

Agenda Item # 17
Date 3/10/21

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VIA OVERNIGHT COURIER AND HAND DELIVERY ON MARCH 1, 2021 TO:

City of Fremont
Tyler Ficken, City Clerk
400 E. Military Avenue
Fremont, NE 68025

Dodge County Clerk
Fred Mytty
435 N Park
Fremont, NE 68025

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2021 MAR 12 PM 2:31
DODGE COUNTY, NEBRASKA
FRED HYTTY, COUNTY CLERK

VIA OVERNIGHT COURIER ON MARCH 1, 2021 TO:

City of Fremont
Joey Spellerberg, Mayor
400 E. Military Avenue
Fremont, NE 68025

City of Fremont
Brian Newton, City Administrator
400 E. Military Avenue
Fremont, NE 68025

HDR Engineering
Eric Berggren and Ron Sova
1917 S. 67th St.
Omaha, NE 68106

RE: Notice of Claim Pursuant to Section 45-1210 of the Nebraska Construction Prompt Pay Act

Dear Representatives of the City of Fremont, HDR, and Other Persons and Entities,

Pursuant to the Agreement Between Owner and Contractor For Construction Contract (Stipulated Price) dated effective May 7, 2018 (the "Agreement"), and related documents and agreements, and Neb. Rev. Stat. § 45-1210 of the Nebraska Construction Prompt Pay Act ("NCPAA"), Weiss Construction Co., LLC and Public Works Constructors, LLC (collectively "PWC"), hereby file, present, and provide the following timely Notice of Claims to the City of Fremont, as Owner of the 2017 Wastewater Treatment Plant Anaerobic System project (the "Project"). This Notice of Claims is made in good faith and the information and data provided and the amounts requested are accurate as of the date hereof to the best of PWC's knowledge and belief.

PWC is a highly experienced general contractor, whose personnel have served many cities across the country for over 50 years. PWC has completed many water and wastewater treatment plants and/or completed related upgrades, very similar to the Project discussed further below. The value of these projects in the aggregate exceeds one Billion dollars. During this period, PWC has had many repeat customers. On many of its projects, PWC has been invited by cities and large, well-established national and global engineering companies to be the key general contractor, and sometimes leader of the Design/Build team. PWC has a reputation in the industry for consistently and properly completing all required work in accordance with industry standards, which often involves extensive pre-qualification processes, detailed specifications, inspections, and approvals. And yet, only one other time in PWC's 50 year tenure has PWC had cause to sue a customer for anything. However, in this case, given the wrongful, abusive, and arbitrary treatment PWC was subjected to (which was consistent, repetitive, and habitual throughout the project, as shown by the detailed descriptions below), PWC is preserving its right to sue the City of Fremont and others if the claims further discussed below are not satisfactorily resolved.

JOHN V. MATSON
DIRECT, 402.343.3814

As you will see further below, great detail has been provided regarding each of PWC's claims. In the detailed notice provided below, PWC identifies sixteen (16) independent claims it has against the City. The injuries and damages suffered by PWC are extreme. By way of illustration only: (1) the City promised PWC, before the bid date, that it could use a yellow clay dirt supply the City owned for no charge, and then breached that representation and agreement resulting in huge added expense to PWC (in the amount of not less than \$1,226,190.00), and unnecessary Project delays; (2) the City insisted upon and ultimately engaged a sole source supplier of the major gas conditioning equipment for the Project, that delivered equipment that did not meet the specifications, requiring PWC to do extensive and costly remedial work, which equipment was delivered over one year late – the City knew of such problems and received the benefits of an egregiously low price that was obtained improperly by the City, all over PWC's written objections, resulting in large losses and damages to PWC (in the amount of not less than \$929,693.00); (3) the City required PWC to comply with an arbitrary and non-industry-standard leakage rate for the Project lagoons, which alleged requirement is not found anywhere in the Agreement (which resulted in not less than \$328,121.00 in damages to PWC); and (4) the City required PWC to complete work outside of the agreed upon scope (e.g., requiring extra and costly joint restraints and pipe insulation), without payment for the same (resulting in not less than \$159,361.00 in additional costs and damages to PWC). These actions, and many separate instances of wrongdoing described in detail below, resulted in a multi-million dollar loss to PWC, which the City of Fremont must resolve through this claim submission/filing process or through litigation.

Please issue a decision on these claims within ninety (90) days after receipt hereof as required by Neb. Rev. Stat. § 45-1210.

Also please note that PWC, through counsel, sought guidance from the Fremont City Clerk, and Dodge County Clerk, regarding the filing/submission of these claims, and was directed to submit this letter and claims in writing to the Fremont City Clerk, which would be accepted as proper filing/submission of the claims. PWC is also submitting to each of you this notice of claims in accordance with other potentially applicable legal requirements.

PWC specifically reserves all rights, remedies, claims, defenses, and causes of action which each of them may have against the Owner and related and other parties under the Agreement and applicable law.

Sincerely,

John V. Matson

John V. Matson

cc: Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
VIA OVERNIGHT COURIER

Dodge County Court Clerk
Judicial Center 3rd Floor
428 North Broad Street
Fremont, Nebraska 68025
VIA OVERNIGHT COURIER

Dodge County District Court Clerk
Linda J Nelson
428 N Broad
Fremont, NE 68025
VIA OVERNIGHT COURIER

Dodge County Attorney
Oliver Glass
PO Box 147
Fremont, NE 68026
VIA OVERNIGHT COURIER

SUMMARY OF CLAIMS AND AMOUNTS OWED

	DESCRIPTION	AMOUNT
1	Dirt Source	\$1,226,190.00
2	DMT - EXT OH	\$492,831.00
3	DMT - Scope	\$436,862.00
4	Lagoon - Zero Leakage	\$328,121.00
5	Pipe Insulation	\$4,196.00
6	Restrained Joints	\$155,165.00
7	Increased Trucking - Flood	\$531,460.00
8	Water Table - Flood	\$227,216.00
9	Interior Piping Modifications	\$75,075.00
10	Water Source	\$82,278.00
11	Covid - PCS4	\$328,554.00
12	Covid - PCS2-6 (subcontractors/suppliers)	\$306,656.00
13	Covid-PCS2-6 (employees)	\$101,044.00
14	Concrete Mix Design	\$26,832.00
15	Interference	\$443,899.00
16	Punitive Inspections and Resulting Extra Work Costs	\$279,200.00
	Total Claims against City	\$5,045,579.00

FURTHER DETAIL REGARDING STATED CLAIMS

1. Claim Title: Dirt Source; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications, including a detailed summary of claims communication dated 2/28/2020; Claim Amount: \$1,226,190

The Owner represented to PWC¹ that dirt would be provided in order to lower the bid. After the pre-bid meeting and prior to submission of the bid, Fremont Plant manager Keith Kontor advised PWC that the City owned a parcel of real property on the south side of town where they wanted to make a shooting range for their police department from which dirt could be used. During the call, Mr. Kontor was specifically asked what the Owner would charge PWC for the dirt. He answered: "nothing." He emphasized that PWC could use the dirt at no cost. PWC asked if it needed to carry any funds for reseeding the area, and Mr. Kontor replied "no." Further, PWC inquired whether it needed to carry any costs for SWPPP (Storm Water Pollution Protection Plan). Mr. Kontor responded that the City would take care of the SWPPP with respect to the dirt. Mr. Kontor was asked about the specific grading/excavation plan, and stated that the City would go over the area with PWC prior to starting the removal.

¹ Weiss Construction Co., LLC and Public Works Constructors, LLC are collectively referred to as "PWC" herein.

As a result of the discussion with Mr. Kontor and the representations made, PWC advised Mr. Kontor that it would bid the Project using the City's dirt. Mr. Kontor never stated that PWC would need to carry funds to purchase the dirt in the event the City's plan for dirt fell through; that a deductive change order would be required; or that approval of this dirt plan was pending or needed to be finalized in any way. To the contrary, there was an express agreement to use the City's dirt free of charge.

After PWC was awarded the Agreement, on May 7, 2018, Mr. Kontor advised PWC, for the very first time, that a conditional use permit would be needed. Mr. Kontor proceeded to apply for a conditional use permit. However, the conditional use permit was denied, for the purported reason that the City did not want the related truck hauling traffic going through town. Pat Baker from PWC was onsite when Mr. Kontor advised him of the denial, and asked what source to use instead for the dirt. Mr. Kontor responded, shockingly, that, "well the contract says that the contractor is to provide the dirt source."

Mr. Baker explained that he did not include any amount in the bid for the dirt based on the Owner's representations and using another source would be an additional cost. Mr. Kontor replied "you can submit something once you figure out where you are getting dirt and I'll look at it, but I can't promise anything."

The City and HDR regularly stated to PWC that PWC would have the opportunity to seek redress of its claims against the City at a later point with respect to this and other issues, and PWC now believes that such statements and representations were made to induce PWC to continue to conduct its scope of work even though it was being inhibited in many material respects from completing its scope of work and was being forced to incur much higher costs than it should have been required to incur on this Project as a result of others' unlawful, inhibiting, contractually non-compliant, and wrongful actions and omissions.

Mr. Baker, on behalf of PWC, had almost daily communication with Mr. Kontor regarding the dirt issue. It was also discussed with HDR in an email dated June 13, 2018 as well as verbally on many, many occasions. This was an urgent issue frequently discussed with the Owner and its engineer. The majority of the dirt was imported between July, 2019 and September, 2019. Additional dirt was needed in late October, 2019 due to a rise in the water table associated in part with historic flooding in the area (and related *force majeure* events), which led to raising the floor of the three lagoons.

The dirt source issue had an enormous adverse effect on all aspect of the Project. PWC wasted critical good weather days (approximately 30 to 45 days) while waiting for the City's dirt source to become available. Once the conditional use permit was denied and the City took the position that PWC was responsible for the dirt, PWC tried to quickly locate a new dirt source while at the same time trying to minimize the financial impact on the Project. Once new dirt sources were located and secured, the weather had turned and increased precipitation and associated costs added to the problem. In an attempt to keep the Project moving notwithstanding the City's wrongful and inhibiting actions and omissions, PWC hauled about 40,000 cubic yards of dirt and stockpiled it onsite through the winter, but could not place the dirt due to cold temperatures. As spring neared, PWC started to place the dirt that was stockpiled, but it was wet because it sat un-compacted through the winter (which issue was a result of the City's wrongdoing and not the result of any wrongful or unlawful act by PWC).

As the City is aware, the historic floods impacting the Fremont, NE area washed out the concrete along much of Highway 30, along with the gravel roads. These roads of course were necessary transportation

routes to access the yellow dirt source. This issue forced PWC to use the only remaining source of dirt which was the “dark/black gumbo” material that was ultimately used on the Project.

This gumbo dirt takes approximately 3 times the energy and cost to handle and put into place properly. In contrast, the dirt the Owner had agreed to provide and that was figured into PWC’s bid was yellow clay, which is ideal, and one third of the cost. As a result, in lieu of one (1) Cat 815 compactor, one (1) D6 dozer, one (1) tractor/disc, and one (1) Cat 140 blade that were originally planned for this work, PWC required two (2) 815 compactors, two (2) tractor/discs, two (2) D6 dozers, another tractor with an aerator, a box scraper, a second blade, and PWC was unable to use the two (2) belly dump trailers PWC owned because the gumbo material would not unload from these trailers. PWC was forced to purchase two (2) additional side dump trailers to address this issue that was a direct result of the City’s wrongful actions.

Further, the railroad was in dire need of trucks to repair the 100-year flood damage, and they were paying as high as \$250/hour for trucks that normally charge \$95 to \$105/hour, which made it nearly impossible to acquire the number of trucks needed to efficiently move the amount of dirt necessary (the costs related to the increased trucking expenses are separately addressed below).

The injuries, damages, and problems caused by the City’s failure to honor its agreements relating to dirt that PWC was promised that it could use on this Project at no cost, but which PWC was denied and prevented from using, resulted in material harm to PWC, monetized in the amount of no less than \$1,226,190 associated with the increase in dirt cost, increased labor, increased equipment costs, delays, and related factors.

2. Claim Title: Extended OH Stemming from Owner Sourced Subcontractor – DMT; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants’ knowledge of the claim, and PWC addressed the same with the City and HDR in many communications, including but not limited to communications regarding the same as recent as January/February 2021; Claim Amount: \$492,831

The City/HDR was required to choose between two available gas system subcontractors that had submitted bids. The City/HDR chose DMT despite PWC’s repeated objections voiced to the City arising from the monetary differential between the two bids. DMT has failed to perform. The work product delivered by DMT has been significantly different from what was specified by the Project documents. This poor performance by DMT and related changes to the system damaged PWC in terms of excessive time delays, and labor costs. DMT was more than 14 months late in delivering the project equipment. PWC also was forced to incur related costs to make changes to the equipment delivered by DMT so that it would fit within the systems onsite and in accordance with the terms of the Agreement. PWC’s damages in this respect are the direct result of the failures by the Owner and the Owner selected/Owner sourced subcontractor.

Initial delays were encountered with DMT shortly after the Agreement was awarded, when DMT claimed that “everything would NOT fit within the allocated footprint.” DMT began requesting additional space, which entailed relocating underground utilities. DMT’s lack of understanding and/or refusal to comply with the Contract Documents continued to cause delays throughout the Project and continues to this day.

The City and HDR were notified of the problems with DMT from the beginning and throughout the Project and still up to this day. PWC, through Mr. Pat Baker, continually communicated its concerns with DMT in various progress meetings, numerous emails, phone calls, and written correspondence with HDR and others. Additionally, PWC also communicated these problems on many occasions to Mr. Kontor. Mr. Kontor has stated he is not concerned about DMT, that he does not care if the gas system ever gets completed (notwithstanding the fact that the Agreement requires this scope of work to be completed by PWC), and that his sole concern was/is the lagoon system.

DMT's increased footprint led to relocation of underground utilities. DMT's delays and lack of adequate engineering led to delayed construction of the foundations, delayed piping fabrication, extended period for costs of construction equipment being onsite, extended time for management to be onsite, and delayed electrical installations. PWC ultimately had to supplement many aspects of DMT's scope of work in order to facilitate the Project and continues to do so as reflected in all of the documentation surrounding this claim, and PWC's damages directly caused by the DMT – EXTENDED OH issues described herein have been no less than \$492,831.

3. Claim Title: Scope Supplementing - Stemming from Sole Sourced Subcontractor – DMT; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/ Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications, including but not limited to communications regarding the same as recent as January/February 2021; Claim Amount: \$436,862

The Project's original bid day drawings were designed around the subcontractor Unison Solutions, Inc. DMT was added as an additional option in a pre-bid Addendum issued by the City. Separate "alternate" bids are required by that addenda. The City's chosen subcontractor, DMT, prior to and post bid stated there would be no monetary differences between them and the other bidder, even though the Specifications provided that the contractor shall be responsible for all differences between the two systems if DMT is chosen.

In fact, prior to award, PWC was called into a meeting with HDR, the Owner and DMT. DMT again stated that there would be no monetary differences and DMT would fit in the same footprint. Based on DMT's repeated representations, and PWC's reasonable reliance on the City and its engineer to select a subcontractor for the given scope of work that was competent, able to complete the subject scope of work, and able to complete the subject scope of work within the budgeted amounts presented to PWC, PWC did not anticipate DMT charging more than Unison Solutions (and did not anticipate the huge additional costs to PWC resulting from the fact that DMT was not competent, could not complete the required scope, and could not complete the required scope within budget).

Within the first 30 days of signing the subcontract agreement, DMT began its habit and pattern of not living up to the promises and representations it had made to secure the bid. DMT requested that various aspects of its required scope of work be changed, amended, deleted, and revised. It incorrectly claimed that certain items were not within its scope, that it was not responsible for engineering of other items, and stated that it did not have a Nebraska Professional Engineer (PE) to stamp its designs nor any duty to hire one. It made related statements and took related positions inconsistent with its previous statements and promises. DMT purported to reallocate scope of supply duties through the submittal review process. DMT incorrectly believed that if HDR approved a submittal where DMT listed various items as being

furnished by PWC, DMT could effectively reallocate its scope of work onto PWC. This issue was addressed with DMT through many conversations, emails, and letters. The City and its engineer were also advised of all of these issues. Once DMT understood that its method was unsuccessful in shifting its scope of work, DMT then turned to simply refusing to provide specific items; refusing to engineer portions of the system; and refusing to provide items that are blatantly called out in the Prime Contract and subcontract agreement as DMT's responsibility.

As DMT is the City's chosen single-source supplier, all of the damages resulting from DMT are the City's responsibility. PWC had no say in the selection of which subcontractor would be used, as it was solely the City's/HDR's choice, but PWC expressed concerns due to the monetary difference. Further, the Owner/Engineer were notified of the issues surrounding DMT shortly after the first encounter with the pre-fabrication submittal drawings and specs from DMT. Throughout the Project and to this very day, there have been numerous discussions and written communications with HDR and the City addressing PWC's concerns with DMT and DMT's inability to provide a fully engineered product that was compliant with the Project specifications. HDR supplemented some of the engineering required by DMT, likely as a result of its and the City's selection of DMT. DMT's system required a completely different structural layout, including the size of the footprint, bases, footings, etc. The specifications required that this layout be designed and stamped by a Nebraska PE. DMT refused to do this work. HDR then took it upon themselves to do this structural design.

DMT's attempts to remove work from its scope of work and refusal to perform caused significant delays to the Project. PWC reasonably believed and relied upon DMT, the City, and its Engineer regarding their representations that DMT would perform its specified scope of work (including the scope identified in the supply contract), for the budgeted amount. PWC was harmed and injured as a result of these parties' wrongful actions and inactions in this respect. PWC attempted to mitigate the impact on the Project and was forced to undertake significant additional work itself to make the equipment delivered by DMT work as part of the overall system. The injuries and harms directly resulting from the above-described wrongdoing is no less than \$436,862.

4. Claim Title: Zero Leakage - Unspecified Requirement and Associated Extra Work Required by the City of Fremont; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$328,121

The industry standard requirement for permitted leakage for lagoons such as those completed by PWC is not zero leakage. PWC has obtained an expert report from Zimmel Consulting, LLC confirming this reality, and related information, which prove the City's unreasonable and wrongful positions relating to this issue. Thus, it was expected and proper that all lagoons would have some amount of leakage and for this reason a leak collection system is built and installed. Depending on the type of liner and amount of seams specified, there may be more or less leakage. If zero leakage is required, then the specifications must clearly provide for a system and extra measures to attain this. For example, the specifications could have specified a conductive backed liner as this would have provided a means of locating almost all leaks.

There is no zero leakage standard identified in the specification or the Contract Documents nor would it be industry standard or a reasonable expectation. The City took the completely unreasonable position

that zero leakage must be attained, which led to delays and significant costs in attempting to determine the level and source of leakage in the lagoons. This included hiring two separate leak locator companies, pumping out manholes, extra testing and various related work. None of this cost would have been incurred but for the position taken by the City and Engineer that zero leakage must be attained despite the fact that the same was not stated in the specifications. The leakage rate of 35-40 gallons per day (23-26 gallons/acre-day) that was reported demonstrates that the performance of the geomembrane liners installed at the Project is well within the expected industry standard performance of 100 gallons/day (66 gallons/acre-day).

PWC provided the City and HDR notice of these issues, added costs, and added expense to PWC directly resulting from the unreasonable position taken by them. Such notices were provided within the applicable 30 days notice period identified in the Agreement. There were many additional notices provided. For example, notice of these issues was provided by PWC to the City/HDR in March and April of 2020. Written notice was also provided on April 15, 2020 through a Request for Information. Numerous other verbal and written communications have been exchanged with the City and the Engineer on this issue. In fact, to this day, PWC continues to communicate with the City and the Engineer on this issue. Mr. Kontor, as he repeatedly has done on many material aspects of this Project, has encouraged and induced PWC to continue to work on the Project, promising PWC that this issue (and the monetary losses of PWC stemming from this issue) would be addressed in due course (yet such reconciliation/payment has never occurred to date). PWC has incurred damages as a direct result of this issue in the amount of no less than \$328,121.

5. Claim Title: Pipe Insulation; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$4,196

Steve Weibers (of HDR) was unhappy with the number of wraps that were recommended by the manufacturer. The amount recommended by the manufacturer was (and is) industry standard, and in this instance such amount was bid as part of the Project and was the amount that PWC anticipated would be included on the Project. Notwithstanding the foregoing, Mr. Weibers directed the field workers to add more wraps. He also spoke with the manufacturer and requested more wraps. On HDR's direction, the manufacturer sent more wraps followed by an invoice for the additional wraps. In short, it was demanded of PWC that PWC complete work outside of the scope required in the Agreement without being paid for the same. These issues also slowed down the installation process as it delayed the import and placement of fill materials.

This issue was raised as an issue in July or August 2019 and continued on for some time thereafter. HDR was physically onsite and directed the work in the field just prior to the installation. Mr. Weibers told the manufacturer how many wraps he requested to be installed, which the manufacturer supplied, leading to additional materials and labor. PWC provided contractually compliant notice of this claim, issue, and related damages to the City/HDR within 30 days as required by applicable agreements. It further has submitted other written statements/notices of claim related information to the City/Engineer within required time allocations.

6. Claim Title: Joint Restraints; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$155,165

The Agreement, under Pipe & Fittings, Basic Requirements, addresses "restrained joint segments." It is industry standard to specify in the project specification which joints require which type of restraints, if any (*i.e.*, on a straight run, maybe one (1) of every four (4), but none to exceed a distance of 30 feet apart, for certain types of pipe and joints and pipe pressures, etc.). The Specifications, Section 40-05-00, page 7, paragraph 3.1.G Anchorage, Blocking & Restraint, subpart 3, state as follows:

"Restrained Joints (Where Shown or Called for) a. Provide length of restrained piping for fittings and valves designed for test pressure as determined in accordance with DIPRA, thrust restraint design for ductile iron pipe." (emphasis added).

Although specific references are made to DIPRA and EBAA, HDR would not allow the use of those common industry standards and restrained joint calculation methods. The Engineer would not acknowledge DIPRA or EBAA formulas for calculating the lineal footage of restrained joint piping (as specifically allowed by the specifications). Instead, the City and HDR required PWC to mechanically restrain each joint without regard for the DIPRA restraint standards. There was no contractual basis for this requirement, and the City must compensate PWC for these extra costs. Such wrongful action and inaction added substantial costs (including added labor and materials which led to increased time to install piping), held up the import and placement of dirt; held up the installation of the lagoon liners; and caused related problems. As such, the impact due to these requirements imposed by the Engineer and the City lasted through the entirety of the Project.

This issue was identified to the City/Engineer, and notice of the same was provided to them, within 30 days of occurrence/PWC's notice of the claim. Further notice was provided to the City and Engineer in writing in July 2018. Notices were provided within product submittals, in submittal review comments, and were also discussed in progress meetings (and likely also is contained in the progress meeting minutes). PWC has been damaged in an amount of not less than \$155,165 as a direct result of this issue. Note that this does not account for the delay on other activities stemming from the extended time it took to perform this work. This figure only covers the cost of the added work.

7. Claim Title: Trucking Expense - Rate Increase From Floods; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$531,460

The basis of this claim is that trucking rates sky-rocketed after historic flooding (see Claim No. 1). This was a *force majeure* event and not reasonably foreseeable. However, if PWC would have been able to use the City's dirt as had been represented, then this cost could have been avoided entirely as the dirt could have been placed prior to the floods. PWC bid the project with rates at \$90 to \$105/hour for trucking equipment. Due to the increased demand for trucks after the floods, PWC took reasonable steps to locate reasonably priced trucking services, such as placing ads on the radio for trucks. PWC was able to keep an average of 5 to 6 trucks going at an increased hourly rate. Fortunately, PWC was able to keep the rate

fairly under control and managed to avoid having to match the railroad rates of \$250/hour. PWC ended up paying an average of \$125/hour, with some equipment rates being as high as \$145/hour.

This issue arose immediately after the flood of March 2019, and continued until all of the dirt was imported sometime in late October 2019. This issue was discussed in the April 10, 2019 progress meeting. Highway 30 going to the east borrow pit was washed out, so PWC was forced to use the black gumbo dirt from Lyman Ritchie. PWC requested a reasonable deviation on the moisture content which was appropriate in this location for purposes of testing, however, HDR denied this request.

Notice regarding such matters and issues was provided in writing and verbally, including in progress meetings. PWC, the Engineer, and City exchanged emails and letters addressing these and other problems resulting from the flooding. All roads in and out of Fremont were closed down and some for a very long period of time (months). PWC has been damaged in an amount of not less than \$531,460 as a direct result of this issue.

8. Claim Title: Elevated Water Table Stemming from Floods;

Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$227,216

In the fall of 2019, PWC encountered what it believed to be rain water in the storage lagoon floor of cell 3 that was built. PWC pumped this out during the day and the next morning it would be back to the same level in cell 3. PWC notified the Engineer that it had encountered ground water in the lagoon floor above the bottom of lagoon elevation. It became apparent that flooding had caused a rise in the groundwater level. Per the NDEQ, the bottom of the lagoons cannot be below the seasonally high elevation of the water table. An expert report from Geotech addresses this issue as well and warns of the close proximity to the water table.

Initially, HDR denied that this was a water table issue. Mr. Baker, on behalf of PWC, wrote a letter to HDR informing it of the "changed condition." HDR verbally communicated with Mr. Baker on the issue and asked for his input on what would be the quickest way to address this issue. Mr. Baker suggested raising the lagoon floor by a couple of feet. Mr. Baker stressed his concern about getting a firm floor base due to the water level, which otherwise would float the base of the lagoon liner and increased desired levels planned in the contract drawings. Mr. Baker suggested the use of sand to absorb the water. HDR responded in writing advising PWC to proceed with filling the lagoon floor one foot using clay dirt, which PWC proceeded to do.

Further, HDR's letter stated that given the circumstances, it was willing to "help" the contractor address the water table issues by allowing PWC to raise the lagoon floor by one foot, but indicated, inexplicably, *that the work would need to be performed at no cost to the Owner*. PWC objected at all times to providing this additional work for no cost.

In order to keep the Project going, PWC proceeded doing the dirt fill under protest. This additional work contributed to delay in getting the liner installed. HDR and the City were adamant that they needed at least one lagoon available for handling wastewater immediately (even though the lagoon that was made available to the City was never used). MidAmerica Liner (MAL), the liner subcontractor, refused to

mobilize and perform this work, which contributed to the termination of MAL's subcontract, a pending lawsuit between PWC and MAL, additional expenses for having to hire a replacement contractor, and added expense for PWC to complete MAL's scope of work that the replacement contractor would not perform.

Notice of these issues was provided to the City, the Engineer, and others repeatedly as the issues were ongoing. For example, and without limitation, the Engineer was notified on October 16, 2019, and again on October 17, 2019, of these issues. Additionally, written notification was sent on October 18, 2019. PWC's damages relating to this issue are not less than \$227,216.

9. Claim Title: Interior Piping Mods; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$75,075

Interior piping modifications were required as a result of inlet/outlet being incorrectly drawn on the contract drawings. The air separators and heat exchangers are substantially larger than shown on the drawings. This caused significant costly alignment changes in the carbon steel piping. Specifically, it caused a complete rerouting of large sections of piping, relocation of supports, reconfiguration of insulation, extra work to solve clearance issues within the structure, refabrication of piping, added fittings/bends, and overall delay of work in progress.

This issue arose in late 2019. The City/Engineer were made aware of this issue almost immediately following occurrence of this issue. Written notifications of this issue were provided in late 2019 through a Request for Information. The complete, downstream impact of this additional work and costs were not known for a significant period following the issue arising. Relating to this issue, PWC has been damaged in an amount of not less than \$75,075.

10. Claim Title: Water Source; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$82,278

HDR and the City have claimed that it was PWC's responsibility, as the contractor, to provide water for filling the lagoons from early on in the Project. However, there is an express provision in the specifications (*see* 33 47 14-16 3.4 A.1) that provides that the Owner will provide the water source.

This issue has been raised many times with the City/Engineer. For example, this issue was raised in a notice provided on March 2020. It was discussed during progress meetings and was thereafter included as part of a change order in October of 2020. The City/HDR have never responded to the change order. PWC has been damaged as a result of this issue in an amount not less than \$82,278.

11. Claim Title: PCS4-Covid-Force Majeure; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$328,554

Due to the COVID-19 pandemic, the gas conditioning supplier, DMT, was delayed in performing its scope of work. International travel was restricted, there were delays in material deliveries, and delays associated with quarantine of various employees and other counterparts.

The impact of this started early on during the pandemic, in March 2020. This was documented and communicated to the City and the Engineer many times in letters, emails and in oral communications, as well as being obvious and observable as resulting from the pandemic. The impact the pandemic has had on the Project is ongoing. PWC has been damaged in an amount of not less than \$328,554 with respect to the same.

12. Claim Title: PCS2-6 Covid - Subs/Supps Extended Onsite General Conditions and Overhead; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$306,656

Due to the COVID-19 pandemic, the Project experienced delays in performing startup and testing activities and associated overhead costs. The pandemic delayed delivery of materials and delayed scheduling of subcontractors performing their work due to the uncertainty surrounding the pandemic and how to keep their employees safe. Many, many individuals and companies would not commit to a start-up schedule for a long time. Again, delays/restrictions in international travel, as well as inefficiency in performing work due to lack of personnel, lack of materials, and employees required to undergo quarantine as a result of exposure.

The impact of this started early on during the pandemic, in March/April/May 2020. This was documented and communicated to the City and the Engineer many times in letters, emails and in oral communications, as well as being obvious and observable as resulting from the pandemic. PWC has been damaged in an amount of not less than \$306,656 with respect to the same.

13. Claim Title: PCS2-6 Covid - Employee Driven - Force Majeure; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$101,044

This claim is based on reduced productivity of employees due to believed concerns of completing this Project and not having another job to go to in the middle of a pandemic. Unfortunately, this had a real impact on the Project. COVID-19 brought uneasiness for workers. It became apparent that employees were happy to be receiving a paycheck during the pandemic and were not sure if there would be any other project or work waiting for them once this one was completed. As a result, production of employees decreased, notwithstanding best efforts by PWC to maintain industry standard levels of productivity. Based on PWC's experience and observations, this occurred because employees were afraid of

completing the Project and being laid off in the middle of a pandemic with no other income or job in sight for their immediate future.

The impact of this started early on during the pandemic, in March 2020. This was documented and communicated to the City and the Engineer many times in letters, emails and in oral communications, as well as being obvious and observable as resulting from the pandemic. PWC has been damaged in this regard in an amount not less than \$101,044.

14. Claim Title: Unpumpable Concrete Mix Design;

Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$26,832

The specified mix design for "weight piping" was not a pumpable concrete mix. PWC contacted several concrete pump companies and relayed to the City and the Engineer the same information received from all of them, which was that the specified mix cannot be pumped. However, the City and Engineer would not budge on changing the mix design.

For weeks, PWC tried but could not get a single pump company to even attempt to pump this mix. As a result, PWC was forced to rent a pump from North Dakota (400+ miles away), and attempted to pump the mix into the weight piping, but it failed. PWC wasted two (2) truckloads of concrete and there was a resulting huge mess on the the lagoon covers that had to be remediated. On the second day of attempting to pump the mix, HDR finally acquiesced and said to go ahead and add 600# of cementitious material to the mix in order to accommodate its "pumpability." This worked and PWC successfully pumped the remaining weight piping without issue. If HDR would have agreed to this small modification from the start, this cost could have been avoided.

This issue first arose in April of 2020 and continued on through the summer of 2020. Notification was provided to the City and Engineer in April, May and June of 2020 through written submission, requests for information and oral communications (including during progress meetings and in phone calls). PWC was damaged in this regard in an amount not less than \$26,832.

15. Claim Title: City, Engineer and Plant Manager Interference; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$443,899.00

The City, and its engineer HDR, and in particular Steve Weibers, repeatedly and consistently interfered with and inhibited the Project in a material way. The interference of Steve Weibers has continued throughout the Project and remains ongoing. Keith Kontor also contributed to job interference by renegeing, on behalf of the City, on the City's agreement to provide the dirt source, and in many other ways. In the reservation of rights, and notice of claims, letter that was sent to HDR and the City on or around October 2, 2020, PWC identified various details regarding this claim, and those are incorporated herein (along with all other portions of that communication). Additionally, job interference, and related wrongful conduct attributable to the City of Fremont, started almost immediately upon mobilization and continued on through the entire Project. PWC was damaged in an amount of not less than \$443,899.00 as a direct result of these issues.

16. Claim Title: Punitive Inspections and Resulting Extra Work Costs; Claim Date: The City and HDR were presented with and notified of this claim/issue within 30 days of occurrence of the issue/Claimants' knowledge of the claim, and PWC addressed the same with the City and HDR in many communications; Claim Amount: \$279,200.00

The City, its representatives, and others providing guidance on this Project on their behalf, for no reason other than to punish PWC for PWC's insistence upon compliance with (i) industry standards, (ii) the terms and conditions of the Agreement, and (iii) the representations and promises made to PWC (such as that PWC would be permitted access to the City's yellow clay dirt source at no charge), have subjected PWC throughout the project to meaningless inspections and evaluations, which PWC has consistently passed without issue, but which materially inhibited Project progress and caused material delays and large and unnecessary costs for PWC. In the reservation of rights, and notice of claims, letter that was sent to HDR and the City on or around October 2, 2020, PWC identified various details regarding this claim, and those are incorporated herein (along with all other portions of that communication). Punitive inspections, and resulting extra work costs, and related wrongful conduct attributable to the City of Fremont, started almost immediately upon mobilization and continued on through the entire Project. PWC was damaged in an amount of not less than \$279,200.00 as a direct result of these issues.