

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
CASE NO. 11-2100  
ORIGINAL ACTION IN MANDAMUS**

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**IN THE CASE OF:**

**KOKOSING CONSTRUCTION COMPANY, INC.,**

**Relator**

**v.**

**CITY OF ZANESVILLE, OHIO, ET AL.,**

**Respondents.**

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**ANSWER OF RESPONDENT  
CH2M HILL**

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**FILED**  
JAN 10 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

## **ANSWER OF RESPONDENT CH2M HILL**

Now comes Respondent CH2M Hill and in response to the Complaint for the Writ of Mandamus filed by the Relator, by and through its counsel, hereby states the following as its Answer:

### **FIRST DEFENSE**

1. Respondent denies the averments contained in paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein except that Respondent admits that Relator is engaged in the construction business.
2. Respondent admits the allegations contained in paragraph 2.
3. Respondent admits the allegations contained in paragraph 3.
4. Respondent admits that Respondent's predecessor, BBS Corporation Consulting Engineers, and the City of Zanesville, Ohio entered into the February 4, 2004 Agreement for Engineering Services in Connection with Water Treatment Plant Expansion (the "Agreement") and that Exhibit 1 to the Complaint is a true and accurate copy of that Agreement, with the exception of subsequent modifications thereto, but denies any additional averments in paragraph 4, as the Agreement speaks for itself.
5. Respondent admits that subsequent to the Agreement, CH2M Hill purchased BBS Corporation Consulting Engineers, but denies the remaining averments in paragraph 5 for lack of knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.
6. Respondent admits that Respondent and the City entered into the October 17, 2007 Modification No. 2 to Agreement ("Modification No. 2") and that Exhibit 2 to the Complaint is a

true and accurate copy of Modification No. 2, but denies any additional averments in paragraph 6, as Modification No. 2 speaks for itself.

7. Respondent admits the averments contained in paragraph 7, except that it denies that all documents in the custody and control of Respondent are public records.

8. Respondent admits the averments contained in paragraph 8.

9. Respondent admits the averments contained in paragraph 9.

10. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 10. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

11. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 11. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

12. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 12. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

13. Respondent admits the averments contained in paragraph 13 except that it denies that such actions were taken pursuant to R.C. 153.06 and R.C. 153.07. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

14. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 14. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.

15. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 15. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.
16. Respondent states that the Project was not subject to R.C. 153.01 and accordingly denies the averments contained in paragraph 16. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.
17. Respondent denies the averments contained in paragraph 17.
18. Respondent denies the averments contained in paragraph 18 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
19. Respondent admits the averments contained in paragraph 19.
20. Respondent admits the averments contained in paragraph 20.
21. Respondent admits the averments contained in paragraph 21.
22. Respondent denies the averments contained in paragraph 22. Respondent further states that such averments are irrelevant for purposes of the Public Records Act and this mandamus action, but states that the contract and instructions to bidders advised bidders regarding the course of action if deficiencies were found.
23. Respondent admits the averments contained in paragraph 23.
24. Respondent denies the averments contained in paragraph 24 and states that R.C. 153.01 does not apply. Respondent further states such averments are irrelevant for purposes of the Public Records Act and this mandamus action.
25. Respondent denies the averments contained in paragraph 25, but admits that change orders have been approved by Respondent and the City during the course of the Project.

26. Respondent admits that pursuant to the Agreement and the modifications thereto, Respondent agreed to provide a Resident Project Engineer, but denies any additional averments contained in paragraph 26, as the Agreement and the modifications thereto speak for themselves.
27. Respondent denies the averments contained in paragraph 27, as the Agreement and the modifications thereto speak for themselves.
28. Respondent admits that Respondent performed the services referenced in paragraph 28 in accordance with the terms of the Agreement subject to review by the City, but denies any remaining averments for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
29. Respondent admits that Respondent performed the services referenced in paragraph 29 in accordance with the terms of the Agreement subject to review by the City, but denies any remaining averments for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
30. Respondent admits that change orders were issued and paid to Relator during and after the first twenty-one months of construction of the Project, but denies Relator's characterization in paragraph 30 of such changes as numerous and states that the contract between Relator and the City states that all such change orders are final with respect to time and money.
31. Respondent admits that change orders had to be priced by Relator and negotiated and that Respondent conducted such negotiations in accordance with the terms of the Agreement subject to review by the City, but denies any remaining averments contained in paragraph 31.
32. Respondent admits that Relator submitted a number of requests for alleged additional work/cost/time and that Respondent negotiated such requests in accordance with the terms of the

Agreement subject to review by the City, but denies any remaining averments contained in paragraph 32.

33. Respondent admits that Exhibit 3 to the Complaint is a true and accurate copy of Modification No. 4 to the Agreement, but denies any additional averments in paragraph 33, as Modification No. 4 speaks for itself.

34. Respondent denies the averments contained in paragraph 34, as Exhibit 4 fails to include a complete copy of the Modified Standard General Conditions of the Construction Contract (“General Conditions”), a copy of which is attached as Exhibit A to the City’s Answer, and as the General Conditions and the Agreement speak for themselves.

35. Respondent denies the averments contained in paragraph 35 as it seeks a legal conclusion and the General Conditions speak for themselves.

36. Respondent denies the averments contained in paragraph 36 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

37. Respondent admits the averments contained in paragraph 37.

38. Respondent denies the averments contained in paragraph 38 to the extent that the City’s legal counsel had communications with Respondent in Respondent’s capacity as the City’s agent as set forth in the Agreement.

39. Respondent admits that a meeting was attended by the City Service Director, the Mayor, the Law Director, Respondent’s Project Engineer, and Relator on July 8, 2011 to discuss pricing of certain proposed change orders and that the parties were not able to reach consensus as to all of the proposed change orders, and further states that at that meeting Relator’s General Counsel attempted to discourage the City from engaging Bricker as the City’s counsel, and that despite

such attempts, the City subsequently provided legal services for the Project through Bricker as the City's counsel, but denies any additional averments contained in paragraph 39.

40. Respondent denies the averments contained in paragraph 40 and further states that it is Respondent's understanding that Relator, not the City or its legal counsel, was the party that requested the tolling of the contractual time limitation for initiating litigation contained in the Contract Documents for the Project and that mediation be delayed until after completion of the Project.

41. Respondent denies the averments contained in paragraph 41.

42. Respondent denies the averments contained in paragraph 42.

43. Respondent admits that Exhibit 6 is a copy of an email between Mike Sims, the City Service Director, and Gary Long of Respondent, which has been redacted for attorney-client privileged communications, but denies any remaining averments contained in paragraph 43, as the email speaks for itself.

44. Respondent admits that Exhibit 7 is a copy of emails between Mike Sims, the City Service Director, and Gary Long of Respondent regarding the tracking and accounting of legal services provided by the City's legal counsel, but denies any remaining averments contained in paragraph 44, as Relator fails to include the entire email exchange in an effort to portray such exchange out-of-context and the emails speak for themselves.

45. Respondent denies the averments contained in paragraph 45.

46. Respondent states in response to the averments contained in paragraph 46 that the contract between Relator and the City speaks for itself and that Relator has deliberately omitted key portions of the cited language.

47. Respondent admits the averments contained in paragraph 47 and further states that while Respondent requested documentation from Kokosing in support of its claims, Kokosing continues to create road blocks to Respondent and the City obtaining copies of Kokosing's documents for purposes of evaluating Kokosing's claims (which claims include, for example, a claim for \$736,673 of "additional supervision" on a project that, at the time the claim was submitted, had no increase in the contract amount and had less than \$400,000 labor and materials approved through the contract contingency of \$766,750). Respondent has legitimately questioned whether Relator can support and document a claim that it spent twice the amount in alleged supervision than it spent in additional labor and materials as well as other claims that have been submitted.

48. Respondent denies the averments contained in paragraph 48.

49. Respondent admits the averments contained in paragraph 49.

50. Respondent admits that Exhibit 8 is a true and accurate copy of a September 9, 2011 letter from Relator to Respondent, but denies any remaining averments contained in paragraph 50, including but not limited to the averment that such letter was a public records request.

51. Respondent admits that the majority of the City's files relating to the Project are public records and that such public records were made available to Relator prior to the filing of this action, but states that certain documents such as those subject to the attorney-client privilege are not public records and accordingly denies any remaining averments contained in paragraph 51.

52. Respondent states that certain documents in Respondent's files are public records and states that all such documents provided by Respondent to the City were made available to Relator prior to the filing of this action to the extent such records were not privileged, but denies the averments contained in paragraph 52 as they seek a legal conclusion.

53. Respondent denies the averments contained in paragraph 53 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
54. Respondent denies the averments contained in paragraph 54 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
55. Respondent denies the averments contained in paragraph 55 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
56. Respondent denies the averments contained in paragraph 56 as Relator's September 9, 2011 letter made no reference to a public records request. Respondent further states that while Respondent was/is a limited agent of the City on the Project, Respondent is not an agent of the City for purposes of service of a public records request under the Ohio Public Records Act.
57. Respondent denies the averments contained in paragraph 57 as Relator's September 9, 2011 letter made no reference to a public records request. Respondent further states that while Respondent was/is a limited agent of the City on the Project, Respondent is not an agent of the City for purposes of service of a public records request under the Ohio Public Records Act.
58. Respondent admits that Exhibit 10 is a true and accurate copy of a letter sent by Respondent in response to Relator's September 9, 2011 letter, but denies the remaining averments contained in paragraph 58 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
59. Respondent denies the averments contained in paragraph 59 as Relator's September 9, 2011 letter made no reference to a public records request. Respondent further states that while Respondent was/is a limited agent of the City on the Project, Respondent is not an agent of the City for purposes of service of a public records request under the Ohio Public Records Act.

60. Respondent denies the averments contained in paragraph 60 as Relator's September 9, 2011 letter made no reference to a public records request. Respondent further states that while Respondent was/is a limited agent of the City on the Project, Respondent is not an agent of the City for purposes of service of a public records request under the Ohio Public Records Act.

61. Respondent admits that Exhibit 11 is a true and accurate copy of Relator's General Counsel's September 23, 2011 letter to the City's legal counsel and Respondent, but denies the remaining averments contained in paragraph 61.

62. Respondent denies the averments contained in paragraph 62 in light of the fact that Relator willingly agreed to such a time limit on the production of its documents under its contract with the City and that the documents requested from Relator relate to Relator's specific claims. Respondent further states that it is under no such 10-day contractual or legal time limitation on the production of public records to Relator, especially in light of Relator's overbroad requests spanning nearly eight years.

63. Respondent admits that Exhibit 12 is a true and accurate copy of an October 5, 2011 letter from Relator's General Counsel to Respondent and the City's legal counsel, but denies any remaining averments contained in paragraph 63.

64. Respondent denies the averments contained in paragraph 64 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

65. Respondent denies the averments contained in paragraph 65 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

66. Respondent denies the averments contained in paragraph 66 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

67. Respondent denies the averments contained in paragraph 67 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
68. Respondent denies the averments contained in paragraph 68 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
69. Respondent denies the averments contained in paragraph 69 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
70. Respondent denies the averments contained in paragraph 70 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
71. Respondent denies the averments contained in paragraph 71 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
72. Respondent denies the averments contained in paragraph 72 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
73. Respondent denies the averments contained in paragraph 73 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
74. Respondent denies the averments contained in paragraph 74 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
75. Respondent denies the averments contained in paragraph 75 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
76. Respondent denies the averments contained in paragraph 76 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.
77. Respondent admits that prior to December 9, 2011, Respondent provided the City with electronic copies of all documents responsive to Relator's request for privilege review and disclosure by the City to Relator upon payment of copying cost for such electronic records, and

as is indicated in Exhibit 22 of Relator's Complaint, dated December 9, 2011, the City's legal counsel made such documents available to Kokosing on an external hard drive upon receipt of payment in the amount of \$144.00. Respondent denies any remaining averments contained in paragraph 77.

78. Respondent admits that Respondent estimated the production of between 1,000,000 and 2,000,000 documents from its files, but denies any remaining averments contained in paragraph 78. However, Respondent states that the number of pages of documents produced on the hard drive, although over 100,000 pages, was less than originally anticipated. Respondent estimated the number of pages based on the amount of electronic memory needed to store the data. Based on the total size of the data, Respondent estimated that there were between 850,000 and 2.5 million pages of documents. However, it was later discovered that a substantial volume of memory was used to store drawings, which are larger files than document files. Thus, the actual number of pages, while still substantial, was much less than originally estimated. Respondent further states that Exhibit 22 specifically made separate reference to two categories of electronic documents: (1) copies of the emails, which had been previously produced to Relator, which would be available in the next week, and (2) extensive records then available to Relator that would be downloaded to a 250 GB external hard drive upon receipt of a check for \$144.00. In response to a December 12, 2011 letter from Relator's General Counsel to the City's legal counsel, Exhibit F to the City's Answer, in which Relator's General Counsel indicated he would deliver the \$144.00 check on that date, the City's legal counsel sent a letter dated December 14, 2011, Exhibit G to the City's Answer, giving instructions for the check to reimburse Respondent for its costs of production. Included as part of Exhibit G was an invoice with an itemized breakdown of the cost of "1 External Hard Drive with CH2M Documents Bates Nos. CH00001-

CH119623 \$144.38.” The invoice also included an itemized breakdown of the costs of scanning the emails, which were previously produced by the City, in the amount of \$260.77.

79. Respondent denies the averments contained in paragraph 79 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

80. Respondent states that the City agreed under Sections 3.5 and 3.6 of the Agreement to provide any legal services reasonably requested by Respondent with regard to legal issues on the Project in CH2M Hill’s capacity as agent for the Owner and provided such legal services through the City’s legal counsel, but denies the remaining averments contained in paragraph 80. Respondent further states that any consultation with legal counsel did not preclude Respondent from rendering impartial, good faith decisions on Relator’s claims and Respondent did, in fact, render impartial, good faith decisions on Relator’s claims.

81. Respondent states that the City agreed under Sections 3.5 and 3.6 of the Agreement to provide any legal services reasonably requested by Respondent with regard to legal issues on the Project and provided such legal services through the City’s legal counsel to CH2M Hill in its capacity as agent for the Owner, but denies the remaining averments contained in paragraph 81. Respondent further states that any consultation with legal counsel did not preclude Respondent from rendering impartial, good faith decisions on Relator’s claims and Respondent did, in fact, render impartial, good faith decisions on Relator’s claims.

82. Respondent states that the City agreed under Sections 3.5 and 3.6 of the Agreement to provide any legal services reasonably requested by Respondent with regard to legal issues on the Project in Respondent’s capacity as agent for the Owner and provided such legal services through the City’s legal counsel. Respondent further states that any consultation with legal counsel did not preclude Respondent from rendering impartial, good faith decisions on Relator’s

claims and Respondent did, in fact, render impartial, good faith decisions on Relator's claims. Respondent further states that Kokosing has been provided with a written decision from Respondent on each of its claims and can challenge the conclusions and decisions contained in those written decisions regardless of whether they are challenging those decisions on factual, legal, or contractual grounds. Respondent denies the remaining averments contained in paragraph 82.

83. Respondent admits the averments contained in paragraph 83.

84. Respondent admits that Exhibit 24 contains copies of redacted emails, but denies any remaining averments contained in paragraph 84.

85. Respondent admits that Respondent's counsel was contacted by Relator's General Counsel on or about October 11, 2011, but denies the remaining averments contained in paragraph 85 as they misstate the substance of that conversation.

86. Respondent denies the averments contained in paragraph 86 and states that Respondent's responsive public records were provided electronically to the City prior to December 9, 2011, for privilege review and disclosure to Relator and that the City made such non-privileged documents available to Relator on December 9, 2011 upon payment of \$144.00 to reimburse the City for the cost of copying such records on a 250 GB hard drive as stated in Exhibit 22 of Relator's Complaint. Respondent further states that on December 12, 2011, Relator's General Counsel indicated that he would deliver the check for the hard drive to Respondent's legal counsel on that date, as stated in Exhibit F to the City's Answer, but evidently did not do so; that on December 14, 2011, the City's legal counsel provided Relator's General Counsel with instructions for delivery of the check along with an itemized invoice, as stated in Exhibit G to the City's Answer; and that Relator evidently did not deliver a check for the hard drive containing the CH2M Hill

records until December 20, 2011, as stated in the City's legal counsel's December 22, 2011 letter to Relator's General Counsel, which is Exhibit H to the City's Answer.

87. Respondent denies the averments contained in paragraph 87 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

88. Respondent denies the averments contained in paragraph 88 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

89. Respondent denies the averments contained in paragraph 89 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

90. Respondent denies the averments contained in paragraph 90 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

91. Respondent denies the averments contained in paragraph 91 for lack of knowledge or information sufficient to form a belief as to the truth of the averments contained therein.

92. Respondent denies the averments contained in paragraph 92 and states that Respondent's responsive public records were made available to Relator on December 9, 2011, prior to the filing of this action.

93. Respondent denies the averments contained in paragraph 93.

94. Respondent denies the averments contained in paragraph 94.

95. Respondent admits the averments contained in paragraph 95, except that it denies Relator is an aggrieved party or that it made a proper public records request.

96. Respondent denies the averments contained in paragraph 96.

97. Respondent denies all averments not specifically admitted herein.

#### **AFFIRMATIVE DEFENSES**

98. The Complaint fails to state a claim upon which relief can be granted.

99. Relator's claims are moot.
100. Relator has failed to comply with the Ohio Public Records Act.
101. The documents requested by Relator are exempt from production under the Ohio Public Records Act by R.C. 149.43(A)(1)(v), R.C. 2317.02(A)(1), and R.C. 2317.021, as the documents are exempt from disclosure by the statutory and common-law attorney-client privilege.
102. Relator's Complaint fails to comply with the requirements of R.C. 2731.04.
103. Relator failed to deliver its public records request via hand delivery or certified mail limiting any available damages under the Public Records Act.
104. Relator's public records request was overbroad and thereby failed to comply with the Public Records Act.

WHEREFORE, Respondent respectfully requests the following:

- (a) that the Complaint of the Relator be dismissed;
- (b) that sanctions be imposed under Rule XIV, Section 5 of the Rules of Practice of the Ohio Supreme Court;
- (c) that Respondent be awarded its costs, including attorneys fees, expended herein;  
and
- (d) for such further relief as this Court deems equitable and just.

Respectfully submitted,

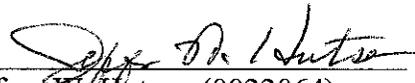
  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **ANSWER OF RESPONDENT CH2M HILL** was sent by regular U.S. Mail, postage prepaid, delivery on this 10<sup>th</sup> day of January, 2012 upon the following:

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