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March 17, 2023

Merchants Bonding Company  
Attn: Claims  
P.O. Box 14498  
Des Moines, IA 50306-3496

**RE: HWY 212 RECONSTRUCTION, WATERTOWN, SD  
J&J EARTHWORKS, INC. - GENERAL CONTRACTOR  
TIMMONS CONSTRUCTION, INC. - CONCRETE SUBCONTRACTOR**

Dear Sirs:

This letter is in response to a bond claim filed by J&J Earthworks on or about March 8, 2022 concerning the above referenced project. Please accept this letter as a response to the claim. This response will establish that the bond claim by the General Contractor is unsupported for several reasons. In general, Timmons Construction denies any significant deviation from the terms of its subcontract, and affirmatively states that any delays or cost overruns related to the project are due to the failures of the General Contractor in its performance and time management of the contract and/or its failure to bid the project appropriately.

Enclosed with this letter are attachments entitled "Background" (Attachment A) and "Outline" (Attachment B) which outline the failures on the part of the General Contractor which are the true cause of the delays resulting in the damages being claimed by the General Contractor. Most importantly, the vast majority of the delay penalty mentioned by the General Contractor is the result of a clear failure on the part of the General Contractor to reasonably bid the number of block days for the project. Had the General Contractor bid the project consistent with competitive bidders, the excess number of block days would have been as low as 8 versus the 163 days being faced by the General Contractor. This aspect of the concerns expressed by the General Contractor was completely out of the hands of Timmons Construction and therefore, Timmons is not in any way responsible for the same.

The General Contractor's bond claim is clearly inappropriate based on the fact that by its own accounting, the General Contractor is withholding \$458,400.00 due under the subcontract to

TCI\_00000334

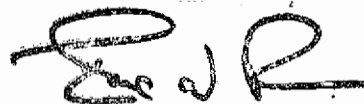
Timmons Construction (Attachment C). As indicated in the General Contractor's February 1, 2023 letter to Timmons Construction, the amount currently withheld from the subcontractor exceeds the claim of the General Contractor. Timmons does not agree with the damage calculation in the February 1 letter, but is pointing it out for this purpose to establish there are no damages that should be assessed against the performance bond of Timmons. (This is clearly not a payment bond issue as there is no claim that Timmons has failed to pay any subcontractors.)

Based on comments Brad Timmons of Timmons Construction has heard from others knowledgeable about the project, Mr. Timmons is concerned that one of the purposes for the General Contractor to file a claim against Timmons Construction's bond is to adversely affect Timmons Construction's bond rating. Based on the scope of untrue and incorrect statements being made by officials of J&J Earthworks and the concern about improper motivations, it is entirely likely that this matter will end up in litigation. At all times, Timmons Construction has been ready and willing to resume work on the project after the winter shutdown period has expired. However, unless satisfactory arrangements are made for the General Contractor to make a substantial partial payment of the amount already due for work performed by Timmons Construction, Timmons will have no choice but to declare a default for failure to pay and terminate the subcontract, which action is allowed pursuant to Section 11.05 of the contract.

We hope the information contained in this letter and the attachments are reasonably understandable. If you have any questions or need follow-up documentation, please advise.

Very truly yours,

HELSPER, McCARTY  
& RASMUSSEN, P.C.



ERIC N. RASMUSSEN

ENR:srl

Enclosures

cc: Timmons Construction

## ATTACHMENT A

### Background

J&J Earthworks, Inc. was the low bidding prime contractor on a street rehabilitation project for the SDDOT on Highway 212 through from Hwy 81 to 19<sup>th</sup> Street SE in Watertown, SD. The letting date was 12/1/2021. This was a two schedule and two contract project with a portion of the work being paid by the City of Watertown and the majority by the SDDOT. J&J had a low bid of \$12,300,649.21 for the SDDOT work and a low bid of \$1,450,140.85 for WMU sanitary sewer & wain main replacement work for a combined total of \$13,750,790.06. The other two competing bids were from BX Civil & Construction, Inc. & Reede Construction, Inc. and were \$14,408,883.23 & \$14,250,296.98 respectively. The prime contractor self-preformed the removals, utility work, and grading work. They subcontracted the concrete work, the asphalt work, the traffic control, the lighting/electrical work, de-watering, and landscape/seeding work.

This project was divided into two phases. Phase 1 from Highway 81 to 10 Street SE and Phase 2 was from 10 Street SE to 19<sup>th</sup> Street SE. Phase 1 allowed for full closure of east and west bound traffic at the same time. Phase 2 was allowed for only half closure at a time. Phase 1 had a \$2,500/day/block rental. Block rental was a bid item included in the project in which the prime contractor bid a number of block rental days. If the prime contractor bid extra days, then it took to do the work, they kept the remaining amount. If the prime contractor bid less than days it took to do the work then the prime contractor had money deducted from the contract. Example: If 3 blocks were closed and being worked on, the block rental rate was \$7,500 every day those three blocks were closed. If the first 3 blocks took 60 days to complete at full closure for those three blocks the total would be 180 days at a cost of \$450,000.00. If the second 3 blocks took 60 days to complete at full closure for those three blocks the total would be 180 days at a cost of \$450,000.00 for a combined total of all 6 blocks at \$900,000.00. Phase 2 had no block rental on it and could have one entire half of the road worked on at a time. Phase 2 could not begin until entire full width road was paved up to 11<sup>th</sup> Street SE. The project could start as soon as the frost was out and had a substantial completion date of October 28, 2022. Liquidated damages for work continuing past October 28<sup>th</sup> was \$2,400.00/day. Currently the project has run 33 days past the substantial completion date of October 28<sup>th</sup>, 2022 at a cost of \$79,200.00.

The prime contractor, J&J Earthworks, Inc., had an alarmingly low price on the block rental. Their block rental bid was 150 days for a total of \$375,000.00, BX Civil & Construction, Inc. was 700 days for a total of \$1,750,000.00, and Reede Contracting was 280 days for a total of \$700,000.00. It was rumored that BX Civil had made a clerical error in the bidding process and had meant to enter \$700,000.00 worth of block rent and not 700 days. The \$700,000.00 would have also equated to 280 block rental days. Reede Contracting has been in the municipal paving industry for 30 years and is a highly respected bidder.

In total, it took 288 block rental days from the start of closure to the opening of 10<sup>th</sup> Street SE, or 116 calendar days. Once 10<sup>th</sup> Street SE was opened, a small cul-de-sac was also incorporated into the Phase 1 block rental costs. Since J&J was already into penalty, the SDDOT made a deal with J&J that if they continued with the cul-de-sac right after the opening of 10<sup>th</sup> Street SE then penalties would stop. J&J did not start the cul-de-sac work right after 10<sup>th</sup> Street SE. Due to J&J's lack of communication & ability to start the cul-de-sac work right away, the SDDOT commenced with block rental penalty resulting in 25 more days at an additional cost of \$62,500.00. The actual number of days it took was 313 days at a cost of \$782,500.00, an excess of 163 days and \$407,500.00 worth of penalty.

## ATTACHMENT B

### Outline

- J&J Earthworks, Inc. was the low bidding prime contractor for the SDDOT on Highway 212 from Hwy 81 to 19<sup>th</sup> Street SE in Watertown, SD
  - This was a two schedule and two contract project with a portion of the work being paid by the City of Watertown and the majority by the SDDOT
  - On December 1, 2021, J&J had a low bid of \$13,750,790.06
    - \$12,300,649.21 for the SDDOT and \$1,450,140.85 for City of Watertown
      - The other two competing bids were:
        - BX Civil & Construction, Inc. (\$14,408,883.23)
        - Reede Construction, Inc. (\$14,250,296.98 )
- The project could start as soon as the frost was out and had a substantial completion date of October 28, 2022
  - Project started April 25, 2022
- Liquidated damages for work continuing past October 28<sup>th</sup> is \$2,400.00/day
  - Currently the project has run 33 days past the substantial completion date at a cost of \$79,200.00
- J&J self-performed the removals, utility work, and grading work
  - They subcontracted the concrete, the asphalt, the traffic control, the lighting/electrical, de-watering, and landscape/seeding
- Timmons Construction Inc. entered into a contract with J&J Earthworks for \$4,256,175.75 to perform the SDDOT portion of the concrete work including the PCC paving, curb & gutter, sidewalks, driveways, aprons, fillet sections, and retaining walls
- Timmons never received a contract for the City of Watertown portion of work
- Project was divided into two phases
  - Phase 1 from Highway 81 to 10 Street SE
  - Phase 2 was from 10 Street SE to 19<sup>th</sup> Street SE
- Phase 1 allowed for full closure of east and west bound traffic at the same time
  - Phase 1 had a \$2,500/day/block rental (in emails from prime contractor we are told it's \$2,400/day/block)
    - Every day for every block that was closed to traffic, the contractor was charged \$2,500 per block per day. When the contractor exceeded their bid item dollar amount, they were expected to pay the overage.
      - ie. 2 blocks closed for work = \$5,000 per day, 3 blocks = \$7,500 per day
    - J&J's block rental bid item dollar amount was \$375,000.00, 150 days of block rent
      - BX Civil & Construction, Inc. made a clerical error during bidding and entered 700 days but intended 280 days
      - Reede Contracting was \$700,000.00, 280 days of block rent
      - Reede Contracting has been in the municipal paving industry for 30 years and is a highly respected bidder
  - In total, the project required 313 whole days (\$407,500.00 over contract bid item dollar amount)
  - Actual time from closure to 10<sup>th</sup> Street SE opening was 288 block rental days

## ATTACHMENT B

- A cul-de-sac by 10<sup>th</sup> Street SE was also part of block rent, SDDOT made an agreement with J&J that if cul-de-sac work was completed right after 10<sup>th</sup> Street SE was opened no further block rental would be charged. J&J failed to do this or communicate this agreement to Timmons resulting in 25 additional days of block rent.
- Phase 2 was allowed for only half closure at a time
  - Phase 2 had no block rental on it
  - Phase 2 could not begin until entire full width road was paved up to 11<sup>th</sup> Street SE

### Scheduling

- First schedule received was March 22, 2022 by prime contractor
- Next schedule received was June 1, 2022 by SDDOT
- Last schedule received during project work was July 6, 2022 by SDDOT
- Schedule request was sent from Timmons to J&J on August 3, 2022 and became invalid when prime contractor fell behind their scheduled work at 14<sup>th</sup> Street SE
- Timmons asked to see a schedule September 27, 2022 with no response
- Timmons asked to see a schedule October 3, 2022 with no response
- Timmons asked to see a schedule October 5, 2022 with no response
- Schedule requested November 25, 2022 was given via phone call as there were only a few days left of work on the project to meet the substantial completion requirements
- Schedule for 2023 anticipated work was sent March 7, 2023 by prime contractor

### Extra Help

- Timmons was told by J&J that another concrete contractor was found and would be used
- Timmons was told by SDDOT that no other concrete contractor was submitted and approved for work
- Waldner Construction was contacted by Timmons and paperwork submitted and approved by SDDOT
- No help was offered or given by J&J to remove frost from ground

### Additional Information

- Concrete comes after removals, underground, grading, and base course
- The concrete work could not be completed until J&J's work was first completed; Timmons repeatedly waited for J&J to get its work done.
- Owner of J&J, Jamie Andrews, last contact with Timmons was May 16, 2022
- The furthest Timmons crews worked from the 212 project was 60 miles away in Madison, SD on another J&J project
- Timmons was working with J&J on the Watertown Airport at the same time and was told by J&J to take crews from 212 project to make the Airport project the priority at a weekly meeting with Helms & Associates
- Cement powder shortage limited when Timmons could pour concrete, very few Saturdays were allowed by supplier
- Timmons crews worked weekends, holidays, and late evenings (past 10pm)
  - Brad Timmons, owner, worked many Sundays prepping gravel for Monday paving

## ATTACHMENT B

- Verbal deadlines Timmons was given by J&J, were made
- Weekly radio broadcast were made by J&J with an anticipated completion date of November 15, Timmons was told there was a two week extension to the project's completion date
- Once Timmons had completed all the work up to 11<sup>th</sup> Street SE, Timmons followed up behind J&J and poured concrete up to 14<sup>th</sup> Street SE where Timmons caught up with J&J and there was a delay in concrete paving for approximately 3 weeks while Timmons waited for J&J Earthworks to do their utility and grading work
- J&J stated in an email that Timmons could have paved approximately 300 feet past 14<sup>th</sup> Street SE but that was not true. Timmons needed an intersection in order to bring concrete trucks in at and where J&J needed to have a utility connection was before this intersection. Timmons could not do any paving that would have been beneficial until they had gone past an intersection.
- Timmons paved directly behind J&J every time a portion of work was ready on Phase 2
- Timmons had to pave one block at a time for the majority of Phase 1 which was very inefficient
- Payment was expected every 2 weeks and more than once, was received much later, but Timmons continued to work in good faith
- Winter costs were excluded on this project and winter costs were incurred, but have not been billed to J&J
- Englestad Electric was working past the substantial completion date (work that had nothing to do with Timmons)
- In conversations with J&J employees throughout the project, Timmons was told J&J was short-handed all season
- SDDOT onsite inspectors noted J&J had more equipment on the project than operators
- Via emails, SDDOT notes the mismanagement of the project due to J&J
- Timmons bid items have not been paid in quantities according to SDDOT
- Last phone conversation with J&J was December 20, 2022. A meeting regarding the block rent and liquidated damages was discussed but no meeting was set up by J&J, the prime contractor
- A late start in April due to frost cost the project approximately 3 weeks of work
- A cold November with temperatures 20 degrees below normal for the first half hurt progress and added excluded expenses
- Timmons has full intention upon completing the project once payment has been made



February 1, 2023

Timmons Construction Inc.  
Brad Timmons  
1306 Western Avenue  
Brookings, SD 57006

**RE: Highway 212 Reconstruction - Watertown, South Dakota**

Timmons Construction Inc.:

As you are aware, this project did not meet the intended schedule or completion date, set for October 28, 2022. The general scope of work Timmons Construction Inc. was to provide included all cement concrete pavement and associated work. The expected total extended price for all subcontract work equaled \$4,256,175.75, before any change orders.

It is of our opinion that the subcontractor failed to comply with the progress schedule, which caused delays to the prime contract work. We offered help on several occasions, including bringing in additional subcontracts, but were rejected by you. It was also confirmed on numerous occasions that you had crews on different jobs around the state. We feel this directly caused delays to this project. To prevent further delays, we did not pursue the termination of this subcontract.

As of today, February 1, 2023, the total block rental days being assessed for the first phase of the project totals 313 days, which is 163 days over anticipated. Each day is assessed at \$2,500 per day, equaling \$782,500. The total disincentive for this project stands at \$407,500. Based on the progress schedule and the notes from the Department of Transportation (DOT) on block rental days, we feel this sum should be divided between Timmons Construction Inc. and J&J Earth Works, Inc., with approximately \$300,000 being assessed to you and the remaining being assessed to us.

There are also 33 days of Liquidated Damages (LD's) currently being assessed, with more to come as work continues this spring. It is anticipated that this amount could double, based on the amount of work yet to complete. Each day is assessed at \$2,400, bringing the total to-date to \$79,200. We feel that if we were allowed to bring in other subcontractors, the work would have been completed by the expected completion date. Therefore, we feel you are responsible for the full amount of LD's.

As everything sits today and based on the information above, we are currently withholding \$458,400 from the subcontract amount. This amount is being withheld to not only ensure the project is completed this spring, but to cover these costs that we feel are the responsibility of the subcontractor. This letter does not address possible other damages, including PCCP Smoothness. It also does not take into account the possibility of negotiating lower damages with the DOT at the end of the project. If that occurs, that number will be reflected in the final payment.

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1002 S. Madison Street  
Milbank, SD 57252

Office: 605-432-7966 Fax: 605-432-6715 Jeremy Cell: 320-761-3008 Jamie Cell: 605-924-0406



We are trying to avoid too much of a conflict here. I have tried to contact you a few times to sit down and discuss this issue and will look forward to that meeting soon. We have enjoyed working with you on the numerous other projects we have had with you and want to continue a working relationship going into the future.

If you have any questions or concerns, please do not hesitate to contact me or the office.

Sincerely,

Colln A. Paulsen /S/  
Superintendent of Project Operations

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1002 S. Madison Street  
Milbank, SD 57252

Office: 605-432-7966 Fax: 605-432-6715 Jeremy Cell: 320-761-3908 Jamie Cell: 605-924-0496