ORIGINAL

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

IN THE CASE OF:

KOKOSING CONSTRUCTION COMPANY, INC.,

Relator

v.

CITY OF ZANESVILLE, OHIO, ET AL.,

Respondents.

RESPONDENT CH2M HILL'S MOTION FOR JUDGMENT ON THE PLEADINGS

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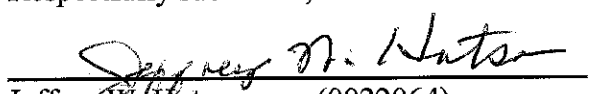
FILED
JAN 10 2012
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION FOR JUDGMENT ON THE PLEADINGS

Respondent CH2M Hill, by and through counsel and pursuant to Rule 10.5(B) of the Supreme Court Practice Rules, hereby joins in Respondent City of Zanesville, Ohio's Motion for Judgment on the Pleadings. The grounds for this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Respondent CH2M Hill hereby joins in Respondent City of Zanesville, Ohio's Motion for Judgment on the Pleadings filed in this matter and incorporates the factual statements made and legal arguments set forth in the City's Memorandum in Support of this Motion. As stated in the City's Motion, Relator's Complaint fails to state a claim upon which relief can be granted for the following reasons: (1) Kokosing's public records request was overbroad and failed to comply with the Ohio Public Records Act, (2) CH2M Hill provided its responsive documents to the City and the City made such non-privileged responsive public documents available to Kokosing prior to the filing of Kokosing's Complaint, (3) the City properly redacted attorney-client privileged communications from the public records provided to Kokosing, and (4) the action was not brought in the name of the State on the relation of the person applying for mandamus as required by Ohio Revised Code Section 2731.04.

In addition, Kokosing's suggestion that any confidentiality that may have existed regarding the communications between CH2M Hill and Bricker & Eckler was destroyed when those communications were disclosed to the City is without merit. As already discussed in detail in the City's Motion, when CH2M Hill was communicating with Bricker & Eckler it was doing so in its capacity as agent of the City and on the City's behalf, and such statements between an agent and a principal's attorney are privileged. In order for advice provided by the attorney to be beneficial to the principal, it must be *communicated to the principal.* Thus, common sense dictates that any statements between the attorney and the agent made on behalf of the principal would then be communicated to the principal. Certainly such disclosures to the principal do not waive the confidential nature of those communications. The fact that the City was copied on communications between CH2M Hill and Bricker & Eckler does not preclude those

communications from being confidential because those communications were made for the benefit of the City to be discussed with the City.

Finally, CH2M Hill takes great exception to Relator's unsupported assertions that CH2M Hill somehow permitted the City's legal counsel to usurp CH2M Hill's role on this Project. Under Sections 3.5 and 3.6 of the Agreement between the City and CH2M Hill, the City agreed to provide any legal services reasonably requested by CH2M Hill with regard to legal issues on the Project in CH2M Hill's capacity as agent for the Owner. However, any consultation with legal counsel did not preclude CH2M Hill from rendering impartial, good faith decisions on Relator's claims and CH2M Hill did, in fact, render impartial, good faith decisions on Relator's claims. *See* Exhibit A. Moreover, Relator has cited to no case law that would indicate that an engineer is not permitted to consult with counsel when evaluating claims submitted by a contractor (especially a contractor such as Relator that has a full-time, experienced in-house construction litigator taking the leading role in pursuing those claims, as has been the case here). It is industry standard that legal counsel for the project is supplied to the design professional by the Owner at the Owner's expense, which is what occurred here. This eliminates the need for the design professional to include such costs in its proposal. CH2M Hill's decisions were unbiased, independent, and made in good faith, and no one ever suggested that CH2M Hill should conduct itself otherwise. Those decisions are written and subject to challenge on their face by Relator in the appropriate forum.

Accordingly, for the reasons set forth herein and in the City's Motion for Judgment on the Pleadings, CH2M Hill respectfully requests that this Court grant CH2M Hill judgment on the pleadings as to the claims set forth in Kokosing's Complaint.

Respectfully submitted,

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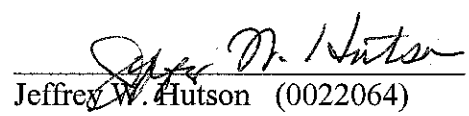
Counsel for Respondent CH2M Hill

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of **RESPONDENT CH2M HILL'S MOTION FOR JUDGMENT ON THE PLEADINGS** was sent by regular U.S. Mail, postage prepaid, delivery on this 10th day of January, 2012 upon the following:

Michael W. Currie
Matthew R. Wushinski
KOKOSING CONSTRUCTION COMPANY, INC.
6235 Westerville Road
Westerville, Ohio 43081
Attorney for Relator

Jack R. Rosati, Jr.
Mark E. Evans
Benjamin B. Hyden
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
Counsel for Respondent City of Zanesville, Ohio



Jeffrey W. Hutson (0022064)

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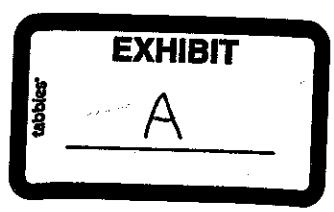
	:	Case No. 11-2100
Relator,	:	
v.	:	
CITY OF ZANESVILLE, OHIO, et al.,	:	
Respondents.	:	

AFFIDAVIT OF GARY R. LONG

STATE OF OHIO :
:ss
COUNTY OF FRANKLIN :

Now comes Gary R. Long, having first been duly cautioned and sworn, who deposes and states as follows:

1. I am over the age of eighteen and testify herein from my own personal knowledge.
2. I am employed by CH2M Hill and am CH2M Hill's Project Manager on the Project at issue in this case.
3. As CH2M Hill's Project Manager, I issued all decisions on behalf of CH2M Hill on claims submitted by Relator on the Project.
4. I investigated all claims, including claims 3-10, submitted by Kokosing in an objective fashion, sending copies of draft decisions to the City, Bricker & Eckler, and other individuals working on the project for comment only. My decisions to approve or deny Kokosing claims were not changed by these consultations.



5. The decisions I issued on the Project were unbiased, and made in good faith and independently of any discussions I may have had with lawyers at Bricker & Eckler.

6. Pursuant to Sections 3.5 and 3.6 of the Agreement between the City and CH2M Hill, the City provided legal services through the City's legal counsel, Bricker & Eckler.

7. CH2M Hill does not waive any attorney-client privilege attaching to the redacted documents.

8. On September 23, 2011, Kokosing sent CH2M Hill a public records request.

9. On or about November 10, 2011, in order to comply with this public records request, all documents relating to this project in the possession of CH2M Hill on this date were electronically copied to a hard drive and provided to the City.

Further Affiant Sayeth Naught.

Gary R. Long

Sworn to before me and subscribed in my presence this 9th day of January, 2012.

Notary Public

Jennifer Reep
Notary Public-State of Ohio
My Commission Expires
January 25, 2016