

Three-Party Construction Contract
Waukesha Parade Memorial at Grede Park

This Contract is by and among the City of Waukesha, a Wisconsin municipal corporation, 201 Delafield Street, Waukesha, Wisconsin 53188, referred to herein as the City; the Waukesha County Community Foundation, Inc., 2727 North Grandview Boulevard, Suite 301, Waukesha, Wisconsin 53188, referred to herein as the Foundation; and VJS Construction Services, Inc., W233N2847 Roundy Circle West, Pewaukee, Wisconsin 53072, referred to herein as the Contractor. City, Foundation, and Contractor are each referred to as a Party, and together they are referred to as the Parties.

Recitals

An independent volunteer Parade Memorial Commission has determined that a memorial to the persons who lost their lives in the 2021 Waukesha Christmas Parade be built. The memorial will be built on City park land, and has the working title "Parade Memorial at Grede Park."

The Commission has solicited contributions to the construction of the memorial, and has received very substantial contributions from private parties, both in money and pledges of in-kind donations of materials and labor.

Contractor is a contributor to the memorial, in the form of both money and in-kind donations of materials and volunteer labor. The City has pledged a money contribution towards the memorial.

The Foundation has agreed to collect money donations and administer the funds towards the construction of the memorial.

The Parties acknowledge that the memorial will be public construction subject to the requirements of Wis. Stat. §62.15. However, because of the substantial pledges from contributors and volunteers of in-kind support, it would be detrimental to the memorial project to require competitive bidding for the construction of the project, and therefore the Parties wish to avail themselves of an exemption from the competitive bidding requirement of §62.15(1), while remaining in full compliance with the law.

Section 62.15(1) states that all public construction costing more than \$25,000 be competitively bid, but that "This provision does not apply to public construction if the materials for such a project are donated or if the labor for such a project is provided by volunteers."

Therefore, the Parties intend that all labor for the memorial will be donated and provided by volunteers, that no City funds will be used for labor costs, and that all City funds used in the construction of the memorial will be used only for materials costs.

The Contractor will act as the general contractor for the project. The Foundation will act as the administrator of the construction and disbursement of funds, and will donate the completed memorial to the City.

Therefore, in consideration of the mutual covenants of the Parties expressed herein, the Parties agree and contract as follows:

1. **The Project.** The Parade Memorial at Grede Park is referred to as the Project in this Contract. The Project shall be constructed according to the plans and specifications in Exhibit A, which are referred to as the Project Plans and are incorporated into this Contract by reference.
2. **Total Project Cost.** The Total Cost to construct the Project shall be \$1,066,663.00, payable as provided elsewhere in this Contract. The Parties acknowledge that the Total Cost is reflective of the funds raised by the Commission, and that the Total Cost will not be exceeded unless the fund-raising goal is exceeded and the Parties agree by written amendment to adjust the Total Cost. If unforeseeable cost overruns occur, or if there is

a shortfall in fund-raising, certain components of the Project shall be reduced in scope or eliminated to avoid exceeding the Total Cost or the total available funds, by written amendment.

3. Contractor Obligations.

- a. Contractor shall act as the general contractor for the construction of the Project, and shall be responsible for the procurement of all required materials, equipment and labor, and for contracting with and supervising all required subcontractors.
- b. Contractor shall construct the Project in accordance with the Project Plans, expeditiously and as quickly as conditions will allow, according to usual, customary and accepted practices, standards and methods in the construction industry.
- c. Contractor shall be responsible for all construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the work subject to this Contract.
- d. Contractor shall promptly pay all bills and invoices from subcontractors and suppliers, and obtain lien waivers from them.
- e. Contractor shall keep the premises and surrounding area free from the accumulation of waste materials or rubbish caused by construction of the Project. Upon completion, all waste materials, rubbish, tools, construction equipment, machinery, and surplus materials shall be removed from the Project site.
- f. Contractor shall be responsible for the safety and security of the Project site at all times during performance of this Contract. Contractor shall take reasonable precautions to ensure the safety of the public and to prevent unauthorized entry into the Project site.
- g. Contractor shall allow City access to the Project site at all times.
- h. Contractor shall conduct its construction operations, and the staging and storage of materials and equipment, only in areas designated for those purposes by the City.
- i. Contractor shall comply with all local, state, and federal laws, regulations, and codes applicable to construction of the Project; and obtain all necessary permits and licenses for the construction of the Project, at Contractor's expense. City shall waive fees for all City permits.
- j. Contractor shall maintain insurance of the following kinds and for not less than the following limits, at Contractor's sole expense, at all times during the performance of this Contract. Policies shall be occurrence, and not claims-made, policies, except for professional errors and omissions policies. Contractor shall obtain an endorsement making the City an additional insured, and Contractor's insurance shall be primary, not excess, and non-contributory. All policies shall be from insurers licensed to issue such policies in Wisconsin. Upon the execution of this Contract, Contractor shall deliver a certificate of insurance to City and Foundation showing that all requirements of this subsection are met.
 - i. Commercial general liability, including products-completed operations, \$1,000,000 per occurrence, \$2,000,000 aggregate per project.
 - ii. Automobile liability, \$1,000,000 bodily injury, \$1,000,000 property damage.
 - iii. Excess liability-umbrella, \$5,000,000.
 - iv. Worker compensation, statutory requirements.

- k. Contractor shall coordinate donated labor and other volunteers work required for construction of the Project. Contractor shall designate a representative with full and complete authority to act on Contractor's behalf at all times during the performance of this Contract.
- l. Contractor shall substantially complete construction of the Project no later than November 15, 2024.
- m. Contractor shall provide to the City and Foundation in writing the names of all subcontractors, suppliers, and service providers performing, furnishing, or procuring labor, services, materials, plans, or specifications under the contract.
- n. Contractor shall obtain and deliver to the City performance and payment bonds each in the amount of the Total Cost, in compliance with the requirements of Wis. Stat. §779.14(1m)(e).
- o. Contractor shall provide City and Foundation with periodic reports on the progress and quality of the construction work.
- p. Contractor shall correct work that does not conform to this Contract's terms promptly upon notification by City.

4. Contractor Representations and Warranties.

- a. Contractor represents that it has the necessary experience, skill, labor and equipment required for the construction of the Project and the performance of this Contract.
- b. Contractor represents that it has had full access to the Project site, has viewed and evaluated the site, and has determined that the site is suitable for the construction of the Project as contemplated in this Contract.
- c. Contractor warrants that all materials used in the construction of the Project will be new and of good quality.

5. City Obligations.

- a. City shall contribute \$600,000.00 to the Foundation, to be used only for the construction of the Project. These funds shall be used only for the cost of materials, and none of these funds shall be used for the cost of labor.
- b. City shall give Contractor complete access to the area designated by the City within Grede Park for construction and the storage and staging of materials and equipment.
- c. City shall designate a contact person to coordinate the City's participation in the Project, respond to inquiries, and make decisions on the City's behalf.
- d. City shall promptly provide Contractor with all information in its possession relating to the Project as requested by the Contractor or as reasonably necessary to assist Contractor in its performance of this Contract, including any surveys or other documentation describing physical characteristics, legal limitations, utility locations, grades and lines of streets, adjacent drainage, right-of-way restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site, locations, dimensions and necessary data pertaining to existing structures, other improvements and trees, information concerning available utility services and lines, and any reports of environmental testing or remediation done at the Project site.
- e. City shall provide responses to all requests from Contractor and Foundation in a timely manner.

- f. City shall assist Contractor in securing building and other permits, licenses, other necessary approvals of governmental authorities, and inspections. City shall waive all City permit fees.
- g. City shall promptly notify Contractor of any defect in workmanship or materials, or any nonconformity with this Contract that the City becomes aware of.
- h. City shall be responsible for the completion of any work associated with the Project that is not specified in Exhibit A, which may include such items as grading, landscaping, and sidewalk installation.

6. Foundation Obligations.

- a. Foundation shall collect and hold donated funds designated for the construction of the Project in a separate fund, referred to herein as the Fund, which shall be used for no other purpose, except for the Foundation's administrative costs and fees. This Contract does not supersede the agreement previously executed with the Foundation for administration of the Fund, and only supplements it. Any conflicts between this Contract and that agreement shall be resolved in favor of that agreement.
- b. The City's \$600,000.00 contribution shall be kept in a segregated account within the Fund and shall not be intermingled with any other donor's funds.
- c. Foundation shall not disburse any amounts from the segregated account holding City's contribution for payment of any labor costs, and shall disburse funds from that account only for payment of the cost of materials.
- d. Foundation shall prepare detailed statements at least monthly showing the Fund balance and all disbursements from the Fund. The statements shall specify the items that the City's funds have been applied to, and shall show that the City's funds have been applied only to the cost of materials and not labor.
- e. Foundation shall only be obligated to make payments towards the Project from the Fund, and shall not be required to apply any other funds to the Project.
- f. Upon completion and acceptance by the City, Foundation shall donate the Project to the City, and execute and deliver any documentation reasonably required to convey full ownership of all improvements to the City.

7. Payment.

- a. Payment to Contractor shall be in progress-payment installments, upon monthly invoicing by Contractor and approval by the City, which shall not be unreasonably withheld. Payment terms shall be net 30 days.
- b. Total payments for the construction of the Project shall not exceed the Total Cost.
- c. Invoices shall be delivered to the City and Foundation.
- d. Invoices shall include detail sufficient that the City can confirm that the Contractors applications for payment meet the terms of the Project agreement. An example of Contractors application for payment is attached. Contractor and Foundation shall make documentation supporting invoices available to City upon request for audit purposes.
- e. City shall review all invoiced amounts and shall inspect the Project site to verify that invoiced work has been completed satisfactorily. Upon verification and approval of the invoice, City shall promptly notify Foundation, and payment shall then be made by Foundation from the Fund. No payment shall be made without the City's prior approval.

- f. Regardless of the foregoing, no more than 90% of the Total Cost shall be paid before substantial completion of the Project, and delivery to the City of lien waivers from all subcontractors and suppliers.
 - g. Substantial completion and acceptance of the Project by the City shall occur only by written notice thereof from City.
 - h. City shall have no obligation to pay for the cost of the Project other than its contribution to the Fund pursuant to section 5.a.
 - i. The Foundation and Contractor shall provide the City and any parties identified by the City with all documentation requested for the purpose of verifying that all of the City's contributions to the Project have been applied to materials costs only.
8. **Indemnification.** To the fullest extent permitted by law, Contractor shall indemnify and hold the City and the Foundation, their employees, elected officials, board members, and agents harmless from and against claims, damages, losses, and expenses, including but not limited to attorney fees, arising out of or resulting from performance of Contractor's performance of this Contract. This indemnification includes, without limitation, liabilities arising from bodily injury, sickness, disease or death, or damage to property, but only to the extent caused in whole or in part by negligent act or omissions of Contractor, its employees, or any other parties for whose acts Contractor may be liable. This obligation does not affect any common-law rights of indemnity or contribution to which the City and Foundation may otherwise be entitled.
9. **Notices.** Notices required to be given under this Contract shall be given as follows:

To the City of Waukesha:

Anthony Brown, City Administrator
City of Waukesha
201 Delafield Street
Waukesha, Wisconsin 53188
abrown@waukesha-wi.gov

To the Waukesha County Community Foundation:

Melissa Baxter, Executive Director
Waukesha County Community Foundation, Inc.
2727 North Grandview Boulevard
Suite 301
Waukesha, Wisconsin 53188
mbaxter@waukeshafoundation.org

To Contractor:

Joe Jorgensen
VJS Construction Services, Inc.
W233N2847 Roundy Circle West
Pewaukee, Wisconsin 53072
jcjorgensen@vgscs.com

10. **Record Keeping.** Contractor shall keep all documents and records generated in the performance of the Work for no less than 7 years after completion of the Work, and shall make them available to the City at the City's request. Contractor acknowledges that such documents and records may be subject to Wisconsin's Open Records Law.

11. **Parties Are Independent Contractors.** Nothing in this Contract shall be construed to create any relationship among the Parties other than independent contractors. Unless specifically provided in this Contract, the Parties are not agents for one another, have no authority to bind the other to contracts, and have no vicarious liability for the other's acts or omissions.
12. **Governmental Immunities, Liability Limits, and Notice Requirements Preserved.** Nothing in this Contract shall be construed to be a waiver or modification of the governmental immunities, notice requirements, or limitations of liability imposed by Wis. Stats. §893.80 or any other law.
13. **Corporate Authorization.** The individuals executing this Contract on behalf of the Parties warrant and represent that they are duly authorized to bind the Parties to this Contract. The Parties warrant and represent that the execution of this Contract is not prohibited by their articles of incorporation, by-laws, operating agreements, or other internal operating orders, or by any applicable law, regulation or court order. The Parties shall provide proof upon request.
14. **Costs of Enforcement.** The Parties agree that in the event legal action is necessary to enforce any term or condition of this Contract, then the breaching Party will pay the non-breaching Party's costs incurred in such legal action, including actual attorney fees. If a judgment is taken, then costs of enforcement will be added to the judgment, subject to statutory governmental immunities and liability limits.
15. **Severability.** If any term of this Contract is held to be illegal or unenforceable by a court having jurisdiction, then to the extent the illegal or unenforceable term can be severed from the remainder of this Contract without affecting the enforceability of the remainder of this Contract or substantially frustrating its purpose, it will be so severed, and the remainder of this Contract will remain in effect and enforceable.
16. **Force Majeure.** The Parties shall not be in breach of this Contract if hindered or prevented from performing any act required herein by reason of strikes, lockouts, labor troubles, inability to procure materials, pandemic, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, or other similar reason not reasonably foreseeable and beyond the control of the Party. Performance shall be excused for the period of delay, and the time for performance shall be extended for a time equal to the delay, provided the Party resumes performance in good faith as promptly as possible.
17. **Survival and Parties Bound.** Unless specifically limited in this Contract, any term, condition or provision of this Contract will survive the execution of this Contract or any stated time periods, to the extent necessary for their performance. This Contract is binding upon, and inures to the benefit of, the Parties' successors and assigns.
18. **Governing Law and Jurisdiction.** This Contract will be construed and enforced according to the laws of Wisconsin. If a lawsuit arises out of this Contract, it shall be filed in the state Circuit Court for Waukesha County, Wisconsin. The Parties consent to personal and subject-matter jurisdiction in Wisconsin, and waive all jurisdictional defenses.
19. **Integration, Construction of Contract.** This Contract constitutes the entire agreement of the Parties. All other agreements and understandings of the parties with respect to the subject matter expressed in this Contract are unenforceable unless incorporated into an amendment to this Contract executed by all Parties.
20. **Public Records.** All documents created pursuant to this Contract, and all documents delivered to the City, are public records and will be subject to disclosure to the public under Wisconsin's Open Records law.
21. **Effective Date.** This Contract shall be effective as of the latest date of execution shown below.

City of Waukesha

By Shawn N. Reilly, Mayor
Date:_____

Attested by Sara Spencer, Interim City Clerk
Date:_____

To certify that funds are provided for payment:

Approve form of contract:

Joseph P. Ciurro, Finance Director
Date:_____

Brian E. Running, City Attorney
Date:_____

Waukesha County Community Foundation, Inc.

By Melissa Rigney Baxter, President
Date:_____

VJS Construction Services, Inc.

By David Jorgensen, Executive Vice President
Date:_____