

**ORDINANCE NO. 2019-13**

**AN ORDINANCE AUTHORIZING THE CITY MANAGER TO ENTER INTO AN AGREEMENT WITH LAKE ERIE DIVING, INC. FOR LABOR AND MATERIALS FOR THE INSTALLATION OF AN ALTERNATE INTAKE RISER IN AN AMOUNT NOT TO EXCEED SEVENTY-TWO THOUSAND NINE HUNDRED EIGHTY-SEVEN AND 00/100 DOLLARS (\$72,987.00), WAIVING COMPETITIVE BIDDING; AND DECLARING AN EMERGENCY.**

**WHEREAS**, the City's water filtration plant intake is prone to the formation of needle (frazil) ice during winter months which puts the City's water supply at risk; and

**WHEREAS**, in prior years, the Water Department has used trash pumps to maintain operations during needle ice events, but this is not a best practice both because the trash pumps cannot produce the volume of water required to serve the City's customers and also because in sub-zero temperatures, the suction and discharge lines of the pumps freeze; and

**WHEREAS**, the Water Department studied available options, including: (1) an intake extension that would require extending out several miles into Lake Erie resulting in a cost over two million dollars; (2) a river intake which would require a pump station and force main resulting in a cost over two million dollars; (3) larger trash pumps, but the City has learned from other municipalities that the suction and discharge hoses still freeze making this an unviable option; and (4) a side intake (water door) which has been successfully utilized in other communities at a much lower cost and for which there is only one provider, Lake Erie Diving, Inc.; and

**WHEREAS**, the Water Department has determined that an alternate intake riser, with air actuated "water door", is the best technology and system available and the best value to the City to maintain operations during needle ice events and that Lake Erie Diving, Inc. is the patent holder and only company that designs, manufactures and installs such a system; and

**WHEREAS**, in order to ensure the City's water supply is not jeopardized during needle ice events, an alternate intake riser must be installed at the earliest possible time, meaning that the project needs to be commenced on or before July 31, 2019 to guarantee completion before winter, freezing temperatures and the possibility of needle ice events; and

**WHEREAS**, pursuant to Section 735.051 of the Ohio Revised Code, City Council can award a contract in excess of \$25,000 for work to be done and for the purchase of supplies and materials without competitive bidding upon a finding of a real and present emergency; and

**WHEREAS**, pursuant to Sections 1.02, 1.03 and 5.06 of the Charter, City Council has broad Charter powers to adopt, by ordinance, procedures that differ from state law regarding contracting for public improvements, including waiving competitive bidding on the basis of a sole source provider.

**BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HURON, OHIO:**

**SECTION 1.** The Huron City Council finds that a real and present emergency exists in that it is immediately necessary to commence the intake improvement project on or before July 31, 2019 to ensure completion before the winter and guarantee the continued efficient operation of the water filtration plant intake during needle ice events and, thus, waives competitive bidding under R.C. 735.051.

**SECTION 2.** The Huron City Council finds that Lake Erie Diving, Inc. is a sole source provider, being the current exclusive patent holder and only company know to design, manufacture and install the alternate intake riser, with air actuated "water door," which is substantially less expensive than other methods of addressing the problem, and finds that waiving the necessity for competitive bidding on this basis is also appropriate and in the best interest of the City.

**SECTION 3.** That the City Manager shall be, and he hereby is, authorized and directed to enter into an agreement with Lake Erie Diving, Inc. to perform the scope of work set forth in the proposal, in an amount not to exceed Seventy Two Thousand Nine Hundred Eighty-Seven and 00/100 (\$72,987.00), which agreement shall be substantially in the form on file in the office of the Clerk of Council.

**SECTION 4:** That this Council hereby finds and determines that all formal actions relative to the adoption of this Ordinance were taken in an open meeting of the Council and that all deliberations of this Council and of its committees, if any, which resulted in formal action, were taken in meetings open to the public in full compliance with applicable legal requirements, including O.R.C. §121.22 of the Revised Code.

**SECTION 5:** This Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and general welfare of the residents and for the further reason that this Ordinance shall become immediately effective so that the City can commence the alternate water intake project on or before July 31, 2019 to ensure project completion before the winter months for the continued efficient operation of the City's water filtration plant; **WHEREFORE** this Ordinance shall take effect immediately upon its adoption.

  
Brad Hartung, Mayor

ATTEST:

  
Clerk of Council

ADOPTED: \_\_\_\_\_

25 JUN 2019

**AGREEMENT TO DESIGN, MANUFACTURE AND INSTALL  
ALTERNATE INTAKE RISER**

This Agreement is made by and between LAKE ERIE DIVING, INC., an Ohio corporation, 362 Blackbrook Road, Painesville Township, Ohio 44077 ("COMPANY"), and the CITY OF HURON, OHIO, an Ohio municipal corporation, 417 Main Street, Huron, Ohio 44839 (the "CITY").

IN CONSIDERATION of the terms and conditions herein set forth, and other good and valuable consideration, the parties agree as follows:

**SECTION 1. SCOPE OF WORK.**

COMPANY agrees to perform the work set forth in the Proposal attached hereto and incorporated herein by reference as Exhibit A.

Company shall at all times comply with the Ohio Revised Code, Huron Codified Ordinances and safety and health requirements of the Occupational Health and Safety Administration.

**SECTION 2. COST OF SERVICES.**

CITY agrees to pay COMPANY the lump sum of Seventy-Two Thousand Nine Hundred Eight-Seven Dollars (\$72,987.00) (as itemized in COMPANY's proposal, Exhibit A). No other expenses shall be billed to the CITY, unless previously approved in writing by the CITY. Final payments totally this amount shall constitute full and final payment for all the work under this Agreement. All invoices shall be paid by the CITY within thirty (30) days of receipt.

All wages paid by COMPANY pursuant to this Agreement shall be in compliance with Chapter 4115 of the Ohio Revised Code and the prevailing wage rates set by the Ohio Department of Commerce, Division of Industrial Compliance and Labor, Bureau of Wage and Hour Administration, as applicable.

**SECTION 3. CHANGE ORDERS.**

There shall be no change order issued pursuant to this Agreement without prior approval and agreement of the parties in writing and subject to the approval of City Council.

**SECTION 4. PERFORMANCE OF SERVICES.**

COMPANY will work under its own direction and supervision. COMPANY shall perform all work set forth in Exhibit A to the best of its ability and to the satisfaction of the CITY; however, COMPANY shall be responsible for its own conduct and the conduct of any employees, suppliers or agents hired by COMPANY, while engaged in the performance of this Agreement. COMPANY shall furnish all labor, materials, tools and equipment required for the performance of the work required under this Agreement, except as may be specifically described herein.

COMPANY agrees that all materials and workmanship shall be in compliance with all applicable codes, industry standards, and the requirements of any governmental agencies having jurisdiction. COMPANY hereby acknowledges that it will abide by all safety regulations. All work performed by COMPANY will be in accordance with any warranties arising under applicable law.

**SECTION 5. WARRANTY/CORRECTION OF WORK.**

COMPANY warrants that materials and equipment furnished under the Agreement will be of good quality, and will be new, unless otherwise provided herein, and that they will conform to the requirements of the Proposal attached as Exhibit A and will be free from defects.

COMPANY agrees to correct or repair any defects in the work performed under this Agreement provided COMPANY is notified of such defects within one year after the work is completed. COMPANY shall correct or repair any defects in the work promptly after receipt of notice in writing from CITY. Corrections or repairs of work shall be at the sole expense of COMPANY.

All warranties arising under this Agreement or applicable law shall commence on the date COMPANY receives written notice of final completion from CITY.

**SECTION 6. RELATIONSHIP OF PARTIES.**

COMPANY shall be and remain an independent contractor to the CITY with respect to all work and services performed under the Agreement and agrees to and does hereby accept full and exclusive liability for its officers and employees for the payment of any and all compensation, contributions or taxes, unemployment benefits, pensions and annuities now or hereafter imposed under any state or federal laws which are measured by wages, salaries or other remuneration paid for work performed under the terms of this Agreement and further agrees to obey all lawful rules and regulations and to meet all lawful requirements

**SECTION 7. RIGHT OF ACCESS.**

COMPANY and its duly authorized representatives shall have the right to access the CITY's water filtration plant at all times reasonable in order to perform the work required under this Agreement.

**SECTION 8. TERM/TERMINATION.**

This Agreement and the obligations hereunder shall commence on the date of execution and continue until COMPANY has completed the work set forth in EXHIBIT A to the satisfaction of the CITY. The work set forth in EXHIBIT A shall be completed by November 30, 2019. Notice of final completion of the work required under this Agreement shall be provided in writing to COMPANY by the CITY.

This Agreement may be terminated by the CITY at any time upon thirty (30) days written notice to the other party.

The Agreement may be terminated by either party upon thirty (30) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within thirty (30) days of receipt of written notice of default (or, if such default is not curable within thirty (30) days, if the defaulting party fails to commence such cure within thirty (30) days or fails thereafter diligently to prosecute such cure to completion).

Each subcontract or supplier agreement for any portion of the work is assigned by the COMPANY to the CITY, provided that:

- (1) assignment is effective only after termination of this Agreement by the CITY for cause and only for those subcontract agreements that the CITY accepts by notifying the subcontractor or supplier and the COMPANY; and
- (2) assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Agreement.

When the CITY accepts the assignment of a subcontract or supplier agreement, the CITY assumes the COMPANY's rights and obligations under the subcontract. Each subcontract or supplier agreement shall contain an acknowledgment by the subcontractor or supplier of this contingent assignment and further agreeing and acknowledging that the CITY shall not be required to assume any liabilities to subcontractors or supplier for work performed prior to the date of the assignment and that the subcontractor's or supplier's exclusive remedy shall be a claim against the COMPANY for such liabilities.

## **SECTION 9. CORRECTION OF WORK.**

The COMPANY shall promptly correct work rejected by the CITY or failing to conform with the work described in Exhibit A, whether or not such work has been fabricated, installed, or completed. Costs of correcting such rejected work, including additional testing and inspections (if any), shall be borne by the COMPANY.

If the COMPANY defaults or neglects to carry out the work in accordance with this Agreement, and fails within a ten (10) day period after receipt of notice from the CITY to commence and continue correction of such default or neglect with diligence and promptness, the CITY may, without prejudice to any other remedies the CITY may have, correct such default or neglect, and withhold all payments to the COMPANY to the extent reasonably necessary to reimburse the CITY for the reasonable cost of correcting such deficiencies.

If the COMPANY fails to correct work which is not in accordance with the requirements of this Agreement, or repeatedly fails to carry out the work in accordance with this Agreement, the CITY may issue a written order to the COMPANY to stop the work, or any portion thereof, until the cause for such order is eliminated; however, the right of the CITY to stop the work shall not give rise

to a duty on the part of the CITY to exercise this right for the benefit of the COMPANY or any other person or entity.

**SECTION 10. INSURANCE.**

COMPANY hereby represents that it maintains, and agrees to furnish to the CITY, upon request, certificates of insurance for the following forms of insurance with the following minimum coverage levels:

- a. Workers compensation insurance: in accordance with applicable law
- b. Motor vehicle liability insurance: \$2,000,000
- c. General liability insurance and property damage insurance: \$2,000,000

All insurance is to be obtained from accredited insurance carriers reasonably acceptable to the CITY and shall name the CITY as an additional insured.

**SECTION 11. INDEMNIFICATION.**

COMPANY agrees to indemnify and to hold the CITY harmless and immune from any and all claims for injury or damages arising from the work and activities which are the subject of this Agreement and which are attributable to COMPANY's own actions or omissions or those of its officers, agents, employees, subcontractors, suppliers, third parties utilized by COMPANY in performance under this AGREEMENT, or those persons or entities in a joint venture with COMPANY in any activities related to the performance under this Agreement. In no event shall the CITY be liable to the COMPANY for indirect, consequential, incidental, special, or punitive damages or for lost profits.

**SECTION 12. DISPUTES.**

Any dispute arising from this Agreement, shall be resolved through claims brought in a court of competent jurisdiction. However, the parties may first refer the dispute to mediation, if acceptable to both COMPANY and CITY, to be held in Erie County, Ohio. The cost for any mediation services (facility charges and mediator charges) will be equally split between COMPANY and CITY, while each will be responsible for its own attorney fees and witness fees and costs, if any.

Pending final resolution of any claim, except as otherwise agreed in writing, the COMPANY shall proceed diligently with performance of this Agreement and the CITY shall continue to make approved and undisputed payments as set forth herein.

**SECTION 13. RETURN OF RECORDS/PROPERTY.**

Upon termination of this Agreement, COMPANY shall deliver all records, notes, data, memoranda, models, and equipment of any nature that are in COMPANY's possession or under COMPANY's control and that are the CITY's property.

**SECTION 14. NOTICES.**

All notices required or permitted under this Agreement shall be in writing and shall be deemed delivered when delivered in person or deposited in the United States mail, postage prepaid, addressed as follows:

If for COMPANY:

Patrick M. Murphy, President  
362 Blackbrook Road  
Painesville Township, Ohio 44077

If for the CITY:

Andrew D. White, City Manager  
City of Huron  
417 Main Street  
Huron, Ohio 44839

Such address may be changed from time to time by either party by providing written notice to the other in the manner set forth above.

**SECTION 15. ASSIGNMENT.**

The terms, provisions, and conditions of this Agreement and the rights and obligations of the parties hereto shall not extend to, inure to, bind, be transferred to or vest in the successors or assigns of either party other than by operation of law, unless the prior written consent of the other party is obtained.

**SECTION 16. ENTIRE AGREEMENT.**

This Agreement contains the entire agreement of the parties and there are no other promises or conditions in any other agreement whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.

**SECTION 17. AMENDMENT.**

This Agreement may be modified or amended if the amendment is made in writing and is signed by both parties.

**SECTION 18. SEVERABILITY.**

If any provision of this Agreement shall be held to be invalid or unenforceable for any reason by a court of competent jurisdiction or by appropriate governmental authorities, the remaining

provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

**SECTION 19. WAIVER OF CONTRACTUAL RIGHT.**

The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.

**SECTION 20. GOVERNING LAW AND VENUE.**

This Agreement shall be governed by the laws of the State of Ohio and any legal action concerning the provisions hereof shall be brought in an Ohio court of competent jurisdiction.

**[BALANCE OF PAGE INTENTIONALLY LEFT BLANK;  
SIGNATURES ON NEXT PAGE]**



**INTENDING TO BE LEGALLY BOUND**, the parties have set their hands and seals as of the dates set forth below.

**LAKE ERIE DIVING, INC.**

By: \_\_\_\_\_  
Patrick M. Murphy, President

Date: \_\_\_\_\_

**CITY OF HURON, OHIO**

By: \_\_\_\_\_  
Andrew D. White, City Manager

Date: \_\_\_\_\_

Approved as to legal form and correctness:

\_\_\_\_\_  
Aimee W. Lane, Director of Law

**CERTIFICATION BY FISCAL OFFICER**

I, as the Finance Director for the City of Huron, Ohio, certify that the money required for the within Agreement is in the treasury, to the credit of the fund for which it is drawn, or in the process of collection, and not appropriated for any other purpose.

\_\_\_\_\_  
Cory Swaisgood, Finance Director

Date: \_\_\_\_\_

EXHIBIT A

Lump Sum Quote



# LAKE ERIE DIVING, INC.

*Professional Diving & ROV Services*

5 June 2019

Huron Water Treatment Plant  
500 Cleveland Rd. West  
Huron, Ohio  
44839

Attn: Mr. Jason Gibboney

Re: Alternate Intake Riser

Dear Mr. Gibboney:

Our quote to furnish all labor and materials to install an emergency riser and patent pending water door approximately 450' out from the shore shaft is as follows:

- Design and fabricate a new pipe saddle with a 30" high 24" diameter riser. Furnish two 12" high – 24" diameter spools for future use as the lake bottom shifts.
- Pick up saddle and spools, paint, deliver to Huron, required fasteners, crane to set in water, and tow out to location in the lake.
- Furnish labor and pumps to excavate existing 36" intake pipe.
- Furnish drill, bolts, and epoxy to secure new saddle to the 36" pipe.
- Hydraulic chainsaw to cut 24" hole in the existing intake pipe.
- Furnish and install new water door, air lines, pneumatic cylinder, inclinometer, friction clamp, chinese fingers for hose strain relief, misc. air fittings, bulkhead fittings for shore shaft sluice valves, and hose.
- Control valve, mounting, and run plant air to the valve.
- Test and video.

**LUMP SUM QUOTE: \$72,987.00**

Liability, automobile, and workers compensation certificates will be furnished before work starts.

If you have any questions in regards to the above, or require any additional information, please contact me at your convenience.

Sincerely,

Patrick M. Murphy  
President

362 BLACKBROOK ROAD, PAINESVILLE TWP., OHIO 44077  
(440) 352-9472 • Fax (440) 352-8471