

AGREEMENT (CONSTRUCTION CONTRACT)

THIS AGREEMENT made this 12th day of March, 2024, by and between the City of Rialto, a municipal corporation, organized and existing in the County of San Bernardino, under and by virtue of the laws of the State of California, hereinafter designated as the City, and Deark E&C Inc., a California corporation, hereinafter designated as the Contractor.

The City and the Contractor, in consideration of the mutual covenants hereinafter set forth, agree as follows:

ARTICLE 1 -- THE WORK

For and in consideration of the payments and agreements to be made and performed by City, Contractor agrees to furnish all materials and perform all work required to complete the Work as specified in the Scope of Work for the Project entitled:

DOWNTOWN PARKING LOT IMPROVEMENTS CITY PROJECT NO. 230801

The Work comprises of the furnishing of all materials, equipment, tools, labor, incidentals, all implied requirements, and all appurtenant work as required by the Plans, Specifications, and Contract Documents for the above stated project. The general items of work to be performed consist of but are not limited to construction of a new parking area with paved asphalt surface over a compacted base layer to include ADA accessible parking spaces, electric vehicle charging, a biofiltration system, lighting, landscaping, and all associated work as identified on the project plans and specifications.

ARTICLE 2 -- COMMENCEMENT AND COMPLETION

The Work to be performed under this Contract shall commence on the date specified in the Notice to Proceed by the City, and the Work shall be fully completed within the time specified in the Notice to Proceed.

The City and the Contractor recognize that time is of the essence of this Agreement, and that the City will suffer financial loss if the Work is not completed within the time specified in Article 2, herein, plus any extensions thereof allowed in accordance with applicable provisions of the Standard Specifications, as modified herein. They also recognize the delays, expense, and difficulties involved in proving in a legal proceeding the actual loss suffered by the City if the Work is not completed on time. In executing the Agreement, the Contractor acknowledges it has reviewed the provisions of the Standard Specifications, as modified herein, and has made itself aware of the actual loss incurred by the City due to the inability to complete the Work within the time specified in the Notice to Proceed.

ARTICLE 3 -- CONTRACT PRICE

The City shall pay the Contractor for the completion of the Work, in accordance with the Contract Documents, in current funds the Contract Price(s) named in the Contractor's Bid Proposal and Bid Schedule(s). The amount of the initial contract award in accordance with

the Contractor's Bid Proposal is **Seven Hundred Ninety-Four Thousand and Seventy-Three Dollars and No Cents (\$794,073.00)**.

Contractor agrees to receive and accept the prices set forth herein, as full compensation for furnishing all materials, performing all work, and fulfilling all obligations hereunder. Said compensation shall cover all expenses, losses, damages, and consequences arising out of the nature of the Work during its progress or prior to its acceptance including those for well and faithfully completing the Work and the whole thereof in the manner and time specified in the Contract Documents; and, also including those arising from actions of the elements, unforeseen difficulties or obstructions encountered in the prosecution of the Work, suspension or discontinuance of the Work, and all other unknowns or risks of any description connected with the Work.

ARTICLE 4 -- THE CONTRACT DOCUMENTS

The Contract Documents consist of this executed Agreement; the Bid Package, which may include, but is not limited to, the Notice Inviting Bids, Instructions to Bidders, Request for Bid or Proposal (RFB/RFP), Front End Specifications; Bidder's Proposal; Plans; Notice of Award; Notice to Proceed; General Conditions; Supplementary General Conditions; Exhibits; Standard Specifications; Standard Specifications for Public Works Construction "Greenbook"; City of Rialto Standards; Caltrans Standard Specifications, if applicable; Drawings; all Bonds and Insurance required; any Addenda; and Change Orders.

In the event of a conflict between component parts of the Contract Documents, the document highest in precedence shall control. The precedence shall be:

1. Change Orders and Supplemental Agreements, whichever occurs last;
2. Agreement
3. Addenda
4. General Conditions and Supplementary General Conditions
5. Specifications (Technical Provisions)
6. Project Plans
7. Standard Drawings, Details, and Specifications as referenced in the Plans and Specifications
8. Notice of Inviting Bids, Instructions to Bidders, Request for Bid or Proposal, Bidders Proposal, Notice of Award, Notice to Proceed, Pre-bid Information, Bidding Requirements, Exhibits, Bonds and Insurance
9. Greenbook, City of Rialto Standards, Caltrans Standard Specifications

ARTICLE 5 – CONTRACT TIME

Contractor shall commence the Work on the date specified in the Notice to Proceed. The Work shall be fully completed within One Hundred Forty (140) working days ("Contract Time") from the date of commencement specified in the Notice to Proceed, as modified pursuant to the terms of the Contract Documents. Time is of the essence in the

performance of all obligations under these Contract Documents, and all timing requirements shall be strictly adhered to unless otherwise modified by the City in writing.

ARTICLE 6 – LIQUIDATED DAMAGES

If Contractor fails to complete THE Work within the Contract Time, Contractor shall pay to the City, as liquidated damages and not as a penalty, the sum of One Thousand Nine Hundred Dollars (\$1,900) for each calendar day after the expiration of the Contract Time per area that the Work remains incomplete. The City and Contractor agree that in the event that the Work is not completed within the Contract Time, the City's damages would be extremely difficult or impracticable to determine and therefore the City and Contractor agree that the amount stated herein is a reasonable estimate of the amount of such damages. The City may deduct any liquidated damages owed to the City, as determined by the City, from any payments otherwise payable to Contractor under this Contract. Nothing contained herein shall limit the City's rights or remedies against Contractor for any default other than failure to complete the Work within the Contract Time. This provision for liquidated damages shall not be applicable nor act as a limitation upon the City if Contractor abandons the Work. In such event, Contractor shall be liable to the City for all losses incurred.

ARTICLE 7 -- MUTUAL OBLIGATIONS

For and in consideration of the payments and agreements to be made and performed by the City, the Contractor agrees to furnish all materials and perform all work required for the above stated project, and to fulfill all other obligations as set forth in the aforesaid Contract Documents.

City hereby agrees to employ, and does hereby employ, Contractor to provide the materials, complete the Work, and fulfill the obligations according to the terms and conditions herein contained and referred to, for the Contract Price herein identified, and hereby contracts to pay the same at the time, in the manner, and upon the conditions set forth in the Contract Documents.

Contractor specifically acknowledges and agrees to be bound by the Wage Rates and Labor Code requirements and shall pay the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations of the State of California.

ARTICLE 8 -- PAYMENT PROCEDURES

By submitting an invoice for payment under this Contract, Contractor is certifying compliance with all provisions of the Contract. The invoice shall detail charges for all necessary and actual expenses. City may independently review each invoice submitted by the Contractor to determine whether the work performed, and expenses incurred are in compliance with the provisions of this Agreement. Except as to any charges for work performed or expenses incurred by Contractor which are disputed by City, City will use its best efforts to cause Contractor to be paid within thirty (30) days of receipt of Contractor's correct and undisputed invoice; however, Contractor acknowledges and agrees that due to City warrant run procedures, the City cannot guarantee that payment will occur within this time period.

ARTICLE 9 -- NOTICES

Whenever any provision of the Contract Documents requires the giving of a written Notice, it shall be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the Notice.

ARTICLE 10 -- INDEMNIFICATION

To the full extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless the City, its officers, employees and agents ("Indemnified Parties") against any and all actions, either judicial, administrative, arbitration or regulatory claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities whether actual or threatened (herein "claims or liabilities") that may be asserted or claimed by any person, firm or entity arising out of or in connection with the negligent performance of the Work, operations, or activities provided herein of Contractor, its officers, employees, agents, subcontractors, or invitees, or any individual or entity for which Contractor is legally liable ("indemnitors"), arising from Contractor's reckless or willful misconduct, or arising from Contractor's or indemnitors' negligent performance of or failure to perform any term, provision, covenant, or condition of this Agreement, and in connection therewith:

(a) Contractor will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith;

(b) Contractor will promptly pay any judgment rendered against the City, its officers, agents, or employees for any such claims or liabilities arising out of or in connection with the negligent performance of or failure to perform such work, operations or activities of Contractor hereunder; and Contractor agrees to save and hold the City, its officers, agents, and employees harmless therefrom;

(c) In the event the City, its officers, agents or employees is made a party to any action or proceeding filed or prosecuted against Contractor for such damages or other claims arising out of or in connection with the negligent performance of or failure to perform the Work, operation or activities of Contractor hereunder, Contractor agrees to pay to the City, its officers, agents, or employees, any and all costs and expenses incurred by the City, its officers, agents, or employees in such action or proceeding, including but not limited to, legal costs and attorneys' fees.

Contractor shall incorporate similar indemnity agreements with its subcontractors and if it fails to do so Contractor shall be fully responsible to indemnify City hereunder therefore, and failure of City to monitor compliance with these provisions shall not be a waiver hereof. This indemnification includes claims or liabilities arising from any negligent or wrongful act, error or omission, or reckless or willful misconduct of Contractor in the performance of the Work. The provisions of this Article do not apply to claims or liabilities occurring as a result of City's sole negligence or willful acts or omissions, but, to the fullest extent permitted by law, shall apply to claims and liabilities resulting in part from City's

negligence. The indemnity obligation shall be binding on successors and assigns of Contractor and shall survive termination of this Agreement.

ARTICLE 11 -- NON-DISCRIMINATION

The Contractor represents and agrees that it does not and will not discriminate against any subcontractor, consultant, employee, or applicant for employment because of race, religion, color, sex, sexual orientation, gender, gender identity, or national origin in any matter including without limitation employment upgrading, demotion, transfers, recruitment, recruitment advertising, layoff, termination, rates of pay, or other forms of compensation and selection for training, including apprenticeship.

ARTICLE 12 -- MISCELLANEOUS

Terms used in this Agreement which are defined in the Standard Specifications and the Special Provisions will have the meanings indicated in said Standard Specifications and the Special Provisions. No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically, but without limitation, monies that may become due and monies that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

No term or provision hereof shall be deemed waived and no default or breach excused, unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented to such breach. The consent by any party to or waiver of, a breach or default by the other, shall not constitute a consent to, waiver of, or excuse for, any other different or subsequent breach or default.

The Contractor shall be responsible for complying with all local, state, and federal laws, whether or not said laws are expressly stated or referred to in the Contract Documents.

The City and the Contractor each binds itself, its partners, successors, assigns, and legal representatives, to the other party hereto, its partners, successors, assigns, and legal representatives, in respect of all covenants, agreements, and obligations contained in the Contract Documents.

ARTICLE 13. INSURANCE

13.1 Insurance Coverages.

The Contractor shall procure and maintain, at its sole cost and expense, in a form and content satisfactory to City, during the entire term of this Agreement including any extension thereof, the following policies of insurance which shall cover all elected and appointed officers, employees, and agents of City:

(a) Comprehensive General Liability Insurance (Occurrence Form CG0001 or equivalent). A policy of comprehensive general liability insurance written on

a per occurrence basis for bodily injury, personal injury, and property damage. The policy of insurance shall be in an amount not less than \$1,000,000.00 per occurrence or if a general aggregate limit is used, then the general aggregate limit shall be twice the occurrence limit.

(b) Worker's Compensation Insurance. A policy of worker's compensation insurance in such amount as will fully comply with the laws of the State of California and which shall indemnify, insure, and provide legal defense for both the Contractor and the City against any loss, claim, or damage arising from any injuries or occupational diseases occurring to any worker employed by or any persons retained by the Contractor in the course of carrying out the work or services contemplated in this Agreement.

(c) Automotive Insurance (Form CA 0001 (Ed 1/87) including "any auto" and endorsement CA 0025 or equivalent). A policy of comprehensive automobile liability insurance written on a per occurrence for bodily injury and property damage in an amount not less than \$1,000,000. Said policy shall include coverage for owned, non-owned, leased, and hired cars.

(d) Professional Liability. Professional liability insurance appropriate to the Contractor's profession. This coverage may be written on a "claims made" basis, and must include coverage for contractual liability. The professional liability insurance required by this Agreement must be endorsed to be applicable to claims based upon, arising out of, or related to services performed under this Agreement. The insurance must be maintained for at least 5 consecutive years following the completion of Contractor's services or the termination of this Agreement. During this additional 5-year period, Contractor shall annually and upon request of the City submit written evidence of this continuous coverage.

(e) Additional Insurance. Policies of such other insurance, as may be required in the Special Requirements.

(f) Subcontractors. Contractor shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all the requirements stated herein.

13.2 General Insurance Requirements.

All of the above policies of insurance shall be primary insurance and shall name the City, its elected and appointed officers, employees, and agents as additional insureds, and any insurance maintained by City or its officers, employees, or agents shall apply in excess of, and not contribute with, Contractor's insurance. The insurer is deemed hereof to waive all rights of subrogation and contribution it may have against the City, its officers, employees, and agents and their respective insurers. The insurance policy must specify that where the primary insured does not satisfy the self-insured retention, any additional insured may satisfy the self-insured retention. All of said policies of insurance shall provide that said insurance may not be amended or cancelled by the insurer or any Party hereto without providing thirty (30) days prior written notice by certified mail return receipt requested to the City. In the event any of said policies of insurance are cancelled, the

Contractor shall, prior to the cancellation date, submit new evidence of insurance in conformance with this Agreement to the Contract Officer. No work or services under this Agreement shall commence until the Contractor has provided the City with Certificates of Insurance or appropriate insurance binders evidencing the above insurance coverages and said Certificates of Insurance or binders are approved by the City. City reserves the right to inspect complete, certified copies of all required insurance policies at any time. Any failure to comply with the reporting or other provisions of the policies including breaches or warranties shall not affect coverage provided to City.

City, its respective elected and appointed officers, directors, officials, employees, agents, and volunteers are to be covered as additional insureds as respects: liability arising out of activities Contractor performs; products and completed operations of Contractor; premises owned, occupied, or used by Contractor; or automobiles owned, leased, hired, or borrowed by Contractor. The coverage shall contain no special limitations on the scope of protection afforded to City, and their respective elected and appointed officers, officials, employees, or volunteers. Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City or its respective elected or appointed officers, officials, employees and volunteers or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration, defense expenses and claims. The Contractor agrees that the requirement to provide insurance shall not be construed as limiting in any way the extent to which the Contractor may be held responsible for the payment of damages to any persons or property resulting from the Contractor's activities or the activities of any person or persons for which the Contractor is otherwise responsible nor shall it limit the Contractor's indemnification liabilities as provided in Article 8.

In the event the Contractor subcontracts any portion of the work, the contract between the Contractor and such subcontractor shall require the subcontractor to maintain the same policies of insurance that the Contractor is required to maintain pursuant to this Agreement, and such certificates and endorsements shall be provided to City.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the City and the Contractor have caused this Agreement to be executed the day and year first above written.

CITY OF RIALTO, a municipal corporation

DEARK E&C INC., a California corporation

By: _____
David Carmany
City Manager

By: _____
Name
Title

ATTEST:

By: _____
Barbara A. McGee
City Clerk

By: _____
Name
Title

APPROVED AS TO FORM:

Burke, Williams & Sorensen, LLP

By: _____
Eric S. Vail
City Attorney

****Two signatures are required if a corporation****