

LANDSCAPE MAINTENANCE AGREEMENT

EDS #A249-13-320063

This Maintenance Agreement (“AGREEMENT”) is entered into this _____ day of _____, 2012, by and between the City of Westfield (“CITY”) and the Indiana Department of Transportation (“INDOT”) (and collectively referred to as “PARTIES”) with this particular agreement referring to the specific landscape maintenance of the US31 corridor in Hamilton County from 146th Street to SR38.

WITNESSETH:

WHEREAS, the Parties have previously contracted to install certain landscaping within the US31 corridor in Hamilton County between 146th Street and SR38 (as shown on Exhibits A through U); and

WHEREAS, the Parties desire to delineate certain maintenance responsibilities related to the Landscaping, (as shown on Exhibits A through U); and

WHEREAS, it is of mutual interest for INDOT and CITY to cooperate in providing highway improvements for the convenience and aesthetic appeal for the public.

NOW THEREFORE, the parties to this AGREEMENT set forth the following terms and conditions:

Section 1. INDOT will grant permission to CITY to install future Landscaping at the locations shown on Exhibits A through U.

Section 2. CITY will be responsible for all necessary maintenance of said landscaping at all times, including but not limited to mowing, and pruning/trimming, removal and replacement and as further explained below.

Section 3. When performing work in INDOT Right-of-Way, CITY shall at all times adhere to the traffic control measures found in the most recent version of the Indiana Manual on Uniform Traffic Control Devices. Upon request, INDOT will furnish CITY with instructions on how to obtain a copy of said Manual.

Section 4. CITY agrees to and shall hold INDOT, its officials and employees harmless from liability, loss, damage, injuries, or other casualties of whatever kind, or by whom-so-ever caused, due to the performance of any of the obligations under this Agreement which is caused by or arises from the negligence of CITY or any entity contracted to perform said maintenance on behalf of the City.

Section 5. INDOT grants the CITY, its contractors and subcontractors permission to enter upon the State right of way for the sole purpose of installing and maintaining areas listed. The party shall notify INDOT of its intent a minimum of five (5) business days before commencing work. For interstate and limited access facilities, INDOT must grant written

permission for right of entry, which it shall not unreasonably withhold upon the submittal of a specific traffic control and/or worker safety plans.

Section 6.

- A. The party shall send the District Permit Manager a maintenance plan every year for approval on or before January 1 of each year. The maintenance plan shall identify the types of maintenance activities to be completed and an estimated schedule of when these activities will occur.
- B. All landscaped areas shall have maintenance performed a minimum of four (4) times per year. This maintenance shall include mowing and the removal of noxious weeds or undesirable plants. Any shrub trimming or tree pruning should be completed at the proper time recommended for the species. In the event noxious weeds are left unattended INDOT reserves the right to eliminate the weeds and any adjoining landscaping providing cover by whatever means deemed necessary for the control of any noxious weeds.
- C. City may conduct supplemental mowing as needed or required by INDOT. Emphasis on supplemental mowing, if needed, should be performed (1), one week prior to the Memorial Day, July fourth and Labor Day holidays. INDOT's intent is to leave all mowing to the City to maintain the best possible aesthetic appeal. Litter removal should be considered a regularly monthly maintenance activity by the City and performed as such.
- D. The landscaped area (excluding "no mow" areas) that are between an entrance or exit ramp and the mainline portion of a highway shall have the entire grass area mowed at least three times per year. All litter pick-ups shall be done prior to such mowing. Minimum areas to mow are (depending on landscape location) are as follows and detailed in Exhibits V through X:
 - 1. Infield area bounded by an entrance or exit ramp, the cross road and the mainline portion of a highway
 - 2. Outfield area bounded by an entrance or exit ramp, the cross road, the mainline portion and the right of way of a highway
 - 3. Entire Island area. This includes both US31 and the intersecting roads.
 - 4. 500 ft. beyond the landscaped area, both ways, between the right of way and the mainline highway. This includes both sides of an intersecting roadway. This also includes both side of US31, 151st Street, Union Street, 156th Street, 161st Street, 169th Street, SR32, 181st Street and 191st Street, and the north side of 146th Street.
- E. The landscaping shall be removed by the CITY, if INDOT determines that the CITY is not adequately maintaining the landscaping or for any other justified reason (i.e. safety, change in policy etc). INDOT will provide ninety (90) days notice that the landscaping should be removed. If the landscaping is not removed

or modified to INDOT's approval within that 90 day period, INDOT will remove the landscaping at the CITY's expense.

General Provisions.

Access to Records. CITY will maintain all documents, records and other evidence pertaining to the project and shall make such materials available at their respective offices at all reasonable times under the Agreement.

Certification for Federal-Aid Contracts Lobbying Activities. CITY certifies, by signing and submitting this agreement, to the best of its knowledge and belief that CITY has complied with Section 1352, Title 31, U.S. Code, and specifically, that:

- A. No federally appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal Contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- B. If any funds other than federally appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, (Disclosure Form to Report Lobbying), in accordance with its instructions.
- C. CITY also agrees by signing this Agreement that it shall require that the language of this certification be included in all lower tier sub contracts, if any, which exceed \$100,000, and that all such sub recipients shall certify and disclose accordingly. Any person who fails to sign or file this required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each failure.

Compliance with Laws.

- A. CITY shall comply with all applicable Federal, State and Local laws, rules, regulations and ordinances, and all provisions required thereby to be included herein are hereby incorporated by reference. The enactment of any State or Federal statute or the promulgation of regulations there under, after execution of this Agreement shall be reviewed by INDOT and CITY to determine whether the provisions of this Agreement require formal modification.

- B. CITY and its agents shall abide by all ethical requirements that apply to persons who have a business relationship with the State, as set forth in Indiana Code § 4-2-6, *et seq.*, Indiana Code § 4-2-7, *et. seq.*, the regulations promulgated there under, and Executive Order 05-12, dated January 12, 2005. If CITY is not familiar with these ethical requirements, CITY should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at <<<http://www.in.gov/ethics/>>>. If CITY or its agents violate any applicable ethical standards, the State may, in its sole discretion, terminate this Agreement immediately upon notice to CITY. In addition, CITY may be subject to penalties under Indiana Code §§ 4-2-6 and 4-2-7, and under any other applicable State or Federal laws.
- C. CITY represents and warrants that CITY and its subcontractors, if any, shall obtain and maintain all required permits, licenses, registrations and approvals, as well as comply with all health, safety, and environmental statutes, rules, or regulations in the performance of work activities for INDOT. Failure to do so may be deemed a material breach of this Agreement and grounds for termination and denial of further work with the State.
- D. As required by IC 5-22-3-7: (1) CITY and any officials of CITY certify that (A) CITY, except for de minimis and nonsystematic violations, has not violated the terms of (i) IC 24-4.7 [Telephone Solicitation Of Consumers], (ii) IC 24-5-12 [Telephone Solicitations], or (iii) IC 24-5-14 [Regulation of Automatic Dialing Machines] in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by Federal law; and (B) CITY will not violate the terms of IC 24-4.7 for the duration of the Agreement, even if IC 24-4.7 is preempted by Federal law. (2) CITY and any officials of CITY certify that an affiliate or official of CITY and any agent acting on behalf of CITY or on behalf of an affiliate or official of CITY: (A) except for de minimis and nonsystematic violations, has not violated the terms of IC 24-4.7 in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by Federal law; and (B) will not violate the terms of IC 24-4.7 for the duration of the Contract, even if IC 24-4.7 is preempted by Federal law.

Conflict of Interest.

- A. As used in this section:
"Immediate family" means the spouse and the unemancipated children of an individual.
"Interested party," means:
1. The individual executing a contract pursuant to this Agreement;
 2. An individual who has an interest of three percent (3%) or more of CITY's contractor, if the contractor is not an individual; or
 3. Any member of the immediate family of an individual specified under subdivision 1 or 2.
- "Commission" means the State Ethics Commission.

- B. INDOT may cancel this Agreement without recourse by CITY if any interested party is an employee of the State of Indiana.
- C. INDOT will not exercise its right of cancellation under section B, above, if CITY gives INDOT an opinion by the Commission indicating that the existence of this Agreement and the employment by the State of the interested party does not violate any statute or code relating to ethical conduct of State employees. INDOT may take action, including cancellation of this Agreement consistent with an opinion of the Commission obtained under this section.
- D. CITY has an affirmative obligation under this Agreement to disclose to INDOT when an interested party is or becomes an employee of INDOT. The obligation under this section extends only to those facts that CITY knows or reasonably could know.

Disputes.

- A. Should any dispute arise with respect to the Agreement, CITY and the State agree to act immediately to resolve such disputes. Time is of the essence in the resolution of disputes.
- B. CITY agrees that the existence of a dispute notwithstanding, it shall continue without delay to carry out all of its responsibilities under this Agreement that are not affected by the dispute. Should CITY fail to continue to perform its responsibilities regarding all non-disputed work, without delay, any additional costs incurred by the State or CITY as a result of such failure to proceed shall be borne by CITY and CITY shall make no claim within ten (10) working days following notification in writing by either party of the existence of a dispute, then the following procedure shall apply:
 - 1. The Parties agree to resolve such matters through submission of this dispute to the Commissioner of the Indiana Department of Administration (IDOA). The Commissioner shall reduce a decision to writing and mail or otherwise furnish a copy thereof to CITY and INDOT within ten (10) working days after presentation of such dispute for action. The Commissioner's decision shall be final and conclusive unless either party mails or otherwise furnishes to the Commissioner, within ten (10) working days after receipt of the Commissioner's decision a written appeal. Within ten (10) working days of receipt by the Commissioner of a written request for appeal, the decision may be reconsidered. If no reconsideration or mediation for the determination, or otherwise the dispute may be submitted to an Indiana court of competent jurisdiction.
 - 2. The State may withhold payments on disputed items pending resolution of the dispute. The unintentional nonpayment by the State to CITY of one or more invoices not in dispute in accordance with the terms of this Contract

will not be cause for CITY to terminate this Agreement, and CITY may not bring suit to collect these amounts without following the disputes procedure contained herein.

Drug-Free Workplace Certification. CITY hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace, and that it shall give written notice to INDOT and the IDOA within ten (10) days after receiving actual notice that an employee of CITY in the State of Indiana has been convicted of a criminal drug violation occurring in CITY's workplace. False certification or violation of the certification may result in sanctions including, but not limited to, suspension of Agreement payments, termination of the Agreements and/or debarment of contracting opportunities with the State of Indiana for up to three (3) years.

In addition to the provisions of the above paragraphs, if the total Agreement amount set forth in this Contract is in excess of \$25,000.00, CITY hereby further agrees that this Agreement is expressly subject to the terms, conditions and representations of the following certification:

This certification is required by Executive Order No. 90-5, April 12, 1990, issued by the Governor of Indiana. Pursuant to its delegated authority, the IDOA is requiring the inclusion of this certification in all contracts with and grants from the State of Indiana in excess of \$25,000.00. No award of a contract shall be made, and no contract, purchase order or agreement, the total amount of which exceeds \$25,000.00, shall be valid, unless and until this certification has been fully executed by CITY and made a part of the contract or agreement as part of the contract documents.

CITY certifies and agrees it shall provide a drug-free workplace by:

- A. Publishing and providing to all of its employees a statement notifying their employees the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in CITY's workplace and specifying the actions that will be taken against employees for violations of such prohibition; and
- B. Establishing a drug-free awareness program to inform their employees of (1) the dangers of drug abuse in the workplace; (2) CITY's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation, and employee assistance programs; and (4) the penalties which may be imposed upon an employee for drug abuse violations occurring in the workplace.
- C. Notifying all employees in the statement required by subparagraph (A) above as a condition of continued employment the employee shall (1) abide by the terms of the statement; and (2) notify CITY of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;

- D. Notifying in writing the State within ten (10) days after receiving notice from an employee under subdivision (B)(2) above, or otherwise receiving actual notice of such conviction;
- E. Within thirty (30) days after receiving notice under subdivision (C)(2) above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (1) take appropriate personnel action against the employee, up to and including termination; or (2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State or Local health, law enforcement, or other appropriate agency; and
- F. Making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (A) through (E) above.

Force Majeure. In the event either party is unable to perform any of its obligations under this Agreement or to enjoy any of its benefits because of natural disaster or decrees of governmental bodies not the fault of the affected party (hereinafter referred to as a Force Majeure Event), the party who has been so affected shall immediately give notice to the other party and shall do everything possible to resume performance. Upon receipt of such notice, all obligations under this Agreement shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, the party whose ability to perform has not been so affected may, by giving written notice, terminate this Agreement.

Funding Cancellation Clause. When the Director of the Budget Agency makes a written determination that funds are not appropriated or otherwise available to support continuation of the performance of this Agreement this Agreement shall be canceled. A determination by the Budget Director that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive. I.C.5-22-17-5.

Governing Laws. This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana and suit, if any, must be brought in the State of Indiana.

Indemnification. The City agrees to indemnify, defend, and hold harmless the State, its agents, officials, and employees from all claims and suits including court costs, attorney's fees, and other expenses caused by any act or omission the City and/or its subcontractors, if any, in the performance of this Contract. The State shall **not** provide such indemnification to the City.

Merger & Modification. This Agreement constitutes the entire agreement between the parties. No understandings, agreements, or representations, oral or written, not specified within this Agreement will be valid provisions of this Agreement. This Agreement may

not be modified, supplemented or amended, in any manner, except by written agreement signed by all necessary parties.

Non-Discrimination.

- A. Pursuant to I.C. 22-9-1-10 and the Civil Rights Act of 1964, CITY shall not discriminate against any employee or applicant for employment, to be employed in the performance of work under this Agreement, with respect to hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment, because of race, color, religion, sex, disability, national origin, ancestry or status as a veteran. Breach of this covenant may be regarded as a material breach of this Agreement. Acceptance of this Agreement also signifies compliance with applicable Federal laws, regulations, and executive orders prohibiting discrimination in the provision of services based on race, color, national origin, age, sex, disability or status as a veteran.

- B. CITY understands that INDOT is a recipient of Federal Funds. Pursuant to that understanding, CITY agrees that if CITY employs fifty (50) or more employees and does at least \$50,000.00 worth of business with the State and is not exempt; CITY will comply with the affirmative action reporting requirements of 41 CFR 60-1.7. CITY shall comply with Section 202 of executive order 11246, as amended, 41 CFR 60-250, and 41 CFR 60-741, as amended, which are incorporated herein by specific reference. Breach of this covenant may be regarded as a material breach of Agreement.

It is the policy of INDOT to assure full compliance with Title VI of the Civil Rights Act of 1964 and related statutes and regulations in all programs and activities. Title VI and related statutes require that no person in the United States shall on the grounds of race, color or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (INDOT's Title VI enforcement shall include the following additional grounds: sex, ancestry, age, religion and disability.) The following are examples of where this policy shall be applied relative to the INDOT.

- C. CITY shall not discriminate in its selection and retention of contractors, including without limitation, those services retained for, or incidental to, construction, planning, research, engineering, property management, and fee contracts and other commitments with persons for services and expenses incidental to the acquisitions of right-of-way.

- D. CITY shall not modify the Project in such a manner as to require, on the basis of race, color or national origin, the relocation of any persons. (INDOT's Title VI enforcement will include the following additional grounds; sex, ancestry, age, religion and disability).

- E. CITY shall not modify the Project in such a manner as to deny reasonable access to and use thereof to any persons on the basis of race, color or national origin. (INDOT's Title VI enforcement will include the following additional grounds; sex, ancestry, age, religion and disability.)
- F. CITY shall neither allow discrimination by contractors in their selection and retention of subcontractors, lessors and/or material suppliers, nor allow discrimination by their subcontractors in their selection of subcontractors, lessors or material suppliers, who participate in construction, right-of-way clearance and related projects.

INDOT shall:

- G. Take appropriate actions to correct any deficiency determined by itself and/or the Federal Highway Administration ("FHWA") within a reasonable time period, not to exceed ninety (90) days, in order to implement Title VI compliance in accordance with INDOT's assurances and guidelines.

Payment. All payments made by INDOT, if any, shall be made in arrears in conformance with State fiscal policies and procedures and, as required by IC 4-13-2-14.8, by electronic funds transfer to the financial institution designated by CITY in writing unless a specific waiver has been obtained from the Indiana Auditor of State. No payments will be made in advance of receipt of the goods or services that are the subject of this Agreement except as permitted by IC 4-13-2-20.

Penalties, Interest and Attorney's Fees. INDOT will in good faith perform its required obligations hereunder, and does not agree to pay any penalties, liquidated damages, interest, or attorney's fees, except as required by Indiana law in part, IC 5-17-5, I. C. 34-54-8, and I. C. 34-13-1.

Severability. The invalidity of any section, subsection, clause or provision of the Agreement shall not affect the validity of the remaining sections, subsections, clauses or provisions of the agreement.

Status of Claims. CITY shall be responsible for keeping INDOT currently advised as to the status of any claims made for damages against CITY resulting from services performed under this agreement. CITY shall send notice of claims related to work under this agreement to:

Indiana Department of Transportation
32 South Broadway
Greenfield, Indiana 46140

Notice.

Whenever any notice, statement or other communication is required under this agreement, it shall be sent to the following address, unless otherwise specifically advised.

A. Notice to the State, regarding agreement provisions shall be sent to:

Jack Kimmerling / or successor
Indiana Department of Transportation
32 South Broadway
Greenfield, Indiana 46140

B. Notice to CITY shall be sent to:

Neil VanTrees, PE / or successor
City of Westfield
2706 East 171st Street
Westfield, IN 46074

Debarment and Suspension. CITY certifies by entering into this agreement, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into this agreement by any federal agency or department, agency or political subdivision of the State of Indiana.

Ethics. CITY shall abide by all ethical requirements that apply to persons who have a business relationship with the State of Indiana, as set forth in Indiana Code § 4-2-6 et seq., the regulations promulgated thereunder, and Executive Order 04-08, dated April 27, 2004. If CITY is not familiar with these ethical requirements, the Town should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at <http://www.in.gov/ethics/>. If CITY or its agents violate any applicable ethical standards, the State may, in its sole discretion, terminate this contract immediately upon notice to CITY. In addition, CITY may be subject to penalties under Indiana Code § 4-2-6-12.

Substantial Performance. This Agreement shall be deemed to have been substantially performed only when fully performed according to its terms and conditions and any modification thereof.

Termination for Convenience.

This agreement may be terminated, in whole or in part, by the State whenever, for any reason, the State determines that such termination is in its best interest. Termination of services shall be effected by delivery to the Contractor of a Termination Notice at least thirty (30) days prior to the termination effective date, specifying the extent to which performance of services under such termination becomes effective. The Contractor shall be compensated for services properly rendered prior to the effective date of termination. The State will not be liable for services performed after the effective date of termination. The Contractor shall be compensated for services herein provided but

in no case shall total payment made to the Contractor exceed the original contract price or shall any price increase be allowed on individual line items if canceled only in part prior to the original termination date.

Termination for Default.

With the provision of thirty (30) days notice to the Contractor, the State may terminate this agreement in whole or in part if the Contractor fails to:

Correct or cure any breach of this agreement;

Deliver the supplies or perform the services within the time specified in this agreement or any extension;

Make progress so as to endanger performance of this agreement or

Perform any of the other provisions of this agreement.

If the State terminates this agreement in whole or in part, it may acquire, under the terms and in the manner the State considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the State for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

The State shall pay the contract price for completed supplies delivered and services accepted. The Contractor and the State shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The State may withhold from these amounts any sum the State determines to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders.

The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or equity or under this agreement.

Authorizations. Any person executing this Agreement in a representative capacity hereby warrants that he/she has been duly authorized by his/her principal to execute this Agreement on such principal's behalf.

No Agency Relationship. Both Parties hereto, in the performance of this Agreement, shall act in an individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purposes whatsoever. Neither party will assume liability for any injury (including death) to any persons, or damage to any property, arising out of the acts or omissions of the agents, employees or subcontractors of the other party. CITY shall be responsible for providing all necessary unemployment and workers' compensation insurance for its employees.

Non-Collusion

The undersigned attests, subject to the penalties for perjury, that he/she represents CITY or that he/she is the properly authorized representative, agent, member or officer of the City, that he/she has not, nor has any other member, employee, representative, agent or officer of CITY directly or indirectly, to the best of his/her knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid, any sum of money or other consideration for the execution of this agreement other than that which appears upon the face of this agreement. In Witness Whereof, CITY and the State of Indiana have, through duly authorized representatives, entered into this agreement. The parties having read and understand the forgoing terms of this agreement do by their respective signatures dated below hereby agree to the terms thereof.

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“INDOT”
INDIANA DEPARTMENT OF TRANSPORTATION

By: _____
Brandye Hendrickson
District Deputy Commissioner

Date: _____

STATE OF INDIANA
Department of Administration

Approved By: _____
Robert D. Wynkoop,
Commissioner

Date: _____

STATE BUDGET AGENCY

Approved By: _____
Adam M. Horst
Director

Date: _____

Approved as to Legality and Form:

_____(FOR)
Gregory F. Zoeller
Attorney General of Indiana

Date Approved: _____