



City Council Memorandum

To: Mayor Fasbender & City Councilmembers
From: Chris Jenkins, Parks & Recreation Director
Date: June 26, 2023
Item: Guaranteed Energy Savings Agreement with Apex Facility Solutions, LLC

Council Action Requested:

Approve Guaranteed Energy Savings Agreement with Apex Facility Solutions, LLC for the Refrigeration Plant Replacement, West Rink Roof Replacement, and Solar System Installation projects at the Hastings Civic Arena.

Background Information:

Both of these projects have been identified as needed facility upgrades, and Council has provided their commitment to completing both of these projects in 2024.

The refrigeration plant replacement requires up front design and engineering services to be completed, and the plants motor control center also needs to be ordered well in advance of the project due to long lead times for specialty equipment.

Minnesota Statute 471.345 subd. 13 allows the City to enter into a Guaranteed Energy Savings Agreement such as what is proposed. Using this statute does require the City to publish our intent to enter into this agreement, which was completed in the June 22, 2023 edition of the Hastings Journal. This agreement must also guarantee energy savings over the 20-year life of the agreement, which it does.

Entering this agreement with Apex allows them to act as our general contractor, solicit quotes from pre-qualified contractors for each individual component of the project, which city staff will review and approve as appropriate, and allows each of the major components of the project to be added by amendment.

Once the design and engineering is completed, the first amendment will be adding the purchase of the motor control center. Future amendments will add the west rink roof and solar system.

Financial Impact:

Refrigeration design and engineering costs are not to exceed \$217,391.00. This expense was previously authorized by City Council at their May 15th, 2023 regular meeting.

Once the design and engineering are completed, a not to exceed price for the motor control center will be firmed up, and if in line with estimates, can be ordered by amending this agreement.

Advisory Commission Discussion:

N/A

Council Committee Discussion:

Attachments:

- Apex Facility Solutions, LLC agreement.

City of Hastings

AGREEMENT

HASTINGS CIVIC ARENA

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This Guaranteed Energy Savings Agreement (“Agreement”), is made by and between the City of Hastings, hereafter referred to as CLIENT with an office at 101 4th St. E, Hastings, MN 55033, and Apex Facility Solutions, LLC, with its principal place of business at 3495 Northdale Blvd., Suite 230, Coon Rapids, MN 55448 hereafter referred to as CONTRACTOR. CLIENT and CONTRACTOR may be referred to as “Party” or collectively as “Parties.”

1.0 Recitals

WHEREAS, the CLIENT is authorized under Minnesota Statutes Section 471.345 subd.13, the Statute, to enter into guaranteed energy savings agreements with a qualified provider not exceeding twenty years for the purpose of implementing comprehensive utility cost-savings measures to improve the energy efficiency of a municipal facility provided the cost of implementing the measures will not exceed the amount to be saved in utility operation and maintenance costs over a twenty year period and the qualified provider provides a written guarantee that the energy or operating cost savings will meet or exceed the cost of the system; and

WHEREAS, CONTRACTOR represents that it is qualified, willing and able to responsibly act as guarantor for energy, operational and maintenance cost savings (the “Savings”), and to provide or to arrange for long term debt financing as hereafter set forth;

WHEREAS, CLIENT has reviewed the Project Costs and Savings and believes it to be reasonable and accurate;

WHEREAS, CLIENT is authorized under the Statute to make payments required by the debt service obligation from the Savings obtained from the installation of the utility cost savings measures described herein; and

WHEREAS, CLIENT has published notice of, and held a meeting in which it proposed to award the contract, the names of the Parties to the proposed contract, and the contract's purpose.

NOW, THEREFORE, in consideration of the mutual benefits and obligations set forth herein, the Parties hereto agree as follows:

2.0 Definitions

The terms defined in this section shall, for all purposes of this Agreement, have the meaning herein specified.

“Acts of God” An Act of God is an unusual, extraordinary, and sudden manifestation of an event that could not under normal circumstances have been anticipated or expected. Ordinary weather conditions of normal intensity for the locality shall not be considered as an Act of God

“Change” shall mean substitutions, additions, or deletions within the scope of the Agreement as expressly approved in writing by CLIENT.

“Client’s Premises” shall mean any location where Work is occurring as defined by Exhibit A of this Agreement.

“Client’s Property” shall mean any material, equipment, machinery, or other items, owned, or controlled by the Client that are not Owned by the Contractor.

“Completion Date” shall mean the date on which CLIENT issues the Certificate of Final Completion. “Completion Date” shall also mean the “Date of Final Installation”.

“Contractor’s Property” shall mean any material, equipment, machinery, or other items, owned or controlled by the Contractor that are not Owned by the Client.

“Extra Work” shall mean work outside the scope of this Agreement.

“Facility” shall mean building or structure where Work under the Agreement occurs.

“Facility Improvement Measures” shall mean any improvement included in the Work as listed on the summary table in Exhibit A of this Agreement.

“Final Completion” shall mean that one or more Facility Improvement Measures as outlined in the summary table of Exhibit A have met requirements for Substantial Completion and all punch list items and documentation has been received.

“Guarantee Commencement Date” shall mean the Completion Date and the Date of Final Installation.

“Guarantee Term End Date” shall mean the date on which CONTRACTOR’s guarantee term ends.

“Guarantee Year” shall mean each twelve (12) month period during the term of this Agreement, beginning on the Completion Date.

“Measured and Verified Savings” shall mean utility cost savings calculated using utility consumption data recorded by utility meter(s).

“Parties” shall mean the Client and Contractor as defined in the first paragraph of the Agreement.

“Performance Assurance Services” shall mean services provided under the Technical Services Agreement section of Exhibit D of the Agreement.

“Premises” shall mean location where Work done under this agreement is occurring and is owned or controlled by the Client.

“Pre-agreed Savings” shall mean utility cost savings calculated using generally accepted engineering methods when actual measurements are impossible or not cost effective.

“Project” shall mean the Work or scope of work as outlined in Exhibit A of this Agreement.

“Substantial Completion” shall mean one or more Facility Improvement Measures as outlined in the summary table of Exhibit A has progressed to the point where, in the opinion of the CONTRACTOR as evidenced by his Certificate of Substantial Completion, it is sufficiently complete, in accordance with the contract documents, so that the Work can be utilized for the purposes for which it was intended; or if there be no such certificate issued, when final payment is due. The term “substantially complete” and “substantially completed” as applied to any work refer to Substantial Completion thereof.

“Technical Services Agreement” shall mean ongoing services provided after achievement of “Substantial Completion” as outlined in Exhibit D of the Agreement.

“Total Actual Savings” shall mean the sum of the reconciled utility cost savings, and the operation and maintenance cost savings.

“Utility Savings” shall mean the difference between the utility consumption under the pre-contract conditions and the utility consumption after the “Work” has been completed under the contract. Utility savings shall be calculated in comparison to an established baseline of utility consumption.

“Work” means activities set forth in Exhibit A.

“Working Days” means Monday through Friday excluding State holidays.

3.0 Order of Precedence

In case of conflict between provisions of this Agreement, the order of precedence for conflict resolution in descending order shall be as follows: (i) Change Orders, including amendments; (ii) the Agreement; and (iii) the Exhibits.

4.0 Exhibits

The following Exhibits are attached hereto and made a part hereof thereby:

- Exhibit A – Scope of Work
- Exhibit B – Schedule of Payments
- Exhibit C – Certificates of Substantial Completion & Final Acceptance
- Exhibit D – Facility Operating Parameters & Utility Savings Calculation Methods
 - Breakdown of Guarantee Savings
 - Summary of Guarantee Savings
 - Guarantee Reconciliation
 - Technical Service Agreement
- Exhibit E – Project Schedule
- Exhibit F – Contractor’s Measurement and Verification Responsibilities
- Exhibit G – CLIENT’s Maintenance Responsibilities
- Exhibit H – Insurance Coverage

5.0 Term of Agreement

Effective Date: The Effective Date of this Agreement shall be the date of City Council approval. CONTRACTOR shall not begin work under this Agreement until this Agreement is fully executed and CONTRACTOR has been notified by CLIENT’s contact to begin the Work.

Term: Unless otherwise terminated, this Agreement shall expire nineteen (19) years after the Completion Date.

6.0 Contacts

For the purpose of administration of this Agreement, the following individuals will be the contact personnel authorized to speak on behalf of the respective Parties.

CLIENT Contact: **Chris Jenkins, Park and Recreation Director**, (hereafter “CLIENT Contact”). CONTRACTOR shall render all services pursuant to this Agreement under the direction of the CLIENT Contact or the designated representative.

CONTRACTOR Contact: **Mark Rasmussen, Chief Operating Officer**, CONTRACTOR (hereafter "CONTRACTOR Contact"). CLIENT shall provide all the direction and supervision pursuant to this Agreement under the direction of the CONTRACTOR Contact or the designated representative.

7.0 Contractor's Duties

Design and Engineering: Contractor shall provide design, engineering and consulting services for the Work including preparation of Plans and Specifications, soliciting proposals for various components of the Work and providing management and oversight of the Work. CONTRACTOR shall work with CLIENT to identify subcontractors to include in the budgeting and pricing of the project. CONTRACTOR shall also work with CLIENT to review and analyze subcontractor quotes and jointly determine which subcontractors to include in the execution of the project.

Equipment and Materials: CONTRACTOR shall provide all materials, and equipment necessary to perform the Work. CONTRACTOR shall provide CLIENT with specifications, drawings, cut sheets, and other information required by CLIENT regarding the materials and equipment for review, acceptance and approval pursuant to Section 8.0 Acceptance, prior to implementation of the Work.

Installation Services: CONTRACTOR shall enter into all subcontracts necessary for the completion of the Work. CONTRACTOR shall provide CLIENT with specifications, drawings, and other information required by CLIENT regarding installation, replacement and refurbishment for review, acceptance, and approval pursuant to Section 8.0 Acceptance, prior to implementation of the Work. CONTRACTOR shall ensure that the installation, replacement, and refurbishment services are performed with minimum interruption to the normal business of the Facility. CONTRACTOR and subcontractors shall perform all Work under this Agreement according to the schedule set forth in each subcontract as generally described in Exhibit E.

8.0 Acceptance

Authority: The CLIENT Contact shall have final authority to review and approve specifications, drawings, and related documents concerning the Work prior to the solicitation of proposals or quotes, to review and approve subcontractors, to approve and accept all equipment, materials, and services, and to approve CONTRACTOR's invoices for payment. No approval by the CLIENT will act as a waiver of the CLIENT's rights hereunder or relieve CONTRACTOR of its obligations hereunder.

Construction Documents: During the construction period, CONTRACTOR shall keep copies of Construction Documents at the Facility for review by CLIENT at all reasonable hours and shall provide a complete set of as-built drawings to the CLIENT upon completion of each portion of the Work.

Satisfactory Performance: Within fifteen (15) Working Days of receipt of an invoice, CLIENT shall have the right to review the Work performed by CONTRACTOR on the Facility, for purposes of determining whether the Work is deemed satisfactory. Where CLIENT finds the Work performed by CONTRACTOR unsatisfactory, the CLIENT Contact shall provide CONTRACTOR with a written notice of unsatisfactory Work within fifteen (15) Working Days of its receipt of CONTRACTOR's invoice. CONTRACTOR shall cure the Work within ten (10) Working Days after receiving the CLIENT Contact's notice of unsatisfactory Work. When the invoiced Work has been completed to the satisfaction of the CLIENT Contact, the CLIENT Contact shall approve the invoice for payment.

Work Substantial Completion: Upon receipt of the written Notice of Substantial Completion documents by CONTRACTOR, the CLIENT Contact shall review all Work and all project completion documents within fifteen (15) Working Days. Upon approval of all Work and project completion documents, the CLIENT Contact shall send the dated Certificate of Substantial Completion to all Parties. A punch list shall be created by the Parties prior to issuance of Acceptance of Substantial Completion.

Work Final Completion: Upon receipt of the written Notice of Work Completion and project completion documents by CONTRACTOR (as described in Exhibit C), the CLIENT Contact shall review all Work and all project completion documents within fifteen (15) Working Days. Upon approval of all Work and project completion documents, the CLIENT Contact shall send the dated Certificate of Final Completion (Exhibit C) to all Parties. In the event the CLIENT reasonably determines that additional work is required to complete the project, it shall inform CONTRACTOR, and CONTRACTOR shall perform the additional work in accordance with a mutually agreed upon prompt schedule.

9.0 Change and Extra Work

Amendments of Agreement and Exhibits: The Parties expressly recognize, prior to the Completion Date, that there may be Change or Extra Work, either at the request of CLIENT, at the suggestion of CONTRACTOR, or as the result of an "act of God"; but in each event upon a mutual agreement that the proposed Change or Extra Work is proper. The Parties also recognize that the correct interpretation and administration of this Agreement depends in large part on the accuracy of all the exhibits attached hereto, which may need to be amended according to the type of Change or Extra Work agreed to by the Parties, and therefore the Parties agree to amend this Agreement or the exhibits hereto as appropriate to reflect the agreed upon Change or Extra Work. Any "Change" or "Extra Work" providing for price, energy savings guarantee, or project schedule adjustments or relief will be made in accordance with the procedures established herein.

CLIENT Initiated: CLIENT, at any time prior to the Completion Date, may propose "Changes" or "Extra Work" in writing. CONTRACTOR shall respond by submitting to CLIENT a proposed written proposal containing the initial cost, annual energy and annual utility, operational and maintenance cost savings, payback period, and a schedule for completion of the Change or Extra Work within ten (10) Working Days of CLIENT's request. CONTRACTOR shall perform the Changes or Extra Work only upon receipt of CLIENT's approval of the written proposal and after execution of an amendment to this Agreement when an amendment is required for performance of the Extra Work or Changes. Any Change or Extra Work performed by CONTRACTOR which is not approved by CLIENT in writing shall not be approved for payment and will not be included in the final scope of Work. The Parties will amend this Agreement accordingly.

CONTRACTOR Initiated: CONTRACTOR, at any time prior to the Completion Date, may propose "Changes" or "Extra Work" in writing. CONTRACTOR shall submit to CLIENT a written proposal that explains the circumstances for the change, initial cost, annual energy and utility, operational and maintenance cost savings, payback calculations and a schedule for completion of the Change or Extra Work. CLIENT may accept or reject the request within ten (10) Working Days. Failure by CLIENT to respond within ten (10) Working Days to the proposed change order shall be deemed a rejection by CLIENT. CONTRACTOR shall perform the Changes or Extra Work only upon approval by CLIENT and receipt of the written proposal, and after execution of an amendment

to this Agreement when an amendment is required for performance of the Extra Work or Changes. The Parties will amend this Agreement accordingly.

10.0 Compensation and Payment

Total Obligation: The CLIENT’s total obligation to CONTRACTOR under this Agreement, including compensation for goods, services, and reimbursable expenses, shall not exceed:

Design Work

Refrigeration System Design	\$217,391.00
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Construction Work

Refrigeration System Motor Control Center (long lead item)	TBD and added by Amendment
Refrigeration System	TBD and added by Amendment
Roof Replacement West Rink	TBD and added by Amendment
Solar on West Rink	TBD and added by Amendment

Invoices: CLIENT will pay CONTRACTOR after CONTRACTOR presents an invoice for the work completed and the CLIENT Contact accepts the invoice. Invoices must be submitted timely and according to the schedule contained in Exhibit B. Payment shall be made within 30 days following the receipt of a correct and proper invoice for the completed delivery of the product or services. If the invoice is incorrect, defective, or otherwise improper, CLIENT will notify CONTRACTOR within ten (10) Working Days of discovering the error.

Conditions of Payment: All services provided by CONTRACTOR under this Agreement must be performed to CLIENT’s satisfaction, in accordance with all applicable federal, state, and local laws, ordinances, rules, and regulations. CONTRACTOR will not receive payment for Work found by CLIENT to be unsatisfactory or performed in violation of federal, state, or local law.

Retention: 5% retention shall be held by CLIENT on the Work excluding design. Upon receipt of CONTRACTOR’s written notice that the Work is ready for final inspection and acceptance, and upon receipt of the final pay application for a specific Facility Improvement Measure, the CLIENT will, within 10 working days, make such inspection, and when the CLIENT finds the work acceptable under the Contract Documents and the scope of work for the Facility Improvement Measure’s Final Completion, the CLIENT Contact shall approve final payment for the Finally Complete Facility Improvement Measure and release the retention associated with the Facility Improvement Measure according to the payment requirements outlined herein.

11.0 Contractor’s Energy Savings Guarantee

Guarantee Term: The term of CONTRACTOR’s Guarantee shall be the Term of the Agreement and shall survive any earlier cancellation or termination of this Agreement. CONTRACTOR’s guarantee will be terminated if the Technical Services Agreement – Performance Assurance Services are cancelled by the CLIENT or if the time after Substantial Completion exceeds the payback indicated on the summary table total line in Exhibit A.

Total Guaranteed Savings: CONTRACTOR guarantees that the amount to be saved in energy and operation costs over the term of this Agreement shall be at least the “Total Guaranteed Savings” as set forth in Exhibit D which Total Guaranteed Savings are sufficient to meet or exceed the total cost of the energy conservation measures.

Annual Meetings: CLIENT and CONTRACTOR shall meet at least once annually for the purpose of, reviewing utility loads, changes in utility rates, operating hours and maintenance issues of equipment installed under this Agreement, for the previous Guarantee Year. At each annual meeting, CLIENT will provide CONTRACTOR with the applicable utility rates for the previous Guarantee Year. The Parties agree to hold the Annual Meeting within thirty (30) Working Days after the final month of each Guarantee Year. In the event of chronic or material equipment failure, CLIENT and CONTRACTOR will meet within a reasonable time after a request by the CLIENT to discuss a timely cure for the failure.

Guarantee Reconciliation: While within the guaranteed term, CONTRACTOR shall perform a guarantee reconciliation at the end of each Guarantee Year and submit a guarantee reconciliation report with updated Exhibits D to the CLIENT Contact within forty-five (45) Working Days of each Guarantee Year anniversary, and at the Guarantee Term End Date. CONTRACTOR shall calculate the Total Actual Savings as set forth in Exhibit D for the immediately previous Guarantee Year. In the event that the Total Actual Savings realized by CLIENT are less than the Guaranteed Savings, CONTRACTOR shall remit an amount equal to such deficiency to CLIENT within forty-five (45) Working Days of the guaranteed reconciliation submittal.

Survival: This Section 11.0 survives the termination of the Agreement and terminates only upon presentation of the final Annual Report of the Technical Services Agreement by CONTRACTOR and final payment of any savings deficiencies if required. CONTRACTOR's guarantee will be terminated if the Technical Services Agreement is cancelled by the CLIENT.

12.0 Client Responsibilities

CLIENT agrees to perform the following tasks in addition to those set out in Exhibit G of this Agreement:

Daily Operations: After acceptance by CLIENT of the Work performed by CONTRACTOR, CLIENT shall be responsible for all routine maintenance as set out in the original equipment manufacturer's documentation provided by CONTRACTOR to the CLIENT. Exhibit D contains a set of operating parameters that need to be maintained to obtain the Utility Cost Savings and the Operation and Maintenance Cost Savings outlined in Exhibit D.

Automatic Functions: To protect public health and safety, or CLIENT property, CLIENT may manually override any automatic function provided by CONTRACTOR's equipment furnished hereunder or make changes in operating procedures specified. In that event, the Parties shall make the necessary changes to the established baseline.

CLIENT shall grant CONTRACTOR reasonable access to the Facility to perform CONTRACTOR's Verification Responsibilities.

Energy Management System: CLIENT shall provide standard energy management system reports to CONTRACTOR for Guarantee Reconciliation when requested by CONTRACTOR.

13.0 Insurance

CONTRACTOR shall maintain in full force and effect, at its expense, property, casualty, worker's compensation and liability insurance as specifically described in Exhibit I. The insurance is for the benefit of the Facility. In the

event of loss or damage to the property under this Agreement, loss payment will be made in favor of the Facility. Insurance will not be maintained after achievement of Final Completion for all Facility Improvement Measures.

14.0 Indemnification

CONTRACTOR shall defend, indemnify and save and hold harmless CLIENT, its elected officials, appointed officials, agents and employees, from and against any and all claims, demands, or causes of action, and damages, including all attorney’s fees incurred by CLIENT, arising out of the performance of this Agreement by CONTRACTOR or CONTRACTOR’s agent, employees, or subcontractors, except for gross negligence by CLIENT. This section shall not be construed to bar any legal remedies CONTRACTOR may have for CLIENT’s failure to fulfill its obligations pursuant to this Agreement.

15.0 Performance and Payment Bonds

CONTRACTOR shall furnish all performance and payment bonds (the “Bonds”), each in amounts equal to the Construction Cost. The Bonds shall cover completion of the physical work per the approved design and shall not cover any design obligation or any guarantee or warranty of efficiency or system performance. The Bonds shall not cover any obligation of the contractor to ensure that the Work as constructed will result in any particular level of energy savings. Any suit on the Bonds must be brought within the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit. Payment Bond is intended for the use and benefit of all persons furnishing labor and materials who are engaged by CONTRACTOR. Performance Bond is intended for the use and benefit of the CLIENT to complete the Work as described in Exhibit A. These bonds shall be released within thirty (30) Working Days of the Completion Date. The surety for each such bond shall be an insurance company or corporate surety licensed to do business in the state of Minnesota. The bonds shall contain a provision requiring reasonable advance notice to CLIENT in the event that CONTRACTOR is in default of any obligation in relation to the bond.

16.0 Events of Default

Default by CLIENT. Each of the following events or conditions shall constitute an “Event of Default” by CLIENT:

- A. Failure to make payments in accordance with this Agreement.
- B. Any other material failure to perform or comply with the terms and conditions of this Agreement, including breach of any covenant or duty contained herein, provided that such failure continues for thirty (30) Working Days after written notice to CLIENT demanding that such failure to perform be cured or, if cure cannot be effected in such thirty (30) Working Days, without commencement of a cure and diligent subsequent completion thereof. In the event the default is cured within said periods, this Agreement shall remain in full force and effect

Default by CONTRACTOR: Each of the following events or conditions shall constitute an “Event of Default” by CONTRACTOR:

- A. The installation of the materials and equipment is not completed in a timely or satisfactory manner, according to the terms of this Agreement, provided however that CONTRACTOR shall have thirty (30)

Working Days from receipt of written notice that it is in default to cure said default. In the event the default is cured; this Agreement shall remain in full force and effect.

- B. Any representation or warranty furnished by CONTRACTOR in this Agreement, which is false or misleading in any material respect when made.
- C. Any other material failure by CONTRACTOR to perform or comply with the terms and conditions of this Agreement, including breach of any covenant or duty contained herein, provided that such failure continues for thirty (30) Working Days after written notice to CONTRACTOR demanding that such failure to perform be cured, or if cure cannot be effected in such thirty (30) Working Days, without commencement of a cure and diligent subsequent completion thereof. In the event the default is cured within said period, this Agreement shall remain in full force and effect.

17.0 Remedies Upon Default

Default by CLIENT. Upon the occurrence of an Event of Default by CLIENT, CONTRACTOR may elect to enforce one or more of the following remedies:

- A. Terminate this Agreement by delivery of a notice declaring termination, whereupon CONTRACTOR may enter the premises on which the Work is being performed and remove CONTRACTOR's Property;
- B. Seek damages in the amount of all payments, then or thereafter owing from CLIENT to CONTRACTOR pursuant to this Agreement, together with all costs and expenses reasonably incurred in exercise of its remedies (including reasonable attorneys' fees and court costs) in seeking and enforcing any or all of the remedies provided in this section;
- C. Seek specific performance of the terms and conditions of this Agreement to the extent permitted by law, including without limitation injunctive relief where appropriate; and/or
- D. Suspend further provision of the Work. If delivery of the Work has been suspended as a result of CLIENT's default and CLIENT and CONTRACTOR agree to arrange for the reinstatement of the delivery of the Work, CLIENT shall pay to CONTRACTOR a performance reinstatement fee in such amount or amounts, and payable on such date or dates as shall be reasonably acceptable to CONTRACTOR, as will reimburse CONTRACTOR for its actual costs (including overhead) to be incurred in reinstating delivery of the Work; provided, however, that nothing herein shall obligate CONTRACTOR to reinstate the delivery of Work.

Default by CONTRACTOR: Upon the occurrence of an Event of Default by CONTRACTOR, CLIENT shall have the right to:

- A. Terminate the Agreement by delivering a notice declaring termination (permitting CONTRACTOR to enter the Premises on which the work is being performed, and remove all CONTRACTOR's Property; and/or
- B. Seek specific performance of the terms and conditions of this Agreement to the extent permitted by law, including without limitation injunctive relief where appropriate;
- C. Seek damages in the amount of all payments, then or thereafter owing from CONTRACTOR to CLIENT pursuant to this Agreement, together with all costs and expenses reasonably incurred in exercise of its remedies (including reasonable attorneys' fees and court costs) in seeking and enforcing any or all of the remedies provided in this section;

18.0 Termination

For Uncured Breach: Either Party may terminate this Agreement thirty (30) days after written notice to the other Party of any material breach of this Agreement by such Party that has not been cured within such thirty (30) day period (an “Event of Default”). The notice must set forth the nature of the breach with reasonable specificity. Notwithstanding the foregoing, CONTRACTOR shall have the right to terminate this Agreement if CLIENT fails to pay any amounts due hereunder within five (5) working days after written notice.

Bankruptcy: In addition to Section 18.0 and any other rights it may have at law or in equity, either Party may terminate and without liability suspend all activity related to this Agreement immediately if the other Party is adjudicated a bankrupt, ceases to do business as a going concern, makes an assignment for the benefit of creditors, permits the appointment of a receiver, or otherwise avails itself of or becomes subject to any bankruptcy or insolvency statute.

19.0 General Provisions

Governing Law, Jurisdiction and Venue: This Agreement is governed by the laws of the State of Minnesota. The venue for any proceedings is agreed to be in CLIENT’s County, State of Minnesota, and CONTRACTOR consents to such jurisdiction. CONTRACTOR shall incorporate the requirements of this Section in its agreements with subcontractors, consultants, and independent contractors in connection with this Agreement.

Conditions Beyond Control of Parties: Neither Party will be responsible for any failure to comply with, or for any delay in performance of, the terms of this Agreement where the failure or delay is due to acts of God or the public enemy, war, riot, embargo, new tariffs, fire, explosion, sabotage, flood, strikes, labor disputes, default of subcontractors, accident; or, without limiting the foregoing, any circumstances of like or different character beyond its control (collectively, “Force Majeure Event”). If either Party is unable to perform under this Agreement for more than sixty (60) due to a Force Majeure Event, then the other Party may terminate this Agreement upon fifteen (15) days’ written notice.

Notices and Changes of Address: All notices to be given by either Party to the other shall be in writing and must be either delivered in person or mailed by registered or certified mail, return receipt requested, addressed as follows:

To CONTRACTOR:

Apex Facility Solutions, LLC
 3495 Northdale Blvd., Suite 230
 Coon Rapids, MN 55448
 Attn: **Mark Rasmussen**

To the CLIENT:

City of Hastings
 101 4th Street East
 Hastings, MN 55033
 Attn: Dan Wietecha, City Administrator

Or such other addresses as either Party may hereinafter designate by a written notice to the other.

Successors and Assigns: CONTRACTOR binds itself jointly and severally, his successors, executors, and administrators to CLIENT in respect to all covenants of this Agreement. CONTRACTOR shall not assign or transfer any part of its interest in this Agreement.

Permits: CONTRACTOR shall be responsible for obtaining all governmental permits, consents, and authorizations as may be required to perform its obligations hereunder unless otherwise specifically excluded by this Agreement.

Sewer Access Charges (SAC)/Water Access Charges (WAC): Client is responsible for any SAC or WAC changes required as a result of the Work.

Compliance by CONTRACTOR's Subcontractors and Consultants: CONTRACTOR shall provide and require in all of its contracts or subcontracts with other Parties who provide services in regard to performance of this Agreement that such subcontractors, consultants, or other Parties contracting with CONTRACTOR with regard to performance of this Agreement shall comply with those requirements of State law specified herein and otherwise required of persons performing work for the CLIENT of the type contemplated under this Agreement.

No Waiver: The failure of CONTRACTOR or CLIENT to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either Party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of CONTRACTOR or CLIENT. The waiver of any default by either Party shall not be deemed a continuing waiver but shall apply only to the instance to which such a waiver is directed.

Complete Agreement: This Agreement, when executed, together with all exhibits attached hereto as provided for by this Agreement, shall constitute the entire agreement between both Parties and this Agreement may not be amended, modified or terminated except in writing signed by the Parties hereto. The terms and conditions contained in this Agreement shall govern and shall take precedence over any different or additional terms and conditions which CONTRACTOR may have included in any documents attached to or accompanying this Agreement. Any handwritten changes on the face of this document shall be ignored and have no legal effect unless initialed by both Parties.

Severability: In the event that any clause or provision of this Agreement or any part thereof shall be declared invalid, void or unenforceable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Agreement unless the result would be manifestly inequitable or unconscionable.

Recitals: The background recitals set forth at the beginning of this Agreement are expressly incorporated into and made an integral part of the body of this Agreement and the terms of the Recitals fix the obligations of the Parties and are binding upon them in the same way and to the same extent as all other provisions of this Agreement.

AGREEMENT

IX-03

Headings: The headings of all provisions are for ease of reference only. The headings in no way define, limit or describe the scope, intent or obligations of the provisions of this Agreement and therefore are not to be used in construing this Agreement.

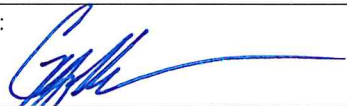
Amendments: Amendments to this Agreement shall be valid only if they are in writing and are signed by the same Parties, or their successors in office, who signed the original Agreement.

Limitations on Liability: In no event shall the Parties be liable to one another for any indirect, consequential, incidental, lost profits or like expectancy damages arising out of this Agreement.

Ownership of Works and Intellectual Property Rights: For the purposes of this paragraph, the term "Works" includes creative writings, research data and reports, writings, sound recordings, pictorial reproductions, drawings, film and video recordings, and other graphical representations, software, business methods, inventions, improvements, and discoveries, and works of any similar nature (whether or not eligible for copyright, trademark, patent or other proprietary rights), which are to be prepared for the CLIENT and delivered under this Agreement. It does not include any of CONTRACTOR's background intellectual property. Ownership of the Works and all copyrights, trademarks, patents and other proprietary rights in the Works shall be owned exclusively by CONTRACTOR. The CLIENT agrees that all copyrightable Works shall be considered a "work made for hire" and that the CONTRACTOR is the author of and owns all rights in and to the Works. Notwithstanding the foregoing, the CLIENT shall have a license to utilize the Works to maintain its equipment or to complete the Work in the event of a termination of CONTRACTOR for cause. The CLIENT shall not have a license to use the Works for any other project.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed intending to be bound thereby.

CONTRACTOR:

By:	
Its:	CEO / President

[Client signature page to follow.]

AGREEMENT

IX-03

CLIENT:	
By:	By:
Mary Fasbender, Mayor	Kelly Murtaugh, City Clerk

Attached Exhibits: