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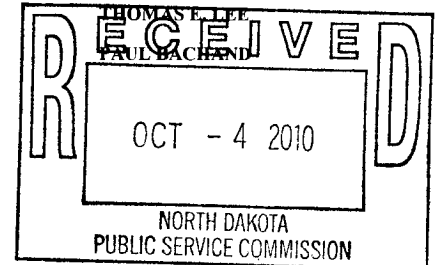
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Certified Mail - Return Receipt Requested

October 1, 2010

Mr. James R. Deutsch, Director  
AML Division - Public Service Commission  
600 East Blvd. Ave. - Dept. 408  
Bismarck, ND 58505-0480

Re: Contract Dispute  
Smith Contracting-Buechler/Velva AML Project

Dear Mr. Deutsch:

As you recall, I represented my client, Smith Contracting, Inc., at the Friday, August 20, 2010 meeting at your offices to discuss the contract dispute involving the Buechler/Velva AML Project.

At that time we pointed out that performance of the project work was impracticable due to an unanticipated site condition. Smith Contracting, Inc. advised it would be seeking a Change Order to cope with the unanticipated extra costs associated with the work due to the changed conditions.

The invitation for bid and proposal documents, and your agency represented the material to be "unconsolidated dirt." The solicitation notice and invitation for bids specifically states "dirt work" (cubic yards) 1,850,000. An on-site conference was scheduled for April 7, 2010, for interested bidders to meet with agency personnel at the Buechler/Velva site. The agency representative specifically affirmed that the material was "unconsolidated". Smith Contracting's president, Dave Smith, was on site at all relevant times during the pre-bid on-site conference. General Terms and Conditions ¶ 10 of the solicitation affirms the purpose of the pre-bid, on-site conference was to afford an opportunity to prospective bidders to receive clarification related to the solicitation. One of the clarifications was the representation of the agency that the material was "unconsolidated".

The Standard Specifications for AML Reclamation Projects does not require prospective bidders to perform any geotech investigation. Specification § 103.5 states that the bidder is expected to examine carefully the site of the proposed work, the bid form, plans, specifications, special provisions, and contract forms before submitting a bid. Further, the submission of a bid shall be considered prima facie evidence that the bidder has made such examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of all contract documents. This is a boiler-plate specification and has universally been interpreted to

Mr. James R. Deutsch, Director  
AML Division - Public Service Commission  
October 1, 2010  
Page 2

mean only a visual examination of the site. That was certainly performed by Dave Smith as mentioned.

Even though not required, Dave Smith, while at the site for the pre-bid, on-site conference, dug some test holes and determined the material was in fact unconsolidated to the limited extent of his testing. He certainly made a due diligence effort.

The PSC made its solicitation for bids to out-of-state contractors knowing they would of necessity have to rely on the proposal documents and information obtained at the pre-bid, on-site conference.

Smith Contracting did everything any prudent contractor would have done to bid this project in reliance upon the representations of the PSC.

Count II of the Contractual Features is entitle: **“Specific Provisions Dirt Work”**. While the term “dirt” is not a geotechnical term, it is generally defined as “earth or soil, especially when loose,” or “any fine grained unconsolidated mixture that comes from the ground.” Any farmer, or juror for that matter would define “dirt” as tillable top soil.

Smith Contracting, in reliance on the representations of the PSC that the material was “unconsolidated dirt”, estimated and bid the work accordingly.

After engaging in the work Smith Contracting encountered a rather solid mass of clay running throughout the spoils pile. The spoils pile had existed in place for many previous years. Moisture causes these clays to expand and consolidate over the years. After exposure by construction the material was subjected to highly abnormal rainfall in May and June which the PSC admits was “much higher than usual”. The pre-existing clay conditions, when exposed and subjected to the highly unusual rainfall during that period created soft and spongy and slick conditions impeding the use and productivity of Smith Contracting’s equipment. This type of saturated clay material does not dry out quickly. Even though there may have been warmer conditions during July and part of August, the material remained extremely difficult to work and caused severe inefficiency to Smith Contracting’s equipment. Once saturated it will simply not dry out.

The basis of claim is the misrepresentation of the material to be encountered during the work. The PSC’s proposal and contract documents are substandard from an engineering point of view.

Theories of recovery under North Dakota law will be breach of contract, breach of the implied warranty of accuracy, negligent misrepresentation, breach of the implied contractual obligation of good faith and fair dealing, arbitrary and capricious decisions and/or abuse of discretion, among possibly others as additional research is completed.

Smith Contracting believes it has made a good faith effort under the Disputes clause of the General Provisions of the Contract. Notice of the problems was given to PSC agents and representatives in June. The contractor met, as mentioned, with the PSC staff on August 20th to

Mr. James R. Deutsch, Director  
AML Division - Public Service Commission  
October 1, 2010  
Page 3

attempt to resolve the dispute under the Disputes clause. Smith Contracting proposed a Change Order which was summarily denied without any effort on the part of the PSC to negotiate a resolution. Smith Contracting advised the continuing work on the project was commercially impracticable and would result in bankruptcy at best. The PSC has made no counter-proposals. Smith Contracting had no choice under the circumstances but to leave the project.

Suffice it to say, Smith Contracting is not desirous of costly, extensive litigation. The company offers in good faith to continue meeting to attempt to resolve this dispute without litigation. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ronald G. Schmidt', with a stylized flourish at the end.

Ronald G. Schmidt

RGS:mlm

cc: David Smith  
Jeff Olson/Liberty Mutual