

CONTRACT



AGREEMENT FOR CITY OF POWDER SPRINGS BROWNSVILLE ROAD PROJECT

This Agreement for the Construction of the Brownsville Project (the "Agreement") is made and entered into this _____ day of _____, 2023, between the **City of Powder Springs**, Georgia, a municipal corporation, and **Summit Construction and Development, LLC**, a general contractor licensed to do business in the State of Georgia. The **City of Powder Springs** and **Summit Construction and Development, LLC** may hereafter be referred to as a "**Party**," individually or collectively as the "**Parties**." For the purposes of payment only SCP/SEI BR Holdings, LLC. ("SCP/SEI BR Holdings, LLC") is an additional party to this Agreement with rights and responsibilities limited to those specified in Article 2.

WHEREAS, the City desires to construct the City of Powder Springs Brownsville Road project, which is located on Brownsville Road from CH James Parkway to Hiram Lithia Springs Road.

WHEREAS, Contractor is knowledgeable and experienced in the construction and installation of traffic control, curb and gutter, concrete sidewalks, drainage, paving, landscaping, and related improvements and desires to provide, furnish, and deliver all necessary materials, labor and equipment and to construct and install improvements, in the locations more specifically set forth herein; and

WHEREAS, SCP/SEI BR Holdings, LLC will benefit from certain improvements to be constructed pursuant to this Agreement and agree to pay the Contractor directly the amount of \$487,266.50 for those improvements, as set forth herein; and

WHEREAS, the parties desire to contract for the provision of said work according to the terms and conditions and provisions set forth herein

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

Article I – Definitions

Wherever used in this agreement, the following terms shall have the meanings indicated:

- (a) *Agreement* shall mean this written agreement between City and Contractor covering the work to be performed, including any and all exhibits hereto, said exhibits being incorporated herein by reference. **The Invitation for Bid for City of Powder Spring Brownsville Road Project RFP # 22-019, issued by the City and the Bid Response/Proposal submitted by the Contractor (the "Bid Documents") are also incorporated herein by reference.** To the extent there are any inconsistencies between the Agreement and the Bid Documents, the Agreement shall control.
- (b) *Application for Payment* shall mean the form furnished by the City which is to be used by Contractor in requesting progress payments and which is to include an affidavit of Contractor that progress payments received from City on account of the Work have been applied by Contractor to discharge in full all of Contractor's obligations incurred in connection with the Work covered by all prior applications for payment. A form for the Application for Payment is attached hereto as **Exhibit F**.

If the Application for Payment includes payment for completed work to be paid by SCP/SEI BR Holdings, LLC, then the City upon approval of the Application for Payment shall forward a copy the Application to SCP/SEI BR Holdings, LLC designating SCP/SEI BR Holdings, LLC portion with a request for SCP/SEI BR Holdings, LLC to pay directly to Contractor SCP/SEI BR Holdings, LLC portion of the cost of the completed work.

- (c) *Change Order* shall mean a written order to Contractor signed by City authorizing an addition, deletion, or revision in the Work, or an adjustment in the Contract Price or the Contract Time issued after execution of the Agreement.
- (d) *City* shall mean the municipal corporation for whom the Work is to be performed.
- (e) *Contract Documents* shall mean and include the designs and specifications prepared by **Croy Engineering, LLC**, attached hereto by reference.
- (f) *Contract Price* shall mean the total monies payable to Contractor under the Agreement.
- (g) *Contractor* shall mean the firm or corporation with whom City has executed this Agreement.
- (h) *Field Order* shall mean minor changes in the Work in accordance with Section 8 02
- (i) *Modification* shall mean: (a) A written amendment of the Agreement signed by both Parties; (b) a Change Order; (c) a written order for a minor change or alteration in the Work issued by City pursuant to Section 8 02. A Modification may only be issued after execution of the Agreement
- (j) *Project* shall mean the entire construction to be performed as provided in the Agreement.
- (k) *Program Manager* shall mean **Croy Engineering, LLC**.
- (l) *Proposal* shall mean Contractor's page offer and proposal to construct the project and perform other specified Work and the specifications included thereon.
- (m) *Subcontractor* shall mean an individual, firm, or corporation having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work at the site.
- (n) *Substantial Completion* shall mean the date as certified by Program Manager when the construction of the Project or a specified part is sufficiently completed, in accordance with the Bid Documents and Agreement, so that the Project or specified part can be utilized for the purposes for which it was intended; or if there be no such certification, the date when final payment is due in accordance with Section 12 08.
- (o) *Work* shall mean any and all obligations, duties, and responsibilities necessary to the successful completion of the Project assigned to or undertaken by Contractor under the Agreement, including the furnishing of all labor, materials, equipment and other incidentals. The Work shall include, but shall not be limited to, the provision, installation and/or construction of: traffic control, milling, patching, asphalt topping, drainage, curb and gutter, sidewalk, striping and marking, and all work necessary to complete the City of Powder Springs Brownsville Road project in accordance with the

Agreement, and the Contract Documents prepared by Croy Engineering, LLC, for the City of Powder Springs, which is attached hereto by reference, and the work, services, and materials set forth.

Article II – Contract Time and Price

Section 2.01 Contract Time. Contractor shall complete construction of the Project within **120** days of the date of the Program Manager's notice to proceed. The work included in Add Alternate 1 must be completed and operational by April 30, 2023, or additional liquidated damages will be incurred by the contractor. The Work shall begin within **ten (10)** days after notification to begin work by the Program Manager and shall be carried through to completion without unreasonable delay and suspension (except as allowed for herein) If there are unreasonable delays or unauthorized suspensions of work, the City reserves the right to charge the Contractor, not as a penalty, but as liquidated damages, the cost incurred by the City to maintain its engineering and Program Manager's personnel on the Project or to cancel this Agreement and complete the Work by another contract or otherwise.

Section 2.02 Contract Price. Contractor shall complete the Work for the sum of **\$ 1,643,725.96**. SCP/SEI BR Holdings, LLC shall pay Contractor directly \$487,266.50 of the Contract price \$1,643,725.96. The City shall pay Contractor the remaining \$1,156,459.46 for the total Contract price not to exceed \$1,643,725.96. The contribution by SCP/SEI BR Holdings, LLC is based on the bid attached hereto for the Add Alternate 1 work. SCP/SEI BR Holdings, LLC shall not be required to pay for any work that is not identified in the Add Alternate 1 bid and the maximum contribution by SCP/SEI BR Holdings, LLC shall be \$487,266.50. Any savings between the bid and the actual cost of work shall inure to the benefit of SCP/SEI BR Holdings, LLC. No Change Orders to the Add Alternate 1 work shall be approved unless approved by SCP/SEI Add Alternate 1 work. Payment by SCP/SEI BR Holdings, LLC to the contractor shall be made in the same manner as the City pays the contractor as set forth in Article XII.

Article III – Preliminary Matters

Section 3.01 Execution of Agreement. At least **three (3)** counterparts of the Agreement will be signed by City, SCP/SEI BR Holdings, LLC and Contractor. City will identify those portions of the Agreement not so signed and such identification will be binding on all parties. City, SCP/SEI BR Holdings, LLC and Contractor will each receive an executed counterpart of the Agreement.

Section 3.02 Before Starting Work.

- (a) Within **five (5)** days after execution of the Agreement, Contractor will (i) submit to City and the Program Manager, for approval, an estimated progress schedule indicating the starting and completion dates of the various stages of the Work and (ii) meet with the City and Program Manager for a preconstruction conference.
- (b) Before starting the Work, Contractor will furnish to City Certificates of Insurance and Bonds as required by Article IV, and any other documents, affidavits, or things required to be submitted by the

City of Powder Springs Brownsville Road Project

terms of this Agreement, the Bid Documents, and/or the State Law of Georgia (i) prior to the commencement of the Work or (ii) upon execution of the Agreement.

Section 3.03 Commencement of the Work. Contractor will start the Work within **ten (10)** days after notification to begin work by the Program Manager.

Article IV – Insurance

Section 4.01 Contractor's Insurance. The Contractor shall not commence work under the Agreement until it has obtained all the insurance required under this Article and such insurance has been reviewed and approved by the City nor shall the Contractor allow any Subcontractor, of any tier, to commence work on a subcontract until the applicable insurance has been obtained, reviewed, and approved by the City. The insurance specified herein shall be maintained in full force and effect during the life of the Agreement and through final completion of the Project.

- (a) *Statutory Workers' Compensation Insurance.* The statutory limits as established by the General Assembly of the State of Georgia shall be met by Contractor. **(NOTE: A self-insurer must submit a certificate from the Georgia Board of Workers' Compensation stating the Contractor qualifies to pay its own workers' compensation claims.)** The workers' compensation policy must include Coverage B-Employer's minimum liability limits of:

Employers Liability:

- Bodily Injury by Accident -\$500,000 each accident
- Bodily Injury by Disease -\$500,000 policy limit
- Bodily Injury by Disease -\$500,000 each employee

Excess liability coverage may be used in combination with the base policy to obtain these limits. The Contractor shall require all Subcontractors, of any tier, performing Work under this Contract to obtain an insurance certificate showing proof of Workers' Compensation Coverage. If a Subcontractor fails to obtain adequate Worker's Compensation Insurance for the period set forth in this Agreement, an amount determined by the City sufficient to cover such liability will be deducted from the first payment to the Contractor, or, at the City's option, Contractor, and/or Subcontractor may be terminated from the Project

- (b) *Commercial General Liability Insurance.* The Contractor shall procure and maintain a Commercial General Liability Insurance Policy, including products and completed operations liability, and contractual liability coverage covering bodily injury, property damage liability and personal injury. The policy or policies must be on an "occurrence" basis ("Claims Made" coverage is not acceptable) insuring personal injury and property damage against the hazards of Premises and Operations, Products and Completed Operations, Independent Contractor's and Contractual Liability (specifically covering the indemnity) and have the minimum limits of liability listed below. The Commercial General Liability policy shall also include contractual liability coverage. The Commercial General Liability policy purchased by the Contractor must be issued by a company authorized to conduct business in the State of Georgia or by a company acceptable to the State if the company is an alien insurer. The Commercial General Liability policy must include separate aggregate limits per project. Excess liability coverage may be used in combination with the base policy to obtain the following limits.

- \$1,000,000 per Person
 - \$1,000,000 per Occurrence
 - \$1,000,000 per General Aggregate
 - \$1,000,000 per Products/Completed Operations and Aggregate
- (c) *Auto Liability Insurance.* The Contractor shall procure and maintain a Business Automobile Liability Policy with liability limits of not less than \$500,000 per person and \$500,000 per occurrence or a policy with a Combined Single Limit of not less than \$1,000,000 covering any owned, non-owned or hired autos. Excess liability coverage may be used in combination with the base policy to obtain these limits. The form of coverage must be as follows and/or cover the following areas:
- Comprehensive form covering all owned, non-owned, leased, hired, and borrowed vehicles
 - Additional Insured Endorsement
 - Contractual Liability
- (d) *Umbrella Liability Insurance.* Combined Single Limit of Bodily Injury and Property Damage Liability. This policy shall be written on an Umbrella basis and shall follow the form of coverages as described in the policies above, except Worker's Compensation policy.
- \$1,000,000 per Occurrence
 - \$1,000,000 per Annual Aggregate
- (e) *Hazardous Operations.* When the Work for this Contractor or any contractor or Subcontractor involves any subsurface activities, the Contractor or any contractor or Subcontractor shall provide liability coverage for explosion, collapse, and underground hazards with the minimum limits listed above. Other hazardous operations, as determined by the City may require other coverage and/or higher limits of liability.
- (f) *Professional Liability Insurance.* For professional services the Contractor shall procure and maintain a Professional Liability Insurance (Errors and Omissions) Policy with liability limits of not less than \$2,000,000 (project/contract specific for the City) per aggregate, \$1,000,000 per claim, and a maximum deductible of \$50,000.
- (g) *Required Bonds.* The following bonds shall be required by the City:
- (i) **A Performance Bond and Labor and Materials Payment Bond** satisfactory to the City each in the amount of 100% of the Contract Price will be required of Contractor to guarantee delivery of the completed Work and services under this Agreement and payment for labor and materials. No company, regardless of size or financial rating, will be allowed to write its own bonds. **The Surety Company shall have an A.M. Best Company minimum rating of no less than A- or be otherwise acceptable to City.** The Bonds must be delivered to the City prior to City's execution of the Contract and must be accompanied by a letter stating the bonding company's current rating. In the event that the bonds are not timely presented or if the City deems the bonds unsatisfactory, the Contract may be terminated or, at its option, City may require Contractor to present acceptable bonds. Substitution of Cashier's Check, Certified

Check or Cash Deposit (or substitution of an irrevocable letter of credit by a bank or savings and loan association for a Performance Bond amount up to and including \$750,000) may, at City's sole discretion, be acceptable.

- (ii) Performance and Labor and Material Payment Bonds must be accompanied by a Certificate of Power of Attorney showing that the party who executed the bonds is authorized to do so by the surety company.
- (h) Any person or entity seeking payment under this Agreement from the City shall file a W-9 form with the City before payment is issued.
- (i) The City (and any applicable Authority) must be shown as an additional insured on General Liability, Auto Liability, and Umbrella Liability policies and a copy of said certificates must be provided to the City's designated representative prior to commencement of the Work Certificate Holder must read:

**The City of Powder Springs, Georgia
4426 Marietta Street
Powder Springs, GA 30127**

- (j) The certificates evidencing the aforementioned listed required coverages shall provide that such coverages not be cancelled or reduced except by written notice to the Contractor and City at least **thirty (30) days** prior to the effective date of such cancellation or material reduction in coverage.
- (k) Any insurer providing coverage hereunder, except a Worker' Compensation carrier, must have an A.M. Best rating of no less than A- or be otherwise acceptable to City. Certain Workers' Compensation funds may be acceptable by the approval of the City Manager. European markets including those based in London and domestic surplus lines markets that operate on a non-admitted basis are exempt from this requirement provided that the Contractor's broker/agent can provide financial data to establish that a market is equal to or exceeds the financial strengths associated with the AM Best's rating of no less than A- or be otherwise acceptable to the City.
- (l) Any selected insurance company should be licensed to do business by the Georgia Department of Insurance, unless otherwise excepted herein.
- (m) Certificates of Insurance, and any subsequent renewals, must reference the specific bid/contract by project name and project bid/contract number or have other identification acceptable to the City.
- (n) All insurance coverages required to be provided by the Contractor will be primary over any insurance program carried by the City.
- (o) Contractor shall incorporate/require incorporation of a copy of the insurance requirements as herein provided in each and every subcontract with each and every Subcontractor, of any tier, and shall require each and every Subcontractor to comply with all such requirements. Contractor agrees that if for any reason a Subcontractor fails to procure and maintain insurance as required,

all such required insurance shall be procured and maintained by Contractor at Contractor's expense or such Subcontractor shall be terminated, at Contractor's option.

- (p) Neither the Contractor nor any Subcontractor shall commence any Work of any kind until all insurance requirements have been complied with and until evidence of such compliance satisfactory to the City's designated representative as to form and content has been filed with the City's designated representative. The Accord Certificate of Insurance or a pre-approved substitute is the required form in all cases where reference is made herein to a Certificate of Insurance or an approved substitute. Such certificates shall contain a provision that the coverage afforded under the policies will not be cancelled or materially changed until at least thirty (30) days prior written notice has been given to City. The Contractor shall provide to the City certified copies of the current policies required hereunder upon the City's request.
- (q) The Contractor shall agree to waive all rights of subrogation against the City, the City Council, the Mayor, its officers, officials, employees, agents, and volunteers from losses arising from Work performed by the Contractor for the City.
- (r) The Contractor shall also obtain All Risk Contractors' Equipment and Contents Insurance covering owned, used, and leased equipment, tools, supplies, and contents required to perform the Work. The limits must be for full replacement cost. The City will be included as a Loss Payee in this coverage for City owned equipment, tools, supplies, and contents used to perform the Work. The All Risk Contractors' Equipment and Contents Insurance shall also be subject to and comply with all other general terms and conditions of this Article which are applicable to the other coverages set forth above.
- (s) The Contractor shall, upon request, make available to the City, through its records or records of its insurer, information regarding specific claims. Any loss run information available from the Contractor or its insurer will be made available to the City upon City's request.
- (t) Compliance by the Contractor and all Subcontractors, with the foregoing requirements as to carrying insurance, shall not relieve the Contractor and all Subcontractors of responsibility and liability related to the liability provisions of the Agreement.
- (u) The Contractor and all Subcontractors are to comply with the Occupational Safety and Health Act of 1970, Public Law 91-956, and any other laws that may apply to this Agreement,
- (v) The Contractor shall at a minimum apply risk management practices accepted by the Contractors' industry.

Section 4.02 City's Liability Insurance. City will be responsible for purchasing and maintaining its own liability insurance, if any and, at its option, may purchase, and maintain such insurance as will protect it against claims which may arise from Contractor's operations.

Article V – Contractor's Responsibilities

Section 5.01 Supervision and Superintendence.

- (a) Contractor will perform, supervise, and direct the Work efficiently and with its best skill and attention. Contractor will be solely responsible for the means, methods, techniques, sequences, and procedures of construction. Contractor will be responsible to see that the finished Work complies accurately with the terms and conditions of this Agreement. The Contractor shall study and compare the Agreement and the Bid Documents, including but not limited to, all drawings, specifications and instructions and shall at once report to the Program Manager and the City any error, inconsistency, or omission which it may discover, but it shall not be held responsible for their existence or discovery unless the error, inconsistency or omission is a result of the actions or inactions of the Contractor, its employees, agents, and/or Subcontractors, of any tier, or is the type that a reasonable contractor performing the same or similar services in this location would have discovered.
- (b) Contractor will keep on the Project/Work at all times during its progress a competent resident superintendent, who shall not be replaced without written notice to Program Manager except under extraordinary circumstances. The superintendent will be Contractor's representative at the site and shall have authority to act on behalf of Contractor. All communications given to the superintendent shall be as binding as if given to Contractor.

Section 5.02 Labor; Materials, Equipment, Duties and Responsibilities.

- (a) The Contractor shall furnish and deliver all the material authorized by the City and do and perform the Work for the Project. Contractor will provide competent, suitably qualified personnel to survey and layout the Work and perform the Work. Contractor will at all times maintain good discipline and order at the Work site. The Contractor shall be fully equipped, staffed, certified, and licensed for the Work. Copies of all applicable licenses shall be provided to the City and Program Manager, if not already provided, prior to execution of this Agreement by the City. Contractor shall own or have access to all equipment and instrumentation required for the Work performed under the Agreement, and that equipment and instrumentation shall be available for the duration of the Agreement. All employees of the Contractor shall have knowledge and experience, including all applicable and current licenses, certifications, and/or permits necessary to perform the Work under the Agreement. Any employee of the Contractor, who in the opinion of City or Program Manager is incompetent or whose conduct becomes detrimental to work or safety shall be immediately removed from association with the Agreement and/or the Project upon request by the City or Program Manager.
- (b) Contractor will furnish all materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water and sanitary facilities and all other facilities and incidentals necessary for the execution, testing, initial operation and completion of the Work. It is agreed that the quantities shown in **Exhibit A** are approximate only and subject to increase or decrease and any increase or decrease is to be paid at the contract unit price shown in **Exhibit A**.
- (c) All materials and equipment will be new or perform as if new.
- (d) All materials and equipment shall be applied, installed, connected, erected, used, cleaned, and conditioned in accordance with the instructions of the applicable manufacturer, fabricator, or processors.

- (e) The Contractor shall provide material pits at no cost to the City.
- (f) The Contractor shall clear right of way obstructions without expense to the City.
- (g) Contractor represents and warrants that it has visited the Work site and fully informed itself as to all conditions and matters which can in any way affect the character, quality and/or quantity of the Work to be performed, the materials to be furnished, or the cost thereof. The City does not warrant or represent cite or local conditions.
- (h) Workmanship and materials shall be as prescribed by this Agreement. Whenever not expressly provided for, all workmanship used or employed in carrying out the Work shall be the best of the respective grades and qualities. Where equipment, materials, or articles are referred to in the Agreement as equal to any particular standard, the Program Manager shall decide the question of equality. When called for by the Agreement, or upon the request of the City or Program Manager, the Contractor shall furnish for approval by the Program Manager full information concerning the materials or articles which it contemplates incorporating into the Project. Samples of materials shall be submitted for approval when so directed or requested. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection by the City or Program Manager, the removal and replacement of which will be at Contractor's cost.
- (i) The Contractor shall perform all extra work which may be required of it for such compensation as is provided in Article IX. Notwithstanding the previous sentence, it is agreed that the quantities shown in **Exhibit A** are approximate only and subject to increase or decrease and any increase or decrease is to be paid at the contract unit price shown in **Exhibit A**.
- (j) The Contractor shall submit to the Program Manager all drawings, product data, and samples required by the Agreement, or requested, for approval. The Project and Work shall be in accordance with the approved submittals.

Section 5.03 Concerning Subcontractors.

- (a) Contractor will not make any substitution for any Subcontractor who was listed on the Bid Documents and has been accepted by City unless City or Program Manager determines that there is good cause for doing so. The City reserves the right to remove any Subcontractor for cause.
 - (b) Contractor will be fully responsible for all acts and omissions of his Subcontractors and of persons directly or indirectly employed by them and of persons for whose acts any of them may be liable to the same extent that it is responsible for the acts and omissions of persons directly employed by it. Nothing in the Agreement shall create any contractual relationship between any Subcontractor and City or any obligation on the part of the City to pay or to see to the payment of any monies due any Subcontractor, except as may otherwise be required by law. City may furnish to any Subcontractor, to the extent practicable, evidence of amounts paid to Contractor on account of specific work done.
 - (c) Contractor agrees to bind specifically every Subcontractor to the applicable terms and conditions of the Agreement for the benefit of City.
 - (d) All work performed by Contractor or by a Subcontractor shall be pursuant to an appropriate agreement between Contractor and the Subcontractor. The City and Program Manager reserve the
- City of Powder Springs Brownsville Road Project

right to review all subcontracts prepared in connection with this Agreement. The Contractor agrees that it shall submit to the City and Program Manager any proposed subcontract documents together with Subcontractor cost estimates for review and written approval in advance of their execution.

Section 5.04 Patent Fees and Royalties. Contractor will pay all license fees and royalties and assume all costs incident to the use of any invention, design, process or device which is the subject of patent rights or copyrights held by others. Contractor will indemnify and hold harmless City and anyone directly or indirectly employed by either of them from and against all claims, damages, losses and expenses (including attorneys' fees) arising out of any infringement of such rights during or after completion of the work, and shall defend all such claims in connection with any alleged infringement of such rights.

Section 5.05 Permits. Contractor will secure and pay for all permits and licenses and will pay all governmental charges and inspection fees necessary for the prosecution of the Work. Contractor will also pay all public utility charges.

Section 5.06 Laws and Regulations. Contractor will give all notices and comply with all federal, state, and/or local laws, ordinances, rules and/or regulations ("Laws") applicable to the Work, including but not limited to those regarding erosion and sedimentation control, as defined in the City's codes and ordinances, and those Laws concerning the installation of necessary silt fencing. If Contractor observes that the Work or any part thereof, conflicts with any such requirement, it will give Program Manager prompt written notice, and any necessary changes shall be adjusted by an appropriate modification. If Contractor performs any Work contrary to such Laws, Contractor shall bear all costs arising therefrom. Contractor's ignorance of applicable Laws shall not relieve it from responsibility for compliance with applicable Laws and no adjustments/compensations in favor of Contractor shall be made for losses caused Contractor's failure to comply with the Laws. In addition, Contractor shall, at its sole cost, obtain and hold all licenses, permits, and/or certifications as may be required by the Laws for the proper execution and completion of the Work. Contractor shall, at the time of execution of this Agreement by it, if it has not already done so, provide copies of said licenses, permits, and/or certifications to the City and Program Manager. The Contractor shall also be responsible for any required permanent stabilization. The Contractor may not seek an adjustment, amendment or change order to this Agreement as a result of not being able to comply with applicable Laws.

Section 5.07 Taxes. Contractor will pay all sales, consumer, use and other similar taxes required by the law of the place where the Work is to be performed. Notwithstanding the preceding sentence, no sales tax shall be charged to the City on any of the material and/or equipment incorporated or used in the performance of the Work. In the event that the Contractor does not have the capability of selling to the City on a tax exempt status (sale for resale), it will build the sales tax into the cost of the materials and/or equipment. The City reserves the right to purchase any such equipment and/or materials from Contractor's suppliers and decrease the Contract Price by the amount of the Contractor's materials and/or equipment bill, including sales tax, included in the Contract Price. This action, if applied, is not intended to reduce the Contractor's profit. It is intended to avoid sales tax due to the City's status as a tax-exempt entity. Any action taken hereunder shall not relieve the Contractor of its independent tax liability.

Section 5.08 Use of Project Site.

- (a) Contractor will confine his equipment, the storage of materials and equipment and the operations of his workers to areas permitted by the Laws and/or the requirements of the Agreement, and shall not

unreasonably encumber the Project site and the property adjacent thereto with materials or equipment. All materials, tools, and equipment shall be removed or safely stored on a daily basis. The City is not responsible for the theft or damage to the Contractor's property. All possible safety hazards to workers or the public shall be corrected immediately and left in a safe condition at the end of each workday. If there are any questions the City's designated representative shall be consulted.

- (b) Contractor will not load nor permit any part of the Project to be loaded with stresses or pressures that will endanger it, nor will it subject any part of the Project to stresses or pressures that will endanger it.

Section 5.09 Record Drawings. Contractor will keep one (1) record copy of the Agreement, including the Bid Documents, all specifications, drawings, addenda, modifications, and shop drawings at the site in good order and annotated to show all changes made during the construction process which shall be available to City and shall be delivered to City upon completion of the Project.

Section 5.10 Safety and Protection.

- (a) Contractor will be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. The Contractor shall also be responsible for the provision of temporary restroom facilities and other similar related facilities needed at the Work site. Contractor will take all necessary precautions for the safety of, and will provide the necessary protection to prevent damage, injury, or loss to:
1. All employees on the Work site and other persons who may be affected thereby, including, but not limited to, the general public, residents and neighbors;
 2. All the Work and all materials or equipment to be incorporated there, whether in storage on or off the site; and,
 3. Other property at the Work site or adjacent property, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation, or replacement in the course of construction.
- (b) Contractor will comply with all applicable Laws and/or orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury, or loss. Contractor will erect and maintain, as required by the conditions and progress of the Work, all necessary safeguards for safety and protection, and in addition, he will comply with all applicable recommendations of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, Inc, latest edition. Contractor will notify owners of adjacent utilities when prosecution of the Work may affect them. All damage, injury or loss to any property referred to in subparagraphs (2) or (3) of Section 5.10 (a) caused, directly or indirectly, in whole or in part, by Contractor, any Subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, will be remedied by Contractor, except damage or loss attributable to the fault of drawings or specifications or to the gross negligence of City or anyone employed by the City or anyone for whose acts the City may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of Contractor.

- (c) Contractor will designate a responsible member of his organization at the site whose duty shall be the prevention of accidents. This person shall be Contractor's superintendent unless otherwise designated in writing by Contractor to City.

Section 5.11 Emergencies. In emergencies affecting the safety of persons or the Work or property at the site or adjacent property, Contractor, without special instruction or authorization from City, is obligated to act, at its discretion, to prevent threatened damage, injury, or loss. Contractor will give City prompt written notice of any significant changes in the Work or deviations caused thereby, and a Change Order or written amendment shall thereupon be issued/executed covering the changes and deviations involved. If Contractor believes that additional work done by it in an emergency which arose from causes beyond its control entitles it to an increase in the Contract Price or an extension of the Contract Time, it may make a claim therefore as provided in Articles IX and X.

Section 5.12 Cleaning Up. On a daily basis, the Contractor will keep the Project site free from accumulations of waste materials, rubbish, and other debris resulting from the Work, and at the completion of the Work Contractor will remove all waste materials, rubbish and debris from and about the Work site as well as all tools, construction equipment and machinery, and surplus materials, and will leave the Project and Work site clean and ready for occupancy/use by City. Contractor will restore to their original condition those portions of the Project/Work site not designated for alteration, specifically including any material pits. The Contractor shall be solely responsible for disposing of debris and materials and the costs associated therewith. Disposal of debris and materials must be done in a lawful manner and in accordance with applicable Laws. In addition, the Contractor shall not burn any materials on-site or within the city limits of the City.

Section 5.13 Indemnification and Limitation of Liability.

- (a) The Contractor, shall indemnify and save harmless the City, its officers, council members, agents, contractors, assigns, volunteers, and employees from and against all claims, demands, liabilities, suits, judgments and decrees, losses and costs and expenses of any kind or nature whatsoever on account of injuries to or death of any person or persons or damage to any property occurring directly or indirectly from performance of Work hereunder by Contractor or its employees, agents, servants, associates, and/or Subcontractors, however such injuries or death or damage to property may be caused. Contractor shall also indemnify, defend and hold harmless the City, its officers, council members, agents, contractors, assigns, volunteers, and employees from and against any and all claims, actions, damages, liabilities, and expenses, including reasonable attorneys' and other professional fees, arising out of any breach by Contractor of any representation, warranty, covenant, duty or obligation. Contractor agrees and acknowledges that claims, demands, liabilities, suits, judgments and decrees, losses and costs and expenses may include monetary claims.
- (b) City shall not be liable to the Contractor or any Subcontractor, of any tier, for any lost profits, special, incidental, punitive, exemplary or consequential damages, including but not limited to frustration of economic or business expectations, loss of profits, loss of capital, cost of substitute product(s), facilities or services, or down time cost, even if advised of the possibility of such damages, arising out of or resulting from City's performance or non-performance of City's obligations under the Agreement, or from City's termination or suspension of services under the Agreement, or for any other reason. Furthermore, the City shall not be liable in contract or tort to Contractor, contractors, subcontractors or suppliers thereof; regardless of tier, for incidental or**

consequential damages arising out of or resulting from City's performance or nonperformance of City's obligations under the Agreement, or from City's termination or suspension of services under the Agreement, or for any other reason.

- (c) In any and all claims against City or any of its officers, council members, agents, contractors, assigns, volunteers, and employees by any employee of Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under Paragraph (a) of this section shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.
- (d) These indemnities shall not be limited by reason of any insurance coverage held by the Contractor or the Contractor's Subcontractors.

Section 5.14 Standards. The Work and materials shown in **Exhibit A** shall be in strict and entire conformity with (i) the Agreement, including but not limited to the Contract Documents, (ii) the Georgia Department of Transportation Standard Specifications, and Special Provisions, latest edition, which is also incorporated herein by reference. This Agreement shall be construed in accordance with the Georgia Department of Transportation Standard Specifications and Special Provisions, latest edition. In addition, the Work shall be performed to the entire satisfaction of the City. The decision of the City's Program Manager upon any question connected with the execution or fulfillment of this Agreement and interpretation of the specifications or upon any failure or delay in the prosecution of the Work by the Contractor shall be final and conclusive.

Article VI – Work by Others

Section 6.01 Additional Work. City may perform additional work related to the Project by itself or it may let other direct contracts for additional work. Contractor will afford the other contractors who are parties to such direct contracts (or City, if it is performing the additional work itself), reasonable opportunity for the introduction and storage of materials and equipment and the execution of work, and shall properly connect and coordinate its work with theirs.

Section 6.02 Work of Other Contractors. If any part of Contractor's Work depends for proper execution or results upon the work of any such other contractor (or City), Contractor will inspect and promptly report to the Program Manager, in writing, any defects or deficiencies in such work that render it unsuitable for such proper execution and results. Contractor's failure so to report shall constitute an acceptance of the other work as fit and proper for the relationship of Contractor's Work, except as to defects and deficiencies which may appear in the other work after the execution of Contractor's Work.

Section 6.03 Coordination with Other Work. Contractor will do all cutting, fitting, and patching of its Work that may be required to make it's several parts come together properly and fit it to receive or be received by such other work. Contractor will not endanger any work of others by cutting, excavating or otherwise altering their work and will only cut or alter their work with the written consent of City or Program Manager.

Section 6.04 Notice of Other Work. If the performance of additional work by other contractors or City is not noted in the Contract Documents prior to the execution of the Agreement, written notice shall be given to Contractor prior to starting any such additional work. If Contractor believes that the performance of such additional work by City or others involves additional expense or entitles him to an extension of the Contract time, he may make a claim as provided in Articles IX and X.

Article VII – City's Responsibility

Section 7.01 Communications with Contractor. Except as is specifically allowed for in this Agreement, City will issue all communications to Contractor through the Program Manager. Croy Engineering LLC and shall be deemed the City's designated representative for purposes of this Agreement. All Work under this Agreement shall be coordinated with the Program Manager and any changes to the established schedule shall be approved by the Program Manager. The Contractor agrees to work closely with the Program Manager and City to resolve any and all problems affecting the Agreement or performance there under.

The Program Manager is the agent of the City and is the City's Authorized Representative in providing Basic Services and Additional Services under the Program Management Services Agreement, dated September 22, 2015, entered into by and between Croy Engineering, LLC and the City said agreement being incorporated herein by reference. In addition, the Program Manager is the agent of the City and the Authorized Representative (as defined in the Program Management Services Agreement) of the City for purposes of the design and construction of the Project. All communications between the Contractor and City shall be through the Program Manager. The Program Manager may be changed in the event the Program Management Services Agreement is terminated. The Program Manager shall have such authority, duties, obligations and control, as more particularly set forth in the Program Management Services Agreement, which is incorporated herein by reference, to insure that the Work is performed and the Project is fully and properly constructed and completed in accordance with the terms and conditions of the Agreement.

Section 7.02 Payment. City and SCP/SEI BR Holdings, LLC will make payments to Contractor promptly after they are due as provided in Article XII.

Section 7.03 Change Order. In addition to its rights to request changes in the Work in accordance with Article VIII, City (especially in certain instances as provided in Section 9.04) will be obligated to execute Change Orders.

Section 7.04 Work Stoppage. City and Program Manager shall have the right to stop, suspend or terminate work in accordance with Article XIII.

Section 7.05 Utilities. The City shall be responsible for obtaining and handling any agreements with utility owners for necessary removal and/or relocations of said utilities. The City shall provide the utility owners reasonable notice to allow for sufficient time for engineering and material orders required for any removal and/or relocation necessary. Railroads shall be considered a utility. The City shall be responsible for obtaining approval of plans and for acquiring easements of other property rights from any affected railroad for construction within any railroad property/right-of-way and shall provide for the protection of the said railroad's interest, including flagging and inspection, or as may be otherwise reasonably required by the effected railroad.

Article VIII – Changes in the Work

Section 8.01 Change Orders. Without invalidating the Agreement, City may, at any time or from time to time, order additions, deletions or revisions in the Work which will be authorized by Change Orders. Upon receipt of a Change Order, Contractor will proceed with the Work involved. All such Work shall be executed under the applicable conditions of the Agreement. If any Change Order causes an increase or decrease in the Contract Price or an extension or shortening of the Contract Time, an equitable adjustment will be made as provided in Article IX or Article X. No material changes to the scope, character, complexity, or duration of the Project from those required under the Agreement shall be allowed absent a properly executed Change Order. Unreasonable estimates shall be deemed good cause to terminate this Agreement.

Section 8.02 Field Order. City may authorize minor changes or alterations in the Work not involving extra cost and not inconsistent with the overall intent of the Agreement and Proposal. These may be accomplished by a Field Order. If Contractor believes that any minor change or alteration authorized by City entitles him to an increase in the Contract Price, he may make a claim as provided in this Agreement.

Section 8.03 Additional Changes. Additional work performed by Contractor without authorization of a Change Order will not entitle it to an increase in the Contract Price or an extension of the Contract Time, except in the case of an emergency as provided in Section 5.11 and except as provided in Article XI and XIII.

Section 8.04 Execution by City. City will execute appropriate Change Orders covering changes in the Work to be performed, work performed in an emergency as provided in Section 5.11 and any other claim of Contractor for a change in the Contract Time or the Contract Price which is approved by City and Program Manager. Contractor acknowledges that due to the scheduling of City mayor and council meetings, that immediate execution of a Change Order may not be possible and that execution of said Change Order may be delayed until the next regularly scheduled meeting of the mayor and council.

Article IX – Change of Contract Price

Section 9.01 Contract Price. The Contract Price constitutes the total compensation payable to Contractor for performing the Work. All duties, responsibilities, and obligations assigned to or undertaken by Contractor shall be at his expense without change in the Contract Price. The specifications are based on requirements to ensure that the lowest practical cost and highest practical quality of construction services are obtained at quality prices using the latest technology. **The City will not honor or consider any price increase, fuel surcharge, or add-on cost during the established Contract Time.**

Section 9.02 Adjustment to Contract Price by Change Order. The Contract Price may only be changed by a Change Order, or as otherwise allowed in this Agreement. Any claim for an increase in the Contract Price shall be in writing delivered to Program Manager within **fifteen (15)** days of the occurrence of the event giving rise to the claim. Any change in the Contract Price resulting from any such claim shall be incorporated in a Change Order. If changes involve quantities only, with no additional items, funding or time required, the decisions shall be rendered by the Project Manager.

Section 9.03 Method of Adjustment. The value of any work covered by a Change Order or of any claim for an increase or decrease in the Contract Price shall be determined in one of the following ways:

City of Powder Springs Brownsville Road Project

- (a) By mutual acceptance of a lump sum.
- (b) By cost and a mutually acceptable fixed amount for overhead and profit.
- (c) If none of the above methods is agreed on, the value shall be determined by City on the basis of costs and a percentage or overhead and profit. Costs shall only include labor (payroll, payroll taxes, fringe benefits, workers' compensation, etc), materials, equipment, and other incidentals directly related to the Work involved. The maximum percentage which shall be allowed for Contractor's combined overhead and profit, shall be as follows:
 - (i) For all such Work done by its own organization, Contractor may add up to **ten percent (10%)** of its actual net increase in cost; and,
 - (ii) For all such Work done by Subcontractors, each Subcontractor may add up to **ten percent (10%)** of its actual net increase in costs for combined overhead and profit and Contractor may add up to **five percent (5%)** of the Subcontractor's total for its combined overhead and profit, provided that no overhead or profit shall be allowed on costs incurred in connection with premiums for public liability insurance or other special insurance directly related to such Work.

Contractor will submit in a form prescribed by the City an itemized cost breakdown together with supporting data.

Section 9.04 Credits. The amount of credit to be allowed by Contractor to City for any such change which results in a net decrease in cost will be the amount of the actual net decrease as determined by City.

Article X – Change of Contract Time

Section 10.01 Adjustment by Change Order. Except as is specifically allowed herein, the Contract Time may only be changed by a Change Order. Any claim for an extension in the Contract Time, shall be in writing delivered to Program Manager within **ten (10)** days of the occurrence of the event-giving rise to the claim. Any change in the Contract Time resulting from any such claim shall be incorporated in a Change Order.

Section 10.02 Extension. The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of Contractor if he makes a claim as provided in Section 13.04. Such delays shall include, but not be restricted to, acts or neglect by any separate contractor employed by City, fires, floods, labor disputes, epidemics, abnormal weather conditions, or acts of God. The Contract Time shall be extended one day for each rain day encountered. A rain day is defined as a day in which the Contractor is unable to perform **ANY** work at the Work site, as determined by the Program Manager.

Section 10.03 Time is of the Essence. All time limits stated in the Agreement are of the essence of the Agreement. The provisions of Article XIII shall not exclude recovery for damages (including compensation for additional professional services) for delay by either Party.

Article XI – Warranty and Guarantee; Tests and Inspection; Correction, Removal or Acceptance of Defective Work

Section 11.01 Warranty and Guaranties. Contractor warrants and guaranties to the City that all materials and equipment will be new unless otherwise specified and that all Work will be of good quality and free from faults or defects and in accordance with the requirements of the Agreement and of any inspections, tests, or approvals. All unsatisfactory Work, all faulty or defective Work, and all Work not conforming to the requirements of the Agreement or of such inspections, tests, or approvals shall be considered defective. Prompt notice of all defects shall be given to Contractor. All defective work, whether or not in place, may be rejected, collected, or accepted as provided in this Article XI.

Section 11.02 Access to the Work. City and Program Manager will at all times have access to the Work. Contractor will provide proper facilities for such access and observation of the Work and also for any inspection or testing by others.

Section 11.03 Uncovering Work.

- (a) If any Work is covered contrary to the written request of City or Program Manager, it must, if requested by City or Program Manager, be uncovered for its observation and replaced at Contractor's expense.
- (b) If any Work has been covered which City or Program Manager has not specifically requested to observe prior to its being covered, or if City or Program Manager considers it necessary or advisable that any Work be inspected or tested by others, Contractor, at the request of City or Program Manager, will uncover, expose or otherwise make available for observation, inspection or testing as City or Program Manager may require, that portion of the Work in question, furnishing all necessary labor, material and equipment. If it is found that such Work is defective, Contractor will bear all the expenses of such uncovering, exposing, observation, inspection, and testing and of satisfactory reconstruction, including compensation for additional professional services, and an appropriate deductive Change Order shall be issued. If however, such Work is not found to be defective, Contractor will be allowed an increase in the Contract Price or all extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction, if he makes a claim as provided in Articles IX and X.

Section 11.04 Stopping the Work. If the Work is defective, or if Contractor fails to supply sufficient skilled workers or suitable materials or equipment, or if Contractor fails to make prompt payments to Subcontractors or for labor, materials or equipment, City or Program Manager may order Contractor to stop the Work, or any portion thereof; until the cause for such an order has been eliminated; however, this right of City or Program Manager to stop the Work shall not give rise to any duty on the part of City or Program Manager to exercise this right for the benefit of Contractor or any other party.

Section 11.05 Correction or Removal of Defective Work. If required by City or Program Manager prior to approval of final payment, Contractor will promptly, without cost to City and as specified by City, either correct any defective Work, whether or not fabricated, installed or completed, or, if the Work has been rejected by City, remove it from the site and replace it with non-defective Work. If Contractor does not correct defective Work or remove and replace rejected Work within a reasonable time, all as specified

in a written notice from City, City may have the deficiency corrected or the rejected Work removed and replaced. All direct or indirect costs of such correction or removal and replacement, including compensation for additional professional services, shall be paid by Contractor, and an appropriate deductive Change Order shall be issued. In the event that the cost of the correction or removal and replacement is greater than any remaining sums to be paid under the Agreement, the Contractor shall pay the difference thereof to the City. Contractor will also bear the expenses of making good all Work of others destroyed or damaged by his collection, removal, or replacement of Contractor's defective Work.

Section 11.06 One-Year Correction Period. If, after the approval of final payment and prior to the expiration of **one (1)** year after the date of Substantial Completion or a longer period of time as may be prescribed by law or by the terms of any applicable special guaranty required by the Agreement, any Work is found to be defective, Contractor will, promptly without cost to City and in accordance with City's written instructions, either correct such defective Work, or, if it has been rejected by City, remove it from the site and replace it with non-defective Work. If Contractor does not promptly comply with the terms of such instructions, City may have the defective Work corrected or the rejected Work removed and replaced, and all direct and indirect costs of such removal and replacement, including compensation for additional professional services, will be paid by Contractor.

Section 11.07 Acceptance of Defective Work. If, instead of requiring correction or removal and replacement of defective Work, City prefers to accept it, City may do so. In such case, if acceptance occurs prior to approval of final payment, a Change Order shall be issued incorporating the necessary revisions in the Agreement, including appropriate reduction in the Contract Price, or, if the acceptance occurs after approval of final payment, an appropriate amount shall be paid by Contractor to City. If the payments then or thereafter-due Contractor are not sufficient to cover such amount, Contractor will pay the difference to City.

Section 11.08 Neglected Work by Contractor. If Contractor should neglect to prosecute the Work in accordance with the Agreement, including any requirements of the progress schedule, City, may, without prejudice to any other remedies which it may have, employ such remedies available to it under this Agreement, including those listed in Section 13.02.

Article XII -Payments and Completion

Section 12.01 Applications for Progress Payment. Payments will be made monthly in the amount of sums earned based upon the quantity complete and unit prices as indicated in **Exhibit A**, and/or as otherwise provided in this Agreement, less previous partial payments and less an established retainage of **five percent (5%)** of the sums earned, said retainage amount to be held by the City. The final application shall reflect the cost of the Work accomplished by the Contractor under the terms of this Agreement, and shall be the base for the final payment. All payments shall be made on the quantity of the Work completed of the unit price bid, as shown in **Exhibit A** and/or as otherwise provided for in this Agreement. It is further agreed that the contingency pay item as shown in Exhibit A shall be used only with the owner's approval any any unspent funds are credited to the city at the end of the project. It is further agreed that upon completion of the Work by the Contractor, approval by the Program Manager, and acceptance thereof by the City, the City shall pay to the Contractor a sum equal to the one hundred percent of the total compensation as set forth in the all approved payment applications, less the total of all previous partial payments paid or in the process of being paid.

At least **ten (10)** days before each progress payment falls due (but not more often than once a month), Contractor will submit to City for review a Program Manager certified/approved application for payment also filled out and signed by Contractor covering the Work completed as of the date of the application and supported by such data as City and Program Manager may reasonably require. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the site or at another location agreed to in writing, the application for payment shall also be accompanied by such supporting data, satisfactory to City and Program Manager, as will establish City's title to the material and equipment and protect its interest, including applicable insurance.

Section 12.02 Contractor's Warranty of Title. Contractor warrants and guaranties that title to all Work, materials and equipment covered by an application for payment, whether incorporated in the Project or not, will have passed to City prior to the making of the application for payment, free and clear of all liens, claims, security interests and encumbrances (referred to below as "liens"); and that no work, materials or equipment covered by an application for payment will have been acquired by Contractor or by any other person performing the Work at the site or furnishing materials and equipment for the Project, subject to an agreement under which an interest or encumbrance is retained by the seller or otherwise imposed by Contractor or such other person.

Section 12.03 Approval of Payments.

- (a) City will, within **thirty (30)** days after receipt of each duly certified and approved application for payment, either indicate in writing its approval of payment or return the application to Contractor indicating in writing the reasons for refusing to approve payment. In the latter case, Contractor may make the necessary corrections and resubmit the application, and City will, within **thirty (30)** days of presentation to it of an approved application for payment, pay Contractor the amount so approved.
- (b) City may refuse to approve the whole or any part of any payment because of subsequently discovered evidence or the results of subsequent inspections or tests which nullify the grounds for any payment previously approved, to such extent as may be necessary in its opinion to protect itself from loss because:
 - (i) The Work is defective;
 - (ii) Claims have been filed or there is reasonable evidence indicating the probable filing of claims;
 - (iii) The Contract price has been reduced because of Modifications;
 - (iv) City has been required to correct defective Work or complete the Work in accordance with Section 11; or
 - (v) Of unsatisfactory prosecution of the Work, including failure to clean up as required by Section 5.12.

Section 12.04 Substantial Completion.

- (a) Prior to final payment, Contractor may, in writing to Program Manager, certify that the entire Project is substantially complete and request that the Program Manager City issue a certificate of substantial completion. Within a reasonable time thereafter, Program Manager and Contractor will make an inspection of the Project to determine the status of completion. If Program Manager does not consider the Project substantially complete, Program Manager will notify Contractor in writing, giving its reasons for such determination. If it is determined that the Project is substantially complete, the

Program Manager will prepare a tentative Certificate of Substantial Completion which shall fix the date of Substantial Completion and the responsibilities between City and Contractor for maintenance. There shall be attached to the certificate a tentative list of items to be completed or collected before final payment, and the certificate shall fix the time within which such items shall be completed or collected, the time to be within the Contract Time. Upon the completion and correction of the items on the tentative list, if Program Manager considers the Project substantially complete, it shall issue the definitive Certificate of Substantial Completion.

- (b) City shall have the right to exclude Contractor from the Project after the date of Substantial Completion, but City will allow Contractor reasonable access to complete or collect items on the tentative list.

Section 12.05 Partial Utilization. Prior to final payment, City may request Contractor in writing to permit it to use a specified part of the Project which it believes it may use without significant interference with construction of the other parts of the Project. If Contractor agrees, it will certify to City that such part of the Project is substantially complete and request the Program Manager to issue a Certificate of Substantial Completion for that part of the Project. Within a reasonable time thereafter, Program Manager and Contractor will make all inspection of that part of the Project to determine its status of completion. If Program Manager does not consider that it is substantially complete, Program Manager will notify Contractor in writing, giving it the reasons therefor. If Program considers that part of the Project to be substantially complete, it will execute and deliver to Contractor a Certificate to that effect, fixing the date of Substantial Completion as to that part of the Project, attaching to it a tentative list of items to be completed or corrected before final payment and fixing the responsibility between City and Contractor for maintenance as to that part of the Project. City shall have the right to exclude Contractor from all or part of the Project which Program Manager has certified to be substantially complete, but City will allow Contractor reasonable access to complete or collect items on the tentative list. It is contemplated that City may desire to begin use of each portion of the Project as said portion is substantially completed rather than wait until all the entire Project is substantially complete.

Section 12.06 Final Inspection. Upon written notice from Contractor that the Project is complete, Program Manager will make a final inspection with Contractor and Program Manager will notify Contractor in writing of any particulars in which this inspection reveals that the Work is defective. Contractor shall immediately make such corrections as are necessary to remedy such defects.

Section 12.07 Final Application for Payment. After Contractor has completed any such corrections to the satisfaction of City and Program Manager and delivered all maintenance and operating instructions, schedules, guarantees, bonds, certificates of inspection and other documents required, it may make application for final payment following the procedure for progress payments. The final application for payment shall be accompanied by such supporting data as City and Program Manager may require, together with complete and legally effective releases or waivers (satisfactory to the City and Program Manager) of all liens arising out of the Agreement and the labor and services performed and the material and equipment furnished there under. In lieu of this and as approved by City, Contractor may furnish receipts or releases in full; an affidavit of Contractor that the releases and receipts include all labor, services, material and equipment for which a lien could be filed, and that all payrolls, material and equipment bills, and other indebtedness connected with the Work for which City or its property might in any way be responsible, have been paid or otherwise satisfied; and consent of the surety, if any, to final

payment **Exhibit G**. If any Subcontractor or supplier fails to furnish a release or receipt in full, Contractor may furnish a bond satisfactory to City, indemnifying City against any lien.

The City shall prohibit any Contractor, contractor or Subcontractor from filing a lien or encumbrance against the items delivered to or against the owned property of the City.

Section 12.08 Approval of Final Payment.

- (a) If, on the basis of its observation and review of the Work during construction, its final inspection and its review of the final application for payment, all as required by the Agreement, City and Program Manager are satisfied that the Work has been completed, and Contractor has fulfilled all of its obligations under the Agreement, the City will, within **thirty (30)** days after receipt of the final application for payment, indicate in writing its approval of payment and process the application for payment. Otherwise, the City will return the application to Contractor, indicating in writing its reasons for refusing to approve final payment, in which case Contractor will make the necessary corrections and resubmit the application. City will, within **thirty (30)** days of presentation to it of an approved final application for payment, pay Contractor the amount approved.
- (b) If, after Substantial Completion of the Work, final completion is materially delayed through no fault of Contractor and City so agrees, City shall make payment of the balance due for that portion of the Work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Section 12.09 Contractor's Continuing Obligation. Contractor's obligation to perform the Work and complete the Project in accordance with the Agreement shall be absolute. Neither approval of any progress or final payment by City, nor the issuance of a Certificate of Substantial Completion, nor any payment by City to Contractor, nor any use or occupancy of the Project or any part by City, nor any act of acceptance by City nor any failure to do so, nor any correction of defective Work by City shall constitute an acceptance of Work not in accordance with the Agreement.

Section 12.10 Waiver of Claims. The making and acceptance of final payment shall constitute:

- (a) A waiver of all claims by City against Contractor other than those arising from unsettled liens, from defective Work appearing after final payment or from failure to comply with the requirements of the Agreement; and,
- (b) A waiver of all claims by Contractor against City other than those previously made in writing and still unsettled

Section 12.11 Verification of Costs. The Contractor shall, upon request, allow the examination and verification of costs by the Program Manager or other representatives of the City before final payment is due. If the examination of the contract cost records, results in the determination that unallowable expenses were charged to the City by the Contractor, the Contractor shall be immediately responsible for reimbursing the City for the full amount of such unallowable expenses. The Contractor shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred for the Work and Project and used in support of its Proposal and shall make such documents available at all reasonable times during the period of the Agreement and for **three (3)** years from the date of final payment under the

Agreement, for inspection by the City and any reviewing agencies, and copies thereof shall be furnished upon request. The Contractor agrees that the provisions of this Section shall be included in any agreement it may make with any Subcontractor, assignee, or transferee.

Article XIII -Suspension of Work and Termination

Section 13.01 City May Suspend Work. City or Program Manager may, at any time and without cause, suspend the Work or any portion for a period of not more than **ninety (90)** days by notice in writing to Contractor which shall fix the date on which work shall be resumed. Contractor will resume the Work on the date so fixed . Contractor will be allowed an increase in the Contract Price or an extension of the Contract *Time*, or both, directly attributable to any suspension, if he makes a claim as provided in Articles IX and X.

Section 13.02 City May Terminate.

- (a) If Contractor is adjudged a bankrupt or insolvent, or if it makes a general assignment for the benefit of its creditors, or if a trustee or receiver is appointed for Contractor or for any of its property, or if it files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or similar laws, or if it repeatedly fails to supply sufficient skilled workers or suitable materials or equipment, or if it repeatedly fails to make prompt payments to Subcontractors or for labor, materials or equipment, or if it disregards Laws of any public body having jurisdiction, or if he disregards the authority of Program Manager, or if he otherwise violates any provision of the Agreement, then City may, without prejudice to any other right or remedy and after giving Contractor and his surety **five (5)** days' written notice, terminate the Agreement and take possession of the Project and of all materials, equipment, tools, construction equipment and machinery owned by Contractor, and finish the Work by whatever method it may deem expedient. In such case, Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds the direct and indirect costs of completing the Project, including compensation for additional professional services, such excess shall be paid to Contractor. If such costs exceed such unpaid balance, Contractor will pay the difference to City. Such costs incurred by City will be incorporated in a Change Order.

In addition, if at any time the City or Program Manager shall be of the opinion that the Agreement or any part thereof is unnecessarily delayed or that the rate of progress or delivery is unsatisfactory, or that the Contractor is willfully violating any of the conditions or covenants of the Agreement, or is executing the same in bad faith, the City's designated representative may notify the Contractor of the nature of the complaint. If after **five (5)** working days after the date of the notification the conditions are not corrected to the satisfaction of the City and Program Manager, the City shall thereupon have the power to take whatever action it may deem necessary to complete the Work, or any part thereof, and the expense thereof; so charged, shall be deducted from any paid by the City out of such monies as may be or become due to said Contractor, under and by virtue of the Agreement. In such case Contractor shall not be entitled to receive any further payment until the Work complained of corrected. If such costs exceed the unpaid balance, Contractor shall pay the difference to City. Such costs incurred by City will be incorporated in a Change Order.

- (b) Where Contractor's services have been so terminated by City, such terminations shall not affect any rights of City against Contractor then existing or which may thereafter accrue. Any retention or payment of monies by City due Contractor will not release Contractor from liability.

Section 13.03 Termination for Convenience. City reserves the right to terminate this Agreement in whole or in part at its convenience, with or without cause, by written notice to Contractor. Such termination shall be effective upon **five (5)** days' written notice to Contractor and shall be without prejudice to any claims which City may have against Contractor. Aside from any continuing Work, the sole obligation of City in the event of such termination shall be to reimburse Contractor for services actually and properly performed by Contractor up to the effective date of termination.

Section 13.04 Contractor May Stop Work or Terminate. If, through no act or fault of Contractor, the Work is suspended for a period of more than **ninety (90)** days by City or under an order of court or other public authority, or City fails to act on any application for payment within **thirty (30)** days after it is submitted, or City fails to pay Contractor any sum within **thirty (30)** days of its approval and presentation, then Contractor may, on **seven (7)** days' written notice to City, terminate the Agreement and recover from the City payment for all Work properly performed. In addition and in lieu of terminating the Agreement, if City has failed to act on an application for payment or City has failed to make any payment as aforesaid, Contractor may upon **seven (7)** days' notice to City stop the Work until it has been paid all amounts then due.

Section 13.05 Early Termination. Upon **thirty (30)** days written notice to the Contractor, the City may also exercise its right to early termination in the event of:

- (i) The cancellation of funds,
- (ii) a change of priorities, or
- (iii) cancellation of a program

The City has the right to monitor performance, certification, and any subsequent recourse available in the event of default or non-performance.

Article XIV –Miscellaneous

Section 14.01 Registration with a Federal work authorization program

(a) Contractor shall comply with the requirements of the Official Code of Georgia ("OCGA") Sec. 13-10-91 and Rule 300-10-1-02 and compliance therewith is a condition of the Agreement.

(b) Contractor shall indicate its employee-number category applicable to it by placing a check mark next to the category applicable. The person executing the Agreement on behalf of the Contractor shall also place their initials next to the indication of the Contractor.

- RD Contractor fewer than 100 employees
 100 or more employees
 500 or more employees

(c) In the event that the Contractor employs or contracts with any Subcontractor(s) in connection with the Agreement, that party shall secure from the Subcontractor(s) such Subcontractor(s)' indication of the employee-number category applicable to the Subcontractor and provide written notice of same to

the City. Said notice to be signed by the party and the Subcontractor(s) and be in substantially the same form as set forth in subsection (b) above.

- (d) Compliance of Contractor with the requirements of OCGA Sec. 13-10-91 and Rule 300-10-1-02 shall be attested by the execution of the contractor affidavit attached hereto as **Exhibit B**, and incorporated herein. Once executed, the contractor affidavit shall be attached to and become a part of the Contract as **Exhibit C**.
- (e) Pursuant to OCGA Sec. 13-10-91, in the event that Contractor employs or contracts with any Subcontractor(s) in connection with the Agreement, the effected party will secure from such Subcontractor(s) attestation of the Subcontractor's compliance with OCGA Sec 13-10-91 and Rule 300-10-1-02 by the Subcontractor's execution of the subcontractor's affidavit attached hereto as **Exhibit D**, and maintain records of such attestation for inspection by the City at any time. Such subcontractor's affidavit shall become a part of the any agreement between the effected party and the Subcontractor. A copy of any such affidavits shall be returned to the City and shall be attached and become a part of the Agreement as collective **Exhibit E**.
- (f) All portions of contracts pertaining to compliance with OCGA Sec 13-10-91 and the rules implementing said section and any affidavits related thereto shall be open for public inspection in this state at reasonable times during normal business hours.

Section 14.02

- (a) Should any section, phrase, clause, sentence, or paragraph of the Agreement be held invalid or unconstitutional, it shall in no way affect the remaining provisions, which remain in full force and effect.
- (b) The Agreement shall be governed and interpreted by the laws of the State of Georgia and any action brought to clarify or enforce this Agreement shall be brought in a court of competent jurisdiction located in Cobb County, Georgia.
- (c) This Agreement embodies and constitutes the entire understanding between the parties with respect to the Work contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements (oral or written) are merged into this Agreement. Except as specifically allowed for in this Agreement, neither this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument in writing signed by the Party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.
- (d) The captions in this Agreement are inserted for convenience of reference only and in no way define, describe, or limit the scope or intent of this Agreement or any of the provisions hereof.
- (e) This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

- (f) The Parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both Parties. Each counterpart shall be deemed an original instrument as against any party who has signed it.
- (g) This Agreement shall not be deemed to have established an agency relationship between the City and Contractor.
- (h) The relationship between the City and the Contractor is that of an independent contractor. Contractor is not authorized to act as an agent, employee, or legal representative of the City, and may not hold itself out to the public as such. Contractor shall not have authority to make any representations or warranties on behalf of the City, nor in any manner to assume or create any obligation or responsibility, whether express or implied, on behalf of; or in the name of the City. Neither the Contractor, nor any Subcontractor or the respective employees shall be considered an employee of the City. The method and manner of performance of the Work shall be under the exclusive control of the Contractor. The City and Program Manager shall have the right to inspect such undertakings at any time without prior notice.
- (i) All persons furnished by the Contractor shall be considered solely employees or agents of Contractor and Contractor shall be responsible for payment of all unemployment, Social Security and other payroll taxes, including contributions from them when required by law.
- (j) All notices or other communications required or permitted under this Agreement to be given to the City, SCP/SEI BR Holdings, LLC or Contractor shall be deemed to have been given when made in writing and deposited in the United States mail, first class, postage pre-paid, or by registered or certified mail or by overnight courier with tracking capabilities to the parties at the following address. Notice sent via facsimile to the facsimile number provided below shall also be acceptable.

City:

City of Powder Springs, Georgia
Attn: Pam Conner
4426 Marietta St.
Powder Springs, Georgia 30127
Fax: 770-439-2258

SCP/SEI BR Holdings, LLC:

SCP/SEI BR Holdings, LLC.
Attn: Kenneth J. Clayman
1100 Spring St NW, Suite 550
Atlanta, GA 30309

with a copy to:

Gregory, Doyle, Calhoun and Rogers, LLC
Attn: Richard W. Calhoun
49 Atlanta St
Marietta, GA 30060

City of Powder Springs Brownsville Road Project

Fax: 770-426-6155

Contractor:

Summit Construction and Development, LLC
Attn: Ruben Bucio Duran
2108 Bentley Drive
Stone Mountain, GA 30087

or at such other address or fax number as the parties may, in written notice to the other, from time to time elect.

- (k) *Interest.* All monies not paid when due under this Agreement shall bear interest at the legal rate in force at the place of the Project. In the event that SCP/SEI BR Holdings, LLC fails to timely pay the Contractor pursuant to a City approved Application for Payment, SCP/SEI BR Holdings, LLC shall be responsible directly to the Contractor for any interest due on all monies not timely paid. If the City, in its sole discretion, decides to pay the Contractor monies due from SCP/SEI BR Holdings, LLC that have not been paid timely by SCP/SEI BR Holdings, LLC then SCP/SEI BR Holdings, LLC shall pay to the City all such monies owed by SCP/SEI BR Holdings, LLC that have been paid by the City to Contractor and interest in amount that shall continue to accrue until paid by SCP/SEI BR Holdings, LLC to the City.
- (l) *Rights and Remedies.* The duties and obligations imposed by these general conditions and the rights and remedies available hereunder, and, in particular but without limitation, the warranties, guaranties and obligations imposed upon Contractor and City pursuant to this Agreement shall be in addition to and not a limitation of any otherwise imposed or available by law. The covenants herein contained shall, except as otherwise provided, accrue to the benefit of and be binding upon the representatives, successors, and assigns of the parties thereto.
- (m) *Time Limit for Notice of Claims.* Should City or Contractor suffer injury or damage to its person or property because of any error, omission or act of the other or of any of its employees or agents or others for whose acts it is legally liable, such a claim shall be made in writing to the other Party within a reasonable time of the first observance of such injury or damage.
- (n) *Assignment.* The Work of the Contractor is considered personal by the City. The Contractor shall not assign, sublet, or transfer any or all of its interest in this Agreement without prior written approval of the City.
- (o) *Documents.* All drawings and specifications for the Work/Project are the sole property of the City and are intended for use in the Work contemplated in such drawings and specifications.

All reports, drawings, studies, specifications, survey notes, estimates, maps, computations, computer diskettes and print-outs and other data prepared by or for Contractor under the terms of this Agreement shall be delivered to and shall become and remain the Property of the City upon termination or completion of the Work. The City shall have the right to use same with restriction or limitation and without additional compensation to the Contractor other than that provided for in this Agreement. Articles, papers, bulletins, interim or final reports, oral transmissions or other materials reporting the plans, progress analyses, or results and findings of the Work conducted under this Agreement shall not be presented publicly or published without the prior written approval of the City.

City of Powder Springs Brownsville Road Project

Furthermore, all releases of information, findings, and recommendations shall include a disclaimer provision and that all published reports shall include said disclaimer on the cover and title page in the following form: **"The contents in this publication reflect the views of the author(s), who is responsible for the facts and accuracy of the data presented herein. The opinions, findings, and conclusions in this publication are those of the author(s) and do not necessarily reflect the opinion, finding(s), or policy of the City of Powder Springs, Georgia."** If any information concerning the Project, the conduction thereof; results or data gathered or processed should be released by the Contractor without prior written approval by the City, the release of same shall constitute grounds for termination of this Agreement without indemnity, if any, to the Contractor. However, should any such information be released by the City or the Contractor with such written approval, the same shall then be regarded as public information and no longer subject to the restrictions of this Agreement. Provided, however, that should such information be required to be released by the City pursuant to the Georgia Open Records Act, OCGA, Section 50-18-70, et seq, the restrictions and penalties set forth herein shall not apply. Any request for information directed to the Contractor pursuant to the Open Records Act by the public shall be redirected to the City for further action.

The Contractor is prohibited from copyrighting the final reports or any papers, interim reports, forms or other material which are a part of the Work under this Agreement, without written approval of the City. The City reserves the right to a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, or otherwise use and authorize others to use the documents and things prepared under this Agreement.

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date and year first written above.

CONTRACTOR:

Summit Construction and Development, LLC

By:  (Signature)

Printed Name: Ruben Bucio Duran (seal)

Its: President

CITY:

The City of Powder Springs, Georgia

By: 
Al Thurman

Date: 02/15/2023

Title: Mayor

LS Attest: 
Kelly Axt

Date: 2/15/2023

Title: City Clerk

SCP/SEI BR Holdings, LLC.

By:  (Signature)

Printed Name: Kenneth J. CLAYMAN (seal)

Its: SVP, GC, secretary of Selis Enterprises, INC.

Attorney:

Gregory, Doyle, Calhoun and Rogers, LLC

By: 
Attorney Signature

Date: 2-14-2023

City of Powder Springs Brownsville Road Project