

19-00030

CONSTRUCTION - DESIGN / BUILD AGREEMENT

THIS DESIGN / BUILD AGREEMENT (this "Agreement") is made and entered into as of this 16th day of December 2019 (the "Effective Date"), by and between Benny Neill / Creasy Constuction, a sole proprietorship ("Developer"), and Adenus Solutions Group, LLC, a Tennessee Limited Liability Company ("Contractor").

RECITALS:

WHEREAS, Developer is the owner of a certain tract of real property (the "Property") consisting of unimproved land, located on Calista Road in Robertson County, Tennessee, and identified as Map 84, Parcel 79, which Property is more particularly identified on the Legal Description attached to this Agreement as Exhibit A, and depicted on the Site Map attached to this Agreement as Exhibit B;

WHEREAS, Developer desires and intends: (i) to develop a certain wastewater sewer collection, treatment, and disposal system (the "System") on the Property (the development of the System, hereinafter, the "Project"), the location, configuration, scope, size and description of which System and Project are more particularly detailed and set forth on the Plans and Specifications attached to this Agreement as Exhibit C; and (ii) to engage Contractor to provide to Developer certain design, engineering, construction, and development services (as more particularly described and identified in Section 1 below, the "Services") with respect to the Project; and

WHEREAS, Contractor desires and intends to provide the Services for the consideration and upon and subject to the terms, provisions and conditions set forth in this Agreement, and

WHEREAS Developer and Contractor each desire and intend to set forth their understandings and agreements with respect to the Project in this Agreement;

AGREEMENT:

NOW, THEREFORE, for and in consideration of the sum of Six Hundred Forty-three Thousand Five Hundred and 00/100 Dollars (\$643,500.00), the foregoing, the terms, provisions and conditions set forth below, and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Developer and Contractor hereby agree as follows:

- 1) **SERVICES.** Contractor agrees to perform, provide or cause to be performed or provided the permitting, engineering and design, construction, and coordination of the Project as follows:
 - a) **Permitting:** Coordinate, apply for and receive all permits required by applicable law from the State of Tennessee and all other governmental entities and agencies having authority over the Services (collectively "Governmental Authority").
 - b) **Engineering and Design:** Design the Treatment Facility System and receive approval of the System from Governmental Authority and Tennessee Wastewater Systems Inc. in accordance with the Specifications.
 - c) **Construction Services:** Construct the System in accordance with the Plans and

Specifications approved by Governmental Authority and Tennessee Wastewater Systems, Inc.

- d) **Work:** Contractor shall furnish all labor, supervision, materials, equipment, tools, scaffolding, machinery, transportation, and supplies necessary to complete the installations and improvements (all of the foregoing, the "Work") shown and/or described in: the Plan and Specifications attached hereto as Exhibit C and those certain specifications (the "Specifications"), dated as of _____, entitled "Tennessee Wastewater Systems, Inc. – Rules and Regulations Governing the Design and Installation of Effluent Collection Systems and Recirculating Sand Filters," and attached hereto as Exhibit D.

The Work shall be performed in accordance with such Plans and Specifications in a good and workmanlike manner, and shall meet all industry standards, and all material and equipment used in the Work shall be new and meet or exceed the specifications required by Tennessee Wastewater Systems, Inc., except as otherwise expressly specified or agreed in writing. Contractor warrants that the equipment manufactured by it shall be free from defects in material and workmanship arising from normal usage for a period of one (1) year from delivery of said equipment, or if installed by Contractor, for a period of one (1) year from installation. Contractor warrants that for equipment furnished and/or installed but not manufactured by Contractor, Contractor will extend the same warranty terms and conditions which Contractor receives from the manufacturer of said equipment provided the Contractor has provided Developer in writing the names of such manufacturers and a copy of each of their warranties and Developer has not objected to the same in writing. For equipment installed by Contractor, if Owner provides written notice to Contractor of any such defect within thirty (30) days after the appearance or discovery of such defect, Contractor shall, at its option, repair or replace the defective equipment. These warranties do not extend to any equipment which has been repaired by others, abused, altered or misused, or which has not been properly and reasonably maintained. THESE WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THOSE OF MERCHANTABILITY AND FITNESS FOR A SPECIFIC PURPOSE, AND MAY BE ASSIGNED TO TENNESSEE WASTEWATER SYSTEMS, INC.

- e) **Acceptance:** Guarantee acceptance of the system by Tennessee Wastewater Systems, Inc. and passing of the final inspection by all Governmental Authority.
- f) **General Coordination:** As required and mutually agreed.
- g) **No Liens** Contractor shall complete the Work in accordance with the Plans and Specifications and the Work shall be free of any laborers', materialmens', mechanics', or any other liens on any part of the Work and Contractor shall not permit any such lien to be filed or otherwise imposed on the Property or any part thereof for any portion of the Work. In the event any such lien is filed against the Property, Contractor shall promptly cause such lien to be discharged in accordance with Tennessee Code Annotated Section 66-11-142 or in lieu thereof file a bond or other security for the payment of such lien in form and amount satisfactory to Developer.

2) **COMPENSATION.**

- a) **Payment for Services.** Developer and Contractor agree that Contractor will be paid for providing the Services in phases according to the schedule below in 2b.

b) **Schedule of Payment.** Developer will pay Contractor according to the following schedule:

- a capacity development fee of \$ 5,500.00 per lot for 117 lots (\$643,500.00). Payment of the capacity development fees will be due as follows:
 - 15% due 10 business days after execution of this agreement
 - Monthly draws based upon percentage of completion in accordance with the Schedule of Values
 - Final Payment due when the system is accepted by Tennessee Wastewater Systems, Inc., Inc. and any permits required by Governmental Authority are issued.

3) **ITEMS NOT INCLUDED IN THE WORK.** The items shown on Exhibit E are not included in the Work and will be performed by the Developer.

4) **REPRESENTATIONS, WARRANTIES AND COVENANTS OF DEVELOPER.** Developer represents, warrants and covenants to, for and with Contractor as follows:

- a) Developer is a sole proprietorship duly organized and validly existing under the laws of the State of Tennessee and is authorized to do business in the State of Tennessee and is legally entitled to own and lease its properties and to carry on its business as and in the places where such properties (including the Property) are now owned or operated;
- b) Developer is the fee simple owner of the Property, which has not been conveyed, either a fee simple interest or leasehold interest, in whole or in part, to any other party, all contingent upon closing of the Property by the Developer;
- c) Developer has the authority to execute this Agreement and perform its obligations hereunder, and the execution of this Agreement and performance of any duties hereunder will not conflict with, result in a breach by, constitute a default under or accelerate the performance provided by the terms of any law, or any rule or regulation of any governmental agency or authority or in any judgment, order, or decree of any court or other governmental agency to which Developer may be subject, any contract, agreement or instrument to which Developer is a party or by which Developer is bound or committed or constitute an event, which, with a lapse of time, action by a third-party and/or giving of notice, could result in the default under any of the foregoing or result in the creation of any lien, charge, or encumbrance upon any of the assets or properties of Developer;
- d) Developer shall cooperate with Contractor in Contractor's performance of its obligations under this Agreement;
- e) Developer shall deliver to Contractor copies of all notices and other material information relating to the Project or any portion thereof promptly after the receipt thereof by Developer;
- f) Developer shall pay compensation to Contractor at the times and in the manner set forth above; and
- g) Developer shall duly comply with and perform in all material respects the terms and

provisions on its part to be complied with or to be performed under this Agreement.

5) REPRESENTATIONS WARRANTIES AND COVENANTS OF CONTRACTOR.

Contractor represents, warrants and covenants to, for and with Developer as follows:

- a) Contractor is a Tennessee Limited Liability Company duly organized and validly existing under the laws of the State of Tennessee and is authorized to do business in the State of Tennessee and is legally entitled to engage in the business of being Contractor to perform its obligations hereunder;
- b) Contractor has the authority to execute this Agreement and perform its obligations hereunder, and the execution of this Agreement and performance of any duties hereunder will not conflict with, result in a breach by, constitute a default under or accelerate the performance provided by the terms of any law, or any rule or regulation of any governmental agency or authority or in any judgment, order, or decree of any court or other governmental agency to which may be subject, any contract, agreement or instrument to which is a party or by which Contractor is bound or committed or constitute an event, which, with a lapse of time, action by a third-party and/or giving of notice, could result in the default under any of the foregoing or result in the creation of any lien, charge, or encumbrance upon any of the assets or properties of Contractor;
- c) Contractor shall cooperate with Developer in Developer's performance of its obligations under this Agreement;
- d) Contractor shall deliver to Developer copies of all notices and other material information relating to the Project or any portion thereof promptly after the receipt thereof by Contractor;
- e) Contractor shall duly comply with and perform in all material respects the terms and provisions on its part to be complied with or to be performed under this Agreement.
- f) Contractor hereby warrants all Sewer System improvements installed by Contractor according to the Services outlined in Exhibit C for one year from the date Tennessee Wastewater Systems, Inc. obtains 25% of the platted lots in the phase being connected to the system.

6) DEFAULT OF DEVELOPER or CONTRACTOR. Any one or more of the following events shall constitute an "Event of Default" by Developer or Contractor:

- a) If Developer or Contractor fails to comply with or perform in any material respect any of the terms and provisions on its part to be complied with or to be performed under this Agreement;
- b) If any one or more of the representations, warranties and/or covenants set forth above shall be or become untrue in any material respect or be breached; and/or
- c) If Developer or Contractor commits a fraud, makes a material misrepresentation, or commits an action involving gross negligence or willful misconduct in connection with its duties or obligations under this Agreement.

- 7) **REMEDIES IN EVENT OF DEFAULT BY DEVELOPER.** Upon the occurrence of an Event of Default which remains uncured by Developer for a period of more than ten (10) days, after Contractor has given notice to Developer specifying such Default, Contractor shall have the following rights:
- a) To terminate this Agreement immediately upon written notice to Developer and to receive immediate payment for all Services performed as of such date (including all reimbursables and incurred expenses [including with respect to ordered materials]);
 - b) To sue for monetary damages and/or injunctive relief; and/or
 - c) To pursue any other remedy available at law or in equity.
- 8) **REMEDIES IN EVENT OF DEFAULT BY CONTRACTOR.** Upon the occurrence of an Event of Default which remains uncured by Contractor for a period of more than ten(10) days, Developer has given notice to Contractor specifying such Default, Developer shall have the following rights:
- a) To terminate this Agreement immediately upon written notice to Contractor and payment for all Services performed as of such date less the cost of all damages and losses suffered by Developer (including all reimbursables and incurred expenses [including with respect to ordered materials]);
 - b) To sue for monetary damages and/or injunctive relief; and/or
 - c) To pursue any other remedy available at law or in equity.
- 9) **REUSE OF DOCUMENTS.** All documents including any drawings and/or specifications prepared by Contractor relative to this Agreement are instruments of service. They are not intended or represented to be suitable for reuse by Developer or others on extensions of the Project or on any other project, and there shall be no reuse of any kind whatsoever without the prior written consent of Contractor, which consent may not be unreasonably be withheld. Provided however, Developer may use such documents in the event of a needed repair or restoration of the Work. Any reuse without written consent by Contractor is prohibited and will be at Developer's sole risk and without liability or legal exposure to Contractor; and Developer shall indemnify and hold harmless Contractor from all claims, damages, losses and expenses including attorney's fees arising out of or resulting therefrom. Any verification or adaptation will entitle Contractor to further compensation at rates to be agreed upon by Contractor, and any breach of this section by Developer will entitle Contractor to pursue its legal and equitable remedies against Developer for such breach. The provisions of this section shall survive completion of the Project and/or expiration or termination of this Agreement.
- 10) **ACCESS TO THE SITE/JOB SITE SAFETY.** Unless otherwise stated, Contractor will have access to the Property for activities necessary for the performance of the Services. Developer understands and agrees that Contractor is not responsible, in any way, for the means, methods, sequence, procedures, techniques, or jobsite safety of any activity (construction or otherwise) other than the Services.

11) INDEMNIFICATION.

- a) Developer shall indemnify, defend, and hold Contractor, its employees, officers, directors, and affiliates harmless from any loss, cost, expense, or damage claimed by third parties for property damage and/or bodily injury, including death, to the proportionate extent such loss, cost, expense, or damage arises from the negligence or willful misconduct of Developer, its employees, officers, or directors in connection with the Contract or project.
- b) Contractor shall indemnify, defend, and hold Developer, its employees, officers, directors, and affiliates harmless from any loss, cost, expense, or damage claimed by third parties for property damage and/or bodily injury, including death, to the proportionate extent such loss, cost, expense, or damage arises from the negligence or willful misconduct of Contractor, its employees, officers, or directors in connection with the Contract or project.
- c) In addition to the above, Developer shall further indemnify and hold Contractor harmless of, from, against and in respect of:
 - i) Any tax lien, levy, assessment, payment, liability, penalty or other deficiency, whether disputed or not, suffered or incurred by Contractor as a result of or arising out of Developer's ownership of the Property;
 - ii) Any judgment, award, payment, settlement, cost or expense arising out of Developer's ownership of the Property, and rendered against or suffered or incurred by Contractor as a result of or with respect to any lawsuit or cause of action against or involving the Property;
 - iii) Any and all liabilities, whether disputed or not, suffered or incurred by Contractor as a result of or arising out of Developer's ownership of the Property; and/or
- d) The indemnifying party shall be responsible for any and all costs and expenses, including reasonable attorney's fees, arising in connection with any of the foregoing.
- e) The provisions of this section shall survive completion of the Project and/or expiration or termination of this Agreement.
- f) In addition to the above, Contractor shall further indemnify and hold Developer harmless of, from, against and in respect of:
 - i) Any tax lien, levy, assessment, payment, liability, penalty or other deficiency, whether disputed or not, suffered or incurred by Developer as a result of or arising out of Contractor's activities on the Property;
 - ii) Any judgment, award, payment, settlement, cost or expense arising out of Contractor's activities on the Property, and rendered against or suffered or incurred by Developer as a result of or with respect to any lawsuit or cause of action against or involving the such activities;
 - iii) Any and all liabilities, whether disputed or not, suffered or incurred by Developer as a result of or arising out of Contractor's activities on of the Property;

- 12) **ENVIRONMENTAL INDEMNITY.** In addition to the above, Developer represents, warrants and covenants to, for and with Contractor that there are no Hazardous Materials which have been generated and disposed of by Developer or which have been generated and disposed of by Developer and have migrated to the Property (including the ground water thereon) from any adjacent real estate owned, leased, or otherwise controlled by Developer, (except for those Hazardous Materials which may be stored on or about the Property in accordance with the Applicable Environmental Laws), as such terms are defined in the Applicable Environmental Laws, or in any regulations promulgated pursuant thereto, (ii) there are no underground storage tanks which are owned or operated by Developer located in or about the Property, (iii) Developer has not received any notice and to the actual knowledge of Developer no notice has been given to any party in the chain of title to the Property, by any person claiming any violation of, or requiring compliance with, any Applicable Environmental Laws, demanding payment or contribution for environmental damage; and (iv) to the actual knowledge of Developer no investigation, administrative order, consent order or agreement, litigation, or settlement with respect to Hazardous Materials located, on about or under all or a portion of the Property or contiguous or adjacent to the Property (provided that such contiguous or adjacent property is owned or controlled by Developer) is pending, or, to the actual knowledge of Developer, proposed, threatened or anticipated. To the extent that Developer breaches any of the aforementioned representations and Contractor is required by law to undertake any remedial or removal actions in connection therewith, as defined in the Applicable Environmental Laws, or to the extent that Contractor is otherwise liable to incur costs or may otherwise be held liable to any third party in connection with such breach or for any removal or remedial actions taken with respect thereto, then, within a reasonable period of time following receipt of notice thereof from Contractor, Developer shall indemnify Contractor and hold Contractor harmless from all liabilities, damages and costs incurred by Contractor with respect to such breach including, without limitation, all claims, liabilities, loss, costs or expenses arising from the incurrence of any penalties, charge or expenses with respect thereto in defending itself against any suit or action brought by such third party, and in paying or satisfying any judgment obtained by such third party against Contractor. The obligations of Developer under this section and the indemnity given hereunder shall survive the Closing.
- 13) **INSURANCE.** Contractor shall secure and maintain such insurance as will protect Contractor and Developer from claims of negligence, bodily injury, death, or property damage which may arise from the performance of Services. Developer shall maintain at all times during the Project and keep in force for the mutual benefit of Developer and Contractor, commercial general liability insurance against claims for personal injury, death or property damage occurring in, on or about the Property and/or areas adjacent to the Property, to afford protection to the limit of not less than \$2,000,000 combined single limit. Such insurance as described in the above sentences shall name Contractor as an additional insured.
- 14) **DISPUTES RESOLUTION.** It is agreed by both parties that all unsettled claims, counterclaims, disputes or other matters in question arising out of or related to this Agreement shall first be attempted to be resolved by mediation. This provision can be waived by the mutual consent of the parties, or by either party if a delay in initiating arbitration or the right to file a lawsuit would prejudice its rights.
- 15) **MATERIALS.** If the materials or equipment necessary for the Services and/or the Project to be completed in accordance with this Agreement shall become temporarily or permanently

unavailable for reasons beyond the control of Contractor, then in the case of such temporary unavailability, the time for performance of the Services and/or completion of the Project shall be extended to the extent thereof, and, in the case of a permanent unavailability, Developer shall have the right, in its sole discretion, either to terminate this Agreement or allow Contractor to proceed with the Services; provided, that if Developer elects to allow Contractor to proceed with the Services, Contractor (i) shall be excused from furnishing said materials or equipment that are unavailable for reasons beyond the control of Contractor, and (ii) shall be reimbursed for the difference between the cost of the materials or equipment permanently unavailable and the cost of a reasonably available substitute therefor which has been approved by Developer which approval shall not be unreasonably withheld or delayed.

16) MISCELLANEOUS.

- a) **Entire Agreement.** This Agreement shall constitute the entire contract between the parties and may not be modified except by an instrument in writing and signed by both of them.
- b) **Construction.** This Agreement shall be construed and enforced in accordance with the laws of the State of Tennessee.
- c) **Notices.** Any notice, demand, waiver or consent required or permitted hereunder shall be in writing and shall be given by hand delivery, national overnight courier service for delivery on the next business day, facsimile, telegram or prepaid registered or certified mail, with return receipt requested, addressed as follows:

If to Developer:

Creasy Construction
Attn: Benny Neill
PO Box 786
Savannah, TN 38372

If to Contractor:

Adenus Solutions Group, LLC
Attn: Matthew Nicks
849 Aviation Parkway
Smyrna, TN 37167

Any such notice shall be deemed received when sent, if sent by overnight courier, email or by facsimile, or three (3) days after posting if sent by any other method. Any party may change its address for the purpose of notice by giving written notice in accordance with the provisions of this section.

- d) **Attorney's Fees.** In the event of litigation arising out of this Agreement, the prevailing party shall be entitled to recover, in addition to the relief granted, all costs incurred, including reasonable attorney's fee.
- e) **Section Headings.** The article or section headings of this Agreement are for convenience of reference only and do not form a part hereof and do not in any way modify, interpret or construe the intentions of the parties.
- f) **Waivers.** Waiver by either party of any right for any default of the other party, including a

waiver determined to occur as the result of an action or inaction, shall not constitute a waiver of any right for either a subsequent default of the same obligation or for any other default, past, present or future.


- g) **Partial Invalidity.** If any term, covenant or condition of this Agreement, or the application thereof to any person or circumstance, shall ever be held to be invalid or unenforceable, then in each event the remainder of this Agreement or the application of such term, covenant or condition to any other person or any other circumstance (other than those as to which it shall be invalid or unenforceable) shall not be thereby affected and each term, covenant, condition and provision hereof shall remain valid and enforceable to the fullest extent permitted by Laws.
- h) **Survival of Representations and Warranties.** All warranties, representations, covenants, indemnities, and other agreements made in this Agreement shall survive completion of the Project and/or expiration or termination of this Agreement.
- i) **Time.** Time is of the essence with respect to every provision of this Agreement.
- j) **Counterparts.** To facilitate execution, this Agreement may be executed in as many counterparts as may be required. It shall not be necessary that the signatures on behalf of all parties appear on each counterpart hereof. All counterparts hereof shall collectively constitute a single agreement.
- k) **Exhibits.** THE EXHIBITS TO THIS AGREEMENT ARE AN INTEGRAL PART HEREOF AND BY THIS REFERENCE ARE INCORPORATED AS THOUGH FULLY SET FORTH HEREIN.

SIGNATURE PAGE TO FOLLOW

IN WITNESS WHEREOF, the parties have executed this Agreement to be effective as of the Effective Date.

DEVELOPER:

Benny Neill
Creasy Construction
A Sole Proprietorship

By: 
Name: Benny Neill
Title: owner

CONTRACTOR:

Adenus Solutions Group, LLC
a Tennessee Limited Liability Company

By: 
Name: Jeff Rison
Title: CEO

Exhibit A

Legal Description - Property

[See Attached]

Exhibit B

Site Map

[See Attached]

Exhibit C

Project Description - Plans

[See Attached]

Exhibit D

Specifications

[See Attached]

EXHIBIT E

- a. **Site Assessment.** The Contractor shall be provided with the following prior to any of the Services being rendered:
 - i) 2' Interval Topographic Survey prepared by Registered Surveyor in the State of Tennessee, Extra High Intensity Soils Map prepared by a Certified Soil Scientist in the State of Tennessee, Boundary Survey and Preliminary Plat of the above- mentioned project, and any other relative site assessment information as required.
- b. **Site Condition.** Staking of the boundaries of "construction activity" and areas that are soil mapped for the System and maintaining the grid staking references until construction activity has begun. Developer must provide a clean (mowed, cleared, etc.) area for construction activity, as reasonably determined by Contractor. Contractor will clear treatment facility footprint and wooded drip areas.
- c. **Access Road.** Properly constructing and maintaining an access road as shown on Exhibit C, to include any permanent or temporary bridges or creek crossings, for construction activities on the Property and with respect to the Project that is capable of accommodating 80+ triple axle dump trucks. This access road must be constructed and passable for the intended purpose prior to the Contractor starting the Work. This access road is to be maintained by Developer until such time that Tennessee Wastewater Systems, Inc. accepts the system.
- d. **Electrical Service.** Providing Single Phase service (100-amp service) to the boundary of the parcel containing the Control Building of the Project, as designated on the Site Map and/or on the site plan to be prepared by Contractor, which electrical service shall be underground.
- e. **Amenities.** Any upgrades/amenities that are not specified as general construction activity according to the treatment site plan to be prepared by Contractor (e.g., Vinyl fencing, landscaping, custom brick/block work, etc.). Developer will install four (4) foot high fence around primary drip field disposal areas.
- f. **Collection System.** The installation of any and all aspects of the sewer collection system, to include the installation of any required Pump Stations, including excavation, plumbing, electrical service, setting any required meters and control panels, and finished grading. Developer agrees to install the forcemain from the outlet of any Pump Station(s) installed by the Developer, to the inlet of the Treatment Facility. Developer agrees to install the forcemain and reuse to the treatment facility and all drip field areas.