

June 24, 2016

Mr. Brian Person
Acting Area Manager
United States Department of Interior
Bureau of Reclamation
Mid-Pacific Region
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365

Re: C Flume Replacement Project Funds - Contract No. 16-WC-20-4838
Klamath Project Oregon-California

Dear Mr. Person,

I am in receipt of your June 23, 2016 correspondence addressed to KID Chair, Brent Cheyne, entitled above, expressing uncertainty surrounding KID's intent regarding the KID-R&G Excavating, Inc. Contract and the Project.

The problem is that the Bureau cannot guarantee full funding of the Contract, even considering how unnaturally low the winning bid is (approximately \$1.2 million less than the second lowest bidder). Jeremy Morris' recent cash flow calculations reveal that the Bureau requested only \$1 million new dollars for FY 2017, which brings the total funding in FY 2017 to only \$6.5 million of what is likely to be a \$9.7-10 million construction contract after all possible prospective change orders are considered.

Yes, I question whether the Bureau's ability to guarantee only \$5.5 million of a \$10 million dollar contract does not strongly suggest that the Bureau is NOT committed to fully funding the Project as provided for in the Contract. Yes, short of the Bureau's commitment in writing that it will fund the entire \$10 million of construction costs, I do not believe that its requests for congressional appropriations in FY 2017 and FY 2018 can be counted on, for they are not certain to ever materialize. Isn't true that this administration will end on January 20, 2017? Isn't it also true that congressional elections are approaching? If your answer is yes to one or both of these questions, then could you please explain how the Bureau can guarantee that KID will receive funds greater than \$5.5 million after this administration has left office?

Granted, "KID is currently authorized, pursuant to Oregon Revised States section 545.301 and the corresponding 269-16 vote of district electors, to borrow up to \$10,000,000 from the United States for the Project." However, district patrons did not authorize the KID Board to enter into a one-sided take-it-or-leave-it contract the terms and conditions of which would (even more clearly now) shortchange the district monies and place it in financial jeopardy.

It is fantasy for the Bureau to suggest that “the requirement that KID expend \$1,712,000 of its funds prior to the advancement of Federal funds for the XM work pursuant to the Contract [...] was discussed at the initial public negotiation session between KID and Reclamation held on February 24, 2016, as well as in prior technical meetings with KID.” Where is the written proof of KID committing itself to this requirement? Why does the Contract not expressly state this requirement?

Your subsequent statement that although this “requirement is not stipulated in the contract, [...] its basis is paragraph 5.B. of Reclamation Manual Directives and Standards, *Extended Repayment of Extraordinary Maintenance Costs* (PEC 05-03), and that the “amount was arrived a[s] based on financial information submitted by KID on January 26, 2015,” is equally fantastic, if not, self-serving. Where is your hard evidence that KID Board members approved the condition requiring that \$1.7 million of KID funds be expended before the loan facility is disbursed? In the absence of such evidence and any express reference to it in the Contract, there is no legal justification for KID’s Board to consider that this requirement is other than a unilateral unauthorized post-execution alteration of the Contract which need not be acknowledged.

The Bureau’s behavior to date strongly suggests a deliberate effort to compel the District to enter into a contract which it cannot financially afford, thereby placing District patrons at financial and legal risk. Your personal assurances, notwithstanding, the Bureau has NOT acted in good faith or in a transparent manner through the negotiation of the executed contract since March of this year.

You are correct in stating that I had advised the KID Board that I would treat the Contract as void *ab initio* because it was entered into under duress and false pretense. The Board, however, has yet to reach its decision on this point.

If the Bureau wishes to demonstrate good faith insofar as guaranteeing in writing, in an incorporated Contract rider or addendum, that it will provide \$10 million in readily available funding (available during FY 2016) to support the construction contract, then I suppose that such written guarantee would go a long way to reassure the Board that it could honor the Bureau’s Contract and enter into the contract with R&G Excavating, Inc. immediately. Short of the Bureau providing such written guarantee, I would advise the Board that it cannot rely on the Bureau for such funding.

Lastly, your veiled threat to reallocate the \$5.5 million of funding to other Projects unless KID immediately commits to repayment is less than helpful and actually worsens the situation for all concerned. I highly recommend that you reengage with your Bureau colleagues for purposes of arriving at a more constructive approach for resolving the issue at hand.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
Managing Principal