

## **CONSTRUCTION AGREEMENT**

This Agreement is dated for identification this 18<sup>th</sup> day of April and is made by and between the TOWN OF LOS GATOS, a California municipal corporation, whose address is 110 East Main Street, Los Gatos, California 95030 (hereinafter "TOWN"), and Pavement Coatings Co., identified as an S Corporation and whose address is 10240 San Sevaine Way, Jurupa Valley, CA 91752 (hereinafter "CONTRACTOR").

NOW, THEREFORE, the parties agree:

### **ARTICLE I: WORK TO BE DONE AND DOCUMENTS FORMING THE CONTRACT.**

That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the said TOWN, and under the conditions expressed in the two bonds hereunto annexed, the said CONTRACTOR agrees with the said TOWN, at his own proper cost and expense, to do all the work and furnish all the materials and equipment necessary to construct and complete, in accordance with the plans and specifications hereinafter mentioned, in a good, workmanlike and substantial manner, under the supervision of the Town Engineer, or his, of the TOWN OF LOS GATOS, California, all the works and improvements described, mentioned and set forth in those plans and specifications on file in the Office of the Parks and Public Works of said TOWN, entitled:

"Plans and Specifications for the #22-811-9901 FY 2022/23 Annual Street Repair and Resurfacing"

which said plans and specifications and all the documents therein contained, including the TOWN OF LOS GATOS's Standard Provisions, are hereby specially referred to and by such reference made part of this contract.

### **ARTICLE II: CONTRACTOR'S ACCEPTANCE**

CONTRACTOR agrees to receive and accept the prices shown on Exhibit "A" \$3,341,090.18, which is attached hereto and incorporated by reference herewith, as full compensation for furnishing all materials and equipment and for doing all the work described in the contract documents; also for all loss or damage as provided in the contract documents in the prosecution of the work until its acceptance by the Town Council of the TOWN OF LOS GATOS, and for well and faithfully completing the work, and the whole thereof, in the manner and according to the contract documents, plans and specifications, and the requirements of the Town Engineer.

### **ARTICLE III: ACCEPTANCE BY TOWN**

The said TOWN hereby promises and agrees with the said CONTRACTOR to employ, and does hereby employ the said CONTRACTOR to provide the materials and to do the work according to the terms and conditions herein contained and referred to, for the prices aforesaid, and hereby contracts to pay the same at the time, in the manner and upon the conditions above set forth; and the said parties for themselves their heirs, executors, administrators, successors and assigns, do hereby agree to the full performance of the covenants herein contained.

### **ARTICLE IV: COMPLETION OF AGREEMENT**

Reference is made to Part I – Page 1 of the TOWN's Project Specifications Notice to Contractors which are hereby made a part of this contract. Inasmuch as the work called for under this contract concerns a needed public improvement, the time of performance and completion of this work is of the essence of this contract. It is expressly understood and agreed by the parties hereto that all the work called for under this contract, in all its parts and requirements, shall be completed fifty (50) working days from Notice to Proceed.

### **ARTICLE V: HOURS OF LABOR**

The CONTRACTOR shall forfeit, as a penalty, to the TOWN, Twenty-Five Dollars (\$25) for each workman employed in the execution of the contract by him or by any subcontractor for each calendar day during which any workman is required or permitted to labor more than eight (8) hours in violation of the provisions of Sections 1810-1815 inclusive of the Labor Code and all amendments thereto.

### **ARTICLE VI: APPRENTICES**

Attention is directed to the provisions in Sections 1777.5, 1777.6 and 1777.7 of the Labor Code governing the employment of apprentices by the CONTRACTOR or any subcontractor under him. CONTRACTOR and any of his subcontractors shall comply with the requirements of said sections of the Labor Code; CONTRACTOR shall have full responsibility for compliance with the said sections regardless of any other contractual or employment relationships alleged to exist.

Information relative to apprenticeship standards and other requirements may be obtained from the Director of Industrial Relations ex officio the Administrator of Apprenticeship, San Francisco, California or from the Division of Apprenticeship Standards at its branch offices.

### **ARTICLE VII: NONDISCRIMINATION**

The CONTRACTOR sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. CONTRACTOR shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts.

Failure by CONTRACTOR to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as recipient deems appropriate.

#### **ARTICLE VIII: INDEPENDENT CONTRACTOR**

It is agreed that CONTRACTOR is an independent contractor, and all persons working for or under the direction of CONTRACTOR are CONTRACTOR's agents, servants and employees, and said persons shall not be deemed agents, servants or employees of TOWN.

#### **ARTICLE IX: OWNERSHIP OF DATA AND DOCUMENTS**

CONTRACTOR agrees that all records, specifications, data, maps, designs, graphics, writings, recordings and other tangible materials regardless of form or format, including, without limitation, electronically transmitted documents and ACAD files, and other collateral materials collected, compiled, drafted, prepared, produced and/or generated in the performance of this Agreement shall be the property of TOWN. CONTRACTOR shall regularly provide such documents to TOWN upon TOWN's request. In the event that this Agreement is terminated prior to completion of the scope of work, CONTRACTOR shall provide all such data and documents to TOWN forthwith.

#### **ARTICLE X: INDEMNIFICATION**

To the fullest extent permitted by law, CONTRACTOR shall defend, indemnify, and hold harmless the TOWN, its elected and appointed officials, employees, and agents ("Indemnified Parties"), from and against any claims, allegations, damages, awards, judgments, and expenses of every kind or character, including, but not limited to, attorney fees and expert costs, which may arise out of or result from in whole or in part CONTRACTOR's performance of the work, except to the extent caused by the sole negligence or willful misconduct of Indemnified Parties. CONTRACTOR's obligation to defend Indemnified Parties shall be immediate upon written notice by TOWN to CONTRACTOR and CONTRACTOR shall, if requested by TOWN, defend Indemnified Parties using counsel approved by TOWN in its sole discretion.

#### **ARTICLE XI: INSURANCE**

a. Commercial General Liability/Automobile Liability Insurance:

CONTRACTOR shall obtain and maintain Commercial General Liability insurance in the amount of Two Million Dollars (\$2,000,000) and Automobile Liability insurance in the amount of One Million Dollars (\$1,000,000) per occurrence. If a general aggregate limit is used, either the general aggregate limit shall apply separately to this contract or the general aggregate limit shall be twice the required occurrence limit. CONTRACTOR's insurance coverage shall be written on an occurrence basis.

b. Workers' Compensation Insurance:

CONTRACTOR shall obtain and maintain statutory Workers' Compensation insurance and Employer's Liability insurance in the amount of One Million Dollars (\$1,000,000) per accident.

CONTRACTOR is familiar with the Workers' Compensation laws of California (generally contained in Section 3700 of the Labor Code), including those provisions which provide for specific exemptions from the requirement that all employers must carry Workers' Compensation insurance, and CONTRACTOR maintains they are exempted under the law from the requirement to maintain Workers' Compensation insurance coverage.

In addition, during the term of any work for TOWN under said agreement: (1) CONTRACTOR will not employ any person in any manner so as to become subject to the Workers' Compensation laws of California, or (2) should CONTRACTOR become subject to the Workers' Compensation provisions of Section 3700 of the Labor Code for any reason, CONTRACTOR shall forthwith comply with those provisions and send evidence of financial compliance to TOWN.

c. Acceptability of Insurers: Insurance is to be placed with insurers with a current *Best Rating* of A:VII unless otherwise acceptable to TOWN.

d. Verification of Coverage: Insurance, deductibles or self-insurance retentions shall be subject to TOWN's approval. Original Certificates of Insurance with endorsements shall be received and approved by TOWN before work commences, and insurance must be in effect for the duration of the contract. The absence of insurance or a reduction of stated limits shall cause all work on the project to cease. Any delays shall not increase costs to TOWN or increase the duration of the project.

e. Other Insurance Provisions:

(1) The TOWN OF LOS GATOS, its elected and appointed officials, employees, and agents are to be covered as additional insured by Endorsement CG 20 10 11 85 or other endorsement approved by Town Attorney for Commercial General and Automobile Liability coverage.

(2) For any claims related to this project, CONTRACTOR's insurance coverage shall be primary and any insurance or self-insurance maintained by TOWN, its elected and appointed, officials, employees, and agents shall not contribute to it.

(3) Each insurance policy required shall be endorsed that a thirty (30) day notice be given to TOWN in the event of cancellation or modification to the stipulated insurance coverage.

(4) In the event CONTRACTOR employs subcontractors as part of the work covered by this Agreement, it shall be the responsibility of CONTRACTOR to ensure that all subcontractors comply with the same insurance requirements that are stated in this Agreement.

(5) Approval of the insurance by TOWN or acceptance of the Certificate of Insurance by TOWN shall not relieve or decrease the extent to which CONTRACTOR may be held responsible for payment of damages resulting from CONTRACTOR's services or operation pursuant to this Agreement, nor shall it be deemed a waiver of TOWN's rights to insurance coverage hereunder.

(6) If, for any reason, CONTRACTOR fails to maintain insurance coverage that is required pursuant to this contract, the same shall be deemed a material breach of contract. TOWN, at its sole option, may terminate this contract and obtain damages from CONTRACTOR resulting from said breach. Alternately, TOWN may purchase such required insurance coverage, and without further notice to CONTRACTOR, TOWN may deduct from sums due to CONTRACTOR any premium costs advanced by TOWN for such insurance.

#### **ARTICLE XII: BONDING REQUIREMENT**

CONTRACTOR agrees to post a Faithful Performance Bond and a payment bond for Labor and Materials, or other guarantees, in the required \$3,341,090.18 upon bond forms provided by the TOWN, guarantying the performance of the terms of this Agreement. Surety issuing bonds for CONTRACTOR shall be approved by the U.S. Department of Treasury's Financial Management Service and shall be listed on the most current Treasury Circular 570 as contained in the Federal Register.

Contractor agrees to allow five percent of the faithful performance bond to remain in effect for a period of two years following Town Council project acceptance as guarantee for any needed repair or replacement caused by defective materials and workmanship.

#### **ARTICLE XIII: MAINTENANCE AND GUARANTY**

CONTRACTOR shall promptly repair, replace, restore, or rebuild, as the TOWN may determine, any finished product in which defects of materials or workmanship may appear or to which damage may occur because of such defects, during a two (2) year period subsequent to the date of final acceptance.

This article does not in any way limit the guaranty on any items for which a longer guaranty is specified or on any items which a manufacturer gives a guaranty for a longer period, nor does it limit the other remedies of the TOWN in respect to a latent defect, fraud or implied warranties. CONTRACTOR shall furnish the TOWN all appropriate guaranties or warranty certificates upon completion of the project.

#### **ARTICLE XIV: SHORING FOR TRENCHES**

If the contract specifies an expenditure of Twenty-Five Thousand Dollars (\$25,000) or greater for trenching, and if the depth of the trench is five feet (5') or more, then Section 6705 of the Labor Code shall also be applicable.

#### **ARTICLE XV: APPLICABLE LAWS AND ATTORNEY'S FEES**

This Agreement shall be construed and enforced pursuant to the laws of the State of California. Should any legal action be brought by a party for breach of this Agreement or to enforce any provision herein, the prevailing party of such action shall be entitled to reasonable attorneys' fees, court costs, and such other costs as may be fixed by the court. Reasonable attorneys' fees of the TOWN Attorney's Office, if private counsel is not used, shall be based on comparable fees of private attorneys practicing in Santa Clara County.

#### **ARTICLE XVI: LIQUIDATED DAMAGES**

It is mutually agreed by CONTRACTOR and TOWN that in the event that completion of the construction by CONTRACTOR under this Agreement is delayed beyond fifty (50) working days from Notice to Proceed, TOWN will suffer damages and will incur other costs and expenses of a nature and amount which is difficult or impractical to determine. The Parties agree that by way of ascertaining and fixing the amount of damages, costs and expenses, and not by way of penalty, CONTRACTOR shall pay to TOWN the sum of Ten Thousand Dollars (\$10,000) per day in liquidated damages for each and every calendar day such delay in completion of the services under this Agreement continues beyond fifty (50) working days from Notice to Proceed. In the event that the liquidated damages are not paid, CONTRACTOR agrees that TOWN may deduct the amount of unpaid damages from any money due or that may become due to CONTRACTOR under this Agreement.

#### **ARTICLE XVII: INTERPRETATION OF CONTRACT**

It is further expressly agreed by and between the parties hereto that should there be any conflict between the terms of this instrument and the bid or proposal of said CONTRACTOR, then this instrument shall control and nothing herein shall be considered as an acceptance of the said terms of said proposal conflicting herewith.

#### **ARTICLE XVIII: AMENDMENTS AND CHANGE ORDERS**

This Agreement may be amended from time to time as necessary by formal and written amendment or authorized change order executed by the Town Manager or designee and principal acting on behalf of the CONTRACTOR.

## ARTICLE XIX: DBE RESPONSIBILITIES

For projects that are State or Federal funding; With respect to Disadvantaged Business Enterprises, CONTRACTOR shall do the following:

(1) Pay each subcontractor under this prime contract for satisfactory performance of its contract no later than ten (10) days from the receipt of each payment the prime contractor receives from TOWN. Any delay or postponement of payment from the above-referenced time frame may occur only for good cause following written approval of TOWN. This clause applies to both DBE and non-DBE subcontractors.

(2) Release all retainage owed to a subcontractor for satisfactory completion of the accepted work within thirty (30) days after TOWN's payment to CONTRACTOR. Any delay or postponement of payment from the above-referenced time frame may occur only for good cause following written approval of TOWN. This clause applies to both DBE and non-DBE subcontractors.

## ARTICLE XX: PREVAILING WAGES

Prevailing Wage. This project is subject to the requirements of Section 1720 et seq. of the California Labor Code requiring the payment of prevailing wages, the training of apprentices and compliance with other applicable requirements. Contractors and all subcontractors who perform work on the project are required to comply with these requirements. Prevailing wages apply to all projects over \$1,000 which are defined as a "public work" by the State of California. This includes: construction, demolition, repair, alteration, maintenance and the installation of photovoltaic systems under a Power Purchase Agreement when certain conditions are met under Labor Code Section 1720.6. This include service and warranty work on public buildings and structures.

1. The applicable California prevailing wage rate can be found at [www.dir.ca.gov](http://www.dir.ca.gov) and are on file with the Town of Los Gatos Parks and Public Works Department, which shall be available to any interested party upon request. The contractor is also required to have a copy of the applicable wage determination posted and/or available at each jobsite.
2. Specifically, contractors are reminded of the need for compliance with Labor Code Section 1774-1775 (the payment of prevailing wages and documentation of such), Section 1776 (the keeping and submission of accurate certified payrolls) and 1777.5 in the employment of apprentices on public works projects. Further, overtime, weekend and holiday pay, and shift pay must be paid pursuant to applicable Labor Code section.
3. The public entity for which work is being performed or the California Department of Industrial Relations may impose penalties upon contractors and subcontractors for failure to comply with prevailing wage requirements. These penalties are up to \$200 per day per worker for each wage violations identified; \$100 per day per worker for failure to provide the required paperwork and documentation requested within a 10-day window; and \$25 per day per worker for any overtime violation.

4. As a condition to receiving progress payments, final payment and payment of retention on any and all projects on which the payment of prevailing wages is required, the contractor agrees to present to the TOWN, along with its request for payment, all applicable and necessary certified payrolls (for itself and all applicable subcontractors) for the time period covering such payment request. The term “certified payroll” shall include all required documentation to comply with the mandates set forth in Labor Code Section 1720 et seq, as well as any additional documentation requested by the Agency or its designee including, but not limited to: certified payroll, fringe benefit statements and backup documentation such as monthly benefit statements, employee timecards, copies of wage statements and cancelled checks, proof of training contributions (CAC2 if applicable), and apprenticeship forms such as DAS-140 and DAS-142.
5. In addition to submitting the certified payrolls and related documentation to the TOWN, the contractor and all subcontractors shall be required to submit certified payroll and related documents electronically to the California Department of Industrial Relations. Failure to submit payrolls to the DIR when mandated by the project parameters shall also result in the withholding of progress, retention and final payment.
6. No contractor or subcontractor may be listed on a bid proposal for a public works project unless registered with the Department of Industrial Relations pursuant to Labor Code section 1725.5 [with limited exceptions from this requirement for bid purposes only under Labor Code section 1771.1(a)].
7. No contractor or subcontractor may be awarded a contract for public work on a public works project, unless registered with the Department of Industrial Relations pursuant to Labor Code section 1725.5. Contractors MUST be a registered “public works contractor” with the DIR AT THE TIME OF BID. Where the prime contract is less than \$15,000 for maintenance work or less than \$25,000 for construction alternation, demolition or repair work, registration is not required.
8. Should any contractor or subcontractors not be a registered public works contractor and perform work on the project, Contractor agrees to fully indemnify the TOWN for any fines assessed by the California Department of Industrial Relations against the TOWN for such violation, including all staff costs and attorney’s fee relating to such fine.
9. The TOWN shall withhold any portion of a payment; including the entire payment amount, until certified payroll forms and related documentation are properly submitted, reviewed and found to be in full compliance. In the event that certified payroll forms do not comply with the requirements of Labor Code Section 1720 et seq., the TOWN may continue to hold sufficient funds to cover estimated wages and penalties under the contract.

#### **ARTICLE XXI: ENTIRE AGREEMENT**

This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements or understandings



(whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein.

#### **ARTICLE XXII: PUBLIC RECORDS**

The parties recognize and acknowledge that TOWN is subject to the California Public Records Act, California Government Code Section 6250 and following. Public records are subject to disclosure.

#### **ARTICLE XXIII: NOTICES**

Any notice required to be given to CONTRACTOR shall be deemed to be duly and properly given if mailed to CONTRACTOR, postage prepaid, addressed to:

Pavement Coatings Co.  
10240 San Sevaine Way  
Jurupa Valley, CA 91752

or personally delivered to CONTRACTOR at such address or at such other addresses as CONTRACTOR may designate in writing to TOWN.

Any notice required to be given TOWN shall be deemed to be duly and properly given if mailed to TOWN, postage prepaid, addressed to:

Nicolle Burnham  
Parks and Public Works Director  
TOWN OF LOS GATOS  
41 Miles Avenue  
Los Gatos, California 95030

or personally delivered to TOWN at such address or at such other addresses as TOWN may designate in writing to CONTRACTOR.

#### **ARTICLE XXIV: SECTION 7106 FORM**

Attached to the Agreement is a fully executed and sworn non-collusion affidavit as required by Section 7106 of the California Public Contracts Code. Said affidavit is incorporated herein by this reference.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands the year and date first written above.

APPROVED AS TO CONTENT:

"TOWN":  
TOWN OF LOS GATOS

\_\_\_\_\_  
Nicolle Burnham  
Director of Parks and Public Works

By: \_\_\_\_\_  
Laurel Prevetti  
Town Manager

APPROVED AS TO FORM:

Attest:

\_\_\_\_\_  
Gabrielle Whelan, Town Attorney

\_\_\_\_\_  
Wendy Wood, CMC, Town Clerk

CONTRACTOR:

By: Pavement Coatings Co.

Name:

Title: \_\_\_\_\_

Address: \_\_\_\_\_

By: \_\_\_\_\_

Tax ID No. or SSAN: \_\_\_\_\_

Title: \_\_\_\_\_