

INFRASTRUCTURE CONSTRUCTION AGREEMENT

This Infrastructure Construction Agreement (“Agreement”) is made as of _____, 2023 (the “Effective Date”) between CP Crescent, LLC, an Ohio limited liability company (“Contractor”), and the City of Gahanna, Ohio (“Gahanna” and, collectively with Contractor, the “Parties”).

BACKGROUND

- A. Gahanna desires to engage Contractor to oversee and contract for certain construction services to construct infrastructure that will be built for and/or transferred to Gahanna and is built as part of the construction of a new public street northward from Tech Center Drive and related appurtenant facilities, all as more specifically described in the Development Agreement (defined below) and in this Agreement (the “Work”) and Contractor desires to be so engaged.
- B. Gahanna may provide funds to pay for part of the Work from a loan through the State Infrastructure Bank program pursuant to Ohio Revised Code Chapter 5531 (the “SIB Loan”) in accordance with the terms of the Development Agreement between Gahanna and Contractor, executed by Contractor on November 28, 2022 and Gahanna on December 1, 2022 and incorporated herein by reference (the “Development Agreement”).

NOW THEREFORE, in consideration of the foregoing and the mutual and dependent covenants hereinafter set forth, the Parties agree as follows.

AGREEMENT

1. ENGAGEMENT OF CONTRACTOR. Pursuant to the terms and conditions set forth herein, Contractor is hereby engaged to construct the Work in accordance with the plans and specifications set forth in Exhibits A and D, attached hereto and incorporated herein by reference (the “Plans”). All obligations relating to the performance and manner of construction, set forth in Exhibit B, the SIB Loan, and TIF Funds (defined herein), shall be complied with by the Contractor and its subcontractors in performance of the Work. The Work shall be dedicated to Gahanna upon substantial completion and acceptance by Gahanna.

2. OBLIGATIONS OF CONTRACTOR. Contractor shall: (a) determine the method, manner, and sequence of construction of the Work; (b) select all subcontractors; (c) select all materials and provide all equipment and tools; (d) coordinate all aspects of the Work, and; (e) take all reasonable precautions for the protection of persons and property during the performance of the Work. Subject to the terms of Section 4, below, and the reimbursement obligations set forth in the Development Agreement, Contractor shall initially pay all costs of the Work, including, but not limited to, costs of labor, materials, equipment, tools, supplies, subcontracts, building permits, connection fees, inspection fees, taxes (other than real estate taxes), transportation, insurance (described in Section 7) and all other facilities and services necessary for the construction. Contractor shall perform the

Work in substantial accordance with the Plans (subject to change orders), the terms and conditions of this Agreement and applicable law. Contractor shall comply with all obligations placed upon Gahanna pursuant to SIB Loan and the TIF Funds in performance of the Work provided such obligations are provided, in writing, to Contractor. Contractor shall bid the Work in accordance with Gahanna's bidding standards, and require compliance by all subcontractors with all laws, policies, and obligations that would be applicable to Gahanna, if Gahanna itself were performing the Work. Contractor shall obtain written consent from Gahanna's Engineer with regard to the costs for the work to be performed pursuant to the Specifications attached as Exhibit D (such portion of the Work, the "Signal Work"), before entering into a binding agreement to perform such Signal Work.

3. COMMENCEMENT AND COMPLETION. The parties acknowledge that the Contractor will commence the Work on or before December 31, 2023. Further, the Parties anticipate that the Work will be Substantially Complete (as defined below) on or before December 31, 2024, subject to force majeure and any other delay beyond the immediate control of the Contractor and in accordance with the SIB Loan.

4. CONTRACT PRICE AND PAYMENT. Gahanna shall pay the Contractor the fixed sum of one dollar (\$1.00) (the "Contract Price") for overseeing the Work. Notwithstanding any contrary provision of this Agreement, Gahanna shall also reimburse Contractor for all costs and expenses incurred by Contractor, without markup, in performing the Signal Work including, without limitation, costs and expenses incurred by Contractor for design, materials and services related to construction of the traffic signal (collectively, the "Traffic Signal Payment"). For the avoidance of doubt, the Traffic Signal Payment is intended to be made to Contractor separate and apart from: (i) the Contract Price, and (ii) any other payments or reimbursements described herein and related to the Work, to the extent the same are to be funded by SIB Loan proceeds; it being expressly acknowledged that payment of the Traffic Signal Payment hereunder is not tied to or otherwise conditioned upon Gahanna obtaining the SIB Loan.

Pursuant to the terms and conditions of the Development Agreement, Gahanna shall either pay directly, or indirectly provide for payment, to Contractor the sums necessary to pay for all Work to all third-party subcontractors or material suppliers, or reimburse Contractor for sums initially advanced by Contractor (to the extent such sums are subject to reimbursement hereunder or pursuant to the Development Agreement), for work completed up to a maximum sum of Two Million Dollars (\$2,000,000.00), if Gahanna receives the SIB Loan for that amount for this Work. All third-party subcontractors and material suppliers shall be engaged by Contractor in conformance with Gahanna's bidding procedures and the laws and rules applicable to Gahanna for procurement of such services and materials. Payment(s) shall be made pursuant to Section 10 hereof. Moreover, and without limiting the above, in addition to paying the Contract Price, Gahanna shall take all actions necessary to finalize the SIB Loan, TIF Agreement and to comply with the requirements of the SIB Loan. Gahanna will take all reasonable efforts to obtain the proceeds from the SIB Loan in accordance with the terms of this Agreement.

5. PERFORMANCE OF WORK.

- a. The Contractor agrees to complete the Work in a good and workmanlike manner, with due diligence. The Contractor will obtain, with the assistance of Gahanna, all permits required in order to perform the Work. Contractor may, at its sole discretion, engage subcontractors to perform the Work hereunder, provided that Contractor remains responsible for proper completion of the Work at all times.
- b. The Contractor warrants to Gahanna, its successors and assigns, that materials and equipment furnished by the Contractor hereunder will be of good quality and be free from defects. Upon receipt of notice from Gahanna of any non-conformity or defect in the Work, within one (1) year after Substantial Completion of the Work, the Contractor will promptly complete such repairs and/or replacements as may be required, all at its own cost and expense. For the avoidance of doubt, the foregoing repair/replacement obligation is not intended to obligate Contractor to make repairs or replacements required as the result of normal use of the Work for its intended purposes or as the result of normal wear and tear.

6. CONDITIONS TO PERFORMANCE. If, in the course of construction, the Contractor encounters unforeseen geological or physical formations or other concealed subsurface conditions that make it impractical for the Contractor to perform the Work as set forth herein, the Contractor shall promptly notify Gahanna of the conditions and of the estimated additional time necessary to perform the Work under such conditions. Contractor is obligated to complete all Work necessary, even if unforeseen conditions are encountered.

7. INSURANCE. Prior to commencing the Work, the Contractor shall, at its own expense, secure and maintain in force the following insurance coverage through the performance of the Work: (a) Commercial General Liability Insurance, which includes comprehensive, premises/operations, products/completed operations, contractual liability, broad form property damage and personal injury: \$2,000,000 per occurrence and \$2,000,000 general aggregate; (b) Automobile Liability which includes owned, lease or non-owned vehicles; (i) Bodily Injury: \$500,000 per person and \$500,000 per occurrence; and (ii) Property Damage: \$500,000 per accident; and (c) workers compensation in such amounts set forth under applicable state law. All insurance shall be placed with companies, and be in form and substance, reasonably acceptable to Gahanna. Certificates of insurance evidencing the insurance required in this Section shall be provided to Gahanna prior to the commencement of the Work and shall provide that thirty (30) days written notice shall be provided to Gahanna, prior to cancellation or substantial alteration of coverage, and all such insurance shall name Gahanna as an additional insured.

8. SIB LOAN REQUIREMENTS. Gahanna shall provide Contractor with all SIB Loan documents and any other rules and requirements imposed by or in connection with the SIB Loan. Contractor shall comply with all such requirements of a general contractor set forth in the SIB Loan and shall take all reasonable action within its ability or control and necessary to enable Gahanna to comply with the obligations of the SIB Loan. Further,

Contractor shall determine the applicability of either the Davis Bacon Act wage rule, or of prevailing wage by the Ohio Department of Commerce, Division of Labor and Worker Safety, Wage and Hour Bureau of the State as well as providing certified payrolls it issues to the Ohio Department of Commerce, Division of Labor and Worker Safety, Wage and Hour Bureau as required by the SIB Loan.

9. WAIVER OF CONSEQUENTIAL DAMAGES; LIMITATION OF LIABILITY.

- a. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR ENHANCED DAMAGES, LOST PROFITS OR REVENUES OR DIMINUTION IN VALUE, ARISING OUT OF, OR RELATING TO, AND/OR IN CONNECTION WITH ANY BREACH OF THIS AGREEMENT, REGARDLESS OF (A) WHETHER SUCH DAMAGES WERE FORESEEABLE, (B) WHETHER OR NOT SUCH PARTY WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND (C) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, OR OTHERWISE) UPON WHICH THE CLAIM IS BASED.

10. PAYMENT OF THE WORK COMPLETED. Gahanna shall make periodic payments of the SIB Loan proceeds and the Traffic Signal Payment to Contractor for the Work completed in accordance with the following provisions:

- a. Contractor shall deliver to Gahanna a Request for Advance in form and substance and as attached as Exhibit C hereto (the "Request for Advance"), which shall include information as required by the form.
- b. Upon Gahanna receiving a Request for Advance, Gahanna shall, within fourteen (14) business days following the Request for Advance, disburse such sum directly to Contractor or to a subcontractor or material provider from the SIB Loan proceeds (provided such funds are available) or, with respect to the Traffic Signal Payment, from other funding sources available to Gahanna, the amount of the funds being requested in the Request for Advance, provided Gahanna has no reason to believe in good faith that the representations in the Request for Advance are not correct. If Gahanna believes that the information stated in the Request for Advance is incorrect, it so shall inform the Contractor of such within five (5) business days of the receipt of Request for Advance.
- c. Other than its obligations: (i) hereunder, which are conditioned on Gahanna obtaining the SIB Loan, (ii) hereunder, with respect to the Traffic Signal Payment, and (iii) under the Development Agreement, Gahanna shall have no further liability or claim for funds to be distributed to the Contractor or a subcontractor or material provider in connection with performance of the Work.

11. TERMINATION BY THE CONTRACTOR FOR CAUSE. If Gahanna has not made payment required by this Agreement, within the timeframe stated in this Agreement, and does not cure such default within fifteen (15) business days of written notice from the Contractor to Gahanna, the Contractor may terminate this Agreement.

12. DEFAULT BY CONTRACTOR. If the Contractor is adjudged bankrupt, has a receiver appointed for it, makes a general assignment for the benefit of creditors, or fails to perform the Work in accordance with this Agreement and does not begin to cure such default, if a cure is reasonably feasible, within thirty (30) days of written notice from Gahanna, then Gahanna may terminate this Agreement upon notice to Contractor; provided, however, that such termination shall not relieve Gahanna from its obligation to distribute SIB Loan funds to Contractor to pay or reimburse Contractor for any portion of the Work completed prior to such termination so long as Contractor has complied with the requirements of Section 10, above, in requesting such payment or reimbursement. Contractor shall not be deemed to be in default, if the default requires more than thirty (30) days to cure and Contractor commences to remedy such default within said thirty (30) day period and proceeds therewith with due diligence.

13. MISCELLANEOUS.

- a. Notices. All notices and communications required, necessary or desired to be given pursuant to this Agreement, including, but not limited to, a change of address for purposes of such notices and communication, shall be in writing and shall be deemed given and received (i) upon personal delivery (which shall include delivery by commercial overnight courier) or refusal to accept delivery or (ii) one (1) day after deposit, for overnight delivery, with a nationally recognized overnight courier providing evidence of delivery or rejection. The addresses for notice are as follows:

If to Contractor: CP Crescent, LLC
C/O CASTO
250 Civic Center Drive, Suite 500
Columbus, Ohio 43215
Attn: Brent Sobczak

With a copy to: CASTO
250 Civic Center Drive, Suite 500
Columbus, Ohio 43215
Attn: C.H. Waterman

If to Gahanna: City of Gahanna
Attention Mayor
200 Hamilton Road
Gahanna, Ohio 43230

With copies to: City of Gahanna
Attention City Attorney

200 Hamilton Road
Gahanna, Ohio 43230

Albers and Albers, Attorneys at Law
Attn: John Albers
1086 North 4th St. Suite 105
Columbus, OH 43201

- b. Law. This Agreement shall be construed and interpreted under the laws of the State of Ohio.
- c. Assignment. Gahanna may not assign this Agreement without the prior written consent of Contractor. Contractor may assign this Agreement or any of its rights or obligations herein, with the written consent of Gahanna, which shall not be unreasonably withheld.
- d. Amendment. This Agreement may be amended, but only by a written amendment signed by Contractor and by Gahanna.
- e. Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.
- f. Entire Agreement; Defined Terms; Conflicts. This Agreement, Contractor's SIB Loan Shortfall Guaranty of even date herewith, and the Development Agreement represent the entire agreement of the Parties hereto with respect to the specific subject matter treated herein, supersede all prior negotiations and understandings (oral or written), and may only be amended by the written agreement of both parties. Capitalized defined terms used, but not defined herein shall have the respective meanings ascribed to such terms in the Development Agreement. In the event of any conflict or inconsistency between the terms and conditions of this Agreement and the terms and conditions of the Development Agreement, the terms and conditions of the Development Agreement shall be deemed to control and any conflicting or inconsistent term or condition set forth herein shall be deemed null and void.
- g. Claims against Gahanna. Any claims by the Contractor against Gahanna pursuant to this Agreement shall not include claims for consequential, indirect, incidental, special, exemplary, punitive, or enhanced damages, lost profits or revenues or diminution in value damages or attorney's fee or costs. Contractor shall hold Gahanna harmless from any and all claims made by its subcontractors (or other third parties hired by Contractor) relating to this Agreement, including any reasonable attorney fees and costs incurred by Gahanna relating to such claims.

- h. Partial Invalidity. If any provision of this Agreement or the application of any such provision to any such person or any circumstance shall be determined to be invalid or unenforceable by a court of law, then such determination shall not affect any other provision of this Agreement or the application of such provision to any other person or circumstance, all of which other provisions shall remain in full force and effect; and, if any provision of this Agreement is capable of two constructions one of which would render the provision invalid, then such provision shall have the meaning which renders it valid.

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

CP CRESENT, LLC, an Ohio limited liability company

By: _____

THE CITY OF GAHANNA, OHIO

By: _____
Laurie Jadwin, Mayor

Approved as to Form

Raymond J. Mularski, City Attorney

FISCAL OFFICER'S CERTIFICATE

As fiscal officer for the City of Gahanna, Ohio, I hereby certify that funds sufficient to meet the obligations of Gahanna in this Agreement (including specifically the funds required to meet the obligation of Gahanna in the year 2023) have been lawfully appropriated for the purposes thereof and are available in the treasury, and/or are in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. Except for the Traffic Signal Payment, Gahanna has no obligation to make payments to Contractor pursuant to this Agreement except from the SIB Loan, TIF Fund, and proceeds and other amounts specifically set forth in this Agreement. All monies required to meet Gahanna's obligations hereunder are available pursuant to this Agreement, the TIF Fund, and the Escrowed Amount (as defined in the Development Agreement) and other funding sources available to Gahanna. This certificate is given in compliance with Ohio Revised Code Sections 5705.41 et seq.

Dated: _____

Fiscal Officer
City of Gahanna, Ohio

EXHIBIT A
PLANS AND SPECIFICATIONS

(attached hereto)

EXHIBIT B

CONSTRUCTION REQUIREMENTS

Section 1. Procedures and Policies Applicable to Design and Construction of Public Infrastructure Improvements. The Contractor has designed or shall design and shall procure construction of the Work through contracts complying with this Agreement.

(a) Approval of Construction Plans. The Work shall be constructed in accordance with construction plans and any amendments thereto approved by all necessary parties associated with Gahanna and required for dedication to Gahanna.

If approved construction plans are amended, any such amendment shall be approved by Gahanna prior to any such work being performed.

(b) Prevailing Wages. For construction of any the Work the cost of which exceeds the threshold amount established from time to time under R.C. Section 4115.03(B), the Contractor agrees to pay, and cause its contractors and subcontractors to pay, State of Ohio prevailing wage rates ("Prevailing Wages") in accordance with: (i) R.C. Sections 4115.03 through 4115.16; and (ii) a Prevailing Wage schedule or schedules which shall be determined in accordance with R.C. Sections 4115.03 through 4115.16 and provided by a Gahanna representative, and documented as an exhibit or supplement to this Agreement prior to commencement of such construction. Gahanna, and not the Contractor, shall be responsible to designate and appoint a prevailing wage coordinator as provided in R.C. Section 4115.071.

(c) Invitations to Bid; Award of Contracts. In accordance with Gahanna's established bidding requirements, the Contractor (and/or its affiliated general contractor) shall issue and advertise, or shall have issued and advertised, invitations to bid on the construction components of the Work, open and read, or opened and read, the bids aloud in a public forum, determine or determined the best bids (which need not be the lowest bids), and award or awarded the contract(s). Such contracts may be executed in the name of the Contractor (and/or its affiliated general contractor). Bidding procedures shall be reviewed and approved by Gahanna, prior to Contractor commencing bidding .

(d) Retainage Time for Completion. The contracts for construction of the Work shall provide for withholding of retainage in accordance with R.C. Sections 153.12 through 153.14, and shall specify time for completion of work, and damages for delay, in accordance with R.C. Section 153.19.

(e) Security for Performance. In accordance with R.C. Sections 153.54 through 153.571, all contractors bidding to construct the Work shall be required to furnish a bid guarantee, and all contractors contracting to construct the Work shall be required to furnish, prior to commencement of construction, a surety bond to guarantee completion of construction, Each surety bond shall name the Contractor (and/or its affiliated general contractor) and Gahanna as

respective obligees in the form provided by R.C. Section 153.57 or 153.571.

(f) Underground Utility Facilities. The Contractor shall comply with the applicable obligations of R.C. Section 153.64 with respect to underground utility facilities.

(g) Non-Discrimination. Each contract for construction of Work shall contain provisions by which the contractor agrees to both of the following:

- (i) That, in the hiring of employees for the performance of work under the contract or any subcontract, no contractor, subcontractor, or any person acting on a contractor's or subcontractor's behalf, by reason of race, creed, sex, disability (as "disability" is defined in R.C. Section 4112.01), or color, shall discriminate against any citizen of the state in the employment of labor or workers who are qualified and available to perform the work to which the employment relates; and
- (ii) That no contractor, subcontractor, or any person on a contractor's or subcontractor's behalf, in any manner, shall discriminate against or intimidate any employee hired for the performance of work under the contract on account of race, creed, sex, disability (as "disability" is defined in R.C. Section 4112.01), or color.
- (iii) Contractor, and its subcontractors shall comply with all requirements placed upon Gahanna pursuant to the Grant Agreements and SIB Loan in the performance of all activities associated with the Work and contracting for the Work.

(h) Professional Design Services. If and only if the Contractor intends to seek reimbursement of costs incurred by the Contractor for design (as opposed to construction) of the Work, the Contractor (and/or its affiliated general contractor) shall procure, or shall have procured, such services in accordance with R.C. Sections 153.65 through 153.71.

(i) Installations by Public Utilities. The Work may include public utilities or communication facilities (including, but not limited to, water mains, gas mains, sanitary sewers, storm sewers, electric service lines, telephone lines, and cable communication lines). Such facilities, to the extent they are installed by or for the respective service provider, other than Gahanna, (rather than by a construction contractor selected by the Contractor) are hereby defined as "Installations by Public Utilities." Costs incurred by or on behalf of the Contractor for Installations by Public Utilities are not part of the Work under this Agreement. Paragraphs (a) through (i) of this Section shall not apply to Installations by Public Utilities.

Section 2. Dedication to Public Use.

- (a) Public Infrastructure Improvements. Except as otherwise provided below, the Contractor agrees to dedicate for public use the Work to Gahanna. The dedication requirements provided herein shall not apply to (i) installations by Public Utilities, or (ii) items of the Work that are not required by law to be publicly dedicated and that, in the Contractor's sole discretion, are to remain privately owned ("collectively, "On Site Designated Public Infrastructure Improvements"). Notwithstanding anything to the contrary in this Agreement, the owner of such On Site Designated Public Infrastructure Improvements shall be solely responsible for all maintenance on such On Site Designated Public Infrastructure Improvements, unless agreed upon in writing by the Contractor and Gahanna.

- (b) Construction Drawings. Upon such dedication as provided in this Section, applicable original construction drawings in the possession of the Contractor shall become the property of Gahanna, and shall be delivered to Gahanna by the Contractor.

EXHIBIT C

FORM OF REQUEST FOR ADVANCE

[Month] [Day], [Year]

TO: []

RE: _____ (the “Agreement”)

Ladies and Gentlemen:

This Request for Advance is being delivered pursuant to the terms of the Agreement. Capitalized terms used but not defined herein shall have the meanings ascribed thereto in the Agreement.

The undersigned Project Engineer certifies that the attached Advance Summary (or ‘Draw’) details categories of costs now due and payable, and the work has been completed and/or the materials have been delivered.

The undersigned certifies that Project Costs incurred prior to the date of the Advance requested hereby shall not equal or exceed _____ in the aggregate.

The undersigned hereby further certifies and represents, as of the date hereof, that, to the knowledge of the undersigned:

1. There is no litigation existing, pending or threatened against the Project or the Contractor that, if adversely determined, would materially adversely affect the Project. For purposes of the preceding sentence, “threatened” litigation shall include only those adverse claims having a substantial likelihood of actually resulting in existing or pending litigation.
2. No adverse changes have occurred in the financial condition or in the assets and liabilities of the Contractor that will materially adversely affect the Project.
3. There are no new liens against the Property.
4. No event of default, or condition or event which, with the giving of notice or passage of time, or both, would constitute an event of default, exists under the Agreement.
5. All requested payment amounts reflected in each application or request for payment heretofore received by the Contractor have been paid in full.

6. All work and materials heretofore furnished for the Project conform to the Project Plans and Specifications.
7. The sums indicated below fully summarize this Request for Advance and all funds requested by this Request for Advance, along with all funds disbursed previously, will be and have been used for payment of costs in accordance with the Agreement.

Funding Amount Requested, This Requisition: >

Total Amount of Funding Received to Date
(including interest accrual): >

Balance of Funds Remaining to be Funded: >

Requested Funding Date: >

Project Engineer

EXHIBIT D

SPECIFICATIONS FOR TRAFFIC SIGNAL

A four-legged, signalized intersection shall be designed at the intersection of Tech Center Drive and Crescent Boulevard, with the southern leg considered as ‘future’. The signal shall meet the city’s specifications, including, however not limited to mast arms, control cabinet, pedestrian and vehicular detection, and signal system communications. A field survey, subsurface utility investigation, utility relocation assistance, and maintenance of traffic plans are to be included and are incidental to the overall design and construction. Upon completion and approval of the design, the signal shall be constructed, tested, burned in, coordinated and timed, and carry a one-year maintenance warranty. The City will carry a cost independent of the Agreement for providing third-party inspections.