

MAY 10 2019

Approved

REQUEST FOR AGENDA PLACEMENT FORM

Submission Deadline - Tuesday, 12:00 PM before Court Dates

SUBMITTED BY: Ralph McBroom

TODAY'S DATE: April 30, 2019

DEPARTMENT: Purchasing

DEPARTMENT HEAD: Ralph McBroom

REQUESTED AGENDA DATE: May 10, 2019

SPECIFIC AGENDA WORDING: Consider and approve Master Rental Agreement and Johnson County Contract Terms Addendum to Rental Contract and Kirby Smith Machinery Rental Agreement for rental of equipment.

PERSON(S) TO PRESENT ITEM: Ralph McBroom C.P.M.

SUPPORT MATERIAL:

TIME: 5 min

(Anticipated number of minutes needed to discuss item)

ACTION ITEM: X
WORKSHOP
CONSENT:
EXECUTIVE:

STAFF NOTICE:

COUNTY ATTORNEY: X
AUDITOR:
PERSONNEL:
BUDGET COORDINATOR:

IT DEPARTMENT:
PURCHASING DEPARTMENT:
PUBLIC WORKS:
OTHER:

*****This Section to be completed by County Judge's Office*****

ASSIGNED AGENDA DATE: _____

REQUEST RECEIVED BY COUNTY JUDGE'S OFFICE _____

COURT MEMBER APPROVAL _____ Date _____

**MASTER RENTAL AGREEMENT AND
JOHNSON COUNTY CONTRACT TERMS
ADDENDUM TO RENTAL CONTRACT**

This Master Rental Agreement And Johnson County Contract Terms Addendum to Rental Contract, (hereinafter referred to as the "AGREEMENT") is between Johnson County, Texas, a political subdivision of the State of Texas, (hereinafter referred to as "COUNTY"), and Kirby-Smith Machinery (hereinafter referred to as "VENDOR"), collectively referred to as the "PARTIES", and is a master rental agreement and an addendum to the Rental Contract of Vendor between the Parties for the rental of equipment and together this AGREEMENT and the Rental Contract shall constitute the entire and complete contract between the Parties.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the Parties agree and understand as follows:

1. This Agreement is to apply to each and every Rental Contract for the rental of equipment by County from Vendor after the date this Agreement is approved by the Parties and shall continue to be effective until April 30th 2020. A signed copy of this Agreement shall be attached to and become part of each Rental Contract between the Parties as though said copy of this Agreement were an original. In the event a signed copy of this Agreement is not attached to a Rental Contract, the Parties agree that the terms and conditions of the Agreement will apply to the Rental Contract as though said Agreement had been attached.
2. This Agreement is to clarify, limit, modify or delete terms and provisions of the Rental Contract and in the event of any conflict between the terms and provisions of this Agreement and the terms and provisions of those contractual provisions tendered to Johnson County in the Rental Contract, this Agreement shall control and amend the contractual provisions of the Rental Contract and any provisions in the Rental Contract to the contrary are hereby deleted.
3. This Agreement is being executed in order to facilitate County being able to rent equipment from Vendor on an "as needed" basis and that when a representative of County signs the Rental Contract upon taking possession of the equipment, the representative of County is acknowledging the tender or delivery of Vendor's equipment, the rate to be charged and the time period of the rental; however, the representative of County is not agreeing to or binding the County to any terms and conditions that conflict with this Agreement.
4. Each Rental Contract with a signed copy of this Agreement attached will be an effective agreement between the Parties upon the Purchasing Agent of County issuing a Purchase Order for the rental of equipment listed on the Rental Contract and a representative of County signing the said Rental Contract.

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5. Either Party may cancel this Agreement by providing written notice to the other Party thirty (30) days prior to cancellation.
6. This Agreement will be governed by and construed according to the laws of the State of Texas. Venue for any action or claim arising out of the Agreement will be in the state district courts in Johnson County, Texas or the federal district courts in Dallas County, Texas. Any provision in the Rental Contract stating that County agrees to waive any right to trial by jury is hereby deleted.
7. Limitations for the right to bring an action, regardless of form, shall be governed by the laws of the State of Texas, Texas Civil Practice and Remedies Code §16.070, as amended, and any provision in the Rental Contract to the contrary is hereby deleted.
8. Under Texas law, a contract with a governmental entity that contains a claim against future revenues is void; therefore, any term in the Rental Contract which provides for such a claim is hereby deleted.
9. Under the Texas Constitution and laws of the State of Texas, Johnson County cannot enter into an agreement whereby Johnson County agrees to indemnify or hold harmless any other party; therefore, all references in the Rental Contract of any kind to Johnson County indemnifying and holding harmless any individuals or entities for any reason whatsoever are hereby deleted.
10. County is a political subdivision of the State of Texas, and therefore has certain governmental/sovereign immunity and limitations on liability, and that County's general liability and vehicle insurance coverage is with the Texas Association of Counties Risk Pool and said insurance coverage is limited to the statutory maximum limits of the Texas Tort Claims Act (Chapter 101, Texas Civil Practice and Remedies Code); therefore, any provisions in the Rental Contract requiring County to provide and maintain any insurance in excess of the statutory maximum limits are hereby deleted.
11. County does not waive any of its common law, statutory or constitutional defenses to which it may be entitled; therefore any provisions in the Rental Contract to the contrary are hereby deleted.
12. County will provide property insurance covering the replacement (fair market value) cost of the equipment rented and will provide Vendor with a certificate of insurance.
13. County will provide statutory workers compensation for its employees; however, County does not agree to include a waiver of subrogation, and therefore any provisions in the Rental Contract to the contrary are hereby deleted.

14. County does not agree to waive any rights and remedies available to County under the Uniform Commercial Code ("UCC"); therefore, any provisions in the Rental Contract to the contrary are hereby deleted.
15. County does not agree to waive any rights and remedies available to County under the Texas Deceptive Trade Practices-Consumer Protection Act; therefore, any provisions in the Rental Contract to the contrary are hereby deleted.
16. Except for a heavy equipment tax, County does not agree to be responsible for any sales tax, use tax, or any other taxes, fees, fines or penalties that may be imposed, levied or assessed by any federal, state or local government or agency which relates to the Rental Contract, the equipment or its use; therefore, any provisions in the Rental Contract to the contrary are hereby deleted.
17. Pursuant to Texas Government Code Section 2251.021 and this Agreement, a payment by a governmental entity under a contract is overdue on the 31st day after the later of:
 - a. the date the governmental entity receives the goods under the contract;
 - b. the date the performance of the service under the contract is completed; or
 - c. the date the governmental entity receives an invoice for the goods or service.

Pursuant to Texas Government Code Section 2251.021 and this Agreement, a payment begins to accrue interest on the date the payment becomes overdue. The rate of interest that accrues on an overdue payment is the rate in effect on September 1 of the fiscal year in which the payment becomes overdue. The rate in effect on September 1 is equal to the sum of: (1) one percent; and (2) the prime rate as published in the Wall Street Journal on the first day of July of the preceding fiscal year that does not fall on a Saturday or Sunday. Interest on an overdue payment stops accruing on the date the governmental entity or vendor mailed or electronically transmits the payment. Therefore, all provisions in the Rental Contract to the contrary are hereby deleted.

18. To the extent, if any, that any provision in this Agreement is in conflict with Chapter 552 of the Texas Government Code (the "Public Information Act"), the same shall be of no force and effect. Furthermore, it is expressly understood and agreed that Johnson County, its officers and employees may request advice, decisions and opinions of the Attorney General of the State of Texas in regard to the application of the Public Information Act.
19. Services provided under the Agreement shall be provided in accordance with all applicable state and federal laws.

IN WITNESS WHEREOF, intending to be legally bound, the Parties have caused their authorized representative to execute this Agreement. Each representative whose signature appears

on this Agreement represents and does hereby certify that they have the authority to enter into this Agreement for their represented Party.


APPROVED AS TO FORM AND CONTENT:

JOHNSON COUNTY:


Roger Harmon
County Judge

05/10/19
Date

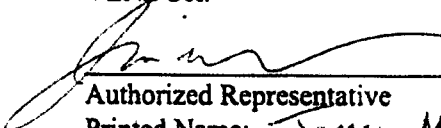
Attest:


County Clerk, Johnson County



05/10/19
Date

VENDOR:


Authorized Representative
Printed Name: James McDonnell
Title: Sales Rep

1/29/19
Date

TERMS AND CONDITIONS

USAGE

RENTAL DAY is the first to elapse of a calendar day or eight hours of equipment use. Any period of equipment use less than eight hours or any period of time less than 24 hours during which the equipment is held by Lessee shall constitute a full Rental Day.

RENTAL WEEK is the first to elapse of three calendar days or 40 hours of equipment use.

RENTAL MONTH means the first to elapse of three rental weeks or 176 hours of equipment use. Overtime usage is determined by service meter hour readings. The contract shall extend beyond the term, at the same rate, if the Lessee holds the machine over the specified term of the lease.

SAFETY

Lessee acknowledges that they are familiar with the operation of the rented equipment and that all necessary and proper safety equipment, including the operators manual, is in place and they agree not to permit any such safety equipment to be removed or tampered with. Lessee also acknowledges they are aware of the limitations of the equipment and agree not to exceed them.

Lessee agrees that they are responsible for ensuring that all operators read all warnings and operating instructions. Lessee agrees not to allow use by any operator not properly trained in the use or operation of the equipment or who fails to use equipment in accordance with all safety procedures. Failure to comply could result in injury or death to operator or others.

Lessee shall comply with all laws, ordinances and regulations relating to the possession, use or maintenance of the equipment. Lessee is solely responsible to advise any persons operating the equipment or in the vicinity of the equipment of all safety operating procedures and safety precautions.

MAINTENANCE AND EQUIPMENT CONDITION

This equipment furnished by Lessor is understood to be in good working order at the time of shipment and upon receipt. If the Lessee finds it otherwise, Lessor shall be notified within 24 hours after arrival and Lessor has the right to put the same in good working order at its expense, but will not be responsible for any expenses contracted without their written consent. Failure to send notification will be construed to mean acceptance by the Lessee and shall necessitate maintenance of all the equipment in good condition by the Lessee throughout the term of the rent.

LESSOR MAKES NO WARRANTIES EXPRESS OR IMPLIED AS TO THE CONDITION OF THE EQUIPMENT RENTED NOR AS TO VISIBLE OR HIDDEN DEFECTS IN MATERIAL, WORKMANSHIP, OR CAPACITY OF THE EQUIPMENT.

Lessee is responsible for all maintenance of this equipment and will pay for all fuel, oil and filters used during the term of this agreement and will MAINTAIN PROPER OIL, COOLANT AND OTHER FLUID LEVELS AT ALL TIMES. Recommended service intervals for this equipment are set forth in the operator's manual.

Any damage to this equipment arising from any source whatsoever will be charged to the Lessee. Any repairs which become necessary to said equipment shall be done by the Lessor unless permission has been given in writing to the Lessee to do such repairs. The terms and conditions as set forth herein continue during the period of repair. The cost of repairs for normal use is to be borne by Lessor. If Lessee returns equipment with less than a full tank of fuel, it will be refueled and charged to Lessee.

Lessee shall not expose the Equipment to any hazardous material or waste. In the event the Equipment is exposed to any hazardous material or waste, Lessee shall immediately (1) notify Lessor, (2) remove the Equipment from such exposure and (3) completely clean and decontaminate the Equipment. If the Equipment cannot be completely cleaned, decontaminated and otherwise discharged from all adverse effects of such exposure, Lessee shall pay Lessor the full value of the Equipment, together with interest thereon from that date until the said sum is paid in full. Lessee indemnifies and holds Lessor harmless from any and all claims, actions, expenses, damages, costs and liabilities arising from any such exposure of the Equipment to hazardous material or waste. This indemnification survives and continues after the term of this rent.

The Lessee agrees and guarantees to return the rented equipment in as good condition as when received or to pay the expense of putting it in such condition, less ordinary wear incident to normal use in the hands of a competent operator. This includes physical cleanliness. This guarantee is absolute and may not be excused by theft, acts of God, or for any other reason whatsoever.

If at any time, Lessor in its sole discretion determines its rights to the equipment are endangered or that the equipment is in any manner improperly cared for or abused or if there shall be any default by Lessee in the terms and conditions of this rent, Lessor may without notice REPOSSESS the equipment and cancel this rent.

The rented equipment is to be used at the location shown on the face of this agreement and is not to be removed from that location except with the written consent of Lessor. Upon request by Lessor, Lessee shall provide to Lessor the following information: (a) a copy of the contract governing all projects on which the equipment is used, (b) a copy of a payment bond, if any, issued pursuant to the contract and the name and location of all projects where the equipment has been used throughout the term of this agreement. Lessee agrees to promptly provide to Lessor on request, any and all other information whatsoever, as Lessor shall in its sole judgment deem appropriate. Failure to provide such information shall be deemed a default of the rent.

The rented equipment is to be used solely by the Lessee or Lessee's agents.

PURCHASE OF EQUIPMENT:

The lessee has no option to purchase the equipment leased on this agreement unless a separate RPO agreement has been executed.

INSURANCE REQUIREMENTS FOR ALL RENTALS:

Lessee shall provide and maintain Commercial General Liability insurance and other insurance necessary to protect the Lessor and its affiliates continuously during the life of this Agreement from any and all claims for bodily injury, death or property damage (including the loss of use thereof) made or arising out of the operation, handling or transportation of the equipment rented under this Agreement with limits of not less than One Million Dollars (\$1,000,000.00) combined single limit per occurrence and general aggregate. The latter is to be provided on a per location or per job site basis. Such insurance shall be endorsed, without limitation, condition or exclusion, to include the Lessor as an additional insured. All insurance required by this agreement shall include a waiver of rights of recovery against Kirby-Smith Machinery, Inc or its insurers by the Lessee and its insurers, as well as a waiver of subrogation against Kirby-Smith Machinery, Inc or its insurers.

Lessee shall provide All Risk Physical Damage insurance on all rented equipment, written to the full replacement value subject to a deductible acceptable to the Lessor and shall insure against but not be limited to the perils of fire, theft, vandalism, malicious mischief, overload, collapse, water damage and such other perils as may be required by Lessor in its sole judgment. Lessor shall be shown as loss payee.

Lessee shall provide and maintain Workers Compensation insurance written to comply with all state laws in which the equipment shall be used or operated by Lessee.

If Lessee chooses to pay for the Limited Damage and Theft Waiver (LDW), Lessor agrees to waive its right to recover from the Lessee the amount of physical loss or damage (excluding supply items) to the rented equipment which exceeds the standard monthly rental rate. Lessor's rights are not waived if the loss or damage occurred under the following circumstances: Use or operation was without the Lessor's permission or in violation of this agreement; loss or damage to the equipment was caused by war, nuclear reaction, nuclear radiation or radioactive contamination; loss or damage was caused by normal

wear and tear; loss or damage caused by abuse, neglect or carelessness; loss or damage caused by overturn, tipping, use of machine beyond its rated capacity (overload); loss or damage to tires, tubes and/or tools that was caused by normal work application; vandalism or malicious mischief, unless such loss or damage coincides with other waived loss or damage; loss or damage was caused by dishonesty or the intentional act of the Lessee or Lessee's employees; wrongful conversion by any person to whom the property is entrusted by the Lessee; mysterious disappearance; disappearance, theft, or conversion of the equipment NOT documented by the Lessee's prompt filing with applicable public authorities of a formal theft or conversion report; or failure to perform or pay for all normal periodic and basic service, adjustments and lubrication. Limited Damage and Theft Waiver is not available for crane rentals. The charge for the LDW is 14% of the total rental rate and will be included as a miscellaneous charge on each invoice.

PAYMENT OF LIMITED DAMAGE & THEFT WAIVER DOES NOT RELIEVE THE LESSEE OF THE REQUIREMENT FOR ANY INSURANCE COVERAGES OTHER THAN PHYSICAL DAMAGE TO THE RENTED EQUIPMENT.

ADDITIONAL INSURANCE REQUIREMENTS FOR CRANE RENTALS:

The all-risk physical damage insurance listed above must be endorsed to include boom damage and overload damage. This may be written on a blanket or machine specific basis. In the latter case the Make, Model, Year, VIN# and value must be stated on the Insurance Certificate.

ADDITIONAL INSURANCE REQUIREMENTS FOR ON-HIGHWAY EQUIPMENT:

Lessee agrees to provide and maintain full automobile liability insurance with combined single limits of not less than One Million Dollars (\$1,000,000.00). Lessor shall be shown as additional insured.

PROOF OF INSURANCE:

All required insurance coverage and contract terms shall be evidenced on a certificate of insurance and shall provide that in the event the liability and/or physical loss policies are canceled prior to the expiration date shown on the certificate, the issuing insurance companies shall be required to provide Lessor with thirty (30) days written notice of such cancellation prior to the effective date of cancellation. The cost of any insurance policies, endorsements and deductibles shall be the obligation of Lessee.

INDEMNIFICATION:

Lessee agrees to indemnify and hold Lessor and its affiliates harmless from any and all claims whatsoever relating to or arising from transportation, use, maintenance or possession of rented equipment, for injury to persons or damage to property, and from any and all expense incurred in the defense of any such claims. In no event shall Lessor be held responsible for injury, delays or damages consequential or otherwise, resulting by reason of delays on the part of Lessor or railroads or trucking companies in making delivery, or loss or damage to equipment in transit or from strikes or other contingencies beyond its control or from any cause whatsoever.

CHARGES:

The rent period shall begin at the time when the equipment is loaded at shipping point and end when equipment is returned. Lessee shall pay all transportation charges to the place of work and return to Lessor's yard, or to such place as Lessor shall designate.

All amounts charged will be due on date of receipt of invoice or later date as specified on invoice and a FINANCE CHARGE (18% APR) will be imposed on this account if said account is not paid on date the amount comes due.

In the event of Lessee's default in making payments as billed the balance of rent for the entire term herein described shall immediately become due and payable.

In the event of default in payment of any installment mentioned herein, Lessor may enter the premises, repossess said equipment, and lock or remove the equipment. Lessor is hereby designated as lessee's attorney-in-fact for that purpose.

Any holdover beyond the term of this rent as set forth above shall extend the term of the rent on the same terms and conditions as set forth herein except that during any holdover period Lessor may repossess the equipment and terminate the rent, without default, upon 24 hour notice. On termination of this rent during any holdover period the rent for the entire rent period shall be computed on the lowest basis provided above and adjusted with Lessee accordingly.

Lessor shall have any and all remedies provided in this rent, at law or equity, including, but not limited to, the right to sue for damages, collection of unpaid rent, repossession and consequential damages for Lessee's breach of this rent.

All remedies given Lessor, hereunder are cumulative, and the exercise of any one remedy by Lessor shall not be to the exclusion of any other remedy.

In the event any sales, use or other personal property tax or assessment are hereafter levied by any public authority upon the transaction herein specified, or on the property which is the subject of this transaction or any part thereof, then the Lessee agrees to pay any such taxes or assessments upon demand.

GENERAL TERMS:

This contract shall not be considered in full force until accepted by the Lessor and executed by its proper officer.

This agreement shall not only be binding upon the parties hereto but shall inure to and be binding upon their heirs, successors in interest, personal representative, and assigns, (where permission to assign by Lessor is given). Lessee's rights under this rent are not assignable without Lessor's written permission.

If any word, phrase, clause, sentence, or paragraph of this agreement is or shall be invalid for any reason, the same shall be deemed severable from the remainder hereof and shall in no way effect or impair the validity of this agreement or any other portion thereof.

It is hereby agreed that title to the rented equipment remain in the Lessor and it is not intended hereby to vest any rights in the Lessee to said equipment other than as specifically provided herein.

Time is of the essence.

This writing contains the entire agreement between the parties hereto, and any oral representation or agreement not contained herein shall be of no force or effect whatsoever, unless reduced to writing signed by the parties, hereto.

The termination or cancellation of this rent by Lessor, for any reason shall not terminate or cancel Lessor's right to pursue any remedies provided herein or at law or equity against Lessee.

This agreement is enforceable under the laws of the State of Oklahoma, Oklahoma County, Oklahoma, and is agreed to be the sole and exclusive jurisdiction and venue to litigate or enforce this contract. It is further agreed by the parties that should litigation become necessary to enforce this contract, the debtor shall be liable and bear the expense for all reasonable attorney's fees and court costs.

If the rental equipment described herein is purchased, notice is hereby given that Kirby-Smith Machinery, Inc.® will assign its rights under the sales contract to KSM Exchange LLC to sell the rental equipment and, if applicable to purchase any trade-in property.