

07-928-CD

Hicks Associates vs Girard Twp.

2007-928-CD
Hicks Assoc vs Girard Twp Municipal Auth

COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

No. 07-928-CD

Type of Case: Civil Action

HICKES ASSOCIATES, INC.
Plaintiff

vs.

GIRARD TOWNSHIP MUNICIPAL
AUTHORITY
Defendant

Type of Pleading: Complaint

Filed on Behalf of: Plaintiff

Counsel of Record for this Party:

James W. Kutz
I.D. No.: 47245
Megan N. Dreisbach
I.D. No. 201418
McNEES WALLACE & NURICK LLC
100 Pine Street – P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Dated: June 7, 2007

FILED *acc Atty*
m/2/2007
JUN 11 2007 *Atty pd.*
85.00
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

HICKES ASSOCIATES, INC. :
Plaintiff :
:
v. : No.
:
GIRARD TOWNSHIP MUNICIPAL : Civil Action - Law
AUTHORITY, :
Defendant :
:

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

David S. Meholic, Court Administrator
Clearfield County Courthouse, Clearfield, PA 16830
(814)765-2641, Ext 5982

McNEES WALLACE & NURICK LLC

By James W. Kutz
James W. Kutz
Megan N. Dreisbach
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
(717)232-8000

IN THE COURT OF COMMON PLEAS
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NOTICE

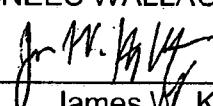
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David S. Meholick, Court Administrator
Clearfield County Courthouse, Clearfield, PA 16830
(814)765-2641, Ext 5982

McNEES WALLACE & NURICK LLC

By 

James W. Kutz
Megan N. Dreisbach
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P.O. Box 1166
Harrisburg, PA 17108
(717)232-8000

COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

HICKES ASSOCIATES, INC. :
Plaintiff :
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GIRARD TOWNSHIP MUNICIPAL : Civil Action - Law
AUTHORITY, :
Defendant :
:

COMPLAINT

AND NOW, comes the Plaintiff, Hickes Associates, Inc., through its counsel McNees Wallace & Nurick LLC, and hereby files the following Complaint.

Parties

1. Plaintiff is Hickes Associates, Inc., a Pennsylvania corporation with its principal place of business located at 8253 Old Route 22, Alexandria, Pennsylvania 16611. Hickes Associates, Inc. (hereinafter "Hickes") provides services as a general, mechanical, and electrical contractor.
2. Defendant is the Girard Township Municipal Authority (hereinafter "Authority") with its principal place of business located in LeContes Mills, Pennsylvania 16850.

Factual Background

3. On or about April 12, 2001, the Authority engaged Hickes to perform certain construction services on the municipal wastewater collection and treatment system of the Girard Township Wastewater Treatment Facility (hereinafter "Project").
4. Pursuant to the original contract executed April 12, 2001 (hereinafter "Contract"), Hickes agreed to perform said services for compensation in the amount of Four

Hundred Forty Thousand, Four Hundred Eighty Seven Dollars (\$440,487.00). A true and correct copy of portions of said contract is attached hereto as Exhibit A.

5. Following execution of the Contract, Hickes immediately commenced work on the Project.

6. Over the course of the Project, the Authority issued multiple change orders, thereby increasing the scope and total cost of the Contract.

7. The Authority requested the most recent change orders in 2005.

8. Hickes prosecuted all change orders, and satisfactorily completed the work required by the contracts including all change orders.

9. Notwithstanding completion of the work by Hickes, the Authority is withholding from Hickes an undisputed contract balance of Seventeen Thousand Five Hundred Eighty Two Dollars and Thirty Cents (\$17,582.30).

10. Despite repeated demands from Hickes, the Authority has refused to pay Hickes the money due under the Contract.

COUNT I

Breach of Contract

11. Paragraphs 1-10 are hereby incorporated by reference as if fully set forth.

12. Hickes has fulfilled its obligations pursuant to the Contract and subsequent change orders.

13. The Authority breached its contract with Hickes when it failed to pay Hickes the undisputed remaining contract balance of Seventeen Thousand Five Hundred Eighty Two Dollars and Thirty Cents (\$17,582.30).

14. Hickes has thereby incurred damages in the amount of Seventeen Thousand Five Hundred Eighty Two Dollars and Thirty Cents (\$17,582.30), plus interest and other

damages as set forth below, due to the Authority's refusal to make payment in accordance with the Contract.

15. The Authority is liable to Hickes for the aforesaid damages as a result of its breaches of contract.

WHEREFORE, Hickes respectfully requests judgment in its favor, in the amount of Seventeen Thousand Five Hundred Eighty Two Dollars and Thirty Cents (\$17,582.30), plus interest, penalties, attorneys' fees and other such relief as this Court deems appropriate, in excess of the compulsory arbitration limit in Clearfield County.

COUNT II

**Claim for Interest, Penalties, Attorneys' Fees, and Expenses Pursuant to
62 Pa.C.S.A. §3931 et seq.**

16. Paragraphs 1-15 are hereby incorporated by reference as if fully set forth.

17. The Prompt Payment Provisions of the Commonwealth Procurement Code (hereinafter the "Act"), 62 Pa.C.S.A. § 3931, *et seq.*, apply to this Contract.

18. Hickes has performed in accordance with the provisions of the Contract by completing its work pursuant to the Contract and subsequent change orders.

19. The unpaid contract balance amount of Seventeen Thousand Five Hundred Eighty Two Dollars and Thirty Cents (\$17,582.30) that is due and owing by the Authority to Hickes has been improperly withheld by the Authority.

20. Notwithstanding Hickes repeated demands, the Authority has wrongfully and unreasonably failed and refused to pay Hickes in accordance with the terms of the Contract.

21. The Authority has violated 62 Pa.C.S.A. § 3931, *et seq.*, by failing and refusing to timely and completely pay Hickes in accordance with the Contract.

22. Section 3932 of the Act provides, in relevant part, if payment is not made to a contractor when due in accordance with the contract or §3932 of the Act, "the government

agency shall pay to the contractor, in addition to the amount due, interest on the amount due."

23. Pursuant to the Act, Hickes is entitled to interest from the Authority.

24. Section 3035 of the Act provides, in relevant part, that in the event a government agency, in bad faith, fails to comply with the payment terms of the Act, a court may award, in addition to all other damages, a penalty in the amount of one percent (1%) per month of the amount that was withheld in bad faith, and reasonable attorneys' fees and expenses.

25. Pursuant to the Act, Hickes is entitled to a penalty of one percent per month on the amount wrongfully withheld by the Authority, and attorneys' fees and expenses.

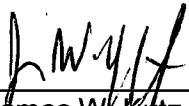
26. As a result of the Authority's wrongful and unreasonable withholding of amounts due to Hickes in violation of the Act, Hickes requests that damages under the Act be assessed against the Authority in the form of, (1) the undisputed contract balance owed to Hickes by the Authority; (2) an award to Hickes of interest pursuant to 62 Pa.C.S.A. § 3932; (3) an award to Hickes of a penalty pursuant to 62 Pa.C.S.A. § 3935 equal to 1% per month of the amount wrongfully withheld by the Authority; and (4) an award to Hickes of its reasonable attorneys' fees and expenses incurred in pursuing its claims under the Act pursuant to 62 Pa.C.S.A. § 3935. Said damages continue to accrue, and will exceed \$35,000 if this matter proceeds to trial.

WHEREFORE, Hickes respectfully requests judgment in its favor, in the amount of Seventeen Thousand Five Hundred Eighty Two Dollars and Thirty Cents (\$17,582.30), plus interest, costs, expenses, penalties, attorneys' fees and all such other relief that is available

under the Prompt Payment Provisions of the Commonwealth Procurement Code, as well as other such relief as this Court deems to be appropriate, in excess of the compulsory arbitration limit in Clearfield County.

Respectfully Submitted:

McNEES WALLACE & NURICK LLC

By 

James W. Kutz

I.D. No. 47245

Megan N. Dreisbach

I.D. No. 201418

100 Pine Street

P.O. Box 1166

Harrisburg, PA 17108

(717)232-8000

Dated: June 7, 2007

**AGREEMENT
BETWEEN OWNER AND CONTRACTOR
ON THE BASIS OF A STIPULATED PRICE**

THIS AGREEMENT is by and between GIRARD TOWNSHIP MUNICIPAL AUTHORITY,
(hereinafter called OWNER)

and Hickes Associates, Inc.

(hereinafter called CONTRACTOR).

OWNER and CONTRACTOR, in consideration of the mutual covenants hereinafter set forth, agree as follows:

ARTICLE 1 - WORK

1.01 CONTRACTOR shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:

CONTRACT # GIR - 2: CONTRACT FOR CONSTRUCTION OF 30,000 SEWAGE TREATMENT PLANT AND 30,000 GPD LIFT STATION IN GIRARD TOWNSHIP, CLEARFIELD COUNTY.

ARTICLE 2 - THE PROJECT

2.01 The Project for which the Work under the Contract Documents may be the whole or only a part is generally described as follows:

CONSTRUCTION OF PUBLIC SEWAGE COLLECTION SYSTEM AND WASTEWATER TREATMENT FACILITIES IN THE VILLAGES AND AREAS OF LECONTES MILLS AND BALD HILL IN GIRARD TOWNSHIP, CLEARFIELD COUNTY

ARTICLE 3 - ENGINEER

3.01 The Project has been designed by Wilson Fisher, Jr., P.E., President of Hess & Fisher Engineers, Inc., 36 North Second Street, Clearfield, PA 16830, Tel. 814.765.7541, Fax 814.765.6488, Email: wfisher@hessfishereng.com

who is hereinafter called ENGINEER and who is to act as OWNER's representative, assume all duties and responsibilities, and have the rights and authority assigned to ENGINEER in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 4 - CONTRACT TIMES

4.01 *Time of the Essence*

A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

4.02 *Days to Achieve Substantial Completion and Final Payment*

A. The Work will be substantially completed within 120 days after the date when the Contract Times commence to run as provided in paragraph 2.03 of the General Conditions, and completed and ready for final payment in accordance with paragraph 14.07 of the General Conditions within 120 days after the date when the Contract Times commence to run.

4.03 *Liquidated Damages*

A. CONTRACTOR and OWNER recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the times specified in paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$ 500.00 for each day that expires after the time specified in paragraph 4.02 for Substantial Completion until the Work is substantially complete. After Substantial Completion, if CONTRACTOR shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by OWNER, CONTRACTOR shall pay OWNER \$ 500.00 for each day that expires after the time specified in paragraph 4.02 for completion and readiness for final payment until the Work is completed and ready for final payment.

ARTICLE 5 - CONTRACT PRICE

5.01 OWNER shall pay CONTRACTOR for completion of the Work in accordance with the Contract Documents an amount in current funds equal to the sum of the amounts determined pursuant to paragraphs 5.01.A, 5.01.B, and 5.01.C below:

A. For all Work other than Unit Price Work, a Lump Sum of:

Four Hundred Forty Thousand Four Hundred (\$ 440,487.00)
(use words) Eighty-Seven Dollars (figure)

All specific cash allowances are included in the above price and have been computed in accordance with paragraph 11.02 of the General Conditions.

B. For all Unit Price Work, an amount equal to the sum of the established unit price for each separately identified item of Unit Price Work times the estimated quantity of that item as indicated in this paragraph 5.01.B:

BID SCHEDULE TABLE AND BID COMBO SHEET START ON PAGE 00500-10

TOTAL OF ALL UNIT PRICES N/A
\$ _____ (dollars)
(use words)

As provided in paragraph 11.03 of the General Conditions, estimated quantities are not guaranteed, and determinations of actual quantities and classifications are to be made by ENGINEER as provided in paragraph 9.08 of the General Conditions. Unit prices have been computed as provided in paragraph 11.03 of the General Conditions.

C. For all Work, at the prices stated in CONTRACTOR's Bid, attached hereto as an exhibit.

ARTICLE 6 - PAYMENT PROCEDURES

6.01 *Submittal and Processing of Payments*

A. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER as provided in the General Conditions.

6.02 *Progress Payments; Retainage*

A. OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR's Applications for Payment on or about the 5th day of each month during performance of the Work as provided in paragraphs 6.02.A.1 and 6.02.A.2 below. All such payments will be measured by the schedule of values established in paragraph 2.07.A of the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no schedule of values, as provided in the General Requirements:

1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as ENGINEER may determine or OWNER may withhold, in accordance with paragraph 14.02 of the General Conditions:

2. Upon 50% Completion, OWNER shall pay an amount sufficient to increase total payments to CONTRACTOR to 95% of the Work completed, less such amounts as ENGINEER shall determine in accordance with paragraph 14.02.B.5 of the General Conditions and less 5% of ENGINEER's estimate of the value of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.

6.03 *Final Payment*

A. Upon final completion and acceptance of the Work in accordance with paragraph 14.07 of the General Conditions, OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER as provided in said paragraph 14.07.

ARTICLE 7 - INTEREST

7.01 All moneys not paid when due as provided in Article 14 of the General Conditions shall bear interest at the rate of 18% per annum.

ARTICLE 9 - CONTRACT DOCUMENTS

9.01 *Contents*

- A. The Contract Documents consist of the following:
 1. This Agreement (pages 1 to 10, inclusive);
 2. Performance Bond (pages 610-1 to 610-3, inclusive);
 3. Payment Bond (pages 620-1 to 620-3, inclusive);
 4. Other Bonds (pages --- to ---, inclusive);
 - a. N/A (pages --- to ---, inclusive);
 - b. N/A (pages --- to ---, inclusive);
 - c. N/A (pages --- to ---, inclusive);
 5. General Conditions (pages 1 to 45, inclusive);
 6. Supplementary Conditions: N/A
 7. Specifications as listed in the contents of the Project Narratives
 8. Drawings consisting of a cover sheet and sheets numbered 1 through 9, inclusive, with each sheet bearing the following general title: Girard Township Wastewater Facilities.
 9. Addenda: N/A
 10. Exhibits to this Agreement (enumerated as follows):
 - a. Notice to Proceed (page 1)
 - b. CONTRACTOR's Bid (pages 9 to 9, inclusive);
 - c. Documentation submitted by CONTRACTOR prior to Notice of Award (pages 300-2 to 11, inclusive);
 - d. MBE/WBE solicitation letters;
 11. The following, which may be delivered or issued on or after the Effective Date of the Agreement and are, not attached hereto:
 - a. Written Amendments;
 - b. Work Change Directives;
 - c. Change Order(s).
- B. The documents listed in paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.

D. The Contract Documents may only be amended, modified, or supplemented as provided in paragraph 3.05 of the General Conditions.

ARTICLE 10 - MISCELLANEOUS

10.01 *Terms*

A. Terms used in this Agreement will have the meanings indicated in the General Conditions.

10.02 *Assignment of Contract*

A. No assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

10.03 *Successors and Assigns*

A. OWNER and CONTRACTOR each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

10.04 *Severability*

A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and CONTRACTOR, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

10.05 *Other Provisions*

IN WITNESS WHEREOF, OWNER and CONTRACTOR have signed this Agreement in duplicate. One counterpart each has been delivered to OWNER and CONTRACTOR. All portions of the Contract Documents have been signed or identified by OWNER and CONTRACTOR or on their behalf.

This Agreement will be effective on _____, _____ (which is the Effective Date of the Agreement).

OWNER:

By: _____

[CORPORATE SEAL]

Attest _____

Address for giving notices:

(If OWNER is a corporation, attach evidence of authority to sign. If OWNER is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of OWNER-CONTRACTOR Agreement.)

Designated Representative:

Name: _____

Title: _____

Address: _____

Phone: _____

Facsimile: _____

CONTRACTOR:

Hickes Associates, Inc.

By: William J. Howe

William J. Howe
President

[CORPORATE SEAL]

Attest Cynthia L. Ross

Cynthia L. Ross

Address for giving notices: Asst. Secretary

P.O. Box 379

Alexandria, PA 16611

License No. _____
(Where applicable)

Agent for service of process: _____

(If CONTRACTOR is a corporation or a partnership, attach evidence of authority to sign.)

Designated Representative:

Name: William J. Howe

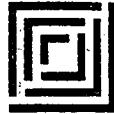
Title: President

Address: RR 1, P.O. Box 379

Alexandria, PA 16611

Phone: (814) 669-4160

Facsimile: (814) 669-4199



General, Mechanical & Electrical Contractors
P.O. BOX 379
ALEXANDRIA, PA 16611
(814) 669-4160
FAX (814) 669-4199

CORPORATE RESOLUTION

RESOLVED THAT ANY ONE OF THE FOLLOWING OFFICERS AND EMPLOYEES OF THE CORPORATION, TO WIT:

WILLIAM J. HOWE, PRESIDENT
JACK D. ISETT, VICE-PRESIDENT
JACK D. ISETT, SECRETARY/TREASURER
CYNTHIA L. ROSS, ASSISTANT SECRETARY/TREASURER

BE AND HEREBY IS AUTHORIZED TO EXECUTE CONTRACT DOCUMENTS, RESOLUTIONS, AGREEMENTS, ET AL FOR SAID CORPORATION.

FURTHER RESOLVED THAT ANY AGENT TO WHOM A COPY OF THIS RESOLUTION SHALL BE DELIVERED MAY RELY UPON THIS RESOLUTION UNTIL SUCH TIME AS WRITTEN NOTICE OF ANY CHANGE, AMENDMENT OR CANCELLATION THEREOF SHALL HAVE BEEN RECEIVED.

I, JACK D. ISETT, SECRETARY/TREASURER OF HICKES ASSOCIATES, INC. HEREBY CERTIFIES THAT THE FOREGOING IS A TRUE COPY OF RESOLUTIONS DULY ADOPTED BY THE BOARD OF DIRECTORS OF SAID CORPORATION AT A MEETING HELD ON 05/25/99 AT WHICH TIME A QUORUM WAS PRESENT AND THAT THE SAME HAVE NOT BEEN REPEALED OR AMENDED AND REMAIN IN FULL FORCE AND EFFECT. I FURTHER CERTIFY THAT THE AUTHORITY THEREBY CONFERRED IS NOT INCONSISTENT WITH THE CHARTER OF BY-LAWS OF THIS CORPORATION.

DATED: MAY 25, 1999.

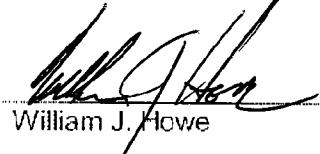


JACK D. ISETT, SECRETARY/TREASURER

SEAL

VERIFICATION

Subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities, I hereby certify that I am William J. Howe, President of Hickes Associates, Inc., and that the facts set forth in the foregoing document are true and correct to the best of my information and belief.


William J. Howe

Dated: 5/8/07

COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

HICKES ASSOCIATES, INC.
Plaintiff

v.

No. 2007-00928-CD

GIRARD TOWNSHIP MUNICIPAL
AUTHORITY,
Defendant

Civil Action - Law

PRAECIPE TO DISCONTINUE

TO THE PROTHONOTARY:

Please mark the above-action settled and discontinued with prejudice.

Respectfully Submitted,

McNEES WALLACE & NURICK LLC

By

James W. Kutz
I.D. No. 47245
Megan N. Dreisbach
I.D. No. 201418
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Dated: October 16, 2007

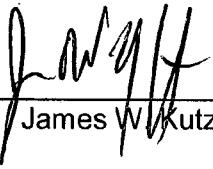
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m/3:35 LM disc issued to
OCT 19 2007 Atty Kutz

William A. Shaw
Prothonotary/Clerk of Courts

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 16th day of October, 2007, a true and correct copy of the foregoing Praeclipe to Discontinue was served via U. S. Mail, First Class, postage prepaid upon the following:

Rodney Smith, Chairman
Girard Township Municipal Authority
385 Le Conte's Mills Road
Frenchville, PA 16836



James W. Kutz

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

COPY

Hickes Associates, Inc.

Vs. No. 2007-00928-CD
Girard Township Municipal Authority

CERTIFICATE OF DISCONTINUATION

Commonwealth of PA
County of Clearfield

I, William A. Shaw, Prothonotary of the Court of Common Pleas in and for the County and Commonwealth aforesaid do hereby certify that the above case was on October 19, 2007, marked:

Settled and discontinued with prejudice

Record costs in the sum of \$85.00 have been paid in full by James W. Kutz Esq..

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of this Court at Clearfield, Clearfield County, Pennsylvania this 19th day of October A.D. 2007.



William A. Shaw, Prothonotary