



## **CONSTRUCTION AGREEMENT**

**THIS AGREEMENT** is made and entered into \_\_\_\_\_, by and between the **CITY OF BILLINGS, MONTANA**, a municipal corporation organized and existing under the laws of the State of Montana, P.O. Box 1178, Billings, Montana 59103, hereinafter referred to as "**CITY**," and **FINISHING TOUCH EXTERIORS, INC**, of P.O. Box 30556, Billings, MT 59107 hereinafter referred to as "**CONTRACTOR**."

In consideration of the mutual covenants and agreements herein contained, the receipt and sufficiency whereof being hereby acknowledged, the parties hereto agree as follows:

1. **PURPOSE**: **CITY** agrees to hire **CONTRACTOR** as an independent contractor to perform the services of general contracting hail repairs described in the Scope of Work attached hereto as Exhibit "A" and by this reference made a part hereof.
2. **EFFECTIVE DATE**: This **AGREEMENT** is effective upon the date of its execution and will terminate on July 31, 2023. The parties may extend this **AGREEMENT**, by mutual concurrence, for sixty days, in writing prior to its termination.
3. **SCOPE OF WORK**: The **CONTRACTOR** shall perform the services outlined in Exhibit "A". In performing these services, the **CONTRACTOR** shall at all times comply with all federal, state and local statutes, rules and ordinances applicable. These services and all duties incidental or necessary therefor, shall be performed diligently and completely and in accordance with professional standards of conduct and performance.
4. **INCORPORATION BY REFERENCE**: All exhibits and addenda attached hereto, as well as any bid or proposal referenced, are hereby incorporated into this **AGREEMENT** and made a part hereof. If there is any conflict between such exhibits or addenda and the terms of this **AGREEMENT**, the terms of this **AGREEMENT** shall control.
5. **PAYMENT**: **CITY** agrees to pay **CONTRACTOR** six hundred forty-six thousand seven hundred fifty dollars (\$646,750.00) for the work described in the Scope of Work in Exhibit "A". Any alteration or deviation from the described work that involves extra costs will be executed 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 upon any extra charges in writing.

Except as otherwise specified herein, the **CONTRACTOR** shall invoice the **CITY** monthly (or on such other basis as the Parties may mutually determine) for all services rendered pursuant to this **AGREEMENT**. Such invoices shall specify the



services provided to the **CITY** during the preceding month and identify the applicable fees, and shall be accompanied by reasonable documentation or other reasonable explanations supporting such charges.

Except as otherwise specified herein, the **CITY** shall pay, net of applicable withholding tax, if any, the **CONTRACTOR** for said invoice within thirty (30) days after receipt.

If partial payment is requested by **CONTRACTOR**, it shall be made upon invoice and said estimate being proportioned to the work completed by the **CONTRACTOR**. **CITY** shall deduct five percent (5%) from each pay estimate to be held until the completion of the final scope of work. The final payment shall be made only after acceptance of final invoice by the **CITY**, and determination has been made by the **CITY** that the scope of work has been satisfactorily completed.

The prices established in this **AGREEMENT** may be extended to other political subdivisions within the State of Montana solely at the **CONTRACTOR'S** discretion.

6. **LIQUIDATED DAMAGES:** If **CONTRACTOR** does not complete the work by the designated contract date(s), liquidated damages will be assessed in the form of a daily charge for each day, except Saturdays, Sundays, and legal holidays which exceed the contract date.

The daily charge(s) are stipulated to be reasonable quantifications of the damages incurred by the **CITY**:

- Liquidated damages for failure to complete project: \$150.00 per day.
- The charge(s) will be deducted from money due the **CONTRACTOR**.

7. **INDEPENDENT CONTRACTOR STATUS:** The parties agree that **CONTRACTOR** is an independent contractor for purposes of this **AGREEMENT** and is not to be considered an employee of the **CITY** for any purpose. **CONTRACTOR** is not subject to the terms and provisions of the **CITY's** personnel policies handbook and may not be considered a **CITY** employee for workers' compensation or any other purpose. **CONTRACTOR** is not authorized to represent the **CITY** or otherwise bind the **CITY** in any dealings between **CONTRACTOR** and any third parties.

8. **INDEMNITY:**

The **CONTRACTOR** SHALL:



- A. Indemnify, defend, and save **CITY**, its officers, agents and employees harmless from any and all losses, damage and liability occasioned by, growing out of, or in any way arising or resulting from any intentional or negligent act on the part of **CONTRACTOR** or its agents or employees.
- B. Not indemnify, defend, save, and hold the **CITY** harmless from claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses or attorneys' fees and costs arising from wrongful or negligent acts, error or omission solely of the **CITY** occurring during the course of or as a result of the performance of the **AGREEMENT**.
- C. Where claims, lawsuits or liability, including attorneys' fees and costs arise from wrongful or negligent act of both the **CITY** and the **CONTRACTOR**, the **CONTRACTOR** shall indemnify, defend, save, and hold the **CITY** harmless from only that portion of claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses including attorneys' fees and costs, which result from the **CONTRACTOR'S** or any subcontractor's wrongful or negligent acts occurring as a result from the **CONTRACTOR'S** performance pursuant to this **AGREEMENT**.

The **CITY** SHALL:

- D. Indemnify, defend and save **CONTRACTOR**, its officers, agents and employees harmless from any and all losses, damage and liability occasioned by, growing out of, or in any way arising or resulting from any intentional or negligent act on the part of **CITY** or its agents or employees.
- E. Not indemnify, defend, save and hold the **CONTRACTOR** harmless from claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses or attorneys' fees and costs arising from wrongful or negligent acts, error or omission solely of the **CONTRACTOR** occurring during the course of or as a result of the performance of the **AGREEMENT**.
- F. Where claims, lawsuits or liability, including attorneys' fees and costs arise from wrongful or negligent act of both the **CONTRACTOR** and the **CITY**, the **CITY** shall indemnify, defend, save, and hold the **CONTRACTOR** harmless from only that portion of claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses including attorneys' fees and costs, which result from the **CITY'S** or any subcontractor's wrongful or negligent acts occurring as a result from the **CITY'S** performance pursuant to this **AGREEMENT**.

**9. INSURANCE:** The **CONTRACTOR** shall maintain in good standing the insurance described in this Section. Before rendering any services under this



**AGREEMENT**, the **CONTRACTOR** shall furnish the **CITY** with proof of insurance in accordance with this Section.

The **CONTRACTOR** shall provide the following insurance:

- 1) Workers' compensation and employer's liability coverage as required by Montana law.
- 2) Commercial general liability, including contractual and personal injury coverage's -- \$750,000 per claim and \$1,500,000 per occurrence.
- 3) Automobile liability -- \$1,500,000 per accident.

Each policy of insurance required by this Section shall provide for no less than 30 days' advance written notice to the **CITY** prior to cancellation.

The **CITY** shall be listed as an additional insured on all policies except Worker's Compensation Policies.

**CONTRACTOR** shall comply with the applicable requirements of the Workers' Compensation Act, Title 39, Chapter 71, MCA, and the Occupational Disease Act of Montana, Title 39, Chapter 71, MCA.

**CONTRACTOR** shall maintain workers' compensation insurance coverage for all members and employees of **CONTRACTOR's** business, except for those members who are exempted as independent contractors under the provisions of §39-71-401, MCA.

**CONTRACTOR** shall furnish **CITY** with copies showing one of the following: **(1)** proof of registration as a registered contractor under Title 39, Chapter 9, MCA; **(2)** a binder for workers' compensation coverage by an insurer licensed and authorized to provide workers' compensation insurance in the State of Montana; or **(3)** proof of exemption from workers' compensation granted by law for independent contractors.

**CONTRACTOR** shall furnish an approved Performance Bond and a Labor and Materials Payment Bond, each in the amount of one hundred percent (100%) of the contract amount.

**10. PERMITTING AND INSPECTIONS:**

- A. **CONTRACTOR** to obtain all required permits before beginning construction. Cost of permits shall be billed to the **CITY** as a reimbursable expense with no mark-up.
- B. **CONTRACTOR** to obtain all required inspections during construction and at final completion.

**11. EQUIPMENT AND MATERIALS CUSTODY:**



- A. **CITY** shall not be responsible for any equipment or materials until it is installed and commissioned.
- B. If materials or equipment go missing for any reason before they are installed and commissioned, they shall be replaced at no cost to **CITY**.
- C. All equipment and materials shall be secured and stored by **CONTRACTOR** in a location approved by the **CITY** or offsite.
- D. If arrangements are made to store onsite **CITY** shall not be responsible for any missing items.
- E. **CITY** will not take delivery of any equipment or materials.
- F. All equipment and materials must be brought onsite by **CONTRACTOR**.

**12. EQUIPMENT AND MATERIALS INVENTORY:**

- A. A detailed inventory list shall be provided by **CONTRACTOR** to **CITY** upon **CONTRACTOR** mobilization or project commencement.
- B. Inventory list to include material information (make, model, etc.), and quantity.
- C. When an item is installed and commissioned it shall be deducted from the inventory list.

**13. WARRANTY: **CONTRACTOR** warrants that all services and work will be performed in a good workman-like manner. **CONTRACTOR** acknowledges that it will be liable for any breach of this warranty for the lesser period of two (2) years from the time services are completed or any warranty described in the Scope of Work in Exhibit "A".**

**14. COMPLIANCE WITH LAWS: **CONTRACTOR** agrees to comply with all federal, state, and local laws, ordinances, rules, and regulations. **CONTRACTOR** agrees to purchase a **CITY** business license.**

**15. PREVAILING WAGE RATES: Unless superseded by federal law, Montana law requires that contractors and subcontractors give preference to the employment of Montana residents for any public works contract in excess of \$25,000 for construction or nonconstruction services in accordance with sections 18-2-401 through 18-2-432, MCA, and all administrative rules adopted pursuant thereto. Unless superseded by federal law, each contractor shall ensure that at least 50% of the contractor's workers performing labor on a construction project are bona fide Montana residents. The Commissioner of the Montana Department of Labor and Industry has established the resident requirements in accordance with sections 18-2-403 and 18-2-409, MCA. Any and all questions concerning prevailing wage and Montana resident issues should be directed to the Montana Department of Labor and Industry.**



In addition, unless superseded by federal law, all employees working on a public works contract shall be paid prevailing wage rates in accordance with sections 18-2-401 through 18-2-432, MCA, and all administrative rules adopted pursuant thereto. Montana law requires that all public works contracts, as defined in section 18-2-401, MCA, in which the total cost of the contract is in excess of \$25,000, contain a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, travel, per diem, and zone pay that the contractors, subcontractors, and employers shall pay during the public works contract.

Section 18-2-406, MCA, requires that all contractors, subcontractors, and employers who are performing work or providing services under a public works contract post in a prominent and accessible site on the project staging area or work area, no later than the first day of work and continuing for the entire duration of the contract, a legible statement of all wages and fringe benefits to be paid to the employees in compliance with section 18-2-423, MCA. Section 18-2-423, MCA, requires that employees receiving an hourly wage must be paid on a weekly basis.

Furthermore, Section 18-2-417, requires allowance for a 3% annual increase in wages for a multiyear contract. (1) Any public works contract that by the terms of the original contract calls for more than 30 months to fully perform must include a provision to adjust, as provided in subsection (2), the standard prevailing rate of wages to be paid to the workers performing the contract. (2) The standard prevailing rate of wages paid to workers under a contract subject to this section must be adjusted 12 months after the date of the award of the public works contract. The amount of the adjustment must be a 3% increase. The adjustment must be made and applied every 12 months for the term of the contract. (3) Any increase in the standard rate of prevailing wages for workers under this section is the sole responsibility of the contractor and any subcontractors and not the contracting agency.

Each contractor, subcontractor, and employer must maintain payroll records in a manner readily capable of being certified for submission under section 18-2-423, MCA, for not less than three years after the contractor's, subcontractor's, or employer's completion of work on the public works contract.

The nature of the work performed or services provided under this contract meets the statutory definition of a "public works contract" under section 18-2-401(11)(a), MCA. The booklet is attached and may also be found at <http://erd.dli.mt.gov/labor-standards/state-prevailing-wage-rates>.

16. **CONTRACTORS' GROSS RECEIPTS TAX:** **CONTRACTOR** understands that all contractors or subcontractors working on a publicly funded construction project, including any work requiring the installation, addition, placement, replacement, or removal of any equipment, parts, structures, or materials of any kind whatsoever, are required to pay or have withheld from earnings one percent



(1%) of the gross contract price if the gross contract price is Five Thousand Dollars (\$5,000) or more.

**17. NONDISCRIMINATION:**

- A. **CONTRACTOR** shall, in performance of work under this **AGREEMENT**, fully comply with all applicable federal, state, or local laws, rules, regulations, and executive orders including but not limited to, the Montana Human Rights Act, the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. **CONTRACTOR** is the employer for the purpose of providing healthcare benefits and paying any applicable penalties, fees and taxes under the Patient Protection and Affordable Care Act [P.L. 111-148, 124 Stat. 119]. Any subletting or subcontracting by **CONTRACTOR** subjects subcontractors to the same provisions. In accordance with 49-3-207, MCA, and Executive Order No. 04-2016. **CONTRACTOR** agrees that the hiring of persons to perform this Contract will be made on the basis of merit and qualifications and there will be no discrimination based on race, color, sex, pregnancy, childbirth or medical conditions related to pregnancy or childbirth, political or religious affiliation or ideas, culture, creed, social origin or condition, genetic information, sexual orientation, gender identity or expression, national origin, ancestry, age, disability, military service or veteran status, or marital status by the persons performing this **AGREEMENT**.
- B. The **CONTRACTOR** shall state, in all solicitations or advertisements for employees to work on jobs, that all qualified applicants will receive equal consideration for employment without regard to race, color, religion, national origin, ancestry, age, sex or marital status, or mental or physical impairment/disability.

The **CONTRACTOR** and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a) and 41 CFR 60-741.5(a), which prohibit discrimination against qualified protected veterans and/or qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities.

The **CONTRACTOR** and any subcontractor shall abide by the requirements of 41 CFR 60-1.4, which states employees or applicants may not be discharged or in any other manner discriminated against because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to



compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the **CONTRACTOR'S** legal duty to furnish information.

- C. The **CONTRACTOR** shall comply with any and all reporting requirements that may apply to it that the **CITY** may establish by regulation.
  - D. The **CONTRACTOR** shall comply with all applicable federal, state, and city laws concerning the prohibition of discrimination.
  - E. The **CONTRACTOR** shall include the provisions of Subsections A through D of this Section in every subcontract or purchase order under this **AGREEMENT**, so as to be binding upon every such subcontractor or vendor of the **CONTRACTOR** under this **AGREEMENT**.
  - F. 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.
18. **CONTRACTOR PERSONNEL:** A list of personnel who will be onsite for project shall be provided by **CONTRACTOR** to **CITY** within 10 business days of contract execution, including:
- A. First and last name;
  - B. Duration onsite; and,
  - C. Personnel responsibilities.
19. **SAFETY PROGRAM:** **CONTRACTOR** to provide **CITY** with safety program within 10 business days of contract execution.
20. **MEETINGS:** **CONTRACTOR** shall attend a pre-construction meeting with **CITY** representatives, as well as progress meetings as requested by the **CITY**.
21. **PROJECT SCHEDULE TIMELINE:** A project schedule timeline shall be provided by **CONTRACTOR** to **CITY** within 10 business days of contract execution.

Accepted schedule formats are Gantt chart, network diagram, critical path diagram, or sequential flow chart.

A Phase-Based Work-Breakdown Structure (WBS) by resource shall be provided by **CONTRACTOR** to **CITY** within 10 business days of contract execution and shall include a decomposed project scope consisting of phases and deliverables, tasks, and component deadlines.

If for any reason **CONTRACTOR** (or any subcontractors) fall behind on approved schedule, **CONTRACTOR** shall take all necessary actions to bring project back on schedule with no additional expense to the **CITY**.



22. **EXTENSION OF CONTRACT TIME DUE TO WEATHER DELAYS:** **CONTRACTOR** shall schedule the work to be completed within the contract time stipulated in the **AGREEMENT**. **CONTRACTOR'S** progress schedule shall include an allowance for time lost due to normal adverse weather. "Adverse weather" is defined as atmospheric conditions at a definite time and place that are unfavorable to construction activities. Adverse weather occurrences will not constitute justification for an extension of contract time unless the total time lost due to weather occurrences exceeds ten (10) percent of the contract time stipulated in the **AGREEMENT**. If the total time lost due to adverse weather exceeds the 10%, the contract time will be adjusted for each adverse weather day after the 10% is reached. **CONTRACTOR** shall, throughout the Project, record occurrences of adverse weather and resultant impacts to normally scheduled work, as well as the lingering effects of the occurrence. Adverse weather must prevent work on critical path activities for 50 percent or more of **CONTRACTOR'S** scheduled workday and actually cause a delay to the completion of the Project to be considered an adverse weather delay day. **CONTRACTOR** shall, in a timely manner, submit a written record of each adverse weather occurrence to **CITY** for approval.
23. **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) calendar 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**.
24. **LIAISON:** The **CITY's** designated liaison for this **AGREEMENT** is John Caterino and the **CONTRACTOR's** designated liaison for this **AGREEMENT** is Nate Weaver.
25. **GOVERNING LAW AND VENUE:** This **AGREEMENT** shall be construed and enforced in accordance with the laws of the State of Montana. Venue for any suit between the parties arising out of this **AGREEMENT** shall be the State of Montana Thirteenth Judicial District Court, Yellowstone County.
26. **SEVERABILITY:** Any provision or part of the **AGREEMENT** 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 the **CITY** and the **CONTRACTOR**, who agree that the **AGREEMENT** 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.



27. **SUCCESSORS AND ASSIGNS:** Neither the **CITY** nor the **CONTRACTOR** shall assign, transfer or encumber any rights, duties or interests accruing from this **AGREEMENT** without the written consent of the other.
28. **OWNERSHIP OF DOCUMENTS:** All documents, data, drawings, specifications, software applications and other products or materials produced by the **CONTRACTOR** in connection with the services rendered under this **AGREEMENT** shall be the property of the **CITY** whether the project for which they are made is executed or not. All such documents, products and materials shall be forwarded to the **CITY** at its request and may be used by the **CITY** as it sees fit. The **CITY** agrees that if the documents, products, and materials prepared by the **CONTRACTOR** are used for purposes other than those intended by the **AGREEMENT**, the **CITY** does so at its sole risk and agrees to hold the **CONTRACTOR** harmless for such use. All or any portions of materials, products and documents produced under this **AGREEMENT** may be used by the **CONTRACTOR** upon confirmation from the **CITY** that they are subject to disclosure under the Public Disclosure Act. All services performed under this **AGREEMENT** will be conducted solely for the benefit of the **CITY** and will not be used for any other purpose without written consent of the **CITY**. Any information relating to the services will not be released without the written permission of the **CITY**. The **CONTRACTOR** shall preserve the confidentiality of all **CITY** documents and data accessed for use in **CONTRACTOR**'s work product.



**IN WITNESS WHEREOF**, the parties hereto have executed this instrument the day and year first above written.

**CITY OF BILLINGS, MONTANA**

**FINISHING TOUCH EXTERIORS, INC**

\_\_\_\_\_  
**WILLIAM A. COLE,  
MAYOR**

\_\_\_\_\_  
**SIGNATURE**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
**PRINT NAME**

\_\_\_\_\_  
**CITY ATTORNEY'S OFFICE**

\_\_\_\_\_  
**PRINT TITLE**

**ATTEST:**

\_\_\_\_\_  
**DENISE BOHLMAN, CITY CLERK**



## EXHIBIT A

### SCOPE OF WORK

All services to be rendered at

**Site Name:** Billings Community Center

**Site Address:** 360 N 23<sup>rd</sup> St. Billings, MT 59101

**Tax ID:** A00216

**Legal Description:** BILLINGS ORIGINAL TOWNSITE, S33, T01 N, R26 E, BLOCK 40, LOT 5-12

Alternates #1 and #2 were selected.

Alternate #1 is to replace exterior siding with approved lap siding product as specified in lieu of steel siding material included in the Base Bid – see Exhibit B for specific product.

Alternate #2 is to replace membrane roofing with a single ply roofing system as specified in lieu of differing ply roofing systems (not including the asphalt shingle roofing) included in the Base Bid – see Exhibit B for specific product.

All work will be subject to Exhibit B Project Manual and Specification dated 3/2023.

Detailed scope of work is included in Exhibit C drawings dated 3/9/23 and titled  
“Hail Damage Repairs  
Billings Community Center  
360 North 23<sup>rd</sup> Street  
Billings, MT 59101”