

## CONSTRUCTION AGREEMENT

**THIS CONSTRUCTION AGREEMENT** (hereinafter referred to as this “Agreement”) is made and entered into effective the date last signed below (hereinafter referred to as the “Effective Date”), by and between the **City of Clarkston, Georgia** (hereinafter referred to as the “City Council”), and **DAF CONCRETE, INC.** (hereinafter referred to as the “Contractor”). The City Council and the Contractor are sometimes referred to collectively as “the Parties” or individually as a “Party.”

WITNESSETH:

**WHEREAS**, City Council desires that Contractor perform the Construction described in Paragraph II below, and Contractor desires to perform said Construction as specified in, and subject to, the terms and conditions in this Agreement.

**NOW THEREFORE**, in consideration of the mutual covenants stated herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

I. DEFINITIONS

- A. “Construction” is defined as those construction tasks to be provided by Contractor as described in Paragraph II below.
- B. “Work Area” is defined as the entire geographic area Contractor utilizes or affects in order to perform the construction improvements.
- C. “Project” is defined as East Ponce de Leon Sidewalk Improvements – Phase I as shown on the construction plans prepared by ATWELL & Associates, Inc. dated September 29<sup>th</sup>, 2015 and attached as Exhibit “A”. Other specific requirements include:
- D. “Project Engineer” is CIS, Inc., City Council’s designated agent responsible for ensuring that the Construction is performed consistent with the Project Plan.

II. CONSTRUCTION TO BE PERFORMED

- A. Contractor agrees to provide all labor, materials, and equipment to remove existing sidewalks and construct new sidewalks (the “Project”), which includes, but are not limited to; curb and gutter, reconstruction of existing driveways and new driveways, striping, erosion and sedimentation control, water utility adjustments and related construction details, to provide for pedestrian improvements in accordance with and as shown on the construction plans prepared by ATWELL & Associates, Inc. dated September 29<sup>th</sup>, 2015 and attached as Exhibit “A”. Other specific requirements include:

- 1) A Notice to Proceed will be issued by the City Council's Project Engineer. Within ten (10) calendar days of a Notice to Proceed, the Contractor shall mobilize and begin work on the Project. The Contractor shall notify the Project Engineer, at least three (3) business days prior to beginning Construction. Once construction begins, the Contractor must continuously (within the allowed hours of operation set out below) pursue completion of the Project without undue delay. The entire Project must be completed within ninety (90) calendar days from issuance of a Notice to Proceed. Liquidated damages in the amount of \$100 dollars per calendar day will be assessed by the City Council if construction is not substantially completed within 90 calendar days.
- 2) Prior to beginning work in the Work Area, Contractor shall be responsible for water meter and valve relocations and grade adjustments and coordination with DeKalb Watershed for scheduling of work and inspections. The Contractor shall alert the Project Engineer to any utility conflicts as soon as possible, to determine the need, if applicable, for utility relocations not identified on the construction plans. All utility relocations will be coordinated by Contractor with the appropriate utility company and shall receive prior authorization from the Project Engineer before any work shall begin.
- 3) Contractor is responsible for maintaining a clean and safe Work Area. Contractor shall remove and dispose of all trash and debris removed from the Work Area on a daily basis.
- 4) Contractor is responsible for providing all traffic control for each Project Work Area in accordance with the Manual of Uniform Traffic Control Devices ("MUTCD"). A traffic and pedestrian control plan for each Project Work Area shall be provided to the Project Engineer minimum of one (1) week prior to commencement of Construction on a Project Work Area. When required to close down a lane of traffic to perform the Construction, Contractor shall only close down one lane of traffic. At such time as Contractor must close down a lane of traffic, Contractor shall utilize all required signage, lights, flagman, and buffer vehicles as required by MUTCD. All flagmen must have valid GDOT certification and current cards. Any road closures shall be coordinated with the Project Engineer at the hours approved by same. Allowable hours for Construction in the Work Area are 7:00 a.m. – 5:00 p.m., Monday through Friday. Other work hours or days are at the discretion of the City Council. Pedestrian access is required at all times. The surface of the pedestrian access within the Work Area must be either concrete or compacted crusher run at all times.
- 5) All work shall be performed by the Contractor on right-of-way or temporary construction easements. Any disturbance of property outside right-of-way or temporary construction easements shall require City Council and the property owner's prior written approval. Contractor

shall make every effort to ensure private property outside the ROW or easements is not disturbed.

- 6) The Contractor shall be responsible for the cost of setting its own grades and ensure that its construction fits existing field conditions.
- 7) The Contractor shall provide written notification to each owner and tenant for all parcels or property located within the Work Area. This notification shall be approved by the Project Engineer before submittal to the owners and tenants. Written notification shall be provided a minimum of five (5) days before construction commences.

B. The Construction required of Contractor under this Agreement shall at all times be in accordance with the Georgia Department of Transportation (“GDOT”) Standard Specifications for Construction of Transportation Systems, 2001 Edition, as well as adhere to City of Clarkston standards and requirements.

### III. MATERIALS, SUPPLIES AND SERVICEMANSHIP

- A. Contractor shall purchase and provide all equipment, materials, supplies and labor to timely complete the Construction to City Council’s satisfaction. The risk of loss or damage to any such materials, supplies, or equipment due to fire, theft, vandalism, or any other cause whatsoever shall remain with and be borne by the Contractor.
- B. All construction provided by Contractor shall be performed in a workmanlike and professional manner to the satisfaction of City Council. Contractor warrants that all material, equipment and workmanship furnished hereunder shall be free from fault or defect and suitable in appearance without cracks or degradation and for the purposes for which they were installed, and agrees, at its expense, to promptly remedy any failure of such material, equipment or workmanship to comply with such warranty, if such failure is discovered, and Contractor is notified thereof in writing, within one (1) year of the approval of the punch list by the Project Engineer.

### IV. RELATIONSHIP OF THE PARTIES

- A. Contractor is retained by City Council only for the purposes set forth in this Agreement, and its relation to City Council shall be that of an independent contractor. Neither Party shall act as an agent, employee, partner, joint venturer or associate of the other Party. All employees furnished by Contractor will be employees of Contractor, and will at all times be subject to the direct supervision and control of Contractor. Contractor will have the sole responsibility of paying the salaries, taxes (including, but not limited to, Federal Social Security Taxes and Federal and State Unemployment Taxes), Worker’s Compensation Insurance, and all other expenses relating to each such employee of Contractor, and for paying all

other costs incurred in performing the Construction. Contractor shall employ only qualified personnel for the purpose of performing its obligations hereunder.

V. PERFORMANCE OF CONSTRUCTION BY CONTRACTOR

- A. Contractor shall conduct its Construction in a manner that will cause minimum interference with the business operations and activities of the property owners, tenants, employees and the general public along the roadway and in and around the Work Area. Contractor shall adhere to all Construction schedule requirements outlined by City Council. Contractor agrees to work in harmony with other trades, businesses and tenants in the Work Area.
- B. Contractor shall provide at all times during the performance of its duties under this Agreement, on-site supervisory personnel, who can speak fluent English, and who shall be responsible for the direct supervision of the employees of Contractor and who shall be available as needed to report to and confer with the Project Engineer.
- C. The Project Engineer (along with other City Council representatives) shall have access to the Work Area at all times for the purpose of making inspections of the Construction. Neither the making nor the failure to make inspections nor the express or implied approval of the Construction shall relieve Contractor of the responsibility to complete and guarantee the Construction as specified in this Agreement. Any unsatisfactory Construction shall be remedied by Contractor at its expense or, in the event Contractor fails to so remedy the Construction immediately, City Council may have unsatisfactory Construction remedied by a contractor other than Contractor at Contractor's expense.
- D. Contractor shall be responsible for the adequacy and safety of materials, tools, equipment, temporary and permanent structures and Construction used in the Construction, whether furnished or constructed by Contractor or another.
- E. Tools and equipment provided by Contractor shall be maintained in good repair and efficient operating condition. Contractor acknowledges that no materials, supplies, tools or equipment may be stored in the Work Area and all shall be removed from the Work Area at the end of each work day.
- F. Contractor acknowledges that no sanitary facilities are provided by City Council in the Work Area and Contractor agrees to make provision for same to its employees.
- G. The apparent silence of these specifications and any supplemental specifications as to any details, or the omission from it of a detailed description concerning any point, shall be regarded as meaning that only the best commercial practices are to prevail and that only materials of first quality and correct type, size and design are to be used. All workmanship is to be first quality. All interpretations of the

specification shall be made upon the basis of this statement, with City Council interpretation to prevail.

- H. It shall be the responsibility of the Contractor to coordinate its work with any work to be performed by others in a right-of-way clearance and arrange a schedule of operations that will allow for completion of the Project without undue delay.
- I. The Contractor will not be paid for any delays or extra expense caused by utility facilities, obstructions, or any other items not being removed or relocated to clear construction in advance of its work.
- J. Georgia law requires that a telephone call or adequate notice must be given to the Utilities Protection Center (UPC) at 811 a minimum of three (3) days before work is to begin. The notice will remain in effect for 10 working days from the date the Utilities Protection Center is notified. Contractor is responsible for providing all required notifications to UPC.
- K. Contractor shall provide 100% Performance and 100% Labor/Materials bonds to the City Council a minimum of seven (7) days prior to Project Engineer's issuance of a NTP; bonds to be included in the Agreement as Exhibit "B".

## VI. COMPLIANCE WITH LAWS

- A. Contractor shall plan and conduct the Construction to comply with local, state and federal laws, rules and regulations, to exercise the highest degree of care to safeguard persons and property from injury. Contractor shall direct the performance of the Construction in compliance with reasonable safety regulations and Construction practice and with applicable federal, state, and local laws, rules and regulations including but not limited to, "Occupational Safety and Health Standards" promulgated by the U.S. Secretary of Labor. Neither the giving of such special instructions by the City Council Representative nor the adherence thereto by Contractor shall relieve Contractor of the sole responsibility to maintain safe and efficient working conditions. Contractor will perform all Construction in compliance with applicable Federal Health and Safety laws currently in effect.
- B. Contractor shall obtain and maintain current any and all licenses, certificates, registrations, permits and any other item or permission necessary to perform and complete the Construction.
- C. Contractor shall be fully knowledgeable and comply with all applicable State of Georgia rules and regulations either currently in effect or as may be promulgated in the future, while performing the Construction.
- D. Contractor shall require its employees to wear protective clothing, reflective vests, masks, eye protections, etc., during any operation as required or directed by

applicable laws, regulations, ordinances, and/or directions by manufacturer of materials or equipment.

- E. Contractor shall adequately protect worker, land owners, tenant, adjacent property, and the public during his operations. Contractor must maintain Erosion and Sedimentation Controls throughout the Construction in accordance with all governmental standards.
- F. Contractor acknowledges it and its subcontractors are solely responsible for complying with the provisions of, including maintaining and providing records of compliance, and providing affidavits verifying compliance with, the Immigration Reform and Control Act of 1986, located at 8 U.S.C Section 1324, *et seq.*, the Georgia Security and Immigration Compliance Act of 2006 located at OCGA §13-10-90, *et seq.*, Georgia Department of Labor Rule 300-10-1-.02, and all regulations relating to the foregoing.
- G. Contractor shall adhere to the various Certifications and Affidavits included in the Contractors Bid Proposal submittal, attached as Exhibit "C".

## VII. INSURANCE AND INDEMNITY

- A. Contractor shall assume responsibility and liability for any damage, loss, or injury, including death, of any kind or nature whatever to person or property, including but not limited to employees and property of the City of Clarkston, utilities, and property owners, caused by or resulting from any error or omission of the Contractor, or the negligent act of the Contractor, or its subcontractors or any of the Contractor's or its subcontractors' officers, agents, servants, or employees, arising from the performance of the Construction under this Agreement. Contractor shall defend, indemnify and hold harmless City Council, its officials, officers, directors, commissioners, agents, inspectors, servants and employees, past and present, from and against any and all claims, loss, damage, charge, expense and liability without limitation of any nature whatsoever resulting from injury to or death of any persons, or any damage, destruction or injury to any property, arising out of or in any way connected with the performance of this Agreement or from Contractor's or its subcontractors' negligent or intentionally wrongful acts or omissions, however caused, regardless of any negligence of City Council or its representative, whether active or passive. Contractor shall, on request, defend, at its sole expense, any suit, action or other legal proceeding asserting a claim covered by this obligation to indemnify, whether such claims or actions are rightfully or wrongfully brought or filed, and Contractor agrees to satisfy, pay and cause to be discharged of record any judgment which may be rendered against City Council or others protected by this indemnification arising therefrom. No officer, employee, or agent of City Council, acting within the scope of his/her employment or function shall be held personally liable in tort or named as a defendant in any action for injury or damage suffered because of any act, event, or failure to act.

- B. Contractor and each subcontractor shall procure and maintain in full force and effect, at all times during the term of this Agreement, the following insurance through companies with an “A” rating from Bests, licensed to conduct business in the State of Georgia and approved by City Council:
- 1) Comprehensive General Liability insurance covering Contractor’s operations as set forth in this Agreement with a combined single limit of not less than \$3,000,000 for bodily injury and property damage, \$1,000,000 each occurrence, \$250,000 fire damage, \$10,000 medical expense, \$2,000,000 personal & advertising injury general aggregate, and \$2,000,000 products & completed operations.
  - 2) Business Automobile Liability insurance with a minimum \$1,000,000 combined single limit/each occurrence (including operation of non-owned, owned, and hired autos).
  - 3) Said liability insurance policies shall name City Council and the Project Engineer, CIS, Inc., as additional insureds. Said liability insurance shall recognize and insure performance by Contractor of the obligation to indemnify herein contained. Contractor’s insurance must provide coverage for fines, penalties, and punitive damages.
  - 4) Professional Liability Insurance covering Contractor’s Construction with a limit of not less than \$1,000,000.
  - 5) Worker’s Compensation insurance covering all employees of Contractor or any subcontractor engaged in performing the Construction required by this Agreement as required by Georgia statute, and Employer’s Liability insurance of not less than the minimum requirement of \$500,000.
- C. Contractor shall provide City Council with valid certification of insurance confirming the purchase of said insurance, and the inclusion of the above listed named additional insured. The certificate will further confirm that at least thirty (30) days prior written notice will be furnished to City Council by insurer before any material change, cancellation or non-renewal of policy. The certificates must contain the policy number, policy limits, policy expiration date, location and operations to which the insurance applies, and protective coverage for any subcontractor operations. It is further agreed that any coverage extended by reason of this paragraph shall be primary and that any similar insurance maintained by City Council for its own protection shall be secondary or excess and non-contributing insurance. Insurance certifications to be included in the Agreement as Exhibit “D”.
- D. Prior to initiating performance of Construction, Contractor will obtain from all subcontractors and provide to City Council a waiver of subrogation from their insurance carriers, waiving any right to subrogate back against City Council in the event of a claim for damages.

## VIII. TERM AND PAYMENT

- A. The Term of this Agreement shall commence on the Effective Date and shall continue in full force and effect final acceptance of the Construction by the Project Engineer.
- B. Total compensation to be paid by City Council to Contractor for the Construction provided herein shall be based upon the bid prices shown on Exhibit "C". These bid prices are hereby incorporated as a part of this Agreement. Liquidated damages of \$100.00/day will be assessed against Contractor if the Project is not completed within ninety (90) calendar days from the Notice to Proceed. Upon proper and timely performance by Contractor of discrete aspects of the Project, and subject to any other provisions of this Agreement, City Council shall pay Contractor within thirty (30) days after receipt of an itemized invoice and approval of the invoiced Construction by the Project Engineer, the sum for performance of the Construction, minus Ten Percent (10%) retainage pending final acceptance of the entire Project by the Project Engineer. Said invoice shall specify a description of the Construction performed.
- C. City Council shall withhold from payments owed to Contractor and credit against its account with Contractor sufficient funds for the following:
  - 1. To cover the cost of property damage incurred to City Council, utilities, or any property owner or any tenant as a result of conduct by Contractor, its agents of employees regardless of whether said conduct is in the performance of Contractor's Construction hereunder;
  - 2. To indemnify City Council pursuant to Insurance and Indemnity paragraphs of this Agreement;
  - 3. To compensate City Council for cost to correct Construction rejected by City Council and not remedied by Contractor pursuant to this Agreement; or
  - 4. To compensate for any failure by Contractor to clean up the Work Area pursuant to this Agreement.
- D. The Contractor agrees that acceptance of final payment shall be in full and final settlement of all claims arising against the City Council for Construction, work done, materials furnished, costs incurred, or otherwise arising out of this Agreement and shall release the City Council from any and all further claims of whatever nature, whether known or unknown for and on account of said Agreement, and for any and all work done, and labor and materials furnished, in connection with same.

No final payment shall be made until the Contractor and its subcontractors furnish to the City Council a sworn affidavit to the effect that all bills are paid

and no outstanding claims, suits and/or liens are pending in connection with the work done or labor and materials furnished under this Agreement. Final payment will be made within sixty (60) days after approval by the Project Engineer.

The Contractor will be required to maintain all work done in a first-class condition for sixty (60) days after the same has been completed as a whole, and Project Engineer has notified the Contractor in writing that the Project has been completed to the Project Engineer's satisfaction. The retained percentage will not be due or payable to the Contractor until the 60-day maintenance period has ended. The maintenance period is not the same as the one (1) year warranty period set forth in Section III (B), above.

#### IX. TERMINATION

- A. City Council shall have the right to terminate this Agreement at any time and for any reason whatsoever upon giving the Contractor written notice of its intention to exercise its right of termination. City Council shall pay for construction satisfactorily rendered through the date of termination, subject to City Council's rights in Article VIII, and City Council shall have no further liability to Contractor.

#### X. GENERAL PROVISIONS

- A. No subcontract, delegation or assignment of this Agreement or of any duty, right, or obligation of performance hereunder shall be made by Contractor, in whole or in part, without the prior written consent of City Council. Any attempted transfer, delegation or assignment without City Council's prior written consent shall be void and confer no rights upon any third person. In the event that prior written consent is given by City Council with respect to an assignment, delegation or subcontract, said consent shall not relieve Contractor of any obligation to City Council unless specified therein.
- B. If City Council determines that any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, City Council shall be entitled to reasonable attorneys' fees, costs and necessary disbursements incurred in prosecuting such action in addition to any other relief to which City Council may be entitled.
- C. No oral statement shall in any manner modify or otherwise affect the terms and conditions set forth herein, and no charge shall be made for extra Construction, changes, or materials unless they have been previously ordered in writing by a City Council representative.
- D. Contractor shall discharge at once, and hold City Council, Project Engineer and all property owners and tenants harmless from liens that may be filed in connection with the Construction.

- E. This Agreement shall be governed by the laws of the State of Georgia. The conflicts of law provisions of Georgia law shall not apply to this Agreement. The Parties acknowledge that this Agreement is to be at least partially performed in Georgia. Each Party hereby consents to DeKalb County, Georgia as the sole jurisdiction over any dispute which arises as a result of the execution or performance of this Agreement, and each Party hereby waives any and all objections to venue in DeKalb County, Georgia.
- F. This constitutes the entire Agreement between the Parties regarding its subject matter. If any provision or portion of a provision is held by a court to be invalid, void or unenforceable, the remaining provision and portions thereof shall nevertheless continue in full force and effect. Should any dispute or alleged ambiguity arise concerning the meaning or construction of any term or terms of this Agreement, no part or term of this Agreement shall be construed for or against City Council as the drafting Party.
- G. All notices, demands, or other writing in this Agreement provided to be give, made or sent by either Party hereto to the other, or to, shall be deemed to have fully given when made in writing and hand delivered or sent certified mail, Federal Express, or similar carrier and addressed as follows:
- TO OWNER:** City of Clarkston  
ATTN: Keith Barker, City Manager  
1055 Rowland Street  
Clarkston, GA 30021
- TO CONTRACTOR:** DAF CONCRETE, Inc.  
ATTN: Antonio Sanche; President  
212 Hicks Road  
Marietta, GA 30060
- H. “Time Is Of The Essence” of this Agreement and every term, covenant and condition herein.
- I. Any delay, deferral, forbearance or selective enforcement by City Council of any provision of this Agreement is not a waiver or release of the right to enforce that provision in full at a future date. No waiver of any right under this Agreement by City Council will be effective unless in writing.
- J. The words “City Council” and “Contractor”, as herein used, shall include the plural as well as the singular. In the event there is more than one Contractor, the obligations to be performed shall be joint and several.

- K. The provisions of this Agreement shall not impart rights enforceable by any person or entity not a Party to this Agreement or not a permitted successor or assignee of the party bound by this Agreement. This Agreement shall not be construed to create any third party beneficiary rights of any sort.
- L. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.
- M. The provisions of Sections III, VII, VIII, IX, and X shall survive the expiration or earlier termination of this Agreement.
- N. Contractor must maintain complete records during the life of this Agreement and for a period of one (1) year after completion. Such records are to be made available to City Council if requested, to be audited by a designated City Council auditing staff. In such audits reveal overcharges and/or undercharges, such will be adjusted and compensation made by the appropriate Party to correct charges.

IN WITNESS WHEREOF, the Parties hereto have entered into this Agreement effective on the date last signed below.

THIS AGREEMENT IS NOT VALID UNTIL EXECUTED BY ALL PARTIES INDICATED BELOW.

**CITY OF CLARKSTON, GEORGIA**

\_\_\_\_\_  
Witness:

By: \_\_\_\_\_ (Seal)

Name: Ted Terry

Title: Mayor

Date: \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
Stephen G. Quinn, City Attorney

**DAF CONCRETE, INC**

\_\_\_\_\_  
Witness:

By: \_\_\_\_\_ (Seal)

Antonio Sanche

President

Date: \_\_\_\_\_