



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

## American Recovery and Reinvestment Act Site Visit of the Diversion Ditch Repair Project at the Gilt Edge Mine Superfund Site, Lawrence County, South Dakota

Report No. 12-R-0601

July 25, 2012



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**Report Contributors:**

Allen Orand  
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**Abbreviations:**

CFR	Code of Federal Regulations
DBA	Davis-Bacon Act
DOJ	U.S. Department of Justice
EPA	U.S. Environmental Protection Agency
FAR	Federal Acquisition Regulation
HBI	Hayward Baker, Inc.
OI	Office of Investigations
OIG	Office of Inspector General
PWT	Pacific Western Technologies
WA	Work Assignment

**Cover photo:** Diversion ditch repair in process at the Gilt Edge Mine Superfund Site in Lawrence County, South Dakota. (EPA OIG photo)

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# At a Glance

## Why We Did This Audit

The U.S. Environmental Protection Agency (EPA) Office of Inspector General audits projects funded by the American Recovery and Reinvestment Act of 2009 (Recovery Act). We selected the Gilt Edge Mine Superfund Site project in Lawrence County, South Dakota, for audit. The purpose of this audit was to determine compliance with selected Recovery Act requirements.

## Background

EPA provided \$2,935,228 in Recovery Act funding for Pacific Western Technologies (PWT) to hire a subcontractor to perform the drilling and grouting portion of the diversion ditch repair at the site. The funding was provided through a work assignment under PWT's existing remedial action contract.

For further information, contact our Office of Congressional and Public Affairs at (202) 566-2391.

The full report is at:  
[www.epa.gov/oig/reports/2012/20120725-12-R-0601.pdf](http://www.epa.gov/oig/reports/2012/20120725-12-R-0601.pdf)

## ***American Recovery and Reinvestment Act Site Visit of the Diversion Ditch Repair Project at the Gilt Edge Mine Superfund Site, Lawrence County, South Dakota***

### What We Found

PWT did not have adequate controls to ensure that its subcontractors and vendors complied with the Buy American and Davis-Bacon Act (DBA) provisions of the Recovery Act. Non-American-made steel grouting pipes were used in the project. As a result, we questioned \$349,635 in costs incurred under the project, consisting of ineligible pipe costs of \$88,712 and unsupported field inspection costs of \$260,923. Also, PWT did not verify whether subcontract vendor employees who worked at the site were paid according to DBA requirements. These Recovery Act requirements were incorporated into both the prime contract and the subcontract, and apply to not only the contractor and subcontractor but to second-tier subcontractors and vendors.

The lack of control was due to PWT employees not being trained on contract terms and conditions, including Recovery Act requirements. PWT representatives also said that the company did not have policies and procedures to require inspection of all materials for Buy American compliance, and PWT employees did not understand that DBA requirements applied to vendor employees. PWT subsequently established material inspection procedures in response to the Buy American noncompliance. PWT also started the review process to verify subcontractor and vendor compliance with DBA requirements.

PWT accurately reported the number of jobs created and retained due to Recovery Act funding, and PWT's procurement of the subcontractor for the project was in accordance with the federal requirements and contract terms and conditions.

### Recommendations and Planned Corrective Actions

We recommend that EPA's Director, Office of Acquisition Management, Office of Administration and Resources Management, advise the contracting officer to designate the grouting pipe cost of \$88,712 as ineligible costs and to reduce the funding for the project accordingly. We also recommend that the Director disallow and recover PWT field inspection costs.

PWT indicated it is working with the contracting officer to deobligate \$88,712 from the project. The contractor proposed, and EPA accepted, \$2,551 as the amount of ineligible field supervision costs relating to Buy American compliance monitoring. However, while this is all that can be collected based on EPA's actions, we do not believe the contracting officer's determination identified all ineligible field supervision costs.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

July 25, 2012

**MEMORANDUM**

**SUBJECT:** American Recovery and Reinvestment Act Site Visit of the  
Diversion Ditch Repair Project at the Gilt Edge Mine Superfund Site,  
Lawrence County, South Dakota  
Report No. 12-R-0601

**FROM:** Arthur A. Elkins, Jr.

A handwritten signature in black ink, appearing to read "Arthur A. Elkins, Jr.", is written over the printed name.

**TO:** John Bashista  
Director, Office of Acquisition Management  
Office of Administration and Resources Management

This is our report on the subject site visit conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. EPA managers in accordance with established audit resolution procedures will make the final determination on matters in this report.

**Action Required**

In accordance with EPA Manual 2750, you are required to provide a written response to this report within 120 calendar days, or by November 26, 2012. You should include a corrective action plan for agreed-upon actions, including milestone dates. Your response will be posted on the OIG's public website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public. If your response contains such data, you should identify the data for redaction or removal. We have no objection to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Melissa Heist, Assistant Inspector General for Audit, at (202) 566-0899 or [heist.melissa@epa.gov](mailto:heist.melissa@epa.gov); or Robert Adachi, Product Line Director, at (415) 947-4537 or [adachi.robert@epa.gov](mailto:adachi.robert@epa.gov).

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# Introduction

## Purpose

The purpose of our audit was to determine whether Pacific Western Technologies (PWT) and its subcontractors complied with selected requirements under the American Recovery and Reinvestment Act of 2009 (Recovery Act) in the performance of the diversion ditch repair project at the Gilt Edge Mine Superfund Site in Lawrence County, South Dakota. We also evaluated PWT's procurement of its subcontractor to ensure compliance with federal requirements.

## Background

The President signed the Recovery Act on February 17, 2009. The purpose of the Recovery Act as it applies to the U.S. Environmental Protection Agency (EPA) is to preserve and create jobs, promote economic recovery, and invest in environmental protection that will provide long-term economic benefits. The Recovery Act provided EPA with \$600 million for the Superfund remedial program. EPA uses this funding to support new and ongoing projects at various National Priorities List Superfund sites.

The Gilt Edge Mine Superfund Site is a former gold mining site located about 5 miles east of Lead, South Dakota. It was added to the National Priorities List on December 1, 2000, and consists of three operable units. The Recovery Act project we audited is part of Operable Unit 3, the Ruby Gulch Waste Rock Repository.

The Gilt Edge Mine Superfund Site was contaminated with acid waste from the former mining operations. Acid rock drainage from the site posed a major threat to nearby waterways. EPA initially addressed the threat by capping the repository and installing surface water drainage diversion ditches.

Subsequent testing revealed that many of the diversion ditches were leaking. EPA, in consultation with the South Dakota Department of Environment and Natural Resources, decided to repair the leakage by drilling and pressure grouting the fractured areas in the diversion ditches, and covering the ditches with geomembrane liners to reduce or eliminate surface water infiltration. Recovery Act funding was allotted for PWT to hire a subcontractor for the drilling and grouting portion of the project.

EPA Region 8 has an ongoing remedial action contract with PWT, Contract No. EP-W06-006. The region modified the contract on May 4, 2009, to incorporate the Recovery Act requirements and on May 28, 2009, to obligate the Recovery Act funds.

Under the contract, the region issues work assignments (WAs). Region 8 issued WA08 to PWT on April 4, 2008, for all remedial actions at the Ruby Gulch Waste Rock Repository. On May 28, 2009, the region reissued the subcontract portion of the drilling and grouting work under WA014 with Recovery Act funds. On July 10, 2009, PWT awarded a fixed-unit-price agreement/subcontract to Hayward Baker, Inc. (HBI), for \$2,935,228, to perform the drilling and pressure grouting activities.

All remaining remedial action work at Ruby Gulch will continue to be funded under WA08 with the regular Superfund appropriation (i.e., non-Recovery Act funding). PWT's work at the site includes preparing work plans, procuring subcontractors, performing field oversight, managing the project, and providing technical engineering services.

## **Scope and Methodology**

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

We conducted our field work between August 30, 2010, and January 19, 2012. The field work included an initial unannounced site visit to the project and subsequent visits to corporate offices of PWT and HBI to review documentation and obtain an understanding of the controls PWT had in place to ensure that activities under the project complied with the Recovery Act requirements and federal procurement regulations. Specifically, we performed the following procedures:

1. Toured the project
2. Interviewed the EPA contracting officer and project officer, and contractor and subcontractor personnel
3. Reviewed records maintained by the contractor and subcontractor to verify that activities under the project complied with the following requirements:
  - a. Buy American requirements under Recovery Act Section 1605
  - b. Davis-Bacon Act (DBA) wage requirements under Recovery Act Section 1606
  - c. Reporting requirements under Recovery Act Section 1512
  - d. Federal regulations applicable to the procurement of the subcontractor for the Recovery Act project

## Summary of Results

Our audit disclosed that PWT did not have adequate controls to ensure that its subcontractors and vendors for drilling and grouting comply with the Buy American and DBA provisions of the Recovery Act. As a result, ineligible grouting pipe costs of \$88,712 were incurred under the project. In the draft report, we also identified \$260,923 of unsupported field inspection costs. Subsequently, the contracting officer determined that \$2,551 of the field inspection costs were ineligible. Further, we did not find evidence that all laborers and mechanics who worked at the site were paid in accordance with DBA requirements. PWT accurately reported the number of jobs created and retained by the Recovery Act funding, and PWT's procurement of the subcontractor for the project was in accordance with the federal requirements and contract terms and conditions.

### Buy American Compliance

PWT did not have adequate controls to ensure that its subcontractor for drilling and grouting complied with the Buy American requirements of the Recovery Act. Although these requirements were in the terms and conditions of the contract with EPA and in the subcontract with HBI, we found that non-American-made steel grouting pipes were used in the project.

Recovery Act Section 1605 states that no Recovery Act funds may be used to construct, alter, maintain, or repair a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. To use foreign-made construction materials, the contractor must apply for, and receive, a waiver from the government. The written justification for the waiver must be published in the Federal Register.

To implement this requirement, the following Federal Acquisition Regulation (FAR) clauses, derived from the Code of Federal Regulations (CFR), were included in the terms and conditions of the PWT contract and HBI subcontract:

- Title 48 CFR 52.225-21—Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials
- Title 48 CFR 52.225-22—Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials

These clauses reiterate the requirements in Recovery Act Section 1605. Thus, both PWT and HBI are subject to the Buy American requirements.

During our unannounced site visit to the project on August 30, 2010, we found that grouting pipes made in Taiwan and Korea were used in the project without EPA's approval or waiver, contrary to the Buy American requirement.



Grouting pipes labeled *Taiwan*.  
(EPA OIG photo)



Grouting pipes labeled *Made in Korea*.  
(EPA OIG photo)

The noncompliance was due to the lack of training for PWT's field employees on contract terms and conditions, including Recovery Act requirements. The noncompliance was also due to the lack of policies and procedures requiring inspection of all materials for Buy American compliance. According to PWT, at the time, inspectors only conducted spot checks of the materials delivered to the site.

### ***Settlement Agreement***

We notified the Office of Inspector General's (OIG's) Office of Investigations (OI) about the issue on August 31, 2010. OI special agents visited the site on September 2, 2010, and confirmed the Buy American noncompliance. OI referred the noncompliance to the U.S. Department of Justice (DOJ) and worked with DOJ to pursue a civil claim against HBI, the subcontractor responsible for purchasing and installing the non-American-made pipes.

On May 9, 2011, HBI entered into a settlement agreement with DOJ. The government alleged that HBI failed to purchase domestic steel pipes for the project from the inception of the subcontract on July 10, 2009, to September 30, 2010, in violation of Recovery Act requirements. HBI did not admit liability, but agreed to pay the settlement amount of \$120,216.

In the settlement agreement, the government acknowledged that HBI already repaid \$73,296 by way of funds withheld from its subcontract performance. HBI was required to pay the remaining \$46,920 according to DOJ's instruction within 10 days of the agreement.

Under the agreement, the government would release HBI from any civil or administrative monetary claim under the False Claims Act; Program Fraud Civil

Remedies Act; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud. The agreement reserved a number of releases of claims, including Internal Revenue Service tax liabilities and administrative liabilities such as suspension and debarment.

### ***Corrective Actions***

Based on an OI briefing of Region 8 officials on the Buy American noncompliance, EPA issued a stop work order on September 2, 2010. The stop work order was lifted on September 7, 2010, due to programmatic considerations.<sup>1</sup> However, no grouting, pipe installation, or work in areas where existing grouting pipes were installed was performed until PWT received written notice to continue performance from the contracting officer on October 12, 2010.

As a condition for lifting the stop work order, the contracting officer directed PWT to prepare a corrective action plan to address the noncompliance. On September 8, 2010, PWT and HBI conducted inventories of stockpiled materials on site. They identified the pipes as of foreign, unknown, or American origin. The pipes labeled “unknown” were those that PWT could not confirm as melted and manufactured in the United States. Stockpiled materials not labeled “American” were either removed from the site or marked “Don’t Use.”

PWT submitted the draft corrective action plan to EPA for review on September 10, 2010. A final corrective action plan was submitted to and was accepted by the contracting officer on September 20, 2010. The corrective action plan included the following:

- Procedures PWT implemented to ensure that, going forward, only American-made materials will be used for the project
- PWT’s comparison of the cost and impact of removing the materials from the project versus retaining them

Title 48 CFR 25.607 requires the contracting officer to take appropriate action if foreign construction material is used without authorization. These actions include determining whether the foreign-made construction material should be removed and replaced. If removal and replacement is impracticable, would cause undue delay, or would otherwise be detrimental to the interests of the government, the contracting officer may determine in writing that the foreign-made material need not be removed and replaced.

In accordance with 48 CFR 25.607, the contracting officer issued a written determination on October 12, 2010, to retain all pipes used in the completed work and permit PWT to continue work with materials that comply with the Buy American requirement. The determination explained that removal and

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<sup>1</sup> These considerations include weather factors that did not allow work at the site to proceed from November to May, and the requirement to expend Recovery Act funds by September 30, 2011.

replacement of the foreign-made and unknown-origin pipes would not be in the government's best interest for the following reasons:

- Cost for removal and replacement of the pipes would be unreasonable when compared to the cost of the noncompliant material.
- Leaving the completed work in place would avoid prolonged delays in the completion of the project.
- The activities involved with removing the existing pipe would increase the risk of serious injury to the employees.
- Removing the existing grouting pipe would compromise the drilling and grouting remedy completed to date.

The determination also clarified that the contracting officer's action did not constitute an exception to Section 1605 of the Recovery Act. However, the determination did not include a decision regarding the costs for the pipes. The contract officer stated that the costs are being held by PWT until final resolution of the matter.

### ***Costs Associated With the Buy American Noncompliance***

In the invoice for the period ending August 29, 2010, PWT identified and credited EPA for all pipes purchased and invoiced by HBI under the project, totaling \$88,712. The \$88,712 represents the \$73,296 recognized in the settlement agreement and additional grouting pipe costs of \$15,416 included in the August 2010 invoice.

In our opinion, the \$88,712 is an ineligible cost under the project due to the Buy American noncompliance. The contracting officer should formally notify PWT that this cost is ineligible and reduce the funding for WA014 by \$88,712.

In addition, we believe that a portion of PWT's construction field supervision costs should be disallowed. Under WA08, Subtask 3.5.2, Construction Field Supervision, PWT is required to assure that field work is completed in accordance with the design and all subcontract document requirements. The Buy American requirement is part of the subcontract documents, and PWT did not adequately monitor the subcontractor's work to ensure compliance. According to its cost records, PWT incurred total construction field supervision costs of \$260,923 as of the end of August 2010, when we discovered the Buy American noncompliance. A portion of the \$260,923 was for Buy American compliance monitoring; however, PWT did not provide us the data to identify that portion prior to the issuance of the draft report. As a result, we initially questioned all construction field supervision costs incurred as of August 2010 as unsupported costs. Subsequently, PWT proposed \$2,551 as the estimated ineligible field supervision costs relating to Buy American compliance monitoring. The contracting officer accepted this amount and PWT repaid it to EPA in February 2012.

## Davis-Bacon Act Compliance

PWT did not have adequate controls to ensure that all laborers and mechanics who work at the site were paid in accordance with DBA wage requirements. We obtained a listing of the vendors HBI used for the project, and performed a cursory review of the invoice descriptions for goods and services provided by each vendor, to identify vendors that may be subject to DBA requirements. We found that one of the vendors providing cement for the project had a truck driver, a cement pumper operator, and a quality control person working on site for several hours at a time between July 8, 2011, and August 30, 2011. The vendor did not submit certified payroll reports, and PWT did not verify that the employees were paid at least DBA wage rates for the hours worked on site.

Section 1606 of the Recovery Act requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by the Recovery Act be paid wages at rates not less than DBA rates. The DBA requirement was included in the PWT contract and the HBI subcontract.

Section H.43 of the PWT contract requires PWT to include the DBA wage requirements in all construction subcontract solicitations exceeding \$2,000. Subtask 3.4.2 under WA008 requires PWT to monitor subcontractor compliance with DBA and related requirements.

HBI subcontract Section 3.0 incorporated the following DBA-related FAR clauses by reference:

- Title 48 CFR 52.222-6 establishes the same DBA requirements as Section 1606 of the Recovery Act.
- Title 48 CFR 52.222-8 requires the prime contractor to submit weekly certified payroll to the contracting officer for each week in which any contract work is performed. The FAR clause further states that the prime contractor is responsible for the submission of certified payrolls by all subcontractors.
- Title 48 CFR 52.222-11 requires the prime contractor to insert the DBA clauses in all construction subcontracts and makes the prime contractor responsible for compliance by any subcontractor or lower-tier subcontractors.
- Title 48 CFR 52.222-13 incorporated all rulings and interpretations of DBA and related requirements in 29 CFR Parts 1, 3, and 5, by reference.

Contrary to the requirements stated above, PWT did not submit weekly certified payrolls for the subcontractor vendor, or verify that the employees were paid according to the DBA requirements.

This issue was discussed with PWT and the contracting officer during our field work. The contracting officer concurred with our finding. A PWT representative explained that PWT did not include vendors in its initial DBA compliance review

because the DBA requirements were not clear. PWT interpreted DBA requirements as applying to subcontractors and not vendors. Title 29 CFR Part 5 was incorporated into 48 CFR 52.222-13 by reference, as stated above. According to 29 CFR 5.2(j), work relating to furnishing of materials, such as providing cement, is included in the DBA labor standards. We provided PWT with a DBA guidance document issued by the U.S. Department of Labor. The guidance document clarified that DBA requirements apply to truck drivers if the hours worked are more than de minimis, which is defined in the document as “a few minutes at a time merely to pick up or drop off materials.” We explained that the vendor employees (truck driver, cement pumper operator, and quality control employee) worked at the site several hours at a time. The vendor employees were not there to merely drop off materials; they operated the equipment to pour the concrete. Therefore, hours worked were more than de minimis, and the DBA requirements apply. PWT did not provide its position on the issue, but stated that it has started the review process to verify compliance.

We identified this instance of noncompliance from a cursory review of selected invoices. We did not review all vendor invoices for the project. PWT is responsible for ensuring that all lower-tier subcontractors and vendors, not just the vendor cited above, comply with the DBA requirement. Further, the DBA provisions are regular requirements under PWT’s ongoing Superfund remedial action contract and apply to all construction projects for the duration of the contract, regardless of funding source. The contract is currently in the second year of its 5-year option period. PWT needs adequate controls to ensure DBA compliance for all future work.

## **Recovery Act Reporting Requirements**

We reviewed the Recovery Act Section 1512 reports submitted by PWT for the quarters ending March 31, 2010, and September 30, 2010. PWT properly calculated and reported the number of jobs created and retained.

## **Subcontract Procurement Requirements**

The process PWT used to procure the subcontractor, HBI, for the drilling and pressure grouting activities was consistent with the method approved by EPA in the work plan and met the federal and contract requirements. Section I.9 of the contract requires PWT to follow the competition requirements in 48 CFR 52.244-5 for subcontracting. The regulation requires contractors to select subcontractors on a competitive basis to the maximum practical extent, consistent with the objectives and requirements of the contract. PWT used an invitation-to-bid method to procure the subcontractor for the project. This method was detailed in the work plan and later in the subcontract consent. EPA’s approval of the work plan and the subcontract consent represent the contracting officer’s determination that PWT’s procurement method would provide competition to the maximum practical extent under the circumstance.

## Recommendations

We recommend that the Director, Office of Acquisition Management, Office of Administration and Resources Management:

1. Disallow and recover PWT field inspection costs of \$2,551.
2. Advise the contracting officer to designate the grouting pipe costs of \$88,712 as ineligible costs under the contract and reduce the project funding accordingly.
3. Require PWT to ensure that PWT staff are trained on contract terms and conditions, including Recovery Act requirements.
4. Require PWT to verify that all subcontractors and vendors comply with DBA requirements.

## Contractor Comments and OIG Evaluation

We received draft report comments from PWT on February 17, 2012. PWT provided additional clarification and documentation on February 22, 2012, based on our request. We held exit conferences with PWT and EPA on February 28, 2012, to discuss PWT's draft report comments and their impact on our final report.

PWT did not agree or disagree with our findings and recommendations. Instead, it cited the corrective actions taken to address our recommendations. PWT's comments and corrective actions taken are summarized below, along with OIG's evaluation of these comments and corrective actions:

- 1) In the draft report, we recommended disallowing and recovering PWT field inspection costs of \$260,923. In response to the recommendation, PWT proposed \$2,551 as the ineligible construction field supervision costs for the Buy American noncompliance. The contracting officer accepted this amount on January 9, 2012, and PWT repaid the amount to EPA in February 2012. As a result, PWT has addressed the recommendation in the draft report. We have modified the recommendation to reflect the amount of the contracting officer's determination and we consider the recommendation closed.

Although the actions taken by the contracting officer and PWT have addressed this recommendation, we do not believe that the contracting officer's decision identified all ineligible field supervision costs. The \$2,551 only accounts for the estimated time required for the initial shipment inspections. It does not include the time the site superintendents spent onsite daily to oversee the project. The adequacy of the resident inspection services for every day the noncompliant materials were on the job site is questionable. The site superintendents should

have identified the noncompliances even if they were missed during the shipment inspections. We believe that, at a minimum, a portion of those employees' time for every day the noncompliant materials were on the job site should also be disallowed.

During the exit conference, PWT explained that the \$2,551 proposed as ineligible construction field supervision costs represents its best estimate of the costs that would have been incurred had PWT followed the material inspection procedures it implemented in response to the noncompliance (i.e., reasonable value for the inspection that PWT should have performed). PWT explained that the estimate included the time that would have been required by the site superintendent/construction foreman, mid-level engineer, senior engineer, and program manager to conduct the shipment inspections and manage the documentation. PWT's view is that once the material shipments are inspected according to procedure to ensure compliance with the Buy American requirement, there would be no need to further inspect them as part of daily oversight.

Contrary to PWT, we believe multiple controls should be implemented to ensure compliance. These controls should include shipment inspections as well as daily project oversight. In addition, PWT's assertion assumes that adequate controls were in place and the cost of adequate controls were of a prospective nature. However, as explained above, adequate controls were not in place and there is no way to determine whether the shipment inspections would have been able to identify and eliminate the noncompliance.

- 2) In response to recommendation 2, PWT stated that it received formal notification from the contracting officer to withhold the \$88,712 and reduce project funding by this amount. PWT is currently working with the contracting officer to deobligate the \$88,712 from the project. We agree with PWT's pending actions. However, this recommendation is not resolved until the \$88,712 is deobligated from the project.
- 3) In response to recommendation 3, PWT stated that it has documented the training requirements in its policies and procedures and has held training sessions regarding contract terms and conditions. PWT's corrective actions addressed our recommendation.
- 4) In response to recommendation 4, PWT stated that it has verified the certified payrolls and supporting documentation submitted by the construction contractor and all the lower-tier subcontractors and vendors, including the cement pumper operator, to ensure compliance with DBA requirements. PWT's corrective actions addressed our recommendation.

PWT's complete response to the draft report is included as appendix A of this report.

## **Status of Recommendations and Potential Monetary Benefits**

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status <sup>1</sup>	Action Official	Planned Completion Date	Claimed Amount	Agreed To Amount
1	9	Disallow and recover PWT field inspection costs of \$2,551	C	Director, Office of Acquisition Management, Office of Administration and Resources Management	02/16/12		\$2.6
2	9	Advise the contracting officer to designate the grouting pipe costs of \$88,712 as ineligible costs under the contract and reduce the project funding accordingly.	U	Director, Office of Acquisition Management, Office of Administration and Resources Management			\$88.7
3	9	Require PWT to ensure that PWT staff are trained on contract terms and conditions, including Recovery Act requirements.	C	Director, Office of Acquisition Management, Office of Administration and Resources Management	02/17/12		
4	9	Require PWT to verify that all subcontractors and vendors comply with DBA requirements.	C	Director, Office of Acquisition Management, Office of Administration and Resources Management	02/17/12		

<sup>1</sup> O = recommendation is open with agreed-to corrective actions pending  
 C = recommendation is closed with all agreed-to actions completed  
 U = recommendation is unresolved with resolution efforts in progress

## ***Contractor's Comments on the Draft Report***

February 17, 2012

Ms. Lela Wong  
EPA OIG – Office of Audit  
75 Hawthorne Street, 7<sup>th</sup> Floor, Mail Code IGA-1  
San Francisco, CA 94105

Subject: American Recovery and Reinvestment Act Site Visit of Diversion Ditch Repair Project at the Gilt Edge Mine Superfund Site, Lawrence County, South Dakota

Dear Ms. Wong:

Pacific Western Technologies, Ltd. (PWT) has reviewed the Draft Report of the Office of Inspector General (OIG), US Environmental Protection Agency, titled “American Recovery and Reinvestment Act Site Visit of Diversion Ditch Repair Project at the Gilt Edge Mine Superfund Site, Lawrence County, South Dakota”, dated January 19, 2012. PWT appreciates the opportunity to comment and respond to the draft report. PWT believes that the report and the findings should be revised as described below and offers the following additional information to be considered by the USEPA Office of Inspector General before the site visit report is published as a final report for general circulation.

### **I. Summary of Results (Page 3)**

- A. The first sentence of this section states, “...PWT did not have adequate controls to ensure that its subcontractors and vendors for drilling and grouting comply with Buy American and DBA provisions of Recovery Act.”

**RESPONSE:** As the OIG acknowledges, PWT caused the subcontracts entered into for the Gilt Edge project to include all appropriate language and flow-down requirements for the Buy American and Davis-Bacon Wage Act (DBA) provisions of the American Recovery and Reinvestment Act (Recovery Act) of 2009.

- o **Buy American Provisions:** PWT utilizes usual and customary internal and external operational controls in the field to cause compliance with the Buy American provisions of the Recovery Act. PWT recognizes that in this case controls could be improved; however, PWT was in good faith at all times. Continuous improvement is a normal characteristic of any company’s operations and PWT did take immediate steps to improve its internal controls.

PWT’s subcontracts are unequivocal and unambiguous, making clear the responsibility of the construction contractor to ascertain and cause compliance with the Recovery Act’s Buy American provisions. This contract was open for inspection, copying and/or critiquing before and during the project. Upon discovery of foreign-

made steel borehole casing in August 2010, PWT immediately implemented a corrective action plan to address the discovery and prevent any future occurrences. PWT required the construction subcontractor to segregate, sequester, and remove all steel borehole casing discovered on site that could not be definitively documented to be of domestic origin (melted and manufactured documentation), and suspended all payments (totaling \$88,712) to the construction subcontractor for such casing. PWT's prompt remedial conduct met the expectations of the Recovery Act and the contract. Further, PWT had no information that the subcontractor was one who had been noncompliant in the past.

PWT trained all PWT field personnel on rigorous inspection, documentation, and reporting procedures, and immediately implemented said procedures to prevent any such occurrence in the future. The event was one-of-a-kind on the project and in PWT's history. There were no other incidents related to the Buy American provisions of the Recovery Act for the duration of the project.

- **Davis-Bacon Wage Act Provisions:** PWT's subcontracts with the construction subcontractors included specific language requiring compliance with all provisions of the DBA, and all relevant FAR clauses implementing the Recovery Act provisions applicable to the DBA. Included in the subcontracts with the construction subcontractors were specific requirements for prior notification and approval of all lower-tier subcontractors, as well as requirements for inclusion of all flowdown provisions into all lower-tier subcontracts.

To ensure compliance with the DBA, PWT conducted field audits of subcontractor personnel employed on the project, and has audited and verified the certified payrolls submitted by the construction contractor and all the lower-tier subcontractors and vendors, including the cement pumper operator.

- B. The second sentence of the summary states, "As a result, ineligible grouting pipe costs of \$88,712 and unsupported field inspection costs of \$260,923 were incurred under the project."

**RESPONSE:** As mentioned, PWT immediately suspended all payments of the \$88,712 to the construction subcontractor. PWT received formal notification from the Contracting Officer on January 10, 2012, that the \$88,712 should be withheld and to reduce funding for the project accordingly. PWT is working with the Contracting Officer to deobligate \$88,712 in budget and funding from the project.

In addition, PWT submitted to EPA on December 2, 2011, and the EPA Contracting Officer accepted and approved for recovery from PWT on January 9, 2012—prior to issuance of the Draft Report—total costs for field inspections related to the ineligible grouting pipe of \$2,550.64 (two-thousand-five-hundred-fifty-and-sixty-four-one-hundredths dollars). The Contracting Officer's correspondence of January 9, 2012 with PWT states:

"EPA is in agreement with PWT's estimate regarding Cost Recovery at the Gilt Edge Mine Site for the oversight of the foreign made pipe. PWT is to reduce their costs associated with this work assignment by \$2,550.64, which

represents PWT's best estimate of the oversight costs for ARRA Buy-American compliance certification.”

Please note that PWT has completed the cost recovery process and provided the \$2,550.64 in recovered costs to EPA.

PWT is a contractor committed to high quality federal work; it has adhered to the contracting provisions. PWT contends that the statement, “As a result, ineligible grouting pipe costs of \$88,712 and unsupported field inspection costs of \$260,923 were incurred under the project,” should be revised based on the foregoing facts and in conjunction with the OIG’s statement on Page 6 that states, “If PWT identifies the actual costs related to Buy American compliance monitoring, we will adjust the questioned amount accordingly.” PWT respectfully requests that this sentence and similar sentences elsewhere in the draft report (such as in the section titled “At a Glance”) be revised to read:

“As a result of the issues noted above, we questioned costs of ineligible pipe costs of \$88,712, payments for which had been immediately suspended by PWT, and which are in the process of being deobligated from the project. In addition, we also questioned PWT field inspection costs of \$2,550.64 associated with Buy American compliance monitoring.”

## **II. RECOMMENDATIONS**

### 1. PWT field inspection costs.

**RESPONSE:** As related above, PWT submitted to EPA on December 2, 2011, and the EPA Contracting Officer accepted and approved for recovery from PWT on January 9, 2012—prior to issuance of the Draft Report—total costs for field inspections related to the ineligible grouting pipe of \$2,550.64. The Contracting Officer’s correspondence of January 9, 2012 with PWT (see attached) states:

“EPA is in agreement with PWT's estimate regarding Cost Recovery at the Gilt Edge Mine Site for the oversight of the foreign made pipe. PWT is to reduce their costs associated with this work assignment by \$2,550.64, which represents PWT's best estimate of the oversight costs for ARRA Buy-American compliance certification.”

While PWT believes that *quantum meruit* principles should attach to all monetary adjustments, as of February 16, 2012, PWT has paid to EPA the cost recovery amount of \$2,550.64. PWT respectfully requests that the Recommendations state, “1. Recover PWT field inspection costs of \$2,550.64.”

### 2. Advise the contracting officer to designate the grouting pipe costs of \$88,712 as ineligible costs under the contract and to reduce the project funding accordingly.

**RESPONSE:** PWT had immediately suspended the \$88,712 as of August 2010. PWT received formal notification from the Contracting Officer on January 10, 2012 that the \$88,712 on which PWT had suspended payment should be withheld, and to reduce funding for the project accordingly. PWT has been working with our Contracting Officer to deobligate \$88,712 in budget and funding from the project.

3. Require PWT to ensure that PWT staff is trained on contract terms and conditions, including Recovery Act requirements.

**RESPONSE:** While PWT employees are informed of contract terms and conditions at the time work assignments are received and at initiation of projects, PWT has strengthened its training procedure for contract terms and conditions. PWT training requirements have been identified and documented in its policies and procedures. PWT has also held training sessions regarding contract terms and conditions, including Recovery Act requirements.

4. Require PWT to verify that all subcontractors and vendors comply with DBA requirements.

**RESPONSE:** PWT conducted field audits of the subcontractor personnel employed on the project and has audited and verified the certified payrolls submitted by the construction contractor and all the lower-tier subcontractors, including vendors.

PWT has strengthened its training program to ensure that all its project managers are aware of the need to determine that all potential service providers that may be engaged by a subcontractor for any federally-funded projects are approved by PWT in advance, that all such service providers are notified of their responsibility to comply with the provisions of the DBA, and that the certified payrolls of all such service providers are provided to PWT covering all personnel engaged at or on the site of the work in excess of the *de minimis* standards established by Department of Labor guidance for deliveries and other services that are wholly incidental to the fundamental nature of the project.

### **III. OTHER**

**Statements regarding unsupported field inspection costs.** PWT respectfully requests that the statements regarding unsupported field inspection costs be revised to reflect the agreed to cost recovery of \$2,550.64 that was accepted by the Contracting Officer on January 9, 2012, prior to issuance of the Draft Report. The locations where this is discussed include:

- a. At a Glance, What We Found, 3<sup>rd</sup> Paragraph.
- b. At a Glance, What We Recommend.
- c. Summary of Results, 1<sup>st</sup> paragraph, page 3.
- d. Buy American Compliance, 1<sup>st</sup> paragraph, page 3.
- e. Costs Associated with the Buy American Noncompliance, 3<sup>rd</sup> paragraph, 2 times, page 6.

- f. Recommendations, 1., Page 9.
- g. Status of Recommendations and Potential Monetary Benefits, Rec. No. 1, page 10.

If you have any questions regarding this response, please call me at (303) 274-5400 x18.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tai-Dan Hsu". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dr. Tai-Dan Hsu, Ph.D.  
President and Chief Executive Officer  
Pacific Western Technologies, Ltd.

Enclosures

cc: File  
James Abrams, Ph.D., J.D.

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