

# CONTRACT AGREEMENT

## City of Missoula

### Playfair Tennis Court Reconstruction

THIS AGREEMENT, made and entered into this \_\_\_\_\_ day of August, 2022, in the City of Missoula, County of Missoula, State of Montana, by and between the City of Missoula, a municipal organization under the laws of the State of Montana (hereinafter referred to as "City") and Western Excavating, 4685 Mullan Rd, Missoula, MT 59850 (hereinafter referred to as the Contractor).

#### WITNESSETH

For and in consideration of the mutual promises and agreements set forth herein, the City and Western Excavating, a Montana Corporation, mutually stipulate and agree to the following provisions:

#### I. CONSTRUCTION SERVICES CONTRACT WITH CITY

The City hereby agrees to retain the construction services of Contractor pursuant to the terms and provisions of this Agreement. Work shall be accomplished with all reasonable care and minimal disruption or damage to other trees, grounds, driveways, streets, and curbs, sidewalks, structures and utilities on or adjacent to work site. Any damage shall be reported in writing to a property owner and the City's Project Representative at 100 Hickory St, on the day of occurrence, and such damage shall be repaired at the Contractor's expense within five days of the occurrence (unless demonstrable reason for a delay can be shown). Failure to do so may be cause for termination of the contract. Contractor agrees to perform the professional services identified pursuant to the terms and provisions of this Agreement in a competent, professional, and acceptable manner.

#### II. EFFECTIVE DATE

This agreement is effective upon the date of its execution and will terminate on the 15<sup>th</sup> day of July 2023. The parties may extend this Agreement in writing prior to its termination.

#### III. SCOPE OF CONSTRUCTION SERVICES

Contractor agrees to furnish all labor, supervision, equipment, materials, and expertise necessary for construction work in the City of Missoula as identified in the Bid sheet, Project Manual and on the Project Plans. The work is to be performed at Playfair Park, 3001 Bancroft St located in Missoula, Montana, Geocode: **04-2200-33-2-01-18-0000**; **Legal Description:** S33, T13 N, R19 W, SE1/4 NW1/4.

#### IV. MATERIALS AND WORKMANSHIP

All materials and equipment shall be installed in a neat and workmanlike manner. The City reserves the right to direct the removal and replacement of any items, which in their opinion shall present an orderly and reasonably neat or workmanlike appearance, provided such time can be properly installed in such orderly way by the usual methods in such work. Such removal and replacement shall be done, when directed in writing, at the Contractor's expense without additional cost to the City. Whenever any material is specified by name and/or number thereof, such specifications shall be deemed to be used for the purpose of facilitating a description of the

materials and establishing quality, and shall be deemed and construed to be followed by the words "or approved equal." No substitutions will be permitted which have not been submitted for prior approval to the Project Manager. All materials shall be new and without flaws or defects and shall be the best of their class and kind. Sufficient descriptive literature and/or samples must be furnished for any materials submitted as "equal" substitutes.

#### **V. ADDITIONAL SERVICES**

Any alteration or deviation from the described work that involves extra costs will be permitted only upon written request by the City to Contractor and will become an extra charge over and above the contract amount. The parties must agree to any extra charges in writing.

#### **VI. INDEPENDENT CONTRACTOR SERVICES**

The Contractor is an independent contractor and not a City of Missoula employee.

#### **VII. NON-DISCRIMINATION**

Contractor shall take affirmative action to ensure all hiring is done on the basis of merit and qualification and there shall be no discrimination in employment on the basis race, ancestry, color, physical or mental disability, religion, national origin, sex, age, marital or familial status, creed, ex-offender status, physical condition, political belief, public assistance status or sexual orientation, gender identity or expression, except where these criteria are reasonable bona fide occupational qualifications. Such action shall include, but is not limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.

#### **VIII. AFFIRMATIVE ACTION POLICY**

Contractors, subcontractors, subgrantees, and other firms doing business with the City of Missoula or any agency connected with the City of Missoula must be in compliance with the City of Missoula's Affirmative Action Plan and Title 49, M.C.A., or forfeit the right to continue such business dealings. See Attachment A.

#### **IX. EVIDENCE OF WORKERS' COMPENSATION COVERAGE**

Contractor hereby certifies it is covered by a Workers' Compensation insurance program with either the State of Montana, a private insurance carrier, or an approved self-insurance plan in accordance with Montana State law and that the City has no liability for Contractor's workers' compensation insurance or claims. Contractor shall provide evidence of such coverage to the City Clerk prior to the City Clerk's validation of the agreement.

#### **X. LIABILITY INSURANCE**

Contractor hereby certifies that it has and shall maintain during the time period of this Agreement, liability insurance in the minimum amount of **\$1,500,000.00** per occurrence and \$3,000,000 in the aggregate to include liability for accidents occurring during contract or at the project site that are attributable to the Contractor or its agents' conduct.

#### **XI. INDEMNITY**

The Contractor shall hold harmless, indemnify, and shall defend the Owner and each of their officers and employees and agents, from any and all liability claims, demands, losses, costs, damages, expenses or liability to the extent arising or alleged to arise from the Contractor's performance of the work described herein, but not including the sole negligence of the Owner. Contractor shall procure and maintain in force, at its expense, the liability insurance required.

## **XII. CONTRACT PRICE**

The parties hereto mutually agree that the total costs for acceptable performance of all construction services of Western Excavating a Montana Corporation, pursuant to this agreement shall not exceed **ONE MILLION, TWO HUNDRED FORTY-FOUR THOUSAND, FOUR HUNDRED THIRTY-NINE DOLLARS (\$1,244,439.00)** as shown on Attachment B. The City may be billed monthly for all work completed in accordance with the terms of the contract. The Contractor may bill the City for advance purchase of products and materials necessary to complete the work.

No invoice shall include Federal excise tax, since the City is exempt therefrom and will furnish certificates of exemptions as needed. The Agency or Contractor must, in accordance with Section 15-50-206, Montana Code Annotated, withhold one percent (1%) of incremental payments due the Contractor or subcontractor. Amount withheld from the prime Contractor must be forwarded to the Department of Revenue.

This Agreement is conditioned upon the ability of the Contractor to complete the project at present material costs. The Contractor agrees to use best efforts to obtain the lowest possible prices from available material suppliers. If, during the performance of the lowest possible prices from the contract, the price of material significantly increases, through no fault of the Contractor, the contract unit price shall be adjusted. As used herein, a significant price increase shall mean an increase exceeding 10% between the date of bids received and completion date of the project. Such price increases shall be documented through invoices or receipts. This escalation provision only applies to the cost of: Diesel fuel (base bid \$4.75/Gal.), Concrete (base bid \$147/CY.), and Type C Asphalt (base bid \$600/Ton).

## **XIII. MODIFICATION AND WAIVER**

This Agreement may not be modified, altered, or changed except pursuant to a written agreement signed by the parties hereto. A waiver of any term or condition of this Agreement or of any breach of this Agreement shall not be deemed a waiver of any other term or condition of this Agreement or any part hereof or of any later breach of the Agreement. Any waiver must be in writing.

## **XIV. LICENSE TO DO BUSINESS**

Contractors, subcontractors, sub grantees, and other firms doing business with the City of Missoula or any agency connected with the City of Missoula must obtain or have a valid City of Missoula business license and must comply with applicable business regulation ordinances. No payments shall be made by the City pursuant to this Agreement until a valid City business license has been obtained. Contractor shall continue to retain a valid City business license during the term of this Agreement or the City has the right to withhold payments until such time as a valid City business license is acquired by Contractor.

## **XV. PREVIOUS AGREEMENTS**

This Agreement constitutes the entire understanding of the parties and is intended as a final expression of their agreement and a complete statement of the terms thereof. There are no promises, terms, conditions, or obligations, other than contained herein. This Agreement shall supersede all previous communications, representations, or agreements, either oral or written, between the parties.

## **XVI. PREVAILING WAGE**

For any contract let for City of Missoula construction, services, repair, or maintenance work under any law of the State of Montana that exceeds \$25,000, the Contractor is required to give preference to the employment of bona fide Montana residents in the performance of the work and to pay the standard prevailing rate of wages, including fringe benefits for health and welfare and pension contributions and travel allowance provisions in effect and applicable to Missoula County as defined in Section 8-2-403 MCA. Contractor is also required to comply with all requirements of Title 8, Chapter 2, Part 4 of the Montana Code Annotated.

## **XVII. PAYMENT PROCEDURES**

### Submittal and Processing of Payments

The Contractor shall submit Applications for Payment in accordance with the General Conditions. Applications for Payment will be processed by the Project Manager as provided in the Contract Documents.

#### 1. Progress Payments; Retainage

A. The Owner shall make progress payments in accordance with the General Conditions on account of the Contract Price on the basis of the Contractor's Applications for Payment as recommended by the Project Manager, once each month during construction as provided below. All progress payments will be on the basis of the progress of the Work measured by the number of units of each bid item completed times the bid unit price in the Unit Price Schedule of the Bid Form for that item.

1. Prior to Substantial Completion, progress payments will be made in an amount equal to the sum of the unit price items less the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as the Project Manager may determine or the Owner may withhold, in accordance with the General Conditions.

a. The Owner shall retain five percent (5%) of the amount of each payment until final completion and acceptance of all Work covered by the Contract Documents.

b. Retainage will be five percent (5%) of materials and equipment not incorporated in the Work (but delivered, suitably stored and accompanied by documentation satisfactory to the Owner as provided in the General Conditions).

2. Upon Substantial Completion and at the Owner's discretion, the amount of retainage may be further reduced if requested by the Contractor.
  3. Each application for payment shall be accompanied by an executed lien release form from the General Contractor. Upon request and prior to issuing final payment of the project, lien releases must be received from any Subcontractor and Supplier performing work on the project. Lien release shall be in a format acceptable to the Owner.
- B. Final Payment. Upon final completion and acceptance of the Work in accordance with the General Conditions, the Owner shall pay the remainder of the Contract Price as recommended by the Project Manager.

## **XVIII. INTEREST**

Not used. (Interest not allowed on unpaid balance.)

## **XIX. CONTRACTOR'S REPRESENTATION**

In order to induce the Owner to enter into this Agreement, the Contractor makes the following representations:

1. The Contractor has examined and carefully studied the Contract Documents (including all Addenda) listed in paragraph 9 and the other related data identified in the Bidding Documents.
  - A. The Contractor has visited the site and become familiar with and is satisfied as to the general, local and site conditions that may affect cost, progress, performance or furnishing of the Work.
  - B. The Contractor is familiar with and is satisfied as to all federal, state and local Laws and Regulations that may affect cost, progress, performance and furnishing of the Work.
  - C. The Contractor has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or contiguous to the site and all drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the site (except Underground Facilities) which have been identified in the Special Provisions as provided in paragraph 4.02 of the General Conditions and (2) reports and drawings of a Hazardous Environmental Condition, if any, at the Site which has been identified in the Special Provisions as provided in paragraph 4.06 of the General Conditions. The Contractor acknowledges that such reports and drawings are not Contract Documents and may not be complete for the Contractor's purposes. The Contractor acknowledges that the Owner and the Project Manager do not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities at or contiguous to the site.
  - D. The Contractor has obtained and carefully studied (or assumes responsibility for having done so) all such additional supplementary examinations, investigations, explorations, tests, studies and data concerning conditions (surface, subsurface and Underground Facilities) at or contiguous to the site or otherwise which may

affect cost, progress, performance or furnishing of the Work or which relate to any aspect of the means, methods, techniques, sequences and procedures of construction to be employed by the Contractor including applying the specific means, methods, techniques, sequences and procedures of construction, if any, expressly required by the Contract Documents to be employed by the Contractor, and safety precautions and programs incident thereto.

- E. The Contractor does not consider that any additional examinations, investigations, explorations, tests, studies or data are necessary for the performance and furnishing of the Work at the Contract Price, within the Contract Times and in accordance with the other terms and conditions of the Contract Documents.
- F. The Contractor is aware of the general nature of work to be performed by OWNER and others at the site that relates to the Work as indicated in the Contract Documents.
- G. The Contractor has correlated the information known to The Contractor, information and observations obtained from visits to the site, reports and drawings identified in the Contract Documents and all additional examinations, investigations, explorations, tests, studies and data with the Contract Documents.
- H. The Contractor has given PROJECT MANAGER written notice of all conflicts, errors, ambiguities or discrepancies that The Contractor has discovered in the Contract Documents and the written resolution thereof by PROJECT MANAGER is acceptable to the Contractor.
- I. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.

## **XX. CONTRACT DOCUMENTS**

The parties hereto agree that this Contract Agreement for the completion of the project herein referred to as is evidenced by the following contract documents:

- (1) This writing, entitled "Contract Agreement" (Including all Contract Documents made Part Hereof by Reference); and
- (2) Bid Proposal (Attachment B)
- (3) Project Special Conditions
- (4) General Conditions
- (5) Project Plans
- (6) Montana Prevailing Wage Rate for HEAVY CONSTRUCTION SERVICES
- (7) Notice of Award
- (8) Notice to Proceed

(9) Addenda #1 – 10' Chain link fence footing diameter

OWNER and CONTRACTOR each acknowledged delivery, concurrently with the execution of this Contract Agreement of a full, true, complete and identical counterpart of each such Contract Documents. Any further or additional contract documents (if any) shall be identified by the signature of both parties hereto, and made a part hereof by clear, written reference appended hereto.

#### **XXI. DEFAULT AND TERMINATION**

If either party fails to comply with any condition of this Agreement at the time or in the manner provided for, the other party may, at its option, terminate this Agreement and be released from all obligations if the default is not cured within ten (10) days after written notice is provided to the defaulting party. Said notice shall set forth the items to be cured. Additionally, the non-defaulting party may bring suit for damages, specific performance, and any other remedy provided by law. These remedies are cumulative and not exclusive. Use of one remedy does not preclude use of the others. Notices shall be provided in writing and hand-delivered or mailed to the parties at the addresses set forth in the first paragraph of this Agreement.

#### **XXII. LIAISON**

City's designated liaison with Contractor is **Garrick Swanson** and Contractor's designated liaison with City is **Eric Richards**.

#### **XXIII. JURISDICTION AND VENUE**

This Agreement and any extensions hereof shall be governed and constructed in accordance with the laws of the State of Montana, and the venue for any dispute shall be in Missoula County.

#### **XXIV. TERM OF AGREEMENT**

This contract agreement will be in force and effect on the date signed by the Mayor of the City of Missoula and shall run until all work is satisfactorily completed or, unless terminated in writing, provided hereinbefore. The work is to be completed on or before: July 15, 2022.

Contractor will commence work within ten (10) calendar days after the date of the written Notice to Proceed and shall complete the work as follows:

- Demolition, grading, and paving – November 25, 2022
- Install fencing and net posts - No sooner than 30 days after paving but before March 15, 2023
- Tennis Court Temporary Stripping - No sooner than 30 days after paving but before March 15, 2023
- Tennis Court Color Coat and Stripping – Start no sooner than June 1, 2023 with completion on or before July 15, 2023

## **XXV. MISCELLANEOUS**

### **1. Assignment of Contract.**

No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically, but without limitation, moneys that may come due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

### **2. Successors and Assigns**

The Owner and the Contractor each bind itself, its partners, successors, assigns and legal representatives to the other party hereto, its partners, successors, assigns and legal representatives in respect of all covenants, agreements and obligations contained in the Contract Documents.

### **3. Severability**

Any provision or part of the Contract Documents held to be void or unenforceable under a Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon the Owner and the Contractor, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.



IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year in this certificate first hereinabove written.

CONTRACTOR: Western Excavating Inc.

Address: 4685 Mullan Rd  
Missoula, MT 59808

\_\_\_\_\_  
Contractor's Authorized Signature

Date: \_\_\_\_\_

CITY OF MISSOULA

Address: 435 Ryman Street  
Missoula, Montana 59802

\_\_\_\_\_  
Mayor John Engen

Date: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Marty Rehbein, City Clerk

Date: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
Jim Nugent, City Attorney STATE OF MONTANA )

County of Missoula )

) ss

Date: \_\_\_\_\_

Attachments

- A. Affirmative Action Policy
- B. Contractors Completed Bid Form and Bid tabulations with alternates
- C. Project Manual + Drawings

## ATTACHMENT A

**AFFIRMATIVE ACTION POLICY.** Contractors, subcontractors, sub grantees, and other firms doing business with the City of Missoula must be in **compliance** with the City of Missoula's Affirmative Action Plan, and Title 49 Montana Codes Annotated, entitled "Human Rights" or forfeit the right to continue such business dealings.

### **The City's Affirmative Action Policy Statement is:**

The Mayor of the City of Missoula or the Mayor's designee may adopt an affirmative action plan to provide all persons equal opportunity for employment without regard to race, ancestry, color, disability, religion, creed, national origin, sexual orientation, gender identity or expression, age, marital status. In keeping with this commitment, we are assigning to all department heads and their staff the responsibility to actively facilitate equal employment opportunity for all present employees, applicants, and trainees. This responsibility shall include assurance that employment decisions are based on furthering the principle of equal employment opportunity by imposing only valid requirements for employment and assuring that all human resource actions are administered on the basis of job necessity.

Specific responsibility for developing, implementing, monitoring and reporting are assigned to the City Personnel staff under the supervision and direction of the Chief Administrative Officer and the Mayor.

It is the policy of the City of Missoula to eliminate any practice or procedure that discriminates illegally or has an adverse impact on an "affected" class. Equal opportunity shall be provided for all City employees during their terms of employment. All applicants for City employment shall be employed on the basis of their qualifications and abilities.

The City of Missoula, where practical, shall utilize minority owned enterprises and shall ensure that subcontractors and vendors comply with this policy. Failure of subcontractors and vendors to comply with this policy statement shall jeopardize initial, continued, or renewed funds.

Our commitment is intended to promote equal opportunity in all employment practices and provide a positive program of affirmative action for the City of Missoula, its employees, program participants, trainees and applicants.

## ATTACHMENT B

Bid Form						
Playfair Tennis Court Reconstruction w/ Western Excavating Proposal (7.1.2022)						
No.	Activity	Quantity	Unit	Unit Cost	Line Item Total	
1.0	<b>General Conditions</b>					
1.1	Mobilization and Demobilization, Bonds, Insurance, Permits	1	LS	\$25,000.00	\$25,000.00	
1.2	Temporary Traffic Control as needed or required	1	LS	\$10,000.00	\$10,000.00	
2.0	<b>Civil + Park</b>					
2.1	Temporary Construction Fencing as required or needed	1,500	LF	\$13.50	\$20,250.00	
2.2	Temporay Construction Access	1	LS	\$8,500.00	\$8,500.00	
2.3	Tree Protection Fencing as required or needed	700	LF	\$13.50	\$9,450.00	
2.4	Demo - Existing 10' Fence	1,610	LF	\$10.00	\$16,100.00	
2.5	Demo - Remove Existing Bituminous Pavement with Tennis Posts	88,026	SF	\$1.50	\$132,039.00	
2.6	Excavation	60	CY	\$40.00	\$2,400.00	
2.7	3/4" Minus Crushed Aggregate Base Course	580	CY	\$85.00	\$49,300.00	
2.9	Grading and Drainage - Fine Grade Base Course	84,550	SF	\$1.85	\$156,417.50	
2.10	10' Chainlink Fence	1,535	LF	\$65.75	\$100,928.25	
2.11	4' Gate in 10' Chainlink Fence	12	EA	\$765.00	\$9,180.00	
2.12	Trifluralin or Approved Equal	84,550	SF	\$0.10	\$8,455.00	
2.13	4" Concrete Sidewalk	100	SF	\$20.00	\$2,000.00	
2.14	4" thick Type C Bituminous Pavement	2,020	TON	\$205.00	\$414,100.00	
2.15	Contractor installed - owner provided tennis net and poles	12	EA	\$1,500.00	\$18,000.00	
2.16	Tennis Court Temporary Stripping	1	LS	\$15,000.00	\$15,000.00	
2.17	Tennis Court Color Coat and Striping	1	EA	\$205,000.00	\$205,000.00	
<b>Sub-Total</b>					<b>\$1,202,117.75</b>	
	Contingency & Accelleration Clause	1			\$30,000.00	
<b>Sub-Total</b>					<b>\$1,232,117.75</b>	
<b>GRT 1%</b>					<b>\$12,321.18</b>	
<b>Grand Total</b>					<b>\$1,244,439</b>	

Bidders information:

  
 \_\_\_\_\_  
 Authorized Signature

7-21-22  
 \_\_\_\_\_  
 Date

Western Excavating  
 \_\_\_\_\_  
 Company Name

11305  
 \_\_\_\_\_  
 MT Contractor #

**ATTACHMENT C**  
**Project Manual and Plans following this page**