

GENERAL TERMS & CONDITIONS PURCHASE ORDER/CONTRACT

1. **ACCEPTANCE:** Seller shall be bound by this order and its terms and conditions upon receipt of this order.
2. **APPLICABLE LAW:** The laws of the State of West Virginia and the *Legislative Rules* of the Purchasing Division shall govern all rights and duties under the Contract, including without limitation the validity of this Purchase Order/Contract.
3. **NON-FUNDING:** All services performed or goods delivered under State Purchase Orders/Contracts are to be continued for the terms of the Purchase Order/Contract, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise available for these services or goods, this Purchase Order/Contract becomes void and of no effect after June 30.
4. **COMPLIANCE:** Seller shall comply with all Federal, State and local laws, regulations and ordinances including, but not limited to, the prevailing wage rates of the WV Division of Labor.
5. **MODIFICATIONS:** This writing is the parties final expression of intent. No modification of this order shall be binding unless agreed to in writing by the Buyer.
6. **ASSIGNMENT:** Neither this Order nor any monies due, or to become due hereunder may be assigned by the Seller without the Buyer's consent.
7. **WARRANTY:** The Seller expressly warrants that the goods and/or services covered by this order will: {a} conform to the specifications, drawings, samples or other description furnished or specified by the Buyer; {b} be merchantable and fit for the purpose intended; and/or {c} be free from defect in material and workmanship.
8. **CANCELLATION:** The Director of Purchasing may cancel any Purchase Order/Contract upon 30 days written notice to the seller.
9. **SHIPPING, BILLING & PRICES:** Prices are those stated in this order. No price increase will be accepted without written authority from the Buyer. All goods or services shall be shipped on or before the date specified in this Order.
10. **LATE PAYMENTS:** Payments may only be made after the delivery of goods or services. Interest may be paid on late payments in accordance with the *West Virginia Code*.
11. **TAXES:** The State of West Virginia is exempt from Federal and State taxes and will not pay or reimburse such taxes.
12. **RENEWAL:** Any reference to automatic renewal is hereby deleted. The Contract may be renewed only upon mutual written agreement of the parties.
13. **BANKRUPTCY:** In the event the vendor/contractor files for bankruptcy protection, this Contract may be deemed null and void, and terminated without further order.
14. **HIPAA BUSINESS ASSOCIATE ADDENDUM:** The West Virginia State Government HIPAA Business Associate Addendum (BAA), approved by the Attorney General, and available online at the Purchasing Division's web site (<http://www.state.wv.us/admin/purchase/vrc/hipaa.htm>) is hereby made part of the agreement. Provided that, the Agency meets the definition of a Cover Entity (45 CFR §160.103) and will be disclosing Protected Health Information (45 CFR §160.103) to the vendor.
15. **WEST VIRGINIA ALCOHOL & DRUG-FREE WORKPLACE ACT:** If this Contract constitutes a public improvement construction contract as set forth in Article 1D, Chapter 21 of the West Virginia Code ("The West Virginia Alcohol and Drug-Free Workplace Act"), then the following language shall hereby become part of this Contract: "The contractor and its subcontractors shall implement and maintain a written drug-free workplace policy in compliance with the West Virginia Alcohol and Drug-Free Workplace Act, as set forth in Article 1D, Chapter 21 of the West Virginia Code. The contractor and its subcontractors shall provide a sworn statement in writing, under the penalties of perjury, that they maintain a valid drug-free work place policy in compliance with the West Virginia and Drug-Free Workplace Act. It is understood and agreed that this Contract shall be cancelled by the awarding authority if the Contractor: 1) Fails to implement its drug-free workplace policy; 2) Fails to provide information regarding implementation of the contractor's drug-free workplace policy at the request of the public authority; or 3) Provides to the public authority false information regarding the contractor's drug-free workplace policy."



SPILMAN THOMAS & BATTLE, P.C.
ATTORNEYS AT LAW

FAX

To: Karen Byrd
558-0006

From: Alex Macia

Phone: 304.340.3835

Date: Tuesday, February 03, 2009

Client.Matter: 2.12

Re: Diamond Chemical

Pages: 4. If you did not receive all of the pages, please call Chris at 304.340.3883.

RECEIVED
2009 FEB -3 AM 9:00
WV PURCHASING
DIVISION

Original Sent by: No Original Sent U.S. Mail Hand Delivery Overnight Mail

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ATTORNEYS AT LAW

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arnacia@spilmanlaw.com

February 2, 2009

RECEIVED
2009 FEB -3 AM 9:00
WV PURCHASING
DIVISION

Karen Byrd, Assistant Director
Department of Administration
Purchasing Division
2019 Washington Street, East
Charleston, WV 25305-0130

Re: Laundry09/Diamond Chemical Company, Inc.

Dear Director Byrd:

Thank you very much for taking the time to meet and speak with me in connection with the Statewide Contract Laundry09 Award ("Contract"). As you know, I have been recently retained by Diamond Chemical Co., Inc. ("Diamond"), the successful bidder in the Contract, in order to assist it in resolving certain significant issues pertaining to its contract bid.

Since the Contract was awarded on October 1, 2008, representatives from Diamond have been trying to contact or visit the more than 30 West Virginia facilities ("Laundries") in order to determine the particular site-specific needs of each Laundry ("Laundry Setup Process"). This additional information (e.g., contact names, phone numbers, products utilized, types and number of washers, etc.) is required in order to set up each account and provide products and services to the Laundries in accordance with the Contract. Admittedly, this process took much longer than anyone anticipated or desired. Diamond regrets any inconvenience such delays may have caused the Laundries or the Division.

However, as we discussed, and as a result of this process, Diamond discovered that the actual laundry product dispensing requirements of the Laundries are materially different from the requirements set forth in the original LAUNDRY09 Request for Quotation ("RFQ"). These differences do result in substantial additional costs to Diamond in order to properly provide product and services under the Contract. As a direct, and unfortunate result of which, Diamond must request the Director of the Division of Purchasing, pursuant to the requirements set forth in 148 C.S.R. 6.2.7, to reject Diamond's bid, and rescind the Contract, because of a material error which affected the basis of, and calculation for, its bid amount.

Concisely stated, Diamond's bid was made in response to certain items contained in the RFQ Pricing Page which was part of the original RFQ. More specifically, prior to submitting its bid, Diamond analyzed the various Estimated Loads and Product Descriptions columns

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West Virginia North Carolina Pennsylvania Virginia

Karen Byrd, Assistant Director
February 2, 2009
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contained in the Pricing Page and calculated the following approximate distribution of quantities between powder, liquid and solid laundry products:

Powder: 56.5%

Liquid: 28.5%

Solid: 15.0%

Diamond's bid of \$149,202.90 was based on this specific distribution of these respective quantities. More particularly, the pricing contained in the bid included the need for the appropriate dispensing equipment relative to those various percentages. However, after gathering all of the information as part of its Laundry Setup Process from the various Laundries, it became apparent to Diamond that over 90% of the Laundries (and not approximately 15%) are on solid products.

Solid products require the installation and maintenance of specialized dispensing systems at a cost well in excess of the cost determinable under the Pricing Page contained in the RFQ. Diamond believes that a modification of the available dispensing equipment to accommodate the 90% solid laundry product needs that currently exists at the Laundries would cost approximately \$150,000 above and beyond its present bid amount. Regrettably, since the current dispensing equipment is proprietary to the previous vendor, Diamond cannot simply convert those dispensers for its own usage. Therefore, it would not be possible for Diamond to properly service and maintain those dispensers in a manner to secure the efficient uninterrupted usage by the Laundries. Moreover, as indicated below, it is not possible for Diamond to expend \$150,000 on a Contract for which it will only be paid \$149,202.

To be sure, the Purchasing Division did send out to prospective bidders a Contract Questions & Answers which contained a "total historical quantity usage per line item" for the laundry items contained in the Pricing Page. The analysts for Diamond who reviewed the Questions & Answers (incorrectly as it now turns out) believed those quantities represented historical data only, that is, past usage, and that such data did reflect the quantities needed under the Contract. Thus, Diamond believed the quantities contained in the Pricing Page were those that the Purchasing Division deemed to be the relevant ones in connection with the RFQ. Diamond's price, therefore, reflected its quotation for those items, and their relative distribution, as reflected by and contained in the Pricing Page. Clearly, they were erroneous, and have resulted in a mistake in the magnitude of size of their actual bid.

Pursuant to 148 C.S.R. 6.2.7., the Director of Purchasing may reject an erroneous bid if the following conditions are met: (1) an error was made; (2) the error materially affected the bid; (3) rejection of the bid would not cause hardship to the state agency; and (4) enforcement of the bid would be unconscionable. Diamond believes each of the foregoing elements has been met.

Karen Byrd, Assistant Director

February 2, 2009

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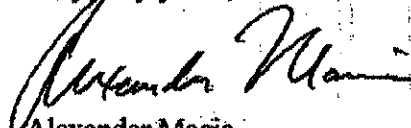
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Notably, an error in calculation was admittedly committed by Diamond and that error materially affected its bid. Certainly, had Diamond fully comprehended the actual distribution of laundry products, it would never have submitted what was a winning bid of \$149,202.90 for a contract that would cost Diamond an additional \$150,000 to install its own solid detergent dispensing equipment. The rejection of this Bid would not cause hardship to the state agency. That said, Diamond acknowledges that such a rejection would be an inconvenience to the Laundries, but one that could be ameliorated or entirely removed by the Division through the granting of waivers, as appropriate, or the selection of the second place vendor as the winning bid, or even a re-bidding of the Contract. Again, while this is an unfortunate and regrettable inconvenience, it does not rise to the level of hardship as required by the state rules. Finally, when weighing the facts detailed hereinabove, and considering the impact on Diamond of the mandatory performance of a Contract at a price that is only half of what it should be, we believe such a result would be unconscionable to Diamond. In the end, Diamond's bid on the Contract was based on incorrect assumptions which if let stand, would essentially compel it to supply laundry products to the State at a significant and substantial loss.

Finally, Diamond is now aware of, and sincerely apologizes for, the apparent lack of communications that attended its performance of this Contract. During the months it struggled to identify and quantify the nature and extent of the obligations it had undertaken in the Contract, it should have made its growing concerns about its ability to perform the Contract known to the Purchasing Division in a more timely fashion. It did not do so and it regrets, too, this error.

I thank you for the opportunity to express these concerns to you and I look forward to continuing our discussions about this issue.

Very truly yours,


Alexander Macia

AM/cjb

cc: Harold Diamond

