

COOPERATIVE PURCHASING AGREEMENT
BETWEEN
THE CITY OF TOLLESON
AND
EMPIRE SOUTHWEST, LLC

THIS COOPERATIVE PURCHASING AGREEMENT (this “Agreement”) between the CITY OF TOLLESON, an Arizona municipality, (the “City”), and EMPIRE SOUTHWEST, LLC, a Delaware limited liability company, (the “Supplier”) (collectively, “the parties”), is hereby entered into and shall be effective on the last signature date set forth below.

RECITALS

A. After a competitive procurement process, the City of Tucson, an Arizona municipality and Caterpillar Inc. entered into Contract No. #212816-01, dated October 3, 2022, as amended, (collectively, the “Cooperative Contract”) for heavy equipment parts, accessories, supplies and related services (“Equipment and Services”). Supplier is a Caterpillar dealer as described in the Cooperative Contract. A copy of the Cooperative Contract is on file with the City Clerk’s office and is incorporated herein by reference.

B. The City is permitted, pursuant to Section 3-5-7 of the City Code, to make purchases under the Cooperative Contract, at its discretion and with the agreement of the awarded Supplier, and the Cooperative Contract permits its cooperative use by other public entities, including the City.

C. The City and the Supplier desire to enter into this Agreement for the purpose of (i) acknowledging their cooperative contractual relationship under the Cooperative Contract and this Agreement, (ii) establishing the terms and conditions by which the Supplier may provide the City with the required Products, and (iii) setting the maximum aggregate amount to be expended pursuant to this Agreement related to the Equipment and Services.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing introduction and recitals, which are incorporated herein by reference, the following mutual covenants and conditions, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Supplier hereby agree as follows:

1. Term of Agreement. This Agreement shall be effective on the last signature date set forth below and shall remain in full force and effect until October 2, 2026 (the “Term”), unless terminated as otherwise provided in this Agreement or the Cooperative Contract.

2. Scope of Work. This is an indefinite quantity and indefinite delivery, i.e., as needed as determined by the City, Agreement for Equipment and Services under the terms and conditions of the Cooperative Contract. The City does not guarantee that any minimum or

maximum number of purchases will be made pursuant to this Agreement. Purchases will only be made when the City identifies a need and proper authorization and documentation have been approved. For purchase(s) determined by the City to be appropriate for this Agreement, the Supplier shall provide the Equipment and Services to the City in such quantities and configurations agreed upon between the parties, in a written invoice, quote, Purchase Order or other form of written agreement describing the work to be completed (each, a "Purchase Order"). Each Purchase Order approved and accepted by the parties pursuant to this Agreement shall (i) contain a reference to this Agreement and the Cooperative Contract and (ii) be attached hereto as Exhibit A and incorporated herein by reference. Purchase Orders submitted without referencing this Agreement and the Cooperative Contract will be subject to rejection.

2.1 Inspection; Acceptance. All Equipment and Services are subject to final inspection and acceptance by the City. Equipment and Services failing to conform to the requirements of this Agreement and/or the Cooperative Contract will be held at Supplier's risk and may be returned to the Supplier. If so returned, all costs are the responsibility of the Supplier. Upon discovery of non-conforming Equipment and Services, the City may elect to do any or all of the following by written notice to the Supplier: (i) waive the non-conformance; (ii) stop the work immediately; or (iii) bring the Equipment and Services into compliance and withhold the cost of same from any payments due to the Supplier.

2.2 Cancellation. The City reserves the right to cancel Purchase Orders within a reasonable period of time after issuance. Should a Purchase Order be canceled, the City agrees to reimburse the Supplier, but only for actual and documentable costs incurred by the Supplier due to and after issuance of the Purchase Order. The City will not reimburse the Supplier for any costs incurred after receipt of City notice of cancellation, or for lost profits, shipment of product prior to issuance of Purchase Order or for anything not expressly permitted pursuant to this Agreement.

3. Compensation. The City's payments to the Supplier (if any) shall not exceed an aggregate amount of \$175,000.00 for each fiscal year, July 1st through June 30th, for the Equipment and Services at payment rates that shall be agreed upon by the parties. If an entire fiscal year does not fall within the Term of this Agreement, the aggregate compensation limit for that partial year shall be reduced to an amount equal to the compensation limit multiplied by a factor having as its numerator the number of days in the partial fiscal year and as its denominator the number three hundred sixty-five (365).

4. Payments. The City shall pay the Supplier based upon acceptance and delivery of Equipment and Services performed and completed to date, and upon submission and approval of invoices. Each invoice shall (i) contain a reference to this Agreement and the Cooperative Contract and (ii) document and itemize all work completed to date. The invoice statement shall include a record of materials delivered, time expended, and work performed in sufficient detail to justify payment. Additionally, invoices submitted without referencing this Agreement and the Cooperative Contract will be subject to rejection and may be returned.

5. Records and Audit Rights. To ensure that the Supplier and its subcontractors are

complying with the warranty under Section 6 below, Supplier's and its subcontractors' books, records, correspondence, accounting procedures and practices, and any other supporting evidence relating to this Agreement, including the papers of any Supplier and its subcontractors' employees who perform any work or services pursuant to this Agreement (all of the foregoing hereinafter referred to as "Records"), shall be open to inspection and subject to audit and/or reproduction during normal working hours by the City, to the extent necessary to adequately permit evaluation of the Supplier's and its subcontractors' compliance with the Arizona employer sanctions laws referenced in Section 6 below. To the extent necessary for the City to audit Records as set forth in this Section, Supplier and its subcontractors hereby waive any rights to keep such Records confidential. For the purpose of evaluating or verifying such actual or claimed costs or units expended, the City shall have access to said Records, even if located at its subcontractors' facilities, from the effective date of this Agreement for the duration of the work and until three years after the date of final payment by the City to Supplier pursuant to this Agreement. Supplier and its subcontractors shall provide the City with adequate and appropriate workspace so that the City can conduct audits in compliance with the provisions of this Section. The City shall give Supplier or its subcontractors reasonable advance notice of intended audits. Supplier shall require its subcontractors to comply with the provisions of this Section by insertion of the requirements hereof in any subcontract pursuant to this Agreement.

6. E-verify Requirements. To the extent applicable under A.R.S. § 41-4401, the Supplier and its subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and their compliance with the E-verify requirements under A.R.S. § 23-214(A). Supplier's or its subcontractors' failure to comply with such warranty shall be deemed a material breach of this Agreement and may result in the termination of this Agreement by the City.

7. Conflict of Interest. This Agreement may be canceled by the City pursuant to A.R.S. § 38-511.

8. Applicable Law; Venue. This Agreement shall be governed by the laws of the State of Arizona and a suit pertaining to this Agreement may be brought only in courts in Maricopa County, Arizona.

9. Agreement Subject to Appropriation. The City is obligated only to pay its obligations set forth in this Agreement as may lawfully be made from funds appropriated and budgeted for that purpose during the City's then current fiscal year. The City's obligations under this Agreement are current expenses subject to the "budget law" and the unfettered legislative discretion of the City concerning budgeted purposes and appropriation of funds. Should the City elect not to appropriate and budget funds to pay its Agreement obligations, this Agreement shall be deemed terminated at the end of the then-current fiscal year term for which such funds were appropriated and budgeted for such purpose and the City shall be relieved of any subsequent obligation under this Agreement. The parties agree that the City has no obligation or duty of good faith to budget or appropriate the payment of the City's obligations set forth in this Agreement in any budget in any fiscal year other than the fiscal year in which this Agreement is executed and

delivered. The City shall be the sole judge and authority in determining the availability of funds for its obligations under this Agreement. The City shall keep Supplier informed as to the availability of funds for this Agreement. The obligation of the City to make any payment pursuant to this Agreement is not a general obligation or indebtedness of the City. Supplier hereby waives any and all rights to bring any claim against the City from or relating in any way to the City's termination of this Agreement pursuant to this section.

10. Conflicting Terms. In the event of any inconsistency, conflict, or ambiguity among the terms of this Agreement, any City-approved Purchase Orders, the Cooperative Contract, and invoices, the documents shall govern in the order listed herein. Notwithstanding the foregoing, and in conformity with Section 2 above, unauthorized exceptions, conditions, limitations, or provisions in conflict with the terms of this Agreement or the Cooperative Contract (collectively, the "Unauthorized Conditions"), other than the City's project-specific requirements, are expressly declared void and shall be of no force and effect. Acceptance by the City of any Purchase Order or invoice containing any such Unauthorized Conditions or failure to demand full compliance with the terms and conditions set forth in this Agreement or under the Cooperative Contract shall not alter such terms and conditions or relieve Supplier from, nor be construed or deemed a waiver of, its requirements and obligations in the performance of this Agreement.

11. Rights and Privileges. To the extent provided under the Cooperative Contract, the City shall be afforded all of the rights and privileges afforded to the City of Tucson, an Arizona municipal corporation (as defined in the Cooperative Contract) for the purposes of the portions of the Cooperative Contract that are incorporated herein by reference.

12. Indemnification; Insurance. In addition to and in no way limiting the provisions set forth in Section 11 above, the City shall be afforded all of the insurance coverage and indemnifications afforded to the Lead Public Agency to the extent provided under the Cooperative Contract, and such insurance coverage and indemnifications shall inure and apply with equal effect to the City under this Agreement including, but not limited to, the Supplier's obligation to provide the indemnification and insurance. In any event, the Supplier shall indemnify, defend and hold harmless the City and each council member, officer, employee or agent thereof (the City and any such person being herein called an "Indemnified Party"), for, from and against any and all losses, claims, damages, liabilities, costs and expenses (including, but not limited to, reasonable attorneys' fees, court costs and the costs of appellate proceedings) to which any such Indemnified Party may become subject, under any theory of liability whatsoever ("Claims"), insofar as such Claims (or actions in respect thereof) relate to, arise out of, or are caused by or based upon the negligent acts, intentional misconduct, errors, mistakes or omissions, in connection with the work or services of the Supplier, its officers, employees, agents, or any tier of subcontractor in the performance of this Agreement.

13. Israel. To the extent A.R.S. § 35-393 through § 35-393.03 is applicable, Supplier certifies that it is not currently engaged in, and agrees for the duration of this Agreement that it will not engage in, a boycott of goods and services from Israel, as that term is defined in A.R.S. § 35-393.

14. China. Pursuant to and in compliance with A.R.S. § 35-394, Supplier hereby agrees and certifies that it does not currently, and agrees for the duration of this Agreement that Supplier will not, use: (i) the forced labor of ethnic Uyghurs in the People's Republic of China; (ii) any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China; or (iii) any contractors, subcontractors or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China. Supplier also hereby agrees to indemnify and hold harmless the City, its officials, employees, and agents from any claims or causes of action relating to the City's action based upon reliance upon this representation, including the payment of all costs and attorney fees incurred by the City in defending such as action.

15. Notices and Requests. Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if (i) delivered to the party at the address set forth below, (ii) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below or (iii) given to a recognized and reputable overnight delivery service, to the address set forth below:

If to the City:	City of Tolleson 9055 W. Van Buren Street Tolleson, Arizona 85353 Attn: Crystal Zamora, City Clerk
With copy to:	Pierce Coleman PLLC 17851 North 85 th Street, Suite 175 Scottsdale, Arizona 85255 Attn: Justin Pierce, City Attorney
If to Supplier:	Empire Southwest, LLC 1725 S. Country Club Dr. Mesa, AZ 85210 Attn: Legal Dept.

or at such other address, and to the attention of such other person or officer, as any party may designate in writing by notice duly given pursuant to this subsection. Notices shall be deemed received: (i) when delivered to the party, (ii) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage or (iii) the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day. If a copy of a notice is also given to a party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a party shall mean and refer to the date on which the party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year last set forth below.

“City”

CITY OF TOLLESON,
an Arizona municipal corporation

Reyes Medrano, Jr., City Manager

DATE

ATTEST:

Crystal Zamora, City Clerk

APPROVED AS TO FORM:

Justin S. Pierce
Pierce Coleman PLLC
City Attorney

“Supplier”

EMPIRE SOUTHWEST, LLC,
a Delaware limited liability company

By: _____
Name: _____
Its: _____

DATE

EXHIBIT A
TO
COOPERATIVE PURCHASING AGREEMENT
BETWEEN
THE CITY OF TOLLESON
AND
EMPIRE SOUTHWEST, LLC

[Purchase Order]

See following pages (to be added subsequent to execution).