

City of Detroit

Office of Inspector General

McDonagh Topsoil Issues
OIG Case No. 20-0013-INV
March 30, 2021



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Inspector General

Executive Summary

On June 9, 2020, the Office of Inspector General (OIG) received a complaint that alleged McDonagh Demolition (McDonagh) was unable to provide the Detroit Land Bank Authority (DLBA) with the required topsoil documentation for five properties. Therefore, in accordance with the Hardest Hit Fund (HHF) Demolition Program *Scope of Services*, McDonagh tested the suitability of the topsoil which was found to not meet program standards. Based on these test results, all of McDonagh's contracted demolition sites were tested because all properties used the same topsoil source. The results showed that 81 of the 89 sites located in Detroit neighborhoods failed to meet program standards.

The focus of the OIG investigation was to determine if any DLBA and/or City of Detroit Demolition Department (Demo Department) employee abused his/her/their authority with the timing of or actions taken as a result of the topsoil testing. The OIG found

- The DLBA likely did not abuse their authority with the actions taken as a result of the topsoil testing. However, many of the DLBA's actions and explanations are questionable. For example, the DLBA stated they chose to review program standards because so many properties failing to meet requirements was a new issue and they wanted to pursue the science. However, 14,995 demolitions were able to be completed based on existing program requirements. The DLBA engaged in this time consuming process after less than 1% (0.54% to be exact) of demolitions completed were not done with topsoil that met *Part 201: Generic Cleanup Criteria* as required by the *Scope of Services*. Yet 99.46% of demolitions were able to meet program requirements.
- The Demo Department did not abuse their authority with their actions taken as a result of the topsoil testing. All evidence suggests that the final decision making rested with the DLBA.

The OIG also sought to determine if the DLBA and/or Demo Department wasted any city resources, including time, effort, and taxpayer dollars, in the steps taken to determine the soil suitability. The OIG found

- The DLBA wasted city resources in the steps taken to determine soil suitability. For example, the DLBA engaged experts ASTI Environmental (ASTI) and Dickinson Wright at a cost of at least \$99,743.50 to determine if the topsoil used by McDonagh was acceptable despite AKT Peerless determining that it did not meet program requirements.
- The Demo Department wasted city resources because of the course of action determined by the DLBA.

The OIG did not investigate McDonagh's actions in backfilling the HHF properties. The test results clearly show the composition of the topsoil dumped at HHF properties. Additionally, McDonagh is no longer a city contractor.

On March 8, 2021, the OIG provided a copy of the draft report to the DLBA, DLBA General Counsel Tim Devine, DLBA Demolition Director Tammy Daniels, Demolition Department Director LaJuan Counts, and City of Detroit Corporation Counsel Lawrence Garcia.

The *2012 Charter of the City of Detroit* at Section 7.5-311 states “no report or recommendation that criticizes and official act shall be announced until every agency or person affected is allowed a reasonable opportunity to be heard with the aid of counsel.” Therefore, pursuant to the *OIG Administrative Hearing Rules*, all affected parties are provided with a copy of the *OIG’s* draft report so they have an opportunity to provide a written response to the draft report and/or request an administrative hearing by March 22, 2021.

On March 18, 2021, the *OIG* received a joint written response from the *DLBA*, Ms. Daniels, and Mr. Devine. No administrative hearing was requested. The *DLBA* response, which is included in its entirety at the end of this report, states that it “will not attempt to correct the many factual mistakes and baseless assumptions in the Draft Report...” It also states that the draft report applied the “wrong legal standard” and assumed that “if the Land Bank just ordered McDonagh to remediate all 89 sites at the outset, McDonagh would have promptly and voluntarily done so.” It is important to note that the *OIG* applied the *Scope of Services*, as written in all demolition contracts and did not attempt to make any legal conclusions as that would be outside of our jurisdiction. More importantly, the *DLBA* provided no evidence or information to substantiate their assertions which would have allowed the *OIG* to correct the alleged “factual mistakes.”

The *OIG* found that Ms. Counts may have improperly signed a contract at the request of the *DLBA*. However, the *OIG* was unable to make the final determination on this matter because we were unable to request legal guidance from the Law Department. The *OIG* believes that requesting a legal opinion would have created a conflict of interest because the Law Department represented Ms. Counts at her *OIG* interview during our investigation. While the *OIG* notes that we could have requested an outside counsel to seek the legal opinion on this matter, we chose not to do so. The *OIG* did not receive a written response or a request for an administrative hearing from the Demolition Department or Law Department.

I. Complaint

On June 9, 2020, the Office of Inspector General (OIG) received a complaint involving McDonagh Demolition (McDonagh). The complaint alleged that McDonagh was unable to provide the Detroit Land Bank Authority (DLBA) with the required topsoil documentation for five properties. All requests for payment must include documentation of the “origin of backfill and topsoil sources, and certification or analytical data where appropriate, verifying material is uncontaminated.”¹ Therefore, in accordance with the *Scope of Services*, McDonagh was given the option of either testing the topsoil or removing and replacing it. McDonagh chose to evaluate the suitability of the topsoil material for residential use through testing. The results of the samples tested revealed that the topsoil materials of the five properties were not suitable for residential use and failed to meet the standards established by the Hardest Hit Fund (HHF) Demolition Program as indicated below.

Property	Results
19801 Fenmore	Volatile Organic Compounds (VOCs) exceed Michigan Department of Environmental, Great Lakes, and Energy (EGLE) Residential Cleanup Criteria (RCC).
20108 Archdale	VOCs exceed EGLE RCC.
19801 Harlow	Metals and VOCs exceed EGLE RCC.
19773 Harlow	VOCs exceed EGLE RCC.
19201 Harlow	Metals exceed EGLE RCC.

Based on the test results of the above five properties, all of McDonagh’s demolition sites were tested because the same topsoil source was used. The tests showed that 81 of the 89 sites failed to meet program standards.

II. Scope of Investigation

The focus of the OIG investigation was limited to the actions of the DLBA and City of Detroit Demolition Department (Demo Department). The OIG sought to determine if any DLBA and/or Demo Department employee abused his/her/their authority with the actions taken as a result of the topsoil testing and whether any DLBA and/or Demo Department employee abused his/her/their authority in the timing of those actions. The OIG also sought to determine if the DLBA and/or Demo Department wasted any city resources, including taxpayer dollars, in the steps taken to determine the soil suitability.

The OIG did not investigate the actions taken by McDonagh in backfilling the HHF properties as a part of this complaint. The test results speak for themselves and clearly show the composition of soil dumped at HHF properties. Additionally, McDonagh is no longer a part of the demolition program and has no city contracts. The 2012 Charter of the City of Detroit makes it clear the OIG is not a law enforcement agency nor do we make legal determinations. Therefore, the OIG did not investigate or opine on any potential criminal conduct or make any legal determinations.

¹ Detroit Land Bank Authority Abatement and Demolition of Residential Properties Agreement RFP 10.2.18C, Exhibit A *Scope of Services*, (Revised 4/30/2018), Part 3: Request for Payment, pg. 49.

III. Overview of Findings

Based on the evidence detailed in this report, the OIG finds the following:

- The DLBA likely did not abuse their authority with their actions taken as a result of the topsoil testing. However, many of the DLBA's actions were questionable and their responses to the OIG's questions and concerns were unclear.
- The Demo Department did not abuse their authority with their actions taken as a result of the topsoil testing.
- The DLBA wasted city resources, including taxpayer dollars, in the steps taken to determine soil suitability.
- The Demo Department wasted city resources because the course of action taken by the Demo Department was determined by the DLBA.
- The Demo Department may have improperly signed a contract at the request of the DLBA and ASTI Environmental (ASTI).²
- The OIG was unable to make a definitive determination whether the ASTI contract was improperly signed by Demolition Department Director LaJuan Counts because the OIG was unable to request a legal opinion from the Law Department to determine if she obligated the City of Detroit. The OIG cannot request a legal opinion from the Law Department because it would create a conflict of interest due to their representation of Ms. Counts.

IV. McDonagh Demolition and the HHF Program

McDonagh Demolition is a Chicago-based demolition company that specializes in demolition and wrecking.³ On July 23, 2018, McDonagh became a pre-qualified bidder for the HHF Demolition Program. On October 2, 2018, McDonagh was awarded their first HHF contracts.⁴ In total, between October 2, 2018 and December 4, 2018, McDonagh was awarded 22 HHF contracts totaling \$17,046,764 (McDonagh properties).

On February 22, 2019, the Detroit Building Authority (DBA)⁵ issued McDonagh a *Stop Work Order & Corrective Action Plan*. It stated that the DBA had “become aware of four properties where there is an indication (such as a sunken grade) of large, dense material (i.e. clay, rock, concrete) in the backfill.” McDonagh was therefore “ordered to refrain from abating or knocking any standing structure on all properties under contract... until further notice.” The *Stop Work Order & Corrective Action Plan* also stated that, for any properties knocked down but not backfilled, McDonagh “may only backfill those sites with materials from a current, approved source.”

² ASTI is an environmental consulting firm hired by the DLBA.

³ <http://www.mcdonaghdemo.com/>

⁴ McDonagh was awarded 4 HHF contracts at this time: 10.2.18A, 10.2.18B, 10.2.18C, and 10.2.18F.

⁵ The DBA was the Program Manager for the DLBA HHF Demolition Program when the *Stop Work Order and Corrective Action Plan* was issued to McDonagh.

On March 8, 2019, McDonagh was issued a *Revised Stop Work Order & Corrective Action Plan*. The DLBA advised McDonagh that as a result of the excavation of four properties and the discovery of unacceptable materials buried in the holes, McDonagh was prohibited from abating or demolishing any property. It also stated that McDonagh may complete backfill on properties with open hole approval using backfill from a current, approved source.

On March 24, 2019, McDonagh was issued a *Notice of Termination of Demolition Properties Agreements (RFP Groups 10.2.18 (A, B, C and F), 10.16.18 (B, C, D, E, F, and G), 10.30.18(C), 11.13.18 (B, C, D and F), 11.27.18 (A, B, G, and H), and 12.4.18 (E, G, and J) between the Detroit Land Bank Authority and McDonagh Demolition, Inc., (“Contracts”)*. It stated that “[d]espite numerous efforts by the Detroit Building Authority to coordinate with the McDonagh team to mobilize and execute the Correction Action Plan, McDonagh refused.” It also stated that

As McDonagh has failed to perform its obligations in a satisfactory and proper manner as required by Section 2.01 of the Contracts, the DLBA is exercising its right to terminate the Contracts for cause under Section 9.02(1) & (2) of the Contracts. McDonagh’s refusal to promptly remediate the documented deficiencies in the work performed, leaves the DLBA with no other recourse. Please also be aware that the DLBA will be filing a Notice of Claim on the Performance and Payment bonds associated with the Contracts for any and all costs incurred in remediating the properties⁶ outlined in the Corrective Action Plan.

On March 25, 2019, McDonagh sent a letter proposing a settlement offer to the DLBA. In response, on March 28, 2019, the DLBA sent McDonagh a *Response to McDonagh Demolition Proposed Settlement Offer*. McDonagh was allowed to fulfill certain remedial obligations outlined in the March 8, 2019 *Revised Stop Work Order and Corrective Action Plan*. All remediation work was done at McDonagh’s expense.⁷

McDonagh demolished 89 of the 772 properties contracted prior to the DLBA terminating the agreements. Despite the termination of contracts, pursuant to the terms of the settlement, McDonagh was permitted to backfill the 89 properties it had demolished as well as finish the sites with topsoil, seeding, and grading. As such, all 89 properties received backfill and topsoil in April, May, or June of 2019. On April 2, 2020, during a review of the invoicing documentation required for payment, the DLBA discovered that five properties lacked documentation⁸ of the “origin of backfill and topsoil sources... verifying material is uncontaminated.”⁹

⁶ 13047 Maiden, 10981 Rossiter, 14445 Kilbourne, and 12763 Evanston.

⁷ McDonagh Chief Operating Officer Paul Dadian letter to City of Detroit Demolition Department Assistant Director, Field Operations Tom Fett regarding the “Suitability of Soils for Residential Use.” June 5, 2020.

⁸ Email from DLBA Demolition Contractor Specialist Sara M. Hernandez to DLBA Demolition Deputy Director Michele Chittick, copied to Derick Benedict and Stacy Wilson with the subject MDD- Top Soil Tickets, April 2, 2020.

⁹ Detroit Land Bank Authority Abatement and Demolition of Residential Properties Agreement RFP 10.2.18C, Exhibit A Scope of Services, (Revised 4/30/2018), Part 3: Request for Payment, pg. 49.

On April 6, 2020, DLBA Demolition Deputy Director Michele Chittick informed McDonagh Chief Operating Officer Paul Dadian and Corporate Controller Nickole Capps that the DLBA

[C]onferred with DBA and AKT Peerless¹⁰ regarding the backfill and topsoil documentation that McDonagh Demolition has provided for [19773 Harlow, 19801 Fenmore, 20108 Archdale, 19801 Harlow, and 19201 Harlow.] McDonagh Demolition only provided MMCR backfill tickets for each of the properties and the executed contract Scope of Services defines "clean" fill as material free from any crushed or processed hardfill, thus McDonagh will need to provide 12" of new, clean fill or test the soil to ensure compliance with the Scope of Services.¹¹

On April 8, 2020, the DBA sent McDonagh a memorandum detailing options for the undocumented soil at the five properties. Option 1 required the removal of the topsoil material and for McDonagh to "[e]mploy a qualified Environmental Professional" to test soil samples from the floor of the excavation site for various contaminants¹² and forward the results to the DLBA within seven business days. Option 2 required McDonagh to "[e]valuate the Suitability of Soils for Residential Use." To show that the "top fill materials are suitable for residential use," McDonagh was required to "employ a qualified Environmental Professional" to sample and test each site within seven business days. McDonagh chose Option 2.¹³

On June 5, 2020, McDonagh provided the Demo Department with the analysis of the five residential sites that lacked proper documentation.¹⁴ The Demo Department¹⁵ and its Backfill Program Manager, AKT Peerless, reviewed the analytical results for the five sites and determined that the "fill materials for all five sites fail to meet the standards of the demolition

¹⁰ AKT Peerless Environmental Services, LLC¹⁰ (AKT Peerless) is a City of Detroit contractor who provides backfill material monitoring and testing services for the Demolition Program.

¹¹ Email from Michele Chittick to Nickole Kapps and Paul Dadian, copied to Derick Benedict, Sara Hernandez, Tammy Daniels, Tom Fett, Timothy Palazzolo, and Anthony Kashat, regarding MDD- Top Soil Tickets, April 6, 2020.

¹² Testing was required to include i...Volatile Organic Compounds (VOCs, U.S. EPA Method 8260); ii. Semi-Volatile Organic Compounds (SVOCs, U.S. EPA Method 8270); iii. Polychlorinated biphenyls (PCBs, U.S. EPA Method 8080); iv. Michigan 10 Metals (arsenic, barium, cadmium, chloride, copper, lead, mercury, selenium, silver, and zinc, U.S. EPA Methods 6020 & 7470/7471) v. Chloride (U.S. EPA Method 9056); and vi. Herbicides and pesticides (EPA Method 8081/8082).

¹³ Memorandum from DBA Assistant Director of Field Operations Tom Fett to McDonagh Chief Operating Officer Paul Dadian regarding Two Options for either Soil Removal or Testing dated April 8, 2020. The memorandum was also sent to Derick Benedict, Sara Hernandez, Tammy Daniels, Timothy Palazzolo, Anthony Kashat, Nickole Capps, Michele Chittick, Jessica Parker, and LaJuan Counts.

¹⁴ McDonagh sent a letter to City of Detroit Demolition Department Assistant Director, Field Operations Tom Fett regarding the "Suitability of Soils for Residential Use." June 5, 2020.

¹⁵ The Demolition Department took over the demolition related functions of the Detroit Building Authority (DBA) in around early 2020.

program.¹⁶ McDonagh was directed to undertake immediate corrective actions including erecting fencing around the fill material and excavating a minimum of 15 inches of fill material from each site. The company also had to “complete all backfill and site finishing activities in accordance with the Scope of Services and as directed by the [Demo Department].¹⁷” On June 26, 2020, McDonagh informed the city that they completed all directives outlined.¹⁸ Based on the test results, the remaining McDonagh properties were tested as described in Section V of this report.

V. HHF Backfill and Topsoil Requirements

The HHF Demolition *Scope of Services*¹⁹ details the requirements contractors must adhere to when they are awarded a *Detroit Land Bank Authority Abatement and Demolition of Residential Properties Agreement* contract. It states that the purpose of the demolition work is “to improve the neighborhoods in a lasting and meaningful way and, thereby, improve the quality of life for Detroiters.²⁰” The *Scope of Services* also states that these “protocols seek to efficiently eliminate vacant, blighted, and hazardous structures in the City of Detroit, while protecting the health of community residents, workers, and natural resources.²¹”

Additionally, the *Scope of Services* outlines backfill and topsoil requirements. It should be noted that, though the *Scope of Services* says backfill, the requirements also apply to topsoil.²² It states that the contractor “must apply twelve inches (12”) of clean soil to the open hole or void on top of the approved backfill.²³” It outlines the specifications for clean soil as follows:

1. Clean soil must be free of pulverized building materials and construction debris.
2. Clean soil must have an organic content of no more than 20 percent.
3. Clean soil may contain no more than 20% organic material. Topsoil, sand, or loam qualify as “clean soil.” Clay **may not** be used in the top twelve inches (12”).

¹⁶ Memorandum from Tim Palazzolo, Demolition Team to Paul Dadian, McDonagh Demolition re: Corrective Action Plan for 5 sites 19801 Fenmore, 20108 Archdale, 19801 Harlow, 19773 Harlow, and 19201 Harlow, dated June 10, 2020.

¹⁷ *Id.*

¹⁸ Letter from Chief Operating Officer for McDonagh Paul Dadian to City of Detroit Demolition Department Assistant Director, Field Operations Tom Fett re: Correction Action Plan, dated June 26, 2020.

¹⁹ The *Scope of Services*, which is incorporated by reference into the executed contract, at Section II: General Requirements, pg. 1, states that “in case of a discrepancy between the requirements of this Scope of Services and any applicable laws, regulations, ordinances, rules, or protocols, the most stringent requirements must apply. It also states that “in the case of any discrepancy between this Scope of Services and the executed contract, and in the case of any discrepancy between this Scope of Services and the executed contract for the abatement and demolition work, the most stringent requirements must apply.”

²⁰ Exhibit A *Scope of Services* (Revised 9/13/2018), Section I: Introduction, pg. 1.

²¹ *Id.*

²² Email from DLBA Demolition Deputy Director Michele Chittick to HHF Demolition Contractors and DLBA and City of Detroit employees regarding “All Backfill Source Documentation Including Topsoil is Required in DocuVault for Contractor Invoice Payment,” dated July 18, 2019. Michele Chittick shared the same information at the Detroit Building Authority Mandatory Contractor’s Meeting held on July 24, 2019.

²³ Exhibit A *Scope of Services* (Revised 9/13/2018), Section 4: Grading, Final Grade B., pg. 25.

4. Upon request, provide analytical data or a certification from the borrow source documenting that all off-site materials to be used as clean dirt is uncontaminated.²⁴

Contractors are also required to “restore appearance, quality, and condition of finished surfacing to match adjacent work, and eliminate evidence of restoration to the greatest extent possible.”²⁵

Contractors must also provide documentation “as to the origin and environmental condition of backfill materials.”²⁶ It further states

Appropriate documentation described in the DBA Guidance for Backfill Material Evaluation and Testing, dated December 18, 2014, must consist of certification letters; material transportation logs, load tickets, manifests, etc. that track quantity, date and origin; and/or a written report detailing the known history and/or current environmental condition of a soil stockpile being proposed for use by the Owner. As described in the DBA Guidance for Backfill Material Evaluation and Testing, there are three acceptable types of backfill material origination:

1. Category 1 - Residential Construction Sites; Residential Landscape Yard Sites
2. Category 2 - Virgin (Native) Commercial Borrow and Sand/Gravel Pit Sites
3. Category 3 - Non-residential: Commercial, Utility, Road, and Construction Sites; Commercial Landscape Sites, and Agricultural Sites.²⁷

The *Scope of Services* also states that “Category 1 and 2 materials proposed to be relocated for backfill by the Contractor do not require chemical testing for Backfill Materials to be relocated from Category 1 or 2 Type sources.”²⁸ However, for Category 1 backfill material to be considered acceptable, contractors must provide a written certification identifying the site of origin. For Category 2 backfill material to be considered acceptable, contractors must provide a written certification that includes the following:

- i. The origin of the backfill material and address location;
- ii. No evidence of known or suspected sources of environmental contamination that may have impacted the proposed backfill materials;
- iii. The backfill materials are from a native soil source and are homogeneous in nature and general composition;

²⁴ *Id.*

²⁵ *Id.* at E, pg. 25.

²⁶ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (C), pg. 18.

²⁷ *Id.*

²⁸ *Id.* at E, pg. 25.

- iv. The backfill materials are free from debris, large rocks, concrete, or other conditions which would make the material unsuitable for use as backfill;
- v. The materials meet the backfill specifications established by the Demolition Program.²⁹

The *Scope of Services* also outlines the steps that must be taken if the DLBA or its authorized representative has a reasonable suspicion that the backfill is not from a Category 1 source. It states that the DLBA or its authorized representative may

[R]equest and the Contractor must perform soil testing to determine the suitability of any backfill material at the Contractor's expense. The testing of soil includes the use of the Contractor's equipment to excavate material at the Contractor's expense. In the event that backfill testing shows that the material does not meet specifications and/or is contaminated above a Part 201 residential standard, the Contractor will be required to remove all backfilled materials within forty-eight (48) hours and supply acceptable backfill with test results from an accredited laboratory prior to backfilling. Contractor must assume responsibility for all costs associated with testing and removal of the unacceptable material and the replacement with acceptable material.³⁰

The *Scope of Services* also notes that the contractor "must comply with all applicable laws, ordinances, rules, regulations, whether stated or omitted from bidding documents, including, but not limited to... MDEQ,³¹ Natural Resources and Environmental Protection Act, Part 201: 'Environmental Remediation: Generic Cleanup Criteria for Unrestricted Residential Use.'³²" (Part 201: Generic Cleanup Criteria).

VI. Topsoil and Backfill Testing

a. Topsoil Testing

AKT Peerless is a City of Detroit contractor who provides backfill material monitoring and testing services for the Demolition Program. AKT Peerless approves or denies contractors' backfill materials based on the requirements outlined in the *Scope of Services* and is also responsible for receiving and interpreting analytical results for proposed backfill materials to confirm compliance with applicable criteria and screening levels.³³ Based on McDonagh's test results of the five properties, on June 17, 2020, AKT Peerless was tasked with testing six additional McDonagh properties as well as one of the five properties previously tested.

²⁹ *Id.* at D, pg. 19.

³⁰ *Id.* at G, pgs. 21-22.

³¹ Michigan Department of Environmental Quality, now known as Michigan Department of Environment Great Lakes and Energy (EGLE).

³² *Id.* at Section XI: References 13, pg. 31.

³³ City of Detroit Building Authority Backfill Material Monitoring and Testing Services Agreement RFP 7.30.2018 with AKT Peerless Environmental Services, LLC. The agreement was effective as of October 2018.

Specifically, the June 17, 2020 Work Order tasked AKT Peerless with providing sampling, analysis, and a summary report of topsoil from seven (7) properties.³⁴ The *Work Order Request- Backfill Program* stated

Upon receipt of the analytical results, AKT Peerless will tabulate the results and compare the data to the state EGLE Part 201 residential cleanup criteria to determine the suitability of the material for use in the Detroit backfill program. AKT Peerless will prepare a separate report for each address summarizing the sampling activities and analytical results.³⁵

The total cost for services rendered by AKT Peerless was \$12,270.

Five of the six new properties tested by AKT Peerless also failed to meet program standards, bringing the total number of failed properties to ten. As a result, on July 29, 2020, AKT Peerless was tasked with providing sampling, analysis, and a summary report of topsoil of the remaining 78 McDonagh properties. The *Work Order* again required AKT Peerless to compare the results to “EGLE Part 201 residential cleanup criteria to determine the suitability of the material for use in the Detroit backfill program.”³⁶ The total cost incurred for this process was \$117,677.62.

Eighty one of the 89 properties tested failed to meet program standards based on AKT Peerless analysis of the test results. According to AKT Peerless’ *Topsoil Composite Soil Sampling Reports*

AKT Peerless compared the laboratory analytical results to Michigan Department of Environment, Great Lakes and Energy (EGLE) Part 201 Residential Cleanup Criterion (RCC) provided in Michigan Administrative Rules 299.1 through 299.50 and the requirements outlined in the Detroit Land Bank Authority (DLBA) Scope of Services, revised September 13, 2018 (which were the applicable Scope of Work standards at the time backfill was placed at the subject property).

It is important to emphasize that AKT Peerless used *Part 201: Generic Cleanup Criteria* as its basis for determining the topsoil used by McDonagh did not meet program requirements. This is the standard stated in the *Scope of Services* and applied throughout the course of the Demolition Program by AKT Peerless when approving backfill for use in Detroit neighborhoods.

³⁴ The properties tested under the work order were 19334 Archdale, 19452 Archdale, 19736 Archdale, 19788 Archdale, 20526 Fenmore, 19201 Archdale, and 19801 Harlow (previously tested by McDonagh).

³⁵ AKT Peerless Work Order Request- Backfill Program. This work request was submitted by AKT Peerless Senior Engineer Megan Napier on June 17, 2020 and was accepted by DBA Manager of Commercial Operations Tim Palazzolo.

³⁶ AKT Peerless Work Order Request- Backfill Program. This work request was submitted by AKT Peerless Senior Engineer Megan Napier on July 29, 2020 and was accepted by DBA Manager of Commercial Operations Tim Palazzolo.

Therefore, the OIG used this standard, the same standard used for all demolition contractors, in our analysis. However, on March 18, 2021, the DLBA indicated in a response to the OIG that AKT Peerless “looked at statewide standards, rather than the appropriate background criteria.”³⁷ Again, this is not the standard stated in the *Scope of Services*.

Below is a summary of AKT Peerless’ findings for all 89 properties.³⁸

	Address	Topsoil Result	Backfill Result	Findings
1	19201 Archdale	F	F	Mercury in topsoil and backfill, lead in backfill
2	19201 Harlow*	F	F	Mercury and Arsenic in backfill. Topsoil metals exceed EGLE RCC
3	19334 Archdale	F	F	Mercury in topsoil and backfill, selenium in topsoil
4	19452 Archdale	P	F	Mercury in backfill
5	19736 Archdale	F	F	Mercury in topsoil and backfill
6	19773 Harlow*	F	F	Mercury in backfill. Topsoil VOCs exceed EGLE RCC
7	19788 Archdale	F	F	Mercury in topsoil and backfill
8	19801 Fenmore*	F	F	Mercury in backfill. Topsoil VOCs exceed EGLE RCC
9	19801 Harlow*	F	F	Mercury and PNAs in backfill 6", mercury in backfill 18".
10	20108 Archdale*	F	F	Mercury and phenanthrene in backfill. Topsoil VOCs exceed EGLE RCC
11	20526 Fenmore	F	F	Mercury in topsoil and backfill
12	19173 Harlow	P	-	-
13	19214 Harlow	F	-	Selenium and Mercury in topsoil
14	19360 Fenmore	F	-	Mercury in topsoil
15	19370 Fenmore	F	-	Mercury in topsoil
16	19376 Fenmore	F	-	Mercury in topsoil
17	19411 Archdale	P	-	-
18	19480 Fenmore	F	-	Selenium and Mercury in topsoil
19	19515 Ashton	F	-	Arsenic, Chromium, Mercury and Selenium in topsoil
20	19715 Ashton	F	-	Arsenic and Mercury in topsoil
21	19757 Rosemont	F	-	Arsenic and Mercury in topsoil
22	19913 Southfield	F	-	Mercury in topsoil
23	19960 Archdale	F	-	Mercury in topsoil
24	19972 Fenmore	F	-	Mercury in topsoil
25	20001 Oakfield	F	-	Mercury in topsoil
26	20021 Archdale	P	-	-
27	20090 Fenmore	F	-	Mercury in topsoil
28	20101 Forrer	F	-	Mercury in topsoil

³⁷ DLBA Response to OIG Draft Report dated March 18, 2021. The full response is attached to the end of this report.

³⁸ This chart was prepared by AKT Peerless Senior Engineer Megan Napier.

29	20101 Oakfield	F	-	Mercury in topsoil
30	20200 Oakfield	P	-	-
31	20309 Lindsay	F	-	Mercury in topsoil
32	10219 Lanark	F	-	Arsenic and Mercury in topsoil
33	10531 Haverhill	F	-	Mercury in topsoil
34	11192 Corbett	F	-	Arsenic and Mercury in topsoil
35	11766 Camden	F	-	Arsenic and Mercury in topsoil
36	12012 Chelsea	F	-	Arsenic and Mercury in topsoil
37	12596 Corbett	F	-	Mercury in topsoil
38	12607 Corbett	F	-	Mercury in topsoil
39	12614 Corbett	F	-	Arsenic and Mercury in topsoil
40	12622 Corbett	F	-	Mercury in topsoil
41	12702 Corbett	F	-	Arsenic and Mercury in topsoil
42	12745 Corbett	F	-	Mercury in topsoil
43	12751 Corbett	F	-	Mercury in topsoil
44	12755 Evanston	F	-	Mercury in topsoil
45	12763 Evanston	F	-	Mercury in topsoil
46	12775 Evanston	F	-	Mercury in topsoil
47	12814 Corbett	F	-	Arsenic and Mercury in topsoil
48	13048 Elmdale	F	-	Mercury in topsoil
49	14431 Kilbourne	F	-	Mercury in topsoil
50	14445 Kilbourne	F	-	Mercury in topsoil
51	14459 Kilbourne	F	-	Arsenic and Mercury in topsoil
52	6039 Holcomb	F	-	Arsenic, Mercury and Selenium in topsoil
53	6126 Iroquois	F	-	Mercury in topsoil
54	6133 Iroquois	F	-	Arsenic, Chromium, and Mercury in topsoil
55	6133 Maxwell	F	-	Arsenic, Mercury, and SVOCs in topsoil
56	6139 Iroquois	F	-	Chromium and Mercury in topsoil
57	6154 Rohns	F	-	Mercury in topsoil
58	6174 Sheridan	F	-	Mercury in topsoil
59	6195 Sheridan	F	-	Mercury in topsoil
60	6199 Sheridan	F	-	Arsenic, Mercury, and SVOCs in topsoil
61	6232 Concord	F	-	Arsenic, Chromium, Lead, Mercury, TCE in topsoil
62	6408 Burns	F	-	Mercury in topsoil
63	6415 Iroquois	F	-	Mercury in topsoil
64	6421 Iroquois	F	-	Arsenic, Chromium, and Mercury in topsoil
65	6427 Iroquois	F	-	Mercury in topsoil
66	6432 Iroquois	F	-	Arsenic and Mercury in topsoil
67	6433 Iroquois	F	-	Arsenic, Mercury and Selenium in topsoil
68	7436 Marcus	F	-	Mercury in topsoil
69	8024 Curt	F	-	Mercury in topsoil
70	9156 Lakepointe	F	-	Mercury in topsoil
71	9160 Norcross	F	-	Lead and Mercury in topsoil (lead above DC)
72	10981 Rossiter	F	-	Arsenic and Mercury in topsoil

73	11240 Maiden	P	-	-
74	11241 Wayburn	F	-	Arsenic and Mercury in topsoil
75	11265 Maiden	P	-	-
76	11284 Maiden	F	-	Mercury in topsoil
77	11415 Grayton	F	-	Arsenic and Mercury in topsoil
78	12024 Maiden	F	-	Mercury in topsoil
79	12053 Maiden	F	-	Arsenic, Chromium, and Mercury in topsoil
80	12145 Wade	F	-	Arsenic and chromium in topsoil
81	12345 Maiden	F	-	Arsenic, mercury, and selenium
82	12516 Hampshire	F	-	Arsenic and Mercury in topsoil (arsenic above DC)
83	12741 Maiden	F	-	Mercury in topsoil
84	13016 Longview	F	-	Mercury in topsoil
85	13047 Maiden	F	-	Mercury in topsoil
86	13089 Maiden	F	-	Mercury in topsoil
87	13120 Longview	P	-	-
88	14253 Wilshire	F	-	Mercury in topsoil
89	9913 Balfour	F	-	Mercury in topsoil

*Denotes properties in which McDonagh was responsible for topsoil testing.

-Denotes properties that had no backfill testing completed.

b. Backfill Testing

All backfill came from Mid-Michigan Crushing & Recycling (MMCR) which is not the source of the topsoil. The *Scope of Services* states that all “holes or voids which result from the demolition and removal of any structure on site must be backfilled to 12” below the surrounding grade level and compacted with clean backfill...³⁹” The top 12” of soil represents the topsoil and the remaining soil is the backfill. AKT Peerless was tasked by the DLBA and Demo Department with providing sampling, analysis, and a summary report of backfill for 11 McDonagh properties. AKT Peerless determined that, based on the backfill composite samples, the engineered backfill materials did “not meet the DLBA Scope of Service requirements.”⁴⁰ However, no additional testing has been conducted because the backfill used by McDonagh was from MMCR which was approved for use by MDEQ (now EGLE) and the City of Detroit. Further, McDonagh was able to provide all required documentation that showed backfill material came from MMCR, an approved source.

Specifically, on August 6, 2014, the DBA hired Atwell, LLC and DCR Services & Construction, LLC who issued its *Backfill Method and Materials Analysis*. It proposed crushing basement hardfill to use as backfill material at residential properties within the HHF Demolition

³⁹ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (A), pg. 18.

⁴⁰ AKT Peerless Backfill Composite Soil Sampling Reports for 19201 Archdale, 19201 Harlow, 19334 Archdale, 19452 Archdale, 19736 Archdale, 19773 Harlow, 19788 Archdale, 19801 Fenmore, 19801 Harlow, 20108 Archdale, and 20526 Fenmore.

Program.⁴¹ The report also noted that “because the broken up concrete is an existing material, the site could still be considered environmentally clean in regards to potential contaminated/hazardous materials.⁴²”

On August 20, 2014, MDEQ issued a letter to the DBA supporting the use of the inert crushed material as backfill. According to the DLBA, the MDEQ letter stated that “the proposal was supported by law exempting crushed concrete and brick from the definition of solid waste and declaring them as inert materials.⁴³” The DLBA also stated that, with this support, the “City’s Emergency Manager issued an executive order authorizing the use of crushed building foundation and pavement as subsurface backfill for residential demolitions.⁴⁴”

AKT Peerless compared the backfill laboratory analytical results to EGLE Part 201 Residential Cleanup Criterion and the requirements outlined in the DLBA *Scope of Services* to make the determination that the backfill did not meet program standards.⁴⁵ The Demo Department and DLBA have engaged in talks with EGLE, in part, to discuss the backfill requirements. Demo Department Director LaJuan Counts stated that the EGLE discussions have included how the inert material would be classified and how it related to contaminants. Ms. Counts explained that the recycled material is not dirt. Therefore, it cannot be classified or tested as such. Ms. Counts stated that EGLE will make a determination whether the recycled material is still appropriate for use in the demolition program.⁴⁶

c. Remediation

As of the publishing of this report, 23 McDonagh properties have been remediated because the topsoil failed to comply with the standards of the Demolition Program.⁴⁷ These properties are:

19801 Fenmore	19773 Harlow	19201 Harlow
20108 Archdale	19801 Harlow	9160 Norcross*

⁴¹ The City of Detroit Ordinance required to remove the basement walls, foundation and backfill material in August 2014 to (1) dismantle basement and cellar walls and (2) fill all basements, cellars or holes to grade level with backfill that shall be clean earth consisting of a mineral soil material such as crumbling yellow clay, sand, or loam.

⁴² Report dated August 6, 2014 from Atwell, LLC and DCR Services & Construction, LLC to the City of Detroit and Detroit Land Bank Authority regarding Detroit Blight Removal- Backfill Method and Material Analysis Detroit, Michigan, pg. 5.

⁴³ DLBA provided document entitled Residential Inert Recycling Program Design and Implementation.

⁴⁴ *Id.*

⁴⁵ AKT Peerless Backfill Composite Soil Sampling Reports for 19201 Archdale, 19201 Harlow, 19334 Archdale, 19452 Archdale, 19736 Archdale, 19773 Harlow, 19788 Archdale, 19801 Fenmore, 19801 Harlow, 20108 Archdale, and 20526 Fenmore.

⁴⁶ OIG Interview of Demo Department Director LaJuan Counts on February 2, 2021.

⁴⁷ City of Detroit Demolition Department Deputy Director Tim Palazzolo sent the *Revised Corrective Action Plan for 5 Sites: 19801 Fenmore, 19773 Harlow, 19201 Harlow, 20108 Archdale, 19801 Harlow* to McDonagh Chief Operating Officer Paul Dadian dated August 25, 2020; Letter from Demolition Department Deputy Director Timothy Palazzolo to McDonagh Chief Operating Officer Paul Daidan regarding Corrective Action Plan for 3 Sites: 9160 Norcross, 6232 Concord, and 6133 Maxwell, dated October 9, 2020; and City of Detroit Demolition Department Deputy Director Tim Palazzolo sent the *Corrective Action Plan for 16 Sites* to McDonagh Chief Operating Officer Paul Dadian dated February 11, 2021.

6232 Concord	6133 Maxwell	6126 Iroquois
6133 Iroquois	6421 Iroquois	6432 Iroquois
6433 Iroquois	6199 Sheridan	6408 Burns
11284 Maiden	12024 Maiden	12053 Maiden
13089 Maiden	14445 Kilbourne	19201 Archdale
19376 Fenmore	19515 Ashton	

* 9160 Norcross was listed on both the October 6, 2020 and February 11, 2021 *Corrective Action Plans*

According to the DLBA, both the Demo Department and DLBA “ordered corrective actions at certain of the properties, including fencing where appropriate pending the completion of the process. All 89 properties will remain in the Land Bank’s inventory until the discussions with EGLE and [Michigan State Housing Development Authority (MSHDA⁴⁸)] have been completed.⁴⁹” It also stated that additional corrective actions may occur after discussions with EGLE and MSHDA are complete⁵⁰ though the DLBA stated that they were advised by independent experts that 66 of McDonagh’s 89 properties appears to comply with all environmental and contract standards.⁵¹

VII. Discussion/ Analysis

a. DLBA’s Course of Action

On June 2, 2020, Ms. Counts informed Mayor Duggan of the issues identified with the topsoil at the first five McDonagh properties.⁵² The Demo Department was assisting the DLBA in closing out the remaining HHF demolitions when this issue arose.⁵³ At that time, the scope of the problem was not yet known because no other testing had taken place. According to Ms. Count, Mayor Duggan determined that DLBA General Counsel, Timothy Devine would take the lead in ensuring this issue was resolved.⁵⁴

i. Use of an Unapproved Source

The DLBA and Demo Department’s internal investigation determined McDonagh sourced its topsoil for all but two (11192 Corbett and 11240 Maiden) of the 89 properties from

⁴⁸ MSHDA is the state agency the program manager for the State of Michigan for the HHF program.

⁴⁹ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

⁵⁰ ASTI Memorandum from ASTI President Tom Wackerman to LaJuan Counts, Tammy Daniels, Timothy Devine, and Sharon Newlon. Subject: Review of Part 201 Status for Top Fill for Detroit/ Land Bank Soil Management Program (ASTI File No. 11551), dated February 11, 2021, pg. 1 stated that the other properties not identified for remediation “meet the unrestricted residential criteria and are not a facility due to the top fill placed by McDonagh.

⁵¹ DLBA Update: Successful Conclusion of HHF Program dated February 11, 2021.

⁵² OIG Interview of LaJuan Counts, February 2, 2021.

⁵³ In Ms. Counts February 2, 2021 interview with the OIG, she explained that the Demo Department and the DLBA do not have a formal agreement in writing that formalizes the Demo Department’s consulting role. The agreement that existed was between the DBA and the DLBA. However, several DBA employees with the historical and operational knowledge of the HHF program were transferred to the Demo Department and have continued to help closeout the remaining HHF properties. The Demo Department is currently working with the Law Department to formalize their relationship with the DLBA. The current role is more of a handshake agreement.

⁵⁴ OIG Interview of LaJuan Counts, February 2, 2021.

In-N-Out Topsoil (In-N-Out).⁵⁵ However, contrary to the investigative findings by the DLBA and the Demo Department, upon closer examination of Load Ticket No. 21342, the OIG found that 11192 Corbett received In-N-Out topsoil.⁵⁶ According to AKT Peerless, who is responsible for approving soil sources for the Demolition Program, In-N-Out is not an approved dirt source.

Prior to this issue, another demolition contractor had inquired about potentially using In-N-Out as a soil source. AKT Peerless spoke with In-N-Out about the sampling requirements to become an approved vendor. However, it never went beyond that conversation and In-N-Out remains an unapproved source for topsoil.⁵⁷ Additionally, after McDonagh used In-N-Out topsoil from their Northville location in early 2019, another demolition contractor requested In-N-Out's Detroit location be approved for use in the Demolition Program in December 2019. AKT Peerless determined that the topsoil did not meet program requirements due to high levels of arsenic based on testing data submitted by the contractor. AKT Peerless was never able to determine the origin of In-N-Out's dirt. In-N-Out's owner stated that dirt can from various sources which may have included In-N-Out's Northville location.⁵⁸

On July 18, 2019, HHF demolition contractors received an email from DLBA Deputy Director of the Demolition Department Michele Chittick which stated the DLBA was informed that contractors

were advised to not load any backfill source documentation for the topsoil used to backfill DLBA HHF demolitions. This is incorrect and non-compliant with the DLBA executed HHF demolition and abatement services contract's Scope of Services. **ALL BACKFILL MATERIALS USED TO COMPLETE SITE GRADING UP TO AND INCLUDING THE REQUIRED TOPSOIL to obtain the BSEED Final Grade Approval must be documented on the backfill platform.**⁵⁹

This was reiterated at the July 24, 2019 DBA Mandatory Contractor's Meeting attended by McDonagh employee Greg Carlson.⁶⁰

On July 25, 2019, the day after the mandatory contractor meeting, McDonagh submitted a certification letter from In-N-Out. The letter stated that McDonagh "purchased and hauled unscreened topsoil" and "to the best of [In-N-Out's] knowledge, this unscreened topsoil is free of any hazardous and/or toxic contaminants." It also stated that "[s]ince [In-N-Out] did not transport this material, [In-N-Out] cannot attest to the content or specifications as stated above

⁵⁵ DLBA Update: Successful Conclusion of HHF Program dated February 11, 2021.

⁵⁶ According to the Load Ticket No. 21342, 11192 Corbett received In-N-Out topsoil. It was on a split ticket with 12145 Wade. However, both properties have an In-N-Out letter in each properties files which was submitted by McDonagh.

⁵⁷ OIG Phone Call with AKT Peerless VP of National Quality Control Megan Napier on January 26, 2021.

⁵⁸ OIG Phone Call with AKT Peerless VP of National Quality Control Megan Napier on March 19, 2021.

⁵⁹ Email from DLBA Deputy Director of the Demolition Program Michele Chittick to HHF demolition contractors regarding All Backfill Source Documentation Including Topsoil is Required in DocuVault for Contractor Invoice Payment, dated July 18, 2019.

⁶⁰ July 24, 2019 DBA Mandatory Contractor's Meeting Sign-in Sheet

once it was dropped at the delivery site since the chain of custody was transferred to McDonagh upon leaving [In-N-Out's] yard.⁶¹ The certification letter submitted by McDonagh is not in compliance with the *Scope of Services* as written in the contract and further reiterated at the contractors' meeting. McDonagh should have known the certification was lacking for the reasons stated below.

The *Scope of Services* states that for Category 1 backfill material to be considered acceptable, contractors must provide a written certification identifying the site of origin.⁶² However, in this instance, there is no indication in the certification letter that the topsoil originated from In-N-Out. For Category 2 backfill material to be considered acceptable, contractors must provide a written certification that includes the origin of the backfill; there is no evidence of known or suspected sources of environmental contamination; materials are from a native soil source and are homogeneous in nature and general composition; materials are free from conditions which would make the material unsuitable for use as backfill; and the materials meet the backfill specifications established by the Demolition Program.⁶³

Mr. Devine confirmed that In-N-Out was not an approved source. He stated that McDonagh pursued a "different contractually permissible method" to having the dirt approved. He explained that instead of using a preapproved source, McDonagh received the necessary certifications documenting the origin of the materials and that it was free of contaminations. Mr. Devine initially stated that he believes the certifications met the standards as outlined in the *Scope of Services*. When asked by the OIG how he came to that belief, he modified his prior statement and said that he does not "know whether it met the obligations necessary for the program."⁶⁴

However, AKT Peerless confirmed that the certification letter submitted by McDonagh was not sufficient for approval and does not meet program requirements. The certification letter required sampling data to substantiate that the dirt is free of any hazardous and/or toxic contaminants unless there is evidence that it came from a Category 1 site. However, the In-N-Out certification letter lacked the required sampling data and it is clear that the soil did not come from a pit at In-N-Out which appears, instead, to be stockpiling dirt.⁶⁵

The *Scope of Services* also states that "approval and relocation of Category 1 and 2 type backfill materials are conditioned upon submittal of the information" verifying the suitability of the soil. It further states that notification must be provided to the DBA or AKT Peerless "in advance of backfill."⁶⁶

⁶¹ In-N-Out Topsoil Certification Letter signed by owner Tony Calo, dated July 25, 2019.

⁶² Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (C), pg. 19.

⁶³ *Id.*

⁶⁴ Transcript of OIG Interview with DLBA General Counsel Timothy Devine, January 22, 2021, pgs. 31-32.

⁶⁵ OIG Phone Call with AKT Peerless VP of National Quality Control Megan Napier on October 16, 2020.

⁶⁶ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (D), pg. 19.

On July 10, 2019, at the DBA Mandatory Contractors' Meeting, contractors were reminded that putting dirt in an open hole prior to approval is at the contractor's risk. This meeting was attended by McDonagh employees Greg Carlson and Mitch Resetar. This statement was confirmed by AKT Peerless who stated that demolition contractors need to use pre-approved sources and that contractors run the risk of having to test and/or remove dirt if it is not approved prior to use.⁶⁷

ii. Questioning the Soil Suitability Standards

In her OIG interview, Ms. Counts stated that McDonagh used an unapproved dirt source at its demolition properties in violation of the *Scope of Services*. She explained that the *Scope of Services* indicates that if there is a problem with the topsoil, the contractor is usually presented with the options of (1) producing the load tickets, (2) removing/ replacing the soil, or (3) testing it.⁶⁸ Therefore, Ms. Counts recommended to the DLBA that McDonagh be required to remove and replace the topsoil at all of its failed demolition properties. She stated "bottom line they just did not follow directions."⁶⁹ However, in this instance, the DLBA, not McDonagh, elected to test the topsoil of the remaining 84 properties which indicated that 81 of the 89 properties failed to meet program requirements. Ms. Counts stated that Mr. Devine "thought that it was going to be too much of an expense to direct McDonagh to remove and replace" the topsoil.⁷⁰

Mr. Devine explained that the Demo Department decided what corrective action was required for the first five McDonagh properties that indicated the topsoil did not meet program requirements. Once the DLBA became aware of potential issues beyond the first five properties, the decision making circle expanded so that it was not just the Demo Department making decisions.⁷¹ It was then determined that if the DLBA was going to "pursue [its] core mission of public health based on the science in a responsible manner, [the DLBA] would engage EGLE and do so in a scientifically responsible manner" and also hire an environmental consulting firm for their expertise.⁷²

Mr. Devine characterized this course of action as a consensus decision with the Demo Department. He also stated that he informed the OIG, Demo Department, MSHDA, Special Inspector General for the Troubled Asset Relief Program (SIGTARP), City Councilmembers, and the Mayor's Office so that the issues were plainly in front of all stakeholders. He also noted that if any of the stakeholders had an objection, it would have been discussed.⁷³ However, as discussed below, it should be noted at least some of these "stakeholders" identified by Mr. Devine, including the OIG, MSHDA, and the Demo Department, have presented questions throughout the process including why the properties were not just remediated by McDonagh as required by the *Scope of Services*. More importantly, though the OIG asked questions, we are

⁶⁷ OIG Phone Call with AKT Peerless VP of National Quality Control Megan Napier on October 16, 2020.

⁶⁸ OIG Interview of LaJuan Counts, February 2, 2021.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 10.

⁷² *Id.*

⁷³ *Id.* at 9-10.

not a “stakeholder” in the demolition program as we do not have the authority to dictate, manage, or operate a department or a program.

Mr. Devine was asked if any DLBA policies and procedures and/or contracts have any provisions that allow for a scientific approach as opposed to following the requirements outlined in the *Scope of Services*.⁷⁴ He responded, without citing any policies, procedures, or contract language, that some initial testing results showed “results exceeding baseline generic residential criteria, and there were complexities⁷⁵ there because at soil and backfill levels there were questions already as to whether the [baseline generic residential criteria] would apply. And given that the question was not 5 sites or 3 sites or 6 sites but potentially 89 sites, [the DLBA] informed the stakeholders and arrived at the determination that this required a more scientifically informed point of view.”⁷⁶

Mr. Devine further explained that he thought there might be an issue with using *Part 201: Generic Cleanup Criteria* as required by the *Scope of Services* because

for the first time in the 15,000 sites which had been successfully concluded, there were samples indicating potential exceedances of the GRCC; and if the sampling was--- if the initial samples were correct and if they were being applied against the correct criteria correctly, that it would require potentially testing and remediating 89 sites.⁷⁷

A total of 15,084 demolitions have been completed as a part of the HHF Demolition Program.⁷⁸ Yet program standards were not questioned until the McDonagh issue arose at the end of the program. At the time this issue was discovered, no new HHF contracts would be issued because all HHF funds have either been spent or are contracted. Inexplicably, it is only at the end of the HHF Demolition Program that the DLBA has now decided to review the standards established in the *Scope of Services* with only 89 properties left to be resolved. To be exact, the DLBA determined to spend a great deal of taxpayer money because less than 1% (0.54% to be exact) of demolitions completed were not done with topsoil that meets *Part 201: Generic Cleanup Criteria* as required by the *Scope of Services*. However, 99.46% of demolitions were able to meet program requirements by using topsoil from an approved source.

Additionally, DLBA Deputy Director Tammy Daniels stated that McDonagh gave “some pushback” and questioned if the science used by AKT Peerless was accurate, which also factored into the DLBA’s decision to do additional investigation. She stated that McDonagh’s stance was based on the initial testing of the five properties that was completed by McDonagh. Ms. Daniels said that because this was the first time several properties were found not to meet program standards, it was prudent to investigate McDonagh’s concerns.⁷⁹

⁷⁴ *Id.* at 17-19.

⁷⁵ Mr. Devine explained that “complexities” refers to the appropriate standards to apply. Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 23.

⁷⁶ *Id.* at 19.

⁷⁷ *Id.* at 20-21.

⁷⁸ DLBA Update: Successful Conclusion of HHF Program dated February 11, 2021.

⁷⁹ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pgs. 2-3.

It is still unclear why, after all these years, the DLBA is now questioning the standards of the HHF program. On February 12, 2021, over four months after the test results were completed, McDonagh was finally issued a *Corrective Action Order* requiring them to remediate 16 additional properties. In response to this, Ms. Daniels told the Detroit News

Given that we have this history where people are questioning ‘Is there good dirt in the ground?’ it’s important for us to let people know that in those instances when we remotely question, we take action and we remediate. In this particular case, we’ve erred on the side of caution. It is important that the citizens of Detroit know that we are holding contractors accountable.⁸⁰

Yet, AKT Peerless reports state that there are 58 additional McDonagh properties that failed to meet *Part 201: Generic Cleanup Criteria*. Instead of erring on the side of caution and requiring remediation for all 81 properties that failed to meet program requirements, the DLBA undertook an expensive and time consuming process to question the standards outlined in the *Scope of Services* which have been used over the years.

Moreover, the DLBA is no longer responsible for City of Detroit demolitions since all HHF demolitions are complete. Therefore, the unanswered question is why the DLBA now finds the need to revise program requirements. The Demo Department will be managing the demolitions carried out with the \$250 million bond and the department developed its own standards for backfill and topsoil. Contractors will now be required to use organic material that will grow grass. If grass does not grow, the Demolition Department will require the contractor to fix it.⁸¹

The OIG attempted several times to get an answer from Mr. Devine as to why the DLBA decided to question its own standards before holding McDonagh responsible when there was a potential issue with the 89 McDonagh properties.⁸² Mr. Devine stated that “isn’t what happened.”⁸³ He was also asked why the DLBA did not consider that McDonagh used dirt that was not suitable for residential neighborhoods, as opposed to questioning HHF program standards. More specifically, he was asked why not immediately require McDonagh to remove the questionable dirt and replace it. Mr. Devine stated that McDonagh “may end up doing that.”⁸⁴ It was again stated to Mr. Devine that it appears the DLBA decided to question its own program standards rather than holding McDonagh accountable. Mr. Devine stated that conclusion “would be flat wrong.”⁸⁵

⁸⁰ Christine Ferretti (2021) ‘Contractor penalized in Detroit demolition program under new scrutiny,’ *The Detroit News*, February 11, 2021, available at <https://www.detroitnews.com/story/news/local/detroit-city/2021/02/11/contractor-penalized-detroit-house-demolition-program-under-new-scrutiny/6721861002/>

⁸¹ OIG Interview with LaJuan Counted, February 2, 2021.

⁸² Transcript of OIG Interview with Timothy Devine, January 22, 2021, pgs. 24.

⁸³ *Id.* at 25.

⁸⁴ *Id.* at 30.

⁸⁵ *Id.* at 30-31.

Mr. Devine also explained that the DLBA did not require McDonagh to remove and replace the topsoil because “at the time we were responding to a potential public health concern and a science issue that was novel in the program, and [the DLBA] determined to prioritize the science and the public health, reserving all our rights under the contract.”⁸⁶ Mr. Devine was asked if the topsoil had just been removed and replaced if that would have addressed any potential public health issues. He stated he did not know. “And what we’re going to discover now when these results come out is whether or not that would have been a waste of time and money, and potentially deleterious to the public.”⁸⁷ However, two soil experts confirmed that removing the topsoil as is would not cause a greater risk to human health.⁸⁸

As indicated above, Ms. Counts stated that Mr. Devine “thought that it was going to be too much of an expense to direct McDonagh to remove and replace” the topsoil.⁸⁹ However, when the OIG asked Mr. Devine why McDonagh was not being required to remove and replace the topsoil at the 81 properties that failed to meet programs requirements, he never mentioned the expense to McDonagh. Instead he stated numerous times that there was a potential issue with program standards and that the DLBA would follow the science.

The Demo Department estimated it would cost \$7,500 for removal, disposal, new fill, placement, and site finalization for each property.⁹⁰ Thus, it would have cost McDonagh \$607,500 to remediate 81 properties. However, the OIG questions whether the cost to a contractor should be a consideration when determining the suitability of soil for Detroit neighborhoods. The health, safety, and welfare of residents should be prioritized above all else, including the cost to a contractor that was put on notice several times that if an unapproved dirt source was used it would be at their risk.

iii. Contract Compliance

Mr. Devine confirmed that there is a contractual obligation in terms of the quality of topsoil that can be used in the HHF program. He explained that there is a “contractual requirement that the parties provide dirt according to the contractual specifications; so it’s at a minimum contractual. And there are practices, programs, documents, rules, double checks, et cetera, controls at various layers of the process from beginning to end, through payment, that are oriented to assure and evidence compliance with those requirements.”⁹¹ As it relates to McDonagh, Mr. Devine stated that the DLBA is “enforcing the contract and [the DLBA] is fulfilling the mandate of the integrity of the program to ensure the public health is respected and recognized in a responsible manner.”⁹²

⁸⁶ *Id.* at 62.

⁸⁷ *Id.*

⁸⁸ OIG Phone Call with EGLE Senior Geologist Steve Hoin, January 26, 2021 and OIG Phone Call with AKT Peerless VP of National Quality Control Megan Napier on January 26, 2021.

⁸⁹ OIG Interview of LaJuan Counts, February 2, 2021.

⁹⁰ Email from LaJuan Counts to Jennifer Bentley, copied to Douglas Baker, regarding OIG Follow-up, dated February 4, 2021.

⁹¹ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 16.

⁹² *Id.* at 17.

The *Scope of Services* states that the DLBA or its authorized representative may

[R]equest and the Contractor must perform soil testing to determine the suitability of any backfill material at the Contractor's expense. The testing of soil includes the use of the Contractor's equipment to excavate material at the Contractor's expense. In the event that backfill testing shows that the material does not meet specifications and/or is contaminated above a Part 201 residential standard, the Contractor will be required to remove all backfilled materials within forty-eight (48) hours and supply acceptable backfill with test results from an accredited laboratory prior to backfilling. Contractor must assume responsibility for all costs associated with testing and removal of the unacceptable material and the replacement with acceptable material.⁹³

However, in this instance, McDonagh was not required to test all properties that used an unapproved dirt source. To date, the Demo Department paid AKT Peerless to test the soil which showed that 81 of 89 McDonagh properties did not meet program specifications. Additionally, AKT Peerless completed all testing by October 2, 2020. Despite the results of AKT Peerless' testing, McDonagh was not required to remediate the properties within 48 hours, as required by the *Scope of Services*.

Mr. Devine was asked, given the above provision in the *Scope of Services*, if McDonagh was treated differently from other contractors by not being held to the standard that was applied to others. He responded that the DLBA "approached this thing in a way that preserves [the DLBA's] ability to fulfill and vindicate all of our contractual rights and that [the DLBA will] be dictated by what the science tells us, sure." He also stated that he does not think that McDonagh is being held to a different standard as compared to other contractors.⁹⁴

During the OIG interview, Mr. Devine interjected that the line of questioning has been focused on "the contract was the contract." He stated that DLBA's "mission has been to follow the science to ensure the public health. That's been priorities one through a hundred." Mr. Devine was asked if contract compliance was important and he initially stated that the DLBA has waived zero rights against the contractor. He then agreed contract compliance is important.⁹⁵

iv. Other Demolition Contractors

The *Scope of Services* requirements have been used against other demolition contractors who violated standards. Contractors have been required to perform testing at their expense when there was a question as to the suitability of the soil and were required to remediate the properties if testing revealed that program standards were not met. The DLBA identified at least four other instances in which contractors failed to meet program requirements related to backfill or topsoil.

⁹³ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (G), pgs. 21-22.

⁹⁴ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 67-69.

⁹⁵ *Id.* at 33.

These contractors were required to hire a qualified environmental professional to collect soil verification samples at their own cost for all identified properties. However, McDonagh was only required to test five of the 89 properties at their expense. The remaining 84 properties were tested by AKT Peerless at the DLBA and Demo Department's request and was paid for by the Demo Department at a total cost of \$129,947.62 though the DLBA has indicated that McDonagh will reimburse the City for these funds. However, in no other instance did the Demo Department and DLBA perform testing on the contractor's behalf. The following paragraphs detail multiple examples of where contractors were held accountable to the *Scope of Services*.

On February 6, 2019, DMC Consultants, Inc. (DMC) received a *Stop Work Order & Corrective Action Plan*. It stated that the "DBA was informed of seventeen (17) properties under contract with DMC Consultants for which the backfill was denied due to a failure to comply with program requirements.⁹⁶" A DLBA review of records eventually identified 70 DMC properties in total that "failed to comply with program requirements."⁹⁷ As a result, DMC was required to hire a qualified environmental professional, at their own cost, to collect soil verification samples and send the analytical results to AKT Peerless. On March 13, 2019, ABF Environmental provided AKT Peerless with its *DMC Basement Fill Investigation* sampling and verification results report. Based on the report, it was "AKT Peerless' opinion that the materials back filled at the sites listed in the DMC Stop Work Order appears to be suitable for residential use."⁹⁸

On July 11, 2019, Rickman Enterprise Group (Rickman) received a *Stop Work Order & Corrective Action Plan*. It stated that the DBA was informed of six properties in which Rickman's backfill was "denied due to failure to comply with the program requirements." It also stated that Rickman had "performed limited sampling" on each of the identified properties and the "analytical results for those properties show exceedances above the states residential cleanup criteria." Therefore, Rickman was required to hire a qualified environmental professional, at their own cost, to perform additional testing.⁹⁹ PM Environmental, Inc. completed the required testing and forwarded the results to AKT Peerless. On August 22, 2019 AKT Peerless opined that "based on our review, the remaining sites can be backfilled, except 8686 Vaughan, which sample SS-32 (floor sample) showed detection's of Volatile Organic Compounds (VOCs). Although the VOCs are below the residential criteria, the specification states that no detection's are allowed."¹⁰⁰ As a result, additional testing was required at 8686 Vaughan. AKT Peerless reviewed the analytical results from the additional testing and determined there were "no detections of VOCs which was the concern. No additional excavation is recommended."¹⁰¹

⁹⁶ *Stop Work Order & Corrective Action Plan*- February 6, 2019 from DBA Deputy Director Tim Palazzolo to Mike Chaudhary.

⁹⁷ *Stop Work Order & Corrective Action Plan*- February 20, 2019 from Tim Palazzolo to DMC President Mike Chaudhary. It noted 71 properties were discovered but one property was listed twice.

⁹⁸ Email from Anthony Kashat to James Nachtman and Timothy Palazzolo, cc: Megan Napier regarding DMC Attorney Palazzolo Letter (3.27.19).pdf—DMC Fill Investigation Report 3-13-19 Comments, dated March 29, 2019.

⁹⁹ *Stop Work Order & Corrective Action Plan*- July 11, 2019 to Rickman President Roderick Rickman from DBA Deputy Director Tim Palazzolo.

¹⁰⁰ Email from AKT Peerless Principal & Founder Anthony Kashat to Tom Fett, Rickman employee Paul Przygocki, cc: Julie Barton, Aaron (Rickman), Timothy Palazzolo, Hannah Koskiniemi regarding Laboratory Analytical Results from Additional Excavation dated August 22, 2019.

¹⁰¹ Email from Megan Napier to Tom Fett, Timothy Palazzolo, cc: Anthony Kashat re: Analytical Results from Additional Excavation Conducted at 8686 Vaughan dated August 28, 2019.

On January 17, 2020, the DBA directed Homrich to sample and analyze, at their own cost, the topsoil at four sites identified by the DLBA for which Homrich failed to produce documentation of the origin of the material.¹⁰² NTH Consultants completed the analysis and forwarded it to AKT Peerless. On March 9, 2020, AKT determined that “[b]ased on the sampling conducted, the results indicate the topsoil material of the four sites locations are suitable for residential use and meet the requirements” for use in the demolition program.¹⁰³

On July 14, 2020, Rickman received a *Stop Work Order & Corrective Action Plan for 2426 Leslie*. It stated that Rickman was “unable to produce any load tickets for fill materials on this site.” Therefore, Rickman was required to employ an environmental professional, at their own cost, to test the backfill.¹⁰⁴ AKT Peerless reviewed the report prepared by OPM Environmental and opined that “[b]ased on the data provided, the evaluated soils meet the DLBA Scope of Services requirements.” It was compared to EGLE Part 201 Residential Cleanup Criteria.¹⁰⁵

The above evidence shows that McDonagh was treated differently from the other contractors with soil issues. DMC, Rickman, and Homrich were all required to test all identified properties at their own cost. McDonagh, on the other hand, was only required to test five properties at their own cost despite that fact that 88 of the 89 properties had topsoil from an unapproved source. Initially, the DLBA and Demo Department were contemplating not even requiring testing at all 89 properties.¹⁰⁶ However, MSHDA stated that all properties had to be tested.

Mr. Devine was asked if he thought it was the right decision to test all 89 properties. He stated that MSHDA ordered that all McDonagh properties had to be tested. Mr. Devine further stated that he does not understand “MSHDA’s mandate, their laws, their responsibilities, their mission statement, their policies, so I have zero basis on which to decide whether it was a good decision or not; that was their decision.”¹⁰⁷

Mr. Devine stated that the DLBA has “never had a situation before in the history of the HHF where [the DLBA] have reports of sampling which appear to exceed the [Part 201: Generic Cleanup Criteria]. Mr. Devine explained that he does not “see the comparison of the activities to test which indicate no issue being compared to tests indicating a potential issue.”¹⁰⁸ However, 15,084 properties have been demolished in the City of Detroit and 14,995 of these properties appear to have used backfill and topsoil from sources that met program requirements.¹⁰⁹

¹⁰² *Corrective Action Plan Options for Four Sites 19220 Hawthorne (2.5.19H), 13820 Mitchell (2.5.19H), 18512 Brinker (1.22.19E), and 9310 Cheyenne (4.2.19C)* to Homrich Project Manager Keith Bohlinger from Demolition Department Deputy Director Tim Palazzolo dated February 13, 2020.

¹⁰³ Email from Megan Napier to Tim Palazzolo, Anthony Kashat, cc: Tom Fett, LaJuan Counts re: Homrich Corrective Action Plan dated March 9, 2020.

¹⁰⁴ *Corrective Action Plan for 2426 Leslie* to Paul Przygocki, P.E. Rickman from Demo Department Deputy Director Tim Palazzolo dated July 14, 2020.

¹⁰⁵ Email from Megan Napier to Tom Fett, cc Tim Palazzolo regarding 2426 Leslie; PM summary Report dated September 15, 2020.

¹⁰⁶ OIG Interview with LaJuan Counts, February 2, 2021.

¹⁰⁷ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 74.

¹⁰⁸ *Id.* at 29-30.

¹⁰⁹ DLBA Update: Successful Conclusion of HHF Program dated February 11, 2021.

Further, McDonagh had already been removed from the Demolition Program because of buried debris and a failure to promptly remediate the documented deficiencies after completing 89 of 772 properties. Therefore, McDonagh has a history of not complying with program requirements. Yet, the DLBA has spent a lot of time, effort, and money to prove that the topsoil used by McDonagh is suitable for Detroit neighborhoods. These actions do not seem logical given the totality of the circumstances.

b. ASTI

i. ASTI Hired

On July 17, 2020, the DLBA and Demo Department hired ASTI, an environmental consulting and engineering firm,¹¹⁰ to “review and provide an independent assessment of the sampling results¹¹¹” completed by AKT Peerless. DLBA General Counsel Tim Devine stated that

It was important to ensure that an independent expert be brought in to help the Land Bank and Detroit Demo define a path that prioritized public health and environmental standards... [ASTI’s] focus was to ensure due care regarding any potential public health issues, and to ensure appropriate soil classification according to applicable environmental standards.¹¹²

ASTI reviewed environmental information associated with the topsoil used by McDonagh at its contracted HHF properties. ASTI’s objectives were to “(1) identify the nature and extent of impacts associated with the placed materials; and (2) determine regulatory requirements and soil management options to protect public health.¹¹³” In its review, ASTI defined topsoil as “any clean soil from Category 1 to 3 type sources placed in the top 12 inches of an excavation.¹¹⁴”

ASTI stated that it reviewed all available information related to McDonagh’s topsoil source. Load tickets and a “certification” letter indicated that all topsoil was purchased by McDonagh from In-N-Out. The letter stated that McDonagh “purchased and hauled unscreened topsoil” and “to the best of [In-N-Out’s] knowledge, this unscreened topsoil is free of any hazardous and/or toxic contaminants.¹¹⁵” The inadequacies of the “certification” letter pursuant

¹¹⁰ <http://www.asti-env.com/>

¹¹¹ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹¹² *Id.*

¹¹³ ASTI Memorandum from ASTI President Tom Wackerman to LaJuan Counts, Tammy Daniels, and Tim Devine. Subject: Interim Review of Environmental Data for 51 Properties, Detroit, MI (ASTI File No. 11551), dated September 15, 2020. Pg. 1. ASTI also completed a second memorandum for an additional 38 properties dated October 14, 2020.

¹¹⁴ ASTI Memorandum from ASTI President Tom Wackerman to LaJuan Counts, Tammy Daniels, and Tim Devine. Subject: Interim Review of Environmental Data for 51 Properties, Detroit, MI (ASTI File No. 11551), dated September 15, 2020. Pg. 2. ASTI also completed a second memorandum for an additional 38 properties dated October 14, 2020.

¹¹⁵ In-N-Out Topsoil Certification Letter dated July 25, 2019.

to the *Scope of Services* speak for themselves. Yet, inexplicably, ASTI determined that the “descriptions are assumed to be accurate and the top soil is assumed to be native material. This review assumes the top soil is therefore defined as Category 1.”¹¹⁶

The OIG is not an expert on dirt classification and is not attempting to classify dirt in this instance. However, the OIG is concerned that the proper due diligence was not undertaken to properly classify the category of topsoil used in Detroit neighborhoods. The DLBA stated that ASTI was hired to “define a path that prioritized public health and environmental standards.”¹¹⁷ In order to ensure that this occurs, logic would dictate the origin of the topsoil would first be determined rather than assume the origin to be native material and defined as Category 1 as was determined by ASTI.

A review of the *Scope of Services* clearly states that for Category 1 backfill material to be considered acceptable, contractors must provide a written certification identifying the site of origin.¹¹⁸ In-N-Out’s five sentence “certification” letter does not state the origin of the topsoil though it notes the topsoil was purchased from their pit located at 7871 Chubb Road in Northville. However, a review of In-N-Out’s website indicates that it was established in 2010 by the owner of Calo & Sons Construction, Inc. so that “he could accept large quantities of unscreened material to recycle it by screening it to sell clean topsoil to his customers.”¹¹⁹ This statement suggests that the topsoil does not come from 7871 Chubb Road but instead is stockpiled at that location from other unknown sources. Therefore, it would have been prudent for ASTI to do additional research as to the origin of the In-N-Out topsoil that was used by McDonagh in Detroit neighborhoods given that people live next door to these properties. Also, it should be noted that McDonagh purchased the less expensive option of unscreened topsoil from In-N-Out.¹²⁰

AKT Peerless, a current HHF Demolition Contractor who, in part, approves or denies contractors’ backfill materials based on the requirements outlined in the *Scope of Services*, is also an environmental consulting firm like ASTI. According to the DLBA, “AKT Peerless has had an operational role in the HHF Program for some time. ASTI had not previously provided environmental expertise to the HHF Program or to the Land Bank and so was a fresh and independent expert.”¹²¹

Mr. Devine explained that ASTI was identified as an environmental expert without prior operational involvement or responsibility for the Demolition Program. Therefore, ASTI could

¹¹⁶ ASTI Memorandum from ASTI President Tom Wackerman to LaJuan Counts, Tammy Daniels, and Tim Devine. Subject: Interim Review of Environmental Data for 51 Properties, Detroit, MI (ASTI File No. 11551), dated September 15, 2020. Pg. 4. ASTI also completed a second memorandum for an additional 38 properties dated October 14, 2020.

¹¹⁷ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹¹⁸ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (C), pg. 19.

¹¹⁹ <https://www.caloandsons.com/>

¹²⁰ In-N-Out Topsoil 2020 Pricing stated Screened Topsoil is \$11.00/yard and Unscreened Topsoil is \$8.00/yard. Though the OIG does not have a copy of the 2019 Pricing Sheet, the year McDonagh purchased the topsoil, there is nothing to suggest that in 2019 Screened and Unscreened Topsoil would have cost the same.

¹²¹ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

act as an independent scientific expert. In contrast, AKT Peerless has had an operational role and has been involved with the program since the beginning of the Demolition Program. Therefore, AKT Peerless is very familiar with all program requirements. The DLBA did not want to “crisscross [AKT Peerless’] role with an independent examination of whether or not [the DLBA] had health concerns in this, which [the DLBA] saw as the first time that [the DLBA] had testing results come back with potential exceedances.”¹²²

Given the importance of determining if potentially contaminated topsoil was placed in Detroit neighborhoods, the OIG questions why an expert who is unfamiliar with program requirements would be hired to determine the suitability of topsoil. AKT Peerless has been involved in determining whether the soil meets program requirements since almost the beginning of the HHF program. Yet when there is a potential issue with unapproved topsoil from 89 properties, a company with no expertise in the Demolition Program was hired to help make a determination.

ii. ASTI Contract Issues

On January 5, 2021, the OIG requested various documents, including the ASTI contract, from the DLBA and Demo Department which was received on January 13, 2021. The ASTI contract, dated July 17, 2020, is on ASTI letterhead and is addressed to Dickinson Wright attorney Sharon Newlon. Dickinson Wright was hired by the DLBA on June 25, 2018 to provide various legal services¹²³ and the contract allows for Dickinson Wright to engage experts on behalf of the DLBA.¹²⁴ Therefore, ASTI was selected on Ms. Newlon’s recommendation.¹²⁵ The City of Detroit is not a party to the Dickinson Wright contract. However, Demo Department Director LaJuan Counts and DLBA Deputy Executive Director Tammy Daniels both signed the contract under the “Client Authorization” heading.¹²⁶

The contract states, in part,

Per our conversation, this letter is a cost quotation to review existing environmental information and provide options for soils management at various locations. The objectives of this project are to: 1) identify the nature and extent of impacts associated with imported fill and topsoil; 2) determine regulatory requirements and management options; and 3) conduct presentations to interested stakeholders. It is our understanding that we are being engaged on behalf of the City of Detroit and the Detroit Land Bank.

¹²² Transcript of OIG Interview of Tim Devine, January 22, 2021, 2021, pg. 42.

¹²³ Detroit Land Bank Authority’s Services Agreement between the DLBA and Dickinson Wright PLLC dated June 25, 2018.

¹²⁴ Transcript of OIG Interview of Tim Devine, January 22, 2021, pgs. 45-46.

¹²⁵ OIG Interview of LaJuan Counts, February 2, 2021.

¹²⁶ ASTI Contract sent by ASTI President Thomas Wackerman to Dickinson Wright, PLLC attorney Sharon Newlon regarding “Proposal to Conduct Data Review and Assessment, Provide Recommendations, and Assist with Public Education for Soil Management Options at Various Locations, Detroit, MI,” dated July 17, 2020.

It also states under *Attachment A Terms and Conditions* that ASTI shall perform for Dickinson Wright the services described.¹²⁷ Further, “services will be provided on a time and materials basis for actual work performed to amount not-to-exceed \$100,000.¹²⁸” As of January 30, 2021, ASTI has invoiced the DLBA for services rendered in the amount of \$30,637.¹²⁹

Ms. Daniels stated that the ASTI contract was not a DLBA contract and was not approved by the DLBA Board. It was a document provided by ASTI. When asked if it was functioning as a contract, she stated that it is functional as an agreement. Ms. Daniels stated she does not know why Ms. Counts was asked to sign the document. However, Ms. Daniels would have forwarded it to her because there was a signature line for her. According to Ms. Daniels, ASTI was operating on behalf of the City of Detroit and the DLBA. Ms. Counts was acting on behalf of the City of Detroit.¹³⁰ Ultimately, Ms. Daniels stated it seems that ASTI could hold both the DLBA and City of Detroit responsible for its obligations. However, Ms. Daniels noted that the DLBA is holding McDonagh dollars that can be used to pay for these services.¹³¹

Ms. Counts acknowledged that she should not have signed the ASTI contract, which did not follow the City of Detroit’s contracting process. She stated that Ms. Daniels emailed it to her the night before she signed it. Ms. Counts briefly read it but did not realize at that time she needed to sign it. Ms. Counts stated that the next day Ms. Daniels called her and stated that Ms. Counts needed to sign it. Ms. Counts stated that she never thought it was a contract. The DLBA represented to her that she was holding up the McDonagh process so she signed the document because her focus was on Proposal N. She stated it was not clear to her why she needed to sign it, as she thought she was looking at a proposal.¹³²

The OIG questions the impact of Ms. Counts’ signature on the contract and if the City of Detroit is now legally contractually obligated to ASTI. Ms. Counts stated in her OIG interview that she believes she signed for “the technical aspect” and that the Demo Department was in agreement with the scope of services. Ms. Counts stated that it was her understanding that her signature was not for approval of the contract and that she was not obligating the City of Detroit or her department to anything, including payment. However, Ms. Daniels stated that ASTI could hold both the DLBA and City of Detroit responsible for the contract. Ms. Counts also confirmed that no other department from the City of Detroit, including the Office of Contracting and Procurement (OCP) or Law Department, reviewed this agreement.¹³³

OCP’s *Standard Operating Procedure* clearly outlines requirements for all City contracts. For example, “all new contracts must be competitively bid to the greatest extent possible.” OCP is the only entity within the City of Detroit that is authorized to conduct the bid

¹²⁷ ASTI Contract, Attachment A Terms and Conditions, pg. 4.

¹²⁸ ASTI Contract, Fee Section, pg. 2.

¹²⁹ ASTI Invoices to Dickinson Wright PLCC dated August 14, 2020, September 11, 2020, October 16, 2020, and December 15, 2020. Response of Tim Devine to Detroit OIG Questions, February 18, 2021.

¹³⁰ Transcript of OIG Interview of Tammy Daniels, February 23, 2021, pg. 6.

¹³¹ *Id.* at 6-7.

¹³² OIG Phone Call with LaJuan Counts, February 16, 2021.

¹³³ OIG Interview of LaJuan Counts, February 2, 2021.

solicitation process for purchases valued at \$2,000 or greater.¹³⁴ Further, OCP is responsible for “managing the bid review, evaluation, tabulation, and award process.”¹³⁵ All contracts must also contain certain boilerplate language which has been “vetted and is essential for the City’s protection when entering into a contract.”¹³⁶ Contracts also require specific approvals from various departments including OCP and the Law Department. Contracts also require City Council approval.¹³⁷

This process was clearly not followed. The OIG does not make legal determinations and would typically request a legal opinion from the Law Department to determine if Ms. Counts’ signature and the wording of the agreement contractually obligates the City of Detroit to ASTI. In this instance, the OIG is unable to do so, as the Law Department elected to represent Ms. Counts in her OIG interview. The OIG believes that this creates a conflict of interest and would undermine the independence of the legal opinion.

The OIG’s concerns were expressed to the Law Department prior to its representation of Ms. Counts. On January 26, 2021, the Law Department requested to “sit in” with Ms. Counts during her OIG interview. Later that day, Inspector General Ellen Ha responded with her concerns, which included the possibility of the situation where the OIG would be precluded from seeking any legal advice or opinion on matters related to this investigation. She further explained that the OIG’s interview of Ms. Counts was an administrative proceeding within the City and that the Law Department’s election to provide representation during the OIG’s proceeding could be problematic in the future.¹³⁸

On January 27, 2021, the Law Department responded that it did not perceive a conflict, potential conflict, or any basis for denying Ms. Counts the assistance of counsel at an OIG interview. In the event the OIG needed representation from Corporation Counsel in the future and a conflict exists, the Law Department stated it can always secure outside counsel to represent the OIG.¹³⁹ The OIG agrees that Ms. Counts has a right to representation but questions whether the Law Department should provide such services, as many City employees are questioned by the OIG during an investigation. What is more important in this instance is that the result of the Law Department’s representation of Ms. Counts made it impossible for the OIG to request an opinion from the Law Department to determine whether Ms. Counts abused her authority by signing the ASTI agreement.

The OIG could have sought a legal opinion from outside counsel. However, the OIG decided that the time and cost associated with this action when weighed against delaying the finalization of the report was not reasonable given there is no evidence of any immediate harm

¹³⁴ OCP Standard Operating Procedure, Chapter 3, Section 3.5: Creating, Advertising, and Managing Solicitations, I. Managing the Solicitation, Policy and Procedure, pg. 26.

¹³⁵ OCP Standard Operating Procedure, Chapter 3, Section 3.6: Receiving, Evaluating, and Selecting Bid Responses Section Summary.

¹³⁶ OCP Standard Operating Procedure, Chapter 4: Developing and Managing Contracts, Section 4.2: Building the Contract, Section Summary, pgs. 5-6.

¹³⁷ OCP Standard Operating Procedure, Chapter 4, Section 4.3: Executing the Contract, Section Summary, Pg. 10.

¹³⁸ Email exchange between Law Department Attorney Douglas Baker and OIG Inspector General Ellen Ha dated January 26, 2021 through January 27, 2021.

¹³⁹ *Id.*

that signing the contract would negatively impact the City of Detroit. It should be noted that this issue could have been quickly resolved at no additional cost if the OIG was able to request an opinion from the Law Department.

c. EGLE Meetings

The Michigan Department of Environment, Great Lakes, and Energy (EGLE) is a state agency whose mission is to “protect Michigan’s environment and public health by managing air, water, land, and energy resources.”¹⁴⁰ In early July 2020, the DLBA contacted EGLE to request a meeting regarding the McDonagh topsoil test results. The meetings included representatives from the MSHDA, EGLE, Demo Department, ASTI, DLBA, and DLBA’s outside counsel Dickinson Wright. The initial purpose of the meeting was to inform EGLE of the AKT Peerless test results of the McDonagh properties. As additional test results became available, subsequent meetings were held to get clarity on EGLE’s review of the test results and how it met the expectations EGLE had of the HHF Demolition Program.¹⁴¹

The EGLE review process is still ongoing. As of February 24, 2021, seven Zoom meetings have been conducted.¹⁴² The DLBA stated that all “sampling data and the ASTI assessments have been timely and fully shared” and that, as the information has become available, the DLBA, Demo Department, and MSDHA “have been engaged in a constructive dialogue with EGLE as to the appropriate next steps.”¹⁴³

EGLE Senior Geologist Steve Hoin has attended all the meetings. Mr. Hoin is an expert in the soils found in Southeastern Michigan. He explained that the test results showed high levels of mercury, above what naturally occurs but below background criteria. Mr. Hoin stated that the DLBA never provided an answer as to the source of the dirt, therefore he lacks an understanding of the soil’s history. He noted that the mercury levels were consistent among the properties and that the “levels kind of raised a red flag.”¹⁴⁴

Mr. Hoin clarified that he does not think there is a potential ongoing public health issue. He stated there was a “slim chance of harm” and a “slim chance of a vapor intrusion risk.”¹⁴⁵ However, Mr. Hoin asked the DLBA to look at the vapor intrusion pathways but he said the DLBA declined to do so. Mr. Hoin stated that EGLE would have liked to have seen the study done but EGLE is a regulatory agency and cannot mandate the DLBA to conduct such a study.

On February 4, 2021, Mr. Devine was asked why the DLBA declined to do a vapor intrusion study. He stated that he does not have any recollection of EGLE recommending a vapor intrusion study and asked for more specific information so he could review the records.¹⁴⁶ On March 2, 2021, Mr. Devine responded with additional information. He stated the following:

¹⁴⁰ <https://www.michigan.gov/egle/0,9429,7-135-3306---,00.html>

¹⁴¹ OIG Interview of LaJuan Counts, February 2, 2021.

¹⁴² Response of Tim Devine to Detroit OIG Questions, February 18, 2021.

¹⁴³ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹⁴⁴ OIG Phone Call with EGLE Senior Geologist Steve Hoin, January 26, 2021.

¹⁴⁵ *Id.*

¹⁴⁶ Response of Tim Devine to Detroit OIG Questions, February 18, 2021.

It's not clear whether Steve Hoin recommended a look at the vapor intrusion pathways on certain properties or whether ASTI did so; it was a collaborative scientific process. In any event, the Land Bank's independent environmental expert, ASTI, did initiate an evaluation of potential vapor intrusion issues, noting that vapor intrusion is a relevant pathway for due care on properties where structures are going to be built. The first step in the evaluation was to determine whether any of the properties exceed the screening criteria – that is, are they above applicable background, and, if so, are they above EGLE's proposed vapor screening levels. Although these proposed screening levels are not promulgated criteria (in other words they are not binding), ASTI recommended that they nonetheless be considered in conjunction with the evaluation of the top fill at these properties. As noted in ASTI's October 14, 2020 report (available at buildingdetroit.org) properties exceeding the regional background criteria for mercury ("mercury outliers") were potential candidates for further evaluation of this sort. ASTI suggested that if the top fill at these properties remained in place, soil gas sampling would be appropriate prior to construction of any buildings, to determine whether a vapor mitigation system was warranted. Because the Land Bank ordered the demolition contractor to remove and replace the top fill at all of the mercury outlier properties, no further vapor intrusion evaluation is warranted. Accordingly, the Land Bank considers the vapor intrusion discussion successfully resolved. EGLE has not to our knowledge completed its final written analysis of the McDonagh properties, but if EGLE's final analysis were to indicate that any other McDonagh sites should be considered along these lines, the Land Bank would of course act accordingly.

Mr. Hoin has made it clear that he does not think there is a potential ongoing public health issue. The OIG does not have the technical expertise to determine if a vapor intrusion study should be conducted on any of the McDonagh properties that were not remediated. Mr. Devine has repeatedly stated he would follow the science and EGLE's recommendations.

To date, this process with EGLE has taken over eight months. On March 19, 2021, Mr. Devine informed the OIG that EGLE requires additional testing to be performed by AKT Peerless before a final determination can be made.¹⁴⁷ The DLBA and Demo Department have both spent a lot of time and resources in getting EGLE to make a determination. One factor that has held up the process is that EGLE required additional information from AKT Peerless. The DLBA did not invite AKT Peerless to attend the EGLE meetings because "it would have merged the science and discussion to the point that it would not have been necessarily for independent point of view that [the DLBA] was looking for."¹⁴⁸ ASTI was hired to "provide an independent point of view, independent of the operational point of view." Mr. Devine explained that the

¹⁴⁷ OIG Phone Call with Tim Devine, March 19, 2021.

¹⁴⁸ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 49.

thinking was that if AKT Peerless was included with their “operational point of view, people would not be able to stay in their lane.” He stated that was not “a bad thing but it would blur the approach.”¹⁴⁹ However, DLBA informed EGLE that AKT Peerless had operational knowledge and EGLE should feel free to contact AKT with any questions.¹⁵⁰

The OIG questions if this process would have been completed if AKT Peerless had been included in the meetings. This process is ongoing and it is possible that EGLE may conclude that more properties require remediation. However, had the DLBA followed the *Scope of Services* and required McDonagh to remove and replace the topsoil that came from an unapproved source, all properties would have been remediated and there would clearly be no potential environmental issue.

d. Notifications

i. DLBA Notification to Residents

Detroit residents who live next door to the McDonagh properties where topsoil was found to not meet program requirements received no direct notification. Therefore, residents were not informed that they should avoid the lots while additional testing and evaluation of the topsoil took place.

In July 2020, a potential press release was discussed by the DLBA, Demo Department, and Mayor’s Office because data indicated that the topsoil on “11 properties appeared to exceed certain environmental specifications in the applicable contracts, which could represent potential environmental or health concerns.”¹⁵¹ However, a “press release was deferred in order to be driven by the science” because the DLBA thought it “became apparent that further sampling and data analysis was required to accurately assess any potential environmental or public health risks.”¹⁵²

Mr. Devine stated that the decision to not notify neighbors directly was made by the DLBA and Demo Department.¹⁵³ Ms. Counts thought the Demo Department and DLBA agreed to provide notice through the use of door hangers but it was ultimately the DLBA’s responsibility to inform neighbors.¹⁵⁴ Ms. Counts stated that she thought notification was important though she could not recall expressing this thought directly to the DLBA.

Additionally, the “Mayor’s Office urged the Lank Bank to issue a press release.”¹⁵⁵ However, the DLBA determined that there was “not enough reliable data to make an accurate statement at that time.”¹⁵⁶ Therefore, the Mayor’s Office recommended that the DLBA “post all

¹⁴⁹ *Id.* at 49-50.

¹⁵⁰ *Id.* at 46.

¹⁵¹ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹⁵² *Id.*

¹⁵³ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 37.

¹⁵⁴ OIG Interview of LaJuan Counts, February 2, 2021.

¹⁵⁵ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹⁵⁶ *Id.*

soil sampling data and scientific analysis on its website on a property-by-property basis, along with any corrective actions.¹⁵⁷

Sometime in September of 2020, the DLBA posted information regarding this issue on its website at <https://buildingdetroit.org/demolition-field-samples/>. However, this important information about the suitability of the soil in Detroit neighborhoods is difficult to locate and understand. It is not highlighted on the DLBA's main page and someone searching for information on topsoil testing would have to know to look under the FOIA link. Also, Ms. Counts acknowledged that the information is difficult for most people to understand and that the DLBA had to hire a consultant to review the information for them.¹⁵⁸

Mr. Devine was asked if any consideration was given to Detroiters who do not have internet access.¹⁵⁹ He stated that the “commitment has been to pursue the science, get to appropriate understandings with the right people in the room, including ELGE and MSHDA, and to take responsible actions, you know, whatever remediation may be necessary, whatever communication might be necessary, that’s been the focus.”¹⁶⁰ The DLBA has not taken all steps to ensure that people who live next door to these properties have all available information to determine if they want their children or pets on this topsoil. Though the information is posted on the DLBA website, it is essentially hidden in plain sight. Not only is it difficult to locate but residents were never informed that the information existed in the first place.

According to the DLBA, “[w]here appropriate, properties were fenced, pending further review or additional corrective action, with a No Trespassing posting indicating that the property is owned by the Land Bank, with a phone number provided for people with questions.”¹⁶¹ Additionally, the DLBA and Demo Department has “addressed every property where a Direct Contact exceedance or potential Direct Contact exceedance was identified, even while additional scientific review was taking place, and shared its determinations and corrective actions with EGLE in every such situation.”¹⁶² Again, no such information has been directly shared with the Detroit residents who live near these properties. It has been eight months since the first issue was identified and not all corrective actions have been taken or completed, leaving a lot of time for residents to potentially come in contact with soil not suitable for neighborhoods.

The DLBA also noted that notifications may be made in the future. Discussions with “EGLE are ongoing; what, if any, disclosures will need to be made is not yet known at this time. The Land Bank and [Demo Department] continue to review next steps in discussions with the parties involved in the EGLE discussions. The Land Bank will hold the 89 lots in its inventory pending completion of this process.”¹⁶³ The OIG believes that residents should have been notified for the sake of transparency. Therefore, the OIG recommends that notifications be

¹⁵⁷ *Id.*

¹⁵⁸ OIG Interview of LaJuan Counts, February 2, 2021.

¹⁵⁹ Households with a broadband Internet subscription, percent, 2015-2019 for Detroit is 64.4%. <https://www.census.gov/quickfacts/fact/table/MI,detroitcitymichigan#>

¹⁶⁰ Transcript of OIG Interview with Timothy Devine, January 22, 2021, pg. 40.

¹⁶¹ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹⁶² *Id.*

¹⁶³ *Id.*

provided to the public on any potential public health issue so residents have all available information related to their health, safety, and welfare.

ii. DLBA Notification to City Council

In July 2020, the Mayor's Office directed the DLBA and Demo Department to inform City Council of the McDonagh topsoil issues.¹⁶⁴ Mr. Devine stated that City Council was "notified of the data, as well as the commitment to engage scientific experts and to consult with EGLE."¹⁶⁵ The purpose of the notification was to provide City Council with background information on the McDonagh issue before they considered the Proposal N resolution in late July of 2020.¹⁶⁶

According to Ms. Counts, the initial update to City Council was to explain that McDonagh was unable to provide topsoil tickets for five properties and that subsequent testing showed that the topsoil did not meet program requirements. As a result, six additional properties were tested and those results triggered concern over the remaining 78 properties. City Council was then informed that the DLBA was going to hire a consultant to review the test results.¹⁶⁷

In September 2020, some City Councilmembers were provided with a second update via individual phone conversations.¹⁶⁸ All test results were completed in October 2020. However, City Council was not provided with an update on the final results of all properties. Ms. Counts stated that she believes City Council was not updated on the final results because the DLBA and Demo Department are waiting for the final opinion from EGLE as to the suitability of soil for all McDonagh properties.¹⁶⁹

In July 2020, City Councilmembers were updated in phone calls, in part, so they could consider this information prior to voting on the Proposal N resolution though the OIG does not know exactly what they were told. After the test results were finalized in October, City Council was not provided with a final update. It is unknown what impact, if any, information on potential soil suitability issues within the Demolition Program based on the final test results would have had on City Council deliberations and on the public. Any government program that uses taxpayer dollars should operate with full transparency. In this instance, the DLBA and Demo Department fell short.

e. Waste

The DLBA and Demo Department have spent a great deal of time, energy, and resources to determine if the HHF Demolition Program standards for backfill and topsoil established at the beginning of the program were appropriate. This position ignores the fact that all other

¹⁶⁴ During her OIG interview on February 2, 2021, Ms. Counts stated that this direction was provided by Alexis Wiley.

¹⁶⁵ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹⁶⁶ *Id.*

¹⁶⁷ OIG Interview of LaJuan Counts, February 2, 2021.

¹⁶⁸ During her February 2, 2021 interview, Ms. Counts could not recall which Councilmembers received the second update. All Councilmembers received the initial notification.

¹⁶⁹ OIG Interview of LaJuan Counts, February 2, 2021.

demolition contractors were able to provide backfill and topsoil in compliance with program standards since the program's inception in 2014, showing that it is not a problem with the standards but instead a problem with McDonagh. As stated above, the standards established by the *Scope of Services* are being reviewed based on the testing results of 81 of the 89 McDonagh properties which represent less than 1% (0.54%) of all demolitions completed. Additionally, all demolitions are either (1) completed or (2) under contract. The OIG finds the actions taken and money expended in this instance are a waste of government resources.

Waste is defined as “to consume, spend, or employ uselessly or without adequate return.”¹⁷⁰ It is also defined as “the thoughtless or careless expenditure, mismanagement, or abuse of resources to the detriment (or potential detriment) of the U.S. government. Waste also includes incurring unnecessary costs resulting from inefficient or ineffective practices, systems, or controls.”¹⁷¹ It is also the “extravagant, careless, or needless expenditure of government funds, or the consumption of government property that results from deficient practices, systems, controls, or decisions.”¹⁷²

The Demo Department was responsible for coordinating and paying for AKT Peerless' work related to the McDonagh properties. AKT Peerless invoiced a total of \$129,947.62¹⁷³ for soil testing and \$22,263.30¹⁷⁴ for monitoring McDonagh's soil removal at the 16 additional properties. Ms. Counts explained that the Demo Department is the holder of the AKT Peerless contract and is thus responsible for payment. Ms. Counts requested that the DLBA reimburse the City of Detroit for those costs.¹⁷⁵ The DLBA stated that the Demo Department will be reimbursed with the frozen \$223,000 of contract payments owed to McDonagh “pending final resolution of contractual issues associated with the 89 sites.”^{176,177}

No other contractor with a dirt issue has been handled in this way. All other contractors have been required to pay for testing on their own as required by the *Scope of Services* which states, in part, “the Contractor must perform soil testing to determine the suitability of any

¹⁷⁰ <https://www.dictionary.com/browse/waste?s=t>

¹⁷¹ <https://oig.usaid.gov/report-fraud>, Hotline & Fraud FAQs: What is considered fraud, waste, or abuse?

¹⁷² https://www.af.mil/Portals/1/documents/ig/FWA_Guide_Final.pdf

¹⁷³ AKT Peerless Work Order Request- Backfill Program. This work request was submitted by AKT Peerless Senior Engineer Megan Napier on June 17, 2020 and was accepted by DBA Manager of Commercial Operations Tim Palazzolo and AKT Peerless Work Order Request- Backfill Program. This work request was submitted by AKT Peerless Senior Engineer Megan Napier on July 29, 2020 and was accepted by DBA Manager of Commercial Operations Tim Palazzolo.

¹⁷⁴ AKT Peerless Work Order Request. This work request was submitted by AKT Peerless Senior Engineer Megan Napier on October 19, 2020 and was accepted by DBA Manager of Commercial Operations Tim Palazzolo and AKT Peerless Work Order Request. This work request was submitted by AKT Peerless Senior Engineer Megan Napier on February 15, 2021 and was accepted by DBA Manager of Commercial Operations Tim Palazzolo on February 17, 2021.

¹⁷⁵ OIG Interview of LaJuan Counts, February 2, 2021.

¹⁷⁶ Response of Tim Devine to Detroit OIG Questions, February 18, 2021.

¹⁷⁷ The Demolition Department also paid for the removal of soil at the five initial McDonagh sites. The remove was done by SC Environmental under RFQ 20RJ18802 because McDonagh did not have the necessary equipment to remove and replace the topsoil. The Demolition Department also requested the DLBA reimburse them for the \$22,501 paid to SC Environmental with the frozen McDonagh funds.

backfill material at the Contractor's expense.¹⁷⁸ Test results are then sent to AKT Peerless to review and determine if results meet the *Scope of Services* requirements. The City of Detroit typically only pays for review of the testing results submitted by the contractor. The most expensive review prior to McDonagh was for \$2,600.¹⁷⁹

The Demo Department was forced to spend a great deal of time coordinating the soil sampling because the DLBA decided to question the standards outlined in the *Scope of Services*. This is a task that usually falls on the contractor when an unapproved dirt source is used. This constitutes waste. Additionally, the DLBA had to expend its funds to pay for the testing and monitoring. Though it appears that the Demo Department will be reimbursed, it was an expense that the department should not have incurred in the first place.

On July 17, 2020, ASTI was hired to "review and provide an independent assessment of the sampling results¹⁸⁰" completed by AKT Peerless. AKT Peerless completed sampling and issued all reports by October 2, 2020. Yet ASTI's review is ongoing. Additionally, the DLBA requested an informal review from EGLE to determine if the soil used by McDonagh is suitable for Detroit neighborhoods. The OIG is unsure why it was necessary to engage ASTI when the DLBA is awaiting a final determination from EGLE. EGLE has access to AKT Peerless' test data which should be adequate to make a determination on soil suitability.

As of March 1, 2021, ASTI has submitted invoices to the DLBA totaling \$30,637. The DLBA indicated that all ASTI expenses will be deducted from the frozen McDonagh funds to ensure the contractor is held accountable.¹⁸¹ However, MSHDA and US Treasury have indicated that ASTI invoices should be covered by the DLBA and not deducted from McDonagh's frozen funds.¹⁸² The DLBA chose to hire ASTI, not McDonagh. Therefore, MSHDA concluded that McDonagh is not responsible for those costs. Conversely, Mr. Devine stated in his March 18, 2021 response to the OIG that McDonagh will be required to pay all costs associated with ASTI.¹⁸³ However, on March 19, 2021, MSHDA stated that no such determination has been made and that MSHDA is waiting for Mr. Devine to "isolate the section of the contractors contract that allow for this to be paid by the contractor."¹⁸⁴ The DLBA has also paid Dickinson Wright to advise them on this issue. To date, Dickinson has invoiced for \$69,106.50 and more costs may be incurred.¹⁸⁵

At minimum, this issue is taking a long time to be resolved. Potential issues were discovered in June of 2020. The *Scope of Services* states that contractors have 48 hours to remove all backfilled materials that do not meet specifications.¹⁸⁶ The discovery of these issues is well past 48 hours, the time allotted for under the *Scope of Services*. Further, it is likely the

¹⁷⁸ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (G), pgs. 21-22.

¹⁷⁹ OIG Phone Call with AKT Peerless VP of National Quality Control Megan Napier on October 16, 2020.

¹⁸⁰ Response of Tim Devine to Detroit OIG Questions, December 15, 2020.

¹⁸¹ Response of Tim Devine to Detroit OIG Questions, February 18, 2021 and Transcript of OIG Interview with Tammy Daniels, February 23, 2021, pg. 7.

¹⁸² Email from Mary Townley to Jennifer Bentley regarding DLB processing of costs, February 23, 2021.

¹⁸³ DLBA Response to OIG Draft Report, March 18, 2021.

¹⁸⁴ Email from Mary Townley to Jennifer Bentley regarding DLB processing of costs, March 19, 2021.

¹⁸⁵ Response of Tim Devine to Detroit OIG Questions, February 18, 2021.

¹⁸⁶ Exhibit A *Scope of Services* (Revised 9/13/2018), Section VI: Site Finishing, Part 1: Earthwork and Backfill Management (G), pgs. 21-22.

DLBA will be responsible for paying ASTI and Dickinson Wright at least \$99,743.50 in taxpayer money to determine if the standards used for the entirety of the Demolition Program are appropriate.

The DLBA is nearing the end of its HHF Demolition Program. However, before the DLBA can officially close the program, the McDonagh issue must be resolved.¹⁸⁷ As stated previously, test results in June 2020 indicated potential problems with the soil suitability. Subsequent testing completed at the beginning of October 2020 showed the scope of the issues. Months have gone by and this issue has yet to be resolved, which is indicative of a waste of City of Detroit and DLBA's time and resources.

Mr. Devine was asked if the DLBA did a cost benefit analysis to compare the cost to remediate the properties versus the cost of examining the science. Mr. Devine responded that the "target and goal from the first time [the DLBA] became engaged on this issue was to pursue the science with regard to the public health and the integrity of the program in a responsible way."¹⁸⁸ He further noted that if EGLE concludes that 70 percent of the sites have no public health issue and no contractual issue then "stripping it all off and replacing it would have created—would have been at least arguably wasteful."¹⁸⁹ However, it should be noted that EGLE is not making a determination on any contractual issues.

Mr. Devine was also asked if it was wasteful in regards to time and money to pursue a scientific approach instead of requiring McDonagh to remediate the properties. He responded that if the DLBA "had decided to go forward on the track of what [the OIG] is presenting [of removing and replacing the topsoil], [the DLBA] would have been prioritizing contractual over science, and that's not the path we went. We put science and the public health as our first priority and reserved our rights under the contract."¹⁹⁰ However, it is arguably a waste of time and money to pursue the scientific route because removing and replacing the topsoil would have also prioritized public health in a much faster manner. If the topsoil was just removed and replaced with an approved source there would be no lingering question as to the public health. It is also important to hold contractors accountable to the provisions in the contract especially when the violation may have an impact on the health, safety, and welfare of the citizens of Detroit.

In contrast, Ms. Counts stated that when there is a question about topsoil, contractors must choose between the options of (1) producing the tickets, (2) removing and replacing the dirt, or (3) testing it. Ms. Counts stated she could not answer why so much time, effort, and money was spent to determine if the topsoil meets criteria specific to this region instead of meeting the criteria detailed in the *Scope of Services*.¹⁹¹

The OIG finds that the DLBA and Demo Department engaged in waste by spending a great deal of time, energy, and resources to determine if the HHF Demolition Program standards for backfill and topsoil established at the beginning of the program were appropriate. Questioning the program standards at the end of the program undermines the entire program and

¹⁸⁷ DLBA Update: Successful Conclusion of HHF Program dated February 11, 2021.

¹⁸⁸ Transcript of OIG Interview of Tim Devine, January 22, 2021, pg. 12.

¹⁸⁹ *Id.* at 62-63.

¹⁹⁰ *Id.* at 63.

¹⁹¹ OIG Interview of LaJuan Counts, February 2, 2021.

those who adhered to the standards to their detriment. Over nine months have elapsed since the potential issues were discovered with the McDonagh properties. What is inexplicable is that the Demo Department owes AKT Peerless \$152,210.92 for services rendered on behalf of McDonagh. The DLBA engaged experts ASTI and Dickinson Wright at a cost of \$99,743.50. It is unclear why this expertise was necessary given the DLBA is seeking an opinion from EGLE which will be based on AKT Peerless test results.

VIII. Conclusion

The OIG does not find that the Demo Department abused their authority. All evidence suggests that the final decision making rested with the DLBA. The OIG is also unable to definitively state that the DLBA abused their authority. However, the course of action pursued by the DLBA is questionable and was arguably not done with the best interest of the citizens of the City of Detroit in mind.

On March 24, 2019, McDonagh was removed from the HHF Demolition Program for failing to perform in a manner as required by the contracts and for failing to promptly remediate the documented deficiencies. As a result, McDonagh had \$15,609,021.71 in contracts cancelled.¹⁹² However, McDonagh was permitted to provide backfill and topsoil on the 89 properties that it had already demolished. It is clear that McDonagh used unscreened topsoil from an unapproved source to complete this task.

After testing revealed 81 of 89 properties were found to not meet program requirements, the DLBA decided to question the standards of the HHF Program despite the fact that all HHF funds have either been spent or were contracted. The DLBA stated this course of action was taken because this was a new issue and they wanted to pursue the science. However, 14,995 demolitions were able to be completed based on existing program requirements. The DLBA engaged in this time consuming process after less than 1% (0.54% to be exact) of demolitions completed were not done with topsoil that met *Part 201: Generic Cleanup Criteria* as required by the *Scope of Services*. Yet 99.46% of demolitions were able to meet program requirements. Under the circumstances, it would make more sense if McDonagh was questioning the program standards, not the DLBA.

Therefore, the OIG questions the reasoning given by the DLBA for pursuing this course of action. Removing and replacing the topsoil would have immediately addressed any potential concerns related to the health, safety, and welfare of the people who reside next to the 89 McDonagh properties in the City of Detroit. The OIG cannot conclude the DLBA abused its authority without clearer evidence of the actual reasons and motivations. Moreover, questionable decision making does not necessarily equate to an abuse of authority. Nevertheless, the OIG finds the reasons for this course of action taken by the DLBA to be suspect.

While we did not find abuse of authority, the OIG finds that the DLBA engaged in waste. A great deal of time, energy, and resources have been spent on this issue. The problem could

¹⁹² McDonagh was awarded contracts totaling \$17,046,764. McDonagh completed 89 properties for a total of \$1,437,742.29.

have been resolved months ago if McDonagh was treated like other contractors who failed to meet the program standard.

Specifically, the DLBA engaged in waste by pursuing this time consuming and expensive path. The DLBA hired ASTI and Dickinson Wright for their respective expertise at a cost of \$99,743.50 which, at this time, appears to be a cost the DLBA will have to cover. Also, it is unclear why this expertise was necessary given the DLBA is seeking an opinion from EGLE which should be based on AKT Peerless' test results. EGLE has an expertise in what soils are suitable in Michigan. It does not appear that EGLE would require the DLBA's experts to help them render a decision. Further, if the DLBA is strictly concerned about the science, they should not need experts to advocate for a specific outcome.

The Demo Department also wasted time and resources coordinating the AKT Peerless testing and attending meetings with EGLE. However, as stated above, this process was driven by the DLBA and the Demo Department was required to participate as a program manager.

Detroit Land Bank Authority Response to Detroit Office of the Inspector General Draft Report McDonagh Topsoil Issues, OIG Case No. 20-0013-INV

Thank you for the opportunity to comment on the Draft Report. As your Draft Report acknowledges, the Land Bank's priority in responding to the issues we identified on the McDonagh sites was to secure the public health and enforce our contracts. In support of those priorities, we sought advice from the State environmental regulators, and with them, we followed the science to ensure that each and every one of the 89 properties would be fully compliant with all applicable environmental standards.

The good news is this: we are on track to meet all of these goals. All topfill which did not meet applicable environmental standards has already been removed and replaced, and taxpayers will bear none of the cost under the contract. We have held McDonagh accountable for all of its contract obligations without litigation, which would surely have wasted taxpayer money and caused unnecessary delays in resolving the problems and successfully closing out the HHF program.

While we will not attempt to correct the many factual mistakes and baseless assumptions in the Draft Report, we must address the two fundamental errors that support its misguided conclusions.

First, the Draft Report applies the wrong legal standard in concluding that the topfill at 81 of the 89 McDonagh properties did not comply with the law. All agree that Part 201 of Michigan's environmental statute is the governing legal and contractual standard. But the Draft Report relies on initial draft conclusions by AKT that looked at statewide standards, rather than the appropriate background criteria. Based on the extensive analysis by ASTI, and the significant technical guidance from EGLE, we have concluded that AKT's draft assertions about what criteria to apply are not supported by the law and the data as to at least 66 of the properties.

The Land Bank has already ordered McDonagh to remove and replace the topfill at all sites where the scientific review concluded that remediation was required, and all of that work will be completed as of this week. The remaining 66 sites comply with the environmental standards that we have concluded apply, and with the contract, and therefore require no further action. This conclusion is supported by the independent scientific review of ASTI, including numerous discussions with EGLE. It is our understanding that EGLE is in agreement with this conclusion at this point in its review. If EGLE ultimately concludes otherwise as to any of the remaining 66 sites, the Land Bank will order McDonagh to take all necessary action at all such sites at McDonagh's expense.

The Land Bank will hold McDonagh accountable under the contract for all applicable costs, including the work of AKT and ASTI and the removal and replacement of topfill at the affected

sites. None of those costs are going to be borne by the taxpayer.¹ All out-of-pocket costs described above which were incurred by the City or the Land Bank will be reimbursed out of funds that would have been payable to McDonagh, but have been held back for this purpose by the Land Bank and MSHDA. If the monies held back for this purpose are not sufficient to cover these costs, the Land Bank will take action to recover any remaining amounts from McDonagh pursuant to the contract. MSHDA Director Mary Townley has approved this approach to contract enforcement and application of the funds.

Second, the Draft Report erroneously assumes that if the Land Bank had just ordered McDonagh to remediate all 89 sites at the outset, McDonagh would have promptly and voluntarily done so. There are two fatal flaws with this assumption. First, there was not then (and is not now) sufficient evidence to conclude that the soil at all of these sites was out of compliance. Second, there is simply no basis to assume McDonagh would have complied voluntarily with such an order.

It was clear to the Land Bank very early on that McDonagh did not agree with the AKT draft assertions and would refuse to remediate properties that it believed complied with the contract and the applicable law, especially when the cost to McDonagh to remove and replace topfill at all 89 sites would have been between \$600,000 and \$1,200,000. The Land Bank would have had to sue McDonagh to attempt to enforce such an order, which would have caused the taxpayers great expense, potentially left the properties in limbo for many years, and prevented the Land Bank from closing out the HHF program on time. If the Land Bank had decided to perform the work on its own in the mean time, it would have been at taxpayer risk and expense.

To be clear, if the Land Bank determined that McDonagh did, in fact, have an obligation to remediate all 89 sites under the contract, we would have had no reservations about confronting the contractor, and aggressively holding them accountable. The Land Bank has consistently and successfully litigated against contractors as necessary throughout the program. But in this instance, the Land Bank concluded that seeking the advice of the environmental regulators was both the most cost-effective and the most expeditious path to protecting the public health and enforcing the contract. Accordingly, the Land Bank – in consultation with Detroit Demo, MSHDA, the Mayor’s Office and others, and with notice to the OIG at each step – decided to follow the more deliberate and thoughtful process that we have described.

Taking the time to follow the science and to consult with EGLE has resulted in a prompt and successful resolution of the public health issues and has convinced McDonagh to remediate the affected sites without unnecessary taxpayer expense or protracted and expensive litigation.

¹ The Land Bank will pay the incremental costs of removing material that appears to have been dumped by a third party on one of the sites after all McDonagh demolition work there had been completed.

AFFIDAVIT OF TIMOTHY A. DEVINE

STATE OF MICHIGAN)

) ss.

COUNTY OF OAKLAND)

I, Timothy A. Devine, state under oath:

1. I am General Counsel of the Detroit Land Bank Authority.
2. I have served in that role since May 2019.
3. I attest to the veracity to the best of my personal knowledge of the facts contained in the March 18 2021 DLBA Response to the Draft Report of the Office of the Inspector General, dated March 8 2021, OIG Case No. 20-0013-INV.

Dated: March 18, 2021

Signature Timothy A. Devine

Printed Name Timothy A. Devine

Subscribed before me on the 18 day of March,

Signature [Signature]

Printed name David G. Judge

Notary public, State of Michigan, County of Oakland

My commission expires 07-14-2026

