

**RESOLUTION R-2023-58**

**A RESOLUTION AUTHORIZING THE EXECUTION OF AGREEMENT NO. 394 WITH  
TOTAL MECHANICAL SOLUTIONS FOR HVAC PREVENTATIVE MAINTENANCE AND SERVICE FOR  
A TWO-YEAR AGREEMENT AND A TOTAL AMOUNT NOT TO EXCEED \$69,260**

**WHEREAS**, the City of Wheaton, Illinois, ("City") is an Illinois home rule municipality pursuant to the provisions of Article VII, Section 6, of the Illinois Constitution of 1970; and as such the City may exercise any power and perform any function pertaining to its government and affairs; and

**WHEREAS**, the City solicited an Invitation to Bid package (ITB Number 23-32) for HVAC Preventative Maintenance and Service and Total Mechanical Solutions was determined to be the lowest, responsive, responsible bidder with a bid amount of \$69,260; and

**WHEREAS**, the City budgeted funds in multiple accounts for a total amount of \$74,330 for HVAC Preventative Maintenance and Service; and


**WHEREAS**, both parties agree to the terms and conditions set forth in the ITB and the agreement contained in the City's bid package for HVAC Preventative Maintenance and Service; and

**WHEREAS**, the corporate authorities of the City of Wheaton, DuPage County, Illinois find it reasonable and appropriate to enter into an agreement with Total Mechanical Solutions located at 6100 Elm St., Lisle, Illinois, 60532 for HVAC Preventative Maintenance and Service for a total amount not to exceed \$69,260.

**NOW, THEREFORE, BE IT RESOLVED** by the Mayor and City Council of the City of Wheaton, Illinois, that:

The Mayor is hereby authorized to execute, and the City Clerk is hereby directed to attest to City of Wheaton Agreement No. 394 with Total Mechanical Solutions for HVAC Preventative Maintenance and Service; and that a copy of that certain City of Wheaton Agreement No. 394 is on file with the City Clerk's office and is incorporated herein as if fully set forth as Exhibit A.

**ADOPTED** this 17<sup>th</sup> day of July 2023

  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

**Roll Call Vote:**

Ayes: Councilwoman Robbins  
Councilman Weller  
Councilman Brown  
Mayor Pro Tem Barbier  
Councilman Clousing

Nays: None  
Absent: Councilwoman Bray-Parker  
Mayor Suess  
Motion Carried Unanimously

**CITY OF WHEATON, ILLINOIS  
GENERAL CONTRACTED SERVICES AGREEMENT FOR  
HVAC PREVENTIVE MAINTENANCE AND SERVICE**

**THIS AGREEMENT** is made and entered this 18<sup>th</sup> day of JULY, 2023 by and between the **CITY OF WHEATON**, an Illinois municipal corporation ("**City**"), located at 303 W. Wesley Street, Wheaton, Illinois, 60187 and **Total Mechanical Solutions ("**Contractor**")**, located at 6100 Elm Street, Lisle, Illinois 60532. City and Contractor are at times collectively referred to hereinafter as the "**Parties.**"

WHEREAS, the City has determined that it is reasonable and appropriate to engage a Contractor to provide the materials, labor, equipment, supervision, and services required to perform HVAC Preventative Maintenance and Service at City facilities (hereinafter, "**HVAC Preventative Maintenance**") consistent with the City's HVAC Preventative Maintenance and Service Invitation to Bid package which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit A**; and

WHEREAS, the Contractor has submitted to the City a cost proposal for the materials, labor, equipment, supervision, and services required to perform HVAC Preventative Maintenance and Service at City facilities consistent with the City's HVAC Preventative Maintenance and Service Invitation to Bid package, a copy of the Contractor's proposal is attached hereto and incorporated herein as if fully set forth as **Group Exhibit B**; and

WHEREAS, Contractor represents that it has the necessary expertise and experience to perform HVAC Preventative Maintenance and Service at City facilities, upon the terms and conditions set forth herein below; and

WHEREAS, the City finds that the Contractor's proposal meets the City's requirements for the services.

NOW, THEREFORE, in consideration of the recitals and the mutual covenants, agreements, and conditions set forth in the Agreement, the parties agree as follows:

**SECTION 1. CONTRACT DOCUMENTS.**

**1.1 Incorporated Documents.** The Contract Documents consist of this Agreement and the following attached exhibits which are incorporated into this Agreement:

- a. The City's RFP and all related documents is attached as **Group Exhibit A**;
- b. The Contractor's Proposal and all related documents is attached as **Group Exhibit B**;
- c. Insurance Coverage for Contractual Services is attached as **Exhibit C**;

- d. Legal certifications and compliance with laws documentation is attached as **Group Exhibit D**; and
- e. Change Order Form, is attached as **Exhibit E**.

These attachments along with this Agreement represent the entire integrated Contract between the Parties and supersede any and all prior negotiations, representations, or agreements, written or oral.

The Contract Documents also shall include any subsequent Change Orders or Written Amendments to any documents listed above or included within the incorporated exhibits, and other documents amending, modifying, or supplementing the Contract Documents, which may be delivered or issued after the effective date of the Agreement and are not attached hereto.

It shall be understood that words "Agreement" and "Contract" are synonymous in this document and its incorporated exhibits.

**1.2 Controlling Document.** In the event of a conflict between this Agreement and any attachment or exhibit, the provisions of this Agreement shall control. Any inconsistency between the services as stated by the City in **Group Exhibit A** and the services as proposed by the Contractor in **Group Exhibit B** shall be controlled by the services as stated by the City in **Group Exhibit A**, unless specifically waived in writing.

## **SECTION 2. PROJECT.**

**2.1 Project Name.** The name of this project is the **HVAC Preventative Maintenance and Service ("Project")**.

**2.2 Retention and Work to Be Done by Contractor.** The City retains the Contractor to perform HVAC Preventative Maintenance and Service at City facilities for the completion of this Project. For and in consideration of the payments indicated in the Contractor's cost proposal hereto attached in **Group Exhibit B**, the Contractor promises and agrees that it shall, at its own cost and expense, perform all the services and furnish to the City all the labor, materials, tools, equipment, services and incidental and customary work necessary to fully and adequately perform HVAC Preventative Maintenance and Service at City facilities or other general services ("**Services**"), necessary for the Project, in accordance with and in compliance with and as required by the Contract Documents, including any and all Addenda or Change Orders for such Services, and to do all other things required of the Contractor by the Contract Documents for such Services.

**2.3 Independent Contractor Status.** The Contractor shall act as an independent contractor in providing and performing the Services. Nothing in, nor done pursuant to, this Agreement shall be construed (i) to create the relationship of principal and agent, employer and employee, partners, or joint-venturers between the City and Contractor; or (ii) to create any

relationship between the City and any subcontractor of the Contractor. Contractor is not in any way authorized to make any contract, agreement, or promise on behalf of the City, or to create any implied obligation on behalf of the City, and Contractor specifically agrees that it shall not do so. The City shall not have the authority to control the method or manner by which Contractor complies with the terms of this Agreement.

**2.4 Project Manager.** The City's Project Manager for the Project is Al Schefske. The Project Manager's contact information is as follows: (630) 260-2867 or via email at aschefske@wheaton.il.us.

**2.5 Time of Performance.** The Contractor shall perform the Services within the Term of this Agreement as set forth in **Section 8.1** of this Agreement, in accordance with the schedule of services as indicated in the attached proposal (**Group Exhibit B**) and **Group Exhibit A**, and in accordance with any other completion schedule or milestones which may be separately agreed upon in writing by the Parties. Contractor represents that it has the professional and technical personnel required to perform the Services in conformance with such conditions. Upon request of City, Contractor shall provide a more detailed schedule of anticipated performance to meet the schedule of Services.

**2.6 Additional Services.** The Contractor shall provide only the Services specified in the Contract Documents. The Contractor acknowledges and agrees that the City shall not be liable for any costs incurred by the Contractor in connection with any services provided by the Contractor that are outside the scope of this Agreement ("**Additional Services**"), regardless of whether such Additional Services is requested or directed by the City, except upon the prior written consent of the City through an approved Change Order. Upon recognizing the need to perform Additional Services, the Contractor shall notify the City with reasonable promptness and explain the facts and circumstances giving rise to the need and submit to the City a Change Order Form for amendment to this Agreement for the City's review and approval setting forth the details of the requested Additional Services. Additional Services that have been authorized in writing by the City shall be subject to the terms and conditions of this Agreement and shall be compensated at the hourly rates included in the Contractor's cost proposal included in **Group Exhibit B** and in the absence of such hourly rates, then payment for Additional Services shall be mutually agreed upon by the parties before the commencement of any Additional Services.

**2.7 Bonds.** When specifically requested by City in Exhibit A, Contractor shall furnish with the executed Agreement, performance and payment bonds equal to one-hundred and ten percent (100%) of the full contract price, on forms approved by the City, as security for the faithful performance and completion of all the Contractor's obligations under the Contract Documents, including, but not limited to Contractor's Prevailing Wage Act obligations under this Agreement, and covering the payment of all materials used in the performance of this Agreement and for all labor and services performed under this Agreement. Such bond(s) shall be conditioned to save and keep harmless the City from any and all claims, demands, losses, suits, costs, expenses and damages which may be brought, sustained or recovered against the City by reason



of any negligence, default or failure of the Contractor in performing or completing the Services, and that the Services shall be free from all defects and remain in good order and condition for one year from its completion and acceptance by the City; ordinary wear and tear, and damage resulting from accident or willful destruction excepted. Each surety providing a bond must be licensed in Illinois and have an A.M. Best Company, Inc. financial strength rating of at least A-. All bonds signed by an agent must be accompanied by a certified copy of his or her authority to act. Should, in the City's sole opinion, any bond become insufficient, or any surety be found to be unsatisfactory, Contractor shall renew or replace the affected bond within ten (10) days of receiving notice from the City. In the event the surety or Contractor intends to reduce or cancel any required bond, at least thirty (30) days prior written notice shall be given to the City, and Contractor shall post acceptable replacement bonds at least ten (10) days prior to the expiration of the original bonds. No further payments shall be deemed due or will be made under this Agreement until any replacement bonds required by this section are accepted by the City. To the extent, if any, that the Agreement Amount is increased in accordance with the Agreement, the Contractor shall, upon request of the City, cause the amount of the bonds to be increased accordingly and shall promptly deliver satisfactory evidence of such increase to the City. To the extent available, the bonds shall further provide that no change or alteration of the Agreement (including, without limitation, an increase in the Agreement Amount, as referred to above), extensions of time, or modifications of the time, terms, or conditions of payment to the Contractor, will release the surety. A copy of all bond certificates shall be attached to this Agreement and made a part hereof. Failure to provide the required bond(s) shall constitute a breach of Contractor's obligations under this Agreement.

### **SECTION 3. PERSONNEL; SUBCONTRACTORS.**

**3.1 Key Project Personnel.** The Key Project Personnel identified in the attached **Group Exhibit B** shall be primarily responsible for carrying out the Services on behalf of the Contractor. The Key Project Personnel shall not be changed without the City's prior written approval.

**3.2 Availability of Personnel.** The Contractor shall provide all personnel necessary to complete the Services including, without limitation, any Key Project Personnel identified in this Agreement. The Contractor shall notify the City as soon as practicable prior to terminating the employment of, reassigning, or receiving notice of the resignation of, any Key Project Personnel. The Contractor shall have no claim for damages and shall not bill the City for additional time and materials charges as the result of any portion of the Services which must be duplicated or redone due to such termination or for any delay or extension of the Time of Performance as a result of any such termination, reassignment, or resignation.

**3.3 Use of Subcontractors.** The Contractor shall perform the Services with its own personnel and under the management, supervision, and control of its own organization unless otherwise approved in advance by the City in writing. All subcontractors and subcontracts used by the Contractor shall be acceptable to, and approved in advance by, the City. The City's approval of any subcontractor or subcontract shall not relieve the Contractor of full responsibility

and liability for the provision, performance, and completion of Services as required by this Agreement. All Services performed under any subcontract shall be subject to all of the provisions of this Agreement in the same manner as if performed by employees of the Contractor. For purposes of this Agreement, the term "Contractor" shall be deemed also to refer to all subcontractors of the Contractor, and every subcontract shall include a provision binding the subcontractor to all provisions of this Agreement.

**3.4 Removal of Personnel and Subcontractors.** If any personnel or subcontractor fails to perform the Services in a manner satisfactory to the City and consistent with commonly accepted practices by other recognized Contractors in the Wheaton area under similar circumstances at the time the Services are performed, the Contractor shall immediately upon notice from the City remove and replace such personnel or subcontractor. The Contractor shall have no claim for damages, for compensation in excess of the amount contained in this Agreement, or for a delay or extension of the Time of Performance as a result of any such removal or replacement.

**3.5 No Additional Obligation.** The Parties acknowledge and agree that the City is under no obligation under this Agreement or otherwise to negotiate or enter into any other or additional contracts or agreements with the Contractor or with any vendor solicited or recommended by the Contractor.

**3.6 Corporate Authorities of the City.** Notwithstanding any provision of this Agreement, any negotiations, or agreements with, or representations by the Contractor to, vendors shall be subject to the approval of the City Manager or Corporate Authorities of the City. For the purposes of this Section, "vendors" shall mean entities engaged in subcontracts for the provision of additional services directly to the City. The City shall not be liable to any vendor or third party for any agreements made by the Contractor without the knowledge and approval of the City Manager or of the City's Corporate Authorities.

#### **SECTION 4. COMPENSATION AND METHOD OF PAYMENT.**

**4.1 Agreement Amount.** The total amount billed by the Contractor for the Services performed for the Project under this Services Agreement shall not exceed **\$69,260 (\$34,630 annually)** including reimbursable expenses, without the prior express written authorization of the City.

**4.2 Invoices and Payments.** The Contractor shall be paid in accordance with the amount set forth in the Proposal (**Group Exhibit B**). Contractor shall submit to the City a monthly itemized statement ("Invoice") which indicates Services completed and hours of Services rendered by Contractor. The Invoice shall describe the amount of Services and supplies provided since the initial commencement date, or since the start of subsequent billing periods, as appropriate, through the date of the Invoice. Authorization of payment requires the receipt by the City of such invoices from the Contractor containing sufficient detail of the Services

performed to enable the City to properly evaluate the payout request; acceptance by the City of the Services, including materials and/or equipment; and receipt of other paperwork required by this Agreement, such as properly filled out and executed Certified Payrolls, Lien Waivers, supplier's invoices to justify material mark-up, and receipts for subcontracted services. The City shall pay the Contractor in compliance with the Local Government Prompt Payment Act. The City shall use its best efforts to make payments within thirty (30) days after review and approval of the invoice. Each payment requires the City Council's approval of the expenditure which occurs at publicly scheduled meetings. Invoices shall be submitted within six (6) months of the date Services were performed. Any Invoices submitted more than six (6) months from the date Services were performed will not be paid. Under no circumstances will a third party be reimbursed for Services provided under this Agreement.

**4.3. Unappropriated Funds.** The obligation of the City for payment to the Contractor is limited to the availability of funds appropriated in a current fiscal period, and continuation of this Agreement into a subsequent fiscal period is subject to the appropriation of funds, unless otherwise authorized by law.

**4.4. Taxes, Benefits, and Royalties.** The Agreement Amount includes all applicable federal, state and City taxes of every kind and nature applicable to the Services as well as all taxes, contributions, and premiums for unemployment insurance, old age or retirement benefits, pensions, annuities, or similar benefits and all costs, royalties, and fees arising from the use of, or the incorporation into, the Services, of patented or copyrighted equipment, materials, supplies, tools, appliances, devices, processes, or inventions. All claims or right to claim additional compensation by reason of the payment of any such tax, contribution, premium, costs, royalties, or fees is hereby waived and released by Contractor.

**4.5. Interest Waiver.** Contractor hereby waives any and all claims or rights to interest or money claimed to be due pursuant to this Agreement, and all such rights to interest to which it may otherwise be entitled pursuant to law, including, but not limited to, the Local Government Prompt Payment Act (50 ILCS 505/1 *et seq.*) as amended, or the Illinois Interest Act (815 ILCS 205/1, *et seq.*) as amended.

**4.6. Account Records.** The Contractor shall maintain records showing actual time devoted and costs and expenses incurred in connection with the Services performed under this Agreement and shall permit the authorized representative of the City to inspect, audit and make copies of all data and records of the Contractor for the Services done under this Agreement. All such records shall be clearly identifiable. The records shall be made available to the City during normal business hours during the Agreement period, and for three years after the termination of the Agreement.



## **SECTION 5. REPRESENTATIONS OF CONTRACTOR.**

**5.1 Standard of Care.** The Contractor represents, certifies, and warrants that it shall perform and complete the Services in a manner consistent with the level of care, skill, and diligence exercised by other recognized Contractors in the Wheaton area, under similar circumstances at the time the Services are performed. Contractor agrees that all employees shall have sufficient skill and experience to perform the Services assigned to them. The representations, certifications, and warranties expressed herein shall be in addition to any other representations, certifications, and warranties expressed in this Agreement, or expressed or implied by law, which are hereby reserved unto the City. Contractor shall perform, at its own cost and expense and without reimbursement from the City, any services or work necessary to correct errors or omissions which are caused by the Contractor's failure to comply with the standard of care provided for herein. Any employee of the Contractor who is determined by the City to be uncooperative, incompetent, a threat to the adequate or timely completion of the Project, a threat to the safety of persons or property, or any employee who fails or refused to perform the Services in a manner acceptable to the City, shall be promptly removed from the Project by the Contractor and shall not be re-employed to perform any of the Services on the Project.

**5.2 Solvency.** The Contractor represents that it is financially solvent and has the necessary financial resources to perform the Services with the standard of care required under this Agreement.

## **SECTION 6. INDEMNIFICATION; INSURANCE; LIABILITY.**

**6.1 Indemnification.** The Contractor shall be responsible for any and all damages to property or persons arising out of an error, omission, and/or negligent act by Contractor, or its employees, agents or subcontractors, in the provision of Services or failure to provide the Services and shall indemnify, hold harmless, and defend the City, its elected or appointed officials, directors, officers, employees, attorneys, and agents (hereinafter collectively, the "**City Indemnitees**") from all lawsuits, actions, claims, demands, losses, damages, injuries, liabilities, fines, judgments, settlement, penalties, costs, and expenses of any nature whatsoever (hereinafter the "**Claims**") resulting therefrom. The Contractor shall assume all restitution and repair costs arising out of such errors, omissions and/or negligence.

The Contractor, without regard to the availability or unavailability of any insurance, either of the City or of the Contractor, shall indemnify, save harmless, and defend the City and City Indemnitees, in whole or in part from and against any and all Claims, including, but not limited to reasonable expert witness and attorneys' fees, as well as costs of litigation incident thereto, and any Claims made by employees of the Contractor or any of its subcontractors, as well as all other persons, that arise, or may be alleged to have arisen, out of or in connection with: (i) Contractor's failure to meet the representations and certifications set forth in **Section 5** and **Section 9** of this Agreement; (ii) Contractor's infringement of any patent or copyright in the sale or use of materials, processes, products, goods, or devices provided to the City or City

Indemnities by Contractor or Contractor's employees, agents or subcontractors and (iii) the Work covered by this Agreement or the equipment used in connection therewith. It is understood that this agreement shall apply to any and all Claims whether arising from the negligence or the intentional acts of the Contractor, the Contractor's employees or subcontractors, the City or City Indemnities or otherwise, with the single exception of any claim, damage, loss, or expense arising solely out of the negligence or intentional misconduct of the City or City Indemnities. The Contractor is solely responsible for determining the accuracy and validity of any information provided to the Contractor by the City or its representatives. This indemnification shall apply to the fullest extent of the law, and in the event that any provision hereof is determined to be unenforceable, the indemnification obligations shall be severable and the fullest extent of indemnification that may lawfully apply shall remain in full force and effect.

In the event any such Claim is asserted, any such money due the Contractor under and by virtue of the Agreement as shall be deemed necessary by the City for the payment thereof, may be retained by the City for said purpose, or in case no money or insufficient money is due to satisfy such Claim, the Contractor's Surety (if a bond is required by this Agreement) shall remain liable for any payment therefore until any such Claim has been settled or has been fully judicially determined and satisfied.

Contractor (and any subcontractor into whose subcontract this clause is incorporated) shall assume the entire liability for all personal injury claims suffered by its own employees and waives any limitation of liability defense based upon the Worker's Compensation Act and cases decided there under. Contractor agrees to indemnify and defend the City and City Indemnities from and against all such loss, expense, damage, or injury, including reasonable attorneys' fees, which the City or City Indemnities may sustain as a result of personal injury claims by Contractor's employees, except to the extent those claims arise as a result of the City's own negligence.

The obligation on the part of the Contractor to defend, hold harmless, and indemnify the City shall survive the expiration or termination of this Agreement. Nothing in this Agreement shall be construed as prohibiting the City or City Indemnities from defending, through the selection and use of their own agents, attorneys and experts, any Claims brought against them arising out of the performance of this Agreement.

In the event that any claim for indemnification hereunder arises from the negligence or willful misconduct of both the Contractor and the City, the parties agree that any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses shall be apportioned between the parties on the basis of their comparative degrees of fault, except as otherwise herein provided.

**6.2 Insurance.** Contemporaneous with the Contractor's execution of this Agreement, the Contractor shall provide certificates and policies of insurance, all with coverages and limits acceptable to the City, and evidencing at least the minimum insurance coverages and limits as set forth by the City in the **Special Provisions for: Insurance Coverage for Contractual Services**

included in **Exhibit C** to this Agreement. The City shall be included under the Contractor's insurance as an additional primary insured with respect to claims and/or liability arising out of Services performed for the City by the Contractor. All subcontractors shall comply with each and every insurance provision in **Exhibit C**. Contractor shall therefore not allow any subcontractor to commence work/services on any subcontract to perform any part of the Services until it has provided evidence satisfactory to the City that the subcontractor has secured all insurance required under this Agreement. The insurance described herein as set forth in **Exhibit C** shall be maintained for the duration of the Agreement, including any warranty period.

**6.3     No Personal Liability.** No elected or appointed official, director, officer, agent, or employee of the City shall be personally liable, in law or in contract, to the Contractor as the result of the execution, approval or attempted execution of this Agreement.

**6.4     Governmental Immunity.** Nothing in this Agreement shall be construed as a waiver of any and all privileges, immunities, or defenses provided to or enjoyed by the City under common law or pursuant to statute, including but not limited to the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-101 *et. seq.*

**6.5     Third Party Beneficiaries.** There are no third-party beneficiaries of this Agreement.

**6.6     Limitation of Liability.** CITY SHALL NOT BE LIABLE TO CONTRACTOR FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, PUNITIVE, OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION, LOST PROFITS (DIRECT OR INDIRECT) AND LOST REVENUES HOWSOEVER ARISING, WHETHER OR NOT CHARACTERIZED IN NEGLIGENCE, TORT, CONTRACT OR OTHER THEORY OF LIABILITY, EVEN IF CITY HAS BEEN ADVISED OF THE POSSIBILITY OF OR COULD HAVE FORESEEN ANY SUCH DAMAGES.

## **SECTION 7. CONFIDENTIAL INFORMATION.**

**7.1     Confidential Information.** The term "**Confidential Information**" shall mean information in the possession or under the control of the City relating to the technical, business, or corporate affairs of the City; City property; user information, including, without limitation, any information pertaining to usage of the City's computer system, including and without limitation, any information obtained from server logs or other records of electronic or machine readable form; and the existence of, and terms and conditions of, this Agreement. City Confidential Information shall not include information that can be demonstrated: (i) to have been rightfully in the possession of the Contractor from a source other than the City prior to the time of disclosure of said information to the Contractor under this Agreement ("**Time of Disclosure**"); (ii) to have been in the public domain prior to the Time of Disclosure; (iii) to have become part of the public domain after the Time of Disclosure by a publication or by any other means except an unauthorized act or omission or breach of this Agreement on the part of the Contractor or the City; or (iv) to have been supplied to the Contractor after the Time of Disclosure without

restriction by a third party who is under no obligation to the City to maintain such information in confidence.

**7.2 No Disclosure of Confidential Information by the Contractor.** The Contractor acknowledges that it in the event that it shall, in performing the Services for the City under this Agreement, have access to or be directly or indirectly exposed to Confidential Information, that Contractor shall hold confidential all Confidential Information and shall not disclose or use such Confidential Information without express prior written consent of the City. The Contractor shall use reasonable measures at least as strict as those the Contractor uses to protect its own confidential information. Such measures shall include, without limitation, requiring employees and subcontractors of the Contractor to execute a non-disclosure agreement before obtaining access to Confidential Information.

**7.3 Breach of Confidentiality.** In the event of breach of the confidentiality provisions of **Section 7** of this Agreement, it shall be conclusively presumed that irreparable injury would result to the City and there would be no adequate remedy at law. The City shall be entitled to obtain temporary and permanent injunctions, without bond and without proving damages, to enforce this Agreement. The City shall be entitled to damages for any breach of the injunction, including but not limited to, compensatory, incidental, consequential, exemplary, and punitive damages. The confidentiality provisions of this Agreement survive the termination or performance of this Agreement.

## **SECTION 8. TERM, TERMINATION and DEFAULT.**

**8.1 Term.** This Agreement shall become effective upon the latter of the date accepted and signed by the City and the date accepted and signed by the Contractor, and shall continue in full force and effect until the earlier of the following occurs: (i) the termination of this Agreement; or (ii) final completion of all items of Services specified in the Agreement by **July 16, 2025** or to a new date mutually agreed upon by the parties in writing, or (iii) the completion by Contractor and City of their respective obligations under this Agreement, in the event such completion occurs before the date(s) in item (ii) above. A determination of completion shall not constitute a waiver of any rights or claims which the City may have or thereafter acquire with respect to any term or provision of this Agreement.

The City, at its option, may extend this Agreement (the "Option") for up to three (3) additional one-year terms if the vendor performs satisfactorily and provided there are no changes in the terms, conditions, specifications, and pricing structure unless mutually agreed to by the parties. If the City exercises this Option, the extended Agreement shall be considered to include this Option provision.

**8.2 Termination.** Notwithstanding any other provision hereof, the City may terminate this Agreement, with or without cause, at any time upon fifteen (15) days prior written notice to the Contractor. In the event that this Agreement is so terminated, the City shall pay

Contractor for the Services performed and reimbursable expenses actually incurred as of the effective date of termination, less any sums attributable, directly, or indirectly, to Contractor's breach of this Agreement. The written notice required under this subsection shall be either (i) served personally during regular business hours; (ii) served by facsimile during regular business hours (iii) served by certified or registered mail, return receipt requested, addressed to the address listed at the end of this Agreement with postage prepaid and deposited in the United States mail or (iv) by e-mail sent to the Contractor's Key Project Personnel. Notice served personally, by facsimile transmission or e-mail shall be effective upon receipt, and notice served by mail shall be effective upon receipt as verified by the United States Postal Service. Contractor shall provide the City with its Key Project Personnel's e-mail address upon its execution of this Agreement. On receiving such notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all Services under this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice to the City showing in detail the Services performed under this Agreement up to the termination date. Contractor's receipt of payment for Services rendered upon City's termination of this Agreement, is Contractor's sole and exclusive remedy for termination for convenience by the City. City's termination for convenience does not constitute a default or breach of this Agreement.

If this Agreement is terminated as provided herein, City may require Contractor to provide all finished or unfinished documents and data and other information of any kind prepared by Contractor in connection with the performance of the Services under this Agreement. Contractor shall be required to provide such documents, data, and other information within fifteen (15) days of the request.

**8.3 Default.** If it should appear at any time that the Contractor has failed or refused to perform, or has delayed in the performance of, the Services with diligence at a rate that assures completion of the Services in full compliance with the requirements of this Agreement, or has otherwise failed, refused, or delayed to perform or satisfy the Services requirements or any other requirement of this Agreement ("**Event of Default**"), then the City shall have the right, without prejudice to any other remedies provided by law or equity, to pursue any one or more of the following remedies:

1. **Cure by Contractor.** The City may require the Contractor, within a reasonable time, to complete or correct all or any part of the Services that are the subject of the Event of Default; and to take any or all action necessary to bring the Contractor and the Services into compliance with this Agreement.
2. **Termination of Agreement by City.** The City may terminate this Agreement as to any or all Services yet to be performed, effective at a time specified by the City, and shall pay Contractor for the Services performed or reimbursable expenses actually incurred as of the effective date of termination.

3. **Withholding of Payment by City.** The City may withhold from any payment, whether or not previously approved, or may recover from the Contractor, any and all costs, including attorneys' fees and administrative expenses, incurred by the City as the result of any Event of Default by the Contractor or as a result of actions taken by the City in response to any Event of Default by the Contractor.

## **SECTION 9. COMPLIANCE WITH LAWS AND GRANTS.**

9.1 **Freedom of Information Act.** The Contractor shall, within four (4) business days of the City's request, provide any documents in the Contractor's possession related to this Agreement which the City is required to disclose to a requester under the Illinois Freedom of Information Act ("FOIA"). This provision is a material covenant of this Agreement. Contractor agrees to not apply any costs or charge any fees to the City regarding the procurement of records required pursuant to an FOIA request. Should Contractor request that the City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Contractor agrees to pay all costs connected therewith (such as reasonable attorneys' fees and witness fees, filing fees, and any other expenses) to defend the denial of the request. The defense shall include, but not be limited to, challenged or appealed denials of FOIA requests to either the Illinois Attorney General or a court of competent jurisdiction. Contractor agrees to defend, indemnify, and hold harmless the City, and agrees to pay all costs in connection therewith (such as reasonable attorneys' and witness fees, filing fees, and any other expenses) to defend any denial of a FOIA request by Contractor's request to utilize a lawful exemption to the City.

9.2 **Generally: Permits/Codes/Business Laws/Safety Standards/Grants.** Contractor shall give all notices, pay all fees, and take all other action that may be necessary to ensure that the Services are provided, performed, and completed in accordance with all required governmental permits, licenses, or other approvals and authorizations that may be required in connection with providing, performing, and completing the Services, and will comply with all applicable municipal, county, state and federal statutes, ordinances, rules, and regulations, including without limitation all applicable building and fire codes, now in force or which may hereafter be in force, any statutes regarding qualification to do business, and all local, state and federal safety standards. Contractor shall comply with all conditions of any federal, state, or local grant received by Owner or Contractor with respect to this Agreement or the Services. Contractor shall be solely liable for any fines or civil penalties that are imposed by any governmental or quasi-governmental agency or body that may arise, or be alleged to have arisen, out of or in connection with Contractor's, or its subcontractors', performance of, or failure to perform, the Services or any part thereof. Every provision of law required by law to be inserted into this Agreement shall be deemed to be inserted herein.

9.3 **No Delinquent Taxes.** The Contractor represents and certifies that the Contractor is not barred from contracting with a unit of state or local government as a result of a delinquency in the payment of any tax administered by the Illinois Department of Revenue unless



the Contractor is contesting, in accordance with the procedures established by the appropriate revenue act, its liability for the tax, or has entered into an agreement with Department of Revenue for payment of all taxes due and is currently in compliance with that agreement, as set forth in 11-42.1-1 et seq. of the Illinois Municipal Code, 65 ILCS 5/11-42.1-1 et seq.

**9.4 No Collusion.** The Contractor represents and certifies that the Contractor is not barred from contracting with a unit of state or local government as a result of a violation of either Section 33E-3 or Section 33E-4 of Article 33E of the Criminal Code of 2012, 720 ILCS 5/33E-1 et seq. The Contractor represents that the only persons, firms, or corporations interested in this Agreement as principals are those disclosed to the City prior to the execution of this Agreement, and that this Agreement is made without collusion with any other person, firm, or corporation. If at any time it shall be found that the Contractor has, in procuring this Agreement, colluded with any other person, firm, or corporation, then the Contractor shall be liable to the City for all loss or damage that the City may suffer, and this Agreement shall, at the City's option, be null and void.

**9.5 Sexual Harassment Policy.** The Contractor shall certify that it has a written sexual harassment policy in full compliance with Section 2-105(A)(4) of the Illinois Human Rights Act, 755 ILCS 5/2-105(A)(4).

**9.6 Patriot Act (USA Freedom Act) Compliance.** The Contractor represents and warrants to the City that neither it nor any of its principals, shareholders, members, partners, or affiliates, as applicable, is a person or entity named as a Specially Designated National and Blocked Person (as defined in Presidential Executive Order 13224) and that it is not acting, directly or indirectly for or on behalf of a Specially Designated National and Blocked Person. The Contractor further represents and warrants to the City that the Contractor and its principals, shareholders, members, partners, or affiliates, as applicable, are not directly or indirectly, engaged in, and are not facilitating, the transactions contemplated by this Agreement on behalf of any person or entity named as a Specially Designated National and Blocked Person. The Contractor hereby agrees to defend, indemnify, and hold harmless the City, its corporate authorities, and all City elected or appointed officials, officers, employees, agents, representatives, engineers, and attorneys, from and against any and all claims, damages, losses, risks, liabilities, and expenses (including reasonable attorneys' fees and costs) arising from or related to any breach of the representations and warranties in this subsection.

**9.7 Anti-Discrimination Laws.** Contractor is an equal opportunity employer and the requirements of 775 ILCS 5/2-105 and 44 Ill. ADM Code APPENDIX A are incorporated herein as though fully set forth. The Contractor shall comply with all federal and state laws prohibiting discrimination because of or requiring affirmative action based on race, color, religion, sex, sexual orientation, gender identity, marital status, order of protection status, national origin or ancestry, genetic information, citizenship status, age. Physical or mental disability unrelated to ability, military status, or an unfavorable discharge from military service, and shall execute the Equal

Employment Opportunity Clause compliance certification attached to this Agreement in **Group Exhibit D**.

In the event of the Contractor's noncompliance with any provision of the Illinois Human Rights Act or any other applicable law, the Contractor may be declared non-responsible and therefore ineligible for future Agreements or subcontracts with the City, and the Agreement may be cancelled or voided in whole or in part, and such other sanctions or penalties may be imposed, or remedies invoked as provided by statute or regulation. In all solicitations or advertisements for employees placed by it on its behalf, the Contractor shall state that all applicants be afforded equal opportunity without discrimination because of race, color, religion, sex, sexual orientation, gender identity, marital status, order of protection status, national origin or ancestry, genetic information, citizenship status, age physical or mental disability unrelated to ability, military status, or an unfavorable discharge from military services.

**9.8 Americans with Disabilities Act.** Contractor shall utilize standards and/or methods that do not discriminate against the disabled in compliance with the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq.

**9.9 Drug Free Workplace Act.** Contractor shall comply with all conditions of the Illinois Drug Free Workplace Act, 30 ILCS 580/3 et seq.

**9.10 CDL Driver Controlled Substances and Alcohol Use and Testing.** To the extent that the Contractor and any employees, agents, or subcontractors thereof, will operate any commercial vehicles requiring the necessity for a state issued Commercial Driver's License, Contractor shall comply with Federal Highway Authority Rules on Controlled Substances and Alcohol Use and Testing, 49 CFR Parts 40 and 382 and shall notify the City of any employee, agent subcontractor driver participating in a drug and alcohol testing program pursuant to the aforementioned rules during the term of this Agreement.

**9.11 Employment of Illinois Workers on Public Works Projects Act.**

☒ Employment of Illinois Workers on Public Works Projects Act **DOES NOT APPLY**  
☐ Employment of Illinois Workers on Public Works Projects Act **APPLIES.** The Employment of Illinois Workers on Public Works Projects Act, 30 ILCS 570/1 et seq., requires the workforce on all public works projects to be comprised of a minimum of 90% Illinois residents during excessive periods of unemployment. Excessive unemployment is defined as any month immediately following two (2) consecutive calendar months that the Illinois unemployment rate exceeds 5%. Due to the high unemployment rate caused by the ongoing COVID-19 pandemic, the Employment of Illinois Workers on Public Works Act is in effect.

**9.12 Public Works Employment Discrimination Act.** Contractor shall comply with all conditions and requirements of the Illinois Public Works Employment Discrimination Act, 775 ILCS 10/0.01 et seq.

**9.13 Steel Products Procurement Act.** When applicable, any steel product used or supplied in the performance of the contract or any subcontract thereto, shall be manufactured or produced in the United States, as required by the Illinois Steel Products Procurement Act, 30 ILCS 565/1 et seq.

**9.14 Substance Abuse Prevention.** Pursuant to the Substance Abuse Prevention on Public Works Projects ("SAPPWP") 820 ILCS 265/1 et seq., employees of the Contractor and employees of any Subcontractor are prohibited from the use of drugs or alcohol, as defined in the SAPPWP, while performing work on any public works project. The Contractor certifies that it has a written Substance Abuse Prevention Program for the prevention of substance abuse among its employees which meets or exceeds the requirements of the SAPPWP or shall have a collective bargaining agreement in effect dealing with the subject matter.

**9.15 Prevailing Wage Act.**

☐ Prevailing Wage Act **DOES NOT APPLY**

☒ Prevailing Wage Act **APPLIES.** The Illinois Prevailing Wage Act, 820 ILCS 130/4 requires contractors and subcontractors to pay laborers, workers, and mechanics performing work under this contract no less than the "general prevailing rate of wages" (hourly cash plus annualized fringe benefits) and "general prevailing rate for legal holiday and overtime work" for Du Page County, Illinois as ascertained by the Illinois Department of Labor or a court on review. The selected Bidder and all its subcontractors shall be responsible for checking the Illinois Department of Labor web page at:  
<https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/prevailing-wage-rates.aspx>  
to ensure that they are paying the current prevailing rate of wages.

All contractors and subcontractors rendering services under this contract shall comply with all requirements of the Illinois Prevailing Wage Act, *including, but not limited to*, all wage, notice and record keeping duties, as more fully set forth in the "Special Provisions for: Wages of Employees on Public Works" contained in Group Exhibit A to this Agreement. Contractor shall insert into each subcontract and into the project specifications for each subcontract a provision stating to the effect that no less than the prevailing rate of wages shall be paid to all laborers, workers, and mechanics performing work under the contract.

All bonds provided by Contractor and any subcontractor under the terms of this Agreement shall include such provisions as will guarantee the faithful performance of the Contractor and subcontractor's obligations under this clause and under the Prevailing Wage Act, 820 ILCS 130/1 et seq. The Contractor shall indemnify the City for any and all violations of the prevailing wage laws and any rules and regulations now and hereafter issued pursuant to said laws.

**9.16 Veterans Preference Act.** When applicable, Contractor shall comply with all employment preference requirements of the Illinois Veterans Preference Act, 330 ILCS 55/0.01 et seq.

**9.17 Illinois Property Tax Code (35 ILCS 200/18-50.2).** The City of Wheaton is required under Section 200/18-50.2 of the Illinois Property Tax Code (35 ILCS 200/18-50.2) to collect and electronically publish information from vendors/contractors, and sub-vendors/subcontractors pertaining to their status as a minority-owned, women-owned, or veteran-owned business. Vendors/Contractors seeking contract award are required to complete the City's Vendor/Contractor/Subcontractor Information Reporting Form and return with their submittal to the City. This information will be electronically published on the City's website in compliance with the Property Tax Code's vendor information collection and reporting requirements. Current City Vendors/sub-vendors/contractors/subcontractors should return this form to the City within thirty (30) days of receipt of this form from the City. Additionally, vendors/contractors are required to provide this form to all sub-vendors/subcontractors providing goods, work, or services to the City and shall return completed forms to the City's Procurement Officer prior to the subcontractor's performance of work or services.

**9.18 Execution of Certifications.** Contractor shall execute the legal certifications and compliance with laws documentation which is attached hereto and incorporated herein as if fully set forth as **Group Exhibit D**.

## **SECTION 10. GENERAL PROVISIONS.**

**10.1 Integration.** The provisions set forth in this Agreement represent the entire agreement between the parties and supersede all prior agreements, promises, and representations, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement.

**10.2 Amendment.** No amendment or modification to this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed.

**10.3 Subcontractors; Assignment or Transfer.** Contractor shall not subcontract any portion of the Services required under this Agreement, except as expressly authorized herein, without the prior written approval of the City. Subcontracts, if any, shall include a provision making them subject to all provisions of this Agreement. Contractor shall also not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement, or any interest herein without the prior written consent of the City. Any attempt to subcontract or take any other action not authorized herein shall be null and void, and any subcontractors, assignees, hypothecates or transferees shall acquire no right or interest by reason of such action.

**10.4 Binding Effect.** The terms of this Agreement shall bind and inure to the benefit of the parties hereto and their agents, successors, and assigns.

**10.5 News Releases.** The Contractor shall not issue any news releases or other public statements regarding the Services without prior approval from the City Manager.

**10.6 Work Products.** Designs, drawings, plans, specifications, photos, reports, information, observations, calculations, notes, studies, logbooks, instructions, manuals, models, recommendations, printed and electronic files, and any other data or information, in any form, prepared, collected, or received by the Contractor in connection with any or all of the Services to be performed under this Agreement ("**Documents**") shall be and remain the exclusive property of the City. At the City's request, or upon termination of this Agreement, the Contractor shall cause the Documents to be promptly delivered to the City.

**10.7 Waiver.** Any failure of either the City or the Contractor to strictly enforce any term, right or condition of this Agreement, whether implied or express, shall not be construed as a waiver of such term, right or condition, nor shall it be deemed to or constitute a continuing waiver unless otherwise expressly provided in this Agreement.

**10.8 Severability.** If any term, covenant, condition, or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

**10.9 Time.** Time is of the essence as to those provisions in which time is an element of performance.

**10.10 Governing Laws/Jurisdiction.** This Agreement shall be interpreted according to the laws of the State of Illinois. Exclusive jurisdiction for any litigation involving any aspect of this Agreement shall be in the Eighteenth Judicial Circuit Court, DuPage County, Illinois.

**10.11 Force Majeure.** No party hereto shall be deemed to be in default or to have breached any provision of this Agreement as the result of any delay, failure in performance or interruption of services resulting directly or indirectly from acts of God, acts of civil or military disturbance, or war, which are beyond the control of such non-performing party.

**10.12 Headings.** The headings of the several paragraphs of this Agreement are inserted only as a matter of convenience and for reference and are in no manner intended to define, limit, or describe the scope of intent of any provision of this Agreement, nor shall they be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

**10.13 Rights Cumulative.** Unless expressly provided to the contrary in this Agreement, each and every one of the rights, remedies, and benefits provided by this Agreement shall be cumulative and shall not be exclusive of any other such rights, remedies and benefits allowed by law.

**10.14 Counterpart Execution.** This Agreement may be executed in several counterparts, each of which, when executed, shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

**10.15 Notice.** Unless otherwise expressly provided in this Agreement, any notice or communication required or permitted to be given under this Agreement shall be in writing and shall be delivered (i) personally, (ii) by a reputable overnight courier, (iii) by certified mail, return receipt requested, and deposited in the U.S. Mail, postage prepaid, (iv) by facsimile, or (v) by electronic internet mail ("e-mail"). Facsimile notices shall be deemed valid only to the extent that they are (a) actually received by the individual to whom addressed and (b) followed by delivery of actual notice in the manner described in either (i), (ii), or (iii) above within three (3) business days thereafter at the appropriate address set forth below. E-mail notices shall be deemed valid and received by the addressee thereof when delivered by e-mail and (a) opened by the recipient on a business day at the address set forth below, and (b) followed by delivery of actual notice in the manner described in either (i), (ii), or (iii) above within three (3) business days thereafter at the appropriate address set forth below. Unless otherwise expressly provided in this Agreement, notices shall be deemed received upon the earlier of (a) actual receipt; or (b) one business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (c) three business days following deposit in the U.S. mail, as evidenced by a return receipt. By notice complying with the requirements of this Subsection, each party shall have the right to change the address or the addressee, or both, for all future notices and communications to such party, but no notice of a change of addressee or address shall be effective until actually received.

Notices and communications shall be addressed to, and delivered to as follows:

**If to the Contractor:**

Total Mechanical Solutions

Attn: John Kadlcek

6100 Elm Street

Lisle, IL 60532

E-Mail: [john@totalmechanicalsolutions.com](mailto:john@totalmechanicalsolutions.com)

**If to the City:**

City of Wheaton

Attn: City Clerk

303 W. Wesley Street, Box 727

Wheaton, IL 60187-727

E-Mail: [cityclerk@wheaton.il.us](mailto:cityclerk@wheaton.il.us)

**10.16 Contract Numbering.** The faces of all invoices and documents shall contain the following contract number 394 for reference purposes.

**10.17 Electronic Signatures.** The parties may execute this Agreement in writing or by facsimile transmission or by e-mail delivery of a ".pdf" format data file, and any such signature shall have the same legal effect as a handwritten signature for the purposes of validity, enforceability, and admissibility. In addition, a true and correct facsimile copy or computer image of this Agreement shall be treated as and shall have the same effect as an original signed copy of this document.



**10.18 Authority to Enter Agreement.** Contractor has all requisite power and authority to conduct its business and to execute, deliver, and perform the Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party. If the Contractor is a corporation, the legal name of the corporation shall be set forth below, together with the signature of the officer or officers authorized to sign contracts on behalf of the corporation; if Contractor is a co-partnership the true name of the firm shall be set forth below, together with the signatures of all partners; and if the Contractor is an individual, the Contractor shall sign his or her name below. If signature is by an agent other than an officer of a corporation or a member of a partnership, a power-of-attorney must be attached hereto.

IN WITNESS WHEREOF, the parties have entered into this Agreement this 18th day of July 2023.

CITY OF WHEATON, an Illinois municipal corp.

By: Philip J. Suen Date: July 18, 2023  
Mayor

ATTEST:  
By: Andrea Rosedale  
City Clerk

Total Mechanical Solutions

By: Jennifer Kadlcek Date: 7/5/2023  
Signature

Its: President

ATTEST:  
By: JL Hud  
Title: Vice President