SECTION 00500

AGREEMENT BETWEEN
THE TOWN OF NANTUCKET, MASSACHUSETTS
AND
NIEZGODA & MURRAY EXCAVATING LLC

THIS AGREEMENT made effective DECEMBER 12, 2023, by and between the **TOWN OF NANTUCKET, MASSACHUSETTS**, a municipal corporation, acting by and through its Town Manager, with offices at Town Hall, Nantucket, Massachusetts 02554 (hereinafter called the "Town"), and Niezgoda & Murray Excavating LLC whose principal office address and state of incorporation are as set forth on Exhibit A (hereinafter called the "Contractor").

RECITALS:

WHEREAS, the Town desires to retain the Contractor to provide certain services for the Town, as described below, and the Contractor is willing to accept such engagement, all on the terms hereinafter set forth,

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

ARTICLE 1 - ENGAGEMENT OF THE CONTRACTOR

1.1 The Town hereby engages the Contractor, and the Contractor hereby accepts the engagement to perform certain services for the Town, as described in Article 2.

1.2. In the performance of any service under this Agreement, the Contractor acts at all times as an independent contractor. There is no relationship of employment or agency between the Town, on the one hand, and the Contractor, on the other, and the Town shall not have or exercise any control or direction over the method by which the Contractor performs its Work or functions aside from such control or directions which are consistent with the independent contractor relationship contemplated in the Agreement.

ARTICLE 2 - SERVICES OF THE CONTRACTOR

2.1 The Contractor will perform the services described in the Scope of Services set forth on Exhibit A (the "Work").

2.2 The Contractor shall report, and be responsible, to the Town and its designee (if any) as set forth on Exhibit A.

2.3 There shall be no amendment to the Scope of Services or Work provided for in this Agreement without the written approval of the Town. The Town shall be under no obligation to pay for any services performed by the Contractor which are not explicitly agreed to by the Town in writing.

2.4 The Contractor represents and warrants to the Town that the Contractor (including all of its personnel, whether employees, agents or independent contractors) will be qualified and duly licensed (if necessary) to perform the services required by this Agreement and

further agrees to perform its services in a professional manner, and in accordance with the reasonable standard of care implied by law and all applicable local, state or federal ordinances, laws, rules and regulations, all of which are incorporated herein by reference. The Contractor will obtain and pay for any and all permits, bonds and other items required for the proper and legal performance of the Work.

2.5 The Contractor represents and warrants to the Town that it is not a party to any agreement contract or understanding which would in any way restricts or prohibits it from undertaking or performing its obligations hereunder in accordance with the terms and conditions of this Agreement.

2.6 All written materials and any other documents (whether in the form of "hard" copies, graphics, magnetic media or otherwise) which are received and produced by the Contractor pursuant to this Agreement shall be deemed to be "work for hire" and shall be and become the property of the Town upon the receipt and production of such items by the Contractor. The Town acknowledges that such materials are being prepared with respect to the specific project contemplated hereby and that any reuse of such materials by the Town in connection with any other project shall be at the Town's sole risk, unless otherwise agreed to by the Contractor in writing.

2.7 The Contractor shall be responsible for the professional and technical accuracy, and for the coordination, of all designs, drawings, specifications, estimates and other Work or services furnished by the Contractor or its consultants and subcontractors. The Contractor shall perform its Work under this Agreement in such a competent and professional manner that detail checking and reviewing by the Town shall not be necessary. The Contractor shall supervise and direct the Work, using its best skills and attention, which shall not be less than such state of skill and attention generally rendered by the design and engineering profession for projects similar to the subject project in scope, difficulty and location.

2.8 The Contractor shall not use any subcontractors or sub-consultants (not identified herein) for any Work required under this Agreement unless such use has been approved in advance in writing by the Town.

2.9 Notwithstanding anything to the contrary in this Agreement, the Contractor shall not be relieved of its obligations under this Agreement by the Town's performance, or failure to perform, any of the Town's administrative duties under this Agreement, including, but not limited to, the Town's review and/or approval of plans, estimates, programs, documents, materials, Work and services furnished by Contractor.

ARTICLE 3 - PERIOD OF SERVICES

3.1 Unless otherwise provided on Exhibit A, the term of this Agreement shall commence on the date hereof and continue until the Work is completed to the Town's reasonable satisfaction.

3.2 The Contractor shall proceed with the Work promptly after receiving Notice to Proceed and will diligently and faithfully prosecute the Work to completion in accordance with the provisions hereof. In any event, the Work shall be completed no later than the date set forth on Exhibit A. The Contractor acknowledges that time is of the essence of this Agreement.

3.3 If the Contractor is delayed in the performance of any of its obligations under this Agreement by the occurrence of an unforeseen event beyond its control such as fire or other casualty, abnormal adverse weather conditions, acts of God (collectively, "Unavoidable Events") which materially and adversely affect its ability to perform the Work, then the time for the Contractor to perform the Work shall be extended for such time as the Town shall reasonably determine is necessary to permit the Contractor to perform in light of the effects of the Unavoidable Event.

If an Unavoidable Event occurs which, in the Town's reasonable determination, makes the performance of the Agreement impossible without the expenditure of additional Town funds, the Town may, at its option, elect to terminate this Agreement upon thirty (30) days written notice.

ARTICLE 4 - PAYMENTS TO THE CONTRACTOR

4.1 The compensation due to the Contractor shall be paid in the amounts, and in the manner, set forth on Exhibit B, attached hereto.

4.2 The Contractor will bill the Town at the completion of the Work unless otherwise provided on Exhibit B, with one or more invoices broken down to show the quantity of work performed and the percentage of the entire project completed, categories and amount of reimbursable expenses (if any) and provide such supporting data as may be required by the Town.

4.3 The Town will pay the Contractor upon review and approval of such invoices by the Town or its designee.

4.4 This engagement may be subject to budgetary restrictions which may limit the total amount of funds available for the Work. Accordingly, unless otherwise stated on Exhibit B, the Town will not be obligated to pay any amount in excess of the maximum project amount without the express written approval of the Town.

4.5 The Contractor and its sub-contractors shall not be compensated for any services involved in preparing changes that are required for additional Work that should have been anticipated by the Contractor in the preparation of the documents, as reasonably determined by the Town.

ARTICLE 5 – TERMINATION

5.1 This Agreement may be terminated, with cause, by either the Town or Contractor, upon written notice given by the non-defaulting party. For the purposes of this provision, "cause" shall include the failure of a party to fulfill its material duties hereunder in a timely and proper manner.

5.2 The Town shall have the right to terminate this Agreement for its convenience and without cause upon ten (10) days written notice.

5.3 Following termination of this Agreement, the parties shall be relieved of all further obligations hereunder except:

(a) unless the Town terminates for cause under paragraph 5.1, in which event the Town shall be under no obligation to make any payments to Contractor except for those services satisfactorily provided, the Town shall remain responsible for payments for the services satisfactorily performed and, unless this Agreement is for a lump-sum, expenses of Contractor reasonably accrued prior to the effective date of the notice of termination in compliance with this Agreement (less the value of any claims of the Town), all as determined by the Town in its sole discretion, but for no other amounts, including, without limitation, claims for lost profits on Work not performed; and

(b) The Contractor shall remain liable for any damages, expenses or liabilities arising under this Agreement (including its indemnity obligations) with respect to Work performed pursuant to the Agreement.

ARTICLE 6 - INSURANCE AND INDEMNIFICATION

6.1 The Contractor agrees to indemnify and save the Town harmless from any and all manner of suits, claims, or demands arising out of any errors, omissions or negligence by Contractor (including all its employees, agents and independent contractors) in performing the Work, or any breach of the terms of this Agreement by such Contractor and shall reimburse the Town for any and all costs, damages and expenses, including reasonable attorney's fees, which the Town pays or becomes obligated to pay, by reason of such activities, or breach. The provisions of this Section 6.1 shall be in addition to, and shall not be construed as a limitation on, any other legal rights of the Town with respect to the Contractor, in connection with this Agreement, and shall survive termination or expiration of this Agreement.

6.2 Before commencing Work the Contractor shall obtain and maintain at its expense and from insurance companies of a Best Rating of A or better, which are licensed to do business in the Commonwealth of Massachusetts, insurance as set forth below. If the Contractor is permitted to sub-contract a material portion of the Work or is otherwise identifying a third party to perform services for the Town, the Contractor shall assure that such sub-contractor or other third party also has such insurance.

(a) Workers' Compensation:

(1) State Workers Compensation Benefits: Statutory Limits

(2) Employer Liability:
$1,000,000 Bodily Injury by Accident
$1,000,000 Bodily Injury by Disease – policy limit
$1,000,000 Bodily Injury by Disease – each employee

(b) Commercial General Liability (including Premises-Operations; Independent Contractor's Protective; Products and Completed Operations; Broad Form Property Damage, Contractual Liability):

(1) Bodily Injury and Property Damage Liability (including coverage for XCU hazards):

$1,000,000 Each Occurrence
$2,000,000 General Aggregate Per Project
$2,000,000 Aggregate, Products and Completed Operations

(2) Products and Completed Operations insurance shall be maintained for a minimum period of 6 years after final payment and Contractor shall continue to provide evidence of such coverage to Owner on an annual basis during the aforementioned.

(c) Commercial Automobile Liability (owned, non-owned, hired):$1,000,000 Bodily Injury and Property Damage Each Accident

(d) Umbrella Liability Coverage
$5,000,000 per Occurrence;
$5,000,000 General Aggregate
$5,000,000 Products and Completed Operations Aggregate

Coverage shall be excess to the Contractor's General Liability, Auto Liability, and Employers Liability coverages.

(e) Builders Risk Insurance: Builder's Risk (Fire Insurance) in an amount equal to the insurable value of the Contract.

(f) Such additional insurance as the Town may reasonably require, as set forth on Exhibit A.

Contractor shall maintain such insurance during the term of Agreement and give the Town twenty (20) days written notice of any change or cancellation of coverage. Each insurer providing policies hereunder shall waive its rights to subrogate claims against the Town. The Town will be added as an additional named insured with respect to each such policy and such endorsement shall be reflected on a Certificate of Insurance to be delivered to the Town upon the execution of this Agreement and at such times thereafter as the Town may reasonably request.

ARTICLE 7 - GENERAL PROVISIONS

7.1 Upon the expiration or the termination of this Agreement for any reason, all data, drawings, specifications, reports, estimates, summaries and other work product which have been accumulated, developed or prepared by the Contractor (whether completed or in process) shall become the property of the Town upon payment for such to the Contractor and the Contractor shall immediately deliver or otherwise make available all such material to the Town.

7.2 Neither party may assign, transfer, or otherwise dispose of this Agreement or any of its rights hereunder or otherwise delegate any of its duties hereunder without the prior written consent of the other party, and any such attempted assignment or other disposition without such consent shall be null and void and of no force and effect.

7.3 Except as otherwise expressly provided in this Agreement, any decision or action made by the Town relating to this Agreement, its operation, amendment, or termination, shall be

made by the Board, Committee or Authority of the Town specified in the initial paragraph of this Agreement, unless specifically authorized or delegated by a lawful vote of such body.

7.4 This Agreement, together with Exhibit A (Contractor, Scope of Work, Term), Exhibit B (Payments), and Exhibit C (Tax Compliance Certificate), and any additional exhibits referred to therein, constitute the entire agreement of Town and Contractor with respect to the matters set forth therein and may not be changed, amended, modified or terms waived except by a writing signed by Town and Contractor. If there is any conflict among the terms set forth in the body of this Agreement and the terms or provisions set forth in Exhibit A or Exhibit B, or in any other attachment hereto, or in any other document or law incorporated by reference herein, such conflict shall be resolved by giving precedence to the party's address above by certified mail, return receipt requested Terms or provisions contained in the following documents in accordance with the following hierarchy, with the topmost document of the highest priority:

(a) Applicable federal, state, and local laws, rules and regulations.

(b) Amendments to this Agreement, if any.

(c) Exhibits A and B.

(d) This Agreement.

(e) Any other attachments to this Agreement.

To the extent the conflict is not resolved by applying the above hierarchy, the conflict shall be resolved in a manner that results in the highest quantity and best quality of goods and services to the Town.

7.5 This Agreement is governed by the law of The Commonwealth of Massachusetts and shall be construed in accordance therewith. The parties agree that exclusive jurisdiction for any action arising out of or relating to this Agreement shall lie with the state and federal courts having jurisdiction over the county and state in which the Town is located and the parties hereby irrevocably waive, to the fullest extent permitted by law, any objection which they may now or hereafter have to the venue of any proceeding brought in such location and further irrevocably waive any claims that any such proceeding has been brought in an inconvenient forum.

7.6 Any notices required or allowed, shall be to the person's address above by certified mail, return receipt requested.

7.7 Notwithstanding anything to the contrary in this Agreement, this Agreement is subject to the appropriation and availability of funds.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first written above.

TOWN OF NANTUCKET,
MASSACHUSETTS:

C. Elizabeth Gibson
Asst Town Manager
G. TIYNAN

CONTRACTOR:

Robert Murray
Managing Partner

Funding Org/Obj:

FEIN: 84-1871816

Approved as to Funds Available

PO#_____

Pursuant to M.G.L. c.44, s31C, I certify that an appropriation has been made in the total amount of the contract.

Brian E. Turbitt – Director of Municipal Finance

Approved as to Form

Town Counsel

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Contract EXHIBIT A

CONTRACTOR, SCOPE OF WORK, TERM

1. **Name of Contractor**: Niezgoda & Murray LLC

2. **State of Incorporation**: Massachusetts

3. **Principal Office Address**: 1250 Long Pond Road, Brewster, MA 02631

4. **Description of Services**:

   A. **Work includes**, but is not limited to, the following (§ 2.1):

      1. General Sewer Infrastructure Improvements

         a. General Utility Construction Support including: securing/maintaining staging area; soil and waste management; sedimentation and erosion control; permitting; traffic management; temporary environmental controls; utility coordination; pre/post construction photography; material and performance/acceptance testing; construction administration; and close-out (e.g. As-builts, Warrantees, etc.).

         b. Buried Utility Construction including: excavation; trench support; flow handling; trench dewatering and proper disposal; protecting utilities (underground and overhead) and surrounding property; infrastructure bedding; installing pipe (gravity pipe and building services) and fitting; installing manholes and catch basins; backfill and compaction; grading; adjusting castings; proper handling and disposing Asbestos Cement Pipe; temporary surface restoration; etc.

         c. Specialty Sewer Inspection including: close-circuit television (CCTV) Inspection; pipe cleaning and material disposal.

         d. Water Work including: coordinating with Nantucket Water Department; typical Trench Work as included in "Buried Utility Construction" paragraph above; bypassing and temporary services; installing pipe, service taps, and fittings; disinfecting; temporary surface restoration; etc.

         e. Surface Restoration including: pavement cold planing and overlay; full depth reclamation and final paving; concrete and bituminous sidewalk and apron installation; removing and resetting curb, and brick/paver/cobblestone sidewalk and aprons; removing and replanting landscaping/grass at property line; dismantling and reassembling fencing at property line; and removing and resetting sidewalk features (i.e. street signs, benches, etc.).

5. **Person, Department, or Committee, if any, to whom Contractor reports** (§ 2.2):

   A. Nantucket Sewer Department

6. **Term of Agreement** (§3.1):

A. The time for completion of this contract is:
400 calendar days for Substantial Completion.
430 calendar days for Final Completion.

7. **Completion Date** (§3.2):

A. The contract completion date is MARCH 7, 2025

B. Liquidated damages will be in the amounts shown below for each calendar day of delay beyond the dates established below:

Substantial completion (400 calendar days)	$1,000 per day
Final completion (430 calendar days)	$1,000 per day

8. **Additional Insurance Coverage** (§6.2(f)):

None

CERTIFICATE OF VOTE
(to be filed if Contractor is a Corporation)

I, DEAN NIEZGODA, hereby certify that I am the duly qualified
(Secretary of the Corporation)

and acting Secretary of NIEZGODA + MURRAY EXCAVATING LLC and I further certify that a meeting of the
(Name of Corporation)

Directors of said Company, duly called and held on 12/13/23, at which
(Date of Meeting)

all Directors were present and voting, the following vote was unanimously passed:

VOTED: To authorize and empower

Robert Murray - Manager

Anyone acting singly, to execute Forms of General Bid, Contracts or Bonds on behalf of the Corporation.

I further certify that the above vote is still in effect and has not been changed or modified in any respect.

By: _____
(Secretary of Corporation)

A True Copy:

Attest: Patrick Edward Carbone
(Notary Public)

My Commission Expires: 4/27/29
(Date)

PATRICK EDWARD CARBONE
Notary Public, Commonwealth of Massachusetts
My Commission Expires April 27, 2029

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AGREEMENT EXHIBIT B

PAYMENTS

1. **Contract Price**: Owner shall pay Contractor for completion of the Work in accordance with the Contract Documents an amount in current funds as follows:

   TOTAL CONTRACT PRICE

   Four Million, Three Hundred Thirty-Nine Thousand, Two Hundred Seventy-Five Dollars and Seventy Cents

   $4,339,275.70

2. **Payment Procedures**:

   2.01 Submittal and Processing of Payments

   A. Contractor shall submit Applications for Payment in accordance with Article 14 of the Standard General Conditions and Project Specific Conditions, if any. Applications for Payment will be processed by the Engineer as provided in the Standard General Conditions and Project Specific Conditions, if any, and the General Requirements.

   2.02 Progress Payments; Retainage

   A. Owner shall make progress payments on account of the Contract Price on the basis of Contractor's Applications for Payment on or about the 21st day of each month during performance of the Work as provided in Article SC 14.02.C of the Project Specific Requirements. All such payments will be measured by the schedule of values established as provided in Article 2.07.A of the Standard General Conditions and Project Specific Requirements, if any, (and in the case of Unit Price Work based on the number of units completed).

      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 Engineer may determine or Owner may withhold, including but not limited to liquidated damages, in accordance with Article 14.02 of the Standard General Conditions and Project Specific Conditions, if any, and additional retainage allowed by Laws and Regulations.

Progress Payments of 95 percent for Work completed (with the balance of 5 percent being retainage).

2. Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to 99 percent of the Work completed (with the balance of 1 percent being retainage), less such amounts as Engineer shall determine in accordance with Article 14.02.B.5 of the General Conditions and Project Specific Requirements, if any, and less the Engineer's estimate of the value of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected (Punch List) attached to the certificate of Substantial Completion and subject to Article 14.04 of the General Conditions and Project Specific Requirements, if any.

   However, retainage for items planted in the ground shall remain at 5 percent of the cost of such items until Final Payment per Massachusetts General Laws Chapter 30, Section 39G.

2.03 Final Payment

A. Upon final completion and acceptance of the Work in accordance with Paragraph 14.07 of the General and Project Specific Conditions, if any, Owner shall pay the remainder of the Contract Price as recommended by Engineer as provided in said Paragraph 14.07.

TAX COMPLIANCE CERTIFICATION
EXHIBIT C

Pursuant to M.G.L. 62C, Sec.49A, the undersigned certifies under the penalties of perjury that it, to the best knowledge and belief of management, has filed all state tax returns and paid all state taxes required under law (if any are so required).

By:

NIERGODA + MURRAY LLC

Robert Murray
Name, Managing Partner

12/12/23
Date

84-1871816
FEIN:

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SUBMIT THIS FORM WITH BID

SECTION 00510

CERTIFICATIONS REQUIRED BY LAW
FOR PUBLIC CONSTRUCTION CONTRACTS

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CERTIFICATIONS REQUIRED BY LAW FOR PUBLIC CONSTRUCTION CONTRACTS

You must COMPLETE and SIGN the following certifications. You must also print, at the bottom of this page, the name of the contractor for whom these certifications are submitted.

TAX COMPLIANCE

Pursuant to Chapter 62C of the Massachusetts General Laws, Section 49A(b), I, the undersigned, authorized signatory for the below named contractor, do hereby certify under the pains and penalties of perjury that said contractor has complied with all laws of the Commonwealth of Massachusetts relating to taxes, reporting of employees and contractors, and withholding and remitting child support.

NON-COLLUSION

The undersigned certifies under the penalties of perjury that this bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this subsection the word "person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity.

PUBLIC CONTRACTOR DEBARMENT

The undersigned certifies under penalty of perjury that the below named contractor is not presently debarred from doing public construction Work in the commonwealth under the provisions of section twenty-nine F of chapter twenty-nine, or any other applicable debarment provisions of any other chapter of the General Laws or any rule or regulation promulgated thereunder.

OSHA TRAINING

Pursuant to G.L. c. 30, §39S, the Contractor hereby certifies under penalties of perjury as follows:

(1) Contractor is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work;
(2) All employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins Work and they shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; and
(3) All employees to be employed in the Work subject to this contract have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration.

COMPLETE AND SIGN BELOW:

Authorized Person's Signature

11/27/23
Date

Robert Murray - Managing Partner
Print Name & Title of Signatory

NIEZGODA + MURRAY EXCAVATING LLC
Name of Contractor

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