

**DOCUMENT 00 52 43
AGREEMENT**

PART I GENERAL

1.1 CONTRACTOR

- A. Name: Pivot Excavation, LLC
- B. Address: 11650 S State Street, Suite #300, Draper, UT 84020
- C. Telephone number: 801-326-9588
- D. Facsimile number: _____
- E. E-Mail addresses: frank.m@pivotexcavation.com

1.2 OWNER

- A. Herriman City, a municipal corporation of the State of Utah, 5355 West Herriman Main Street, Herriman, Utah 84096.

1.3 CONSTRUCTION CONTRACT

The Construction Contract is known as

***HERRIMAN CITY
Whisper Rose PRV Replacement***

1.4 ENGINEER

- A. ***Jonathan Bowers, PE, or his designee*** is the Engineer who has the rights, authority and duties assigned to Engineer in the Contract Documents; provided, however, Engineer shall not have authority to increase the contract price to an amount that exceeds the amount budgeted for the project by the Owner for the Project.

1.5 AGREEMENT PERFORMANCE

- A. The Contractor shall perform everything required to be performed by Contractor in the Contract Documents, shall provide and furnish all labor, tools and equipment, and shall furnish and deliver all materials not specifically stated in the Contract Documents as being furnished by the Owner (Owner will only be furnishing the EFI Pressure Reducing Station, there will be no additional items or materials), to complete all the work necessary to complete the Project in Herriman City, State of Utah in the best and most workmanlike manner, and in strict conformity with the provisions of this Agreement. The plans and specifications

and the proposals are hereby made a part of the agreement as fully and to the same effect as if the same had been set forth at length in the body of this Agreement. In the event of inconsistencies within or among parts of this Agreement, the Contract Documents or among Contract Documents, this Agreement, and applicable standards, codes, and references to previous versions of the Manual of Standard Specifications or Manual of Standard Plans, the Contractor shall (i) provide the better quality or greater quantity of work; or (ii) comply with the more stringent requirement; either or both in accordance with Engineer's interpretation.

- B. It is agreed that the status of the Contractor under this agreement is that of Independent Contractor rather than that of an Employee of the Owner. Accordingly, the Contractor, in performance of his obligations hereunder, is independent and free from control of the Owner in all that pertains to the execution of the work and shall perform the work according to the Contractor's own methods without being subject to the rule, control or direction of the Owner or its representatives, save and except as to the results obtained. The finished work and the materials furnished must, however, conform strictly to this contract, the proposal, and the plans and specifications, and are subject to the final approval of the Owner and its authorized representatives, who may exert such direction and control thereof as may be necessary to achieve that conformity. All provisions in the specifications with respect to the direction and control of the work shall be construed so as to make effective this provision.

PART 2 TIME AND MONEY CONSIDERATIONS

2.1 CONTRACT PRICE

- A. The Contract Price includes the cost of the Work specified in the Contract Documents, and the cost of all bonds, insurance, permits, fees, and all charges, expenses or assessments of whatever kind or character. The Owner shall pay the Contractor, as full consideration for the performance of this contract, the contract bid price per item as shown in the proposal, for the quantities of work actually performed and accepted.
- B. The Contract Price is: Fifty Nine Thousand Five Hundred Dollars 00/100 (\$59,500.00)

2.2 CONTRACT TIME

- A. The work shall commence on the date set forth in the written Notice to Proceed from the Owner or its agent to Contractor and shall be completed and ready for Owner's substantial completion inspection within 21 calendar days from the date of such notice.
- B. Any time specified in work sequences in the Summary of Work (Section 01 11

10) shall be a part of the Contract Time.

2.3 PUNCH LIST TIME

- A. The Work will be complete and ready for final payment within 30 calendar days after the date Contractor receives Engineer's Final Inspection Punch List unless exemptions of specific items are granted by Engineer in writing or an exception has been specified in the Contract Documents.
- B. Permitting the Contractor to continue and finish the Work or any part of the Work after the time fixed for its completion, or after the date to which the time for completion may have been extended, whether or not a new completion date is established, shall in no way operate as a waiver on the part of the Owner of any of Owner's rights under this Agreement.

2.4 LIQUIDATED DAMAGES

- A. **Late Completion:** Time is the essence of the Contract Documents. Contractor agrees that Owner will suffer damage or financial loss if the Work is not completed on time or within any time extensions allowed in accordance with Part 12 of the General Conditions (Document 00 72 00). Contractor and Owner agree that proof of the exact amount of any such damage or loss is difficult to determine. Accordingly, instead of requiring any such proof of damage or specific financial loss for late completion, Contractor agrees to pay to Owner the amount of **\$1,000** for each calendar day that extends after the Contract Time until the Work is accepted as Substantially Complete as provided in Article 14.5 of the General Conditions.
- B. **Survey Monuments:** No land survey monument will be disturbed or moved until Engineer has been properly notified and the Engineer's surveyor has referenced the survey monument for resetting. The parties agree that upon such an unauthorized disturbance it is difficult to determine the damages from such a disturbance, and the parties agree that Contractor will pay as liquidated damages the sum of \$1,000 to cover such damage and expense.
- C. **Interruption of Public Services:** No interruption of public services shall be caused by Contractor, its agents or employees, without the Engineer's and Owner's prior written approval. Owner and Contractor agree that in the event Owner suffers damages from such interruption, liquidated damages as stipulated above shall not be deemed to be a limitation upon Owner's right to recover the full amount of damages.
- D. **Deduct Damages from Moneys Owed Contractor:** Owner shall be entitled to deduct and retain liquidated damages out of any money which may be due or become due the Contractor. To the extent that the liquidated damages exceed any amounts that would otherwise be due the Contractor, the Contractor shall be liable for such amounts and shall return such excess to the Owner.

2.5 RETAINAGE

- A. **Retainage is Owner's Option:** Owner may, in its sole discretion, retain five (5) percent of the value of all Work done and materials or equipment supplied as part security for the fulfillment of the Construction Contract by the Contractor. If, in Engineer's opinion, the Work is proceeding in accordance with Contractor's approved progress schedule, and all progress schedule submittals are current and up to date, and all required payrolls, Shop Drawings, and miscellaneous submittals are current and up to date, the Owner may choose not to withhold retainage.
1. **Reducing the Retainage:** As the Work nears completion and solely at the Engineer's discretion, the Owner may reduce the retainage to an amount more in line with the Work actually remaining.
 2. **Retainage Held Until Final Payment:** The Owner reserves the right to retain all amounts previously withheld or due the Contractor, including liquidated damages, until all Punch List items are complete. However, at Engineer's sole option, Engineer may authorize the release of up to all retained amounts except any liquidated damages and double Engineer's best estimate of the Contractor's cost to complete all remaining Punch List items.
- B. **Interest:** Except for money retained for items not provided or installed in accordance with the Contract Documents, any money retained by the Owner will be placed in an interest-bearing account held by the Owner in its Utah State Treasury Pool. The interest accrued thereon shall be the only interest paid to Contractor on the money retained and will be due and payable to the Contractor when the retained monies are paid.

2.6 PAYMENT PROCEDURES

- A. **Progress Payments:** Contractor shall submit Applications for Payment in accordance with Part 14 of the General Conditions (Document 00 72 00) and Section 01 29 00 (Payment Procedure). Payment will become due or payable only for items provided or installed by Contractor. If required by the Owner, any request or application by the Contractor for a partial payment shall be accompanied and supported by data establishing payment or satisfaction of all Contractor obligations for payroll, bills for materials and equipment, and other indebtedness, with such data establishment to be evidenced by receipts, releases and waivers of lien, arising out of the contract, to the extent and in such form as may be designated as acceptable and satisfactory by the Owner. The Owner may require such data, including but not limited to, and executed, completed lien waiver and release from all subcontractors, lower-tier subcontractors and suppliers. The submission of these items, if requested by the Owner with the Contractor's application or request for a partial payment shall constitute a condition precedent to the Contractor's right to any such partial payment, and any

particular application or request for partial payment submitted without these items, if so requested by the Owner, shall be deemed incomplete.

1. **Withholding Payment:** Owner reserves the right to withhold payment from Contractor for noncompliance with any provision of the Contract Documents.
 2. **Price Adjustments:** Owner will consider making partial payment to the Contractor for certain nonconforming work in advance of any negotiated settlement reached between the Contractor and the Owner, provided the Contractor requests in writing that this be done. Contractor agrees that any such payments made by the Owner are "payments in advance" and that any money which becomes due when the final settlement is negotiated will not constitute payments "withheld" or "retained" under State law.
- B. **Final Payment:** After completion of all Work and Punch List items, Owner shall pay the Contract Price due after deducting therefrom all previous payments, unit price quantity adjustments, penalties, liquidated damages, and other amounts to be retained. All prior progress payments shall be subject to correction in the final payment. The final payment shall not be due and payable until the expiration of 30 days from approval of the request for final payment of Contractor by Engineer and Owner. Final payment, constituting the entire unpaid balance of the contract sum, shall be paid by the Owner to the Contractor when the work has been completed, the contract fully performed, and a final certificate for payment has been issued by the Engineer. Neither the final payment nor the remaining retainage shall become due until the Contractor submits to the Owner through the Engineer, (1) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the work for which the Owner might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety to final payment, and (3) if required by the Owner, other data establishing payment or satisfaction of all such obligations, such as receipts, releases and waivers of liens arising out of the contract, to the extent and in such form as may be designated by the Owner. If after substantial completion of the work, final completion thereof is materially delayed through no fault of the Contractor or by the issuance of change orders affecting final completion, and the Engineer so confirms, the Owner shall, upon application by the Contractor and certification by the Engineer and without terminating the contract, make payment of the balance due for that portion of the work fully completed and accepted. If the remaining balance for work not fully completed or corrected is less than the retainage stipulated in the contract documents, and if bonds have been furnished, the written consent of the Surety of the payment of the balance due for that portion of the work fully completed and accepted shall be submitted by the Contractor to the Engineer prior to certification of such payment. Such payment shall be made under the terms and conditions governing payments as heretofore set forth, except that it shall not constitute a waiver of claims. The making of final payment shall constitute a waiver of all claims by the Owner except those arising from: (1) unsettled liens; (2) faulty or defective work; (3) failure of the work to comply

with the requirements of the contract documents; or (4) terms of any special warranties required by the contract documents. The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of the final application for payment. All provisions of this agreement, including without limitation those establishing obligations and procedures, shall remain in full force and effect notwithstanding the making or acceptance of final payment.

1. **Submittal:** Final payment shall not be made until the Contractor has delivered and Engineer has accepted all submittals specified in Article 14.8 of the General Conditions (Document 00 72 00).
2. **Owner Released From Claims:** The payment and acceptance of the final Contract Price due and the adjustment and payment for any Work done in accordance with any alterations of the same, shall release the Owner from any and all claims of Contractor on account of Work performed under the Contract Documents or any Modification thereof, except for those claims specifically agreed to as reserved and unresolved by the Owner.

2.7 EXTRA WORK

- A. No money will be paid to the Contractor for any additions, deletions or revisions in the Work as stipulated in Article 10.1 of the General Conditions (Document 00 72 00), unless a contract Modification for such has been made in writing and validly executed by the Owner and Contractor.

PART 3 COVENANTS

3.1 ASSIGNMENT NOT BINDING WITHOUT WRITTEN CONSENT

- A. Owner and Contractor agree no assignment of any right or interest in the Contract Documents will be made without the written consent of the Owner and the Contractor. No assignment will release or discharge the Owner or the Contractor from any duty or responsibility under the Contract Documents unless specifically stated to the contrary in any written consent to an assignment.
- B. Contractor shall make no assignment of money that is due without the Owner's written consent (except to the extent that the effect of this restriction may be limited by Law or Regulation).

3.2 BINDING TERMS

- A. The Agreement, with all its forms, plans, specifications and stipulations, shall be binding upon the heirs, executors, administrators, successors and assigns of the respective parties.

3.3 INDEMNIFICATION

- A. Provisions concerning indemnification are set forth in Article 6.17 of the General Conditions (Document 00 72 00) as modified by Supplemental Conditions (Document 00 73 00).

3.4 DISPUTE RESOLUTION

A. In General:

1. Unless a decision shall be held by an appropriate court of law to have been procured by fraud or to be arbitrary and capricious or so grossly erroneous as necessarily to imply bad faith, any factual decision made under this Article shall be final and binding in any suit or action arising under this Construction Contract, including any actions by Contractor or others against Owner or any of Owner's agents, consultants, or employees.
2. Compliance with provisions of this Article shall be a condition precedent prior to any legal action by the Contractor or any of Contractor's Subcontractors and Suppliers against Owner or any of Owner's agents, consultants, or employees.
3. The provisions of this Article shall not preclude or limit judicial review of issues of law.

- B. **Disputes Not Related to the Guarantee of the Work:** Any dispute arising under the Construction Contract concerning a question of fact, not related to the guarantee of the Work (Part 13 of the General Conditions (Document 00 72 00)), which is not disposed of by contract Modification shall be decided pursuant to the following procedure.

1. Any decision by Engineer interpreting the requirements of the Contract Documents may be appealed in writing to the Engineer. The Engineer's decision shall be reduced to writing and a copy shall be mailed or otherwise furnished to the Contractor. The decision of Engineer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to Engineer a written appeal to the Owner.
2. Within 15 days from the receipt of any such appeal, the City Administrator shall issue a decision in writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the City Administrator shall be final and conclusive unless, within 15 days from the date of receipt of such decision, the Contractor mails or otherwise furnishes to the City a written appeal to a Dispute Committee.
3. The Dispute Committee shall consist of the Owner's Attorney, the Mayor, and an independent engineer selected by the Owner.

4. Said Committee shall have authority to investigate the appeal.
 5. The decision of said Committee shall be rendered in writing within 15 days from receipt of the appeal and mailed or otherwise delivered to the Contractor.
 6. The decision of said Committee shall be the final binding interpretation of the facts which are the subject of the appeal.
- C. **Disputes Related to the Guarantee:** Except as otherwise provided by contract Modification, any dispute concerning a question of fact involving or arising out of the guarantee required by the Contract Documents (Article 13.1 of the General Conditions (Document 00 72 00)), which is not disposed of by contract Modification shall be decided pursuant to the provisions of Paragraph 3.4B above.
- D. **Work During Appeal:** Notwithstanding the pendency of any protest or appeal provided above, Contractor shall, if so ordered by Engineer, proceed with the Work under the Contract Documents according to Engineer's direction and according to the decision on any appeal. The existence of a claim or protest shall not excuse Contractor from the requirements of the Contract Documents, including, but not limited to, the Contract Time.
- E. **Appeals of Termination or Suspension:** Any decision of Owner to terminate or suspend the Work shall not be subject to the provisions of this Article.

3.5 ATTORNEY'S FEES.

- A. In the event that either party institutes any action or proceeding against the other relating to the breach of any term of this agreement, then the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expenses of such action including reasonable attorney fees, incurred therein by the successful party.

3.6 CONTRACTOR'S REPRESENTATIONS.

The Contractor represents and warrants the following to the Owner (in addition to any other representations and warranties contained in the Contract Documents), as an inducement to the Owner to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement, any termination of this Agreement, and the final completion of the Work:

- A. that it and its Subcontractors are financially solvent, able to pay all debts as they mature, and possessed of sufficient working capital to complete the Work and perform all obligations hereunder;
- B. that it is able to furnish the plant, tools, materials, supplies, equipment, and labor required to complete the Work and perform its obligations hereunder;

- C. that it is authorized to do business in the State of Utah and properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over it and over the Work and the Project;
- D. that its duly authorized representative has visited the site of the Project, familiarized himself with the local and special conditions under which the Work is to be performed, and correlated his observations with the requirements of the Contract Documents; and
- E. that it possesses a high level of experience and expertise in the business administration, construction, construction management, and superintendence of projects of the size, complexity, and nature of this particular Project, and it will perform the Work with the care, skill and diligence of such a contract.

The foregoing warranties are in addition to, and not in lieu of, any and all other liability imposed upon the Contractor by law with respect to the Contractor's duties, obligations, and performance hereunder. The Contractor acknowledges that the Owner is relying upon the Contractor's skill and experience in connection with the work called for hereunder.

3.7 SPECIAL PROVISIONS REGARDING NONFUNDING

The Contractor specifically understands and agrees that funds are not presently available for performance of this Agreement beyond the end of Owner's fiscal year, which is June 30, 2024. Each party's obligation for performance of this Agreement beyond such date is contingent upon funds being budgeted and appropriated for payment with respect to this Agreement. If no such funds or insufficient funds are appropriated and budgeted in any fiscal year, or if there is a reduction in appropriation due to insufficient revenues, resulting in insufficient funds for the payments due or about to become due under this Agreement, then this Agreement shall create no obligation on the parties as to such fiscal years (or any succeeding fiscal year), and all obligations thereunder shall terminate and become null and void on the first day of the fiscal year on which funds were not budgeted or appropriated or in the event of reduction in appropriation on the last day before the reduction became effective (except as those portions of payments herein then agreed upon for which funds are appropriated and budgeted.) Such said termination shall not be construed as a breach of or a default under this Agreement and such termination shall be without penalty, additional payment, or other charges of any kind whatsoever to Contractor and no right of action or damage or other relation shall accrue to the benefit of the Contractor as to this Agreement, or any portion thereof, which may so terminate and become null and void.

3.8 CONTRACT DOCUMENTS.

Contract Documents include the most current version of *Manual of Standard Specifications*, published by Utah LTAP Center, Utah State University, and the most current version of *Manual of Standard Plans*, published by Utah LTAP Center, Utah

State University, and those documents included in the term “Contract Documents” as defined therein.

PART 4 EXECUTION

4.1 EFFECTIVE DATE.

A. Owner and Contractor executed this Agreement and declared it in effect as of the _____ day of _____, 20__.

IN WITNESS WHEREOF, we have hereunto set our hands and seal at Herriman, Utah, on the day and year first above written:

HERRIMAN CITY, OWNER

By _____
Nathan Cherpeski, City Manager

Attest:

Jackie Nostrom, City Recorder

Approved as to form:

Matthew Brooks, Assistant City Attorney

Pivot Excavation, LLC

By _____

Its _____

Attest:

By _____