

CONSTRUCTION AGREEMENT

This **Construction Agreement** is made this ____ day of _____, 20____, by and between the **CITY OF HELENA, MONTANA**, a municipal corporation organized and existing under the laws of the State of Montana, 316 North Park Avenue, Helena, Montana 59623 (“**City**”), and _____, a _____, of _____, (“**Contractor**”).

Recitals

A. The City issued a Request For Bid for the construction project known as **Bill Roberts Golf Course - Irrigation Renovation Project** (“Construction Project”) pursuant to the requirements of all applicable statutes, rules, regulations, and ordinances.

B. The City analyzed all responses to the Request For Bid received pursuant to its standard practices and the requirements of all applicable statutes, rules, regulations, and ordinances.

C. The City awarded the bid to Contractor on _____, pursuant to the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the covenants, agreements, representations, and warranties contained herein, the parties agree as follows:

Agreement

1. Work to be Performed:

a. A description of the Construction Project and Contractor’s duties is set forth in the Request For Bid and Bid Form as awarded and accepted by City, which are attached hereto and incorporated herein by this reference, and the drawings, plans, and specifications provided by the City and its architects and engineers. The Bid Form and City’s Award are attached here as **Exhibit A**.

b. Prior to the commencement of any work on the Construction Project, Contractor’s representatives and City’s representatives shall hold a meeting to establish a working understanding among the parties as to the scope of the Construction Project and duties of the Contractor. At this meeting, Contractor and City shall resolve any outstanding issues related to the plans, designs, drawings, and specifications. If the parties are unable to resolve these issues and the City fails, refuses, or is unable to approve the same, no work shall commence on the Construction Project until such issues are resolved and the City approves the related plans, designs, drawings, and specifications.

c. Except as provided elsewhere in this Agreement, Contractor shall furnish all the labor, materials, equipment, tools, and services necessary to perform and complete the Construction Project.

d. During work on the Construction Project, and as part of the final completion of the Construction Project, Contractor shall clean up the Project site, including the removal and satisfactory disposal of all waste, garbage, excess materials, equipment, temporary buildings, the removal or grading of all embankments made for construction purposes, the filling in of all excavations, and the performance of any other work necessary to restore the site to at least as good order and condition as at the commencement of the Construction Project.

2. **City-Supplied Materials:** City will supply the materials set forth on **Exhibit B** attached hereto.

3. **Time of Performance:**

a. Contractor shall begin the Construction Project after receiving a Notice to Proceed from City and shall complete the Construction Project within **Fifty (50)** days of the starting date stated in the Notice to Proceed. The various phases of the Construction Project shall be completed pursuant to the Construction Schedule attached hereto as **Exhibit C** and incorporated herein by this reference. Time is of the essence of completion of all work and each phase of the Construction Project.

b. The Construction Schedule is subject to the City's approval. Contractor's construction plan, methods of operation, materials used, and individuals and subcontractors employed (collectively "Contractor's Resources") are subject to the City's approval at all times during the term of this Agreement, and must be such as to ensure the completion of the work in compliance with the deadlines set in the Construction Schedule during the term of this Agreement. In the event the City determines the Contractor's Resources are inadequate to meet the approved Construction Schedule, the City may order the Contractor to accelerate its performance to give reasonable assurances of timely completion and quality results. Acceleration under this section shall not be deemed a Change Order as defined in Section 5b below and the Contractor shall receive no equitable adjustment for such acceleration. Nothing in this section shall be interpreted to relieve the Contractor of its duties and responsibilities to plan for and complete the work in a timely manner according to the Construction Schedule.

4. **Liquidated Damages:** If the Construction Project is not completed within the time provided by this Agreement, the City may deduct for each day the Construction Project remains uncompleted the sum of **Five Hundred Dollars (\$500.00)** from the compensation hereinafter specified and retain that sum as payment for liquidated damages sustained by reason of the Contractor's failure to complete the Construction Project on time.

5. Compensation:

a. City shall pay to Contractor, and Contractor shall accept as full payment for the performance of this Agreement and the Construction Project, the amount of _____ (\$ _____), as paid in accordance with **Exhibit D**, Compensation Schedule, attached hereto.

b. If work not included within the original Scope of Work documents is requested by City, such additional work and the related compensation shall be agreed to in writing by both parties prior to commencement of the additional work (“Change Order”) pursuant to the Change of Work Specifications set forth on **Exhibit E** attached hereto.

c. Monthly progress payments and final payment will be made only in accordance with the terms of the Compensation Schedule. All invoices must be submitted to the City’s Representative.

d. City shall retain five percent (5%) of the total amount of compensation to be paid to the Contractor to ensure compliance with the terms and conditions of this Agreement and the timely completion of the Construction Project and any and all “punch list” items (“Retainage Amount”). The Retainage Amount shall be paid to Contractor thirty (30) days after the City’s final acceptance of the portion of work for which a separate price is stated in the specifications for the Construction Project.

e. Upon acceptance of final payment and for other good and valuable consideration, Contractor shall release and forever discharge City, its officers, agents, and employees of and from any and all claims, demands, actions, causes of action, obligations, and liabilities of every kind and character whatsoever, in law and in equity, whether now known or in the future discovered, arising from or related to this Agreement or the Construction Project that Contractor may have or assert against City, its officers, agents, and employees.

6. Inspection and Testing:

a. City has the right to inspect and test any and all work performed by Contractor on the Construction Project. Contractor shall allow City and its agents access to the Construction Project at all times and shall provide every reasonable facility for the purpose of such inspection and testing, including temporarily discontinuing portions of the work or uncovering or taking down portions of the finished work. Any inspection and testing performed by the City and its agents is for the sole benefit of the City and shall not relieve the Contractor of its duty, responsibility, and obligation to ensure that the work strictly complies with the Agreement terms and conditions and all applicable laws and building and safety codes. City’s inspection and testing shall not be deemed or considered acceptance by the City of any portion of the Construction Project. City’s inspection and testing shall not serve to nullify, amend, or waive any warranties provided by the Contractor under this Agreement.

b. Contractor shall, without charge, replace any material or correct any work found by the City or its agents to be defective or otherwise not in compliance with the terms and conditions of this Agreement. In the event Contractor fails to replace or correct any defective work or materials after reasonable written notice by the City to do so, the City may take such corrective action, either with its own materials and employees or by retaining any third party to do so, and deduct the cost and expense of such corrective action from the Contractor's compensation.

7. **Partial Utilization of Construction Project:** City shall have the right to use or occupy any portion of the Construction Project that City and Contractor mutually agree is substantially completed and constitutes a separately functioning and usable part of the Construction Project for its intended purpose without significant interference with Contractor's performance of the remaining portions of the Construction Project. In the event City takes possession of any portion of the Construction Project, such possession shall not be deemed an acceptance of the Construction Project, in whole or in part. Contractor shall still be required to conduct any final testing of the portions in the possession of the City. City's use of any portion of the Construction Project shall not be grounds for extensions of any construction deadlines or a change in the Contractor's compensation. Contractor's warranties shall run from the completion of the total Construction Project and not from the date the City may take possession of selected portions of the Construction Project.

8. **Related Work at the Site:** Nothing in this Agreement shall prevent or preclude City, through its own employees or by contract with any third party, from performing other work related to the Construction Project at the construction site; provided such related work is not otherwise addressed in this Agreement and provided such related work does not otherwise interfere with Contractor's performance of this Agreement or the completion of the Construction Project. Contractor shall afford any City employee, agent or representative, or any third party under contract with the City to perform the related work, proper and safe access to the construction site, a reasonable opportunity for the introduction and storage of materials and equipment, the opportunity to perform the related work, and shall properly coordinate the Contractor's work on the Construction Project with the related work.

9. **Contractor's Warranties:** Contractor represents and warrants as follows:

a. Unless otherwise specified by the terms of this Agreement, all materials and equipment used by Contractor on the Construction Project shall be new and where not otherwise specified, of the most suitable grade for their intended uses.

b. All workmanship and materials shall be of a kind and nature acceptable to the City.

c. All equipment, materials, and labor provided to, on, or for the Construction Project must be free of defects and nonconformities in design, materials, and workmanship for a minimum period beginning with the commencement of the work on the Construction Project and ending one (1) year from the final completion and

acceptance by the City of the Construction Project, regardless of whether such equipment, materials, or labor were supplied directly by Contractor or indirectly by Contractor's subcontractors or suppliers. Other express warranties on materials that provide for a warranty period longer than one year apply for the period of that express warranty and are not reduced by this provision. Upon receipt of City's written notice of a defective or nonconforming condition during the warranty period, Contractor shall take all actions, including redesign and replacement, to correct the defective or nonconforming condition within a time frame acceptable to the City and at no additional cost to the City. Contractor shall also, at its sole cost, perform any tests required by City to verify that such defective or nonconforming condition has been corrected. Contractor warrants the corrective action taken against defective and nonconforming conditions for a period of an additional one (1) year from the date of City's acceptance of the corrective action.

d. Contractor and its sureties are liable for the satisfaction and full performance of all warranties.

e. Contractor shall give its personal attention to the faithful prosecution of the completion of the Construction Project and Contractor, or its duly authorized representative assigned to serve as the Construction Project Manager, shall be personally present at the site of the Construction Project during working hours for the term of this Agreement until the completion of the Construction Project.

f. Contractor shall maintain an office at the site of the Construction Project and shall have a complete, accurate, and up-to-date set of construction plans, drawings, and specifications at that office at all times.

g. Contractor has examined all available records and made field examinations of the site of the Construction Project. Contractor has knowledge of the field conditions to be encountered during the Construction Project. Contractor has knowledge of the types and character of equipment necessary for the work, the types of materials needed and the sources of such materials, and the condition of the local labor market.

h. Contractor is responsible for the safety of the work and shall maintain all lights, guards, signs, temporary passages, or other protections necessary for that purpose at all times.

i. All work must be performed at Contractor's risk, and Contractor shall promptly repair or replace all damage and loss at its sole cost and expense regardless of the reason or cause of the damage or loss; provided, however, should the damage or loss be caused by an intentional or negligent act of the City, the risk of such loss shall be placed on the City.

j. Contractor is responsible for any loss or damage to materials, tools, or other articles used or held for use in the completion of performance of the Construction Project.

k. Contractor's performance must be without damage or disruption to any other work or property of the City or of others and without interference with the operation of existing machinery or equipment.

l. Title to all work, materials, and equipment covered by any payment of Contractor's compensation by City, whether directly incorporated into the Construction Project or not, passes to City at the time of payment, free and clear of all liens and encumbrances.

10. Delays and Extensions of Time: If Contractor's performance of this Agreement is prevented or delayed by any unforeseen cause beyond the control of the Contractor, including acts or omissions of the City, Contractor shall, within ten (10) days of the commencement of any such delay, give the City written notice thereof. Further, Contractor shall, within ten (10) days of the termination of such delay, give the City written notice of the total actual duration of the delay. If the City is provided with these required notices and if the City determines that the cause of the delay was not foreseeable, was beyond the control of the Contractor, and was not a result of the fault or negligence of the Contractor, then the City will determine the total duration of the delay and extend the time for performance of the Agreement accordingly. Unless the delay is caused by the intentional interference of the City with the Contractor's performance, Contractor shall make no claim for damages or any other claim other than for an extension of time as herein provided by reason of any delays.

11. Suspension:

a. The City may, by written notice to the Contractor and at its convenience for any reason, suspend the performance of all or any portion of the work to be performed on the Construction Project ("Notice of Suspension"). The Notice of Suspension shall set forth the time of suspension, if then known to the City. During the period of suspension, Contractor shall use its best efforts to minimize costs associated with the suspension.

b. Upon Contractor's receipt of any Notice of Suspension, unless the notice requires otherwise, Contractor shall: **(1)** immediately discontinue work on the date and to the extent specified in the Notice of Suspension; **(2)** place no further orders or subcontracts for materials, services, or equipment; **(3)** promptly make every reasonable effort to obtain suspension upon terms satisfactory to City of all orders, subcontracts, and rental agreements to the extent that they relate to the performance of the work suspended; and **(4)** continue to protect and maintain the Project, including those portions on which work has been suspended.

c. As compensation for the suspended work, Contractor will be reimbursed for the following costs, reasonably incurred, without duplication of any item, and to the extent that such costs directly resulted from the suspension: **(1)** a standby charge paid

during the period of suspension which will be sufficient to compensate Contractor for keeping, to the extent required in the Notice of Suspension, Contractor's organization and equipment committed to the Project in standby status; (2) all reasonably incurred costs for the demobilization of Contractor's and subcontractor's crews and equipment; (3) an equitable amount to reimburse Contractor for the cost to protect and maintain the Project during the period of suspension; and (4) an equitable adjustment in the cost of performing the remaining portion of the work post-suspension if, as a direct result of the suspension, the cost to Contractor of subsequently performing the remaining work on the Construction Project has increased or decreased.

d. Upon receipt of written notice by the City to resume the suspended work ("Notice to Resume Work"), Contractor shall immediately resume performance of the suspended work as to the extent required in the Notice to Resume Work. Any claim by Contractor for time or compensation described in Section 11(c) shall be made within fifteen (15) days after receipt of the Notice to Resume Work and Contractor shall submit a revised Construction Schedule for the City's review and approval. Contractor's failure to timely make such a claim shall result in a waiver of the claim.

e. No compensation described in Section 11(c) shall be paid and no extension of time to complete the Construction Project shall be granted if the suspension results from Contractor's non-compliance with or breach of the terms or requirements of this Agreement.

12. Termination for Contractor's Fault:

a. If Contractor refuses or fails to timely do the work, or any part thereof, or fails to perform any of its obligations under this Agreement, or otherwise breaches any terms or conditions of this Agreement, the City may, by written notice, terminate this Agreement and the Contractor's right to proceed with all or any part of the Construction Project ("Termination Notice Due to Contractor's Fault"). The City may then take over the Construction Project and complete it, either with its own resources or by re-letting the contract to any other third party, and may immediately take possession of and use such materials, appliances, tools, and equipment as may be on the site and which may be necessary for the completion of the Construction Project.

b. In the event of a termination pursuant to this Section 12, Contractor shall be entitled to payment only for those services Contractor actually rendered. In the case of a lump sum or unit price contract, Contractor shall not be entitled to any further payment until the Construction Project has been completed. Upon completion of the Construction Project, if the unpaid balance of the Contractor's compensation exceeds the cost to the City of completing the work, including all costs paid to any subcontractors or third parties retained by the City to complete the Construction Project and all administrative costs resulting from the termination ("City's Cost for Completion"), such excess shall be paid to the Contractor. If the City's Cost for Completion exceeds the unpaid balance of the Contractor's compensation, then Contractor and its sureties shall be liable for and shall pay the difference, plus interest at the rate applicable to court judgments, to the City.

c. Any termination provided for by this Section 12 shall be in addition to any other remedies to which the City may be entitled under the law or at equity.

d. In the event of termination under this Section 12, Contractor shall, under no circumstances, be entitled to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature arising, or claimed to have arisen, as a result of the termination.

13. Termination for City's Convenience:

a. Should conditions arise which, in the sole opinion and discretion of the City, make it advisable to the City to cease work on the Construction Project, City may terminate this Agreement by written notice to Contractor ("Notice of Termination for City's Convenience"). The termination shall be effective in the manner specified in the Notice of Termination for City's Convenience and shall be without prejudice to any claims that the City may otherwise have against Contractor.

b. Upon receipt of the Notice of Termination for City's Convenience, unless otherwise directed in the Notice, the Contractor shall immediately cease work on the Construction Project, discontinue placing orders for materials, supplies, and equipment for the Construction Project, and make every reasonable effort to cancel all existing orders or contracts upon terms satisfactory to the City. Contractor shall do only such work as may be necessary to preserve, protect, and maintain work already completed, in progress, or in transit to the construction site.

c. In the event of a termination pursuant to this Section 13, Contractor is entitled to payment only for those services Contractor actually rendered and materials actually purchased or which Contractor has made obligations to purchase on or before the receipt of the Notice of Termination for City's Convenience, and reasonably incurred costs for demobilization of Contractor's and any subcontractor's crews. It is agreed that any materials that City is obligated to purchase from Contractor will remain the City's sole property.

d. The compensation described in Section 13(c) is the sole compensation due to Contractor for its performance of this Agreement. Contractor shall, under no circumstances, be entitled to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature arising, or claimed to have arisen, as a result of the termination.

14. Limitation on Contractor's Damages; Time for Asserting Claim:

a. In the event of a claim for damages by Contractor under this Agreement, Contractor's damages shall be limited to contract damages and Contractor hereby expressly waives any right to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature or kind.

b. In the event Contractor wants to assert a claim for damages of any kind or nature, Contractor shall provide City with written notice of its claim, the facts and circumstances surrounding and giving rise to the claim, and the total amount of damages sought by the claim, within ten (10) days of the facts and circumstances giving rise to the claim. In the event Contractor fails to provide such notice, Contractor shall waive all rights to assert such claim.

15. Representatives:

a. **City's Representative:** The City's Representative for the purpose of this Agreement shall be **Baer Design Group, LLC** or such other individual as City shall designate in writing. Whenever approval or authorization from or communication or submission to City is required by this Agreement, such communication or submission shall be directed to City's Representative and approvals or authorizations shall be issued only by such Representative; provided, however, that in exigent circumstances when City's Representative is not available, Contractor may direct its communication or submission to other designated City personnel or agents and may receive approvals or authorization from such persons.

b. **Contractor's Representative:** The Contractor's Representative for the purpose of this Agreement shall be _____ or such other individual as Contractor shall designate in writing. Whenever direction to or communication with Contractor is required by this Agreement, such direction or communication shall be directed to Contractor's Representative; provided, however, that in exigent circumstances when Contractor's Representative is not available, City may direct its direction or communication to other designated Contractor personnel or agents.

16. Locating Underground Facilities: Contractor shall be responsible for obtaining and determining the location of any underground facilities, including but not limited to, the location of any pipelines or utility supply, delivery, or service lines in accordance with the provisions of §69-4-501, et seq., MCA. Contractor shall make every effort to avoid damage to underground facilities and shall be solely responsible for any damage that may occur. If City personnel assume responsibility for locating any underground facilities, this fact shall be noted in writing prior to commencement of such location work.

17. Permits: Contractor shall provide all notices, comply with all applicable laws, ordinances, rules, and regulations, obtain all necessary permits, licenses, and inspections from applicable governmental authorities, pay all fees and charges in connection therewith, and

perform all surveys and locations necessary for the timely completion of the Construction Project.

18. Ownership of Documents; Indemnification: All plans, designs, drawings, specifications, documents, sample results and data, in whatever medium or format, originated or prepared by or for Contractor in contemplation of, or in the course of, or as a result of this Agreement or work on the Construction Project, shall be promptly furnished to the City (“City Documents and Information”). All City Documents and Information shall be the exclusive property of the City and shall be deemed to be works-for-hire. Contractor hereby assigns all right, title, and interest in and to the City Documents and Information, including but not limited to, all copyright and patent rights in and to the City Documents and Information. Neither party grants to the other any express or implied licenses under any patents, copyrights, trademarks, or other intellectual property rights, except to the extent necessary to complete its obligations to the other under this Agreement.

19. Laws and Regulations: Contractor shall comply fully with all applicable state and federal laws, regulations, and municipal ordinances including, but not limited to, all workers’ compensation laws, all environmental laws including, but not limited to, the generation and disposal of hazardous waste, the Occupational Safety and Health Act (OSHA), the safety rules, codes, and provisions of the Montana Safety Act in Title 50, Chapter 71, MCA, all applicable City, County, and State building and electrical codes, the Americans with Disabilities Act, and all non-discrimination, affirmative action, and utilization of minority and small business statutes and regulations.

20. Non-discrimination in Hiring: All hiring by Contractor and subcontractors of persons performing work for Contractor will be on the basis of merit and qualification and will not discriminate on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, gender identity, sexual orientation, or national origin.

21. Intoxicants; DOT Drug and Alcohol Regulations: Contractor shall not permit or suffer the introduction or use of any intoxicants, including alcohol or illegal drugs, upon the site of the Construction Project. Contractor acknowledges it is aware of and shall comply with its responsibilities and obligations under the U.S. Department of Transportation (DOT) regulations governing anti-drug and alcohol misuse prevention plans and related testing. City shall have the right to request proof of such compliance and Contractor shall be obligated to furnish such proof.

22. Labor Relations:

a. Contractor shall post a legible statement of all wages and fringe benefits to be paid to the Contractor’s employees and the frequency of such payments (i.e., hourly wage employees shall be paid weekly). Such posting shall be made in a prominent and accessible location at the site of the Construction Project and shall be made no later than the first day of work. Such posting shall be removed only upon the final completion of the Construction Project and the termination of this Agreement.

b. In performing the terms and conditions of this Agreement and the work on the Construction Project, Contractor shall give preference to the employment of bona fide residents of Montana, as required by §18-2-403, MCA, and as such, term is defined by §18-2-401(1), MCA. When making assignments of work, Contractor shall use workers both skilled in their trade and specialized in their field of work for all work to which they are assigned.

c. Pursuant to §§18-2-403 and 18-2-422, MCA, Contractor shall pay wages, benefits, and expenses as set forth on **Exhibit F**, Contractor's Rates of Wages, Benefits, and Expenses, attached hereto. Contractor shall pay all hourly wage employees on a weekly basis. Violation of the requirements set forth on **Exhibit F** may subject the Contractor to the penalties set forth in §18-2-407, MCA. Contractor shall maintain payroll records and provide certified copies to the City. Contractor shall maintain such payroll records during the term of this Agreement, the course of the work on the Construction Project, and for a period of three (3) years following the date of final completion of the Construction Project and termination of this Agreement.

d. In the event that, during the term of this Agreement and throughout the course of Contractor's performance of the Construction Project, any labor problems or disputes of any type arise or materialize which in turn cause any work on the Construction Project to cease for any period of time, Contractor specifically agrees to take immediate steps, at its own expense and without expectation of reimbursement from City, to alleviate or resolve all such labor problems or disputes. The specific steps Contractor shall take to resume work on the Construction Project shall be left to the discretion of Contractor; provided, however, that Contractor shall bear all costs of any related legal action. Contractor shall provide immediate relief to the City so as to permit the work on the Construction Project to resume and be completed within the time frames set forth in the Construction Schedule at no additional cost to City.

e. Contractor shall indemnify, defend, and hold the City harmless from any and all claims, demands, costs, expenses, damages, and liabilities arising out of, resulting from, or occurring in connection with any labor problems or disputes or any delays or stoppages of work associated with such problems or disputes.

23. Subcontractors:

a. Contractor may employ subcontractors for any work on the Construction Project. Contractor shall provide City with a list of all subcontractors employed.

b. Contractor remains fully responsible for the acts and omissions of any subcontractor, just as Contractor is for its own acts and omissions, and Contractor shall remain fully responsible and liable for the timely completion of the Construction Project.

c. Contractor is solely liable for any and all payments to subcontractors. Contractor shall hold all payments received from the City in trust for the benefit of subcontractors, and all such payments shall be used to satisfy obligations of the

Construction Project before being used for any other purpose. Contractor shall make any payments due to any subcontractor within seven (7) days of Contractor's receipt of payment, including a proportional part of the retainage Contractor has received from the City. In the event of a dispute regarding any subcontractor's invoice, Contractor shall promptly pay the undisputed amount to the subcontractor and notify the subcontractor in writing of the amount in dispute and the reasons for the dispute. Any withholding of payment must comply with the requirements of §28-2-2103, MCA. In the event Contractor is unwilling or unable to make timely and proper payment to any subcontractor, City may elect to withhold any payment otherwise due to Contractor and upon seven (7) days' written notice to Contractor, may pay subcontractor by direct or joint payment.

24. Indebtedness and Liens: Before City may make any final payment to Contractor, Contractor shall furnish City with satisfactory proof that there are no outstanding debts or liens in connection with the Construction Project. If the Contractor allows any indebtedness to accrue to subcontractors or others during the progress of the work, and fails to pay or discharge the same within five (5) days after demand, then City may either withhold any money due to Contractor until such indebtedness is paid or apply the same towards the discharge of the indebtedness. If any lien or claim is filed or made by any subcontractor, material supplier, or any other person, the Contractor shall immediately notify the City and shall cause the same to be discharged of record within thirty (30) days after its filing.

25. Hazard Communication: Contractor shall comply with all hazard communication requirements dictated by the Environmental Protection Agency, the Montana Department of Agriculture, OSHA, Hazard Communications Standard, 29 CFR 1910.1200, and applicable City ordinances. Contractor shall supply a chemical list, the associated material safety data sheets (MSDS), and other pertinent health exposure data for chemicals that the Contractor's, subcontractor's or the City's employees may be exposed to while working on City property during the course of the Construction Project. One copy of this documentation must be delivered to City to the attention of the City's Representative. This documentation must be delivered before work involving these chemicals may commence.

26. Accounts and Records: During the term of this Agreement and for two (2) years following the City's final acceptance of the Construction Project, Contractor shall maintain accounts and records related to the Construction Project. Upon reasonable notice, City shall have the right to inspect all such accounts and records, including but not limited to, Contractor's records, books, correspondence, instructions, drawings, specifications, field and site notes, receipts, invoices, bills, contracts, or other documents relating to the Construction Project.

27. Indemnification; Insurance; Bonds:

a. To the fullest extent permitted by law, Contractor shall fully indemnify, defend, and save City, its agents, representatives, employees, and officers harmless from and against any and all claims, actions, costs, fees, losses, liabilities or damages of whatever kind or nature arising from or related to Contractor's performance of this

Agreement and Contractor's work on the Construction Project or work of any subcontractor or supplier to Contractor.

b. Contractor shall maintain those insurances as may be required by City as set forth on the attached **Exhibit G**, Required Insurance Coverage, and Contractor shall provide City with proof of such insurance coverage within ten (10) days following execution of this Agreement and at least annually thereafter during the term of the Project. Contractor shall notify City thirty (30) days prior to the expiration of any such required insurance coverage and shall ensure such required insurance coverage is timely renewed during the term of this Agreement so that there is no lapse in coverage during Contractor's performance of this Agreement. Contractor shall further notify City within two (2) business days of Contractor's receipt of notice that any required insurance coverage will be terminated or Contractor's decision to terminate any required insurance coverage for any reason. Each required insurance coverage must name the City and the architect and engineer as additional insureds.

c. Contractor shall maintain those security guarantees set forth on the attached **Exhibit H**, Required Bonds.

28. Taxes: Contractor is obligated to pay all taxes of any kind or nature and make all appropriate employee withholdings. Contractor understands that all contractors or subcontractors working on a publicly funded project are required to pay or have withheld from earnings a license fee of one percent (1%) of the gross contract price if the gross contract price is Five Thousand Dollars (\$5,000) or more. This license fee is paid to the Montana Department of Revenue.

29. Dispute Resolution:

a. Any claim, controversy, or dispute between the parties, their agents, employees, or representatives shall be resolved first by negotiation between senior-level personnel from each party duly authorized to execute settlement agreements. Upon mutual agreement of the parties, the parties may invite an independent, disinterested mediator to assist in the negotiated settlement discussions.

b. If the parties are unable to resolve the dispute within thirty (30) days from the date the dispute was first raised, then such dispute shall be resolved in a court of competent jurisdiction in compliance with the Applicable Law provisions of this Agreement.

30. Survival: Contractor's indemnification and warranty obligations shall survive the termination or expiration of this Agreement for the maximum period allowed under applicable law.

31. Headings: The headings used in this Agreement are for convenience only and are not be construed as a part of the Agreement or as a limitation on the scope of the particular paragraphs to which they refer.

32. Waiver: A waiver by City of any default or breach by Contractor of any covenants, terms, or conditions of this Agreement does not limit City's right to enforce such covenants, terms, or conditions or to pursue City's rights in the event of any subsequent default or breach.

33. Severability: If any portion of this Agreement is held to be void or unenforceable, the balance thereof shall continue in effect.

34. Applicable Law: The parties agree that this Agreement is governed in all respects by the laws of the State of Montana and the parties expressly agree that venue will be in Lewis and Clark County, Montana, and no other venue.

35. Binding Effect: This Agreement is binding upon and inures to the benefit of the heirs, legal representatives, successors, and assigns of the parties.

36. Amendments: This Agreement may not be modified, amended, or changed in any respect except by a written document signed by all parties.

37. No Third-Party Beneficiary: This Agreement is for the exclusive benefit of the parties, does not constitute a third-party beneficiary agreement, and may not be relied upon or enforced by a third party.

38. Counterparts: This Agreement may be executed in counterparts, which together constitute one instrument.

39. Assignment: Contractor may not assign this Agreement in whole or in part without the prior written consent of the City. No assignment will relieve Contractor of its responsibility for the performance of the Agreement and the completion of the Construction Project. Contractor may not assign to any third party other than Contractor's subcontractors on the Construction Project, the right to receive monies due from City without the prior written consent of City.

40. Authority: Each party represents that it has full power and authority to enter into and perform this Agreement and the person signing this Agreement on behalf of each party has been properly authorized and empowered to sign this Agreement.

41. Independent Contractor: The parties agree and acknowledge that in the performance of this Agreement and the completion of the Construction Project, Contractor shall render services as an independent contractor and not as the agent, representative, subcontractor, or employee of the City. The parties further agree that all individuals and companies retained by Contractor at all times will be considered the agents, employees, or independent contractors of Contractor and at no time will they be the employees, agents, or representatives of the City.

42. Agreement Documents: All work on the Construction Project shall be performed by Contractor in accordance with all of the terms and conditions of this Agreement

and all Exhibits attached hereto, which Exhibits consist of the following documents and are incorporated herein by this reference:

- Exhibit A: Bid Form
- Exhibit B: City Supplied Materials
- Exhibit C: Construction Schedule
- Exhibit D: Compensation Schedule
- Exhibit E: Change of Work Specifications
- Exhibit F: Contractor’s Rates of Wages, Benefits, and Expenses
- Exhibit G: Required Insurance Coverage
- Exhibit H: Required Bonds

43. Integration: This Agreement and all Exhibits attached hereto constitute the entire agreement of the parties. Covenants or representations not contained therein or made a part thereof by reference, are not binding upon the parties. There are no understandings between the parties other than as set forth in this Agreement. All communications, either verbal or written, made prior to the date of this Agreement are hereby abrogated and withdrawn unless specifically made a part of this Agreement by reference.

IN WITNESS WHEREOF, Contractor and City have caused this Agreement to be executed, effective on the date written above, and intend to be legally bound thereby.

CITY OF HELENA, MONTANA _____, **CONTRACTOR**

By: _____
Ronald J. Alles, City Manager

By: _____
Print Name: _____
Title: _____

APPROVED AS TO FORM:

By: _____
Jeffrey M. Hindoien, City Attorney

Exhibit A

Bid Form and City Staff Transmittal Memorandum

Attached.

Exhibit B

City Supplied Materials

Exhibit C

Construction Schedule

Exhibit D

Compensation Schedule

Contractor shall not demand or be entitled to receive payment for any work on the Construction Project, in whole or in part, except in the manner set forth herein.

Monthly Progress Payments

A. After the commencement of work on the Construction Project, the Contractor may request monthly progress payments by submitting an Application for Payment to the City during each successive calendar month, with a copy to the project architect or engineer. The Application for Payment must be based upon the actual or estimated percentage of work completed and materials supplied on the Construction Project prior to the date of the Application and shall be filled out and signed by the Contractor. Contractor shall attach all supporting documentation to the Application, including certified payroll records and receipts, to verify that the work claimed in the Application has been completed. Only one Application for Payment may be submitted within a calendar month.

B. Beginning with the second Application for Payment, each Application shall also include an affidavit signed by the Contractor stating that all previous monthly progress payments received have been applied on account to discharge Contractor's obligations associated with the prior Applications for Payment.

C. City and its architect or engineer shall promptly review all Applications for Payment and, within twenty-one (21) days after receipt of each Application, determine whether a progress payment should be disapproved in whole or in part. An Application for Payment is considered to have been received when it is submitted to City's Representative and is considered approved unless prior to the expiration of the 21-day period the City or its architect or engineer provides the Contractor with a written statement containing specific items that are being disapproved. A progress payment or any portion may be disapproved upon a claim of: **(1)** unsatisfactory job progress; **(2)** failure to remedy defective construction work or materials; **(3)** disputed work or materials; **(4)** failure to comply with material provisions of this Agreement, drawings, plans, specifications for the Construction Project, or other required documents, including but not limited to, payroll certifications, insurance coverage, bonding, lien releases, warranties, material certifications, and test data; **(5)** failure of Contractor to make timely payment for claims including, but not limited to claims for labor, equipment, materials, subcontracts, taxes, fees, professional services, rent, and royalties; **(6)** damages to the City; **(7)** the existence of reasonable evidence that the Agreement cannot be completed for the unpaid balance of the Agreement's Compensation; and **(8)** Contractor's non-compliance with applicable federal, state, and local laws, rules, and ordinances.

D. The City will furnish Contractor a written statement specifying a reason for disapproval that is listed in Section C above for which approval of the Application for Payment or a portion thereof is being withheld. If the City disapproves only a portion of an Application for Payment, the remainder of the Application for Payment is considered approved.

E. If the City approves a monthly progress payment, the City shall withhold the five percent (5%) Retainage Amount from the total payment requested in the Application for Payment and may withhold an amount that is sufficient to pay the direct expenses that the City may reasonably expect will be necessary to correct any claim based on the eight (8) items set out in Section C above. City shall tender the balance of the approved monthly progress payment to Contractor within seven (7) days following the approval.

F. Contractor understands that the Montana Public Contractors' Gross Receipts Tax requires all contractors or subcontractors working on a publicly funded project to pay or have withheld from earnings one percent (1%) of the gross contract price if the public contract price, including subcontracts attached thereto, is Five Thousand Dollars (\$5,000) or more. If required, the City will withhold this tax from any payment made to Contractor and will remit the amount withheld to the Montana Department of Revenue. Contractor must withhold the tax from payments made to subcontractors by Contractor.

G. City's approval of any progress payment shall not operate as City's acceptance of any portion of the Construction Project as complete or free of defects or nonconformities, nor shall it operate as a waiver of Contractor's obligations under the Agreement including, but not limited to, Contractor's testing and warranty obligations.

Final Payment

A. Upon completion of the Construction Project, Contractor shall submit an Application for Final Payment to the City, with a copy to the project architect or engineer, seeking payment of the remaining balance of Contractor's compensation, including all retainage amounts. Contractor shall attach all supporting documentation and receipts to the Application for Final Payment to verify that the Construction Project has been fully and finally completed in compliance with all terms and conditions of the Agreement, including complete and legally effective releases or waivers of all liens or encumbrances that have been filed against the Construction Project, and a consent from all of Contractor's sureties to final payment. In addition, Contractor shall include an affidavit signed by the Contractor stating that all previous monthly progress payments received have been applied on account to discharge Contractor's obligations associated with the Construction Project and that the prior Applications for Payment and all claims asserted by any person arising from or related to the Construction Project have been settled or satisfied. In the event any claims have not been settled or satisfied, the Affidavit shall contain a complete listing of such claims, the name and address of each person making a claim, the facts and circumstances surrounding each claim, the amount of each claim, and the efforts made to date by Contractor to resolve, settle or satisfy each claim.

B. City and its architect or engineer shall promptly review the Application for Final Payment and, within twenty-one (21) days after receipt of the request, determine whether it should be disapproved in whole or in part. An Application for Final Payment is considered to have been received when it is submitted to City's Representative and is considered approved unless the City or its architect or engineer provides the Contractor with a written statement containing specific items that are being disapproved prior to the expiration of the 21-day period. A final payment or any portion may be disapproved upon a claim of: **(1)** unsatisfactory job

progress; **(2)** after City's final inspection of the Construction Project, Contractor has not completed all punch list items and failed to remedy defective construction work or materials; **(3)** disputed work or materials; **(4)** failure to comply with material provisions of this Agreement, drawings, plans, specifications for the Construction Project, or other required documents including, but not limited to, payroll certifications, insurance coverage, bonding, lien releases, warranties, material certifications, and test data; **(5)** failure of Contractor to make timely payment for claims including, but not limited to, claims for labor, equipment, materials, subcontracts, taxes, fees, professional services, rent, and royalties; **(6)** claims have been brought or liens have been filed against Contractor or the City related to the Construction Project, or any such claims have not been properly documented in Contractor's Affidavit; **(7)** damage to the City; **(8)** Contractor has not delivered all maintenance and operating instructions, marked-up record documents, and any other documents relating to the Construction Project as required by City; and **(9)** the Contractor is not in compliance with applicable federal, state, and local laws, rules, and ordinances and has not remedied the noncompliance.

C. The City will furnish Contractor a written statement specifying a reason for disapproval that is listed in Section B above for which approval of the Application for Final Payment or a portion thereof is being withheld. If the City disapproves only a portion of an Application for Payment, the remainder of the Application for Payment is considered approved.

D. Final payment is due and payable within fourteen (14) days of City's approval, but City may withhold an amount that is sufficient to pay the direct expenses that the City may reasonably expect will be necessary to correct any claim based on the nine (9) items set out in Section B above and any tax withholding required by law.

Exhibit E

Change of Work Specifications

A. City may, at any time or from time to time, order changes, additions, deletions, or revisions to the work on the Construction Project by submitting a written Change Order to Contractor. Upon receipt of any Change Order, Contractor shall comply with the terms of the changed work as reflected in the Change Order.

B. City and Contractor shall negotiate in good faith for an agreement as to any increase or decrease in the Contractor's compensation that results from any Change Order. The increased or decreased Contractor's compensation shall be set forth in the Change Order and both the City and the Contractor shall sign the Change Order as an indication of their respective acceptance of the changes and modifications to the Agreement. In the event the City and Contractor are unable to agree upon the increase or decrease in Contractor's compensation resulting from any Change Order, such increase or decrease shall be determined as follows:

1. increases to Contractor's compensation shall be calculated as follows and shall be evidenced by Contractor's submission to the City of its actual supporting documentation including time slips/cards, invoices, and receipts:

- a.** by unit prices otherwise set forth in the Agreement or subsequently agreed upon;
- b.** by an agreed upon lump sum; or
- c.** by the cost of the work and an agreed upon mark-up for Contractor's overhead and profit, with the costs of the work determined as follows:

(i) Contractor's actual, direct payroll expenses for the cost of labor. Payroll expenses shall only include actual gross wages paid, without any deductions, withholding, or overhead. The agreed upon mark-up fee shall cover Contractor's liability insurance, workers' compensation, and Social Security taxes applicable to said wages, Contractor's reasonable profit, the costs for the use of small tools and equipment not otherwise classified under heavy equipment use, and Contractor's general overhead expenses.

(ii) Contractor's actual cost of materials, including actual transportation costs, for all materials supplied by Contractor.

(iii) Costs for the use of heavy equipment and the transportation of the same. Such costs shall be the actual rental fees incurred for the use of the heavy equipment and the actual costs of transporting such heavy equipment to and from the site of the Construction Project.

2. decreases to Contractor's compensation shall be determined by the City's good faith estimate. If Contractor disagrees with such good faith estimate, Contractor can avail itself of the Dispute Resolution provisions set forth in the Agreement.

C. Except for minor modifications in the work not involving an increase of costs or Contractor's compensation and not inconsistent with the purposes of the work required by the Agreement, and except in an emergency situation which endangers life or property, no change to the work requirements shall be made unless pursuant to a written Change Order duly executed.

D. Contractor shall not be entitled to any increase in the Contractor's compensation or the extension of any deadlines set forth in Construction Schedule with respect to any work performed by Contractor that is not required by the terms and conditions of the Agreement and is not contained in a duly executed Change Order.

Exhibit F

Contractor's Rates of Wages, Benefits, and Expenses

For purposes of prevailing wage requirements, this Project is considered as **Heavy Construction 2011**. The Montana Prevailing Wage Rates for this type of project, as included in these Contract Documents, are incorporated herein by this reference.

Exhibit G

Required Insurance Coverage

Contractor shall purchase and maintain insurance coverage as set forth below. The insurance policy must, unless not available from the insured, name the City as an additional insured and be written on a “primary—noncontributory basis.” Each coverage shall be obtained from an insurance company that is duly licensed and authorized to transact insurance business and write insurance within the state of Montana, with a minimum of “A.M. Best Rating” of A-, VI, as will protect the Contractor, the various acts of subcontractors, the City and its officers, employees, agents, and representatives from claims for bodily injury and/or property damage which may arise from operations and completed operations under this Agreement. All insurance coverage shall remain in effect throughout the life of this Agreement and for a minimum of one (1) year following the date of expiration of Contractor’s warranties. All insurance policies must contain a provision or endorsement that the coverage afforded will not be canceled, materially changed, or renewal refused until at least forty-five (45) days prior written notice has been given to Contractor, City, and all other additional insured to whom a certificate of insurance has been issued.

Required Insurance Coverage:

1.	Commercial General Liability (bodily injury and property damage)	\$1,500,000 per occurrence \$3,000,000 aggregate
2.	Products and Completed Operations	\$3,000,000
3.	Automobile Liability (all owned, hired, non-owned)	\$1,500,000 per accident
4.	Workers’ Compensation	Not less than statutory limits
5.	Employers’ Liability	\$1,500,000
6.	Professional Liability (E&O) (only if applicable)	\$1,500,000
7.	Builder’s Risk/Property Insurance (for buildings) compensation or full replacement (covering all work. buildings, materials and equipment, whether on site or in transit, loss due to fire, lightening, theft, vandalism, malicious mischief, earthquake, collapse, debris removal, demolition occasioned by enforcement of laws, water damage, flood if site within a flood plain, repair or replacement costs, testing and start-up costs)	Equal to greater of Contractor’s
8.	Owner’s and Contractor’s Protective Liability	\$1,000,000 per occurrence \$3,000,000 aggregate
9.	Contractual Liability Insurance (covering indemnity obligations)	\$1,000,000 per occurrence \$3,000,000 aggregate

Additional coverage may be required in the event of the following:
crane operating services: add On-Hook Coverage
transportation services: add \$1,000,000 Transit Coverage

Exhibit H

Required Bonds

Contractor shall make, execute, purchase, maintain and deliver to City performance and payment bonds in an amount at least equal to the Contractor's compensation under this Agreement, conditioned that the Contractor shall faithfully perform of all of Contractor's obligations under this Agreement and pay all laborers, mechanics, subcontractors, material suppliers and all persons who supply the Contractor or Contractor's subcontractors with provisions, provender, material, or supplies for performing work on the Construction Project. All bonds must be obtained with a surety company that is duly licensed and authorized to transact business within the state of Montana and to issue bonds for the limits so required. The surety company must have a Best's Financial Strength Rating of A, as rated by the A. M. Best Co., or an equivalent rating from a similar rating service. All bonds must remain in effect throughout the life of this Agreement and for a minimum of one (1) year following the date of expiration of Contractor's warranties. A certified copy of the agent's authority to act must accompany all bonds signed by an agent. If the surety on any bond furnished by Contractor is declared bankrupt or becomes insolvent or its right to do business within the state of Montana is terminated, Contractor shall promptly notify City and shall within twenty (20) days after the event giving rise to such notification, provide another bond with another surety company, both of which shall comply with all requirements set forth herein.

Bond Types and Amounts:

- | | | |
|-----------|--------------------------|---|
| 1. | Performance Bond | Equal to Contractor's compensation amount |
| 2. | Labor and Materials Bond | Equal to Contractor's compensation amount |