Performance Audit
TWS Technical Services, LLC
Improperly Certified as a
Minority Business Enterprise

June 2013

City Auditor's Office

City of Kansas City, Missouri

09-2013

Office of the City Auditor

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June 19, 2013

Honorable Mayor and Members of the City Council:

This performance audit examines the Human Relations Department's 2007 certification of TWS Technical Services, LLC (TWS) as a minority business enterprise (MBE). We undertook the audit due to concerns raised about contracting issues related to the CenterPoint/Richards-Gebaur development project in City Council Resolution 101060 and completed the audit when additional information became available in an arbitration ruling.

The city should not have certified TWS as a Minority Business Enterprise (MBE) qualified to perform excavation, hauling, grading, and sewer construction projects. Information in TWS's MBE application and supporting materials should have raised concerns that initiated a more thorough examination by the city's Human Relations Department.

Arbitration materials support a finding that TWS did not have the necessary experience to be certified to perform construction activities. TWS was not "qualified" under the city's MBE ordinance and other qualified and certified firms lost out on the opportunity to participate in major construction contracts. In addition, other jurisdictions may have relied on the Human Relations Department's certification of TWS.

We make recommendations to identify and correct weaknesses in the certification processes; to ensure the future integrity of the certification process; to evaluate reported MBE participation by TWS; and to notify others who may have relied on the Human Relations Department's certification of TWS.

We shared a draft of this report with the director of human relations on May 23, 2013. His response is appended. We would like to thank staffs from the Economic Development Corporation of Kansas City, Missouri, the Port Authority of Kansas City, Missouri, and the city's Human Relations and Law departments for their assistance. The auditor for this project was Nancy Hunt.

Gary L. White
City Auditor

TWS Technical Service, LLC Improperly Certified as a Minority Business Enterprise

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Introduction

Objective

We conducted this audit of the city's certification of TWS Technical Services, LLC as a minority business enterprise (MBE) under the authority of Article II, Section 216 of the Charter of Kansas City, Missouri, which establishes the Office of the City Auditor and outlines the city auditor's primary duties. This performance audit grew out of City Council Resolution 101060 which directed the city auditor to look at contracting issues related to the development of the former Richards-Gebaur Air Force base project.[1] We completed this audit when additional information from an arbitration ruling became available.

A performance audit provides findings or conclusions based on an evaluation of sufficient, appropriate evidence against criteria. Performance audits provide objective analysis so that management and those charged with governance and oversight can use the information to improve program performance and operations, reduce costs, facilitate decision making, and contribute to public accountability.[2]

This report is designed to answer the following question:

- Did the city's Human Relations Department properly certify TWS Technical Services, LLC, as a minority business enterprise?

Scope and Methodology

Our review focuses on the Human Relations Department's certification of TWS Technical Services, LLC (TWS) as an MBE and the potential effects of that certification. Our audit methods included:

[1] Resolution 101060 was adopted on December 16, 2010. It reads in part "The City Auditor should focus upon the grading and excavation work done at the Project site…including the certification by the City of minority and women business enterprises…"

[2] Comptroller General of the United States, *Government Auditing Standards* (Washington, DC: U.S. Government Printing Office, 2011), p. 17.

- Identifying the city requirements for MBE certification to establish criteria.

- Reviewing TWS's application and supporting documentation to identify information used to support the certification.

- Interviewing Human Relations Department (HRD) staff and using staff notes and work products to understand the process and thinking that led to TWS's certification.

- Comparing information contained in an arbitration between TWS and Kissick Construction Company, Inc. (Kissick) with information submitted by TWS in support of its application to be certified as an MBE.

- Reviewing contracts, and projected and reported MBE participation for TWS on two CenterPoint/Richards-Gebaur projects to determine potential consequences of the TWS certification.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We sent a memoranda to the director of human relations with information related to the interpretation of a certification requirement. No other information was omitted from this report because it was deemed privileged or confidential.

Background

MBE/WBE Program

The city's Minority and Women's Business Enterprise (MBE/WBE) Program is described in chapter 38 of the city's Code of Ordinances (code).[3] The program aims to remedy the ongoing impact of discrimination by encouraging and increasing MBE/WBE participation

[3] In this report we site the sections of the city's Code of Ordinances in effect at the time of TWS's certification.

in procurement and contracting processes. The code includes eligibility requirements for MBE/WBE certification.

The Port Authority, under the terms of an annual contract with the city, encourages MBE/WBE participation in its contracts. CenterPoint Properties Trust entered into a participation agreement with the Port Authority in April 2007. This agreement established an obligation for the developer to create contracting opportunities for minority and women owned businesses in its development of the former Richards-Gebaur property. The agreement also established standards that must be met before MBE/WBE participation may be counted towards MBE or WBE goals. The agreement contained a minimum 18 percent overall project MBE goal for each phase of the project.

Relationships

The Port Authority of Kansas City, Missouri, (Port Authority) is responsible for certain economic development efforts throughout Kansas City. As a part of these efforts, the Port Authority selected CenterPoint Properties Trust, to be the developer of a portion of certain property formerly known as the Richards-Gebaur Air Force Base.[4] CenterPoint Properties Trust purchased a portion of the former Richards-Gebaur property from the Port Authority in April 2007.

CenterPoint Properties Trust transferred its development obligations to CenterPoint Kansas City One LLC (CenterPoint). In developing the former base into an intermodal freight center, CenterPoint selected J.E. Dunn (Dunn) to be the project manager. Dunn in turn contracted with Kissick to provide excavation and site preparation services. Kissick then subcontracted a majority of its work to TWS. (See Exhibit 1.) TWS was certified as an MBE and disadvantaged business enterprise (DBE) eligible to perform environmental consulting, excavation, hauling, grading, and sewer construction.

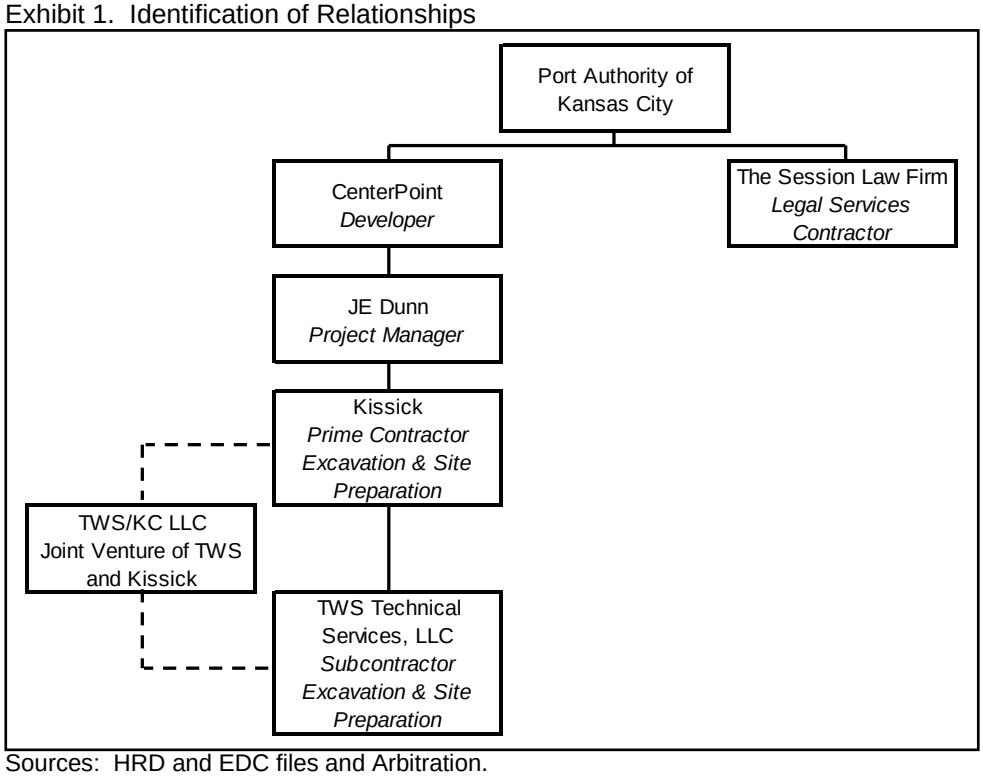
The owner of TWS is an attorney. His firm, The Session Law Firm, was certified by the city as an MBE in the areas of environmental consulting and legal services. The law firm provided legal services to the Port Authority for many years, including representing the Port Authority in its role as oversight authority for the privatization and redevelopment of the former Richards-Gebaur property. The firm provided assistance to the

[4] The Port Authority sold portions of the former Richards-Gebaur property to CenterPoint Properties Trust, a Maryland real estate investment trust. CenterPoint Kansas City One LLC, an Illinois limited liability company registered in the state of Missouri, is the successor to CenterPoint Properties Trust under the development agreement by assignment. CenterPoint Kansas City One, LLC was the developer of the property.

Port Authority in environmental remediation, real estate development and redevelopment, minerals management and legal issues arising from the privatization and redevelopment of the former air force base.[5]

TWS/KC LLC was a joint venture formed by TWS and Kissick in October 2007 to obtain CenterPoint contracts. HRD denied TWS/KC LLC's application for MBE certification on December 18, 2007.

Exhibit 1. Identification of Relationships



Sources: HRD and EDC files and Arbitration.

Arbitration

Arbitration is one method of alternative dispute resolution. Rather than going to court to have a judge or jury determine the outcome of a disagreement, the parties to a dispute may select an impartial third party to receive evidence, hear testimony, and impose a final and binding decision that is enforceable by the courts.

Kissick and TWS eventually had a disagreement involving two subcontracts for CenterPoint work. Both of the subcontracts contained

[5] In January 2011, the Office of United States Attorney for the Western District of Missouri, issued a news release announcing the closure of its preliminary inquiry into potential violations of federal law by the Kansas City Port Authority and William Session. According to the news release, "Neither the Kansas City Port Authority nor William Session are targets or subjects in any federal investigation."

an arbitration clause and an arbitration was conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. After the arbitration, the party's dispute continued in the Missouri courts and some arbitration materials became public. These materials offer insights into the information TWS submitted in support of its application to become certified as an MBE. (See Appendix A for arbitration materials, contracts, and court orders related to two CenterPoint project contracts.)

Findings and Recommendations

Summary

The Human Relations Department should not have certified TWS Technical Services, LLC, as a minority business enterprise eligible to perform excavation, hauling, grading, and sewer construction projects. Information provided in TWS's application and in supporting materials should have raised concerns about TWS's ability to perform excavation, hauling, grading, and sewer construction. Evidence in an arbitration between TWS and Kissick provides information that appears to be inconsistent with the materials submitted for TWS's certification.

The improper certification of TWS resulted in legitimate MBEs losing the opportunity to participate in millions of dollars in construction contracts and probably resulted in CenterPoint being $3.8 million short of obtaining its MBE participation goals for two contracts. In addition, two other jurisdictions requested copies of the Human Relations Department's on-site form and may have relied upon that information and the improper certification of TWS for other certifications.

We recommend reviewing the certification process to identify and correct the weaknesses that permitted the certification of TWS; determining actions to protect the city's MBE and DBE programs from future certification submissions by the owner of TWS; reviewing MBE credit given for TWS's participation on city construction projects; determining the actions that should be taken by HRD when certification information and an improper certification were relied on by other jurisdictions; and notifying the Port Authority of the problems in TWS's certification and potential problems in participation credit for the CenterPoint projects.

TWS Should Not Have Been Certified as an MBE

TWS should not have been certified as a minority business enterprise engaged in excavation, hauling, grading, and sewer construction. Information in TWS's MBE application and supporting materials should have raised concerns that initiated a more thorough examination. An initial evaluation that TWS was "not certifiable" by HRD's MBE/WBE program manager should have raised concerns.

The arbitration materials confirm that TWS did not have the necessary experience to be certified for excavation, hauling, grading, and sewer construction. TWS was not "qualified" under the city's MBE ordinance to perform excavation, hauling, grading, and sewer construction. Other jurisdictions may have relied on the city's certification of TWS.

Application Information Should Have Raised HRD's Concerns

The Human Relations Department should have looked more closely at the information it gathered in its certification of TWS Technical Services, LLC (TWS) as a minority business enterprise engaged in excavation, hauling, grading, and sewer construction. The department did not address the close ties between TWS and a construction contractor, TWS's lack of equipment, or the timing of events related to TWS's completed construction contracts. HRD overlooked information TWS listed on or provided in support of its application that should have raised concerns. The speed of HRD's certification of TWS could have contributed to the improper certification of TWS.

TWS's claimed construction experience was tied to one contractor. In certifying eligible MBE/WBE firms, city code required HRD to make determinations concerning control. Section 38-100.2 (7) (b) stated that "Only an independent business may be certified as a MBE/WBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms." Section 38-100.2 (7) (b) 3 went on to require "The director [of HRD] must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE/WBE firm."

TWS's MBE application tied all of TWS's recently completed contracts to one contractor. The application asks applicants to list its ten largest contracts completed in the past three years. TWS listed only three contracts and all were subcontracts for Kansas storm sewer installation work with Kissick Construction Company.

TWS lacked equipment to perform the storm sewer installation contracts. Code section 38-100.2 (7) (m) required that "In determining whether a firm is controlled by its minority or women owners, the director shall consider whether the firm owns equipment necessary to perform its work. However, the director must not determine that a firm is not controlled by minority or women individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship

with a prime contractor or other party that compromises the independence of the firm."

According to TWS's certification file, the only non-office equipment TWS owned was a 10-year-old pickup truck and hand tools. During the on-site visits and interview in late July 2007, the HRD compliance officer noted that TWS "rents equipment as needed," had established an account with an equipment rental firm, but had not yet rented equipment.

Each of the three storm sewer installation contracts TWS reported completing for Kissick required that TWS provide the necessary equipment. The lack of equipment rental should have raised concerns because it is unlikely TWS could have completed storm sewer installations without more equipment than a pickup truck and hand tools.

The timing of events raises questions about TWS's experience. Although the storm sewer contracts were made over a 14-month-period, the jobs were all completed on May 31, 2007, five days before TWS filed its initial MBE application with the city's Human Relations Department.[6] Kissick issued three sequentially numbered checks as apparent payment for these jobs. All of the checks were dated June 4, 2007, the day before TWS submitted its initial application for MBE certification. Completion of all projects and payments received just days before TWS submitted its MBE application should have at least raised concerns, but, the senior compliance officer reported that she did not notice the dates or sequence of the checks. (See Exhibit 2.)

[6] According to TWS's July 12, 2007, transmittal letter for the new MBE application, TWS submitted an initial application on June 5, 2007. TWS's letter indicated that HRD staff had raised issues with the June 5 application in a June 24, 2007, comment letter; however, HRD has been unable to provide us with a copy of the letter or the original application file. The application and supporting materials may have been returned to the applicant. Under code, had the city denied the original application, the firm would have been ineligible to reapply for two years. A new application was received by HRD from TWS on July 13, 2007. The transmittal letter for the new application says that "You will likely note several significant changes from the application we forwarded to you on June 5th, 2007."

Exhibit 2. TWS Experience Timeline

Date	Event
3/1/2006	TWS Technical Services LLC, Articles of Organization.
3/3/2006	Georgia Secretary of State issues the Certificate of Organization for TWS Technical Services, LLC.
3/16/2006	Kissick subcontracts with TWS Construction Services[7] for storm sewer installation in Olathe, Kansas.
4/24/2007	Kissick subcontracts with TWS Construction Services for removal, modification, and installation of storm sewers in Leawood, Kansas.
5/9/2007	Kissick subcontracts with TWS Construction Services for storm sewer installation in Shawnee, Kansas.
5/29/2007	TWS Technical Services, LLC, a foreign limited liability company, is approved to do business in the state of Kansas by the Kansas Secretary of State.[8]
5/31/2007	TWS completed all three Kansas storm water subcontracts with Kissick.
6/4/2007	Kissick issues three checks to TWS for work on the storm sewer projects.
6/5/2007	TWS files initial MBE application with the city's Human Relations Department.
6/6/2007	TWS opens an account with an equipment rental business.

Source: TWS Technical Services, LLC certification file.

Although TWS's contracts with Kissick were dated between March 16, 2006 and May 9, 2007, TWS Technical Services, LLC, was not registered as a foreign limited liability company by the Kansas Secretary of State until May 29, 2007, just two days before the jobs were completed and more than a year after TWS had signed the reported first Kansas sewer installation contract. Kansas State Statute 17-76, 121 requires that "before doing business in the state of Kansas, a foreign limited liability company shall register with the secretary of state." The timing of TWS's registration with the Secretary of State should have raised concerns.

The owner's multiple business interests should have raised concerns about the sufficiency of time available to manage TWS. Code section 38-100.2 (7) (j) required that "In order to be viewed as controlling a firm, a minority or woman owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed

[7] The three Kissick contracts were with TWS Construction Services. TWS Technical Services, LLC was doing business as TWS Construction Services.

[8] A "foreign" company does business in one state though it is organized in another state. Because TWS was organized in Georgia, it is required to consent to certain conditions and restrictions in order to do business in other states. TWS registered with the Kansas and Missouri Secretaries of State as a foreign limited liability company.

as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating."

TWS was not anticipated to be a part-time operation. On July 23, 2007, TWS's owner wrote to the HRD senior compliance officer assigned to his certification that "at least three contract opportunities (collectively in the mid to upper six figures and maybe more) are available to me and are dependent upon some kind of 'early' signal about the potential for this company [TWS] to be certified in the near future."

During the site visit with HRD's senior compliance officer, TWS's owner responded that he was devoting 8 hours a day to TWS. Earlier that year, during the site visit for the MBE certification of The Session Law Firm, the same owner had told the same senior compliance officer that he was devoting 8+ hours per day to his law firm. Each of these two businesses would be a full-time endeavor and, based on the code, this raises concerns about the owner's ability to control the firms.

The senior compliance officer's on-site visit notes from July 27, 2007, report that TWS is "planning to do some work in Atlanta." Operation of a multi-location operation would further stretch the owner's capabilities and raise additional concerns regarding the owner's control of the firm. In addition, the certification memo did not address the owner's involvement in WTS Enterprises or TWS Enterprises.

The speed of the certification could have contributed to the improper certification. The speed with which HRD conducted the certification may have contributed to unaddressed discrepancies in the certification information. The Human Relations Department took only 20 calendar days to certify TWS. Of the 200 certification applications received by the Human Relations Department in 2007, only 11 were certified in less than 30 days.[9] The majority of applications received in 2007 and eventually certified took more than 90 days to certify.

The senior compliance officer reported that a former assistant to the former city manager inquired about the status of TWS's MBE application on July 24, 2007. Although he did not try to pressure her to make an improper certification, he did ask her not to linger or take too long, because the city's MBE ordinance was about to change. Under the code revision, MBE and WBE firms must be in business in the Kansas

[9] *Minority and Women Business Enterprise Program,* Office of the City Auditor, Kansas City, Missouri, April 2009, p. 7.

City area for at least one year prior to submitting its application.[10] She was directed by him to go by the book, but to hurry with everything. (See Exhibit 3.)

Exhibit 3. TWS Certification Timeline

Date	Event
5/31/2007	Missouri Secretary of State registered TWS as a foreign limited liability company authorized to transact business in Missouri.
6/5/2007	TWS files its initial MBE certification application.
7/6/2007	City issues business license for TWS.
7/9/2007	Missouri Secretary of State registers TWS Construction Services, LLC as a fictitious name owned by TWS Technical Services, LLC.
7/13/2007	TWS hand delivers a new MBE application to HRD.
7/16/2007	TWS file is assigned to a senior compliance officer.
7/23/2007	TWS's owner emails a request to the senior compliance officer for an "early" signal about the potential for TWS to be certified in the near future.
7/24/2007	TWS's owner and employees, and a former assistant to the former city manager phone the senior compliance officer about the certification status of TWS.
7/24/2007	HRD manager of the MBE/WBE program reviewed the TWS file and found that the business was not certifiable.
7/25/2007	HRD asked TWS for additional documents.
7/27/2007	The senior compliance officer conducts site visit.
7/31/2007	HRD issues MBE certificate of certification.
8/3/2007	Senior compliance officer prepares memo recommending certification for TWS and forwards it to the director of the human relations department for approval.
8/3/2007	TWS is approved as an MBE.
8/3/2007	MBE certification letter goes to TWS. TWS is certified for excavation, hauling, grading, sewer construction, and environmental consulting.

Source: HRD's Certification File for TWS.

TWS's MBE certificate was issued before TWS was certified by HRD. HRD's certification memo recommending MBE certification for TWS was dated August 3, 2007. On the same day, this memo, along with the supporting documentation, was submitted to the director of

[10] Section 38-100.4 (c) of the code adopted in Committee Substitute for Ordinance No. 071067, as amended, required that after the effective date of the provision, January 1, 2008, "Each person that seeks certification as an MBE/WBE in the Kansas City Metropolitan Area must demonstrate the business enterprise has a real and substantial presence." To demonstrate this presence a firm had to have been in existence in the metropolitan area for at least one year prior to its MBE/WBE application; have transacted business more than once in the metropolitan area within the last three years; have full-time employees using a majority of their working time to conduct or solicit business in the metropolitan area; and have its principal place of business in the metropolitan area.

human relations for review and approval. The director's approval was recorded by initialing the memo. The MBE certification certificate for TWS, however, shows an issued date of July 31, 2007, three days before the certification memo was submitted for review and approval. Normally the MBE certification certificate is printed after the file is approved by the director and turned over to staff for processing.

TWS was certified despite the MBE manager's initial evaluation. On July 24, 2007, after TWS's new certification application was received, the manager overseeing the city's MBE/WBE certification program, said, after looking through TWS's file, that "they [TWS] are not certifiable."

We do not know the reasons for the manager's comments, but based on our review of the file, we concur with her conclusion. The following should have raised concerns:

- TWS's claimed construction experience was tied to a single contractor;
- TWS lacked the equipment to have performed its claimed construction work;
- TWS's three claimed construction contracts were completed on a single date just five days before TWS submitted its MBE application;
- TWS's three claimed construction contracts were paid for with sequentially numbered checks just the day before TWS submitted its initial MBE application;
- TWS was not registered with the Kansas Secretary of State to conduct business in Kansas until two days before its three claimed Kansas construction contracts were completed; and
- the owner could not have had sufficient time to devote to controlling two unrelated, certified MBE businesses as well as other business operations.

To protect the integrity of the city's certification process, the director of human relations should identify and correct department procedures and processes that permitted the improper certification of TWS as an MBE qualified to perform excavation, hauling, grading, and sewer construction projects.

Arbitration Raises Problems with TWS Certification Information

Arbitration materials raise problems with the certification information provided by TWS. TWS should not have been certified in the areas of

excavation, hauling, grading, or sewer construction. TWS was not qualified under the city code.

Sworn TWS information appears to be inconsistent. The MBE application is submitted with a sworn affidavit that "the foregoing statements and application contents are true and complete." Arbitrations are also based on sworn testimony. There are apparent inconsistencies between TWS's application and supporting materials and the TWS-Kissick arbitration.

TWS claimed experience it did not appear to have. TWS claimed in its MBE application that it performed three storm sewer installation jobs for Kissick. These jobs served as the basis for the city's MBE certification of TWS to perform excavation, hauling, grading, or sewer construction projects.

According to the arbitration, Kissick "pushed seven subcontracting jobs to TWS to establish its reputation in the local construction community as a viable subcontractor. Between April of 2007 and November of 2007, Kissick provided TWS with seven subcontracting jobs in that endeavor. Kissick put its employees in those jobs as those of TWS, paid for the materials, and fronted the money for both employee payroll and materials."[11]

TWS should not have been certified. TWS did not appear to have performed the storm sewer installation jobs listed on TWS's application for MBE certification. Without the actual construction experience reported in TWS's MBE application, the city would not have certified TWS as an MBE firm capable of performing excavation, hauling, grading, or sewer construction projects.

The director of human relations should determine actions to be taken to protect the integrity of the city's MBE and DBE programs from future submissions for certification by the owner of TWS.

TWS was not "qualified" under the city's MBE ordinance. TWS would not have been "qualified" under the city's MBE/WBE ordinance to perform excavation, hauling, grading, and sewer construction projects. A firm is "qualified" when it has "the demonstrated ability to perform the contracted task."[12] Based on information contained in the arbitration, it does not appear that TWS performed the storm sewer projects. Although TWS was certified, without actual experience, it would not have

[11] Arbitration page 3.

[12] Section 38-84 (33), Ord. No. 030287 section 1, 7-31-2003.

demonstrated its ability to perform the contracted task. Its performance could not be counted towards MBE participation goals for city projects.

Because TWS was not "qualified" under the city's MBE program, the director of the city's human relations department should evaluate any reported construction participation for TWS as an MBE performing excavation, hauling, grading, or sewer construction projects.

Major Opportunity for MBE Participation Lost

The certification of TWS was based on the submission of incorrect information by TWS and the failure of the Human Relations Department to evaluate and investigate potential discrepancies in the information provided by TWS. As a result, TWS was able to subcontract for and be credited with performing millions of dollars of work on at least two CenterPoint projects. Based on the arbitration materials, it is unlikely that TWS's performance on the two CenterPoint contracts met the Port Authority's standards for MBE participation credit. Without TWS, the MBE performance on two CenterPoint projects will be $3.8 million below the projects' combined MBE goals and millions of dollars in contracting opportunities were never available to qualified and certified MBEs.

Because TWS was a major subcontractor on CenterPoint projects, the director of human relations should notify the Port Authority about the problems with TWS's certification.

Other Jurisdictions May Have Relied on TWS's DBE Certification Granted by the City

Other certifying entities may have relied on the city's disadvantaged business enterprise (DBE) certification of TWS. Some certifying entities require that a business seeking DBE certification be certified in the state in which it has its principal place of business. Information from the city's certification of TWS was requested and provided to the Georgia State Department of Transportation and to the Louis Armstrong New Orleans International Airport. In addition, a May 2008 communication indicated that TWS had a pending application for certification as a small, disadvantaged business enterprise by the United States of America's Small Business Administration.

Because TWS should not have been certified to perform excavation, hauling, grading, and sewer construction projects, the director of human relations should determine what steps should be taken to notify others

who could have relied on certification information or the improper certification of TWS.

Recommendations

1. The director of human relations should identify and correct department procedures and processes that permitted the improper certification of TWS as an MBE qualified to perform excavation, hauling, grading or sewer construction projects.

2. The director of human relations should determine actions to be taken to protect the city's MBE and DBE programs from future submissions for certification by the owner of TWS.

3. The director of human relations should evaluate any reported construction participation for TWS as an MBE performing excavation, hauling, grading, or sewer construction projects.

4. The director of human relations should notify the Port Authority about the problems with TWS's certification.

5. The director of human relations should determine what steps need to be taken to notify others who could have relied on certification information or the improper certification of TWS.

Appendix A

TWS Contracts, Arbitration Materials, and Court Orders

WD75015

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KISSICK CONSTRUCTION COMPANY, INC.,

Respondent,

vs.

TWS CONSTRUCTION SERVICES, L.L.C.,

Appellant

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Sandra C. Midkiff, Judge

APPENDIX TO THE BRIEF OF THE APPELLANT

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SUBCONTRACT AGREEMENT

No. 2802-01

THIS AGREEMENT is made this 11th day of February 2008, by and between Kissick Construction Company, Inc. of 8131 Indiana Avenue, Kansas City, Missouri 64132, hereinafter called the Contractor and TWS Construction Services, Inc. of 2600 Grand Boulevard, Suite 440, Kansas City, Missouri, 64108, hereinafter called the Subcontractor.

For good and valuable consideration, the parties agree as follows:

SECTION 1. General Contract.

The Contractor has entered into an agreement with the Owner, CenterPoint Properties Trust (hereafter the "General Contract") for the following Project: Phase One of the CenterPoint-KCS Intermodal Center, located at South and East of the Intersection of Missouri Highway 150 and of US Highway 71 in Kansas City, Missouri (the "Project"). A copy of the General Contract has been provided to Subcontractor (from which Contractor's compensation may be deleted), and is incorporated herein by this reference.

SECTION 2. Scope of Work and Schedule.

2.1 The Subcontractor agrees to furnish all labor, material and equipment, necessary to perform and complete all the work for the following portion of the Project Site Grading, Equipment Rental, Demolition of Utilities and Structures, Project Management, Office Trailer Rental, Security, Permits and Project Photography as described more fully in Section 2 hereof, and in accordance with the contract documents, which are described more fully in **Exhibit "A"**, attached hereto. The contract documents are prepared by Lutjen, Inc., which are incorporated herein by reference.

2.2 The Subcontractor shall execute the work as described in **Exhibit "B"** attached hereto, including all labor, materials, equipment, services and other items required to complete such work. The Subcontractor agrees to promptly begin the work within ten (10) calendar days after notification by the Contractor. The work of the Subcontractor shall be completed in conformance with the Construction Schedule as developed by the Contractor in collaboration with the Subcontractor. The Subcontractor shall complete the work in cooperation with all trades.

2.3 Contract substantial completion date is To Be Determined, and final completion date is To Be Determined. The Subcontractor shall perform its work within the Construction Schedule so as to allow the Contractor to achieve the above completion dates. Time is of the essence for this Subcontract.

2.3 Subcontractor shall pay for all state and/or federal taxes, assessments, unemployment compensation contributions or other charges, and acquire and pay for necessary permits and/or licenses to do business as required by law in order to perform the Subcontract work on this Project.

SECTION 3. Insurance.

3.1 The Subcontractor shall obtain and carry for the duration of the Project the following types of insurance in amounts not less than indicated on the attached **Exhibit "C"**, unless the General Contract requires Subcontractor to carry different types and limits of insurance: Employers' Liability insurance, Worker's Compensation insurance, Automobile insurance, and Public Liability and Property Damage insurance. Certificates of insurance showing the same must be deposited with the Contractor before any work is started by the Subcontractor.

3.2 The Contractor and Subcontractor waive all rights against (1) each other and any of their Subcontractors, Sub-subcontractors, agents and employees, each the other, and (2) the Owner, Architect, the Architect's consultants, separate contractors, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other perils to the extent covered by insurance provided under the Prime Contract or other insurance applicable to the Work, except such rights as they may have to proceeds of such insurance. The Subcontractor shall require of its lower-tier subcontractors and suppliers, by appropriate agreements, similar waivers in favor of the other parties named in this paragraph.

SECTION 4. Changes.

4.1 A Subcontract Change is any change in the Subcontractor's work within the general scope of the Subcontract, including a change in the drawings, specifications or technical requirements of the subcontract and/or a change in the schedule of work affecting the performance of the Subcontract.

4.2 When the Contractor orders in writing, the Subcontractor, without nullifying this Subcontract, shall make any and all changes in the Subcontract work which are within the general scope of this Subcontract. Adjustments in the Subcontract price or Subcontract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Subcontract work, adjustment in the Subcontract price, and/or Subcontract time.

4.3 Unless the Change Order is for a lump sum, Contractor may order changed work either on a time and materials basis, or on a Cost-Not-To-Exceed basis by issuing an Extra Work Ticket to Subcontractor, signed by an authorized representative of the Contractor. Subcontractor shall not start any changed work without a signed Extra Work Ticket. Each day on which changed work is performed, Subcontractor shall have its daily work tickets signed by the Contractor's superintendent to acknowledge the hours and type of work performed. The signed daily work tickets shall be submitted at the end of each month to Contractor along with Subcontractor's invoice for the extra or changed work.

4.4. If the Contractor requests either a lump sum price adjustment or a Not-To-Exceed price, then the Subcontractor shall evaluate the proposed adjustment in the subcontract price or subcontract time, if any, as set forth in the Contractor's Extra Work Ticket and respond in writing to the Contractor, stating the Subcontractor's proposed adjustment and the reasons therefore.

SECTION 5. Contract Assignment.

This contract shall not be assigned by the Subcontractor, in whole or in part, without first obtaining permission in writing from the Contractor. The Subcontractor shall be responsible for performance of work by its employees, agents or lower-tier subcontractors, and the Subcontractor agrees to bind its Subcontractors to all provisions of this Agreement.

SECTION 6. Responsibilities.

6.1 Subcontractor agrees to be bound by all terms and conditions of all provisions of the Prime Contract, including all General and Supplemental Conditions and other Contract Documents. Insofar as the provisions of the General Contract do not conflict with specific provisions herein contained, they, and each of them, are hereby incorporated into this Subcontract as fully as if completely rewritten herein. The Subcontractor agrees to be bound to the Contractor by all terms of the General Contract applicable to this

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Subcontract, and to assume toward Contractor, with respect to the work and all operations of Subcontractor on this construction project, all the obligations and responsibilities that Contractor by the General Contract assumes toward Owner.

6.2 The Subcontractor agrees that it will so perform this Subcontract as not to violate any terms, covenants or conditions of the General Contract. The relationships of the Subcontractor hereunder toward Contractor shall be the same as that of Contractor toward the Owner under the General Contract, and the relationship of the Contractor hereunder to the Subcontractor shall be the same as that of the Owner toward the Contractor under the General Contract. Subcontractor is to be furnished access to a copy of the General Contract upon request. Such access shall be limited to only those terms and conditions affecting the Subcontractor.

6.3 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the General Contract or this Subcontract with reasonable promptness and in such sequence as to cause no delay in the Contractor's work or in the activities of the Contractor's other subcontractors.

6.4 The Subcontractor agrees that the Contractor and the Owner's Architect/Engineer will each have the authority to reject work of the Subcontractor which does not conform to the General Contract or applicable standards of the industry.

6.5 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

SECTION 7. Indemnification.

7.1 The Subcontractor shall indemnify and hold the Contractor, Owner, Architect, their agents, consultants and employees harmless from and against all claims, losses, costs, judgments and damages, including but not limited to attorneys' fees and defense costs, pertaining to the performance of the Subcontract including but not limited to personal injury, sickness, disease, death or property damage, loss of use of property resulting there from, and damage to the work itself, but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor, or any of the Subcontractors' employees, subcontractors, suppliers, manufacturers, or other persons or entities for whose acts the Subcontractor may be liable.

7.2 This indemnification agreement is binding on the Subcontractor, to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which the Subcontractor is obligated to provide indemnification. This indemnification provision does not negate, abridge or reduce any other rights or obligations of the persons and entities described herein with respect to indemnity.

7.3 The Subcontractor's indemnification obligation under this Section 7 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

SECTION 8. Safety.

8.1 The Subcontractor agrees to observe and comply with all applicable federal, state and local laws, ordinances, rules and regulations, including but not limited to the Occupational Safety and Health Act of 1970, as amended, effective where the work under this Subcontract is to be performed.

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Establishment of a safety program by the Contractor shall not relieve the Subcontractor or other parties of their safety responsibilities. The Subcontractor shall establish its own safety program implementing safety measures, policies and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by the Contractor and Owner, including, but not limited to, requirements imposed by the Subcontract Documents. The Subcontractor shall comply with the reasonable recommendations of insurance companies or lenders having an interest in the Project. The Subcontractor shall notify the Contractor immediately following an accident and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by the Contractor.

8.2 The Subcontractor shall indemnify the Contractor for fines, or penalties imposed on the Contractor as a result of safety violations, but only to the extent that such fines, or penalties are caused by the Subcontractor's failure to comply with applicable safety requirements, and then only to the extent that such fines or penalties are determined to be the Subcontractor's responsibility based upon the particular failure of compliance cited, and not due to prior or repeated safety violations by the Contractor. In turn, the Contractor shall indemnify the Subcontractor for fines, or penalties imposed on the Subcontractor as a result of safety violations, but only to the extent that such fines, or penalties are caused by the Contractor's failure to comply with applicable safety requirements, and then only to the extent that such fines or penalties are determined to be the Contractor's responsibility based upon the particular failure of compliance cited, and not due to prior or repeated safety violations by the Subcontractor.

SECTION 9. Claims and Remedies.

9.1 A claim is a demand or assertion made in writing by the Contractor or the Subcontractor seeking an adjustment in the Subcontract price and/or Subcontract time, an adjustment or interpretation of the Subcontract terms, or other relief arising under or relating to this Subcontract, including the resolution of any matters in dispute between the Contractor and Subcontractor in connection with the Project. The Subcontractor agrees to make all claims against the Contractor for which the Owner is or may be liable in the same manner and within the time limits provided in the General Contract for like claims by the Contractor against the Owner and in sufficient time for the Contractor to make such claims against the Owner in accordance with the contract.

9.2 The Subcontractor shall give the Contractor written notice of all claims within seven (7) calendar days of the date when the Subcontractor knew of the facts giving rise to the event for which claim is made; otherwise, such claims shall be deemed waived. All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor shall be resolved in the manner provided in Section 10 herein.

9.3 Liquidated damages for delay, if provided for in the General Contract, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may have caused such delay to the Contractor's completion.

9.4 If the Subcontractor defaults or neglects to carry out the work in accordance with this Subcontract fails within two (2) working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, without any additional notice and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

SECTION 10. Arbitration.

10.1 **For Disputes Between Contractor and Subcontractor.** All claims, disputes and other matters in

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question arising out of or relating to this Subcontract or the breach thereof, solely between the Contractor and Subcontractor, except claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. The Subcontractor agrees that any arbitration instituted under this Section may, at the Contractor's election, be consolidated with any other arbitration proceeding involving a common question of fact or law between 1) the Contractor and the Owner, 2) and/or the Contractor and any other subcontractor or supplier performing work in connection with the project described in Section 1 hereof.

10.2 **Consolidation and Jointer.** To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and others involved with the Project concerning a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding. Unless the parties may otherwise agree, notice of demand for arbitration shall be filed in writing with the other party to this subcontract and with the American Arbitration Association. The demand for arbitration shall be made within the time specified with the General Contract, General Conditions, or Supplemental Conditions, or this Subcontract. In no event shall it be made when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitation.

10.3 **For Disputes Involving the Owner.** All claims, disputes and other matters in question arising out of or relating to this Subcontract or the breach thereof, that involve the Owner as a necessary party, shall be resolved in accordance with the provisions of the General Contract regarding dispute resolution, and in the venue required by that agreement so that all necessary parties may be joined into one proceeding. If the General Contract requires arbitration, then the provisions in Sections 10.1 and 10.2 shall apply. However, if there is any inconsistency between those paragraphs and the General Contract, then the General Contract shall apply.

10.4 **For Disputes Involving Other Third Parties.** If Contractor or Owner is sued by a third party who is not under any obligation to arbitrate with Contractor, and the dispute involves the Subcontractor's Work, acts, errors or omissions, then Contractor shall be able to join the Subcontractor into such legal proceedings, in the court in which Contractor or Owner was sued and the arbitration provisions shall not apply.

SECTION 11. Bonds.

The parties may agree that the Subcontractor shall furnish to the Contractor, as the named Obligee, (and the Owner as a co-obligee, if required) appropriate surety bonds to secure the faithful performance of the subcontract work and to satisfy all Subcontractor payment obligations arising hereunder.

Subcontractor Performance and Payment Bonds are ☐ Required ☒ Not Required

If performance and payment bonds are required of the Subcontractor under this Subcontract, then the bonds shall be in the full amount of the Subcontract price, unless otherwise specified herein, and the bonds shall be in a form and by a surety mutually agreeable to the Contractor and Subcontractor. The Subcontractor shall be reimbursed separately, without retainage or markup, for the direct cost of any premiums for required performance and payment bonds. The reimbursement amount for the bonds shall not exceed the actual cost of the subcontract bonds. In the event the Subcontractor shall fail to promptly provide any required bonds, the Contractor may terminate this Subcontract and enter into a subcontract for the balance of the Subcontract work with another subcontractor. All Contractor costs and expenses incurred by the Contractor

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as a result of the termination and replacement shall be paid by the Subcontractor.

SECTION 12. Time of Payment.

Progress payments to the Subcontractor for satisfactory performance of the subcontract work shall be made no later than seven (7) calendar days after the receipt by the Contractor of payment from the Owner for the subcontract work. Subcontractor acknowledges that Contractor's receipt of payment from Owner is a condition precedent to Subcontractor's right to payment, and that payment to Subcontractor is directly contingent upon Contractor's receipt of such funds from the Owner.

SECTION 13. Time of Application.

For each progress payment period, the Subcontractor shall submit its progress payment application to the Contractor for the Subcontract Work performed to date no later than the **Fifteenth** (15th) day of each month.

SECTION 14. Contract Price.

The Contractor agrees to pay the Subcontractor, in **monthly payments**, the sum of **Seven Million Nine-Hundred Ninety Two Thousand Seven Hundred Thirteen and 00/100** Dollars ($7,992,713.00) for the materials and work.

14.1 Payment shall be made as follows: **Ninety** percent (90 %) of the value of labor and materials incorporated by Subcontractor in the work and of materials stored on the job site in an acceptable manner, (subject to the terms established under Section 12 above) except the final payment which the Contractor shall pay to the Subcontractor thirty (30) days after final acceptance of the Subcontractor's work by the ☐ Architect ☐ Engineer ☒ Owner ☐ Contractor. The Subcontractor shall have submitted all necessary Sales and Use Tax report forms and any other required warranties, reports or manuals.

14.2 As a prerequisite for progress payments and final payment, the Subcontractor shall provide, in a form satisfactory to the Owner and Contractor, partial and final lien or claim waivers, as appropriate, in the amount of the application for payment, from the Subcontractor and its Subcontractors, Materialmen and Suppliers.

SECTION 15. Equal Opportunity.

15.1 In connection with the performance of work under this Subcontract, Subcontractor agrees not to discriminate against any employee or applicant for employment because of race, religion, sex, color or national origin, individuals with disabilities and Veterans. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Subcontractor agrees to post notices in conspicuous places, available for employees and applicants for employment, prepared by Subcontractor, and approved by the government when required, setting forth the provisions of this Section 15.

15.2 Subcontractor shall permit access to its books, records and accounts by representatives of Contractor or Owner for purposes of investigation to ascertain compliance with the provision of this Section 15.

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15.3 In the event of Subcontractor's noncompliance with the equal opportunity provisions of this Subcontract, this Subcontract may be terminated for default.

15.4 Subcontractor shall include the provisions of this Article, in every lower-tier subcontract and purchase order. The requirement of this Section 15 shall be in addition to any Equal Opportunity provisions of the General Contract.

SECTION 16. Termination and Suspension.

16.1 If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with this Subcontract or otherwise to perform in accordance with this Subcontract and fails within two (2) days after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after two (2) days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

16.2 If the Owner terminates the Contract for the Owner's convenience, the Contractor shall deliver written notice to the Subcontractor.

16.3 Upon receipt of written notice of termination, the Subcontractor shall:

a. cease operations as directed by the Contractor in the notice;
b. take actions necessary, or that the Contractor may direct, for the protection and preservation of the work; and
c. except for work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing lower tier sub-subcontracts and purchase orders and enter into no further sub-subcontracts and purchase orders.

16.4 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum. An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

a. that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Subcontractor is responsible;
b. that an equitable adjustment is made or denied under another provision of this Subcontract.

SECTION 17. Miscellaneous.

17.1 Except as stated in Section 4, Changes, the Subcontract may be amended or modified only by a written instrument signed by the parties hereto.

17.2 Except in case of emergency involving safety of life or property, the Subcontractor shall only communicate with the Owner through the Contractor.

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17.3 The Subcontractor shall give notices and comply with laws, ordinances, rules, regulations and orders of public authorities bearing on performance of the work of this Subcontract. The Subcontractor shall secure and pay for permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the General Contract.

17.4 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. If the Subcontractor fails to clean up its work area and areas disturbed by the Subcontractor, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

The Contractor and the Subcontractor for themselves, their successors, executors, administrators and assigns, hereby agree to the full performance of the covenants of this Agreement.

IN WITNESS WHEREOF, they have executed this Agreement the day and date written above.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES

Contractor:
KISSICK CONSTRUCTION COMPANY, INC.

By: _____

Name: Pete B. Brown

Title: Vice President

Date: 11 Feb 08

Subcontractor:
TWS CONSTRUCTION SERVICES, INC.

By: William T. Session

Name: _____

Title: President

Date: 2/13/08

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Exhibit A

Contract Documents

See the Attached

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Exhibit B

Subcontractor's Scope of Work

Furnish all labor, equipment, tools, materials and incidentals necessary to complete the following work:

Site Grading
Equipment Rental
Demolition of Existing Utilities and Structures
Project Management
Office Trailer
Security
Permits
Job Site Photography

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Exhibit C

Insurance Requirements

(See Attached)

Certificate of Insurance must name Kissick Construction Company, Inc. as additional insured and must reference the project.

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EXHIBIT A

Richards-Gebaur Development
J. E. Dunn Project No. 10246

CONTRACT DOCUMENTS

1 This Subcontract Contract and all Exhibits.

2 Contract Between Owner & Contractor attached as Exhibit C.

3 Drawings as follows:

Sheet Number	Title	Date Revision Num	Revision Date
01	COVER SHEET	0	11/16/07
02	DEMOLITION PLAN	0	11/16/07
03	DEMOLITION PLAN	0	11/16/07
04	DEMOLITION PLAN	0	11/16/07
05	DEMOLITION PLAN	0	11/16/07
06	LAND DISTURBANCE PLAN GENERAL LAYOUT	0	11/16/07
07	GRADING PLAN	0	11/16/07
08	GRADING PLAN	0	11/16/07
09	GRADING PLAN	0	11/16/07
10	GRADING PLAN	0	11/16/07
11	GRADING PLAN	0	11/16/07
12	DETENTION BASIN PLAN	0	11/16/07
13	DETENTION BASE PLAN	0	11/16/07
14	DETENTION BASIN PLAN	0	11/16/07
15	DETENTION BASIN PLAN	0	11/16/07
16	DRAINAGE TABLES	0	11/16/07
17	DRAINAGE TABLES	0	11/16/07
18	TYPICAL SECTIONS	0	11/16/07
19	STREET PLAN AND PROFILE	0	11/16/07
20	STREET PLAN AND PROFILE	0	11/16/07
21	STREET PLAN AND PROFILE	0	11/16/07
22	STREET PLAN AND PROFILE	0	11/16/07
23	STREET PLAN AND PROFILE	0	11/16/07
24	STREET PLAN AND PROFILE	0	11/16/07
25	STREET PLAN AND PROFILE	0	11/16/07
26	STREET PLAN AND PROFILE	0	11/16/07
27	PHASE I, LAND DISTURBANCE PLAN	0	11/16/07
28	PHASE I, LAND DISTURBANCE PLAN	0	11/16/07
29	PHASE I, LAND DISTURBANCE PLAN	0	11/16/07
30	PHASE I, LAND DISTURBANCE PLAN	0	11/16/07
31	PHASE II, LAND DISTURBANCE PLAN	0	11/16/07
32	PHASE II, LAND DISTURBANCE PLAN	0	11/16/07
33	PHASE II, LAND DISTURBANCE PLAN	0	11/16/07

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EXHIBIT A

Richards-Gebaur Development
J. E. Dunn Project No. 10246

CONTRACT DOCUMENTS

34	PHASE II, LAND DISTURBANCE PLAN	0	11/16/07
35	LAND DISTURBANCE DETAILS	0	11/16/07

END OF EXHIBIT

SUBCONTRACT AGREEMENT

No. 2830- 001

THIS AGREEMENT is made July 28, 2008 by and between Kissick Construction Co., Inc, of 8131 Indiana, Kansas City, Missouri 64132, hereinafter called the Contractor and TWS Construction Services of 2600 Grand, Suite 440, Kansas City, MISSOURI hereinafter called the Subcontractor.

For good and valuable consideration, the parties agree as follows:

SECTION 1. General Contract.

The Contractor has entered into an agreement with the Owner, Centerpoint (hereafter called the General Contract) for the following Project: Centerpoint Properties (hereafter called the project). A Copy of the General Contract will be provided to Subcontractor if requested (from which Contractor's compensation may be deleted), and is incorporated herein by this reference.

SECTION 2. Scope of Work and Schedule.

2.1 The Subcontractor agrees to furnish all labor, material and equipment, necessary to perform and complete all work for the following portion of the Project: , Sainitary and Storm Sewers and Water Main Extensions as described more fully in Section 2 hereof, and in accordance with the contract documents, which are described more fully in Exhibit A, attached hereto. The contract documents are prepared by Lutjen, Inc. , which are incorporated herein by reference.

2.2 The Subcontractor shall execute the work as described in **EXHIBIT " B "** attached hereto, including all labor, materials, services and other items required to complete such work. The Subcontractor agrees to promptly begin the work within **ten (10)** days after notification by the Contractor. The work of the Subcontractor shall be completed in conformance the Construction Schedule as developed by the Contractor in collaboration with the Subcontractor. The Subcontractor shall complete the work in cooperation with all trades.

2.3 Contract substantial completion date is To Be Determined and final completion date is To Be Determined. The Subcontractor shall perform its work within the Construction Schedule so as to allow the Contractor to achieve the above completion dates. Time is of the essence for this Subcontract

2.4 Subcontractor shall pay for all state and/or federal taxes, assessments, unemployment compensation contributions or other charges, and acquire and pay for necessary permits and/or licenses to do business as required by law in order to perform the Subcontract work on this Project.

SECTION 3. Insurance.

3.1 The Subcontractor shall obtain and carry for the duration of the Project the following types of insurance in amounts not less than indicated on the attached Exhibit **"C"** , unless the General Contract requires Subcontractor to carry different types and limits of insurance: Employers' Liability insurance, Worker's Compensation insurance, Automobile insurance, and Public Liability and Property Damage insurance. Certificates of insurance showing the same must be deposited with the Contractor before any work is started by the Subcontractor.

EXHIBIT 1007

ENSAD-Bayonne, N.J.

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3.2 The Contractor and Subcontractor waive all rights against (1) each other and any of their Subcontractors, Sub-subcontractors, agents and employees, each the other, and (2) the Owner, Architect, the Architect's consultants, separate contractors, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other perils to the extent covered by insurance provided under the Prime Contract or other insurance applicable to the Work, except such rights as they may have to proceeds of such insurance. The Subcontractor shall require of its lower-tier subcontractors and suppliers, by appropriate agreements, similar waivers in favor of the other parties named in this paragraph.

SECTION 4. Changes

4.1 A Subcontract Change is any change in the Subcontractor's work within the general scope of the Subcontract, including a change in the drawings, specifications or technical requirements of the subcontract and/or a change in the schedule of work affecting the performance of the Subcontract.

4.2 When the Contractor orders in writing, the Subcontractor, without nullifying this Subcontract, shall make any and all changes in the Subcontract work which are within the general scope of this Subcontract. Adjustments in the Subcontract price or Subcontract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order. No such adjustments shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor. A Subcontract Change Order is a written instrument prepared by the Contractor and signed by the Subcontractor stating their agreement upon the change in the scope of the Subcontract work, adjustment in the Subcontract price, and/or Subcontract time.

4.3 Unless the Change Order is for a lump sum, Contractor may order changed work either on a time and materials basis, or on a Cost-Not-To-Exceed basis by issuing an Extra Work Ticket to Subcontractor, signed by an authorized representative of the Contractor. Subcontractor shall not start any changed work without a signed Extra Work Ticket. Each day on which changed work is performed, Subcontractor shall have its daily work tickets signed by the Contractor's superintendent to acknowledge the hours and type of work performed. The signed daily work tickets shall be submitted at the end of each month to Contractor along with Subcontractor's invoice for the extra or changed work.

4.4 If the Contractor requests either a lump sum price adjustment or a Not-To-Exceed price, then the Subcontractor shall evaluate the proposed adjustment in the subcontract price or subcontract time, if any, as set forth in the Contractor's Extra Work Ticket and respond in writing to the Contractor, stating the Subcontractor's proposed adjustment and the reasons therefor.

SECTION 5. Contract Assignment.

This contract shall not be assigned by the Subcontractor, in whole or in part, without first obtaining permission in writing from the Contractor. The Subcontractor shall be responsible for performance of work by its employees, agents or lower-tier subcontractors, and the Subcontractor agrees to bind its Subcontractors to all provisions of this Agreement.

SECTION 6. Responsibilities.

6.1 Subcontractor agrees to be bound by all terms and conditions of all provisions of the Prime Contract, including all General and Supplemental Conditions and other Contract Documents. Insofar as the provisions of the General Contract do not conflict with specific provisions herein contained, they, and each of them, are hereby incorporated into this Subcontract as fully as if completely rewritten herein. The Subcontractor agrees to be bound to the Contractor by all terms of the General Contract applicable to this Subcontract, and to assume toward Contractor, with respect to the work and all operations of Subcontractor on this construction project, all the obligations and responsibilities that Contractor by the General Contract assumes toward Owner.

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6.2 The Subcontractor agrees that it will so perform this Subcontract as not to violate any terms, covenants or conditions of the General Contract. The relationships of the Subcontractor hereunder

6.3 toward Contractor shall be the same as that of Contractor toward the Owner under the General Contract, and the relationship of the Contractor hereunder to the Subcontractor shall be the same as that of the Owner toward the Contractor under the General Contract. Subcontractor is to be furnished access to a copy of the General Contract upon request. Such access shall be limited to only those terms and conditions affecting the Subcontractor.
The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the General Contract or this Subcontract with reasonable promptness and in such sequence as to cause no delay in the Contractor's work or in the activities of the Contractor's other subcontractors.

6.4 The Subcontractor agrees that the Contractor and the Owner's Architect/Engineer will each have the authority to reject work of the Subcontractor which does not conform to the General Contract or applicable standards of the industry.

6.5 The Subcontractor shall take necessary precautions to protect properly the work of other subcontractors from damage caused by operations under this Subcontract.

SECTION 7. **Indemnification.**

7.1 The Subcontractor shall indemnify and hold the Contractor, Owner, Architect, their agents, consultants and employees harmless from and against all claims, losses, costs, judgments and damages, including but not limited to attorneys' fees and defense costs, pertaining to the performance of the Subcontract including but not limited to personal injury, sickness, disease, death or property damage, loss of use of property resulting therefrom, and damage to the work itself, but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor, or any of the Subcontractors' employees, subcontractors, suppliers, manufacturers, or other persons or entities for whose acts the Subcontractor may be liable.

7.2 This indemnification agreement is binding on the Subcontractor, to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which the Subcontractor is obligated to provide indemnification. This indemnification provision does not negate, abridge or reduce any other rights or obligations of the persons and entities described herein with respect to indemnity.

7.3 The Subcontractor's indemnification obligation under this Section 7 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

SECTION 8. Safety.

8.1 The Subcontractor agrees to observe and comply with all applicable federal, state and local laws, ordinances, rules and regulations, including but not limited to the Occupational Safety and Health Act of 1970, as amended, effective where the work under this Subcontract is to be performed. Establishment of a safety program by the Contractor shall not relieve the Subcontractor or other

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parties of their safety responsibilities. The Subcontractor shall establish its own safety program implementing safety measures, policies and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by the Contractor and Owner, including, but not limited to, requirements imposed by the Subcontract Documents. The Subcontractor shall comply with the reasonable recommendations of insurance companies or lenders having an interest in the Project. The Subcontractor shall notify the Contractor immediately following an accident and promptly confirm the notice in writing. A detailed written report shall be furnished if requested by the Contractor.

8.2 The Subcontractor shall indemnify the Contractor for fines, or penalties imposed on the Contractor as a result of safety violations, but only to the extent that such fines, or penalties are caused by the Subcontractor's failure to comply with applicable safety requirements, and then only to the extent that such fines or penalties are determined to be the Subcontractor's responsibility based upon the particular failure of compliance cited, and not due to prior or repeated safety violations by the Contractor. In turn, the Contractor shall indemnify the Subcontractor for fines, or penalties imposed on the Subcontractor as a result of safety violations, but only to the extent that such fines, or penalties are caused by the Contractor's failure to comply with applicable safety requirements, and then only to the extent that such fines or penalties are determined to be the Contractor's responsibility based upon the particular failure of compliance cited, and not due to prior or repeated safety violations by the Subcontractor.

SECTION 9. Claims and Remedies

9.1 A claim is a demand or assertion made in writing by the Contractor or the Subcontractor seeking an adjustment in the Subcontract price and/or Subcontract time, an adjustment or interpretation of the Subcontract terms, or other relief arising under or relating to this Subcontract, including the resolution of any matters in dispute between the Contractor and Subcontractor in connection with the Project. The Subcontractor agrees to make all claims against the Contractor for which the Owner is or may be liable in the same manner and within the time limits provided in the General Contract for like claims by the Contractor against the Owner and in sufficient time for the Contractor to make such claims against the Owner in accordance with the contract.

9.2 The Subcontractor shall give the Contractor written notice of all claims within seven (7) calendar days of the date when the Subcontractor knew of the facts giving rise to the event for which claim is made; otherwise, such claims shall be deemed waived. All unresolved claims, disputes and other matters in question between the Contractor and the Subcontractor shall be resolved in the manner provided in Section 10 herein.

9.3 Liquidated damages for delay, if provided for in the General Contract, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may have caused such delay to the Contractor's completion.

9.4 If the Subcontractor defaults or neglects to carry out the work in accordance with this Subcontract fails within two (2) working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, without any additional notice and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

SECTION 10. Arbitration

10.1 **For Disputes Between Contractor and Subcontractor.** All claims, disputes and other matters in question arisng out of or relating to this Subcontract or the breach thereof, solely between the Contractor

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and Subcontractor, except claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. The Subcontractor agrees that any arbitration instituted under this Section may, at the Contractor's election, be consolidated with any other arbitration proceeding involving a common question of fact or law between 1) the Contractor and the Owner, 2) and/or the Contractor and any other subcontractor or supplier performing work in connection with the project described in Section 1 hereof.

10.2 **Consolidation and Joinder.** To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and others involved with the Project concerning a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding. Unless the parties may otherwise agree, notice of demand for arbitration shall be filed in writing with the other party to this subcontract and with the American Arbitration Association. The demand for arbitration shall be made within the time specified with the General Contract, General Conditions, or Supplemental Conditions, or this Subcontract. In no event shall it be made when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitation.

10.3 **For Disputes Involving The Owner.** All claims, disputes and other matters in question arising out of or relating to this Subcontract or the breach thereof, that involve the Owner as a necessary party, shall be resolved in accordance with the provisions of the General Contract regarding dispute resolution, and in the venue required by that agreement so that all necessary parties may be joined into one proceeding. If the General Contract requires arbitration, then the provisions in Sections 10.1 and 10.2 shall apply. However, if there is any inconsistency between those paragraphs and the General Contract, then the General Contract shall apply.

10.4 **For Disputes Involving Other Third Parties.** If Contractor or Owner is sued by a third party who is not under any obligation to arbitrate with Contractor, and the dispute involves the Subcontractor's Work, acts, errors or omissions, then Contractor shall be able to join the Subcontractor into such legal proceedings, in the court in which Contractor or Owner was sued and the arbitration provisions shall not apply.

SECTION 11. Bonds.

The parties may agree that the Subcontractor shall furnish to the Contractor, as the named Obligee, (and the Owner as a co-obligee, if required) appropriate surety bonds to secure the faithful performance of the subcontract work and to satisfy all Subcontractor payment obligations arising hereunder.

Subcontractor Performance and Payment Bonds are **Required** **Not Required**[3] **X**

If performance and payment bonds are required of the Subcontractor under this Subcontract, then the bonds shall be in the full amount of the Subcontract price, unless otherwise specified herein, and the bonds shall be in a form and by a surety mutually agreeable to the Contractor and Subcontractor. The Subcontractor shall be reimbursed separately, without retainage or markup, for the direct cost of any premiums for required performance and payment bonds. The reimbursement amount for the bonds shall not exceed the actual cost of the subcontract bonds. In the event the Subcontractor shall fail to promptly provide any required bonds, the Contractor may terminate this Subcontract and enter into a subcontract for the balance of the Subcontract work with another subcontractor. All Contractor costs and expenses incurred by the Contractor as a result of the termination and replacement shall be paid by the Subcontractor.

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SECTION 12. Time of Payment.
Progress payments to the Subcontractor for satisfactory performance of the subcontract work shall be made no later than seven (7) calendar days after the receipt by the Contractor of payment from the Owner for the subcontract work. Subcontractor acknowledges that Contractor's receipt of payment from Owner is a condition precedent to Subcontractor's right to payment, and that payment to Subcontractor is directly contingent upon Contractor's receipt of such funds from the Owner.

SECTION 13. Time of Application

For each progress payment period, the Subcontractor shall submit its progress payment application to the Contractor for Subcontract Work performed to date no later than the Fifteenth (15th) day of each month.

SECTION 14. Contract Price.
The Contractor agrees to pay the Subcontractor, in payments monthly, the sum of $2,923,377
Two Million, Nine Hundred Twenty Three Thousand, Three Hundred Seventy Seven Dollars for all of the labor, equipment, materials and work.

14.1 Payment shall be made as follows:Ninty Five percent (95) of the value of labor and materials incorporated by Subcontractor in the work and of materials stored on the job site in an acceptable manner, (subject to the terms established under Section 12 above) except the final payment which the Contractor shall pay to the Subcontractor thirty (30) days after final acceptance of the Subcontractor's work by the Engineer and Owner. The Subcontractor shall have submitted all necessary Sales and Use Tax report forms and any other required warranties, reports or manuals.

14.2 As a prerequisite for progress payments and final payment, the Subcontractor shall provide, in a form satisfactory to the Owner and Contractor, partial and final lien or claim waivers, as appropriate, in the amount of the application for payment, from the Subcontractor and its Subcontractors, Materialmen and Suppliers.

SECTION 15. Equal Opportunity.

15.1 In connection with the performance of work under this Subcontract, Subcontractor agrees not to discriminate against any employee or applicant for employment because of race, religion, sex, color or national origin, individuals with disabilities and Veterans. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Subcontractor agrees to post notices in conspicuous places, available for employees and applicants for employment, prepared by Subcontractor, and approved by the government when required, setting forth the provisions of this Section 15.

15.2 Subcontractor shall permit access to its books, records and accounts by representatives of Contractor or Owner for purposes of investigation to ascertain compliance with the provision of this Section

15.3 In the event of Subcontractor's noncompliance with the equal opportunity provisions of this Subcontract, this Subcontract may be terminated for default.

15.4 Subcontractor shall include the provisions of this Article, in every lower-tier subcontract and purchase order. The requirement of this Section 15 shall be in addition to any Equal Opportunity provisions of the General Contract.

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The Contractor and the Subcontractor for themselves, their successors, executors, administrators and assigns, hereby agree to the full performance of the covenants of this Agreement.

IN WITNESS WHEREOF, they have executed this Agreement the day and date written above.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES

Contractor:

Kissick Construction Company, Inc.

By:

Name: Jim Kissick

Title: President

Date: 7/28/2008

Subcontractor:

TWS Construction Services

By:

Name: William L. Session

Title: President

Date: 7/31/2008

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Exhibit A

Contract Documents

The Contract Drawings Consist of the following Documents; 1 of 6 Water main Cover Sheet, 2 of 6 Water main Layout Andrews, 3 of 6 Water main extension profile, 4 of 6 Water main extension profile, 5 of 6 Water main extension profile, 6 of 6 Water main extension profile, 1 of 6 Water main Cover Sheet, 2 of 6 Water main layout Thunderbird, 3 of 6 Water main extension profile, 4 of 6 Water main extension profile, 5 of 6 Water main extension profile, 6 of 6 Water main extension profile, 1 Andrews Road Public Sewer, 2 Andrews sanitary general layout, 3 Andrews sanitary profile, 4 Andrews sanitary profile, 5 Andrews sanitary profile, 6 Andrews sanitary profile, 1 Botts Road public sewer, 2 Botts road sanitary general layout, 3 Botts Road sanitary profile, 4 Botts Road sanitary profile, 5 Botts Road sanitary profile, 6 Botts Road sanitary profile, 1 of 4 Water main cover sheet, 2 of 4 Water layout Botts Road, 3 of 4 Water main extension profile, 4 of 4 Water main extension profile, 1 Andrews Road street and storm cover, 1A Quantities, 2 Street and Storm General Lay out, 3 Grading Plan, 4 Typical Sections, 5 Street Plan and Profile, 6 Street Plan and Profile, 7 Street Plan and Profile, 8 Street Plan and Profile, 9 Intersection details, 10 Storm Sewer Profile, 11Storm Sewer Profile, 12 Storm Sewer Profile, 13 Drainage plan, 14 Drainage table, 15 Drainage table, 16 Pavement Markings, 17 Pavement Markings, 18 Erosion Control, 19 Erosion Control, 20 Traffic Control, 1Botts Road street and storm cover, 1A Quantities, 2 Street and Storm General Layout, 3 Grading Plan, 4 Typical Sections, 5 Street Plan and Profile, 6 Street Plan and Profile, 7 Street Plan and Profile, 8 Intersection Details, 9 Storm Sewer Plan and Profile, 10 Storm Sewer Plan and Profile, 11 Storm Sewer Plan and Profile, 12 Drainage Plan, 13 Drainage Table, 14 Drainage Table, 15 Pavement Markings, 16 Erosion Control, and 17 Traffic Control all Dated 2/28/2008

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Exhibit B

Subcontractor's Scope of Work

Furnish all labor, equipment and material necessary to complete the following:

Sanitary and storm sewer installation material, labor, and equipment water Main extensions material, labor, and equipment all in accordance with documents reference herein.

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Exhibit C

ACORD.. CERTIFICATE OF LIABILITY INSURANCE 01/01/2007 — DATE (MM/DD/YY): 09/13/2006

PRODUCER
Loction Companies
444 W. 47th Street, Suite 900
Kansas City Mo 641 2-1906
(816) 960-9000

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED
1018437 SUBCONTRACTOR'S NAME AND ADDRESS

INSURER A: ABC INS COMPANY
INSURER B:
INSURER C:
INSURER D:
INSURER E:

COVERAGES JD

THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	GENERAL LIABILITY X COMMERCIAL GENERAL LIABILITY CLAIMS MADE X OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY X PRO-JECT LOC	YOUR POLICY NUMBER	01/01/2006	01/01/2007	EACH OCCURRENCE FIRE DAMAGE (Any one fire) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG	$ 1,000,000 $ 50,000 $ 5,000 $ 1,000,000 $ 2,000,000 $ 2,000,000
A	AUTOMOBILE LIABILITY X ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS X HIRED AUTOS X NON-OWNED AUTOS	YOUR POLICY NUMBER			COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1,000,000 $ XXXXXXX $ XXXXXXX $ XXXXXXX
	GARAGE LIABILITY ANY AUTO	NOT APPLICABLE			AUTO ONLY - EA ACCIDENT OTHER THAN EA ACC AUTO ONLY: AGG	$ XXXXXXX $ XXXXXXX $ XXXXXXX
A	EXCESS LIABILITY X OCCUR CLAIMS MADE DEDUCTIBLE X WORK-ERS COMP X RETENTION $ 10,000	YOUR POLICY NUMBER			EACH OCCURRENCE AGGREGATE	$ 1,000,000 $ 1,000,000 $ XXXXXXX $ XXXXXXX $ XXXXXXX
A	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	YOUR POLICY NUMBER			X WC STATU-TORY LIMITS OTH-ER E.L. EACH ACCIDENT E.L. DISEASE - EA EMPLOYEE E.L. DISEASE - POLICY LIMIT	$ 1,000,000 $ 1,000,000 $ 1,000,000
	OTHER					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS
REGARDING: _____(PROJECT); CERTHOLDER, (CONTRACTOR) AND _____ (OWNER & ENGINEER) ARE NAMED AS PRIMARY, NONCONTRIBUTING ADDITIONAL INSUREDS INCLUDING PRODUCTS & COMPLETED OPERATIONS, EXCLUDING WORKERS COMPENSATION AND EMPLOYERS LIABILITY. WAIVER OF SUBROGATION APPLIES AS ALLOWED BY LAW. GENERAL LIABILITY/UMBRELLA CONTAINS NO HABITATIONAL OR EIFS EXCLUSIONS OR LIMITATIONS.

CERTIFICATE HOLDER | ADDITIONAL INSURED; INSURER LETTER: ____ | CANCELLATION

2660365
KISSICK CONSTRUCTION COMPANY, INC.
8131 INDIANA
KANSAS CITY MO 64122

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ~~ENDEAVOR TO MAIL~~ 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, ~~BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.~~

AUTHORIZED REPRESENTATIVE

ACORD 25-S (7/97) — © ACORD CORPORATION 1988

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A MATTER IN ARBITRATION BEFORE
THE AMERICAN ARBITRATION ASSOCIATION

KISSICK CONSTRUCTION COMPANY, INC.,	)	
Claimant,	)	American Arbitration Association
v.	)	Case No. 57 110 Y 78 09
TWS TECHNICAL SERVICES, LLC d/b/a TWS CONSTRUCTION SERVICES, LLC,	)	
Respondent.	)	

INTERIM ARBITRATION AWARD

This arbitration proceeding began on June 8, 2009, with the filing of a claim for damages by Kissick Construction Company, Inc. ("Kissick"). The Respondent, TWS Technical Services, LLC ("TWS") then commenced an action in the Circuit Court of Jackson County, Missouri, against Kissick to stay the arbitration, urging that Kissick could not arbitrate claims arising from an oral agreement. Kissick asserted its right to arbitrate under the provisions of two Subcontract Agreements, identified as "Nos. 2802 and 2830," between the parties. On October 13, 2009, TWS filed an Application for a Stay of Arbitration and a Declaratory Judgment. Thereafter, on January 11, 2010, Kissick filed a Cross-Application to Compel Arbitration.

On April 1, 2010, Circuit Court Judge Brian C. Wimes determined that the written agreements contained arbitration provisions, that Kissick's claims arose out of those agreements, and that Kissick's claims fell within the scope of the written agreements to arbitrate. Based upon those findings, Judge Wimes ordered the parties to arbitrate and the American Arbitration Association assumed the administration of the arbitration proceedings. The parties have appointed the undersigned Arbitrator as the sole arbiter of their dispute to hear the evidence and render a final and binding award.

EXHIBIT
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FINDINGS OF FACT

Background

The dispute between these parties arises from excavation and site preparation work done by the two companies at the location of the former Richards-Gebaur Air Force Base in Belton, Missouri. The work was done in anticipation of the further development of a substantial intermodal facility promoted by the City of Kansas City, Missouri. TWS was a construction company originally formed by William T. Session ("Session"), a prominent environmental lawyer in Kansas City, for the purpose of performing environmental inspection and construction work. Kissick is a long-established, experienced contractor in the earth-moving and excavation business. The interests of the two companies in the Richards-Gebaur project, and the long-term vision of Session for his company, seemed to coalesce. TWS had no experience in major construction projects, but had the potential to become a Minority Business Enterprise ("MBE") for the purpose of satisfying governmental contractual requirements and it also had the contacts with the developer of the intermodal project, CenterPoint Kansas City One, LLC. Also, Session was the General Counsel of the Kansas City Port Authority, the governmental entity with oversight over the project. In short, Session had the connections that could bring the business to the table and Kissick had the construction experience and the ability to do the project. Recognizing a potential symbiotic relationship between the two companies, a mutual friend introduced them and Session and Jim Kissick, President of Kissick Construction Company, began discussions about the involvement of their two companies in the project.

A relationship between the two companies with respect to the CenterPoint Project was explored between Session and Jim Kissick in the spring of 2007 in anticipation of work Session could bring from CenterPoint. They met with the potential client and it appeared that they could land the initial site preparation work, especially if TWS could obtain MBE certification as a minority contractor on the job. Its participation as an MBE would satisfy much of the requirement for minority participation imposed by

the City of Kansas City on the entire project. CenterPoint was interested in both timely completion of the work and the minority participation. Session and Jim Kissick were excited about the possibilities of performing millions of dollars of construction work at the Richards-Gebaur location, not only in the initial site preparation, a massive endeavor in itself, but also for later work from other major companies as the intermodal center progressed.

Based upon their preliminary discussions, Jim Kissick approached vendors and insurance representatives to get TWS established. Because it was not known in the Kansas City construction industry, TWS would not have had those entrées with the project manager, J.E. Dunn Construction ("Dunn"), vendors and insurance brokers. However, with its established reputation as a reliable and competent contractor with more than 30 years experience, Kissick could get TWS in the door with these necessary entities. Moreover, not only did Kissick provide that assistance, but it also pushed subcontracting jobs to TWS to establish its reputation in the local construction community as a viable contractor. Between April of 2007 and November of 2007, Kissick provided TWS with seven subcontracting jobs in that endeavor. Kissick put its employees in those jobs as those of TWS, paid for the materials, and fronted the money for both employee payroll and materials. Those contracts were handled as "cost –plus" projects. AIA form subcontracts were used in each of those jobs.

The Meeting of Friday, August 24, 2007

In August of 2007, Session telephoned Jim Kissick to say, "I am the CenterPoint guy. I want 60% of the job; you get 40%." Jim Kissick had no disagreement with that proposition because without Session and his MBE participation he could not have acquired the CenterPoint job. Around 12:30 p.m., on August 24, 2007, Session and Jim Kissick met in the office of the Session Law Firm in anticipation of a meeting with Dunn representatives. This meeting, and the discussions which took place there, is the epicenter of this dispute.

At the meeting in his office, Session made it clear that not only did he want to make money from the project, but he also desired to gain prominence for his firm, TWS, in the national construction industry. So, during their meeting, Session told Jim Kissick that he wanted TWS to be the "lead dog" in the project; he wanted TWS to control it. "I want TWS to be a force to be reckoned with," said Session. Again Jim Kissick deferred to that demand, knowing that Session was bringing the business to him. In that August 24th meeting, Session and Jim Kissick verbally agreed that TWS would receive 60% of the revenues received in the project and would pay 60% of the job costs, and that Kissick would receive 40% of the revenues and would pay 40% of the job costs, a pure and seemingly simple"60/40" split. They also agreed that Kissick would continue to assist in placing TWS in construction jobs wherein it could demonstrate some experience in construction, which it did not have at the time, and would continue to vouch for TWS in obtaining bonding capacity and credibility with third-part vendors. In return, TWS would land the project through CenterPoint, would apply for MBE certification with the City of Kansas City, and would either dissuade CenterPoint from requiring a surety bond or obtain one itself. Kissick would provide the construction expertise and personnel to provide the bid estimates and contacts for the Project Manager, J.E. Dunn Construction ("J.E.Dunn"), and direct the actual work.

The meeting with the representatives of J.E. Dunn took place shortly after the meeting in Session's office. They were skeptical about the qualifications of TWS to do the job. TWS had no equipment; few employees; no experience; no bonding capacity; and no substantial capitalization. For those reasons, the J.E. Dunn representatives issued a "Request for Qualifications" to Kissick and TWS, requesting comprehensive information from the two companies. In their respective responses, Kissick related its extensive work experience, but TWS did not have much to relate about its experience in grading and excavation projects.

In October, in an obvious effort to document the oral agreement had had made with Jim Kissick, in October, Session had a lawyer prepare a lengthy "Joint Venture Agreement" which created a limited

liability corporation between TWS and Kissick "for the purpose of obtaining contracts for and providing and/or performing pre-construction and construction services . . ." That contract, prepared by Session's lawyer, provided TWS with an 60% interest in the entity and Kissick a 40% interest. Presumably, future construction work would have flowed thrdugh that entity, with TWS taking 60% of the revenue and paying 60% of the costs. That agreement apparently was based upon earlier discussions between Session and Jim Kissick.

Storm Clouds

After he received the Joint Venture Agreement, Jim Kissick then prepared a proposals based on the joint venture to present to a representative of Lockton, Inc., a national broker of surety bonds. However, like the J.E. Dunn representatives, the Lockton representative was also skeptical about TWS's lack of experience and its potential to be bonded as the controlling entity in the project. Later, the Lockton representative informed Jim Kissick in November that the joint venture proposal could not be bonded if TWS remained in control. With that, Jim Kissick informed Session that TWS could not get bonding and that Kissick would have to be in control to get it. In other words, Kissick had to be the prime contractor or the controlling member of the joint venture. TWS had to be either the subcontractor or the subordinate owner of the joint venture. Jim Kissick still reiterated, however, that TWS would receive 60% of the revenue, either as a subcontractor or as a subordinate member of the joint venture.

Those two clouds hovered over the proposed joint venture. But the first two were not insurmountable. Jim Kissick simply submitted cost proposals to J.E. Dunn with Kissick Construction Company, the experienced and established contractor, as the controlling entity. All the estimates in the bid proposals were done by Kissick; TWS had no involvement in preparing the bid documents, basically because it had no expertise to do so. With the final proposal, giving Kissick control over the project as a prime contractor and TWS as a subcontractor, the first two clouds dissipated. Both J.E. Dunn and

Lockton were satisfied that Kissick had the experience and wherewithal to complete the project successfully. The prime contract with J.E.Dunn, representative of CenterPoint, would be a lump sum amount. A subcontract between Kissick and TWS would give TWS 60% of that amount.

However, a third cloud drifted in. The key to the project was MBE status for TWS. Session had pledged to obtain it from the City. At initial meeting with the Kansas City Human Relations Department over MBE certification, the city representatives express their own skepticism over TWS's controlling involvement in a major project without any demonstrable experience in the construction industry. They also questioned how Session could manage both a construction company and a law firm at the same time. MBE certification was denied on December 18, 2007, potentially eliminating a key selling point in the venture for the two companies.

Ironically, four days earlier, on December 14, 2007, J.E. Dunn had provided Kissick with a letter of intent approving Kissick's price proposal. That letter of intent was based upon the condition that Kissick would be the controlling entity in the CenterPoint project. Having received that letter, and relying on the representation that its proposal had been accepted, Kissick mobilized to begin work at the Richards-Gebaur site. A contract was signed between J.E. Dunn and Kissick on January 9, 2008, weeks after Kissick and TWS had already begun work. No contracts had been signed between Kissick and TWS at that point in time. However, judging from their objective actions, both Kissick, and TWS management, presumed that the "60% - 40%" agreement was in place. There were no indicia of a different agreement at that time.

The SubContract No. 2802 – "The Mass Excavation" Project

Knowing that Kissick and TWS had to be in a prime contractor – subcontractor relationship to satisfy the City, the Project Manager, and the Bonding Company, Jim Kissick pulled out AIA Subcontract form contracts he had used in the past, filled in the blanks (with TWS receiving 60% of the lump sum amount of the contract, that being $7,992,713.00), and presented it to Session. No specific mention was

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made of an assumption of 60% of the" job costs" by TWS, but TWS did agree to "[f]urnish all labor, material and equipment, necessary to perform and complete all the work" as described in its scope of work. Session signed the contract for TWS. That contract was executed on February 11, 2008, almost two months after the two companies had mobilized and a substantial portion of the excavation and grading work had been done at the CenterPoint site. TWS had done no bid proposals or independent estimating to arrive at the lump sum amount of the contract.

The Course of Conduct of the Parties

In theory, Subcontract No. 2802 established up the classic prime contractor/ subcontractor relationship wherein each would be responsible for its own scope of work, its own job costs, and its own cost information. However, in fact, from the very inception of the written contract, and well before, neither Kissick nor TWS administered the contract as a true prime contractor/ subcontractor agreement. In most significant respects, the relationship was handled like the "60 - 40" joint venture they had originally envisioned and previously discussed. As the companies went forward in the ensuing months, with repeated discussions between their key personnel about achieving a 60% - 40% split of job costs and revenues, Session, the lawyer, raised no issue that their course of conduct varied from the written agreements they had with respect to revenue and costs.

With both companies performing similar or overlapping work on the project, it would have been difficult, if not impossible, to maintain the project in a true prime contractor/subcontractor environment, especially with Kissick as the experienced contractor who provided TWS with guidance and advice, and its supervisory personnel to oversee the physical work, the accounting, and contract compliance issues. As Session testified, "Kissick and I had a deal where I got 60% of the revenue. That was the deal Jim Kissick and I made in August or September of 2007. My goal was to make a lot of money."

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The "Division of Responsibilities"

As early as January 9, 2008, a month before Subcontract No. 2802 was signed, but after work had already commenced, Jim Kissick, as President of Kissick Construction; Thomas Walton, as Senior Vice President of TWS; and George Holler, as Vice President of TWS and CenterPoint Project Manager, met to discuss an allocation of job costs to achieve the 60%-40% split. Session did not attend the meeting. Kissick had provided them with a proposed "Division of Responsibilities." That "Division of Responsibilities" served as a loose estimate of how to achieve a "60%-40%" split based upon the capacities of each of the companies. The subject of the meeting was primarily about how to divide the job costs according to the "60/40" agreement. Kissick already had equipment, fuel capacity, equipment maintenance ability , and accounting systems. To shoulder its responsibilities and earn its 60% of the revenues, TWS had to purchase or rent equipment, acquire an accounting system, hire employees, and establish itself with third-party vendors. Specific third-party vendors were assigned to TWS to help offset the cost differentials with respect to Kissick's larger share of its company-owned equipment. At that time, early in the project, no one at TWS, neither Session nor any other TWS representative, objected to the goal; namely, to establish 60% participation by TWS in the work, the revenues, and the job costs. In fact, there was no objection by anyone at TWS about a "60/40" allocation of job costs until months later when the project did not prove as profitable as Session had anticipated. As it later proved out, the allocation of costs shown on the "Division of Responsibilities" did not reflect the true job costs which the two respective companies would encounter, but simply was an early effort to maintain the "60/40" balance. With a significant change in an element of the assigned job costs, the balance of the job costs dramatically shifted in the late spring.

Payment Applications

For the first six or seven months of the project, the parties consistently deviated from the procedures and practices required by the subcontract when it came to its administration. TWS never

submitted pay applications which truly reflected the actual work it actually performed. Rather, TWS's monthly pay applications consistently mimicked those of Kissick's by reporting the completed work as 60% of that reported to J.E. Dunn by Kissick. From January 7, 2008 to February 13, 2008, Kissick advanced TWS money to cover its payroll. $1,265,851 was paid in advance by Kissick even though the subcontract called for payment in accordance with pay applications reflecting the actual work completed. The pay application submitted by TWS did not reflect the actual schedule of values for work it had completed, even though those submitted to the J.E. Dunn, the Project Manager, by Kissick did. In fact, Jim Kissick had to show Tm Walton, TWS Senior Vice President, how to properly complete the initial pay applications to comply with retainage amounts and the advances. Once the pay applications were properly adjusted to show the 60% split of revenue, Kissick paid 60% of the revenue it received from Dunn less the money which it had advanced and retainage.

The subcontract required approved and written change orders for work done by TWS. But TWS did only a fraction of the change order work for which it received revenue from Kissick. Kissick simply received revenue from J.E. Dunn on its own written pay applications, including change order work, and then remitted 60% of that revenue to TWS. No written change orders were submitted by TWS for that revenue. The revenue from the change orders paid to TWS exceeded the lump sum amount of its subcontract. At the end of May, Kissick showed $970,818.00 in change orders on its pay application to J.E. Dunn. Kissick simply paid $582,490 of the $970,818.00 to TWS. From January, February, March, April and early May of 2008, TWS had been paid 60% of all work done on the project, less retainage.

Job Costs

By March 16, 2008, the job costs were out of balance in relation to the "60-40" agreement. So, Kissick sent George Holler, Vice President of TWS, a series of invoices, totaling approximately $100,000, and stated, "Can you confirm that TWS is not getting invoiced for these [invoice charges]. * * * Due to the 60/40 cost split we may want to have them reinvoice them to you all." Holler, in response,

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acquiesced and requested that the third-party reinvoice the charges to TWS. Session was sent a copy of the email message and its attached invoices, but never objected to their payment. That is one of the early examples in which the two companies tried to "true up" job costs to achieve that balance. Other invoices billed to Kissick by third-party vendors in February were reinvoiced to TWS to achieve the agreed split in costs. More would come later.

Significantly, unlike a traditional relationship between a prime contractor and a subcontractor, the two companies exchanged cost information with the "60/40" split in mind. For example, as early as April 14, 2008, Jim Kissick sent an email with attachments to Tom Walton, Senior Vice President of TWS, in which he wrote, "Tommy, these are our costs to date. Jim." Walton replied, "Thanks. We need to discuss this and how to remedy the difference. * * * We can iron all this out next week or at the end of the job. It still looks like a great project for both of us."

By late May, Kissick began withholding payment of revenue because TWS was not paying its "job cost" share of the "60/40" agreement. Jim Kissick had begun to receive complaints from crucial third-party vendors that they were not being paid on a timely basis. So, Kissick posed questions about TWS's job costs.

On May 30, 2008, Kerrie Mauer, the TWS accountant, sent an email to Walton, Kissick, and Brenda Richmond, the financial person at Kissick, with a cost analysis, in which Mauer wrote, "Per your request here is the summary of our job costs through 04/30/08 for the CenterPoint project. If there is anything else needed let us know." Mauer's summary showed a breakdown of job costs, revenue and profit for TWS.

On June 13th, Mauer, on behalf of TWS, inquired of Richmond as to when TWS would receive its checks on its April billings. Richmond, on behalf Kissick, responded, "in order to reach our 60%-40% split, we need to adjust the overall costs since Kissick's costs are about 2 million more than the TWS costs Tommy shared with Jim [Kissick]. Jim would like to meet with Bill [Session] and Tom [Walton] to review

these numbers." That email was sent to Session, Walton, George Holler, and Bob Verdi, another TWS employee. Walton responded, " Please send me your cost summary so I can see the total picture. Then we will be ready to discuss issues concerning the costs." Session never objected. Nor did he challenge the need to achieve a 60%-40% allocation of the job costs on the Mass Excavation Project.

On June 18, 2008, Walton sent Session a comprehensive email to Session, in which he stated:

> This is to explain our present dilemma with the billing status at the Center Point project. I have attached an analysis of the contract situation as of Kissick's last update. Based on where Kissick's costs are in comparison to TWS cost, we need to make some adjustments in invoice payments to provide both parties with the proper profit allocation and most importantly provide CenterPoint their 60% MBE participation. As it stands now, Kissick shows costs as of May 31, 2008 of $5,812,804 and TWS has projected to have cost of $4,401,167 at the end of this project. TWS's contracts needs to meet the 60% allocation for CenterPoint. To meet that goal TWS needs to receive the full 60% of the contract value of $14,349,926 ($8,575,204). We have put together a spread sheet to show where we are today. We need Kissick to confirm their cost to complete the project. And TWS needs to pay the additional invoices to stay in line with 60% cost."

Other cost information was exchanged between the companies in a series of email messages and attachments through July and August, all seemingly to come to terms with the "60/40" cost and revenue agreement. Again, Session did not object.

On August 26, 2008, Session sent a terse email to Jim Kissick in which he stated, "We have reviewed your job accounting reports on the RG [Richards-Gebaur] related projects and have a number of pointed questions." Significantly, Session did not question the allocation of 60% of the job costs of the projects to TWS, but instead posed questions about the legitimacy of specific costs items. He requested a "face-to-face" meeting. A meeting was held between Jim Kissick and TWS representatives to discuss job costs; detailed cost information was exchanged. Session did not attend that meeting.

Then, early on the evening of September 8, 2008, Session sent Jim Kissick an email, questioning over $1,000,000 in job costs recorded by Kissick. Those job costs included fuel, equipment hauling,

landscaping costs, and other costs items. Although Jim Kissick was leaving for three weeks in Ireland and was preparing for his trip, he quickly responded with a lengthy email generally explaining the costs. He later followed his email with a detailed job-cost report.

So, despite all denials to the contrary, it is clear that Kissick and TWS exchanged job-cost information for several months. That exchange of cost information was clearly an atypical procedure in a prime contractor/subcontractor relationship wherein the subcontractor does its scope of work, pays its own costs, and relies on a proper bid estimate to make a profit. It is clearly unusual for a prime contractor to share its cost information toone of its subcontractors.

The Job Progresses

In January and February of 2008, the CenterPoint project was progressing at a phenomenal pace. Crews were working double shift and the weather permitted continuous progress despite cold temperatures. By the end of February 78.5% of the job had been completed. 82.7% of the grading work was done. Sometime in February, when the job was progressing beyond all expectations, Jim Kissick, in a casual conversation, apparently said to Bill Session that it appeared the project could achieve a 30% gross profit. Session apparently took that comment to be an inalterable truth. Throughout January, February, March, and April, Kissick paid 60% of the revenue it received from Dunn "like clockwork," a total of $6,600,000.

But then the rains came and fuel prices spiked. In May the project bogged down in the mud. Labor, fuel, and equipment prices rose dramatically. Equipment sat idle in the rain. Rental was still being paid on idle equipment. Kissick paid fuel prices which had not been reasonably anticipated. No one expected the torrential rains which came. What looked like a very profitable project became a slightly profitable or losing project.

A Rift Develops

Jim Kissick continued to receive complaints that TWs was not paying its vendors. Kissick began to withhold payment from TWS until the job costs were properly allocated. A rift began to develop between the two companies and their principals. But even so, Kissick and TWS entered into another subcontract, identified as Subcontract No. 2830 (the" CIMO" project) to perform additional work at the Richards-Gebaur location for CenterPoint. The contract price was a lump sum of $2,923,377. Again, the "60-40" agreement seemed to be in play with TWS receiving 60% of the revenue and paying 60% of the job costs.

By the end of the summer, both jobs were reaching completion. However, in early August, Session, who had stayed largely removed from the day-to-day operations of TWS, learned that the companies were losing money on the projects.[1] A Job Status Report dated August 1, 2008 indicated that the "Mass Excavation" project was losing $1,080,692.28. Session, who apparently had not been keeping close watch over the accounting reports for the project, thought, "How did that happen? I thought we were going to make 30%." Earlier, in the spring, when he believed that the "Mass Excavation" project would return a 30% profit, he had pulled almost $1,000,000 out of TWS to buy a house, pay his law firm and pay for other things unrelated to the construction project. By the late summer, he was cash strapped. With that realization, the rift between the companies and its principals widened further.

Following the August meeting between Kissick and TWS officials concerning questioned costs, a meeting which Session did not attend, Mauer, the TWS accountant, wrote Kissick providing detailed accounting information and saying, "[I] have an idea what we can do to get the numbers billed to us so we are the 60/40 on costs too." In her report, Mauer concluded that Kissick needed to bill TWS

[1] Throughout these proceedings Session often disavowed the actions and communications of TWS employees as unauthorized by him, as president of the company. At one point in his testimony, Session characterized the role of George Holler, the Vice President of TWS and its CenterPoint project manager, as "secretarial." However, each those employees had executive titles and clearly had apparent authority to speak for the company.

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$1,394,370 for job costs, and Kissick owed TWS $1,698,192 for withheld revenue. On September 26, 2008, Mauer sent another detailed report on job costs to Kissick on the CIMO project.

On September 25, 2008, another TWS voice entered the cost/revenue conversation. Walton, Senior Vice President of TWS, wrote Jim Kissick to say:

> Jim you have probably received our final billing analysis for the Center Point project. As you can see TWS should receive our final payment of $1.688 mil. There is also a need for TWS to pay for invoices totaling $1.394 million to get out share of 60% of total cost. We [are] suggesting there are several ways to pay these invoice amounts. One would be to pay all the invoices that we show in charging the Center Point project. These non documented invoices totaled $533,000. The remaining invoices could come from your equipment rental to the project. We could pay Kissick for equipment rental to the project for the balance of $861,00 due on TWS' share of the invoices This would make the project accounting for the project reflect the 60/40 division of work scope and all parties paid accordingly. It is up to you how the invoicing is done but we do need invoices to pay for TWS's share of the project."

At some point in the cost conversation, Kissick suggested that in order to true up the job costs, TWS could pay a substantial bill, approximately $900,000, invoiced to Kissick by an asphalt subcontractor, Superior Bowen, on the CIMO project in order to balance the job costs on both projects. Session tentatively agreed. However, then came the ultimate and definitive schism between the companies. And TWS never paid the subcontractor's invoice as it had agreed.[2]

The decisive blow to the relationship between Kissick and TWS (Bill Session and Jim Kissick) occurred in late September. Before that the two companies attempted to come to terms on revenue and cost issues on the two projects, believing that a volume of business stood before them at the Richard-Gebaur location.

On September 23, 2008, TWS sent Kissick a 13-page bound "Interim Project Cost Evaluation Report." The report, with language befitting a lawyer, was highly critical of Kissick's field work, its

[2] When the parties were still discussing how to balance or "true up" the job costs in late summer or early fall of 2008, both companies apparently believed that TWS needed to assume more of those costs to achieve that "60/40" balance.

accounting, its documentation, its bidding estimates, and other matters related to the CenterPoint Project. It accused Kissick Construction Company, which had successfully and profitably survived more than three decades in the excavation and grading business, of a lack of expertise and inexperience. It recited that "the issues ranged from the simple arithmetical mistakes and oversights in the initial bid process to poor and inadequate contract administration processes."

Notably, for the purposes of a these proceedings, the report referred to a project that "[Kissick] and TWS pursued, for all practical purposes, as a joint venture." It went on repeatedly to refer to the "60-40" agreement between the companies, claiming that Kissick owed TWS $583,364 on the project. Most damning to the current suggestion that no "60-40" agreement existed between Kissick and TWS, as now contended by TWS, the Report stated that "If [its] recommendations [were] not adopted by [Kissick] then the 60/40 arrangement should be abandoned and any relationship between the two companies should be based upon legally binding documents negotiated at 'arms length'," that "[p]ursuant to the 'informal 60/40 agreement, the two companies were to share all change order costs and revenues generated on the project" and that "TWS ha[d] no way of determining whether it [was] being asked to bear 100% of the change order job costs or 60% as 'agreed' to." The Report went on to suggest a method to "reconcile the change order revenues and costs to the 60/40 agreement." Nowhere in that Report, as delivered to Kissick, was any disavowal of the existence of the "60/40" agreement to split costs, but rather there appeared repeated affirmances of it.[3]

[3] Curiously, an undated "Final Report" with a similar cover and TWS logo was offered by TWS during the last phases of the evidentiary portion of this hearing. The Report which Kissick received was characterized as an unauthorized "draft" which had been prepared by TWS executives without the permission of its president. Like many other documents referring to the "60-40" agreement, that "Final Report" was not produced during prehearing discovery and was not the report which was identified in Session's prehearing deposition. The explanation for the sudden appearance of the "Final" Report was that it had been discovered during a search of the TWS computer files after this hearing had commenced. Deleted from the "draft" report and notably absent in the "final" report were any references to either a "60-40" agreement to split costs or the criticism of Kissick's expertise. The explanation for the deletions was that Session did not want to offend Jim Kissick with harsh criticism and that the "60-40" agreement never existed. However, what could not be satisfactorily explained was that Jim Kissick originally received the "draft" report in September of 2008, had a bound copy of it in his possession, and had never seen the "final" report before it appeared in this arbitration proceeding. So, the only explanation is that

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When Jim Kissick received the Report, he read it and became extremely angry, believing that he had been wrongly criticized for a project for which he was proud and for weather and fuel market circumstances beyond his control. So, he immediately demanded a meeting with Session. He went to Session's office, had brief, but angry words with him, and left. Kissick concluded that no matter what future business might develop through Session's contacts he could no longer do business with him. After that, the formal litigation proceedings commenced.

CONCLUSIONS OF LAW

The constant refrain by TWS throughout these proceedings was that it had subcontracts, the provisions of which could never be altered without a later written agreement, that it paid "its" job costs, and that it is now entitled it to more than $4,000,000 in withheld revenue and interest under the Missouri Prompt Payment Act. In all its pleadings, TWS has relied upon contract law concerning integration and merger clauses in contracts. These were, it argues, "fully integrated" contracts with clear and unambiguous meanings. On that basis, TWS vigorously has asserted that the contracts, Subcontracts Nos. 2802 and 2830, rule the day because they contain merger and integration clauses and cannot be varied without a subsequent written agreement and consideration, and any modification or reformation of their contractual provisions "violates the sanctity of contracts upon which our civilization founded." Relying on its own interpretation of the contracts, TWS asserted that "we paid our costs, now Kissick wants us to pay its costs." And any notion that the subsequent conduct of the parties could alter the terms of the written contracts or be a guide to the interpretation of their provisions is "just wrong," it claimed. It denied, albeit in the face of overwhelming and plausibly irrefutable evidence to the contrary, that any agreement to split job costs on the two projects, the "Mass Excavation" project and the "CIMO"

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even if the "final" report existed in September of 2008, it was never provided to Kissick and TWS executives sent it to him with all the representations about the existence of the "60/40" agreement and the criticism of his job performance.

project, ever existed.[4] Ignoring the consistent conduct and communications of the parties throughout the relationship between Kissick and TWS, both before the subcontracts were signed and afterwards, it focused on one meeting between William Session and James Kissick on August 24, 2007 to claim that Kissick has relied on an unproven oral contract which was superseded and supplanted by the written contracts, thus precluding any parole evidence to the contrary. Session has repeatedly denied that such an agreement ever existed.

Modification of the Subcontracts and/or Interpretation of Those Agreements By the Subsequent and Consistent Course of Conduct of the Parties

But despite TWS's arguments to the contrary, Missouri law does permit the conduct of contracting parties occurring subsequent to the execution of their contract to be examined to interpret and construe that agreement if evidence of that conduct is clearly established. Moreover, in some instances involving construction contracts, the Missouri courts have held the subsequent course of conduct of the parties may also modify an agreement without a later writing.

That the subsequent conduct of parties is an accepted guide to the interpretation of contracts is well established in Missouri decisional law. In *Walnut Associates v. J.H. Mackoy Electric Co., Inc*, 597

[4] In the initial phases of these proceedings argued that no extrinsic evidence could be admitted or entertained outside the confines of the written subcontracts. That argument was made to exclude parole evidence of the meeting of August 24, 2007, and the actions of the parties in the ensuing few months before the subcontracts were signed, as, for example, the Joint Venture Agreement which Session had prepared. However, now, in its post-hearing letter-brief TWS argues that no evidence of the *subsequent* conduct of the parties may be taken into consideration, no matter how overwhelming, but that the "Division of Responsibilities" email which was sent *before* the subcontracts were executed is relevant and admissible as "merged" into the agreements to give meaning to its provision with respect to job costs.

Ironically, *Kennedy v. Bowling*, 4 S.W.2d 438 (Mo. 1928), an early Missouri decision cited by TWS, states, "If not reduced to writing, the parole evidence rule would not apply to the prevent introduction of extrinsic evidence with reference to matters not fixed by the writing." 4 S,W.2d at 444. When literally read, that language approves the admission of extrinsic evidence to clarify a latent ambiguity even in the face of an integration clause in the contract. Seemingly, if extrinsic evidence existing prior to the subcontracts can be considered in the form of the "Division of Responsibilities" document, then so can other evidence relating to the 60%-40% agreement which came before the execution of those documents. If so, the trier of fact then must decide which evidence is credible. That evidence clearly demonstrates that the parties had agreed to a 60%-40% split of both revenues and costs. But regardless of what came before the subcontracts, the fact remains that subsequently the parties consistently and constantly treated their relationship as a joint venture and the division of their job costs on a 60%-40% allocation That conduct is a legitimate guide to the interpretation and construction of their agreements.

S.W.2d 685 (Mo.Ct.App. 1980), the Missouri Court of Appeals relied upon Section 235 of the Restatement of the Law of Contracts (First) to the effect that "[i]f the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation." *Foley*, at 688. The Court also quoted Comment (d) of Section 235 that "[e]ven to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into not for the purpose of modify or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement." *Foley, supra.* Moreover, the Missouri courts, in construction subcontract cases, have even permitted the parties to modify subcontracts by their course of conduct without a subsequent writing even in the face of contractual provisions which clearly require any modifications to be in writing. *See H.B. Deal Construction Co. vg. Labor Discount Center, Inc.*, 418 S.W.2d 940, 950 (Mo. 1967)(waiver of written change orders) ; *Flooring Systems, Inc., v. Staat Construction Co.*, 100 S.W.3d 835, 838 (Mo.Ct.App. 2003) (course of conduct waived contractual requirements in the face of integration clause); *Brockman v. Soltysiak*, 49 S.W.3d 740, 745 (Mo.Ct.App. 2001)(waiver of contractual requirement for written purchase orders); *Wisch & Vaughn Construction Co. v. Melrose Properties Corp.*, 21 S.W. 3d 36, 41 (Mo.Ct.App. 2000)(waiver of written change orders through course of conduct); *Winn-Senter Construction Co. v. Kate Franks, Inc.*, 816 S.W.2d 943, 946 (Mo.Ct.App. 1991)(waiver of written change orders); *Julian v. Kiefer*, 382 S.W.2d 723, 729 (Mo.Ct.App. 1964)(waiver of written change orders).

Identical provisions in Subcontracts Nos. 2802 and 2830 required TWS "to furnish all labor, material and equipment, necessary to perform and complete all the work" in performing its scope of work at the Richards-Gebaur site. Subcontracts 2802 and 2830, Sections 2.1. In the normal context of a prime contractor/subcontractor relationship that provision has no ambiguity. A contractor, like Superior Bowen at the CIMO project for example, simply furnishes "all" its labor, equipment and material as

required by its subcontract, keeps its cost accounting to itself, submits written pay applications based upon the work it has actually done, submits written change orders for extra work, receives revenue for the actual value of its completed work, and profits or loses based upon its own independent bid estimate and the vagaries of external forces which impact the job like weather or the commodities markets in fuel. However, that was not the relationship which ever existed between Kissick and TWS. To the contrary, the overwhelming, clear, convincing and plausibly undeniable evidence demonstrates that Kissick and TWS treated their relationship as a joint venture on a "60%-40%" basis, with each receiving an allocation of revenue and job costs accordingly. Whatever label the subcontracts put on the relationship to satisfy a bonding company, municipal officials in the MBE certification process, the project manager or the owner, in truth and in fact the project was a joint venture. So, the course of conduct of the two companies and principals and employees, which occurred both before and the subcontracts were executed gives meaning to Sections 2.1 of Subcontracts 2802 and 2830 in a factual context wherein they would otherwise be ambiguous.

The most obvious example is fuel costs. Had TWS been a true "subcontractor," it would have been required its own fuel, a major item in the earthmoving process. Big tractors needed big fuel supplies. However, during the early stages of the joint venture and for several months thereafter, Kissick provided the fuel not only for its own equipment, but also for the equipment owned or rented by TWS. TWS characterizes that expense solely as a "Kissick" job cost, based upon a loose allocation established before the Subcontracts were executed.[5] However, nowhere in this proceeding was any evidence presented that the loose allocation of the "Division of Responsibilities" memorandum sent to Bill

[5] Ironically, the "Division of Responsibilities" allocation was made outside the written provisions of the Subcontracts, as were many of the subsequent agreements of the parties with respect to specific job cost items. There is no provision of the Subcontracts which "integrate" that document, or even refer to it. If TWS's arguments about merger and integration were rigidly applicable to its own true job costs, then it would be precluded from denying its fuel and other job-related costs. This is just one of many examples in which TWS's merger and integration arguments fail in the context of the actual joint venture relationship the parties embraced from the inception of the Richards-Gebaur projects.

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Session, Tom Walton and George Holler before the subcontracts were signed ever became a hard and fast provision of those agreements. That document certainly was never formally incorporated into those written agreements.

The Effect of Latent Ambiguity

The subcontracts contain no definition of costs, no specific identification of costs, no schedules of costs, and no allocation of costs for the projects. Those provisions merely set out broad and general language that TWS would provide the necessary labor equipment and materials to complete its work. So, in the context of the actual work performed and the actual administration of the subcontracts, the defining question is - - What job costs were TWS's and what job costs were Kissick's? That question illustrates the latent ambiguity of the provisions of Sections 2.1. They do not answer that question. "[A] latent ambiguity not being apparent on the face of the writing, must be developed by extrinsic evidence to show the real intention of the parties." *Building Erection Services Co. v. Plastic Sales & Manufacturing Co., Inc.*, 163 S.W.3d 472, 479 (Mo.Ct.App. 2005). With the existence of that latent ambiguity, evidence of the conduct of the parties, both prior and subsequent to the execution of the subcontracts becomes highly relevant; the parole evidence does not preclude it. *Finova Capital Corp. v. Ream*, 230 S.W.3d 35, 49 (Mo.Ct.App. 2007).

Conclusion

There can be no reasonable denial that TWs and Kissick treated their relationship as a joint venture and operated under an agreement that TWS would pay 60% of the job costs of the Richards-Gebaur projects. The evidence presented in these proceedings clearly and convincingly supports that conclusion. With the extensive written admissions of TWS employees, and indeed of its principal, and the volume of communications between Kissick and TWS establishing the 60% agreement, TWS cannot credibly deny that it had agreed to pay 60% of the job costs on both the "Mass Excavation" Project and the "CIMO" Project under its obligation "to furnish all labor, material and equipment necessary to

complete all the work under the subcontracts. That being the case, liability on the part of TWS for 60% of the job costs of the projects has been established by Kissick under Subcontracts 2802 and 2830 by the overwhelming, credible testimony and evidence presented in the ten hearing days of this proceeding by Kissick. There is simply no basis to arrive at a different finding.

For the reasons stated above, based upon all the testimony and evidence which has been presented by the parties at this point in these arbitration proceedings, the undersigned Arbitrator finds in favor of Claimant Kissick Construction Company and against Respondent TWS Technical Services, LLC, upon the Motion of Respondent TWS Technical Services, LLC to Dismiss, or in the Alternative, for Summary Judgment on Claimant Kissick Construction Company's Amended Demand for Arbitration. It is further

FOUND and AWARDED that Claimant TWS Technical Services, LLC, shall be liable to Respondent Kissick Construction, Inc., for any outstanding balance of 60% of the job costs and expenses of the "Mass Excavation" Project and the "CIMO" Project under Subcontracts Nos. 2802 and 2830.

This Award shall be considered an "INTERIM AWARD," subject to subsequent modification based upon additional testimony and evidence to be heard on damages at a later point in these arbitration proceedings. A "FINAL AWARD" will be entered upon completion of all the testimony and evidence, and any post hearing motions which may be submitted by the parties. Thus, the record of these arbitration proceedings is not yet closed.

Richard H. Ralston
Arbitrator

Dated this 30th day of March, 2011
at Kansas City, Missouri.

A MATTER IN ARBITRATION BEFORE
THE AMERICAN ARBITRATION ASSOCIATION

KISSICK CONSTRUCTION COMPANY, INC.,	)	
Claimant,	)	American Arbitration Association
v.	)	Case No. 57 110 Y 78 09
TWS TECHNICAL SERVICES, LLC d/b/a TWS CONSTRUCTION SERVICES, LLC,	)	
Respondent.	)	

FINAL ARBITRATION AWARD

On March 3, 2011, the undersigned Arbitrator, who has been appointed by the parties as the sole arbitrator to hear and determine their dispute in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, entered his Interim Award in this proceeding. That Interim Award essentially determined, among other things, that the parties had agreed to allocate job costs and revenues for their excavation and site preparation work at the former Richards-Gebaur Air Force Base on a 60%-40% basis under two subcontracts they had executed. Under the Findings of Fact and Conclusions of Law of the Interim Award the undersigned Arbitrator found that Kissick Construction Company ("Kissick") was responsible for 40% of the job costs on those projects, and TWS Technical Services ("TWS") was responsible for 60% of those costs. A second and final hearing was set to determine a damage award under that arrangement.

EXHIBIT
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A two-day hearing was held on April 27th and 28th of 2011 at which both parties presented testimony and evidence to support their respective views of revenue and job costs relating to their two at Richards-Gebaur site, those being the "Mass Excavation/Centerpoint" project (Subcontract 2802) and the "GIMO" project (Subcontract 2830).[1]

At the second phase of the hearing TWS presented extensive testimony through Dale Jensen, a forensic accountant with the Price-Waterhouse-Coopers accounting firm, based upon a review he and his team of accountants did with respect to Kissick's documentation of job costs and revenues.[2] Their work was focused upon verifying Kissick's job costs based upon their supporting documentation.

Jensen's analysis, which primarily focused on third-party invoices and job-site equipment logs, was highly critical of Kissick's documentation and record keeping. He opined that hundreds of thousands of dollars should be extracted from Kissick's claimed job costs. There seemed to be no dispute with respect to the revenues received from the owner and those which had been paid to TWS.

Some of Jensen's analysis was credible and compelling. However, during cross examination it became abundantly clear that Jensen and his team had operated under incorrect factual assumptions in some critical areas of their work. For example, Jensen and his team excluded third-party invoices from Kissick's job costs that did not carry specific subcontract or

[1] At the request of TWS it was allowed to postpone introduction of its evidence with respect to job costs and revenues until after a finding had been made as to the meaning and interpretation of the subcontracts with respect to the liability of the parties. That determination was made in the Interim Award.

[2] It should be noted that Jensen's analysis was being revised even during the hearing, and his revisions were revealed to Kissick's counsel even on the evening before he was cross-examined.

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project numbers ("2802" or "2830") as prepared by the vendor.[3] Without those job numbers, Jensen testified, his team could not attribute an invoice to either the CenterPoint project or the CIMO project without corroborative documentation. Despite the absence of contract of project number designations, most, if not all, of the invoices which the accountants excluded did carry designations of the destinations to which the goods or services were delivered. For example, an excluded invoice might have indicated that products or services were delivered at "Centerpoint" or "Richards Gebaur" or an address at that location. It was excluded under the misapprehension by members of the accounting team that Kissick was working on a number of projects at Richards-Gebaur, presumably some of which did not involve the Kissick/TWS venture. Jensen was unclear about the source of the information which formed the basis of his assumption, but he relied upon it to exclude a volume of third-party invoices. Without contract or project numerical designations, the Price-Waterhouse-Coopers accountants believed that they could not give credit to any of those invoices and rejected them, the effect being that hundreds of thousands of dollars were backed out of Kissick's job legitimate costs.

The accounting team's assumption that Kissick was operating several construction projects at the site was simply wrong. From the start of the CenterPoint project in December of 2007 until the late spring of 2008, Kissick and TWS were working on only one project, the "CenterPoint/ Mass Excavation" project, not multiple projects. And even after the "CIMO" project began, an invoice indicating delivery to the Richards-Gebaur site or and address at that

[3] Their approach was not always uniform. Some invoices were credited to the CenterPoint project without project or subcontract numbers while others which clearly involved goods and services for that project were discredited.

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location could only have been related to job costs on either the CenterPoint or CIMO projects.[4] Thus, those invoices which were excluded by Jensen and his team had to relate to the joint venture between the two companies despite the absence of a specific project or contract number. Third-party vendors did not always put a project or contract number on their invoices, but they invariably indicated the location of their deliveries. Without exception those invoices which did not carry a project or contract number indicated that the deliveries had been made at the Richards-Gebaur site. Thus, they reflected legitimate job costs which should have been recognized even in the absence of some kind of additional documentation.

Jensen's testimony was compelling with respect to one area of his analysis; namely Kissick's job costs relating to Kissick-owned or rented equipment. The accounting team compared the on-site equipment logs maintained by George Holler, a TWS Vice President who was responsible for maintaining logs of equipment at the project sites on a regular basis. The comparison of those logs with the job costs attributed by Kissick for its equipment demonstrated substantial discrepancies between the costs Kissick allocated to the CenterPoint and CIMO projects and the contemporaneous documentation by Holler. Admittedly, Holler's logs themselves had some discrepancies. But all in all, it is the judgment of the undersigned Arbitrator that recognition should be should given to the errors discovered by the accounting team. For that reason, some of Kissick's damage claims will be reduced for equipment costs which could not be properly documented as having been on the job sites during some relevant times.

[4] There might have been one or two minor exceptions, one being a small demolition job which was done at the Richard-Gebaur site, but they would have had little or no impact on the job costs Kissick allocated to the CenterPoint or CIMO projects.

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The Findings of Fact and Conclusions of Law set out in the Interim Award of March 3, 2011 should be, and they hereby are, fully adopted and incorporated in this Final Award.

For the reasons stated above, and for those set forth in the Interim Award, the undersigned Arbitrator hereby finds infavor of Kissick Construction Company (Kissick) and against TWS Technical Services, LLC (d/b/a TWS Construction Services, LLC) (TWS), and awards Kissick Construction Company the sum of Six Hundred Seven Thousand Six Hundred Twenty Seven Dollars and Thirty Seven Cents ($607,627.37).

The administrative fees and expenses of the American Arbitration Association totaling $19,750.00 and the compensation and expenses of the arbitrator totaling $31,050.00 shall be borne equally. Therefore, Kissick shallreimburse TWS the sum of $1,375.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Kissick.

This Final Award is in full settlement of all claims and counterclaims submitted in this Arbitration. All claims and counterclaims raised by any party not expressly granted in this Award or not explicitly found by the undersigned Arbitrator to be outside his jurisdiction, are hereby denied.

Richard H. Ralston
Arbitrator

Dated this 16th day of May, 2011
at Kansas City, Missouri.

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

TWS TECHNICAL SERVICES, LLC,	)	
	)	
Plaintiff,	)	
	)	**Case No. 0916-CV33473**
v.	)	
	)	
KISSICK CONSTRUCTION COMPANY, INC.,	)	
	)	
Defendant.	)	

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ORDER

On October 13, 2009, Plaintiff TWS Technical Services, LLC d/b/a TWS Construction Services, LLC's ("TWS") filed an Application for Stay of Arbitration and Declaratory Judgment (the "Application"). Thereafter, on January 11, 2010, Defendant Kissick Construction Company, Inc. ("Kissick") filed a Cross-Application to Compel Arbitration (the "Cross-Application"). Through the Application and Cross-Application, TWS and Kissick request this Court to determine whether Kissick may proceed with its claims against TWS in an arbitration, which is pending before the American Arbitration Association ("Arbitration").

After reviewing the legal papers and hearing oral argument, the Court finds that Kissick and TWS have two written agreements to arbitrate, as contained in Subcontract Agreement No. 2802-01 and Subcontract Agreement 2830-001 (the "Subcontracts"); that Kissick's claims asserted against TWS in the Arbitration arise out of the Subcontracts; and, that Kissick's claims fall within the scope of the written agreements to arbitrate. Accordingly, TWS's Application is denied and Kissick's Cross-Application is granted. **IT IS SO ORDERED.**

DATE: 4/1/2010

EXHIBIT
B

The Honorable Brian C. Wimes
Circuit Court Judge for Jackson County, Missouri

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KISSICK CONSTRUCTION COMPANY, INC., Petitioner, v. TWS CONSTRUCTION SERVICES, LLC, Respondent.	Case No. 1116-CV23239 Consolidated with Case No. 1116-CV26476 Division 1

ORDER AND JUDGMENT OVERRULING TWS' MOTION TO VACATE AND REMAND AWARD, OVERRULING TWS' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STAY PETITIONER'S APPLICATION TO CONFIRM AN ARBITRATION AWARD, AND GRANTING KISSICK'S APPLICATION TO CONFIRM AN ARBITRATION AWARD

This case comes before the Court on Petitioner Kissick Construction Company, Inc.'s ("Kissick") Application to Confirm an Arbitration Award, filed herein on August 26, 2011; Respondent TWS Construction Services, LLC's ("TWS") Motion to Dismiss, or in the Alternative, Motion to Stay Petitioner's Application to Confirm an Arbitration Award, filed herein on October 6, 2011; and, Respondent TWS' Motion to Vacate and Remand Award, filed herein on September 14, 2011. After careful review and consideration of the pleadings, suggestions filed by the parties, and applicable law, the Court now enters the following findings and orders:

TWS' Motion to Vacate and Remand Award

In seeking an order vacating and remanding the arbitration award, TWS argues that the arbitrator, Judge Richard Ralson, exceeded the authority granted to him by the Federal Arbitration Act ("FAA") and entered findings and conclusions which represent a manifest disregard for federal and state contract law.

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First, this Court agrees with Judge Ralston that the claims at issue are arbitrable because the claims center on the interpretation of the payment and cost terms of the Subcontracts, which contain arbitration clauses agreed to by the parties. Therefore, the Court finds that Judge Ralston did not exceed the authority granted to him by the FAA by not dismissing the arbitration and later entering the Arbitration Award.

Secondly, the Court finds that "manifest disregard of the law" is not a standard of review for this court in deciding whether to vacate and remand the Arbitration Award.

"The FAA authorizes a district court to vacate an arbitration award in four limited circumstances, and in the absence of one of these grounds, the award must be confirmed." *Med. Shoppe Int'l v. Turner Inv., Inc.*, 614 F.3d 485, 486 (8th Cir. 2010). "Specifically, [Section 10 of the FAA] states that a federal court may vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id* at 486-487.

TWS argues that the United States Supreme Court case *Hall Street Assoc., LLC v. Mattell, Inc.*, held that the enumerated grounds under Section 10 of the FAA together amount to an additional standard for vacatur of the award based on the confirming court's determination of whether the arbitrator manifestly disregarded the law. *See* 552 US 576, 585 (2007). However, the Supreme Court in *Hall Street*, explicitly rejected that argument stating the Court "[saw] no reason to accord it the significance that [the petitioner urged]." *Id.*

Therefore, applying the standards for review set out in Section 10 of the FAA and applicable case law, the Court, after review of the Judge Richard Ralston's Arbitration Award and the pleadings and suggestions of the parties, finds no authority under the FAA to vacate the Arbitration Award. Furthermore, if "manifest disregard of the law" was a standard of review for this Court to apply, the Court finds that Judge Ralston's findings and conclusions do not represent a manifest disregard for federal and state law. Therefore, TWS' Motion to Vacate and Remand the Award is OVERRULED.

Kissick's Application to Confirm an Arbitration Award and TWS' Motion to Dismiss, or in the Alternative, Motion to Stay Petitioner's Application to Confirm an Arbitration Award

TWS' Motion to Dismiss, or in the Alternative, Motion to Stay Petitioner's Application to Confirm an Arbitration Award relies on the following two arguments:

1. This Court is barred from entering a judgment confirming the Arbitration Award because the arbitration clauses at issue do not empower the Court to enter a judgment on confirming the Arbitration Award, and
2. Without regard for this Court's ruling on its ability to enter judgment confirming the Arbitration Award, this Court should stay Kissick's Application to Confirm the Arbitration Award until this Court decides TWS' Motion to Vacate and Remand the Arbitration Award.

Motion to Dismiss

The FAA provides that a party to an arbitration may apply to the court for confirmation of an arbitration award only "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." *PVI, Inc. v. Ratiopharm GMBH*, 135 F.3d 1252, 1253 (8th Cir. 1998). The arbitration clauses, at issue in the above-captioned matter, are contained in two subcontract agreements and provide in relevant part:

> "For Disputes Between Contractor and Subcontractor. All claims, disputes and other matters in question arising out of or relating to this Subcontract or the breach thereof, solely between the Contractor and Subcontractor, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise...."

Rule 49(c) of the American Arbitration Association's Construction Industry Arbitration Rules states:

> "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof"

Because the parties, through the arbitration clauses in their subcontract agreements, agreed for judgment to be entered in any state court having jurisdiction thereof and because this Court finds that it has the requisite jurisdiction to enter such a judgment, TWS' motion to dismiss Kissick's application is OVERRULED.

Alternative Motion to Stay

Because this Court has treated TWS' Application to Vacate and Remand the Arbitration Award as a compulsory counterclaim and because the Court finds no authority in the FAA to stay Kissick's application at this point in time, TWS' alternative motion to stay Kissick's application is OVERRULED.

WHEREFORE, IT IS NOW HEREBY ORDERED TWS' Motion to Vacate and Remand the Award is OVERRULED.

IT IS FURTHER ORDERED that TWS' Motion to Dismiss, or in the Alternative, Motion to Stay Petitioner's Application to Confirm an Arbitration Award is OVERRULED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Kissick's Application to Confirm an Arbitration Award is GRANTED, and that Kissick shall have and recover from TWS the sum of $607,627.37, together with interest thereon at the rate of nine

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percent (9%) per annum from May 16, 2011 until paid in full. Kissick and TWS shall each bear their own costs and expenses.

IT IS SO ORDERED.

2/16/12
Date

Sandra C. Midkiff
Sandra C. Midkiff, Circuit Court Judge

I certify that a copy of the foregoing was faxed this 16th day of Feb., 2012, to:

Jeffrey Rosen, 816-374-0509
Darwin Johnson, 816-842-1815

, Judicial Administrative Assistant

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Appendix B

Director of the Human Relations Department's Response

CITY OF FOUNTAINS
HEART OF THE NATION

KANSAS CITY
MISSOURI

Human Relations Department
4th Floor, City Hall
414 East 12th Street
Kansas City, Missouri 64106

(816) 513-1836
(816)513-1805 fax

RECEIVED
JUN 13 2013
CITY AUDITOR'S OFFICE

Date: June 13, 2013

To: Gary White, City Auditor

From: Phillip Yelder, Director, Human Relations Dept.

Subject: Response to the Draft Report on TWS Technical Services, LLC Improperly Certified as a Minority Business Enterprise

The Human Relations Department concurs with the Auditor's finding that TWS Technical Services, LLC doing business as TWS Construction should not have been certified as MBE firm. TWS Technical Service provided information to the City's Human Relations Department that was false and misleading, and in-part lead to an improper certification.

The certification of TWS Technical Services, LLC occurred in July 2007, and the firm was certified for three years. During their certification period it does not appear TWS Technical Service worked directly on any KCMO funded projects. TWS Technical Service did work on projects under the supervision of the Kansas City Port Authority. In April of 2010, TWS Technical Services allowed both their Disadvantaged Business Enterprise (DBE), and Minority Business Enterprise (MBE) certification to expire. Since 2007 when the company was first certified, the owner has not tried to renew the company's certification with KCMO.

HRD's response to the Auditor's finding are follows:

1. The Director of Human Relations should identify and correct department procedures and processes that permitted the improper certification of TWS as an MBE qualified to perform excavation, hauling, grading or sewer construction projects.

   Response: Agree

   HRD has established written policies and procedures for certifications since TWS' certification in 2007. These policies and procedures are posted on the

server under Policies and Procedures for Certification. Chapter 38 (Now Chapter 3, section 461) of the City Ordinance and 49 CFR, part 26, have also has also been revised since this certification was processed. The Director reviews all certifications and annual updates personally.

2. The Director of Human Relations should determine actions to be taken to protect the city's MBE and DBE programs from future submissions for certification by the owner of TWS.

   Response: Agree

   HRD would thoroughly investigate any future applications from any company in which the owner of TWS Technical Services, LLC is involved. The company did not renew their certifications in 2010 and they are no longer certified as a MBE or DBE. The Ordinance does not contain any provisions for refusing to accept a firm's application, but a review of the owner's ability to control a firm is spelled out:

   (l) Determinations concerning control. In determining whether the minority or women owners control a firm, the director must consider all the facts in the record, viewed as a whole.

   (17) The director may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the MBE/WBE program.

3. The Director of Human Relations should evaluate any reported construction participation for TWS as an MBE performing excavation, hauling, grading, or sewer construction projects.

   Response: Agree

   HRD will remove TWS Technical Services, LLC participation from HRD records and reports where possible. Based on our minority utilization reports, TWS Technical Services did not work on any KCMO funded projects. However, they were listed on participation reports from the Port Authority.

4. The Director of Human Relations should notify the Port Authority about the problems with TWS's certification.

   Response: Agree

   HRD will notify the Port Authority about the problems with TWS Technical Services, LLC's certification as a Minority Business Enterprise, and recommend that any participation credit for minority participation be removed.

5. The Director of Human Relations should determine what steps need to be taken to notify others who could have relied on certification information or the improper certification of TWS.

   Response: Agree

HRD will notify the appropriate agencies regarding the improper certification of TWS Technical Services, LLC. HRD will cooperate fully with any requests for information from those agencies.