

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A PROFESSIONAL SERVICES AGREEMENT WITH KS ASSOCIATES AND DECLARING AN EMERGENCY.

WHEREAS, the City Engineer has solicited quotations for surveying and engineering design services for the 31900 Lake Road Outfall Rehabilitation Project; and

WHEREAS, the City Engineer and Public Service Committee have reviewed said quotations and recommended KS Associates of Elyria, Ohio; and

WHEREAS, Council coming now to consider said quotations has determined the quote submitted by KS Associates to be the best responsive quotation and is acceptable to this Council.

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF
THE CITY OF AVON LAKE, STATE OF OHIO:

Section No. 1: That the Mayor is hereby authorized and directed to enter into an Agreement with KS Associates of Elyria, Ohio, for surveying and engineering design services for the 31900 Lake Road Outfall Rehabilitation Project. The Agreement shall state among its terms that the cost of said personal services shall not exceed \$42,116.00 (Exhibit A).

Section No. 2: Upon completion of said surveying and engineering design services, the Director of Finance is hereby directed to deliver to KS Associates the warrant of this City in an amount not to exceed \$42,116.00 and to cause said warrant to be paid.

Section No. 3: That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council and that all deliberations of this Council and any of its committees which resulted in such formal actions, were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Section No. 4: That this Ordinance is hereby declared to be an emergency measure, the emergency being the necessity of rehabilitating the outfall along the shore of Lake Erie, thus for the health, safety, and welfare of the public. Therefore, this Ordinance shall take effect and be in full force immediately after its passage and approval by the Mayor.



Civil Engineers + Surveyors

September 5, 2022

Steve Presley
Finance Director
City of Avon Lake
150 Avon Belden Road
Avon Lake, Ohio 44012

260 Burns Road, Suite 100
Elyria, Ohio 44035
P 440 365 4730
F 440 365 4790
www.ksassociates.com

**RE: 31900 Lake Road Outfall Rehabilitation, Avon Lake, Ohio
KS Project #22098-3**

Dear Mr. Presley:

Please accept this proposal for professional surveying and engineering services that may be required to meet your objective.

Project Objective:

We understand that the City of Avon Lake (Client) wishes to rehabilitate the existing sewer outfall along the shore of Lake Erie at 31900 Lake Road in Avon Lake, Ohio. The rehabilitation is expected to include replacement of a portion of the outfall pipe, extending the pipe, and installation of new shore protection. To accomplish these objectives, we recommend the following scope of services:

Phase 1: Hydrographic, Topographic, and Boundary Survey

KS Associates will perform a topographic and boundary survey for the outfall easement at 31900 Lake Road in Avon Lake, Ohio. KS will also perform a hydrographic survey of the nearshore lakeward of the project site. The surveys will only include the site features required for the design of the proposed project and for the preparation of the permit applications. We will also obtain photographs of existing site conditions and prepare an existing site plan meeting the permit requirements of the Ohio Department of Natural Resources (ODNR).

Phase 2: Site Investigation, Preliminary Design, Permit Applications, and Permit Coordination

KS will perform one site visit to determine the extent of the existing outfall pipe that requires replacement and to observe the condition of the existing shore protection. Following the site visit, KS will prepare preliminary drawings and a preliminary engineer's opinion of probable construction costs for the proposed improvements to rehabilitate the outfall. The preliminary drawings will include sufficient detail for preparation of permit applications and will include a location map, existing site plan, proposed site plan, and cross sections of the proposed project. KS will submit the preliminary drawings to you for review and attend a meeting or conference call with you to discuss the proposed design.

Please note that preliminary drawings prepared for the purpose of obtaining regulatory permits are not final construction drawings and will be clearly marked "Not for Construction". The Owner is cautioned and advised not to use permit sketches for construction.

The proposed improvements to the outfall and new shore protection are anticipated to require authorization from the U.S. Army Corps of Engineers (USACE) pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The project is expected to qualify for authorization under Nationwide Permit 7 (Outfall Structures and Associated Intake Structures) and Nationwide Permit 13 (Bank Stabilization). The project is anticipated to require more than one cubic yard of fill below the Ordinary High Water Mark of Lake Erie (elevation 573.4 feet IGLD 1985). Therefore, the

project will exceed the conditions of the Ohio Environmental Protection Agency's (OEPA) certification of the Nationwide Permits and a Director's Authorization will be required from the OEPA pursuant to Section 404 of the Clean Water Act. The project will also require a Shore Structure Permit, Submerged Lands Lease, and Coastal Consistency Certification from ODNR pursuant to ORC Section 1506.

Upon your approval of the preliminary design, KS will prepare the ODNR and USACE permit applications for the project and submit them to you for signature. The Submerged Lands Lease in Phase 3 will also be prepared and submitted with the ODNR permit application. A pre-application meeting request form will also be submitted to OEPA to initiate coordination regarding the project.

Once the USACE issues a provisional authorization for the project, KS will prepare an application for a Director's Authorization from the OEPA. The OEPA charges a \$2,000 application fee at the time the application is submitted. The application fee is not included in the fees for this Phase and will be the financial responsibility of the Client.

KS Associates will coordinate the permit applications with the government agencies, as required, during their review periods and will revise the permit drawings, if requested by the agencies.

Phase 3: Preparation of Submerged Lands Lease Plat and Description

KS will prepare a Submerged Lands Lease Plat and Description for any portions of the proposed structures that extend lakeward of the natural shoreline and will submit the documents to ODNR along with the ODNR Shore Structure Permit Application. ODNR requires the Lease to be approved by the City of Avon Lake under a local ordinance. KS will coordinate City staff to obtain the local ordinance.

Phase 4: Final Construction Plans and Specifications

After approval of the permits or upon your notice to proceed, KS Associates will prepare a detailed design of the proposed outfall and shore protection improvements. KS will prepare final construction drawings, specifications, and an engineer's opinion of probable construction costs for the project, to be used for bidding purposes.

Professional Service Fees

Our fee for the listed scope of services will be billed for each phase based on direct labor costs, our ODOT approved overhead rate, ODOT approved facilities capital cost of money rate, and a net fee percentage of 11%. Reimbursable expenses will be billed at cost. The total fee for each phase will not exceed the following amounts for each phase:

Phase 1: Hydrographic, Topographic and Boundary Survey	\$10,707
Phase 2: Preliminary Design, Permit Applications, and Permit Coordination	\$19,473
Phase 3: Preparation of Submerged Lands Lease Plat and Description	\$ 2,570
Phase 4: Final Construction Plans and Specifications	<u>\$ 9,365</u>
TOTAL	\$42,116

KS will bill monthly for services rendered. The fees listed above do not include the OEPA application fee.

Schedule

If written authorization is received by September 30, 2022, KS will endeavor to perform the Phase 1 survey within 40 business days after the signed agreement is received. KS will endeavor to prepare the Phase 2 preliminary design drawings and opinion of probable construction costs within 30 business days of completing the survey. KS will endeavor to prepare the USACE and ODNR permit applications and Phase 3 Submerged Lands Lease documents within 20 business days of your approval of the preliminary design. KS will endeavor to prepare the OEPA application within 20 business days after receipt of the USACE provisional authorizations. The timing for preparing construction documents will be dependent on the regulatory review timelines, which are outside of our control.

Clarifications

- Additional Services:
 - The scope of services included above describes all services to be provided by KS under this contract. Any items not specifically listed in this proposal are not included. If the Owner requests additional surveying or engineering services beyond those included in this proposal, or if KS determines that additional services are required, KS will request a modification to this contract before the services are provided.
 - KS has estimated the man-hours necessary to perform this work based on our past experience and our understanding of the prevailing requirements. We have included a modest amount for MINOR revisions that may be requested/required by the reviewing agencies. If extensive revisions are mandated by ODNR, the USACE, OEPA, or you, after permit drawings and applications are completed, we will seek additional compensation before beginning such out-of-scope work.
 - Bidding and construction phase services are not included in this proposal. If requested, KS can aid with bidding and construction administration under a separate contract.
- Additional Properties:
 - The services detailed herein assume that the project will be constructed within the outfall easement at 31900 Lake Road. Extension of the project onto a neighboring property could require additional permits and Submerged Lands Lease documents, resulting in additional fees.
- Regulatory Permitting:
 - The Contractor will be responsible for obtaining any building permits from local jurisdictions required for the project.
 - Because the project is located along the shore of Lake Erie, the USACE jurisdiction is known. Individual and cumulative impacts to the human environment are also assumed to be minimal for typical projects on Lake Erie. Therefore, a Jurisdictional Determination, Categorical Exclusion, Environmental Assessment and Environmental Impact Statement should not be required and are not included in this scope of services. If these documents are required by the USACE, KS can prepare them for an additional fee. A qualified subconsultant will be required for environmental services.
 - KS does not anticipate that the proposed project will have adverse effects to historic properties. If required by the USACE, KS will prepare a project summary form to be submitted to the USACE to assist with their coordination with the Ohio Historic Preservation Office (pursuant to Section 106 of the Historic Preservation Act). This scope of services does not include historical or archeological investigations, coordination, evaluations, or data recovery. If additional historical or archaeological coordination is required, KS can recommend a qualified cultural resources management professional to perform these services under a separate contract.
- Opinions of Probable Construction Costs:
 - The engineer's opinions of probable construction costs will be made on the basis of the engineer's experience and qualifications and represent the engineer's best judgment as an experienced and qualified professional generally familiar with the construction industry. However, because the engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, the engineer cannot and does not guarantee that proposals, bids, or actual construction costs will not vary from opinions of probable construction costs prepared by the engineer.

Terms of the Agreement

By accepting this proposal, you agree to the Standard Conditions, which are integral parts of this Agreement.

In order to initiate services, please have a properly authorized person sign this Proposal, sign the Standard Conditions, and return the entire agreement to KS.

If you have any questions or comments, please call me at 419-239-5935 or email to cencerm@ksassociates.com. This engineering proposal is valid until September 30, 2023.

Sincerely,

KS ASSOCIATES, INC.



Mark P. Cencer, P.E.
Director of Coastal Engineering

Attachments:

Standard Conditions

cc: Lynn S. Miggins, P.E., President, KS Associates, Inc.
Project File / Billing File

This Proposal is hereby accepted by:

City of Avon Lake
150 Avon Belden Road
Avon Lake, Ohio 44012

Authorized Signature

Date

Printed Authorized Signature

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STANDARD CONDITIONS

Fee

The total fee shall be understood to be an estimate, based upon Scope of Services, and shall not be exceeded without written approval of the Client. Where the fee arrangement is to be on an hourly basis, the rates shall be those that prevail at the time services are rendered. Reimbursable expenses will be invoiced at cost with no markup.

Billings/Payments

Invoices for services and reimbursable expenses shall be submitted, at KS's option, either upon completion of the services or on a monthly basis. Invoices shall be payable within 30 days after the invoice date. A service charge of 1.5% (or the maximum legal rate) per month will be applied to the unpaid balance after 30 days from the invoice date. KS shall have the right to suspend/terminate services if payment is not received within 60 days after the invoice date and KS shall have no liability for any resultant delays or damages incurred by the Client as a result of such suspension/termination. Retainers shall be credited on the final invoice. The Client agrees to pay all costs of collection, including but not limited to reasonable attorney's fees.

Standard of Care

In providing services under this Agreement, KS will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. KS will perform its services as expeditiously as is consistent with professional skill and care and the orderly progress of KS's part of the Project. Regardless of any other term or condition of this Agreement, KS makes no express or implied warranty of any sort. All warranties, including warranty of merchantability or warranty of fitness for a particular purpose, are expressly disclaimed.

Consequential Damages

Notwithstanding any other provision to the contrary, and to the fullest extent permitted by law, neither the Client nor KS shall be liable to the other for any incidental, indirect or consequential damages arising out of or connected in any way to the Project or this Agreement. This mutual waiver of consequential damages shall include, but not be limited to, loss of use, loss of profit, loss of business or income or any other consequential damages that either party may have incurred from any cause of action whatsoever.

Unforeseeable Conditions

A condition is unforeseeable if concealed or is not capable of investigation by reasonable visual observation. If KS has reason to believe that such a condition may exist, the Client shall authorize and pay for all costs associated with the investigation of such a condition. If (1) the Client fails to authorize such investigation after such due cause of action in favor of a third party notification, or (2) KS has no reason to believe that such a condition exists, KS shall not be responsible for the existing conditions or any resulting damages or losses resulting therefrom.

Hazardous Materials/Mold

KS shall have no responsibility for the discovery, presence, handling, removal, disposal or exposure of persons to hazardous materials of any form including mold. The Client shall inform KS of any potentially hazardous condition prior to KS performing the services.

Indemnifications

~~The Client agrees, to the fullest extent permitted by law, to indemnify and hold KS and its subconsultants harmless from and against any and all damage, losses or cost (including reasonable attorneys' fees and defense costs) caused in whole or in part by its acts, errors or omissions and those of anyone for whom they are legally liable. KS further agrees to indemnify the Client for damages arising from its own negligent errors, acts or omissions.~~

Limitation of Liability

~~In recognition of the relative risks and benefits of the project to both the Client and KS, the Client agrees, to the fullest extent permitted by law, to limit KS's total liability to the Client or anyone making claims through the Client, for any and all damages or claim expenses (including attorney's fees) arising out of this Agreement, from any and all causes, to the amount of KS's actual fee charged to the client, or another amount agreed upon in writing and signed by both parties.~~

Termination of Services for Convenience

This Agreement may be terminated upon written notice by the Client for its convenience. In the event of termination, the Client shall pay KS for all services rendered to the date of termination, all reimbursable expenses, and reasonable termination expenses.

Termination of Services for Default

This Agreement may be terminated upon 10 days written notice by either party should the other fail to perform their obligations hereunder. In the event of termination, the Client shall pay KS for all services rendered to the date of termination, all reimbursable expenses, and reasonable termination expenses.

Ownership of Documents

All documents produced by KS under this Agreement, including electronic files, shall remain the property of KS and may not be used by this Client for any other purpose without the written consent of KS. Any such use or reuse shall be at the sole risk of the Client who shall defend, indemnify and hold KS and its subconsultants harmless from any

and all claims and/or damages arising therefrom. Electronic files are not contract documents and cannot be relied upon as identical to contract documents because of changes or errors induced by translation, transmission, or alterations while under the control of others. Use of information contained in the electronic files is at the user's sole risk and without liability to KS and its subconsultants.

Defects in Service

The Client shall promptly report to KS any defects or suspected defects in KS's services. The Client further agrees to impose a similar notification requirement on all contractors in its Client/Contractor contract and shall require all subcontracts at any level to contain a like agreement. Failure by the Client and the Client's contractors or subcontractors to notify KS shall relieve KS of the costs of remedying the defects above the sum such remedy would have cost had prompt notification been given when such defects were first discovered.

Construction Activities

KS shall not be responsible for (1) the acts or omissions of any one performing any of the Work, (2) the instructions given by the Client or its representatives to any one performing any of the Work, (3) the means and methods of anyone performing any of the Work, (4) job-site safety.

Dispute Resolution

In the case of a claim or dispute between the Client and KS, at least one principal from each party shall enter into a negotiation to resolve the dispute. If the parties cannot reach resolution, the claim or dispute shall then be submitted to non-binding mediation, subject to the parties agreeing to a mediator(s). If the Parties cannot agree upon a mediator the claim or dispute shall be submitted to the American Arbitration Association (AAA) for mediation in accordance with the Construction Arbitration and Mediation Rules of the AAA then in effect. Unless otherwise specified, the laws of the State of Ohio shall govern this Agreement.

No Third Party Beneficiaries

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Consultant. The Consultant's services under this Agreement are being performed solely for the Client's benefit, and no other party or entity shall have any claim against the Consultant because of this Agreement or the performance or nonperformance of services hereunder. The Client and Consultant agree to require a similar provision in all contracts with contractors, subcontractors, subconsultants, vendors and other entities involved in this Project to carry out the intent of this provision.

Standard Conditions Accepted by the Client:

Authorized Signature

Title

Date

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PASSED: 9/26/2022

/s/ Martin E. O'Donnell

President of Council

POSTED: 9/30/2022

APPROVED: 9/27/2022

ATTEST: /s/Valerie E. Rosmarin
Clerk of Council

/s/ Gregory J. Zilka
Mayor