

EXHIBIT A - DRAFT AGREEMENT

DRAFT AGREEMENT FOR PUBLIC IMPROVEMENTS

THIS AGREEMENT made and entered into this ____, day of ____, ____, between the CITY OF SOUTH SAN FRANCISCO, a municipal corporation and political subdivision of the State of California, hereinafter called "CITY", and MCGUIRE AND HESTER, Inc., hereinafter called "CONTRACTOR"¹.

W I T N E S S E T H:

WHEREAS, City has taken appropriate proceedings to authorize construction of the public work and improvements herein provided and execution of this contract.

WHEREAS, a notice was duly published for bids for the contract for the improvements hereinafter described.

WHEREAS, on ____, notice duly given, the City Council ("Council") of said City awarded the contract for the construction of the improvements hereinafter described to the Contractor, which Contractor said Council found to be the lowest responsible bidder for said improvements.

WHEREAS, City and Contractor desire to enter into this agreement for the construction of said improvements pursuant to the terms, definitions, and conditions set forth in the General Provisions and other Contract Documents.

IT IS AGREED as follows:

1. Scope of Work. Contractor shall perform the Work described briefly as follows:

The Work consists of the furnishing of all labor, materials, tools, equipment, and services necessary for the construction of the **CALTRAIN ACCESS AND BAY TRAIL GAP CLOSURE PROJECT**; in accordance with the Contract Documents.

Also included are any such other items or details not mentioned above that are required by the Contract Documents, which are to be constructed or furnished and installed as shown on the plans, as specified herein and as directed by the Engineer.

The aforementioned improvements are further described in the "Contract Documents" hereinafter referred to.

2. The Contract Documents. The complete Contract consists of the following documents:

- (A) Notice Inviting Bids
- (B) Part I – Submitted Proposal (as accepted)
- (C) This Agreement, including Contractor's Payment Bond, Faithful Performance Bond and Guaranty Bond.
- (D) Part II – General Conditions

1. ¹The term "Contractor" as used herein is employed without distinction as to either number or gender and shall include whenever the context shall permit all agents, representatives, employees, servants, subcontractors and business or social invitees.

(E) Part III – Special Provisions: Special Conditions and Technical Specifications, including State Standard Specifications dated 2018, sections 10-99, as revised in Revised Standard Specifications (RSS) dated April 17, 2020

(F) Part IV – Project Plans dated January 14, 2022

(G) Administrative subsections of the State Standard Specifications dated 2018, as specifically referenced in contract Parts I-IV and as revised in RSS dated April 17, 2020.

All rights and obligations of City and Contractor are fully set forth and described in the contract documents.

All of the above-named documents are intended to cooperate, so that any work called for in one and not mentioned in the other, or vice versa, is to be executed the same as if mentioned in all said documents. The documents comprising the complete contract will hereinafter be referred to as “the Contract Documents.”

3. Equipment - Performance of Work. Contractor shall furnish all tools, equipment, apparatus, facilities, labor, and materials necessary to perform and complete in a good and workmanlike manner the Work of general construction as called for, and for the manner designated in, and in strict conformity with, the plans and specifications for said Work entitled:

CALTRAIN ACCESS AND BAY TRAIL GAP CLOSURE PROJECT

The equipment, apparatus, facilities, labor, and materials shall be furnished and said Work performed and completed as required in said plans and specifications under the direction and supervision and subject to the approval of the Engineer of said City or the Engineer’s designated assistant.

4. Contract Price. City shall pay, and Contractor shall accept, in full payment for the Work agreed to be done the sum of **Five Hundred Sixty-Five Thousand Six Hundred Forty-Six Dollars (\$565,646.00)**. Said price is determined by the lump sum price contained in Contractor's bid proposal (“Bid”). The lump sum price and unit prices are set forth in the completed Bid forms attached hereto and made a part hereof as if set forth herein verbatim. In the event work is performed or materials furnished in addition to those set forth in Contractor's bid and the specifications herein, such work and materials will be paid for at the unit prices therein contained. Said amount shall be paid in installments as hereinafter provided.

5. Rights of City to Increase Working Days. If such Work is not completed within the time specified, the Engineer shall have the right to increase the number of working days in the amount it may determine will best serve the interest of the City. If it desires to increase said number of working days, it shall have the further right to charge to Contractor and deduct from the final payment for the Work the actual cost of engineering, inspection, superintendence, and other overhead expenses which are directly chargeable to Contractor and which accrue during the period of such extension, except that the cost of the final service and preparation of the final estimates shall not be included in such charges, provided, however, that no extension of time for the completion of such Work shall be allowed unless at least twenty (20) calendar days prior to the time herein fixed for the completion thereof or the time fixed by the Engineer for such completion as extended, Contractor shall have filed application for extension thereof, in writing with the Engineer.

6. Option of City to Terminate Agreement in Event of Failure to Complete Work. If at any time in the opinion of the Engineer, the Contractor has refused or failed to prosecute the Work or any severable part thereof, with such diligence as will insure its work, or any completion within the time

specified, or any extensions thereof, or shall have failed to complete said work within such time, or if Contractor should be adjudged a bankrupt, or if Contractor should make a general assignment for the benefit of Contractor's creditors, or if a receiver should be appointed in the event of Contractor's insolvency, or if Contractor, or any Subcontractor, should violate any of the provisions of this Agreement, the Engineer may give written notice to Contractor, and Contractor's sureties of its intention to terminate this Agreement, such notice to contain the reasons for such intention to terminate this Agreement, and unless within five calendar (5) days after the serving of such notice, such violation shall cease and satisfactory arrangements for the correction thereof be made, this Agreement may, at the option of City, upon expiration of said time, cease and terminate. Any excess of cost arising therefrom over and above the contract price will be charged against the Contractor and the Contractor's sureties who will be liable therefore. In the event of such termination, all money due the Contractor or retained under the terms of this contract shall be forfeited to the City; but such forfeiture will not release the Contractor or the Contractor's sureties from liability or failure to fulfill the contract. The Contractor and the Contractor's sureties will be credited with the amount of money so forfeited toward any excess of cost over and above the contract price, arising from the suspension termination of the operations of the contract and the completion of the Work by the City as above provided, and the Contractor will be so credited with any surplus remaining after all just claims for such completion have been paid.

In the determination of the question whether there has been any such noncompliance with the contract as to warrant the suspension termination or annulment thereof, the decision of the Engineer shall be binding on all parties to the contract.

7. Termination of Contract for Convenience. The City also reserves the right to terminate the contract at any time upon a determination by the Engineer in the Engineer's sole discretion that termination of the contract is in the best interest of the City. If the City elects to terminate the contract for convenience, the termination of the contract and the total compensation payable to the Contractor shall be governed by the following:

(A) The City will issue the Contractor a written notice signed by the Engineer, specifying that the contract is terminated. Upon receipt of said written notice, the Contractor will be relieved of further responsibility for damage to the Work (excluding materials) as specified in Section VII-17, "Contractor's Responsibility for the Work," of the General Conditions and, except as otherwise directed in writing by the Engineer, the Contractor shall:

- (1) Stop all work under the contract except that specifically directed to be completed prior to acceptance.
- (2) Perform work the Engineer deems necessary to secure the project for termination.
- (3) Remove equipment and plant from the site of the Work.
- (4) Take such action as is necessary to protect materials from damage.
- (5) Notify all subcontractors and suppliers that the contract is being terminated and that their contracts or orders are not to be further performed unless otherwise authorized in writing by the Engineer.
- (6) Provide the Engineer with an inventory list of all materials previously produced, purchased or ordered from suppliers for use in the Work and not yet used in the Work, including its storage location, and such other information as the Engineer may request.

(7) Dispose of materials not yet used in the Work as directed by the Engineer. It shall be the Contractor's responsibility to provide the City with good title to all materials purchased by the City hereunder, including materials for which partial payment has been made as provided in Section IX-2, "Progress Payments," of the General Conditions and with bills of sale or other documents of title for such materials.

(8) Subject to the prior written approval of the Engineer, settle all outstanding liabilities and all claims arising out of subcontracts or orders for materials terminated hereunder. To the extent directed by the Engineer, the Contractor shall assign to the City all the right, title, and interest of the Contractor under subcontracts or orders for materials terminated hereunder.

(9) Furnish the Engineer with the documentation required to be furnished by the Contractor under the provisions of the contract, including, on projects as to which Federal and State funds are involved, all documentation required under the Federal and State requirements included in the contract.

(10) Take such other actions as the Engineer may direct.

(B) Acceptance of the contract as hereinafter specified shall not relieve the Contractor of responsibility for damage to materials. The Contractor shall continue to be responsible for damage to materials after issuance of the Notice of Termination, except as follows:

(1) The Contractor's responsibility for damage to materials for which partial payment has been made as provided in Section IX-2, "Progress Payments," of the General Conditions and for materials furnished by the City for use in the Work and unused shall terminate when the Engineer certifies that such materials have been stored in the manner and at the locations the Engineer has directed.

(2) The Contractor's responsibility for damage to materials purchased by the City subsequent to the issuance of the notice that the contract is to be terminated shall terminate when title and delivery of such materials has been taken by the City.

(3) When the Engineer determines that the Contractor has completed the Work under the contract directed to be completed prior to termination and such other work as may have been ordered to secure the project for termination, the Contractor will recommend that the Engineer formally accept the contract to the extent performed, and immediately upon and after such acceptance by the Engineer, the Contractor will not be required to perform any further Work thereon and shall be relieved of the Contractor's contractual responsibilities for injury to persons or property which occurs after the formal acceptance of the project by the Engineer.

(C) Termination of the contract shall not relieve the surety of its obligation for any just claims arising out of the work performed.

(D) The total compensation to be paid to the Contractor shall be determined by the Engineer on the basis of the following:

(1) The reasonable cost to the Contractor, without profit, for all work performed under the contract, including mobilization, demobilization and work done to secure the project for termination. In determining the reasonable cost, deductions will be made for the cost of materials

to be retained by the Contractor, amounts realized by the sale of materials, and for other appropriate credits against the cost of the work. When, in the opinion of the Engineer, the cost of a contract item of work is excessively high due to costs incurred to remedy or replace defective or rejected work, the reasonable cost to be allowed will be the estimated reasonable cost of performing such work in compliance with the requirements of the plans and specifications and the excessive actual cost shall be disallowed.

(2) A reasonable allowance for profit on the cost of the work performed as determined under Subsection (1), provided the Contractor establishes to the satisfaction of the Engineer that it is reasonably probable that the Contractor would have made a profit had the contract been completed and provided further, that the profit allowed shall in no event exceed four (4) percent of said cost.

(3) The reasonable cost to the Contractor of handling material returned to the vendor, delivered to the City, or otherwise disposed of as directed by the Engineer.

(4) A reasonable allowance for the Contractor's administrative costs in determining the amount payable due to termination of the contract.

(5) A reasonable credit to the City for defective or incomplete work not corrected.

All records of the Contractor and subcontractors necessary to determine compensation in accordance with the provisions of this Section 5 shall be open to inspection or audit by representatives of the City at all times after issuance of the Notice of Termination and for a period of three (3) years, thereafter, and such records shall be retained for that period.

After acceptance of the Work by the Engineer, the Engineer may make payments on the basis of interim estimates pending issuance of the Final Estimate in accordance with Section IX-7, "Final Payment," of the General Conditions when, in the Engineer's opinion, the amount thus paid, together with all amounts previously paid or allowed, will not result in total compensation in excess of that to which the Contractor will be entitled. All payments, including payment upon the Final Estimate shall be subject to deduction for prior payments and amounts, if any, to be kept or retained under the provisions of the contract.

If this contract is terminated by the City for cause, and it is later determined that the proper basis for a termination for cause did not exist, the termination shall be deemed to have been a termination for convenience and governed by the terms of this contract dealing with such termination.

If the contract is terminated by the City for cause or convenience, such termination shall neither act as a waiver by the City of its right to require the Contractor to correct defects in the Work performed by the Contractor nor void any warranties applicable to the Work performed under the contract.

The provisions of this Section 5 shall be included in all subcontracts.

In the event of conflict between the termination provisions of this Section 8 and any other provision or the contract, this Section 5 shall prevail.

8. Performance by Sureties. In the event of any termination as herein before provided, City shall immediately give written notice thereof to Contractor and Contractor's sureties and the sureties shall have the right to take over and perform the Agreement, provided, however, that if the sureties, within five (5) working days after giving them said notice of termination, do not give the City written notice of their

intention to take over the performance of the Agreement and do not commence performance thereof within five (5) working days after notice to the City of such election, City may take over the Work and prosecute the same to completion by contract or by any other method it may deem advisable, for the account, and at the expense, of Contractor, and the sureties shall be liable to City for any excess cost or damages occasioned City thereby; and, in such event, City may, without liability for so doing, take possession of and utilize in completing the Work such materials, appliances, plant, and other property belonging to Contractor as may be on the site of the Work and necessary therefore. Should Contractor contract in an individual capacity, the surety bond shall contain the following provision: "Should Contractor contract in the Contractor's individual capacity, the death of the Contractor shall not relieve the surety of its obligations."

9. Hold-Harmless Agreement and Contractor's Insurance. Contractor agrees to, and shall, hold City, its elective and appointive boards, officers, agents, and employees harmless from any liability for damage or claims for damage for personal injury, including death, as well as from claims for property damage which may arise from Contractor's or any of Subcontractor's operations under this Agreement, whether such operations be by Contractor or by any Subcontractor or Subcontractors, or by any one or more persons directly or indirectly employed by, or acting as agent for, Contractor or any Subcontractor or Subcontractors. Contractor agrees to, and shall, defend City and its elective and appointive boards, officers, agents, and employees from any suits or actions at law or in equity for damages caused, or alleged to have been caused, by reason of any of the aforesaid operations, provided as follows:

(A) The City does not, and shall not, waive any rights against Contractor which it may have by reason of the aforesaid hold-harmless agreement, because of the acceptance by City, or the deposit with City by Contractor, of any of the insurance policies hereinafter described in Paragraph 15, "Insurance" hereof.

(B) That the aforesaid hold-harmless agreement by Contractor shall apply to all damages and claims for damages of every kind suffered, or alleged to have been suffered, by reason of any of the aforesaid operations of Contractor or any Subcontractor, regardless of whether or not such insurance policies shall have been determined to be applicable to any of such damages or claims for damages.

10. Insurance. The Contractor shall take out and maintain during the life of this Agreement the following policies of insurance:

(A) Workers' Compensation and Employers' Liability Insurance providing full statutory coverage.

In signing this Agreement, the Contractor makes the following certification, required by Section 1861 of the California Labor Code:

"I am aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and I will comply with such provisions before commencing the performance of the work of this contract".

(B) Comprehensive General Liability Insurance.

Public Liability Insurance (includes premises, elevator - if applicable, products, completed operations, personal injury and contractual):

(1) Bodily Injury Liability:

\$ 500,000 each person \$1,000,000 each occurrence

(2) Property Damage Liability [includes XCU (explosion, collapse, and underground damage); water damage and broad form property damage or third party liability]:

\$ 500,000 per occurrence

(C) Comprehensive Automobile Liability Insurance (includes owned, non-owned, and hired vehicles):

(1) Bodily Injury Liability:

\$ 500,000 per person \$1,000,000 each occurrence

(2) Property Damage Liability:

\$ 500,000 each occurrence

(D) It is agreed that the insurance required by Subsections B and C, in an aggregate amount of not less than ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000), shall be extended to include as additional insured the City of South San Francisco, its elective and appointive boards, commissions, officers, agents, employees, with respect to operations performed by the Contractor, as described herein. Evidence of this insurance described above shall be provided to City upon execution of this Agreement and shall be subject to approval of the City Attorney as to form, amount, and carrier. The policy of insurance shall also contain a provision indicating that such insurance shall not be reduced or cancelled except upon thirty (30) calendar days written notice to City. In addition, the following endorsement shall be made on said policy of insurance:

"The following are named as additional insured on the above policies: The City of South San Francisco, its elective and appointive boards, officers, agents, and employees."

"Notwithstanding any other provision in this policy, the insurance afforded hereunder to the City of South San Francisco shall be primary as to any other insurance or re-insurance covering or available to the City of South San Francisco, and such other insurance or reinsurance shall not be required to contribute to any liability or loss until and unless the approximate limit of liability afforded hereunder is exhausted."

The above requirements that the City be named as additional insured, that the insurance shall be primary to any other, and that the insurance not be cancelled without notice, shall be provided in the form of an endorsement signed by an authorized representative of the insurance company providing coverage, who shall declare his or her authority to sign on behalf of the insurer.

11. Proof of Carriage of Insurance. Contractor shall furnish City through the Engineer, concurrently with the execution hereof, with satisfactory proof of carriage of the insurance required and that each carrier shall give City at least thirty (30) calendar days prior notice of the cancellation or change of any policy during the effective period of this contract. Further, if the Contractor'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.

12. Provisions Cumulative. The provisions of this Agreement are cumulative, and in addition to and not in limitation of, any other rights or remedies available to City.

13. Notices. All notices shall be in writing and delivered in person or transmitted by certified mail, postage prepaid.

Notices required to be given to City shall be addressed as follows:

City Clerk
City Hall, 400 Grand Avenue
South San Francisco, California 94080

Notices required to be given to Contractor shall be addressed as follows:

Notices required to be given sureties of Contractor shall be addressed as follows:

Notices required to be given to the Escrow Agent of Contractor, if any, shall be addressed as follows:

14. Interpretation. As used herein, any gender includes each other gender, the singular includes the plural, and vice versa.

IN WITNESS WHEREOF, two (2) identical counterparts of this Agreement, consisting of twelve (12) pages (being pages A-1 through A-12), each of which counterparts shall for all purposes be deemed an original of said Agreement, have been duly executed by the parties hereinabove named, on the day and year first hereinabove written.

CITY OF SOUTH SAN FRANCISCO:
A Municipal Corporation

By: _____
Mike Futrell, City Manager

ATTEST

City Clerk

APPROVED AS TO FORM

City Attorney

CONTRACTOR:

By: _____

(If Contractor is an individual, so state. If Contractor is a Corporation, a corporate seal or signatures of the President or Vice President and the Secretary Treasurer are required).

ATTEST

By: _____

ATTACHMENT A
ESCROW AGREEMENT FOR
SECURITY DEPOSITS IN LIEU OF RETENTION

THIS ESCROW AGREEMENT is made and entered into by and between the City of South San Francisco whose address is 400 Grand Ave., P.O. Box 711, South San Francisco, CA 94083, hereinafter referred to as "City," and _____, whose address is _____, hereinafter called "Contractor" and _____, whose address is _____, hereinafter called "Escrow Agent."

For the consideration hereinafter set forth, the Owner, Contractor, and Escrow Agent agree as follows:

1. Pursuant to Section 22300 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract entered into between the Owner and Contractor for _____ in the amount of _____ dollars (\$_____) dated _____ (hereinafter referred to as the "Contract"). Alternately, on written request of the Contractor, the Owner shall make payments of the retention earnings directly to the Escrow Agent. When the Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within 10 working days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

2. The Owner shall make progress payments to the Contractor for those funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

3. When the Owner makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until the time that the escrow created under this contract is terminated. The Contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the Owner pays the Escrow Agent directly.

4. Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor, and Escrow Agent.

5. The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

6. Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

7. The Owner shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven day's written notice to the Escrow Agent from the Owner of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the Owner.

8. Upon receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

9. Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (5) to (8), inclusive, of this Agreement, and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

10. The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:

Title

Name

Signature

Address

On behalf of Contractor:

Title

Name

Signature

Address

On behalf of Escrow Agent:

Title

Name

Signature

Address

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

Owner:

Contractor:

Title

Title

Name

Name

Signature

Signature

Approved as to form:

Attest:

City Attorney

Date

City Clerk