

AGREEMENT

for the Service of the

City of San Luis

Municipal Pool Renovation and Repair Project

This agreement ("AGREEMENT") is made and entered into this ____ day of March 2024, by and between:

D W D Construction
13461 S Avenue B
Yuma, Arizona 85365, a sole proprietorship of Nathaniel David Darnell, Jr., doing business as D W D Construction ("CONTRACTOR" or "Vendor") and

City of San Luis
1090 E Union St. (Physical Address)
P.O. Box 3750 (Mailing Address)
San Luis, Arizona 85349, a municipal corporation organized under the laws of Arizona ("OWNER" or "City of San Luis")

The CONTRACTOR and OWNER may be referred to individually as the Party and collectively as the Parties.

WITNESSETH: The CONTRACTOR, for and in consideration of the sum of **\$286,859.67**, to be paid him by the OWNER, in the manner and at the time provided in this AGREEMENT, and of the other covenants and agreements herein contained, and under the penalties expressed in the bonds provided, hereby agrees, for himself, his heirs, executors, administrators, successors, and assigns as follows:

ARTICLE I - SCOPE OF WORK: The CONTRACTOR shall furnish any and all labor, materials, equipment, transportation, utilities, services, and facilities required to perform all work for the **City of San Luis – Municipal Pool Renovation and Repairs** ("PROJECT"), per the CONTRACTOR's bid of February 8, 2024, ("PROPOSAL"). and to completely and totally remove and install the materials therein for the OWNER, in a good and workmanlike and substantial manner and to the satisfaction of the OWNER through its engineers or properly authorized agents ("ENGINEER").

ARTICLE II - AGREEMENT DOCUMENTS: The advertisement for bids, the Request for Proposal ("RFP") for the City of San Luis Pool Renovation and Repairs Project at Municipal Pool at 981 N. Park Avenue, San Luis ("PROJECT"), the CONTRACTOR's Proposal ("PROPOSAL"), Addenda, Bonds required by the RFP, documents or submittals required by the RFP, Certificates of Insurance required by the RFP, Change Orders, if any, are, by this reference made a part of this AGREEMENT to the same extent as if fully set forth again in full. Part 100 of the 2015 Maricopa Association of

Governments Uniform Standard Specifications for Public Works Construction, as adopted by the City of San Luis as its Public Works Standards ("Part 100"), shall apply to this AGREEMENT. In the event of a conflict between Part 100 and the RFP, the terms and conditions of the RFP shall control. All references to the Engineer in Part 100 shall refer to the Assistant Director of Parks and Recreation.

ARTICLE III - LEGAL ARIZONA WORKERS ACT COMPLIANCE: To the extent applicable under A.R.S. § 41-4401, the CONTRACTOR and its subcontractors warrant compliance with the federal immigration laws and regulations that relate to their Employees and compliance with the E-Verify requirements under A.R.S. § 23-214(A). The CONTRACTOR or subcontractors' breach of the above-mentioned warranty shall be deemed a material breach of the AGREEMENT. The breach may result in the termination of the AGREEMENT by the OWNER. OWNER retains the legal right to randomly inspect the papers and records of the CONTRACTOR and its subcontractors who work on the AGREEMENT to ensure that the CONTRACTOR and its subcontractors are complying with the above-mentioned warranty. The CONTRACTOR and its subcontractors warrant to keep the papers and records open for the OWNER's inspection during regular business hours and to cooperate with the OWNER's inspections.

ARTICLE IV - CERTIFICATION REQUIRED BY ARIZONA STATUTE: Pursuant to A.R.S. § 35-393,01, CONTRACTOR hereby certifies, to the extent permitted by law, that it does not participate in and agrees not to participate in during the term of this AGREEMENT a boycott of Israel. Under A.R.S. § 35-394, the CONTRACTOR certifies by signing this AGREEMENT, to the extent permitted by law, that it does not currently, and agrees for the duration of the AGREEMENT that it will not, use:

1. The forced labor of ethnic Uyghurs in the People's Republic of China.
2. Any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China.
3. Any contractors, subcontractors, or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China.

The CONTRACTOR certifies that if the CONTRACTOR becomes aware during the term of the AGREEMENT that the CONTRACTOR is not in compliance with the written certification, the CONTRACTOR shall notify the OWNER within five (5) business days after becoming aware of the noncompliance. If the CONTRACTOR does not provide the OWNER with a written certification that the CONTRACTOR has remedied the noncompliance within one hundred eighty days after notifying the OWNER of the noncompliance, The AGREEMENT terminates, except that if the AGREEMENT termination date occurs before the end of the remedy period, the AGREEMENT terminates on the AGREEMENT termination date.

ARTICLE V - CONFLICT OF INTEREST: All Parties acknowledge that this AGREEMENT is subject to cancellation for conflict of interest pursuant to the provisions of A.R.S. § 38-511.

ARTICLE VI - TIME OF COMPLETION: The CONTRACTOR further covenants and agrees, at its own proper cost and expense, to do all work as aforesaid for the construction of said improvements and to completely construct the same and install the material therein, as called for by this AGREEMENT free and clear of all claims, liens, and charges whatsoever, in the manner and under the conditions specified within the time, or times, stated in the PROPOSAL Pamphlet.

ARTICLE VII - PAYMENTS: For and in consideration of the faithful performance of the work herein embraced as set forth in the AGREEMENT DOCUMENTS, which are a part hereof and in accordance with the directions of the OWNER, through its Engineer, and to his satisfaction, the OWNER agrees to pay the said CONTRACTOR the amount earned, computed from actual quantities of work performed and accepted or materials furnished at the unit bid price on the PROPOSAL made a part hereof, and to make such payments.

ARTICLE VIII - INDEMNIFICATION: CONTRACTOR and/or subcontractors shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this AGREEMENT are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the CONTRACTOR, his agents, representatives, employees, or subcontractors.

The insurance requirements herein are minimum requirements for the AGREEMENT and in no way limit the indemnity covenants contained in the AGREEMENT.

The OWNER in no way warrants that the minimum limits contained herein are sufficient to protect the CONTRACTOR from liabilities that might arise out of the performance of the work under this AGREEMENT by the CONTRACTOR, his agents, representatives, employees, or subcontractors. The CONTRACTOR is free to purchase such additional insurance as necessary.

Additional Insurance Requirements: The policies shall include, or be endorsed to include, the following provisions:

1. On insurance policies where the City of San Luis is named as an additional insured, the City of San Luis shall be an additional insured to the full limits of liability purchased by the CONTRACTOR even if those limits of liability are in excess of those required by this AGREEMENT.

Additional Insured:

City of San Luis
1090 E Union Street

P.O. Box 1170
San Luis, Arizona 85349

2. The CONTRACTOR's insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.

All certificates required by this AGREEMENT shall be emailed directly to msabori@sanluisaz.gov and lvarela@sanluisaz.gov. The PROJECT shall be noted on the certificate of insurance as the "City of San Luis Pool Renovation and Repairs Project." The OWNER reserves the right to require complete, certified copies of all insurance policies required by this AGREEMENT at any time. Any Renewal of insurance certificates with endorsements will need to be emailed to msabori@sanluisaz.gov and lvarela@sanluisaz.gov at least two weeks prior to expiration.

Notice of Cancellation: With the exception of a ten (10) day notice of cancellation for nonpayment of premium, any changes to the insurance policies above shall require thirty (30) days written notice.

Acceptability of Insurers: Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VII unless otherwise approved by the City of San Luis Risk Management Division.

Verification of Coverage: The CONTRACTOR shall furnish the OWNER with certificates of insurance (ACORD form or equivalent approved by the OWNER) as required by this AGREEMENT. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

All certificates and any required endorsements are to be received and approved by the OWNER before work commences. Each insurance policy required by this AGREEMENT must be in effect at or prior to the commencement of work under this AGREEMENT and remain in effect for the duration of the AGREEMENT. Failure to maintain the insurance policies as required by this AGREEMENT or to provide evidence of renewal is a material breach of the AGREEMENT.

Insurance Limit Requirements – The CONTRACTOR shall provide coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a following form basis.

Commercial General Liability – Occurrence Form:

The policy shall include bodily injury, property damage, personal injury, and broad-form contractual liability coverage.

- General Aggregate \$ 2,000,000
- Products-Completed Operations Aggregate \$ 1,000,000 (if applicable)

- Personal and Advertising Injury \$ 1,000,000 (if applicable)
- Each Occurrence \$ 1,000,000
- Fire Legal Liability (Damage to Rented Premises) \$ 100,000 (if applicable)

The policy shall be endorsed to include the following additional insured language: "The City of San Luis shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of, the Vendor."

Business Automobile Liability: Bodily Injury and Property Damage for any owned, hired, and/or non-owned vehicles used in the performance of this AGREEMENT.

Combined Single Limit (CSL) \$ 1,000,000

The policy shall be endorsed to include the following additional insured language: "The City of San Luis shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Vendor."

Worker's Compensation and Employer's Liability:

Workers' Compensation Statutory Employer's Liability

Each Accident - \$ 1,000,000

Disease – each employee - \$ 1,000,000

Disease – policy limit - \$ 1,000,000

The policy shall contain a waiver of subrogation against the OWNER for losses arising from work performed by or on behalf of the Vendor (CONTRACTOR).

All insurance required pursuant to this AGREEMENT must be written by an insurance company authorized to do business in the State of Arizona, to be evidenced by a Certificate of Authority as defined in A.R.S. § 20-217, a copy of which certificate is to be attached to each applicable bond or binder.

Prior to commencing work under this AGREEMENT, the CONTRACTOR shall provide OWNER with evidence that it is either a "self-insured employer" or a "carrier-insured employer" for Workers' Compensation as required by A.R.S. § 23-901 et seq. or that it employs no persons subject to the requirement for such coverage.

ARTICLE IX - GUARANTY OF WORK:

A. CONTRACTOR agrees to guarantee all work under this AGREEMENT for two years from the date of final settlement of this AGREEMENT.

B. If any unsatisfactory condition or damage develops within the time of this guaranty due to materials or workmanship that are defective, inferior, or not in accordance with the AGREEMENT, the CONTRACTOR shall, whenever notified by the OWNER, immediately place such guaranteed work in a condition satisfactory to the OWNER and make repairs of all damage to the curbing made necessary in the fulfillment of the guaranty.

C. If CONTRACTOR fails to proceed promptly to comply with the terms of any guaranty under this AGREEMENT, CONTRACTOR agrees that OWNER may have such work performed as the OWNER considers necessary to fulfill the guaranty or may allow the damage or defective work to remain as it is. In the first instance, the CONTRACTOR shall promptly pay the OWNER such sums as were spent in fulfilling the guaranty. In the second instance, CONTRACTOR shall promptly pay OWNER such sums of money as it would have been necessary to expend to fulfill the guaranty. Usual wear and tear and the results of accidents not chargeable to CONTRACTOR or CONTRACTOR's agents are excepted from the above requirements. Everything necessary for the fulfillment of any guaranty must be done without any expense to the OWNER.

D. To secure the performance of CONTRACTOR's guaranty, OWNER shall retain for two years from the date of final settlement five percent (5%) of the AGREEMENT price. If, at the expiration of this period, the CONTRACTOR has fulfilled the CONTRACTOR's guaranty to the satisfaction of the OWNER, the sum retained shall be paid to the CONTRACTOR. As an alternative, CONTRACTOR may furnish a specific performance bond that will meet the requirements of this section.

ARTICLE X - LIQUIDATED DAMAGES: In the event the CONTRACTOR breaches this AGREEMENT by delays beyond the June 30, 2024, deadline for completion of the PROJECT, then the CONTRACTOR agrees to pay OWNER a predetermined amount of four hundred dollars (\$400.00) per day capped at \$25,000.00. This predetermined amount will serve as compensation for the anticipated damages incurred by OWNER due to CONTRACTOR's failure to comply with their contractual duties and obligations to complete the PROJECT on time. The liquidated damages amount is not intended as a penalty but rather is intended to compensate the OWNER for damages that are difficult to estimate accurately. The Parties agree this clause represents the sole remedy for breach by Contractor due to delay, other than the provisions under the *Force Majeure* clause in this AGREEMENT.

ARTICLE XI - MISCELLANEOUS:

A. Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof. No waiver by the CONTRACTOR or OWNER of the breach of any covenant of this AGREEMENT shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this AGREEMENT.

B. Time of the Essence. Time is of the essence of this AGREEMENT.

C. Headings. The descriptive headings of the paragraphs of this AGREEMENT are inserted for convenience only. The headings shall not control or affect the meaning or construction of any of the provisions of this AGREEMENT.

D. No Partnership, No Third Parties. It is not intended by this AGREEMENT to, and nothing contained in this AGREEMENT shall create any partnership, joint venture, or other similar arrangement between CONTRACTOR or OWNER. No term or provision of this AGREEMENT is intended to, or shall, be for the benefit of any person, firm, organization, or corporation not a party hereto. No such other person, firm, organization, or corporation shall have any right or cause of action hereunder. The relationship of the CONTRACTOR to the OWNER is an independent contractor.

E. Severability. Every provision of this AGREEMENT is and will be construed to be a separate and independent covenant. If any provision of this AGREEMENT or the application of the same is, to any extent, found to be invalid or unenforceable by a court of competent jurisdiction or controlling legislation, then the remainder of this AGREEMENT or the application of that provision to circumstances other than those to which it is invalid or unenforceable, will not be affected by that invalidity or unenforceability, and each remaining provision of this AGREEMENT will be valid and will be enforced to the extent permitted by the law. The Parties shall negotiate in good faith for such amendments of this AGREEMENT that may be necessary to achieve its intent, notwithstanding such severed invalidity or unenforceability.

F. Amendment. No change or additions are to be made to this AGREEMENT except by a written amendment signed by both Parties to this AGREEMENT.

G. Compliance with Law. CONTRACTOR shall abide by all federal, state, and local statutes, laws, ordinances, rules, and regulations. The CONTRACTOR will comply with the Americans with Disabilities Act ("ADA") and will indemnify the OWNER for any costs, including but not limited to damages, attorney's fees, and staff time in any action or proceeding brought alleging violation of the ADA. The CONTRACTOR will not discriminate against any person on the basis of race, religion, color, age, sex, or national origin in the performance of this AGREEMENT and must comply with the terms and intent of Title VII of the Civil Rights Act of 1964, P.L. 88-354 (1964). In addition, the CONTRACTOR must include similar requirements of subcontractors in any contracts entered into for the performance of the CONTRACTOR's obligations under this AGREEMENT. The CONTRACTOR shall not engage in conduct declared to be unlawful by Arizona state law.

H. No Personal Liability. No elected official, officer, employee, or agent of the OWNER shall be personally liable to CONTRACTOR, or any successor or assignee, (a) in the event of any default or breach by the OWNER, (b) for any amount which may become due to CONTRACTOR or its successor or assign, or (c) pursuant to

any obligation of the OWNER under the terms of this AGREEMENT.

I. Assignment. The rights and obligations of each Party under this AGREEMENT are personal to that Party and may not be assigned or transferred to any other person, firm, corporation, or other entity without the prior, express, and written consent of the other Party.

J. Governing Law. This AGREEMENT is entered into in Arizona and shall be construed and interpreted under the laws of the State of Arizona, including Arizona's provisions for choice of law.

K. Venue. Any legal action relating to this AGREEMENT shall be brought in either the Yuma County Superior Court or in the United States District Court for the District of Arizona at the election of the plaintiff in such legal action, provided, however, that nothing in this paragraph will be deemed to have authorized the bringing of any legal action in a court which does not otherwise have jurisdiction to adjudicate the legal action.

L. Attorneys' Fees. If any Party finds it necessary to bring any action at law or other proceeding, including arbitration, against the other Party to enforce any of the terms, covenants, or conditions of this AGREEMENT, or by reason of any breach or default under this AGREEMENT, the Party prevailing in any such action or other proceeding shall be paid all reasonable costs, reasonable expert fees, and reasonable attorneys' fees by the other Party. If any judgment is secured by said prevailing Party, all such costs and fees shall be included in that judgment, and such fees are to be set by the court and not by jury.

M. Force Majeure Event. A "*Force Majeure* Event" means any action or event that occurs outside the OWNER's and CONTRACTOR's reasonable control and without the fault or negligence of either Party that prevents, prohibits, or materially interferes with the ability to progress on the PROJECT. Without limitation, a *Force Majeure* Event means any of the following events: (a) floods, fires, earthquakes, hurricane-force winds, tornados, explosions, or other natural disasters; (b) acts of God (c) war, invasions, hostilities (whether war is declared or not), terrorist threats or acts, riots, or other civil unrest; (d) federal, state, or local governmental authority, proclamations, orders, laws, or actions; (e) embargoes or blockades in effect on or after the date of this AGREEMENT; (f) epidemics, pandemics, biological or chemical contamination, or other national or regional public health emergencies; (g) strikes, labor stoppages or slowdowns, or other industrial disturbances; (h) material shortages of supplies, adequate power, or transportation facilities; and (i) any governmental enactment that prohibits, or materially interferes with the PROJECT; and (j) other events beyond the control of the Parties.

1. Notwithstanding anything to the contrary, a *Force Majeure* Event shall not include acts, events, or other matters arising out of either Party's violations of any

environmental laws with respect to or the mere presence or discharge of any hazardous substances on the lands comprising the Project.

2. In the event of a *Force Majeure* Event that impacts the PROJECT's schedule, the CONTRACTOR shall only be entitled to an extension of time and shall not be entitled to any compensation or any increase in the AGREEMENT compensation, except to the extent that a *Force Majeure* Event causes damage to PROJECT work in place or causes the work to be shut down for more than seven (7) calendar days.

3. The costs for damage to the PROJECT's work in place may be recoverable by insurance applicable to the PROJECT. However, if the costs to correct the work damaged by a *Force Majeure* Event or for a shutdown lasting longer than the period of seven (7) days are not covered by insurance, then the CONTRACTOR shall be entitled to recover only its actual direct costs. Actual direct costs for purposes of this section are limited to the actual direct costs for performing the work as opposed to indirect costs and expenses, such as loss of use, loss of profits, consequential damages, cost of capital, loss of wages, pain and suffering, loss of productivity, financing charges, increased or extended office overhead, loss of interest on retainage, loss of interest on anticipated income, loss of bonding capacity, loss of use, decrease in value, or interest on debt financing.

4. A *Force Majeure* Event shall not release the Parties from their obligations under this AGREEMENT, nor shall it be construed to discharge any surety.

5. No recovery on any basis shall be allowed unless the CONTRACTOR has satisfied all the following conditions:

a. The CONTRACTOR has given immediate written notice within four (4) calendar days of the *Force Majeure* Event and documented the anticipated impact on the CONTRACTOR's ability to perform. The CONTRACTOR shall provide updates to its assessment of the impacts on its ability to perform under the AGREEMENT on an ongoing basis at appropriate intervals no less than every seven (7) calendar days.

b. The CONTRACTOR is not in default under the AGREEMENT.

c. The CONTRACTOR has documented all its direct costs for the OWNER and any insurance carrier (for example, photographs, videos, receipts, and other credible documentation).

d. The CONTRACTOR has used reasonable and diligent efforts to avoid and minimize delays, regardless of cause.

e. The CONTRACTOR has cooperated with the OWNER to mitigate the impact of any delays encountered by the CONTRACTOR that would entitle it to an extension of time.

N. Further Acts. Each of the Parties hereto shall execute and deliver all such documents and perform all such acts as reasonably necessary, from time to time, to carry out the matters contemplated by this AGREEMENT.

O. Entire Agreement. This AGREEMENT constitutes the entire AGREEMENT between the Parties hereto pertaining to the subject matter hereof. All prior and contemporaneous agreements, representations, and understandings of the Parties, oral or written, are hereby superseded and merged herein.

P. Counterparts. This AGREEMENT may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute only one AGREEMENT. The signature pages from one or more counterparts may be removed from such counterparts. Such signature pages may all be attached to a single instrument so that the signatures of all Parties may be physically attached to a single document.

[Intentionally left blank. Signature page follows.]

IN WITNESS WHEREOF, the original AGREEMENT will be filed with the City of San Luis City Clerk.

The CONTRACTOR agrees that this AGREEMENT, as awarded, is for the stated work and understands that payment for the total work will be made on the basis of the indicated amount, as bid in the PROPOSAL. The OWNER shall pay to the CONTRACTOR, as full consideration for the faithful performance of the AGREEMENT, subject to any additions or deductions as provided in the PROJECT documents, the sum of \$286,859.67.

The Parties have executed this AGREEMENT in Yuma County, Arizona.

City of San Luis, Arizona

Nieves Riedel, Mayor

Date: _____

Attest:

Approved As to Form

Sonia Cornelio, City Clerk

Kay Marion Macuil, City Attorney

DWD Construction

Shane Darnell
Nathaniel David Darnell, Jr.
Proprietor
Registrar of Contractors #248137

Witness:

Signature

Print Name: _____