

K21-1277

BOND NO. BD7901065407

BID CONTRACT
BETWEEN
THE CITY OF NEW ORLEANS
AND
BERGKAMP, INC.

SELF-CONTAINED, ALL-IN-ONE, FLAMELESS PATCHER UNIT
BID PROPOSAL NO. 1474

THIS CONTRACT (the “**Contract**”) is entered into by and between the City of New Orleans, represented by LaToya Cantrell, Mayor (the “**City**”) and Bergkamp, Inc., represented by Jimmy Kendrick, Director of Sales (the “**Contractor**”). The City and the Contractor may sometimes be referred to as the “**Parties**”. This Contract is effective as of the date of execution by the City (the “**Effective Date**”).

RECITALS

WHEREAS, the City issued an Invitation to Bid No. 1474 on August 18, 2021 and its Addenda No. 1 dated September 14, 2021 and No. 2 dated September 17, 2021 (collectively, the “**ITB**”) seeking a contractor to provide the City with self-contained, all-in-one, flameless patcher units in accordance with the ITB;

WHEREAS, the Contractor submitted the lowest responsive and responsible bid in response to the City’s ITB, and the City desires to award the Contract to the Contractor; and

NOW THEREFORE, the City grants and confirms to the Contractor the Contract to provide five (5) self-contained, all-in-one, flameless patcher units in accordance with the ITB, and the City and the Contractor, for good and valuable consideration, agree as follows:

I. THE CONTRACTOR’S OBLIGATIONS

The Contractor will perform all obligations of the Contract, and be subject to all terms and conditions set forth, in the Contract and in the following documents that are incorporated fully into this Contract by reference: the ITB; the Contractor’s Bid dated September 14, 2021 (the “**Contractor’s Bid**”); all documents, drawings, and specifications incorporated or referenced in the ITB and/or the Contractor’s Bid, including, but not limited to, any and all terms, conditions, documents, drawings, and/or specifications contained therein.

II. THE CITY'S OBLIGATIONS

The City will pay the Contractor at the rates set forth in the Contractor's Bid for the satisfactory performance of this Contract and will perform all obligations of the City, and be subject to all terms and conditions set forth in this Contract and any incorporated documents.

III. COMPENSATION

This is a price protected requirements contract and is not binding as to any specific quantity or minimum amount. The City will pay the Contractor in accordance with the rates provided in the Contractor's Bid dated September 14, 2021.

IV. THE SURETY'S OBLIGATIONS

A. **Performance and Payment Bonds.** Nationwide Mutual Insurance Company (the "Surety") intervenes in this Contract and binds itself as surety for:

1. The faithful performance of all work required of the Contractor by this Contract in the full sum of **\$1,301,450.00**; and
2. The full payment by the Contractor of all payments to be made by the Contractor under this Contract in the full sum of **\$1,301,450.00**.

Each of these bonds is to be considered separate and distinct, and no payment made by the Surety under either bond shall in any way reduce the obligations of the Surety under the other.

B. **Acknowledgement of Contract.** The Surety represents and warrants that it has fully read and understands the terms of this Contract, including all incorporated documents.

C. **Survival and Validity of Bonds.** The Surety's bonds shall remain in full force and effect, and shall survive the termination of this Contract, but shall become null and void if the Contractor: (1) well and faithfully performs all and singular obligations assumed by the Contractor in this Contract; (2) promptly pays all wages of laborers, workmen, or mechanics to be employed by the Contractor for all work done or labor performed by the Contractor or by any subcontractors; or furnished to subcontractors, and used in the construction, erection, alteration, performance or repairs of the work required by the Contract; (3) promptly pays for all materials or supplies furnished to the Contractor, or by any subcontractor, or to any subcontractor, for the use in machines used in the construction, erection, alteration, performance, or repair of the work required by the Contract; (4) fully secures and protects the City, its legal successor and representatives, from all loss or expenses of any kind, including premises, including all costs of Court and attorneys' fees, made necessary or arising from the failure, refusal, or neglect of the Contractor to comply with all of the obligations assumed by it; and (5) promptly delivers all the work required by the Contract to the City, free from any and all claims, liens, and expenses. The

obligations of the Surety will not be affected in any way by any modifications, omissions, or additions in or to the terms of this Contract, the plans or specifications, or in the manner and mode payment.

V. ADDITIONAL PROVISIONS

A. **Convicted Felon Statement.** The Contractor complies with City Code § 2-8(c) and no principal, member, or officer of the Contractor has, within the preceding 5 years, been convicted of, or pled guilty to, a felony under state or federal statutes for embezzlement, theft of public funds, bribery, falsification, or destruction of public records.

B. **Non-Solicitation Statement.** The Contractor has not employed or retained any company or person, other than a bona fide employee working solely for it, to solicit or secure this Contract. The Contractor has not paid or agreed to pay any person, other than a bona fide employee working for it, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from this Contract.

C. **Non – Waiver.** The failure of either party to insist upon strict compliance with any provision of this Contract, to enforce any right or to seek any remedy upon the discovery of any default or breach of the other party at such time as the initial discovery of the existence of such noncompliance, right, default, or breach shall not affect or constitute a waiver of either party's right to insist upon such compliance, exercise such right, or seek such remedy with respect to that default or breach or any prior contemporaneous or subsequent default or breach.

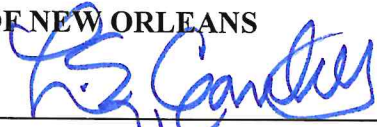
D. **Entire Agreement.** This Contract, including all incorporated documents, constitutes the final and complete agreement and understanding between the Parties. All prior and contemporaneous agreements and understandings, whether oral or written, are superseded by this effect to vary or alter any terms or conditions of this Contract.

(Signatures on the following page)

(Remainder of this page intentionally left blank)

IN WITNESS WHEREOF, the City, the Contractor, and the Surety, through their duly authorized representatives, execute this Contract.

THE CITY OF NEW ORLEANS

BY: 

LATOYA CANTRELL,
MAYOR

Executed on this 25th of January, 2021.

FORM AND LEGALITY APPROVED:
Law Department

By: 

Printed Name: Tracy Tyler

BERGKAMP, INC.

BY: 

JIMMY KENDRICK,
DIRECTOR OF SALES

FEDERAL TAX I.D. NO. 

NATIONWIDE MUTUAL INSURANCE
COMPANY

BY: 

BRENDA R. SMITH,
ATTORNEY-IN-FACT

[ORIGINAL BOND AND POWER OF ATTORNEY MUST BE ATTACHED TO CONTRACT]

PERFORMANCE BOND

Bond Number: BD 7901065407

AMCO Insurance Company
Nationwide Mutual Insurance Company
Allied Property & Casualty Insurance Company
1100 Locust St., Dept 2006 Des Moines, IA 50391-2006
(866) 387-0457

CONTRACTOR:

Bergkamp, Inc.
3040 Emulsion Dr
Salina, KS 67401

SURETY:

Nationwide Mutual Insurance Company
1100 Locust St., Dept. 2006
Des Moines, IA 50391-2006

OWNER:

City of New Orleans
Department of Finance, Purchasing Bureau
City Hall, 1300 Perdido St, Room No. 4W07, New Orleans, LA 70112

CONSTRUCTION CONTRACT

Date: September 14, 2021

Amount: \$1,301,450.00

Description:

Providing self-contained, all-in-one, flameless patcher units

BOND

Date: December 14, 2021

Amount: \$1,301,450.00

Modifications to this Bond: ☒ None ☐ See Section 16

CONTRACTOR AS PRINCIPAL

Company: *(Corporate Seal)*
Bergkamp, Inc.

Signature: *Janet Pahls*

Name

And Title: Janet Pahls, CFO

(Any additional signatures appear on the last page of this Performance Bond)

SURETY

Company: *(Corporate Seal)*
Nationwide Mutual Insurance Company

Signature: *Brenda R. Smith*

Name

and Title: Brenda R. Smith, Attorney-in-Fact



(FOR INFORMATION ONLY – Name, address and telephone)

AGENT or BROKER:

Assurance Partners, LLC
P O Box 1213
Salina, KS 67402-1213
785-493-4329



OWNERS REPRESENTATIVE:

(Architect, Engineer or other party:)

§ 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.

§ 2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provide in Section 3.

§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after

- .1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;
- .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; and
- .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.

§ 4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.

§ 5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

§ 5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;

§ 5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;

§ 5.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for the execution by the Owner and the contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or

§ 5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

- .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
- .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.

§ 6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

§ 7 If the Surety elects to act under Section 5.1, 5.2, or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- .1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

§ 8 If the Surety elects to act under Section 5.1, 5.3, or 5.4, the Surety's liability is limited to the amount of this Bond.

§ 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors, and assigns.

§ 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontractors, purchase orders and other obligations.

§ 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

§ 12 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.

§ 13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

§ 14 Definitions

§ 14.1 **Balance of the Contract Price.** The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

§ 14.2 **Construction Contract.** The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.

§ 14.3 **Contractor Default.** Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.

§ 14.4 **Owner Default.** Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.

§ 14.5 **Contract Documents.** All the documents that comprise the agreement between the Owner and Contractor.

§ 15 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be a Subcontractor and the term Owner shall be deemed to be Contractor.

§ 16 Modifications to this bond are as follows:

(Space is provided below for additional signatures of added parties, other than those appearing on cover page.)

CONTRACTOR AS PRINCIPAL

Company: _____
(Corporate Seal)

SURETY

Company: _____
(Corporate Seal)

Signature: _____
Name _____
And Title: _____
Address _____

Signature: _____
Name _____
and Title: _____, Attorney-in-Fact
Address _____