

This document is being presented simultaneously to the Utah State Attorney General's Office, The Wasatch County Attorney and other investigative and political offices and possibly news agencies. The purpose of this document is to request that the agencies receiving it actively investigate the circumstances surrounding the project commonly known as The North School Renovation Project.

I realize the Utah Attorney General's Office recently reviewed the matter and issued a report in which they acknowledged that while there were a lot of strange things that happened, they could find nothing prosecutable. In my opinion the AG's Office overlooked the obvious infractions of state law and gave the district officials & employees an unreasonable and unjustifiable "benefit of the doubt", especially in light of the information that was presented. For instance see the McAllister letter where he states, "There is likely a contract" when there most definitely is not and it is clear in the documentation there is not. It appears to me that only a cursory review was conducted at best. I am particularly concerned that the AG's Office implies that this matter doesn't come under their responsibility, "We do not monitor school districts or local boards which are supposed to operate on the concept of "local Control" and within the law." QUESTION for the AG's Office, **WHEN A SCHOOL DISTRICT ACTS OUTSIDE THE LAW AND SHOWS NO INTENTION OF POLICING ITS OWN ACTIONS TO WHOM DO THE CITIZENS TURN? ARE WE JUST "OUT OF LUCK?"**

**Reasons this needs to be investigated:**

From start to finish there was **NOTHING** about the "contract" with Architectural Design West (hereafter ADW) that was done legally or properly. When not a single aspect of a project that involved millions of dollars was done properly. And this by people who absolutely had to know better. Among those involved with this project you have two **SUPERINTENDENTS** (not principals, not teachers, but Superintendents. You have a **BUSINESS ADMINISTRATOR**, with a Business Administration degree, charged with protecting the assets of a \$22 million a year school district (not some clerk or accountant.) You have four board members, two of whom are in the real estate business, and deal with contracts on a daily basis, one a **BROKER** (not an agent) and one the **MANAGER** of a title business. You have a **PRINCIPAL** (not some intern) in a well-respected architectural firm with a history of working on publicly financed projects. In my opinion these folks are too bright and too educated and have too much real world experience **NOT TO GET A SINGLE ASPECT OF THIS CONTRACT RIGHT**. Not one of them had a hint that something was terribly wrong? Stupidity has been the perfect defense in Wasatch County for generations. You do a disservice to its citizens by allowing it to continue. These folks aren't dumb enough to be able to use the, "I didn't know it was wrong" defense.

**Attorney General's Office Responsible to Investigate:**

**63-56-33. Factual information to attorney general if collusion suspected.**

When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general.

**76-6-704. Attorney general, county attorney, or district attorney to prosecute -- Conduct violating other statutes.**

(1) The attorney general, district attorney, or the county attorney shall prosecute suspected criminal violations of this part.

(2) Prosecution under this part does not prevent any prosecutions under any other law.

**76-10-916. Attorney General's powers -- Investigations -- Institution of actions -- Cooperation.**

(1) The attorney general may investigate suspected violations of this act and institute appropriate actions regarding those suspected violations as provided in this act.

(2) Any violations of this act which come to the attention of any state government officer or agency shall be reported to the attorney general. All state government officers and agencies shall cooperate with, and assist in, any prosecution for violation of this act.

(3) The attorney general may proceed under any antitrust laws in the state or federal courts on behalf of this state, any of its political subdivisions or agencies, or as parens patriae on behalf of natural persons in this state.

**76-10-923. Attorney general to advocate competition.**

The attorney general shall have the authority and responsibility to advocate the policy of competition before all political subdivisions of this state and all public agencies whose actions may affect the interests of persons in this state.

**76-10-1604. Enforcement authority of peace officers.**

Notwithstanding any law to the contrary, peace officers in the state of Utah shall have authority to enforce the criminal provisions of this act by initiating investigations, assisting grand juries, obtaining indictments, filing informations, and assisting in the prosecution of criminal cases through the attorney general or county attorneys' offices.

In presenting this information please remember I am not an attorney nor do I have any special investigative powers. But in light of the AG's Office refusal to further pursue the matter I feel compelled to submit the following documents, suspicions and opinions. The information presented here is only that which is available to the public (as limited and incomplete as the records are.) Further, since I have no legal training, any legal arguments I present are strictly my laymen's interpretation of the law, flawed as it may be. Further I will present circumstances I feel would lead a reasonable person to suspect laws may have been broken. These are strictly my suspicions and may or may not be valid. It feels very awkward to be voicing my suspicions about the actions of others. But if individuals always deferred voicing their suspicions, few crimes would be known, much less resolved.

(a) he confers, offers, or agrees to confer upon the employee, agent, or fiduciary of an employer or principal any benefit with the purpose of influencing the conduct of the employee, agent, or fiduciary in relating to his employer's or principal's affairs; or

(b) he, as an employee, agent, or fiduciary of an employer or principal, solicits, accepts, or agrees to accept any benefit from another upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs; provided that this section does not apply to inducements made or accepted solely for the purpose of causing a change in employment by an employee, agent, or fiduciary.

(2) A person is guilty of violation of this section if he holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of goods or services and he solicits, accepts, or agrees to accept any benefit to influence his selection, appraisal, or criticism.

**76-6-704. Attorney general, county attorney, or district attorney to prosecute -- Conduct violating other statutes.**

(1) The attorney general, district attorney, or the county attorney shall prosecute suspected criminal violations of this part.

(2) Prosecution under this part does not prevent any prosecutions under any other law.

**76-10-920. Fine and imprisonment for violation -- Certain vertical agreements excluded -- Nolo contendere.**

(1) (a) Any person who violates Section 76-10-914 by price fixing, *bid rigging*, agreeing among competitors to divide customers or territories, or by engaging in a group boycott with specific intent of eliminating competition shall be punished, notwithstanding Sections 76-3-301 and 76-3-302:

(i) if an individual, by a fine not to exceed \$100,000 or by imprisonment for an indeterminate time not to exceed three years, or both; or

(ii) if by a person other than an individual, a fine not to exceed \$500,000.

(b) Subsection (a) may not be construed to include vertical agreements between a manufacturer, its distributors, or their subdistributors dividing customers and territories solely involving the manufacturer's commodity or service where the manufacturer distributes its commodity or service both directly and through distributors or subdistributors in competition with itself.

(2) A defendant may plead nolo contendere to a charge brought under this title but only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

Amended by Chapter 291, 1995 General Session

**76-10-914. Illegal anticompetitive activities.**

(1) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal.

(2) It shall be unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or

commerce.

**76-10-916. Attorney General's powers -- Investigations -- Institution of actions -- Cooperation.**

(1) The attorney general may investigate suspected violations of this act and institute appropriate actions regarding those suspected violations as provided in this act.

(2) Any violations of this act which come to the attention of any state government officer or agency shall be reported to the attorney general. All state government officers and agencies shall cooperate with, and assist in, any prosecution for violation of this act.

(3) The attorney general may proceed under any antitrust laws in the state or federal courts on behalf of this state, any of its political subdivisions or agencies, or as *parens patriae* on behalf of natural persons in this state.

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**76-10-1801. Communications fraud -- Elements -- Penalties.**

(1) *Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:*

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is less than \$300;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$300 but is less than \$1,000;

(c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$1,000 but is less than \$5,000;

(d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$5,000; and

(e) a second degree felony when the object of the scheme or artifice to defraud is other than the obtaining of something of monetary value.

(2) The determination of the degree of any offense under Subsection (1) shall be measured by the total value of all property, money, or things obtained or sought to be obtained by the scheme or artifice described in Subsection (1) except as provided in Subsection (1)(e).

(3) Reliance on the part of any person is not a necessary element of the offense described in Subsection (1).

(4) An intent on the part of the perpetrator of any offense described in Subsection (1) to permanently deprive any person of property, money, or thing of value is not a necessary element of the offense.

(5) *Each separate communication made for the purpose of executing or concealing a scheme or artifice described in Subsection (1) is a separate act and offense of communication fraud.*

(6) (a) *To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information.*

(b) *Means of communication include but are not limited to use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.*

(7) *A person may not be convicted under this section unless the pretenses, representations, promises, or material omissions made or omitted were made or omitted intentionally, knowingly, or with a reckless disregard for the truth.*

**NOTE: I am not an attorney. I only represent the following to be a reasonable interpretation of the events from a laymen's point of view. Any legal speculations I make are simply a reasonable man looking at the facts as he understands them. There are two instances I'd like you to look at. The first is when the AS contract and CM addendum that were signed on June 21, 2000 (according to Gary Acord's (ADW principal) signature.) According to Johansen's letter, "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."**

**Mr. Shoemaker's letter mirrors Johansen's recollection of the incident, with the added note that, "Rather than being the design/build contract previously supplied to Mr. Johansen, the new contracts were for architectural services and construction management services."**

**Mr. Robinson's letter is unique in that it is a group recollection of Board members and District employees. It is the most detailed of the accounts, mirroring Mr. Johansen's recollection of the meeting and again contends "The Board had approved ADW for architectural services".**

**If these 3 various accounts of the meeting are correct, then I believe Mr. Acord may have committed communication fraud. That is a big if however, since all of the district officials' accounts contend the Board had approved some sort of design/architectural services contract with ADW prior to the**

6/21/2000 signing by Mr. Johansen. HOWEVER I could find no such approval in the minutes. I have a hard time putting much faith in the school's collective story, but you have 4 Board members and 2 Superintendents and the Business Manager for the District contending this is what happened. If this is true, isn't Mr. Acord guilty of communications fraud per the above statute?

*Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:*

**If the district's contention is true one could conclude that Mr. Acord devised a scheme to defraud the school district by eliminating any competition for a lucrative school remodeling project and getting it with a cost plus a percent of cost contract to boot, consistent with "has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value".**

**According to Johansen, "He (Mr. Acord) stated that in order to satisfy some "paperwork" requirements, he needed a signature on the contract for the North School." Isn't the "paperwork" reference, attributed as a direct quote, clearly false and consistent with "by means of false or fraudulent pretenses, representations, promises, or material omissions" ?**

**According to Johansen, "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." Clearly a face to face meeting between persons for the purpose of executing the scheme (the signing. ) Consistent with "who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice".**

**Also consistent with:**

**(6) (a) To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information.**

**(b) Means of communication include but are not limited to use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.**

According to Johansen, "I told him I was not authorized to sign for the Board, and he stated that it was just a formality." If Johansen is to be believed he clearly told Mr. Acord that he did not have the authority to sign the contracts, yet Mr. Acord insisted regardless. Further, in spite of being told by Mr. Johansen that he (Johansen) did not have the authority to sign for the Board, Mr. Acord proceeded as if he had a legally binding contract, 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." He knew the contract wasn't legal, had been flatly told that by the signer himself, and then proceeded to work under that contract as if it were a legal document.

Consistent with:

*(7) A person may not be convicted under this section unless the pretenses, representations, promises, or material omissions made or omitted were made or omitted intentionally, knowingly, or with a reckless disregard for the truth.*

Interestingly, perhaps an even better case for communication fraud can be made for an incident described in the Robinson letter (the collective recollections of the Board members, the Superintendents and the Business Manager.) At the December 7<sup>th</sup>, 2000 Board meeting, "a motion to approve the contract to ADW was unanimously carried." But strangely, no actual physical contract was presented to the Board, nor was any legal review of the contract require or carried out. Nor was a contract ever signed by the President of the Board or any other Board member.

To explain this anomaly, the following explanation is included in the Robinson letter immediately after the above quote, "The District was informed at that time (the board meeting-dhs) by Mr. Acord 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."

This has all the aspects of the first scenario (the Johansen-Acord meeting) but has the added benefit of being in a public meeting. One problem however, 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. Hmm...somehow

**the illegally signed contract and addendum of 6/21/2000 magically, with Board approval, become not only legal, but "expands" to become so without even being legally signed, much less legally reviewed for compliance with state law?? Eh?**

**But if such respected and admired individuals in our community as 4 Board members and 2 Superintendents and the Business Manager for the District contend this is what happened then I believe this has all the required elements of Communication Fraud as well.**



**I believe that with the publicly available documentation it is reasonable to believe that the following laws may have been violated:**

**63-56-16**

**63-56-21 (1) (a)**

**63-56-21 (5) (b)**

**63-56-21 (6) (c)**

**63-56-29 (1)**

**63-56-36 (1) (b) (ii)**

**63-56-36 (2) (b) (ii)**

**63-56-38**

**63-56-40**

**53A-20-101 (5)**

**53A-3-303 (3)**

**53A-3-303 (8)**

**53A-3-405 (1)**

**76-10-1801 Two Instances**

I believe it is clear that the citizens of Wasatch County have been abused, possibly to the tune of millions of dollars. I further believe we, as citizens of the State of Utah, have the right to expect our government to be responsive to our concerns, especially when the documentation the citizens have provided clearly justifies a complete, in depth investigation into what happened.

## Requested Actions,

In my conversation with Superintendent Shoemaker, he keep asking me, "What do you want ?" Fair question. In reply, I believe the following actions should be taken:

### Action by the Wasatch County School Board:

1. The termination of Mr. Johansen. By his own account he knowingly violated state law by signing an obligation, which he knew he did not have the authority to sign. Further he did not date his signature, initial the handwritten changes nor keep a copy of what he had signed. The result is a lawsuit with ADW and huge tax increase for the taxpayers of Wasatch County. In addition, the way this project was handled clearly shows Mr. Johansen did not, ***"insure that adequate internal controls are in place to safeguard the district's funds"*** as required by state law of School District Business Administrators.
2. Proceedings against Mr. Johansen's bond, if it exists. If it exists (or existed at the time) it may be possible to recover some of the money Mr. Johansen's actions have cost the taxpayers.

### Action by the Utah AG's Office and / or the Wasatch County Attorney's Office or other investigative offices.

1. A declaration by judicial review that per 63-56-63 the contract with ADW is null and void and the money paid to ADW be returned to the taxpayers.
2. An investigation into the question of Communication Fraud by Mr. Acord in the 2 incidents cited (the contract signing & the presentation to the board in Robinson)
3. An investigation into any possible collusion/bid rigging between district officials and ADW in the award of the contract to ADW.
4. An investigation of a possible quid pro quo between the District and Mr. Johansen (your job for your silence.) In light of his actions it is hard to believe they'd keep him otherwise.
5. An investigation into to possible debarment of ADW from state contracts per 63-56-48
6. An investigation as whether ADW, its officers and/or employees, defrauded the taxpayers by concocting a scheme wherein they obtained an illegal cost plus construction management contract under false circumstances and without competition. Further that they intentionally refused to follow state law, which requires subcontracts to be competitively bid, signed inflated subcontracts (again without competition nor authority to do so) thus unjustly enriching both themselves (cost plus CM contract) and their subcontractors at the expense of the taxpayers.
7. An investigation of whether District employees or Board members received any "emolument, gratuity, contribution, loan or reward, or any promise thereof" in return for their actions (or inactions) from ADW, its officers or its subcontractors.

### Summary of the North School Project:

1. 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. I 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.)
2. 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. 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. This from the Business Administrator for a \$22 million per year district and with a Business Administration degree (per Shoemaker.) **Why?**
3. ADW clearly proceeded as if they had a valid contract 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" at the conclusion of which ADW was selected as the CM contractor.
4. In spite of the fact that at that point both the District and ADW had to be aware that the contract/addendum signed by Mr. Johansen were illegal, the documents were **NEVER** revisited and properly reviewed and executed. They continued to be the working documents that both the District and ADW relied upon well after it became known to both that they were not legally executed. In spite of this knowledge, no effort was ever made by the District or ADW to execute a valid contract. **Why?** In fact the District did not acknowledge that the contract was illegal until it filed suit against ADW. **Why?**
5. The Request for Proposals process used by the District was flawed. First, contrary to state law, ADW assisted the District in preparing the RFP and then bid on the work themselves. Second, it appears to me extremely 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 to tell from the limited information in a published RFP, for a bidder to determine what an owner actually wants. This requires some interaction between the owner and bidders, a chance for presentation. While the district spent months working with ADW, no other bidders were even asked any questions nor allowed to make presentations. Two days after the receipt of the proposals the committee recommend ADW. And the price schedule from the illegal 6/21/2000 contract is bound into ADW's proposal. Convenient if you later don't submit or sign a new contract after the board approval of your RFP, but rather "expand" the illegally signed, illegal cost plus a percentage of cost and illegal as to form contract signed on 6/21/2000 into the working contract.....Frankly I don't believe, given the circumstances, that an investigation into bid rigging and collusion is unjustified. As I was told by a contractor, "when we saw Design West's name on the sign in front of the school (before the RFP), we knew the fix was in."

6. After being awarded the contract by the Board, ADW proceeded with the work. Note at this point the controlling document is apparently the illegally signed, illegal cost plus a percentage contract signed 6/21/2000. There is some question about whether the District even had a physical copy of the contract at this point. I understand the District has stated they didn't have a copy of the contract until the suit was filed by ADW, yet I received a copy from the District in May of 2001 and in the Shoemaker letter he says, "the District prepared to go through the procurement process with the assistance of Design West as contemplated by the June 2000 contract." This implies they did have a copy of the contract and had read it. They must have been aware of the shortcomings of the illegal contract at that point (never legally signed, illegal cost plus, illegal as to form, no bonds, etc.) yet no effort was made to bring the document into compliance or execute a new, legal agreement.
7. At his point ADW starts procuring subcontractors. Per state law on a construction management project (63-56-36 (b) (ii)), these subcontracts must be bid to produce the lowest cost to the taxpayers. Even per the illegal 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.) *Consider this possibility, an illegal cost plus a percentage of cost*

*contract where the Construction Manager refuses to bid the subcontracting and further writes the subcontracts between himself and the subs instead of the District and the subs. Seems a recipe for abuse and/or fraud. The higher the dollar amount of the subcontracts, the more the Construction Manager makes. Further, to hide the subcontracts from scrutiny, ADW executes the subcontracts with themselves, not the District as per the contract. ADW (and quite possibly its subcontractors) makes out like thieves and the taxpayers pay the tab. In fact in Shoemaker's letter he states, "it became apparent that there were few, if any, records which documented how Design West procured the services of subcontractors" and "Despite repeated questioning as to Design West's procedures for selecting contractors and entering into contracts, the District has not been provided any such information" and "It also became apparent that the cost of completing phase 1...would be substantially in excess of the estimates given in April 2000". It seems clear that there is sufficient circumstantial documentation to investigate if ADW was intentionally defrauding the taxpayers by using a cost plus contract and inflating its subcontracts.*

8. 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. At that time Mr. Acord, a principal with ADW, had been "released for cause" according to a conversation I had with Mr. Heindel. In this agreement, the District agrees to take over roughly 8 subcontracts (exhibit A.) These subcontracts aren't legal per state law (they were not bid, nor were they with the District, but rather with ADW acting, illegally, 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. It appears to me Mr. Davis acted outside his authority by not getting Board approval prior to signing the addendum. In the addendum, "the parties agree to sign a standard AIA Design Build Contract to replace the Construction Management Contract previously executed." I wonder if it is legal to modify an illegal contract, much less change from a CM to a Design Build contract without re-advertising for new proposals? Regardless, I could find no new Design/Build contract that was signed.
9. July 5, 2002, ADW sues the District claiming breach of contract.

## **North School Time Line**

### **April 2000 - (Shoemaker Letter)**

Design West gives District an estimate of \$2,370,360 to \$2,862,960. According to Shoemaker Board votes to have Design West proceed with "planning and design" of the project. No evidence of any competitive bidding for these services despite Shoemaker contention that "Design West's architectural services had been properly procured."

**NOTE: This is for architectural services only, NOT Design/Build nor Construction Management Services (per Shoemaker.)** I could find nothing in the minutes to indicate the Board approved a contract with Design West during April. From Pugsley, it appears Board may not approved this contract until July 13<sup>th</sup>, 2000 (if then, per Pugsley "Board approved continuing to work with Architectural Design West" not a contract approval per se.) *Question to Pugsley, Did I miss something n the minutes? If not approved in minutes of April 2000 the whole thing falls on its face.*

### **Between April 2000 and June 21<sup>st</sup> 2000 - (Shoemaker Letter)**

Despite NOT having properly procured **Design/Build nor Construction Management Services** (per Shoemaker) Design West begins demolition work on the project with no contract (and no competitive bidding.) District does nothing to stop them, tacit approval?

### **May 2000 - (Shoemaker Letter)**

Design West raises estimates from the April figures of \$2,370,360 to \$2,862,960 to \$2,679,657 to \$3,278,748. These figures are given to the Administration **BUT NOT TO THE BOARD** (per Shoemaker.)

### **June 2000 - Revision of Estimate Figures (Shoemaker Letter)**

Design West slightly lowers estimates from the May figures roughly \$10,000 from \$2,679,657 to \$3,278,748 to \$2,670,954 to \$3,268,065. These figures are given to the Administration **BUT NOT TO THE BOARD** (per Shoemaker.)

**NOTE: There is a discrepancy here. In Shoemaker's letter he states, "Although these estimates may have been given to District Administrators, they were not provided to the Board." However in the "Summary of North School Proposal Architectural Design West" dated November, 14<sup>th</sup> 2000, which is an synopsis of Design West's bid, it states, "Note: these costs were first presented to the Board in May, 2000 and later revised slightly lower at the June, 2000 Board meeting."** *Question, Which is it? Was the Board presented the figures in May and June per the "Summary," or not per Shoemaker? If the Board was being apprised of projected costs monthly did they tacitly or overtly give Johansen approval (or the impression of approval) to move forward with Design West? I didn't see any mention of this in the minutes. What happened in all those executive sessions?*

**June 21<sup>st</sup> 2000, - Architectural Services and Construction Management Services  
Contract signed by Johansen and Accord (Shoemaker Letter & Pugsley Report)**

**Per Shoemaker**, "At some point during these discussions, Gary Accord, Design West's principal architect for the Project contacted Keith Johansen, the District's business administrator. Mr. Accord asked if he could drop the contracts by the District's offices for Mr. Johansen's signature. Mr. Accord informed Mr. Johansen that the contracts were a mere formality. When Mr. Accord arrived, Mr. Johansen informed him that did not have the authority to sign the contracts, but that they would need to be signed by the Board. Mr. Accord asked Mr. Johansen to sign them since they were a mere formality. Mr. Johansen signed them and Mr. Accord took them with him. Rather than being for the design/build contract previously supplied to Mr. Johansen, the new contracts were for architectural services and construction management services. These contracts were dated as of June 21, 2000."

**Per Pugsley**, "He may have been misled 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."

**Per Pugsley**, "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."

**NOTE: A Business Administrator (with a Business Administration Degree) for a many multi million dollar School District doesn't know enough about business not to sign a contract he knows he doesn't have authority to sign, doesn't initial the handwritten changes and doesn't keep a copy? Stretches credibility to the breaking point. Further, I believe the contention that he did not keep a copy is questionable. I was supplied a copy pursuant to a GRAMA request I made in the May of 2001. I further believe the copy in the State's procession is either the copy I obtained or a subsequent copy.**

**NOTE: At this point (6/21/00) the District HAS entered into a contract for Architectural Services and Construction Management Services, the same services they will advertise for bids from other contractors until November 14<sup>th</sup>, 2000. But what Design West's competitors (and the public) don't know is that a contract has already been signed with Design West 4 months earlier for these very services. *Question, is it fraud and/or bid rigging to have a bid for services, which have already been procured? Especially when no new contract was signed replacing the illegal 6/21/00 contract, even after the Board approval of 12/7/2000? While the Board hadn't yet approved the contract, was the "fix" already in? Johansen (signatory to the contract already signed) was one of 3 persons on the Selection Committee.***

**July 13<sup>th</sup>, 2000 - District Board Meeting**

Superintendent Talbot discusses possible uses for the school building with the Board, including private development, green space, historical site and District Offices. Architectural Design West recommended for the project. Per Pugsley "Board approved continuing to work with Architectural Design West," (whatever that means?)

**NOTE: It appears at this point Talbot doesn't know (or isn't telling) the Board that Johansen has already signed a contract for Architectural Services and Construction Management Services. But he DOES recommend them for the project (before any proposals from other companies have been received or reviewed.)**

**November 14<sup>th</sup>, 2000 – Responses to the Request For Proposals for Architectural Services and Construction Management Services for the North School due.**

Proposals received from 13 bidders.

**NOTE: Other bidders didn't know that the District had already signed a contract for these very services. According to conversations I had with bidders subsequently they figured something was afoot. After all there was already a Design West sign in front of the project. *Question, Is it a fraud against the other bidders to request expensive, time consuming proposals from other contractors when you already have signed a contract for those very services?***

**November 15<sup>th</sup> to 16<sup>th</sup> (approx) Selection Committee consisting of Talbot, Johansen and Harrison meets to consider and grade the RFP's. Per RFP summary from District.**

A unanimous recommendation from Talbot, Johansen and Harrison that Architectural Design West be selected.

**November 17<sup>th</sup>, 2000 – Talbot and Johansen meet with Board member Ron Davis to discuss the selection process and recommend Architectural Design West. Per RFP summary from District.**

**NOTE: In a scant 2-3 days (depending on what actually happened) the 3 men have reviewed 13 RFP's containing hundreds, if not thousands of pages and come to the unanimous recommendation that Architectural Design West be selected. According to my conversations with the other bidders there was no follow-up with any of them. No chance was given other bidders to tour their previous work (ala Design West) or make an in-person presentation (or even a phone presentation.) No questions were**



fielded from any of the committee to the other bidders. 13 proposals and NO QUESTIONS from the committee to any of the bidders?

Further, this was a Construction Management contract. The committee apparently overlooked the fact that Design West had only completed construction one building to that point (a \$400,000 project) and was in the process of completing another building in the \$1 million dollar range, per Design West's own RFP. The North School project would be 7+ times larger than their previous largest (and only) building completed to date. This compared to other companies that had designed and built scores of similar and MUCH larger buildings. How could companies such as Layton, Union Pointe, Bud Bailey, etc. be graded lower than a company that had previously only completed a single \$400,000 building? The "construction" portion of the contract was by far the larger dollar volume, yet the committee seems to have overlooked the respondents' construction experience. Again, this stretches credibility to the breaking point. And always lurking in the background is the fact that the District already had a contract signed for this work. *Questions: "Was the selection of Design West preordained, regardless of the facts?" "Was it an effort to cover-up / justify / legitimize the already signed contract?" "Given that Design West helped author the RFP (when they knew they already had a contract for the very work they were preparing RFP requests for,) did they commit a fraud? In other words was it a sham bid and they (both Design West and the District) knew it?"*

#### **December 7<sup>th</sup>, 2000 – District Board Meeting (Pugsley Report)**

Keith Johansen presents the results of the RFP to the Board for Architectural Services and Construction Management Services for the North School. Thirteen responses received and graded. Committee recommends awarding contract to Architectural Design West. Board approves doing so.

**Note: State Law, Section 63—56-36 requires performance and payment bonds from successful bidders. No such bonds were required or given. In hindsight a major mistake. Perhaps the reason is that according to the 9/5/2003 Mark Robinson letter (attorney for district officials and board members) that at the December 7<sup>th</sup>, 2000 Board meeting Mr. Acord informed the Board "that the form of agreement previously signed under date of June 21, 2000, 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's 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 its December 7 open meeting." *Questions: Can a contract signed illegally in the first place "automatically expand" to cover a subsequent RFP? Does this "expansion" of an existing contract relieve the Board from requiring a***

*Performance and Payment Bonds as required by state law (to protect taxpayers from exactly what happened?) If they (Robinson's clients) can remember Acord's representation of the "expanding contract" that precisely why didn't one of them say "Hey wait, we never approved ANY Construction Management Contract for the North School before, where did you get a signed one?"*

**NOTE:** It appears that what the district contends happened is that the Board approved the contract illegally signed in June 2000. That conclusion is supported by the fact that apparently neither the Board or anyone else signed a new contract. **NOT EVEN A NEW LEGITIMATE CONTRACT WHEN THEY KNEW THE CONTRACT THEY HAD WAS ILLEGAL?** In fact it appears that there was no question about the legitimacy of the Contract until the May 7<sup>th</sup> 2002 letter from Shoemaker to Design West, almost 2 years after it was signed. *Questions for Pugsley: The District's (and your) contention seems to be that since the Board later ratified the contract signed by Mr. Johansen that makes everything legal and above board. But can a board ratify a contract the District KNOWS is illegal, which they haven't seen and with no modifications (like a legal signature, correctness as to form for a public contract, bonding requirements, not a cost plus, you know, the minor things?) If so, to my mind that makes it effective June 21<sup>st</sup>, 2000 (barring any contradictory language in the minutes.) If the contract was in effect at that date (even if retroactively) then wasn't the entire RFP process a sham? Given the circumstances doesn't it at least raise the possibility it was rigged from the beginning?*

## **Relevant Notes on Wasatch County School District Meeting Minutes**

### **January 22, 1998 Wasatch County School District Board Meeting**

Response received from 3 local architects to discuss feasibility of remodeling Central School. Told it costs 1 ½ to 2 times more to remodel an old building to code as build a new building.

*Note: Included to show how far back in the minutes I reviewed and that the Board was aware that remodeling would be much more expensive than new. I've included a reference to every Board Meeting in which a reference to the North School was made within the time frame for completeness.*

### **April 22, 1998 Wasatch County School District Board Meeting**

Motion made "to accept Design West as the architect for the new middle school. Motion carried unanimously."

*Note: This is the only "acceptance" of anything to do with Design West (hence ADW) until 7/13/2000, over 2 years away, and it is clearly for the middle school (Rocky Mountain Middle School) NOT the old North School.*

### **February 25, 1999 Wasatch County School District Board Meeting**

After discussion a motion made, "to accept the bid from Hughes Construction and to issue a Notice to Proceed as soon as the contract has been approved by the district's legal counsel."

At this same session the district's laymen Land and Building Committee makes the following recommendation, "The district should not use district school money to refurbish either North or Central Schools."

*Note: Bid acceptance shows that they know really how they should proceed. Everything appears proper. Note review by counsel. The citizens' advisory comments, though advisory only and quickly disregarded, shows the wisdom of laymen.*

### **October 22, 1999 Wasatch County School District Board Meeting**

County Commissioners come calling, "The final item discussed with the county was the status of the North School property."

*Note: included only because of the North School Reference.*

### **April 27, 2000 Wasatch County School District Board Meeting**

*Note: Contrary to the implication in some accounts there is NO mention of the North School, much less any board approvals during this meeting.*

### **July 13, 2000 Wasatch County School District Board Meeting**

Superintendent Talbot reviews the history of the North School "Project" (somewhere along the way it's grown into a project.) Cites the Land and Building Committee (2/25/99) as "recommending that the school be saved as a historical site" and "in view of the fact that the district has outgrown it's present office, a feasibility study has been conducted to consider the conversion of the building into new district offices". They estimate cost at \$115 per sq. ft. "The district would like to use Architectural Design West, who has won numerous awards for its work in remodeling buildings similar to North School. A motion was made by Ron Davis, seconded by Claudia Bradshaw, to authorize the Superintendent to continue working with design West in the remodeling of the North School property."

*Note: This is the only time from 1/22/98 until now that the Board has discussed, much less given approval to any work ADW has done/proposed for the North School. NOTE that the contract(s) signed by Keith Johansen for Architectural Services were signed 6/21/2000, three weeks earlier (and PRIOR to any semblance of Board approval.)*

### **August 10, 2000 Wasatch County School District Board Meeting**

Superintendent Talbot reports "positive feedback from the community on its plans to remodel the North School property."

*Note: Has gone from a "feasibility study" to "plan to remodel".*

### **December 7, 2000 Wasatch County School District Board Meeting**

Business Administrator Keith Johansen, "then presented to the Board the results of the Request for Proposals to furnish design/construction management services for the remodel of the North School. The RFP was published in the local papers for three weeks as well as the on the Wasatch Front and in the Intermountain Contractor. The district received thirteen responses to the RFP and a committee graded the responses, based on the criteria published in the RFP. This grading was done independently, and the results were a unanimous decision to recommend to the board that Architectural Design West be awarded the bid to remodel North School. After some discussion a motion was made by Richard Bonner, seconded by Kevin DiStefano, to award the bid to provide design and construction management services for the remodel of North School to Architectural Design West."

*Note: 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 (impossible) to believe that given the scope of this statement it wouldn't warrant inclusion in the minutes. Hmm....somehow the illegally signed contract and addendum of 6/21/2000 magically, with Board approval, become not only legal, but "expand" to become so without even being legally signed much less legally reviewed for compliance with state law?? Eh?*

**Laws I believe may be relevant.**

**Italics mine to provide reference to sections I deemed relevant. Notes in Arial font mine.**

**Utah Procurement Code**

**63-56-2 Application of chapter**

(2) Except as provided in Section 63-56-3, *this chapter shall apply to every expenditure of public funds irrespective of their source, including federal assistance, by any state agency under any contract.*

(3) (a) *Only the following sections shall apply to local public procurement units: Sections 63-56-3, 63-56-5, 63-56-16, 63-56-19 through 63-56-33, 63-56-35.5, 63-56-36 through 63-56-41, 63-56-45 through 63-56-50, and 63-56-59 through 63-56-63; provided, however, that, except as provided in Sections 63-56-70 and 63-56-71, the jurisdiction of the procurement appeals board is limited to matters involving state agencies.*

(b) Subsections 63-56-14(1)(b), 63-56-37(4), and 63-56-38(2) also apply to local public procurement units.

(c) *For the purpose of application of those sections and subsections to a local public procurement unit, "state" shall mean "local public procurement unit," "chief procurement officer" or "head of a purchasing agency" shall mean any person conducting procurement for a local public procurement unit, and "rules and regulations" shall mean ordinances and rules and regulations promulgated by a local public procurement unit to implement or supplement those sections.*

(d) In addition to the sections and subsections listed above and except as provided in Section 17A-1-801 relating to special districts, each local public procurement unit shall adopt ordinances relating to the procurement of architect-engineer services not inconsistent with the provisions of Part G of this chapter.

**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.*

**NOTE: ADW did much of the work in preparing the RFP and in the end (perhaps not surprisingly) was the successful proposal. Per the Shoemaker letter, "the District and Design West did solicit proposals for construction management services." There are no written rules extant.**

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

(1) (a) When, according to rules established by the Procurement Policy Board, *the*

*chief procurement officer, the head of a purchasing agency, or a designee of either officer above the level of procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals.*

**NOTE: No such document exists. I specifically requested this in my May 17, 2001 GRAMA request.**

(b) (i) Competitive sealed proposals may be used for the procurement of services of consultants, professionals, and providers as defined by the policy board by rule, whether or not the determination described in this subsection has been made.

(ii) The policy board shall make rules establishing guidelines to assure maximum practicable competition in those procurements, including the relative importance, if any, of the fee to be charged by an offeror.

(iii) The rules may provide that it is either not practicable or not advantageous to the state to procure certain types of supplies, services, or construction by competitive sealed bidding or competitive sealed proposals.

(2) (a) Proposals shall be solicited through a request for proposals.

(b) Public notice of the request for proposals shall be given in accordance with policy board rules.

(3) (a) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation.

(b) A register of proposals shall be prepared in accordance with policy board rules and shall be open for public inspection after the contract is awarded.

(4) The request for proposals shall state the relative importance of price and other evaluating factors.

(5) (a) As provided in the request for proposals and under policy board rules, discussions may be conducted with responsible offerors who submit proposals for the purpose of assuring full understanding of, and responsiveness to, solicitation requirements.

(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.*

**NOTE: There is a legitimate question about the "opportunity for discussion" given to bidders other than ADW. It is clear ADW had lengthy discussions over many months with the District about this project and may have done a "field trip" to Logan to observe an ADW project at USU. Other bidders requested an opportunity to present their concept of the project but were never contacted or given an opportunity to make a presentation.**

(c) In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(6) (a) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price and the

evaluation factors set forth in the request for proposals.

(b) No other factors or criteria shall be used in the evaluation.

(c) *The contract file shall contain the basis on which the award is made.*

**NOTE: While there is a summary sheet showing the ranking of the proposals, there is no record of how the individual members of the review committee ranked the contractors by criteria, making it impossible to determine on what basis the project was awarded.**

**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.*

**Note: The CM contract signed by Johansen was a cost plus a percentage of cost contract. It was even determined as such in Superintendent Shoemaker's (acting as the Chief Procurement Officer for the District) letter to ADW of 5/7/2002.**

(2) Except with respect to firm fixed-price contracts, no contract type shall be used unless it has been determined in writing by the chief procurement officer, the head of a purchasing agency, or a designee of either officer that:

(a) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(b) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

**63-56-33. Factual information to attorney general if collusion suspected.**

When for any reason collusion or other anticompetitive practices are suspected among bidders or offerors, a notice of the relevant facts shall be transmitted to the attorney general.

**NOTE: Shows that AG Office has the responsibility to investigate this case. Given the circumstances, while collusion hasn't been shown (nor can it be by laymen,) it should certainly be "suspected" and investigated.**

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

(1) (a) Rules shall provide as many alternative methods of construction contracting management as determined to be feasible.

(b) These rules shall:

(i) grant to the chief procurement officer or the head of the purchasing agency responsible for carrying out the construction project the discretion to select the



appropriate method of construction contracting management for a particular project; and  
(ii) *require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.*

**NOTE: No such written statement exists.**

(c) Before choosing a construction contracting management method, the chief procurement officer or the head of the purchasing agency responsible for carrying out the construction project shall consider the following factors:

- (i) when the project must be ready to be occupied;
- (ii) the type of project;
- (iii) the extent to which the requirements of the procuring agencies and the ways in which they are to be met are known;
- (iv) the location of the project;
- (v) the size, scope, complexity, and economics of the project;
- (vi) the source of funding and any resulting constraints necessitated by the funding source;
- (vii) the availability, qualification, and experience of state personnel to be assigned to the project and how much time the state personnel can devote to the project; and
- (viii) the availability, qualifications, and experience of outside consultants and contractors to complete the project under the various methods being considered.

(2) (a) Rules adopted by state public procurement units and local public procurement units to implement this section may authorize the use of a Construction Manager/General Contractor as one method of construction contracting management.

(b) Those rules shall require that:

(i) the Construction Manager/General Contractor shall be selected using one of the source selection methods provided for in Sections 63-56-20 through 63-56-35.8 of this chapter; and

(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.*

**NOTE: Per the Shoemaker letter, "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. " A cost plus a percentage of cost contract where the Construction Manager refuses to bid out the subcontracting?? With a cost plus a percentage of cost contract it is clearly in the Construction Manager's best interest to spend as much as possible (5% of \$100 vs. 5% of \$1,000.) Without the competitive bidding**

required by this section and an illegal cost plus a percentage of cost contract, one can only assume the taxpayers paid too much, possibly way too much. See 63-56-63. "Effect of violation after award of contract. (2) *If the person awarded the contract has acted fraudulently or in bad faith*" the contract can be declared null and void. This clearly appears to be fraudulent and in bad faith. Isn't this a violation of some other state law as well? A fraud perhaps?

**63-56-38. Bonds necessary when contract is awarded -- Waiver -- Action -- Attorneys' fees.**

*(1) When a construction contract is awarded under this chapter, the contractor to whom the contract is awarded shall deliver the following bonds or security to the state, which shall become binding on the parties upon the execution of the contract:*

*(a) a performance bond satisfactory to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in this state or any other form satisfactory to the state; and*

*(b) a payment bond satisfactory to the state that is in an amount equal to 100% of the price specified in the contract and is executed by a surety company authorized to do business in this state or any other form satisfactory to the state, which is for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided for in the contract.*

*(2) (a) When a construction contract is awarded under this chapter, the chief procurement officer or the head of the purchasing agency responsible for carrying out a construction project may not require a contractor to whom a contract is awarded to obtain a bond of the types referred to in Subsections (1)(a) and (b) from a specific insurance or surety company, producer, agent, or broker.*

*(b) A person who violates Subsection (2)(a) is guilty of an infraction.*

*(3) Rules may provide for waiver of the requirement of a bid, performance, or payment bond for circumstances in which the state considers any or all of the bonds to be unnecessary to protect the state.*

**Note: No bonds were required or provided on this project, nor was a waiver granted, nor do any rules exist to grant such a waiver. Perhaps that isn't surprising given that the contracts were never presented to the Board or reviewed by legal counsel for conformance to state law. In hindsight, given the current legal action regarding payment of subs and performance, bonds would have been a great idea...this is precisely the situation this was written to prevent.**

*(4) A person shall have a right of action on a payment bond under this section for any unpaid amount due him if:*

*(a) he has furnished labor, service, equipment, or material for the work provided for in the contract for which the payment bond is furnished under this section; and*

*(b) he has not been paid in full within 90 days after the last date on which he performed the labor or service or supplied the equipment or material for which the claim*

is made.

(5) An action upon a payment bond shall be brought in a court of competent jurisdiction in any county where the construction contract was to be performed and not elsewhere. The action is barred if not commenced within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based. The obligee named in the bond need not be joined as a party to the action.

(6) In any suit upon a payment bond, the court shall award reasonable attorneys' fees to the prevailing party, which fees shall be taxed as costs in the action.

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

(1) 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 adjustments in prices, time of performance, or other appropriate contract provisions, and covering the following subjects:

(a) the unilateral right of the state to order in writing changes in the work within the scope of the contract and changes in the time of performance of the contract that do not alter the scope of the contract work;

(b) variations occurring between estimated quantities of work in a contract and actual quantities;

(c) suspension of work ordered by the state; and

(d) site conditions differing from those indicated in the construction contract, or ordinarily encountered, except that differing site conditions clauses required by the rules and regulations need not be included in a construction contract when the contract is negotiated, when the contractor provides the site or design, or when the parties have otherwise agreed with respect to the risk of differing site conditions.

(2) Adjustments in price pursuant to clauses promulgated under Subsection (1) shall be computed in one or more of the following ways:

(a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(b) by unit prices specified in the contract or subsequently agreed upon;

(c) by the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

(d) in any other manner as the contracting parties may mutually agree; or

(e) in the absence of agreement by the parties, by a unilateral determination by the state of the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as computed by the state in accordance with applicable sections of the rules and regulations issued under Subsection 63-56-28(1) and subject to the provisions of Part H of this chapter.

(3) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 63-56-28.

*(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.*

(5) The contract clauses promulgated under this section shall be set forth in rules and regulations. However, the chief procurement officer or the head of a purchasing agency may modify the clauses for inclusion in any particular contract. Any variations shall be supported by a written determination that describes the circumstances justifying the variations, and notice of any material variation shall be included in the invitation for bids or request for proposals.

**NOTE: None of these required provisions were included in the contract. Of course the contract itself was never presented to the Board nor was it submitted for legal review. Again, like the bond provision above, there is a good reason this is state law...it protects the taxpayers...And it is the law.**

**63-56-48. Debarment from consideration for award of contracts -- Causes for debarment.**

(1) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the chief procurement officer or the head of a purchasing agency, after consultation with the using agency and the attorney general, shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period exceeding three years. The same officer, after consultation with the using agency and the attorney general, shall have authority to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall not be for a period exceeding three months unless an indictment has been issued for an offense which would be a cause for debarment under subsection (2) of this section, in which case the suspension shall, at the request of the attorney general, remain in effect until after the trial of the suspended person.

(2) The causes for debarment include the following:

(a) conviction of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract;

(b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a state contractor;

(c) conviction under state or federal antitrust statutes;

(d) failure without good cause to perform in accordance with the terms of the contract;

or

(e) any other cause the chief procurement officer, or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for any cause listed in rules and regulations.

**63-56-63. Effect of violation after award of contract.**

*If after an award it is determined administratively or upon administrative or judicial review that a solicitation or award of a contract is in violation of law:*

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
  - (a) The contract may be ratified and affirmed if it is determined that doing so is in the best interests of the state; or
  - (b) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract prior to termination, plus a reasonable profit;
- (2) *If the person awarded the contract has acted fraudulently or in bad faith:*
  - (a) *The contract may be declared null and void; or*
  - (b) The contract may be ratified and affirmed if such action is in the best interests of the state, without prejudice to the state's rights to any appropriate damages.

**NOTE: I believe a case can be made that ADW acted fraudulently and in bad faith. (Cost plus contract, no bidding for subcontractors, representing that a contract be signed, "to satisfy some paperwork requirements" by a person who tells them he doesn't have the authority to sign it and then proceeding as if it had a legal contract, etc...) In fairness to the taxpayers I would hope that the contract would be declared null and void (and the money returned to the taxpayers.)**

**63-56-72. Felony to accept emolument.**

Any person acting as a procurement officer for the state of Utah or any subdivision thereof, or who in any official capacity participates in the procurement of any supplies, services, construction, real property, or insurance for any such political units, is guilty of a felony if the person asks, receives, or offers to receive any emolument, gratuity, contribution, loan, or reward, or any promise thereof, either for the person's own use or the use or benefit of any other person or organization from any person interested in the sale of such supplies, services, construction, real property, or insurance.

**63-56-73. Felony to offer emolument.**

A person who is interested in any way in the sale of any supplies, services, construction, real property, or insurance to the state of Utah or any political subdivision thereof, is guilty of a felony if the person gives or offers to give any emolument, gratuity, contribution, loan or reward, or any promise thereof to any person acting as a procurement officer, or who in any official capacity participates in the procurement of such supplies, services, construction, real property, or insurance, whether it is given for his own use or for the use or benefit of any other person or organization.

**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.**

- (1) As used in this section, the word "sealed" does not preclude acceptance of electronically sealed and submitted bids or proposals in addition to bids or proposals

manually sealed and submitted.

(2) (a) Prior to the construction of any school or the alteration of any existing school plant, if the total estimated accumulative building project cost exceeds \$80,000, a local school board shall advertise for bids on the project at least ten days before the bid due date.

(b) The board shall have the advertisement published in a newspaper having general circulation throughout the state and in appropriate construction trade publications that offer free listings.

(c) A similar advertisement is required in a newspaper published or having general circulation in any city or county that would be affected by the proposed project.

(d) The advertisement shall:

(i) require sealed proposals for the building project in accordance with plans and specifications furnished by the local school board;

(ii) state where and when the proposals will be opened and shall reserve the right of the board to reject any and all proposals; and

(iii) require a certified check or bid bond of not less than 5% of the bid to accompany the bid.

(3) (a) The board shall meet at the time and place specified in the advertisement and publicly open and read all received proposals.

(b) If satisfactory bids are received, the board shall award the contract to the lowest responsible bidder.

(c) If none of the proposals are satisfactory, all shall be rejected.

(d) The board shall again advertise in the manner provided in this section.

(e) If, after advertising a second time no satisfactory bid is received, the board may proceed under its own direction with the required project.

(4) (a) The check or bond required under Subsection (2)(d) shall be drawn in favor of the local school board.

(b) If the successful bidder fails or refuses to enter into the contract and furnish the additional bonds required under this section, then the bidder's check or bond is forfeited to the district.

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

**NOTE: Specific to school construction, (5) A local school board shall require payment and performance bonds of the successful bidder as required in Section 63-56-38. That is SHALL not should. Why is the penalty for noncompliance?**

(6) (a) A local school board may require in the proposed contract that at least 10% of the contract price be withheld until the project is completed and accepted by the board.

(b) If money is withheld, the board shall place it in an interest bearing account, and the interest accrues for the benefit of the contractor and subcontractors.

(c) This money shall be paid upon completion of the project and acceptance by the board.

(7) (a) A local school board may not bid on projects within the district if the total

accumulative estimated cost exceeds \$80,000.

(b) The board may use its resources if no satisfactory bids are received under this section.

(8) If the local school board determines in accordance with Section 63-56-36 to use a construction manager/general contractor as its method of construction contracting management on projects where the total estimated accumulative cost exceeds \$80,000, it shall select the construction manager/general contractor using one of the source selection methods provided for in Sections 63-56-20 through 63-56-36.

(9) A local school board member may not have a direct or indirect financial interest in the construction project contract.

#### **53A-3-302. Business administrator -- Term -- Oath and bond.**

(1) Each board shall appoint a business administrator.

(2) The business administrator's term of office is for two years and until a successor is appointed and qualified.

(3) If it becomes necessary to appoint an interim business manager due to a vacancy in the office of business administrator, then the board shall make an appointment during a public meeting for an indefinite term not to exceed one year, which term shall end upon the appointment and qualification of a new business manager.

(4) The business administrator qualifies for office by taking the constitutional oath of office and *by posting any required bond or undertaking.*

**NOTE: Is there a bond for Johansen? Is his signing of the contracts, KNOWING HE DIDN'T HAVE THE AUTHORITY, an action for which a claim could be made on his bond?**

#### **53A-3-303. Duties of business administrator.**

Subject to the direction of the district superintendent of schools, the district's business administrator shall:

(1) attend all meetings of the board, keep an accurate record of its proceedings, and have custody of the seal and records;

(2) be custodian of all district funds, be responsible and accountable for all money received and disbursed, and keep accurate records of all revenues received and their sources;

(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;*

(4) prepare and submit to the board each month a written report of the district's receipts and expenditures;

(5) use uniform budgeting, accounting, and auditing procedures and forms approved by the State Board of Education, which shall be in accordance with generally accepted accounting principles or auditing standards and Title 63, Chapter 38, Utah Budgetary Procedures Act;

(6) prepare and submit to the board a detailed annual statement for the period ending June 30, of the revenue and expenditures, including beginning and ending fund balances;

(7) assist the superintendent in the preparation and submission of budget documents

and statistical and fiscal reports required by law or the State Board of Education;

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

(9) perform other duties as the superintendent may require.

**NOTE: Clearly this requires the Board President to countersign all contracts. Neither the AS Contract nor the CM Contract was ever signed by anyone but the Business Administrator. The only thing signed by the Board President (Mr. Davis) was the last addendum, #3, which assigned the subcontracts to the school (and it was never approved or presented to the Board, or dated.) Given the seriousness of his misconduct and the resultant cost to the taxpayers one can reasonably ask, "Why does he still have this job." It's not much of a step to asking, "Is there a quid pro quo? Your job for your silence?"**

**53A-3-401. Boards of education are bodies corporate -- Seal -- Authority to sue -- Conveyance of property.**

(1) The board of education of a school district is a body corporate under the name of the "Board of Education of ..... School District" (inserting the proper name), and shall have an official seal conformable to its name.

(2) The seal is used by its business administrator in the authentication of all required matters.

(3) A board may sue and be sued, and may take, hold, lease, sell, and convey real and personal property as the interests of the schools may require.

**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.*

(2) The board shall adopt one of the following approval methods, or a combination of the two:

(a) The board shall approve an appropriation for identified purchases in the district budget. Each purchase made under an identified purchase does not require additional board approval.

(b) The board shall approve individual purchases when made throughout the fiscal year.

**NOTE: Isn't this exactly what Johansen did by signing the 6/21/2000 contract when he admittedly knew he didn't have the authority? What's the penalty?**

**76-6-508. Bribery of or receiving bribe by person in the business of selection, appraisal, or criticism of goods or services.**

(1) A person is guilty of a class A misdemeanor when, without the consent of the employer or principal, contrary to the interests of the employer or principal: