

APPENDIX H

BOROUGH OF COLWYN WASTEWATER RFP

ESCROW AGREEMENT

THIS ESCROW AGREEMENT (“Escrow Agreement”) is made and entered into this ___ day of ____, 2017 by and among _____, _____, a _____, as escrow agent (the “Escrow Agent”), the Borough of Colwyn, a municipal entity under the laws of the Commonwealth of Pennsylvania (the “Borough”), and _____, a _____ organized under the laws of _____ (the “Respondent”).

WITNESSET

H:

WHEREAS, the Borough of Colwyn, Pennsylvania has solicited offers from qualified Respondents to enter an agreement to purchase its Wastewater Collection System (the “Purchase Agreement”) in accordance with a certain request for proposals dated October 9, 2017 (the “RFP” and, together with the Purchase Agreement, the “Bid Documents”); and

WHEREAS, the Respondent intends to submit an offer in response to the RFP; and

WHEREAS, capitalized terms defined in this Escrow Agreement and not otherwise defined herein shall have the same meanings as assigned to such terms in the RFP unless otherwise defined herein; and

WHEREAS, the RFP requires that the Respondent’s offer be secured by Proposal Security; and

WHEREAS, the Respondent’s offer will be unconditional and irrevocable until 5:00 p.m. (Eastern time) on January 31, 2018, unless extended to a later time by mutual consent of both the Borough and the Respondent; and

WHEREAS, the Escrow Agent is desirous of acting as escrow agent with respect to the Proposal Security provided by the Respondent pursuant to the RFP.

NOW THEREFORE, in consideration of the foregoing premises and the mutual covenants contained herein the parties hereto intending to be legally bound do hereby agree as follows:

Section 1. For a period commencing on the Commencement Date and terminating 10 days after the final disbursement of all of the Proposal Security deposited hereunder and any earnings thereon (the “Funds”) in accordance with the terms hereof, the Escrow Agent agrees to act as escrow agent for the Funds when received by the Escrow Agent and to promptly deposit the Proposal Security into a segregated escrow account (the “Escrow Account”) to be established hereunder and to be held in trust for the Respondent and the Borough pursuant to the terms

of this Agreement.

Section 2. On or before 3:00 p.m. (Eastern time) on November 22, 2017 the Proposal Security will be provided to the Escrow Agent by the Borough and deposited into the Escrow Account. Upon receipt of the Proposal Security, the Escrow Agent shall immediately issue a receipt to the Respondent, confirming that the Escrow Agent has received the Proposal Security, and confirming the dollar amount on deposit in the Escrow Account at such time. **All risk of loss, if any, in regard to such investments or reduction of the Proposal Security resulting from such investments shall be borne by the Respondent, other than losses arising from the Escrow Agent's negligence or willful misconduct.** The Escrow Agent shall calculate the market value on a daily basis as of close of business on the preceding day. If there is a deficit (a "Deficit") that reduces the market value of the Proposal Security below the requirement imposed by the RFP (the "Benchmark"), the Escrow Agent shall promptly give notice to the Borough and the Respondent of the amount of such deficit ("Deficit Notice"). The Respondent agrees to replenish the Proposal Security to reach the applicable Benchmark through an additional deposit ("Deficit Deposit") by 5:00 p.m. (Eastern time) on the third business day following receipt by the Respondent of the Deficit Notice; provided that no Deficit Deposit need be made if the Escrow Agent, following the daily calculation of the market value of the Proposal Security on the morning of the third business day, determines that the Deficit has been eliminated as of the time of calculation. The Escrow Agent shall provide notice to the Borough and the Respondent within one business day following the deadline for the Deficit Deposit established in the Deficit Notice if the Respondent has not fully replenished the Proposal Security by such deadline.

Section 3. The Escrow Agent shall invest and reinvest the Proposal Security in Eligible Investments (as defined in Schedule 1 hereto) at the written direction of an Authorized Respondent Representative (as described below) without distinction between principal and income. The Escrow Agent may conclusively rely upon such written instructions as to both the suitability and legality of the directed investments. Ratings of Eligible Investments shall be determined at the time of purchase of such Eligible Investments and without regard to ratings subcategories. The Escrow Agent may make any and all such investments through its own investment department or that of its affiliates or subsidiaries, and may charge its ordinary and customary fees for such trades, including cash sweep account fees. In the absence of investment instructions from the Authorized Respondent Representative, the Escrow Agent shall not be responsible or liable for keeping the moneys held by it hereunder fully invested in Eligible Investments. Any interest or other earnings on the Funds shall become part of the Proposal Security and shall be disbursed in accordance with the provisions of this Escrow Agreement. The Escrow Agent will provide monthly statements to the Borough, the Borough and the Respondent that will show accrued interest along with any deposits and withdrawals from the Escrow Account. The Authorized Respondent Representatives are _____ . It is further understood by all parties that the Borough is not responsible in any way for the investments by the Escrow Agent of the Proposal Security or the investment earnings thereon nor is either the Borough or the Borough responsible for the actions of the Escrow Agent unless such actions have been directed by an authorized representative of the Borough and the Borough (a "Borough Authorized Representative") pursuant to the terms of this Agreement. The Borough Authorized Representatives are Kenneth Schuster, Esquire.

Section 4. The Funds shall at all times be held in a separate account and (i) may be delivered by the Respondent at all times prior to 2:00 p.m. (Eastern time), on the Commencement Date pursuant to instructions of the Respondent and (ii) shall be disbursed after the Commencement

Date pursuant to the terms and conditions of Section 5 below.

Section 5. The Escrow Agent shall, as soon as practicable, but no sooner than 9:00 a.m. (Eastern time) on January 31, 2018, liquidate all investments and pay to the Respondent (or as directed by the Respondent) all Funds in the Escrow Account under the following conditions: (i) upon receipt of a statement signed by a Borough Authorized Representative addressed to the Respondent and the Escrow Agent to the effect that the Respondent has not been selected as the Concessionaire for the Concession; or (ii) upon receipt of a statement signed by a Borough Authorized Representative addressed to the Escrow Agent that no party has been selected as the Concessionaire for the Concession.

If the Borough and the Respondent mutually consent to extend the Escrow Deadline or the Closing Escrow Deadline to a date certain (collectively, an “Extended Escrow Deadline”), and the Borough provides timely notice to the Escrow Agent of such Extended Escrow Deadline, the term of this Escrow Account shall be extended to coincide with the Extended Escrow Deadline.

Section 6. All disbursements by the Escrow Agent pursuant to this Escrow Agreement shall be made by wire transfer in immediately available funds to such account or accounts as the party entitled to receive the Funds shall designate in writing to the Escrow Agent. The Escrow Agent undertakes to perform such duties and only such duties as are expressly set forth herein and no implied duties or obligations may be read into this Escrow Agreement other than as may be required by applicable law. The Escrow Agent has not examined and is in no way responsible for the contents of the Purchase Agreement or the RFP. By accepting the position of escrow agent, the Escrow Agent, the Borough and the Respondent agree that the Escrow Agent’s duties and obligations are set forth solely in this Escrow Agreement.

Section 7. The Escrow Agent shall be responsible in fulfilling its duties under this Agreement to a standard of care that could fairly be attributable to an experienced corporate escrow agent. The Escrow Agent shall have only those duties as are specifically provided herein, which shall be deemed purely ministerial in nature. This Agreement sets forth all matters pertinent to the escrow contemplated hereunder, and no additional obligations of the Escrow Agent shall be inferred from the terms of this Agreement or any other agreement. In no event shall the Escrow Agent be liable, directly or indirectly, for any (i) damages or expenses arising out of the services provided hereunder, other than damages which result from the Escrow Agent’s failure to act in accordance with the standards set forth in this agreement, or (ii) special, punitive or consequential damages, even if the Escrow Agent has been advised of the possibility of such damages except in cases of negligence or willful misconduct. This Escrow Agreement and all information received by the Escrow Agent is sensitive (in that it pertains to information which may be pertinent to public bidding), is confidential and may not be disclosed by the Escrow Agent to any third party without the express written permission of the Borough and the Respondent, except as set forth in this Section 7. To the extent that the Escrow Agent deems it necessary in the carrying out of its duties to consult with its outside counsel, such outside counsel shall acknowledge the confidential nature of this Agreement in writing and agree to be bound by such requirements. In the event the Escrow Agent is presented with a request for documents by any administrative agency or with a subpoena *duces tecum* regarding this Escrow Agreement or any documents related thereto which may be in its possession, the Escrow Agent shall immediately give notice to the Borough, the Borough and the Respondent with the understanding that the Borough, the Borough and the Respondent shall have the opportunity to contest such process by any means available to them before such records or documents are submitted to a court or other third party, provided,

however, that the Escrow Agent shall not be obligated to withhold such delivery beyond that time as may be ordered by the court or administrative agency, unless the subpoena or request is quashed or the time to produce it otherwise extended. Such confidentiality provisions shall survive the termination of this Escrow Agreement and any breach thereof may subject the Escrow Agent or its agents to liability. The Escrow Agent has the right to perform any of its duties hereunder through agents, attorneys, custodians or nominees (collectively “Agents”) appointed by it with due care so long as such Agents are informed of the requirements of confidentiality imposed in this Agreement and agree to follow such requirements.

Section 8. Except as to matters covered in Section 7, to the fullest extent permitted by law, the Escrow Agent shall not be liable for any action taken by it without negligence and in good faith and believed by it to be authorized or within the rights or powers conferred upon it by this Escrow Agreement, and may consult with counsel of its own choice (whether specially retained or regularly employed) and shall have full and complete authorization and protection for any action taken or suffered by it hereunder in good faith and in accordance with the advice of such counsel. The Respondent shall be liable for and shall reimburse and indemnify Escrow Agent and hold Escrow Agent harmless from and against any and all claims, losses, liabilities, costs, damages or expenses (including reasonable attorney's fees and expenses) (collectively, “Losses”) arising from or in connection with or related to this Escrow Agreement or being Escrow Agent hereunder (including but not limited to Losses incurred by Escrow Agent in connection with its successful defense, in whole or in part, of any claim of negligence or willful misconduct on its part), provided that nothing contained herein shall require Escrow Agent to be indemnified for Losses caused by its negligence or willful misconduct. The terms of this indemnification shall survive the termination of the Escrow Agreement and the resignation or removal of the Escrow Agent.

Section 9. The Escrow Agent shall charge an escrow fee pursuant to its schedule of fees in effect from time to time payable at the inception of the Escrow Account. Such fee shall be payable by the Respondent.

Section 10. The Escrow Agent may rely and shall be protected in acting or refraining from acting upon any written notice, instruction or request furnished to it hereunder and reasonably believed by it to be genuine and to have been signed or presented by the proper party or parties. The Escrow Agent shall not be entitled to any portion of the Funds in the Escrow Account under any circumstances except as provided herein. The Borough hereby agrees that any actions taken by the Borough with respect to the Funds in the Escrow Account shall be consistent with the RFP.

Section 11. The Escrow Agent shall not be bound by any amendment, modification, cancellation or rescission of this Escrow Agreement unless the same shall be in writing and signed by all the parties hereto.

Section 12. All notices and communications hereunder shall be in writing and shall be deemed to be duly given if sent by regular mail or facsimile as follows:

If to the Escrow Agent:

If to the Borough:

Borough Manager
The Borough of Colwyn
221 Spruce Street
Colwyn, PA 19023
Telephone: 610.461.2000
E-mail: tmason@colwynborough.com

If to the Respondent: _____

Attn: _____
Fax Number: _____

The Escrow Agent agrees to accept and act upon instructions or directions pursuant to this Agreement sent by facsimile transmission (including pdf transmission of such facsimile), provided, however, that each of the parties hereto desiring to provide any directions or instructions by facsimile shall provide to the Escrow Agent an incumbency certificate listing the persons with Borough to act hereunder, which incumbency certificate shall be amended whenever a person is to be added or deleted from the listing. If the Respondent or the Borough elects to give the Escrow Agent instructions or directions by facsimile (including pdf transmission of such facsimile), and the Escrow Agent acts upon such instructions or directions, the Escrow Agent's understanding of such instructions and directions shall be deemed controlling; provided that such instructions or directions are consistent with the applicable provisions of this Agreement. The Escrow Agent shall not be liable for any losses, costs or expenses arising directly or indirectly from the Escrow Agent's reliance upon and compliance with such instructions or directions notwithstanding whether such instructions or directions conflict or are inconsistent with a subsequent written instruction other than any losses which result from the Escrow Agent's negligence or willful misconduct; provided that the instructions or directions being complied with are consistent with the applicable provisions of this Agreement. The Respondent and the Borough agree to assume all risks arising out of the use of the foregoing electronic methods to submit instructions and directions to the Escrow Agent, including without limitation the risk of the Escrow Agent acting on unauthorized instructions, and the risk of interception and misuse by third parties.

Section 13. This Escrow Agreement shall be governed by, and interpreted and enforced in accordance with, the laws in force in Pennsylvania (excluding any conflict of laws rule or principle which might refer such interpretation to the laws of another jurisdiction). All parties hereby waive, to the extent permitted by law, the right to trial by jury. Any defined terms in this Agreement shall have the meanings set forth in the Purchase Agreement unless otherwise defined in this Agreement.

Section 14. No assignment of the interest of any of the parties hereto shall be binding upon the Escrow Agent unless and until written evidence of such assignment in form satisfactory to the Escrow Agent shall be filed with and accepted by the Escrow Agent. No such assignment shall be permitted by the Borough or the Respondent without the prior written consent of the other such two parties; provided, however, that the Borough may assign its interest herein to the Borough without the need of prior consent from the Respondent.

Section 15. The Escrow Agent reserves the right to resign at any time by giving written notice of resignation, specifying the effective date thereof. Within 30 days after receiving the aforesaid notice, the parties to this Escrow Agreement agree to appoint a successor escrow agent to which the Escrow Agent may distribute the property then held hereunder, less the Escrow Agent's fees, costs and expenses. If a successor escrow agent has not been appointed and has not accepted such appointment by the end of the 30-day period, the Escrow Agent may apply to a court of competent jurisdiction for the appointment of a successor escrow agent, and the costs, expenses and reasonable attorneys' fees which are incurred in connection with such a proceeding shall be paid, one-half by the Borough and one-half by the Respondent.

Any banking association or corporation into which the Escrow Agent may be merged, converted or with which the Escrow Agent may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Escrow Agent shall be a party, or any banking association or corporation to which all or substantially all of the corporate trust business of the Escrow Agent shall be transferred, shall succeed to all the Escrow Agent's rights, obligations and immunities hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

Section 16. If any one or more of the covenants or agreements provided in this Agreement on the part of the Respondent, the Borough or the Escrow Agent to be performed should be determined by a court of competent jurisdiction to be contrary to law, such covenant or agreement shall be deemed and construed to be severable from the remaining covenants and agreements herein contained and shall in no way affect the validity of the remaining provisions of this Agreement.

Section 17. This Escrow Agreement may be executed in several counterparts, all of which shall be regarded for all purposes as one original and shall constitute and be but one and the same instrument.

Section 18. The Escrow Agent shall report to the Internal Revenue Service, as of each calendar year-end, and to the Respondent all income earned from the investment of any sum held in the Escrow Account against the Respondent, as and to the extent required under the provisions of the Internal Revenue Code of 1986 and the regulations promulgated thereunder (the "Code"). The Respondent is required to deliver a Form W-9 to the Escrow Agent and to prepare and file any and all income or other tax returns applicable to the Escrow Account with the Internal Revenue Service and all required state and local departments of revenue in all years income is earned in any particular tax year as and to the extent required under the provisions of the Code. Any taxes payable on income earned from the investment of any sums held in the Escrow Account shall be paid by the Respondent, whether or not the income was distributed by the Escrow Agent during any particular year as and to the extent required under the provisions of the Code. The Escrow Agent shall have no responsibility for the preparation and/or filing of any tax or information return with respect to any transaction, whether or not related to the Agreement or the Concession Agreement, that occurs outside the Escrow Account.

IN WITNESS WHEREOF, the parties hereto each has caused this Escrow Agreement to be duly executed as of the day and year first above written.

[RESPONDENT]

[BOROUGH]

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Federal Employer ID #: _____

SCHEDULE

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ELIGIBLE INVESTMENTS

For purposes of this Escrow Agreement, “Eligible Investments” means any one or more of the following obligations or securities:

(i) direct obligations of, and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America; (ii) demand or time deposits, federal funds or bankers’ acceptances issued by any Institutional Lender (provided that the commercial paper or the short-term deposit rating or the long-term unsecured debt obligations or deposits of such Institutional Lender at the time of such investment or contractual commitment providing for such investment have been rated “A” (or the equivalent) or higher by a Rating Agency or any other demand or time deposit or certificate of deposit fully insured by the Federal Deposit Insurance Corporation); (iii) commercial paper (including both non-interest-bearing discount obligations and interest-bearing obligations payable on demand or on a specified date not more than one year after the date of issuance thereof) which has been rated “A” (or the equivalent) or higher by a Rating Agency at the time of such investment; (iv) any money market funds, the investments of which consist of cash and obligations fully guaranteed by the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America and which have been rated “A” (or the equivalent) or higher by a Rating Agency; and (v) other investments then customarily accepted by the Borough in similar circumstances; provided, however, that no instrument or security shall be an Eligible Investment if such instrument or security evidences a right to receive only interest payments with respect to the obligations underlying such instrument.

“Institutional Lender” means (a) the United States of America, any state thereof or any agency or instrumentality of either of them, any municipal agency, public benefit corporation or public Borough, advancing or insuring mortgage loans or making payments which, in any manner, assist in the financing, development, operation and maintenance of projects, (b) any (i) savings bank, savings and loan association, commercial bank, trust company (whether acting individually or in a fiduciary capacity) or insurance company organized and existing under the laws of the United States of America or any state thereof, (ii) foreign insurance company or commercial bank qualified to do business as an insurer or commercial bank as applicable under the laws of the United States (if such qualification is necessary in connection with the acquisition of Collateral Assignment Debt), (iii) pension fund, foundation or university or college or other endowment fund or (iv) investment bank, pension advisory firm, mutual fund, investment company or money management firm, (c) any “qualified institutional buyer” under Rule 144(A) under the Securities Act or any other similar Law hereinafter enacted that defines a similar category of investors by substantially similar terms or (d) any other financial institution or entity designated by the Concessionaire and Approved by the Borough (provided that such institution or entity, in its activity under this Agreement, shall be acceptable under then current guidelines and practices of the Borough); provided, however, that each such entity (other than

entities described in clause (c) of this definition) or combination of such entities if the Institutional Lender shall be a combination of such entities shall have individual or combined assets, as the case may be, of not less than \$200,000,000, which shall include, in the case of an investment or advisory firm, assets controlled by it or under management.

“Rating Agency” means any of Standard & Poor’s Corporation, Moody’s Investors Service, Inc. or Fitch Ratings, Inc. or any similar entity or any of their respective successors.