



# ERIE COUNTY WATER AUTHORITY

## INTEROFFICE MEMORANDUM

August 11, 2022

To: Terrence D. McCracken, Secretary to the Authority

From: Michael J. Quinn, PE, Sr. Distribution Engineer

A handwritten signature in dark ink, appearing to read "MJQ", is written over the name Michael J. Quinn.

Subject: WSA-015 Water System Improvements City of Lackawanna and Town of Hamburg  
Construction Monitoring and Flagging Agreement  
RailPros Field Services, Inc.  
ECWA Project No. 202000058

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The Erie County Water Authority (ECWA) is undertaking a watermain replacement project in the City of Lackawanna and the Town of Hamburg (WSA-015). A portion of the new main in the City of Lackawanna will be constructed on property owned by the Norfolk Southern Railway Company (Norfolk Southern). In order to construct the improvements as well as to operate and maintain the main following completion of the project, the Authority executed a License Agreement with Norfolk Southern (Item 8 on December 22, 2021 Board Meeting).

Norfolk Southern requires the Authority to use RailPros Field Services, Inc. (RailPros) for construction monitoring and flagging during construction, therefore the Engineering Department requests that the Board review and approve attached Agreement and authorize the Chairman to execute same. Attached to the Agreement is a table which lists the schedule of compensation for various services provided by RailPros. The Authority is responsible for these charges. However, since the services required and the duration of those services is dependent upon the construction process, the total fee cannot be determined until the work is complete. Therefore, in addition to executing the Agreement itself, it is requested that the Board approve payment of the associated fee in the amount not to exceed \$50,000.00. Again, actual charges will be determined based on the hourly rate schedule attached as Appendix 1 to the Agreement. Funds are available for this payment in 2022 Capital Budget Unit: 2590 Eng/Const Distribution Mains, Item: 101518 WSA-015 Waterline Replacement.

Attached find one copy of the Agreement for execution by the Chairman. Thank you and please feel free to contact me if you have any questions.

MJQ:jmf

Attachments

cc: L.Kowalski

S.Denzler

CONT-WSA-015-2020-X-10

ERIE COUNTY WATER AUTHORITY  
AUTHORIZATION FORM  
For Approval/Execution of Documents  
(check which apply)

**Contract:** WSA-015 **Project No.:** 202000058

**Project Description:** Water System Improvements  
Town of Hamburg, City of Lackawanna

**Item Description:**


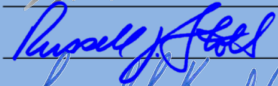





- |   |  |   |                                       |
|---|--|---|---------------------------------------|
| <input checked="" type="checkbox"/> Agreement                 | <input type="checkbox"/> Professional Service Contract | <input type="checkbox"/> Amendment          | <input type="checkbox"/> Change Order |
| <input type="checkbox"/> BCD                                  | <input type="checkbox"/> NYSDOT Agreement              | <input type="checkbox"/> Contract Documents | <input type="checkbox"/> Addendum     |
| <input type="checkbox"/> Recommendation for Award of Contract | <input type="checkbox"/> Recommendation to Reject Bids |   |                                       |
| <input type="checkbox"/> Request for Proposals                |  |   |                                       |
| <input type="checkbox"/> Other _____                          |  |   |                                       |

**Action Requested:**

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> Board Authorization to Execute            | <input checked="" type="checkbox"/> Legal Approval                   |
| <input type="checkbox"/> Board Authorization to Award                         | <input checked="" type="checkbox"/> Execution by the Chairman        |
| <input type="checkbox"/> Board Authorization to Advertise for Bids            | <input type="checkbox"/> Execution by the Secretary to the Authority |
| <input type="checkbox"/> Board Authorization to Solicit Request for Proposals |  |
| <input type="checkbox"/> Other _____  |  |

**Approvals Needed:**

**APPROVED AS TO CONTENT:**

- |  |   |                         |
|--|---|-------------------------|
| <input checked="" type="checkbox"/> Sr Distribution Engineer   |  | Date: <u>8/11/2022</u>  |
| <input checked="" type="checkbox"/> Chief Operating Officer    |  | Date: <u>08/11/2022</u> |
| <input checked="" type="checkbox"/> Executive Engineer         |  | Date: <u>08/11/2022</u> |
| <input checked="" type="checkbox"/> Director of Administration |  | Date: <u>08/11/2022</u> |
| <input checked="" type="checkbox"/> Risk Manager               |  | Date: <u>08/11/2022</u> |
| <input checked="" type="checkbox"/> Chief Financial Officer    |  | Date: <u>08/11/2022</u> |
| <input checked="" type="checkbox"/> Legal                      |  | Date: <u>8/11/2022</u>  |

**APPROVED FOR BOARD RESOLUTION:**

- |  |   |                      |
|--|---|----------------------|
| <input checked="" type="checkbox"/> Secretary to the Authority |  | Date: <u>8/15/12</u> |
|--|---|----------------------|

**Remarks:** Construction Monitoring and Flagging Agreement, RailPros Field Services, Inc.

**Resolution Date:** \_\_\_\_\_

**Item No:** \_\_\_\_\_

**RailPros Field Services, Inc.**

**Construction Monitoring and Flagging Agreement**

**THIS AGREEMENT** ("Agreement") is made and entered into as of Aug 09, 2022 by and between **ERIE COUNTY WATER AUTHORITY** ("Company"), located at 295 Main Street Room 350, Buffalo, New York, 14203 and RailPros Field Services, Inc. ("RPFS"), located at 1320 Greenway Dr., STE 490, Irving, TX 75038-2690. RPFS is a consultant to Norfolk Southern Railway ("NS").

Whereas, Company has been granted permission by NS for temporary access or use of its right of way or property for the installation, construction, maintenance, operation, and removal of certain facilities that cross or encroach upon NS right of way or property, trackage, or other facilities through license agreements, referred to as Activity Number: 1293239 (the "Project").

Whereas, NS may require the Company to utilize one or more services of RPFS to 1) monitor the installation, construction and/or maintenance activities and communicate with NS regarding the status of the work and any issues that arise that may impact NS or not meet NS executed agreement(s) 2) perform railroad flagging services.

**A. Services**

1. **Construction Monitoring.** The Company is required to use the services of RPFS to observe the work being performed on the Project by the Company and its contractors and to communicate with NS regarding issues that may arise during the Project. RPFS owes no duty to the Company regarding this service. This service is performed exclusively for the benefit of NS. RPFS services do not include supervision or direction of the means, methods, or actual work of the Company or its contractors.
2. **Flagging.** The Company is required to utilize the services of RPFS to perform railroad flagging services in accordance with NS work orders and with RPFS staff qualified under the NS rules where the Project is located.

**B. RPFS Non-Responsibility**

1. The presence of RPFS monitors and/or flaggers on site will not relieve the Company of its responsibility to comply with the terms and conditions of the applicable NS license or permit and approved design specifications. RPFS will not be responsible for job or site safety or security of the Project.
2. RPFS shall not be responsible for delays caused by Company's failure to furnish necessary information promptly as requested, or for delays resulting from faulty equipment or late, slow, or faulty performance by Company, other contractors or sub-consultants of Company, or government agencies whose performance of work is precedent to or concurrent with the performance of RPFS monitoring of Company's work.
3. RPFS shall not be responsible for damages due to any delays in the performance of the work for any reason other than for RPFS negligence or misconduct. RPFS shall be entitled to additional compensation at the same rates described in Appendix 1 for any delay which is not due to RPFS or its contractors, employees, or agents' acts or omissions. Any such adjustments to the Project duration and compensation shall be put in writing in the form of an invoice issued to the Company upon determination of same.

**C. Company Responsibilities**

1. In accordance with generally accepted construction practices, Company will be solely responsible for working conditions on the job site, including security and safety of all persons and property during the Project, and compliance with NS safety requirements, local safety requirements and Occupational Safety and Health Administration (OSHA) regulations. This requirement shall apply continuously and not be limited to normal working hours.
2. Wherein the Project site is determined by the Company to be unworkable due to inclement weather conditions, the Company must notify RPFS on-site field representative as soon as practicable of any such delays.

**D. Compensation**

1. Company agrees to pay RPFS according to the rates stated in Appendix "1" attached hereto for the duration of

the Project. Company shall pay RPFS within thirty (30) calendar days of the date of RPFS invoices, which will be based on the value of the services completed during each calendar month. Invoices unpaid in excess of thirty (30) calendar days will be past due and will incur a late fee of 1 ½ % of the outstanding balance for each month or portion thereof that the invoice is past due. RPFS shall be paid regardless of payment status between Company and any other party, and Company’s failure to timely pay RPFS invoices when due is a material breach of this Agreement.

2. RPFS has the right to invoice for fees (a minimum of \$1,500.00) to cover necessary costs whenever a Project is terminated or delayed by the owner, applicant, or agent without four (4) days advanced notice; when the Company requests expedited mobilization of services; or when the Project is installed in absence of RPFS Construction Monitoring services when required by NS.

**E. Commencement Date and Term of Services**

- 1. RPSF services will begin upon acceptance of this Agreement by Company and shall continue through construction of the Project and NS property has been returned to the condition prior to the Company Project.
- 2. This Agreement has been executed by the authorized representatives of the parties and is intended to create a binding contractual relationship.
- 3. This Agreement shall take precedence over other documents, purchase orders, work orders that may be issued and/or signed after this Agreement. In no event, shall the terms and conditions in any RPFS or Company purchase order, work order, or similar document issued after the signing of this Agreement govern over this Agreement.

**F. Standard Provisions of RPFS Construction Monitoring and Flagging Agreement**

The Standard Provisions of RPFS Construction Monitoring and Flagging Agreement attached hereto as Exhibit A shall apply to the services provided under this Agreement.

**RAILPROS FIELD SERVICES, INC.**

By: \_\_\_\_\_  
[Authorized Representative]

By: \_\_\_\_\_  
[Print Name]

Title: \_\_\_\_\_

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

**ERIE COUNTY WATER AUTHORITY**

By: \_\_\_\_\_  
[Authorized Representative]

By: \_\_\_\_\_  
[Print Name]

Title: \_\_\_\_\_

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

**EXHIBIT A**  
**STANDARD PROVISIONS OF RPFS**  
**CONSTRUCTION MONITORING AND FLAGGING AGREEMENT**

The Company and RailPros Field Services, Inc. ("RPFS"), agree that the following provisions shall be part of this Agreement.

1. The Company shall designate an individual with authority to act on behalf of the Company with respect to the Project and shall give prompt written notice to RPFS if the Company becomes aware of any problems with the Project and shall otherwise fully cooperate as may be required or appropriate in connection with the Project.

2. RPFS services shall be performed in a manner consistent with that degree of skill and care typically exercised by similar professionals performing similar services under the same or similar circumstances and conditions. RPFS makes no other representations or any warranties, whether expressed or implied, with respect to the services rendered hereunder.

3. In no event, shall any statute of limitations commence to run any later than the date when RPFS services are substantially completed and any cause of action against RPFS arising from or pertaining to this Agreement must be initiated no later than two (2) years after the date when RPFS services are substantially completed.

4. In no event shall RPFS be liable for consequential damages, including lost profits, loss of investment or other incidental damages.

5. Compensation payable to RPFS pursuant to this Agreement shall be in addition to taxes (except income taxes) that may be assessed against RPFS by any state or political subdivision directly on services performed or payments for services performed by RPFS. Such taxes that RPFS may be required to collect or pay shall be added by RPFS to invoices submitted to the Company pursuant to this Agreement.

6. This Agreement may be terminated by either Company or RPFS upon four (4) days' written notice delivered to [NS.Coordinator@RailPros.com](mailto:NS.Coordinator@RailPros.com) for any or no reason. Either party may terminate this Agreement upon twenty-four (24) hours' written notice in the event of a material breach of the Agreement by the other party. Company expressly agrees to hold RPFS harmless from any liability arising out of RPFS termination of its services hereunder. In the event of termination of this Agreement, Company shall promptly pay RPFS for all of the services performed by RPFS prior to the termination of the Agreement. All fees paid are deemed earned.

7. Neither the Company nor RPFS shall assign its interest in this Agreement without the written consent of the other. The Construction Monitoring services to be provided pursuant to this Agreement are being performed solely for the benefit of NS and no benefit is meant to be conferred upon any other person or entity, and no such person or entity should rely upon RPFS performance of this service. No claim against RPFS shall accrue to any contractor, subcontractor, owner, officer, director, consultant, engineer, supplier, fabricator, manufacturer, lender, tenant, surety, or any other third-party as a result of the performance or non-performance of Construction Monitoring services on this Project.

8. Unless otherwise provided by specific agreement, RPFS shall have no responsibility for the discovery, presence, handling, removal, or disposal of or exposure of persons to hazardous materials or toxic substances at the Project site.

9. The Company agrees to indemnify and hold RPFS, its officers, directors, agents and employees, harmless from and against any and all liabilities, claims, losses, damages, expenses (including attorneys' fees) or costs for personal injuries (including death) and from property damage to whomsoever or whatsoever occurring that arise in any manner from (a) the installation, construction, maintenance, operation, presence or removal of, or the failure to properly install, construct, maintain, operate or remove, the Project, or (b) any act, omission or neglect of Company, its agents, servants, employees or contractors in connection therewith, unless caused solely by the negligence of RPFS or caused solely by the willful misconduct of RPFS. If the Company lists NS as an additional insured on its insurance policy, the Company also agrees to similarly list RPFS as an additional insured

on its insurance policy as well.

10. To the extent any damage or claim is covered by insurance during performance of this Agreement, the Company and RPFS waive all rights against each other and against the contractors, consultants, agents, and employees of the other for damages, except such rights as they may have to the proceeds of such insurance. The Company or RPFS, as applicable, shall require of the contractors, consultants, agents, and employees of any of them similar waivers in favor of the other parties enumerated herein.

11. Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation prior to the commencement of any legal or arbitration proceeding as a condition precedent to the right to recover attorney fees in any proceeding. The mediator shall be jointly selected by the Company and RPFS. The mediator's fees shall be shared equally and shall be held at the location selected by the mediator.

12. Equal Opportunity. RPFS shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a), and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.

13. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

14. This Agreement is the entire agreement between the Parties pertaining to the subject matter hereof, and supersedes all previous agreements, negotiations, or understandings, written or oral, between the Parties. The parties hereto declare and represent that no promises, inducements, representations, warranties, or other agreements, whether express or implied, not contained herein, have been made, and further declare and represent that they have not executed this Agreement in reliance upon any such promise, inducement, representation, warranty, or other agreement not contained herein.

15. This Agreement may only be modified, amended, or supplemented in a writing executed by the Parties hereto.

16. No term or provision of this Agreement shall be deemed waived, and no breach or default shall be deemed excused, unless such waiver, consent or excuse is in writing, and signed by the Parties hereto. A waiver by a Party hereto of any breach or default by the other Party to this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach or default hereunder by the other Party.

17. In case any one or more of the provisions in this Agreement should be declared by a court, arbitrator, or governmental agency or department to be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

18. Each Party is or had an opportunity to be represented by counsel and made a full and independent investigation of the matters contained herein and is only entering into this Agreement based on the Party's full satisfaction of the results of any investigation and arm's length negotiations. This Agreement will be deemed to have been jointly and equally drafted by the Parties.

19. Time is of the essence in the performance of the terms and conditions of this Agreement.

20. In the event of any legal, equitable or alternative dispute resolution proceeding to interpret or enforce this Agreement, the prevailing party shall be entitled to its reasonable legal fees and costs.

**APPENDIX 1****Compensation****Flagging:**

RPFS shall provide on-site staff (Flagger or Employee in Charge or Watchman or Supervisor) and shall be compensated as follows:

<b>Rate Category</b>	<b>Description</b>	<b>Rates</b>
Flagman Daily Rate	Minimum billable charge for up to 8-hours straight time	\$1,200/day
Overtime Rate	Hourly rate payable for all hours over 8-hours	\$162/hour
Alternate/Weekend Daily Rate	Minimum billable charge for up to 8-hours - Saturday, Sunday, Holidays and any 2nd or 3rd shift assignments	\$1,339/day
Alternate/Weekend Overtime Rate	Hourly rate payable for all hours over 8-hours - Saturday, Sunday, Holidays and any 2nd or 3rd shift assignments	\$181/hour

**Construction Monitoring:**

RPFS shall provide on-site staff (Construction Monitor) and shall be compensated as follows:

<b>Rate Category</b>	<b>Description</b>	<b>Rates</b>
Mobilization Fee	Travel and administrative costs. Multiple mobilization fees will be charged if the Project is delayed or cannot be constructed in consecutive days	\$1,000/Project
Monitor Daily Rate	Minimum billable charge for up to 8-hours straight time	\$1,500/day
Overtime Rate	Hourly rate payable for all hours over 8-hours	\$205/hour
Alternate/Weekend Daily Rate	Minimum billable charge for up to 8-hours - Saturday, Sunday, Holidays and any 2nd or 3rd shift assignments	\$1,640/day
Alternate/Weekend Overtime Rate	Hourly rate payable for all hours over 8-hours - Saturday, Sunday, Holidays and any 2nd or 3rd shift assignments	\$205/hour