

CONTRACT AGREEMENT
between City of Othello and Farmer's Electric II LLC

THIS AGREEMENT is made by and between the City of Othello, a Washington municipal corporation (hereinafter the "City"), and Farmer's Electric II, LLC organized under the laws of the State of Washington, located and doing business at City of Othello Fire Station, 250 S. Broadway, Othello, WA 99344 (hereinafter the "Contractor").

AGREEMENT

The parties agree as follows:

I. DESCRIPTION OF WORK.

Contractor shall perform the following services for the City in accordance with the following described plans and/or specifications:

Supply and Installation of 50kw 1 phase natural gas back-up generator, supplied by Cummins NW, including wiring, transfer switch and other items as listed during the RFQ process. The RFQ documents are incorporated herein and are made part of this agreement to the extent they do not conflict with the terms of this agreement.

Contractor further represents that the services furnished under this Agreement will be performed in accordance with generally accepted professional practices within the Eastern Washington region in effect at the time such services are performed.

II. TIME OF COMPLETION. The parties agree that work will begin on the tasks described in Section I above immediately upon execution of this Agreement. Upon the effective date of this Agreement, the Contractor shall complete the work described in Section I within 120 days from the date of council award of project.

III. COMPENSATION. The City shall pay the Contractor a total amount not to exceed \$31,091.00 (Thirty-One Thousand, ninety one dollars) plus any applicable Washington State Sales Tax, for the initial work and services contemplated in this Agreement. The City shall pay the Contractor fifty percent (50%) of the invoiced amount upon completion and acceptance of the work by the City, and the remainder upon fulfillment of the conditions listed below and throughout this Agreement.

A. Performance & Payment Bond / Retainage. Because this contract, is less than \$35,000, and pursuant to Chapter 39.08 RCW, the Contractor, may in lieu of providing the City a performance and payment bond in the amount of 100% of the project cost, can elect to have the City retain the final fifty percent (50%) of the Contract amount. The contractor hereby elects to exercise that option rather than post the requisite bonds. The City will retain the final fifty percent (50%) of the Contract until the next regular voting council meeting subsequent to a period of sixty (60) days after the date of final acceptance, or until receipt of all necessary releases from the State

Department of Revenue and the State Department of Labor & Industries and until settlement of any liens filed under Chapter 60.28 RCW, whichever is later.

B. **Defective or Unauthorized Work.** The City reserves its right to withhold payment from Contractor for any defective or unauthorized work. Defective or unauthorized work includes, without limitation: work and materials that do not conform to the requirements of this Agreement; and extra work and materials furnished without the City's written approval. If Contractor is unable, for any reason, to satisfactorily complete any portion of the work, the City may complete the work by contract or otherwise, and Contractor shall be liable to the City for any additional costs incurred by the City. "Additional costs" shall mean all reasonable costs, including legal costs and attorney fees, incurred by the City beyond the maximum Contract price specified above. The City further reserves its right to deduct the cost to complete the Contract work, including any Additional Costs, from any and all amounts due or to become due the Contractor.

C. **Final Payment: Waiver of Claims.** THE CONTRACTOR'S ACCEPTANCE OF FINAL PAYMENT (EXCLUDING WITHHELD RETAINAGE) SHALL CONSTITUTE A WAIVER OF CONTRACTOR'S CLAIMS, EXCEPT THOSE PREVIOUSLY AND PROPERLY MADE AND IDENTIFIED BY CONTRACTOR AS UNSETTLED AT THE TIME FINAL PAYMENT IS MADE AND ACCEPTED.

IV. **INDEPENDENT CONTRACTOR.** The parties intend that an Independent Contractor Relationship will be created by this Agreement and that the Contractor has the ability to control and direct the performance and details of its work, the City being interested only in the results obtained under this Agreement. This Agreement is not indented, does not and shall not be interpreted to create an employer-employee relationship.

V. **TERMINATION.** The City may terminate this Agreement for good cause. "Good cause" shall include, without limitation, any one or more of the following events:

A. The Contractor's refusal or failure to supply a sufficient number of properly skilled workers or proper materials for completion of the Contract work.

B. The Contractor's failure to complete the work within the time specified in this Agreement.

C. The Contractor's failure to make full and prompt payment to subcontractors or for material or labor.

D. The Contractor's persistent disregard of federal, state or local laws, rules or regulations.

E. The Contractor's filing for bankruptcy or becoming adjudged bankrupt.

F. The Contractor's breach of any portion of this Agreement.

If the City terminates this Agreement for good cause, the Contractor shall not receive any further money due under this Agreement until the Contract work is completed. After termination, the City may take possession of all records and data within the Contractor's possession pertaining to this project which may be used by the City without restriction.

VI. PREVAILING WAGES. Contractor shall file a "Statement of Intent to Pay Prevailing Wages," with the State of Washington Department of Labor & Industries prior to commencing the Contract work. Contractor shall pay prevailing wages in effect on the date the bid is accepted or executed by Contractor, and comply with Chapter 39.12 of the Revised Code of Washington, as well as any other applicable prevailing wage rate provisions.

VII. CHANGES. The City may issue a written change order for any change in the Contract work during the performance of this Agreement. If the Contractor determines, for any reason, that a change order is necessary, Contractor must submit a written change order request to the person listed in the notice provision section of this Agreement, section XV(D), within fourteen (14) calendar days of the date Contractor knew or should have known of the facts and events giving rise to the requested change. If the City determines that any change order increases or decreases the Contractor's costs or time for performance, the City will make an equitable adjustment. The City will attempt, in good faith, to reach agreement with the Contractor on all equitable adjustments. However, if the parties are unable to agree, the City will determine the equitable adjustment as it deems appropriate. The Contractor shall proceed with the change order work upon receiving either a written change order from the City. If the Contractor fails to require a change order within the time specified in this paragraph, the Contractor waives its right to make any claim or submit subsequent change order requests for that portion of the contract work. If the Contractor disagrees with the equitable adjustment, the Contractor must complete the change order work; however, the Contractor may elect to protest the adjustment as provided in subsections A through E of Section VIII, Claims, below.

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, or (3) not protesting in the way this section provides. A change order that is accepted by Contractor as provided in this section shall constitute full payment and final settlement of all claims for contract time and for direct, indirect and consequential costs, including costs of delays related to any work, either covered or affected by the change.

VIII. CLAIMS. If the Contractor disagrees with anything required by a change order, or another written order, or any direction, instruction, interpretation, or determination by the City, the Contractor may file a claim as provided in this section. The Contractor shall give written notice to the City of all claims within fourteen (14) calendar days of the occurrence of the events giving rise to the claims, or within fourteen (14) calendar days of the date the Contractor knew or should have known of the facts or events giving rise to the claim, whichever occurs first. Any claim for damages, additional payment for any reason, or extension of time, whether under this Agreement or otherwise, shall be conclusively deemed to have been waived by the Contractor unless a timely written claim is made in strict accordance with the applicable provisions of this Agreement.

At a minimum, a Contractor's written claim shall include the information set forth in subsections A, items 1 through 5 below.

FAILURE TO PROVIDE A COMPLETE, WRITTEN NOTIFICATION OF CLAIM WITHIN THE TIME ALLOWED SHALL BE AN ABSOLUTE WAIVER OF ANY CLAIMS ARISING IN ANY WAY FROM THE FACTS OR EVENTS SURROUNDING THAT CLAIM OR CAUSED BY THAT DELAY.

A. Notice of Claim. Provide a signed written notice of claim that provides the following information:

1. The date of the Contractor's claim;
2. The nature and circumstances that caused the claim;
3. The provisions in this Agreement that support the claim;
4. The estimated dollar cost, if any, of the claimed work and how that estimate was determined; and
5. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption.

B. Records. The Contractor shall keep complete records of extra costs and time incurred as a result of the asserted events giving rise to the claim. The City shall have access to any of the Contractor's records needed for evaluating the protest.

The City will evaluate all claims, provided the procedures in this section are followed. If the City determines that a claim is valid, the City will adjust payment for work or time by an equitable adjustment. No adjustment will be made for an invalid protest.

C. Contractor's Duty to Complete Protested Work. In spite of any claim, the Contractor shall proceed promptly to provide the goods, materials and services required by the City under this Agreement.

D. Failure to Protest Constitutes Waiver. By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the City any written or oral order (including directions, instructions, interpretations, and determination).

E. Failure to Follow Procedures Constitutes Waiver. By failing to follow the procedures of this section, the Contractor completely waives any claims for protested work and accepts from the City any written or oral order (including directions, instructions, interpretations, and determination).

IX. LIMITATION OF ACTIONS. CONTRACTOR MUST, IN ANY EVENT, FILE ANY LAWSUIT ARISING FROM OR CONNECTED WITH THIS AGREEMENT WITHIN 120 CALENDAR DAYS FROM THE DATE THE CONTRACT WORK IS COMPLETE OR CONTRACTOR'S ABILITY TO FILE THAT CLAIM OR SUIT SHALL BE FOREVER BARRED. THIS SECTION FURTHER LIMITS ANY APPLICABLE STATUTORY LIMITATIONS PERIOD.

X. **WARRANTY.** Upon acceptance of the contract work, Contractor must provide the City a 1-Year parts and labor warranty and a 2-year factory warranty from Cummins NW, on the Generator and Transfer Switch. The Contractor shall correct all defects in workmanship and materials within One (1) year from the date of the City's acceptance of the Contract work. The Contractor shall also coordinate any and all repairs made by the factory during the 2-year factory warranty period of the generator and transfer switch. In the event any parts are repaired or replaced, only original replacement parts shall be used—rebuilt or used parts will not be acceptable. The Contractor shall begin to correct any defects within seven (7) calendar days of its receipt of notice from the City of the defect. If the Contractor does not accomplish the corrections within a reasonable time as determined by the City, the City may complete the corrections and the Contractor shall pay all costs incurred by the City in order to accomplish the correction.

XI. **DISCRIMINATION.** In the hiring of employees for the performance of work under this Agreement or any sub-contract, the Contractor, its sub-contractors, or any person acting on behalf of the Contractor or sub-contractor shall not, by reason of race, religion, color, sex, age, sexual orientation, national origin, or the presence of any sensory, mental, or physical disability, discriminate against any person who is qualified and available to perform the work to which the employment relates.

XII. **INDEMNIFICATION.** Contractor shall defend, indemnify and hold the City, its officers, officials, employees, agents and volunteers harmless from any and all claims, injuries, damages, losses or suits, including all legal costs and attorney fees, arising out of or in connection with the Contractor's performance of this Agreement, except for that portion of the injuries and damages caused by the City's negligence.

The City's inspection or acceptance of any of Contractor's work when completed shall not be grounds to avoid any of these covenants of indemnification.

Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Contractor and the City, its officers, officials, employees, agents and volunteers, the Contractor's liability hereunder shall be only to the extent of the Contractor's negligence.

IT IS FURTHER SPECIFICALLY AND EXPRESSLY UNDERSTOOD THAT THE INDEMNIFICATION PROVIDED HEREIN CONSTITUTES THE CONTRACTOR'S WAIVER OF IMMUNITY UNDER INDUSTRIAL INSURANCE, TITLE 51 RCW, SOLELY FOR THE PURPOSES OF THIS INDEMNIFICATION. THE PARTIES FURTHER ACKNOWLEDGE THAT THEY HAVE MUTUALLY NEGOTIATED THIS WAIVER.

The provisions of this section shall survive the expiration or termination of this Agreement.

XIII. **INSURANCE.** The Contractor shall procure and maintain for the duration of the Agreement, insurance of the types and in the amounts as required by the State of Washington. This is including but not limited to a general commercial liability policy, which covers the contractor's work under this agreement, in the amount of 1 Million dollars per occurrence and 2

Million dollars aggregate, identifying the city as an additional insured. Before commencing any work under this agreement, contractor shall provide certificates of insurance to the City, identifying the coverage and policy limits, and naming the City as an additional insured which are approved by the City.

XIV. WORK PERFORMED AT CONTRACTOR'S RISK. Contractor shall take all necessary precautions and shall be responsible for the safety of its employees, agents, and subcontractors in the performance of the contract work and shall utilize all protection necessary for that purpose. All work shall be done at Contractor's own risk, and Contractor shall be responsible for any loss of or damage to materials, tools, or other articles used or held for use in connection with the work.

XV. MISCELLANEOUS PROVISIONS.

A. Non-Waiver of Breach. The failure of the City to insist upon strict performance of any of the covenants and agreements contained in this Agreement, or to exercise any option conferred by this Agreement in one or more instances shall not be construed to be a waiver or relinquishment of those covenants, agreements or options, and the same shall be and remain in full force and effect.

B. Resolution of Disputes and Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. If the parties are unable to settle any dispute, difference or claim arising from the parties' performance of this Agreement, the exclusive means of resolving that dispute, difference or claim, shall only be by filing suit exclusively under the venue, rules and jurisdiction of the Adams County Superior Court, Adams County, Washington, unless the parties agree in writing to an alternative dispute resolution process. In any claim or lawsuit for damages arising from the parties' performance of this Agreement, the prevailing party shall be entitled to recover from the other party all its legal costs and attorney's fees incurred in defending or bringing such claim or lawsuit, including all appeals, in addition to any other recovery or award provided by law; provided, however, nothing in this paragraph shall be construed to limit the City's right to indemnification under Section XII of this Agreement.

C. Written Notice. All communications regarding this Agreement shall be sent to the parties at the addresses listed on the signature page of the Agreement, unless notified to the contrary. Any written notice hereunder shall become effective three (3) business days after the date of mailing by registered or certified mail, and shall be deemed sufficiently given if sent to the addressee at the address stated in this Agreement or such other address as may be hereafter specified in writing.

D. Assignment. Any assignment of this Agreement by either party without the written consent of the non-assigning party shall be void. If the non-assigning party gives its consent to any assignment, the terms of this Agreement shall continue in full force and effect and no further assignment shall be made without additional written consent.

E. Modification. No waiver, alteration, or modification of any of the provisions of

this Agreement shall be binding unless in writing and signed by a duly authorized representative of the City and Contractor.

F. Entire Agreement. The written provisions and terms of this Agreement, together with any Exhibits attached hereto, shall supersede all prior verbal statements of any officer or other representative of the City, and such statements shall not be effective or be construed as entering into or forming a part of or altering in any manner this Agreement. All of the above documents are hereby made a part of this Agreement. However, should any language in any of the Exhibits to this Agreement conflict with any language contained in this Agreement, the terms of this Agreement shall prevail.

G. Compliance with Laws. The Contractor agrees to comply with all federal, state, and municipal laws, rules, and regulations that are now effective or in the future become applicable to Contractor's business, equipment, and personnel engaged in operations covered by this Agreement or accruing out of the performance of those operations.

H. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute an original, and all of which will together constitute this one Agreement.

I. Severability. If any provision of this Agreement is deemed to be unenforceable under Washington law, then it will be interpreted in such a way as to be enforceable if possible or stricken. For example, if the period for payment of retainage is deemed violate to the 30 day timeframe set forth in RCW 30.08 et seq., then it shall be interpreted to apply the 30 day timeframe, rather than the timeframe set forth in the agreement. If any provision is deemed to be unenforceable, then all other terms of the Agreement will remain in full force and effect.

IN WITNESS, the parties below execute this Agreement, which shall become effective on the last date entered below.

CONTRACTOR:

Farmer's Electric II, LLC
30 E. Hemlock
Othello, WA 99344

By: _____

(Signature)

Print Name: _____

Jonathan Fox

Its: _____

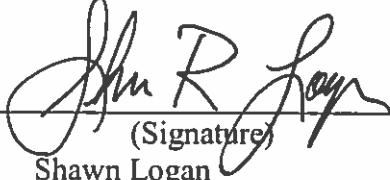
Manager

(Title)

DATE:

CITY OF OTHELLO
500 E. Main St.
Othello, WA 99344

By: _____



(Signature)

Print Name: Shawn Logan
Its Mayor

DATE:

NOTICES TO BE SENT TO:

CONTRACTOR:

Caleb Booth
Farmer's Electric
30 E. Hemlock
Othello, WA 99344


509-488-2822 (telephone)
509-488-3229 (facsimile)

NOTICES TO BE SENT TO:

CITY OF OTHELLO:

Wade Farris, City Administrator
City of Othello
500 E. Main Street
Othello, WA 99344
(509) 488-5686 (telephone)
(509) 488-0102 (facsimile)

APPROVED AS TO FORM:



City Attorney