The City of New York

DEPARTMENT OF ENVIRONMENTAL PROTECTION

59-17 Junction Boulevard
Flushing, New York 11373

Christopher O. Ward
Commissioner

David B. Tweedy
First Deputy Commissioner

Tel. (718) 595-6576
Fax (718) 595-3557
dtweedy@dep.nyc.gov

DEPARTMENT OF ENVIRONMENTAL PROTECTION GENERAL COUNSEL'S OFFICE RECEIVED

2004 NOV -3 P 3:53

F WORLD TRADE CENTER - BUILDING INTERIORS

October 28, 2004

Stephen A. Stallings, Esq.
Sacks Montgomery, P.C.
800 Third Avenue
New York, New York 10022

Re: Termon Construction, Inc.
Notice of Dispute
Contract WTC-ARD
Emergency World Trade Center Indoor Air
Quadrant D, Manhattan

Dear Mr. Stallings:

By letter dated August 9, 2004, Termon Constructio
a Notice of Dispute, pursuant to Article 19 of the N
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work." In the Notice of Dispute, Termon requests
to this matter be forwarded to your attention. As I
Commissioner Christopher O. Ward to render the Agency Head's decision on
Disputes, your Dispute was routed to me.

By way of background, it is important to note that while your client did enter into a Contract with the New York City Department of Environmental Protection, that Contract made clear that any and all services were to be directed by the United States Environmental Protection Agency (USEPA) and as such, all work and invoices had to be approved by USEPA. The NYCDEP was acting as a conduit for administering payments, as the Contract funds were paid by the Federal Emergency Management Agency (FEMA). The work performed under the Contract itself was supervised by USEPA, with USEPA certifying the work and approving the invoices, which were then sent to NYCDEP to effectuate payments.

It must be further noted that although there were four air remediation contracts let (one for each quadrant), Termon is the only Contractor to present the argument that Contract work is actually "extra work," requiring payment of additional funds.

The Dispute contains several allegations, which shall be dealt with categorically:

(1) Invoices and Retainage;
(2) Cleaning of HVAC Units in Residential Apartments;
(3) HVAC Units at 395 South End Avenue;
(4) Baseboard Heaters in Common Spaces;
(5) Additional Insurance Premium; and
(6) Removal and Disposal of Wall-to-Wall Carpeting.

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION
DEP
www.nyc.gov/dep
DIAL 311 Government Information and Services for NYC

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Notice of Dispute
Contract WTC-ARD
Emergency World Trade Center Indoor Air Remediation
Quadrant D, Manhattan

Dear Mr. Stallings:

By letter dated August 9, 2004, Termon Construction, Inc. ("Termon") presented a Notice of Dispute, pursuant to Article 19 of the New York City Standard Construction Contract. The Dispute sets forth seven categories of work for which Termon believes it should be paid, some of which Termon contends is "extra work." In the Notice of Dispute, Termon requests that all correspondence related to this matter be forwarded to your attention. As I have been designated by Commissioner Christopher O. Ward to render the Agency Head's decision on Disputes, your Dispute was routed to me.

By way of background, it is important to note that while your client did enter into a Contract with the New York City Department of Environmental Protection, that Contract made clear that any and all services were to be directed by the United States Environmental Protection Agency (USEPA) and as such, all work and invoices had to be approved by USEPA. The NYCDEP was acting as a conduit for administering payments, as the Contract funds were paid by the Federal Emergency Management Agency (FEMA). The work performed under the Contract itself was supervised by USEPA, with USEPA certifying the work and approving the invoices, which were then sent to NYCDEP to effectuate payments.

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NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION
DEP
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1. Invoices and Retainage

First, your Dispute alleges that there are four enumerated invoices, as well as others categorized as "various" to be paid to your client. With respect to the "various" invoices, in the amount of $3,447.90, a check in the amount, of $3,103.11 ($3,447.90 less the retainage amount) dated March 22, 2004 (check no. AD00153987024) was sent to your client. (See copy of FMS report attached hereto as Exhibit "1").

With regard to the other invoices, NYCDEP has, on several occasions, advised Termon that the majority of these funds have been approved for payment by USEPA and has asked on several occasions for a request for the release of retainage, all of which would be included in one payment. When the $3,447.90 is deducted from the total amount your client claims is due and owing, the remaining balance, according to your client, is $ 82,205.98. NYCDEP recently learned that with respect to these invoices (011, 022, 024 and 025), USEPA has authorized payment in the amount of $78,339.41.

By letter dated September 8, 2004 to Krish Radhakrishnan, your client has asked that future payments be sent to you. In order to do so, your client must effectuate an Assignment of Payment, which must include your firm's EIN number, a vendor code and your firm's name and address. Further, if not already in the City's payment system, your firm must fill out a Substitute W-9 form to ensure that the checks are properly cut (a W-9 form is attached as Exhibit "2"). Once NYCDEP has received an appropriate request for an Assignment of Payment (a sample of which is attached hereto for your information as Exhibit "3" – please note that the Assignment of Payment must be notarized and must have a place for the Department's stamp of consent), as well as an invoice requesting release of the retainage amount, both will be processed, ensuring that your firm receives any and all balances due under this Contract. In the interest of expediency, it is most likely that both the $78,339.41 and the retainage amount will be included in one check.

I have been advised that on numerous occasions, NYCDEP has asked your client to submit, in writing, an invoice for the release of the retainage amount. As discussed above, upon receipt of a Proper Payment Assignment and invoice for the retainage amount, a check shall be cut to your firm, as Assignee. It should be noted that while your client claims $213,800.57 is due and owing as retainage, NYCDEP's figure is $214,145.06, which shall be the amount provided.

Therefore, once all the Payment Assignment paperwork has been approved and processed, your firm shall be receiving $214,145.06 (retainage) plus $78,339.41 (invoices), a total of $292,484.47.

2. Cleaning of HVAC Units in Residential Apartments

With regard to the HVAC Units in Residential Apartments, the Scope of Work clearly states that "[t]he Cleaning Contractor is responsible for cleaning residences, common spaces, and portions of HVAC systems identified by the Monitoring Contractor." The HVAC Systems "determined by the Monitoring Contractor to be impacted by dust or debris" were to be cleaned in accordance with the "site-specific scope of work" prepared and provided by the Monitoring Contractor. While Section 3(h) does reference HVAC systems, so does Section 3(i), referencing "window and room air conditioners." However, Termon's reading of

Sections 3(h) and (i) in a vacuum is improper. These must be read in conjunction with Section 2, "Cleaning of HVAC Systems."

Your client's argument that the individual apartments contained "HVAC" systems, requiring extra work, rather than simple window and room air conditioners is simply a case of semantics. The mere fact that DEP issued Change Order No. 2[1] to cover HVAC units in common spaces is not tantamount to the Department's belief that this was extra work in all cases. Rather, had the Department been of that belief, one can assume that the HVAC units in the residences would have also been included in the Change Order, which they were not.

In its Dispute, Termon argues that this work was outside of the scope of the Contract. I have been advised that EPA and the Department disagrees with Termon's position. Had Termon believed all along that this was "extra work," it should have brought this to the attention of the EPA and the Department right away. However, Termon did not do so, choosing instead to perform the work, then seek additional recovery for contract work.

3. HVAC Units at 395 South End Avenue

With respect to the common-space HVAC Units at 395 South End Avenue, I have been advised that Change Order 2 related to instances in which the entire building's system required work, which was not necessarily realized when the Contract was let.

When asked to provide the HVAC cleaning estimate for 395 South End Avenue for the Change Order work, Termon did not include the common-space units. Prior to preparing the estimate, Termon or its subcontractors had the opportunity to investigate the site. If Termon truly believed this work was to be part of the Change Order, it should have been included in the estimate provided to the Department. It appears that The EPA, responsible for approving or disapproving the invoices, made a determination that these twelve units were not separately billable under the Change Order, as they were part of the common space work contained in the Specifications. As such, because this particular work was not extra work, as determined by EPA, additional compensation is not warranted.

Further, the $6,000 Termon claims was included in Payment Invoice No. 24 was not included therein. Rather, the Invoice, signed on September 8, 2003, was for two apartments in the building, not any common space HVAC units.

4. Baseboard Heaters in Common Spaces

As to the baseboard heaters, Section 3(r) states that "[b]aseboard heaters will be cleaned" in Residential Areas. Again, this cannot be read in a vacuum. Permeating the Contract is the statement that "[t]he Cleaning Contractor is responsible for cleaning residences, common spaces, and portions of HVAC systems identified by the Monitoring Contractor." This means that when the Monitoring Contractor directs the Cleaning Contractor to do something that falls into those categories, the Cleaning Contractor is contractually bound to do so. In fact, in his September 23, 2003 in response to Termon's Payment Applications 22, 23 and 24, R. Radhakrishnan, P.E., Director of the Asbestos Control Program states that neither the cleaning

[1] Termon erroneously referred to Change Order No. 3, which does not exist. Termon meant to reference Change Order No. 2.

of the baseboard heaters in common spaces, nor the cleaning of 'through the wall HVAC Units' are separate or additional items and neither are reimbursable under the terms of the Contract.

Pursuant to Section 4 of Article 19 "Resolution of Disputes," your client was to submit its dispute "within thirty (30) days of receiving written notice of the determination or action that is the subject of the dispute." Since Mr. Radhakrishnan advised your client that neither the baseboard heaters in common spaces, nor the "through the wall HVAC Units" were extra work on September 23, 2003, the time to submit such dispute has long since passed. Your client's appeal was submitted almost one year after the Bureau's Determination. This is not only unacceptable, but violates the terms of the Contract.

5. Additional Insurance Premium

Termon's request to recoup additional insurance premiums is unheard of. Given the significant amount of insurance required under this Contract, all Contractors were told to include the premiums in their bids. As your client was well aware, the Contract enabled business and homeowners to call the DEP/EPA hotline to request clean up and remediation services. It was estimated that approximately ten thousand (10,000) people would request such services. However, at no time did the "DEP materially reduce[ ] the amount of work that was assigned" nor did DEP end the contract "prematurely on June 1, 2003."

6. Removal and Disposal of Wall-to-Wall Carpeting

Your client received a letter from Virginia Smyth, Bureau Chief Contracting Officer, dated July 9, 2003, wherein Ms. Smyth responded to your client's letters of April 7, 2003 and May 2, 2003. As stated above, pursuant to Section 4 of Article 19 "Resolution of Disputes," your client was to submit its dispute "within thirty (30) days of receiving written notice of the determination or action that is the subject of the dispute." Ms. Smyth advised your client that the disposal of items is within the scope of the Contract" and that there would be no reimbursements for this Contract work. Again, the time to dispute such a finding has long since passed. Your client's appeal was submitted well over one year after the Bureau's Determination.

As set forth under Section 1 above, the Department shall process the payment of outstanding invoices and the release of the retainage, so long as a proper assignment of payment and a request for the release of retainage are submitted. Accordingly, as to that item, your Dispute is granted, as modified by the amount approved for payment of the final invoices from USEPA.

However, as to the remaining requests, your Dispute is hereby denied. Please be advised that in accordance with Article 19 of the Standard Construction Contract, I have conducted the requisite investigation. I hereby determine that NYCDEP's prior determinations that additional compensation for items that were part of the Contract work, communicated to Termon well over a year ago, were appropriate.

Should you continue to disagree with the Department's Determination, you are referred to Article 27.5, "Presentation of Dispute to the Comptroller."

Very truly yours,

David B. Tweedy
First Deputy Commissioner

c: Durig, Fenves, Hoffer, Moss, Radhakrishnan, Resnick, Schiano, Smyth

FMS Desktop - Release 31 - FHBF241 @ FMS Production - [Open Payment Voucher Line Inquiry (1 of 2)]

File Edit Display Window Help

ayee/ Vendor	00016558381	Voucher Number	826 3FY5134	Voucher Line	01
endor Invoice	11 24270	Payment Type	P		
DA Number		Description			

Payment Data | Accounting Attributes | Related Transactions | Interest Voucher Information

Quantity 0.000 Discount Type Discount Percentage 0.00

Percentage Completed Before 000 Now 000

nterest Eligibility Date 03 / 25 / 04

Not Eligible for Interest

Check Data

Number of Checks Written	1
Last Check Number	AD00153987024
Last Check Date	03 / 22 / 04
Last Check Cancellation Reason	

Original Line Amount	3,447.90
Line Amount	3,447.90
Freight Amount	0.00
Retained Amount	344.79
Discount Amount	0.00
Payment Amount	3,103.11
Withheld Amount	0.00
Disbursed Amount	3,103.11
Closed Amount	3,103.11
Outstanding Amount	0.00

Messages 2:58 PM 07/14/04

Exhibit 1

The City of New York
FMS Substitute Form W-9
INSTRUCTIONS

The City of New York, like all organizations that file an information return with the IRS, must obtain your correct Taxpayer Identification Number (TIN) to report income paid to you or your organization. The City uses the attached Substitute Form W-9 to obtain certification of your TIN in order to ensure accuracy of information contained in its vendor/payee database and to avoid backup withholding (according to IRS regulations, the City must withhold 31% of payments if the vendor/payee fails to provide the City of New York with a certified TIN).

We ask for the information on the FMS Substitute Form W-9 to carry out the Internal Revenue laws of the United States. You are required to give us the information.

Part 1: Vendor Information

1. **Legal Business Name:** For individuals, enter the name of the person who will do business with The City of New York as it appears on the Social Security card or required Federal tax documents. An organization should enter the name shown on its charter or other legal document creating the organization. *Do not abbreviate names.*
2. **DBA (Doing Business As):** Enter your DBA on the designated line, if applicable.
3. **Entity Type:** Mark the Entity Type of the individual or organization that will do business with the City of New York. Limited Liability Companies should mark "Partnership".

Part II: Taxpayer Identification Number (TIN) and Taxpayer Identification Type

1. **Taxpayer Identification Number:** Enter your nine-digit TIN. See the table and Special Note below for instructions on the type of taxpayer number you should report
2. **Taxpayer Identification Type**: Mark the appropriate option.

The following table gives the type of Taxpayer Identification Type that is appropriate for each Entity Type.

Entity Type	Taxpayer Identification Type
Individual/Sole Proprietor who does NOT have employees other than him or herself.	Social Security Number
Individual/Sole Proprietor who has employees other than him or herself	Employer Identification Number
Custodian account of a minor	The minor's Social Security Number
Partnership/Limited Liability Company	Employer Identification Number
Joint Venture	Employer Identification Number
Non-Profit Corporation	Employer Identification Number
Corporation	Employer Identification Number
Government Entity	Employer Identification Number
Employee of The City of New York	Social Security Number
Resident Alien (see Special Note below)	Individual Tax ID Number
Non-Resident Alien (see Special Note below)	Individual Tax ID Number
Non-United States Business Entity (see Special Note below)	None

Part III: Primary Administrative/10099 Reporting Address

The location where your 1099 tax information should be delivered, if applicable. Otherwise, provide your headquarters address.

Part IV: Backup Withholding Exemption

Only non-United States Business Entities can be exempt from back-up withholding. If applicable, "Exempt" should be written in the space provided.

Part V: Certification

Please sign and date in the space provided. Enter the preparer's name and telephone number. The preparer should be employed by organization.

<u>Special Note for Resident and Non-Resident Aliens and Non-United States Business Entities</u>

<u>Resident and Non-Resident Aliens</u>: An ITIN is a nine-digit number issued by the United States Internal Revenue Service to individuals who are required to file a Federal tax return. An ITIN is for tax purposes only and does not entitle you to Social Security benefits. To obtain an ITIN, submit form W-7 to the IRS. The IRS will notify you within 4 to 6 weeks in writing about your ITIN status. In order to do business with the City of New York, you MUST submit IRS Form W-8 along with FMS Substitute Form W-9 showing your ITIN. IRS Form W-8 certifies your foreign status.

<u>Foreign Corporations or Partnerships</u>: In order to do business with the City of New York you MUST submit IRS Form W-8 along with FMS Substitute Form W-9. IRS Form W-8 certifies your foreign status and exempts you from United States information return reporting and backup withholding rules.

To obtain IRS Forms W-7 and W-8, call (800) 829-3676 or visit the IRS website **www.irs.gov.**

October, 2001

Exhibit 1

9/26/00 REVISION	THE CITY OF NEW YORK FMS SUBSTITUTE FORM W-9 REQUEST FOR TAXPAYER ID NO. & CERTIFICATION	DO NOT SEND FORM TO IRS

TYPE OR PRINT INFORMATION NEATLY. PLEASE REFER TO INSTRUCTIONS FOR MORE INFORMATION.

Part I: Vendor Information

1. Legal Business Name:

2. If you use a Doing Business As (DBA) name, please list below:

3. Entity Type (check one only):

☐ Non-Profit Corporation ☐ Corporation ☐ Government ☐ City of New York Employee

☐ Individual/Sole Proprietor ☐ Joint Venture ☐ Partnership/Limited Liability Company

☐ Non-United States Business Entity (W-8 Required) ☐ Resident/Non-Resident Alien (W-8 Required)

Part II: Taxpayer Identification Number (TIN) & Taxpayer Identification Type

1. Enter your TIN here: *(DO NOT USE DASHES)* ☐☐☐☐☐☐☐☐☐

2. Taxpayer Identification Type (check appropriate box): ☐ N/A (Non-United States Business Entity)

☐ Employer ID No. (EIN) ☐ Social Security No. (SSN) ☐ Individual Taxpayer Identification No. (ITIN)

Part III: Primary Administrative / 1099 Reporting Address

Number, Street:			Apartment or Suite No.:
City:	State:	Nine Digit Zip Code:	Country:

Part IV: Exemption from Backup Withholding

For payees that are Non-United States business entities only. See instructions.

Part V: Certification

The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding.

Under penalties of perjury, I certify that the number shown on this form is my correct Taxpayer Identification Number (TIN).

Sign Here

Authorized Signature Date

Preparer's Name and Phone Number (please print)

Print Preparer's Name Phone Number

OFFICIAL USE ONLY:

Know all Men by these Presents,

THAT [redacted] *of* [redacted], *County of* Queens *of the State of* New York, *hereinafter designated as the Assignor.*

IN CONSIDERATION of the sum of $ 1.00 and other just consideration *paid to the Assignor by* [redacted], *County of* Suffolk *of the State of* New York, *hereinafter designated as the Assignee, receipt whereof is hereby acknowledged by the Assignor.*

The Assignor hereby assigns, sells, transfers and sets-over to the Assignee, [redacted] *out of all moneys due or to become due to the Assignor under a certain contract made by and between* the New York City Department of Environmental Protection *as party of the first part, and the Assignor as party of the second part, bearing Contract No.* [redacted]

AND the Assignor hereby authorizes, empowers, and directs the Treasurer or the Comptroller of the New York City Department of Environmental Protection *or any department thereof to pay to the Assignee* [redacted] *any and all money or moneys due or to become due to the Assignor by virtue of said contract.*

AND the Assignor hereby certifies that the Assignor has not encumbered nor done any act or acts to lessen any rights or diminish any security given under said contract; and the Assignor further certifies that the Assignor has a good right to assign said money or moneys due or to become due under said contract.

AND the Assignor hereby agrees to make, execute and deliver any and all papers, instruments and documents that may be required by the Assignee and/or the Treasurer or Comptroller of said New York City Department of Environmental Protection *or any department thereof to effectuate the purpose hereof, and the Assignor authorizes and empowers the Assignee to sign for and on behalf of the Assignor any and all papers, instruments and documents that may be required by the Treasurer or the Comptroller of said* New York City Department of Environmental Protection *or any department thereof to effectuate the purpose hereof.*

AND the Assignor hereby appoints the Assignee, and Assignee's administrators, executors, assigns and successors, the lawful attorney for the Assignor irrevocably, with full power of substitution and revocation, at the cost and expense of the Assignor, and in the name of the Assignor or otherwise, to ask for, collect, demand and receive; to prosecute and sue for; by proceedings or otherwise, in a court of law or equity; to give acquittance for said money or moneys due ro to become due, or any part thereof; and to withdraw any claims, suits or proceedings pertaining to or arising out of this assignment.

AND the Assignor hereby covenants that the Assignor will receive said moneys advanced hereunder by the Assignee and will hold the right to receive said moneys as a trust fund to be held and applied for the following expenditures arising out of the improvement of real property or public improvement and incurred in the performance of said contract:

(a) payments of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;
(b) payment of the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement;
(c) payment of taxed and unemployment insurance and other contributions due by reason of the employment out of which such claims arose;
(d) payment of any benefits or wage employments, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;
(e) payment of premiums on a surety bond or bonds filed and premiums on insurance accrued during the making of the improvement or public improvement.

IN WITNESS WHEREOF, the Assignor hereby sets his Hand and seal or caused these presents to be signed by its proper corporate officers and caused its proper corporate seal to be hereto affixed this 7th *day of* ~~*January,*~~ April *2004.*

In the presence of: [redacted]

[redacted]