

Ghilotti Brothers - Contract #5747 - Vendor #4399

CONSTRUCTION AGREEMENT

This Construction Agreement (“Agreement”) is made and entered into this 23 day of July, 2021, by and between the City of Richmond, a municipal corporation and charter city (“City”) and Ghilotti Bros., Inc., (“Contractor”), with reference to the following facts. The parties may be referred to in this Agreement individually as “Party” and collectively as the “Parties.”

RECITALS

A. In December, 2020, The Trust for Public Land City solicited construction bids to implement Phase I of the Richmond Wellness Trail in Richmond, California (the “Project”).

B. Contractor submitted the lowest responsive bid and in March, 2021, was awarded a construction contract by The Trust for Public Land.

C. City now desires to contract with Contractor to perform additional, complementary asphalt, concrete, and ancillary work within the Public Right-of-Way adjacent to and along the alignment of Project.

NOW THEREFORE, in consideration of the promises and agreements hereinafter set forth, and intending to be bound hereby, the Parties agree as follows:

ARTICLE I CONSTRUCTION OF PROJECT

Section 1.1 Contract Documents.

Project Specifications – including the Notice to Prospective Bidders, Invitation for Bids, Instructions to Bidders, Special Provisions, Description of Work, Construction Details (including all plans and specifications), and Proposal Package, along with any Requests for Information (RFI), responses to RFI, and addenda issued prior to the deadline for submitting bids – Contractor’s Proposal attached as Exhibit A, and this Agreement, constitute the “Contract Documents.”

Section 1.2 Construction.

Contractor shall furnish all labor, materials, methods, processes, implements, tools and machinery, within the time frames set, and do all the things necessary for the proper completion of the work shown and described in Contract Documents.

Section 1.3 Payments.

Contractor agrees to receive and accept the sums set forth in the Bid Schedule attached as part of the Proposal, as full compensation for furnishing all materials and doing all the work contemplated and required by this Agreement, and for all loss or damage arising out of the nature of the undertaking of the construction of the Project, or from the acts of the elements, or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the construction of the Project until its completion and acceptance by the City, and for all expenses incurred by or in consequence of the suspension or discontinuance of the construction of the Project, and for well and faithfully performing the construction of the Project and the whole thereof, in the manner and according to the Contract Documents.

Section 1.4 Discovery of Hazardous Waste or Unusual Conditions.

- (a) Promptly and before the following conditions are disturbed, the Contractor shall notify the City in writing of any:
- (1) Material that the Contractor believes may be hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.
 - (2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.
 - (3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement.
- (b) The City shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the Contractor's cost of, or the time required for, performance of any part of the work shall issue a Change Order under the procedures described in this Agreement.
- (c) In the event that a dispute arises between the City and the Contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the Contractor's cost of, or time required for, performance of any part of the work, the Contractor shall not be excused from any scheduled completion date provided for by this Agreement, but shall proceed with all work to be performed under this Agreement. The Contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the Parties.

Section 1.5 Laws and Regulations.

- (a) The Project work shall proceed only after procurement of each permit, license, or other authorization that may be required by any governmental agency having jurisdiction, and

Contractor shall be responsible to the City for the procurement and maintenance thereof.

(b) Contractor shall cause all work performed in connection with construction of the Project to be performed in compliance with (i) all applicable laws, ordinances, rules and regulations now in force or that may be enacted hereafter; (ii) all conditions of Project approval and mitigation measures included in any adopted or certified environmental document prepared for the Project; and (iii) all directions, rules and regulations of any fire marshal, health officer, building inspector, or other officer of every governmental agency now having or hereafter acquiring jurisdiction, provided that such direction given during construction does not conflict with conditions of Project approval or mitigation measures.

(c) Contractor shall and shall cause its subcontractors to pay prevailing wages in the construction of the Project as those wages are determined pursuant to Labor Code Sections 1720 et seq., and implementing regulations of the Department of Industrial Relations, and to comply with all other applicable federal, State and local laws, regulations and ordinances pertaining to labor standards insofar as those laws, regulations and ordinances apply to the performance of this Agreement, including any applicable City of Richmond employment requirements, including but not limited to the City's Living Wage Ordinance (Richmond Municipal Code Chapter 2.60), the City's Business Opportunity Ordinance (Richmond Municipal Code Chapter 2.50), and the City's Local Employment Program Ordinance (Richmond Municipal Code Chapter 2.56). During the construction of the Project, Contractor shall post at the construction site the applicable prevailing rates of per diem wages. Contractor shall indemnify, hold harmless and defend, (with counsel reasonably acceptable to the City) the City against any claims for damages, compensation, fines, penalties or other amounts arising out of failure or alleged failure of any person or entity (including Contractor and its subcontractors) to pay prevailing wages in connection with construction of the Project. This Section 1.5(c) shall survive the termination of this Agreement.

(d) Contractor and all subcontractors shall maintain accurate payroll records showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker and others employed on the Project. Each payroll record shall contain or be verified by a written declaration made under penalty of perjury, stating both of the following: (1) the information contained in the payroll record is true and correct, and (2) the employer has complied with the requirements of Labor Code Section 1771 (prevailing wage provisions), Section 1811 (eight-hour day, forty-hour week provisions), and Section 1815 (overtime compensation) for any work performed by his or her employees on the Project. The Contractor shall provide certified payroll records to the City each week, no later than ten (10) days after the end of a weekly pay period. Pay records shall be maintained and made available in accordance with Labor Code Section 1776. In addition, Contractor shall and shall cause its subcontractors promptly to deliver to the City, upon request, documents verifying compliance with the Living Wage Ordinance, which include documents which evidence that each affected employee has been notified regarding the wages required to be paid pursuant to the Living Wage Ordinance. Such wages shall also be posted at the construction site. This Section 1.5(d) shall survive the

termination of this Agreement.

Section 1.6 Inspections.

Contractor shall permit and facilitate, and shall require its subcontractors to permit and facilitate, observation and inspection of the Project by the City and by public authorities at all times for the purposes of determining compliance with this Agreement and permits issued to perform the Project work. In so doing, Contractor shall provide access for testing and inspections. Contractor shall coordinate and schedule all testing and inspections required on the Project with the required advance notice as defined in the Project Specifications.

Section 1.7 Equal Opportunity.

(a) During the construction of the Project there shall be no discrimination on the basis of race, color, creed, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in the hiring, firing, promoting, or demoting of any person engaged in the construction work.

(b) In addition, Contractor agrees to observe the provisions of Section 2.28.030 of the Richmond Municipal Code, obligating Contractor and its subcontractors to refrain from discriminatory employment or subcontracting practices on the basis of race, color, sex, sexual orientation, religion, creed, national origin or ancestry of any employee, any applicant for employment or any potential subcontractor.

Section 1.8 Working Hours.

Eight hours of labor is a legal day's work. Any worker's time of service is restricted to eight hours during any calendar day, and 40 hours during a calendar week, unless overtime compensation is paid at not less than one and one-half times the basic rate of pay. The Contractor shall be assessed a penalty of twenty-five dollars (\$25) for each day a worker is employed in violation of these requirements.

Section 1.9 Insurance and Bond Requirements.

(a) In accordance with California Labor Code Section 3700, Contractor must secure Workers' Compensation coverage for its employees. Prior to performing any work, Contractor must execute a certification in the form set out at California Labor Code Section 1861.

(b) Contractor shall submit to the City evidence of the insurance and payment and performance bond coverage meeting the requirements set forth in the Project Specifications. Proof of insurance and bonding related to the construction of the Project shall be provided to the City not more than (10) days after award of the contract. The City shall review and approve or disapprove of

the evidence of insurance within twenty (20) days after submittal of complete information in the form required by the City. If the City disapproves the evidence of insurance, it shall specify in writing the reasons for such disapproval. Contractor shall resubmit the information required within ten (10) days. The review and submittal periods for resubmittals shall be reduced to a ten (10) day review period for the City and a five (5) day period for resubmittal by Contractor and shall continue to apply until the City approves the evidence of insurance coverage, but in no event shall the submittal and review period continue for more than forty-five (45) days. If, after forty-five (45) days the Contractor has not provided evidence of insurance and bond coverage meeting the requirements of the City, the City shall terminate the contract and may either award the work to the next lowest responsive responsible bidder or issue a new request for bids. (If the City issues a new request for bids, the Contractor shall be disqualified from re-bidding the work because of the failure to provide timely proof of insurance and/or bond coverage.) No work shall be initiated on the Project prior to Contractor's receipt of the City's approval of evidence of insurance coverage related to the construction of the Project.

(c) Contractor shall require and verify that all subcontractors or other parties hired for the Project purchase and maintain coverage for indemnity and insurance at least as broad as specified in the Project Specifications to the extent they apply to the scope of the subcontractor's work with the same certificate of insurance requirements and naming as additional insureds all parties to this Agreement. Contractor shall include the following language in their agreement with subcontractors: "Subcontractors hired by Contractor agree to be bound to Contractor and City in the same manner and to the same extent as Contractor is bound to City under the Contract Documents and provide a valid certificate of insurance and the required endorsements included in the agreement as proof of compliance prior to commencement of any work and to include this same requirement for any subcontractors they hire for this work. A copy of the insurance and indemnity requirements of the Contract Documents will be furnished to the subcontractor upon request." Contractor shall have furnished the City with evidence of the insurance coverage meeting the insurance requirements set forth in Project Specifications for each subcontractor prior to initiating any work on the Project, including Builder's Risk insurance with appropriate coverage for the cost of construction. The periods for submittal, review and approval shall apply as stated in subparagraph (b) above.

(d) The Parties agree that notwithstanding the time requirements set forth in this subsection for submittal and resubmittal to the City by the Contractor of the evidence of insurance and review and approval of the evidence of insurance by the City, Contractor is responsible for ensuring that the evidence of insurance in approvable form is submitted to the City in a timely manner.

(e) Any available insurance proceeds broader than or in excess of the specified minimum insurance coverage requirements and/or limits set forth in the Project Specifications shall be available to the City as an additional insured. Furthermore, the requirements for coverage and limits shall be (1) the minimum coverage and limits specified in the Project Specifications; or (2) the broader coverage and maximum limits of coverage of any insurance policy or proceeds available to the named insured, whichever is greater. No representation is

made that the minimum insurance requirements set forth in the Project Specifications are sufficient to cover the obligations of the Contractor under this Agreement.

(f) Contractor shall maintain the insurance requirements set forth in the Project Specifications for a minimum of five (5) years following the completion of the Project. In the event Contractor fails to obtain or maintain completed operations coverage as required by the Project Specifications, the City at its sole discretion may purchase the coverage required and the cost for the same shall be paid by Contractor upon demand by the City.

Section 1.10 Security In Lieu of Retention.

(a) The City shall retain five percent (5%) of the sum requested in each progress payment unless the Contractor elects to invoke the procedures set forth at California Public Contract Code 22300 to substitute securities to ensure performance under the contract.

1. At the request and the expense of the Contractor, securities equivalent to the amount withheld shall be deposited with the City, or with a state or federally chartered bank in the state as escrow agent, who shall then pay the retained funds to the Contractor. Upon satisfactory completion of the contract, the securities shall be returned to the Contractor.
2. Alternatively, the Contractor may request and the City shall make payment of retentions earned directly to the escrow agent at the expense of the Contractor. At the expense of the Contractor, the Contractor may direct the investment of the payments into securities and the Contractor shall receive the interest earned on the investments upon the same terms provided for in Public Contract Code 22300 for securities deposited by the Contractor. Upon satisfactory completion of this Agreement, the Contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the owner, pursuant to the terms of this section.

(b) If the Contractor chooses to place securities in escrow, the escrow agreement to be used shall be substantially similar to the following form:

ESCROW AGREEMENT FOR SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is made and entered into by and between _____ whose address is _____ hereinafter called "Owner," _____ 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 ____ dated ____ (hereinafter referred to as the "Contract"). Alternatively, 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 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 days' 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:

On behalf of Contractor:

Title

Title

Name

Name

Signature

Signature

Address

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

Section 1.11 Senate Bill 854 Notice Requirements.

As provided in SB 854 (Stats. 2014, ch. 28): (a) no contractor or subcontractor may be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the California Public Contracts Code, or engage in the performance of any contract for public work, unless currently registered with DIR and qualified to perform public work pursuant to California Labor Code Section 1725.5 (Lab. Code §1771.1(a)); (b) no contractor or subcontractor may be awarded a public works contract unless registered with the DIR to perform public work pursuant

to Labor Code Section 1725.5 (Lab. Code §1771.1(b)); and (c) work performed on the project is subject to compliance monitoring and enforcement by DIR (Lab. Code §1771.4).

Section 1.12 Job Site Notices.

Contractor shall post at the job site notices in compliance with Title I California Code of Regulations Section 16451.

Section 1.13 Municipal Code Chapter 2.65 Requirements.

Contractor shall comply with Chapter 2.65 of the Richmond Municipal Code banning the requirement to provide information of prior criminal convictions on employment applications.

ARTICLE II
DEFAULT AND REMEDIES

Section 2.1 Events of Default.

In addition the remedies set forth in Section 2.2, below, in the event of default the Department Head reserves the right to stop work immediately if any action or inaction by the Contractor or any subcontractor creates a risk of imminent harm to the public or property.

Each of the following shall constitute a “Default” by Contractor under this Agreement:

(a) Breach of Covenants. Failure by Contractor or any subcontractor to duly perform, comply with, or observe any of the conditions, terms, or covenants of any of the Contract Documents. The City shall give Contractor written notice of the breach and specify a time in which to cure the breach. If the Contractor cures the breach within the time specified in the notice or, if the breach cannot be cured in the time specified but the Contractor has diligently pursued measures to cure the breach and to keep the City informed of its progress, then the breach shall not constitute a default provided that the breach is cured within thirty (30) days from the date of the City’s last notice and demand to cure.

(b) Disregard of Laws. Disregard of laws, rules, regulations, directions or instructions of City by Contractor or any subcontractor with respect to the performance of work.

(c) Insolvency. A court having jurisdiction shall have made or entered any decree or order (i) adjudging Contractor to be bankrupt or insolvent, (ii) approving as properly filed a petition seeking reorganization of Contractor or seeking any arrangement for Contractor under the bankruptcy law or any other applicable debtor’s relief law or statute of the United States or any state or other jurisdiction, (iii) appointing a receiver, trustee, liquidator, or assignee of Contractor in bankruptcy or insolvency or for any of their properties, (iv) directing the winding up or liquidation of Contractor if any such decree or order described in clauses (i) to (iv),

inclusive, shall have continued unstayed or undischarged for a period of ninety (90) days; or (v) Contractor shall have admitted in writing its inability to pay its debts as they fall due or shall have voluntarily submitted to or filed a petition seeking any decree or order of the nature described in clauses (i) to (iv), inclusive.

(d) Suspension; Termination. Contractor shall have voluntarily suspended its business, or shall have voluntarily or involuntarily lost or terminated one or more of the licenses required to perform the work.

(e) Liens on Property and the Development. There shall be filed any claim of lien (other than liens approved in writing by the City) against the Project or the construction site or any part thereof, or any interest or right made appurtenant thereto and the continued maintenance of said claim of lien for a period of twenty (20) days without discharge or satisfaction thereof or provision therefore (including, without limitation, the posting of bonds) satisfactory to the City.

Section 2.2 Remedies.

The occurrence of any Default hereunder following the expiration of all applicable notice and cure periods will, either at the option of the City or automatically where so specified, relieve the City of any obligation to make or continue payments and shall give the City the right to proceed with any and all remedies set forth in the Contract Documents, including but not limited to the following:

(a) Specific Performance. The City shall have the right to mandamus or other suit, action or proceeding at law or in equity to require Contractor to perform its obligations and covenants under this Agreement or to enjoin acts on things which may be unlawful or in violation of the provisions of this Agreement.

(b) Right of Contest. Contractor shall have the right to contest in good faith any claim, demand, levy, or assessment the assertion of which would constitute a Default hereunder. Any such contest shall be prosecuted diligently and in a manner unprejudicial to the City or the rights of the City hereunder.

(c) Remedies Cumulative. No right, power, or remedy given to the City by the terms of the Contract Documents is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such instrument, or by any statute or otherwise against Contractor and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

Section 2.3 Waiver of Damages.

Contractor, in having tendered the Proposal, shall be deemed to have waived any and all claims for damages because of termination of this Agreement for any reason. Contractor shall not be entitled to any lost profit in the event of termination.

ARTICLE III
GENERAL PROVISIONS

Section 3.1 Relationship of Parties.

Nothing contained in this Agreement shall be interpreted or understood by any of the Parties, or by any third persons, as creating the relationship of employer and employee, principal and agent, limited or general partnership, or joint venture between the City and Contractor or its agents, employees or subcontractors, and Contractor shall at all times be deemed an independent contractor and shall be wholly responsible for the manner in which it or its agents, or both, perform the services required of it by the terms of this Agreement. Contractor has and retains the right to exercise full control of employment, direction, compensation, and discharge of all persons assisting in the performance of services under the Agreement. In regards to the construction of the Project, Contractor shall be solely responsible for all matters relating to payment of its employees, including compliance with Social Security, withholding, and all other laws and regulations governing such matters, and shall include requirements in each contract that subcontractors shall be solely responsible for similar matters relating to their employees. Contractor shall be solely responsible for its own acts and those of its agents and employees.

Section 3.2 Change Orders.

(a) Changes affecting the time of performance, unit pricing, or total contract price shall be set forth in a written Change Order that shall specify:

1. The work performed in connection with the change to be made;
2. The amount of the adjustment to the Payment Limit, if any, and the basis for compensation for the work ordered; which adjustment may be a negotiated lump sum amount, agreed unit price, or paid under Section 9-1.04 "Force Account" of the 2015 State of California Department of Transportation Standard Specifications; and
3. The amount of time to be adjusted in the schedule for performance, if any.

(b) A Change Order will become effective when signed by the Department Head, or his or her representative, notwithstanding that Contractor has not signed it. A Change Order will become effective without Contractor's signature, provided the Department Head or his or her representative so indicates by noting thereon "unilateral change order."

(c) All changes in any plans and specification approved by any authority with jurisdiction over the Project may also require addenda or change orders approved by that authority.

(d) Where the City requests, a performance bond rider covering the changed work must be executed and delivered to the City before proceeding with the changed work, or shortly in time thereafter.

(e) The Department Head or his or her representative has the authority to approve Change Orders with a cumulative dollar value of up to ten percent (10%) of the contract price.

Section 3.3 Claims By Contractor.

(a) **No Third-Party Claims.** Nothing contained in this Agreement shall create or justify any claim against the City by any person that Contractor may have employed or with whom Contractor may have contracted relative to the purchase of materials, supplies or equipment, or the furnishing or the performance of any work or services with respect to the construction of the Project, and Contractor shall include similar requirements in any contracts entered into for the construction of the Project. Pursuant to Section 9204 (d)(5) of the Public Contract Code, however, Contractor may present a claim on behalf of a subcontractor for work which was performed by that subcontractor or lower tier subcontractor. Such claim shall have been reviewed and evaluated by Contractor prior to submission to the City.

(b) **Obligation to File Claims for Disputed Work.** Should it appear to the Contractor that the work to be performed or any of the matters relative to the Contract Documents are not satisfactorily detailed or explained therein, or should any questions arise as to the meaning or intent of the Contract Documents, or should Contractor have a claim against the City, as the term “claim” is defined in Section 9204 of the Public Contract Code, or should any dispute arise regarding the true value of any work performed, work omitted, extra work that the Contractor may be required to perform, time extensions, payment to the Contractor during performance of the work, construction of the Project, and/or compliance with procedures or standards set forth in the Contract Documents, or should Contractor otherwise seek extra time or compensation FOR ANY REASON WHATSOEVER (each, a “Claim”), then Contractor shall first follow the procedures set forth in this Agreement, including but not limited to Section 3.2, “Change Orders.” If a dispute remains, then Contractor shall give written notice by registered or certified mail with return receipt requested, and such Claim shall be resolved as set forth below.

(c) **Form and Contents of Claim.** The Claim shall be submitted to the City within thirty (30) days of receiving the City’s written decision regarding the dispute, or the date the Contractor contends such decision was due, and in no event later than the date of final payment. Contractor’s written claim must identify itself as a “Claim” under this Section 3.3 and must include the following: (1) a narrative of pertinent events; (2) citation to contract provisions; (3) theory of entitlement; (4) complete pricing of all cost impacts; (5) a time impact analysis of all time delays that shows actual time impact on the critical path; (6) documentation supporting items 1 – 5; and (7) verification under penalty of perjury of the claim’s accuracy. The Claim shall be priced like a Change Order, and must be updated every thirty (30) days as to cost and entitlement if it remains a continuing Claim. Routine contract materials, for example, correspondence, RFI, Change Order requests, or payment requests shall not constitute a Claim. Contractor shall bear all costs incurred in preparation, submittal, and administration of a Claim.

(d) **Administration After Claim Submittal.**

1. City may render a final decision based solely on the materials submitted in support of the Claim or may in its sole discretion conduct an administrative hearing on the Claim, in which case Contractor shall appear, participate, answer inquiries, and present any further evidence or analysis requested by City. Should City take no action on the Claim within forty-five (45) days (or any extension thereof mutually agreed upon by City and Contractor, or any such greater time to respond afforded City under Section 9204(d)(1)(C) of the Public Contract Code) of submittal, it shall be deemed denied.
2. If Contractor disputes City's written response, or if City fails to respond to a Claim within the time prescribed, Contractor may demand in writing an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, City will schedule a meet and confer conference within thirty (30) days for settlement of the dispute.
3. Within ten (10) business days following the conclusion of the meet and confer conference, if the Claim or any portion of the Claim remains in dispute, City will provide Contractor a written statement identifying the portion of the Claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the Claim will be processed and made within sixty (60) days after City issues its written statement. Any disputed portion of the Claim, as identified by Contractor in writing, shall be submitted to nonbinding mediation, with City and Contractor sharing the associated costs equally. City and Contractor shall mutually agree to a mediator within ten (10) business days after the disputed portion of the Claim has been identified in writing. If City and Contractor cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the Claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator. If mediation is unsuccessful, the parts of the Claim remaining in dispute shall be subject to Section 3.3(f) of this Agreement.
4. Failure by City to respond to a Claim within the time periods described in Section 9204 of the Public Contract Code or to otherwise comply with the time requirements of that section shall result in the Claim being deemed rejected in its entirety. A Claim that is denied by reason of City's failure to have responded to a claim, or its failure to otherwise comply with the time requirements of Section 9204 of the Public Contract Code, shall not constitute an adverse finding with regard to the merits of the Claim or the responsibility or qualifications of the claimant filing the Claim.

5. Notwithstanding and pending the resolution of any Claim or dispute, Contractor shall diligently perform the disputed work to final completion in accordance with the City's direction.

(f) **Compliance**

1. The provisions of this Section 3.3 constitute a non-judicial claim settlement procedure that, pursuant to California Government Code Section 930.2, shall constitute a condition precedent to the submittal of a valid claim under the California Government Code. Any Government Code claims alleging disputed work must affirmatively indicate prior compliance with this Section 3.3. In accordance with Richmond Municipal Code Section 1.10.010(b), all Government Code claims must be presented no later than the 100th day after the earlier of (i) the date the City actively or passively denied the Claim, or (ii) substantial completion or termination of the contract.
2. **Failure to submit and administer Claims as required in Section 3.3 shall waive Contractor's right to compensation for any disputed work not included in a timely Claim. Disputes not raised in a timely protest and timely Claim submitted under this Section 3.3 may not be asserted in any subsequent Government Code claim, administrative hearing, or civil action.**
3. City shall not be deemed to waive any provision under this Section 3.3 if, at City's sole discretion, a Claim is administered in a manner not in accord with this Section 3.3. Waivers or modifications of this Section 3.3 may only be made by signed Change Order approved as to form by legal counsel for both City and Contractor. Oral or implied modifications shall be of no force or effect.

Section 3.4 Indemnification.

(a) To the fullest extent permissible by law, Contractor shall indemnify, defend, and hold harmless, and require its subcontractors to defend, indemnify and hold harmless, the City, its elected and appointed officials, and all of its employees, volunteers and agents (the "Indemnified Parties"), from all liability, penalties, costs, losses, damages, expenses, causes of action, claims or judgments, including attorney's fees and other defense costs (collectively, "Actions"), resulting from injury to or death sustained by any person (including Contractor's or any subcontractors' employees), or damage to property of any kind, or any other injury or damage whatsoever, which Actions arise out of or are in any way connected with the construction of the Project, regardless of Contractor's fault or negligence; provided, however, that Contractor's, and Contractor's subcontractors' indemnity obligations hereunder shall not apply to the extent any Actions are caused by the active negligence or willful act or omission of an Indemnified Party. The indemnification obligations of Contractor and its subcontractors shall extend to Actions asserted after termination of this Agreement for whatever reason for the full period of time allowed by law.

(b) In Actions against any person or entity indemnified under Section 3.4(a) above by an employee of Contractor or its subcontractors, anyone directly or indirectly employed by any one of them or anyone for whose acts one of them may be liable, the indemnification obligation under Section 3.4(a) above shall not be limited by a limitation on amount or type of damages, compensation of benefits payable under workers' compensation acts, disability benefit acts or other employee benefit acts.

(c) The defense and indemnification obligations set forth in Section 3.4(a) above are undertaken in addition to, and shall not in any way be limited by, the insurance obligations set forth in the Project Specifications.

Section 3.5 Non-Liability of City Officials, Employees and Agents.

No member, official, employee or agent of the City shall be personally liable to Contractor in the event of any default or breach by the City or for any amount which may become due to Contractor or its successor or on any obligation under the terms of this Agreement.

Section 3.6 No Third Party Beneficiaries.

There shall be no third party beneficiaries to this Agreement.

Section 3.7 Conflict of Interest.

(a) Except for approved eligible administrative or personnel costs, no person described in Section 3.7(b) below who exercises or has exercised any functions or responsibilities with respect to the activities funded pursuant to this Agreement or who is in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from the activity, or have an interest in any contract, subcontract or agreement with respect thereto, or the proceeds thereunder, either for themselves or those with whom they have family or business ties, during, or at any time after, such person's tenure. Contractor shall exercise due diligence to ensure that the prohibition in this Section 3.7(a) is followed.

(b) The conflict of interest provisions of Section 3.7(a) above apply to any person who is an employee, agent, consultant, officer, or elected or appointed official of the City of Richmond, and any immediate family member or dependent of such person.

Section 3.8 Notices, Demands and Communications.

If at any time after the execution of this Agreement it shall become necessary or convenient for one of the Parties hereto to serve any notice, demand or communication upon the other Party, such notice, demand or communication shall be in writing and shall be served

personally or by depositing the same in the registered United States mail, return receipt requested, postage prepaid or delivered by express delivery service, return receipt requested and

(1) if intended for the City shall be addressed to:

City of Richmond
450 Civic Center Plaza
Richmond, California 94804
Attention: Tawfic Halaby

With copy to:

City of Richmond
450 Civic Center Plaza
Richmond, CA 94804
Attention: City Attorney

(2) if intended for Contractor shall be addressed to:

Ghilotti Bros., Inc.
525 Jacoby Street
P. O. Box 10268
San Rafael, CA 94912
Attn: Lance Bushnell

Any notice, demand or communication shall be deemed given, received, made or communicated on the date personal delivery is affected or, if mailed in the manner herein specified, on the delivery date or date delivery is refused by the addressee, as shown on the return receipt. Any Party may change its address at any time by giving written notice of such change at least ten (10) days prior to the date such change is desired to be effective.

Section 3.9 Applicable Law.

This Agreement shall be governed by California law. This Agreement is made in Contra Costa County, California, and any action relating to this Agreement shall be instituted and prosecuted in the courts of Contra Costa County, California.

Section 3.10 Parties Bound.

Except as otherwise limited herein, the provisions of this Agreement shall be binding upon and inure to the benefit of the Parties and their heirs, executors, administrators, legal representatives, successors, and assigns. Any reference in this Agreement to a specifically named Party shall be deemed to apply to any successor, heir, administrator, executor, successor, or assign of such Party who has acquired an interest in compliance with the terms of this

Agreement or under law. This Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors in interest, and assigns of each of the Parties.

Section 3.11 Severability.

If any term of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

Section 3.12 Force Majeure.

Performance by either Party shall not be deemed to be in default when delays in performance are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, quarantine restrictions, freight embargoes, or court order, or any other similar causes (other than lack of funds of Contractor) beyond the control or without the fault of the Party claiming an extension of time to perform (“Force-Majeure Delays”). In no event shall any extension of any period of time be deemed to have occurred unless the Party claiming the Force-Majeure Delay gives written notice to the other Party within ten (10) days following the commencement of any such delay, setting forth the facts giving rise to the Force-Majeure Delay request, the expected duration of the delay, and the steps the Party intends to take to minimize the Delay. During the Force-Majeure Delay, the Party whose performance is delayed shall keep the other Party reasonably informed of the situation and the steps taken by such Party to continue performance and minimize delay. After the Force-Majeure Delay is over, the Parties shall in good faith jointly prepare an accurate written record of the circumstances giving rise to delay, specifying the commencement date and duration of the Force-Majeure Delay and the cause thereof, which record shall be signed by each Party to confirm agreement with respect to its content. In no event shall the City be required to agree to cumulative Force-Majeure Delays in excess of sixty (60) days unless the City is the cause of such delay. In the event that the parties cannot agree upon a record of the circumstances giving rise to the Force-Majeure Delay, the procedures set forth in Section 3.3 of this Agreement shall apply.

Section 3.13 Waivers.

Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Contractor or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Contractor to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by Contractor shall not be construed to be consent to any other or subsequent act or omission or to waive the requirement for the City’s written consent to future waivers.

Section 3.14 Title of Parts and Sections.

Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

Section 3.15 Entire Understanding of the Parties.

The Contract Documents – along with any written change orders and dispute determinations that may be issued by the City in the course of performance – shall constitute the entire understanding and agreement of the Parties with respect to construction of the Project. The Contract Documents, written change orders (if any), and dispute determinations (if any) are deemed complementary and should be interpreted together.


Section 3.16 Multiple Originals; Counterpart.

This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts. A facsimile or electronic signature to this Agreement shall be as valid as an ink signed original.

[Signatures on following page]

WHEREAS, this Agreement has been entered into by the undersigned as of the date first above written.

Reviewed By:

DocuSigned by:

065D6D2E8EAC4C9...
City Attorney

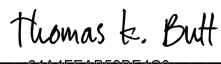
ATTEST:

DocuSigned by:

C66438FF4A43406...
City Clerk

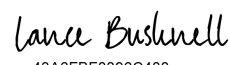
CITY:

CITY OF RICHMOND, a municipal corporation and charter city

DocuSigned by:

64A4FEAB53BE4C0...
By: _____
Name: Thomas K. Butt
Its: Mayor

CONTRACTOR:

Ghilotti Bros., Inc.

DocuSigned by:

43A0FBF6396C488...
By: _____
Name: Lance A. Bushnell
Its: Vice President of Estimating

**Exhibit A
Proposal**