

CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT (the “AGREEMENT”) is by and between the City of Lebanon, Indiana (the “OWNER”) and Milestone Contractors, LP (the “CONTRACTOR”). OWNER and CONTRACTOR, in consideration of the mutual covenants hereafter set forth, agree as follows:

ARTICLE 1. WORK

CONTRACTOR shall complete all Work (described below) as specified or indicated in the Contract Documents (hereafter defined). The project is generally described as follows:

CITY OF LEBANON, INDIANA ANNUAL SUPPLY BIDS CALENDAR YEAR 2021

Asphalt Materials per Bid Dated November 23, 2020

INDOT #11 HMA Surface (Material picked up by City of Lebanon at Bidder’s Facility) \$55.25 per Ton.

INDOT #8 HMA Binder (Material picked up by City of Lebanon at Bidder’s Facility) \$48.00 per Ton.

INDOT #9 HMA Binder (Material picked up by City of Lebanon at Bidder’s Facility) \$51.00 per Ton.

MWS Winter Mix (Material picked up by City of Lebanon at Bidder’s Facility) \$130.00 per Ton.

MWS Winter Mix (Material delivered to City of Lebanon) \$138.00 per Ton.

ARTICLE 2. CONTRACT TIME

2.1 The Work shall be substantially complete as directed by December 31, 2021 (“Substantial Completion”). Work shall be completed and ready for final payment in accordance with this Agreement. It is hereby understood and mutually agreed, by and between the CONTRACTOR and the OWNER, that the date of commencement and the time for completion of the Work as specified in the Contract Documents are essential conditions of this AGREEMENT.

2.2 The CONTRACTOR and the OWNER acknowledge and agree that time is of the essence of this AGREEMENT and that the time allotted by this AGREEMENT for the performance and completion of the Work is reasonable and takes into account any and all risks and adverse conditions which may befall the CONTRACTOR hereunder.

ARTICLE 3. CONTRACT PRICE

3.1 The CONTRACTOR shall, in strict conformity with the Contract Documents, furnish all necessary labor, tools, materials, equipment, services, assume and fulfill all obligations and perform all Work required to construct, complete, and make ready for use by the OWNER pursuant to Exhibit "A", subject to any additions or deletions based on actual approved quantities of the respective unit price items, which price the CONTRACTOR agrees to accept as full payment for all such Work actually performed and accepted as described in the Contract Documents (the "Contract Price"). The CONTRACTOR agrees that the Contract Price shall be deemed full and complete compensation for all direct and indirect costs the Work, including, without limitation, all materials, labor, supervision, equipment, transportation, warranties, repairs, replacement, overhead and profit, complete and in place.

3.2 The Contract Price will be paid to the CONTRACTOR in the manner and at such times as set forth in the Contract Documents.

3.3 All amounts due under this AGREEMENT by the OWNER shall be subject and subordinate to the OWNER's obligations pursuant to all: (a) bonds; and (b) installment contracts assigned to lenders to secure financing; whether first arising before or after the date of this AGREEMENT.

ARTICLE 4. PAYMENT PROCEDURES

4.1 CONTRACTOR shall submit Applications for Payment. Application for Payment will be processed by OWNER as provided in the Contract Documents.

ARTICLE 5. CONTRACTOR'S REPRESENTATIONS

In order to induce OWNER to enter into the AGREEMENT, CONTRACTOR makes the following representations:

5.1 CONTRACTOR has familiarized itself with the nature and extent of the Contract Documents, Work, site, locality and all local conditions and Laws and Regulations that in any manner may affect cost, progress, performance or furnishing of the Work.

5.2 CONTRACTOR has studied carefully all Contract Documents, and accepts the determination of the extent of the data contained therein, upon which CONTRACTOR is entitled to rely.

ARTICLE 6. DISPUTE RESOLUTION

6.1 For any claim subject to, but not resolved by, mediation, the method for binding dispute resolution shall be litigation in a court of competent jurisdiction, either in the Circuit or Superior Courts of Boone County, Indiana, and such court shall have the sole and exclusive jurisdiction over the action or proceeding, unless agreed to otherwise, in writing, by the OWNER. The parties expressly waive the right to a trial by a jury in the action or the proceeding. In the event litigation is needed to enforce or defend actions related to the project or this AGREEMENT, the OWNER shall be entitled to recover its costs, expenses, and reasonable attorneys' fees as a result of such actions.

6.2 Pending the resolution of any disputes, to the extent requested by the OWNER, the CONTRACTOR shall continue to render services under this AGREEMENT.

ARTICLE 7. TERMINATION OR SUSPENSION

7.1 Default. If, in the opinion of the Owner, the Contractor fails to provide a sufficient number of properly skilled laborers or adequately supervise the Work, or fails in any material respect to prosecute the Work according to Project Schedule, cause delay to, disruption of, or interference with the work of the Owner, or any separate contractor, or fails in any material respect to comply with any other provisions of the Contract Documents, makes a general assignment for the benefit of creditors, has a receiver appointed, becomes insolvent or files for protection under the Bankruptcy Code (collectively, "Default"), the Owner may, after forty-eight (48) hours written notice from the Owner to the Contractor:

7.2 take such steps to correct, cure or overcome the Default as the Owner deems expedient, and charge all expenses, losses, costs and damages, including attorney's fees, to the Contractor; or

7.3 Upon Default, the Owner may exclude the Contractor from the site and take possession of all materials, equipment, tools and construction equipment and machinery thereon owned or leased by the Contractor. If the Owner terminates this Agreement, the Owner may finish the Contractor's Work by whatever method the Owner deems expedient. If the unpaid balance of the Contract Sum exceeds the expense of finishing the Contractor's Work and other losses, costs and damages incurred by the Owner, and the Construction Manager, including attorney's fees, such excess shall be paid to the Contractor. If such expense and other losses, costs and damages, including attorney's fees, exceed the unpaid balance of the Contract Sum, the Contractor shall pay the difference to the Owner.

7.4 The Owner may, at any time, terminate this Agreement for its convenience. Upon receipt of written notice of termination, the Contractor shall cease operations as directed by the Owner in the notice, take actions necessary, or as the Owner may direct, for the protection and preservation of the Work, and terminate all existing contracts and purchase orders. Provided the Contractor is not in Default, the Contractor shall receive, as full compensation, its actual, necessary, and reasonable costs of performing the Work to date of termination, plus a reasonable markup for overhead and profit on Work performed. The Contractor shall make its records available for the Owner's review. In the event any termination of the Contractor for Default is

later determined to have been improper, the termination shall automatically convert to a termination for convenience, and the Contractor shall be limited in its recovery strictly to the compensation provided for in this Section.

7.5 The Work may be suspended by the OWNER.

ARTICLE 8. CONTRACT DOCUMENTS

8.1 The Contract Documents which comprise the entire AGREEMENT between the OWNER and CONTRACTOR concerning the Work consist of the following:

- 8.1.1 This AGREEMENT
- 8.1.2 Itemized Bid Form
- 8.1.3 Non -Collusion Affidavit
- 8.1.4 Certification Concerning Investment In Iran
- 8.1.5 General Conditions, Special Conditions, and Special Provisions
- 8.1.6 Notice of Award
- 8.1.7 Required Sureties and Certifications

8.2 In resolving conflicts, errors, discrepancies and disputes concerning the nature, character, scope and/or extent of Work to be performed or furnished by the CONTRACTOR hereunder, or other rights and obligations of the OWNER and/or the CONTRACTOR, the provision of a Contract Document expressing the greater quantity, quality or scope of the Work, or imposing a greater obligation upon the CONTRACTOR, or affording a greater right or remedy to the OWNER, shall govern, without regard to the party who drafted such provision

ARTICLE 9. MISCELLANEOUS PROVISIONS

9.1 Where reference is made in this AGREEMENT to a provision in the Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents. Terms used in this AGREEMENT that are defined in the Contract Documents will have the meanings indicated in the Contract Documents.

9.2 Any notice, invoice, order or other correspondence required or permitted to be sent under or pursuant to this AGREEMENT shall be in writing and either hand-delivered or sent by postage prepaid, U.S. Certified mail, return receipt requested, addressed to the parties at the following address:

9.2.1 The OWNER's representative is:

Kevin Krulik PE, LS, AICP

City Engineer City Engineer
City of Lebanon, Indiana
401 S. Meridian Street, Lebanon, IN 46052
(765) 482-8845
kkruklik@lebanon.in.gov.

9.2.2 The CONTRACTOR’s representative is:

9.3 The OWNER or CONTRACTOR’s representative shall not be changed without ten days’ prior notice to the other party.

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

9.5 Nothing contained herein shall be construed to give any rights or benefits hereunder to anyone other than the OWNER or the CONTRACTOR. The relationship of the parties hereto shall be as provided for in this AGREEMENT, and the CONTRACTOR, as well as its agents, employees, contractors, subcontractors, outside sources and other persons shall in no fashion be deemed to be an employee of the OWNER. Furthermore, the CONTRACTOR shall be solely responsible for payment to or for its agents, employees, contractors, subcontractors, outside sources and other persons all statutory, contractual and other compensation, benefits and obligations due thereto, and the OWNER shall not be responsible for same. Rather, the Contract Price to be paid hereunder by the OWNER to the CONTRACTOR shall, subject to the terms and conditions hereof, be the full and maximum compensation and monies required of the OWNER to be paid to the CONTRACTOR pursuant to this AGREEMENT.

9.6 The CONTRACTOR shall indemnify and hold harmless the OWNER, its officers, officials, employees, agents and legal representatives, from all losses, liabilities, claims, judgments and liens, including, but not limited to, all costs, expenses and attorney fees, arising out of any intentional or negligent act or omission of the CONTRACTOR and/or any of its agents, employees, contractors, subcontractors, outside sources and/or other persons in the performance of this AGREEMENT. The failure to do so shall constitute a material breach of this AGREEMENT. This indemnification obligation shall survive the termination of this AGREEMENT. At all times during the term of this AGREEMENT, the CONTRACTOR shall

maintain the policies of insurance described in the Contract Documents, which policies shall: (a) name the OWNER and the City of Lebanon, Indiana as additional insureds; (b) provide that the policy may not be cancelled without thirty (30) days' advance written notice to the OWNER; and (c) provide standard waiver of subrogation provisions, such that there shall be no recovery against the OWNER or the City of Lebanon, Indiana to the extent that the loss or damage is or would be covered by any insurance required to be maintained under this AGREEMENT (or that otherwise is maintained).

9.7 In addition to any right of setoff provided by law, all amounts due the CONTRACTOR shall be considered net of indebtedness of the CONTRACTOR to the OWNER, and the OWNER may deduct any amounts due or to be come due from the CONTRACTOR to OWNER from any sums due or to become due from the OWNER to the CONTRACTOR hereunder.

9.8 Being a public work project, this AGREEMENT and all conditions are subject to compliance with Indiana Code 36-1-12 et. seq; which shall govern. The CONTRACTOR agrees to comply with all present and future federal, state and local laws, executive orders, rules, regulations, codes and ordinances which may be applicable to the CONTRACTOR's performance of its obligations under this AGREEMENT, and all relevant provisions thereof are incorporated herein by this reference. The CONTRACTOR agrees to indemnify and hold harmless the OWNER from any loss, damage or liability resulting from any violation of such laws, orders, rules, regulations, codes and/or ordinances. This indemnification obligation shall survive the termination of this AGREEMENT.

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

9.10 If any provision of this AGREEMENT is held to be invalid, illegal or unenforceable by a court of competent jurisdiction, that provision shall be stricken, and all other provisions of this AGREEMENT which can operate independently of such stricken provision shall continue in full force and effect.

9.11 Any delay or partial inaction on the part of the OWNER in exercising or pursuing any right and/or remedy provided hereunder or by law shall not operate to waive any such rights or remedies.

9.12 All exhibits and/or appendices referenced herein, whether marked "Exhibit", "Appendix", or by some other title, shall be considered a part of this AGREEMENT.

9.13 Each party hereto represents and warrants that it is authorized to enter into this AGREEMENT and that such party, in executing this AGREEMENT, has the authority to bind such party or the party which it represents, as the case may be.

9.14 All headings and paragraphs of this AGREEMENT are inserted for convenience only and do not form a part of this AGREEMENT nor limit, expand or otherwise alter the meaning of any provisions hereof.

9.15 The parties warrant that they have read this AGREEMENT and understand it, are fully aware of their respective rights, have had the opportunity for the advice and assistance of an attorney throughout the negotiation of this AGREEMENT, and enter into this AGREEMENT freely, voluntarily and without any duress, undue influence, coercion or promise of benefit, except as expressly set forth herein.

9.16 This AGREEMENT, together with any attachments hereto or referenced herein, constitutes the entire agreement between the OWNER and the CONTRACTOR with respect to the subject matter hereof, and supersedes all prior oral or written representations and agreements regarding same. Notwithstanding any other term or condition set forth herein, to the extent any term or condition contained in any exhibit attached to this AGREEMENT conflicts with any term or condition contained in this AGREEMENT, the term or condition contained in this AGREEMENT shall govern and prevail, unless the parties hereto, or their successors in interest, expressly and in writing agree otherwise. This AGREEMENT may be modified only by written amendment executed by both parties hereto, or their successors in interest.

ARTICLE 10. INSURANCE AND BONDS.

10.1 The OWNER and CONTRACTOR shall purchase and maintain insurance as set forth in the Contract Documents.

10.2 The CONTRACTOR shall provide surety as set forth in the Contract Documents.

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

This AGREEMENT will be effective on December _____, 2020.

CONTRACTOR

(Milestone Contractors, LP (Contractors United, Inc. – General Partner))

BY _____

(Name & Title) _____

OWNER

Matthew Gentry, Mayor

ATTEST:

Tonya Thayer

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