

New York Water Environment Association, Inc.

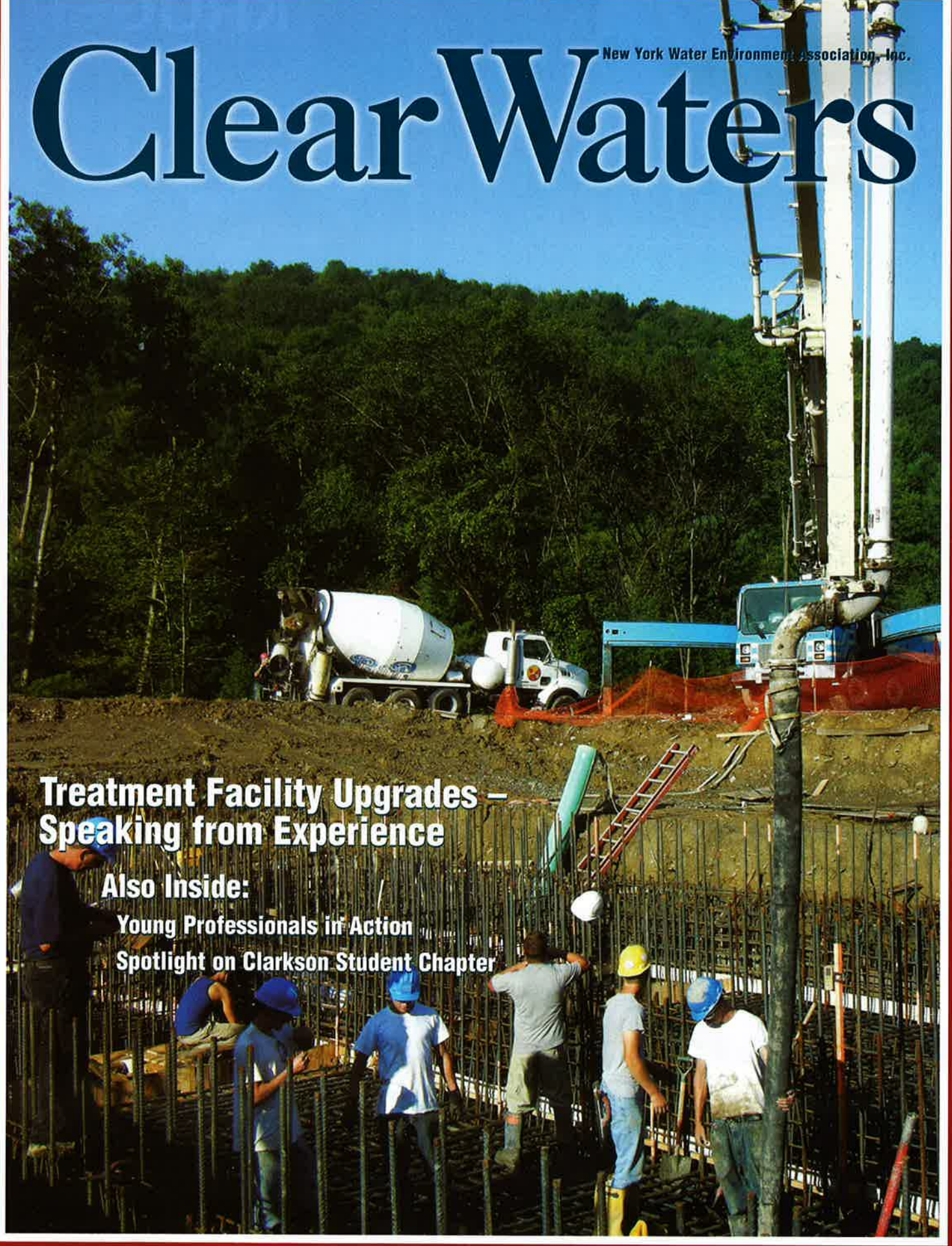
# Clear Waters

## Treatment Facility Upgrades – Speaking from Experience

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**Young Professionals in Action**

**Spotlight on Clarkson Student Chapter**



# Procurement of Design and Construction Services

*Insights from a Construction Lawyer*

by Jim Hughes

The following is a scenario to avoid when selecting an engineering consultant to help upgrade your municipality's water filtration or wastewater treatment facilities:

The municipal board sends out requests for proposals (RFPs) for needs assessment and/or design services. After diligent review of responses, interviews are conducted, negotiations are completed and a selection is made, along with a tentative agreement as to price and services to be rendered. This is often followed by a proposed letter of intent (LOI) submitted by the successful engineering firm. The successful consultant then provides a "standard form" EJCDC (Engineers Joint Contract Document Committee) Owner-Engineer Agreement, or an AIA form (American Institute of Architects Committee Agreement, if the project is led by an architect), which is then forwarded to the municipal attorney for review.

## A Missed Opportunity

In the above situation, a significant opportunity has been missed because the proposed services agreement was not considered until after the selection had been made known to all of the candidates and the public. Consulting services agreements are complex and can easily exceed a dozen pages. A water/wastewater treatment plant owner's ability to negotiate favorable modifications to the agreement is heavily dependent upon two factors: bargaining position and knowing what can be negotiated.

An owner's bargaining position wanes with the passage of time for the simple reason that the owner loses the ability to choose a different consultant if acceptable terms cannot be agreed upon. The owner's bargaining position is significantly reduced if the terms of the agreement are not negotiated before the "selection" is announced. Skilled review and negotiated modifications of such agreements are rarely contentious or drawn out. However, the modifications made to the agreement can make a big difference if the project is one of the unfortunate few that suffers a significant failure.

Most reputable design professionals understand a municipality's various needs, including its budgetary constraints and the need to avoid unexpected hourly fees. Such experienced professionals may not take advantage of the opportunity created by leaving negotiation of the specific terms of their services agreement until last. However, a consultant may be proposing a lower fee by excluding certain services, the importance of which the owner may not fully appreciate. Or, the consultant may simply lack experience in recognizing reasonable requests for modification of its proposed agreement. When such requests are initiated late in the selection process by the owner's attorney, they may not be well received even if they are needed to reasonably protect the municipality's interests.

Conversely, by issuing a signed LOI, this signals to interested parties that the consultant selection has been made. The successful candidate may conclude that the mayor or supervisor is unable or

unwilling to change the selection decision if differences arise while resolving the terms of the service agreement. Changing the selection after it has become public knowledge often carries undesirable consequences. As a result, a consultant may become less likely to agree to modifications to its proposed agreement. Unnecessary time and resources can be wasted getting to an agreement. Such difficulties may unnecessarily diminish the goodwill that exists at the time a selection is made.

If the terms of the consultant's agreement is introduced before the consultant selection is made, less effort will be required to produce acceptable terms. This approach allows the competitive incentives at work in the RFP process to assist



Photo by The Cook, BC Group

Construction begins in a WWTP for pouring concrete in an equalization tank and sequential batch reactor (SBR).

in reaching agreement on acceptable contract language. Negotiating the contract is facilitated by having other candidates in the hunt. Contract negotiation is further enhanced by having a proposed services agreement on the table at the outset. This allows a direct comparison of services and features offered by the various candidates for inclusion in the agreed upon fee.

Early development and review of a proposed agreement offers many other benefits. It will help to educate the municipality's various representatives who are participating in the RFP process. Candidates and participants can comment on the proposed agreement and list any exceptions they may have to its terms. Exceptions raised while the RFP contest is alive are more likely to be valid and warrant consideration. Generating a proposed agreement will get the municipality's construction attorney involved and allow more understanding of the services earlier in the process.

Make the proposed agreement part of the selection process by including it as part of the RFP package each candidate receives when responding to the RFP. Try to avoid signing anything in the way of a preliminary agreement or LOI before a full agreement is reached. Achieving a comprehensive agreement should not be unduly burdensome. Remember, if things go bad and goodwill with the consultant is lost, the contract will define the scope of services, terms of payment, responsibility for loss and myriad other issues.

### FLOW DIAGRAM OF RFP PROCESS

#### The Usual Way | Proposed Improvements

- ➔ Prepare brief Request for Proposal (RFP) & send to list of desirable candidates
  - Have proposed agreement that is suitable to the project prepared by construction counsel
- ➔ Provide package of additional information (deliverables) to candidates requesting same as instructed in RFP
  - Include proposed contract (form that is modified to your needs) & require submission of any changes a candidate wants "or forever hold their peace."
- ➔ Receive & review written responses and materials provided by candidates.
  - Review any changes to the proposed agreement that have been requested.
- ➔ Conduct interviews of candidates surviving first cut (A great learning opportunity, not merely a beauty contest)
  - Discuss proposed contract changes as part of the interview process (more involved issues can be saved for a second round with the "preferred" candidate).
  - Resolve any areas of disagreement in proposed contract with preferred candidate.
- ➔ Make final selection, sign contract and notify remaining candidates.

***If done in sequence, all parties will spend less time and money and get a better agreement.***

specify the many different types of services to be provided. Not all of the required services will be included in the fixed fee. Those services that are not likely to be required may appropriately be paid for on an hourly basis, if and when they are needed. There is no reason to pay for unnecessary services as part of a fixed fee. However, paying for hourly services creates budgetary uncertainty and unanticipated costs. Thus, an important objective is to include all reasonably anticipated services in the consultant's fixed fee. The EJCDC and AIA form agreements provide for several types of reasonably anticipated services to be compensated on an hourly, rather than a fixed fee basis. To the extent that such services are to be included in the fixed fee, the agreement must be modified. An addendum to the agreement is commonly employed to address these and other modifications.

The EJCDC and AIA form agreements commonly provide that services within the fixed fee end upon a specific date. After that date, all services are charged and paid for on an hourly basis. This protects the consultant from the risks of delay. If possible, fixed fee services should not end until sometime after substantial completion is actually achieved. Ninety days is a good minimum. Thus, the fixed fee services period should float with the project. This creates additional incentive for the design professional to try to get the job done on time. It also requires the engineer to share a small portion of the risk of project delay with the municipality. This may be appropriate as the engineer can have a great influence upon whether project delay occurs.

Where fixed fee services end on a fixed date, the consultant may start hourly billing of all of its services at a time when municipal officials are highly distressed by the delay being experienced on the project. It is best for the consultant to establish a price at the outset that avoids hourly services due to a project running over scheduled completion.

The following are some other activities where modification of the EJCDC or AIA form agreement is required to include such services in the fixed fee:

1. Rebidding where the project funding limit is exceeded
2. Preparation of bid alternatives
3. Preparation of the various submittals required by NYS Department of Environmental Conservation
4. Existing conditions investigation
5. Detailed cost estimates
6. Preparation of equipment schedules
7. As built drawing review
8. Periodic onsite investigation
9. Conduct of regular job meetings
10. Inclusion of certain other engineering services (asbestos abatement, geotechnical engineer, etc.)
11. Preparing specifications that are compliant with the Wick's Law (multiple prime contractors)
12. Multiple reviews of deficient shop drawings
13. Review of excessive requests for substitutions
14. Review of excessive change order requests

The cost for the last three items may be shifted to an offending contractor by including appropriate language in the proposed construction contractor's agreement.

More recently, design and technical services agreements are expressly limiting the design professional's or service provider's liability with caps on exposure, waivers of certain types of damages or modified indemnification clauses. Often, both parties have no

### Important Services to Include in Agreement

There are several issues that must be considered in preparing a successful consultant's agreement. One of these is to properly define the consultant's scope of services. The consultant's agreement will

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objection to removal of these limitations so long as the risk of loss can be insured. Providing language that properly dovetails with current insurance products requires careful collaboration between experienced construction counsel and an insurance advisor. Otherwise, significant problems in this regard will not be revealed until after it is too late to correct them.

Many of these same considerations apply to preparing the contracts for construction. As a public municipality, these contracts will be competitively bid. Thus, the contract is prepared and made part of the bid documents. It is not negotiated. This allows the municipality a freer hand in preparing a favorable contract so long as the proposed contract being bid upon is not so unfair as to drive good contractors away. This requires early collaboration between the attorney, the design professional and a construction manager, if one is involved.

The best consultant's agreement could be very brief. It would state that, for an agreed upon fixed fee, the consultant will exercise professional care and diligence to provide all of the services the owner needs to successfully program, design, gain approval of, bid, and administer construction of a project that is satisfactory to the owner and is built on time and under budget. For good reason, few consultants would expose themselves to such unlimited commitments. As a result, it makes sense to give consideration to the terms of the agreement early on in the selection process.

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