

AGREEMENT

THIS AGREEMENT is by and between Brookings County, South Dakota ("Owner") and
Bowes Construction Inc. ("Contractor").

Owner and Contractor hereby agree as follows:

ARTICLE 1 – WORK

- 1.01 ***The Contractor shall perform all Work associated with the construction of this Project as set forth in the Contract Documents. The scope of Work shall include all labor, materials, equipment, tools, services, and the like required by the Contract Documents or otherwise necessary for the completion of the Project. The Contract Items shall include those Bid Items indicated on the Notice of Award with the estimated quantities and unit prices listed in the accepted Bid Schedule.***
- 1.02 Contractor shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:
- ***1" Cold Mill and 2" Asphalt Concrete Overlay on Brookings County 4***
 - ***1" Cold Mill and 2" Asphalt Concrete Overlay on Brookings County 6***
 - ***1" Cold Mill and 2" Asphalt Concrete Overlay on Brookings County 8***
 - ***Additional items as set forth in the Contract Documents***

ARTICLE 2 – THE PROJECT

- 2.01 The Project, of which the Work under the Contract Documents is a part, is generally described as follows: ***2020 Brookings County Surfacing Project.***

ARTICLE 3 – ENGINEER

- 3.01 The Project has been designed by ***Clark Engineering Corporation.***
- 3.02 The Owner has retained ***Clark Engineering Corporation*** ("Engineer") to act as Owner's representative, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 4 – CONTRACT TIMES

- 4.01 ***Time of the Essence***
- A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.
- 4.02 ***Contract Times: Days and Dates***

- A. The Work will be substantially completed ***on or before August 22, 2020. Furthermore, the Notice to Proceed will not be issued for Milestone #1 before June 1, 2020. The work will be completed and ready for final payment in accordance with Paragraph 15.06 of the General Conditions on or before thirty (30) calendar days have expired from the date the Engineer determines the Work to be substantially complete.***
- B. Parts of the Work shall be substantially completed on or before the following Milestone(s):
1. ***Milestone 1***
 - a. ***Brookings County 6 shall be substantially completed within 14 calendar days of Notice to Proceed for Milestone 1.***
 2. ***Milestone 2***
 - a. ***Brookings County 4 shall be substantially completed within 14 calendar days of Notice to Proceed for Milestone 2. The Notice to Proceed for Milestone 2 will be issued the following working day after completion of Milestone 1.***
 3. ***Milestone 3***
 - a. ***Brookings County 8 shall be substantially completed within 10 calendar days of Notice to Proceed for Milestone 3. The Notice to Proceed for Milestone 3 will be issued the following working day after completion of Milestone 2.***

Milestones shall be completed in the order given above and shall not be completed concurrently.

4.03 *Liquidated Damages*

- A. Contractor and Owner recognize that time is of the essence as stated in Paragraph 4.01 above and that Owner will suffer financial and other losses if the Work is not completed and Milestones not achieved within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with the Contract. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty):
1. Substantial Completion: ***The amount according to the Schedule of Liquidated Damages below shall be deducted from the amount due or that may become due the Contractor for each day that expires after the time (as duly adjusted pursuant to the Contract) specified in Paragraph 4.02.A above for Substantial Completion until the Work is substantially complete.***
 2. Completion of Remaining Work: After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Time (as duly adjusted pursuant to the Contract) for completion and readiness for final payment, ***Engineer shall deduct from final pay request the amount according to the Schedule of Liquidated Damages below for each day that expires after such time until the Work is completed and ready for final payment.***
 3. Liquidated damages for failing to timely attain Substantial Completion and final completion are not additive and will not be imposed concurrently.

4. If Milestones used: ***Engineer shall deduct from pay request the amount according to the Schedule of Liquidated Damages below*** for each day that expires after the time (as duly adjusted pursuant to the Contract) specified above for achievement of Milestone 1, until Milestone 1 is achieved.

B. Schedule of Liquidated Damage

<i>Original contract amount</i>		
<i>From</i>	<i>To and</i>	<i>Amount of liquidated</i>
<i>More Than</i>	<i>Including</i>	<i>damages per calendar day</i>
<i>\$0</i>	<i>\$50,000</i>	<i>\$300.00</i>
<i>\$50,000</i>	<i>\$100,000</i>	<i>\$450.00</i>
<i>\$100,000</i>	<i>\$500,000</i>	<i>\$650.00</i>
<i>\$500,000</i>	<i>\$1,000,000</i>	<i>\$950.00</i>
<i>\$1,000,000</i>	<i>\$2,000,000</i>	<i>\$1,250.00</i>
<i>\$2,000,000</i>	<i>\$4,000,000</i>	<i>\$1,500.00</i>
<i>\$4,000,000</i>	<i>\$6,000,000</i>	<i>\$1,650.00</i>
<i>\$6,000,000</i>	<i>\$8,000,000</i>	<i>\$1,900.00</i>
<i>\$8,000,000</i>	<i>\$10,000,000</i>	<i>\$2,150.00</i>
<i>\$10,000,000</i>	<i>Over \$10,000,000</i>	<i>\$2,300.00</i>

4.04 Special Damages

- A. In addition to the amount provided for liquidated damages, Contractor shall reimburse Owner (1) for any fines or penalties imposed on Owner as a direct result of the Contractor’s failure to attain Substantial Completion according to the Contract Times, and (2) for the actual costs reasonably incurred by Owner for engineering, construction observation, inspection, and administrative services needed after the time specified in Paragraph 4.02 for Substantial Completion (as duly adjusted pursuant to the Contract), until the Work is substantially complete.
- B. After Contractor achieves Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Times, Contractor shall reimburse Owner for the actual costs reasonably incurred by Owner for engineering, construction observation, inspection, and administrative services needed after the time specified in Paragraph 4.02 for Work to be completed and ready for final payment (as duly adjusted pursuant to the Contract), until the Work is completed and ready for final payment.

ARTICLE 5 – CONTRACT PRICE

- 5.01 Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents the amounts that follow, subject to adjustment under the Contract:

- A. For all Work, at the prices stated in Contractor's Bid, attached hereto as an exhibit. The extended prices for Unit Price Work set forth as of the Effective Date of the Contract are based on estimated quantities. As provided in Paragraph 13.03 of the General Conditions, estimated quantities are not guaranteed, and determinations of actual quantities and classifications are to be made by Engineer.

ARTICLE 6 – PAYMENT PROCEDURES

6.01 *Submittal and Processing of Payments*

- A. Contractor shall submit Applications for Payment in accordance with Article 15 of the General Conditions. Applications for Payment will be processed by Engineer as provided in the General Conditions.

6.02 *Progress Payments; Retainage*

- A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment each month during performance of the Work as provided in Paragraph 6.02.A.1 below, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no Schedule of Values, as provided elsewhere in the Contract.
1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Owner may withhold, including but not limited to liquidated damages, in accordance with the Contract
 - a. 90 percent of Work completed (with the balance being retainage). If the Work has been 50 percent completed as determined by Engineer, and if the character and progress of the Work have been satisfactory to Owner and Engineer, ***Owner, on recommendation of Engineer, may determine that as*** long as the character and progress of the Work remain satisfactory to Owner and Engineer, there will be no additional retainage; and
 - b. 90 percent of cost of materials and equipment not incorporated in the Work ***in accordance with paragraph 6.02.A.1.c below*** (with the balance being retainage).
 - c. ***If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at or near the site, the partial payment estimate shall also be accompanied by such supporting data, satisfactory to the Owner, as will establish the Owner's title to the material and equipment and protect his interest therein, including applicable insurance. Partial progress payments will be made upon written request by the Contractor on specific items as listed herein which are stockpiled in a manner and location satisfactory to the Engineer. All material for which an allowance is requested shall be stored in an approved manner in areas where damage from flood waters is not likely to occur. If at any time stored materials are lost or become damaged by floods, or in any other manner, the Contractor will be responsible for repair and replacement of such damaged materials. If payment has been made prior to***

such damage, the amount so allowed or a proportionate part thereof shall be deducted from the next partial payment and withheld until satisfactory repairs or replacements have been made. No payment on stockpiled materials as specified herein shall be made on fuel, hardware such as bolts, plates, etc., supplies, form lumber, false work, perishable materials, or on temporary structures of any kind which will not become an integral part of the finished construction, nor on items when unit bid prices are obviously unbalanced as compared to the Engineer's estimated unit prices prepared prior to the letting.

- B. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to **95** percent of the Work completed, less such amounts set off by Owner pursuant to Paragraph 15.01.E of the General Conditions, and less **200** percent of Engineer's estimate of the value of Work to be completed or corrected as shown on the punch list of items to be completed or corrected prior to final payment.

6.03 Final Payment

- A. Upon final completion and acceptance of the Work in accordance with Paragraph 15.06 of the General Conditions, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in said Paragraph 15.06.

ARTICLE 7 – INTEREST

- 7.01 All amounts not paid when due shall bear interest *per State of South Dakota law*.

ARTICLE 8 – CONTRACTOR'S REPRESENTATIONS

- 8.01 In order to induce Owner to enter into this Contract, Contractor makes the following representations:
 - A. Contractor has examined and carefully studied the Contract Documents, and any data and reference items identified in the Contract Documents.
 - B. Contractor has visited the Site, conducted a thorough, alert visual examination of the Site and adjacent areas, and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
 - C. Contractor is familiar with and is satisfied as to all Laws and Regulations that may affect cost, progress, and performance of the Work.
 - D. Contractor has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or adjacent to the Site and all drawings of physical conditions relating to existing surface or subsurface structures at the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings, and (2) reports and drawings relating to Hazardous Environmental Conditions, if any, at or adjacent to the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings.
 - E. Contractor has considered the information known to Contractor itself; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such

- information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor; and (3) Contractor's safety precautions and programs.
- F. Based on the information and observations referred to in the preceding paragraph, Contractor agrees that no further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract.
- G. Contractor is aware of the general nature of work to be performed by Owner and others at the Site that relates to the Work as indicated in the Contract Documents.
- H. Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
- I. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
- J. Contractor's entry into this Contract constitutes an incontrovertible representation by Contractor that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract Documents.

ARTICLE 9 – CONTRACT DOCUMENTS

9.01 Contents

- A. The Contract Documents consist of the following:
1. This Agreement (pages 1 to 9, inclusive).
 2. Performance bond (pages 1 to 3, inclusive).
 3. Payment bond (pages 1 to 3, inclusive).
 4. Other bonds.
 - a. (pages to , inclusive).
 5. General Conditions (page i, ii, iii, iv, and v and pages 1 to 66, inclusive).
 6. Supplementary Conditions (pages 1 to 22, inclusive).
 7. Specifications as listed in the table of contents of the Project Manual.
 8. Drawings (not attached but incorporated by reference) consisting of 22 sheets with each sheet bearing the following general title: **2020 Brookings County Surfacing Project**.
 9. Addenda (numbers to , inclusive).
 10. Exhibits to this Agreement (enumerated as follows):
 - a. Contractor's Bid (pages 1 to 6, inclusive).
 11. The following which may be delivered or issued on or after the Effective Date of the Contract and are not attached hereto:
 - a. Notice to Proceed.

- b. Change Orders.
- B. The documents listed in Paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in the General Conditions.

ARTICLE 10 – MISCELLANEOUS

10.01 *Terms*

- A. Terms used in this Agreement will have the meanings stated in the General Conditions and the Supplementary Conditions.

10.02 *Assignment of Contract*

- A. Unless expressly agreed to elsewhere in the Contract, no assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, money that may become due and money that is 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.

10.03 *Successors and Assigns*

- A. Owner and Contractor each binds itself, its successors, assigns, and legal representatives to the other party hereto, its successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

10.04 *Severability*

- A. Any provision or part of the Contract Documents 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 Owner and Contractor, who agree that the Contract Documents 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.

10.05 *Contractor's Certifications*

- A. Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 10.05:
 - 1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;
 - 2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;

3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

10.06 *Other Provisions*

- A. Owner stipulates that the General Conditions that are made a part of this Contract are based on EJCDC® C-700, Standard General Conditions for the Construction Contract, published by the Engineers Joint Contract Documents Committee®, and Owner is the party that has furnished said General Conditions, ***and*** Owner has plainly shown all modifications to the standard wording of such published document to the Contractor in the Supplementary Conditions.
- B. ***The Contractor stipulates and agrees that it has (i) thoroughly examined and understands all the Contract Documents and other related data, (ii) investigated and become familiar with the existing conditions present at the Project Site, (iii) investigated and become familiar with all Laws and Regulation which affect the Work to be performed on this Project, AND (iv) fully correlated the information from (i), (ii), and (iii). Or, if the Contractor has not adequately performed such investigations and/or examinations that the Contractor agrees without exception to comply with all conditions, provisions, specifications, requirements, and the like set forth in the Contract Documents.***
- C. ***The Contractor stipulates and agrees that the Contract Documents are generally sufficient to indicate and convey understanding of all terms, conditions, provisions, specifications, requirements, and the like as are necessary to perform the Work on this Project. The Contractor does not consider that any additional information, examinations, investigations, explorations, tests, studies, and/or data are necessary to perform the Work on this Project.***

IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement.

This Agreement will be effective on 2/3/2020 (which is the Effective Date of the Contract).

OWNER:

CONTRACTOR:

Brookings County, South Dakota

Bowes Construction Inc.

By: _____

By: Miranda Bowes Peterson

Title: _____

Title: Vice President

(If Contractor is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)

Attest: _____

Attest: Carl Adelman

Title: _____

Title: Estimator

Address for giving notices:

Address for giving notices:

422 Western Avenue

2915 22nd Ave S

Brookings, SD 57006

Brookings, SD 57006

License No.: 7000-3468-HC

(where applicable)

(If Owner is a corporation, attach evidence of authority to sign. If Owner is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of this Agreement.)

NOTE TO USER: Use in those states or other jurisdictions where applicable or required.

ACTION-IN-WRITING IN LIEU
OF THE
ANNUAL MEETING
OF THE
DIRECTORS OF

BOWES CONSTRUCTION, INC.

MARCH 27, 2019

THE UNDERSIGNED, being all of the Directors of BOWES CONSTRUCTION INC., a South Dakota corporation, and being the elected, qualified, and serving Directors of the Corporation, do hereby take this action in writing by unanimous consent, in a manner authorized by the laws of the State of South Dakota, and not prohibited by the Bylaws of the Corporation, and do further jointly and severally waive notice of meeting and formal meeting and do thus consent to the resolutions, actions, and matters transacted and stated herein.

WHEREAS, the Board of Directors agree that the below-named persons should be elected to serve in the respective offices below indicated, to serve at the pleasure of the Board of Directors, and each to serve for a one (1) year term, commencing this day and continuing until the next annual meeting of Directors:

<u>OFFICE</u>	<u>NAME</u>
President	Jason P. Bowes
Vice President	Miranda C. Peterson
Secretary	Miranda C. Peterson
Treasurer	Jason P. Bowes

NOW, THEREFORE, the Directors hereby **RESOLVE** that the foregoing identified individuals be and the same are each hereby elected to hold the office immediately preceding such individual's name, for the terms as above stated;

AND,

IT IS FURTHER RESOLVED that the acts, actions and activities of the Officers of the Corporation undertaken in the name of or for the benefit of the Corporation during the prior year ended December 31st, be and the same are hereby ratified by the Directors as official authorized actions taken in the name of the Corporation, as its acts alone.

AND,

RESOLVED, FINALLY, the Directors do hereby approve the reports this day given.

Dated at Brookings, South Dakota this 27th day of March, 2019.

THE DIRECTORS:



Jason P. Bowes, Director



Miranda C. Peterson, Director



Lyle F. Bowes



Marcia L. Bowes, Director

IN WITNESS WHEREOF, I have hereunto affixed my signature as Secretary of the Corporation the date last written above.



Miranda C. Peterson, Secretary

