

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** by and between **MARTY B'S, LLC**, a Texas limited liability company (hereinafter referred to as "Developer"), and the **BARTONVILLE COMMUNITY DEVELOPMENT CORPORATION**, a Texas non-profit corporation (hereinafter referred to as the "BCDC"), is made and executed on the following recitals, terms and conditions.

WHEREAS, BCDC is an economic development corporation operating pursuant to Chapter 505 of the Texas Local Government Code, as amended (also referred to as the "Act"), and the Texas Non-Profit Corporation Act, as codified in the Texas Business Organizations Code, as amended; and

WHEREAS, Section 505.158 of the Texas Local Government Code provides that "[f]or a Type B corporation authorized to be created by a municipality with a population of 20,000 or less, "project" also includes the land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements found by the corporation's board of directors to promote new or expanded business development." Further, the statute provides that "[a] Type B corporation may not undertake a project authorized by this section that requires an expenditure of more than \$10,000 until the governing body of the corporation's authorizing municipality adopts a resolution authorizing the project after giving the resolution at least two separate readings"; and

WHEREAS, Section 501.158 of the Texas Local Government Code prohibits the provision of a direct incentive unless BCDC enters into an Agreement with Developer providing at a minimum a schedule of additional payroll or jobs to be created or retained by BCDC's investment; a schedule of capital investments to be made as consideration for any direct incentives provided by BCDC to Developer; and a provision specifying the terms and conditions upon which repayment must be made should Developer fail to meet the agreed to performance requirements specified in this Agreement; and

WHEREAS, Developer has applied to the BCDC for financial assistance for the construction of Patio Weather Cover to be made to the Property generally located at 2664 FM 407 East, Town of Bartonville, Texas; and

WHEREAS, the BCDC's Board of Directors have determined the financial assistance provided to Developer for the Qualified Expenditures to be made to the Property is consistent with and meets the definition of "project" as that term is defined in Section 505.158 of the Texas Local Government Code; and the definition of "cost" as that term is defined by Section 501.152 of the Texas Local Government Code; and

WHEREAS, Developer agrees and understands that Section 501.073(a) of the Texas Local Government Code requires the Town Council of the Town of Bartonville, Texas, to approve all programs and expenditures of the BCDC, and accordingly this Agreement is not effective until Town Council has approved this project at a Town Council meeting called and held for that purpose.

NOW, THEREFORE, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the BCDC and Developer agree as follows:

SECTION 1. FINDINGS INCORPORATED.

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

SECTION 2. TERM.

This Agreement shall be effective as of the Effective Date, as defined herein, and shall continue thereafter until **September 30, 2026**, unless terminated sooner under the provisions hereof.

SECTION 3. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement.

- (a) **Act.** The word “Act” means Chapters 501 to 505 of the Texas Local Government Code, as amended.
- (b) **Agreement.** The word “Agreement” means this Performance Agreement, together with all exhibits and schedules attached to this Performance Agreement from time to time, if any.
- (c) **BCDC.** The term “BCDC” means the Bartonville Community Development Corporation, a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is 1941 East Jeter Road, Bartonville, Texas 76226.
- (d) **Developer.** The word “Developer” means Marty B’s, LLC, a Texas limited liability company, its successors and assigns, whose address for the purposes of this Agreement is 2664 FM 407 East, Bartonville, Texas 76226.
- (e) **Effective Date.** The words “Effective Date” mean the date of the latter to execute this Agreement by and between the Developer and the BCDC.
- (f) **Event of Default.** The words “Event of Default” mean and include any of the Events of Default set forth below in the section entitled “Events of Default.”
- (g) **Full-Time Equivalent Employment Positions.** The words “Full-Time Equivalent Employment Position” or “Full-Time Equivalent Employment Positions” mean and include a job requiring a minimum of One Thousand Nine Hundred Twenty (1,920) hours of work averaged over a twelve (12) month period.

- (h) **Property.** The word “Property” means Lot 1R2, Block A of the Denkmann Plaza Addition, an addition to the Town of Bartonville, Denton County, Texas, and generally located at 2664 FM 407 East, Bartonville, Texas 76226, Denton CAD Property ID # 701528.
- (i) **Qualified Expenditures.** The words “Qualified Expenditures” mean those expenditures consisting of the construction of Patio Weather Cover as depicted in *Exhibit A* of this Agreement, which is attached hereto and is incorporated herein for all purposes, and those expenses which otherwise meet the definition of “project” as that term is defined by Section 505.158 of the Act, and the definition of “cost” as that term is defined by Section 501.152 of the Act.
- (j) **Term.** The word “Term” means the term of this Agreement as specified in Section 2 of this Agreement.
- (k) **Town.** The word “Town” means the Town of Bartonville, Texas, a Texas general-law municipality.

SECTION 4. AFFIRMATIVE COVENANTS OF DEVELOPER.

Developer covenants and agrees with BCDC that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Qualified Expenditures.** Developer covenants and agrees to submit to the BCDC invoices, receipts, or other documentation in a form acceptable to the BCDC for the Qualified Expenditures made to the Property in a minimum amount of **Five Hundred Thousand and No/100 Dollars (\$500,000.00)** by **December 31, 2024**. Developer covenants and agrees said construction of the Qualified Expenditures shall comply with all federal, state and local statutes, rules, regulations, and ordinances.
- (c) **Operate Restaurant.** Developer covenants and agrees during the Term of this Agreement to keep open to the general public the Marty B’s Restaurant located on the Property.
- (d) **Job Creation and Retention.** Developer covenants and agrees by **December 31, 2024**, and during the Term of this Agreement to employ and maintain an approximately forty (40) Full-Time Equivalent Employment Positions and eighty (80) part-time positions working at the Property. Developer covenants and agrees beginning on **February 1, 2025**, and during the Term of this Agreement, Developer shall deliver to BCDC a quarterly compliance verification signed by a duly authorized representative of Developer that shall certify the number of Full-Time Equivalent Employment Positions and part-time positions, and shall disclose and certify the average wage for all Full-Time Equivalent Employment Positions and part-time positions (the “Quarterly Compliance Verification”). The Developer covenants and agrees beginning on **February 1, 2025**, and quarterly thereafter during the Term of this Agreement, there will be a total of **eleven (11)** Quarterly Compliance Verifications due and submitted to the BCDC covering the Full-Time Equivalent Employment Positions and part-time positions created and maintained during

the Term of this Agreement. All Quarterly Compliance Verifications shall include quarterly IRS 941 returns, or Texas Workforce Commission Employer Quarterly Reports.

- (e) **Performance Conditions.** Developer agrees to make, execute and deliver to BCDC such other instruments, documents and other agreements as BCDC or its attorneys may reasonably request to evidence this Agreement.
- (f) **Performance.** Developer agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and between the Developer and BCDC.

SECTION 5. AFFIRMATIVE COVENANTS OF THE BCDC.

BCDC covenants and agrees with Developer that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Financial Assistance.** BCDC covenants and agrees to provide financial assistance to the Developer within thirty (30) days of receipt of invoices, receipts, or other documentation for the Qualified Expenditures made to the Property provided to the BCDC pursuant to Section 4(a) of this Agreement. The amount of said financial assistance shall not exceed the lesser of the following:
 - (1) **One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00); or**
 - (2) fifty percent (50%) of said invoices, receipts, or other documentation provided to the BCDC pursuant to Section 4(a) of this Agreement.
- (b) **Performance.** BCDC covenants and agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements by and between the BCDC and Developer.

SECTION 6. CESSATION OF ADVANCES.

If BCDC has made any commitment to provide any financial assistance to Developer, whether under this Agreement or under any other agreement, the BCDC shall have no obligation to advance or disburse financial assistance if: (i) Developer becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or (ii) an Event of Default occurs.

SECTION 7. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **General Event of Default.** Failure of Developer or BCDC to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement, or failure of Developer or BCDC to comply with or to perform any other term, obligation, covenant or

condition contained in any other agreement by and between Developer and BCDC is an Event of Default.

- (b) **False Statements.** Any warranty, representation, or statement made or furnished to the BCDC by or on behalf of Developer under this Agreement that is false or misleading in any material respect, either now or at the time made or furnished is an Event of Default.
- (c) **Insolvency.** Developer's insolvency, appointment of receiver for any part of Developer's property, any assignment for the benefit of creditors of Developer, any type of creditor workout for Developer, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Developer is an Event of Default.
- (d) **Ad Valorem Taxes.** Developer allows its ad valorem taxes owed to the Town to become delinquent and fails to timely and properly follow the legal procedures for protest and/or contest of such taxes and to cure such failure within thirty (30) days after written notice thereof from BCDC and/or Denton County Central Appraisal District is an Event of Default.

SECTION 8. EFFECT OF AN EVENT OF DEFAULT.

In the event of default under Section 7 of this Agreement, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured as of the last day of the applicable cure period, and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement, enforce specific performance as appropriate, or maintain a cause of action for damages caused by the event(s) of default. In the event, Developer defaults and is unable or unwilling to cure said default within the prescribed time period, the amounts provided by BCDC to Developer pursuant to Section 5 of this Agreement shall become immediately due and payable by Developer to BCDC.

SECTION 9. INDEMNIFICATION.

TO THE EXTENT ALLOWED BY LAW, EACH PARTY AGREES TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE OTHER (AND ITS OFFICERS, AGENTS, AND EMPLOYEES) FROM AND AGAINST ALL CLAIMS OR CAUSES OF ACTION FOR INJURIES (INCLUDING DEATH), PROPERTY DAMAGES (INCLUDING LOSS OF USE), AND ANY OTHER LOSSES, DEMAND, SUITS, JUDGMENTS AND COSTS, INCLUDING REASONABLE ATTORNEYS' FEES AND EXPENSES, IN ANY WAY ARISING OUT OF, RELATED TO OR RESULTING FROM ITS PERFORMANCE UNDER THIS AGREEMENT, OR CAUSED BY ITS NEGLIGENT ACTS OR OMISSIONS (OR THOSE OF ITS RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, OR ANY OTHER THIRD PARTIES FOR WHOM IT IS LEGALLY RESPONSIBLE) IN CONNECTION WITH PERFORMING THIS AGREEMENT.

SECTION 10. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- (b) **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Denton County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Denton County, Texas.
- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other party.
- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. Developer warrants and represents that the individual or individuals executing this Agreement on behalf of Developer has full authority to execute this Agreement and bind Developer to the same. BCDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **Entire Agreement.** This written agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.
- (h) **Force Majeure.** It is expressly understood and agreed by the parties to this Agreement that if the performance of any obligations hereunder is delayed by reason of war, civil commotion, acts of God, inclement weather, fire or other casualty, or court injunction, the party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the time period applicable to such obligation or requirement shall be extended for a period of time equal to the period such party was delayed.
- (i) **Notices.** Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow)

or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested. The parties agree to keep the other party or parties informed of their address at all times during the Term of this Agreement. The Notices shall be addressed as follows:

if to Developer: Marty B's, LLC
2664 FM 407 East
Bartonville, Texas 76226
Attn: Marty W. Bryan, President
Telephone: (972) 849-5177

if to BCDC: Bartonville Community Development Corporation
1941 East Jeter Road
Bartonville, Texas 76226
Attn: Shannon Montgomery
Telephone: (817) 693-5280

- (j) **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.
- (k) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- (l) **Undocumented Workers.** Developer certifies that the Developer does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Developer is convicted of a violation under 8 U.S.C. § 1324a(f), Developer shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of six percent (6.0%), not later than the 120th day after the date the BCDC notifies Developer of the violation.

[The Remainder of this Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed.

BCDC:

BARTONVILLE COMMUNITY DEVELOPMENT CORPORATION,

a Texas non-profit corporation

By: _____

Randy Van Alstine, Chair

Date Signed: _____

DEVELOPER:

MARTY B'S, LLC

a Texas limited liability company

By: _____

Marty W. Bryan, President

Date Signed: _____

DRY

Exhibit A



Proposal Date: 9-18-2023

Attn: Marty Bryan
 Address: 2664 FM 407
 Bartonville TX, 76226

Job Name: Marty B's Patio Weather Cover

BASE BUDGET:

	DESCRIPTION/COMMENTS	COST
	SHELL CONSTRUCTION	
Layout / Survey	Establish horizontal and vertical control	1,440.00
Barricades	Low walls constructed from plywood and ready for imaging and cover plates at holes to be taken down and set back as needed to keep patio operational as much as possible during this construction process	4,000.00
Demolition / Excavation	Hand excavate 12 footing holes at column locations	6,309.00
Structural Concrete	Place footings and plinths at 12 locations	19,936.00
Pre-engineered Metal Structure	Prefabricated metal structure and trim fabricated and installed	201,600.00
Grade Patch	Backfill footings and get ready for turf or concrete patch	1,440.00
Concrete Patch	Stamped and stained concrete patch back at 7 columns	6,145.00
Drain Culverts	At 6 locations along sidewalk	3,848.00
Turf Patch	Tie in existing turf to new columns	3,000.00
CMU / Stone	CMU with stone façade at 4 columns to tie into and match existing	20,910.00
Paint	Paint entire structure and underside of roof, touch up as needed to repair trade damage at existing surfaces	13,250.00
Heaters and Hangers	Per existing spec at upper dining area, at 8 locations	39,360.00
Electrical	Rearrange power at columns, take down and reinstall lighting, low voltage to heaters	27,950.00
Plumbing	Gas line to new heaters, Gas Upgrade to Support New Gas Meter	14,702.00
Fire Sprinkler	Not Included	Not Included
General Conditions	Project supervision, dumpsters, storage, clean up, deliveries etc....	16,600.00
Design and Engineering		27,900.00
Sub Total		408,350.00
Insurance	General Liability Insurance (Builders Risk Insurance is By Owner) 1.5%	6,125.00
Discount	Applied Discount	(40,479.00)
	TOTAL	\$373,996.00

ADD ALTERNATES: (Straight Cost No Overhead or Profit Mark Ups)

Add Dry Fire Suppression System Per Fire Marshal - \$184,986.00

Add New Upsized Gas Meter Coserv Cost Budget – 10,000.00 (Support for this work is included above)

EXCLUSIONS AND CLARIFICATIONS:

Assumes normal work hours

Fans are not included

Permit fees are not included and are to be reimbursed by owner
Assumes no hazardous materials to be encountered and hidden or buried obstacles are not included

Sound or thermal insulation is not included

Gas meter upgrade requirement is unknown and not included

Fire Suppression is not included

Assumes a 2-month duration of construction

As always J-CM Services Inc. recommends the client carry a 10% contingency to cover any unexpected cost that could be encountered and require a change in the work

A sight logistics and safety meeting between client and contractor is required prior to the commencement of work