

## **CONSTRUCTION AGREEMENT**

THIS AGREEMENT, entered into this \_\_\_\_ day of \_\_\_\_\_, 202020, by and between CITY OF IDAHO FALLS, IDAHO, a municipal corporation of the State of Idaho (hereinafter referred as “CITY”),  
and \_\_\_\_\_ (hereinafter  
”CONTRACTOR”):

### **WITNESSETH:**

WHEREAS, pursuant to the invitation of CITY to construct underground CITY utilities in areas as identified as needing fiber optic drops to residences (the “Project”), CONTRACTOR did, in accordance therewith file with CITY a proposal containing an offer which was invited by said notice; and

WHEREAS, CITY has determined that that CONTRACTOR was the lowest responsive responsible bidder.

NOW THEREFORE, the parties to this Agreement, in consideration of the mutual covenants and stipulations set out, agree as follows:

### **SECTION 1 PROJECT DOCUMENTS**

The Project Documents which comprise the entire Agreement between CITY and CONTRACTOR concerning the work to be performed include this Agreement and the Project Plans attached to this Agreement as Exhibit “A” and incorporated in this Agreement by this reference.

### **SECTION 2 SCOPE OF WORK**

CONTRACTOR shall perform all services necessary to complete the entire work described in the Project Documents, in accordance with the plans and specifications established for this Project, except where specifically indicated in the Project Documents to be the responsibility of others.

### **SECTION 3 PROJECT TIME / SUBSTANTIAL COMPLETION**

The work to be performed pursuant to this Agreement shall be on an as needed basis by the City basis and shall continue until terminated by either party.

**SECTION 4**  
**NOT TO EXCEED PER UNIT AMOUNT**

CITY shall pay CONTRACTOR for completion of work in accordance with the Project Documents in current funds, the not-to-exceed amount of \_\_\_\_\_ per residence, plus \$xxxxxxx per sidewalk crossing.

**SECTION 5**  
**PAYMENT**

Payment for this work will be monthly within 30 days of invoice.

**SECTION 6**  
**INDEPENDENT CONTRACTOR**

The parties warrant by their signature that no employer-employee relationship is established between CONTRACTOR and CITY by the terms of this Agreement. It is understood by the parties hereto that CONTRACTOR is an independent contractor and as such neither it nor its employees, agents, representatives or subcontractors, if any, are employees of CITY for purposes of tax, retirement system, or social security (FICA) withholding.

**SECTION 7**  
**CONTRACTOR'S RESPONSIBILITIES**

1. Permits: Contractor shall obtain and comply with the provisions of all applicable permits and licenses relative to the services to be performed hereunder as may be required by the local jurisdiction.
2. Work in the Right-of-Way. During any period of relocation, construction, or maintenance in the public easement or Right-of-Way, Contractor shall comply with all applicable public health and safety rules and regulations, as required by and law, statute, regulation, ordinance, or resolution of any jurisdiction, regulator, agency, or authority of the City, State, or Federal government.

**SECTION 8**  
**HOLD HARMLESS INDEMNIFICATION**

In addition to other rights granted CITY by the Project Documents, CONTRACTOR shall indemnify and save harmless CITY, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damages received or sustained by any person, persons, or property on account of the negligent operations of CONTRACTOR or its subcontractors; or on account of or in consequence of any neglect in safeguarding the Work.

Within the limits of the Idaho Tort Claims Act and the Idaho Constitution, CITY agrees to indemnify, defend, and hold harmless CONTRACTOR and its officers, agents, and employees against all liability, loss, and costs arising from actions, suits, claims, or demands for the acts or omission of CITY and its officers, agents, and employees, in performance of this Agreement.

## **SECTION 9 CONFLICT OF INTEREST**

CONTRACTOR covenants that it presently has no interest and will not acquire any interest, direct, or indirect, in the Project which would conflict in any manner or degree with the performance of its services hereunder. CONTRACTOR further covenants that, in performing this Agreement, it will employ no person who has any such interest. Should any conflict of interest arise during the performance of this Agreement, CONTRACTOR shall immediately disclose such conflict to CITY.

## **SECTION 10 ENTIRE AGREEMENT, MODIFICATION AND ASSIGNABILITY**

This Agreement and Project Documents hereto contain the entire agreement between the parties for this subject matter, and no other statements, promises, or inducements made by either party, or agents of either party are valid or binding. This Agreement may not be enlarged, modified or altered except upon written agreement signed by the parties hereto. CONTRACTOR may not subcontract or assign its rights (including the right to compensation) or duties arising hereunder other than as contemplated by the Project Documents, without the prior written consent and express authorization of CITY.

## **SECTION 11 ADHERENCE TO LAW REQUIRED**

All applicable local, state and federal statutes and regulations are hereby made a part of this Agreement and shall be adhered to at all times. Violation of any of these statutes or regulations by CONTRACTOR shall be deemed material and shall subject CONTRACTOR to termination of this Agreement for cause. CONTRACTOR and CONTRACTOR's surety shall indemnify and save harmless CITY and its employees, agents and representatives against any claim or liability arising from or based on the violation of any such laws, codes, ordinances, or regulations by CONTRACTOR.

CITY shall not terminate this Agreement for a minor or immaterial violation of the law.

## **SECTION 12 LEGAL FEES / JURISDICTION AND VENUE**

In the event either party incurs legal expenses to enforce the terms and conditions of this Agreement, the prevailing party is entitled to recover reasonable attorney's fees and other costs and expenses, whether the same are incurred with or without suit.

It is agreed that this Agreement shall be construed under and governed by the laws of the State of Idaho. In the event of litigation concerning this Agreement, it is agreed that proper venue shall be the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville.

### **SECTION 13 NON-DISCRIMINATION**

CONTRACTOR shall not discriminate against any employee or applicant for employment on the basis of race, color, religion, creed, political ideals, sex, age, marital status, physical, or mental handicap, gender identity/expression, sexual orientation, veteran's status, or national origin.

Nothing in this section shall require CONTRACTOR to go beyond the reasonable accommodation requirements of the Americans with Disabilities Act in regards to accommodating any employee or applicant for employment.

### **SECTION 14 SPECIAL WARRANTY**

CONTRACTOR warrants that nothing of monetary value has been given, promised or implied as remuneration or inducement to enter into this Agreement. CONTRACTOR further declares that no improper personal, political or social activities have been used or attempted in an effort to influence the outcome of the competition, discussion, or negotiation leading to the award of this Agreement. Any such activity by CONTRACTOR shall make this Agreement null and void.

### **SECTION 15 COMMUNICATIONS**

Written notice as are required by this Agreement shall be satisfied by mailing, emailing, or by personal delivery to the parties at the following mailing addresses:

CONTRACTOR:

Idaho Falls, ID 83403-3609  
Office (208) 523-6978  
Cell (208) 521-2980  
Email kmservicecompany@yahoo.com

CITY:  
Jace Yancy  
140 S. Capital Ave.  
Idaho Falls, ID 83402  
(208) 612-8430  
sboorman@ifpower.org

Neither CITY's nor CONTRACTOR's representative shall be changed without ten (10) days prior written notice to the other party.

## **SECTION 16 INSURANCE AND BOND REQUIREMENTS**

CONTRACTOR shall purchase and maintain insurance and provide performance and payment bonds as specified in Project Documents.

## **SECTION 17 CITY'S RIGHT FOR TERMINATION OR SUSPENSION**

1. Termination of the Construction Agreement for Default. Without limitation to any of CITY's other rights or remedies at law or in equity, and reserving to itself all rights to losses related thereto, CITY shall have the right to terminate this Agreement, in whole or in part, upon the failure of CONTRACTOR to promptly cure any default within fourteen (14) days of CITY's written notice to CONTRACTOR. CITY's election to terminate the Agreement for default shall be communicated by giving CONTRACTOR a written notice of termination. Any notice of termination given to CONTRACTOR by CITY shall be effective immediately, unless otherwise provided.
2. Suspension by City for Convenience. CITY may, at any time and from time to time, without cause, order CONTRACTOR, in writing, to suspend, delay, or interrupt the Project in whole or in part for such period of time, as CITY may determine, up to an a period of five (5) days. The period of suspension shall be computed from the date of the written order.

Upon receipt of a Suspension Order, CONTRACTOR shall, at CITY's expense, comply with its terms and take all reasonable steps to minimize costs allocable to the Project covered by the Suspension Order during the period of the Suspension Order.

Within the period of the above noted aggregate time, or such extension to that period as is agreed upon by CONTRACTOR and CITY, CITY shall either

- a. cancel the Suspension Order; or
- b. delete the portion of the Project covered by the Suspension Order by issuing a change order.

If a Suspension Order is canceled or expires, CONTRACTOR shall resume and continue with the Project. A change order shall be issued to cover any adjustments of the not-to-exceed amount or the Project Time necessarily caused by such suspension. The provisions of this section shall not apply if an order to stop or suspend work is not issued by CITY.

A Suspension Order shall not be required to stop the Work as permitted or required under any other provision of the Project Documents.

3. Termination Without Cause. CITY shall have the option, at its sole discretion and without cause, of terminating this Agreement in part or in whole by giving thirty (30) days written notice to CONTRACTOR. CONTRACTOR agrees to accept such sums as allowed under this section as its sole and exclusive compensation and waives any claim for other compensation or losses, including, but not limited to, loss of anticipated profits, loss of

revenue, lost opportunity, or other consequential, direct, indirect or incidental damages of any kind.

Following such termination and within forty-five (45) days after receipt of a billing from CONTRACTOR seeking payment of sums authorized by this section, CITY shall pay to CONTRACTOR as its sole compensation for performance of the Project the following: .

- a. For Work Performed. The amount of the not-to-exceed amount allocable to the portion of the Project properly performed by CONTRACTOR as of the date of termination, less sums previously paid to CONTRACTOR.
  - b. For Close-out Costs. Reasonable costs of CONTRACTOR and its Subcontractors and Sub-subcontractors for:
    - i. Demobilizing, and
    - ii. Administering the close-out of its participation in the Project (including, without limitation, all billing and accounting functions, not including attorney or expert fees) for a period of no longer than thirty (30) days.
  - c. For Fabricated Items. Previously unpaid cost of any items delivered to the Project site which were fabricated for subsequent incorporation in the Project.
  - d. As a liquidated damage, CITY shall pay CONTRACTOR six percent (6%) of the remaining sums less the amount paid and owed for work performed and for Close-out Costs.
4. Subcontractors. CONTRACTOR shall include provisions in all of its subcontracts, purchase orders, and other contracts permitting termination for convenience by CONTRACTOR on terms that are consistent with this Agreement and that afford no greater rights of recovery against CONTRACTOR than are afforded to CONTRACTOR under this section.
5. CONTRACTOR's Duties Upon Termination. Upon receipt of a notice of termination for default or for convenience, CONTRACTOR shall, unless the notice directs otherwise, do the following:
- a. Immediately discontinue the Project to the extent specified in the notice;
  - b. Place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of such portion of the Project as is not discontinued;

- c. Provide to CITY a description, in writing no later than fifteen (15) days after receipt of the notice of termination, of all subcontracts, purchase orders and agreements that are outstanding, including, without limitation, the terms of the original price, any changes, payments, balance owing, the status of the portion of the Project covered and a copy of the subcontract, purchase order or agreement and any written changes, amendments or modifications thereto, together with such other information as CITY may determine necessary in order to decide whether to accept assignment of or request CONTRACTOR to terminate the subcontract, purchase order or Agreement;
- d. Promptly assign to CITY those subcontracts, purchase orders or agreements, or portions thereof, that CITY elects to accept by assignment and cancel, on the most favorable terms reasonably possible, all subcontracts, purchase orders or agreements, or portions thereof, that CITY does not elect to accept by assignment; and
- e. Thereafter do only such work as may be necessary to preserve and protect the Project already in progress and to protect materials, plants, and equipment on the Project site or in transit thereto.

## **SECTION 18**

### **CONTRACTOR'S RIGHT FOR TERMINATION**

1. Termination for Cause. CONTRACTOR may terminate this Agreement for cause only upon the occurrence of one of the following:
  - a. For Work Stoppage. The Work is stopped for sixty (60) consecutive days, through no act or fault of CONTRACTOR, any Subcontractor, or any employee or agent of CONTRACTOR or any Subcontractor, due to issuance of an order of a court or other public authority, other than CITY, having jurisdiction or due to an act of government, such as a declaration of a national emergency making material unavailable.
  - b. For City's Non-Payment. If CITY does not make payment of sums that are not in good faith disputed by CITY and does not cure such default within fourteen (14) days after receipt of notice from CONTRACTOR, then upon an additional fourteen (14) days' notice to CITY, CONTRACTOR may terminate the Agreement.
2. Damages to CONTRACTOR. In the event of termination for cause by CONTRACTOR, CITY shall pay CONTRACTOR the sums provided for in Section 16.3 above. CONTRACTOR agrees to accept such sums as its sole and exclusive compensation and agrees to waive any claim for other compensation or losses, including, but not limited to, loss of anticipated profits, loss of revenue, lost opportunity, or other consequential, direct, indirect and incidental damages, of any kind.

IN WITNESS WHEREOF, said CONTRACTOR and CITY have caused this Agreement to be executed on the day and year first above written.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date indicated above.

ATTEST:

“CITY”

City of Idaho Falls, Idaho

By \_\_\_\_\_

Kathy Hampton, City Clerk

By \_\_\_\_\_

Rebecca L. Noah Casper, Mayor

“CONTRACTOR”

\_\_\_\_\_

By \_\_\_\_\_

STATE OF IDAHO )

) ss.

County of Bonneville )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2020, before me, the undersigned, a notary public for Idaho, personally appeared Rebecca L. Noah Casper, known to me to be the Mayor of the City of Idaho Falls, Idaho, a municipal corporation that executed the foregoing document, and acknowledged to me that she is authorized to execute the same for and on behalf of said City.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_

Notary Public of Idaho

Residing at: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

(Seal)



STATE OF \_\_\_\_\_)

) ss:

County of \_\_\_\_\_)

On this \_\_\_\_\_ day of \_\_\_\_\_, 2020, before me, the undersigned, a notary public, in and for said State, personally appeared \_\_\_\_\_, known or identified to me to be the \_\_\_\_\_ and whose name is subscribed to the within instrument and acknowledged to me that he is authorized to execute the same for and on behalf of said \_\_\_\_\_.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_

Notary Public of Idaho

Residing at: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

(Seal)

Exhibit “A”