



Elmsford Executive Park, Building 5
2269 Saw Mill River Road ■ Elmsford, New York 10523
TELEPHONE 914 • 345 • 6000 ■ FACSIMILE 914 • 345 • 0045

DATE: 10 September 2002
TO: Bob Avaltroni, Deputy Commissioner
DEP
FAX: 713-595-4544
FROM: Akin A. Cole
SUBJECT: ADDENDUM NO. 5 - CONTRACT WTC-AMB
PAGES: 6

FAX TRANSMITTAL

- ◆ Pursuant to our telephone conversation of a few minutes ago, I am faxing you a copy of my concerns to Addendum No. 5 of the above-referenced contract.
- ◆ As you can see these concerns are very real and reasonable; and I hope you can find it absolutely necessary to modify the language addendum to give us some level of comfort and a sense of working on the same team.
- ◆ Please review and call me with your thoughts and possible revisions to the addendum.



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2269 Saw Mill River Road ■ Elmsford, New York 10523
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DATE: 06 September 2002
TO: Carol Fenves
NYC.DEP
FAX: 718-595-3278
FROM: Akin A. Cole
SUBJECT: ADDENDUM NO.5 - CONTRACT WTC-AMB
PAGES: 2

FAX TRANSMITTAL

- ◆ This is to acknowledge receipt of Addendum No. 5 regarding the above-referenced WTC contract.
- ◆ I wish to point out certain concerns regarding the addendum:
 - 1) First paragraph does not provide for the verification or validation of claims for theft, disappearance, destruction of/or damage to property by building owners and their occupants. This suggests that claims are automatically attributed to the environmental consultant(s) and its employees without a built-in process of verification or validation. It does not address potential fraudulent claims by owners of buildings and/or their occupants. It leaves the consultant(s) open to such fraudulent claims.
 - 2) The additional 5% retainage called for as additional security to the fidelity bond in place for this project is excessively high. This amounts to a 15% retainage of the entire contract amount plus the costs of obtaining a fidelity bond. The agency should consider waiving this additional 5% retainage because of the additional financial burden it places on the respective consultants.
 - 3) The third paragraph calls for release of any retainage owed to the consultant three(3) months following the completion of all work. If this money were placed in a bank, it would yield interest over the duration it is maintained in the bank. Since the agency has presumably divested this money into interest-yielding instruments, the agency should consider and be willing to pay interest on the substantial amounts to be withheld.
 - 4) Article 26, Waiver of Right to Assert Mechanic's Liens. I think this paragraph needs to relate Lien waivers to payments withheld for specific reasons. The consultant(s) should be able to have recourse

Cole Consulting Corporation

NYC.DEP
06 September 2002
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to the collection of unattached monies owed by its client and not paid promptly or in a timely fashion including the possible use of a mechanic's lien.

- ◆ Please revise your addendum with consideration to the issues raised in my facsimile to bring about an early contract resolution.

ENV COMPLIANCE

Fax: 17185954422

Sep 5 2002 16:24 P.01



The City of New York
Department of Environmental Protection

39-17 Junction Boulevard
 Flushing, New York
 11373-5104

Christopher O. Ward
 General Counsel

Virginia Smyth 718 595 4404
 Carol Fenves 718 595 3225
 September 5, 2002

Akin A. Cole
 Environmental Technologies Division, Cole Consulting Group
 Elmsford Executive Park, Building 5
 2269 Saw Mill River Road
 Elmsford, New York 10523

RE: Addendum #5
 Contract WTC-AMB

Dear Mr. Cole:

Attached, please find Addendum # 5 to Contract WTC-AMB. Please review the Addendum, and sign below acknowledging your firm's consent to adhere to the provisions therein.

After the Contract Books have been prepared, you will be asked to sign the Contract and all addenda, including #5, thereto.

Please fax the signed acknowledgment to my attention at (718) 595-3278, and follow-up by returning the original signed acknowledgement to my office (17th floor).

Very truly yours,

Carol Fenves
 Deputy ACCO

I acknowledge that my firm will adhere to the provisions of Addendum #5 to the Contract.

 Authorized Signature

 Print Name, Title

 Date



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ADDENDUM No. 5

ADDENDUM TO CONTRACT NO. WTC-AMB, by and between The City of New York (the "City"), acting by and through the New York City Department of Environmental Protection ("DEP") and Cole Consulting ("Contractor").

Supply and Service Agreement

1. Article 6.5: ADD a new Paragraph C, as follows:

C. The Contractor shall be obligated to pay, satisfy and discharge any claims for theft, disappearance, destruction of or damage to personal property made by the owners of buildings where work is being performed by the Contractor, and/or by the owners/occupants of apartments where work is being performed by the Contractor, to the extent such claims are not otherwise covered in full by the proceeds of insurance maintained by the Contractor with respect to the performance of work hereunder.

As security for the faithful performance by the Contractor of the foregoing obligation, DEP is hereby authorized, in addition to the ten percent (10%) retainage referred to in Paragraph B above, to deduct and retain a further five percent (5%) of the value of all work certified for payment in each partial payment voucher. The additional 5% retainage shall continue to be made up to an aggregate total of \$75,000. All monies deducted and retained by DEP pursuant to this Paragraph C may be applied by DEP, in its sole and absolute discretion, to pay, satisfy and discharge any such claims, if such claims are not otherwise paid, satisfied or discharged by the Contractor within 30 days after demand by DEP. If at any time, because of payments made by DEP out of such monies for such purpose, a total of less than \$75,000 is available to pay, satisfy or discharge such claims, DEP is hereby authorized to resume deducting and retaining a further five percent (5%) of the value of all work certified for payment in each partial payment voucher, the intent being that a fund of \$75,000 shall always be available to DEP as security for the faithful performance by the Contractor of the obligation under this paragraph.

DEP is authorized to continue using any monies deducted and retained pursuant to this Paragraph C to pay, satisfy and discharge such claims for a period of three (3) months after completion of all work hereunder. Upon the expiration of three (3) months after completion of all work assigned under this Contract, DEP shall refund any remaining portion of the monies deducted and retained pursuant to this Paragraph C to the Contractor.

2. ADD a new Article 26, as follows:

Article 26, Waiver of Right to Assert Mechanic's Liens.

In consideration of the mutual covenants and agreements contained in the Contract, the Contractor agrees as follows:

The Contractor agrees to look solely to DEP for payment of all sums due and owing to it for the Work performed hereunder, and the Contractor hereby waives and relinquishes any right to assert a mechanic's lien or other lien against any real property where work is being performed hereunder to secure or collect payment of such sums, including any buildings or apartments where such work is being performed.

The Contractor agrees to insert a similar provision in any subcontract for labor, equipment, or materials entered into by the Contractor for purposes of performing work hereunder, requiring the subcontractor or supplier to look solely to the Contractor or to any monies held by DEP applicable to such work in accordance with and subject to the procedures for filing a lien for a public improvement under the New York State lien law, for payment of any sums due to the subcontractor or supplier, and to relinquish any right to assert a mechanic's lien or other lien against any such real property to secure or collect payment of such sums.

Sherraton Falls
View

(905) 374-1077 (Phone)

(905) 374-6224 (Fax)