

BILL NO. S-11-12-19

SPECIAL ORDINANCE NO. S-_____

AN ORDINANCE approving CONSTRUCTION CONTRACT FOR THREE RIVERS FILTRATION PLANT (TRFP) UV DISINFECTION PROJECT (COST-PLUS) AND (GUARANTEED SAVINGS CONTRACT) between KOKOSING CONSTRUCTION COMPANY and the City of Fort Wayne, Indiana, in connection with the Board of Public Works.

NOW, THEREFORE, BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF FORT WAYNE, INDIANA:

SECTION 1. That the CONSTRUCTION CONTRACT FOR THREE RIVERS FILTRATION PLANT (TRFP) UV DISINFECTION PROJECT (COST-PLUS) AND (GUARANTEED SAVINGS CONTRACT) by and between KOKOSING CONSTRUCTION COMPANY and the City of Fort Wayne, Indiana, in connection with the Board of Public Works, is hereby ratified, and affirmed and approved in all respects, respectfully for:

All labor, insurance, material, equipment, tools, power, transportation, miscellaneous equipment, etc., necessary for Construction of potable water facilities including sitework, yard piping, structural, architectural, process-mechanical pumping equipment, gate equipment, and piping plumbing, heating, ventilation, air conditioning, electrical, and instrumentation and control. Structural work for new structures and buried piping includes bored cast-in-place concrete pile foundation;

involving a total cost of NINETEEN MILLION, TWO HUNDRED THIRTY-SIX THOUSAND, THREE HUNDRED TEN AND 00/100 DOLLARS (\$19,236,310.00).

SECTION 2. Prior Approval has been requested from Common Council on DECEMBER 13, 2011. Said copy is on file in the Office of the City

1 Clerk and made available for public inspection, according to law.

2 **SECTION 3.** That this Ordinance shall be in full force and effect
3 from and after its passage and any and all necessary approval by the Mayor.
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Council Member

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10 APPROVED AS TO FORM AND LEGALITY

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Carol Helton, City Attorney
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AGREEMENT BETWEEN
BOARD OF PUBLIC WORKS OF THE CITY OF FORT WAYNE, INDIANA
AND KOKOSING CONSTRUCTION COMPANY

FOR
THREE RIVERS FILTRATION PLANT (TRFP) UV DISINFECTION PROJECT
FOR CONSTRUCTION CONTRACT (COST-PLUS)
(GUARANTEED SAVINGS CONTRACT)

Resolutions 2304-2010

Work Orders 65942

THIS AGREEMENT is by and between the Board of Public Works of the City of Fort Wayne, Indiana
("Owner") and Kokosing Construction Co., Inc. ("Contractor").

Owner and Contractor, in consideration of the mutual covenants hereinafter set forth, agree as follows:

ARTICLE 1 – WORK

- 1.01 Contractor shall complete all Work as specified or indicated in the Contract Documents. The Work is specifically described in the plans, specifications and other Contract Documents and can be generally described as follows:

See Exhibit A to this Agreement.

ARTICLE 2 – THE PROJECT AND Guaranteed Savings Representations, Warranties, Guarantees and Covenants

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

Three Rivers Filtration Plant UV Disinfection Project is comprised of two parts. One part relates to disinfection improvements (referred to herein as "Part A" or "Part A – Disinfection Improvements") and the other part relates to reservoir improvements (referred to herein as "Part B" or "Part B – Reservoir Improvements").

- 2.02 As to guaranteed savings representations and warranties, Contractor hereby represents and warrants to Owner that:

A. The installation of UV disinfection equipment (i.e., Part A of the Project) is a technology upgrade to the Owner's existing disinfection system at the Three Rivers Filtration Plant that constitutes a "conservation measure," as that term is defined in Indiana Code section 36-1-12.5-1 (the "Conservation Measure");

- B. That this Agreement is a "guaranteed savings contract," as that term is defined in Indiana Code section 36-1-12.5-2(2);
- C. Contractor is a "qualified provider," as that term is defined in Indiana Code section 36-1-12.5-3(a)(2) and (3);
- D. the reservoir improvements (i.e., Part B of the Project) is either a part of the Conservation Measure or is "causally connected work," as that term is defined in Indiana Code section 36-1-12.5-0.7; and
- E. Contactor has issued a report containing all data and information required by Indiana Code section 36-1-12.5-6.

2.03 Contractor hereby further represents and warrants to Owner that the Project will result in energy savings in the total amount of \$35,000 and operational savings in the total amount of \$24,738,930 (the "Total Operational Savings") during the first ten (10) years following completion and Owner's acceptance of the Conservation Measure, pursuant to Section 16.07 hereof (the "Guarantee Period"), and Contractor guarantees that such total savings in the amount of \$24,773,930 (the "Total Guaranteed Savings") will exceed the Owner's total cost of the Project. A summary of the Total Guaranteed Savings and associated calculations are set forth in Exhibit C attached hereto and incorporated herein by this reference.

2.04 Owner and Contractor acknowledge and agree that the operational savings are comprised of repair and maintenance operational savings and savings from avoided operational capital expenditures. Owner and Contractor further acknowledge and agree that the actual savings from avoided operational capital expenditures is \$23,365,376, as determined by industry engineering standards (the "Capital Operational Savings"), and the Capital Operational Savings is to be allocated in equal amounts across each year of the Guarantee Period for the purposes of calculating the total annual savings to Owner from the Conservation Measure (see Table 3 of Exhibit C).

If, at the end of any year during the Guarantee Period, the Conservation Measure fails to achieve the annual guarantee of energy or repair and maintenance operational savings or capital operational savings set forth in Table 1 of Exhibit C (each an "Annual Savings Guarantee" and collectively, the "Annual Savings Guarantees"), Contractor agrees to pay Owner the difference between such Annual Savings Guarantee(s) and the corresponding actual savings for such year. Any payment owed by Contractor to Owner pursuant to the preceding sentence (a "Guarantee Payment") shall be paid within ninety (90) days of the end of each applicable year. Any energy or repair and maintenance operational savings that is achieved by Owner prior to the completion and Owner's acceptance of the Conservation Measure will be added to the actual annual energy and repair and maintenance operational savings, as applicable, achieved during the first year of the Guarantee Period for the purpose of determining any amount owed by Contractor to Owner under this Section 2.04. Contractor and Owner also agree that if the amount of actual annual energy or repair and maintenance operational savings exceeds the corresponding Annual Savings Guarantee for a given year, such excess actual annual savings amount will be added to the actual annual savings amount achieved during the following year.

Contractor further agrees that Owner shall have the option to make a claim against the Performance Bond for any Guarantee Payment arising from the first year of the Guarantee Period. The foregoing right of Owner to make a claim against the Performance Bond shall in no respect limit or restrict Owner's right to obtain such Guarantee Payment directly from Contractor or pursue any remedies that may be available to Owner in the event of Contractor's failure to remit such Guarantee Payment to Owner. For any Guarantee Payment arising after the first year of the Guarantee Period, Owner shall look solely to Contractor for payment. Notwithstanding any other provision of this Contract or the bonds, except for the one year guarantee payment of the performance bond arising from the first year of the Guarantee Period, in no event and in no manner shall coverage under the Performance Bond and Payment Bond extend to Exhibit C Performance Guarantee Agreement, or any related provisions.

- 2.05 Pursuant to Indiana Code section 36-1-12.5-5(d)(3), Contractor guarantees that the savings in energy costs and other operating costs due to the Conservation Measure will cover the costs of the payments for the Conservation Measure and Contractor will reimburse Owner for the difference between the guaranteed energy and operational savings and the actual savings as set forth in Section 2.04 hereof.
- 2.06 Owner and Contractor further stipulate and agree that (a) the Total Guaranteed Savings shall be considered fully satisfied upon Contractor's i) completion of all actions required under Indiana Code section 36-1-12.5 et. seq., ii) fulfillment of all its obligations under this Article 2 and iii) receipt of a written guaranteed savings release executed by Owner; and (b) the Total Guaranteed Savings will be realized over a period of ten (10) years following completion and Owner's acceptance of the Conservation Measure, which term of years the Contractor hereby represents is less than the average life of the Conservation Measure.
- 2.07 Contractor hereby covenants and agrees, pursuant to Indiana Code sections 36-1-12.5-6 and -10 to:
- A. issue a report, prior to commencement of any Work, that includes the following:
1. all costs attributable to the Work, including the costs of design, engineering, installation, maintenance, repairs and debt service;
 2. the amount by which energy and operating costs will be reduced;
 3. the amount by which billable revenues will be increased; and
 4. a list of contractors and subcontractors to be used by Contractor with respect to the Conservation Measure.
- B. provide to the governing body of Owner for provision to the Lieutenant Governor of Indiana, not more than sixty (60) days after the date of execution of this Agreement, the following:
1. a copy of this executed Agreement;
 2. the energy costs of Owner's Three Rivers Filtration Plant before the date of execution of this Agreement; and
 3. the documentation using industry engineering standards for "related capital expenditures," as that term is defined in Indiana Code section 36-1-12.5-3.5.

- C. provide an annual report to the governing body of the Owner, for provision to the Lieutenant Governor of Indiana, that includes the previous year's energy and operational savings to Owner resulting from this Agreement.

ARTICLE 3 – ENGINEER AND DESIGNER

- 3.01 Part A – Disinfection Improvements section of the Project has been designed by Black & Veatch Corporation under a separate contract between Owner and Designer. Part B – Reservoir Improvements section of the Project has been designed by Donohue & Associates, Inc. under a separate contract between Owner and Designer. Throughout these Contract Documents, the term Engineer is used. Engineer is to act as Owner's representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents. Black & Veatch Corporation and Donohue & Associates, Inc., who are hereinafter called Designer in Part A and Part B, respectively, will consult with, advise, and assist the Engineer in connection with the completion of the Work in accordance with the Contract Documents. Owner will advise Contractor prior to issuance of Notice to Proceed as to who will serve as Engineer.

ARTICLE 4 – CONTRACT TIMES

4.01 *Time of the Essence*

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

4.02 *Dates and Days to Achieve Substantial Completion and Final Payment*

- A. Part A – Disinfection Improvements. The Work shall be substantially completed by the last day of June 2013, and completed and ready for final payment in accordance with Paragraph 14.07.B of the General Conditions on or before the last day of December 2013.
- B. Part B – Reservoir Improvements. The Work will be substantially completed within 546 days after the date when the Contract Times commence to run as provided in Paragraph 2.03 of the General Conditions, and completed and ready for final payment in accordance with Paragraph 14.07 of the General Conditions within 574 days after the date when the Contract Times commence to run.
- C. Definition of Substantial Completion in Article 1.01(A)(44) of the General Conditions is deleted and replaced with the following:

“Substantial Completion” means the facilities are complete to the point that water can be treated and disinfected, engine generator run, and no nuisance is created, to the satisfaction of Engineer. All process equipment shall be installed and operational or temporary arrangements satisfactory to Owner shall have been made. All performance testing shall be completed prior

to the date of Substantial Completion. All training shall be complete and all Operation and Maintenance manuals shall be approved prior to the date of Substantial Completion.

To be considered substantially complete, all work except that identified below, must be complete and operational and ready for Owner's continuous use as intended.

Portions of the Work not essential to plant operation, which can be completed without interruption of plant operation, may be completed after the Work is accepted as substantially complete, and may include the following items:

Restoration of existing Contractor's staging area.

Final Cleanup

4.03 *Liquidated Damages*

- A. Contractor and Owner recognize that time is of the essence as stated in Paragraph 4.01 above and that Owner will suffer financial loss if the Work is not completed within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty), and not including any damages, liquidated or otherwise, for failure to comply with any other requirements in the Contract Documents, Contractor shall pay Owner the following amounts for each day that expires after the time specified in Paragraph 4.02 for Substantial Completion until the Work is substantially complete. After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Times specified or any proper extension thereof granted by Owner, Contractor shall pay Owner the following amounts for each day that expires after the time specified in Paragraph 4.02 for completion and readiness for final payment until the Work is completed and ready for final payment.

<u>Item</u>	<u>Liquidated Damages, Per day</u>
Part A – Disinfection Improvements	
Substantial Completion of the Work	\$1,500.00
Completion of all Work	\$750.00
Part B – Reservoir Improvements	

Substantial Completion of the Work	\$1,500.00
Completion of all Work	\$750.00

- B. The liquidated damages set forth herein shall not be accumulative. If Substantial Completion of the Work is not met within the time specified for final completion of all Work, the liquidated damages shall continue to be at the rate or rates specified for default on Substantial Completion until Substantial Completion is attained. If the Work is not then finally completed, the rate or rates specified for default on final completion shall apply until final completion is attained.
- C. In case of delays in the completion of more than one section of the Contract, liquidated damages shall be assessed separately against Part A and Part B during the period of delay in the respective section.
- D. In case of joint responsibility for delay in the completion of the Work, where two or more separate contracts are in force at the same time and cover work at the same site, liquidated damages assessed against any one Contractor will be based upon the individual responsibility of that Contractor for the delay as determined by, and in the judgment of, Engineer.
- E. Owner shall have the right to deduct the liquidated damages from any money in its hands, otherwise due, or to become due, to Contractor, or to initiate applicable dispute resolution procedures and to recover liquidated damages for nonperformance of this Contract within the time stipulated. If any such money is insufficient to fully satisfy the liquidated damages to which the Owner is entitled, then Contractor shall pay to Owner that portion of the liquidated damages which remain after the unpaid balance of the Contract Price has been fully applied.
- F. Contractor acknowledges that it has received all necessary information required to perform, coordinate, sequence and schedule its obligations and duties to perform the Work under the Contract Documents and that the completion dates and times for the Contractor's performance, as set forth in the Contract Documents, are reasonable.

4.04 Delays and Damages.

- A. In the event Contractor is delayed less than thirty (30) days in the prosecution and completion of the Work because of any delays caused by Owner or Engineer and, except as set forth in Paragraph 4.01 of the General Conditions, Contractor shall have no claim against Owner or Engineer for damages or contract adjustment other than an extension of the Contract Times, and the waiving of liquidated damages during the period occasioned by the delay. In the event Contractor is delayed more than thirty (30) days in the prosecution and completion of the Work because of any delays caused by Owner or Engineer and, except as set forth in Paragraph 4.01 of the General Conditions, Contractor and Owner negotiate an adjustment to the contract in addition to an extension of the Contract Times, and the waiving of liquidated damages during the period occasioned by the delay.

4.05 Incentives.

- A. The Owner shall pay Contractor an incentive payment for Part A – Disinfection Improvements Work for early Substantial Completion of Work of \$1,000 for each day up to a maximum of \$60,000 based on the time specified in Paragraph 4.02.

ARTICLE 5 – CONTRACT PRICE

- 5.01 Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents an amount in current funds equal to the sum of the amounts determined pursuant to Paragraphs 5.01.A and 5.01.B, below:

- A. For all Work other than Unit Price Work, the Cost of the Work plus a Contractor's fee for overhead and profit, both of which shall be determined as provided in Articles 6 and 7 below, subject to additions and deletions as provided in the Contract Documents and subject to the limitations set forth in Article 8 below. The amount shall include Contractor's fees, work change allowance, construction contingency, the fees for acceptance of the assigned procurements, and the amounts of the assigned procurement contracts (less any payments made to the Procurement Contractor by Owner prior to the Effective Date of this Agreement) and less any unused portion of the work change allowance and construction contingency removed by Change Order prior to final payment in accordance with Paragraph 11.02 of the General Conditions and are listed in Exhibit B.
- B. For all Unit Price Work, an amount equal to the sum of the established unit price for each separately identified item of Unit Price Work times the actual quantity of that item as identified in the Contractor's Proposal.

The Bid prices for Unit Price Work set forth as of the Effective Date of the Agreement are based on estimated quantities. As provided in Paragraph 11.03 of the General Conditions, estimated quantities are not guaranteed, and determinations of actual quantities and classifications are to be made by Engineer as provided in Paragraph 9.07 of the General

Conditions. Unit prices have been computed as provided in Paragraph 11.03 of the General Conditions and are listed in Exhibit B.

ARTICLE 6 – COST OF THE WORK

6.01 Cost of the Work shall be determined as provided in Article 11 of the General Conditions and as further described in Exhibit B.

ARTICLE 7 – CONTRACTOR'S FEE

7.01 Contractor's fee shall be determined as follows:

- A. A fixed fee of \$1,385,000, which shall be subject to increases or decreases due to changes in the Work Change Allowance in accordance with Paragraph 12.01C in the General Conditions and for changes in the Work as provided in Paragraph 9.01.A below.

ARTICLE 8 – GUARANTEED MAXIMUM PRICE

8.01 Contractor guarantees that the maximum amount payable (Guaranteed Maximum Price) by Owner for the sum of the Cost of the Work plus Contractor's fee under Article 7 will not exceed \$19,236,310, subject to increases or decreases for changes in the Work.

ARTICLE 9 – CHANGES IN THE CONTRACT PRICE

9.01 The amount of any increases or decreases in Contractor's fee, in any Guaranteed Maximum Price, or in any guaranteed maximum fee which results from a Change Order shall be set forth in the applicable Change Order subject to the following:

1. If Contractor's fee is a fixed fee, any increase or decrease in the Contractor's fee resulting from net additions or decreases in the Cost of the Work shall be determined in accordance with Paragraph 12.01.C of the General Conditions.
2. Wherever there is a Guaranteed Maximum Price:
 - (a) In the case of net additions in the Work, the amounts of any increase in either Guaranteed Maximum Price shall be determined in accordance with Paragraph 11.01 through 11.02, inclusive, of the General Conditions.
 - (b) In the case of net deletions in the Work, the amount of any such decrease shall be determined in accordance with Paragraph 11.02.C of the General Conditions, and any Guaranteed Maximum Price shall be reduced by mutual agreement.

ARTICLE 10 – PAYMENT PROCEDURES

10.01 *Submittal and Processing of Payments*

- A. Contractor shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will indicate the amount of Contractor's fee then payable. Applications for Payment will be processed by Engineer as provided in the General Conditions.
- B. As payments are made by Contractor on the assigned procurement contracts in accordance with the Milestones specified in the Procurement Documents, Contractor shall include such payments as line items in Contractor's Applications for Payment.

10.02 *Progress Payments; Retainage*

- A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment as recommended by Engineer each month during construction as provided in Paragraphs 10.02.A.1 and 10.02.A.2 below. All such payments will be measured by the cost loaded Progress Schedule, the schedule of values established as provided in Paragraph 2.07.A of the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no schedule of values, as provided in the General Requirements.
- B. For Cost of Work: Progress payments on account of the Cost of the Work will be made:
 - (a) Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Engineer may determine or Owner may withhold, including but not limited to liquidated damages, in accordance with Paragraph 14.02 of the General Conditions:
 - (a) 95 percent Cost of Work completed (with the balance being retainage); and
 - (b) 95 percent of cost of materials and equipment not incorporated in the Work but are delivered, suitably stored, and accompanied by documentation satisfactory to Owner as provided in Paragraph 14.02 of the General Conditions (with the balance being retainage).
- C. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to 100 percent of the Work completed, less such amounts as Engineer shall determine in accordance with Paragraph 14.02.B.5 of the General Conditions and less 200 percent of Engineer's estimate of the value of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.
 - 1. For Contractor's fee: Progress payments on account of the Contractor's fee will be made as follows:

- (a) If Contractor's fee is a fixed fee, payments prior to Substantial Completion will be in an amount equal to 95 percent of such fee earned to the date of the approved Application for Payment (less in each case payments previously made on account of such fee) based on the progress of the Work measured by the schedule of values established as provided in Paragraph 2.07.B of the General Conditions (and in the case of Unit Price Work on the number of units completed), and upon Substantial Completion in an amount sufficient to increase total payments to Contractor on account of his fee to 100 percent of Contractor's fee. In the event there is no schedule of values the progress of the Work will be measured as provided in the General Requirements.

D. M.B.E./W.B.E. Good Faith Deposit.

1. The Board of Public Works will retain 5% of the total owing to insure Contractor's compliance with the M.B.E./W.B.E. Rider for Federally Funded Projects through the City of Fort Wayne attached to this contract. Payments to the Contractor are not to exceed 95% of the total contract amount until the Owner has verified the Contractor has made good faith efforts to attain the M.B.E./W.B.E. goal stipulated in the M.B.E/W.B.E. rider attached hereto.

E. Escrow Agreement.

1. If the contract is in excess of \$100,000, the contract will be subject to the standard Board of Public Works escrow agreement unless written notice is received from Contractor prior to execution of the Agreement stating that an Escrow Account is not desired. If an Escrow Account is not desired, then the Board of Public Works, in accordance with IC 36-1-12-14, shall hold the retainage and will not pay interest on the amounts of retainage that it holds. Contractor acknowledges that it does not desire the retainage to be held in an escrow account.

10.03 Final Payment

- A. Upon final completion and acceptance of the Work in accordance with Paragraph 14.07 of the General Conditions, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in said Paragraph 14.07.

ARTICLE 11 – INTEREST

- 11.01 All moneys not paid when due as provided in Article 14 of the General Conditions shall bear interest at the prime rate plus 1%.

ARTICLE 12 – CONTRACTOR'S REPRESENTATIONS

- 12.01 In order to induce Owner to enter into this Agreement, Contractor makes the following representations:
 - A. Contractor has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents.

- B. Contractor has visited the Site and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
- C. Contractor is familiar with and is satisfied as to all federal, state, and local Laws and Regulations that may affect cost, progress, and performance of the Work.
- D. Contractor has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or contiguous to the Site and all drawings of physical conditions relating to existing surface or subsurface structures at the Site (except Underground Facilities), if any, that have been identified in Paragraph SC-4.02 of the Supplementary Conditions as containing reliable "technical data," and (2) reports and drawings of Hazardous Environmental Conditions, if any, at the Site that have been identified in Paragraph SC-4.06 of the Supplementary Conditions.
- E. Contractor has considered the information known to Contractor; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, including any specific means, methods, techniques, sequences, and procedures of construction expressly required by the Contract Documents; and (3) Contractor's safety precautions and programs.
- F. Based on the information and observations referred to in Paragraph 12.01.E above, Contractor does not consider that further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract Documents.
- G. Contractor is aware of the general nature of work to be performed by Owner and others at the Site that relates to the Work as indicated in the Contract Documents.
- H. Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
- I. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
- J. In connection with the performance of Work under this Contract, Contractor agrees to comply with Anti-Discrimination Under Indiana Code Chapter 5-16-6-1 and be bound by Chapter 93.036, of the Code of the City of Fort Wayne, Indiana of 1974, passed by the Common Council of the City of Fort Wayne, Indiana as General Ordinance No. G-34-78 (as amended) on December 12th, 1978. Contractor shall file a Manpower Utilization Report for this project with the Compliance Office within ten (10) days after completion of the construction or upon request of the Office of Compliance.

ARTICLE 13 – ACCOUNTING RECORDS

13.01 Contractor shall keep such full and detailed accounts of materials incorporated and labor and equipment utilized for the Work consistent with the requirements of Paragraph 11.01.D of the General Conditions and as may be necessary for proper financial management under this Agreement. Subject to prior written notice, Owner shall be afforded reasonable access during normal business hours to all Contractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda, and similar data relating to the Cost of the Work and Contractor's fee. Contractor shall preserve all such documents for a period of three years after the final payment by Owner.

ARTICLE 14 – CONTRACT DOCUMENTS

14.01 *Contents*

A. The Contract Documents consist of the following:

1. This Agreement (pages 1 to 18, inclusive).
2. Performance bond
3. Payment bond
4. M.B.E. / W.B.E. Rider.
5. Insurance Certificate.
6. MBE/WBE Declaration Form.
7. Federal Davis/Bacon Wage Rates and Wage Rate Requirements.
8. Drug Policy Acknowledgement Form.
9. E-Verify Affidavit.
10. Bidder's List.
11. MBE/WBE Good Faith Efforts Worksheet.
12. OEE-1 Form.
13. OEE-2 Form.
14. General Conditions (pages 1 to 62, inclusive).
15. Supplementary Conditions (pages 1 to 55, inclusive).
16. Specifications as listed in the table of contents of the Project Manuals (enumerated as follows):

- (a) Contract Specifications, City of Fort Wayne, Three Rivers Filtration Plant, UV Disinfection Project, Part A – Disinfection Improvements.
 - (b) Contract Specifications, City of Fort Wayne, Three Rivers Filtration Plant, UV Disinfection Project, Part B – Reservoir Improvements.
- 17. Drawings with each sheet bearing the following general title: Three Rivers Filtration Plant UV Disinfection Project (enumerated as follows):
 - (a) Contract Drawings, City of Fort Wayne, Three Rivers Filtration Plant, UV Disinfection Project, Part A – Disinfection Improvements.
 - (b) Contract Drawings, City of Fort Wayne, Three Rivers Filtration Plant, UV Disinfection Project, Part B – Reservoir Improvements.
- 18. Addenda (numbers ___ to ___, inclusive).
- 19. Exhibits to this Agreement (enumerated as follows):
 - (a) Exhibit A - Scope of Work
 - (b) Exhibit B – Contract Pricing and Open Book Structure.
 - (c) Exhibit C - Performance Guarantee.
 - (d) Exhibit D - Support Services.
 - (e) Exhibit E - Project Completion Schedule.
- 20. The following which may be delivered or issued on or after the Effective Date of the Agreement and are not attached hereto:
 - (a) Notice to Proceed (pages ___ to ___, inclusive).
 - (b) Written Amendments
 - (c) Request for Quotation.
 - (d) Allowance Modifications.
 - (e) Work Change Directives.
 - (f) Change Orders.
 - (g) Field Orders.
- 21. Procurement Contract Documents.
- 22. State Board of Accounts Form No. 96 completed and submitted by Contractor.

- B. The documents listed in Paragraph 14.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 14.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in Paragraph 3.04 of the General Conditions.

ARTICLE 15 – PROCUREMENT CONTRACTS

15.01 *Procurement Contracts*

- A. The procurement contracts for the UV Disinfection Equipment and Reservoir Site Ductile Iron Piping will be assigned to Contractor by Owner, and Contractor will accept such assignment. Contractor assumes responsibility for the performance of each Procurement Contractor as a Subcontractor or Supplier; and for the work included in the procurement contracts. Notwithstanding this assignment and transfer, the guarantees and warranties specified in the procurement contracts are intended for the benefit of Owner and Contractor, and may be enforced by either party. Owner will provide Contractor with a conformed copy of the assigned contract after assignment of each contract. Contractor agrees to execute a form documenting the assignment.

ARTICLE 16 – MISCELLANEOUS

16.01 *Terms*

- A. Terms used in this Agreement will have the meanings stated in the General Conditions and the Supplementary Conditions.

16.02 *Assignment of Contract*

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

16.03 *Successors and Assigns*

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

16.04 *Severability*

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

16.05 *Business Addresses*

- A. The business address of Contractor given herein and the address of Contractor's office in the vicinity of the Work are both hereby designated as the places to which all notices, letters, and other communication to Contractor will be mailed or delivered. The address of Owner appearing herein is hereby designated as the place to which all notices, letters, and other communication to Owner shall be mailed or delivered. Either party may change its address at any time by an instrument in writing delivered to Engineer and to the other party.

16.06 *Completion and Inspection; Acceptance*

- A. Completion and inspection will be in accordance with the Specifications, Drawings, General Conditions, and Supplementary Conditions. In addition, Owner will not give Contractor notice of acceptance until Contractor has obtained all Approvals.

16.07 *Applicable State Laws Part of Contract – Conflict With Laws*

- A. This Contract shall include in its terms all of the applicable federal, state and local, and any provisions of this Contract, including the plans and specifications, which are a part of this Contract in conflict with laws of the State of Indiana, are hereby declared to be inoperative, but the invalidity of any part of this Contract shall in no way affect the validity of the remainder of this Contract insofar as permitted by law. Special attention of the parties hereto is called to the I.C. 5-16-5-1 et seq., as amended, I.C. 5-16-7-1 et seq., as amended, I.C. 36-1-12.5.1 et seq., as amended, and all requirements necessary to comply with the Indiana Finance Authority, State Revolving Fund Loan Program which, together with all other applicable laws, are part of the Contract.

16.08 *No Third Party Beneficiaries*

- A. Except where expressly stated in the Contract Documents, nothing contained in the Contract Documents is intended to, and nothing therein shall be interpreted to, confer rights or benefits on any person or entity not a party to this Agreement.

16.09 *Contractor's Certifications*

- A. Contractor certifies that it has not engaged in corrupt, fraudulent, collusive or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 15.05:

1. "corrupt practice" means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the bidding process or in the Contract execution;
2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;
3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

16.10 *Limitation of Liability*

- A. Notwithstanding any provision to the contrary herein, the parties hereto agree that in no event shall either party be liable to the other party for any indirect, special, consequential, incidental or punitive damages as a result of a breach of any provision of this Agreement or for any other claim of any kind arising out of or relating to this Agreement, whether in contract, in tort or otherwise. Notwithstanding any provision to the contrary herein, for all losses, damages, liabilities or expenses (including attorney's fees and costs), whether for indemnity or negligence, including errors, omissions or other acts, or willful misconduct, or based in contract, warranty (including any costs and fees for repairing, replacing or re-performing services or curing a breach hereof), or for any other cause of action (individually, a "Claim"; collectively, "Claims"), Contractor's liability, including the liability of its insurers, employees, agents, directors, and officers and all other persons for whom Contractor is legally responsible, shall not, to the maximum extent permitted by law, exceed in the cumulative aggregate with respect to all Claims arising out of or related to this Agreement, three (3) times the total amount of compensation paid to Contractor hereunder.

IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement. Counterparts have been delivered to Owner and Contractor. All portions of the Contract Documents have been signed or have been identified by Owner and Contractor or on their behalf.

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

OWNER:

City of Fort Wayne

By: _____

Title: Thomas C. Henry, Mayor

Board of Public Works

By: _____

Title: Robert P. Kennedy, Chairman

By: _____

Title: John Suarez, Member

By: _____

Title: Kumar Menon, Member

Attest: _____

Title: Victoria Edwards, Clerk

Address for giving notices:

CONTRACTOR:

Kokosing Construction Company, Inc.

By: Daniel B. Walker

Title: Sr. Vice President

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

Attest: Mark Nigo

Title: Assistant Secretary

Address for giving notices:

Kokosing Construction Co., Inc.

6235 Westerville Road, Suite 200

Westerville, Ohio 43081

License No.: N/A
(Where applicable)

CITY OF FORT WAYNE, INDIANA

Kokosing Construction Company, Inc.
(Vendor Name)

VENDOR DISCLOSURE STATEMENT RELATING TO:

- 1. FINANCIAL INTERESTS;**
- 2. POTENTIAL CONFLICTS OF INTERESTS;**
- 3. CURRENT AND PENDING CONTRACTS OR PROCUREMENTS**

Vendors desiring to enter into certain contracts with the City of Fort Wayne, Indiana (the "City") shall disclose their financial interests, potential conflicts of interest and current and pending contract or procurement information as set forth below.

The following disclosures by Vendors are required for all contracts with annual payments by the City in the amount of \$25,000 or more. Vendors shall disclose the financial interests, potential conflicts of interest and other contract and procurement information identified in Sections 1, 2 and 3 below as a prerequisite for consideration of an award of contract by the City. This Disclosure Statement must be completed and submitted together with Vendor's contract, bid, proposal, or offer.

A publicly traded entity may submit its current 10K disclosure filing in satisfaction of the disclosure requirements set forth in Sections 1 and 2 below.

Section 1. Disclosure of Financial Interest in Vendor

- a. If any individuals have either of the following financial interests in Vendor (or its parent), please check all that apply and provide their names and addresses (attach additional pages as necessary):

(i) Equity ownership exceeding 5% ☐

(ii) Distributable Income share exceeding 5% ☐

(iii) Not Applicable (If N/A, go to Section 2) ☒ (N/A)

Name: N/A

Name: N/A

Address: N/A

Address: N/A

- b. For each individual listed in Section 1a., show his/her type of equity ownership: sole proprietorship ☐ stock ☐ partnership interest ☐ units (LLC) ☐ other (explain) _____

- c. For each individual listed in Section 1a., show the percentage of ownership interest in Vendor (or its parent): ownership interest: _____ %

Section 2. Disclosure of Potential Conflicts of Interest (not applicable for vendors who file a 10K)

For each individual listed in Section 1a., check "Yes" or "No" to indicate which, if any, of the following potential conflict of interest relationships apply. If "Yes", please describe using space under applicable subsection (attach additional pages as necessary):

- a. City employment, currently or in the previous 3 years, including contractual employment for services.

Yes ☐ No ☒

- b. City employment of "Member of Immediate Family" (defined herein as: spouse, parent, child or sibling) including contractual employment for services in the previous 3 years. Yes _____ No. X
- c. Relationship to Member of Immediate Family holding elective City office currently or in the previous 3 years. Yes _____ No. X
- d. Relationship to Member of Immediate Family holding appointive City office currently or in the the previous 3 years Yes _____ No X

Section 3. DISCLOSURE OF OTHER CONTRACT AND PROCUREMENT RELATED INFORMATION

- a. Does Vendor have current contracts (including leases) with the City? Yes _____ No X
- b. If "Yes", identify each current contract with descriptive information including purchase order or contract reference number, contract date and City contact using space below (attach additional pages as necessary).
- c. Does Vendor have pending contracts (including leases), bids, proposals, or other pending procurement relationship with the City? Yes _____ No. X

If "Yes", identify each pending matter with descriptive information including bid or project number, contract date and City contact using space below (attach additional pages as necessary).

Section 4. CERTIFICATION OF DISCLOSURES

In connection with the disclosures contained in Sections 1, 2 and 3 Vendor hereby certifies that, except as described in attached Schedule A:

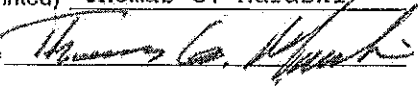
- a. Vendor (or its parent) has not, within the five (5) year period preceding the date of this Disclosure Statement, been debarred, suspended, proposed for debarment declared ineligible or voluntarily excluded from any transactions by any federal, state or local unit of government;
- b. No officer or director of Vendor (or its parent) or individual listed in Section 1a. is presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state or local) with commission of any offense;
- c. Vendor (or its parent) has not, within the five (5) year period preceding the date of this Disclosure Statement, had one or more public transactions (federal, state or local) terminated for cause or default;
- d. No officer or director of Vendor (or its parent) or individual listed in Section 1a. has, within the five

(5) year period preceding the date of this Disclosure Statement, been convicted, adjudged guilty, or found liable in any criminal or civil action instituted by the City, the federal or state government or any other unit of local government; and

- e. Neither Vendor, nor its parent, nor any affiliated entity of Vendor, or any of their respective officers, directors, or individuals listed in Section 1a. is barred from contracting with any unit of any federal, state or local government as a result of engaging in or being convicted of: (i) bid-rigging; (ii) bid-rotating; or (iii) any similar federal or state offense that contains the same elements as the offense of bid-rigging or bid-rotating.

The disclosures contained Sections 1, 2 and 3 and the foregoing Certifications are submitted by
6235 Westerville Road, Suite 200
Kokosing Construction Company, Inc. Westerville, Ohio 43081
(Name of Vendor) Address
(614) 212-5700
Telephone
jwr@kokosing.biz
E-Mail Address

The individual authorized to sign on behalf of Vendor represents that he/she: (a) is fully informed regarding the matters pertaining to Vendor and its business; (b) has adequate knowledge to make the above representations and disclosures concerning Vendor; and (c) certifies that the foregoing representations and disclosures are true and accurate to the best of his/her knowledge and belief.

Name (Printed) Thomas G. Muraski Title Vice President
Signature  Date December 5, 2011

NOTE: FAILURE TO COMPLETE AND RETURN THIS FORM WITH YOUR DOCUMENTATION MAY RESULT IN YOUR CONTRACT, OFFER, BID OR PROPOSAL BEING DISQUALIFIED FROM CONSIDERATION.

Interoffice Memo

Date: **December 8, 2011**
To: Common Council Members
From: Andrew Schipper, City Utilities Engineering
RE: **UV Disinfection Project**
Res. #2304-2010, W.O. #65942

The contractor shall furnish all labor, insurance, equipment, materials and power for the completion of the project:

“Three Rivers Filtration Plant UV Disinfection Project” as follows: Construction of potable water facilities including sitework, yard piping, structural, architectural, process-mechanical pumping equipment, gate equipment, and piping, plumbing, heating, ventilation, air conditioning, electrical, and instrumentation and control. Structural work for new structures and buried piping includes bored cast-in-place concrete pile foundation.

Implications of not being approved:

Time is of the essence. In accordance with the EPA Long Term 2 Enhanced Surface Water Treatment Rule we are to bring this project into full operation by December 2013.

If Prior Approval is being Requested, Justify:

Prior Approval is requested to avoid delays associated with possible canceled meetings in December.

Because of the complexities of the construction of this project at the water filtration plant site and the importance of construction sequencing in order to maintain operations of the plant during construction, Contractors were prequalified.

This project was advertised to contractors on June 17, 2011 and June 24, 2011 in the Fort Wayne Newspapers Journal Gazette and News-Sentinel.

We received two proposals in August and evaluated them on the following merits: Company qualifications and experience, project approach and implementation plan, local participation, financial approach, guarantee management, and proposal costs.

In August the Board of Public works awarded to Kokosing Construction Company, Inc. City Utilities Engineering then began the design build process for the planned upgrades to the facility and value engineering. Through the design build and value engineering processes, the original construction cost proposal from Kokosing was reduced by \$2.1M. The design is now complete, critical components of the design including

pipe and UV reactors are progressing, pricing negotiations are now complete, and the final contract negotiations are complete. The Board of Works signed the contract with Kokosing valued at \$19,236,310 on December 7, 2011.

The cost of said project funded by: 2011 Water SRF Bond.

Council Introduction Date: December 13, 2011

CC: BOW
Matthew Wirtz
Diane Brown
Chrono
File