



Celebrating 25 Years of Making Your Project Our Priority

# Amendment to Agreement

# 1

DATE: May 1, 2019

CLIENT: Town of McCordsville

JOB NO.: 16029

ADDRESS: 6280 W. 800 North, McCordsville, IN 46055 **Attn:** Mark Witsman

PROJECT: Stansbury and Schultz Ditch

## Description of Change in Services:

Conditional Letter of Map Revision (CLOMR) for Flood Insurance Rate Map through Federal Emergency Management Agency (FEMA) in support of the Stansbury and Schultz Ditch relocation to include:

- Delineation of conditional floodway and floodplain
  - Fill out MT-2 application form for CLOMR
  - Provide notice of Letter of Map Revision in newspaper
  - Provide FEMA with application packet to include technical information in support of application.
- \* The application fee for the CLOMR will need to be paid for by the Town of McCordsville.*

**Cost: \$5,000**

Letter of Map Revision (LOMR) for Flood Insurance Rate Map through Federal Emergency Management Agency (FEMA) in support of the Stansbury and Shultz Ditch relocation to include:

- As built survey of project area.
  - Delineate floodway and floodplain based on final survey grades.
  - File with Indiana Department of Natural Resources-Division of Water (IDNR-DOW) a Floodplain Analysis and Regulatory Assessment (FARA)
  - Fill out MT-2 application form for LOMR
  - Provide notice of Letter of Map Revision in newspaper
  - Provide FEMA with application packet to include technical information in support of application.
- \* The application fee for the LOMR will need to be paid by the Town of McCordsville.*

**Cost: \$12,000**

If the stated cost and services are agreeable, please sign and forward this document to our office. Receipt of the signed amendment to agreement will serve as our Notice-to-Proceed. If you have any questions about this document, please contact Joseph Miller at 317-707-3736.

  
 \_\_\_\_\_  
 Signature (Date) 5/1/19  
 Joseph Miller, PE  
 \_\_\_\_\_  
 (Printed Name/Title)

\_\_\_\_\_  
 Signature (Date)  
 \_\_\_\_\_  
 (Printed Name/Title)



*Over 20 Years of Making Your Project Our Priority*

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## SCHEDULE OF FEES

January 1, 2018

Engineer-1	\$190 / hour
Engineer-2	\$170 / hour
Engineer-3	\$145 / hour
Engineer-4	\$125 / hour
Engineer-5	\$100 / hour
CADD-1	\$120 / hour
CADD-2	\$90 / hour
CADD-3	\$75 / hour
GIS Tech	\$90 / hour
Survey-1	\$190 / hour
Survey-2	\$145 / hour
Survey-3	\$100 / hour
Survey-4	\$90 / hour
Crew 2 Man	\$160 / hour
Crew 1 Man	\$120 / hour
Scan Crew-2 Man	\$240/ hour
Scan Crew-1 Man	\$200/ hour
Observation-1	\$135/ hour
Observation-2	\$115 / hour
Observation-3	\$105 / hour
Observation-4	\$90 / hour
Admin Staff-1	\$100 / hour
Admin Staff-2	\$75 / hour

Note: Fees above are subject to change with 30-day written notice from ENGINEER to CLIENT.

## TERMS AND CONDITIONS

1. **Acceptance.** This Agreement constitutes an offer by BE and may only be accepted on the exact terms herein. Documents containing additional or different terms shall not be binding on BE.

2. **Responsibilities of the Parties.** BE and Client shall cooperate with one another to fulfill their respective obligations under the Agreement and shall endeavor to maintain good working relationships among all Project team members.

**Client.** Client shall provide prompt written notice to BE of any error or defect in the Services or Deliverables for the Project, including any errors, omissions or inconsistencies.

a. **Designated Representative.** Client's designated representative shall be authorized to act on Client's behalf with respect to the Services and shall render decisions in a timely manner in response to documents submitted by BE to avoid delay in the orderly progress of the Services.

b. **Client's Duties.** Client shall assist BE with the performance of the Services and shall: (a) provide previous reports, construction drawings, and all available information related to the Project site; (b) guarantee and provide access to, and make provision for entrance into, public and private lands as required to perform the Services; (3) examine and timely report its comments on reports, sketches, drawings and other documents presented for examination regarding the Project; and (4) furnish all legal, auditing, insurance and accounting services necessary for the Services.

c. **Payment.** Client shall pay the Fee which includes all Change Orders and Reimbursable Expenses, and fees for additional services incurred by BE, its employees, agents or representatives in the performance of the Services.

**Engineer.** BE shall be entitled to rely on the accuracy and completeness of any information furnished by the Client for the Services.

a. **Designated Representative.** BE's designated representative shall be authorized to act on BE's behalf with respect to the Project and Services.

b. **BE's Duties.** BE shall perform all Services that are required under the Agreement; and, Client will be responsible for the completion of all other services involved in the development, construction and completion of the Project.

3. **Means and Methods.** BE shall supervise and direct the Services and have control over all means, methods, techniques, sequences and procedures related to the Services. The Services shall not include governmental permits or fees of any kind; testing, removal and disposal of contaminated or hazardous materials, or of any materials containing hazardous material as defined by the EPA; relocating Client's property; restoration related to Client's prior Project activities, including repair of damage to roadways, driveways, or sidewalks resulting from equipment or vehicles.

4. **Warranty and Disclaimer.** All warranties (written, express implied or oral), including any implied warranty of

merchantability, workmanship and fitness for a particular purpose, are excluded from this Agreement.

5. **Standard of Care.** The standard of care for all Services performed by BE and its sub-consultants shall be the care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project. BE shall perform its Services as expeditiously as is consistent with such professional skill and care and the orderly and timely progress of the Project.

6. **Insurance.** Client has personal, property and casualty insurance. BE shall maintain workers' compensation; general liability; automobile liability, professional liability insurance for the duration of this Agreement in the limits represented in its Certificate of Insurance which is available upon written request.

7. **Delays / Interruption.** Client recognizes that events out of BE's reasonable control may prevent the timely provision of the Services. If the Services are delayed or interrupted by any act or neglect of Client or a separate service provider employed by Client or by changes in the Services, labor disputes, fire, unusual delay in deliveries, adverse weather conditions, unavoidable casualties, or other causes beyond BE's reasonable control, the Completion Date shall be extended for a period of time equal to the delay. It is expressly agreed that Client shall not be entitled to any damage for delay in the Services.

8. **Claims for Consequential Damages.** Client and BE waive claims against each other for consequential damages arising out of or relating to this Agreement. This waiver includes damages incurred for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity along with liable for any loss of business, revenues, profits, or any other special, incidental, consequential or punitive damages of any nature.

9. **Changes.** Client may request changes within the general scope of the Services, in which event the Fee and Completion Date shall be adjusted by written Change Order. Unless otherwise agreed, the cost of change or additional Services shall be determined on the basis of the costs of the change, plus a reasonable allowance for overhead and profit. If conditions are encountered at the Project which differ from the conditions anticipated by BE or from those ordinarily found to exist and generally anticipated in the Services, the Fee and Completion Date shall be equitably adjusted by written Change Order. Circumstances beyond BE's control include, but are not limited to, the following: (1) a change in the instructions or approvals given by the Client that necessitate revisions in the BE's Deliverables; (2) enactment or revision of codes, laws or regulations or official interpretations which necessitate changes to previously prepared Deliverables; (3) decisions of the Client

not rendered in a timely manner; (4) a significant change in the Project including, but not limited to, location, size, complexity, the Client's schedule or budget, or procurement method; (5) failure of performance on the part of the Client.

No changes to the Services will be effective without the prior written consent of BE, which consent may be withheld in the sole discretion of BE. Any additional services or other changes to the Services will be documented in a Change Order, which will become part of this Agreement. Should the parties be unable to mutually agree to the necessary modification, BE may proceed with performance of the Agreement and Client shall continue to make all other payments due and owing BE under this Agreement.

10. **Boundary Determinations.** Boundary determinations occasionally disclose unseen or unknown conflicts between the record documents and the location of physical improvements. Upon discovery of any latent or patent ambiguity, uncertainty, or dispute disclosed by the records or by placement of the boundaries, Services will be suspended and Client will be notified. BE will present alternatives for possible resolution and any additional services required. If Client decides to forego resolution, all Services completed to date will be invoiced and the Project file will be archived. If Client chooses resolution, BE will act as Client's consultant. Upon resolution, the Agreement will be completed in accordance with its terms subject to interim rate increases.

11. **Indemnification.** To the fullest extent permitted by law, Client or BE shall indemnify and hold harmless the other party and its agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from provision of the Services, provided that such claim, damage, loss or expense is attributable to sickness, disease or death, or to injury to or destruction of tangible property, but only to the extent caused by the negligent acts or omissions of a party, anyone directly or indirectly employed by it or anyone whose acts it may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by the party indemnified hereunder.

12. **Limits on Liability.** In recognition of the relative risks, rewards and benefits of the Services provided for the Project to both the Owner and BE, the risks have been allocated so that the Owner agrees that, to the fullest extent permitted by law, BE's total liability to the Owner, for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this Agreement, whether based in contract, tort, strict liability or otherwise, from any cause or causes, shall not exceed the total amount of \$50,000.00 or the amount of the Fee (whichever is greater). This limit is not affected by any insurance limits described in (6) above.

13. **No Responsibility for the Work of Others.** BE shall not have control over or charge of or be responsible for the acts, omissions or failure of the Client's contractors, subcontractors, or their agents or employees, or any other

persons or entities to perform their work, labor or services in accordance with the Project's requirements.

14. **Safety, Protection of Persons and Property.** BE shall take necessary precautions to comply with applicable federal, state and municipal safety laws. Except for its own employees, agents, contractors and subcontractors, BE shall not be responsible for the safety of any person or property within or on the Project site. The Client's contractors, subcontractors, or their agents or employees, shall be solely responsible for the safety of their employees and others affected by its/their work at the Project. The Client shall cause its contractors, subcontractors, agents or employees to take necessary precautions for the safety of its own employees and the Client's property.

15. **Hazardous Waste.** The Client shall promptly notify BE of the existence of any hazardous substance on or adjacent to the Project site of which the Client has actual knowledge. The phrase "hazardous waste" shall be defined by the Superfund Act (Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended) and shall include similar definitions of a substance subject to a similar control by state or local law. The Client, or its other agents or subcontractors, shall have responsibility for compliance with all federal, state and local laws, regulations, guidance or other requirements relating to the handling, treatment, storage or disposal of hazardous wastes, substances or constituents. Client agrees that BE, as well as its owners, officers, directors or employees are not an owner, handler, generator, operator, treater, storer, transporter, disposer or Potentially Responsible Party, under the Resource Conservation and Recovery Act of 1976, as amended, the Comprehensive Environmental Response, Compensation and Liability Act as amended, or any other similar federal, state or local law or regulation, including the Indiana Environmental Legal Action statute. Client agrees to defend, indemnify and hold harmless BE, its owners, officers, directors and employees from and against all claims and liabilities resulting from any form of allegation that BE, its owners, officers, directors or employees are an owner, handler, generator, operator, treater, storer, transporter, disposer, or potentially responsible party under any federal, state, or local law or regulation. Notwithstanding the foregoing, Client does not agree to defend, indemnify, or hold BE harmless to the extent that damages are caused by the negligent actions or inactions of BE.

16. **Payment.** Invoices will be submitted monthly for Services and reimbursable expenses. Payment is due upon receipt. Invoices shall be based upon Services provided through the date of Invoice. Undisputed invoices unpaid thirty (30) days from the Invoice date shall accrue interest at 1 ½% per month (18% per annum) and shall entitle BE to immediately suspend the Services or terminate this Agreement upon seven (7) days written notice to Client, in the sole discretion of BE, without any further liability to BE under this Agreement. By exercising its rights of suspension

or termination, BE does not waive any rights it may have under any applicable law. Before resuming the Services, BE shall recover from the Client all undisputed amounts due BE for all Services performed pursuant to this Agreement and Reimbursable Expenses incurred. In the event of Service stoppage, the Completion Date, shall be extended and the Fee increased by the amount of BE's reasonable costs of shutdown, delay and start up pursuant to a Change Order and the Client may not withhold its approval of same. If BE incurs any cost or expense, including attorneys' fees and/or costs of collection, to recover undisputed sums due and owing, Client shall be responsible for payment of all such sums. The Client shall make no deductions from the BE's compensation on account of sums withheld from payments to others providing services, materials or labor at the Project.

17. **Reimbursable Expenses.** Reimbursable Expenses are in addition to the compensation for the Services and include, but are not limited to, expenses for the following: (1) filing fees, title searches, submittal fees, certified letters, reproduction of drawings and specifications or other documents, as well as the handling costs associated therewith; (2) any fees paid for securing approval of authorities having jurisdiction over the Project; (3) authorized travel and electronic communications and (4) the expense of professional liability insurance dedicated exclusively to this Project or the expenses of additional insurance coverage or limits requested by the Client in excess of that normally carried by BE and its consultants. BE shall not be obligated to advance payment associated with the foregoing expenses and upon written notice to Client, the Client may be required to make direct payment of these expenses.

18. **Default.** In the event of default, the non-defaulting entity shall give to the defaulting entity forty-eight (48) hours to cure such default. In addition to any other legal remedies available to BE, under this Agreement, law or equity, BE shall have the absolute right to immediately discontinue the Services when Client is in default of any of its obligations or fails to make timely payment.

19. **Disputes.** The parties agree to provide one another with written notice of a dispute within a reasonable time, not to exceed thirty (30) days, after obtaining knowledge of the same and shall include: (1) a statement specifying that a dispute has occurred that falls within the scope of this paragraph, (2) a statement of the party's position and a summary of evidence and arguments that support such position, and (3) the name and title of the disputing party's authorized representative. Within twenty (20) days after receipt of the disputing party's notice, the responding party shall submit a written response to the disputing party. The response shall contain: (1) a statement of the responding party's position and a summary of evidence and arguments that support such position; and (2) the name and title of the responding party's authorized representative. In the absence of an agreement to the contrary, the parties' authorized representatives shall meet in Hendricks County, Indiana, at

a mutually acceptable time and place within ten (10) days after the disputing party receives a response and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute. If the dispute has not been resolved within forty (40) days after the disputing party receives the response, or if the responding party refuses or fails to comply with the provisions of this paragraph, then the disputing party may commence mediation or legal action.

20. **Mediation.** If negotiations prove fruitless, the parties shall endeavor to settle the dispute by mediation (which shall be conducted, administered and governed by the Indiana Rules for Alternative Dispute Resolution or by other process agreed to by the parties) before recourse to other dispute resolution methods are used. Mediation shall be concluded within sixty (60) days after the conclusion of the initial thirty (30) day dispute negotiation period. Either party may terminate the mediation at any time after the first session. The cost of any mediation proceeding shall be shared equally by the Parties. If mediation efforts are not successful, the parties may exercise all of their rights under law.

21. **Litigation/Venue.** Exclusive venue for all claims or disputes arising out of this Agreement or Services provided hereunder shall be in Hendricks County, Indiana and any litigation between the parties that arises under this Agreement shall be prosecuted in Hendricks County, Indiana.

22. **Termination for Cause.** This Agreement may also be terminated by a party upon not less than seven (7) days' written notice should the other party fail to substantially perform in accordance with the terms of this Agreement through no fault of the party initiating termination. If the Client fails to make undisputed payments to the BE in accordance with this Agreement, such failure shall be considered substantial nonperformance of services under this Agreement and BE may terminate this Agreement for cause. In the alternative, BE may suspend the Agreement.

23. **Termination Due to Delay or Suspension.** If the Services are stopped, suspended or delayed for a period of thirty (30) days under an order of any court or other public authority having jurisdiction, or as a result of any *force majeure*, act or neglect of the Client's contractors, subcontractors, agents or employees, changes ordered in the Services, labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the control of the BE or its agents or employees, then the BE shall be entitled to a reasonable extension in the Completion Date pursuant to a Change Order and the Client may not withhold its approval of same. In the alternative, BE may upon not less than seven (7) days' written notice to the Client, terminate this Agreement and recover from the Client all amounts due BE for all Services performed pursuant to this Agreement and Reimbursable Expenses incurred, including overhead and profit, together with any other liabilities, obligations, damages or commitments, attorneys' fees

and/or costs of collection of the amounts due under this Agreement.

24. **Assignment.** Client may assign the Agreement to a separate entity, but only with the prior written consent of BE. This Agreement will be binding upon the parties, their successors, executors, administrators, and assigns.

25. **Notice.** Notice shall be in writing and delivered via e-mail, fax, overnight delivery, hand delivery, or certified mail. Notice shall be considered provided as of the date of delivery. Where notice cannot be immediately provided in writing, telephonic notice may be made followed by written notice.

26. **No Third-Party Beneficiaries.** It is agreed that the Services are for Client's sole use and benefit at the Project; as such, BE and Client agree that this Agreement is not intended to benefit any third-party.

27. **Ownership of BE's Deliverables.** All Deliverables, including, but not limited to, original drawings, field notes, reports, written data, and electronic data are and shall remain the exclusive property of BE until BE is paid in full under this Agreement and may not be used by the Client for any other endeavor without the written consent of BE. Upon completion of the Services and final payment of the Fee, the Client shall have a non-exclusive license to reproduce the Deliverables. Client shall also be permitted to make changes, corrections or additions to the Deliverables for the purposes of completing, using and maintaining the Project or for future additions or alterations to the Project; provided however, that the Client's use of the Deliverables shall be at the Client's sole risk and without liability to BE. In the event BE is not fully compensated under this Agreement, Client

shall remit the Deliverables and related documents to BE upon BE's demand. In the absence of BE's demand for remittance or upon completion of the BE's Services under this Agreement, the Client shall have a non-exclusive license to reproduce BE's drawings and related document provided however, that the Client's use of the Deliverables shall be at the Client's sole risk and without liability to BE, except that BE shall remain liable for its own negligent errors and omissions.

28. **Applicable Law**

The terms and conditions of this Agreement will be governed by the laws of the State of Indiana.

29. **Severability.** In case any one or more of the provisions contained in this Agreement or any application thereof shall be judicially determined to be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

30. **Miscellaneous.** This Agreement represents the entire and integrated agreement between BE and Client, supersedes all prior negotiations, representations and agreements, written or oral, and shall not be modified, supplemented or interpreted by evidence of course of dealing, course of performance or usage of trade. If any provision of the Agreement is found by a court to be illegal, invalid, void or otherwise unenforceable, the remaining terms and conditions shall remain in full force.

BME 2726475v4 Client 8876-0001