

Term
F.V.I.
Mason

PROFESSIONAL SERVICE AGREEMENT [D.R.1]

THIS AGREEMENT, is made and entered into this 24th day of July, 2000 by and between CITY OF MASON, whose address is 202 West Main Street, Mason, Ohio 45040 ("Mason") and Frank Messer & Sons Construction Co. ("Service Provider").

SECTION 1. GENERAL DESCRIPTION OF PROJECT

Mason hereby retains Service Provider to perform and Service Provider hereby agrees to perform the professional services described in Section 2 according to the terms and conditions outlined herein. The project for which such services will be provided is generally described as follows: Pre-Construction – Construction Management Services for the New Municipal Facility.

SECTION 2. GENERAL DESCRIPTION OF PROFESSIONAL SERVICES

The Professional Services to be provided by Service Provider are identified below and are more fully described in the "Scope of Services" (Attachment A to this Agreement), which is incorporated herein by reference (the "Services"): See Attachment 'A' – Including Ordinance 2000-102, Ordinance write-up, Frank Messer & Sons Construction Co. proposal dated May 18, 2000, June 7, 2000 Messer Presentation and June 14, 2000 letter from Bernard Suer to Richard J. Fair.

Any services beyond those identified in this Agreement shall be considered Additional Services as more fully described in Section 6.16 and shall be authorized in writing by an Addendum to this Agreement executed by both parties.

SECTION 3. CONTACT PERSON

Mason and Service Provider shall each appoint a contact person who shall have the authority to act on behalf of each party, including, by way of illustration and not by way of limitation, to define the scope of the Services, transmit instructions, receive information and recommend changes in Professional Services. Any additional or revised fees must be approved by City Council. The contact person for Mason shall be: Richard Fair and the contact person for the Service Provider shall be: Bernard Suer.

SECTION 4. DATE OF COMMENCEMENT

The Date of Commencement for Services provided pursuant to this Agreement shall be the date on which the Agreement is fully executed. Service Provider shall perform its services with due and reasonable diligence consistent with sound professional practice.

SECTION 5. COMPENSATION AND DURATION

This Agreement shall remain in effect and the Service Provider shall provide all services necessary as provided herein on or before January 31, 2001. If services are delayed as a result of actions of the Service Provider beyond the above date, Service Provider shall be considered to be in default of the Agreement. Upon any default by the Service Provider, Mason may, at its sole discretion, in addition to any other remedies provided at law or in equity, terminate the Agreement, withhold outstanding compensation, and/or seek reimbursement for cost and time lost as a result of the Service Provider's inability to complete the Service by the agreed to completion date.

The Service Provider shall be entitled to receive a sum not to exceed \$40,000 for providing the all requested Services.

SECTION 6. TERMS AND CONDITIONS

6.1 Delayed Services: If services are delayed as a result of the Service Provider, Mason may seek remedial action as described in Section 5.

If services are disrupted or delayed as a result of the actions of Mason, the duration date specified in Section 5 of this Agreement shall be modified. If services are delayed for more than ~~30~~ ~~365~~ days, the fees may be equitably renegotiated and mutually agreed to be the parties hereto.

If services are delayed as a result of occurrences beyond the control of Mason or the Service Provider ~~for more than 365 days~~, this contract completion date may be extended upon mutual agreement of the parties hereto.

6.2 Invoice Procedures and Payment: Service Provider shall submit invoices to Mason for Services rendered as follows:

<u>last day of August, 2000</u>	<u>\$5,000</u>
<u>last day of September 2000</u>	<u>\$7,000</u>
<u>last day of October 2000</u>	<u>\$7,000</u>
<u>last day of November 2000</u>	<u>\$7,000</u>
<u>last day of December 2000</u>	<u>\$7,000</u>
<u>last day of January 2000</u>	<u>\$7,000</u>

The invoices shall be due and payable by Mason according to Mason's standard billing procedures. Reimbursables approved by Mason will be submitted with each invoice with appropriate backup with no markup.

~~during each invoicing period, which shall generally be on a monthly basis. The amount of each invoice shall be determined on the "percentage of completion method, whereby Mason and the Service Provider will estimate the percentage of the Services accomplished during the invoicing period. Such invoices shall also separately list reimbursable expenses, if applicable. Such invoices shall be submitted not more frequently than monthly by Service Provider and shall be due and payable by Mason according to Mason's standard billing procedure.~~

Mason hereby acknowledges that unpaid invoices shall accrue interest at 1.5 percent per month after such invoices have been outstanding for over 60 days of receipt of the invoice; provided, however, that no interest will be assessed when a valid dispute has arisen between the parties.

6.3 Expert Witness Services: It is understood and agreed that Service Provider's services under this Agreement do not include any participation in any litigation. Should such services be required, a Professional Service Agreement Addendum may be negotiated between Mason and Service Provider describing the services desired and providing a basis for compensation to Service Provider.

6.4 Opinion of Probable Construction Cost/Cost Estimates: Mason hereby acknowledges that Service Provider cannot warrant that opinions or estimates of probable construction or operating costs provided by Service Provider will not vary from actual costs incurred by Mason. However, Service Provider shall be bound by and perform this service consistent with sound professional practice.

6.5 Indemnification: Service Provider agrees to indemnify and harmless Mason, its agents, officials and employees, against any and all suits or claims that may be based on any injury to persons or property to the extent that such suits or claims are a result of an negligent or wrongful error, omission or act of Service Provider or any person employed by Service Provider, per work scope under this agreement.

6.6 Insurance: Service Provider shall carry, on all operations hereunder, workers compensation insurance, commercial general liability insurance, professional liability insurance, and automobile liability insurance. Mason must approve any such insurance and Mason shall be named as a certificate holder under any such policy. Service Provider must provide Mason a current copy of certificate of liability insurance coverage prior to commencement of Services. Service Provider shall continue to provide current insurance through the duration of this Agreement.

6.7 Assignment/Third Parties: Neither Mason nor Service Provider will assign or transfer its interest in this Agreement without the written consent of the other. Service Provider, however, does reserve the right to subcontract any portion of the Services with prior written consent of Mason. Service Provider shall insure and be liable for the work of its subcontractors. Nothing in this Agreement shall be construed as creating any rights, benefits or causes of actions for any third party against Mason.

6.8 Suspension, Termination, Cancellation, or Abandonment: Mason may, upon written notice, terminate this agreement at any time for its convenience. In the event the Project identified in this Agreement is suspended, canceled, or abandoned by Mason and except as expressly provided otherwise in Section 5, or upon any other default by Service Provider under this agreement, shall be compensated for the Services provided and reimbursable expenses incurred up to the date of suspension, cancellation, or abandonment. If Mason delays or suspends Service Provider's services for more than 180 days, then Service Provider may terminate this Agreement upon giving fifteen (15) days' written notice. Mason may terminate this Agreement upon the Service Provider filing for bankruptcy, insolvency, or assignment for the benefit of creditors. Except as expressly provided otherwise in this Agreement, either party may terminate this Agreement for cause upon 30 days' written notice of a substantial failure by the other party to perform in accordance with the terms of this Agreement through no fault of the terminating party. The party receiving such termination notice shall have the right to correct its failure within seven days of receiving said notice.

Pursuant to Section 5 of this Agreement, Service Provider shall not be obligated to commence services until this Agreement is fully executed. If Mason fails to execute this Agreement within 60 days of the date of receipt by Mason, Service Provider shall have the right to revise fees or revoke any proposal related to the services.

6.9 Disputes: If a dispute between the parties arises out of or relates to this Agreement, or the breach thereof, then the parties agree to make a good faith effort to settle the issue through direct discussion between the parties prior to having recourse to a judicial forum. In the event of any litigation, the prevailing party shall be entitled to recover reasonable attorney's fees.

6.10 Standard of Care: Service Provider agrees to perform services in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. Service Provider agrees to perform services in accordance with any applicable federal, state, or local law or regulation.

6.11 Waiver: Any failure by Mason to require strict compliance with any provision of this Agreement shall not be construed as a waiver of such provision, and Mason may subsequently require strict compliance at any time, notwithstanding any prior failure to do so.

6.12 Relationship: Service Provider is an independent contractor to Mason in performing its Services under this Agreement and is not an employee, agent, joint-venturer, or partner of Mason.

6.13 Mason's Responsibilities: Mason shall provide Service Provider all pertinent data, criteria, and information including but not limited to design objectives and constraints, space and use requirements, operational information, budgetary limits, flexibility and expandability requirements, and any other available project data such as sketches, reports, prior designs, soil tests, surveys, and plans. Service Provider shall be entitled to rely on any and all information provided pursuant to this provision. Mason shall review Service Provider's work thoroughly and promptly, provide direction as necessary and, if Mason at any time becomes aware of any defect, shall give notice of such defect in the work or services provided. Mason shall provide access to the project site.

6.14 Severability: Any provision of this Agreement later held to be unenforceable for any reason shall be deemed void, and all remaining provisions shall continue in full force and effect.

~~**6.15 Electronic/CADD Documents:** Service Provider shall include electronic computer aided design and drafting (CADD) files. Unless specifically directed otherwise by Mason prior to execution of this Agreement, electronic files shall be developed based on Service Provider's standard practice. In the case of any discrepancy or difference between electronic files and hard copies of drawings or files, hard copies shall control.~~

Service Provider shall not make or permit to be made any copies or any modification to electronic media, plans and specifications without the prior written authorization of Mason. Mason hereby authorizes Service Provider to make copies or permit its constituents to make copies as contemplated by or in the attached Scope of Services. Mason shall not be liable for any erroneous information supplied by Service Provider or third party that Service Provider relies upon and incorporates into an electronic file, or other documents, plans, and specifications. All project specific documents/electronic media prepared by Service Provider shall remain the property of Mason, and are not intended for re-use. Any unauthorized re-use by Mason or others is at their sole risk.

6.16 Addendum/Additional Services: Any modification of this Agreement or additional obligation assumed by either party in connection with this Agreement shall be binding only if evidenced in writing signed by each party or an authorized representative of each party. The Agreement also may be modified by a formal, written amendment, change order or work change directive.

In addition, the requirements of this Agreement may require minor variations and deviations in the work or services provided. This work shall not be considered to be additional services outside of the scope of Section 2 work by either party and may be authorized by the City Engineer's approval. Notwithstanding the foregoing, items of work and additional materials not included in the estimate of the original Agreement and in an amount in excess of \$10,000.00 shall be authorized only in written modifications to the Agreement.

Mason may, at its sole discretion, authorize alterations or modifications in the specifications and plans or eliminate from the Project any portion thereof. Before the Service Provider revises any work or service, the change in price for the revised services shall have been agreed upon in writing.

6.17 Entirety of Agreement: This Agreement embodies the entire agreement and understanding between the parties, and there are no other agreements and understandings, oral or written, with reference to the subject matter hereof that are not merged herein and superseded hereby. No alteration, change, or modification of the terms of this Agreement shall be valid unless made in writing and signed by both parties hereto, except that all terms and conditions contained in a Client purchase order or other standard or preprinted work authorization issued by Mason shall be null and void, even if such document is of later date. This Agreement shall be governed by the laws of the state where the services are performed. This Agreement includes this document and, by this reference, incorporates the following as if fully set forth herein:

Attachment A: Scope of Services

6.18 Notices: Any notice required hereunder shall be sufficiently given when sent to the signatories hereunder or to the above-named contact person via United States certified mail, return receipt requested, or via overnight courier with receipt verification to the address set forth herein, or by personally delivering such notice to the party to be in receipt thereof.

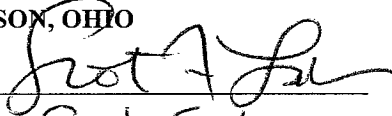
6.19 Confidentiality: Service Provider agrees to hold in confidence and not disclose to anyone other than (i) those of its employees required to know; and (ii) other City Staff any and all information and data provided by Mason which it knows or has reason to know is confidential, without the prior written consent of Mason. This provision shall be an ongoing requirement and shall survive the termination and expiration of this Agreement.

IN WITNESS WHEREOF, this Agreement, which is subject to the terms and conditions of Sections 1 through 6 and Attachment(s), is accepted as of the date first written above:

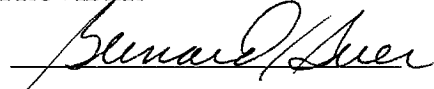
CITY OF MASON, OHIO

SERVICE PROVIDER

Signed:



Signed:



Print Name:

Scot F. Lehner

Print Name:

Bernard P. Suer

Title:

City Manager

Title:

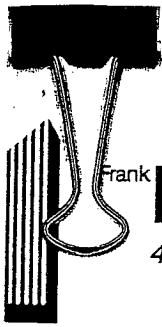
Senior Vice President

Date:

8/18/00

Date:

August 16, 2000



Frank

MESSER & Sons CONSTRUCTION CO.

4612 Paddock Road, Cincinnati, Ohio 45229-1298 (513) 242-1541 FAX (513) 242-6467

June 14, 2000

Mr. Richard J. Fair, P.E.
City Engineer
City of Mason
214 West Main Street
Mason, Ohio 45040

Re: City of Mason New Municipal Facility
At-Risk Sample Contract

Dear Richard:

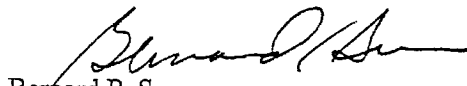
Enclosed is a sample at-risk construction management agreement Messer has used for the Public Library of Cincinnati and Hamilton County. This agreement is very flexible and can be easily modified while still providing the Owner with all the benefits of a complete Construction Manager's package including: guaranteed cost, schedule, safety, quality, constructability, value engineering, and influence on the subcontracting-market.

Using this contract model, the method of compensation for a Construction Manager is similar to that of the Designer as described in Article 7. Our existing proposal divides the fee into two distinct fees, one for the preconstruction phase and one for the construction phase. Given the explanation at the interview, Messer is willing to change our preconstruction phase fee to \$40,000.00, with the difference added to the construction phase fee. Hopefully, this change reflects our confidence in achieving your cost and schedule goals.

I would be very interested in discussing this at-risk, public construction management agreement, with you at your convenience.

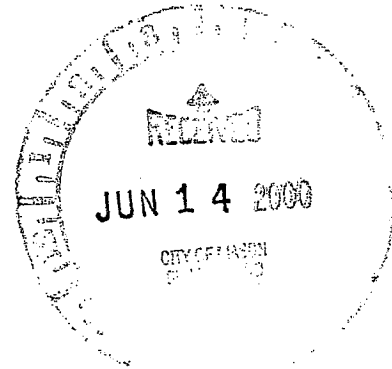
Sincerely,

FRANK MESSER & SONS CONSTRUCTION CO.


Bernard P. Suer
Senior Vice President

Enclosure

cc: Steve L. Keckeis
File



An Employee-Owned Company



TO: City Council

FROM: Scot F. Lahrmer, City Manager

RE: Contract for Pre-Construction Construction Management Services

DATE: July 21, 2000

ACTION REQUESTED: By motion, adopt **Ordinance 2000-102** authorizing the City Manager to enter into a contract with Frank Messer and Sons Construction Company for Pre-construction Services for a new municipal facility on the former Westerkamm property.

PURPOSE: The CP Team for the new municipal facility (consisting of Chief Ferrell, Richard Fair, Eric Hansen, Jennifer Heft, Greg Nicholls, and Terry Schulte) has worked with the project architect, MSA/PSA, to prepare documents in phases for the design and construction of the proposed municipal building. They are recommending that a Construction Manager be brought on board at this phase to enable the City to prepare for construction by evaluating value engineering options, providing precise cost and time estimates, and position the Construction Manager to provide a Guaranteed Maximum Price (GMP) should this construction delivery option method be chosen for the actual construction phase.

In March, the Team composed and distributed invitations for Statements of Qualifications to several construction and construction management companies. Five firms responded with interest in Mason's building. All five were sent RFPs in April, and upon review the Team selected three for interviews. All three interviewed favorably, and references were contacted for the firm's current project(s). After a thorough review, the committee is recommending Messer and Sons for the Pre-construction contract.

The CP Team used the following criteria to make its recommendation:

- Cost of Services
- Qualifications of key personnel assigned to the project.
- Similar project history.
- Review of functional design capability, cost estimate accuracy and ability to remain within budget during construction, and aesthetic achievement on previous projects.
- Current workload and ability to meet the time schedule.
- Current working relationship with the City.
- Demonstration of a thorough understanding of the project.

SERVICES PROVIDED BY THE CONSTRUCTION MANAGER

The Construction Manager will provide the City with the following **Pre-construction Phase** services:

- Preliminary review of project program, schedule and budget.
- Review of schematic design concepts as prepared by architect.
- Review progress of design and construction documents, advising on overall feasibility, selection of materials, building systems, construction methods, availability of labor and materials and other factors relating to the economic feasibility of the project.
- Prepare and update a project schedule for the design phase of the work.
- Prepare cost estimates at appropriate stages in the progression of the documents.
- Prepare estimates at 25, 40, 60, 80 and 95 percent completion of the documents.
- Advise on the division of the project into individual contracts.
- Preparation of a construction schedule.
- With the assistance of the architect, issue bidding documents of the various portions of the work. The Construction Manager will receive bids and prepare bid analyses and advise the City on the acceptability of contractors preparing bids.
- Assist the City in obtaining permits. The City will pay permit costs.

Frank Messer and Sons was impressive in the interview, showing genuine interest in being selected for the project. Messer has done several large and medium scale projects for Hamilton County over the last two decades. We are confident that Messer can provide the Pre-construction services and then continue as the Construction Manager for the construction phase of the project.

Messer's contract for this phase of the work is for an amount of \$40,000. There are no alternates or options associated with this contract amount. The Building Committee of Council met to review options for construction management services and concurred with this pre-construction phase approach. As documents are completed and bids prepared, options for construction management during the actual construction phase will be pursued.

Ordinance 2000-102 is recommended for adoption.

C: Chief Ferrell Eric Hansen Jennifer Heft
Richard Fair Greg Nicholls Terry Schulte

ORDINANCE NO. 2000-102

**AUTHORIZING THE CITY MANAGER TO ENTER INTO A
CONTRACT WITH FRANK MESSER & SONS CONSTRUCTION
COMPANY FOR THE PRE-CONSTRUCTION SERVICES NECESSARY
FOR THE NEW MUNICIPAL FACILITY**

BE IT ORDAINED by the Council of the City of Mason, Ohio, _____ members

thereto concurring:

Section 1. That the City Manager is hereby authorized to enter into a contract with Frank Messer & Sons Construction Company for the pre-construction services necessary for the new municipal facility, in accordance with the proposal submitted by Frank Messer & Sons Construction Company, which proposal is attached hereto as Exhibit "A", and incorporated herein by reference.

Section 2. That the Finance Director is hereby authorized to pay said Frank Messer & Sons Construction Company an amount not to exceed \$40,000.00 for said work.

Section 3. That this Ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed this day of July, 2000.

Mayor

Attest:

Clerk of Council

7/19/2000