

# **ROAD CONSTRUCTION LITIGATION**

Lessons from experience



***L. S. EQUIPMENT CO. INC. dba  
LONE STAR EQUIPMENT  
COMPANY v. CITY OF PALESTINE***

- Construction of a road from a U. S. Highway to a poultry plant being constructed in the City of Palestine
- Important that road be usable in time to get plant operating
- Texas Department of Agriculture project grant paid for ½ of costs



***L. S. EQUIPMENT CO. INC. dba  
LONE STAR EQUIPMENT  
COMPANY v. CITY OF PALESTINE***

- Lone Star sued the city for breach of contract
  - Failure to pay what was owed under the contract
  - Under the immunity waiver of Chapter 271,  
Texas Local Government Code
  - Jury verdict for almost a half million dollars,  
exclusive of attorney's fees and interest



# EARLY TROUBLES

## PRE-CONSTRUCTION MEETING AGENDA

CITY OF PALESTINE  
SANDERSON BOULEVARD CONSTRUCTION (TCF 713372)  
Wednesday, 9/3/2014, 11:00 a.m., at the City Manager Conference Room

1. Sign-in
2. Call to Order
3. Introduction of Attendees - *Barry Robinson (concrete)*
4. Explanation of Award, Contract Execution, Bonds
5. Location of Existing Utilities
  - Call DIG TESS
  - Phone Lines/Fiber Optic Cables
  - Water Lines and Services
  - Sewer Lines and Services
  - Utility Lines (electrical, gas, etc.)
6. Permits
  - TxDOT
  - TPDES General
  - SWP3
7. Explanation of Construction Requirements and Procedures
  - Construction Start Date \_\_\_\_\_
  - Calendar Days \_\_\_\_\_ Substantial 150 Final
  - Liquidated Damages \$400 /day after Final
  - Trench Safety
  - Inspection and Testing Procedures
  - Relocation of Utilities
  - Top Soil
  - Select Fill
  - Sequence of Construction
  - Contractor's Liability and Responsibility to the Public
    - Insurance Requirements (*NCT Public Works Construction Standards*)
  - Change Order Requirements
  - Partial and Final Payments
    - Photo of Project Signage must be submitted to Grant Consultant prior to release of construction funds.
  - Special Events Coordination
8. Plans and Specifications
  - Contract Documents Set including specifications and half-size plans
    - Additional specifications and half-size plans available upon request
  - Full-size set of Plans (*Record Drawings*)
    - Pay attention to scales.
9. Questions - *select fill & traffic control*  
*- 200 trucks/day*
10. Adjournment

GARY BURTON ENGINEERING, INC.  
Consulting•Planning•Permitting•Design•Management (F2812)

Z:\Projects\Palestine\041130201\03 Sanderson-Ind Rd Recon TCDP\5 Construction\PreCon Mtg Agenda.docx

- Preconstruction Meeting
- Contractor expressed concern about use of road during construction project
- *Lesson learned – document understandings about concerns*



# EARLY TROUBLES

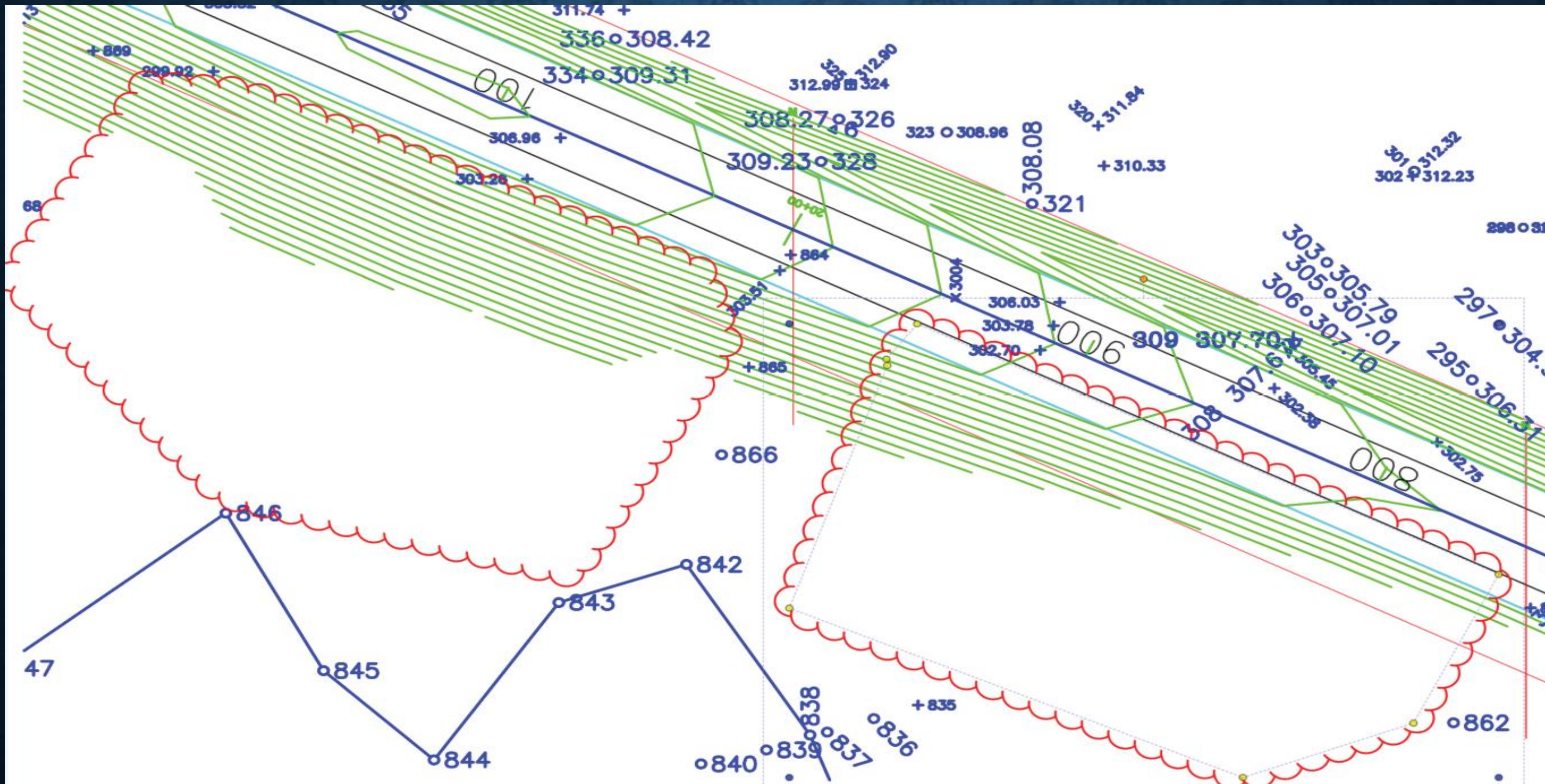
- Slow start
  - Concern expressed by city officials that contractor wasn't getting started quickly enough
    - *Lesson learned – document concerns about delays in construction*





# EARLY TROUBLES

- Survey
  - Contractor claimed to not have survey data for entire project
  - Project scope changed as budget changed
    - *Lesson learned – document when survey documents are delivered*





# EARLY TROUBLES

- Extra Material
  - Contractor claimed to have placed “a lot” more material than specifications called for
    - *Lesson learned – document when claim for additional material is mentioned*
    - *Lesson learned – document that claims procedure must be followed*

OWNER: City of Palestine

CONTRACTOR: L.S. Equipment Co., Inc. dba Lone Star Equipment Co

ENGINEER: Gary Burton Engineering, Inc

PROJECT: Sanderson Boulevard Construction

TCDP Project Number: TCF F13372 (B2014-05)

PX-001163

CONTRACT ITEMS				ORIGINAL CONTRACT AWARD				CUMULATIVE CHANGE ORDERS				CURRENT CONTRACT AMOUNT				
Item Item Description				Qty.	Unit	Unit Price	Total	Qty.	Total	Qty.	Unit Price	Total				
CHANGE ORDERS ***CHANGE ORDER PRICING***																
Change Order No. 1																
7	Change from lime to cement			SY	\$	5.00	\$ -	13429.0	\$	67,145.00	13429.0	\$	5.00	\$	67,145.00	
8	Change from lime to cement			TON	\$	150.00	\$ -	303.0	\$	45,450.00	303.0	\$	150.00	\$	45,450.00	
Terms of Agreement																
Furnish and install 2" HMAC (Type D) as per agreement				269.6	TON	\$	125.00	\$	33,700.00	\$	-	269.6	\$	125.00	\$	33,700.00
Asphalt 14+50 and 15+00				Per agreement												
PENDING CHANGE ORDERS																
HOT Mix Freight				LS	\$	17,520.75										
Extra Traffic Handling				LS	\$	63,940.00										
delays due to traffic				LS	\$	278,000.00										
Additional Staking / CAD Files				LS	\$	12,325.00										
Hwy 79 (40'x24') Changes				LS	\$	25,000.00										

ORIGINAL CONTRACT AMOUNT		CUMULATIVE CHG ORDER AMT		CURRENT CONTRACT AMT	
\$1,279,012.00		\$ -		\$1,279,012.00	

Amount Earned:

Materials on hand:

Amount Retained (5%):

Paid Retainage due to Reduction:

Retainage Due:

Less Previous Pay Applications:

Amount Due:

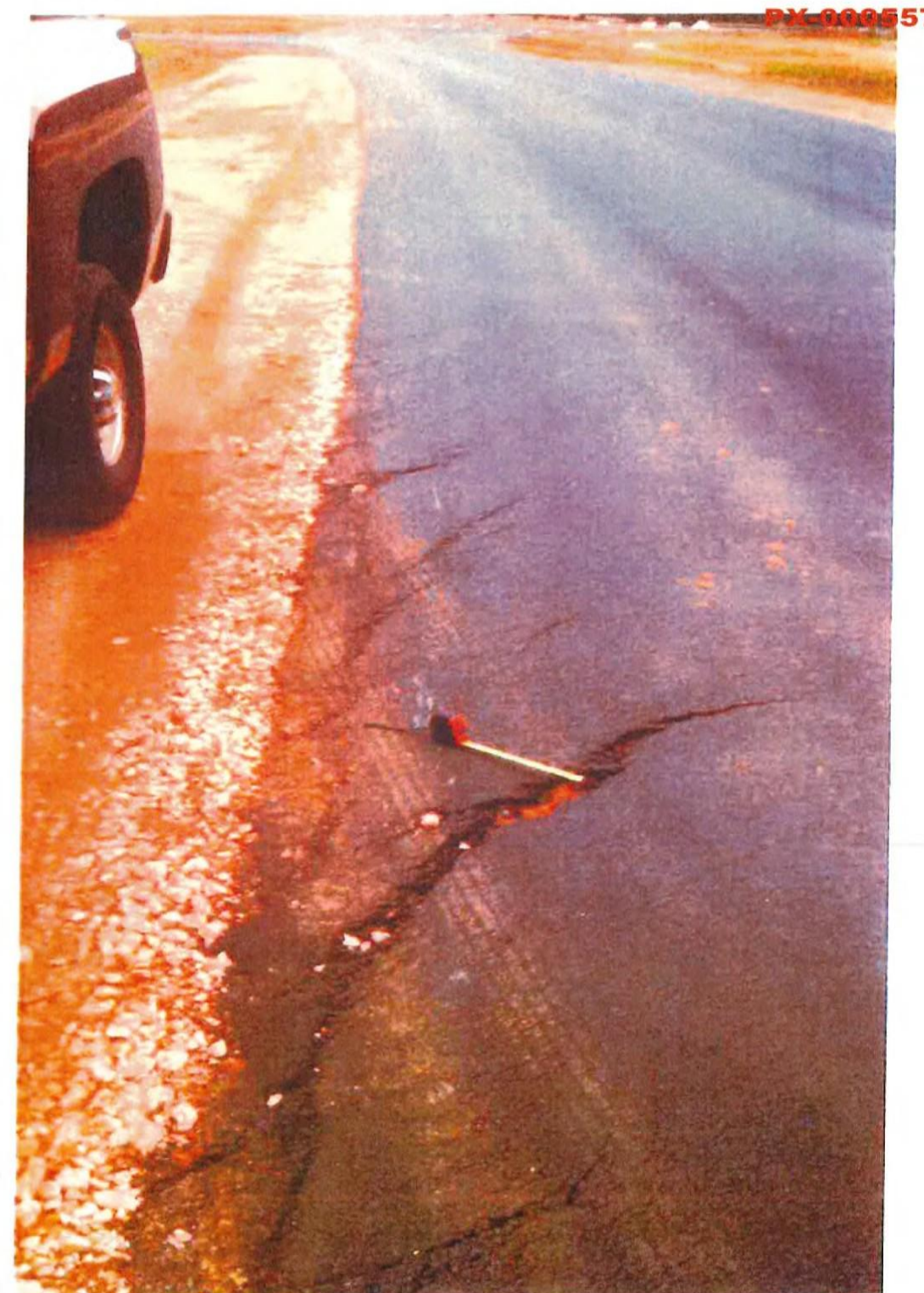
PREVIOUS PERIODS		CURRENT PERIOD		TOTAL TO DATE	
Est #	Amount	Est #	Amount	Est #	Amount
1	\$ 1,250,344.33	2	\$ 743,979.25	113.0%	\$ 1,994,323.58
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Amount Paid to Date By City of Palestine			
Est #	CK Date	Amount	
Est #1	1/5/2016	\$	619,339.73
Est #2	3/3/2015	\$	181,333.67
Est #3	4/22/2015	\$	148,516.40
Est #4	7/7/2015	\$	206,890.45
Est #5*	3/23/2016 * Agreement	\$	33,755.49
Est #6	Pending (GBEI / City)		
Total Paid to Date		\$	1,187,823.93



# LATE TROUBLES

- Inadequate thickness/slippages in asphalt
  - First involvement of counsel
  - Contractor changed counsel
    - *Lessons learned – counsel should be involved earlier*





# LATE TROUBLES

- Notice of default
  - Contractor was stubbornly refusing to complete project until other issues resolved
- City issued notice of default
  - *Lessons learned – Read the contract*



To: Ronnie Pruitt, Lone Star Equipment Company, Inc.

From: Tim Perry, City Of Palestine

Reason: Termination of Contract

Date: July 29, 2015

Dear Mr. Pruitt:

This letter is to inform you that the City of Palestine is terminating the contract between Lone Star Equipment Company, Inc. (contractor) and the City of Palestine (owner) for the construction of Sanderson Farms Parkway as identified in the contract under General Contract Conditions for Construction item # 9 A and B effective August 3, 2015.

The reason for termination is that you have informed the project Engineer, Gary Burton via phone conversation on July 20, 2015 that you have no intentions of performing any more work until you get several issues resolved that you claim you need to be compensated for. You were informed by the emailed punch list on June 24, 2015 that the last course of type "D" mix asphalt has failed and is not acceptable. You have made no effort to contact the Engineer or the owner on what your intentions are regarding this issue.

The original time for the completion of this contract was for 150 calendar days and you have received two 30 day extensions due to weather conditions, which ended April 12, 2015. In the contract under General Contract Conditions for Construction item # 11 A through C, all disputes shall not hinder the contractor from continuing with the work under protest.

We are also sending a copy of this letter to Colonial American Casualty and Surety Company (reference bond #PRF09147094) so they will be aware of this notification as directed under General Contract Conditions for Construction item # 9. By this letter, we request that Colonial immediately take the necessary steps to complete the project according to the terms of the contract.

Regards,

Wendy Ellis  
City Of Palestine  
City Manager









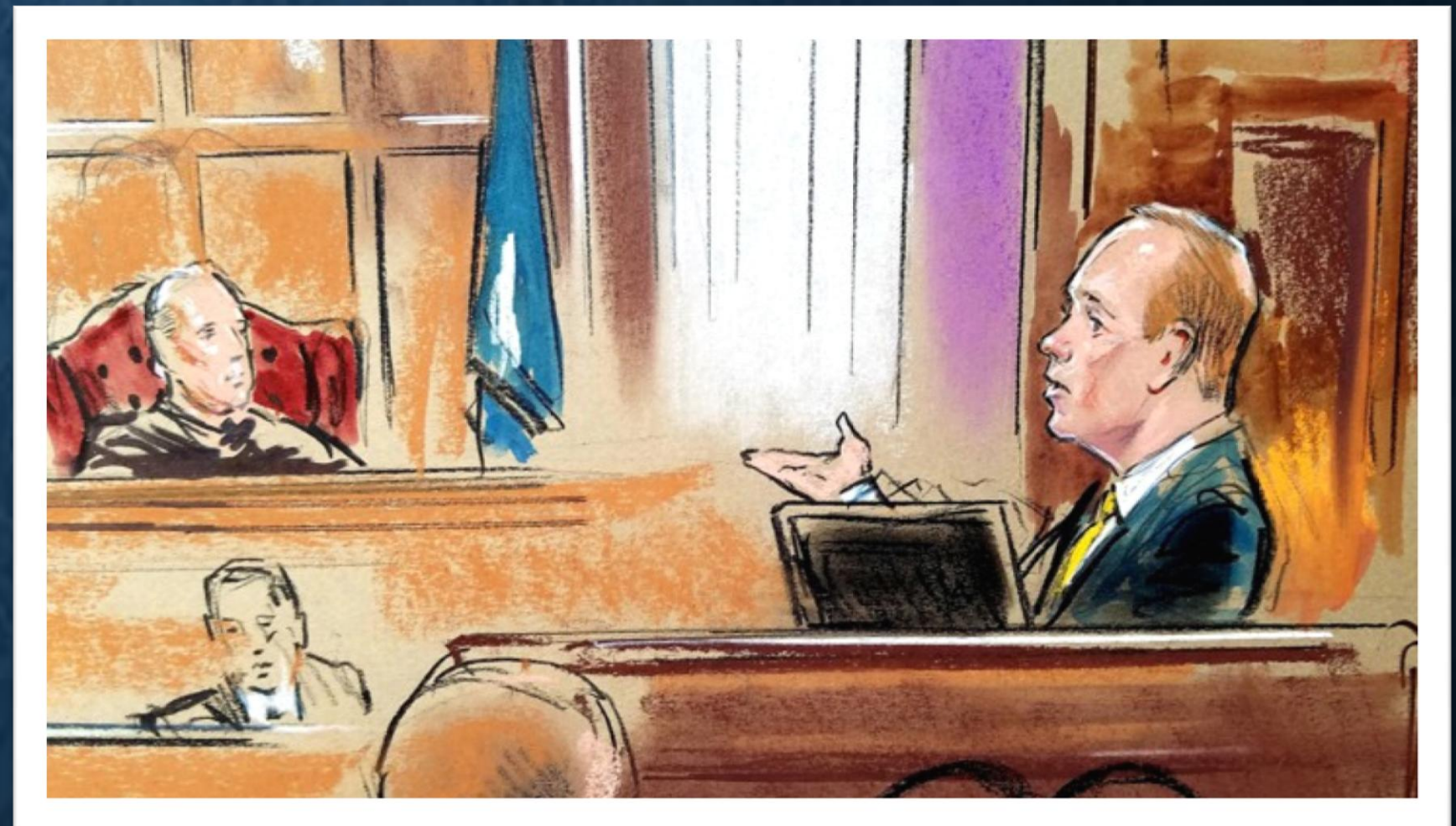






# POST MORTEM

- Experts
  - Make sure that experts are well-versed and easily understood
    - Experts who worked on the project may not be the best witnesses
    - Experts who state absolutes and then back off are not the best witnesses
    - Penny-wise and pound foolish





# POST MORTEM

- State standard contracts
  - Presume that the language is pro-city
    - But there is language that can be used to be pro-contractor
  - Jury is not concerned with contract language
    - Summary Judgment
    - Appeal

## CITY OF PALESTINE



Sanderson Boulevard Construction  
(TCF 713372) (B2014-05)

## CONTRACT DOCUMENTS

June 2014



*Gary L. Burton, III*

*Plans and Specifications Prepared By:*

**GARY BURTON ENGINEERING, INC.**  
Consulting • Planning • Permitting • Design • Management

TBPE FIRM No.: F-2812

TYLER:  
FORT WORTH:

14531 State Hwy 155 S - Tyler TX 75703  
6320 Southwest Blvd Ste 102 - Fort Worth TX 76109

• Ph 903-561-6984 • Fax 903-561-6757  
• Ph 817-599-9067 • Fax 817-599-9104



# POST MORTEM

- Communicate with client
  - In writing and orally
    - Early and often
    - Understand that council members
      - Change
      - Don't recall earlier briefings
  - Make sure that the cost of litigation is understood and accepted
  - Make the staff and the council partners in the decision-making process





**RONALD D. STUTES**

**Potter Minton  
Tyler, Texas**

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