

Pener, Sarah

From: Dilan, Cynthia
Sent: Wednesday, July 20, 2011 9:12 AM
To: Pener, Sarah
Subject: CTU# 71390
Attachments: 71390.pdf

Sarah, not sure if you need this or not. If not, pls disregard.

Cynthia Dilan |Director Correspondence Tracking Unit | NYC Environmental Protection
(O) (718) 595-6558 | (F) (718) 595-3525| cdilan@dep.nyc.gov

7/25/2011



**Environmental
Protection**

59-17 Junction Blvd.
Flushing, NY 11373

Murray Gertner
669-1600 **TICKLER:**

**From the Commissioner's Office
Correspondence Routing Slip**

Log #: 71390

Date Routed 7/20/2011

Source Code: CTU

Due Date 8/3/2011

Priority Status Normal

Routing Information

Person Responsible: ELISSA STEIN-CUSHMAN

cc: Pener

Bureau Responsible: BLA

Instructions: Please handle as appropriate

Notes:

Letter Information

Primary Correspondent Information

Name: Henry Cirit

Organization: Frontier-Kemperer/Durr/Perini, JV

Address:

415 Fifth Avenue

Pelham NY 10803

Secondary Correspondent Information (On Behalf Of)

Name: N/A

Organization:

Address:

Date of Letter: 7/14/2011

Reference Code: N/A

Location of Problem/ Account Information: N/A

Subject of Letter: WP-237 Bowery Bay WPCP Interim Plant upgrading, phase 1 contract# BB-57G, structures & equipment reg#20010011921 Notice of Claim - Storage costs for RFP Froth control hoods

Please respond to the attached correspondence as requested and return once closed out to Cynthia Dilan with Log Number indicated clearly. Please contact Cynthia at (718) 595-3478 or via e-mail if you have any questions.

FRONTIER-KEMPER/DURR/PERINI, J.V.

CONTRACT BB-57G, BOWERY BAY WPCP INTERIM PLANT UPGRADE
 415 Fifth Avenue, Pelham, NY 10803
 914 738-0280 / FAX 914 738-0026

July 14, 2011
 Letter Serial No. BB-57G-791

Hon. John Lu
 Comptroller of the City of New York
 Municipal Building
 One Centre Street
 New York, New York 10007

Hon. Caswell F. Holloway
 Commissioner
 Department of Environmental Protection
 City of New York
 59-17 Junction Boulevard, 19th Floor
 Flushing, New York 11373-5108

WP-237 Bowery Bay WPCP
 Interim Plant Upgrading, Phase 1
 Contract No. BB-57G, Structures &
 Equipment
 Registration #20010011921
 Re: Notice of Claim – Storage Costs for
 FRP Froth Control Hoods

RECEIVED
 DEPT. OF ENVIRONMENTAL PROTECTION
 JUL 15 P 2:24

71390

Gentlemen,

Pursuant to Article No. 51 (5) (a) of the Agreement, Frontier-Kemper/Durr/Perini, J.V. ("FKDP") hereby submits a Notice of Claim to protest the Final Determination date June 14, 2011 ("Final Determination") and received on June 16, 2011, signed by Portfolio Manager Matthew Osit, P.E. of the New York City Department of Environmental Protection ("DEP"), denying FKDP's claim for the additional cost that FKDP incurred to store 32 Fiber Reinforced Plastic Froth Control Hoods ("hoods") at an offsite location pursuant to the direction of both the City and its resident engineer, Hazen & Sawyer ("H&S"). This storage cost is associated with WP-237 Bowery Bay WPCP Interim Plant Upgrading, Phase 1, Contract No. BB-57G, Structures & Equipment ("BB-57G").

Attached are copies of: (a) Attachments in support of this Notice of Claim; (b) the Final Determination; and, (c) FKDP's Request for Final Determination dated April 6, 2009 (BB-57G-768).

Under change order BB-57G-58R, the DEP directed FKDP to furnish and install forty (40) hoods. By March of 2005 FKDP's subcontractor had fabricated and delivered eight (8) hoods to the jobsite. On March 15, 2005 FKDP received notification from the DEP releasing the remaining thirty-two (32) hoods for fabrication. On or about this time the DEP also notified FKDP that only two (2) of the thirty-two (32) hoods would require pre-assembly; the rest would remain in component form. They would not be installed under the BB-57G contract. By April 29, 2005 FKDP's subcontractor was prepared to deliver all thirty-two (32) hoods to the project site. Unfortunately, DEP could not provide a storage area at the project site because the DEP failed to timely execute a change order to construct the storage area. Therefore, H&S directed FKDP to have its subcontractor find a remote site to store the hoods until room onsite was made available. These hoods were stored offsite for a period of two (2) years, from June 2005 to June 2007, at a subcontractor cost to FKDP of \$71,032.50 plus 5% for FKDP's overhead and profit. Total claim equals \$74,584.13.

The DEP Final Determination letter, in denying FKDP's claim, stated that FKDP is not entitled to receive payment for the storage of material because FKDP received advanced payment under General Condition Article 2E and by doing so FKDP is responsible to pay shipping costs. It cites a paragraph 5 of Article 2E which it claims states that *"All costs, charges and expenses arising out of the storage of such materials shall be paid by the Contractor"*.

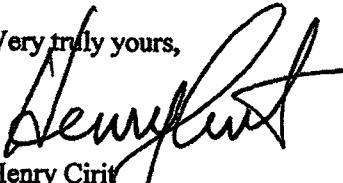
The DEP is not only confused with the facts of this matter but it has also misapplied General Conditions Article 2E. The correct facts and this misapplication are discussed below:

- 1) The initial paragraph of Article 2E specifies in what circumstances the article should be utilized. It states that *"In order to better insure the availability of materials, fixtures, and equipment when needed for the work, the Commissioner may authorize partial payment for certain materials, fixtures and equipment, prior to their incorporation in accordance with the work..."* This was not the case in the present matter. In accordance with the DEP's direction FKDP had its subcontractor purchased material, fabricated the hood components, and pre-assembled two (2) hoods. The final step was to deliver them directly to the project site by April 29, 2005 at an onsite location to be determined by the DEP. FKDP was only required to supply these items and there was no intent by either the DEP or FKDP that FKDP would have to incorporate the hoods into the work; installation would be performed by a future contractor. At no time during this process did FKDP request any payment from the DEP under Article 2E for the hoods. In fact what FKDP had expect to do was deliver the material to a H&S designated storage area on the project site and be paid 100% of the change order amount less retainage. Unfortunately, the area designated for project site storage was not available when the hoods were ready for delivery and FKDP was directed to store the hoods off site. This unanticipated storage cost was never included in any change order or in any price H&S negotiated for the hoods. At the time FKDP had no concern that it would be paid for its storage costs. In fact, H&S's field memo REO-57G-2841 dated May 27, 2005 not only confirmed that the hoods would not be installed but also stated that the cost for delivery and storage of the hoods would be addressed in change order BB-57G-58R. However, for unknown reasons that were inconsistent with every prior statement made by H&S, a field memo, REO 57G-3275 dated March 6, 2006, was issued by H&S denying FKDP its rightful payment of storage costs. Subsequent, on August 18, 2005 (Payment Requisition No. 74), when it became apparent that the DEP was not in a hurry to take delivery of the hoods at the project site, FKDP did finally request partial payment for the hoods under Article 2E. this was the only way that it would be able to receive some payment for the money it had expended. At no time did FKDP waive its rights to receive storage costs, which had never been included in the original change order.
- 2) The DEP relied on paragraph 5 of Article 2E as its justification for denying storage cost. As stated above, the DEP claims that it places the obligation to pay for all costs, charges and expenses arising out of the storage of materials on the Contractor. The DEP cannot rely on Article 2E for two (2) reasons. One, Article 2E is not applicable in the present situation because FKDP did not seek advanced payment – this is the basic requirement for applying this article, and two, there is no paragraph 5 in the Article 2E that is included in the contract documents for BB-57G. Article 2E contains just two (2) paragraphs and neither paragraph contains language that would prohibit the contractor from receiving payment for storage costs. [See attached]
- 3) This is not a unique situation. The DEP has paid FKDP to store other items offsite when storage was (1) not available at the site and (2) the items were no longer intended to be incorporated into the work. For example, the installation of seven (7) large sewage pumps was removed from the BB-57G scope of work. These pumps were manufactured for the project by Fairbanks Morse. Since there was no space available at the project site to store these pumps the DEP paid FKDP for the costs associated with the short and long term storage of the pumps. Refer to change orders BB-57-167 and BB-57-169.
- 4) FKDP submitted invoice documentation demonstrating what its subcontractor had paid to store the hoods for two (2) years offsite as it waited for H&S to finally release the hoods for delivery to the site. H&S had no interest in discussing this storage cost issue with FKDP. As a result, there was no agreement between the parties regarding the type of proof of payment that the DEP would require.

As demonstrated above the DEP's decision not to pay storage cost for the hoods is arbitrary, capricious and unsupported by the contract documents. The DEP's use of Article 2E is not applicable. Further its assertion that Article 2E requires that the contractor is required to pay storage costs is not supported by the language contained in the contract documents.

Therefore, FKDP respectfully requests that the City reverse the decision contained in the Final Determination and direct the DEP to issue FKDP a change order for the cost to store thirty-two (32) Fiber Reinforced Plastic Froth Control Hoods offsite for a period of two (2) years.

Very truly yours,



Henry Ciri
Project Manager

Attachments

cc: Osit
J. Veksenfeld
Kelly (letter only)
DeNicola (letter only)
Durr
Perini
NEDO
EVV
File (2)