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PUBLIC HEARING

before

ASSEMBLY TRANSPORTATION AND COMMUNICATIONS COMMITTEE

on

Awarding of Highway and Bridge Construction Contracts

October 16, 1985
Room 438
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Wayne R. Bryant, Chairman
Assemblyman Thomas P. Foy
Assemblyman Newton E. Miller

ALSO PRESENT:

Assemblyman Chuck Hardwick
District 21

Laurence A. Gurman
Office of Legislative Services
Aide, Assembly Transportation
and Communications Committee

New Jersey State Library

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ASSEMBLYMAN WAYNE R. BRYANT (Chairman): This is a continuation of the hearing dealing with the Edison Street Bridge. I would like to thank you, Commissioner, for coming back. Will you and your staff please come up to the witness table?

Let me start out by saying, first, thank you for the information you submitted. However, I do have a couple of questions. We asked for the specifications and the contract documents which were actually executed, but those have not been submitted to the Committee. I am wondering why that was not done. We also asked for costs for the temporary repairs to that Bridge; that was also not done. It is very difficult to ask questions when the specifications and contracts are missing.

FROM AUDIENCE: The contracts were not submitted?

ASSEMBLYMAN BRYANT: Also, the specifications for the bid were not submitted.

COMMISSIONER ROGER A. BODMAN: Mr. Chairman, Mr. Weinstein will see if he can get those documents brought right down. As to the temporary repairs, Mr. Chairman, Mr. Freidenrich may well be able to give you an estimate on those. He has had an opportunity to do that.

Jack, what are the costs? Are they for just repaving it now and tearing it up in the spring?

ASSISTANT COMMISSIONER JACK FREIDENRICH: Yes. The problem I ran into, Mr. Chairman -- I am trying to develop a response to that question -- was, the purpose of putting an overlay down is to protect the work you do on the deck. If you did it temporarily, it would not preclude the intrusion of the deicing salts over the wintertime. Not only that, the deicing chemicals would not be precluded by a temporary asphalt pavement, but once it got down onto the concrete deck, it would also be trapped there, so it couldn't even run off in any subsequent rainfall.

So, as a practical matter, such a solution would be counterproductive to the very work we are trying to do. In other words, correct the deck defects, and then put something there so that those defects will not reoccur in a very short time.

In addition then, we would have to come back in the spring and remove that temporary overlay, and we would quite probably have to

redo some of the deck repair we did that had been subjected to the deicing chemicals.

ASSEMBLYMAN BRYANT: But what you are telling me is, there are no costs? We have no idea what those costs could be? We're talking about one season, so it is not like we are doing five years of this deicing material going over. We are talking about one season. If we look at the mild winters we have had in the past, I mean, you might be talking about one major snowstorm.

COMMISSIONER BODMAN: Except the Bridge tends to ice up more readily, does it not?

ASST. COMMISSIONER FREIDENRICH: Yes, sooner than approach roadways. Quite frankly, we never did try to develop the cost because of the-- You know, we could not figure out to what end. We have determined to be sure to keep the deck with as good a rideable surface as possible over this next winter. Once we concluded that there was no practical reason to do that, we never pursued it any further to develop a cost. Frankly, it was rather difficult to try to determine what it was we would be seeking to estimate.

ASSEMBLYMAN BRYANT: Well, my understanding -- and I don't want to belabor the point because it is a minor point-- What we are trying to figure out is, what was the actual cost in dollars, assuming, you told me, you were going to have a lip of maybe an inch or a quarter of an inch if you overlaid it and then had to remove it. That is what you are telling me would happen if you overlaid the Bridge because of that gap -- what it would cost to put it down, what it would cost to take it up.

ASST. COMMISSIONER FREIDENRICH: Because it would make vulnerable the deck underneath, even if we had only one storm, and the deicing salts intruded to the concrete deck below that overlay and then was trapped there so that it would be working away at that concrete through the whole winter season. We have learned through many years that if you overlay concrete without having an impermeable layer between that bituminous material and the concrete deck, that is more deleterious to the concrete structure than leaving the concrete exposed. There when it is exposed to the deicing chemicals, the next

rain comes along and at least washes it off. That does not happen when you have a bituminous concrete layer over a Portland Cement concrete structure. The salts just lay there and are trapped, and they continue to work away at the deck.

ASSEMBLYMAN MILLER: Mr. Chairman, may I ask a question?

ASSEMBLYMAN BRYANT: Yes.

ASSEMBLYMAN MILLER: Let's say you were to go ahead and put this temporary pavement down, wouldn't you have to put that out to bid also? If you are going to do what is being thought about here, put the layer over the top of the cement to protect it, and then put your temporary macadam or something -- wouldn't that have to go out to bid too?

ASST. COMMISSIONER FREIDENRICH: It is not inconceivable that you could do that by a change-order to the existing contract. But again, and maybe it is my engineering mentality I'm stuck with, as a practical matter, it just, you know, would not be to any end. It wouldn't do anything for us, but it could create significant additional costs and time, again incidentally, in the springtime to remove all of that material, and then clean off the deck so it would be in a clean condition for the application of the final material.

ASSEMBLYMAN BRYANT: I don't want to be argumentative, but we can't determine whether that was a significant cost. That was the question posed, and we do not have that answer because we did not do that. So, we don't know that. That was the whole exercise, to find out so we could make some mental judgments as to what those costs would be.

I didn't say there was going to be significant cost involved. We asked a direct question; that is, for you to give us the cost, and you tell me you didn't do it. I think basically what we are doing is conjecture because we don't know.

ASSEMBLYMAN MILLER: Mr. Chairman, though, common sense dictates really.

ASSEMBLYMAN BRYANT: I am only dealing with cost.

ASSEMBLYMAN MILLER: I recognize what you're saying, but to have these people try to work up the cost-- They would probably come

in with a cost figure just as much as the bridge job would cost in the contract itself, because you have to put down the under layer, you have to put the temporary down, and you have to take it back up again. You have the cost of not only that, but the traffic conjestion twice instead of once. I think just common sense dictates it is going to cost you almost as much, if not more, in the long run.

ASSEMBLYMAN BRYANT: I said I am not going to belabor it; that is the reason I asked just for the cost. It is just a simple question, and then I would have known.

ASST. COMMISSIONER FREIDENRICH: Mr. Chairman, if it would be helpful, I could call our chief engineer of design and ask him to calculate the cost of putting down an inch and a half of bituminous concrete all over the Edison Bridge, and also to calculate the cost of removing it in the springtime. If that would be useful.

ASSEMBLYMAN BRYANT: I think that might be helpful. At least we would know.

Let me ask another question since we don't have the contract. Is there a liquidated damages clause in the contract?

ASST. COMMISSIONER FREIDENRICH: Yes, there is a liquidated damages clause in all of our contracts.

ASSEMBLYMAN BRYANT: What does this one say?

ASST. COMMISSIONER FREIDENRICH: I would really have to check the specifications to determine the amount of liquidated damages incorporated in that contract.

ASSEMBLYMAN MILLER: May I ask, what are liquidated damages? When you say "liquidated damages," what do you mean by that expression?

ASSEMBLYMAN BRYANT: Liquidated damages means that if you can't perform the contract on time you start paying us for not completing the contract within a specified time.

ASSEMBLYMAN MILLER: Okay, but don't you have to have another clause in there saying if they complete it ahead of time they get paid a premium for doing so?

ASSEMBLYMAN BRYANT: I am not sure whether they have to or not. You don't have to have that.

ASSEMBLYMAN MILLER: I think law dictates that if you put it one way, you have to have it the other way also. At least that is the way it was at the municipal level.

ASSEMBLYMAN BRYANT: The question I was asking came up at the last hearing. We are still getting the same answers; no one has looked at it. If we had gotten it, I would have looked at it myself to see what the liquidated damages clause was. I mean, we specifically asked you that. (speaking to witnesses) You said you didn't know at that time. In the week since, you haven't looked at the liquidated damages clause? That was what we wanted to have information about.

ASST. COMMISSIONER FREIDENRICH: Excuse me, Mr. Chairman. I don't recall that that was a direct question. I do recall that there was a discussion about a penalty and an offsetting incentive clause. But forgive me, I don't recall that there was a specific question asked about the amount of specified liquidated damages. That is a simple question to answer because it would be in the specifications.

ASSEMBLYMAN BRYANT: Let me ask the next question then. Are we planning to exercise the liquidated damages clause, assuming we are not getting this work done? The completion date is November 16.

ASSEMBLYMAN FOY: Twenty-sixth.

ASST. COMMISSIONER FREIDENRICH: Pardon?

ASSEMBLYMAN BRYANT: November 26.

ASST. COMMISSIONER FREIDENRICH: No, I don't believe so. As I indicated, there were discussions with the second bidder, who became the apparent low bidder, as to the feasibility of completing that project within the time specified because of the temperature sensitive material that was included in the contract. I believe there is language in the specifications which provides for appropriate extensions of time when the work specified, for good reason, cannot be accomplished within the time specified. It is my expectation that, based on the information I brought you last time-- It is our staff's conclusion, as a practical matter, given the information that was brought to us about the time it would take to get the joint material and the temperature requirements that come along afterward, that the job could not be completed this construction season.

ASSEMBLYMAN BRYANT: Let me ask you another question. Did your staff also conclude that on September 16 you knew it could not be completed, but the contract was not signed until October 1? And yet there was a \$900,000 differential, or even if you gave the first bidder his \$375,000, or you misquoted him a \$500,000 differential-- Maybe the sense of what should be done is, rebid it anyway because of this wide gap. From my understanding, the whole purpose of the contract from the beginning, was to get it done before November. Now, all of a sudden, on September 16, according to the documents you submitted, we knew that nobody could do that, and we had this wide disparity in terms of price. It is not going to be done until the spring, so we have plenty of time to rebid it.

ASST. COMMISSIONER FREIDENRICH: The award was made, I believe, on September 12. At that time, the Department, recognizing the strong desire to have this work done this particular construction season, moved ahead after it had been determined that we could not award to the original apparent low bidder. We moved ahead and took an action to make an award to the second bidder, who then became the apparent low bidder. It is my recollection -- and I believe this was included in the information furnished to you -- that there was a commission action which recommended and made the award on September 12.

It was not until after the contractor was notified of the award -- if I recall the sequence correctly -- that he brought up the problem on the delivery of the joint material, which, in turn, would create the problems with the temperature sensitive materials.

ASSEMBLYMAN BRYANT: Why didn't we cancel the contract? I mean, I don't understand. When you say you made an award-- The contracts were not signed until October 1, from what you submitted to us.

ASST. COMMISSIONER FREIDENRICH: That's right. Also submitted was a commission action which made the award. An award is made, and the contract itself, based on that decision, is mailed to the contractor for execution. He has 10 days within which to return that executed contract. It is then executed by the Department.

ASSEMBLYMAN BRYANT: Let me ask you about the first bidder. Do they submit projects they are currently working on so you can determine their rate? In other words, when you decide they have exceeded their rate in the documents, do they actually submit contracts they are currently working on to you, so you can tell whether they have exceeded their rate or not?

ASST. COMMISSIONER FREIDENRICH: I believe we discussed that at length last time. Let me see if I can say it again. When a contractor submits a bid on a project, one of the things he has to submit is an updated financial statement. That includes work on hand, outstanding commitments, his whole updated financial statement. One of the things done after we receive bids, and before a determination on award is made, is an analysis of his residual financial capacity. So, yes, that information is submitted with his bid.

ASSEMBLYMAN BRYANT: And the first bidder was \$135,000 and some odd dollars over his financial capacity from the information you received?

ASST. COMMISSIONER FREIDENRICH: No, he had-- The analysis by our Bureau of Contract Administration determined that he had a negative posture, a minus, I believe, in those answers that were developed by the staff--

ASSEMBLYMAN BRYANT: That's what I meant when I said over; I meant negative. In other words, he did not have the capacity needed in order to do the contract by \$135,642. He was short of sufficient financial capacity.

ASST. COMMISSIONER FREIDENRICH: I don't believe that is what that information says. I think what it says is, his posture was minus \$135,000. If I understand that correctly -- and I just got back from a meeting late last night -- he bid \$1.4 million; he had a minus capacity of \$135,000, so he was short by the amount, I believe, of his whole bid, plus \$135,000 more. In other words, the first number-- I am trying to locate that answer. The first number that's shown is his residual capacity. That capacity--

ASSEMBLYMAN BRYANT: Let me refer you to: Assembly Transportation Committee, Subject - Answers to Questions of October 7,

1985, dated October 11, 1985, Question No. 10. "What was Pressure Concrete's financial status at the time of the Edison Bridge decision?" The answer reads: "Based on the information available, DOT from Pressure Concrete, the firm fell \$135,642 short of sufficient capacity." Now, if I read that right, it means if he bid \$1.6 million, he really had a \$1.5 million capacity at that time.

ASST. COMMISSIONER FREIDENRICH: Well, I would read it the same way. Even on that basis, you know, the regulation is that he must have sufficient capacity to cover the amount of his bid.

ASSEMBLYMAN BRYANT: I understand that. I am just asking you if this information is correct. That is basically what I am saying.

ASSEMBLYMAN FOY: Isn't the real issue the fact that he really didn't want the bid? He really didn't have any incentive to run out and get himself an extra line of credit; he didn't want the job because he perceived that he fell short by \$375,000. That concerns me because -- you can correct me if I am wrong, Mr. Freidenrich -- doesn't the Department have the authority to provide change-orders for an amount up to 20% of the cost of the total contract? He could have been given an extra allowance for that \$375,000.

ASSEMBLYMAN MILLER: There wasn't any contract, Tom, at this point.

ASSEMBLYMAN FOY: Well, you are in a position to negotiate with the apparent low bidder on the contract, are you not?

ASST. COMMISSIONER FREIDENRICH: Absolutely not.

ASSEMBLYMAN FOY: You can't?

ASST. COMMISSIONER FREIDENRICH: Under no circumstances are we allowed to negotiate once we have a competitive bid submitted. The only time we ever negotiate anything after that is if an unanticipated condition occurs where we need some additional work done during the life of the contract. There are provisions in our specifications to negotiate for that extra work at a mutually acceptable price. If we are unable to do that, we then also have the ability under our contract to require the contractor to perform that additional work on what we call "a force account basis," time and materials.

ASSEMBLYMAN FOY: Then you could have held his feet to the fire and insisted that he perform the job for that price if you would have accepted his representation that he had reduced his backlog of other work and, therefore, had an additional \$185,000 worth of credit.

ASST. COMMISSIONER FREIDENRICH: Mr. Foy, I believe we discussed that at some length at the last hearing. I tell you that upon advice of legal counsel, we never got to that question. We had no choice but to reject his bid as not responsive.

ASSEMBLYMAN FOY: What I am trying to find out, Mr. Freidenrich, is-- He bid approximately \$1.4 million, and he indicated he made a mistake regarding -- by his estimates -- \$375,000 worth of materials and work. I am trying to find out if you had the flexibility under the laws and regulations of the Department whereby you could have negotiated in the \$375,000 he said he left on the table. If you could, he could have then done the work, and it still would have been about \$400,000 or \$500,000 less than the Schiavone Company's bid. But what you are telling me is you didn't have that flexibility.

ASST. COMMISSIONER FREIDENRICH: It is my opinion that we do not have that flexibility.

ASSEMBLYMAN FOY: All right. Then that question is moot. You could not have dealt with it in a fashion of attempting to correct his bid for him subsequent to the fact.

ASST. COMMISSIONER FREIDENRICH: That is right.

ASSEMBLYMAN FOY: Okay; all right.

ASSEMBLYMAN BRYANT: My question is, since you have this financial ability or rating, and looking at your responsibility to save us as much money as possible in this State-- One of his major projects is with the New York/New Jersey Port Authority, and if I am not mistaken from your previous testimony, the Department had knowledge of this, based on his financial statement.

ASST. COMMISSIONER FREIDENRICH: We have information on just what his projects are, but I don't recall saying that one of them was the Port Authority.

ASSEMBLYMAN BRYANT: Here is my line of thinking so you can understand what I'm saying in terms of saving taxpayers' money. That

is a public job. Payments on that public job are public also. Therefore, assuming we can lock a person into a \$900,000 saving and he sent a letter on, September 5, I think it was, that he had aggressively reduced his outstanding obligations by just mere calls to the places where he was working, we might find out from the Department's standpoint that \$135,000 in the kind of contracts he is doing could have been reduced from his contract. In other words, let's assume he got paid 20% from the New York/New Jersey Port Authority on a \$2 million project. That's \$200,000 which would have been reduced in terms of increasing his rating. Let's assume he also listed other municipal projects which were public information. If we had made inquiries, we could have locked him into that contract because his rating then could have been increased.

ASST. COMMISSIONER FREIDENRICH: Mr. Chairman, it is my understanding that the information he submitted, the updated financial statement, includes information on the outstanding work he still has to complete, not the sum of his original contract, but the amount that remains to be completed from the original contract.

ASSEMBLYMAN BRYANT: What I am asking is, if that information was submitted, according to your testimony-- I think we let those bids in July or August, between August and when we made this decision, which is a month, and people pay monthly. We had all the information, and then he sent us a letter basically saying, "I have aggressively done work since I submitted that information that will reduce what I need." That information is readily available if we make the calls.

ASSEMBLYMAN MILLER: Mr. Chairman, if I may, please.

ASSEMBLYMAN BRYANT: If the intent is to save the taxpayers dollars. I don't know; I mean, I am asking that question. The only reason I asked that, Mr. Miller, is because they told me there are 11 other people who are following the same situation, and we never lost one in the last four or five years.

ASSEMBLYMAN MILLER: If I may-- You know, I agree with you. If we lost \$900,000 because of \$137,000, I would be concerned too. But on the other hand, let's look at it from their side of the table. Suppose they had called, and suppose they did say, "Oh, we're satisfied

by these telephone calls that this man is whole; he's okay, we can go with him." But then let's say he fell on his nose. This Committee would then be investigating these people as to why they awarded it when they had nothing in black and white to substantiate what the man said over the phone, and we took somebody else's word for it.

ASSEMBLYMAN BRYANT: What if I tell you this is--

ASSEMBLYMAN MILLER: Now, wait a minute, Wayne. What you want them to do is deviate from the set procedure for the sake of trying to save \$900,000, which I admire. I agree with you, if we can do it, fine. But you can't expect these people to stick their necks out because then we would be in here chopping them down for doing something that was contrary to the rules and regulations.

ASSEMBLYMAN BRYANT: No, no, I am not asking them to do that. I'm saying, you can make the call and you can get a letter sent. The New York/New Jersey Port Authority doesn't want--

ASSEMBLYMAN MILLER: They had the opportunity. They sent them a letter asking them to support or to come in with something, a bond, or some other-- Why didn't he send the letter back and say, "Here is our financial situation right now," so they could accept it? They didn't do that.

ASSEMBLYMAN BRYANT: Let me explain.

ASSEMBLYMAN MILLER: Wait a minute. They sent a letter saying, "Look, believe us. Believe us, we're okay. We've reduced everything; we're fine," but there was nothing in black and white.

ASSEMBLYMAN FOY: But, see, Assemblyman Miller, that is not really what he said.

ASSEMBLYMAN BRYANT: That's not my point. My point is--

ASSEMBLYMAN MILLER: Never mind the incentive. What's the rule?

ASSEMBLYMAN BRYANT: I am going to tell you how you get to the rule.

ASSEMBLYMAN MILLER: Go ahead.

ASSEMBLYMAN BRYANT: My point is, you have an individual who has made the low bid. The individual then finds out that he should have changed the bid by \$335,000. That is not an incentive for him to

supply the information, but you, as a representative of the State, have information on where he got the contracts from. He has given you information that he reduced those contracts since he submitted his bid, which you could easily check and get written, to lock him into State money. That's the point.

ASSEMBLYMAN MILLER: I don't disagree with you. What I'm saying is, they can't do it legally because there is nothing in black and white from these people.

ASSEMBLYMAN BRYANT: If you call the New York/New Jersey Port Authority and say, "Send me a letter as to what you paid them since July," they will send you a letter.

ASSEMBLYMAN MILLER: That is not what the rule says. The rule doesn't say that. The rule says "they shall submit," and they didn't submit. They just gave us--

ASSEMBLYMAN FOY: You know, I just had an opportunity this morning to review Pressure Concrete's letter. Wasn't this a situation in which Pressure Concrete was really trying to have it both ways, and, in a sense, was taking advantage of the inflexibility of the departmental regulations?

Let me give you an example. I will read Falcone's letter dated August 13. He must have had some good lawyer write this letter because it is very clever, as far as I am concerned. He writes to John Walz, Chief, Bureau of Contract Administration, regarding U.S. 9, Section 1-A, Middlesex County: "Gentlemen: We acknowledge receipt of your letter dated August 5, 1985, in which you state that due to the significant increase in our outstanding contracts to be completed since the time of our pre-qualification, you request that we provide an additional line of credit to increase our financial capacity, or state that our financial position has changed substantially, and thus display our ability to finance the project." So, you have asked for one of two things. Either an actual line of credit, which is an instrument -- a commercial instrument -- or you have asked for evidence that their financial position has changed substantially.

Now I don't know what you accepted in the past in the way of evidence, but what he says, certainly, I would never accept. It says,

"We are aware that your letter was written prior to our notification to your office that our proposal contained certain items of work which were omitted, and which totaled a substantial value and, therefore, we had requested permission to withdraw our proposal and to be relieved of any contractual responsibilities relative to this project." So he is again advising them, "We don't want this job."

Then he goes on to say, to try to cover himself, I guess, for future work or for posterity, or whatever: "I can therefore only answer your letter of August 5 with regard to our financial plan to perform the above-referenced contract as if there were no omission, and we were satisfied with our bid proposal price, and state that we have been aggressively reducing our backlog of uncompleted work, and, therefore, would propose to complete the above-referenced project without providing additional lines of credit assigned specifically for this project."

He is playing a very cute game with the Department, in my opinion. He doesn't really want the job. As a consequence, he doesn't go far enough in terms of what you have the authority to accept in providing you with additional financial data that would enable him to do the job, because he doesn't really want to do it. It seems to me that if we are going to point a finger, or find the culprit, these guys are the culprits to that extent.

I am a little mystified as to why this wasn't followed up by saying specifically, "Show us where your backlog has been reduced and how you have additional financial capacity." Of course, that may be-- I don't know why you didn't follow it up to that extent, whether it be phone calls-- I don't think phone calls are the answer. I would have said, "Produce evidence that you received additional payments and that your outstanding backlog has been reduced. Give it to us."

ASSEMBLYMAN MILLER: He has been asked that, Tom. In an order before this, he was asked for it and he refused to give it.

ASSEMBLYMAN FOY: Well, it says, "request for an additional line of credit or submission of an updated financial statement." He didn't submit that. It was the fourteenth when he got that. Okay? And he never submitted it subsequent to that. See, his letter was dated the thirteenth.

ASSEMBLYMAN MILLER: Okay. Mr. Falcone indicated that Pressure Concrete would not be supplying the additional financial information requested. They would not be supplying the information that they had to have in black and white so they could do what they had to do to award the contract to them. I am looking at the next draft.

ASSEMBLYMAN FOY: The memo from Walz to Freidenrich?

ASSEMBLYMAN MILLER: That's right. There is a sentence in the second paragraph -- John Falcone, President-- If they are not going to supply the additional information, I don't think the Department of Transportation has any choice in the matter but to go to the next bidder. Again, remember they are looking for a time element here. They want to get the job done.

COMMISSIONER BODMAN: Mr. Foy, if I may. In reading this correspondence, the letter you just read was dated August 13 from Falcone to Walz--

ASSEMBLYMAN FOY: Right.

COMMISSIONER BODMAN: --explaining that position. On the previous piece of paper in my package -- I don't know if yours is collated the same way -- there is a letter dated August 14--

ASSEMBLYMAN FOY: Yes, the fourteenth, which was a follow-up letter.

COMMISSIONER BODMAN: --in reference to a phone conversation which supposedly took place on August 13. Presumably that letter had not arrived in our Department -- I don't have an arrival date -- but apparently a conversation took place between Walz-- I'll read it: "Dear Mr. Falcone: As per telephone conversations with Mr. John Walz and myself on August 13, 1985" -- which is the same date as the letter you just read -- "you are to provide our office with your reply to our request for an additional line of credit, or submission of an updated financial statement." That seems to be a second request by phone, as well as by this follow-up letter, to again seek that information and file the appropriate financial statement, Form DC-74B.

ASSEMBLYMAN FOY: Okay. This leads to another matter then. The two instruments you will accept by way of additional financial capability are either: (a) a line of credit, or (b), that particular

document, Form DC-74B. You don't have the authority to accept other things -- that is what I am trying to get at -- in terms of the waiver of the \$185,000. You either had to have one of those two things, or you couldn't move. Is that right?

ASST. COMMISSIONER FREIDENRICH: That is exactly right.

ASSEMBLYMAN FOY: Then he really was able to take advantage of the fact that you are limited in terms of what you can accept. Is that a fair assessment of the situation? If he didn't supply you with either one of those things, he was basically off the hook.

ASST. COMMISSIONER FREIDENRICH: Well, his bid, under the regulations, was considered non-responsive and it was not a bid.

ASSEMBLYMAN FOY: Okay. That is really what he wanted because he had told you in advance, "Hey, I left \$375,000 out of my bid," and he didn't really have a way to change his bid to allow him to put the \$375,000 in. So he sure as heck didn't want to have to go in there and do it for \$1.4 million, particularly when he left \$900,000 on the table up to the next bidder. I don't know whether he knew about the limitation as far as what you could accept, but he certainly planned to his best advantage because he didn't provide you with either of the things you could have used. He simply gave you a statement that things were a little better on his other jobs, and therefore let him do it. You couldn't do it. I think he really managed to take advantage of the situation, much to the \$900,000 detriment of the taxpayers.

ASSEMBLYMAN MILLER: You know, if anything comes out of this at all, Tom and Mr. Chairman, I think we have to, or someone has to, check into how to keep people like this from getting up, if they have to sacrifice 20% of their bond, or some such thing, if they make a bid and they refuse to come back with additional collateral, or--

ASSEMBLYMAN FOY: Well, what concerns me is, we got stuck with a \$900,000 higher tab by virtue of: (a) his mistake, and (b), his ability to not suffer from that mistake because he was able to use departmental regulations to his advantage.

So the issue for me is, how do we stop this from happening again because, "Once burnt, twice shy," you know.

ASSEMBLYMAN MILLER: A bidder can underbid on the thing with the thought in mind that, "Well, I don't have enough coverage here. If the bid is right, I'll bring the coverage up, but if it isn't right, I'll just back off on the thing."

ASSEMBLYMAN FOY: He is in a great position. It's win, win for him because he has all the options. He is holding all the cards.

ASSEMBLYMAN MILLER: So, something has to be done to protect the State from that kind of action.

ASSEMBLYMAN BRYANT: Are there any other questions on this point?

ASSEMBLYMAN FOY: The Commissioner has to appoint a task force to figure out how to get around that problem.

ASSEMBLYMAN BRYANT: I should welcome the Minority Leader, Mr. Hardwick, who has joined us again.

ASSEMBLYMAN HARDWICK: May I ask Mr. Foy a question?

ASSEMBLYMAN BRYANT: Sure.

ASSEMBLYMAN HARDWICK: Mr. Foy, if Pressure Concrete or someone else was apparently in error-- I don't know much about that business, but they have made an error. Under what circumstances is it in the public interest to hold them to it if it would mean bankruptcy of a company? Are you advocating such a law or regulation? If someone makes an error in bidding -- apparently a good-faith error; I mean, they apparently screwed up their bid -- would you advocate a law? Is that what you're saying, that they should be held to it regardless?

ASSEMBLYMAN FOY: Well, the law already exists that they can be held to it regardless. It's really a decision for--

COMMISSIONER BODMAN: It is my understanding that we have a procedure to deal with those kinds of questions.

ASSEMBLYMAN FOY: --the policymakers. That is already a law. They could have been held to it under the set of circumstances, if you really wanted to go to it. The problem here is -- and I think, unfortunately, this is the worst "Catch-22" situation I have seen -- the extraordinary time considerations. If they said, "Okay, we are going to hold you to it," and this guy said, "Fine. I am going bankrupt," or whatever, "litigate," where are we? Nothing would be

achieved in the sense of holding him to it, other than ultimately we probably would have gotten the \$900,000 difference through either liquidated damages or the Attorney General's litigation in suing the company, assuming that bankruptcy was not his response.

You know, if I were his lawyer I would say, "Hey, take a salvage, go bankrupt." The Department would be beat and he would be none the worse for wear.

That is already the law; what you're saying is already the law. The Department seriously could have decided, "Look, we don't care about the mistake. We're saying you're in there." Then it would have to be litigated as to whether their lateral mistake was so obvious that the Department was acting irresponsibly by forcing them to go forward with a contract which they knew was impossible to perform. That is a serious question here. You know, I am not going to second-guess the Department and say what they did wasn't appropriate. They were trying to get the job done. It's just-- I think the real consideration is that the next bidder was so much higher. Even with the \$375,000 mistake -- okay? -- it was still \$525,000 cheaper than the next bidder.

ASSEMBLYMAN BRYANT: And looking at where they said they made the mistake and what the Department estimates, they would be hard-pressed. The Department estimate was \$11.00 per square yard, and theirs was \$9.00.

ASSEMBLYMAN FOY: I hate to tell you that I think, unfortunately, the Department engineer may have made a mistake, because the Department engineer's number for that unit price and Pressure Concrete's number are very close. All of the other bidders are three times as much, and they are all very close to each other. So I think they had the right number in there. They probably had more realistic bids, as far as that goes. The Department had an \$11.00 estimate per cubic yard; Pressure Concrete bid \$9.00 per cubic yard. I think Schiavone was \$27.00, the other guy was \$28.00, and the other guy was \$29.50. So they seem to be the right numbers for that particular unit.

ASSEMBLYMAN MILLER: Can we get back to the point, Mr. Chairman, of why the bids were not dumped when they were opened and found-- If I am not mistaken, you have to have just cause and reason

for dropping -- for canceling out the bid. You just can't drop them without a reason, and reason or not, we are dropping these because the low bidder forgot to put \$375,000 into his bid. In view of the fact that the other three bidders were pretty much in the ball park, I think we would subject ourselves then to possible litigation on the part of Schiavone.

ASSEMBLYMAN BRYANT: Let me ask the question because I don't have the specifications. The specifications would have told me that. You can have language where you reserve the right to reject all bids, and that is regardless of whether they are low bids or not.

ASSEMBLYMAN MILLER: Even this-- I have to go back--

ASSEMBLYMAN BRYANT: Do these specifications require that?

ASST. COMMISSIONER FREIDENRICH: I believe there is the right to reject all bids in the contract.

ASSEMBLYMAN BRYANT: If that is the case in the specifications, then it doesn't matter whether they are low or not, and you don't have to worry about being sued if you reserve the right. Case law is very, very specific on that point.

ASSEMBLYMAN MILLER: The only reason I am saying this is, getting back to the municipal level and coming up with something like this, it has happened where bids were rejected, and the second low bidder made a case out of it. If I am not mistaken, the ruling on it was that unless you have a justifiable reason for throwing them all out, whatever that might be, you just can't reject the bid because of someone's favorite, it could be, who didn't come in right in the bid.

ASSEMBLYMAN BRYANT: I understand that.

ASSEMBLYMAN MILLER: Even though you state in your contract that you have the right to do that.

ASSEMBLYMAN BRYANT: But it has been upheld. When you have a \$900,000 difference in bids, that is a wide difference.

ASSEMBLYMAN MILLER: But what about the fact that the State estimated \$1.9 million on this, and these bids are coming in at \$2.1. That is in the ball park. I mean, I think you would be hard-pressed to prove that there was some reason other than the low bidder being dumped here -- you know, dumping the whole bid because the low bidder didn't

come in right. Now you can be accused by the others saying, "Well, they're playing favorites here. They want this man to put this thing in. He puts the \$375,000 in and he's still low bid." If you put the bids back out again, everyone knows what everyone else's bid is. They could come in high; depending on how hungry the market is, they could come in higher.

ASSEMBLYMAN BRYANT: My understanding of why the Department continued with the bid was, they wanted to get it done. I assume if they weren't going to do it until spring, they probably would have re-bid the whole thing.

ASSEMBLYMAN MILLER: Taking their chances on it.

ASSEMBLYMAN BRYANT: Taking their chances on re-bidding the whole thing to see what kind of numbers they might come up with. Because of the emergency of the situation, they are trying to get it done by November 26, so it was important to go to the second lowest bidder. That is my understanding of the Department's position.

ASSEMBLYMAN MILLER: I think it is important to note also, Wayne, that in the letter of August 5, signed by Falcone, we inadvertently omitted the following required work from Bid Item #72. It included furnishing and installing angle irons, complete with expansion anchors, and this is what we have had the problem with. This is why the job wasn't getting done for that particular item.

So, even if this man had gotten a contract, we would probably have had the same problem as far as the delay in getting this job done was concerned.

ASSEMBLYMAN FOY: My question then for the Department is, do you contemplate establishing a procedure so that someone who has caused all of these problems-- For example, there were literally dozens, if not a hundred, man-hours involved in having to go through all of this. I mean, it was time and expense for the Department to have to make all of these adjustments in the process, and this guy gets off scot-free, with no penalty. He is able to take advantage of what is apparently a loophole. This really should not happen again. Someone should not be able to have it both ways, so to speak, which he did. Theoretically, he was in a position, if he wanted to be in a position, to say, "Okay,

I will come up with the extra money," because really, if he had a \$6 million capacity, he could go to his bank and say, "I need you to up my line \$185,000 for me to get this \$1.4 million contract," if he really wanted the contract. Then you would have been satisfied. If he had the additional line of credit, you would have been obliged to give it to him if he really wanted it. He didn't really want it, so he was able to say, "Well, sorry; I'm doing a lot better, but no line of credit, no Form FC-26," or whatever it is.

So, he took advantage of it, and you are really not in a position, under your existing authority, to impose any kind of penalties for the inconvenience he caused, for the expense he caused the Department, or for the delay that was caused with respect to the project. It is a remediless situation from the point of view of the State and the taxpayers. My strong advice would be to promulgate a regulation so that this does not happen again.

COMMISSIONER BODMAN: I agree with you, Mr. Foy. This is certainly a unique circumstance. I think you are absolutely right. I think your suggestion of what happened is accurate, and we should revisit this issue to see if there is some remedy we can come up with that would prevent it from happening in the future.

ASSEMBLYMAN FOY: Then, to add insult to injury, to compound the problem from a lot of perspectives, because of, shall we say, the high profile of the next lowest bidder-- I mean, if the next lowest bidder had been Joe Smith--

ASSEMBLYMAN MILLER: Or Tom Foy.

ASSEMBLYMAN FOY: --or Tom Foy, it wouldn't have been quite as glaring a situation. Unfortunately, the next lowest bidder has other problems with which we have some concern, which makes it even more of a situation that causes questions to be raised, you know, through no one's fault, but that is just a fact of life. He was in second place, moved up to first place, and there were a lot of questions involved with respect to that.

ASSEMBLYMAN BRYANT: Does anyone have any other comments with respect to the first bidder?

ASSEMBLYMAN FOY: Well, one question. Do we need a law, or are you going to-- I don't want to pass any more bills if we don't have to. Are you going to do something about this?

COMMISSIONER BODMAN: Let us look at the issue and--

ASSEMBLYMAN FOY: To see if you have regulatory authority and to do something.

COMMISSIONER BODMAN: --we will get back to you.

ASSEMBLYMAN BRYANT: May we request that you get back to us in 30 days or 60 days? Is that pressuring, or what do you need?

COMMISSIONER BODMAN: I think 60 days would be appropriate, Mr. Chairman.

ASSEMBLYMAN BRYANT: All right. In 60 days you will give us your opinion one way or the other.

COMMISSIONER BODMAN: Will do.

ASSEMBLYMAN MILLER: May I sign as cosponsor? Are you sponsoring-- It depends on what happens on November 5.

ASSEMBLYMAN BRYANT: We are really not looking to go into a law. I think what we are trying to say is, it would be much better if they could do it by regulation.

ASSEMBLYMAN FOY: I think if you were able to say in your bid documents or in your contracts that there would be a penalty for a bid in which a unilateral mistake exists -- where the Department would have to incur extra expense and things like that-- You could make treble damages, three times the estimated departmental cost. If it cost you \$10,000, it would cost them \$30,000 in their forfeiture. I think you have the authority to do something like that; you would just have to have your legal staff develop an appropriate instrument or mechanism.

ASST. COMMISSIONER FREIDENRICH: Mr. Chairman, I do have a copy of the standard specifications that govern all of our contracts. In response to your question about liquidated damages, for contracts that are between \$1 million and \$2 million, the liquidated damages are \$300.00 a day. For contracts which are between \$2 million and \$5 million, the liquidated damages are \$450.00 a day.

ASSEMBLYMAN BRYANT: What triggers the liquidated damages?

ASST. COMMISSIONER FREIDENRICH: Pardon me?

ASSEMBLYMAN BRYANT: What triggers the liquidated damages?

ASST. COMMISSIONER FREIDENRICH: The failure to complete the project within the adjusted completion date. I say "adjusted" because there is an original completion date, and then there is a whole series of things that could happen which, under the specifications, permit extensions of time. So, it is the original completion date, plus any extensions of time which develop an adjusted completion date. Failure to complete the work by that adjusted completion date triggers the liquidated damages.

ASSEMBLYMAN BRYANT: How do we arrive at adjusted completion dates?

ASST. COMMISSIONER FREIDENRICH: Well, there are--

ASSEMBLYMAN BRYANT: I'm asking, who makes the determination?

ASST. COMMISSIONER FREIDENRICH: Pardon?

ASSEMBLYMAN BRYANT: Who makes the determination?

ASST. COMMISSIONER FREIDENRICH: The determination is made by our construction supervision staff.

ASSEMBLYMAN BRYANT: The Department makes the determination?

ASST. COMMISSIONER FREIDENRICH: Yes. That is not to say that if the contractor believes he has a right to an extension of time and the Department does not agree, that he does not have further remedy to pursue that through the claims procedure.

ASSEMBLYMAN BRYANT: Is there any other information you would like to provide on the first issue? (negative response) Does anyone on the panel have a question?

ASSEMBLYMAN FOY: I have one more question. One thing I failed to ask you to provide information about is, in the course of a year, how many contracts end up in litigation regarding issues such as, you know, requests for extensions of time that are denied, or things like that? Is there much litigation regarding this?

ASST. COMMISSIONER FREIDENRICH: There are contractor claims we are involved in periodically. I am unable to tell you exactly how many. Sometimes the litigation starts, and then our attorneys and the attorneys for the litigant work with it and reach a settlement. Sometimes it goes all the way to the end. Then if either party isn't satisfied, they seek further remedy in a higher court. So, you know, there is something going on--

ASSEMBLYMAN FOY: All right. But in terms of 100 contracts let in the course of a year, what percentage would you say -- 5%, 10% -- are troublesome in that sense?

ASST. COMMISSIONER FREIDENRICH: My guess would be it is a very low percentage, Assemblyman. I hesitate to try to guess just what it is.

ASSEMBLYMAN MILLER: Mr. Chairman, before we leave this stage of it, are we satisfied, as a Committee, that the actions taken by DOT up to this particular point in awarding this contract, were done, without question, according to rules and regulations, and that there is no fault here on anyone's part? What I'm saying is--

ASSEMBLYMAN FOY: I wasn't trying to place fault.

ASSEMBLYMAN MILLER: No, no, I am not saying that, Tom. I'm just saying I would like to clean up this phase of it before we get to the next phase of it. Personally, I am satisfied that--

ASSEMBLYMAN FOY: I am satisfied that the Commissioner has been responsive to our inquiry, but I am not satisfied that the Department had sufficient protection in place to prevent this kind of thing from occurring. I think that is--

ASSEMBLYMAN MILLER: Well, we've asked for that. Then again, as the Commissioner stated, this is a very unique situation. It has probably never happened before. What I'm saying is, up to this particular point, there is a \$135,000 difference. I'm satisfied that they did not have the discretionary power to do anything about that. I'm satisfied that the low bidder did not come in with the necessary paperwork to allow them to consider the low bidder, so I am satisfied that the bid was handled in a proper fashion at this particular point.

Now, if there is something else from this point on that we haven't gone into yet-- But, up until this point, is anyone dissatisfied with the behavior or the actions of DOT?

ASSEMBLYMAN BRYANT: Let me explain this. Since the Deputy Attorney General cannot be present because the request didn't go to the Attorney General, I am not satisfied at this point. I am not satisfied because the regulations say you cannot make inquiries. I don't see anything in the regulations which prohibits that.

ASSEMBLYMAN MILLER: I don't know. Do you have something in the regulation that would prohibit you from using your discretion in allowing the \$135,000 to stand aside, or set aside, to overlook it and go along with it because you made a phone call?

ASSEMBLYMAN BRYANT: It was not a phone call. I'm saying he asked it from the particular individual. There is nothing in the regulation which prohibits the Department from asking the actual public contractor for information.

ASSEMBLYMAN MILLER: Well, I think he has asked that, hasn't he? He has asked the concrete outfit to furnish that, and they said, in effect, that they wouldn't do it.

ASSEMBLYMAN BRYANT: Let me give you an example. If, in fact, one of their contracts was-- I am a solicitor, and this is public record. If the Department called and asked us, between August 5 -- whenever the bids were taken -- and August 12, "Have you made any pay-downs on that contract?" we would have provided that information in writing.

ASSEMBLYMAN MILLER: But they asked--

ASSEMBLYMAN BRYANT: No, they asked to fund the contract, saying, "We have information in our possession as the Department of Transportation." There is nothing in the regulation which prohibits them from asking the actual persons with whom they are doing business for information, especially a public contractor. The biggest part of this public contract was the New York/New Jersey Port Authority.

ASSEMBLYMAN MILLER: Then let's ask them that. Do you have that right? Do you have the right by regulation, or otherwise, to go to the New York/New Jersey Port Authority and say, "How does Mr. Contract X deal? How far down is he on his commitment? How much has he been relieved of his bonding?" Do you have the right to do that and to accept that -- to accept whatever you find out as a basis for giving the man the contract, even though he is \$135,000 short?

ASST. COMMISSIONER FREIDENRICH: We certainly can ask any public agency for any information we seek. There is good cooperation amongst the agencies. To the best of my knowledge, we did exactly what our regulations require. I think, as has been pointed out here on

several occasions, what occurred in this particular situation was a unique occurrence. Based on that unique occurrence, the Commissioner has just indicated that he will have all of our regulations examined to see what we need to do to preclude such a situation from occurring again. With that direction from the Commissioner, we will reexamine it, and we will talk to our counsel.

ASSEMBLYMAN MILLER: That is not what I am driving at, Jack. What I am driving at is this: Let's take this case. You went to the Authority and you said, "How does this contractor stand? He has done \$1 million worth of work on his \$2 million commitment." Now, you know this; you have been told this. Does that give you the authority then to come back to the contractor and say, "We are going to award this to you because even though you didn't give us this information, you do have enough residual. You didn't give us this information; we found this out from the Port Authority." Now, you are going to award this, even though they didn't give it to you. Do you have the authority to by-pass the regulations because they didn't put it in black and white but you got it from someone else?

ASST. COMMISSIONER FREIDENRICH: Not in my opinion, Assemblyman.

ASSEMBLYMAN MILLER: Okay, that's what I'm saying.

ASSEMBLYMAN FOY: I'm operating under the assumption that there were only two instruments that would satisfy your request for financial capabilities. Is that correct? One was the additional line of credit, which is an actual commercial instrument. The second was the completion of a form which you would review and then either accept or reject. Those are the only two things that you could have done, as I understand it.

ASST. COMMISSIONER FREIDENRICH: That is correct.

ASSEMBLYMAN FOY: I think that is what the representation was.

COMMISSIONER BODMAN: Under the present regulations, it is my understanding, Assemblyman Foy, that it is incumbent upon the contractor to satisfy us, and not some other public body they may be--

ASSEMBLYMAN FOY: Right. He is only allowed to use two things to satisfy you: a line of credit, which comes from a bank, or a lender, or what have you, or completing the form and having this form satisfy someone who reviews it in the Department.

The one concern I have is, under normal circumstances -- I acknowledge that this is an abnormal situation -- wouldn't there have been an action on the part of the Department to move against his bid bond if he failed to execute his contract?

ASST. COMMISSIONER FREIDENRICH: I think here again we have had situations in the past where contractors, after they have submitted a bid, have directed our attention to the fact that they made an error. When that happens, we have a hearing to determine the nature of that error and, with advice of counsel, there have been situations where based on the nature of the error, we have said, "Yes, it would be unconscionable to try to have the contractor perform the work of the contract on the basis of that error." There have been other cases. I believe I mentioned there is one under review by a court right now, where after we had the hearing, we determined that the contractor should not be relieved of his obligation to perform. We so advised him, and he has appealed that to a court.

ASSEMBLYMAN FOY: Do you then proceed against his bond when you say, "Okay, you are supposed to execute the contract by thus and such a date. We do not accept your reasoning as to the apparent unilateral mistake. It is insufficient; you must proceed." Do you then move against his bid bond?

ASST. COMMISSIONER FREIDENRICH: We would. Of course, while it is before a court of proper jurisdiction, you know--

ASSEMBLYMAN FOY: There is a stay on that.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN MILLER: Then what we are saying here is, as long as those are the only two documents, the only two ways they can accept the bid, then there isn't anything else that I see here, up to this particular point, that they can do to change the situation around in making this award. All I am saying to you is--

ASSEMBLYMAN FOY: Well, I think you are correct. That is the representation. There are only two things they could accept. He wouldn't give them either.

ASSEMBLYMAN MILLER: All I'm saying is--

ASSEMBLYMAN BRYANT: You two agree, but I disagree until I can talk to the Attorney General.

ASSEMBLYMAN MILLER: You're the Chairman and you control it, so we have to agree. Okay, fine.

ASSEMBLYMAN BRYANT: No, I am not saying you have to agree. I'm saying you can disagree. But you are in a gray area where you have a person who does not want the contract.

ASSEMBLYMAN MILLER: I don't see any gray area.

ASSEMBLYMAN BRYANT: The reason I say a gray area is because they did submit some information.

ASSEMBLYMAN MILLER: It's black and white.

ASSEMBLYMAN BRYANT: No, no, you have the information before you. They submit it to all the people with whom they have contracts. That is how you learn their rating and stuff. They also submitted that they had reduced it. I'm saying, and I don't know what the Attorney General would say-- The Attorney General, looking at that, could tell me that we have the right to allow those places with public contracts to find out whether, in fact, their representation that they reduced it is correct, and to hold them into our contract.

ASSEMBLYMAN FOY: I think we still need to talk to the Attorney General.

ASSEMBLYMAN BRYANT: There is not a regulation that says you cannot do that. So, it is a very gray area. That is why I say I am not convinced. I'm not saying it is the Department; I'm saying their representation-- Now you don't know whether or not you want to hold a person in.

ASSEMBLYMAN MILLER: Let's take it a step further. Let's assume they have the authority to do it, okay, or they make an exception in this case and do it because of the difference.

ASSEMBLYMAN BRYANT: Because of the circumstances of what is involved.

ASSEMBLYMAN MILLER: Okay, let's say they do this, and all of a sudden they find that the outfit goes bankrupt or some other such thing. Then, is the investigation going to be, "Why did we award this thing?" when you are going contrary to the practice of what we have been doing all these years, and you made one exception? I don't care what the Attorney General says as to what they have. These are the rules.

ASSEMBLYMAN BRYANT: You would end up having the performance bonds and those things to protect the Department?

ASSEMBLYMAN MILLER: Sure. It would still be, "Why did you do it? They went bankrupt." Now you have to go back out to bid to complete the thing, and it will probably cost you more than your bond coverage because they know they've got you, that you are going to pick up someone else's work.

ASSEMBLYMAN BRYANT: You're asking me to be satisfied when I don't have certain information. What you don't understand is, I won't be satisfied until I explore that with the Attorney General's office.

ASSEMBLYMAN MILLER: Well, lots of luck.

ASSEMBLYMAN FOY: The other curiosity here is, you know, of all the things a guy leaves out of his bid, the thing that is causing the delay now is the anchors. That begs the question for us. If the guy had had it in, would he even have been able to obtain this material in order to complete the job on time, or would the Department then have given him an extended completion date because he couldn't get it? So, you know, it's a mess.

ASSEMBLYMAN BRYANT: Are there any further questions on this first particular point?

ASSEMBLYMAN MILLER: I'm satisfied to close this part of it, but go ahead.

ASSEMBLYMAN FOY: As far as the Department goes, I am, but I would still like to talk to the Attorney General.

ASSEMBLYMAN BRYANT: Okay. Going into the second part now, we awarded the contract, through the procedures -- we have already gotten to that point -- to Schiavone, the second lowest bidder. Maybe the Commissioner can tell me how Schiavone became the bidder and what

process was followed in terms of what I understand was a proposed suspension. It is important for the Committee to understand the whole process.

COMMISSIONER BODMAN: If I understand the question, Mr. Chairman, you would like to know how they became a bidder--

ASSEMBLYMAN BRYANT: Yes. At some point in time, there was a--

COMMISSIONER BODMAN: --on the specific contract, or would you like to know the more generic question of why they continued to bid?

ASSEMBLYMAN BRYANT: There was a proposed suspension by your predecessor.

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN BRYANT: Okay. What I want to know is, what is a "proposed suspension"? Maybe you better start out with the basics.

COMMISSIONER BODMAN: A proposed suspension is just what its name implies in the King's English. It is a suspension that is, in fact, proposed. The Commissioner of DOT, in my understanding of the powers of that office, has the right and authority to immediately suspend any contractor or proposed bidder solely and only on an indictment. Clearly, I believe Mr. Sheridan had that very authority to immediately suspend this contractor, based upon the indictment that was let by the New York authorities on September 24, 1984.

ASSEMBLYMAN BRYANT: Let me ask a question because everyone is getting technical with regulations. In the regulations, as I review them, there is no such thing as a proposed suspension. There is either suspension or not. Maybe you can identify where the proposed suspension is in the regulations, since we don't want to go by the letter of what--

COMMISSIONER BODMAN: I am familiar with the regulations, and I am familiar with certain court cases that, in so many words -- and I am not an attorney -- said that the opportunity should be available for a contractor who is proposed to be--

ASSEMBLYMAN BRYANT: I think the court cases say that the person who has been suspended must have an opportunity to be reviewed.

What I am trying to get at first, since we are all dealing with the foundation of regulations, is, where in the regulations is there authority for proposed suspension as opposed to suspension? It is my understanding -- and I read the regulations -- that the regulations do not talk about suspension. Maybe someone can tell me where the proposed suspension is in the regulations, as opposed to an actual suspension.

COMMISSIONER BODMAN: I don't know where that authority is, Mr. Chairman. I understand that Mr. Sheridan, at the time, made the decision to issue this proposed suspension, and invite the contractor to come in and "explain away the criminal charges," which I believe is consistent with appropriate case law. I believe he did so based on the advice of counsel at the time. I should remind the Committee that I was not the Commissioner, and I did not make that decision.

ASSEMBLYMAN BRYANT: Okay. Since there is a proposed suspension, I have to get back to understanding that in my mind. If it is not in the regulations, then someone needs to explain to me what it is.

COMMISSIONER BODMAN: What -- I'm sorry?

ASSEMBLYMAN BRYANT: What is a proposed suspension?

COMMISSIONER BODMAN: Well, I can certainly read you a letter from Mr. Sheridan, which perhaps, in this instance, would demonstrate that. It was dated October 18, 1984, and was addressed to Mr. Joseph DiCarolus, who I believe is President of Schiavone Construction Company. It says: "Please take notice that there has been a development subsequent to the classification of Schiavone Construction Company to bid on New Jersey Department of Transportation projects, namely, the indictment of Schiavone Construction Company and a number of its officers and employees in the Supreme Court of the State of New York, Indictment No. 3571-4548284. The indictment charges Schiavone Construction Company and the named individuals, with one count of grand larceny in the second degree, 125 counts of falsifying business records in the first degree, and 11 counts of offering a false instrument for filing in the first degree.

"This development may affect the responsibility of Schiavone Construction Company to do business with the State of New Jersey. Accordingly, you are hereby notified that I am considering the suspension of the classification of Schiavone Construction Company, in accordance with N.J.A.C. 16:65-8.1, et seq.. Said suspension may also be applied to the classification of any affiliates of Schiavone Construction Company."

ASSEMBLYMAN BRYANT: Would you please read that regulation again?

COMMISSIONER BODMAN: It's N.J.A.C. 16:65-8.1.

"You are also advised that the suspension I am considering may apply to bidding on all DOT and State Aid contracts, and may also preclude Schiavone from serving as a subcontractor and from supplying materials for NJDOT and State Aid projects, pending the completion of the legal proceedings in the indictment.

"You are further notified that an opportunity for a hearing or to supply a written explanation by way of affidavits and supporting documents, will be granted, provided, however, that a request for an opportunity to be heard is made in writing within 10 days of the receipt thereof."

Again, I am reminding the Committee that I was not Commissioner at the time that such a hearing, in fact, took place. I believe they responded. A similar letter, by the way, was sent to Mr. DiCarolus by Mr. Premo, Executive Director of New Jersey Transit. Mr. Premo's letter, dated October 18, 1984, said essentially the same thing. On October 24, 1984, a Mr. Geiser replied on Schiavone's behalf to both DOT and NJT, essentially requesting a hearing. I understand a hearing took place on November 15 for both DOT and NJT, and on November 27, a request for a hearing in a contested matter was filed with the Office of Administrative Law by Mr. Sheridan.

ASSEMBLYMAN BRYANT: It is my understanding that under this proposed-- They were not suspended then?

COMMISSIONER BODMAN: They were not.

ASSEMBLYMAN BRYANT: They were proposed for suspension?

COMMISSIONER BODMAN: That's correct.

ASSEMBLYMAN BRYANT: You're telling me at this point in time that N.J.A.C. 16:65-8.1--

COMMISSIONER BODMAN: I was reading to you from Mr. Sheridan's letter to Mr. DiCarolus. That is the statute he made reference to in his letter.

ASSEMBLYMAN BRYANT: I guess my question is for the Department, because the Department is, from my understanding of the first part of this hearing, the strict constructionist in terms of regulations. Is the proposed suspension in the regulations, or are people suspended under that? I am trying to figure out how you trigger a hearing.

ASSEMBLYMAN MILLER: He just answered that.

ASSEMBLYMAN HARDWICK: By that statute.

ASSEMBLYMAN BRYANT: Let's take a three-minute break.

(RECESS)

AFTER RECESS

ASSEMBLYMAN BRYANT: Everyone is back and we are ready to proceed. We pulled out the regulations; they were codified, I guess, in 16:44.

ASSEMBLYMAN FOY: Is that the year or the citation?

ASSEMBLYMAN BRYANT: That's the citation, 16:44-8 on.

I recognize, Commissioner, that you were not there at the time, but I guess there were Department people there at the time. In reviewing the regulations for suspension, there is no proposed suspension. There is suspension; then you have 10 days to do whatever you have to do according to the procedures under 16:44-8.7. I guess my only inquiry is-- We belabor the fact that we follow the regulations to a "T," but I don't understand how we do a proposed suspension. First, there is the actual suspension, and then they allow a hearing according to the regulations. When does the Department choose to follow the regulations, and when does the Department decide it is going to make a deviation?

COMMISSIONER BODMAN: Well, I can only say that it is my understanding, Mr. Chairman, that the then Commissioner, Mr. Sheridan, consulted with the appropriate Deputy Attorneys General who represent the Department, and was advised that this proposed suspension was a proper and just way to proceed. Again, I was not there, but that is what my departmental people have told me took place back in October, 1984.

ASSEMBLYMAN BRYANT: Okay. So we ask the Attorney General when we want to do one thing. But my question is in terms of why we didn't ask the Attorney General why we had the ability, possibly the regulations didn't preclude us, and getting certain information-- It seems to me we selectively ask the Attorney General to give us information. The procedure is clear.

COMMISSIONER BODMAN: We selectively ask--

ASSEMBLYMAN HARDWICK: Well, you always do that, Assemblyman Bryant. You don't ask him every time you want to move your little finger. You ask when you think you need guidance. There is nothing unusual about that.

ASSEMBLYMAN BRYANT: It is my understanding from the Department that the Attorney General says these regulations do not have to be complied with.

ASSEMBLYMAN MILLER: No, he is not saying that; come on, Wayne.

ASSEMBLYMAN BRYANT: I'm asking the question because I don't know.

ASSEMBLYMAN FOY: I have a more germane question.

ASSEMBLYMAN HARDWICK: Have you read the regulation, Mr. Bryant?

ASSEMBLYMAN BRYANT: On suspension, that is what we are talking about, yes, I have. There is a difference between--

ASSEMBLYMAN HARDWICK: Because it refers to the fact that the discretion of the Commissioner of Transportation shall be rendered in the best interest of the State. How did they deviate from the regulation? I don't follow you.

ASSEMBLYMAN BRYANT: Because the regulation requires that you suspend and then you give 10 days. What he is telling me-- The present Commissioner is saying that the former Commissioner never suspended them; therefore, they were allowed to continue to do work. So, it never triggered the 10 days, because the regulation requires suspension prior to one having a hearing.

ASSEMBLYMAN MILLER: He didn't say that. He proposed and gave 10 days.

ASSEMBLYMAN HARDWICK: Before gathering the information to determine whether or not he should suspend?

ASSEMBLYMAN BRYANT: That is what the regulations read at 16:44-8.7. He can suspend on the basis of an indictment, or whatever. There are numerous--

ASSEMBLYMAN HARDWICK: But it also says -- 16:44-8.6 -- that it should be made at the discretion of the Commissioner of Transportation, and of the Attorney General, and shall be rendered in the best interest of the State.

ASSEMBLYMAN BRYANT: I am not disagreeing. I am not saying he should have suspended. The issue is not whether he should have suspended or not. What I'm saying is, there is no regulation for a proposed suspension. Either you take affirmative action to suspend, and then trigger--

ASSEMBLYMAN HARDWICK: Now, wait a minute. It says, "Suspension should not be based upon a unsupported accusation, but upon adequate evidence that cause exists or upon evidence adequate to create a reasonable suspicion that cause exists." How do you know -- if you don't conduct a hearing, or a due process of one kind or another -- whether or not the best interest of the State is being served by suspending a bidder?

ASSEMBLYMAN BRYANT: Because in one of the-- Let me see. An indictment in itself is grounds for suspension under the regulations.

ASSEMBLYMAN HARDWICK: Grounds, but at the discretion of the Commissioner of Transportation.

ASSEMBLYMAN BRYANT: Procedurally, you don't have a hearing unless you have a suspension. What I am saying is, there is no proposed suspension in the regulations.

ASSEMBLYMAN HARDWICK: Did you criticize the hearing at that time? If it was wrong, did you criticize the previous Commissioner at that time?

ASSEMBLYMAN BRYANT: Well, what happened was, we asked for a letter, through Legislative Services, as to how the person got to that point, and we never received it. So, I couldn't criticize. I didn't know.

ASSEMBLYMAN HARDWICK: Do you mean Commissioner Sheridan? At that time you asked for a letter?

ASSEMBLYMAN BRYANT: We asked for a letter explaining that, and we never got it.

ASSEMBLYMAN HARDWICK: Commissioner Sheridan? You asked back at that time -- October, 1984?

ASSEMBLYMAN BRYANT: I don't know whether we asked in 1984.

ASSEMBLYMAN FOY: I don't know what the relevancy of all of this is. What concerns me--

ASSEMBLYMAN HARDWICK: I agree, Mr. Foy; I don't know what the relevancy is either.

ASSEMBLYMAN BRYANT: I just want it on the record that there is no proposed suspension under the regulations.

ASSEMBLYMAN HARDWICK: Wasn't the final line the same thing?

COMMISSIONER BODMAN: I suggest that it was a legal interpretation. I believe the counsel to the Department provided that option to the then Commissioner.

ASSEMBLYMAN FOY: That's right. What I would like to say is, I'm certain the Department must have maintained a file on the whole issue of the proposed suspension of Schiavone Construction, the Administrative Law Judge's hearing, and the subsequent action by the Commissioners. I assume neither you nor Commissioner Sheridan acted independently of advice from the Attorney General's office, that you solicited and received advice as to how to act. If that advice was put in writing, which it should have been, rather than just making some

phone calls and someone saying, "Yes, go ahead, Commissioner, do what you want," I assume there are some memos that confirm this transaction and the advice to both Commissioner Sheridan and yourself.

What I would like to have supplied by the Commissioner is the record of this transaction in terms of the advice of the Attorney General or his designate, the Deputy Attorney General assigned to the particular case. What I find troublesome is, you know, it is another one of these left-hand/right-hand situations. Here we have the Deputy Attorney General going in and arguing all about why Schiavone should be suspended before the Administrative Law Judge, and at the same time he is obliged to provide advice as to how to proceed subsequent to that decision being received.

So I am really concerned about the activities of the Attorney General's office in relationship to the Department, what their advice was regarding this matter, and what procedures they followed. You know, in a technical reading of this regulation, there is no such thing as a proposed suspension. You suspend, and then you give them the opportunity to have a hearing. So it is somewhat of an aberration. There may well be a basis for it somewhere else, in the ultimate discretionary authority of the Commissioner, or there may be some other part of the administrative code that provides it. I just want to know who told John Sheridan to do it, and what was the basis of their authority for telling him to do it.

We can't seem to find it in the existing regulation. I'm sure there is a memo that covers it. If you can provide that information, I think it will be useful.

ASSEMBLYMAN BRYANT: The Committee requested that.

ASSEMBLYMAN MILLER: Mr. Chairman, whether the word "proposed" is in there or not, wasn't the final line the same? Wasn't the final result the same?

ASSEMBLYMAN BRYANT: No.

ASSEMBLYMAN FOY: Because of the unusual nature of the situation-- I mean, if this is the only time it has ever been done in the history of the Department, it would raise serious questions in my mind as to its propriety. Why are we doing it to this individual?

ASSEMBLYMAN MILLER: Let's make the assumption, Tom, that they left the word "proposed" out. You have been suspended and you have 10 days to answer. All right?

ASSEMBLYMAN FOY: Right.

ASSEMBLYMAN MILLER: Within the 10 days, you send a letter that you want a hearing.

ASSEMBLYMAN FOY: Substitutively the net effect is the same; there is no question about it.

ASSEMBLYMAN MILLER: That's right, the same thing. So the word "proposed" doesn't mean a damned thing.

ASSEMBLYMAN FOY: Well, it does if it is a deviation that was afforded only to this--

ASSEMBLYMAN MILLER: What is the deviation?

ASSEMBLYMAN FOY: The fact that there was a proposed suspension, not an actual suspension.

ASSEMBLYMAN MILLER: The word "proposed."

ASSEMBLYMAN FOY: Right; that is a concern to me.

ASSEMBLYMAN MILLER: The word "proposed." At the end of the 10 days if they had said the man was suspended, it would have been effective as of that particular point in time. If they had suspended the man first, and then had the hearing at the end of 10 days, if the man wasn't suspended, he would be back in.

ASSEMBLYMAN FOY: If they did that they would have been following the regulation that has been followed and undeviated from throughout the history of the Department. Suddenly we have a situation in which the Commissioner takes an unusual action. He obviously had a basis for taking that action, and I want to know what the basis was.

ASSEMBLYMAN HARDWICK: Mr. Foy, the basis is in the regulation, which simply says-- Let me read it one more time; maybe you don't have a copy of it: "The existence of any cause for suspension shall not require that a suspension be imposed, and a decision to suspend shall be made at the discretion of the Commissioner of Transportation, and of the Attorney General, and shall be rendered in the best interest of the State. Suspension shall not be based upon unsupported accusation, but upon adequate evidence that cause exists or

upon evidence adequate to create a reasonable suspicion that cause exists."

It seems to me very clearly that Mr. Sheridan said, "You know, I think maybe we ought to suspend these people. Let's have a hearing and find out." Subsequently, as you know, it was turned over to the Administrative Law Judge for a ruling. You have not yet given Commissioner Bodman a chance to say what happened and what directions came back from the Administrative Law Judge. I think Mr. Sheridan acted very properly to gather the evidence and use his discretion to suspend the bidder should the evidence warrant suspending him, and he apparently turned it over -- and maybe Commissioner Bodman will explain -- to the Administrative Law Judge to render a decision.

ASSEMBLYMAN FOY: That's wonderful. I'm glad you--

ASSEMBLYMAN HARDWICK: What could be more in keeping with the regulation?

ASSEMBLYMAN FOY: I'm thrilled that you think the Commissioner acted properly. I didn't say that he acted improperly. All I want to find out is who he got his legal advice from, and what that legal advice was. What was the predicate for taking this different type of action?

ASSEMBLYMAN HARDWICK: What's different?

ASSEMBLYMAN FOY: The fact that it was an unusual procedure -- proposed suspension.

ASSEMBLYMAN HARDWICK: What's different?

ASSEMBLYMAN MILLER: One word.

ASSEMBLYMAN FOY: The regulation does not provide for it.

ASSEMBLYMAN BRYANT: It doesn't provide for it, and secondly, theoretically--

ASSEMBLYMAN HARDWICK: It doesn't prohibit it. Where does it prohibit it?

ASSEMBLYMAN FOY: Let me ask you a question. Do you have something to hide? Is there any reason you don't want the Commissioner to supply this?

ASSEMBLYMAN HARDWICK: Come on, Tom. We know what you are trying to do.

ASSEMBLYMAN FOY: Seriously, is there any reason you don't want us to have these memos?

ASSEMBLYMAN HARDWICK: This is one of your three political hearings for the day. Of course not. You are harassing the Department.

ASSEMBLYMAN FOY: Listen, I am not holding any hearings; I am not the Chairman of any committee.

ASSEMBLYMAN BRYANT: Hold it, gentlemen. Gentlemen--

ASSEMBLYMAN FOY: I don't think the Commissioner is objecting to providing that.

COMMISSIONER BODMAN: Mr. Chairman, I will be happy to provide--

ASSEMBLYMAN FOY: I don't think he needs you to protect him.

COMMISSIONER BODMAN: Mr. Foy, please. I will be happy to provide pertinent information. I should say that during my time as Commissioner and my dealing with this issue, to my knowledge -- and I will review my file -- I met with someone in the Attorney General's office, whose name escapes me at the moment, but a senior person who served above the normal DAGs that represent our Department, for the very simple reason that I was acting, in fact, in a judicial capacity, as I believe is envisioned by the statute. I don't believe I had a written expression from that individual. I had a meeting with her and spoke of my concerns and my desires on how to proceed with this matter once the Administrative Law Judge handed down his ruling. But I do not know off the top of my head what type of written documentation may be in the file. However, I will be happy to supply it to you.

ASSEMBLYMAN FOY: All right. Let me flesh out what the real distinction is so we can make this crystal clear. If there is a suspension order, notwithstanding the fact that a person appeals the order and says he wants a hearing, if the Commissioner suspends, it is my understanding that the person is then prohibited from bidding on State work. Is that right, Mr. Freidenrich?

ASST. COMMISSIONER FREIDENRICH: That is correct.

COMMISSIONER BODMAN: I believe that's true.

ASSEMBLYMAN FOY: If there is a proposal to suspend, it is not a suspension, and all during the time that that person is fleshing out the reasons why he shouldn't be suspended under this proposed order, he can then continue to bid on State work. That is the fundamental difference about the word "proposed." It kept Schiavone in business for a long time, when he might have been--

ASSEMBLYMAN HARDWICK: Sure, so what? What is your point?

ASSEMBLYMAN FOY: Well, you know, that is a highly irregular and unusual procedure. There must have been a basis for it.

ASSEMBLYMAN HARDWICK: What is irregular about it?

ASSEMBLYMAN FOY: If Attorney General Kimmelman gave them some advice, I would like to know what it was.

ASSEMBLYMAN MILLER: I think the question is, did they finish? Were they doing any work at that particular time?

ASSEMBLYMAN FOY: Sure. The Governor signed an award for a contract before the Turnpike Authority. He got a \$758,000 contract.

ASSEMBLYMAN HARDWICK: Proposed suspension is presumably the period of time between when the thought occurs to you and when you do it. I mean, what is so mysterious about it?

ASSEMBLYMAN BRYANT: Not to belabor the point, but we asked the Commissioner if-- Oh, there is a definite distinction because the regulation says if you are suspended, then you have no rights. Suspension does cut off rights.

ASSEMBLYMAN HARDWICK: You may suspend.

ASSEMBLYMAN BRYANT: Yes, it says you may under certain conditions.

ASSEMBLYMAN HARDWICK: You may.

ASSEMBLYMAN BRYANT: And what it basically does-- It is a procedural issue, Mr. Hardwick.

ASSEMBLYMAN HARDWICK: I understand what you're saying.

ASSEMBLYMAN BRYANT: A procedure saying that if you request a hearing, you have to do certain things before you get that hearing.

ASSEMBLYMAN HARDWICK: And the Commissioner chose to get his facts before he suspended or did not suspend.

ASSEMBLYMAN BRYANT: The regulations do not dip into that. But he went to the Attorney General and I want to know what the Attorney General's opinion was, and how he got to that point when the regulations do not provide it, just like when the others told me they couldn't do this because it wasn't in the regulations.

ASSEMBLYMAN HARDWICK: You are a real constructionist. Okay.

ASSEMBLYMAN BRYANT: I'm just telling you-- You told me you were a constitutional constructionist on the other-- What I'm saying is, what's good for the goose is good for the gander. In other words, if you do it on one side and you are going to be strictly a constructionist, you have to do it on the other side. If you are going to be consistent, be consistently consistent; if you are going to be inconsistent, be inconsistently inconsistent.

ASSEMBLYMAN HARDWICK: They were very consistent with the regulations both times.

ASSEMBLYMAN BRYANT: They were not, because the regulations do not provide for that opportunity.

ASSEMBLYMAN HARDWICK: They don't prohibit it.

ASSEMBLYMAN FOY: See, if every other contractor--

ASSEMBLYMAN BRYANT: Do you agree with my other argument? They didn't--

ASSEMBLYMAN MILLER: It does allow discretion.

ASSEMBLYMAN BRYANT: Thank you. Let us now get through-- We have a proposed suspension, and the process that went on from there. I am going to ask you all to try not to stop the Commissioner. Commissioner, would you like to give us something on that for about five minutes to get us through it? Then people can ask questions.

COMMISSIONER BODMAN: I'll try to give you the sequence of events, Mr. Chairman, as I understand them. A hearing apparently took place on November 15 with Mr. Sheridan and officials from the Schiavone Construction Company.

ASSEMBLYMAN BRYANT: That was in 1984?

COMMISSIONER BODMAN: Excuse me?

ASSEMBLYMAN BRYANT: That was in 1984, just to keep the dates straight?

COMMISSIONER BODMAN: Yes, sir, 1984; November, 1984. On November 27, 1984, a request for a hearing as a contested matter was filed with the Office of Administrative Law by DOT. In March and April, 1985, hearings were held before Administrative Law Judge -- Miller, I believe his name was. On July 2, the Office of Administrative Law issued its ruling, recommending that Schiavone not be forbidden to continue to bid. On August 20, I affirmed that decision -- August 20, 1985.

That is a brief capsulization of the sequence of events.

ASSEMBLYMAN BRYANT: Does anyone have any questions?

ASSEMBLYMAN HARDWICK: Sounds good to me.

ASSEMBLYMAN BRYANT: Let me ask a couple of questions to start out. The Attorney General represented the Department in the hearing. Can you tell me what his position was on the hearing?

COMMISSIONER BODMAN: His position was that they should be suspended.

ASSEMBLYMAN BRYANT: On what basis?

COMMISSIONER BODMAN: I don't know, sir. I was not present before those hearings.

ASSEMBLYMAN BRYANT: No one from your Department knows?

COMMISSIONER BODMAN: Well, I'm sure it was based on the indictment in New York.

ASSEMBLYMAN BRYANT: And, the Administrative Law Judge came back and said what they should be allowed?

COMMISSIONER BODMAN: Yes, sir.

ASSEMBLYMAN BRYANT: And you agreed with that decision?

COMMISSIONER BODMAN: I did.

ASSEMBLYMAN BRYANT: On the basis on which the Administrative Law Judge did?

COMMISSIONER BODMAN: Yes, sir. I did take some exception in my statement.

ASSEMBLYMAN BRYANT: Could you tell me the foundation upon which the Administrative Law Judge rendered his decision? What was the foundation, or the facts, or the basis for the decision?

COMMISSIONER BODMAN: Well, there were a number of points leading from his ruling. I'll quote it, if I may: "As I have indicated above, the evidence adduced by Schiavone Construction at the instant hearing is strongly indicative of a fair arm's length business transaction of benefit to both contractor and subcontractor."

I think the Committee should understand that the nature of the indictment, as I understand it, relates to whether or not Schiavone Construction Company properly dealt with its responsibilities with relation to a minority business enterprise goal -- with emphasis on the word "goal" -- that was set by the Transit Authority of New York at the time, and further that the question of whether equipment that was leased by Schiavone Construction Company to the subcontractor in question, one Joe Pell, was, in fact, an appropriate lease transaction arrangement. Apparently what took place was that to meet its 10% goal, Schiavone Construction Company utilized the equipment rental as part and parcel of that transaction. That is my somewhat brief understanding.

The Administrative Law Judge dealt with the following issues: the equipment needed by Joe Pell to perform his subcontract was complex and not easily obtainable; Joe Pell did not own the necessary equipment and could not readily obtain it from others; the terms of the lease agreement were fair and the rental charge was based on fair market value; the governmental policy guidelines and regulations from 1978 to the present time have encouraged prime contractors to assist MBEs in various ways, including the leasing of equipment when necessary; and he cites various memorandums and so forth to back up that that be the Federal Highway Administration and other DOT position, and that New Jersey DOT recognizes the legality and priority of leases of equipment to MBE subcontractors in offsetting rental payments. And it goes on to basically state, in so many words -- I'm looking for the conclusion -- "I mention the above factors not to criticize New York authorities or to try to demonstrate any essential legal defects in the indictment, or to make a prediction as to the ultimate disposition of the charges. In my opinion, however, petitioner has succeeded in showing that: 1) the validity of the indictment is debatable; 2) the chances of a successful

prosecution are dubious; and 3), of the total 137 counts in the indictment, all but one, larceny, are essentially technical in nature and do not manifest conduct which is morally reprehensible or which strikes at the heart of the bidding process.

"In these respects, I believe the petitioner has met its burden of 'explaining away' the criminal charges made against it in the State of New York." Then, in so many words, it suggests that this decision be -- that Schiavone be permitted to bid.

ASSEMBLYMAN BRYANT: Okay. You say your decision differed? In what respect did it differ?

COMMISSIONER BODMAN: Excuse me?

ASSEMBLYMAN BRYANT: In what respect did you differ from the-- I know you came to the same conclusions, but what I am trying to get at is, he had one set of reasoning to reach his conclusion, and you had another set of reasoning. Sometimes people come to the same conclusion, but the conclusions are based on different facts or different circumstances.

COMMISSIONER BODMAN: I should point out that this document that was written by the Administrative Law Judge is some 40-odd pages in length, Mr. Chairman, with any number of references to a considerable number of exhibits that were attached at one point. I believe the exhibits are somewhere in the range of 65.

ASSEMBLYMAN BRYANT: In making your decision-- Well, first you can tell us how you differed, but you can tell me what you reviewed to make your decision, too.

COMMISSIONER BODMAN: Excuse me, what I reviewed?

ASSEMBLYMAN BRYANT: Yes.

COMMISSIONER BODMAN: I reviewed the Administrative Law Judge's decision.

ASSEMBLYMAN BRYANT: That's all?

COMMISSIONER BODMAN: Yes, sir. Basically what I was concerned about-- I rejected his reference to the economic difficulties which may result from a temporary suspension. He -- Judge Parker, I believe, is the name -- made reference to economic difficulties that might well accrue to the Schiavone Construction

Company should it be suspended. I rejected that because I felt it was inappropriate. My primary concern, however, was attempting to just reaffirm the position of DOT to, in fact, suspend these individuals, and I made reference to that in the first page or so of this document.

However, it is of great concern to me that the Administrative Law Judge, Judge Miller, in his decision, fails to direct sufficient attention to the need to maintain public confidence in the integrity of the bidding process. I went into some detail citing, after consultation with the Attorney General's office, some appropriate case law.

ASSEMBLYMAN BRYANT: I guess that is what is confusing. The Attorney General's office, on your behalf, argues strongly that based on the record they had from New York, Schiavone should not be allowed to bid. Now you're telling me that the Attorney General's office is the one which then told you that they thought it was all right, that they failed to meet their burden?

ASSEMBLYMAN HARDWICK: The Administrative Law Judge--

ASSEMBLYMAN BRYANT: The Administrative Law Judge gave an opinion, but he just said that he met with the Attorney General to form his opinion.

ASSEMBLYMAN HARDWICK: After the Administrative Law Judge handed--

COMMISSIONER BODMAN: I didn't say I met with the Attorney General himself.

ASSEMBLYMAN BRYANT: Well, the Attorney General's office.

COMMISSIONER BODMAN: When I spoke to the Attorney General's people, I told them I intended to affirm this decision and that I was concerned about some of the conclusions that were made, which I just mentioned, particularly the economic harm issue.

ASSEMBLYMAN BRYANT: Why were you concerned with that issue?

COMMISSIONER BODMAN: Excuse me?

ASSEMBLYMAN BRYANT: Why were you concerned with that issue?

COMMISSIONER BODMAN: Because I didn't think it was germane to the matter. The matter is public confidence in the bidding process, not whether or not Schiavone will or will not do well in an economic sense in the State of New Jersey.

ASSEMBLYMAN BRYANT: Isn't it true that case law basically said that that is not a consideration to be taken into account?

COMMISSIONER BODMAN: What is not a consideration, sir? I don't understand the question.

ASSEMBLYMAN BRYANT: Case law in New Jersey.

COMMISSIONER BODMAN: Says?

ASSEMBLYMAN BRYANT: Court law says that the bases upon which the Administrative Law Judge made his decision were erroneous because one's economic well-being is not to be considered.

COMMISSIONER BODMAN: Well, that was not the only point he made. He quarreled with the indictment. He made reference to the fact that -- and I agreed with him -- Schiavone, during its first 25 years, was heavily involved in public works contracts. It had been awarded 73 construction contracts totaling \$292 million and had performed them well. But for the New York indictment, Schiavone has not been indicted. In 1978, when Schiavone bid on the New York City Transit project, the governmental program to aid minority business enterprises was in its early stages. Much confusion existed. When bidding on the New York City Transit Authority project, Schiavone agreed to a goal of 10%, and the New York indictment stems from Schiavone's inclusion of \$7.41 million of the rental value.

ASSEMBLYMAN BRYANT: What was the confusion? I looked at the Administrative Law Judge's view and you also restated basically what he said, that there was confusion. Maybe someone can explain what confusion there was in terms of minority bidding.

COMMISSIONER BODMAN: You might want to ask the Judge to come in and explain it to you further. His reasoning--

ASSEMBLYMAN BRYANT: I'm asking you.

COMMISSIONER BODMAN: My understanding, Mr. Chairman, was that according to this document from the Administrative Law Judge, Joe Pell was included on a list of appropriate minority business enterprises that the TA issued at the time, and that there were various decisions and regulations which dealt with the issue of-- There were umpteen regulations at the time which dealt with the issue of whether or not the rental of that equipment could, in fact, properly be

included. There were numerous regulations that dealt with the issue to, in effect, recommend -- let me put it that way -- or strongly suggest, or, in fact, require, that contractors do what they could "to assist a MBE." I believe the word "mentor" was used from time to time, and implicitly suggested that such leasing relationships be established, and that that would assist the MBE to move forward.

Again, I am not an attorney. I would have to review that Judge's case to more specifically answer your question, but that is my recollection.

ASSEMBLYMAN BRYANT: Did you also review the indictment?

COMMISSIONER BODMAN: I did not, other than the reference made to it in the Administrative Law Judge's decision where he capsulizes the indictment.

ASSEMBLYMAN BRYANT: You didn't think it was important to review the indictment as the final arbitrator?

COMMISSIONER BODMAN: I thought that the findings of fact in the beginning of this document were sufficient, where he cites, on September 24, a true bill and goes through essentially a two-page capsulization of the indictment.

ASSEMBLYMAN BRYANT: But at the same-- Let me ask you a question. If those findings of fact, and you took those literally-- In essence, my understanding from the regulation is that you are the final arbitrator of fact; therefore, you review everything.

COMMISSIONER BODMAN: That's right.

ASSEMBLYMAN BRYANT: And the indictment was out. It seems strange to me that when it came to his finding of facts about hardship, that that was reviewed, but yet the indictment wasn't reviewed. I mean, it shows that he made a clear error based on the law.

COMMISSIONER BODMAN: You're certainly entitled to your opinion of what is strange and what isn't strange. I felt that this was a legitimate review, that I was not an attorney, and that the reading of this New York indictment and the findings of fact he set forth there clearly established a considerable understanding of the nature of those charges, and was sufficient for my purposes.

ASSEMBLYMAN BRYANT: Oh, I agree with you that you are not an attorney, and yet you took great pains in yours to cite for us all of the appropriate cases where--

COMMISSIONER BODMAN: I did so with the benefit of counsel, sir.

ASSEMBLYMAN BRYANT: --the Administrative Law Judge erred in terms of using financial standards. What I am saying is, when you read us the thing and you found out, or someone told you -- State attorneys, I guess, or someone in the Attorney General's office--

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN BRYANT: --that he made a clear error, it would seem to me his whole report would then become suspect in terms of the foundations, as opposed--

ASSEMBLYMAN MILLER: Whose report, the Judge's?

ASSEMBLYMAN BRYANT: The Administrative Law Judge's.

ASSEMBLYMAN MILLER: Let me ask you a question, Wayne.

COMMISSIONER BODMAN: Again, I am afraid I misunderstood you. Why would it become suspect? What is suspect about it?

ASSEMBLYMAN BRYANT: What is suspect about it is-- Your opinion basically says he has made an erroneous assumption that cannot be substantiated by court law.

COMMISSIONER BODMAN: I never said that. I don't believe that is what I said at all. I believe I made reference to the fact that I wanted to emphasize that the integrity of the bidding process should be maintained, and I made reference to the Trap Rock case in that regard. That does not in any way undermine, in my view, the Administrative Law Judge's definition. I just don't believe he put sufficient emphasis on that question; therefore, I chose to do so in my affirmation of his decision.

ASSEMBLYMAN BRYANT: You're saying that in his opinion, where he said--

COMMISSIONER BODMAN: He was citing--

ASSEMBLYMAN BRYANT: --that the financial burden of an individual should be taken into account in terms of--

COMMISSIONER BODMAN: That was the one point that I disagreed with him on.

ASSEMBLYMAN BRYANT: That is what Trap Rock basically says. Therefore, that means he was erroneous in terms of making that decision.

COMMISSIONER BODMAN: Well, you're reaching that conclusion; I'm not.

ASSEMBLYMAN BRYANT: An Administrative Law Judge cannot overrule what has happened in either the Appellate Division or the Supreme Court. If they say the standard is that you cannot consider financial hardship--

ASSEMBLYMAN MILLER: I thought you were talking case law.

ASSEMBLYMAN BRYANT: No.

ASSEMBLYMAN HARDWICK: But because you had one paragraph, or whatever it was, that the Commissioner didn't agree with doesn't mean that the whole decision is necessarily to be thrown out the window.

ASSEMBLYMAN BRYANT: I didn't say the whole decision. What I was getting to, and what my question basically is-- We dealt with one portion of his decision and there were problems. I want to know if I happen to look at the indictment-- I am asking the Commissioner why he didn't review the indictment, why he just took the Administrative Law Judge's facts, and if, in essence, basically what he tells me is gospel. In other words, his interpretation of the facts of the indictment, even though--

COMMISSIONER BODMAN: Well, see, it comes to the very question, Mr. Chairman, as to why we asked the Administrative Law Judge to hear it in the first place. The fact is, I am not an attorney. The decision, in fact, was made to do so prior to my becoming Commissioner. I believe that he, being an Administrative Law Judge, was an impartial, qualified, prudent individual.

ASSEMBLYMAN BRYANT: He might not be an attorney either.

COMMISSIONER BODMAN: Well, the fact of the matter is, he was making a recommendation which was requested by the Department and I did, in fact, put good faith in his decision. I felt it was the appropriate thing to do because I did not spend three or four months listening to this testimony, nor would I feel I was qualified to do so.

ASSEMBLYMAN BRYANT: But you don't think the major indictment upon which the suspension, or proposed suspension was based is a necessary document to review?

COMMISSIONER BODMAN: I felt that the--

ASSEMBLYMAN MILLER: Why should he want to review it?

COMMISSIONER BODMAN: Again, Mr. Chairman, I felt that the--

ASSEMBLYMAN MILLER: Someone who was qualified reviewed it for him. The Administrative Law Judge did this. Why should he sit down-- Let's go a step further.

ASSEMBLYMAN BRYANT: Well, let me ask the question why--

ASSEMBLYMAN MILLER: Just a second, Wayne; just a second. Suppose the Department said, "We are not going to go along with the Administrative Law Judge. We are going to deny this man the right to bid." Doesn't that put the Department in the position of legal entanglement with Schiavone because they are being denied, when the Judge said it was okay to let them? Now they are on the other side of the table.

ASSEMBLYMAN BRYANT: Mr. Miller, the only reason I asked the question was because for some reason I imagine the regulations say that after the Administrative Law Judge does his thing, the final arbitrator is the Commissioner. Now, if that--

ASSEMBLYMAN MILLER: How was this man going to support--

ASSEMBLYMAN BRYANT: All I'm asking-- What you're telling me is that there is surplus language in the regulations. In other words--

ASSEMBLYMAN MILLER: There is surplus language at this table. (laughter)

ASSEMBLYMAN BRYANT: No, surplus language in the regulations. What are we supposed to do? Do the regulations say he is supposed to adopt, has to adopt the Administrative Law Judge's--

ASSEMBLYMAN MILLER: You have a professional, a lawyer like yourself, sitting up on the bench, and he is saying: "This is what it is. I have reviewed the whole case." This man, who is not an attorney, who has the final say, says, "Hey, Judge, you're wrong. We are not going to let this man do it." Where does that put the Department?

ASSEMBLYMAN BRYANT: Is he an attorney? I don't know whether he is an attorney or not. We have plenty of--

ASSEMBLYMAN MILLER: We have a lot of attorneys who make judge, but judges don't have to be attorneys. I understand that, too.

ASSEMBLYMAN BRYANT: There are a lot of attorneys who are not Administrative Law Judges -- I cannot make the assumption -- and there are a lot of non-attorneys who think they are.

ASSEMBLYMAN MILLER: You know; you've been there.

COMMISSIONER BODMAN: Agreed. What is the question? Apparently you are suggesting that I erred in that I did not review the indictment itself, but just the findings of fact, which I believe accurately reflect the indictment. I have no reason to believe that the Administrative Law Judge's decision would contain these two pages of citing the charges against Schiavone in an erroneous or irresponsible fashion.

ASSEMBLYMAN BRYANT: My only comment is, if you didn't review it, you don't know. If you didn't review the document, his interpretation of the facts would be different than what your interpretation of the facts would be.

COMMISSIONER BODMAN: Again, Mr. Chairman, it should be understood that this process went on, as I understand it, for some months, where this Administrative Law Judge sat there and reviewed 65-some-odd documents. He made records of this case. That is exactly what we asked him to do. He made a prudent, impartial, fair judgment.

ASSEMBLYMAN HARDWICK: You're just haranguing-- Now you're haranguing, Wayne.

COMMISSIONER BODMAN: The fact of the matter is, I did not believe that I would have been competent, having read an indictment. I have never read an indictment in my entire life, sir. I mean, I wouldn't even-- I must plead ignorance on that matter. I did not think I was competent; therefore, this was an appropriate, fair, and impartial way to proceed. I think what you are suggesting is that is not the best way to proceed. You are questioning his abilities and whether he is an attorney or not.

ASSEMBLYMAN BRYANT: I am not questioning that; they questioned it. I just wanted to make the point that it doesn't necessarily mean he is an attorney because I don't want anyone to have a false impression.

COMMISSIONER BODMAN: Agreed. I have no idea; I don't think it is relevant.

ASSEMBLYMAN HARDWICK: Mr. Chairman, I would like to make a point that you are talking about a Commissioner who is running one of the most important, difficult departments in all of State government. You're implying that he should have sat down and somehow read, however many pages the indictment is, analyzed it, and studied it, and that somehow that is the only thing he has to do. I mean, he delegated that to an Administrative Law Judge for an opinion. What more do you expect the Commissioner to do?

ASSEMBLYMAN BRYANT: No, he didn't delegate that; the regulations did.

ASSEMBLYMAN FOY: Let me ask a question, if I may. One concern that I have, and it really doesn't deal with the Commissioner per se, but deals with the advice, again, the Commissioner received-- Here you have a transcript that is replete with, you know, a very damaging argument, if not evidence, on the part of the Attorney General as to why this contractor should be suspended. You have the Judge basically rejecting those arguments and determining on the facts that were presented to him that, in fact, the contractor should not be suspended.

ASSEMBLYMAN MILLER: We should have an investigation of the Judge, Tom.

ASSEMBLYMAN FOY: I'm not concerned about that. But now you have the Commissioner faced with three options: He can either accept the Administrative Law Judge's findings in toto, affirm the decision, and issue his approval of that decision; he can accept them with certain modifications; or, he can reject them. He chose to accept them and to offer some different reasons as to why he was doing so, reasons independent of the decision itself. There was a change in emphasis.

In that process, I assume you had to seek advice from that selfsame Attorney General, who, for several weeks, had been telling the Judge, "No, throw these guys out."

COMMISSIONER BODMAN: In fact, it was not, Mr. Foy. It was another individual for that very reason. Clearly, as I understand the process, the Commissioner sits, in effect, in a judicial capacity.

ASSEMBLYMAN FOY: Right.

COMMISSIONER BODMAN: And therefore, presumably it is intended that he or she be fair in their judgment.

ASSEMBLYMAN FOY: Did you get advice from a different Attorney General? That was my question.

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN FOY: Okay.

COMMISSIONER BODMAN: The individual I consulted with when dealing with the affirmation and the change of emphasis, as you so smartly put it, was a different individual than the individual who argued the case on behalf of the Department.

ASSEMBLYMAN FOY: Did that person provide you with written rationale as to why you rendered your decision?

COMMISSIONER BODMAN: No.

ASSEMBLYMAN FOY: You simply had meetings and discussions.

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN FOY: No minutes were kept of those meetings and discussions?

COMMISSIONER BODMAN: Not to my knowledge.

ASSEMBLYMAN FOY: You reviewed the matter, received their advice, and rendered your decision?

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN FOY: Okay. Who was that Deputy Attorney General?

COMMISSIONER BODMAN: Frankly, I am sorry to say I do not remember. We will get it to you.

ASSEMBLYMAN FOY: All right. Will you please investigate and provide us with that information. Again, it is a situation in which, you know, you have one Deputy Attorney General spending months

investigating a situation, presenting a case, and arguing one thing, and then you are obliged to seek the advice of that same entity.

COMMISSIONER BODMAN: I will be the first to agree that it is a curious situation one finds one's self in, but it didn't prevent me from proceeding with my duties in this regard, and to be fair, regardless of what position some Attorney General may have taken.

ASSEMBLYMAN FOY: Do you know what the value of the contracts was that Schiavone Construction held in the State at the time of your decision? That would be not just for the Department of Transportation, but for the Garden State Parkway, the New Jersey Turnpike, and New Jersey Transit?

COMMISSIONER BODMAN: I don't believe I have the information. I just have information relating to DOT.

ASSEMBLYMAN FOY: How much did they have extended at the time?

COMMISSIONER BODMAN: Between October, 1984, when this whole indictment issue arose, and the present, Schiavone has bid on 18 contracts, and has been awarded one, which was this Edison Bridge contract we have been spending so much fun time on recently. Since the Kean Administration took office, Schiavone Construction Company has won five competitive bids, totaling \$18.9 million. During Governor Byrne's second term, Schiavone won 14 contracts for \$150.2 million, of which about \$40 million was M&E, Morris and Essex--

ASSEMBLYMAN FOY: Did anyone check his contribution record in the Democratic State Committee? (laughter)

COMMISSIONER BODMAN: I don't know if anyone has taken the time to do that, Mr. Foy. The name of the individual I consulted with is Mary Ann Burgess, who is Head of the Administrative Law Section of the AG's office.

ASSEMBLYMAN BRYANT: I think part of what we are doing here also -- from your point of view, Mr. Miller, Mr. Hardwick, and Mr. Foy -- is, if in fact we think the Administrative Law Judge should be the final arbitrator and then when you set up another-- Just like coming through the regular court, then the Appellate, and then the Supreme Court. If the last person is not supposed to totally review the

record, then maybe what we should be suggesting is a regulation change, and just let the Administrative Law Judge be the final arbitrator.

ASSEMBLYMAN MILLER: No, I don't agree with that.

COMMISSIONER BODMAN: I don't agree with that either.

ASSEMBLYMAN MILLER: I don't agree with that at all. What I am saying here is, I think the Administrative Law Judge, again, being an employee of this State, and being part of the State involvement, if you will-- I think you have to depend upon him as an expert, and give his word a lot of credence when you make a decision in the Commissioner's position. I don't say to just throw it out.

ASSEMBLYMAN BRYANT: I'm not saying throw it out.

ASSEMBLYMAN MILLER: No, but I'm saying you have to do this.

COMMISSIONER BODMAN: In this particular case, Mr. Chairman, again, I made some changes on emphasis, as Mr. Foy put it, and reviewed his case. The fact is, I agreed with that Administrative Law Judge, true, but that does not mean that we accepted his decision in toto and affirmed it as it stood. I don't believe that is an appropriate process to suggest. I do believe there was a fair review here, perhaps not to what you consider to be your standards as an attorney, but in my opinion, I believe it was a fair review that I made of his recommendation, and it came to what I consider to be an intelligent conclusion.

ASSEMBLYMAN MILLER: May I ask a question?

ASSEMBLYMAN BRYANT: Mr. Foy and then Mr. Miller.

ASSEMBLYMAN FOY: The other question I have is, once your decision was rendered, the Attorney General was afforded an opportunity to appeal your decision to the Appellate Division, was he not?

COMMISSIONER BODMAN: That's a legal opinion. I don't know.

ASSEMBLYMAN FOY: Yes. I think there is a 45-day period from the final decision rendered by the Department head in which the Attorney General, or the party who continues to feel aggrieved -- in this case it was the Attorney General -- can appeal the decision to the Appellate Division. My question really is not for you again; it is for the Attorney General, as to why that wasn't done. If they felt so strongly in prosecuting the case, why then didn't the Attorney General

appeal your decision? If, in fact, they felt your affirmance of the Administrative Law Judge's erroneous decision, in their opinion, was also erroneous, why wasn't there an appeal?

See, the way the process works now is, you go before the Administrative Law Judge, he renders a proposed decision, and that proposed decision, in order to become law, has to be affirmed by the Commissioner. I can tell you in my experience of practicing law in this State, Commissioners almost invariably affirm decisions. However, I don't want to see them taken out of the process because the Appellate Division can sometimes be troublesome to attorneys. I would rather have an intermediate step after I had gotten a wrong decision from an Administrative Law Judge, in which I could then appeal to the Department Head and say, "Look, he is off base, and here's why. Let me meet with you to discuss the practicalities of it." We do it all the time. I don't want to see them eliminated; I want to see them as part of the process. If we take it--

ASSEMBLYMAN BRYANT: I do too, but I think they should review everything if, in fact, they are an arbitrator of the information. That is my only point.

ASSEMBLYMAN FOY: Well, I think it would help to have uniform standards of review imposed upon the Department heads so they would know what they can and what they cannot consider. Right now, I think it is out of the blue sky, as far as it goes. It is wide-open.

ASSEMBLYMAN MILLER: Wayne, how does a case get before an Administrative Law Judge? Who brought this case before the Judge? Who brings it up there? Who asked for the review by the Judge?

ASSEMBLYMAN FOY: Well, that is really not clear, because apparently, in this instance, Commissioner Sheridan took an unusual set of circumstances, in that he was pro-active in sending it immediately to the Administrative Law Judge-- What normally happens is, a Commissioner would suspend; then it would be up to the person who was suspended to say, "I want a hearing." Then, since it is what is called a "contested case," it would be referred over to the Office of Administrative Law, which hears contested cases.

In this instance, Commissioner Sheridan said it was a contested case himself. He said, "I don't want to render a decision ab initio."

ASSEMBLYMAN MILLER: In other words, the AG's opinion was--

ASSEMBLYMAN FOY: Up-front he said, you know, "Let them present a case. Let the Attorney General present a case and do it there at the outset." So, it's a little bit of a departure from the norm.

ASSEMBLYMAN MILLER: This is why lawyer's fees are so high, all those big words you fellows use all the time.

ASSEMBLYMAN HARDWICK: Right. I'm sorry, can I just get a clarification of something the Commissioner said?

ASSEMBLYMAN MILLER: Sure.

ASSEMBLYMAN HARDWICK: I'm not sure I got the numbers straight, Commissioner, and I want to be sure. Did you say that during the Kean Administration Schiavone has only been awarded five contracts, totaling \$18.9 million--

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN HARDWICK: --compared to the second Byrne Administration, when they were awarded 16 contracts, totaling \$58 million?

COMMISSIONER BODMAN: No, no. During Byrne's second term, they were awarded 14 contracts for \$150.2 million, and during his first term -- Byrne's first term -- they were awarded 16 contracts for \$58.3 million. So it's a total of what -- roughly, I guess, 30 contracts for about \$208 million. That was during Byrne's time as Governor.

ASSEMBLYMAN MILLER: We should check into contributions.

ASSEMBLYMAN BRYANT: Let me ask a question. During the Byrne Administration, was Schiavone indicted by any other state?

COMMISSIONER BODMAN: No, sir.

ASSEMBLYMAN BRYANT: Thank you.

ASSEMBLYMAN FOY: So we can diffuse this issue very quickly, all four of the Committee members sitting here today have been recipients of contributions from organizations which have been recipients of contributions from Schiavone Construction Company.

ASSEMBLYMAN MILLER: Have we?

ASSEMBLYMAN FOY: Yes, we have. I assume you have been endorsed by the New Jersey Business and Industry Association, haven't you? They've gotten contributions from Schiavone. I have; Wayne has. I assume you received contributions from Constructors for Good Government. I have; Wayne has. And Schiavone has contributed to both of them. That doesn't impact me one way or the other. I can make objective decisions about issues notwithstanding the fact that organizations that that company has supported have made contributions to everyone sitting here.

ASSEMBLYMAN BRYANT: Mr. Foy, are you finished? (affirmative response) Let's ask some questions because it is the process which disturbs me. Our minority leader asked that. Your decision was on August 22, right?

COMMISSIONER BODMAN: I believe it was August 20; it was announced August 21.

ASSEMBLYMAN BRYANT: Assuming the procedures as outlined, if they were suspended, they would not have made a bid on this project, would they?

COMMISSIONER BODMAN: That is correct. Had they been suspended--

ASSEMBLYMAN BRYANT: Suspended, and then the hearing process went along-- They would not have been able to bid.

COMMISSIONER BODMAN: Well, I suppose that is a judgment call. It depends on the time frame in which-- Given the state of affairs here, yes, that is true.

ASSEMBLYMAN BRYANT: Can anyone tell me whether New Jersey DOT has ever used a proposed suspension before?

COMMISSIONER BODMAN: I cannot say. Does anyone have a recollection?

ASST. COMMISSIONER FREIDENRICH: I just don't know.

ASSEMBLYMAN BRYANT: In your memory -- you have 36 years -- do you ever remember having a proposed suspension or an outright suspension?

ASST. COMMISSIONER FREIDENRICH: Mr. Chairman, as the engineer, it is not a matter that I get involved with very often. I do

get involved in matters when collusive bidding becomes an issue, because that goes to things which I know something about.

ASSEMBLYMAN BRYANT: Could the Department supply us with that information?

COMMISSIONER BODMAN: Yes, sir.

ASSEMBLYMAN BRYANT: Your decision came out on August 22.

COMMISSIONER BODMAN: August 20.

ASSEMBLYMAN BRYANT: August 20. On August 21, because your decision basically says they had never been disbarred from any other state, and technically that is correct-- Had their bids been rejected in other states at the time you make your decision?

COMMISSIONER BODMAN: My understanding -- and Mr. Freidenrich may know more about this process -- is that the State of New York DOT, rather than having a process of suspension, permits all contractors to bid, and then summarily makes some decisions, apparently, as to whether or not they want to accept those bids. I believe that somewhat capsulizes the process, and that they, in fact, rejected a Schiavone bid, which was, in fact, a low bid on a New York DOT project. I believe Schiavone went into court to contest that decision, and the New York court ultimately upheld the New York DOT. Is that a fair statement?

ASST. COMMISSIONER FREIDENRICH: That is my understanding as well, Commissioner. I only have that understanding from reading about it in the papers or in technical journals where it was written up.

COMMISSIONER BODMAN: Frankly, my thinking on that process is that it is grossly unfair to permit any contractor to bid on a project when you have no intention of awarding the bid, regardless of whether or not it is low. I think our process in New Jersey is definitely superior to that. That way, the contractor, if he is suspended, knows, obviously, that he is not going to be awarded the bid.

ASSEMBLYMAN BRYANT: Well, since New York is a sister state, or close by-- You made the point that they have not been disbarred from bidding in any other state in terms of reaching your conclusion.

COMMISSIONER BODMAN: That's right.

ASSEMBLYMAN BRYANT: Didn't you think it was relevant that their bids had been rejected in another state?

COMMISSIONER BODMAN: I just offered my opinion of that process, Mr. Chairman. I think it is unfair to cause a contractor to bid when you have no intention of giving him the bid. You're darned right, I didn't consider that to be an appropriate example of a judicious way to handle the process.

ASSEMBLYMAN BRYANT: I'm not saying whether it is judicious. I'm saying in terms of-- We're talking about the integrity of the process; that is what the argument comes down to. Yet, there is a state that is rejecting bids on the grounds of the integrity of the process. There is a sister state--

COMMISSIONER BODMAN: I just told you, I have fought with their very process. I think it is unconscionable that New York DOT would permit the company to go to the expense and trouble of putting together a bid, when they know darned well they don't intend to award the bid. Frankly, I think that is a case I would not consider as being germane to any decision I made with relation to New Jersey. I think it is an inappropriate process.

ASSEMBLYMAN BRYANT: Are you saying the foundation of that decision to reject bids is not something we would look into? It happened prior to your decision.

COMMISSIONER BODMAN: I am aware of that. I am just telling you my opinion of their process.

ASSEMBLYMAN BRYANT: Okay.

COMMISSIONER BODMAN: And I believe-- Mr. Freidenrich, do you want to comment on that? Do you agree with that?

ASST. COMMISSIONER FREIDENRICH: I believe to allow a contractor to submit a bid, and then to say to him, "You are allowed to submit a bid, but be aware that if you are the low bidder, we are not going to award the contract"-- That kind of a process does not make much sense to me.

ASSEMBLYMAN BRYANT: Well, isn't that exactly what we did?

ASST. COMMISSIONER FREIDENRICH: Pardon me?

ASSEMBLYMAN BRYANT: Isn't that exactly the result of what could happen-- We did a proposed suspension to allow them to bid, but if we had come out with an opposite determination, we would have made them go through the whole process, and we would have rejected it.

Let's assume on the twenty-second-- Let's assume just the reverse. Because we did a proposed suspension, they would have bid it. Then we would have come out with our decision. Let's say the Administrative Law Judge said, "No, we don't think they should bid." Then if it was upheld by the Commissioner, wouldn't we have done the same thing as New York did, the thing you just condemned?

ASST. COMMISSIONER FREIDENRICH: No. I say no because, from my recollection of what I read in the newspapers, they did not debar the contractor; they did not preclude him from submitting a bid. He then was the low bidder on a project. They said that he could not be awarded the bid, and then he bid a second project and was the low bidder. They allowed him to bid again after that. Then, when he was the low bidder on the second project--

ASSEMBLYMAN BRYANT: I'm asking you, isn't that basically a fallacy? Maybe you have given me the best argument of why we shouldn't have proposed suspensions, because what you've done is induce people to do something, and then all of a sudden, we could come in with a determination that they should not. Tell me where the difference is.

ASST. COMMISSIONER FREIDENRICH: The difference is that another action took place. If, indeed, prior to coming to the decision point of making an award to a contractor-- If, prior to coming to that decision, a subsequent action took place which, in effect, debarred him, then you have another incident occurring. But, absent another action taking place, other than saying--

Well, frankly, I don't understand, nor do I intend to really second guess the whole process in New York. You know, I don't know how they arrived at it; I don't understand that they apparently do not have a debarment procedure. I suspect, you know, just from what I have read in the newspapers, that notwithstanding what has occurred, if they were to advertise a project tomorrow that Schiavone was interested in bidding, they would still be permitted to bid, notwithstanding that even if he were the low bidder, on the history of the action they took on the other ones, they would not award it. Frankly, I do not understand that kind of a process.

ASSEMBLYMAN MILLER: Mr. Chairman, may I deviate for just a minute?

ASSEMBLYMAN BRYANT: Yes.

ASSEMBLYMAN MILLER: I have sat here now for two hearings and, personally, I think we are beating a dead horse. Once again, can you tell me why this particular contract was selected for investigation? Why not some other contract? Why this particular one? Why did you or someone select this one to look into?

ASSEMBLYMAN BRYANT: Because it has something to do with the integrity of the process. I don't know of any other contractor we are dealing with in the State who has been indicted on 137 counts in another state, which is a sister state, and which deals with one of the issues we deal with. We have minority contractors too, which brings in a whole question. It seems to me we want to question what he is going to do on his contract for minority contractors also.

ASSEMBLYMAN MILLER: Oh, then what you are really saying here is, because he was indicted in New York on this minority situation, we just want to check in to see whether or not he is complying with all of the rules and regulations relating to that particular requirement. Is that what you're saying? Is that the purpose of this gathering?

ASSEMBLYMAN FOY: No. Let me give you some thoughts about--

ASSEMBLYMAN MILLER: Because if that is the purpose, I don't think it is necessary to go all through this routine. Why don't we just check it out to find out?

ASSEMBLYMAN FOY: I think what happened here is -- and it is by the Commissioner's own recognition -- we had, with the Edison Bridge contract, which subsequently Schiavone came to be involved in, a very unusual departure from the pattern of the normal contract process in the Department of Transportation--

ASSEMBLYMAN MILLER: Okay, we have been satisfied, Tom.

ASSEMBLYMAN FOY: --because of a lot of circumstances, okay? Phase one was to go through and get all of that pretty much cleared up, which we have done.

ASSEMBLYMAN MILLER: Yes, we're satisfied.

ASSEMBLYMAN FOY: The second phase of that deals with the focus of Schiavone being-- See, sometimes there are things that raise questions in people's minds. It could be pure coincidence, or

serendipity, from his standpoint, that just about the same time all of these things were happening with respect to the Route 9 Bridge contract, the decision came down to give Schiavone the ability to continue to bid on work, despite the fact that there was a cloud, and that is all it is. It is an indictment; the man is not convicted, and due process, in my opinion, mandates that he be given the benefit of a doubt. I am still a firm believer that you are innocent until proven guilty, although that doesn't seem to be the popular theme anymore in this country. But, the fact of the matter is, the clouds were raised, in my opinion, in the public's mind, and it was incumbent upon this Committee to investigate the matter fully to determine precisely what happened, to remove, at least in New Jersey, any kind of cloud over the process, in terms of what happened.

You know, he gets the letter saying, "Hey, happy days, you are the bidder," on August 22, and he has just been restored, in a sense, on August 21. The timing raised some serious questions in people's minds. Perhaps it is the function of the diligence of the fourth estate, the press, which raised a lot of these questions. You know, when you hear that the public is interested in something that is the public's business, I think it is incumbent upon us to act. I think we have done very well in satisfying one aspect of the situation.

ASSEMBLYMAN MILLER: I hear you, Tom, but first of all, I would not have known anything about this if someone hadn't called a meeting and said, "Look, we are going to check this particular contract out." I don't know the reasons for it, except that Schiavone's name is one, and as Assemblyman Bryant points out, the minority situation, to make sure they are in compliance, which could have been taken care of on the side without any of this sort of stuff. We have had the hearing so far, and what I have heard up to this particular point is that the contract was awarded properly; there has been nothing improper on the part of DOT's operation of this whole thing up to this particular point.

Now, what are we trying to determine? Are we trying to find out about your point, the point of the proper awarding? Are we trying to find out--

ASSEMBLYMAN FOY: I am trying to find out very specifically-- It really has little to do with Commissioner Bodman, because I am less troubled with his decision to affirm the Administrative Law Judge, than I am with the decision of Commissioner Sheridan to take an unusual route from the route that is normally taken in these cases. I want to find out if Schiavone Construction received favorable, differential treatment in this matter initially.

The normal route is to suspend someone; they can't bid or do business during the time they are suspended. Instead, there was a proposed suspension, and he was permitted to continue to bid and do work all along with a number of State agencies.

ASSEMBLYMAN MILLER: No, no, the normal route--

ASSEMBLYMAN HARDWICK: You missed a point, Tom.

ASSEMBLYMAN FOY: Yes, I have a million and a half dollars worth of contracts from the Garden State Parkway and the New Jersey Turnpike Authority, which he got during that period.

ASSEMBLYMAN HARDWICK: You missed a point.

ASSEMBLYMAN FOY: If he had been suspended, he could not have bid.

ASSEMBLYMAN HARDWICK: The normal route is, it is up to the Commissioner to suspend or not to suspend, depending upon his discretion. That is the regulation.

ASSEMBLYMAN BRYANT: No hearing is ever scheduled unless the Commissioner takes an action.

ASSEMBLYMAN HARDWICK: There is nothing to prohibit that. The Commissioner uses his judgment to investigate, and to decide whether or not to suspend someone.

ASSEMBLYMAN BRYANT: It is irregular; that is why I asked the question.

ASSEMBLYMAN FOY: That's just it. He didn't do what the law gave him the authority to do, either suspend or not suspend. Instead, he invented an artifice, the proposal to suspend, which got him off the hook.

ASSEMBLYMAN MILLER: I disagree with you.

ASSEMBLYMAN BRYANT: Clearly, if there had been a suspension, he never would have gotten this contract in the beginning, because he would not have been able to bid.

ASSEMBLYMAN HARDWICK: Wait a minute now. Counsel just pointed out Regulation 16:44-8.10 to me, which says: "Insofar as practical, prior notice of any proposed suspension shall be given to the Attorney General and the Treasurer," which implies the regulations have the concept of a proposed suspension. You asked where it was. It is embodied right here, the concept of a proposed suspension. It says right here, "Any proposed suspension shall be given to the Attorney General." It was not made up; it was in the regulation already.

ASSEMBLYMAN BRYANT: No, no, that is a notice to the Attorney General, so that the Attorney General can tell you what--

ASSEMBLYMAN HARDWICK: No, you're missing my point. The point is, the concept of a proposed suspension is in the regulations. It is right here. You said there is no place for such a thing as a proposed suspension, and clearly there is.

ASSEMBLYMAN BRYANT: No, you're misreading it.

ASSEMBLYMAN HARDWICK: I am not misreading anything. Read the thing.

ASSEMBLYMAN BRYANT: Counsel can tell you procedurally it only allows one procedure. That is to notify the Attorney General that you are thinking about it.

ASSEMBLYMAN HARDWICK: You said that nowhere in the regulations is there such a thing as a proposed suspension. It's right here.

ASSEMBLYMAN BRYANT: To the actual bidder.

ASSEMBLYMAN HARDWICK: It's right here.

ASSEMBLYMAN BRYANT: It is not.

ASSEMBLYMAN HARDWICK: Well, you're not seeing it because you don't want to.

ASSEMBLYMAN FOY: He tells the contractor, "You are suspended." He tells the Attorney General, "I am suspending this guy. Get your troops ready, we are going to court." That is what he tells them. I mean, that is pretty simple.

ASSEMBLYMAN MILLER: Let me ask you another question.

ASSEMBLYMAN FOY: You don't even have to be a lawyer to understand that one.

ASSEMBLYMAN MILLER: Do you, or does anyone--

ASSEMBLYMAN BRYANT: Mr. Miller, I want to ask you to direct your questions to the Commissioner. I am not here to answer questions.

ASSEMBLYMAN MILLER: Oh, yes you are. You're chairing this thing. You're asking the questions, and I have the right to ask you questions pertaining to your procedure.

I want to know, do you know of anything criminal in nature associated with this particular contract? Do you have anything to back you up? Does anyone know anything about something of a criminal nature?

ASSEMBLYMAN BRYANT: I am worried about the integrity of the process.

ASSEMBLYMAN MILLER: I asked you a question; never mind the integrity of the process. Do you know anything criminal in nature? Yes or no?

ASSEMBLYMAN BRYANT: Do I know anything criminal in nature?

ASSEMBLYMAN MILLER: Criminal in nature -- associated with this?

ASSEMBLYMAN BRYANT: By the time I am finished with this hearing, I might find out something. I don't know.

ASSEMBLYMAN MILLER: Do you know anything now?

ASSEMBLYMAN BRYANT: Do I know anything now?

ASSEMBLYMAN MILLER: Right now. Do you have anything, a piece of paper--

ASSEMBLYMAN FOY: Who is the criminal, the Commissioner, Schiavone, who are you talking about?

ASSEMBLYMAN MILLER: All I'm saying-- Wait a minute; hold it.

ASSEMBLYMAN FOY: Do I know anything that Schiavone has done criminally? The answer is no, other than that indictment, which is merely an indictment.

ASSEMBLYMAN MILLER: The Speaker was in here last week and he made some pretty damning statements in my book, indicating to me that

there is something wrong here someplace. As a matter of fact, he told me on the side, "Don't stick your neck out too far because this thing hasn't opened up all the way yet."

Now, I'm asking you, is there anything here criminal in nature that you know about? Because if there is, I think we are in violation because you didn't go to the AG with it. That's all I'm saying.

ASSEMBLYMAN BRYANT: Mr. Miller, this hearing is about the integrity of the process, the whole thing the regulations deal with. One of the things is indictments. One of the things is, what were the circumstances changed from October 24 to August 20 which made the Department change--

ASSEMBLYMAN MILLER: There is nothing criminal in nature associated with this.

ASSEMBLYMAN BRYANT: It still might mean that they should not be--

ASSEMBLYMAN FOY: Wait a minute. We don't have it in our authority to investigate.

ASSEMBLYMAN MILLER: Right.

ASSEMBLYMAN FOY: That is for the SCI; it's for the Attorney General; it's for the U.S. Attorney.

ASSEMBLYMAN MILLER: That's why I'm asking.

ASSEMBLYMAN FOY: That's where that stuff belongs. All I want to do is find out about their procedures. We found there was a gap in one of their procedures, and they are going to clear it up.

ASSEMBLYMAN MILLER: Then you're saying there is nothing criminal, right?

ASSEMBLYMAN BRYANT: I don't know.

COMMISSIONER BODMAN: Let me read from a copy of a letter to the Governor from Mr. Karcher. It says: "I suggest to you in the strongest and most emphatic terms that this is not the simple problem that your Commissioner" -- meaning me -- "suggests, but entails a sinister and perhaps illegal attempt to manipulate the bidding process." That letter is signed Alan J. Karcher, Speaker.

ASSEMBLYMAN MILLER: That's right; that is what I want to know.

ASSEMBLYMAN BRYANT: Is anyone carbon copied on that?

COMMISSIONER BODMAN: No, sir. I will be happy to give you a copy.

ASSEMBLYMAN FOY: I never saw that letter in my life, don't know anything about it, and I don't believe that is the purpose of these hearings, from my perspective.

ASSEMBLYMAN BRYANT: That is not the purpose for which I called the hearings.

ASSEMBLYMAN FOY: Let me see it.

COMMISSIONER BODMAN: You are welcome to get a photocopy of it.

ASSEMBLYMAN MILLER: We are in the wrong ball park if there is something wrong legally or criminally here. Then it goes to the AG, not here.

ASSEMBLYMAN BRYANT: Well, Mr. Miller, I did not call the hearings on the position that something is illegal.

COMMISSIONER BODMAN: Mr. Foy, in a telegram to the Governor, the Speaker said, "Extraordinary questions of governmental efficiency and ethics are involved in this situation." So I assume there are some--

ASSEMBLYMAN FOY: I don't know about the ethics situation, but I think efficiency in departmental regulations -- I think that is admitted, as far as that goes.

COMMISSIONER BODMAN: Agreed. I am not quarreling with the purpose of the hearing. I am simply stating that there are some allegations, Mr. Foy.

ASSEMBLYMAN FOY: No one has accused anyone of anything unethical. That's news to me. He is asking the Governor to investigate the matter. We didn't bother to wait for the Governor; we did it on our own. My concern focuses on the precise authority that this Committee has, which is really, in a sense, a certain amount of oversight authority over your Department and its activities. Our inquiry, in my opinion, has to be based upon whether, given the questions that have been raised about the situation, the Department acted properly.

I don't think there is any question that you acted properly on the first part of it. Now we are just trying to find out if you acted properly on the second part of it.

COMMISSIONER BODMAN: Well, I think this question was raised, and it is worthy of a reading from a News Tribune article dated October 8, 1985, and I quote: "Once again we see a situation in which a major contract has been awarded to a major contributor to the Governor's reelection effort amid signs that delays and other problems are developing, Bryant said." I assume that means you, Mr. Chairman. I would construe that as being an allegation that in some way favorable treatment was supplied to Schiavone Construction Company in exchange for contributions.

ASSEMBLYMAN BRYANT: Well, one thing I have discovered is that the procedures are unusual, and I want to know why. And I want to know the opinions as to who planned those things.

COMMISSIONER BODMAN: I see, but the question on the floor at the moment is one of purpose and allegation. You are suggesting-- I agree with you, Mr. Foy. I think this is a unique situation and it deserves this hearing.

ASSEMBLYMAN BRYANT: There are a few purposes.

COMMISSIONER BODMAN: But there have been some suggestions made in the public media and elsewhere that perhaps there are more -- to use the Speaker's words -- "sinister activities" taking place here.

ASSEMBLYMAN BRYANT: Mr. Commissioner, you're asking me what the purposes of these hearings are. The purposes are twofold. Number one is, you started out with a project and it is supposed to get done. It is not getting done. I understand it is now going to be done. There was a low bidder, and the procedures through which that low bidder went have now been called into question. Number two is, we have had a proposed suspension of the individual who ended up winning the contract. There are a lot of questions which have been raised in my mind.

With all those questions -- and I am not saying there is anything illegal -- maybe we need to tighten up the process so these things will not happen. We should either do one thing or do the other.

COMMISSIONER BODMAN: We have concurred in that, Mr. Chairman, and we will review those regulations.

ASSEMBLYMAN BRYANT: And that is the purpose of this Committee, to examine not only what has happened, but to ascertain if there are procedures we need to tighten up in our Transportation Department.

Now, if you disagree, Mr. Miller, that's fine.

COMMISSIONER BODMAN: Then the statement you made to the paper that in some way we were treating Schiavone favorably in exchange for political contributions was not accurate?

ASSEMBLYMAN BRYANT: Well, it does seem ironic to me that the Appellate Court of New York says there are enough facts, and all of a sudden, you tell me you never reviewed the indictment.

COMMISSIONER BODMAN: I am suggesting-- You just finished telling me, Mr. Chairman, what the purpose of this hearing was.

ASSEMBLYMAN BRYANT: It concerns me that we argued that they shouldn't bid, and I just want to know what circumstances changed in the Department's mind from October 24, 1984 to August 20. I can't understand that.

COMMISSIONER BODMAN: Well, in the explanation of your purpose here, you made no reference to this particular comment that was made in the newspaper, so I assume that is a moot issue. Is that right?

ASSEMBLYMAN BRYANT: About what?

COMMISSIONER BODMAN: About, once again: "We see a situation in which a major contract has been awarded to a major contributor to the Governor's reelection effort amid signs that delays and other problems are developing, Bryant said." I interpret that as an allegation that--

ASSEMBLYMAN BRYANT: It's a statement of fact.

COMMISSIONER BODMAN: I see. Are you suggesting something beyond that?

ASSEMBLYMAN BRYANT: No, I stated a fact. I have a right to state facts.

COMMISSIONER BODMAN: Absolutely.

ASSEMBLYMAN MILLER: But you're casting aspersions upon the integrity of the Department.

ASSEMBLYMAN BRYANT: I'm asking, what has changed in the Department?

COMMISSIONER BODMAN: In the very same article, the Speaker is quoted as saying: "They rejected the low bidder so they could give the contract to the second low bidder, Schiavone."

ASSEMBLYMAN BRYANT: You would have to ask the Speaker about that. What I am asking you is this: What major changes, from the standpoint of the Department, happened between October 24 and August 20, of one year?

COMMISSIONER BODMAN: What major changes?

ASSEMBLYMAN BRYANT: Yes.

COMMISSIONER BODMAN: The Administrative Law Judge made a ruling after exhaustive hearings and made a recommendation to me. The other major change, frankly, was that Mr. Sheridan left office and I took office.

ASSEMBLYMAN BRYANT: And that changed the Department's view? Is that what you're telling me?

COMMISSIONER BODMAN: I didn't say the Department's view. You didn't ask that question.

ASSEMBLYMAN BRYANT: I did. That is what I asked.

ASSEMBLYMAN FOY: Let me ask this question. Commissioner, did you have occasion to review this matter with Commissioner Sheridan? Did you ever have any discussions from when you took office to when you ultimately had to reach your decision? Did you talk to John Sheridan about it?

COMMISSIONER BODMAN: Yes, I did.

ASSEMBLYMAN FOY: Did you get the benefit of his thinking about what he did originally?

COMMISSIONER BODMAN: Yes, I did, both before and after the fact.

ASSEMBLYMAN FOY: All right. Then my question is, did he still advocate the suspension of Schiavone Construction?

COMMISSIONER BODMAN: He never advocated the suspension, Mr. Foy. He advocated the proposed suspension. He felt that my action was appropriate. I just spoke with him three or four days ago.

ASSEMBLYMAN FOY: All right. He concurs with what you did, based upon the Administrative Judge's decision?

COMMISSIONER BODMAN: Yes, sir.

ASSEMBLYMAN FOY: But he never advocated the actual suspension? He never suspended?

COMMISSIONER BODMAN: He did not.

ASSEMBLYMAN FOY: That is the point I am focusing on. That is why I'm here in terms of these things. I want to know why.

ASSEMBLYMAN MILLER: Why the proposed suspension instead of a suspension. As far as I am concerned, I think you are into semantics.

ASSEMBLYMAN FOY: No, it is not semantics. It is a very practical situation that has an enormous economic impact on the contractor. If I suspend -- meaning the Commissioner -- notwithstanding the fact that the person who is suspended then asks for a hearing, he is not permitted to bid on State work during the period of that suspension. If I propose to suspend, about which there is a question as to the authority of the Commissioner to invent that particular aspect-- If I propose to suspend, then, in fact, he can continue to bid. He was able to bid on this project and he did, in fact, bid on other projects.

So, they have a tremendous practical economic impact, those little semantics. Millions of dollars are involved in those semantics, and I want to know why that occurred.

ASSEMBLYMAN MILLER: Will you agree with me, Tom, that the Commissioner does have the right, does have the final say as to whether to grant contracts or not grant contracts?

ASSEMBLYMAN FOY: Absolutely.

ASSEMBLYMAN BRYANT: We agree with that.

ASSEMBLYMAN FOY: I don't question Commissioner Bodman's decision to agree with the Administrative Law Judge. I would probably have done the same thing.

ASSEMBLYMAN MILLER: Would you also agree then that if he didn't put the words "proposed suspension"-- If he just sent the man a letter and said, "Look, we want to sit down and have a hearing with you" -- period -- "about the situation. Come on in, we want to talk to you"--

ASSEMBLYMAN BRYANT: He would not have gotten this contract.

ASSEMBLYMAN MILLER: I'm saying, "Just sit down, we want to have a talk with you." Never mind even mentioning the statute. "We want to sit down and have a discussion with you about the situation." He has a right to do that too, doesn't he? I mean, he has the final say; he has a right to do it. You can't disagree with that.

ASSEMBLYMAN FOY: No, I think that is within his discretion.

ASSEMBLYMAN MILLER: Okay.

ASSEMBLYMAN FOY: But it is highly unusual.

ASSEMBLYMAN MILLER: Fine, but he has that discretion. All he did was point out, "Here's a statute. We're proposing suspension, but we want to talk to you first." I see nothing wrong with that either, except that you're saying in those 10 days, he could have been awarded contracts.

COMMISSIONER BODMAN: Mr. Foy, I understand--

ASSEMBLYMAN FOY: Suppose he had been awarded contracts in those 10 days?

COMMISSIONER BODMAN: --your concern, but it should be pointed out that my people tell me that at the time former Commissioner Sheridan made the decision to issue this proposed suspension, it was, in fact, widely publicized. The Department issued press statements to the effect. Frankly, here we are, a year later, questioning that decision.

ASSEMBLYMAN FOY: I am questioning the decision in light of all of the facts which have emerged. What brought it to my attention was the Route 9 Bridge issue.

COMMISSIONER BODMAN: I understand.

ASSEMBLYMAN FOY: That is how Schiavone got involved.

COMMISSIONER BODMAN: It just should be noted that at the time, they tell me, a press statement was issued -- a year ago -- putting forth the then Commissioner's decision.

ASSEMBLYMAN FOY: Let me just say something for the record. I don't have a particular hang-up about the contribution issue as far as this goes. I know there has been some commentary in the paper about that, but, you know, I did my homework. I have a list of all the money Schiavone has contributed to anybody and everybody. His lawyers are here. I know how much they gave. They have been very generous to the Democratic party. You know, that is incidental as far as all this goes. What concerns me is the--

COMMISSIONER BODMAN: Well, I'm glad that is not an issue.

ASSEMBLYMAN FOY: --procedural process; the other is not an issue.

ASSEMBLYMAN MILLER: How come I'm not on that list, Tom?

ASSEMBLYMAN FOY: Pardon?

ASSEMBLYMAN MILLER: How come I'm not on that list?

ASSEMBLYMAN FOY: Well, you're not on the list individually, but some of the people who gave to you are on the list.

ASSEMBLYMAN MILLER: Oh, okay. I just don't want to be discriminated against.

ASSEMBLYMAN BRYANT: The process-- This is something you might not know. EPA has also stopped them from working. It just seems strange to me that New York, Federal people--

ASSEMBLYMAN MILLER: It can be very strange, but I see nothing illegal or wrong with what--

ASSEMBLYMAN BRYANT: Why, all of a sudden, is New Jersey adopting different procedures?

ASSEMBLYMAN MILLER: I think first we ought to--

ASSEMBLYMAN BRYANT: Maybe you're right; maybe Mr. Sheridan is the only one who can answer that. Maybe the Attorney General is the only one who can answer that. I am going to have to bring them in to find out those answers.

COMMISSIONER BODMAN: Obviously, I made the final decision, Mr. Chairman, and I stand by that decision. Obviously, it is a judgment call. You can quarrel with and you can question my judgment in the matter, just like you can question Mr. Freidenrich's judgment on the Edison Bridge thing we finished discussing a while ago. But the

fact is, it is a judgment call. I felt there was sufficient evidence presented by that Administrative Law Judge to concur with his opinion, and I stand by it. It's that simple, and, frankly, I don't care what New York does. We are not in New York; we're in New Jersey.

ASSEMBLYMAN BRYANT: We're not the Federal government either, but they did it too.

COMMISSIONER BODMAN: That is correct. That is clearly within their authority. I don't know if they asked some Administrative Law Judge or some other non-biased third party to review the matter in as exhaustive a fashion as we did. I don't know what process they used, and, frankly, I don't care. I believe this was a clear, just, and appropriate process, and it was a fair decision based upon the facts. And that's it. There is really not much more to discuss.

ASSEMBLYMAN BRYANT: But you only reviewed some of the facts.

COMMISSIONER BODMAN: Excuse me?

ASSEMBLYMAN BRYANT: You only reviewed some of the facts.

COMMISSIONER BODMAN: I reviewed what I considered to be a sufficient number of facts to make a decision.

ASSEMBLYMAN MILLER: Mr. Chairman, you know, something good is coming out of this. I am more impressed with DOT today than I was before we started the hearings. I think they really handled themselves very well. They are doing a commendable job in supplying all you have asked them to supply.

ASSEMBLYMAN BRYANT: Are there any other questions for the Commissioner? I know I am going to have to bring the Attorney General in because he has a lot to do with this. I will probably have to bring Mr. Sheridan in too, because I still want to know procedurally why we are doing some things, and if it was a unique situation. We are getting into all these unique situations surrounding one contract. Those things sort of glare when there are so many unique things happening at one time, in my mind, procedurally. We want to find out who is making these determinations to allow these unique situations to continue and what we should be doing, whether through regulation or through statute, to make sure these things do not happen in the future, and whether, in fact, there was actually a decision to allow this unique procedure.

Does anyone have any other questions of the Commissioner?

ASSEMBLYMAN MILLER: I just want to say one last word, Mr. Chairman. Once again, I think this is a witch hunt. I see nothing here whatsoever, and I will guarantee you you will find nothing on the bottom line, unless Mr. Karcher has something he is not letting us know about from the statements he has made in the papers. Other than that, as far as I am concerned, we are wasting our time.

ASSEMBLYMAN FOY: Let me answer that. We were going along pretty well until you got on the soapbox there. If this was really and truly any sort of a political witch hunt, Commissioner Bodman has had a longtime, political affiliation and relationship with one of the principals of the company we are concerned about. Not once in this hearing did anyone bring that into account, because I have more respect for Commissioner Bodman as a person, and as a public official. No one got into that. If it was going to be political, if we were going to try to throw some mud against the wall-- You can make anything out of nothing if you want to politically. We didn't focus on that.

As for the other business, the contributions, that is tangential as far as I am concerned. I want to know what the procedures are. I'm satisfied that the professional civil servants in the Department acted responsibly. I think the Commissioner exercised his judgment. I may disagree with what he did; I may agree with what he did, but that is incidental. That is his role in the process.

Our role in the process, and the one which I will stand by in terms of protecting the integrity of this branch of State government, is our ability and obligation to go in and investigate where issues of serious consequence to the public's business are raised. That is what this Committee hearing is all about. It is not a political witch hunt, because if someone wants to go on a witch hunt and they need someone to go in and investigate, I am the guy to do it. I could have raised a lot of questions that I didn't raise because they were inappropriate. I don't believe you do those kinds of things.

So, I take offense to any accusation that efforts by, at least this person on the Committee, involved any kind of a political witch hunt. I don't play those games.

ASSEMBLYMAN MILLER: Well, I suppose the fact that this bridge is in the nineteenth district, Mr. Karcher's district, has no effect upon this whole hearing.

ASSEMBLYMAN FOY: I don't care where the bridge is. What difference does it make?

ASSEMBLYMAN MILLER: Come on, will you?

ASSEMBLYMAN BRYANT: It's a contract. I wouldn't care where it was.

ASSEMBLYMAN FOY: If I want to do something for everybody, look at the bridge down in my district.

COMMISSIONER BODMAN: I think we fixed that bridge, didn't we, Mr. Foy, the Rancocas Bridge?

ASSEMBLYMAN FOY: Yes, we opened that bridge, Commissioner.

ASSEMBLYMAN BRYANT: Commissioner, we want to thank you and your staff for coming. We will continue to ask questions through the Attorney General. You might have to come back because I don't know whether-- Would you also supply us with the name of the person who argued the hearing from the Attorney General's staff?

COMMISSIONER BODMAN: Yes, sir.

ASSEMBLYMAN BRYANT: I think you gave us the name of the person who helped you with your opinion. We would like to hear from those individuals. Also, there might be a third person -- I'm not sure it is the same person -- who made a decision on the first contract. And whether, in fact, if you didn't get the rating, you never looked at the other ones. If there are three different individuals, we would like to have those names. We appreciate it.

COMMISSIONER BODMAN: Thank you.

ASSEMBLYMAN BRYANT: Thank you.

(HEARING CONCLUDED)

