

TOWN OF WEST SENECA



SHEILA M. MEEGAN
TOWN SUPERVISOR

To: Fellow Town Board Members
From: Sheila M. Meegan, Town Supervisor
Date: March 20, 2014
Re: **Amendment No. 1 for Contract No. C004507**

Kindly authorize the Supervisor to complete and sign the Amendment No. 1 for Contract NO. C004507 for the Agreement Between the State of New York and the Town of West Seneca for the design deficiency correction construction for the Cazenovia Creek Ice Control Project. The contract term is from March 1, 2003 through project completion which currently is projected for sometime in 2016.

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New York State Department of Environmental Conservation

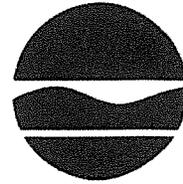
Division of Water

Bureau of Flood Protection & Dam Safety, 4th Floor

625 Broadway, Albany, New York 12233-3504

Phone: (518) 402-8267 • FAX: (518) 402-9029

Website: www.dec.ny.gov



Joe Martens
Commissioner

March 5, 2014

Ms. Sheila M. Meegan
Supervisor
Town of West Seneca
Town Hall
1250 Union Road
West Seneca, New York 14224

Dear Ms. Meegan:

Enclosed is one (1) copy of the proposed Amendment No. 1 for Contract No. C004507 for the Agreement Between the State of New York and the Town of West Seneca for the design deficiency correction construction for the Cazenovia Creek Ice Control Project. The contract term is from March 1, 2003 through project completion which currently is projected for sometime in 2016.

This contract requires the notarized signature of the authorized representative. Please forward a municipal resolution with original signature and raised seal when you return the proposed contract. Please return the original signed and notarized contract plus the two original signature pages as soon as possible to my attention at: NYSDEC, Division of Water, 625 Broadway, 4th Floor, Albany, NY 12233-3504.

Any technical questions should be referred to Theodore Myers, P.E., Regional Flood Control Engineer, at (716) 851-7070. Any administrative questions should be referred to me at (518) 402-8223.

Thank you for your efforts in protecting the lives and property of the local residents.

Sincerely,

Linda Lee Jennings
Environmental Program Specialist 1

Enclosures

c: w/letter only:

T. Myers, P.E., NYSDEC, Region 9, Buffalo

S. Dong, P.E., NYSDEC, Albany

M. June, NYSDEC, M/WBE Program Office, Albany

004507

**AMENDMENT NO. 1
TO THE AGREEMENT
BETWEEN
THE STATE OF NEW YORK
AND
TOWN OF WEST SENECA
FOR
THE CONSTRUCTION
OF THE
CAZENOVIA CREEK ICE CONTROL PROJECT**

THIS AMENDMENT NO. 1 is entered into by and between the Department of Environmental Conservation of the State of New York (hereinafter referred to as the "State") with main offices located at 625 Broadway, Albany, New York and the Town of West Seneca (hereinafter referred to as the "Town") with offices located at 1250 Union Road, West Seneca, New York 14224. The Town and the State are jointly referred to as 'Non-Federal Sponsor.

WITNESSETH THAT:

WHEREAS, the State and the Town entered into an agreement approved by the New York State Comptroller's Office on June 11, 2003 (hereinafter the "Agreement") a copy which is attached as Attachment 1, to develop the Cazenovia Creek Ice Control Project pursuant to the authority contained in Section 205 of the Flood Control Act of 1948, as amended; and

WHEREAS, the Department of the Army (herein after called the "Government") and the State entered into an agreement on May 9, 2003 a copy of which is attached as Attachment 2, for the construction of Cazenovia Creek Ice Control Structure at West Seneca, New York; and

WHEREAS, the State and Town hereby express their intent to further cooperate with the Government for construction of the project, in order to reduce flooding in the area; and

WHEREAS, a design deficiency correction was approved for construction by the Division Engineer, Great Lakes and Ohio River Division by memorandum dated December 6, 2012 pursuant to the authority contained in Section 205 of the Flood Control Act of 1948, as amended, 33 U.S.C.701s; and

WHEREAS, the Town hereby represents that it has the authority and capability to enter into this Amendment and furnish the Non-Federal cooperation as described in this agreement; and

WHEREAS, pursuant to ARTICLE XII-MODIFICATIONS of the State and Town Agreement, the Agreement may be modified in writing subscribed by both parties; and

NOW, THEREFORE, the State and the Town agree to amend the Agreement as follows:

1. The following WHEREAS clause is added:

1534003

“WHEREAS, a design deficiency correction was approved for construction by the Division Engineer, Great Lakes and Ohio River Division by memorandum dated December 6, 2012 pursuant to the authority contained in Section 205 of the Flood Control Act of 1948, as amended, 33 U.S.C.701s.”

ARTICLE I – DEFINITIONS

2. Article I, b of the Agreement is amended by striking the paragraph and replacing with the following:

b. The term “Project” shall mean the “flood risk management features” as generally described in the Detailed Project Report approved by Chief, Planning Division HQ on September 12, 1986 and subsequently modified by Cold Regions Research and Engineering Laboratory Report: Cazenovia Creek Ice Control Structure, dated August 2000 and the “design deficiency correction features” as generally described in the Design Deficiency Report dated April 30, 2012 and approved by the Division Engineer, Great Lakes and Ohio River Division on December 6, 2012”.

3. Article I, c of the agreement is amended by striking the first sentence and replacing it with the following:

c. “The term “total projects costs” shall mean the sum of all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of the agreement directly related to design and construction of the Project”.

4. Article I, a new Paragraph e is added as follows:

e. The term “flood risk management features” shall mean construction of nine, 5-foot diameter cylindrical piers across Cazenovia Creek, approximately 2,300 feet upstream of the Mill Road Bridge and a riprap berm along the right bank as generally described in the Detailed Project Report approved by the Chief, Planning Division, HQ on September 12, 1986 and subsequently modified by Cold Regions Research and Engineering Laboratory Report: Cazenovia Creek Ice Control Structure, dated August 2000.

5. Article I, a new Paragraph f is added as follows:

f. “The term “design deficiency correction features’ shall mean base site improvements and structural stream bank improvements as generally described in the Design Deficiency Report dated April 30, 2012 and approved by the Division Engineer, Great Lakes and Ohio River Division on December 6, 2012.”

6. Article I, a new Paragraph g is added as follows:

g. The term “total flood risk management costs” shall mean the portion of total project costs allocated to the flood risk management features.

7. **Article I, a new Paragraph h is added as follow:**
 - h. The term “total design deficiency correction costs” shall mean the portion of total costs allocated to the design deficiency correction features.
8. **Article I, a new Paragraph i is added as follows:**
 - i. The Non-Federal Sponsor shall contribute a minimum of 35 percent, but not to exceed 50 percent, of total design deficiency correction costs.

ARTICLE II – OBLIGATIONS OF PARTIES

9. **Article II, a is amended by striking the paragraph and replacing with the following:**
 - a. As of the effective date of this Amendment, Total Flood Risk Management Costs are projected to be \$4,753,173.80 and the Non-Federal Sponsor’s cash contribution required of this agreement is projected to be \$228,250.00. The State and Town are each responsible for 50 percent of the Non-Federal share of the design deficiency correction share. Each share of the design deficiency correction features are currently estimated at \$114,125.00. The State shall provide its share to the Government within 30 days of being notified by the Government of the estimated Non-Federal share of costs.
10. **Article II, b is amended by striking the paragraph and replacing with the following:**
 - b. The Town’s cash share is the Town’s Non-Federal share of flood risk management features less the credit allowed the Town for the acquisitions of project lands as detailed in subparagraph “f” below. The Town shall provide its cash share to the Government prior to solicitation of bids for construction of the Project as further specified in Article V of this Agreement. The Government and Non-Federal parties acknowledge that the Town will incur costs greater than its fair share because the Town has agreed, with consent of all parties, to undertake the State’s obligation to acquire all necessary lands for the Project, as clarified and stated in more detail in subparagraphs below. By way of example, the property acquisition costs attributed to the Non-Federal Sponsor (i.e. The Town) are currently estimated to be \$736,250. In light of the above and in order to ensure that each Non-Federal party pays its fair share of Total Project Costs, and no more, the Government or the State, shall reimburse the Town for its flood risk management features cost which exceed 50 percent on the Non-Federal share of such flood risk management features cost, subject to the availability of funds.

11. Article II, a new Paragraph o is added as follows:

o. If the Government projects that the value of the Non-Federal Sponsor's contributions under this Agreement that are determined by the Government to be attributable to the design deficiency corrections features will be less than 25 percent of total design deficiency corrections costs, the Non-Federal Sponsor shall provide an additional cash contribution, in the amount necessary to make the Non-Federal Sponsor's total contribution equal to 25 percent of total design deficiency correction costs.

12. Article II, a new Paragraph p is added as follows:

p. If the Government determines that the value of the Non-Federal Sponsor's contributions provided has exceeded 45 percent of total design deficiency correction costs, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for any such value in excess of 45 percent of total design deficiency correction costs. After such a determination, the Government, in its sole discretion, may provide any remaining lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas and perform any remaining relocations for the design deficiency correction features on behalf of the Non-Federal Sponsor.

13. Article II, a new Paragraph q is added as follows:

q. The Government shall not incur costs for mitigation and data recovery that exceed the statutory one percent limit unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit in accordance with Section 208(3) of Public Law 96-515 (16 U.S.C. Section 469c-2(3)). Any costs of mitigation and data recovery that exceed the one percent limit shall not be included in total project costs but shall be cost shared between the Non-Federal Sponsor and the Government consistent with the minimum non-Federal cost sharing requirements for the underlying flood control purpose, as follows: for flood risk management features, 25 percent borne by the Non-Federal Sponsor, and 75 percent borne by the Government, and for design deficiency correction features, 35 percent borne by the Non-Federal Sponsor, and 65 percent borne by the Government.

ARTICLE IV – PROJECT PHASING AND MANAGEMENT

14. Article IV, d of the Agreement is amended by striking the paragraph and replacing with the following:

d. For the purpose of this paragraph, any notifications to the Town shall be sent to:

Supervisor, Town of West Seneca
Town Offices
1250 Union Road
West Seneca, NY 14224

Any notification to the State shall be sent to:

Director, Bureau of Flood Protection and Dam Safety
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-3504

ARTICLE V – METHOD OF PAYMENT

15. **Article V - Method of Payment** is replaced with the following:

- a. Unless otherwise requested in writing by the State, the Town agrees to provide its share of the Project to the Government. The Government will designate an account for deposit or specify a payee for the check.
- b. If at any time, the Government determines that additional funds will be needed from the State to cover the Non-Federal Sponsors obligation under the Project; the State shall notify the Town of the request of such additional funds, providing the Town with a written explanation. Within 60 days from the receipt of such notice, the Town will provide the Government with the full amount of such additional funds through the payment method specified in paragraph a of this Article except otherwise stated by the State.

ARTICLE VI - OPERATIONS, MAINTENANCE, REPAIR, REPLACEMENT AND REHABILITATION (OMRR&R)

16. **Article VI Operations, Maintenance, Repair, Replacement, and Rehabilitation (OMRR&R)** the following paragraphs are added:

- c. As defined herein, the Town shall operate, complete routine maintenance, and complete minor repair of Project components or any functional portion of the Project for the life of the Project, at no cost to the Federal Government and the State in a manner compatible with: the Project's authorized purposes, in accordance with obligations as specified in Article II subparagraphs "h", and in accordance with specific directions prescribed herein.
- d. Upon written notice to the Town, the State may choose to undertake any activity that is otherwise noted herein as being the responsibility of the Town. The written notice shall include whether such an activity will be undertaken by the State as a single occurrence or repeatedly for the life of the project.
- e. In the event that the specific responsibility for an operation, maintenance, repair, replacement and/or rehabilitation activity is not clearly defined herein, the State and Town may negotiate a mutually acceptable resolution that involves

either a shared or sole responsibility for the activity. The mutually acceptable resolution shall be provided in writing to all parties involved.

f. All materials used for any repair must be equal to or better than the materials used in the original construction. Repair must also be accomplished in conformance with the "as-built" drawings.

g. At the time the Federal Government turns the Project over to the State, the Town shall assume its operation and maintenance duties of the Project as outlined herein.

h. The Town, in consultation with the State, shall obtain all necessary State and Federal permits for carrying out its operation and maintenance duties.

i. No other improvements shall be constructed over, under, or through the protective features, nor shall any construction or excavation (except for approved removal of sediment) be permitted within the limits of the project right-of-way, nor shall any change be made in the project without prior written approval of the ACOE and State.

j. Project components and features referenced within this Agreement are as described in the Federal Government Operation and Maintenance Manual for the Cazenovia Creek Ice Control project.

k. The routine operation and maintenance duties of the Town shall include the following (except where noted):

1. The Town shall be responsible for maintenance of organized records of activities and costs expended in undertaking operation and maintenance duties of the Town. These records shall be available to the State upon written request.

2. The Town shall be responsible for coordination with the State in the performance of necessary inspections and a follow up annual inspection once per year, after results of the Corps of Engineers joint annual inspection are provided to the State.

3. Based on inspection and notification from the State, the Town shall complete minor repair of damage to the Ice Control Piers or cracking of the concrete, erosion around foundations, or concrete joint damage if any such damage is discovered during inspection. Note: concrete repair beyond routine patching and sealing or significant erosion around the foundation shall be the responsibility of the State.

4. The Town shall be responsible for removal of trees, branches and other similar debris trapped behind the ice control piers or ice control boulders. At a minimum, the Town shall remove debris and any unapproved encroachments seasonally and prior to the accumulation of ice in the channel each winter.

5. The Town shall be responsible for removal of sediment routinely deposited and/or accumulating behind the ice control piers. At a minimum, the Town should remove sediment seasonally and prior to the accumulation of ice in the channel each winter. Under no circumstances should the sediment and/or debris be removed from the creek when there is an intact ice jam at the Ice Control Structure.

6. Based on inspection and notification from the State, the Town shall be responsible for correcting damage to any improved creek bank within the project area such as: unwanted vegetative growth; encroachments; minor sloughing of bank slopes; minor bank erosion or scour; minor settlement, depressions, or rutting; animal activity; minor displacement of stones and rip-rap; or other similar damage. Note: If the disturbance of the bank is greater than 50 ft in length, the State may assist the Town with the repair.

7. Based on inspection and notification from the State, the Town shall be responsible for correcting damage to the Flow Diversion Channels such as: unwanted vegetative growth, encroachments, minor shoaling, minor erosion, displacement of stones and rip-rap, or other similar damage. Note: If the disturbance of the bank is greater than 50 ft in length, the State may assist the Town with the repair.

8. The Town shall be responsible for the routine repair of minor damage to the Gravel Access Road and associated staging areas. Such damage may include: minor settlement or depressions; minor rutting; encroachments; or minor damage to the access gate. The access road shall be maintained in a drivable condition so access to the Ice Control Structure is uninterrupted. These areas shall be maintained and top-dressed with gravel, as necessary, to maintain a constant level elevation across the entire access road and staging areas(s). Note: The costs involving extensive repair or replacement of the access gate shall be shared equally by the State and Town. In the event the access road or staging areas are extensively damaged by high water or a storm event (or a repetition of frequent high water events), the state may assist the Town with the repair.

9. If an inspection shows that the Town has failed to meet its obligations under this Agreement, the Federal Government or the State shall have the right to operate, repair and maintain the Project. The Town shall be responsible for reimbursement to the Federal Government or the State for any such action that the Federal Government or the State has undertaken due to any failure of the Town to perform its obligations under this Agreement. No such action by the Federal Government or the State shall operate to relieve the Town of responsibility to meet its obligations as set forth in this Agreement or to preclude the Federal Government or State from pursuing any other remedy at law or equity to assure faithful performance pursuant to this Agreement.

ARTICLE XVI - APPENDICES

17. Article XVI is amended by striking it and replacing with the following:

ARTICLE XVI – APPENDICES AND ATTACHMENTS

APPENDIX A, Standard Clauses for all New York State Contracts, and APPENDIX B, Standard Clauses for all New York State Department of Environmental Conservation Contracts are replaced with new Appendix A, dated January 2014 and new Appendix B, dated March 2013.

ATTACHMENT 1, Original Agreement between the State and Town approved by the Comptroller on June 11, 2003 and

ATTACHMENT 2, Original Agreement between the Department of Army and the State dated May 9, 2003 and 1st amendment to that agreement.

All other terms and conditions of the agreement between the State and the Town as amended remain unchanged and in full force and effect.

C004507

IN WITNESS WHEREOF, the parties hereto have executed Amendment No. 1 as of the day and year appearing above their respective signatures.

The State of New York

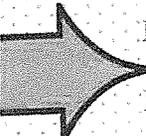
In addition to the acceptance of this Amendment, I also certify that original copies of this signature page will be attached to all other exact copies of this Amendment.

BY: _____

DATE: _____

Nancy Lussier
Director of Division of Management and Budget Services

Town of West Seneca, New York



BY: _____

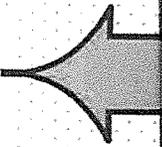
DATE: _____

Sheila M. Meegan
Supervisor, Town of West Seneca

State of New York

County of _____ ss.:

On the _____ day of _____ in the year 2014, before me the undersigned, a Notary Public in and for said State, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose names(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity (is), and that by his/her/their signatures(s) on the instrument, the individual(s) or the person upon behalf of which the individual(s) acted, executed the instrument.



NOTARY PUBLIC

Approved:
Attorney General

Approved:
State Comptroller

BY: _____

BY: _____

DATE: _____

DATE: _____