801.11

[redacted]

[redacted]

[redacted]

August 26, 1991

Re: Annual Net Revenues Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended

Patrick Sharpe
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Via telecopy (202) 326-2050

Dear Mr. Sharpe:

As we discussed on August 15, 1991, on behalf of our client, [redacted] company (together with all the entities which it controls, [redacted] we would like your assistance in determining the view of the staff of the Federal Trade Commission (the "*Staff*") with respect to the meaning of "annual net revenues" under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (as amended, the "*Act*") and the rules (16 C.F.R. parts 801-803) promulgated thereunder (the "*Premerger Notification Rules*") as they apply to the Proposed Transaction (defined below) and the facts stated herein.

Assuming that the tests set forth in Sections 7A(a)(1) (the "*commerce test*") and 7A(a)(3) (the "*size-of-the-transaction test*") of the Clayton Act would be met in a proposed transaction (the "*Proposed Transaction*") whereby [redacted] would acquire the ultimate parent entity of another person and all of the entities which it controls (the "*Target*"), whether the Proposed Transaction would be subject to the reporting requirements of the Act would be determined by Section 7A(a)(2) of the Clayton Act (the "*size-of-the-parties test*"). [redacted] has informed us that it has less than $100 million in total assets. Therefore, assuming that the Target has less than $100 million in annual net sales and total assets, whether the Proposed Transaction would be subject

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to the reporting requirements of the Act would be determined by [redacted] level of annual net sales in accordance with Section 801.11 of the Premerger Notification Rules.

Whether [redacted] annual net sales equal or exceed $100 million depends upon what constitutes annual net sales for the purposes of the Act and the Premerger Notification Rules. According to [redacted] Consolidated Profit and Loss Account for 1990 (the "*Consolidated Income Statement*", a copy of which is attached hereto as Exhibit A), [redacted] had "turnover" ("*Turnover*") in 1990 of 237,203,000 guilders or approximately $121,680,000[1]. The Consolidated Income Statement also reflects that of the 237,203,000 guilders of Turnover, 93,288,000 guilders or approximately $47,754,000 of such Turnover was "Subcontracted work and other suppliers' costs" (the "*Conduit Payments*"). Therefore, by subtracting the Conduit Payments from Turnover, the net turnover (the "*Net Turnover*") of [redacted] and its consolidated entities would be 144,415,000 guilders or approximately $73,926,000.

With respect to the character of the Conduit Payments in the Consolidated Income Statement, [redacted] has informed us of the following:

1. All of the amounts reported under the heading "Subcontracted work and other supplier's costs" are pass-through charges (a) which [redacted] incurs and pays on behalf of its customers, (b) for which [redacted] customers reimburse [redacted] and (c) out of which [redacted] receives no profits;

2. The table attached hereto as Exhibit B was prepared by [redacted] and reflects the constituent amounts reported as Conduit Payments by type of subcontracted work or suppliers' cost and the [redacted] entity which incurred such amounts on behalf of its customers;

3. The Conduit Payments are not viewed by [redacted] as its costs of doing business, and, therefore, are not accounted for as costs of doing business;

4. Only one entity which [redacted] controls (within the meaning of the Act and the Premerger Notification Rules) is not consolidated in the Consolidated Income Statement: [redacted] and

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[1] All currency conversions herein are based upon a currency exchange rate as of August 13, 1991, determined by Banker's Trust Co. of 0.5119 dollars per guilder as reported in *The Wall Street Journal* on August 14, 1991.

5. [redacted] is not active and has no revenues.

You have informed me that, in the past, the Staff has taken the view that annual net sales of a construction company is equivalent to such company's gross receipts less amounts for which such company acted as a conduit for payment for its subcontractors (*"Net Reciepts"*). [redacted] is a geotechnical, environmental and engineering consulting company that accounts for its revenues much like a construction company. [redacted] believes that the Conduit Payments it makes on behalf of its customers which are reported under the heading of "Subcontracted work and other suppliers' costs" are not part of its annual net sales. Therefore, [redacted] believes that its annual net sales is its Net Turnover of approximately $73,926,000. If [redacted] annual net sales are equal to its Net Turnover and the facts are as stated herein, the Proposed Transaction would not be subject to the reporting requirements of the Act because the size-of-the-parties test would not have been met.

This is not an office position

You have also informed me that, in the past, when the Staff has taken the view that the annual net sales of a construction company are equivalent to its Net Receipts, the last regularly prepared statement of income and expense of such construction company had a line item reflecting Net Receipts. Because the Consolidated Income Statement is prepared in accordance with accounting rules applicable in The Netherlands, it does not have a line item reflecting either gross or net sales or revenues. Even so, [redacted] believes that its annual net sales are as stated on its last regularly prepared statement of income and expense because both the "turnover" and "Subcontractor's work and other supplier's costs" line items are provided in the Consolidated Income Statement. [redacted] believes that the Consolidated Income Statement sufficiently states Net Turnover in such constituent parts for the purposes of Section 801.11(c)(1) of the Premerger Notification Rules. Therefore, [redacted] believes that from both a substantive and technical perspective, its Net Turnover is its annual net sales for the purposes of the Act and the Premerger Notification Rules.

A/O

We respectfully request, on behalf of [redacted] your assistance in determining the Staff's view with respect to whether the Net Turnover of approximately $73,926,000 is the amount of [redacted] annual net sales for the purposes of determining whether the reporting requirements of the Act are applicable to the Proposed Transaction. If it is possible, we would appreciate a letter confirming the Staff's view with respect to the same. [redacted] is in the process of negotiating the terms of the Proposed Transaction and hopes to consummate such transaction by the end of next month (assuming that its obligations under the Act have been satisfied). Therefore, any assistance you may be able to provide us in meeting this schedule would also be appreciated.

This is not comparab. to net sales

Thank you for your assistance in this matter. If you have any further questions regarding the foregoing, please call me at the number noted above.

Very truly yours,

[redacted]

cc: [redacted]

You donot deduct costs (including subcontracted work) from gross revenues (turnover) in order to derive a figure comparable to net sales. Net sales are Gross sales minus returns and allowances — not minus cost and expenses. Use the turnover figure for the size-of-person test

called [redacted]

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JSS — CONCURS