



ERIE COUNTY WATER AUTHORITY

INTEROFFICE MEMORANDUM

October 22, 2018

To: Terrence D. McCracken, Secretary to the Authority

From: Leonard F. Kowalski, Senior Distribution Engineer

Subject: Contract NC-36 Amendment No.1
Water System Improvements
Towns of Cheektowaga and Clarence
Project No. 201700090

A handwritten signature in black ink, appearing to read "LFK", is written over the "From" line of the memorandum.

Attached are the following documents:

1. ECWA Authorization Form for processing Professional Service Contract Amendment #1 with Nussbaumer & Clarke, Inc.
2. Three originals of Professional Service Contract Amendment #1 for the above referenced project.

The Amendment is to increase the Resident Inspection and Resident Inspection Fixed Fee for the above referenced project.

The Authority estimated the inspection hours in the original request for proposal (RFP), which was responded to by the Consultant. There is no accurate means to calculate these costs prior to construction.

Consulting engineering must inspect the work site daily, accounting for material, supplies and equipment on the work site, as well as counting the number and type of laborers being employed on the site. These inspections must take place daily, even when no work is taking place on site. These inspections ensure and verify the accuracy of prevailing wage reports and invoices being submitted for payment and reimbursement. Delays in construction due to unexpected or unforeseen problems or weather-related delays will increase the hours for resident inspections. The Authority estimates these costs based on the size of the construction project and past experience with projects of similar size.

In this case, the hours estimated by the Authority were inadequate to properly provide inspection services for the duration of the construction project and therefore need to be increased to compensate the consultant for the services that were provided.

Construction work cannot continue without daily inspections. If we would have halted inspection services and told the contractor to stop working, the Authority would most likely be subjected to demobilization and remobilization costs associated with the contractor pulling off the job until the inspection services were reestablished. Having the contractor stop work would

adversely affect their schedule and the project would most likely not get done this construction season.

The increased amount reflects the actual construction schedule and site conditions encountered during construction. The following table provides the original contract cost, proposed amendment cost and total contract cost.

	Original Contract	Amendments No.1	Original Contract + All Amendments
Survey	\$28,300.00	\$0.00	\$28,300.00
Design	\$61,700.00	\$0.00	\$61,700.00
General Services	\$30,000.00	\$0.00	\$30,000.00
Estimated Resident Inspection	\$58,900.00	\$94,000.00	\$152,900.00
Estimated Resident Inspection Fixed Fee	\$5,890.00	\$9,400.00	\$15,290.00
Record Drawings	\$9,800.00	\$0.00	\$9,800.00
Estimated Special Services	\$7,000.00	\$0.00	\$7,000.00
TOTALS	\$201,590.00	\$103,400.00	\$304,990.00

This work is within the original scope of the Professional Services Contract dated May 2, 2017 and the project is adequately funded.

The cost for the contractor to perform the work associated with this project is \$2,027,546.00.

LFK:jmf

Attachments

cc: R.Stoll

CONT-NC-036-1701-I-186-B

PROFESSIONAL SERVICES CONTRACT

AGREEMENT made this 28th day of April, 2017, by and between

ERIE COUNTY WATER AUTHORITY
295 Main Street, Room 350
Buffalo, New York 14203

hereinafter referred to as the "Authority", and

NUSSBAUMER & CLARKE, INC.
3556 Lake Shore Road, Suite 500
Buffalo, New York 14219

hereinafter referred to as "Consultant".

WHEREAS, the Authority desires to contract with the Consultant to render professional services upon the terms and for the consideration hereinafter stated;

WHEREAS, the Consultant represents that it is properly qualified to render such services, and

WHEREAS, the parties desire to set forth herein the terms and conditions under which the said professional services will be furnished,

NOW, THEREFORE, in consideration of mutual promises herein set forth, the parties agree as follows:

1. QUALIFICATIONS OF CONSULTANT:

The Consultant shall perform its services under this agreement in a skillful and competent manner in accordance with the prevailing standards of the consulting profession. The Consultant will be responsible to the Authority for errors or omissions in the performance of its services and failure to perform thereof.

2. SCOPE OF SERVICES:

A. PROJECT DESCRIPTION:

This project consists of the design and construction of approximately:

- 2,900 linear feet of new waterline along Southern Parkway / Lindbergh Court / Eastland Parkway (from Rosewood Terrace to Central Boulevard) in the Town of Cheektowaga,
- 2,900 linear feet of new waterline along Stahley Road (from House #8672 to #8790) in the Town of Clarence, and
- 3,100 linear feet of new waterline along Eggert Road and Ivanhoe Road (from Rowan Road to East Delavan Avenue) in the Town of Cheektowaga, New York.

The existing waterlines will be abandoned in place. The sizes of the new waterlines will be determined as a part of the design project.

B. ENGINEERING SERVICES:

Consultant shall provide all engineering services necessary to design and install the improvements described in Section A, including, but not limited to, the following:

1. **Survey**

Upon authorization from the Authority, the Consultant shall complete the following services.

- a. Obtain field topographic survey data for the preparation of construction plans required for final design of the project. Survey data is to be according to NAD83 and NAVD88 standards.

2. **Design**

Upon authorization from the Authority, the Consultant shall complete the following services.

- a. Prepare detailed design drawings, specifications and contract documents. Tasks include, but are not limited to:
 - 1) Conferences with the Authority, agencies, etc.
 - 2) Review of available drawings and records furnished by the Authority.
 - 3) Preparation of base drawings in AutoCAD version 2014 from the survey data obtained in the survey phase and the available records furnished by the Authority.
 - 4) Preparation of engineering calculations to support the design of the improvements, including related civil, hydraulic, mechanical, electrical, structural, and architectural features of the project.
 - 5) Submission of the plans to various utility companies and agencies as required.
 - 6) Preparation of final plans, profiles, and job specific detail drawings that include editing of the Authority's standard detail drawings where appropriate.
 - 7) Preparation of contract specifications that include editing of the Authority's standard "front end" specifications and standard technical specifications where appropriate and preparation of additional technical specifications as required.
 - 8) Obtaining New York State Wage Rates and inserting them into the specifications.
 - 9) Preparation of a quantity take-off and a construction cost estimate.

- 10) Preparation of an engineering report and submission with contract specifications, drawings, application forms and fees to Erie County Health Department for approval.
- 11) Attendance at a final design meeting with the Authority.
- b. Prepare engineering data, where necessary, with regard to regulatory permit applications as required to obtain local, state, federal and public utility approval for the initiation and construction of the work.
- c. Furnish to the Authority five (5) sets of drawings, specifications and other contract documents, for final review by the Authority and other approving agencies.
- d. Prepare documentation for compliance with New York State SEQR (Type II actions) and SWPPP.
- e. Prepare a schedule for the project utilizing the Authority's standard format. The project schedule shall be updated as needed.

3. **General Services**

Upon authorization from the Authority, the Consultant shall complete the following services.

- a. Furnish twenty (20) sets of contract drawings, final specifications, and other documents required for bidding and construction purposes for each contract.
- b. Conduct a pre-bid meeting when appropriate.
- c. Prepare and distribute addenda.
- d. Provide assistance to the Authority in securing bids, tabulating bid results, analyzing bid results, and making recommendations on the award of each construction contract.
- e. Conduct a pre-construction meeting and distribute minutes.
- f. Supply an approved contractor's schedule for construction of the project.
- g. Provide detailed initial stakeout (once only), including bench marks, reference and axis lines along the routes of the construction or where necessary.
- h. Give consultation and advice to the Authority during construction.
- i. Prepare elementary sketches and supplementary sketches, if required, to resolve actual field conditions encountered.
- j. Interpret contract documents and resolve problems as to amount, quality, acceptability, and fitness.
- k. Review the contractor's submittals of material and/or equipment for compliance with the Consultant's design concept and take appropriate action such as but not limited

to: "approved", "approved as corrected", "revise and resubmit"; or "not approved".

- l. Furnish general construction inspection as to quality and quantity of the contractor's work as the construction progresses in order to recommend partial payment.
- m. Schedule and attend progress meetings.
- n. Report to the Authority bi-weekly on the progress of the work via email, with the following information:
 - 1) Summary of the work performed in the previous two-week period.
 - 2) Attach an updated project schedule (in Microsoft Project format) identifying all project milestones and current project status.
 - 3) Forecast of all upcoming work and project costs expected for the project. Identify any contract items which may exceed bid quantities.
 - 4) Attach copies of final inspection reports (in .pdf format) for reports in the previous two-week period.
- o. Notify the Authority when a change in the work is proposed which will cause an adjustment in the contract cost. Evaluate whether the proposed change is justified and reasonable, and if necessary prepare change orders, field directives, and make recommendations for approval. Discuss changes in the plans or procedures authorized by the Consultant with the Authority prior to implementation. Obtain approval for all change orders from the Board of Commissioners prior to implementation.
- p. Check line and grade for preparation of record drawings.
- q. Make a final inspection, furnish a report on project completion, and make recommendations for final payments to contractors and for the release of retained amounts, if any.

4. **Resident Inspection**

Upon authorization from the Authority, the Consultant shall complete the following services.

- a. Provide technical inspection of construction by a full-time resident engineer and/or inspectors as required, who will:
 - 1) Inspect all work to determine the progress, quality, quantity and conformance of the work in accordance with contract documents.
 - 2) Notify customers prior to start of construction.
 - 3) Prepare daily inspector reports.
 - 4) Review, verify and approve requests for monthly and final payments to contractors, based on quantities of work put in place.

5. **Record Drawings**

Upon authorization from the Authority, the Consultant shall complete the following services.

- a. Provide record drawings, including the basemapping, (on AutoCAD Version 2014) of all completed work according to the latest ECWA As-Built Standards. Update the existing ECWA valve and hydrant details to reflect the completed work. Furnish one set of mylar transparencies and all AutoCAD files on CD of these drawings to the Authority.
- b. Provide horizontal and vertical coordinates using survey grade Real Time Kinematic (RTK) GPS with horizontal centimeter level accuracy and best possible vertical precision given the environmental conditions during collection for all mainline valves, hydrants, hydrant valves, permanent blow-offs, and meter pits. Coordinates shall be presented as points within an ESRI geodatabase feature class, or provided in Microsoft Excel, Microsoft Access, or .dbf format. At a minimum, the coordinate file shall contain a Northing, Easting, Elevation, horizontal precision, vertical precision, and Description for each feature.
- c. Record Drawings and coordinates to be based on the NY State Plane Coordinate System – West Zone. Data is to be according to NAD83 and NAVD88 datums. Coordinates shall be provided in Microsoft Excel, Microsoft Access, or .dbf format. At a minimum, the coordinate file shall contain a Northing, Easting, Elevation, and Description for each feature.
- d. Submit mylar transparencies, AutoCAD files, and GPS coordinates no later than one month after final payment of the Construction Contract is recommended for approval and in accordance with Authority Standards.

C. SPECIAL SERVICES

The Authority may require the Consultant to provide or arrange for and assist in obtaining one or more of the following special services in carrying out the project. Because it is not possible to determine in advance the need for or the cost of such services, these are included as separate elements of cost which shall be separately negotiated. These services include:

1. Soils Investigations - including test borings, pavement cores, and the related analysis.
2. Detailed mill, shop and/or laboratory inspection of materials and equipment.
3. Land surveys, maps, plates, descriptions and title investigations which may be required to acquire lands, easements, and rights-of-way for the proposed facilities.

4. Additional copies of reports, contract drawings and documents.
5. Extra travel and subsistence for the Consultant and his staff beyond that normally required under ordinary circumstances, when authorized by the Authority.
6. Assistance to the Authority serving as an expert witness in litigation arising from project development or construction.
7. New York State SEQR (Type I and Unlisted Actions).
8. Air, water, and/or soil sampling, testing, and/or analysis.
9. Operation and maintenance manuals.
10. Start-up services.
11. Hazardous material testing and assessment.
12. Wetlands investigations, delineation, and mitigation.

3. **PAYMENT FOR SERVICES:**

A. The Consultant agrees to accept a lump sum payment for all services to be provided herein except for Resident Inspection which shall be paid on a cost plus fixed fee basis per the schedule included in paragraph 3.D. The methods of payment are as follows.

1. **Survey**

For services described under Section 2B1, Survey, the Authority shall pay Consultant a lump sum which will include all expense, labor and cost associated with this task. Payment will be made monthly based on the percentage of completion up to 100% of the total lump sum amount.

2. **Design**

For services described under Section 2B2, Design, the Authority shall pay Consultant a lump sum which will include all expense, labor, and cost associated with this task. Payment will be made monthly based on the percentage of completion up to 70% of the total lump sum amount. After submission by the Consultant to the Authority of a draft set of contract documents, payment will be made monthly based on the percentage of completion up to 90% of the total lump sum amount. The balance will be paid when the final contract documents are submitted to the Authority.

3. **General Services**

For services described under Section 2B3, General Services, the Authority shall pay Consultant a lump sum which will include all expense, labor and cost associated with this task. Payment will be made monthly based on the percentage of completion up to 100% of the total lump sum amount.

4. **Resident Inspection**

For services described under Section 2B4, Resident Inspection, the Authority shall pay Consultant the direct cost of labor, times a multiplier based on the hours worked at straight time (without overtime premium), direct non-salary expenses, and a fixed fee. Payment for Resident Inspection labor and expenses will be made monthly based on actual costs. Payment for the fixed fee will be

made monthly based on the proportion of construction completed. Fixed fee shall be billed separately from the Resident Inspection costs.

5. **Record Drawings**

For services described under Section 2B5, Record Drawings, the Authority shall pay Consultant a lump sum which will include all expense, labor and cost associated with this task. Payment will be made monthly based on the percentage of completion up to 70% of the total lump sum amount. After submission by the Consultant to the Authority of draft record drawings, payment will be made monthly based on the percentage of completion up to 90% of the total lump sum amount. The balance will be paid when the final record drawings are submitted to the Authority.

B. SPECIAL SERVICES

For services described under Section 2C, Special Services, the Authority shall pay Consultant an amount to be negotiated at the time such service is required.

C. AUDIT

The Authority reserves the right to audit the Consultant's records to verify bills submitted and representations made. For this purpose, the Consultant agrees to make company records available for inspection upon written notice by the Authority. The Authority shall have two years from the date of the Consultant's final bill to complete its audit. If the audit establishes an overcharge, Consultant agrees to refund the excess.

D. ENGINEERING COST SCHEDULE

1. Engineering Costs:

Survey	\$28,300.00
Design	\$61,700.00
General Services	\$30,000.00
Estimated Resident Inspection	\$58,900.00
Resident Inspection Fixed Fee	\$5,890.00
Record Drawings	\$9,800.00
Estimated Special Services	<u>\$7,000.00</u>
TOTAL ENGINEERING COST	\$201,590.00

2. Other Costs:

Direct Labor Cost Multiplier	2.50
Mileage	IRS rate
Subcontractor Expenses	Cost plus 5% maximum
All Other Direct Non-Salary Costs	At Cost

4. **SUBCONTRACT AND ASSIGNMENT:** The Consultant may not subcontract or delegate any of the work, services, and/or other obligations of the Consultant without the express written consent of the Authority. The Authority and the Consultant bind themselves and their successors, administrators and assigns to the terms of this Agreement. The Consultant shall not assign, sublet or transfer its interest in the Agreement without the written consent of the Authority.
5. **AMENDMENTS:** No modification or variation from the terms of this Agreement shall be effective unless it is in writing and authorized by a resolution of the Board of Commissioners of the Authority and signed by all parties.
6. **RIGHT TO TERMINATE:** The Authority reserves the right to terminate the Consultant's services at any time, without cause, based on seven (7) days' written notice. Consultant shall not be entitled to lost profit and shall perform only such services, after notification of termination, as the Authority directs.
7. **INDEMNIFICATION:** The Consultant shall indemnify the Authority against any and all claims arising from the services performed by the Consultant herein and shall defend and hold harmless the Authority from and against all claims, suits, actions, costs, counsel fees, expenses, damages, judgments or decrees based upon or arising out of damage to property or injury to persons or other tortious conduct caused or contributed to it by the Consultant or anyone under its direction or control or on its behalf in the course of its performance under this Agreement. The Consultant further agrees to indemnify, defend and hold harmless the Authority from any and all claims in reference to the services performed by the Consultant hereunder which may infringe on a patent, copyright, trade secret or other proprietary right of any third party.
8. **CONFIDENTIAL INFORMATION:** In order to assist the Consultant in the performance of this Agreement, the Authority may provide the Consultant with confidential information including, but not limited to information relative to the services to be performed. All information received by the Consultant in any fashion and under any conditions resulting from the rendering of the services in consideration of this agreement, are considered confidential. The Consultant shall hold in confidence and not disclose to any person or any entity, any information regarding information learned during the performing of services including but not limited to information relative to the services to be performed.

The Consultant shall use at least the same degree of care to protect and prevent unauthorized disclosure of any confidential information as it would use to protect and prevent unauthorized disclosure of its own proprietary information. The Consultant shall use confidential information only in the performance of this Agreement. No other use of the confidential information whether for the consultant's benefit or for the benefit of others shall be permitted.

In no event is the Consultant authorized to disclose confidential information without the prior written approval of the Authority. Consultant may provide such information to its subconsultants for the purpose of performing the services; or disclose such information, with notice to the Authority, if such information is required to be disclosed by law or court order. The terms of this paragraph shall be binding during and subsequent to the termination of this agreement.

9. **INSURANCE:** The Consultant shall secure and maintain such insurance as will protect itself from claims under the Workers' Compensation Act; claims for damages because of bodily injury, including personal injury, sickness or disease, or death of any of its employees or of any person other than its employees; and from claims for damages because of injury to or destruction of property including loss of use resulting therefrom in the amounts indicated on Exhibit "A". The Consultant shall provide and maintain insurance that will provide coverage for claims arising out of the negligent performance of its services. The Consultant shall provide Certificates of Insurance certifying the coverage required by this provision.
10. **COPYRIGHTS, TRADEMARKS, AND LICENSING:** All materials produced under this Agreement, whether produced by the Consultant alone or with others, and whether or not produced during regular working hours, shall be considered work made for hire and the property of the Authority. The Consultant shall, during and subsequent to the terms of this Agreement, assign to the Authority, without further consideration, all right, title and interest in all material produced under this Agreement. All material produced under this Agreement shall be and remain the property of the Authority whether or not registered.

In performing work under this agreement, the Consultant may be granted access to the Authority's GIS data, documents, and other information. The Consultant understands and agrees that the use of such data, documentation and information shall be treated as confidential information and the Consultant shall abide by the terms and conditions of any confidentiality and copyright leasing agreements (attached as Exhibit "B").

11. **NEW YORK LAW AND JURISDICTION:** Notwithstanding any other provision of this Agreement, any dispute concerning any question of fact or law arising under this Agreement which is not disposed of by agreement between the Consultant and the Authority shall be governed, interpreted and decided by a Court of competent jurisdiction of the State of New York in accordance with the laws of the State of New York.

12. **CONFLICTS OF INTEREST:** The Consultant represents that it has advised the Authority in writing prior to the date of signing this Agreement of any relationships with third parties, including competitors of the Authority, which would present a conflict of interest with the rendering of the services, or which would prevent the Consultant from carrying out the terms of this Agreement or which would present a significant opportunity for the disclosure of confidential information. The Consultant will advise the Authority of any such relationships that arise during the term of this Agreement. The Authority shall then have the option to terminate the Agreement without further liability of the Consultant, except to pay for services actually rendered.
13. **ADDITIONAL CONDITIONS:** The Consultant and the Authority acknowledge that there may be additional conditions, terms and provisions which shall apply specifically to the services to be performed. The parties agree to negotiate in good faith to agree upon such additional terms.
14. **ENTIRE AGREEMENT:** This Agreement constitutes the entire understanding of the parties and no representations or agreements, oral or written, made prior to its execution shall vary or modify the terms herein. This Agreement supersedes all prior contemporaneous communications, representations, or agreements, whether oral or written with respect to the subject matter hereof and has been induced by no representations, statements or agreements other than those herein expressed. No agreement hereafter made between the parties shall be binding on either party unless reduced to writing and signed by an authorized officer of the party sought to be bound thereby.
15. **INDEPENDENT STATUS:** Nothing contained in the Agreement shall be construed to render either the Authority or the Consultant a partner, employee or agent of the other, nor shall either party have authority to bind the other in any manner, other than as set forth in this Agreement, it being intended that the Consultant shall remain an independent contractor responsible for its own actions. The Consultant is retained by the Authority only for the purpose and to the extent set forth in this Agreement.

The Consultant is free to choose the aggregate number of hours worked and substantially all of the scheduling of such hours as it shall see fit at its discretion within the limitations set forth hereinbefore in Paragraph 2.

Neither the Consultant nor its employees shall be considered under the provisions of this Agreement or otherwise as having an employee, servant or agency status or as being entitled to participate in any plans, arrangements or distributions of the Authority.

In providing the services under this Agreement, the Consultant represents and warrants that it has complied with all applicable federal, state and local laws particularly with respect to licenses, withholdings, reporting and payment of taxes. The Consultant agrees to furnish copies of documentation to the Authority

evidencing its compliance with such laws. The Consultant further represents and warrants that any income accruing to the Consultant and its employees from the Agreement shall be reported as such to the appropriate taxation authorities.

16. **COMPLIANCE:** The Consultant agrees that the Agreement herein shall be in compliance with and governed by the provisions of Section 2875, 2876 and 2878 of the Public Authorities Law of the State of New York. The Consultant further affirms under the penalties of perjury that there was no collusion in the proposal submitted herein to ECWA which forms the basis of the within Agreement.
17. **GRATUITIES:** The Consultant prohibits its employees from using their positions for personal financial gain, or from accepting any personal advantage from anyone under circumstance which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their official duties. The Consultant or its employees shall not, under circumstances which might be reasonably interpreted as an attempt to influence the recipients in the conduct of their duties, extend any gratuity or special favor to employees of the Authority.
18. **NOTICE:** Any notices required by this Agreement or otherwise shall be delivered by United States Postal mail or personal delivery upon the addresses hereinbefore stated. Any change in such addresses shall be required to be in writing to the other party and acknowledged as such.
19. **SEVERABILITY:** If any provision of this agreement shall be held invalid or unenforceable, in whole or in part, such provision shall be modified to the minimum extent necessary to make it valid and enforceable, and the validity and enforceability of all other provisions of this agreement shall not be affected thereafter.
20. **TERMINATION:** The Authority reserves the right to terminate this contract in the event it is found that the Certification filed by the Consultant in accordance with New York State Finance Law §139-k was intentionally false or intentionally incomplete. Upon such finding, the Authority may exercise its termination right by providing written notification to the Consultant in accordance with the written notification terms of this contract.

ERIE COUNTY WATER AUTHORITY

By Robert Anderson
Robert Anderson, Chairman

NUSSBAUMER & CLARKE, INC.

By Michael T. Marino
Michael T. Marino, P.E., CEO - Engineering

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

On the 20th day of April, in the year 2017 before me personally came Robert Anderson to me known, who, being by me duly sworn, did depose and say that he resides in Amherst New York, that he is the Chairman of the Corporation described in the above instrument; and that he signed his name thereto by order of the Board of Directors of said Corporation.

Patricia Fabozzi
Notary Public

PATRICIA FABOZZI #4957586
Notary Public, State of New York
Qualified in Erie County
My Commission Expires October 16, 2017

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

On the 13th day of April, in the year 2017, before me personally came Michael T. Marino, to me known, who, being by me duly sworn, did depose and say that he resides in Niagara Falls, New York, that he is the CEO - Engineering of the Corporation described in the above instrument; and that he signed his name thereto by order of the Board of Directors of said Corporation.

Michele J. Rappl
Notary Public

MICHELE J. RAPPL
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 2/17/19