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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

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From:

Thomas Lieber, Esq

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Date:

6/4, 2002

Re:

See Attached

Pages:

5 (including cover sheet)

Message:

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GENERAL COUNSEL'S OFFICE
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JUN-04-2002 15:20

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION 2
 290 BROADWAY
 NEW YORK, NY 10007-1866

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JUN - 4 2002

Frank Schiano, Esq.
 NYC Department of Environmental Protection
 By Facsimile Transmission 718-595-6543

Re: Changes to City Contract for WTC dust cleanup and project monitor/sampling

Frank
 Dear Mr. Schiano:

I very much appreciated you sending Beverly and me the insurance information and the boilerplate for the City contracts so quickly. Here are a few of the changes which I feel will be needed for the dust cleanup and the project monitor/sampling contracts. Others will be forthcoming in the SOW and Site Quality Assurance Procedures which are to be attachments to the contracts.

First, because of the need for the contractors to input to and access a confidential database that's being created, we are trying to determine what, if any, language on this subject needs to be added. (Possibly this is not necessary for the cleaning contractor.) We are consulting with our HQ about the addition of the following language from the Federal Acquisition Regulation (which might have to be further modified to make sense in the context of the City's contract):

The Contractor will be required to design, develop, or operate a system of records on individuals, to accomplish an agency function subject to the Privacy Act of 1974, Public Law 93-579, December 31, 1974 (5 U.S.C. 552a) and applicable EPA regulations. Violation of the Act may involve the imposition of criminal penalties.

(a) The Contractor agrees to-

- (1) Comply with the Privacy Act of 1974 (the Act) and the EPA ("EPA" should be defined in the definition section or at its first usage) rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals to accomplish an EPA function when the contract specifically identifies-
 - (i) The systems of records; and
 - (ii) The design, development, or operation work that the contractor is to perform;
- (2) Include the Privacy Act notification contained in this contract in every solicitation and resulting subcontract and in every subcontract awarded without a solicitation, when the work statement in the proposed subcontract requires the redesign, development, or operation of a system of records on individuals that is subject to the Act; and
- (3) Include this clause, including this paragraph (3), in all subcontracts awarded under this contract which require the design, development, or operation of such a system of

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records.

(b) In the event of violations of the Act, a civil action may be brought against the agency involved when the violation concerns the design, development, or operation of a system of records on individuals to accomplish an agency function, and criminal penalties may be imposed upon the officers or employees of the agency when the violation concerns the operation of a system of records on individuals to accomplish an agency function. Solely for purposes of the Privacy Act, when the contract is for the operation of a system of records on individuals to accomplish an agency function, the Contractor is considered to be an employee of the agency.

(c)(1) "Operation of a system of records," as used in this clause, means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

(2) "Record," as used in this clause, means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains the person's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.

(3) "System of records on individuals," as used in this clause, means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

We also believe it will be necessary to include the following language based on the Environmental Protection Agency Acquisition Regulation:

(a) The Contractor recognizes that Contractor employees in performing this contract may have access to data, either provided by EPA or other contractors or first generated during contract performance, of a sensitive nature (such as the names and addresses of residents whose dwellings are subject to cleanup and sampling) which should not be released to the public without EPA approval. Therefore, the Contractor agrees to obtain confidentiality agreements from all of its employees working on requirements under the contract.

(b) Such agreements shall contain provisions which stipulate that each employee agrees that the employee will not disclose, either in whole or in part, to any entity external to EPA, the Department of Justice, or the Contractor, any information or data provided by EPA or other contractors or generated by the Contractor, under this contract, without first obtaining the written permission of EPA. If a contractor, through an employee or otherwise, is subpoenaed to testify or produce documents, which could result in such disclosure, the Contractor must immediately notify EPA so that the EPA can authorize such disclosure or have the opportunity to take action to prevent such disclosure. Such agreements shall be effective for the life of the contract and for a period of five (5) years after completion of the contract.

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(c) The Department may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to prevent the unauthorized disclosure of information to outside entities. If such disclosure occurs without the written permission of EPA, the Department may terminate the contract, for default or convenience, or pursue other remedies as may be permitted by law or this contract.

(d) The Contractor further agrees to insert in any subcontract or consultant agreement placed hereunder, provisions which shall conform substantially to the language of this clause, including this paragraph, unless otherwise authorized by EPA.

While there is a confidentiality provision in the DEP contract which could be amended, it may be better to include these provisions in an addendum, indicating that these provisions supercede the City confidentiality provisions where there is a conflict. Let's discuss. Lastly on the privacy issue, I'd be interested if there could be an amendment to the "hotline" contract which could add this language as well, because that contract is also supposed to be covered by the Privacy Act.

Second, we want to be sure that there is no question of either contractual responsibilities flowing to EPA or the creation of DEP or EPA being the agent for the other, so we'd recommend the following in an addendum:

In accordance with the attached Scope of Work and the attached Quality Assurance Plan, EPA's On Scene Coordinators will have all the oversight authority of the Project Manager under this contract. Nonetheless, it is understood by all parties to this contract that the United States Government (including any of its agencies, employees and/or agents) is not a party to the contract and there is no relationship of agency created thereby.

Third, I very much agree with you that the U.S. will need to be named as an additional insured on each of the contractors' insurance policies. In addition, Article 7.1A. of the City contract needs to be amended, perhaps through an addendum, to extend to the United States the indemnification the contractor provides to the City. Likewise, the first line of Article 7.1B should be amended to add the United States, so that an action against the United States will also be a trigger for the City to withhold payments.

Fourth, there should be an addendum provision indicated that a copy of the invoices is sent to EPA (do any of the City's Prompt Payment Act provisions or other rules allow you extra time to pay in such a circumstance where we review invoices first?)

Fifth, an addendum should clarify section 12.9 of the City contract, so that EPA's prior written permission is also necessary for any publication of material or statements to the press.

Sixth, an addendum should clarify section 14.4 of the City contract, so claims cannot be made against employees of EPA, FEMA or the Coast Guard.

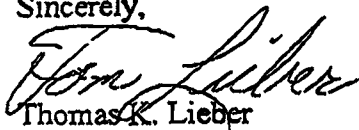
Please contact me at 212-637-3158 or Wayne Gold at 212-637-3432 after you've had an opportunity to look this over. Sorry this took so long to get to you, and thanks for your help.

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Sincerely,



Thomas K. Lieber

Associate Regional Counsel and Team Leader
Office of Regional Counsel

cc: Beverly Kolenberg
Wayne Gold

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