



***Delivered via Email***

February 3, 2021

Dylan Mulfinger  
City Administrator  
20 Second Avenue SW  
Oelwein, IA 50662

RE: Project Closeout - Disinfection and 42 Well Improvements  
*FOX PN 3406-10B*

Mr. Mulfinger,

On December 20, 2020, FOX Engineering, on behalf of the City of Oelwein, submitted a letter to Portzen Construction with an offer to issue a change order extending the substantial and final completion dates for the above referenced project in exchange for a credit of \$50,000. The intent of this change order being to provide a credit to the city to recover the costs the city has incurred as a result of the project extending beyond the original completion dates without officially assessing liquidated damages to the contractor.

Following subsequent correspondence with Portzen Construction, on February 2, 2021, Portzen Construction submitted the attached letter with a counteroffer of a \$25,000 credit in exchange for extending the contract completion dates. While the counteroffer amount is half what the city originally requested, we believe it to be a fair and reasonable counteroffer worth consideration.

Please be advised that if the city does decide to pursue the \$50,000 originally requested, the city would likely have to assess the amount as liquidated damages as the contractor has indicated they will not agree to a change order of that amount. Based on our experience, if the city does pursue the full amount requested as liquidated damages, it would likely lead to the contractor filing a claim against the city which would result in additional costs to both parties (at a minimum, mediation, and likely arbitration with associated attorney fees and staff time). As noted in previous correspondence, liquidated damages cannot be assessed as a penalty to the contractor so it would be the city's burden to justify the liquid damage amounts and that the total amount of liquidated damages is reasonable. While the exact outcome of this approach is hard to predict, please be aware that if the city is not able to reasonably justify the amount of liquidated damages, the actual losses aren't anywhere near the amount requested, or the arbitrator finds that delays were outside the control of the contractor, there is a possibility that the city could end up with less than the counteroffer amount in addition to any legal fees spent. Legal fees are not reimbursed to the "winner" in arbitration and the administrative fees of mediation and arbitration are split evenly.

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Please also be aware that since the SRF loan being used to fund the project construction cannot be closed until the project is complete, this approach would likely create further delays in closing of the SRF construction loan.

Strong consideration should also be given for how this approach could negatively impact bids the city receives on future projects. City's that develop a reputation for strictly enforcing liquidated damages often see fewer bidders on projects or bidders will increase bid prices in anticipation of a potential loss. While less is written on this concern, one should not underestimate the potential long term costs.

As noted above, we believe Portzen Construction's counteroffer to be reasonable and acceptance of this offer to be in the best interest of the city. The offer from Portzen, from our understanding with discussions with City staff, will cover the City's direct out-of-pocket costs (staff overtime, additional engineering fees, etc) and also have some remaining value to the indirect costs (additional administrative time for salaried staff) that are difficult to quantify. It is FOX Engineering's recommendation that the city accept Portzen Construction's counteroffer of a \$25,000 credit and proceed with issuing a change order as noted above so that project closeout can proceed without further delay.

Sincerely,  
FOX Engineering Associates, Inc.



Lance Aldrich, P.E., BCEE  
Principal, Project Manager

cc: Vic Kane, Utilities Superintendent, City of Oelwein (Email)



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***205 STONE VALLEY DRIVE • DUBUQUE, IOWA 52003 • (563) 557-7642 • Fax (563) 557-9048***

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February 2, 2021

Fox Engineering  
414 South 17<sup>th</sup> St, Suite 107  
Ames, IA 50010

RE: Project Closeout  
Disinfection & 42 Well Improvements, Oelwein, Iowa

Lance,

After reviewing the Project Closeout letter dated January 21, 2021, Portzen Construction still disagrees with the \$50,000.00 change order request for liquidated damages and additional expenses. The largest delay on the project was Automatic Systems, who the City of Oelwein solely specified to use on this project. The second largest delay was caused by the well contractor. While it was ultimately Portzen Construction's final decision to hire Cahoy Well & Pump Service, both Fox and the City of Oelwein reviewed and provided input on Cahoy's work experience and references per section SC-7.06 D of the Supplementary Conditions of the project specifications. After reviewing all the information it was agreed by all parties to hire Cahoy as the well contractor. Therefore, the City of Oelwein did have say for which Well Contractor was ultimately hired for this project. So, in the end, the City of Oelwein had complete control in hiring Automatic Systems and also agreed to using Cahoy Well & Pump after review. These two contractors attributed to the majority of the delays on this project.

While Portzen still does not agree with any liquidated damages on this project, we are willing to settle on a \$25,000 credit change order to keep the project closeout process moving forward and complete the project.

If you have any questions, please feel free to contact me at 563-557-7642. Thanks.

Sincerely,

A handwritten signature in black ink that reads "Joe Klein". The signature is written in a cursive, slightly slanted style.

Joe Klein  
Project Manager

cc: Dylan Mulfinger, City Administrator, City of Oelwein  
Vic Kane, Utilities Superintendent, City of Oelwein



***Delivered via Email***

January 21, 2021

Joe Klein  
Portzen Construction  
205 Stone Valley Drive  
Dubuque, Iowa 52003

RE: Project Closeout  
Disinfection and 42 Well Improvements, Oelwein, Iowa  
FOX PN: 3406-10B

Joe,

In response to your letter dated January 4, 2021, the city acknowledges that selection of the control system integrator subcontractor was out of Portzen Construction's control and that it would be unreasonable to make Portzen liable for all delays associated with their work. This acknowledgment is evident in the fact that the city is not requesting a change order for the full amount of liquidated damages incurred. The City disagrees that Portzen is not responsible for any damages resulting in the overall project delay. While the control system integrator contractor contributed to a significant portion of the project delays, there were other delays on the project that also significantly impacted completion of the project that were within Portzen's control.

For example, the well rehabilitation work was originally scheduled to start in late September 2017 and be completed by December 2017. Cahoy Well and Pump Service delayed start of the well rehabilitation work until November 2017 and didn't completed the well work until August of 2018. This significantly impacted completion of the well building and subsequent work by approximately 8 months. Selection of the well subcontractor was at Portzen's discretion and any delays resulting from their work would be Portzen's responsibility.

There were also issues with the chemical feed systems that contributed to delays in completing the project. The chemical feed system supplier provided the wrong type of storage tanks which required new tanks to be ordered. This delayed installation and startup of the chemical feed systems. Issues with the chemical feed pumps also led to delays in getting the chemical feed systems operating as intended. These issues were later found to be a result of the pumps not being supplied with the proper connections for the flow sensors and the flow sensors not being installed in accordance with the manufacturer's instructions.

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Additionally, there were delays in completing the closeout submittals which were unrelated to the control system integrator. For example, the 42 Well received partial substantial completion in October 2019; however, O&M manuals for the well pump, chemical feed system, and HVAC and mechanical equipment for the 42 Well were not provided until July of 2020 or later.

As stated in previous correspondence, the city believes the \$50,000 change order being requested is a fair and equitable approach to cover actual costs the city has incurred as a result of the project delays in lieu of formally assessing liquidated damages. Please reconsider this offer again and if you determine it to be acceptable return a signed copy of Change Order No. 3. If this approach is unacceptable to you, the city may proceed with closing out the project and assessing liquidated damages.

Sincerely,  
FOX Engineering Associates, Inc.



Lance Aldrich, P.E.  
Project Manager

cc: Dylan Mulfinger, City Administrator, City of Oelwein (*Email*)  
Vic Kane, Utilities Superintendent, City of Oelwein (*Email*)



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**205 STONE VALLEY DRIVE • DUBUQUE, IOWA 52003 • (563) 557-7642 • Fax (563) 557-9048**

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January 4, 2020

Fox Engineering  
414 South 17<sup>th</sup> St, Suite 107  
Ames, IA 50010

RE: Project Closeout  
Disinfection & 42 Well Improvements, Oelwein, Iowa

Lance,

After reviewing the Project Closeout letter dated December 30, 2020, Portzen Construction disagrees with the \$50,000.00 change order request for liquidated damages and additional expenses. A majority of the delays over the past two years were related to the controls portion of the project. Portzen Construction had no control over who was hired for this scope of work as Automatic Systems was solely spec'd for this scope. After the first few project meetings it was made clear that both the City of Oelwein and Fox Engineering had concerns with Automatic Systems being able to meet the schedule and get their work completed on time. Therefore, Portzen Construction does not feel responsible for the delays on the project.

If you have any questions, please feel free to contact me at 563-557-7642. Thanks.

Sincerely,

Joe Klein  
Project Manager

cc: Dylan Mulfinger, City Administrator, City of Oelwein  
Vic Kane, Utilities Superintendent, City of Oelwein



***Delivered via Email***

December 21, 2020

Dylan Mulfinger  
City Administrator  
20 Second Avenue SW  
Oelwein, IA 50662

RE: Assessment of Liquidated Damages - Disinfection and 42 Well Improvements  
*FOX PN 3406-10B*

Mr. Mulfinger,

As you are aware, the contract times for the Disinfection and 42 Well Improvements project commenced on September 13, 2017, the date the Notice to Proceed was issued to Portzen Construction. The project was to be substantially completed per the Agreement on October 31, 2018 and ready for final payment within 30 days, or November 30, 2018. The actual date of substantial completion was August 27, 2020, or 666 days past the Contract substantial completion date. The actual date of final completion was November 13, 2020, or 48 days past the provided 30 days.

The Agreement with the contractor includes liquidated damages in the amount of \$500 for each day that expires after the contract substantial completion date and \$100 per day for each day that expires after the final completion date. Based on the actual completion dates noted above, the total liquidated damages for not completing the work by the Contract completion dates currently stands at \$337,800. The city is currently holding \$73,064.75 for retainage and work that remains to be paid. While the Agreement technically includes provisions for the city to collect liquidated damages in the amount noted above, being able to successfully collect the full amount would likely be a challenge.

Historically, liquidated damages cannot be enforced as a punishment to the contractor. The intent of liquidated damages is to cover actual losses to the owner as a result of a project extending beyond the agreed upon completion date and those costs must be reasonable and justified. For the city to successfully collect the full liquidated damages amount, the city would need to provide evidence of losses in line with to the amount being requested. Additionally, it must be shown that the delays were within the control of the contractor.

While there were unexpected issues that came up during construction that required additional time on the contractor's part, such as additional over-excavation for the building foundation and the discovery of a potential obstruction in the well, these issues did not have a large enough impact to affect the overall project schedule. Much of the delay in completing the project was a result of the contractor, or in most instances their sub-contractors, not performing the work in a timely manner. For example, the



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subcontractor performing the well rehabilitation work demobilized from the site to perform work on another project and did not return to the site for 3 months. Once the well subcontractor resumed work, it took an additional three months to complete the well rehabilitation work which set the project back by approximately 6 months.

Additional delays occurred as a result of long lead times for the manufacturing and delivery of key electrical equipment for the 42 Well. While the manufacturing and shipping delays of this equipment were out of the control of the Contractor's subcontractor, the controls subcontractor was aware of the long lead times and failed to order the equipment in a timely manner. This resulted in a delay of startup of the 42 well by approximately 3 months.

While it is our belief that the delays on this project were within the control of the contractor, with the current liquidated damages total being approximately 27% of the contract price, requesting the full liquidated damages amount would likely be viewed as excessive, even though the individual per day cost might be reasonable during an active construction period. Based on our experience, pursuing liquidated damages that are not reasonable or justified typically results in both the city and contractor spending a significant amount of time and money to resolve the matter. It is FOX Engineering's recommendation that the city propose to accept a deduct to the contract price of approximately \$40,000 to \$50,000, which is more in line with the actual amount of damages (costs) incurred by the city.

Sincerely,  
FOX Engineering Associates, Inc.



Lance Aldrich, P.E., BCEE  
Principal, Project Manager

cc: Vic Kane, Utilities Superintendent, City of Oelwein