

**AGREEMENT
BETWEEN OWNER AND CONTRACTOR FOR
CONSTRUCTION CONTRACT (STIPULATED PRICE)**

Prepared by



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National Society of Professional Engineers
1420 King Street, Alexandria, VA 22314-2794
(703) 684-2882
www.nspe.org

American Council of Engineering Companies
1015 15th Street N.W., Washington, DC 20005
(202) 347-7474
www.acec.org

American Society of Civil Engineers
1801 Alexander Bell Drive, Reston, VA 20191-4400
(800) 548-2723
www.asce.org

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**AGREEMENT
BETWEEN OWNER AND CONTRACTOR
FOR CONSTRUCTION CONTRACT (STIPULATED PRICE)**

THIS AGREEMENT is by and between City of Minot, P.O. Box 5006, 515 2nd Ave
SW, Minot, North Dakota 58702 ("Owner") and
Keller Paving and Landscaping, Inc., 1820 Highway 2 Bypass East, Minot, ND 58701 ("Contractor").

Owner and Contractor hereby agree as follows:

ARTICLE 1 – WORK

- 1.01 Contractor shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:

**Downtown Infrastructure Improvements Project – Phase 2
Storm Sewer District 119 – Phase 2 and Street Lighting District 64 – Phase 2
City of Minot, Ward County, North Dakota**

ARTICLE 2 – THE PROJECT

- 2.01 The Project, of which the Work under the Contract Documents is a part, is generally described as follows:

The Project Area is that portion of Downtown Minot generally bounded on the west by Broadway Street, on the south by Burdick Expressway, on the east by 3rd Street SE, and on the north by the BNSF Railway property and 1st Ave NE.

The Work includes, but is not limited to, construction of infrastructure replacement including new sanitary sewer mains and service lines, new storm sewer mains and inlets, new water mains and service lines, new sidewalks with ADA compliant pedestrian ramps, new concrete streets with new concrete curb and gutter, new signage and street striping, new street lighting, new streetscape components, demolition of existing items, and abandonment of existing sub-sidewalk vaults.

ARTICLE 3 – ENGINEER

- 3.01 The Project has been designed by HMjv, a joint venture between Houston Engineering, Inc. and MWH Americas, Inc.
- 3.02 The Owner has retained HMjv ("Engineer") to act as Owner's representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 4 – CONTRACT TIMES

- 4.01 *Time of the Essence*
- A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

4.02 *Contract Times: Dates*

A. The Work will be substantially completed on or before the Milestone completion dates reflected in paragraph 4.02.B, following the construction constraints reflected in paragraph 4.02.C, and shall be completed and ready for final payment in accordance with Paragraph 15.06 of the General Conditions on or before **December 17, 2016**.

B. Parts of the Work shall be substantially completed on or before the following Milestones:

Contract Milestone No.

Substantial Completion Date

1. All Work on:

July 16, 2016

- a. South Main Street from Central Ave to the north side of 2nd Ave SE
- b. 1st Ave SE
- c. 1st Ave SW between Main Street and the east side of 1st Street SW.
- d. 2nd Ave SE between 2nd Street SE and the west side of 1st Street SE.
- e. 1st Street SE between 2nd Ave SE and the south side of 3rd Ave SE.

2. All WORK on:

September 17, 2016

- a. 2nd Ave SE and 2nd Ave SW
- b. South Main Street from 2nd Ave SE/SW to Burdick Expressway

3. All Work on North Main Street

October 15, 2016

4. All WORK on:

November 19, 2016

- a. 1st Ave SW from 1st Street SW to Broadway
- b. 1st Street SE from 1st Ave SE to 2nd Ave SE
- c. 1st Street SE from 3rd Ave SE to Burdick Expressway

C. Construction Constraints:

1. Work on Milestone No. 2 shall not commence until work on Milestone No. 1 is substantially complete. Work on Milestone No. 4 shall not commence until work on Milestone No. 2 is substantially complete.
2. Completion of all underground utility work and concrete paving of streets, curb & gutter, and sidewalks establishes Substantial Completion.
3. Street Intersection Constraints:
 - a. No street intersection shall be closed to vehicular traffic for longer than 28 consecutive days.
 - b. Milestone No. 1: When the intersection of 2nd Ave SE and 1st Street SE is closed, the intersection of 3rd Ave SE and 1st Street SE shall remain open and passable for vehicles when utility work or paving is not being completed. To accomplish this, use of temporary gravel surfacing is required.

- c. **Milestone No. 2: When the intersection of Main Street and 2nd Ave SE/SW is closed, the intersection of Main Street and 3rd Ave SE/SW shall remain open and passable for vehicles when utility work or paving is not being completed. To accomplish this, use of temporary gravel surfacing is required.**
4. **Alleyways shall remain open and passable for vehicles when utility work or paving work is not being completed. To accomplish this, use of temporary gravel surfacing is required.**

4.03 Liquidated Damages

- A. Contractor and Owner recognize that time is of the essence as stated in Paragraph 4.01 above and that Owner will suffer financial and other losses if the Work is not completed and Milestones not achieved within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with the Contract. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty):
 1. Substantial Completion: Contractor shall pay Owner **\$2,400** for each day that expires after the time (as duly adjusted pursuant to the Contract) specified in Paragraph 4.02.A above for Substantial Completion until the Work is substantially complete.
 2. ~~Completion of Remaining Work: After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Time (as duly adjusted pursuant to the Contract) for completion and readiness for final payment, Contractor shall pay Owner \$_____ for each day that expires after such time until the Work is completed and ready for final payment.~~
 3. Liquidated damages for failing to timely attain Substantial Completion and final completion are not additive and will not be imposed concurrently.
 4. Milestones: Contractor shall pay Owner **\$2,400** for each day that expires after the time (as duly adjusted pursuant to the Contract) specified above for achievement of **Milestone 1, 2, 3, or 4 until Milestone 1, 2, 3, or 4 is achieved.**
- B. ~~Bonus: Contractor and Owner further recognize the Owner will realize financial and other benefits if the Work is completed prior to the time specified for Substantial Completion. Accordingly, Owner and Contractor agree that as a bonus for early completion, Owner shall pay Contractor \$_____ for each day prior to the time specified in Paragraph 4.02 for Substantial Completion (as duly adjusted pursuant to the Contract) that the Work is substantially complete. The maximum value of the bonus shall be limited to \$_____.~~

4.04 Special Damages

- A. In addition to the amount provided for liquidated damages, Contractor shall reimburse Owner (1) for any fines or penalties imposed on Owner as a direct result of the Contractor's failure to attain Substantial Completion according to the Contract Times, and (2) for the actual costs reasonably incurred by Owner for engineering, construction observation, inspection, and administrative services needed after the time specified in Paragraph 4.02 for Substantial Completion (as duly adjusted pursuant to the Contract), until the Work is substantially complete.

- B. After Contractor achieves Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Times, Contractor shall reimburse Owner for the actual costs reasonably incurred by Owner for engineering, construction observation, inspection, and administrative services needed after the time specified in Paragraph 4.02 for Work to be completed and ready for final payment (as duly adjusted pursuant to the Contract), until the Work is completed and ready for final payment.

ARTICLE 5 – CONTRACT PRICE

5.01 Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents the amounts that follow, subject to adjustment under the Contract:

- A. For all Work, at the prices stated in Contractor's Bid, attached hereto as an exhibit.

ARTICLE 6 – PAYMENT PROCEDURES

6.01 *Submittal and Processing of Payments*

- A. Contractor shall submit Applications for Payment in accordance with Article 15 of the General Conditions. Applications for Payment will be processed by Engineer as provided in the General Conditions.

6.02 *Progress Payments; Retainage*

- A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment **on a monthly basis** ~~or about the _____ day of each month~~ during performance of the Work as provided in Paragraph 6.02.A.1 below, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no Schedule of Values, as provided elsewhere in the Contract.
1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Owner may withhold, including but not limited to liquidated damages, in accordance with the Contract
 - a. **90 percent** of Work completed (with the balance being retainage). If the Work has been 50 percent completed as determined by Engineer, and if the character and progress of the Work have been satisfactory to Owner and Engineer, then as long as the character and progress of the Work remain satisfactory to Owner and Engineer, there will be no additional retainage; and
 - b. **90 percent** of cost of materials and equipment not incorporated in the Work (with the balance being retainage).
 - B. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to **97.5 percent** of the Work completed, less such amounts set off by Owner pursuant to Paragraph 15.01.E of the General Conditions, and less **150 percent** of Engineer's estimate of the value of Work to be completed or corrected as shown on the punch list of items to be completed or corrected prior to final payment.

6.03 *Final Payment*

- A. Upon final completion and acceptance of the Work in accordance with Paragraph 15.06 of the General Conditions, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in said Paragraph 15.06.

ARTICLE 7 – INTEREST

~~7.01 All amounts not paid when due shall bear interest at the rate of percent per annum.~~

ARTICLE 8 – CONTRACTOR'S REPRESENTATIONS

- 8.01 In order to induce Owner to enter into this Contract, Contractor makes the following representations:
 - A. Contractor has examined and carefully studied the Contract Documents, and any data and reference items identified in the Contract Documents.
 - B. Contractor has visited the Site, conducted a thorough, alert visual examination of the Site and adjacent areas, and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
 - C. Contractor is familiar with and is satisfied as to all Laws and Regulations that may affect cost, progress, and performance of the Work.
 - D. Contractor has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or adjacent to the Site and all drawings of physical conditions relating to existing surface or subsurface structures at the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings, and (2) reports and drawings relating to Hazardous Environmental Conditions, if any, at or adjacent to the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings.
 - E. Contractor has considered the information known to Contractor itself; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor; and (3) Contractor's safety precautions and programs.
 - F. Based on the information and observations referred to in the preceding paragraph, Contractor agrees that no further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract.
 - G. 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.
 - H. Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to 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.
- J. Contractor's entry into this Contract constitutes an incontrovertible representation by Contractor that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract Documents.

ARTICLE 9 – CONTRACT DOCUMENTS

9.01 *Contents*

- A. The Contract Documents consist of the following:
 - 1. This Agreement (pages 1 to 11, inclusive).
 - 2. Exhibit A to the Agreement (pages 1 to 16, inclusive).
 - 3. Performance bond (pages 1 to 3, inclusive).
 - 4. Payment bond (pages 1 to 3, inclusive).
 - 5. General Conditions (pages 1 to 65, inclusive).
 - 6. Supplementary Conditions (pages 1 to 6, inclusive).
 - 7. EDA Contracting Provisions for Construction Projects (pages 1 to 23, inclusive).
 - 8. DHUD Provisions (pages 1 to 22, inclusive).
 - 9. Davis-Bacon Wage Rates and Federal Labor Standards Provisions.
 - 10. Certification Regarding Lobbying.
 - 11. Notice of Requirements for Affirmative Action.
 - 12. DHUD Forms and Certifications
 - a. Minority and Women's Business Enterprise Utilization Worksheet
 - b. Certification of Bidder Regarding Equal Employment Opportunity
 - c. Certification of Bidder Regarding Section 3 and Segregated Facilities
 - d. Contractor's Certification Concerning Labor Standards and Prevailing Wage Requirements
 - e. Noncollusion Affidavit of Prime Bidder
 - f. Certification by Proposed Subcontractor Regarding Equal Employment Opportunity
 - g. Certification of Proposed Subcontractor Regarding Section 3 and Segregated Facilities
 - h. Subcontractor's Certification Concerning Labor Standards & Prevailing Wage Requirements
 - i. Noncollusion Affidavit of Subcontractor
 - j. Certification Regarding Debarment and Suspension
 - 13. Specifications as listed in the table of contents of the Project Manual.

14. Drawings (not attached but incorporated by reference) consisting of **206** sheets with each sheet bearing the following general title: **_____** ~~[or]~~ the Drawings listed on the attached sheet index.
15. Addenda (numbers **1** to **2**, inclusive).
16. Exhibits to this Agreement (enumerated as follows):
 - a. Contractor's Bid (pages **1** to **65**, inclusive).
17. The following which may be delivered or issued on or after the Effective Date of the Contract and are not attached hereto:
 - a. Notice to Proceed.
 - b. Work Change Directives.
 - c. Change Orders.
 - d. Field Orders.
- B. The documents listed in Paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in the General Conditions.

ARTICLE 10 – MISCELLANEOUS

10.01 Terms

- A. Terms used in this Agreement will have the meanings stated in the General Conditions and the Supplementary Conditions.

10.02 Assignment of Contract

- A. Unless expressly agreed to elsewhere in the Contract, no assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, money that may become due and money that is 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.

10.03 Successors and Assigns

- A. Owner and Contractor each binds itself, its successors, assigns, and legal representatives to the other party hereto, its successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

10.04 Severability

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and 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.

10.05 *Contractor's Certifications*

- A. Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 10.05:
1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;
 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;
 3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
 4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

10.06 *Other Provisions*

- A. In accordance with City of Minot Standard Specifications and General Conditions, Contractor acknowledges the TWO YEAR warranty correction period contract requirement as further detailed in Supplementary General Conditions paragraph SC-15.08.A.
- B. Equipment or products to be purchased by the EDA award funds must be American made, to the maximum extent possible, in accordance with Public Law 103-121, Sections 606 (a) and (b).

IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement.

This Agreement will be effective on **April 15, 2016** (which is the Effective Date of the Contract).

OWNER:

CONTRACTOR:

City of Minot

Keller Paving and Landscaping, Inc.

By: 

By: 

Title: Mayor

Title: President

(If Contractor is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: 

Attest: 

Title: City Clerk

Title: Vice President

Address for giving notices:

PO Box 5006

515 2nd Ave SW

Minot, ND 58702

Address for giving notices:

Keller Paving and Landscaping, Inc.

1820 Highway 2 Bypass East

Minot, ND 58701

License No.: 24502, Class A

(If Owner is a corporation, attach evidence of authority to sign. If Owner is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of this Agreement.)

Dun & Bradstreet (D-U-N-S) No.: 877268169

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