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December 15, 1995

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Re: Arbitration, Wand Electric, Inc. v. County of Clinton  
Case No.: 15-110-00058-9401RGR

Gentlemen:

### INTRODUCTION

Kindly consider this letter to be in the nature of a Memorandum submitted on behalf of Wand Electric, Inc. in connection with the above referenced arbitration.

I would also request that this Memorandum be used in conjunction with and as a supplement to the claims of Wand Electric, Inc. previously submitted to you in the form of Demands for Arbitration, my letters dated January 17, 1994, June 15, 1994 and August 29, 1994 and the loose leaf binders prepared by KRC International, Inc. The claims of and the position of Wand

Electric, Inc. under both the building renovations general construction contract and the building renovations electrical contract are set forth in said documents, and in particular, in said loose leaf binders. It is the purpose of this Memorandum to supplement said claims.

#### GENERAL BACKGROUND

During March, 1993 Wand Electric was the low bidder relative to a general construction contract and an electrical contract in connection with a renovation project at the Clinton County Highway Garage. One of the other bidders which Wand Electric, Inc. edged out for the general construction contract was Murnane Building Contractors, Inc., the second low bidder. James Arvay, an architect with Arvay Whitford Associates was the architect who designed the plans and specifications for the project for the County owner. He was also the owner's representative on the job during the course of the project. Frank LaBarge was the County Highway Superintendent during this time period in question.

Written contracts were entered into on or about May 18, 1993 between Wand Electric, Inc. and the County of Clinton relative to said renovation project being undertaken at the Clinton County Highway garage located on Route 3 in the Town of Plattsburgh, County of Clinton, State of New York. One of the terms and conditions of the general construction contract was that the job be completed within **120** calendar days (See Article 3 of Exhibit 1).

Two specific contracts were entered into between the parties

to this arbitration, i.e., a general construction contract and an electrical contract. Work was originally scheduled to commence on the general construction project on the project during the latter part of May, 1993. However due to the County's failure to secure a building permit (LaBarge testimony page 1597) the starting date was pushed forward until July 19, 1993. Work under the general construction project actually began on the first day the job site was made available to Wand Electric, Inc., i.e., Monday, July 19, 1993 (Exhibit 3). With subsequently agreed upon change orders the total contract price for the general construction contract was \$175,696.00 (Exhibit 11).

Work continued on Wand's general construction project by Wand employees until late December, 1993 and by one of Wand's subcontractors, Adams Glass, until January, 1994. By letters dated January 11, 1994 (Exhibit 39) and January 21, 1994 (Exhibit 40) the County terminated Wand's general construction contract and ultimately hired Murnane Building Contractors, Inc., one of Wand's bid competitors to finish said general construction contract. Although the County did not formally terminate the general construction contract in writing until January, 1994, it became clear that the County was intending to terminate Wand by early November 1993 (Claimant's Exhibit 59 and LaBarge testimony at pages 1607-1608) at a time when there were virtually no complaints made as to any defects in workmanship or materials.

Despite the January, 1994 termination of it's general construction contract Wand Electric, Inc. continued to perform

its obligations under the separate electrical contract. This portion of the job was fully completed, although a problem did occur with respect to the electrical thermal storage heat (Richard Soule testimony at page 1119). Yet, as in the general construction contract, Wand Electric, Inc. was denied the opportunity to correct this problem (Richard Soule testimony page 1120, LaBarge testimony page 1646, Dave Caron testimony page 1368, Terry Chilton testimony pages 1218-1223, Exhibits 89 and 80) by the County. The County admits owing Wand Electric, Inc. approximately \$18,440.06 of its "base claim" of \$21,608.06 in connection with the electrical contract (see pages 1218-1220 of the arbitration transcript). Thus the only item in dispute relative to the "base" claim of Wand Electric, Inc. under its electrical contract is the \$3,168.00 credit the County claims it is entitled to for correcting the ETS problem which it admittedly refused to let Wand correct (LaBarge testimony at page 1646, Exhibit 104).

The general construction job was to be completed in two phases, i.e., phase one was the first floor and phase two was the second floor of the County Highway Building. While phase one was being done, Clinton County highway operations continued out of the second floor. Then when the first floor was available those same operations become concentrated on the first floor to permit construction work to proceed on the vacated second floor. Working under these cramped conditions obviously offended the Napoleonic nature of the Clinton County Highway Superintendent

and he unquestionably was anxious to return to normal working conditions as soon as possible (LaBarge testimony page 1584). This difficulty was compounded by the advent of autumn/winter weather and cold temperatures. It is important to point out that despite the fact that the Clinton County Highway Department exerted unrelenting pressure upon Wand Electric, Inc. to complete the job, there is no doubt that substantial delays occurred. These delays were directly due to the County's failure to timely obtain a building permit, several changes in materials used on the project as directed by the architect and the failure of the architect/County to promptly make appropriate selections. Therefore, the County on one hand was pressuring Wand to move the project forward, yet on the other was creating the very delays it railed against. The County created delays in turn caused additional delays in obtaining materials and caused the project to languish into cold weather months (Exhibit 24). This created an impossible atmosphere for Wand Electric, Inc. to work under. Certainly the fact that (i) County employees moved filing cabinets, desks, chairs, computers and other heavy objects over a newly installed floor without permitting the requisite setting or drying time, in their haste to re-occupy the first floor, (ii) County personnel, office equipment and furniture were rapidly moved in to occupy the first floor before it was ready for occupancy without a joint inspection being conducted to document any deficiencies, and (iii) numerous complaints about delay voiced by the County and its representatives in letter form and

at the construction meetings, all reveal the level of anxiety the County felt at moving this project along. Yet this same anxiety caused some of the very defects and deficiencies the County later cited to terminate the contract.

It is also important to point out that Wand Electric, Inc. was not the only prime contractor on this job. K&L Plumbing and Heating was responsible for performing certain plumbing and heating work as a prime mechanical contractor. It should be noted that K&L Plumbing & Heating was operating under a separate prime contract with the County and was an entity entirely distinct and separate from Wand Electric, Inc. Also Twin State Telephone was a different contractor performing work for the County under a separate contract with the County.

In this arbitration Wand Electric, Inc. seeks money damages, i.e., direct, consequential and punitive against the County of Clinton for the county's breach of contract, malfeasance, culpable conduct and reckless disregard of Wand's contractual rights under both the general construction and electrical contracts. In turn, the county has counterclaimed against Wand Electric, Inc. seeking money damages for Wand's alleged breach of contract under the general construction contract.

With the foregoing as general background it is critical to point out that the County of Clinton had no right to terminate Wand's general construction contract. It's arrogant and acrimonious refusal to meet Wand half-way in the spirit of working together to get the job done caused a breakdown of

communication, cooperation and mutuality of purpose which led to this arbitration.

POINT I

THE COUNTY OF CLINTON UNLAWFULLY TERMINATED  
WAND'S GENERAL CONSTRUCTION CONTRACT

It is the most fundamental position of Wand Electric, Inc. that the County of Clinton illegally, improperly, arbitrarily and unjustly terminated its general construction contract with Wand Electric, Inc. By doing so it breached its contractual obligations with Wand and must answer in damages.

It is axiomatic that a contract may be rescinded only for a material breach or default in performance. 22 NY Jur. 2d, Contracts, Section 443, pages 366-367. Although an owner may rescind a building contract for the contractor's inability to perform it after it is made, for the contractor's repudiation of the contract or an essential part thereof and for such a breach as substantially defeats its purpose. 22 NY Jur. 2d, Contracts, Section 444, pages 367-370. The owner may not rescind a building and construction contract for a slight, casual, or technical breach, but as a general rule, only for such breaches as are material and wilful, or, if not wilful, so substantial and fundamental as to tend strongly to defeat the object of the parties in making the contract. The failure of the contractor to perform in every respect is not essential to the right of the owner to terminate, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient. 22 NY Jur. 2d, Contracts, Section 444, page 368.

Where a building or construction contract in effect gives the owner the right to terminate the contract on the certificate of an architect that the contractor's default is sufficient ground for such action, such a provision makes the certificate of the architect a condition precedent to the right of the owner to rescind the contract. This provision must be strictly followed in order to justify the owner in rescinding the contract thereunder. 22 N.Y. Jur. 2d, Contracts, Section 444, page 370.

By letter dated January 11, 1994 James Arvay, the architect handling this construction project, as the owner's representative, provided written certification to the County of Clinton that Wand Electric, Inc. had breached its contract and sufficient cause existed to justify termination by Clinton County (see claimant's Exhibit 60). On the same date Frank LaBarge, Clinton County Highway superintendent issued a letter dated January 11, 1994 (claimant's exhibit number 39) providing Wand Electric, Inc. seven days written notice of the county's intention to terminate Wand's general construction contract. This letter merely echoed Arvay's letter of January 11, 1994. By letter dated January 21, 1994 (Exhibit 40) the County of Clinton terminated said contract based upon Mr. Arvay's written certification (Exhibit 60) and the written notification of Mr. LaBarge (Exhibit 39). Yet a decision had been made to terminate the contract well before January 11, 1994.

Despite the fact that virtually no complaints had been voiced by the architect or by the County as to any specific

deficiency in the workmanship of the work performed or the quality of the materials used, the County was considering terminating Wand Electric, Inc.'s contract by early November, 1993 (LaBarge testimony pages 1607-1610).

Sensing there was difficulty involving the contract due to letters which had been sent to Wand's bonding company Terry Chilton, an officer of Wand Electric, Inc. arranged for a meeting between representatives of Wand Electric, Inc. the County Highway Department, the architect and certain County legislators during November, 1993. Mr. LaBarge testified as follows at pages 1607-1610 regarding these issues:

**Q** All right. But you indicated a few moments ago, I believe, that you said you were very close to having the contract terminated as of early November of 1993, correct?

A. Yes.

**Q** As of that point in time, what communications had you made with Wand Electric, Inc. to express your dissatisfaction with the quality of the work?

A. Like I said, that was being handled by the deputy.

**Q** What communications did he make to Wand Electric, Inc. regarding the quality of the work as of early November of 1993?

A. I don't know.

**Q** Do you have any letters from Mr. Burns or anyone under Mr. Burns objecting to any particular portion of the work?

A. I don't know. I'd have to go through the files, job meeting notes, that type of stuff, letters, I don't know.

**Q** I've got the job meeting notes right here, sir, I'm going to ask you to take a look at the

job meeting notes up until and including October 27th. That's the last meeting before November. And I'd like you to tell me what complaints were voiced by Mr. Burns or by you regarding the quality of the work. Again, I'm talking about the general construction. I'm not interested, for this question, regarding the electrical contract, just so it's clear.

A. How far do you want me to go?

Q. Through October 27, 1993, because the next one after that is in December.

A. Okay.

Q. What item is referring to the quality of the work? What complaints were voiced at those meetings regarding the general construction contract by Mr. Burns or you or anyone else on behalf of the county?

A. I don't see any.

Q. And again, did you write any letters, right up until early November, concerning any complaints you had or Mr. Burns had regarding the quality of the work?

A. I didn't write any letters.

Q. You don't know if Mr. Burns did?

A. That's correct.

Q. Now, were you provided, or Mr. Burns provided, with a copy of these notes after the notes were prepared regarding each meeting?

A. Yes.

Q. And did you or Mr. Burns review them?

A. I didn't review them after every meeting. Whether Mr. Burns did or not, I couldn't tell you.

A. Yes.

Q. And was that done regarding any of the minutes up through April, including October 27, 1993?

A. I don't know what Mr. Burns did.

Q. So then, as of early November of 1993, the time period when you say this meeting with the county occurred, you were thinking strongly -- I don't want to put words in your mouth -- you were close to terminating the contract, is that correct?

A. We were considering terminating the contract.

Q. For what reason, sir?

A. Poor workmanship and not meeting the schedule"

Yet there is even more evidence that the County fully intended to terminate Wand's general construction contract by November, 1993. Arvay wrote a letter dated November 12, 1993 (Exhibit 59) stating that Wand had breached its contract. Arvay also wrote another letter dated November 12, 1993 (Exhibit 106) which contained the following language:

"I am in receipt of your Certificate for Application No. 4. I cannot certify this payment request since there is reasonable evidence that the work will not be completed within the contract time and that the unpaid balance will not be adequate to cover actual or liquidated damages for the anticipated delay, as well as the cost to finish the work.

For certification to be made for the amount indicated, it would be necessary for you to demonstrate that you will complete the work in the contract time allotted."

By this letter the owner's representative stated that a decision

had been made not to pay Wand for work already performed or for work to be performed after that date. A decision had been made to refuse to extend the contract time, despite the fact that the delays were due to the owner/architect's actions or lack of action. No showing was ever made that reasonable evidence existed that the work would not be completed within the contract time. And finally his stated intention to use the unpaid balance to cover "actual or liquidated damages for the anticipated delay, as well as the cost to finish the work", telegraphs the County's intention to improperly use this money and terminate the contract.

Thus by November, 1993 a decision had been made to terminate Wand without any perceived deficiency in work or materials. There was no substantial or material breach by Wand. The County merely delayed a formal written termination until January, 1994. This decision to terminate was without justification, it was malicious and it was made with reckless disregard of Wand's contractual rights.

It is absolutely critical to point out that with only a couple of exceptions there was absolutely no written notification given to the contractor of any claimed deficiencies in the work or materials utilized in connection with the construction project prior to January, 1994.

In the letters of January 11, 1994 (Exhibits 39 and 60) seven reasons were cited in support of the County claim that Wand Electric, Inc. breached its contract. Yet only one of those

seven reasons (number 7) was ever the subject of any written complaint made by the County or its representative prior to January, 1994.

It is respectfully submitted that each and every one of the seven cited reasons simply ~~constitut~~ a smoke screen to disguise the County's unjustified, bad faith objective to remove Wand Electric, Inc. from this construction project at all cost. It is clear that the County of Clinton merely utilized the termination procedure to award the job to the other contractor it originally sought to award the bid to; and to effectuate certain changes in its inadequate original plans and specifications on a time and material arrangement, thereby hiding numerous mistakes in the original drawings and specifications and avoiding the bidding process. One thing is certainly crystal clear - the County had no right to terminate Wand Electric, Inc. on January 11, 1994. No substantial or material breach had occurred on Wand's part to justify termination.

The only written complaints made by the County of Clinton to Wand Electric, Inc. either directly or through its architectural representative prior to January 11, 1994 are the following:

1. Mr. Arvay's letter dated August 3, 1993 (see exhibit 12) wherein he complains about Wand Electric Inc.'s lack of full-time supervision on the job site.
2. Mr. Arvay's letter of September 6, 1993 (Exhibit 14) complaining of alleged delays.
3. Mr. Arvay's letter dated November 12, 1993 (Exhibit 59)

complaining about the alleged refusal to use properly skilled supervisors and an alleged failure to meet a construction schedule.

4. Mr. Arvay's letter dated November 18, 1993 (Exhibit 105) setting forth environmental concerns.
5. Mr. Arvay's letter of December 24, 1993 (Exhibit 30) wherein he complains about the plywood underlayment and several doors not closing properly.
6. Mr. Arvay's letter of January 5, 1994 again complaining about the plywood underlayment and the lack of a vinyl cove base (claimant's exhibit 9).

At no time until a month after termination was the contractor ever provided with any deficiency list setting forth the alleged deficiencies in the work and materials (claimant's exhibits 28 and 28a). It was not until January 14, 1994, three days after written notice of termination was sent out, that the compilation of the deficiency list was even begun, and seven weeks after the owner had occupied the first floor!

Therefore, with the above noted exceptions, no written complaints regarding specific deficiencies in workmanship or materials were made by either the owner or by its representative, the architect, at any time during the course of Wand's work on the project. No claim notification was made by the County to the architect against Wand under Section 4.3 of the contract. A careful review of the above mentioned letters of complaint reveal

that the only specific items or areas of materials and work claimed to be deficient up until January, 1994 amounted to the plywood underlayment installation, the outline of the plywood sheets(ghosting), the vinyl cove base and doors not closing properly. Yet it is absolutely clear that any significant problem which existed in connection with these areas are all due to the actions of the owner and/or the architect.

Therefore as of January 11, 1994, the date the architect certified to the owner that sufficient cause for termination existed, and the very day that the owner allegedly elected to terminate the contract, the only specific items of deficient work complained of in writing related to the plywood underlayment, the "ghosting", the vinyl cove base and doors not closing properly. These were the only areas of claimed deficient work and materials and by that time the job had been underway for several months.

As the following clearly shows all of these problems were caused or were substantially contributed to by the owner and/or architect or were only "punch" list items.

First, with respect to the plywood underlayment the architect wholly failed to provide proper specifications to properly guide the contractor in the plywood underlayment installation. Under the terms of the contract there were absolutely no specifications given as to the manner which the plywood underlayment was to be applied to the asbestos tile and the concrete base. The contract documents fail to specify a fastener size or spacing. Although the contract specifications

do make general reference to an American Plywood Association publication, said publication (Exhibit 30) only discusses installation of plywood on treated wood sleepers over a concrete floor and then only if a vapor barrier is present. When the bathroom floor was dug up no vapor barrier was present. There is absolutely no detail provided to guide the contractor relative to the application involved in this project. Interestingly, architect Arvay waited until after he had approved payment for the plywood underlayment installation to the contractor, after he had verbally approved the manner of installation and after he had walked over the installed plywood underlayment before seeing fit to provide the contractor with a copy of the APA underlayment specifications (Exhibit 9 with attachment).

Moreover, Architect Arvay freely admitted to having conversations with the contractor's foreman as to the manner of application of the fasteners at the outset of application. He also admitted observing the installation at the outset of that process (Arvay, page 827). He also freely admitted walking over and observing the finished flooring materials in place after installation of plywood and before the carpet installation and making no requests to add additional fasteners (page 1910 of Arvay's testimony).

Moreover, even more significantly, the architect admitted approving the application for payment made by Wand Electric, Inc. which included charges for the installation of the plywood underlayment at a time when he knew the exact manner and method

of installation (pages 836 and 1908 of Arvay's testimony).

Certainly ~~Wand Electric, Inc., and the~~ County should be estopped from complaining that said installation was deficient and using it as a basis or reason for termination in light of all of the foregoing.

The fact that the plywood over slab-on-grade system is a substandard application is borne out clearly by the testimony in this proceeding. Dr. Richard Pikul issued a written report (Exhibit 43) and testified at the arbitration proceeding and indicated in both that the system is inadequate. One of the County's witnesses, Robert Wicichowski, indicated that despite 30 years of experience he had never seen an installation such as this one. Robert Dandrow, the flooring subcontractor with over 24 years of experience, indicated in his sworn testimony and in his written report (exhibit 29) that the system designed by the architect, i.e., applying plywood to an existing concrete floor was a lousy application. Interestingly, despite Mr. Dandrow's alleged deficient work on the floor covering, he was re-hired by Murnane Building Contractors, Inc. to complete the work under Murnane's time and materials basis agreement.

Furthermore, with respect to the alleged "ghosting", Mr. Arvay reports he observed this through the carpeting. This is an alleged defective condition that was allegedly apparent to the architect as he walked through the premises yet he never voiced any objection to same until his letter of January 5, 1994 (Exhibit 9). Moreover both the flooring tile and carpeting

subcontractor, Mr. Dandrow, and Dr. Pikul both testified that it was not necessary or even desirous to apply a filler around the plywood edges prior to installation of the carpet. Dr. Pikul clearly indicated in his report that it was his opinion that the lifting of the plywood edges (ghosting) was due to warping of the plywood on the slab-on-grade due to moisture differentials. He unequivocally opined that the warping (or ghosting) is due to the poor design system utilized and not due to any failure on the part of the contractor or flooring sub-contractor. Robert Dandrow stated in his testimony that the plywood sheets were all secure (page 641) and the plywood flooring was good and sound (page 670). It should also be pointed out that when Murnane finished the first floor in 1994 the architect directed that five of the seven first floor rooms' floors be covered with tile, not carpeting (Wicuhowski, pages 2414-2415). This shows that the original plans were so sub-standard they had to be changed.

The only other specific items of deficiencies cited by the architect or by the owner prior to January 11, 1994 related to door closings and vinyl cove base not meeting contract specifications. That it is clear in the record that the type and size of vinyl cove base called for in the specifications was no longer manufactured at the time that this project was underway cannot be disputed (Dandrow testimony at pages 655-656, Exhibit 8). Therefore this problem was due not to any fault on the part of the contractor but due to the inadequacies in the plans and specifications provided by the architect. The door closing

problem was purely a punch list item (see Exhibit 43).

The only other objections voiced in writing prior to the January 11, 1994 termination dealt with delays, environmental concerns, construction scheduling and the alleged failure to supply properly skilled supervisors. Yet all of these alleged deficiencies were addressed by the contractor in writing (see Exhibits 6, 13, 17, 18, 19, 20, 24) and during the construction meetings (Exhibit 7). Moreover in the basis or reasons cited for termination on January 11, 1994 no mention of delay or failure to provide a construction schedule were set forth. Therefore it is respectfully submitted that there were very few written complaints relative to specific deficiencies of work or materials made by the owner or owner's representative prior to the certification for termination on January 11, 1994. The only specific complaints of deficiencies in the work or materials related to complaints where the architect personally oversaw and personally approved them or where the architect's own specifications were deficient. Very tellingly, the construction notes are virtually devoid of any mention of complaints of Wand's deficient work or materials until January 5, 1994. Yet the construction meetings are a forum controlled by the owner's representative and held for the purpose of voicing and resolving such complaints. Such problems, if they existed at all, would have logically been brought up and recorded at these meetings. In fact in only two areas of the construction notes are complaints made about deficient work prior to January, 1994 and

these were either the fault of the mechanical contractor, K&L, or accepted by the owner, to wit:

12/8/93 - ceilings to be reinstalled and corrected  
(later changed to reflect K&L).

9/29/93 - Substitution of a conventional stucco system without architect's approval (this was accepted by the owner and is not a part of this arbitration).

One can acquire an understanding of the real reason for termination when one realizes that the major concern of the County prior to January, 1994 was that the project was taking so long to finish. The complaints made by the County Highway representative at the meetings (Exhibit 6) and in writing, letters dated October 14, 1993, October 19, 1993 and October 28, 1993 all relate to LaBarge's urgency in completing the project. It was only when LaBarge's frustration with delay became uncontrolled that the County elected to terminate the contract based upon alleged deficiencies in work and materials. But the Highway Superintendent's frustration at the pace of the job was caused by the owner's shortcomings and failures and those of it's representatives.

## POINT II

MAJOR AREAS OF DEFICIENCY IN WORKMANSHIP AND MATERIALS  
CITED BY THE COUNTY AFTER THE DECISION TO  
TERMINATE HAD BEEN MADE WERE EITHER NOT  
SUBSTANTIAL PROBLEMS, WERE NON-EXISTENT  
OR WERE PROBLEMS CAUSED BY THE OWNER/ARCHITECT

It should be pointed out that it was not until February 22, 1994 that the contractor ever received any type of list of deficiencies from the architect/owner. On that date, the contractor first received a copy of Exhibit 28 (page 1069 of Terry Chilton's testimony and page 871 of Arvay's testimony). This was also the same date that Dr. Pikul made his inspection of the premises. At no time prior to the County's re-occupancy of the first floor in late November, 1993 did the County or architect ever insist upon any joint walk-through for the purpose of documenting any deficiencies in violation of the contract (Arvay, page 943). The following is a general discussion of the major areas of deficiency claimed by the County.

1. PLYWOOD UNDERLAYMENT & "GHOSTING" OF CARPET

A prime complaint made by the County was that the plywood underlayment installation performed by Wand Electric did not meet contract specifications. Yet, as pointed out above, the following facts were clearly shown through the course of the arbitration:

A) The system designed by the architect was substandard. Murnane foreman Wicichowski indicated in his testimony at page 2460 that the plywood underlayment system was not a standard application. In fact, he clearly indicated he had never seen such an installation before. Mr. Wicichowski testified at page 2460, lines 6-7 as follows:

"Well, if I never did it it has got to be uncommon".

B) Mr. Arvay admitted that he observed fasteners being

applied to the plywood underlayment on the first floor and never objected to the method and spacing of same.

C) Mr. Arvay admitted that he observed and walked over the completed plywood underlayment installation prior to the carpet installation but never objected to or commented about same (page 1910 of Arvay's testimony).

D) Mr. Arvay admitted to approving contractor's payment applications numbered 1 through 4 (Exhibit 23), with full knowledge that said payments included the plywood underlayment installation (page 1908 of Arvay's testimony). He approved said payments knowing that his contract with the County required him to be familiar with the progress and quality of the work (page 1920 of Arvay's testimony).

E) Mr. Arvay admitted that no joint inspection involving the architect, owner and contractor of the first floor prior to the County's moving back into the first floor was ever done (pages 943 and 1622 of Arvay's testimony), despite Section 922 of the contract. In fact no such meeting has ever been done to this very day!

F) The plywood APA specifications cited by Mr. Arvay do not relate to the application of plywood directly upon concrete but rather relate to the application of plywood on treated wood sleepers. Mr. Arvay admitted at page 850 of his testimony that the APA specifications contain no direct reference of plywood being fastened to concrete. Dr. Pikul, in his report (Exhibit 43) clearly indicates that the

are inapplicable to the County Highway garage project.

G) Representatives of Wand Electric, Inc. questioned Mr. Arvay about the spacing and method of applying fasteners and the method and spacing was approved by Mr. Arvay. (See pages 63-64 of Mr. Leo Smith's testimony and pages 551-553 of Mr. George Daniels testimony).

H) Robert Dandrow, flooring subcontractor, stated that all of the plywood was secure (page 641) and it was sound (page 670).

Thus, one of the key complaints made by the architect and owner, and one of the few ever made to the contractor relative to work or material deficiencies prior to January, 1994 is clearly a problem related to design failure and the failure of the architect and owner to object to the contractor's workmanship when it was apparent to them and could have been easily remedied.

## 2. CEILING INSTALLATION

Another major complaint voiced by the owner relates to the ceiling installation. Yet at only one time prior to January, 1994 was any complaint ever voiced by the owner or owner's representative relative to the ceilings. In the construction meeting notes of December 8, 1993 (claimant's Exhibit No. 7) the following language is contained under paragraph 4:

"The GC is to reinstall and correct the ceilings in phase 1 while the Owner will reinstall the ceiling in Lisa's office where the telephone company is currently working."

Yet at the very next meeting, i.e. January 5, 1994, Wand requested and was granted a correction of the December 8, 1993

meeting notes regarding ceiling damages. The following correction was listed under paragraph 4:

"Wand requested correction of the last meeting notes regarding ceiling damage. It was agreed that K & L was responsible for ceiling damage due to installation of fans and heat pumps. The Architect will contact K & L to repair the ceilings."

Moreover Mr. Arvay admitted that the other prime contractors damaged the ceilings Wand has installed (Arvay, page 888).

Therefore any damages and disruption to the ceilings were clearly caused by the other prime contractor, K & L Plumbing and Heating and by the telephone company, Twin State, which was separately hired by the owner to run cables and make connections. They both appeared at the job site to do their respective jobs after Wand Electric had installed the grid work and ceiling tiles on the first floor.

Murnane's supervisor or foreman, Robert Wicihowski, testified that the ceiling tiles called for under the specifications were 2' x 4' panels with fancy grooves (page 2420 of Wicihowski's testimony). He indicated at page 2417 of his testimony that said tiles were "really a nightmare to put in". He also confirmed that said tiles easily becomes damaged or marked (page 2422) and if said tiles were already installed and a separate contractor came along and worked around said tiles they could easily become damaged (Wicihowski, page 2422). This is precisely what occurred. K&L and Twin State performed their work above the ceiling tiles and grids and caused damage to the ceilings.

The construction meeting notes vividly substantiate Wand's position that the alleged ceiling defects were not due to any deficiencies in Wand's workmanship or materials but rather due to the lack of coordination of work on the part of Arvay or the owner by permitting the mechanical contractor (K & L Plumbing and Heating) and a separate contractor (Twin State) hired by the County to work above the already installed ceilings. Under these circumstances damage was bound to occur to the ceiling and apparently did occur. The meeting notes reflect this. Mr. Daniels indicates this in his testimony (pages 563-567). Mr. Smith does as well in his (pages 187-188). This is not Wand's fault.

However, the County's contentions regarding the first floor ceilings goes beyond deficiencies in workmanship involving the grid work and ceiling tiles. Their position is that some of the ceilings are not level. However it appears clear based upon the video tapes taken of the ceilings (Exhibits 41 and QQ) that the alleged problems are minor, if there are any real problems at all. The County's video tape (Exhibit QQ) shows the ceiling in Room 101 is out of alignment by at most, one and three quarters (1 3/4") inch in a room that was 21' by 19' in size. It took the use of a laser level by Murnane, the new general construction contractor, to eliminate any subsequently perceived leveling problems. This complaint is absolutely outrageous. Certainly if the ceilings were not level this would have been noted in construction meeting notes prior to Wand's termination. No such

complaint was ever noted. Certainly if the ceilings were not level the architect in meeting his contractual duty to familiarize himself with the quality and progress of the work would have observed this and complained to Wand about it before January 11, 1994. Yet no such complaint was made by the architect. No complaint was ever made to Wand regarding the ceilings not being level until February 22, 1994 when Exhibit 28 was delivered to Wand. Tom Raville was unable to tell that the ceilings were not level (Raville testimony page 798). Obviously this is a contention injected into the dispute after the termination decision had already been made and it played no real role in the decision to terminate.

### 3. UNINSTALLED SHEETROCK ON THE SECOND FLOOR

The County complained that the uninstalled sheetrock left on the second floor by contractor, Wand Electric, Inc., upon its termination was defective in that it had been damaged by moisture and weather. Assuming arguendo that this is true, the moisture damage was caused by County employees plowing snow against it (Daniels' testimony at pages 569-70).

Witnesses called to testify on behalf of Wand Electric, Inc. indicated that the sheetrock was adequate and suitable for installation on the second floor (see testimony of Dr. Pikul, Terry Chilton, George Daniels and Leo Smith). Witnesses called on behalf of the County indicated that the sheetrock was largely damaged and not fit for use. However Mr. Arvay made no observations of it because the County merely directed him to

demolish and remove it (Arvay, page 953).

In the interests of resolving this dispute Leo Smith contacted the manufacturer of the sheetrock to have a determination made by said manufacturer. A representative of U.S. Gypsum inspected the subject sheetrock at the County Highway garage on January 17, 1994. This representative also inspected the sheetrock which had been installed on the second floor and the method of installation.

The U.S. Gypsum Company representative determined that the product was in good condition and its integrity was good (Exhibit 22). It should also be pointed out that after Wand Electric, Inc.'s contract was terminated it was prohibited from entering upon the premises. Thus, the owner had complete control over the sheetrock product. Yet it failed to preserve even a small sample of the sheetrock for use in this arbitration proceeding. It failed to take photographs or a video tape clearly illustrating that the sheetrock was unusable.

This failure on the part of the County, when combined with the opinion of the person best able to objectively determine the sheetrock's integrity, i.e. the manufacturer's representative, shows that the sheetrock was in acceptable condition for installation on the second floor. This clearly demonstrates that the County's position is fallacious.

#### 4. SHEETROCK AND STUDS INSTALLED ON THE SECOND FLOOR

After January 11, 1994 the County has complained about the sheetrock and studs installed on the second floor of the project.

Yet, Dr. Pikul in his report (Exhibit 43, page 8), in his testimony and in his photographs (Exhibit 44) documents that the sheetrock was not damaged and that it was completely functional as a wall surface. He did note one or two instances of twisted studs that needed to be straightened and refastened. Mr. Daniels confirms this (page 572). Mr. Smith also confirms this (pages 389-390). Yet certainly the problem was merely a punch list item and the contractor was ready and prepared to perform the corrective work required.

Moreover, the U.S. Gypsum representative also determined that the workmanship was acceptable with a few exceptions which were pointed out during her walk through (Exhibit 22). This opinion is entirely consistent with Dr. Pikul's opinion and the observations of George Daniels, Rick Curry and Leo Smith.

##### 5. CERAMIC TILE WORK/THRESHOLDS

The concern registered by the owner after termination were addressed by Leo Smith and by Dr. Pikul who indicate as follows:

Dr. Pikul observed transition problems between Corridor 107 and Toilet Rooms 105 and 106. The difference in finish floor elevations created by plywood installation in the corridor resulted in the need for a nonstandard marble threshold. In his opinion, the contract documents do not sufficiently indicate how the transition in floor elevations is to be accommodated. The "Finish Schedule" on Drawing GC9a indicates a cement board of unspecified thickness is to be used as a substrate. However,

Specification 09311 does not discuss a cement board substrate and indicates the floor tile should be placed on a leveled existing substrate. This appears to be how the tile was installed in Toilet Rooms 105 and 106.

In the second floor toilet rooms 119 and 120, Dr. Pikul noted that a cement board had been installed to more nearly level corridor and toilet room substrate surfaces. The Contractor indicated the cement board installation was at his suggestion to avoid problems experienced at the first level. Because the first level corridor and toilet room finish substrates were at different elevations, the specified marble threshold (Spec. 09311 2.08C) was not appropriate. Significantly the Door Sill Detail (12/GC9c) does not recognize the difference in finish floor elevations or the marble threshold. The Contractor merely installed the noted threshold to allow use of the facility until the transition problem could be resolved. The installed threshold is clearly an appropriate width.

In Dr. Pikul's opinion the toilet room Floors should either be brought to the same finish level as the corridor floor to allow use of the specified threshold or a special threshold should be designed to accommodate the elevation differences. In either case, the correction of the problem should be by a Change Order to the Contract. The other concerns with the installation are clearly punch list items.

Obviously the fact that no mention was made of the ceramic tile work or of thresholds in any job meeting or any written

complaint prior to January, 1994 demonstrates the accuracy of Dr. Pikul's and Leo Smith's opinions and observations.

6. WALL SUBSTRATE AND WALL COVERINGS

It is undisputed that certain wall paper seam problems and uneven substrate surfaces called for in the specifications existed. The type of product called for in the specifications is not seamless, especially in the uniform light color selected (Exhibit 10). Uneven and unbonded seams needed to be repaired as punch list items (Dr. Pikul's report, Exhibit 43). The isolated instances of uneven substrates need to have the wall covering removed, the sub-strate surface corrected and the new wall covering installed. The sub-contractor was rushed to allow Owner occupancy of the first level and fully was prepared to correct these problems as punch list items. Yet he was never afforded the opportunity to do this. Joe Johnson, the wallcovering subcontractor, indicated his willingness, and even eagerness, to return to correct any deficiencies (Johnson, pages 492-539).

7. FAILURE TO EXTEND SHEETROCK TO UNDERSIDE OF STEEL DECK

Wand didn't extend the sheet rock to the underside of the steel deck to enable the electrical and mechanical contractor to do their work. Otherwise this mechanical contractor and electrical contractors would have had to damage sheet rock.

Terry Chilton explained this at page 1211 of his testimony:

"Q. Were there certain areas in particular on the second floor, I think was in question, about that the sheetrock did not go to the

ceiling when it was required under the contract?

A. Well, nothing was ever said about that but what we intended to do was we had left, intentionally, a one foot space between the ceiling and where the sheetrock ended so the electrical contractor could run their conduit and refrigeration, and so forth, and once they had done their thing, then we can go in and box in that final one foot or six inches, whatever it was, but we were never allowed to do that."

This rationale is illustrated by the drawings/maps which comprise Exhibit 1. In particular drawings numbered M1 and M2 reveal that the mechanical contractor would have had refrigeration, venting and hot/cold plumbing lines in virtually every room on the first and second floors of the project. By deferring completion of the sheet rock installation until the mechanical contractor had finished his job Wand was preventing damage to the sheet rock. Unfortunately Wand was terminated before it had the opportunity to return to the first floor and finish this.

8. WALL OUT OF ALIGNMENT IN WAITING AREA 112

Bruce Kipp indicated at pages 2206-2207 of his testimony that no walls were out of plumb on the first floor. He indicated as follows at pages 2206-2207:

"Q. Were there any other walls that you know of that were out of the plumb there were installed by Wand?

A. Well, I mentioned there were a few upstairs.

Q. No; downstairs.

A. Downstairs? The walls and stuff, I -- no, I can't say. No, not that I -- not that I can recall, there was any."

9. RESILIENT FLOOR TILES/VINYL BASE

Dr. Pikul noted resilient floor seam problems and isolated problems with the vinyl base installation. The floor seam problems were caused by the County's movement of office equipment and furniture onto the 1st floor offices before the tile cement had properly set (Arvay testimony pages 887-888). Mr. Arvay indicated as follows at pages 887-888:

"Q. Did the county move in the weekend after that Friday?

A. Again, I'm not sure of when. I know they moved in approximately that time.

Q. Do you know what the county was required to move into Phase One to occupy that part of of the premises? What things did they move in?

A. They moved in all their office equipment from upstairs to downstairs, file cabinets, desks, chairs, computers, office type equipment.

Q. Was it done on a weekend?

A. Again, I don't know.

Q. Do you have any notes of that?

A. No.

Q. Did you go to the site the Monday after that weekend?

A. I believe I went there, yes, and I recall they had some things still being moved but the vast majority of them were already in place.

Specification Section 09650,3.06A requires the prohibition of traffic on the finished floor for 48 hours. James Arvay, Leo Smith and Robert Dandrow and testified that the requisite number

of hours were not permitted to elapse between the time of installation and use. Correction of this problem required removal and installation of tiles that have shifted. This was due to the County's impatient weekend rush to vacate the second floor and return to the first floor.

Dr. Pikul testified and stated in his report that the vinyl base problems appear to be due to the difficulty in matching new materials to old surfaces. Where the workmanship is objectionable the base needs to be recut as a punch list item. The uneven vinyl base in Corridor 107 was apparently due to a wall finish problem at the base of the wall. This would have been similarly corrected as a punch list item.

#### 10. Window Sills

This is another item that was not mentioned or complained about to the contractor until February, 1994. However, as Dr. Pikul indicates in his report (Exhibit 43) the plastic laminate sill needs to be replaced. It is covered under warranty provided by Wand and by the supplier. Had a complaint been registered by the owner/architect prior to termination this would have been corrected as a punch list/warranty item as Dr. Pikul suggests.

### POINT III

#### THE COUNTY AND ITS REPRESENTATIVE EXHIBITED MALICIOUSNESS AND RECKLESS DISREGARD OF THE CONTRACTOR'S CONTRACTUAL RIGHTS

The maliciousness and reckless disregard of Wand Electric Inc.'s contractual rights during 1993 and 1994 has been spelled out earlier in this memorandum and in the proof adduced during