

RESOLUTION NO. 9 , 2020

A RESOLUTION APPROVING A CONSTRUCTION AGREEMENT WITH BRANDICORP, LLC FOR THE MONTGOMERY QUARTER PUBLIC IMPROVEMENTS

WHEREAS, as a part of the Montgomery Quarter development project, the City does desire to contract for construction of certain public improvements which include site preparation, utility relocation, utility infrastructure, supporting walls, sidewalks, curbs, roadway, streetscape and landscaping; and

WHEREAS, the Criteria Drawings as prepared by the City's design professionals has recommended a budget not to exceed \$10,000,000 for such public improvements in Stage 1 of the project, which public improvements are to be funded in part from Tax Increment Financing Bonds to be issued in support of all public improvements for the Montgomery Quarter Project; and

WHEREAS, to obtain market competitive pricing for such construction work and to maximize the timely efficient construction of such public improvements, the City Administration did elect to proceed under R.C. § 9.33 *et. seq.* to pursue a Construction Manager-At-Risk model to choose a contractor; and

WHEREAS, after advertising for Request For Qualifications, then soliciting Request For Proposals from the Best Value candidates, the City Administration through its Evaluation Committee did choose to negotiate a contract with Brandicorp, LLC; and

WHEREAS, the City Administration is now asking Council to approve a Construction Agreement with Brandicorp, LLC in the substantial form of the Construction Agreement attached hereto.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Montgomery, Hamilton County, Ohio, that:

SECTION 1. The City Manager is hereby authorized to finalize and execute the attached Construction Agreement, substantially in the form and under the terms and conditions of the Construction Agreement attached hereto, as negotiated with Brandicorp, LLC to construct certain public improvements in Stage 1 of the Montgomery Quarter Project. The specific terms and conditions of such contract shall allow a construction management fee not to exceed 3.5% of the Cost of Work as defined within the contract, and a split of shared savings allocated 75% to the City and 25% to Brandicorp to incentivize valued engineering and efficient construction management of the project.

SECTION 2. Such contract shall include Guaranteed Maximum Pricing for each Sequence of the project for the total project costs not to exceed \$10,000,000. The City Manager is authorized to execute such Guaranteed Maximum Pricing amendments with the Contractor when design and engineering plans have been reviewed and finally approved for each Sequence of the project.

SECTION 3. The City Manager is authorized to execute such additional documentation as may be necessary to complete the Construction Agreement to assure efficient and quality construction of the public improvements within Stage 1 of the Montgomery Quarter Project.

SECTION 4. This Resolution shall be in full force and effect from and after its passage.

PASSED: March 4 2020

ATTEST: Connie M. Gaylor
Connie M. Gaylor, Clerk of Council

Christopher P. Dobrozsi
Christopher P. Dobrozsi, Mayor

APPROVED AS TO FORM:

Terrence M. Donnellon
Terrence M. Donnellon, Law Director

CONSTRUCTION AGREEMENT

This Construction Agreement ("Agreement" or "Contract") is a Construction Manager-at-Risk Agreement as defined by R.C. § 9.33 *et. seq.* This Agreement is entered into as of the _____ day of _____, 2020 by and among the CITY OF MONTGOMERY, Hamilton County, Ohio, an Ohio municipal corporation ("City") and BRANDICORP, LLC, a Kentucky limited liability company ("Contractor").

WHEREAS, the City has acquired certain real property to develop a mixed-use development, which property herein is referred to as "Montgomery Quarter"; and

WHEREAS, the City has elected to proceed under R.C. § 9.33 *et. seq.* to seek qualifications and later proposals for the construction of certain public improvements ("Public Improvements" or "Project") on the site under a Construction Manager-at-Risk Agreement ("CMAR") with a Guaranteed Maximum Price; and

WHEREAS, after designating Contractor as the Preferred Contractor under the State of Ohio process for public projects, the City did enter into negotiations with the Contractor, the result of which is the City does desire to enter into this Agreement with Contractor modeled after the accepted contract format by the State of Ohio to outline the specific terms and conditions of this Project under which Contractor as the CMAR will construct certain Public Improvements for the City in the Montgomery Quarter development.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

1. GENERAL PROVISIONS

A. Parties. The parties to this Agreement are the CITY OF MONTGOMERY, OHIO, an Ohio municipal corporation, whose address is 10101 Montgomery Road, Montgomery, Ohio 45242, and BRANDICORP, LLC, a Kentucky limited liability company, whose address is 45 Fairfield Avenue, Bellevue, Kentucky 41073.

B. Public Improvement Criteria. The Project is based upon the *Montgomery Quarter (define Project docs)*, Exhibit A attached hereto and incorporated herein, which provide a general outline of the Public Improvements to be constructed by Contractor. Stage 1 of the Project will be constructed in three (3) Sequences. In support of the Project, attached hereto are available Criteria Drawings and Specifications ("Project Criteria"), Exhibit B, which provide a general description of the three Sequences of Work to be completed. From the Project Criteria, the final design drawings, engineering drawings, and specifications ("Final Drawings") for each Sequence will be prepared by the City consultant for acceptance and approval by the City. Combined, the Project Criteria, Criteria Drawings, Final Drawings and this Agreement shall be considered the "Contract Documents". If there is any change in the Project Criteria or Criteria Drawings after execution of this Agreement, it is agreed that the City and the Contractor shall negotiate a modification of this Agreement.

C. Work. The term “Work” means the construction and related services required to fulfil Contractor’s obligations under this Agreement, and includes all labor, materials, equipment and services provided or to be provided by the Contractor as specified in the Contract Documents. “Project Work” includes the Work in Stage 1 of the Project.

D. City’s Obligations. The City is obligated to retain appropriate Design and Engineering Consultants to refine the Project Criteria and to develop Final Drawings from which to authorize the specific Work of the Project.

E. Contractor’s Obligations. Based upon the Criteria Drawings and Project Criteria and Final Drawings, Contractor is obligated to perform the Work under the general terms of this Agreement and the Contract Documents, and as appropriate solicit bids and contract with subcontractors to complete the Work in a good and workmanlike manner with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of the Project.

F. Change Orders. After execution of this Agreement, Changes to the Work, Contract Sum, Contract Time, Criteria Drawings, Final Drawings, Design-Build Documents, or any other aspect of the Project shall be made only by written agreement of the parties stating the change to be made (“Change Order”), and Contractor shall be under no obligation to execute any change without a fully executed Change Order.

2. CONTRACT SUM

A. Cost of Work / Contractor’s Fee. The City shall pay the Contractor the Contract Sum in current funds for the Contractor’s performance of this Construction Manager-at-Risk Agreement. The Contract Sum shall be the actual Cost of Work incurred by Contractor plus the Contractor’s fee equal to 3.50% of the Cost of Work. The Cost of Work in Stage 1 will be detailed in each Sequence once Final Drawings for each Sequence are received and approved by the City. The Cost of Work also shall include such General Conditions applicable to the entire Project as outlined in Exhibit C attached hereto.

B. Guaranteed Maximum Price. The sum of the Cost of the Work and Contractor’s fee shall be guaranteed by the Contractor and shall not exceed the Total Sum as detailed on the Guaranteed Maximum Price Amendment (“GMP Amendment”) for each Sequence. The GMP Amendment (in the format attached hereto as Exhibit D) will be negotiated as the Final Drawings are approved for each Sequence. This combined sum of the GMP for each Sequence shall be the Guaranteed Maximum Price for Stage 1 for this Agreement as it may be adjusted as specified in this Agreement and by Change Order. Costs which would cause the Guaranteed Maximum Price for Stage 1 to be exceeded shall be paid by the Contractor without reimbursement by the City.

C. Contingency and Buy-Out Savings. The Guaranteed Maximum Price shall include a “Contingency” for each Sequence. This amount is the “Initial Contingency”. The Initial Contingency shall be increased by any agreed Change Order and “buy-out” savings, if any, realized as a result of the Contractor’s estimate of the cost of a particular Contract item detailed in

the Sequence GMP Amendment that is higher than the actual Cost of that Work for that Sequence as completed. The Initial Contingency as adjusted by any buy-out savings or authorized use of the Contingency funds shall be rolled over to each Sequence and shall be the available Contingency.

The Contingency (including the buy-out savings) shall be available for the Contractor's exclusive use for costs that are incurred in performing the Work that are not included in a specific line item or the basis for a Change Order. The Contingency is not available to the City for any reason, including changes in the scope of the Project, Project Criteria, Criteria Drawings, or any other item which would entitle the Contractor to an increase in the Guaranteed Maximum Price. The Contractor shall provide the City with advance notice of the use of the Contingency for any item in excess of \$5,000 and shall otherwise identify the Contractor's use of the Contingency in the Contractor's monthly job cost reports to the City. The City shall promptly notify the Contractor of any objections the City may have to the Contractor's use of the Contingency. The Contingency shall be carried forward from Sequence 1 to Sequence 2 to Sequence 3. This amount shall be the "Final Contingency".

If at final completion of the Project there exists any unused Final Contingency funds including buy-out savings, the City and Contractor shall share the unused Final Contingency funds as follows: 25% to the Contractor and 75% to the City.

3. PROGRESS PAYMENTS

A. Based upon Applications for Payment submitted to the City by the Contractor, the City shall make "Progress Payments" on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. Each Application for Payment shall be based upon the Cost of Work completed, general conditions, and other appropriate costs incurred by Contractor in furtherance of the Project for the portions of Work included in the Application for Payment.

B. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

C. Provided that an Application for Payment is received not later than the 10th day of the month, the City shall make Progress Payment to the Contractor not later than the last day of the same month. If an Application for payment is received by the City after the application date fixed above, payment shall be made by the City not later than thirty (30) days after the City receives the Application for Payment.

D. Five percent (5%) of each Progress Payment applicable to site construction costs for the Work completed shall be withheld and retained by the City or the City's agent until Fifty percent (50%) of the Work of the Project is completed.

E. The retainage for the Project shall be released and paid to Contractor when Substantial Completion for the Project has been achieved as defined herein and such Public Improvements have been accepted.

4. **TIME**

A. **Progress, Phasing and Completion.** It is anticipated that the Project Work will be completed in three Sequences as outlined in the *Sequencing Plan/Project Schedule* attached hereto as **Exhibit E**. It is anticipated that Sequence 1 will commence on or about April 1, 2020. The Commencement Date and Substantial Completion Date for each Sequence shall be set forth in the GMP Amendment for each Sequence. Contractor confirms that the timing and Sequencing will be a reasonable period for performing the Work. Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion of each Sequence by the anticipated close of such Sequencing date subject to adjustments to completion time by Change Orders.

“**Substantial Completion**” of the Project Work, or Project Work being “substantially completed,” is the stage in the progress of the Work when the elements comprising the Project Work as designated in the Contract Documents are inspected and accepted by City except for any identified punch-list items.

B. **Final Completion and Final Payment.**

(1) At the conclusion of the Project Work, upon receipt of the Contractor’s written notice that the Work is ready for Final Inspection, and acceptance and upon receipt of a final Application for Payment, the City will promptly make such inspection. When the City finds the Project Work acceptable under the Contract Documents and the requirements of the Contract Documents are fully performed, the City will, subject to Paragraph (B)(2) below, promptly issue a final Certificate for Payment and make such payment, which shall include payment of all remaining amounts due for the Work.

(2) Final payment shall not become due until the Contractor submits to the City (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work, for which the City or the City’s property might be responsible or encumbered, (less amounts withheld by City) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment, (5) as-constructed record copy of the Construction Documents marked to indicate field changes and selections made during construction, (6) manufacturer’s warranties, product data, and maintenance and operations manuals, and (7) if required by the City, other data establishing payment or satisfaction of obligations, such as receipts, or releases and waivers of liens, claims, security interests, or encumbrances, arising out of the Contract, to the extent and in such form as may be designated by the City. If Contractor’s Consultants, any Sub-Contractor, or other person or entity providing services or work for the Contractor, refuses to furnish a release or waiver required by the City, the Contractor may furnish a bond satisfactory to the City to indemnify the City against such liens, claims, security interests, or encumbrances. If such liens, claims, security interests, or encumbrances remains unsatisfied after payments are made, the Contractor shall refund to the City all money that the City may be compelled to pay in discharging such liens, claims, security interests, or encumbrances, including all costs and reasonable attorneys’ fees.

(3) If, after Substantial Completion of the Project Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, the City shall, upon application by the Contractor, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the City prior to issuance of payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

(4) The making of final payment for the Project Work shall constitute a waiver of Claims by the City except those arising from:

- (a) liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- (b) failure of the Work to comply with the requirements of the Contract Documents; or
- (c) terms of special warranties required by the Contract Documents.

(5) Acceptance of final payment by the Contractor for Project Work shall constitute a waiver of claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of final Application for Payment.

5. FAILURE TO COMPLETE ON TIME

If the Contractor, through no fault of Contractor, fails to complete the Work within the time or times allowed by the Contract, as adjusted by any Change Order, and if the City is satisfied that the Contractor is carrying the Work forward with reasonable progress, and the City deems it to be in the best interest of the public, the City may allow the Contractor to continue in control of the Work. It shall be necessary for the Contractor to make written application to the City in order to warrant such continuance. City will continue to make payments to the Contractor for Work performed and inspected and for materials furnished as provided herein.

When the Work is not completed within the time or times allowed by the Contract through no fault of Contractor, and the Contractor is permitted to remain in control, the Work shall be prosecuted at as many different places, at such times, and with such forces as the City may reasonably request.

Permitting the Contractor to continue and finish the Work or any part of it after the date or dates fixed for its completion, or after the date or dates to which completion may have been extended, will in no way operate as a waiver on the part of the City of any of its rights under the contract.

6. **UNSATISFACTORY PROGRESS AND TERMINATION OF THE CONTRACT**

In case the Contractor or any Subcontractor fails to furnish materials or to execute the Work in accordance with the Contract Documents, or if the provisions of this Agreement are otherwise violated, then in any such case, the City shall have the right to notify the Contractor and Surety of a Claim and submit the Claim for dispute resolution as provided in Section 23. If the outcome of the dispute resolution determines the Contractor in default on this Agreement, the City may declare the Contractor in default on this Agreement and, unless within ten (10) days after service of said notice the violation shall cease or satisfactory arrangements shall have been made for its correction, the Contractor, upon the expiration of said ten (10) days, shall be in default on this Agreement and its right to proceed under this Agreement shall be terminated.

In the event this Agreement is thus declared to be defaulted, the City will immediately notify the Contractor and its Surety of such action, and will at once cause the Work already done to be measured and computed. The action of the City in the declaration of the default of this Agreement shall be final and conclusive, and the Contractor shall not be entitled to claim or receive any damages for not being allowed to continue. After the default of this Agreement, the Surety shall have the right to take over and complete the Work, provided, however, that the Surety shall notify the City in writing of its intent to do so within twenty (20) days after the notice of default of this Agreement. Such completion of the Work by the Surety shall be done in strict accordance with all the provisions of this original Agreement. However, if the Surety does not take over performance of this Agreement as stated above, then the City shall cause the Work to be completed under a second Agreement. If the cost of the Work done under the second Agreement exceeds what it would have cost under this original Agreement, the increased cost shall be paid from any money due the Contractor under this Agreement, and if that is not sufficient, then the increased cost shall be paid by the Contractor and/or its Surety.

The Contractor and/or its Surety shall also pay all cost and expense of re-letting the Work and all damages resulting from non-completion of the Work within the Agreement time. If, when the Work is completed, it is found that there is any money due the Contractor, it will be paid to it; but no money shall be paid to the Contractor under this Agreement after it has been declared in default, until the Work has been completed and accepted and all claims and suits resulting therefrom shall have been settled.

7. **INSPECTION OF WORK**

All materials and each part or detail of the Work shall be subject to inspection by the City. The City or its representatives shall be allowed access to all parts of the Work and shall be furnished with such information and assistance by the Contractor, as it requires to make a complete and detailed inspection.

If the City requests it, the Contractor, at any time before acceptance of the Work, shall remove and uncover such portions of the finished Work as may be directed. After examination, the Contractor shall restore said portions of the Work to the standard required by the specification. Should the Work thus exposed or examined prove acceptable, the uncovering,

removing, and the replacing of the covered Work or making good of the parts removed will be paid for at the City's expense; but, should the Work so exposed or examined prove unacceptable, the uncovering or removing and the replacing of the covering or making good of the parts will be at the Contractor's expense.

Any Work done or materials used without the City or an authorized representative having an opportunity for inspection, may be ordered removed and replaced at the Contractor's expense. Failure to reject any defective Work or material shall not in any way prevent later rejection when such defects are discovered, nor obligate the City to final acceptance.

The Contractor shall notify the Director of Public Works at least twenty-four (24) hours in advance of operations requiring field inspection. Contractor shall not be required to give advance notice of any other Work to be performed except as specified in the Contract Documents or as specifically requested in writing by City reasonably in advance of the performance of such work. The City will provide all inspections unless specifically stated otherwise.

At the discretion of the City, the Contractor will be charged with inspection costs when it incurs additional expenses for such because of:

1. Re-inspection due to rejection;
2. Use of inspected materials on other than the City's work;
3. When inspection is requested and cannot be performed;
4. For any other cause over which the City have no control.

The charges for unnecessary inspection or inspection costs due to causes within the Contractor's control will be deducted from amounts due the Contractor at the completion of Work.

8. REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK

Work which does not conform to the requirements of the Contract Documents because of poor workmanship, use of defective materials, or damage through carelessness of Contractor or anyone acting in Contractor's behalf, will be considered unacceptable unless otherwise determined acceptable.

Unacceptable Work shall be removed immediately and replaced in an acceptable manner.

Upon failure on the part of the Contractor to comply with any order of the City under the provisions of this section, the City will have authority to cause unacceptable Work to be remedied or removed and replaced and unauthorized work to be removed and to deduct the costs from any moneys due or to become due the Contractor.

9. CORRECTION OF WORK

A. Before or After Substantial Completion. The Contractor shall promptly correct Work rejected by the City or failing to conform to the requirements of the Contract

Documents, whether discovered before or after Substantial Completion of any phase of the Work and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for any Construction Consultants employed by the City whose expenses and compensation were made necessary thereby, shall be at the Contractor's expense.

B. After Substantial Completion.

(1) In addition to the Contractor's obligations under Section 9(A), if, within one year, or two years for asphalt work, after the date of Substantial Completion of the Project Work or after the date for commencement of warranties established under Section 10, specified in the Contract Documents, any of the Project Work is found not to be in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the City to do so unless the City has previously given the Contractor a written acceptance of such condition. The City shall give such notice promptly after discovery of the condition. During the one-year period for correction of the Work, if the City fails to notify the Contractor and give the Contractor an opportunity to make the correction, the City waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the City, the City may correct such defective Work at Contractor's expense.

(2) The one-year period, or two-year period for asphalt work, for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

(3) The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the City.

(4) The Contractor shall bear the cost of correcting destroyed or damaged construction of the City or separate contractors, whether completed or partially completed, caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

(5) Nothing contained in this Section 9 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 9(B) relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

C. Acceptance of Nonconforming Work

If the City prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the City may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

10. WARRANTY

In addition to any specific warranties detailed herein, the Contractor warrants to the City that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work or otherwise expressly permitted by the Contract Documents. If at any time within one (1) year after Final Inspection any defect should appear, which in the opinion of the City is due to inferior materials or workmanship, the Contractor guarantees that it will immediately, without cost to the City, remedy such defect. Provided, however, that this warranty shall be extended to two (2) years from Final Inspection for all asphalt work. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes damage or defects caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the City, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

11. RESPONSIBILITY FOR WORK

Until final written acceptance of the Project by the City, the Contractor shall have responsibility for the Project site and Work in progress and shall take every precaution against injury or damage to any part thereof by the action of the elements or from any other cause, whether arising from the execution or from the non-execution of the Work. The Contractor shall rebuild, repair, restore, and make good all injuries or damages to any portion of the Work occasioned by any of the above causes before final acceptance and shall bear the expense thereof except damage to Work due to unforeseeable causes beyond the control of and without fault or negligence of the Contractor, including but not restricted to acts of God, of the public enemy or governmental authorities.

In case of suspension of Work the Contractor shall be responsible for the Project and shall take such precautions as may be necessary to prevent damage to the project, provide for normal drainage and shall erect any necessary temporary structures, signs, or other facilities at his expense. During such period of suspension of Work, the Contractor shall properly and continuously maintain in an acceptable growing condition all living material in newly established plantings, seedings, or soddings furnished under this Agreement, and shall take adequate precaution to protect new tree growth and other important vegetative growth against injury. If the Work is suspended at City's request or otherwise through no fault of Contractor, the City shall pay any additional cost incurred by Contractor resulting from the suspension, and such amount shall be an addition to the Guaranteed Maximum Price.

12. **CONTRACTOR'S RESPONSIBILITY FOR UTILITY PROPERTY AND SERVICES**

At points where the Contractor's operations are adjacent to properties of telephone, power and other utility companies, or are adjacent to other property, damage to which might result in considerable expense, loss, or inconvenience, work shall not be commenced until all arrangements necessary for the protection thereof have been made.

The Contractor shall cooperate with the City and the owner of any underground or overhead utility lines in their removal and rearrangement operations in order that these operations may progress in a reasonable manner, that duplication of rearrangement work may be reduced to a minimum, and that services rendered by those parties will not be unnecessarily interrupted.

In the event of interruption to underground or overhead utility services as a result of accidental breakage or as a result of being exposed or unsupported, the Contractor shall immediately alert the occupants of nearby premises as to any emergency that the Contractor may create or discover at or near such premises. The Contractor shall then notify the Director of Public Works and the owners or operator of the utility facility of the disruption and shall cooperate with the said utility owners or operator in the restoration of service. If water service is interrupted; repair work shall be continuous until the service is restored. No work shall be undertaken around fire hydrants until the local fire authority has approved provisions for continued service.

13. **PROTECTION AND RESTORATION OF PROPERTY**

The Contractor shall be responsible for the preservation of all public and private property. The Contractor shall be responsible for all damage or injury to property of any character, during the prosecution of the Work, resulting from any act, omission, neglect or misconduct in its manner or method of executing the Work, or at any time due to defective work or materials, and said responsibility will not be released until the Project shall have been completed and accepted. The Contractor at the sole expense of the Contractor shall control dust nuisance originating from any work.

When and where any direct or indirect damage or injury is done to public or private property by or on account of any act, omission, neglect, or misconduct in the execution of the Work, or in consequence of the non-execution thereof by the Contractor, it shall restore, at its own expense, such property to a condition similar or equal to that existing before such damage or injury was done, by repairing, rebuilding or otherwise restoring as may be directed, or it shall make good such damage or injury in an acceptable manner.

The Contractor shall cooperate with the Director of Public Works in protecting and preserving cornerstones and monuments that are within the Work area. Monuments, cornerstones and land markers unexpectedly encountered shall be protected, referenced and preserved in the same manner.

When cornerstones, monuments and land markers are damaged, destroyed, or made inaccessible during the progress of Work, the Contractor will furnish all the labor, tools and other

materials required to remove, store, reset, or replace such cornerstones, monuments, and land markers under the supervision of the Director of Public Works.

14. **RESPONSIBILITY FOR DAMAGE CLAIMS, ACCIDENTS, INJURIES, OR LOSSES**

The Contractor shall save harmless the City and all of its representatives from and against all suits, actions, or claims of any character brought on account of actual or alleged damages, accident, injuries, or losses sustained by any person or property resulting from any negligent act, error or omission of the Contractor, its subcontractors, agents or employees, in the execution of the Work or in guarding the same.

15. **REQUIREMENT OF PERFORMANCE BOND**

Before commencing the Work, Contractor shall furnish a Performance Bond to City in the full amount of its proposal for that Sequence of the Project equal in amount to the total allocated Cost of Work for such Sequence, which bond shall cover the entire term of such Sequence. Upon Substantial Completion of each Sequence of the Work, the Performance Bond shall be reduced by the Cost of Work completed in that Sequence, and a maintenance bond shall be furnished to the City to insure performance of any required warranty work.

The Bond shall be executed on the form provided herewith or in a similar form acceptable to the City. Agents of bonding companies shall furnish evidence of their power of attorney, bearing seal of the company authorizing them to execute the particular type to be furnished.

If at any time after the approval of the Bond and the execution of the Agreement the City shall deem the surety or sureties upon the Bond to be unsatisfactory or if for any other reason the Bond shall cease to be adequate security for the City, the Contractor shall, within five (5) days after notice from the City to do so, furnish a new additional bond which shall be adequate and satisfactory to the City. The Contractor shall pay for all costs of such bonds. The City shall determine the sufficiency of all sureties.

16. **CONTRACTOR'S INSURANCE**

Insurance Requirements. Contractor shall procure and maintain for the duration of the contract, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by Contractor, its agents, representatives, employees or subcontractors.

A. **Minimum Scope of Insurance.** Contractor's insurance coverages shall include the following:

1. **Workers Compensation Insurance.** The Contractor and all Subcontractors shall furnish the City one (1) unaltered copy of the official certificate of the Ohio Industrial Commission indicating that it has paid the premiums required under the Ohio Workers'

Compensation Act evidencing that these workers are covered by Workers' Compensation during the Contract Term. If the Contractor is legally permitted and qualified to be a self-insurer, such self-insurer shall furnish proof of such status to the City.

2. Commercial General Liability Insurance. Insurance Services Office (ISO) Form CG 00 01 covering CGL on an "occurrence" basis, including products-completed operations, with limits no less than \$2,000,000 per occurrence for bodily injury, property damage, personal & advertising injury. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO form CG 25 03 or CG 25 04) or the general aggregate limit shall be twice the required occurrence limit.

3. Comprehensive Automobile Liability Insurance. Insurance Services Office Form Number CA 0001 covering Code 1 (any auto), or if Contractor has no owned autos, hired (Code 8), and non-owned autos (Code 9), with limit no less than \$1,000,000 per accident for bodily injury and property damage

Insurance coverage in the minimum amounts set forth above neither relieves the Contractor from liability in excess of such coverage, nor precludes the City from taking such other actions as are available to it under any other provisions of this contract or otherwise in law. If the Contractor maintains higher limits than the minimum shown above which the City requires, the City shall be entitled to coverage for the higher limits maintained by the Contractor. The minimum coverages provided herein may be obtained through primary insurance or any combination of primary and excess/umbrella insurance.

B. Notice of Cancellation. Each insurance policy required above shall state that coverage shall not be cancelled, except with notice to the City. If the Contractor receives a non-renewal or cancellation notice from an insurance carrier providing coverage required herein, or receives notice that coverage no longer complies with the requirements herein, Contractor agrees to notify the City by fax or email within five (5) business days with a copy of the non-renewal or cancellation notice, or written explanation of how coverage is no longer in compliance. The Contractor shall cease operations on the occurrence of any such non-renewal, cancellation, or material change and shall not resume operations until insurance is in force that complies with these requirements.

C. Other Insurance Provisions. The policies of insurance required herein shall contain, or be endorsed to contain, the following provision:

1. Additional Insured. The City of Montgomery, Ohio, its officials, agents and employees, shall be named as Additional Insureds under the commercial general liability and automobile liability policies as respects liability arising out of work or operations performed by or on behalf of the Contractor within this project. Coverage shall be primary to the Additional Insureds and not contributing with any other insurance or similar protection available to the Additional Insureds, whether other available coverage be primary, contributing or excess.

(a) To provide appropriate Additional Insured coverage for general liability, including liability arising out of the products-completed operations hazard,

Contractor agrees to use the following endorsement(s), or similar endorsements providing equal or broader Additional Insured coverage:

- (i) ISO Form CG 20 10 11 85, OR if later revisions are used;
- (ii) ISO Form CG 20 10, CG 20 26, CG 20 33, or CG 20 38; AND ISO Form CG 20 37 10 01.

2. Primary Coverage. For claims related to this project, the Contractor's insurance coverage shall be primary as respects the City, its officials, agents and employees. Any insurance or self-insurance maintained by the City, its officials, agents and employees shall be excess of Contractor's insurance and shall not contribute with it.

D. Umbrella or Excess Liability. Contractor may satisfy the minimum liability limits required above for Commercial General Liability or Business Auto Liability under an Umbrella or Excess Liability policy. Contractor agrees to endorse the City as an Additional Insured on the Umbrella or Excess policy, unless the Umbrella or Excess policy provides coverage on a "Follow Form" basis and such fact is disclosed on the Certificate of Insurance.

E. Waiver of Subrogation. Contractor hereby agrees to waive rights of subrogation which any insurer of Contractor may acquire from Contractor by virtue of the payment of any loss. Contractor agrees to secure endorsements necessary to effect this waiver of subrogation.

F. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of no less than A:VII, unless otherwise acceptable to the City.

G. Proof of Coverage. The Contractor shall furnish the City with Certificates of Insurance and amendatory endorsements (or copies of the applicable insurance language effecting coverage required herein) and a copy of the Declarations and Endorsements Page of the CGL policy listing all policy endorsements. All certificates and endorsements shall be received by the City before work commences. However, failure to obtain the required documents prior to the beginning of the Work shall not waive the Contractor's obligation to provide them. The City reserves the right to require complete, certified copies of all required insurance policies, including endorsements, required by these specifications, at any time.

H. Non-renewal, Cancellation, or Material Change of Coverage. Each insurance policy required above shall state that coverage shall not be cancelled, except with notice to the City. If the Contractor receives a non-renewal or cancellation notice from an insurance carrier providing coverage required herein, or receives notice that coverage no longer complies with the requirements herein, Contractor agrees to notify the City by fax or email within five (5) business days with a copy of the non-renewal or cancellation notice, or written explanation of how coverage is no longer in compliance. The Contractor shall cease operations on the occurrence of any such non-renewal, cancellation, or material change and shall not resume operations until insurance is in force that complies with these requirements.

I. Subcontractor's Insurance. The Contractor shall require and verify that all Subcontractors maintain insurance meeting all the requirements stated herein, and the Contractor shall ensure that the City is an Additional Insured on insurance required from subcontractors. For CGL coverage, subcontractors shall provide coverage with a format at least as broad as CG 20 38 04 13. Subcontractors performing work must also name the City as an Additional Insured in the same language as provided in Paragraph (C) herein.

J. Special Risks or Circumstances. City reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other circumstances.

17. **GENERAL REQUIREMENTS OF THE WORK OF THE CONSTRUCTION MANAGER-AT-RISK AGREEMENT**

A. General

(1) The Contractor shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.

(2) The Contractor shall designate in writing a representative who is authorized to act on the Contractor's behalf with respect to the Project.

(3) The Contractor shall perform the Work in accordance with the Contract Documents as finally approved by the City, with an appropriate adjustment to the Guaranteed Maximum Price for any change from the Project Criteria or Criteria Drawings attached hereto. The Contractor shall not be relieved of the obligation to perform the Work in accordance with the Contract Documents by the activities, tests, inspections or approvals of the City.

(4) The Contractor shall perform the Work in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Contractor performs Work contrary to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, the Contractor shall assume responsibility for such Work and shall bear the costs attributable to correction.

(5) The Contractor shall not be obligated to perform any act which it believes will violate any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities. If the Contractor determines that implementation of any instruction received from the City, including those in the Project Criteria, would cause a violation of any applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall notify the City in writing. Upon verification by the City that a change to the City's Criteria is required to remedy the violation, the City and the Contractor shall execute a modification in accordance with this Agreement.

(6) The Contractor shall be responsible to the City for acts and omissions of the Contractor's employees, Contractor's Consultants, Subcontractors, and their agents and employees, and other persons or entities performing portions of the Work.

(7) The Contractor shall obtain all permits necessary in connection with the work. All permits shall be subject to the inspection of the City. If the Contractor intends to use water from fire hydrants for any purpose, it shall obtain the required permits from the City and Greater Cincinnati Water Works for the use of the hydrants.

(8) In the hiring of employees for the performance of work under this contract or any subcontract hereunder, neither Contractor nor any Subcontractor, nor any person acting on behalf of such Contractor or Subcontractor, shall by reasons of race, sex creed or color, discriminate against any person in the employment of labor or workers, who is qualified and available to perform the work to which the employment relates.

B. General Consultation. The Contractor shall schedule and conduct periodic meetings with the City to review matters such as procedures, progress, coordination, and scheduling of the Work.

(1) When applicable law requires that services be performed by licensed professionals, the Contractor shall provide those services through qualified, licensed professionals. The City understands and agrees that the services of the Contractor's Consultants are performed in the sole interest of, and for the exclusive benefit of, the Contractor.

(2) The Contractor shall prepare and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project. The City shall assist Contractor as reasonably necessary to promptly obtain easements, zoning variances, planning commission approval, legal authorizations, and other necessary approvals in furtherance of the Work.

C. Progress Reports

A. The Contractor shall keep the City informed of the progress and quality of the Work. On a monthly basis, or otherwise as agreed to by the City and Contractor, the Contractor shall submit written progress reports to the City, showing estimated percentages of completion and other information identified below:

1. Work completed for the period;
2. Project schedule status;
3. Submittal schedule and status report, including a summary of outstanding Submittals;
4. Responses to requests for information to be provided by the City;
5. Approved Change Orders;
6. Pending Change Orders;
7. Tests and inspection reports;
8. Status report of Work rejected by the City;
9. Cumulative total of the Cost of the Work to date including the Contractor's compensation, if any;
10. Current Project cash-flow and forecast reports; and

11. Additional information as agreed to by the City and Contractor.

18. **PREVAILING WAGES**

Under 4115.071(C) of the Ohio Revised Code, any Contractor contracting with a Public Authority, and any Subcontractor participating in this Project, must submit certain personnel and payroll information to the City's Prevailing Wage Coordinator during the life of the Agreement. The City is considered by definition a Public Authority by statute.

Any Contractor or Subcontractor participating in this Project must:

A. Supply to the Prevailing Wage Coordinator designated by the City a schedule of the dates during the life of the contract with the authority on which it is required to pay wages to employees.

B. Deliver to the Prevailing Wage Coordinator a certified copy of its payroll, within two (2) weeks after the initial pay date, and supplement report for each month thereafter. If the construction period is to be less than one (1) month, the payroll reports must be made on a weekly basis. Payroll reports must contain the following information:

1. Wages
2. Names
3. Current Addresses
4. Social Security Numbers
5. Number of hours worked during each day of the pay period covered and total for each week
6. Hourly rate of pay
7. Job classifications
8. Fringe benefits
9. Deductions from wages

C. Comply with the prevailing wage rates required on public improvement projects within the City of Montgomery and Hamilton County, Ohio as provided within R.C. §§ 4115.03 through 4115.19.

D. An "Affidavit of Contractor or Subcontractor, Prevailing Wage" must be executed and returned to the City upon completion of the Project. Final payment will be retained until the document is received. Please note that the Affidavit encompasses the Work done by all Subcontractors as well as the Contractor's workforce.

19. **TESTING**

In addition to material testing by the supplier, on-site material and soil testing will be required to insure the Work meets the specifications established as part of this Project. The Contractor shall bear the cost of and provide all required materials, labor, apparatus, services and

facilities in connection therewith. The Director of Public Works shall be notified reasonably in advance of any work that requires on-site material and soil testing. Unless the Director of Public Work notifies Contractor otherwise, all testing shall be done in the presence of the Director of Public Works, or his designee, by an approved testing laboratory and one (1) copy of the test shall be sent directly to the Director of Public Works.

When questions arise as to whether the requirements of the Agreement have been fulfilled, the City may engage an independent testing laboratory to perform any tests necessary to establish the acceptability of the Work.

Should additional tests show, in the judgment of the City, the work or materials to be defective or otherwise not meeting the requirements of the Contract Documents, the Contractor shall, immediately upon notification by the City, remove, replace, or reconstruct same, as the case may require and shall, if directed by the City, make such further tests as may be necessary to determine fulfillment of the Contract Documents' requirements. The cost of all re-tests shall be deducted from the Contractor's fee for said Work. All tests shall be made under the supervision and direction of the City except that those required by a public authority shall be under the supervision and direction of such authority.

Minimum testing requirements shall be as follows:

- A. All Asphalt Materials will be supplied from an ODOT approved facility.
- B. Subgrade: At least one field density test shall be made for every 5000 SF of compacted subgrade, but in no case, shall less than three tests be made.
- C. Compaction: At the beginning of the compaction operation, the density requirement shall be determined by compacting a short section, at the direction of the Director of Public Works, until no further increase in density is obtained. The remainder of the course shall be compacted to a density of not less than 92% to 97% of the test density. Density tests shall be taken every 500 S.Y.

20. SUBLETTING OR ASSIGNMENT OF AGREEMENT

The Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of this Agreement or its rights, title or interest in or to the same or any part thereof, without the written consent of the City. Such assignment and consent shall not release nor relieve the Contractor or its Surety from any obligation or liability under this Agreement.

The Contractor shall furnish the City the names of subcontractors proposed and shall not employ any subcontractor that the City object to as incompetent or unfit. The Contractor shall be responsible to the City for its subcontractors.

21. **SANITARY PROVISIONS**

The Contractor shall provide and maintain in a neat, sanitary condition such accommodations for the use of its employees.

22. **FINAL CLEAN-UP**

The Contractor shall at all times maintain the Project site and working areas in an orderly condition, reasonable clean and free of accumulations of dirt and debris. If the Contractor fails to maintain the job site and working area in a satisfactory condition, the City shall have the right to employ others to do so at the Contractor's expense.

As soon as portions of the Project are ready for use, they shall be thoroughly cleaned by the Contractor of all dirt and rubbish, and cleared of all materials, forms, falsework, temporary structures and equipment.

The Contractor shall also clean out all sewer drains, inlets, manholes, and other underground lines and structures built by him or affected by its work. The Contractor shall be responsible to restore all disturbed areas to their original condition.

23. **CLAIMS AND DISPUTE RESOLUTION**

A. **Claims**

(1) **Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between the City and Contractor arising out of or relating to the Agreement. The responsibility to substantiate Claims shall rest with the party making the Claim.

(2) **Time Limits on Claims.** The City and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other, arising out of or related to the Agreement in accordance with the requirements of the binding dispute resolution method selected herein, within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the respective phase of the Work to which the claim relates. The City and Contractor waive all claims and causes of action not commenced in accordance with this Section (A)(2). The provisions of this Section 23 shall survive the completion of the Work under this Agreement and be enforceable by the parties.

(3) **Notice of Claims**

(a) **Prior To Final Payment.** Prior to Final Payment, Claims by either the City or Contractor must be initiated by written notice to the other party within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

(b) Claims Arising After Final Payment. After Final Payment, Claims by either the City or Contractor must be initiated by prompt written notice to the other party. The notice requirement in Section (A)(3)(a) and the Initial Decision requirement as a condition precedent to mediation in Section (B)(1) shall not apply.

(4) Continuing Contract Performance. Pending final resolution of a Claim, except as otherwise agreed in writing, the Contractor shall proceed diligently with performance of the Contract and the City shall continue to make payments in accordance with the Contract Documents.

(5) Claims for Additional Time

(a) If the Contractor intends to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

(b) If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, and had an adverse effect on the scheduled construction.

(6) Claims for Consequential Damages

The Contractor and City waive Claims against each other for consequential damages arising out of or relating to this Agreement. This mutual waiver includes:

(a) damages incurred by the City for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

(b) damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of the Work.

B. Initial Decision

(1) An Initial Decision shall be required as a condition precedent to mediation of all Claims between the City and Contractor initiated prior to the date Final Payment is due, unless thirty (30) days have passed after the Claim has been initiated with no decision having been rendered. Unless otherwise mutually agreed in writing, the City shall render the Initial Decision on Claims.

(2) Procedure

(a) Claims Initiated by the City. If the City initiates a Claim, the Contractor shall provide a written response to City within ten days after receipt of the notice required under Section (A)(3)(a). Thereafter, the City shall render an Initial Decision within ten (10) days of receiving the Contractor's response: (1) withdrawing the Claim in whole or in part, (2) approving the Claim in whole or in part, or (3) suggesting a compromise.

(b) Claims Initiated by the Contractor. If the Contractor initiates a Claim, the City will take one or more of the following actions within ten (10) days after receipt of the notice required under Section (A)(3)(a): (1) request additional supporting data, (2) render an Initial Decision rejecting the Claim in whole or in part, (3) render an Initial Decision approving the Claim, (4) suggest a compromise, or (5) indicate that it is unable to render an Initial Decision because the City lacks sufficient information to evaluate the merits of the Claim.

(3) In evaluating Claims, the City may, but shall not be obligated to, consult with or seek information from persons with special knowledge or expertise who may assist the City in rendering a decision. The retention of such persons shall be at the City's expense.

(4) If the City requests the Contractor to provide a response to a Claim or to furnish additional supporting data, the Contractor shall respond, within ten (10) days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the City when the response or supporting data will be furnished or (3) advise the City that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the City will either reject or approve the Claim in whole or in part.

(5) The City's Initial Decision shall (1) be in writing; (2) state the reasons therefor; and (3) identify any change in the Cost of Work or Contract Time, or both. The Initial Decision shall be final and binding on the parties, but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

(6) Either party may request mediation of an Initial Decision within thirty (30) days from the date of an Initial Decision as provided in Section (C)(2).

(7) In the event of a Claim against the Contractor, the City may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the City may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

(8) If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

C. Mediation

(1) Claims, disputes, or other matters in controversy arising out of or related to the Project shall be subject to mediation as a condition precedent to binding dispute resolution.

(2) The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

(3) The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in Cincinnati, Ohio. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction.

D. Arbitration

(1) If the parties are unable to settle their claim by mediation, then any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

(a) A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations or statute of repose. For statute of limitations or statute of repose purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

(2) The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

(3) The foregoing agreement to arbitrate, and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

24. **MISCELLANEOUS PROVISIONS**

A. **Authorization for Release of Tax Department Information.** The Contractor must comply with all requirements of the Montgomery City Income Tax Code regarding the reporting, filing, withholding and/or payment of Montgomery City Income Tax, and shall require such compliance in its contracts with Subcontractors. The Contractor shall sign an Authorization and Release to allow the Income Tax Department to verify to the Office of the City Manager, Public Works Department and legal counsel for the City that all such reports, filings, withholdings and/or payments have been completed or secured, and Contractor shall require each Subcontractor to sign an Authorization and Release.

B. **Noise Restrictions.** The City of Montgomery does not permit noise generation during restricted noise ordinance times of 10 pm until 7 am. Special exception may be granted for concrete placement. Notice must be provided to the City forty-eight (48) hours prior to such activity.

C. **Maintenance of Traffic.** When construction interferes with the normal use of Montgomery Road or Main Street, temporary traffic facilities shall be provided.

The Contractor shall provide and maintain safeguards, safety devices and protective equipment and take any other needed actions as may be necessary to protect the public and property in connection with the work.

The presence of barricades, lights or other traffic control devices provided and maintained by any party other than the Contractor, shall not relieve the Contractor of this responsibility.

D. **Indemnification.** To the fullest extent permitted by law, Contractor shall indemnify and hold harmless the City, including the City's agents and employees, from and against claims, damages, losses and expense, including but not limited to attorney's fees arising out of or resulting from performance of the Work, but only to the extent caused by the negligent acts or omissions of the Contractor, the Contractor's consultants, subcontractors, or anyone directly or indirectly employed by them, or anyone for whose acts they may be liable.

E. **Taxes.** Contractor shall pay sales, consumer, use and similar taxes for the Work performed by Contractor to the extent required by law. The parties agree, however, it is anticipated that as a public works project it is tax exempt and City shall cooperate with Contractor to provide appropriate tax exemption certificates. Such taxes are not included in the Guaranteed Maximum Price, and shall be reimbursed as a Cost of the Work and shall be an increase to the Guaranteed Maximum Price for any part of the Work for which City fails to provide appropriate tax exemption certificates, and for any part of the Work which is not eligible to be tax-exempt.

F. Governing Law. This Agreement shall be governed by the law of the State of Ohio. Any cause of action brought as a result of any dispute in this Agreement shall be resolved through mediation, arbitration or litigation solely in any court, state or federal, having jurisdiction and sited within Hamilton County, Ohio.

G. Written Notice. Except as otherwise specifically set forth in this Agreement, all notices, demands, requests, consents or approvals given, required or permitted to be given hereunder must be in writing and will be deemed sufficiently given if actually received or if hand-delivered or sent by recognized, overnight delivery service or by certified mail, postage prepaid and return receipt requested, addressed to the other party at the address set forth in this Agreement or any addendum to or counterpart of this Agreement, or to such other address as the recipient has previously notified the sender of in writing. All notices will be deemed received upon actual receipt, unless sent by certified mail, in which event such notice will be deemed to have been received when the return receipt is signed or refused. The parties, by notice given hereunder, may designate any further or different addresses to which subsequent notices, certificates, requests or other communications must be sent. The present addresses of the parties follow:

As to the City:

City of Montgomery, Ohio
10101 Montgomery Road
Montgomery, Ohio 45242
Attn: City Manager
Currently: Brian K. Riblet

With a copy to the Director of Law

Currently: Terrence M. Donnellon
Donnellon, Donnellon & Miller
9079 Montgomery Road
Cincinnati, Ohio 45242

As to Contractor:

Brandicorp, LLC
45 Fairfield Avenue
Bellevue, Kentucky 41073
Attn: Michael T. Brandy

[SIGNATURE PAGES TO FOLLOW]

IN WITNESS WHEREOF, the City and the Contractor have caused this Agreement to be executed in their respective names by their duly authorized officers, all as of the date hereinbefore written.

THE CITY:

**City of Montgomery, Hamilton County,
Ohio**
an Ohio municipal corporation

By: _____
Brian K. Riblet

Its: City Manager

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

On this _____ day of _____, 2020, personally appeared before me, a Notary Public in and for the State of Ohio, CITY OF MONTGOMERY, HAMILTON COUNTY, OHIO, by Brian K. Riblet, known to be the City Manager of said City and duly authorized in the premises, who acknowledged the signing and sealing of the said Construction Agreement for himself and on behalf of said City, to be his voluntary act and deed, and the voluntary act and deed of said City.

Notary Public

My commission expires: _____

APPROVED AS TO FORM:

Terrence M. Donnellon,
Director of Law

CONTRACTOR:

Brandicorp, LLC
a Kentucky limited liability company

By: _____
Michael T. Brandy

Its: Managing Member

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

On this _____ day of _____, 2020, personally appeared before me, a Notary Public in and for the State of Ohio, BRANDICORP, LLC, a Kentucky limited liability company, by Michael T. Brandy, known to be the Managing Member of said company and duly authorized in the premises, who acknowledged the signing and sealing of the said Construction Agreement for himself and on behalf of said company, to be his voluntary act and deed, and the voluntary act and deed of said company.

Notary Public

My commission expires: _____

