

STATE OF WISCONSIN

CIRCUIT COURT

15CV00918-7
MILWAUKEE COUNTY

DAKOTA INTERTEK CORP.
16600 W. National Avenue
New Berlin, WI 53151,

Plaintiff,

vs.

CITY OF WEST ALLIS
7525 W. Greenfield Ave.
West Allis, WI 53214

Defendant.

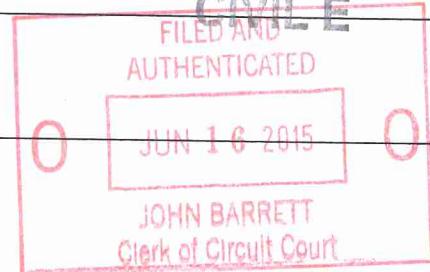
6-22-15 2139P

Case No.
Case Code: 30303

[Signature]

SUMMONS

TO: CITY OF WEST ALLIS
7525 W. Greenfield Ave.
West Allis, WI 53214



You are hereby notified that the Plaintiff named above has filed a legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Clerk of Circuit Court, Milwaukee County Courthouse, 901 North Ninth Street, Room 104, Milwaukee, Wisconsin 53233, and to McDonald & Kloth, LLC, 1840 North Farwell Avenue, Suite 205, Milwaukee, Wisconsin 53202. You may have an attorney help or represent you.

RECEIVED

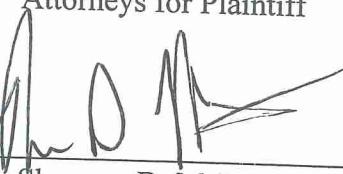
JUN 22 2015

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mt

CITY OF WEST ALLIS
CITY CLERK

Dated this 16th day of June, 2015.

McDONALD & KLOTH, LLC
Attorneys for Plaintiff

By: 

Shannon D. McDonald
SBN: 1036954
1840 North Farwell Ave.
Suite 205
Milwaukee, WI 53202
Direct: 414-403-2161
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STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

DAKOTA INTERTEK CORP.
16600 W. National Avenue
New Berlin, WI 53151,

Plaintiff,

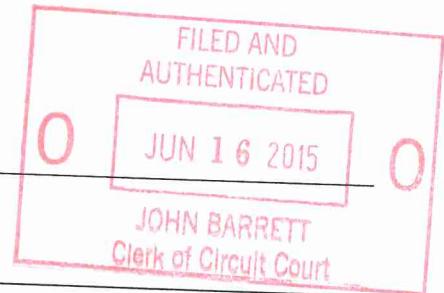
vs.

Case No.
Case Code: 30303

CITY OF WEST ALLIS
7525 W. Greenfield Ave.
West Allis, WI 53214

Defendant.

COMPLAINT



NOW COMES the above-named plaintiff, Dakota Intertek Corp., by and through its attorneys, McDonald & Kloth, LLC, and as and for its cause of action against the defendant, City of West Allis, alleges as follows:

THE PARTIES

1. The Plaintiff, Dakota Intertek Corp. ("Dakota"), is a business organized under the laws of the State of Wisconsin with a principal place of business located at 16600 W. National Avenue, New Berlin, Wisconsin 53151.
2. The Defendant, City of West Allis (the "City"), is a political subdivision organized under the laws of the State of Wisconsin having a principal place of business located at 7525 West Greenfield Avenue, West Allis, Wisconsin 53214.

JURISDICTION AND VENUE

3. Jurisdiction is proper in this court pursuant to Wis. Stat. §§ 801.05(1)(c) & (d), as the City is a domestic corporation that is engaged in substantial and not isolated business activities within the State of Wisconsin.

4. Venue is proper in Milwaukee County pursuant to Wis. Stat. §§ 801.50(2)(a)(c), as Milwaukee County is the county out of which the claims alleged herein arose, and Milwaukee County is a county in which the City does substantial business.

GENERAL ALLEGATIONS

5. On December 2, 2013, Dakota entered into a contract with the City (hereinafter, the "Contract") wherein the City agreed to pay Dakota a specific sum of compensation in exchange for Dakota performing demolition services at the "Former Yellow Freight Terminal located at 11406 West Rogers Street and 11528 West Rogers Street in the City of West Allis." Attached hereto and labeled as Exhibit A is a true and correct copy of the Contract.

6. The Contract required Dakota to demolish an old truck terminal and level the site following demolition.

7. The total value of the Contract was \$208,436.

8. Dakota demolished the truck terminal and transported the waste off-site in accordance with the Contract.

9. During the course of Dakota's demolition of the truck terminal, Dakota was informed by WE Energies that Dakota could not demolish the radio tower without WE Energies removing power lines prior to the demolition and replacing the power lines following the completion of the demolition.

10. Dakota informed the City that WE Energies would not allow Dakota to demolish the radio tower without removing/replacing the power lines, and that a cost would be associated with the work performed by WE Energies.

11. WE Energies sent an invoice to Dakota for removing and replacing the power lines in the amount of \$5,236.

12. Dakota provided the WE Energies cost to the City, and the City has refused to pay Dakota for the WE Energies cost.

13. Dakota paid the WE Energies cost.

14. After Dakota had demolished the truck terminal and transported the resulting waste off-site, the City directed Dakota to level the project site with crushed limestone instead of top soil.

15. Dakota leveled the project site using crushed limestone instead of top soil in accordance with the City's request.

16. To date, the City has provided Dakota with payments totaling \$183,936.00.

17. The City has refused to provide Dakota with the remaining \$24,500 payment under the Contract.

LEGAL CLAIMS

FIRST CAUSE OF ACTION – BREACH OF CONTRACT – BASE CONTRACT

18. Dakota incorporates paragraphs 1 through 17 by reference as if fully set forth herein.

19. The City and Dakota entered into a valid and binding contract which required the City to pay Dakota a total of \$208,436.00 for professional services rendered by Dakota.

20. The City provided Dakota with payments totaling \$183,936.00.

21. There remains a sum due and owing to Dakota in the amount of \$24,500 for services rendered under the Contract.

22. The City breached its Contract with Dakota when it failed and refused to pay Dakota in accordance with the terms of the Contract.

SECOND CAUSE OF ACTION – BREACH OF CONTRACT – CHANGE ORDER

23. Dakota incorporates paragraphs 1 through 22 by reference as if fully set forth herein.

24. During the demolition of the truck terminal, Dakota was informed by WE Energies that it could not demolish the radio tower without first removing the power lines. This requirement was not known to Dakota or the City at the time they entered into the Contract.

25. Dakota informed the City of the mandate issued by WE Energies.

26. The cost of WE Energies removing the power lines and replacing the power lines following demolition of the radio tower was a \$5,236 expenditure, which was billed directly to Dakota.

27. Dakota made the City aware of this cost.

28. The City has failed and refused to pay Dakota for this cost.

29. The City has breached the Contract with Dakota by refusing to pay Dakota for the cost incurred from WE Energies.

THIRD CAUSE OF ACTION – UNJUST ENRICHMENT

30. BDC incorporates paragraphs 1 through 29 by reference as if fully set forth herein.

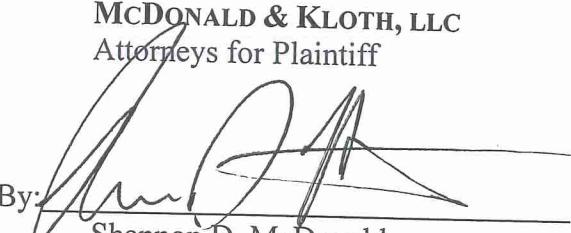
31. Dakota performed services and provided materials to the City in accordance to the scope of work identified in the Contract.

32. The City received the benefit of the services and materials provided by Dakota.
33. The City was unjustly enriched by receiving the benefits of Dakota's services and materials while refusing to pay Dakota for the benefits and materials it provided.
34. Dakota is entitled to damages under the equitable theory of unjust enrichment in an amount to be determined at trial, but no less than \$29,736 (\$24,500 plus \$5,236), plus interest, fees and costs.

WHEREFORE, the Plaintiff prays for and demands judgment against the Defendant for the following:

- A. An Order awarding the Plaintiff any and all costs, expenses, and fees flowing from the Defendant's breach of the Contract;
- B. An Order awarding the Plaintiff interest on monies due flowing from the Defendant's breach of the Contract;
- C. An Order awarding the Plaintiff any and all costs, expenses, and fees flowing from Defendant being unjustly enriched by Plaintiff;
- D. An Order awarding the Plaintiff interest on monies due flowing from the Defendant being unjustly enriched by Plaintiff; and
- E. An Order awarding the Plaintiff any and all other remedies deemed just and equitable.

Dated on this 16th day of June, 2015.

MCDONALD & KLOTH, LLC
Attorneys for Plaintiff

By: _____
Shannon D. McDonald
SBN: 1036954
1840 North Farwell Ave.
Suite 205

Milwaukee, WI 53202
Direct: 414-403-2161
Main: 414-395-8774
Fax: 414-395-8773
Email: sdm@themklaw.com

CONTRACT

CITY OF WEST ALLIS
2013 PROJECT NO. 20

Truck Terminal Demolition
11406 West Rogers Street &
11528 West Rogers Street
West Allis, Wisconsin

THIS AGREEMENT made this 2nd day of December, 2013
by and between Dakota Intertek Corp.

hereinafter called the Contractor, and the City of West Allis, hereinafter called the City,

WITNESSETH:

THAT, WHEREAS, The City intends to complete the demolition of the truck terminal at the Former Yellow Freight Terminal located at 11406 West Rogers Street and 11528 West Rogers Street in the City of West Allis.

WHEREAS, The Contractor has offered by proposal, in writing, to the Board of Public Works of the City, for furnishing the material, labor, tools, equipment, services and everything necessary for the proper construction and completion in a workmanlike manner of the work herein described for the City, for the price and within the time specified and according to the Contract Documents, and the City has awarded the work to the Contractor according to law.

NOW, THEREFORE, In consideration of the City paying to the Contractor for the performance of the aforesaid work according to the following prices, the Contractor, for himself, his heirs, executors and administrators, or for itself and its successors, as the case may be, hereby covenants and agrees to and with the City as follows:

(C) 9.1

EXHIBIT

A

Bid Form

Department of Development of the City of West Allis
Truck Terminal Demolition
11406 West Rogers Street
& 11528 West Rogers Street
West Allis, Wisconsin

ds Must Be Submitted Using This Bid Form.

·native - not used in Bid evaluation

Proposed Project Schedule:

Mobilization	1 working days
Asbestos Abatement and Hazardous Material Removal	10 working days
Building Demolition and Backfill	30 working days
Site Restoration	10 working days
Total Project Time	51 working days

•mited By:

Company Name: Dakota Intertek Corp. - Wei-bin Yuan

Address: 16600 W. National Ave.

New Berlin, WI 53151

Signature:

signature:

ed Name.

Date: 12-2-2013

The foregoing totals shall be the basis for establishing the amount of the performance bond and is not to be construed to be a lump sum contract price. The foregoing quantities of the unit price items are approximate only and it is understood and agreed that payment will be made only on the actual quantities of work completed in place, measured on the basis defined in the contract documents and at the unit prices stated above.

CONSTRUCTION BY CONTRACTOR

PLANS AND SPECIFICATIONS PART OF THE CONTRACT

1. The Contractor agrees to provide certain material, all labor, tools, equipment and services and to do all things necessary for the proper construction and completion in a workmanlike manner of the work hereinbefore described and in conformity with the contract documents which include the (a) Notice to Contractors; (b) Instructions to Bidders; (c) General Conditions; (d) Specifications; (e) Special Provisions; (f) Proposals; (g) Plans; (h) Schedule of Fixed Prices; (i) Supplemental Agreements; (j) all addenda, and (k) Technical Requirements, which Contract Documents are hereby made a part of this contract as though set forth herein in full.

Specifications for Sewer and Water Construction in Wisconsin, 6th Ed., December 22, 2003, and addenda, are included by reference as part of the contract and are on file in the office of the Director of Public Works/City Engineer. In the event that any provision in any of the above Specifications conflicts with any provision in any other Contract Document, the provision in the Contract Document shall govern.

PERSONAL ATTENTION

CONTRACTOR NOT TO ASSIGN UNLESS WRITTEN CONSENT

2. The Contractor shall exercise, for the City's benefit, its best knowledge and skill and give its personal attention constantly to the faithful prosecution of the work and shall not assign by power of attorney or otherwise this contract or any interest therein or sublet any part of the work without the consent in writing of the Board of Public Works of said City. If the Contractor shall so assign or sublet without such written consent, then the Common Council of the City shall have the right in its discretion to rescind this contract and declare the same null and void and to relet the said work to some competent party; and the Contractor shall be liable to said City for such damages as the Common Council of the City shall determine, which determination thereof shall be final and conclusive on the parties hereto.

STARTING AND COMPLETION

3. The Contractor agrees to commence work under this contract within ten (10) days of the date to be specified in a written notice to proceed from the City and to complete all work included in this contract to the point of final acceptance by the City within the time limits prescribed in the Special Provisions.

LIQUIDATED DAMAGES

4. The Contractor further covenants and agrees that the time limit for the completion of the work herein provided for is of the essence of this contract, and in case the Contractor shall fail to complete the work hereunder within the time aforesaid, the Contractor agrees to pay to the City the sum prescribed in the Special Provisions for each and every day the time consumed in said performance and completion exceeds the time hereinbefore allowed for that purpose, which said sum in view of the difficulty in ascertaining the loss which the City will suffer by reason of delay in the performance of the work hereunder is hereby agreed upon, fixed, and determined by the parties hereto as liquidated damages that the City will suffer by reason of said delay and default and not as a penalty and the City may deduct and retain the amount of such liquidated damages out of the moneys which may be due or become due under this contract.

It is hereby further agreed that the determination and acceptance by the City of the liquidated damages for the delay in the completion of the work shall be in addition to any other damages that the City may sustain by reason of any other breach of this contract.

CITY MAY RELET FOR IMPROPER PERFORMANCE

5. In case of improper or imperfect performance of the work herein specified by the Contractor in the event of written consent by the City, the City may suspend said work and order the entire reconstruction of the whole or any part or may, at its option, relet such partial or entire work to another competent party. The City may do likewise in case said work shall not be prosecuted with such diligence and with such number of men as to insure its completion within the time limited herein, or may employ men and secure material for the completion of the same and charge the cost thereof to the Contractor which sum may be deducted from any balance due the Contractor and without waiver of any rights of the City with respect to liquidated damages for the delay and completion of the work or for actual damages of the breach of any other part of this contract to be performed by said Contractor.

CONTRACTOR TO HOLD CITY HARMLESS FOR INJURIES OR DAMAGES TO THIRD PERSONS

6. The said Contractor further covenants and agrees to and with the City of West Allis that in the performance of this contract it will put up and maintain such barriers and lights as will effectively prevent the happening of any accident in consequence of any depressions, holes, or the accumulation of any obstruction or hazards of any nature whatsoever, made or suffered upon the premises, public sidewalks, highways or areas within the immediate vicinity of said construction; Contractor further covenants and agrees to indemnify and hold harmless the City against any and all claims and losses which arise as a result of any negligence, acts or omissions from the performance of the duties, work or service in

connection with said project, excepting those claims or losses which are a direct result of the "active" or "sole" negligence of the City; and that Contractor covenants and agrees that it shall and does hereby assume such liabilities and will pay on demand any and all damage or damages occasioned as above specified.

CONTRACTOR TO SAVE CITY HARMLESS FOR CLAIMS OF SUBCONTRACTORS.
SECS. 779.14 & 779.15, STATS.

7. It is Further Understood and Agreed that the Contractor shall save the City harmless from all claims or demands of any subcontractor employed by the Contractor or from any claims or demands of any person, firm or corporation furnishing any material, apparatus, fixtures, services, machinery or labor to the Contractor herein for the doing of the work referred to herein and of whatsoever kind or nature referred to and established by sec. 779.15, Stats., and Acts supplementary thereto.

CONTRACTOR TO PAY ALL CLAIMS FOR WORK UNDERTAKEN BY SURETY,
SEC. 779.14, STATS.

8. It Is Further Understood and Agreed that the Contractor shall pay all claims for work and labor performed and materials furnished in or about the work herein referred to, and the Contractor shall pay to each and every person or party entitled thereto all claims for work or labor performed and materials furnished for or in or about said building or under this contract and it is understood and agreed that the liability of the Contractor under this contract and undertaking thereon shall continue and remain in force for a period of one year after the completion and acceptance of said contract as provided in sec. 779.14, Stats., and Acts supplementary thereto.

INDEMNIFYING AGREEMENT

9. To the fullest extent allowable by law, Contractor hereby indemnifies and shall defend and hold harmless the City of West Allis, its elected and appointed officials, officers, employees or authorized representatives or volunteers and each of them from and against any and all suits, actions, legal or administrative proceedings, claims demands, damages, liabilities, interest, attorneys' fees, costs, and expenses of whatsoever kind or nature whether arising before, during, or after completion of the work hereunder and in any manner directly or indirectly caused, occasioned, or contributed to in whole or in part or claimed to be caused, occasioned, or contributed to in whole or in part, by reason of any act, omission, fault, or negligence, whether active or passive, of Contractor or of anyone acting under its direction or control or on its behalf in connection with or incident to the performance of this Agreement. Contractor's aforesaid indemnity and hold harmless agreement shall not be applicable to any liability caused by the sole fault, sole negligence, or willful misconduct of the City of West Allis, or its elected and appointed officials,

officers, employees or authorized representatives or volunteers. This indemnity provision shall survive the termination or expiration of this Agreement.

In any and all claims against the City of West Allis, its elected and appointed officials, officers, employees or authorized representatives or volunteers by an employee of Contractor, any subcontractor, or anyone for whose acts any of them may be liable, the indemnification obligation under this paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Contractor or any subcontractor under worker's compensation, disability benefit, or other employee benefit laws.

No provision of this indemnification clause shall give rise to any duties not otherwise provided for by this Agreement or by operation of law. No provision of this indemnity clause shall be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity that would otherwise exist as to the City of West Allis, its elected and appointed officials, officers, employees or authorized representatives or volunteers under this or any other contract. This clause is to be read in conjunction with all other indemnity provisions contained in this Agreement. Any conflict or ambiguity arising between any indemnity provisions in this Agreement shall be construed in favor of indemnified parties except when such interpretation would violate the laws of the state in which the job site is located.

Contractor shall reimburse the City of West Allis, its elected and appointed officials, officers, employees or authorized representatives or volunteers for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. Contractor's obligation to indemnify shall not be restricted to insurance proceeds, if any received by the City of West Allis, its elected and appointed officials, officers, employees or authorized representatives or volunteers.

DAMAGES TO CITY

10. If, upon any adjustment or determination of damages by the Common Council of the City of West Allis, said damages should exceed the amount due from the City to the Contractor, then in that case the Contractor covenants and agrees to pay the same to the said City on demand.

ESTIMATES OF WORK DONE AND ACCEPTANCE, SEC. 66.0901(9)(b), STATS.

11. The City hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating this Contract or binding itself to accept the remainder of the work or any portion thereof, whether completed or not. The Contractor shall prepare and present a schedule of materials delivered and work performed to the Director of Public Works/City Engineer. The Director of Public

CHANGED CONDITIONS

13. If the Contractor encounters physical conditions at the site of the work of an unusual nature, differing materially from those which might be reasonably encountered and generally recognized as inherent in work of the character provided for, or implied in the Plans and Specifications, he shall promptly and before such conditions are unduly disturbed notify the Director of Public Works/City Engineer, in writing, of his intention to claim an adjustment in compensation. The Director of Public Works/City Engineer shall thereupon promptly investigate the conditions and, if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of the contract or in the time required for performance of the contract, the contract will be modified, in writing, and an equitable adjustment made in accordance with the contract unit price, fixed extra price or time and material, as the case may be.

If the Contractor fails to give the Director of Public Works/City Engineer written and timely notice of his intention to claim an adjustment in compensation, as herein before provided, and to afford the Director of Public Works/City Engineer the opportunity to investigate any changed conditions claimed before they are unduly disturbed, the claim may be denied by the Board of Public Works.

GUARANTEE

14. All work shall be and is guaranteed to a period of one year from and after the completion date of the work. For purposes of this contract, the completion date is the date certified by the Director of Public Works/City Engineer. If, within said guarantee period, repairs or changes are required in connection with the work, which, in the opinion of the Director of Public Works/City Engineer, is rendered necessary as the result of the use of materials, equipment or workmanship which are inferior, defective or not in accordance with the terms of the contract, the Contractor shall promptly, upon receipt of the notice from the Director of Public Works/City Engineer, and without expense to the City, restore the work to a satisfactory condition, correct all defects, make good all damage to the structure, site or contents thereof, which damage, in the opinion of the Director of Public Works/City Engineer, results from the use of such inferior or defective materials, equipment or workmanship.

If, within ten (10) days after notice, the Contractor fails to comply with the terms of any guarantee herein contained, the City may have the defects corrected and the Contractor or his surety shall be liable for all expenses incurred; except, when, in the opinion of the Director of Public Works/City Engineer, delay in correcting the defects would cause serious cost or damage, repairs may be made by the City without notice being given to the Contractor and the Contractor shall pay the cost thereof.

All special guarantees or warranties applicable to specific parts of the work, as may be stipulated in the Contract Documents, shall be subject to the terms of this paragraph during the one-year guarantee period. All special guarantees and manufacturers warranties shall be delivered to the Director of Public Works/City Engineer before shop drawings on items of major equipment are approved, guarantees and warranties for other items shall be furnished prior to the acceptance of the work.

15. Nothing contained in the contract herein shall be construed to prevent the Board of Public Works or the Common Council from extending the time to complete the work under this contract and this contract is signed by the respective parties and the surety with the understanding that such extension of time may be given when considered proper, and shall not be deemed a modification or a change affecting the liability of the surety.

CHANGE OF MATERIAL

16. It is further agreed that any change of material different from that specified in the specifications shall, when agreed upon by the Contractor and Common Council in writing, be accepted by all parties in lieu of that so changed and shall in no way be considered as changing said contract, but all parties including the surety signing this contract do so with the knowledge that such changes are likely to be made.

DELAYS

17. The City shall not be liable to the Contractor and/or any subcontractor for claims or damages or monetary claims of any nature caused by or arising out of delays from any cause whatsoever, including but not limited to any time which may be specified for the notice to proceed under this contract. The sole remedy against the City for delays shall be the allowance to claimant of additional time for completion of work, the amount thereof to be reasonable as determined by the Director of Public Works/City Engineer.

IN WITNESS WHEREOF, The parties hereto have executed this instrument under their several seals, on the day and year first above written, the name and corporate seal of each corporate party hereto affixed and this instrument duly signed by its duly authorized representative.

Dakota Intertek Corp. (Seal)

Contractor
16600 W. National Ave.
New Berlin, WI 53151 (Seal)

Business Address

By:  President (Seal)
Signature & Title

By: WENBIN YUAN (Seal)
Printed

By:  Secretary (Seal)
Signature & Title

By: CHI ZHANG (Seal)
Printed

CORPORATE CERTIFICATE

I, CHI ZHANG, certify, that I am the Secretary of the Corporation named as Contractor herein; that WENBIN YUAN who signed this contract on behalf of the Contractor, was then President of said Corporation; and that such contract was duly signed for and in behalf of said Corporation by authority of its governing body.

 (SEAL)
Signature

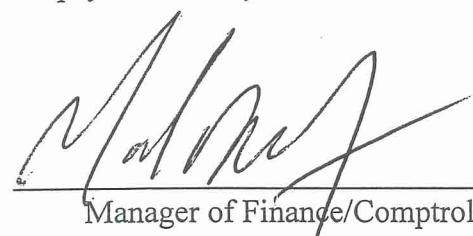
Witness:

CITY OF WEST ALLIS

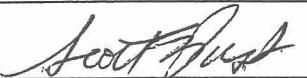
by Tom Alvin Date: 12/13/13
Mayor

Paul M. Ziebler Date: 12/13/13
City Administrative Officer
Clerk Treasurer

Countersigned at West Allis this 10 day of Dec, 2013,
and I hereby certify that provision has been made to pay the liability that will accrue under this
contract by the City of West Allis.


Manager of Finance/Comptroller

Approved as to form this 13 day of Dec., 2013.


City Attorney