

Town of Windsor

Memorandum

December 12, 2017

TO: The Honorable Mayor and Town Council
FROM: Michael Stallings, Town Manager *MS*
SUBJECT: Engineering Services RFP

Attached you will find the final contract for annual engineering services from Bowman Consulting.

This contract would provide the Town with an “on call” engineer to help us with our various projects throughout the year. The first two would be the water system mapping and master planning, and engineering for the water main replacement on Duke Street and Virginia Ave.

As you may recall, there were a couple of items that needed to be resolved regarding liability in the contract. Wallace and Brian have worked on the contract, and the terms of this contract have been reviewed and approved by our attorney.

It is our recommendation that Town Council adopt a motion that authorizes and directs the Town Manager to execute the attached contract with Bowman Consulting.

Recommended Motion

Move that Council authorize and direct the Town Manager to execute the attached contract for annual engineering services with Bowman Consulting.

Bowman CONSULTING

TERMS AND CONDITIONS

These Terms and Conditions are incorporated by reference into the Proposal (the "Proposal") from Bowman Consulting Group, Ltd., a Virginia Corporation ("BCG") to Town of Windsor (the "Client") for performance of services described in the Proposal and associated with the project described in the Proposal (the "Project") and in any subsequent approved Change Order related to the Project. These Terms and Conditions, the accepted Proposal and any Change Orders or other amendments thereto, shall constitute a final, complete, and binding agreement (the "Agreement") between BCG and the Client.

1. Scope of Services: BCG will provide the services expressly described in the Proposal (the "Scope"). If in BCG's professional judgment the Scope must be expanded or revised, BCG will forward a change order agreement to the Client that describes the revision to the Scope (the "Change Order") and the increased fee associated therewith. The Client may approve a Change Order in writing, by electronic verification, or orally pursuant to Section 3 below.

2. Standard of Care: The standard of care for all services performed by BCG for the Client shall be the care and skill ordinarily used by members of the applicable profession practicing under similar circumstances at the same time and locality of the Project. The Client shall not rely upon the correctness or completeness of any design or document prepared by BCG unless such design or document has been properly signed and sealed by a licensed professional on behalf of BCG.

3. Client's Oral Decisions: The Client or any of its employees or agents with apparent authority may orally and with the express written consent of BCG: (a) make decisions relating to BCG's services under this Agreement, (b) authorize a Change Order and increased fee associated therewith, (c) direct BCG to forward information related to the Project to a third party, or (d) direct BCG to take any reasonable action in the interest of the Project. The Client may, from time to time, limit the authority of any or all persons to act orally on its behalf by providing seven (7) days notice to BCG. If BCG submits a Change Order by giving Notice to the Client then the Change Order shall be deemed accepted by Client unless the Client gives Notice to BCG that it rejects the Change Order not later than 10 business days after the Client receives the proposed Change Order.

4. Fees by Hourly Rate Schedule: If the Client requests BCG to perform services not included in the Proposal or an approved Change Order (including without limitation attending meetings and conferences on an as needed basis with public agencies), Client shall compensate BCG for such services in accordance with the Hourly Rate Schedule attached to and made a part of the Agreement. Expert witness testimony or participation at legal discussions, hearings or depositions, including necessary preparation time, will be charged at 150% of the quoted rates. If the Project

extends beyond the calendar year in which the Proposal is dated, BCG may revise its Hourly Rate Schedule in January of each subsequent year.

5. Client Duties and Responsibilities: The Client shall inform BCG of any special criteria or requirements related to the Project or BCG's services and shall, in a timely manner and at its cost, furnish any and all information in its possession relating to the Project, including reports, plans, drawings, surveys, deeds, topographical information or title reports. BCG shall bear no responsibility for errors, omissions or additional costs arising out of its reliance upon such information supplied by the Client. Some services included in the Scope may, in BCG's discretion, require a current title report, and if so the Client shall timely and at its cost provide such a current title report to BCG. If the Scope includes preparation of plats to be recorded in the land records of the jurisdiction in which the Project is situated, the Client shall be responsible for timely preparation, submission and recordation of necessary deeds and for all fees associated with such deeds and plats. All off-site easements are the responsibility of the Client. Client shall indemnify and hold harmless BCG from and against any and all claims, demands, losses, costs, and liabilities, including without limitation, reasonable attorney fees and expenses incurred by BCG and arising out of (a) Client's breach of this Agreement or (b) an action by Client or a third party with respect to any matter not included in the Scope or that is excluded from the responsibility of BCG pursuant to this Agreement.

6. Exclusions from Scope: By way of illustration and not limitation BCG has no obligation or responsibility for the following unless specifically included in the Scope:

- a. Favorable or timely comment or action by any governmental entity.
- b. Taking into account off-site conditions or circumstances that are not clearly visible or reasonably ascertainable by the performance of on-site services.
- c. The accurate location or characteristics of any subsurface utility or feature that is not clearly and entirely visible from the surface.

d. Structural design (including but not limited to structural design of retaining wall(s) or of special drainage structure(s)).

7. Payment Terms: BCG will invoice the Client monthly or more frequently based on a percentage of the work completed for lump sum tasks, number of units completed for unit tasks, and actual hours spent that month for hourly tasks. Invoices are due and payable in full upon receipt without offset of any kind or for any reason. Client agrees to pay a finance charge of one and one-half percent (1.5%) per month from the invoice date on any unpaid balance not received by BCG within thirty (30) days of the invoice date. Payment of invoices is subject to the following further terms and conditions.

(a) If any invoice is not paid in full within forty-five (45) days of the invoice date and the Client has not timely and in good faith disputed the invoice as provided below, BCG shall have the right at its election by giving notice to Client to either (i) suspend the performance of further services under this Agreement and, at its sole discretion, suspend the performance of further services on other projects which are being performed by BCG on behalf of the Client or any related Client entities, until all invoices are paid in full and BCG has received a retainer in such amount as BCG deems appropriate to be held as described in Section 8 below, or (ii) deem Client to be in material breach of this Agreement and proceed pursuant to Section 11 below. Client agrees to pay any and all charges, costs or fees incurred in collection of unpaid invoices, including reasonable attorneys' fees and costs. If BCG elects its rights under (a)(i) above BCG shall bear no liability to Client or any other person or entity for any loss, liability or damage resulting from any resulting delay, and any schedule for the performance of services hereunder prepared previously shall be deemed void, and any future schedule for the performance of services shall require the approval of both Client and BCG.

(b) If Client disputes any invoices submitted to it the Client shall give written notice to BCG within thirty (30) days of the invoice date detailing the dispute. If no written notice of a dispute is provided to BCG within that time period, the invoice shall then be conclusively deemed good and correct. If part of an invoice is disputed, then the Client shall remain liable to timely pay the undisputed portion of the invoice in accordance with the terms of this Agreement. Client and BCG shall promptly negotiate in good faith to resolve any disputed portion of an invoice,

8. Retainer. Should (a) the Proposal require a Retainer or (b) BCG have exercised its right to require a Retainer prior to continuing work as provided in Section 7(a)(i) above, the Client shall deliver to BCG by good check a retainer to be held by BCG as an advance against future billings (the "Retainer"). This Retainer is not intended as the regular source of payment for invoices issued under to this Agreement. Instead the

parties intend that the Retainer be applied to the final invoice for the services described in the Agreement, or against any other unpaid amounts owed BCG under this Agreement should Client fail to timely pay invoices in accordance with Paragraph 7. If the retainer is applied during the course of the Agreement Client agrees to promptly replenish the retainer upon request of BCG. Upon the conclusion of this Agreement, or its earlier termination, then (i) the portion of the Retainer, if any, that exceeds the amount owed BCG shall be returned to Client upon request, or (ii) any amount owed BCG in excess of the Retainer shall be paid immediately to BCG by Client. The Retainer shall not be required to be held in a separate account nor shall it bear interest, and the Retainer may include other amounts paid to BCG by Client with respect to the Project or other projects.

9. Insurance. BCG and its employees are protected by workman's compensation, commercial general liability, automobile liability, and professional liability insurance policies. Upon request of Client BCG shall provide a certificate of insurance to Client evidencing such coverage and shall attempt to include Client as an additional insured on such coverage. Client acknowledges it has been offered the opportunity to review the current limits of such coverage and finds them satisfactory, and further agrees that in no event shall BCG's liability to Client or any party claiming through Client be greater than the limits of such insurance. From time to time BCG may, without notice to Client, amend the carriers, conditions, exclusions, deductibles or limits of any such insurance; provided that prior to any decrease in any insurance limit becoming effective BCG shall give notice thereof to Client.

10. Potential Liability of BCG. The following provisions shall operate with respect to any potential liability of BCG arising under the Agreement.

(a) Client agrees that should it wish to assert that there is a breach, defect, error, omission or negligence in the services performed by BCG that Client believes creates liability on the part of BCG the Client must give written notice to BCG not later than the first to occur of (i) the beginning of any corrective work or (ii) thirty days after Client had knowledge of the existence of the breach, defect, error, omission or negligence. BCG shall have the opportunity to participate in decisions regarding the corrective work, and the Client shall insure that corrective action is taken at the lowest reasonable expense under the circumstances.

(b) Notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of BCG and BCG's officers, directors, partners, employees, agents, and consultants to Client and anyone claiming through Client, shall not in any manner whatsoever exceed the direct losses incurred by Client (to the extent of and in proportion to BCG's comparative degree of fault as determined by agreement or by a

court of competent jurisdiction) that resulted from the error, omission or negligent act of BCG in the performance of services under this Agreement.

11. Termination: Either party may terminate the provision of further services by BCG under this Agreement for convenience with thirty (30) days advance notice to the other party. In addition, following a material breach by the other party the provision of further services under this Agreement may be immediately terminated by the non-breaching party giving notice to the other party, and such notice may be given at any time after such material breach (including less than thirty (30) days after notice of termination for convenience). Client acknowledges that its failure to timely pay undisputed invoices is a material breach. After a termination for convenience the Client shall immediately following the termination date pay BCG for all services performed through the termination date, including reasonable costs of transitioning the Project to a new design professional designated by Client, if applicable. Following any termination BCG shall have the right to withhold from the Client the use or possession of drawings or documents prepared by BCG for the Client under this or any other agreement with the Client, until all outstanding invoices are paid in full. Following any termination by BCG following a material breach by Client BCG shall have the right to withdraw any plans, applications or other documents filed with any governmental agency by BCG in its name on behalf of the Client.

12. Assignment: This Agreement may not be assigned by one party without the express written consent of the other party. Notwithstanding the forgoing, BCG may employ consultants, sub consultants, or subcontractors, as it deems necessary to perform the services described in the scope. Also, BCG may assign its right to receive payments under this agreement.

13. Ownership of Documents and other Rights of BCG: (a) All reports, plans, specifications, computer files, field data, notes and other documents and instruments prepared by BCG as instruments of service shall remain the property of BCG up until such time as all monies due to BCG have been paid in full. At such time as all monies due to BCG have been paid in full, the Client may take possession of plans, documents and specifications prepared under this Agreement. If requested by BCG the Client (and Client's new design professional if applicable) shall execute BCG's standard Electronic File Transfer Agreement or such other similar agreement as the parties shall in good faith negotiate. If the Client or a party acting on the Client's behalf modifies the plans and specifications or reuses them on a different project the Client agrees to indemnify and hold BCG harmless from any claim, liability or cost (including reasonable attorneys' fees and defense costs) arising therefrom. Client acknowledges that if BCG provides Client with plans, information and specifications in an electronic or

digital format ("Electronic Data") the Client is responsible for cross checking the Electronic Data with the applicable paper document for full conformance and consistency between such paper document and the Electronic Data. The Client and BCG shall jointly retain all common law, statutory, and other reserved rights, including the copyright to all reports, plans, specifications, computer files, field data, notes and other documents prepared by BCG.

(b) BCG reserves the right to include photographs and descriptions of the Project in its promotional, marketing, and professional materials. Client grants its consent to BCG for BCG to install reasonable signage at the Project equivalent to that which is or could be installed by other vendors to the Project.

14. Covenants Benefiting Third Parties: BCG and Client acknowledge that from time to time third parties may request BCG to execute documents which benefit that third party. These documents may include certifications, consent of assignment, and waiver of certain of BCG's rights under this Agreement ("Requested Covenant"). Client acknowledges that execution of Requested Covenants is beyond the Scope, is at BCG's sole discretion, and if BCG decides to so execute a Requested Covenant the language, terms and conditions of such Requested Covenant must be acceptable to BCG, at BCG's sole discretion.

15. Applicable Law: This Agreement shall be governed and interpreted in accordance with the laws of the Commonwealth of Virginia, without giving effect to conflicts of laws principles thereof.

16. Severability: If any provision of this Agreement shall be held invalid, illegal or unenforceable, the other provisions of this Agreement shall remain in full force and effect.

17. Entire Agreement and Modification: This Agreement and the attachments hereto contains the entire agreement of BCG and Client in respect to the transactions contemplated hereby and supersedes any and all prior agreements, arrangements, and understandings among the parties relating to the subject matter hereof. Except for Change Orders authorized by Client either orally or by electronic verification this agreement may be amended, modified, or supplemented, but only in writing signed by all parties hereto. Signature by email transmission is permitted hereunder.

18. Waivers: The failure of a party to enforce any provision hereof shall not affect its right at a later time to enforce same. A waiver by a party of any condition or breach hereunder must be in writing to be effective and unless that writing provides otherwise shall waive only one instance of that condition or breach.

19. Notices: Any notice, request, instruction, or other document to be given hereunder by a party hereto shall be in writing and shall be deemed to have been given (a) when received when given in person or by a courier or a courier service, (b) on the date of transmission (or the next business day if the date of transmission is not a business day) if sent by facsimile, or (c) five business days after being deposited in the mail, certified or registered postage prepaid:

If to Client, addressed to the individual signing this Agreement at the address, facsimile number, or e-mail address noted on the Proposal;

If to BCG, to the address set forth in the proposal; provided that for any notice given by Client pursuant to Paragraphs 10 or 11 a copy shall be sent to:

Bowman Consulting Group, Ltd.
3863 Centerview Drive; Suite 300
Chantilly, Virginia 20151
Facsimile number: (703) 481-1490
Attn: Robert A. Hickey
Email: rhipkey@bowmancg.com

Or to such other individual or address as a party hereto may designate for itself by notice given as herein provided.

20. No Third Party Beneficiaries: This Agreement is solely for the benefit of the parties hereto and, to the extent provided herein, their respective affiliates, directors, officers, employees, agents and representatives, and no provision of this Agreement shall be to confer upon third parties any remedy, claim, liability, reimbursement, cause of action, or other right.

21. Headings, Counterparts, Certain Rules of Construction: The headings in this Agreement are for convenience and identification purposes only, are not an integral part of this Agreement, and are not to be considered in the interpretation of any part hereof. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. References in this agreement to any gender shall include references to all genders. Unless the context otherwise requires, references in the singular include references in the plural and vice versa. The words "include", "including", or "includes" shall be deemed to be followed by the phrase "without limitation". The individual who signs this Agreement warrants that he has the authority to sign as, or on behalf of the Client and to bind the Client to all of the terms and conditions of this Agreement. To the extent that they are inconsistent or contradictory, the terms of the Proposal or an authorized Change Order shall supersede these Terms and Conditions.

22. Early Bid Documents. The Client acknowledges that if it requests submission of early bid documents to contractors for bid purposes prior to full

completion of construction documents by BCG and all other design disciplines, or prior to governmental approval, the potential exists for additional design and construction costs arising from required subsequent revisions, additions and corrections to BCG design documents so as to conform to those of other design disciplines and/or governmental agencies.

23. Estimates: Any cost, timing or quantity estimates provided as a part of the Scope are estimates only and reflect BCG's judgment as a design professional familiar with the construction industry. Estimates do not represent a guarantee that proposals, bids or the construction cost will not vary from the estimates prepared by BCG. Client acknowledges that BCG has no control over contractors as to cost, timing or quantity matters, and further acknowledges that if Client desires greater accuracy as to construction costs it has the opportunity to employ an independent cost estimator.

24. Use of Work Prepared by Others: If the Scope requires BCG to use work prepared by other parties (e.g. drawings, surveys, computations, calculations, specifications) then unless otherwise disclosed by the Client in writing to BCG the Client warrants and represents that the Client has obtained the full and unconditioned prior written consent from such other party. If the Client discloses that it has not obtained such prior consent then the Client, at its expense, shall use its best efforts to obtain such consent, which consent shall be in a form that, in BCG's reasonable discretion, does not violate any applicable law, regulation, or code of ethics. Unless the Scope specifically provides otherwise, BCG shall not be responsible for the accuracy, completeness, or correctness of work prepared by others.

25. Construction Means and Methods: Client acknowledges that BCG shall not have control of and shall not be responsible for construction means, methods, techniques, sequences, or procedures, or for any safety precautions in connection with the Project or for the acts or omissions of any contractor, subcontractor or any other person or entity performing work for the Project.

26. Shop Drawing Review: If specifically included in the Scope BCG shall review and check the contractor's shop drawings, product data, and samples, but only for the limited purpose of checking for general conformance with the intent of such contract documents. Client acknowledges that such review is not for the purpose of determining or substantiating the accuracy and completeness of other details such as dimensions or quantities or for substantiating instructions for installation or performance of equipment or systems designed by the contractor. BCG's review shall not constitute approval of safety precautions, construction means, methods, techniques, schedules, sequences or procedures, or of structural features. Client shall provide BCG with

sufficient time in BCG's professional judgment to permit adequate review.

27. Plan and Permit Processing: If the Scope includes preparation of plans and/or plats for review and approval by public agencies, submission and processing of such plans and plats in a manner consistent with a normal course of business is included within the Scope. If the Client requests BCG to expedite the plan review process by attending meetings, hand carrying plans and documents from agency to agency, or performing other such services, these services will be performed by BCG at Client's request and as hourly rate services under Section 4 above. Except as described otherwise in the Scope, preparation and processing of permit applications (including but not limited to building permit applications, grading permit applications, bond applications, entrance permit applications, etc.) will be performed at the Client's request and treated as hourly rate services under Section 4 above.

28. Building Plan Coordination: If the Scope includes preparation of site plans, site grading plans, subdivision plans, or similar plans that involve coordination with building plans (including architectural, mechanical, structural, or plumbing plans) to be prepared by others, the Client shall provide such building plans to BCG by such date and in such state as BCG reasonably deems necessary to timely perform its services hereunder. If the Client fails to so provide building plans to BCG then BCG may make reasonable assumptions regarding building characteristics in order to timely perform its services and any later revisions to BCG plans required to properly coordinate them with building plans will require a Change Order subject to an additional fee.