

AGREEMENT FOR REPLACEMENT OF PLAYGROUND SURFACE

THIS AGREEMENT (“Agreement”) is made and entered into this 3rd day of April, 2012, by and between The City of Maricopa, Arizona, an Arizona municipal corporation (“City”), and FlexGround, LLC, an Arizona limited liability company, (“Contractor”), for the replacement of a playground surface at Pacana Park.

WHEREAS, City desires to retain a contractor to furnish Work and to make payment for the same in accordance with the terms and conditions set forth in this Agreement, including all attachments and addenda, which are incorporated herein by mutual agreement of the parties; and

WHEREAS, in procuring these services, City has complied with the open market procedures set forth in Section 3-215 of the City of Maricopa’s City Code.

NOW, THEREFORE, City agrees to retain and does hereby retain Contractor and Contractor agrees to provide the Work required according to the terms and conditions and for the consideration hereinafter set forth:

1. CONTRACTOR’S WORK: The term “Work” means the replacement of playground surface at Pacana Park as required by this Agreement, and includes all other labor, materials, equipment and services provided by the Contractor to fulfill the Contractor’s obligations. Contractor agrees to perform the following Work in connection with the Project:

See attached Exhibit A, which is incorporated into this Agreement.

2. COMPENSATION: In accordance with the terms and conditions of this Agreement, City shall compensate Contractor for its Work as follows:

See attachment Exhibit B, which is incorporated into this Agreement.

In no event, shall the total compensation under this contract exceed Seventy Seven Thousand Five Hundred Nine and 00/100 Dollars (\$77,509.00), which includes a price of Sixty Seven Thousand Three Hundred Ninety Eight and 59/100 Dollars (\$67,398.59) and a contingency of Ten Thousand One Hundred Ten and 41/100 Dollars (\$10,110.41). Exhausting the total amount payable for activities described in Section 1 above shall not relieve Contractor of its obligations to perform such Work. Should City request additional Work beyond that specified in Section 1, Contractor’s Work, Contractor shall charge, and City shall pay, a rate as mutually agreed upon in writing prior to Contractor performing the additional Work.

Costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible thereof.

3. CONTRACTOR BILLING: Contractor shall bill City on a time and expense basis in a total amount not to exceed Section 2 above. City shall pay such billings within thirty (30) days of the date of receipt of the Contractor's invoice.

4. TAXES: The Contractor shall pay sales, consumer, use and similar taxes that are legally required when the Agreement is executed.

5. SUPERVISION AND CONSTRUCTION PROCEDURES: The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work.

6. SAFETY PRECAUTIONS AND PROGRAMS: The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs, including all those required by law in connection with performance of the Agreement. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor, or by anyone for whose acts the Contractor may be liable.

7. LABOR AND MATERIALS: Unless otherwise provided in this Agreement, the Contractor shall provide and pay for labor, materials, equipment, tools, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work. The Contractor shall deliver, handle, store and install materials in accordance with manufacturers' instructions.

8. PERMITS FEES AND NOTICES: The Contractor shall obtain and pay for all permits and fees, licenses, and inspections necessary for proper execution and completion of the Work. The Contractor shall comply with and give notices required by agencies having jurisdiction over the Work. If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without notice of the City, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs. The Contractor shall promptly notify the City in writing of any known inconsistencies in this Agreement with such governmental laws, rules and regulations.

9. CONTRACTOR'S STANDARD OF PERFORMANCE: While performing the Work, Contractor shall exercise the reasonable care and skill customarily exercised by reputable members of Contractor's profession practicing in the Phoenix Metropolitan Area, and shall use reasonable diligence and best judgment while exercising its skill and expertise. Contractor shall be responsible for all errors and omissions Contractor commits in the performance of this Agreement that are a breach of this standard.

10. WARRANTY: The Contractor warrants to the City that: (1) materials and equipment furnished under this Agreement will be new and of good quality unless otherwise required or permitted by this Agreement, (2) the Work will be free from defects not inherent in the quality required or permitted; and (3) the Work will conform to the requirements of this Agreement.

11. NOTICES: All notices to the other party required under this Agreement shall be in writing and sent by first class certified mail, postage prepaid, return receipt requested, addressed to the following personnel:

If to City:

City of Maricopa
City Manager
P.O. Box 610
Maricopa, AZ 85139

If to Contractor:

FlexGround, LLC
Attn: William Stafford
1950 W. Rose Garden Ln., #100
Phoenix, AZ 85027

12. **TERMINATION BY CONTRACTOR:** If the City fails to make payment when due or substantially breaches any other obligation of this Agreement, following ten (10) days' written notice to the City, the Contractor may terminate the Agreement and recover from the City payment for Work performed, including reasonable overhead and profit. In the event of such termination, Contractor shall deliver to City all work in any state of completion at the date of effective termination.

13. **TERMINATION BY CITY:** The City may terminate this Agreement if the Contractor (i) persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials; (ii) fails to make payment to subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the subcontractors; (iii) persistently disregard laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; (iv) is otherwise guilty of substantial breach of a provision of the Agreement; or (v) for any reason upon thirty (30) days written notice. In the event of such termination, Contractor shall deliver to City all work in any state of completion at the date of effective termination.

When any of the above reasons exist, the City may without prejudice to any other rights or remedies and after giving the Contractor ten (10) days written notice, terminate this Agreement with the Contractor and may (i) take possession of the site and of all materials thereon owned by the Contractor; and (ii) finish the Work by whatever reasonable method the City may deem expedient.

When the City terminates the Agreement for one of the reasons stated above, the Contractor shall not be entitled to receive further payment until the Work is finished. If the unpaid balance of the Agreement exceeds costs of finishing the Work, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the City. This obligation for payment shall survive termination of the Agreement.

14. **SUBCONTRACTORS:** Contractor shall, within ten (10) days after the execution of this Agreement and before awarding any subcontract, furnish City with a list of proposed subcontractors, if any, and shall not employ any that City may object to for any reason. Contractor agrees that it is as fully responsible to City for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by them as it is for the acts and omissions of persons directly employed by

Contractor. Nothing contained in the Agreement shall create any contractual relations between any subcontractor and City.

15. RECORDS: Records of Contractor's labor, payroll, and other costs pertaining to this Agreement shall be kept on a generally recognized accounting basis and made available to City for inspection on request. Contractor shall maintain records for a period of at least two (2) years after termination of this Agreement, and shall make such records available during that retention period for examination or audit by City personnel during regular business hours.

16. INSURANCE:

16.1 General.

a. Insurer Qualifications. Without limiting any obligations or liabilities of the Contractor, the Contractor shall purchase and maintain, at its own expense, hereinafter stipulated minimum insurance with insurance companies duly licensed by the State of Arizona with an AM Best, Inc. rating of A- or above with policies and forms satisfactory to the City. Failure to maintain insurance as specified herein may result in termination of this Agreement at the City's option.

b. No Representation of Coverage Adequacy. By requiring insurance herein, the City does not represent that coverage and limits will be adequate to protect the Contractor. The City reserves the right to review any and all of the insurance policies and/or endorsements cited in this Agreement but have no obligation to do so. Failure to demand such evidence of full compliance with the insurance requirements set forth in this Agreement or failure to identify any insurance deficiency shall not relieve the Contractor from, nor be construed or deemed a waiver of, its obligation to maintain the required insurance at all times during the performance of this Agreement.

c. Additional Insured. All insurance coverage and self-insured retention or deductible portions, except Workers' Compensation insurance and Professional Liability insurance, if applicable, shall name, to the fullest extent permitted by law for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, directors, officials and employees as Additional Insured as specified under the respective coverage sections of this Agreement.

d. Coverage Term. All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement are satisfactorily performed, completed and formally accepted by the City, unless specified otherwise in this Agreement.

e. Primary Insurance. The Contractor's insurance shall be primary insurance with respect to performance of this Agreement and in the protection of the City as an Additional Insured.

f. Claims Made. In the event any insurance policies required by this Agreement are written on a "claims made" basis, coverage shall extend, either by keeping coverage in force or purchasing an extended reporting option, for three (3) years past completion and acceptance of

the services. Such continuing coverage shall be evidenced by submission of annual Certificates of Insurance citing applicable coverage is in force and contains the provisions as required herein for the three-year period.

g. Waiver. All policies, except for Professional Liability, including Workers' Compensation insurance, shall contain a waiver of rights of recovery (subrogation) against the City, its agents, representatives, officials, officers and employees for any claims arising out of the work or services of the Contractor. The Contractor shall arrange to have such subrogation waivers incorporated into each policy via formal written endorsement thereto.

h. Policy Deductibles and/or Self-Insured Retentions. The policies set forth in these requirements may provide coverage that contains deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to the City. The Contractor shall be solely responsible for any such deductible or self-insured retention amount.

i. Use of Subcontractors. If any work under this Agreement is subcontracted in any way, the Contractor shall execute written agreement with the Subcontractor containing the indemnification provisions and insurance requirements (unless waived by City in City's sole discretion) set forth herein protecting the City and the Contractor. The Contractor shall be responsible for executing the agreement with the Subcontractor and obtaining certificates of insurance verifying the insurance requirements.

j. Evidence of Insurance. Prior to commencing any work or services under this Agreement, the Contractor shall furnish the City with certificate(s) of insurance, or formal endorsements as required by this Agreement, issued by Contractor's insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. If a certificate of insurance is submitted as verification of coverage, the City shall reasonably rely upon the certificate of insurance as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. If any of the above-cited policies expire during the life of this Agreement, it shall be the Contractor's responsibility to forward renewal certificates within ten (10) days after the renewal date containing all the aforementioned insurance provisions. Certificates of insurance shall specifically include the following provisions:

(1) The City, its agents, representatives, officers, directors, officials and employees are Additional Insureds as follows:

- (a) Commercial General Liability - Under Insurance Services Office, Inc., ("ISO") Form CG 20 10 03 97 or equivalent.
- (b) Auto Liability - Under ISO Form CA 2048 or equivalent.
- (c) Excess Liability - Follow Form to underlying insurance.

(2) The Contractor's insurance shall be primary insurance as respects performance of the Agreement.

(3) All policies, including Workers' Compensation, waive rights of recovery (subrogation) against the City, its agents, representatives, officers, officials and employees for any claims arising out of work or services performed by the Contractor under this Agreement.

(4) A 30-day advance notice cancellation provision. If ACORD certificate of insurance form is used, the phrases in the cancellation provision "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" shall be deleted. Certificate forms other than ACORD form shall have similar restrictive language deleted.

16.2 Required Insurance Coverage.

a. Commercial General Liability. The Contractor shall maintain "occurrence" form Commercial General Liability insurance with an unimpaired limit of not less than \$2,000,000 for each occurrence, \$2,000,000 Products and Completed Operations Annual Aggregate and a \$4,000,000 General Aggregate Limit. The policy shall cover liability arising from premises, operations, independent contractors, products-completed operations, bodily injury or death, personal injury, advertising injury and property damage. Coverage under the policy will be at least as broad as ISO policy fous CG 00 010 93 or equivalent thereof, including but not limited to, separation of insured's clause. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, officials, volunteers and employees shall be cited as an Additional Insured under ISO, Commercial General Liability Additional Insured Endorsement form CG 20 10 03 97, or equivalent, which shall read "Who is an Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you." If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

b. Vehicle Liability. The Contractor shall maintain Business Automobile Liability insurance with a limit of \$1,000,000 each occurrence on the Contractor's owned, hired and non-owned vehicles assigned to or used in the performance of the Contractor's work or services under this Agreement. Coverage will be at least as broad as ISO coverage code "1" "any auto" policy form CA 00 01 12 93 or equivalent thereof. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, directors, officials and employees shall be cited as an Additional Insured under ISO Business Auto policy Designated Insured Endorsement form CA 20 48 or equivalent. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

c. Professional Liability (Errors and Omissions Liability). Contractor shall maintain Professional Liability insurance covering negligent errors and omissions arising out of the

Services performed by the Contractor, or anyone employed by the Contractor, or anyone for whose negligent acts, mistakes, errors and omissions the Contractor is legally liable, with an unimpaired liability insurance limit of \$2,000,000 each claim and \$2,000,000 all claims. In the event the Professional Liability insurance policy is written on a "claims made" basis, Contractor warrants that any retroactive date under the policy shall precede the effective date of this Agreement; and that either continuous coverage will be maintained or an extended discovery period will be exercised for a period of three (3) years beginning at the time work under this Agreement is completed.

d. Workers' Compensation Insurance. Contractor shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of Contractor's employees engaged in the performance of work or services under this Agreement and shall also maintain Employers Liability Insurance of not less than \$500,000 for each accident, \$500,000 disease for each employee and \$1,000,000 disease policy limit.

16.3 Cancellation and Expiration Notice. Insurance required herein shall not expire, be canceled, or materially changed without thirty (30) days prior written notice to the City.

17. RIGHT OF CITY TO CONTRACT WITH OTHERS: Nothing in this Agreement shall imply City is obligated to obtain the services described herein with only this particular Contractor.

18. UNCONTROLLABLE FORCES: City and Contractor shall exert all efforts to perform their respective responsibilities under this Agreement. However, neither party shall hold the other party responsible for inability to render timely performance if such inability is a direct result of a force beyond its control, including but not limited to the following: strikes, lockouts, embargoes, failure of carriers, inability to obtain transportation facilities, acts of God or the public enemy, or other events beyond the control of the other or the other's employees and agents.

19. INDEMNIFICATION: Contractor shall defend, indemnify, and hold City, its officers and employees harmless from any and all loss, damage, claim for damage, liability, expense, or cost, including attorneys' fees, which arise out of, or is in any way connected with the performance of work under this Agreement by Contractor, or any of Contractor's employees, agents or subconsultants, and from all claims by Contractor's employees, subconsultants and agents for compensation for services rendered to Contractor in the performance of this Agreement, notwithstanding that City may have benefited from their services. This indemnification provision shall apply to any and all acts or omissions, willful misconduct or negligent conduct, whether active or passive, on the part of Contractor or Contractor's employees, subconsultants or agents. This section shall survive the expiration or early termination of the Agreement.

20. WAIVER OF TERMS AND CONDITIONS: The failure of City or Contractor to insist in any one or more instances on performance of any of the terms or conditions of this Agreement or to exercise any right or privilege contained herein shall not be considered as thereafter waiving such terms, conditions, rights or privileges, and they shall remain in full force and effect.

21. INDEPENDENT CONTRACTOR: Contractor shall at all times during Contractor's performance of the services retain Contractor's status as independent contractor. Contractor's employees shall under no circumstances be considered or held to be employees or agents of City, and City shall have no obligation to pay or withhold state or federal taxes or provide workers' compensation or unemployment insurance for or on behalf of them or Contractor.

22. ARBITRATION. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree to attempt to settle the dispute by nonbinding arbitration before commencement of litigation. The arbitration shall be held under the rules of the American Arbitration Association. The matter in dispute shall be submitted to an arbitrator mutually selected by Contractor and the City. In the event that the parties cannot agree upon the selection of an arbitrator within seven (7) days, then within three (3) days thereafter, the City and Contractor shall request the presiding judge of the Superior Court in and for the County of Pinal, State of Arizona, to appoint an independent arbitrator. The cost of any such arbitration shall be divided equally between the City and Contractor. The results of the arbitration shall be nonbinding on the parties, and any party shall be free to initiate litigation subsequent to the final decision of the arbitrator.

23. GOVERNING LAW AND VENUE: The terms and conditions of this Agreement shall be governed by and interpreted in accordance with the laws of the State of Arizona. Any action at law or in equity brought by either party for the purpose of enforcing a right or rights provided for in this Agreement shall be tried in a court of competent jurisdiction in Pinal County, State of Arizona. The parties hereby waive all provisions of law providing for a change of venue in such proceeding to any other county. In the event either party shall bring suit to enforce any term of this Agreement or to recover any damages for and on account of the breach of any term or condition in this Agreement, it is mutually agreed that the prevailing party in such action shall recover all costs including: all litigation and appeal expenses, collection expenses, reasonable attorneys' fees, necessary witness fees and court costs to be determined by the court in such action.

24. LICENSE: Contractor represents and warrants that any license necessary to perform the work under this Agreement is current and valid. Contractor understands that the activity described herein constitutes "doing business in the "City of Maricopa" and Contractor agrees to obtain a business tax license pursuant to Article 8-1 of the City of Maricopa's City Code and keep such license current during the term of this Agreement. Any activity by subconsultants within the corporate city limits, will invoke the same business tax regulations on any subconsultants, and Contractor ensures its subconsultants will obtain any required business tax license.

25. NONASSIGNMENT: Neither party to this Agreement shall assign its interest in the Agreement, either in whole or in part. Contractor shall not assign any monies due or to become due to it hereunder without the prior written consent of City.

26. ENTIRE AGREEMENT: This Agreement and any attachments represent the entire agreement between City and Contractor and supersede all prior negotiations, representations or agreements, either express or implied, written or oral. It is mutually understood and agreed that no

alteration or variation of the terms and conditions of this Agreement shall be valid unless made in writing and signed by the parties hereto. Written and signed amendments shall automatically become part of the Agreement, and shall supersede any inconsistent provision therein; provided, however, that any apparent inconsistency shall be resolved, if possible, by construing the provisions as mutually complementary and supplementary.

27. SEVERABILITY: If any part, term or provision of this Agreement shall be held illegal, unenforceable or in conflict with any law, the validity of the remaining portions and provisions hereof shall not be affected.

28. CONFLICTS OF INTEREST: The provisions of A.R.S. §38-511 relating to cancellation of contracts due to conflicts of interest shall apply to this contract.

29. AMERICANS WITH DISABILITIES ACT: This agreement is subject to all applicable provisions of the Americans with Disabilities Act (Public Law 101-336, 42 U.S.C. 12101-12213) and all applicable federal regulations under the Act, including 28 CFF Parts 35 and 36. (Non-Discrimination: The Contractor shall comply with Executive Order 99-4, which mandates that all persons, regardless of race, color, religion, sex, age, national origin or political affiliation shall have equal access to employment opportunities, and all other applicable state and federal employment laws, rules and regulations, including the Americans With Disabilities Act. The Contractor shall take affirmative action to ensure that applicants for employment and employees are not discriminated against due to race, creed, color, religion, sex, age, national origin or political affiliation or disability.)

30. FEDERAL REGULATIONS: Non-Federal entities are prohibited from contracting with or making sub-awards under covered transactions to parties that are suspended or debarred or whose principals are suspended or debarred. Contractor acknowledges, by signature to this Agreement, that: Contractor is not currently suspended or debarred from contracting with the federal government or any of its agencies or the State of Arizona or any of its political subdivisions; Contractor's principals are not currently suspended or debarred from contracting with the federal government or any of its agencies or the State of Arizona or any of its political subdivisions.

31. UNDOCUMENTED WORKERS: Contractor understands and acknowledges the applicability to it of the Immigration Reform and Control Act of 1986. Under the provisions of A.R.S. §41-4401, Contractor hereby warrants to the City that the Contractor and each of its subcontractors ("Subcontractor") will comply with, and are contractually obligated to comply with, all Federal Immigration laws and regulations that relate to their employees and A.R.S. §23-214(A) (hereinafter "Immigration Warranty"). A breach of the Immigration Warranty shall constitute a material breach of this Agreement and shall subject the Contractor to penalties up to and including termination of this Agreement at the sole discretion of the City. The City retains the legal right to inspect the papers of any Contractor or Subcontractor employee who works on this Agreement to ensure that the Contractor or Subcontractor is complying with the Immigration Warranty. Contractor agrees to assist the City in regard to any such inspections. The City may, at its sole discretion, conduct random verification of the employment records of the Contractor and any of subcontractors to ensure compliance with Immigration

Warranty. Contractor agrees to assist the City in regard to any random verifications performed.

Neither the Contractor nor any Subcontractor shall be deemed to have materially breached the Immigration Warranty if they establish that it has complied with the employment verification provisions prescribed by sections 274A and 274B of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. §23-214, Subsection A.

The provisions of this paragraph must be included in any contract the Contractor enters into with any and all of its subcontractors who provide services under this Agreement or any subcontract. "Services" are defined as furnishing labor, time or effort in the State of Arizona by a contractor or subcontractor.

32. **SCRUTINIZED BUSINESS OPERATIONS:** In signing this Agreement, Contractor certifies pursuant to ARS §35-391 that they do not have scrutinized business operations in the Sudan and pursuant to ARS §35-393 that they do not have scrutinized business operations in Iran.

33. **NO KICK-BACK CERTIFICATION:** Contractor warrants that no person has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee; and that no member of the City Council or any employee of the City has an interest, financially or otherwise, in the Contractor's firm. For breach or violation of this warranty, the City shall have the right to annul this Agreement without liability, or at its discretion to deduct from the compensation to be paid Contractor hereunder, the full amount of such commission, percentage, brokerage or contingent fee.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by their duly authorized representatives as of the day and year first above written.

CONTRACTOR:

FlexGround, LLC,
an Arizona limited liability company

By: _____
Title: _____

CITY OF MARICOPA
An Arizona municipal corporation

Anthony Smith
Mayor

ATTEST:

Vanessa Bueras
City Clerk

APPROVED AS TO FORM:

Denis M. Fitzgibbons
City Attorney

EXHIBIT A
REQUEST FOR PROPOSAL

EXHIBIT B
CONTRACTOR'S RESPONSE