

RESOLUTION NUMBER 2021-12

A RESOLUTION TO ENTER INTO A MAINTENANCE SERVICES AGREEMENT FOR THE DOVER ROAD WATER TANK WITH CENTRAL PAINTING & SANDBLASTING, INC.; AUTHORIZE THE MAYOR TO EXECUTE SAID AGREEMENT; AND DECLARING AN EMERGENCY.

WHEREAS, due to concerns regarding the conditions of the Village's Water Tanks, Central Painting & Sandblasting, Inc. was contacted regarding implementation of a maintenance services plan of the Dover Road Water Tank; and

WHEREAS, immediate provision of such maintenance services, and provision of such services on an ongoing basis, is vital to the Village and its residents for its continuing health, safety and general welfare; and

WHEREAS, the Village Council of Apple Creek hereby desires to enter into said Maintenance Services Agreement for the Dover Road Water Tank and authorizes the Mayor to execute said Agreement on the Village's behalf;

BE IT RESOLVED by the Council of the Village of Apple Creek, Ohio, that:

SECTION ONE:

The terms of the attached Maintenance Services Agreement for the Dover Road Water Tank are approved, whereby the village shall contract with Central Painting & Sandblasting, Inc. with fees paid as set out forth in said Agreement.

SECTION TWO:

The Mayor is hereby authorized to execute the attached Maintenance Services Agreement for the Apple Creek Dover Road Water Tank on behalf of the Village.

SECTION THREE:

This Resolution is hereby declared to be an emergency measure, and shall take effect and be in force immediately from and after its passage. The reason for the emergency lies in the fact that this Resolution is necessary for the immediate preservation of public peace, health, safety and welfare.

SECTION FOUR:

All prior resolutions which conflict with the provisions of this resolution are hereby repealed to the extent that they are in conflict herewith.

SECTION FIVE:

If any provision of this resolution, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of this resolution which can be given effect without the invalid provision or application, and to this end the provisions are severable.

VOTE TO SUSPEND RULES: Yeas _____ Nays _____

VOTE ON EMERGENCY RESOLUTION: Yeas _____ Nays _____

PASSED: June _____, 2021.

ATTEST:

President of Council

Fiscal Officer

APPROVED:

Rodney Mackey, Mayor

CPS MAINTENANCE SERVICES AGREEMENT Dover Road Tank

This Maintenance Services Agreement and its exhibits incorporated by reference herein (collectively, the "Agreement"), is made this 26th day of May, 2021 (the "Effective Date") by and between **CENTRAL PAINTING & SANDBLASTING, INC.**, an Ohio corporation with an address at 8543 Riverland Avenue SW, Navarre, OH 44662, for itself and its successors and assigns ("CPS") and the **Village of Apple Creek**, an Ohio municipality with an address at 63 East Main Street, Apple Creek, OH 44606 ("Customer") establishes the terms and conditions governing CPS's provision of services.

RECITALS

WHEREAS, CPS is in the business of providing the highest quality painting, sandblasting and related services; and

WHEREAS, Customer wishes to engage CPS to provide such services; and

WHEREAS, the parties hereto, intending to be legally bound, do hereby agree to such an engagement under the terms, conditions and promises herein this Agreement;

NOW, THEREFORE, for good and valuable consideration, including without limitation the terms, conditions, and promises set forth below, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

DEFINITIONS

"CPS Services" means those services provided by CPS to Customer, as described in the attached Exhibit A.

"Effective Date" means the date this Agreement is executed by all parties.

"Fees" means any amounts due to CPS from Customer under this Agreement.

"Opt-Out Fees" means those Fees agreed to by the parties herein Paragraph 2, which shall be paid by Customer to CPS only in the event Customer elects to terminate this Agreement early according to the terms herein.

"Term" means the period of time as described herein Paragraph 2.

AGREEMENT

- (1) **GENERAL.** This Agreement governs the purchase of CPS Services by Customer as identified in Exhibit A, which is incorporated into this Agreement by this reference.
- (2) **TERM and TERMINATION.**
- A. The Term of this Agreement shall be ten (10) years.
 - B. Prior to the end of each 12-month period during the Term, Customer may terminate this Agreement by:
 - a. written notice to CPS within thirty (30) days prior to the expiration of the period, AND
 - b. payment of the Opt-Out Fees as described in this Paragraph 2, below, within thirty (30) days prior to the expiration of the period.
 - C. CPS may immediately terminate this Agreement or discontinue CPS Services if Customer fails to cure its breach of the payment terms in Paragraph 3, below, within ten (10) days after written notice from CPS.
 - D. Notwithstanding termination of the Agreement as set forth in this Paragraph 2, Customer will remain liable for all invoices, charges and fees that remain outstanding, whether or not invoiced by the termination date.
 - E. If CPS materially fails to provide CPS Services, Customer may terminate this Agreement. To terminate for such failure, Customer must give CPS written notice of the failure and provide CPS with a reasonable opportunity to cure, which will be a minimum of Thirty (30) days from CPS's receipt of notice. If CPS fails to cure, then Customer may terminate Thirty (30) days after giving CPS written notice of termination due to the material failure. CPS's material failure does not include a failure caused by circumstances not within CPS's sole control, including without limitation a failure caused by Customer-provided equipment or Customer or third parties.
 - F. The pricing in this Agreement, including any discounts, is based on Customer's commitment to purchase CPS Services for the entire Term. Customer acknowledges that a precise calculation of CPS's damages for an early termination of this Agreement would be extremely difficult, and that the Opt-Out Fees in this Agreement represent reasonable liquidated damages, not a penalty. If Customer terminates an order in whole or in part before expiration of the Term, or if CPS terminates the Agreement under this Paragraph 2, then Customer will pay the charges set forth in (a) below:

a. **Opt-Out Fees.**

Prior to end of Year 1: \$491.00
Prior to end of Year 2: \$24,297.00
Prior to end of Year 3: \$12,519.00
Prior to end of Year 4: \$2,257.00
Prior to end of Year 5: \$0.00
Prior to end of Year 6: \$42,558.00
Prior to end of Year 7: \$31,693.00
Prior to end of Year 8: \$22,344.00
Prior to end of Year 9: \$10,411.00

- b. Nothing in this Paragraph is intended to limit or preclude other remedies available to CPS at law or in equity if Customer terminates this Agreement before expiration of the applicable term commitment.

(3) FEES AND PAYMENT TERMS.

- a. Customer shall pay to CPS the following yearly Fees:

\$13,918.00 US Dollars

- b. CPS's rates and fees for CPS Services do not include taxes. Customer will pay all taxes, including without limitation sales, use, property, gross receipts, excise, VAT, bypass or other local, state, national or international taxes or charges imposed on or based upon the provision, sale or use of the Services.
- c. **Payment Date.** Customer will pay CPS's yearly invoices in full in U.S. currency within Thirty (30) days of the invoice date. Failure to make payment of amounts past due within Fifteen (15) days following CPS's written notice of non-payment may, at CPS's option, result in immediate termination of this Agreement and/or the CPS Services.
- d. **Interest Charges.** If Customer fails to pay fees for CPS Services when due, CPS will charge Customer interest on those fees equal to the lesser of 10% annual percentage rate, calculated monthly; or the maximum rate allowed by law.

(4) PROVISION OF SERVICES.

- a. **Performance.** CPS's obligations under this Agreement extend only to the CPS Services specified in Exhibit A, and the CPS-provided equipment relating to those CPS Services. CPS is not responsible for other equipment or services.

- b. Customer acknowledges and agrees that all weather sensitive services will only be provided during appropriate weather conditions.
- c. Notwithstanding anything contained herein this Agreement, Customer acknowledges and agrees that the CPS Services will not begin unless and until the agreed-upon Fees have been actually received by CPS.
- d. Customer acknowledges and agrees that any additional services requested by Customer, outside of the scope of the CPS Services as described in Exhibit A, shall be paid as a separate fee on a case by case basis, according to CPS's then-current pricing. CPS shall provide a written quote for any such services, which may be approved by Customer.
- e. Inspections. CPS shall perform yearly inspections as described in Exhibit A.
- f. Reports. CPS shall provide Customer with written reports detailing the CPS Services which have been provided, within thirty (30) days following the completion of such CPS Services.
- g. **Warranties.** EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, CPS DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, NOT EXPLICITLY STATED IN THIS AGREEMENT, AND IN PARTICULAR DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND WARRANTIES RELATED TO THIRD PARTY EQUIPMENT, MATERIAL, OR SERVICES. SUCH SERVICES, MATERIALS, OR EQUIPMENT ARE SUPPLIED "AS IS".

(5) **SUSPENSION OF SERVICES.** Without prejudice to the parties' other rights and remedies under this Agreement, and subject to its termination provisions, CPS may suspend the performance of its obligations without penalty if any of the following occur:

- a. Customer fails to make payments as required in Paragraph 3.
- b. CPS terminates this Agreement in accordance with the termination provisions.
- c. CPS is required to suspend such performance in order to comply with any law or a request by any governmental authority with jurisdiction.

(6) **EQUIPMENT NOT PROVIDED BY CPS.**

- a. Customer is responsible for the operation of any equipment that is not provided by CPS.

- b. CPS is not liable for any changes in CPS Services caused by equipment not provided by CPS that becomes obsolete, requires alteration, or performs at lower levels.

(7) USE OF NAME, SERVICE MARKS, TRADEMARKS OR TRADE SECRETS.

Customer will not use the service marks, trademarks, or trade secrets of CPS or any of its affiliates for any purpose, including without limitation resale of services or press releases, without CPS's prior written consent.

(8) CUSTOMER RESPONSIBILITIES. Preparation for Services. Customer will do all of the following, if applicable:

- a. at its own expense, prepare its sites to comply with CPS's installation and maintenance specifications;
- b. maintain the equipment space and associated facilities, conduits and rights-of-way as safe places to work, and insure such facilities against fire, theft, vandalism and other casualty;
- c. ensure that the use of the equipment space and associated facilities, conduits and rights-of-way comply with all applicable laws, rules and regulations, as well as any existing leases or other contractual agreements or rights of third parties.
- d. Use of Services. Customer will not make any illegal use of the CPS Services. Customer will not permit or allow others to: (i) abuse or fraudulently or illegally use CPS Services, including without limitation unauthorized or attempted access, alteration, or destruction of CPS Services; (ii) use CPS Services in such a manner that causes interference, or tampers with another customer's or authorized user's use of the CPS Services.
- e. Customer shall provide prior notice to CPS of any maintenance to be performed by any Customer employee or third party which may affect CPS's provision of CPS Services hereunder, including without limitation electrical work.
- f. If Customer fails to comply with this Paragraph 9, Customer releases CPS from all liabilities or obligations (including any warranty or indemnity obligations) under this Agreement and Customer will indemnify CPS for all costs or damages that CPS incurs as a result of Customer's failure to comply.

(9) **CONFIDENTIALITY.** Customer will keep the terms of this Agreement and the details of the CPS Services confidential, in the same manner as Customer would keep its own confidential information confidential. Notwithstanding anything contained herein this Agreement, the parties may disseminate a press release regarding the existence of their business relationship, the form and timing of which press release shall be mutually agreed to in writing.

(10) **REPRESENTATIONS & WARRANTIES.** The parties hereto represent and warrant to each other that:

- a. each party has all necessary rights, licenses and approvals required to perform its obligations hereunder, and to operate and provide the services in accordance with this Agreement; and
- b. each party's performance hereunder will be rendered in a good and workmanlike manner using sound, professional practices in accordance with industry practices applicable at the time of delivery of such services; and
- c. each party's obligations are not in conflict with any other obligations or agreement (in writing or otherwise) it has with any third party; and
- d. each party will comply with all applicable foreign, federal, state and local laws, rules and regulations in the performance of its obligations hereunder.

(11) **LIMITATIONS OF LIABILITY.**

- a. CPS's entire liability for damages caused by any failure to perform its obligations under this Agreement will not exceed Ten Percent (10%) of Customer's aggregate yearly service fees during the Term. This limitation of liability will not apply to claims arising from the parties' indemnification obligations under this Agreement.
- b. **Consequential Damages. NEITHER PARTY WILL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES FOR ANY CAUSE OF ACTION, WHETHER IN CONTRACT OR TORT. CONSEQUENTIAL, INCIDENTAL, AND INDIRECT DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOST PROFITS, LOST REVENUES, AND LOSS OF BUSINESS OPPORTUNITY, AND INCIDENTAL DAMAGE TO CUSTOMER'S PREMISES OR EQUIPMENT FOR SERVICE INSTALLATION, WHETHER OR NOT THE OTHER PARTY WAS AWARE OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF THESE DAMAGES. THIS LIMITATION OF LIABILITY WILL NOT APPLY TO CLAIMS ARISING FROM THE PARTIES' INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT.**

- c. Damages to Customer Facilities. Except for damages caused to Customer's equipment due to physical access to Customer's facilities by CPS employees, CPS is not responsible for unauthorized access or damages to Customer's facilities or Customer's premise or equipment, including without limitation that caused by vandalism or graffiti.

(12) **INDEMNIFICATION.**

- a. Each party will indemnify and defend the other party, its directors, officers, employees, agents and their successors from and against all third party claims for damages, losses, or liabilities, including attorney's fees, arising directly from performance of this Agreement.
- b. Customer will indemnify and defend CPS from and against all third-party claims for damages arising from or related to the use or misuse of the CPS-serviced Customer equipment as set forth in Paragraph 9 (Customer Responsibilities).
- c. The party seeking indemnification under this Paragraph must promptly notify the other party in writing of any such claim and give the indemnifying party full and complete authority, information and assistance for the claim's defense and settlement. The indemnifying party will retain the right, at its option, to settle or defend the claim, at its own expense and with its own counsel. The indemnified party will have the right, at its option, to participate in the settlement or defense of the claim, with its own counsel and at its own expense, but the indemnifying party will retain sole control of the claim's settlement or defense. To be indemnified under this Paragraph 12, the party seeking indemnification must not by any act (including any admission or acknowledgement) materially impair or compromise a claim's defense.

(13) **FORCE MAJEURE.** Neither party will be responsible for any delay, interruption or other failure to perform under this Agreement due to acts beyond the control of the responsible party. Force majeure events include without limitation natural disasters (e.g. lightning, earthquakes, tornadoes, floods), wars, riots, terrorist activities, and civil commotions; inability to obtain equipment from third party suppliers; and other acts of third parties; explosions and fires; embargoes, strikes, and labor disputes; and governmental decrees and any other cause beyond the reasonable control of a party.

(14) **INSURANCE.** CPS carries insurance at Assured Partners provided by Westfield Insurance Company. Upon request, CPS shall furnish appropriate documentation evidencing such insurance coverage to Customer.

(15) **MISCELLANEOUS.**

- a. Independent Contractor. CPS provides CPS Services as an independent contractor under this Agreement. The parties' relationship and this Agreement will not constitute or create an association, joint venture, partnership, or other form of legal entity or business enterprise between the parties, their agents, employees or affiliates.
- b. No Waiver of Rights. If either party fails to enforce any right or remedy under this Agreement, that failure is not a waiver of the right or remedy for any other breach or failure by the other party.
- c. Governing Laws. This Agreement will be governed by applicable federal laws and regulations and the laws of the State of Ohio and decided via Arbitration in Stark County.
- d. Arbitration. Each of the parties hereto agrees to submit to binding arbitration any and all differences and disputes which may arise between them, their successors, assigns, employees, officers, directors, affiliates, subsidiaries, or shareholders which are related to this Agreement. Prior to initiating arbitration, the parties shall first meet face-to-face to attempt to resolve the differences, for which meeting either party may elect to have a mediator present. Any differences which the parties are unable to resolve in said face-to-face meeting shall be heard and finally settled by binding arbitration in accordance with the Commercial Rules of the American Arbitration Association. The arbitration proceeding shall be final, binding, and may be entered and enforced in any court of competent jurisdiction. The parties shall make such orders, conduct and schedule all proceedings in connection with the arbitration so that final arbitration commences no less than thirty (30) days and concludes no later than seventy-five (75) days after a party files the initial notice of arbitration. The cost of such arbitration shall be apportioned and determined by the arbitrator, in any manner determined by him/her based upon the fault or lack thereof by the respective parties. If the cost of such arbitration is not apportioned by the arbitrator, then the cost shall be borne equally between the parties.
- e. Assignment. Either party may assign any rights or obligations under this Agreement at any time.
- f. Amendments. This Agreement may only be modified by a written amendment signed by both parties.
- g. Notice. Any notice required or permitted by this Agreement shall be in writing and shall be deemed sufficient upon delivery, when delivered personally, or by certified overnight courier with signature required, or sent by facsimile (upon confirmation of receipt), or seventy-two (72) hours after being deposited in the U.S. mail, as certified or registered mail, with

postage prepaid, addressed to the party to be notified at such party's address as follows:

"CPS"

Central Painting & Sandblasting, Inc.
8543 Riverland Avenue SW
Navarre, OH 44662
Attn: Richard L. Morrow Jr.
Telephone: (330) 756-2043
Facsimile: (330) 756-3144
Email: cps@sssnet.com

"Customer"

Village of Apple Creek
Address: 63 East Main Street
Address: Apple Creek, OH 44606
Attn: _____
Telephone: (330) 698-5462
Facsimile:
Email: _____

- h. Severability. If any provision of this Agreement is found to be unenforceable, the Agreement's unaffected provisions will remain in effect and the parties will negotiate a mutually acceptable replacement provision consistent with the parties' original intent.
- i. Survivability. The terms and conditions of this Agreement regarding confidentiality, indemnification, warranties, and payment shall survive expiration and continue in effect.
- j. Entire Agreement. This Agreement, including all referenced Exhibits, constitutes the entire agreement and understanding between the parties relating to its subject matter. It supersedes all prior or contemporaneous negotiations or agreements, whether oral or written, relating to its subject matter.

(SIGNATURE PAGE FOLLOWS)

THE PARTIES DO HEREBY AGREE BY SIGNATURE BELOW:

"CUSTOMER"

VILLAGE OF APPLE CREEK

By: _____

(Print Name)

Its: _____

Date: _____

CENTRAL PAINTING & SANDBLASTING, INC
For itself and its successors and assigns

By: _____

Richard L. Morrow Jr.

Its: President

**EXHIBIT A
"CPS SERVICES"**

**Dover Road Tank
10-year Tank Assist**

Year 1:

- Open-up tank, pressure wash out, touch-up.
- Replace both pressure hatch gaskets, bolts, nuts, and washers (galvanized).
- Install new 12" slip on current 10 state standard approved vent.
- Dress end of overflow pipe and install a new 10-state standard approved screened flap gate.
- Replace ladder gate door with new.

Year 2:

- Prepare and overcoat the exterior.
- Remove damaged sealant on base of tank and replace with new sika-flex 1A.

Year 3:

- In-service annual inspection.

Year 4:

- Wash-out annual inspection.

Year 5:

- In-service annual inspection.

Year 6:

- Prepare and paint the interior surfaces.
- Prepare and paint the piping in the valve vault.
- Annual inspection.
- Install a new Cathodic Protection System including hardware. Does Not include the electrical supply, nor does this contract include any future maintenance to the Cathodic System.

Year 7:

- In-service annual inspection.

Year 8:

- Wash-out annual inspection.

Year 9:

- In-service annual inspection.

Year 10:

- Wash-out annual inspection.

Annual Inspection Detail

Inspect and Document the observed following conditions of:

- General site conditions
- Vegetation
- Foundation including grout and sealant
- Ladders
- Anti-Climb doors and their locks
- Safety climb
- Safety signs
- Overflow discharge assembly
- Overflow discharge erosion
- Vent screens
- Access hatches and their locks
- Pressure man-ways
- Sway rods
- Safety chains on ladder openings
- Exterior coating condition
- Interior coating condition

Perform the following maintenance items:

- Oil and exercise all locks on site
- Operate each safety climb for proper function (exterior only during in-service inspection)
- Touch-up minor areas within reach on exterior without rigging

Washout Annual Inspection Detail

Includes all items in the above annual Inspection details and the tank will be drained (by owners) the hatch will be opened, and the interior of the tank will be washout with all debris being removed from the tank. Once cleaned out any areas of corrosion that are within reach without the use of rigging will be spot repaired and coated with an epoxy coating that is NSF approved. The tank will be chlorinated and sealed up. New gaskets will be installed should the existing gasket show signs of deterioration.