

Resolution 21-035

**DECLARING EVENTS OF DEFAULT FOR CONTRACT NO. 40 “FINAL CLARIFIERS REPAIR PROJECT” AND UNLESS CURED AS SET FORTH IN THIS RESOLUTION, TERMINATING CONTRACT NO. 40 FOR CAUSE**

**WHEREAS**, on July 13, 2017, the Rockaway Valley Regional Sewerage Authority (“RVRSA”) awarded Contract No. 40 – “Final Clarifiers Repair Project” to Tomar Construction Services, Inc., having a business address of 18 Connerty Court, Suite B, East Brunswick, New Jersey 08816 (“Tomar” or the “Contractor”) as the lowest responsible bidder in accordance with the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., having submitted a bid in the amount of \$5,594,000.00, subject to authorization to award by NJDEP, pursuant to Resolution 17-089 (the “Contract”); and

**WHEREAS**, NJDEP subsequently authorized the award of the Contract to Tomar; and

**WHEREAS**, the Contract included replacement of the sludge collection mechanisms in four final clarifier tanks, modification of the clarifier walls to accommodate the new sludge collection mechanisms, installation of baffles in each final clarifier tank, and replacement of the motor control center to be completed by June 6, 2019 (630 days after the issuance of the Notice to Proceed); and

**WHEREAS**, on March 14, 2019, RVRSA authorized the execution of Change Order No. 1 in the amount of \$56,882.67 for certain additions to the work including clarifier draft tube modifications and local control panel modifications, together with a 7-day non-compensable time extension for the completion of all the work by June 13, 2019; and

**WHEREAS**, on April 9, 2020, RVRSA authorized the execution of Change Order No. 2 in the amount of \$68,678.29 for certain additions to the work including launder slab additional

reinforcing and waterstop, clarifier bridge access steps, drainage pump emergency repairs to Final Clarifier No. 1, upper drain valve replacement to Final Clarifier No. 1, yard hydrant curb boxes and heat tracing end seal connections; and

**WHEREAS**, on April 9, 2020, RVRSA also authorized the execution of Change Order No. 3 in the amount of \$11,228.61 for certain additions to the work including perimeter site lighting at the final clarifiers and the chlorine contact tank; and

**WHEREAS**, torque issues at Valve Actuator 2b and a breaker issue at Valve Actuator 1A have occurred due to the defective work of the Contract which the Contractor has failed to resolve, and it is estimated to cost \$4500.00; and

**WHEREAS**, the Contractor has failed to provide the complete final clarifier and valve/actuator O&M Manuals, a valve actuator certification from the manufacturer; replacement of the FC3 hydraulic box ID Plate; site restoration work; and issuance of a two-year Maintenance Bond and Environmental Maintenance Bond; and

**WHEREAS**, RVRSA has incurred engineering fees beyond the June 13, 2019 date for final completion of the work in the amount of \$556,923.14 through January 29, 2021; and

**WHEREAS**, by letter dated January 29, 2021, RVRSA's project engineer, Kleinfelder, sent a letter to Tomar attaching proposed Change Order No. 4 deducting engineering fees incurred by RVRSA between June 13, 2019 and January 29, 2021 due to the unexcused delay in the performance of the work by the Contractor in the amount of \$556,923.14; a deduction for the aforementioned contract work and defective work not completed, totaling \$13,000.00; a deduction for the deletion of control and signal wiring in the amount of \$1,727.44; a non-compensable time extension of 598 calendar days, without prejudice to the RVRSA to revoke the same in the event

that the contractor fails to agree to have the aforementioned engineering fees deducted from the contract price; and requiring the Contractor to deliver the two-year Maintenance Bond and Environmental Maintenance Bond to RVRSA, together with the Contractor's affidavit of full-payment to subcontractors and suppliers and release of municipal mechanics' liens; and

**WHEREAS**, all of the foregoing was to be provided by the Contractor to RVRSA by February 3, 2021; and

**WHEREAS**, the Contractor has not: (1) executed the deduction Change Order No. 4; (2) provided the two-year Maintenance Bond or Environmental Maintenance Bond; (3) provided its affidavit of full payment to subcontractor and suppliers and release of municipal mechanics' liens; (4) responded to the letter from Kleinfelder dated January 29, 2021; and

**WHEREAS**, the Authority desires to declare the Contractor in default of Contract No. 40 pursuant to Article CA.33 of the Contract for the following reasons:

- (a) Contractor's breach of, any material obligation, or any covenant or warranty made by it, under the terms of the Contract;

....

- (f) In the reasonable judgment of the Owner, Contractor is or has been unnecessarily, unreasonably, or willfully delaying performance pursuant to the Contract and/or not executing the Contract in good faith in accordance with its terms;

- (g) Contractor's persistent failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the progress schedule);

....



(j) Contractor's violation in any substantial way of any provisions of the Contract; and

**WHEREAS**, pursuant to Article CA. 33 of the Contract, the Contractor has seven (7) business days after receipt of a notice from the Owner of an Event of Default to cure the same.

**NOW, THEREFORE, BE IT RESOLVED** by the Rockaway Valley Regional Sewerage Authority as follows:

1. The Executive Director is authorized and directed to issue the Notice of the Events of Default to the Contractor described in this Resolution in accordance with Article CA.33 of the Contract, with a copy to the surety, Berkley Insurance Company, and to NJDEP.
2. The Contractor shall have seven business days from receipt of the Notice of Events of Default to cure the Events of Default by either: (1) executing Change Order No. 4 in the form attached to the Kleinfelder letter dated January 29, 2021 and providing the two-year maintenance bond and environmental maintenance bond and affidavit of full payment to subcontractors and suppliers and release of municipal mechanics' liens; or (2) within seven business days from the receipt of said notice, correcting all remaining work and defective work, providing the two-year maintenance bond, environmental maintenance bond and affidavit of full payment to subcontractors and suppliers and release of municipal mechanics' liens to RVRSA and agreeing in writing to the deduction from the contract value of \$556,923.14 for engineering fees incurred by RVRSA from June 13, 2019 through January 29, 2021, together with the deduction of \$1,727.44 from the contract value for deletion of control and signal wiring.

3. If within seven (7) business days after serving the Events of Default notice upon the Contractor the same is not cured as set forth above in Paragraph 2 of this Resolution, Contract No. 40 is terminated for the following causes:

(a) Contractor's persistent failure to perform the Work in accordance with the Contract Documents;

....

(c) Contractor's material violation or breach of any provision of the Contract Documents; and

....

(e) an Event of Default.

4. In the event the Contract is terminated as set forth above in Paragraph 3 and in accordance with Article CA.33 of the Contract, all costs, expenses, losses, damages, engineering fees, attorney's fees and any and all other charges incurred by the RVRSA shall be first charged against the Contractor out of moneys due or payable or to become due or payable under the Contract to the Contractor; in computing the amounts chargeable to the Contractor, the Owner shall not be held to a basis of the lowest prices for which the completion of the Work or any part thereof might have been accomplished, but all sums actually paid or obligated therefor to effect its prompt completion shall be charged to and against the account of the Contractor. In the case the costs, expenses, losses, damages, engineering fees, attorney's fees and other charges together with all payments theretofore made to or for the account of the Contractor exceed the sum which would have been payable under the Contract if the Work had been properly performed and completed by the Contractor, the Contractor shall pay the amount of the excess to the Owner.

5. Pursuant to the Municipal Mechanic's Lien Law, the work completed to date by the

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Contractor is accepted by RVRSA for the purpose of N.J.S.A. 2A:44-142(b).

6. The Executive Director, staff and consultants of RVRSA are hereby authorized to take all other actions necessary or desirable to effectuate the terms and conditions of this Resolution.

7. This Resolution shall take effect immediately.

### CERTIFICATION

I do hereby certify that this Resolution was adopted at a regular meeting of the Rockaway Valley Regional Sewerage Authority held on February 11, 2021.

on motion of: Commissioner Andes

second by: Commissioner Corbett

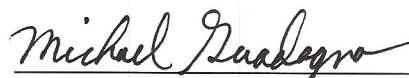
ROLL CALL VOTE:

YEAS: (6) Andes, Corbett, Farrell, Guadagno, Isselin, Schorno

NAYS: (0)

ABSTAIN: (1) Recchia

ABSENT: (3) Cegelka, Borough of Rockaway Commissioner, Zuppa



Michael Guadagno  
Board Secretary