

BILL NO. S-13-03-15

SPECIAL ORDINANCE NO. S-_____

AN ORDINANCE approving CONTRACT FOR
PRIMARY/SECONDARY TREATMENT AND
DIGESTER PROCESS UPGRADES PROJECT -
W.O. #75865 between KOKOSING
CONSTRUCTION COMPANY, INC. 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 CONTRACT FOR
PRIMARY/SECONDARY TREATMENT AND DIGESTER PROCESS
UPGRADES PROJECT - W.O. #75865 by and between KOKOSING
CONSTRUCTION COMPANY, INC. 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
Improvements to the Water Pollution Control Plant (WPCP)
that will consist of secondary clarifier modifications, digester
improvements, W.A. S. thickening upgrades, aeration basin
repair, and methane system improvements:

involving a total cost of TWENTY-SEVEN MILLION, SIX HUNDRED
TWENTY-THREE THOUSAND, NINE HUNDRED FIFTY-FIVE AND 00/100
DOLLARS - (\$27,623,955.00). A copy said Contract is on file with the Office
of the City Clerk and made available for public inspection, according to law.

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

Council Member

APPROVED AS TO FORM AND LEGALITY

Carol Helton, City Attorney

AGREEMENT BETWEEN
BOARD OF PUBLIC WORKS OF THE CITY OF FORT WAYNE, INDIANA
AND
KOKOSING CONSTRUCTION COMPANY, INC.
FOR
WATER POLLUTION CONTROL PLANT (WPCP) PRIMARY/SECONDARY
TREATMENT AND DIGESTER PROCESS UPGRADES PROJECT
FOR CONSTRUCTION CONTRACT (COST-PLUS)
(GUARANTEED SAVINGS CONTRACT)

Resolutions 75865

Work Orders 75865

THIS AGREEMENT is by and between the Board of Public Works of the City of Fort Wayne, Indiana
("Owner") and Kokosing Construction Company, 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 future final signed and sealed Contract Documents that will be completed by Designers of Record. The Work will be specifically described in the future final plans, specifications, and other Contract Documents.
- 1.02 The Scope and Summary of Work to be completed is described in Exhibit A to this Agreement.
- 1.03 Contractor shall collaborate and coordinate with Owner to prepare and execute subcontracts for professional services during construction and Programming/System Supplier.

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:

Water Pollution Control Plant Primary/Secondary Treatment and Digester Process Upgrades Project is comprised of the following Project Element Items.

- Item No. 1 - Chemically Enhanced Primary Treatment (not used)
- Item No. 2 - WPCP Floodwall (not used)
- Item No. 3 - Secondary Clarifier Hydraulic Improvements
- Item No. 4 - Digester #5 Improvements
- Item No. 5 - Aeration Basin Concrete Repair
- Item No. 6 - West Digester Complex Improvements

- Item No. 7 - Digested Sludge Pump Station
- Item No. 8 - WAS Thickening Improvements
- Item No. 9 - Methane Compression System Improvements
- Item No. 10 - Methane Utilization Phase 1

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

- A. The installation of applicable process equipment planned to be used to upgrade the Owner's Water Pollution Control Plant will constitute conservation measures as 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. Contractor will submit to Board of Public Works of the City of Fort Wayne, IN a report containing all data and information required by Indiana Code section 36-1-12.5-6, prior to installation of applicable process equipment.

2.03 Contractor hereby further represents and warrants to Owner that the Project will result in energy savings in the total amount of \$ 92,000 and operational savings in the total amount of \$ 34,023,800 (the "Total Operational Savings") during the first 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 \$ 34,115,800 (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 \$ 33,946,340, 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 Water Pollution Control 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 DESIGN ENGINEER

- 3.01 The firm of CH2MHILL, who is hereinafter called Engineer, will 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, during the construction phase, per GC-1.01A19.
- 3.02 The person or entity who has designed each Project element, who is hereinafter called Design Engineer (aka Designer); will consult with, advise, and assist the Engineer in connection with the completion of the Work in accordance with the Contract Documents, during the construction phase, per SC-GC-1.01A53.

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.
- B. Project Element Item No. 3 – Secondary Clarifier Hydraulic Improvements is required to be completed in a timely manner to meet the City's Consent Decree deadlines. Contractor shall receive 90% complete design documents for Project Element Item No. 3 and be issued a Project Element Notice of Release (Exhibit F) to start construction of Project Element Item No. 3 – Secondary Clarifier Hydraulic Improvements 30 days after NTP, to expedite completion of this work. Contractor, Owner, Engineer, and Design Engineer will expedite completion of clarifier design work to assure this work can be completed in a timely manner.
- C. Project Element Item No. 7 – Digested Sludge Pump Station; Contractor shall receive 90% complete foundation design documents for Project Element Item No. 7 and be released to start foundation construction of Project Element Item No. 7 – Digested Sludge Pump Station on or before August 1st, 2013.
- D. Project Element Items Numbers 4, 5, 6, remainder of 7 as not included in 4.01C above, 8, 9, and 10; Contractor acknowledges that individual project elements and phase start dates must be

coordinated and agreed upon with the Owner, Engineer, and Design Engineer; included on the Contractor's progress schedule; and managed by the Contractor on a monthly basis. Contractor shall receive 90% complete design documents for all elements and issued a Project Element Notice of Release (Exhibit F) for each Project Element on or before March 17th, 2014. Contractor, Owner, Engineer and Design Engineer will expedite completion of Project Element design documents to assure this work can be completed in a timely manner.

- E. Release dates for all critical equipment, materials, and other long lead items will be established by the Contractor, Owner, Engineer, and Design Engineer at the Project Schedule Workshop, to be held 60 days after NTP. The Contractor will be released, by the Engineer, to proceed with the procurement of these items on or before the dates established at 60 day Project Schedule Workshop.
- F. Contractor shall coordinate the following workshops with Owner and the Owner's representatives during the initial phases of the project to develop an overall Project Schedule, including major deliverables for all design efforts by Designers:
 - 1. Draft Progress Schedule Workshop: Participate in overall Project (all elements) schedule coordination meeting on or before 30 days after NTP. Review and coordinate Design Engineer's initial design schedules and incorporate into Contractor's draft (preliminary) progress schedule, by Project element, including 30%, 60%, 90% design workshop milestones.
 - 2. Project Schedule Workshop (60 days after NTP). Conduct overall Project (all elements) schedule coordination meeting on or before 60 days after NTP. Review and coordinate Design Engineer's design schedules and incorporate into Contractor's progress schedule, by Project element, including 30%, 60%, 90% design workshop milestones and timeline for all significant design and construction activities.

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

The Work shall be substantially completed by October 15, 2015 and completed and ready for final payment in accordance with Paragraph 14.07.B of the General Conditions on or before December 31, 2015.

- A. 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 completed to the point that plant upgrades properly operate as specified, to the satisfaction of Engineer. All process equipment shall be installed and operational or temporary arrangements satisfactory to Owner shall have been made. All system demonstrations and 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

- B. Project Substantial Completion includes all Project elements; however, Contractor acknowledges that individual project elements and phase milestones must be coordinated and agreed upon with the Owner, included on the Contractor's progress schedule, and managed by the Contractor on a monthly basis. The Owner and Contractor will agree to and establish a Substantial Completion date for project element item No. 3 Secondary Clarifier Hydraulic Improvements, at ninety percent design, said substantial completion date is anticipated to be on or before December 1, 2014 for purposes of earning project incentive payment. The Owner reserves the right to establish additional individual project element Substantial Completion dates, if necessary to coordinate with plant operations and NPDES permit compliance.

4.03 *Liquidated Damages*

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 4.02A 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.

- A. Contractor shall pay Owner the following amounts for each day that expires after the time specified in Paragraph 4.02 for Substantial Completion of the Work, until the Work is substantially complete.
1. \$2,000 for each day that expires from the 1st day to the 77th day after October 15, 2015; until the Work is substantially complete;
 2. \$7,500 for each day that expires beyond December 31, 2015; until the Work is substantially complete;
- B. Contractor shall pay Owner the following amounts for each day that expires after August 15, 2015 for Substantial Completion of Project Element No. 3 Secondary Clarifier Hydraulic Improvements, until the Work is substantially complete.
1. \$2,000 for each day that expires after August 15, 2015; until the Work is substantially complete;

- C. 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.
1. \$1,000 for each day that expires after December 31, 2015 for completion and readiness for final payment until the Work is completed and ready for final payment.
- D. 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.
- E. 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.
- F. 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.
- G. 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 early completion of project element item No. 3 Secondary Clarifier Hydraulic Improvements. Owner shall pay Contractor \$2,000 per day for every day the Work is substantially complete prior to the date established, per 4.02B; up to a maximum of \$60,000.
- B. The Owner shall pay Contractor an incentive payment for early completion of the Work. Owner shall pay Contractor \$2,000 per day for every day the Work is Substantially Complete prior to October 15, 2015; up to a maximum of \$60,000.

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, Owner 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 Owner 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 \$1,926,409, listed as "Provider / General Contractor Fee" in Exhibit B, which shall be subject to increases or decreases only due to changes in the Work as provided in Paragraph 9.01 below and in accordance with Paragraph 12.01C in the General Conditions.

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 \$27,623,955, per Exhibit B, subject to increases or decreases for changes in the Work. While Contractor guarantees the GMP as defined in the previous sentence, Contractor does not guarantee any specific line items comprising the GMP.

8.02 BASIS OF GUARANTEED MAXIMUM PRICE

The Contractor determined the GMP as a result of reviewing the Scope of Work described in Exhibit A (Scope and Summary of Work) and Exhibit B (Cost Tables) and the following:

- (A) Reviewing the documents including drawings and specifications, including all addenda, which were distributed by the Owner during the RFQ and RFP periods;
- (B) A list of the assumptions and clarifications made by the Contractor in the preparation of the GMP Proposal to supplement the information contained in the documents made available by Owner during the RFQ and RFP periods; however, Owner and Contractor agree that assumptions and clarifications will be further refined and agreed upon at 30%, 60%, and 90% design and cost estimating.
- (C) Owner's Allowances included in Exhibit B;
- (D) The Contract Times and provisions stated in ARTICLE 4 herein.
- (E) A statement of additional services for alternate prices included in Exhibit A, as applicable;
- (F) The Contractor's contingencies listed in Exhibit B (Cost Tables).

- 8.03 ESTABLISHING THE GMP. The parties acknowledge that the GMP in this Agreement was established based on preliminary or conceptual documents and information. The Owner and

Contractor agree and acknowledge that both are mutually responsible to require completion of the design for the Project in a manner that will support the GMP established in the contract.

- (A) Contractor will provide an interim budget at the thirty percent (30%) design stage. Owner shall be responsible for providing thirty percent (30%) complete design documents to Contractor. Upon receipt of the thirty percent (30%) complete design documents, Contractor shall within fourteen (14) days provide Owner a written budget of its estimate for construction, suggestions for design changes for both constructability and value and a construction schedule based on the current design. It shall be Owner's and Contractor's mutual responsibility to direct changes to revise the design and provide Contractor with a revised design to conform the project to budget unless construction contingency can be reduced to maintain project costs below the GMP.
 - (B) Contractor will provide an interim budget at the sixty percent (60%) design stage. Owner shall be responsible for providing sixty percent (60%) complete design documents to Contractor. Upon receipt of the sixty percent (60%) complete design documents, Contractor shall within fourteen (14) days provide Owner a written budget of its estimate for construction, suggestions for design changes for both constructability and value and a construction schedule based on the current design. It shall be Owner's and Contractor's mutual responsibility to direct changes to revise the design and provide Contractor with a revised design to conform the project to budget unless construction contingency can be reduced to maintain project costs below the GMP.
 - (C) Contractor will provide an interim budget at the ninety percent (90%) design complete stage. Owner shall be responsible for providing ninety percent (90%) complete design documents to Contractor. Upon receipt of the ninety percent (90%) complete design documents, Contractor shall within twenty-eight (28) days provide Owner a written budget of its estimate for construction, suggestions for design changes for both constructability and value and a construction schedule based on the current design. It shall be Owner's and Contractor's mutual responsibility to direct changes to revise the design and provide Contractor with a revised design to conform the project design within the GMP unless Owner agrees to issue an allowance modification to reduce the Owner's Allowance and accordingly increase the GMP.
- 8.04 CONSTRUCTION CONTINGENCY. The GMP contains, as part of the estimated Cost of the Work, the Construction Contingency, a sum mutually agreed upon and monitored by the Contractor and the Owner to cover costs which are properly reimbursable as a Cost of the Work but are not the basis for a Change Order. The Construction Contingency shall be used by the Owner and Contractor during the design period prior to the 90% Design completion. The Construction Contingency is expected to be between 5% and 10% after 90% Design is complete. The Contractor shall provide the Owner with a contemporaneous accounting of charges against the Contractor's Contingency, if applicable, with each application for payment.

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 Guaranteed Maximum Price shall be determined in accordance with Paragraph 11.01 through 11.02, inclusive, of the General Conditions. The Contingency Allowance, per 11.02C of the General Conditions, is the same as the "Owners Allowance" listed in Exhibit B.
 - (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.

10.03 *Emerging Business Enterprise (EBE) Participation*

EBE Retainage Requirements – If the Contractor is in compliance with the provisions of the construction Contract the Owner will make payments for such work performed and completed. Pursuant to Executive Order 90-01 (amended 5-8-06); the Owner will retain five percent (5%) of the Contract Price to ensure compliance with the EBE participation requirements. Upon final inspection and acceptance of the Work, and determination by the Fort Wayne Board of Public Works that the Contractor has made a good faith effort to subcontract ten percent (10%) of the Contract Price to emerging business enterprises, the Contractor will be paid in full.

In the event there is a determination that good faith compliance with these EBE participation requirements has not occurred, appropriate reduction in the final payment pursuant to paragraph 10.06.E will be made.

If the Contract Price is in excess of \$200,000, the contract will be subject to the standard Board of Public Works escrow agreement. However, payments to the Contractor are not to exceed 95% of the total Contract Price until the Owner has verified that the Contractor has made good faith efforts to attain the 10% EBE goal stipulated in here within. Payment of the final 5% of the total Contract Price will be dependent upon acceptance of the Work, in accordance with Paragraph 14.07 of the General Conditions, and good faith efforts to comply with these EBE participation requirements; subject to reduction in the event of non-compliance as provided in paragraph 10.06.E.

- A. Request for Waiver – If, at the time final payment application is made, Contractor has not attained the ten percent (10%) EBE goal, Contractor shall file with the final payment application a “Request for Waiver.” Said Request for Waiver shall contain a written description of the efforts taken by Contractor to attain the ten percent (10%) EBE goal.
- B. Determination of Waiver Requests – The Contract Compliance Department of the City of Fort Wayne shall examine all Requests for Waiver to determine if Contractor’s efforts constitute good faith efforts to attain such goal and shall submit recommendations concerning said requests for Waiver for the final determination of the Board of Public Works of the City of Fort Wayne.
- C. Good Faith Efforts. – In determining whether or not the Contractor used “good faith” efforts, the following shall be considered:
1. Whether the contract can be subdivided as determined by the Engineer and Administrator of Contract Compliance;
 2. Availability of certified EBE businesses to participate as subcontractors;
 3. Non-competitive price quotes received from EBE firms. The Board of Public Works’ determination for granting a reduction or waiver of the goal because of higher quotes from EBE firms will be based on factors that include, but are not limited to the following:
 - (a) The Engineer’s estimate for the work under a specific contract;
 - (b) The Contractor’s own estimate for the work under the subcontract;
 - (c) An average of the valid prices quoted for the subcontract;
 - (d) Demonstrated increase in other contract costs as a result of sub-contracting to EBE firm(s).
 4. Documented measures taken by the Contractor to comply with the EBE participation goal;
 5. EBE subcontractor failed to fulfill their obligation in regard to the time delivery of goods and/or services. Also in regards to the quality of the goods and/or services set forth in the bid specifications.
 6. Such other matters as the Board of Public Works deems relevant.
- D. Consequences of Noncompliance – In the event the Board of Public Works approves a recommendation that Contractor failed to make good faith efforts at compliance, the Contract Price shall be reduced by the amount calculated as the difference between the EBE participation goal of 10% and the actual participation level met by the Contractor, but in no case shall it be reduced by more than 5%. Said amount shall be added to the City of Fort Wayne EBE Bond Guarantee Fund and Contractor agrees to accept the reduced amount as full payment under the terms of his/her Contract.

- E. Waiver Approved -- In the event the Board of Public Works determines that a good faith effort to comply with these EBE participation requirements has been made, the Contract Price shall not be reduced, and the balance owing to the Contractor shall be paid in full.

10.04 *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 RFQ and RFP period.
- 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 (3) years after the final payment by Owner.
- 13.02 Contractor shall develop and submit to Owner each month an Executive Summary report that summarizes the status of the project cost data including projections and other data as required by the Owner. Contractor shall collaborate with Owner and Owner's Representative to develop the initial report and shall meet on a monthly basis with Owner thereafter to review monthly report including any projected updates for the following month.

ARTICLE 14 -- CONTRACT DOCUMENTS

14.01 *Contents*

- A. The Contract Documents consist of the following:
 - 1. This Agreement

2. State Board of Accounts Form 96
3. Certificate in Lieu of Financial Statement (if financial statement is on file with the Board of Public Works and is current within one (1) year of the RFP)
4. EBE Declaration Form
5. Vendor Disclosure Statement Form
6. Escrow Account Agreement
7. E-Verify Affidavit
8. Signed Drug Policy Acknowledgement Form
9. Federal Davis/Bacon wage Rates and Wage Rate Requirements
10. Performance bond
11. Payment bond
12. Insurance Certificate.
13. General Conditions
14. Supplementary Conditions
 - Article 10.05(E) of the General Conditions is hereby deleted and replaced with the following: Engineer's written action under Paragraph 10.05.C or denial pursuant to Paragraphs 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedures set forth in Article 16 within 30 days of Substantial Completion.
15. Documents provided by Owner with RFQ, RFP, and RFP Addenda (numbers 1 to 3, inclusive); not attached hereto.
16. Exhibits to this Agreement (enumerated as follows):
 - (a) Exhibit A - Scope and Summary of Work
 - (b) Exhibit B -- Contract Pricing and Open Book Pricing
 - (c) Exhibit C -- Performance Guarantee
 - (d) Exhibit D -- Support Services
 - (e) Exhibit E -- Schedule Summary Dates
 - (f) Exhibit F -- Project Element Notice of Release

17. 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
- (b) Future completed signed and sealed Contract Documents prepared by Designers for each Project Element.
- (c) Written Amendments.
- (d) Written Clarifications.
- (e) Request for Quotation.
- (f) Allowance Modifications.
- (g) Work Change Directives.
- (h) Change Orders.
- (i) Field Orders.

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. Not used.

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 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 (Work Order Number 75769). One counterpart has been delivered to Owner, and one counterpart delivered to 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).

CONTRACTOR:

Kokosing Construction Company Inc.

BY: _____

(Name) John W. Rigo

TITLE: Vice President

DATE: March 4, 2013

(Date signed by Contractor)

Address for giving notices:

Kokosing Construction Company, Inc.

6235 Westerville Road, Suite 200

Westerville, OH 43081

OWNER:

CITY OF FORT WAYNE

BY: _____

THOMAS C. HENRY, MAYOR

BOARD OF PUBLIC WORKS, CITY OF FORT WAYNE INDIANA

BY: _____

ROBERT P. KENNEDY, CHAIR

BY: _____

MIKE AVILA, MEMBER

BY: _____

KUMAR MENON, MEMBER

ATTEST: _____

VICTORIA EDWARDS, CLERK

DATE: _____

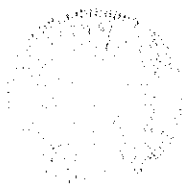
(Date signed by Board)

OHIO
STATE OF INDIANA)
SS:)
COUNTY OF ALLEN)
FRANKLIN

ACKNOWLEDGMENT (CONTRACTOR)

BEFORE ME, a Notary Public, in and for said County and State, this 4th day of March, 2013, personally appeared the within named John W. Rigo who being by me first duly sworn upon his oath says that he is the Vice President of Kokosing Construction Company, Inc. and as such duly authorized to execute the foregoing instrument and acknowledged the same as the voluntary act and deed of Kokosing Construction Company, Inc. for the uses and purposes therein set forth.

IN WITNESS WHEREOF, hereunto subscribed my name, affixed my official seal.



Claudia Ridgway
Notary Public
COMMISSION EXPIRES
AUGUST 25, 2014

Claudia Ridgway
Printed Name of Notary

My Commission Expires:

Resident of _____ County

ACKNOWLEDGMENT (OWNER)

STATE OF INDIANA)
SS:)
COUNTY OF ALLEN)

BEFORE ME, a Notary Public, in and for said County and State, this _____ day of _____, _____, personally appeared the within named **Thomas C. Henry, Robert P. Kennedy, Matthew Wirtz, Kumar Menon, Mike Avila, and Victoria Edwards**, by me personally known, who being by me duly sworn said that they are respectively the **Mayor of the City of Fort Wayne, and Chairman, Members, Manager and Clerk of the Board of Public Works of the City of Fort Wayne, Indiana**, and that they signed said instrument on behalf of the City of Fort Wayne, Indiana, with full authority so to do and acknowledge said instrument to be in the voluntary act and deed of said City for the uses and purposes therein set forth.

IN WITNESS WHEREOF, hereunto subscribed my name, affixed my official seal.

Notary Public

Printed Name of Notary

My Commission Expires:

Resident of _____ County

Interoffice Memo

Date: March 6, 2013
To: Common Council Members
From: Zach Schortgen, Program Manager, City Utilities Engineering
RE: Contract Title: Primary/Secondary Treatment and Digester Process Upgrades Project
W.O. #75865

Council District: City Wide

Project Description:

The contractor shall furnish all labor, insurance, equipment, materials and power for the completion of the project: "Primary/Secondary Treatment and Digester Process Upgrades": Improvements to the Water Pollution Control Plant (WPCP) that will consist of secondary clarifier modifications, digester improvements, W.A.S. thickening upgrades, aeration basin repair, and methane system improvements.

This project provides many benefits. It will support compliance with regulatory requirements of the EPA. It also provides for treatment capacity increases, not only for our mandates, but also matching our community's priorities to improve water quality in river areas and promote riverfront development. It will allow for reductions in CSO's as well as providing many years of future growth and economic development in our system. Other benefits include improvements to sewer system performance, helping with reductions in basement backups and street flooding in combined sewer system areas, and improved flood fighting abilities when rivers are high.

Implications of not being approved: This project increases the wet weather treatment capability of the WPCP to achieve peak capacity of 85 mgd required in CSO Control Measure 2 of the consent decree. Work must be done by the December 31, 2015 deadline. The timely completion of the work requires the contractor and designers to work together on an aggressive timetable. A delay in the contracting may threaten achieving the CD completion date or require changes to the construction schedule that would add increased costs to the project.

If Prior Approval is being Requested, Justify: N/A

This project was advertised to contractors on: November 9, 2012 and November 16, 2012 in the Fort Wayne newspapers Journal Gazette and the News-Sentinel, and November 14, 2012 in the Frost Illustrated

The contract awarded to Kokosing Construction Company for \$27,623,955.00 was the lowest most responsive proposal of 2 proposals and 9% below the Engineer's estimate of \$30,444,427.00. The second lowest proposal was \$2,171,163.00 above Kokosing Construction Company's proposal. The Board of Public Works approved the contract in the amount of \$27,623,955.00 on Wednesday March 6, 2013.

The cost of said project funded by Sewer Revenue Bonds.

Council Introduction Date: March 12, 2013

CC: BOW
Matthew Wirtz
Diane Brown
Chrono