COTTONWOOD HEIGHTS

RESOLUTION NO. 2013-37

A RESOLUTION APPROVING AN INDEPENDENT CONTRACTOR AGREEMENT WITH PRECISION CONCRETE CUTTING, INC. (2013-14 FISCAL YEAR)

WHEREAS, the city council (the "*Council*") of the city of Cottonwood Heights (the "*City*") met in regular session on 27 August 2013 to consider, among other things, approving an independent contractor agreement (the "*Agreement*") with Precision Concrete Cutting, Inc. ("*Precision*") whereunder Precision would provide concrete cutting, concrete grinding and other forms of sidewalk trip hazard mitigation and related services to the City during the City's 2013-14 fiscal year; and

WHEREAS, the Council has reviewed the form of the Agreement, a photocopy of which is annexed hereto; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interests of the health, safety and welfare of the citizens of the City to approve the City's entry into the Agreement as proposed;

NOW, THEREFORE, BE IT RESOLVED by the Cottonwood Heights city council that the attached Agreement is hereby approved, and that the City's mayor and recorder are authorized and directed to execute and deliver the Agreement on behalf of the City.

This Resolution, assigned no. 2013-37, shall take effect immediately upon passage.

PASSED AND APPROVED effective 27 August 2013.

COTTONWOOD HEIGHTS CITY COUNCIL

By _____
Kelvyn H. Cullimore, Jr., Mayor

COTTONWOOD HEIGHTS, UTAH
CORPORATE SEAL

ATTEST:

_____
Kory Solorio, Recorder

VOTING:

Kelvyn H. Cullimore, Jr.	Yea ✓	Nay ___
Michael L. Shelton	Yea ✓	Nay ___
J. Scott Bracken	Yea ✓	Nay ___
Michael J. Peterson	Yea ✓	Nay ___
Tee W. Tyler	Yea ✓	Nay ___

DEPOSITED in the office of the City Recorder this 27th day of August 2013.

RECORDED this 29 day of August 2013.

603752.1

Independent Contractor Agreement

THIS INDEPENDENT CONTRACTOR AGREEMENT (this "*Agreement*") is entered into effective 1 July 2013 by and between **COTTONWOOD HEIGHTS**, a Utah municipality ("*City*") and **PRECISION CONCRETE CUTTING, INC.,** a Utah corporation ("*Contractor*").

R E C I T A L S:

A. Contractor has significant experience in removing trip hazards from sidewalks.

B. City is in need of such services.

C. City desires to retain Contractor to remove trip hazards from sidewalks in City's public right-of-way, as specified in this Agreement.

D. The parties have determined that it is mutually advantageous to enter into this Agreement.

A G R E E M E N T:

NOW, THEREFORE, in consideration of the premises, the mutual covenants and undertakings of the parties hereto, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. **Employment of Contractor**. City hereby engages Contractor, and Contractor hereby agrees, to perform all services necessary or desirable to remove trip hazards from sidewalks within City (as designated by City in writing from time to time), up to the maximum contract amount as set forth in paragraph 3 below.

2. **Detailed Description of the Services**. In furtherance of this Agreement, Contractor shall do, perform, and carry out in a good, professional manner, the following services (the "*Services*"):

(a) *Elimination of Trip Hazards*. Contractor shall eliminate all trip hazards (up to a maximum height of 2") by saw cutting all such trip hazards in accordance with the Americans with Disabilities Act requirements. Each offset will be tapered at a 1:8 slope and shall have a smooth uniform appearance and texture.

(b) *Saw Cut*. All saw cutting shall be taken to the zero point of differential settlement and to the edges of the sidewalk to eliminate trip hazards the full width of the sidewalk.

(c) *Cleaning*. All debris and concrete dust shall be cleaned from the sidewalk surface as well as surrounding areas, sidewalks, driveway, landscaping or other objects in vicinity of the work. Any damage to adjacent landscaping, sprinklers, grass, etc. shall be repaired and otherwise returned to as good of condition as existed prior to such work.

3. **Fees for Services.** City shall pay Contractor for Services actually performed as described on the attached exhibit; provided, however, that the maximum amount to be paid to Contractor for all Services performed under this Agreement shall not exceed $75,000.

4. **Method of Payment**. Contractor shall submit monthly to City a detailed invoice setting forth the Services performed since the last monthly billing, and specifying the charges therefor computed as specified on the attached exhibit. Provided that the aggregate amount of all previous invoices and the current invoice does not exceed the total maximum compensation specified in section 3 hereof, City shall pay (or provide a reasoned objection to) the amount set forth in the current invoice within 30 days after receipt.

5. **Services Performed in a Professional, Reasonable Manner**. Contractor shall perform the Services in a professional, reasonable, responsive manner in compliance with all laws and applicable standards of performance. Subject to the foregoing, the exact nature of how the Services are to be performed and other matters incidental to providing the Services shall remain with Contractor.

6. **Personnel, Equipment and Facilities**. Except as otherwise specified in this Agreement, Contractor shall at its sole cost furnish all supervision, personnel, labor, equipment, materials, supplies, communication facilities, vehicles for transportation and identification cards, and shall obtain all licenses and permits, necessary or incidental to performing any and all of the Services. Contractor shall not use City staff as a means to perform the Services in lieu of using Contractor's own staff.

7. **Term**. This Agreement shall be effective on the date hereof and shall terminate at 11:59:59 p.m. on 30 June 2014.

8. **Assignment and Delegation**. Contractor shall not assign or delegate the performance of its duties under this Agreement without City's prior written consent.

9. **Independent Contractor Status.** Contractor shall perform the Services as an independent contractor, and all persons employed by Contractor in connection herewith shall be employees or independent contractors of Contractor and not employees of City in any respect.

(a) *Control*. Contractor shall have complete control and discretion over all personnel providing Services hereunder.

(b) *Salary and Wages*. City shall not have any obligation or liability for the payment of any salaries, wages or other compensation to personnel providing Services hereunder.

(c) *No Employment Benefits*. All personnel providing Services are and shall be and remain Contractor's employees, and shall have no right to any City pension, civil service, or any other City benefits pursuant to this Agreement or otherwise.

10. **Termination**. Either party may terminate this Agreement upon 30 days' prior written notice to the other party. Neither party shall have any liability to the other for damages nor other losses because of termination of this Agreement, provided; however, City shall pay Contractor all amounts due for actual work performed within the scope of Services, as specified herein.

11. **Indemnification**. Contractor shall defend, indemnify, save and hold harmless City (including, without limitation, its elected and appointed officers, employees, successors and assigns) from and against any and all demands, liabilities, claims, damages, actions and/or proceedings, in law or equity (including reasonable attorneys' fees and cost of suit), relating to or arising in any way from the Services provided, or to be provided, hereunder. Contractor shall so defend, indemnify, save and hold harmless City whether such demands, liabilities, claims, damages, actions and/or proceedings are attributable to the simple negligence, gross negligence, recklessness or intentional misconduct of Contractor (or any officers, employees, agents, subcontractors, etc. of Contractor), or under any other applicable legal theory, and shall be effective whether or not such negligence, recklessness or other misconduct reasonably was foreseeable. Nothing herein shall, however, require Contractor to indemnify as provided in this section with respect to (a) City's own negligence or intentional misconduct, or (b) any demand, liability, claim, damage, action and/or proceeding not alleged to relate to the Services provided, or to be provided, by Contractor hereunder.

12. **Insurance**. Without limiting any indemnity or other obligations of Contractor hereunder, Contractor shall, prior to commencing work hereunder, secure and continuously thereafter (throughout the term of this Agreement) carry with insurers the following insurance coverage in policies which include provisions or endorsements naming City and its designees as an additional insured, and shall furnish proof thereof satisfactory to City prior to commencement of performance of the Services hereunder, and thereafter promptly when requested:

(a) *Commercial general liability insurance* coverage with a minimum single limit of $1,000,000.00, with a deductible not to exceed $5,000. The coverage shall include bodily injury and property damage liability coverage, contractual liability coverage, products and completed operations coverage, as well as coverage to protect against and from all loss by reason of injury to persons or damage to property, including Contractor's own workers and all third persons, property of City and all third parties based upon and arising out of the negligent performance of Contractor's operations hereunder, including the operations of its subcontractors of any tier.

(b) *Business automobile liability insurance* coverage with a minimum single limit of $1,000,000.00 for bodily injury and property damage with respect to Contractor's vehicles whether owned, hired or non-owned, assigned to or used in the performance of the Services. Contractor may elect to not provide this coverage if no Contractor-owned or hired automobiles are used in performance of the Services, provided, however, that Contractor shall defend, indemnify and hold City harmless from any and all claims, damages, actions, proceedings, fees (including attorneys fees) and costs incurred by City arising from or in any way related to use of any automobile by Contractor or any of its employees, subcontractors or other related parties in performance of the Services.

(c) *Workers' compensation insurance* coverage as required by applicable workers' compensation and employer's liability statutes.

The foregoing insurance policies shall be through reputable, licensed insurers reasonably acceptable to City, and specifically shall provide that such insurance may not be terminated or reduced without at least 30 days' prior written notice to City.

13. **Laws and Regulations.** Contractor shall at all times comply with all applicable laws, statutes, rules, regulations, and ordinances, including without limitation, those governing wages, hours, desegregation, employment discrimination, workers' compensation, employer's liability and safety. Contractor shall comply with equal opportunity laws and regulations to the extent that they are applicable.

14. **Alcohol and Drug-Free Work Place**. All personnel during such time that they provide Services shall not be under the influence of alcohol, any drug, or combined influence of alcohol or any drug to a degree that renders the person incapable of safely providing the Services. Further, all personnel during such time that they provide Services shall not have sufficient alcohol in his body, blood, or on his breath that would constitute a violation of UTAH CODE ANN. § 41-6-44 or any measurable controlled substance in his body that would constitute a violation of UTAH CODE ANN. § 41-6-44.6.

15. **Non-Exclusive Rights**. Nothing in the Agreement is to be construed as granting to Contractor any exclusive right to perform any or all Services (or similar services) now or hereafter required by City.

16. **Conflict Resolution.** Except as otherwise provided for herein, any dispute between the parties regarding the Services which is not disposed of by agreement shall be decided by City, which shall provide written notice of the decision to Contractor. Such decision by City shall be final unless Contractor, within 30 calendar days after such notice of City's decision, provides to City a written notice of protest, stating clearly and in detail the basis thereof. Contractor shall continue its performance of this Agreement during such resolution. If the parties do not thereafter agree to a mutually-acceptable resolution, then they shall resolve the dispute pursuant to section 17 below.

17. **Claims and Disputes.** Unresolved claims, disputes and other issues between the parties arising out of or related to this Agreement shall be decided by litigation in the Third Judicial District Court of Salt Lake County, Utah. Unless otherwise terminated pursuant to the provisions hereof or otherwise agreed in writing, Contractor shall continue to perform the Services during any such litigation proceedings and City shall continue to make undisputed payments to Contractor in accordance with the terms of this Agreement.

18. **Notices**. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received (a) upon personal delivery or actual receipt thereof, or (b) within three days after such notice is deposited in the United States Mail, postage prepaid, and certified and addressed to the parties as set forth below:

City: COTTONWOOD HEIGHTS
Attn. Mike Allen, Public Works Director
1265 East Fort Union Blvd., Suite 250
Cottonwood Heights, UT 84047

with a copy to: Wm. Shane Topham
CALLISTER NEBEKER & MCCULLOUGH
10 East South Temple, 9th Floor
Salt Lake City, UT 84133

Contractor: PRECISION CONCRETE CUTTING, INC.
3191 North Canyon Road
Provo, UT 84604

19. **Additional Provisions.** The following provisions also are integral to this Agreement:

(a) *Titles and Captions*. All section or subsection titles or captions herein are for convenience only. Such titles and captions shall not be deemed part of this Agreement and shall in no way define, limit, augment, extend or describe the scope, content or intent of any part or parts hereof.

(b) *Pronouns and Plurals.* Whenever the context may require, any pronoun used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns, pronouns and verbs shall include the plurals and vice versa.

(c) *Applicable Law.* The provisions of this Agreement shall be governed by and construed in accordance with the laws of the state of Utah.

(d) *Integration.* This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto.

(e) *Time.* Time is the essence hereof.

(f) *Survival.* All agreements, covenants, representations and warranties contained herein shall survive the execution of this Agreement and shall continue in full force and effect throughout the term of this Agreement.

(g) *Waiver.* No failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition. Any party may, by notice delivered in the manner provided in this Agreement, but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation or covenant of any other party. No waiver shall affect or alter the remainder of this Agreement but each and every other covenant, agreement, term and condition hereof shall continue in full force and effect with respect to any other then existing or subsequently occurring breach.

(h) *Rights and Remedies.* The rights and remedies of the parties hereto shall not be mutually exclusive, and the exercise of one or more of the provisions of this Agreement shall not preclude the exercise of any other provisions hereof.

(i) *Severability.* In the event that any condition, covenant or other provision hereof is held to be invalid or void, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained. If such condition, covenant or other provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

(j) *Litigation.* If any action, suit or proceeding is brought by a party hereto with respect to a matter or matters covered by this Agreement, all costs and expenses of the prevailing party incident to such proceeding, including reasonable attorneys' fees, shall be paid by the non-prevailing party.

(k) *Exhibits.* All exhibits annexed to this Agreement are expressly made a part of this Agreement as though completely set forth herein. All references to this Agreement, either in this Agreement itself or in any of such writings, shall be deemed to refer to and include this Agreement and all such exhibits and writings.

(l) *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

(m) *Authorizations.* Each person signing this Agreement represents and warrants that he is authorized to sign this Agreement for the party indicated.

DATED effective the date first-above written.

CITY:

ATTEST:

COTTONWOOD HEIGHTS

_____
Linda W. Dunlavy, Recorder
Date signed _____

By:_____
Kelvyn H. Cullimore, Jr., Mayor
Date signed _____

CONTRACTOR:

ATTEST:

PRECISION CONCRETE CUTTING, INC.,
a Utah corporation

By:_____
Its: _____

By:_____
Jared Taylor, _____

602540.1

Exhibit to
Independent Contractor Agreement

Contractor shall be paid for Services performed on the basis of $27.45 per inch-foot of trip-hazard removal performed.

Inch-feet shall be calculated by multiplying the average depth of the cut by the width of the cut. For example, if a joint is cut 1" on one side and tapered to 0" on the other side of a full 4-foot wide sidewalk, the number of inch-feet would be calculated as follows:

$$\frac{1'' + 0''}{2} \times 4' = 2 \text{ inch-feet}$$

2 inch-feet x $27.45/inch-foot = $54.90

All invoices must show the address of the work; the depth, length and width of the cut; the inch-feet calculation; and the resulting charge.

Contractor's process for removal of trip hazards to the specifications in this Agreemetn are protected by the following patents. Contractor is a sole-source provider for the Services.

U.S. Pat. No. 6,827,074
U.S. Pat. No. 6,896,604
U.S. Pat. No. 7,000,606
U.S. Pat. No. 7,143,760
U.S. Pat. No. 7,201,644
U.S. Pat. No. 7,402,095