

## AGREEMENT

THIS AGREEMENT is by and between Brookings County (“Owner”) and  
TopKote Inc. (“Contractor”).

Owner and Contractor hereby agree as follows:

### ARTICLE 1 – WORK

- 1.01 *The Contractor shall perform all Work associated with the construction of this Project as set forth in the Contract Documents. The scope of Work shall include all labor, materials, equipment, tools, services, and the like required by the Contract Documents or otherwise necessary for the completion of the Project. The Contract Items shall include those Bid Items indicated on the Notice of Award with the estimated quantities and unit prices listed in the accepted Bid Schedule.*
- 1.02 Contractor shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:
- A. Prepare roads immediately before chip sealing; sweep roads, clean all entrances back to grass line and beyond to ROW line if asphalt surfaced at intersecting roads, driveways and mailbox pullouts, clean any foreign properties stuck to road surface.
  - B. Provide double covered centerline marking tabs prior to asphalt surface treatment.
  - C. Provide traffic control, safety trained flagging personnel, & road work signing during the construction process.
  - D. Provide equipment for application of CRS-2P emulsion at the rate of minimum .32 up to +.06 gallon per square yard (Liquid Asphalt rate to be determined by Highway Superintendent) between grass lines; centerline to be swept back to have sufficient overlap for complete coverage; contractor to check all roadway widths; intersecting radius areas, mailbox pullouts, entrances/pullouts are to be chip sealed within the project limits—County & Contractor to coordinate.
  - E. Contractor shall be responsible for ordering liquid asphalt from Brookings County’s supplier and will be responsible for demurrage charges, returned load charges, and less than minimum material delivery charges. Any freight and/or pumping charges are the responsibility of the Contractor. 1 paper copy of the bill of lading shall be provided to Brookings County upon delivery. (Liquid Asphalt provided by Brookings County)
  - F. Provide equipment to Screen (If needed), load & haul chips from chip pile locations (provided on attached map) and apply 3/8” Type 1a granite stone chips or 3/8” Type 1b natural stone chips @ the rate of 21± lbs. per sq. yd. (Chips provided by Brookings County in stock pile, pounds per sq. yd. to be determined by Highway Superintendent)
  - G. Provide equipment for rolling chips immediately after chips have been placed; rolling to conform to 2015 SD Standard Specifications for Roads & Bridges 360.3 B. 4.
  - H. Sweep chips off roads after a 24 waiting period & within 48 hours after the waiting period—roads to be swept in mornings under cooler temperatures; some sweeping will require

directional—one-way sweeping; no chips are to be swept onto manicured lawn areas—  
Brookings County & Contractor to visually inspect & coordinate before sweeping.

- I. Temperatures to be 65+ degrees & all road surfaces dry before application of liquid asphalt. Chip seal operations are allowed in daylight hours only; no operations while dark.
- J. Contractor shall monitor project for 12 hours after completion for any oil tracking, bleeding or if wet weather is forecast— contractor will keep traffic off the project if any oil pickup is occurring; contractor will maintain this traffic control until traffic can safely travel project with no oil pickup; the contractors liability insurance will be responsible for vehicle cleaning if oil pickup occurs—contractor will monitor for oil bleeding at the same time and blot with sand if necessary.
- K. No work will be allowed to be performed on Sunday.

## ARTICLE 2 – THE PROJECT

- 2.01 The Project, of which the Work under the Contract Documents is a part, is generally described as follows: ***2020 Brookings County Chip Seal Project.***

## ARTICLE 3 – ENGINEER

3.01

## ARTICLE 4 – CONTRACT TIMES

4.01 *Time of the Essence*

All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

4.02 *Contract Times: Days and Dates*

- A. The Work will be substantially completed ***on or before August 22, 2020. Furthermore, the Notice to Proceed will not be issued before June 15, 2020. The work will be*** completed and ready for final payment in accordance with Paragraph 15.06 of the General Conditions ***on or before thirty (30) calendar days have expired from the date the Owner determines the Work to be substantially complete.***

4.03 *Liquidated Damages*

- A. Contractor and Owner recognize that time is of the essence as stated in Paragraph 4.01 above and that Owner will suffer financial and other losses if the Work is not completed and Milestones not achieved within the times specified in Paragraph 4.02 above, plus any extensions thereof allowed in accordance with the Contract. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by Owner if the Work is not completed on time. Accordingly, instead of requiring any such proof, Owner and Contractor agree that as liquidated damages for delay (but not as a penalty):

- 1. Substantial Completion: ***The amount according to the Schedule of Liquidated Damages below shall be deducted from the amount due or that may become due the Contractor***

for each day that expires after the time (as duly adjusted pursuant to the Contract) specified in Paragraph 4.02.A above for Substantial Completion until the Work is substantially complete.

2. Completion of Remaining Work: After Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Time (as duly adjusted pursuant to the Contract) for completion and readiness for final payment, **Owner shall deduct from final pay request the amount according to the Schedule of Liquidated Damages below** for each day that expires after such time until the Work is completed and ready for final payment.
3. Liquidated damages for failing to timely attain Substantial Completion and final completion are not additive and will not be imposed concurrently.

**B. Schedule of Liquidated Damage**

<i>Original contract amount</i>		
<i>From</i>	<i>To and</i>	<i>Amount of liquidated</i>
<i>More Than</i>	<i>Including</i>	<i>damages per calendar day</i>
<i>\$0</i>	<i>\$50,000</i>	<i>\$300.00</i>
<i>\$50,000</i>	<i>\$100,000</i>	<i>\$450.00</i>
<i>\$100,000</i>	<i>\$500,000</i>	<i>\$650.00</i>
<i>\$500,000</i>	<i>\$1,000,000</i>	<i>\$950.00</i>
<i>\$1,000,000</i>	<i>\$2,000,000</i>	<i>\$1,250.00</i>
<i>\$2,000,000</i>	<i>\$4,000,000</i>	<i>\$1,500.00</i>
<i>\$4,000,000</i>	<i>\$6,000,000</i>	<i>\$1,650.00</i>
<i>\$6,000,000</i>	<i>\$8,000,000</i>	<i>\$1,900.00</i>
<i>\$8,000,000</i>	<i>\$10,000,000</i>	<i>\$2,150.00</i>
<i>\$10,000,000</i>	<i>Over \$10,000,000</i>	<i>\$2,300.00</i>

4.04 *Special Damages*

- A. In addition to the amount provided for liquidated damages, Contractor shall reimburse Owner (1) for any fines or penalties imposed on Owner as a direct result of the Contractor's failure to attain Substantial Completion according to the Contract Times, and (2) for the actual costs reasonably incurred by Owner for engineering, construction observation, inspection, and administrative services needed after the time specified in Paragraph 4.02 for Substantial Completion (as duly adjusted pursuant to the Contract), until the Work is substantially complete.
- B. After Contractor achieves Substantial Completion, if Contractor shall neglect, refuse, or fail to complete the remaining Work within the Contract Times, Contractor shall reimburse Owner for the actual costs reasonably incurred by Owner for engineering, construction observation, inspection, and administrative services needed after the time specified in

Paragraph 4.02 for Work to be completed and ready for final payment (as duly adjusted pursuant to the Contract), until the Work is completed and ready for final payment.

#### ARTICLE 5 – CONTRACT PRICE

- 5.01 Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents the amounts that follow, subject to adjustment under the Contract:
- A. For all Work, at the prices stated in Contractor's Bid, attached hereto as an exhibit. The extended prices for Unit Price Work set forth as of the Effective Date of the Contract are based on estimated quantities. As provided in Paragraph 13.03 of the General Conditions, estimated quantities are not guaranteed, and determinations of actual quantities and classifications are to be made by Engineer.

#### ARTICLE 6 – PAYMENT PROCEDURES

6.01 *Submittal and Processing of Payments*

- A. Contractor shall submit Applications for Payment in accordance with Article 15 of the General Conditions. Applications for Payment will be processed by Engineer as provided in the General Conditions.

6.02 *Progress Payments; Retainage*

- A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment each month during performance of the Work as provided in Paragraph 6.02.A.1 below, provided that such Applications for Payment have been submitted in a timely manner and otherwise meet the requirements of the Contract. All such payments will be measured by the Schedule of Values established as provided in the General Conditions (and in the case of Unit Price Work based on the number of units completed) or, in the event there is no Schedule of Values, as provided elsewhere in the Contract.
1. Prior to Substantial Completion, progress payments will be made in an amount equal to the percentage indicated below but, in each case, less the aggregate of payments previously made and less such amounts as Owner may withhold, including but not limited to liquidated damages, in accordance with the Contract
    - a. 90 percent of Work completed (with the balance being retainage). If the Work has been 50 percent completed as determined by Owner, and if the character and progress of the Work have been satisfactory to Owner, ***Owner may determine that as*** long as the character and progress of the Work remain satisfactory to Owner, there will be no additional retainage; and
    - b. 90 percent of cost of materials and equipment not incorporated in the Work ***in accordance with paragraph 6.02.A.1.c below*** (with the balance being retainage).
    - c. ***If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at or near the site, the partial payment estimate shall also be accompanied by such supporting data, satisfactory to the Owner, as will establish the Owner's title to the material and equipment and protect his interest therein, including applicable insurance. Partial***

*progress payments will be made upon written request by the Contractor on specific items as listed herein which are stockpiled in a manner and location satisfactory to the Engineer. All material for which an allowance is requested shall be stored in an approved manner in areas where damage from flood waters is not likely to occur. If at any time stored materials are lost or become damaged by floods, or in any other manner, the Contractor will be responsible for repair and replacement of such damaged materials. If payment has been made prior to such damage, the amount so allowed or a proportionate part thereof shall be deducted from the next partial payment and withheld until satisfactory repairs or replacements have been made. No payment on stockpiled materials as specified herein shall be made on fuel, hardware such as bolts, plates, etc., supplies, form lumber, false work, perishable materials, or on temporary structures of any kind which will not become an integral part of the finished construction, nor on items when unit bid prices are obviously unbalanced as compared to the Engineer's estimated unit prices prepared prior to the letting.*

- B. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to **95** percent of the Work completed, less such amounts set off by Owner pursuant to Paragraph 15.01.E of the General Conditions, and less **200** percent of the estimated of the value of Work to be completed or corrected as shown on the punch list of items to be completed or corrected prior to final payment.

6.03 *Final Payment*

- A. Upon final completion and acceptance of the Work in accordance with Paragraph 15.06 of the General Conditions, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in said Paragraph 15.06.

**ARTICLE 7 – INTEREST**

- 7.01 All amounts not paid when due shall bear interest *per State of South Dakota law*.

**ARTICLE 8 – CONTRACTOR’S REPRESENTATIONS**

- 8.01 In order to induce Owner to enter into this Contract, Contractor makes the following representations:
  - A. Contractor has examined and carefully studied the Contract Documents, and any data and reference items identified in the Contract Documents.
  - B. Contractor has visited the Site, conducted a thorough, alert visual examination of the Site and adjacent areas, and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
  - C. Contractor is familiar with and is satisfied as to all Laws and Regulations that may affect cost, progress, and performance of the Work.
  - D. Contractor has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or adjacent to the Site and all drawings of physical conditions relating to existing surface or subsurface structures at the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings, and (2) reports and drawings relating to Hazardous Environmental Conditions, if any, at or adjacent

to the Site that have been identified in the Supplementary Conditions, especially with respect to Technical Data in such reports and drawings.

- E. Contractor has considered the information known to Contractor itself; information commonly known to contractors doing business in the locality of the Site; information and observations obtained from visits to the Site; the Contract Documents; and the Site-related reports and drawings identified in the Contract Documents, with respect to the effect of such information, observations, and documents on (1) the cost, progress, and performance of the Work; (2) the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor; and (3) Contractor's safety precautions and programs.
- F. Based on the information and observations referred to in the preceding paragraph, Contractor agrees that no further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract.
- G. Contractor is aware of the general nature of work to be performed by Owner and others at the Site that relates to the Work as indicated in the Contract Documents.
- H. Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
- I. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
- J. Contractor's entry into this Contract constitutes an incontrovertible representation by Contractor that without exception all prices in the Agreement are premised upon performing and furnishing the Work required by the Contract Documents.

## ARTICLE 9 – CONTRACT DOCUMENTS

### 9.01 *Contents*

- A. The Contract Documents consist of the following:
  - 1. This Agreement (pages **1** to **9**, inclusive).
  - 2. Performance bond (pages **1** to **3**, inclusive).
  - 3. Payment bond (pages **1** to **3**, inclusive).
  - 4. Other bonds.
    - a. 006113.13 (pages 1 to 3, inclusive).
  - 5. General Conditions (page i, ii, iii, iv, and v and pages 1 to 66, inclusive).
  - 6. Supplementary Conditions (pages **1** to **22**, inclusive).
  - 7. Specifications as listed in the table of contents of the Project Manual.
  - 8. Addenda (numbers na to na, inclusive).
  - 9. Exhibits to this Agreement (enumerated as follows):
    - a. Contractor's Bid (pages 002113-1 to 002113-12, inclusive).

10. The following which may be delivered or issued on or after the Effective Date of the Contract and are not attached hereto:
  - a. Notice to Proceed.
  - b. Change Orders.
- B. The documents listed in Paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in the General Conditions.

## ARTICLE 10 – MISCELLANEOUS

### 10.01 *Terms*

- A. Terms used in this Agreement will have the meanings stated in the General Conditions and the Supplementary Conditions.

### 10.02 *Assignment of Contract*

- A. Unless expressly agreed to elsewhere in the Contract, no assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, money that may become due and money that is due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

### 10.03 *Successors and Assigns*

- A. Owner and Contractor each binds itself, its successors, assigns, and legal representatives to the other party hereto, its successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

### 10.04 *Severability*

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Contractor, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

### 10.05 *Contractor's Certifications*

- A. Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing the Contract. For the purposes of this Paragraph 10.05:
  1. "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value likely to influence the action of a public official in the bidding process or in the Contract execution;

2. "fraudulent practice" means an intentional misrepresentation of facts made (a) to influence the bidding process or the execution of the Contract to the detriment of Owner, (b) to establish Bid or Contract prices at artificial non-competitive levels, or (c) to deprive Owner of the benefits of free and open competition;
3. "collusive practice" means a scheme or arrangement between two or more Bidders, with or without the knowledge of Owner, a purpose of which is to establish Bid prices at artificial, non-competitive levels; and
4. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Contract.

10.06 *Other Provisions*

- A. Owner stipulates that the General Conditions that are made a part of this Contract are based on EJCDC® C-700, Standard General Conditions for the Construction Contract, published by the Engineers Joint Contract Documents Committee®, and Owner is the party that has furnished said General Conditions, **and** Owner has plainly shown all modifications to the standard wording of such published document to the Contractor in the Supplementary Conditions.
- B. ***The Contractor stipulates and agrees that it has (i) thoroughly examined and understands all the Contract Documents and other related data, (ii) investigated and become familiar with the existing conditions present at the Project Site, (iii) investigated and become familiar with all Laws and Regulation which affect the Work to be performed on this Project, AND (iv) fully correlated the information from (i), (ii), and (iii). Or, if the Contractor has not adequately performed such investigations and/or examinations that the Contractor agrees without exception to comply with all conditions, provisions, specifications, requirements, and the like set forth in the Contract Documents.***
- C. ***The Contractor stipulates and agrees that the Contract Documents are generally sufficient to indicate and convey understanding of all terms, conditions, provisions, specifications, requirements, and the like as are necessary to perform the Work on this Project. The Contractor does not consider that any additional information, examinations, investigations, explorations, tests, studies, and/or data are necessary to perform the Work on this Project.***

IN WITNESS WHEREOF, Owner and Contractor have signed this Agreement.

This Agreement will be effective on June 16, 2020 (which is the Effective Date of the Contract).

OWNER:

CONTRACTOR:

Brookings County

TopKote Inc.

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

*(If Contractor is a corporation, a partnership, or a joint venture, attach evidence of authority to sign.)*

Attest: \_\_\_\_\_

Attest: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Address for giving notices:

Address for giving notices:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

License No.: \_\_\_\_\_  
*(where applicable)*

*(If Owner is a corporation, attach evidence of authority to sign. If Owner is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of this Agreement.)*

*NOTE TO USER: Use in those states or other jurisdictions where applicable or required.*