First we need to clear up some misconceptions. In talking to Mr. Salazar it became clear that he feels that this building would have cost $ 4 million to remodel regardless of who did the remodeling. His question," So who was harmed?"

a. FFKR and McCullough Construction offered a $2.9 ($2.5 plus $400,000 fees) million, set price, contractor at risk proposal.
b. Design West's proposal had a $2.8 million projected maximum (but no guarantee.) That was the figure presented to the Board.
c. Had anyone taken the time to actually review and compare the proposals the District could had the project completed for $2.9 million saving the taxpayers at least $1.1 million and perhaps much more (since we don't know the final cost, "but it's at least $ 4 million.")
d. Who was hurt? THE TAXPAYERS WERE HURT to the tune of at least $1.1 million (not an insignificant sum.)

The other thing we hear is, "it was just one of those unfortunate things that happen. Wrong. We have laws in this State (the Utah Procurement Code, which apply to school districts) which are designed to prevent what happened from happening. Had Mr. Johansen and other District employees and officials simply followed the law, none of this would have happened. **Is it asking too much to ask the Business Administrator to follow the laws of the State?**

There is one section of the Utah Code in particular that describes the legal duties and responsibilities of a school district Business Administrator. Keep this in mind as we review what happened. It is **53A-3-303. Duties of business administrator. (8*) insure that adequate internal controls are in place to safeguard the district's funds.***

Safe guarding the Districts funds is a cornerstone of the Business Administrators duties.

Summary of the North School Project:

A contract for Architectural Services (hereafter the AS contract) and an addendum for Construction Management Services (hereafter the CM contract) were signed for the Wasatch County School District (hereafter the District) by District Business Administrator Keith Johansen around approximately 6/21/2000 (per Acord signature.) The Johansen, Shoemaker, Talbot & Robinson letters all contend that ADW had Board approval for Architectural Services prior to Johansen's signing the AS contract. This simply is **NOT** supported by the minutes. We could find **NO** semblance of District Board approval for AS services prior to July 13, 2000 and even then the wording is, "to authorize the Superintendent to continue working with Design West in the remodeling of the North School property." This is after the fact and tenuous at best. No contract was presented for review by the Board nor was any competitive procurement process followed (as required by state law.)

Per the Pugsley, Shoemaker and Johansen letters, the Business Administrator admits signing them with full knowledge that the Board hadn't approved the contract and that he informed the ADW principal who presented them to him for signature, Gary Acord, that he had no authority to sign them. . Mr. Johansen states, "*In June 2000, Gary Acord, a partner at Design West and architect on the RMMS (Rocky Mtn. Middle School) project, stopped by my office. He stated that in order to satisfy some "paperwork" requirements, he needed a signature on the contract for the North School. I told him I was not authorized to sign for the Board, and he stated that it was just a formality. The contract was an AIA document, and I thought it was just for architectural services, so I signed on behalf of the school district.*"

Further they were signed without date and though they had many hand written modifications to the AIA form, the Business Administrator did not initial the changes, nor, he claims, did he keep a copy. We're not the only ones to question Mr. Johansen's actions. Quoting AG Pugsley, "*He may have been mislead into doing so, but it was nevertheless improper for Keith Johansen to have signed the agreement with Architectural Design West in June 2000, six months prior to the time the agreement was presented and approved by the Board.*"

And "*The contract that was signed was a strange one, with many of the printed figures having been crossed-out and replaced with higher handwritten figures. It is unclear at which stage these figures were made and they were not initialed by Mr. Johansen on behalf of the District. It seems remarkable that he signed the contract and did not keep a copy to assure that it was not changed subsequently without his being aware of such changes.*" This from the Business Administrator for a $22 million per year district and with a Business Administration degree (per Shoemaker.)

Utah Code 53A-3-303. Duties of business administrator.

(3) countersign with the president of the board all warrants and claims against the district as well as other legal documents approved by the board;

(8) insure that adequate internal controls are in place to safeguard the district's funds; and

53A-3-405. Approval of purchases or indebtedness -- Board approval of identified purchases

(1) ***An officer or employee of a school district may not make a purchase or incur indebtedness on behalf of the district without the approval and order of the board.***

We need to take a minute and review the form of the contracts signed by Mr. Johansen. Since these were signed illegally you'd think they'd be replaced by legal contracts on December 7th, 2000 when the Board actually approved awarding *" **design and construction management services**"* to ADW, BUT THAT NEVER HAPPENED, THESE CONTRACTS WERE NEVER REPLACED WITH VALID CONTRACTS ! (see below, the "expanding contract".) Thus we need to address the deficiencies in the contract that Mr. Johansen signed.

The CM contract was an illegal "Cost plus a Percentage of Cost" contract. Mr. Shoemaker even administratively finds it so in his letter. Further it doesn't have other features required in contracts by the Utah Procurement Code. Such things as performance and payment bonds, liquidated damages, termination, etc. Things that would have precluded the lawsuit with ADW had they been included. **Again, had the Utah Procurement Code been followed none of this fiasco would have happened.**

63-56-29. Cost-plus-a-percentage-of-cost contract prohibited.

(1) Subject to the limitations of this section, any type of contract which will promote the best interests of the state may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

63-56-40. Required contract clauses -- Computation of price adjustments -- Use of rules and regulations.

(4) Rules and regulations shall require for state construction contracts and may permit or require for state contracts for supplies and services the inclusion of clauses providing for appropriate remedies and covering at least the following subjects:

(a) liquidated damages as appropriate;

(b) specified excuses for delay or nonperformance;

(c) termination of the contract for default; and
(d) termination of the contract in whole or in part for the convenience of the state.

53A-20-101. Construction and alteration of schools and plants -- Advertising for bids -- Payment and performance bonds -- Contracts -- Bidding limitations on local school boards -- Interest of local school board members.

(5) A local school board shall require payment and performance bonds of the successful bidder as required in Section 63-56-38.

From 6/21/00 onward ADW clearly proceeded as if they had a valid contract for both AS and CM services and were actively performing work under it. Per the Johansen letter, *"...in the fall of 2000, the architect who had been overseeing the demolition stated that he was ready to bid the windows and doors. That is when it first occurred to me that Design West thought it was the construction manager on the project. At that point all work on the project was terminated and the district went through an extensive RFP process"* A committee was appointed to review the proposals consisting of Johansen, Talbot and Harrison and overseen by Davis, at the conclusion of which ADW was selected as the CM contractor.

The Request for Proposals process used by the District was flawed. First, contrary to state law, the District allowed ADW to assist the District in preparing the RFP without promulgating rules and then allowed ADW to bid on the work themselves. Seems like an inherent conflict of interest.

63-56-16. Rules and regulations for specifications of supplies.
Rules and regulations shall be promulgated to govern the preparation, maintenance, and content of specifications for supplies, services, and construction required by the state. Rules and regulations shall determine the extent to which a nonemployee who has prepared specifications for use by the state may participate in any state procurement using such specifications.

Questions for Johansen, given your contention that ADW had misrepresented the contracts you signed on 6/21/00 as **" 'paperwork' requirements"** why did you still allow them to assist in the preparation of the RFP's ? Given you had such prior baggage with ADW why didn't you excuse yourself from the selection committee?

53A-3-303. Duties of business administrator.
(8) ***insure that adequate internal controls are in place to safeguard the district's funds.***

It appears unlikely that in an objective and fair analysis of the proposals ADW could be ranked #1. Just one example, according to ADW's own proposal they had previously completed only one building as a Construction Manager which was a $400,000 building in Logan. This compared to companies like Union Pointe, Bud Bailey, Herm Hughes and many others that have built scores of multi-million dollar projects. Further much of the

required documentation is missing, making it impossible to determine how the individuals on the review committee ranked the individual proposals. Further state law requires equal opportunity for all bidders. The reason for having a proposal, rather than a fixed cost bid, is that a proposal includes a concept of what the final results will be, and some negotiations to determine the final design and price. It's impossible for a bidder to tell from the limited information in a published RFP, what an owner actually wants. This requires some interaction between the owner and bidders, a chance for presentation and discussion. While the district spent months working with ADW, including a reported "field trip" by the Board to Logan to inspect an ADW project, no other bidders were even asked any questions nor allowed to make presentations. Two days after the receipt of the proposals the committee recommended ADW. The price schedule from the illegal 6/21/2000 contract is bound into ADW's proposal.

63-56-21. Use of competitive sealed proposals in lieu of bids -- Procedure.

(b) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the contract is awarded for the purpose of obtaining best and final offers.

Following a unanimous recommendation from the Selection Committee, the Board approves ADW as the CM on the project. At this point a remarkable thing happens. NO CONTRACT is presented to the Board for its review nor is a contract ever signed by the Board President (as required by law.)

This is almost six months AFTER Johansen has already signed a contract for Architectural Services and addendum for Construction Management Services (6/21/2000) Note motion is for" **design and construction management services.**" No contract is presented for approval nor is it approved pending legal review (as was done with Hughes contract of 2/25/99 for Middle School.) This lack of a physical contract is explained in Robinson Letter thus, "The District was informed at that time by Mr. Acord (ADW's Utah Principal) that the form of agreement previously signed under date of June 21, 2000. with the scope of which was intended to cover preliminary architectural services, would, with Board approval of December 7, 2000. automatically expand to a construction management agreement consistent with ADW's response to the RFP as accepted and approved by the Board of Education. Hence, no additional contract was executed with ADW and the project proceeded as the Board believed it had approved in it's December 7 open meeting." One problem, there is no record of Mr. Acord being in attendance at the meeting (second agenda item) nor is there any indication in the minutes that he made any such presentation. Hard to believe that given the scope of this statement it wouldn't warrant inclusion in the minutes. Also puzzling is the motion ***"to award the bid to provide design and construction management services for the remodel of North School"***. We thought the Architectural Services contract was already approved? That's what everyone (Talbot, Johansen, Shoemaker, Robinson) contends. Why were they approving both ***"design and construction management services"*** and not just construction management services? Of course you can't "expand" a contract that doesn't

exist...hence the insistence that there was a prior contract?? **Somehow the illegally signed and illegal as to form contract and addendum of 6/21/2000 magically, with Board approval, become not only legal, but "expand" to become so without even ever being legally signed by the board president (even after the 12/7/2000 approval) much less legally reviewed for compliance with state law (as in not a cost plus contract, bonds, etc.)? What? The public deserves an explanation of how this is possible.**

53A-3-303. Duties of business administrator. (8*) insure that adequate internal controls are in place to safeguard the district's funds.*

At his point ADW starts procuring subcontractors. Per state law on a construction management project (63-56-36 (2) (b) (ii)), these subcontracts must be bid to produce the lowest cost to the taxpayers. Even per the illegal AIA CM contract, section 2.10-15, ADW was obligated to bid out the work and "make recommendations to the Owner for the Owner's award of Contracts." Yet ADW apparently refused to follow state law or even it's own contract. Per Shoemaker, "the District prepared to go through the procurement process with the assistance of Design West as contemplated by the June 2000 contract. However, Design West insisted that that procedure would be overly time consuming and that it should be allowed to hire trade contractors directly. Without any documentation or modifications to the contracts, Design West proceeded in that manner. " In this case the subcontracts were with ADW and not "the Owner" (the District) as required in the contract and per the standard for Construction Management (as opposed to a General Contractor.) The District admits knowing that the practice of not bidding subcontracts and having them with the CM and not the owner, violates the procurement code (and the illegal AIA contract as well,) YET DOES NOTHING TO STOP IT. THIS IS THE ROOT CAUSE OF THE ADW LAWSUIT. HAD THIS BEEN PREVENTED BY THE BUSINESS ADMINISTRATOR (*insure that adequate internal controls are in place to safeguard the district's funds*) THERE WOULD HAVE BEEN NO LAWSUIT. THEY KNEW AND THEY DID NOTHING!

63-56-36. Alternative methods of construction contracting management.

(2) (b) (ii) when entering into any subcontract that was not specifically included in the Construction Manager/General Contractor's cost proposal submitted under the requirements of Subsection (2)(b)(i), the Construction Manager/General Contractor shall procure that subcontractor by using one of the source selection methods provided for in Sections 63-56-20 through 63-56-35.8 of this chapter in the same manner as if the subcontract work was procured directly by the state.

53A-3-303. Duties of business administrator. (8*) insure that adequate internal controls are in place to safeguard the district's funds.*

At some afterwards Mr. Acord, a principal with ADW, is "released for cause" according to a conversation I had with Mr. Heindel of ADW. Unfortunately, Mr. Acord is the qualified employee for ADW's Contractor's License. With his departure the state pulls ADW's license and shuts down the project.

At some time after July 2001 Ron Davis, President of the Board, signed what ADW considers addendum #2, "AGREEMENT AND ASSIGNMENT" (of subcontracts.) There is no date on either Mr. Davis's signature or ADW's signature. It appears that Mr. Richard Heindel signed for ADW.

In this agreement, the District agrees to take over roughly 8 subcontracts. These subcontracts aren't legal per state law (they were not bid, nor were they with the District, but rather with ADW acting, improperly, as a general contractor rather than a construction manager.) Further, there is no record in the minutes that this arrangement was ever presented to, or approved by the Board. Why would the district agree to take over subcontracts they knew were suspect and not competitively bid per state law? Per Shoemaker, they obviously knew," the District prepared to go through the procurement process with the assistance of Design West as contemplated by the June 2000 contract. However, Design West insisted that that procedure would be overly time consuming and that it should be allowed to hire trade contractors directly. Without any documentation or modifications to the contracts, Design West proceeded in that manner. " So why did they agree to assume them? Why didn't it require board approval? In the addendum, "the parties agree to sign a standard AIA Design Build Contract to replace the Construction Management Contract previously executed." Is it legal to modify an illegal contract, much less change from a CM to a Design Build contract without re-advertising for new proposals? Regardless, we could find no new Design/Build contract that was signed. The illegal 6/21/00 contract was **the only contract that was ever executed on this project.** In spite of the fact that the District apparently knew of its deficiencies, they were never corrected.

53A-3-303. Duties of business administrator. (8*) insure that adequate internal controls are in place to safeguard the district's funds.*

July 5, 2002, ADW sues the District claiming breach of contract.

A note on the suit. The District spent $1,928,281.79 with ADW on 31 checks from 9/15/00 to 12/28/01. Only the first 6 of these checks ($240,018) have any backup. There is no backup for the other 25 ($1,688,263.70) $1.7 million and no backup? In fact it appears at some point ADW abandoned the Cost Plus method of billing and assumed the Percentage of Completion method. It is our understanding that Percentage of Completion is used with fixed bid contracts, but that documentation of expenses is a basic requirement of Cost Plus and Construction Management contracts. **DOES THE BOARD HAVE ANY IDEA WHAT THEY GOT FOR THEIR $1.7 MILLION? HAS THE BOARD PAID FOR THE SUBCONTRACTS IN QUESTION IN THE ADW SUIT AND DOESN'T EVEN KNOW IT?**

53A-3-303. Duties of business administrator. (8*) insure that adequate internal controls are in place to safeguard the district's funds.*

What do we want? We believe Mr. Johansen has demonstrated he should not be in a position where he can control and disburse District funds. We believe it is clear in the case of the North School Project he did not, "***insure that adequate internal controls are in place to safeguard the district's funds.***" **As per state code, 53A-3-303. Duties of business administrator.** We ask that he either be removed from office or transferred to a position where he has no control or influence over the District's funds.

We believe it is the fiduciary responsibility of the Board to research whether any funds can be recovered from Mr. Johansen's Public Official Bond in force at the time (Lumbermen's Mutual #3S56116-00.)

We believe any settlement of the ADW suit is premature. We ask that the Board take time to consider what we have presented today and not rush into a settlement agreement.