

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

UPTON CONSTRUCTION CO, INC., a
West Virginia Corporation,

Plaintiff,

v.

TOWN OF MILL CREEK, WEST
VIRGINIA, a West Virginia Municipal
Corporation, & POTESTA &
ASSOCIATES, INC., a West Virginia
Corporation

Defendants.

Case No.: 16-C-165

Judge David Wilmoth

ANSWER AND AFFIRMATIVE DEFENSES

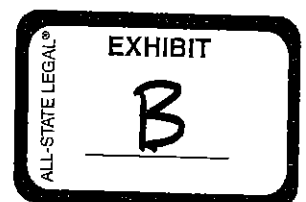
AND NOW, Defendant, Potesta & Associates, Inc. ("Potesta"), by and through its counsel, Pietragallo Gordon Alfano Bosick & Raspanti, LLP, hereby files the following Answer and Affirmative Defenses:

1. After reasonable investigation, Potesta is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiff's Complaint. Said allegations are, therefore, denied and strict proof is demanded.

2. After reasonable investigation, Potesta is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiff's Complaint. Said allegations are, therefore, denied and strict proof is demanded.

3. Admitted.

4. The allegations contained in Paragraph 4 of Plaintiff's Complaint constitute conclusions of law that do not require a response. To the extent a response may be deemed necessary, Potesta admits only that the construction project that gives rise to this litigation took



place in Randolph County, West Virginia. As for all remaining allegations contained in Paragraph 4 of Plaintiff's Complaint, said allegations are denied and strict proof is demanded.

FACTUAL BACKGROUND

5. Potesta admits that on or about August 19, 2015, Mill Creek accepted bids for a construction project identified as "Water Systems Improvements Project Town of Mill Creek, West Virginia." As for all remaining allegations contained in Paragraph 5 of Plaintiff's Complaint, said allegations refer to contents of the Contract, which is a written instrument that speaks for itself. Potesta denies any characterization of the Contract inconsistent with its contents. To the extent that any further response may be deemed necessary, Potesta denies Plaintiff's characterization of the Contract, which also includes responsibilities, duties, and conditions ascribed to Plaintiff beyond those alleged in Paragraph 5 of Plaintiff's Complaint.

6. Potesta admits that it provided services in connection with the Project, including preparing and submitting drawings and contract documents, and that it performed its services in accordance with the contractual, legal, and professional requirements appropriate to the Project.

7. Potesta admits that its bid set drawings were provided to potential bidders by The Town of Mill Creek, West Virginia. As for all remaining allegations contained in Paragraph 7 of Plaintiff's Complaint, said allegations refer to contents of drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and contract documents inconsistent with its contents. To the extent that any further response may be deemed necessary, Potesta denies Plaintiff's characterization that the bid set drawing is the only item upon which Plaintiff could rely upon in submitting its bid for the Project.

8. Potesta admits that Plaintiff submitted a bid in the amount as alleged in Paragraph 8 of Plaintiff's Complaint. As for all remaining allegations contained in Paragraph 8 of Plaintiff's Complaint, after reasonable investigation Potesta is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations. Said allegations are, therefore, denied and strict proof is demanded.

9. Potesta admits that Plaintiff was awarded the Project based on its bid and that Plaintiff subsequently entered into a contract with the Town of Mill Creek, West Virginia. As for all remaining allegations contained in Paragraph 9 of Plaintiff's Complaint, after reasonable investigation Potesta is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations. Said allegations are, therefore, denied and strict proof is demanded.

10. The allegations contained in Paragraph 10 of Plaintiff's Complaint refer to the Contract, which is a written instrument that speaks for itself. Potesta denies any characterization of the Contract inconsistent with its contents.

11. After reasonable investigation, Potesta is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 of Plaintiff's Complaint. Said allegations are, therefore, denied and strict proof is demanded.

12. The allegations contained in Paragraph 12 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 12 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent a further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 12 of Plaintiff's

Complaint. To the contrary, pursuant to customary and appropriate standards and practice, Potesta issued updated drawings following field surveys and in response to input provided by Plaintiff, which provided information to Plaintiff as a contractor. In addition, updated drawings were issued to support a proposed change order regarding the water storage tank site. Potesta denies Plaintiff's allegation that its issuance of updated drawings in any way materially and/or cardinally changed the scope of the Contract or Project, and/or caused Plaintiff to suffer its alleged damages.

13. The allegations contained in Paragraph 13 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 13 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response may be deemed necessary, Potesta denies that it "caused problems" as identified in subparagraphs (a)-(d). To the contrary, Potesta provided its services in connection with the Project, including preparing and submitting drawings and contract documents, in accordance with the contractual, legal, and professional requirements appropriate to the Project.

14. The allegations contained in Paragraph 14 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent that any response may be deemed necessary, Potesta denies the allegations contained in Paragraph 14 of Plaintiff's Complaint and strict proof is demanded.

15. The allegations contained in Paragraph 15 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent that any response may be

deemed necessary, Potesta denies the allegations contained in Paragraph 15 of Plaintiff's Complaint and strict proof is demanded.

16. It is admitted that representatives of Plaintiff, the Town of Mill Creek, West Virginia and/or Potesta conferred regarding Plaintiff's listing of claims prior to Plaintiff's filing of its Complaint. As for all remaining allegations contained in Paragraph 16 of Plaintiff's Complaint, said allegations constitute conclusions of law to which no response is required. To the extent that any response may be deemed necessary, Potesta denies the remaining allegations contained in Paragraph 16 of Plaintiff's Complaint and strict proof is demanded.

17. The allegations contained in Paragraph 17 Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response. To the extent that any response may be deemed necessary, Potesta denies the allegations contained in paragraph 17 of Plaintiff's Complaint. To the contrary, Plaintiff requested Termination for Convenience.

18. The allegations contained in Paragraph 18 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent that any response may be deemed necessary, Potesta denies the allegations contained in Paragraph 18 of Plaintiff's Complaint and strict proof is demanded.

19. The allegations contained in Paragraph 19 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent that any response may be deemed necessary, Potesta denies the allegations contained in Paragraph 19 of Plaintiff's Complaint and strict proof is demanded.

COUNT I: BREACH OF CONTRACT AGAINST DEFENDANT,
TOWN OF MILL CREEK WEST VIRGINIA

20. Paragraph 20 of Plaintiff's Complaint incorporates the previous Paragraphs of the Complaint and Potesta responds by incorporating its responses to said allegations as if fully set forth herein at length.

21. The allegations contained in Paragraph 21 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 21 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 21 of Plaintiff's Complaint and strict proof is demanded.

22. The allegations contained in Paragraph 22 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 22 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 22 of Plaintiff's Complaint and strict proof is demanded.

23. The allegations contained in Paragraph 23 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 23 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 23 of Plaintiff's Complaint and strict proof is demanded.

24. The allegations contained in Paragraph 24 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 24 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 24 of Plaintiff's Complaint and strict proof is demanded.

25. The allegations contained in Paragraph 25 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 25 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 25 of Plaintiff's Complaint and strict proof is demanded.

WHEREFORE, Defendant, Potesta & Associates, Inc., respectfully requests that judgment be entered in its favor.

COUNT II: UNJUST ENRICHMENT AGAINST DEFENDANT,
TOWN OF MILL CREEK WEST VIRGINIA

26. Paragraph 26 of Plaintiff's Complaint incorporates the previous Paragraphs of the Complaint and Potesta responds by incorporating its responses to said allegations as if fully set forth herein at length.

27. The allegations contained in Paragraph 27 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 27 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any

further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 27 of Plaintiff's Complaint and strict proof is demanded.

28. The allegations contained in Paragraph 28 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 28 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 28 of Plaintiff's Complaint and strict proof is demanded.

29. The allegations contained in Paragraph 29 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 29 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 29 of Plaintiff's Complaint and strict proof is demanded.

30. The allegations contained in Paragraph 30 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 30 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 30 of Plaintiff's Complaint and strict proof is demanded.

WHEREFORE, Defendant, Potesta & Associates, Inc., respectfully requests that judgment be entered in its favor.

COUNT III: DEFAMATION AGAINST DEFENDANT,
TOWN OF MILL CREEK WEST VIRGINIA

31. Paragraph 31 of Plaintiff's Complaint incorporates the previous Paragraphs of the Complaint and Potesta responds by incorporating its responses to said allegations as if fully set forth herein at length.

32. The allegations contained in Paragraph 32 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 32 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 32 of Plaintiff's Complaint and strict proof is demanded.

33. The allegations contained in Paragraph 33 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 33 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 33 of Plaintiff's Complaint and strict proof is demanded.

34. The allegations contained in Paragraph 34 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 34 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 34 of Plaintiff's Complaint and strict proof is demanded.

35. The allegations contained in Paragraph 35 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 35 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 35 of Plaintiff's Complaint and strict proof is demanded.

36. The allegations contained in Paragraph 36 of Plaintiff's Complaint are directed to a party other than Potesta and, therefore, do not require a response by Potesta. To the extent that any response may be deemed necessary, the allegations contained in Paragraph 36 of Plaintiff's Complaint constitute conclusions of law to which no response is required. To the extent any further response may be deemed necessary, Potesta denies the allegations contained in Paragraph 36 of Plaintiff's Complaint and strict proof is demanded.

WHEREFORE, Defendant, Potesta & Associates, Inc., respectfully requests that judgment be entered in its favor.

COUNT IV: NEGLIGENCE AGAINST DEFENDANT, POTE STA

37. Paragraph 37 of Plaintiff's Complaint incorporates the previous Paragraphs of the Complaint and Potesta responds by incorporating its responses to said allegations as if fully set forth herein at length.

38. The allegations contained in Paragraph 38 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 38 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further

response is necessary, Potesta admits that it provided services in connection with the Project, including preparing and submitting drawings and contract documents, and that it did so in accordance with the contractual, legal, and professional requirements appropriate to the Project.

39. The allegations contained in Paragraph 39 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 39 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 39 of Plaintiff's Complaint and strict proof is demanded.

40. The allegations contained in Paragraph 40 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 40 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 40 of Plaintiff's Complaint and strict proof is demanded.

41. The allegations contained in Paragraph 41 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 41 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further

response is necessary, Potesta denies the allegations contained in Paragraph 41 of Plaintiff's Complaint and strict proof is demanded.

WHEREFORE, Defendant, Potesta & Associates, Inc., respectfully requests that judgment be entered in its favor.

COUNT V: FRAUD AGAINST DEFENDANTS,
TOWN OF MILL CREEK WEST VIRGINIA AND POTE STA

42. Paragraph 42 of Plaintiff's Complaint incorporates the previous Paragraphs of the Complaint and Potesta responds by incorporating its responses to said allegations as if fully set forth herein at length.

43. The allegations contained in Paragraph 43 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 43 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 43 of Plaintiff's Complaint and strict proof is demanded.

44. The allegations contained in Paragraph 44 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 44 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 44 of Plaintiff's Complaint and strict proof is demanded.

45. The allegations contained in Paragraph 45 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 45 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 45 of Plaintiff's Complaint and strict proof is demanded.

46. The allegations contained in Paragraph 46 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 46 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 46 of Plaintiff's Complaint and strict proof is demanded.

47. The allegations contained in Paragraph 47 of Plaintiff's Complaint constitute conclusions of law to which no response is required. The allegations in Paragraph 47 of Plaintiff's Complaint also refer to drawings and contract documents, which are written instruments that speak for themselves. Potesta denies any characterization of the drawings and/or contract documents inconsistent with their contents. To the extent that any further response is necessary, Potesta denies the allegations contained in Paragraph 47 of Plaintiff's Complaint and strict proof is demanded.

WHEREFORE, Defendant, Potesta & Associates, Inc., respectfully requests that judgment be entered in its favor.

AFFIRMATIVE DEFENSES

Potesta hereby incorporates the previous paragraphs of its Answer as if fully set forth herein at length.

FIRST AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claim for fraud is barred, in whole or in part, for failure to plead fraud with particularity as required by W. Va. R.C.P. 9(b).

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, for failure to allege facts sufficient to demonstrate that any act or omission by Potesta caused any injury or damages to Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, for failure to allege facts sufficient to demonstrate that Potesta breached any duty owed to the Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' alleged injuries and damages were caused solely and/or exclusively by circumstances over which Potesta did not have control and/or responsibility and/or intervening, superseding, and/or independent causes over which Potesta did not have control and/or responsibility and not in any manner whatsoever by the actions and/or inactions of Potesta.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of clean hands.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of unjust enrichment.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by its failure to mitigate damages.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of assumption of risk.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, due to its contributory and/or comparative negligence.

FOURTEENTH AFFIRMATIVE DEFENSE

To the extent discovery reveals, Plaintiff's claims are barred, in whole or in part, by the statute of limitations and/or statute of repose.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's request for an award of attorney's fees is improper, impermissible, and inappropriate based on the allegations of the Complaint and any applicable law.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to state a cognizable claim for punitive damages.

SEVENTEENTH AFFIRMATIVE DEFENSE

Due to the lack of clear standards, the imposition of punitive damages against Potesta would be unconstitutionally vague and/or overbroad.

EIGHTEENTH AFFIRMATIVE DEFENSE

None of the alleged acts or omissions of Potesta were malicious, willful, wanton, reckless, grossly negligent and/or intentional; therefore, any award of punitive damages is barred.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claim for punitive damages are in contravention of Potesta's rights under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, the Excessive Fines Clause of the Eighth Amendment of the United States Constitution, and similar provisions in the Constitution of West Virginia and/or the common law and public policies of West Virginia.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the terms, conditions, and limitations contained in the contract between Plaintiff and the Town of Mill Creek, West Virginia.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiff specifically failed to comply with the Contract Documents, including the "Information for Bidders," "Agreement," "General Conditions," "Technical Specifications," "Specification Special Conditions," "Addendum" (relevant portions of which are attached hereto collectively as Exhibit A (see highlighted and tabbed sections "a-z")), and Drawings (relevant portions of which are attached hereto as Exhibit B (see highlighted and tabbed section "aa")) including, but not limited to the following:

- a. Information for Bidders ("IB") Sections entitled "Examination of Contract Documents and Site" (Ex. A, p. 6) and "Interpretations and Addendum" (Ex. A, p. 6), and Item I of "Irregular or Non-Responsive Bids" of IB (Ex. C, p. 10), and document "Certification of Receipt of Addenda" of the IB (Ex. A, p. 19);
- b. Articles 7.2, 7.4, 7.6, and 7.7 of the Agreement (Ex. A, pp.36-37);
- c. Paragraphs 3.03.A.1 and 3.03.A.2 of the General Conditions ("GC") (Ex. A, p. 63);
- d. Paragraphs 4.01.C and 4.04 of the GC (Ex. A, pp. 64, 66);
- e. Paragraphs 6.01.A, 6.04.A.1, 6.05.A.2, 6.18, 6.19.A, and 6.19.C of the GC (Ex. A, pp. 71-72, 77)
- f. Paragraphs 10.05.B and 10.05.F of the GC (Ex. A, p. 82-83);
- g. Paragraphs 11.01 and 11.03.C of the GC (Ex. A, pp. 83-85);
- h. Paragraph 12.01.B of the GC (Ex. A, p. 85);
- i. Paragraph 13.06.A of the GC (Ex. A, p. 87);
- j. Paragraphs 14.02.A and 14.02.B of the GC. (Ex. A, p. 89);
- k. Paragraphs 14.07 and 14.09 of the GC (Ex. A, pp. 91-92);
- l. Paragraphs 15.02 A.1, 3, and 4 of the GC (Ex. A, p. 92);
- m. Section 1000.1.03 of the Technical Specifications ("TS") (Ex. A, p. 120);
- n. Section 1300.1.06 of the TS (Ex. A, p. 135);
- o. Section 1300.1.08 of the TS (Ex. A, pp. 135 -136);
- p. Section 1700.1.03 of the TS (Ex. A, pp. 143-144);
- q. Sections 2025.1.01 , 2.01, and 3.01 to 3.03 of the TS (Ex. A, pp. 146 -147);
- r. Sections 2210.3.06.A, C, D, E, and F of the TS (Ex. A, pp. 160-161);
- s. Section 2260.3.01 of the TS (Ex. A, pp. 191-192);
- t. Sections 2300.3.13 and 3.15 of the TS (Ex. A, pp. 201-202);

- u. Sections 2610 (Ex. A, pp. 206-207) and 2820 (Ex. A, pp. 208-210);
- v. Sections 3300.2.01, 2.02, and 3.04 of the TS (Ex. A, pp. 217-218, 220);
- w. Sections 15000.3.03 and 3.04 of the TS (Ex. A, pp.266-267);
- x. Sections 15020 (Ex. A, pp. 269-274),15025 (Ex. A, pp.275-279), and 15030 (Ex. A, pp. 280-282) of the TS;
- y. Specification Special Condition No. 5. (Ex. A, p. 111);
- z. Item 48 of Addendum No. 1 (Ex. A, p. 333); and,
- aa. General Note Nos. 1, 3, 4, 8, 11 of Drawing No. 2 (Ex. B, p. 1).

TWENTY-SECOND AFFIRMATIVE DEFENSE

Potesta reserves the right to assert additional affirmative defenses as further investigation and discovery may warrant.

WHEREFORE, Defendant, Potesta & Associates, Inc., respectfully requests that judgment be entered in its favor.

Respectfully submitted:

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

UPTON CONSTRUCTION CO, INC., a West
Virginia Corporation,

Plaintiff,

v.

TOWN OF MILL CREEK, WEST VIRGINIA,
a West Virginia Municipal Corporation, &
POTESTA & ASSOCIATES, INC., a West
Virginia Corporation

Defendants.

Case No.: 16-C-165

Judge David Wilmoth

VERIFICATION

I hereby swear and affirm that I am a duly authorized representative of Defendant, Potesta & Associates, Inc., and that the factual allegations made in the foregoing Answer and Affirmative Defenses are true and correct based on my knowledge, information, and belief. I understand that any false statements herein are made subject to penalty relating to unsworn falsification to authorities.

Date: February 10, 2017



Terence Cato Moran, P.E.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Answer and Affirmative Defenses on February 10, 2017 by email and U.S. First Class Mail upon the following counsel of record:

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