

OCT 29 2012

STATE OF NORTH DAKOTA	)	IN DISTRICT COURT
	: ss	
COUNTY OF BURLEIGH	)	SOUTH CENTRAL JUDICIAL DISTRICT
SMITH CONTRACTING, INC.	)	File No. 08-2011-CV01887 _____
)	
Plaintiff,)	
v.)	
	)	PLAINTIFF'S NOTICE OF MOTION
NORTH DAKOTA PUBLIC SERVICE	)	FOR PARTIAL SUMMARY JUDGMENT
COMMISSION ABANDONED MINE	)	ON LIABILITY AND NOTICE OF
LANDS DIVISION	)	HEARING
)	
Defendant.)	
)	

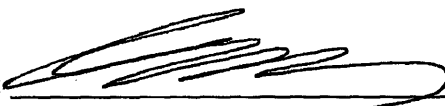
TO: ALL PARTIES OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Smith Contracting, Inc., has submitted the attached Plaintiff's Motion for Partial Summary Judgment on Liability pursuant to Rule 56 of the North Dakota rules of civil Procedure and Rule 3.2 of the North Dakota Rules of Court.

PLEASE TAKE FURTHER NOTICE that the parties have stipulated and agreed that the hearing on Plaintiff's motion may be held at the same and place as the hearing scheduled for Defendant's motion before the Honorable Donald Jorgensen in the Morton County Courthouse in the City of Mandan, North Dakota at 10:30 a.m. on Thursday, December 13, 2012, or as soon thereafter as counsel can be heard.

Dated this 25 day of October, 2012.

SCHMIDT, SCHROYER, MORENO, LEE & BACHUND, P.C.

By: 

Ronald G. Schmidt - N.D. Bar I.D. #02689
832 St. Joseph Street - P. O. Box 860
Rapid City, SD 57709-0860
Telephone: (605) 341-0112
(Attorneys for Plaintiff Smith Contracting, Inc.)


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COUNTY OF BURLEIGH)	SOUTH CENTRAL JUDICIAL DISTRICT
SMITH CONTRACTING, INC.)	File No. 08-2011-CV01887 _____
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v.)	
)	PLAINTIFF'S MOTION FOR PARTIAL
NORTH DAKOTA PUBLIC SERVICE)	SUMMARY JUDGMENT ON LIABILITY
COMMISSION ABANDONED MINE)	
LANDS DIVISION)	
)	
Defendant.)	
)	

Purautn to Rule 56 of the North Dakota Rules of Civil Procedure and Rule 3.2 of the North Dakota Rules of Court, Plaintiff Smith Contracting, Inc. hereby makes this motion for partial summary judgment on liability. This motion is supported by the attached Brief, and all of the materials thus far contained in the record, including but not limited to those placed in the record by the Affidavit of Attorney Mitchell D. Armstrong dated September 14, 2012 and filed herein in conjunction with Defendant's Motion for Summary Judgment.

Dated this 25 day of October, 2012.

SCHMIDT, SCHROYER, MORENO, LEE & BACHUND, P.C.

By: 
 Ronald G. Schmidt - N.D. Bar I.D. #02689
 832 St. Joseph Street
 P. O. Box 860
 Rapid City, SD 57709-0860
 Telephone: (605) 341-0112
 (Attorneys for Plaintiff Smith Contracting, Inc.)

OCT 29 2012

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF BURLEIGH	)	SOUTH CENTRAL JUDICIAL DISTRICT
 SMITH CONTRACTING, INC.	)	File No. 08-2011-CV01887
)	
Plaintiff,)	
v.	)	PLAINTIFF SMITH CONTRACTING,
	)	INC.'S BRIEF IN SUPPORT OF
NORTH DAKOTA PUBLIC SERVICE	)	PARTIAL SUMMARY JUDGMENT ON
COMMISSION ABANDONED MINE	)	LIABILITY, AND IN OPPOSITION TO
LANDS DIVISION	)	DEFENDANT PSC'S MOTION FOR
	)	SUMMARY JUDGMENT
Defendant.)	
)	

INTRODUCTORY COMMENTS

The North Dakota Public Service Commission Abandoned Mine Lands Division (PSC) filed its Motion and Brief for summary judgment on September 14, 2012. This Brief is filed in opposition to that Motion.

Plaintiff Smith Contracting, Inc. (Smith) is contemporaneously filing its Motion for Partial Summary Judgment on Liability. This Brief is in support of that Motion.

Both Motions are scheduled for hearing at the Morton County Courthouse in Mandan, North Dakota at 10:30 a.m., Thursday, December 13, 2012, or as soon thereafter as counsel may be heard.

UNDISPUTED MATERIAL FACTS

1. Statement of the Case

This action involves a dispute arising out of an abandoned strip mine reclamation project near Velva, North Dakota. The project is referred to as the 2010 Buechler/Velva AML Project (Project). The solicitation and Invitation for Bids (IFB) was under seal and dated February 23,

2010. The public bid opening was held at 11 a.m., cdt, April 19, 2010, in the PSC hearing room, 12th floor, State Capitol, Bismark, North Dakota. There was only approximately two months between the issuance of the IFB and the bid opening. Prospective bidders could draw the IFB at anytime during that period.

The IFB contained Special Provision 10 providing for a pre-bid, on-site conference scheduled for April 7, 2010, to afford an opportunity to prospective bidders to receive **clarification** related to the solicitation. (IFB - Barron Deposition Exhibit 3.) This pre-bid, on-site conference was held just 12 days before bids were due. Smith's President, David Smith, attended that conference. (David Smith Deposition 9:11-12.) Smith's Project Manager, Lee Barron prepared the bid in consultation with David Smith. (Barron Deposition 16:23-25; 17:1-9.)

The bid tabulation for the April 19, 2010 bid letting discloses Smith was the low bidder. (Dodd Deposition Exhibit 60.) Smith bid the "**dirt work**" for 47¢ per cubic yd. (Ibid.) On April 28, 2010 the PSC notified Smith it was awarded the contract. Contract No. AM-588-10, containing Special Provisions was entered into by the parties. (Knell Deposition Exhibit 35.)

The Contract at p.1 expressly states a start date of May 10, 2010 **and an end date of June 30, 2011**. (Ibid.) The Contract at p. 11 incorporates the Standard Specifications for AML Reclamation Projects (February 2000), and the 2010 Buechler/Velva AML Project Invitation for Bids (February 2010) (IFB) as part of the Contract. (Ibid.) The IFB at p.12, ¶ 6 states that the Contract issued as a result of that solicitation will be for the **period from approximately May 17, 2010 to June 30, 2011**. (IFB - Barron Deposition Exhibit 3.)

The IFB at p. 27 in §200, Scope of Work states in part:

“ * * * The Contractor shall be **capable** of completing this Project within One Hundred Fifty (150) consecutive calendar days between approximately May 17, 2010 and October 13, 2010. * * * ” (Emphasis added.)

This conflicts with the Contract completion date of June 30, 2011. The Standard Specifications for AML Reclamation Projects (February 2000) are boiler plate and used on all such projects. (Knell Deposition 23:13-17.) (The Standard Specifications appear in the record as Barron Deposition Exhibit 1.)

Spec §109.2 states that the “Notice to Proceed” will be issued within 30 days after contract execution. The Spec states that the Notice will stipulate a date, not to exceed 10 days from the date of issuance on which it is expected the Contractor will begin the construction and from which date contract time will be charged. Spec §109.3 provides that the Contractor shall submit his “**progress schedule**” for the Engineer’s approval within 10 days after the effective date of the “Notice to Proceed”.

Spec §109.6 concerns the determination of contract time. That section states in part as follows:

“ * * * When the proposal shows an approximate completion date at a maximum number of working days, **the Contractor shall begin the work on or before the starting date as shown on the Progress Schedule.** * * * **Time will be counted from the starting date shown on the Project Schedule or,** if the Contractor commences work before this starting date, time will be counted from the date the Contractor commences work. The time shall be counted without interruption until the Contract has been completed, except as provided. * * * ” (Emphasis added.)

There are three differing and conflicting dates concerning the commencement and completion of the work. Specification §106.4 governs the coordination of Plans, Specifications, and Special Provisions. It states the Specifications, the Plans, Special Provisions, and all supplementary documents are essential though occurring in all documents and are intended to be

complimentary. It then specifies that in case of discrepancy Plans will govern over Standard Specifications; and **Special Provisions will govern over Standard Specifications**. The Contract Special Provision stating a start date of May 10, 2010 and an end date of June 30, 2011 must prevail. As will be explained this goes to the heart of the termination dispute between the parties.

The Contract No. AM-588-10 also contains a Special Provision governing disputes. This Special Provision would override anything in the Standard Specifications and reads as follows:

“DISPUTES. The Contractor agrees to attempt to resolve disputes arising from this Contract by informal administrative process and **negotiations in lieu of litigation**. Continued performance by the Contractor **during disputes is assured**.

Any disputes concerning a question of fact arising under this Contract which is not settled by the informal means shall be decided by the authorized representative of the Commission who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to the Contractor.

The Contractor shall be afforded an opportunity to be heard and to offer evidence in support of an appeal. Pending final decision of a dispute, the Contractor shall proceed diligently with the performance of the Contract and in accordance with the decision of the Commission.

The State does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. **The parties have the right to enforce their rights and remedies in judicial proceedings**. The State does not waive any right to a jury trial.” (Emphasis added.)

The Contract at p. 4 states that it is governed by and construed in accordance with the laws of the state of North Dakota, and any action to enforce the Contract must be brought in the District Court of Burleigh County, North Dakota.

2. Defective Specification

Spec §105.2d reads as follows:

“ If any change under this title clause causes an increase or decrease in the contractor’s cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly; provided, however, that except for claims based on defective specifications, no claim for any change under ¶b above shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as therein required; and provided further that in the case of defective specifications for which the commission is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications. (Emphasis added.)

Specification §103.5 covers soil borings for design purposes and reads in part as follows:

“* * * Boring logs and other records of subsurface investigations may be available for inspection by bidders. It is understood that such information was obtained and is intended for design and estimating purposes only. It is made available to bidders that they may have access to identical subsurface information available to the engineer, and is not intended as a substitute for personal investigation, interpretations and judgment of the bidders.” (Emphasis added.)

Specification §103.2 states the contents of Bid Forms. The IFB at p. 48 is the Bid Form furnished for this Project. (Exhibit A hereto.) Line item 4 is for “**dirt work**” with an estimated quantity of 1,850,000 cubic yds and requiring the bidder to insert the price per cubic yd and total of the bid for that item.

Specification §103.2 reads in part as follows:

“ 103.2. Contents of Bid Forms. Upon request, the owner will furnish the prospective bidder with a Bid Form. This form will state the location and description of the contemplated construction and will show the approximate estimate of the various quantities and kinds of work to be performed or materials to be furnished, and will have a schedule of items for which unit bid prices are invited. * * * .” (Emphasis added.)

Mark Knell became the Abandoned Mine Land Division Design Engineer in 1985.

(Knell 6:23-25; 7:1-4.) As Design Engineer he puts together design plans to reclaim old

hazardous coal mines. He designs and prepares the Invitation to Bid package for the various projects. He also designs and prepares the Plans and Specifications for the projects. (Id. 7:6-21.) He acts as "Project Engineer" on the projects he designs. (Id. 7:24-25; 8:1-10.)

Knell has a degree in Civil Engineering from NDSU. (Id. 6:9-13.) He signed and sealed the Plans and his seal confirms he is a licensed professional engineer in North Dakota with Registration No. 2927. (Id. 11:13-25; 12:1-9.) He has been a registered engineer since 1985, and knows the significance of placing his engineer's registration seal on a set of Plans. (Ibid.) He personally prepared all of the Plan Sheets. (Id. 12:15-21.) He understands when he seals an engineering document with his professional engineering seal that indicates he is complying with engineering standards. (13:1-7.)

Knell testified that there is nothing in the Plan Sheets or Plan documents which would indicate the type of material to be handled on this Project. (Id. 12:22-25; 13:1-7.)

Knell further admitted he signed and sealed the Invitation for Bids (IFB) and personally prepared the Invitation for Bids packet that went out to prospective bidders on this Project. (Id. 13:8-14.)

Knell reaffirms that the Plan Sheets would not tell a prospective bidder what type of material is on the Project other than the dimensions. (Id. 22:8-16.)

As mentioned, the Contract incorporated the Standard Specifications for AML Reclamation Projects (February 2000) as a Contract document. Knell agreed that the Standard Specifications are boilerplate specs used on every project. (Id. 23:13-17.) He agreed there is nothing in the Standard Specifications specific to this particular Project other than in general fashion. (Id. 23:18-21.) He did not modify the Standard Specifications in anyway specifically

for this Project. (Id. 23:22-25.)

Knell testified there is nothing in the Standard Specifications that he uses for every project that would define or tell a prospective bidder what specific types of materials that would be found on this project. (Id. 25:3-13.)

Knell confirms that the Forward of the IFB bears his signature, an issue date of February 23, 2010 and his seal as a professional registered engineer. (Id. 25:19-24.) He testifies his signature and seal would inform a prospective bidder that the proposal was designed and prepared by him as a professional engineer. (Id. 25:25; 26:1-3.) He did not sign or seal the Standard Specifications. (Id. 26:4-7.)

When asked what he did specifically relative to the soils on this Project prior to finalizing the design package and submitting it to prospective bidders, he testified he **visually** looked at the spoil piles and high walls and looked at the soil **but did not do any borings**. (Id. 26:14-25; 27:1-7.) He did not have any geotechnical engineer do any work at all to assist in determining the type or nature or classification of the soils within the spoil piles. (Ibid.) He did not do any backhoe testing to determine, as a civil engineer, what types of materials might be contained in the spoil piles. (Ibid.)

Knell admitted he did not do any testing of the soils prior to finalizing his design and submitting the Invitation to Bidders. (Id. 27:13-16.)

Knell breached the contractual obligation contained in Specification §103.5 requiring boring logs and other records of subsurface investigations which are required to be obtained for design purposes.

The IFB at p. 1 contains an Index of Contents. Part II is entitled Specific Provisions -

Dirt Work. The section of the IFB covering “**dirt work**” is separately set forth in the subsection “D. Dirt Work” at pp. 30 and 31. The headings and body of this section speak of “**dirt work**”.

Subsection D.1. sets forth the scope of the work. It says this item of work shall consist of the excavation of the spoil piles and high wall areas and the backfilling of the high walls and filling of the pits shown on Plan Sheets 2 of 7 through 7 of 7 and as described herein.

AML Division Director, Jim Deutsch, testified that the reference to the material as “mine spoil” does not tell you what the soil type is within those spoil piles. (Deutsch 33:19-25.) Deutsch agreed that there was no definition of the word “**dirt**” anywhere in the Contract documents. (33:15-18.)

The body of the IFB Special Provision covering “**dirt work**” sets forth specific provisions in §D.2. of a total volume of 1,850,000 cubic yds. and the method and time of payment for the dirt work line item. It provides that the production figures shall include equipment description, equipment operating hours, average cycle time, average load capacity, job efficiency factor, and estimated volume of “**dirt moved**”. It provides that the total payment for the “**dirt work line item**” will not exceed the total line item bid amount until the final survey results are completed. It further provides that the final surveyed cut volume shall be the basis of “**total dirt work**” for payment. The PSC never did a final survey. (Knell 45:17-19)

As mentioned, IFB Special Provision 10 at p. 13 established a pre-bid on-site conference for April 7, 2010, to “**afford an opportunity to prospective bidders to receive clarification related to this solicitation.**” David Smith attended the pre-bid, on-site conference. (Smith 9:11-12.) He testified that for each project he visits the site to decide what type of material, and how hard it is going to be to move. (Id. 9-1-4.) David Smith has been involved in heavy

construction earthwork, including mine reclamation for upwards of 40 years. (Smith 5:5-25; 6:1-11.) He knows and understands soil classifications and types of soil.

When asked by Mr. Armstrong to tell what was said about the Project at the pre-bid, on-site conference Smith responded:

A: Just that there was 1,800,000 yds of dirt to move, and I believe one of the contractors asked what kind of material it was. They said in the bottom that we would need to mix up some of the mud where the water was after we pumped it out. There tended to be some silty mud in the bottom. That's about the extent of it, I believe. **One of the contractors asked if it was consolidated or unconsolidated material, and they represented that it was all unconsolidated.**

Q: So somebody else asked the question about consolidated or unconsolidated?

A: Yes." (Emphasis added.) (Id. 12:2-14.)

The fact that the material was represented as "unconsolidated" clarified the IFB. Smith understood the material to be "unconsolidated dirt".

Smith testified as to what "unconsolidated" meant to him as follows:

Q: And what's your interpretation of consolidated verses unconsolidated?

A: Anything that's hard, compacted or rocky.

Q: Is that consolidated then?

A: Yes.

Q: Any unconsolidated would be what?

A: Just loose, flowable material.

Q: What do you mean by "flowable"?

A: Just something you can push with a dozer and it just pushes. It doesn't roll up and stick to the dozer blade. When you push it, it's just like pushing a good, flowable material." (Id. 15:6-17.) (Emphasis added.)

Smith also dug three test holes while at the pre-bid on-site meeting to determine the type of soils. He dug the test holes two to five feet deep with a shovel and the material seemed like a "silty loam" to him. (13:19-25; 14:1-8.) Smith relied on the material being "unconsolidated dirt" for purposes of its bid. When asked when bidding this Project what he thought the spoil piles consisted of, Lee Barron testifies:

"I thought they consisted of what Dave found when he dug his holes. And Dave and I talked about that, because it was important for me to know, and that material would flow in front of a dozer blade while we are pushing it." (Barron 25:24-25; 26:1-3.)

When asked if he believed it was the Public Service Commission's responsibility to tell him exactly what was in those dirt piles, Barron testifies:

" A: Normally, like I said before, if there's items that the contractor has to deal with in a bid on a project that can increase the cost substantially, they're called out in the bid package or they have geotechnical reports. Because the people who did put out the bid package know that they need accurate bids, and they don't want a contractor to come away with a bid that's not going to fit the project." (Id. 27:19-25; 28:1-2.)

The actual material was **subsurface, consolidated clay exacerbated by saturation** from abnormal rain. When asked when he first became aware of the contention that the material was consolidated clay verses unconsolidated dirt Smith testified:

" A: The second time I was out there within a couple of weeks, I pointed out that the high wall banks were 8, 10 feet high and they were all stuck together. The excavator was struggling just digging it the way it was. Sometimes we had to come up on the bank even within the second or third week and rip it so the excavator would dig it." (Smith 38:12-21.)

Smith advised the PSC representatives that the material was different from what had been bid. (Id. 39:10-25.)

The Specifications were defective in having misrepresented the type and nature of the

soil, and for having been designed without the mandated soil borings and subsurface soil information as required by the Contract. The Contract was breached.

3. PSC's Unfair Bid Analysis Based on Superior Knowledge.

The bid opening was on April 19, 2010. (IFB at p. 5.) The PSC reserved **“the right to reject any and all bids in whole or in part.”** (IFB §17 at 7.) Specification §104.1 reads in part as follows:

“ 104.1. * * * Until the award of the contract, however, the right will be reserved to reject any and all bids and to waive technicalities, as may be deemed best for the interest of the owner.” (Emphasis added.)

Director Deutsch testified that PSC, as owner has an obligation to review the bids as to their reasonableness and that was his understanding. (Deutsch 65:18-23.) He testified that if a bid seems out of whack, **either too high or too low**, that the Commission, as owner, could reject that bid and take the next bid. (Id. 66-14:18.) (Emphasis added.) He agreed the owner has the right to reject any or all bids if it chooses. (Id. 66:23-25; 67:1.)

When Deutsch was asked if Smith's bid was in line with other bids on other projects he'd previously let he stated he did not recall. (Id. 67:12-17.) He agreed Smith's bid was 47¢ per cubic yd. for the dirt work item. (Id. 68:1-16.)

Engineer Knell was at the bid opening. (Knell 51:18-20.) He agreed it's the duty of the PSC to review the bids and determine if the bid is a fair and reasonable bid. (Id. 57:8-25; 58:1-2.) He personally reviewed Smith's bid. (Ibid.) He testified the PSC ultimately accepted that bid as a fair and reasonable bid. (Ibid.)

Knell testified that had PSC determined Smith's bid was not a fair and reasonable bid it

could have rejected that bid. (Id. 57:22-25; 58:1-2.) He understood the PSC had the right to reject bids. (Id. 53:3-6.) Knell understood from his experience that if a specific bid, a low bid is determined not to be fair and reasonable it could be rejected and the PSC could accept the next low bidder. (Id. 58:7-12.)

Assistant Director Dodd testified he called Lee Barron on the day of the bid opening and asked him if there were any mistake in the bid. (Dodd 32:8-22.) He said Barron responded that there was no mistake and they never walked away from a bid and they expected to do the work. (Ibid.) He said that was the sum and substance of the conversation on the day of the bid letting after the opening of bids, and said he mainly wanted to let Barron know that he got the bid. (Ibid.)

Engineer Knell testified he had a conversation with Lee Barron the day after the bid opening. (Knell 52:24-25; 53:1-20.) He asked Lee if he was aware that Smith was basically about a half million dollars lower than the next lowest bidder. (Ibid.) He asked Lee if he had made an error in estimating and Lee said no but he would talk to David Smith. (Ibid.) (It must be remembered that Lee put together the bid with the understanding the material was “unconsolidated dirt” based on the IFB and the representations to David Smith and his test holes during the pre-bid on-site conference.)

Dodd Exhibit 60 is the official PSC Bid Tabulation for the April 19, 2010 bid opening. (Id. 56:8-20.) It discloses Smith’s bid for the dirt work line item of 47¢ per cubic yd. The other bids range upward to \$1.12 per cubic yd. for dirt work.

On September 2, 2010 Director Deutsch denied Smith’s attempt to negotiate a Change Order/equitable adjustment for increased price and time under the disputes clause. (Barron

Deposition Exhibit 13.) The primary and inconsistent reason was that Smith allegedly **“underestimated its bid”**. Another rationale was that recent soil analysis had indicated **“that the soils at this site are not unusual for AML project sites in North Dakota”** (Ibid.) (On August 26, 2010 a geotechnical soil analysis of soil samples from this Project by Material Testing Services was attached disclosing the samples were classified as “clay”.) Director Deutsch was questioned concerning the alleged justification for the denial. He testified that based on the experience of Mark Knell and Bill Dodd and himself that the conditions at the Buechler/Velva site **“were not that different from other sites in North Dakota”**. (Deutsch 57:29-22.) He further testified that the geotechnical report attached to the denial letter classified the soil as clay and stated, there again, **“I believe that is similar to what we’ve had on other projects. It’s at least not that different.”** (Id. 59:6-15.) He nevertheless admitted that the PSC had never done any other soils reports on any other material on any other site. (Id. 60:15-18.)

When questioned about whether there was **discretion** to have deferred the Project for completion in 2011, and to delete the **acceleration** costs included in Smith’s request he testified that may have been considered but they wanted the Project done in 2010. He again reiterated as he had stated before that **“ . . . We did not see the site conditions at Buechler/Velva being that unusual or different from other project we’ve done in the past.”** As to the denial letter stating: **“Recent soil analysis have indicated that the soils at this site are not unusual for AML project sites in North Dakota”**; he confirmed his admission that he did not have any other soil analysis of any other projects anywhere in the state at that time for purposes of any comparison. (Id. 75:17-23.)

Deutsch was specifically asked if the **“bid was too low”** why didn’t PSC reject it at the

bid letting? The question was asked that if he or Mark Knell or Bill Dodd knew at the time of the bid opening that the 47¢ per cubic yd. bid of Smith was significantly lower than the cost per cubic yd. of other previous projects he testified he didn't know if it was significantly lower or not. (Deutsch 76:17-24.)

When asked if that wouldn't be one of the major things he'd think of when Smith bid 47¢ per cubic yd. for the **dirt work** and if he'd say, this is way below anything we've had on any other AML projects and there must be something wrong here, Deutsch responded:

“It was a concern, yes, and that is why both Bill and Mark called Lee.”

PSC counsel Armstrong in response to requests of Mr. Deutsch and Mr. Knell during their depositions provided the Bid Tabs disclosing the per cubic yd. bids on major surface mine reclamation projects, including for the years 2006 through 2009. (Exhibit “B” hereto.) These are all of the major surface mine reclamation project bid lettings for the four years just previous to Buechler/Velva. (Yellow highlighting added.)

A summary of the bids for dirt work per cubic yd. for all major surface mine reclamation projects for the four years just prior to Buechler/Velva are as follows:

- (1) 2006 - Columbus Phase VII. PSC estimate of \$2.25 per cubic yd.; Bids from a low of \$1.68 per cubic yd. to \$2.09 per cubic yd.
- (2) 2007 - Columbus Phase VIII. PSC estimate of \$1.55 per cubic yd.; Bids from a low of \$1.50 per cubic yd. to \$3.89 per cubic yd.
- (3) 2008 - Columbus Phase IX. PSC estimate of \$1.80 per cubic yd.; Bids from a low of \$1.08 per cubic yd. to \$2.04 per cubic yd.
- (4) 2009 - Columbus Phase X. PSC estimate of \$1.25 per cubic yd.; Bids from a low of \$1.00 per cubic yd. to \$2.12 per cubic yd.
- (5) 2009 - Hazen West Phase II. PSC estimate of \$1.10 per cubic yd.;

Bids from a low of \$.88 per cubic yd. to a high of \$1.66 per cubic yd.

Subsequent bid lettings for major surface mine reclamation projects for 2011 and 2012 are also informative. It must be noted that beginning with the projects immediately following Buechler/Velva the PSC changed the bid item from "dirt work" to "earthwork". Those bid tabs show the following:

- (1) 2011 - Columbus Phase XI. PSC estimate of \$1.10 per cubic yd.;
Bids from a low of \$1.69 per cubic yd. to a high of \$2.40 per cubic yd.
- (2) 2011 - Columbus Phase XII. PSC estimate of \$1.20 per cubic yd.;
The lone bid was for \$1.60 per cubic yd.
- (3) 2012 - Columbus Phase XIII. PSC estimate of \$1.15 per cubic yd.;
Bids from a low of \$.84 per cubic yd. to a high of \$2.20 per cubic yd. (Appendix "B".)

For the PSC to terminate Smith's Contract claiming that Smith "underestimated" the dirt work on the one hand, and not having rejected the bid as unreasonable in light of its superior knowledge of prior estimates and bids on "comparable" projects is incomprehensible. It can only be concluded that the PSC was attempting to take advantage of Smith to its prejudice and damage.

4. Delayed Mobilization/Unanticipated Work Conditions

Due to heavy rains during April and May, 2010, the State Department of Transportation and local governments placed load restrictions on highways across the State. As mentioned, the Contract Special Provision and the Specifications had conflicting provisions as to when the work was to be started and completed. The Contract stated a start date of May 10, 2010. The Specifications tied the start date to either the Notice to Proceed or the Schedule. In any event Smith was restricted from mobilizing its heavy equipment to the Project.

The Notice of Award was dated April 28, 2010. (Deutsch Exhibit 50.) The Notice to Proceed was issued May 17, 2010. (Barron Exhibit 6.) On May 20, 2010, Lee Barron wrote Mark Knell giving notice that David Smith had inadvertently signed the Notice to Proceed on May 19. In that letter Lee Barron advised Knell as follows:

“ The complicating factor, even with a start date of May 24, 2010, is the DOT load restrictions. As of today (5-20-10) there are still restrictions on most roads north of Highway 200. We are presently mobilizing equipment as close to the project as possible with the intent of mobilizing the remainder of the way as soon as the limits come off. We are doing this so we will be ready to start the project as soon as the load limits come off. * * * .” (Barron Exhibit 7.)

Mark Knell understood Dave Smith had signed the Notice to Proceed inadvertently. (Knell 66:25; 66:1-3.) The PSC nevertheless started the day count knowing that the road restrictions were in effect. (Id. 67:4-12.) He knew the road restrictions were in place and didn't know when they would be lifted. (Id. 67:25; 68:1-4.)

On May 7, 2010, Lee Barron had furnished Mark Knell, as Project Engineer, Smith's equipment list and schedule. (Barron Exhibit 5.) After reviewing the schedule for mobilizing and performing the work and looking at the equipment list, Knell testifies: **“From their schedule and from the equipment list, I had no reason not to believe that it wasn't adequate to perform the work.”** (Knell 57:13-25.) He reaffirmed that there was no reason to believe that there wasn't adequate equipment and that it couldn't meet the schedule saying: “There was nothing to put a red flag on that, no.” Knell had designed and acted as Project Engineer on approximately 60 previous mining reclamation projects. (Id. 73: 24-25; 74:1-7.) He would know a reasonable schedule and equipment spread to perform this Project

As of June 3 the only equipment mobilized to the job was a storage tank and a tractor. (Knell 116:10-12.) On June 4 his diary states: **“I left to let George and County Engineer discuss how they would get equipment on site.”** (Id. 116:13-18.) On June 4 it also states: **“Weight limits are still posted for roads in this area. Road restrictions are off but weight limits are posted.”** (Id. 116:19-25.) (Emphasis added.)

On June 5 the Knell diary states: “Stripping started at approximately 10 a.m. on June 5.” (Id. 117:1-4.) Stripping is the first work to be performed on the Project.)

The June 8 diary indicates “rain last night.” (Id. 117:17-25.) On June 9 the diary indicates that Smith was **“behind schedule on equipment mobilization”**. (Id. 117:22-25.) (Emphasis added.)

The June 11 diary states: “Some work done on site this morning, then rain came.” (Id. 118: 1-16.)

The June 21 diary states: “Wet, large amounts of rain, two inches last night.” (Id. 118:7-10.)

For June 22 it states: “Little less than one inch of rain last night.” (Id. 118: 11-13.)

Director Knell testifies: “I’m aware that, you know, particularly in June there was above normal rainfall for much of the state, including the area around the Project.” (Deutsch 13:13-17.) Deutsch agreed based on his experience that excessive rainfall affects soil conditions, and would affect the efficiency of the equipment. (Id. 13:24-25; 14:1-3.)

Assistant Director Dodd testified there was no disagreement that there was clay on the site. (Dodd 13: 24-25; 14:1-3.) His records stated that June had “two times average rainfall.” (14:12-19.) Dodd admits there were inefficiencies in Smith’s equipment but did not know

whether or not it was directly related to the soil conditions. (Id. 15:17-23.)

On June 28, 2010, Deutsch wrote David Smith stating he had “serious concerns that the AML Division has with the slow start and progress of the 2010 Buechler/Velva Project.” (Barron Exhibit 8.) He expressed concern about the limited progress Smith had made on the Project “in the past 40 days and your inability to fulfill the terms of the Contract without mobilizing additional equipment and manpower.” (Ibid.) He demanded an updated Project Schedule by 5 p.m. on Thursday, July 1 detailing a plan for completing the Project within the 150 day performance period. (Ibid.) He threatened the exercise of “other options if adequate progress is not made in the next ten days.” (Ibid.) No mention was made of the fact that Smith was unable to mobilize its heavy equipment to the Project until near mid-June due to road restriction or the impact on equipment efficiency due to the subsurface saturated clay.

Knell testified that when he was on the Project he saw areas where the material was sticky and chunky and sticking together, and the material came out in “chunks when they were loading it with the excavator.” (Knell 87:19-25; 88:1.) When asked if the wet soil conditions impacted Smith’s ability to process the material, Knell states: “Oh, there were certain times that when it was wet, they couldn’t get out there. It slowed - - for a period it slowed their progress. There’s no doubt about that.” (Id. 95:5-8.)

Knell admits there was clay material. (Id. 119:10-12.) His diary for July 7 states: “**A major amount of swell when loading into trucks and scrappers due to damp chunks of material.**” (Id. 119:13-16.) He further stated: “Because it was wet, it came out in clumps. So actually they probably loaded it up higher, but there is so much - - because of chunks there is so much void space between the chunks that they weren’t getting good loads.” (Id. 119:19-25.)

Knell readily admitted "If you have loose dirt, everything falls and it kind of fills the voids. Well, when it's chunky, your load isn't going to be as big." (Id. 120:2-16.)

Knell's July 20 diary indicates: "Material is in chunks due to wetness." (Id. 123:11-17.) When asked if the material were clay, he responded the soil was a mixture, not just clay: "**But if you want to say it's classified, yes, it was classified as clay.**" (Id. 125:6-15.)

Just a few days later on Sunday, July 25, 2010, Knell records a conversation with George, Smith's Project Superintendent, stating in part:

" * * * He (George) thinks David wants more money for wet clay conditions on the site." (Id. 105:16-25; 106:1-11; Exhibit 37 - Knell diary for July 25, 2010.) (Emphasis added.)

Digressing to July 13, Director Deutsch read his internal Memorandum of that date into the record as follows:

" Lee called back about us looking at forfeiting the performance bond. We have not initiated anything like that, but that is the option of last resort. Mark apparently mentioned something to George about this. If we do not see adequate progress in the next week or two, we may look more seriously at this option." (Deutsch 22:16-25; 23:1.) (Emphasis added.)

Knowing of the delays due to the road restrictions, the excessive moisture and clay and equipment inefficiencies caused by the soil conditions the PSC was threatening calling on Smith's Performance Bond beginning in June 28, 2010. ("other options")

Around July 20 Deutsch admitted that he definitely planned on calling on Smith's bonding company and was going to write a letter to Smith and its Surety but agreed wait until receipt of Smith's August 4 letter before contacting the Surety. (27:5-18; 28:1-25.) The PSC officials had already determined that Smith would be terminated and its bond called.

5. The Breach of the Disputes Clause

The Contract contains a Special Provision governing disputes which overrides the Specifications. (Contract No. AM-588-10 - Knell Exhibit 35 at p. 3.) Specification 106.4 coordinates the Contract documents and states that Special Provisions will govern over Standard Specifications.

Director Deutsch testified that from and after August 4, 2010, Smith was pursuing a claim under the Dispute provisions and wanted to negotiate on that. (Deutsch 39:5-16.) (Deutsch Exhibit 10 - August 4, 2010 letter.)

The August 4 letter states: **“Our production is less than half of what we originally anticipated and our expenses are, in turn, more than double what was originally anticipated.”** (Id. 39:25; 40:1-6.) Deutsch understood that Smith was seeking more money and time. (Ibid.)

The August 4, 2010 Smith letter very clearly outlined its position as follows:

“ AML had superior knowledge in that they knew that this material was Clay Loam and/or a Clay and that it could be very difficult to work with .. Especially when wet. North Dakota AML may not have known the technical details of the soils origin and its construction but it knew the behavioral properties of the soil.

AML’s representation of the material as “dirt,” as relied upon by Smith for bidding and performing the work, was misleading and non-descriptive.

AML had an obligation to the bidders to sufficiently define the soil in a manner such that all bidders would be aware of the type soil and the challenges that would be faced in moving this soil.

AML also had an obligation to inform the bidders that the appearance, properties and the consistency of the soil during the walk-through would change dramatically with the addition of moisture.

Because of AML’s acts and omissions, we were unknowingly lacking in the information that we needed in order to properly price and perform this project.”

Smith specifically requested the opportunity of meeting and discussing these issues pursuant to the Disputes provisions of the Contract to come to an amicable resolution. (Ibid.)

On August 10, 2010 Deutsch responded to David Smith and First National Insurance Company of America, Claims Department, Smith's Surety. (Barron Exhibit 11.) Deutsch states that pursuant to §109.12 of the AML Division Standard Specifications pertaining to unsatisfactory progress of a project, "we are arranging a meeting with Smith Contracting, Inc. and First National Insurance Company of America (the Surety Company that issued Performance and Payment Bonds, Bond No. 6662386 for this Project.)" (Ibid.) It states the purpose of the meeting will be to discuss the Project work and determine the steps and procedures to be followed to insure that the required work is completed. (Ibid.)

Specification §109.12 reads as follows:

"Unsatisfactory Progress. If during construction the contractor is not making satisfactory progress in accordance with the proposed progress schedule submitted, the **engineer** may arrange a meeting of the contractor, the contractor's surety and **authorized representative of the owner** to discuss the work, devise and arrange certain steps and procedures to be followed to restore the progress of the work to a satisfactory status in conformity with the previously submitted schedule." (Emphasis added.)

The Disputes Clause in relevant part relating to the "**authorized representative of the Commission**" state as follows:

" * * * Any dispute concerning a question of fact arising under this contract which is not settled by the informal means shall be decided by the authorized representative of the Commission who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to the contractor. * * *." (Emphasis added.)

The Section 109.12 and Dispute Meeting was subsequently held on August 20, 2010 at the PSC office in Bismarck. The Section 109.12 and Disputes Clause Meeting could not have

been held without the presence of an “**authorized representative of the owner**” to discuss the steps and procedures to be followed to restore the progress of the work and **decide** the disputed questions of fact. The August 20 meeting involved the “disputed” issues presented by Smith’s August 4, 2010 letter. Deutsch admitted there was a dispute concerning the effect of the weather and the effect of the clay and testified that was discussed on August 20. (Id. 88:1-19.)

When asked if he were the “authorized representative” of the Commission pursuant to §109.12 and the Disputes Clause Deutsch testifies:

“ No, there was no authorized representative really named or otherwise assumed that role. I guess in my reading of this provision, once we denied the Change Order, if Smith wanted to further dispute the issue, they should have asked for review by someone else with the Commission under this provision.” (Deutsch 88:9-15.) (Emphasis added.)

Deutsch’s actions impeach his testimony.

The PSC blatantly breached the Contract Disputes Clause. The parties clearly negotiated for a Change Order/equitable adjustment as discussed in the next section. Direction Deutsch denied any Change Order/equitable adjustment on September 2, 2010. The Disputes Clause states that any dispute concerning a “**question of fact**” arising under this Contract which is ‘**not settled by the informal means shall be decided by the authorized representative of the Commission who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to the Contractor.**’ (Disputes Clause) The Disputes were not settled by the informal negotiated means. Director Deutsch denied any Change Order/equitable adjustment on September 2, 2010. He testified there was no authorized representative of the Commission named or otherwise assuming that role. Therefore the PSC’s obligation to have the questions of fact decided “by the authorized representative of the Commission” was clearly breached. Since

there was never any decision as to the disputed questions of fact decided by the authorized representative of the Commission there could have been no appeal in any event.

The Specification §109.12 meeting was to discuss the dispute over Smith's progress. It was Smith's position that the delay in mobilization caused by the State and local highway weight restrictions, and the unanticipated, subsurface saturated clay soils affected the equipment efficiency and directly caused the lack of progress in accordance with the schedule. The Director, Assistant Director and Engineer of PSC disputed that facts asserted by Smith. This was the issue under the Disputes Clause. The §109.12 Specification mandates the presence of an **"authorized representative of the owner"** to discuss the work, devise and arrange certain steps and procedures to be followed to restore the progress of the work to a satisfactory status in conformity with the schedule. The next section of this Brief discusses the undisputed negotiations for a Change Order/equitable adjustment due to the misrepresented soil conditions and unanticipated mobilization delays. Director Deutsch testified that there was never any **"authorized representative of the owner"** for purposes of the §109.12 meeting or the Disputes Clause. Thus, as mentioned, there was nobody who could have decided the questions of fact for any purpose.

Specification §106.4 calls for the coordination of the Specifications and Special Provisions. Specification §109.12, the Disputes Clause and the Termination Clause must be deemed "complimentary" and construed in proper relationship.

Specification §109.12 calls for a meeting of the Contractor, Contractor's Surety, and the **authorized representative** of the Owner to discuss the work, devise and arrange steps and procedures to be followed to restore the progress of the work to a satisfactory status in

conformance with the schedule. The PSC claimed Smith was behind schedule and threatening to pursue the Surety. The Disputes Clause, as a Special Provision provides that any dispute concerning a question of fact arising out of the Contract which is not settled by informal means “**shall**” be decided by the authorized representative of the Commission who shall reduce the decision to writing and furnish a copy to the Contractor.

The Termination Clause, as a Special Provision, authorizes written notice by default listing the causes and reasons for, among other things the Contractor failing to provide services required by the Contract within the time specified.

As mentioned, the dispute between the parties was whether the mobilization was delayed into June because of the road restrictions without fault of the Contractor, and whether the unanticipated, subsurface saturated clay soil conditions impeded the efficiency of Smith’s equipment and contributed to the delays without Smith’s fault. The PSC representatives disputed these facts. Director Deutsch denied Smith’s request for a Change Order/equitable adjustment for increased price and time creating substantial issues of fact within the meaning of the Disputes Clause. The PSC undisputedly breached the requirements of both §109.12 and Disputes Clause which mandate an authorized representative of the Commission to attempt to resolve the dispute. Not having made any decision as to these questions of fact there was no basis or justification for termination since there was no finding of the facts essential for termination under the Termination Clause. The PSC breached the requirements of §109.12, the Disputes Clause and the Termination Clause.

6. The Dispute Clause Negotiations.

Under the Disputes Clause the Contractor agrees to attempt to resolve disputes arising

from the Contract by informal administrative process and negotiations in lieu of litigation.

Deutsch stated he was willing to negotiate. (Deutsch 32:1-9.) The negotiations would be on the issues of more money and time due to the wet clay conditions. (Id. 4-9.) Smith's August 4 letter requested Change Order No. 1. (Id. 21-24.)

As mentioned in his August 10 response Deutsch was arranging a §109.12 meeting. In that letter Deutsch states: "Also, the spoil materials are considered **unconsolidated** in part because they have been previously disturbed by past mining activities." (Id. 40:17-23.) He also admitted that the wet conditions caused work delays during June. (Id. 41:4-23.)

Deutsch kept handwritten notes of the August 20, 2010 meeting he called pursuant to Specification §109.12. His meeting notes state that the following was said by Lee Barron: "**Time extension is needed. Expense per yard needs to be recalculated. Need to renegotiate the unit price.**" (Id. 48:3-13.) He agreed it was clear that Smith wanted both time and money. (Id. 48:11-13.) Deutsch's notes further indicate his own statement: "**We need a number from Smith Contracting.**" (Id. 48:14-29. Further, Lee Barron responded: "**Can get the updated estimate by next Wednesday.**" (Ibid.) Deutsch also testified that he would want to look at a revised schedule. (Id. 48:20-25.)

At the close of the August 20 meeting Smith was requested to make a submittal on time and price for further negotiation. (Id. 50:8-11.) Smith timely responded on August 25, 2010 with Change Order documentation. (Barron Exhibit 12.) Deutsch agreed that this proposal was very specific with very specific numbers, and an attached schedule which would call for "**acceleration**" and complete all of the work on or about October 30, 2010 as requested. (Id. 50: 17-21.)

At the conclusion of the August 25, 2010 Change Order submittal Lee Barron stated: **“Please let me know what you think.”** (50:23-25; 51:1.) When asked if at anytime between receipt of the August 25 letter, and Deutsch’s September 2 denial **“Did you ever contact anybody from Smith to discuss this submittal, either Lee Barron or David Smith or anyone else?”** Deutsch responded: **“No, I don’t recall that we did.”** (Id. 51:10-15.)

On September 2, 2010 Deutsch wrote Lee Barron flatly denying the Change Order request. (Barron Exhibit 13.)

Deutsch made a personal handwritten note of a telephone conversation with Lee Barron on September 13, 2010 wherein Lee stated: **“Open to negotiation.”** (Id. 53:3-18.) Deutsch testified Lee Barron at that time told him Smith was open to negotiating the Change Order. (Id. 53:11-18.) This was even more strongly reconfirmed by Deutsch when he testified: **“From what I recall, he made the statement that they’re open to negotiation in the whole matter.”** (Id. 53: 24-25; 54:1-4.)

Deutsch agreed there were no negotiations after September 13 even though Smith said they were open to negotiations. (Id. 54:21-25; 55:1-2.) When asked if he ever counter-proposed or said, well, let’s try to work it out, before he denied the Change Order he testified: **“No, I guess we did not call and negotiate with Smith on it.”** (Id. 55:25; 56:1-4.) Deutsch testified that the Commission has **discretion** to grant a Change Order with an equitable adjustment for unanticipated site conditions. (Id. 70:21-25; 71:1-6.) Standard Specification §105.4 provides for equitable adjustments for differing site conditions. (Id. 71:7-11.) He agrees that if a condition exists consistent with §105.4 an equitable adjustment may be made. (Id. 71:19-22.) (It is Smith’s legal position that it is entitled to a claim for both defective Specifications as set forth

above, and for differing site conditions due to the unanticipated, subsurface clay soils.)

The next contact by Deutsch with Smith was a September 30, 2010 letter entitled Notice of Default. (Barron Exhibit 14.) The letter was not conclusive in that it requested a response by October 7 as to whether or not Smith planned to complete the Project. It further indicated future plans to initiate action against the Bond company. (Ibid.)

The September letter indicated the Project needed to be finished by the end of October. When Deutsch was asked if he were **demanding** that the Project be completed by the end of October he responded: **"Yes, we were wanting to get the Project completed in 2010."** The September 30 letter indicated that only the 40 percent of the Project work had been completed. There is absolutely no way the work could have been totally completed between September 30 and October 30 unless **"accelerated"** as proposed by Smith. This was an unreasonable demand.

Deutsch testified he had **discretion to carry the Project over had he chosen to do so**. (Id. 79:16-19.) Assistant Director Dodd was asked if in the past the PSC had carried projects over that had a fall completion date and the weather turned bad or whatever, and the job was carried over to be completed the following year. Dodd testified: **"We have done that in the past if there is good rationale for doing so and if we get a request for it."** (Dodd 19:19-25; 20:1-4.) **By terminating Smith's Contract and calling on the Surety the Project was of necessity carried over to 2011 in any event. It could have been completed by October 30 under Smith's "accelerated" proposal as demanded by PSC.**

When Dodd was asked if there were any discussion about Smith's Change Order proposal seeming high but wanting to get the job done, if there were some way it could be worked out and carried over to the next spring and **cut out all of the acceleration costs** in Smith's proposal,

Dodd responds: **“Some of it like that was discussed and that we wanted the Project to be completed, but I don’t recall any request to extend the Project longer than it was.”** (Dodd 19:8-18.) The most significant additional cost in Smith’s Change Order was for **acceleration** for additional equipment and labor to get the Project done by October 30 as demanded by Deutsch and Dodd. It may well be that the elimination of the acceleration costs would have resulted in less cost to the PSC than the hiring of the replacement contractor through the Bond company for 2011 completion.

Concerning the September 30 Notice of Default letter, Deutsch testified: **“Yes, it was a Notice of Default and, yes, in effect terminated the Contract.”** (Deutsch 80:3-7.) When asked if PSC terminated Smith under the Special Provision Termination clause of the Contract he responded: “In our September 30, 2010 letter, we did not specifically refer to this.” He testified he did not see a “specific default provision in the Contract”. He further said he did not see any provision in the Contract for curing a default. (Id. 83:17-25.)

In reviewing Specification §109.9 he testified that PSC complied with §109.9, Subsection A. (Id. 84:16-24.) However, Specification §109 was superceded by the Special Provision for Termination in the Contract. (Specification §106.4 providing Special Provisions will govern over Standard Specifications.)

Deutsch testified . . . “There was no authorized representative really named or otherwise assumed that role” for purposes of the §109.12 and Disputes Clause requirements of the Contract. (Deutsch 88:9-15.)

His actually testimony reads as follows:

“ No, there was no authorized representative really named or otherwise assumed that role. I guess in my reading of this Provision, once we denied the Change Order, if Smith wanted to further dispute the issue, they should have asked for review by someone else with the Commission under this Provision.”
(Ibid.) (Emphasis added.)

Deutsch’s testimony is impeached by the actual language of the Disputes Clause. The Disputes Clause states that if any question of fact is not settled by the informal means, such questions of fact “shall be decided by the authorized representative of the Commission who shall reduce that decision to writing and mail or otherwise furnish a copy thereof to the Contractor.” By testifying that there was no authorized representative really named or otherwise assuming that role, Deutsch readily admits that the PSC breached the requirements of the Disputes Clause mandating questions of fact not settled by negotiation shall be decided by the authorized representative of the Commission. **There being no decision by the authorized representative of the Commission under Deutsch’s twisted interpretation of the Disputes Clause there could be no basis for any appeal as a matter of law.** The Disputes Clause provides that he has the right to appeal from the decision of the authorized representative of the Commission on the findings of fact in dispute. The language of the Disputes Clause is that the Contractor “shall be afforded an opportunity to be heard and to offer evidence in support of an appeal” from the decision of the authorized representative of the Commission. There was nothing to appeal. The clear language of the Disputes Clause mandates the PSC to designate an authorized representative to hear and decide any disputed facts not resolved by the informal negotiation process.

Assuming arguendo that there may have been some right to appeal, Deutsch admits that he never afforded Smith any “opportunity to be heard and to offer evidence in support” of any

such appeal. When asked if Smith had been given any written notice of any “opportunity to be heard and offer evidence in support of an appeal” Deutsch testifies: **“No, a statement to that effect was not included in the September 2, 2010 letter denying the Change Order.”** (Id. 89:19-25.) Of course, as mentioned, there could never have been any basis for appeal based on the undisputed material facts.

The PSC clearly breached both the Special Provisions in the Contract for disputes and termination.

8. Liquidated Damages and Attorney’s Fees

When asked if the PSC was claiming liquidated damages Deutsch testified: **“There could have been, but we did not specifically assess - - or lay out a schedule for paying liquidated damages.”** (Id. 86:8-12.) Moreover, Deutsch took the position that the September 30, 2010 letter terminated that Contract. (There is however a legal question concerning whether or not the Contract could have been terminated since the Special Provision in Contract No. Am-558-10 between the parties called for an end date of June 30, 2011. Assuming termination any provision for liquidated damages was extinguished. If not, liquidated damages were waived under the undisputed facts.

The Special Provision in the Contract only provides for attorney’s fees in the **“event a lawsuit is initiated by the State to obtain performance due of any kind under this Contract, and the State is the prevailing party.”** Such is obviously not the case. The State’s only claim is its counterclaim for liquidated damages.

REPLY TO PSC'S LEGAL ARGUMENTS

Summary Judgment Standard

Smith concurs with the PSC's Statement of Standard for Summary Judgment set forth at pp. 10-12 of its Brief.

A. Smith complied with and exhausted all administrative and contractual remedies.

The PSC's first argument is that Smith failed to comply with the requirements of §32-12-03, N.D.C.C. providing that no action upon a claim arising from contract for the recovery of money only can be obtained against the State until the claim has been presented to the Commission to which the claim relates for allowance and allowance therefore refused. As set forth above, the Contract set forth a Special Provision for disputes and claims against the Commission. It is an undisputed material fact that on August 25, 2010 Smith made a claim for money arising from the Contract which was to be considered by the "authorized representative of the Commission" who is mandated to make a decision deciding all disputed questions of fact. Deutsch, as Director of the Commission AML Surface Mine Reclamation Projects denied Smith's claim on September 2, 2010. Director Deutsch testified he decided all policy questions on behalf of the Commission. All of the Commission employees testified that Smith was claiming both time and money under the Disputes Clause. The Disputes Clause further specifically states that the parties have the "right to enforce their rights and remedies in judicial proceedings." The action is to be venued in Burleigh County. There was absolutely no other administrative or contractual remedies.

The PSC's reliance on Messiah v. State of North Dakota, 1998 N.D. 149, ¶¶16 and 18,

283 N.W.2d 385 is totally misplaced. The PSC's quote from that case indicates that §32-12-03 N.D.C.C. requires a claim to be made directly to the appropriate agency or Commission. It indicated that the 1991 amendments changed on the entity that "must be presented with a written claim for money." Smith presented it claim for money on August 25, 2010 directly to the PSC under the Disputes Clause. The claim for money was denied and this judicial remedy has been properly pursued.

If, as Deutsch testified there was no "authorized representative of the Commission" acting for purposes of the Specification §109.12 meeting or Disputes Clause the PSC must be deemed to have waived, or be subject to judicial estoppel from asserting that Smith did not properly present a written claim for money.

The PSC's comments concerning notice of claim are unsupported by any provision of the Contract. The Disputes Clause supercedes and takes precedence over any other provision of the Contract. In any event there is no other notice requirement anywhere in the Contract.

The PSC's second argument is that Smith's "three tort-like causes of action" violate the requirements of §32-12.2-04 N.D.C.C. (Brief 13-15.) Again, the PSC argument is totally misplaced. That statute only covers a person bringing a claim for an "injury".

Section 32-12.2-01(2) defines the term "injury" for purposes of that act as meaning "personal injury, death, or property damage." Most importantly, Subsection (3) of the definition defines "occurrence" as meaning an "**accident, including continuous or repeated exposure to a condition, which results in an injury.**" To argue that that section of the Code which by its plain language applies only to "accidents" and resulting personal injury, death or property damage might apply to Smith's tort claims is an unacceptable stretch.

The North Dakota Supreme Court in Bulman v. Hulstrand Const. Co., Inc., 521 N.W.2d 632, 638 (N.D. 1994) which abolished the Doctrine of Sovereign Immunity liability states as follows:

“ We conclude that the state sovereign immunity for tort liability is out dated and is no longer warranted. We expressly overrule our prior cases sustaining that obsolete doctrine, and we join those states that have judicially abolished it. (Citations omitted.) Although we abolish the state sovereign immunity from tort liability, our decision should not be interpreted as imposing tort liability on the state for the exercise of **discretionary acts** in its official capacity, including legislative, judicial, quasi-legislative, and quasi-judicial functions. See, e.g., Kitto, supra; Nieting, supra; Wirtz, supra. See also Restatement (2d) of Torts §895B (1979).” (Emphasis added.)

It is to be noted that in Bulman the action was for wrongful death. The Court held its decision to be prospective only so that the Legislature could implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance. (Ibid.) Although the Decision abolished sovereign immunity for all tort liability, the facts of Bulman were limited to personal “injury” resulting from accident. The subsequent legislative enactment of §32-12.2 was restricted to “injury” resulting from “accident”. Although the Supreme Court in Bulman comprehensibly abolished sovereign immunity for “all” tort liability the Legislature only addressed situations of personal injury, death or property damage resulting from “accident”. The Legislature has never spoken to any other tort type liability of the State.

Moreover, the Supreme Court’s holding that its abolition of tort liability should not be interpreted as imposing tort liability on the State for the exercise of discretionary acts, it is subject to the tried and true legal concepts of abuse of discretion, or arbitrary or bad faith decisions.

Interestingly, the Supreme Court in Messiah dealt with a concept of abuse of discretion.

The principle of abuse of discretion is no different in a judicial or administrative setting. In Messiah the Court held that an abuse of discretion exists when the Decision is arbitrary, unconscionable or unreasonable. (Id. at 387.)

Specification §106.1 defines the authority of the engineer in part as follows:

“ 106.1. Authority of the Engineer. The engineer will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed **and as to the rate of progress of the work; all questions which may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the contractor.**
* * * (Emphasis added.)

The primary issue before this Court on Summary Judgment is whether the PSC interpreted and applied the Plans and Specifications with the proper exercise of its discretion in denying Smith's claim for more money and time in light of the undisputed material facts of the delay being caused by the highway load restrictions and unanticipated, subsurface saturated clay through no fault of Smith.

The governing law is set forth in the North Dakota Decision in Eickhof Const. Co. v. City of Grafton, 123 N.W.2d 580 (N.D. 1963). That was an action to recover money allegedly due under a written Construction Contract such as presently before this Court. In that case the Court held that the decision of the Engineer not to pay for gravel not approved by him would be conclusive, **there being no proof of fraud or of such gross mistake on this part as would necessarily imply bad faith or a failure to exercise an honest judgment.** The Court rejected the City's argument and found the Engineer's decision was in the nature of construing the Contract instead of merely interpreting the intent and meaning of the Specifications. This is precisely the situation before this Court.

In Eickhof the Court relied on and quoted at length from the South Dakota case of Kyburz v. State, 108 N.W.2d 645 (S.D. 1961). (See, Eickhof at 583-584.) In Eickhof the Court adopted the rule that the power to construe the Contract itself, and to determine what is within and what is without such Contract is a question belonging to the Courts. The PSC under the undisputed material facts has improperly construed the Contract Provisions of the Disputes and Termination Clauses. The PSC's decisions are legally deemed inconclusive since there is evidence of fraud or gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. (e.g. abuse of discretion.) The foregoing is the foundation for Smith's allegations and claims of fraud, negligent misrepresentation, standards, etc.

The South Dakota case of Brezina Const. Co., Inc. v. South Dakota Dept. of Trans., 297 N.W.2d 168, 170 (S.D. 1980) following Kyburz states in part as follows:

“ The pertinent rule . . . is to the effect that a contract clause providing the architect or engineer shall be the final arbiter of disputes is binding upon the parties unless the architect or engineer's decision is manifestly arbitrary or rendered in bad faith.” (Emphasis added.)

Smith's tort claims state legal causes of action under governing North Dakota Supreme Court precedent.

B. Smith is entitled to partial summary judgment on its breach of contract claims.

The Undisputed Material Facts fully support the granting of partial summary judgment for Smith on its breach of contract claims. The PSC breached its contractual obligation to do soil boring for purposes of designing the Project. Having materially breached its obligation to do soil borings and obtain other subsurface soil conditions it represented the soils to be “unconsolidated dirt”. It is undisputed that Smith relied upon the representation of the soils as “unconsolidated

dirt” as represented in the Contract documents, and to David Smith and other prospective bidders at the pre-bid, on-site meeting conducted for purposes of clarification of the soils, and David Smith’s examination of the soils from his test holes at the Project site.

The Undisputed Material Facts further disclose that the PSC breached its contractual obligations set forth in both the Disputes and Termination Clauses of the Contract. The PSC further breached the contractual provision providing a June, 2011 completion date by terminating the Contract on September 2, 2010.

Smith agrees that the construction of a Contract to determine its legal effect is a question of law for the Court, and that the Contract should be “considered as a whole” as stated by PSC. (Brief 15-16.) This is further the law set forth in Eickhof. The Standard Specifications provide for the coordination of the Contract documents and that Special Provisions govern over Smith’s vacations. The plain language of the Disputes and Termination Clauses clearly establish the breach of those provisions as set forth above. Interestingly, the PSC relied on Specification §109.9 for purposes of its September 2, 2010 termination of Smith’s Contract. The PSC failed to bring to this Court’s attention the provisions of Specification §109.9d which expressly provides that the Contractor’s right to proceed shall not be terminated nor the Contractor charged with resulting delay if the delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Presently, the twice normal rains through May and June resulted in delays in mobilization due to the state and local load restrictions into mid-June, and resulted in the unanticipated, subsurface clay to become saturated and impede the efficiency of Smith’s equipment through no fault of its own.

Again, Smith concurs in the PSC’s authority at p. 15 of its Brief in reliance on Wend,

LLC v. Fargo Marc., LLC, 2007 N.D. 67, ¶13, 730 N.W.2d 841 as follows:

“ A breach of contract is the non-performance of a contractual duty when it is due. The elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. The burden of proving the elements of a breach of contract is on the party asserting the breach. Although the interpretation of a contract is a question of law, whether a party has breached a contract is a finding of fact . . . ”

The foregoing Statement of Undisputed Material Facts sufficiently meets Smith’s burden of proof and establishes a prima facie case for partial summary judgment on liability on the breach of contract claims as a matter of law.

C. Smith is entitled to partial summary judgment on liability on the “differing site conditions” contract claim.

Standard Specification §105.4 governs differing site condition claims. This Specification reads in relevant part as follows:

“ 105.4. Differing Site Conditions. (a) The contractor shall promptly, and before such conditions are disturbed, notify the engineering and writing of

- (1) **Subsurface or latent physical conditions at the site differing materially from those indicated in this contract.**
(Emphasis added.)

The Undisputed Material Facts clearly disclose Smith to be entitled to partial summary judgment on liability for differing site conditions under Specification §105.4 a(1). The soils were represented to be “unconsolidated dirt”. Upon commencing work after the removal of the top soil, Smith encountered subsurface saturated clay which was totally unanticipated. The PSC admittedly never undertook any soil borings or determinations of the subsurface soil conditions as required by its own Standard Specifications. It materially misrepresented the soil and breached its contractual obligations. Smith is entitled to partial summary judgment on liability

under §105.4a(1) as a matter of law.

D. Smith is entitled to partial summary judgment on liability on its claim of defective Specifications.

The PSC's Standard Specifications recognize a claim based on defective Specifications. The Specifications fail to properly represent the soils on the Project. The standard set forth in the PSC's Standard Specifications calls for borings and determinations of the subsoil conditions for design purposes. Mark Knell designed the Project and prepared the Project documents as a Registered Engineer. He admitted that nothing in the Information for Bidders (IFB) documents, Plans or Standard Specifications identified the type of soil to be encountered on the Project. The Design Specification were totally defective and deficient in this regard. Smith is entitled to partial summary judgment on liability on its defective Specification claim as a matter of law.

E. Smith's allegations that the PSC breached the Contract requirements by initiating the start date and counting days knowing of the state and local highway load restrictions are supported by the Undisputed Material Facts.

The PSC devotes three pages of its Brief asserting it is entitled to summary judgment "on Smith Contracting's allegations of breach of contract for initiating commencement of the start date and failing to extend the Contract time." (Brief 21-23.) As mentioned above, the PSC's Contract documents set forth three separate and conflicting provisions as to the start date. The actual Contract states a start date of May 10, 2010. The Specifications tie the start date to either the Notice to Proceed or the Contractor's Schedule. The PSC's Specifications for coordination of Contract documents stated that Special Provisions govern over Specifications. It is thus clear that the Contract start and completion dates should govern. The Contract completion date was June, 2011. The PSC wrongfully terminated Smith's Contract on September 2, 2010.

The PSC never offered or gave Smith any extension of time. The PSC started the day count knowing the load restrictions were in place into mid-June, 2010. On June 28, 2010 the PSC, knowing of the load restrictions and Smith's inability to mobilize its heavy equipment on the Project until mid-June, and knowing of the lumpy, clumpy, saturated subsurface clay affecting Smith's equipment efficiency nevertheless threatened to call Smith's Surety Bond.

Due to continuing difficulty of Smith with the unanticipated, subsurface saturated clay impact on its equipment efficiency it made its claim for additional money and time. Deutsch testified he knew Smith was making its claim based on the conditions being different from what they had bid and the above normal rainfall. (Deutsch 72:4-11.) The negotiations under the Disputes Clause continued from August 4 through August 25 after which the PSC refused to continue negotiating. On September 15, 2010 Lee Barron offered to continue negotiating. Deutsch admitted the PSC never bothered to contact anyone with Smith from August 25 through September 2, 2010 when he denied Smith's proposal which had been requested by the PSC.

In Metropolitan Sewerage Commission v. R. W. Construction, Inc., 241 N.W.2d 371 (Wis. 1976) the Court concluded that the persistent refusal of the State Agency to negotiate an equitable adjustment **"was a material breach of contract"** which justified the Contractor's refusal to continue performance without some form of additional financial assistance. The materiality of the breach was held to be established by three factors: (1) the outright refusal of the Agency to act on the changed conditions claim and attempt to renegotiate an equitable adjustment; (2) the substantial increase in the Contractor's costs caused by the changed conditions; and (3) the Contractor's need for current funding by an equitable adjustment in order to continue the project. Such again, is presently the case.

Assistant Director Bill Dodd made a Project visit about the time he claims Smith “walked off the job”. (Dodd 26:11-20.) When asked if he knew why Smith left he said he didn’t know all the reasons, but Lee Barron, in a phone conference, “**had said because of lack of funding or something like that.**” The Undisputed Material Facts fall squarely within the principles laid down in Metropolitan.

The PSC’s termination of Smith and calling on its Bond under the Undisputed Material Facts further falls clearly within the rules of Eickhof as constituting bad faith or an abuse of discretion as a matter of law. The PSC’s decisions were manifestly arbitrary or in bad faith.

The PSC’s argument that the North Dakota Supreme Court does not recognize the contractual obligation of good faith and fair dealing is without merit in light of that Court’s holding in Eickhof. (PSC Brief 26-27.) The Supreme Court has clearly held that the state of North Dakota has consented to be sued in cases arising from contract, and this includes “implied as well as express contracts”. Stark County v. State, 160 N.w.2d 101 (N.D. 1968); and Little v. Burleigh County, 82 N.W.2d 603 for example.

The PSC makes the statement at p. 24 of its Brief that the North Dakota Supreme Court has specifically declined to apply the doctrine of an implied covenant of good faith or fair dealing. As mentioned, that is an untrue statement in light of Eickhof.

The Undisputed Material Facts clearly disclose that the PSC breached its obligations under the Contract requirements concerning the start and completion dates and the unjustified and untimely termination of Smith’s Contract as a matter of law.

F. The PSC is not entitled to summary judgment on Smith’s claim of breach for making a claim against the Bonding Company and terminating the Contract without justifiable cause.

The PSC claims entitlement to summary judgment on Smith's claim of breach for making a claim against the Bonding Company and terminating the Contract without justifiable cause. (Brief 25-26.) The unjustified and untimely termination of Smith's Contract and breach of the Termination Clause has already been discussed. The PSC quotes the Contract Special Provision Termination Clause at p. 25 of its Brief. It then quotes from the Standard Specification as to termination which conflicts with the Contract Special Provision on termination. Deutsch testified he did not rely on the Contract Termination Clause for his September 2, 2010 termination of Smith's Contract. In fact, the September 2, 2010 letter did not even constitute a termination of the Contract. Deutsch equivocated in his testimony when he said it "in effect" terminated the Contract.

The violation of the Disputes Clause denied any justification for the September 2 letter. There was no authorized representative of the Commission to decide the disputed questions of fact concerning the reasons for the delays according to Deutsch. Termination could only be perfected if the representative of the Commission decided and found that the delays were the fault of Smith. Further, the Contract completion date was June, 2011. The purported termination was both unjustified and untimely.

G. The PSC claims summary judgment as warranted on Smith Contracting's claim for breach of the implied contractual obligation of good faith and fair dealing.

This issue is raised in the PSC Brief. (Brief 26-27.) As mentioned, this assertion is without merit in light of the North Dakota's Supreme Court Decision in Eickhof. The PSC's decisions are inoperable if made in "bad faith". The Undisputed Material Facts justify a finding by this Court of bad faith.

H. Smith's claim under the "doctrine of unconscionability" should not be dismissed.

The PSC Brief asserts that Smith's claim under the "doctrine of unconscionability" should be dismissed. (Brief 29-31.) The Court in Eickhof states at p. 584 that the PSC's decisions may not be conclusive under undisputed facts which would imply "bad faith or a failure to exercise an honest judgment." It is asserted that the Undisputed Material Facts before this Court justify a finding of unconscionability due to a "failure to exercise an honest judgment."

As earlier mentioned, the Supreme Court in Messiah held that an abuse of discretion exists, including when the Decision is unconscionable. (Id. at 387.) In Strand v. U.S. National Bank National Association N.D., 2005 N.D. 68, 693 N.W.2d 918, the Court held that "unconscionability" is doctrine which allows Courts to deny enforcement of a Contract because of procedural abuses arising out of the Contract's formation and substantive abuses relating to the terms of the Contract. The determination whether a particular contractual provision is unconscionable is a question of law for the Court. (Ibid.) An adhesion contract is one drafted by experts in the subject matter of the Contract and offered on a take-it-or-leave-it basis. The PSC Contract is an "adhesion contract" as a matter of law. It was drafted by Registered Engineer Mark Knell. All Contract documents were provided to prospective bidders in the IFB. There was no way the Contract documents could be altered. They had to be accepted as proposed by PSC. In Strand the Court points out that "contracts of adhesion" are subject to unconscionability doctrine. The Contract Provisions are "one-sided" granting PSC unfettered discretion on its face. The PSC under the Undisputed Material Facts was "unconscionable" in its interpretation and application of the Disputes and Termination Clauses, as well as the subsurface site conditions

and equitable adjustment clauses.

The Supreme Court holds in Rutherford v. BNSF Ry. Co., 765 N.W.2d 705 (N.D. 2009) holds that the doctrine of unconscionability allows a Court to “deny enforcement of a contract because of procedural abuses arising out of the contract’s formation and substantive abuses relating to the terms of the contract.” When a Trial Court determines whether a contractual provision is unconscionable it is to look at the Contract from the perspective of the time it was entered into, without the benefit of hindsight. (Id. ¶ 20.) The principal underlying the Code’s unconscionability provisions is the prevention of oppression and unfair surprise. (Ibid.) Because the determination of unconscionability is fact specific, Courts must consider such claims on a case-by-case basis, and assess the totality of the circumstances. (Id. ¶ 21.)

The PSC Contracts and actions were unconscionable under the totality of the Undisputed Material Facts.

I. The PSC claims summary on Smith’s claim of breach of the implied warranties of accuracy in providing bidders with information that will not mislead.

This issue is set forth in the PSC Brief. (Brief 27-29.) Smith asserts that the PSC’s representations of the soils as “unconsolidated dirt” is a breach of the implied contractual obligations of accuracy. As mentioned, the State may be sued in cases arising from contract which includes implied as well as express contracts. Stark County v. State and Little v. Burleigh County, supra.

The Michigan case of W.H. Knapp Co. v. State, 18 N.W.2d 421 (Mich. 1945) is instructive and relies on this long-standing principal of law. In that case the Plaintiff made a bid, received a Contract, and claimed that it was misled by misrepresentations of the character of the

soil, and found that the construction was more difficult and more expensive because of the difference in the soil conditions between that represented in the Plans and Specification submitted by the State, and the soils found during the progress of the work. This case is directly on point. The Court affirmed a judgment for the Contractor.

The foundational authority for the implied warranty of accuracy is Spearin v. United States, 248 U.S. 132, 39 S. Ct. 59, 63 L.Ed. 166 (1918). The Supreme Court held that if the Contractor is bound to build according to the owners Plans and Specifications, the owner will be responsible for consequences of defects in the Plans and Specifications, despite clauses requiring the Contractor to check the Plans, visit the site, etc. Such is presently the case.

In Kensington Corp. v. State of Michigan, 253 N.W.2d 781 (Mich. App. 1977) the State Highway Department misrepresented the type of soil present at a bridge reconstruction site resulting in added expense to the Contractor. The Court states at 785 as follows:

“A review of the record in the instant case certainly justifies a finding of reliance on the part of the subcontractor herein. In preparing its bid to Kensington, Korneffel’s president testified that if the company had known that the soil was very soft instead of soft clay, its bid would have been substantially higher. In addition, Kensington, the prime contractor, also bid in on this project and testified that its bid would have also been substantially higher had the true soil conditions been known. It certainly is reasonable to this court for a contractor to rely on the State Highway Department’s representations of soil conditions. (Citations omitted.) The State freely volunteered this material and erroneous information to the subcontractor. * * * .” (Emphasis added.)

Smith again concurs with the legal authority set forth in the PSC Brief at p. 28 concerning the application of the implied warranty of accuracy. The first case recognizes a cause of action in contract against a public entity based upon the theory that the furnishing of misleading Plans and Specifications by the public body constitutes a breach of the implied warranty of their

correctness. Thompson Pacific Construction, Inc. v. City of Sunnyvale, 155 Cal.App.4th 525, 551, 66 Cal. Rptr.3d 175, 196 (Ct.App. 6th Dist. 2007). The second case relied on by PSC holds that the public agency has an obligation to provide prospective bidders with correct Plans and Specifications. Los Angeles Unified School Dist. v. Great American Ins. Co., 49 Cal. 4th 739, 752, 234 P.3d 490, 498 (Ca. 2010).

The PSC had the advantage and superior knowledge of approximately 60 prior projects according to Mark Knell. Deutsch and Knell testified repeatedly that the soils on this Project were fairly identical to the soils on all previous projects. The PSC estimates, and the bids on the major projects for the four years prior to this bid letting were exceedingly higher. The PSC withheld or actively concealed those material facts in accepting Smith's bid for the "dirt work" of 47¢ per cubic yd. It's affirmative representations of "unconsolidated dirt", and its active concealment of the material facts concerning the price per cubic yd. estimated at bid on all previous projects breached the implied warranty of correctness and accuracy.

J. Smith's claim for equitable rescission.

Smith stipulates to the dismissal of the claim for equitable rescission. Smith will cooperate with PSC counsel to dismiss this claim.

CONCLUSION

For all of the above and foregoing reasons, Smith respectfully requests that this Court grant it partial summary judgment on liability on its claims, and deny the PSC's Motion for Summary Judgment.

Dated this 25 day of October, 2012.

SCHMIDT, SCHROYER, MORENO, LEE & BACHAND, P.C.

By: 

Ronald G. Schmidt - N.D. Bar I.D. #02689
832 St. Joseph Street
P. O. Box 860
Rapid City, SD 57709-0860
Telephone: (605) 341-0112
(Attorneys for Plaintiff Smith Contracting, Inc.)

BUECHLER/VELVA AML PROJECT

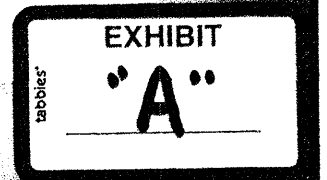
<u>Item No.</u>	<u>Description</u>	<u>Estimated Quantity of Units</u>	<u>Unit</u>	<u>Price</u>	<u>Total</u>
1.	Mobilization*	1	L.S. X	_____ =	_____
2.	Water Management	1	L.S. X	_____ =	_____
3.	Topsoil Salvage	15,000	Yds ³ X	_____ =	_____
4.	Dirt Work	1,850,000	Yds ³ X	_____ =	_____
5.	Culvert	240	Feet X	_____ =	_____
6.	Fertilize, Seed & Mulching	150	Acres X	_____ =	_____
7.	Wattles	12,000	Feet X	_____ =	_____
8.	Force Account	1	L.S. X	<u>80,000</u> =	<u>80,000</u>
9.	Clean-Up	1	L.S. X	_____ =	_____
		Total	(In Numbers)	_____	

Written Total: _____

- * This bid item shall not exceed 5% of the total contract bid.

Also enclosed in this package is a bid bond, certified check or cashier's check in the amount of:

Signed: _____



Major Surface Mine Reclamation Projects
NDPSC WD July 27, 2012

2012

Columbus Phase 14
Columbus Phase 13

2011

Columbus Phase 12
Columbus Phase 11
Buechler/Velva Completion

2010

Buechler/Velva

2009

Columbus Phase 10
Hazen West Phase 2

2008

Columbus Phase 9

2007

Columbus Phase 8

2006

Columbus Phase 7

2005

Leith

2004

Columbus Phase 6
Belfield

2003

Columbus Phase 5

2002

Haynes Phase 4

2001

Noonan A(6)

2000

Columbus 4

1999

Noonan A(5)
Custer Phase 3

1998

Graf
Custer Phase 2

1997

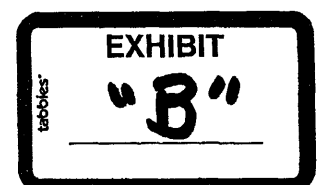
Haynes Phase 3
Columbus Phase 3

1996

Custer Phase 1
Haynes Phase 2

1995

Columbus Phase 2
Dakota Star 2
Noonan A(4)



North Dakota Public Service Commission
2007 Columbus Phase VIII
Bid Tabulation for April 16, 2007 Bid Opening

	Bid Items											Total Bid
	Mob.	Topsoil Salvage	Dirt Work	Sloping Piles - D9	Soil Amendment	Scarify	Waste Removal	Fert. Seed	Erosion Control	Force Account	Clean-Up	
	L.S.	Cubic Yd	Cubic Yd	Hrs	Cubic Yd	Acres	Hrs	Acres	Ft.	L.S.	L.S.	
Bidder	1	12500	53600	352	1000	80	40	80	1500	1	1	
PSC Est.	\$25,000.00 \$25,000.00	\$2.25 \$28,125.00	\$1.55 \$83,080.00	\$225.00 \$79,200.00	\$3.00 \$3,000.00	\$130.00 \$10,400.00	\$300.00 \$12,000.00	\$500.00 \$40,000.00	\$9.00 \$13,500.00	\$20,000.00 \$20,000.00	\$695.00 \$695.00	\$315,000.00
Geray Construction	\$16,000.00 \$16,000.00	\$1.62 \$20,250.00	\$1.80 \$96,480.00	\$175.00 \$61,600.00	\$2.00 \$2,000.00	\$90.00 \$7,200.00	\$112.50 \$4,500.00	\$227.00 \$18,160.00	\$2.00 \$3,000.00	\$20,000.00 \$20,000.00	\$800.00 \$800.00	\$249,990.00
Morlock Construction	\$20,000.00 \$20,000.00	\$2.00 \$25,000.00	\$1.50 \$80,400.00	\$220.00 \$77,440.00	\$2.00 \$2,000.00	\$35.00 \$2,800.00	\$190.00 \$7,600.00	\$226.00 \$18,080.00	\$4.20 \$6,300.00	\$20,000.00 \$20,000.00	\$2,000.00 \$2,000.00	\$261,620.00
Schwartz Construction	\$25,000.00 \$25,000.00	\$1.14 \$14,250.00	\$1.40 \$75,040.00	\$242.00 \$85,184.00	\$5.00 \$5,000.00	\$70.54 \$5,643.20	\$242.00 \$9,680.00	\$212.31 \$16,984.80	\$3.95 \$5,925.00	\$20,000.00 \$20,000.00	\$6,000.00 \$6,000.00	\$268,707.00
Gratech Company	\$20,000.00 \$20,000.00	\$1.55 \$19,375.00	\$1.70 \$91,120.00	\$180.00 \$63,360.00	\$4.20 \$4,200.00	300 \$24,000.00	\$195.60 \$7,824.00	\$450.00 \$36,000.00	\$6.60 \$9,900.00	\$20,000.00 \$20,000.00	\$3,000.00 \$3,000.00	\$298,779.00
Baranko Bros Inc	\$21,000.00 \$21,000.00	\$2.40 \$30,000.00	\$2.25 \$120,600.00	\$220.00 \$77,440.00	\$2.00 \$2,000.00	\$55.00 \$4,400.00	\$213.00 \$8,520.00	\$300.00 \$24,000.00	\$5.60 \$8,400.00	\$20,000.00 \$20,000.00	\$2,300.00 \$2,300.00	\$318,660.00
Quality Construction	\$31,000.00 \$31,000.00	\$2.20 \$27,500.00	\$1.75 \$93,800.00	\$280.00 \$98,560.00	\$4.00 \$4,000.00	\$230.00 \$18,400.00	\$200.00 \$8,000.00	\$260.00 \$20,800.00	\$4.00 \$6,000.00	\$20,000.00 \$20,000.00	\$2,000.00 \$2,000.00	\$330,060.00
Excavating Inc	\$19,700.00 \$19,700.00	\$2.45 \$30,625.00	\$3.26 \$174,736.00	\$250.00 \$88,000.00	\$11.20 \$11,200.00	\$225.00 \$18,000.00	\$175.00 \$7,000.00	\$400.00 \$32,000.00	\$7.00 \$10,500.00	\$20,000.00 \$20,000.00	\$7,200.00 \$7,200.00	\$418,961.00
Dokken Construction	\$25,000.00 \$25,000.00	\$3.00 \$37,500.00	\$3.70 \$198,320.00	\$290.00 \$102,080.00	\$5.00 \$5,000.00	\$125.00 \$10,000.00	\$200.00 \$8,000.00	\$197.30 \$15,784.00	\$3.68 \$5,520.00	\$20,000.00 \$20,000.00	\$3,000.00 \$3,000.00	\$430,204.00
Holte Contracting *	\$35,404.00 \$35,404.00	\$4.13 \$51,625.00	\$3.89 \$208,504.00	\$285.75 \$100,584.00	\$5.20 \$5,200.00	\$100.00 \$8,000.00	\$240.00 \$9,600.00	\$206.00 \$16,480.00	\$3.72 \$5,580.00	\$20,000.00 \$20,000.00	\$10,000.00 \$10,000.00	\$470,977.00
* There was a math error on the dirtwork line item of the bid for Holte Contracting. The calculated total bid was \$470,977.00 but that shown on the bid form was \$471,010.50.												

North Dakota Public Service Commission
2010 Buechler/Velva
Bid Tabulation for April 19, 2010 Bid Opening

Bidder	Bid Items									Total Bid
	Mob.	Water Management	Topsoil Salvage	Dirt Work	Culvert	Fert. Seed	Wattles	Force Account	Clean-Up	
	L.S.	L.S.	Cubic Yd	Cubic Yd	Feet	Acres	Feet	L.S.	L.S.	
	1	1	15000	1850000	240	150	12000	1	1	
PSC Estimate	\$68,000.00 \$68,000.00	\$40,000.00 \$40,000.00	\$2.10 \$31,500.00	\$0.93 \$1,720,500.00	\$50.00 \$12,000.00	\$600.00 \$90,000.00	\$4.25 \$51,000.00	\$80,000.00 \$80,000.00	\$7,000.00 \$7,000.00	\$2,100,000.00
Smith Contracting, Inc Butte, MT	\$61,000.00 \$61,000.00	\$47,000.00 \$47,000.00	\$2.30 \$34,500.00	\$0.47 \$869,500.00	\$65.00 \$15,600.00	\$510.00 \$76,500.00	\$3.20 \$38,400.00	\$80,000.00 \$80,000.00	\$3,000.00 \$3,000.00	\$1,225,500.00
Kern & Tabery Wadena, MN	\$68,678.00 \$68,678.00	\$9,000.00 \$9,000.00	\$1.75 \$26,250.00	\$0.76 \$1,406,000.00	\$65.00 \$15,600.00	\$420.00 \$63,000.00	\$2.67 \$32,040.00	\$80,000.00 \$80,000.00	\$3,360.00 \$3,360.00	\$1,703,928.00
Baranko Bros Dickinson, ND	\$87,000.00 \$87,000.00	\$50,000.00 \$50,000.00	\$2.00 \$30,000.00	\$0.74 \$1,369,000.00	\$50.00 \$12,000.00	\$512.40 \$76,860.00	\$3.29 \$39,480.00	\$80,000.00 \$80,000.00	\$2,500.00 \$2,500.00	\$1,746,840.00
Morlock Construction * Bismarck, ND	\$30,000.00 \$30,000.00	\$7,000.00 \$7,000.00	\$1.80 \$27,000.00	\$0.85 \$1,572,500.00	\$50.75 \$12,180.00	\$420.00 \$63,000.00	\$2.67 \$32,040.00	\$80,000.00 \$80,000.00	\$1,000.00 \$1,000.00	\$1,824,720.00
Dennis Drewes, Inc * Frazee, MN	\$60,000.00 \$60,000.00	\$40,000.00 \$40,000.00	\$2.50 \$37,500.00	\$0.90 \$1,665,000.00	\$80.00 \$19,200.00	\$493.35 \$74,002.50	\$3.58 \$42,960.00	\$80,000.00 \$80,000.00	\$50,000.00 \$50,000.00	\$2,068,662.50
Schwartz Construction* New England, ND	\$82,000.00 \$82,000.00	\$19,350.00 \$19,350.00	\$2.19 \$32,850.00	\$1.08 \$1,998,000.00	\$62.32 \$14,956.80	\$420.00 \$63,000.00	\$2.70 \$32,400.00	\$80,000.00 \$80,000.00	\$5,000.00 \$5,000.00	\$2,327,556.80
Martin Construction Gladstone, ND	\$80,400.00 \$80,400.00	\$40,000.00 \$40,000.00	\$1.90 \$28,500.00	\$1.05 \$1,942,500.00	\$46.76 \$11,222.40	\$432.60 \$64,890.00	\$2.79 \$33,480.00	\$80,000.00 \$80,000.00	\$2,500.00 \$2,500.00	\$2,283,492.40
Gratech Company Berthold, ND	\$9,456.00 \$9,456.00	\$46,068.75 \$46,068.75	\$2.11 \$31,650.00	\$1.09 \$2,016,500.00	\$69.01 \$16,562.40	\$656.50 \$98,475.00	\$3.38 \$40,560.00	\$80,000.00 \$80,000.00	\$6,250.00 \$6,250.00	\$2,345,522.15
Wood Bros, Inc * Lemoore, CA	\$140,000.00 \$140,000.00	\$335,000.00 \$335,000.00	\$3.06 \$45,900.00	\$1.12 \$2,072,000.00	\$54.80 \$13,152.00	\$575.40 \$86,310.00	\$3.04 \$36,480.00	\$80,000.00 \$80,000.00	\$7,600.00 \$7,600.00	\$2,816,442.00
* Note: Several bids had 1,803,000 units under the "dirt work" bid item. The correct number of units was 1,850,000. This was corrected in all bids.										

North Dakota Public Service Commission
 2011 Columbus Phase 11
 Bid Tabulation for April 14, 2011 Bid Opening

Bid Items	Units	PSC Estimate			Kern & Tabery	Kern & Tabery	Kern & Tabery	Dennis Drewes	Dennis Drewes	Dennis Drewes
		Unit Prices	Totals	W/O Contingency Items	Wadena, MN Unit Prices	Wadena, MN Totals	W/O Contingency Items	Frazee, MN Unit Prices	Frazee, MN Totals	W/O Contingency Items
Mobilization, LS	1	\$55,000.00	\$55,000.00	\$55,000.00	\$111,100.00	\$111,100.00	\$111,100.00	\$150,000.00	\$150,000.00	\$150,000.00
Water Management, LS	1	\$3,000.00	\$3,000.00	\$3,000.00	\$26,908.00	\$26,908.00	\$26,908.00	\$40,000.00	\$40,000.00	\$40,000.00
Topsoil Salvage, CY	4000	\$2.00	\$8,000.00	\$8,000.00	\$6.00	\$24,000.00	\$24,000.00	\$10.00	\$40,000.00	\$40,000.00
Earthwork, CY	899380	\$1.10	\$989,318.00	\$989,318.00	\$1.69	\$1,519,952.20	\$1,519,952.20	\$2.40	\$2,158,512.00	\$2,158,512.00
Surveying, LS	1	\$55,000.00	\$55,000.00	\$55,000.00	\$21,000.00	\$21,000.00	\$21,000.00	\$80,000.00	\$80,000.00	\$80,000.00
Culverts, Ft	150	\$65.00	\$9,750.00	\$9,750.00	\$155.00	\$23,250.00	\$23,250.00	\$150.00	\$22,500.00	\$22,500.00
<u>Soil Amend, CY</u>	20000	\$3.00	\$60,000.00		\$5.50	\$110,000.00		\$15.00	\$300,000.00	
<u>Manure Handling, CY</u>	5000	\$5.00	\$25,000.00		\$8.00	\$40,000.00		\$25.00	\$125,000.00	
<u>Scarify, Ac</u>	150	\$150.00	\$22,500.00		\$210.00	\$31,500.00		\$100.00	\$15,000.00	
<u>Additional TS Handling, CY</u>	2000	\$6.50	\$13,000.00		\$6.00	\$12,000.00		\$20.00	\$40,000.00	
<u>Fertilizer, Mulch Seed, Ac</u>	150	\$600.00	\$90,000.00		\$575.00	\$86,250.00		\$575.00	\$86,250.00	
<u>Wattles, Ft</u>	15000	\$3.20	\$48,000.00		\$3.20	\$48,000.00		\$3.20	\$48,000.00	
<u>Fence, Ft</u>	25000	\$1.45	\$36,250.00		\$4.25	\$106,250.00		\$9.00	\$225,000.00	
<u>Force Account, LS</u>	1	\$80,000.00	\$80,000.00		\$80,000.00	\$80,000.00		\$80,000.00	\$80,000.00	
Clean Up, LS	1	\$5,182.00	\$5,182.00	\$5,182.00	\$5,000.00	\$5,000.00	\$5,000.00	\$50,000.00	\$50,000.00	\$50,000.00
TOTAL BID AMOUNT			\$1,500,000.00	\$1,125,250.00		\$2,245,210.20	\$1,731,210.20		\$3,460,262.00	\$2,541,012.00

Note: Contingency items are underlined. Any or all of these items may be eliminated prior to bid award.

North Dakota Public Service Commission
 2011 Columbus Phase 12
 Bid Tabulation for April 14, 2011 Bid Opening

Bid Items	Units	PSC Estimate		PSC Estimate	Gary Morlock	Gary Morlock	Gary Morlock
		Unit Prices	Totals	W/O Contingency Items	Bismarck, ND Unit Prices	Bismarck, ND Totals	W/O Contingency Items
Mobilization, LS	1	\$45,000.00	\$45,000.00	\$45,000.00	\$40,000.00	\$40,000.00	\$40,000.00
Water Management, LS	1	\$2,000.00	\$2,000.00	\$2,000.00	\$12,000.00	\$12,000.00	\$12,000.00
Topsoil Salvage, CY	5000	\$2.00	\$10,000.00	\$10,000.00	\$3.00	\$15,000.00	\$15,000.00
Earthwork, CY	518630	\$1.20	\$622,356.00	\$622,356.00	\$1.60	\$829,808.00	\$829,808.00
Surveying, LS	1	\$45,000.00	\$45,000.00	\$45,000.00	\$16,445.00	\$16,445.00	\$16,445.00
Culverts, Ft	130	\$65.00	\$8,450.00	\$8,450.00	\$55.10	\$7,163.00	\$7,163.00
<u>Soil Amend, CY</u>	16000	\$3.00	\$48,000.00		\$2.00	\$32,000.00	
<u>Manure Handling, CY</u>	2000	\$5.00	\$10,000.00		\$6.00	\$12,000.00	
<u>Scarify, Ac</u>	120	\$150.00	\$18,000.00		\$50.00	\$6,000.00	
<u>Additional TS Handling, CY</u>	2000	\$6.50	\$13,000.00		\$8.00	\$16,000.00	
<u>Fertilizer, Mulch Seed, Ac</u>	120	\$600.00	\$72,000.00		\$585.00	\$70,200.00	
<u>Wattles, Ft</u>	10000	\$3.20	\$32,000.00		\$3.25	\$32,500.00	
<u>Fence, Ft</u>	15000	\$1.45	\$21,750.00		\$4.85	\$72,750.00	
<u>Force Account, LS</u>	1	\$50,000.00	\$50,000.00		\$50,000.00	\$50,000.00	
Clean Up, LS	1	\$2,444.00	\$2,444.00	\$2,444.00	\$2,000.00	\$2,000.00	\$2,000.00
TOTAL BID AMOUNT			\$1,000,000.00	\$735,250.00		\$1,213,866.00	\$922,416.00

Note: Contingency items are underlined. Any or all of these items may be eliminated prior to bid award.

North Dakota Public Service Commission
 2012 Columbus Phase 13
 Bid Tabulation for April 23, 2012 Bid Opening

	Bid Items						Total Bid
	Mob.	Topsoil Removal	Earthwork	Topsoil Respread	Force Account	Clean-Up	
	L.S.	Cubic Yd	Cubic Yd	Cubic Yd	L.S.	L.S.	
Bidder	1	2000	589250	11500	1	1	
PSC Estimate	\$70,000.00 \$70,000.00	\$1.50 \$3,000.00	\$1.15 \$677,637.50	\$1.25 \$14,375.00	\$20,000.00 \$20,000.00	\$14,987.50 \$14,987.50	\$800,000.00
Baranko Bros Dickinson, ND	\$60,000.00 \$60,000.00	\$2.27 \$4,540.00	\$0.84 \$454,970.00	\$2.00 \$23,000.00	\$20,000.00 \$20,000.00	\$5,000.00 \$5,000.00	\$607,510.00
Kern & Tabery Wadena, MN	\$46,625.00 \$46,625.00	\$1.50 \$3,000.00	\$1.00 \$589,250.00	\$1.75 \$20,125.00	\$20,000.00 \$20,000.00	\$1,000.00 \$1,000.00	\$680,000.00
Doboszinski & Sons Loretto, MN	\$78,782.50 \$78,782.50	\$3.14 \$6,280.00	\$1.25 \$736,562.50	\$1.85 \$21,275.00	\$20,000.00 \$20,000.00	\$35,000.00 \$35,000.00	\$897,900.00
Morlock Construction Bismarck, ND	\$30,000.00 \$30,000.00	\$1.00 \$2,000.00	\$1.45 \$854,412.50	\$1.25 \$14,375.00	\$20,000.00 \$20,000.00	\$2,000.00 \$2,000.00	\$922,787.50
JMAC Resources Williston, ND	\$90,000.00 \$90,000.00	\$2.40 \$4,800.00	\$1.41 \$830,842.50	\$2.90 \$33,350.00	\$20,000.00 \$20,000.00	\$6,360.00 \$6,360.00	\$985,352.50
Riley Bros. Construction Morris, MN	\$25,000.00 \$25,000.00	\$5.40 \$10,800.00	\$1.95 \$1,149,037.50	\$4.75 \$54,625.00	\$20,000.00 \$20,000.00	\$10,000.00 \$10,000.00	\$1,269,462.50
Dennis Drewes, Inc Frazee, MN	\$40,000.00 \$40,000.00	\$4.00 \$8,000.00	\$2.00 \$1,178,500.00	\$4.00 \$46,000.00	\$20,000.00 \$20,000.00	\$20,000.00 \$20,000.00	\$1,312,500.00
Oftedal Construction Miles City, MT	\$136,000.00 \$136,000.00	\$2.55 \$5,100.00	\$2.00 \$1,178,500.00	\$2.15 \$24,725.00	\$20,000.00 \$20,000.00	\$10,000.00 \$10,000.00	\$1,374,325.00
Griffin Construction Chatfield, MN	\$130,000.00 \$130,000.00	\$2.30 \$4,600.00	\$2.20 \$1,296,350.00	\$2.50 \$28,750.00	\$20,000.00 \$20,000.00	\$2,500.00 \$2,500.00	\$1,482,200.00
* Mob may not exceed 10% of total bid.							