TERMON CONSTRUCTION INC.
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August 9, 2004

ENVIRONMENTAL PROTECTION
GENERAL COUNSEL'S OFFICE
RECEIVED
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Commissioner Christopher O. Ward
New York City Department of
Environmental Protection
59-17 Junction Boulevard
Flushing, NY 11373

Re: Contract WTC-ARD
PIN Number: 82603WTCIARD
Emergency World Trade Center Indoor Air Remediation
Quandrant D, Manhattan

Dear Commissioner Ward:

The following constitutes Termon Construction Inc.'s ("Termon") Notice of Dispute pursuant to Article 19.4(a) of the above-referenced contract (the "Contract"). A copy of the Contract is submitted herewith as Exhibit A.

Background

On June 8, 2004, Termon submitted to the New York City Department of Environmental Protection a request that the Contract's Engineer make a determination on several issues on which Termon believes entitles it to additional compensation. Termon never received a response. Pursuant to Article 19.2 of the Contract, the Engineer's failure to respond is deemed a non-determination and Termon is, therefore, submitting its claim to you pursuant to Article 19.4(a).

This Contract involved the cleaning of certain apartment buildings located in Battery Park City after the disaster at the World Trade Center on September 11, 2001. Pursuant to the Scope of Work included in the Contract, Termon was responsible for the cleaning of common areas, residential apartments and the buildings' HVAC systems on a unit price basis. The Scope of Work issued for the Contract separately specified the contractor's responsibility with regard to the cleaning in each of these areas. There was no site visit held prior to the date the bids were due and investigating the areas, especially the private residential spaces, was not possible under the circumstances existing at that time.

During the Contract, significant additional cleaning was required due to furnishings and mechanical systems which had not been disclosed to the bidders. Termon performed this work as directed and subsequently billed for it. The claims herein relate to the additional work that Termon was directed to perform, base contract work which has not been paid and for the retainage that has been withheld.

Termon requests a determination by you of the following:

1. <u>Contract Billings--$85,653.88</u>

During the course of the project, Termon billed for certain work it performed and which was approved, but which has yet to be paid. After the work was completed, the DEP instructed Termon to resubmit these invoices to the EPA which Termon did by letter dated April 8, 2004. Since that time, Termon has not received any written reply though it has been told repeatedly that the amounts claimed have been reviewed by the EPA and will be paid. The amounts claimed are as follow:

Invoice No.	Amount	Description
011	$19,795.00	Cleaning of HVAC systems at 385 South End Avenue
022	$39,811.87	Apartment cleaning
022	$ 1,287.80	Common space cleaning
024	$ 4,062.89	Apartment cleaning
024	$14,588.50	Common space cleaning
025	$ 2,659.92	Apartment cleaning
Various	$ 3,447.90	Apartment cleaning (Invoices 006 and 018) paid
Total:	**$85,653.88**	-3447.90 = 82,205.98

78,339.41 = 3,866.57

There is no basis for the DEP to not pay these amounts. This was Contract work which has been approved. Termon requests that it be awarded $85,653.88.

2. <u>Contract Retainage--$213,800.57</u> 214,145

On all contract payments, retainage was withheld pursuant to the terms of the Contract.

No talk
No release

Article 6.5 of the Contract provides that the retainage will be held by the City "until the substantial completion of the work." That has occurred, as all work that was ordered has been completed and we have not been instructed to perform any additional work since approximately May, 2003.

Moreover, while Article 5a of the Contract allows the Commissioner to retain from Termon's final payment a sum as security, that amount was required to be fixed in the Contract's specifications. No such sum was ever fixed. Therefore, especially in light of the type of work performed under the Contract, it is clear that no money was intended to be withheld.

It is Termon's understanding that the approved contract billings total $2,138,005.65. Based on that amount, the DEP is holding $213,800.57 in retainage. While a final accounting of the approved contract billings needs to be conducted to verify this amount, there is no basis for the DEP to continue to withhold Termon's retainage.

3. <u>Cleaning of HVAC Units In Residential Apartments--$913,000.00</u>

With the Invitation to Bid, the contractors were given a Scope of Work on which to base their bids. For ease of reference, a separate copy of the Contract's Scope of Work is annexed hereto as Exhibit B. While there was a mandatory pre-bid meeting, no site inspection was allowed nor was it possible due to the contingencies of the situation. As a result, the bidders were forced to rely exclusively on the information contained in the Scope of Work provided to them. The Contract's Scope of Work, in fact, omitted a significant amount of work that Termon was obligated to perform.

Scope of Work A concerned "the cleaning of minimal dust accumulations (light coating)" in (a) common spaces, (b) in the buildings' HVAC systems and (c) in the residential spaces. With regard to heating and/or air conditioning units in residential apartments, the Scope of Work only required Termon to remove and clean the "[i]ntake/discharge <u>registers</u> of HVAC systems", to vacuum the "first foot of duct work" of the HVAC systems. (Scope of Work A, ¶3.h, emphasis added) and to remove and vacuum "[w]indow and room air conditioners" (Scope of Work A, ¶3.i). This was the extent of the cleaning of any of the mechanical appliances or systems which was a part of the Scope of Work provided prior to bid.

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Upon commencing work, it was discovered that besides the window air conditioners and HVAC registers, the apartments contained individual HVAC through-wall units. The necessity of cleaning these types of units was not mentioned in the Scope of Work for the Contract. Every apartment in Quandrant D where Termon performed its work contained at least two of these HVAC units—one in each bedroom and at least one unit in the living room/dining room. Termon's claim is based on the number of bedrooms in each apartment plus one unit for the living room/dining room area. For example, for a one bedroom apartment, Termon is claiming for two HVAC units. For a two bedroom apartment, Termon is claiming for three HVAC units.

While it may be argued that there is no difference between the window air conditioning units specified in the Scope of Work and the HVAC units, they are, in fact, significantly different and required significant amounts of additional work to clean.

To remove and clean the window air conditioning units simply required Termon's employees to disconnect the power source and remove the unit from the window. This was accomplished by a single employee. The HVAC units, however, required at least two employees to remove it from the wall and the cleaning of additional heating components that were not present in the air conditioning units.

The fact that cleaning these units was considered extra work was ??? recognized by the DEP with regard to the common spaces. Those spaces also contained through-the-wall HVAC units, identical to those contained in the apartments. The DEP ??? ordered Termon to clean these units in the common areas and agreed, in Change Order No. 3 to pay Termon $500.00 for cleaning each of these units. These are identical to the units contained in the residential spaces. There is no valid reason for Termon to have been paid for cleaning these units in the common areas as extra work and not be paid for cleaning these exact same units in the residential apartments.

In total, Termon was required to clean 1,826 through-the-wall HVAC units in the residential apartments. Charts specifying the number of units in each specific building is annexed hereto as Exhibit C. Based upon the agreed rate of $500.00 per unit, Termon is entitled to receive an additional $913,000.00 for this work.

4. HVAC Units At 395 South End Avenue--$6,000.00

As stated above, Termon cleaned the through-the-wall HVAC units in the common areas pursuant to Change Order No. 3. However, the DEP has yet to approve and pay Termon for the 12 units it cleaned in the common spaces of the building at 395 South End Avenue. Termon billed for this work as part of Invoice No. 24. Termon requests that it paid for this work as well.

5. Baseboard Heaters In Common Spaces--$10,575.00

The Scope of Work for the residential apartments clearly states that the cleaning of baseboard heaters is included as part of the Contract. The Scope of Work for the common areas, however, is completely silent with regard to the necessity to clean baseboard heaters. As a result, Termon did not anticipate performing this work in the common areas when it bid this project.

As stated above, during the course of the project, Change Order No. 3 was negotiated, which contained unit prices for work on various HVAC components. As part of that change order, the parties agreed to a price of $25.00 per linear foot for the cleaning of baseboard heaters. Termon cleaned a total of 423 linear feet of the baseboard heaters, resulting in a total of $10,575.00 being owed at the agreed rate.

Again, there does not appear to be a valid basis for requiring Termon to clean these heaters at no cost in the common areas when it is clearly outside the Scope of

Work in the Contract. Indeed, there would have been no reason to negotiate a unit price for this work in Change Order No. 3 unless the DEP intended to pay Termon for this work. We believe, therefore, that this is additional work which Termon is entitled to be compensated.

6. Additional Insurance Premium

The premium for the insurance policies required under the Contract was based on both the duration of the project and on the Contract's estimated price. The estimated length of the Contract, as provided by the DEP, was 730 days. The Contract's amount, based on the estimated units provided by the DEP was $4,199,499.40. As a result, the premiums for these policies totaled $170,338.66, which was a fixed rate based on the information provided by the DEP. This constitutes a rate of approximately 4.06% of the Contract amount.

However, the DEP materially reduced the amount of work that was assigned under the Contract and ended it prematurely on June 1, 2003, resulting in approved billings to-date of only $2,138,005.65. This reduction, therefore, increases Termon's effective insurance premium rate to 7.97% of the actual Contract amount, almost twice what was anticipated. This additional cost was not expected by Termon at the time it entered into the Contract and resulted in a material increase in its costs for performing work under the Contract. Termon, therefore, believes that it is entitled to be compensated for the additional premium costs that it was forced to absorb.

The difference between the estimated billings ($4,199,499.40) and the actual billings ($2,138,005.65) totals $2,061,493.75. If the anticipated insurance premium rate of 4.06% is applied to this differential, it results in additional insurance premiums, which Termon has been unable to recoup because of the reduction in work, of $83,696.65. Termon believes that it is entitled to be compensated in this amount.

7. Removal and Disposal of Wall-to-Wall Carpeting--$27,200.00

Scope of Work A in the Contract provides that carpeting in the residential apartments will be cleaned. (Scope of Work A, ¶3.e) Separately, Scope of Work A states that "certain furnishings" may be tagged by the owners for disposal. (Scope of Work A, ¶10) While this latter provision does mention "carpets", it continues by stating that the "residents' personal property" shall not be disposed of without their authorization. The import of this section is that the furnishings that may be tagged for disposal would be the resident's furnishings which constitute personal property. That indicates that any carpeting, to be personal property, would be items such as area rugs and the like. Termon, however, was ordered to remove wall-to-wall carpeting which was affixed to the apartments, including the padding and tacking, which is not the personal property of the residents.

As provided to the DEP in our May 2, 2003 letter, our subcontractor provided us with an estimated cost of $2.72/sq. foot for performing this work. (A copy of this letter is annexed hereto as Exhibit D). This is equivalent to the agreed upon price of $2.75/sq. foot that the DEP paid Termon for removing wall-to-wall carpeting in the common areas of the buildings. Using a unit price of $2.72/sq. foot, and based on an average of 1,000 square feet of wall-to-wall carpeting in each of the 10 apartments where this work was performed, we are entitled to an additional $27,200.00 for this work.

Termon requests that it be awarded this amount for performing this work.

Termon thanks you in advance for your consideration of this matter. Any additional information that you require will be forwarded upon request. Termon also asks that all further correspondence or any requests for additional information concerning this matter or this Contract be directed to Stephen A. Stallings, Esq. of Sacks Montgomery, P.C., 800 Third Avenue, New York, New York 10022.

Sincerely,

For

Thomas Heavey
President