

**UNDERGROUND FACILITIES LOCATING AND MARKING  
SERVICE AGREEMENT**

**THIS AGREEMENT** is made effective this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the CITY OF MANITOWOC, Wisconsin, a municipal corporation, with its principal offices located at 900 Quay Street, Manitowoc, Wisconsin 54220 (“CITY”) and EXCEL Underground, LLC, a Limited Liability Corporation with its principal offices located at 14 E. Strawberry Lane, Appleton, Wisconsin 54915 (“EXCEL”).

**WITNESSETH**

**WHEREAS**, CITY owns and operates underground facilities throughout the CITY OF MANITOWOC, Manitowoc County, Wisconsin; and

**WHEREAS**, the CITY has approximately 185 miles of sanitary sewer, 150 miles of storm sewer, 34 signalized intersections, and a fiber optic cable connecting the 8<sup>th</sup> Street Lift Bridge to the 10<sup>th</sup> Street Lift Bridge; and,

**WHEREAS**, CITY desires to contract for services to locate and mark areas which include, but are not limited to sanitary and storm sewer mains, laterals, traffic signals with underground wiring and fiber optic conduits and any other underground facilities owned and operated by CITY; and

**WHEREAS**, EXCEL has the expertise and provides underground locate and marking services; and

**WHEREAS**, CITY desires EXCEL to provide the labor, equipment and services for said locating and marking of the CITY’S underground facilities as is necessary.

**NOW, THEREFORE**, in consideration of the mutual covenants and representations of the parties hereinafter set forth, the parties’ recitations hereinabove set forth, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereby agree as follows:

## ARTICLE I

### SCOPE OF WORK

EXCEL agrees to perform locating and marking services for CITY of its underground facilities located within ANY AREA DESIGNATED BY CITY such services to be performed according to the City's Specifications for this service, as well as the terms and conditions contained herein. EXCEL shall obtain, at its sole expense, any and all permits and licenses as required by law and shall comply with the provisions of all applicable permits and licenses relative to the services to be performed hereunder.

Facilities to be located by EXCEL, include but are not limited to, sanitary and storm sewer mains and laterals, traffic signals with underground wiring and fiber optic conduit connecting the Eighth and Tenth Street Bridges. EXCEL agrees to receive transmittals directly from the One-Call Hotline (i.e. Diggers Hotline) for the dispatching of requests. No additional cost will be assessed against CITY for EXCEL agreeing to this receiving service.

EXCEL shall survey the locate area to determine if facilities have been installed more recently than the revision date of the maps. Map indications shall not be used as the sole reference for marking facility locations. If any sewer lines have a wire buried for locating purposes that line shall be used by EXCEL for location.

EXCEL shall locate sanitary and storm sewer laterals based on measurements from map(s) provided by CITY. If no measurements are given for sanitary laterals, it is understood by the parties that there is an assumption that the sanitary lateral is located in the same trench as water lateral. These maps show general location of facilities installed up through the end of the previous calendar year. CITY agrees to provide EXCEL with maps in digital and/or paper format and all updates necessary to locate its underground facilities. It is understood by

EXCEL that the CITY maps only display general location of facilities due to the scale of these maps.

EXCEL shall request assistance from CITY in determining locations of underground plant deemed un-locatable by EXCEL. EXCEL shall request clarification of CITY records deemed incorrect, inaccurate or misleading. "Un-locatable" for purposes of this Contract shall be defined as "underground facility which is not locatable by the normal business process used by EXCEL in tracing underground plant." EXCEL shall provide previously designated plant as un-locatable verbally or in writing to the CITY Engineering Office.

## **ARTICLE II**

### **DAMAGE INVESTIGATION**

CITY agrees to dispatch EXCEL to all facility damages as soon as possible. EXCEL shall meet the utility crew on site to verify the accuracy of the locate. EXCEL shall perform a complete investigation on all damages regardless of who is at fault. Reports, locator's statements, cleared requests, photographs and all other documentation discovered or created during or after the investigation shall be made available to the CITY within thirty (30) calendar days after an investigation in the event litigation is necessary to collect damage compensation from an excavator or any other time when requested by the CITY. EXCEL locators and damage investigators shall be made available as expert witnesses as required. All EXCEL agents, servants, employees, officers and assigns involved in an investigation shall be made available as witnesses as required.

### **ARTICLE III**

#### **EMERGENCY RESPONSE**

EXCEL shall provide 24-hour, seven (7) days a week response to emergency locates. Charges for this service shall be the same as regular locate rates. EXCEL shall respond to all emergency locates within one (1) hour of receiving the call or notification.

### **ARTICLE IV**

#### **LABOR AND MATERIALS**

EXCEL shall furnish all labor, materials and equipment necessary to perform the obligations contained herein, except for the maps and/or digital files required to be furnished by CITY under ARTICLE I of this contract.

EXCEL agents, employees, officers and assigns shall be equipped with a pager and/or cellular telephones, so they are accessible as necessary under this Contract.

### **ARTICLE V**

#### **INDEPENDANT CONTRACTOR**

EXCEL hereby acknowledges, represents and agrees that it is engaged in an independent business; that it will perform said work as an Independent Contractor; that it has and hereby retains the right to exercise control and supervision of the work and full control over the employment, direction, compensation, and discharge of all persons hired by EXCEL to assist in the work under this Contract. EXCEL will be solely responsible for the payment of its employees and for all federal, state, county, municipal taxes and contributions or any other payments due as a result of employment with EXCEL.

Nothing in this Contract nor the act of the parties shall be deemed or construed to create any relationship of third party beneficiary, of principal or agent of limited or general partners, of joint venture, or of any association whatsoever between the parties hereto.

## **ARTICLE VI**

### **SUBCONTRACTOR**

EXCEL shall not subcontract the work to be performed hereunder, or any part of said work unless it has first obtained the written approval of CITY. CITY shall have full and complete discretion in withholding or granting said approval.

## **ARTICLE VII**

### **CONFIDENTIALITY**

EXCEL acknowledges that any such maps, digital files, drawings, sketches, or other technical information either oral, written or otherwise furnished, disclosed or obtained by EXCEL in the performance of this Contract shall remain the property of CITY. All copies of such information shall be returned to CITY upon written request or at the completion or termination of this Contract. Unless such materials were previously known to EXCEL to be free of any obligation to keep them confidential, or have been subsequently made public by CITY, the material shall be kept confidential by EXCEL, its agents, employees, officers and assigns. All information shall be used only in the performance of this Contract and may not be used for other purposes except upon such terms and conditions agreed to by CITY in writing. This obligation of confidentiality shall survive the termination of this Contract. EXCEL shall be strictly liable to CITY for any breach of this covenant by any of its agents, employees, officers and assigns.

**ARTICLE VIII**

**TERMS OF CONTRACT**

**Section 1. Term.** The term of this Contract shall be for a period of Forty-Eight (48) months commencing January 1, 2017 thru December 31, 2020, unless sooner terminated by either party upon thirty (30) calendar days prior written notice provided by the terminating party to the non-terminating party in accordance with the terms of this Contract under Article XI, Section 2.

**Section 2. Service Charges.** EXCEL shall charge for locate and marking services rendered hereunder in the following manner:

|                         |            |               |                |
|-------------------------|------------|---------------|----------------|
| <b>Year 1</b>           | <b>NLR</b> | <b>Locate</b> | <b>Project</b> |
| Sanitary & Storm        | \$8.30     | \$8.30        | \$44.00/HR     |
| Traffic Signals & Fiber | \$0.25     | \$25.00       | \$44.00/HR     |
| <b>Year 2</b>           | <b>NLR</b> | <b>Locate</b> | <b>Project</b> |
| Sanitary & Storm        | \$8.30     | \$8.30        | \$44.00/HR     |
| Traffic Signals & Fiber | \$0.25     | \$25.00       | \$44.00/HR     |
| <b>Year 3</b>           | <b>NLR</b> | <b>Locate</b> | <b>Project</b> |
| Sanitary & Storm        | \$8.40     | \$8.40        | \$44.00/HR     |
| Traffic Signals & Fiber | \$0.25     | \$25.00       | \$44.00/HR     |
| <b>Year 4</b>           | <b>NLR</b> | <b>Locate</b> | <b>Project</b> |
| Sanitary & Storm        | \$8.40     | \$8.40        | \$44.00/HR     |
| Traffic Signals & Fiber | \$0.25     | \$25.00       | \$44.00/HR     |

The following prices shall include paint & flags supplied by EXCEL.

**Section 3. Project.** A project is a locate in which a utility takes more than fifty nine (59) minutes to complete and is billed per hour in quarter-hour increments. All other prices are per ticket received by Diggers Hotline.

**Section 4. Payments.** EXCEL shall render invoices to CITY on a monthly basis with an itemized summary of the work performed. Each undisputed invoice from EXCEL shall be paid by CITY within thirty (30) calendar days of the date of receipt by the CITY of said invoices.

**Section 5. Non-chargeable Items.** The following category of requests that are performed by EXCEL’S agents, servants, employees, officers and assigns under this Contract will not be chargeable to the CITY:

- Work done before Locators arrival
- Cancellations (Received before locate is performed)
- “No-shows”
- Bad address
- Duplicate
- Not allowed on property
- Conversation only
- Travel time

**ARTICLE IX**

**INSURANCE**

EXCEL shall procure and maintain in force throughout the term of this Contract at Excel’s sole cost and expense the following insurance coverage:

| <b><u>INSURANCE</u></b>  | <b><u>LIMITS</u></b>   |
|--|--|
| Worker’s Compensation  | Statutory Limit  |
| Worker’s Occupational Diseases                                     | Statutory Limit  |
| Employer’s Liability   | Statutory Limit  |
| Comprehensive General Liability<br>Including Contractual Liability | \$1,000,000 Each Occurrence                                  |
| Occurrence Basis BI & PD<br>BI & PD Combined                       | \$1,000,000 Each Occurrence<br>\$2,000,000 General Aggregate |

|                                 |                                   |
|---------------------------------|-----------------------------------|
| Personal Injury                 | \$1,000,000 General Aggregate     |
| Products & Completed Operations | \$2,000,000 General Aggregate     |
| Automotive Liability            |                                   |
| BI & PD                         | \$1,000,000 Combined Single Limit |
| Excess Liability Umbrella Form  | \$5,000,000 Each Occurrence       |

All insurance policies shall be written as primary policies not contributing with and not in excess of coverage that CITY may carry. The Insurance Certificate shall name the CITY as an additional insured, and prior to commencing services under this contract, Excel shall provide the City Clerk the Certificate of Insurance and Endorsement indicating the CITY is listed as an additional insured. The CITY shall be given at least ten (10) consecutive calendar days notice of cancellation or modification of the insurance limits. The Insurance shall be written by an insurance company licensed to do business in the State of Wisconsin. The Insurance Certificate shall be provided to the CITY and approved by the City Attorney prior to commencement of services, and shall remain in full force and effect throughout the term of this contract.

## **ARTICLE X**

### **INDEMNIFICATION**

To the proportionate extent of its negligence, CITY shall indemnify and hold harmless EXCEL from and against loss, liability, claims, actions and damages sustained by EXCEL, its agents, employees, and officers by reason of injury or death to persons, or damage to tangible property to the extent caused directly by the willful misconduct or negligence acts or omissions arising out of or resulting from CITY furnishing incorrect, inaccurate or misleading records to EXCEL. In no event shall CITY be liable for exemplary, lost profits and/or punitive damages.



To the proportionate extent of its negligence, EXCEL shall defend, indemnify and hold harmless CITY, its officers, officials, agents and employees, from and against loss, liability, claims, demands, liens, fees, expenses, actions and damages sustained by CITY, its agents, employees, officers and assigns, by reason of injury or death to persons, or damage to tangible property to the extent caused directly or indirectly by the willful misconduct or negligence acts

or omissions arising out of or resulting from EXCEL, its agents, employees, officers and assigns in the performance of services under this Contract.

Excel shall guarantee their service by accepting 100 percent liability for damages due to error. In cases where cause of the damage is due to errors or omissions in facility drawings, the CITY and EXCEL shall discuss the surrounding facts to determine the fault. Final determination of fault will rest with the CITY.

In the case of concurring fault each party, including the utility, shall bear its share of the loss caused by that party, including attorney's fees and other related costs.

In the event any person or entity threatens a lawsuit, makes written or oral demand or claim, sues or initiates any legal proceeding against either party on account of any provision of this indemnity agreement, that noticed party shall notify the other party to this Contract of such pending or threatened litigation and such notification shall be made as stated under Article XII, Section 2, of this Contract, no later than thirty (30) consecutive calendar days after learning of said pending litigation, lawsuit, claim or demand.

EXCEL or its insurance carrier shall have the right to defend such proceeding by hiring legal representatives selected and chosen by EXCEL or its insurance carrier and EXCEL and

its insurance carrier shall have the right to negotiate settlement of said claim or alleged claim. CITY shall have the right to hire its own counsel at its own expense and not participate in any settlement, at its sole discretion.

## ARTICLE XI

### TERMINATION/DEFAULT

**Section 1. Termination.** This Agreement may be terminated by either party by giving thirty (30) consecutive calendar days written notice to the other party as stated under Article XII, Section 2 of this Contract. CITY shall pay EXCEL for all services performed prior to the termination date. All projects in process at time of notice of termination shall be completed within thirty (30) consecutive calendar days and no new projects may be started once EXCEL receives notice of intent to terminate from CITY.

**Section 2. Default.** A material breach or default shall include, but not be limited to, the failure of a party to comply with any or all terms, provisions, requirements or covenants under this Contract. The breaching or defaulting party shall have ten (10) consecutive calendar days in which to cure such material breach or default. Failure to cure may result in the non-breaching or non-defaulting party to choose to terminate this Contract immediately if they so desire. The parties may agree to a different time period to cure if curing can not be completed within ten (10) consecutive calendar days. The material breaching party or defaulting party shall be responsible to the other party for any costs and expenses incurred relating to or arising from a material breach or default under this Contract.

## ARTICLE XII

### OTHER PROVISIONS

**Section 1. Amendments.** This Contract is the entire agreement between the undersigned parties and shall only be modified, changed or amended in writing executed by the CITY and EXCEL with the same formality as this Contract.

**Section 2. Notice and Demands.** Any notice, demand or communication under this Contract by any party to the other party shall be given or delivered by first class mail, registered or certified mail, postage paid, return receipt requested or delivered in person or sent by facsimile as follows to:

**CITY:** CITY CLERK  
900 Quay Street  
Manitowoc, WI 54220  
Fax: 920-686-6959  
City Engineer: 920-686-6910

**EXCEL:** Raymond L. Rock  
c/o Excel Underground, LLC  
14 E. Strawberry Lane  
Appleton, WI 54915  
Fax: 920-574-2924

The above addresses or designated party may be changed at any time by the parties by giving notice in writing in the manner provided above.

**Section 3. Severability.** If any provision of this Contract is deemed by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Contract shall not be affected thereby, and such remainder would then continue to conform to the requirements of applicable laws.

**Section 4. Assignment.** This Contract shall not be assignable without the written consent of the CITY. CITY shall have full and complete discretion in withholding or granting any assignment. If the CITY consents to an assignment, EXCEL shall be responsible for the assigns actions including any subcontractor, independent contractor, person or firm, which actually performs services under this Contract. The terms of this Contract shall be binding

upon and inure to the benefit of the parties hereto, as well as their respective transferees, successors and assigns.

**Section 5. Applicable Law.** This shall be deemed to have been made in Manitowoc County, Wisconsin and shall be governed by, construed under and enforced in accordance with, the law of the State of Wisconsin, except as otherwise provided herein. All actions or proceedings relating directly or indirectly, to this Contract whether sounding in contract or tort, shall be litigated only in the circuit court located in Manitowoc County, Wisconsin. All parties to this Contract hereby subject themselves to the jurisdiction of the Courts of Manitowoc County, Wisconsin.

EXCEL shall comply with all laws, ordinances and regulations of the United States, the State of Wisconsin, and any unit of local government asserting jurisdiction thereto, applicable to the performance of services hereunder, including, but not limited to Worker's Compensation, Unemployment Compensation and Social Security.

**Section 6. Equal Employment.** EXCEL acknowledges that it is an equal opportunity employer. No provisions or application of this Contract shall cause or result in discrimination against any employee or applicant for employment in his or her hiring, tenure, condition or employment because of race, color, religion, sex or national origin.

**Section 7. Headings.** The section titles inserted in this Contract are primarily for convenience, and do not define, limit or construe the contents of such paragraphs. If headings conflict with the text, the text shall control.

**Section 8. Construction.** All parties have contributed to the drafting of this Contract. In the event of a controversy, dispute or contest over the meaning, interpretation, validity or enforcement of this document or any of its terms or conditions, there shall be no inferences, presumption or

conclusion drawn whatsoever against any party by virtue of that party having drafted the document or any portion thereof.

**Section 9. Relationship of Parties.** Nothing in this Contract nor any act of the parties shall be deemed or construed to create any relationship of third party beneficiary, of principal or agent of limited or general partners, of joint venture, or of any association whatsoever between the parties hereto.

