

ORDINANCE NO. 2018-081

**AN ORDINANCE AUTHORIZING THE CITY
MANAGER TO EXECUTE AN AGREEMENT WITH
ENVIRONMENTAL REMEDIATION CONTRACTORS
AND DECLARING AN EMERGENCY**

WHEREAS, the City entered into a preliminary agreement with Environmental Remediation Contractors (ERC) in April 2018 as the Design-Builder to perform the design of the Turtlecreek Channel and Floodplain Restoration project and to establish the project Guaranteed Maximum Price; and

WHEREAS, the City wishes to enter into an agreement with Environmental Remediation Contractors to restore a natural floodway and floodplain for the property located at 200 South Broadway; and

WHEREAS, Council approves a design - build agreement with Environmental Remediation Contractors in the amount of \$178,750 as outlined in the attached exhibit.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Lebanon, Ohio:

SECTION 1. That the City Manager be authorized and directed to execute an Agreement between the City of Lebanon and Environmental Remediation Contractors in substantially the same form as the agreement attached hereto as "Exhibit 1".

SECTION 2. This Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety, morals and welfare of the City of Lebanon; and, for the further reason, that the execution of this agreement is necessary in order to have the Project can proceed during the 2018 construction season, then this Ordinance shall take effect immediately upon its adoption.

Passed:
Attest:

September 11, 2018

Moya A. Brewer
Mayor

David Brewer
Clerk of Council

Sponsors

Mayor Brewer, Mr. Aylor
Council members

City
Manager



City
Auditor



City
Attorney



PROPOSAL FORM 5

GUARANTEED MAXIMUM PRICE PROPOSAL

THIS FORM SHALL BE SUBMITTED WITH THE PROPOSAL

Calculation of the GMP for the Project:

Pricing	Proposed Price
Design Services Fee	\$ <u>0.00</u>
Preconstruction Fee	\$ <u>14,900.00</u>
Design-Build Services Fee	\$ <u>18,200.00</u>
General Conditions	\$ <u>3,450.00</u>
Maximum Cost of the Work (excluding contingency)	\$ <u>137,200.00</u>
Contingency	\$ <u>5,000.00</u>
Guaranteed Maximum Price (Total for All Items Above)	\$ <u>178,750.00</u>



MODIFIED STANDARD FORM OF AGREEMENT BETWEEN OWNER AND DESIGN-BUILDER - FOR A GUARANTEED MAXIMUM PRICE

The author of this document has revised the text of the original DBIA standard form.

Document No. 530

Second Edition 2010

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Washington, DC

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Modified Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price

*This document has important legal consequences. Consultation with
an attorney is recommended with respect to its completion or modification.*

This **AGREEMENT** is made as of the _____ day of _____ in
the year of 2018, by and between the following parties, for services in connection with the Project
identified below:

OWNER:

(Name and address)

City of Lebanon
50 S. Broadway Ave.
Lebanon, Ohio 45036

OWNER'S REPRESENTATIVE AND CRITERIA ENGINEER:

Scott Brunka, P.E.
Deputy City Manager
50 S. Broadway Ave.
Lebanon, Ohio 45036

The Owner's Representative shall be the point of contact for the Design-Builder on the Project. In
addition to the other requirements contained herein, all communications, submissions or notices to the
Owner from the Design-Builder related to the Project shall be directed to the Owner's Representative.

DESIGN-BUILDER:

Environmental Remediation Contractor
6006 Groveport Rd.
Groveport, OH 43125

The Design-Builder was selected by the Owner, following the selection process outlined in Ohio Revised
Code Sections 153.65 through 153.73, as the Design-Builder whose pricing proposal the Owner
determined to be the best value.

PROJECT:

Lebanon Turtle Creek Channel Restoration, Design-Build Project.

LEBANON TURTLE CREEK CHANNEL RESTORATION DESIGN-BUILD PROJECT

DBIA Document No. 530

Modified Standard Form of Agreement Between Owner and Design-Builder • Cost Plus Fee with an Option for a GMP

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DESCRIPTION OF THE PROJECT:

The Project is a turn-key design-build project. The Design-Builder will design and provide all of the Work necessary to complete the Project in accordance with the Contract Documents. Design-Builder was permitted to physically evaluate the entire site before providing its proposal and, as such, will be responsible for accurately identifying the Cost of the Work and accurately providing a guaranteed maximum price.

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree as set forth herein.

Article 1

Scope of Work

1.1 Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents and the Preliminary Design documents.

1.2 Design-Builder shall be responsible for all topographic survey work, geotechnical investigation, and geotechnical recommendations as part of its scope of work. The Owner will not be responsible for contracting and separately supplying any surveying or geotechnical services to the Design-Builder. The Design-Builder may rely upon the accuracy of the information provided by its surveying and geotechnical consultants in furnishing a complete and operational cost effective design.

1.3 Design-Builder shall not self-perform any construction trades work on the Project without the prior written permission of the Owner specific to a particular scope of work and in accordance with all requirements of the Ohio Revised Code and the Ohio Administrative Code.

1.4 The Design-Builder shall secure the building permit as well as other permits, including but not limited to zoning permits, fees, licenses, and inspections by governmental agencies necessary for proper execution and completion of the Work. Owner shall waive all permit fees that are within its jurisdiction. Warren County Facilities Management will assist the Design-Builder in applying for these waivers. The Design-Builder shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work. If the Design-Builder performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful order of public authorities, the Design-Builder shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

Article 2

Contract Documents

2.1 The Contract Documents are comprised of the following:

2.1.1 All written modifications, written amendments, and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) ("General Conditions of Contract"), as modified;

2.1.2 The GMP Exhibit referenced in Section 6.6.1.1 herein or, if applicable, the GMP Proposal accepted by Owner in accordance with Section 6.6.2 herein;

2.1.3 This Agreement, including the following exhibits:

Exhibit 1	- Statement of Claim Form
Exhibit 2	- Statutory Form of Bonds
Exhibit 3	- Design Builder's Proposal
Exhibit 4	- Design Builder's Guaranteed Maximum Price ("GMP") Proposal
Exhibit 5	- Design Criteria
Exhibit 6	- Design-Builder's Personal Property Tax Affidavit (O.R.C. 5719.042)
Exhibit 7	- Design-Builder's Affidavit with List of Subcontractors and Suppliers with Amounts Withheld
Exhibit 8	- Design-Builder's Waiver and Release Affidavit
Exhibit 9	- Subcontractors – Suppliers Waiver and Release Affidavit

Exhibit 10	- Tax Exempt Certificate
Exhibit 11	- Design-Builder's Payment Application Checklist
Exhibit 12	- The General Conditions of Contract, DBIA Document 535, as modified
Exhibit 13	- Prevailing Wage Determination Cover Letter
Exhibit 14	- Application for Payment Form
Exhibit 15	-Final Lien Waiver and Release Agreement

2.1.4 Additional Requirements (none if left blank): The DBIA Document No. 520, *Modified Standard Form of Preliminary Agreement between Owner and Design-Builder* (2010 Edition).

2.1.5 Construction Documents prepared and approved in accordance with Section 2.7 of the General Conditions of Contract.

Article 3

Interpretation and Intent

3.1 Design-Builder and Owner, prior to execution of the Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement.

3.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, Design-Builder shall provide the better quality or greater quantity of Work or comply with the more stringent requirements.

3.3 Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

3.4 All information provided by the Owner shall be verified by the Design-Builder.

3.5 The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

Article 4

Ownership of Work Product

4.1 **Work Product.** All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Instruments of Service") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.5 below.

4.2 Upon execution of this Agreement, the Design-Builder grants to the Owner a nonexclusive license to use the Design-Builder's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially

performs its obligations, including prompt payment of all sums when due, under this Agreement. The Design-Builder shall obtain similar nonexclusive licenses from the Design-Builder's Design Consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the subcontractors, sub-subcontractors, and material or equipment suppliers, as well as the Owner's consultants to reproduce, including electronically, applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. This license shall survive any termination of this Agreement and any dispute relating to such termination.

Article 5

Contract Time

5.1 Date of Commencement. The Owner shall issue to the Design-Builder a written Notice to Proceed. The date for commencement of the Work shall be the date established in the written Notice to Proceed (the "Date For Commencement"). The Design-Builder shall commence work under this contract on or after the Date For Commencement.

5.2 Substantial Completion and Final Completion.

5.2.1 Substantial Completion of the entire Work shall be achieved no later than ninety (90) calendar days after the Date of Commencement ("Date for Substantial Completion"). The Date for Substantial Completion shall only be changed or modified by Change Order, other Modification, or a Claim that is Finally Resolved regardless of any dates in any schedules, including the Progress Schedule, created by any person, including the Design-Builder.

5.2.1.1 Substantial Completion is defined in the Contract Documents.

5.2.2 Interim milestones and/or Substantial Completion of identified portions of the Work ("Scheduled Interim Milestone Dates") shall be achieved as follows: (None if none are listed) *(Insert any interim milestones for portions of the Work with different scheduled dates for Substantial Completion)*

5.2.3 The Date for Final Completion of the Design-Builder's Work will be fifteen (15) days after the Date For Substantial Completion ("Date for Final Completion"). The Date for Final Completion shall only be changed or modified by Change Order, other Modification, or a Claim that is Finally Resolved regardless of any dates in any schedules, including the Progress Schedule, created by any person, including the Design-Builder.

5.2.4 All of the dates set forth in this Article 5 (collectively the "Contract Time(s)") shall be subject to adjustment in accordance with the General Conditions of Contract.

5.3 Time is of the Essence. Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

5.4 Liquidated Damages. Time is of the essence in the performance of this Agreement. If the Design-Builder does not meet the date for Substantial Completion or the date for Final Completion, which shall be fifteen (15) days after the date of Substantial Completion, the Design-Builder shall pay the Owner (and the Owner may set off from sums coming due the Design-Builder) Liquidated Damages in the per diem amounts as set forth in the following tables, whichever may be applicable:

SCHEDULE OF LIQUIDATED DAMAGES – SUBSTANTIAL COMPLETION

Original Contract From More Than	To and Including	Amount of Liquidated Damages to be Deducted for Each Calendar Day of Overrun in Time past the Date for Substantial Completion
\$0.00	\$250,000.00	\$500.00
\$250,000.00	\$1,000,000.00	\$1,000.00
\$1,000,000.00	\$3,000,000.00	\$2,000.00
\$3,000,000.00	\$10,000,000.00	\$3,000.00
Over \$10,000,000		\$5,000.00

SCHEDULE OF LIQUIDATED DAMAGES – FINAL COMPLETION

Original Contract From More Than	To and Including	Amount of Liquidated Damages to be Deducted for Each Calendar Day of Overrun in Time past the Date for Final Completion
\$0.00	\$250,000.00	\$200.00
\$250,000.00	\$1,000,000.00	\$400.00
\$1,000,000.00	\$3,000,000.00	\$600.00
\$3,000,000.00	\$10,000,000.00	\$800.00
Over \$10,000,000		\$1,000.00

In addition to such Liquidated Damages, the Design-Builder shall indemnify, defend and hold the Owner and its employees and agents harmless from any and all claims or losses, whether or not such claims are proven, and from all costs and expenses incurred, as a result of or related to such claims or losses, including but not limited to attorneys' and consultants' fees and expenses, provided that such claims arise out of or are related to the Design-Builder's failure to meet the Substantial Completion or Final Completion dates set forth herein. These Liquidated Damages are in addition to any other remedies available to the Owner under the Contract Documents.

The Design-Builder acknowledges that such amounts of Liquidated Damages represent a reasonable estimate of the actual damages for loss of or interference with the intended use of the Project that the Owner would incur if the Contractor's Work is not Substantially Complete by its Date for Substantial Completion or Finally Complete by the required date for Final Completion.

Article 6

Contract Price

6.1 Contract Price.

6.1.1 Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") equal to the Design-Builder's Fee (as defined in Section 6.2) plus the Cost of the Work (as defined in Section 6.3) subject to the GMP established in Section 6.6 hereof and any adjustments made in accordance with the General Conditions of Contract.

6.2 Design-Builder's Fee.

6.2.1 Design-Builder's Fee shall be:

6.2.1.1 Design Services Fee. The Design Services Fee is the compensation for services provided by the architect or engineer of record, including all sub-consultants. The Design-Builder's Design Services Fee for the Project is \$12,500.

6.2.1.2 Preconstruction Fee. The Preconstruction Fee is the combination of home office overhead and profit for services provided during the preconstruction phase of the Project as defined in the Contract Documents. The Design-Builder's Preconstruction Fee for the Project is \$ 14,900.

6.2.1.3 Design-build Services Fee. The Design-build Services Fee is the combination of home office overhead and profit for services provided during the construction phase of the Project as defined in the Contract Documents. The Design-Builder's Design-Build Services Fee for the Project is \$160,400.

6.2.1.4 General Conditions. The General Conditions are the Design-Builder's costs for materials, services and equipment necessary to perform the work on the Project but that are not incorporated into the Project. The Design-Builder's General Conditions costs for the Project is \$3,450.

6.2.2 Design-Builder's Fee will be adjusted as follows for any changes in the Work:

6.2.2.1 For additive Change Orders, including additive Change Orders arising from both additive and deductive items, it is agreed that Design-Builder shall receive a Fee of Fifteen percent (15%) of the additional Costs of the Work incurred for that Change Order to account for the Design-Builder's Fee and for the fees, overhead and profit for all design consultants and subcontractors of any tier on the Project. The percentage provided herein shall not be modified without the written approval of the Owner.

6.2.2.2 For deductive Change Orders, including deductive Change Orders arising from both additive and deductive items, the deductive amounts shall include an amount equal to Five percent (5%) applied to the net reduction of the Cost of the Work which amount will account for a reduction associated with Design-Builder's Fee and fees, overhead and profit for all design consultants and subcontractors of any tier on the Project. The percentage provided herein shall not be modified without the written approval of the Owner.

6.3 Cost of the Work.

6.3.1 Subject to the GMP, the Cost of the Work shall be the sum of the following:

6.3.1.1 The total amount included in all sealed bids provided by Design-Builder for all work Design-Builder self-performs in accordance with the requirements of the Contract Documents, including Paragraph 2.7.3.4.6 of the General Conditions;

6.3.1.2 The total amount of all Subcontracts and supplier contracts awarded for Work performed on the Project;

6.3.1.3 The Contingency, identified in Paragraph 6.6.1.2;

6.3.1.4 The amount of Savings, if any, as identified in Paragraph 6.6.2, that the Design-Builder is authorized by the Owner to expend on the Project in accordance with the Contract Documents; and,

6.3.1.5 All Change Orders issued in accordance with the Contract Documents, if any.

6.3.2 The amounts included in Paragraph 6.3.1 are subject to open book pricing in accordance with Paragraph 7.5 of this Agreement.

6.4 Allowance Items and Allowance Values.

6.4.1 Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the GMP Proposal and are included within the GMP.

6.4.2 Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values, if any, based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

6.4.3 No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner's Representative. Owner agrees that if Design-Builder is not provided written authorization to proceed on an Allowance Item by the date set forth in the Project schedule, due to no fault of Design-Builder, Design-Builder may be entitled to an adjustment of the Contract Time(s) and Contract Price provided Design-Builder timely submits a claim in accordance with Article 10 of the General Conditions of Contract.

6.4.4 The Allowance Value for an Allowance Item includes the wages of direct employees performing Work at the Site or, with Owner's Representative's agreement, at locations off the Site, employee benefits, premiums, insurance, contributions and assessments, required by law or collective bargaining agreements, materials, equipment, transportation, taxes and insurance associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and general conditions costs, overhead and fee, are deemed to be included in the original Contract Price, and are not subject to adjustment, regardless of the actual amount of the Allowance Item.

6.4.5 Whenever the actual costs for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.4.4 and also subject to Article 10 of the DBIA Document No. 535, Standard Form of General Conditions of Contract between Owner and Design-Builder. The amount of the Change

Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

6.5 Non-Reimbursable Costs.

6.5.1 The following shall not be deemed as costs of the Work:

6.5.1.1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.3.1, 6.3.2 and 6.3.3 hereof.

6.5.1.2 Overhead and general expenses, except as provided for in Section 6.2 and 6.3 hereof, or which may be recoverable for changes to the Work.

6.5.1.3 The cost of Design-Builder's capital used in the performance of the Work.

6.5.1.4 If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.

6.6 The Guaranteed Maximum Price ("GMP").

6.6.1 GMP Established Upon Execution of this Agreement.

6.6.1.1 GMP. Design-Builder guarantees that it shall not exceed the GMP of \$178,750, subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price or GMP. The GMP and a list of the documents used as a basis for the GMP are identified in the GMP Proposal, which is included at Exhibit 3. The only exception to the Guaranteed Maximum Price will be for changes directed by the Owner in writing that exceed the scope of the Project. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Design-Builder without reimbursement by the Owner.

6.6.1.2 Contingency. The GMP includes a Contingency in the amount of Dollars (\$ 5,000) which is available for Design-Builder's exclusive use for costs that the Design-Builder could not have foreseen or anticipated through the exercise of reasonable diligence at the time the GMP was submitted. The Design-Builder shall not use the Contingency for correction of defective, damaged or non-conforming Work, or design errors or omissions, however caused, and shall not use the Contingency to accelerate the Work if such acceleration was necessary to meet the completion dates as a result of Design-Builder's failure to timely perform its Work. Except as provided in Section 6.6.1.2.2, the Contingency is not available to Owner for increasing the scope of the Project. Design-Builder shall provide Owner prior notice of all anticipated charges against the Contingency, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months.

6.6.1.2.1 The Design-Builder shall use the Contingency before using any amounts from the Savings.

6.6.1.2.2 Any unused portion of the Contingency upon Final Payment shall be reallocated to the Savings and added to the remaining balance of the Savings.

6.6.1.2.3 The use of the Contingency by the Design-Builder is subject to open book pricing in accordance with Paragraph 7.5 of this Agreement.

6.6.2 Savings. The Savings is the difference between the GMP and Contract Price.

6.6.2.1 Except as provided in this Article, the Savings may be used by the Design-Builder for unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents.

6.6.2.2 Design-Builder shall not use the Savings for correction of defective, damaged or nonconforming Work, or design errors or omissions, however caused, and shall not use the Savings to accelerate the Work if such acceleration was necessary to meet the completion dates as a result of Design-Builder's failure to timely perform its Work.

6.6.2.3 Design-Builder shall not use the Savings until after the Design-Builder has expended the full amount of the Contingency.

6.6.2.4 Design-Builder shall provide Owner notice of all anticipated charges against the Savings, and shall provide Owner as part of the monthly status report required by Section 2.1.2 of the General Conditions of Contract an accounting of the Savings, including all reasonably foreseen uses or potential uses of the Savings in the upcoming three (3) months.

6.6.2.5 The use of the Savings by the Design-Builder is subject to open book pricing in accordance with Paragraph 7.5 of this Agreement

6.6.3 Shared Savings.

6.6.3.1 If the Contract Price is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference shall be shared (the "Shared Savings") as follows:

[Choose one of the following:]

Fifty percent (50%) to Design-Builder and Fifty percent (50%) to Owner.

or

The first _____ Dollars (\$ _____) of Savings shall be provided to Owner _____, with the balance of Savings, if any, shared _____ percent (_____ %) to Design-Builder and _____ percent (_____ %) to Owner.

6.6.3.2 Shared Savings earned will be distributed to the Owner at Substantial Completion of the overall Project by deductive change order to the Guaranteed Maximum Price. Fifty percent (50%) of the savings earned by the Design-Builder at the time of Substantial Completion of the entire Project will be paid to the Design-Builder within thirty (30) days of the Owner's acknowledgement of the completion of all required punch list work and receipt of all required Project documentation. The balance of the Design-Builder's share of savings, as adjusted by the reallocation of any unused Contingency to the Savings, will be distributed when the Project is 100% closed out as determined by the Owner.

Article 7

Procedure for Payment

7.1 Progress Payments.

7.1.1 Progress Payments shall be submitted in accordance with Article 6 of the DBIA 535 Standard Form of General Conditions of Contract between Owner and Design-Builder, as modified.

7.1.2 The amount of Design-Builder's Fee in Section 6.2.1 to be included in Design-Builder's monthly Application for Payment and paid by Owner shall be proportional to the percentage of the Work completed, less payments previously made on account of Design-Builder's Fee.

7.1.3 The Design-Builder will supply the Owner's Representative with all information necessary for the Owner to verify the amounts due to the Design-Builder, including but not limited to daily job logs, employee time records, internal job cost reports, original invoices for materials and equipment and documents showing that the Design-Builder has paid for such materials and equipment, and so as to verify that amounts due laborers, Subcontractors, and Sub-Subcontractors have been paid to them. The failure to provide such information shall be justification for withholding payment to the Design-Builder.

7.1.4 The Owner intends to conduct audits of the Design-Builder's records regarding the Project at times to be determined by the Owner.

7.2 Retainage on Progress Payments.

7.2.1 The Owner will withhold retainage in accordance with Ohio Revised Code Section 153.12.

7.3 **Final Payment.** Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment (less any amount the parties may have agreed to set aside for warranty work) within thirty (30) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract.

7.4 Not Used.

7.5 **Record Keeping and Finance Controls.** Design-Builder acknowledges that this Agreement is to be administered on an "open book" arrangement relative to Costs of the Work. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of ten (10) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit from time-to-time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of ten (10) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by the Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit. In addition, Design-Builder shall keep and maintain all

Project records of every type in a readily retrievable electronic format compatible with Owner's software for a period of ten (10) years after Final Payment. Alternatively, such records may be produced to Owner in a format acceptable to Owner at the time of Final Payment. Design-Builder shall provide Owner with a form of receipt for such records at the time of their delivery and the burden shall be on the Design-Builder to produce such receipt in the event of a dispute over the delivery of such records.

Article 8

Termination for Convenience

8.1 Upon three business days written notice to Design-Builder, the Owner may, without cause and without prejudice to any other right or remedy of the Owner, terminate the Agreement. Such termination shall be effective as of the date stated in the written notice. In such case, Design-Builder shall be paid for (without duplication of any items):

1. completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work; and
2. expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses.

8.2 Design-Builder shall not be paid on account of loss of anticipated overhead, profits or revenue or other economic loss arising out of or resulting from such termination.

8.3 Design-Builder shall require similar provisions contained in Article 8 in each of its subcontracts to protect Design-Builder from claims by Design Consultant, Design Sub-Consultant, Subcontractors and Sub-Subcontractors arising from the Owner's termination for convenience, or to minimize claims by such Design Consultant, Design Sub-Consultant, Subcontractors and Sub-Subcontractors. The remedy provided to Design-Builder under this Article 8 shall be the Design-Builder's sole remedy in the event of termination for convenience by the Owner.

8.4 If Owner terminates this Agreement pursuant to Section 8.1 above and proceeds to design and construct the Project through its employees, agents or third parties, Owner's rights to use the Instruments of Service shall be as set forth in Article 4 hereof.

Article 9

Representatives of the Parties

9.1 Owner's Representative ("Criteria Engineer").

9.1.1 Owner designates Scott Brunka, P.E. as its Criteria Engineer. The Criteria Engineer shall only have such authority as is authorized by the Owner's Board and as is permitted under the laws of the State of Ohio.

9.2 Design-Builder's Representatives.

9.2.1 Design-Builder designates the individuals listed below as its Senior Representative(s) and Key Personnel:

Design-Builder's Senior Representative: Chris Ruff

Design-Builder's Lead Engineer of Record: Brian Tornes, P.E.

Design-Builder's Lead Structural Designer: N/A

Design-Builder's Lead Mechanical Designer: N/A

Design-Builder's Lead Electrical Designer: N/A

Design-Builder's Lead Estimator: Chris Ruff

Design-Builder's Construction Project Manager: Chris Ruff

9.2.2 Design-Builder designates the individual listed above as its Design-Builder's Senior Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract.

9.2.3 The Design-Builder shall not replace any of the representatives listed above without the prior consent of the Owner's Representative while such representative is employed by the Design-Builder, except with another representative who is satisfactory to the Owner's Representative. If the Design-Builder proposes to change the representative, the Design-Builder shall submit to the Owner's Representative a written request for the change, including the justification for the change and the name and qualifications for the proposed replacement. The Design-Builder shall provide promptly any related additional information the Owner requests.

Article 10

Bonds and Insurance

10.1 Insurance. Design-Builder and Owner shall procure the insurance coverage(s) set forth in Article 5 of the General Conditions of Contract. All insurance provided on the Project shall designate the Owner as an additional insured and shall not contain any exemption from coverage for claims between insured..

10.2 Bonds and Other Performance Security. Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security:

Performance Bond.

Required (as noted below) Not Required

Payment Bond.

Required (as noted below) Not Required

Design-Builder shall provide a separate payment and performance bond from all Subcontractors and Sub-Subcontractors performing construction services on the Project in the forms specified in Exhibit 2. Design-Builder shall ensure that the Owner is listed as a co-obligee on all performance bonds and payment bonds obtained from Subcontractors and Sub-Subcontractors on the Project.

Article 11

Other Provisions

11.1 Other provisions, if any, are as follows: *(Insert any additional provisions)*

11.1.1 LIMITATION ON LIABILITY. The Owner's cumulative total liability, including the payments previously made to the Design-Builder, under this Agreement shall be limited to the amount set forth in the Fiscal Officer's certificate accompanying this Agreement. Under no circumstances will the elected officials, employees, board members, or agents of the Owner be personally liable for any obligations or claims arising out of or related to this Agreement or the Project.

11.1.2 MODIFICATION. No modification or waiver of any of the terms of this Agreement or of any other Contract Documents will be effective against the Owner unless set forth in writing and signed by or on behalf of the Owner. In the case of the Owner, the person executing the modification or waiver must have express authority to execute the Modification on behalf of the Owner pursuant to a resolution that is duly adopted by the Owner. Under no circumstances will forbearance, including the failure or repeated failure to insist upon compliance with the terms of the Contract Documents, constitute the waiver or modification of any such terms by the Owner. The parties acknowledge that no person has authority to modify this Agreement or the other Contract Documents or to waive any of its or their terms, except as expressly provided in this paragraph.

11.1.3 ASSIGNMENT. The Design-Builder may not assign this Agreement without the written consent of the Owner, which the Owner may withhold in its sole discretion.

11.1.4 LAW AND JURISDICTION. All questions regarding the validity, intention, or meaning of this Agreement or any modifications of it relating to the rights and obligation of the parties will be construed and resolved under the laws of the State of Ohio. Any suit, which may be brought to enforce any provision of this Agreement or any remedy with respect hereto, shall be brought in the Common Pleas Court where the Project is located and each party hereby expressly consents to the exclusive jurisdiction of such court. The parties hereby waive any right that they may have to remove any action related to this agreement to Federal court.

11.1.5 CONSTRUCTION. The parties acknowledge that each party has reviewed this Agreement and the other Contract Documents and voluntarily entered into this Agreement. Accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be employed in the interpretation of this Agreement, the other Contract Documents, or any amendments or exhibits to it or them.

11.1.6 APPROVALS. Except as expressly provided herein, the approvals and determinations of the Owner will be subject to the sole discretion of the Owner and be valid and binding on the Design-Builder, provided only that they be made in good faith, i.e., honestly. If the Design-Builder challenges any such approval or determination, the Design-Builder will have the burden of proving that it was not made in good faith by clear and convincing evidence.

11.1.7 PARTIAL INVALIDITY. If any term or provision of this Agreement is found to be illegal, unenforceable, or in violation of any laws, statutes, ordinances, or regulations of any public authority having jurisdiction, then, notwithstanding such term or provision, this Agreement will remain in full force and effect and such term will be deemed stricken; provided this Agreement will be interpreted, when possible, so as to reflect the intentions of the parties as indicated by any such stricken term or provision.

11.1.8 COMPLIANCE WITH LAWS AND REGULATIONS. The Design-Builder, at its expense, will comply with all applicable federal, state, and local laws, rules, and regulations applicable to the Work, including but not limited to Chapter 4115 of the Revised Code and Sections 153.59 and 153.60 of the Ohio Revised Code, which prohibit discrimination in the hiring and treatment of employees, with respect to which the Design-Builder agrees to comply and to require its Subcontractors to comply. The Design-Builder shall also comply with all federal, state, and local laws, rules, and regulations applicable to the construction of court house facilities, including any applicable safety and security laws and regulations.

11.1.8.1 NON-DISCRIMINATION. Design-Builder agrees:

- .1 That in the hiring of employees for the performance of Work under this Agreement or in any subcontract, neither the Design-Builder, Design Consultant, Subcontractor, Design Sub-Consultant, Sub-Subcontractor nor any person acting for any of them, shall, by reason of race, creed, sex, disability as defined in Section 4112.01 of the Revised Code, or color, discriminate against any citizen of the state in the employment of labor or workers who are qualified and available to perform the Work to which the employment relates.
- .2 That neither the Design-Builder, Design Consultant, Subcontractor, Design Sub-Consultant, Sub-Subcontractor nor any person acting on behalf of them, shall, in any manner, discriminate against or intimidate any employee hired for the performance of Work under this Agreement on account of race, creed, sex, disability as defined in Section 4112.01 of the Revised Code, or color.
- .3 That there shall be deducted from the amount payable to the Design-Builder by the Owner under this Agreement a forfeiture of twenty-five dollars (\$25.00) as required by Ohio Revised Code Section 153.60 for each person who is discriminated against or intimidated in violation of this Agreement.
- .4 That this Agreement may be canceled or terminated by the Owner and all money to become due hereunder may be forfeited for a second or subsequent violation of the terms of this section of this Agreement.

11.1.9 PREVAILING WAGE RATES. The Design-Builder and its Design Consultants, Subcontractors, Design Sub-Consultants, Sub-Subcontractors, regardless of tier, shall strictly comply with their obligation to pay their employees working on the Project site at the applicable prevailing wage rates for the type of work. The Design-Builder shall adjust and shall require its Design Consultants, Subcontractors, Design Sub-Consultants, Sub-Subcontractors, regardless of tier, to adjust the wage rates to conform to the current rates if the applicable wage rates change prior to completion of the Work, without increase in the Contract Sum. With each Application for Payment, Design-Builder and all Design Consultants, Subcontractors, Design Sub-Consultants, Sub-Subcontractors shall provide a properly completed Affidavit of Design-Builder or Subcontractor Prevailing Wage. The Prevailing Wage Determination Cover Letter is attached as Exhibit 13.

11.1.10 ETHICS. By signing and entering into this Agreement with the Owner, the Design-Builder represents that it is familiar with all applicable ethics law requirements, including without limitation Sections 102.04 and 3517.13 of the Ohio Revised Code and certifies that it is in compliance with such requirements. The Design-Builder understands that failure to comply with the ethics laws is, in itself, grounds for termination of this contract and may result in the loss of other contracts with the Owner.

11.1.11 PROPERTY TAX AFFIDAVIT. The Design-Builder's affidavit given under Section 5719.042, Ohio Revised Code, is incorporated herein.

11.1.12 ENTIRE AGREEMENT. This Agreement and the other Contract Documents, including but not limited to DBIA Document No. 520, as modified, constitute the entire agreement among the parties with respect to their subject matter and will supersede all prior and contemporaneous, oral or written, agreements, negotiations, communications, representations, and understandings with respect to such

subject matter, and no person is justified in relying on such agreements, negotiations, communications, representations, or understandings.

11.1.13 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Design-Builder. However, it is understood that the Owner is an intended third-party beneficiary of Design-Builder's agreements with the Design Consultants, and Subcontractors, and Consultants' and Subcontractors' agreements their Design Sub-Consultants, and Sub-Subcontractors. The Design-Builder shall incorporate the obligations of this Agreement into its respective agreements and subcontracts.

11.1.14 Design-Builder's Duties in General. The Design-Builder acknowledges that the Owner is entering this Agreement in reliance on the Design-Builder's abilities to perform the design services requested under this Agreement on a timely basis. To the extent that any service hereunder shall be performed by consultants retained by the Design-Builder, the term "Design-Builder" as used in this Agreement shall be deemed to include any such consultant.

11.1.15 The Design-Builder acknowledges it will use its best professional skill and judgment to coordinate the design of the Project in order to (i) minimize disruption of the adjacent Owner's operations, and (ii) to ensure that the Project is coordinated as to phasing, timing, staging, design, and execution.

11.1.16 The Design-Builder's duties and obligations, as set forth herein, and any liabilities arising hereunder shall at no time be diminished or released by reason of any approval by the Owner of the Drawings and Specifications or any other documents prepared by the Design-Builder.

11.1.17 The Design-Builder, consistent with the applicable standard of care and professional skills, agrees that materials and equipment specified shall be adequate for the purposes for which they are specified.

11.1.18 The Design-Builder's services shall include services to investigate existing conditions and facilities or to make measured drawings thereof and other related services to verify the accuracy of drawings and any other information furnished by the Owner. The Design-Builder shall be responsible for reviewing and confirming information provided by the Owner to the extent that it is an integral part of the Project. The Design-Builder shall use reasonable diligence in confirming information supplied by the Owner.

11.1.19 The Design-Builder shall indemnify and hold harmless the Owner for all damages, losses, attorney fees or claims which the Owner sustains resulting from any breach of contract, negligent act, error, omission or failure to exercise reasonable care, skill or diligence on the part of the Design-Builder, its employees, its agents, or its Design Consultants, Subcontractors, Design Sub-Consultants and Sub-Subcontractors of any tier, respecting the performance of any Work or service in connection with the Project.

11.1.20 Consistent with its standard of care, the Design-Builder shall endeavor to anticipate problems related to zoning, building permits, availability of utilities, equipment and material shortages, and supplier delays and to take steps to address such issues while providing timely written notification to Owner of such issues.

11.1.21 Counterparts. This Agreement may be executed in any number of counterparts each of which when so executed and delivered will be an original hereof, and it will not be necessary in making proof of this Agreement to produce or account for more than one counterpart hereof. This Agreement may be executed and delivered by facsimile or via electronic mail.

11.1.22 The Design-Builder owes a duty of trust and confidence to the Owner in the performance of all duties and obligations under this Agreement.

11.1.23 Cooperative Purchasing Programs. The Owner participates in various cooperative purchasing programs, including the program administered by the Ohio Department of Administrative Services. To the

extent possible, the Design-Builder shall purchase items which are available through one of the cooperative purchasing program in which the Owner participates unless the Design-Builder can demonstrate that it can receive more competitive pricing by other means permitted under the Contract Documents. The Design-Builder shall include provisions within the contracts with its Design Consultants and Subcontractors which require the Design Consultants and Subcontractors to purchase items through one of the cooperative purchasing programs to the same extent required of the Design-Builder. The Owner will provide the Design-Builder with information related to the cooperative purchasing programs.

11.1.24 DESIGN-BUILDER'S PLEDGE. The Design-Builder acknowledges that this is a public project involving public funds and that the Owner expects and requires the Design-Builder to adhere to the highest ethical and performance standards. The Design-Builder pledges and agrees that (a) it will act at all times with absolute integrity and truthfulness in its dealings with the Owner and the Criteria Architect, (b) it will use its best efforts to cooperate with the Owner and at all times will act with professionalism and dignity in its dealings with the Owner, (c) it will assign only competent supervisors, designers and workers to the Project, each of whom is fully qualified to perform the tasks that are assigned to him/her, and (d) it has read, understands and will comply with the terms of the Contract Documents.

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

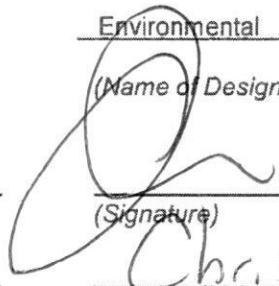
OWNER:

DESIGN-BUILDER:

City of Lebanon, Warren County, Ohio
Solutions
(Name of Owner)

Environmental Remediation Contractors
(Name of Design-Builder)


(Signature)


(Signature)

Scott Brunka
(Printed Name)

Chris McGovern
(Printed Name)

City Manager
(Title)

CEO
(Title)

Date: 10/31/14

Date: 10/11/18

Approved as to Form

Mark Yurick, Esq.
City Attorney
Lebanon, Ohio



CERTIFICATE

(Section 5705.41, R.C.)

The undersigned, Fiscal Officer of City of Lebanon, Ohio, hereby certifies that the moneys required to meet the obligations of the County during the current fiscal year, under the attached Agreement for the services indicated herein have been lawfully appropriated for those purposes and are in the appropriate account of the County, or in the process of collection to the credit of the appropriate account or fund, free from any previous encumbrances.

DATED: 11/5/2018

City of Lebanon
Warren County, Ohio

By:



Fiscal Officer