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PUBLIC HEARING

before

ASSEMBLY TRANSPORTATION AND COMMUNICATIONS COMMITTEE

on

"Awarding of Highway & Bridge Construction Projects"

October 7, 1985
Room 441
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Wayne R. Bryant, Chairman
Assemblyman John S. Watson
Assemblyman Thomas P. Foy
Assemblyman Newton E. Miller
Assemblyman John Penn

ALSO PRESENT:

Assemblyman Chuck Hardwick
Assembly Minority Leader

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

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ASSEMBLYMAN WAYNE R. BRYANT: (Chairman): I would like to convene the Transportation and Communications Committee. This hearing will deal with the awarding of certain highway and bridge construction contracts.

I want to welcome the Minority Leader, Assemblyman Hardwick, who is sitting here as an ex officio member. Some may not be aware of the fact that the Minority Leader, the Majority Leader, and the Speaker of the House are always permitted to sit as ex officio members, which means they can ask questions, but they can't vote. We welcome you here, Mr. Hardwick.

At this time, we will hear from Speaker Karcher. If you gentlemen don't mind, we will hear the Speaker first, and then we hear from you, Commissioner. We are sorry for the delay, Mr. Speaker and Commissioner. We did not realize the two bills would take this much time. Thank you for your indulgence and your patience. (Assemblyman Bryant referring to Committee meeting held before the hearing) Mr. Speaker?

ASSEMBLY SPEAKER ALAN J. KARCHER: Mr. Chairman, members of the Committee: First of all, let me thank you for the opportunity to be here this morning. I thank you not only on my behalf, but also on behalf of my colleagues, Assemblyman Otlowski and Senator Weiss, who represent the District 19 with me.

I am going to save you some time with regard to the history of the Edison Bridge, primarily because this very Committee was gracious enough to take under consideration -- approximately six or seven months ago -- legislation concerning the Route 9 Bridge, the Edison Bridge, which was sponsored by Assemblyman Flynn and me.

At that time you had an opportunity to hear a great deal about the history and importance of this bridge. I would like to touch upon two aspects today, to put today's discussion into context: The safety factor of this bridge and its commercial value and importance with regard to the economy of this State.

I think you would be hard pressed to find a similar span in the State of New Jersey that has had as many incidents of traffic accidents over the same period of time as this bridge has. The bridge

spans the Raritan River, literally just before the river turns into the bay. At that juncture it joins the Borough of Sayreville, in which I reside, and the Township of Woodbridge, which is a municipality of over 100,000 people.

In looking through the accident reports of those two municipalities — they normally respond to occurrences on the bridge — we find that in a period of not quite 36 months there have been 300 accidents on this bridge span alone and on the ramps leading to it. Anyone who has inspected or seen photographs of the bridge can well understand why this is happening. This bridge is not in good condition. You know that from the previous hearing. In fact, it is in very sad and sorry condition.

Moving to my second point, its commercial value, this bridge — and I know because I live there — certainly handled what might have been known as "normal" traffic, prior to the growth of the casino industry in Atlantic City. What we have now though is, on the eastern perimeter of our State, traffic moving from North Jersey, from the metropolitan areas of New York, Jersey City, Newark, etc., and the alternatives for crossing the Raritan River are extremely limited, especially if traffic is on route to Atlantic City or to the Shore. Options are limited, really, to two thoroughfares. Cars cannot travel on what is the most heavily traveled and most important bridge crossing, that being the Driscoll Bridge, which is the span for the Parkway.

All commercial traffic — all trucks and all commercial vehicles — must use the Edison Bridge. The only other option open to this traffic is the so-called Victory Bridge, which is a low bridge with a turnstile opening, or whatever one calls the turn-gate operation for boat traffic. This bridge is not widely used because it is not a thoroughfare in the true sense of the word; it is more for local traffic between Perth Amboy, South Amboy, etc.

So, what we have seen over the last five years is an enormous impact upon this span. I emphasize this once again: I think of great importance is not only the safety factor, but dwarfing that is the economic impact of any problem on this bridge, because it is the main

commercial thoroughfare between North Jersey and South Jersey on the eastern perimeter of the State.

From the hearings you held last spring, you understand that there has been a long, ongoing continuous dialogue with regard to the ultimate reconstruction of this bridge which is now approaching 50 years in age. This Committee saw the importance of the reconstruction and the merits of that argument, and they voted favorably on a bill as an interim measure. We discussed the prospects of repaving this bridge, and everyone moved along with, I think, two assumptions:

- 1) The work would commence this summer, or, at the very latest, this fall. The target date was initially July; it was then moved to September, so this bridge would be serviceable for the winter.

- 2) This repaving would constitute an expenditure by the State of approximately \$900,000 to \$1 million, and that it would be done in order for this road to remain serviceable to the important commercial traffic it handles, as well as passenger vehicles; obviously, it handles a great many of those.

The figures we have -- I think your Committee aide can advise you on this better than I can -- concerning the actual traffic count on this bridge are phenomenal, for lack of a better word. This brings us to what has transpired. We now find that the matter was put out to competitive bidding this summer. Apparently, four bids were received. The low bidder bid an amount in excess of what we understood the estimate to be, that being approximately \$1,400,000.

The second bidder was substantially higher than that: It was for approximately \$2,265,000. I understand there were two other bids submitted, but I do not know the amounts involved in those bids.

The low bidder apparently does other work for the Department, and is known to the Department. In fact, from information I have received and from communication I have had with the Commissioner's office, this company is presently involved in work for the State of New Jersey.

The initial newspaper reports, talking about the delay of this contract, indicated there may be a financial question regarding the wherewithal of the low bidder to actually fulfill the contract

obligations. That issue was raised. After checking, we find that this company is prospering and carrying on its routine business in a manner, described to me by personnel of the company, as "successfully as ever." In fact, things were better for them than ever.

Of course, I am not privy to the inner workings of the Department, nor the rationale for the decision made, with regard to the rejection of the low bidder. Apparently there was then some kind of withdrawal.

Let me discuss that issue at the outset. I see some people here who I know have experience in county and municipal governments, and they are familiar with the public bidding laws, laws that we in the Legislature have imposed on the various levels of government, particularly counties and municipalities through our Public Contracts Law. There are requirements for certain things, such as the submission of a bond with the bid -- the posting of performance bonds -- and certain penalties imposed upon the withdrawal. In other words, the basic rule, or the basic law in New Jersey is, if one is the low bidder, he cannot unilaterally do anything about that. We have a free enterprise system -- thank God we do -- and with regard to competitive bidding, if people submit their bids and if they are the low bidder, they run all the normal anticipated financial risks that we accept as normal in our free enterprise system, with everything that entails.

Apparently, in this case there was an allowance -- an "absolution," if you will -- of not requiring the low bidder to fulfill his bid, and allowing him to ultimately withdraw the bid with no penalty imposed. From what I understand, the Department of Transportation, operating under Title 27 of our Statutes, is different from local government. It is different to the extent that it requires not only the bid bond that we are used to in county and municipal governments, but it requires a higher bond than is normally required.

The risk in the normal statutory law of our State covering public contracts is forfeiture for refusal or attempted withdrawal of a bid. In fact, case law indicates that there is an allowance for a withdrawal of a low bid only if there is a bilateral mistake. To my knowledge that has not occurred here. There was a claim of a

unilateral error, which should put the company making that claim at risk, if not to require them to perform the contract at the bid price, then certainly, through the power of the Department -- through the Deputy Attorney General or the Attorney General's office itself -- to seek compensation.

Now, the rationale behind requiring -- once again, for those of us who drew up the Public Contract Law -- forfeiture, or some kind of movement or execution, if you will, upon bid bonds, if there is a default or a refusal on the part of the low bidder to carry out the contract, and the second lowest bidder is awarded the contract, the State -- the public; the taxpayers -- be made whole. They at least can get back some money from the defaulting bidder, from the bidder who bid in error and was at risk. That is the whole rationale behind it. It is the only compelling factor or at least the major compelling factor in why we require bid bonds.

That was not done in this case, and certainly I think it is a perplexing situation as to why the State did not attempt to make its taxpayers whole by moving against the defaulting, the low bidder, in this case.

So, we now have a situation where the work is apparently going to be done by the second lowest bidder, who bid approximately \$900,000 higher than the low bid. This, of course, is 100 and some odd percent higher than the estimate done by the Department which we discussed last year.

The third thing is, there was no action against the defaulting, or the withdrawing, bidder. Why they were allowed to withdraw is not known. As to the question of their competence and ability, or whether they had the material, supplies, and manpower to do it, apparently they are doing substantial work for the Department now.

Of course, the last factor is probably the most grating factor of all: We are now told that notwithstanding all of the protestations and promises made with regard-- And, they were not just promises made because of pressure; they were a commitment. Let me put it that way. They were not just a commitment to the people of District 19. We are just minority users, if you will. We use it very, very

nominally in the totality of the use of this bridge; it is a major thoroughfare in the State of New Jersey. It is the only artery for commercial traffic between Monmouth, Ocean and Atlantic Counties on the eastern perimeter, and all of North Jersey. It is important that this work be done before the winter comes upon us.

Of course, it is ultimately important that this bridge be reconstructed because traffic is not going to diminish on this thoroughfare; it is going to increase. Now we are told the work will not begin in September, as the commitment was made -- and as the bid specifications required -- but, rather, the entire construction will be delayed until some time in the spring. If that is true, then the question must arise as to why the matter is not being re-bid in its entirety.

I am sorry I have to come here and raise so many questions without giving answers. I hope these hearing will bring about some answers to these questions.

In closing, and before I respond to any questions, it is not a parochial, provincial issue of service between two communities in a given county, or a given district. This is a question of the ability of all commercial traffic to proceed in a north-south, south-north direction on the eastern border of this State. That is why this is so important, and that is why we can't delay-- It is safety. If we are to delay, I cannot even conjure up an answer as to why the matter will not be submitted for reevaluation, or submitted, once again, to public bidding, which is at the heart and soul of our Public Contracts Law. I thank you for this opportunity. I hope I didn't impose upon you too long.

ASSEMBLYMAN BRYANT: Do any members of the Committee have a question at this point? (negative response) There are no questions at this point. Thank you.

ASSEMBLYMAN FOY: If your schedule permits, Mr. Speaker, you might want to stay around because some of the responses by the Department may engender some questions we would like to ask you.

ASSEMBLYMAN KARCHER: Certainly.

ASSEMBLYMAN BRYANT: We will next hear from Commissioner Bodman and his staff.

COMMISSIONER ROGER A. BODMAN: Thank you, Mr. Chairman. Thank you for--

ASSEMBLYMAN BRYANT: Would you like a statement first? I guess we can then get into the questions.

COMMISSIONER BODMAN: Not really. I think we all know why we are here, and I think it might be best just to get into the gist of the issue, if we may. I thank you for the opportunity. I agree with much of what the Speaker said, certainly regarding the need to do repair work on the Edison Bridge. There was some factually incorrect information given. I brought along with me a 36-year employee of the State Department of Transportation, Asst. Commissioner of Operations and Engineering, Mr. Jack Freidenrich, who also serves as State Highway Engineer. It is within his responsibilities to deal with questions of bidding and the process.

I think it may be helpful to go through more or less a generic discussion as to the process, and then perhaps a specific discussion, if we may, as to the particular instance here, if that is acceptable to you, Mr. Chairman.

ASSEMBLYMAN BRYANT: Fine. Why don't you start out with what the bids require, and then you can go from there. Let's start out with the document.

ASST. COMMISSIONER JACK FREIDENRICH: It might be useful as background information to just say a few things about the Department's pre-qualification procedure. This is a statutory requirement that every contractor must pre-qualify with the Department prior to submitting a bid for a project which we advertise.

Simply stated, that pre-qualification procedure requires a contractor to submit a statement of his past experience and of his financial assets. The Statutory Pre-qualification Committee within the Department then evaluates that application and establishes a rating for the type of work that contractor would be permitted to undertake for the Department. It also establishes a range of financial values that the Department will allow that contractor to undertake for the Department.

ASSEMBLYMAN BRYANT: Please be a little bit more specific in that area, recognizing the fact that I don't understand what you are talking about. Other people might understand, but I will tell you when I do not. What is the range?

ASST. COMMISSIONER FREIDENRICH: Well, the ranges could be anywhere from \$100,000 to \$500,000, or to a range of over \$25 million. That is a function of the financial assets the contractor indicates on his pre-qualification application he has available, and our Bureau of Contract Administration checks all of that out.

ASSEMBLYMAN BRYANT: Is that bonding capacity, or is that in terms of assets?

ASST. COMMISSIONER FREIDENRICH: The number I mentioned is the maximum amount of work that contractor can bid to perform for the Department. It is a function of his financial assets.

ASSEMBLYMAN BRYANT: Okay. Are they reviewed? How often are they reviewed?

ASST. COMMISSIONER FREIDENRICH: A contractor must renew his pre-qualification every 15 months, which, as a practical matter, means that he must submit a renewal application every 12 months, because it requires some accounting information which must accompany that application.

In addition, with each bid the contractor submits, he must submit an updated financial statement as of the date of submission of that bid, which takes into account -- or which indicates -- work obligations he has undertaken since the time his pre-qualification application was submitted and the time he is actually submitting the bid for a specific project.

ASSEMBLYMAN BRYANT: If a contractor is growing, can he get an amendment on his 12-month period? Let's assume my financial picture changes drastically within 12 months, and I am stuck with \$100,000; however, all of a sudden, I made \$30 million the the last year. Would I be stuck with \$100,000 for the whole year?

ASST. COMMISSIONER FREIDENRICH: A contractor can re-submit additional information, requests, and upgrading of his pre-qualification rating at any time.

ASSEMBLYMAN BRYANT: Does the opposite happen? Let's assume a contractor has an excellent rating, but we become aware of conditions that could have forced that rating to go down. Do we require him to re-submit?

ASST. COMMISSIONER FREIDENRICH: That is why he is required to submit an updated financial statement with the submission of every bid.

ASSEMBLYMAN BRYANT: Okay.

ASST. COMMISSIONER FREIDENRICH: Getting to the specific project, we received bids for this project on August 1. There were four bids received. The low bidder was Pressure Concrete, and there were three other bids.

ASSEMBLYMAN BRYANT: Since you gave us this information, why don't you give us his rating and the range so we keep it consistent, and we know what we are talking about?

ASST. COMMISSIONER FREIDENRICH: The bidder who was designated at the bid table as the apparent low bidder was Pressure Concrete, and their financial rating — if my memory serves me right — was between \$6 million and \$8 million.

ASSEMBLYMAN BRYANT: What was their range, or is that the rating also?

ASST. COMMISSIONER FREIDENRICH: Between \$6 million and \$8 million.

ASSEMBLYMAN BRYANT: So, it is the same thing? In other words, range and rating are the same thing?

ASST. COMMISSIONER FREIDENRICH: No. They are rated for the type of work they can do. It was apparent that they demonstrated the experience to do the type of work for which they were bidding on this project.

ASSEMBLYMAN BRYANT: Okay. Who was the second low bidder?

ASST. COMMISSIONER FREIDENRICH: The second low bidder was Schiavone Construction Company, and their financial rating was in excess of \$25 million.

ASSEMBLYMAN BRYANT: That is their range?

ASST. COMMISSIONER FREIDENRICH: Well, the ranges go up to-- The final range is \$25 million and over.

ASSEMBLYMAN BRYANT: I am just asking so I don't get confused. You keep using the words "rating" and "range," and I just want to make sure I am consistent. Their range was in excess of \$25 million, and they had an adequate rating? I guess that is what you call it.

ASST. COMMISSIONER FREIDENRICH: Yes. They were classified for the type of work the particular contract required.

ASSEMBLYMAN BRYANT: Who was the third low bidder?

ASST. COMMISSIONER FREIDENRICH: The third low bidder was Ferchetto Construction Company, Inc.

ASSEMBLYMAN BRYANT: And what was their earnings?

ASST. COMMISSIONER FREIDENRICH: Mr. Chairman, I don't have that information because we never got to the question since they never came under consideration for award.

ASSEMBLYMAN BRYANT: Who was the fourth? Probably the same thing happened with the fourth bidder.

ASST. COMMISSIONER FREIDENRICH: Yes. The same thing happened to the fourth. The fourth bidder was Beaver Concrete Breaking Company, Inc.

ASSEMBLYMAN BRYANT: Okay. I am just asking questions, so everyone will have the information.

What was the first bid? What was the low bidder's total bid?

ASST. COMMISSIONER FREIDENRICH: It was \$1,467,235.

ASSEMBLYMAN BRYANT: The second low bidder?

ASST. COMMISSIONER FREIDENRICH: It was \$2,276,969.

ASSEMBLYMAN BRYANT: The third one?

ASST. COMMISSIONER FREIDENRICH: It was \$2,517,299.

ASSEMBLYMAN BRYANT: The fourth one?

ASST. COMMISSIONER FREIDENRICH: It was \$2,997,669.

ASSEMBLYMAN BRYANT: And what was the estimate on the project?

ASST. COMMISSIONER FREIDENRICH: It was \$1,942,505.

ASSEMBLYMAN BRYANT: Okay.

ASST. COMMISSIONER FREIDENRICH: I might add that the Department's engineer's estimate is considered confidential so the perspective bidders have no idea of what the figure is.

ASSEMBLYMAN BRYANT: Continue.

ASST. COMMISSIONER FREIDENRICH: When we receive bids, they are opened in public at the table. All of the total costs bid by the contractors who submit a bid are read at the table, and the lowest one is designated as the apparent low bidder. In this case, Pressure Concrete and Grouting Company was obviously the lowest apparent bidder.

I might also add for the information of the Committee that when we receive bids, there is at the bidding table a microfilming machine, and the contractor's proposal is microfilmed right there so there is a duplicate record of what he submitted.

ASSEMBLYMAN BRYANT: Are bids received and opened on the same day?

ASST. COMMISSIONER FREIDENRICH: Oh, yes. That is the only way we take bids. They are all received at the same time, and they are opened in public at the same time for any job.

ASSEMBLYMAN BRYANT: And on the same day?

ASST. COMMISSIONER FREIDENRICH: The same day, at the same time, yes, sir. One follows the other.

After the bids are received, an analysis procedure takes place within the Department. I might also add that the procedure is memorialized in a departmental procedure document, which, if I am not mistaken, is also made part of the Administrative Code, under the Administrative Procedures Act.

A bid analysis procedure does two things, or it does several things. Number one, it checks the contractor's arithmetic. You know, the number of units on any particular item, multiplied by the unit cost to make sure he didn't inadvertently say two times three is seven. If that review uncovers an arithmetical mistake, then that bid is recalculated, utilizing the correct arithmetic.

ASSEMBLYMAN BRYANT: Did we find that happening in any of these bids?

ASST. COMMISSIONER FREIDENRICH: No.

ASSEMBLYMAN BRYANT: Okay.

ASST. COMMISSIONER FREIDENRICH: The other things that is done is, our Bureau of Contract Administration analyzes the bids, primarily the one of the low bidder, to determine whether, based on his updated financial statement — contracts on hand, or obligations he has incurred since he submitted his pre-qualification which gave him his financial rating — he still has sufficient residual financial capacity to cover the amount of the bid he made on a particular job.

In the case of the apparent low bidder, that analysis indicated that he did not have an adequate residual financial capacity to undertake the additional work on his bid of \$1,467,235.

Now, almost concurrent— Do you have a question, sir?

ASSEMBLYMAN BRYANT: I want to know what was in that analysis. Basically you say that he exceeded the 1.6 in his range.

ASST. COMMISSIONER FREIDENRICH: Six to eight million.

ASSEMBLYMAN BRYANT: Oh, six to eight million?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: Okay. What did the analysis show?

ASST. COMMISSIONER FREIDENRICH: The analysis showed that he did not have sufficient residual financial capacity after we deducted the obligations, the work he had undertaken since his original pre-qualification rating, to leave him with a capacity at least as great as the amount of his bid of \$1,467,000.

ASSEMBLYMAN BRYANT: All I am asking is, I would like to know the components of that. In other words, it must have shown that he was \$8 million over with this bid. Where was he; what was his actual-- Do you know what I am saying?

ASST. COMMISSIONER FREIDENRICH: Between the time he was given the rating of between \$6 million and \$8 million, he was the successful bidder and was awarded a contract for the rehabilitation of the Route 495 viaduct going into the Lincoln Tunnel.

ASSEMBLYMAN BRYANT: In other words you evidently— Somebody actually put numbers together. I just want to know what those numbers were.

ASST. COMMISSIONER FREIDENRICH: You start off with his maximum financial rating.

ASSEMBLYMAN BRYANT: I don't want to know how the procedure works; I want to know what the numbers were. What did the document establish?

ASSEMBLYMAN FOY: He just told you. It was \$8 million for the viaduct, and \$1.4 million for this job. That made it \$9.4 million, right?

ASST. COMMISSIONER FREIDENRICH: Yes. He had completed some of the work on the viaduct. The viaduct was about — as I recall — an \$8 million project. He had completed some of the work there, which reduced his obligation to that job, but he—

ASSEMBLYMAN FOY: How much? Do you recall?

ASST. COMMISSIONER FREIDENRICH: Pardon me?

ASSEMBLYMAN FOY: Do you recall?

ASST. COMMISSIONER FREIDENRICH: No. All those numbers are available, sir.

ASSEMBLYMAN FOY: But, they are very important to us, and I will tell you why. If he did \$3 million worth of that job and there was only really \$5 million committed there, and if he got a \$1.4 million job here, that is \$6.4 million, which is well within his range.

ASST. COMMISSIONER FREIDENRICH: And then he would have been judged not to have an adequate residual.

COMMISSIONER BODMAN: If I may, Mr. Chairman, I don't think Mr. Freidenrich has the exact numbers. I am sure we can provide them to you.

ASSEMBLYMAN BRYANT: Can we get them? That is the heart of this hearing, so maybe we should postpone this until we get the figures. That is the heart of this hearing. Anyone who knows we are talking about low bidders would know what we are talking about.

COMMISSIONER BODMAN: My staff informs me they are getting those exact numbers. We should have them momentarily.

ASST. COMMISSIONER FREIDENRICH: I might also add, for your information, gentlemen, that in addition the contractors who work for us also perform work for other public agencies and authorities, they do private work, and if, indeed, he had undertaken additional obligations for either the New Jersey Highway Authority or the New Jersey Turnpike Authority, or for some private firm or developer—

ASSEMBLYMAN FOY: Are you made aware of that kind of thing?

ASST. COMMISSIONER FREIDENRICH: Oh, yes. All of that is listed on the updated financial statement submitted with his bid.

ASSEMBLYMAN FOY: So, you get that periodically.

ASST. COMMISSIONER FREIDENRICH: No, we get that with his bid. What he submitted--

ASSEMBLYMAN BRYANT: So the range is all inclusive, regardless of whether one is doing DOT work, a municipality's work, a county's work. It is all inclusive.

ASST. COMMISSIONER FREIDENRICH: Yes. The range is one of financial capacity.

ASSEMBLYMAN FOY: I'm confused. Suppose right now I have \$5 million worth of work, and I have an upward limit, or a range of \$6 million to \$8 million. I bid on a contract for you, and it is \$2 million. I am not up to \$7 million. How do you know whether I have bid on something for the Turnpike Authority or the South Jersey Port Corporation, or the Delaware River Port Authority? Is there an ongoing disclosure? Just give me an example.

All of us are politicians up here. When we get a contribution of over \$250 in the last two weeks of the campaign, we have to notify ELEC that we got the contribution so they know what the rolling funds are. Is there a procedure such as that in your Department which tells you that I am bidding on other work and bidding successfully. I may now have growth, in a sense, that is astronomical because I have a sharp pencil.

ASST. COMMISSIONER FREIDENRICH: Assemblyman, the way we protect that is, when a project is awarded--

ASSEMBLYMAN FOY: Right.

ASST. COMMISSIONER FREIDENRICH: Which is based on that current updated financial statement, and that contract is awarded, as a condition of that award, the contractor must furnish a performance bond which, no matter what happens to him, protects that project.

ASSEMBLYMAN FOY: But there is no ongoing disclosure of one's successful bidding record on other projects while I have the award with you.

ASST. COMMISSIONER FREIDENRICH: Unless you get--

ASSEMBLYMAN FOY: Excuse me, just so I am perfectly clear on this, if I got the bid from you on Tuesday, and on Wednesday the Port Authority of New York and New Jersey gave me a \$10 million contract, unless you read about it in the papers you wouldn't know about it.

ASST. COMMISSIONER FREIDENRICH: That's true.

ASSEMBLYMAN FOY: That's what I was getting to. So, potentially there is a problem which is inherent in the system, notwithstanding Mr. Schiavone or any other contractor, including this contractor.

ASST. COMMISSIONER FREIDENRICH: We don't see it as a problem because I will tell you that in all the time I have been in the Department, and even preceding me — because the whole pre-qualification process has been required of the Department by statute long before I came to the Department — once we make an award, since we have a performance bond-- The time for us to worry about it is when we make the award. If on that day the contractor has sufficient financial capacity, as a condition of the award he must furnish a performance bond.

ASSEMBLYMAN FOY: Aren't the subsequent people he bids with more at risk than you are?

ASST. COMMISSIONER FREIDENRICH: Exactly. As a matter of fact, that has happened. In my experience over the last 30 something years, there may been a half dozen contractors who have gone bankrupt for one reason or another. In those cases the performance bond was used to complete the work of the contract.

ASSEMBLYMAN FOY: So the performance bond is kind of critical to the whole process?

ASST. COMMISSIONER FREIDENRICH: Yes. I might add that I think it is testimony to the process we use that over all these years we are talking about there may have been only one half dozen where we have had to go to the performance bond. I think that is testimony to the viability of the process the Department has been using all these years.

ASSEMBLYMAN FOY: Thank you. I am sorry to interrupt; I just wanted to get a clarification on that.

ASSEMBLYMAN BRYANT: I want everything to be clear as we go along. Were there bid bonds required on each one of these contracts?

ASST. COMMISSIONER FREIDENRICH: Yes, bid bonds are required.

ASSEMBLYMAN BRYANT: Did each one of the bidders post a bid bond?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: Can I just ask one thing for clarity?

ASSEMBLYMAN BRYANT: Yes.

ASSEMBLYMAN FOY: Several years ago there were some problems regarding bonding companies. Is there now an examination of the bonds themselves? Is that a procedure now?

ASST. COMMISSIONER FREIDENRICH: We satisfy ourselves regarding the viability of the bonding companies, yes, sir.

ASSEMBLYMAN FOY: There was was no problem with any of the bidders with respect to that?

ASST. COMMISSIONER FREIDENRICH: No, sir.

ASSEMBLYMAN MILLER: Wayne, can I ask a question?

ASSEMBLYMAN BRYANT: Yes.

ASSEMBLYMAN MILLER: If his residual capacity isn't great enough to bid, is he still able to get a bond, or is he denied that bond by the bonding company because he doesn't have the residual capacity?

ASST. COMMISSIONER FREIDENRICH: Are you talking about the performance bond which only comes after awards? We never get to that question because we won't make an award if he doesn't have-- You know, it is very critical to the integrity of the competitive bidding structure that we have a clear set of administrative regulations, and that we adhere to them without any variation.

So, if a particular situation happens, you can't say, "Well, let's reexamine this thing." We have to do it in order to ensure the integrity of that process.

ASSEMBLYMAN MILLER: Let me follow up with this question: You, knowing he doesn't have the residual capacity, award the bid to him anyway.

ASST. COMMISSIONER FREIDENRICH: No, sir.

ASSEMBLYMAN MILLER: I'm saying let's assume that you awarded the bid to him. You then take the risk, do you not, that he is not going to be able to get the performance bond?

ASST. COMMISSIONER FREIDENRICH: I would assume that any reliable bonding company, unless they are satisfied that a particular contractor has whatever they look at in order to issue a performance bond, would have to satisfy themselves of that, yes. Because the possibility always exists that, for whatever reason, the contractor might default on the contract and they would be obligated to complete the work of that contract.

ASSEMBLYMAN BRYANT: So, what is the next step? We now know they all submitted their bids. They were opened, and you did an examination of each of the ranges, I guess.

ASST. COMMISSIONER FREIDENRICH: Okay. We found that Pressure Concrete and Grouting Company did not have sufficient residual financial capacity to cover the bid.

Concurrently — and what complicated this particular issue — the contractor submitted a letter. He first contacted our Bureau of Contract Administration by phone. He then followed that up with a letter saying that one of his subcontractors made an error in the work he was proposing to subcontract, and he requested that he be allowed to withdraw his bid because it was lower than he could perform the contract for.

ASSEMBLYMAN BRYANT: Maybe I'd better get some information on this. When were the bids received, what time, and where?

ASST. COMMISSIONER FREIDENRICH: The bids were received on August 1, 1985 in the hearing room at the New Jersey Department of Transportation.

ASSEMBLYMAN BRYANT: At what time?

ASST. COMMISSIONER FREIDENRICH: Our bids are normally received at 10:00. Sometimes we receive bids on more than one contract. Normally it is never more than three. So, it was sometime between 10:00 and noon.

ASSEMBLYMAN BRYANT: And it was Pressure Concrete. Who did they call?

ASST. COMMISSIONER FREIDENRICH: They called our Bureau of Contract Administration. I think the particular staff person they talked to was Primitivo Criz.

ASSEMBLYMAN FOY: What day was that call made?

ASST. COMMISSIONER FREIDENRICH: I believe it was on August 5th.

ASSEMBLYMAN BRYANT: So, is wasn't concurrently.

ASST. COMMISSIONER FREIDENRICH: Pardon me?

ASSEMBLYMAN BRYANT: You said these things happen concurrently. As I understand the definition of the word "concurrent," it means that they happened at the same time.

COMMISSIONER BODMAN: I think what the Assistant Commissioner is referring to, Mr. Chairman, is that in the determination of the Department, there was a problem with the financial capacity occurring concurrently with the fact that the apparent low bidder contacted us with a request regarding his concern.

ASSEMBLYMAN BRYANT: He stated the withdrawal and the determination were made concurrently. They almost happened concurrently. Concurrently means at the same time. It seems to me that between August 5th and August 1st there is a four-day span.

ASSEMBLYMAN FOY: That's simultaneous in State government.

COMMISSIONER BODMAN: Maybe I can clarify that. Mr. Chairman, if I may, on August 1st they received the bids. My understanding is that on August 5th Pressure Concrete was notified of this concern -- our concern -- to initial financial capacity. And, also, on August 5th, we received an inquiry from them requesting that their bid be "whatever," -- removed or withdrawn.

So, I think the Assistant Commissioner was referring to the fact that he defined concurrent as two circumstances taking place on August 5th: One was our Department's determination that there was a financial capacity question; and, concurrent on that same day, the low bidder contacting us with his concern.

ASSEMBLYMAN BRYANT: Well, let's back up because I am confused again. He told me that determination was made when they open the bids. They have microfilm.

ASST. COMMISSIONER FREIDENRICH: No, sir. I'm sorry. Maybe I didn't say it clearly enough.

ASSEMBLYMAN BRYANT: I can understand that. What does the microfilm do? You said when you open the bids, you take the microfilm and you do something. I thought that happened when you opened the bids.

ASST. COMMISSIONER FREIDENRICH: Mr. Chairman, if you will bear with me for a moment, the minute we open the contractor's bid in public, we immediately microfilm it. That makes a record of just what he submitted.

All of the bids -- the total prices bid by all of the contractors -- are read in public. The lowest amount read is then obviously the apparent low bidder.

I then indicated that the next process is to make several reviews within the Department. Now, they don't happen instantaneously. I told you that one of the things that happens is all of the bids go up to our Accounting Department, and they check all of the arithmetic to see whether it was properly performed in the contractor's bid.

Another review made is done in our Bureau of Contract Administration to determine whether, based on the updated financial statement submitted with the contractor's bid, he has enough residual financial capacity to cover the amount of the bid he made.

ASSEMBLYMAN BRYANT: When was that determination made? I understand now. What day was that?

ASST. COMMISSIONER FREIDENRICH: When was it made? It was made sometime between August 1st, which was a Thursday, and August 5th, which was when the contractor was notified that a review of his residual capacity indicated that it was inadequate to cover the amount of his bid.

COMMISSIONER BODMAN: Again, Mr. Chairman, August 1st happened to be a Thursday. Obviously there was then a weekend; August 3rd and 4th were a Saturday and Sunday. August 5th was on Monday. So, there was a weekend in the middle there.

ASSEMBLYMAN MILLER: Assuming that the man did not have the residual to cover his obligation, he was off by one-half million dollars, and he said, "Withdraw this." One-half million dollars still did not bring him within his residual. Would you not have rejected him anyway?

ASST. COMMISSIONER FREIDENRICH: You don't ever get to any further question. I might add, that is what I started to explain.

ASSEMBLYMAN MILLER: If I may, just one thing.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN MILLER: What I see here is, if in fact he had the residual to cover his bid, regardless of whether he made a mistake or not, and included \$375,000 that shouldn't have been -- or should have been -- then you would have been in a different position, wouldn't you? Because then you would say, "Hey, you are stuck with it, Mister, because you bid on it. You have the residual and you are stuck with it. That's your problem."

ASST. COMMISSIONER FREIDENRICH: Generally you are right, with this exception, sir: There are situations -- and, for these kinds of determinations we seek the advice of the Attorney General's office -- where an error in a bid, depending on the nature of that error, will, with advice from the Attorney General's office, would allow us to let the contractor who made the error -- depending upon the nature of the error -- to withdraw the bid. That only happens after a hearing and an analysis by the Deputy Attorney General that provides legal services to our Department.

In this particular instance, based on the advice of the Deputy Attorney General, we never got to that question. Based on the fact that the contractor did not have sufficient residual financial capacity to cover his bid, that required us to reject the bid and the second question became moot.

ASSEMBLYMAN BRYANT: What happened first? Did we call him to let him know he had problems with his residual, or did he call to tell us he made a mistake?

ASST. COMMISSIONER FREIDENRICH: That is where I used the term concurrently. On August 5, 1985, our Bureau of Contract Administration

notified Pressure Concrete of their financial capacity determination, and on August 5th, the same day, we received a letter from— I don't recall now whether we received a letter, or whether he came into a meeting and requested that he be allowed to withdraw his bid.

ASSEMBLYMAN FOY: Mr. Freidenrich, do these contractors know what their range is?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: Then why would they bid if they know if they got the award, or the contract, it would be outside their range? I mean in preparing the bid specifications and the bid documents, and after going out and paying for a bond, why would someone who knew he had a certain range and had a certain amount of range eaten up already, bid on a contract that he knew — even at a mistaken bid price -- would put him outside of his range and automatically disqualify him? That's wasting thousands of dollars of employees' time, paying the premium for a bid bond, and things like that. Why would they do that?

ASST. COMMISSIONER FREIDENRICH: I can't answer why they would do it. It happens occasionally. What I will tell you though is that when we run into that situation, we notify the contractor and advise him of it. We then allow him an opportunity to provide either an additional line of credit or additional information -- whatever -- that might have some impact on our calculations.

ASSEMBLYMAN FOY: If his grandmother died that day and left him \$1 million, he suddenly has greater financial capacity.

ASST. COMMISSIONER FREIDENRICH: Exactly.

ASSEMBLYMAN FOY: All right.

ASSEMBLYMAN BRYANT: That gets back to my question regarding the 5th. We didn't reject his bid; he was just notified that he had a problem.

ASST. COMMISSIONER FREIDENRICH: That is right.

COMMISSIONER BODMAN: That's correct.

ASSEMBLYMAN BRYANT: And then he called in and said he made a mistake on the same day.

ASST. COMMISSIONER FREIDENRICH: That is right.

ASSEMBLYMAN BRYANT: Now I need to know when we rejected his bid.

ASST. COMMISSIONER FREIDENRICH: The response I just gave to Assemblyman Foy was, when we notified him that he did not have adequate residual financial capacity on our records, we provided him with an opportunity to augment that, be it by an additional line or credit, or additional information which would satisfy us that he had sufficient, adequate, financial resources. He did not elect to provide that information.

ASSEMBLYMAN BRYANT: What would be the position of the State of New Jersey? He posted a bid bond, right?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: We accepted the bid?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: Could we have gone after the bid bond?

ASST. COMMISSIONER FREIDENRICH: That calls for a legal conclusion. I am not an attorney. Based on the advice of our attorneys, my guess is that we could not. We never got to the second question of his request to withdraw. We were advised-- As a matter of fact, I wrote a letter to the contractor based on that advice, telling him that his bid was rejected because he did not have sufficient residual financial capacity.

ASSEMBLYMAN BRYANT: We don't know how much he missed that financial capacity by, do we? Do we have that information yet?

ASST. COMMISSIONER FREIDENRICH: I am sure we have that information. I would venture to say that it is not pertinent. If he didn't have it, he didn't have it. In our analysis there is no--

ASSEMBLYMAN FOY: If he was close-- Let's say \$8 million was his upper limit and this bid, even in its mistaken fashion, put him at \$8.5 million. In the context of an \$8 million dollar contract, \$500,000 is not a lot of money. With an \$8 million dollar capacity, it is not a lot of money if one tried to go out and get additional money.

You said he elected not to do it. Isn't that really giving him an advantageous position insofar as escaping from his obligations under this contract is concerned? I mean, mistakes are made in construction bidding all the time. This contract, by virtue of the fact that he was allowed out, is going to cost the State of New Jersey

\$900,000 more in work, and it has effectuated a several-month delay in terms of the implication of driver safety over that bridge.

I am a little concerned that maybe we were too easy on this guy. Maybe we should have come down hard on him, and given the contract to someone else to do in the meantime, and let him take his shots at us. We have a competent legal staff in the Attorney General's office to deal with these debts.

ASST. COMMISSIONER FREIDENRICH: We do. I think they are extremely competent, and it is based on that competent advice that I did exactly what I did.

ASSEMBLYMAN FOY: They told you? The Attorney General's office told you to let him get out of the contract by allowing him not to submit additional documentation? He made an election; we gave him the opportunity to make that election, didn't we?

ASST. COMMISSIONER FREIDENRICH: We didn't give him the opportunity. First of all, the probability of a situation such as this occurring is infinitely small. I have no knowledge in the years I have been with the Department of that set of circumstances coming together.

ASSEMBLYMAN BRYANT: What Attorney General gave the opinion?

ASST. COMMISSIONER FREIDENRICH: Pardon me?

ASSEMBLYMAN FOY: The New Jersey Attorney General.

ASSEMBLYMAN BRYANT: I just want to know what deputy.

ASST. COMMISSIONER FREIDENRICH: The Deputy Attorney General that provides us with advice in bidding matters is Deputy Attorney General, Susan Roop.

ASSEMBLYMAN BRYANT: She gave the opinion on this case? I am asking about this particular contract.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: Roop?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: How do you spell that last name?

ASST. COMMISSIONER FREIDENRICH: R-O-O-P.

ASSEMBLYMAN BRYANT: Was she aware? We are now talking about the concurrent situation. We now know a guy has made a financial bid and he may have financial problems. We are not sure about how much it involved. Also, at the same time, he said he made a mistake.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: Did she evaluate what that mistake meant, what that big mistake meant to the State of New Jersey?

ASST. COMMISSIONER FREIDENRICH: My guess is--

ASSEMBLYMAN BRYANT: You said you never reached that one. She never reached it. I want to know if she reached it or if she just didn't consider it.

ASST. COMMISSIONER FREIDENRICH: I was going to tell you what my guess is. I guess that question might be more properly posed to her. I hate to misrepresent exactly what she did.

I will give you my understanding of what she did, and that is, she measured these events against the existing law governing these matters, and she provided me with the appropriate legal advice.

ASSEMBLYMAN BRYANT: But you told me that you never got to the second event. Did she get to the second event?

ASST. COMMISSIONER FREIDENRICH: She told me that given the sequence of events, you never get to the second question.

Perhaps it would be useful if I just read the relatively short letter, based on the end result of my letter to the contractor.

ASSEMBLYMAN BRYANT: We would like to have that submitted for the record. You can read it, but we would also like you to submit it.

ASST. COMMISSIONER FREIDENRICH: Okay. It is addressed to Pressure Concrete and Grouting Company: "By letter of August 5, 1985, your firm was notified by the Bureau of Contract Administration that review of the updated financial statement, Form DC7(b)4(b), submitted with your bid, revealed that your organization did not have sufficient capacity to cover the total amount bid. This was based on the fact that the dollar amount of contracts on hand for your firm had increased significantly since the time of your classification with this Department.

"By the same letter, your firm was afforded an opportunity to submit additional lines of credit, or to complete the financial statement, B(c)74(b), in its entirety to provide justification for the termination of financial responsibility for award of Route U.S. 9, Section 1(e) contract.

"By letter of August 13, 1985, you informed the Bureau of Contract Administration that you had been aggressively reducing your backlog of uncompleted work, and chose not to provide additional lines of credit or to submit with that letter a complete financial statement, B(c)74(b).

"We must, therefore, inform you that the Department does not find your financial capacity sufficient to justify award of Route U.S. 9, Section 1(e) contract to your firm.

"Therefore, your bid, submitted on August 1, 1985, has been rejected and Schiavone Construction Company has been named apparent lowest responsible bidder.

"Please note that future bids submitted by your firm without significant reduction in the dollar value of your contracts to be completed, or proof of financial capacity, as verified by the financial information submitted with your bid, may result in similar action by this Department.

"By letter of August 5, 1985, your firm notified this Department that because of errors alleged to have been made in the preparation of your bid, you wish to be allowed to withdraw your bid proposal. The rejection of your bid on the basis of insufficient financial capacity renders unnecessary further departmental consideration of this request."

ASSEMBLYMAN BRYANT: What was the date of that letter, just so we have it?

ASST. COMMISSIONER FREIDENRICH That letter is dated August 22, 1985.

ASSEMBLYMAN BRYANT: Okay. Maybe I misunderstand the date. Now, did they call and say they had been aggressively reducing their backlog? According to that letter, that is what they stated, which would mean their financial capacity should be increased.

What was the nature of his letter regarding the mistakes?

ASST. COMMISSIONER FREIDENRICH: The letter is from the contractor to the Chief of our Bureau of Contract Administration in the Department, which is in response to his notifying them that they didn't have adequate residual financial capacity and providing them an

opportunity to provide either an additional line of credit or a new financial statement. He responded:

"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 this project.

"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 have requested permission to withdraw our proposal and be relieved of any contractual responsibilities relative to this project.

"I can, therefore, only answer your letter of August 5th 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."

ASSEMBLYMAN BRYANT: What date is that?

ASST. COMMISSIONER FREIDENRICH: That is August 13, 1985.

ASSEMBLYMAN BRYANT: May we please have a copy of that for the record too?

ASST. COMMISSIONER FREIDENRICH: Sure.

ASSEMBLYMAN FOY: If I understand that representation to the Department, he then is saying that he has either completed work and been paid for other work, which now reduces his commitments elsewhere and brings him within line. Notwithstanding the fact that he wants to get out of the contract, he feels that if he had to go through with the contract, he would be within the range. Isn't that what he just told you?

ASST. COMMISSIONER FREIDENRICH: I don't know what he was trying to tell us, Assemblyman. If that is what he wanted to tell us,

in accordance with the request to him, he could have provided an entirely new financial statement, which would have indicated how much outstanding work he still had left to do, as opposed to that which had been indicated on the updated financial statement that he had submitted with his bid. Or, he could have submitted to us an additional line of credit. Just a statement that, "I expect to reduce my outstanding obligations," doesn't meet our criteria for responsiveness to that issue.

ASSEMBLYMAN FOY: Right. But, do you get the same impression that I get from the letter? That he is trying to, in some fashion, tell you, "Well, things are a little better now, and we would qualify if I really wanted the job."

You don't have to draw a conclusion.

ASST. COMMISSIONER FREIDENRICH: I try not to.

ASSEMBLYMAN FOY: My suggestion is to really get to the meat of that issue, we ought to have that person here to answer some questions at some future hearing. This is a whole big can of worms, and we have to get to the bottom of it.

ASSEMBLYMAN BRYANT: I agree. Mr. Penn has a question.

ASSEMBLYMAN PENN: Yes, I have a question. Actually, when you went through your process before, you said you had the bid openings, and the bids were then placed before everyone. Then they went to accounting to see where they stood.

So, the day Pressure was mentioned, they were only the apparent low bidder. They were never really awarded anything at that time. Is that correct?

ASST. COMMISSIONER FREIDENRICH: That is exactly right.

ASSEMBLYMAN PENN: So, then later on, you went in and did the financial analysis and found that they really didn't meet the criteria of the State. They fell in-between the cracks; therefore, their bid was never really accepted.

ASST. COMMISSIONER FREIDENRICH: That is exactly right.

ASSEMBLYMAN PENN: So, what we are talking about here is a bid that never happened. They were rejected like the three other bids. Is that correct? For one reason or another?

ASST. COMMISSIONER FREIDENRICH: The other three bidders weren't rejected. They were just not--

ASSEMBLYMAN PENN: Not considered.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN PENN: And, he was not considered because he didn't meet the financial criteria that was specified by the Department. Is that correct?

ASST. COMMISSIONER FREIDENRICH: Yes, that is correct.

ASSEMBLYMAN PENN: All right. Thank you.

ASSEMBLYMAN BRYANT: Mr. Hardwick, do you have a question?

ASSEMBLYMAN HARDWICK: Yes, would you mind, Mr. Chairman? Commissioner, would you clarify something for me? I am not an attorney like the Committee Chairman and Mr. Foy, but in the event that the bidder had adequate resources and capacity, you estimated that the bridge project would be \$1.9 million. The second bid was \$2.27 million, so it was higher than your estimate.

This bid is obviously extremely low at \$1.467 million. In those cases where, going back for many years-- In another case law, a major error was made in bidding. Is this a situation where the State may have rejected the bid on his application? The State is not deliberately trying to bankrupt firms. The State is trying to get the most efficient and lowest bid, consistent with the public's interest.

Isn't this the kind of case where even if he had had sufficient capacity, when he came back and said a subcontractor had made an error, and you see that he is \$500,000, or a third below your estimate, clearly he is way off the mark from everyone else? What was your reaction as to whether or not the bid would have been rejected even if he had had adequate financial capacity?

ASST. COMMISSIONER FREIDENRICH: Well, Assemblyman, if that had been the only issue, if the financial capacity issue wasn't there, and if he had sufficient residual capacity, what would have resulted in the normal process is, because of his request, we would have provided him an opportunity to have a hearing to demonstrate to us the nature of the error he made.

Sitting at that hearing would be a Deputy Attorney General, as well. We would consider that testimony and with the advice of counsel, we would make a determination whether the facts surrounding this particular situation warranted allowing him to withdraw his bid, or in the alternative, warranted insisting that he perform the work for that bid.

If you want an educated guess on my part, had we gotten to that, based on the fact that it was an oversight, and absent any more information than what may have been forthcoming at a hearing, under those circumstances, we would have insisted that he perform.

There are other circumstances. This doesn't happen very often. The last one I recall goes back-- Well, we recently had one on a local aid project where the contractor insisted he made a mistake. We had a hearing, and we asked him to perform. He appealed to the Appellate Court, and, if my understanding is right, they confirmed our decision, and he is presently seeking a further appeal.

ASSEMBLYMAN HARDWICK: So, in doing your job on behalf of the State, you could well rule that he would have to perform, but he would have a basis to go into court, and then a court of equity says whether or not he would have to perform.

ASST. COMMISSIONER FREIDENRICH: He has further remedy to the Appellate Court.

ASSEMBLYMAN HARDWICK: Or not to accept your remedy and go into court. Based on case law, it may or may not be rejected, but it could well be.

ASST. COMMISSIONER FREIDENRICH: In another case some years ago, a contractor submitted a bid. There was a clerical error made, and decimal point was misplaced. After hearings -- this goes back quite a few years ago; I personally wasn't involved in that, but I am aware of the case -- it was judged to be clearly insisting on performance. There were several millions of dollars involved. It would have bankrupted the contractor, and it wouldn't have given us the project. In that case, upon advice of counsel, the Department agreed to allow that bid to be withdraw.

Each one is judged on its own merits after a hearing is made. But, I must repeat, based on legal advice in the particular situation here, the bid had to be rejected. We never got to the second question.

ASSEMBLYMAN FOY: Mr. Chairman, do you know what the specific omission was of the— I'm sorry, do you have another question?

ASSEMBLYMAN HARDWICK: Go ahead, I'll wait.

ASSEMBLYMAN FOY: I just wondered what specifically it was that was omitted. Did he get the price on the piece of steel, or did his subcontractor not bid on a portion of the work that was specified?

ASST. COMMISSIONER FREIDENRICH: It was my understanding that there was certain work to be included in the costs of a particular item which he apparently — allegedly — overlooked, and, therefore, did not bid. His subcontractor did not give him a price adequate to cover the work.

He submitted a letter on that basis. He said, "We inadvertently omitted the following required work from Bid Item #72." Then he outlined three pieces of work that the contract documents required, the cost of which should be included in the bid item. He overlooked them, and as a result, the amount he bid for that item—

ASSEMBLYMAN FOY: And, it was work that was absolutely essential to the construction of the bridge.

ASST. COMMISSIONER FREIDENRICH: Oh, yes.

ASSEMBLYMAN FOY: It was not add-on or deducts or anything like that.

ASST. COMMISSIONER FREIDENRICH: No, no. We don't have those kinds of bids. They are prevalent, I know, in building construction, but not in our highway contracts.

ASSEMBLYMAN BRYANT: Do we have an estimate on what those items he listed cost?

ASSEMBLYMAN FOY: Yes, what was your engineer's estimate on the value of those items in the contract? What did your engineer say they might be worth? He left \$900,000 on the table, but if those items were only worth \$100,000—

ASST. COMMISSIONER FREIDENRICH: He says in his letter, "The value of the above listed omitted items is approximately \$375,000."

ASSEMBLYMAN FOY: Oh, \$375,000. What did your engineer estimate those items would be? Do you have any idea? Can you give us those figures?

ASST. COMMISSIONER FREIDENRICH: We have estimates for the total item. I would have to go back and check with staff to see whether they have it broken down into all of the elements.

ASSEMBLYMAN FOY: I think that would be useful information because he says he values them at \$375,000. He may have \$275,000 of profit built into that. Your engineer may have said they are only worth \$100,000. Then that makes a big difference about what that unilateral mistake really amounted to in order to allow him to escape from his contract. It is important to me.

ASST. COMMISSIONER FREIDENRICH: I find it important to repeat because the process has to be dealt with even-handedly under all conditions. When he did not have adequate residual financial capacity and did not provide the additional financial capacity, it was a non-bid. His bid had to be rejected.

ASSEMBLYMAN BRYANT: We will deal with that later with the Attorney General because it seems to be sort of a chicken-and-egg argument. If, simultaneously, he called and said he made a major mistake, we knew that, and it could save us \$500,000 or \$600,000, it would seem to me that the Attorney General, in the interest of the State, might have wanted to force more information in terms of his financial capacity. If I made that kind of mistake and I was held to that contract, I wouldn't provide you anything either.

But, it could have saved the State of New Jersey \$600,000. I think the Attorney General's-- You are telling me that their opinion was, "Let's not even look at that side of it." Yet, he has also given us information that he did have movement in his contracts that might have given us that financial capacity. It seems as if we may have wanted to bring that in, because now you have put a person in a situation where he discovered he made a major mistake, and yet on the other hand, you say to him, "Tell me you want the bid."

No one in his right mind who has made a \$300,000 mistake is going to give you additional information to get a bid that he is going to lose that money on.

From the State's standpoint, if it could have saved us \$600,000, we should have looked at that because it happened again. Your word was "concurrently." It all happened on August 5th.

I want to know the date of that letter because that is another letter he just read from. We would like to have it for the record. It is a different letter.

ASST. COMMISSIONER FREIDENRICH: That letter is August 5th.

ASSEMBLYMAN BRYANT: That is the August 5th letter?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: May we have that submitted for the record also?

ASST. COMMISSIONER FREIDENRICH: Sure.

ASSEMBLYMAN FOY: You'll get us your engineers' estimates on those various individual items?

ASST. COMMISSIONER FREIDENRICH: Pardon?

ASSEMBLYMAN FOY: You will provide us with the engineers' estimates on those various items? You see, he has estimated that these things he couldn't do, which were omitted, are valued at \$375,000 in his mind. We need to know what they are in your engineers' minds and in the specifications.

COMMISSIONER BODMAN: Again, not being familiar with this, we will do our best certainly to give you the information you seek. I would guess, however-- I don't know if we break it down in our engineers' estimates the same way they have here, so there may be a discrepancy from that perspective.

ASSEMBLYMAN FOY: All right. Just do the best you can. That is all we are asking.

ASSEMBLYMAN BRYANT: Mr. Miller has a question.

ASSEMBLYMAN MILLER: Let's make the assumption that the man didn't make a mistake of \$375,000. It was just a clean bid. It came in; the man didn't have the capacity to handle the thing. You sent him a letter saying, "Hey, get it up. Let us know where you stand." You weren't in any position to insist upon it. If the man doesn't want to send it in, he is not going to send it in, so therefore, you would reject the bid outright.

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN MILLER: So, it seems that we are trying to make the determination, was the bid rejected because you didn't have the capacity, or was it rejected because he made a mistake and someone did him a favor? I would say it is a moot point as far as the \$375,000 is concerned because you didn't have the other to start with. You can't force him to give you the other, and if you can't force him, you have nothing. If you went the other way and gave it to him anyhow, then whose neck is in a sling if he doesn't perform?

ASSEMBLYMAN BRYANT: Well, you would have a performance bond.

ASSEMBLYMAN MILLER: You can't get the performance if, in fact, they do--

ASSEMBLYMAN BRYANT: Ranges for the Department have nothing to do with your ability to get a performance bond.

ASSEMBLYMAN MILLER: It is not the Department that makes the determination on the performance bond. It is that the contractor gets the performance bond, and upon research and investigation, if this Department says, "Wait and minute. Our research shows this. The man is short \$200 million, or whatever it is," do you suppose a bonding house is going to go with it?

ASSEMBLYMAN BRYANT: I won't argue with you. I'll ask the Department the question.

ASSEMBLYMAN MILLER: If you are the bonder, you are not going to do it, Mr. Bryant.

ASSEMBLYMAN BRYANT: If you award the bid, isn't it the contractor's responsibility to get the performance bond?

ASST. COMMISSIONER FREIDENRICH: Yes, it is.

ASSEMBLYMAN BRYANT: Regardless of your range?

ASST. COMMISSIONER FREIDENRICH: We won't award it regardless of our range.

ASSEMBLYMAN BRYANT: I'm not asking that question. My question is, that is a self-imposed range by the Department. It is not something that requires performance bonders not to give performance bonds. Is that true?

ASST. COMMISSIONER FREIDENRICH: It is a process range imposed by the Department so that every bidder out there who bids our

contract knows exactly how that contract is going to be treated even-handedly so that—

ASSEMBLYMAN BRYANT: Let me ask a question. Does your range stop a performance bond — I am asking a direct question — from giving a performance bond?

ASST. COMMISSIONER FREIDENRICH: What I am telling you is, if a man submits—

ASSEMBLYMAN BRYANT: Just answer the question. Does your range tell a performance bond that he cannot give a performance bond?

ASST. COMMISSIONER FREIDENRICH: We do not tell a bond anything.

ASSEMBLYMAN BRYANT: That is all I want to know.

ASSEMBLYMAN MILLER: I find it hard to understand how you, representing the State, can take a contract, award it, and take your chances on the man getting the bond.

ASSEMBLYMAN BRYANT: No, if he doesn't get a bond, he can't get the contract. That is part of the contract, Mr. Miller. Maybe you don't understand that.

ASSEMBLYMAN MILLER: Wait a minute. I've been through it many times. As eight years as a mayor, I've been through this stuff so darned many times. I'll tell you, if someone made a mistake of \$375,000 and he was bondable, he is stuck for \$375,000. On the other hand, if he is not bondable, we are not going to get involved with it. I think what you are doing here is—

ASSEMBLYMAN BRYANT: The process is, you take a bid bond, and if you are awarded a bid, then you must show your performance bond before the contract can be let. Isn't that true? Regardless of your limits.

ASSEMBLYMAN FOY: If you can't get a bond, you can't get the contract, even if they make an exception for the bid range. It is that simple.

ASSEMBLYMAN BRYANT: That is right.

ASSEMBLYMAN FOY: The question is, were you a dollar over the bid range, or were you \$500,000 over the bid range? That is the critical information that this Committee needs at this juncture.

ASST. COMMISSIONER FREIDENRICH: I would submit, sir—

ASSEMBLYMAN FOY: I would guess your engineers are substantially over. I would hope so.

ASST. COMMISSIONER FREIDENRICH: Between the dollar and the half million, where is the line where you would determine we ought to go one way vis-a-vis or go the other way?

ASSEMBLYMAN BRYANT: And, what is at stake here?

ASSEMBLYMAN FOY: Well, I'll tell you, you have to make an engineering judgment. Let me just tell you where I would make the judgment. If I was going to save the taxpayers of the State of New Jersey \$900,000 by awarding this contract, even though he was \$50 over his range, he'd get the contract because I would be saving people \$900,000. Instead we are going to pay \$2.3 million for that contract and not get it until next March.

Someone made some judgments here; we need the facts that were the basis for making the judgments. We need those facts for us to adequately satisfy the fact that everything was appropriate. That is all.

You know, we appreciate this exposition. We are learning about this particular project. We are sorry we are burdening you and taking a lot of time. I calculated with all the help the Commissioner has here, it is at \$190 an hour. (laughter) Maybe we can get the Committee to reimburse you for it.

But, the fact of the matter is, we have to get to the bottom of what occurred in this transaction. It is my sincere hope that when we get to the bottom of it, we are going to be completely satisfied that everything was done appropriately.

You introduced some other players into the cast in terms of the Attorney General, and things like that. It is going to make our job a little more extensive.

ASSEMBLYMAN BRYANT: I think so too. Let me ask you one other question. What was the size of the bid bond by the low bidder, Pressure Concrete?

ASST. COMMISSIONER FREIDENRICH: I don't know the number, but we can get that.

ASSEMBLYMAN BRYANT: Let me ask you a question. If all of this occurred on August 5, from what I understand, we notified him that he didn't meet the qualifications? Why did we wait until September 12 to aware the new contract? Timing is of the essence. The backdrop of all of this is trying to get this contract moving.

ASSEMBLYMAN FOY: The rejection was August 22, and they awarded the twelfth, right? You formally rejected him in your letter of August 22nd, right?

ASSEMBLYMAN BRYANT: My question is, I'm going back to the fifth. The fifth is already the determination. He called and said he wasn't going to do that. Why did we wait from the fifth all the way up to the twelfth of September?

ASSEMBLYMAN MILLER: I don't think you waited that long, did you?

ASSEMBLYMAN BRYANT: Well, he said the call came in on the fifth, and they made the determination. On the fifth, they called him and told him he had to supply additional information so that means that all of the concurrent things had--

ASSEMBLYMAN MILLER: You received the answer on the thirteenth?

ASSEMBLYMAN BRYANT: From the fifth to the twenty-second--

ASSEMBLYMAN FOY: Seventeen days.

ASSEMBLYMAN MILLER: On the thirteenth, you got an answer from the Attorney General's office, didn't you?

ASSEMBLYMAN BRYANT: At that time, we could have rejected the bid.

ASSEMBLYMAN MILLER: No, you had to notify the man, which you did on the twenty-second.

ASSEMBLYMAN BRYANT: You could notify him, but that does not stop you from awarding. You are just notifying him that you are rejecting it.

ASSEMBLYMAN MILLER: I assume that when you go-- If I may, Mr. Chairman, I assume when you go to the second bidder, you have to go through the same process that you go through with the first bidder.

ASSEMBLYMAN BRYANT: I'm really directing the question to the Department.

ASST. COMMISSIONER FREIDENRICH: The letter that I read to you before is my letter to Pressure Concrete and Grouting Company advising them that their bid was being rejected. It is dated August 22. That is after we had gone back and forth in the sequence that I outlined for you earlier.

ASSEMBLYMAN BRYANT: No. Maybe I am confused. You told me that the determinations were made on the fifth. Mr. Cruz got the information that there was a mistake. By that time -- between the first and the fifth -- the decision had been made that they didn't have sufficient grounds. Why did we wait until the twenty-second?

COMMISSIONER BODMAN: Mr. Chairman, I don't believe that is correct.

ASSEMBLYMAN BRYANT: That is what you told me.

COMMISSIONER BODMAN: Sir, we read this letter of August 13 earlier, which was from Pressure Concrete. It described their process when we were seeking to get the additional financial information that we required.

ASSEMBLYMAN BRYANT: So, that is dated the thirteenth; it probably got here about the fourteenth or fifteenth.

COMMISSIONER BODMAN: That is correct. It was dated the thirteenth to us. It was during that period of time from the fifth to the twenty-second, as I understand, that the Department was attempting to solicit the financial information that it sought.

Ultimately, on the twenty-second, Mr. Freidenrich rejected that bid. In other words-- My point is, we did not make a determination on August 5 to reject it; we made the determination on August 22.

ASSEMBLYMAN BRYANT: To get information.

COMMISSIONER BODMAN: That is correct.

ASSEMBLYMAN BRYANT: Then they sent that back to you on the thirteenth, so it got here the fifteenth. That was insufficient to your Department because you said it didn't give you any information to help you.

ASSEMBLYMAN FOY: Well, that raises another question. If you had, at some point in time, a determination that because you have a

certain pattern of bid procedures, and one of those was violated — that is a prerequisite that you mention — and you had the Attorney General advising you to that effect, did the Department begin initiating steps to review the second lowest bidder's package to ensure that they had compliance with all of your requirements? Was that being done? You knew this person had to go no matter what. I think that is the point that was being made earlier by members of the Committee? Did you begin the process of reviewing everyone else, or the next bidder?

ASST. COMMISSIONER FREIDENRICH: It was not true that regardless of anything else— The apparent low bidder was given the opportunity to submit additional financial data that would satisfy us.

ASSEMBLYMAN FOY: Okay. So, as of his letter of the thirteenth, you knew full well he didn't properly submit; therefore, he was going to be rejected.

ASST. COMMISSIONER FREIDENRICH: That is right.

ASSEMBLYMAN FOY: Okay, so you had from the thirteen to the twelfth, which is about a month. And, in that time, you reviewed Mr. Schiavone's—

ASST. COMMISSIONER FREIDENRICH: The thirteenth to the twenty-second. It was on the twenty-second that we sent Pressure Concrete—

ASSEMBLYMAN FOY: That is when you advised him of your determination.

ASST. COMMISSIONER FREIDENRICH: That is the letter in which his bid was rejected.

ASSEMBLYMAN FOY: But, between the thirteenth and the twenty-second, you didn't engage in any activities the next lowest bidder.

COMMISSIONER BODMAN: No, sir, not until the twenty-third.

ASSEMBLYMAN FOY: Not until you made a formal notification that there were rejection bids.

COMMISSIONER BODMAN: That is right.

ASSEMBLYMAN FOY: Then you were in a mode, according to your procedures, to begin examining the next highest bidder to see if he was in compliance with the same things you had examined for Pressure Concrete.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: May I ask another question? If, on the thirteenth, he sent the letter and you received it by the fourteenth or the fifteenth, if we had sent out a rejection at that time, we couldn't have considered a second lowest bidder, could we?

ASST. COMMISSIONER FREIDENRICH: Excuse me. I'm not sure I understood the question.

ASSEMBLYMAN BRYANT: I'm asking the question, if we received it on the fifteenth, we could not have considered the second lowest bidder on that day. That is assuming we got it by the fifteenth, and we sent out the rejection.

ASST. COMMISSIONER FREIDENRICH: I think we had to notify the contractor who was originally the apparent low bidder that his--

ASSEMBLYMAN BRYANT: Yes, that is what I am saying. We got his on the thirteenth -- the fifteenth. Let's say the fifteenth; I'll give him two days for the transfer of mail. At that point in time, because he didn't give us enough information, if we had said, "You are rejected," we could not have considered the second lowest bidder on that day.

ASSEMBLYMAN HARDWICK: Wayne, pardon me. They had to get their answer from some other office before they could put it in black and white to send to the Attorney General's office. The letter you just read, you sent on the twenty-second. The information came from someone else. They didn't probably make the decision on their own, as I see it. Someone had to put that into verbiage for them so they could send it out.

COMMISSIONER BODMAN: Mr. Chairman, why couldn't we have considered the second lowest bidder at that time?

ASSEMBLYMAN BRYANT: Maybe I'm wrong. At that point in time, it was still on the proposed suspension list.

COMMISSIONER BODMAN: Schiavone Construction Company was never under suspension, Mr. Chairman.

ASSEMBLYMAN BRYANT: I said "proposed suspension" list, or whatever that term is.

COMMISSIONER BODMAN: Proposed-- They were simply never under suspension.

ASSEMBLYMAN BRYANT: Well, when did your decision come out?

COMMISSIONER BODMAN: I believe it was August-- With regard to Schiavone Construction Company?

ASSEMBLYMAN BRYANT: Yes.

COMMISSIONER BODMAN: My ruling with regard to the Administrative Law Judge?

ASSEMBLYMAN BRYANT: Yes, your ruling.

ASSEMBLYMAN FOY: August 21 was the date.

COMMISSIONER BODMAN: It was August 20, I believe.

ASSEMBLYMAN FOY: All right. August 20.

ASSEMBLYMAN BRYANT: Okay.

COMMISSIONER BODMAN: It should be understood by this Committee that the Schiavone Construction Company was permitted to bid throughout this entire procedure.

ASSEMBLYMAN BRYANT: Were they awarded any bids during the period of time?

COMMISSIONER BODMAN: They were not; they were never low bidder.

ASSEMBLYMAN BRYANT: So, in other words, you're telling me what the prior Commissioner did. What did he do? Maybe I should understand that.

COMMISSIONER BODMAN: Would you like to get into this other issue? This is a separate issue now, of course.

ASSEMBLYMAN BRYANT: Well, it is not really a separate issue.

COMMISSIONER BODMAN: Well, is it the issue of the proposed suspension of the Schiavone Construction Company versus the contract relating to the Edison Bridge?

ASSEMBLYMAN FOY: I would like to finish with the issues we have here. We have some outstanding information on the request, but we are not done with what happens with the next contract. I don't want to get into that yet if we can-- The Committee still has some additional questions regarding this.

I still have some outstanding things in my mind regarding this. As of the twenty-second, the bid was rejected, and the Department was in a mode to begin the review of the next lowest bidder's contract. Is that right?

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN FOY: And, did that commence on the twenty-second?

ASST. COMMISSIONER FREIDENRICH: On August 23, the second bidder, Schiavone Construction Company, was sent a letter by the Department -- by the Chief of our Bureau of Contract Administration -- advising them that they were now the apparent low bidder for the Route 9 project, because the previous apparent low bid had been rejected.

ASSEMBLYMAN FOY: Okay. Now, my question is-- This deals specifically with the issue of the delay on the manufacturing of the steel expansion joints. Were you advised of that delay by Schiavone Construction Company, or would that delay have occurred if the other company been entitled to be the bidder? In other words, because we went to the second bidder, did he have a problem obtaining materials for the job?

ASST. COMMISSIONER FREIDENRICH: No, we became aware of the difficulty, or the time delay in getting the expansion joints at our pre-construction conference. When we became aware of that, we ourselves checked with three reliable fabricators who we are aware of. Our staff checked--

ASSEMBLYMAN FOY: This is when you were dealing with Schiavone

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: At his pre-construction company?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: Okay. Were the expansion joints among the items that were omitted from Pressure Concrete?

ASST. COMMISSIONER FREIDENRICH: Not the fabricated steel joints, no, sir.

ASSEMBLYMAN FOY: So, his problem regarding the bid had nothing to do with the subsequent problem that emerged regarding a delay in obtaining construction materials for this bridge. Is that right?

ASST. COMMISSIONER FREIDENRICH: That is right.

ASSEMBLYMAN BRYANT: That delay— Let me ask you something about the specifications. When we bid it, were the specifications supposed to be done in a certain amount of time?

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN BRYANT: And, all the bidders, regardless of who they were, were aware that it was supposed to be done in that period of time? What time frame was that?

ASST. COMMISSIONER FREIDENRICH: I believe the original completion date for the contract was the end of November.

ASSEMBLYMAN BRYANT: That was the starting date?

ASSEMBLYMAN FOY: Original starting date or original completion date?

ASST. COMMISSIONER FREIDENRICH: The original completion is my recollection.

ASSEMBLYMAN FOY: What was the projected starting date?

ASST. COMMISSIONER FREIDENRICH: Pardon?

ASSEMBLYMAN FOY: What was the original starting date?

ASST. COMMISSIONER FREIDENRICH: The starting date would have occurred as soon as we could make an award and he could commence. As soon as he has an award, he is then—

ASSEMBLYMAN FOY: So, if you were able to award the day after the bids were opened, if you really had a speed demon in the Department, and you were on 8/2/85 — okay? — and you had all the motors going on at one time — the A.G. was there; everything was okay; no problem -- the bid could have actually been awarded as early as the second of August, which was a Friday, the day after the bids were awarded. When was completion supposed to take place? What date in November? Was there a specific date?

ASST. COMMISSIONER FREIDENRICH: The twenty-sixth, I believe.

ASSEMBLYMAN FOY: August, September, October, or November?

ASST. COMMISSIONER FREIDENRICH: The specifications will say that outright, and we can send you a copy of them.

ASSEMBLYMAN FOY: The entire project was going to be done in four months. What is the new estimated completion date with respect to this project?

ASST. COMMISSIONER FREIDENRICH: Prior to Memorial Day.

ASSEMBLYMAN FOY: Memorial Day of 1986?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: In your professional opinion, what do you attribute the basis for that delay, or the multiple bases for that delay? Obviously, there are contractual problems. How much of it is attributable to the inability to obtain appropriate equipment that would have been both Pressure Concrete's problem, as well as Schiavone's problem? How much would that be?

ASST. COMMISSIONER FREIDENRICH: There are items of work in that contract, which is a protective waterproofing course on the bridge deck after the bridge is repaired. This requires that the special material cannot be put down when the temperature of the deck is below 50 degrees Fahrenheit. That material can't be put down until the fabricated expansion joints are received and put in place.

With the delay in getting delivery of those fabricated expansion joints, it became obvious to us that we had created, as a practical matter, an impossible situation. By the time that material was delivered and by the time it was installed, and in the interest of the high volume of traffic which was referenced earlier, this project was to be performed during the night. With that delay, it became obvious to our staff that by the time he got to the operation of putting down the overlay material, there was no real expectancy that we would have a situation where the temperature on the deck on which it was going to be put down would be above 50 degrees for any sustained period of time.

ASSEMBLYMAN FOY: All right. As far as Schiavone is concerned, the completion under the normal dates was rendered impossible by a combination of both the delays and the technical factors involved in the construction process itself. Is that correct?

ASST. COMMISSIONER FREIDENRICH: Yes. The key delay-- When we awarded the contract, we had a delay in the award of approximately two weeks. We felt that we could still make it this season.

The thing that killed it for this season, in effect, was, when the contractor then went to order those expansion joints from fabricating plants, he found that due to the workload in the plants at

that time, it was going to take him between seven and eleven weeks to get delivery. That delay would have put us well into the time of the year when 50 degree weather for any sustained period of time was impossible.

ASSEMBLYMAN FOY: All right. If, in fact, you did not experience the problems with Pressure Concrete and their bid, and you had taken the normal course of action to satisfy yourself that they could have supplied additional information to remedy the problem regarding the rains or whatever -- and if you, on August 22 had issued a letter to them saying, "Okay, you have given us additional information. We are satisfied. Go forward." -- would there have been sufficient appropriate weather to allow them to complete the work before the bad weather set in?

ASST. COMMISSIONER FREIDENRICH: Yes. We thought that we could make up-- We would need a little break in the weather. We have had that. We thought we could make up the two weeks of time we had lost because of the bidding problem. We thought we could still make that up, so we then proceeded to award to the contractor who then became the apparent low bidder.

It wasn't until after we made the award were we notified that there would be a much longer time frame for delivery of the expansion joints than we had originally contemplated. Only after we checked -- our staff checked -- with three different fabricators did we conclude that it was impossible to get it done during the winter months and that the prudent course of action would be to allow the fabricating to go on. That, of course, is not a function of the weather.

When the weather breaks in the spring, the first day, the contractor could be out there starting work, and have the project completed well before the traditional shore tourists' time frame.

ASSEMBLYMAN FOY: All right. The concern I have though is, there was a six-week delay from the receipt of the bid until the award of the bid to Schiavone. Had that six-week delay not occurred, would Pressure Concrete still have experienced the delay in obtaining materials that seems to be putting this project into 1986?

ASST. COMMISSIONER FREIDENRICH: Assemblyman, I have to tell you that you don't make an award in one day. Number one, there are requirements--

ASSEMBLYMAN FOY: When would have you normally awarded, all things being equal, Pressure being appropriate--

ASST. COMMISSIONER FREIDENRICH: I would guess within two weeks because the contractor -- the apparent low bidder -- has seven days to submit his MBE Plan, which shows how he plans to meet the requirements for DBE goals in the contract.

ASSEMBLYMAN FOY: Okay. If you had been able to award the contract in its normal course, would there still have been a six-month delay due to the fact of being unable to obtain the essential materials? That is my question.

ASST. COMMISSIONER FREIDENRICH: Oh, yes. I think that if--

ASSEMBLYMAN FOY: No matter what, this contract would have never been done on time.

ASST. COMMISSIONER FREIDENRICH: In hindsight, I think that is true, but at the time when we were pressing to do this, based on the time frame we thought we could get the expansion joints delivered--

ASSEMBLYMAN FOY: So, there wasn't any foreknowledge-- You don't believe there was any foreknowledge about materials delays that may have caused Pressure Contract to want to get out of the bid, do you?

ASST. COMMISSIONER FREIDENRICH: I have no indication that that had anything to do with it at all.

ASSEMBLYMAN FOY: So, they must have had other reasons, specifically their belief that those several items that they estimate being--
in their bid price.

ASSEMBLYMAN FOY: (continuing) --\$375,000 was a mistake. Okay. I don't have any further questions.

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

ASSEMBLYMAN BRYANT: Yes, Mr. Hardwick.

ASSEMBLYMAN HARDWICK: It seems to me, and Mr. Freidenrich has been here for several hours now, we set out to look at two

questions: Why the low bidder didn't get the job, and why this very important job that the Speaker spoke of has been delayed? I think he has answered both of those very well. I'd feel better to see the Commissioner go back to work. He has a lot of transportation issues in the State, and I don't know if we really need to continue the hearing. Speaking as an ex officio member, with due respect to the Chairman, I think the Assistant Commissioner has certainly done a thorough job of answering those two legitimate and very important questions.

ASSEMBLYMAN BRYANT: We appreciate your input, Mr. Hardwick, but this Committee Chairman feels that these issues are important to this Committee, and we are going to continue with the hearing. If, in fact, you become bored by it, you have every right not to sit with us.

ASSEMBLYMAN HARDWICK: I appreciate that.

ASSEMBLYMAN BRYANT: Thank you. Let me ask another question. When was the Deputy Attorney General brought in with the knowledge that there was a problem?

ASST. COMMISSIONER FREIDENRICH: Normally I would have to check with the Chief of our Bureau of Contractors Classification, but as soon as we get any kind of an inquiry from a contractor dealing with a matter such as the request to withdraw his bid, we seek legal advice from the Attorney General's office almost immediately.

ASSEMBLYMAN BRYANT: I would appreciate it if we got that information. It starts to become crucial because everyone is telling me that the date we finally rejected the bid was when we had to bring the Attorney General in. My understanding was, he or she was brought in around the fifth. They should have been apprised of the problems from the beginning. It doesn't seem to me that there should have been such a delay between the fifth and the twenty-second. I want to clear that up.

Also, let me ask you about the redecking. You said it is waterproofing. Is that totally within the material for the redecking, or is that something put over top of the already given surface? Through my knowledge, I just don't know.

ASST. COMMISSIONER FREIDENRICH: Simply stated, there is some repaired work done to the concrete deck and then a waterproofing

overlay is put down on top of the deck to try to preclude the intrusion of the de-icing chemicals that we utilize during snow and ice control.

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

ASSEMBLYMAN FOY: Schiavone has a contract now, right? Have they proceeded with any work at the site? Are they able to move forward with any site preparation or anything like that? Notwithstanding any other questions anyone has, I want to see the job go forward as quickly as possible. We can fight out all of the other issues, but let's get the thing built. The safety of the motorists is a primary concern, and keeping those people working is my concern. Have they received any money from the Department as a draw, and are they doing any work at the site?

ASST. COMMISSIONER FREIDENRICH: They have not received any money because no contractor who does work for the Department receives money other than through monthly estimates, which reimburse him for work satisfactorily completed.

ASSEMBLYMAN FOY: So, they are going to have to complete the work, and then they are going to get money. He is not going to get any money in advance to do anything. The work has to be done, it has to meet your schedule, and then he gets his check cut whenever we can concurrently issue checks in State government.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN FOY: So, that is a month later. But, in any event, has he done any work? Do you have inspectors out on the job? What is being done out there?

ASST. COMMISSIONER FREIDENRICH: There has been no physical work. You have to understand that because of the high volume of traffic that is involved here, we are not going to go out there until we can accomplish meaningful work, because it requires, while the work is going on, albeit at night, the roadway width available to traffic be restricted.

ASSEMBLYMAN FOY: Okay. But, a month has gone by since he knows that he is the contractor. I'm concerned. Do we know whether he has acquired the other material he needs for the particular job? Does

he have it in the shop? Is their stuff on site? Does he have the equipment? You know, to get this job rolling — again, notwithstanding any other issues that come up — it is important that he be moving very rapidly to get as much done in the winter that he possibly can, so in the spring, when the weather problems are hopefully cleared up, we can move on the issues of the water coating and the steel.

ASST. COMMISSIONER FREIDENRICH: Yes. To get exactly the status of that, I would have to check with our resident engineer, Assemblyman. But, we full expect that the ordering of all materials will be accomplished so that as soon as the weather breaks in the spring, he will be able to go forward in completing the physical work on the site.

ASSEMBLYMAN BRYANT: May I ask about prefabrication? Did we ask Pressure Concrete who their prefabricator was?

ASST. COMMISSIONER FREIDENRICH: No, sir.

ASSEMBLYMAN BRYANT: Would it seem logical that since they wanted to withdraw, they might let us know so we could check with their prefabricator to see if this project could move on?

ASST. COMMISSIONER FREIDENRICH: Assemblyman, we never get to that question until the pre-construction conference. We never get to the pre-construction conference until we have a contract awarded.

ASSEMBLYMAN BRYANT: I understand that. Fine. And, he is telling you he is having a problem. We have just let Pressure Concrete. They don't seem to have a problem. It would seem logical to me to call them and say, "Who is your prefabricator? There is a problem with prefabrication. We want to get this project moving." You know, he would either say yes or no, but in this situation, he might have been cooperative and said, "Well, my prefabricator is John Jones."

ASST. COMMISSIONER FREIDENRICH: We did better than that. Our staff went directly to the fabricators in this whole area who normally are approached by the contractors to check for ourselves what the time frame for delivering this material was.

ASSEMBLYMAN BRYANT: Were they all the fabricators? I mean, did you check with all of them? I'm not condemning the fact that you checked with some fabricators. It seems to me that we had a low bidder

who was ready to proceed and he was under the same restraints. He may have had a fabricator. He may not have been in this area; he may have been in Ohio, as far as I know. But, he could have delivered the materials, and that would have accomplished the goal that we are all after, which is doing the bridge.

ASST. COMMISSIONER FREIDENRICH: I can check with him. My suspicion is that the moment of truth would have been after he was awarded the contract, that he sought to place an order with a fabricator.

ASSEMBLYMAN BRYANT: Do we pay a penalty?

ASSEMBLYMAN FOY: Where is Schiavone steel coming from? Where is his fabrication coming from?

ASST. COMMISSIONER FREIDENRICH: I'm not sure, but our staff checked that one, plus two others in the area.

ASSEMBLYMAN FOY: I would like to know the name of the one he is going to have do the job.

ASST. COMMISSIONER FREIDENRICH: Okay.

ASSEMBLYMAN BRYANT: Have we thought about one after his performance bond? I am assuming he has a contractor who says, "You have to do this by a certain date." (laughter) Don't laugh because we have sent people out all across the country to get certain materials. Unless he is telling me there is no place in the country that will give him those materials. That contract doesn't say that they have to get the materials from the eastern region, does it? Has he proven beyond a reasonable doubt that he cannot get fabricated materials?

ASST. COMMISSIONER FREIDENRICH: Our staff has satisfied itself that the material cannot be delivered in shorter time frame than the contractor has indicated to us.

ASSEMBLYMAN BRYANT: Anywhere in the country.

ASST. COMMISSIONER FREIDENRICH: We haven't checked anywhere in the country.

ASSEMBLYMAN FOY: I think if the contractor derives that that is the case, then you go after a performance bond on that basis.

ASSEMBLYMAN BRYANT: Yes, but it depends on how exhaustive you go after it in terms of where the region is that you are directing it.

New Jersey State Library

ASSEMBLYMAN FOY: I think it depends on what the language of the contract is. If it is a standard DOT contract, we are not going to be able to pursue this. The standard contract itself says subject to the availability of the materials. I think that is the standard clause I have seen.

ASST. COMMISSIONER FREIDENRICH: Obviously, and again, I am not an attorney, but I've been in this business long enough where, by osmosis, I have picked up certain legal precepts. If you require a contractor to do something that is impossible, and he says, "I can't do it because it is impossible," you can't hold his feet to the fire.

ASSEMBLYMAN FOY: But, you've got an obligation to satisfy yourself that what he is saying accurate and true, and you have done that.

ASST. COMMISSIONER FREIDENRICH: Yes. I might add that most of the people in the country get steel fabricated from the fabricators that we checked with in this part of the country.

ASSEMBLYMAN FOY: You don't have to be an attorney to realize that the fundamental legal concept that we all operate under is, "Never ask a question unless you already know the answer you are going to get."

ASSEMBLYMAN WATSON: Mr. Chairman, I would just like clear up one thing that was stated by you, Mr. Freidenrich. You said that your hearing officers were going through a similar situation that you had made this particular company perform, even those it is similar kind of-- I didn't get the name of that company.

ASST. COMMISSIONER FREIDENRICH: Lad -- L-A-D -- Construction Company. I might just tell you that-- Well, I indicated before that he has appealed that decision. The Appellate Court upheld our decision. He is now seeking to go to a higher court with it.

Our hearing, which resulted in that decision, was -- if, my memory is right -- about three months. I anticipate that before all the legal remedies are exhausted, it may very well be another couple of months.

ASSEMBLYMAN WATSON: Could you tell me, Mr. Freidenrich, how much did he leave on the table?

ASST. COMMISSIONER FREIDENRICH: Well, I will tell you— I don't remember exactly, and I don't even know since this thing is still in the judicial process that I ought to even be talking about it. There may not be any problem, but I can't make that statement.

ASSEMBLYMAN BRYANT: Wouldn't those figures be public anyway at this point?

ASST. COMMISSIONER FREIDENRICH: Pardon?

ASSEMBLYMAN WATSON: Wouldn't those figures be public at this point?

ASST. COMMISSIONER FREIDENRICH: I believe so.

ASSEMBLYMAN WATSON: If those figures are public, will you make them available to the Committee?

ASST. COMMISSIONER FREIDENRICH: Sure.

ASSEMBLYMAN BRYANT: Do we have any idea how long the delay of this fabrication is going to take? Four weeks, six weeks, ten weeks? How many weeks?

ASST. COMMISSIONER FREIDENRICH: Between seven and eleven weeks was the information we received.

ASSEMBLYMAN FOY: Seven and eleven are good numbers.

ASSEMBLYMAN MILLER: It is my understanding that because of the temperature of 50 degrees or more to apply the waterproofing, that even if you had that fabrication in today and the work was being done at night, you couldn't even perform it right now at this time of the year.

ASST. COMMISSIONER FREIDENRICH: I don't think that is so. We have had— As a matter of fact, and coincidentally, in listening to the weather forecast this morning at about 6:30 while I was getting dressed to go to work, I heard a forecast that said we could, tomorrow or the next day, get up to 75 degrees. We expected, with a completion date of November 26, we would have sufficient days -- moderate days -- in order to be able to complete that work.

The facts may have proven us wrong, but we were anxious to get that work done as soon as possible. It was only after a sequence of events beyond our control overtook us that we realized it was going to be impossible.

ASSEMBLYMAN MILLER: Is the waterproofing the final thing you do in the project?

ASST. COMMISSIONER FREIDENRICH: Pretty much. That is the top surface, yes.

ASSEMBLYMAN MILLER: Okay, that is the top surface that goes on after everything else is done. Even now though, with the awarding before, when you go into this thing with the fabrication, you would still be running into the latter part of October before those would be on hand. I don't see how you would be able to anticipate that in October or November you are going to have a temperature of 50 degrees at night.

So, I think if you had been on schedule from the very beginning and fabrication had not been a problem, you could have met your November 26 deadline. But, as soon as that came up, regardless of who did it, it was not going to be able to be done in that time frame.

ASST. COMMISSIONER FREIDENRICH: We were pushing it because of the importance of the project and the bridge, and we were anxious to get it done this year. When it became clearly impossible, even with soliciting some help in the weather, there is a point beyond which you can't even ask for that kind of help because you are not going to get it. We determined that it was just impossible, so we said, "We had better wait until the spring to commence."

ASSEMBLYMAN BRYANT: May I ask a question? Maybe it is an engineering question. Assuming you did everything to the bridge except to put the waterproofing on, could that be done in the spring?

ASST. COMMISSIONER FREIDENRICH: No. The joints have to put in place, and that will create about a two-inch difference in surface elevation. First of all, it would interfere with just the riding—

ASSEMBLYMAN BRYANT: Okay. I guess my next question is, from an engineering—

ASST. COMMISSIONER FREIDENRICH: It would also interfere with snow plowing.

ASSEMBLYMAN BRYANT: From an engineering standpoint, is there any other type of temporary surface that can be put there, then be removed, and then put your permanent surface on at the end? I don't know the answer to that question. I am asking it.

ASST. COMMISSIONER FREIDENRICH: It depends on how much money you wanted to waste. Surely, you could put something down and then tear it up in the spring, and put down a final product. You don't get it put down for nothing.

ASSEMBLYMAN BRYANT: I understand that.

ASST. COMMISSIONER FREIDENRICH: And, you don't get it torn up for nothing.

ASSEMBLYMAN MILLER: We have a million dollars from before that we could use. (laughter)

ASSEMBLYMAN FOY: I have one other question.

ASSEMBLYMAN BRYANT: Maybe you can provide me with what that cost will be, just so I would know.

ASST. COMMISSIONER FREIDENRICH: Pardon me?

ASSEMBLYMAN BRYANT: Maybe you can provide me with the cost for the temporary job of taking it off and then putting it back on. If, in fact, we are really having a lot of problems with commerce in that area, at least I would know. You know, it might be reasonable.

ASST. COMMISSIONER FREIDENRICH: I would submit that we are dedicated to keeping that bridge in a safe operating condition until we can get in there and complete the project. If it should ever, for reasons totally unknown to us at this time, reach a point where it becomes unsafe to the public utilizing it, we will take the bridge out of service. I don't see that happening. I see the bridge operating between now and the spring, and we will keep a very-- Our maintenance forces that have responsibility in that area will keep a very close watch on it.

ASSEMBLYMAN FOY: I need some additional information also about Mr. Schiavone's bid because I am concerned about this \$375,000 that Pressure Concrete omitted from its bids. It is for certain work done. I had asked earlier -- in terms of the engineer's estimate, which was \$1.9 million -- to delineate specifically what Pressure's \$375,000 was in terms of items and his value that he placed upon them and the Department's equivalent number of items and what value the Department placed on them. I think to really make that triangle complete, we should have what Schiavone said they are worth, because

his bid was higher. In that way, we will have your estimate, we will have Pressure's estimate of \$375,000, and we'll know what Schiavone places as a value on those particular things. I think that would be very useful information.

If you look at the \$375,000 and add it to the existing bid -- the first bid you got, the low bid from Pressure -- that really comes up to almost exactly what your engineer said the job should be worth. I am concerned about what the extra \$400,000 is in the second bidder's amount. It may be profit, and God bless him. He is entitled to it. No one ever went broke taking a profit. There is nothing wrong with making it, but I would be curious to know what value his engineer placed on those items. We know what Pressure's engineers placed as a value on those items. I would also like to know the Department's.

So, Schiavone, the Department, Pressure, and the letter will tell us exactly what the items are.

If you will make that available to us, we would appreciate it.

ASSEMBLYMAN BRYANT: Gentlemen, I am going to take one five-minute break, because I have to go to the men's room, if you don't mind. We will convene in five minutes. Thank you.

(Recess)

ASSEMBLYMAN BRYANT: The Transportation Committee hearing will now resume. We have joining us now, under the rules, the Speaker and the Minority Leader. Are there any other questions from the Committee to any of these gentlemen at this time?

Speaker?

ASSEMBLYMAN KARCHER: Commissioner, who is Debbie Lawler?

COMMISSIONER BODMAN: Deborah Lawler is a young lady sitting right here. She is a spokesman for the Department.

ASSEMBLYMAN KARCHER: What is her-- I can't hear you.

COMMISSIONER BODMAN: She is a spokesman for the Department, sir.

ASSEMBLYMAN KARCHER: Is she the only spokeswoman, or spokesperson?

COMMISSIONER BODMAN: Not to my knowledge, no sir.

ASSEMBLYMAN KARCHER: There are a number of them?

COMMISSIONER BODMAN: Yes, sir.

ASSEMBLYMAN KARCHER: And does she report— to whom? To you, or to—

COMMISSIONER BODMAN: Debbie, who do you report to? (answers) Mr. Weinstein, my Executive Assistant, Mr. Speaker.

ASSEMBLYMAN KARCHER: I understand that sometimes there are as many as four in a day, is that correct?

ASST. COMMISSIONER FREIDENRICH: That is not inconceivable, yes sir.

ASSEMBLYMAN KARCHER: How many contracts are awarded inside a year?

ASST. COMMISSIONER FREIDENRICH: About 100, just off the top of my head.

ASSEMBLYMAN KARCHER: In the last three years, there may have been as many as 300?

ASST. COMMISSIONER FREIDENRICH: There may have been, give or take.

ASSEMBLYMAN KARCHER: Out of those 300, in the last three years, how many were rejected-- How many low bidders were rejected because of lack of financial capacity, or having exhausted their residual financial capacity?

ASST. COMMISSIONER FREIDENRICH: I find it difficult to answer that, Mr. Speaker. I-- We can go over the records and determine that. I find it difficult to even try to speculate.

ASSEMBLYMAN KARCHER: I find it difficult-- I have never read about any other one ever having been rejected for that. I only know what I read in the papers. I don't see anything else. Have there been any?

ASST. COMMISSIONER FREIDENRICH: I find it difficult to speculate. I would have to go back and check, sir.

ASSEMBLYMAN KARCHER: All right. You can do that, though?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN BRYANT: Do you recall anyone?

COMMISSIONER BODMAN: Do you recall any others?

ASSEMBLYMAN BRYANT: Do you recall--

ASST. COMMISSIONER FREIDENRICH: That any were rejected for lack of residual financial capacity? I don't recall.

ASSEMBLYMAN FOY: In your 36 years with the Department, or in the last three years we were just talking about?

ASST. COMMISSIONER FREIDENRICH: It is really not something I have thought about. Sitting here, I can't recall any. I will tell you that in most cases, when there is a-- that questions arises, a contractor is provided the opportunity to provide an additional line of credit, or to provide a new financial statement. In most cases, that happens-- they do satisfy the Department.

ASSEMBLYMAN FOY: Thank you.

ASSEMBLYMAN KARCHER: Now, when you solicit bids, and when you advertise for bids, do you send out the specifications and the plans to certain people?

ASST. COMMISSIONER FREIDENRICH: We send out plans and specifications to the municipal engineer, in the municipalities that are affected. We don't send out plans and specifications to contractors. If they are interested in the project, they come in to purchase plans.

ASSEMBLYMAN KARCHER: Purchase plans. You send out a notice, and then plans and specifications are picked up, is that correct?

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN KARCHER: Fine. Now, that is a-- As I recall, your specifications are rather standard, are they not? They are general specifications, as opposed to particular specifications.

ASST. COMMISSIONER FREIDENRICH: There is a set of standard specifications, and then each project may have some special provisions. Generally speaking, the degree of those special provisions is a function of the nature of the contract.

ASSEMBLYMAN KARCHER: Right. So there are general specifications and then, specific specifications per the contract.

Now, you said -- and I tried to listen -- there was a bid bond submitted by all four bidders on this. Can you recall the amount of that bid bond?

ASST. COMMISSIONER FREIDENRICH: No. I believe--

ASSEMBLYMAN KARCHER: Not dollar amount-- percentage-wise?

ASST. COMMISSIONER FREIDENRICH: I don't recall. I believe Assemblyman Bryant asked me that same question, and I said I would get that information. I don't recall.

ASSEMBLYMAN KARCHER: In doing a little review, I understand that it is customary for a bond, upon bidding, to be as high as 50% — 10% bid, 40% performance, and then that is converted for the successful bidder, into a performance bond. Does that account, or does that jibe with your recollection of how this is done?

ASSIST. COMMISSIONER FREIDENRICH: I don't know, Assemblyman.

ASSEMBLYMAN KARCHER: So the bond submitted at the time could have been as high as 50%.

ASSIST. COMMISSIONER FREIDENRICH: I don't know, Mr. Speaker.

ASSEMBLYMAN KARCHER: You'll secure that?

ASSIST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN KARCHER: Now, on these particular specifications, once again, it is normal, is it not, for a starting date and a completion date to be included. Isn't that correct?

ASST. COMMISSIONER FREIDENRICH: There is a completion date to be specified.

ASSEMBLYMAN KARCHER: And in this case, it was November 26?

ASST. COMMISSIONER FREIDENRICH: I believe, in response to the same question before, I said that was my recollection, but that I would check the actual specification document.

ASSEMBLYMAN KARCHER: And, as I understand once again, the municipalities bids are usually kept open for 30 days. How long are bids kept open for the Department of Transportation?

ASST. COMMISSIONER FREIDENRICH: Not at all. They are either delivered at the time of the bid opening, or they are not.

ASSEMBLYMAN KARCHER: No, no, no. You— I am sorry, I misphrased that. The standard procedure of the Department is to act upon bids in one period of time; in other words, the municipality — to give you an analogy — the municipality will receive a bid on a Wednesday night. They have, pursuant to the statute, a period in which they must act upon that bid, either to reject or accept, or

automatically it is accepted. Now, does the Department have something similar to that? Is it 30 days?

ASST. COMMISSIONER FREIDENRICH: We have a statutory requirement which says the Commissioner may accept — if my memory of the language is right — may accept or reject, within 30 working days. There is not, to my recollection, any kind of language there which says that if he does not, it is automatically accepted.

ASSEMBLYMAN KARCHER: The statutory operating frame is 30 working days, as per the rest of State government, municipalities, and so on.

ASST. COMMISSIONER FREIDENRICH: As a matter of fact, sometimes, when a question arises and we can't reach that answer within 30 days, we normally call the contractor and ask him if he would hold the prices that he bid beyond that 30 days.

ASSEMBLYMAN KARCHER: The same thing happens with counties and municipalities.

ASST. COMMISSIONER FREIDENRICH: I thought I heard you say that if you don't act within 30 days, the bid is automatically accepted. That is not true.

ASSEMBLYMAN KARCHER: Unless you get the consent— Unless you get the consent of the bidders who were involved.

ASST. COMMISSIONER FREIDENRICH: In our case, that is not true. The only— My understanding of the statute is, the only consent we have to get is if we run beyond 30 days, the contractor is not bound by the prices that he bid at that point, unless he agrees to be bound by them.

ASSEMBLYMAN KARCHER: Fine. Now, the question as to the bid specifications once again: In the— There is the standard, general, and the specific. In the specific bid specifications, if work is intended to be done by subcontractors, what is the procedure with regard to your bids for securing the identification of the subs who will be cooperating with the general-- with the main bidder?

ASST. COMMISSIONER FREIDENRICH: Generally speaking, he only has to notify us at the time he wants to sub-contract work, with the exception of the DBE-WBE requirements. There, the apparent low bidder

must submit his plan for meeting those DBE or WBE goals within seven days of becoming the apparent low bidder.

ASSEMBLYMAN KARCHER: But on the general specifications sheet -- the bid summary sheets, or the bid summary sheet that is submitted -- on this contract, sub-contractors and suppliers were not listed, is that correct?

ASST. COMMISSIONER FREIDENRICH: That is correct.

ASSEMBLYMAN KARCHER: All right. Now, I take it the contract -- as I understood the chronology -- the low bidder or the apparent low bidder, Pressure Concrete, was notified by letter of August 22 that their bid had been rejected.

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN KARCHER: And, what transpired between those-- the next two and a half, three weeks between August 23 and September 12, when the contract was awarded to Schiavone?

ASST. COMMISSIONER FREIDENRICH: I believe, in response to a question before, I indicated that on August 23, Schiavone Construction Company, who now became the apparent low bidder, was so notified that he was the apparent low bidder, and he was asked for an updated financial statement of part of his financial capacity determination. In addition, I am fairly certain he was also notified that as the apparent low bidder, he needed to submit his DBE-WBE plan for--

ASSEMBLYMAN KARCHER: Which would have included suppliers and subcontractors.

ASST. COMMISSIONER FREIDENRICH: --to meet the goals established for minority participation.

ASSEMBLYMAN KARCHER: I understand. And, I take it the September 12 date was the contract signing date, is that correct?

ASST. COMMISSIONER FREIDENRICH: No. The 12th-- September 12 was the date that we-- the Department took an action to make the award. Now, after the Department makes the award, the contract and bond is then sent out to the contractor, and again, if my memory serves me right, the specifications give him 10 days to execute that and return it for execution in the Department.

ASSEMBLYMAN KARCHER: When and where did the pre-construction meeting take place? The pre-construction conference.

ASST. COMMISSIONER FREIDENRICH: I don't have that information right at my fingertips. I would have to check with our field supervision people.

ASSEMBLYMAN KARCHER: Was this before or after the 12th of September?

ASST. COMMISSIONER FREIDENRICH: I believe it would have been after, but I will have to check.

ASSEMBLYMAN KARCHER: Normally, it would have been?

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN KARCHER: But on August 23, Schiavone was notified that they were the apparent low bidder on this contract?

ASST. COMMISSIONER FREIDENRICH: Yes, sir.

ASSEMBLYMAN KARCHER: September 12 is when they-- when the action was taken by the Department. Why was the delay between the 23rd, when they were notified, and September 12, when the Department finally took the award action? That would have taken you outside the 30 days, would it not?

ASST. COMMISSIONER FREIDENRICH: Pardon?

ASSEMBLYMAN KARCHER: The bids were received August 1. Normally, there should have been action on them within the 30 days. September 12 takes you outside of those 30 days.

ASST. COMMISSIONER FREIDENRICH: Thirty working days, I believe, I said. If my memory of the statute is correct, it is 30 working days.

ASSEMBLYMAN KARCHER: So, you would have been within the 30 working days on the 12th?

ASST. COMMISSIONER FREIDENRICH: I believe so.

ASSEMBLYMAN KARCHER: It would have been just at the end of the 30 working days.

ASST. COMMISSIONER FREIDENRICH: I believe so.

ASSEMBLYMAN KARCHER: All right. And, at the pre-construction meeting was the first time that the issue arose about the delivery of the-- availability of the prefabricated--

COMMISSIONER BODMAN: Expansion joints?

ASSEMBLYMAN KARCHER: Expansion joints?

ASST. COMMISSIONER FREIDENRICH: I got word from the staff, from the Field Supervision Staff and from our Chief Engineer of Design, that the matter of delivery of those fabricated joints had been discussed and the contractor indicated to us that it would take between seven and 11 weeks to get delivery of those joints.

ASSEMBLYMAN KARCHER: From September— From the pre-construction date meeting, which was sometime soon after September 12?

ASST. COMMISSIONER FREIDENRICH: From the time he placed his order for the material.

ASSEMBLYMAN KARCHER: So, at the time the pre-construction meeting had taken place, the order had not been placed yet?

ASST. COMMISSIONER FREIDENRICH: I don't know that. I can find that out.

ASSEMBLYMAN KARCHER: Yes, I would appreciate that.

On September 12 though, sometime within the next 10 days after that, I take it a contract was signed? Was there some indication that there was a binding agreement between Schiavone Construction and the State of New Jersey?

ASST. COMMISSIONER FREIDENRICH: Yes, and I don't know what date that is, because the actual signing of the contract -- while I make the award -- the actual execution of the contract is done in the Deputy Commissioner's office. I assume that what you are saying is correct, but I would have— to tell you the exact date, I would have to check that.

ASSEMBLYMAN KARCHER: Then I take it that contract document incorporates the specifications, both general and specific, as well as in normal contract language that the Department uses, isn't that correct?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN KARCHER: And certainly, you would assume that even if that document were not signed, there was still a binding agreement between Schiavone and the State of New Jersey, from the time you indicated the notification of award and they had complied by submitting their bond, et cetera? Is that correct?

ASST. COMMISSIONER FREIDENRICH: Well, that is— My understanding is, and here again, I am not an attorney, but my understanding is that the legally binding contract does not exist until it is executed by both parties to the contract.

ASSEMBLYMAN KARCHER: No doubt in your mind that one exists, today?

ASST. COMMISSIONER FREIDENRICH: I don't have any doubt. As I indicated earlier, I am not— I don't play a role in the actual execution of that contract.

ASSEMBLYMAN KARCHER: All right. Now, you know what is in standard Department contracts, don't you?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN KARCHER: For instance, this contract contained a liquidated damages clause, did it not?

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN KARCHER: And the liquidated damage clause— If you did not change the date prior to the execution of the contract, that liquidated damage clause would have come into effect November 26, according to specifications, is that correct?

ASST. COMMISSIONER FREIDENRICH: Respectfully, Mr. Speaker, I think— My understanding in the past, that if we create an impossible situation—

ASSEMBLYMAN KARCHER: Well, we'll get to that in a moment.

ASST. COMMISSIONER FREIDENRICH: Okay.

ASSEMBLYMAN KARCHER: As far as you know, there is a liquidated damages clause, and no one unilaterally changed the date prior to the pre-construction meeting?

ASST. COMMISSIONER FREIDENRICH: That is my understanding, yes.

ASSEMBLYMAN KARCHER: And at the pre-construction meeting, we would have operated— We would have been operating until we found out from Schiavone about this impossibility of delivery for 7-11 weeks, we would have been operating with a November 26 completion date, and the standard State liquidated damage clause? Is that a fair statement?

ASST. COMMISSIONER FREIDENRICH: It appears so to me.

ASSEMBLYMAN KARCHER: Fine. Then, the other contract clause with regard to impossibility of performance, refers to wars, emergencies, strikes, national emergencies, and acts of God, does it not? That is what it says, isn't it?

ASST. COMMISSIONER FREIDENRICH: Sir, as an attorney, you are better qualified to answer that question than I am.

ASSEMBLYMAN KARCHER: It doesn't deal with the inability of a subcontractor or a fabricator or a supplier, to deliver material, does it? I have read them a few times. It doesn't say any— a word about inability of material supply. It has to do with acts of God, nuclear holocaust, national emergencies, et cetera. That is what that clause says.

ASST. COMMISSIONER FREIDENRICH: I haven't read it recently. What I do know is, in the past, over the years and without being able to be specific, that we have been challenged on the assessment of liquidated damages, and that challenge has been upheld by the courts.

ASSEMBLYMAN KARCHER: Right. It has been litigated, and there is a great deal of case law with regard to the ability to assess liquidated damages and the question of, if for instance, bonuses -- Route 287 was a case where there was an incentive designed in that. I don't know, Commissioner; do all your contracts say that now?

COMMISSIONER BODMAN: Not to my knowledge; no, sir.

ASSEMBLYMAN KARCHER: They just have the standard liquidated damages.

ASST. COMMISSIONER FREIDENRICH: If I may, since you mentioned Route 287, with the bonus— I think in that case, again, as I understand what the attorneys advise me, that is, when you assess the penalty, there must be an offsetting bonus. Where there is a liquidated damage, there does not have to be a bonus provision.

ASSEMBLYMAN KARCHER: Precisely. And that is why I think the contracts now reflect, in general, the understanding that is set down -- the precept as set down by the courts. Let me ask you, with regard to this -- I just want to make sure I understand this correctly. A bid -- You went out for notice to bidders sometime in June or July, is that correct?

ASST. COMMISSIONER FREIDENRICH: July, I would think.

ASSEMBLYMAN KARCHER: Bids, plans and specifications were picked up by a number of people, at least a minimum of four who did submit bids. And they responded in August, so it was back in July when the plans and specs went out. The August 1 date -- and everyone bid on that -- and then you are telling me now, that sometime -- It was Schiavone's discussion with your field people, sometime subsequent to September 22, Schiavone first discovered that they could not get the material that they had warranted to you would be necessary to complete this job, is that correct? Is that a fair statement?

ASST. COMMISSIONER FREIDENRICH: I don't know what Schiavone thought. I can only respond to when the information came to me, before we accepted it, we checked with-- our staff checked with three fabricators and confirmed--

ASSEMBLYMAN KARCHER: I understand that.

ASST. COMMISSIONER FREIDENRICH: Yes.

ASSEMBLYMAN KARCHER: Certainly, though, it is a fair assumption to make, that in July, when Schiavone picked up the specs, they thought that they would be interested in doing this contract. That is a fair assumption. A fair assumption is that on August 1, when they submitted a bid along with Pressure Concrete and two other companies, that they thought they could perform this contract. It is a fair assumption to make, that they thought they could perform this contract by November 26, or they would not have bid. Nobody would have bid thinking they could not do the contract, would they?

ASST. COMMISSIONER FREIDENRICH: I would hope not.

ASSEMBLYMAN KARCHER: I would hope not, too. So, then it is a fair assumption to make, that on August 1, when Schiavone submitted their bid and their bid bond, along with Pressure Concrete, they thought they could do this contract? And it would be fair to say that on August 23, when you notified them of the award, that they were the apparent low bidder, that they still thought they could do this by August 26 because they did not call you on the phone and say, "Wait a minute, we can't do this," -- that is a fair assumption to make, isn't it?

It is a fair assumption to make that on September 12, when the award was actually granted -- now we are about from July to September 12 -- it is a fair assumption to still make that on that date, when you told Schiavone that they were going to get the award, they still thought they could do it because of the fact that they did not notify you to the contrary. So, the first time -- after making all of those assumptions, with all of those chronological dates, it is sometime at the pre-construction meeting in September, when this matter first came to Schiavone's attention -- and Pressure Concrete, back in July -- that they notified you that they could not get delivery, is that correct?

ASST. COMMISSIONER FREIDENRICH: That is my understanding.

ASSEMBLYMAN KARCHER: How many people in the nation -- in the eastern United States -- do prefabricating of expansion joints?

ASST. COMMISSIONER FREIDENRICH: I can't tell you exactly, but there are not many, and they are getting fewer all the time.

ASSEMBLYMAN KARCHER: Well, how about in the State of New Jersey? There are at least seven companies in the State of New Jersey who do it, aren't there?

ASST. COMMISSIONER FREIDENRICH: I am not sure of that.

ASSEMBLYMAN KARCHER: Between Pennsylvania, New Jersey and Maryland, those -- I'm sorry, New York, Pennsylvania, New Jersey and Maryland, would it surprise you if I told you that there were 24 companies?

ASST. COMMISSIONER FREIDENRICH: That do what, sir?

ASSEMBLYMAN KARCHER: That make prefabricated expansion joints, doing specialty steel work?

Last but not least, Miss Lawler-- Who did-- You say she works for the Department as a spokesperson, and I read to you an article that appeared in the News-Tribune of Woodbridge, Tuesday, September 24, 1985: "DOT Spokeswoman Deborah Lawler said the contract was awarded to Schiavone September 12, after the low bidder on the project, Pressure Concrete and Grouting, of South Orange, requested that its bid be withdrawn due to an error." I take it she misspoke herself at that time, is that correct, Commissioner?

COMMISSIONER BODMAN: Yes, she did.

ASSEMBLYMAN KARCHER: And, in fact, the contract was awarded to Schiavone not because Pressure Concrete asked to have their bid withdrawn, but because they were rejected by the Department -- we have established that -- solely because of their financial capacity, although we can not name anyone else in the last 36 years, in your experience, who has ever had this happen to them.

It happened to them, and my question is this: If they had been awarded the contract, isn't the awarding of the contract to them, or the notification -- not the signing of the contract itself -- your notification to them that they are the successful bidder, as you did with Schiavone on the 12th -- Isn't that the condition precedent, legally, to moving against a bid performance bond -- the bid bond, or in your case, the bid performance, a mixed bond? Isn't that the legal requirement -- condition precedent -- for the State to exercise its rights against a bidder who defaults or refuses to comply, so that the decision made to reject them eliminated the Department's ability to seek any financial recovery or redress against Pressure Concrete? Isn't that a fact?

ASST. COMMISSIONER FREIDENRICH: Speaker Karcher, you-- I believe there are several questions embodied in what you just said--

ASSEMBLYMAN KARCHER: Let me narrow it down--

ASST. COMMISSIONER FREIDENRICH: Not all of them result in asking me whether that is a legal precedent to doing something. I tell you, I am not an attorney. The action that I took in rejecting that bid on the basis of inadequate, residual financial capacity, was on the advice of an attorney.

ASSEMBLYMAN KARCHER: Did you discuss this with Commissioner Bodman, prior to doing it?

ASST. COMMISSIONER FREIDENRICH: Not to my recollection.

ASSEMBLYMAN KARCHER: Commissioner Bodman may recall -- Do you remember discussing this?

COMMISSIONER BODMAN: No, sir.

ASSEMBLYMAN KARCHER: Do you remember discussing it with the Attorney General-- Deputy Attorney General?

ASST. COMMISSIONER FREIDENRICH: I discussed it with the Deputy Attorney General, yes.

ASSEMBLYMAN KARCHER: Did the Deputy Attorney General ask you or did you inquire as to the question of whether or not the rejection of the bid, as opposed to the non-rejection of the bid, absolved the company and thereby eliminated any recourse that the State might have against Pressure Concrete?

ASST. COMMISSIONER FREIDENRICH: My recollection is that I asked for advice, or the Chief of our Bureau of Contract Administration asked for advice on the request to withdraw the bid and the advice we got, after considering the question, was that we would never get to that question, that the bid was unresponsive and must be rejected, and moots the second question.

ASSEMBLYMAN KARCHER: Unresponsive solely for the reason that they had not the residual capacity, and that this would be the first case in 36 years for which a bid would be rejected?

ASST. COMMISSIONER FREIDENRICH: Unresponsive, because it did not meet the— because they did not have sufficient residual capacity. There was no discussion whatsoever, to my knowledge, of it being the first case in 36 years.

ASSEMBLYMAN KARCHER: Fine. Thank you.

ASSEMBLYMAN FOY: I have a couple of questions. First, would you know how many contractors who asked to be let out of a bid because of a unilateral mistake, have been let out of the bid over the past 100 contracts that have been bid? Do you understand my question? Just what they did — they said, "We would like to be let out, we made a mistake." How many have actually been let out, voluntarily, by the Department of Transportation?

ASST. COMMISSIONER FREIDENRICH: The only one that I recall off the top of my head, Assemblyman, is the one that I made reference to before, that took place maybe 4,5 years ago, six years ago— Time runs so fast when you are—

ASSEMBLYMAN FOY: So that is not a common occurrence, to let somebody off the hook, so to speak?

ASST. COMMISSIONER FREIDENRICH: No, it is not a common occurrence, nor is the request therefore a common occurrence.

ASSEMBLYMAN FOY: It doesn't happen very often, right.

Now, can a debarred subcontractor— Can somebody who was debarred from doing work as a general contractor for DOT— Can they do work for an approved subcontractor?

ASST. COMMISSIONER FREIDENRICH: No.

ASSEMBLYMAN FOY: How would you know that they are a contractor if your procedure is that you don't really know until they file the MBE and the other statement, or they show up at a pre-construction meeting?

ASST. COMMISSIONER FREIDENRICH: Because any request for subcontracting has to be submitted for approval.

ASSEMBLYMAN FOY: So you knew—

ASST. COMMISSIONER FREIDENRICH: For any request for subcontracting above \$100,000, that can only be sublet to a pre-qualified contractor—

ASSEMBLYMAN FOY: So you knew who the subcontractors for Pressure Concrete were, did you not?

ASST. COMMISSIONER FREIDENRICH: No.

ASSEMBLYMAN FOY: There was no work that was going to be done in excess of \$100,000?

ASST. COMMISSIONER FREIDENRICH: They only apply for approval to subcontract after they are awarded a contract. We never awarded a contract to Pressure Concrete.

ASSEMBLYMAN FOY: Well, do you consider the ordering of material to be subcontracting or not?

ASST. COMMISSIONER FREIDENRICH: No.

ASSEMBLYMAN FOY: Okay. Let me ask you this question. Do you know whether Pressure Concrete is going to be a subcontractor for Schiavone on this job?

ASST. COMMISSIONER FREIDENRICH: Not to my knowledge.

ASSEMBLYMAN FOY: Do you know whether Pressure Concrete has ever done any subcontracting for Schiavone?

ASST. COMMISSIONER FREIDENRICH: Not to my knowledge. I can check that through our contractors classification office.

ASSEMBLYMAN FOY: Yes, I would appreciate that information, too.

Thank you. I have no further questions.

ASST. COMMISSIONER FREIDENRICH: I would just add, I suspect not, since Schiavone is traditionally a bridge contractor, as is Pressure Concrete.

ASSEMBLYMAN FOY: They compete with each other, rather than work together.

ASSEMBLYMAN BRYANT: It appears that nobody on the Committee has any further questions at this time. We have asked a lot of questions, and we have asked for a lot of information. That is why we can't follow up on the questions, or future questions.

I am asking that this Committee be adjourned until 9:30, Wednesday, October 16. Hopefully, by Thursday of this week, we can have in whole the information we requested from the Department, to have time to review it so we can ask the appropriate questions based on information. And at that time, we will probably ask for the Deputy AG, or make a formal request for the Deputy AG for the Department to be here.

ASSEMBLYMAN FOY: Do we want to ask for Pressure Concrete's personnel to be here at that time, or do you want to hold that for some-- Maybe we had better see what happens.

COMMISSIONER BODMAN: Mr. Chairman?

ASSEMBLYMAN FOY: The other thing is, I enjoyed having both the Speaker and the Minority Leader here. I would like to welcome them back at any time, to sit in.

COMMISSIONER BODMAN: Mr. Chairman, Mr. Freidenrich just informs me that he is scheduled to be out of State at a conference for a State Transportation Conference of some form, I believe in Seattle, on that date-- Is that correct?

ASST. COMMISSIONER FREIDENRICH: The Association of State Highway and Transportation Officials has their annual conference. I have some pre-session meetings over the weekend, but the conference itself is on Monday and Tuesday of the 14th and 15th. I will be leaving Seattle early on the 16th, but because of the change in time, I will not be arriving back in New Jersey until sometime after 4:00.

ASSEMBLYMAN BRYANT: I understand that, but I assume that with the number of people in your Department, we can have the necessary individuals to give us the information.

ASST. COMMISSIONER FREIDENRICH: Oh yes, I thought you indicated that you wanted me to be back here.

ASSEMBLYMAN BRYANT: Oh -- What I am saying is that if you can't be available, we just want persons from the Department to give us that information. We understand that. Thank you for that.

ASSEMBLYMAN MILLER: May I -- Just a comment. With all due respect to you, the Committee, Alan Karcher and everybody here -- I am satisfied in my mind, as far as the completion date of this contract is concerned, it didn't matter who had it, it was not going to get done in time. I think you have answered that question. I think the first question, as to the contractual arrangements -- It's a moot point, as far as the additional amount that you want to put in that contract; he did not bid on the contract. It doesn't mean a thing. If he didn't have the necessary residual capital to cover his bid, the man was going to be counted in, and there is nothing that says he has to do it.

As far as I am concerned, I came down here today because of John Watson's bill, then I found out about the Senator's bill, and I found out about you people coming in here today. Personally, I think it is a witch hunt; there is a bone there with no meat on it. And that is the way I see it. As far as I am concerned, you can wipe this thing out right now and go, unless you come up with something really deep and really penetrating, something happening under the table to somebody, which I don't see on the surface. This is nothing more than a political situation, and I don't blame anybody for making politics out of it just before an election, 19th District or otherwise. But I think what you are doing here today is the wrong thing to do; I think you better grab a bone with more meat than this one has on it.

ASSEMBLYMAN FOY: Mr. Chairman, even a bare bone makes soup, and I think there has been an awful lot stirred--

ASSEMBLYMAN MILLER: It makes pea soup--

ASSEMBLYMAN FOY: --an awful lot stirred in this pot that we need to look at a little further.

ASSEMBLYMAN BRYANT: Mr. Miller -- On the 16th, if you decide that you have enough information, you do not have to attend the hearing.

ASSEMBLYMAN MILLER: I am coming down and keep you guys honest.

ASSEMBLYMAN BRYANT: There are a couple of questions that need to be answered. One of the things is, you could have rejected the bids if they were so high. That has not been answered.

ASSEMBLYMAN MILLER: Why would you do that?

ASSEMBLYMAN BRYANT: Because the bids are overestimates. And if you are not going to do it this year, you might get better bids, especially when you have a \$500,000 or \$600,000 that is done routinely.

ASSEMBLYMAN MILLER: You had better have a good reason to reject those bids, or you are going to be in court because you rejected a bid without a valid reason. If the estimate was \$1.9 million, and the bid comes in at \$2.1 million, you had better believe you are in the ballpark.

ASSEMBLYMAN BRYANT: Let me explain. If, in fact, you feel your position on this Committee is not to explore those areas, and we have just started-- We have asked questions and they can't answer them at this point.

ASSEMBLYMAN MILLER: I don't believe in spinning my wheels, Wayne. And you are spinning your wheels.

ASSEMBLYMAN BRYANT: Well, don't spin your wheels. That is what I am saying. You stay in your district, I will be here, the Committee will be here, and we will ask the proper questions and if you come--

ASSEMBLYMAN MILLER: I'll be here to keep you honest, as I said.

COMMISSIONER BODMAN: Mr. Chairman, you asked a question, or it was just raised in that exchange, as to why the project wasn't re-bid. Could I ask Mr. Freidenrich to attempt to respond to that, in that he will not be here--

ASSEMBLYMAN BRYANT: We are going to deal with that after I get some other information, because I might have some pertinent questions with that.

COMMISSIONER BODMAN: I see. Well, it is unfortunate he will not be here at the next hearing.

ASSEMBLYMAN BRYANT: The Committee is now adjourned. Thank you, Commissioner.

(HEARING CONCLUDED)

