 and station 910+00. (Defendants' Exhibit No. 20 and Plaintiff's Exhibit No. 9)

During cross-examination, Bergener admitted that he knew that "plastic" soil material was the type of soil that retains water. (R. 1145-1146) In spite of the fact that the soil survey and material report was available to Highland and in spite of the requirement that it be examined before preparing a bid, Highland did not examine the report in preparing either of its bids or prior to entering into the subcontract with Stevenson. (R. 648-649; 841)

A map of the project attached to the soil survey report and received into evidence as exhibit 33 contained the notation, "Some seeping from canal to drainage ditch, marsh and saturated areas." This document also was not examined by Highland, although it was available. (R. 648-649; 841)

A number of witnesses testified that the physical evidence at the project site and/or the statements contained in the available soils and materials report should have placed a reasonable contractor on notice of the unstable subgrade conditions. (R. 717-723; 1067; 1481; 674-675; 880-882; 1059-1060) In fact, one of the contractors who reviewed the project in the course of preparation of his bid made the observation to the Project Engineer



that there would be water problems. (R. 683-684)

Furthermore, Highland prepared and executed the subcontract document after Bergener was fully aware of the unstable subgrade conditions and after most of the work on the soft spots had been done. (R. 1035)

In view of the foregoing evidence it is apparent that the trial court's finding that the plans and specifications placed Highland on reasonable notice of the unstable subgrade conditions is not only supported by substantial evidence in the record, but that it was clearly the proper ruling.

The Utah Supreme Court decision relied on by appellant, Thorn Construction Co., Inc. v. Utah Department of Transportation, 598 P.2d 375 (Utah 1979) has no application to the present case. In that case the trial court found that one of the engineers employed by the state on the project in question had "made a positive representation that the barrow was suitable for use on the project, on which plaintiff was entitled to rely." (Id. at 367) In that case the trial court ruled in favor of the plaintiff and the defendant appealed. On appeal the Utah Supreme Court found that the trial court's finding was supported by substantial evidence and it was affirmed.

In the present case no affirmative representations were made misleading appellant. On the contrary, the affirmative representations made contained the statements: "Some water accumulates in marshy and saturated zones and some seepage from canal drainage ditch, marsh and saturated areas."

In its memorandum decision that trial court correctly held that the standard set forth in L.A. Young Sons Const. Co. v. Tooele, 575 P.2d 1034 (Utah 1978) governs the instant case. In that case this Court held:

. . . one who has contracted to perform a particular job for a stated price, if performance is possible,

will not be excused from performance or entitled to extra compensation on account of encountering difficulties which have not been provided against in the contract. Id. at 1037.

In view of the foregoing, it is respectfully submitted that the trial court's finding that the plans and specifications were not defective is supported by the evidence and should be sustained.

POINT II. EVEN IF THE PLANS AND SPECIFICATIONS WERE DEFECTIVE, AS CLAIMED, APPELLANT WAS FULLY COMPENSATED FOR THE ADDITIONAL WORK RESULTING FROM THE SOFT SPOTS.

In its finding of fact number 8, the trial court held:

The Court finds that although Highland was not entitled to additional compensation for its efforts in dealing with the problems caused by the unstable subgrade and subsurface water conditions, the state, nevertheless, voluntarily and by its own initiation kept accurate records (pursuant to subsection 105.17) of the labor and equipment used by Highland in making the additional excavation and backfill required by reason of the unanticipated unstable subgrade and subsurface water conditions; and Highland (through Stevenson) was paid on a force account basis all amounts which it would have been entitled to receive had it been entitled to additional compensation as a result of such condition. (R. 575)

It is undisputed that the state, at its own volition, kept detailed records of the labor, time and equipment used in subexcavating and filling the soft spots. Highland's Grade Superintendant, Wayne Davies, worked closely with the State Inspector in keeping such records and conferred daily with the inspector and verified the figures. (R. 647-648; R. 1455-1457) The accuracy of the state's records with respect to the excavation of the soft spots has not been disputed.

Based on the time and equipment records kept with respect to the unstable subgrade conditions, an award of an additional compensation was made



to Highland for work on the soft spots pursuant to the provisions of the Standard Specifications For Road And Bridge Construction (1970 edition) (which were incorporated by reference into the subcontract). The compensation was consistent with the formula specified in Subsection 104.04 of the Standard Specifications (Defendant's Exhibit No. 26).

The approach used in computing the compensation due to Highland for the soft spots was not only consistent with the terms of the subcontract, but was also consistent with requests made by Highland in its own claim (see pages 16 through 21 of Plaintiff's Exhibit No. 58).

The amounts awarded on the soft spots claims were more than adequate to cover Highland's costs in dealing with the soft spots. Highland was paid for its equipment at the equipment rental rates set forth in the State Department of Highways equipment rental book which actually exceeded the amounts Highland was paying for equipment. (R. 1323-1324; 973-983; Exhibits 39 through 43) In actuality, Highland was overcompensated for its work on the soft spots, as it was not only paid equipment rental rates and labor charges, but was also paid again at unit prices for the roadway excavation material placed back into the soft spots. (R. 1509)

From the foregoing it is apparent that the evidence supports the trial court's finding that even if Highland was entitled to additional compensation for the unstable subgrade conditions, any amounts that it would have been entitled to were fully paid.

POINT III. THE TRIAL COURT'S RULING THAT STEVENSON DID NOT SUBJECT HIGHLAND TO UNREASONABLE DELAYS IS SUPPORTED BY THE EVIDENCE.

On page 21 of its brief, Highland contends that the evidence was uncontroverted that Stevenson assured Highland that Highland could conduct an operation "entirely free of delays or interference from other on-going work on the project." Appellant then makes reference to the self-serving statements of Highland's President in the record. Certainly, appellant must make such statement with "tongue and cheek" as that issue presented one of the major factual disputes at the trial. Although Stevenson did express a willingness to conduct his operations so that they did not unreasonably interfere with Highland's operations, he expressly and repeatedly denied making any guarantee or assurance to Highland that Highland's operation would be "entirely free from delays or interference from other on-going work on the project." In fact, some interference, inconvenience and delay was anticipated as a normal part of such a construction project. (R. 1237-1239; 646) In fact, it is undisputed that another contractor, John W. Lloyd, was willing to perform the same work for less than Highland agreed to perform it for and that Lloyd had asked for no assurance that there would be no hindrance or delay. (R. 1235, R. 936) Stevenson had no incentive to make such a guarantee.

Highland contends that a statement made in paragraph 3 of the subcontract constituted such a guarantee. The trial court's rejection of that contention can, however, be justified for any one of several different reasons.

First, the evidence at trial established that the subcontract was made orally on August 3 and that it was the oral agreement, not the written document (which was not executed until August 19, long after work had

commenced) that constituted the real agreement between the parties. (R. 1245) Second, the court expressly found, consistent with the generally accepted rules governing construction of contracts, that the sentence in question must be construed in light of the facts and circumstance known to the parties at the time of the contract and that it must be construed in conjunction with the other provisions of the contract. (R. 570-579) As part of its findings, the court noted other sections of the contract (§§105.06 and 105.07 of the Standard Specifications) which provide in relevant part:

It is expected that there will be a reasonable amount of inconvenience and delay by reason of contractors working within the limits of the same project . . .

It is understood and agreed that the contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions as shown on the plans, and that no additional compensation will be allowed for any delays, inconvenience, or damage sustained by him due to any interference from the said utility appurtenances or the operation of moving them.  
(R. 577)

As part of the stipulation of facts made by counsel at the commencement of trial, it was stipulated:

Highland knew at the time that it entered into the subcontract that it would be necessary for the work on certain of the utilities, structures, and items to be carried on while Highland was engaged in its earth moving operations. Highland further knew that the work on the utility items and structures would inevitably cause some inconvenience and interference with Highland's operations, and that it would not be possible for Stevenson to entirely eliminate such inconvenience and interference. (R. 646)

Furthermore, at the time that Highland executed the subcontract document, Highland was fully aware of the problems which Shell was incurring, and of the alleged "delays" which it is now complaining of. (R. 1035)



Third, Bergener admitted on cross-examination that in determining his anticipated costs on the project, he was not expecting an uninterrupted operation (R. 1016) and that, in fact, in preparing his bid on the work he expected and calculated in an inefficiency loss of either 27 or 17 percent. (R. 1025-1026)

Fourth, both in the stipulated facts (cited above) and through the testimonies of Stevenson and Bergener it was established that it would have been impossible for Stevenson to complete his work "in advance" of Highland's operations. (R. 997-998, R. 1240-1243, R. 1006-1007) In fact, even Bergener admitted that it was to Highland's advantage to have the work done behind its operation. (R. 1034)

Not only did the trial court reject the notion that Stevenson had given Highland a guarantee of no inconvenience or hindrance, but it also found, "The plaintiff's claimed delays were not caused by the actions or inactions of the defendants." (R. 574) This finding is amply supported in the evidence. Stevenson testified that Highland did not experience any unreasonable interference or delay or any inconvenience that should not have normally been anticipated. (R. 1250-1258; 1242) The full time inspector on the project, Karl Lund, testified that Stevenson's work did not interfere with Highland's operation. (R. 1465) The evidence further established that Stevenson and Shell did work weekends and overtime to complete their work expeditiously. (R. 1161; 1334-1336; 1439-1440; 1451-1452)

The contention made on page 23 of appellant's brief that, "The 120 CMP was not timely completed," is extremely curious, as on page 819 of the trial transcript (R. 1443) appellant's counsel, referring to the 120 CMP,

stated, "Your Honor, we would stipulate the pipe was done in a reasonable time." (R. 1441-1443)

Highland's claim of interference with its men and equipment was refuted by Stevenson's testimony and by Bergener's own admissions. Any use of Highland's men and equipment was done only by request, with Highland's consent and Highland was compensated for it. (R. 1189-1190; 1254-1256; Plaintiff's Exhibit 32)

The remaining claims of "hindrance and delay" were also refuted by substantial evidence. Through the cross-examination of Bergener it became apparent that the so-called "delays" experienced by Highland were not unreasonable and were not, in fact, delays at all. For example, Bergener, in describing the "delays" stated that if two scrapers, travelling different directions arrived at the same time at a point in the road that was narrowed while a pipe was being installed, one scraper would have to slow down or stop while the other passed. Bergener estimated that this would result in a "delay" of 5 to 10 seconds. (R. 1028-1029) The State Inspector testified that with only two scrapers working on the entire project such an occurrence would have been extremely rare, and that he did not recall ever seeing it happen. (R. 1451) Stevenson also testified that he did not recall seeing one scraper stop for another at a pipe. (R. 1253)

It is highly significant to note that Highland's contentions that Stevenson and Shell delayed its operations were based virtually exclusively on the testimony of Bryan Bergener who was rarely on the project. Karl Lund, the State Inspector who was required to be on the project full time, testified that he only saw Bergener on the project two or three times during the entire

two months of Highland's operation. (R. 1460) Stevenson, who also worked full time on the project, testified that he only saw Bergener four or five times during that entire period and that he did not stay very long when he did come. (R. 1319) Even Bergener admitted on cross-examination that he did not actually see the delays claimed by Highland stating, "I was never there during working hours watching them run over that particular spot." (R. 1028) It is certainly significant that the witnesses who were on the project full time all testified that Highland's operation was not delayed, while Bergener, who was not even on the project, claimed that the delays were substantial. It is also significant that Wayne Davies, Highland's foreman on the project, was not called by Highland to testify.

In view of this, it is not surprising that the trial court chose to believe the testimonies of the State Highway Department personnel and Stevenson and to discount the testimony of Bergener.

POINT IV: TRIAL COURT DID NOT ERROR IN FAILING TO FIND THAT SHELL FAILED TO COMPLETE THE RELOCATION OF ITS LINES WITHIN THE TIME PROMISED OR WITHIN A REASONABLE TIME.

Highland's claims for the alleged hindrance and delay resulting from Shell's operations in moving its pipeline are directed chiefly at Shell. In view of this, and in view of the fact that the evidence supporting the trial court's ruling is discussed extensively in the brief filed by Shell, an extensive discussion of this point here is unwarranted and will not be undertaken. However, Highland has claimed in its brief that Stevenson is liable for Shell's allegedly inadequate performance even if Shell is not. Consequently, a response by Stevenson to that claim is needed here.

The weakness of Highland's position on this issue is readily



apparent. Certainly if a finding by the trial court that Shell's performance was adequate and reasonable is sustainable as far as Shell is concerned, it is sustainable as to Stevenson. And, there is ample evidence in the record to sustain such a finding.

The detailed diaries kept by the state inspectors and the testimony of the inspectors confirms that Shell did, in fact, work at least twelve hours a day every day, including Saturdays and Sundays, until its work was completed. (R. 1160-1161) Mr. Cornwall, the State Inspector, specifically assigned to the Shell operation, testified that the work was completed as soon as was reasonably possible under the circumstances. (R. 1439-1441) Furthermore, most of the time that Shell did spend working was spent working out in the fields on either side of the right-of-way where it offered no hindrance whatsoever to Highland's equipment along the right-of-way. Shell's operation was only in the right-of-way three days (R. 1168) and even under Highland's version of the facts, it anticipated hindrance from Shell for four days. (Appellant's Brief, p. 26)

Furthermore, the moving of the Shell pipeline was not part of the contract on the project, but was the subject of a separate contract between Shell and the State. Stevenson had no contract with or authority over Shell. This fact was well known to Highland before it subcontracted with Stevenson. Stevenson never agreed to be responsible for the Shell operation and, in fact, the Shell operation was never even discussed between Stevenson and Highland at the time the subcontract was made. (R. 1237 to 1238)

POINT V: THE TRIAL COURT DID NOT ERROR IN FAILING TO APPLY THE "TOTAL COST" THEORY TO THE COMPUTATION OF HIGHLAND'S ALLEGED DAMAGES.

In Point IV of the Appellant's Brief, the appellant contends that the trial court erred in failing to apply the "total cost" theory to the computation of Highland's damages. This contention is wrong from two separate reasons.

SUBPOINT A: THE COURT'S RULING ON THE LIABILITY ISSUES RENDERED THE MEASURE OF DAMAGES ISSUE MOOT.

In its decision, the trial court found against Highland on all of its claims and issued a verdict of no cause of action on Highland's Complaint. The decision adverse to Highland on the liability issues rendered the decision as to whether Highland could properly use the "total cost" approach in measuring its damages moot. In fact, the trial court expressly so stated in its memorandum decision with the following statement:

In view of the foregoing, the Court need not reach the issue of measure of damages. (R. 527)

Accordingly, it cannot be said that the trial court erred in failing to rule on a moot issue.

SUBPOINT B: EVEN IF THE MEASURE OF DAMAGES ISSUE HAD BEEN REACHED, THE REJECTION OF THE "TOTAL COST" THEORY BY THE COURT WOULD HAVE BEEN PROPER.

In its brief Highland contends that the Utah Supreme Court in its decision in Thorn Construction Co. v. Utah Department of Transportation, 598 P.2d 365 (Utah, 1979), expressly adopted the "total cost" approach. An examination of that decision, however, clearly reveals that that is not the case. At least the "total cost" theory referred to by the Utah Supreme Court in the Thorn case is not the same as the "total cost" theory which Highland attempted

to use in this case. From the statements made by the Court in its decision it is evident that when it referred to the "total cost" theory, it was doing nothing more than referring to the "force account" theory and not to the approach used by Highland in the present action. (See page 370 of the Thorn decision.)

In Thorn, the Court did not hold that the formula for additional compensation set forth in the standard specifications could be totally ignored as Highland has attempted to do, but on the contrary, it expressly cited the Standard Specifications and expressed its approval of the "force account" formula set forth in them. The approach taken in the Thorn case is not inconsistent with the one taken by the project engineer in the instant case. Highland was compensated on a "force account" basis for its work on the unstable subgrade conditions pursuant to the force account formula set forth in the Standard Specifications. The Thorn case does not stand for the proposition, and nothing in it suggests, that Highland was entitled to completely disregard the terms of the subcontract, the provisions of the Standard Specifications, and traditional rules governing recovery of damages. Nor does the Thorn decision support Highland's contention that because it encountered difficulties in one aspect of the project, it was entitled to recover all of its costs, plus a fifteen percent profit on the entire project (regardless of its own errors and inefficiencies). This is evident from the following statement from the Thorn decision:

In its conclusions of law, the Court held plaintiff was entitled to compensation for extra expenses incurred in obtaining and transporting barrow from the Crandal pit, and in widening the turning area where the access road met the existing roadway. No mention is made of any compensation because of the under run alone, and it is

unclear whether any amount was awarded on that basis. However, plaintiff presented sufficient evidence to support the award based on its expenses associated with obtaining barrow from the Crandal pit, and with widening the turning area; and on that basis, we sustain the award of the Court. Id. at 370.

For the foregoing reasons and for the reasons set forth in Point VI hereafter, it is evident that the trial court could have and should have rejected Highland's purported application of the total cost theory in the instant case.

POINT VI: DUE TO ITS ATTEMPTED USE OF THE "TOTAL COST" THEORY, HIGHLAND FAILED TO ESTABLISH A PRIMA FACIE CASE. SUCH FAILURE PROVIDES AN ALTERNATIVE AND ADDITIONAL BASIS FOR THE TRIAL COURT'S DECISION.

It is generally held that a trial court's decision should be upheld on appeal if it was proper for any reason. Cole v. Kyle, 348 P.2d 960 (Colo. 1960); Wilkerson v. Stevenson, 16 Utah 2d 424, 403 P.2d 31 (1965); Thompson v. Jacobsen, 23 Utah 2d 359, 463 P.2d 801 (1970)

This rule provides an additional and alternative basis for the trial court's decision in the instant case to be sustained on appeal. At the conclusion of the plaintiff's case at the trial level, the defendants moved for the dismissal of the plaintiff's claims on the ground that plaintiff had failed to establish a prima facie case. (R. 478-504) Although the trial court chose to base its decision on other grounds, that ground could have served as the basis for the trial court's decision and certainly could be an appropriate basis for sustaining the trial court's decision on this appeal.

Due to its purported use of the "total cost" approach, Highland made no attempt to establish any causal connection between the alleged breaches and its purported damages. It is elementary that where a money



judgment is sought, whether based on breach of contract or on tort, the plaintiff has the burden of proving, as part of its prima facie case, the essential elements of liability, causation and damages. The failure of the plaintiff to establish any of the essential elements is fatal to its case.

In the instant case, Highland not only failed to establish liability, but also clearly failed to establish causation and damages.

Although Highland attempted to establish some breaches on the part of the defendants, it made no attempt to demonstrate a causal link between the specific breaches alleged and any specific amount of damages. Instead, it simply set forth numerous alleged breaches by the various defendants, and then in turn, asked for a total overall damage figure. No effort was made to establish the essential element of causation and tie the specific alleged breaches to any specific amount of damage.

Even the United States Court of Claims, which has a history of being more liberal than most state courts in allowing recovery on construction contracts, has specifically rejected this approach in its decisions. For example, in Wunderlich Contracting Company v. United States, 351 F.2d 956 (Ct.Cl., 1965), the court stated:

Assuming arguendo, that a cause of action in breach of warranty could have been established, plaintiffs have failed, in any event, to prove damages. They have offered evidence to show that the actual cost of completing the project greatly exceeded pre-bid estimates and resulted in a significant net loss on the contract. They have not, however, established the approximate extent to which any of this loss can be said to have been attributable to disruptions in operations caused by defects in the plans and specifications or to tardiness in ordering changes. Id. at 964.

In the Wunderlich decision, the court went on to sustain the trier

of fact's denial of the contractor's claim and expressly rejected the "total cost" approach.

In its opinion in Commerce International Company v. United States, 338 F.2d 81 (Ct.Cl., 1964), the court expressly noted that the plaintiff had failed to establish the essential element of causation. In Point 2 of its opinion, the court stated:

2. Causation. Similarly, plaintiff has not persuaded us that the commissioner was wrong in his alternative conclusion that any undue delays on defendant's part (with respect to the parts) have not been shown to have interfered with production. Plaintiff must admit that, no matter how unreasonable the government's delay, there can be no recovery without proof that delay caused material damage. (Citations omitted)

\* \* \*

The primary lack is plaintiff's complete failure to link its accountants' general survey of the amounts of time taken by the government (in the requisitioning process) with the course of the plaintiff's operations. We are reminded in general terms that for want of a nail a kingdom could be lost, but there is no evidence or attempt to show, even by illustration, that the delay on this-or-that held up work on so many tanks for such-and-such an approximate period . . . . There is no effort to differentiate, even by general classes, between a reasonable and unreasonable government delay, and to show the specific effect of the unreasonable delays. Other important causes of delay (such as dilatory subcontractors) are ignored. The whole subject is left to the general inference that long delays with respect to some parts must have caused damage . . . . Plaintiff has contended itself with broad generalities when specificity is essential. (Emphasis added) Id. at 89.

In the instant case, Highland also resorted to broad generalities, with no attempt at specificity. In doing so, Highland conveniently ignored numerous other factors which must have contributed to its alleged losses on the project. For example, even though it counted on an inefficiency factor of

17 to 27 percent in its bid (R. 1025-1026), it made no allowance for inefficiency in its claim for damages. It also ignored other causes of inefficiency evident from the evidence adduced at trial such as: its admitted errors in bidding the job (R. 1108); its inexperienced and uncooperative equipment operators (R. 1078 to 1079); its inexperienced grade foreman who was unable to accurately make some of the cuts on the project (R. 695); the failure of Bergener, the project foreman to even be present on the job most of the time (R. 1319; 1460); weather (Defendant's Exhibit 48); a concrete shortage (R. 1449); a scraper which consistently broke down (R. 1435-1454); Highland's removing its equipment and personnel from the project for a period of three days to crush gravel for a project which it did not yet even have under contract (R. 1317 to 1318); its having but one cat on the project to perform the operation of both loading scrapers and cutting slopes (R. 1319 to 1321); etc. (R. 1106)

Highland attempted to gloss over all of these factors by the self-serving statement of Bryan Bergener (who was only occasionally on the project) that none of Highland's inefficiencies were of its own making, and that all of them resulted from the wrongful conduct of the defendants.

A review of the case law dealing with the "total cost" approach reveals two leading cases which are representative of a large body of case law rejecting the approach. The leading cases are Huber, Hunt & Nichols, Inc. v. Moore, 67 Cal.App. 3d 278, 136 Cal. Rptr. 603 (1977), and Boyajin v. Unitek States, 423 F.2d 1231 (Ct.Cl. 1970). (For other cases rejecting the "total costs" approach see cases cited in the appendix to this brief.)

In the Huber case, the contractor for the Fresno Convention Center

sued the architect for negligently preparing plans and specifications and for negligent and dilatory approval of change orders and shop drawings and overall supervision of the work. The contractor contended that the acts of the architect caused overall delay of the project resulting in damages to the contractor in the amount of \$732,521.00. As in the instant case, in Huber the plaintiff made no attempt to tie specific amounts to specific alleged breaches, but simply sought a "blanket recovery" of the difference between its overall costs on the project and the amounts that it had been paid pursuant to the contract. As in the instant case, the contractor's manager was permitted to testify from a summary of the overall costs and attributed "every cost overrun to the fault of the defendants without discrimination as to other possible causes." (Id. at 296) The amounts claimed "included extra costs within the total cost without discrimination or segregation and without explanation as to causation." (Id. at Footnote 18.)

The trial court refused to allow the plaintiff to use the total cost approach and the case was appealed. On appeal, the California Appellant Court sustained the trial court's rejection of the total cost approach and stated:

Contractor claims that it was error for the trial court to refuse to allow it to proceed under the 'total cost' principle in proving its damage. This contention is dependent upon the admissibility of plaintiff's Exhibit 3 which we have already discussed.

\* \* \*

Under the 'total cost' method of proof contractor claims that it was entitled to collect the \$732,521.00 difference between its initial bid estimate and the total cost of the project as shown by Appendix A attached hereto. The trial court correctly applied principles enunciated in Boyajian v. United States,



supra. We think the following statement by the United States Court of Claims in Boyajian, supra, is particularly relevant to the basic problems involved in the case at bar:

Nor does the mere fact that plaintiff's books and records do not, in segregated form, show the amounts of the increased costs attributable to the breaches give it automatic license to use the 'total cost' method. Contractors rarely keep their books in such fashion. Such failure, however, normally does not prevent the submission of reasonably satisfactory proof of increased costs incurred during certain contract period or flowing from certain events based, for instance, on acceptable cost allocation principles or on expert testimony . . . . (423 F.2d at 1242)

Contractor's position here and in the court below seems to be simply that although admittedly its computer operated accounting system did not distinguish in any manner between ordinary costs and alleged increased costs proximately caused by Architect's alleged negligence, nevertheless since such computer accounting system was kept in accordance with standard business practices, Contractor was entitled to collect its entire loss as shown by such computer accounting system (plaintiff's Exhibit 3) without being required to prove the normal elements of damage proximately caused by negligence. In other words, Contractor's business accounting methods should be allowed to control principles of law rather than principles of law controlling Contractor's business accounting methods. Id. at 621 and 622.

In its decision in Huber, the court went on to express some of the sound policy reasons underlying its rejection of the total cost method:

If we were to accept Contractor's contention as the law of this state, the result would for all practical purposes, nullify all laws regarding competitive bidding on public contracts. Under such a concept, contractors could submit any bid necessary to obtain the job knowing that the public agency (or its architects) would be required to pay whatever costs contractor incurred on the project if contractor could discover some error or omission however irrelevant in the plans and specifications. Id. at 622-23.

In the Boyajian case, the plaintiff claimed a number of different breaches of a contract with the United States Government. In its damage evidence, the plaintiff made no attempt to tie specific amount of damages to specific breaches, but attempted to use the total cost approach. At the conclusion of the plaintiff's evidence, its claims were dismissed for failure to prove damages and the matter was appealed. In sustaining the dismissal on appeal, the Court of Claims stated:

Defendant's defense based on plaintiff's failure to prove damages is, on this record, required to be sustained. The so-called "total cost" method upon which plaintiff relies is here unacceptable. Accordingly, there is no need to make any determination on the merits of these three causes, for even assuming they are valid and that defendant's conduct amounted to the claimed breaches, plaintiff's failure to make any satisfactory showing of the amount of damages flowing from such breaches would require the dismissal of such cases anyway.

Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach. 'The costs must be tied in to fault on defendant's part.' River Construction Corp. v. United States, 149 Ct.Cl. 254, 270 (1962). As the court held in J.D. Hedin Construction Company v. United States, 347 F.2d 235, 171 Cl.Cl. 70, 108 (1965):

As in all breach of contract cases, the proper measure of damages for defendant's breaches is the amount of plaintiff's extra costs directly attributable to said breaches. Saddler v. United States, supra. (287 F.2d 411, 152 Ct.Cl. 557 (1961))

Defendant properly contends that the excess costs claimed must be tied in to defendant's breaches.

\* \* \*

However, contrary to these basic causal-connection damage principles, no attempt is here made to relate any specific amount of increased costs to any particular alleged breach. Id. at 1235.

In its opinion, the Court made an extensive analysis of the law in this area and reviewed the very few cases which had allowed some form of a total costs approach to be used. In doing so, the Court pointed out that the approach had only been allowed in "extreme" cases, that the total costs were "only a starting point" and that in the rare case where the total cost approach had been allowed it had been done "under proper safeguards."

In the Boyajian decision, the Court went on to point out that the total costs approach had never been allowed in a case involving multiple claims:

None of such cases were comparable to the instant one, in which several breaches are alleged but consolidated for damages purposes into a claimed, unadjusted 'total cost' recovery. The above review indicates that the court has never allowed such a recovery in such a case. On the other hand, it has consistently insisted on a showing that 'the excess costs claimed must be tied to the defendant's breaches. (Citation omitted) Id. at 1242.

The Court concluded its rejection of the total cost approach by stating:

However, where the record is blank with respect to any such alternative evidence, the court has been obliged to dismiss the claim for failure of damage proof, regardless of the merits. (Citations omitted) The instant case falls in the latter category. Accordingly, plaintiff's three causes of action based upon the Modulator Contract must be dismissed. Id. at 1244.

The facts of the instant case compel rejection of the total cost method even more strongly than did the facts in the Boyajian case. The Boyajian case did involve multiple claims lumped into one for damage purposes. However, all of such claims were directed at one defendant, the United States Government. The instant case not only involves multiple claims, but multiple



defendants. In such a case, the total cost method is completely unworkable and would place a totally unreasonable burden both on the defendants (in attempting to refute the damage evidence) and on the court (in attempting to assess the damages, if any).

Based on the foregoing, it is respectfully submitted that the plaintiff's attempted use of the total cost method must be rejected and that the trial court could have and should have dismissed Highland's claims for failure to establish the essential elements of causation and damages.

POINT VII: THE TRIAL COURT'S AWARD OF ATTORNEYS FEES AND COSTS TO STEVENSON IS SUPPORTED BY THE EVIDENCE.

At the commencement of the trial, it was stipulated that the contract in question was a contract for the construction, alteration or repair of a public work and improvement of the State of Utah. (R. 639 to 640) These facts make the contract in question a "public contract" and bring it under the provisions of Title 14, Chapter 1 of the Utah Code, which deals with public contracts. Section 8 of Chapter 1, Title 14, of the Utah Code provides:

In any action brought upon either of the bonds provided herein . . . the prevailing party, upon each separate cause of action, shall recover a reasonable attorney's fee to be taxed as costs.

In its pleadings and at trial, Highland did not dispute that the prevailing party was entitled to recover its attorneys fees and, in fact, Highland sought recovery of attorneys fees under the foregoing section in all of its pleadings. From its brief, it is apparent that Highland does not dispute that Section 14-1-8 is applicable to the instant case and that the prevailing party is entitled to its attorneys fees. (See p. 31-32 of Appellant's Brief)



In their counterclaim against Highland, both defendants Stevenson and USF&G prayed for recovery of attorneys fees under Section 14-1-8. (R. 59)

In addition, the subcontract document, which was prepared by Highland, provided in paragraph 6(e):

In the event Sub-Contractor defaults in the performance of its obligations hereunder, Contractor shall be entitled to recover from Sub-Contractor all costs incurred in connection with the enforcement of Contractor's rights hereunder, including court costs and reasonable attorney's fees, whether incurred with or without suit or before or after judgment.

In its findings of fact and conclusions of law (R. 570-580), the trial court found that Highland had breached the subcontract and was entitled in accordance with the foregoing provision, to recover its attorney's fees and other costs. The court further found that Stevenson was a "prevailing party" within the meaning of Section 14-1-8 and was entitled to recover his attorney's fees and costs.

At trial, the parties stipulated that "evidence with respect to attorneys fees need not be presented at trial, but that consideration by the court of an award of attorneys fees would be deferred until after the court's ruling on the merits of the case in chief." (R. 547-548; 1192) In accordance, with the aforesaid agreement, a hearing was scheduled for April 4, 1980, for the consideration of the claims of defendants, Lamar D. Stevenson and USF&G for attorneys fees and for the presentation of evidence relating to such claims. (R. 548) Subsequent to the scheduling of said hearing, Highland expressed a willingness to waive the hearing and to allow the claims for attorneys fees to be considered by the court pursuant to stipulation (R. 548) Accordingly, all of the parties, through their attorneys of record

entered into a written stipulation wherein it was agreed that the hearing on the attorneys fees question was waived and that Highland waived both its right to present evidence on the issue and its right to cross-examine the opposing witnesses. It was further stipulated that if a hearing were held that Stevenson and his attorney would testify that Stevenson had actually and necessarily incurred attorneys fees and costs in this action totalling \$19,474.00 and that such fees were reasonable. The written stipulation further provided:

The parties stipulate that the aforesaid facts and testimonies of Roger P. Christensen and Lamar D. Stevenson may be considered by the court as if presented by sworn testimony at a formal evidenciary hearing; and the parties waive their right to an evidenciary hearing on the attorney's fees claims and waive their right to cross-examine the witnesses at such hearing.

The attorney's fees claims are hereby submitted to the court for ruling on the basis of this stipulation and the record in this case.

Highland presented no countering evidence and neither expressed nor offered any opposition to the award of attorneys fees and costs to Stevenson in the amount specified. Accordingly, the court subsequently entered its findings of fact and conclusions of law and judgments in favor of Stevenson in the amounts set forth in the written stipulation. (R. 547-550; R. 570-580; R. 599-600; R. 602-605)

Highland, which neither offered nor expressed any opposition to the award of attorneys fees by the trial court, now raises that issue for the first time on appeal. It is fundamental law that issues and theories which were not raised in the lower court, will not be entertained on appeal. Park City v. Ensign Company, 586 P.2d 446 (Utah 1978); Edger v. Wagner, 572 P.2d

405 (Utah 1977); Simpson v. General Motors, 24 Utah 2d 301, 470 P.2d 39 (1970); and Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971).

Furthermore, Highland's contention that the alleged delay in paying sums due it under the subcontract somehow should affect the attorneys fee award is without merit. The alleged delay of Stevenson in making payments to Highland was one of the factual issues in dispute at trial. After hearing the evidence, the trial court found that Highland had failed to sustain its burden on that issue and the claim was rejected. (R. 570-580)

Moreover, by failing to file a motion objecting to the award of costs as required by Rule 54(d)(2) U.R.C.P., Highland waived any right it may have had to raise that issue on this appeal. Suniland Corp. v. Radcliffe, 570 P.2d 847 (Utah 1978)

Accordingly, for the reason that Highland is precluded from raising this issue for the first time on appeal, and for the reason that the facts upon which Highland's arguments are based were rejected by the finder of fact and for the reason that the trial court's award of attorneys fees is supported by facts which were not only undisputed, but stipulated to by Highland; it is respectfully submitted that the trial court's award of attorneys fees should be sustained.

### CONCLUSION

For the foregoing reasons, respondents respectfully submit that the trial court's findings and judgments were proper and amply supported by the evidence in all respects and should be sustained.

It is further submitted that Stevenson should be found to be the "prevailing party" within the meaning of Section 14-1-8, U.C.A. (1953) on this

appeal and that judgment should be awarded by this Court, pursuant to said statute and pursuant to Paragraph 6(e) of the subcontract document, in favor of respondent Stevenson and against appellant for the attorneys fees and costs incurred by respondent in connection with of this appeal.

DATED this 29th day of January, 1981.

CHRISTENSEN, JENSEN & POWELL

By 

Roger P. Christensen  
Attorneys for respondent  
Stevenson and USF&G

CERTIFICATE OF SERVICE

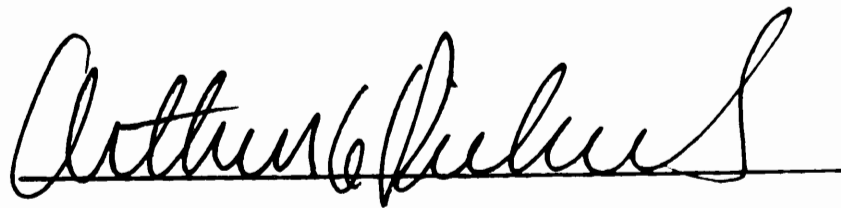
This is to certify that on the 29th day of January, 1981, a true and correct copy of the foregoing Respondent's Brief was mailed, postage pre-paid to the following:

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A handwritten signature in black ink, appearing to read "Arthur G. Richards", written over a horizontal line.

## APPENDIX

Seeger v. United States, 199 Ct.Cl. 766, 469 F.2d 292 (1972); Boyajian v. United States, 191 Ct.Cl. 233, 423 F.2d 1231 (1970); Urban Plumbing & Heating Co. v. United States, 187 Ct.Cl. 15, 408 F.2d 382 (1969), cert. denied 398 U.S. 958 (1970); Sternberger v. United States, 185 Ct.Cl. 528, 401 F.2d 1012 (1968); Turnbull, Inc. v. United States, 180 Ct.Cl. 1010, 389 F.2d 1007 (1967); Wunderlich Contracting Co. v. United States, 173 Ct.Cl. 180, 351 F.2d 956 (1965); Commerce International Co. v. United States, 167 Ct.Cl. 529, 338 F.2d 81 (1964); Laburnum Construction Corp. v. United States, 163 Ct.Cl. 339, 325 F.2d 451 (1963); Lichter v. Mellon-Stuart Co., 305 F.2d 216 (3d Cir. 1962); Lilley-Ames Co., Inc. v. United States, 164 Ct.Cl. 544, 293 F.2d 630 (1961); F.H. McGraw and Co. v. United States, 131 Ct.Cl. 501, 130 F.Supp. 394 (1955); George J. Grant Const. Co. v. United States, 124 Ct.Cl. 202, 109 F.Supp. 245 (1953); Kremer v. United States, 116 Ct.Cl. 358, 88 F.Supp. 740 (1950); J.J. Kelly Co. v. United States, 107 Ct.Cl. 594, 69 F.Supp. 117 (1947); River Const. Corp. v. United States, 159 Ct.Cl. 254 (1962); Christensen Const. Co. v. United States, 72 Ct.Cl. 500 (1931).