

AGREEMENT

THIS WATER TANK MAINTENANCE AGREEMENT (hereinafter called “Agreement”) is made as of the 5th day of December 2011 (the “Effective Date”) by and between the City of West Allis (hereinafter called “Owner”) and SEH Design/Build, Inc., with its principal place of business at St. Paul, Minnesota (hereinafter called “SEH D|B”).

In consideration of the agreements hereinafter contained, the parties hereto agree as follows:

1. SCOPE OF SERVICES. The Owner retains SEH D|B to furnish the services set forth on the attached Exhibit “A”. SEH D|B agrees to perform the services. SEH D|B shall provide all personnel, supervision, services, materials, tools, equipment and supplies and do all things necessary for the Water Tank Services and all materials, equipment and improvements ancillary thereto specified on Exhibit “A” (Sometimes referred to herein as “the Project”). The work to be performed under this Agreement shall be done under the review of a professional engineer licensed in the State of Wisconsin who shall attest that the work will be performed in compliance with all applicable codes and engineering standards. All procurement and construction shall be in accordance with drawings, specifications or other documents to be prepared by SEH D|B in accordance with design premises, performance requirements and other criteria set forth or referenced in the Exhibits hereto. The work shall be performed as set forth in the Contract Documents, which includes this Agreement and Exhibits, including Exhibit “A” – Scope of Services and Exhibit “B” – Schedule of Payment and Fee Schedule. In the event any ambiguity or conflict between the Contract Documents listed above, the order of precedence shall be the following order: (i) this Agreement; (ii) Exhibit “A”, (iii) Exhibit “B”.

2. REPRESENTATIVES. Owner has designated Dan Schwebke (the “Owner Representative”), and SEH D|B has designated Joseph Hoban (the “SEH D|B Representative”). The Owner Representative and the SEH D|B Representative shall be available as often as is reasonably necessary for reviewing the Water Tank Services, providing required information or decisions, and for authorizing changes therein as may be required.

3. COMPENSATION. SEH D|B shall be paid by the Owner for the services described in paragraph 1 in accordance with the amounts designated in Exhibit B for each year of service, inclusive of reimbursable costs.

4. INVOICING

4.1 The invoice for the first year fee will be submitted upon completion of the work done in the first year. Invoices for the subsequent fees will be submitted in the anniversary month of this Agreement.

4.2 Invoices for Change orders shall be separately mailed and billed as outlined in the Change Order.

4.3 Amounts more than 30 days past due shall accrue interest at the lesser of 1.5% per month or at the maximum rate allowed by law. If the Owner fails to make timely payment, SEH D|B may suspend work until receipt of payment.

4.4 If any of the payments listed in Exhibit B and due as set out above exceed the total water utility charges received for the Owner for the year payments are due (“Water Utility Charges”), then the Owner may extend payments, and such amounts shall become due upon the Owner’s receipt of additional Water Utility Charges. Owner agrees to increase, assess or adjust Water Utility Charges as necessary to secure funds for payment within a reasonable time.

5. COMPLETION. Yearly task will be coordinated between SEH D|B and City staff.

6. SUBCONTRACTING. The subcontracting of any portion of the Work shall not relieve SEH D|B of responsibility for the performance of the Work, as provided hereunder. However, SEH D|B shall have the right to subcontract such portions of the Work as it shall determine to others, including any affiliates of SEH D|B (“Affiliates”).

7 OWNER RESPONSIBILITIES.

7.1 TELECOMMUNICATIONS

7.1.1 Owner recognizes that any telecommunications equipment located on the water tank(s) or appurtenant facilities may interfere with the work contemplated in this Agreement. If requested by SEH D|B, Owner agrees to arrange for the owner of any telecommunications equipment located on the water tank(s) or appurtenant facilities to remove or protect telecommunications equipment during the Work. SEH D|B cannot and will not remove such equipment and the removal of such equipment by the Owner or the owner of such equipment is a condition precedent to SEH D|B’s obligations under this Agreement.

7.1.2 Owner will also arrange for the reinstallation of the telecommunications equipment after SEH D|B has notified the Owner that rehabilitation work has been completed or that the work has proceeded to the point where such equipment may be reinstalled. SEH D|B shall have no responsibility for the reinstallation of the telecommunications equipment.

7.1.3 Owner acknowledges that SEH D|B cannot be responsible for any damage to the telecommunications equipment during the removal and reinstallation of that equipment. As a result, Owner will indemnify, defend and hold SEH D|B harmless against any and all claims, damages, suits, disbursements or other costs including reasonable attorneys’ fees incurred by SEH D|B as a result of removal and/or reinstallation of the telecommunications equipment.

7.1.4 Work that results from the proposed or actual installation of telecommunications or other equipment that is anchored to or otherwise attaches to the tank structure or appurtenances is not included as part of this work. Owner agrees that SEH D|B will have the right to review, approve and inspect all proposed telecommunications equipment installations during the term of this contract. SEH D|B shall be compensated in accordance with its then current hourly rates for such work as an additional service. SEH D|B shall bill Owner for these services through a separate invoice for this work.

7.2 PROJECT INFORMATION

7.2.1 The Owner shall furnish all surveys, record drawings, and other information describing legal limitations, physical conditions, soils and subsurface conditions and utility locations material to the Work. The Owner shall provide SEH D|B with copies of all prior evaluations, studies, reports, or existing documentation regarding the condition of Water Tanks, or any concerns or complaints regarding the condition or operation of the Tank(s) or other work subject to this Agreement. The Owner shall secure and pay for necessary permits, approvals, variances, easements, assessments and charges required for the construction, use or occupancy of the Water Tank. If the Owner becomes aware of any fault or defect in the Project, it shall give prompt notice thereof to the SEH D|B.

8. INDEMNIFICATION. SEH D|B shall indemnify and save the Owner, its directors, officers, employees, successors and assigns harmless from and against any and all losses, liabilities, damages, costs and expenses (including cost of defense, settlement and reasonable attorney’s fees) by reason of liability to third parties imposed by law upon the Owner (1) for damages as a result of bodily injury, including death at any time resulting therefrom, sustained by any person or persons or (2) on account of damage to property (other than the Work whether accepted or not), including loss of use thereof, to the extent caused by the negligent acts or omissions or willful misconduct of SEH D|B.

9. INSURANCE. SEH D|B shall secure and maintain such insurance as will protect SEH D|B from claims under the Worker's Compensation Acts, automobile liability, and from claims for bodily injury, death, or property damage which may arise from the performance of services under this Agreement. Such insurance shall be written for amounts not less than:

Commercial General Liability	\$1,000,000 each occurrence/aggregate
Automobile Liability	\$1,000,000 combined single limit
Excess/Umbrella Liability	\$2,000,000 each occurrence/aggregate

The Owner shall be named as an additional insured on the general liability and umbrella policies.

SEH D|B or its engineering subconsultant shall secure and maintain a professional liability insurance policy. Said policy shall insure payment of damages for legal liability arising out of the performance of professional services for the Owner, in the

insured's capacity as engineer, if such legal liability is caused by a negligent act, error or omission of the insured or any person or organization for which the insured is legally liable. Said policy shall provide minimum limits of \$1,000,000 with a deductible maximum of \$200,000 unless the Owner agrees to a higher deductible.

Before commencing work, SEH D|B shall upon written request, provide the Owner a certificate of insurance evidencing the required insurance coverage in a form acceptable to Owner. The certificate shall provide that such insurance cannot be cancelled until thirty (30) days after the Owner has received written notice of the insurer's intention of cancel this insurance.

10. INDEPENDENT CONTRACTOR. The Owner hereby retains the SEH D|B as an independent contractor upon the terms and conditions set forth in this Agreement. The SEH D|B is not an employee of the Owner and is free to contract with other entities as provided herein. SEH D|B shall be responsible for selecting the means and methods of performing the work. SEH D|B shall furnish any and all supplies, equipment, and incidentals necessary for SEH D|B's performance under this Agreement. Owner and SEH D|B agree that SEH D|B shall not at any time or in any manner represent that SEH D|B or any of SEH D|B's agents or employees are in any manner agents or employees of the Owner. SEH D|B shall be exclusively responsible under this Agreement for SEH D|B's own FICA payments, workers compensation payments, unemployment compensation payments, withholding amounts, and/or self-employment taxes if any such payments, amounts, or taxes are required to be paid by law or regulation.

11. CHANGE ORDERS

11.1 The Owner may request that SEH D|B perform additional services not originally included in the basic services identified in Exhibit A. No such work may be done until after the Owner has approved the change order in writing. Upon such a request by Owner, SEH D|B will generate a Change Order in writing describing the additionally requested Work and the anticipated compensation for undertaking that Work. .

11.2 In any emergency affecting the safety of persons or property, SEH D|B shall act, at its discretion, to prevent threatened damage, injury or loss. If the emergency was not the result of SEH D|B's fault, SEH D|B will be entitled to an equitable contract adjustment to compensate SEH D|B for its services.

11.3 All Change Orders shall include:

11.3.1 A detailed description of the Change Order Work to be performed.

11.3.2 The amount of any adjustment (up or down) to the SEH D|B contract for the Work done pursuant to Change Order.

11.3.3 A modification of the project schedule if necessitated by the Change Order Work.

11.4 S.E.H. D|B may request a change order if it believes work outside the scope of services has been requested or is needed. All such change order must be approved in writing by the Owner before the work is done

12. WAIVER OF CONSEQUENTIAL DAMAGES

12.1 Neither the Owner nor SEH D|B and any Affiliates shall be obligated or liable to each other under this Agreement (including, without limitation, any guarantee or remedy hereunder) or otherwise for loss of use, loss of actual or anticipated profits, business interruption, loss of revenues, or product, loss by reason of shutdown, non-operation, or increased expense of manufacturing or operation, increased expenses of borrowing, financing, manufacturing or operation, loss of productivity, loss of shop space, or other consequential, indirect, special, incidental or punitive damages, however the same may be caused, including, without limitation, damages related to breach of warranty, misrepresentation or the negligent acts or omissions, strict liability or other tort of SEH D|B or any Affiliates.

12.2 Limitations of liability and exculpation from consequential, indirect, special, incidental or punitive damages expressed in this Agreement shall apply even in the event of the negligence, fault, strict liability of SEH D|B or any Affiliates, AND SHALL INCLUDE LIABILITY FOR ANY LOSS CAUSED BY THE SOLE OR CONCURRENT NEGLIGENCE OF SEH D|B OR ANY AFFILIATES.

12.3 All releases, waivers, limitation on liability, hold harmless and indemnity provisions in the Contract Documents which apply for the benefit of SEH D|B shall also apply for the benefit of SEH D|B's parent and affiliated companies and SEH D|B's Subcontractors (including but not limited to any Affiliates), and all of their respective directors, officers, employees, agents and representatives.

13. TERM AND TERMINATION

13.1 This Agreement shall be effective for five years from the effective date as set forth in this Agreement.

13.2 Either party may terminate this Agreement prior to the expiration of the term for material breach of this Agreement, provided such breach is not cured as set forth below.

13.3 If either party believes that the other has materially breached the agreement, then the party alleging the breach shall give the other 15 days written notice setting forth the nature of the claimed breach and confirming the intent to terminate. The party claimed to be in breach will then have 15 days to cure the condition which constitutes the alleged material breach of the contract, or demonstrate that no breach exists. If the party in breach fails to correct the breach or demonstrate no breach exists, the agreement will terminate upon two days written notice.

13.4 The Owner may, at any time, terminate this Agreement for the Owner's convenience without cause upon 30 days written notice. In the event the Owner terminates this Agreement for convenience, SEH D|B shall:

- 13.4.1 Cease operations as directed by the Owner in its notice;
- 13.4.2 Take actions as necessary or as the Owner may direct for the protection and preservation of the Work; and
- 13.4.3 Except for work directed to be performed prior to the effective date of the termination for convenience, terminate all existing subcontracts and purchase orders, and enter in to no further subcontracts and purchase orders.
- 13.4.4 Determine the total amount due for services performed prior to the effective date of the termination for convenience.

13.5 In the event of termination for convenience by the Owner, SEH D|B shall be entitled to receive payment for all Work executed per this Agreement, and any Work Orders or Change Orders.

13.6 In the event of termination for cause prior to the expiration of the term of this Agreement or any Work Order, Owner shall pay to SEH D|B the remaining amount due for the Work performed and all claims shall be resolved as set forth in the applicable Work Order. Such payment shall be due within 30 days of termination. Payments not received by the last day of the month shall be overdue and will accrue interest at a rate of 1.5% per month or the maximum rate allowed by law which ever is less.

14. ASSIGNMENT. Neither party shall assign this Agreement, nor any interest arising herein, nor any claims arising from or related to this Agreement or the Project, without the written consent of the other party. Any assignment in violation of this provision shall be null and void. Notwithstanding the above, SEH D|B reserves the right to assign its right(s) for payments due under this Agreement to a bank, credit union or other lending institution or entity in return for immediate payments, financing of work under this Agreement or other good and valuable consideration, and Owner hereby consents to such assignment.

15. WAIVER. Any waiver by either party of a breach of any provisions of this Agreement shall not affect, in any respect, the validity of the remainder of this Agreement.

16. ENTIRE AGREEMENT. The entire agreement of the parties is contained herein. This Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof as well as any previous agreements presently in effect between the parties relating to the subject matter hereof. Any alterations, amendments, deletions, or waivers of the provisions of this Agreement shall be valid only when expressed in writing and duly signed by the parties, unless otherwise provided herein.

17. CONTROLLING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin. All parties to this Agreement consent to and accept the personal jurisdiction of the State of Wisconsin and agree that all claims, disputes or litigation that arises from or relates to this Agreement shall be made in the State of Wisconsin.

18. COPYRIGHT. SEH D|B shall defend actions or claims charging infringement of any copyright or patent by reason of the use or adoption of any designs, drawings or specifications supplied by it for the Project, and it shall hold harmless the Owner from loss or damage resulting therefrom for use of these documents for the Project. Owner shall not use any designs, drawings or specifications supplied by SEH D|B for any other project without the express written consent of SEH D|B.

19. RECORDS. The SEH D|B shall maintain complete and accurate records of time and expense involved in the performance of services.

20. BINDING EFFECT, THIRD PARTIES. Each of the provisions of the Contract Documents shall extend to and shall, as the case may require, bind or inure to the benefit not only of the parties, but also for their respective successors, heirs or assigns, provided this clause shall not permit any assignment by any party of the Contract Documents not otherwise permitted. The parties agree that the Contract Documents are not intended by either party to give any benefits, rights, privileges, actions or remedies to any person, partnership, firm or corporation (other than a party or its permitted assignee, or, to the extent applicable, any Affiliates) as a third party beneficiary or otherwise under any theory of law.

21. MISCELLANEOUS

21.1 This Agreement states the integrated and complete Agreement between Owner and SEH D|B on this subject and replaces any previous understandings, representations or communications, whether oral or written.

21.2 A party's failure to exercise a right in one or many instances does not waive that right as to any later instance. The course of conduct does not affect a modification or a waiver unless ratified in writing by the party to be bound.

21.3 In the event of any litigation between the parties related to this Agreement or its breach, each party will be responsible for its own attorney's fees together with expert's fees and other costs.

21.4 The section headings of this Agreement are included for purposes of convenience only and will not affect the construction or interpretation of any provision.

21.5 All provisions of this Agreement allocating responsibility between Owner and SEH D|B will survive the completion of the Work or termination of this Agreement.

21.6 Any provision or part of this Agreement adjudicated to be void or unenforceable under any law will be deemed deleted, such deletion to apply only with respect to the jurisdiction in which such adjudication is made, and all remaining provisions will continue to be valid and binding upon the parties. The parties agree that this Agreement will be reformed to replace the deleted provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the deleted provision.

IN WITNESS WHEREOF, the parties hereto through their respective authorized representatives have executed this Agreement as of the day and year first written above.

OWNER

SEH DESIGN/BUILD, INC.

BY: _____

BY: *[Signature]*

Its: _____

Its: *DIRECTOR*

Dated: _____

Dated: *12-5-2011*

Approved as to Form: _____
City Attorney

Countersigned Controller: _____
Finance Manager

Exhibit A

Scope of Services

Basic Services

SEH D|B, Inc. shall, within the term of the Agreement, provide, or cause to be provided the services in accordance with the indicated schedule and specified work items and repairs. These services will be provided at the following tanks:

- **116th and Rogers 1.5 MG Legged Tank**

Exhibit A

1.5 MG Legged Tank

Water Tank Maintenance Services Schedule of Services

**City of West Allis
Legged Tank
1.5 MG Gallon**

		PROPOSED WORK				
		2012	2013	2014	2015	2016
VISUAL SURVEY						
• Exterior Coating Observation		X	X	X	X	
• Wet Interior Coating Observation		X	X	X	X	
• Dry Interior Coating Observation		X	X	X	X	
• Pit Piping Coating Observation		X	X	X	X	
• Accessory Observation		X	X	X	X	
• Summary Statement		X	X	X	X	
GENERAL MAINTENANCE						
• Pressure Wash Clean	Exterior					X
	Wet Interior					X
• Spot Coating Repairs	Exterior					X
	Wet Interior					X
	Dry Interior					X
	Pit Piping					X
• Minor Accessory Repairs						X
• Quality Assurance Inspections						X
ENGINEERING EVALUATION						
• Exterior Coating Testing and Analysis						X
• Wet Interior Coating Testing and Analysis						X
• Dry Interior Coating Testing and Analysis						X
• Pit Piping Coating Testing and Analysis						X
• Floatdown/Washout Inspection						X
• Tank Accessories Inspection						X
• Report with Recommendations						X

Exhibit A

1.5 MG Legged Tank

Water Tank Maintenance Services

Specific Work Items and Repairs

Tank Name:	116th and Rogers 1.5 MG Legged Tank West Allis, Wisconsin
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Years: 2012 to 2015	
1.	Yearly Visual Surveys: <ul style="list-style-type: none"> • Full tank inspection (wet interior does not have to be drained). • Summary Report.

Year: 2016	
1.	Exterior: <ul style="list-style-type: none"> • Pressure wash surfaces to remove contaminants and mildew. • Power tool clean rusted areas on exterior surfaces to equivalent of SSPC-SP 3 Power Tool Cleaning Condition. • Apply two coats of epoxy and one coat of urethane with UV protection (AWWA Outside Paint System No. 5) to prepared areas.
2.	Wet Interior: <ul style="list-style-type: none"> • Pressure wash surfaces to remove contaminants and staining. • Power tool clean rusted areas on wet interior surfaces to equivalent of SSPC-SP 11 Power Tool Cleaning to Bare Metal Condition. • Apply two coats of epoxy coating (AWWA Inside Paint System No. 1) to prepared areas. • Disinfect the tank interior per AWWA C652.
3.	Dry Interior: <ul style="list-style-type: none"> • Power tool clean rusted areas on dry interior surfaces to equivalent of SSPC-SP3 Power Tool Cleaning Condition. • Apply two coats of epoxy coating (AWWA Inside Paint System No. 1) to prepared areas.
4.	Pit Piping: <ul style="list-style-type: none"> • Power tool clean rusted areas on the pit piping surfaces to equivalent of SSPC-SP3 Power Tool Cleaning Condition. • Apply two coats of epoxy coating (AWWA Inside Paint System No. 1) to prepared areas.
5.	Engineering Evaluation: <ul style="list-style-type: none"> • Inspection of the exterior, wet interior, dry interior and valve vault coatings. • Coating testing and analysis. • Tank accessories inspection. • Report with recommendations.

Exhibit B

Schedule of Payments

City of West Allis shall pay SEH Design|Build, Inc. for the work provided in the Scope of Services in accordance with the following schedule:

Year	1.5 MG Tank
2012	\$ 5,000
2013	\$ 5,000
2014	\$ 5,000
2015	\$ 5,000
2016	\$ 55,000
Total	\$ 75,000

Exhibit C

Performance Guarantees

Subject to the terms and conditions of the Contract Documents, SEH D|B, Inc. hereby guarantees that, following a complete Rehabilitation procedure, the tanks included under this contract will for the term of the Contract:

1. Be in general compliance regarding safety and access with the following industry standards:
 - American Water Works Association (AWWA) Standards (D100 & D102)
 - Occupational Safety and Health Administration (OSHA) Article 1910
 - Recommended Standards for Water Works (10-State Standards) Subparts 7.0.8 and 7.0.12.
2. Be maintained to meet or exceed the following industry performance levels for coating systems:
 - For exterior polyurethane systems: SSPC Paint Specification 36 - Performance Level 3.
3. For all other coating systems:
 - Rusting: ASTM D-610 - Grade 9
 - Cracking: None Allowed
 - Peeling: None Allowed
 - Delamination: None Allowed
 - Pitting: None Allowed