

**TOWN OF BLADES WATER UPGRADE PROJECT AND SUSSEX COUNTY SEWER
PROJECT TO EXPAND BLADES AREA OF UNIFIED SEWER DISTRICT
CONSTRUCTION AGREEMENT**

THIS AGREEMENT, made and entered into this _____ day of _____, 2017 (“Effective Date”), by and between THE TOWN of BLADES, a municipal corporation of the State of Delaware, party of the first part, hereinafter referred to as “TOWN,”

-AND-

SUSSEX COUNTY, a political subdivision of the State of Delaware, party of the second part, hereinafter referred to as “COUNTY.”

WITNESSETH:

WHEREAS, the engineering firm of Davis, Bowen & Friedel, Inc., hereinafter referred to as “DBF” is the TOWN Engineer of Record and is currently designing a water upgrade and expansion of the TOWN’s water supply system (“Blades Water Project”); and

WHEREAS, DBF is under contract with the COUNTY for the expansion of the Blades Sanitary Sewer District along Concord Road in the same vicinity as the TOWN’s water expansion and upgrade (“County Sewer Project”); and

WHEREAS, the USDA, Rural Development, Rural Utility Service is financing both projects and concurs with a joint effort to complete both projects simultaneously; and

WHEREAS, debt incurred by the Blades Water Project will be an obligation of the TOWN and debt incurred by the County Sewer Project will be an obligation of the COUNTY; and

WHEREAS, the TOWN and COUNTY desire to participate in a mutual effort to bid,

contract for, and administer the construction of the two projects concurrently for a cost-effective construction approach; and

WHEREAS, each party may designate a point of contact in its discretion for the purposes described herein.

NOW, THEREFORE, in consideration of the mutual covenants here before expressed, the parties hereto agree to the following:

1. The foregoing recitals are hereby incorporated in this Agreement.
2. The COUNTY shall advertise and bid the two projects in one EJCDC construction document with separate bid schedules and design plans for the County Sewer Project and for the Blades Water Project, which is a bid alternate (collectively, "Joint Project"). The parties agree to develop jointly all generally applicable bid documents in the bid package for the Joint Project, including but not limited to, EJCDC Supplementary Conditions and any other documents in the bid package subject to modification, before releasing the bid. The parties agree that neither party assumes any liability to the other and specifically releases the other party for any claims, damages, or other losses arising out of the parties' joint development of the EJCDC bid documents, including but not limited to, the design plans and other documents related to their respective projects. Each party will be solely responsible for providing all necessary information and determining all aspects of their respective projects and all contractual and bid terms and conditions related thereto, including the determination of whether EJCDC Bid Documents and resulting contracts are legally compliant with the statutes, laws, and policies applicable to each party's respective project.

3. If both the parties agree in writing, the COUNTY shall award the combined contract in an aggregate amount with written concurrence of the USDA, after each has had an opportunity to consult with their own legal counsel if needed. In the event the TOWN wishes to reject all bids received for its portion of the project, the TOWN has the option to reject all bids for its portion and separately bid its Project. The COUNTY, in its sole discretion, may proceed with awarding its portion of the contract. If the COUNTY wishes to reject all bids, the COUNTY may do so in its sole discretion, and the TOWN shall release the COUNTY from any claims, losses, damages related to such rejection of bids. Except as otherwise provided herein, to the extent that either party is named in a suit, mediation or arbitration solely arising from the other party's project and excluding any bid items performed for the joint benefit of the parties, the party with ownership of the project and DBF, if applicable, shall take all reasonable steps and cooperate as necessary to release or dismiss the other party from the suit, mediation or arbitration.
4. The parties agree to structure this Joint Project with a single point construction administration of the contract by DBF with TOWN issues approved by the TOWN and COUNTY issues approved by the COUNTY. Joint issues shall be approved by both parties in writing.
5. The parties acknowledge that the contractor shall send monthly invoicing to the COUNTY based on completed and approved scope under the respective project bid schedules. The COUNTY shall review the invoices related to its County Sewer Project and provide the invoices to the TOWN for the Blades Water Project for review and approval. After receiving the TOWN's approval, the COUNTY shall

pay the contractor for the County Sewer and the Blades Water Projects, provided that the County receives reimbursement from the USDA. Any delay in the TOWN's approval that results in delayed payments under the Joint Contract shall be solely the TOWN's responsibility and any claim or demand against the COUNTY for any such delay shall be assumed and paid by the TOWN. The Bid Deduct contained in the bid schedule shall be credited at the date of the project close-out and shall be apportioned based upon the ratio of the total bid amounts of the County Sewer Project and Blades Water Project.

6. The parties agree that DBF shall issue joint monthly invoicing for its construction administration and inspection services. Inspection specific to the TOWN and the COUNTY shall be separately designated on the invoice. Administration for the overall Joint Project shall be divided equally between the parties. Payment covering the entire scope of professional services shall be paid by the COUNTY, provided that the COUNTY receives full reimbursement from the USDA. The COUNTY shall review DBF's invoices related to its County Sewer Project and provide the invoice' portion for the Blades Water Project to the TOWN for review and approval. After receiving the TOWN's approval, the COUNTY shall pay DBF for professional engineering services related to the County Sewer and the Blades Water Projects. Any delay resulting from TOWN's approval shall be solely the TOWN's responsibility and any claim against the COUNTY for any such delay shall be assumed and paid by the TOWN.
7. The COUNTY shall file USDA, RD, RUS reimbursement requests for all aspects of the Joint Project in the form of separate account summaries for each respective

scope by the COUNTY and receipt of all associated USDA proceeds. The TOWN and DBF agree to promptly comply with the COUNTY's reasonable requests for cooperation or documentation in order for the COUNTY to obtain reimbursement. For any claims for reimbursement that relate to the Blades Water Project which are denied for any reason, the TOWN shall promptly make payment to the COUNTY for such costs, and no later than thirty (30) days after receipt of notice of such denial. Each party shall be responsible for preparing all proper documentation in order to receive reimbursement from USDA, and neither party shall assume any liability to the other and shall specifically release the other party with respect to any claims, demands, damages, or losses that may be incurred as the result of improper documentation.

8. The TOWN and the COUNTY shall provide prior written approval of any change orders to the scope of their respective projects. With a party's concurrence to a change order, the party assumes the financial obligation incurred under said change order up to and beyond the limits of USDA funding. In the event that the TOWN's change order requires funding beyond the USDA limits, DBF shall send the invoice to the TOWN separately for those costs, and those change order costs shall be paid directly by the TOWN to DBF. The COUNTY has no obligation to administer or pay funds that are not subject to reimbursement from the USDA.
9. The parties shall participate in joint progress meetings throughout the construction duration of the Joint Project.

10. The parties shall cooperate in the project closeout of the Joint Project by DBF at the end of the warranty period. Each party is responsible for its own costs and expenses in enforcing any warranties available to their respective projects.
11. The COUNTY and the TOWN shall be responsible for DBF's engineering expenses incurred in the performance of the aforementioned scope of services in accordance the terms of their respective EJCDC engineering services contracts. In the event the COUNTY terminates its contract with DBF for any reason, the COUNTY may hire an engineering consultant of its choice to complete the Joint Project.
12. The TOWN, on behalf of its officers, employees, agents, representatives, contractors, and assigns, hereby agrees to forever remise, release, waive, quitclaim and relinquish any and all rights, liens, claims, demands, claims for relief, and causes of action (collectively, hereinafter "Claims") against the County Parties (as hereinafter defined) whatsoever arising under, related to, or by virtue of the County's performance of the Blades Water Project. This Release shall apply to Claims regardless of whether the significant facts, circumstances, or events related thereto are within the actual knowledge of the County and TOWN and/or their respective officers or employees or knowledge which may be obtained through the exercise of due care, as of the date of this Release. To the extent permitted by law, this Release shall include any and all claims that may arise from the County Parties' own negligence, act, or omission with respect to any of the matters subject to the Release. For avoidance of doubt, the TOWN does not release the County's

contractor from and against any Claims. The "COUNTY Parties" shall be defined to include the COUNTY's elected and appointed officials and employees.

13. To the extent permitted by law, the TOWN agrees to defend, indemnify, and hold harmless the County and the elected officials, agents, employees, officers, directors, and representatives of County, individually and collectively, (the "Indemnified Parties") from and against Claims, including reasonable attorney's fees and defense costs, arising out of, by virtue of, or related to the performance of the Blades Water Project. The indemnity by the TOWN provided for in this Section shall not apply to the extent it would be deemed unenforceable under Title 6, Section 2704 of the Delaware Code, if determined to be applicable. However, the TOWN's defense obligation shall be implemented, at the COUNTY's option, without regard to alleged negligence or fault. The COUNTY shall give written notice to the TOWN of any Claims that may be subject to indemnification promptly after learning of such Claims. If such Claim falls within the scope of the indemnification obligations herein, the TOWN shall assume the defense of such Claim with counsel selected by the TOWN after reasonably consulting with the COUNTY within twenty (20) business days' of receiving written notice of a Claim. The assumption of the defense of such Claim by the TOWN shall not be construed as an acknowledgement that the TOWN is liable to indemnify the Indemnified Parties with respect to such Claim, nor will it constitute a waiver by the TOWN of any defenses it may assert against the Indemnified Parties concerning indemnification. If such defense is assumed by the TOWN with counsel so selected, the TOWN shall not be subject to any liability for any settlement of such Claim

made by the Indemnified Parties without the TOWN's consent (which consent shall not be unreasonably withheld or delayed). The Indemnified Parties shall participate in good faith in any such defense. The TOWN shall not be responsible for any fees, expenses, and costs of any separate counsel retained by the Indemnified Parties. Nothing herein shall be interpreted to waive any immunity that would otherwise apply to either party.

14. The parties agree to comply with all applicable permits, statutes, ordinances, rules, orders, policies, regulations and requirements of the Federal, State, County and local governments and any and all Courts, Departments and Bureaus that may apply to this Agreement.
15. The parties shall not assign or transfer any interest in this Agreement to any entity(s) or person(s) whatsoever without first receiving the other party's written consent.
16. Any notice provided for herein, unless otherwise noted, shall be given by hand or registered or certified mail, postage prepaid and addressed to, if for the County: Sussex County Engineer, Sussex County Department of Engineering, 2 The Circle, P.O. Box 589, Georgetown, Delaware 19947 and if for Town of Blades: Ms. Vikki Prettyman, Town Administrator, Town of Blades, 200 West 4th Street, Blades, Delaware 19973. The parties must provide advance written notice of any changes to the above-listed addresses. Notices sent to the addresses above or to an updated address properly noticed in writing shall be deemed to be delivered on the third business day after sending to the other party.

17. No amendments or modifications to this Agreement shall be binding unless in writing and signed by both parties.
18. This Agreement shall be binding upon and for the benefit of the heirs, executors, administrators, and successors of each party in like manner as upon the original parties, except as provided by mutual written agreement.
19. This document comprises the entire Agreement between the parties hereto relative to this matter and supersedes any prior agreements or representations, whether verbal or in writing.
20. The Agreement shall be governed by and construed in accordance with the substantive laws of the State of Delaware without regard to principles of conflict of laws. Any action at law, suit in equity, or judicial proceeding for the enforcement of this Agreement or regarding any provision hereof shall be instituted and maintained only in a court of competent jurisdiction located in Sussex County, Delaware, or if under federal jurisdiction, in the District Court of the State of Delaware.
21. Both parties represent and warrant that they have the full and complete authority to execute this Agreement on behalf of their respective organizations.
22. The parties acknowledge that each has had the opportunity to consult with legal counsel of their own choosing concerning the provisions of this Agreement.
23. Time is of the essence. The term "day" as used herein shall mean calendar day, unless specifically defined as a "business day."
24. The parties acknowledge that each had the ability to negotiate terms and conditions, and this Agreement shall not be construed against the party who prepared and

drafted the Agreement documents. If one or more of the provisions of the Agreement is held to be invalid, illegal or unenforceable in any respect for any reason, such invalidity, illegality, or unenforceability shall not affect any other provision of the Agreement, and the Agreement shall be construed as if the invalid, illegal, or unenforceable provision had never been included.

25. The headings and subheadings herein are for convenience only and shall not be used to relieve either party of any obligation under this Agreement.
26. Any forbearance by either party in exercising its rights hereunder shall not be construed as a waiver thereof, unless expressly set forth in writing and signed by the parties. Any waiver by either party of any provision or condition of this Agreement shall not be construed or deemed to be a waiver of any other provision or condition of this Agreement, nor a waiver of a subsequent breach of the same provision or condition.
27. Neither the provisions of this Agreement nor the performance of the parties hereunder is intended to benefit, nor shall inure to the benefit, of any third party.
28. This Agreement may be executed in one or more counterparts, any or all of which shall constitute one and the same instrument.
29. In construing this Agreement, the general intent is that other than the sharing of the joint administration costs and joint bid items, the COUNTY shall be responsible for the County Sewer Project and that the TOWN shall be responsible for its Blades Water Project. This Agreement shall be construed in such a way as to support this intent, and the parties are obligated to take or refrain from actions to enact this intent.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper corporate officers having the requisite authority to bind the respective parties to this Agreement, the day and year first above written.

TOWN OF BLADES

Attest: _____
Town Administrator

By: _____
David L. Ruff, Mayor

SUSSEX COUNTY

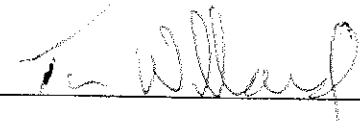
Attest: _____
Clerk, Sussex County Council


By: _____
Michael H. Vincent, President

DBF hereby executes this Agreement for the sole purpose of memorializing its acknowledgement with its role and obligations under this Agreement that are expressly set forth herein. The terms of this Agreement shall be considered supplemental to the terms and conditions of DBF's existing professional services agreements with the COUNTY and the TOWN, unless hereinafter expressly amended in writing and signed by the parties to be bound thereby.

Attest: _____ By: _____

The attorneys for the Town of Blades and Sussex County sign below to indicate their approval as to form of this Agreement for purposes of its compliance with the parties' respective local ordinances but does not constitute approval as to the issues of policy or substance of this Agreement or any other matter, nor a certification of the Agreement's compliance with the requirements of the USDA grant or other applicable federal requirements.

By: 
Town of Blades Attorney

By: 
Sussex County Attorney Assistant