

CITY OF OLATHE AGREEMENT

THIS AGREEMENT is made in Johnson County, Kansas, by and between the City of Olathe, Kansas, hereinafter "City," and EMCOR Fagan, hereinafter "Vendor" (each individually a "Party" and collectively, the "Parties"). City needs mechanical/HVAC work at 1490 W. Ironwood Street, and contracts with Vendor for the work described in Vendor's proposal in **Exhibit A**.

1. FEES, EXPENSES. City agrees to pay Vendor an amount not to exceed \$77469.00 for the work described in **Exhibit A**. If provided for in **Exhibit A**, Vendor will be reimbursed at the actual cost of the specified expenses. All work must be completed on or before June 31, 2024, and time is of the essence for completion of the work

2. ADDITIONAL SERVICES. Vendor may provide services in addition to those listed **Exhibit A** when authorized in writing by City.

3. BILLING. Vendor may bill City monthly for all completed work and reimbursable expenses. Vendor must submit a bill which itemizes the work and reimbursable expenses.

4. PAYMENT. City agrees to pay Vendor within thirty (30) days of approval by the Governing Body or other agent of City in accordance with the City's Procurement Policy. If City becomes credibly informed that any representations of Vendor provided in its billing are wholly or partially inaccurate, City may withhold payment of sums then or in the future due to Vendor until the inaccuracy and the cause thereof is corrected to City's reasonable satisfaction.

5. STANDARD OF CARE. Vendor will exercise the same degree of care, skill, and diligence in the performance of the work as is ordinarily possessed and exercised by a professional under similar circumstances. If Vendor fails to meet the foregoing standard, Vendor will perform at its own cost, and without reimbursement, any work necessary to correct errors and omissions which are caused by Vendor's negligence.

6. TERMINATION FOR CONVENIENCE. City may terminate this Agreement for convenience by providing fifteen (15) days' written notice to Vendor. City will compensate Vendor for all work completed and accepted and reimbursable expenses incurred to the date of its receipt of the termination notice. Compensation will not include anticipatory profit or consequential damages, neither of which will be allowed.

7. TERMINATION FOR LACK OF FUNDS. If, for whatever reason, adequate funding is not made available by City to support or justify continuation of the level of work to be provided by Vendor under this Agreement, City may terminate or reduce the amount of work to be provided by Vendor under this Agreement. In such event, City will notify Vendor in writing at least thirty (30) days in advance of such termination or reduction of work for lack of funds.

8. DISPUTE RESOLUTION. The Parties agree that disputes regarding the work will first be addressed by negotiations between the Parties. If negotiations fail to resolve the dispute, the Party initiating the claim that is the basis for the dispute may take such steps as it deems necessary to protect its interests. Notwithstanding any such dispute, Vendor will proceed with undisputed work as if no dispute existed, and City will continue to pay for Vendor's completed undisputed work. No dispute will be submitted to arbitration without both Parties' written approval.

9. SUBCONTRACTING. Vendor may not subcontract or assign any of the work to be

performed under this Agreement without first obtaining the written approval of City. Unless stated in the written approval to an assignment, no assignment will release or discharge Vendor from any obligation under this Agreement. Any person or entity providing subcontracted work under this Agreement must comply with **Section 11 (Insurance)**.

10. OWNERSHIP OF DOCUMENTS. All final documents provided to City as part of the work provided under this Agreement, including but not limited to reports, plans, and related documents, will become City's property except that Vendor's copyrighted documents will remain owned by Vendor. Such documents must be clearly marked and identified as copyrighted by Vendor.

11. INSURANCE. Vendor and any subcontractor will maintain for the term of this Agreement insurance as provided in **Exhibit B**.

12. INDEMNIFICATION AND HOLD HARMLESS. For purposes of this Agreement, Vendor agrees to indemnify, defend, and hold harmless City, its officers, appointees, employees, and agents from any and all loss, damage, liability or expense, of any nature whatsoever caused or incurred as a result of the negligence or other actionable fault of Vendor, its affiliates, subsidiaries, employees, agents, assignees, and subcontractors and their respective employees and agents. Vendor is not required hereunder to defend City, its officers, appointees, employees, or agents from assertions that they were negligent, nor to indemnify and hold them harmless from liability based on City's negligence. City does not indemnify Vendor.

13. LIMITATION OF LIABILITY FOR BREACH OF CONTRACT OR NEGLIGENT PERFORMANCE. Any attempt to limit liability for breach of contract or negligent performance to the amount of the payment to Vendor by City is void. Any attempt to limit Vendor's liability to City for consequential, exemplary, or punitive damages, or any other measure of damages permitted by law, in any action against Vendor for breach of contract is void.

14. KANSAS ACT AGAINST DISCRIMINATION. *Unless* Vendor employs fewer than four (4) employees during the term of this Agreement, or *unless* the total of all agreements (including this Agreement) between Vendor and City during a calendar year are cumulatively less than \$5,000, *then* during the performance of this Agreement, Vendor agrees that:

- a. Vendor will observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 *et seq.*) and will not discriminate against any person in the performance of work under the present contract because of race, religion, color, sex, disability, national origin, or ancestry;
- b. in all solicitations or advertisements for employees, Vendor will include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission ("commission");
- c. if Vendor fails to comply with the way Vendor reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, Vendor will be deemed to have breached the present contract and it may be canceled, terminated, or suspended, in whole or in part, by City without penalty;
- d. if Vendor is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the commission which has become final, Vendor will be deemed to have breached the present contract and it may be canceled,

terminated, or suspended, in whole or in part, by the contracting agency; and

- e. Vendor will include the provisions of subsections a. through d. in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.

15. ENTIRE AGREEMENT. This Agreement, including all documents and exhibits included by reference herein, constitutes the entire Agreement between the Parties and supersedes all prior agreements, whether oral or written, covering the same subject matter. This Agreement may not be modified or amended except in writing mutually agreed to by both Parties.

16. NO THIRD-PARTY BENEFICIARIES. Nothing contained herein will create a contractual relationship with, or any rights in favor of, any Third Party.

17. INDEPENDENT CONTRACTOR STATUS. Vendor is an independent contractor and not an agent or employee of City.

18. COMPLIANCE WITH LAWS. Vendor will abide by all applicable federal, state, and local laws, ordinances, and regulations.

19. FORCE MAJEURE CLAUSE. Neither Party will be considered in default under this Contract because of any delays in performance of obligations hereunder due to causes beyond the control and without fault or negligence on the part of the delayed Party, including but not restricted to, an act of God or of a public enemy, civil unrest, volcano, earthquake, fire, flood, tornado, epidemic, quarantine restrictions, area-wide strike, freight embargo, unusually severe weather or delay of subcontractor or supplies due to such cause; provided that the delayed Party must notify the other Party in writing of the cause of delay and its probable extent within ten (10) days from the beginning of such delay. Such notification will not be the basis for a claim for additional compensation. The delayed Party must make all reasonable efforts to remove or eliminate the cause of delay and must, upon cessation of the cause, diligently pursue performance of its obligation under the Agreement.

20. APPLICABLE LAW, JURISDICTION, VENUE. Interpretation of this Agreement and disputes arising out of or related to this Agreement will be subject to and governed by the laws of the State of Kansas, excluding Kansas' choice-of-law principles. Jurisdiction and venue for any suit arising out of or related to this Agreement will be in the District Court of Johnson County, Kansas.

21. SEVERABILITY. If any provision of this Agreement is determined to be void, invalid, unenforceable, or illegal for whatever reason, such provision(s) will be null and void; provided, however, that the remaining provisions of this Agreement will be unaffected and will continue to be valid and enforceable.

22. ORDER OF PRECEDENCE. If there is any conflict between the terms of this Agreement, excluding exhibits, and anything contained in the exhibits referenced herein or attached hereto, the terms and provisions of this Agreement, excluding exhibits, shall control.

[The remainder of this page is intentionally left blank.]

The Parties hereto have caused this Agreement to be executed this _____ day of
_____ 20____.

CITY OF OLATHE, KANSAS

By: _____
Mayor

ATTEST:

City Clerk (SEAL)

APPROVED AS TO FORM:

City Attorney or Deputy/Assistant City Attorney

EMCOR Fagan

By: _____
NAME & TITLE
3125 Brinkerhoff Road
Kansas City, KS 66115

Exhibit A
Vendor's Proposal

June 13, 2023
November 20, 2023, Revised

Michael Green
City of Olathe

Approved 69027
MG 12/1/2023
Michael Green

RE: Ironwood Building
Lot 1&2 ERL Industrial Park
1490 West Ironwood Street Olathe KS 66061

Dear Michael:

We offer the following proposal for the Mechanical HVAC work for 1490 West Ironwood Street per Smith & Boucher Drawings Dated 5-24-2023.

1. PRICE:

A. HVAC Unit Heater Relocation and Ventilation Modifications	\$ 77,469.00
Sheet Metal Labor (including fabrication) 270 hours @ \$114/hr.....	\$30,780.00.
Piping Labor 166 hours @ \$114/hr.....	\$18,924.00
Material.....	\$24,790.00
Material markup 12%.....	\$2,975.00

2. SCOPE OF WORK: HVAC Unit Heater Relocation and Ventilation Modifications

- A. Provide and install Qty 1 Unit Heater Natural Gas
- B. Relocate existing Qty 1 Unit Heater Natural Gas
- C. Relocate existing Wall Mounted exhaust fan with associated Damper.
- D. Provide and install new ventilation for Fire Truck Bay.
- E. Duct Fabrication is included.
- F. Natural Gas Piping is included.
- G. See Scope Matrix for items included and excluded in our proposal.
- H. See Attachment A Standard Terms and Conditions.

3. SPECIAL CLARIFICATIONS/ EXCLUSIONS

The following are special clarifications to this proposal.

- 1. Electrical is Excluded
- 2. Carpentry Work is excluded.
- 3. This quote is valid for thirty (30) days. At the end of this time, EMCOR Services Fagan reserves the right to review its pricing for validity.

Thank you for the opportunity to offer this proposal. If we can be of any assistance, or if you require further clarification, please do not hesitate to call.

This proposal, including but not limited to pricing and schedule, is made contingent upon the work addressed herein not being adversely affected, either directly or indirectly, by the COVID-19 pandemic and/or the Corona virus. This proposal is further conditioned upon the parties agreeing, prior to beginning of any work and in writing as part of any

On Call Service | Design Build | Chillers | Boilers | Hydronic Piping | Sheet Metal | Industrial Piping | Industrial Duct | Plumbing

contract/subcontract, that any (i) schedule issues (including, but not limited to, delay, acceleration, compression, interference, hindrance), (ii) overtime hours or added resources to perform work, (iii) shortages (whether as to labor, subcontracted services, materials, or supplies), (iv) change orders, extra work, or extra costs, or (v) inefficiency and impacts relating to the foregoing, that arise as a result of the COVID-19 pandemic or Corona virus will entitle contractor to a change order equitably addressing impacts to its time for performance and costs.

This proposal is valid for the scope of work based on material prices at time of bid. Since commodity prices have escalated dramatically in recent months, sometimes changing daily. EMCOR Services Fagan reserves the right to increase our cost for performing this work, if, at the time of full contract execution, material prices have increased.

Sincerely,
EMCOR Services Fagan

Jason Hicklin
Account Representative

SCOPE MATRIX

The following matrix defines which items are included in the current scope of work and which items are excluded. This matrix is not intended to be all inclusive but is intended to address general scope and standard coordination issues.

<i>ITEM</i>	<i>INCLUDED</i>	<i>EXCLUDED</i>	<i>Notes</i>
1. Mechanical Systems			
1.1. Sheet Metal			
1.1.1. Sheet Metal Ductwork per SMACNA 2005 Edition	X		
1.2. Plumbing			
1.2.1. Natural Gas Piping			
2. Mechanical Equipment			
2.1. Exhaust Fans	X		
2.2. Unit Heaters	X		
3. Municipality Items			
3.1. Permits and Fees		X	
3.2. Taxes		X	

Attachment “A”

Standard Bid Terms and Conditions

- **PAYMENT.** Payments Terms are net 30 days unless specifically approved otherwise. Interest for late payment shall accrue at a rate of 18% per annum. If Progress Payments and/or Retentions are agreed upon, they will be paid to us in the amount equal to the percentage of completion approved by the Owner and Retentions shall be released within 60 days of completion of Fagan’s work. Retention percentage no greater than the lesser of what the law allows or is withheld from you. We will be entitled to substitute securities for retention applicable to our work. Pay-if-Paid terms or conditions, and joint checks are not acceptable. If you direct us to proceed on changed work but have not issued a change order including the agreed price for the changed work, we have the right to include a reasonable amount for such work in our billing and to be paid therefore as part of the payment.
- **SUBCONTRACT FORM.** This proposal is predicated upon mutual acceptance of the terms and conditions of the AIA standard form agreement between Contractor and Subcontract, AIA Document No. A401 - 1997.
- **CHANGES.** Change orders will be based on a lump sum derived from an estimate or actual time and actual material evidenced by supporting documents. We will grant you the right to audit the documents supporting time and material work, but will not grant audit documents on which lump sum work is based.
- **LAW, CODES, DESIGN.** We will perform our work in accordance with the law and codes but will not be required to identify and report violations of the law and codes contained in the design except as we become aware of them in the course of our work. Our duty to find and report or be responsible for the errors and defects in the work of others will be limited to those errors and defects as are sufficiently evident as to be found and reported by a contractor of ordinary skill and expertise for the type of work that is subject of this proposal.
- **SCHEDULE.** We will provide a detailed schedule of our activities, their logic with respect to other activities, their access requirements, and their durations, for incorporation in a mutually agreed upon construction schedule that is to be prepared in advance of construction. Such schedule will provide for completion of work precedent to our work by the dates set forth in the Construction Documents. Fagan’s pricing is predicated upon our being allowed reasonable and adequate time to install our work. Overhead rough-in activities shall be allowed a reasonable duration prior to the commencement of any stud-wall erection. Other analysis services, including data processing, if required, are to be provided by others without cost to Fagan.
- **INSURANCE.** We will provide comprehensive general liability insurance including bodily injury, property damage and completed operations with combined single limits not to exceed \$10,000,000. Fagan excludes the cost of Builders Risk and appropriate related property insurance coverage. We would expect to a named incurred under such policies that may be provided by the Owner or General Contractor. This exclusion contemplates that the contract will contain a mutual waiver of subrogation rights as they relate to Builders Risk and/or other appropriate property insurance coverage for insurable losses which may be covered by such insurance programs.
- **CLEAN-UP / STORAGE.** We will clean up our own trash and debris on the job site. On site trash containers and removal of the trash from the job site shall be provided by others without cost to Fagan. General Contractor to provide a clean, clear, accessible and safe work area. General Contractor will provide an adequate staging area within the construction job site for use by Fagan for job site trailers and to store materials.
- **LIEN RELEASES.** Fagan’s monthly Conditional Lien Releases (if required) shall be acceptable for all progress payments. We will provide an Unconditional Lien Release from Fagan and any Conditional or Unconditional releases from lower-tier vendors and subcontractors only upon final payment.
- **BOND PREMIUMS.** Premiums for Performance and Payment Bonds, if required, shall be added to our contract amount, unless otherwise noted as included in bid amount. If a Bond is required, it must be requested prior to Notice to Proceed. If the request is not received timely, Fagan may elect to not provide the Bond.
- **TEMPORARY FACILITIES.** We have assumed that electrical power, lighting, water, toilet facilities, watchmen, temporary heat, and ventilation will be provided without cost to Fagan. We also require that on-site space for our job site office and storage of equipment and materials will be provided by others without cost to Fagan.
- **HAZARDOUS MATERIALS.** We have not included any costs associated with discovery, abatement, monitoring, or removal of any hazardous materials that may be encountered during the construction of this project. ***We assume that each trade, including Fagan, will provide temporary ventilation as may be required to eliminate and/or mitigate respiratory hazards that may develop as a result of their construction operations.*** We exclude all costs associated with any medial treatment or monitoring required because of exposure of our personnel to hazardous materials.
- **LABOR.** Our work will be performed by union craftsmen. Bid is based on work being performed during normal working hours at straight time rates. Cost of additional overtime, if directed, shall be reimbursed to Fagan.
- **INDEMNIFICATION.** Fagan will not indemnify anyone against their own negligence. Any indemnification required shall be predicated on a pro-rata basis with those entities who contribute to any action requiring such indemnification.
- **DELAY DAMAGES, BACK CHARGES, AND CLAIMS.** Each of us will be responsible to the other for unexcused delays due to our respective fault or within our respective reasonable control to avoid. Neither of us will assert or assess delay damages, back charges or claims against the other unless prompt written notice has been given to the other party of its default, and the default is not corrected within five (5) working days following receipt of written notice.
- **DISPUTES.** We will agree to be bound only by proceedings to which we have been a participating party. We will have the right to make claim against any entity that causes us damages during the course of the prosecution of our work. We will not be required to pay fees or back charges for events that are reasonably part of the contracting process such as missing meetings and re-submittals.
- **WARRANTY.** The warranty start dates will be established by system, area, and/or phase as Owner receives beneficial use of work.
- **BLOCK-OUTS.** Fagan will provide necessary block-out drawings for all HVAC penetrations for use by others to provide required block-outs. Structural reinforcement for all openings required is excluded.
- **EXCAVATION AND/OR DEWATERING.** We exclude costs associated with excavation, backfilling, dewatering, rock excavation, blasting, drilling or any other associated activities, unless, specifically noted elsewhere in this proposal.
- **GENERAL CONSTRUCTION.** We exclude costs associated with general construction work such as concrete, painting, structural steel, and fireproofing.

Exhibit B

CITY OF OLATHE INSURANCE REQUIREMENTS

These requirements apply to the vendor or contractor ("Vendor") entering into an Agreement with the City of Olathe ("City").

A. Insurance. Secure and maintain for the term of the Agreement insurance of such types and in at least such amounts as set forth below from a Kansas authorized insurance company which carries a Best's Policyholder rating of "A-" or better and carries at least a Class "VII" financial rating or better, unless otherwise agreed to by City:

1. Commercial General Liability: City must be listed by ISO endorsement or its equivalent as an additional insured on a primary and noncontributory basis on any commercial general liability policy of insurance. The insurance must apply separately to each insured against whom claim is made or suit is brought, subject to the limits of liability.

Limits: Per Occurrence, including Personal & Advertising Injury and Products/Completed Operations: \$1,000,000; General Aggregate: \$2,000,000.

2. Business Auto Insurance: City must be listed by ISO endorsement or its equivalent as an additional insured on a primary and noncontributory basis on any automobile policy of insurance. Insurance must apply separately to each insured against whom claim is made or suit is brought, subject to liability limits.

Limits: All Owned Autos; Hired Autos; and Non-Owned Autos: Per occurrence, combined single limit: \$500,000.

Notwithstanding the foregoing, if Vendor does not own any automobiles, then Vendor must maintain Hired and Non-Owned Auto insurance.

3. Worker's Compensation and Employer's Liability: Workers compensation insurance must protect Vendor against all claims under applicable state Worker's Compensation laws at the statutory limits, and employer's liability with the following limits.

Limits: \$500,000 Each Accident/\$500,000 Policy Limit/\$500,000 Each Employee

4. Professional Liability (if applicable): **Unless excused by the Agreement with the City**, Vendor must maintain for the term of this Agreement and for a period of three (3) years after the termination of this Agreement, Professional Liability Insurance.

Limits: Each Claim: \$1,000,000; General Aggregate: \$1,000,000.

5. Cyber Insurance (if applicable): **IF** accessing the City's network or City's data, **THEN** maintain the following coverages throughout for the term of this Agreement and for a period of three (3) years after the termination of this

Agreement: Cyber Incident/Breach Response and Remediation Expenses, Digital Data Recovery, Privacy and Network Security Liability, and Notification Expense.

Limits: Per claim, each insuring agreement: \$1,000,000; Aggregate: \$1,000,000.

- B. Exposure Limits.** Above are minimum acceptable coverage limits and do not imply or place a liability limit nor imply that the City has assessed the risk that may be applicable to Vendor. Vendor must assess its own risks and if it deems appropriate and/or prudent maintain higher limits and/or broader coverage. The Vendor's insurance must be primary, and any insurance or self-insurance maintained by the City will not contribute to, or substitute for, the coverage maintained by Vendor.
- C. Waiver of Subrogation.** All liability policies will provide a waiver of subrogation in favor of the City.
- D. Costs.** Insurance costs must be at Vendor's expense and accounted for in Vendor's bid or proposal. Any deductibles or self-insurance in the above-described coverages will be the responsibility and at the sole risk of the Vendor.
- E. Verification of Coverage**
1. Must provide certificate of insurance on ISO form or equivalent, listing the City as certificate holder, and additional insured endorsements for requested coverages.
 2. Any self-insurance must be approved in advance by the City and specified on the certificate of insurance. Additionally, when self-insured, the name, address, and telephone number of the claim's office must be noted on the certificate or attached in a separate document.
 3. When any of the insurance coverages are required to remain in force after final payment, additional certificates with appropriate endorsements evidencing continuation of such coverage must be submitted along with the application for final payment.
 4. For cyber insurance, the certificate of insurance confirming the required protection must confirm the required coverages in the "Additional Comments" section or provide a copy of the declarations page confirming the details of the cyber insurance policy.
- F. Cancellation.** No required coverage may be suspended, voided, or canceled, except after Vendor has provided thirty (30) days' advance written notice to the City.
- G. Subcontractor's Insurance:** If a part of this Agreement is to be sublet, Vendor must either cover all subcontractors under its insurance policies; **OR** require each subcontractor not so covered to meet the standards stated herein.