

**IN THE DISTRICT COURT OF THE UNITED STATES
for the Western District of New York**

THE UNITED STATES OF AMERICA

INDICTMENT: 04-CR-156A

-vs-

BHAVESH KAMDAR

Violation: 18 U.S.C. §§ 1341, 1957, 2

Defendant.

**DEFENDANT'S NOTICE OF MOTION
FOR MOTION TO DISMISS INDICTMENT**

Nature of Action:	Indictment.
Moving Party:	Defendant, Bhavesh Kamdar.
Directed To:	Plaintiff, The United States of America.
Date and Time:	To be determined by the Court.
Place:	U.S. District Court, Western District of New York 68 Court Street, Buffalo, New York 14202 (Magistrate Judge McCarthy)
Supporting Papers:	Memorandum of Law in Support of Motion to Dismiss Indictment and Declaration of Joseph V. Sedita in Support of Motion to Dismiss Indictment, with exhibits.
Answering Papers:	Pursuant to the Court's Scheduling Order the government is required to serve answering papers, if any by April 20, 2009.
Relief Requested:	Dismissal of Indictment.
Grounds for Relief:	F.R.Cr.P. 12(b)(2)
Oral Argument:	Requested.

Dated: Buffalo, New York
March 20, 2009

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**MEMORANDUM OF LAW IN SUPPORT OF
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STATEMENT OF FACTS

This case arises from an environmental remediation contract between Mr. Kamdar's firm, Industrial Site Services, Inc. ("ISS")¹ and the Office of General Services of the State of New York ("OGS"). The Contract was entered into in 1998 and completed by July, 2000. As negotiated, it provided that the State should pay ISS a surcharge of 9.52% as a so-called "guarantee cost" on every formally-approved Payment Request for work completed. The guarantee cost was requested by ISS to offset, wholly or in part, charges imposed on it by Mr. Kamdar and his wife, Panna Kamdar, for agreeing to personally indemnify the corporation's bond surety² for any expenses it might incur against performance, labor and material bonds. Bonds of this type are required on all OGS engineering and construction projects for the protection of the State.

In August 2004, long after the contract was completed, an Indictment was returned against Mr. Kamdar. The gravamen of the charges are:

1. That Mr. Kamdar fraudulently induced the State to agree to pay the guarantee cost by telling OGS that he and his wife, as indemnitors, were required to collateralize their potential obligation to the bond surety, and
2. That he fraudulently induced OGS to continue to pay ISS the 9.52% guarantee cost beyond a negotiated "cap" of \$402,000.00 for this category of expense.

¹ At all times relevant to this case, Mr. Kamdar owned no less than 91% of ISS. *See* accompanying Declaration in Support of Motion to Dismiss the Indictment of Joseph V. Sedita ("Sedita Decl.") at ¶ 6 & Exhibit D.

² The bond surety was an AIG-affiliated insurance company specializing in this type of coverage. *See id.* at Exhibit C.

Within months of return of the Indictment, the State of New York filed a parallel civil Complaint. In the course of that civil litigation, the Assistant U.S. Attorney in charge of the instant criminal prosecution submitted an Affirmation confirming that the operative facts of the civil and criminal prosecutions were identical.³

During the civil case, the testimony of cognizant state employees and officers was taken at examinations before trial (“EBT”) and trial. Their testimony established that when OGS entered into the contract with ISS it was fully aware that Mr. and Mrs. Kamdar had posted no collateral to secure their indemnity obligations to the bond surety.⁴ The testimony also established that OGS paid guarantee costs in excess of \$402,000.00 with full awareness that it was doing so and over the objection of one of its employees.⁵ Further, cognizant state authorities testified that the contract between OGS and ISS contained no “cap” on guarantee costs,⁶ and they denied that Mr. Kamdar deceived them into approving any of the payments at issue.⁷

A unanimous Decision and Order of the Appellate Division, Third Department reversed, on the law and the facts, a trial judgment adverse to ISS and Mr. Kamdar, and dismissed the State’s Complaint.⁸ That Decision and Order, unappealed and final, exonerated Mr. Kamdar and ISS of fraud and breach of contract and declared that ISS had saved New York taxpayers approximately \$3,000,000.00 on the environmental remediation contract.

³ *Id.* at ¶ 16 & Exhibit L.

⁴ *Id.* at ¶ 5, 6 & Exhibits C, D.

⁵ *Id.* at ¶ 13, 14 & Exhibits D, I, J, K.

⁶ *Id.* at ¶ 8-11 & Exhibits D - G.

⁷ *Id.* at ¶ 15 & Exhibits E, F, I.

⁸ *Id.* at ¶ 19 & Exhibit A.

As the case is presented to this court, the following facts are beyond dispute:

1. Mr. and Mrs. Kamdar did not furnish personal collateral to secure their potential obligation to the bond surety.
2. ISS pledged its collateral to the bond surety.⁹
3. Mr. Kamdar owned all or almost all of the stock of ISS.
4. When the State entered into the contract containing the 9.52% guarantee cost provision, it fully understood that Mr. and Mrs. Kamdar had pledged no personal collateral.¹⁰
5. The contract value was increased by the State from \$4.6 Million to \$12.9 Million during the course of performance, resulting in payment of additional guarantee costs at 9.52%.¹¹

POINT I. THE INDICTMENT IS FACIALLY INSUFFICIENT

A. The Mail Fraud Charges Cannot Be Predicated On Mr. Kamdar's Statement of Law

The first section of the Indictment alleges that Mr. Kamdar perpetrated a scheme to obtain bond guarantee charges from the State of New York by falsely representing that he and

⁹ *Id.* at ¶ 5 & Exhibit C.

¹⁰ *Id.* at ¶ 6 & Exhibit D.

¹¹ *See State of New York v. Indus. Site Servs.*, 52 A.D.3d 1153, 1155 (3d Dep't 2008) ("It was understood when the contract was executed . . . that the amount of tank remediation . . . was only an estimate. Indeed, after ISS began work, the need for additional tank remediation work . . . led to change orders which increased the total value of the contract to \$12.9 million.").

his wife were required to provide their personal guarantee and collateral before the surety company would issue a performance bond.

Oral representations made by Mr. Kamdar relating to the guarantee constituted a lay person's characterization of the legal import of a contractual relationship. Specifically, the statements allegedly made by Mr. Kamdar relate to whether the indemnification was properly a "guarantee" or "collateral," as well as whether these legal obligations were personal or corporate. Thus, the question is whether mail fraud can be predicated on these types of representations. The United States Supreme Court has held that the term "defraud" in the mail fraud statute is to be given its established common-law meaning.¹² Under New York common law, representations as to matters of law, even if false, are not actionable in fraud. For example, in *Williams v. Horton Realties*,¹³ the plaintiff alleged that the written contract for the sale of real property was not in fact the agreement which the parties had come to. The plaintiff testified that she was unable to read and, consequently, she relied on defendant's representation that the premises could legally be used as a rooming house, although she later learned that this was untrue.¹⁴ The court dismissed plaintiff's claim holding that "[i]t is well settled that statements of domestic law, though false and fraudulent, do not generally constitute actionable fraud."¹⁵

In *Miller v. Yokohama*,¹⁶ the Ninth Circuit addressed a federal RICO claim which was predicated on a violation of the mail fraud statute. The plaintiff alleged that he was a victim

¹² *Neder v. United States*, 527 U.S. 1 (1999).

¹³ 121 N.Y.S.2d 552 (Sup. Ct. 1953).

¹⁴ *Id.* at 553.

¹⁵ *Id.* (quoting Williston on Contracts, Volume 3, § 1495).

¹⁶ 358 F.3d 616 (9th Cir. 2004).

of a mail fraud scheme by Yokohama managers who falsely represented that he was not entitled to overtime pay because he was salaried. Relying on common law, the Ninth Circuit concluded that the managers' statements did not include express or implied misrepresentations of fact, but were rather opinions regarding the law which could not support a mail fraud allegation.

As that Court acknowledged, there are exceptions to the general rule that a misrepresentation of law is not actionable. When the party making the representation (1) purports to have special knowledge; (2) stands in a fiduciary or other relationship of trust and confidence to the recipient; (3) has successfully endeavored to secure the confidence of the recipient; (4) or has some other special reason to expect that the recipient will rely on his opinion, misrepresentations of law may constitute fraud. But, as in *Miller*, none of the exceptions apply to this case. Mr. Kamdar did not have specialized knowledge or a fiduciary relationship with the State of New York. Nor did Mr. Kamdar successfully secure the confidence of the New York State contracting officials. Thus, Mr. Kamdar's alleged misrepresentations — characterizations of legal obligations between ISS and AIG — are not actionable as mail fraud.

B. The Indictment Is Defective Because it Fails To Actually Identify Any False Representations Made By Mr. Kamdar To Induce The State To Continue Paying The Performance Bond Charge Past The Alleged Contractual “Cap”

Section two of the Indictment alleges that the contract limited the performance bond charge “to \$402,000 and despite the fact that this \$402,000 limit was exceeded as of on or about February 12, 1999, ISS continued to submit requests for partial payments.”¹⁷ The Indictment further states that Mr. Kamdar “both personally and through others, made additional

¹⁷ Indictment at p. 4, ¶ 1.

oral and written false representations” to induce New York State to continue the payments.¹⁸ The Indictment is invalid with respect to the scheme set forth in section B because it fails to identify the false representations alleged by the government or describe how they induced the State of New York to act against its own interest.

Nothing could be more basic to notions of due process than the right of a defendant to receive notice of the essential facts giving rise to the charges against him. The government is required under the Sixth Amendment to inform the accused of the nature and cause of the accusation. The accusation must be contained in an Indictment by a grand jury and the defendant cannot be tried on “charges that are not made in the Indictment against him.”¹⁹ A constitutionally sufficient Indictment must set forth “a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events.”²⁰ Further, there must be “a statement of the facts and circumstances as will inform the accused of the specific offense . . . with which he is charged.”²¹

Here, the Indictment does nothing more than set forth the language in the mail fraud statute without any fair indication of the nature of representations forming a part of this scheme. That is simply not enough. Nowhere in the twelve-page document is Mr. Kamdar alleged to have made any affirmative false written or oral statements relating to the continued

¹⁸ *Id.*

¹⁹ *Stirone v. United States*, 361 U.S. 212 (1960).

²⁰ *United States v. Starvroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

²¹ *Russell v. United States*, 369 U.S. 749, 766 (1962) (*quoting United States v. Hess*, 124 U.S. 483, 487 (1888)).

bond guarantee charges. Nor is there any allegation as to whom Mr. Kamdar made or caused to be made false written or oral statements. In fact, the Indictment is so vague and devoid of concrete allegations that Mr. Kamdar is simply unable to discern the basic nature of the alleged statements. He is, therefore, forced to defend against the conclusory allegation that he “both personally and through others, made additional oral and written false representations” to induce the State to continue to pay. Thus, to the extent the mail fraud charges are grounded in the facts set forth in section two, those charges must be dismissed.

POINT II. IN THE CIRCUMSTANCES OF THIS CASE THE COURT SHOULD DISMISS THE INDICTMENT IN DEFERENCE TO THE DETERMINATION OF THE STATE OF NEW YORK

This case involves most unusual, and possibly unique circumstances. A civil complaint of contract fraud which the government has described as identical in its allegations to the Indictment sub judice, was previously litigated to finality in the courts of New York. The Complaint and Indictment both maintained that the fraud at issue victimized New York State.

The sovereign “victim,” acting through its Attorney General, fully prosecuted the specified fraud allegations in its civil case against Mr. Kamdar and his corporation. That same sovereign, acting through its judiciary, determined that all claims of fraud and breach of contract failed at trial and dismissed the complaint against Mr. Kamdar.²² In doing so, the New York Appellate Division wrote as follows:

Turning . . . to plaintiff’s fraud claim, we find it unsupported by this record²³ . . . We hold, as well, that no

²² *State of New York v. Indus. Site Servs.*, 52 A.D.2d 1153 (3d Dep’t 2008).

²³ *Id.* at 1157.

breach of contract occurred We have weighed this evidence and considered the undisputed fact that defendants fully performed under the contract at a cost which was nearly a million dollars less than the next lowest bidder, representing once the contract amount was tripled by change orders a savings to the taxpayers of nearly three million dollars.²⁴

The Attorney General has not appealed the determination of the Appellate Division and its unanimous Decision and Order is final. Consequently, it constitutes the last word of the State of New York on the factual allegations advanced in both the complaint and Indictment.

The instant motion implicates the deference which the Courts of the United States owe to the legal determinations of a state sovereign.

We propose that this Court can and should credit as adjudicative facts both the decision of the Appellate Division and the government's affirmation in the state case establishing its factual identity to the instant Indictment, pursuant to Fed. R. Evid. 201. As such, they are facts which the Court, when addressing a dismissal motion pursuant to F.R.Cr.P. 12(b)(3)(B), can determine "without a trial of the general issue."²⁵

The question remains whether the unequivocal determination of the State of New York that Mr. Kamdar was guilty of neither breach of contract nor fraud should be given conclusive effect when analyzing the sufficiency of the federal Indictment. We contend that, under the narrow and unusual circumstances of this case, it should. In this regard it bears noting that everything about this case is powerfully within the purview of state law and state

²⁴ *Id.* at 1160-61 (emphasis added).

²⁵ F.R.Cr.P. 12(b)(2).

sovereignty. The case rests upon a contract authored by the state, entered into by the state governed by state law and adjudicated by a state tribunal. Every witness who testified at the trial was called by the state's Attorney General and every such witness was a present or former employee of the state. The Complaint and the Indictment alleged no "victim" other than the state. As the Decision of the Appellate Division makes clear, the case was adjudicated pursuant to the state fraud standard of "clear and convincing evidence," a lesser standard than proof beyond a reasonable doubt. In these circumstances, it beggars logic to maintain that, despite all this, the United States should be permitted to attempt to prove that the State of New York was a victim an alleged fraud which it has conclusively disavowed.

POINT III. THE COURT IS PRESENTED WITH AN UNDISPUTED AND FULLY DEVELOPED FACTUAL RECORD SUCH THAT IT MAY EVALUATE THE SUFFICIENCY OF THE EVIDENCE

It is generally the case that a court should look only to the face of the Indictment when deciding a pretrial motion to dismiss. But, where the government has made "what can fairly be described as a full proffer of the evidence it intends to present at trial," a court may consider the sufficiency of that evidence.²⁶ Indeed, where the facts are undisputed, it is not only permissible but may be desirable for a court to examine the "factual predicate for an Indictment" and to determine whether the government can sufficiently show the elements required to

²⁶ *United States v. Gotti*, 457 F.Supp.2d 411, 421 (S.D.N.Y. 2006) (quoting *United States v. Alfonso*, 143 F.3d 772, 776-77 (2d Cir. 1998)).

convict.²⁷ Thus, where there is a fully developed, undisputed factual record, the court may dismiss an Indictment where the government is incapable of proving the crime charged.²⁸

Here, the court is presented with a case that has already been extensively examined, litigated, and ultimately decided by the alleged “victim” of the mail fraud scheme -- the sovereign State of New York. Specifically, the Appellate Division of the State of New York definitively found that Mr. Kamdar neither committed fraud upon the State of New York nor breached a contract with it.²⁹ The identical nature of the instant action to the state court proceeding has been conceded by the government, in Assistant United States Attorney Bruce’s Affirmation in the state court action:

[T]he State has alleged that Kamdar fraudulently obtained bond guarantee charges from the State by falsely representing that Kamdar was required to provide his personal guarantee and collateral before a performance bond would be issued. Upon information and belief, the State has further alleged that Kamdar continued to fraudulently bill the State for such falsely claimed bond guarantee charges even after the charges exceeded the contract limit. . . . **[T]he allegations contained in the State’s civil action against Kamdar are identical to those contained in a criminal Indictment that the United States**

²⁷ *United States v. Brown*, 925 F.2d 1301, 1304 (10th Cir. 1991).

²⁸ *United States v. Mennuti*, 639 F.2d 107, 109, 113 (2d Cir. 1981) partially abrogated on other grounds by *Russell v. United States*, 471 U.S. 858 (1985) (affirming district court’s dismissal of Indictment on the ground that government’s proposed proof would not establish a crime under the terms of the statute where government submitted affidavit stating facts on which it would rely); see also *United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005) (upholding pretrial dismissal of Indictment based on sufficiency of the evidence where government’s challenge to ruling was untimely and “existence of undisputed facts obviated the need for the district court to make factual determinations properly reserved for a jury”) (citations omitted).

²⁹ *State v. Industrial Site Servs.*, 862 N.Y.S.2d 118 (3rd Dep’t 2008).

Attorney for the Western District of New York has obtained against Kamdar.³⁰

The unequivocal record assertions made by the government coupled with the identical nature of the civil complaint and the instant Indictment demonstrate that the court is faced with a fully developed factual situation such that *any evidence that could be presented at a trial in this case will be identical to that already presented in the state court proceeding*. In this unusual situation, and in light of its assertions, the government should be held to have made a full proffer of the evidence that it intends to present at trial.

The court can and should look past the face of the Indictment to the undisputed facts presented and established during the state court proceeding by the entity allegedly “victimized” by the charged schemes.

Two facts, established beyond controversy in the state proceeding, are fatal to the instant Indictment and may properly be considered by this Court:

1. At the time that it entered into its contract with ISS, the state understood that Bhavesh and Panna Kamdar had pledged no personal collateral to secure their indemnity to the bond surety.³¹

The fact that New York entered into this contract with full awareness of the absence of personal collateral establishes with retrospective certainty that the alleged

³⁰ Sedita Decl. at ¶ 16 & Exhibit L (emphasis added).

³¹ *Id.* at ¶ 6 & Exhibit D; see *Indus. Site Servs.*, 52 A.D.3d at 1159 (“[T]he record is replete with instances where communications between the parties suggest that OGS should have been aware that the expense for which Kamdar demanded reimbursement was not physical collateral, but the risk to which he and his wife . . . were exposed . . .”).

misrepresentation regarding same was not material. In order to support a charge of mail fraud, a claimed misrepresentation must be material.³² Absent such materiality, the charge must fail.

2. The contract between New York State and ISS imposed no “cap” on payments of guarantee costs.

State officers, including OGS Directors of Contract Administration Kainz and Lewyckyj, admitted in the state proceeding that the contract, as drafted by the state, contained no cap.³³ The Appellate Division undertook a state law analysis of the ISS contract based on the record evidence and concluded that “because in our view the evidence does not adequately support the conclusion that the parties intended to cap the guarantee fee, we hold that plaintiff has failed to prove that any breach of contract occurred.”³⁴

CONCLUSION

The United States Supreme Court has observed that “ . . . comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. *That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the states as sovereigns.*”³⁵

Here, the sovereign has pronounced that it was not defrauded and its contract was not breached by the defendant. Moreover, that pronouncement was supported by impeccable

³² *Neder*, 527 U.S. at 25.

³³ Sedita Decl. at ¶ 8-10 & Exhibits D, E, F.

³⁴ *Indus. Site. Servs.*, 52 A.D.3D at 1161.

³⁵ *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring).

testimonial and documentary evidence. This Court should dismiss the Indictment in deference to the determination of a sovereign state speaking to the legal reality of its own contract.

Dated: Buffalo, New York
March 20, 2009

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-vs-

BHAVESH KAMDAR

Violation: 18 U.S.C. §§ 1341, 1957, 2

Defendant.

**DECLARATION IN SUPPORT
OF MOTION TO DISMISS THE INDICTMENT**

JOSEPH V. SEDITA, under penalty of perjury and pursuant to 28 U.S.C.

§ 1746, declares the following to be true and correct.

1. I am a member of the firm of Hodgson Russ LLP, counsel for the defendant in this matter, Bhavesh Kamdar. I make the following representations upon review of the pertinent documents and records. I submit this declaration in support of Mr. Kamdar's motion to dismiss the indictment.

2. In or about December 1997, New York State's Office of General Services ("OGS") advertised for bids on an engineering contract. Industrial Site Services ("ISS"), an environmental remediation firm, submitted a bid proposal to OGS through its President, Bhavesh Kamdar. In its initial bid, ISS included a fixed charge of approximately \$500,000 for expenses associated with bonds required by OGS. OGS did not accept this flat charge and, instead, engaged in a series of negotiations with ISS to lower the charge.

3. The indictment alleges that as part of his effort to justify the \$500,000 performance bond charge, Mr. Kamdar made false and fraudulent statements to the effect that an

AIG subsidiary that provided the performance bond required Mr. Kamdar and his spouse to provide their personal guarantee and collateral of approximately \$1 million before it would issue the performance bond. This specific allegation was set forth and fully litigated in a prior state court civil action. A copy of the decision of the New York Supreme Court, Appellate Division, Third Department in the matter of *State of New York v. Industrial Site Services* is attached as

Exhibit A.

4. It is the case that Mr. Kamdar stated that AIG required his and his wife's assets as collateral. However, it is unclear whether he was using the terms "collateral" and "guarantee" interchangeably, as demonstrated by his deposition testimony taken at the Examination Before Trial ("EBT") in the state proceeding:

Q: And when you said in here, amount of collateral, what are you talking about?
A: Amount of guarantee.
Q: So when you said collateral, you meant guarantee; is that your testimony?
A: Yes.

See Deposition Transcript of Bhavesh Kamdar, dated July 13, 2006, an excerpt of which is attached as **Exhibit B**, at 143, ln 9-14.

5. But regardless of Mr. Kamdar's linguistic intent, it is indisputable that prior to entering into the contract, he actually sent his and Mrs. Kamdar's General Indemnity Agreement with the AIG subsidiary to OGS. A copy of Mr. Kamdar's fax to OGS dated April 29, 1998, which includes his fax coversheet, a letter from the surety, and the General Indemnity

Agreement, is attached as **Exhibit C**. This agreement patently required collateral only from ISS and not from Mr. and Mrs. Kamdar.

6. Further, the trial testimony in the state court proceeding of Mr. Robert Kainz, the then-Director of the Division of Contract Administration for OGS, demonstrates that he was aware of the true nature of the guarantee provided by the Kamdars and that, armed with that information, he recommended approval of the remediation contract:

Q: And you understood that BK owned the corporation or owned substantially all of it. He was the 91 percent shareholder. Correct?

A: Correct.

Q: And then you have the general indemnity agreement itself sent to you by Bhavesh Kamdar. Correct?

A: Correct.

Q: Is it fair to say that the document makes no reference to collateral being posted by the guarantors, the individual guarantors. The Careys and the Kamdars?

A: Yes, sir.

Q: The only collateral reference in the indemnity agreement Mr. Kamdar sent to you is the collateral being posted by the corporation. Correct? ISS?

A: Correct.

Q: And basically the corporation puts up everything its got for its collateral. Correct?

A: Yes, sir.

Q: And you know who owned the corporation. Correct?

A: Yes, sir.

Q: BK Kamdar. Correct?

A: Yes, sir.

Q: Was that why you were satisfied to go forward with the agreement when you had received this information from Mr. Kamdar?

A: I believe so.

Q: Specifically because the corporation pledged its collateral. Right?

A: Yes, sir.

Q: And BK owned the corporation. Right?

A: Yes, sir.

Q: And when you made that recommendation [to enter into the contract] your understanding with respect to the issue of collateral was simply that the corporation had pledged its collateral and BK owned the corporation. Right?

A: Yes, sir.

*See Trial Transcript of Robert Kainz (“Kainz Tr.”), dated July 29, 2007, an excerpt of which is attached as **Exhibit D**, at 69, ln 11-14; 72, ln 19-25 - 73, ln 1-22; 89, ln 8-12.*

7. The indictment also alleges that the contract limited the bond guarantee charge to \$402,000 and that Mr. Kamdar made additional false representations to OGS to induce it to refrain from attempting to recoup payments that exceeded this cap and to allow ISS to continue to receive payments in excess of the cap. This allegation was also addressed in the state court proceeding. *See State of New York v. Indus. Site Servs., Exhibit A*, at 8-9.

8. In reality, however, the contract itself contained no cap on the guarantee fee, as acknowledged by Mr. Kainz, the individual who ultimately recommended approval of the contract. Specifically, Mr. Kainz testified during his deposition taken at the EBT in the state proceeding as follows:

Q: Now, what, if anything, did you anticipate would happen with respect to the guarantee fees after the original chunk of work totaling \$4.6 million was finished?

A: My understanding was that that fee was capped at the \$402,000.

Q: Is there anything in the contractual documents that you are aware of that caps it at \$402,000?

A: I don't believe there is.

Q: Now, you had testified that you thought that perhaps the 9.52 percent guarantee cost would end with additional work that was assigned under the general unit price schedule, correct?

A: Yes.

Q: Why would you expect that to happen in light of what's in the contract itself?

A: Because we had documentation from Kamdar which showed the cost that was -- he incurred, him and his wife incurred.

Q: Well, you testified there was no cost they incurred, it was a risk charge.

A: The risk charge. And we wanted to cap that at 402,000.

Q: But clearly this contract doesn't cap that, does it?

A: As I see it now, correct.

*See Deposition Transcript of Robert Kainz ("Kainz Dep."), dated November 15, 2006, an excerpt of which is attached as **Exhibit E**, at 65, ln 23-24 - 66, ln 1-9; 71, ln 17-24 - 72, ln 1-11.*

9. Mr. Kainz's admission is further bolstered by his subsequent testimony in the state court proceeding:

Q: But you are aware of this. The contract on its face contains, the original contract, the 4.6 million dollar contract contains no cap on guarantee fees as written?

A: As written? No.

Q: And in point of fact, by the time -- let me go back. You are the one who okayed this contract or recommended actually having it signed.

A: Yes.

See Kainz Tr., Exhibit D, at 88, ln 13-17, 20-23.

10. Mr. John Lewyckyj, the then-Assistant Director of Contract Administration, also acknowledged during his deposition testimony at the EBT in the state proceeding that the contract contained no cap on the guarantee fee and that in general, unit price contracts do not contain capped items:

Q: Okay. Thank you. Now, I still want you to look at that last page where the guarantee cost is. Can you show me, looking at that contract, where it indicates that that 9.52 percent calculation caps out at any particular figure? In other words, is there a not to exceed on that item?

A: No.

Q: And not to exceed, can you explain what that means? Is it a cap on the figure?

A: The term "not to exceed" --

Q: Yes.

A: -- could represent not to exceed the value of whatever the value is associated with it until further review and/or subsequent modification or change to that.

Q: You're familiar with unit price schedules?

A: Yes.

Q: You're familiar with not to exceed items?

A: Yes.

Q: Are they generally expressed? Does it say in the contract, this item is not to exceed X dollars?

A: That's how it would be expressed.

Q: Okay. In unit price schedules, do you frequently see items that are listed as not to exceed?

A: No.

*See Deposition Transcript of John Lewyckjy (“Lewyckjy Dep.”), dated December 22, 2006, an excerpt of which is attached as **Exhibit F**, at 48, ln 17-23 - 49, ln 1-9; 49, ln 20-23 - 50, ln 1-7.*

11. These conclusions are further supported by the deposition testimony of Ms. Joanne Garrison, the then-Principal Account Clerk at OGS, taken at the EBT in the state proceeding:

Q: As you were working on these payment applications, was there ever a time when you were told to stop paying further amounts of the guarantee fees?

A: No.

Q: So it was not your understanding that it had to be capped to any particular amount?

A: No.

Q: When you were processing these applications, did there ever come a time where you believed that the guarantee fees needed to be capped or stopped at a certain monetary amount?

A: No.

*See Deposition Transcript of Joanne Garrison, dated December 21, 2006, an excerpt of which is attached as **Exhibit G**, at 55, ln 4-10; 56, ln 5-9.*

12. As work assigned under this contract was completed, ISS forwarded payment applications, which were then put through multiple levels of review. Within each of these applications, ISS sought payment for a clearly-designated “Bond Guarantee Fee,” and ISS

also specifically identified the running total of the guarantee fees that had been requested to date.

A copy of a Payment Application is attached as **Exhibit H**.

13. The transparent nature of the payment applications submitted by ISS and the rigorous process that each application was put through is amply demonstrated through the trial testimony of the relevant State employees.

Specifically, Mr. Kainz testified as follows:

- Q: Those payment applications, before they are acted on by your outfit, the contract administration outfit that you were the director of, they have to be approved first. Don't they?
- A: Yes.
- Q: By the guy on the site?
- A: Yes, sir.
- Q: That would be the EIC [engineer-in-charge]?
- A: Yes, sir.
- Q: So when they come in do they specify every category?
- A: I'm sorry. I couldn't hear you.
- Q: The categories of work they are asking --
- A: Yes.
- Q: And the quantity of units. Right?
- A: Yes.
- Q: Any every single one of those that came from ISS as clear as day said here is the amount 9.52 percent against this tranche of work we are going to charge the State. Right?
- A: Yes, sir.
- Q: Nothing hidden there. Was there?
- A: No, sir.
- Q: Everyone of those was reviewed by a State officer. Correct?
- A: Yes, sir.

Q: And when BK and his company sent these amounts in for billing, not only did they tell you what they wanted to be paid, but they also told you how much they had been paid in that category to date. Right?

A: I believe so.

Q: So they were bending over backwards for there to be no surprises to the State here. Correct?

A: Yes, sir.

See Kainz Tr., Exhibit D, at 84, ln 16-25 - 85, ln 1-17; 86, ln 14-21.

Ms. Joanne Garrison similarly testified to the same effect at the state proceeding:

Q: And you indicated that each of these payment applications indicates the total value earned to date. Correct?

A: Yes.

Q: And Mr. Kamdar, some individual from Industrial Site Services, would have filled in that information?

A: On the back of the summary.

Q: Yes. Total value earned to date would have been completed by the contractor?

A: Yes.

Q: So it was completely transparent in all of these applications how much money was being requested and how much money had been requested to date?

A: Yes.

Q: Whose responsibility would it have been to fill out the work authorization amount?

A: The contractor.

Q: But you certainly would have checked those amounts because you would need to make sure they were right for calculation purposes?

A: Yes.

- Q: So in this case how would you have checked it if there was nothing filled in that column?
- A: We would have just been checking and multiplying out the 9.52 percent against the earned amount on each payment application.
- Q: So you would take the terms from the unit price schedule to check on this?
- A: Yes.
- Q: And again you determined in each of these instances, either you or one of your supervisees, that the amount requested was appropriate pursuant to the contract?
- A: The amount of the guarantee fee?
- Q: Yes.
- A: Was based on the earned amount on each payment. After we performed our review of the payment application we would calculate the guarantee fee amount to be sure that it was correct.
- Q: And you approved it in each instance?
- A: Sometimes we had -- if we had made a change to the payment application we would also have to make a change to the fee amount.
- Q: But you approved the amounts that are reflected here for the guarantee fees?
- A: (No response).
- Q: Inclusive of any changes you made?
- A: Yes.

*See Trial Transcript of Joanne Garrison (“Garrison Tr.”), dated July 29, 2007, an excerpt of which is attached as **Exhibit I**, at 165, ln 16-25 - 167, ln 1-16.*

14. When OGS became concerned that it may have been overpaying Mr. Kamdar, it conducted its own investigation. The investigation concluded with OGS finding that there was no indication that the contract limited the guarantee fee to \$402,000. Thus, OGS

authorized the guarantee payments to continue. This is demonstrated by the trial testimony of Mr. Lewyckyj in the state proceeding:

Q: Now you indicated that at some point in the life of this tank remediation contract you were asked to evaluate the guarantee fee against the terms of the unit price contract?

A: Yes.

Q: So when you went ahead and evaluated this guarantee fee you determined that the contract did not indicate any cap?

A: My evaluation was that the agreement did not indicate a not to exceed or a value of the cap.

Q: And you reported that conclusion to some supervisor?

A: I would have. I'm not sure who.

See Trial Transcript of John Lewyckyj, dated July 29, 2007, an excerpt of which is attached as Exhibit J, at 222, ln 22-25 - 223, ln 1-2; 225, ln 7-14.

Mr. Martin DePaolo, the Building Construction Program Manager, similarly testified as follows:

Q: When you brought this matter of having exceeded \$402,000.00 to the attention of Mr. Kainz and contract administration, was that because you recognized that \$402,000.00 had been exceeded in that category of payment?

A: Yeah. I recognized that 402 has been exceeded, and in my estimates it shouldn't have been.

A: My e-mail was generated because it was my belief that the 402 was a not to exceed amount. That is why I raised the red flag to the ultimate decision makers.

Q: And you got word back from the ultimate decision makers. Didn't you?

A: I think there may have been an e-mail response.

Q: You knew that they decided that contrary to what you thought should happen. Right?

A: Right. Others had -- I was advised that the payments would continue.

Q: That they had looked at it. Correct?

A: Right.

Q: And that the payments would continue. That that is what they decided after looking at your concerns. Right?

A: That is my understanding.

Q: Who told you that?

A: As I sit here today I believe it to be Bob Kainz.

Q: That is your best recall?

A: That is my best recollection.

Q: Indeed these are the people you referred to as the decision makers. Correct?

A: Yes. Contract administration.

See Trial Transcript of Martin DePaolo, dated July 31, 2007, an excerpt of which is attached as Exhibit K, at 290, ln 5-11; 291, ln 9-25 - 292, ln 1-9.

15. Further, cognizant State employees denied that Mr. Kamdar made any representations to deceive them into continuing the payments. Mr. Kainz himself testified in the EBT taken in the state proceeding as follows:

Q: Do you know of any false statements Bhavesh Kamdar or anybody acting for him or for ISS made either to keep or to continue to get payments of guarantee fees over \$402,000?

A: I don't know.

Q: When you said, "I don't know," what did you mean in response to that question?

A: That I don't recall.

Q: Any such false statements?

A: Yes.

See Kainz. Dep., Exhibit E, at 81, ln 9-13; 82, ln 2-6.

Mr. Lewyckj testified to the same effect in the EBT in the state proceeding:

Q: To your knowledge, did Mr. Kamdar ever make any oral or written representations to induce you or someone within your unit to continue making the guarantee fee payments?

A: I don't recall.

Q: You don't recall him making any written or oral representations?

A: To me or my unit specific to your question.

See Lewyckyj Dep., Exhibit F, at 72, ln 23 - 73, ln 1-7.

Ms. Garrison confirmed this contention when she testified at the state trial as follows:

Q: And you don't recall him making any representations to you to convince you to keep paying this guarantee fee?

A: No.

See Garrison Tr., Exhibit I, at 169, ln 3-6.

16. As demonstrated by the foregoing evidence, and as admitted by the Assistant United States Attorney Bruce in an Affirmation submitted in the state proceeding, the allegations brought against Mr. Kamdar in this action have already been fully litigated and completely decided by the prior state court. A copy of the Affirmation of Anthony M. Bruce, Assistant United States Attorney, is attached at **Exhibit L**. Indeed, in his Affirmation, Assistant United States Attorney Bruce explicitly states that "the allegations contained in the State's civil

action against Kamdar are identical to those contained in a criminal indictment that the United States Attorney . . . has obtained against Kamdar." *Id.* at ¶ 2.

17. The Complaint filed in the state proceeding provides conclusive proof of Mr. Bruce's contention, as it is virtually identical to the instant indictment. A copy of the Complaint filed in the state court proceeding is attached as **Exhibit M**. For instance, the Complaint charges that:

As part of the effort to justify \$500,000 for defendant Industrial Site Services, Inc.'s claimed performance bond expense, defendant . . . made false and fraudulent statements to plaintiff and submitted letters and other writings to plaintiff that contained false and fraudulent statements. Primary among these oral and written false and fraudulent statements were statements that AIG, the company that provided the performance bond, required defendant Bhavesh Kamdar and his spouse, Panna Kamdar, to provide their personal guarantee and collateral, consisting of personal funds of approximately \$1,000,000, to AIG before AIG would issue the performance bond.

See Compl., Exhibit M, at ¶ 8.

The indictment, using virtually the exact language, also charges as follows:

As a part of its effort to justify the \$500,000 for its claimed performance bond expense, the defendant . . . made false and fraudulent statements to NYS-OGS and submitted letters and other writings to NYS-OGS that contained false and fraudulent statements. Primary among these oral and written false and fraudulent statements were statements that AIG, the company that provided the performance bond, required the defendant and his spouse, Panna Kamdar, to provide their personal guarantee and collateral, consisting of personal funds, of approximately \$1,000,000 to AIG before AIG would issue the performance bond.

18. The identical nature of these actions is further supported by the fact that the relevant State employees testified in their depositions taken at the EBT in the state proceeding that they had not provided Assistant United States Attorney Bruce with any information other than what they had given in the state proceeding.

Specifically, Mr. Kainz testified as follows:

Q: Did you tell Mr. Bruce anything other and different about the relationships with Mr. Kamdar than what you have said here?

A: In what?

Q: With respect to the construction of the contract, with respect to your recollection of any allegedly false statements having been made by Mr. Kamdar or somebody on his behalf, with respect to all of those issues?

A: I don't recall any. Would you ask me the question again?

Q: Do you recall telling Mr. Bruce or the grand jury anything different than what you've told us here about these relationships and interactions with Kamdar and ISS?

A: I don't think there's anything any different. Again, that was four years ago, four and a half years ago.

See Kainz Dep., Exhibit E, at 97, ln 19-24 - 98, ln 1-13.

Similarly, Mr. Lewyckyj testified:

Q: Simplify it. Did you tell Mr. Bruce anything different about these events that you've told us here today? And the reason for that being that you've had more time to think about it or you've refreshed your recollection about certain events based on documentation that you've looked at in preparation.

A: It's altogether possible, based on the time and the amount of documentation that I had to review or the documentation that was available for me to review, we may have had more specific conversations with specific subject matter.

Q: I think I hear you saying that you don't recall anything different, but it's possible.

A: What I'm saying is that obviously in the element of time and the number of contracts and the number of payments and the number of conversations in the time that has gone by, my recollection may have been clearer or we may have had some discussions that I could have represented differently than here today.

Q: But you don't recall anything specifically. I'm asking if you have any specific recollection about something--

A: Specifically, no.

See Lewyckyj Dep., Exhibit F, at 76, ln 23 - 77, ln 1-22.

19. In the state proceeding, with respect to New York State's claim of fraudulent inducement, the Appellate Division of the State of New York found that "clear and convincing evidence does not exist that the alleged misrepresentations constituted a material fact which justifiably induced OGS to agree to the guarantee provision." *State of New York v. Industrial Site Servs.*, Exhibit A, at 7-8. With respect to the breach of contract claim, the court stated that "because in our view the evidence does not adequately support the conclusion that the parties intended to cap the guarantee fee, we hold that plaintiff has failed to prove that any breach of contract occurred." *Id.* at 9.

Dated: March 20, 2009

s/Joseph V. Sedita
Joseph V. Sedita

EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 26, 2008

504083

STATE OF NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

INDUSTRIAL SITE SERVICES, INC.,
et al.,

Appellants.

Calendar Date: April 23, 2008

Before: Spain, J.P., Lahtinen, Kane, Malone Jr. and Stein, JJ.

Hodgson Russ, L.L.P., Buffalo (Joseph V. Sedita of counsel), for appellants.

Andrew M. Cuomo, Attorney General, Albany (Owen Demuth of counsel), for respondent.

Spain, J.P.

Appeal from an order and judgment of the Supreme Court (Teresi, J.), entered October 23, 2007 in Albany County, upon a decision of the court in favor of plaintiff.

In May 1998, plaintiff's Office of General Services (hereinafter OGS) entered into a contract with defendant Industrial Site Services, Inc. (hereinafter ISS) – the lowest bidder – for the removal and environmental remediation of underground petroleum storage tanks located on State property in several counties in western New York. ISS's original bid included a \$500,000 lump sum fee to cover the cost of securing necessary performance, labor and material bonds. OGS objected to the fee as excessive, and negotiations on that issue ensued between OGS and defendant Bhavesh Kamdar, president of ISS.

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504083

Kamdar insisted that, in addition to reimbursement of premiums paid to the surety company for the necessary bonds, the contract include a provision to reimburse ISS for a guarantee fee which ISS agreed to pay to him and his wife in recognition of the cost to them incurred by providing the security demanded by the surety as a condition of issuing the bonds. Eventually, the parties agreed upon a formula - proposed by OGS as a function of the contract price - to reimburse ISS for the guarantee fee. The formula provided that \$87.50 for every thousand dollars of contract value would be paid out over the course of the contract by adding a supplement of 9.52% to each bill paid to ISS. Based on the original agreed-upon contract amount, application of the formula resulted in up to \$402,000 in guarantee fees to be paid on top of the contract amount, resulting in a total contract price of \$4,626,630.

It was understood when the contract was executed, however, that the amount of tank remediation that would be necessary was only an estimate. Indeed, after ISS began work under the contract, the need for additional tank remediation work performed under the contract led to change orders which increased the total value of the contract to \$12.9 million, and ISS continued to charge OGS for the guarantee fee on the moneys due under the contract in excess of the original contract amount. In October 2000, after ISS had received \$1,114,626 in guarantee costs - \$712,626 over the \$402,000 due as a function of the original contract amount - OGS requested that ISS reimburse the guarantee fees paid over the \$402,000 "cap." Defendants refused, claiming that ISS was entitled to the additional guarantee fee based on the increased contract amount.¹

¹ In March 2001, the Office of the State Inspector General referred the matter to the United States Attorney's office for the Western District of New York (hereinafter USAO) for investigation. The USAO determined that, although Kamdar had never been required to post any personal assets as collateral for the bond, he billed and ultimately received \$1,114,626 in fraudulent guarantee costs from OGS. During the federal investigation, Kamdar fled the United States with his spouse and son and returned to India. Shortly thereafter, Kamdar's brother-

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504083

Plaintiff commenced the instant action in August 2004, alleging fraud, misappropriation of public property, unjust enrichment and breach of contract. Upon completion of discovery, defendants moved for summary judgment. Supreme Court (McNamara, J.) denied the motion and a nonjury trial ensued (Teresi, J.). In October 2007, the court granted judgment in favor of plaintiff in the amount of \$1,114,626 plus costs and interest. Defendants now appeal.

Initially, we agree with Supreme Court's denial of summary judgment to defendants on their breach of contract cause of action because a question of fact existed as to whether the contract contains a cap on the guarantee fee to be paid (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Dobco, Inc. v Facilities Dev. Corp., 263 AD2d 592, 593 [1999]). The guarantee cost provision, which immediately follows the unit price schedule total, simply states:

"Guarantee Cost \$87.50 x Contract Amt. = \$402,000
1,000

Note: To be paid as supplement to unit price
earned as 9.52%."

The stated total of \$402,000 could be construed as a maximum limit on the payment of such guarantee costs to defendants.

in-law sold Kamdar's home located in the Town of Clarence, Erie County, for more than \$352,229. In April 2003, the USAO commenced a forfeiture action for the proceeds of the home sale. Thereafter, the USAO and Kamdar executed a stipulation for resolution which provided that, in the event that Kamdar failed to appear within 180 days from the date that criminal charges were brought against him, a forfeiture order would result. A federal grand jury indicted Kamdar in June 2004 for various counts of mail fraud and money laundering in relation to his dealings with OGS. Despite attempts to reach a plea agreement, Kamdar failed to contact the USAO or appear before District Court to respond to the criminal charges leveled against him and, thereafter, in January 2005, an order of forfeiture was entered.

However, the fee is clearly set forth as a function of the "contract amount" and the contract does not expressly state whether the guarantee cost will continue to be paid if the contemplated "contract amount" were to be increased, as happened here, by subsequent change orders.² Thus, we find the contract to be ambiguous with respect to the issue of a cap on the guarantee fee and, thus, subject to interpretation through parol evidence of the parties' intent (see Stevens & Thompson Paper Co., Inc. v Niagara Mohawk Power Corp., 49 AD3d 1011, 1013 [2008]; Spiak v Zeglen, 255 AD2d 754, 757 [1998]). Given the conflicting evidence on whether a cap was intended by the parties, we conclude that Supreme Court properly denied defendants' summary judgment on this issue (see Encarnacion v State of New York, 49 AD3d 1038, 1039 [2008]).

Defendants' motion for summary judgment on the fraud cause of action was also properly denied. Defendants rely on the General Indemnity Agreement between ISS and its commercial surety company, which clearly states that the surety required only the personal indemnity of Kamdar and his wife; thus, defendants argue, plaintiff could not have justifiably relied on any material representation to the contrary. We find that sufficient evidence was submitted in opposition to support plaintiff's contention that Kamdar affirmatively represented that he and his wife suffered actual costs associated with providing personal collateral demanded by the surety to bond the project. Whether plaintiff's reliance on such statements was reasonable in light of the conflicting evidence posited by the General Indemnity Agreement, and the validity of defendants' assertions that these statements reflected a misunderstanding by Kamdar, rather than any intentional misrepresentations, presented factual questions that could not be resolved as a matter of law (see Reiser, Inc. v Roberts Real Estate, 292 AD2d 726, 728 [2002], lv denied 9 NY3d 804 [2007]; American Honda Fin. Corp. v Progressive Cas. Ins. Co., 290 AD2d 850, 852 [2002]; cf. Torrington Indus., Inc. v Southworth-Milton, Inc., 17 AD3d 894, 895-896 [2005]).

Turning to the trial evidence, however, we conclude – on

² The change orders make no mention of the guarantee fee.

the record before us – that plaintiff failed to prove any basis for liability against defendants. Although in a nonjury trial such as this we will accord considerable deference to the factual findings made by the trial court where "such findings are based largely upon credibility determinations" (Martin v State of New York, 39 AD3d 905, 907 [2007], lv denied 9 NY3d 804 [2007]; see Tatta v State of New York, 20 AD3d 825, 826 [2005], lv denied 5 NY3d 716 [2005]), much of the evidence relied upon by the parties herein consists of documentary and other nontestimonial evidence (see Wolf v Holyoke Mut. Ins. Co., 3 AD3d 660, 660 [2004] [deference is not warranted where determination was made upon submitted affidavits]). Further, where we find that a conclusion different from that of the nonjury factfinder would not have been unreasonable, we "weigh the probative force of the conflicting evidence and the relative strength of conflicting inferences that may be drawn therefrom, and then grant the judgment which upon the evidence should have been granted by the trial court" (Kandrach v State of New York, 188 AD2d 910, 912-913 [1992]; see Martin v State of New York, 39 AD3d at 907; Schieren v State of New York, 281 AD2d 828, 830 [2001]; State of New York v Massapequa Auto Salvage, 267 AD2d 679, 680-681 [1999], lv denied 95 NY2d 753 [2000]).

Turning first to plaintiff's fraud claim, we find it unsupported by this record. "A party alleging fraud in the inducement bears the burden of proving the elements thereof 'by clear and convincing evidence'" (Callahan v Miller, 194 AD2d 904, 905 [1993], quoting Chopp v Welbourne & Purdy Agency, 135 AD2d 958, 959 [1993]; see Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 349-350 [1999]; Tanzman v La Pietra, 8 AD3d 706, 707 [2004]; Mix v Neff, 99 AD2d 180, 183 [1984]). The elements of fraud require plaintiff to demonstrate that defendants knowingly misrepresented a material fact with the intent to deceive plaintiff and, after having justifiably relied upon such misrepresentation, plaintiff experienced pecuniary loss (see Young v Williams, 47 AD3d 1084, 1086 [2008]; Mann v Rusk, 14 AD3d 909, 910 [2005]).

Plaintiff asserts that OGS agreed to the guarantee fee based on Kamdar's misrepresentation that he and his wife were required by the surety to pledge their personal assets as collateral in order to obtain the necessary bonds. Plaintiff relies on correspondence between OGS and Kamdar exchanged during

negotiations over the guarantee fee in which, at times, Kamdar states that the surety demanded "collateral" from Kamdar and his wife, although it is clear that the surety never required Kamdar or his spouse to provide actual collateral of any kind. At one point OGS demanded that Kamdar provide verification from the surety that demonstrated Kamdar's actual costs to secure the bonds. In response, Kamdar presented copies of the invoices for the premium payments - which were already contemplated and subsumed within the contract price - and an invoice that had been created by Kamdar and his wife and submitted to ISS in March 1998 for \$434,765 of "collateral." When OGS informed Kamdar that providing collateral did not constitute "a reimbursable cost since the collateral will be returned when the contract is completed," Kamdar insisted that reimbursement was justified as an out-of-pocket expense to ISS, and submitted a copy of the minutes from an ISS shareholder meeting that took place between himself (as 91% owner of the company) and one other shareholder, in which ISS agreed to pay Kamdar and his wife a fee of \$87.50 per \$1,000 of the amount of the value of the work to be performed under the contract in exchange for their performance guarantee and pledge of their personal collateral.

Thus, clearly, some evidence exists that Kamdar represented that he and his wife were required to pledge collateral to back the surety. On the other hand, the record is replete with instances where communications between the parties suggest that OGS should have been aware that the expense for which Kamdar demanded reimbursement was not physical collateral, but the risk to which he and his wife, and their personal assets, were exposed as a result of the personal guarantee which they provided to the surety. The record evidence clearly establishes that the surety did require Kamdar and his wife to sign the indemnity agreement individually, as indemnitors, which would have permitted the surety to seek recourse against them personally should ISS default and the surety have to pay plaintiff under the performance bonds. Significantly, when plaintiff pressed Kamdar for a description of the collateral allegedly demanded by the surety, Kamdar responded by sending a copy of the surety's General Indemnity Agreement, which clearly required personal guarantees of the indemnitors, but no physical collateral. Kamdar included a note stating, "As you can see[,] the attached agreement is so broad that [the surety] will not limit themselves by giving a letter stating [the] amount of collateral[,] it's

based on my financial statement[;] they put this together with all my assets as collateral and any future assets that I acquire." This correspondence directs plaintiff to look to the General Indemnity Agreement for proof of the risk that Kamdar was undertaking and that agreement clearly contains a guarantee provision, but no requirement that Kamdar provide actual collateral. Kamdar's representations, when juxtaposed against his interpretation of the General Indemnity Agreement as evinced by this correspondence, suggest that he was using the word "collateral" interchangeably with the risk to his personal assets that stemmed from his personal guarantee.

Other statements made by Kamdar that plaintiff offers as affirmative misrepresentations that he was obligated to provide collateral to the surety could also be interpreted as mere inaccuracies made by Kamdar in attempting to describe the risk to himself and his wife which flowed from the surety's demand for their personal guarantee.³ While this evidence is sufficient to indicate that Kamdar misused the word "collateral," and perhaps even sufficient to demonstrate that such misuse was intentional, in our view, Kamdar's misrepresentations, taken as a whole and posited against all the information that plaintiff had before it when evaluating Kamdar's demand for the guarantee fee, are insufficient to establish fraud. Specifically, on the record

³ For example, Kamdar sent a letter to OGS official William O'Connor which stated that the "only way a company like mine can obtain a bond from the largest bonding company in the US, is directly due to the fact that I put up my life savings to secure it." This statement is consistent with the personal guarantee that he was required to give. The only evidence that Kamdar ever represented that he would have to post specific assets as security comes from the vague testimony of Jerry Lipfeld, an auditor with the Office of the State Comptroller, who testified at trial that Kamdar led him to believe that ISS could not attain the bonds without someone putting up collateral: "I remember something about his wife's jewels and there was other securities that I never saw." Lipfeld testified that the cost asserted by Kamdar was the fact that he would lose the opportunity to use those valuables as security in some other transaction.

before us, clear and convincing evidence does not exist that the alleged misrepresentations constituted a material fact which justifiably induced OGS to agree to the guarantee provision. With regard to the element of reliance, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he [or she] cannot claim justifiable reliance on [the] defendant's misrepresentations" (Tanzman v La Pietra, 8 AD3d at 707 [internal quotation marks and citation omitted]). Here, after OGS repeatedly demanded proof of collateral from Kamdar, Kamdar sent the General Indemnity Agreement – which included no collateral requirement – and reminded OGS that he had obtained the necessary bonds and that the nature of the collateral should not be its concern. It is also noteworthy that the contract between the parties refers to the fee as a "Guarantee" cost. Under these circumstances, with clear documentary evidence to the contrary and little evidence of any specific, affirmative representations by Kamdar that he had designated any particular assets as collateral, it simply cannot be said that OGS justifiably relied on the fact that the surety had demanded collateral when it agreed to the excessively generous guarantee provision (see Lusins v Cohen 49 AD3d 1015, 1017-1018 [2008]; Mann v Rusk, 14 AD3d at 910). Accordingly, the finding of fraud against defendants must be reversed (see Tanzman v La Pietra, 8 AD3d at 707-708; Shultis v Reichel-Shultis, 1 AD3d 876, 877-878 [2003]; Bibeau v Ward, 228 AD2d 943, 943-944 [1996], lv denied 89 NY2d 804 [1996]).

We hold, as well, that no breach of contract occurred. In asserting that the parties intended to impose a cap on the guarantee fee, plaintiff relies on a letter sent to Kamdar in April 1998 by OGS Contract Administration Director Robert Kainz which summarized the payment methodology of the guarantee cost and specifically stated that the guarantee cost "will not exceed \$402,000." This letter, however, was written prior to the change orders, and could thus be construed as a reflection of the maximum amount that could be imposed based on the contract amount at that time, but not an absolute cap should the contract price increase. Kainz also testified that it was his understanding that the fee would be capped at \$402,000, as did Martin DePoalo, an OGS employee in charge of the tank remediation projects.

However, this testimony must be viewed against OGS's actual conduct in its performance under the contract (see Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc., 14 AD3d 963, 965-966 [2005]; Matter of Big Tree Energy Partners v Bradford, 219 AD2d 27, 30-31 [1996], lv denied 88 NY2d 810 [1996]). First, OGS had rejected Kamdar's originally proposed lump sum amount of the cost of obtaining the bond and, instead, proposed a formula for calculating that amount as a function of the contract price. Given that ambiguities inherent in that formula "must be construed most strongly against plaintiff, the drafter" (Cone v Stranahan, 44 AD3d 1145, 1147 n 1 [2007]; see Agostinelli v Stein, 17 AD3d 982, 985 [2005], lv dismissed 5 NY3d 824 [2005]), we construe the formula as we would ordinarily construe a mathematical formula, i.e., as a function of its components. The conclusion that no cap was intended is also supported by OGS's course of performance during the contract in that OGS continued to pay the guarantee fee even when, due to the change orders, the amount almost tripled the fee amount derived from the original contract price (see Matter of Big Tree Energy Partners v Bradford, 219 AD2d at 30-31). Finally, John Lewyckyj - Director of Contract Administration for OGS - admitted, after reviewing the contract and the guarantee cost provision, that the contract contained no provision "that would have limited the fee" to the stated amount of \$402,000.

We have weighed this evidence and considered the undisputed fact that defendants fully performed under the contract at a cost which was nearly a million dollars less than the next lowest bidder, representing - once the contract amount was tripled by change orders - a savings to the taxpayers of approximately three million dollars. In sum, because in our view the evidence does not adequately support the conclusion that the parties intended to cap the guarantee fee, we hold that plaintiff has failed to prove that any breach of contract occurred.

In light of our conclusion that the contract provision at issue was enforceable, plaintiff's unjust enrichment claim must be dismissed as duplicative of the breach of contract cause of action (see Eagle Comtronics v Pico Prods., 256 AD2d 1202, 1202-1203 [1998] [the "existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment"], lv denied 688 NYS2d 372 [1999]; cf. Taylor & Jennings v Bellino Bros. Constr. Co., 106

-10-

504083

AD2d 779, 780 [1984] [recovery under equitable doctrine permitted after contract voided as induced by fraud]). Plaintiff's cause of action for misappropriation of public funds, premised as it is on breach of contract and fraud, must also be dismissed.

Given our disposition, we need not reach defendants' remaining contentions.

Lahtinen, Kane, Malone Jr. and Stein, JJ., concur.

ORDERED that the order and judgment is reversed, on the law, without costs, and complaint dismissed.

ENTER:

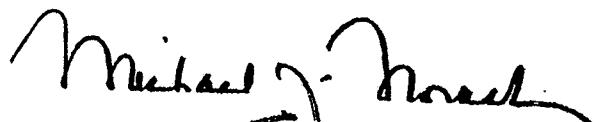

Michael J. Novack
Clerk of the Court

EXHIBIT B

00001

1 STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

2 -----

STATE OF NEW YORK,

3

4 Plaintiff,

5 - against - Index No.: L-00117-04

6

INDUSTRIAL SITE SERVICES INC. and

7 BHAVESH KAMDAR,

8

Defendants.

9 -----

10 STENOGRAPHIC MINUTES OF TELECONFERENCE

11 DEPOSITION conducted of Defendant, BHAVESH KAMDAR,

12 held pursuant to Notice on the 13th of July, 2006 at

13 EXPEDITE VIDEO CONFERENCING SERVICES, 292 Washington

14 Avenue Extension, Albany, New York, commencing at

15 12:15 p.m., before Diane Daly-Gage, a Shorthand

16 Reporter and Notary Public in and for the State of New

17 York.

18

19

20

21

22

23

24

00143

1 financial statements. They put this together with
2 all of my assets as collateral and any future assets
3 that I acquire. Please call for further questions."

4 Q Now, unfortunately, when I came across this document
5 I didn't have the attached agreement. Do you have
6 any recollection of what agreement was attached to
7 this fax?

8 A I don't have any recollection.

9 Q And when you said in here, amount of collateral,
10 what are you talking about?

11 A Amount of guarantee.

12 Q So when you said collateral, you meant guarantee; is
13 that your testimony?

14 A Yes.

15 (Plaintiff's Exhibit 29, Payment Requests, was
16 marked for identification.)

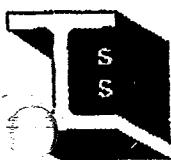
17 BY MR. LOMBARDO:

18 Q I'm showing you what's been marked for
19 identification purposes as Plaintiff's Exhibit 29.
20 Now, do you recall submitting or receiving 20
21 payments in connection with this contract?

22 A I submitted and received various payment. I don't
23 recall exactly number of payments.

24 Q Well, let me try this. On the answer to the

EXHIBIT C



CONFIDENTIAL

INDUSTRIAL SITE SERVICES INC.

187 PALMDALE DRIVE SUITE #6

WILLIAMSVILLE NY 14221

PHONE: (716) 998-3300

FAX (716) 634-7469

A MESSAGE FROM THE DESK OF BHAVESH H. KAMDAR

TO: Robert Raino

DATE: 4/29/98

COMPANY: ANYS OGS

TIME: 4:55

FAX: 518-486-1650

TOTAL PAGES THIS:

PHONE: 518-474-0201

RE: 04000-V

MESSAGE:

As you can see the attached agreement is so broad that AT&T will not limit them selves by giving a letter stating amount of collateral its based on my Financial Statement they put this together with all my assets as collateral and any future assets that I acquire.

Please call for further question

☺ HAVE A NICE DAY!!! ☺

CONFIDENTIAL

ENVIRONMENTAL CONTRACTING ♦ DEMOLITION/DISMANTLEMENT



AIG Environmental
A Division of American International Companies®

March 31, 1998

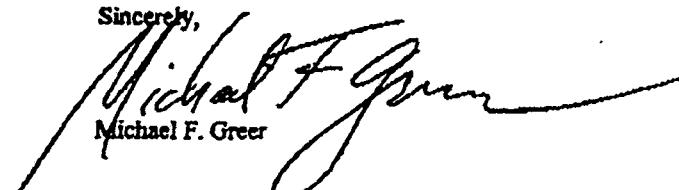
Mr. Bhavesh H. Kamdar
Mr. Thomas J. Carey
Industrial Site Services, Inc.
187 Palmdale Dr.
Suite #6
Williamsville, NY. 14221

Re: Terms of Surety Line

Gentlemen: This letter will outline the terms of our willingness to provide your company with surety credit. We have required the full corporate indemnity of Industrial Site Services and well as the full Personal indemnity of yourselves and your spouses. These indemnities are full and unconditional.

If you have any further questions, please let me know.

Sincerely,



Michael F. Greer

Michael F. Greer
Product Line Manager
ENVIRONMENTAL SURETY DEPARTMENT
1700 MARKET STREET 19th FLOOR
PHILADELPHIA, PA. 19103
(215) 255-6186 Phone (215) 255-6536 Fax

AIG Insurance Company
 American Fidelity Company
 American Home Assurance Company
 Granite State Insurance Company
 Illinois National Insurance Company
 The Insurance Company of the State of Pennsylvania
 National Union Fire Insurance Company of Pittsburgh, PA
 New Hampshire Insurance Company

Principal Bond Office
 70 Pine Street
 New York, NY 10270

GENERAL INDEMNITY AGREEMENT

THIS AGREEMENT of indemnity, made and entered into this 22 day of December, 1997, by Industrial Site Services, Inc. (hereinafter called the Contractor) and Industrial Site Services, Inc., Bhavesh H. Kamdar, Thomas J. Carey, Panna Kamdar, Jacqueline Carey (hereinafter called the Indemnitors, if any) and the member companies of the AMERICAN INTERNATIONAL GROUP OF COMPANIES (AIG Insurance Company, American Fidelity Company, American Home Assurance Company, Granite State Insurance Company, Illinois National Insurance Company, The Insurance Company of the State of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, Pa., New Hampshire Insurance Company), hereinafter individually and collectively referred to as "SURETY".

WITNESSETH:

WHEREAS, the Contractor, in the performance of contracts and the fulfillment of obligations generally, whether in its own name solely, or any one, combination of, or all of the indemnitors, or any present or future subsidiary, or a subsidiary of a subsidiary of the Contractor, whether alone or in joint venture with others not named herein and any corporation, partnership or person who may desire, or be required to give or procure certain surety bonds, undertakings or instruments of guarantee, and to renew, or continue or substitute the same from time to time; or new bonds, undertakings or instruments of guarantee with the same or different penalties, and/or conditions, may be desired or required, in renewal, continuation, extension or substitutions thereof; any one or more of which are hereinafter called Bonds; or the Contractor or Indemnitors may request the Surety to refrain from canceling said Bonds; and

WHEREAS, at the request of the Contractor and the Indemnitors and upon the express understanding that this Agreement of Indemnity should be given, the Surety has executed or procured to be executed, and may from time to time hereafter execute or procure to be executed, said Bonds on behalf of the Contractor; and

WHEREAS, the Indemnitors have a substantial, material and beneficial interest in the obtaining of the Bonds or in the Surety's refraining from canceling said Bonds.

NOW, THEREFORE, in consideration of the premises the Contractor and Indemnitors for themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, hereby covenant and agree with the Surety, its successors and assigns, as follows:

PREMIUMS

FIRST: The Contractor and Indemnitors will pay to the Surety in such manner as may be agreed upon all premiums and charges of the Surety for Bonds in accordance with its rate filings, its manual of rates, or as otherwise agreed upon, until the Contractor or Indemnitors shall serve evidence satisfactory to the Surety of its discharge or release from the Bonds and all liability by reason thereof.

INDEMNITY

SECOND: The Contractor and Indemnitors shall exonerate, indemnify, and keep indemnified the Surety from and against any and all liability for losses and/or expense of whatsoever kind or nature (including, but not limited to, interest, court costs and counsel fees) and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1) By reason of having executed or procured the execution of the Bonds, (2) By reason of the failure of the Contractor or Indemnitors to perform or comply with the covenants and conditions of this Agreement or (3) in enforcing any of the covenants and conditions of this Agreement. Payment by reason of the aforesaid causes shall be made to the Surety by the Contractor and Indemnitors as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor. Such payment shall be equal to the amount of the reserve set by the Surety. In the event of any payment by the Surety the Contractor and Indemnitors further agree that in any accounting between the Surety and the Contractor, or between the Surety and the Indemnitors, or either or both of them, the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters herein contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payments made by the Surety shall be *prima facie* evidence of the fact and amount of the liability to the Surety.

ASSIGNMENT

THIRD: The Contractor, the Indemnitors hereby consenting, will assign, transfer and set over, and does hereby assign, transfer and set over to the Surety, as collateral, to secure the obligations in any and all of the paragraphs of this Agreement and any other indebtedness and liabilities of the Contractor to the Surety, whether heretofore or hereafter incurred, the assignment in the case of each contract to become effective as of the date of the bond covering such contract, but only in the event of (1) any abandonment, forfeiture or breach of any contracts referred to in the Bonds or of any breach of any said Bonds; or (2) of any breach of the provisions of any of the paragraphs of this Agreement; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the Contractor for the benefit of creditors, or of the appointment, or of any application for the appointment, of a receiver or trustee for the Contractor whether insolvent or not; or (5) of any proceeding which deprives the Contractor of the use of any of the machinery, equipment, plant, tools, or material referred to in section (b) of this paragraph; or (6) of the Contractor's dying, absconding, disappearing, incompetency, being convicted of a felony, or imprisoned if the Contractor be an individual: (a) All the rights of the Contractor in, and growing in any manner out of, all contracts referred to in the Bonds, or in, or growing in any manner out of the Bonds; (b) All the rights, title and interest of the Contractor in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be, about or upon the site or sites of any and all of the contractual work referred to in the Bonds or elsewhere, including materials purchased for or chargeable to any and all contracts referred to in the bonds, materials which may be in process of construction, in storage elsewhere, or in transportation to any and all of said sites; (c) All the rights, title and interest of the Contractor in and to all subcontracts let or to be let in connection with any and all contracts referred to in the Bonds, and in and to all surety bonds supporting such subcontracts; (d) All actions, causes of actions, claims and demands whatsoever which the Contractor may have or acquire against any subcontractor, laborer or materialman, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with or on account of any and all contracts referred to in the Bonds; and against any surety or sureties of any subcontractor, laborer, or materialman; (e) Any and all percentages retained and any and all sums that may be due or hereafter become due on account of any and all contracts referred to in the Bonds and all other contracts whether bonded or not in which the Contractor has an interest.

TRUST FUND

FOURTH: If any of the Bonds are executed in connection with a contract which by its terms or by law prohibits the assignment of the contract monies, or any part thereof, the Contractor and Indemnitors covenant and agree that all payments received for or on account of said contract shall be held as a trust fund in which the Surety has an interest, for the payment of obligations incurred in the performance of the contract and for labor, materials, and services furnished in the prosecution of the work provided in said contract or any authorized extension or modification thereof; and, further, it is expressly understood and declared that all monies due and to become due under any contract or contracts covered by the Bonds are trust funds, whether in the possession of the Contractor or Indemnitors or otherwise, for the benefit of and for payment of all such obligations in connection with any such contract or contracts for which the Surety would be liable under any of said Bonds, which said trust also inures to the benefit of the Surety for any liability or loss it may have or sustain under any said Bonds, and this Agreement and declaration shall also constitute notice of such trust.

UNIFORM COMMERCIAL CODE

FIFTH: That this Agreement shall constitute a Security Agreement to the Surety and also a Financing Statement, both in accordance with the provisions of the Uniform Commercial Code of every jurisdiction wherein such Code is in effect and may be so used by the Surety without in any way abrogating, restricting or limiting the rights of the Surety under this Agreement or under law, or in equity.

TAKEOVER

SIXTH: In the event of any breach, delay or default asserted by the obligee in any said Bonds, or the Contractor has suspended or ceased work on any contract or contracts covered by any said Bonds, or failed to pay obligations incurred in connection therewith, or in the event of the death, disappearance, Contractor's conviction of a felony, imprisonment, incompetency, insolvency, or bankruptcy of the Contractor, or the appointment of a receiver or trustee for the Contractor, or the property of the Contractor, or in the event of a assignment for the benefit of creditors of the Contractor, or if any action is taken by or against the Contractor under or by virtue of the National Bankruptcy Act, or should reorganization or arrangement proceedings be filed by or against the Contractor under said Act, or if any action is taken by or against the Contractor under the insolvency laws of any state, possession, or territory of the United States the Surety shall have the right, at its option and in its sole discretion and is hereby authorized, with or without exercising any other right or option conferred upon it by law or in the terms of this Agreement, to take possession of any part or all of the work under any contract or contracts covered by any said Bonds, and at the expense of the Contractor and Indemnitors to complete or arrange for the completion of the same, and the Contractor and Indemnitors shall promptly upon demand pay to the Surety all losses, and expenses so incurred.

CHANGES

SEVENTH: The Surety is authorized and empowered, without notice to or knowledge of the Indemnitors to assent to any change whatsoever in the Bonds, and/or any contracts referred to in the Bonds, and/or in the general conditions, plans and/or specifications accompanying said contracts, including, but not limited to, any change in the time for the completion of said contracts and to payments or advances thereunder before the same may be due, and to assent to or take any assignment or assignments, to execute or consent to the execution of any continuations, extensions or renewals of the Bonds and to execute any substitute or substitutes therefore, with the same or different conditions, provisions and obligees and with the same or larger or smaller penalties, it being expressly understood and agreed that the Indemnitors shall remain bound under the terms of this Agreement even though any such assent by the Surety does or might substantially increase the liability of said Indemnitors.

ADVANCES

EIGHTH: The Surety is authorized and empowered to guarantee loans, to advance or lend to the Contractor any money, which the Surety may see fit, for the purpose of any contracts referred to in, or guaranteed by the Bonds; and all money expended in the completion of any such contracts by the Surety, or lent or advanced from time to time to the Contractor, or guaranteed by the Surety for the purposes of any such contracts, and all costs, and expenses incurred by the Surety in relation thereto, unless repaid with legal interest by the Contractor to the Surety when due, shall be presumed to be a loss by the Surety for which the Contractor and the Indemnitors shall be responsible, notwithstanding that said money or any part thereof should not be so used by the Contractor.

BOOKS AND RECORDS

NINTH: At any time, and until such time as the liability of the Surety under any and all said Bonds is terminated, the Surety shall have the right to reasonable access to the books, records, and accounts of the Contractor and Indemnitors; and any bank depository, materialman, supply house, or other person, firm, or corporation when requested by the Surety is hereby authorized to furnish the Surety any information requested including, but not limited to, the status of the work under contracts being performed by the Contractor, the condition of the performance of such contracts and payments of accounts.

DECLINE EXECUTION

TENTH: Unless otherwise specifically agreed in writing, the Surety may decline to execute any Bond and the Contractor and Indemnitors agree to make no claim to the contrary in consideration of the Surety's receiving this Agreement; and if the Surety shall execute a Bid or Proposal Bond, it shall have the right to decline to execute any and all of the bonds that may be required in connection with any award that may be made under the proposal for which the Bid or Proposal Bond is given and such declination shall not diminish or alter the liability that may arise by reason of having executed the Bid or Proposal Bond.

NOTICE OF EXECUTION

ELEVENTH: The Indemnitors hereby waive notice of the execution of said Bonds and of the acceptance of this Agreement, and the Contractor and the Indemnitors hereby waive all notice of any default, or any other act or acts giving rise to any claim under said Bonds, as well as notice of any and all liability of the Surety under said Bonds, and any and all liability on their part hereunder, to the end and effect that, the Contractor and the Indemnitors shall be and continue liable hereunder, notwithstanding any notice of any kind to which they might have been or be entitled, and notwithstanding any defenses they might have been entitled to make.

HOMESTEAD

TWELFTH: The Contractor and the Indemnitors hereby waive, so far as their respective obligations under this Agreement are concerned, all rights to claim any of their property, including their respective homesteads, as exempt from levy, execution, sale or other legal process under the laws of any State, Territory, or Possession.

SETTLEMENTS

THIRTEENTH: The Surety shall have the right to adjust, settle or compromise any claim, demand, suit or judgment upon the Bonds, unless the Contractor and the Indemnitors shall request the Surety to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Surety, at the time of such request, cash or collateral satisfactory to the Surety in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs, expenses and attorney's fees, including those of the Surety.

SURETIES

FOURTEENTH: In the event the Surety procures the execution of the Bonds by other sureties, or executes the Bonds with co-sureties, or reinsures any portion of said Bonds with reinsuring sureties, then all the terms and conditions of this Agreement shall inure to the benefit of such other sureties, co-sureties and reinsuring sureties, as their interest may appear.

SUITS

FIFTEENTH: Separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising.

OTHER INDEMNITY

SIXTEENTH: That the Contractor and the Indemnitors shall continue to remain bound under the terms of this Agreement even though the Surety may have from time to time heretofore or hereafter, with or without notice to or knowledge of the Contractor and the Indemnitors, accepted or released other agreements of indemnity or collateral in connection with the execution or procurement of said Bonds, from the Contractor or Indemnitors or others, it being expressly understood and agreed by the Contractor and the Indemnitors that any and all other rights which the Surety may have or acquire against the Contractor and the Indemnitors and/or others under any such other or additional agreements of indemnity or collateral shall be in addition to, and not in lieu of, the rights afforded the Surety under this Agreement.

SEVENTEENTH: In case any of the parties mentioned in this Agreement fail to execute the same, or in case the execution hereof by any of the parties be defective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the validity of this Agreement or the liability hereunder of any of the parties executing the same, but each and every party so executing shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect or invalidity had not existed. It is understood and agreed by the Contractor and Indemnitors that the rights, powers, and remedies given the Surety under this Agreement shall be and are in addition to, and not in lieu of, any and all other rights, powers, and remedies which the Surety may have or acquire against the Contractor and Indemnitors or others whether by the terms of any other agreement or by operation of law or otherwise.

ATTORNEY IN FACT

EIGHTEENTH: The Contractor and Indemnitors hereby irrevocably nominate, constitute, appoint and designate the Surety as their attorney-in-fact with the right, but not the obligation, to exercise all of the rights of the Contractor and Indemnitors assigned, transferred and set over to the Surety in this Agreement, including, but not limited to, the power to endorse in the name of the Contractor and Indemnitors and thereby to collect any check, draft, warrant or other instrument made or issued in payment of any moneys due on any contract in which the Contractor has an interest and to disburse the proceeds thereof, and in the name of the Contractor and Indemnitors to make, execute, and deliver any and all additional or other assignments, documents or papers deemed necessary and proper by the Surety in order to give full effect not only to the intent and meaning of the within assignments but also to the full protection intended to be herein given to the Surety under all other provisions of the Agreement. The Contractor and Indemnitors hereby ratify and confirm all acts and actions taken and done by the Surety as such attorney-in-fact.

TERMINATION

NINETEENTH: This Agreement may be terminated by the Contractor or Indemnitors upon twenty day's written notice sent by registered mail to the Surety at its home office at 70 Pine Street, New York, New York, 10270, but any such notice of termination shall not operate to modify, bar, or discharge the Contractor or the Indemnitors as to the Bonds that may have been theretofore executed.

TWENTIETH: This Agreement may not be changed or modified orally. No change or modification shall be effective unless made by written endorsement executed to form a part hereof.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the day and year first above written.

Industrial Site Services, Inc.

Attest:

Thomas J. Careg, Vice President

By:

Bhavesh H. Kamdar, President

By: P.B. Kamdar
Panna Kamdar (Individually)

By: B.H. Kamdar
Bhavesh H. Kamdar (Individually)

By: Jacqueline Carey
Jacqueline Carey (Individually)

By: T.J. Carey
Thomas J. Carey (Individually)

Each signature affixed to this agreement must be acknowledged by a notary public. Attach certified copy of Resolution authorizing execution of this instrument by a corporation. Form B-103 may be used.

STATE OF _____
COUNTY OF _____

On this ____ day of _____ 199____, before me personally appeared Bhavesh H. Kamdar, to me known to be the President of the corporation executing the above instrument, and acknowledged said instruments to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned and on oath stated that the seal affixed is the seal of said corporation and that said instrument was executed by order of the Board of Directors of said corporation.

Notary Public
Commission Expires _____

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____
COUNTY OF _____

On this ____ day of _____ 199____ before me personally appeared Bhavesh H. and Panna Kamdar, to me known and known to me to be the individual(s) described in and who executed the foregoing agreement and acknowledged that the execution of the same was for the purposes, considerations and uses therein set forth as a free and voluntary act and deed.

Notary Public
Commission Expires _____

STATE OF _____
COUNTY OF _____

On this ____ day of _____ 199____, before me personally appeared Thomas J. and Jacqueline Carey, to me known and known to me to be the individual(s) described in and who executed the foregoing agreement and acknowledged that the execution of the same was for the purposes, considerations and uses therein set forth as a free and voluntary act and deed.

Notary Public
Commission Expires _____

At a _____ meeting of the Board of Directors of Industrial Site Services, Inc.
(Regular or Special)

(hereinafter called "Corporation"), duly called and held on the _____ day of _____, 19_____, a quorum being present, the following Preamble and Resolution were adopted:

"WHEREAS, this Corporation is materially interested through ownership or other interest in transactions pertaining to the general conduct of its business, including but not limited to various contracts or agreements in connection with which Industrial Site Services, Inc. or any present or future affiliate, subsidiary or any affiliate or subsidiary of either an affiliate or subsidiary, of Industrial Site Services, Inc., whether alone or in joint venture with others not named herein (and/or any other corporation, partnership or person upon written request of the corporation) has applied or will apply to any of the American International Companies (hereinafter called Surety), for certain bonds or undertakings of whatever kind or nature; and

"WHEREAS, the Surety is willing to execute such bonds or undertakings as Surety upon the written Indemnity of this Corporation and/or written subordination of moneys owed to this Corporation"

"RESOLVED, that

Bhavesh H. Kamdar

President

THAT THE said officers be and they are hereby authorized and empowered, at any time prior or subsequent to the execution by said Surety of any such bonds or undertakings, to execute any and all indemnity agreements and amendments thereto or subordination agreements or agreements; and to execute any other or further agreements relating to any such bonds or undertakings or to any collateral that may have been deposited with the Surety in connection therewith; and to take any and all other actions that may be requested or required by the Surety; and that any and all actions previously taken by the said officers of the kind and nature above described be and they are hereby ratified and accepted."

I, Thomas J. Carey, Vice President of Industrial Site Services, Inc. compared the foregoing preamble and resolution with the original thereof, as recorded in the Minute Book of said Corporation, and do certify that the same are correct and true transcripts therefrom, and of the whole of said original preambles and resolutions, which may have been amended, and are still in full force and effect.

Given under my hand and the seal of the Corporation, in the City of _____ State of _____

this _____ day of _____, 19_____.

Affix Seal

Secretary

EXHIBIT D

STATE OF NEW YORK,

Plaintiff,
-against- INDEX NO.
L-00117-04

INDUSTRIAL SITE SERVICES, INC., and
BHAVESH KAMDAR,
Defendants.

NON-JURY TRIAL

B E F O R E: HON. JOSEPH C. TERESI,
Supreme Court Justice

APPEARANCES:

For the Plaintiff: HON. ANDREW CUOMO,
NYS Attorney General
The Capitol
Albany, NY 12224
BY: ROGER BANAN, ESQ.,
and BONNIE RIGGI, ESQ.,
Assistant Attorneys General.

For the Defendants: HODGSON RUSS, LLP
One M & T Plaza, Suite 2000
Buffalo, NY 14202
BY: JOSEPH SEDITA, ESQ., and
MICHELLE MEROLA KANE, ESQ.

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter

held at the Albany County Courthouse, Albany, New York on
Monday, July 29th, 2007 commencing at 9:05 a.m.

1 (Mr. Kainz - Cross by Mr. Sedita) 69

2 A Correct.

3 Q All right. And that is your understanding
4 today. Is it not? That it was not an out-of-pocket cost
5 to BK and Panna Kamdar. Correct?

6 A Correct.

7 Q In fact, you understood, did you not, that the
8 cost was a cost of ISS, which would be paid by the company
9 to BK and pad dare Kamdar. Correct?

10 A Correct.

11 Q And you understood that BK owned the
12 corporation or owned substantially all of it. He was the
13 91 percent shareholder. Correct?

14 A Correct.

15 Q Correct?

16 A Yes, sir.

17 Q And so that when your organization signed this
18 contract to pay that \$402,000.00 to ISS, it understood
19 perfectly well that ISS would then pay that amount to BK
20 and Panna Kamdar for guaranteeing this cost. Correct?

21 A Yes, sir.

22 Q All right. And in point of fact, before you
23 signed this and before you agreed to sign this contract you
24 wanted to see something from AIG relating to pledges of
25 collateral. Relating to guarantees and indemnities.

1 (Mr. Kainz - Cross by Mr. Sedita) 72

2 that.

3 Q You thought that Exhibit 10 was that. And
4 Exhibit 10 you have Bhavesh Kamdar saying that the
5 agreement is so broad that AIG will not limit themselves by
6 giving a letter stating amount of collateral?

7 A Correct.

8 Q And then what you really had right in front of
9 you from AIG was a letter saying, a letter to Kamdar and
10 Carey saying that they require an absolute guarantee.

11 Correct?

12 A Is that one of the exhibits?

13 Q Yes. You have the exhibit in front of you.

14 March 31st, 1998. It's Exhibit 10.

15 A I'm sorry.

16 Q The next item in Exhibit 10. Not a word of
17 collateral in there is there?

18 A No, sir.

19 Q And then you have the general indemnity
20 agreement itself sent to you by Bhavesh Kamdar. Correct?

21 A Correct.

22 Q Is it fair to say that that document makes no
23 reference to collateral being posted by the guarantors, the
24 individual guarantors. The Careys and the Kamdars?

25 A Yes, sir.

1 (Mr. Kainz - Cross by Mr. Sedita) 73

2 Q The only collateral reference in the indemnity
3 agreement Mr. Kamdar sent to you is the collateral being
4 posted by the corporation. Correct? ISS?

5 A Correct.

6 Q And basically the corporation puts up
7 everything its got for its collateral. Correct?

8 A Yes, sir.

9 Q And you know who owned the corporation.
10 Correct?

11 A Yes, sir.

12 Q BK Kamdar. Correct?

13 A Yes, sir.

14 Q Was that why you were satisfied to go forward
15 with the agreement when you had received this information
16 from Mr. Kamdar?

17 A I believe so.

18 Q Specifically because the corporation pledged
19 its collateral. Right?

20 A Yes, sir.

21 Q And BK owned the corporation. Right?

22 A Yes, sir.

23 Q And so far as you know Mr. BK Kamdar never
24 told you a mistruth in all of his discussions. Is that
25 correct?

1 (Mr. Kainz - Cross by Mr. Sedita) 84

2 Q And they accordingly charged the company.

3 Right?

4 A Yes, sir.

5 Q And the company accordingly paid them the
6 guarantee fee. Correct?

7 A Correct.

8 Q And the company then continued to bill the
9 State. Correct?

10 A Correct.

11 Q What do they call these? These documents they
12 send in to get paid?

13 A Payment application.

14 Q Payment application. Right?

15 A Yes.

16 Q Those payment applications, before they are
17 acted on by your outfit, the contract administration outfit
18 that you were the director of, they have to be approved
19 first. Don't they?

20 A Yes.

21 Q By the guy on site?

22 A Yes, sir.

23 Q That would be the EIC?

24 A Yes, sir.

25 Q So when they come in do they specify every

1 (Mr. Kainz - Cross by Mr. Sedita) 85

2 category?

3 A I'm sorry. I couldn't hear you.

4 Q The categories of work they are asking --

5 A Yes.

6 Q And the quantity of units. Right?

7 A Yes.

8 Q And every single one of those that came in

9 from ISS as clear as day said here is the amount 9.52

10 percent against this tranche of work we are going to charge

11 the State. Right?

12 A Yes, sir.

13 Q Nothing hidden there. Was there?

14 A No, sir.

15 Q Everyone of those was reviewed by a State

16 officer. Correct?

17 A Yes, sir.

18 Q That is Mr. Lewyckyj's department?

19 A Yes.

20 Q And he supervised Ms. Garrison, who is right

21 on top of that. Right?

22 A Yes.

23 Q Good people?

24 A Good people.

25 Q Thorough?

1 (Mr. Kainz - Cross by Mr. Sedita) 86

2 A Yep.

3 Q Read these things when they come in?

4 A Yes.

5 Q So the money then was paid in the same way on
6 the new work. Correct?

7 A Yes, sir.

8 Q And when it came in with these payment
9 requests wasn't that unit for bond guarantee costs, wasn't
10 it billed just the way it was supposed to be billed if it
11 was going to be billed?

12 A It was billed the way it was written on the
13 contract.

14 Q And when BK and his company sent these amounts
15 in for billing, not only did they tell you what they wanted
16 to be paid, but they also told you how much they had been
17 paid in that category to date. Right?

18 A I believe so.

19 Q So they were bending over backwards for there
20 to be no surprises to the State here. Correct?

21 A Yes, sir.

22 Q And you are aware that now Marty DePoalo was
23 in disagreement with continuing to pay that amount.
24 Right?

25 A Yes, sir.

1 (Mr. Kainz - Cross by Mr. Sedita) 88

2 Q That they had been aware of the fact?

3 A Yes.

4 Q What is your explanation for never having seen
5 DePoalo's e-mail?

6 A I cannot give you any explanation. I just
7 don't remember receiving it.

8 Q And if Lewyckyj and Garrison had heard about
9 this you don't know to this day?

10 A I don't know for sure.

11 Q Or what they may have done?

12 A I just don't remember.

13 Q But you are aware of this. The contract on
14 its face contains, the original contract, the 4.6 million
15 dollar contract contains no cap on guarantee fees as
16 written?

17 A As written? No.

18 Q It doesn't contain a cap?

19 A Not as I look at it now.

20 Q And in point of fact, by the time -- let me
21 go back. You are the one who okayed this contract or
22 recommended actually having it signed?

23 A Yes.

24 Q And it was actually signed by Mr. O'Connor.

25 Correct?

1 (Mr. Kainz - Cross by Mr. Sedita) 89

2 A Yes, sir.

3 Q He was the deputy commissioner?

4 A Yes, sir.

5 Q But he did that on your recommendation.

6 Correct?

7 A Yes, sir.

8 Q And when you made that recommendation your
9 understanding with respect to the issue of collateral was
10 simply that the corporation had pledged its collateral and
11 BK owned the corporation. Right?

12 A Yes, sir.

13 Q Now back in 2000 that is when you had the
14 conversation with Pasquarella. Right?

15 A Yes, sir.

16 Q The DePoalo letter came to you much earlier
17 than that now that you see it?

18 A '99.

19 Q In 1999 when it was only 130 thousand above
20 402. Right?

21 A Yes, sir.

22 Q Pasquarella comes in 2000. Well into 2000?

23 A Yes, sir.

24 Q Do you recall having another proceeding,
25 because Mr. Kamdar and ISS were not acceding to the demand

EXHIBIT E

00001

1

2 EBT of ROBERT KAINZ

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4 STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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6 STATE OF NEW YORK,

7 Plaintiff,

8

9 -against- Index No.
L-00117-04

10 INDUSTRIAL SITE SERVICES, INC., and
BHAVESH KAMDAR,

11 Defendants.

12

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14 EXAMINATION BEFORE TRIAL

15 of the Plaintiff, STATE OF NEW YORK, by and
16 through its representative ROBERT KAINZ, held
17 on November 15, 2006, commencing at
18 a.m., at the offices of Hodgson Russ, LLP, 677
19 Broadway, Albany, New York, pursuant to
20 notice, before Susan Florio, Registered
21 Professional Reporter and Notary Public in and
22 for the State of New York.

23

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2 understanding that this in No. 3 and No. 4 and
3 No. 5, each one of them has a guarantee fees
4 item, right?

5 A. Yes, it does.

6 Q. Is it your understanding that that's the way
7 the guarantee fees referenced in Defendants'
8 Exhibit 1 were to have been charged against
9 each submission for payment?

10 A. They would have to have been listed and then
11 carried over onto the back --

12 Q. Yes.

13 A. -- to coincide with the percentage.

14 Q. Okay. And isn't that what these things are
15 doing?

16 A. I believe so.

17 Q. Okay. So that this is basically the sort of
18 billing that would have been anticipated at
19 least with respect to ISS submitting periodic
20 payments that included a portion of the
21 guarantee fees, correct?

22 A. Correct.

23 Q. Now, what, if anything, did you anticipate
24 would happen with respect to the guarantee

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2 fees after the original chunk of work totaling

3 \$4.6 million was finished?

4 A. My understanding was that that fee was capped

5 at the \$402,000.

6 Q. Is there anything in the contractual documents

7 that you are aware of that caps it at

8 \$402,000?

9 A. I don't believe there is.

10 Q. And there's a bar and merger clause, you are

11 familiar with that, aren't you?

12 A. No.

13 Q. You are familiar with the contractual

14 documents that are typically employed by your

15 unit in GSA, correct?

16 A. Yes, sir.

17 Q. We've already gone through the fact that the

18 project manual is part of the contract, right?

19 A. Yes, sir.

20 Q. Now, would you go to that which has been

21 marked 2 for identification? And the first

22 portion of it on the third page of this

23 abbreviated document is Article 1. It defines

24 the contract documents, correct?

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2 A. I can't say specifically. I would have
3 consulted with our counsel's office on how to
4 put --

5 Q. Wouldn't be much point having a lawyer there
6 if you didn't ask his opinion?

7 A. Yes, sir, would not.

8 Q. So, in any event, this went up to the group
9 design and construction group fellow, what's
10 his name again?

11 A. Mr. O'Connor.

12 Q. Mr. O'Connor. With the approval of your
13 group, correct?

14 A. Yes, sir.

15 Q. And then O'Connor signed it?

16 A. Yes, sir.

17 Q. Now, you had testified that you thought that
18 perhaps the 9.52 percent guarantee cost would
19 end with additional work that was assigned
20 under the general unit price schedule,
21 correct?

22 A. Yes.

23 Q. Why would you expect that to happen in light
24 of what's in the contract itself?

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2 A. Because we had documentation from Kamdar which
3 showed the cost that was -- he incurred, him
4 and his wife incurred.

5 Q. Well, you testified there was no cost they
6 incurred, it was a risk charge.

7 A. The risk charge. And we wanted to cap that at
8 402,000.

9 Q. But clearly this contract doesn't cap that,
10 does it?

11 A. As I see it now, correct.

12 MR. REDDING: Objection. I'll
13 object to the form.

14 MR. SEDITA: Repeat the answer.

15 The objection is noted on the record.

16

17 (Answer read.)

18

19 Q. As I see it now?

20 A. Yes, sir.

21 Q. It doesn't cap it?

22 A. No, sir.

23 Q. As point of fact as the scope of the contract
24 increased, as new sites were added and

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2 MR. SEDITA: Well, let me put
3 it again.

4 MR. REDDING: He's given his
5 answer.

6 MR. SEDITA: Let me be very,
7 very clear about this.

8 MR. REDDING: Answers.

9 Q. Do you know of any false statements Bhavesh
10 Kamdar or anybody acting for him or for ISS
11 made either to keep or to continue to get
12 payments of guarantee fees over \$402,000?

13 A. I don't know.

14 Q. You are unaware of any such?

15 A. I --

16 Q. I mean, that's --

17 MR. REDDING: I'll object
18 again. You are putting words in his
19 mouth. You can ask him. That's not
20 what he said. Ask him the question
21 again.

22

23 (Record read.)

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2 Q. When you said, "I don't know," what did you
3 mean in response to that question?

4 A. That I don't recall.

5 Q. Any such false statements?

6 A. Yes.

7 Q. Is that correct you don't recall any false
8 statements?

9 A. I don't recall any statements.

10 Q. False or true, correct?

11 A. When would they have been made to me or to
12 anybody?

13 Q. Well, at any time in terms of the
14 contemplation of the question.

15 A. I do not remember any.

16 Q. Any false statements?

17 A. Any statements.

18 Q. Any statements made to continue to get those
19 payments?

20 A. Yes, sir.

21 Q. Or to be able to keep those payments, correct?

22 You have to answer.

23 MR. REDDING: I'll object to
24 the form again.

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2 jury?

3 A. Yes, sir.

4 Q. How long was your appearance before the grand

5 jury?

6 A. I really can't remember.

7 Q. Were you questioned by any other

8 representatives of federal law enforcement

9 relating to this matter?

10 A. No, sir.

11 Q. Just Mr. Bruce?

12 A. Yes, sir.

13 Q. Just on two occasions?

14 A. Well, I -- yes.

15 Q. Once in his office?

16 A. Yes.

17 Q. And once at the grand jury?

18 A. Yes, sir.

19 Q. Did you tell Mr. Bruce anything other and

20 different about the relationships with Mr.

21 Kamdar than what you have said here?

22 A. In what?

23 Q. With respect to the construction of the

24 contract, with respect to your recollection of

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2 any allegedly false statements having been
3 made by Mr. Kamdar or somebody on his behalf,
4 with respect to all of those issues?

5 A. I don't recall any. Would you ask me the
6 question again?

7 Q. Do you recall telling Mr. Bruce or the grand
8 jury anything different than what you've told
9 us here about these relationships and
10 interactions with Kamdar and ISS?

11 A. I don't think there's anything any different.
12 Again, that was four years ago, four and a
13 half years ago.

14 Q. Did anyone else from your unit or the OGS
15 accompany you when you spoke to Mr. Bruce?

16 A. No, sir.

17 Q. It was simply you?

18 A. Yes, sir.

19 Q. Do you know of other people in your unit who
20 were interviewed by Mr. Bruce?

21 A. I believe -- in my contract administration
22 unit?

23 Q. Yes.

24 A. Yes.

EXHIBIT F

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1 STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
2 * * * * *
STATE OF NEW YORK,)
3 Plaintiff,)
4)
- against-)
5)
INDUSTRIAL SITE SERVICES,)
6 INC. and BHAVESH KAMDAR,)
Defendants.)
7 * * * * *

EXAMINATION BEFORE TRIAL OF STATE OF NEW
8 YORK, the Plaintiff, by and through its representative,
JOHN D. LEWYCKYJ, conducted pursuant to Notice at the
9 law offices of HODGSON-RUSS, 677 Broadway, Albany, New

10 York, on December 22, 2006, commencing at approximately

11 9:50 a.m. before Lynne Billington, a Shorthand Reporter

12 and Notary Public in and for the State of New York.

13 A P P E A R A N C E S:

14 FOR THE PLAINTIFF:

15 OFFICE OF THE ATTORNEY GENERAL

16 The Capitol

17 Albany, NY 12224

18 By: Earl T. Redding, Esq.

19 FOR THE DEFENDANT:

20 HODGSON-RUSS

21 One M&T Plaza, Suite 2000

22 Buffalo, NY 14203

23 By: Michelle Merola, Esq.

00048

1 contract, did you see it in this final form that sits

2 before you today, or did you see it in a draft form

3 that was still being negotiated, if you recall?

4 A I don't recall.

5 Q Okay.

6 Generally, do you recall where in the process

7 you would see a contract like this, whether it would be

8 in a draft form because it's still being negotiated, or

9 whether it would -- would it cross your desk when it's

10 in final form signed by all the parties?

11 A At this time? For this particular contract?

12 Q Well, you just told me for this particular

13 contract you didn't know. I'm asking you now generally

14 if you -- what your practice would have been, if you

15 know.

16 A It would be in final form.

17 Q Okay. Thank you.

18 Now, I still want you to look at that last

19 page where the guarantee cost is. Can you show me,

20 looking at that contract, where it indicates that that

21 9.52 percent calculation caps out at any particular

22 figure? In other words, is there a not to exceed on

23 that item?

00049

1 A No.

2 Q And not to exceed, can you explain what that
3 means? Is it a cap on the figure?

4 A The term "not to exceed" --

5 Q Yes.

6 A -- could represent not to exceed the value of
7 whatever the value is associated with it until further
8 review and/or subsequent modification or change to
9 that.

10 Q Despite the contract, was it at all your
11 understanding that there was a not to exceed on that
12 item?

13 A I don't recall.

14 Q Is it unusual to see a not to exceed in a
15 unit price contract?

16 A Can you ask that one more time, please?

17 Q Is it unusual to see an NTE in a unit price
18 schedule?

19 A I'm not sure I understand the question.

20 Q You're familiar with unit price schedules?

21 A Yes.

22 Q You're familiar with not to exceed items?

23 A Yes.

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1 Q Are they generally expressed? Does it say in
2 the contract, this item is not to exceed X dollars?

3 A That's how it would be expressed.

4 Q Okay.

5 In unit price schedules, do you frequently
6 see items that are listed as not to exceed?

7 A No.

8 Q Also, still with reference to this last page
9 in the guarantee cost, where, if at all, does it say
10 anything about collateral being supplied by Mr. Kamdar?

11 A There's no reference to collateral on this
12 page.

13 Q Was it your understanding that Mr. Kamdar
14 provided some type of collateral for the performance
15 bond?

16 A I don't recall.

17 Q Does your unit require documentation to
18 substantiate the performance and labor bond costs?

19 A Based upon the information that I have before
20 me, I'm not sure without reviewing the specific
21 reference to it in the project manual under that item
22 number what the specific requirement would be.

23 Q Are you saying there are times you enter into

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1 A My interpretation was based on the language
2 in the agreement that the 9.25 [sic] is based on the
3 contract amount earned.

4 Q And there was no cap?

5 A Didn't indicate a not to exceed on the unit
6 price agreement.

7 Q And who did you report that to?

8 A I don't specifically recall.

9 Q Were you ever aware of the guarantee fees
10 being discontinued?

11 A Yes.

12 Q Do you recall when that was?

13 A No, I do not.

14 Q Do you recall who directed that the guarantee
15 fees be discontinued?

16 A I don't recall.

17 Q Did you then ask Miss Garrison or someone
18 within the unit to effect that change?

19 A I don't recall.

20 Q Do you recall whether or not the guarantee
21 fees were then reinstated at some point?

22 A I have no recollection of that.

23 Q To your knowledge, did Mr. Kamdar ever make

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1 any oral or written representations to induce you or
2 someone within your unit to continue making the
3 guarantee fee payments?

4 A I don't recall.

5 Q You don't recall him making any written or
6 oral representations?

7 A To me or my unit specific to your question.

8 Q At some point, were you contacted by New
9 York's inspector general's office regarding this
10 matter?

11 A The New York State Inspector General's
12 Office?

13 Q Yes.

14 A I believe so, yes.

15 Q Do you recall who contacted you?

16 A No, I do not.

17 Q Does the name Mike Pasquarella mean anything
18 to you?

19 A Yes.

20 Q Do you think Mr. Pasquarella contacted you?

21 A He may have, yes.

22 Q Do you recall when that was, approximately?

23 A No, I do not.

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1 A I believe we did, yes.

2 Q What did you discuss in his office that you
3 recall?

4 A I believe the orientation to what would be
5 required of me as a witness, and sort of the ground
6 rules that went along with it; and there would be
7 references to questions specific to the contract and my
8 knowledge of the contract.

9 Q Do you remember there being questions about
10 the guarantee fees?

11 A In that discussion?

12 Q Yes. In his office.

13 A I don't recall.

14 Q Do you recall how long you were in the grand
15 jury, approximately?

16 A I have no time recollection how long it was.

17 Q That's fine.

18 When you spoke with Mr. Bruce in advance of
19 grand jury, did you tell him anything that differs from
20 your recollection of the events as you've relayed them
21 today?

22 A I'm not sure I understand that question.

23 Q Simplify it. Did you tell Mr. Bruce anything

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1 different about these events than you've told us here
2 today? And the reason for that being that you've had
3 more time to think about it or you've refreshed your
4 recollection about certain events based on
5 documentation that you've looked at in preparation.

6 A It's altogether possible, based on the time
7 and the amount of documentation that I had to review or
8 the documentation that was available for me to review,
9 we may have had more specific conversations with
10 specific subject matter.

11 Q I think I hear you saying that you don't
12 recall anything different, but it's possible.

13 A What I'm saying is that obviously in the
14 element of time and the number of contracts and the
15 number of payments and the number of conversations in
16 the time that has gone by, my recollection may have
17 been clearer or we may have had some discussions that I
18 could have represented differently than here today.

19 Q But you don't recall anything specifically.
20 I'm asking if you have any specific recollection about
21 something --

22 A Specifically, no.

23 Q Okay. Thank you.

EXHIBIT G

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EXAMINATION BEFORE TRIAL OF STATE OF NEW
8 YORK, the Plaintiff, by and through its representative,
JOANNE C. GARRISON, conducted pursuant to Notice at the
9 law offices of HODGSON-RUSS, 677 Broadway, Albany, New
York, on December 21, 2006, commencing at approximately
10 9:50 a.m. before Lynne Billington, a Shorthand Reporter
and Notary Public in and for the State of New York.

11 APPEARANCES:

12 FOR THE PLAINTIFF:

13 OFFICE OF THE ATTORNEY GENERAL

14 The Capitol

15 Albany, NY 12224

16 By: Earl T. Redding, Esq.

17 FOR THE DEFENDANT:

18 HODGSON-RUSS

19 One M&T Plaza, Suite 2000

20 Buffalo, NY 14203

21 By: Michelle Merola

22 ALSO PRESENT:

23 Jennifer Principe

00055

1 THE WITNESS: (Moves head.)

2 Q (By Ms. Merola) Was that a no?

3 A I don't understand the question.

4 Q As you were working on these payment

5 applications, was there ever a time when you were told

6 to stop paying further amounts on the guarantee fees?

7 A No.

8 Q So, it was not your understanding that it had

9 to be capped at any particular amount?

10 A No.

11 MR. REDDING: What time are we talking

12 about?

13 MS. MEROLA: Ever during the time

14 period.

15 MR. REDDING: During her period of

16 working there?

17 MS. MEROLA: Exactly.

18 Q (By Ms. Merola) Ever during the timeframe

19 that you were processing these applications, did you

20 believe that the guarantee fees had to be capped at a

21 certain amount?

22 A I don't really -- you'll have to ask the

23 question again. I ...

00056

1 Q Okay.

2 In the time that -- you actually worked on

3 processing these applications. Is that correct?

4 A Yes.

5 Q When you were processing these applications,
6 did there ever come a time where you believed that the
7 guarantee fees needed to be capped or stopped at a
8 certain monetary amount?

9 A No.

10 Q Were you the person who had primary
11 responsibility for supervising the processing of these
12 payment applications?

13 A I supervised the group in the office that I
14 worked in, contract performance.

15 Q Was there any other group that worked on
16 processing these applications?

17 A No.

18 Q So, your group processed these applications
19 and you supervised your group. Is that correct?

20 A Yes.

21 Q All the work billed for on these payment
22 applications were checked by a member of your group?

23 A The --

EXHIBIT H

STATE OF NEW YORK - EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES
DESIGN AND CONSTRUCTION GROUP

Contractor's Summary Application Form - TANK PROGRAM

SCHEDULE 1 - CONTRACTOR INFORMATION

PAYEE (NAME & ADDRESS)

INDUSTRIAL SITE SERVICES INC.
8215 GOLDEN OAK CIRCLE
CLARENCE NY 14221

FACILITY:

Various Locations

District Number

4

DATE PREPARED

6/30/98

APPLICATION NO.

1

WORK PERIOD ENDING DATE

6/30/98

CONTRACT COMPLETION DATE

6/30/00

COMPTROLLER'S CONTRACT NO.

D04000-V

CHECK ONE:

Progress / Substantial Compl:

X

Final Payment:

16-1527824

CONTRACT PERFORMANCE REMARKS:

SCHEDULE 2 - PAYMENT SUMMARY

Line Provisions

	CONTRACT (COL 1)	EARNED TO DATE (COL 2)
1. Contract Amount	\$ 4,626,630.00	\$ 65,391.10 59,207 R
2. Orders on Contract		
3. TOTAL AMOUNT	\$ 4,626,630.00	\$ 65,391.10 59,207 R
4. Claims, Liens, and Judgements / Retainage	Less	
5. Value Earned To Date Less Withholdings (Line 3, Col.2 - Line 4)	\$	65,391.10 59,207 R
6. Value of Prior Applications for Payment	Less	\$
7. Amount Prior to Adjustment (Line 5 - Line 6)	\$	-65,391.10
8. Adjustments (by authorization from Contract Performance)	+ 9,528.00	Less 5684.10
9. Liquidated Damages	Less	
10. PAY AMOUNT (Line 7 - Lines 8, 9)	\$	65,391.10

SCHEDULE 3 - CERTIFICATION BY CONTRACTOR

I, BHAVESH H. KAMDAR, do hereby certify that I am President of the Company/Corporation herein referenced and contractor of record for the work represented in the attached Application for Payment. I further certify the attached payment requests are just, true and correct; that no part thereof has been paid except as stated and the balances are due and owing.

Signature / Contractor of Record

6/30/98

Date

SCHEDULE 4 - WORK ORDER PAYMENTS ATTACHED - (BDC 180, 169T.1, 169T.2, 169T.3, 169T.4 # ISSUED, ENCLOSED)

Work Order Number	Pay Amount	Requisition No.	Work Order Number	Pay Amount	Requisition No.
SUB-TOTAL	\$		SUB-TOTAL	\$	

TOTAL PAY AMOUNT THIS REQUEST (SUM OF SUB-TOTALS - SCHEDULE 4)

\$ ADJUSTED PAY AMOUNT

NOTE: EACH ATTACHED WORK ORDER BDC 169T.1 FOR PAYMENT MUST BE CERTIFIED BY THE E-I-C PRIOR TO SUBMISSION ON THIS FORM

7/98pc

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000367

SCHEDULE 6 - APPROVED ORDERS ON CONTRACT

COL 1 COL 2 COL 3 COL 4 COL 5 COL 6

EXHIBIT I

STATE OF NEW YORK **COUNTY OF ALBANY**

STATE OF NEW YORK,

Plaintiff,
-against- INDEX NO.
L-00117-04

**INDUSTRIAL SITE SERVICES, INC., and
BHAVESH KAMDAR,
Defendants.**

NON-JURY TRIAL

B E F O R E: HON. JOSEPH C. TERESI,
Supreme Court Justice

APPEARANCES:

For the Plaintiff: HON. ANDREW CUOMO,
NYS Attorney General
The Capitol
Albany, NY 12224
BY: ROGER BANAN, ESQ.,
and BONNIE RIGGI, ESQ.,
Assistant Attorneys General.

For the Defendants: HODGSON RUSS, LLP
One M & T Plaza, Suite 2000
Buffalo, NY 14202
BY: JOSEPH SEDITA, ESQ., and
MICHELLE MEROLA KANE, ESQ.

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter
held at the Albany County Courthouse, Albany, New York on
Monday, July 29th, 2007 commencing at 9:05 a.m.

1 (Ms. Garrison - Cross by Ms. Kane) 165

2 figure listed there?

3 A 486,711.17.

4 Q And that amount exceeds the 402 that is listed
5 in the unit price contract?

6 A Yes.

7 Q And you made the payment although it was in
8 excess of \$402,000.00. Correct?

9 A Yes.

10 Q And you did that because you were under the
11 impression that that is what the contract called for
12 because you compared it to the contract?

13 A Yes.

14 Q Is that right?

15 A Yes.

16 Q And you indicated that each of these payment
17 applications indicates the total value earned to date.

18 Correct?

19 A Yes.

20 Q And Mr. Kamdar, some individual from
21 Industrial Site Services, would have filled in that
22 information?

23 A On the back of the summary.

24 Q Yes. Total value earned to date would have
25 been completed by the contractor?

1 (Ms. Garrison - Cross by Ms. Kane) 166

2 A Yes.

3 Q So it was completely transparent in all of
4 these applications how much money was being requested and
5 how much money had been requested to date?

6 A Yes.

7 Q Whose responsibility would it have been to
8 fill out the work order authorization amount?

9 A The contractor.

10 Q But you certainly would have checked those
11 amounts because you would need to make sure they were right
12 for calculation purposes?

13 A Yes.

14 Q So in this case how would you have checked it
15 if there was nothing filled in in that column?

16 A We would have just been checking and
17 multiplying out the 9.52 percent against the earned amount
18 on each payment application.

19 Q So you would take the terms from the unit
20 price schedule to check on this?

21 A Yes.

22 Q And again you determined in each of these
23 instances, either you or one of your supervisees, that the
24 amount requested was appropriate pursuant to the
25 contract?

1 (Ms. Garrison - Cross by Ms. Kane) 167

2 A The amount of the guarantee fee?

3 Q Yes.

4 A Was based on the earned amount on each
5 payment. After we performed our review of the payment
6 application we would calculate the guarantee fee amount to
7 be sure that it was correct.

8 Q And you approved it in each instance?

9 A Sometimes we had -- if we had made a change
10 to the payment application we would also have to make a
11 change to the fee amount.

12 Q But you approved the amounts that are
13 reflected here for the guarantee fees?

14 A (No response.)

15 Q Inclusive of any changes you made?

16 A Yes.

17 Q Now you are familiar with contract conditions
18 that actually state that they are not to exceed? They are
19 referred to sometimes as NTEs?

20 A Yes.

21 Q You have seen them in other contracts such as
22 your emergency contracts?

23 A Yes.

24 Q And you understand that an NTE means that it
25 is a fixed price that can't be exceeded?

1 (Ms. Garrison - Cross by Ms. Kane) 169

2 the contractor of record. Yes.

3 Q And you don't recall him making any
4 representations to you to convince you to keep paying this
5 guarantee fee?

6 A No.

7 Q Now you indicated on direct that the total
8 amount paid under this contract, according to the final
9 payment application, was in the neighborhood of 12.8
10 million dollars. Correct?

11 A Yes.

12 Q And that you said reflects the guarantee fees
13 as well?

14 A Yes.

15 Q Now if you could then look at Exhibit 17. The
16 change orders. One of the change orders. If you would
17 refer to that. Can you tell me what that document is?

18 A Which one?

19 Q Are you looking at Exhibit 17?

20 A It is a change order for 500 thousand
21 dollars.

22 Q What is the date on that document?

23 A The approval date of the change order is
24 6/30/2000.

25 Q Can you determine from referencing that

EXHIBIT J

STATE OF NEW YORK **COUNTY OF ALBANY**

STATE OF NEW YORK,

Plaintiff,
-against- INDEX NO.
L-00117-04

**INDUSTRIAL SITE SERVICES, INC., and
BHAVESH KAMDAR,
Defendants.**

NON-JURY TRIAL

B E F O R E: HON. JOSEPH C. TERESI,
Supreme Court Justice

APPEARANCES:

For the Plaintiff: HON. ANDREW CUOMO,
NYS Attorney General
The Capitol
Albany, NY 12224
BY: ROGER BANAN, ESQ.,
and BONNIE RIGGI, ESQ.,
Assistant Attorneys General.

For the Defendants: HODGSON RUSS, LLP
One M & T Plaza, Suite 2000
Buffalo, NY 14202
BY: JOSEPH SEDITA, ESQ., and
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held at the Albany County Courthouse, Albany, New York on
Monday, July 29th, 2007 commencing at 9:05 a.m.

1 (Mr. Lewyckyj - Cross by Ms. Kane) 222

2 Q How much work, what money value is associated
3 with this contract order? What is the increase?

4 A 500 thousand.

5 Q And what does that bring the total contract
6 value to?

7 A Total contract amount of 12 million nine
8 hundred thousand.

9 Q So you have referenced the final payment
10 application, which was 12.8. So that indicates that the
11 work was done under the amount authorized by OGS?

12 A As of this payment. That is what it would
13 indicate.

14 Q As of payment 19?

15 A As of the date June 16th.

16 Q I'm sorry. Which is payment application
17 number 20?

18 A Yes.

19 Q So that would be approximately 100 thousand
20 dollars less than the total contract value?

21 A At this time, yes.

22 Q Now you indicated that at some point in the
23 life of this tank remediation contract you were asked to
24 evaluate the guarantee fee against the terms of the unit
25 price contract?

1 (Mr. Lewyckyj - Cross by Ms. Kane) 223

2 A Yes.

3 Q Mr. Kainz was the individual who asked you to
4 make that valuation. Isn't that right?

5 A I don't recall who specifically asked me to do
6 that.

7 Q I'm going to show you two exhibits. Exhibit
8 number nine and Exhibit number 11. If I could have those
9 from counsel. Nine is before you and here is number 11.
10 Ask you to take a look at those two documents. Are you
11 looking at number nine?

12 A Yep.

13 Q Have you had a chance to take a look at
14 that?

15 A I'm still reading through it. Okay.

16 Q This is a chain of e-mails?

17 A Yes.

18 Q And at the bottom of that chain is an e-mail
19 from Marty DePoalo to your boss, Robert Kainz, on April
20 16th of 1999. Is that right?

21 A Yes.

22 Q And in summary Mr. DePaolo is saying that he
23 is concerned that the bond guarantee fee may have been
24 exceeded, is above the \$402,000.00. Is that right?

25 A Yes.

1 (Mr. Lewyckyj - Cross by Ms. Kane) 225

2 A It goes on though.

3 Q Do these two e-mails refresh your recollection
4 about who asked you to evaluate this or what the timeframe
5 was when you were asked to evaluate this?

6 A No.

7 Q So when you went ahead and evaluated this
8 guarantee fee you determined that the contract did not
9 indicate any cap?

10 A My evaluation was that the agreement did not
11 indicate a not to exceed or a value of the cap.

12 Q And you reported that conclusion to some
13 supervisor?

14 A I would have. I'm not sure who.

15 Q Excuse me?

16 A Whoever asked.

17 Q So you don't recall who you reported the
18 conclusion to?

19 A There may have been several people. I'm not
20 sure. I don't recall.

21 Q But you did report the conclusion to
22 someone?

23 A Yes.

24 Q And you never spoke to Mr. Kamdar about his
25 concern that the \$402,000.00 was being exceeded?

EXHIBIT K

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

STATE OF NEW YORK,
Plaintiff,

-against-

INDEX NO.
L-00117-04

INDUSTRIAL SITE SERVICES, INC., and
BHAVESH KAMDAR,

Defendants.

NON-JURY TRIAL

B E F O R E: HON. JOSEPH C. TERESI,
Supreme Court Justice

A P P E A R A N C E S:

For the Plaintiff: HON ANDREW CUOMO,
NYS Attorney General
The Capitol
Albany, NY 12224
BY: ROGER BANAN, ESQ.,
and BONNIE RIGGI, ESQ.,
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For the Defendants: HODGSON RUSS, LLP
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JOSEPH SEDITA, ESQ., and
MICHELLE MEROLA KANE, ESQ.

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter
held at the Albany County Courthouse, Albany, New York on
July 31st, 2007.

1 (Mr. DePoalo - Cross by Mr. Sedita) 290

2 THE COURT: This isn't an examination. We
3 are not giving you a grade here.

4 THE WITNESS: Okay.

5 Q When you brought this matter of having
6 exceeded \$402,000.00 to the attention of Mr. Kainz and
7 contract administration, was that because you recognized
8 that \$402,000.00 had been exceeded in that category of
9 payment?

10 A Yeah. I recognized that 402 had been
11 exceeded, and in my estimates it shouldn't have been.

12 Q Okay. And were you aware at the same time
13 that payments had been exceeded in all other categories as
14 well?

15 A No.

16 Q Was it your assumption at that time
17 \$402,000.00 had been exceeded just against the original
18 contract amount of 4.6 million dollars?

19 A I just recognized that 402 had been
20 exceeded.

21 Q And if that had been exceeded because it was
22 continued to be, continuing to be paid against requests for
23 payment against the change orders that enlarged the
24 contract, you didn't know that at that time. Did you?

25 A No.

1 (Mr. DePoalo - Cross by Mr. Sedita) 291

2 Q You just knew that the arithmetic of

3 \$402,000.00 had been exceeded Correct?

4 MS. RIGGI: Objection. The witness already

5 testified as to what his understanding was about

6 the \$402,000.00.

7 THE COURT: Overruled. He can answer if he

8 can.

9 A My e-mail was generated because it was my
10 belief that the 402 was a not to exceed amount. That is
11 why I raised the red flag to the ultimate decision makers.

12 Q And you got word back from the ultimate
13 decision makers. Didn't you?

14 A I think there may have been an e-mail
15 response.

16 Q You knew that they decided that contrary to
17 what you thought should happen. Right?

18 A Right. Others had -- I was advised that the
19 payments would continue.

20 Q That they had looked at it. Correct?

21 A Right.

22 Q And that the payments would continue. That
23 that is what they decided after looking at your concerns.
24 Right?

25 A That is my understanding.

1 (Mr. DePoalo - Cross by Mr. Sedita) 292

2 Q Who told you that?

3 A As I sit here today I believe it to be Bob

4 Kainz.

5 Q That is your best recall?

6 A That is my best recollection.

7 Q Indeed these are the people you referred to as

8 the decision makers. Correct?

9 A Yes. Contract administration.

10 Q They are the ones who make decisions of this
11 kind or this type for the State of New York on this kind of
12 contract. Right?

13 A That is my understanding. Yes.

14 MR. SEDITA: If I may just have a moment,

15 Your Honor?

16 THE COURT: Okay.

17 (Pause.)

18 MR. SEDITA: Thank you very much, sir.

19 THE COURT: No more questions?

20 MS. RIGGI: No, Your Honor. You are all
21 set.

22 THE COURT: I thought you were getting up to
23 ask him a question. I'm sorry. You are all set.

24 Thank you, sir. You are free to go.

25 THE WITNESS: Thank you.

EXHIBIT L

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

STATE OF NEW YORK

Plaintiff,
- against -
INDUSTRIAL SITE SERVICES INC. and
BHAVESH KAMDAR,
Defendants.

AFFIRMATION

Index No.: L-00117-04

ANTHONY M. BRUCE, an attorney duly licensed to practice before the Courts of the State of New York, affirms the following, under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of the United States Attorney for the Western District of New York.
2. I have been informed by the Office of the Attorney General of the State of New York that the State of New York (hereinafter "the State") has commenced a civil action against Bhavesh Kamdar (hereinafter "Kamdar") seeking damages as a result of Kamdar's fraudulent conduct in connection with a state contract for the removal of underground fuel storage tanks. Upon information and belief, the State has alleged that Kamdar fraudulently obtained bond guarantee charges from the State by falsely representing that Kamdar was required to provide his personal guarantee and collateral before a performance bond would be issued. Upon information and belief, the State has further alleged that Kamdar continued to fraudulently bill the State for such falsely claimed bond guarantee charges even after the charges exceeded the contract limit. As will be shown below, the allegations contained in the State's civil action against Kamdar are identical to

those contained in a criminal indictment that the United States Attorney for the Western District of New York has obtained against Kamdar.

3. I have been further informed by the Office of the Attorney General of the State of New York that defendants Industrial Site Services Inc. (hereinafter "ISS") and Kamdar have moved this Court for summary judgment on the basis that triable issues of fact do not exist in this matter. As set forth below, it is respectfully submitted that based upon the indictment of Kamdar by a Grand Jury of the Western District of New York triable issues of fact exist establishing the fraudulent conduct of Kamdar and ISS.
4. There came a time that the Office of the United States Attorney for the Western District of New York commenced a criminal investigation concerning Kamdar, the president of Industrial Site Services Inc. ("ISS"). The investigation by the Office of the United States Attorney for the Western District of New York revealed the following facts:
 - (a) In or about November 1997, the State advertised for bids on contract number D04000V for the removal or modification of underground fuel storage tanks in western portions of New York State. ISS submitted a bid of approximately \$4,968,748 which was the low bid on the contract.
 - (b) Contract number D04000V was a "unit price contract", meaning that the State had the right to attempt to negotiate changes to individual components or "units" of the contract.
 - (c) One unit of ISS' bid on contract number D04000V was a performance bond expense of \$500,000 which, under the terms of contract number D04000V, the State would be required to reimburse ISS in the event that the State awarded

contract number D04000V to ISS.

- (d) Subsequent to its receipt of ISS' bid, the State met with Kamdar and others in an attempt to negotiate, among other things, the unit of ISS' bid wherein ISS was seeking reimbursement of the \$500,000 for ISS' claimed performance bond expense.
- (e) As part of the effort to justify \$500,000 for ISS' claimed performance bond expense, Kamdar, both personally and through others, made false and fraudulent statements to the State and submitted letters and other writings to the State that contained false and fraudulent statements. Primary among these oral and written false and fraudulent statements were statements that AIG, the company that provided the performance bond, required Kamdar and his spouse, Panna B. Kamdar, to provide their personal guarantee and collateral, consisting of personal funds of approximately \$1,000,000, to AIG before AIG would issue the performance bond.
- (f) In truth and in fact, and as Kamdar well knew, AIG never asked Kamdar or his spouse to provide personal guarantees or collateral before AIG would issue the performance bond for ISS.
- (g) In truth and in fact, AIG agreed to provide and thereafter provided the necessary performance bond upon payment of a bond premium of \$59,707.
- (h) Based upon oral and written false representations made by Kamdar, both personally and through others, Kamdar was able to convince the State of the validity of ISS' claimed performance bond expense. However, the State

negotiated this cost down to \$402,000 and agreed to pay this as a "bond guarantee charge." Said falsely claimed charge was to be paid in increments by adding a dollar figure equal to approximately 9.52 percent of each payment request that ISS was to make under contract number D04000V, up to \$402,000.

- (i) By early 1999, ISS had already submitted requests for partial payments, and been paid an aggregate amount substantially in excess of \$402,000, for the falsely claimed cost of the bond guarantee charge. However, despite the fact that contract number D04000V limited this charge to \$402,000 and despite the fact that this \$402,000 limit was exceeded as of on or about February 12, 1999, ISS continued to submit requests for partial payments under the contract which requests, in part, consisted of adding a dollar figure equal to approximately 9.52 percent to each request for partial payment.
- (j) On or about April 16, 1999, the State questioned ISS about its right to receive reimbursement for the falsely claimed bond guarantee charges in excess of \$402,000.
- (k) Thereafter, Kamdar, both personally and through others, made additional oral and written false representations to the State both to induce the State to refrain from attempting to recoup payments that the State had made on the falsely claimed bond guarantee charges that exceeded \$402,000 and to allow ISS to continue to receive payments on this same falsely claimed bond guarantee charge.

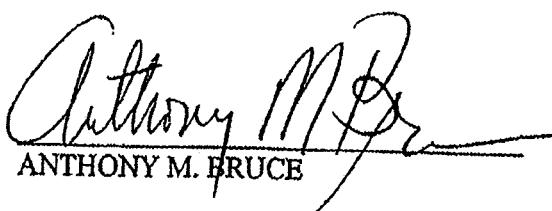
5. Upon information and belief, at the time that this office commenced its criminal investigation, Kamdar resided at and was the owner of the real property located at 8215 Golden Oak Circle, Clarence, New York 14221.
6. Upon information and belief, in 2002, during the course of the Federal Government's investigation, Kamdar fled the United States.
7. On or about November 4, 2002, pursuant to a power of attorney executed by Kamdar, Kamdar's brother-in-law sold the property located at 8215 Golden Oak Circle, Clarence, New York 14221. At the closing, the proceeds of the sale, which were in excess of \$300,000, were seized by the United States.
8. In or about December 2002, this office was contacted by Joseph V. Sedita, Esq. Of the law firm of HodgsonRuss LLP, One M & T Plaza, Suite 2000, Buffalo, New York 14203. Mr. Sedita advised this office that he was representing Kamdar in connection with the office's criminal investigation.
9. On or about April 11, 2003, the United States commenced a civil forfeiture action against the sum of \$352,229.29 in United States currency which represented the proceeds of the sale of 8215 Golden Oak Circle, Clarence, New York 14221. (See "Civil Forfeiture Complaint", attached hereto as Exhibit "A".)
10. Pursuant to a Stipulation for Resolution (a copy of which is attached hereto as Exhibit "B") signed by this office, Mr. Sedita, and Kamdar, *inter alia*, and the subsequent filing of an Order for Resolution (a copy of which is attached hereto as Exhibit "C") filed by the United States District Court for the Western District of New York on July 21, 2003, the parties to the pending civil forfeiture action styled *United States of America v. The Sum of*

*\$352,229.29 United States Currency, Which Represents The Proceeds Of The Sale of
8215 Golden Oak Circle, Williamsville, NY (03-CV-302-A) understood and agreed that
should Kamdar fail to appear within 180 days from the date criminal charges are brought,
regardless of whether said failure to appear is by his own volition or not, the res in the
above referenced pending action shall be forfeited to the United States of America in the
civil forfeiture action.*

11. On or about August 19, 2003, Mr. Sedita filed a verified claim and answer to the government's civil forfeiture complaint. (See "Verified Claim & Answer", attached hereto as Exhibit "D").
12. On or about June 30, 2004, the Grand Jury for the Western District of New York returned an indictment against Kamdar. (See "Indictment", attached hereto as Exhibit "E"). A copy of the indictment was duly served upon Mr. Sedita.
13. On or about August 19, 2004, I met with Mr. Sedita at my office to discuss, *inter alia*, the possibility of Kamdar and the government entering into a plea agreement. Mr. Sedita indicated that he would discuss the government's offer with Kamdar and get back to me. I did not hear back from Mr. Sedita.
14. As of December 27, 2004, which was 180 days from the date that the United States filed criminal charges against him, Kamdar had neither contacted the United States Attorney's Office to advise of his status or whereabouts nor appeared before the United States District Court to answer the criminal charges that were filed against him. Accordingly, on January 14, 2005, the United States District Court issued an order of forfeiture. (See "Forfeiture Order", attached hereto as Exhibit "F").

15. As of the date of this affirmation, Kamdar has still failed to appear before the United States District Court to answer the criminal charges that have been filed against him.

Dated: Buffalo, New York
March 27, 2007



ANTHONY M. BRUCE

EXHIBIT M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
STATE OF NEW YORK,

Plaintiff,

SUMMONS

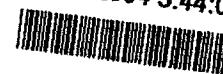
-against-

Index No. L-00117-04

INDUSTRIAL SITE SERVICES INC. and
BHAVESH KAMDAR,

Defendants.

Albany County Clerk
Document Number 9315795
Rcvd 08/17/2004 3:44:02 PM



-----X
To the above named Defendants:

You are hereby summoned and required to serve upon plaintiff's attorney an answer to the complaint in this action within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is completed if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: Albany, New York
August 17, 2004

Yours, etc.,

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Plaintiff
By:



RICHARD LOMBARDO
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 473-2275

Trial is desired in the County of Albany. The basis of venue designated above is that plaintiff resides at the Capitol in the County of Albany.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
STATE OF NEW YORK,

Plaintiff,

VERIFIED COMPLAINT

-against-

Index No. L-00117-04

INDUSTRIAL SITE SERVICES INC. and
BHAVESH KAMDAR,

Albany County Clerk
Document Number 9315795
Rcvd 08/17/2004 3:44:02 PM

Defendants.



-----X
Plaintiff, the State of New York, by its attorney, Eliot Spitzer, Attorney General of the State of New York, complaining of the defendants, Industrial Site Services Inc. and Bhavesh Kamdar, alleges upon information and belief:

1. Plaintiff is the State of New York, whose principal place of business is the Capitol, in the City and County of Albany, New York. Plaintiff acted at all times herein through its employees at the Office of General Services.

2. Defendant Industrial Site Services Inc. is a New York corporation. According to the records of the New York Secretary of State, defendant's mailing address is 8215 Golden Oak Circle, Clarence, New York 14221.

3. At all times hereinafter mentioned, defendant Bhavesh Kamdar was the president of Industrial Site Services Inc. Upon information and belief, defendant Bhavesh Kamdar's last-known address was 8215 Golden Oak Circle, Clarence, New York 14221.

4. In or about November 1997, plaintiff advertized for bids

on contract number D04000V for the removal or modification of underground fuel storage tanks in western portions of New York State. Defendant Industrial Site Services, Inc. submitted a bid of approximately \$4,968,748 which was the low bid on the contract.

5. Contract number D04000V was a "unit price contract", meaning that plaintiff had the right to determine in the first instance the cost of individual components or "units" of the contract.

6. One unit of defendant Industrial Site Services, Inc.'s bid on contract number D04000V was a performance bond expense of \$500,000 which, under the terms of contract number D04000V, plaintiff would be required to reimburse defendant Industrial Site Services, Inc. in the event that plaintiff awarded contract number D04000V to defendant Industrial Site Services, Inc.

7. Subsequent to its receipt of defendant Industrial Site Services, Inc.'s bid, plaintiff met with defendant Bhavesh Kamdar and others in an attempt to negotiate, among other things, the unit of defendant Industrial Site Services, Inc.'s bid wherein defendant Industrial Site Services, Inc. was seeking reimbursement of the \$500,000 for defendant Industrial Site Services, Inc.'s claimed performance bond expense.

8. As part of the effort to justify \$500,000 for defendant Industrial Site Services, Inc.'s claimed performance bond

expense, defendant Bhavesh Kamdar, both personally and through unknown persons, made false and fraudulent statements to plaintiff and submitted letters and other writings to plaintiff that contained false and fraudulent statements. Primary among these oral and written false and fraudulent statements were statements that AIG, the company that provided the performance bond, required defendant Bhavesh Kamdar and his spouse, Panna Kamdar, to provide their personal guarantee and collateral, consisting of personal funds of approximately \$1,000,000, to AIG before AIG would issue the performance bond.

9. In truth and in fact, and as defendant Bhavesh Kamdar well knew, AIG never asked defendant Bhavesh Kamdar or his spouse to provide personal guarantees or collateral before AIG would issue the performance bond for defendant Industrial Site Services, Inc.

10. In truth and in fact, AIG agreed to provide and thereafter provided the necessary performance bond upon payment of a bond premium of \$59,707.

11. Based upon oral and written false representations made by defendant Bhavesh Kamdar, both personally and through others, defendant Bhavesh Kamdar was able to convince plaintiff of the validity of defendant Industrial Site Services, Inc.'s claimed performance bond expense which plaintiff negotiated down to \$402,000.

12. In or about June 1998, plaintiff and defendant Industrial Site Services, Inc. entered into contract number D04000V under the terms of which defendant Industrial Site Services, Inc. was to remove or modify underground fuel storage tanks in western portions of New York State.

13. Contract number D04000V provided that plaintiff would pay defendant Industrial Site Services, Inc. the falsely claimed performance bond expense as a bond guarantee charge to be paid in increments by adding a dollar figure equal to approximately 9.52 percent of each payment request that defendant Industrial Site Services, Inc. was to make under contract number D04000V. The contract provided that such bond guarantee charges would not exceed \$402,000.

14. During the term of contract number D04000V, plaintiff made payments to defendant Industrial Site Services, Inc. which included bond guarantee charges. The aforementioned bond guarantee charges totaled \$1,114,626.31.

15. By early 1999, defendant Industrial Site Services, Inc. had already submitted requests for partial payments, and been paid an aggregate amount substantially in excess of \$402,000, for the falsely claimed cost of the bond guarantee charge. However, despite the fact that contract number D04000V limited this charge to \$402,000 and despite the fact that this \$402,000 limit was exceeded as of on or about February 12, 1999, defendant

Industrial Site Services, Inc. continued to submit requests for partial payments under the contract which requests, in part, consisted of adding a dollar figure equal to approximately 9.52 percent to each request for partial payment.

16. On or about April 16, 1999, plaintiff questioned defendant Industrial Site Services, Inc. about its right to receive reimbursement for the falsely claimed bond guarantee charges in excess of \$402,000.

17. Thereafter, defendant Bhavesh Kamdar, both personally and through others, made additional oral and written false representations to plaintiff both to induce plaintiff to refrain from attempting to recoup payments that plaintiff had made on the falsely claimed bond guarantee charges that exceeded \$402,000 and to allow defendant Industrial Site Services, Inc. to continue to receive payments on this same falsely claimed bond guarantee charge.

FIRST CAUSE OF ACTION AGAINST DEFENDANTS INDUSTRIAL SITE SERVICES INC. AND BHAVESH KAMDAR (FRAUD)

18. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs "1" through "17".

19. Defendants Industrial Site Services, Inc. and Bhavesh Kamdar made the misrepresentations of material fact referred to above, which misrepresentations were known by defendants to be false, with the intent to deceive and induce plaintiff to pay defendant Industrial Site Services, Inc. for falsely claimed bond

guarantee charges.

20. In reliance upon the aforementioned misrepresentations of material fact by defendants Industrial Site Services, Inc. and Bhavesh Kamdar, plaintiff paid defendant Industrial Site Services, Inc. \$1,114,626.31 in falsely claimed bond guarantee charges.

21. As a result of defendants' fraud, plaintiff has been damaged in the amount of \$1,114,626.31.

SECOND CAUSE OF ACTION AGAINST DEFENDANT INDUSTRIAL SITE SERVICES INC. (MONIES HAD AND RECEIVED)

22. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs "1" through "21".

23. By reason of the foregoing, defendant Industrial Site Services, Inc. owes plaintiff \$1,114,626.31, representing monies had and received from plaintiff to which defendant Industrial Site Services, Inc. was not legally entitled.

THIRD CAUSE OF ACTION AGAINST DEFENDANT INDUSTRIAL SITE SERVICES INC. (MISAPPROPRIATION OF PUBLIC PROPERTY)

24. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs "1" through "23".

25. By reason of the foregoing, defendant Industrial Site Services, Inc. has misappropriated, retained, and/or legally derived benefit from public property in the sum of \$1,114,626.31 to which defendant Industrial Site Services, Inc. was not legally entitled.

FOURTH CAUSE OF ACTION AGAINST DEFENDANT INDUSTRIAL
SITE SERVICES INC. (UNJUST ENRICHMENT)

26. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs "1" through "25".

27. Defendant Industrial Site Services, Inc. received money belonging to plaintiff in the sum of \$1,114,626.31.

28. Defendant Industrial Site Services, Inc. benefitted from and has been unjustly enriched by receipt of the money.

29. Under principals of equity and good conscience, defendant Industrial Site Services, Inc. should not be permitted to keep the money.

FIFTH CAUSE OF ACTION AGAINST DEFENDANT INDUSTRIAL
SITE SERVICES INC. (BREACH OF CONTRACT)

30. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs "1" through "29".

31. Defendant Industrial Site Services, Inc. breached contract number D04000V by billing plaintiff for bond guarantee charges totaling \$1,114,626.31 thereby exceeding the contractual limitation by \$712,626.31.

32. Defendant Industrial Site Services, Inc. is liable for the repayment of the \$712,626.31 in bond guarantee charges in excess of the contractual limitation.

33. Defendant Industrial Site Services, Inc. has refused and failed to repay the \$712,626.31 although duly demanded to do so and these sums remain due and owing to the plaintiff.

WHEREFORE, by virtue of the foregoing, plaintiff requests judgment as follows:

(a) Against defendants Industrial Site Services, Inc. and Bhavesh Kamdar on the first cause of action in the amount of \$1,114,626.31, with interest thereon from November 10, 2000, together with punitive damages in the amount of \$1,000,000.00;

(b) Against defendant Industrial Site Services, Inc. on the second cause of action in the amount of \$1,114,626.31, with interest thereon from November 10, 2000;

(c) Against defendant Industrial Site Services, Inc. on the third cause of action in the amount of \$1,114,626.31, with interest thereon from November 10, 2000;

(d) Against defendant Industrial Site Services, Inc. on the fourth cause of action in the amount of \$1,114,626.31, with interest thereon from November 10, 2000;

(e) Against defendant Industrial Site Services, Inc. on the fifth cause of action in the amount of \$712,626.31, with interest thereon from November 10, 2000;

(f) 22% collection fee pursuant to §18 of the State Finance Law;

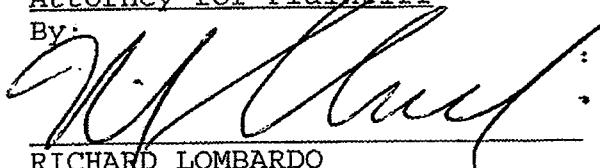
- (g) the costs and disbursements of this action; and
- (h) for such other relief the Court deems appropriate.

Dated: Albany, New York
August 17, 2004

Yours, etc.,

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Plaintiff

By:



RICHARD LOMBARDO
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 473-2275

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
STATE OF NEW YORK,

Plaintiff,

VERIFICATION

-against-

Index No. L-00117-04

INDUSTRIAL SITE SERVICES INC. and
BHAVESH KAMDAR,

Albany County Clerk
Document Number 9315795
Rcvd 08/17/2004 3:44:02 PM

Defendants.



-----X

RICHARD LOMBARDO, an attorney duly licensed to practice
before the Courts of the State of New York, affirms the
following, under penalty of perjury:

I am an Assistant Attorney General in the office of ELIOT SPITZER, Attorney General of the State of New York. I prepared the foregoing complaint and know the contents thereof. The same is true to my own knowledge, except as to those matters alleged upon information and belief and, as to those matters, I believe them to be true. I have in my possession various documents, reports, and correspondence which are the sources of my information and grounds for my belief as to the matters set forth in the complaint.

Dated: Albany, New York
August 17, 2004



RICHARD LOMBARDO