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TOWN OF WEST SENECA

TOWN SUPERVISOR  
SHEILA M. MEEGAN  
TOWN COUNCIL  
EUGENE P. HART  
WILLIAM P. HANLEY, JR.

To: The Honorable Town Board

From: John J. Fenz, Esq.  
Town Attorney

Date: January 19, 2017

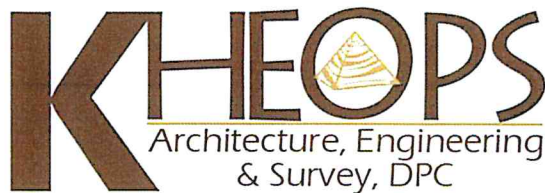
Re: Owner's Representative Agreement  
Community Center and Library Expansion Project

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Kindly adopt a resolution authorizing the Supervisor to execute the attached Agreement with KHEOPS Architecture, Engineering and Survey to provide Owner's Representation Services for the construction of the Community Center and Library Expansion.

The itemized listing of the Representative's responsibilities are set forth on the first page of the attachment; however, it is noted that this entity shall provide observation and monitoring of construction activities at the site.

KHEOPS will provide an engineer for an average of 22 hours per week for the duration of the project at an hourly rate of \$74.00.



Tel (716) 849-8739  
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www.kheopsdpc.com

300 Pearl Street  
Suite 100  
Buffalo, NY 14202

January 11, 2017

Hon. Sheila M. Meegan  
Town of West Seneca  
1250 Union Road  
West Seneca, NY 14224

Re: Owner's Representative During Construction  
West Seneca Library and Community Center

Dear Supervisor Meegan:

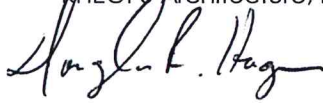
Thank you for selecting KHEOPS Architecture, Engineering and Survey to provide Owner's Representation Services for the Construction of the Community Center and Library. KHEOPS will provide an engineer for an average of 22-hours per week for the duration of the project. We understand our responsibilities to be:

- Review of the final design to confirm all aspects of constructability.
- Review of architect's contract award recommendations and subsequent project contracts and contractor's bonds and insurance certifications.
- Perform on-site observations during the active construction phase as may be reasonably necessary to determine in general if progress and quality of the work being performed will be in conformance with the contract documents when completed.
- Notify the architect and Town immediately if work does not conform with the contract documents or required special inspections or testing.
- Monitor the contractor's progress as it relates to the construction schedule and alert the architect and Town to conditions that may lead to delays in completion of the work.
- Attend all construction coordination and other meetings (Town Board) as directed by the Town Supervisor.
- Attend one Town Board Work Session or other scheduled meeting per month to give project updates.
- Maintain a diary or log book of the construction activities observed, including: weather conditions and weather related site conditions; nature and location of work being performed; record labor and equipment used daily; meetings attended and matters discussed; communications between the Town, contractor, and architect, including instructions, interpretations, and clarifications provided to the contractor; any occurrence or work that might result in a claim for change of contract compensation of time; record all oral agreements, instructions, disputes and questions pertinent to the Work. Clerk shall photograph prior to construction, project progress, and document any issues.
- Attend all the construction meetings for the duration of the project.
- Review and coordinate required special inspections.
- Review and recommend for approval of payment monthly payment requests and change orders (actual approval of these items by the engineer/architect).
- In cooperation with the architect, review the work and prepare interim and final punch lists for the contractor.
- Collect, on the Town's behalf, project close-out documentation, O&M manuals and as-built drawings.

KHEOPS will provide Owner's Representative services at an hourly rate of \$74.00, licensed NYS Architect or Engineer, if required at \$125/hour.

Please feel free to reach out to me with any questions or comments you may have.

Sincerely,  
KHEOPS Architecture, Engineering & Survey, DPC



Douglas R. Hager, PLS  
Principal

**PROPOSAL ACCEPTANCE AND TOTAL AGREEMENT**

In addition to agreeing with the above scope of work and estimated cost, the attached terms and conditions will apply and are binding.

This agreement constitutes the entire Agreement between the CLIENT and KHEOPS Architecture, Engineering & Survey, DPC and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented or modified by a duly executed written instrument.

IN WITNESS WHEREOF, the parties hereto execute this Agreement.

This Agreement will become effective on the date set forth at the bottom of this page (which is the effective date of the Agreement).

If you would like KHEOPS to proceed with the project, please sign below and return to us.

Company: \_\_\_\_\_

By: \_\_\_\_\_ (please sign)

Name: \_\_\_\_\_ (please print)

Date: \_\_\_\_\_



**TERMS & CONDITIONS****SCOPE OF SERVICES**

1. KHEOPS shall provide the Basic and Additional Services set forth:
2. Scope of Services: [See Attached Proposal].
3. Additional Services: If authorized by CLIENT in writing, KHEOPS shall furnish Additional Services which are not included as part of Basic Services on an hourly basis in accordance with the attached hourly rates.
4. Upon the Effective Date of this Agreement, KHEOPS is authorized to begin Scope of Services as outlined above.

**FEES**

5. CLIENT shall pay KHEOPS for all Scope of Services furnished under of this Agreement in accordance with the attached Proposal. If used, the Standard Hourly Rates Schedule and Reimbursable Expenses Schedule will be adjusted annually as of January 1 to reflect equitable changes to the compensation payable to KHEOPS.
6. Fees for Additional Services shall be agreed to in writing prior to commencement of any Additional Services. Reimbursable and Subconsultant expenses will be charged a 0% administrative fee.
7. An initial deposit of 0% of contract value shall be made by CLIENT upon execution of this Agreement and credited to CLIENT's account.
8. Invoices will be prepared in accordance with KHEOPS' standard invoicing practices and will be submitted to CLIENT by KHEOPS on no less than a monthly basis, unless otherwise agreed.
9. Invoices are due and payable upon receipt. If CLIENT fails to make any payment due KHEOPS for services and expenses within thirty (30) days after the date of issue of KHEOPS' invoice, a late fee of 2.5% will be assessed. Should invoices be unpaid for 60 days or greater, an additional late fee of 2.5% per every 30 days past due will be assessed. In addition, KHEOPS may, after giving seven days written notice to CLIENT, suspend services under this Agreement until KHEOPS has been paid in full all amounts due for services, expenses, and other related charges. Payments will be credited first to late fees and then to services and expenses. CLIENT will pay for all collection charges associated with collecting on account including attorney fees and court costs.
10. In the event of a disputed or contested invoice, only that portion so contested may be withheld from payment, and the undisputed portion will be paid.
11. Client has 10 days from date invoice to review and accept the invoice. After 10 days the invoice is considered accepted.

**CLIENT RESPONSIBILITIES**

12. In addition to other responsibilities of CLIENT as set forth in the proposal, CLIENT shall:
  - a.) Provide KHEOPS with all criteria and full information as to CLIENT's requirements for a Specific Project, including design objectives and constraints, space, capacity and performance requirements, flexibility, and expandability, and any budgetary limitations; and furnish copies of all design and construction standards which CLIENT will require to be included in the Drawings and Specifications; and furnish copies of CLIENT's standard forms, conditions, and related documents for KHEOPS to include in the Bidding Documents, when applicable.
  - b.) Furnish to KHEOPS any other available information pertinent to a Specific Project including reports and data relative to previous designs, or investigation at or adjacent to the Site of a Specific Project.
  - c.) Following KHEOPS' assessment of initially-available Project information and data and upon KHEOPS' request, furnish or otherwise make available such additional Project related information and data as is reasonably required to enable KHEOPS to complete its Basic and Additional Services. Such additional information or data would generally include the following:
    - i. Property descriptions.
    - ii. Zoning, deed, and other land use restrictions.
    - iii. Property, boundary, easement, right-of-way, and other special surveys or data, including establishing relevant reference points.
    - iv. Environmental assessments, audits, investigations and impact statements, and other relevant environmental or cultural studies as to the Specific Project, the Specific Project Site, and adjacent areas.
  - d.) Give prompt written notice to KHEOPS whenever CLIENT observes or otherwise becomes aware of a Hazardous Environmental Condition of a nature or extent not identified in the Task Order or of any other development that affects the scope or time of performance of KHEOPS' services, or any defect or nonconformance in KHEOPS' services or in the work of any Contractor.
  - e.) Examine all alternate solutions, studies, reports, sketches, Drawings, Specifications, proposals, and other documents presented by KHEOPS for a Specific Project (including obtaining advice of an attorney, insurance counselor, and other advisors or KHEOPS as CLIENT deems appropriate with respect to such examination) and render in writing timely decisions pertaining thereto.

**STANDARD OF PERFORMANCE**

13. The standard of care for all professional engineering and related services performed or furnished by KHEOPS under this Agreement will be the care and skill ordinarily used by members of KHEOPS' profession practicing under similar circumstances at the same time and in the same locality. KHEOPS makes no warranties, express or implied, under this Agreement or otherwise, in connection with KHEOPS' services.
14. If KHEOPS provides services during the Construction Phase of a Specific Project, KHEOPS shall not supervise, direct, or have control over Contractor's work, nor shall KHEOPS have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected by Contractor, for safety precautions and programs incident to the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work.
15. KHEOPS neither guarantees the performance of any Contractor nor assumes responsibility for any Contractor's failure to furnish and perform the Work in accordance with the Contract Documents, including Year 2000 Compliance matters.
16. KHEOPS shall not be responsible for the acts or omissions of any Contractor(s), subcontractor or supplier, or of any of the Contractor's agents or employees or any other persons (except KHEOPS' own employees) at the Site or otherwise furnishing or performing any of the Contractor's work; or for any decision made on interpretations or clarifications of the Contract Documents given by CLIENT without consultation and advice of KHEOPS.
17. The General Conditions for any construction contract documents prepared hereunder are to be the "Standard General Conditions of the Construction Contract" as prepared by the KHEOPS' Joint Contract Documents Committee (Document No. 1910-8, 1996 Edition).



**INDEMNIFICATION AND LIMIT OF LIABILITY**

18. Certificate of Merit. The Client shall make no claim for professional negligence, either directly or by way of a cross complaint against KHEOPS, unless the Client has first provided KHEOPS with a written certification executed by an independent professional currently practicing in the same discipline as KHEOPS and licensed in the State of New York.
19. This certification shall: (a) contain the name and license number of the certifier; (b) specify the acts or omissions that the certifier contends are not in conformance with the standard of care for a KHEOPS performing professional services under similar circumstances; and (c) state in detail the basis for the certifier's opinion that such acts or omissions do not conform to the standard of care. This certificate shall be provided to KHEOPS not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any arbitration, mediation, or judicial proceeding. This Certificate of Merit clause will take precedence over any existing state law in force at the time of the claim or demand for arbitration.
20. To the fullest extent permitted by law, KHEOPS shall indemnify and hold harmless CLIENT, CLIENT's officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of KHEOPS or KHEOPS' officers, directors, partners, employees, and KHEOPS' consultants in the performance and furnishing of KHEOPS' services under this Agreement.
21. To the fullest extent permitted by law, CLIENT shall indemnify and hold harmless KHEOPS, KHEOPS' officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of CLIENT or CLIENT's officers, directors, partners, employees, and CLIENT's consultants in the performance and furnishing of CLIENT's services under this Agreement.
22. To the fullest extent permitted by law, the total liability, in the aggregate, of KHEOPS and KHEOPS' officers, directors, partners, employees, agents, and consultants, or any of them to client and anyone claiming by, through, or under client, for any and all injuries, losses, damages, and expenses, whatsoever arising out of, resulting from, or in any way related to this agreement from any cause or causes including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract or warranty, express or implied, of KHEOPS or KHEOPS' officers, directors, partners, employees, agents, and consultants, or any of them, shall not exceed a total amount equal to the Fee as defined in Paragraph 5.
23. CLIENT shall not be liable to KHEOPS and KHEOPS shall not be liable to CLIENT for an consequential damages incurred by either due to the fault of the other, regardless of: the nature of this fault; or whether it was committed by CLIENT or KHEOPS, their employees, agents or subcontractors; or whether such liability arises in breach of contract or warranty, tort (including negligence), statute or any other cause of action. Consequential damages include, but are not limited to, loss of use and loss of profit.

**OWNERSHIP AND USE OF DOCUMENTS**

24. All Documents are instruments of service. KHEOPS shall retain an ownership and property interest therein (including the right of reuse at the discretion of KHEOPS) whether or not the Specific Project is completed.
25. Copies of CLIENT-furnished data that may be relied upon by KHEOPS are limited to the printed copies (also known as hard copies) that are delivered to KHEOPS pursuant to paragraph 11. Files in electronic media format of text, data, graphics, or of other types that are furnished by CLIENT to KHEOPS are only for convenience of KHEOPS. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.
26. Copies of Documents that may be relied upon by CLIENT are limited to the printed copies (also known as hard copies) that are signed or sealed by KHEOPS. Files in electronic media format of text, data, graphics, or of other types that are furnished by KHEOPS to CLIENT are only for convenience of CLIENT. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.
27. Any verification or adaptation of the Documents for extensions of the Specific Project for which they were prepared or for any other project will entitle KHEOPS to further compensation at rates to be agreed upon by CLIENT and KHEOPS.

**HAZARDOUS ENVIRONMENTAL CONDITION**

28. CLIENT represents to KHEOPS that to the best of its knowledge a Hazardous Environmental Condition does not exist on a site for the Specific Project, unless set forth in the Scope of Services.
29. CLIENT shall disclose to the best of its knowledge to KHEOPS the existence of all Asbestos, PCB's, Petroleum, Hazardous Waste, or Radioactive Material located at or near the Site of the Specific Project, including type, quantity, and location.
30. If a Hazardous Environmental Condition is encountered or alleged, KHEOPS shall have the obligation to notify CLIENT and, to the extent of applicable Laws and Regulations, appropriate governmental officials.
31. It is acknowledged by both parties that KHEOPS' scope of services in the attached proposal shall not include any services related to a Hazardous Environmental Condition unless specifically agreed to in said Scope of Services. In the event KHEOPS or any other party encounters a Hazardous Environmental Condition not specifically identified, KHEOPS may, at its option and without liability for consequential or any other damages, suspend performance of services until CLIENT: (i) retains appropriate specialist KHEOPS(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the Hazardous Environmental Condition; and (ii) warrants that the Site of the Project is in full compliance with applicable Laws and Regulations.
32. CLIENT acknowledges that KHEOPS is performing professional services for CLIENT and that KHEOPS is not and shall not be required to become an "arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the Site of a Specific Project in connection with KHEOPS' activities under this Agreement.
33. If KHEOPS' services under this Agreement cannot be performed because of a Hazardous Environmental Condition not specifically identified in the Scope of Services, the existence of the condition shall justify KHEOPS' terminating this Agreement for cause on 30 days notice.

**DISPUTE RESOLUTION**

CLIENT and CONSULTANT agree to negotiate all disputes between them in good faith for a period not to exceed 30 days from the date of notice prior to exercising their rights under other provisions of this Agreement, or under law. The CLIENT and CONSULTANT have agreed on a method and procedure for resolving disputes between them arising out of or relating to this Agreement. Such dispute resolution method and procedure is set forth as follows: CLIENT and CONSULTANT agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement or the breach thereof ("Disputes") to non-

binding mediation by a mediator from the American Arbitration Association Construction Mediation Panel, or someone mutually agreed to by CLIENT and CONSULTANT.

**SURVIVAL**

All express representations, indemnifications, or limitations of liability included in this Agreement will survive its completion or termination for any reason.

**TERMINATION**

Either party may at any time, upon seven (7) days prior written notice to the other party, terminate this Agreement. Upon such termination, CLIENT shall pay to KHEOPS all amounts owing to KHEOPS under this Agreement, for all work performed up to the effective date of termination, plus reasonable termination costs.

**CONTROLLING LAW**

This Agreement shall be governed by the laws of the State of New York and court proceedings, if any, will occur in the County of Erie in New York State.

**WAIVERS AND SEVERABILITY**

A waiver or breach of any term, condition, or covenant by a party shall not constitute a breach of any other term, condition, or covenant. If any court of competent jurisdiction declares a provision of this Agreement invalid, illegal, or otherwise unenforceable, the remaining provisions of the Agreement shall remain in full force and effect.