

MINOR CONSTRUCTION AGREEMENT

This Agreement (this “**Agreement**”) is made and entered into between the City of South San Francisco, a municipal corporation (“**City**”) and **The Davey Tree Expert Company**, (“**Contractor**”) effective as of **April 27, 2022** (the “**Effective Date**”). City and Contractor are hereinafter collectively referred to as (the “**Parties**”). In consideration of their mutual covenants, the Parties hereby agree as follows:

1. **Scope of Work.** Contractor shall provide the following services and/or materials (“the Work”): Tree Removal, as more particularly described in the Scope of Work, attached hereto and incorporated herein as Exhibit A. In the event of a conflict or inconsistency between the text of the main body of this Agreement and **Exhibit A**, the text of the main body of this Agreement shall prevail. The Work shall commence on **May 1, 2022**, and shall be completed to the satisfaction of the City by **December 31, 2024**, unless such date is extended or otherwise modified by the City in writing.

2. **Payment.** City shall pay Contractor an amount not to exceed: **Four Hundred Ninety-Five Thousand Dollars (\$495,000)** for the full and satisfactory completion of the Work in accordance with the terms and based on an attached rate schedule. The amount stated above is the entire compensation payable to Contractor for the Work performed hereunder, including all labor, materials, tools and equipment furnished by Contractor.

(A) **Invoices.** City shall make monthly payments, based on invoices received, for Work satisfactorily performed. City shall have thirty (30) days from the receipt of an invoice that complies with all of the requirements above to pay Contractor.

(B) **False Claims Act.** Presenting a false or fraudulent claim for payment, including a change order, is a violation of the California False Claims Act and may result in treble damages and a fine of five thousand (\$5,000) to ten thousand dollars (\$10,000) per violation.

(C) **Retention and Final Payment.** City shall retain five percent (5%) of each payment, which shall be paid within sixty (60) days after acceptance of the services, as described in Section 11, and submittal to City of a final invoice if all services required have been satisfactorily performed. Contractor may substitute securities or establish an escrow in lieu of retainage, pursuant to Public Contract Code Section 22300.

3. **Independent Contractor.** It is understood and agreed that this Agreement is not a contract of employment and does not create an employer-employee relationship between the City and Contractor. At all times Contractor shall be an independent contractor and Contractor is not authorized to bind the City to any contracts or other obligations without the express written consent of the City.

4. **Indemnification.** To the fullest extent permitted by law, Contractor shall indemnify, defend (with counsel acceptable to the City), and hold harmless the City and its elected and appointed officers, officials, employees, agents, contractors and consultants (collectively, the “City Indemnitees”) from and against any and all liability, loss, damage, claims, expenses and costs (including, without limitation, attorneys’ fees and costs of litigation) (collectively, “Liability”) of every nature arising out of or in connection with Contractor’s performance of the Work or Contractor’s failure to comply with this Agreement, except such Liability caused by the gross negligence or willful misconduct of the City Indemnitees.

5. **Excavations.** In accordance with Public Contracts Code Section 714, Contractor shall promptly notify City in writing of discovery of any material Contractor believes may be hazardous waste as defined in Section 25117 of the Health and Safety Code or of any subsurface or latent physical conditions at the site of any unusual nature differing materially from those generally inherent in the work described in

Exhibit A. Upon receipt of such communication, City shall promptly investigate the conditions and if conditions do materially differ, shall issue a change order providing for additional time or payment of additional costs.

6. Relocation of Utilities. In the event that the completion of the services described in Exhibit A requires the removal or protection of main or trunk line public utility facilities, the City shall be responsible for removal and protection of such public utilities pursuant to Government Code Section 4215.

7. Insurance. Prior to beginning the Work and continuing throughout the term of this Agreement, Contractor (and any subcontractors) shall, at Contractor's (or subcontractor's) sole cost and expense, furnish the City with certificates of insurance evidencing that Contractor has obtained and maintains insurance in the following amounts:

A. Workers' Compensation that satisfies the minimum statutory limits.

B. Commercial General Liability and Property Damage Insurance in an amount not less than ONE MILLION DOLLARS (\$1,000,000) combined single limit per occurrence, TWO MILLION DOLLARS (\$2,000,000) annual aggregate, for bodily injury, property damage, products, completed operations and contractual liability coverage. The policy shall also include coverage for liability arising out of the use and operation of any City-owned or City-furnished equipment used or operated by the Contractor, its personnel, agents or subcontractors.

C. Comprehensive automobile insurance in an amount not less than ONE MILLION DOLLARS (\$1,000,000) per occurrence for bodily injury and property damage including coverage for owned and non-owned vehicles.

All insurance policies shall be written on an occurrence basis and shall name the City Indemnitees as additional insureds. The certificates shall contain a statement of obligation on the part of the carrier to notify City of any material change, cancellation, termination, or non-renewal of the coverage at least thirty (30) days in advance of the effective date of any such material change, cancellation, termination or non-renewal. Further, if the Vendor's insurance policy includes a self-insured retention that must be paid by a named insured as a precondition of the insurer's liability, or which has the effect of providing that payments of the self-insured retention by others, including additional insureds or insurers do not serve to satisfy the self-insured retention, such provisions must be modified by special endorsement so as to not apply to the additional insured coverage required by this agreement so as to not prevent any of the parties to this agreement from satisfying or paying the self-insured retention required to be paid as a precondition to the insurer's liability. Additionally, the certificates of insurance must note whether the policy does or does not include any self-insured retention and also must disclose the deductible. The City's Risk Manager may waive or modify any of the insurance requirements of this section by means of a written document.

8. General Warranties and Guarantee. Contractor warrants that: (A) All Work, Products and/or Services are as described in this Agreement, including any exhibits incorporated] conform to all drawings, samples, descriptions and specifications; (B) All Work, Products and/or Services delivered are new and of good merchantable quality, free from material defects of workmanship and fit for the purpose for which sold or provided; (C) Contractor has good title to all Products delivered and all Products delivered are free from liens and other encumbrances; and (D) Contractor's Work will be in strict conformity with all applicable local, state, and federal laws. For purposes of this warranty, any parts not meeting the foregoing quality shall be deemed defective.

Contractor shall guarantee the Work to be free of defects in material and workmanship for a period of one (1) year following the City's acceptance of the Work ("Contractor's Guarantee"), as described in Section 11. As part of Contractor's Guarantee, Contractor agrees to make, at Contractor's own expense, any repairs or replacements made necessary by defects in material or workmanship which become evident

within the one-year guarantee period. The Contractor's Guarantee is effective regardless of whether or not a maintenance bond is required by the City for this Agreement.

9. Licenses. Contractor represents and warrants that Contractor possesses all licenses, permits, and qualifications legally required for the performance of the Work. Contractor shall, at Contractor's sole cost and expense, maintain all such licenses, permits and qualifications in full force and effect throughout the term of this Agreement.

10. Damage to City Facilities and Site Safety. Damage to City or public facilities or private property caused by the Contractor or by its subcontractors during performance of the Work shall be repaired and/or replaced in kind at no cost to the City. The worksite shall be kept clean and free of hazards at all times during installation. After work is completed at the site, Contractor shall clean the surrounding area to the condition prior to performance of the Work.

11. Final Inspection and Work Acceptance. All Work shall be subject to final inspection and acceptance or rejection by the City.

12. Compliance with all Applicable Laws. Contractor shall comply with all applicable local, state and federal laws, regulations and ordinances in the performance of this Agreement. Contractor shall not discriminate in the provision of service or in the employment of persons engaged in the performance of this Agreement on account of race, color, national origin, ancestry, religion, gender, marital status, sexual orientation, age, physical or mental disability in violation of any applicable local, state or federal laws or regulations.

13. Payment of Taxes; Tax Withholding. Contractor is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes. To be exempt from tax withholding, Contractor must provide City with a valid California Franchise Tax Board form 590 ("Form 590. Unless Contractor provides City with a valid Form 590 or other valid, written evidence of an exemption or waiver from withholding, City may withhold California taxes from payments to Contractor as required by law. Contractor shall obtain, and maintain on file for three (3) years after the termination of this Agreement, Form 590s (or other written evidence of exemptions or waivers) from all subcontractors. Contractor accepts sole responsibility for withholding taxes from any non-California resident subcontractor and shall submit written documentation of compliance with Contractor's withholding duty to City upon request.

14. Prevailing Wage. The wages to be paid for a day's work to all classes of laborers, workmen, or mechanics on the work contemplated by this Agreement, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where the work hereby contemplates to be performed as determined by the Director of Industrial Relations pursuant to the Director's authority under Labor Code Section 1770, *et seq.* Each laborer, worker or mechanic employed by Contractor or by any subcontractor shall receive the wages herein provided for. The Contractor shall pay two hundred dollars (\$200), or whatever amount may be set by Labor Code Section 1775, as may be amended, per day penalty for each worker paid less than prevailing rate of per diem wages. The difference between the prevailing rate of per diem wages and the wage paid to each worker shall be paid by the Contractor to each worker.

The City will not recognize any claim for additional compensation because of the payment by the Contractor for any wage rate in excess of prevailing wage rate set forth. The possibility of wage increases is one of the elements to be considered by the Contractor.

NOTE: An error on the part of an awarding body does not relieve the Contractor from responsibility for payment of the prevailing rate of per diem wages and penalties pursuant to Labor Code Sections 1770-1775.

- (A) Posting of Schedule of Prevailing Wage Rates and Deductions. If the schedule of prevailing wage rates is not attached hereto pursuant to Labor Code Section 1773.2, the Contractor shall post at appropriate conspicuous points at the site of the project a schedule showing all determined prevailing wage rates for the various classes of laborers and mechanics to be engaged in work on the project under this contract and all deductions, if any, required by law to be made from unpaid wages actually earned by the laborers and mechanics so engaged.
- (B) Payroll Records. Each Contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the Contractor in connection with the public work. Such records shall be certified and submitted weekly as required by Labor Code Section 1776.

15. Patents. The Contractor shall assume all costs arising from the use of patented materials, equipment, services, or processes used on or incorporated in the Work, and agrees to indemnify and save harmless the City of South San Francisco, the City Council, and the Engineer, and their duly authorized representatives, for all suits at law, or actions of every nature for, or on account of the use of any patented materials, equipment, services, or processes.

16. Dispute Resolution. Prior to initiating litigation in a court of competent jurisdiction, both Contractor and City shall undergo alternative dispute procedures as outlined in Public Contract Code Section 20104, et seq. The Parties also expressly agree that such procedures are incorporated as though fully set forth in this Agreement.

17. Prevailing Party. In the event that either party to this Agreement commences any legal action or proceeding (including but not limited to arbitration) to interpret the terms of this Agreement, the prevailing party in such a proceeding shall be entitled to recover its reasonable attorney's fees associated with that legal action or proceeding.

18. Termination. City may terminate or suspend this Agreement at any time and without cause upon written notification to Contractor. Upon receipt of notice of termination or suspension, Contractor shall immediately stop all work in progress under this Agreement. The City's right of termination shall be in addition to all other remedies available under law to the City.

19. Severability. If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

20. Entire Agreement. This Agreement represents the entire and integrated agreement between the Parties. This Agreement may be modified or amended only by a subsequent written agreement signed by both Parties.

21. Non-Liability of Officials, Employees and Agents. No officer, official, employee or agent of City shall be personally liable to Contractor in the event of any default or breach by City or for any amount which may become due to Contractor pursuant to this Agreement.

22. Execution in Counterparts. This Agreement may be executed in counterparts and/or by facsimile or other electronic means, and when each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterpart, shall constitute one Agreement, which shall be binding upon and effective as to all Parties.

23. Notice. All notices and other communications which are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given (i) when received if personally delivered; (ii) when received if transmitted by telecopy, if received during normal business hours on a business day (or if not, the next business day after delivery) provided that such facsimile is legible and that at the time such facsimile is sent the sending Party receives written confirmation of receipt; (iii) if sent for next day delivery to a domestic address by recognized overnight delivery service (e.g., Federal Express); and (iv) upon receipt, if sent by certified or registered mail, return receipt requested. In each case notice shall be sent to the respective Parties as follows:

Contractor:

The Davey Tree Expert Company
1400 Mission Road
South San Francisco, CA 94080

City:

City Clerk
City of South San Francisco
400 Grand Avenue
South San Francisco, CA 94080

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date written above.

CITY:

THE DAVEY TREE EXPERT COMPANY:

By: _____
Mike Futrell, City Manager

By: _____
Adam Jensen, District Manager

APPROVED AS TO FORM:

City Attorney
2729960.1

ATTESTED:

City Clerk