

ORDINANCE NO. 54-23

AN ORDINANCE TO AUTHORIZE THE CITY MANAGER TO EXECUTE A PROFESSIONAL SERVICES AGREEMENT WITH KURTZ BROS., INC. FOR FACILITY OPERATIONS MANAGER AT THE CONNEAUT CREEK DREDGE RECLAMATION FACILITY, AND DECLARING AN EMERGENCY.

WHEREAS, the City of Conneaut advertised for requests for qualifications for a facility operations manager at the Conneaut Creek Dredge Reclamation Facility, as authorized by Ordinance No. 18-23 passed by this Council.

WHEREAS, Kurtz Bros., Inc. was the sole respondent to the City's request for qualifications.

BE IT ORDAINED, by the City of Conneaut, County of Ashtabula and State of Ohio:

SECTION 1. That the City Manager is hereby authorized to execute a Professional Services Agreement with Kurtz Bros., Inc. for Facility Operations Manager at the Conneaut Creek Dredge Reclamation Facility. (Attached hereto and marked Exhibit A).

SECTION 2. That it is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this ordinance were adopted in an open meeting of this Council and that all deliberations of this Council or any of its committees that resulted in such formal actions were in meetings open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

SECTION 3. That this Ordinance is declared to be an emergency measure in the interests of public peace, health and safety and to allow the project to continue operations, and shall take effect immediately upon passage.

Passed this 22nd day of MAY, 2023.



President of Council

ATTEST:


Clerk of Council

PROFESSIONAL SERVICES AGREEMENT

THIS PROFESSIONAL SERVICES AGREEMENT (“Agreement”) is effective May ____, 2023 (“Effective Date”), by and between the CITY OF CONNEAUT (“City”), 294 Main Street, Conneaut, Ohio, an Ohio municipal corporation, and KURTZ BROS. INC., (“Kurtz”), 6415 Granger Road, Independence, Ohio 44131, an Ohio corporation.

RECITALS

WHEREAS, City is responsible for providing a disposal location for sediment materials that are dredged from waterways within City jurisdiction;

WHEREAS, the US Army Corp of Engineers (“USACE”) is responsible for dredging sediment materials from federal navigation channels and waterways to keep such waterways navigable for boats and ships;

WHEREAS, Bessemer and Lake Erie Railroad Company (“Bessemer”) owns land located in the City of Conneaut at 950 Ford Avenue, Conneaut, Ohio 44030 (“Property”), a portion of which is leased to City (“Premises”);

WHEREAS, City, through a public bidding process, contracted to have a facility constructed at the Premises which can receive, manage, and dewater sediment materials that are dredged from waterways (“Facility”);

WHEREAS, Facility was designed to accept and process up to 90,000 cubic yards (“CY”) of dredged sediment materials, consisting of non-hazardous silt, sand, and clay (“Sediment”) on a biannual basis; and,

WHEREAS, City, through a public bidding process, has selected Kurtz to manage and operate the Facility, pursuant and subject to the terms and conditions contained herein.

NOW THEREFORE, based upon the forgoing and for good and valuable consideration, the receipt and sufficiency of which are hereby accepted and acknowledged, the parties agree as follows:

AGREEMENT

1. Facility License. City retains Kurtz as the exclusive party to manage and operate Facility and occupy Premises, for the term of this Agreement. City will not direct Sediment to an alternative location or authorize a third-party to manage or operate Facility or to occupy Premises, unless this Agreement has been terminated. Kurtz shall manage and operate Facility to accept and process Sediment, and for any other uses reasonably related there to. City shall be granted access to Premises upon reasonable request.

2. Facility Plans. Facility plans and specifications are attached herewith as Exhibit A. Kurtz did not engineer or construct Facility. Notwithstanding anything contained herein to the contrary, Kurtz shall not be responsible for any design or construction defects of the Facility. If for any

reason, Facility is incapable of properly processing Sediment, and such failure is principally the failure of the design or the construction of Facility, City shall be responsible for remedying such failures, and any delay in Kurtz's performance under this Agreement shall be tolled until Facility has been restored to an operable status capable of properly processing Sediment.

3. Facility Access: Kurtz shall abide by all reasonable procedures and safety requirements of Bessemer pertaining to railroad crossings at or by Premises.

4. Term. This Agreement shall commence upon the Effective Date and terminate on January 1, 2033 ("Term"), unless otherwise terminated pursuant to the terms set forth within this Agreement. Kurtz under their discretion may, but is not required to, extend this Agreement for one (1) additional 5-year term upon no less than ninety (90) day written notice to City.

5. Kurtz Scope of Services. In exchange for City's obligation to pay Kurtz as further defined herein, Kurtz shall be responsible for providing the following scope of services to City at Premises.

A. Accepting and Managing Sediment. Pursuant to the dredge schedule, Kurtz shall coordinate with USACE's dredger to accept an anticipated Sediment volume, via barge, at Facility for processing, where processing shall generally include physical acceptance of Sediment by directing Sediment into sluiceways, dewatering Sediment, managing sluiceways and stockpile areas, processing dewatered Sediment into products or other uses, and coordinating the removal of Sediment and sale of products from Premises. Sediment may not be disposed of at Premises nor stockpiled in a manner that creates a nuisance. All Sediment must be removed from Premises prior to termination of this Agreement.

(1). Dredging Schedule. There is one (1) dredge cycle per year, which may last up to thirty (30) days, seven (7) days per week, twenty-four (24) hours per day (upon agreement of the parties, Kurtz will accommodate a second dredge cycle – for informational purposes only, Kurtz generally needs no less than five (5) months to process Sediment and be in a position to accept a new dredge cycle). Once the barge performing the dredging operation is filled, it will present at Facility for offloading into Facility sluiceways. City shall provide Kurtz no less than thirty (30) day notice prior to Kurtz having to accept Sediment at Facility. Any change to the dredge cycle or offloading, requiring a change to the Scope of Services, shall be coordinated in good faith between City and Kurtz.

(2). Dredge Volume. Facility has been designed with a dredge cycle Sediment capacity of approximately 90,000 cubic yards (CY). To the extent Facility has been delivered in excess of 90,000 CY, and the Facility cannot reasonably and economically manage or accommodate such excess capacity, Kurtz shall invoice City (and City shall reimburse Kurtz within 30 days) its incremental costs, fees and expenses resulting from delivery of Sediment in excess of 90,000 CY for that dredge cycle.

B. Facility Maintenance. Kurtz shall be responsible for minor maintenance of Premises, excluding Facility, as well as keeping Premises in a relatively organized manner, where minor maintenance shall refer to up to \$40,000 of repairs to roads and other improved surfaces. To the extent these repairs exceed \$40,000 in any one (1) year, the excess amount shall be recoverable in

the ensuing year's price per cubic yard paid by City, except in the final year of the Agreement, in which case the excess amount shall be billed to and paid by City within thirty (30) days of submission by Kurtz. City shall be responsible for the major maintenance, repairs or replacements to Premises, and all maintenance, repair or replacements necessary to Facility. City shall not be responsible for any Kurtz equipment or any damage to the Facility caused by Kurtz personnel or operations. At the conclusion of each dredge cycle, Kurtz shall restore Facility to its original state, or as close to its original state as reasonably possible, where restore refers to removing Sediment from sluiceways. City shall repair or replace any dredge Facility improvements damaged as a result of dredge operations, unless such damage is the result of the negligence of Kurtz, in which case, Kurtz shall be responsible for such repairs or replacements to Facility.

C. Permitting.

(1). City has and shall maintain during the Term, an EPA Harbor Authorization Permit and an NPDES Discharge Permit for Facility. Kurtz shall operate Facility in a manner consistent with and to ensure compliance with City's permits and any other permit which may be required in the future (subject to C.2. below). The parties acknowledge that the EPA Harbor Authorization Permit and the NPDES Discharge Permit expire every five (5) years and that Kurtz shall be required to operate consistent with those permits, and any changes, as they renew (subject to C.2. below). Any Kurtz non-compliance of City permits shall be addressed as set forth in Section 15.

(2). To the extent there is a change to permitting which results in additional and unanticipated expenses to Kurtz operations or obligations under this Agreement, Kurtz shall document such additional incremental expense, provide the documentation to City, and an appropriate increase shall be added to Kurtz CY rate paid by City.

D. Beneficial Re-Use. Kurtz shall use commercially reasonable efforts to develop and market Sediment as a stand-alone product or as a component of other products that are marketed by Kurtz. City will be paid a royalty, as further set forth herein, for any products sold by Kurtz that contain Sediment.

E. Record Keeping. Kurtz shall record and retain records pertaining to Facility operations, which shall include mandatory testing results, volume of Sediment received (monthly/annually), types of Sediment received (monthly annually), volume of Sediment removed from Facility (monthly/annually), volume and type of Sediment beneficially incorporated into products, daily operational logs, and total revenue from sale of products with material as a component. Kurtz shall make such records available for inspection by City upon reasonable request.

6. City Payment to Kurtz. Subject to the terms and procedures set forth below, City shall pay Kurtz on a per CY of Sediment delivered to Facility for processing.

<u>Contract Year 1 thru Year 5</u>		<u>Contract Year 6 thru Year 10</u>	
>50,000 CY	\$33.50	>50,000 CY	\$35.00
50,000 CY thru 69,999 CY	\$28.00	50,000 CY thru 69,999 CY	\$29.50
70,000 CY thru 89,999 CY	\$23.00	70,000 CY thru 89,999 CY	\$24.50
90,000 CY to 180,000 CY	\$26.00	90,000 CY to 180,000 CY	\$27.50

If the USACE fails to perform annual dredging activities, Kurtz shall be paid a minimum of \$320,000.00. This fee shall be added to the subsequent Dredge cycle fees.

A. Billing Process. The procedure to measure the volume of Sediment delivered to Facility and billed to City for payment of Kurtz shall generally include these steps.

(1). The private dredging contractor shall document the amount of Sediment offloaded to Facility. This volume shall be determined from pre and post in-river hydrographic survey data or dredge scow measurements obtained from the dredging contractor and confirmed by a third-party, which may include USACE, Bessemer, or an independent marine surveyor/inspector.

(2). Sediment removed from Facility sluiceways and ponds are subject to City compensation to Kurtz.

(3). City staff will inspect Facility sluiceways and ponds on a monthly basis within seven (7) days of the last day of each month, and City will authorize Kurtz to submit an invoice for work performed during the previous invoicing period.

(4). The Kurtz invoice shall include the volume, in CYs, of Sediment processed at Facility, with documentation, to the reasonable satisfaction of City, supporting the CY calculation, equivalent to a percentage of the CYs removed from the sluiceways and settling ponds, as a draw on the total volume of Sediment delivered from the dredger to Facility. City shall pay Kurtz, in full, within thirty (30) days receipt of invoice.

B. Verification of Volume. City may, at its own cost, have Facility surveyed prior to, and after the dredging season to ensure that Sediment has neither been disposed of on Premises outside of agreed upon areas, nor been placed in inventory for subsequent removal. Any discrepancy related to material on Premises, related to City estimations and Kurtz estimations, shall be reconciled in good faith between the parties on an annual basis.

C. Fee Adjustments.

(1). The fees set forth in Section 6.A.(1) above, shall apply to a maximum amount of Sediment received whether there are one (1) or two (2) dredge cycles in any one (1) calendar year. For one (1) dredge cycle, the Sediment volume cap is 90,000 CYs; for two (2) dredge cycles, the aggregate Sediment volume cap is 180,000 CYs. If either maximum Sediment cap is exceeded, City and Kurtz shall negotiate in good faith for a per CY increase to the fee set forth in Section 6.A.(1) above, in which case the increase shall be no less than zero.

(2). A fuel surcharge shall be applied to the CY payment to Kurtz when the price for diesel fuel published by the US Energy Information Administration, for the Midwest Region, increases over \$4.00 per gallon (“Base Rate”), for the time period between when a dredge cycle begins and four (4) months thereafter (“Price Window”). The fuel charge shall be based upon the weekly published average during the Price Window. If the average weekly diesel fuel rate during the Price Window is equal or greater than the Base Rate, the CY rate paid to Kurtz for processing Sediment shall increase by 5% increments as set forth below. For each \$.50 increment to the Base Rate thereafter, the CY rate paid to Kurtz for processing Sediment shall increase by 5%.

<u>Base Rate</u>	<u>CY Incremental Increase</u>
\$4.00 to \$4.49	0%
\$4.50 thru \$4.99	5%
\$5.00 thru \$5.49	0%
\$5.50 thru \$5.99	5%
\$6.00 thru \$6.49	0%
\$6.50 thru \$6.99	5%

The pattern shall continue thereafter at 50 cent and 5% increments

For purposes of illustration only, if the CY fee being paid to Kurtz is \$28.00, and the average price per gallon for diesel fuel during the Price Window is \$5.25, the CY fee paid to Kurtz shall be increased by one (1) 5% increment, or \$1.40 total, calculated as follows:

$$\$28.00 \times 5\% = \$1.40$$

7. Royalty Paid to City. Kurtz shall pay City a royalty which is based upon the revenue collected by Kurtz for product sales by Kurtz that incorporate, in whole or in part, Sediment.

A. 100% Sediment. For pure Sediment sold from Facility, the royalty due City shall be equal to 10% of the gross revenue received by Kurtz.

B. Partial Sediment. For product sales from Facility where the product contains some portion of Sediment, the royalty due City shall be equal to 10% of the gross revenue received by Kurtz, multiplied by the percentage Sediment makes up the total product by volume.

Kurtz shall pay CITY royalties on a monthly basis within thirty (30) days after the end of the month during which gross sales have been recognized by Kurtz in accordance with Kurtz normal business practices.

C. Remote Sales of Sediment. For any Sediment removed by Kurtz from Facility for later sale at a remote location, Kurtz shall pay City \$.20 per CY.

D. Sediment Sales to City. City, or agents working at the direction of City on a City project, may purchase Sediment from Kurtz at the lowest market price \$6.00/CY for unscreened sands and \$.20/CY for unscreened silty sands, plus at cost transportation expenses (City and City agents shall make a good faith effort to utilize Sediment based products on City public works projects where project specifications allow for use of Sediment based products). City shall not have access

to more than 5% of total Sediment per dredge cycle. Any Sediment purchase by City, or its agents, shall be exempt from the 10% fee.

E. Record Keeping. Kurtz shall maintain keep accurate records documenting quantities of Sediment harvested, sold, and the revenue received from such sales. Kurtz shall reconcile hydraulically placed dredged sediment delivered into the sluiceways and silt ponds. Sediment that hydraulically enters Facility should be equal to the sum of: (i) Sediment leaving Facility, and (ii) Sediment stockpiled at Facility.

Prior to the start of any new dredge cycle, an inventory log shall be submitted to City for its review to be reconciled with invoices received from Kurtz logging removal of Sediment from Facility, and subsequent sales resulting in a commission to CITY. Notwithstanding the foregoing, the parties understand and agree that any calculation for Sediment is an estimated amount, and that due to the very nature of this material being a moist silt, sand, and clay, it is not a precise calculation.

8. City & Kurtz Collaboration and Wetlands. Should City have additional Sediment processing opportunities, such opportunities shall be presented by City to Kurtz. Kurtz agrees to reasonably consider such opportunities, and if deemed commercially or practically desirable, shall so notify City and negotiate in good faith over the terms and conditions of providing such services to City. Kurtz shall offer to City, if available, on an annual basis, up to one (1) acre of wetlands at Kurtz, or its affiliate, property in Conneaut, at a price 10% below the then market price for wetlands.

9. Facility Utilization & Maximization. As a material inducement to Kurtz, City authorizes Kurtz to engage in any and all activity on Premises which do not conflict with Kurtz's obligations under this Agreement, such activity may include but is not limited to utilizing excess Facility space to mix, store and market products, store tools and equipment, or receive additional Sediment.

10. Compliance with Law. All Kurtz activity at Premises shall comply with local, county, state and federal rules, laws, guidelines, codes and statutes, as modified. In the event a change to, or interpretation of, any such regulations create an economic burden upon Kurtz, the parties agree to negotiate in good faith to an increase in the fees paid to Kurtz. If after thirty (30) days of good faith effort to negotiate an increase to the fee paid to Kurtz, the parties have been unable to reach a mutually agreeable resolution, Kurtz may, upon 30-day notice, terminate this Agreement, at which point Kurtz shall be paid in full for all services rendered up to the point of the termination date.

11. Hazardous Materials. City shall be responsible for any Sediment or dredged material that includes or contains hazardous materials, in which responsibility shall include but not be limited to any and all remedial measures, fines, or fees resulting therefrom. For purposes of this Agreement, "Hazardous Material" shall mean any chemical, substance, material, or waste or component thereof which is now or hereafter listed, defined, or regulated as a hazardous or toxic chemical, substance, material, or waste or component thereof by any federal, state, or local governing or regulatory body having jurisdiction.

Notwithstanding the foregoing, City shall not be liable for any Sediment provided to Facility by a dredger retained by Canadian National Railway Transportation Company, or its affiliates or agents (“Canadian Railway”), for processing. Kurtz may reject any such Sediment from Canadian railway if appropriate testing results or safeguards are not present to ensure an absence of Hazardous Material in Sediment. For purposes of clarity, any Sediment provided by Canadian Railway and processed by Kurtz at Facility is subject to the payment and rate structure of this Agreement.

12. Insurance. Before performance of the scope of services commences, Kurtz shall furnish the City with insurance certificates, certifying that the insurance coverages issued by insurance companies with an A rating, specified hereunder are in full force and effect, and that CITY will be given thirty (30) days written notice prior to any expiration, cancellation or material change of any of such policies. Any agents, contractors and subcontractors hereunder (to the extent applicable to the portion of services to be performed by subcontractors), shall, prior to providing such services, place and maintain in effect similar types and amounts of coverage. City may request Kurtz to modify coverage levels or seek additional coverage in order to mitigate risk to the City.

(1). Workers’ Compensation Insurance and Employers’ Liability Insurance: including, but not limited to, Workers’ Compensation in compliance with the applicable federal, state, local and foreign ordinances, laws, rules and regulations and Employers Liability Insurance with a minimum limit of \$1,000,000 per occurrence/\$1,000,000 aggregate.

(2). The Commercial General Liability insurance shall have a minimum combined single limit of \$1 million per occurrence with excess liability insurance in the amount of \$9 million per annual policy period, with a deductible not to exceed \$50,000.00 and said insurance shall be deemed primary as it relates to this Agreement and the Property Lease Agreement between the City and Bessemer and Lake Erie Railroad Company.

(3). Automobile Liability Insurance: including, but not limited to, owned, hired and non-owned automobiles, all applicable to personal injury, bodily injury, death and property damage with a minimum limit of \$1,000,000 per occurrence/\$1,000,000 aggregate.

(4) Kurtz shall also keep its personal property, fixtures, and any buildings and improvements constructed or placed on the Premises by Kurtz insured with “Causes of Loss – Special Form” (or equivalent) insurance in an amount to cover one hundred percent (100%) of the replacement cost of such property, fixtures, buildings and improvements.

(5). Kurtz shall purchase and maintain in effect, or cause its sublessees to purchase and maintain in effect, at all times during the term of this Agreement either a) a Contractor’s Pollution Liability policy, and/or b) a Pollution Legal Liability policy. The total combined coverage of any such insurance shall be in an amount not less than ten million dollars (\$10,000,000) and with a deductible not to exceed \$100,000 insuring the Railroad against damages, costs, liabilities and expenses resulting from on- or off-site bodily injury (including death to any person), on or off-site loss, damage or destruction of property (including that belonging to the parties hereto), and on-or off-site cleanup costs (including expenses incurred in the investigation, removal, remediation, neutralization, or immobilization of contaminated soils, surface water, groundwater or any other

contamination), and natural resource damages growing out of or incidental to the discharge, spillage, dispersal, release, or escape of Hazardous Materials or Solid Waste at or transportation of Hazardous Materials or Solid Waste to or from the Premises after the Effective Date of the Lease (i.e. "New Pollution Conditions"). Notwithstanding the foregoing, such Contractor's Pollution Liability insurance shall not include coverage for known pre-existing contamination on Premises; provided, that such Contractor's Pollution Liability insurance shall provide coverage for liabilities arising out of facility-related additions to pre-existing contaminant levels or exacerbation of pre-existing contamination, including liability for response costs that would not have existed but for said facility-related additions or exacerbation unless obtaining such coverage on an annual basis would be cost prohibitive which shall be deemed to occur if the cost of such coverage exceeds eighty five thousand dollars (\$85,000.00) in additional premiums.

(6). If Kurtz is responsible for providing Professional Services/Testing – Kurtz should provide Professional Liability coverage – \$5,000,000 limit

(7) Kurtz should provide Products Pollution Liability coverage - \$10,000,000 limit to include City as Additional Insured

All such policies, except (1) and (4) shall name City as additional insured and shall contain a waiver of subrogation rights against City.

13. Indemnity. Kurtz shall defend, indemnify and hold the City, any and all of its officials, members, directors, officers, attorneys, employees, and agents and their respective successors and assigns (collectively, "Indemnitees") harmless from any and all loss, cost, expense, claims or actions arising out of or in connection with Kurtz's performance under this Agreement, including, without limitation, damages for personal injury or property damage, costs of investigation, abatement, or remediation of environmental conditions as required by applicable law and regulations, attorney fees, expenses of litigation, fines, or penalties, unless resulting from the negligence of City. The foregoing indemnity shall be perpetual and shall survive the termination of this Agreement for one (1) year. Notwithstanding the foregoing, Kurtz shall not be required to defend, indemnify or hold the Indemnitees harmless for negligent, intentional, willful or criminal acts of City. In any and all claims, demands or causes of action against any of the Indemnitees, the indemnification obligation hereunder shall not be limited in any way by any limitation on the amount of damages, compensation or benefits payable by or for Kurtz under Workers' Compensation Acts, disability benefits acts or other employee benefit acts; provided, however, that said indemnification obligation shall not confer or be deemed to confer upon any such claimant any right of recovery in addition to those or other than as otherwise available to such claimant at law or in equity. It is expressly agreed to and understood by City and Kurtz that Indemnitees does not include Ryba Marine or the dredging contractor. Notwithstanding anything contained within this section to the contrary, Kurtz shall not: (a) be liable or required to defend or indemnify City for the actions of any third party, except for Kurtz's agents, contractors or subcontractors, and (b) be required to defend, indemnify or hold the Indemnitees harmless for negligent, willful or intentional acts of the City.

14. Events of Default. Following the dispute resolution process set forth in Section 15, this Agreement may be terminated by either party upon ten (10) days written notice upon any Event of

Default, defined below, provided, however, Kurtz shall not terminate this Agreement for non-payment of compensation, if City reasonably initiates the payment process for all reasonably undisputed amounts due Kurtz within ten (10) days of receipt of Kurtz's written notice to terminate.

As used herein, an Event of Default shall exist if any of the following shall occur:

(1). Any party fails to observe or perform any non-monetary obligation of this Agreement, and such failure shall continue for a period of thirty (30) days after receipt of written notice thereof from the non-failing party; or,

(2). Kurtz makes an assignment for the benefit of its creditors; or,

(3). A custodian, liquidator, receiver, or trustee is appointed for Kurtz, or if any action is commenced by or against Kurtz under the Federal Bankruptcy Code, or any similar federal or state statute, or if any proceeding for the dissolution or liquidation of Kurtz shall be instituted and, if such appointment, adjudication, petition or proceeding was involuntary and not consented to by Kurtz, upon the same not being discharged, stayed or dismissed within sixty (60) days.

Prior to seeking any relief for an Event of Default, the non-defaulting party must follow the dispute resolution process in Section 15.

15. Dispute Resolution. Following the procedure set forth in Section 14 pertaining to default, but before a party may file a lawsuit against the other party, such dispute must be referred to one or more qualified mediators for non-binding mediation prior to seeking litigation. If mediation does not produce an acceptable result to both parties within thirty (30) days of submission, the parties may pursue their remedies in the Ashtabula County Court of Common Pleas.

16. Loss of City Permitting. The parties understand and agree that the City provides Facility to Kurtz through year-to-year placement agreements and permits and authorizations received either directly, or through agents acting on the behalf of other Federal, state, and local government agencies. Agency consent and approval may change or be subject to new conditions, restructured agreements, and applicable laws may be repealed, amended, modified, or nullified. In such instances, the continued ability of CITY to cost effectively provide its services may be negatively impacted. If a change to the permitting process, land use agreements, placement agreement, or a change in law creates an unreasonable financial burden (defined as increasing City's out-of-pocket expenses by 10% or more) or eliminates the City's access to or control of Premises, then City may:

- (i) with the consent of Kurtz, restructure the terms of this Agreement; or,
- (ii) suspend this Agreement, without penalty or obligation to City for a period not to exceed sixty (60) days, until a more favorable operating environment can be reached with the applicable government agency or designee; or,
- (iii) terminate this Agreement without penalty or obligation to City or Kurtz, in which case Kurtz will be paid for all work performed to the date of termination.

17. Miscellaneous.

A. Notices. All notices, consents and communications required hereunder (each, a “Notice”) shall be in writing and shall be deemed to have been properly given when either:

- (i). hand delivered with delivery acknowledged in writing;
- (ii). sent by U.S. Certified mail, return receipt requested, postage prepaid, with receipt;
- (iii). sent by overnight delivery service (Fed Ex, UPS, etc.) with receipt; or,
- (iv). sent by fax or email.

Notices shall be deemed given two business days following transmission unless the receiving party otherwise notifies the transmitting party. Any party may change its address for receipt of Notices upon notice to the other party. If delivery cannot be made at any address designated below for Notices, a Notice shall be deemed given on the date on which delivery at such address is attempted. Notices shall be addressed to:

City at: James Hockaday, City Manager
294 Main Street
Conneaut, Ohio 44030

Kurtz at: Jason Ziss
6415 Granger Road
Independence, Ohio 44131

B. Governing Law. The parties agree that any dispute in the terms and conditions of this Agreement shall be resolved in accordance with the law of the State of Ohio. The parties to this Agreement hereby designate the Court of Common Pleas of Ashtabula County, Ohio, as a court of proper jurisdiction and venue of and for any and all actions and proceedings relating to this Agreement; hereby irrevocably consent to such designation, jurisdiction, and venue; and hereby waive any objections or defenses relating to jurisdiction or venue with respect to any action or proceeding initiated in the Court of Common Pleas of Ashtabula County, Ohio.

C. Counterparts. This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together shall constitute but one and the same instrument. Any party hereto may deliver a copy of its counterpart signature page to this Agreement electronically pursuant to Ohio Revised Code Chapter 1306. Each party hereto shall be entitled to rely upon an electronic signature of any other party delivered in such a manner as if such signature were an original.

D. Modifications. This Agreement may be modified only in a writing signed by both parties.

E. Severability. Each provision hereof shall be separate and independent and the breach of any provision by either party hereto shall not discharge or relieve the other party from its obligations to perform each and every covenant to be performed by it hereunder. If any provisions hereof (or the application thereof to any person, firm or corporation or to any circumstances) shall

be deemed invalid or unenforceable by any court of competent jurisdiction, the remaining provisions of this Agreement (or the application of such invalid provision to such persons, firms or corporations or circumstances other than those as to which it is invalid or unenforceable), shall not be affected thereby, and said provisions hereof shall be valid and enforceable to the fullest extent permitted by law.

F. Waiver. A waiver by any party of any breach or default by the other party under this Agreement shall not constitute a continuing waiver by such party of any subsequent act in breach of or in default hereunder.

G. Survival. The obligations of the Parties under Sections 11 and 13 of this Agreement shall survive for a period of two years following the termination of this Agreement.

H. Entire Agreement. This Agreement contains the entire agreement between the parties hereto and shall not be modified, amended or supplemented, or any rights herein waived, unless specifically agreed upon in writing by the parties hereto. This Agreement supersedes any and all previous agreements, whether written or oral, between the parties.

I. Force Majeure. Any delay or failure in the performance by Kurtz shall be excused if and to the extent caused by the occurrence of a Force Majeure. For purposes of this Agreement, Force Majeure shall mean a cause or event that is not reasonably foreseeable or otherwise caused by or under the control of Kurtz, including acts of God, fires, floods, explosions, riots, wars, hurricane, sabotage terrorism, vandalism, accident, restraint of government, governmental acts, injunctions, labor strikes, or unanticipated circumstances, and other like events that are beyond the reasonable control of Kurtz, and which events or the effects thereof are not attributable to Kurtz's failure to perform its obligations under this Agreement, provided, however, that a Force Majeure shall not include the unwillingness or inability of Kurtz to pay any amounts due to any party necessary to perform its obligations under this Agreement. Force Majeure shall include, but not be limited to, governmental action, or failure to act, which prohibits or impedes Kurtz's ability to reasonably provide its services pursuant to this Agreement.

J. Premises Lease. City leases Premises from Bessemer under a Property Lease Agreement ("PLA") executed on or about April 3, 2020. As a condition of this Agreement, City shall remain in compliance with all terms and conditions of PLA (Exhibit B) as well as provide for access to and from Premises along access routes depicted on Exhibit A. Kurtz's duties and obligations as required under this Agreement shall be undertaken in a manner that is compliant with PSA, Section 2, Use of Premises.

(Signature page to Follow)

IN WITNESS WHEREOF, the parties hereto, having read this Agreement in its entirety, including all attachments hereto, do agree in each and every particular and certify as to having authorization to contract on behalf of the party represented.

CITY OF CONNEAUT

KURTZ BROS. INC.

By: James Hockaday
Title: City Manager

By:
Title:

Exhibit A

Facility Plans and Specifications