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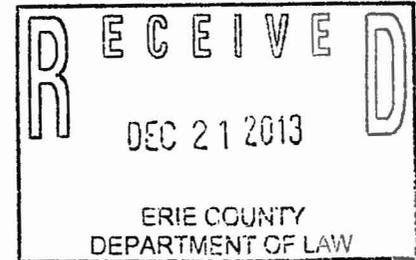
OF COUNSEL
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FAX: 716-855-3101
(NOT FOR SERVICE OF PAPERS)

December 20, 2013

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FOR SETTLEMENT PURPOSES ONLY;
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Michael Siragusa, Esq.
Erie County Attorney
Erie County Department of Law
Rath Building
95 Franklin Street – Room 1634
Buffalo, New York 14203



RE: County of Erie – LPCiminelli Construction Corporation

Project: Contract 79A General/Mechanical
Lake Street and Point Breeze Pumping Station

Dear Mr. Siragusa:

Please be advised that we represent LPCiminelli Construction Corp.

We have been reviewing various issues with respect to the above referenced project in an effort to determine if these can be resolved in an amicable basis so that this project can be closed out. We understand that you have also been reviewing certain matters with respect to this project.

We are also in receipt of the letter dated November 12, 2013 from Joseph L. Tiegl, P.E. to Frank L. Ciminelli II of LPCiminelli, which appears to be the latest communication with respect to this matter.

We note that LPCiminelli representatives have previously had a number of discussions with representatives of the Department of Environment and Planning, but have not been able to resolve the issues that are presented by this project. So it would seem that involvement with lawyers in this process is now necessary. We have been asked by our client to initiate contact with you.

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Please note the following matters:

1. Schedule Delays. LPCiminelli contends that the project was operationally functional approximately twelve (12) months following the original date for substantial completion. The County contends there was an additional four (4) months of time before the project was "accepted". LPCiminelli does note that it was substantially delayed during the course of the project by a number of factors that were caused by the County and its design team. These included delays of seven (7) months based on a lack of permanent power that was to be provided to the project that required an easement from National Grid, delays for another two (2) months for design issues, delays for repairs in cracks in some underground chambers that caused another (1) month of delays and additional delays of almost two (2) months for the testing of the Point Breeze station. We have asked LPCiminelli to put together a time-line analysis of the delays that were encountered. You will see that attached as **Exhibit 1**. During the course of the project, LPCiminelli provided notices to the County that delays beyond LPCiminelli's control were impacting the project schedule. An example is LPCiminelli's letter dated October 22, 2010 attached as **Exhibit 2**. At the most LPCiminelli contends that it was responsible for about six (6) weeks of the delay in completing the project.

2. Base Contract Balance. LPCiminelli is owed retention with respect to this project of \$279,535 that was billed on January 25, 2013. You will see this attached as **Exhibit 3**. No action has been taken with respect to that as the parties have been engaged in close-out discussions.

3. Concrete Gutter Replacement along Lake Street. LPCiminelli also claims that it is owed \$5,544 for the replacement of certain concrete gutters along Lake Street as detailed in **Exhibit 4**. LPCiminelli does not believe that this should be a disputed issue.

4. Crack Repair. LPCiminelli incurred costs to repair the cracks in the underground chambers in the pump station. Here, the County contended that there were construction related deficiencies, but those were never detailed. LPCiminelli contends that its construction was in accordance with the design and, accordingly, LPCiminelli is not responsible for the cracking. LPCiminelli notes that the design for the project relied exclusively on an admixture in the concrete for waterproofing. According to LPCiminelli consultants, there should have been a better waterproofing system as part of the design. This was a topic, among others, that was addressed by LPCiminelli in its letter to the County dated May 24, 2011, a copy of which is attached as **Exhibit 5**. LPCiminelli claims that it should be reimbursed \$55,721 for its work in dealing with the crack repairs as detailed in **Exhibit 6**.

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5. Extended General Conditions. The delays on the project caused LPCiminelli to incur costs for extended general conditions. These have been tabulated and amount to \$92,763 as detailed in **Exhibit 7**. In their discussions with LPCiminelli, the County representatives have flatly refused to consider compensating LPCiminelli for costs for these extended general conditions noting that there is a “no damage for delay” clause in the contract. But, as you know, if there is a failure by an owner to perform its obligations under a contract and/or interference by an owner in the performance of a contractor’s work that delays the contractor, compensating the contractor for extended general conditions costs is appropriate. Here, that is what occurred by the failure to provide for the permanent power and a number of the other delays set forth above as detailed in **Exhibit 1** that were caused by the County or its design team. LPCiminelli was not responsible for these delays. The delays were County caused.

6. Summary of Amounts Claimed to be Owed. From LPCiminelli’s perspective, the following amounts are owed:

Contract Retention	\$	279,535
Concrete Gutter Work		5,544
Crack Repairs		55,721
Extended General Conditions		<u>92,763</u>
Total	\$	433,563

7. Liquidated Damages. The Department of Environment and Planning have threatened to assess liquidated damages against LPCiminelli claiming that the Project was delayed by LPCiminelli. Mr. Fiegl’s letter of November 12, 2013 indicates that the project was delayed for a period of 486 days and, at the rate of \$400/day, the liquidated damages amount could be \$194,400. We are not seeing it. As indicated in **Exhibit 1**, there are delays of at least twelve (12) months that are not at all attributable to LPCiminelli. We note that there was a period of about twelve (12) months that this project was delayed in delivery putting aside some actions by the County (delays in testing, etc.) that resulted in the County not deeming project to be “accepted” for an additional four (4) months. We also question whether the \$400/day amount bears any relationship to any actual loss that could have been incurred by the County for a delay in the completion of the project. As you know, liquidated damages that are penalties are not

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enforceable. At most, LPCiminelli contends that the maximum potential assessment to LPCiminelli would be no more than forty-two (42) days. That amounts to \$16,800, not \$194,400 that is claimed by the County.

8. Engineering Costs. Similar to its threat to assess liquidated damages, the County has also threatened to assess LPCiminelli for the additional costs that were incurred here based on the length of time that it took to complete this project. In his letter dated November 12, 2013, Mr. Fiegl notes that \$261,599 was incurred by the County in engineering costs subsequent to the contract completion date, but we are having trouble seeing that assessment as being properly attributed to LPCiminelli. In fact, some of the engineering costs that are threatened to be assessed include the time spent by the County's engineers on design modifications that pertained to the scope of the work of other prime contractors to the County. Other additional costs that were incurred were the result of the project being delayed, but that delay is not properly attributable to LPCiminelli to the extent claimed by the County. Even if we assume that LPCiminelli were to be responsible for 15% of these costs, the assessment to LPCiminelli would be \$39,240, not the \$261,599 that is claimed.

Based on our analysis, we see LPCiminelli being owed \$433,563 with potential assessment for liquidated damages and engineering costs aggregating less than \$100,000.

In his letter of November 12, 2013, Mr. Fiegl indicated that the County is willing to settle this matter based on a \$100,000 reduction in LPCiminelli's contract with the County. LPCiminelli values its relationship with the County and, like the County, would like to resolve this matter on a fair and amicable basis. Even though LPCiminelli believes that, at most, that reduction should be \$56,040 (being \$16,800 for liquidated damages and \$39,240 for engineering costs), LPCiminelli would be willing to settle this matter on the following basis:

Amount owed to LPCiminelli as set forth above	\$	433,563
<u>Less: Agreed to reduction</u>		<u>100,000</u>
Final payment	\$	333,563

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Mr. Fiegl invites further dialogue on this in his letter of November 12, 2013, and we think that both the County and LPCiminelli would be best served if you or your office could become more involved in that process.

We recommend the following:

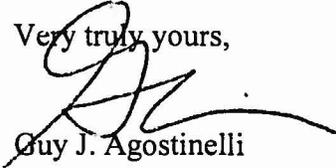
1. Face to face settlement discussions between the County and LPCiminelli with counsel.
2. If a resolution cannot be reached, LPCiminelli would consider mediation of the matter.

Please call me or have one of your assistants call me following your review of this letter and the enclosures.

Of course, this letter and the enclosures are provided to you for settlement purposes only, and is without prejudice to all rights and remedies of LPCiminelli, all of which are hereby reserved.

I shall look forward to hearing from you.

Very truly yours,


Guy J. Agostinelli

GJA/wk
Enclosures

cc: LPCiminelli Construction Corp.
Attn: Frank L. Ciminelli II
John L. Walker
(each with copies of enclosures)

Exhibits

Exhibit Number

Description

- | | |
|---|---|
| 1 | LPCiminelli time-line analysis of delays |
| 2 | LPCiminelli Letter dated October 22, 2010 |
| 3 | LPCiminelli January 25, 2013 Billing for Retention |
| 4 | Detail of Costs of \$5,544 for Concrete Gutters along Lake Street |
| 5 | LPCiminelli Letter dated May 24, 2011 |
| 6 | LPCiminelli Costs for \$55,721 for crack repairs |
| 7 | Extended General Conditions Costs of \$92,763 |