

DATE: SEPTEMBER 15, 2008

CLERK: MARY BETH BAILEY

MASSILLON CITY COUNCIL  
CITY OF MASSILLON, OHIO  
GLENN E. GAMBER, PRESIDENT

COUNCIL CHAMBERS

LEGISLATIVE DEPARTMENT

ORDINANCE NO. 116 - 2008

BY: ENVIRONMENTAL COMMITTEE

TITLE: AN ORDINANCE authorizing the Mayor of the City of Massillon, Ohio, to enter into the Settlement and Joint Prosecution Agreement with Kokosing Construction Company, Inc., regarding the construction and upgrade of the Wastewater Treatment Plant, and declaring an emergency.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MASSILLON,  
STATE OF OHIO, THAT:

Section 1:

The Council of the City of Massillon, Ohio, hereby determines it to be necessary in the public health, safety and welfare to enter into the Settlement and Joint Prosecution Agreement with Kokosing Construction Company, Inc., regarding the construction and upgrade of the Wastewater Treatment Plant.

Section 2:

The Mayor of the City of Massillon, Ohio, is hereby authorized and directed to enter into the Settlement and Joint Prosecution Agreement with Kokosing Construction Company, Inc., regarding the construction and upgrade of the Wastewater Treatment Plant.

(ATTACHED EXHIBIT "A" HERETO)

Section 3:

This Ordinance is hereby declared to be an emergency measure necessary for the preservation of the health, safety and welfare of the community and for the additional reason that it is necessary the issues concerning the construction and upgrade of the Wastewater Treatment Plant are resolved. Provided it receives the affirmative vote of two-thirds of the elected members to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor. Otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

PASSED IN COUNCIL THIS 15<sup>th</sup> DAY OF September, 2008

ATTEST:

Mary Beth Bailey  
MARY BETH BAILEY, CLERK OF COUNCIL

Glenn E. Gamber  
GLENN E. GAMBER, PRESIDENT

APPROVED:

September 16, 2008 Francis H. Cicchinelli, Jr.  
FRANCIS H. CICCHINELLI, JR., MAYOR

I hereby certify that the foregoing ordinance  
is a true copy of the original, as passed by  
the Council of the City of Massillon, Ohio,  
and approved as noted thereon:

Mary Beth Bailey  
Clerk of Council

Date 9/15/08

## SETTLEMENT AND JOINT PROSECUTION AGREEMENT

This Settlement and Joint Prosecution Agreement ("Agreement") is made on this \_\_\_\_ day of August \_\_\_\_, 2008 (the "Effective Date") by and between Kokosing Construction Company, Inc. ("Kokosing") and the City of Massillon, Ohio ("Massillon").

WHEREAS, on May 4, 1999, Massillon entered into an Agreement (the "CTI Design Agreement") with CTI Environmental, Inc. ("CTI") for the design and performance of civil and structural engineering services on the project known as the Regional Wastewater Treatment Plant Upgrade 2000 in Massillon, Ohio (the "Project");

WHEREAS, on May 23, 2001, Massillon entered into an Agreement (the "CTI Construction Administration Agreement") with CTI for certain construction administration and other engineering services on the Project;

WHEREAS, on December 18, 2001, Kokosing and Massillon entered into a Construction Agreement (the "Contract") related to the Project;

WHEREAS, a dispute arose between Kokosing and Massillon wherein Kokosing asserted that Massillon failed to satisfy its obligations under the Contract;

WHEREAS, as a result of the dispute between Kokosing and Massillon, Kokosing asserted claims against Massillon for extra-contractual work and additional compensation relating thereto which Kokosing claimed arose from 1) a differing site condition, 2) errors and omissions in the design documents prepared by CTI pursuant to the Design Contract, 3) changes to the work ordered by Massillon and/or CTI, 4) schedule impacts arising from such errors and omissions and changes and 5) interest

pursuant to R.C. 153.63 due upon the retainage withheld by Massillon (collectively referred to as the "Kokosing Claims");

WHEREAS, on May 7, 2008, Massillon and Kokosing participated in a mediation for the purpose of attempting to settle and resolve the Kokosing Claims;

WHEREAS, as a result of the mediation the parties were able to settle and resolve the Kokosing Claims and the parties wish to set forth the terms of the settlement of such claims herein;

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. The above paragraphs are fully incorporated by reference and are not mere recitals and are relied upon by the parties hereto as a material part of this Agreement;
2. Kokosing and Massillon agree that the Kokosing Claims were each timely submitted under the Contract and Massillon further acknowledges that it had actual knowledge of each of the Kokosing Claims as they arose on the Project.
3. Massillon acknowledges liability to Kokosing for the Kokosing Claims.
4. In satisfaction of the Kokosing Claims for the differing site condition on the project Massillon does hereby agree to pay to Kokosing the sum of Five Hundred Twenty Five Thousand Dollars (\$525,000.00), ("Settlement Amount"). Massillon agrees to make payment to Kokosing of the Settlement Amount within 10 business days of receipt of complete funding for the Settlement Amount from external sources such as but not limited to Ohio Water Development Authority ("OWDA") and/or the Ohio Environmental Protection Agency ("OEPA"). Kokosing will cooperate fully with all of

Massillon's efforts to successfully procure funding for the Settlement Amount from whatever sources may be available. If no such funding is received by September 30, 2008, Kokosing may rescind this Agreement anytime thereafter unless the Settlement Amount has been paid before such rescission.

5. Kokosing and Massillon acknowledge that the ultimate liability for the Kokosing Claims relating to defects, errors and omissions in the Project's design and engineering, including the costs of delays and other schedule impacts associated therewith, is ultimately the responsibility of CTI. Massillon hereby acknowledges that it has claims against CTI for the Kokosing Claims arising out of the CTI Design Agreement, the CTI

~~Construction Administration Agreement and in tort or at law (collectively referred to as~~  
the "CTI Claims"). Massillon hereby represents and warrants that except as may be set forth in the CTI Design Agreement or CTI Construction Administration Agreement there has been no settlement, waiver, release or other similar fact or circumstance that would negate or abridge any liability of CTI under the CTI Design Agreement, the CTI Construction Administration Agreement or in tort or at law.

6. In consideration of the partial settlement of the Kokosing Claims as set forth in paragraph 4 above and its undertaking of the prosecution of the CTI claims as set forth herein, Massillon does hereby fully assign to Kokosing each and every, any and all, claims that it had or now has relating to or arising out of the CTI Design Agreement, whether such claims arise in contract or in tort. Claims arising out of or relating to the CTI Construction Administration Agreement are expressly excluded from assignment to Kokosing.

7. In the event that the assignment contemplated by paragraph 6 above is for any reason found to be ineffective, null, void or failing of its fundamental purpose, and in order to fulfill the ultimate purpose of this Agreement, Massillon hereby appoints Kokosing as its agent for the prosecution of any and all of Massillon's claims against CTI relating to the CTI Design Agreement. As the agent of Massillon, Kokosing is hereby authorized to undertake all such actions as Kokosing deems to be reasonably necessary for the prosecution of the CTI Claims on behalf of Massillon, including, but not limited to the selection of counsel and expert witnesses, the conduct of the preparation and prosecution of the CTI Claims and any settlement of the CTI Claims.

~~8. The parties to this Agreement shall be responsible for their respective~~  
attorney's fees incurred through the date of this Agreement. Kokosing agrees to bear the sole and exclusive responsibility for all legal fees of counsel retained by it and all expenses incurred after the date of this Agreement in the prosecution of the CTI Claims (except as the provisions in paragraph 9 apply). However, if any party is required to initiate legal action to enforce the terms of this Agreement, then the prevailing party shall be entitled to recover from the other party its reasonable attorney's fees and costs incurred in such action;

9. It is understood and agreed by the parties that in the event of any recovery from CTI upon the CTI Claims, whether pursuant to paragraphs 6 or 7 above, such proceeds will be paid as follows:

- a. First, Kokosing will be reimbursed for 100% of the attorneys' fees incurred after the date of this agreement, any and all expert witness fees incurred in the preparation and prosecution of the Claims, direct personnel expense of Kokosing's employees engaged in prosecution of the Claims and all other costs, fees and expenses incurred in the prosecution of the CTI Claims;

- b. Second, all proceeds remaining after the payment of the amounts identified in paragraph 9 a shall be shared ninety percent (90%) to Kokosing and ten percent (10%) to Massillon.

10. Kokosing acknowledges that Massillon's liability to Kokosing for any amounts and/or claims related to the Kokosing Claims, the CTI Claims, the Contract or the Project that exceed Massillon's payment to Kokosing as specified in this Agreement's paragraph 4, is limited solely to the contingent payments contained in this Agreement's paragraph 9 arising out of the net proceeds, if any, of the prosecution of the CTI Claims against CTI, said claims being liquidated by this Agreement;

11. Kokosing and Massillon specifically agree that Kokosing has been authorized by Massillon to prosecute the CTI Claims in the name of Massillon and to initiate litigation and/or arbitration in the name of Massillon for such purpose in Kokosing's sole discretion. Whether pursuant to paragraph 6 or 7 above, and with respect to the CTI Claims, Kokosing has in its sole and exclusive discretion the right to:

- a. select legal counsel to represent Kokosing and/or Massillon;
- b. fully prosecute the CTI Claims;
- c. agree to mediate with CTI;
- d. pursue settlement discussions with CTI; and
- e. should settlement opportunities arise, agree to settle the case in a manner that it alone deems reasonable.



Kokosing and Massillon specifically agree that prior approval by Massillon of any settlement agreement with CTI is not required;

12. Massillon agrees to provide reasonable cooperation to Kokosing with respect to the prosecution of the CTI Claims. Such cooperation shall include, but shall not be limited to:

- a. providing all documents in its possession, custody or control, or within the care, custody or control of its counsel or expert witness(es) that may reasonably be requested by Kokosing; and
- b. providing, at its cost, such Massillon employees as Kokosing

~~may reasonably request for attendance at preparatory meetings,~~

mediation, depositions, hearings and other court appearances.

13. Kokosing and Massillon have agreed to pursue a common purpose related to the CTI Claims and all communications between Kokosing and Massillon and their respective counsel are for the purpose of pursuing this common purpose and all such communications are intended to be privileged and protected. Neither Kokosing nor Massillon will disclose the contents of communications between them or their counsel regarding the Kokosing Claims without the express written consent of the other party or as compelled to by law or court order. The party receiving information under this paragraph shall not have the right or the power to waive the privilege for the other party.

14. This Agreement shall be binding upon all parties to this Agreement, and their successors and assigns and shall inure to the parties' benefit and to that of their respective directors, officers, employees, attorneys, representatives, insurers, suppliers,



distributors, agents and any of their past or present parents, subsidiaries, affiliates, divisions, or other organizational units of any kind;

15. This Agreement shall be governed by the laws of the State of Ohio. Kokosing and Massillon further agree that any claims or disputes between them arising out of or related to this Agreement shall be subject to and decided by mandatory and binding arbitration in accordance with the Construction Industry Rules of the American Arbitration Association ("AAA"), and that such arbitration shall be commenced by either party through the filing of a demand for arbitration with the AAA, with such arbitration being administered through the AAA Management Center;

~~16. The parties to this Agreement acknowledge and agree that this Agreement~~  
is voluntarily entered into by all parties hereto. All reference to days in the Agreement shall mean calendar days. Time is of the essence as to all aspects of this Agreement;

17. In the event that any portion of this Agreement is deemed illegal, invalid or unenforceable, in any respect, then such invalidity, illegality or unenforceability will not affect any other provision of this Agreement and this Agreement shall be construed as though such illegal, invalid or unenforceable provision had never been contained herein;

18. This Agreement and any proceedings taken hereunder are not intended and shall not in any event be construed as, or deemed to be, an admission or concession or evidence of any liability or any wrongdoing whatsoever on the part of any party to this Agreement. The parties hereto specifically disclaim and deny any liability or wrongdoing whatsoever with respect to the allegations and claims asserted against them in this action and enter into this Agreement solely to avoid the further expense,

inconvenience, and uncertainty of further litigation. Further, this Agreement has been entered into by the parties hereto in good faith and for settlement purposes only;

19. This Agreement may be signed in counterpart and a copy or fax shall constitute an original;

20. This Agreement constitutes the full and entire agreement and understanding between the parties with respect to the subject matter hereof, and there are no agreements, representations or warranties except as specifically set forth herein. All prior settlement discussions, negotiations, and demands of any kind are fully merged into this Agreement and are to be construed to be of no further force or effect, it being

~~the intention of the parties that this Agreement shall serve as the sole and entire~~  
expression of their agreement and understanding on the Kokosing Claims. This Agreement may not be amended or modified except by an instrument in writing signed by the party against whom enforcement of such amendment or modification is sought;

21. None of the parties to this Agreement shall be considered to be the drafter of said Agreement or any provision hereof, for the purpose of any statute, case law, or rule of interpretation/construction that would or might cause any provision hereof to be construed against the drafter of this Agreement;

22. The parties acknowledge that they have reviewed this Agreement and have had the opportunity to obtain the advice of counsel of their choice prior to executing this Agreement;

23. The parties represent and warrant that none of the claims referenced in this Agreement have been assigned, transferred or otherwise conveyed to any other person or entity; and

24. The parties represent and warrant that the person executing this Agreement on their behalf is duly authorized by each of them to do so.

Kokosing Construction Company, Inc.

Sign: Daniel B. Walker

Print: DANIEL B. WALKER

Title: SE VICE PRESIDENT

Address: 6235 WESTERVILLE RD

Address: WESTERVILLE, OHIO  
43081

Mayor for the  
City of Massillon, Ohio

Sign: \_\_\_\_\_

Print: \_\_\_\_\_

Address: \_\_\_\_\_

Address: \_\_\_\_\_

Massillon City Attorney

Sign: \_\_\_\_\_

Print: \_\_\_\_\_

Address: \_\_\_\_\_