



ERIE COUNTY WATER AUTHORITY STAFF MEMORANDUM

To: Jerome D. Schad, Chair
Mark S. Carney, Vice Chair
Peggy A. LaGree, Treasurer

Cc: Terrence D. McCracken, Secretary
Karen A. Prendergast, Chief Financial Officer
Russell J. Stoll, Chief Operating Officer
Leonard F. Kowalski, Executive Engineer
Michael Quinn, Senior Distribution Engineer
Jeff Sylvester, Distribution Engineer
Katherine A. Gillette, Associate Attorney

From: Margaret A. Murphy, General Counsel

Date: August 4, 2020

Subject: Settlement and Release Agreement with 716 Site Contracting, Inc.

On August 23, 2019, there was a catastrophic failure of a 24-inch cast iron watermain, located in the vicinity of 177 Cayuga Creek Road, Cheektowaga, New York. At the time, 716 Site Contracting, Inc. (the "Contractor") was installing a new water distribution line pursuant to an Authority contract (CH-010 [PN 201800075], referenced as the "Contract") awarded on [March 26, 2019 \(Item #12\)](#). The Authority immediately deployed work crews, including an Authority crew and a crew supplied by Russo Development, Inc. ("Russo"), to make the emergency repairs and to restore water services in the affected area. Russo had been awarded an emergency repair contract by the Board on August 24, 2017 (Item #2).

After the Engineering and Accounting Departments were able to tally and verify the expenses, the Authority's Executive Engineer Len Kowalski sent a letter, dated December 11, 2019, to the Contractor seeking reimbursement in the amount of \$47,458.49 for expenses incurred by the Authority in repairing and restoring water service to the affected area. A copy of this letter is attached to this memorandum.

In response to this letter, the Contractor retained [Jeffrey A. Carlino](#), a partner at Kenney Shelton Liptak Nowak LLP, to represent it in this claim. Mr. Carlino and the Legal Department have exchanged a series of letters and emails regarding this claim. Members of the Authority's Legal and Engineering Departments also participated in a phone conference with the Contractor and Mr.

Carlino to discuss the facts and the merit of the claim. Mr. Carlino and his client continue to deny any negligence, on the part of the Contractor, relating to the failure of the 24-inch cast iron watermain, or any other allegations of wrongdoing or breach of contract. The Authority, on the other hand, has been resolute in seeking reimbursement for its expenses for repairing the watermain and restoring service.

The Authority and the Contractor, nonetheless, have agreed to disagree as to the merits of the claim and to settle this matter.

Pursuant to the terms of the Settlement and Release Agreement (the "Agreement"), the parties understand that by entering into this Agreement neither party makes any concession or admission as to the merit of the disputed matter claimed or asserted by the other. The Authority and the Contractor agree to settle the matter to avoid the uncertainty and expenses to resolve these legal disputes through arbitration or litigation, and not to sever the business relationship the parties may have now or in the future.

The Contractor agrees to reimburse the Authority the sum of \$47,458.49 for expenses incurred by the Authority in repairing and restoring water service to the affected area. The Authority agrees nothing in this Agreement would give cause for the Authority to find the Contractor as a non-responsible bidder based upon its performance under the Contract or based upon the incident. The Authority further acknowledges that nothing in this Agreement would render the Contractor not qualified to respond to future Authority bid invitations or to be awarded a contract if it was to be determined the Contractor was the lowest responsive bidder.

A copy of the Agreement signed by the Contractor and its attorney is submitted with this memorandum.

If Board member wishes to discuss or ask for more information relating to this incident or the Agreement, I respectfully request such discussions be conducted in a close-door session pursuant to Public Officers Law § 108 (3) (attorney-client privileged communications recognized under state and federal law) and Public Officers Law §105 (1)(d)(discussion regarding proposed or current litigation).

MINUTES of the MEETING of the ERIE COUNTY WATER AUTHORITY held in the office, 295 Main Street, Room 350, Buffalo, New York, on the 24th day of August, 2017.

PRESENT: Robert Anderson, Chairman
Jerome D. Schad, Vice Chairman
Karl J. Simmeth, Jr., Treasurer
Joseph T. Burns, Secretary to the Authority
Earl Jann, Executive Director
Robert J. Lichtenthal, Jr., Deputy Director
Russell Stoll, Executive Engineer
Paul Riester, Director of Administration
Karen Prendergast, Comptroller
Steve D'Amico, Business Office Manager
Daniel NeMoyer, Director of Human Resources
Jacqueline Mattina, Deputy Associate Attorney
Darlene Sikorski-Petritz, Deputy Associate Attorney
Terrence McCracken, Deputy Administrative Director
Richard Planavsky, Chief Business Officer Manager/Budget Director

ATTENDEES: Mike Wymer

CALL TO ORDER

PLEDGE TO THE FLAG

I. - ROLL CALL

II. - READING OF MINUTES

Motion by Mr. Simmeth seconded by Mr. Schad and carried to waive the reading of the Minutes of the Meeting held on Thursday, August 10, 2017.

III. - APPROVAL OF MINUTES

Motion by Mr. Simmeth seconded by Mr. Schad and carried to approve the Minutes of the Meeting held on Thursday, August 10, 2017.

IV. - REPORTS

- A) SECRETARY**
- B) LEGAL**

VI. - UNFINISHED BUSINESS (NONE)**VII. - NEW BUSINESS (RESOLUTIONS 2-5)****ITEM 2 - AWARD OF CONTRACT TO RUSSO DEVELOPMENT, INC. FOR EMERGENCY WATERMAIN REPAIR CONTRACT FROM AUGUST 1, 2017 THROUGH JULY 31, 2019, PROJECT NO. 201700055 - \$2,273,670.00**

Motion by Mr. Simmeth seconded by Mr. Schad

WHEREAS, The Erie County Water Authority (Authority) heretofore advertised in the Dodge Reports and the NYS Contract Reporter on the 3rd day of July, 2017, a notice inviting sealed bids or proposals in accordance with Section 1069 of the Public Authorities Law for Emergency Watermain Repair Contract from August 1, 2017 through July 31, 2019; and

WHEREAS, Sealed bids or proposals were opened in the office of the Authority on the 25th day of July, 2017, at 11:00 a.m., local time, and were as follows:

| BIDDERS | AMOUNT |
|-------------------------|-----------------|
| Russo Development, Inc. | \$2,273,670.00* |
| Mark Cerrone, Inc. | 2,322,998.00 |
| Kandey Company, Inc. | 2,477,565.00 |

*Corrected Figure; and

WHEREAS, The bid bonds have all been approved by Anthony Alessi, Claims Representative/Risk Manager; and

WHEREAS, Lavonya Lester, Director of Equal Employment Opportunity, has advised that the low bidder, Russo Development, Inc. has complied with the Authority's Affirmative Action Requirements and recommends that they be allowed to proceed with their contract based on that fact; and

WHEREAS, Russell J. Stoll, Executive Engineer and Leonard F. Kowalski, Sr. Distribution Engineer have reviewed the specifications and bids and determined that Russo Development, Inc. is the lowest bidder qualified to perform the project and have recommended that a contract be awarded to that firm for the abovementioned project;

NOW, THEREFORE, BE IT RESOLVED:

8/24/17

That it is hereby determined that Russo Development, Inc. is the lowest responsible bidder for the abovementioned project, and that the Chairman is hereby authorized and directed to execute a contract with said contractor for the Emergency Watermain Repair Contract from August 1, 2017 through July 31, 2019 in the total amount of \$2,273,670.00; and be it further

RESOLVED: Pursuant to New York State Finance Law §§139-j and 139-k and the Authority's Purchasing Guidelines, Policies and Procedures with the award and execution by the Authority of this contract, the Restricted Period will cease; and be it further

RESOLVED: That the Secretary is hereby authorized to return to the unsuccessful bidders their deposit submitted with their bid to the Authority for the abovementioned project; and be it further

RESOLVED: That the Director of Administration is hereby authorized and directed to create a Master Purchase Order for the abovementioned contract.

Ayes: Three; Commrs. Anderson, Schad and Simmeth

Noes: None

ITEM 3 - REFUND FOR NEW SERVICE INSTALLATIONS - \$3,731.81

Motion by Mr. Simmeth seconded by Mr. Schad

WHEREAS, The Erie County Water Authority ("Authority") has installed new services identified on its records by OWIP numbers; and

WHEREAS, Said new services have been completed and the actual cost thereof ascertained; and

WHEREAS, The entire actual cost thereof is less than the estimated cost of the new services; and

WHEREAS, Karen A. Prendergast, Comptroller, under the date of August 10, 2017, has recommended that the following refunds be made;

NOW, THEREFORE, BE IT RESOLVED:

That the Authority repay the difference between the estimated cost of said new services and the entire actual costs thereof to the parties and in the amounts hereinafter set forth:



ERIE COUNTY WATER AUTHORITY

3030 Union Road • Buffalo, New York 14227
716-684-1510 • FAX 716-684-3937

ERIE COUNTY WATER AUTHORITY
15 DEC 19 PM 2:11

December 11, 2019

Mr. Eric Pacer
716 Site Contracting, Inc.
PO Box 120
North Boston New York 14110

Re: Contract No. CH-010
Water System Improvements
Town of Cheektowaga
ECWA Project No. 201800075

Dear Mr. Pacer:

On Friday, August 23, 2019, the Erie County Water Authority (ECWA) was made aware of a joint leak on the existing 24-inch cast iron watermain near 177 Cayuga Creek Road by our consultant, CHA Consulting, Inc. (CHA). Based on the information that was provided from the field, ECWA had no objection to the work continuing. A short time later, the main experienced a catastrophic failure. ECWA forces were dispatched to shut down the affected main. Subsequently, it was found the contractor had excavated under and behind a bend compromising the integrity and stability of the bend. At the time ECWA was notified about the joint leak, we were not made aware of the excavation work being performed in the vicinity of the existing watermain that ultimately caused the failure. 716 Site Contracting, Inc. was aware of the location of the existing facilities and failed to protect and support the existing facilities.

Emergency repair crews were dispatched to place the watermain into service. It took multiple crews over 24 hours to get the main temporarily repaired and back into service.

There are numerous items on the plans and in the Project Manual that clearly cautions the contractor to be cognizant of the potential impact/liability of working around/near underground utilities. Notifications to Contractor for maintaining all facilities during construction includes, but is not limited to:

- 1) Project Manual, Section 01270 Measurement and Payment, page 01270-1, 1.01, D, "Each of the bid items shall also include the cost required in supporting and protecting existing utilities while working under, over or alongside or near the utility. Also included, is the protection of overhead telephone, cable, electric power or other lines and the supporting of poles, if required.

- a) The utilities likely to be encountered include:
 - i) Storm and sanitary sewers.
 - ii) Gas, water, electric, telephone, fiber optic, and cable TV house service connections.
 - b) The cost of repairing any damage to the various utilities done during the installation of the work shall be included in the various bid items.
- 2) Project Manual, 0700-14, 4.04, A-2.d, "the safety and protection of all such underground facilities and repairing any damage thereto resulting from the work."
 - 3) Project Manual, 01562-2, 1.04, A-3,4,5
 - 4) Project Manual, 01562-3, C-1,2
 - 5) Plan sheet G-002, General Note 26, "The Contractor shall take care to prevent damage to existing utilities. Damaged utilities shall be immediately repaired by contractor at contractor's expense."

The above referenced sections of the contract documents indicate that the contractor is responsible to protect the existing watermain and is responsible for the damage caused by failing to do so.

The costs borne by ECWA to repair the watermain under emergency conditions are as follows:

| | |
|------------------------------|-------------------|
| Labor | \$5,067.43 |
| Transportation..... | \$2,267.03 |
| Materials..... | \$5,547.87 |
| Payments to Contractors..... | \$29,742.50 |
| Overhead..... | <u>\$4,833.66</u> |
| Total Amount Due | \$47,458.49 |

Your contract with ECWA states, "CONTRACTOR shall assume full responsibility for any damage to any such land or area, or to the owner or occupant thereof, or of the adjacent land or areas resulting from the performance of the Work." (Project Manual at p. 00700-22, § 6.11.A.1). Further, "[s]hould any claim be made by any such owner or occupant because of the performance of the Work, CONTRACTOR shall promptly settle with such other party by negotiation or otherwise resolve the claim by arbitration or other dispute resolution proceeding or at law." (Project Manual at p. 00700-22, § 6.11.A.2). You would also be responsible for all attorney fees

Mr. Eric Pacer
716 Site Contracting, Inc.
December 11, 2019
Page 3

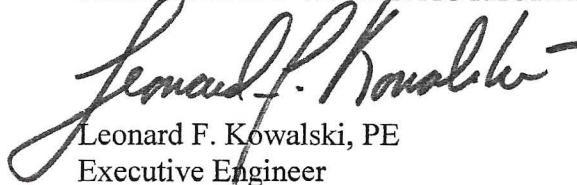
and expenses, including any costs associated with arbitration or other dispute resolution proceeding. (Project Manual at p. 00700-22, § 6.11.A.3 and at p. 00700-25, § 6.20A).

ECWA demands payment of \$47,458.49 for the damages caused by your work performance. ECWA currently hold \$76,384.66 in retention on this contract (CH-010). Unless you dispute this damage claim, ECWA will withhold \$47,458.49 from the final payment of this contract to satisfy this damage claim.

If you have any questions regarding this matter, you should contact Katherine A. Gillette, Associate Attorney, in the ECWA Legal Department. Her direct line is 716-849-8448.

Very truly yours,

ERIE COUNTY WATER AUTHORITY



Leonard F. Kowalski, PE
Executive Engineer

LFK:jmf
cc: R.Stoll
J.Sylvester
M.Jarmuz (CHA)
K. Prendergast
M. Murphy
K. Gillette

CONT-CH-010-1801-I-186-B



ERIE COUNTY WATER AUTHORITY

295 MAIN ST RM 350
BUFFALO NY 14203
(716) 849-8484

INVOICE NO. 201904

DATE: 11/24/2019

716 Site Contracting
PO Box 12
North Boston, NY 14110

TERMS: NET CASH

Repair to 24" cast iron watermain near 177 Cayuga Creek Rd in the Town of Cheektowaga on August 23, 2019.

| <u>Description</u> | <u>Cost</u> |
|-------------------------|-------------|
| Labor | \$ 5,067.43 |
| Transportation | 2,267.03 |
| Materials | 5,547.87 |
| Payments to Contractors | 29,742.50 |
| Overhead | 4,833.66 |

| | |
|------------------|-------------|
| Total Amount Due | \$47,458.49 |
|------------------|-------------|

All payments should be remitted to: 295 Main St Rm 350, Buffalo NY 14203



Kenney Shelton Liptak Nowak LLP
Attorneys

BUFFALO
The Calumet Building
233 Franklin Street
Buffalo, NY 14202
p 716.853.3801
f 716.853.0265
ksinlaw.com

July 28, 2020

Margaret A. Murphy, Esq.
General Counsel
Erie County Water Authority
295 Main Street, Suite 350
Buffalo, New York 14203

Regarding: Contract No. CH-010 (the "Contract")
Water System Improvements
Town of Cheektowaga
ECWA ("ECWA or Owner") Project No. 201800075

Dear Ms. Murphy:

Enclosed please find two (2) partially executed original Claim Settlement and Release Agreements with regard to the above matter. Please provide me with one (1) fully executed original by return mail.

Very truly yours,

KENNEY SHELTON LIPTAK NOWAK LLP

Jeffrey A. Carlino, Partner
JACarlino@ksinlaw.com

JAC:kml

Encls.

Cc (w/o encls.): Katherine Gillette (via email)
Eric Pacer (via email only)

CLAIM SETTLEMENT AND RELEASE AGREEMENT

This Claim Settlement and Release Agreement (the "Agreement") is made effective as of July 30, 2020, by and among the ERIE COUNTY WATER AUTHORITY (the "Authority"), and 716 SITE CONTRACTING, INC. (the "Contractor"). The Authority and the Contractor are referred collectively as the "Parties."

WHEREAS, effective April 10, 2019, the Authority and the Contractor entered into a contract, commonly referred to as CH-010 (PN 201800075), to make certain capital improvements relating to the Authority's water system within the Town of Cheektowaga (the "Contract");

WHEREAS, pursuant to Article 6, § 6.02(A)(1)(a) of the Contract, the Authority is currently holding \$123,979.53 in retention from progress payments made pursuant to the Contract (the "Retainage");

WHEREAS, on August 23, 2019, there was a catastrophic failure of a 24-inch cast iron watermain, located in the vicinity of 177 Cayuga Creek Road, Cheektowaga, New York, an area where the Contractor was performing work on the Authority's behalf pursuant to the Contract (the "Incident");

WHEREAS, the Authority has sought reimbursement from the Contractor in the amount of \$47,458.49 for the expenses incurred by the Authority in repairing and restoring water service to the affected area as a result of the Incident;

WHEREAS, the Contractor denies any negligence on its part regarding the Incident, continues to deny any allegations of wrongdoing, and asserts that they are not liable to the Authority in any manner;

WHEREAS, the Authority claims it is entitled to reimbursement pursuant to several provisions of the Contract and has demanded payment from the Contractor in the amount of 47,458.49 (the "Demand");

WHEREAS, the Parties understand that by entering into this Agreement neither party makes any concession or admission as to the merit of the disputed matter claimed or asserted by the other; and

WHEREAS, the Parties wish to settle this matter to avoid the uncertainty and expenses to resolve these legal disputes through arbitration or litigation, and not to sever the business relationship the parties may have now or in the future;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the Parties hereto agree as follows:

1. For purposes of this Agreement, the Contractor shall be defined to mean 716 SITE CONTRACTING, INC., its shareholders, officers, directors, employees, agents, attorneys, representatives, successors and assigns, and all other persons, firms or corporations with whom any of the foregoing have been, are now or may hereafter be affiliated.

2. For purposes of this Agreement, the Authority shall be defined to mean the ERIE COUNTY WATER AUTHORITY its current and future appointed commissioners, officers, employees, agents, servants, representatives, attorneys, affiliates, predecessors and successors in interest, and assigns, and all other persons, firms or corporations with whom any of the foregoing have been, are now or may hereafter be affiliated.

3. The Parties enter into this Agreement solely for the purpose of settling and resolving the Demand. By entering into this Agreement, the Contractor does not admit to any negligence or wrongdoing in the happening of the Incident. Rather, the Contractor enters into this Agreement solely for the purpose of resolving all matters between it and the Authority without further proceedings.

a. In consideration of the Authority's execution of this Agreement, inclusive of the Release set forth in Paragraph 3, the Contractor agrees to pay to the Authority the sum of FORTY-SEVEN THOUSAND FOUR HUNDRED FIFTY-EIGHT DOLLARS AND FORTY-NINE CENTS (\$47,458.49) [herein "Settlement Payment"].

b. The Contractor agrees the Authority shall retain the Settlement Payment from the Retainage on the Contract, by deducting the amount of the Settlement Payment from the final payment made to the Contractor under the terms of the Contract.

c. The Authority agrees the Settlement Payment shall be in satisfaction of the Authority's claim for damages and any claim or relief the Authority could have brought against the Contractor, including, but not limited to all claims for labor, transportation, materials,

payments to contractors, overhead, attorneys' fees and costs, punitive damages, liquidated damages, compensatory damages, equitable relief, or any other amounts or damages potentially recoverable, relating to this Incident.

d. The Parties further agree and acknowledge that the Settlement Payment is made in settlement of the Demand and that each Party will be responsible for its own legal fees and expenses rendered in connection to this matter.

4. Except as provided in paragraph 5 of this Agreement, the Authority releases the Contractor from any and all liability, claims (known and unknown, existing and contingent), demands, actions, causes of action, suits, grievances, debts, sums of money, controversies, agreements, promises, damages, costs, expenses, interest, attorneys' fees, and remedies of any type, by reason of any matter, cause, act or omission occurring prior to the execution of this Agreement including, without limiting the generality of the foregoing, the Demand and any other claims, demands or actions arising out of the Incident on August 23, 2019. The Authority further covenants not to commence any other legal action of any kind whatsoever that impacts the Contractor, based on any matter, cause, act or omission arising out of or in connection with any matter, cause, act or omission occurring prior to the execution of this Agreement, except to enforce the terms of this Agreement. The Authority acknowledges that the consideration set forth in Paragraph 2(a) of this Agreement is a full and final settlement of its Demand and any statutory or other rights that the Authority may have for reimbursement of costs, interest, expenses, expert witness fees, or attorneys' fees and costs in connection with such demand.

5. This Agreement does not alter the rights of the Authority with respect to any third-party claims brought against the Authority and/or the Contractor relating to the Incident and any damages arising from the Incident.

6. The Parties acknowledge and have received a notice of a property claim filed by Nancy and William Owczarczak, the owners of 177 Cayuga Creek Drive, relating to the Incident.

7. Nothing in this Agreement alters the rights of the Parties to defend and indemnify the other from acts of negligence, caused by the Party, its employees, agents, subcontractor or for anyone for whom the Party is legally liable.

8. The Parties agree this Agreement may not be used as evidence or referred to in any way in any judicial or administrative action, any arbitration or any other proceeding, except for a

proceeding in which any Party alleges a breach of this Agreement, or as may be directed by Court Order.

9. This Agreement is not intended to create any rights in any person or entity other than the Parties.

10. The Authority represents and warrants it has not filed any complaints or claims against the Contractor with any federal or state court or agency based on any actions, omissions, or events occurring prior to the execution of this Agreement. The Authority further represents and warrants that it has not assigned, sold or otherwise transferred any of the claim released in this Agreement.

11. The Authority agrees nothing in this Agreement would give cause for the Authority to find the Contractor as a non-responsible bidder based upon its performance under the Contract or based upon the Incident. The Authority further acknowledges that nothing in this Agreement would render the Contractor not qualified to respond to future Authority bid invitations or to be awarded a contract if it was to be determined the Contractor was the lowest responsive bidder.

12. The Parties agree this Agreement is deemed entered in the State of New York and shall be construed and interpreted in accordance with the laws of the State of New York, without any dispute relating to conflicts of laws.

13. The Parties agree any action brought to enforce, or otherwise arising out of this Agreement shall be brought in a court of competent jurisdiction, situated in the County of Erie.

14. The Parties understand, agree and acknowledge that none of the Parties shall be deemed to be the drafter of this Agreement for purposes of construction.

15. If a statement is requested by members of the media relating to the Settlement Agreement and General Release, the Parties will refrain from making any statements or comments, except to state that the Agreement speaks for itself.

16. The Parties acknowledge this Agreement is their entire agreement and supersedes all other written or oral exchanges, arrangements or negotiations between them or their representatives. The terms of this Agreement may not be altered, amended or modified except by written instrument duly signed by each Party.

17. The Authority acknowledges that no representative of the Contractor has made any representation or promise concerning this settlement other than the terms and conditions contained in this Agreement. The Parties acknowledge that they have not relied upon any promise, representation or warranty, express or implied, not set forth in this Agreement.

18. If any provision of this Agreement is held to be illegal, void or unenforceable, such provision shall be of no force or effect. However, the illegality or unenforceability of such provision shall have no effect upon, and shall not impair the legality or enforceability of, any other provision of this Agreement provided that a legal and enforceable provision shall be substituted for such illegal and unenforceable provision in order to carry out, to the extent legal and enforceable, the intent and purpose of such illegal and unenforceable provision.

19. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

20. The individuals executing this Agreement on behalf of the Authority and the Contractor represent and warrant that he has the legal right, power and authority to execute this Agreement

ERIE COUNTY WATER AUTHORITY

Dated: August __, 2020

By: _____
JEROME D. SCHAD, Chairman

Dated: August __, 2020

By: _____
MARGARET A. MURPHY, General Counsel

716 SITE CONTRACTING, INC.

Dated: July 27, 2020

By: _____
ERIC PACER, Vice President

Dated: July __, 2020

By: _____
JEFFREY A. CARLINO, of counsel
Kenney Shelton Liptak Nowak LLP
Attorneys for 716 Site Contracting, Inc.

STATE OF NEW YORK)
 : ss.
COUNTY OF ERIE)

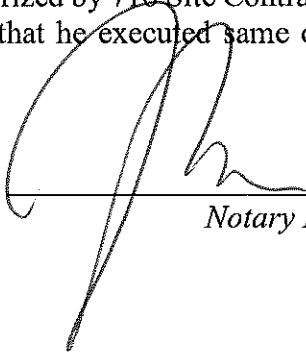
On the ____ day of August, 2020, before me personally appeared **Jerome D. Schad**, Chairman of the Board of Commissioners of the Erie County Water Authority, to me known, who being by me duly sworn did depose and say that he executed the within instrument, that he was authorized by the Erie County Water Authority to execute said instrument, and that he acknowledged to me that he executed same on behalf of the Erie County Water Authority.

Notary Public

STATE OF NEW YORK)
 : ss.
COUNTY OF ERIE)

On the 21st day of July, 2020, before me personally appeared **Eric Pacer**, Vice President of 716 Site Contracting, Inc., to me known, who being by me duly sworn did depose and say that he executed the within instrument, that he was authorized by 716 Site Contracting, Inc., to execute said instrument, and that he acknowledged to me that he executed same on behalf of 716 Site Contracting, Inc.

Jeffrey A. Carlino
Notary Public, State of New York
Qualified in Erie County
Commission Expires April 19, 2023



Notary Public