



Electronic Copy

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

December 20, 2018

Mr. Ron King, President
3 Kings Environmental, Inc.
PO Box 280
Battle Ground, WA 98604

Re: **Contract C1800176** – (Aladdin Plating Site Remediation Project, Tacoma, Washington)

Dear Mr. King:

The Washington State Department of Ecology (Ecology) is providing a response to the following outstanding items:

- 3 Kings Proposed Change Order 2
- 3 Kings Delay Claim due to Force Majeure
- 3 Kings Contract Requirements For Site Fencing
- Reduction of Contract Sum to Account for the Portion of Positive Shoring that was not Installed/Removed.

Proposed Change Order 2

3 Kings submitted proposed Change Order 2 requesting additional Contract Sum and Contract Time associated with quantities for excavation, stockpiling, loading, hauling and disposal of subsurface soil and backfilling of subsurface excavations and additional Contract Sum and Contract Time for restoration of top soil. Ecology agrees to additional Contract Sum for restoration of top soil but does not agree to additional Contract Sum or Contract Time for quantities for excavation, stockpiling, loading, hauling and disposal of subsurface soil and backfilling of subsurface excavations as described below.

Section 00 41 43 Bid Item M, Excavation Support and Protection, specified that the Contractor design excavation shoring and extra excavation to enable completion of the subsurface excavation specified in the Contract Documents. Bid Item M is full compensation for completion of the Contractor designed excavation shoring and extra excavation. Additionally, Bid Item M states that the Contractor shall supply an equal quantity of approved backfill to replace extra excavation soil under the bid item. 3 Kings' proposed Change Order 2 identifies quantities of

subsurface soil and backfill for which they are requesting additional Contract Sum and Contract Time that are the direct result of the excavation shoring and extra excavation they chose for completing the subsurface excavations specified under Bid Item M. Therefore, 3 Kings request is not approved for additional Contract Sum or Contract Time associated with excavation, stockpiling, loading, hauling and disposal of subsurface soil and backfilling of subsurface excavations requested in proposed Change Order 2.

3 Kings submitted a Request for Interpretation (RFI 11) dated August 20, 2018 that identified that the quantity of top soil specified in the Contract Documents was lower than the calculated quantity for the dimensions provided in the Construction Drawing Sheet 8. The estimated quantity in the Contract Documents was 10.5 cubic yards. The revised quantity of top soil required for restoration specified in the Contract Documents is 26 cubic yards based on the area (30 feet by 35 feet) and depth (8 inches). 3 Kings provided their interpretation that 23.63 cubic yards of topsoil would be needed based on the dimensions on Sheet 8. Ecology acknowledged in their response to RFI 11 on August 22, 2018 that an adjustment would be negotiated in accordance with Section 00 72 00 General Conditions Part 7 – Changes. The quantity of top soil now requested by 3 Kings as part of proposed Change Order 2 is 45 cubic yards, well in excess of the quantity required for restoration. Based on field observations, the excess was spread outside the project limits west of the property boundary adjacent to the South Alaska Street right-of-way. Additionally, during a site visit 3 Kings personnel stated that a portion of the excess topsoil (approximately 1 cubic yard) was donated to an adjacent property owner. Therefore, Ecology is providing an adjustment to the top soil quantity from 10.5 cubic yards to 30 cubic yards. Ecology does not agree that any additional change to the contract sum or any change in the contract time for restoration of top soil.

Delay Claim Due To Force Majeure

3 Kings sent a letter in response to Ecology's letter denying 3 Kings' request for additional contract time (3 Kings letter dated November 20, 2018 in response to Ecology letter dated September 7, 2018). The letter states that it is 3 Kings' opinion that the project was delayed due to circumstances beyond their control, "stemming from a lack of Ecology's notice to the City of Tacoma associated with the project permitting and Cultural Resource Notice...". 3 Kings stated that "the delay meets the definition of Force Majeure as defined in Section 00 72 00...". Ecology continues to assert that any delays related to project permitting were within the sole control of 3 Kings, and not related to any action or inaction by Ecology, and any such delay did not meet the definition of Force Majeure. The paragraphs below summarize the major project milestone dates related to permitting and compares the date of receipt of permits to the date 3 Kings completed contract required pre-construction submittals as evidence that permitting activities did not delay 3 Kings from mobilizing to the site and starting on-site construction work.

The Contract Documents clearly specify that 3 Kings was required to obtain and comply with all project related permits. Section 01 10 00, General Requirements, specifies that the Contractor is to "Apply for and obtain all necessary City of Tacoma permits prior to start of work." Section 01 41 00, Regulatory Requirements, specifies that the "Contractor shall apply for and pay for, obtain, maintain, and conform to" permits prior to the start of construction. Therefore, permitting was solely the responsibility of 3 Kings.

3 Kings applied for the permits on July 10, 2018 and received authorization for payment and pickup of the permits by August 10, 2018 as documented by the City of Tacoma. This was a

one-month permit period which is a reasonable period of time for the permitting needed for this project and under the contract period of 120 days to Substantial Completion. In 3 Kings request for time extension date August 23, 2018, it was stated that the permits were received from the City of Tacoma on August 21, 2018. Thus, it appears that 3 Kings incurred 11 days of lost time solely do to 3 Kings failure to pick up the permits, an action that was solely in 3 Kings control. The loss of 11 days was in no way due to any action or inaction by Ecology.

As additional evidence that permitting activities did not cause a delay to 3 Kings, 3 Kings was required by this contract to provide submittals to Ecology for review and response prior to the scheduling of a Pre-Construction Meeting. The last of the submittals provided by 3 Kings to satisfy this requirement was the Positive Shoring Plan submitted on August 28, 2018. As a result of 3 Kings timing of the preparation and submittal of these contract required documents, the Pre-Construction Meeting could not have taken place before August 28, 2018. This is seven calendar days after the date when 3 Kings states they acquired the permits and 17 calendar days after the City has stated that the permits were authorized for payment and pickup.

As a result, there were a minimum of 17 days that were within 3 Kings control for permitting and pre-construction submittal completion. 3 Kings achieved Substantial Completion on November 14, 2018, which is 134 days after project Notice to Proceed dated July 2, 2018. This duration is 14 days in excess of the allowed Contract Time for Completion of 120 Days. As established above, 3 Kings through its own actions delayed the project 17 days, and therefore, no change in the contract time is warranted as requested in 3 Kings proposed Change Order 2.

Access Control Fencing

There are multiple outstanding items associated with completion of the work for the Access Control Fencing required in the Contract Documents.

Section 32 31 13, Fences and Gates, of the Contract Documents clearly specifies the requirements for establishing access control fencing around all sides of the property using existing temporary type chain link fencing. Section 32 31 13 Part 3 specifies that the Contractor is responsible for purchasing the existing fence and providing Ecology with documentation of fence purchase and cessation of Ecology's rental contract for the fencing. Part 3 additionally specifies that the contractor repair damaged sections of the fence, provide additional fencing materials as needed, install sandbags on the base feet and install fence braces. Damages that are preexisting or the result of the Contractor's actions are the sole responsibility of the Contractor as specified in Section 32 31 13 Part 3.

The Department of Ecology has been provided copies of invoices for "Sale" and repair of the rental chain link fencing at the Aladdin Plating Site. These invoice amounts are \$4,756.32 for "Sale" and \$1,664.71 for repair, respectively. The services included on the invoices were ordered by Brett MacDonald of 3 Kings

The invoice dated December 4, 2018 for \$4,756.32, identifies that 240 feet of 6 foot temporary panels was a "Sale with Install". It is not clear if 3 Kings has paid this invoice as 3 Kings has not provided proof of purchase of the fence as required in Part 3. The invoice for "Sale", ordered by Brett MacDonald, specifically states "MUST REPLACE 84' OF 240' ONSITE W/ NEWER MATERIAL. 84' DAMAGED TO BE CHARGED TO DEPT OF ECOLOGY RA".

Ecology received an invoice from National Fence Rental for 84 linear feet of 6 foot by 12 foot damaged temporary fence panels. As the Contract Documents specify that repair of damaged fencing is the responsibility of 3 Kings, the invoice was forwarded by Ecology on December 6,

2018 to Brett MacDonald at 3 Kings for payment. Mr. MacDonald responded the same day in an email by stating that “3 Kings has completed all responsibilities regarding fence installation, including purchasing the fence and replacing all apparently damaged fence panels with new ones.” As the Contract Documents specifies that repair of damaged fencing is the responsibility of 3 Kings, and 3 Kings has not paid for the damaged fencing, the cost of the fence repair has been held back from 3 Kings’ payment.

Additionally, the requirements of Section 32 31 13 have not been completed. The fence is not secured on the northwest and southeast corners of the project site. The fence, as it was observed on December 7, 2018, a total of 22 panels which was less than what was present on site when the project began which was 27 panels. As a result, the northwest and southeast corners of the site are not secured at the property boundaries. This is an unacceptable condition and requires corrective action by 3 Kings. Finally, Section 32 31 13 specifies placement of 2 sandbags on each stabilizing foot and installation of bracing per every 2 fence sections which have not been completed. 3 Kings is required to install the sandbags and bracing prior to final payment or will not be paid for the Install Access Control Fencing bid item.

Positive Shoring

As an additional element of determining the final payment amount due to 3 Kings, Ecology has determined that 3 Kings did not install the quantity of Positive Shoring listed as the Basis of Bid in Section 00 41 43, Summary of Pay Items and Construction Drawing Sheet 5. The Basis of Bid quantity for Positive shoring was 90 linear feet to support excavation to a depth of 16 feet along the eastern property boundary. This results in a minimum of 1,440 square feet of positive shoring that was specified to be installed. 3 Kings chose to implement a positive shoring design and plan that resulted in installation of a total of 605 square feet of positive shoring. The design and plan chosen by 3 Kings resulted in installation of approximately 45 percent (%) of the total shoring specified in the Contract Documents. As only 45% of the positive shoring specified in the Contract Documents was installed and subsequently removed, Ecology is approving final payment for positive shoring in the amount of \$3,600, determined as 45% of \$8,000 which is the total payment for installation and removal of positive shoring in 3 Kings schedule of values. Ecology is not adjusting the payment for the for Design/Permit Positive Shoring and Monitor/Maintain Positive Shoring as the required work for these tasks is not directly dependent on the quantity of positive shoring installed.

Ecology is proposing to meet or hold a conference call with 3 Kings to discuss the project items described above.

If you have any questions or concerns please contact me at (360) 407-6256 or Mohsen.Kourehdar@ecy.wa.gov

Sincerely,



Mohsen Kourehdar, P.E., Project Manager
Toxics Cleanup Program, Southwest Regional Office

cc: Iain Wingard, GeoEngineers, Tacoma Office
John Zinza, P.E., Contract Officer, Ecology TCP

